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Law, Metaphysics, and the New Iconoclasm

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We have been told many times since the dawn of the modern era that we are living in a post-metaphysical age.¹ As Gianni Vattimo recently put it, we are all on our way to becoming “accomplished nihilists.”² When Vattimo uses the word ‘nihilist’, he has in mind Nietzsche’s sense of the term: meaning, roughly, that what we call ‘truth’ is akin to a mobile army of metaphors.³ In Vattimo’s view, and in the view of many social constructivists⁴, the positivist model of scientific knowledge has increasingly given way to Nietzsche’s model of rhetoric.⁵

Simply stated, postmodern truth is, at bottom, an aesthetic experience. As Clifford Geertz once wrote, we live in webs of meaning that are of our own making.⁶ Every culture has its own way of imagining the real. No matter how deep you go, according to this view, it’s constructions all the way down.

Fundamentalists⁷ in a sense may also be described as ‘nihilists’, but their claim is the opposite of the constructivists’. In their effort to eradicate the impurity of constructed truths⁸, which we witness in iconoclastic acts of destruction directed at the idolatrous icon, the false idol, the dead statue⁹, fundamentalists have expressed the felt wish to empty the world of all man-made simulacra, all human constructions or mediations. In the purified world, they believe, the transcendent truth will shine forth in all its glory.

In my scholarly research and writing over the last two decades¹⁰, I have identified intellectually with the constructivist / rhetorical community. To be honest, I still do. And yet, the limits of the constructivist perspective are increasingly coming into view.

Aesthetics isolated from some grounding in the ethical offers no protection against, and might even invite, a sense of law as being rooted in no more than subjective preferences, or perhaps the will to power alone.¹¹ The latter development is reminiscent of Walter Benjamin's invocation, using Carl Schmitt's phrase, of a perpetual state of emergency.¹² It is what happens when the morality of law, or let us say the law of law, which is Justice, collapses into two closely interwoven agents: power and fear. The one thrives on the other.

Positivism, instrumentalism, and the ideology of the marketplace lack the normative resources to fend off the specter of nihilism and the political and legal ascendancy of the will to power. In a word, they simply cannot do justice to Justice. That challenge, I believe, requires metaphysical insight.¹³

One of the underlying premises of my recent work on the practice, theory, and teaching of law in the digital age, is that significant changes in key communication technologies have given rise to significant changes both in the legal mind and the legal culture.¹⁴ This is not simply a matter of how inherited meaning-making tools help us to make sense of (as well as to construct and sustain) the world around us, including the *nomos* (the world of law) in which we live.¹⁵ It is also a matter of understanding the rhetorical norms that we engage when we exercise one set of communication tools as opposed to another.¹⁶ For example, an audio-visual story on the screen engages a

different code of truth, and a different measure of expressive force, than a story told in words alone.¹⁷

When a new set of communication tools begins to challenge the dominance of another set, the nature, function, and even the efficacy of mediation becomes troubled.¹⁸

We may crave novelty, but we tend to grow uneasy when we look *at* mediation rather than *through* it, as if it weren't there at all.¹⁹ We prefer truths that seem transparent. Unlike the Japanese Bunraku player²⁰, the Western puppeteer stays out of view, and tries his best to keep the puppet's strings hidden.²¹

We've been having trouble lately hiding the strings attached to our truth claims. And the confusion between truth and illusion that plays out on the screen has made many people uneasy.²² This sense of uneasiness is now invading the courtroom together with the computers and electronic monitors that have proliferated wherever law is being practiced in the United States, the United Kingdom, and elsewhere.

As a consequence, we are being driven to ask: when are the images that we see on the screen credible, and when are we being 'taken in'? When is 'seeing believing', and when are our eyes deceiving us?²³

Deep rhetorical clashes regarding how best to represent (or mediate) the real, are unsettling on many levels. They invite confusion regarding how a particular sign should be read. And they raise anxieties about how, or whether, we can make sense of the world at all. Under certain conditions, rhetorical clashes of this kind may breed iconoclastic impulses, for when commonplace certainties are shaken, the urge to restore stability grows strong.²⁴

If a competing medium of representation cannot effectively assimilate (or be assimilated into) a pre-existing medium, (in other words, if remediation fails²⁵), a war of mediations may break out. Iconoclasm is the word we use to describe such a war.²⁶

Of course, iconoclasm involves more than the clash of disparate mediations. It also reflects a deep rift regarding the source and legitimacy of conflicting truth claims about the nature of reality itself.

The French sociologist Emile Durkheim once wrote that our value ideals cannot survive if they are not periodically revived.²⁷ Along similar lines, I think iconoclasm expresses an urgent, deep-seated impulse to revive core values in the face of what is perceived by the iconoclast as a severe threat. We see this impulse at work in the historic outbreak of violence toward what some have come to regard as the idolatrous image or icon. This occurred, for example, during the Byzantine era in the 8th century, and at the time of the Protestant Reformation in Europe during the sixteenth and seventeenth centuries.

For the iconoclast, idolatrous or illusory images and icons act as an impediment to the experience of higher or transcendent truths. False idols fool the unwary into treating what their eyes see as the real thing. In so doing, deceptive signs lead people away from true reality which, the iconoclast declares, lies elsewhere. For the iconoclast, true reality is hidden, but accessible by recourse to invisible signs which can be perceived by an inner eye, the eye of the soul.

I will refer to that higher source of invisible truth as ‘second order reality.’

According to the iconoclast, the dead idol of the secular, sensate world, like the sensual spectacle of religious pomp and ceremony, must be overcome, smashed and cast down, if need be, to make way for second order reality to be known as such.²⁸

When significant shifts in communication technology coincide with deep-seated political, philosophical, and cultural conflicts, conditions are ripe for renewed iconoclastic outbursts. For example, the iconoclastic impulse during the European Protestant Reformation marked a shift in the dominant medium of communication from words in the company of images (the ornate realm of religious ceremonies and spectacles) to the invisible realm of the sacred word in prayer. The Protestant iconoclasts in Europe feared that the breakthrough of the sacred into secular time through the ritual enactment of Christ's death and resurrection was becoming confused with the first order reality of material things (the icon, the image, the ceremony). The Protestant iconoclasts believed that Christians were in danger of mistaking the invisible reality of God's presence with the iconic reality of the dead idol.²⁹

Today, we are witnessing the outbreak of similarly powerful iconoclastic impulses. Consider, for example,

- the Taliban in Afghanistan (who wasted no time after coming into power before destroying some remarkable Buddhist stone sculptures³⁰); and, more recently,

- Islamic fundamentalists in Pakistan, Nigeria, and elsewhere, who staged violent protests against European journalists (and Westerners in general) following the publication of idolatrous cartoons that mocked the prophet, Mohammed.³¹

Then there are the iconoclasts who practice closer to home.

I have in mind here neo-Marxist social critics, particularly of the Frankfurt school of Horkheimer and Adorno, who decry the fetish of commodities in late modern, advanced consumerist societies.³² Marxist iconoclasts take aim at the capitalist's magical ('mimetic') thinking which invests consumable products with the totemic power to transform the self. It is this commodification of culture that Andy Warhol brilliantly depicted in his various mass produced silk screens.³³

The commercial world has been making steady advances on Warhol's vision – albeit for a different purpose. Today, mass marketing thrives on commodifying the self.

Consider the ads: “Just do it” [with a pair of Nikes]. “Coke is it” – and presumably when you drink a bottle, you have ‘It’ too.³⁴ In short, according to the Marxist iconoclasts, illusory meanings derive from the consumer's act of incorporating the commodity's brand into the subject's sense of self. You *are* the [corporate] logo that you take on, or take in. Through the triumph of magical, mimetic immanence “I am what I have.” And today, the ads tell us, we can have it all.³⁵

Consuming acquires a fetishistic quality by virtue of the consumer's erotic investment in the commodity.³⁶ Eros is the glue that binds us to the object – like a truly secularized religion, in the ideology of consumption the religious bond ('tying together' being one of the etymological meanings of *re-ligare*), is sublimated downward or outward into the material domain of the transient and the banal rather than upward into the realm of the timeless transcendent.

The Wachowski brothers, in their *Matrix* film trilogy, for all its cultural 'hipness', still end up with the same commercial message: digital utopia it would seem

basically amounts to being whoever you desire based on possessing virtually anything you desire.³⁷ Perhaps this is precisely the secular danger that Protestant reformers feared: a wholly material, intensely sensual sacrament bereft of any transcendental reference whatsoever.³⁸ For Protestant reformers the material image must be purged to protect the sacred domain of the invisible transcendent. For Marxist reformers, the fetishized commodity must cast aside for the sake of more authentic, creative labor. How to ensure that the process (of production) will not be trumped by the pleasures made possible by the product still remains somewhat obscure.

We may also discern of late another form of iconoclasm that is active in contemporary society. Scholarly postmodern iconoclasts proclaim the crisis of representation, and the onslaught of “the image wars.”³⁹ As Bill Nichols archly states, “What counts as knowledge is not what it used to be.”⁴⁰ The late modern self has fragmented into multiple subjectivities⁴¹ and the boundary between traditional categories of knowledge – reason and desire, truth and fiction, concept and experience – has grown increasingly blurred, perhaps to the vanishing point. Amid proliferating frameworks for meaning and interpretation, representation itself seems to be up for grabs. The “ambiguous truths” of media-spawned “pseudo-events” which Daniel Boorstin famously described over four decades ago⁴² have blossomed into what Frederic Jameson has called the “derealization of the event”⁴³ and what Jean Baudrillard has referred to as “simulacra.”⁴⁴ To an ever increasing extent, we seem to be living among copies without originals. Indeed, with the advent of digital communication technologies and the Internet, as copies effortlessly spawn other copies the very notion of an original may soon dissolve into quaintness. In the meantime, however, during the current transitional period, the aura

of the original, or its fragments, haunts the late modern (or as I prefer to call it, the neo-baroque) mind. It is this ghostly encounter that prompts our sense of derealization. In sum, for the postmodern iconoclast reality itself has become “the effect of the sign” in a world where signs no longer “refer to any sort of ‘reality’ or ‘referent’ or ‘signified’ whatsoever.”⁴⁵ Postmodern iconoclasm meets fundamentalist nihilism – without the latter’s faith in a second order reality. For the postmodern iconoclast there is no transcendental truth to rescue us from the chaos of human constructions or to overcome the crisis of representation.⁴⁶

To be sure this metaphysical anxiety can be felt outside the academy as well. In fact, contemporary popular culture is filled with the foreboding sense of how precarious is our grip on reality. We see this in films like *The Truman Show* (1998), *Dark City* (1998), *The Matrix* (1999), *Being John Malkovich* (1999), *Memento* (2000), *Waking Life* (2001) *Vanilla Sky* (2001), *Adaptation* (2002), *Eternal Sunshine of a Beautiful Mind* (2004), *Mulholland Drive* (2001), and *Caché* (2005) (to name only a few⁴⁷). In these films, the distinction between truth and illusion, or between reality and fantasy, or between waking and sleeping, becomes intensely problematic. These cultural products – amid a host of other comparable signs – announce the advent in our time of the neo-baroque.

“*La vida es suéno*,” the great Spanish baroque playwright Calderon tells us.⁴⁸ We are living in a dream world.

Or, perhaps we are simply enmeshed in an artificial digital program, and what we call experience is but a coded series of endless simulacra.⁴⁹

Or perhaps, in an even more sinister vein, it's all a vast conspiracy; someone is 'doing it,' as a character says in David Lynch's *Mulholland Drive*⁵⁰; perhaps it's all a conspiracy orchestrated by the unconscious.⁵¹

Law has not been spared the impact of this cultural development.

Many participants, and observers of the legal system have also experienced uneasiness with the semioticians' wisdom that "it's all signs."⁵² Their fear seems to be that embracing this constructivist insight will undercut confidence in the capacity of legal proceedings (paradigmatically, trials) to yield provable truths about the world.⁵³ 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.

The common thread running through all of these postmodern variations is a fundamental distrust of our collective representations of the order of things. Prick the surface of reality and it fractures into countless pieces, transporting us into a world of dancing shadows, an endless labyrinth, a vast network of ruins. In this respect, I believe that we are now living in the age of the new baroque. Spectacles proliferate, while deeper anxieties roil beneath the surface of appearances. The concern to re-establish threatened meanings coincides with baroque culture's obsession with allegories and symbolic forms. If surfaces cannot be trusted, if we are bathed in shadows, perhaps we may find new meaning by penetrating more deeply into the darkness.⁵⁴

Metaphysical meaning cries out from this hidden depth, this invisible source. Only by looking beyond the finite constructions of everyday discourse and practice might we discern traces of the infinite, that inexhaustible source of meaning that will not be materially or for that matter discursively contained.⁵⁵ That infinite source – be it

‘deconstruction’ or ‘Justice’ (which Derrida treats as one and the same⁵⁶), or the face of the Other (which is Levinas’s measure of Justice⁵⁷), or the unrepresentable Nothing of the empty image (the Protestant trope for the invisible living image and source of law⁵⁸) – whatever it is that lay in secret beneath the spectacle of dancing forms, it is that hidden source for which metaphysical anxiety longs.

Finite form ultimately points beyond itself, toward an unspeakable Nothing.⁵⁹ As Schlegel wrote, “It can never be seized because the mere imposition of form deforms it.”⁶⁰ That deformity, or one might say, that *barocco*, (which is Portuguese for ‘deformed pearl’), takes us to the very heart of the baroque.⁶¹

Today, as in the baroque era of the 17th century, we are once again experiencing the deformity of forms. 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.⁶² This vertiginous sense of a lack of grounding has intensified in the digital age. 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.⁶³

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 virtual connections.⁶⁴ This de-centered, incessantly flowing web of

information provides an apt symbol of the new baroque culture in which we are living today.⁶⁵ We are obsessed, as were those who lived in earlier baroque times, with the endless proliferation of forms as mere projections, shadows of the real, what Baudrillard calls 'simulacra,' specters of virtual reality.

There is a discrete form of anxiety that comes with such radical contingency and de-centering fragmentation. It derives from our feared incapacity to hold onto meaning; to keep our sense of self and social meaning intact. We can hear baroque anxiety whispering in our ear: what if beneath the surface of proliferating form, beneath the spectacle of production, there lies: Nothing? What if it is only a great shadow play, a collective dream?⁶⁶

From Guy Debord's *Society of the Spectacle*, to John Trow's *Within the Context of No Context*, to Jean Baudrillard's popular writings on visual *simulacra*, which also played a role in the Wachowsky brothers' influential 1999 film, *The Matrix*, this repeated theme, that we are living in a dream world of illusory images – of simulacra resting on simulacra – attests to the double-edged potency of the image in our time. On the one hand, we understand that images help us to construct our world. But on the other hand, we wonder: can images be trusted?⁶⁷ Must we break through the web of screen-based illusions in order to penetrate to the realm of the really real?

Given the tightly controlled realities disseminated by embedded journalists, with images of war on radar and TV screens projected straight from governmental centers of command and control, it is hardly surprising to come across Baudrillard's recent title: *The Gulf War Did Not Take Place*.⁶⁸ It is not that there was no war; it's only that we didn't

see it. What we saw instead, says Baudrillard, was a “masquerade of information” and “the prostitution of the image.”⁶⁹

And yet, on the other hand, when we see images of the horrors of Abu Ghraib prison in Iraq⁷⁰, or the instrumentalities of force-feeding techniques used by guards at the American detention center in Guantanamo Bay⁷¹, we say, Ah, reality has finally broken through. Yes, now we know the war is taking place.

And so we are caught in the paradox of the image: torn between belief and disbelief, enmeshed in what historian of science Bruno Latour calls *iconoclash*.⁷² We love the image and we hate it; we need the image and we fear it.

Law, too, is being gripped by the effects of iconoclash.

On an everyday level in legal practice, decision makers today must discern which among the images they see projected in court justify belief.⁷³ But there is a deeper impact as well that needs to be addressed. Law’s iconoclash recapitulates other culture-wide forms of expression. On the one hand, new technologies of visual mass media amplify our craving for, and our expectation that, reality can be instantly and transparently communicated. On the other hand, the epistemological naiveté of this expectation has never been greater. As Latour writes: “Accurate facts are hard to come by, and the harder they are, the more they entail some costly equipment, a larger set of mediations, more deliberate proofs.”⁷⁴

Ambiguity and complexity feed the anti-rhetorical impulse that has long dogged Western culture.⁷⁵ In fact, iconoclasm and the anti-rhetorical impulse share a good deal in common. Both seek to escape the grip of ambiguity and interpretive openness by

attacking their source: by capturing and assimilating a competing medium of representation.⁷⁶

Iconoclasm also seeks to escape ambiguity by assailing it head on, iconoclastically – which is to say, by actively seeking to rid the world of useless fictions, fanciful metaphors, and other figurative forms.

Consider in this regard Bentham’s almost obsessive commitment to weeding out metaphors from legislative language.⁷⁷ Or consider Baudrillard’s insistence that truth has been lost in “the desert of the real,” amid the endless parade of simulacra.⁷⁸ Even here, in the pantheon of postmodernism, the positivist’s impulse is still at work. For Bentham it was the impulse to pin meaning down once and for all, to hold it still.⁷⁹ For Baudrillard, it is positivism by negation, the postmodern elegy regarding modern truth’s demise.

The common thread is plain: as ambiguity grows, so too does the anti-rhetorical reaction. We may crave the simplicity of positivist definitions, empirical quantifications, or naïve realism toward the ‘transparency’ of the image on the screen, but the elusiveness of incontrovertible facts today requires, as Latour notes, a different sort of eloquence. A neo-baroque world calls for a neo-baroque epistemology: “more indirect, distorted, inconclusive,” as Latour puts it.⁸⁰

It also requires a response to a characteristic baroque anxiety, which I have referred to as metaphysical anxiety, for it echoes a deep-seated fear of a pervasive, underlying Nothingness. Metaphysical anxiety wonders aloud whether all that remains of this contingent and fragmented world will have to be flushed away, apocalyptically evacuated, to use Walter Benjamin’s term⁸¹, before something ‘truer’, more essential, can take its place. We witness this urge to purify the world through destructive means in neo-

fundamentalist movements, such as al Qaida⁸², and in other, perhaps more localized, cults such as the Aum Shinrikyo cult that attacked the Tokyo public transit system in 1995⁸³ in an effort to precipitate the coming apocalypse.⁸⁴

My argument up to this point may be distilled into the following inter-related claims:

(1) First, with law's visualization comes *iconoclash: should we (can we) place our trust in images?* Tensions between old and new mediations of reality generate a heightened awareness of the rhetorical (or 'constitutive') nature and function of mediation and of the clashing aesthetic and epistemological assumptions that underpin different kinds of mediations.

(2) Second, iconoclash may give rise to heightened iconoclastic impulses: *these impulses harbor a strong anti-rhetorical component. They express a wish to destroy mediation for the sake of getting at the unvarnished truth: naked facts, Reality itself.* But if second order reality is not mediated, if it is not even susceptible to mediation, how can we hope to know, much less communicate its meaning? And if first order reality is all there is, just the endless flatlands of material forms and digital flows, how do we anchor the endless proliferation of these equally fungible aesthetic representations in some discourse of truth?

(3) Third, overcoming *iconoclash* requires aesthetic clarification as well as metaphysical resolve: *we need to attain a new understanding of proof and persuasion in the digital age.* But we also need to clarify the way we distinguish a source of meaning from the aesthetic means of its mediation. In a word, without metaphysics, epistemological and ontological anxiety will persist.

We need benchmarks – a new baroque aesthetic (“a new eloquence”) – to express a new baroque epistemology (a new understanding of digital mind and culture). And yet, even with these new benchmarks in hand, the proliferation of aesthetic forms without ethical guidance will remain problematic, for they will not lead to metaphysical resolve. If the clash among competing truth claims is not resolved, iconoclasm has revolutionary potential. We have seen this kind of thing before. For example, in the seventeenth century, belief in the divine right of kings was shattered by an iconoclastic repudiation of that belief’s metaphysical underpinning.⁸⁵ The common law then took on the corona of metaphysical legitimacy – what Peter Goodrich has referred to as the invisible (imageless) source of written law. This inaugural image of law is encountered as an absence, an empty space that resists representation.⁸⁶

By displacing the image, the iconoclasts of the Reformation assimilated the spiritual jurisdiction and its courts of conscience to the Crown.⁸⁷ The new regime was to be consummated not in the spectral image but rather in the static stability of the printed word.

And further on, when the king’s transcendental (second order) reality gave way to nominalist beliefs, this opened the way to new forms of political and legal discourse, and new political and legal institutions – together with new normative self-justifications. We witness this transformative drama in Hobbes’ Leviathan. In Hobbes’ scientific view, the rationalization of fear becomes the logical basis for totalizing the authority of the Sovereign - together with the Sovereign’s will to legislate.⁸⁸

The metaphysics of natural law thus gives way to a wholly secular ‘positive law’. Out of the ashes of the feudal concept of the transcendent, manifesting the sovereign right of kings, the secular modern state was born.⁸⁹

As these historical references may suggest, my claim is that we have arrived at a critical juncture that shares a number of striking similarities to the baroque era in Europe during the seventeenth century. As occurred in the aftermath of the Protestant Reformation and the ensuing counter-Reformation in Europe, today we, too, are witnessing the impact of fundamental changes in mind and culture brought on, in large part, by a significant transformation of the dominant forms of communication technologies.

In a word, today we are confronting the iconoclasm of the digital neo-baroque.

In 1600, Giordano Bruno died at the stake for blasphemously theorizing an asymmetrical proliferation of infinite worlds.

Today, we call Bruno’s vision the Internet.

With the Protestant Reformation the realm of the sacred contracted from mimetic, visual ceremonies supplemented by the living word (“This bread is Christ’s body, this wine is His blood”) to the *interior* realm of individual prayer. The living word trumped the visual image.⁹⁰

In modern times, the realm of the sacred (e.g., natural reason and natural law) has contracted even further leaving an even more expansive secular domain for positive law to operate in. Modern jurisprudential thought reflects this trend. Natural law and ethics, as the touchstone of social and political life, have given way to instrumental reason, economics, and the rational calculation of subjective interests and preferences measured

by pleasure and pain, the maximization of individual wealth, or some other calculus of ‘maximized individual satisfaction.’⁹¹ Jurgen Habermas has proposed a paradigm of law to replace the liberal and welfare model. He calls it the model of ‘communicative action.’⁹² This model, he says, “no longer favors a particular ideal of society, a particular vision of the good life or even a particular political option.”⁹³ This sounds a lot like Phillip Bobbitt’s “market state” model, where the state’s sole *raison d’etre* is to maximize economic opportunity.⁹⁴

In short, politics has been “uncoupled from ethics.” As Habermas put it, we can only “hope” people will orient themselves to the common good, as they see it.⁹⁵ Hence the underlying concern that drives this project, which can be expressed by the query: Are we losing the very capacity to articulate irreducible values in modern, secular discourse?

Today, the modern nation-state is threatened on numerous fronts, from without and from within. The moral impoverishment of positivist jurisprudence and the incapacity of instrumental reason to cope with the nature of the crisis serve as an impetus to explore new sources of normative renewal.

According to Isaiah Berlin the liberal tradition of tolerance and the appreciation of life’s imperfections is the ironic fruit of an intolerant European Romanticism. But the irony does not end there. For it might well turn out that the instrumental or pragmatic rationality of Liberalism may be coming undone for lack of what the Romantics craved most: *Eros*, enchantment, which is to say, the authenticating source of belief in an ideal, or cluster of ideals, that are needed to sustain an underlying *Mythos*.⁹⁶

To paraphrase Kafka, modern law remains valid, but there seems to be no mythic narrative left for law to police.⁹⁷ The hell that Grant Gilmore envisioned, namely: a world

in which there would be nothing but law⁹⁸, bears striking resemblance to Gersholm Scholem's reading of Kafka's parable, "Before the Law."⁹⁹ Commenting on the forsaken status of revelation in the modern era, Scholem said that today the law asserts itself, it has validity, but it lacks significance.¹⁰⁰

The baroque labyrinth of law's institutions, like the bureaucratic world depicted in Kafka's writings, ramifies law's presence everywhere. I believe there is a kinship in this respect between Kafka's evocation of validity without significance and the leveling effect of Bruno's metaphysical interpretation of the Copernican system.¹⁰¹ For Bruno, the transcendent realm of the divine has collapsed into the material world; and as goes the divinity, so goes the king, God's representative on earth.¹⁰² In Bruno's view, there are no longer any privileged points in the universe; the same infinite driving spirit pervades everything. Except that in the modern era, starting with Hobbes and Machiavelli, that transcendental spirit devolved into the secular mechanics and strategies of power in a political world of human design. With Foucault, we witnessed the devolution of the transcendent proceed further into the microphysics of disciplinary power within a metonymic system of economic exchange. Power could now be taken as a right that could be possessed, transferred, or alienated just like any other commodity.¹⁰³

Today, little is left of the royal power, the king's right that once metaphysically authorized western law. Ours is the dispensation of nominalism and the secular market. Like the characters in Kafka's *The Castle*¹⁰⁴, where sovereign authority is no more than a rumor, we too have been cut off. The door opening to the transcendent source of law's legitimation appears to have been shut tight.¹⁰⁵

Exiled from a living *nomos*, “the ‘state of emergency’ in which we live is not the exception but the rule.”¹⁰⁶ These words, penned by Walter Benjamin in 1940, carry an ominous familiarity today.

In the United States, for example, the rule of law, with its protective shield of liberal values, has been undermined by increasing privatization,¹⁰⁷ on the one hand, and by unchecked executive fiat on the other.¹⁰⁸ Consider in this regard the growing propertization of information on the Internet and the accompanying diffusion of law into a proliferating network of private licenses, personal electronic self-help programs, and private digital rights management systems. How quickly the Internet has gone from open source utopia to a warren of gated electronic communities.¹⁰⁹ Or consider the aggrandizement of executive power in the U.S. by the proliferation of presidential “signing statements.”¹¹⁰ Allegedly unreviewable claims of national security flaunt the logic of “reason of state” and openly defy the liberal conception of checks and balances.¹¹¹

Under present circumstances, it is becoming increasingly difficult to sustain fundamental liberal ideas such as Rawls’s notion of “a fair system of cooperation between citizens regarded as free and equal.”¹¹² How do we find support for this intuitive assertion? That is a question to which positivism, instrumental rationality, and the ideology of the market place can offer no fruitful response.

To the extent that law is more than command, more than obedience to rules, to the extent that law seeks legitimacy in a *nomos*, a living reality of shared normative beliefs, there may be no escaping the ‘second order’ domain of metaphysics. Born and bred in the

Eros of logos, metaphysics drives the quest for legitimating mythic narratives, over-determined symbols, and transcendent values.¹¹³

In this respect, I believe Peter Goodrich is right to be searching the early history of modern English law where he finds signs – literally visual emblems – that envision the union of wisdom and desire.¹¹⁴ These are signs of a legal knowledge that seduces and binds its subjects. They are signs that speak of (and from) a hidden, erotic reality. Goodrich refers to this invisible source as “the foundation of law.”¹¹⁵

At the time of the early modern English common law tradition, around the sixteenth century, these myths played out in public ceremony and rites. The same erotic binding power of law could be discerned in art, poetry, music, and dance: cultural forces that “humanize the human” in the institutionalization of the social.¹¹⁶ The emblematic images of early modern law betoken the invisible and unspoken, a mysterious reality that reaches us only indirectly, if at all. Their message addresses more than the body’s capacity for pleasure and pain – that Hobbesian register for law’s legitimation. The early modern emblem, like some of the moving emblems that we see today on contemporary screens, points beyond the visible surface of reality.

There is no direct path to this anagogic truth. One must work one’s way as through a maze, or a labyrinth. This is a crucial and recurrent trope of the baroque.

In baroque culture the labyrinth of form is self-consciously discerned and depicted. We see this in Velasquez’s monumental painting, *Las Meninas*, in which the subjectless subject of the painting has become the act of representation itself.¹¹⁷

Here the viewer’s gaze and the artist’s commingle, and in that dynamic exchange of vantage points the artifice of the painterly craft seems to become the chief focus of the

painting. It is a strange convergence of the baroque and the postmodern, where we look at looking, as the unseen subject's image bounces from the surface of the rear wall mirror to the surface of the painting itself.

This intensified kind of baroque self-reflexivity is a commonplace today. We see it in the endless play of digital simulation, (consider the dream world of *The Matrix*), and in the destabilized flux of simulacra, (as in Michel Gondry's and Charlie Kaufman's *Eternal Sunshine of the Spotless Mind*, where reality is endlessly being built up and torn down again in memories gained and lost).

Thus we return to one of the core themes of this essay: namely, the renewed significance of the baroque for our time. We live amid spectacles and shadows, but there are signs of a metaphysical truth, a second order reality that may lead beyond simulacra and illusion.

The hidden poetic structure of law (the *Eros* of law's *logos*) reveals desire deflected against itself. This recursive process opens up a social imaginary in which an ethics of care, the soul's living response to the other, may be enacted. Such a response points to a hidden foundation, a mythic core that is repressed by the commodified images of positive law's unreflexive, outward gaze. Behind what John Noonan once referred to as the mask of the law lies its hidden, ethical foundation: the repressed poetics of Justice.¹¹⁸

Today, the associative, connotative, affective discourse of the visual image on the screen speaks of commodified *Eros*, but it also speaks, if we let it, of something of immeasurably greater significance. The associative, affective logic of visual images help us to escape the disembodied logic of instrumental reasoning. When the flesh of the

image (what ethnographic film maker David MacDougal calls the “materiality” of the image¹¹⁹) arouses and transforms the viewer’s heart and soul in this way it invokes the *Eros* of law’s *logos*. When desire bends toward sublimated care for the other, it invokes law’s hidden source, which is Justice.

Unlike classical contract theory, or law as the command of the sovereign, the traditional origin stories for law, law metaphysically conceived begins with the ethics of obligation.

In the beginning, ethics turns away from abstract theory. Its origin lies closer to hand.¹²⁰ Ethics originates with the neighbor, the other who is near by. The primary ethical query asks: what does our neighbor demand of us?¹²¹ Standing face to face, the neighbor calls us. In our response to that primary ethical calling we affirm our ethical nature and give it a name. It is our own name, in recognition of the one who calls. It is the name of a finite being, charged with an impossible and inescapable task: to respond to the demand of ethical obligation. It is impossible because no human response to that infinite demand will ever exhaust it.

Ethical perfection, like Justice, is an aspirational value, an always yet-to-be. I call this infinite domain the ethical sublime. Its infinitude humbles us, and makes vivid the constraint our finitude imposes. Yet, at the same time, as Shira Wolosky notes, “each moral finitude must have positive responsibility for each other moral finitude.”¹²² In this dispensation, contrary to Heidegger, first philosophy is ethical, not ontological. The metaphysical is prior to the existential.¹²³

In our time, iconoclasm requires a neo-baroque aesthetic, a new eloquence to accommodate the elusiveness of incontrovertible facts.¹²⁴ But baroque aesthetics without

metaphysical resolve¹²⁵, baroque eloquence governed by the will to power, without any benchmark for moral finitude, without that sense of the ethical sublime which marks the proper boundaries of the finite self, may be destined to preside over a labyrinth of ruins.

Today we stand on the brink of “morality without institutions.”¹²⁶ Rescuing law from its current legitimization crisis will depend upon our remembrance of that which lay hidden in the neo-baroque shadows of endlessly proliferating form, beyond the digital matrix with its endless flow of contingent fragments. As Levinas has written, Justice in the face of the Other obliges us “to lodge the whole of humankind in the shelter of conscience.”¹²⁷

From the ethically embodied, metaphysically acute Elizabethan dramas of Shakespeare to their cinematic equivalent in the late modern films of Krzysztof Kieslowski, this call may yet be heard.¹²⁸

But are we attuned to hear it amid the engulfing din of neo-fundamentalist iconoclasm on the one hand, and the neo-baroque spectacle on the other? The challenge we face bears an ancient pedigree, but it is of critical importance in our time. How do we restore a more flourishing relationship between the ethical and the aesthetic, the good and the beautiful? Closely connected with this question is another: How do we bring the totalizing power of instrumental law into relation with the infinitude of justice?

There is no escape in simply denying the metaphysical anxiety over which neo-baroque culture currently presides. In jurisprudence the felt need to work through this anxiety calls for a return to first philosophy. The fate of the ethical, from which law’s hope for legitimacy derives, depends upon our response to this metaphysical turn.

¹ The critical break with medieval and Renaissance metaphysical thinking coincided with the rise of Baroque culture in seventeenth century Europe. Of particular note in this regard are the nominalist writings of Thomas Hobbes [*Leviathan* {1651}] and the rationalist philosophy of Rene Descartes [*Meditations on First Philosophy* {1641}]. See generally Jose Antonio Maravall, *Culture of the Baroque: Analysis of a Historical Structure* (1986). In our own time, leading juridical thinkers have left no doubt that metaphysical thinking is behind us. See, e.g., John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 245 (1985) (arguing that justice is essentially a political, not a metaphysical concept); Ronald Dworkin, *Law's Empire* (1986) (arguing that rights [or principles] and social policies [or collective goals] derive from a preferred 'political' theory); Jurgen Habermas, *Between Facts and Norms* (1998) ("Under the conditions of post-metaphysical thinking for which no plausible alternatives exist, despite fundamentalist reactions against the loss incurred by modernization, the state has lost its sacred substance.").

² Gianni Vattimo, *Nihilism & Emancipation: Ethics, Politics, & Law* (2003). In "Ethics Without Transcendence" *Common Knowledge* 9:3, (403), Vattimo has written: "[T]he emancipating sense that metaphysical absolutes have disintegrated is largely shared and by now so much a matter of common sense that whoever objects must bear the burden of proof."

³ See Friedrich Nietzsche, "On Truth and Lies in an Extra-Moral Sense," in *The Portable Nietzsche* (Walter Kaufmann ed., & trans. 1970) ("What, then, is truth? A mobile army of metaphors, metonyms, and anthropomorphisms – in short, a sum of human relations, which have been enhanced, transposed, and embellished poetically and rhetorically, and which after long use seem firm, canonical, and obligatory to a people...") 47.

⁴ The classic reference here is Peter Berger and Thomas Luckmann, *The Social Construction of Reality* (1966).

⁵ See, for example, Duncan Kennedy, "The Structure of Blackstone's Commentaries," 28 *Buff. L. Rev.* 205, 213 (1979) (describing the "fundamental contradiction" of American legal culture as "that relations with others are both necessary to and incompatible with our freedom"); and Pierre Schlag, "The Aesthetics of American Law," 115 *Harv. L. Rev.* 1047 (2002) ("What I am after is the description of those recurrent forms that shape the creation, apprehension, and identity of law. What is at stake is an attempt to reveal the aesthetics within which American law is cast.").

⁶ Clifford Geertz, *Local Knowledge* 232 (1983).

⁷ I am referring here to a fundamentalist theme that can be found in Islamic, Christian, as well as Jewish traditions.

⁸ See, e.g., Robert Jay Lifton, *Destroying the World to Save It* (2000); Haruki Murakami, *Underground: The Tokyo Gas Attack* (2001).

⁹ See, e.g., Margaret Aston, *England's Iconoclasts* (1988) at 103 ("Lay people were all too prone to worship particular images, to which they were blindly attached. Given the weakness of human nature 'it seems that safety would lie in removing such images, on account of the danger of breaking the first commandment.'" [quoting a sermon by Wycliffe]. Notably, Peter Goodrich has written that "the Anglican legal tradition was born of the Reformation and of the new form of letters, the printed text. In doctrinal terms it developed initially as an aspect of the protest against images and established itself through discourses against the distraction of images and idols of the mind." *Oedipus Lex* (1995) (ix).

¹⁰ See, e.g., Richard K. Sherwin, "A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling," 87 *Mich. Law Rev.* (1988) and "Law Frames," 47 *Stan Law Rev.* 401 (1994). The beginning of a shift in my thinking may be traced (in print) to "Law's Beatitude: A Post-Nietzschean Account of Legitimacy," 24 *Cardozo Law Rev.* 101 (2003).

¹¹ See Sherwin, "Law's Beatitude," supra note 10 ("The ecstasy of evil [in metaphysical beatitude] relieves intolerable suffering at the highest cost, the cost of death and sacrifice.") See also Walter Benjamin's "Critique of Violence" in *Walter Benjamin, Selected Writings Volume 1* (2000) 251 ("If I do not kill, I shall never establish the world dominion of justice... that is the argument of the intelligent terrorist.").

¹² Walter Benjamin, *The Origin of German Tragic Drama*, ([1963]1998) 74 ("The function of the tyrant is the restoration of order in the state of emergency...").

¹³ My use of the term "metaphysical" in this context tracks the term's use by Emmanuel Levinas. To speak of justice implicates infinity. The infinite is that which cannot be encompassed within a totality. Infinity begins with the first philosophy of ethics, which Levinas speaks of as "transcendence in the face of the Other." *Totality and Infinity* (1988) 24. According to Levinas, "The experience of morality does not

proceed from this vision [of eschatology, which Levinas distinguishes from the revealed opinions of positive religions] – it *consummates* this vision; ethics is an optics. But it is a ‘vision’ without image, bereft of the synoptic and totalizing objectifying virtues of vision...” Id. at 23 (emphasis in original).

¹⁴ See Richard K. Sherwin, "Law in Popular Culture," chapter in *The Oxford Companion to American Law* (Oxford University Press, 2004); Richard K. Sherwin, *Popular Culture and Law* (2006); Richard K. Sherwin, *When Law Goes Pop* (2000).

¹⁵ The classic cite here is to Robert Cover’s “Nomos and Narrative” 97 *Harv. Law Rev.* 4 (1983). See also Richard K. Sherwin, “Nomos and Cinema,” 48 *UCLA L. Rev.* 1519 (2001).

¹⁶ See note 14, *supra*. See also Anthony G. Amsterdam and Jerome Bruner, *Minding the Law* (2000).

¹⁷ See Richard K. Sherwin, Neal Feigenson, & Christina O. Spiesel *Communication Technologies are Transforming the Practice, Theory, and Teaching of Law*, 12 *B.U. J. SCI. & TECH. L.* (forthcoming 2006). To view a video clip of a multi-media montage used in the closing argument of a murder prosecution, go to <http://www.npr.org/templates/story/story.php?storyId=4473947>. For a broad array of visual images illustrative of visual evidence and visual argument currently in use in American legal practice, visit: www.nyls.edu/visualpersuasion.

¹⁸ See, e. g. Richard K. Sherwin, Neal Feigenson, & Christina O. Spiesel, note 17 *supra* (text at note 114) (discussing a case in which a videotape featuring the visual metaphor of the Titanic served as the entire closing argument).

¹⁹ Richard Lanham, *The Electronic Word* (1993).

²⁰ See <http://images.google.com/images?hl=en&q=bunraku&btnG=Search+Images&gbv=2>; Bruno Latour, *Iconoclasm* website at http://www.bruno-latour.fr/livres/cat_icono_chap.html.

²¹ Cf. Walter Benjamin’s reference to theology as the hidden, humpbacked dwarf chess-player who controls the strings of the puppet called historical materialism, in “On the Concept of History,” Walter Benjamin, *Selected Writings* vol. 4 (2003) 389.

²² See, for example, the testimony of Colin Powell at the United Nations on weapons of mass destruction in Iraq and accompanying images, sources:

http://www.infoimagination.org/politics/features/niger/powell_un_2.jpg;
http://images.google.com/imgres?imgurl=http://www.thinkandask.com/images/iraqweapon.gif&imgrefurl=http://www.thinkandask.com/news/colinpowell.html&h=226&w=300&sz=48&hl=en&start=1&tbnid=Rs25b_Nxd6d4dM:&tbnh=87&tbnw=116&prev=/images%3Fq%3Dcolin%2Bpowell%2BUN%26svnum%3D10%26hl%3Den%26lr%3D%26sa%3DG.

²³ See, e.g., Daniel Gilbert, “How Mental Systems Believe,” *American Psychologist* vol. 46, No. 2, 107-119 (1991)

²⁴ See Walter Benjamin, *The Origin of German Tragic Drama* (examining the origin of the German baroque mourning play as an allegory of Weimar era politics); see generally Aston, note 9, *supra* (on iconoclasm and the Reformation).

²⁵ See in this regard Jay David Bolter & Richard Grusin, *Remediation: Understanding New Media* (2000) (discussing how the logic of remediation depends upon the inter-related logics of transparency and hypermedia).

²⁶ One such war involves the clashing media of invisible words, on the one hand, and visual images/icons/ceremonies, on the other. See Bruno Latour, *Iconoclasm: Beyond the Image Wars* (2002).

²⁷ See Emile Durkheim, *Sociology and Philosophy* (1974) 92.

²⁸ Cf. Ann Kibbey, *Theory of the Image* (2005) (in which the author brilliantly connects the iconoclasm of the Protestant Reformation with the contemporary fetishization of image commodities in conjunction with the hidden [‘invisible’] body of the corporation).

²⁹ For an illustrative image, go to: <http://www.arikah.com/encyclopedia/Iconoclasm>.

³⁰ For an illustrative image, go to:
<http://images.google.com/imgres?imgurl=http://metamedia.stanford.edu/imagebin/Bamiyan.jpg&imgrefurl=http://metamedia.stanford.edu/~mshanks/weblog/%3Fm%3D200405&h=250&w=300&sz=15&hl=en&start=22&tbnid=tzyH8TLYtpG3hM:&tbnh=97&tbnw=116&prev=/images%3Fq%3Dbamiyan%2Bbuddhas%2B%26start%3D20%26ndsp%3D20%26svnum%3D10%26hl%3Den%26lr%3D%26sa%3DN>.

³¹ For an illustrative image, go to:

<http://images.google.com/imgres?imgurl=http://www.newspaperindex.com/blog/wp-images/Muhammed%2520drawing%2520newspaper.jpg&imgrefurl=http://blog.newspaperindex.com/2005>

[/10/16/newspaper-threatened-after-mohammed-cartoons/&h=563&w=450&sz=12&hl=en&start=3&tbnid=eC0whldHcERsqM:&tbnh=133&tbnw=106&prev=/images%3Fq%3Dcartoons%2Bmohammad%26svnum%3D10%26hl%3Den%26lr%3D.](#)

³² See Max Horkheimer, *The Dialectic of Enlightenment* (1976); Theodor Adorno, *The Adorno Reader* (2000).

³³ For an illustrative image, go to:

http://images.google.com/imgres?imgurl=http://siteimages.guggenheim.org/gpc_work_large_201.jpg&imgrefurl=http://www.guggenheimcollection.org/site/movement_work_lg_Pop_art_163_1.html&h=573&w=440&sz=82&hl=en&start=35&tbnid=ugBUggoIE3b0_M:&tbnh=134&tbnw=103&prev=/images%3Fq%3Dandy%2Bwarhol%2Bsilkscreen%26start%3D20%26ndsp%3D20%26svnum%3D10%26hl%3Den%26lr%3D%26sa%3DN;

<http://images.google.com/imgres?imgurl=http://www.zwirnerandwirth.com/exhibitions/2005/POP0505/images/Four%2520Marilyns%2520ecopy.jpg&imgrefurl=http://www.zwirnerandwirth.com/exhibitions/2005/POP0505/fourM.html&h=550&w=433&sz=274&hl=en&start=136&tbnid=ImtVE8dyhcWCzM:&tbnh=133&tbnw=105&prev=/images%3Fq%3Dandy%2Bwarhol%2Bsilkscreen%26start%3D120%26ndsp%3D20%26svnum%3D10%26hl%3Den%26lr%3D%26sa%3DN.>

³⁴ See Ann Kibbey, *supra* note 28, at 15. For illustrative images, go to:

http://www.c4dgallery.com/uploads/nutriman_nike_o.jpg;

<http://www.ne.jp/asahi/com/koyama/coke/fo/images/us-80-003-s.JPG>;

[http://www.coca-](http://www.coca-colastore.com/coke/images/MEDIA_CustomProductCatalog/b2cm513288_410000372692_L.jpg)

[colastore.com/coke/images/MEDIA_CustomProductCatalog/b2cm513288_410000372692_L.jpg.](http://www.coca-colastore.com/coke/images/MEDIA_CustomProductCatalog/b2cm513288_410000372692_L.jpg)

³⁵ For an illustrative image, go to:

[http://www.rareads.com/scans/13589.jpg.](http://www.rareads.com/scans/13589.jpg)

³⁶ For illustrative images, go to: <http://vj-anshu.smugmug.com/photos/68022024-O.jpg>;

[http://i14.ebayimg.com/04/i/05/6d/5f/bf_1.JPG.](http://i14.ebayimg.com/04/i/05/6d/5f/bf_1.JPG)

³⁷ See [Larry and Andy Wachowski NUMBERED SHOOTING SCRIPT March 29, 1998](#):

http://www.dailyscript.com/scripts/the_matrix.pdf (“When I used to look out at this world, all I could see was its edges, its boundaries, its rules and controls, its leaders and laws. But now, I see another world. A different world where all things are possible. A world of hope. Of peace.”).

³⁸ See Kibbey, note 28, *supra*.

³⁹ See Latour, *Iconoclasm*, note 21, *supra*.

⁴⁰ Bill Nichols, *Blurred Boundaries: Questions of Meaning in Contemporary Culture* (1994) 1. See also Gabriel Weimann, *Communicating Unreality* (2000) 3 (“Modern humanity, several communication scholars argue, is increasingly experiencing a mediated world rather than reality itself.”).

⁴¹ See, e.g., Robert Jay Lifton, *The Protean Self* (1999).

⁴² Daniel J. Boorstin, *The Image: A Guide to Pseudo-Events in America* (1961).

⁴³ Frederic Jameson, *Postmodernism, or, The Cultural Logic of Late Capitalism*, (1991) 66 (noting that the simulacrum's function “lies in what Sartre would have called the derealization of the whole surrounding world of everyday reality.”).

⁴⁴ See generally Jean Baudrillard, *Simulacra and Simulation* (Sheila Faria Glaser trans., 1994) (1981) 160-161 (noting that whereas modernity is concerned with “the immense process of the destruction of appearances ... in the service of meaning,” post-modernism addresses the “immense process of the destruction of meaning, equal to the earlier destruction of appearances.”).

⁴⁵ Jean Baudrillard, *Baudrillard Live* (Mike Gane ed., 1993) 141.

⁴⁶ “We possess indeed simulacra of morality, we continue to use many of the key expressions. But we have -- very largely, if not entirely -- lost our comprehension, both theoretical and practical, of morality.” “What we possess, if this view is true, are the fragments of a conceptual scheme, parts which now lack those contexts from which their significance derived.” ALASDAIR MACINTYRE, *AFTER VIRTUE* 2 (2d ed. 1984).

⁴⁷ See, for example, Frances Flannery-Dailey, “Robot Heavens and Robot Dreams: Ultimate Reality in *A.I.* and Other Recent Films,” in Vol. 7 No. 2 (October 2003) *Journal of Religion and Film*. See also Steven Johnson, “The Science of *Eternal Sunshine* YOU CAN'T ERASE YOUR BOYFRIEND FROM YOUR BRAIN, BUT THE MOVIE GETS THE REST OF IT RIGHT,” source:

<http://www.slate.com/id/2097502/>

⁴⁸ [Pedro Calderon de la Barca](#), *Life is a Dream* (1998 [1636 or 1637]).

⁴⁹ The Matrix, note 37, *supra* (MORPHEUS: “This is the world you know. The world as it was at the end of the Twentieth Century. It exists now only as part of a neural-interactive simulation that we call the Matrix.”).

⁵⁰ Mulholland Drive shooting script (http://www.dailyscript.com/scripts/mulholland_drive.html):

HERB

Okay, so you had a dream about this place. Tell me.

DAN

Well ... it's the second one I've had, but they were both the same.....they start out that I'm in here but it's not day or night. It's kinda half night, but it looks just like this except for the light, but I'm scared like I can't tell ya. Of all people you're standing right over there by that counter. You're in both dreams and you're scared. I get even more frightened when I see how afraid you are and then I realize what it is - there's a man...in back of this place. He's the one ... **he's the one that's doing it.** I can see him through the wall. I can see his face and I hope I never see that face ever outside a dream.” (emphasis added)

⁵¹ See Richard K. Sherwin, “Anti-Oedipus, Lynch: Initiatory Rites and the Ordeal of Justice,” chapter in Austin Sarat, ed., *Law on the Screen* (Stanford University Press, 2005). See also Isaiah Berlin, *The Roots of Romanticism* (107) (on Romantic paranoia: “Someone is at the back of it all: perhaps the Jesuits, perhaps the Jews, perhaps the Freemasons.”).

⁵² See, e.g., Thomas A. Sebeok, *Signs* (1994); see also Pierre Schlag, “Normative and Nowhere to Go,” 43 *Stanf. L. Rev.* 167 (1990).

⁵³ See, e.g., the “Received View” of trials in Robert P. Burns, *A Theory of the Trial* (1999); see also Charles Nesson, “The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts,” 98 *Harv. L. Rev.* 1357 (1985).

⁵⁴ See <http://arthistory.westvalley.edu/images/R/REMBRANDT/MEDITATE.JPG>; <http://www.wga.hu/art/c/caravagg/07/45death.jpg>.

⁵⁵ See Isaiah Berlin, note 51 *supra*, at 101-103 (“I wish to convey something immaterial and I have to use material means for it. I have to convey something which is inexpressible and I have to use expression. I have to convey, perhaps, something unconscious and I have to use conscious means.”).

⁵⁶ See Jacques Derrida, *The “Mystical Foundation of Authority,”* in *Deconstruction and the Possibility of Justice* 1, 23 (Drucilla Cornell et al. eds. 1992).

⁵⁷ See Emmanuel Levinas, *Philosophie, Justice, Amour*, in *Entre Nous: Essai sur le Penser a L'autre* 114-15 (1991) (“The relation to the face is all at once the relation to the absolutely weak - what is absolutely exposed, what is naked and what is deprived ... and at the same time ... the face is also the “Thou shall not kill” ... It is the fact that I cannot let the other die alone, it is as though there were [from the face] an appeal to me For me, he is above all the one for which I am responsible... . It is always from the face, from my responsibility for the other, that justice emerges.”) cited in Shoshana Felman, “READING LEGAL EVENTS: A GHOST IN THE HOUSE OF JUSTICE: DEATH AND THE LANGUAGE OF THE LAW,” 13 *Yale J.L. & Human.* 241, 282 (2001).

⁵⁸ See Ann Kibbey, *supra* 28, note at 10-12.

⁵⁹ See Shira Wolosky, [“A Reply to Vattimo”] *Common Knowledge* 9:3.

⁶⁰ See Isaiah Berlin, note 51 *supra*, at 104.

⁶¹ Fernand Hallyn and Donald Leslie, *The Poetic Structure of the World: Copernicus and Kepler* (1993) (on the deformity of motion – counter to the perfect symmetries, the circle and natural state of rest at the core of the Enlightenment). See also Berlin note 51 supra, at 105. For a sense of the baroque sensibility at its height, see http://www.artlex.com/ArtLex/b/images/baroq_bermini.throne.lg.jpg;

http://www.luc.edu/depts/history/dennis/Visual_Arts/101Images/21_21.07-190_Bernini_Baldacchino.jpg.

⁶² See Richard K. Sherwin, “Anti-Oedipus, Lynch: Initiatory Rites and the Ordeal of Justice,” in *Law on the Screen* 106, 126 (Austin Sarat, Lawrence Douglas, & Martha Merrill Umphrey eds., 2005) (“[L]ike arabesques endlessly improvising their monadic design, baroque ornamentation proliferated, dizzying, decentering, even nauseating in their spatial onslaught.”). See also Heinrich Wölfflin, *Renaissance and Baroque* 34 (1964) (noting that the baroque seeks to stimulate the imagination through infinite figurations); Gilles Deleuze, *The Fold* 3 (1993) (“[T]he Baroque differentiates its folds in two ways, by moving along two infinities, as if infinity were composed of two stages or floors: the pleats of matter, and the folds of the soul.”). The notion that we live in a universe of endless representations is experienced by some not as a source of anxiety but rather as an opportunity for freedom and self-realization. See, e.g., Vilem Flusser, *The Shape of Things: A Philosophy of Design* 65 (1999) (“What the cultural revolution now under way is all about is that we have gained the ability to set alternative worlds alongside the one taken by us as given.”). See also *The Matrix* (Warner Studios, 1999) note 37 supra. For a critique of cyberculture’s utopian strands, see Kevin Robins, *Into the Image: Culture and Politics in the Field of Vision* (1996).

⁶³ See Richard K. Sherwin, Neal Feigenson, & Christina O. Spiesel, note 18 supra.

⁶⁴ See Richard Rorty, “Foreword,” in Gianni Vattimo, *Nihilism & Emancipation: Ethics, Politics, & Law* xvii (2004) (“[T]he Internet provides a model for things in general – thinking about the World Wide Web helps us to get away from Platonic essentialism, the quest for underlying natures, by helping us to see everything as a constantly changing network of relations.”) In audio form this model may be best represented in audio form by “the Mix” (see, e.g., Paul D. Miller, a/k/a DJ Spooky, *Rhythm Science* (2004)), and in visual form by the complex and ever changing network of relations known as the World Wide Web. Of course, computer scientists and engineers who help make digital experience possible might share a different perspective. For them, cyberculture is enabled by technology that relies on mathematical and other scientific reasoning which may be regarded as a thoroughly Enlightenment (or Cartesian) enterprise. See, e.g., Vilem Flusser, *Towards A Philosophy of Photography* 68 (1983) (“[Apparatuses] are omniscient and omnipotent. For in these universes, a concept, an element of the program of the apparatus, is actually assigned to every point, every element of the universe.”)

⁶⁵ For some interesting takes on the “new baroque,” see Omar Calabrese, *Neo Baroque: A Sign of the Times*, (1987); Angela Ndaliansi, *Neo-Baroque Aesthetics and Contemporary Entertainment* (2004); and Gilles Deleuze, *The Fold – Leibniz and the Baroque* (1993).

⁶⁶ See Jean Rousset, *La Litterature de l’Age baroque en France* (1965) 150-154.

⁶⁷ See [Bruno Latour](#), note 26.

⁶⁸ [Jean Baudrillard](#), *Gulf War Did Not Take Place* (1991).

⁶⁹ Id.

⁷⁰ For illustrative images, go to:

http://images.google.com/imgres?imgurl=http://images.usatoday.com/news/photos/2005/04/28/abu-ghraib-inside.jpg&imgrefurl=http://www.usatoday.com/news/world/iraq/2005-04-27-abu-ghraib-changes_x.htm&h=210&w=180&sz=15&hl=en&start=13&tbnid=IBdACJwuDY8xM:&tbnh=106&tbnw=91&prev=/images%3Fq%3DAbu%2BGhraib%2B%26ndsp%3D20%26svnum%3D10%26hl%3Den%26lr%3D%26sa%3DN;
[http://images.google.com/imgres?imgurl=http://www.telegraph.co.uk/news/graphics/2006/02/16/wtor_t16.jpg&imgrefurl=http://www.telegraph.co.uk/news/main.jhtml%3Fxml%3D/news/2006/02/16/wtor_t16.xml&h=323&w=324&sz=27&hl=en&start=2&tbnid=C_1wORH0HJR1pM:&tbnh=118&tbnw=118&prev=/images%3Fq%3DAbu%2BGhraib%2B%26ndsp%3D20%26svnum%3D10%26hl%3Den%26lr%3D%26sa%3DN.](http://images.google.com/imgres?imgurl=http://www.telegraph.co.uk/news/graphics/2006/02/16/wtor_t16.jpg&imgrefurl=http://www.telegraph.co.uk/news/main.jhtml%3Fxml%3D/news/2006/02/16/wtor_t16.xml&h=323&w=324&sz=27&hl=en&start=2&tbnid=C_1wORH0HJR1pM:&tbnh=118&tbnw=118&prev=/images%3Fq%3DAbu%2BGhraib%2B%26ndsp%3D20%26svnum%3D10%26hl%3Den%26lr%3D%26sa%3DN;)

⁷¹ For illustrative images, go to:

[http://images.google.com/imgres?imgurl=http://images.washtimes.com/photos/full/20060629-123645-9615.jpg&imgrefurl=http://washingtontimes.com/national/20060630-121949-9439r.htm&h=231&w=336&sz=26&hl=en&start=90&tbnid=2mRcCdfMZY43LM:&tbnh=82&tbnw=119&prev=/images%3Fq%3Dguantanamo%2Bprison%26start%3D80%26ndsp%3D20%26svnum%3D10%26hl%3Den%26lr%3D%26sa%3DN.](http://images.google.com/imgres?imgurl=http://images.washtimes.com/photos/full/20060629-123645-9615.jpg&imgrefurl=http://washingtontimes.com/national/20060630-121949-9439r.htm&h=231&w=336&sz=26&hl=en&start=90&tbnid=2mRcCdfMZY43LM:&tbnh=82&tbnw=119&prev=/images%3Fq%3Dguantanamo%2Bprison%26start%3D80%26ndsp%3D20%26svnum%3D10%26hl%3Den%26lr%3D%26sa%3DN;)

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- ⁷² See note 67, supra. See also <http://www.bruno-latour.fr/articles/article/images/084-1.jpg>; [http://upload.wikimedia.org/wikipedia/en/thumb/d/de/Piss_Christ_by_Serrano_Andres_\(1987\).jpg/200px-Piss_Christ_by_Serrano_Andres_\(1987\).jpg](http://upload.wikimedia.org/wikipedia/en/thumb/d/de/Piss_Christ_by_Serrano_Andres_(1987).jpg/200px-Piss_Christ_by_Serrano_Andres_(1987).jpg); <http://www.orbit.zkm.de/files/cattalanNinthHour01a.jpg>.
- ⁷³ For a broad range of visual images used as legal evidence and argument in contemporary legal practice, go to the Visual Persuasion website: <http://www.nyls.edu/pages/2734.asp>.
- ⁷⁴ Latour at note 59, supra.
- ⁷⁵ See Peter Goodrich, *Oedipus Lex* (1995) 51, 56 (“In synoptic terms the *Antirretici* defend the icon as the model of an immediate relation between the visible and the invisible, the present and the absent, divinity and its manifest form: the icon represents the archetype, and it alone can direct the human eye from material forms to incorporeal truth... The war of, or against, images was fought for control of what in the Renaissance and in postmodernity is reckoned as being the ultimate means of persuasion and conversion, of communication, knowledge, and power.”)
- ⁷⁶ Jay David Bolter, Richard Grusin, *Remediation: Understanding New Media* (2000). See <http://www.english.ucsb.edu/faculty/ayliu/unlocked/hypermediated-desktop.gif>;
- ⁷⁷ See Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government* ([1823]1977) 411 (“The pestilential breath of Fiction poisons the sense of every instrument it comes near.”).
- ⁷⁸ See Baudrillard, note 44 supra.
- ⁷⁹ See Robert Yelle, “Bentham’s Fictions: Canon and Idolatry in the Genealogy of Law,” 17 *Yale J.L. & Human.* 151 (2005).
- ⁸⁰ Latour, note 26 supra.
- ⁸¹ Benjamin, note 12 supra.
- ⁸² See, e.g., Own Roy, *Globalized Islam The Search for a New Ummah* (2004).
- ⁸³ Go to: http://en.wikipedia.org/wiki/Sarin_gas_attack_on_the_Tokyo_subway.
- ⁸⁴ See note 8 supra.
- ⁸⁵ See Andrew Sharp, *The English Levellers* (1998).
- ⁸⁶ See Peter Goodrich, “The Iconography of Nothing,” in Costas Douzinas & Lynda Nead, *Law and the Image* (1999): 100-102
- ⁸⁷ Id.
- ⁸⁸ See e.g., Corey Robin, *Fear: The History of a Political Idea* (2004).
- ⁸⁹ See Ernst Kantorowicz, *The King’s Two Bodies* (1957).
- ⁹⁰ See Ann Kibbey, note 28 supra. See <http://images.npg.org.uk/OCimg/web/guest/5/9/mw00459.jpg>
- ⁹¹ See generally Guyora Binder and Robert Weisberg, *Literary Criticisms of Law* (2000). Conservative and liberal jurists alike seem to share this common pragmatic and social constructivist premise. For example, the conservative jurist Richard Posner finds ‘promise’ in the work of such left-leaning constructivist legal thinkers as Jack Balkin, Pierre Schlag, and Steven Winter. See Posner’s *Overcoming Law* (1995) (317).
- ⁹² See Jurgen Habermas, *The Theory of Communicative Action* (1985).
- ⁹³ See Habermas, *Between Facts and Norms* (1997).
- ⁹⁴ Philip Bobbitt, *Achilles’s Shield* (2000).
- ⁹⁵ See Habermas, note 93 supra.
- ⁹⁶ See Richard K. Sherwin, *When Law Goes Pop*, note 14 supra, at 230-33.
- ⁹⁷ See Richard K. Sherwin, *Law’s Beatitude*, 24 *Cardozo L. Rev.* 683, 685 (2003). see also Goerges Sorel, *Reflections on Violence ([1915]1941)* 27 (“I can understand the fear of this myth of the general strike in many worthy progressives on account of its character of *infinity*...the myth of the ‘general strike’ implies an absolute revolution.” Id. at 35 (“[B]ergson has taught us that it is not only religion which occupies the profounder region of our mental life; revolutionary myths have their place there equally with religion.” (130-131) (“[U]se must be made of image which, *by intuition alone*, and before any considered analyses are made, is capable of evoking as an undivided whole the mass of sentiments which corresponds to the different manifestations of the war undertaken by Socialism against modern society.”).
- ⁹⁸ Grant Gilmore, *The Ages of American Law* (1979).
- ⁹⁹ See Franz Kafka, *The Trial* 267 (Alfred A. Knopf, Inc., E.M. Butler rev definitive ed, Willa Muir and Edwin Muir trans, 1956); see also Jacques Derrida, *Before the Law*, in Jacques Derrida, *Acts of Literature* 181-220 (Derek Attridge ed., 1992).
- ¹⁰⁰ Richard K. Sherwin, *Law’s Beatitude*, 24 *Cardozo L. Rev.* 683, 685 (2003). See also Gershom Scholem, *The Correspondence of Walter Benjamin and Gershom Scholem 1932-1940*, at 142 (G. Scholem ed.,

Anson Rabinbach trans., 1992) (describing the "nothingness of revelation" as "a state in which revelation appears to be without meaning, in which it still asserts itself, in which it has validity but no significance."); Eric L. Santner, *On the Psychotheology of Everyday Life: Reflections on Freud and Rosenzweig* 38-39 (2001) (linking the "nothingness of revelation" with trauma - "a breakdown in meaning" that leaves the mind "possessed or haunted, under the 'ban' of something that profoundly matters without ... anything resembling an orientation in the world").

¹⁰¹ See Ernst Cassirer, *The Myth of the State* (1946) 133.

¹⁰² Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (1957) 58 ("The king is the perfect impersonator of Christ on earth."). See *Id.* at 312 ("The king who never dies is the head of the one-man corporation that never dies.").

¹⁰³ See Michel Foucault, "Two Lectures," in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977* 98 (Colin Gordon ed., 1980) 88. See also Ann Kibbey, *Theory of the Image* (2005) 5-20 and Rosemary J. Coombe, *The Cultural Life of Intellectual Properties* (1988) and Coombe, *Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 *IND.J. GLOBAL LEGAL STUD.* 59, 100-03 (1999).

¹⁰⁴ Franz Kafka, *The Castle* (Willa & Edwin Muir et al. eds., definitive ed. 1954) (1930).

¹⁰⁵ See Franz Kafka, note 99, *supra*.

¹⁰⁶ Walter Benjamin, "On the Concept of History," note 21 *supra*, at 392.

¹⁰⁷ See, e.g., MARTHA MINOW, "OUTSOURCING POWER: HOW PRIVATIZING MILITARY EFFORTS CHALLENGES ACCOUNTABILITY, PROFESSIONALISM, AND DEMOCRACY," 46 *B.C. L. Rev.* 989 (2005). See also P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003).

¹⁰⁸ See generally Kim Lane Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11," 6 *U. Pa. J. Const. L.* 1001 (2004).

¹⁰⁹ See generally Neil Weinstock Netanel, "Cyberspace 2.0+," 79 *Tex. L. Rev.* 447 (2000); Yochai Benkler, *The Wealth of Networks* (2006).

¹¹⁰ See, e.g., Charlie Savage, "Bush challenges hundreds of laws," *Boston Globe* (April 30, 2006) ("President Bush has quietly claimed the authority to disobey more than 750 laws enacted since he took office, asserting that he has the power to set aside any statute passed by Congress when it conflicts with his interpretation of the Constitution."); John Dean, "The Problem with Presidential Signing Statements: Their Use and Misuse by the Bush Administration," writ.news.findlaw.com/dean/20060113.html (Jan. 13, 2006) ("Rather than veto laws passed by Congress, Bush is using his signing statements to effectively nullify them as they relate to the executive branch."). AMERICAN BAR ASSOCIATION, *TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE* 20 (Aug. 2006), available at <http://www.abanet.org/op/signingstatements>; but see Memorandum from Walter Dellinger to the Counsel to the President, *The Legal Significance of Presidential Signing Statements* (Nov. 3, 1993), available at <http://www.usdoj.gov/olc/signing.htm>.

¹¹¹ See generally Oren Gross, "EXCEPTION AND EMERGENCY POWERS: THE NORMLESS AND EXCEPTIONLESS EXCEPTION: CARL SCHMITT'S THEORY OF EMERGENCY POWERS AND THE "NORM-EXCEPTION" DICHOTOMY," 21 *Cardozo L. Rev.* 1825 (2000);

¹¹² John Rawls, "Overlapping Consensus," in *Collected Papers* (2001) 481.

¹¹³ See generally Giuseppe Mazzotta, *The New Map of the World: The Poetic Philosophy of Giambattista Vico* (1999).

¹¹⁴ See Peter Goodrich, "A Theory of the Nomogram," in Peter Goodrich, Lior Barshack, and Anton Schutz, *Law, Text, Terror* (2006): 21 ("The emblem is the preserver or at least the most explicit protector of the founding myths of law.").

¹¹⁵ See also Jacques Derrida, "The Mystical Foundation of Authority," in Drucilla Cornell, Michel Rosenfeld, and David Carlson, *Deconstruction and the Possibility of Justice* (1992): 14.

¹¹⁶ See Goodrich, note 114 *supra*.

¹¹⁷ See <http://www.ibiblio.org/wm/paint/auth/velazquez/velazquez.meninas.jpg>.

¹¹⁸ John T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* (1976).

¹¹⁹ David MacDougal, *Transcultural Cinema*, 73. See also Hal Foster, *Vision and Visuality* (1988): 8 (referring to Augustine's notion of "ocular desire" as "the moment of erotic projection in vision").

¹²⁰ "'The true life is absent.' But we are in the world." So begins Emmanuel Levinas's seminal text, *Totality and Infinity* (1969).

¹²¹ See *Id.* at 43 ("We name this calling into question of my spontaneity by the presence of the Other ethics."). See also Sorel, note 97 *supra*, at 241-2 ("'To be ready to defend [the dignity of man] in every circumstance with energy, and, if necessary, against oneself, that is Justice... There is a tendency in every man to develop and force the acceptance of that which is essentially himself – which is, in fact, his own dignity. It results from this that the essential in man being identical and one for all humanity, each of us is aware of himself at the same time as individual and as species; and that an insult is felt by a third-party and by the offender himself as well as by the injured person, that in consequence the protest is common. This precisely is what is meant by Justice.'" [quoting Proudhon]). See also Richard Wolin on Walter Benjamin, ("The elements of the end condition are not present as formless tendencies of progress, but instead are embedded in every present as endangered, condemned, and ridiculed creations and ideas. The historical task is to give absolute form in a genuine way to the immanent condition of fulfillment, to make it visible and predominant in the present... [H]owever, it is only comprehensible in its metaphysical structure, like the messianic realm or the idea of the French Revolution."), cited in Anson Rabinbach, *In the Shadow of Catastrophe* (1997)45.

¹²² Shira Wolosky, ["A Reply to Vattimo"] *Common Knowledge* 9:3 ("Levinas's idea of otherness establishes a relationship that removes from any self a right of incursion into any other self." "Each moral finitude is by nature not negotiable – protected, defended, and entitled to be sustained.")

¹²³ See Levinas, note 119 *supra*, at 48 ("This 'saying to the Other' – this relationship with the other as Interlocutor, this relation with an existent – precedes all ontology: it is the ultimate relation in Being. Ontology presupposes metaphysics.").

¹²⁴ See Bruno Latour, *Iconoclasm*, note 26 *supra*. See also Dorota Glowacka, "Ethical Figures of Otherness: Jean-Luc Nancy's Sublime Offering and Emmanuel Levinas's Gift to the Other," in *Future Crossings* (Krzysztof Ziarek and Seamus Deane, ed. 2000).

¹²⁵ What Levinas aptly calls "metaphysical desire" is perhaps not unlike Laplanche's notion of unconscious desire writ large. See Jean Laplanche, *Vie et mort en psychanalyse* (2001). See Levinas, note 119 *supra*, at 34 ("Desire is absolute if the desiring being is mortal and the Desired invisible. Invisibility does not denote an absence of relation; it implies relations with what is not given, of which there is no idea.").

¹²⁶ Emmanuel Levinas, *Proper Names* (1997)122. See also David Cayley, *The Rivers North of the Future: The Testament of Ivan Illich*, (Anansi Press: Toronto, 2005): 221-23.

¹²⁷ *Id.*

¹²⁸ See Richard K. Sherwin, "Law's Enchantment: The Cinematic Jurisprudence of Krzysztof Kieslowski," in Michael Freeman's *Law and Popular Culture* (Oxford University Press, 2005).