

Anne Wagner
Richard K. Sherwin *Editors*

Law, Culture and Visual Studies

 Springer

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Anne Wagner
Centre de Recherche Droits et Perspectives
du Droit, équipe René Demogue
Université Lille – Nord de France
Lille, France

Richard K. Sherwin
New York Law School
New York, USA

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Advance Praise for *Law, Culture, and Visual Studies*

This diverse and exhilarating collection of essays explores the many facets both historical and contemporary of visual culture in the law. It opens a window onto the substantive, jurisdictional, disciplinary, and methodological diversity of current research. It is a cornucopia of materials that will enliven legal studies for those new to the field as well as for established scholars. It is a “must read” that will leave you wondering about the validity of the long-held obsession that reduces the law and legal studies to little more than a preoccupation with the word.

Leslie J. Moran, Professor of Law, Birkbeck College, University of London

Law, Culture and Visual Studies is a treasure trove of insights on the entwined roles of legality and visuality. From multiple interdisciplinary perspectives by scholars from around the world, these pieces reflect the fullness and complexities of our visual encounters with law and culture. From pictures to places to postage stamps, from forensics to film to folklore, this anthology is an exciting journey through the fertile field of law and visual culture as well as a testament that the field has come of age.

Naomi Mezey, Professor of Law, Georgetown University Law Center, Washington, DC, USA

This highly interdisciplinary reference work brings together diverse fields including cultural studies, communication theory, rhetoric, law and film studies, legal and social history, and visual and legal theory, in order to document the various historical, cultural, representational, and theoretical links that bind together law and the visual. This book offers a breathtaking range of resources from both well-established and newer scholars who together cover the field of law’s representation in, interrogation of, and dialogue with forms of visual rhetoric, practice, and discourse. Taken together, this scholarship presents state-of-the-art research into an important and developing dimension of contemporary legal and cultural inquiry. Above all, *Law Culture and Visual Studies* lays the groundwork for rethinking the nature of law in our densely visual culture: How are legal meanings produced, encoded, distributed,

and decoded? What critical and hermeneutic skills, new or old, familiar or unfamiliar, will be needed? Topical, diverse, and enlivening, *Law Culture and Visual Studies* is a vital research tool and an urgent invitation to further critical thinking in the areas so well laid out in this collection.

Desmond Manderson, Future Fellow, ANU College of Law/Research School of Humanities and the Arts, Australian National University, Australia

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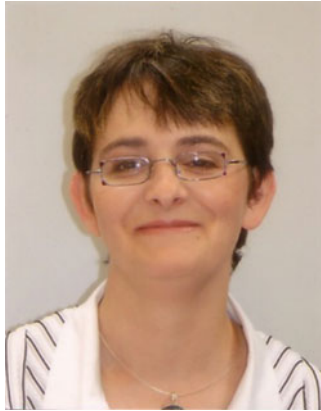
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Biographical Notes on the Editors



Anne Wagner is an Associate Professor at the Université Lille – Nord de France. She is a research member at the Université Lille – Nord de France (Centre de Recherche Droits et Perspectives du Droit, équipe René Demogue: <http://crdp.univ-lille2.fr/le-centre/>). She is a Research and Adjunct Professor at China University of Political Science and Law (Beijing). She is a permanent member of the *Instituto Subalpino per l'Analisi e l'Insegnamento del Diritto della Attivita Transanzionali* (ISAIDAT with Prof. Rodolfo Sacco). She is the Editor in Chief of the *International Journal for the Semiotics of Law* (<http://www.springer.com/law/journal/11196> – Springer) and the Series Editor of *Law, Language and Communication* (<http://www.ashgate.com/default.aspx?page=3916> – Ashgate). She is President of the *International Roundtables for the Semiotics of Law* and Vice President of the *Multicultural Association of Law and Language* (Hong Kong).

She has lectured in Asia, Australia, Europe, and North America. She has extensively published research papers in the area of law and semiotics, law and criminology, legal discourse analyses, law and culture, and legal translation. She is the Editor of *Images in Law* (2006, Ashgate); *Legal Language and the Search for Clarity*

(2006, Peter Lang); *Interpretation, Law and the Construction of Meaning* (2006, Springer); *Obscurity and Clarity in the Law* (2008, Ashgate); *Diversity and Tolerance in Socio-Legal Context* (2009, Ashgate); *Prospects of Legal Semiotics* (2010, Springer); and *Exploring Courtroom Discourse* (2011, Ashgate). She is the author of *La Langue de la Common Law* (2002, L'Harmattan). She also has many editorial appointments as Guest Editor for *Meta – Journal des traducteurs* (2013) and *Semiotica* (2013).

In 2009, Anne Wagner began investigating *Visual Studies* with a close connection to visual semiotics and the way empty spaces, shapes, and garments can either subjugate or disrupt the public sphere and lead to disobedience, incivilities, and crimes: *Nation, Identity and Multiculturalism* (Guest Editor – *International Journal for the Semiotics of Law*, vol.25/2: 2012); *French Urban Space Management – A Visual Semiotic Approach behind Power and Control* (A. Wagner, *International Journal for the Semiotics of Law*, vol.24/2, 2011); and *The Muslim Veil in France: Between Power and Silence, between Visibility and Invisibility* (*Hermes* 46, 2011).



Richard K. Sherwin is Professor of Law and Director of the Visual Persuasion Project at New York Law School. He is the author of *Visualizing Law in the Age of the Digital Baroque: Arabesques & Entanglements* (Routledge: 2011) and *When Law Goes Pop: The Vanishing Line between Law and Popular Culture* (University of Chicago Press: 2000 [2002]). He has written numerous chapters and articles on topics ranging from the interrelationship between law and culture, law and rhetoric, discourse theory, political legitimacy, and the emerging field of visual legal studies. Recent publications include “Law’s Life on the Screen,” in Sara Steinert-Borella and Caroline Wiedmer, eds., *Intersections of Law and Culture* (Palgrave Macmillan: 2012); “Constitutional Purgatory: Shades and Presences Inside the Courtroom,” in

Leif Dahlberg, ed., *Visualizing Law and Authority* (Walter de Gruyter: 2012); “Visual Jurisprudence,” in the New York Law School Law Review Symposium Issue on “Visualizing Law in the Digital Age” (Fall 2012); “Law’s Screen Life,” in A. Sarat, ed., *Imagining Legality* (Alabama: 2011); and “Imagining Law as Film: Representation without Reference?” in Austin Sarat, et. al., *Introduction to Law and the Humanities*, (Cambridge University Press: 2010). He edited and also contributed to *Popular Culture and Law* (Ashgate: 2006).

In 2001, Professor Sherwin debuted Visual Persuasion in the Law, the first course of its kind to teach law students about the role and efficacy (as well as the pitfalls) of using visual evidence and visual advocacy in contemporary legal practice. Student films are produced in New York Law School’s digital media lab.

In 2005, Professor Sherwin launched the Visual Persuasion Project (http://www.nyls.edu/centers/projects/visual_persuasion). The project seeks to promote a better understanding of the practice, theory, and teaching of law through the cultivation of critical visual intelligence. The web site showcases “best practices” in visual persuasion inside the courtroom through a broad range of visual products, from 2-D and 3-D animations to accident reenactments, day-in-the-life documentaries, settlement brochures, montages, and other innovative visual products.

A frequent public speaker both in the United States and abroad, Professor Sherwin is a regular commentator for television, radio, and print media on the relationship between law, culture, film, and digital media. His appearances include NBC’s Today Show, WNET, National Public Radio, RTE Radio 1 (National Public Radio in Ireland), and CKUT (Montreal, Canada).

Biographical Notes on Contributors

Amy Adler is the Emily Kempin Professor of Law at NYU School of Law. She is a specialist in the legal regulation of art, sexuality, and speech. Her scholarship focuses on the intersection of law and culture; her work draws on an array of fields, primarily from the arts and humanities, to explore legal questions. Adler's recent articles have included analyses of nude dancing, obscenity, pornography, child pornography, "sexting," moral rights, and art. She teaches Art Law, First Amendment Law, Feminist Jurisprudence, and Gender Jurisprudence. She is also on the faculty of the Visual Culture department at NYU. Professor Adler has lectured to a wide variety of audiences, ranging from artists to psychoanalysts, to the Federal Bureau of Investigation.

Janet Ainsworth is the John D. Eshelman Professor of Law at Seattle University. Her research interests include comparative legal theory and the intersection of law, language, and meaning. The author of more than 30 book chapters and articles, her work has been published in law reviews such as the *Yale Law Journal*, the *Cornell Law Review*, and the *Washington University Law Quarterly* as well as in linguistics journals such as *Gender and Language*, *Multilingua*, and the *International Journal of Speech, Language and Law*. In addition to scholarly writing and presentations, Professor Ainsworth has been active in a number of other professional endeavors, serving on the Executive Committee of the Criminal Justice Section and as Chair of the Law and Anthropology Section of the American Association of Law Schools and on several committees of the Law and Society Association. Her pro bono activities include membership on the Board of Directors of the Seattle-King County Public Defender, writing amicus curiae briefs to the Washington State Supreme Court and the United States Supreme Court, serving on the Washington State Supreme Court Committee on Pattern Jury Instructions, and acting as consultant to the National Association of Criminal Defense Lawyers, from which she received its Outstanding Service Award in recognition of her contributions. She currently serves on the editorial board of the Oxford University Press series, *Law and Language*.

Shulamit Almog is a Professor of Law at the University of Haifa and Director of the PhD studies of the faculty. Her research focuses on law and culture, law and literature, law and film, and on children's rights. She has published numerous books and articles in US, Canadian, European, and Israeli law reviews. Alongside her academic work, she is appearing before the Israeli Knesset, drafting sections of Israel's report to the UN on the International Convention on Children's Rights, and participating in the committee reforming Israel's Adoption Law and in the committee endowing national award for combating trafficking in persons. She is also a member of the Israeli Press Council Presidency.

Jason Bainbridge is Senior Lecturer and Head of Media at Swinburne University of Technology in Victoria, Australia. He has published widely on the relationship between law and popular culture and is currently working on a monograph mapping this relationship and how it helps to create a popular understanding of how law functions. Additionally, Jason has written on areas as diverse as risk communication in times of natural disaster, media convergence, comic books, anime, action figures, and chequebook journalism. He is a regular commentator for the Australian media and coauthor of *Media and Journalism: New Approaches to Theory and Practice* (Oxford, 2nd edition, 2011).

Malik Bozzo-Rey is Associate Professor in Economic Ethics and Philosophy of Management at the Ethics Department of Lille Catholic University. He is also a researcher at the Law School of Sciences Po Paris and Honorary Research Associate at the Bentham Project of University College London. Philosopher, his previous and present works focus on Utilitarianism and Jeremy Bentham's thought through the question: could ethical utilitarianism become a political philosophy? This work is articulated with thoughts about new conceptions and forms of democracy and history of liberalism. It also led him to business ethics; more particularly what is at stake is the emergence and relationships between legal, ethical, political, and managerial norms. Internormativity is then at the core of his thought.

Denis J. Brion is Professor of Law Emeritus at Washington and Lee University School of Law. He holds the Juris Doctor from the University of Virginia School of Law. He is the author of *Essential Industry and the NIMBY Phenomenon* (1991) and *Pragmatism and Judicial Choice* (2003).

Ronald R. Butters (<<http://trademarklinguistics.com/>>; <ronbutters@mac.com>) is Emeritus Professor of English and Cultural Anthropology and former Chair of the Linguistics Program at Duke University, where he began teaching in 1967. He received his doctorate in English with concentration in English Linguistics from the University of Iowa in 1967. He has served as President of the American Dialect Society, the Southeastern Conference on Linguistics, and the International Association of Forensic Linguists (2008–2011), and he is a former Coeditor of *The International Journal of Speech, Language, and the Law*. He consults frequently with American attorneys and has testified in forensic linguistic cases for over 20 years. His practical and scholarly interests include (1) ethical issues in forensic linguistic consulting, (2) statutes and contracts, (3) deceptive advertising,

(4) copyrights, (5) discourse analysis of linguistic evidence, (6) lexicography, and (7) linguistic and semiotic issues in trademark litigation. Since the 1980s, he has prepared over 300 reports and provided expert linguistic testimony in over 60 depositions and court cases.

Paul Douglas Callister is Director of the Leon E. Bloch Law Library and Professor of Law at the University of Missouri-Kansas City School of Law. Professor Callister received his BA from Brigham Young University, his JD from Cornell Law School (serving as Editor in Chief of the *International Law Journal*), and his MS in Library and Information Science from the University of Illinois at Urbana-Champaign. Professor Callister previously served as a law librarian at the University of Illinois College of Law and practiced law for 9 years in Southern California. He has served as the Chair of the Copyright Committee of the American Association of Law Libraries, serves on the Advisory Board of the *International Journal of the Book*, and is President of a small nonprofit, the Institute for Rule of Law, Identity, Stability and Culture, which conducts research on cultural factors affecting rule of law and stable governance. He teaches courses in *Cyberlaw and Information Policy*, *Advanced Legal Research*, and *Digital Copyright and Licensing*. He regularly publishes and speaks on legal history, as influenced by information environments.

Cristina Costantini is a researcher in Comparative Private Law at the University of Bergamo. She is a member of various academic associations: the Selden Society, the Italian Association of Comparative Law (A.I.D.C.), the Italian Association of Law and Literature (A.I.D.E.L.) Scientific Board, the Associazione Italiana di Anglistica (A.I.A.), and the European Society for the Study of English (ESSE). Her main fields of research include comparative law, law and literature, law and culture, legal systemology, and law and geopolitics. Among her numerous publications are *La Legge e il Tempio. Storia comparata della giustizia inglese* (2007); *The Literature of Temple Bar* (2007); *Equity Breaking Out: Politics as Justice* (2008); *Equity's Different Talks* (2008); *The Jews and the Common Law: A Question of Traditions and Jurisdictions. An Analysis through W. Scott's Ivanhoe* (2008); *The Keepers of Traditions. The English Common Lawyers and the Presence of Law* (2010); and *The Iconicity of Space: Comparative Law and the Geopolitics of Jurisdictions* (2012).

Renee Ann Cramer is Associate Professor and Director of the Program in Law, Politics, and Society at Drake University. Trained as a political scientist, she is an interdisciplinary scholar teacher who uses interpretive methods from a critical race and critical feminist perspective. Her book, *Cash, Color, and Colonialism: The Politics of Tribal Acknowledgement*, was published by the University of Oklahoma Press and reissued in paperback in 2008. A critical race and feminist scholar, her recent work on pregnancy, midwifery regulation, and social movement activism in the United States appears in the *International Review of Qualitative Research*, *The Annals of Iowa*, a publication of the Iowa State Historical Society, and *Fashion Talks: Undressing the Power of Style* (Tarrant and Jolies, eds; SUNY press). She has an article on the Gardasil vaccine, coauthored with Jessica Lavariega-Monforti, in *Women, Politics, and Policy*, and an article on interdisciplinary undergraduate legal

studies and the debate over same-sex marriage in Iowa, in *Studies in Law, Politics, and Society*. She is a runner and a yogini, a wife, and a mom, and the soundtrack for this chapter included quite a bit of Beastie Boys, Cold War Kids, and Delta Spirit.

Dennis E. Curtis, who received his BS from the US Naval Academy and his LLB from Yale, is Clinical Professor Emeritus of Law at Yale Law School, where he teaches courses on sentencing and professional responsibility and directs a clinical course in which students work with Connecticut's State Disciplinary Counsel to prosecute lawyers who violate rules of professional conduct. He was one of the pioneers of clinical education in the 1970s, creating a program at Yale in which faculty supervised students working with indigent clients in a variety of contexts so as to gain insights into an area of substantive law in an administrative-regulatory context. Professor Curtis has written extensively on clinical education and the legal profession and on sentencing and post-conviction justice. His most recent book is *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms*, coauthored with Judith Resnik. In 2012, the American Publishers Association selected the book to receive two PROSE Awards for excellence, one in social sciences and the other in law/legal studies, and the American Society of Legal Writers selected the book to receive the 2012 SCRIBES Award.

Larissa D'Angelo is a Research Fellow at the Department of Comparative Language, Literature and Culture of the University of Bergamo and a Lecturer in English at the Faculty of Educational Studies. She is involved in examination boards, in collaboration with the University Language Centre, and is an active member of the Research Centre on Languages for Specific Purposes (CERLIS) of the University of Bergamo. After graduating in Foreign Languages and Literatures, she specialized in English Language in the USA (Youngstown State University), obtaining an MA, a TESOL Certificate, and a Certificate in Children's and Young Adult Literature. She is currently a PhD candidate in Applied Linguistics at the University of Reading (UK). Her main research interests deal with synchronic/diachronic analyses of gender and cultural identity variation in academic discourse as well as multimedia genres employed in academic discourse. She is a member of AIA (Associazione Italiana di Anglistica), and since 2006, she has been involved in national interacademic Research Projects on academic language and discourse funded by the Italian Ministry of Education and coordinated by Prof. Maurizio Gotti.

Roshan de Silva Wijeyeratne teaches Property Law, Energy and Resources Law, Law and Culture, Law and Faith, and Legal Theory. He graduated from the University of London and undertook his doctorate at the University of Kent where he was supervised by Professor Peter Fitzpatrick. He has recently completed a manuscript, *Imagining Sri Lanka: Contested Cosmologies, Buddhism and the State*, for Routledge. He is about to undertake research on the legal regulation of South Sea Islander labour in north of Queensland in the late nineteenth and early twentieth centuries.

Neal Feigenson is Professor of Law at Quinnipiac University School of Law, where he teaches Torts, Evidence, and Visual Persuasion in the Law. His research interests include the cognitive and social psychology of legal judgment and the uses of visual media and multimedia in legal communication and persuasion. His most recent book, *Law on Display: The Digital Transformation of Legal Persuasion and Judgment* (with Christina Spiesel), was published by NYU Press in 2009. He is also the author of *Legal Blame: How Jurors Think and Talk About Accidents* (American Psychological Association, 2000). Other recent publications include “Visual Evidence,” *Psychonomic Bulletin and Review* 17(2), 149–154 (2010); “Brain Imaging and Courtroom Evidence: On the Admissibility and Persuasiveness of fMRI,” in Michael Freeman and Oliver Goodenough (eds.), *Law, Mind and Brain* 23–54 (2009); and “Emotional Influences on Judgments of Legal Blame,” in B. Bornstein and R. Wiener (eds.), *Emotion and the Law: Psychological Perspectives* 45–96 (Springer, 2009).

James R. Fox is a Professor of Law at Penn State University’s Dickinson School of Law where he served for a time as Director of the Law Library and Associate Dean for International Programs. A graduate of the Ohio State University College of Law, he also holds a Master of Science degree from Drexel University and a diploma in Air and Space Law from McGill University. He is a member of the Bar of the United States Supreme Court and the Pennsylvania Supreme Court. Besides writing about law and visual art, he has published a *Dictionary of International and Comparative Law* and several works on Aviation Law. Professor Fox has been a Gastprofessor at the University of Vienna’s Institute fur Europarecht and Visiting Scholar at McGill’s Institute of Air and Space Law. He continues to visit courthouses collecting material for a book on American courthouse art.

Peter Goodrich is Professor of Law and Director of the Program in Law and Humanities at Cardozo School of Law, New York. His book *Legal Emblems and the Art of Law* is forthcoming with Cambridge University Press.

Maurizio Gotti is Professor of English Language and Translation at the Faculty of Foreign Languages of Università di Bergamo (Italy). He is Director of the Language Centre at the University of Bergamo. He is Deputy Dean of the Faculty of Foreign Languages and Literatures and Head of the MA degree course in Foreign Languages for International Communication. He is also the founder and Director of CERLIS, the research center on specialized languages based at the University of Bergamo. He has been President of the Italian Association of University Language Centres (1997–2000; 2004–2007) of the Italian Association of English Studies (1999–2001) and of the European Confederation of University Language Centres (2000–2004). His main research areas are the features and origins of specialized discourse, both in a synchronic and diachronic perspective (*Robert Boyle and the Language of Science*, Guerini 1996; *Specialized Discourse: Linguistic Features and Changing Conventions*, Peter Lang 2003; *Investigating Specialized Discourse*, Peter Lang 2011). He is also interested in English syntax – *English Diachronic Syntax* (ed.), Guerini 1993; *Variation in Central Modals* (coauthor), Peter Lang 2002 – and

English lexicology and lexicography, with particular regard to specialized terminology and canting (*The Language of Thieves and Vagabonds*, Niemeyer 1999). He is a member of the Editorial Board of national and international journals and edits the *Linguistic Insights* series for Peter Lang.

Steve Greenfield is a Senior Academic at the University of Westminster Law School. He has written and taught in the area of film and the law since the early 1990s, as part of broader work in the area of law and popular culture, and currently teaches a film and the law course to 1st year undergraduates. Since coauthoring the second edition of *Film and the Law* (2010), he has been working on integrating concepts from history and psychology into the field to produce a greater breadth of interdisciplinary work. He has also sought to expand the film base by incorporating Bollywood productions into both teaching and research.

Betty L. Hart teaches ethnic studies and composition at the University of Southern Indiana in Evansville, Indiana. Born in South Charleston, West Virginia, Hart attended Howard University in Washington, DC (1972), for her undergraduate work and finished her Master's (1975) degree in ethnic literature and her Doctoral (1991) degree in composition pedagogy at West Virginia University in Morgantown, WV. Her scholarly investigations include technology and race, composition and computers, ethnic literature, and screenwriting and film. Currently, Hart is researching the life of Harlem Renaissance writer Zora Neale Hurston as background for a biopic film about the author's life.

Mary Hemmings is founding Chief Law Librarian at Canada's newest Law Faculty, Thompson Rivers University, and British Columbia. An academic librarian since 1980, Mary worked at Concordia University and McGill University. At the University of Calgary's Law Library, she was Assistant Director. She is author of a book chapter on the role of women in pulp fiction and is a coauthor of a chapter on libraries and popular culture. She is a prodigious book reviewer and has taught law courses in Fundamental Legal Skills and Advanced Legal Skills. Mary's research interests focus on social and legal controls of popular culture, and legal history, generally.

Paolo Heritier graduated in Law at Turin Law Faculty and in Theology at Milan Theology Faculty. He is an Associate Professor of Philosophy of Law at the Turin University. He teaches Philosophy of Law, Legal and Philosophical Anthropology, and Neurosciences and the Law. Research interests are legal anthropology, legal visual studies, theology and law, theory of liberty, legal epistemology, semiotics of law, network theory, theories of complexity, and neurosciences and the law. He is a member of the Directive Council of Italian Society for Law and Literature (ISLL, Bologna University), Center for Legal Methodology (Trento University, CERMEG), and Center Research on Communication (CIRCE, Turin University). He is Director (with P. Sequeri) of two collections in Anthropology and legal Aesthetics, "Humana" and "Tôb," and Coordinator of the Observatory on Anthropology of Liberty (www.aliresearch.eu). Among his publications are *Ordine spontaneo ed evoluzione nel pensiero di Hayek*, Napoli 1997; *La rete del diritto*, Torino 2001; *L'istituzione*

assente, Torino 2001; *La vitalità del diritto naturale*, Palermo 2008 (eds. with F. Di Blasi); *Le culture di Babele*, Milano 2008 (eds. with E. Di Nuoscio); *Problemi di libertà nel cristianesimo e nella società complessa*, Soveria Mannelli 2008 (ed.); *Società post-hitleriane?*, Torino 2009; *Sulle tracce di Jean Vigo*, Pisa 2010 (ed.); *Estetica giuridica*, Torino 2012; *Good Government, Governance, Human Complexity*, Firenze 2012 (eds., with P. Silvestri); and more than 50 papers in Italian, English, and French.

Pamela Hobbs is a Lecturer in Communication Studies at the University of California, Los Angeles, where she received a PhD in Applied Linguistics, and is also an attorney licensed to practice in Michigan, USA. Her research interests include legal discourse, medical discourse, political discourse, language and gender, and the evolution of communication.

Christopher Mark Hutton is Chair Professor in the School of English at the University of Hong Kong, where he served as Head of School from 2004 to 2007. He holds a BA in Modern languages (1980) and a DPhil in General Linguistics from the University of Oxford (1988); an MA in Linguistics from Columbia University, New York (1985); and an LLB from Manchester Metropolitan University (2008). He was Assistant Professor in the Department of Germanic Languages at the University of Texas at Austin from 1987 to 1989. His research is concerned with the politics of language and linguistics, the history of Western linguistics in its relationship with race theory, and language and law. His publications include *Abstraction and Instance* (Pergamon, 1990); *Linguistics and the Third Reich* (Routledge, 1999); *Race and the Third Reich* (Polity Press, 2005); *Language, Law and Definition* (with R. Harris, Continuum, 2007); and *Language, Meaning and the Law* (Edinburgh, 2009).

Christian Mosbæk Johannessen, MA from the University of Southern Denmark and Industrial PhD from Danfoss A/S and the University of Southern Denmark, currently holds a position at the Institute of Language and Communication, University of Southern Denmark, and conducts research in forensic analysis of graphics and graphetic articulation drawing on theories of multimodal semiotics, ecosocial semiotics, distributed cognition, and ecological psychology.

Orit Kamir is a Professor of law, culture, and gender. She specializes in law and film, honor and dignity cultures, Israeli society and law, feminist analysis of law, and sexual harassment and wrote her dissertation in Law and Culture under the supervision of James Boyd White at the University of Michigan in 1995. Most of her work is in Hebrew. Her books in English are *Every Breath You Take: Stalking Stories and the Law* and *Framed: Women in Law and Film*.

Alexander V. Kozin (PhD in Speech Communication) is a Research Fellow at the University of Edinburgh. Before that, he tenured at Freie Universität Berlin, where he participated in international project “Comparative Microsociology of Criminal Defense Proceedings.” His areas of interest in law studies include legal profession, legal artifacts and phenomena, legal discourse and rhetoric, law as a superordinary

structure, law and literature, law and visual arts, law in popular culture, and law-relevant emotions. His main methods are phenomenology, semiotics, and discourse analysis. He published in *Semiotica*, *Law and Social Inquiry*, *Discourse Studies*, *National Identity*, *American Journal of Semiotics*, *Text and Talk*, *Janus Head*, *Law and Critique*, *Comparative Sociology*, and other academic journals. He is a coauthor (with Katja Hannken-Iljes and Thomas Scheffer) of “Doing Procedure: Ethnomethodological Explorations of Criminal Defensework in the United Kingdom, Germany, and the United States” (Palgrave Macmillan: London, 2010). Currently, he is working on a book project, “The Liminal Place of Law.”

Marett Leiboff is an Associate Professor in the Faculty of Law at the University of Wollongong Australia, where she is a member of the Law and Popular Cultures Group of the Legal Intersections Research Centre. Marett is Vice President of the Law Literature and Humanities Association of Australasia. A lawyer with a diverse background, she has published around legal accounts of visual culture, focussing on the reading and interpretation of the visual as an aesthetic, as an engagement with textually diffuse meanings, and as an exercise in connoisseurship. She has drawn on her background in academic theater studies to engage and develop a theatrical jurisprudence, grounded in the contemporary theories of staging to reclaim the body from law’s valorization of the word. The theatrical reminds us that our actions and responses exist in the moment, rather than the narrative account of our conduct that the law prefers. She coedited a 2010 special issue of the journal *Law Text Culture* on “Law’s Theatrical Presence” and edited a 2012 special issue of the *Australian Feminist Law Journal* on “Law and Humanities Futures.” She can be contacted at marett@uow.edu.au.

Massimo Leone is Research Professor of Semiotics and Cultural Semiotics at the Department of Philosophy, University of Torino, Italy. He graduated in Communication Studies from the University of Siena and holds a DEA in History and Semiotics of Texts and Documents from Paris VII, an MPhil in Word and Image Studies from Trinity College Dublin, a PhD in Religious Studies from the Sorbonne, and a PhD in Art History from the University of Fribourg (CH). He was Visiting Scholar at the CNRS in Paris, at the CSIC in Madrid; Fulbright Research Visiting Professor at the Graduate Theological Union, Berkeley; Endeavour Research Award Visiting Professor at the School of English, Performance, and Communication Studies at Monash University, Melbourne; and Faculty Research Grant Visiting Professor at the University of Toronto. His work focuses on the role of religion in modern and contemporary cultures. Massimo Leone has single-authored three books, *Religious Conversion and Identity: The Semiotic Analysis of Texts* (London and New York: Routledge, 2004; 242 pp.); *Saints and Signs: A Semiotic Reading of Conversion in Early Modern Catholicism* (Berlin and New York: Walter de Gruyter, 2010; 656 pp.); and *Les Mutations du cœur: Histoire et sémiotique du changement spirituel après le Concile de Trente (1563–1622): Mots et Images* (Fribourg [Switzerland]: Ethesis, 2010; 1361 pp.), edited 11 collective volumes, and published more than 200 papers in semiotics and religious studies (a complete list of publication, including a selection of texts, can be accessed at www.academia.edu/massimo).

leone). He has lectured in Africa, Asia, Australia, Europe, and North America. He is the Chief Editor of *Lexia*, the Semiotic Journal of the Center for Interdisciplinary Research on Communication, University of Torino.

Janny Leung is Assistant Professor in the School of English at the University of Hong Kong. Her research interests cover interdisciplinary areas in law, linguistics, and psychology, especially legal discourse and legal multilingualism. She holds a Bachelor of Arts (1st hons) in linguistics and translation from the University of Hong Kong, an MPhil and PhD in psycholinguistics from the University of Cambridge, and an LLB from University of London. Her recent papers have appeared in *Journal of Multilingual and Multicultural Development*, *Studies in Second Language Acquisition*, *Semiotica*, *Language Learning*, *Meta: Translators' Journal*, and *International Journal of the Semiotics of Law* and book chapters in volumes such as *Reading The Legal Case: Cross-Currents Between Law and the Humanities* (Routledge 2012) and *The Ashgate Handbook of Legal Translation* (Ashgate 2013).

Ronnie Lippens is Professor of Criminology at Keele University (UK). Originally his research interests included theoretical and organizational criminology, but latterly his work focuses on representations of forms of life/governance in painting. He has published widely on the above in a wide variety of venues.

Cynthia Lucia is Associate Professor of English and Director of the Film and Media Studies Program at Rider University in Lawrenceville, New Jersey. She is author of *Framing Female Lawyers: Women on Trial in Film* (University of Texas, 2005) and Coeditor of *The Wiley-Blackwell History of American Film* (Wiley-Blackwell, 2012), a four-volume collection of essays written by top film historians and cinema studies scholars. She writes frequently for the film journal *Cineaste*, where she has served on the editorial board more than two decades, and has written for other publications including *Film Journal International* and *The Guardian*. Her essays appear in *Film and Sexual Politics: A Critical Reader* (Cambridge Scholars Press, 2006); *Authorship in Film Adaptation* (University of Texas Press, 2008); *Lesson Plans for Creating Media-Rich Classrooms* (NCTE publications, 2007), with essays forthcoming in *Companion to Woody Allen* (Wiley-Blackwell, 2013); *Modern British Drama on Screen* (Cambridge University Press, 2013); *Oxford Bibliographies Online* (Oxford University Press, 2013); and *Fifty Hollywood Directors* (Taylor & Francis Books). She is currently completing *Patrice Leconte: Intangible Intimacies and Discernable Desires* (University of Illinois Press), a study of the contemporary French filmmaker.

Jody Lyneé Madeira, an Associate Professor at the Indiana University Maurer School of Law, focuses her research upon the intersection of law and emotion in criminal and family law. She is the author of *Killing McVeigh: The Death Penalty and the Myth of Closure* (NYU Press, 2012), which applies collective memory to criminal prosecution and sentencing, exploring the ways in which victims' families and survivors came to comprehend and cope with the Oklahoma City bombing through membership in community groups as well as through attendance and par-

ticipation in Timothy McVeigh's prosecution and execution. She is also actively involved in empirical research projects assessing patient decision-making and informed consent in assisted reproductive technology (ART). Additionally, Madeira investigates the effects of legal proceedings, verdicts, and sentences upon victims' families; the role of empathy in personal injury litigation; and the impact of recent developments in capital victims' services upon the relationship between victims' families and the criminal justice system. After graduating from law school, Professor Madeira clerked for the Hon. Richard D. Cudahy at the United States Court of Appeals for the Seventh Circuit. She then came to Harvard as a Climenko Fellow and Lecturer in Law.

Sarah Marusek (2008; University of Massachusetts Amherst), at the University of Hawaii Hilo in the Department of Political Sciences, specializes in the subfield of Public Law and has a background in Social Thought and Political Economy, German, and Labor Studies. In her scholarship involving jurisprudence, Sarah considers how law works in everyday life. In particular, she focuses her work on the areas of legal semiotics, legal geography, and constitutive legal theory. She serves as the English Book Review Editor for the *International Journal for the Semiotics of Law* and has published in *Social Semiotics*, *International Journal for the Semiotics of Law*, and *Law Text Culture*. She has recently published her first book, *Politics of Parking: Rights, Identity, and Parking* (Ashgate, 2012).

Alec McHoul recently retired as Professor in the School of Media Communication and Culture at Murdoch University, Western Australia, though no one ever told him what he was professor of. Having published widely in the interdisciplinary field of sociology and language studies, he is now dedicated to growing Australian native plants on his semirural property and bird-watching. For more details, go to <http://www.mcc.murdoch.edu.au/~mchoul/>.

Lucia Morra is Lecturer in Logic and Philosophy of Science at the Medical Faculty "San Luigi Gonzaga" of the University of Turin. Her research revolves around philosophy of language and cognitive science. She wrote many articles about metaphors and metaphor understanding, and since 2002, she applied her reflections also to legal language, investigating legal metaphors, their cognitive value, and their role in legal interpretation. More recently, she wrote some articles about implicatures in legal texts.

Guy Osborn is Professor in the School of Law at the University of Westminster, UK, and formerly a Professor (II) at the Department of Sociology and Political Science at the Norwegian University of Science and Technology (NTNU) in Trondheim, Norway. He is Codirector of the Centre for Law Society and Popular Culture at the University of Westminster and Editor of the *Entertainment and Sports Law Journal* and of the Routledge book series *Studies in Law, Society, and Popular Culture*. Guy has conducted research in a number of areas within law and popular culture including books on sport – *Regulating Football: Commodification, Consumption and the Law* (Pluto Press, 2001) and *Law and Sport in Contemporary Society* (Frank Cass, 2001); he is the coauthor of *Film and the Law: The Cinema of*

Justice (Hart Publishing, 2010) and continues to collaborate with fine colleagues on film and law (Steve Greenfield and Peter Robson), youth sport and regulation (Steve Greenfield), and legal issues surrounding the Olympic Games (Mark James).

David Ray Papke is a Professor of Law at Marquette University in Milwaukee, Wisconsin. He holds his AB from Harvard College, JD from the Yale Law School, and PhD in American Studies from the University of Michigan. Prior to joining the Marquette University faculty in 2002, he served on the faculties of the University of Illinois, Indiana University-Purdue University at Indianapolis, and Yale University. In 1986–1987, he was a Fulbright Professor at Tamkang University in Taiwan, and he has lectured abroad in Denmark, Nevis-St. Kitts, South Korea, Switzerland, the Bahamas, and Vietnam. Professor Papke currently teaches Family Law, Jurisprudence, and Property, and he also offers a range of interdisciplinary courses and seminars involving law and the humanities. The latter include American Legal History, Law and Literature, Law and Popular Culture, and the Rule of Law in American History and Ideology. Professor Papke has a special scholarly interest in the role of law in American culture, and he has published extensively in law reviews and other scholarly journals. He is the author of the following books: *Framing the Criminal: Crime, Cultural Work, and the Loss of Critical Perspective* (1987); *Narrative and the Legal Discourse: Storytelling and the Law* (1991); *Heretics in the Temple: Americans Who Reject the Nation's Legal Faith* (1998); and *The Pullman Case: The Clash of Labor and Capital in Industrial America* (1999). With Christine Corcos, et al., he has also published *Law and Popular Culture: Text, Notes, and Questions* (LexisNexis, 2007; second edition, 2012), the first comprehensive textbook concerning the relationship of law and popular culture.

Karen Petroski is an Assistant Professor at the Saint Louis University School of Law, where she teaches Civil Procedure, Evidence, and Legislation. She earned her PhD in Literature at Columbia University and her JD at the University of California, Berkeley. Her scholarship examines legal discourse as a system of cognitive specialization, focusing on its institutional and material aspects, and her publications include work on issues in procedural law, evidence, and legal interpretation.

Joseph Pugliese, Associate Professor, teaches in the Department of Media, Music, Communication, and Cultural Studies, Macquarie University, Sydney, Australia. His research areas include race, ethnicity and whiteness, cultural studies of law, state violence, bodies and technologies, and migration and refugee studies. Recent publications include the edited collection *Transmediterranean: Diasporas, Histories, Geopolitical Spaces* (Peter Lang, 2010) and the monograph *Biometrics: Bodies, Technologies, Biopolitics* (Routledge, 2010) which was short-listed for the international Surveillance Studies Book Prize. His forthcoming book is titled *State Violence and the Execution of Law: Torture, Black Sites, Drones* (Routledge).

Nicole Rafter has taught at Northeastern University since 1977. She has authored five monographs: *Partial Justice: Women, State Prisons, and Social Control*; *Creating Born Criminals*; *Shots in the Mirror: Crime Films and Society*; *The Criminal Brain*; and (with M. Brown) *Criminology Goes to the Movies*. In addi-

tion, she has translated (with M. Gibson) the major criminological works of Cesare Lombroso and published over 50 journal articles and chapters. In 2009, she received the American Society of Criminology's Sutherland Award; other honors include a Fulbright Fellowship and several fellowships to Oxford University. Currently, she is studying genocide, focusing on its criminological implications. Rafter teaches courses in crime films, biological theories of crime, and crimes against humanity.

Judith Resnik is the Arthur Liman Professor of Law at Yale Law School, where she teaches about federalism, procedure, courts, equality, and citizenship. She also holds an appointment for a 5-year term as an Honorary Professor, Faculty of Laws, University College London. Professor Resnik's books include *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (with Dennis Curtis, Yale University Press, 2011); *Federal Courts Stories* (coedited with Vicki C. Jackson, Foundation Press 2010); and *Migrations and Mobilities: Citizenship, Borders, and Gender* (coedited with Seyla Benhabib, NYU, 2009). Recent articles include *Comparative (In) Equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production* (International Journal of Constitutional Law, 2012); *Fairness in Numbers* (Harvard Law Review, 2011); and *Detention, the War on Terror, and the Federal Courts* (Columbia Law Journal, 2010). In 2001, Professor Resnik was elected a Fellow of the American Academy of Arts and Sciences and, in 2002, a member of the American Philosophical Society; in 2008, Professor Resnik received the Outstanding Scholar of the Year Award from the Fellows of the American Bar Foundation. In 2010, she was named a recipient of the Elizabeth Hurlock Beckman Prize, awarded to outstanding faculty in higher education in the fields of psychology or law. In 2012, her book, *Representing Justice* (with Dennis Curtis), was selected by the American Publishers Association as the recipient of two PROSE Awards for excellence, in social sciences and in law/legal studies, and the book was selected by the American Society of Legal Writers for the 2012 SCRIBES Award.

Peter Robson has an LLB from St Andrews University and a PhD from Strathclyde University. He is a solicitor and sits as a judge in the Courts and Tribunals Service of the Ministry of Justice in Scotland dealing with disability issues, and his principal professional work is in Housing Law on which he has published extensively. He has been Professor of Social Welfare Law in the University of Strathclyde since 1992. In the past decade, he has extended his early focus writing on legal theory and sociology of law from the work of judges into coverage of how popular culture affects the practice of law. In addition to writing in the area, he has developed undergraduate and postgraduate courses on law, film, and popular culture which he has taught in Universities in Scotland, Portugal, Spain, and Argentina. He has written widely on law and film in journals and edited collections including coediting *Law and Film* (with Stefan Machura) in 2001. His most recent work (with Steve Greenfield and Guy Osborn) *Film and the Law: The Cinema of Justice* was published in 2010 and updates the influential 1st edition. He is author of essays on British lawyers on TV, is working on TV lawyers, and most recently is examining law and the theater.

David Rolph is an Associate Professor at the University of Sydney Faculty of Law, specializing in media law. He is the author of *Reputation, Celebrity and Defamation Law* (Ashgate, 2008), as well as numerous book chapters and journal articles. He is the Editor of the *Sydney Law Review*, a member of the editorial board of the *Communications Law Bulletin*, and an international advisor to the *International Journal for the Semiotics of Law*.

Jessica Silbey is a Law Professor at Suffolk University Law School in Boston. Professor Silbey received her BA from Stanford University and her JD and PhD (comparative literature) from the University of Michigan. Before becoming a law professor, Professor Silbey was a litigator at Foley Hoag LLP in Boston. She also served as a law clerk to the Honorable Robert E. Keeton on the United States District Court for the District of Massachusetts and to the Honorable Levin Campbell on the United States Court of Appeals for the First Circuit. Professor Silbey has published widely in the field of law and film, exploring 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. Professor Silbey is also currently working on a book about intellectual property law, investigating common and conflicting narratives within legal institutions and private organizations that explain intellectual property protection in the United States. The book will be published by Stanford University Press in 2013. Professor Silbey teaches courses in constitutional law, trademarks, and copyrights.

Meghan Hayes Slack received her BA in film production from Emerson College and her JD from Suffolk University Law School. She currently works as a solo practitioner in the Boston area and focuses on employment law. While in school, Ms. Slack served as a law clerk at the Equal Employment Opportunity Commission, a legal intern for the United States Senate Committee on Health, Education, Labor, and Pensions, and research assistant to Professor Jessica Silbey.

Christina O. Spiesel is a Senior Research Scholar and Fellow of the Information Society Project at Yale Law School. She is also an Adjunct Professor of Law at Quinnipiac University School of Law. She was trained to be interdisciplinary at Shimer College and the University of Chicago and joined the legal academy as an artist and writer with additional background in software development and its pedagogical uses. She is interested in how pictures are impacting the understanding of and practice of law. She is the coauthor, with Neal Feigenson, of *Law on Display: The Digital Transformation of Legal Persuasion and Judgment* and has published chapters, articles, and book reviews in a wide variety of contexts. Her most recent publication was a comment for the Harvard Law Review Forum, "More Than a Thousand Words in Response to Rebecca Tushnet" (2012).

Wim Staat is Assistant Professor of Film and Visual Culture at the University of Amsterdam. He has developed an interest in the political representation of cultural identity in film and in the specific ways in which film can be considered as performatively displaying ethical concern. Ethics and film are his main research topics. He has taught in language and literature departments and in philosophy at universities in the USA and in the Netherlands. Recently, he has written on film ethics in

Terrence Malick's *The Thin Red Line*, on Lars von Trier's *Dogville* in relation to John Ford's version of *The Grapes of Wrath*, and on questions of responsibility in Claire Denis' *L'intrus*. Web site: <http://home.medewerker.uva.nl/w.staat/>

Tracey Summerfield is a consultant in the areas of child support law and law/social policy. Her research interests include legal theory, criminal law, family law, and children and the law.

Allison Tait is the Gender Equity Postdoctoral Associate at the Yale Women Faculty Forum at Yale University. She received her JD from Yale Law School, where she was the Editor in Chief of the Yale Journal of Law and the Humanities, a board member of Yale Law Women, and a student director in the Community and Economic Development Clinic. She also was awarded a PhD from Yale University's French Department, where she studied early modern French theater and political theory, focusing on the role of the family and marriage in shaping social order and political understanding. Her primary research interests are in family law, trusts and estates, property, and legal history. She is particularly interested in how law regulates and shapes the family through the distribution of benefits and allocation of property. She recently published *A Tale of Three Families: Historical Households, Earned Belonging, and Natural Connections* 63 HASTINGS L. J., 1345 (2012), discussing the legal logics according to which courts regulate families, and *Polygamy, Publicity, and Locality: The Place of the Public in Marriage* MICH. ST. L. REV. 173 (2011) about the role of publicity in marriage law and practice. She is currently working on a project about models of marital crime and regulation and a historical project about the development of married women's property and the role of the separate estate, an equitable form of property that allowed women to own property despite the conventions of coverture.

Ira Torresi works as a Lecturer at the Department of Interpreting and Translation (DIT, formerly SSLMIT/SITLeC) of the University of Bologna at Forlì. Her interest in comparative visual semiotics originates in the study of advertising translation, a field in which she has published the book *Translating Promotional and Advertising Material* (St Jerome, 2010); the articles "Women, Water and Cleaning Agents" (*The Translator* 10.2, 2004), "Translating the Visual" (*Across Boundaries*, eds. K. Ryou and D. Kenny, 2007), "Translating Dreams Across Cultures" (*Betwixt and Between*, eds. S. Kelly and D. Johnston, 2007), "Advertising: A Case for Intersemiotic Translation" (*Meta* 53.1, 2008), "The (Gendered) Construction of 'Home' in Contemporary Italian and US Food Advertising" (*Minding the Gap*, eds. R. Baccolini et al., 2011), and "How Do 'Man' and 'Woman' Translate?" (*Words, Images and Performances in Translation*, eds. R. Wilson and B. Maher, 2011); and the entry "Advertising" in the 2009 *Routledge Encyclopedia of Translation Studies*. She also works on gender studies, Joycean translation, and child language brokering.

Hanneke van Schooten is Associate Professor of Law at the Faculty of Law, Tilburg University, the Netherlands. She teaches postgraduate courses on comparative constitutional law. In her current research, she focuses on the concept of legal rules and processes of meaning construction from an institutional perspective. In her recently

published book *Jurisprudence and Communication* (Legal Semiotic Monographs, Liverpool: Deborah Charles Publications, 2011), she analyzed these subjects and constructed a new conceptual legal framework.

Farid Samir Benavides Vanegas is a Colombian Lawyer. He holds a PhD in Political Science from the University of Massachusetts and is a PhD candidate in Philosophy and Law in Barcelona. He is currently a law Professor in Colombia and works for the Colombian government as its Vice Minister of Justice.

Pekka Virtanen is Docent and Science Advisor at the Faculty of Social Sciences, University of Jyväskylä, Finland. He has worked extensively in Africa and Latin America, where he has participated in various research projects and development cooperation activities. His research interests include identity politics, democratization and legal pluralism, decentralization, the role of indigenous institutions in natural resource management, and local appropriation/transformational interpretation of global environmental issues.

Marco Wan is Assistant Professor of Law and Honorary Assistant Professor of English at the University of Hong Kong. His main areas of interest include “law and literature” and “law and film.” He has published on literary trials in nineteenth-century England and France, as well as on law and visuality in Hong Kong and China.

Oliver Watts is a Lecturer at Sydney University, Art History and Film Studies, and at the Sydney College of the Arts. An art historian and jurisprudential scholar, he writes on the nexus of art and law and visual studies; he approaches this study through critical legal studies and in particular, psychoanalytic theory. Watts’ dissertation entitled *Images on the Limit of the Law* looked at how the image produces and performs belief in the law, through “icons” of sovereignty for which Watts recalled an ancient term, the effigy.

Majid Yar is Professor of Sociology at the University of Hull, UK. His research interests include crime and deviance, media/new media, social theory, and sexual culture. His publications include *Cybercrime and Society* (2006), *Key Concepts in Criminology* (2008), *The Handbook on Internet Crime* (2009), *Community & Recognition* (2009), and *The Politics of Misrecognition* (2011).

Introduction: Law, Culture, and Visual Studies

Richard K. Sherwin

[E]very epoch is defined by its own practices of knowledge and strategies of power, which are composed from regimes of visibility and procedures of expression.

(Rodowick 2001, xi)

The proliferation of electronic visual media has transformed social and cultural practices around the world. In all walks of life, the life of law included, visual images increasingly compete with words in the meaning-making process. This is no small matter. Visual communication is different from communicating in words alone. Of particular interest in this regard is the peculiar efficacy of visual representation. What explains its power? For one thing, visual representations do not simply resemble reality, they also tend to stimulate the same cognitive and especially emotional responses that are aroused by the reality they depict. Movies, television, and video games, among other image-based media, tend to eclipse words alone. This is largely because visual images effectively engulf the spectator (or, in the case of computer games and immersive virtual environments, the interactive player) in vivid, life-like sensations. Emotion enhances belief. To the extent that visual images amplify emotion beyond the usual efficacy of text, images tend to be more compelling.

Another reason for the peculiar power of visual images is that they often get treated as “windows” opening onto reality, rather than as the visual constructions that they are. As Richard Lanham put it, we tend to look *at* text, but we look *through* the electronic screen (Lanham 1993). Unlike words, which are abstract and obviously constructed, photographs, films, and video images seem to be caused by the external world. With no obvious trace of mediation, visual images seem to lack artifice. That is why visual images make for such highly persuasive evidence for what they purport to depict (Kassin and Dunn 1997). Finally, unlike words, even when images seek to make propositional claims, some of their meaning always remains implicit. Put simply, images cannot be reduced to explicit propositions (Messaris 1997).

R.K. Sherwin
New York Law School, New York, NY 10013, USA

For these reasons, visual images do not simply enhance the meaning of words. The image is transformative, both qualitatively and quantitatively, which is to say, both in terms of the content it displays and the efficacy of emotion and belief that it evokes. Part of its power derives from the way visual images work. For example, unlike the sequential assimilation of verbal or textual messages, the meaning of images often can be grasped all at once. It takes a lot less time and seeming effort to absorb a picture than to read a thousand words. Such rapid and comparatively easy intelligibility allows viewers to assimilate one visual meaning after another in quick succession. The immediacy of visual uptake also serves to enhance believability. We are so busy and often so sensorially gratified taking in rapid flows of visual information that the felt need to second-guess what we see hardly arises. Diminished critical judgment typically invites enhanced visual credulity. The disinclination to object (or to suspend belief) is further advanced by the fact that so much of what we glean from visual images remains unconscious. Visual communication operates largely on the basis of associative logic. In response to what we see on the screen, we unconsciously associate to memories, thoughts, and feelings. Investing images with personal feelings and associations strengthens the viewer's sense of "ownership." It is difficult to argue with something one has already experienced as true. By the same token, familiarity alone, the feeling of having encountered the same sort of visual image before in other works or other genres, benefits from an already authorized sense of shared cultural meaning. The pleasure of such recognition, like the sensory gratification of experiencing the image itself, augments the viewer's feeling of immersion and sense of the "truthfulness" of what appears.

The way we mind the world and others around us changes along with significant changes in our tools of perception and mass communication. Over time, we become the tools we use. The camera is already inside our head, so to speak, along with the stream of digital programs that we commonly use to recognize patterns on the screen before us. Law and culture intertwine. No longer may students of law remain preoccupied exclusively by the texts of the trade – whether judicial opinions, legislative codes, regulations, contracts, constitutions, or treaties. Law awakens from its dogmatic slumber upon contact with the flesh of the world and the skin of the image. Facts have a tendency to carry abstract legal codes into the realm of real human drama. Facts spawn stories. And stories are not easily bred in captivity, much less the lab. They are a part of our everyday lives, and they permeate the popular culture in which we live. In the stories that we hear and tell, popular culture speaks. Our sense of self is distributed by the stories that circulate around and through us (Bruner 1990, 69). Those very stories cross over into law whenever human conflicts crank up the law's machinery of dispute resolution. Law without storytelling is like having rules without human conflict.

Culture constitutes the collective repository and repertoire of legal storytelling. In a visual age such as our own, visual storytelling asserts its own measure of content and craft, along with its own sense of expectation, interpretation, and critique. The world of law, as everywhere else in contemporary society, marches in lockstep with shared visual scripts and digital programs. In the previous century, Heidegger said we dwell in the house of being. But today, new rooms have been added on.

Today, we live increasingly in a digital matrix of synthetic visual representations. It is a little like living in the mirror – a special kind of mirror that has been algorithmically encoded to reflect back other rooms and other faces, some of which may or may not be our own. On this imaginary landscape of flattened signs, we live out much of our private and public lives. The ensuing transformation in the meaning-making process runs the gamut from entertainment to commerce to managing the affairs of state (Noveck 2009).

In short, the days when law could be treated as an autonomous domain, with no need to look beyond the law's own rules and procedures and specialized forms of discourse, are long gone. Today, it is a commonplace that the boundary between law and the culture in which it operates is highly porous (Sherwin 1992, 2000). In the realm of the human sciences, it has long been accepted that interpretations of truth and falsity and judgments of liability and guilt are socially constructed and, to a significant degree, culturally contingent (Ricoeur 1981). Many other disciplines, including the philosophy of science (Latour 1987), the philosophy of language (Bernstein 1985), and linguistics (Sweetser 1990), similarly recognize that meaning depends on context and that truth depends on the ways in which it is represented. Indeed, new studies of the physiology of perception indicate that even our most basic contacts with reality are socially mediated and constructed (Berns et al. 2005). In short, across many disciplines, scholars have sought to explain how knowledge is locally constructed through culturally embedded practices and through diverse techniques of investigation and representation (Geertz 1983; Shweder 1991). So, too, in Anglo-American legal studies, many have recognized that legal meaning is produced by the ways law is practiced (Llewellyn 1962) and that rhetoric in its many guises is constitutive of, not opposed to, truth (Sherwin 1988).

Nevertheless, the cultural shift from an objectivist to a constructivist approach to human knowledge has not been anxiety-free. Many participants in and observers of the legal system in particular continue to experience uneasiness with the semioticians' wisdom that 'it's all signs' (Sebeok 1994). Their fear seems to be that embracing this constructivist insight would undercut confidence in the capacity of legal proceedings (paradigmatically, trials) to yield provable truths about the world (Burns 1999; Nesson 1985). An unbridgeable gap between what legal decision-makers believe they need to know and what, on reflection, they seem able to know is for many a cause for real concern. Within this late modern (or postmodern) mindset, there is a heightened sense of inhabiting a universe of representations that seems to turn the urge for real-world knowledge back upon itself, as if in an endless regression, like some spectacular baroque tapestry or infinite arabesque endlessly folding in upon itself (Sherwin 2011a).

This vertiginous sense of a lack of grounding has intensified in the digital baroque age in which we now live. Digital technologies allow the pictures and words from which meanings are composed to be seamlessly modified and recombined in any fashion whatsoever, while the Internet allows practically anyone, anywhere, to disseminate meanings just about everywhere. The Enlightenment-era insistence upon essentialist foundations (whether exemplified by Locke's empiricism, Kant's rational categories, or other totalizing epistemologies) is being challenged by digital

experience, which has helped to inspire an alternative model of knowledge and reality as a centerless and constantly morphing network of relations (Flusser 1999; Rorty 2004).

No walk of life, no matter how far flung or esoteric, is immune to the influence of contemporary visual culture. From aboriginal rituals (Deger 2006) to neuroscientific studies (Gazzaniga 2005) to courtroom practices around the world (Sherwin et al. 2006), electronic screens increasingly mediate the realities in which we live and from which we seek meaning, understanding, and judgment. Aesthetics, epistemology, ethics, metaphysics, and, yes, jurisprudence are all being interpellated anew by new communication technologies. Everyone everywhere lives more and more of his or her life on the screen. It behooves us, therefore, to cultivate a proper understanding of the visual codes that are operating in the meaning-making process. The stakes involved in undertaking this task are greatest when it comes to law, for that is where power and meaning converge. It is where particular interpretations are backed by the police power of the state. Finding oneself on law's "field of pain and death" (Cover 1986) is hardly the occasion to indulge postmodern irony.

Juxtaposing law, culture, and visual studies has the power of removing the scales from our eyes, so that we may begin to see anew, perhaps as if for the first time, the visual codes which surround us. As the character Cipher put it, staring at the unceasing flow of digital data in the Wachowskis' epochal film, *The Matrix* (1999): "Your brain does the translating. I don't even see the code. All I see is blonde, brunette, and redhead." So do we all, more or less, and to a degree of habituation that may or may not serve our personal, much less the collective good. New visual media, new digital communication technologies, and new social networks together with the diverse codes of visual meaning making that they entail require new forms of critical awareness. We need to retool the mind, the better to attain the visual literacy that is required of us in the digital age, so that we may judge well that which calls out for judgment. This mandate marks the *raison d'être* and overarching objective of this volume.

In our mass-mediated society, information and entertainment, fact and fiction, real events and strategically constructed media events, common law and folk law readily intermingle. The ensuing blend of fantasy and reality is not an isolated phenomenon. Recent studies in cognitive psychology have shown that our world knowledge is often scripted by a mixture of fictional and nonfictional claims (Gilbert 1991). We have seen this, for example, when filmmakers skillfully emulate popular expectations about what reality looks like on the screen. Consider in this regard the credibility of the home video aesthetic. This low-tech style was effectively exploited in popular horror films like *The Blair Witch Project* (1999) and *Cloverfield* (2008). The rough, ill-lit images produced by an unsteady camera, off-center framing, and seemingly unscripted exchanges, all contributed to an enhanced sense of immediacy and visual truthfulness. What began as a distinct cinematic visual style, however, may have serious consequences outside the realm of popular entertainment, particularly when the chief evidence in a law case is a film. The prospect of life imitating art through the genre of *cinema vérité* is no idle speculation. It is currently on display in courtrooms around the world (Sherwin 2011b; Sherwin et al. 2006).

The symbols, images, icons, codes, rituals, and gestures that pervade our lives operate on multiple levels of visual meaning. Exposing them to critical analysis is a complex task. It requires a multidisciplinary approach. This volume begins the task of laying the groundwork for a semiotics of visual legal meaning making. To carry out this task requires that we explore a variety of cultural and historical contexts and diverse cognitive as well as philosophical and pragmatic perspectives. New forms of visual rhetoric have created the need for a new kind of visual rhetorical handbook. Such a handbook must bring together multiple codes for making and deconstructing visual meanings across a broad landscape of skills, methods, and practices. The various sites where discrete visual codifications occur – the new rhetorical places or *topoi* that shape and inform the contemporary world – incorporate and project multiple ways of seeing, being, and knowing.

In an effort to map this visual terrain, we begin, in Part I, with a historical perspective, looking back to a time when visual culture played a robust role in the practice and study of law. In this vein, Peter Goodrich tracks the classical Roman “law of images” up through the early modern tradition of legal emblems. Paolo Heritier takes Pierre Legendre’s concept of the nomogram as his point of departure in assessing the emblematic legal structure of society and the image. Paul Callister takes us to seventeenth-century England in his examination of the law book’s (paradigmatically, Lord Coke’s *Institutes* and *Reports*) importance as an authoritative sign. Luccia Morra and Cristina Costantini examine the visibility of sovereignty, including the codes of dress, pageantry, and figural depiction of Kingship. Our focus then shifts to a more contemporary setting commencing with Neal Feigenson’s analysis of the cognitive properties of visual perception inside the modern courtroom. We round out this initial survey of the field with Ira Torresi’s examination of photographs as evidence in criminal proceedings and other legal contexts and Hanneke van Schooten’s semiotic investigation of the relationship between fictitious legal rules and factual behavior.

Part II alerts us to the various ways in which conventional legal topics are often informed and shaped by discrete, frequently implicit or unconsciously held visual codes. Amy Adler begins the inquiry by revealing the remarkable similarity between the reasons why the United States Supreme Court tends to favor text over image and the reasons that motivated iconoclasts throughout the history of their religious and secular struggles over visual images. In what follows, Jessica Silbey takes the analysis of US Supreme Court jurisprudence through a variety of cases from which she derives a semiotics of film in law. David Rolph next focuses our attention on the role of photographs as a form of information in the context of invasion of privacy disputes. Alec McHoul and Tracey Summerfield address the line between art and pornography in an ethno-semiotic analysis of recent cases involving the display of nude photographs of children. Janet Ainsworth next explores how dress codes function in the workplace. Along the way, she demonstrates the extent to which visual representation and the performance of identity converge and conflict. In the following two chapters, Ronald Butters and Christian Johannssen offer their respective takes on visual semiotic interpretations of trademark law. We close out this part with Anne Wagner’s and Malik Bozzo-Rey’s look at the semiotics of postage stamps as a means

of cultural and legal memory and David Brion's semiotic exploration of the impact of visual protests inside the courtroom in the criminal trial of *Musladin v. Lamarque*.

Part III explores a semiotics of pictorial icons as they appear in diverse legal settings. The studies in this part range from Marett Leiboff's look at a court's struggle to define what constitutes "Australian audiovisual content" to Massimo Leone's semiotic analysis of "the giving of the law," Oliver Watts' exploration of Honore Daumier's politically controversial depictions of the King's body, and Ronnie Lippens' discussion of the role of "prophetic paintings" that, perhaps akin to Shelley's poets as the "unacknowledged legislators of the world," anticipate novel forms of life. In Part IV, the focus shifts to indigenous or folkloric forms of legal culture. The topics in this part range from Renee Cramer's treatment of the creative ways that tribal buildings and signs reflect and resolve the tensions between modern and indigenous cultures and Sarah Marusek's look at the conflicting emblematic value of the bald eagle in American environmental law and in the native American religious tradition. As Marusek shows, from the perspective of the former, the act of shooting an eagle becomes an assault not only on a particular endangered species but also on the emblem of American nationhood itself. From the contrasting perspective of the owner and protector of the Mohawk Trout Hatchery, however, the very same act is understood as one of safeguarding a precious livelihood.

In Part V, we take up the perspective of place as a source of visual legal meaning making. Topics here range from Judith Resnik, Dennis Curtis, and Allison Tait's survey of courtroom architecture as revelatory of the ideology of judging to Pekka Virtanen's sophisticated analysis of the juridical role of sacred sites among the Oromo people living in the Horn of Africa, to Roshan de Silva Wijeyeratne's extraordinary look at the tension between the virtual sovereignty that characterizes Buddhist kingship and the actuality of a decentralized bureaucratic state that derives from Buddhist polities stretching back to the third century BCE. Christopher Hutton next draws our attention to the juridification of modern societies using as his case study the display of public signs in Hong Kong. James Fox rounds out our survey of the role of place in visual legal studies as we join him in his travels across the United States looking at the paintings that adorn local courtrooms. The messages that this visual art conveys about law and the judicial process are diverse, to say the least, verging at times on the bizarre.

In Part VI, the focus shifts to the technology of visual representation and the various ways in which digital visual tools in particular are affecting day-to-day legal practices. Maurizio Gotti begins with an analysis of alternative dispute resolution online. Next, Joseph Pugliese investigates the growing warfare between biometric scientists and technologists who seek to protect confidential information and a covert clan of "fraudsters" who struggle to penetrate those defenses by simulating identity and live presence online. From the assault on confidentiality, we move next to Karen Petroski's look at how legal scholarship is with increasing frequency turning away from conventional text to a diverse array of visual digital displays, including graphical representations, tables, and diagrams. Pamela Hobbs brings this section on the visual technologies of law to a close with her study of the mysterious function of the largely invisible Foreign Intelligence Surveillance Court. Along the

way, she questions the court's use of an online web site to manage the public's perception of the court's covert operations.

Part VII examines the interpenetration of popular and legal visual culture using a variety of case studies to shed light on the two-way traffic that runs between these two domains. Cynthia Lucia kicks things off with her close study of a feature film about, as well as the actual trial of Claus von Bulow, who stood accused of murdering his wife, Sunny, by administering an overdose of insulin. Orit Kamir next takes us on a tour of Hollywood's love affair with the lawyer-hero character, singling out the liminal as well as the "champion of liberty" aspects of this cinematic prototype. Wim Staat guides us through the films *Mr. Deeds* and *Adam's Rib* to illustrate their significance in regard to our understanding of law's morality in the context of cinematic courtroom renditions of private life. In the next contribution, Majid Yar and Nicole Rafter analyze popular crime films to garner insights into popular representations of the learning disabled. Jason Bainbridge follows this with his examination of the popular American lawyer-based television series, *Ally McBeal*, among other pop cultural legal representations, to generate insights into the public perception of the significance of civil litigation. Christina Spiesel next draws our attention to the popular television series *CSI* ("crime scene investigations") as a vehicle for exploring the mass media's impact on the public's perceptions of forensic evidence in real cases and the consequent rise of "scientific" magical thinking. The latter, in Spiesel's view, invites comparison to the medieval notion of trial by ordeal. Madeira Lynee next offers a phenomenological examination of the way popular culture visualizes executions, while Marco Wan and Janny Leung, in their concluding piece in this part, examine how the popular press in Hong Kong played upon popular prejudices to construct the identity of a criminal defendant as sexually deviant and criminal.

Part VIII ends our survey by suggesting new ways of theorizing law from the standpoint of visual culture. This part gathers insights about visual legal meanings from diverse times and places, ranging from Mary Hemmings' exploration of eighteenth-century images of law in popular culture to Alexander Kozin's analysis of "instant justice" in the contemporary science fiction comic, *Judge Dredd 2000 AD*. In his contribution, David Papke shows how the conventions of popular media tend to preclude meaningful depictions of constitutional deliberation, while Shulamit Almog explores why the Israeli film industry has generally avoided direct treatment of legal issues altogether. Betty Hart explores how popular assumptions regarding legal guidelines for the production of biographical films have helped to shape and inform the perceived truthfulness of what those films depict. Farid Vanegas next takes us to the aftermath of the Spanish civil war, using three films to explore how cinema helped the process of transition to democracy. In their concluding contribution, Peter Robson, Guy Osborn, and Steve Greenfield provide a grand overview of various approaches to the study of law and popular culture and offer important questions for future research.

Thus, do we come full circle? As Eliot wrote in *Little Gidding*, "What we call the beginning is often the end, and to make an end is to make a beginning. The end is where we start from." Such is the way of things when one undertakes to survey a

new field of scholarly inquiry. With this volume, we have begun the process of delineating the new multidisciplinary field of law, culture, and visual studies. Our venture begins and ends with some of the core questions of our era: Who do we become, what are our institutions like, and how does the state police preferred meanings through the legal system using the shared visual tools, codes, and interpretive methods of our time? How do we ritualize or otherwise habituate the world-preserving (“jurisgenerative”) and world-destroying (“jurispathic”) processes of law (Cover 1982)? For in law, as in semiotic meaning making more generally, to paraphrase Kenneth Burke, every creation is also an act of nihilation. As Eliot says, “every beginning is often the end.”

Yet, ultimately, the task before us is not one of exclusion, but rather of cultivating a more robust heterogeneity in the way we conceive and practice the art and science of visual legal meaning making. As Martin Jay writes: “Rather than erect another hierarchy, it may therefore be more useful to acknowledge the plurality of scopic regimes now available to us. Rather than demonize one or another, it may be less dangerous to explore the implications, both positive and negative, of each” (Jay 1988).

Different visual representations operate in different aesthetic, epistemological, and perhaps even metaphysical registers – ranging from the purely gratifying domain of aesthetic delight to the uncanny presence of the aesthetic and ethical sublime (Sherwin 2011a). Assessing the reliability of a given visual image requires an awareness of the virtues and defects of its form of expression. Thus, we ask: What does the image want? What state of being, what mood, affect, beliefs, memories, and values does it invoke, and how does it do this? How do we think and feel through the image? And what kind of self and social world does the image call into being? Today, practitioners, teachers, and scholars of law, culture, and visual studies alike need to enter an apprenticeship with the image makers, including the digital wizards who know the binary codes that regulate the art of digital visual representation on the screen.

Aided by freshly honed tools of critical reflection, buoyed by insights from semiotics, phenomenology, cognitive psychology, and pragmatic philosophy, among other disciplines, contemporary scholars of law, culture, and visuality will be able to renew the perennial aspiration to synthesize experience and knowledge, meaning and power, and ultimately the aesthetic and the ethical. Crucial to this challenge is a shift in emphasis that leads away from ingrained habits of analytical induction and deduction from rules or axiomatic certainties as a point of departure, to a more capacious, heterogeneous attunement to the diverse tools, concepts, embodied experiences, and operative methodologies that are needed to facilitate visual prudence in contemporary legal culture.

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Part I
Introducing Visual Legal Studies

Chapter 1

Devising Law: On the Philosophy of Legal Emblems

Peter Goodrich

*Pro lege et pro grege*¹

Abstract Early modern lawyers, civilian and common alike, developed their very own *ars iuris* or art of law. A variety of legal disciplines had always relied in part upon the use of visual representations, upon images and statuary to convey authority and sovereign norm. Military, religious, administrative and legal images found juridical codification and expression in collections of signs of office (*notitia dignitatum*), in heraldic codes, in genealogical devises (*impresa*) and then finally in the juridical invention in the mid-sixteenth century of the legal emblem book. This chapter traces the complex lineage of the emblem book and argues that the visual depiction of authority and norm that it promulgated so successfully laid down an early modern structure and implicit regulation of vision. The *mens emblematica* of the humanist lawyers was also the inauguration of a visiocratic regime that continues in significant part into the present and multiple technologies of vision.

There is a body of early modern legal doctrine, little studied and even less remembered, that deals with the definition and use of images. Inherited from classical Rome, the *ius imaginum* or law of images was most immediately concerned with heraldic arms and the hierarchy of military, social and ecclesiastical precedence as represented visually and verbally in banners, shields, coats of arms, livery, colour, crests and other images and inscriptions, trophies and insignia placed in both public and private spaces. It was, as John Selden puts it, the law that governed

¹ 'For the law and for the people', a motto that is used as an exemplary emblem (Estienne 1650)

P. Goodrich (✉)
Benjamin N. Cardozo School of Law, 55 Fifth Avenue, Suite 522,
New York, NY 10003, USA
e-mail: goodrich@yu.edu

the ‘titles of honour’ of the nobility (Selden 1614).² While this *ius imaginum* may seem rather specific and particular, concerned with archaic details of greater and lesser social dignities, there is also a much more general interest and application to the doctrines governing the composition and interpretation of images and thence the proper context and construction of the legal emblem tradition which is my subject here.

It is sometimes argued that the juristic emblem, associated most prominently with Andreas Alciatus and his *Emblematum liber* of 1531, was an accidental invention, the inspiration of a publisher who whimsically added woodcut illustrations to a book of adages (moralising maxims), but in fact the emblem belongs to a much older and better established tradition of visual representation (Manning 2002).³ While Alciatus was entitled to ‘baptise’ his book with the novel name of *Emblemata*, the images that accompanied the epigrams stemmed, as Alciatus elsewhere acknowledges, from a much more diverse tradition of funereal, genealogical, military and esoteric (hieroglyphic) figures. The *ius imaginum*, in its broadest definition, is the study of what Selden terms ‘the trophies of virtue’, the insignia of nobility, knowledge, honour and law. It governed all aspects of the visual presence of governance and administration, the representation of family and lineage, public office, sovereignty and *oeconomia* (domestic administration) in the terms recently revived by Agamben in his study of the acclamatory apparatuses of power (Agamben 2009).⁴ The science of symbols, military and civil, was juristically a systematic lexicon, a collation of the lawful icons of such visibility. Colours, combinations, figures and the relation of images to words were all coded and defined so that the proper order of things seen, the visocracy, be recognised and noted. The later common law systematiser John Brydall in his treatise of 1675 indeed defines the *ius imaginum* as the study of the names of nobility, ‘that is the names of celebrity’, whereby virtue is noted and social place represented (Brydall 1675).

The emblem book was a legal invention of the Renaissance, but it belongs within a much lengthier tradition of heraldry, arms and along with them the fame or notoriety that accompanied military heroics and political prominence. As the lawyer John Ferne nicely puts it, the inherited insignia were only as valuable as their current practices: ‘ancient statueas, smokie images, autentique coate armors, torne and

² Noting that ‘Nobility ... being rightly ... the virtue of his Fathers’ and then observing that in ancient Rome, only the *nobiles* could show the images of their ancestors. The *ius imaginum* here meant the right to house the ancestral images and by extension the duty to maintain, which is to say stay true to and keep faith with the image of the forebears (at preface, n.p.).

³ Chapter 1 presents a version of this genealogy. This view is corrected with great erudition in Pierre Laurens, ‘L’invention de l’emblème par André Alciat et le modèle épigraphique’ 2005 149 *Académie des inscriptions et belles-lettres* 883. For a comprehensive study of the classical and humanistic roots of the legal emblem tradition, see Valérie Hayaert, *Mens emblematica et humanisme juridique* (Geneva: Droz, 2008).

⁴ It is interesting to note that Nebrija (1612) distinguishes *oconomus*, referring to domestic administration, from *iconomus*, which concerns governance of the Church and matters ecclesiastical.

rotten guidons, of the valiant and virtuous ancestors' will not of themselves repel the enemy (Ferne 1586). What was displayed had to be internalised, the images must be real, their interpretation so serious a matter as to be a subject of law. The disciplinary rules and lawful representations of what were variously termed *insignia armorum*, *symbola heroica*, *pictura* and images generally, latterly being translated into imprese, devises, blazons, enigmas and symbols, required strict disposition. It is with this military and administrative context that I will start and then subsequently move to the theatre of legal emblems properly so called.

1.1 Ensigns and Dignities

If war begins where language runs out, then it makes sense that the most basic science of signs must deal in forms of visible communication that can be seen in circumstances where language or, more exactly, diplomatic modes of conversation have become impossible. Heraldry was the science of seeing from a distance. The first logic of heraldry or, as it was also frequently termed, the law of arms was thus an external one, namely, that of indicating the difference between friend and foe, familiar and stranger within the theatre of war. The study and systematisation of insignia involved the classification and ranking of all the visible elements used to demarcate, distinguish and transmit the identity of their bearer (Pastoureau 1998). Some of our early modern authors stressed the religious origins of armorial symbols, stating that 'they go back before the flood to Seth the Son of Adam who took certain signs and marks to distinguish his family from the children of Cain' (Segoing 1650). In other authors, the symbols used were deemed to be 'holy letters', forms of 'hieroglyphy' and more generally still were secret missives carried, in war or peace, between the divinity and its subjects (Estienne 1650; Goodrich 2010). Thus, Marc de Vulson, in an intriguingly detailed work on the history of French heraldry, offers as his first definition of 'Kings of Arms' that they were 'messengers of the sacred' who would convey 'to all and indifferently, to friends and enemies with equal certainty, the announcement of peace or the declaration of war, and always under the protection of the law of nations [*droict des gens*]' (de Vulson 1645).

To the extent that, at least from the beginning of the Christian era – *nobilitas Christiana* – religion lay behind majesty and war alike; the military origin of the science of symbols does not preclude a theological derivation and interpretation. Early modern rhetoricians were all 'Christian soldiers', and this was as true of the visual science of arms as of the art of speech.⁵ What matters is that the identity of groups and persons needs to be visible – on columns, buildings, shields,

⁵ See, for instance, Lamy (1676), translated from the French the year after its original publication: 'If Postures be prooper for defence, in corporal invasions; Figures are as necessary, in spiritual attacks. Words are the Arms of the Mind ...' (Part 2, lib. 2, s.2).

machines, vestments, carriages, uniforms, banners and more. Visible signs, and in theological terms visible words, are key elements in the ritual ordering of public and private spheres, the realms of providence and fate alike. The image of the sovereign (*principum vultus*), as Pancirolus records in his commentary on the *notitia dignitatum*, is to be put on pillars in the market and in other public places as well as in private homes. These images are to be honoured and protected, and stringent punishment was meted out to those who defaced them (Pancirolus 1608). Bartolus, in his treatise on insignia, the earliest but far from comprehensive juristic work, defines the sign as a name which is painted on coats of arms, banners, shields and the walls of the city (Cavallar et al. 1994; Goodrich 2009b). It marks legitimacy, rank and subjection. Referring to *Digest* 1.8.8, Bartolus also suggests that these signs are sacred.⁶

The representation of legitimacy must be by means of legitimate signs. While this might seem tautological, it in fact refers to the complex and forgotten details of the transcription of the full panoply of facets of domestic and social identity, the images of honour, virtue, office, rank and local and national affiliation that define the administration of a territory. This is the visible and most basic *lex terrae*, as common lawyers term it, and finds its first expression in the insignia or *notitia* of administrative regions and offices. These, in the surviving Roman sources, take the form of extensive listings of the imperial territories and the administrative offices – the dignities – through which they were ordered and maintained. The empire was represented, in Pancirolus again, though Selden also reproduces this image, as being suspended under the armorial images of divine providence: angels representing military knowledge and virtue hold up the circular icon of the emperor's face above the list, in the form of an array of books that represent authority and felicity (Fig. 1.1). Beyond this, every province has its map (or properly chorography) and insignia of places – of towns, villages, routes and borders. These then are depicted by way of listings of their visible dignities and offices, literally their *viri illustris* and *viri spectabilis*, translating for us as their manifest (we could also transliterate this as illuminated, embellished) and notable, meaning brilliant, remarkable, famous and even spectacular men.

Every office in every territory listed in the *notitia* had its mark, its image and *insignum* by which it was recognised and known. These were military and religious, of course, but also legal, commercial, scriptive and domestic. The *notitia* were the signs of office and celebrity and included elaborate schemata for the Provost of the Sacred Bedchamber, the Master of Missives, Letters and Records, as well as innumerable clerks of *oeconomic* (domestic) duties, from maintenance of linens to stocking of the kitchen. The point is structural. The notes of office (*dignitates*) formed the visual architecture of the social, carefully tabulated and inscribed by lawyers – a beginning was made by Bartolus in the fourteenth century, by Alciatus and Pancirolus in the sixteenth century – and available and visible in the buildings, designs, figures, statuary, ceremonies and vestments of those who

⁶D. 1.8.8 (Marcian). 'Whatever has been defended and secured against human mischief is sacred (*sanctum*)'.

occupied the social and domestic roles that law purveyed. Celebrity emanated from and imitated the sovereign's court and what the herald Thynne terms the *arcana imperii heraldorum*, the secrets of arms, were the rules whereby the insignia of the court and of all the lesser and imitative courts of the nobility were to be composed and interpreted as the manifestation of their lineage and legitimacy, their honour, virtue and felicity.

The rules governing insignia are recognised and indeed deferred to by the common law and explicitly carry not simply the authority of life, death and loss of liberty – *ius incarcerationandi* – in their military uses but also bear an important acclamatory function (Hearne 1720).⁷ Thus, to take one instance from the ceremony of investiture of honours, honorific preferment, here membership of the Order of the Garter is in recognition of 'acts of the highest order of virtue, meriting the most praiseworthy status and dignity of honor' (Doderidge 1600). It needs, therefore, to be recognised that in addressing images in law, the *ius imaginum* in its various modes and expressions, the subject matter is that of ritual and ceremony, of praise and celebration, of honour and sanctification as inscribed in the architecture of the social and in the figures of administrative and political as well as legal presence. The image is extant in and through the living, through the exemplary ambulant image, but such charismatic personages in their nobility and majesty are but representative, the mere spectacle of the invisible monuments, the unseen causes, that exist ineffably and eternally. Honour and also its attributes, office, rank, lineage and law are greater than the living; they are inheritances; they survive and live on beyond the grave.⁸ The law and the *oeconomic* order are founded alike upon the 'Reverence and Honour, Fidelity and Subjection', the allegiance and obedience that is owed the sovereign and the parents, the heavenly and the temporal father in their impossible unity (Hale 1713).⁹ *Dignitas non moritur*, the dignity, which is to say the image, the rite, the acclamation and the honour that inheritance passes on, that time carries as vestige, impresse and relic, does not die. It belongs in the domain of dogma as Legendre interprets it, namely, the dream of the social and the imaginings of law (Legendre 1983, 2009; Kantorowicz 1958).¹⁰

⁷ '& c'est bone Justificacione al comen Ley & Ashton & Moyle concesserunt, que comen Ley prendra notice del Ley del Constable & Marshall' which is worth citing for the law French if nothing else and recognises, by citation to Justice Needham that the jurisdiction over social insignia, precedence and honour is a civil law jurisdiction, expressly derived from 'Bartolus the Lawyer in the Government of Charles the fourth Emperour' who incidentally, we are then told, 'permitted to Gowne-men (or, as the French termeth them, of the longe Robe, for under that name were learned men, Clergie men, and Schollers comprehended) to beare Armoryes'.

⁸ Thynne, *Heralde*, at 236 cites the maxim *quod consuetudo dat, homo tollere non potest*, translating as 'what custom – time immemorial, the invisible cause, the unseen mover – gives, man cannot take away'.

⁹ Fortescue (1453) at 3 talks of the proper 'filial fear' of law, though the quotation is from a later and much more secular source, (Hale 1713) at 42 who lists these rights or duties as defining the subject.

¹⁰ Legendre (1983) at 25–34 tracing the etymological link between honour, decorum, dignity and dogma. In his latest book, Legendre, (2009) at 55–59, the theme is elaborated in interesting ways in relation to architecture and Vasari in particular. Kantorowicz (1958) offers important discussion of the concept of dignity.

1.2 Visiocracy

The early modern systematisation of common law, the *mos Britannicus* that I will use as my example, inherited and elaborated a strict order for the composition and construction of visible rule as precedence, hierarchy and acclamatory order.¹¹ The earliest source, already mentioned, was the late Roman *notitia dignitatum* in its various Renaissance reconstructions, and Bartolus' mid-fourteenth century treatise on signs. Bartolus is the earlier and more schematic work, and his concern throughout is the legitimacy of representations of rank and office. The basic categories of the law of images concern the dignities that the earlier Roman *notitia* had listed. Thus, those of the specified rank could bear the insignia of that rank, be it proconsul, legate, bishop or doctor of law, but 'if someone who is not of that rank bears them he incurs the charge of fraud' (Bartolus 1883). Further rules govern the appropriate signs of subjection to lord and king that the arms should insert. In addition to that, Bartolus notes the rules that governed how insignia should be composed, namely, that they should imitate the order of nature, were to be supplemented by the requirement that representation of social dignities had to observe the hierarchy of the social order: 'nobler things should be preferred and placed in a privileged position', the right and top of the coat of arms being nobler than the bottom and left (Bartolus 1883). Similarly, colours have their proper order and meaning, descending from gold to purple and red, which latter colours were restricted, Bartolus states, to princes (Bartolus 1883).¹²

The basic elements of the heraldic art, the proper order of colours, metals, stones, and animals form a simple lexicon of the visual signs of a highly regulated manifest social, military and ecclesiastical hierarchy. The order of precedence and rank is arranged to reflect what is technically the celebrity of the bearer and is coded and collated to the order of virtues, the honours attained and inherited. It is worth emphasising this foundational moment, this visual schema of law, and observing that in the early systematising works, it is conceived explicitly to be a reflection of the order and hierarchy of angels: 'almightie God is the originall authour of honouringe noblilitie, who, even in the heavens hath made a discrepance of his heavenly Spirites, givinge them severall names, as Ensignes of honour. And these heavenly Spirites, when they are sent of God, are called, *Angeli*, Angels, which in the Greek tongue signifieth, sent' (Bosewell 1572).¹³ Pause for an example, taken from Legh, the earliest of the Inns of Court authors on heraldic law who offers an instructive

¹¹ On the *mos Britannicus* and the development of the English *ius commune*, see Goodrich, 'Intellection and Indiscipline' 2009a.

¹² The same can be extracted in greater details from later systematic works, such as Bosewell (1572), Legh (1562), and Trevor (1557).

¹³ Continuing to note that 'the Lawe of Armes was by the auncient heraultes grounded upon these orders of Angells in heaven, encorowned with the pretious stones, of colours, and vertues diverse'.



Fig. 1.1 Gerard Legh, *The Accedens of armory* at fol. 135v. (Herald)

image of a herald at the end of the 1572 edition of his *Accedens* (Fig. 1.1). Here we can see what the legal scientist of symbols saw and follow his interpretation of the visual clues that the picture relays.

The image of the angelic herald is not obvious – not immediately visible – to contemporary view. It is emblematic, though not precisely an emblem, as will be discussed later, because it lacks an explanatory verse. It is properly a ‘devise’ (or *imprese*) and serves to devise, which is to say to invent and convey a message of