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INTRODUCTION: *IN FLAGRANTE DEPICTO*

*Peter Goodrich**

Unpopular as popular culture usually is in the legal academy, it now has to be recognized that law and film is an accredited sub-discipline. True, its credits may be less than stellar, garnering fewer accolades and acclamations than deflections or diminutions. After all, it is just one of a litany of law 'and' sub-disciplines. It is *otium* not *negotium* as the Latinists used to say, meaning that it is leisure not work, playful rather than serious. But then, and paradoxically, it is rather popular. The reasons for the popularity may not all be heuristic or pedagogic. The attraction may be that of sitting in the dark so that one does not have to look at one's neighbor, and that may be a comfort in the competitive environment of law school. It is also, however, undeniable that films transcend linguistic boundaries, persuade more effectively, and bring students into the room, in ways that print no longer does. Fight it if you wish, but the juridical future is digital and increasingly to be seen on screen. Law cannot escape the drive to the virtual and visual. Indeed it is already succumbing to the long march of the image back into the trial and so into the records, reports, and other promulgations of law.

Film, however, is something of a misnomer. It is really quite possible, ironic to say, that film and law has been superseded pretty much before it was born. The only legal case book on the subject hedges its bets with the nomination *Law and Popular Culture* and deflects potential blame by boasting no less than nine principal authors, an ennead of exegetes, a nonet of compilers.¹ Welcome as the project is, a valuable extension of *lex populi*, it must also be observed that it follows the nascent conventions in the literature by opting for a filmography at the start of each chapter.² The reference of filmography, of course, is to *graphos*, to writing, which thereby subjects the film to an antique reduction to print in much the same manner as the humanists

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¹ DAVID RAY PAPKE ET AL., *LAW AND POPULAR CULTURE: TEXT, NOTES, AND QUESTIONS* (2007).

² See the admirable, WILLIAM P. MACNEIL, *LEX POPULI: THE JURISPRUDENCE OF POPULAR CULTURE* 10, 29, 44 (2007) (referencing *HARRY POTTER AND THE CHAMBER OF SECRETS* (Warner Bros. Pictures 2002), *BUFFY THE VAMPIRE SLAYER* (20th Century Fox 1992), and *FIGHT CLUB* (20th Century Fox 1999) to introduce the first three chapters, respectively).

reduced painting to text in the concept of the picture as *liber pauperum*, the poor man's—the illiterate man's—book.

My point is that the reduction of film to writing and implicitly to narrative operates an aesthetic and heuristic restraint as well. Film—and I cannot resist mentioning that it is a French invention, the magic of the aptly named Lumière brothers, a thoroughly Gallic play of smoke and mirrors³—is not necessarily the most pertinent or most common of law-oriented traditions. Film operates from a critical distance, from the zone of what are, in some theories, termed primary norms, which the early tradition always viewed as shadows, the spectral relics of invisible causes. The visual regimen, the iconocratic modes of governance, have their history and play their part in the long term of image and law, the *ius imaginum* as common lawyers inherit it from their continental inspirations.⁴ The visual, however, implies more and promises a plurality of dimensions, a diversity of media that impact legality and potentially proffer something beyond the constraint of the singular copulation of film and law. Image and law belong within a broader and more plural past, a tradition of esoteric transmission, of hieroglyphs, enigmas, emblems, devises, and other symbols. There is a tradition of images, a science of symbols, a pictorial and theatrical staging of legality that has long co-existed with the textual tradition. The tradition deserves recollection and reinvention as a specula knowledge and promulgation of law that precedes and exceeds, though is equally represented in and through film.

The title of the present conference, the neologistic *in flagrante depicto* endeavors singlehandedly to deflect criticism by use of a Latin maxim and, through a certain philological misappropriation, to capture what is at stake in the recourse to images as operators in law. Latin in its roots, but present in common law sources such as *Fleta*⁵ and later in Blackstone, *in flagrante delicto*, the root of our maxim, refers to the aggravated character and augmented offense of a crime that is encountered *in actu* or in the moment of commission.⁶ Acts of adultery and burglary take place, respectively, in furtive privacy or under cover of night, and are instances where the events themselves have a greater capacity to shock and inflame if they are witnessed in person rather than encountered in speech alone. *Maior est imago quam oratio*: An image is greater than an oration, as the long dead are wont to say. So great

³ VICKY LEBEAU, *PSYCHOANALYSIS AND CINEMA: THE PLAY OF SHADOWS 1* (Wallflower Press 2006) (2001).

⁴ "Iconocracy" is a term taken from Marie-José Mondzain, *Can Images Kill?*, 36 *CRITICAL INQUIRY* 20 (2009).

⁵ JOHN SELDEN, *THE DISSERTATION OF JOHN SELDEN: ANNEXED TO FLETA* (General Books 2009) (1771).

⁶ 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 303 (Philadelphia, Bell 1772).

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was the blaze of the event seen, that in early common law those apprehended *in flagrante* were subject to immediate and summary jurisdiction.⁷ Translated next into the idiom of filmosophy, or returned to the imaginary, *in flagrante depicto* refers to the force of the visual, the power of specular depiction, the tear or wound that, as Didi-Huberman argues, constitutes the openness of the image as something more than simple narrative by other means.⁸ Color, for example, can bear its own meaning, subvert appearances, displace perception by invoking affects, references, and associative chains that were not present in the figures, symbols, mottos, and words of the painting.⁹ By the same token, letters inserted into film as credits become figures and moving images, ideally capturing an array of meanings that were not present in the prior juxtapositions.¹⁰ More obvious, though just as intriguing, music accompanying images, camera angles, tracking shots, montages, cut-aways, flashbacks, and animatrix provide the law of “the great parataxis” in Rancière’s engaging and not too distant attempt to work around the flattened norms of textual description of image relays.¹¹

It is not only that the image presents and promises a *plus ultra*, a beyond of the word of the law, but also promises something more than the gothic print of the legal treatise, or the solemn black and white of the case report. *In flagrante depicto* proffers a glimpse of the behind-the-scenes of the apparatus that precedes legal event and apprehension. The image inhabits the domain of desire, of erotic aspiration or maniacal scheme. Thus, taking the emblem of the event, one of the

⁷ See *id.* (“For he might, when so detected *flagrante delicto*, be brought into court, arraigned, and tried, without indictment . . .”).

⁸ See GEORGES DIDI-HUBERMAN, *L’IMAGE OUVERTE* 49-50 (Gallimard 2007) (discussing image and incarnation through the motif of Christ’s wound, and the injunction that “they shall look upon him that they pierce,” or “*videbunt in quem transfixerunt*”).

⁹ See GEORGES DIDI-HUBERMAN, *FRA ANGELICO: DISSEMBLANCE AND FIGURATION* 218 (Jane Marie Todd trans., Univ. Chicago Press 1995) (1990) (“We note that often in the paintings—including those of the Renaissance—*color does not serve to distinguish bodies*: on the contrary, it drowns them, devours them or, more subtly, *melts* them into one another.”). On “the image as rend,” see GEORGES DIDI-HUBERMAN, *CONFRONTING IMAGES: QUESTIONING THE ENDS OF A CERTAIN HISTORY OF ART* 139 (John Goodman trans., 2005) (1990) (discussing how an image has the power to open, to break something, and to “make an incision, to rend”):

The . . . image . . . holds us in suspense, motionless, we who, for an instant, no longer know what to see under the gaze of this image. Then we are before the image as before the unintelligible exuberance of a visual event. We are before the image as before an obstacle and its endless hollowing. We are before the image as before a treasure of simplicity, for example a color, and we are there-before—to quote the beautiful phrase of Henri Michaux—as if facing something that conceals itself.

Id. at 228.

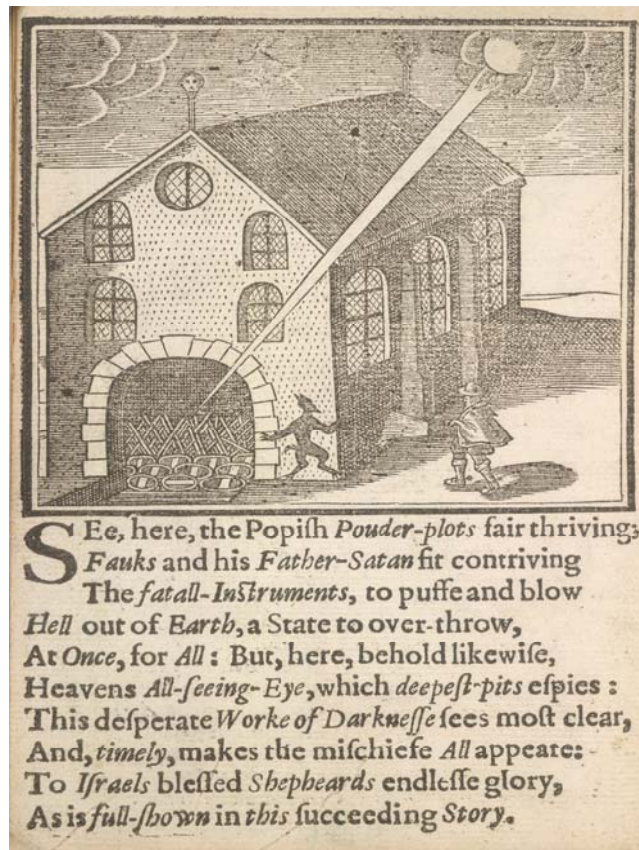
¹⁰ LAURENCE MOINEREAU, *LE GÉNÉRIQUE DE FILM: DE LA LETTRE À LA FIGURE* 121 (2009).

¹¹ See JACQUES RANCIÈRE, *THE FUTURE OF THE IMAGE* 43 (Gregory Elliott trans., Verso 2007) (2003) (“[W]here all the common terms of measurement that opinions and histories lived on have been abolished in favor of a great chaotic juxtaposition, a great indifferent melange of significations and materialities. . . . Let us call this the great parataxis.”).

earliest of images of an *in flagrante* act can be taken from contemporary portrayals of the Catholic Guy “Guido” Fawkes. He was the chief architect of the gunpowder plot that failed to blow up the English sovereign’s political residence, the houses of Parliament, on November 5, 1605.

The image shows the furtive Fawkes, punningly named “Fauks”—in several versions of the image it is explicitly *faux* (false)—about to set fire to kegs of gunpowder when a stream of light from the heavens, the ever watching eye of the deity, illuminates and exposes his infamous plan. *Video [et] rideo*—I see [and] I smile—is the motto used in more laconic versions of the same image.

Guy Fawkes and Satan Outside the Houses of Parliament¹²



¹² This image, *Guy Fawkes and Satan*, was first printed in FRANCIS HERRING, *MISCHEEFES MYSTERIE: OR, TREASONS MASTER-PEECE, THE POWDER-PLOT* (London, Hartford 1641). The image is reprinted here with permission from the British Library, <http://www.imagesonline.bl.uk/results.asp?image=067118&imagex=4&searchnum=3>.

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And so Fawkes enters the early modern videosphere, the domain of the conjunction of visibility and apprehension. What can be seen, captured by the celestial panoptic eye, the omnivoyant spirit, or caught on camera, subject to surveillance by CCTV, recorded by the lens of the computer, or simply surprised *in actu*, is already apprehended, no longer a nuisance, the subject of prosecution or removal.

Equally delightful and indicative is the image of the devil passing between the actor and the act, the go-between, an angel gone bad. The image portrays the devil conventionally as a shadow, with a tail and a somewhat wolf-like head, cast in outline, without features, ready to disappear into the shadow thrown by Fawkes himself. Here then, and in very precise visual form, we are witness to evil as shadow and darkness, God as light. The devil is in the darkness, *in aenigmate*, as St. Paul puts it, meaning in the invisible realm of specters that humans should not enter and ought not to view.¹³ According to Pauline theology, the shadow and its attendant occlusions are the human condition awaiting their dispersal by the celestial forum, by our meeting the divinity face to face, and his face, we are told, illuminates and emanates a fearsome light. Put it like this, to be caught *in flagrante* is to be caught in the shadows, to be engaged in crime—in evil—under cover of darkness, and then illuminated, exposed, trapped by the eye, apprehended in image and actuality. The dark is the devil, the transcendent shadow, *tenebras*, in an invisible sphere of causes and spiritual transmissions that are not meant, and hence the darkness, for human eyes.

What is also intriguing about the Guy Fawkes story is that nothing happened. The event was uneventful but the image lived on; the *faux*, the irrelevant, was extraordinarily successful. Over four hundred years later, the British still celebrate this failure, the exposure of an unsuccessful plot to unseat Leviathan. More than that, the image exposes the invisible and interior, the basement of Parliament, and illuminates the shadowy and nocturnal with the light of a panoptic surveillance. There is something extraordinarily popular and enduring in this image of Fawkes caught in the act, apprehended in commission but prior to conflagration. Captured pre-ignition, the emblem of the event depicts an image of an imagined but never actualized explosion. The excitement resides in part in the proximity and relief, partly in the unfinished nature of the project, which is picked up over four centuries later, and in a uniquely filmic form, in the movie *V for Vendetta*.¹⁴ In director James McTeigue's film, "V" blows up Parliament as a

¹³ 1 *Corinthians* 13:12 (King James) ("For now we see through a glass, darkly; but then face to face: now I know in part; but then shall I know even as also I am known."). On the enigma as reference to the alien sources of law, see generally Peter Goodrich, *Legal Enigmas: Antonio de Nebrija, The Da Vinci Code, and the Emendation of Law*, 30 OXFORD J. LEGAL STUD. 77 (2010).

¹⁴ *V FOR VENDETTA* (Warner Bros. 2005).

theatrical spectacle and, quite ironically, V stages the explosion before a wholly masked audience. The viewed become the viewers, the actors take to the stalls, and an empty theater is demolished without plan or substitute in view.

Fears that this second millenium recreation of the Guy Fawkes plot would incite, upset, or discomfort audiences in a terror-traumatized United States delayed the release of the film. In the event, no such trauma was evident. The audience's response to the film was more acclamatory than trepidatory, more familiar with the media and the virtuality of collateral damage than the studio executives either hoped or feared. That said, the videosphere acknowledged—and the visual competence if not critical skills of the viewers recognized—the omnipresence of the visual in the legal, the pure significance of the spectacle to the promulgation of law; the weight of images that apprehend acts *in flagrante* deserve their due. Whether it is celluloid, digital, High Definition, podcast, translocator, or hologram, the visual media and relays have significant and increasing roles to play in the representation, transmission, and social presence of law.

That is the theme of the following Articles. Amongst the topics that cohere a disparate grouping of scholarly interventions are: iconic photographs traced over the long term of their reception and circulation; cameras introduced into courts; filmic reconstructions of real crimes re-enacted by their perpetrators and victims; legal history as theatre; architecture as transmission; the cadaver as forensic sign; and visual culture as law. Even out-takes were incorporated on the theory that the repressed can return and that visual parataxis includes the excluded. For obviously linear reasons, the out-takes are not published but remain external to the textual representation of the Articles delivered or shown. They are the unwritten custom, as it were, that precedes the norm, the law of the event after the event, once deposed.

Mixing the screening of movies with scholarly disquisitions, image with text, movement with hypostasis, the fundamental question raised for lawyers is that of recognizing the visual, that of learning to see the law as a spectacle. The long march of the image back into law, after its repression in the Reformation, and subsequently the Enlightenment, has been ironically expedited by war and war crimes trials: first Nuremberg, later the Eichmann trial; latterly the Hague and Cambodia. Systematic and enduring atrocity, the violence that defies dialogue, reason, and unspeakable terror, such as that of the Holocaust, could only be tried in image, could only be believed, as Christian Delage has both argued and evidenced, through being seen.¹⁵ Where the documentary trial of the genocide—a unique violence generated by a modern Western state

¹⁵ CHRISTIAN DELAGE, LA VÉRITÉ PAR L'IMAGE: DE NUREMBERG AU PROCES MILOSEVIC 121 (2006).

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against elements of its own population—defied belief and foundered on the absence of any relevant legal concepts, the introduction of a screen into the Court, the relaying of footage of the slaughter, and the emaciated remains of the survivors were all too credible. It was seen, it was believed, and it persuaded. It is that trajectory toward the evidential value of the visual, the power of flagrant depiction, of the visibility of the act, that the ensuing Articles develop and renew.