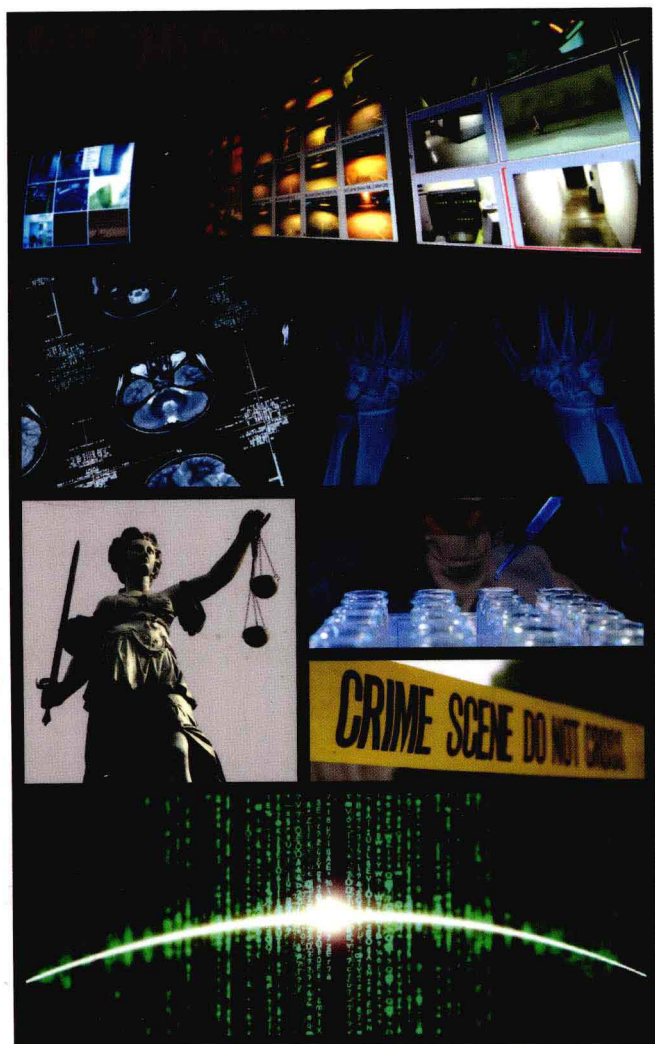


# Visualizing Law in the Age of the Digital Baroque

ARABESQUES AND ENTANGLEMENTS



Richard K. Sherwin

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*Arabesques and Entanglements*

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## CHAPTER 1

# Introduction

Tell me where is fancy bred,  
Or in the heart, or in the head?  
It is engendered in the eye.  
(William Shakespeare<sup>1</sup>)

You're living in a dream world, Neo.  
(*The Matrix*<sup>2</sup>)

O God, show us things as they are.  
(Sufi prayer<sup>3</sup>)

This is a book about law and visual culture. It poses the question, what happens when the search for truth and fact-based justice is increasingly driven by visual evidence and visual argument inside the courtroom? The answer takes us beyond the pragmatic concerns of lawyers and judges facing new interactive, audiovisual technologies of persuasion. The shape and texture of the legal imagination itself – how we think and feel and deliberate about truth and justice – are undergoing radical change.

When I refer to “visual culture” in these pages, I have in mind David Morgan’s description of the field: “what images, acts of seeing, and attendant intellectual, emotional, and perceptual sensibilities do to build,

maintain, or transform the worlds in which people live.”<sup>4</sup> When we study visual culture we are not only analyzing and interpreting images, but also “ways of seeing (or gazes) that configure the agents, practices, conceptualities, and institutions that put images to work.”<sup>5</sup> Styles of imagining the world have been known to shift along with significant changes in technology, culture, and socio-economic conditions. For example, Benedict Anderson has observed that during the nineteenth century the technologies of “navigation, astronomy, horology, surveying, photography, and print” gave rise to a manner of imagining a world in which the particular came to be viewed as a fungible representative in a series, as if everyone and everything wore a serial number.<sup>6</sup> Today the technologies of digital imaging, interactive computing, and instant access to an almost infinite flow of information online are likewise giving rise to new communities, institutions, and practices, including the communities, institutions, and practices of law. In a visual culture law, too, operates visually. In contemporary legal practice, lawyers, judges, and lay jurors face a vast array of visual evidence and visual argument. From videos documenting injuries, crimes, and accidents, or advocating the mitigation or enhancement of sentences in criminal cases, to computer displays of all manner of digital graphics and re-enactments, the search for fact-based justice inside the courtroom is increasingly becoming an offshoot of visual meaning making.

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 perceive the world at large. Vision is a complex physiological, cultural, and cognitive response to visual stimuli. It depends on a variety of cues. Implicit meanings – often the offspring of emotional and mnemonic associations to what we see on the screen – tend to remain hidden from conscious reckoning. Images quickly activate patterns of seeing and feeling that we have internalized from a lifetime of watching. So when law lives as an image on the screen it lives there as other images do. That is to say, it motivates belief and judgment on the basis of visual delight and unconscious fantasies and desires as well as actualities – all within the discrete aesthetic code in which a given visual medium operates.

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. This is not the world of strict linear logic, deductive reasoning, and rational volition that legal positivists, rational choice theorists, and behavioral economists tend to favor. 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. Thus it falls upon us to ask: How does visual culture alter the legal mind, and with what consequences for the practice and theory of law? That is the subject of this book.

How do we know the truth of what we see on the screen? What warrants our belief in images? When does the image add a living reality (of feelings and impressions) which words alone may not convey, and when does it divert judgment and belief through an intensification of irrational fantasies and desires? When law marries visual culture their joint offspring requires new academic partners, including media and cultural studies, art history, cognitive psychology, psychoanalysis, and neuroscience. In short, jurists need to cultivate a new visual literacy so that they may understand better how images work, the better to cultivate competencies in visual communication, cross-examination, and judgment. That objective is one of the core goals of this book. But it is not the only one.

If law is to be treated as a part of contemporary visual culture, and of that need there can be no doubt, it is not enough to consider the way in which law partakes in the various aesthetic, cognitive, and cultural codes that different visual media deploy. Law also shares in the various normative aspirations and afflictions that are bound up in the culture at large. For this reason, we must also be attentive to cultural conditions. What does it mean to aspire to visual eloquence, for example? How do we recognize and capture it in contemporary cultural terms? Moving to the other end of the spectrum, what anxieties, what loss of confidence in the reliability of visual representation afflicts the visual legal imagination? Addressing these highs and lows represents the second core objective of this book.

Writing about visual eloquence is not an easy undertaking. In what follows, I shall seek to retrieve a category that I believe can help. I call it the visual sublime. There is something uncanny in the excess of meaning that some images convey. The poignant dignity of a victim wrongfully harmed, the implicit malice of one who has perpetrated (or is about to perpetrate) an act of violence, the collapse of time in the visual and aural synthesis of various pieces of visual evidence presented at trial – these legal examples, together with a host of other illustrations of the visual sublime will be explored in these pages. There are times when images move us with an uncanny power, a sense of presence that cannot be easily explained. But there are also times when visual images convey a very different kind of reality, perhaps something that may not be reality at all. This is the image as mere sensation or digital simulacrum, the image as aesthetic delight or flight of fancy, the image as progenitor of irrational desire. These forms of vision are also now part of the legal landscape.

They are a part of what it means when we say law lives as an image on the screen as other images do.

And here is where the specter of the baroque comes to the fore. In a time when we can digitally picture just about anything we can imagine it should not prove surprising that doubts may arise concerning the truth of what we see. This feeling of doubt, which culminates in a loss of confidence in the faculty of representation itself, lies at the core of baroque culture – both the baroque culture of seventeenth century Europe, and the global digital baroque culture that we are living in today. What is real, and what is imaginary? And how can we be sure of the difference? Baroque visuality is an affliction of vision. It comes about amid a proliferation of visual forms, forms that invite an intensification of feeling as well as a dizzying sense of dislocation and confusion. For the baroque mind, lurking beneath the surface of visual spectacle and delight lies a formidable terror. It takes shape in the thought that perhaps there is nothing else but this, these dancing forms, these infinitely unfolding arabesques. Such was Pascal's horror in the face of the infinite.

The anxiety that accompanies baroque visuality, on the one hand, which is at bottom a fear of the loss of meaning, and the uncanny presence of the visual sublime on the other, frame the contemporary, culture-wide quest for visual competence. The stakes of that search grow weightier when it plays out on the landscape of law, where visual representations are secured by the police power of the state. Law's aspiration to fact-based justice can ill afford the baroque recession of reality inside the courtroom.

In order to counter the uncertainties that afflict the baroque mind, in what follows I seek out those cultural and cognitive resources that may help us to recognize (and display) visual eloquence. Overused categories such as "postmodernism" no longer provide a useful source of insight here. And while the constructivist perspective, and the critical deconstructivist method that illuminates it, remains of value, it is possible to have too much of a good thing. Deconstruction usefully excavates structures of meaning in texts and images. But like that classic Marx Brothers scene from *A Night at the Opera* (1935), in which Chico and Groucho rip away extraneous clauses of a contract until nothing worth saving remains, deconstruction risks excessive critical zeal. Even the inexpressible (perhaps that above all) in text and image alike is worth saving. Ultimately, that act of recuperation and affirmation may well be what deconstruction is for. (After all, didn't Derrida say, deconstruction *is* justice?)

Baroque visuality, at any rate, has no difficulty discerning the forms; it's meaning that gives it trouble. Consider in this regard the Wachowski brothers' film, *The Matrix* (1999), which struck a nerve worldwide.

There is something eerily recognizable about Neo's discovery that he is living in a neuro-interactive simulation, a vast computer program called the matrix. It's as if in the film we've stumbled upon a collective fantasy, or shared terror: what we've taken for reality all our lives turns out to be no more than a collective dream. That the quintessentially baroque vision of dreams endlessly enfolding within dreams resonated so powerfully a decade later in Christopher Nolan's film *Inception* (2010) should not be surprising. In these films (and innumerable other contemporary movies, novels, plays, and games on line) the precariousness of our grasp on reality has emerged as a pervasive cultural theme. 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, like Neo.

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. The model of visual jurisprudence that I propose in these pages offers a new approach to legal theory and practice that is more suitable to the actual conditions of contemporary life, including the visual life of the law. Cut off from its figurative, poetic roots, blinded by lack of a pragmatic ethical phenomenology, justice recedes from view. In its place, legal forms endlessly proliferate: guidelines and principles, policies and regulations, rules and metrics – overwhelming in their disparate array. An overabundance of forms and measures leaves us disoriented and uncertain, longing for a way out of the dazzling baroque labyrinth we've made for ourselves.

To meet the challenge of visualizing law in the age of the digital baroque, this book argues for the cultivation of visual literacy and for a renewal of confidence in the world-maintaining power of human inventiveness. Simply put, we need to revitalize the legal imagination. This effort must not only incorporate new insights from neuroscience and cognitive psychology, but also from the humanities, and in particular from the rich rhetorical tradition that flourished before the age of modernity. Inventiveness, eloquence, and the power to give life to social and legal reality in verbal as well as visual figures and images dominated the pre- (and early) modern culture of law.<sup>8</sup> In this book, I advocate greater attentiveness to the properties and virtues of visual eloquence not as ornament ("mere rhetoric"), but as both constitutive and invocative of the real. Visual eloquence takes us beyond ourselves to something other, something that comes to be in the

field of attunement that is generated between seer and seen. The authenticity of this kind of visual experience consists in its capacity to animate *mimesis* – not as mere imitation (as Aristotle wrote), but rather as a form of identification.

Visual eloquence invites the viewer to experience the reciprocal nature of mimetic identification, a process in which the viewer identifies what is present in the field of vision and, in that very act of recognition, experiences a renewed sense of identity. This visual experience is not entirely vicarious, which is to say, it is not wholly removed from the real. It allows an experience of the real in its own right. Experience influences our way of knowing and being in the world. This kind of embodied cognition serves as a springboard to integrated judgment. Judgment in this sense is the offshoot of an entangled identity. It reflects both what one knows (and feels) and who one is in relation to others and objects in the world beyond the self. Sensation, by contrast, merely registers a range of physical stimulations or affects. Images that move us simply by simulating the real, perhaps by merely reproducing the effects of authentic experience, lack the authority of mimetic identification. Sensational images may affect us, but they cannot change us, or alter our relationships with others and the world around us. Sensational images leave us as they find us. Judgments made on the basis of sensation alone are quick, thin, and ephemeral. I shall contend that they are unworthy of law's aspiration to fact-based justice.

What constitutes prudent judgment in a predominantly visual society? How do we know we have gotten right the truth and justice claims that visual digital images make in particular cases? These questions make vivid the need for forms of knowledge and discourse that are suitable to the practice, theory, and teaching of law in the digital age. When law shifts away from words alone to encompass visual meaning making, the modern jurist's habitual reliance upon semiotic conventions, deductive and inductive logic, and dispassion in the deliberative process no longer suffice.

There is much work to be done to excavate and reconstruct the habits of heart and mind (of passion and knowledge) in the visual meaning making process. Consider in this regard the traditional Anglo-American common law ideal of adversarial justice. The adversarial system has always expressed a preference for live testimony. The live witness may be tested in court, as tradition has it, by taking an oath to testify truthfully as well as through the clash of cross-examination, and of course based on the fact finder's close scrutiny of the witness's bodily and expressive demeanor during the testimonial process. Today, however, videos, graphics, and digital simulations of all kinds increasingly compete with live testimony. As a result, contemporary triers of fact increasingly find themselves cast in the role of putative

*eye witnesses* to electronically mediated events (filmed, remixed, or digitally simulated). But how does the adversarial process test the *decision maker's* reliability as witness to these screened realities?

Law's migration to the screen raises in a new form a very old controversy. It harks back to the ancient Greek debate about rhetoric versus philosophy (what Plato called "dialectic"). Platonic philosophy posits universal Ideal Forms of knowledge, effectively reducing everything else to mere appearances. In this framework, rhetoric becomes mere ornamentation, a matter of stylistic adornment without truth-value. Thus began a long tradition in the West in which truth and appearances, knowledge and persuasion, ethics and aesthetics were split asunder. Recurrent outbreaks of iconoclastic fervor attest to the persistence of this binary opposition. For the iconoclast, false idols (mere appearances) mock hidden realities (invisible truths). Material forms blaspheme against spiritual substance. As Protestant reformer John Calvin put it, "Since God has no similarity to those shapes by means of which people attempt to represent him . . . all attempts to represent him are an impudent affront . . . to his majesty and glory."<sup>9</sup> At issue here is not only how much truth the image can bear (or bare), but also how much power the image maker should wield. If mimicry is a form of mastery, do we usurp the creative prerogative of God when we recreate the world in images? History is studded with such contentious claims – together with the highly destructive and potentially fatal consequences that they carry for perceived transgressors. This is not a distant threat. As recently as 2001, we saw the revival of iconoclastic fervor when the Taliban dynamited into dust the monumental Bamiyan Buddhas in central Afghanistan, claiming them to be idols forbidden under Sharia law. We witnessed this destructive impulse at work again in 2005, when protests, threats, and acts of violence by Islamic fundamentalists erupted around the world after the Danish newspaper *Jyllands-Posten* published 12 editorial cartoons that mockingly depicted Mohammed.

Who can doubt the power of the visual image? And who can doubt the power of new communication technologies to alter the way we live, from our construction of self and interactions with others to our very sense of the world we live in? As Sherry Turkle has observed, digital simulation wants immersion, and immersion makes it difficult to doubt simulation: "[C]ompelling virtual objects that engage the body as well as the mind . . . [can make it] hard to remember all that lies beyond [simulation]."<sup>10</sup> The potent expressive power of digital simulation raises important questions for law and society as a whole. It causes us to wonder, what does it mean today to speak of our continuing fealty to reality, and in particular of law's continuing commitment to fact-based justice? And so we ask, what does it

mean to perceive an image? And what does it mean for law to anchor its authority in perceptions and judgments based on digital simulations? These questions prompt practical as well as deeply philosophical responses. It is not simply a matter of knowing how to create visual evidence and visual arguments that win cases inside the courtroom, although that is no small thing. It is also a question of coming to grips with how we know what's true and what's just in a given legal controversy. How do we avoid being taken in, or led astray by a visually compelling, emotionally fraught, but perhaps ultimately misleading image?

What do we see, and what is absent from (or hidden on) the screen? What reality do images present (or make present)? What makes it seem as if the image stares back at us, with a life of its own? How are images inscribed in our body? How do they affect us, change us, enliven us, distract us, lead us astray? What mental tools, what cultural and cognitive categories, do we use to see with? How do images draw from popular cultural resources (such as advertising, film, and television) to cue familiar feelings, memories, thoughts, and desires in the mind of the viewer? And how do these associative processes and substantive resources for meaning making constitute the legal imagination and, by extension, help to construct the reality of law? In short, what kind of life is it (and what sort of world, what sort of mind) when law lives the life of images on the screen?

Plato taught that when law comports with reality it can aspire to justice.<sup>11</sup> But today we are not so sure about reality. Thus we come to inquire, what is the fate of law, and justice, in a time when the real grows elusive? If there is no "there" there, if reality becomes interchangeable with digital simulation, if it is always being created anew – unfolding from moment to moment, like some Deleuzian assemblage or rhizoidal network of "movement-images" endlessly flowing in a state of "pure immanence," or like Derrida's irrepressibly protean *différance*, that unrepresentable, non-existent source from which differences, traces without origins, endlessly disseminate – might it be that everything we see on the screen is momentary and inescapably contingent? But if everything is equally contingent, then may we also say that everything is equally valuable? Equally true? If that were so, then what, aside from the will to power, arbitrates judgment? This vexatious uncertainty permeates baroque culture, including the digital baroque culture in which we live today. In baroque times it often seems as if we have nothing but our own fabricated forms to live with, nothing but our own "garrulity" (as Stanley Rosen put it<sup>12</sup>).

In this sense, baroque law is hyper-positive law, law cut off from nature or from essences of any kind. Such may well be law's fate in a condition of "creation without grace."<sup>13</sup> Under such conditions, positive law's legitimacy

only arises from the public's acceptance of its commands, and of its right to command in the first place. But what justifies such acceptance? We know that the baroque lacks transcendental references. Rousseau, along with other Liberal theorists of law and the modern state, understood that deprived of traditional metaphysics, no longer able to imagine the sovereign as the living agent of God on earth, people would need to be taught anew how to believe in sovereignty and the legitimacy of state power. Rousseau referred to this as "civil religion." Expressed in visual terms, however, the available spectrum for persuasion and belief stretches far wider than Rousseau's strategic faith might suggest. It also includes, as Machiavelli and Hobbes understood full well, the persuasive inducements of fear and spectacle. And, indeed, in their generation, baroque spectacle was one of the paramount agencies of church and state power alike. State sponsored parades, elaborate pomp and ceremony, awe-inspiring mechanical gardens, massive firework displays – these were the signs of power in the age of baroque spectacle. Today, their digital analogue may be found on screens everywhere, including the courtroom.

Baroque ornamentation ramifies precisely in order to intensify its effect, as if the power of sensation alone might suffice to distract us from, or disguise, the fear that hollowness lies at the core of things. Such a condition cannot be sustained. Inwardly empty, left with nothing more than the will to form, the baroque is haunted by the idea of catastrophe. As Walter Benjamin wrote:

The baroque knows no eschatology; and for that very reason it possesses no mechanism by which all earthly things are gathered in together and exalted before being consigned to their end. The hereafter is emptied of everything which contains the slightest breath of this world, and from it the baroque extracts a profusion of things which customarily escaped the grasp of artistic formulation and, at its high point, brings them violently into the light of day, in order to clear an ultimate heaven, enabling it, as a vacuum, one day to destroy the world with catastrophic violence."<sup>14</sup>

Baroque culture stands like a tree whose roots have been excised. Little wonder that it feels as if one were being "driven along to a cataract."<sup>15</sup>

At some point something must occur to arrest the unending profusion of empty baroque form. In this book I call that event the sublime. The sublime arrests the recession of the real and the ethical. It helps us to reassert our fealty to reality, which is to say, our capacity to respond to what others and the concrete situation that we face demands of us. Indeed, it

turns out, or so I shall argue, that both beauty and justice share the sublime, albeit each in its own way. In nature, we experience a sublime beauty that momentarily arrests the recession of being. And in the social domain, attuned to the other who stands before us, we experience a sublime ethical demand, momentarily halting the spiraling recession of justice from the fragmented, monadic, and contingent legal forms that it leaves behind. Every entanglement is an occasion for mindfulness in our response to things and others around us. Entanglements ground and focus the attentive mind in concrete human encounters. They root legal decision making in the ethical demands that we experience when we stand face to face with others, and with social conflicts in specific contexts that demand resolution. In this sense, justice is an entangled reality from which we turn at our peril.

Every way of seeing is a way of being (of feeling one's way) among others in the world. An ethical optics describes attentiveness to what the situation at hand calls for. This view marks a significant shift in philosophy away from the abstraction of concepts toward the concrete particularities of everyday life. This is the way of ethical phenomenology. Applicable rules play a part, but mindfulness is not the same thing as placing facts under a category or rule. Judgment in this sense takes place in a far richer experiential register than the rule-bound domain described in the literature of legal positivism, rational choice theory, and behavioral economics. In what follows, I shall argue that the shift from abstract linguistic conventions to concrete visual practices models a concomitant jurisprudential shift from abstract concepts to embodied experience and embodied judgment. The conceptual bias in traditional jurisprudence, as we find, for example, in the disembodied, highly decontextualized framework adopted by Rawls, among others, is ill suited to the highly tactile, emotionally robust, immediately intuited affordances of visual culture. This is a far cry from Descartes' influential insistence upon disembodied rationality. The devaluation of perception and sensory experience, like the medieval subordination of flesh to soul, has no place in the legal imaginary constituted by visual jurisprudence.

There is something authentic, something grounding and sublimely transformative in our experience of the visual, as well as something deadening, reductive, flat, and sensationally hollow, as baroque culture manifestly demonstrates. Of course, in practice we do not enjoy the luxury of choice amid such simple polar extremes. The authentic and the ornamental (image as empty sensation) often come in dismayingly mixed forms. When law migrates to the screen it brings unprecedented descriptive and persuasive power to the search for truth-based justice. It also creates



new risks. We see this, for example, when law adopts the screen's code of representation as its own. Then legal certainty may be conflated with visual delight, and unconscious fantasies (the mass media's logic of desire) may become the engine of legislation (as we will see in Chapter 3's case study of child pornography laws).

Today, our command and control of digital form continues to grow while our ethical confidence seems to falter. Aesthetics alone has never provided an adequate basis for constituting ethical judgment, just as ethics alone has never provided an adequate basis for motivating right outcomes. The challenge we face is to bring aesthetics and ethics (arabesques and entanglements) into better alignment. This challenge is most fraught with consequence where image-based judgments are backed by the power of the state, which is to say, in the domain of law. Accordingly, the task of lawyers, judges, and lay citizens alike in this new digital visual world of ours is to cultivate the visual sophistication and ethical competence that is needed to judge well, so that we may remain confident that the legal process and its decisional offshoots stay true to the ongoing demands of fact-based justice. We need a new visual literacy to crack the aesthetic, cognitive, and cultural codes of law as image in the digital age. But visual literacy will not suffice without an abiding confidence in the human mimetic faculty, the inventive act of representation itself. If justice is to continue to play a part in legal outcomes aesthetics in law must operate in the service of the ethical. As Jean-Luc Godard put it in a recent film, when law no longer knows justice, justice comes to be judged before the law.<sup>16</sup> That event marks the subversion and demise of equity. True equity looks beyond the law to correct it.<sup>17</sup> Justice and the ethical take on a living (albeit imperfectly realized) presence in specific acts of judgment that are attuned to the real, and that poetically stir our hearts and minds by means of figurative and visual eloquence.

Each generation bears the burden of acquitting itself of the indictment of reality. Today it is incumbent upon us to retool the legal mind so that it may pursue fact-based justice wherever it takes us – including law's life as an image on the screen. That is the challenge this book sets out to address. We shall proceed first by exploring some of the underlying cultural and cognitive conditions in which we live, drawing out the historical analogue to contemporary digital baroque culture in order to see more clearly how the visual turn today is affecting (and afflicting) the life of the law. We shall then examine examples of visualizing law in both its sensational and sublime aspects inside the courtroom and in the culture at large. The next task is to attempt to marshal those cultural and cognitive resources that are available to overcome law's iconoclasm, which is to say, the baroque anxiety