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## Law Among the Sight Lovers

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FRANCIS J. MOOTZ III

## Law Among the Sight Lovers

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## I. INTRODUCTION

Can law exist among the sight lovers? If so, is it a legal system of which we can be proud, or a degenerate and deceptive form of manipulation? In his most recent book,<sup>1</sup> Richard Sherwin consolidates his status as one of the most sophisticated commentators on these pressing questions. In this short article, I offer several observations and cautions regarding Sherwin's accomplishment.

I begin my exploration of these issues by returning to the philosophical source. Plato raised these questions provocatively in the context of his cave analogy in *The Republic*.<sup>2</sup> Plato is discussing the deepest of epistemic questions, but the imagery that he crafts in the dialogue helps us to address the central problems that Sherwin raises regarding contemporary legal practice. To doubt that the sight lovers can sustain law is to assume with Plato that it is possible to break away from the multitude, escape from the cave, and gain access to the forms of legal certainty. Plato's aspirations, I will argue in concert with Sherwin, are not warranted. But the cave analogy also provides a means to discuss whether the visualization of law has dramatically changed the nature of law, or has just altered the setting in which timeless dilemmas are posed. I find Sherwin's book more ambiguous on this point, and so I direct my critical observations to this question. I reject Sherwin's apparent claim that the visual age represents a sharp break from the textual age,<sup>3</sup> concluding that the contemporary age of the digital baroque is a new setting for age-old dilemmas.

## II. THE VISUAL AGE

### A. *The Sight Lovers*

Plato famously derides those who remain content with appearances and do not seek a deeper understanding of the intelligible realm of the forms. These "sight lovers" are not fit for the higher challenges of philosophy, as Plato explains in *The Republic*.

This, then, said I, is my division. I set apart and distinguish those of whom you were just speaking, the lovers of spectacles and the arts, and men of action, and separate from them again those with whom our argument is concerned and who alone deserve the appellation of philosophers or lovers of wisdom."

What do you mean? He said.

The lovers of sounds and sights, I said delight in beautiful tones and colors and shapes and in everything that art fashions out of these, but their thought is incapable of apprehending and taking delight in the nature of the beautiful in itself.<sup>4</sup>

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1. RICHARD K. SHERWIN, *VISUALIZING LAW IN THE AGE OF THE DIGITAL BAROQUE: ARABESQUES AND ENTANGLEMENTS* (2011).
  2. PLATO, *THE REPUBLIC*, in *THE COLLECTED DIALOGUES OF PLATO* 747 [532b] (Edith Hamilton & Huntington Cairns eds., Princeton Univ. Press 1978).
  3. See SHERWIN, *supra* note 1, at 30.
  4. PLATO, *supra* note 2, at 715 [476a–b].

The sight lovers are lovers of opinion; they focus on something other than truth, and they employ a different faculty than the rational pursuit of knowledge.<sup>5</sup>

Later, in the famous cave analogy, Plato adds a different spin on his indictment of sight lovers. His story is about prisoners in a cave who are fettered so that they can only look forward where shadows are cast on the wall by puppeteers behind them. Convinced of the reality of this world of mere appearances, the prisoners cannot be persuaded that they are enthralled by artificially created pictures meant to deceive them.<sup>6</sup> Plato goes so far as to suggest that if a prisoner escaped and made his way out of the cave to apprehend the sunlit world and then attempted to return to the cave to enlighten his fellow prisoners, the prisoners would surely reject his heretical message and even seek to kill him.<sup>7</sup> Additionally, the enlightened prisoner who returned to the gloom of the cave would be totally incapable of dealing effectively with the world of shadows in which the prisoners live. Plato explains:

And again, do you think it at all strange, said I, if a man returning from divine contemplations to the petty miseries of men cuts a sorry figure and appears most ridiculous, if, while still blinking through the gloom, and before he has become sufficiently accustomed to the environing darkness, he is compelled in courtrooms or elsewhere to contend about the shadows of justice or the images that cast the shadows and to wrangle in debate about the notions of these things in the minds of those who have never seen justice itself?<sup>8</sup>

This is a dystopian image to be sure: those who have knowledge are ineffectual in the world of mere appearance, and are shunned by the sight lovers. The sight lovers rule, but it is a rule based on simulacra—mere representations, if not mirages—rather than on truth. For Plato, law among the sight lovers can only be an anaesthetizing farce.

### *B. Sophistic Manipulation of the Sight Lovers*

Sherwin's critique of the visualization of legal practice focuses on the challenges raised by the digital creation and manipulation of images that are used to persuade decisionmakers.<sup>9</sup> He begins the book with the question, "[W]hat happens when the search for truth and fact-based justice is increasingly driven by visual evidence and visual argument inside the courtroom?"<sup>10</sup> At the most simplistic level, the problem is the power wielded by sophistic lawyers who seek only to prevail in adversarial combat and have no concern for truth or the integrity of legal process. Can law exist among the sight lovers when there are skilled puppeteers who can lead them to erroneous conclusions about the state of reality? We live in an age of "iconoclasm," which

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5. *Id.* at 720 [480].

6. *Id.* at 747–48 [514–515c].

7. *Id.* at 749 [517].

8. *Id.* at 750 [517d].

9. *See* SHERWIN, *supra* note 1, at 11.

10. *Id.* at 1.

Sherwin explains is a simultaneous fascination and mistrust of visual images that destabilizes social norms, just as the baroque age was one of dislocation and uncertainty.<sup>11</sup> Iconoclasm is a destabilizing condition in which we can't help looking at the digitized train wreck, even as we acknowledge that it never really happened.

Let us begin to address this quandary by rejecting the assumption that girds Plato's account; namely, that there is an unmediated reality against which we can determine the accuracy of the images we see. Plato does not indict sight *per se*; rather, he criticizes those who are taken in by the puppeteers, unable to see the world clearly in the transparent light of day outside the cave. Sherwin forcefully rejects Plato's faith in the forms that can vouchsafe the accuracy of perception. In the contemporary world of manipulable visual images, we are confronted by the brute fact that there are no brute facts: reality is rhetorically structured rather than analytically discerned.<sup>12</sup> The dream of escaping the cave of a historically unfolding rhetorical-hermeneutical mediation of reality is simply a fantasy that distracts us from addressing iconoclasm.

Sherwin appears to equivocate, as he occasionally suggests that we might employ a technology of visual science to get behind images and thereby counteract manipulation. For example, he declares that the "key task of jurisprudence is to break the code, and cultivate the craft, by which legal meanings are made and exchanged. It is science and rhetoric combined."<sup>13</sup> Toward this end, Sherwin seeks to cultivate a visual literacy that "requires conscientious training" and "critical self-reflexiveness."<sup>14</sup> Notwithstanding these occasional statements, his discussion makes clear that he is

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11. As commonly used, the term "baroque" refers to the excessive ornamentation that defined seventeenth and eighteenth century art, placing the artwork at the center of attention rather than what the work represented. Sherwin uses this as the basis for what he terms a "baroque mentality," which is the gnawing fear that we have lost access to meaning and the simultaneous surrender to that fear by glorification of the manipulability of the image. "Bruno Latour calls it 'iconoclasm.' We love the image and we hate it. We are enchanted by its vivid persuasive power, but remain fearful of being seduced and deceived, taken in unawares . . ." *Id.* at 5. He then draws the comparison:

Infinitely distant from a source of authenticating meaning, the never-ending artifice of play (in theater and painting and elsewhere in public life) became the baroque era's secular god. . . . Like its counterpart in baroque art, baroque law embodies a distinctly decadent form: the will to legislate and command has been divorced from a legitimating source of significance. . . . Having turned away from life, the baroque subject seeks comfort (and mastery) in a land of dream, fantasy, and spectacle.

*Id.* at 107–09.

12. Sherwin rebukes the Platonic legacy by reference to the modern rationalist worldview most forcefully articulated by Descartes.

One lesson of the digital baroque is that the rationalist assumptions underlying modern jurisprudence are manifestly inadequate to the demands of the times. The Cartesian legacy, with its anti-rhetorical animus and its repudiation of embodied forms of knowing, which is to say, with its dismissal of emotional knowledge and the creative power of the imagination, is ill equipped to cope with the challenges of visual culture.

*Id.* at 5; *see also id.* at 21–22, 112–13.

13. *Id.* at 18.

14. *Id.* at 23.

arguing for a scholarly inquiry that can never be reduced to mere technology nor aspire to a definitive critical methodology.

How, then, do we respond to the potential for sophistic manipulation? Sherwin looks back to the rhetorical tradition that was overwhelmed by the rationalist and technological assumptions of modernity, but that has been recovered recently (to a degree) by the Legal Realist movement. He agrees that we have no recourse to unmediated reality, but he argues that there can be integrity in how we constitute our world rhetorically. We must use the scientific method to study law, but this is far from sufficient. Our inquiry will remain normatively impotent unless we recover the wisdom of the rhetorical tradition.<sup>15</sup>

In the modern era the dominance of scientific reason and instrumental rationality pushed the classical rhetorical tradition and the humanist ideal of ethical wisdom into the shadows. Eloquence became synonymous with empty ornamentation. Its role in presenting (or opening up a clearing for) the sublime was supplanted by an ambition to totalize knowledge in the quest for rational certainty. Critical thinking, with its ideals of logical necessity and impersonal causation, offers no home for the rhetorical/humanist ideals of situated invention, creative intuition, and the eloquence of prudent interpretation.

Visual jurisprudence aims to revitalize these perennial rhetorical values. Visual eloquence is the offshoot of an integral rhetoric that seeks to harmonize the aesthetic and the ethical.<sup>16</sup>

Sherwin properly links this tradition to the insights of the Legal Realists, rejecting the naturalistic reading of their work by Brian Leiter.<sup>17</sup> Prominent Realists such as Karl Llewellyn acknowledged that legal practice demanded the ancient rhetorical virtues of “poetic imagination, ingenious invention and prudent understanding,”<sup>18</sup> competencies that we need more than ever in the visual age of law. Sherwin offers the Realists’

recapitulation of the rhetorical ideal that we find in the humanist tradition, and in the writings of [Giambattista] Vico in particular, as suggestive of how we might achieve metaphysical resolve in our own time and thus work through the manifold impasses of law’s iconoclasm in the age of the digital baroque.”<sup>19</sup>

The ancient rhetorical ideal rejected the mythology of a hidden reality that could be accessed through reason.<sup>20</sup> It was an ideal, and not merely a resignation to the

15. *Id.* at 29.

16. *Id.* at 179.

17. *Id.* at 127–36. Sherwin is criticizing BRIAN LEITER, *NATURALIZING JURISPRUDENCE* (2007).

18. *Id.* at 181. For my assessment of the significance of Llewellyn’s realism, see generally Francis J. Mootz III, *Vico, Llewellyn and the Task of Legal Education*, 57 *LOYOLA L. REV.* 135 (2011), and Francis J. Mootz III, *The Irrelevance of Contemporary Academic Philosophy for Law*, in *ON PHILOSOPHY IN AMERICAN LAW* (2009).

19. SHERWIN, *supra* note 1, at 186.

20. Sherwin succinctly describes this connection, concluding that this issue “harks back to the ancient Greek debate about rhetoric versus philosophy . . . . For the iconoclast, false idols (mere appearances) mock hidden realities (invisible truths). Material forms blaspheme against spiritual substance.” *Id.* at 7.

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impossibility of indubitable knowledge, because it sought to cultivate the power of the sublime. The sublime is not achieved by communicating information that can be dissected and understood in a linear fashion. Sherwin's goal is to articulate a notion of "visual eloquence" that encompasses "a retrieval of the ancient virtue of inventiveness fortified by a renewed appreciation of the visual sublime."<sup>21</sup> Sherwin explains that the sublime results from an entanglement with the world through the artwork, such that meaning is lived rather than communicated through a transparent medium from artist to viewer.<sup>22</sup> Vico sought to preserve the sublime against the flattening features of modern rationalism,<sup>23</sup> which Sherwin describes as having charted a path between "naive realism and postmodern suspicion . . ."<sup>24</sup>

Sherwin offers a concrete example of the sublime at work in contemporary legal proceedings by referencing the use of a documentary video made for use in a custody dispute between two estranged parents.<sup>25</sup> The wife was charged with arranging for her husband's murder, and the State argued that her motive was having lost custody of their child to him. Ironically, the wife had hired a professional videographer in the course of the custody battle to document one of her daughter's visits with her husband. The video included a poignant scene of the daughter clinging to the wife and the wife obstructing the husband's efforts to take her. Sherwin recounts the image poetically, explaining how its meaning is not easily articulated and reduced to words.

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 [the wife] locked in a custodial embrace, circling, unable to let her daughter go. There is something uncanny in a 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 may foretell . . .

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

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21. *Id.* at 12.

22. *Id.* at 20.

23. *Id.* at 48–49. For my assessment of the significance of Vico's rhetorical philosophy, see generally Francis J. Mootz III, *Vico and Imagination: An Ingenious Approach to Educating Lawyers with Semiotic Sensibility*, 22 INT'L J. SEMIOTICS L. 11 (2009) and Francis J. Mootz III, *Vico's 'Ingenious Method' and Legal Education*, 83 CHI.-KENT L. REV. 1261 (2008).

24. SHERWIN, *supra* note 1, at 52. He explains that neither "the positivist's urge to cut off the vagaries of the senses (in order to preserve the order of conventional rules) nor the radical constructivist's impulse to dive into the whirlpool of affect-laden, free-floating signifiers (for the sake of preferred outcomes or values) addresses what the times demand of us." *Id.* at 32.

25. *Id.* at 78–79.

back again, as if in disbelief. A shudder coursed through the courtroom. Something uncanny was unfolding, and it made them shudder. That is what happens when we encounter powerful images that we cannot fully comprehend.<sup>26</sup>

This experience in the presentation of visual evidence demands an ethical response that acknowledges the difference between the sublime and mere aesthetical manipulation—what Sherwin terms the “ersatz sublime.”<sup>27</sup>

Despite the transformative power of visual images to engender the sublime, Sherwin argues that courts of law can too follow “the path of contemporary politics and marketing” by flattening messages on the electronic screen in simplistic fashion.<sup>28</sup> This is evidenced by the naive visual realism displayed by the Supreme Court in *Scott v. Harris*.<sup>29</sup> If we fail to develop a sophisticated visual literacy, we will have no ability to judge proffered images, and justice will be captive to the sophistic puppeteers who can prey on the simplistic gullibility of the prisoners. The visual sublime is a product of a refined sense that is cultivated through education and experience to see truth and justice in the shifting world in which we live.

### C. *The Visual Sublime*

We can be enchanted by meaning, but in different ways. A sophist enchants the audience by bending them to his will, whereas the sublime enchants in a non-instrumental manner, through a power that resides beyond the control of the presenter or the interpreter. Sherwin rejects a Platonic solution to the threat raised by iconoclasm, but the possibility of enchantment through the sublime gives him grounds for optimism. Beyond the more mundane goals of describing and effectuating the means of visual persuasion, Sherwin wants to cultivate the metaphysical experience of the sublime as an antidote to the fear that our practices lack meaning in the swelter of manufactured images. “The challenge we face is how, amid the dizzying proliferation of images, are we to orient ourselves toward the authentic and the authoritative.”<sup>30</sup> The answer is to experience the uncanny excess of meaning that grips us when we experience the sublime.<sup>31</sup>

Modern law represses its origins in theology and mythology, seeking to ground its authority in self-validating origins and self-executing perspicacious texts that fix the law amid the historical inconstancy of social life. Sherwin explains that visual

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26. *Id.* at 79–80.

27. *Id.* at 80.

28. *Id.* at 81.

29. *Id.* at 39–42; *see also* *Scott v. Harris*, 550 U.S. 372 (2009).

30. SHERWIN, *supra* note 1, at 119.

31. Sherwin explains that in “the presence of the visual sublime the viewer experiences a deep and vital bond with the expressive work and the reality it displays. The sublime animates a way of being entangled in the world.” *Id.* at 20. The enchanting character of the sublime is not merely a pleasing sensation, but rather is an actualization of our way of being in the world.



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jurisprudence undermines this hopeless simplification by bringing to the fore once more the metaphysical dimensions of legal meaning.

To the extent that law is more than command, more than obedience to rules, to the extent that law seeks legitimacy in a *nomos*, a living reality of shared normative beliefs, there may be no escaping the second order domain of metaphysics. Born and bred in the *mythos* of *logos*, metaphysics drives the quest for legitimating mythic narratives and images. These are what [Professor Peter] Goodrich calls the hidden foundations of law. They are the perennial gift of the poetic and visual sublime.<sup>32</sup>

The metaphysical role of the sublime is to provide, in powerful yet elusive ways, a foundation for the role of law in securing justice.

On this view, we may say that visual jurisprudence envisions a metaphysic of the sublime. Such a sublime jurisprudence accounts for the metaphysical origin of society (or sociality) as coincident with the origin of the law of law—or justice. This origin is not a rational construct, as embodied in the modern concept of the social contract, or the deontological derivation of universal rational principles. Rather, it is an act of poetic visual imagination—the genesis, as Robert Cover would put it, of a foundational narrative (or *mythos*) that constitutes a way of life.<sup>33</sup>

The sublime is not a new strategy for dealing with the conundrums of modern law, then, because it has always resided at the heart of law. However, the sublime takes on new valences in different historical periods, and this is most assuredly true as we move from a textual legal culture to a visual legal culture.

If the sublime is “the answer,” the instrumental thinker will expect Sherwin to reveal how to conjure up the sublime to rescue us from our predicament. Ironically, this is precisely the attitude that casts a veil of technique over the sublime and obscures its power. We cannot create the sublime like we can build a courthouse. The advocate who invokes the sublime must participate in a social event that is beyond her will and technical manipulation. Sherwin compares the situation to psychoanalysis, in which we can gain understanding about the unconscious through dream work without ever purporting to control the mechanics of unconscious meaning-making.<sup>34</sup> The sublime is beyond our ken, and captures our imagination in concrete settings in a manner that always remains partly unfulfilled and therefore is aspirational.<sup>35</sup>

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32. *Id.* at 177.

33. *Id.* at 185.

34. Sherwin writes:

Just as the tools of psychoanalytic interpretation, brought to bear upon dream work, presuppose but will never fully grasp or delineate the creative unconscious, so, too, the tools of visual interpretation, brought to bear upon the sublime image, presuppose but will never fully capture the shimmering surplus of meaning that animates it.

*Id.* at 48.

35. *Id.* at 178.

Indeed, the critical element of the sublime is the simultaneous experience of presence and absence.<sup>36</sup> Justice, like beauty, is never fully present, and it is felt most vividly in those moments where the absence is profound and yet ineffable. A beautiful sunset captivates us and holds us in its grip, but it inspires a relationship to something more than the beautiful colors on the horizon. It is our participation in beauty itself, through the temporal event of a particular sunset, that renders the experience sublime. We can never witness the “perfect” sunset, and yet they are all perfect in their own way.

And so, we return to the sight lovers of Plato’s *Republic*. Plato castigates those who remain transfixed by spectacles of sight and sound and do not attend to the nature of things, but he errs in believing that philosophy can apprehend the nature of things as an intellectual matter. It is only through our participation in the concrete experience of the moment that we participate in the nature of beauty or justice—only this nature resists being cabined and exhausted by the moment. This is the experience of the sublime. But we must give full due to Plato’s fear of the sublime, even if we reject his rationalist response. If the sight lovers are enchanted by sophists such as Pol Pot or Hitler, then an ersatz sublime can manipulate them in ways that drive them away from truth.<sup>37</sup> The dilemma of the sublime is that it is never fully present to us, and so we bear the never-ending ethical burden of distinguishing between sophistic and sublime.

There is no definitive methodology for recognizing the sublime. Just as Aristotle concluded millennia ago that it requires a virtuous person to recognize the demands of justice, no amount of visual technology will empower us to produce a sublime experience that fosters justice.<sup>38</sup> The visual literacy that Sherwin seeks is an aspect of what Aristotle would term “virtue,”<sup>39</sup> a quality that one must cultivate through educative observation, critical reflection, and habituating action.

### III. DÉJÀ VU?

Sherwin presents a compelling account of the opportunities and perils presented by the visualization of law. After the ascendance of rational models of law in response to baroque culture, we now are faced with a digitized baroque that again opens the

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36. *Id.* at 166.

37. *Id.* at 177.

38. Aristotle observes that

to know what is just and what is unjust requires, men think, no great wisdom, because it is not hard to understand the matters dealt with by the laws (though these are not the things that are just, except incidentally); but how actions must be done and distributions effected in order to be just, to know this is a greater achievement than knowing what is good for the health; though even there, while it is easy to know that honey, wine, hellebore, cautery, and the use of the knife are so, to know how, to whom, and when these should be applied with a view to producing health, is no less an achievement than that of being a physician.

ARISTOTLE, *NICOMACHEAN ETHICS*, BOOK V 98–9 [1137a] (Roger Crisp ed., 2000).

39. *See id.* at xv [1104a].

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space for an appreciation of the sublime as a necessary feature of a just legal order. Sherwin draws from the ancient rhetorical tradition, Vico's rhetorical defense against the onslaught of the critical philosophy of modernity, and the Legal Realist challenge to the reductive formalism and positivism of prevailing accounts of law and legal practice. He addresses concrete cases in which digitized images are used in trials as examples of his philosophical thesis, and extends his analysis to the broader visualized culture in which we now live. The result is a wide-ranging and sophisticated assessment and critique that I find persuasive and important.

I turn my attention now to Sherwin's ambiguous mixture of recovering the abiding wisdom of the rhetorical tradition and of recognizing a distinct new reality created by the visual age. Is the age of digital baroque just a new setting for the same contest between philosophy and rhetoric, rationalism and romanticism, and empiricism and phenomenology? On one hand, Sherwin presents the digital baroque as a qualitatively new experience that transforms the old debates. He argues that the ubiquitous digital images in our culture can profoundly and immediately affect us in fundamentally different ways than other forms of communication.

For example, he introduces the book by emphasizing that visual meaning making is *different* from the way we make meanings in words alone. Visual meanings are written in the body, so to speak. We respond to images quickly, holistically, and affectively—the same way we perceived the world at large. Vision is a complex physiological, cultural, and cognitive response to visual stimuli . . . . In short, analyzing and interpreting the visual culture of law requires that we understand the *peculiar* logic of the media that produce it, and the kind of visual world those productions help to create.<sup>40</sup>

Our response to visual stimuli “is *different*, as a perceptual and cognitive matter, from the way we respond to words alone” primarily because visual images

tend to capitalize on the power of people's intuitive, *gestalt* emotional responses to shape their judgments . . . . It is also notable that visual images tend to have a more *embodied impact* than non-visual expressions of the same information. That is because they tend to be *more vivid*, and *more lifelike*.<sup>41</sup>

The age of the digital baroque arrived before we had the opportunity to prepare ourselves for this different environment, which brings with it both the opportunity for the sublime and the risk of manipulation.<sup>42</sup>

In this sense, the pictorial turn, particularly in the context of contemporary digital baroque culture, is an occasion of both opportunity and concern. For notwithstanding (indeed, partly because of) the immense power and efficacy of visual communication and visual advocacy that digital technologies have unleashed, the inherited, traditionally dominant forms of legal reasoning and communicative practice now face profound epistemological, metaphysical, and ethical challenges. What authenticates visual meaning as a matter of law?

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40. SHERWIN, *supra* note 1, at 2–3 (emphasis added).

41. *Id.* at 59 (emphasis added).

42. *Id.* at 10–11.

On what authority do we invest belief in what we see? To what extent is emotion an appropriate, perhaps even essential, part of the decision making process, and when does the visual image invite emotional excess and deceit? When has our visual knowledge been appropriately animated by aesthetic craft or undermined by sensory gratification for its own sake? These questions together with a host of other bear upon, but cannot be reduced to evidentiary issues of admissibility alone . . . in order to successfully undertake these tasks jurists will have to travel beyond conventional evidentiary rules and procedures. They will have to understand how visual images make and convey meaning, both explicitly and implicitly.<sup>43</sup>

Sherwin appears to be issuing a call to action to address a distinctly new visual world.

I reject Sherwin's apparent characterization of the visual age as different and unique, without disagreeing with Sherwin's specific analysis of how visual images have distinctive qualities. Visual images may have a distinct impact on the viewer, and the ability to create and manipulate images may provide a new vehicle for manipulation that raises important questions for the legal system, but we should not view this situation as unprecedented. More strongly, it is precisely by regarding the age of the digital baroque as something radically new that will cause us again to be distracted from the perennial basic questions relating to law and justice.

Visual images affect us by connecting to, and working off of, deep-seated narratives that enable and inform our perceptions. This is not to say that visual images are themselves narratively structured, because their sublime character is sometimes explained by their lack of such a linear coherence. However, the sublime experience is integrated into social practices such as law only by "narrativizing" the experience. Hans-Georg Gadamer famously insisted that, "being that can be understood is language,"<sup>44</sup> and we risk forgetting this important insight by regarding the visualization of law as a fundamentally new situation. Visual images hold power only by virtue of their embeddedness in a linguistically structured and mediated cultural reality. Sherwin argues that visual images can be studied on the level of cultural memes, physical sensation, unconscious structuring, and the experience of the sublime.<sup>45</sup> This is certainly the case, but we make sense of these dimensions through linguistic mediation. Even the immediate and preconscious physical sensations evoked by a video image are predicated on the predisposition of the viewer that is socially established through narratives and other linguistic structuring of personal and shared experiences. Show a crime reconstruction video to a chimpanzee, and there will likely be little effect. Show a crime reconstruction video to a jury that has been acculturated through images embedded in overriding cultural narratives, and you will trigger very strong responses. Visual images are powerful tools because

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43. *Id.* at 30. He construes this new reality as a "digital challenge" that results from the "emotionally powerful and visually compelling" quality of visual evidence that can now be digitally altered and, ultimately, wholly simulated through digital technology. *Id.* at 153.

44. HANS-GEORG GADAMER, *TRUTH AND METHOD* 474 (Joel Wiensheimer & Donald G. Marshall trans., 2d rev. ed. 1992).

45. *See* SHERWIN, *supra* note 1, at 57.

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they can evoke narrative structures seemingly instantly and effortlessly, without necessarily repeating the narrative structure itself, but this can happen only because the meaning that we take from the images is parasitic on rhetorically structured ways of perceiving and reacting to the world.

The important questions posed by the visualization of law are not fundamentally different from the questions from previous eras. Sherwin asks:

How do we distinguish the authentic and authoritative from the ersatz sublime (mere aesthetic delight) when law lives as an image on the screen? How do we recognize and assess, in particular legal cases, hyper-aestheticized forms of visual expression, from sense-delighting digital displays aglow with the magical realism of pop science to lawful prohibitions driven by hidden and displaced unconscious fantasies, as distinguished from images that make us shudder by the uncanny force of their sublime presence on the screen?<sup>46</sup>

These are the precise questions that we might pose about the orators of ancient Athens, the glossators of the middle ages, and the brief writer of the last century. Visual images are a different site for the enduring challenge of avoiding sophistic and cultivating the sublime.

If the special characteristics of visual culture do not represent a fundamentally new reality, we should at long last recognize how our world is rhetorically structured to permit visual images to have their power before we become too entranced by the special features of visual images. We face a great risk by not attending to first principles, precisely because the efficacy of the image threatens to become a new fixation that diverts our attention. The development of text-based jurisprudence in modernity provides a cautionary example, inasmuch as legal scholars lost sight of the underlying rhetorical basis of law and focused on the text as an object. Seemingly fixed and immune to the manipulation of interpreters, legal texts were offered as the antidote to the uncertainty and probability of rhetorical argumentation. Successive attempts to tame the text, currently expressed by “new originalists” who abandon the text as a self-sufficient artifact and seek certainty and stability in historical understanding, have only reinforced the fundamental inattention to the rhetorical basis for legal meaning.<sup>47</sup>

Sherwin clearly would reject a similar path for visual studies, but I believe that he underestimates the potential for this trajectory. Perhaps my caution can be summarized as a warning that as we enter the digital age we must not do to the visual image what we did to the text as we entered the literate age. The risk is that the sophists will seize the technical lessons of visual literacy and run with them, while the defenders of justice will misunderstand the nature of the sublime as an aesthetic response peculiar to visual images that can't be cultivated linguistically. Sherwin emphasizes that the visual image purports to be self-validating and transparent, but these were precisely the seductive attributes of written texts.

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46. *Id.* at 81.

47. For my recent, light-hearted critique of the New Originalism from a rhetorical-hermeneutical perspective, see generally Francis J. Mootz III, *Ugly American Hermeneutics*, 10 *NEV. L.J.* 587 (2010).

Sherwin's project would be better served by placing more emphasis on the continuity of the jurisprudential issues that arise in the age of the digital baroque. He should emphasize his acknowledgment in the Introduction that law "has always been a matter of effective storytelling as well as logic, and now *visual* storytelling must be added to the lawyer's (scholar's and law teacher's) cultural toolkit."<sup>48</sup> This perspective acknowledges the distinctive features of visual images without occluding the perennial issues in legal theory.

#### IV. CONCLUSION

Sherwin asks whether law can exist among the sight lovers. He explains how the cultivation of the visual sublime can overcome sophistic practices by awakening our inventive imagination to see the potential for an instantiation of justice in the case at hand. The sight lovers are not flawed beings incapable of knowledge, then, because it is the love of sights and spectacles that permits us to participate in the sublime. We risk falling prey to sophism, or to adopting the instrumental strategies of the puppeteers, but these risks are just a manifestation of our inability to control the sublime and they underscore the fundamental characteristic of human understanding: understanding is not the elimination of prejudice and the perception of what truly is; rather, understanding is the product of the cultivation of productive prejudices.<sup>49</sup> There is no shining forth outside of the cave, but the images on the wall can give rise to sublime understanding.

A reader might be disappointed that we can take the analysis no further, but Sherwin is careful not to oversell the analysis of digital technology as the means to visual literacy. Describing the means of motivating viewers with images is no different than providing a rhetorical handbook with stock lines of argumentation, because it is at once helpful and wholly inadequate. Having all the commonplaces at one's disposal does not empower one to develop the kairotic insight that reveals a

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48. SHERWIN, *supra* note 1, at 2. Sherwin elaborates:

Modern jurisprudence has staked much on the reliability of text-based rules and conventions. The medium of text generates its own rhetorical field of descriptive and normative practices and expectations. The stories we tell and the values those stories embody, the rules we apply and the norms that govern their interpretation, are all part and parcel of the medium in which they are rooted. The shift to a visual medium obliges legal theorists and practitioners alike to come to grips with a new set of cognitive and cultural tools, methods, and norms. We do not respond to visual images the way we read a text. There is no escaping the abstract nature of words on a page. But images want nothing so much as not to be an image. They want reality, to be taken as equivalent to what they show, and we are inclined to grant them their wish. What does this mean for law, particularly when digital signs not only deny they are signs but also that they need any external reality to warrant the truth they assert? What is the truth of the digital image, that aniconic simulacrum?

*Id.* at 120–21. The point that bears emphasis is that although we are experiencing a "shift" from texts to visual images that we must take account of, this is not a fundamental change. The entire block paragraph applies equally to a text-based jurisprudence, even if the details of the analysis are different.

49. GADAMER, *supra* note 44, at 298–99.

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shimmering truth beneath the logical contest. Knowledge of technique is impotent without rhetorical excellence. As Isocrates insisted, Aristotle acknowledged, and Vico recalled with lament, we require no less than the development of virtue to foster the sublime in our rhetorical practices.

The age of the digital baroque provides a new and complicated setting for the age-old quest for rhetorical knowledge.<sup>50</sup> Sherwin is a trustworthy guide who recognizes the rhetorical backdrop for our current issues and he situates his discussion artfully in the context of the legacy of Legal Realism in America. Nevertheless, his attention to the distinctive characteristics of visual images raises the possibility that we will become fixated with the medium, as we did with the advent of text-based legal culture, and remain inattentive to the rhetorical-hermeneutical structuring of meaning that subtends visual media. We failed to attend to Vico's warnings three hundred years ago, and so it is all the more necessary that Sherwin keep us focused on first principles as he deftly describes the visual culture in which we must now seek to do justice.

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50. See FRANCIS J. MOOTZ III, *RHETORICAL KNOWLEDGE IN LEGAL PRACTICE AND CRITICAL LEGAL THEORY* (2006).