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Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy

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THROUGH A GLASS DARKLY[1]: USING BRAIN SCIENCE AND VISUAL RHETORIC TO GAIN A PROFESSIONAL PERSPECTIVE ON VISUAL ADVOCACY

LUCILLE A. JEWEL*

I. INTRODUCTION

Lawyers face new challenges for persuading in a culture where visual imagery predominates, information is instantaneously transmitted and received, and individual attention spans are shrinking to a nano-scale level. Spending hours at a trial listening to oral arguments, observing witness testimony, and viewing documentary exhibits is a daunting task for jurors who are used to accessing instant information through the internet, social networking sites, and Twitter. Based on the number of news stories of bored jurors refusing to look away from their blackberries during trials,[2] attorneys might be fighting a losing battle to control the attenuated attention spans of modern jurors. In other words, the traditional method of trying a case—through oral opening and closing statements, witness testimony, and static documentary exhibits—no longer meshes with the way that most people process information in the twenty-first century.[3]

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[1] 1 *Corinthians* 13:12 (King James) (This passage has commonly been interpreted to be a comment on the fallibility of human perception).

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[2] *See* Tom Brennan, *Jurors' Texting A Growing Problem*, TAMPA TRIBUNE, Mar. 26, 2009, at 6, *available at* http://www2.tbo.com/content/2009/mar/26/na-jurors-texting-a-growing-problem/ (reporting the problem of Florida jurors who refuse to stop texting even when admonished to do so); Talia Buford, *New Juror Policy Accounts For New Technology*, PROVIDENCE JOUNRAL AND BULLETIN, May 17, 2009, *available at* http://www.projo.com/news/content/TWITTER_AND_THE_JURY_05-17-09_C7EA4AE_v30.37df756.html# (explaining the new instructions judges are giving juries to explain why they cannot access external information during the trial); Kathleen Kerr, *Attorneys: Juror Tried to 'Friend' Witness on Facebook*, NEWSDAY, Apr. 7, 2009, at A16, *available at* http://www.newsday.com/news/local/crime/ny-nyfire0812629767apro07,0,2056953.story (reporting that a juror's attempt to convince a trial witness to connect on Facebook could result in a mistrial); Scott Michaels, *Cases Challenged Over 'Tweeting' Jurors*, ABC NEWS ONLINE, Mar. 17, 2009, http://abcnews.go.com/print?id=7095018 (discussing recent appeals arising out of jurors who posted information about cases on Twitter and social networking websites); John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 17, 2009, *available at* http://www.nytimes.com/2009/03/18/us/18juries.html? (explaining the disruption of recent trials across the country, disrupted by jurors who discussed the case on Facebook or Twitter).

[3] *See, e.g.* Jerry Crimmins, *The New Jury Math: X + Y = Big Change*, 155 CHI. DAILY L. BULL. 3 (Mar. 2, 2009) (explaining that younger jurors expect to see information presented quickly, in much the same way that a case is solved in 48 minutes on CSI [the television show]).

One approach to captivating twenty-first century jurors is for lawyers to embrace new technology and incorporate computer-based visual arguments into their advocacy.[4] Although visuality is undeniably ascendant in American legal culture, visual arguments have been criticized as too superficial, emotional, and illogical, and responsible for a general "dumbing-down" of courtroom advocacy.[5] However, many of the criticisms that have been lodged against visual advocacy can be explained in terms of an imbalance in the adversarial system. When one side incorporates a compelling visual theme into its case but the other side does not have a counter visual strategy, one-sided results occur.[6] On the other hand, where both sides weave a visually-based narrative into their argument, a more level playing field emerges.[7] If all attorneys are familiar with how to construct and counter visual arguments, then the adversarial system should do its job and produce the right result.

The thesis of this Article is that attorneys should stay current with our evolving media culture by incorporating visual technologies into their advocacy toolboxes, but they must do so in a rigorous, ethical, and professional manner. Lawyers should develop what Ann Seward Barry calls "visual intelligence":

> Visual intelligence . . . may be described as a quality of mind developed to the point of critical perceptual awareness in visual

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[4] *See, e.g.*, Brian Carney & Neal Feigenson, *Visual Persuasion in the Michael Skakel Trial: Enhancing Advocacy Through Interactive Media Presentations*, 19 CRIM. JUST. 22, 22–23 (Spring 2004) (explaining how the prosecution incorporated multimedia elements into its case, resulting in a guilty verdict); Richard K. Sherwin et al., *Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law*, 12 B. U. J. SCI. & TECH. L. 227, 260 (Summer 2006) [hereinafter Sherwin et al., *Law in the Digital Age*]; Richard K. Sherwin, *A Manifesto for Visual Realism*, 40 LOY. L.A. L. REV. 719 (2007) [hereinafter Sherwin, *A Manifesto for Visual Realism*] (Sherwin's position is that the law has unequivocally entered the digital age and that attorneys must embrace technology in order to remain effective advocates); Avi Stachenfeld & Christopher M. Nicholson, *Blurred Boundaries: An Analysis of the Close Relationship Between Popular Culture and the Practice of Law*, 30 U.S.F. L. REV. 903, 906–10 (1995) (explaining two early examples of incorporating digital media into a trial).

[5] *See generally*, Evelyn Marcus, Note *The New Razzle Dazzle: Questioning the Propriety of High-Tech Audiovisual Displays in Closing Argument*, 30 VT. L. REV. 361, 382 (2005–2006) (describing how visual presentations can appeal too strongly to the "non-rational portion of the mind," coming too close to the "machinations of Madison Avenue"); Sherwin et al., *Law in the Digital Age*, *supra* note 4, at 267–68 (generally explaining fears that too much visual culture within the law will contribute to a decline in rational deliberation).

[6] For instance, in the much publicized murder trial that the State of Connecticut brought against Michael Skakel, the prosecution relied heavily on a "highly customized interactive multimedia evidence presentation system." Carney & Feigenson, *supra* note 4, at 22. Skakel's defense counsel, on the other hand, did not have a competing visual strategy and did not attempt to counter the prosecution's visual arguments. *See generally*, Robert F. Kennedy, Jr., *A Miscarriage of Justice*, 291 ATLANTIC MONTHLY 51, 74 (Jan.–Feb. 2003).

[7] A well-known example here is the Rodney King assault trial, where both the prosecution and defense relied on cognitive narrative frameworks to explain the videotape of Mr. King being beaten by the police officers. The prosecution approached the video with a certain amount of naivety, relying on the belief that the video itself, showing the violent beating of a prone man, was sufficient evidence to convict the police officers. *See* Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLIN. L. REV. 1, 48 (2005); Sherwin, *A Manifesto for Visual Realism*, *supra* note 4, at 734–36. The defense, on the other hand, relied on framing techniques to generate a narrative of heroic police officers doing battle with a dangerous African American man from the inner city. Alper et al., *supra* at 30. The defense also slowed down the videotape and had an expert tell the jury that each blow to Mr. King was in response to an act of aggression from King. Alper et al., *supra* at 36–38, 48; Sherwin, *A Manifesto for Visual Realism*, *supra* note 4, at 734–36. The defense's visual strategy helped acquit the police officers involved in the beating.

> communication. It implies not only the skilled use of visual reasoning to read and to communicate, but also a holistic integration of skilled verbal and visual reasoning, from an understanding of how the elements that compose meaning in images can be manipulated to distort reality, to the utilization of the visual in abstract thought.[8]

In the field of visual communication and law, several excellent articles discuss the emerging art of visual rhetoric and provide helpful illustrations of visual advocacy skills in action.[9] This Article expands upon the pre-existing literature and contributes a detailed outline of the knowledge lawyers need to become effective visual advocates. Accordingly, the Article explores three areas relevant for developing a deeper understanding of visual issues within the law: the brain science principles[10] that explain how humans process visual information; the emerging discipline of visual rhetoric; and the dynamic confluence of factors that produce serious ethical and professional issues within visual advocacy.

Without a basic knowledge of the psychology and neuroscience principles that relate to visual processing, lawyers will never know exactly how visual persuasion works. The processes involved with visual perception differ from how we apprehend logo-centric information. For instance, many perceptual processes are unconscious processes that do not interact with rational cognition. The non-rational aspects of visual processing lead to perceptual decisions that can be based on rapid reactions of fear or implicit bias, reactions that do not register within conscious perception. While an intuitive understanding of visual issues might suffice on some levels, a deeper understanding of visual processing will help attorneys construct more effective arguments and analyze those arguments for potential inflammatory and overreaching characteristics. Moreover, to counter or object to an opposing counsel's visual presentations, an attorney needs to be able to identify the processes, both conscious and unconscious, that drive an audience's perceptual conclusions. If attorneys are in the dark as to how visual arguments work, they cannot construct and respond to visual arguments in a competent and professional way.

To competently analyze a visual argument from a professional and ethical standpoint, attorneys also need a thorough grounding in principles of visual rhetoric, an emerging discipline that draws upon cultural studies, psychology, classical rhetoric, and media studies.[11] Visual rhetoric asks how visual arguments are constructed and how images persuade.[12] Because

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[8] ANN MARIE SEWARD BARRY, VISUAL INTELLIGENCE, PERCEPTION, IMAGE, AND MANIPULATION IN VISUAL COMMUNICATION 6 (1997).

[9] *See, e.g.*, Neal Feigenson & Christina Spiesel, *Teaching Visual Rhetoric to Law Students*, *in* VISUAL PRACTICES ACROSS THE UNIVERSITY (James Elkins ed. 2007); Christopher J. Buccafusco, *Gaining/Losing Perspective on the Law, or Keeping Visual Evidence in Perspective*, 58 U. Miami L. Rev. 609 (2003); Carney & Feigenson, *supra* note 4; Sherwin et al., *Law in the Digital Age*, *supra* note 4; Sherwin, *A Manifesto for Visual Realism*, *supra* note 4; Stachenfeld & Nicholson, *supra* note 4.

[10] I use the term "brain science" to refer to a wide range of approaches to understanding the human mind and visual processing, including neuroscience, cognitive psychology, and social psychology.

[11] VISUAL RHETORIC xv (Lester C. Olson, Cara A. Finnegan, & Diane S. Hope eds., 2008).

[12] Charles A. Hill, *The Psychology of Rhetorical Images*, *in* DEFINING VISUAL RHETORICS 25, 25–40 (Charles A. Hill & Marguerite Helmers eds., 2004).

our common law system is still text-based and reliant upon inductive and deductive reasoning, visual rhetoric can help lawyers translate visual arguments into logical text and vice versa. This translation skill is necessary to construct a visual argument in the legal context and to spot weaknesses and fallacies in an opposing counsel's visual argument.

Anytime a visual argument is raised, ethical and professional issues must be considered. What does it mean for professional advocacy when individuals sometimes do not see what is really there and reach erroneous snap judgments as to what they think they have seen? Should courts play a greater gate-keeping role for multimedia visual arguments or should they ban them altogether? What can lawyers do to ensure that they are presenting arguments in a professional way? A central idea of this Article is that in order for technology to have a positive effect on the quality of legal advocacy, the adversarial system must operate efficiently. And for that to happen, all lawyers engaged in advocacy must be able to make these new kinds of arguments in an ethical and professional manner. Because most educational institutions, including law schools, do not emphasize visual communication skills,[13] attorneys will have to engage in self-directed education to acquire the knowledge base discussed in this Article. Ideally, as proficiency in visual communication comes to be recognized as an indispensable skill for advocates, legal advocacy courses will routinely include lessons on visual rhetoric and visual narrative.

In Part II of this Article, I will explain the increasing role that visuality is playing in American legal culture. In Part III, I will explain certain aspects of the brain science that relate to human visual processing. In Part IV, I will introduce a few basic principles of visual rhetoric, focusing on common visual rhetorical devices and visual logical fallacies. Part III's explanation of how humans process visual images and Part IV's introduction to visual rhetoric provide the foundation for Part V of the Article, which summarizes the positive and negative attributes of visual arguments and identifies strategies to encourage a consistent level of balance and professionalism in visual arguments.

II. VISUALITY IN AMERICAN ADVOCACY

A. THE EMERGENCE OF IMAGE-BASED ARGUMENTS IN AMERICAN COURTS

Over the past two centuries, Western culture has become increasingly "occularcentric."[14] With the advent of the photograph, film, television, and now the internet, we receive and process much of our information through

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[13] *See* M. ETHAN KATSCH, LAW IN A DIGITAL WORLD 153–55 (1995) (explaining that educational institutions do not teach skills in visual communication because it is assumed that no training is required in order to see and consume the visual). One notable exception is the law school class taught by Richard Sherwin and his colleagues, which focuses on teaching law students how to incorporate visual principles into their advocacy. *See* Sherwin et al., *Law in the Digital Age*, *supra* note 4, at 260–61.

[14] Bruce E. Gronbeck, VISUAL RHETORIC xxi, xxi–xxv (Lester C. Olson, Cara A. Finnegan & Diane S. Hope eds., 2008).

images.[15] With respect to law, demonstrative visual evidence first became commonplace in American courtrooms in the nineteenth century, coinciding with the invention of the photograph.[16] By the 1880s, in terms of admitting visual images into evidence, many judges noted that photographs and diagrams were "too common . . . to meet anything but our approval."[17]

Today, modern technology has added a new level of sophistication to multimedia imagery in the courtroom. While visual aids used to consist of blackboards, blown-up posters, and documents passed around to jurors, courtroom technology now allows attorneys to seamlessly incorporate images, video, and sound into an argument.[18] Lawyers can now create a complementary multimedia narrative that interlocks with their primary argument; the two narratives, if done correctly, use audio, video, and images to reach a "well orchestrated synchrony."[19] The attorneys who created the prosecution's successful multimedia presentation for the much publicized Michael Skakel murder trial described it as a "highly customized interactive multimedia evidence presentation system."[20] At trial, while "witnesses were testifying, prosecutors displayed on a large screen photographic evidence, maps, diagrams of the murder scene, and other demonstrative evidence that they were able to summon on demand from a CD-Rom."[21] Just as the photograph was accepted into courtrooms in the 1880s,[22] courts are generally embracing computerized visual aids as "positive, inevitable, and in many ways quite natural."[23]

B. VISUAL ARGUMENT CASES

Much of the legal literature on visual advocacy has dealt with the visual issues raised in several high-profile cases. In addition to the Michael Skakel murder trial,[24] these cases include the Rodney King assault trial,[25]

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[15] BARRY, *supra* note 8, at 3. Barry remarks that sleeping is now the only thing that children spend more time on than watching television. *Id.*

[16] Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J. L. & HUMANITIES 1, 4 (1998).

[17] W. Gas. Const. Co. v. Danner, 97 F. 992, 996 (9th Cir. 1899); Mnookin, *supra* note 16, at 63–64 (citing Jordan v. Duke, 53 P. 197, 200 (Ariz. 1898).

[18] Sam Guiberson, *Digital Media as Evidence and Evidence as Media*, 19 CRIM. JUST. 57, 60 (2004).

[19] *Id.*

[20] Carney & Feigenson, *supra* note 4, at 22.

[21] *Id.* at 22–23.

[22] Mnookin, *supra* note 16, at 63–64.

[23] Fred Galves, *Where the Not-So-Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance*, 13 HARV. J.L. & TECH. 161, 166–67 (2000).

[24] For instance, five law review articles have covered, from a positive and negative perspective, the prosecution's use of multimedia visual arguments during the trial of Michael Skakel, a cousin of the Kennedy family, for a murder that occurred more than twenty years prior. *See* Sherwin et al., *Law in the Digital Age*, *supra* note 4; Sherwin, *A Manifesto for Visual Realism*, *supra* note 4. Both Sherwin articles describe and analyze the visual arguments that the prosecutors employed. *Compare* Robert Aronson and Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 FORDHAM L. REV. 1453 (2007), *and* Marcus, *supra* note 5 (both criticizing the Skakel prosecution for using technology to make a misleading and overreaching argument), *with* Carney & Feigenson, *supra* note 4 (celebrating the multimedia presentation that helped the prosecution convict Skakel (one of the authors of this article, Brian Carney, worked for the company that helped the Skakel prosecution build its multimedia presentation). For additional information on the *Skakel* case, see generally DOMINICK DUNNE, A SEASON IN PURGATORY (1st ed., Crown 1993) (a fictionalized account that is based on the facts of the case); Alison Leigh Cowan, *Skakel Seeks New Trial in 75'*

and the recent Supreme Court decision of *Scott v. Harris*,[26] where the Court analyzed a police chase video and held as a matter of law that no reasonable juror could find that the fleeing driver did not pose a deadly risk to the public.[27] In this Article, I will look at these high-profile cases in a new light, analyzing how they specifically relate to visual perception and visual rhetoric issues.

In addition to these high-profile cases, the pervasiveness of high-tech visual technology has led to an explosion of reported cases where one party's visual argument has been challenged.[28] Most of these cases arise out of prosecutorial misconduct claims, where the defendant alleges that the prosecution made a prejudicial and misleading visual argument.[29] These cases usually involve challenges to visuals used in closing arguments, but a few cases have dealt with the use of visual images in an opening statement.[30] These emerging cases allow us to track and catalogue what types of visual arguments are being made in the courtroom, revealing how visual issues interrelate with the rules of evidence and professionalism concerns. Thus, in addition to the high-profile cases, I will be looking at several cases "from the trenches" as helpful sources for the study of visual advocacy.

C. HOW DOES AN ARGUMENT BECOME VISUAL?

As a foundational matter, to make a visual argument, an attorney needs to have an arsenal of admitted visual evidence with which to work. Still and

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Moxley Killing, N.Y. TIMES, April 18, 2007, at B3, *available at* http://www.nytimes.com/2007/04/18/nyregion/18skakel.html?_r=1; Kennedy, *supra* note 6, at 51.

[25] *See, e.g.* Alper et al., *supra* note 7 (analyzing the differing narrative approaches the prosecution and defense took with respect to the video in the Rodney King case).

[26] Scott v. Harris, 550 U.S. 372 (2007).

[27] Dan M. Kahan, David Hoffman, & Donald Braman, *Whose Eyes Are You Going To Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 838 (2009). In this Article, the authors critique the idea that there is only one "reasonable" interpretation of a video. The authors conducted a study where they showed the video to 1350 people and found that a substantial minority (twenty-six percent) of those who viewed the video disagreed that the fleeing driver posed a deadly risk to the public.

[28] *See, e.g.*, Smith v. Hawaii, 304 F. App'x 535, 536 (9th Cir. 2008) (challenging prosecutor's PowerPoint presentation that included a photograph of a newborn followed by an autopsy photograph of the infant victim); State v. Hilton, No. 89220, 2008 WL 2477431, 13 (Ohio Ct. App. June 12, 2008) (challenging the use of a PowerPoint slide containing an image of a scale with the terms "defendant" and "State of Ohio" on each side of the scale; the scale balanced in favor of Ohio as the prosecution's closing proceeded); Bell v. State, 172 P.3d 622, 627 (Okla. Crim. App. 2007) (challenging the use of captions on photographs in the prosecution's PowerPoint presentation).

[29] *See, e.g.*, State v. Sotelo, No. 2 CA-CR 2007-0226, 2008 WL 5104891, 6 (Ariz. Ct. App. Dec. 5, 2008) (prosecutorial misconduct alleged when the prosecutor used a PowerPoint slide containing a photograph of the defendant's father and a caption that read "gang banger"); No. F05482, 2009 WL 402088, 3 (Cal. Ct. App. Feb. 19, 2009) (prosecutorial misconduct alleged when the prosecutor displayed images of a dead fetus in his closing argument that had already been declared inadmissible).

[30] *See, e.g.*, State v. Vega, No. CA-CR 06-0320, 2008 WL 3845456, 3 (Ariz. Ct. App. Feb. 19, 2008) (the prosecutor displayed a close-up photograph of the victim in his deceased condition in a PowerPoint presentation during her opening statement that had not been disclosed to the defense); People v. Kennedy, No. H030734, 2009 WL 791226, 24 (Cal. Ct. App. Mar. 26, 2009) (the prosecutor used photographs from the defendant's cell phone in a PowerPoint presentation in his opening statement); Bell v. State, 172 P.3d at 627 (Okla. Crim. App. 2007) (the prosecutor's opening statement PowerPoint presentation displayed photographs from the crime scene).

moving visual images (photographs and video)[31] are usually admitted into evidence as demonstrative evidence, offered to clarify or illustrate a witness's trial testimony,[32] or as direct visual evidence, offered as proof of what the image depicts.[33] Demonstrative evidence has no probative value in and of itself; rather, its purpose is merely to aid the jury in understanding testimony.[34] On the other hand, direct visual evidence functions as a "silent witness" that can provide substantive testimony of the facts portrayed in the image.[35]

Under Federal Rule of Evidence 1006, visual evidence might also be admitted as a chart, summary, or calculation, which helps a jury understand voluminous evidence.[36] Information that is admitted under Federal Rule of Evidence 1006 is considered direct evidence, although some confusion exists on the issue.[37]

To be admitted into evidence, visual evidence must be both authenticated[38] and relevant.[39] Even if visual evidence is relevant, it may be excluded under Federal Rule of Evidence 403 (and state law analogues) if its probative value is outweighed by a danger of unfair prejudice.[40] Graphic and gruesome photographs that have no evidentiary purpose other than to inflame the jury can be excluded under this rule.[41]

Once visual evidence has been properly admitted, lawyers can incorporate that evidence into "pedagogical devices," visual aids that

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[31] While computer animations and simulations can also be admitted as demonstrative evidence, these tools are outside the scope of this Article. The focus of this Article is on simple visual displays that use basic projection or video technology, but which nonetheless employ sophisticated visual rhetoric. For a thorough explanation of the issues related to computer generated animations and simulations, see Galves, *supra* note 23; John Selbak, Comment, *Digital Litigation: The Prejudicial Effects of Computer-Generated Animation in the Courtroom,* 9 HIGH TECH. L.J. 337, 340–41 (1994); Mario Borelli, Note, *The Computer as Advocate: An Approach to Computer-Generated Displays in the Courtroom,* 71 IND. L.J. 439 (1995).

[32] *See,* 29A AM. JUR. 2D *Evidence* §949 (2009); MICHAEL H. GRAHAM, 1 HANDBOOK OF FED. EVID. §401.7 (6th ed. 2008).

[33] 29A AM. JUR. 2D *Evidence* §975 (2009).

[34] *See generally,* 29A AM. JUR. 2D *Evidence* §950; THOMAS A. MAUET & WARREN D. WOLFSON, TRIAL EVIDENCE 332–33 (3d ed. 2005).

[35] 29A AM. JUR. 2D *Evidence* §975 (2009).

[36] *See* United States v. Milkiewicz, 470 F.3d 390, 398 (1st Cir. 2006) (defining a chart as a sufficient summary of large volumes of evidence); United States v. Boesen, 541 F.3d 838, 848 (8th Cir. 2008) (admitting charts as relevant because they helpfully summarized complex background information for the jury); FED. R. EVID. 1006.

[37] *See, e.g.,* U.S. v. Green, 428 F.3d 1131, 1134 (8th Cir. 2005) ("Charts properly admitted under Rule 1006 can be treated as evidence and allowed in the jury room during deliberations, but the district court should issue proper limiting instructions."); U.S. v. DeBoer, 966 F.2d 1066, 1069 (6th Cir. 1992) ("[N]otwithstanding Rule 1006, this Circuit has traditionally endorsed summary evidence so long as an appropriate limiting instruction informs the jury that 'the chart is not itself evidence but is only an aid in evaluating the evidence.").

[38] *See* FED. R. EVID. 901; 29A AM. JUR. 2D *Evidence* §§ 980, 981 (2009) (photographs); 29A AM. JUR. 2D *Evidence* §996 (2009) (video footage); 29A AM. JUR. 2D *Evidence* §1003 (2009) (maps and diagrams).

[39] FED. R. EVID. 401, 402, 403.

[40] FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

[41] 29A AM. JUR. 2D *Evidence* §979 (2009).

summarize or illustrate previously admitted evidence.[42] Federal Rule of Evidence 611(a) grants courts discretion to allow pedagogical devices in the interest of efficiency in order to reach the truth and save time.[43] Unlike direct visual evidence, demonstrative exhibits, and summary evidence admitted pursuant to Federal Rule of Evidence 1006, pedagogical devices are not admitted into evidence and the jury should be instructed not to consider the pedagogical devices as evidence.[44] Pedagogical devices "may reflect to some extent, through captions or other organizational devices or descriptions, the inferences and conclusions drawn from the underlying evidence by the summary's proponent."[45]

D. VISUAL CLOSING ARGUMENTS

Closing arguments are the place where attorneys can practice their most powerful visual rhetoric.[46] As it stands, attorneys have great latitude in closing arguments.

> There are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.[47]

By way of example, in the prosecution's rebuttal closing argument in the *Skakel* trial, a slide was projected that combined Skakel's audio testimony about his feeling of panic the morning after the victim's death, the text of his testimony, and a photo of the victim's corpse.[48] For many

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[42] *See* 4 JACK B. WEINSTEIN AND MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 611.02(vii) (Joseph M. McLaughlin ed. 2009). For cases that generally discuss pedagogical devices as beneficial for clarifying complex issues, see United States v. Ollison, 555 F.3d 152, 162 (5th Cir. 2009); *Milkiewicz*, 470 F.3d at 397; United States v. Janati, 374 F.3d 263 (4th Cir. 2004); United States v. Jamison, 1996 WL 84916, 5 (9th Cir. 1996).United States v. Pelullo, 964 F.2d 193, 205 (3rd Cir. 1992); United States v. Bradley, 869 F.2d 121, 123 (2nd Cir. 1989); Gomez v. Great Lakes Steel Div., Nat. Steel Corp., 803 F.2d 250, 257 (6th Cir. 1986);

[43] *See* FED. R. EVID. 611(a); WEINSTEIN & BERGER, *supra* note 42.

[44] *See* United States v. Scales, 594 F.2d 558, 564 (6th Cir. 1979) (Pedagogical devices should not be allowed into the jury room without the consent of all parties because they are more akin to argument than evidence.); United States v. Taylor, 210 F.3d 311, 315 (5th Cir. 2000) (Although charts may be used as pedagogical devices within the court's discretion under Federal Rule of Evidence 611, jury must be warned that the chart is not evidence and may not go into jury room, absent consent.); WEINSTEIN & BERGER, *supra* note 42.

[45] United States v. Bray, 139 F.3d 1104, 1111 (6th Cir. 1998) (citing United States v. Wood, 943 F.2d 1048, 1053–54 (9th Cir. 1991). *Cf* United States v. Sawyer, 85 F.3d 713, 740 (1st Cir. 1996).

[46] While there are some instances of attorneys employing visual arguments in their opening statements, use of visual imagery in opening statements creates evidentiary difficulties because at the time of opening, visual exhibits have not yet been authenticated or admitted into evidence. *See, e.g.*, State v. Dann, 207 P.3d 604, 616 (Ariz. 2009) (the court allowed the attorney to use images in opening that had not yet been admitted into evidence but gave the caveat that if any of the images in the PowerPoint were not admissible into evidence, that could be grounds for a mistrial); Ford v. Gooden, 2007 WL 4554444, *5 (Ohio App. 2007) (the court excluded an opening statement PowerPoint presentation because the incorporated photographs had not been properly admitted into evidence).

[47] Wilhelm v. State, 326 A.2d 707, 714 (Md. 1974) (citing 53 AM. JUR. *Trials* §463 (1956)).

[48] Carney & Feigenson, *supra* note 4, at 28–29 (describing the sequence of slides); Sherwin, *A Manifesto for Visual Realism*, *supra* note 4, at 737 (there is a photo of the slide at issue included in the article).

commentators, the prosecution's multimedia presentation was the deciding factor that led to the guilty verdict.[49] Because closing arguments are where the most powerful visual fireworks are seen, much of this Article will focus on visual representations in closing arguments. However, I will also address instances where attorneys have used visual techniques to present evidence and create visual associations in the minds of jurors in their cases in chief, before closing arguments.

We are beginning to see more and more published cases involving visual closing arguments made using Microsoft's PowerPoint presentation software. Although PowerPoint has been maligned as a "pushy" template that turns all presentations into a bullet-pointed sales pitch,[50] the format provides an effective, simple, and cheap method for creating visual arguments. PowerPoint can easily be used to integrate video, sound, text, and images into a presentation.[51] If attorneys do not abuse the form and follow good design principles,[52] PowerPoint can be a highly effective advocacy tool. The relative ease with which PowerPoint and courtroom presentation technology can be used means that resource disparities have become less of an issue for visual arguments.[53]

What is an issue, however, are disparities in skill between attorneys who are comfortable incorporating imagistic arguments into their trial presentations and those who are not. Another issue is that attorneys may be comfortable with making visual presentations on a technical level but do not understand what they are doing on a rhetorical level. To evaluate whether or not a visual argument is effective and professional, lawyers need to understand how visual processing and visual rhetoric relate back to logo-centric law arguments. Thus, attorneys should become familiar not only with the technology that goes into making visual arguments, but also with the science that underlies visual images and the rhetoric that makes these images come alive.

E. WILL TEXT BECOME OBSOLETE?

In 1995, Ethan Katsh predicted that a more visual model of the law was emerging.[54] Katsh predicted that the legal system would embrace more visual forms of communication such that law would no longer be an

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[49] Marcus, *supra* note 5, at 361 n.5 (citing various legal commentators who all agreed that the prosecution's multimedia presentation was what convicted Michael Skakel in the end).

[50] Edward Tufte, *PowerPoint Is Evil*, WIRED MAGAZINE (September 2003), *available at* http://www.wired.com/wired/archive/11.09/ppt2.html ("PowerPoint's pushy style seeks to set up a speaker's dominance over the audience. The speaker, after all, is making power points with bullets to followers. Could any metaphor be worse?"). *See also* the Gettysburg Address in PowerPoint format, http://norvig.com/Gettysburg/sld001.htm (illustrates the futility of turning a substantive speech into a PowerPoint presentation).

[51] Simon Jones, *Product Review: PowerPoint 2007*, http://www.pcpro.co.uk/reviews/100144 (February 2007).

[52] The work of Edward Tufte is an excellent source of good design principles that attorneys can follow in presenting information visually. *See* EDWARD R. TUFTE, THE VISUAL DISPLAY OF QUANTITATIVE INFORMATION (1983); EDWARD R. TUFTE, VISUAL EXPLANATIONS, IMAGES AND QUANTITIES, EVIDENCE AND NARRATIVE (1997).

[53] Disparities in resources do become an issue for computer generated animations and simulations, which can cost between $50,000 and $150,000. *See* Galves, *supra* note 23, at 288–89.

[54] KATSCH, *supra* note 13, at 145, 153.

exclusively print and text-based culture.[55] In a contemporaneous review of Katsh's book, Eugene Volokh agreed that the law had become more visual, but disagreed that a more visual model of the law had emerged or would emerge.[56] More than a decade after Katsh made his predictions, the law has definitely become more visual, but Volokh was correct to point out that certain aspects of the law have not embraced visual communication. Why is this? The reason is that our common law system has always been and will continue to be highly linear, logo-centric, textual, and iterative.[57] The written brief, relying on logical and analytical arguments, is still the primary method by which lawyers persuade judges. In the late 1990s and early 2000s, we did see some movement toward using new technology in the formatting of e-briefs, particularly with CD-ROM briefs that organized information in a more interactive way.[58] However, it does not appear that the CD-ROM hypertext form really took off as a viable brief format.[59]

Thus, despite the fact that lawyers might incorporate more visual arguments into their presentations, the fact remains that the primary goal of legal advocacy is to determine what the facts are, identify what the law is, and use deductive logic to construct a persuasive case theory.[60] The relationship between logo-centric text arguments and visual argument means that attorneys need to be able to translate a visual argument back into a text-based form in order to see its logical structure (or lack thereof). A foundation in visual rhetoric principles (the subject of Part IV of this Article) will assist attorneys with this translation endeavor. Further,

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[55] *Id.*

[56] Eugene Volokh, *Technology and the Future of Law*, 47 STAN. L. REV. 1375 (1994) (reviewing KATSCH, LAW IN A DIGITAL WORLD, *supra* note 13).

[57] *See, e.g.*, Morgan Cloud, *Pragmatism, Positivism, And Principles In Fourth Amendment Theory*, 41 UCLA L. REV. 199, 297–98 (1993) (explaining Fourth Amendment jurisprudence as a text-based system of rules); Lawrence A. Cunningham, *The Common Law as Iterative Process: A Preliminary Inquiry*, 81 NOTRE DAME L. REV 747 (2005–2006) (explaining that the common law system relies on the endless repetition of text-based legal decisions, creating a system that is "simultaneously stable and dynamic").

[58] *See* Maria Perez Crist, *The E-Brief: Legal Writing For An Online World*, 33 N.M. L. REVIEW 49, 66 (Winter 2003) (explaining that electronically filed e-briefs using Adobe Acrobat software can include a table of contents that includes hypertext links to the arguments in the brief); Marilyn Devin, *Thinking Like a Lawyer in Hypertext*, 32 BEVERLY HILLS B. ASS'N J. 65, 74 (Winter–Spring 1998) (explaining how the hypertext format offers great potential for briefs because it allows "complex tapestries that have until now had to be squeezed into a single thread will be free to flow naturally").

[59] CD-ROM itself has become a somewhat obsolete technology. Most of the media that would have been produced on CD-ROM is now produced on websites or stored in flash memory drives. *See* LEV MANOVICH, THE LANGUAGE OF NEW MEDIA 127 (MIT 2001).

While e-filing has become more prevalent, "lawyers are still doing little more than 'dumping' a traditional print brief into electronic format." Maria Perez Crist, *The E-Brief: Legal Writing For An Online World*, 33 N.M. L. REVIEW 49, 66 (Winter 2003). The failure of interactive e-briefs to take off could be due to the fact that appellate rules for the electronic filing of appellate briefs require the electronic version to mimic the paper version in terms of format and text. For instance, 11th Cir. R. 31-5 requires that any electronically filed brief be the "same brief in electronic format." However, the rules for electronic filing do allow hypertext links or bookmarks (a tool that Adobe Acrobat allows) to cases, statues and other reference materials on the web as well as on a self-contained CD-ROM. *See, e.g.*, 11TH CIR. R. 31-5 (a), (b), and (c). Thus, while hypertext links to external sources are countenanced by the rules, the brief itself must still retain the linear format of a traditional brief. *See, e.g.*, 3RD CIR. RULE 113.13 (Allows hypertext links as long as the links are replicated in a normal citation format); 9th Cir. Administrative Order, R. 11 (allows the use of hypertext links in case-briefs, but hypertext links do not replace formal citation requirements); 11TH CIR. R. 31-5 (requires submission of "the same brief" in electronic form but allows hypertext links).

[60] Joel R. Comwell, *Legal Writing as a Kind of Philosophy*, 48 MERCER L. REV. 1091, 1113 (1997) ("The deductive syllogism is the backbone of traditional legal rhetoric even when it is not expressly acknowledged.").

translating arguments into a visual form requires knowledge of how visual processing differs from text-based processing and how perception operates in the human mind. It is to this subject of visual processing that I now turn.

III. VISION AND THE HUMAN BRAIN

A. WHY ATTORNEYS NEED TO KNOW BRAIN SCIENCE

To develop visual intelligence, lawyers should understand how perception works in the human mind. Robert Sherwin writes that learning how visual processing works in the brain will help lawyers understand the multiple ways that meaning can be interpreted.[61] Indeed, understanding how the mind constructs meaning from visual images has far-reaching practical and professional uses. Specifically, if attorneys have a deeper knowledge of the brain science that underlies visual processing, they will be better equipped to analyze the efficacy and ethics of their own arguments and counter opposing visual arguments.

With respect to being able to analyze one's own arguments for ethical rigor, that analysis cannot be completed without a full understanding of exactly how a visual argument works in the mind of the audience. As it stands now, attorneys who counter or object to another attorney's visual argument usually rely on intuitive arguments about why a particular visual argument goes too far. For instance, common objections to visual advocacy include arguments that persuasive images are too emotional and illogical,[62] rely on swift non-deliberative thinking,[63] and may result in decisions that are the product of implicit or unconscious bias.[64] While these arguments might sometimes sustain a valid objection to a prejudicial visual argument, a more sophisticated understanding of how the mind processes visual arguments might lead to more successful objections. For example, in Michael Skakel's appeal of his murder conviction, his attorneys unsuccessfully argued that "[t]he state's use of the selectively edited snippets of the defendant's voice pasted into the graphic photos of the victim conveyed false literal and subliminal messages to the jury"[65] and that the presentation was "manipulative."[66] Skakel's attorneys' attempt to explain the manipulative nature of the prosecution's visuals did not go far enough. First of all, the slide presentation in the Skakel trial was not at all "subliminal" within the traditional meaning of the word.[67] Second, the slide did not contain any false information. The manipulation problem is best explained in the way the prosecution took advantage of the rapid cognition

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[61] Sherwin et al., *Law in the Digital Age*, *supra* note 4, at 239.
[62] Hill, *supra* note 12, at 26.
[63] *Id.* at 34.
[64] *Id.* at 35.
[65] Brief of Appellant at 61, Connecticut v. Skakel, 888 A.2d 985 (Conn. Jan. 24, 2006) (No. 16844), 2003 WL 25439693 [hereinafter Skakel Appellate Brief].
[66] *Id.*
[67] A truly subliminal visual presentation would flash an image so swiftly that the subject would have no conscious recollection of the image. BARRY, *supra* note 8, at 262–63. A true subliminal image flashes on a screen for 1/3000 of a second. *Id.*

process individuals use to comprehend sensory information[68] and the unconscious emotional reactions people have when they see gruesome images.[69] Skakel's attorneys, however, may not have had the knowledge base necessary to make an in-depth argument as to why the visuals went too far.[70] Thus, in order to make more sophisticated objections to prejudicial visuals (at the trial and appellate level), attorneys should become conversant with the ways that humans process visual information. To this end, I will now summarize some of the basic psychological and neuroscientific principles that shed light on how humans perceive and give meaning to visual images.

B. SEEING IS NOT ALWAYS BELIEVING

What individuals' eyes tell them they are seeing does not always mirror reality.[71] There is a disconnect between perception and reality that is "fundamental—it is, in fact, a gulf that is never closed."[72] The eye does not work like a camera;[73] rather, reality is a map-like mental image of the external world.[74] Thus, because of distortions in the retina and the shortcuts the mind takes to fill in sensory gaps, the images the eye generates do not always match external reality.[75]

Perception refers to the general process the mind uses to reach an understanding of an image. Perception is a "dynamical system that utilizes the input from the body's sensory systems, synthesizes this with memory and understanding, and creates from both an integrated sense of self and mind."[76] Perception begins at the retina, where photoreceptors pick up light and turn it into electrical signals, which are then transmitted through the optic nerve into the brain.[77] What enters the brain through the retina is two-

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[68] *See, e.g.*, MALCOLM GLADWELL, BLINK 11–12 (2005) (explaining that humans have a decision-making system that is capable of turning out decisions very quickly, so swiftly that we are not aware of the process); JOSEPH LEDOUX, THE EMOTIONAL BRAIN 165 (1996) (explaining that the rapid processing of fearful sensory information is a survival mechanism that allowed us to quickly react to danger in the wild); TOM STAFFORD & MATT WEBB, MIND HACKS 124–25 (2005) (explaining that the evolutionarily ancient part of the brain that looks for dangerous stimuli or occurrences that require urgent action processes images very quickly).

[69] *See, e.g.*, Kevin S. Douglas, David R. Lyon and James R. P. Ogloff, *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?*, 21 L. & HUM. BEHAV. 485, 492 (1997) (In this study, mock jurors who were shown graphic photographs of a murder victim had a much higher likelihood of voting for conviction than mock jurors who did not see the photo).

[70] In addition to an understanding of visual processing, a better grasp on visual rhetoric and the visual logical fallacies within this presentation may have also benefitted Skakel's argument. The slide presentation definitely took advantage of the rapid and unconscious sensory processing, but it also utilized emotionally powerful but analytically weak visual logic in the form of visual syllogism with a weak unstated premise, and a visually displayed causal logic which became much stronger when displayed visually.

[71] BARRY, *supra* note 8, at 15.

[72] *Id.*

[73] *Id.* at 33; STAFFORD & WEBB, *supra* note 68, at 32–33.

[74] BARRY, *supra* note 8, at 15.

[75] *Id.*

[76] *Id.* at 36.

[77] STAFFORD & WEBB, *supra* note 68, at 34.

dimensional; the brain then processes the two-dimensional image into a three-dimensional image.[78]

1. *Conscious and Unconscious Processing of Visual Information*

The information processing theory of perception[79] tells us that there are two basic systems,[80] routes,[81] or stages of processing[82] that the brain uses to generate an image in the mind. The first is a crude, atavistic system that operates early in the cognition process and relies on "automatic (gut-level) responses" to determine basic information about an image (such as shape).[83] The second, "upper-level" system is centered in the cortex and relies on cognitive processes to make perceptual judgments.[84] The cruder perceptual system does not have access to rational cognitive thought processes[85] and does not operate using rational, logical principles.[86]

By way of example, the phenomenon of blindsight supports the theory that there are elements of perceptual processes that are disconnected from cognitive thought.[87] With blindsight, blind persons with damaged visual cortexes cannot consciously register that they are seeing, yet they can perform vision related tasks such as reaching for objects with their hands.[88] The Ponzo and Müller-Lyon optical illusions also demonstrate a disconnect between logic and our perceptual process.[89]

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[78] STEVEN PINKER, HOW THE MIND WORKS 8 (1997); ZENON W. PYLYSHYN, SEEING AND VISUALIZING IT'S NOT WHAT YOU THINK 5 (2003).

[79] The information processing theory of the mind is the dominant view in cognitive science. LEDOUX, *supra* note 68, at 27. The basic idea behind the information processing theory of perception is that there is a pre-conscious visual processing stage that then segues into later stages of processing in which conscious attention is added. For an overview of the information processing theory of perception, *see* BARRY, *supra* note 8, at 41–42.

[80] PINKER, *supra* note 78, at 135 (describing information processing as two concurrent systems or "pools").

[81] BARRY, *supra* note 8, at 18 (citing, Joseph LeDoux, *"Sensory Systems and Emotion,"* 4 INTEGRATIVE PSYCHIATRY 237–48 (1986)) (describing LeDoux's theory of two routes of sensory perceptual processing—an "immediate and crude" route with connections to the amygdala and a longer and more complex route that involves cognition in the cortex).

[82] *See* Stanislas Dehaene et al., *Conscious, Preconscious, and Subliminal Processing: A Testable Taxonomy,* TRENDS IN COGNITIVE SCIENCE 1 (2006) (In this article, the authors theorize that cognitive processing occurs in stages, beginning with the subliminal stage, then the preconscious stage, and ending with conscious activity).

[83] PINKER, *supra* note 78, at 135; PYLYSHYN, *supra* note 78, at 50.

[84] PINKER, *supra* note 78, at 135; LEDOUX, *supra* note 68, at 90.

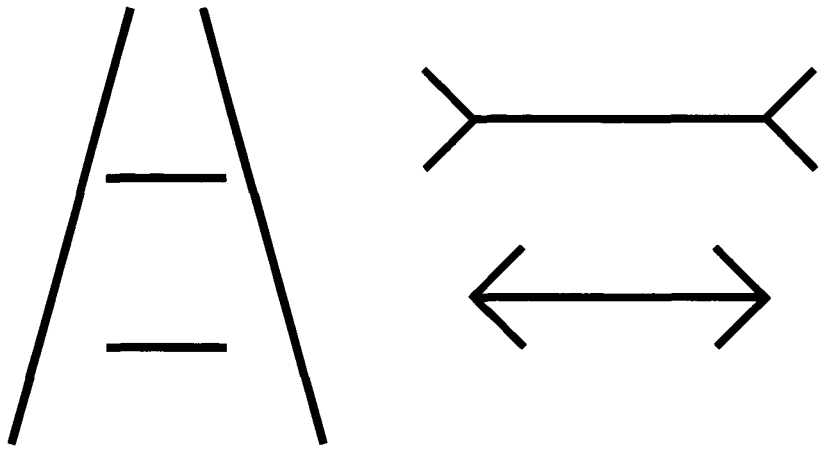
[85] PINKER, *supra* note 78, at 135; PYLYSHYN, *supra* note 78, at 50.

[86] PYLYSHYN, *supra* note 78, at 67.

[87] *Id.* at 45–46.

[88] *Id.*; STAFFORD & WEBB, *supra* note 68 at 126.

[89] PYLYSHYN, *supra* note 78, at 64–65.



The Ponzo illusion is on the left and the Müller-Lyer Illusion is on the right.[90] In both these images, the mind sees the top line as being larger than the bottom line even though both lines are the same length.[91] Thus, even though people know that what they are seeing is wrong (both shapes are the same), they still perceive the shapes to be of different sizes.

Instead of rational thought and logic, low-level perceptual processing relies on a set of abstract rules and principles to make sense of the world.[92] One of these rules is the completion principle. The eye tends to see partially obscured or occluded figures as complete.[93] For instance, in the below illustration, individuals perceive the figure underneath the square to be a circle, even though that perceptual decision is not based on any principle of rational logic.[94]

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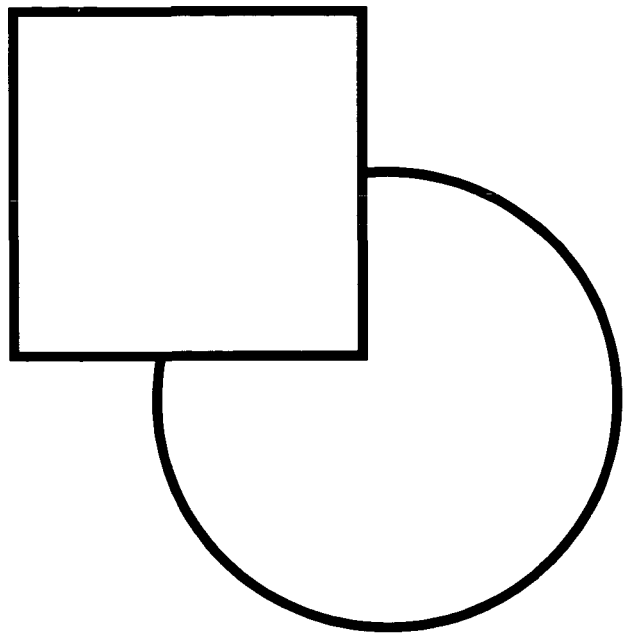
[90] These illusions can also be viewed at http://www.illc.uva.nl/~seop/entries/mental-imagery/illusion.gif.

[91] PYLYSHYN, *supra* note 78, at 64–65.

[92] *Id.* at 66–67.

[93] *Id.* at 67.

[94] This illustration is based on a figure that can be found at http://www.mi.sanu.ac.yu/vismath/fila/Fig08.jpg.



The completion theory is related to the Gestalt Theory of perception, which holds that perception is a "holistic, direct interpretation of the environment, a natural mechanism for detecting ecologically significant information."[95] Under the Gestalt Theory, we tend to simplify complex information, fill in partial information to make it complete, and try to fit information into pre-existing patterns.[96] The conceptual principles we use to organize images in our mind are often a stronger influence than the contents of the images themselves (which would rely on rational logic).[97] By way of example, Steven Pinker provides the following test: which of these statements are true?

> Madrid is farther north than Washington D.C.
>
> Reno is farther west than San Diego.
>
> Portland, Oregon is farther north than Toronto.
>
> The Atlantic entrance to the Panama Canal is farther west than the Pacific entrance.[98]

The answers to the above questions are all true and demonstrate that we tend to store and access visual information in a way that differs from how we relate to text-based information.[99]

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[95] BARRY, *supra* note 8, at 40.
[96] *Id.* at 47, 52.
[97] PINKER, *supra* note 78, at 295.
[98] *Id.*
[99] *Id.*

2. *Unconscious Influences on Perception*

Unconscious responses to stimuli[100] operate within the lower level processing system and can affect both our emotions and our decision-making processes.[101] This phenomenon originates in our evolutionary history. To survive in the wild, animals had to develop a lightning-fast ability to analyze a stimulus and determine whether that stimulus warrants a flight, fight, or neutral response.[102] When presented with a visual stimulus, before we even know what the image is, our brain can generate an automatic nervous system ("ANS") response in the form of a rapid heartbeat, an involuntary flinch, stiffer muscles, and hormonal infusions (such as adrenaline).[103] For example, one ancient ANS response is that we involuntarily flinch when we are presented with a looming object.[104] Our ancient rapid response system has stayed with us, meaning that we often respond to images "instantaneously and without the benefit of a sustained rational analysis."[105]

Unconscious processing provides a quick and efficient method of analyzing a stimulus because only the most relevant information is allowed in. If all processing involved rational cognition, then there would be an information overload, making it impossible to process information in a rapid fashion.[106] Rapid, unconscious nonverbal processing is the most tried and true (and fastest) method of stimulus appraisal; slower conscious processes (such as language) are the "new kids on the evolutionary block."[107] Thus, even though we have progressed into modernity, some atavistic processes remain in our minds and continue to influence our emotions and our decision-making processes, often without our conscious knowledge. Usually our unconscious decision-making processes successfully guide us to a point where we can add cognition and make sound, rational decisions.[108] However, unconscious emotional responses do exert a non-rational influence on our emotions and decision-making processes, often without us even knowing about it.[109]

a. Unconscious Influences on Emotion

The swiftness by which the pre-conscious processing system operates means that "the emotional meaning of a stimulus can begin to be appraised by the brain before the perceptual systems have fully processed the stimulus. It is possible for our brain to know that something is good or bad

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[100] Unconscious processing is not exclusive to visual stimuli. Speech also relies on unconscious processing. For instance, we do not consciously think about the grammar of the sentences we use in our everyday conversations. LEDOUX, *supra* note 68, at 31.
[101] LEDOUX, *supra* note 68, at 30, 69.
[102] BARRY, *supra* note 8, at 16–17.
[103] LEDOUX, *supra* note 68, at 149.
[104] STAFFORD & WEBB, *supra* note 68, at 106.
[105] Hill, *supra* note 12, at 34.
[106] PINKER, *supra* note 78, at 134. *See also* GLADWELL, *supra* note 68, at 33–34 (explaining that the unconscious usually does an adequate job of quickly sifting through information, focusing only on what is relevant to make a decision).
[107] LEDOUX, *supra* note 68, at 71.
[108] BARRY, *supra* note 8, at 19.
[109] *Id.*; PYLYSHYN, *supra* note 78, at 41.

before it knows exactly what it is."[110] For instance, experiments in split-brain patients[111] have shown that a person can register emotional content in one area of the brain yet be consciously unaware of the stimulus that generated the emotional response.[112] In a study by social psychologist Robert Zajonc, which neuroscientist Joseph LeDoux cites as evidence that unconscious stimuli can affect emotion, subjects were subliminally exposed to a series of images and then asked to choose which image they preferred from another series of images.[113] The subjects tended to choose those images that they had been previously subliminally exposed to but had no conscious recollection of.[114]

With respect to the emotion of fear, scientists have been able to pinpoint where fear processing takes place in the brain and show that this processing occurs independently from the part of the brain responsible for rational processing.[115] In fear-conditioning experiments, a subliminally presented stimulus is associated with a fear-inducing stimulus such as an electric shock.[116] Eventually, the subliminally presented stimulus will by itself generate an ANS response in the form of a faster heartbeat, muscle contractions or stiffening, and hormonal changes.[117] While performing these fear-conditioning experiments, scientists have been able to map pathways in the brain by injecting a tracer into it.[118] The brain maps generated during fear-conditioning experiments show that ANS responses to subliminally presented stimuli use pathways in the brain that are not connected to the cortex (the place where rational thought takes place).[119] Scientists have also used fear-conditioning experiments to pinpoint the evolutionarily ancient area of the brain known as the amygdala as the central processing unit for unconsciously generated fear responses.[120]

In terms of the persuasive influence unconscious stimuli can have on our emotions, the scientific research supports the broad conclusion that our "emotions are more easily influenced when we are not aware that the influence is occurring"[121] and that "the emotional mind seems to be particularly susceptible to stimuli that its conscious counterpart does not have access to."[122]

Initially, social science research into subliminally presented stimuli generated great interest in how these stimuli might be employed in advertising.[123] However, a truly subliminal image projection requires that

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[110] LEDOUX, *supra* note 68, at 69.
[111] Split brain patients have had the two halves of their brains surgically severed as a treatment for severe epilepsy. LEDOUX, *supra* note 68, at 13.
[112] *Id.* at 13–15.
[113] *Id.* at 52–53.
[114] *Id.*
[115] *Id.* at 158–59.
[116] *Id.* at 141–50.
[117] LEDOUX, *supra* note 68, at 149.
[118] *Id.* at 154, 158–59.
[119] *Id.* at 161 (the results of these studies suggest that "emotional responses can occur without the involvement of the higher processing systems of the brain").
[120] *Id.* at 158–59.
[121] *Id.* at 59.
[122] *Id.* at 61.
[123] PINKER, *supra* note 78, at 57; BARRY, *supra* note 8, at 261–62.

an image be projected below the threshold of consciousness, for about 1/3000 of a second.[124] Aside from the ethical and moral problems with using subliminal persuasion, subliminal advertising never became a commercial media force because television did not have the technical capacity to project undetectable images.[125] In any event, more recent research shows that subliminal messages are not nearly as effective as supraliminal messages, which reach the viewer consciously.[126]

Even though true subliminal persuasion is not a viable method for legal advocacy, *consciously viewed* visual stimuli can generate *unconscious* emotional responses in the courtroom. For instance, a 1997 mock jury trial study demonstrated that viewing graphically gruesome evidence had a measurable effect on juror verdicts.[127] In this study, one-third of the study participants viewed a gruesome color photograph of the murder victim; one-third viewed the same photo in black-and white; and the last third, the control group, did not view the gruesome photo.[128] The purpose of the experiment was to analyze the potential prejudicial effect of graphic photographs.[129]

In introducing the purpose and design of the experiment, the authors noted that gruesome photos can "induce a dysphoric mood in jurors which influences their subsequent perceptions and judgments."[130] Although the authors did not attempt to take biological measurements of ANS responses, the study participants who saw the gruesome photos (both color and black-and-white) reported feeling "anxious, anguished, and disturbed."[131] The participants who were exposed to the graphic photograph of the murder victim were almost twice as likely to find the defendant guilty in comparison to the participants who were not exposed to the photograph.[132] However, when asked whether or not the photographs impacted their verdict, the majority of the jurors (those who saw the gruesome photograph and those who did not) answered that it did not, indicating that the jurors were unaware of how their emotional reaction to the photograph may have affected their verdict.[133] This study shows that the danger in using emotionally vivid imagery is not that it is subliminally persuasive, but that it tends to generate emotionally driven reactions that can unconsciously affect a decision-maker's thought process.

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[124] BARRY, *supra* note 8, at 261 (discussing a now-discredited 1957 study in which the words "Drink Coca-Cola" and "Eat Popcorn" were projected in a New Jersey Movie Theater for 1/300 of a second).
[125] *Id.* at 262. These technological requirements would make it equally difficult to use this technique in the courtroom.
[126] *Id.*
[127] *Id.* at 499–500.
[128] Douglas et al., *supra* note 69, at 489–91.
[129] *Id.* at 486.
[130] *Id.* at 487.
[131] *Id.* at 492. It can be hypothesized that before the participants consciously felt these things, they did experience some automatic nervous system responses. *See e.g.*, Hill, *supra* note 12, at 34 ("[W]hen we are exposed to visual information our body reacts much as it would if the danger represented in the image were actually present. Our evolutionary response kicks in, and we are prompted to make a quick decision and to take action without an extensive amount of analysis.").
[132] Douglas et al., *supra* note 69, at 492.
[133] *Id.* at 494.

b. Unconscious Decision-Making Processes

Not only can our emotions be unconsciously influenced by stimuli, the way we make decisions (normally considered to be a product of rational thought) can also be affected by unconscious processes. In *Blink*, Malcolm Gladwell describes the rapid cognition system that allows humans to make decisions very quickly based on a limited amount of information.[134] We access this rapid cognition system so quickly that we never become aware of the process we use to make a decision.[135] Also known as thin-slicing, unconscious decision-making processes have "the ability . . . to find patterns in situations and behavior based on very narrow slices of experience."[136] While the unconscious usually excels at making decisions quickly, the system is fallible and particularly susceptible to bias and prejudice.[137]

In terms of how *Blink* fits in with the theme of this Article, almost all of the examples that Gladwell provides represent rapid decisions based on *visually* presented information. For instance, in one study, participants rated the quality of an instructor's teaching after watching a three-second video-clip of the instructor in the classroom.[138] The three-second evaluations did not measurably differ from the evaluations that students completed for the instructor at the end of a semester.[139] This example illustrates that when persons engage in a rapid decision-making process, they do not tend to rethink that decision over time.

With respect to visual first impressions, advertisers and manufacturers also try to take advantage of rapid decision-making processes. For instance, with sensation transference, a manufacturer engineers a situation where the consumer transfers "sensations or impressions that they have about the packaging of the product to the product itself."[140] As examples, Gladwell points out that sales of canned peaches increased after a manufacturer changed the packaging from a metal can to a glass jar.[141] Another example is that consumers will pay more for ice cream packaged in cylindrical containers than for ice-cream packaged in rectangular containers.[142]

While rapid decision-making can lead to good results, decisions made in this way are also highly susceptible to implicit bias.[143] As an example, Gladwell cites a study of the opening offers provided to customers at Chicago-area car dealerships.[144] The thirty-eight study participants, of diverse genders and races, were told to dress and behave as young college-

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[134] GLADWELL, *supra* note 68.
[135] *Id.* at 11–12.
[136] *Id.* at 23.
[137] *Id.* at 15, 233.
[138] *Id.* at 12–13.
[139] *Id.*
[140] GLADWELL, *supra* note 68, at 160.
[141] *Id.* at 164.
[142] *Id.*
[143] Since implicit bias can affect unconscious decision-making processes as well as conscious, rational deliberation, I will provide a deeper explanation of implicit bias in the next section.
[144] GLADWELL, *supra*, note 68, at 92–94 (citing Ian Ayres, *Race and Gender Discrimination in Negotiation For the Purchase of a New Car*, 84 AM. ECON. REV. 304 (1995) (with Peter Siegelman)).

educated professionals.[145] On average, the white male participants received initial offers of $725 above the dealer's invoice; white women received offers of $935 above invoice; black women received offers of $1,195 over invoice; and black men received initial offers of $1,687 over the invoice price.[146] The initial price the car dealers offered to the customers, rapidly calculated based on a visual first impression, appeared to be based on an automatic association between the person's gender and race and their gullibility for paying the full sticker price on a car.[147]

A far more serious example of how bias can infect rapid decisions is the Amadou Diallo shooting, where New York City police officers, in a split-second decision, mistook the edge of Diallo's wallet for a gun.[148] In the early morning hours, Diallo, an immigrant from Guinea, stood on the steps of his apartment building in the Soundview section of the Bronx, drawing the attention of four white police officers on patrol.[149] When the police followed him into his apartment building, one police officer quickly decided that Diallo was reaching for his gun when in fact he was reaching for his wallet.[150] That police officer yelled, "He's got a gun!" and opened fire, prompting the others to join with him in opening fire, resulting in the forty-one fatal shots.[151] Due to the social and racial factors involved, the Diallo shooting shows how rapid cognition in response to a visual stimulus can combine with implicit biases to lead to tragic results.[152] The lesson from these anecdotal examples is that we should become more aware of how rapidly we can make decisions and cognizant of the role that unconscious bias might play in the process.

One of the more disturbing facets of unconscious decision-making is that we tend to fabricate rational reasons for our behavior after the fact.[153] For instance, in one famous experiment, subjects were asked to pick out the highest quality pantyhose stockings from a box.[154] Unbeknownst to the subjects, all of the stockings were identical.[155] When asked why they picked the particular stocking that they did, the subjects fabricated a range of false reasons.[156] In another study, participants were provided with a subtle clue that enabled them to complete a puzzle.[157] Although they were unable to figure out the answer to the puzzle without the clue, the participants did not consciously register the clue in their minds.[158] When asked how they determined the answer to the puzzle, the participants reported that the solution came to them on their own.[159] These studies show

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[145] *Id.* at 92.
[146] *Id.* at 92–94.
[147] *Id.* at 94–95.
[148] *Id.* at 189–197.
[149] *Id.* at 190–191.
[150] GLADWELL, *supra* note 68, at 192.
[151] *Id.* at 194.
[152] *Id.* at 197.
[153] LEDOUX, *supra* note 68, at 13–15, 32–33.
[154] *Id.* at 32–33.
[155] *Id.*
[156] *Id.*
[157] GLADWELL, *supra* note 68, at 69.
[158] *Id.* at 69–70.
[159] *Id.* at 70.

that even though people may not be cognizant of how they reached a particular decision, they will rarely admit their ignorance.[160] From a professional standpoint, knowledge of rapid cognition based on visual first impressions should drive attorneys to infuse the decision-making process with as much conscious, rational deliberation as possible.[161]

3. *Tacit Bias in Rational Perception*

While implicit adherences to stereotypes and prejudices can influence our *unconscious* decision-making processes, they can also influence, in an unconscious way, our rational, *conscious* decision-making processes. In other words, even when we are able to consciously think and deliberate on a problem, our rational abilities can be affected by biases that originate from our social backgrounds, expectations, and pre-existing biases. We have already seen how the lower-level sensory processing system enables us to make pre-conscious or unconscious perceptual judgments. Unlike the lower-level system, the upper-level sensory processing system is a rational system, centered in the cortex of the brain, which uses visual memory, cognitive thought, and deliberate decision-making.[162] Although the upper-level system relies on cognitive processes, it is nonetheless highly susceptible to influence by tacit biases, expectations, background, and other social factors.[163]

The New Look theory of behavioral psychology rose to prominence after World War II with the work of Jerome Bruner.[164] New Look theorists posited that our perceptions are merely constructs that combine sensory information about an object's physical attributes with internal social based factors such as expectations, needs, and attitudes.[165] Because so much of what we "see" is based on social factors such as our expectations and beliefs, it is not possible to separate vision from cognition.[166] While the New Look movement has fallen out of favor as a unifying theory,[167] many of its principles survived to become accepted tenets of behavioral psychology.

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[160] *Id.* at 71.
[161] *See infra* note 464 and accompanying text (explaining the principle that legal decisions should result from a rational, deliberative process).
[162] BARRY, *supra* note 8, at 16–17; PINKER, *supra* note 78, at 135.
[163] Jerome S. Bruner & Cecile C. Goodman, *Value and Need as Organizing Factors in Perception*, *in* BEYOND THE INFORMATION GIVEN: STUDIES IN THE PSYCHOLOGY OF KNOWING 43–56 (Jeremy M. Anglin ed., W.W. Norton Company 1973) [hereinafter Bruner, *Value and Need*]; Jerome S. Bruner, *On Perceptual Readiness*, *in* BEYOND THE INFORMATION GIVEN: STUDIES IN THE PSYCHOLOGY OF KNOWING 7, 30 (Jeremy M. Anglin ed., W.W. Norton Company 1973) [hereinafter Bruner, *On Perceptual Readiness*]; LEDOUX, *supra* note 68, at 55; PYLYSHYN, *supra* note 78, at 52–53.
[164] Jerome S. Bruner, *The Functions of Perceiving: New Look Theory in Retrospect*, *in* BEYOND THE INFORMATION GIVEN STUDIES IN THE PSYCHOLOGY OF KNOWING 114, 114 (Jeremy M. Anglin ed., W.W. Norton Company 1973) [hereinafter Bruner, *The Functions of Perceiving*]; LEDOUX, *supra* note 68, at 55; PYLYSHYN, *supra* note 78, at 52–53.
[165] LEDOUX, *supra* note 68, at 55.
[166] Bruner, *The Functions of Perceiving*, *supra* note 164, at 121; PYLYSHYN, *supra* note 78, at 52–53.
[167] LEDOUX, *supra* note 68, at 55.

a. The Impact of Social and Cultural Factors on Perception

One principle put forth by New Look theorists is that one's social and cultural background can affect one's perceptions.[168] Early on in his career, Bruner conducted a study to test this hypothesis. In this study, Bruner divided up groups of children by their socioeconomic status and had them estimate the size of coins.[169] The poor children overestimated the size of the coins more so than the wealthier group of children.[170] Bruner's theory for this result was that the poor children, having a greater need for money, estimated the size of the coin to be greater than it really was.[171] In other words, socially derived behavioral determinants caused the poor group of children to perceive the coins as larger.

In terms of how this principle operates within the law, Dan M. Kahan, David Hoffman, and Donald Braman authored a recent Harvard Law Review article that argues that the Supreme Court's decision in *Scott v. Harris*[172] was based on cultural and social factors rather than reality-based perception.[173] In this case, a motorist sued a police department for paralyzing injuries sustained when a police officer made the decision to deliberately run his car off the road during a high-speed police chase.[174] The Supreme Court affirmed the District Court's grant of summary judgment for the police department, deciding that, as a matter of law, the police officer's decision to deliberately run the car off the road (paralyzing the motorist) was not an illegal seizure under the Fourth Amendment because the fleeing driver clearly posed a deadly risk to the public.[175] The unique aspect of this case is that the Court uploaded the police video of the chase onto its official website, seemingly inviting members of the public to agree that the video speaks for itself.[176]

In response to this decision, Professors Kahan, Hoffman, and Braman organized a study in which 1350 participants were shown the *Scott v. Harris* video and asked whether or not the police officer was justified in running the car off the road.[177] Although the majority of the study participants agreed with the Supreme Court's decision, the authors identified a substantial subgroup (the actual number is not disclosed by the authors) that came to the conclusion that the police officer was not justified in running the car off the road.[178] According to the authors, this minority subgroup was composed primarily of African-Americans, low-income

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[168] The anecdotal example that Bruner provides is that African visitors to London believed that British bobbies were friendly because of the way they raised their hand to halt coming traffic. Bruner, *On Perceptual Readiness*, *supra* note 163, at 30.
[169] Bruner, *Value and Need*, *supra* note 163, at 43–56.
[170] *Id.* at 50.
[171] *Id.* at 48, 51.
[172] Scott v. Harris, 550 U.S. 372 (2007).
[173] *See* Kahan et al., *supra* note 27.
[174] *Scott*, 550 U.S. at 375.
[175] *Scott*, 550 U.S. at 386.
[176] Kahan et al., *supra* note 27, at 838.
[177] *Id.* at 841–42.
[178] *Id.*

workers, and residents of the Northeast.[179] Most of the members of this minority subgroup characterized themselves as Democrats or liberals.[180] The authors argued that their study indicates that a person's cultural, social, and racial background has a bearing on what they "see" and that it was wrong for the Supreme Court to elevate its culturally-based view as the only reasonable view.[181]

b. Priming and Perception

Another principle of the New Look theory is that one's pre-existing expectations can affect what one perceives. As seen above, these expectations might derive from one's social background,[182] or they can be planted in a subject as a way of influencing how the subject perceives information.[183] In psychology parlance, "priming" is the practice of exposing a subject to information about a stimulus to influence the subject's perception.[184] The earliest priming experiment dates back to 1910, in which a psychologist told subjects to imagine a specific object and look at a blank screen.[185] When the experimenter projected faint abstract images onto the screen, the subjects often believed that what they were told to imagine was also the shape of the image on the screen.[186] In a more recent study, it was observed that participants who were primed with words associated with being polite took longer to interrupt the study administrators after completion of an exercise than those participants who were primed with words associated with aggression.[187]

Priming can also affect a person's memory of what he or she perceived. In a 1974 experiment by Elizabeth Loftus and John C. Palmer, subjects were divided into two groups and viewed a film of an automobile accident.[188] One group of subjects was asked, "About how fast were the cars going when they *smashed* into each other?"[189] The other group was asked, "About how fast were the cars going when they *hit* each other?"[190] The subjects who received the question with the verb "smashed" estimated

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[179] *Id.* at 841–42, 869. The authors predicted that African-Americans might be more inclined to view the video tape in favor of the motorist because they were more likely to have had negative experiences with the police. *Id.* at 860. The authors predicted that women would be inclined to side with the motorist because females had stronger egalitarian and liberal values. *Id.* at 862. The authors predicted that persons from the Northeast would tend to side with the motorist because in the Northeast, an egalitarian and communitarian worldview predominates. *Id.* at 25.

[180] *Id.* at 841–42.

[181] *Id.* at 860, 879–80.

[182] An example would be the theory, put forth by Professors Kahan, Hoffman, and Braman that African Americans sided with the *Scott v. Harris* motorist because they had had previous negative experiences with the police. Kahan et al., *supra* note 27, at 860–61.

[183] *See generally* GLADWELL, *supra* note 68, at 52–53; PYLYSHYN, *supra* note 78, at 40.

[184] *Id.*

[185] PYLYSHYN, *supra* note 78, at 40.

[186] *Id.*

[187] GLADWELL, *supra* note 68, at 53–55 (citing John A. Bargh, Mark Chen, and Lara Burrows, *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 74 J. OF PERSONALITY AND SOC. PSYCHOL. 865, 865–77 (1998)).

[188] Elizabeth Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. OF VERBAL LEARNING AND VERBAL BEHAVIOR, 585 (1974).

[189] *Id.* (emphasis added).

[190] *Id.* (emphasis added).

the speed of the cars at 40.8 miles per hour, whereas the subjects who were asked the question with the verb "hit" estimated the speed at 34 miles per hour.[191] Moreover, when questioned a week later, a greater percentage of subjects who received the "smashed" question reported seeing broken glass in the film than those who responded to the "hit" question, even though there was no broken glass in the film.[192] Thus, for client interviews, depositions, and trial examinations, priming theory supports the idea that "the way a question is asked can enormously influence the answer that is given."[193] For visual advocacy, the lesson is: how one refers to an image can affect how the viewer perceives and remembers the image.

Although it would be neither ethical nor professional to influence jurors with the extremely subtle techniques seen in the psychological priming studies,[194] lawyers can professionally persuade through more direct priming techniques. Lawyers can, for instance, use specific word choices as a powerful type of foreshadowing to frame how jurors perceive an image.[195] Although direct priming techniques should not generally exceed the bounds of professional and ethical argumentation, attorneys should nonetheless understand that priming can exert subtle and unconscious perceptual influences, conflicting with the principle that legal decisions should result from a rational, deliberative process.

c. Implicit Bias and Perception

A third principle of the New Look theory relevant to legal advocacy is that one's pre-existing biases, prejudices, and stereotypes can affect one's perceptions. This principle has received renewed interest in light of recent research on implicit, or unconscious, bias. Implicit biases are "discriminatory biases based on implicit attitudes or implicit stereotypes," which "can produce behavior that diverges from a person's avowed or endorsed beliefs or principles."[196]

The Implicit Association Test (the "IAT") can effectively measure implicit attitudes and stereotype associations.[197] Developed in 1995, the test works by tracking the amount of time it takes for a subject to categorize

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[191] *Id.* at 586.
[192] *Id.* at 587.
[193] *Id.* at 588.
[194] Intentionally taking advantage of gaps in a person's perceptual processing to construct a persuasive argument would be an example of a "dirty" rhetorical trick that falls outside of the ethical rhetorical culture that is inherent within the legal profession. *See generally* Jack L. Sammons, *The Radical Ethics of Legal Rhetoricians*, 32 VAL. U. L. REV. 93, 98–99 (1998) (explaining that the rhetorical culture of law imposes ethical standards on all lawyers to maintain the quality of the legal conversation and not engage in unbridled rhetoric).
[195] For instance, the police officers' defense attorneys effectively used priming techniques in the Rodney King assault trial. Before showing the Holliday videotape of King being beaten, the defense set up their theory of what the image showed—that each movement of the police officers was precipitated by King's violent aggressions. *See* Alper et al., *supra* note 7, at 30, 37–38; Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571, 574, 576–577 (1992–1993). Then, as the jurors watched the video, the defense used an expert witness to give a "play-by-play" analysis that reinforced the theory. *See* Sherwin, *A Manifesto for Visual Realism*, *supra* note 4, at 734–735.
[196] Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006).
[197] *Id.* at 952; GLADWELL, *supra* note 68, at 77–85.

African American or European American faces with either pleasant or unpleasant words.[198] The test does not measure a person's stated values; instead, it evaluates unconscious attitudes, the "immediate, automatic associations that tumble out before we've even had time to think."[199] The test tends to show that "[w]e make connections much more quickly between pairs of ideas that are already related in our minds than we do between pairs of ideas that are unfamiliar to us."[200] The test shows the strength of our implicit associations, namely, that the majority of North Americans implicitly associate positive attributes with European American persons and negative attributes with African American persons.[201] Moreover, the implicit preference for European American faces is not exclusive to white persons; fifty percent of African Americans show the same unconscious preferences for European American faces.[202]

How can implicit bias exist when most Americans view intentional racism as morally abhorrent? Implicit bias invades our minds because, "[w]e are surrounded every day by cultural messages linking white with good."[203] From a neuroscience perspective, scientists have observed that when white persons viewed photographs of black faces, there was greater activation in the amygdala, the part of the brain responsible for rapid unconscious fear reactions, compared to when they viewed white faces.[204] Even subliminal projections of black faces trigger amygdala activity in white subjects.[205] The IAT, more so than any other social science research in recent years, provides support for the argument that unconscious racism does in fact exist.

The IAT has also been shown to have the ability to predict external behaviors.[206] For instance, one study indicated that a person with an implicit bias against African Americans exhibited more socially awkward behavior such as speech errors, verbal discomfort, lack of eye-contact, and verbal hesitancy when conversing with African Americans.[207] The biased person's distant behavior had an overall negative effect on the conversation, which led the biased person to generate a negative first

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[198] Greenwald & Krieger, *supra* note 196, at 952–53; GLADWELL, *supra* note 68, at 77, 81.
[199] GLADWELL, *supra* note 68, at 84–85.
[200] *Id.* at 77.
[201] *Id.* at 84; Greenwald & Krieger, *supra* note 196, at 955–956. The IAT data, collected over several years, show that, "Any non-African American sub-group of the United states population will reveal high proportions of persons showing statistically noticeable implicit race bias in favor of European Americans relative to African Americans." Greenwald & Krieger, *supra* note 196, at 955–956.
[202] GLADWELL, *supra* note 68, at 85.
[203] *Id. See also* Laurie A. Rudman, Richard D. Ashmore, & Melvin L. Gary, *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. OF PERSONALITY AND SOC. PSYCHOL. 856, 856 (2001).
[204] Greenwald & Krieger, *supra* note 196, at 962 (2006) (citing Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 732–734 (2000)).
[205] William A. Cunningham, Marcia K. Johnson, Carol L. Raye, J. Chris Gatenby, John C. Gore, and Mahzarin R. Banaji, *Separable Neural Components in the Processing of Black and White Faces*, 15 PSYCHOL. SCIENCE 806 (2004) (finding that subliminal presentation of Black faces in White subjects led to more amygdala activity than *supra*liminal presentations).
[206] Greenwald & Krieger, *supra* note 196, at 954.
[207] GLADWELL, *supra* note 68, at 85–86; Greenwald & Krieger, *supra* note 196, at 961–962 (citing Carol O. Word et al., *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 J. Experimental Soc. Psychol. 109 (1974)).

impression that was not based on any kind of conscious racism, but was nonetheless a product of the person's implicit bias.[208]

In the legal world, implicit bias can affect every aspect of advocacy, including how jurors unconsciously perceive the attorneys, the witnesses, and the parties.[209] Indeed, implicit bias within the legal system has probably contributed to the fact that African Americans are arrested and imprisoned at far greater rates than European Americans.[210] It is disturbing that studies have shown that implicit bias can be triggered through visual images that reveal the color of a person's face.[211] Equally disturbing is the fact that persons who show an implicit preference for European Americans can generate an unconscious emotional reaction within their amygdala just from viewing an unfamiliar African American face.[212]

It would certainly be unethical for attorneys to deliberately take advantage of known implicit biases,[213] but it would be almost impossible to prove, for instance, that emphasizing a photograph of an African American person is an intentional attempt to take advantage of implicit bias. In the afterword to *Blink*, Malcolm Gladwell imagines a utopian legal system where the accused is not in the courtroom and all information about the age, race, or gender of the defendant is redacted.[214] While this idea has substantive merit, it is not likely to be adopted in our current legal system, given issues that would arise with respect to identification and witness credibility.

The most practical lesson that attorneys can take away from the implicit bias research is to know that implicit bias exists and to learn how it can be countered. For instance, one study has shown that priming subjects with images of famous African Americans with positive reputations as well as images of European Americans with negative reputations had the effect of reducing the level of implicit preference for European American persons.[215] Other research has shown that when persons with an implicit bias form a personal connection with a member of a devalued group, implicit attitudes may quickly and dramatically decrease.[216] This research on implicit bias, in particular, gives continued urgency to the unfulfilled goal of diversity in every aspect of our society. Finally, Drew Westen, who writes how politicians can counter implicit bias, argues that political advocates should strive to counter implicit bias by making the unconscious conscious, since "people's conscious values are their better angels."[217]

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[208] Gladwell, *supra* note 68, at 85–86.
[209] *Id.* at 274.
[210] *Id.* at 274–275.
[211] GLADWELL, *supra* note 68 at 77–85; Greenwald & Krieger, *supra* note 196, at 952–953.
[212] Greenwald & Krieger, *supra* note 196, at 955–56 (2006) (citing Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729 (2000)). *See also* DREW WESTEN, THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION 65 (Public Affairs 2007).
[213] *See supra* note 194 and accompanying text (explaining the ethical and professional issues raised when attorneys knowingly take advantage of logical gaps in the perceptual process).
[214] GLADWELL, *supra* note 68 at 274–276.
[215] Greenwald & Krieger, *supra* note 196, at 963 (2006).
[216] *Id.* at 964; *see also* Rudman, *supra* note 203, at 856 (finding that diversity education can reduce implicit bias against black persons).
[217] WESTEN, *supra* note 212, at 220–21.

Hopefully, we will be able to take advantage of future research done on other possible ways to counteract implicit bias.

4. *The Fallibility of Vision and the Phenomenological Fallacy*

To briefly summarize the foregoing, our perceptions are fallible for three broad reasons. First, the rules we unconsciously use to make sense of the two-dimensional visual information that comes through the retina sometimes leads to mistakes.[218] Second, we process sensory information rapidly and unconsciously, in a way that we cannot cognitively comprehend or analyze with logic.[219] Sometimes, we are unable to rationally consider how images affect our emotions or our decision-making process. As we are processing an image in our pre-conscious sensory system, that image can activate an emotional reaction in our mind without us even knowing about it.[220] Or, as we view sensory information, we might reach a decision on its substantive meaning in a mere split second and that decision might be the product of unconscious bias.[221] Third, in line with the New Look theory, what we perceive is highly influenced and affected by pre-existing biases and expectations[222] that we are often unaware of.[223] Thus, whether our perception is created due to unconscious visual processing or visual processing that is unconsciously influenced by our expectations and beliefs, the bottom line is that we may not have much conscious control over what we see.

Despite the fallibility of human perception, we nonetheless give great weight to what we see and do not tend to critically evaluate it unless highly motivated to do so.[224] Even though our vision is not perfect, our minds tell us that it is seamless.[225] This idea of "seeing is believing" has been referred to as the phenomenological fallacy of perception.[226] It might be argued that members of the Supreme Court bought into the "seeing is believing" myth when they decided, as a matter of law, that no reasonable juror could find that a high-speed police chase, recorded on the police car's video camera, did not pose a deadly threat to the public.[227] When faced with a visual argument or visual evidence that needs to be countered, lawyers need to challenge the "seeing is believing" mentality and urge the audience to confront the imagistic material and rationally consider its logic. Lawyers must also understand the instances where unconscious biases and processes might affect a person's understanding of an image.

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[218] PYLYSHYN, *supra* note 78, at 3.
[219] *Id.* at 66–67 (MIT Press 2003) (explaining that principles of visual organization do not follow principles of rationality or logic).
[220] BARRY, *supra* note 8, at 18; LEDOUX, *supra* note 68, at 61–62.
[221] GLADWELL, *supra* note 68, at 11–12.
[222] PYLYSHYN, *supra* note 78, at 40, 49–50.
[223] Greenwald & Krieger, *supra* note 196, at 948.
[224] BARRY, *supra* note 8, at 285; Bruner, *On Perceptual Readiness*, *supra* note 163, at 10; PYLYSHYN, *supra* note 78, at 41; STAFFORD & WEBB, *supra* note 68, at 134.
[225] STAFFORD & WEBB, *supra* note 68, at 134.
[226] BARRY, *supra* note 8, at 19.
[227] Kahan et al., *supra* note 27, at 840.

IV. VISUAL RHETORIC

The next step towards becoming a professional visual advocate is to develop a working knowledge of visual rhetoric principles. Knowing how visual arguments work will help lawyers make effective and compelling visual arguments that aid their client's case. Moreover, familiarity with visual rhetoric principles will enable attorneys to evaluate the professionalism of their visual presentations. In order to know whether an argument overreaches or persuades primarily through bias or emotion,[228] attorneys need to understand the rhetorical and logical principles their argument is based on. Finally, knowledge of visual rhetoric will help attorneys predict and counter opposing visual arguments so that each side has an effective visual theory and/or counter theory for their case.[229]

In this section, I will explain two commonly used visual rhetorical devices: chronological visual narratives and the visual enthymeme. I will provide a few case law examples of the use of each device in the courtroom and explain the relevant legal standards that apply to these types of arguments. Finally, I will conclude this section with an explanation of two common visual logical fallacies that attorneys should be aware of.

A. CHRONOLOGICAL VISUAL NARRATIVES

Chronological visual narratives are simple but powerful devices that use two or more images, taken at different points in time, and ask the viewer to imagine what happened in between those two points in time. The story of Emmett Till exemplifies the power of the chronological visual narrative. Emmett Till was a young man from Chicago who traveled to rural Mississippi to visit relatives in the summer of 1955.[230] While the facts leading up to Till's death may never be known, most accounts hold that while in Mississippi, Till ignored established Jim Crow norms and spoke with a white, female shopkeeper.[231] In response to his "transgression," Till was brutally murdered by at least two white men who, after being brought to trial, were found not guilty by a unanimous verdict.[232] Members of Till's jury later admitted that they had absolutely no doubt that the two men were

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[228] From a professional perspective, attorneys have an obligation to honestly assess the rhetoric they use and avoid devices that intentionally persuade through deception and bias. *See* Sammons, *supra* note 194, at 99.

[229] For instance, in the *Skakel* case, in addition to an understanding of the science of visual processing, a better grasp on visual rhetoric and the visual logical fallacies within the prosecutor's presentation may have helped the defense's objections to the prosecution's visuals. Skakel Appellate Brief, *supra* note 65. The prosecutor's slide presentation utilized emotionally powerful but analytically weak rhetorical devices. If Skakel's defense team had employed foresight to deconstruct the logic within the visual argument, they would have been able to isolate and attack the weak, unstated portions of the visual argument. *See infra* Part IV.B.2 and text accompanying notes 325-57 and Part IV.C.2 and text accompanying notes 421–28.

[230] Christine Harold & Kevin Michael DeLuca, *Behold the Corpse – Violent Images and the Case of Emmett Till, in* VISUAL RHETORIC 258 (Lester C. Olson, Cara A. Finnegan, and Diane S. Hope eds., Sage 2008).

[231] *Id.* at 258.

[232] *Id.*

guilty of killing Till.[233] After the trial, the two defendants tried for Till's murder also confessed to a journalist that they committed the crime.[234]

When Till's mother received his body, she insisted on an open casket funeral and invited members of the press to photograph Till's corpse so that the whole world could see the heinous crime that her son had fallen victim to.[235] That summer, the African American press published two photographs of Till, usually presented alongside each other.[236] The first picture showed Till as a young man with "confident eyes and serene smile . . . looking toward his future."[237] The second photograph provided the ending for the story, showing that "Till [did] not become a man, [did] not see a future. The photo of the bloated face-that-was Emmett Till after Mississippi and after Jim Crow justice [was] monstrous and incomplete, violating the norms of civilized society."[238]

The two photos drew visceral responses from many African Americans, and had the effect of bringing mass numbers into the Civil Rights Movement.[239] Jesse Jackson stated that "when Emmett Till was killed, unlike with *Brown* [*v. Board of Education*], there was no need for definition. It touched our bone marrow, the DNA of our dignity."[240] The gruesome photos, once viewed, could not be forgotten. James Baldwin stated that, "I do not know why the case pressed on my mind so hard—but it would not let me go."[241] Muhammad Ali credits the Till photos with causing him to become conscious of his identity as a young black man living in a violent racist society.[242] In his autobiography, Ali explained that the two photos released a great amount of anger within him, anger that he later put to use to advocate for civil rights and against the Vietnam War.[243] For many African Americans living middle class lives outside of the South, the Emmett Till photographs made the South's savagery and complete lack of a justice system come vividly alive, serving as a reminder that the vicious violence in the South was a threat to all members of their community.[244] The great rhetorical power of Emmett Till's story did not lie in words. Rather, the resonance within the story derived from two simple images—images that invited the viewer to see how the barbarism of the white supremacist South cut a young man's life short.

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[233] *Id.*
[234] *Id.*
[235] *Id.* at 262, 267.
[236] Harold & DeLuca, *supra* note 230, at 264.
[237] *Id.*
[238] *Id.*
[239] *Id.* at 262–265, 270.
[240] *Id.* at 265 (citing Reverend Jesse L. Jackson, Sr., *Forward* to TILL-MOBLEY & BENSON, DEATH OF INNOCENCE xii (Random House 2003)).
[241] *Id.* at 264–65 (citing Thomas Doherty, *The Ghosts of Emmett Till*, Chronicle of Higher Educ., January 17, 2003, at B11).
[242] Harold & DeLuca, *supra* note 230, at 262–63 (citing MUHAMMAD ALI, THE GREATEST (Random House 1975) and Elizabeth Alexander, BLACK MALE: REPRESENTATIONS OF MASCULINITY IN CONTEMPORARY AMERICAN ART 104 (New York: Whitney Museum of American Art 1994)).
[243] *Id.*
[244] *Id.* at 265.

Chronological visual narratives comport with Aristotle's view that that every compelling story should have a beginning, a middle, and an end.[245] Here, the viewer sees the beginning and the end and is invited to imagine what happened between the two points. The technique also fits well into the definition of a narrative plot provided by Anthony Amsterdam and Jerome Bruner[246] in their groundbreaking book on legal narrative, *Minding the Law*.[247] Amsterdam and Bruner explain plot in terms of a character encountering conflict or "trouble" and the effort to redress or transform the situation caused by the trouble.[248] With the chronological narrative technique, the viewer first sees the character and then sees the result of the trouble. The viewer comes out of the narrative with a desire to resolve the conflict and eradicate the trouble.

In the courtroom, attorneys often employ chronological visual narratives by juxtaposing two images of the same person—the first image shows the person in a healthy, happy state and the other shows the person injured or dead. Just as with the Emmett Till example, the viewer sees the beginning and the end of the story and is invited to vividly imagine the trouble that took place in between the two points. The technique emphasizes what has been taken from the victim and how it was taken to persuade the viewer to do justice, either through a criminal conviction or an award of tort damages. While the undeniable brutality of the Emmett Till images led to an eminently good result (stoking the fire of the Civil Rights Movement), using this device in the courtroom can promote emotional decision-making at the expense of rational deliberative logic. In the remaining part of this section, I will address how chronological narratives are used in the legal context, first in criminal trials and then in the civil arena.

1. *Chronological Visual Narratives in Criminal Cases*

In criminal cases, chronological visual narratives usually involve "before" pictures showing the victim before the crime juxtaposed with an "after" photograph of the dead victim. For instance, in its closing rebuttal argument in the *Skakel* murder trial, the prosecution juxtaposed a photograph of a smiling Martha Moxley (the victim) with a photograph of her corpse.[249] In *People v. Rodriguez*,[250] the prosecution displayed a set of before portrait photos of the vehicular homicide victims in contrast with a police videotape showing the victims' corpses smoldering in the vehicle for five minutes after the accident.[251] The New York Appellate Division, Second Department, and the District Court for the Eastern District of New

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[245] ARISTOTLE, POETICS Part VII (Publishing LLC 2008).

[246] This is the same Jerome Bruner who developed the New Look Theory. *See supra* text accompanying notes 164–71.

[247] ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW, 113 (Harvard University Press, 2000).

[248] *Id.* at 113–14.

[249] State of Connecticut v. Skakel, 888 A.2d 985, 1069–70 (2006); Carney & Feigenson, *supra* note 4, at 28–29.

[250] People v. Rodriguez, 766 N.Y.S.2d 863 (N.Y. App. Div. 2003) habeas corpus appeal denied, Rodriguez v. Connell, 2009 WL 792092, *2, *4 (E.D.N.Y. 2009).

[251] *Connell*, 2009 WL 792092 at *2, *4, *6.

York (on a habeas corpus appeal) rejected defendant's argument that the prosecution's admission and use of the photos amounted to prosecutorial misconduct.[252] Both the *Skakel* and *Rodriguez* presentations successfully reinforced the prosecution's theme and theory that the defendant should be held responsible for a heinous and depraved crime.[253]

Effective chronological visual narratives may also utilize more than two images, going beyond a simple "before and after" technique. For instance, in *Smith v. Hawaii*, the prosecution displayed three photographs in succession: a photograph of the deceased infant as a newborn, wrapped in a blanket; a full length photograph of the defendant; and an autopsy photograph showing the deceased infant's injuries.[254] Instead of two photographs, three were used to show the story's beginning (the newborn infant), ending (the infant's death) as well as the middle and source of the trouble (the full-length photograph of the defendant). The District Court for the District of Hawaii denied defendant's habeas corpus petition, finding that the prosecution's display of the photographs did not amount to prosecutorial misconduct.[255]

The visual narrative technique can also work with only one image, where a vivid verbal description is substituted for the bookend of the story. For instance, in *Ogletree v. Graham*,[256] the prosecutor showed a before photograph of the victim with one of her children. During summation, the prosecutor graphically described the crime: "He tore her anus open, and he ejaculated inside of her, for his own deviant pleasure.... This poor girl. They are going to have to roll back her face to find out what injury is underneath her scalp."[257]

While the photograph of the defendant in death may have been too gruesome and prejudicial to be admitted into evidence, the initial photograph of the victim with her child, coupled with the prosecutor's graphic description of her fatal injuries had the same effect as an after photograph.[258] The *Ogletree* court denied defendant's habeas corpus petition, finding that although the prosecutor's conduct may have generated

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[252] The Appellate Division held that the victim's "before" portraits should not have been admitted but that the admission was not a harmless error, given the overwhelming amount of evidence of defendant's guilt. *Rodriguez*, 766 N.Y.S.2d at 863. The Eastern District court denied the habeas claim on procedural grounds, finding that the New York Appellate Division had adjudicated the claims. *Connell*, 2009 WL 792092 at *6.

[253] Both cases resulted in convictions, although the *Connell* jury declined to find the defendant guilty of depraved indifference murder and instead found him guilty of the lesser manslaughter charge. *Connell*, 2009 WL 792092 at *4. The District Court took the jury's rejection of the depraved murder charge as evidence that "its passions were not inflamed by the videotape or the portraits." *Connell*, 2009 WL 792092 at *2, *4.

[254] Smith v. Hawaii, 2007 WL 1853982, *8 (D. Hawaii 2007).

[255] *Smith*, 2007 WL 1853982 at *8, *11. The *Smith* court denied the prosecutorial misconduct claim in part because the defendant failed to object to the admissibility of his full length photo during the trial, thus waiving any objection to it on appeal. *Smith*, 2007 WL 1853982 at *9. The *Smith* court also based its holding on the trial judge's limiting instructions, which stated that the prosecution's closing presentation was not evidence that the jury should rely on in reaching their verdict. *Id.* at *11.

[256] Ogletree v. Graham, 559 F. Supp. 2d 250, 259–260 (N.D.N.Y. 2008).

[257] *Id.* at 259 n.8.

[258] When a person imagines a graphic scene, the visual cortex is activated, the same part of the brain that is responsible for processing real sensations. STAFFORD & WEBB, *supra* note 68, at 101 ("If you ask someone to imagine what the inside of a teapot looks like, his visual cortex works harder.").

more emotion than necessary, it was not prejudicial enough to warrant a new trial.[259]

Similarly, during the closing argument in *Gasaway v. Indiana*, a manslaughter trial, the prosecutor projected autopsy photographs of a young child while he read a poem:

> Christopher Gasaway has died;
> Yes little Chris is dead.
> Burned and beaten, literally,
> From the soles of his feet, to the top of his head.
> Pursuing one man while, yet married to another;
> Kathy, lying to everyone; her husband, her sisters, her brother.
> When faced with devastation, running from old and rejected by new.
> She struck out in rage;
> Angry red turned to black and blue.
> Murdered by mommy, who was entrusted to care,
> But not one said his life would be long or his death would be fair.
> Christopher Gasaway has died;
> Yes, little Chris is dead.
> But no matter, she can always have more.[260]

Although the record is unclear as to whether any before pictures were employed here, the prosecutor's poem begins with a verbal before image, the image of "little Chris," and goes on to emphasize the trouble in the story, the mother's callous savagery, which caused the child to meet his death.[261] The literal emphasis on the pathos surrounding the child's murder, combined with the display of the graphic autopsy images of the child, created a highly emotional narrative that influenced the jury to hold the defendant accountable for her actions. The trial court overruled the defense counsel's objections to the summation presentation and poem and denied a subsequent motion for a mistrial.[262] On appeal, the Indiana Court of Appeals found that the prosecutor had not engaged in any kind of misconduct but was just earnestly advocating his case.[263]

While chronological visual arguments can be highly persuasive, they do not persuade through deliberative logic. Instead, they rely heavily on emotional reactions that might result from processes operating below the level of conscious awareness. As noted above, there is evidence that gruesome photographs cause unconscious emotional reactions—reactions

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[259] *Ogletree*, 559 F. Supp. 2d at 260. The court went on to hold that even if there was prosecutorial misconduct, the overwhelming evidence of guilt negated the need for granting a new trial under the habeas corpus petition. *Id.*

[260] Gasaway v. Indiana, 547 N.E.2d 898, 900–901 (Ind. Ct. App. 1990).

[261] *Id.*

[262] *Id.* at 901.

[263] *Id.* at 902. Similar to the reasoning in *Smith v. Hawaii*, discussed *supra*, note 254, the *Gasaway* court found that the jury's conviction of the defendant of a lesser charge (involuntary manslaughter instead of murder) evinced that it had not been improperly inflamed. *Gasaway*, 547 N.E.2d at 902.

that may not be curable with a limiting instruction.[264] While there is an obvious evidentiary objection that chronological visual arguments are prejudicial and inflammatory,[265] courts are generally inclined to allow these presentations, especially if the underlying images are relevant and have been (or will be) admitted into evidence.[266]

Another obstacle for defense attorneys who seek to limit the emotional effect of visual arguments is the broad leeway that courts grant for summation arguments (which is usually where visual arguments are employed). In closing arguments, the adversary system allows prosecutors to argue their case with "earnestness and vigor," striking "hard blows" where appropriate.[267] Innovative techniques and rhetorical devices are "simply fair argument."[268] While bald appeals to emotion are not appropriate, courts accept a certain amount of emotion, especially in a criminal trial where "the stakes are high, and the participants are inevitability charged with emotion."[269] While hard blows are allowed, foul ones are not.[270] However, a prosecutor cannot be accused of a foul blow just for making an argument steeped in "earnestness or . . . stirring eloquence."[271] Although courts have held that prosecutors, as public officers, must present fair arguments that seek justice as the primary goal,[272] the reality is that courts allow prosecutors to make all kinds of emotionally driven visual arguments.[273] Even in cases where an appeals court has found that a particular trial presentation went too far, it is enormously difficult to show the requisite amount of prejudice that would justify a new trial.[274] Moreover, even if a court finds that there has been

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[264] *See* Douglas et al., *supra* note 69, at 499 ("[I]f jurors cannot even recognize the extent to which [graphic] evidence affects them, it will be impossible for them to reduce or control the impact of the evidence when instructed to do so by a judge.").

[265] Such an objection would be made under FED. R. EVID. 403.

[266] *See e.g.*, Conn. v. Skakel, 888 A.2d at 1070 (holding that the prosecution's summation presentation was proper, in part because each of the individual photographs (of the victim alive and in death) had been admitted into evidence during the trial); Arizona v. Sucharew, 66 P.3d 59, 64 (Ariz. Ct. App. 2003) (holding that a PowerPoint presentation used in an opening statement was not improper because the underlying photographs were relevant and later admitted into evidence during the trial); *Smith*, 2007 WL 1853982 at *10 (holding that the prosecution's closing presentation of photographs to be proper in part because the incorporated photographs were relevant to the case and admitted.)

[267] *Gasaway*, 547 N.E.2d at 902 (citing Berger v. United States, 295 U.S. 78 (1935)).

[268] *Skakel*, 888 A.2d at 1057.

[269] *Ogletree*, 559 F. Supp. 2d at 259 (quoting United States v. Young, 470 U.S. 1, 8, 10 (1985) (quoting the ABA Standards for Criminal Justice 3-4.8 (2d ed. 1980) and United States v. Wexler, 79 F.2d 526, 529–30 (2d Cir. 1935))).

[270] *Skakel*, 888 A.2d at 1057.

[271] *Id.* at 1058.

[272] *Id.*

[273] *See, e.g.*, *Skakel*, 888 A.2d 985; *Gasaway*, 547 N.E.2d 898. The emotional visual arguments employed in the *Skakel* and *Gasaway* cases are but two examples of the liberal approach that courts take when evaluating closing arguments.

[274] For direct appeals under state law, courts generally take a two pronged approach, first asking whether or not there was prosecutorial misconduct and then inquiring into whether the misconduct deprived the defendant of his/her due process rights to a fair trial. *Skakel*,888 A.2d 1058; *Gasaway*, 547 N.E.2d at 901. For Federal habeas challenges, the appellant must prove that the lower court infringed upon "a federal constitutional or statutory provision or [deprived] the defendant of the fundamentally fair trial guaranteed by due process." *Smith*, 2007 WL 1853982 at *3 (citing Pully v. Harris, 465 U.S. 37, 41 (1984) and Drayden v. White, 232 F.3d 704, 710 (9th Cir. 2000)). 28 U.S.C. §2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") mandates that "federal courts must give substantial deference to a state court determination that has adjudicated a federal constitutional

prosecutorial misconduct, "rarely are comments in a prosecutor's summation so prejudicial that a new trial is required."[275]

2. *Chronological Visual Narratives in Civil Cases*

In civil cases involving catastrophic injuries, chronological visual narratives are commonly employed to show an accident victim's life either before or after the accident. The most common after image reflects a "day-in-the-life" of an individual after an accident, communicating how the accident has affected the victim's quality of life.[276] Day-in-the-life videos are admissible to document a plaintiff's injuries and mode of life after a catastrophic injury.[277] These types of videos are usually admitted to help the jury understand the extent of the plaintiff's injuries,[278] the nature of the medical care necessitated by the injuries,[279] and the "impact the [injuries have] had on the plaintiff's life in terms of pain and suffering and loss of enjoyment."[280]

Day-in-the-life presentations are limited in scope and must not include information unrelated to an "actual day in the life of the victim."[281] For this reason, before images may not be allowed in a day-in-the-life video.[282] Although they may be excluded from the actual video, before images might be admissible as probative evidence of how the plaintiff was before his/her injuries.[283] For instance, in wrongful death actions, images of the decedent before the accident have been held admissible because they function as

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claim on the merits." *Ogletree*, 559 F. Supp. 2d at 256–257 (citations omitted). For federal habeas prosecutorial misconduct claims, courts employ the same general analysis as state appellate approaches, first looking at whether the prosecutor acted improperly and if so, asking if the improper conduct had a "substantial and injurious effect or influence in determining the jury's verdict." *Ogletree*, 559 F. Supp. 2d at 259 (quoting Tankleff v. Senkowski, 135 F.3d 235, 252 (2d Cir. 1998) (quoting Bentley v. Scully, 41 F.3d 818, 823 (2d Cir. 1994))).

[275] *Ogletree*, 559 F. Supp. 2d at 259 (quoting United States v. Germosen, 139 F.3d 120, 128 (2d Cir. 1998) (quoting United States v. Forlorma, 94 F.3d 91, 93 (2d Cir. 1996))). The *Ogletree* court held that even if there was prosecutorial misconduct, the misconduct was harmless error because there was so much other evidence of guilt. *Ogletree*, 559 F. Supp. 2d at 260.

[276] Fred I. Heller, Annotation, *Using or Challenging a "Day-in-the-Life" Documentary in a Personal Injury Lawsuit*, 40 Am. Jur. Trials 249, §1 (April 2009) (describing the general purpose of a "Day-in-the-Life" documentary video).

[277] *See generally*, Donnellan v. First Student, Inc., 891 N.E.2d 463, 474–75 (Ill. App. Ct. 2008); Jones v. Los Angeles, 24 Cal.Rptr.2d 528, 531 (Cal. App. Ct. 1993); Ocasio v. Amtrak, 690 A.2d 682, 690 (N.J. Super. App. Div. 1997).

[278] *Jones*, 24 Cal.Rptr.2d 528 (Cal. App. Ct. 1993) (Day-in-the-life films "can uniquely demonstrate the nature and extent of an accident victim's injuries.").

[279] Many day-in-the-life films document a plaintiff being assisted by healthcare providers or undergoing therapy for injuries. *See e.g.*, *Jones*, 24 Cal.Rptr.2d at 529 (the video at issue showed the paralyzed plaintiff "being moved from her bed by two attendants, being bathed, being placed in her wheelchair . . . and attempting to move around in the chair"); Grimes v. Employers Mutual Liability Co. of Wisc., 73 F.R.D. 607, 609 (D. Alaska 1977)) (the video at issue depicted plaintiff performing daily activities in the home, performing a hand-function test, and operating a prosthetic device); Donnellan, 891 N.E.2d at 474–75 (the video at issue showed plaintiff undergoing physical therapy on his leg and foot).

[280] *Grimes*, 73 F.R.D. at 610.

[281] Eckman v. Moore, 876 So.2d 975, 985 (Miss. 2004).

[282] *Eckman*, 876 So.2d at 985 (holding that high school and wedding photographs of the decedent before his injuries should not have been included in the day-in-the-life video).

[283] *See e.g.*, Fred I. Heller, Annotation, *Using or Challenging a "Day-in-the-Life" Documentary in a Personal Injury Lawsuit*, 40 Am. Jur. Trials 249, §1.5 (April 2009) (collecting cases that have allowed depictions of the victim before the accident). *See also*, *Eckman*, 876 So.2d at 985. The *Eckman* court reversed the verdict of the lower court and granted a new trial because the two day-in-the-life video and before photographs were cumulative and unduly prejudicial. *Id.* at 985. The court noted, however, that some of the photographs may have been relevant to show the decedent as he was before his injuries. *Id.*

testimony for the quality of the victim's life before death and thus help the jury calculate the amount of damages that should be awarded for the lost life.[284] Images of the decedent before the fatal accident usually show the victim in a happy state, with his or her family, generally enjoying life.[285]

Day-in-the-life videos coupled with images depicting an individual before the injuries powerfully persuade by contrasting images of an individual life before a catastrophe with images of the injuries and pain that occurred afterward.[286] Images before the accident might show the victim smiling, happy, and living a full and vibrant life.[287] On the other hand, within day-in-the-life films, it is permissible to show a plaintiff grimacing in pain and showing obvious discomfort.[288] Using the narrative framework described by Anthony Amsterdam and Jerome Bruner, the power of day-in-the-life imagery lies in its ability to vividly depict trouble (the plaintiff's catastrophic injuries) and compel the fact finder to quell the pain the trouble has caused.[289]

Similar to prosecutorial misconduct challenges, the standard for reversal in the civil context is high. The appellate standard of review in these cases asks whether or not the judge abused discretion in allowing the evidence or presentation.[290] In addition to abuse of discretion, the error must have negatively impacted the outcome of the proceeding[291] in a way that prejudicially affected a substantial right of a party.[292] Even in cases where an error has been found in the admission of visual evidence, in the form of before images, the error may not be held to be prejudicial, especially if there is other admitted evidence that attests to the facts within the images.[293]

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[284] Bilello v. Alton Ochsner Medical Foundation, 621 So. 2d 6, 8–10 (La. Ct. App. 1993) (allowing photographs of the eight year old decedent, which showed him smiling and playing); Marcotte v. Timberlane/Hampstead School District, 733 A.2d 394, 406–07 (N.H. 1999) (allowing photographs of deceased second-grader, which showed him with his family and participating in sports); Jones v. Livingston, 416 S.E.2d 142, 146–47 (Ga. Ct. App. 1992) (allowing photographs of a 17 year old decedent which showed him with his family, playing baseball, and singing in his church). *But see* Rubin v. Aaron, 594 N.Y.S.2d 797 (N.Y. App. Div. 1993) (holding that photographs taken of the decedent before her death were admitted in error) Papa v. City of New York, 598 N.Y.S.2d 558 (N.Y. App. Div. 1993) (holding that video footage of the plaintiff, taken before he was beaten by defendants, should not have been admitted); *Eckman*, 876 So.2d at 985 (holding that it was a prejudicial error to admit approximately seventy-five high school and wedding photographs of the decedent before his injuries).

[285] *Bilello*, 621 So. 2d at 8–10; *Marcotte*, 733 A.2d at 394, 405; *Jones*, 416 S.E. 2d at 146–47.

[286] In wrongful death suits, there is, of course, no "day-in-the-life" video—the absence of the victim speaks for itself.

[287] *Bilello*, 621 So. 2d at 8–10; *Marcotte*, 733 A.2d at 406–07.

[288] *See e.g.*, *Donnellan*, 891 N.E.2d at 475 (the video included images of the plaintiff wincing and grimacing in pain); *Jones*, 24 Cal. Rptr.2d at 530 (segments of the video zoomed in on plaintiff's face while she was "in obvious discomfort and grimacing.").

[289] *See* AMSTERDAM & BRUNER, *supra* note 247, at 113–14.

[290] *See generally*, Robinson v. Equifax Information Services, LLC, 560 F.3d 235, 240 n.1 (4th Cir. Va. 2009); Kaiser Foundation Health Plan, Inc. v. Abbot Laboratories, Inc., 552 F.3d 1033, 1042 (9th Cir. 2009); Dillon v. Mountain Coal Co., 2009 WL 1758764, *7 (10th Cir. 2009); In Re Contest of General Election, 2009 WL 1866379, *10 (Minn. 2009); Investor Resource Services, Inc. v. Cato, 2009 WL 1798616, *1 (Miss. 2009).

[291] Wohrle v. Kootenai County, 207 P.3d 998, 1003 (Idaho 2009).

[292] Mendelsohn v. Sprint/United Management Co., 587 F. Supp. 2d 1201, 1218 (D. Kan. 2008).

[293] *See e.g.*, *Rubin*, 594 N.Y.S.2d (although photographs taken of the decedent before her death were admitted in error, the error was harmless in light of other evidence that attested to the victim's happy demeanor before the accident); *Papa*, 598 N.Y.S.2d at 530 (although video footage of the plaintiff,

3. *Professional Lessons for Attorneys*

Imposing professional standards on visual rhetoric creates a sticky situation, made worse when we add what we now know about unconscious reactions to visual stimuli, unconscious influences on emotion, and implicit biases, all of which can infect the decision-making process. From a professional[294] perspective, any attorney who plans to use a chronological visual narrative should think hard about whether the intent is to persuade based on the facts of the case or through emotion alone.[295] However, given the great lenience that trial courts and appellate courts grant for these kinds of presentations, a searching inquiry of this sort may be an unrealistic Pollyanna-esque expectation.

As a result of the apparent belief of courts that the messy issues raised by emotional visual arguments can be fairly resolved in the boxing ring of the courtroom,[296] attorneys on the other side of these narratives must be prepared to strike their own "hard blows."[297] Armed with the knowledge that their opposing counsel might employ a chronological visual narrative in any case where a victim has suffered severe bodily injuries or death, attorneys should be prepared with objection arguments for potentially prejudicial graphic visual evidence,[298] and with separate objections for presentations that combine graphic visual evidence with verbal argument.[299] In civil cases, bifurcating issues of liability and damages may help diminish the emotional impact of chronological visual narratives.[300]

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taken before he was beaten by defendants, should not have been admitted, its admission was harmless in light of other testimony as to the victim's vibrant personality before the beating).

[294] I use the word "professional" instead of "ethical" here because professionalism represents a higher, normative concept that looks at what attorneys *should* do as opposed to what they must do. *See* Benjamin H. Barton, *The ABA, The Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approaches of the Canons*, 83 N.C. L. REV. 411, 440–41 (2005) (discussing how "ethics" has become synonymous with the minimum rules governing attorney conduct whereas "professionalism" embodies a more normative standard as to what lawyers "should" do); Jeffrey A. Maine, *Importance of Ethics and Morality in Today's Legal World*, 29 STETSON L. REV. 1073, 1077–78 (2000) (explaining that disciplinary rules such as the rules of model responsibility contain the minimum ethical standards whereas true professionalism requires one to go beyond the bounds of the disciplinary rules).

[295] *See* Sammons, *supra* note 194, at 99.

[296] *Gasaway*, 547 N.E.2d at 902 (referencing the adversary system that allows attorneys to strike "hard blows" in summation); *Skakel*, 888 A.2d at 1057 (also referencing the "hard blows" that prosecutors are allowed in summation).

[297] *Skakel*, 888 A.2d at 1057.

[298] A prosecutorial misconduct claim might be rejected if a party fails to object to the presentation at trial. *See e.g.*, Smith v. Hawaii, 2007 WL 1853982, *6, *9 (D. Hawaii 2007) (holding that because the defendant did not object to the photograph at trial, he waived any objection, on appeal, to the photo's use in the prosecution's opening statement and closing argument). *See also*, *supra* text accompanying note 266 (discussing cases that held the prosecution's summation presentation was not improper, in part because each of the individual photographs had been admitted into evidence during the trial).

[299] For instance, in the *Gasaway* case, the court noted that the defendant's failure to object to both the autopsy slides in the presentation and the concurrent reading of the poem potentially waived his right to contest the presentation as a whole on appeal. *Gasaway*, 547 N.E.2d at 901. Because of the potential for prejudice, however, the court analyzed the prosecutorial misconduct claim for the slides and poem in conjunction with one another. *Id.*

[300] In one bifurcated trial, photographs of the victim before the alleged act of medical malpractice as well as a day-in-the-life video of her in a vegetative state were excluded from the liability phase of the trial. Cantrell v. Northeast Georgia Medical Center, 508 S.E.2d 716, 722 (Ga. Ct. App. 1999). The jury entered a verdict for the defendant doctor and hospital. *Id.* at 717. The Georgia Court of Appeals held that these images were not relevant for any issue of liability for medical malpractice. *Id.* at 722.

Given the general rule that gruesome, graphic, and emotional images are admissible as long as they are probative of some issue in the case, evidentiary objections might be exercises in futility.[301] Nonetheless, more sophisticated objection arguments, based on brain science, as to why and how graphic visual evidence and emotional visual presentations cause prejudice and stifle rational deliberation, might lead courts to exercise more caution. In any event, if a "before and after" presentation cannot be prevented, attorneys must at least be prepared with strategies to counter this visual narrative. Effective counter strategies might include pointing out the emotional and illogical appeal of the argument or constructing a powerful visual counter-theme.

B. THE VISUAL ENTHYMEME

The visual enthymeme is a visually reproduced rhetorical device that presents an argument in which one or more of the premises are left unstated.[302] Aristotle defined the enthymeme as a device, similar to a logical syllogism, that employs premises that are probably, though not absolutely true.[303] The contemporary definition of the enthymeme is that it is a shortened syllogism of any kind.[304]

To fully understand how the enthymeme works, let's begin with a formal syllogism:

Politicians are not trustworthy.
This person is a politician.
Therefore, we cannot trust this person.[305]

The enthymeme version of this syllogism would state: "We cannot trust this [person] as he/she is a politician."[306] To process the enthymeme, the audience must implicitly understand the premise that has been left out—that politicians are not trustworthy. Thus, when presented with an

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[301] *See* 40 Am. Jur. 2d Homicide § 416—Photograph of Homicide Victim—Gruesomeness as Affecting Admissibility ("The general rule is that a photograph does not become inadmissible simply because it is gruesome and the crime is heinous."); M.C. Dransfield, Annotation, *Admissibility of Photograph of Corpse in Prosecution for Homicide or Civil Action for Causing Death*, 73 A.L.R.2d 769 § 3 (First Published in 1960) (collecting cases supporting the general rule of admissibility for photos of corpses as long as the photo is relevant and tends to illuminate an important aspect of the case); Douglas et al., *supra* note 69 (explaining that in conflict with cognitive science research, the legal system generally assumes that jurors will not be unduly prejudiced by photographs). *But see* M.C. Dransfield, Annotation, *Admissibility of Photograph of Corpse in Prosecution for Homicide or Civil Action for Causing Death*, 73 A.L.R.2d 769 §8b (First Published in 1960) (collecting decisions that excluded gruesome photographs because they were not directly relevant and did not shed light on any material issue in the case).

[302] Cara A. Finnegan, *Recognizing Lincoln, Image Vernaculars in Nineteenth Century Visual Culture*, *in* VISUAL RHETORIC 61, 63 (Lester C. Olson, Cara A. Finnegan, and Diane S. Hope eds. Sage Publishing 2008).

[303] ARISTOTLE, RHETORIC 11 (Filiquarian Publishing LLC 2008) [hereinafter ARISTOTLE, RHETORIC]; Richard A. Landham, A HANDLIST OF RHETORICAL TERMS 65 (2d ed. Univ. of Calif. Press 1991).

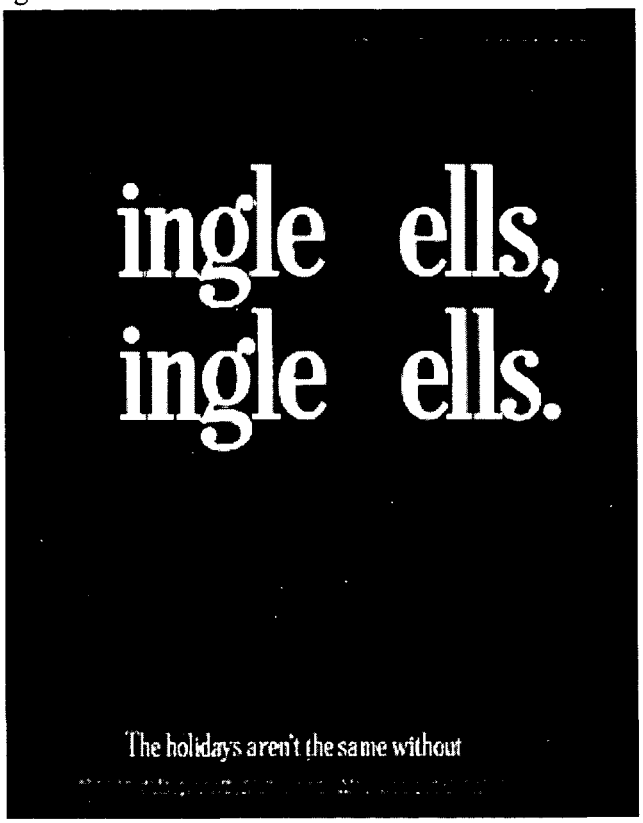
[304] Landham, *supra* note 303, at 65.

[305] This syllogism is adapted from an example that Ian Bogost provides in PERSUASIVE GAMES: THE EXPRESSIVE POWER OF VIDEOGAMES 18 (MIT Press 2007).

[306] *Id.*

enthymeme, the listener fills in the missing parts of the syllogism to understand the argument.[307]

The persuasive strength of the enthymeme derives from two sources. First, the enthymeme grants audiences agency.[308] By filling in the missing foundation of the argument, the audience is encouraged to "participate in its own persuasion by filling in that unexpressed premise."[309] Anne Marie Seward Barry writes that the most persuasive advertisements are those in which the viewer participates.[310] To illustrate her point, Barry references the following text-based advertisement for J&B brand Scotch whiskey[311]:



[307] ARISTOTLE, RHETORIC, *supra* note 304, at 11; J. Anthony Blair, *The Rhetoric of Visual Arguments* in DEFINING VISUAL RHETORICS 41 (Charles A. Hill & Marguerite Helmers eds., Lawrence Erlbaum Associates 2004).

[308] Finnegan, *supra* note 303, at 61–74.

[309] Blair, *supra* note 308, at 41.

[310] BARRY, *supra* note 8, at 257.

[311] The image is available at Two Ads One Concept, http://images.google.com/imgres?imgurl=http://www.wisdumb.com/blog/wp-content/uploads/2009/01/jbad.jpg&imgrefurl=http://www.wisdumb.com/blog/%3Fp%3D273&usg=__l0yC3e378NyJvg4t_kiIZRPczig=&h=403&w=313&sz=21&hl=en&start=1&sig2=f-SujP_P7GgSehjT3bLyGw&tbnid=PkLkqpDtRjENNM:&tbnh=124&tbnw=96&prev=/images%3Fq%3Dingle%2Bells%26gbv%3D2%26hl%3Den%26sa%3DG&ei=73FOSoS5LdGGmQfXrY25BA (January 20, 2009).

One of the advances in modern advertising is that the "spectator becomes the artist . . . because he/she must supply all of the connections."[312] Similar to advertisements in which the audience participates in the persuasion, enthymemes allow the audience to actively participate in the argument's creation, rather than just passively taking it in.[313]

The second reason an enthymeme is persuasive is that it taps into the audience's "tacit social knowledge."[314] The "unstated premise, at once invisible and transparent, is 'natural' rather than context-bound; it is simply something that everybody knows."[315] For instance, the untrustworthy politician enthymeme referenced above relies on an unstated assumption that many people would agree with, that as a general matter, politicians are not trustworthy individuals. Aristotle noted that enthymemes are powerful because the unstated premises can reinforce a person's individual values; people love to hear something that confirms what they already believe.[316] The unstated premises may also reinforce a commonly held morality, which in turn contributes to an ethos-based argument.[317] The danger here is that enthymemes, to the extent they rely on shared tacit knowledge, could easily take advantage of unconscious or implicit bias. Indeed, some rhetorical scholars view the enthymeme as an effective device for subconscious persuasion:

> [The enthymeme] is thought of as concluding because of something unexpressed, unarticulated: enthymeme primarily signifies something within one's soul, mind, heart, feelings, hence something not uttered or "outered" and to this extent not a fully conscious argument, legitimate as though it may be. Aristotle's term here thus clearly acknowledges the operation of something at least very like what we today would call a subconscious element.[318]

The enthymeme exploits the concept that we are often most persuaded when we are unaware that we are being influenced.[319] Unconscious acceptance of an enthymeme occurs because we do not generally stop to analyze the strength of the unstated premises; rather, we quickly accept what appears to be intuitive logic. Thus, the enthymeme does not create a true dialectic experience because there is no room to raise objections to or refute the unstated premises.[320] Although the enthymeme's unstated premises allow logical fallacies and weak premises to be swept under the carpet, the end result is an argument that makes sense in an emotionally intuitive way.

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[312] MARSHAL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN vii (Signet 1964) (quoted in BARRY, *supra* note 8, at 257).
[313] Finnegan, *supra* note 303, at 63.
[314] *Id.*
[315] *Id.*
[316] ARISTOTLE, RHETORIC, *supra* note 304, at 116 (Aristotle actually made this point about the use of maxims in rhetoric, but the point is equally applicable to enthymemes).
[317] *Id.*
[318] WALTER J. ONG, RHETORIC, ROMANCE, AND TECHNOLOGY: STUDIES IN THE INTERACTION OF EXPRESSION AND CULTURE (Cornell Univ. Press 1971) (quoted in Landham, *supra* note 304, at 66).
[319] LEDOUX, *supra* note 68, at 59.
[320] Bogost, *supra* note 306, at 35–36.

1. *Lyndon B. Johnson's Daisy Advertisement*

Visual arguments commonly use enthymemes.[321] One famous example of a visual enthymeme is the Lyndon B. Johnson "Daisy Ad," a controversial and emotionally compelling advertisement produced for Johnson's 1964 presidential campaign against Barry Goldwater.[322] The advertisement must really be seen to understand its power. The advertisement begins with an image of a little girl counting as she plucks petals from a daisy. Before she gets to the tenth count, she freezes as another countdown is heard, a countdown toward a nuclear detonation. While footage of the nuclear detonation is being shown, Johnson's voice can be heard saying: "[t]hese are the stakes . . . to make a world in which all of God's children can live or to go into the dark. We must either love each other or we must die." The advertisement concludes with another voice exhorting the viewers to "Vote for president Johnson on November 3. The stakes are too high for you to stay home." Visual rhetorician J. Anthony Blair identifies the full syllogism within the ad:

> Goldwater might, on something as arbitrary as a whim, launch a nuclear holocaust.
>
> Such a holocaust would cause unspeakable horror for everyone, including innocent children.
>
> Hence, it would endanger the national interest to elect Goldwater.[323]

The only images from the full syllogism that we see in the ad are references to innocent children and the nuclear holocaust. However, the ad shows all that we need to see to understand the argument. "[T]he juxtaposition of the child in its innocence and the nuclear mushroom cloud has huge pathetic force that words cannot capture."[324]

2. *The Michael Skakel Trial*

A visual enthymeme was used in one of the most famous and controversial courtroom arguments in recent years, the prosecution's closing argument in the trial of Michael Skakel for the murder of Martha Moxley.[325] The *Skakel* trial received much attention in the popular press and in law journals, because it represented an unsolved murder in an affluent town and involved a relative of the Kennedy family. While some believe that the conviction represented the dispensation of justice,[326] others

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[321] Blair, *supra* note 308, at 52.

[322] Although the ad only aired once, on September 7, 1964, visual rhetoric scholars cite it as a seminal example of the visual enthymeme. *See e.g.*, BARRY, *supra* note 8, at 278; Bogost, *supra* note 306, at 35–36; Blair, *supra* note 308, at 52. The Daisy Ad, together with related historical documents and contextual information, can be seen at Conelrad.com, http://www.conelrad.com/daisy/index.php, a website devoted to archiving information about atomic fear and pop culture during the Cold War.

[323] Blair, *supra* note 308, at 50.

[324] *Id.*

[325] Although it has not until now been identified as an enthymeme.

[326] See e.g., Carney & Feigenson, *supra* note 4; Dominick Dunne, *Triumph by Jury*, Vanity Fair (August 2002), *available at* http://www.vanityfair.com/fame/features/2002/08/dunne200208.

argue that an innocent person was wrongly convicted of a crime that occurred twenty five years earlier, through the sheer force of an emotional visual presentation.[327] The prosecution used multimedia tools throughout the trial for demonstrative purposes, but waited until the rebuttal portion of its summation to present an argument that combined visual images, visually displayed text, audio testimony, and the prosecutor's oral advocacy.[328] The rebuttal summation has been described as "chilling, riveting, and unforgettable."[329]

The prosecution used a visual enthymeme in its rebuttal summation to make its theory of the case seem like the only commonsense explanation for the facts and testimony. The enthymeme allowed the prosecution to de-emphasize the assumptions that had to be made for its theory to make sense and silence an equally compelling explanation for the evidence.

To truly comprehend how the prosecution used the enthymeme here, one must understand the two competing theories of how the evidence fit together. In 1975, when Michael Skakel was first interviewed by the police, he stated that on the night of Moxley's murder, he had gone to a friend's house to watch a movie and then, upon returning, had gone immediately to bed, not leaving the house again.[330] However, in 1993, Skakel provided private detectives hired by his family with a different story as to what happened that night.[331] And in 1997, Skakel recorded his recollection of what happened that night and the next morning for possible use in a ghostwritten autobiography.[332] Skakel's 1997 story was consistent with his 1993 story, but differed from what he told detectives in 1975. A substantial portion of the 1997 audio recording was introduced as evidence in the case and played in its entirety for the jurors.[333]

Skakel's 1990s story was that at 11:20 p.m., after returning intoxicated from his friend's home, he walked to a nearby home, hoping to catch a

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[327] For two law review pieces that argue that Skakel's conviction may have resulted prosecutorial overreaching, see Marcus, *supra* note 5, and Aronson & McMurtrie, *supra* note 24.

While he is by no means a neutral party, Michael Skakel's first cousin, Robert F. Kennedy, Jr., wrote an extensively researched article for THE ATLANTIC about the investigation and subsequent Moxley murder trial. Kennedy, *supra* note 6. Kennedy forcefully argues that Skakel's arrest, indictment, and conviction was the unfair result of an overzealous prosecution that took its theme and theory from a journalist's theory of what might have happened the night of Moxley's murder. *Id.* at 59–65. Kennedy identifies journalist Dominick Dunne as being primarily responsible for Michael Skakel's arrest and indictment because of his numerous public portrayals of Michael Skakel as the killer who was trying to use his wealth and ties to the Kennedy family to evade justice. *Id.* at 59–65. The reality, according to Kennedy, is that the Republican Skakels were not at all close to the Kennedy family. *Id.* at 72. Until Dominick Dunne started writing about the case, Michael Skakel was never a serious suspect for the crime, instead, Kennedy points to Ken Littleton, the Skakel's mentally disturbed tutor (who failed five polygraph tests concerning Moxley), and Skakel's gardener Franz Wittiner, a German expatriate with violent tendencies, as eminently more probable suspects. *Id.* at 59–65. At the end of the article, Kennedy recognizes that ultimately, Skakel's jury conviction may have been precipitated in large part by the prosecutor's "brilliant" multimedia summation. *Id.* at 74.

[328] Carney & Feigenson, *supra* note 4, at 22–23, 28.

[329] Carney & Feigenson, *supra* note 4, at 28 (quoting Jeffrey Toobin, *Crossfire*, (CNN television broadcast, June 7, 2002) *available at* http://edition.cnn.com/TRANSCRIPTS/0206/07/cf.00.html.)

[330] Carney & Feigenson, *supra* note 4, at 28.

[331] Kennedy, *supra* note 6, at 61–62. The report, written by the private detective agency for the benefit of the Skakel family, eventually found its way to Dominick Dunne, who, along with Mark Fuhrman, used the report's information to publicize his theory that Michael Skakel was the murderer.

[332] Carney & Feigenson, *supra* note 4, at 27.

[333] *Id.*

glimpse of a neighborhood woman known for wearing skimpy clothing.[334] Seeing that the shades were drawn, he wandered over to the Moxley home and climbed a tree next to what he thought was Martha's bedroom (in fact, it was next to her brother's bedroom).[335] From the tree, he threw a few pebbles at the window, attempted to masturbate, and then gave up and went home.[336] On the way home, he yelled when he sensed a "presence" in the bushes near the Moxley's driveway and ran in fear back home. Because the downstairs door was locked, he climbed into his bedroom through a window.[337]

In the 1997 recording, Skakel recollected that Martha's mother appeared at the Skakel front door the next morning and asked if he had seen Martha.[338] In response to Mrs. Moxley's question, Skakel remembered feeling panic at the thought that someone may have seen him wandering outside the night before.[339] From the defense's perspective, Skakel's panic derived from his fear that someone had seen him masturbating on the Moxley's property.[340] Fear of being caught masturbating in a tree is also the explanation for why he did not tell the police the full story of his whereabouts in 1975.[341] However, from the prosecution's perspective, Skakel's "panic" came from remembering that he had murdered his neighbor the night before.[342]

For its rebuttal closing argument, the prosecution used Skakel's audio testimony, photographs of Martha Moxely (both alive and in death) and projected the text (in red letters) of Skakel's words to reinforce its theory that Skakel's feeling of panic derived from the fact that he killed Martha Moxley, not from the acute embarrassment of being caught masturbating on the Moxley's property.[343] The prosecution employed the audio recording in conjunction with three slides "to define what Michael Skakel was thinking about" the next morning, when Mrs. Moxley asked him if he had seen her daughter.[344] In the first slide, the jury hears and sees the following words from Skakel's interview with the ghostwriter: "And then I woke up, went to sleep, than [sic] I woke up to Mrs. Moxley saying 'Michael, have you seen Martha?' I'm like, 'What?' And I was like still high from the night before, a little drunk, then I was like 'What?'[345] As Michael's words are being played, a photograph of Moxley, smiling and holding schoolbooks, is displayed.[346]

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[334] Kennedy, *supra* note 6, at 61–62.
[335] *Id.* at 61–64.
[336] *Id.* at 61–62.
[337] *Id.*
[338] Marcus, *supra* note 5, at 366.
[339] Carney & Feigenson, *supra* note 4, at 28.
[340] Skakel Appellate Brief, *supra* note 65, at 78.
[341] Kennedy, *supra* note 6, at 61–62. Skakel's father allegedly believed that masturbation was the "equivalent to the slaughter of millions of potential Christians." *Id.*
[342] Carney & Feigenson, *supra* note 4, at 28.
[343] Skakel Appellate Brief, *supra* note 65, at 78.
[344] Carney & Feigenson, *supra* note 4, at 28.
[345] *Id.*; Transcript of the Proceedings at 138, *Conn. v. Skakel*, 31 Conn. L. Rptr. 138 (Conn. Super. Ct. Dec. 11, 2001) (No. FST CR00-135792T) [hereinafter Skakel Trial Transcript].
[346] Carney & Feigenson, *supra* note 4, at 28; Skakel Trial Transcript, *supra* note 346 at 138.

For the second slide, the jury sees and hears the following: "I was like, 'Oh my God, did they see me last night?' And I'm like 'I don't know,' I'm like, and I remember just having a feeling of panic."[347] For this slide, a photograph of Moxely's corpse, where it was found on the Moxley property, is displayed.[348]

For the last slide in this segment, the jury sees and hears Skakel expound on his panicked feelings: "Like 'Oh Shit.' You know. Like my worry of what I went to bed with, like may . . . , I don't know, you know what I mean I just had, I had a feeling of panic."[349] Another photograph of Moxley's corpse is displayed within this slide.[350] After the jury saw the three slides and heard the concurrent audio recording, the prosecutor asked "[h]ow could the site [sic] of Dorothy Moxley possibly produce a feeling of panic in an innocent person, in a person who had gone to sleep knowing nothing of Martha Moxley's murder?"[351]

The enthymeme that the prosecutor employed with the multimedia slides can be reduced to the following textual syllogism:

> A person who has murdered is likely to experience a feeling of panic after realizing what he/she has done.
>
> Skakel felt a feeling of panic the morning after Martha Moxley was murdered.
>
> Skakel must have murdered Martha Moxley.

The visual enthymeme glossed over the major premise, presenting the idea that Skakel's panic was triggered by his realization that he had killed Moxley not as a theory, but as the only plausible explanation for the facts. By showing Moxley mutate from a smiling schoolgirl into a lifeless corpse in tandem with Skakel's description of his panic, the prosecution was able to minimize the wide gaps between the circumstantial evidence and the inference it wanted the jury to accept.

At first glance, the internal logic of the syllogism upon which the visual enthymeme was based appears to be airtight. However, a closer look reveals serious weaknesses within the syllogism because there are other compelling premises, explanations for why Skakel felt panic the day after Moxley's murder.[352] By sidestepping the major premise, the enthymeme did not allow inquiry into its logic, leaving no room for alternative explanations for Skakel's panic.

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[347] Carney & Feigenson, *supra* note 4, at 28; Skakel Trial Transcript, *supra* note 346 at 138.
[348] Carney & Feigenson, *supra* note 4, at 28; Skakel Trial Transcript, *supra* note 346 at 138.
[349] Carney & Feigenson, *supra* note 4, at 28; Skakel Trial Transcript, *supra* note 346 at 138.
[350] Carney & Feigenson, *supra* note 4, at 28. A copy of the third slide is reproduced in Sherwin, *A Manifesto for Visual Realism*, *supra* note 4, at 737.
[351] Skakel Trial Transcript, *supra* note 346 at 138.
[352] The name for this type of logical fallacy is the fallacy of exclusion. With the fallacy of exclusion, "[i]mportant evidence which would undermine an inductive argument is excluded from consideration." Stephen Downs, *Stephen's Guide to Logical Fallacies*, Fallacy of Exclusion, May 26, 1995, http://www.onegoodmove.org/fallacy/welcome.htm.

Unlike what Skakel's counsel argued on appeal,[353] the multimedia presentation in this case was not false or subliminal, but it did not require much conscious thought for the viewer to make the logical leap that Skakel's feeling of panic arose because he had committed murder. Moreover, the photographs of Moxley's corpse may have generated rapid and unconscious feelings of fear, which may have also contributed to the jury's conviction of Skakel.[354] Some rely on the *Skakel* case to argue that courts need to reign in attorneys, especially prosecutors, who seek to exploit the power of visual arguments to advance their cases.[355] On the other hand, those directly involved in producing the graphics for the Skakel trial argue that the prosecutor was just doing what a good prosecutor is supposed to do in a closing argument, which is to "explain, in the most effective method available . . . , the prosecution's theory of the case."[356]

The *Skakel* case raises important ethical and professional issues with respect to visual arguments that I will address in Part IV of this article. Preliminarily, the central lesson to be gleaned from the Skakel case is not that prosecutors have a tendency to exploit the emotionality of visual evidence, but that an opposing counsel's failure to counter and attack one side's visual narratives can be fatal to a case. Mickey Sherman, Skakel's defense attorney, has been described as incompetent on many levels.[357] However, a major factor that may have contributed to Skakel's conviction was Sherman's complete failure to anticipate the logic of the prosecution's visual arguments.

C. VISUAL LOGICAL FALLACIES

The *Skakel* case illustrates the necessity of being able to anticipate, attack, and counter the logic of the other side's visual narratives. One aspect of this skill is the ability to pick apart an opposing counsel's visual presentation and identify the logical fallacies within it. Just as with text-based arguments, visual arguments can be based on any number of logical fallacies. The ability to recognize and attack logical fallacies in text-based arguments has always been a part of effective advocacy; now, attorneys must learn how to apply that skill to visual arguments. The skill of identifying and attacking visual logical fallacies is especially crucial because visual arguments often persuade by obscuring weak or incorrect premises and evoking an instantaneous belief in an argument's

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[353] On appeal, Skakel's counsel argued that the prosecution conveyed "false literal and subliminal messages to the jury." Skakel Appellate Brief, *supra* note 65, at 79.

[354] *See, e.g.*, Douglas et al., *supra* note 69, at 487, 497 (discussing the emotional reactions in mock jurors who viewed graphic autopsy photographs); LEDOUX, *supra* note 68, at 60 (discussing, in general, how emotional reactions to stimuli can occur rapidly, before a person is even consciously aware of what the stimuli is).

[355] *See generally*, Marcus, *supra* note 5; Aronson & McMurtrie, *supra* note 24.

[356] Carney & Feigenson, *supra* note 4, at 33.

[357] *See* Kennedy, *supra* note 6, at 71–72 (describing Sherman as an "overconfident and less than zealous" attorney more interested in being in the media spotlight than developing a workable defense for his client). One thing that was not entirely Sherman's fault was the prosecution's decision to use its most powerful visual argument during its *rebuttal* summation, which did not allow the defense a chance to respond. See Marcus, *supra* note 5, at 390. Nonetheless, the Skakel prosecution team employed visual advocacy throughout the trial, and the defense made little effort to counter the prosecution's visual strategy.

correctness.[358] For this Article, I will focus on two of the most prevalent visual logical fallacies: affect transfer and false causal connections.

1. *Affect Transfer*

Affect transfer, most often discussed in the context of advertising, refers to when "an emotional response from an unrelated object or event is transferred to the product being sold, simply by showing an image of the product, followed by an image of the emotional object or event."[359] In terms of classical rhetoric, arguments that employ affect transfer are what Aristotle defined as epideictic arguments, arguments that praise or censure someone or some object, rather than deliberative or forensic arguments, which seek to exhort the audience to do or not do something.[360] Affect transfer relies on associative reasoning, also known as associative logic, which takes place when "the focus of the reasoning process is transferred from one concept to other concepts that are held to be associated."[361] Associative reasoning might be the most "frequent and powerful reasoning technique used by humans."[362] Affect transfer also takes advantage of the human mind's tendency to perceive simple patterns within a complex set of information and to see things as related when that relatedness may not accurately reflect reality.[363]

One cited example of a visually-based affect transfer argument is an advertisement for an insurance company that appropriated the well-known image of marines raising the flag at Iwo Jima.[364] The juxtaposition allowed the insurance company to immediately associate itself with the emotions and feelings associated with the Iwo Jima photograph without having to explicitly argue why and how the image related to its insurance business.[365] Thus, in a visual context, affect transfer works well because it rapidly exploits the emotionality of an image without having to verbalize the explicit connections between the two objects.

In a legal context, affect transfer is not exclusive to visual arguments. Anytime attorneys associate their clients with positive narratives or images or associate the other side with negative stories and imagery, affect transfer is involved. For instance, Gerry Spence was able to successfully convince jurors to acquit his client in the Ruby Ridge case by associating his client with positive narratives of individual freedom in the face of government oppression.[366]

Although affect transfer can be used effectively and innocuously for advocacy purposes, I have placed it under the rubric of a visual logical

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[358] Blair, *supra* note 308, at 54.
[359] Hill, *supra* note 12, at 37.
[360] EDWARD P. J. CORBETT & ROBERT J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT 23–24 (4th ed. 1999); Sherwin et al., *Law in the Digital Age*, *supra* note 4, at 268 (citation omitted).
[361] KARL M. WIIG, EXPERT SYSTEMS: A MANAGER'S GUIDE 153 table 17.2 (International Labour Office 1990).
[362] *Id.*
[363] *See supra* text accompanying notes 96 and 97.
[364] Hill, *supra* note 12, at 36 (citing KENNETH BURKE, A RHETORIC OF MOTIVES 87 (U. of Calif. Press 1969)).
[365] *Id.*
[366] Sherwin et al., *Law in the Digital Age*, *supra* note 4 at 268.

fallacy because affect transfer is not actually an argument at all, but simply a way of connecting latent emotions and feelings with another concept.[367] Moreover, affect transfer becomes dangerous when employed visually because of the immediacy with which such arguments are apprehended and because "the implied connections are not likely to be questioned or challenged."[368] Another major problem with affect transfer occurs when negative emotional reactions associated with racial stereotypes (conscious or unconscious) are linked to persons whose credibility is under attack. Recent research into implicit bias, discussed above, confirms that in the context of race, affect transfer is a highly prejudicial device.[369] I will first discuss two simple examples of affect transfer being used in court cases and then address instances where implicitly referenced harmful stereotypes have undermined a person's credibility.

In their article, *Blurred Boundaries: An Analysis of the Close Relationship Between Popular Culture and the Practice of Law,*[370] coauthors Avi J. Stachenfeld and Christopher M. Nicholson write about how their media company, Legal Video Services, created visual presentations as a way to enhance the trial advocacy in two cases. In one of those cases, *Maxus Corporate Co. v. Kidder, Peobody & Co.*,[371] the plaintiff, a Texas company, sued a New York investment firm for damages arising from the investment firm's insider trading, alleging that the inside trades inflated the price of the target company that the plaintiff sought to acquire.[372] Stachenfeld and Nicholson write about how they used imagery of the Texas flag to strengthen a highly circumstantial case by cementing the theme that the plaintiff was a "homegrown company that was deceived and betrayed by [the defendant], [an] elite East Coast financial establishment."[373] The coauthors provide the following explanation for how they were inspired to use the Texas flag:

> We incorporated the state flag designs in the map to resonate with Texans' reverence to their flag. Nowhere in this country is the state flag more proudly displayed than in Texas. During several visits to Houston and Dallas, we were amazed by the ubiquitousness of the state flag. It was clearly an influential symbol, something which did not escape one local entrepreneur. For example, while sitting in a Houston bar, we saw a car commercial that consisted solely of a sixty second shot of the Texas flag waving proudly in brisk Texas breeze and accompanying narration regarding the deals on prices the dealership offered.

For the plaintiff's opening statement, the authors designed a visual graphic that emphasized the proud Texas origins of the plaintiff by overlaying an image of the Texas state flag over the state of Texas on a map

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[367] Blair, *supra* note 308, at 57.
[368] Hill, supra note 12, at 36.
[369] *See supra* text accompanying notes 196–212.
[370] Stachenfeld & Nicholson, *supra* note 4.
[371] No. 87-15583-M (Tex. Dist. Ct. Dallas County 1992).
[372] Stachenfeld & Nicholson, *supra* note 4, at 907.
[373] *Id.* at 908.

of the United States.[374] In addition, to capitalize on negative feelings that Texans have against "elite" East Coast states, the coauthors designed the image of New York State "so that it [looked] as if you could lasso the entire state."[375] The idea of Texas being able to lasso New York State also drew inspiration from advertising, this time from a popular salsa commercial in which a group of angry cowboys, upon finding out that their salsa was made in New York, curtly demand a rope for the cook.[376]

The *Maxus* case illustrates how visual affect transfer can create a positive emotional resonance for the plaintiff and a negative emotional resonance for the defendant. Although the affect transfer in this case was fairly innocuous, it allowed the attorneys to make an argument that would not have worked well in a purely verbal format. A verbal argument generalizing Texas corporations as essentially authentic and good while painting New York companies as inherently suspect and elitist would be objectionable as unfounded and prejudicial.

In another case involving affect transfer, *Standard Chartered PLC v. Price Waterhouse*, the Arizona Court of Appeals held that the plaintiff went beyond the allowable bounds in closing argument, by presenting a video that analogized the errors that precipitated the sinking of the Titanic with the defendant's alleged accounting negligence.[377] For the closing argument in this case, the plaintiff's counsel presented a video that interspersed segments of the movie "A Night to Remember" with summaries of the defendant's alleged accounting negligence.[378] The trial judge prescreened the video presentation and determined that it was appropriate for a closing argument.[379] Although the defendant's counsel was unable to view the video prior to it being shown, he objected to the video after the closing arguments, arguing that the analogy was incorrect and that the facts portrayed in the Titanic movie were not at all similar to the facts of the accounting negligence case.[380] The trial judge overruled the objection.[381]

On appeal, however, the Arizona Court of Appeals held that the video was "improper, inflammatory, argumentative, and based on nonexistent or inaccurate evidence about the sinking of the Titanic."[382] The Court of Appeals took issue with the plaintiff's use of affect transfer by equating "graphic representations of a Hollywood version of an event [to] wholly unrelated . . . events that the trial concerned."[383] The court also noted that it was inappropriate for the plaintiff to attempt to capitalize on the intentional

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[374] *Id.* The actual images from the presentation are reproduced on page 913 of the article.
[375] *Id.* at 908–09.
[376] *Id.* at 907.
[377] Standard Chartered PLC v. Price Waterhouse, 945 P.2d 317, 358–59 (Ariz. Ct. App. 1996). *See also* Sherwin et al., *Law in the Digital Age*, *supra* note 4 at 251–52 (generally discussing the visual issues in the *Standard Chartered* case).
[378] *Standard Chartered PLC*, 945 P.2d at 358. In its opinion, the court does not actually identify the name of the "Hollywood production" that the plaintiff's used in the video. In writing about the case, Richard Sherwin identified the movie as "A Night to Remember." *See* Sherwin et al., *Law in the Digital Age*, *supra* note 4, at 251–52.
[379] *Standard Chartered PLC*, 945 P.2d at 358.
[380] *Id.*
[381] *Id.*
[382] *Id.*
[383] *Id.* at 359.

emotionality of "Hollywood disaster footage" and link that emotionality with the dry facts of an accounting negligence case.[384] One of the lessons from the *Standard Chartered* case is that opposing counsel should be prepared to object to overreaching arguments that employ the affect transfer fallacy. Even though the objection was overruled at trial, it was properly preserved on appeal.[385] Fortunately, in this case, the Arizona Court of Appeals recognized the fallacy and disallowed the video on remand.[386]

Linking negative racial stereotypes with a person whose credibility is under attack is an especially insidious form of affect transfer. The "Willie Horton" presidential campaign advertisement that George H. W. Bush employed against Michael Dukakis in 1988 is an infamous example of an affect transfer device that drew upon negative racial stereotypes.[387] The advertisement stated that Dukakis supported weekend furloughs for prisoners and explained how "Willie Horton"[388] committed another violent crime while out on furlough.[389] Mug-shot and custodial photographs of Horton were displayed throughout the ad. Horton's mug-shot has been described as "the most emotionally powerful image in the ad, playing on every white person's fears of the dangerous, lawless, violent, dark black male."[390] In his book, *The Political Brain*, Drew Westen explains how the Willie Horton ad linked Dukakis to latent race-based fears within the white populace:

> The Willie Horton ad was well attuned to the primate brain, and particularly to the amygdala, which is highly responsive to both facial expressions and fear-evoking stimuli. The ad was packed with both. . . . The Bush team chose its photos—and its subject, a brutal and coincidentally, very black criminal—well. Recent findings suggest that the more "Afrocentric" the features of a convicted criminal (the darker the skin, the more African the features—as in Horton's "Afro" haircut), the tougher the sentence he tends to receive in American courts.[391]

In the legal context, affect transfer usually works to associate implicit negative stereotypes with a person (a witness or a party) whose credibility is under attack. A race-based affect-transfer can be as simple as a caption

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[384] *Id.*

[385] Because closing arguments are not previewed in advance, a failure to object will not generally prevent judicial review of the propriety of the closing argument. *See* Marcus, *supra* note 5, at 378.

[386] *Standard Chartered PLC*, 945 P.2d at 359.

[387] See e.g., E.J. DIONE, WHY AMERICANS HATE POLITICS 77 (1st Simon & Schuster trade paperback ed. 2004) (describing how the advertisement was able to tap into implicit white racism and white fears of black men); WESTEN, *supra* note 212, at 62–63 (explaining that the implicit message of the advertisement is that Dukakis allows menacing black men to threaten our safety).

[388] William Horton, the subject of the ad, never used the name "Willie." WESTEN, *supra* note 212, at 65; KATHLEEN HALL JAMIESON, THE PRESS EFFECT: POLITICIANS, JOURNALISTS, AND THE STORIES THAT SHAPE THE POLITICAL WORLD 3 (Oxford Univ. Press 2004) [hereinafter Jamieson, *The Press Effect*]. It was not until Bush began talking about the case that the name Willie came to be associated with Horton. JAMIESON, THE PRESS EFFECT at 3. Both Westen and Jamieson remark that the name "Willie," considered an African American nickname, reinforced the negative stereotypes that Horton represented. *Id.*.; WESTEN, *supra* note 212, at 62–64.

[389] WESTEN, *supra* note 212, at 62–64.

[390] *Id.* at 65.

[391] *Id.*

on a PowerPoint slide that refers to a witness as a "gang-banger."[392] It can also take a more subtle form, such as the way defense counsel used narratives incorporating implicit race-based fears to create a theme in the Rodney King case.[393] In this famous police brutality case, the defense counsel, as a way of counteracting the raw video footage of the police beating King, presented subtle cues that primed the case as being about a violent black criminal fleeing the Los Angeles inner city toward the suburb where the trial took place.[394]

The defense counsel for the police officers established latent fears of the "big black man" by presenting lengthy witness testimony on police protocols for dealing with violent criminals who will not stand down to the police.[395] They also referenced white suburban fear of the lawless inner city by prominently displaying a map showing that King would have ended up in the Town of Simi Valley, Ventura County (where the trial was taking place) had he not been stopped by the police.[396] The defense's subtle narrative was also helped by deeply ingrained stereotypes, found within all facets of American popular culture, that place the police in the role of heroic protectors against a menacing "Other"—African-American males from the inner-city. [397] Thus, by subtly associating Rodney King as a nonwhite threat to the safety of the white populace, the defense counsel used an implicit form of affect transfer to secure an acquittal for the four police officers involved in the beating.

The law review articles that discuss the racial stereotypes in the King case do not point to any evidence of the defense counsel's conscious intent to draw upon blatant racial stereotypes.[398] Since bias works unconsciously, it is difficult to assign agency, or blame, to the defense attorneys for using a race-based affect transfer device. In other words, it would be nearly impossible to prove that the defense attorneys intentionally set out to capitalize on racial stereotypes and bias to win their case. A solution does not yet exist for courtroom prejudice that originates from unconscious forces, because our judicial system generally remedies only those harms that result from intentional racism.[399] However, the vast disproportionality between the percentage of non-white persons incarcerated for crimes in contrast with white persons shows that implicit bias likely plays an active

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[392] *State v. Sotelo*, 2008 WL 5104891, *6 (Ariz. App. Div. 2 2008) (the court held that the "gang-banger" reference was inappropriate given that there was no evidence in the record that the witness had any gang involvement).

[393] *See generally*, Alper et al., *supra* note 7.

[394] *See id.* at 30; Vogelman, *supra* note 195, at 574. In addition to illustrating implicit affect transfer, the Rodney King case demonstrates how priming techniques can be used to control how jurors perceive visual information. *See supra* Part III.B.3.b.

[395] Vogelman, *supra* note 195, at 574, 576–77.

[396] *Id.* at 574, note 6.

[397] Alper et al., *supra* note 7, at 38–46.

[398] *See, e.g., id.*; Vogelman, *supra* note 195.

[399] *See generally*, Eva Patterson, Kimberly Thomas Rapp & Sara Jackson, *The Id, The Ego, and Equal Protection in the 21st Century: Building upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175 (2008) (explaining that while evidence of implicit bias has been allowed in cases concerning jury selection, expert witness qualification, immigration, and prison voting rights, for the most part, American law requires evidence of intent in order to remedy equal protection violations).

role in the resolution of cases.[400] Malcolm Gladwell's utopian legal system of allowing a party's color to be shielded behind a curtain is not likely to gain wide support anytime soon. One thing attorneys can do, as discussed above, is to vigilantly look for methods that can counter that unconscious bias.[401] Moreover, because unconscious fears and biases are not feelings that would be countenanced if brought to the conscious forefront, one of the more promising countering techniques might be to make the unconscious explicitly conscious.[402] Finally, attorneys should become cognizant of implicit bias and understand that their own biases might play a role in how they construct their case.[403]

2. *False Causal Connections*

The visual logical fallacy of false causal connections takes special advantage of how our minds construct meaning out of sequenced images. To the human mind, "[visual] [e]vents that happen in close succession and those that have a consistent relationship appear to be causally connected."[404] Thus, one can use visual imagery to evoke the sensation of causation "simply by showing the juxtaposition of two events in sequence."[405] In other words, "[i]f you can visually show what looks like . . . a causal effect, the brain will manufacture a feeling of causation to go along with it."[406] Similar to affect transfer, the perception of false causal connections is a product of the mind's constant attempts to arrange complex information into a unifying pattern or gestalt.[407] "Our judgment

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[400] GLADWELL, *supra* note 68, at 274–75.

[401] *See supra* text accompanying notes 213–17 (discussing ways in which implicit bias may be countered). One practical approach might be to humanize one's client as much as possible. This might alleviate the effect of implicit bias, given the research showing implicit biases decrease where there is a personal connection with a member of a devalued group. *See supra* text accompanying note 216.

[402] Making the unconscious conscious is the advice that Drew Westen gives to politicians whose opponents seek to persuade with strategies that draw upon unconscious racial biases. WESTEN, *supra* note 212, at 221–23. One approach here might be to present expert testimony that explains implicit bias as it relates to race. Although identifying specific approaches as to how expert testimony on implicit bias could be introduced at trial is outside the scope of this Article, this kind of testimony could possibly be introduced as part of an evidentiary objection or within a motion in limine, which seeks to exclude or limit the use of a visual argument. An analogy can also be made here to the way that expert psychology testimony is used to raise issues of fallibility with respect to eyewitness identification testimony in criminal cases. *See, generally*, Frederic D. Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969 (May 1977); Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 613 (Summer 1995).

[403] An attorney's ethical duty not to knowingly appeal to irrelevant information, such as racial bias, must also be counter-balanced by the advocate's duty to zealously represent his/her client. *See* Vogelman, *supra* note 195, at 574 ("[The justice system] pits two fundamental values of our society against one another: the need to have our system or justice do its work free from the shackles of racial, ethnic, or religious prejudice, versus the rights of those accused of crimes to zealously and creatively defend themselves."). With implicit bias, which is not generally recognized as a harm that warrants a legal remedy, this balance becomes even more difficult.

[404] STAFFORD & WEBB, *supra* note 68, at 265.

[405] Sherwin, *A Manifesto for Visual Realism*, *supra* note 4, at 735 (citing JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS 14 (1986)). *See also* BARRY, *supra* note 8, at 47 (citing ALBERT MICHOTTE, THE PERCEPTION OF CAUSALITY (1963) (quoted in E. BRUCE GOLDSTEIN, SENSATION AND PERCEPTION 307 (3d ed. 1989)).

[406] STAFFORD & WEBB, *supra* note 68, at 265.

[407] BARRY, *supra* note 8, at 47.

can easily be tricked into creating complete pictures in our minds that do not exist in reality."[408]

In the context of popular culture, Ann Marie Seward Barry explains how the special effects-laden Hollywood action film takes advantage of this fallacy. "[D]espite the lack of a plot or unified theme, [these types of movies] seem to tell a story where essentially none exists."[409] Thus, by projecting images in sequence, we are tricked into believing in the existence of a chronology of events, caused by prior events.

In the legal context, two previously discussed cases, the Rodney King assault trial and the Michael Skakel trial, demonstrate how this logical fallacy works. In the Rodney King case, the defense attorneys were faced with the problem of counteracting a video-tape that showed the defendants "in *flagrante delicto*, beating Mr. King with an apparent savagery that . . . completely convinced the national viewing public of the defendants' guilt." The defense counsel's strategy was two-fold. First, as discussed above, the case narrative was framed in terms of heroic police officers apprehending a dangerous African American man who was speeding from the inner city toward the suburbs.[410] The police officers also testified that Rodney King exhibited bizarre, uncontrollable behavior from the beginning. Additionally, because he was seemingly immune to the shocks from the taser, the officers concluded that he must have been under the influence of PCP, or angel dust.[411] By priming the case as being about the police officers' attempts to quell the "trouble" caused by the "larger than life" and "superhuman" King,[412] the defense counsel was able to set the stage for the next step of their strategy, controlling how the jurors perceived the video.

The prosecutors took a naïve approach to the video, believing that, like the general public, the jurors would see the video and believe that it was incontrovertible evidence of the officers' guilt.[413] The defense counsel employed a different strategy, using a slowed down, frame-by-frame analysis to show the jury how King's own threatening actions precipitated each blow of the officers' batons.[414] The original footage showed King reacting, in pain, to the officers' taser shocks and baton clubbings.[415] When the defense slowed down the footage, however, "King's movements are separated by greater time from the blows, making his reaction seem like unprovoked action and his defensive movements appear aggressive."[416] While the jurors watched the slowed-down (and silent) video, an expert witness, schooled in the art of escalation and de-escalation of force, calmly explained that the police were using appropriate levels of force to subdue King.[417]

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[408] Marcus, *supra* note 5, at 361, 377 (citing BARRY, *supra* note 8, at 47).
[409] BARRY, *supra* note 8, at 47.
[410] *See supra* text accompanying notes 394–98.
[411] Alper et al., *supra* note 7, at 37.
[412] Vogelman, *supra* note 195, at 574.
[413] Alper et al., *supra* note 7, at 48; Sherwin, *A Manifesto for Visual Realism*, *supra* note 4, at 734–36.
[414] MARITKA STURKEN & LISA CARTWRIGHT, PRACTICES OF LOOKING 287 (Oxford Univ. Press 2001); Alper et al., *supra* note 7, at 30.
[415] STURKEN & CARTWRIGHT, *supra* note 417, at 288.
[416] *Id.*
[417] Sherwin, *A Manifesto for Visual Realism*, *supra* note 4, at 734.

By planting and then cementing the idea in the jurors' minds that King's behavior was the cause that led to the officers' actions, the jurors perceived the video footage to be evidence of that causal relationship. The idea behind the defense's strategy was that "by slowing down or stopping a moving image, we can see things we might have missed when events fly by in real time."[418] However, by obscuring some of the time-based aspects of the situation, the slowed down video had the effect of "construct[ing] some meanings while blocking others."[419] The surprising outcome in the King trial demonstrates how priming techniques and visual sequences can easily evoke cause and effect relationships. It also demonstrates the danger of approaching visual evidence with a too simplistic "seeing is believing" approach.

The other example of constructed causal connections comes from the Michael Skakel trial. I have previously described the slide sequence that the prosecutor employed in his rebuttal closing argument as an example of a visual enthymeme.[420] The slides also demonstrate how cause and effect relationships can be conjured up by referring to events in close succession to each other. As the first of the three rebuttal slides were projected, the jurors heard Skakel explaining (and see his words on the slide) that the morning after Martha Moxley's murder, Mrs. Moxley appeared at the Skakel's front door and asked Michael if he had seen Martha.[421] Within the first slide is a photograph of a smiling Martha Moxley, holding her schoolbooks.[422] On the next slide, Skakel began to describe the panic he felt in responding to Mrs. Moxley.[423] As the jurors heard the description of his panic, the prosecution projected an image of Martha Moxley's corpse.[424] For the third slide, as Skakel continued to talk about his panic, the jury saw an alternate photograph of Moxley's corpse.[425] The visual logic within the slides, by first discussing Skakel's panic, and then showing Moxley's corpse, strongly reinforced the defense's cause and effect theory by capitalizing on the human mind's tendency to construct cause and effect relationships from events that are presented in close sequence.

As discussed above, with respect to visual enthymemes, the prosecution probably went too far in its closing argument by sidestepping the defendant's rationale for the panic (that someone had seen him masturbating outside the night before) and presenting its own theory, that Skakel's murder of Martha Moxley was the cause of the panic, as the only common-sense explanation for the facts.[426] Likewise, the prosecution's visual construction of a cause and effect relationship may have improperly exploited visual heuristics to manipulate the jury, as opposed to presenting

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[418] STURKEN & CARTWRIGHT, *supra* note 417, at 288.
[419] *Id.*
[420] *See supra* text accompanying notes 343–52.
[421] Carney & Feigenson, *supra* note 4, at 28.
[422] *Id.*; Skakel Trial Transcript, *supra* note 346, at 138.
[423] Skakel Trial Transcript, *supra* note 346, at 138.
[424] *Id.* Carney and Feigenson's description of the slides indicate that the photo of Moxley's corpse is projected after the jury hears Skakel's description of his panic. *See* Carney & Feigenson, *supra* note 4, at 28.
[425] Carney & Feigenson, *supra* note 4, at 28.
[426] *See supra* Part IV.B.2. and text accompanying notes 351-52.

an argument that invited rational deliberation. On appeal, Skakel's counsel argued, in conclusory fashion, that the slides were prejudicial and misleading because they conveyed "false literal and subliminal messages to the jury."[427] Skakel's attorneys, however, were unable to convince the Connecticut Supreme Court that the prosecution had engaged in misconduct. A more sophisticated deconstruction of the logic within the prosecution's argument would have been a better argument to make on appeal. Even if a more substantive attack on the prosecution's faulty visual logic would not have produced a different result on appeal, it would have helped correct the advocacy imbalance resulting from the prosecution's unchecked use of emotional visual imagery.

V. VISUAL ARGUMENTS: PROS, CONS, AND SOLUTIONS

This Article has explained how visual arguments manipulate audiences by harnessing rapid unconscious or emotional reasoning processes and by exploiting the fact that we do not generally question the rapid conclusions we reach based on visually presented information. While visual imagery can be used to overreach and inflame an audience, professionally presented visual arguments can also greatly enhance the quality of one's advocacy. In this section, I will expound upon the pros and cons of visual advocacy, with the end goal of identifying ways to advance the positive aspects of visual advocacy but also defuse the negative.

A. PROS

Basic computer technology[428] allows an advocate to seamlessly weave visual imagery into underlying text-based narratives and arguments, amplifying the power of the advocacy. One of the most positive effects of melding traditional verbal argument forms with visual imagery is that the argument becomes more memorable. Presenting information in more than one format (visual and verbal, for instance) drastically improves a listener's rate of retention for the information. For instance, the average listener retains 10% of information presented in text form; 20% of information presented in audio/verbal form; and 30% of information presented in visual form.[429] When information is presented in both a visual and audio form, the retention rate jumps to 50%.[430]

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[427] Skakel Appellate Brief, *supra* note 65, at 79.

[428] Here, I am referring to the simple technology that allows one to access images and to project those images in tandem with opening statements, witness testimony, and closing arguments.

[429] *See* Bruce Hyland, *Cone of Learning Graphic*, *available at* http://www.public-health.uiowa.edu/icphp/ed_training/ttt/archive/2002/2002_course_materials/Cone_of_Learning.pdf (citing Edgar Dale, *Audio-Visual Methods in Teaching* (3d ed. 1969). A multi-sensory argument is also more effective than a traditional verbal courtroom argument because it is processed in more parts of the brain. *See* STAFFORD & WEBB, *supra* note 68, at 187. One potentially negative attribute of multi-sensory processing is that some of the information is processed pre-consciously, outside the control of rational cognition and more susceptible to unconscious bias. *See* Cunningham et al., *supra* note 205, at 811 (reporting that implicit negative stereotypes may originate within automatic processes in the brain; higher level, rational processing tends to counteract automatic responses of bias).

[430] *See* Hyland, *supra* note 431.

In addition to higher retention rates, visually presented information is more memorable because it is *vivid*, defined as "emotionally interesting, concrete and imagery-provoking, and proximate in a sensory, temporal, or spatial way."[431] In their groundbreaking 1985 study, Brad Bell and Elizabeth Loftus documented that mock jury members will both remember and give greater credence to information that is more colorful, concrete, and detailed.[432] In this study, a witness provided two descriptions of a pedestrian.[433] In the first description, the witness described the pedestrian as wearing blue tennis shoes, pink socks, and a Columbia University t-shirt.[434] In the second description, the witness described seeing the pedestrian but did not provide any additional details.[435] The mock jurors rated the witnesses who gave vivid descriptions as more credible and as having a better memory than those who did not.[436] While the Bell/Loftus study focused on vivid language, graphic images are considered vivid evidence that carry the same effects for jurors.[437]

Visual imagery, when woven into an underlying case narrative, also takes advantage of the human tendency to perceive and remember information in holistic forms and patterns.[438] Visual imagery, when added to a narrative, helps extend a "suggested continuing pattern along the direction previously established, . . . lend[ing] stability and creat[ing] meaning" for the story.[439] In other words, enhancing a text-based argument with visual imagery creates a "harmonic effect on perception and retention of information that flows from stimulating the mind with changing input from many senses, each alternatively primary and then secondary, all repeating and thereby reinforcing, a common message."[440] Thus, visual narratives become more memorable because they create a synergistic flow of information that parallels the way we tend to remember and construct meaning.

Other positive attributes of visual presentations include their efficiency, their pedagogic helpfulness, and the fact that they mirror contemporary cultural expectations for the presentation of information. Visual presentations, produced with computer projection technology, bring efficiency to the courtroom on two different levels. First, the ability to quickly project photographs, documents, and transcript text allows each item to be presented immediately, avoiding the time required to pass information around to individual jurors.[441] Projection technology can cut

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[431] Brad E. Bell & Elizabeth F. Loftus, *Vivid Persuasion in the Courtroom*, 49 J. OF PERSONALITY ASSESSMENT 659 (1985). *See also* Douglas et al., *supra* note 69, at 487.
[432] Bell & Loftus, *supra* note 433, at 659–60.
[433] *Id.*
[434] *Id.*
[435] *Id.*
[436] *Id.*
[437] *See* Douglas et al., *supra* note 69, at 487.
[438] *See* BARRY, *supra* note 8, at 52; STAFFORD & WEBB, *supra* note 68, at 252–54. Both sources describing Gestalt theory.
[439] BARRY, *supra* note 8, at 52.
[440] Guiberson, *supra* note 18, at 58.
[441] Carney & Feigenson, *supra* note 4, at 24.

down trial times by 25-50%.[442] In a rhetorical sense, visual arguments are also efficient because they allow the persuader to quickly immerse an audience in the logic of an argument without having to lay a lengthy foundation.[443] In addition to their efficiency, visual projections can help a jury comprehend complex and voluminous evidence and testimony.[444] The positive pedagogical effect of a projected image can be as simple as making sure the jurors and the judge are all on the same page with respect to a witness's discussion of a particular document or photograph.[445] Image projection technology can also be used in tandem with witness testimony to improve listener retention rates. For instance, projecting the text from a lengthy deposition transcript as it is being read aloud can help a jury pay attention and stay focused on the testimony, when they might otherwise lose interest.[446]

A final positive attribute of visual advocacy is that it reflects the modern way in which information is processed and received. Not only has our culture become highly visual,[447] but it has also evolved into a multi-modal "convergent" culture in which information flows across multiple media platforms.[448] "In the world of media convergence, every important story gets told, every brand gets sold, and every consumer gets courted across multiple media platforms."[449] Thus, our information flows to us through "transmedia" stories; stories that present "the same information, the same stories, and the same characters and worlds across multiple modes of representation."[450] By presenting legal arguments in a multimodal, multisensory format, attorneys present information in the way that we have become accustomed to receiving it. Because our information culture has evolved to become dependent on visual representation and multiple media forms, exclusively verbal arguments are not only outdated, they are probably no longer effective at persuading the majority of people today.[451]

B. CONS

As set forth above, visual arguments can bring highly positive effects and results, especially in terms allowing an audience to retain and hold on

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[442] Aronson & McMurtrie, *supra* note 24, at 1459 (citing Daniel Wolfe, *Seeing is Believing: Visual Tools for Today's Courtroom*, CHICAGO DAILY L. BULL. 10 (2004), *available at* http://www.trialgraphix.com/documents/Seeing%20Is%20Believing.pdf.)

[443] Blair, *supra* note 307, at 53.

[444] *See* Carney & Feigenson, *supra* note 4, at 24–27 (generally describing how the Skakel prosecution's courtroom projections helped the jury make sense out of case that contained a voluminous amount of evidence and testimony).

[445] *Id.* at 24.

[446] *Id.* at 27–28 (explaining how the Skakel prosecution's text projections of deposition testimony encouraged the jurors to stay interested and focused on the lengthy testimony).

[447] BARRY, *supra* note 8, at 1.

[448] HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 2–3 (NYU Press 2006).

[449] *Id.* at 3.

[450] Henry Jenkins et al., *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century* (MacArthur Foundation Report, Oct. 19, 2006), *available at* http://digitallearning.macfound.org/atf/cf/%7B7E45C7E0-A3E0-4B89-AC9C-E807E1B0AE4E%7D/JENKINS_WHITE_PAPER.PDF.

[451] *See e.g.*, Crimmins, *supra* note 3, at 3 (describing how cultural changes in how people receive and digest information necessitates the adoption of new multimedia trial strategies).

to information relevant to an argument. However, visual arguments often conflict with principles of fairness in legal argument because they rely too heavily on emotion instead of logic, and they are often apprehended too rapidly, disallowing time for rational deliberation. A common perception of visual arguments is that they "tend to prompt emotional reactions and that, once the viewer's emotions are excited they tend to override his or her rational faculties, resulting in a response that is unreflective and irrational."[452] As explained previously, visual logic can conflict with rational logic in several ways, primarily because visual logic is not congruent with principles of rational reasoning; is often the product of preconscious or unconscious processes; is influenced by atavistic emotional forces; and is highly susceptible to bias.[453] Moreover, similar to the way in which commercial advertising works, visual advocacy often persuades by drawing upon a generalized emotional sentiment, instead of appealing to analytical reasoning processes.[454]

Vividness and efficiency, two positive attributes of visual advocacy, also have negative characteristics. The vividness effect, in which a juror gives greater credence to graphic information, may not comport with logic or reality.[455] Thus, because we tend to believe what we see without question,[456] vivid information, including graphic images, may lead to false conclusions of credibility. While rhetorical efficiency, made possible through visual imagery, can boost the power of an argument, it can also obscure the use of disingenuous logic. As the *Skakel* case illustrates, a visual advocate can easily gloss over a weak premise, presenting a powerfully persuasive argument, but only on the most superficial levels.[457]

Moreover, logical analysis can become attenuated in visual arguments because of the speed by which visual arguments are processed. This effect has to do with how the processing of verbal arguments differs from the processing of visual arguments. Language helps us reason,[458] whereas visual imagery tends to push us toward analytical shortcuts.

> It is likely that verbal text, because of its analytic nature (being made up of discrete meaningful units) and because it is apprehended relatively slowly over time, is more likely to prompt systematic processing, while images, which are comprehended holistically and almost instantaneously, tend to prompt heuristic processing. In short, because our minds prefer to take the fastest and easiest route to making a decision, and because images or imagistic texts offer shortcuts toward the endpoint of making a decision, the images (or, to a lesser extent, imagistic, concrete language) will prompt the viewer to make a relatively quick

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[452] Hill, supra note 12, at 26.
[453] *See* discussion *supra* Part II.
[454] BARRY, *supra* note 8, at 254 (explaining how advertisers exploit Gestalt theory to persuade); Marcus, *supra* note 5, at 383 (explaining that both commercial advertising and overreaching visual arguments in the law tend to exploit the "non-rational portion of the mind").
[455] *See* Bell & Loftus, *supra* note 433, at 662.
[456] *See supra* text accompanying notes 224–26.
[457] *See, e.g.*, *supra* text accompanying notes 319–20.
[458] STAFFORD & WEBB, *supra* note 68, at 195.

decision, largely ignoring the more analytical, abstract information in verbal form.[459]

Further, from an evolutionary standpoint, visual thinking is geared toward making rapid decisions, a process that derives from an ancient time when speed meant the difference between life and death.[460] Thus, when we see things, we tend to act first and ask questions later.[461] With visual information, people believe what they see and will not step back and critically examine the conclusions they reach, unless they are explicitly motivated to do so.[462] Thus, the alacrity by which we process and make decisions based on visual information conflicts with a bedrock principle of our legal system—that reasoned deliberation is necessary for a fair justice system.[463]

Legal commentators have offered two more objections to visual advocacy, arguing that it leads to unfair results in the courtroom. First, there is the argument that visual presentations are just too persuasive and too effective. For instance, Robert Aronson and Jacqueline McMurtrie argue that visually presented arguments are potentially more prejudicial "because they can include effective multimedia presentations that are more persuasive to the lay juror."[464] As I will explain more fully below, a visual argument usually only becomes too persuasive when opposing attorneys fail to develop their own visual strategies and counter the other side's visual themes. Critics also mention resource disparities, where one party has a greater ability to shoulder the expense of a visual presentation, as another reason that visual presentations can lead to unfair results.[465] While the use of complex computer-generated animations may produce resource disparities,[466] resource disparities are not an issue for the subject of this article because current technology enables lawyers to inexpensively produce simple, but effective, visual advocacy presentations with basic imaging software (such as Photoshop) and presentation programs (such as PowerPoint).[467] Today, most courtrooms have projection technology that lawyers can access by connecting a laptop computer to the equipment.[468]

C. SOLUTIONS

Some commentators, believing that the negative aspects of visual advocacy outweigh its benefits, advocate an approach that focuses on

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[459] Hill, *supra* note 12, at 33.
[460] BARRY, *supra* note 8, at 24.
[461] *Id.*
[462] *Id.* at 285.
[463] *See generally*, William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 UNIV. PENN. J. CONST. L. 171, 261 (2001) (citing JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1994)) (generally discussing the basic democratic principle for jury trials is that deliberations should be a rational and reasoned process).
[464] *See* Aronson & McMurtrie, *supra* note 24, at 1467.
[465] *See id.* at 1460–61; Marcus, *supra* note 5, at 389.
[466] *See* Aronson & McMurtrie, *supra* note 24, at 1461.
[467] *See supra* text surrounding notes 50-53.
[468] Frederic I. Lederer, *Technology For Trial Lawyers: The Future is Now*, 19 CRIM. JUST. 14, 16 (2004–2005).

limiting the use of visual arguments in the courtroom. Especially concerned with technology in the hands of prosecutors, Robert Aronson and Jacqueline McMurtrie discuss the idea that high-tech presentations should be avoided if "the same presentation can be made in a low-tech fashion," using testimony and charts, for instance.[469] Aside from the problem of whether a low-tech presentation can ever be "the same" as a high-tech presentation, a major objection to this approach would be that disseminating information in analog form no longer comports with how most people receive and process information.[470] Based on what we know about lower retention rates for unimodal presentations,[471] it is simply not reasonable to confine advocates to low-tech presentations. Thus, while I agree that manipulative and overreaching visual arguments present serious problems for our advocacy system, a strictly limiting approach would be wrong. Advocating that attorneys should ignore the realities of our modern media culture and cling instead to legal culture populated by Dictaphones and yellow legal pads, is bad advice for anyone who is serious about zealously advocating for their client.

There is a more balanced solution that will reduce some of the negative aspects of visual advocacy while accentuating its many positives. The solution encompasses four approaches. First, courts should take a more constrained approach for evaluating and analyzing visual evidence and visual arguments. Second, there needs to be a more even playing field in terms of the use of visual arguments. Third, attorneys who use visual advocacy must be willing to critically evaluate their own presentations, searching for logical fallacies and untoward appeals to emotion and prejudice. Finally, in order to achieve the first three approaches, attorneys must develop a deeper level of knowledge about visual arguments and visual processing.

The first step for diffusing the negative effects of visual arguments would be for the courts to take a stronger gate-keeping role with respect to visual evidence and arguments.[472] I agree with visual advocacy critics in that courts should take a more sophisticated approach to visual issues, especially in light of recent research on implicit bias, unconscious processing, and rapid emotional reactions. However, courts are not likely to engage in a deeper analysis of visual evidence and visual argument issues until attorneys start effectively educating courts on how these arguments work. A working knowledge of visual rhetoric and the scientific principles that underlie visual arguments will enable attorneys to make more specific arguments as to how visual presentations exploit unconscious processes and implicit biases as well as persuade based on irrational logic and prejudice. Stated differently, new arguments concerning the prejudicial

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[469] Aronson & McMurtrie, *supra* note 24, at 1487 (citing Robert B. Bennet, Jr. et al., Seeing is Believing: Or Is It? An Empirical Study of Computer Simulation as Evidence, 34 WAKE FOREST L. REV. 257, 286 (1999)).

[470] *See supra* Part V.A. and text accompanying notes 448–52.

[471] *See supra* Part V.A. and text accompanying notes 430–31. While a low-tech presentation that uses testimony and charts would not technically be unimodal, definite inefficiencies arise from the process of arranging unwieldy posterboard illustrations so that the jury and the witness are able to see and comprehend the information.

[472] Aronson & McMurtrie, *supra* note 24, at 1467; Marcus, *supra* note 5, at 390.

effects of visual arguments could lead to a change in the way that courts evaluate visual issues.

In addition to a more educated and constrained approach from the courts, we also need to develop a more robust adversarial system for visual advocacy. Most of the cases involving improprieties in visual advocacy have also contained grievous imbalances in the deployment of visual arguments. For instance, in the *Skakel* case, the defense did not have a visual strategy of its own and did not effectively anticipate or counter the visual arguments that the prosecution made. To realize the full positive potential for visual advocacy, we need a system where both sides vigorously use visual arguments and counter-visual strategies. Such a system should serve as a checks and balances system, ensuring that visual arguments are used fairly and that any attempts to overreach are blocked.

As with any statement made to a judge or a jury, attorneys who use visual arguments should self-evaluate their presentations, checking that their arguments are ethical, professional, and do not rely on bias or prejudice.[473] However, because decisions of whether an argument is inflammatory[474] or whether a piece of evidence is more prejudicial than probative[475] remain in the judge's discretion, the propriety of visual arguments will almost always reside in the gray areas. Thus, for the most part, an attorney's internal evaluation will proceed as a professional, as opposed to an ethical, inquiry. In other words, the lawyer evaluates whether or not a particular argument *should* be making a particular argument as opposed to whether an argument *can* be made.[476] As I stated above, however, the concept of a professional self-evaluation is highly optimistic and somewhat naïve.[477] It also competes with the maxim that lawyers are supposed to zealously advocate on behalf of their clients.[478] Thus, because there is no guarantee that lawyers will professionally regulate what arguments they choose to present, it is crucially important that we also have a balanced adversarial system for visual advocacy.

To enable attorneys to educate judges on visual arguments, contribute to a balanced adversarial system for visual advocacy, and self-evaluate the

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[473] At least two disciplinary rules are implicated for attorneys who make misleading arguments in court. For instance, Rule 3.3, which prohibits attorneys from making false statements of fact or law to a tribunal, could be violated with arguments that seek to evade facts and persuade through emotion alone. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2009). Rule 3.5, which prohibits attorneys from seeking to influence a judge, juror, or prospective juror though illegal means, could also present an issue. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2009).

[474] *See supra* Part IV.A.1. and text accompanying notes 267-75 (discussing the broad leeway that prosecutors are granted for closing arguments and the difficult standard that must be met in order to overturn a verdict based on prosecutorial misconduct) and *supra* Part IV.A.2. and text accompanying notes 290–93 (discussing the abuse of discretion standard of review for overreaching arguments in the civil context).

[475] Coleman v. Home Depot, Inc., 306 F.3d 1333, 1345 (3d Cir. 2002) ("the decision of whether or not [a piece of evidence] is more probative than prejudicial is within the discretion of the trial court, and to be determined on a case-by-case basis.") (citing Hines v. Brandon Steel Decks, Inc., 886 F.2d 299, 302 (11th Cir. 1989); Cortes v. Maxus Exploration Corp., 977 F.2d 195, 201–02 (5th Cir. 1992); Johnson v. Yellow Freight Systems, 734 F.2d 1304, 1309 (8th Cir. 1984); United States v. MacDonald, 688 F.2d 224, 229–30 (4th Cir. 1982)).

[476] *See supra* Part IV.A.3. and text accompanying notes 294–95.

[477] *See id.*

[478] *See* Vogelman, *supra* note 195, at 574.

professionalism of their own arguments, attorneys need to know how these arguments work. The minimum knowledge that lawyers need to be competent visual advocates includes a working knowledge of the scientific principles that explain visual processing and basic visual rhetoric concepts.

With respect to the science, knowing a bit about how the mind processes information will help attorneys in constructing visual arguments that captivate their audience and improve retention rates. Knowing how a person tends to react to visual information will also help attorneys counter and attack the other side's argument. For instance, knowing that a particular image sequence may generate an unconscious emotional reaction should tell the attorney that a strategy needs to be developed to make "the unconscious conscious."[479] Finally, a deeper knowledge of visual processing will better prepare attorneys for objecting to particular visual displays, enabling specific explanations as to how and why a presentation is inflammatory or prejudicial.

With respect to building a knowledge base for visual rhetoric, the starting point is cultivating the skill of translating a visual argument into a text-based form and vice-versa. Given the primacy of iterative text in our common law system, law will not likely become a completely visual culture.[480] Since law remains a logo-centric enterprise at its essence, visual arguments should always, in some way, connect back to inductive or deductive logic or a narrative theme. Thus, attorneys should begin where they always begin, with a strong theory and theme for their case. Knowledge of visual rhetoric can then guide an attorney towards complementing that theme and theory with visual imagery.

Being able to see the narrative or logical structure within a visual argument will also ensure that attorneys are prepared to point out fallacies and weak premises. In this sense, the art of countering a visual argument is not much different than countering a text-based argument. Aristotle's advice, that an advocate should either highlight the fallacies and weak premises in an opponent's argument or construct a competing syllogism[481] applies with equal force to visual arguments. Finally, understanding the various ways in which a text-based theory or narrative can be represented visually will enable attorneys to anticipate their opposing counsel's arguments. Anticipating visual arguments is an especially important skill because the work product doctrine allows attorneys to keep their visual arguments, especially their closing argument visuals, under wraps.[482]

VI. CONCLUSION

The integration of visual components into legal arguments has brought many positive benefits to legal advocacy. Visual images help captivate an audience and are an especially helpful aid in this age of miniscule attention spans, where attorneys battle boredom and culturally ingrained urges to

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[479] *See supra* text accompanying note 217.
[480] *See supra* text accompanying notes 54-59.
[481] ARISTOTLE, RHETORIC, *supra* note 304, at 138.
[482] Carney & Feigenson, *supra* note 4 at 35.

access external information through text messages, email, and Twitter updates. Visual arguments deliver a message in a multi-modal way, which is how we have become accustomed to receiving and processing information. Visual imagery also helps an audience understand and remember the information that is being presented. Most importantly, visual advocacy can intensify the persuasiveness of almost any argument.

It would be unwise, however, to ignore the many troubling issues that exist within visual advocacy. Visual reasoning is not only fallible, it also relies on an abstract set of rules that do not follow rational principles of logic. When viewing visual information, we are highly susceptible to making judgments too rapidly, unconsciously, or on the basis of automatic emotional processes. Moreover, when we see something persuasive, we do not tend to ask questions about the underlying logic. We tend to believe that what we see is true and correct. Nonetheless, despite the many problematic issues inherent in visually presented arguments, I remain optimistic that the positive attributes outweigh the negative. A commitment to knowledge and professionalism should keep the positive aspects of visual advocacy at the forefront.