Notes: Part II


46. As the next section of this Article will demonstrate, some Americans tend to be more visually biased than others. The term “we” may nonetheless be used in this context insofar as all Americans, regardless of their specific identities or affiliations, work and live within a national social and political structure that has encouraged or required them (at least for limited purposes) to adopt a significant number of visualist habits.


49. “A lean skyscraper, its glass-sheathed walls reflecting the tinted clouds of twilight, is beautiful to behold from the outside. . . . But the senses other than sight tend to be underfed. The place has neither odor nor sound other than the muted noises of office work or of soft canned music-and it discourages touch” Yi-Fu Tuan, Segmented Worlds and Self: Group Life and Individual Consciousness 114 (1982).


52. See Robert Goldwater, Primitivism in Modern Art 35 (1986); see also Clement Greenberg, Art and Culture: Critical Essays 142 (1961) (“Under the modernist 'reduction,' sculpture has turned out to he almost as exclusively visual in its essence as painting itself.”).

53. See generally James Jones, “The Concept of Racism and Its Changing Reality,” in Impacts of Racism on White Americans 27,40 (Benjamin Bowser ed., 1981) (“Western society has had a tendency to categorize human groups according to simple visible traits and to infer mental, behavioral, and sociocultural capacities and tendencies from them.”)

54. In part because it is less necessary in a visualist society; wearing a hearing aid carries a significant stigma. Jillyn Smith, Senses and Sensibilities 45 (1989).


59. “Earwitness testimony, in contrast to eyewitness testimony, has not received a great amount of attention from . . . the courts, possibly because of the greater reliance on information processed visually rather than orally.” A. Daniel Yarmey, “Earwitness Evidence: Memory for a Perpetrator’s Voice,” in Adult Eyewitness Testimony: Current Trends and
Of course, the hearsay rule is formally premised on a presumption that has little to do with visuality or aurality: that an out-of-court statement should not be taken as evidence of the truth asserted in the statement if its maker is not available for in-court cross-examination. Thus construed, the hearsay rule can preclude the admissibility of a witness's testimony as to what the witness has seen, read, or heard. In practice, however, the rule tends to apply most frequently and forcefully against reports of third-party speech. In that context, it may reflect the distinctly visualist concern that speech per se is a casual phenomenon having limited probative value outside of very specific circumstances—thus, the exception of the "dying declaration."

One evidence expert has called this indulgence of the visual the "wax museum" effect. People are fascinated by the real thing. The bullets that were found lodged in the victim's heart, the actual handwritten memorandum that was used to seal the agreement, the remains of the automobile gas tank that ruptured on impact burning the occupants of the car.

... Until we see something tangible, [the event] is something that did not happen, or at least did not happen to real people ...

Ashley S. Lipson, Art of Advocacy: Demonstrative Evidence 2.02 (1994).


This tendency accords with our primarily visual understanding of pollution itself. Findings suggest that the strongest physical stimuli influencing awareness of air pollution are particulates, soiling of buildings and household objects by dustfall, and reduced visibility caused by haze. Awareness of air pollution obviously depends heavily upon visual perception. This finding takes on particular significance because many toxic gaseous pollutants cannot be seen.


Marshall McLuhan recognized the relationship in our society between visuality and remedy in the early 1960s: "Especially the child, the cripple, the woman and colored person appear in a world of visual ... technology as victims of injustice." McLuhan, supra note 1, at 31.

Advocates of "deaf rights" have repeatedly commented on the problems associated with bearing an "invisible" disability in a visualist environment. For example,

[i]n a good story, we can almost hear the voice. It's as if, reading and assimilating the qualities of a voice's language, we're translating the written word into the spoken one, using our eyes to listen . . . . Look Who's Talking: An Anthology of Voices in the Modern American Short Story at xxi (Bruce Weber ed., 1986). Likewise, poetry has been described as "still bound to the oral tradition of sound more than sight, even though our access is most often through the eye than the ear." Berleant, supra note 51, at 151.
The celebration of sight was more equivocal than is sometimes claimed.

Downcast Eyes: The Denigration of Vision in Twentieth Century French Thought

Ancient Hebrews (see, e.g., Thorlief Boman, Ancient Literacy) all of our knowledge of ancient Greek life comes from surviving visible texts, images, and artifacts, and partly because misapprehensions concerning the extent and influence of pre-Hellenistic literacy (see scholars interested in the origins of Western philosophy have paid to pre-Hellenistic “light” metaphors, partly because of the extent of pre-Hellenistic Greek Formation,” in Modernity, supra note 75, at 30; Dorothy Tarrant, “Greek Metaphors of Light,” 10 Classical Q. 181 (1960). The extent of pre-Hellenistic Greek visuality has traditionally been overestimated, partly because of the attention that modern scholars interested in the origins of Western philosophy have paid to pre-Hellenistic “light” metaphors, partly because of misapprehensions concerning the extent and influence of pre-Hellenistic literacy (see supra note 82), partly because virtually all of our knowledge of ancient Greek life comes from surviving visible texts, images, and artifacts, and partly because ancient Greek culture has repeatedly been described and defined by contrast with the seemingly more aural society of the ancient Hebrews (see, e.g., Thorlief Boman, Hebrew Thought Compared With Greek (1960)). See generally Martin Jay, Downcast Eyes: The Denigration of Vision in Twentieth Century French Thought (1993) (noting that “the Greek celebration of sight was more equivocal than is sometimes claimed”).


Svenbro, supra note 84, at 4, 114.

Perhaps not coincidentally, one of the first Athenian lawgivers, Solons was a poet. In the second century A.D., the Greek biographer Plutarch claimed that Solon had originally attempted to set his laws in verse, beginning:

First let us pray to Zeus, royal son of Cronos  
To grant my laws success and wide renown.


In the fourth century B.C., Aristotle actually speculated that *nomos* meant both "law" and "tune" "because before men could write, they sang their laws, to avoid forgetting them . . . ." Aristotle, *Problems* 920a, at 395 (Walter S. Hett trans., 1961).


Oral delivery undoubtedly had an impact on what was said. In the Anglo-Saxon epic *Beowulf*, for instance,

action is presented less by visual particulars than by means of its material effects-often sound effects. There is consistent metonymy: we hear the footsteps of Beowulf, the scream of Grendel, the horn of Hygelac, the jingle of a mail-shirt.

It would be easier to imagine Beowulf as an oratorio than as a . . . film.


In pre-Christian Norse mythology, for instance, the guardian of heaven, Heimdellr, was so wise that "he could hear the wool grow on the sheep and the grass grow in the fields." Alexander F. Chamberlain, "Primitive Hearing and 'Hearing-Words',' "16 *Am. J. Psych.* 119, 119 (1905). Right through the Middle Ages, Benedictine monks lived according to a Rule which analogously described spiritual wisdom as hearkening to the call of God. Norvene Vest, "Ear of the Heart," 19 *Parabola* 42 (1994).

M.T. Clanchy, *From Memory to Written Record: England 1066-1307*, at 35, 43 (2d ed. 1993); Hibbitts, supra note 79.

In this context it may be no coincidence that in Anglo-Saxon law, a litigant's formal statement of claim was described as a talu - literally, a "tale." *Anglo-Saxon Charters* 366 (A.J. Robertson ed., 1956).
For instance, the singular form "lag" of the term "law" in Old Norse, also meant "tune." Philip Moseley, "Laying Down the Law: Bruce Chatwin's The Songlines and Australian Aboriginal Concepts of Land," in 3 Law and Semiotics 267, 274 (Roberta Kevelson ed., 1989).


"Of course, concordia is etymologically derived from cor, cordis, 'the heart' and stands for 'an agreement of hearts, peace, order,' but the association with chorda, 'string,' leading to the idea of a 'harmony of strings,' gives the word 'a poetic ambivalence which allows for a kind of metaphysical punning'; indeed we find an interchangeable use of 'consonance' and concordia in the Vulgate, in St. Augustine, in Boethius, to name only a few. If we consider the importance of musical theory for St. Augustine as a key to the understanding of the divine order of creation and salvation, it is surely no idle playing with words to point out these musical implications (should we say 'overtones'?) of Gratian's thought." Id. at 4 (footnote omitted).

On the early fourth-century surge in Greek literacy, see Harris, supra note 82, at 115.

Plato, "Timeus" 47a (Benjamin Jowett trans.), in Plato: The Collected dialogues of Plato, supra note 86, at 1151, 1174. On visual expressiveness and metaphors in the works of Plato, see Hans Jonas, The Phenomenon of Life: Towards a Philosophical Biology 135 (1966); Keller & Grontworski, supra note 87, at 210-11. But see also Eva C. Keuls, Plato and Greek Painting 47 (1978) ("The sense of sight and the one art which relates exclusively to vision, painting, furnish Plato's favorite metaphors for everything which he considers relative, transitory and deceptive.").


The analogy between painting and poetry, prompted in part by the growing tendency to write or inscribe poetry on a surface, can be traced back to Plato ("[T]he poet is . . . the counterpart of the painter." Plato, "The Republic" 605a in Plato: The Collected dialogues of Plato, supra note 86, at 575, 830) and, beyond him, to the sixth century B.C. poet Simonides ("Painting is silent poetry; poetry is painting that speaks." Quoted in C.M. Bowra, The Greek Experience 155 (1957)). Simonides's qualifications to the comparison accurately reflected the more attenuated relationship between painting and poetry in his less literate age.

Rosalind Thomas, Literacy and Orality in Ancient Greece 89 (1992).


Harris, supra note 82, at 73, 120; see also Robert J. Bonner, "The Use and Effect of Attic Seals," 3 Classical Philology 399 (1908).


J Huizinga, The Waning of the Middle Ages 284 (1954) ("One of the fundamental traits of the mind of the declining Middle Ages is the predominance of the sense of sight . . . ."); see also R.W. Scribner, For the Sake of Simple Folk: Popular Propaganda for the German Reformation 3-5 (1981). On literacy levels in the late medieval period, see generally Harvey J. Graff, The Legacies of Literacy: Continuities and Contradictions in Western Culture and Society 53-74 (1987).


On the late medieval explosion of images, see Jacques Ellul, The Humiliation of the Word 186-92 (Joyce M. Hanks ed., 1985); Huizinga, supra note 117, at 151-52. On images as the "books of the illiterate" (a concept originally propounded by Pope Gregory I in the sixth century, but increasingly influential in this period), see Carlos M.N. Eire, War Against the Idols: The Reformation of Worship From Erasmus to Calvin 19 (1986).


See generally Hallidor Hermannsson, _Illuminated Manuscripts of the Jonsbok_ (1940); Anthony Melnikas, _The Corpus of Miniatures in the Manuscripts of Decretum Gratiani_ (1975); Malcolm Letts, "The Sachsenspiegel and Its Illustrators," 49 _Law Q. Rev._ 555 (1933); Jean-Claude Schmitt, "Le miroir du canoniste: Les images et le texte dans un manuscrit medieval," 6 _Annales: Economies, Societes, Civilisations_ 1471 (1993). On occasion, individual legal documents were also illustrated. A charter recording Edward I's grant of hunting rights to one Roger of Pilkington in 1291 "is surrounded on all four sides with good coloured drawings of animals, birds and trees, as if to embody the privileges it grants." Clanchy, _supra_ note 100, at 195. Such depictions became increasingly useful as legal texts began to circulate more generally among members of what were still only semiliterate populations. Michael Camille, "At the Edge of the Law: An Illustrated Register of Writs in the Pierpont Morgan Library," in _England In The Fourteenth Century_ , 5-6 (Nicholas Rogers ed., 1993).

For example, a thirteenth-century French manuscript of Gratian's _Decretum_ sets the "Table of Consanguinity" in the allegorical embrace of Time, drawn as a king. Reproduced in _Jacques Le Goff, Medieval Civilization: 400-1500_ , at plate 16 (Julia Barrow trans., Basil Blackwell 1988) (1964). In a fifteenth-century work, the same "table" is allegorically presented as a "Tree of Affinities." Reproduced in Gombrich, _supra_ note 47, at 256.


Perhaps the most famous example of a legal "mirror"-text is the German _Sachsenspiegel_, or "Mirror of the Saxons," composed in the early thirteenth century; also note the rather more dubious English work, _Mirror of Justices_, written in Law French circa 1285-1290, and the canon law text, _Speculum Abbreviatum_ ("Abbreviated Mirror"), composed in Germany in the early fourteenth century. As to lawyers being identified as "mirrors," note the thirteenth-century French canonist Guillaume Durand, known as Speculator (probably for his 1271 work, _Speculum judiciale_), the early fourteenth-century Italian canonist Joannes Andrae, called _speculum er lumen juris canonici_ ("mirror and light of the canon law"), and the contemporary Italian commentator Bartolus, referred to simply as _speculum juris_ ( mirror of the law ). See generally David M. Walker, _The Oxford Companion To Law_ 384, 1169-70 (1980).

For extended discussions of the "equilibrium" of the aural and the visual which marked the later Middle Ages, see Clanchy, _supra_ note 100, at 266-72; D.R. Woolf, "Speech, Text and Time: The Sense of Hearing and the Sense of the Past in Renaissance England," 18 _Albion_ 159, 166-71 (1986).


On the intersection of speaking, writing, and reading from the twelfth century, see Clanchy, _supra_ note 100, at 266-72; Joyce Colemen, "The Solace of Reading: Late Medieval Views on the Reading Aloud of Literature," 46 _ARV: Scandinavian Y.B. Folklore_ 123 (1990); Ruth Crosby, "Oral Delivery in the Middle Ages," 11 _Speculum_ 88 (1936).

On the fortunen of the dialogue form in Europe from the twelfth to the mid-fifteenth century, see K.J. Wilson, "The Continuity of Post-Classical Dialogue," 21 _Cithara_ 23 (1981); see also W.A. Davenport, "Patterns in Middle English Dialogues," in _Medieval English Studies Presented to George Kane_ 144 (Edward D. Kennedy et al. eds., 1988).

On the medieval use of poetry as a scholarly form, see Lynn Thorndike, "Unde Versus," 11 _Tractio_ 163 (1955).

Thus, the repeated formula in Froissart's _Chronicles_ (circa 1400): "as you have heard." Woolf, _supra_ note 132, at 159.

In late medieval England, for example, conveyances that might previously have involved the transfer of a symbol, such
as a knife, were instead based on the transfer of a document with the symbol physically attached. See Clanchy, supra note 100, at 39.


140. Thus, the famous thirteenth-century English property statute Quia Emptores (“Because the purchasers”). Compare this style of naming with the contemporary habit of referring to the Christian “Lord’s Prayer” (still more often heard than read) as the “Our Father.”

141. Note, for example, the thirteenth-century Court Baron, Sir John Fortescue's fifteenth-century In Praise of the Laws of England, and Christopher St. Germain's early sixteenth-century Doctor and Student. Dialogue format was also employed in the early English Year Books. T.F.T. Plucknett, Early English Legal Literature 102 (1958).

142. In the late thirteenth century, for instance, Phillippe de Beaumanoir wrote that the chapters in his Coutumes de Beaumais would "speak to" different topics, and frequently looked back on past subjects with the words: "We have spoken of . . . ." The Coutumes de Beaumais of Phillippe de Beaumanoir 5, 21 (F.R.P. Akehurst trans., 1992). Contemporary illuminated manuscripts actually depicted Beaumanoir as speaking or reciting to an audience. Camille, supra note 122, at 2.

143. Thus Littleton (in translation from Law French): "It is commonly said, that there be three warranties . . . . " Littleton's Tenures sec. 697, at 312 (Eugene Wambaugh ed., 1903). "I have heard say, that in the time of King Richard the Second . . . ." Id. sec. 720, at 322. "And upon this I have heard reason . . . ." Id. sec. 739, at 333.

144. Again, Littleton: "Also, it is spoken in the end of the said statute of Gloucester, which speaketh of the alienation with warranty made by the tenant by the curtesy . . . ." Id sec. 728, at 326.


146. See generally McLuhan, supra note 44. See also Harold A. Innis, The Bias of Communication 138 (1951) ("The discovery of printing in the middle of the fifteenth century implied the beginning of . . . a type of civilization dominated by the eye rather than the ear."); Robert K. Logan, The Alphabet Effect: The Impact of The Phonetic Alphabet on the Development of Western Civilization 185 (1986) ("Print reinforces the visual bias of the alphabet. It makes literary material more available and hence creates a greater dominance over the spoken word than manuscript writing does.").

147. Synnott, supra note 55, at 618.

148. Quoted in Keller & Grontworski, supra note 87, at 214.

149. Id.

150. For more on the epistemological shift from pictorial "image" to text-driven "imagination" and its cultural and legal implications in the seventeenth and eighteenth centuries, see James Fentress & Chris Wickham, Social Memory 13-14 (1992); Steven Wills, "Imagining Justice: Aesthetics and Public Executions in Late Eighteenth Century England," 5 Yale J.L. & Human. 51 (1993). Print was ultimately (if not initially) unfriendly to images and the medieval pictorial tradition in part because the boost which its low cost and mass availability gave to popular literacy made pictures less necessary as textual equivalents, and in part because it could not readily reproduce either the colors or the fine texture of the old illuminations. See, e.g., Bolter, supra note 88, at 73 (discussing how print technology encouraged a segregation of image and text which effectively subordinated the image by confining it to a specific small portion of the book (the Plates)); Anne Hollander, Moving Pictures 33-38 (1991) (discussing how print's growing popularity and cultural power contributed to a certain suppression of color in post-sixteenth-century European painting).

151. See generally Jay, supra note 85, at 69-82.


153. For instance, the early editions of Coke on Littleton contained a "Table of Consanguinity" that, although possessing an allegorical element (this time emphasizing the patriarchal power of the father), was neither framed nor subordinated by allegory in the same way that earlier Tables had been. See Edward Coke, The First Part of the Institutes of the Laws of England sec. 13, at 19 (photo. reprint 1979) (1628). In 1766, the allegorical aspects of the "Table of Descent" included in the first edition of Blackstone's Commentaries would be minimal, being limited to the representation of handshakes denoting marriages, and ropes indicating lines of relation. 2 William Blackstone, Commentaries on the Laws of England 240 (photo. reprint 1979) (1766).

154. This process continued into the late eighteenth century, culminating in the radical de-iconization of the Parisian Palais de Justice after the French Revolution. In the long run, however, the French government came to regret its initial asceticism, and in the nostalgic days of Napoleon III's Second Empire restored at least a measure of iconic grandeur to the criminal courts of the Palais. See generally Katherine F. Taylor, In the Theatre of Criminal Justice: The Palais De Justice in Second Empire Paris (1993).
Peter Goodrich, "Critical Legal Studies in England: Prospective Histories," 12 Oxford J. of Legal Stud. 195, 225 (1992) ("Visual representations of faith were outlawed...at the same time that English law became a textual tradition and Justitia was rendered sightless. In the specific terms of English law the text came to take the place, not least by virtue of the facilities and reproductional capacities of print technologies, of the image."). The apparent contradiction between a blindfolded figure of Justice and increased respect for texts may be resolved if one recalls that when Justice was blindfolded in the sixteenth and seventeenth centuries, texts still tended to be read aloud. See William Nelson, "From 'Listen, Lordings' to 'Dear Reader,'" 46 U. Toronto Q. 110, 113 (1976-77).


158. For instance, Coke followed the traditional pattern in frequently referring to Littleton as having "spoken," or having "said" something, but he occasionally departed from this phraseology by saying, "Littleton sheweth here," or the like, indicating an approach to the words as visual text. See, e.g., Coke, supra note 153, sec. 2, at 10; sec. 247, at 167; sec. 248, at 168; sec. 286, at 185; sec. 288, at 186. Likewise, Coke at one point remarked, "let us heare what our Author will say." Id. sec. 241, at 164. At another point he announced, "let us turne our eye to." Id. sec. 241, at 165.

159. See, e.g., Edward Coke, The Fourth Part of the Institutes of the Lawes of England cap. l, at 21,29,31,33,44; cap. 5, at 63; cap. 7, at 74 (photo. reprint 1979) (1641). But see also id. cap. l, at 24; cap. 8, at 82; cap. 9, at 97; cap. 38, at 211; cap. 53, at 259; cap. 73, at 317, for instances where Coke refers to himself and his readers as "speakers."

160. Thus, John Doderidge wrote that he had composed his work for those "who covet to contemplate with their inward eye the express and perfect image of an English Lawyer [and who desire] to view [various aspects of law] in their particular charge and duty." John Doderidge, The English Lawyer 1 (London, Assignes of J. More, Esq. 1631).

161. Coke, supra note 153, Epilogus, at 395 (wishing his students "the gladsome light of Jurisprudence"); see also Henry Finch, Law or a Discourse Thereof 5 (photo. reprint 1978) (1759) (writing of "reason" in relation to law: "[T]hrough Adam's fall...that excellent image of reason is now so wonderfully defaced, even in the best and wisest, that the light of this, as the light of the moon, shineth more obscurely, but yet shineth, so that from it all the other laws receive their light.").


165. It has been said that "the nineteenth century was among the most visual periods of western culture, the most given to precise observation-a spectator-like view shared by novelists, painters, scientists, and, to an extent, by poets, who became 'visionary,' although poetic vision did not always mean observation." Wylie Sypher, Literature and Technology: The Alien Vision 74 (1968).


168. On the predominantly "visual" gardening styles of the seventeenth and eighteenth centuries, see Classen, supra note 80, at 26-29; Yi-Fu Tuan, Topophilia: A Study of Environmental Perception, Attitudes and Values 140 (1974).

169. On surveillance and the prevailing concept of madness, see Michel Foucault, Madness and Civilization: A History of Insanity in the Age of Reason 70 (Richard Howard trans., Random House 1965) (1961) ("During the classical period, madness was shown, but on the other side of bars; if present, it was at a distance, under the eyes of reason that no longer felt any relation to it and that would not compromise itself by too close a resemblance. Madness had become a thing to look at . . ."). On surveillance and eighteenth-century criminal punishment, see Michel Foucault, Discipline and Punish: The Birth of the Prison 170-228 (Alan Sheridan trans., Pantheon Books 1979) (1975).


See, e.g., id. at 183, 220.

See, e.g., id. at 145, 203.

Id. at 35. A comment of Walter Ong's may help to put this metaphor in context in a way that underlines the relationship between print and visuality: "Only after print and the extensive experience with maps that print implemented would human beings, when they thought about the cosmos or universe or ‘world’ [or here, law], think primarily of something laid out before their eyes, as in a modern printed atlas . . . ." Walter J. Ong, Orality and Literacy: The Technologizing of the Word 73 (1982).


Thus in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall declared:

Those then who controvert the principle that the constitution is to be considered . . . are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

... .

Could it be that the intention of those who gave this power, to say that in using it the constitution should not be looked into?

In some cases, then, the constitution must be looked into by the judges.


On the history of the idea of "law as geometry" in the eighteenth and nineteenth centuries, see Greysupra note 163, at 16-20; Hoeflich, supra note 163.


Holmes once described life as "painting a picture." Oliver W. Holmes, Jr., "The Class of 61," in The Occasional Speeches of Justice Oliver Wendell Holmes, supra note 6, at 160, 161. He later suggested that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918). In connection with Holmes's penchant for visual metaphors, it is interesting to note that "he developed a religion of books," once again suggesting the link between visuality and attachment to the written word. Peter Gibian, "Opening and Closing the Conversation," in The Legacy of Oliver Wendell Holmes, Jr. 186, 214 (Robert W. Gordon ed., 1992).

See supra note 6.

See Henly, supra note 14, at 83. On other occasions, Holmes invited his interlocutors to envisage law as "a princess . . . eternally weaving into her web dim figures of the everlengthening past" (Holmes, supra note 6, at 22), and to "look at [law] as [would] a bad man" (Oliver W. Holmes, Jr., "The Path of the Law," 10 Harv. L. Rev. 407, 459 (1897)).


189. See generally Richard Sennett, The Fall of Public Man 214-16 (1976) (discussing silence as a bourgeois mechanism for controlling the less literate working class).


191. It is perhaps scarcely surprising that the dialogue of Ramus' age [the sixteenth century] should have tended away from true dialogue towards an elaborate monologue, turning its speakers from active protagonists into the custodians of a method elaborated, far from the clamour of their voices, by the writer's solitary pen.


192. See generally id. at 99-113.


194. The English poet William Blake lamented what he considered to be the aural poverty of eighteenth- and early-nineteenth-century English poetry in these lines addressed to the ancient Muses:

How have you left the ancient love
That bards of old enjoy'd in you!
The languid strings do scarcely move,
The sound is forced, the notes are few.


199. From the late seventeenth century, slander plaintiffs were burdened by a requirement of proving "special damage" that did not apply to libel plaintiffs. Alan Harding, A Social History of English Law 294 (1966).

200. One of the last major works in this form is Edward Wynne, Eunomus, or Dialogues Concerning the Law and Constitution of England (London, Benjamin White and Son 1775).


202. Afterwards, poetry played no serious role in English law except as a mnemonic device for struggling law students. In 1742, for instance, one J. Worrall published a version of Sir Edward Coke's Reports done into verse; the text was republished in a second edition in 1825, and in a third edition in 1826. Frederick C. Hicks, Men and Books Famous in the Law 81-82 (1921); Miller, supra note 72, at v-vi.


205. Jay Fliegelman, Declaring Independence: Jefferson, Natural Language and the Culture of Performance 4-15
Puckett, "Let the Girls Do the Spelling and Dan Will Do the Shooting": Literacy, the Division of Labor, and Identity in a Rural

Shirley B. Heath, communities. For a study of two contemporary Southern towns in which women are more writing-oriented than men, see

individual American women, or that men have uniformly been more writing-oriented than women in particular American


See Robert Stevens, "Harvard Sets the Style," in Law School: Legal Education In America From The 1850s To The 1980s, at 50 (1983).

For a list of the eight references to "harmony" in the Federalist Papers, see The Federalist Concordance 237 (Thomas S. Engeman et al. eds., 1980). For a list of the 21 references to "voice" or "voices," see id. at 596. But see also the relatively more abundant references to "enlightened" (23); "eye" or "eyes" (25); "reflect," "reflected," "reflecting," "reflection," or "reflections" (45); "light" or "lights" (46); "observation" or "observations" (78); and "view," "viewed," "viewing," or "views" (168).

Id. at 166, 190, 303-04, 359, 454, 593-94.

See, e.g., 1 Joseph Story, Commentaries on the Constitution of the United States 387 (Da Capo Press 1970) (1833) [hereinafter Commentaries] (declaring that in constitutional interpretation, "[w]here the words admit of two senses . . . that sense is to be adopted, which . . . best harmonizes with the nature and objects . . . of the instrument"); Joseph Story, "Course of Legal Study," in Miscellaneous Writings of Joseph Story 69 (William W. Story ed., Da Capo Press 1972) (1852) (referring to maritime law as exhibiting a "harmony of principles"); Joseph Story, "Value and Importance of Legal Studies," in Miscellaneous Writings of Joseph Story, supra, at 504 (referring to the "harmony of civil society"); see also 3 Commentaries, supra, at 754 (declaring that "our constitutions of government . . . are to speak in the same voice now, and for ever").

As to our facility, "something in excess of 60 million Americans are wholly or functionally illiterate." Jeremy Murray-Brown, "Video Ergo Sum," in Video Icons & Values 17, 19 (Alan M. Olson et al. eds., 1991). As to our comfort, it has been noted repeatedly that "increasing numbers of undergraduate students simply do not enjoy reading any more." Alan M. Olson, "Video Icons and Values: An Overview," in Video Icons and Values, supra, at 1, 3.

Explicit reference in this paragraph to a select number of less visually biased, relatively more aurally oriented American groups (and the discussion of them below) is not meant to deny the existence of other groups fitting the same description for the same reasons, such as Native Americans and, less obviously, Asian Americans. See, e.g., Smoothing the Ground: Essays on Native American Oral Literature (Brian Swann ed., 1983) (discussing the significance and manifestations of oral tradition in Native American societies); Linda C. Sledge, "Oral Tradition in [Maxine Hong] Kingston's China Men," in Redefining American Literary History 142 (A. LaVonne Brown Ruoff & Jerry W. Ward, Jr. eds., 1990) (discussing the significance of aurality in Asian American culture). Members of the latter groups, however, have had even less opportunity than members of the groups mentioned in the text to influence American legal thought and legal language. To consider them at length now would not significantly advance or affect the argument I will eventually offer on the relationship between aural cultural traditions and the use of aural legal metaphors.


See supra note 80.

On the particular danger of group-based "differences of kind" being exploited for prejudicial or discriminatory purposes, see Daniel A. Farber & Suzanna Sherry, "Telling Stories Out of School: An Essay on Legal Narratives," 45 Stan. L. Rev. 807, 818 n.69 (1993); see also Kennedy, supra note 214, at 1816-18.

This is patently not to say, however, that individual American men have uniformly been more writing-oriented than individual American women, or that men have uniformly been more writing-oriented than women in particular American communities. For a study of two contemporary Southern towns in which women are more writing-oriented than men, see Shirley B. Heath, Ways With Words: Language, Life and Work in Communities and Classrooms (1983). See also Anita Puckett, "Let the Girls Do the Spelling and Dan Will Do the Shooting": Literacy, the Division of Labor, and Identity in a Rural
219. "[I]t is indisputable that literateness (in the fullest sense of the term) was more valued, encouraged and achieved in early America by men than by women." Cathy N. Davidson, Revolution and the Word: The Rise of the Novel in America 61 (1986).

220. One feminist solution to the perceived "maleness" of writing has been to consciously disrupt traditional syntactic forms and "rewrite" the dictionary (on which written language is based) so as to accommodate the hitherto unarticulated or semantically suppressed realities of women's lived experience. See, e.g., Mary Daly, Gyn/Ecology: The Metaethics of Radical Feminism (1978); see also Mary Daly, Webster's First New Intergalactic Wickedary of the English Language (1987).

221. In Western societies, "[s]exual dominance is . . . intimately related to visual dominance." David Howes, Sensorial Anthropology, in Varieties, supra note 48, at 167, 189; see also Arthur Krocker, Spasm: Virtual Reality, Android Music and Electric Flesh 49 (1993) ("[T]he eye has a penis. It is a privileged organ of the male sex . . . ").


223. Contemporary feminist opposition to pornography is at least partly based on the fact that it is purely visual, disconnected from any other form of sensory engagement:

   The man who stares at a photograph of a nude woman is a voyeur. He can look freely and turn away when he wishes. He can run his hands over the two dimensional surface, but he will not be touched. He can know the body of a woman, and yet encounter a knowledge that will not change him . . .

Susan Griffin, Pornography and Silence: Culture's Revenge Against Nature 34 (1981); see also Sontag, supra note 48, at 24 ("The knowledge gained through still photographs will always be . . . a semblance of knowledge, a semblance of wisdom; as the act of taking pictures is a semblance of wisdom, a semblance of rape. The very muteness of what is, hypothetically, comprehensible in photographs is what constitutes their attraction and provocativeness."). This feminist critique of visuality has recently been extended to embrace the now famous photograph of the whole Earth taken from space. See Yaakov J. Garb, "Perspective or Escape? Ecofeminist Musings on Contemporary Earth Imagery," in Reweaving the World: The Emergence of Ecofeminism 264 (Irene Diamond & Gloria E. Orenstein eds., 1990). "[T]he whole earth image," writes Garb in language that purposefully evokes Sontag's, "has no telling: it is verb-less, a snapshot, a single frozen instant. . . . It is not farfetched to call this image the magnum opus of patriarchal consciousness." Id. at 267, 275.


225. In most popular representations it seems that men look and women are looked at. In film, in television, in the press and in most popular narratives men are shown to be in control of the gaze, women are controlled by it. Men act; women are acted upon. This is patriarchy.

Gamman & Marshment, supra note 222, at 1.

226. See Keller & Grontworski, supra note 87.

227. Thus, Linda Greene's initial concern about the reception that Derrick Bell's dialogically structured Chronicles would get from traditional (and mostly male) legal academics: "After all, some would say, isn't it a bit contrived to discuss a subject as important as equality through conversations . . . [?]" Linda Greene, "A Short Commentary on the Chronicles," 3 Harv. Blackletter J. 60, 62 (1986).

228. Studies have indeed suggested that men talk more than women in a variety of different settings. See generally Deborah James & Janice Drakich, "Understanding Gender Differences in Amount of Talk: A Critical Review of Research," in Gender and Conversational Interaction 281 (Deborah Tannen ed., 1993).


231. Most eighteenth- and nineteenth-century women lived within a world bounded by home, church, and the institution
...of visiting-that endless trooping of Women to one another's homes for social purposes. It was a world inhabited by children and other women. Women helped one another with domestic chores and in times of sickness, sorrow, or trouble. Entire days, even weeks, might be spent exclusively with other women. Urban and town women could devote virtually every day to visits, teas, or shopping trips with other women. Rural women developed a pattern of more extended visits that lasted weeks and sometimes months.


ld. at 165.


Brown, supra note 232, at 167-81; Barbara Sicherman, "Sense and Sensibility: A Case Study of Women's Reading in Late-Victorian America," in Reading in America: Literature and Social History 201 (Cathy N. Davidson ed., 1989).

On how this anxiety burdened women who, by writing, proposed to enter a primarily male preserve and in so doing proposed to dissociate themselves from their own bodies and their own culture, see Sandra M. Gilbert & Susan Gubar, The Madwoman in the Attic: The Woman Writer and the Nineteenth Century Literary Imagination 3-16 (1979).


"Men don't make passes at girls who wear glasses."

Compare the words of feminist Luce Irigaray, speaking from the somewhat analogous perspective of twentieth-century France: "Investment in the look is not privileged in women as in men." Quoted in Craig Owens, The Discourse of Others: Feminists and Postmodernism, in The Anti-Aesthetic: Essays on Postmodern Culture 70 (Hal Foster ed., 1983); see also Luce Irigaray, "The Sex Which Is Not One," in New French Feminism: An Anthology 99, 101 (Elaine Marks & Isabelle de Courtivron eds., 1980) ("Woman's desire . . . does not speak the same language as man's desire . . . . In this logic, the prevalence of the gaze . . . is particularly foreign . . . ").

On talk or "dialogue" as "the essence of friendship" among American women, see Deborah Tannen, You Just Don't Understand: Men and Women in Conversation 80, 85 (1990); Carl S. Becker, "Friendship Between Women: A Phenomenological Study of Best Friends," 18 J. Phenomenological Psychol. 59 (1987). On talk as the primary medium by which women have passed on significant bodies of scientific, as well as personal, information (concerning, for instance, the practice of midwifery), see Ruth Ginzberg, "Uncovering Gynocentric Science," in Feminism & Science 69, 74-75 (Nancy Tuana ed., 1989)

On women's storytelling and storytelling strategies, see Barbara Bate, "Themes and Perspectives in Women's Talk," in Women Communicating: Studies Of Women's Talk 303 (Barbara Bate & Anita Taylor eds., 1988); Deanna L Hall & Kristin M. Langellier, "Storytelling Strategies in Mother-Daughter Communication," in Women Communicating: Studies of Women's Talk, supra, at 107; Susan Kalcik, "...like Ann's gynecologist or the time I was almost raped": Personal Narratives in Women's Rap Groups," in Women and Folklore 3 (Claire R. Farrer ed., 1975); Michael Presnell, "Narrative Gender Differences: Orality and Literacy," in Doing Research on Women's Communication: Perspectives on Theory and Method 118 (Kathryn Carter & Carole Spitzack eds., 1989). The particular association of storytelling with women in the Euro-American tradition notably goes back to the seventeenth century when rapidly increasing levels of male literacy left women largely responsible for continuing the oral traditions of Western culture. Peter Burke, Popular Culture in Early Modern Europe 51 (1978).


On the popularity of novels with American women in the eighteenth and early nineteenth centuries in particular, see Davidson, supra note 219, at 112-25; see also Brown, supra note 232, at 195-96. To some extent, women during this period may have preferred novels because they had limited access to other forms of printed matter. At the same time, novels-many of which revolved around female characters-had a special appeal to female readers insofar as they enabled them to feel "part of a community and tradition of women who talk well about their lives and link them, by language, to larger subjects." Rachel M. Brownstein, Becoming a Heroine: Reading About Women in Novels 24 (1982).

"Many women report feelings of craziness when their own experience fails to comport with the dominant theory of what they should feel. The way out of this craziness is talk with other women about women's experience. This talk, or consciousness raising, has taught women several things." Mari J. Matsuda, "Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice," 16 N.M. L. Rev. 613, 620-21 (1986) (footnotes omitted); see also Catherine A. MacKinnon, "Feminism, Marxism, Method and the State: An Agenda for Theory," 7 Signs 515, 536 (1982).


See, e.g., Rachel W. Jacobsohn, The Reading Group Handbook 5, 15, 55 (1994); Elizabeth Long, "Textual Interpretation as Collective Action," in The Ethnography of Reading 180, 196-203 (Jonathan Boyarin ed., 1992); Elizabeth Long, "Women, Reading, and Cultural Authority: Some Implications of the Audience Perspective in Cultural Studies," 38 Am. Q. 591 (1986) [hereinafter Long, Women, Reading, and Cultural Authority]. As Long's work emphasizes, reading groups are not now, nor have they ever been, an exclusively female enterprise. Contemporary American men nonetheless seem to be less attracted to them despite the precedents for such groups in the history of American and European men's culture (ranging backwards from the "correspondence societies" of nineteenth-century male artisans, to the eighteenth-century English coffeehouses, to the medieval monasteries which featured vocal readings of scripture during communal meals).


Mary F. Belenky et al., Women's Ways of Knowing: The Development of Self, Voice and Mind 18 (1986); see also Jack, supra note 222, at 30-37 (describing loss of "voice" as women's metaphorical equivalent for loss of "self"); Elizabeth Bernstein & Carol Gilligan, "Unfairness and Not Listening: Converging Themes in Emma Willard Girls' Development," in Making Connections: The Relational Worlds of Adolescent Girls at Emma Willard School 47 (Carol Gilligan et al. eds., 1990) (discussing the use of "not listening" as a metaphorical expression for "unfairness" in the language of eleventhand twelfth-grade girls in a private girls' school in New York State).

In another recent study, Lyn Mikel Brown and Carol Gilligan have noted the tendency of American adolescent girls to draw more visual metaphors into their speech just as they are entering their first romantic relationships with boys who bring with them the visualist biases of American men's culture. See Lyn M. Brown & Carol Gilligan, Meeting at the Crossroads 167, 184, 210-12 (1992). Elizabeth Long has also noted how women in reading groups tend to be drawn towards visual metaphors, which "seems to support Ong's claim that the increasing influence of the written word in our culture has privileged the visual . . . over the oral/aural in the human sensorium." Long, Women, Reading And Cultural Authority, supra note 248, at 605.


Id. at 162. Compare the words of biophysicist Cynthia Haggerty, quoted in Linda J. Shepherd, Lifting the Veil: The Feminine Face of Science 83 (1993) ("What does this material tell me about the life process and about whatever pathology is going on?"). In a similar metaphoric vein, cancer researcher Sigrid Myrdal has characterized her scientific approach as "just sort of listening-just listening, without knowing how you're listening." Id. at 84.

In this context, it is interesting to note that traditional, male-generated, scientific language labels irrelevant data "noize," metaphorically suggesting the undesirability, or at least the extraneous nature, of hearing and things heard.

the authors pointedly reject a visual metaphor for female fulfillment—a woman smiling in favor of the aural metaphor of a
women singing); Cries of The Spirit: A Celebration of Women's Spirituality (Marilyn Sewell ed., 1991); Stephanie
Demetrakopoulos, Listening to Our Bodies: The Rebirth of Feminine Wisdom (1983); Bell Hooks, Talking Back:
Thinking Feminist, Thinking Black (1989); Rita C. Manning, Speaking From the Heart: A Feminist Perspective on
Ethics (1992); Manuela D. Mascetti, The Song of Eve (1990) (discussing goddesses and religious aspects of feminism);
Kathleen Noble, The Sound of a Silver Horn: Reclaiming The Heroism in Contemporary Women's Lives (1994); To
phenomenon of "dialogue" as a recurrent metaphor of power relationships in feminist writing, see Alice Templeton, "The

256. Having said this, I do not wish to imply that feminist metaphors have been uniformly aural A variety - "lifting the veil,
"removing the blindfold," or "looking behind the mirror," used as figures of empowerment, or "invisibility," used as a figure of
disempowerment - have been strikingly visual Visual metaphors nonetheless seem to fill a less distinctive role in feminist
rhetoric.

257. See Graff, supra note 117, at 108-72.

258. On the extent and impact of literacy instruction in colonial American schools, see Lawrence Cremin, American
Education: The Colonial Experience 1607-1783 (1970); Kenneth Lockridge, Literacy in Colonial New England 57-69
(1974).

259. See, e.g., Cornel West, "West of Righteous: Anders Stephanson Talks with Cornel West," Artforum, Feb. 1994, at 66,
104.

260. On the significance of aurality and oral communication in eighteenth- and nineteenth-century (white) America, see
Brown, supra note 232; Warner, supra note 176, at 21-29; Harry S. Stout, "Religion, Communications, and the Ideological

261. On eighteenth- and nineteenth-century (white) American oratory, see Barnet Baskerville, The People's Voice: The
Orator in American Society (1979). See also A History and Criticism of American Public Address (William N. Brigade
ed., 1943).

262. See Graff, supra note 117, at 340-72.

263. In 1875, E.L. Godkin, the editor of the influential periodical Nation, observed that "[e]veryone . . . knows what the 'great
speech' of the average Congressman has become. It is usually a diffuse written essay, full of quotations, often far-fetched
and sometimes absurd, which he expects few people to listen to, and only lets off that he may get it printed." Quoted in
Baskerville, supra note 261, at 90.

264. Barnet Baskerville, "19th Century Burlesque of Oratory," 20 Am. Q. 726, 726 (1968); Barnet Baskerville, "Principal

265. On the "declamatory" nature and style of much antebellum American literature, see Daniel J. Boorstin, "A Declamatory
conventions shaped one famous antebellum literary work, see John G. Bayer, "Narrative Techniques and the Oral Tradition
in The Scarlet Letter," 52 Am. Literature 250 (1980). It should not be assumed, however, that white American authors
completely disregarded or denigrated aurality in the years after the Civil War. See, e.g., Barry Sanders, A is For OX:
caricatured and occasionally condescending treatment of orality in The Adventures of Huckleberry Finn); Thomas D. Zlatic,
"The 'Seeing Eye' and the 'Creating Mouth': Literacy and Orality in Mark Twain's Joan of Arc," 21 Clio 285 (1992); Larry D.
author).


267. "The ritualistically silent audience of the nineteenth century was an audience of readers observing a print convention.
Richard Lanham, The Electronic Word: Democracy, Technology and the Arts 76 (1993); see also Kasson, supra note
266, at 239-40; Lawrence W. Levine, Highbrow/Lowbrow: The Emergence of Cultural Hierarchy in America 177-200
(1988).

268. For a brief introduction to the late-nineteenth-century "silent reading" movement, see Daniel Calhoun, The Intelligence
of a People 82-85 (1973).

269. The antiliteracy laws were not completely effective, however. In some cases, white slaveowners taught their slaves to
read so that the latter could assist in keeping their masters' accounts or running their businesses. White children are also
known to have instructed their black playmates and servants. Thomas L. Webber, Deep Like the Rivers: Education in the
Slave Quarter Community 131-38 (1978). For a recent study of the extent and nature of African American literacy in the
pre-Civil War South, see Janet D. Cornelius, "When I Can Read My Title Clear": Literacy, Slavery and Religion in the

271. Writing's limited role in African American society—especially in the antebellum period—was long complemented and its negative impact on African American visuality was even reinforced by the limited presence of paintings and other pictures in African American homes. As Frederick Douglass noted in 1870:

> Heretofore, colored Americans have thought little of adorning their parlors with pictures . . . . Pictures come not with slavery and oppression and destitution, but with liberty, fair play and refinement. These conditions are now possible to colored American citizens, and I think the walls of their houses will soon begin to bear evidence of their altered relation to the people about them.


273. Michele Wallace, "Modernism, Postmodernism and the Problem of the Visual in Afro-American Culture," in *Out There: Marginalization and Contemporary Culture* 39, 40 (Russell Ferguson et al. eds., 1990); see also West,* supra* note 259, at 71 ("I do not believe we have produced an African-American painter comparable to a John Coltrane or a Duke Ellington. In fact I don't even think we've produced a writer comparable to them. But you have this long history in which literacy was denied, in which pictorial art was downplayed . . . .").

274. The African cultures from which black Americans came have historically declined to accord superior status to the visual. Thus, "African aesthetics beautifully blends the human senses of sight, touch, sound, and the physical feel of movement . . . [while] Western literacy has led to a rearrangement of the senses, with emphasis on the visual, on looking." Simon Ottenberg, *Anthropology and African Aesthetics* 9 (1971); see also Ian Ritchie, "Fusion of the Faculties: A Study of the Language of the Senses in Hausaland," in *Varieties,* *supra* note 48, at 192.


While obviously excelling at a visual craft, a number of African American novelists have expressed or demonstrated discomfort with visuality, especially as they have associated that with white American culture. The most obvious case in point is Ralph Ellison, author of *The Invisible Man* (1952). Toni Morrison's first novel, *The Bluest Eye* (1970), featured a young female character, Pecola Breedlove, suffering under the racist, judgmental gaze of her white teachers and the other white people in her community. Morrison's narrator, Claudia MacNeer, "vents her rage against this eye-dominated culture by poking out the 'glassy blue eyeballs' of a baby doll." Anthony J. Berret, "Toni Morrison's Literary Jazz," 32 *CLA J.* 267, 269 (1989); see also Malin L. Walther, "Out of Sight: Toni Morrison's Revision of Beauty," 24 *Black Am. Literature F.* 775, 786 (1990) (discussing how Morrison's writing consistently "removes black beauty from the [white] specular system").


280. See Smitherman,* supra* note 275, at 157-61.

recount how one of Haley's own ancestors was abducted by slavers. Toni Morrison's personal quest made possible by a history of family storytelling, a quest which culminates in Haley hearing a West African riot notably features the night-long retelling of a historical tale about escaped slaves. Alex Haley's

On the role of oral storytelling in contemporary African American fiction, see generally Jay Clayton, "The Narrative Turn in Recent Minority Fiction," 2 Am. Literary Hist. 375 (1990). The climax of David Bradley's The Chaneysville Incident (1981) notably features the night-long retelling of a historical tale about escaped slaves. Alex Haley's Roots (1976) is the story of a personal quest made possible by a history of family storytelling, a quest which culminates in Haley hearing a West African riot recount how one of Haley's own ancestors was abducted by slavers. Toni Morrison's Song of Solomon (1977) features three
characters—Macon Dead, First Corinthians, and Milkman—who through personal experiences rediscover the power of stories told and heard. (On the specific connection between Morrison's storytelling and African American oral tradition, see Clarke, supra note 293; Joyce I. Middleton, "Orality, Literacy, and Memory in Toni Morrison's Song of Solomon," 55 C. Eng. 64 (1993)). John Wideman's Reuben (1987) is about an unlicensed lawyer who helps clients by simply listening to them tell their own stories. Compare the prominence of storytelling in these and other works with the prominence of storytelling in the Canterbury Tales and the Decameron. See supra p. 253.

295. See generally Graff, supra note 117.


298. NEA-Tuscon Survey, supra note 297, at 110-11.

299. "Were the Hispanic community in the United States to possess the means of production, promotion, and distribution of its literature in printed form, were it to control its history and image in print, [Hispanic writers'] works might he more print-bound [i.e., more visually oriented] . . . " Nicolas Kanellos, "Orality and Hispanic Literature in the United States" in Redefining American Literary History, supra note 213, at 117,122.

300. Arnulfo D. Trejo, "Of Books and Libraries" in The Chicanos: As We See Our Selves 167,172-74 (Arnulfo D. Trejo ed., 1979). It is noteworthy that the rate of illiteracy among Spanish adults as late as the 1850s was roughly 75%, as compared to 30% to 33% among English adults. Carlo M. Cipolla, Literacy and Development in the West 1115 (1969).

301. "For the Mexican American, the spoken language has been the primary means of transmitting from one generation to another information that is considered significant and/or unusual." Trejo, supra note 300, at 172.


304. See, for example, the works of Rudolfo Anaya, discussed in Reed W. Dasenbrock, "Forms of Biculturalism in Southwestern Literature: The Work of Rudolfo Anaya and Leslie Marmon Silko," 21 Genre 307 (1988).


306. See generally Kanellos, supra note 299.


313. Roger Thompson, Sex in Middlesex: Popular Mores in a Massachusetts County, 1649-1699, at 32, 169-89 (1986).


315. Sally M. Promey, Spiritual Spectacles: Vision and Image in Mid-Nineteenth Century Shakerism 19 (1993). The "first Shaker," Ann Lee, is supposed to have said, "I look into the windows of heaven, and see what there is in the invisible world." Quoted in id. at 17.
Torah is emphasized by this excerpt from the Midrash: Holy Book and Holy Tradition

At least one student of McLuhan's thought has explicitly concluded that his "communication theory was a direct outgrowth of his Catholicism." Arthur Krocker, Technology and the Canadian Mind: Innis/McLuhan/Grant 78 (1984).

One commentator has suggested that the label "is a strange one for a people who . . . made prodigious efforts to prevent just the fate of being smothered by texts." Daniel J. Silver, The Story of Scripture: From Oral Tradition to the Written Word 276 (1990).

"And the Word became flesh and dwelt among us . . .; we have beheld his glory." John 1:14.

E.g. Deuteronomy 6:4. See Susan A. Handelman, The Slayers of Moses: The Emergence of Rabbinic Interpretation in Modern Literary Theory 17 (1982); Raymond A. Bowman, "Yahweh as Speaker," 3 J. Near E. Stud. 1 (1944); Don Ihde, "Studies in the Phenomenology of Sound: 111. God and Sound," 10 Int'l Phil. Q. 247 (1979); Adin Steinsaltz, "The Command is to Hear: An Interview with Rabbi Adin Steinsaltz," 19 Parabola 27 (1994). The notion of God as speaker is magnificently captured in the rabbinic legend that holds that if all things in the world were to fall silent, humankind would hear the voice of God from Sinai, incessantly pronouncing the words of the Ten Commandments. David J. Wolpe, In Speech and In Silence: The Jewish Quest for God 45 (1992). But see also Daniel Boyarin, "The Eye in the Torah: Ocular Desire in Midrashic Hermeneutic," 16 Critical Inquiry 532 (1990) (arguing that the importance of visual revelation in Judaism has traditionally been underestimated).

It has been said that the Hebrew Bible is "full of a dialogue between heaven and earth. It tells us how again and again God addresses man and is addressed by him.... [S]ometimes these records actually assume a dialogic form." Martin Buber, On Judaism 214 (1967). See generally Walter L. Reed, Dialogues of the Word: The Bible as Literature According to Bakhtin (1993).

Quoted in Herbert Howarth, "Jewish Art and the Fear of the Image: The Escape from an Age-Old Inhibition," Commentary, Feb. 1950, at 142, 143. See also Shemaryahu Talmon, "Oral Tradition and Written Transmission, or the Heard and the Seen Word in Judaism of the Second Temple Period," in Jesus and the Oral Gospel Tradition 121,156 (Henry Wansbrough ed., 1991) ("In the biblical milieu, aurality, viz. the heard word, fulfils the function which visibility, viz. written transmission and/or pictorial narration, fulfils in cultures that are more manuscript-conscious.").

Jose Faur, Golden Doves with Silver Dots: Semiotics and Textuality in Rabbinic Tradition 29-30 (1986). Compare the comment of Jewish historian Hans Kohn:

[To this folk [i.e., the Jews] did God become a voice. Again and again sounds the command "Hear!" When Elijah becomes aware of God he hears only a still small voice. Therefore the Jew never made himself an image of God. It is the word, the logos, which to the Jews is the mediator between the infinite and the individual, and the word carries more of infinity within it than the sharp form of the frozen image.

Quoted in Howarth, supra note 324, at 144; see also Boman, supra note 85; Handelman, supra note 322 (discussing aurality's impact on various dimensions of Jewish religious tradition); Philip S. Alexander, "Orality in Pharisaic-Rabbinic Judaism at the Turn of the Eras," in Jesus and the Oral Gospel Tradition supra note 324, at 159.

In light of such comments, it is interesting to note that ancient Judaism took a limited turn towards the visual when it encountered Hellenistic Greek culture (on the visuality of which see supra notes 107-16 and accompanying text). In the first century A.D., for instance, the Jewish commentator, Philo of Alexandria, repeatedly "transform[ed] . . . biblical expressions involving hearing into ones involving sight. Hans Blumenberg, The Legitimacy of the Modern Age 286 (Robert M. Wallace trans., MIT Press 1983).

Thus, Genesis begins with the words "In the beginning," and in Hebrew is calledBereshit: Exodus begins with the word "Names," and is called Sh'mot: Leviticus begins with the words "In the wilderness," and is calledBamidbar; and Deuteronomy begins with the word "Propositions," and is called D'varim. Arthur J. Jacobson, "The Idolatry of Rules: Writing Law According to Moses, with Reference to Other Jurisprudences," 11 Cardozo L. Rev. 1079, 1079 n.1 (1990). Compare the medieval method of labelling statutes, supra note 140 and accompanying text.

On Oral Torah, see generally Birger Gerhardsson, Memory and Manuscript: Oral Tradition and Written Transmission in Rabbinic Judaism and Early Christianity (1961); Jacob Neusner, Oral Tradition in Judaism: The Case of the Mishnah (1987). The Judaic insistence on Oral Torah as a necessary complement to Written Torah has led at least one commentator to suggest, not altogether tongue in cheek, that "[w]hat the Catholic Encyclopedia writes [about oral revelation] could just as well have been written by a rabbi." Marcel Simon, "The Ancient Church and Rabbinic Tradition," in Holy Book and Holy Tradition 94, 94 (F.F. Bruce & E.G. Rupp eds., 1968). The religious and cultural importance of Oral Torah is emphasized by this excerpt from the Midrash:
After he had taught Moses the oral Torah, the Holy One - blessed be He - said unto him: teach it to Israel. Moses answered: Lord of the Universe, I shall write it down for them. But God replied, saying: I do not want you to write it down, for I know that the nations of the world will rule over Israel and attempt to take it from them. I give Israel mikra [reading] in written form, but I give them Mishna, Talmud and Agada orally, and thus will Israel be distinguished from all other nations.

Midrash Rabba, Exodus 47, quoted in Simon, supra, at 110.

328. Faur, supra note 325, at 100-02.


330. Lukinsky, supra note 329, at 1840; see also Jonathan Boyarin, "Voices Around the Text: The Ethnography of Reading at Mesivta Tifereth Jerusalem," in The Ethnography of Reading, supra note 248, at 212 (discussing the relationship of text and speech in Jewish study).

333. Quoted in Wolpe, supra note 322, at 123. The importance of spoken prayer in Jewish tradition is intimately connected with God's status not only as a speaker, but as a listener. Id. at 125-27.

332. Benjamin Yarshav, The Meaning of Yiddish 79 (1990). As this Article was going to print, I chanced upon a recent comment by Rabbi Harold S. Kushner that generally reinforces the points made in this paragraph about the place of aurality in modern Judaism: "We sanctify our power of speech. . . . While some would claim that 'talk is cheap,' in Judaism words are real . . . . Jews take words seriously . . . because, since the Temple was destroyed nineteen hundred years ago and we no longer bring animal offerings, words are the currency of our transactions with God." Harold S. Kushner, To Life!: A Celebration of Jewish Being and Thinking 69 (1993).

333. See supra notes 58-69 and accompanying text.

334. See supra notes 70-73 and accompanying text.


344. See supra note 209 and accompanying text.


347. For example, for Jews and Catholics alike . . . it seems plausible to argue that there is a price attached to entry into leadership positions within [the bench and bar]. This price has been the modulation, if not outright suppression of much awareness of anything within their respective religious traditions that might be significantly different from—let alone pose a challenge to—the wider American (and Protestant?) culture. Levinson, supra note 340, at 1058.

348. In the words of one woman looking back on the early history of women in American law teaching:

The trick was to be able to be just like the men—whether that meant in our behaviors, demeanors, emotions, values, assumptions, styles of thinking or styles of relating. If our femaleness showed through, or if we relied on our socialized natures for guidance about how to behave, react, interact or reason, we were presumed less competent, disqualified, and necessarily less lawyerly.


349. "Marginalized groups may lack the inclination to engage in certain ways of thinking and writing because we learn early that such work may not be recognized or valued." Bell Hooks, Yearning: Race Gender and Cultural Politics 129 (1990).

350. Recall, for example, the Realists of the 1930s and 1940s, the adherents of Critical Legal Studies in the 1970s and 1980s, not to mention today's feminist and critical race scholars.


353. For a recent discussion of this aspect of traditional legal thought that rejects the notion that "autonomy" necessarily leads to "atomism," see Linda C. McClain, "'Atomistic Man' Revisited: Liberalism, Connection and Feminist Jurisprudence," 65 S. Cal. L. Rev. 1171 (1992).


355. On the nineteenth-century roots of this idea, see Grey, supra note 163, at 7. Although it is currently out of favor in many quarters of the academic community, this notion has been stoutly defended, and to some extent reanimated, by Ronald Dworkin. See Ronald Dworkin, Taking Rights Seriously (1977); Ronald Dworkin, "No Right Answer?," 53 N.Y.U. L. Rev. 1 (1978).


357. For any jurists . . . the central task of jurisprudence appears as the analysis and systematic exposition of legal rules and precepts, and the deduction of the general principles and concepts that underlie them, and the way in which these may be built up into a logical and coherent scheme or system. A.L. Epstein, "The Case Method in the Field of Law," in The Craft of Social Anthropology 205, 208-09 (A.L. Epstein ed., 1967). On the systematizing, ordering predispositions of "classical" American legal thought, see Grey, supra note 163, at 8-10; Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940," 3 Res. L. Soc. 3, 8-9 (1980).

358. See Horwitz, supra note 351, at 10-19; Kennedy, supra note 357, at 4-5.


360. "Vision is that sense which places the world at greatest remove." Keller & Grontworski, supra note 87, at 213.


362. From a Platonic perspective, it might be said that "[v]ision connects us to truth as it distances us from the corporeal." Keller & Grontworski, supra note 87, at 209.

363. Tuan, supra note 49, at 118; see also Clemens E. Benda, "Language, Consciousness and Problems of Existential Analysis," 14 Am. J. Psychotherapy 259, 262 (1960) (positing that "when sound is eliminated from our experience, it becomes clear how inadequate and ambiguous is the [purely] visual experience").
364. See supra note 223 and accompanying text.

365. “Critics of the Cartesian skeptical tradition have long questioned vision as the Cartesian paradigm of perception, asking if sight, by its very nature, does not presume a detachment from the Other that is then solidified into separateness from the Other.” O’Fallon & Ryan, supra note 22, at 897.


371. Lowe, supra note 80, at 7.

372. Ong, supra note 75, at 166.


375. Ackerman, supra note 166, at 219.


377. “To view something closely by sight, we wish to stop it for inspection, and we do so when we can, studying even motion itself, or so we pretend, in a series of still shots.” Ong, supra note 75, at 41.

378. Keller & Grontworski, supra note 87, at 213; see also Jonas, supra note 108, at 145 (“Only sight . . . provides the sensual basis on which the mind may conceive the idea of the eternal, that which never changes and is always present.”).

379. Quoted in Cox, supra note 191, at 102.


381. Tuan, supra note 49, at 118.

382. Chidester, supra note 368, at 11.


384. Ong, supra note 75, at 129.

385. See supra part II.A (Seeing Culture).

386. See supra part II.B (Visuality and Power).


388. As Joan Williams has pointed out, “feminists of difference submerge the fact that the [female] thinkers who have developed the new epistemology [that has challenged these values] have, by and large, been cerebral and detached in the extreme.” Joan C. Williams, “Deconstructing Gender,” 87 Mich. L. Rev. 797, 805 (1989); see also Frances Olsen, “Feminist Theory in Grand Style,” 89 Colum. L. Rev. 1147, 1168-74 (1989) (reviewing Catherine A. MacKinnon, Feminism
389. Williams, supra note 388, at 806. This would seem to undermine the contention that any particular values are "male" per se.


391. Witness the large body of African American legal scholarship framed in "traditional" style that reflects and indeed indulges the norms of abstraction, disengagement, and detachment.

392. See, for example, the "critical" works of the white American legal theorists discussed in part III, infra ("Fair Hearings").

393. See, e.g., Ong, supra note 75, at 283-86. Following American sociologist Robert Merton, a number of scholars have suggested that the Protestant bias towards these values created a North European, and eventually an American, intellectual climate in which science and scientism naturally flourished. For a recent review and critique of the "Merton thesis", see John H. Brooke, Science and Religion: Some Historical Perspectives 109-16 (1991).


396. E.g., story, poetry. See discussion infra part III.C (Law and the Phenomenology of Sound).

397. Note, for example, the striking correlation between the idea of legal objectivity/impartiality and the use of visually evocative language on the one hand, and the idea of partiality/subjectivity and the use of aurally evocative language on the other in this excerpt from a well-known law review article:

The idea of impartiality implies human access to a view beyond human experience, a "God's eye" point of view. Not only do humans lack this inhuman perspective, but humans who claim it are untruthful, trying to exercise power to cut off conversation and debate. . . . [A] single absolute truth would mean the end of human discourse, but . . . we are happily saved from that end because any truth, once uttered, becomes immediately one truth among many, subject to more discourse and dispute.

Martha Minow, "The Supreme Court, 1986 Term - Foreword: Justice Engendered," 101 Harv. L. Rev. 10, 75 (1987) (footnotes omitted). Carol Gilligan and her colleagues might have been referring to precisely this statement when they observed that "the talk of separation with its imagery of seeing . . . suddenly yields to a different language for describing connection and closeness with others, a language of talking, of listening. . . ." Gilligan et al., supra note 255, at 316.

398. Martha Minow came to the edge of this point in 1988 when, in a footnote, she suggested that in legal discourse, even her casual use of "visual metaphors, like 'glimpse,' 'see,' and 'reveal,' despite my intentions, may invoke positivist conceptions of objectivity and unmediated reality, graspable through perception." Minow, supra note 397, at 68 n.270.

Part II Lyrics: What a shame, what a shame we all remain / Such fragile broken things / A beauty half betrayed / Butterflies with punctured wings / Still there are darkened places deep in my heart.Â Part II, thereâ€™s just nothing like that. That song will never be on a radio station. â€” that song doesnâ€™t need that sort of following in order to connect.â€ ”Part II” Track Info.