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# Images in/of Law

Jessica M Silbey

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## **Images in/of Law**

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## Images in/of Law

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## I. INTRODUCTION

The proliferation of images in and of law lends itself to surprisingly complex problems of epistemology and power.<sup>1</sup> Understanding through images is innate; most of us easily understand images without thinking. But arriving at mutually agreeable understandings of images is also difficult. Translating images into shared words leads to multiple problems inherent in translation and that pose problems for justice. Because images are inherently “what we know” (because they are “what we see”), insofar as most of us process our experiences first through sight, images do not naturally lend themselves to linguistic translation. We don’t believe they require translation because we are so sure of what we see, and yet comparing and sharing understandings of images requires communication through words. Despite our saturated imagistic culture, we have not established methods to pursue that translation process with confidence.

Translating images into words in order to compare them to what we understand through sight is a troubling problem for law. We need to be sure of the facts contained in the image, the relevance of the image, its perspective and potential bias, its partiality, and its ambiguities. And yet images do not lend themselves to a good “fit” between inherent knowledge and descriptive or analytical language of legal evidence and evaluation. This problem of fit (turning facts into knowledge into judgment) is what law attempts to accomplish. Justice is a question of proportionality and fit, which is a matter of sharing common understandings. With images, given their inscrutability (or their mistaken total scrutability),<sup>2</sup> we cannot be sure if mutual understanding has been achieved, especially if we simply rely on our innate sense of “what we see” to do the job of building consensus. Without a language on which we can agree to describe the images upon which law and legal process increasingly rely to adjudicate disputes, law and justice will remain an unspoken endeavor. Transparency and fairness are hallmarks of our justice system. If we cannot be clear about the manner in which we interpret and use images in the pursuit of justice, and if we fail to justify our interpretive choices, we undermine the system’s procedures and corrupt its ends. Images do not speak for themselves. Advocates (and audiences, be they juries or judges) speak for them. With images quickly becoming the common currency in legal knowledge, we must learn to scrutinize images in language we can each understand and upon which we can each agree.

## II. THE INSCRUTABILITY OF IMAGERY

How are images inscrutable? Professor Jennifer Mnookin has recently written an essay on just this subject—what she calls “semi-legibility”—building on writing and

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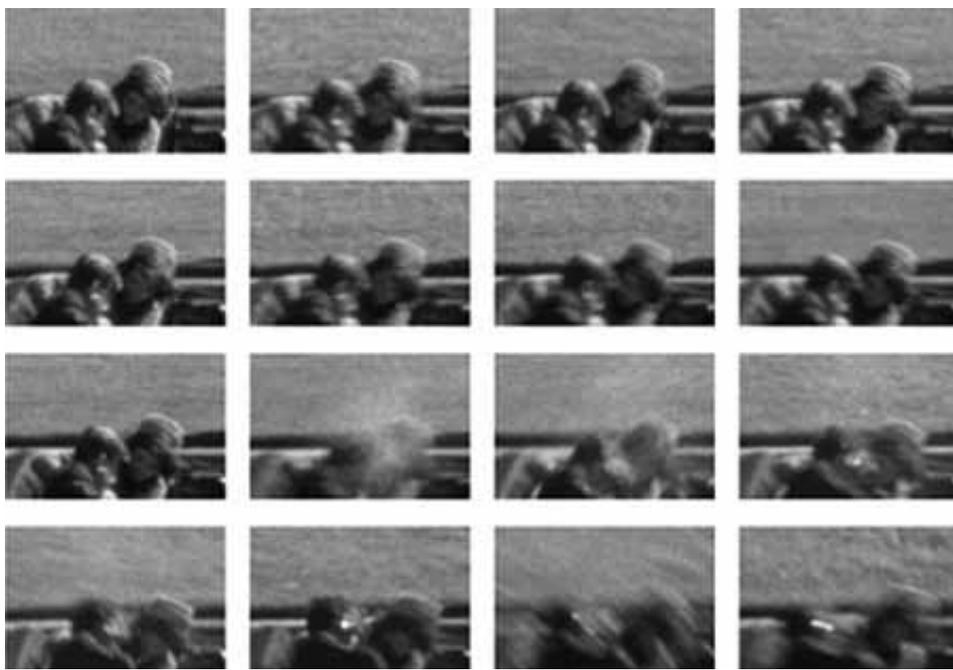
1. Jessica Silbey, *Evidence Verité and the Law of Film*, 31 CARDOZO L. REV. 1257 (2010) (exploring the polysemic nature of photographs and film in legal situations that demand truth-seeking).

2. See Jennifer Mnookin, *Semi-Legibility and Visual Evidence: An Initial Exploration*, J.L. CULTURE & HUMAN. (2012) [hereinafter Mnookin, *Semi-Legibility and Visual Evidence*].

research on which she and I have worked for nearly a decade.<sup>3</sup> Mnookin's recent article in the *Journal of Law, Culture and Humanities* provides a template for thinking about semi-legible images in legal disputes.<sup>4</sup> The concept of "semi-legibility usefully focuses our attention on the ways that much visual evidence neither speaks for itself nor permits unbounded interpretations, but rather, has a range of plausible—and potentially inconsistent—readings." Mnookin's goal, as she puts it, is to invite us "to look at the strategies . . . by which those who make use of visual evidence—from the lawyers who introduce it, to the experts who explain it, to the jurors who assess it—work to read meaning into ambiguous evidence and make it into proof."<sup>5</sup>

Examples of inscrutable images are everywhere once you look for them, from the most popular to the most mundane. The images of the Zapruder film (fig. 1), capturing

FIGURE 1



3. *Id.*; see Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1 (1998); Jessica Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 COLUM. J.L. & ARTS 107 (2005) [hereinafter Silbey, *Filmmaking in the Precinct House*] (observing that film is increasingly being used as a policing tool to monitor police and suspect interactions because it appears to provide an objective and unambiguous representation of past events); Jessica Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493 (2004) [hereinafter Silbey, *Judges as Film Critics*] (describing a variety of film evidence and the problems and contradictions that occur when judges unconsciously act as film critics when determining the admissibility and weight of film evidence); see also Jessica Silbey, *Criminal Performances: Film, Autobiography, and Confession*, 37 N.M. L. REV. 189, 218–40 (2007) [hereinafter Silbey, *Criminal Performances*] (discussing the filming of criminal confessions in particular).
4. Mnookin, *Semi-Legibility and Visual Evidence*, *supra* note 2.
5. *Id.*

## IMAGES IN/OF LAW

images from a particular perspective of the assassination of President John F. Kennedy,<sup>6</sup> are notoriously ambiguous concerning the issue for which people inspect them: Who killed JFK? We may watch these films over and over, witness the violence and horror of the moments, but in doing so we know no more or less about the mysteries of the shooter and his mechanism. The photograph of Sabrina Harman (fig. 2) in Abu Ghraib giving a thumbs-up over an Iraqi corpse is equally inscrutable.<sup>7</sup>

FIGURE 2



We know who she is (and eventually who the corpse is) because of witness testimony after the fact, but what does this photograph tell us of the conditions at Abu Ghraib, who was responsible for those conditions, and the fate of the dead man in the photograph? We can speculate (and that is exactly what happened) based on our first impression of this gruesome and cavalier image, but what we “know” that is relevant to the questions of accountability and retribution remains debatable.<sup>8</sup>

What about an everyday image from a surveillance camera at a bank that captures a moment (or set of moments) during a robbery? What can we say we “know” about the

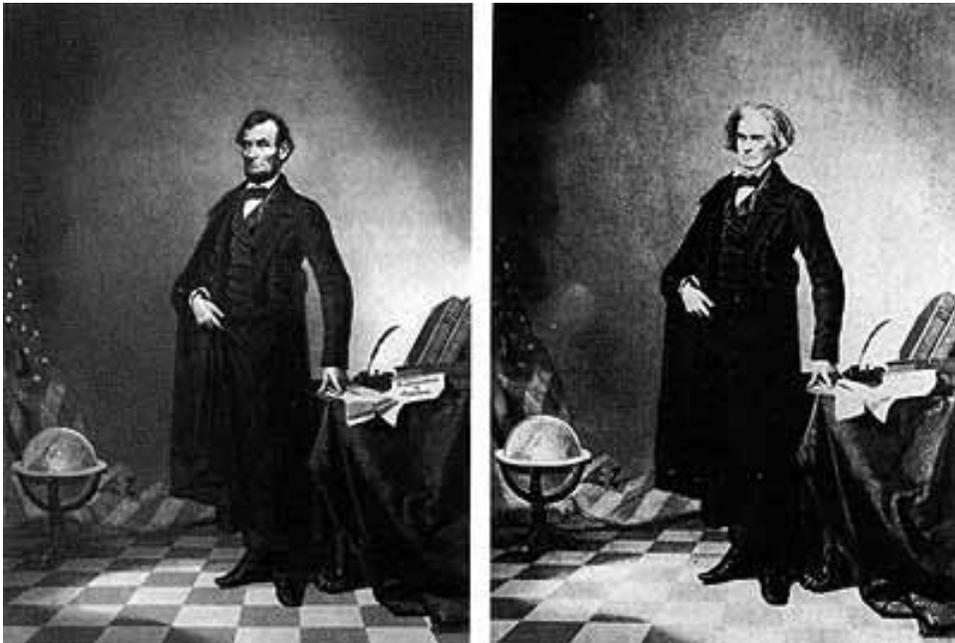
- 
6. Frame-by-Frame Images of the Abraham Zapruder Film, ASSASSINATION RESEARCH, <http://assassinationresearch.com/v2n2/zfilm/zframe001.html> (last visited Sept. 23, 2012) (follow hyperlink for frames 303 to 319 of film).
  7. ERROL MORRIS, BELIEVING IS SEEING (OBSERVATIONS ON THE MYSTERIES OF PHOTOGRAPHY) 109 (2011). The photograph was taken of Sabrina Harman and a deceased Iraqi prisoner by Army Specialist Charles Graner on November 4, 2003 while on duty at Abu Ghraib, Iraq. *Id.* at 97–113.
  8. *Id.* at 111–12.

crime and its perpetrators from an image taken from an automated camera, hanging from a ceiling, unfocused but nonetheless capturing images from the robbery in progress? We might know the relative size and shape of some of the thieves, we may know what they were wearing, but we don't know how many thieves there are in total, we don't see their faces without significant technological enhancements, we don't know how many weapons were in use, we don't know whether the weapons on camera are real or fake. Left with questions about what we are seeing (especially when the images are unfocused, impartial, and out of context as so many are), we are left with further questions about the significance of the images for the legal issues at hand.

Some images require expert interpretation, such as images of fMRI scans or x-rays.<sup>9</sup> In such cases, we acknowledge that these images are inscrutable without a translator. We call the translator "an expert," one who understands the science behind the evidentiary image. That expert/translator must also engage in an additional translation, however, of not only the science that produces the image for us to collectively view, but also of the image itself, pointing to or explaining certain parts of the images as more relevant than others.

Some images are so notorious that we cannot fathom the dispute they may generate. Consider the famous pictures of Abraham Lincoln reprinted here (fig. 3).

FIGURE 3



9. NEAL FEIGENSON & CHRISTINE SPIESEL, *LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT* 104–30 (2009).

It is a doctored photograph of Lincoln's head on John Calhoun's body.<sup>10</sup> Only an expert on digital images (or a civil war historian) would know this.<sup>11</sup> Despite having seen this photograph in history textbooks for decades and "knowing" it to be Abraham Lincoln, we are not "seeing" Abraham Lincoln as he was photographed. We are seeing a collage of at least two photographs together forming a political and ironic statement about Lincoln's legacy in light of his political competitor John Calhoun.

An image of an in-utero fetus produces a similar feeling of familiarity and potential strangeness. We know what we are seeing generally speaking, but what is its significance? How old is this fetus? In whose body is it? The ultrasound output of a fetus twitching and rolling in a mother's uterus is increasingly shown on legislative floors to add evidence to the constitutional debate on abortion. But what kind of evidence does this film provide? What is its factual or legal significance? Does this photograph help answer the legal question of whether a fetal life is constitutionally protected against any or all maternal choices, from drinking wine to terminating the pregnancy pre-viability?

The inherent inscrutability of film and photographic images may be no different from the inscrutability of written text or oratory, the critical evaluation of text and oratory being an academic study of longstanding. And yet we have not yet developed a regular habit of being skeptical of film and photographic images used as demonstrative or substantive evidence in legal settings.<sup>12</sup> Photographic or film images, when put at issue in a lawsuit, should be subject to the same level of scrutiny (if not more) than testimonial and documentary evidence, the goal of the scrutiny being to test the message for which its proponent asserts the film or photograph stands. Doing so will generate multiple interpretations of the film or photograph, confirming the nature of images as inherently polysemous. This will also confirm the long-standing theoretical perspective in film and literary studies that audiences (and readers) generate significance for the film and literature as much as (or more than) the images and texts themselves generate meaning. The image of the in-utero fetus means different things depending on the context in which the image is situated and the argument it is being used to advance. In a trial on the constitutionality of the requirement that women seeking abortions be shown an ultrasound image of the fetus in their uterus, the ultrasound image can stand for competing sides of the debate: (1) that a fetus with a beating heart lives inside the woman and cannot be killed; and (2) that a first-term fetus is so underdeveloped and dependent on the woman's body to survive that it is unrecognizable as human and inseparable from the woman: a part of her body itself.

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10. The photograph is circa 1860, creator unknown; see Hany Farid, *Digital Doctoring: Can We Trust Photographs?*, in *DECEPTION: FROM ANCIENT EMPIRES TO INTERNET DATING* 95, 97–98 (Brooke Harrington ed., 2009), available at <http://www.cs.dartmouth.edu/farid/publications/deception09.pdf>. [hereinafter Farid, *Digital Doctoring*]; see also Hany Farid, *Photography Changes What We Are Willing to Believe*, *CLICK!*, <http://click.si.edu/Story.aspx?story=178> (last visited Mar. 5, 2012).

11. See Farid, *Digital Doctoring*, *supra* note 10.

12. See Jessica Silbey, *Cross-Examining Film*, 8 U. MD. L.J. RACE RELIGION GENDER & CLASS 17 (2008) [hereinafter Silbey, *Cross-Examining Film*]; see also Silbey, *Judges as Film Critics*, *supra* note 3, at 570–71.

Despite the proliferation of film as a basic tool of communication in our digital age, it remains rare to hear of legal scholarship, case law, and legislative initiatives analyzing film's role as a legal tool or constitutive part of legal culture. Why is this? One reason may be because lawyers and judges are word people and not picture people. Thinking in terms of images as building blocks for legal arguments is not how lawyers and judges are trained. We might use chalk to diagram a room or a chase. We might use photographs to identify suspects. But the nuts and bolts of law study and practice are words, not pictures. Another reason may be that too many lawyers and judges (ironically enough) believe images are less precise than words. We are uncomfortable with the maxim that "a picture is worth a thousand words." Which words? And how can I shape them, direct them, cross-examine them? This is precisely the right worry to have.

### III. THE INTERSECTION OF LAW AND FILM IMAGERY

The field of law and film has grown in the past ten to fifteen years. Roughly, the field has three overlapping foci. There is the "law-in-film" scholarship, which began as a study of law's popular forms in cinema and television and is primarily concerned with the ways in which law and legal processes are represented in popular forms.<sup>13</sup> This "law-in-film" approach considers film and television as a jurisprudential text and asks how law should or should not regulate and order our worlds by critiquing the way it does so in the film or television show.<sup>14</sup> Studies of film (e.g., *Twelve Angry Men*) and television shows (e.g., *Ally McBeal*) proliferated in law journals over the past years.<sup>15</sup>

There is also a "film-as-law" approach, which asks how films about law constitute a legal culture beyond the film. This approach pays special attention to film's unique qualities as a medium and asks how its particular ways of world-making shape our expectations of law and justice in our world.<sup>16</sup> Writings in the "film-as-law" vein

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13. See generally ANTHONY CHASE, MOVIES ON TRIAL: THE LEGAL SYSTEM ON THE SILVER SCREEN (2002) (describing films about law as a vehicle to explore popular beliefs about law and politics); LEGAL REELISM: MOVIES AS LEGAL TEXTS (John Denvir ed., 1996) (collection of essays discussing film stories about law).
  14. See generally ORIT KAMIR, FRAMED: WOMEN IN LAW AND FILM (2006) (reading "law films" as feminist critiques of power struggles in law to imagine a more inclusive, compassionate legal order).
  15. See LAW AND JUSTICE ON THE SMALL SCREEN (Peter Robson & Jessica Silbey eds., 2012) (a collection of essays on law and television); Jessica Silbey, *The Politics of Law and Film Study: An Introduction to the Symposium on Legal Outsiders in American Film*, 42 SUFFOLK U. L. REV. 755 (2009) (articles collected from a symposium on law and film studies); Nancy S. Marder, *Introduction to the 50<sup>th</sup> Anniversary of 12 Angry Men*, 82 CHI.-KENT L. REV. 557 (2007) (introduction to two academic panels discussing the fiftieth anniversary of the film *12 Angry Men*); Symposium, *Picturing Justice: Images of Law & Lawyers in the Visual Media*, 30 U.S.F. L. REV. 891 (1996); see also Diane Klein, *Ally McBeal and Her Sisters: A Quantitative and Qualitative Analysis of Representations of Women Lawyers on Prime-Time Television*, 18 LOY. L.A. ENT. L. REV. 259 (1998) (discussing portrayals of female lawyers on prime-time television).
  16. See generally CYNTHIA LUCIA, FRAMING FEMALE LAWYERS: WOMEN ON TRIAL IN FILM (2005) (showing how the genre of the female lawyer film both emboldens and undermines women's authority in law and society); Rebecca Johnson, *Leaving Normal: Constructing the Family at the Movies in Law*, in NEW PERSPECTIVES ON DEVIANCE: THE CONSTRUCTION OF DEVIANCE IN EVERYDAY LIFE 163 (Lori G. Beaman ed., 2000); Jessica Silbey, *Patterns of Courtroom Justice*, 28 J.L. & Soc'y 97 (2001).

explore the rhetorical power of film form to affect popular legal consciousness.<sup>17</sup> The focus is less on the story the film tells about law (the film's plot) and more on the *way* it tells the story (the film's form).<sup>18</sup> This analysis more acutely centers on the particular way that film stories are differently embodied as visual representation and, therefore, how they differently embody their audience as judge or jury. This "film-as-law" scholarship explains "how viewers are actively positioned by film to identify with certain points of view; to see some groups of people as trustworthy, dangerous, disgusting, laughable; to experience some kinds of violence as normal; to see some lives as lightly expendable."<sup>19</sup> In this latter approach, film and law are compared as epistemological systems, formidable social practices that, when combined, are exceptionally effective in defining what we think we know, what we believe we should expect, and what we dare hope for in a society that promises ordered liberty.<sup>20</sup>

The third focus of law and film scholarship concerns film as evidence. This area of research draws on "law-in-film" and "film-as-law" scholarship but considers the role of film more specifically in policing and dispute resolution settings.<sup>21</sup> It asks how film is used as a legal tool and how it becomes an object of legal analysis in light of its history as a cultural object and art form. How does automated surveillance film become testimony in a court of law?<sup>22</sup> How do cultural perceptions about film affect its evaluation by jurors, advocates, and judges?<sup>23</sup> How might legal actors and lay citizens mobilize the audiovisual technology of our twenty-first century to further the promises of our justice system?<sup>24</sup> In this sub-field, the history of film as entertainment and as an art form combines with the epistemological complexities inherent in this representational medium to explore the benefits and pitfalls of film's role in shaping formal legal procedures.

In addition to law and film studies, policy debates that surround televised courtroom proceedings and court television gained traction in the scholarly literature

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17. Silbey, *supra* note 16, at 97–98.

18. See generally Jennifer Mnookin, *Reproducing a Trial: Evidence and Its Assessment in Paradise Lost*, in *LAW ON THE SCREEN* 153 (Austin Sarat et al. eds., 2005); Jessica Silbey, *A History of Representations of Justice: Coincident Preoccupations of Law and Film*, in *A REPRESENTATION OF JUSTICE* 131 (Antoine Masson & Kevin O'Connor eds., 2007) (comparing film and law as knowledge systems).

19. See Ruth Buchanan & Rebecca Johnson, *Strange Encounters: Exploring Law and Film in the Affective Register*, 46 *STUD. L. POL. & SOC'Y* 33, 34 (2009).

20. See Silbey, *supra* note 18.

21. See Silbey, *Criminal Performances*, *supra* note 3, at 194–97; Silbey, *Filmmaking in the Precinct House*, *supra* note 3, at 114–16; Silbey, *Judges as Film Critics*, *supra* note 3, at 500–02.

22. Silbey, *Judges as Film Critics*, *supra* note 3, at 515–20.

23. RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* 107 (2000); Kimberlianne Podlas, "The CSI Effect": *Exposing the Media Myth*, 16 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 429, 431–32 (2006).

24. FEIGENSON & SPIESEL, *supra* note 9, at 131–62.

in the 1980s and 1990s.<sup>25</sup> Reality television with a focus on law continues to interest legal scholars and media scholars.<sup>26</sup> Policy debates circulate about the proper role of cameras in the courtroom, beginning with the Supreme Court case *Estes v. Texas* in 1965<sup>27</sup> and culminating for many in the O.J. Simpson murder trial.<sup>28</sup> This debate has become mundane for many of us, and courts and legislators seem to understand the pros and cons of filming and filmmaking in the courtroom: its educative and distortive capacities.<sup>29</sup> The debates continue about the disparate filming practices in the thousands of courtrooms around the country, particularly whether and how a court should allow filming to occur. Cameras in the courtroom are becoming more widespread throughout the United States, and yet the U.S. Supreme Court staunchly refuses to visually record its proceedings.<sup>30</sup> We might ask ourselves why the Supreme Court has refused to open its proceedings to audiences beyond the physical courtroom. The Justices describe worries of “sound bites” and questions and answers reported “out of context,” of harm to the court’s reputation, and of undue influence on the advocates before the court. Do these concerns translate into the use of film and digital photography as evidentiary proffers more generally? Are the Justices onto something or resisting an inevitable future?<sup>31</sup>

#### IV. THE IMPACT OF THE INSCRUTABILITY OF IMAGERY ON LEGAL PRACTICE

Across these varied subject areas of the “visualization of law,” scholars tend to write from two basic perspectives. The first critiques the images of law in popular visual forms, highlighting the disjunction between the stories and characters on-screen with the reality of legal practice. The concern here is that because image culture helps constitute law and legal culture, popular film representations may distort the law and its admirable purposes and processes. The persistent images of corrupt or incompetent judges (e.g., the films *My Cousin Vinny* or *And Justice for All*<sup>32</sup>), vicious and unethical lawyers (e.g., the HBO series *Damages*<sup>33</sup>), and the

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25. Angelique M. Paul, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About Real Law?*, 58 OHIO ST. L.J. 655 (1997); see also MARJORIE COHN & DAVID DOW, *CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE* (2002).

26. See, e.g., Nancy S. Marder, *Judging Reality: Television Judges*, in *LAW AND JUSTICE ON THE SMALL SCREEN* 229, 230 (Peter Robson & Jessica Silbey eds., 2012).

27. *Estes v. Texas*, 381 U.S. 532 (1965).

28. COHN & DOW, *supra* note 25, at 3–13; see also SHERWIN, *supra* note 23, at 44–47, 162–63.

29. COHN & DOW, *supra* note 25, at 14–25.

30. *Id.* at 39–61.

31. But see *Scott v. Harris*, 550 U.S. 372 (2007), in which the Supreme Court held that a police-made videotape of a car chase from the dashboard of the police cruiser “captures” the event in dispute such that summary judgment should be decided in light of the facts depicted in the videotape. With this ruling, the Court appears unafraid of “sound bites” and filmed events taken out of context in policy brutality cases, but still afraid of this problem for filming their own oral arguments.

32. See *MY COUSIN VINNY* (Twentieth Century Fox 1992); *AND JUSTICE FOR ALL* (Columbia Pictures 1979).

33. See *Damages* (Fox Entertainment Group 2007).

dominance and infallibility of scientific evidence (e.g., the television show *CSI: Crime Scene Investigation*<sup>34</sup>) devastate the reputation of our legal system and our faith in the rule of law. Furthermore, false representations of legal process—that trials are common, cross examination is always earth-shattering (e.g., *A Few Good Men*<sup>35</sup>), and lawyers are dramatic and heroic (e.g., *To Kill a Mockingbird*<sup>36</sup>)—lead to disappointment in one’s own personal experience with legal disputes. This creates false expectations and, some suggest, vigilantism or a nihilistic view of the profession and our legal system. For scholars writing in this vein, their focus is to realign the popular expectations of law with the activity of legal adjudication, to demystify legal practice, and to develop a critical attitude toward popular cultural representations. This scholarship urges that we become smarter consumers of popular legal culture for the purpose of educating our students, juries, and clients.

Related to this form of scholarship about images in law is the critical investigation of the cultural representations of law for what they teach us about law’s history and future promise. Many films about law question the balance of power between the individual and institutions (legal and non-governmental) as it relates to gender equality (e.g., *North Country*<sup>37</sup>), tort reform (e.g., *Erin Brockovich*,<sup>38</sup> *A Civil Action*<sup>39</sup>) or race relations (e.g., *A Time to Kill*<sup>40</sup>). These films about law are often based on true stories, strengthening their message about equal justice and the need for social change.<sup>41</sup> Consider also the surge of documentary film as a popular cinematic genre and that many of the documentary films are about law and policy.<sup>42</sup> This has been further material for this area of scholarship on the intersection between popular culture and legal institutions.

In comparison to images of law, many scholars also write about images in law—literally in law, such as surveillance film, filmed confessions, or other forms of photographic or filmic evidence and argument.<sup>43</sup> These scholars accept that film images are part of our present and future ways of making sense of our world. As such, we must learn how they work, how they are variously used, and the benefits and drawbacks of their widespread use. The question for this scholarly trajectory is not “what is the content of the image?” or “what does it mean?” but “how is it meaningful within the legal process?” Further questions around which this kind of

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34. See *CSI: Crime Scene Investigation* (CBS Television 2000).

35. See *A FEW GOOD MEN* (Castle Rock Entertainment 1992).

36. See *TO KILL A MOCKINGBIRD* (Alan J. Pakula 1962).

37. See *NORTH COUNTRY* (Warner Bros. 2005).

38. See *ERIN BROCKOVICH* (Universal Pictures 2000).

39. See *A CIVIL ACTION* (Touchstone Pictures 1998).

40. See *A TIME TO KILL* (Warner Bros. 1996).

41. Silbey, *Filmmaking in the Precinct House*, *supra* note 3, at 109–12.

42. *Id.* at 109–10 (discussing this trend).

43. *Id.*; see also Silbey, *Criminal Performances*, *supra* note 3; Silbey, *Cross-Examining Film*, *supra* note 3; FEIGENSON & SPIESEL, *supra* note 9; Mnookin, *Semi-Legibility and Visual Evidence*, *supra* note 2.

work centers are: “What are the imagistic mechanisms for conveying relevance and for persuading?” and “How do film and photography compare to other representational forms aimed at communicating and advocating?” For example, work on filmed confessions asks questions about the camera angle: whether the film frame focused equally on the defendant and interrogator and the time frame and sequencing of the confessional film evidence.<sup>44</sup> Work on clemency videos and victim impact statements asks questions about the use of soundtracks, the propriety of the stylization of these biographical and autobiographical film forms, the acceptability of mixing factual stories (biography) with fictional genres (feature film), and the benefits and drawbacks of these persuasive film forms in legal proceedings where life and liberty are at stake.<sup>45</sup>

## V. INTEGRATING THE STUDY OF IMAGERY INTO THE PRACTICE OF LAW

In the scholarly arena that studies images in law, the goal is not to achieve realignment, as it is in many critiques of popular cultural images of law, but instead to practice translating images into the language and policies, of our legal system. These investigations enact critical interpretations of film, applying the learning of film studies (its history and form) to examine the complexity of film’s meanings and effect when used by legal advocates. This work encourages using well-established techniques of cross-examination and discovery to assess relevancy and prejudice of film evidence.<sup>46</sup> It does not advocate abandoning film as a legal tool. To the contrary, this work creates a framework through which the evaluation and continued use of images in law can be accomplished in accordance with well-accepted legal principles of evidentiary and procedural fairness and access, but also on its own terms and alongside the strengths and weaknesses of other testimonial and documentary evidence. For example, in my own work on the varieties of film evidence, their treatment, and the importance of cross-examining film, I urge that discovery requests for outtakes and framing choices be made in both civil and criminal contexts.<sup>47</sup> I also describe how lawyers and judges can more easily discern when film is not adequately being examined and when it is ambiguous. When advocates provide preambles to film images, they are demonstrating that the film requires some explanation.<sup>48</sup> And when lawyers ask leading questions of their witnesses who narrate film evidence, they are implying the film cannot speak for itself.<sup>49</sup> In both contexts, judges and

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44. Silbey, *Filmmaking in the Precinct House*, *supra* note 3, at 162 (citing studies by Daniel Lassiter).

45. See Regina Austin, *Documentation, Documentary, and the Law: What Should Be Made of Victim Impact Videos?*, 31 CARDOZO L. REV. 979 (2010); I. Bennett Capers, *Crime Music*, 7 OHIO ST. J. CRIM. L. 749 (2010).

46. Silbey, *Cross Examining Film*, *supra* note 12, at 41.

47. Silbey, *Judges as Film Critics*, *supra* note 3, at 561.

48. Silbey, *Cross Examining Film*, *supra* note 12, at 40–41.

49. *Id.* at 41.

opposing counsel should be aware that the film has more than one perspective, is likely ambiguous, and its relevance (and interpretation) is in need of justification.

The present symposium<sup>50</sup> focused on the above-described range of scholarship on the “visualization of law.” Considering the future of legal scholarship in this area—new trajectories for images of and in law—I cannot help but think about the variety of new legal subject areas in which images (both digital and analogue) are central. The billion-dollar video and online gaming industry (think about *World of Warcraft* or *Second Life*) is a field rich with legal battles ranging from privacy, contract, unfair business practices, intellectual property, and criminal law.<sup>51</sup> Any dispute in each of these areas will have to reckon with how the games are played, how they are significant to their purchasers (the identities and communities they create and the passions they fuel), and the mechanisms of their commercial success. These questions, in turn, depend on parsing the relationship between the video or digital images—the virtual reality these games create—and the real world. This requires wrestling with some of the most deeply philosophical and humanistic inquiries about images themselves: the differences between representation and reality, the easy elision between them, and the historical insistence that differences between representation and reality be maintained.<sup>52</sup> This is not to say that representation (be it verbal language or visual art) is not real or that it does not have real effects. It is to say that, when so much of our experience in the twenty-first century is through or via cyberspace, we might take care that our laws regulating both the physical world and the cyber world account for whatever differences distinguish them.

The visualization of law is also apparent in the increased regulation and protection of data alongside the evolution of privacy law. As social networking sites become the *modus operandi* for communicating with professional and social peers, the issue of what information and images we make “public” and what we keep “private” and what information and images the webhosts own and control is of central concern. How our identities evolve on the web—how much control we maintain and how much control we must necessarily relinquish—will be closely tied to the existence of easy access to images of ourselves going about our daily life. What of an image search on Google’s search engine that turns up dozens of personal photographs that you were unaware were posted online? How, if at all, is this different from textual references to your personal or professional life? What of the competing need for surveillance and safety—in public parks, airports, or government buildings? Body scanners and surveillance cameras take photographs and film of a huge swath of everyday activity. How should we regulate that data? And should consideration be given to the fact that images (especially personal images) may be experienced as more private and their distribution as more invasive than other forms of surveillance and data collection?

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50. Symposium, *Visualizing Law in the Digital Age*, 57 N.Y.L. SCH. L. REV. 1 (2012–2013).

51. See generally GREG LASTOWKA, *VIRTUAL JUSTICE: THE NEW LAWS OF ONLINE WORLDS* (2010).

52. See generally ERNST H. GOMBRICH, *ART AND ILLUSION: A STUDY IN THE PSYCHOLOGY OF PICTORIAL REPRESENTATION* (1960).

Intellectual property is another area of law increasingly becoming the subject of public debate. Its obvious value in business, education, and research—all of which are required for continued national growth and prosperity—has made it the subject of recent and hotly contested legislative initiatives.<sup>53</sup> Although much intellectual property is not image-based, much of it is—especially as seen recently in well-known cases, such as the *Shepherd Fairey* copyright lawsuit concerning the Obama/Hope poster and the high-fashion *Louboutin* shoe trademark case.<sup>54</sup> It is remarkable how much of intellectual property is about the visual sense and yet how little intellectual property law considers the epistemology of the image.<sup>55</sup>

Finally, moving images are making their way into constitutional debates. As mentioned above, ultrasound films of pre-viable fetuses and fMRI images of brain activity purport to shed light on debates about abortion and end of life decisions. These images are used rhetorically on the legislative floor to prove the humanity of the unborn fetus and the inviolability of a terminally ill person based on brain function. The images may also be mandated by law, as in some states that require doctors show their patients a fetal ultrasound before terminating a pregnancy. Understanding how these images work (or fail) to persuade and how they convey factual (or misleading) information is necessary if we are to fully engage the legal and social dimensions of these pressing national issues.

## VI. CONCLUSION

In the near future, it might be helpful if within the field of the visualization of law we develop a taxonomy of the various strategies of visualization, how they occur in our society generally, and how they are embedded in diverse legal contexts specifically. Beyond the usual suspects of visualization and law—e.g., criminal law and popular culture—we would be wise to consider how images in and of law are hardly exceptional but instead are diffuse and complex—like language itself. For this reason, aesthetic and cultural theory based on the image must be at the center of law teaching and practice today.

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53. See Stop Online Piracy Act (SOPA), H.R. 3261, 112th Cong. (2011); Protect Intellectual Property Act (PIPA) Protect Intellectual Property Act of 2011, S. 968, 112th Cong. § 3(d)(2)(D) (2011); see also SOPASTRIKE, <http://sopastrike.com> (last visited June 13, 2012).

54. Randy Kennedy, *Artist Sues the A.P. Over Obama Image*, N.Y. TIMES, Feb. 9, 2009 at C1; *Christian Louboutin v. Yves Saint Laurent Am., Inc.*, 778 F. Supp. 2d 445 (S.D.N.Y. 2011).

55. A notable exception to this is Rebecca Tushnet, *Looking at the Lanham Act: Images in Trademark and Advertising Law*, 48 HOUSTON L. REV. 862 (2011); see also Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683 (2012).