

## **Law as Performance: Presence and Simulation in the Theater/Courtroom<sup>1</sup>**

Richard K. Sherwin  
Professor of Law  
Director, Visual Persuasion Project  
New York Law School

“Without Art, Nature can ne’er be perfect; and without Nature, Art can clayme no being.” (Ben Jonson)<sup>2</sup>

“Theater today can be a laboratory to stage [...] a crossover state between physical presence and electronic presence.” (Marianne Weems)<sup>3</sup>

Contemporary theatrical performances and courtroom performances are increasingly grappling with the same challenge, namely: how to respond to world loss, the steadily advancing process of dematerialization.<sup>4</sup> A growing number of cultural productions, including law, oscillate between virtual reality effects (the screen-based sensorium of heightened baroque sensation<sup>5</sup>) and bodily presence (what Sherry Turkle describes as “fealty to the real,”<sup>6</sup> and what I refer to as the “visual sublime”<sup>7</sup>). We are torn between reflexive meaning construction, on the one hand, and the material recuperation of reference and perception, on the other. Of course, it is one thing to explore, in the relative safety of the theater, what it is like to move along the continuum from live (bodily) presence to the percussive reality effects of electronic, screen-based images. It is something else again when the state seeks to authorize the exercise of power based on the persuasiveness of an electronic image inside the courtroom.

In what follows, I will argue that when law migrates to the screen – when it becomes a multi-media spectacle (as is occurring in courtrooms throughout the United States and around the world) – the conventional understanding of “performance” no longer holds.<sup>8</sup> In avant-garde theater today we encounter diverse explorations of this problemization or complexification of performance (as it shifts from live presence to hybrid forms of multi-mediatization). Drawing upon one such production, namely: the

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<sup>1</sup> Excerpt from Richard K. Sherwin, “Présences et simulacres sur scène et au tribunal,” *Communications* 92 (2013) pp. 147-158, symposium issue on “Performance: Le corps exposé.”

<sup>2</sup> Ben Jonson, *Discourses*, ed., G.H. Hereford and Percy & Evelyn Simpson, vol. viii (Oxford 1947).

<sup>3</sup> Marianne Weems at: [http://poptech.org/popcasts/marianne\\_weems\\_poptech\\_2006](http://poptech.org/popcasts/marianne_weems_poptech_2006).

<sup>4</sup> See Hans Ulrich Gumbrecht, *Production of Presence* (Stanford University Press 2004) at 47.

<sup>5</sup> See RICHARD K. SHERWIN, *VISUALIZING LAW IN THE AGE OF THE DIGITAL BAROQUE* (Routledge 2011) [hereinafter *VISUALIZING LAW*].

<sup>6</sup> Sherry Turkle, *Simulation and Its Discontents*, (MIT Press 2009) at 8.

<sup>7</sup> Sherwin, *Visualizing Law* at 119 – 149.

<sup>8</sup> See Fischer-Lichte, *The Transformative Power of Performance* (Routledge 2008) at 32 (describing performance as requiring “bodily co-presence” in a specific place, for a specific time).

Builders Association's "House/Divided,"<sup>9</sup> I will ask, what lessons multi-media theater may hold out for the contemporary performance of law? I will conclude that the current neo-baroque condition of world loss, and the familiar baroque strategy of proliferating form to distract us from metaphysical anxiety, poses serious political and legal challenges. It is possible that, absent an appropriate response, unchecked growth in ongoing processes of *de-realization*, *dis-ownership*, and *de-responsification* may ultimately threaten the continued legitimation of law's claim to power in the digital age.

### Setting the Legal Stage

In courtrooms throughout the United States, the United Kingdom, and elsewhere around the world, electronic screens are now playing a growing role in the search for truth and justice under color of law. Trials are increasingly multi-media events, with electronic screens being incorporated into live action inside the courtroom. In an age of smartphones and ubiquitous surveillance cameras, events that once would have gone unrecorded are preserved for posterity and, inevitably, for trial. At the same time, digital graphics and animations take decision makers anywhere and everywhere—into the body in medical malpractice cases, inside complex machinery in patent-infringement cases, or on the scene as a virtual eyewitness to murder in a criminal case. We witnessed an example of the latter in the Amanda Knox trial in Italy. Amanda Knox, an American college student studying abroad, was accused (and ultimately convicted in 2009) of murdering her roommate. In his closing argument at trial, Perugian prosecutor Giuliano Mignini played a computer-generated simulation that showed an avatar-Amanda Knox killing an avatar-Meredith Kercher. It ended with a gory crime-scene photo of Kercher's body. But was this simply a fantasy—an animated version of the prosecution's theory featuring Amanda Knox as a sex-crazed femme fatale, "Foxy Knoxy," as the British tabloids called her, a "she-devil," as many European journalists wrote, appropriating the prosecutor's phrase?<sup>10</sup>

The battle inside the courtroom over competing storylines plays out even more powerfully on the screen than it does in words. When law migrates to the screen it lives there as other images do, motivating belief and judgment on the basis of visual delight and unconscious fantasies and desires as well as actualities. Law as image also shares broader cultural anxieties concerning not only the truth of the image, but also the mimetic capacity itself, the human ability to represent reality. What is real, and what is simulation? This is the hallmark of the baroque, when dreams fold into dreams, or should we say the digital baroque, when images on the screen immerse us in a seemingly endless matrix of digital appearances.<sup>11</sup>

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<sup>9</sup> "House/Divided" (subtitled: "Inspired by *The Grapes of Wrath*") was produced by The Builders Association. The play was written by Moe Angelos and James Gibbs, and was directed by Marianne Weems. It played at the BAM Harvey Theater in Brooklyn, New York from October 24 – 27, 2012.

<sup>10</sup> See Richard K. Sherwin, *The Digital Trial*, PROJECT SYNDICATE (Oct. 12, 2011), <http://www.project-syndicate.org/commentary/the-digital-trial>. Knox served four years of a 26-year sentence before the murder conviction was overturned on October 3, 2011. Earlier this year, Italy's highest court overturned Knox's acquittal, faulting the lower court for "deficiencies, contradictions and illogical" conclusions in freeing Knox and her onetime boyfriend, Raffaele Sollecito. In July of this year, a Florence appeals court set September 30, 2013 as the start date for the retrial.

<sup>11</sup> See Sherwin, VISUALIZING LAW.

As with the baroque in art or music, the digital baroque in law is characterized by saturation of detail and hyper-ornamentation. Perhaps it will come in the form of shimmering colors of a functional magnetic resonance image purporting to show abnormalities in a criminal defendant's brain. Or perhaps it will come in the juxtaposition of sounds and images digitally mixed and choreographed to simulate causation,<sup>12</sup> or edited on screen to evoke what must have been going on inside a criminal defendant's mind.<sup>13</sup>

Videos and animations are powerful tools in the search for fact-based justice.<sup>14</sup> But they also create new stumbling blocks. As viewers, we may think we are getting the whole picture, but every camera frames its own point of view. With equal certainty we may believe in the digital images that we see, but how can we be sure of their basis in reality? Once we enter the domain of digital simulation, how do we keep from slipping into an endless matrix of mere appearances?

In a visual digital age such as our own, visual storytelling asserts its own measure of content, craft, and efficacy – along with its own sense of expectation, interpretation, and critique. As film maker Chris Marker once remarked: “I ask myself how people remember if they do not make movies, or photographs, or tapes to go about remembering.” Over time, we become the tools we use. The camera is already inside our head, so to speak, along with the stream of digital programs and codes that we commonly use today to recognize patterns on the screen before us. As the technology of memory changes so, too, does the way we recall, and what comes (or fails to come) to mind.

Traditionally, decision makers at trial are cast in the role of assessing the credibility of live testimony. In the adversarial system, witnesses swear an oath to tell the truth, their demeanor is carefully scrutinized in court, and they are also subject to intense cross-examination by opposing counsel. Such are the traditional tools for testing witness reliability. Things are different, however, when evidence migrates to the screen. Then it is as if the decision makers themselves have become eyewitnesses to the reality they watch. (Though it remains unclear how exactly the adversarial process tests the reliability of a decision maker who “witnesses” reality on the screen.) Indeed, visual evidence not only problematizes what it means to “witness”, but also what it means to “testify”. Is it the camera that testifies once it has captured the scene it shows? Do the images “speak for themselves” (as Justice Antonin Scalia and other members of the United States Supreme Court recently asserted in *Scott v. Harris*<sup>15</sup>)? But how could that be? We know that a camera begins and ends at a particular point in time, and that it occupies a particular place that provides its own particular (and partial) view onto the reality it shows. It also goes without saying that digital reconstructions (and digital images

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<sup>12</sup> See Sherwin, *When Law Goes Pop: The Vanishing Line between Law and Popular Culture* (Chicago 2000, 2002) at 193.

<sup>13</sup> Sherwin, *Visualizing Law*, at 75.

<sup>14</sup> For numerous illustrations of various forms of visual lawyering, see Richard K. Sherwin, VISUAL PERSUASION PROJECT, [http://www.nyls.edu/centers/projects/visual\\_persuasion](http://www.nyls.edu/centers/projects/visual_persuasion) (last visited October 31, 2012).

<sup>15</sup> Consider, in this regard, Justice Antonin Scalia's reference to the feature film *THE FRENCH CONNECTION* (20th Century Fox 1971) during oral argument in *Scott v. Harris*, 127 U.S. 1209 (2007). For Justice Scalia the film served as a benchmark for evaluating a crucial police surveillance video in the *Harris* case. For a transcript of the oral argument, go to [http://www.oyez.org/cases/2000-2009/2006/2006\\_05\\_1631/argument](http://www.oyez.org/cases/2000-2009/2006/2006_05_1631/argument). (Last visited October 30, 2012).

generally) can only show what invisible algorithmic calculations are designed to show, based on a given digital program. Who or what, then, is testifying? The image? The photographer? The camera? The digital data it contains? The underlying digital program? The engineer who designed the program?

### Theater Dematerialized: the Builder Association's "House/Divided"

The tension between live performance and electronic (screen-based) representation is also a recurrent theme in contemporary theater. As Marianne Weems of the Builders Association put it, "What happens when you have the palpable presence, the live bodies of the actors, and the ability to stage the network of technology that surrounds those bodies?"<sup>16</sup> For Weems, theater today not only stages the impact of technology on human presence, but it also extends our reach into the virtual. Our "tele-prosthetic relationship between the physical world and the virtual world," Weems says, is now part and parcel of the reality in which we live.<sup>17</sup>

But what exactly is the difference between physical and electronic presence? Does the "now" happen in the virtual world? Is Being there? Once we enter the virtual, do we risk, as psychologist Sherry Turkle has warned, the loss of the real? "Compelling virtual objects that engage the body as well as the mind... [can make it] hard to remember all that lies beyond [digital simulation]." <sup>18</sup> What does it mean today to speak in defense of our continuing fealty to the real, and in particular of law's continuing commitment to the quest for fact-based justice? This metaphysical quandary is shared by contemporary theater and contemporary trials alike. The risk of world loss is part and parcel of the neo- (or digital) baroque culture in which we now live.

Post-dramatic theater aspires to return to liveness, bringing us closer (in time and space) to an original, to the "something happens" of Being.<sup>19</sup> As Gumbrecht writes: "The more we approach the fulfillment of our dreams of omnipresence [through contemporary communication technologies] and the more definite the subsequent loss of our bodies and of the spatial dimension in our existence seems to be, the greater the possibility becomes of reigniting the desire that attracts us to the things of the world and wraps us into their space."<sup>20</sup> In short, the more we live our lives on the screen the greater our fear that our fealty to the real may be lost. Thus it is that when Nina Tecklenburg asks, "What is theater in the virtual 21<sup>st</sup> century? A guarantor of the authentic? A playground for artificial worlds? A microscope of the everyday? A social space for fantasies?"<sup>21</sup>, we could just as readily substitute the phrase "what is the contemporary multi-media trial?"

New avant-garde theater groups like the Builders Association, The Gob Squad, The Wooster Group, and others, are staging what it is like to live today along the continuum between live and mediated experience. For example, in their recent

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<sup>16</sup> Marianne Weems, note 3, *supra*.

<sup>17</sup> *Ibid*.

<sup>18</sup> Turkle, *Simulation and Its Discontents*, at 7.

<sup>19</sup> Hans-Thies Lehmann, *Post-Dramatic Theater*; see also Jean-Francois Lyotard, *The Inhuman* (Stanford University Press 1987) at 100-101.

<sup>20</sup> Gumbrecht, *Production of Presence*, at 139.

<sup>21</sup> Nina Tecklenburg, "Reality Enchanted, Contact Mediated: A Story of Gob Squad," *The Drama Review* 56:2 (Summer 2012) 21.

production, “House/Divided,” the Builders Association invites audiences to confront the immense and at times catastrophic impact of massive technological systems. In this play, the creators ask, how would we (*can we still*) tell *The Grapes of Wrath* story today? In the years of the dust bowl during the Great Depression of the 1930s in America, thousands of farmers lost their homes along with their livelihood. The tragedy of their plight was made palpable in Steinbeck’s novel and John Ford’s magisterial film that was based on it. These works vividly narrate the transformation of fear into anger as newly migrant workers come to recognize the “monster” banks whose appetite for capital must be fed, no matter what the human cost.

How does one tell this story today? In “House/Divided” the narrative montage unfolds on stage more as a film than a traditional live performance. Multiple screens show us the historic parallels between the homeless of the 1930s Depression era and those of the post-2008 Great Recession, as we shift back and forth from screen images of the dusty plains, on the road to California, to the foreclosures that decimated whole neighborhoods in the state of Ohio 70 years later. Actors perform before live camera feeds. We see their faces instantly projected, in historicized black and white images, onto a large screen on stage. We see the house they live in, and must leave behind. Its walls sometimes serve as a screen for images, while at other times the walls dissolve, and we move to encounter live actors within. Sometimes, there is simply a screen with images of victims of the foreclosure crisis, or of a foreclosure expert reporting the damage in documentary style, or workers on a modern trading floor, where houses are no more than disembodied numbers, like the stock prices that trail on screens around the stage in a seemingly infinite data stream.

The human reality has been washed out. It is now as difficult to locate who owns the divided and widely dispersed mortgage instruments as it is to perceive the agency or, for that matter, the humanity of the entities among whom all this financial data is flowing, victims and destroyers alike.

In this telling, everything flows: data, history, life stories, and power. As quickly as we move from one screen to another we also move from one era to another, and from one family, one set of victims, to another. In the end, the sense of individual tragedy dissipates, along with a coherent sense of who is to blame. Reaching the responsible actor proves impossible. There are simply too many owners, too many fragments. The play invites a similar reaction to the characters on stage whom we see sometimes live, sometimes in fragments projected onto the walls of the contemporary house that dominates the stage. The identity of victims and culprits seems to be as broken up and dispersed as the mortgage instruments themselves.

No one seems in charge. In the end all we are left with are the traces of a massive information system. The baroque complexity and dematerialized virtuality of streaming financial data simultaneously overwhelm us and leave us cold. And that may be the key. Without a sense of coherence it is difficult to express either pity or blame. And yet thousands have suffered, and continue to do so. How are we to respond?

One manner of response, which “House/Divided” depicts, is the non-response of those in positions of power: the robotic information clerks, the home mortgage employees whose employer no longer owns the risk of the mortgage instruments they once sold to hapless homeowners, the CEOs of banking firms struggling to “de-risk” their firms (using dehumanized language to describe strategies involving dis-ownership of

housing stock and massive layoffs). In this way, “House/Divided” depicts the confluence of dematerialization, dehumanization, and the wholesale dis-owning of responsibility (“de-responsification”) for massive economic crisis and human suffering. It seems that once you disown reality you likewise disown whatever responsibilities reality may demand. The shorthand formula for this digital baroque phenomenon of world loss, or massive dematerialization of reality, becomes: dematerialization = disownership = de-responsification. Obligation and responsibility are broken up and dispersed along with the reality that the banks and other corporate entities similarly disperse into disembodied data flows.

This much “House/Divided” brilliantly stages. But the take away is more problematic. What are we to make of our newly mediatized polis? How are ethical judgments possible when face-to-face reality yields to tele-presence?<sup>22</sup> When fantasies, emotions, and actualities become equally fungible? This, too, is what we see when legal performance joins the neo-baroque ranks of politics, advertising, and avant-garde theater. It is what we see when communication is modeled on post-modern principles. Electronic communications increasingly consist of copies spinning on their own axes, free of any constraining original. The version of things and events that we see on the screen is only as good or real as its impression lasts, and there is nothing out there to stabilize our constantly shifting impressions. The most we can hope for perhaps are the next set of polling results reporting on the most recent consensus, telling us which set of impressions are held in common by whom, where, and by how much of a percentage.

On screen, images may give the appearance of fulfillment and plenitude – so long as they continue to hold our gaze, from one image to the next. But many electronic images remain flattened, and ghostly, unable to become more present. In Lehmann’s words, these images are “lacking a lack.” As such, they risk casting us into a world of totalized, ghostly plenitude. I call this the data-rich virtual world of the digital baroque. The totality of digital images comprising this world is cold, cold enough, it might seem, to absorb the heat of presence of live bodies on the stage. In this way, the data stream that takes us in dissipates the heat of tragedy.<sup>23</sup> Its coldness disperses presence into the phantasmal flow that, for all appearances, owns and takes responsibility for nothing. [Dematerialization = de-responsification.]

The risk of staging dematerialization, which the producers of “House/Divided” brilliantly accomplish, lies in its success. Having depicted so well the lack of a lack that makes totality possible, the play risks leaving its audience cold. This is not boredom. Boredom cannot account for the animated disappointment that a number of audience members expressed after the show.<sup>24</sup> Rather, it may well be the displacement of passion itself that is at stake. When you evoke *The Grapes of Wrath* you cue tragedy and

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<sup>22</sup> See Richard K. Sherwin, “Visual Jurisprudence,” *New York Law School Law Review* 57:7 (2012) (exploring the constitutional ramifications of tele-presencing in criminal trials).

<sup>23</sup> On October 25, 2012, during a question and answer session with the audience at the Brooklyn Academy of Music [BAM], theater director and performance studies scholar Richard Schechner defended “House/Divided” as resisting the temptation to “retreat to tragedy.” This is true enough, but it still leaves problematic the moral ground upon which fear may turn to anger, which is the crux of the dramatic arc in *The Grapes of Wrath*.

<sup>24</sup> A number of audience members at the BAM performances on October 24 and 25, 2012, voiced frustration and disappointment. (“You failed,” one audience member told Marianne Weems during the question and answer session that followed the show.)

redemption. At the end of that narrative, the men do not break; rather, the fear drains from their faces and is replaced by anger (i.e., by the promise of political action). By contrast, phantasmal data flows leave us cold at the end of “House/Divided.” There is no vindication, either of tragedy (as a genre) or of responsibility (for the suffering of real victims). Simply put, there seems to be no space for pity, fear, or anger. There seems to be no space to experience our own alienation from the data stream that absorbs property titles and disperses them into the digital ether. The Brechtian “pleasure” of liberation, or at least the promise that change is possible, is nowhere to be found.<sup>25</sup>

Could it be that the lack of expected emotions, not to mention a proper target toward which to direct them, prompts some viewers of “House/Divided” to turn their displaced anger against the play itself? (“How dare you not leave me with the emotion this situation demands! This emptiness just feels wrong in the face of such suffering.”) Have the producers succeeded too well in dispersing their viewers into the emptiness of virtual data flow?

Perhaps this is one of the costs of staging dematerialization. Hot travels to cold.<sup>26</sup> The presence of live actors dissipates into the coldness of visual simulacra on the screen. This leaves disembodiment, and de-responsification, triumphant. The dead space of virtual data flow seems capacious enough to store (and hold back) the presence of the real, and along with it the sense of embodied ownership that gives rise to active responsibility.

If this is so, the problem of staging mediatized dematerialization may be larger than the play’s producers realize. If hot goes to cold, how do we make images that shimmer with presence on the screen? Could it be that only a radical re-materialization of our social world will re-ignite moral passions and the accompanying sense of active responsibility for human suffering? If the answer is yes, then the strategy of using media to evoke and judge media may prove, at least in this rendering, ineffective.<sup>27</sup> Blinded perhaps by the play’s brilliant mise-en-scene, in the end the producers either leave the living source (and embodiment) of suffering invisible or (worse still) risk leaving its viewers passive and cold in the face of a systemic totality that perpetually disowns the real together with the sense of responsibility that it demands.

An aesthetic that risks a morally problematic outcome is one thing when staging a play; it is something else again when we turn to the performance of law. Thus we ask, what are the lessons for law of “House/Divided”? What trial reality does this sort of mediated staging permit, or disallow, inside the courtroom? For one thing, the destabilization of presence, the loss of the aura of an original, may leave jurors (and judges) disconnected from the real, capable only of registering the percussive reality effects that screen images impress upon the senses or, alternatively, enwrapped in disembodied fantasy and displaced desire. This dematerialized state, flush with a proliferation of ornamental image flow, marks the baroque, or should we say, digital baroque condition par excellence: the proliferation of form, and the intensification of effect, must compensate for the loss of the real. This is what we may witness when the

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<sup>25</sup> Bertolt Brecht, *Brecht on Theatre*, trans. by John Willett (Hill and Wang 1964) 181, 202.

<sup>26</sup> I am indebted to Victoria Horowitz for this insight.

<sup>27</sup> In *Visualizing Law in the Age of the Digital Baroque* I contend that sublime images are capable of uncanny effects that overcome world loss. Here, I am simply questioning whether “House/Divided” has managed to create, or even endorse, the production of such images.

world is no longer a stage for live action, when, instead, it has become a flattened visual interface.

Such is the flux and transience of neo-baroque law. Things cohere but briefly by dint of the reality effects they generate by what appears on the screen. In politics and advertising these results are incessantly being measured by pollsters and marketing firms. The same measures may be useful to trial lawyers, for they, too, are interested in amplified impressions. They, too, want to know what affective and other intensities will stabilize belief long enough to sustain a verdict. But the aesthetics of intensity and delight are not necessarily equivalent to the triumph of fact-based justice.

Without an original, all we have are re-morphing copies, like memories floating free of lived experience. It's like living in the matrix, a dream reality maintained by consensus. In neo-baroque culture the forces of reality never stabilize. Commentators, talking heads, bloggers, and the rest, may reinforce a given set of impressions. But we can't seem to get outside the flux of images and effects. We can only measure them, just as we measure other consumer preferences in the marketplace.

In recent years we have witnessed the derivatives bubble, the home mortgage bubble, and more recently the emerging higher education bubble. Alongside them all we are beginning to recognize the bubble of neo-baroque law. And the question is: what will be left when that bubble bursts? Even in a consensual dream world the call of historical accountability may eventually reach out and awaken us.<sup>28</sup> When that happens we come face to face with the awesome responsibility of rematerializing the law.

## Conclusion

In the previous century, Martin Heidegger said we dwell in language, "the house of Being."<sup>29</sup> But today, new rooms have been added on, together with the screens that glow within them. We increasingly inhabit a digital matrix of synthetic visual representations. It's a little like living in the mirror—a special kind of mirror that has been algorithmically encoded to reflect back other rooms and other faces, some of which may or may not be our own. On this imaginary landscape of flattened signs we live out much of our private and public lives. The ensuing transformation in the meaning making process runs the gamut from entertainment, to commerce, to managing the affairs of state.<sup>30</sup>

In law, however, unlike in theater, it is not enough simply to enjoy or even critically reflect upon the nature of contemporary aesthetics. We lack that luxury when the power of the state – to take away an individual's property, or freedom, or (in nations like the United States) life itself – rests upon the persuasive effect of screen images. If the demand of ethics, and of judgment itself, begins with the reality of others, with what

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<sup>28</sup> See, for example, Sherwin, *Visualizing Law* at 83 – 117 (describing David Lynch's *Mulholland Drive* [2001]). The first two-thirds of Lynch's film is a dream sequence that narrates the main character's eroding defense against guilt for arranging her ex-lover's murder. Upon awakening she realizes what she has done and commits suicide.

<sup>29</sup> See JOSEPH J. KOCKELMANS, *HEIDEGGER ON ART AND ART WORKS* (1985) 198 ("In thinking, Being comes to language. Language is the house of Being. Man dwells in this house, and the thinkers and the poets are the guardians of this house") (citing Heidegger's "Letter on Humanism").

<sup>30</sup> See, e.g., BETH SIMONE NOVECK, *WIKI GOVERNMENT* (2009).



Emmanuel Levinas describes as the infinite demand of the naked face before us,<sup>31</sup> then the implications of trial by tele-presence, digital simulation, and visual montage, must be carefully considered.<sup>32</sup>

The metaphysical anxiety of neo-baroque performances on the stage may help us to understand similar performances inside the courtroom. Post-dramatic theater can help us to appreciate what it is like to balance the presence of bodies with the percussive reality effects of virtual representations on the screen. Nevertheless, much work remains to be done in order to make that benefit real. The challenge that digital baroque culture poses is both elusive and deep. It asks: how do we rematerialize the act of judgment? How do we re-humanize our narratives so that identity, agency, and causation cohere sufficiently for blame and exoneration to continue to make sense? In short, how do we reclaim ownership of the terms of our social existence?

Performance inside the courtroom has become hybridized and unstable as it oscillates between different forms of meaning making. Indeed, the construction of legal meaning oscillates today not only between different media (off screen and on), but also between different temporalities (past and present), improvised and scripted. Moments of formal ceremony and boredom give way to moments of high drama and spectacle. In this sense, the trial performance oscillates along an aesthetic spectrum between baroque effects (percussive reality effects based on affective states such as sensory delight) on the one hand, and intimations of the sublime, on the other (as when an originary presence, perhaps in the form of a mythic now-time, breaks into, and disrupts ordinary linear time).<sup>33</sup>

Thus when we ask what ‘truth’ and ‘justice’ may mean in the context of post-dramatic performances at trial, it becomes apparent that we are also asking how ‘truth’ and ‘justice’ are constructed and experienced under contemporary cultural conditions. The oscillations of trial performance reflect and express different aesthetic and ethical registers. Success in the construction of meaning requires fluency in the medium at play; ethical efficacy, however, may require more. It may also require materialization for the sake of ownership of, and responsibility for the reality that compels the event of judgment.

The living theater of post-dramatic law as performed at trial raises in the context of shared political community the same question that progressive and radical artists and thinkers are raising in the context of aesthetics, namely: Are the forms and ceremonies, the rituals, personas and values, that are currently available to us capable of supporting a flourishing and humane civic life?<sup>34</sup>

In the end, we may put the question this way: Is digital spectacle – the neo-baroque world in which everything gets reduced to the immediacy of representation – cutting us off from the invisible source of coherence, the unrepresentable lack out of

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<sup>31</sup> Emmanuel Levinas, *Otherwise Than Being, or Beyond Essence*, trans. A. Lingis, (Kluwer Academic Publishers, 1991) 114-15.

<sup>32</sup> See Richard K. Sherwin, *Visual Jurisprudence*, vol. 57, *New York Law School Law Review* 11 – 39 (2012/13).

<sup>33</sup> For more on mythic time inside the courtroom see Richard K. Sherwin, *When Law Goes Pop* at 50 – 71; see also Sherwin, *Visualizing Law* at 119 – 149 (on the “visual sublime”).

<sup>34</sup> As Lehmann puts it, at stake is “society’s capacity to uphold its inner coherence.” Lehmann, *Postdramatic Theater* at 182.

which representability and performance itself come to life?<sup>35</sup> The Builders Association's "House/Divided" aptly captures both the nature of our plight and the immense difficulty of grappling with it. In "House/Divided" the lack is brilliantly represented, but paradoxically the work may suffer from its own technological bravado, leaving us in the end with the challenge of our times renewed: Held in the grip of the metaphysical anxiety that arises from digital baroque conditions (which include dematerialization and dis-ownership of the real), are we able to sufficiently rematerialize the social world in which we live so as to actively accept responsibility for what situated afflictions demand of us? In the age of the digital baroque, the living presence of ethical obligation, civic responsibility, and law's ongoing claim to legitimacy may require nothing less.

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<sup>35</sup> See, for example, Georges Didi-Hubermann, *Confronting Images* (Penn State Press 2005) (describing the "not-knowledge" of the image and the way the real rends, disrupts, and disfigures discursive order and figurative representation itself, leaving us before the mysterious exuberance of image as visual event).