Evidence Verité and the Law of Film

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INTRODUCTION

This Article explores a puzzle concerning the authority of certain film images that increasingly find themselves at the center of lawsuits in the United States. These are surveillance or “real time” film images that purport to capture an event from the past about which there is a dispute. Increasingly, this kind of “evidence verité”—film footage of arrests, criminal confessions, and crime scenes—is routinely admitted in U.S. courts of law as the best evidence of what happened. This kind of evidence tends to overwhelm all other evidence, such as witness testimony, paper records, and other documentary evidence. Evidence verité also tends to be immune to critical analysis. It is rarely analyzed.

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1 See generally Jessica M. Silbey, Filmmaking in the Precinct House and the Genre of Documentary Film, 29 COLUM. J.L. & ARTS 107 (2005) [hereinafter Silbey, Filmmaking in the Precinct House] (observing that film is increasingly being used as a policing tool to monitor police and suspect interactions because it appears to provide an objective and unambiguous representation of past events); Jessica M. Silbey, Judges as Film Critics: New Approaches to Filmic Evidence, 37 U. MICH. J.L. REFORM 493 (2004) [hereinafter Silbey, Judges as Film Critics] (describing variety of film evidence and the problems and contradictions that occur when judges unconsciously act as film critics when determining the admissibility and weight of film evidence); see also Jessica Silbey, Criminal Performances: Film, Autobiography, and Confession, 37 N.M. L. REV. 189, 218-40 (2007) [hereinafter Silbey, Criminal Performances] (discussing the filming of criminal confessions in particular).

2 See Silbey, Judges as Film Critics, supra note 1, at 507-20.


4 Silbey, Cross-Examining Film, supra note 3, at 25.

5 Silbey, Judges as Film Critics, supra note 1, at 499, 507-09.
for its ambiguity, its bias, or its incompleteness. To the contrary, it is most often admitted without any cross-examination at all. Why would this be so?

The treatment of evidence verité is particularly intriguing given another contemporary trend: the rise of the documentary film as mainstream entertainment. Of the top thirty grossing documentaries of all time, twenty-five of them were made in the past decade. A glance at this list confirms that these films participate in the generic conventions of documentary: they are forms of advocacy. These titles include: *Fahrenheit 9/11*, *Sicko*, *An Inconvenient Truth*, *Super Size Me*, *Enron: The Smartest Guys in the Room*, and *The Fog of War*. Calling these films “advocacy” does not demean their clarity or power. It merely emphasizes what is obvious to most film makers and film scholars: that films—all films—tell a story but certainly not the only story that could be told about a particular issue. Film historians confirm that “[c]ontrary to existing idealized expectations of documentary film, the documentary genre has never aimed to objectively depict real life. It has always been a form of artistic and politicized expression, representing at least one version [but not the only version] of some historic event.” Indeed, the first popular documentary film—Robert Flaherty’s *Nanook of the North* (1914)—was staged. The documentary films that followed were state-sponsored to encourage participation in or support for state programs. These included Dziga Vertov’s newsreal montages (promoting the promise of the Bolshevik revolution), John Grierson’s *Drifters* (advertising the importance of the fishing industry in Britain), Pare Lorentz’s *The River* (promoting the promise of the Tennessee Valley Authority in the United States), and Leni Riefenstahl’s *Triumph of the Will* (glorifying Hitler’s Germany).

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6 *Id.; see also* Silbey, *Cross-Examining Film*, supra note 3, at 22-23.
7 *See* Silbey, *Judges as Film Critics*, supra note 1, at 501 (explaining that labeling evidence verité “demonstrative evidence” may be one root of the problem).
12 *SICKO* (Dog Eat Dog Films 2007).
13 *AN INCONVENIENT TRUTH* (Lawrence Bender Productions 2006).
14 *SUPER SIZE ME* (Kathbur Pictures 2004).
16 *THE FOG OF WAR* (Sony Pictures Classics 2003).
17 *Id.* at 145-46.
18 *Id.* at 153-54.
19 *Id.* at 152-54.
Contemporary movie-going audiences and critics understand the ambiguous truth-value of documentary film. Labels of “docudrama,” “infotainment,” “faux doc,” “mockumentary,” “agit prop,” and even “reality television,” exemplify the audience’s critical stance toward these films. Epistemological uncertainty is a marker of the earliest documentaries.

Documentary filmmaking has almost always concerned the building of credibility and authority for the story being told. It is a form of persuasion, not a claim to represent unadulterated reality.

But critical reflection on documentary filmmaking tends to be absent when documentary film is part of a court case. Be it a criminal confession, an arrest, or a speeding car chase, these evidence verité films (made by the state for the purposes of improving law enforcement and the due process of law) go largely untested for bias, incompleteness, or ambiguity.

I have elsewhere written at length about the problematic manner in which the legal process incorporates film into its justice-rendering function. This Article steps back from the goals of these other articles, which seek to understand how legal culture uses or renders film for adjudication, and asks instead about film culture’s relationship to law generally. I take as a given that film and law are cultural institutions with substantial influence over public and popular consciousness concerning truth and righteousness. But how might film culture influence legal culture? More specifically, how might film culture influence the ways we think about law’s role in society? All legal

22 See, e.g., Peter Hogue, Genre-Busting: Documentaries as Movies, FILM COMMENT, July-Aug. 1996, at 56 (“Once upon a time, ‘documentary’ meant ‘factual film’ or ‘propaganda,’ or both. Now, various kinds of documentary style are so prevalent in film and television—in commercials, TV news, music videos, etc.—that it may have come to mean ‘infotainment,’ or ‘promotional illustration,’ more than anything else.”); Irene Lacher, Documentary Criticized for Re-Enacted Scenes, N.Y. TIMES, Mar. 29, 2005, at E1 (noting film directors’ use of the term “faux doc” to refer to their 2005 Oscar-winning documentary short Mighty Times: The Children’s March and highlighting criticism that their “failure to disclose their use of re-enactments called into question the nature of reality implied by the use of the term documentary”).

23 Silbey, Filmmaking in the Precinct House, supra note 1, at 148-49.
24 Id. at 154.
25 Id. at 132-33.
26 Id.; see also Silbey, Cross-Examining Film, supra note 3, at 25.
27 See Silbey, Criminal Performances, supra note 1 (analyzing filmed confessions not for their truth but as evidence of constraint); Silbey, Cross-Examining Film, supra note 3 (discussing Scott v. Harris and methods for cross-examining film); Silbey, Filmmaking in the Precinct House, supra note 1 (comparing police films to state-sponsored documentaries that are forms of advocacy); Silbey, Judges as Film Critics, supra note 1 (advocating that filmic evidence of all kinds should be considered as substantive evidence and evaluated for its assertive content).
processes are framed in the context of a larger cultural narrative. When film or photography become central to law, the cultural discourses about, expectations for, and uses of film and photography become salient. What emerges is a cultural partnership between law and film. What might this partnership look like? What are its foundations and its assumptions? Where might it be headed? This Article explores these questions by tracing the life of certain photographs (still film images) from the twentieth century that have become iconic.30 Studying the circulation and reception of these iconic images—for example, of the flag being raised on Mt. Suribachi in Iwo Jima, of the nuclear bomb over Hiroshima, of the first human steps on the moon—may demonstrate how these “real time” photographs are meaningful beyond their textual existence (i.e., beyond the “facts” they represent) and how they become part of larger and more diverse cultural narratives. Doing so may help explain how our understanding of everyday and historic events is shaped by “real time” images of those events and how that shaping occurs in a court of law.

At the center of this investigation is a concern over the importance and functioning of witnessing, or bearing witness, which forms a cornerstone of the law’s authoritative endeavor to render judgment.31 I assume that the law and legal disputes are always about important, historic events, even if on a small scale. That is, a trial decides something important in the public eye for a particular community of people. When film images are at the center of the trial, the way the law manages the dispute has something to do with how those kinds of images live in our world, how we think they bring meaning to our world, and what we think they have to say that is different from telling the story in words. But what is that difference? What are we witnessing when we look at a documentary photograph or film? And how might that experience of witnessing through a famous filmic image affect our impressions of the more mundane photographs and film—evidence vérité—at law?

My hypothesis is that when a photograph is asserted as evidence, the nature of the story being told is changed. This is because, often times, a photograph becomes iconic in a court of law. The photograph becomes more than mere evidence of some fact. It serves as a symbol

30 I use the term “iconic” not in any technical sense as authorized by a religious creed or doctrine. Rather, I use the term in a more vernacular sense, albeit sharing some qualities (e.g., repetition, assertions of authority) of its roots in theological practice.

31 See Jessica Silbey, A Witness to Justice, in 46 STUDIES IN LAW, POLITICS, AND SOCIETY 61, 62-63 (Austin Sarat ed., 2009); cf. Shoshana Felman & Dori Laub, Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History, at xx (1992) (describing their book as “about how art inscribes (artistically bears witness to) what we do not yet know of our lived historical relation to events of our times,” in the context of twentieth century atrocities such as the Holocaust).
around which a central, potentially even dominant, message revolves. This happens in the same way a photograph becomes iconic in culture: through its various documentary, rhetorical, and appropriative uses. This Article aims to better understand the “iconization” of a photograph at law through an analysis of a similar process in culture. Doing so might help advocates and fact-finders to clarify the underlying facts of their particular disputes and to distinguish those facts from argument.

In culture, the repetitious use of a well-known photograph in various contexts legitimates (even authorizes) the message conveyed. This is regardless of whether the new message reflects any original meaning that was ascribed to the photograph or any original intent for which the photograph was taken. Anchoring a message in a photograph that has circulated in culture and whose original taking garnered some initial fame facilitates the production of a dominant narrative (although surely not a dogmatic one given the photograph’s inescapable polysemy). The photograph, having been embraced by a large public, initially garners immediate legitimacy upon its reuse. To be sure, not all of the photographs discussed below were instantaneously famous. But, as I will show, they became widely recognized over a relatively short period of time—some because of the nature of their subjects, others because of the circumstances of their takings, and still others because of the ostensible facts that they recorded. A photograph’s “iconicity” does not occur in the moment of its taking, but rather through the material process of its making, remaking, and circulation, the broad reception of the photograph, and the interpretive shifts in its reuse and reception that necessarily occur. This Article attempts to render this process more explicit through a study of certain iconic photographs outside the law to encourage a similar thinking about evidence verité in everyday court cases.

This Article is not about how we understand film images as a psychological or neurological matter. It is about the cultural life of photographic and filmic images and how that cultural life inflects the law of which they become a part. This investigation concerns more than what we can say we see in and know from the filmic picture; it raises political concerns because photographs and films affect inclusions and exclusions of people and ideas through literal and cultural frames of reference. In concluding this Article, I will discuss

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32 To be sure, police photos, surveillance photos, and other sorts of prevalent evidence verité become “widely recognized” in a more circumscribed setting. Yet, within that setting, they are familiar and accepted more so, I argue, than other kinds of evidence. The reasons for the initial sanctions of such photographs are discussed infra in Parts I.A and I.B.

33 See SHOSHANA FEILMAN, THE JURIDICAL UNCONSCIOUS: TRIALS AND TRAUMAS IN THE TWENTIETH CENTURY 82 (2002) (“[S]eeing—as the essence of the cognitive activity and as the foundation of both consciousness and memory—is in turn an act that is not simply physiological; it can in turn be inherently, unwittingly political.”).
some of the implications of these political concerns for the use of evidence verité in adjudication. Part I of this Article surveys some of the most prominent theorists of photography and film who fruitfully explore the relationship between seeing and knowing in film imaging. Part II surveys some of the most famous photographs of the twentieth century in order to give shape to our cultural life of images through specific examples. Part III investigates the life of these images from their inception to the present: how they have been used, reused, reimagined, and incorporated into similar or new stories of our past and present. The evolution of the iconic images indicates that even real-time images that document historic events with which most of us are familiar change in significance over time. They are appropriated for new or alternative stories with ease and, for the most part, without controversy. That these images are of real life and of uncontroverted facts does not restrict their semantic possibilities. If this is true of even the most famous of real-time images in our twentieth century history, it is true of the most mundane. Part IV explores the implications for law of the existence of this habit of mind that we bring to the reception of iconic filmic images. It concludes with some thoughts on the benefit for the pursuit of justice of rendering this habit of mind obvious and open for critique and self-reflection at law.

I. WHAT PHOTOGRAPHS SHOW, DO, AND WANT

A. Photographs as Documentary

Roland Barthes famously wrote that “the Photograph’s essence is to ratify what it represents,” to confirm to its audience the “that-has-been.” He said that photography’s “power of authentication exceeds the power of representation,” suggesting that we believe there to be more in the photograph than we can see. Susan Sontag wrote that “photograph[y] furnish[es] evidence. Something we hear about, but doubt, seems proven when we’re shown a photograph of it.” Sontag’s use of the words “evidence” and “proof” situates photography as powerful rhetoric. Walter Benjamin isolates photography as unique among communicative media, writing that in photography, “one encounters something strange and new: . . . something that is not to be silenced, something demanding the name of the person who had lived

34 As Roland Barthes has written, “all images are polysemous.” ROLAND BARTHES, IMAGE, MUSIC, TEXT 38-39 (Stephen Heath trans., 1977).
36 Id. at 89.
37 SUSAN SONTAG, ON PHOTOGRAPHY 5 (1977).
then, who even now is still real and will never entirely perish into art.”

Robert Stam notes that André Bazin, who was concerned with film in particular, believed moving pictures to “bear[] unimpeachable witness to ‘things as they are,’” perpetuating the myth of total cinema as a transparent and undistorted representation of the world—something as close to the real as one can get within art.

These critics confirm that photography and film account in a particularly persuasive way for a person, object, or event having been present in the past. Photographs are documentary. None of these critics suggests, however, that the “that-has-been” connotes any particular meaning. The ontology of the image is just that: it does not go beyond signifying being to signifying discrete knowledge or connotation. Photojournalists, who are in the business of documenting past events, echo these critics. Errol Morris says that photographs merely present “ocular proof.” Lennart Nilsson—the famous mid-century photographer best known for his photographs of an eighteen-week-old fetus in utero, which Life magazine ran on its April 30, 1965 cover—describes photography as “reproducing what you are seeing,” which can extend through technological breakthroughs to reproducing that which no human eye can see. Both Morris and Nilsson recognize the force of photography to extend one’s sensory exposure, to reveal more of the natural world to thinking beings. But neither Morris nor Nilsson assert that what is seen has any inherent cultural significance. Indeed, both Morris and Nilsson contest photography’s epistemological dominance, Morris as he mobilizes filmic images to tell counter-factual stories and Nilsson as he emphasizes the disconnect between his famously clear photographs of early-stage fetuses and the inevitable ambiguity.

40 This is what Barthes meant when he said a photograph is a “message without a code.” BARThES, IMAGE, MUSIC, TEXT, supra note 34, at 17 (emphasis omitted); see also André Bazin, The Ontology of the Photographic Image (1958), reprinted in CLASSIC ESSAYS ON PHOTOGRAPHY, supra note 38, at 237, 241 (“[W]e are forced to accept as real the existence of the object reproduced, actually, re-presented, [and] set before us . . . .”).
42 For a web-image of this photograph, see Life magazine’s website at http://www.life.com/image/85576582 (last visited Mar. 15, 2010).
surrounding the scientific, political, ethical, and cultural implications of life’s beginning.45

B. Photographs as Rhetoric

These critics recognize that there is more to photography than recording an instant moment, whatever its significance. Photographs are said to bear witness to history—to make individual stories into histories of and by a larger community—by focusing the collective gaze. Errol Morris suggests that “you [can] enter history through a photograph,” “through something really, really specific, like a moment in time and a specific place.”46 John Tagg, in his classic essays on photography, revisits Barthes by saying that although photographs appear to have “evidential force,” they evidence only time (and not an object).47 What could this mean? When we look at a photograph, which by its public nature becomes a common experience shared by many viewers, we at least bear witness to time having passed: there was a then, which the photograph records, and we are now. But there is more to time passing than simply acknowledging it. To effectively bear witness as a community, time must have content: time becomes history.48 Henry Luce, founder of Life magazine, described the power of photojournalism in the context of Alfred Eisenstaedt’s photographs (the author of the “Times Square Kiss” or “VJ Day in Times Square”)49 as “deal[ing] with an entire subject—whether the subject was a man, a maker of history, or whether it was a social phenomenon.”50 In this way, photographs confer a privilege on their viewers51 by evidencing time passed and our shared history through that time, and enabling reflection upon “our collective souls and struggles.”52

Given this discourse—that photographers or filmmakers enable discoveries through collective acts of witness to history—it is no

46 Meyer, supra note 41, at 53.
49 For a web-image of this photograph, see http://en.wikipedia.org/wiki/V–J_day_in_Times_Square.
50 Henry R. Luce, Foreword to ALFRED EISENSTAEDT, WITNESS TO OUR TIME 7 (1966).
52 Douglas Brinkley, Foreword to ONE HUNDRED DAYS IN PHOTOGRAPHS: PIVOTAL EVENTS THAT CHANGED THE WORLD 10, 11 (Nick Yapp et al. eds., 2007) [hereinafter ONE HUNDRED DAYS].
wonder that photography and film have such authority and power over popular consciousness. It is no wonder that they are brought into the courtroom to bear on legal decision-making. “A trial is presumed to be a search for truth, but, technically, it is a search for a decision, and thus, in essence, it seeks not simply truth but a finality: a force of resolution.”53 With an understanding that truth can be elusive and that law renders decisions whether or not truth is met, photographs and film are attractive tools for legal storytelling. This is especially true in light of photography’s intimacy (i.e., it “bridges” the viewer and subject) and its production of a common experience or response.54 “To photograph is to appropriate the thing photographed. It means putting oneself into a certain relation to the world that feels like knowledge—and, therefore, like power.”55 Sontag here suggests that the “truth” reflected in photographs appears to justify the present use of force (incarceration or vengeance) by deferring to the authority of the collective witnessing that the photographs enable. We make sense of a unique past recorded on film by situating it in a shared present. In this way, making sense of what is recorded in photographs or film justifies a communal judgment of guilt (and punishment) or innocence (and absolution).

This is a different aspect of photography. It is not what a photograph purports to be (what it documents) but what it may do (how it rhetorically persuades). How does a photograph generate knowledge of collective memory and cultivate the power that flows from it? One way is to create a shared vision that begins with the assertion that “this is worth seeing” and thus is worth becoming part of our memory and of who we are. On this front, photographers and critics are effusive. Photographic journalists describe photographs as “lift[ing] past events . . . out of obscurity”56 and serving as “bridge[s] connecting”57 the photographer or viewer to the subjects photographed. Photographs, by merely existing and being published to an audience, appear to “warrant deep reflection”58 and often times “transform[ ] human apathy.”59 By creating a geography that connects people, happenings,

53 FEELMAN, supra note 33, at 54-55. Another way of putting this might be to compare legal with literary processes. Whereas trials, for example, may seek a decision, a literary text (or a photograph or film) seeks “meaning,” “expression,” “heightened significance,” and “symbolic understanding.” Id. at 55.
54 PHOTOS THAT CHANGED THE WORLD, supra note 51, at 6 (“Images have tremendous influence. They are suggestive, and what they show is casually accepted as truth and reality. We frequently challenge the statistics and content of written reports. But photographs enjoy an incredible presumption of veracity, and the belief in their objectivity is difficult to shake. The seeming impartiality of a technically governed piece of machinery, the camera, suggests authenticity. And the mechanisms of this seduction operate with great subtlety.”).
55 SONTAG, supra note 37, at 4.
56 Brinkley, supra note 52, at 11.
57 Chris Johns, Introduction to ONE HUNDRED DAYS, supra note 52, at 17.
58 Brinkley, supra note 52, at 11.
59 Gordon Parks, Introduction to ONE HUNDRED PHOTOGRAPHS THAT CHANGED THE
and things ("bridging"), the transformed space transforms those of us who inhabit it.

Even though a photograph’s transformative power usually is not the author’s aim in taking the picture, a photograph can take on a life of its own. Lennart Nilsson’s photograph of the eighteen-week old fetus, contrary to specific intention, is said to have galvanized a pro-life movement. War photographers, such as Nick Ut of the Associated Press, who took the Pulitzer Prize winning photograph of a nine-year-old girl fleeing a Napalm attack on the Trang Bang village during the Vietnam war, do not know (though might hope) that their photographs will change the public discourse about the merits of war and become “decisive moments” in our politic. They lodge in our collective memory; they become our memory. As Susan Sontag has written of the photos from Abu Ghraib prison in Iraq, “The pictures will not go away”; “the photographs are us.” She implies here that the photographs, by their unforgettable nature, have changed us. They reconstitute history; they reconstitute us. And as such, they are an unavoidable basis of judgment.

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61 To view a reproduction of the photograph, see http://en.wikipedia.org/wiki/Nick_Ut.
62 The reference here is to Henri Cartier-Bresson, The Decisive Moment (1952).
63 See Susan Sontag, Regarding the Torture of Others, N.Y. TIMES, May 23, 2004, § 6 (Magazine), at 25 (“For a long time . . . photographs have laid down the tracks of how important conflicts are judged and remembered. The Western memory museum is now mostly a visual one. Photographs have an insuperable power to determine what we recall of events . . . .”).
64 Id.; see also Seymour Hersh, Torture at Abu Ghraib, NEW YORKER, May 10, 2004, at 42.
65 Silbey, A Witness to Justice, supra note 31, at 86-87 (discussing ideal acts of witness).
Perhaps most astonishing and troubling is that whether or not the photographs are truthful (candid or staged, manipulated or untouched, in or out of context), they form part of the relentlessness of collective memory. Do we think or know differently about Abraham Lincoln and his presidency because his head is on Calhoun’s body in this famous picture of our sixteenth president?

**Abraham Lincoln and John Calhoun**
Is Apollo 11’s landing any less momentous were the famous moon landing photo a staged photograph rather than a candid?

**Buzz Aldrin on the Moon**

We might question whether there is significance to the categories of “candid,” “staged,” or “faked” when it comes to understanding what photographs do. The famous composite photograph of Senator Millard Tydings in 1950 showing him talking with Earl Browder, the leader of the American Communist Party at the time, is said to have cost Tydings the election, despite it being captioned as a composite photo from the moment of publication.66 We saw a similar effect in the 2004 election with the well-known fake of John Kerry standing next to Jane Fonda at an anti-Vietnam War rally.67 Photographic images, whether or not manipulated, change the way people think and feel about the people and events in the photo.68 “Images, real or fake, have a very real and lasting impact.”69

68 Farid, supra note 67, at 107 (citing studies showing that doctored photographs can alter childhood and adult memories).
69 Id.
C. Photographs as Wanting an Explanation

Photographs inevitably affect our memories, our beliefs, and our judgment. But why? Because they want to be believed. They exist in order to be seen. As such, the “evidential force” of photographs is not their “denoted message” but the fact of their taking and circulation. Photographs appear to “zero in on the moment that is the culmination of a sequence of actions” and “epitomize the events over time.” We feel as we look at the photograph that it was meant to be taken. Whether the photograph serendipitously captures an important event or stages that event, the photograph “confer[s] importance” on the event. The fact of the photograph and our witnessing of it highlights that our attention on the photograph is key to the overarching message expressed through it.

Part of the import conferred by a photograph is not only that this photograph was taken (and not others) but that it is also being shown to us as witnesses. It was taken so that we would make sense of it as we do with everything: in terms of our own frame of reference, our own experience. Photographs work on us to produce a “narrative and discursive frame” that explain them, inevitably involving us in their supplementation. The force of a photograph’s assertion of the need for an explanation is unrelenting, unconscious, and irresistible. Seeing therefore becomes believing, despite alternative or contrary indications of authenticity or semantic stability. This is because seeing is both objective (we can agree on what we see) and subjective (it becomes personal to us as we provide context to explain what we see). This is another way of saying that it is a form of observation and witness. Observation and witness create knowledge by combining the facts that observation can produce with the authority of the individual who makes sense of what she sees. Together, they coalesce with “the irrational

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70 This is a slightly different formulation than the one found in What Do Pictures Want?, in which William Mitchell describes how images are “living historical agents” that move us by “wanting—i.e., needing, demanding, and lacking.” See Ashjorn Gronstad & Oyvind Vagnes, An Interview with W.J.T. Mitchell, IMAGE & NARRATIVE, Nov. 2006, http://www.imageandnarrative.be/iconoclasme/gronstad_vagnes.htm [hereinafter Mitchell Interview]. Images “want” by requiring that they be noticed and then explained, by demanding that their viewers provide a “narrative and discursive frame.” Id. I add the element of believability because I think it necessarily follows the event of being noticed and being explained. Explanations are only rational if they can be understood and believed to be at least plausibly true.

71 BARTHES, CAMERA LUCIDA, supra note 35, at 88-89.

72 BARTHES, IMAGE, MUSIC, TEXT, supra note 34, at 18-21.

73 PHOTOS THAT CHANGED THE WORLD, supra note 51, at 8.

74 SONTAG, supra note 37, at 28.

75 Mitchell Interview, supra note 70.

power . . . to bear away our faith.” Indeed, Errol Morris has said that photographs persuasively “stop us from thinking”; they encourage us not to think.

To this, there are several responses. William Mitchell suggests that a new phase of image study must “encourage prolonged contemplation, second and third looks, [and] reversals of perceptual fields” so that “pictures might themselves be sites of theoretical discourse.” Mitchell’s recent work asks that we attend to the nature of pictures to learn better how they captivate us. Part IV of this Article discusses the implications of this response for the practice and promise of law. Another response is to undermine the premise of photographic images that seeing is believing. John Tagg says we must learn to ask different questions of the photographic image because “the causative link between the pre-photographic referent and the sign . . . is . . . highly complex, irreversible, and can guarantee nothing at the level of meaning.” He continues:

[A photograph is no] phenomenological guarantee[.] At every stage, chance effects, purposeful interventions, choices and variations produce meaning, whatever skill is applied and whatever division of labor the process is subject to. This is not the inflection of a prior . . . reality . . . but the production of a new and specific reality, the photograph, which becomes meaningful in certain transactions and has real effects, but which cannot refer . . . to a pre-photographic reality as to a truth. The photograph is not a magical “emanation” but a material product of a material apparatus set to work in specific contexts, by specific forces, for more or less defined purposes. It requires, therefore, not an alchemy but a history . . . .

For Tagg, seeing as mediated through a photograph is not knowing. To make this point more directly, Tagg asks, “[U]nder what conditions would a photograph of the Loch Ness Monster (of which there are many) be acceptable?” In order to know, we must look not to some “magic” of the medium, but to the conscious and unconscious processes, the practices and institutions through which the photograph can incite a phantasy, take on meaning, and exercise an effect. What is real is not just the material item but also the discursive system of which the image it bears is part. It is to the reality not of the past, but of present meanings and of changing discursive systems that we must therefore turn our attention.

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77 Bazin, supra note 40, at 241.
78 Meyer, supra note 41, at 54.
79 Mitchell Interview, supra note 70.
80 TAGG, supra note 47, at 3.
81 Id.
82 Id. at 5.
83 Id. at 4.
Whereas Mitchell initially looks inward at the nature of the image and how it acts on us, Tagg focuses outward at the photograph’s material production of meaning through its making and circulation. Both approaches are central to becoming more self-aware of our tendency to overvalue photographs when they serve as evidence verité. Both approaches are crucial if we are to accept, even embrace, the ubiquity of evidence verité in our justice system.

“Photographs bear witness to a human choice being exercised in a given situation. . . . A photograph celebrates neither the event itself nor the faculty of sight in itself. . . . Photography is the process of rendering observation self-conscious.”84 Both Tagg and Mitchell would concur in this formulation. And it is where I will begin in the next Part. The photographs discussed below were taken to be noticed, not only for their obvious or literal content, but to pique self-consciousness of both the limits and expansive power of witness, in both the legal and moral sense. Photographs represent that which is absent.85 The photos below became iconic in part because they brought the force of collective judgment to the moment when the larger community was obviously (perhaps necessarily) absent, but for which the larger community’s gaze was necessary in order to render the moment into consciousness.

This is much like what photographs do in a court of law: they focus our attention around that which the parties claim is crucial evidence of the past and inject it into our present minds to enable judgment. “As such, the photo is capable of becoming a kind of fetish, standing in for the absent subject or moment.”86 By structuring a collective gaze and bringing the force of the present to bear on a past event, photographs create a history (a narrative) and make judgment possible, and potentially justified.87 But on what is that judgment based other than a feeling that results from having appropriated the photograph as our own memory? What do we know from the photographic experience of remembering (making memories and a history by looking at photos) other than the story we tell to explain the photograph?88 The knowledge the photograph produces—what it appears to represent and the experience it creates in us—remains dependent on specific contexts and specific forces89 that structure our explanation.

84 John Berger, Understanding a Photograph (1972), reprinted in Classic Essays on Photography, supra note 38, at 291, 292.
85 Id. at 293 (“The most popular use of the photograph is as a memento of the absent.”).
87 “[I]mages are the thing that allows matter to have memory . . . .” Mitchell Interview, supra note 70.
88 From the perspective of “justice now,” the photograph’s factual allure is also its danger: “The photograph may be summative, but it is in the end compelling only in its fragmentary incompleteness.” Campany, supra note 86, at 29.
89 Tagg, supra note 47, at 3.
In other words, in order to make sense, photographs want and require our supplementation. The process of that supplementation—the context and forces that structure it—is the subject of Parts II and III, and is discussed in light of the role and circulation of iconic photographs in culture. But the purpose of this discussion is to consider how the same type of supplementation might occur at trial to overdetermine or destabilize the evidentiary value of evidence verité.90

II. ICONIC IMAGES

I selected the following photographs by researching the overlap among the many books on famous photographs.91 I discuss only seven photographs—a subset of the overlap among the many books I studied—but my analysis does not depend on this set being exhaustive. I believe that my conclusions would be the same were I to include other photographs that were common to most of the collections.92 To be clear, not all of the photographs discussed became famous instantaneously. The process of becoming famous—whether that happened relatively quickly upon publication or thereafter—is what is being examined here. These photographs are celebrities among photographs, their “star power” deriving from the process by which they “insert” and “incarnate” themselves within culture.93

This Part provides context for the photos (the circumstances of their taking and certain factual details). Part III follows the photographs as they are reproduced, recontextualized, and reimagined for later decades. These analyses proceed all with an eye toward understanding how image culture shapes our understanding of the past in order to

90 See infra Part IV.
91 See, e.g., ONE HUNDRED DAYS, supra note 52; ONE HUNDRED PHOTOGRAPHS, supra note 59; PHOTOS THAT CHANGED THE WORLD, supra note 51; PLATINUM ANNIVERSARY COLLECTION: SEVENTY YEARS OF EXTRAORDINARY PHOTOGRAPHY (Life Books 2006). Based on the credits in these books, “famous” seems to mean photographs that were disseminated widely when taken and reproduced often in subsequent years.
92 Some of the other photographs that were common to the collections included that of the World Trade Towers falling in 2001, the Tiananmen Square Protest in 1989, the Challenger disaster in 1986, the napalm bombing in South Vietnam in 1972, the tragedy at Kent State in 1970, and Martin Luther King giving his “I Have a Dream” speech in 1963.
93 EDGAR MORIN, THE STARS 147 (Richard Howard trans., 2005). Speaking about human celebrities as aesthetic objects, Edward Morin writes:

The star is indeed a myth: not only a daydream but an idea-force... If the myth of the stars incarnates itself so astonishingly within reality, it is because that myth is produced by that reality—that is, the human history of the twentieth century. But it is also because the human reality nourishes itself on the imaginary to the point of being semi-imaginary itself.

Id. at 147-49 (emphasis omitted).
judge present circumstances—that is, how legal judgment (made now but concerning an event in the past) is affected by images in evidence.

A. **The Migrant Mother**

   **“Migrant Mother”**

This photograph was taken in March 1936. It is of a migrant U.S. farm worker, who was publicly unnamed until 1978, and several of her children. Her pea crop had frozen. She and her seven children had been living off frozen vegetables and birds they had killed. She and her family were among the ranks of the poorest in the nation. Before having her picture taken, the woman in this picture is reported to have sold the tires on her car to buy food. The photographer, Dorothea Lange, was hired by the Farm Security Administration (FSA) to take photographs of migrant workers, soil erosion, and rural poor during the Great Depression to convince Congress to provide aid to farmers. Dorothea Lange was previously a portrait photographer. "Migrant

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94 ROBERT HARIMAN & JOHN LOUIS LUCAITES, NO CAPTION NEEDED: ICONIC PHOTOGRAPHS, PUBLIC CULTURE, AND LIBERAL DEMOCRACY 61 (2007). Her name is Florence Owens Thompson and she was thirty-two years old in the picture. *Id.*

95 PHOTOS THAT CHANGED THE WORLD, *supra* note 51, at 48.

96 *Id.*

97 *Id. But see* HARIMAN & LUCAITES, *supra* note 94, at 331 n.40.


99 *Id.*
Mother’ quickly achieved critical acclaim as a model of documentary photography, becoming the preeminent photo among the hundreds of thousands of images being produced by [FSA] photographers and used to promote New Deal policies.” 100 It is one of the most requested photographs in the Library of Congress’s collection.101

B. Hiroshima

“Little Boy” over Hiroshima on August 6, 1945

Around 8:15 on the morning of August 6, 1945, George Caron, the co-pilot of the Enola Gay that dropped “Little Boy” (the 9700 pound uranium bomb) on Hiroshima, Japan, took this photograph.102 The pilot of the Enola Gay, Lieutenant Colonel Tibbets, described the moments after the bomb was dropped this way: “A bright light filled the plane. We turned back to look at Hiroshima. The city was hidden by that awful cloud... boiling up, mushrooming.” 103 It is estimated that 45,000 people died on August 6th and a total of 200,000 from radiation sickness thereafter, over two-thirds of the city’s population.104 No one on the ground in Japan could have ever taken such a picture. We are able to “witness” this now-famous mushroom cloud image solely because the co-pilot brought his camera on the bombing mission and turned around after the bomb dropped to take a picture. Whatever fantasy may have existed about the atomic bomb, this picture made the bomb real to hundreds of millions of people as it was reprinted

100 HARIMAN & LUCAITES, supra note 94, at 54-55.
101 Id. at 55.
102 PHOTOS THAT CHANGED THE WORLD, supra note 51, at 68.
103 Id. (alteration in original).
104 Id.
repeatedly in the world’s newspapers. The United States bombed Nagasaki three days later, on August 9, 1945, and Japan surrendered shortly thereafter.

C. Raising the Flag on Mount Suribachi

Most Americans would recognize the photograph of marines raising the U.S. flag on Mount Suribachi, taken on the island of Iwo Jima during World War II. It was taken on February 23, 1945, by Joe Rosenthal, on assignment for the Associate Press in the Pacific during the war. Iwo Jima is six-hundred miles off the coast of Japan. Japan used it as a strategic air base. It is estimated that more than 20,000 Japanese and 7000 Americans lost their lives fighting over the island.

Before the fighting ended, American marines captured the island’s 166-metre (546-foot) Mount Suribachi, an extinct volcano. Rosenthal climbed to the top just as five marines and a navy hospital corpsman were getting ready to raise a flag large enough to be seen from ships off shore as well as from any spot on the entire island.

The photo circulated widely in daily newspapers almost immediately. “Newspapers were inundated with requests for reprints . . . .” It won the Pulitzer Prize the same year, the only time that has ever happened. There was some controversy over whether the photograph was posed. Rosenthal assures that it was not. Because things were happening so quickly on the mountain, Rosenthal says that he was unsure whether the initial shots of the flag raising would come out. He therefore took a subsequent photo of the marines posed around the raised flag pole and sent all of the pictures off the island to be developed. There was a

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106 PHOTOS THAT CHANGED THE WORLD, supra note 51, at 64.
107 Id.
108 Id.
109 HARIMAN & LUCAITES, supra note 94, at 93.
110 Id.
111 Id. at 94.
112 PHOTOS THAT CHANGED THE WORLD, supra note 51, at 64.
113 Id.
114 Id.; see also HARIMAN & LUCAITES, supra note 94, at 97.
posed photograph among the many that he took that day, but the Pulitzer Prize winning photograph was candid.

D. The Times Square Kiss

The photograph known as the “Times Square Kiss” or “VJ Day in Times Square” was taken in New York City on August 14, 1945, and was published by Life magazine on August 27, 1945, accompanying an article entitled Victory Celebrations.115 Photographer Alfred Eisenstaedt was on staff at Life. He says that he “was walking through the crowds on V-J Day, looking for pictures,” when he saw a sailor coming his way.116 The sailor “was grabbing every female he could find and kissing them all—young girls and old ladies alike.”117 “Then,” Eisenstadt said,

I noticed the nurse, standing in that enormous crowd. I focused on her, and just as I’d hoped, the sailor came along, grabbed the nurse, and bent down to kiss her. Now if this girl hadn’t been a nurse, if she’d been dressed in dark clothes, I wouldn’t have had a picture. The contrast between her white dress and the sailor’s dark uniform gives the photograph its extra impact.118

Life has reported that this photo is “one of the three most famous pictures published in Life.”119 An enduring mystery behind this image is the identities of the kissers. There have been several attempts since the picture was published to identify the individuals, but nothing has been proven conclusively.120

115 HARIMAN & LUCAITES, supra note 94, at 45, 68 & n.53. For web-images of this photograph, see http://www.digitaljournalist.org/issue9911/icon01.htm and http://en.wikipedia.org/wiki/V–J_day_in_Times_Square. Life magazine has refused its permission to reprint this photograph for the purposes of the present scholarly commentary, taking a similar position as the Associated Press. See supra note 105.
117 Id.
118 Id. Notice how Eisenstaedt says that there would have been no photograph absent the aesthetic qualities he sought (contrasting light and dark clothing). It is unclear from this statement whether he means that the photograph wouldn’t have been taken or whether the photograph, if taken, would not have functioned as it should, that is, as something with an effect.
119 See Abigail Van Buren, The Unknown Kisser of World War II, DALLAS MORNING NEWS, May 25, 1994, at 13C.
120 HARIMAN & LUCAITES, supra note 94, at 81.
E. Life Before Birth

Lennart Nilsson’s “Life Before Birth”121 was published in Life magazine on April 30, 1965, to accompany an article entitled The Drama of Life Before Birth.122 It was part of a series of photographs taken by Nilsson, a Swedish photographer who dedicated twelve years to imaging early stage fetuses in utero using endoscopic technology.123 The series was the first to show a fetus’s face.124 Nilsson remembers that the editors were initially dubious of the authenticity of the picture and “wanted to have a witness to say that this was really the case” because, as he explains, “it was a very sharp picture.”125 Eventually convinced, Life ran many more photos like this one.126 Nilsson soon published A Child Is Born,127 a book containing similar photographs. It remains a best-selling book and has been issued in four editions in over twenty countries.128

F. Man on the Moon

The photograph (displayed supra in Part I.B) of Buzz Aldrin walking on the moon was taken on July 20, 1969. In it, Buzz Aldrin stands on the moon’s surface four days after taking off from Cape Kennedy in Apollo 11. This photo documents the first humans to walk on the moon. Looking closely you can see Neil Armstrong reflected in Aldrin’s visor. Armstrong took the photograph and was, in fact, the very first man to walk on the moon. During this first trip to the moon, Armstrong relayed the famous message to earth: “One small step for man, one giant leap for mankind.” Armstrong and Aldrin explored the moon’s surface—the Sea of Tranquility—for approximately two hours. There were other pictures (and film) of this first moon landing—of the two astronauts playing golf and raising the flag—but this one of Aldrin

121 For a web-image of this photograph, see photograph number eleven at http://www.magazine.org/asme/top_40_covers/16991.aspx. Nilsson’s agent has refused permission to reprint this photograph for the purposes of the present scholarly commentary, taking a similar position as the Associated Press. See supra note 105.
122 ONE HUNDRED PHOTOGRAPHS, supra note 59, at 171; see also Q&A with Lennart Nilsson, supra note 45.
124 Id.
125 Id.
126 ONE HUNDRED PHOTOGRAPHS, supra note 59, at 171.
127 LENNART NILSSON, A CHILD IS BORN (1965).
128 Nilsson Biography, supra note 43.
remains the most iconic. The lunar landing on July 20, 1969 was the fulfillment of President Kennedy’s promise, made in 1961, that before the end of the decade U.S. astronauts would walk on the moon. This photo, published to the world shortly after being taken, proved that President Kennedy’s promise had been kept. One critic says this of the photograph: “For the vast majority of us, the moon remains a purely visual object; the only evidence that men ever landed there is photographic. No wonder there were conspiracy theories that the pictures were faked.”

G. Abu Ghraib

Detainee at Abu Ghraib

This photograph from Abu Ghraib prison in Iraq is of the detainee dubbed “Gilligan” by the prison’s military police (MP). Testimony affirms that he was naked and covered with a blanket and hood, told to stand on a cardboard box, and had dead wires attached to his limbs. He was told not to fall off or he would be electrocuted. This was a lie. Sabrina Harman, one of the MPs who took photos of Gilligan, says the “mock-electrocution business had not lasted more than ten or

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129 PHOTOS THAT CHANGED THE WORLD, supra note 51, at 124.
131 Id.
132 Id.
133 Id.
fifteen minutes—just long enough for a photo session.” 134 Staff Sargeant Ivan Frederick instructed Gilligan to hold his arms out just before the picture was taken.135 Many photographs of mistreatment of detainees have come to light.136 But this one of Gilligan seems to have become the most iconic, perhaps because of the questions surrounding the identity of the photographed individual, as in the case of the “Migrant Mother,” the “Time Square Kiss,” and “Life Before Birth.”137 Beyond the man’s identity, however, the rapid circulation of this photograph fueled the debate over the justification of the United States’s military presence in Iraq. It also undermined the United States’s moral and political legitimacy and reignited the debate about the illegal use of torture to ostensibly minimize the loss of innocent lives. The circumstances surrounding the taking of the photograph have also been the subject of discussion. Few doubt the candid nature of the photograph, but many ask why photographs were taken in the first place. Interestingly, Sabrina Harman gave the same reason for taking the photos of Gilligan (as well as the many others she took) that the photo journalists provided for taking the iconic photographs discussed above: for documentary purposes.138

Harman said that she began photographing what she saw because she found it hard to believe. “If I come up to you and I’m like, ‘Hey this is going on,’ you probably wouldn’t believe me unless I had something to show you,” she said. “So if I say, ‘Hey this is going on. Look, I have proof,’ you can’t deny it, I guess.” That was the impulse, she said. “Just show what was going on, what was allowed to be done.”139

Documenting evidence is not the only reason for taking photographs. As discussed supra in Part I, photographs can change minds, bond a community, focus memory, and create history. But all of these iconic photographs share the initial impulse of documenting a moment, an event, or a fact considered important enough to share with many people, important enough to bring people’s attention to the event despite their absence from it. In this way, these photographs make these

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134 Id.
135 Id.
136 Sontag, supra note 63.
137 Michael Scherer, Identifying a Torture Icon, SALON.COM, Mar. 14, 2006, http://www.salon.com/news/feature/2006/03/14/torture_photo/print.html (“The New York Times announced Monday night that it would review the accuracy of a recent Page One story that claimed to identify the hooded detainee shown in one of the most iconic photos of abuse from Abu Ghraib, after Salon presented evidence suggesting that the paper had identified the wrong man.”).
138 Why other MPs took photographs at Abu Ghraib remains less known. Sabrina Harman was interviewed for publication only about her own picture taking. See Gourevitch & Morris, supra note 130. The stories of the other MPs who used cameras are less public. For other explanations for the impulse to take pictures, see infra Part III.
139 Gourevitch & Morris, supra note 130, at 51-52.
events significant simply by recording their occurrence. These photographs were taken both to be shown (to be noticed) and to say something (to send a message). They were taken to witness. But what do we witness when we see these photographs beyond that someone (the photographer) thinks the moment is worthy of recording?140

Because the law encourages us to be specific, contextual, and historically accurate, we are tempted to say that through these pictures we are witnessing: a migrant family’s struggle, the first atomic bomb, U.S. victory in the South Pacific, the beginning of human life, the first humans to walk on the moon, and a scene of humiliation and torture. But the context and subsequent history of these photographs belies any static, specific meaning. Indeed, despite any initial documentary impulse (the impulse to record), these photographs have persisted in our culture to carry meaning beyond the mere documentation of a fact or event. How? James Elkins wrote that “seeing alters the thing that is seen and transforms the seer. Seeing is metamorphosis, not mechanism.”141 The next Part of this Article explores the metamorphoses of these photographs and their persistence in our culture in order to determine how they do what they do—i.e., render a moment of the past relevant for the present.142 This may, in the end, shed light on how documentary photographs function as evidence verité and why photographs cannot and do not speak for themselves. We situate them through their use, and in so doing, do the speaking ourselves.

III. THE LIFE OF ICONIC IMAGES

“Photographs can speak to us only after we have mistrusted and challenged them.”143 The law requires this kind of critical evaluation

140 This might be fairly posed as a chicken-and-egg problem. What came first: the importance of the event or the photograph of the event? The discussion that follows in Part III attempts an answer in terms of the uses to which the photographs are put. “In this sense it is almost impossible to separate what we think photography and film are from what we think they are for.” CAMPANY, supra note 86, at 11. To be sure, some photographs record nothing consequential, and are quotidian details of life made into art. Consider David Campany’s discussion of Henri Cartier-Bresson’s photographs that arrest time (e.g., a man jumping over a puddle, his foot barely skimming the water): “Cartier-Bresson’s most celebrated photographs are of everyday situations made eventful only by his precise framing and timing. The subject matter is often insignificant until it is photographed . . . . Best when conjured out of next to nothing, his decisive moments avoided competition with history’s decisive moments.” CAMPANY, supra note 86, at 27. The photographs discussed in this Article, and the ones that are most often used for legal purposes, are less of this nature—although the lines can blur.
142 As one writer said, famous photographs such as these take us to a specific moment and “haunt the world to this day.” ONE HUNDRED PHOTOGRAPHS, supra note 59, at 6.
143 PHOTOS THAT CHANGED THE WORLD, supra note 51, at 12.
when assessing evidence. But what does it mean to critically evaluate a photograph? How do we understand the message a photograph conveys in the context of its asserted use? We begin with the documentary impulse that birthed the iconic photographs, and then we must look to the journey that they have since taken. Photographs speak only through their circulation, their use, and their correlations. So how have these photographs circulated (what histories have they become a part of)? To what uses have they been put (how are they used to tell new stories)? What relations have they created (which communities do they bind, which judgments do they enable)? We ask these questions to understand what these photographs do (how they rhetorically function) and how they seek explanations (how they are appropriated by the viewer). In terms of the law and evidence verité, we might ask: What do the photographs become when they enter the courtroom? How do they focus our collective gaze? In what ways are they being used to structure our judgment about past circumstances and how, in contrast, do they become part of the stories now being told? Are they being used to assert and justify the dominance of evidence verité as truth-revealing despite their on-going and varied semantic possibilities?

Dorothea Lange’s photo has become stock trade in teaching and remembering the Great Depression. It is used in school books and museum displays. It also became a stamp in 2000 to commemorate the 1930s. What exactly is being celebrated? Surviving the Great Depression? The devotion of a mother to her children? It’s hard to tell. Indeed, Lange’s photograph has become unmoored from its original context. In the 1970s, the image was appropriated by a Black Panther artist and made into a pencil drawing of an African American family. The caption of this new version reads: “Poverty is a crime and our people are the victims.” This is not celebratory of a moment or a nation. It is a condemnation of a government’s apathy towards its citizens.

In 2005, as an April Fools joke, Popular Photography ran a special feature on how to touch up photos, like removing wrinkles and dirt. Lange’s photo was used as an example. Apparently, the Migrant Mother was in need of a makeover:

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144 HARMAN & LUCAITES, supra note 94, at 60.
145 Id.
146 Id. at 329-30 & n.32.
147 Id. at 60 (“More than just a representation of our past, it collapses past and present to create a structure of feeling... [a] fundamental property of still photography reinforces the idea that the image represents a condition rather than a moment in an unfolding story. The corresponding idea that completes the image dramatically is that any response to and change in that condition must come from outside the frame.”).
148 Id. at 61, 330 n.34.
149 Id. at 61.
150 Id. at 332 n.45.
[U]nder the masterful touch of *Popular Photography* editors, the Migrant Mother was transformed from an iconic symbol of the struggle for survival into a smooth-faced suburban soccer mom. Her wrinkles were erased, her gaze softened, and those depressing, poverty-stricken kids removed. Readers were appalled. The editors later noted that the article generated more responses than anything [they had] done in years. . . . Most of [their] readers got the joke. But many didn’t. [They] received hundreds—yes, HUNDREDS—of rants, hate letters, and excommunication threats.\(^{151}\)

Also in 2005, the *Nation* featured a story called *Down and Out in Discount America*\(^ {152}\) in which it transformed Lange’s Migrant Mother into a Walmart employee, comparing Walmart to the dustbowl.\(^ {153}\) The “Migrant Mother” photograph was on the cover of the magazine, decorated with the Walmart brand. As with *Popular Photography*, readers wrote angry letters to the magazine because it “deface[d] a great photograph.”\(^ {154}\)

Compare and contrast these examples of the itinerant path through cultural history that “Migrant Mother” took. First, the readers of *Popular Photography* and *The Nation* appear to be concerned not about the manipulation of history, but about the altering of the image. No one complains that the identity of the woman is harmed or the facts of her circumstances falsified. Indeed, no one appeared to be offended by the Black Panther rendition of the photograph. Complaints center around the icon—what the image stands for in popular consciousness—and not around the facts of Florence Owen’s life or the successes and failures of subsequent government intervention. The experience of “Migrant Mother” through the decades is not, “Who is this woman and what has happened to her?” but rather, “What does she stand for?” The “great photograph” has been “defaced” because the sacred suffering that the photograph portrays is debased when compared to today’s lower classes on which Walmart preys. It is offended when the age lines that evidence extreme poverty, a certain toughness of experience that predicts one’s subsequent survival, are erased. The poverty experienced by today’s standards is somehow different in kind to the poverty Americans survived in the 1930s. We survived that dire time. Walmart is evidence of our triumph (it sells things even the poor can afford); it is not a symptom of persistent problems. The Black Panther version is consistent with this critique: “Migrant Mother” is an indictment of the


\(^{152}\) Liza Featherstone, *Down and Out in Discount America*, NATION, Jan. 3, 2005, at 11.

\(^{153}\) Hariman & Lucaites, supra note 94, at 65.

government’s criminal negligence towards a persistent underclass. It repeats the devotion and strength of family in terms of a nation of survivors.  It represents a collision of sentiments about the government’s relation to the United States’s poor. The Black Panther version of “Migrant Mother” is a moral statement, not evidence. Despite being documentary in impulse and origin, “Migrant Mother” reflects Lange’s own career, “travel[ing] the ambiguous and shifting frontier between art, journalism, social science, and propaganda.”

The image of the mushroom cloud persists in our culture, but as a symbol of what? It recalls August 6, 1945, but no longer to bear witness to the moment the bomb exploded over Hiroshima. Now that image means so much more—and so much less. It was used in the 1950s and 1960s to decorate survival guides and advertise bomb shelters. It illustrated book jackets that retold the story of the atomic bomb as the end of the world—heralding the cold war rhetoric. The mushroom cloud was used to advertise nuclear testing products along with the slogan “more bang for your buck,” thereby eliding America’s capitalist prowess with its war violence. It became the proud symbol of those towns and schools that contributed to atomic development, such as Richland, Washington, whose high school teams are called the “Bombers” in honor of the nearby plutonium plant that provided the materials for the Nagasaki bomb. It is even used by contemporary artists as an aesthetic starting point and “not as [a] picture of anything.”

The mushroom cloud photograph may be evidence of a unique act of witness, but that act has lost its specific import. It no longer provides authoritative testimony to the deaths that followed. Instead, the mushroom cloud imagery stands for civic pride and the promise of free markets. It is an image worth looking at for its strange beauty. It may still stand for the possibility of devastation and American power, but it

155 A 2009 review of books about Dorothea Lange describes “Migrant Mother” this way: “It’s a portrait in which squalor and dignity are in fierce contention, but both one’s first and last impressions are of the woman’s resilience, pride, and damaged beauty.” Jonathan Raban, American Pastoral, N.Y. REV. BOOKS, Nov. 19, 2009, at 12.
156 Id. at 14.
157 For example, see the album cover to If the Bomb Falls: A Recorded Guide to Survival (Tops Records 1961), which is available at http://www.conelrad.com/media/atomicmusic/sh_boom.php?platter=3, and the business card for Bomb Shelters, Inc., which is available at http://www.conelrad.com/atomic_honeymooners.html.
158 See, e.g., W.D. Herrstrom, The Atomic Bomb and the End of the World (1945). For an image of the cover to Herrstrom’s book, see http://www.conelrad.com/books/flyleaf.php?id=267_0_1_0_M.
160 Id. at 69-70.
161 Id. at 78. For one such painting, see Guy Trebay, Work With Me, Baby, N.Y. TIMES, Dec. 6, 2007, at G1, available at http://www.nytimes.com/2007/12/06/fashion/06photo.html?_r=1.
no longer persists as evidence of actual devastation or the questionable morality of the choice to use the atomic bomb in World War II. The circulation and use of the mushroom cloud photograph is not as a fact, but as a threat.

“Raising the Flag on Mount Suribachi” has similarly broadened in its effect and influence. Like “Migrant Mother,” it became a postage stamp. But it did so instantly in 1945, requiring the U.S. Post Office to make an exception to its rule that no living person appear on a stamp. The Iwo Jima image has appeared on silver dollars, bonds, and bumper stickers. Used in this way, the photograph stands for American valor and victory. It represents national strength—military, monetary, and moral.

Yet unlike “Migrant Mother,” the photo of Iwo Jima has been used commercially without controversy: to sell tee shirts, mugs, clocks, tattoos, and even condoms. And it is often used to comment on political issues of the day, such as: military policy on gays and lesbians, the limits of free speech doctrine, the righteousness of the Gulf War, the war in Afghanistan, and health care. It has even been

Bill Schorr’s Spin on the Iwo Jima Photo

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162 HARIMAN & LUCAITIES, supra note 94, at 94.
163 Id.
165 Id. at 94, 108. For some popular uses and images of those uses, see http://www.nocaptionneeded.com/?page_id=5.
166 This cartoon by Bill Schorr was originally published in The Kansas City Star in 1993. It is reprinted here with the permission of United Feature Syndicate, Inc.
168 Id. at 301 (showing editorial cartoon featuring image of soldiers in Iwo Jima pose raising a gasoline pump instead of a flag, commenting on the first Iraq War).
170 See J. Lester Feder, Fighting for Our Health, NATION, Apr. 27, 2009, at 11 (cover story). For a web-image of the front cover to The Nation’s April 27, 2009 issue, see
reenacted—whether intentionally or not—at the spot of the former World Trade Center in New York City, in the now-famous photograph of firefighters raising the U.S. flag at Ground Zero.171

More so than any other photograph, this one of Iwo Jima seems the most iconic. Not only was the image circulated widely and quickly, but its “slippage in referential meaning began immediately.”172 Although referring to a specific moment and victory, its attraction to the public at large pushes beyond the concrete details of February 1945 to symbolize—while also critiquing—in its various editorial incarnations the American promises of liberty, equality, and democracy. It may symbolize “the success that is achievable through collective sacrifice,”173 but the nature of the success and the goals of the collective sacrifice vary.174 As one article on the subject explains: “The image has become a discourse fragment that multiple publics appropriate for diverse purposes.”175 Useless without its historical roots, the image of Iwo Jima nonetheless becomes useful precisely because it loses its history and is re-integrated into contemporary struggles and politics. It has become a “resource for U.S. public culture” with which to tell new stories about today’s issues.176 The reoccurring use of the Iwo Jima iconicity is not to recall an event in the past but to craft a wholly new story about “the now.” It has lost its evidentiary function, if it ever had one.

Much like the image of raising the flag at Iwo Jima, the “Times Square Kiss” has become symbolic of much more than American triumph and jubilation over international victory. The photograph’s widespread commercialization to sell clothing, puzzles, and videos177 does not offend viewers in the same way that the appropriation of other iconic images does. It does not draw ire even when used politically to critique the U.S. military’s anti-gay policy, as did the June 17, 1996 cover of *The New Yorker*,178 or when used to make an off-color joke about incest, as was the case with the February 4, 1990 episode of *The

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172 HARIMAN & LUCAITES, supra note 94, at 107.
173 Edwards & Winkler, supra note 167, at 301.
174 “If the nation is a cultural artifact created through public arts, then the design and circulation of the iconic photograph of the Iwo Jima flag raising provide stylistic inflection that encourages both egalitarian collective identity and an emotional responsiveness not tied to any one definition of the state.” HARIMAN & LUCAITES, supra note 94, at 114.
175 Edwards & Winkler, supra note 167, at 297.
176 HARIMAN & LUCAITES, supra note 94, at 128.
177 HARIMAN & LUCAITES, supra note 94, at 73-76.
178 For a web-image of the cover, which depicts two male sailors kissing in the pose of the “Times Square Kiss,” see http://archives.newyorker.com/?i=1996-06-17.
Simpsons entitled “Bart the General.” This image from 1945 has become part of the public discourse—and is not to be protected or kept sacred like “Migrant Mother.” It becomes “part of a larger process of imitation that reflects continuing struggle over embodied citizenship.”

The historical moment captured by Alfred Eisenstaedt is no longer of August 14, 1945 and VJ Day; it is of today—particularly as it gets reenacted regularly by the Times Square Alliance with its “Times Square Kiss-In.” The moment of the kiss has been conjured nearly every year since 2004, making something new of the declaration of joy that the photograph instantly evokes. It is no longer only about war, military successes, elation, or camaraderie. Indeed, it may not be about any of that at all. As the event’s website says: “A special invitation is extended to couples whose kisses bridge boundaries, be they religious, political, racial, national or otherwise, as well as veterans of WWII, returning veterans from the Iraq War, and couples in costumes commemorating the original 1945 kiss.”

The Pepsi television commercial shown during the 2009 presidential inauguration and featuring a reenactment of the “Times Square Kiss” demonstrates the elasticity of photographic rhetoric. The commercial displayed central cultural figures from past decades all drinking Pepsi—1920s flappers, the Times Square crowd on VJ Day, 1950s women in poodle skirts and men in bomber jackets, 1960s flower children, 1980 break dancers, and crowds tearing down the Berlin Wall. The message here is that the “Times Square Kiss” may be rooted in the 1940s, but we are all one people (united by Pepsi Co.). The “Times Square Kiss” together with Pepsi stands for whatever this generation is celebrating. Contrary to how we might examine evidence in a courtroom, we do not think to ask of the Eisenstadt photograph: “Who are these people?,” “Did they know each other?,” “How long did they kiss?,” or “Did he kiss anyone else?” Instead, as the photograph is summoned yearly in New York

_Sources:_

179 _HARIMAN & LUCAITES, supra_ note 94, at 80-81, 336 n.78 (describing the episode in which Bart Simpson, while wearing a sailor hat, “grabs [his sister] Lisa for the classic kiss,” intentionally evoking the pose from the Eisenstaedt photograph).

180 _HARIMAN & LUCAITES, supra_ note 94, at 80.

181 _Id. at 82._ For a description of the annual “Times Square Kiss-In,” see Times Square Alliance, Times Square Kiss-In, http://www.timessquarenyc.org/about_us/events_vjday.html (last visited Mar. 15, 2010) [hereinafter Times Square Kiss-In].

182 _Id._ The reenactment did not take place in 2009 but is slated to return for 2010. Times Square Kiss-In, _ supra_ note 181.

183 _Id._


185 _See HARIMAN & LUCAITES, supra_ note 94, at 82 (“[T]hese festive reenactments may be advancing a progressive redefinition of public culture.”).

186 Some of these questions were the subject of some investigation decades ago into Eisenstaedt’s photograph. _See id._ at 82-83.
City, we now think that these people are us. The epilogue to the commercial confirms this sentiment: “[E]very generation refreshes the world. [N]ow it’s your turn.” We have transformed the photograph into reflections of ourselves.

Lennart Nilsson’s scientific photographs of the human fetus in utero mobilized a political movement. His *Life* photograph did not get reproduced on tee shirts or postage stamps to triumph scientific progress and ingenuity, but on protest placards to decry the killing of unborn human beings. The recontextualization of Nilsson’s remarkable photographs was strategic, as were all the above recontextualizations: it made “fetal personhood a self-fulfilling prophecy” by giving the fetus a public presence, taking it from the scientists and bringing it to the people. Particularly noteworthy for the present discussion of photographs as evidence is that the photograph of the fetus is apparently accepted as proof of life, despite the initial disbelief by the *Life* editors in what they were seeing. The image of the fetus has become so familiar that no one questions its authenticity anymore. It is evidence of life and that evidence is relevant for the debate on reproductive choice. But why? What is the connection between proof of life (if this is what the photograph is) and reproductive choice?

The answer is in the way the photograph circulates, how it is framed and reframed, and how it generates correspondences between people in our culture. Where is the woman in this picture? As surely as she must be there, she is unseen. Whereas the fetus floats in the picture—autonomous, unconnected, and primary—the woman is forgotten and made irrelevant by the subsequent discourse that frames the picture. This fetal imagery, as one scholar writes, “epitomizes the distortion inherent in all photographic images: their tendency to slice up reality into tiny bits wrenched out of real space and time.” With the zealousness of science and the force of positivism a truth is made from a “discrete bit[ ]”—an empirical data point—which in its photographic incarnation is “divorced from historical process [and] social

187 See id. at 84 (“The icon presents anonymous figures enacting stock characters embodying a democratic structure of feeling, which then in turn is recast within a liberal framework emphasizing individual identity and personalized reactions.”); cf. supra text accompanying note 64.

188 2009 Pepsi Commercial, supra note 184.


191 Behind the Lens, supra note 123.

192 Petchesky, supra note 190, at 268.

193 Id. at 277.

194 Id. at 268.
relationships.”  As such, the photograph can be made to mean almost anything. “[N]one of this viewing and measuring and recording of bits of anatomical data gives [us] the slightest clue as to what value should be placed on this or any other fetus, whether it has a moral claim to heroic therapy or life at all, and who should decide.” In other words, seeing the fetus in utero (observing its existence) does not necessarily help us render a fair or righteous judgment on abortion (whether the fetus should have a right to live off the mother). The use of the picture as a mechanism for judgment is political, not evidential. It is already a statement on the hierarchy of values and persons. I submit that most photographs presented as evidence are similarly constituted. They are floating facts that lack value (moral, social, or political relevance) until they are situated in the story that one side tells at trial.

The fetal imagery is much like the famous “man on the moon” photograph. They are separated by only a few years in time. Like the fetus, Buzz Aldrin stands in space, unattached and autonomous. He represents the “Hobbesian view of . . . human beings as disconnected,” isolated, and free. Although costumed in the space suit, we see in him, as we do in the fetus, images of ourselves. We reflect onto the fetus the beginnings of all of us and onto the astronaut the triumph of human civilization. And, like Nilsson’s photograph of the fetus, the lunar photo is the only evidence we have of something we will never see with our own eyes. Perhaps because of this, as with the fetal imagery, some people thought that the man on the moon photograph was faked. But once the photograph was accepted as science and no longer as science fiction, it was embraced not only as evidence that JFK could fulfill his promise beyond the grave but also as evidence of the possibility of human kind.

195 Id. at 269.
196 It is a fetish, as one scholar suggests. Id. at 270.
197 Id. at 274.
198 Id. at 272.
199 This connection was made explicit by Rosalind Petchesky. Id. at 270.
200 Id.
201 PHOTOS THAT CHANGED THE WORLD, supra note 51, at 124.
First Moon Landing Commemorative Stamp

To commemorate the 25th anniversary of this American triumph, the man on the moon photograph was made into a U.S. stamp in 1994. The stamp is no longer a picture of Buzz Aldrin, however, but a representation of American culture. The photo was changed by enlarging the astronaut and turning him into a saluting soldier, placing the U.S. flag in the foreground, and inserting planet earth as a backdrop. Here, evidence of a man on the moon becomes the message of American might. The famous photo to which the stamp refers does not function as a mirror reflecting an event or a window onto a slice of time; its circulation and commemoration produces a new story and, with it, a new reality. As John Tagg writes: “That a photograph can come to stand as evidence . . . rests not on a natural or existential fact, but on a social, semiotic process . . . .”

To be sure, we do not often admit photographs into court to prove an existential fact—e.g., that someone was at the scene of the crime. Instead, we admit photographs to tell a persuasive story of guilt or

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203 Speaking of the $9.95 express mail stamp that became the inspiration for the twenty-nine-cent stamp, the stamp designers said: “We wanted to convey the image of the United States on the Moon, so we utilized the flag as a design element’ . . . .” Id.
204 Quite explicitly, the stamp designers said: “There are so few actual photos of the Apollo 11 astronauts on the Moon . . . and they’ve been so overused by now, that we wanted to paint a picture that would indicate how it was—how it might have looked—if we had been there with them.” . . . [The stamp designers] decided that the new U.S. stamp should show the two lunar astronauts saluting Old Glory, as one of them held the flagstaff in his left hand.
Id.
205 TAGG, supra note 47, at 4.
innocence or of liability or exculpation, to evoke compassion, anger, or fear, and to emotionally engage the audience in the story we want to tell. We rely on the documentary essence of photography to engage in rhetoric. Whether consciously or not, when waving photographic evidence in a courtroom, we are doing with photographs what these iconic photographs are doing in culture: moving an audience to render judgment they can believe in. This being the case, we might do well to treat a photograph in court as a testimonial or an argument, as requiring rebuttal and context rather than as speaking for itself.206

Perhaps more than any of the other photographs discussed above, the photograph of the hooded detainee in Abu Ghraib is the kind of photograph that would be evidence in a criminal trial, the kind of filmic proffer that would take center stage and be offered as quintessential proof of guilt. But do such pictures actually help us to assign guilt or responsibility, the legal questions that would be at issue? Do they definitively show us that a crime was committed? Recall that Sabrina Harman, one of the MPs who photographed the scene, says she was taking pictures to record evidence because no one would believe her.207 Susan Sontag reminds us that photographs are trophies, “less objects to be saved than messages to be disseminated.”208 Certainly this seems the case with Abu Ghraib. And it is what Sabrina Harman says explicitly when explaining or justifying her actions after the fact. But what is the message sent by her photograph? To what are we bearing witness when we look at it? What was Harman afraid no one would believe that would be rendered obvious when looking at the photograph?

The photograph is an image of abuse, to be sure. But Harman’s photographing of the hooded detainee does not only send the message that “abuse happened” to this detainee. Sontag wrote about this picture and others that “[t]he events are in part designed to be photographed.”209 Based on Harman’s testimony, this seems to be true.210 In this way, the photo is not evidence of torture but of social control and surveillance that make torture acceptable. The obsessive photographing at Abu Ghraib is part of the dehumanization process in and of itself. Photographs “objectify[] [that which is] visualized by creating distance between [the] knower and [the] known. . . . Elevation of the visual in a hierarchy of senses actually has the effect of debasing sensory experience . . . .”211 Harman said as much when she described her

206 See generally Silbey, Judges as Film Critics, supra note 1 (making the same argument for moving picture evidence).
207 See supra text accompanying notes 138-139.
208 Sontag, supra note 63.
209 Id.
210 Gourevitch & Morris, supra note 130, at 55.
211 Petchesky, supra note 190, at 275. Errol Morris and Philip Gourevitch suggest that Harman’s obsessive photographing was a coping mechanism. “[I]t was a way of deflecting her
experience at Abu Ghraib: “It seem[ed] like stuff like this only happened on TV. It’s not something you really thought was going on. At least I didn’t think it was going on. It’s just something that you watch and that is not real.”212 This detached objectification may be necessary when on the battle front, but it is destructive when moral judgment and law-abidingness is required as an ongoing matter.213 So in addition to abuse, the photograph evidences a culture of surveillance in which record keeping, bureaucratic uber-rationality, and oppression go hand in hand.

As these images repeat and reoccur in popular and political culture they become part of our myths and fantasies.214 They become the way to tell the story of who we are—not who we were yesterday but who we are today as we currently reimagine ourselves.215 As the many editorial cartoons about Abu Ghraib suggest, the stories equate U.S. military policy with torture, but their message has more to do with American values than with the people detained or tortured. Two such editorial cartoons explicitly describe the harm of the Abu Ghraib scandal as relating to “U.S. Credibility” and the wrong done to principles of liberty and the rule of law (as embodied in the U.S. flag).216 Beyond political commentary, the image of the tortured, hooded prisoner “proliferated around the globe in uncountable reproductions and representations—in the press, but also on murals and placards, T-shirts and billboards, on mosque walls and in art galleries.”217 The posters shown below (a blend of art, advertising, and political commentary) are by Forkscrew Graphics, a group who plastered California freeways with its “guerilla poster campaign” protesting the Iraq war policies. “Harman [herself] even acquired a Gilligan tattoo on one arm, but she considered that a private souvenir.”218 Harmon could not fathom the public’s fascination

own humiliation in the transaction, by acting as a spectator. . . . By downloading her impressions to a document, she could clear them from her mind and transform reality into an artifact.”

Gourevitch & Morris, supra note 130, at 54.

212 Gourevitch & Morris, supra note 130, at 54.

213 James Boyd White explores the “systems of thought and imagination at work in our heads and heart that make up an empire of force,” the “phenomenon that lies beyond war and enables . . . us to reduce other people to objects, to deny their equal claims to a life of meaning and fulfillment.” JAMES BOYD WHITE, LIVING SPEECH: RESISTING THE EMPIRE OF FORCE 4 (2006). He would likely contest the above statement that objectification is a necessary good at all.

214 Petchesky, supra note 190, at 272.

215 “[P]hotographs have an insuperable power to determine what we recall of events . . . .” Sontag, supra note 63.


217 Gourevitch & Morris, supra note 130, at 57.

218 Id.
with the photograph of Gilligan. “‘There’s so many worse photos out there. I mean, nothing negative happened to him, really,’ she said. ‘I think they thought he was being tortured, which he wasn’t.’”

“iRaq” Posters by Forkscrew Graphics

Why would Sabrina Harman be “baffled that the figure of Gilligan—hooded, caped, and wired on his box—had eventually become the icon of Abu Ghraib and possibly the most recognized emblem of the war on terror after the World Trade towers?” Harman failed to understand that the photographs are not significant because of what they might have recorded (torture or no, as she seems to dispute). They are not important because of their indexical or phenomenological value. They are important because, like all forms of language, they become part of us through their use, reuse, appropriation, and contextualization. Through this process we gain understanding. And what we understand, we do not like. We do not like what we have become.

Whether or not the photographs from Abu Ghraib evidence the fact that torture occurred, the fact of the photographs (that pictures were taken) tells us about the importance of domination and subordination in a society engaged in war. The photography itself caused pain and humiliation. And the reassertion of the photographs—their reappropriation—shifts the story from evidence to rhetoric. One scholar has compared the photos from Abu Ghraib, especially the one of the hooded detainee, to the lynching photographs from the Jim Crow era.

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219 Id.
221 Id.
222 The photographs were meant as a form of blackmail against the prisoners. Dora Apel, Torture Culture: Lynching Photographs and the Images of Abu Ghraib, 64 ART J. 88, 90 (2005).
The lynching photographs were trophies of domination, assertions of power, just like the photos from Abu Ghraib are. And yet, like the lynching photos which were appropriated and transformed into antilynching images by left-wing and liberal artists and organizations in the 1930s . . . the . . . photos of Abu Ghraib also have become the basis for antiwar images and artworks. . . . This public visibility transforms them from private souvenirs of American supremacy into blistering anti-American pictures.223

Is it any surprise that the most iconic photograph of the United States’s intervention in Iraq, the one that is repackaged to tell a new story critiquing U.S. judgment and righteousness, is the one that most resembles a crucifixion and a Klansman, central and contested symbols in American cultural life? The iconic Abu Ghraib “Gilligan” photo is us—it is made by us, it tells our history, and it remakes us in many, many ways.224 And yet these uses and reuses—despite the singular photograph—are varied and even opposed. The photograph galvanized debates ranging from utilitarianism and torture to governmental transparency and national security. The debates still rage in part because the iconicity of the photograph does not allow for uniform interpretation.

Errol Morris asks, “[E]veryone has seen the photographs [of Abu Ghraib], but does anybody really know what the photographs are about?”225 Errol Morris calls for critical evaluation of these documentary photographs (evidence verité), a kind of evaluation that looks “beyond” the picture in order to understand it.226 This is what John Tagg calls for when he seeks to understand “the specific contexts [and] specific forces” that produce the photograph and explain it.227 And it is what I have tried to do with each of these iconic photographs—the “Migrant Mother,” the bomb over Hiroshima, the “Times Square Kiss,” victory at Iwo Jima, “Life Before Birth,” the man on the moon, and the hooded detainee. Critical evaluation is crucial because seeing the photograph does not tell us what it means.228 The only way to decide what the photograph means—its value to us in our assessment and judgment—is to discuss it, turn it upside down, place it in one story and then another one, until the photograph gets what it wants: to be explained.229 We should not be looking at the photograph

223 Id. at 94-95 (footnote omitted).
224 See supra text accompanying note 64.
225 Meyer, supra note 41, at 53.
226 Id.
227 TAGG, supra note 47, at 3.
228 Petchesky, supra note 190, at 274 (“[N]one of th[e] viewing and measuring and recording [that the photograph does] . . . gives [us] the slightest clue as to what value should be placed on [its image], . . . and who should decide [that value].”).
229 See Mitchell Interview, supra note 70.
for its meaning but at the story in which the photograph is situated. This is a lesson of iconic photographs for law and evidence verité: we should look to the story and the storyteller, not only at the photograph pinned to the courtroom wall. A photograph’s explanatory value will arise from the context it is given and its persuasive force will issue from the authority of the speaker.

So how does the cultural life of film images explain the rule of law’s promise and dominion? The notorious and mythic nature of these iconic photographs tells us that even the most scientific and documentary of impulses cannot be constrained to facts, data, and rules. The demonstration of the photograph as connotative—as carrying significance beyond the moment it records—explains the expansive symbolic capacity of photographs and film. We change iconic photographs as our identities as citizens (and our obligations to the next generation) change with time. We do the same with evidence verité to confer legal judgment because that is what photographs want from us.230

IV. POLITICAL IMPLICATIONS OF EVIDENCE VERITÉ

I promised to conclude this Article by saying something about how we might attend to the nature of photographs in order to learn better how they captivate us, to make the photographs themselves the subject of analysis.231 We would do this in order to “come to terms with the systems of meaning, with the languages, that shape our world,” especially when used at law “where public power is given shape and reality in language.”232 Because we cannot banish evidence verité from the courtroom—photographs and films are permanently part of the way we make sense of our world—we must critique them. This is not the “utopian impulse that yearns for a critical relation to images, a way of demystifying . . . their power with a counter-discourse [that] separat[es] them into the usual binary categories: false and true; evil and good; inauthentic and authentic . . .”233 Rather, “[t]he critique of the image becomes a moral and political task . . . [that] find[s] a common ground in the concept of the indestructibility of images as elements of consciousness and the construction of a symbolic world, a human world.”234

“The point . . . is . . . to put our relation to the work into question, to make the relationality of image and beholder the field of

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230 See id.
231 See id.
232 WHITE, supra note 213, at 7-9.
233 Mitchell Interview, supra note 70.
234 Id.
Were we to do this with evidence verité, as we did with the iconic photographs discussed above, we would learn that photographs facilitate political discourse—they provide us with support for prescriptive commentary on how we (or others) should live our lives together. That a photograph indexes a lived moment or an uncontroverted fact from the past (e.g., that of a mother, a fetus, a lunar landing, raising a flag, or standing on a box hooded and wired) does not prevent it from being a “living agent” and speaking to us about a present state of affairs (e.g., that of today’s underclass not the Great Depression, of a current war rather than a previous one, of contemporary social policy not military policy, of constitutional rights not scientific data). Our relation to the photograph begins with its documentary impulse—the key that opens the door to the courtroom and “authenticates” it as a document to be considered. But the photograph rapidly evolves through its rhetorical uses and culminates in being appropriated as a personal experience on which we base assertions of knowledge and righteousness. The iconic photographs attest to facts, but above all they assert varied and evolving moral statements about poverty, the force of collective action, the threat of U.S. nuclear domination, the ubiquity of celebration for each unique generation, our common beginnings, our technological prowess, and our capacity for self-destruction. We understand this not by looking at the photograph but rather to the story in which the photograph is situated. Time and again, good judgment requires that we evaluate the stories told and the communities that they constitute, and that we not overstate the value of the asserted facts (as embodied by filmic evidence) on which the stories are based to determine the messages that the stories convey. As William Mitchell puts it:

The idea is to make pictures less scrutable, less transparent; also to turn analysis of pictures toward questions of process, affect, and to put in question the spectator position: what does the picture want from me or from “us” . . . ? One can also translate the question: what does this picture lack; what does it leave out? . . . What does it need or demand from the beholder to complete its work?

The pattern that emerges when asking these kinds of questions of iconic photographs and evidence verité is that the partnership of film images with the law risks the perpetuation of dominance by those in control of the camera (what Foucault might call “institutional technologies”). (This seems especially obvious with the photographs from Abu Ghraib,

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236 See Mitchell Interview, supra note 70.
237 MITCHELL, supra note 235, at 49-50.
238 Gillian Rose, Visual Methodologies: An Introduction to the Interpretation of Visual Materials 174-75 (2d ed. 2007) (discussing institutional concepts put forth in Michel Foucault, Discipline and Punish (Alan Sheridan trans., 1977)).
but is equally true with the other photographs.) Where legal rules ordain the photograph (and thus the photographer’s vision) as the truth of the matter, 239 the stories told and the verdicts rendered will be dominated by those who exaggerate the photograph’s importance, thereby “contribut[ing] to the simplification of an event [and] promot[ing] prejudice and partial knowledge.” 240 Making the photograph “less scrutable, less transparent” or asking “what does it leave out” would resist the dominance that evidence vérité can exercise over stories told in the courtroom and shift the focus to evaluating the storytellers (i.e., the attorneys, witnesses, and other documentary or real evidence).

Barthes recognized a “historical paradox: the more technology develops the [circulation] of information (and notably of images), the more it provides the means of masking the constructed meaning under the appearance of the given meaning.” 241 In light of the law’s unparalleled power to take away life, liberty, and property, the law’s pursuit of justice would be improved were we to render self-conscious and open for critique the social and semiotic process that photographs and film (evidence vérité) require for their signification. Studying the habit of mind already in place with regard to our reception and appropriation of iconic images can help us understand how we as viewers supplement photographs and film to make them whole—that is, how we identify “what the pictures lack” and what we provide to make sense of them. Studying this habit of mind teaches us that:

- We provide the photograph’s meaning; its significance does not originate from the photograph’s referentiality but from what we currently use it for in our world.
- We are capable of slowing and often do slow down the reception of images by taking second and third looks at pictures we think we know in order to relearn or reappropriate them; 242 doing so with evidence vérité should be second nature.
- Photographs and film are abstractions of lived experiences; abstract by nature, they require grounding in a current story to make sense.
- Photographs and film may represent the world as it once was; but they also necessarily participate in its remaking, remodeling the world anew.

240 PHOTOS THAT CHANGED THE WORLD, supra note 51, at 11.
241 BARTHES, IMAGE, MUSIC, TEXT, supra note 34, at 46.
242 Mitchell Interview, supra note 70.
Asking why a photograph or film was taken only begins the critical inquiry because documentation (if that was a purpose) only explains its purpose at a single moment in time, not its significance for the present matter at hand.

These lessons may lead to a myriad of practical changes in the courtroom, many of which I am sure readers of this Article can provide better than I can.243 But here are a few:

- Photographs, when admitted into evidence under proper authentication, should be admitted as substantive evidence (for the truth they assert) and analyzed for their assertive message, rather than considered demonstrative aids or real evidence.244

- Photographs should not remain posted during trials or evidentiary hearings as a background illustration to everything else that occurs during the proceedings. Like all other evidence, it should be temporarily before the fact-finder and only recalled upon request and with reason.

- Judges might consider withholding photographs and film from the jury room when the jury deliberates unless specifically requested (and then only for limited times) as evidence verité can be given undue weight in evaluating the case.

- When faced with the choice between a personal viewing of a crime scene or other relevant space and a viewing of a photograph or video of the same, judges might consider opting for the personal viewing to avoid the mediation of the camera and the exaggerated effect of evidence verité.

- Photographs and film should not be allowed as part of opening or closing statements unless both parties agree to their use in advance and the court is given the opportunity to preview their presentation and rule on their potential prejudicial impact.245

These suggestions might seem paternalistic or heavy-handed. But all they do is force several moments of reflection about the evidence verité

243 Louis-Georges Schwartz, Mechanical Witness: A History of Motion Picture Evidence in U.S. Courts (2009), presents a history of film evidence in the twentieth century and the growing comfort with film and video evidence in court. Like the current Article, Schwartz calls for greater contextualization and formal as well as institutional specificity to understand film’s proper role in adjudication.

244 See Silbey, Judges as Film Critics, supra note 1 (arguing for this treatment for all filmic proffers).

being offered in the hopes of minimizing the potential for unconscious or less-than-deliberative responses to the photographs or films. These suggestions incorporate our learning about the culture of images. They recognize that law cannot be isolated from the cultural attitudes and habits of which it—as a social and political institution—forms a part.

These suggestions also may help temper the illusion of objectivity and of “the whole truth” that evidence verité is perceived to project. Stanley Fish has famously argued that legal rhetoric maintains its authority by asserting its independence from “ethical-political value judgments” and that it does so by embracing (while denying reliance on) certain ethical-political value judgments and not others.246 I am arguing similarly in terms of the way the law considers evidence verité, photographic and filmic evidence being the new medium (and written language being the old medium) through which the law asserts its ability to fairly resolve disputes and command resolutions by relying on presumed unambiguous or self-evident expressions of responsibility or will (as depicted in the photograph or film). Yet, as Fish’s essay demonstrates, there is no such thing as unambiguous or self-evident expressions of responsibility or will that the law is called to adjudicate: “[N]o matter how carefully a contract is drafted [or a photograph is taken] it cannot resist incorporation into a persuasively told story in the course of whose unfolding its significance may be altered from what it had seemed to be.”247 Fish’s conclusion is that “whenever there is a dispute about the plain meaning of a contract [or a photograph, for our purposes], at some level the dispute is between two (or more) visions of what life is or should be like,” which has nothing to do with the contract (or photograph) and everything to do with questions of morality, ethics, or culture from which the law claims to be independent.248

In the end, then, I am not saying anything new, but something relatively well-established. I nonetheless do so in light of a growing obsession with photographic and filmic dominance that is proving stubborn if not entrenched.249 The cultural life of photographic and filmic images (their dominance and their variability) inflects the law of which they become a part. We are comfortable with—indeed we embrace—the appropriation of iconic photographs as our own, as relevant to today rather than to yesterday, as having contemporary (in contrast to historic) significance. Our shift in focus from data to story (from fact to meaning) affects inclusions and exclusions of people,

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246 Stanley Fish, The Law Wishes to Have a Formal Existence, in THE FATE OF LAW 159, 161, 195 (Austin Sarat & Thomas R. Kearns eds., 1991) (borrowing the term “ethical-political value judgments” from HANS Kelsen, THE PURE THEORY OF LAW 192 (Max Knight trans., 1967)). This is a standard although slightly modified argument from critical legal studies. See id. at 193.

247 Id. at 172.

248 Id. at 175.

249 Silbey, Filmmaking in the Precinct House, supra note 1, at 116.
ideas, more data, and other stories. This is the essence of writing history.\textsuperscript{250} It can never be complete. This same kind of history-making occurs at trial when overdetermining or destabilizing the truth value of \textit{evidence verité}. We can bear witness only to the present use of the photograph or film, not to some event, person, or thing in the past. Our collective witnessing—bringing us to the moment when the larger community was obviously (or necessarily) absent, but for which the larger community’s gaze is necessary to render the moment into our present consciousness—helps us feel justified in our collective judgment. And perhaps that is how it must be. In this way, a photograph or film is no different from testimony. It contains a lacuna that the law (through our participation in it) may strive to fill but which, as we know from our own lives, may feel like an impossible task.\textsuperscript{251} The law might aim for truth and justice but it can only be assured of arriving at judgment.\textsuperscript{252} We should simply be aware of this and not defer to baldly assertive film or photographic images for truth. The cultural life of these images demonstrates that the law’s promise ultimately rests not with abstract legal rules or technological advances but with us.

\textsuperscript{250} \textsc{White}, supra note 48, at 6-9.

\textsuperscript{251} \textsc{Giorgio Agamben}, \textsc{Remnants of Auschwitz: The Witness and the Archive} 33 (Daniel Heller-Roazen trans., 1999). This is similar to Mitchell’s statement that images “want” inasmuch as they need, demand, or lack an explanation. \textit{Mitchell Interview}, supra note 70.

\textsuperscript{252} \textsc{Agamben}, supra note 251, at 18-19.