

# Preface

Law has traditionally been about words: trial testimony and oral argument, statutes and judicial opinions, negotiations and jury deliberations. Now, as never before, it's also about pictures displayed on screens: dashboard camera videotapes, digitally enhanced crime scene photos, computer animations, PowerPoint slide shows, and much more. And not just pictures, but multimedia displays combining photographs and videos, drawings and diagrams, the sounds of witnesses' voices, and, indeed, anything that will help lawyers to present their cases and convince their audiences. Law's incorporation of digital visuals and multimedia is advancing rapidly and continuously taking new forms; 3-D virtual reality evidence is on the horizon, and, thanks to videoconferencing technology and the Internet, entire legal proceedings may soon go online.

This is a major change in legal culture. Thinking with pictures—looking at them, trying to interpret them, and using them to reach decisions—is very different from thinking with words alone. Understanding them requires new skills. That's unsettling to many lawyers and judges; law school doesn't train them to deal with pictures, and their experiences in practice may not have prepared them well, either. The change is also unsettling to jurors. True, digital technologies promise jurors unprecedented access to the facts they must decide; think of a videotape enhanced to identify a culprit or a brain scan image that reveals otherwise hidden injuries. And when trial information is presented on a courtroom screen, it's likely to appeal to people who are accustomed to learning about the world through audiovisual media on television and computer screens. But jurors also know that digital pictures can be crafted to show practically anything the presenter wants, and this suspicion battles with their intuitive belief in the truth of what they see. It troubles the public, too, to imagine that judgments of guilt or innocence may turn on the kinds of audiovisual displays that they're used to seeing in movies and advertisements. How can justice be done in this new environment?

This book grapples with that question. We describe the changing legal culture, using detailed case studies to explore how lawyers are deploying new media and how judges and jurors are responding. We also take a broader perspective, analyzing how digital technologies and new habits of using them in everyday life are reshaping the nature of legal knowledge and altering the ever-shifting relationships between law and the wider culture. We discuss what lawyers, judges, and the legal system can do to obtain the greatest benefit from the new technologies while reducing the threats they pose to good judgment. And we look ahead to law's future, in which multimedia on screens may well play an even greater role. We identify the issues that the legal system and the public must confront to maintain law's legitimacy as justice goes online.

As we contemplate the arc of the book, we cannot help but ask whether digital pictures and multimedia are in general good or bad for law. There is no simple answer. Since it's clear, though, that digital pictures are here to stay, the question becomes how the law can best accommodate them, along with words spoken and written. Unless the legal system makes the effort to embrace and understand the new media, it's going to encounter even more trouble as lawyers routinely deploy their digital tools. If, on the contrary, the law takes up the challenge to be alert, wise, and full of inquiry about the uses of new media, judgment and justice may be enhanced. This book is a first effort to suggest what should be done—not because we have all the answers but because, we hope, we have some of the right questions.

Our interdisciplinary approach to our subject reflects our different backgrounds and areas of expertise, which have come together over a decade of talking, teaching, and writing. One of us (Spiesel) is an artist in both analog and digital media and a semiotician; in an earlier stage of the digital revolution, she was an officer in a small software development company. Spiesel first started thinking about the intersection of law and visuality after hearing a lecture by Bernard Hibbets, a law professor, at a meeting of the College Art Association in 1996. She then created a course, *Envisioning Law*, which she taught at the Yale Law School in spring 1998. The other of us (Feigenson), a law professor with an interest in cognitive and social psychology, audited the course. We then collaborated with Richard Sherwin, also a law professor, to develop it into a new course, *Visual Persuasion in the Law*, which has been taught since 2000 at Quinnipiac University School of Law and at New York Law School.

In this book, as in our course, we draw on the wisdom of many disciplines to understand the confluence of law, digital media, and culture:

rhetoric and narrative theory, the psychobiology of vision and the psychology of persuasion and decision making, information design and media studies. We hope that readers will be not only stimulated by our efforts to bring knowledge together from so many domains but also inspired to improve upon them. We are also aware that what we say about particular tools may well be outpaced by technological change. While some of our predictions may prove mistaken, we're confident that our general observations about the roles of new media in law will be more enduring.

Most of the book has not previously appeared in published form, but portions of some chapters have been adapted from the following sources: Brian Carney and Neal Feigenson, "Visual Persuasion in the Michael Skakel Trial," *Criminal Justice* 19, no. 1 (Spring 2004): 22–35 (discussion of *Skakel*, chapter 3); Lisa Podolski and Neal Feigenson, "Digitally Processed Images in Connecticut Courts After *Swinton*," *Connecticut Trial Lawyers Association Forum* 25, no. 1 (Winter 2007): 33–41 (discussion of *Swinton*, chapter 4); Neal Feigenson, "Brain Imaging and Courtroom Evidence: On the Admissibility and Persuasiveness of fMRI," *International Journal of Law in Context* 2, no. 3 (2006): 233–55 (discussion of fMRI, chapter 4); Richard K. Sherwin, Neal Feigenson, and Christina Spiesel, "Law in the Digital Age," *Boston University Journal of Science and Technology Law* 12, no. 2 (Summer 2006): 227–70 (discussion of *Maxus* and *Skakel* cases, chapter 5).

The book, as we said, is built around detailed studies of the audiovisual displays used in actual cases, and we are grateful to the lawyers, trial consultants, and others who have provided us with their materials as well as information and insights into their cases: law professors Donald Braman, Dan Kahan, and David Hoffman and attorney Craig T. Jones (*Scott v. Harris*, chapter 2); attorney Michael Conroy and video archivist Eileen Clancy (*People v. Dunlop*, chapter 2); trial consultant Christopher Ritter of The Focal Point and attorneys Bob Pommer and Jack Worland (*SEC v. Koenig*, chapter 3); trial consultants Larry Collins and Brent Larlee of Animation Technologies and attorney Tom Ullmann (*State v. Bontatibus*, chapter 3); trial consultant Brian Carney of WIN Interactive, Inc. (*State v. Skakel*, chapters 3 and 5); attorneys Hugh Keefe and Michael Georgetti and Connecticut Superior Court Judge Christine Keller (*State v. Murtha*, chapter 3); Barbara Williams, managing partner, Image Content Technology LLC, and attorney Norm Pattis (*State v. Swinton*, chapter 4); communications consultant Cliff Atkinson of BBP Media and attorney Mark Lanier (*Ernst v. Merck, Inc.*, and *Cona and McDarby v. Merck, Inc.*, chapter 5). Four

of our nine cases were tried in Connecticut courts, but, while the selection is partly a matter of convenience (it's our home state and we tend to have more contact with local lawyers than distant ones), we believe that comparable visuals and multimedia are being employed throughout the United States (not to mention the United Kingdom and Australia), so that the full range of cases we analyze offers readers a reasonably representative glimpse of law in the digital visual age.

We would also like to thank the many people who have taught us about our topic, read and commented on portions of the manuscript, or helped us in other ways: David Bolinsky of XVIVO; Bill Buckley; Todd Constable; Brenda Danet; Brett Dignam; David Dill; Ellen Eisenberg; Michael Fischer; Joann Gaughran; Federal District Court Judge Nancy Gertner; Andy Goodman; Daniel Kiecza; Fred Lederer; Jim Lehrer of the Media Arts Center; Andrea Levine; Nancy Marder; Jeff Meyer; Linda Meyer; Keith Murphy; Elaine Pagliaro and Paul Penders of the Connecticut Department of Public Safety; Damian Schofield; Elie Spiesel; Sirri Spiesel; Sydney Spiesel; David Tait; and Wendell Wallach. We have greatly benefited from all of their wisdom; any errors in the book are of course our responsibility, not theirs. We would like to give special thanks to Debbie Gershenowitz and Gabrielle Begue, our editors at NYU Press, whose careful revisions and constant good judgment considerably improved the book. Our Visual Persuasion in the Law students have provided us with continuing inspiration through their visual work and their contributions to class discussions over the years. We are also grateful to Dean Brad Saxton of the Quinnipiac University School of Law for his generous support throughout the writing of the book and to successive deans of the Yale Law School, Anthony Kronman and Harold Koh, who gave Spiesel access to all that a research scholar needs to carry on her work.

Finally, we dedicate this book to our wonderful families, without whose support, encouragement, patience, and generosity this book would never have been completed.