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Articles

The Image of Truth: Photographic Evidence and the Power of Analogy

Jennifer L. Mnookin*

We have but Faith: We cannot know
For Knowledge is of things we see.
Alfred Tennyson, *In Memoriam*[1]

Maxims that urge the power of images are cultural commonplaces with which we are all too familiar: "a picture's worth a thousand words," "seeing is believing," and so forth.[2] The photograph, in

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1. ALFRED TENNYSON, *In Memoriam*, *in* TENNYSON'S POETRY 119, 120 (Robert W. Hill, Jr. ed., 1971).

2. Some research lends credence to these adages. *See, e.g.*, Brad E. Bell & Elizabeth F. Loftus, *Vivid Persuasion in the Courtroom*, 49 J. PERSONALITY ASSESSMENT 659 (1985) (claiming that "vivid" testimony is more persuasive than "pallid" testimony); William C. Costopoulos, *Persuasion in the Courtroom*, 10 DUQ. L. REV. 384, 406 (1972) (suggesting that more

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particular, has long been perceived to have a special power of persuasion, grounded both in the lifelike quality of its depictions and in its claim to mechanical objectivity.[3] Seeing a photograph almost functions as a substitute for seeing the real thing. As Susan Sontag pointed out in her seminal musings on photography, "Photography furnishes evidence. Something we hear about, but doubt, seems proven when we're shown a photograph of it."[4] Though Sontag meant "evidence" in the general sense of proof or knowledge, her claim holds equally true in the specifically legal context. Indeed, the use of photographs and other kinds of machine-produced visual images has become a routine evidentiary technique in the American courtroom. Visual evidence has played a central role in several of the highest-profile legal cases of the last few years—think, for example, of the infamous videotape of the Los Angeles police officers' beating of Rodney King,[5] or of the damaging photographs admitted in the civil suit against O.J. Simpson showing him clad in Bruno Magli shoes.[6] And it is by no means only in such sensational cases that photographs and other kinds of visual evidence are deployed; rather,

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learning takes place through vision than through the use of all other senses combined); M.I. Posner et al., *Visual Dominance: An Information Processing Account of Its Origins and Significance*, 83 PSYCHOL. REV. 157 (1976) (arguing that visual inputs dominate other sensory modalities).

3. *See generally* ROLAND BARTHES, CAMERA LUCIDA: REFLECTIONS ON PHOTOGRAPHY 80 (Richard Howard trans., Hill & Wang 1981) (1980) (declaring that "the photograph is literally an emanation of the referent"); Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, *in* ILLUMINATIONS 221, 221 (Hannah Arendt ed. & Harry Zohn trans., 1973) (arguing that the aura of an individual work of art withers with the creation of photography and the possibility of mechanical production); Lorraine Daston & Peter Galison, *The Image of Objectivity*, REPRESENTATIONS, Fall 1992, at 81, 120 (suggesting that for late-19th-century scientists, the machine, and in particular the photograph, "seemed at once a means to, and a symbol of, mechanical objectivity").

4. SUSAN SONTAG, ON PHOTOGRAPHY 5 (1978).

5. For a selection from the mountain of popular coverage that focuses on the videotape and its interpretations, see Chuck Hagen, *Photography View: The Power of a Video Image Depends on the Caption*, N.Y. TIMES, May 10, 1992, § 2, at 32; *How the Defense Dissected the Tape*, NEWSWEEK, May 11, 1992, at 36; David A. Kaplan, *Roll the Tape Again*, NEWSWEEK, Feb. 8, 1993, at 69; Richard Lacayo, *Anatomy of an Acquittal*, TIME, May 11, 1992, at 30; Charles Leerhsen, *L.A.'s Violent New Video*, NEWSWEEK, Mar. 18, 1991, at 53. For scholarly analysis examining the interpretation of the videotape see Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia*, *in* READING RODNEY KING/READING URBAN UPRISING 15, 16, 20 (Robert Gooding-Williams ed., 1993) (describing the prosecution's failure to offer a counterreading to the defense's presentation of the video as a collection of frozen frames and interpreting the trial as producing "a contest within the visual field, a crisis in the certainty of what is visible"); Kimberlé Crenshaw & Gary Peller, *Reel Time/Real Justice*, *in* READING RODNEY KING/READING URBAN UPRISING, *supra*, at 56, 66 (suggesting that "*[b]oth* the perception of the tape as showing a 'reasonable exercise of force' *and* the perception of the tape as showing 'racist brutality' depend, not simply on the physiology of visual perceptions, but rather on *interpretation*").

6. *See, e.g.*, William Booth, *Legal Experts Cite Many Factors as Making a Difference in Simpson Verdicts*, WASH. POST, Feb. 6, 1997, at A6; Elaine Lafferty, *The Inside Story of How O.J. Lost*, TIME, Feb. 17, 1997, at 28; Stephanie Simon & Jim Newton, *Simpson Civil Case*, L.A. TIMES, Feb. 5, 1997, at A15.

80 (Richard Howard trans., Hill & Wang 1981) (1980) (declaring that "the photograph is literally an emanation of the referent"); Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, *in* ILLUMINATIONS 221, 221 (Hannah Arendt ed. & Harry Zohn trans., 1973) (arguing that the aura of an individual work of art withers with the creation of photography and the possibility of mechanical production); Lorraine Daston & Peter Galison, *The Image of*

they are a taken-for-granted form of proof in many civil and criminal cases.[7]

Given the power of the photograph to provide strong representations[8]—vivid displays that seem almost to compel belief—its frequent and growing use as evidence may not seem at all surprising. The origins of this significant form of evidence, however, have received almost no scholarly attention. A smattering of recent articles and notes have examined the evidentiary dilemmas raised by the emergence of new forms of visual evidence, such as "day-in-the-life" films and computer simulations.[9] A few other pieces have analyzed the various doctrinal foundations that underlie the photograph's admissibility.[10] But despite more than 125 years of photography's

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7. Indeed, Charles Scott, the author of the most significant treatise on photographic evidence, declared in 1942 that photographic evidence constituted a significant part of the proof in "nearly half of today's cases." CHARLES SCOTT, PHOTOGRAPHIC EVIDENCE § 1 (1942). Scott, however, provides no source to support this claim.

8. This term is borrowed from ALEXANDER WELSH, STRONG REPRESENTATIONS (1992). Welsh uses the term specifically in relation to circumstantial evidence, which he finds to have become an especially significant mode of proof in the eighteenth century, both in literature and in law. To a certain extent, I want to use the term in the same way that Welsh does: to denote evidence that brings about emphatic conviction or belief. For Welsh, however, "strong representations" are explicitly circumstantial and *unseen* rather than visual; they make a "claim to know many things without anyone's having seen them at all." *Id.* at 9.

9. *See, e.g.*, James A. Sprowl, *Evaluating the Credibility of Computer-Generated Evidence*, 52 CHI.-KENT L. REV. 547 (1976); Adam T. Berkoff, Comment, *Computer Simulations in Litigation: Are Television Generation Jurors Being Misled?*, 77 MARQ. L. REV. 829 (1994); Mario Borelli, Note, *The Computer as Advocate: An Approach to Computer Generated Displays in the Courtroom*, 71 IND. L.J. 439 (1996); Jennifer Robinson Boyle, Note and Comment, State v. Pierce*: Will Florida Courts Ride the Wave of the Future and Allow Computer Animations in Criminal Trials?*, 19 NOVA L. REV. 371 (1994); Karen Martin Cambell, Note, *Roll-Tape—Admissibility of Videotape Evidence in the Courtroom*, 26 MEMPHIS ST. U. L. REV. 1445 (1996); Elaine M. Chaney, Note, *Computer Simulations: How They Can Be Used at Trial and the Arguments for Admissibility*, 19 IND. L. REV. 735 (1986); David B. Hennes, Comment, *Manufacturing Evidence for Trial: The Prejudicial Implications of Videotaped Crime Scene Reenactments*, 142 U. PA. L. REV. 2125 (1994); Joseph M. Herlihy, Note, *Beyond Words: The Evidentiary Status of "Day-in-the Life" Films*, 66 B.U. L. REV. 133 (1986); Gregory T. Jones, Note, *Lex, Lies & Videotape*, 18 U. ARK. LITTLE ROCK L.J. 613 (1996); Jane Kalinski, Note, *Jurors at the Movies: Day-in-the-Life Videos as Effective Evidentiary Tool or Unfairly Prejudicial Device?*, 27 SUFFOLK U. L. REV. 789 (1993); Evelyn D. Kousoubris, Comment, *Computer Animation: Creativity in the Courtroom*, 14 TEMP. ENVTL. L. & TECH. J. 257 (1995); Benjamin V. Madison III, Note, *Seeing Can Be Deceiving: Photographic Evidence in a Visual Age—How Much Weight Does It Deserve?*, 25 WM. & MARY L. REV. 705 (1984); Craig Murphy, Note, *Computer Simulations and Video Re-Enactments: Fact, Fantasy and Admission Standards*, 17 OHIO N.U. L. REV. 145 (1990); Barry Sullivan, Comment, *Computer-Generated Re-enactments as Evidence in Accident Cases*, 3 HIGH TECH. L.J. 193 (1989).

10. *See, e.g.*, John H. Anderson, Jr., *Admissibility of Photographs as Evidence*, 7 N.C. L. REV. 443 (1929) (arguing that a North Carolina case excluding a photograph as substantive evidence was incorrectly decided); Dillard S. Gardner, *The Camera Goes to Court*, 24 N.C. L. REV. 233 (1946) (stating that photographs properly taken are "the very highest type of evidence" and suggesting that those courts that limit photographs to "illustrative" uses are mistaken); James McNeal, *Silent Witness Evidence in Relation to the Illustrative Evidence Foundation*, 37 OKLA. L. REV. 219 (1984) (positing that subject to an adequate foundation, photographs should be allowed as "silent witnesses"); John E. Mouser & James T. Philbin, *Photographic Evidence—Is There a Recognized Basis for Admissibility?*, 8 HASTINGS L.J. 310 (1957) (asserting that there is no generalizable and clearly defined basis for admissibility of

Borelli, Note, *The Computer as Advocate: An Approach to Computer Generated Displays in the Courtroom*, 71 IND. L.J. 439 (1996); Jennifer Robinson Boyle, Note and Comment, State v. Pierce*: Will Florida Courts Ride the Wave of the Future and Allow Computer Animations in Criminal Trials?*, 19 NOVA L. REV. 371 (1994); Karen Martin Cambell, Note, *Roll-Tape—Admissibility of Videotape Evidence in the Courtroom*, 26 MEMPHIS ST. U. L. REV. 1445

sustained legal use, the history of photographic evidence remains almost entirely untold.[11]

This Article takes a close look at the early use of photographic evidence in the American courtroom, providing a snapshot, if you will, of the legal use of photography in the second half of the nineteenth century. It reveals that photography was recognized, almost from the time of its invention, as a potentially powerful juridical tool—perhaps even a dangerously powerful tool. The meaning and epistemological status of the photograph were intensely contested, both inside and outside the courtroom. Furthermore, the history of the legal use of photography is intimately intertwined with the history of photographic technologies.[12]

Moreover, this Article argues that the judicial response to photographic evidence helped to bring about broader changes in both courtroom practice and the conceptualization of evidence. Superficially, the legal use of photography steadily expanded: Within twenty years of its invention, the new technology was employed as evidence in courtroom settings, and by the turn of the century, photography had become a routine evidentiary tool. But when we look more closely at the tangled and contradictory ways in which photographs were understood, the photograph's evidentiary status becomes both more complex and more interesting.

In the second half of the nineteenth century, two competing paradigms governed the understanding of the photograph. One emphasized its ability to transcribe nature directly, while the other highlighted the ways in which it was a human representation. From the first perspective, the photograph was viewed as an especially privileged kind of evidence; from the second perspective, the photograph was seen as a potentially misleading form of proof. Although there was often forceful support for photographs as

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photographs); Steven I. Berger, Comment, *"Silent Witness Theory" Adopted to Admit Photographs Without Percipient Witness Testimony*, 19 SUFFOLK U. L. REV. 353 (1985) (discussing increased use of "silent witness" theory of admissibility). For an interesting account of the use of films as evidence in the Nuremberg trials, see Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 YALE L.J. 449 (1995). For a thorough, practical treatise on photographic evidence that includes a short historical section, see SCOTT, *supra* note 7 (2d. ed. 1969).

11. A recently published commentary examined the use of photographs as attachments in Supreme Court opinions. *See* Hampton Dellinger, *Words Are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704 (1997). Generally, however, nearly all of the best research to date on legal photography from an historical perspective has been produced by art historians. *See, e.g.*, JOHN TAGG, THE BURDEN OF REPRESENTATION (1993) (analyzing legal photography from a Foucauldian perspective); William Allen, *The Spirit of Fact*, 6 HIST. PHOTOGRAPHY 327 (1982) (describing two early photographic evidence cases); Alan Sekula, *The Body and the Archive*, 36 OCTOBER 3 (1986) (analyzing criminality, phrenology, and photography).

12. *See infra* notes 19-52 and accompanying text.

emphasized its ability to transcribe nature directly, while the other highlighted the ways in which it was a human representation. From the first perspective, the photograph was viewed as an especially

evidence, both in the cases and in the periodical literature, there was also grave concern about this novel form of proof. The doctrine that emerged from this marriage of enthusiasm and unease was a peculiar one, a precarious balancing act not wholly internally consistent. By linking photographs analogically to maps, models, and drawings, this new doctrine invented a pedigree for the new technology. Through the use of analogy, judges gave the photograph a history.[13]

The doctrine that developed to govern the admissibility of photographs resulted in the reconceptualization and invigoration of an entire category of evidentiary representations, ushering in a "culture of construction" in the courtroom. In the 1850s and before, legal evidence usually consisted of words—spoken testimony, written depositions, contracts, deeds, and the like. Those few images present in court were often those that had received explicit legal sanction, such as county-approved maps and surveys in land dispute cases, or drawings and diagrams in patent cases. When unofficial drawings were used, they were not thought to be evidence. Only with the advent of photography were these broader kinds of visual representations conceptualized as evidence, their evidentiary value deemed significant enough to be fought over, their improper inclusion or exclusion deemed worthy grounds for appeal. Indeed, by the end of the century, the use of visual evidence had blossomed, and images of many sorts, from photographs to diagrams to three-dimensional models, were frequently used in an effort to persuade the jury. Visual representation, not limited to photography, had become a significant persuasive technique in the courtroom. Now, an attorney or witness could not only locate evidence, but could create it himself. He could represent his side of the story with an elaborate visual image prepared especially for the lawsuit. These forms of visual evidence were especially persuasive because jurors and judges could *see* the evidence for themselves. To put it crudely, judicial response to the photograph brought into existence that category of proof we now know as "demonstrative evidence."[14] This Article suggests that understanding this "origin story" turns demonstrative evidence into a more comprehensible and a more interesting legal category than is generally recognized.

Finally, this Article endeavors to provide a case study of the processes through which new technologies are brought into the courtroom. With ever-increasing frequency, judges are required to make legal sense of new technological forms. In the process, judges

13. *See infra* Section III.C.
14. *See infra* Section IV.D.

not limited to photography, had become a significant persuasive technique in the courtroom. Now, an attorney or witness could not only locate evidence, but could create it himself. He could represent

often must determine whether or not they can appropriately analogize a new technology—such as electronic mail or DNA profiling or computer simulations—to an already existing one, and, if so, *which* one. Moreover, given the frequency with which judges *do* assimilate new technologies through the use of analogies, it seems worthwhile to inquire into the extent to which these analogies matter, and the extent to which they genuinely end up controlling legal understandings of the new technological form. Taking a detailed glance backwards to see how judges assimilated a significant new technology in the second half of the nineteenth century reveals the consequences of the judicially made analogy that linked the photograph to other evidentiary forms. And in this instance, although the analogy judges invoked certainly did affect legal uses and understandings of the photograph, it did not eradicate alternative (and contradictory) understandings.

In the case of photography, the analogy through which judges made sense of the new technology served several purposes. To a certain extent, the photograph's offer of verisimilitude was threatening; indeed, in its strongest form, the photograph threatened to make the factfinding portion of a trial redundant by providing the facts in an incontestable form. The analogy, therefore, provided judges with a form of domestication, a way to tame the new technology by linking it to already existing representational forms, like maps, models, and diagrams. Judges constructed an evidential category containing *all* of these representational forms as elements. The judicially constructed doctrine defused the institutional challenge posed by the photograph by disempowering the photographic image through the claim that, like a painting or diagram, it was mere illustration.

But this analogy had some unintended consequences. At a formal level, the photograph was indeed tamed. As evidence, it operated like a hand-drawn picture, as merely a visual appendage to someone's testimony. It was neither self-proving nor necessarily true and therefore threatened neither the judge's power to regulate evidence nor the jury's province of factfinding. But practically, the domestication was only partially successful, and the new technology operated as proof as well as illustration. In the process, the outlines of a new evidentiary category—what would later be called demonstrative evidence—came into being. Judges attempted to accommodate the new technology by pronouncing it an iteration of an existing phenomenon, but this assertion ended up transforming the preexisting categories to a significant degree. Although this back-and-forth process of accommodation and transformation may not represent a *uniform* model for the legal system's incorporation of new technologies as evidence, the case of photography offers a useful and significant instance. We can see, concretely, how the act of domes-

doctrine defused the institutional challenge posed by the photograph by disempowering the photographic image through the claim that, like a painting or diagram, it was mere illustration.

tication can bring about a transformation and how dramatic change can be wrought out of the very effort to accommodate new technologies *without* change. A study of the photograph, therefore, lets us see the process of common law change in action. Though there has been a resurgence of scholarly interest in the study of legal analogies in recent years, there have been no detailed case studies of their operation in practice.[15] This Article elaborates both the power and the limits of analogic reasoning as a judicial strategy for coping with novelty.

Part I provides a brief overview of the use of photographic evidence in the nineteenth-century American courtroom, emphasizing the connections between technological changes and legal uses. Part II examines the kaleidoscopic understandings of the meaning of photographic evidence both inside and outside of the courtroom, showing how these mechanically generated images were simultaneously viewed as offering privileged access to truth and as potentially misleading and manipulable. It focuses on one legal setting in particular: spirit photographer William H. Mumler's preliminary hearing for fraud, which turned into a significant public forum for the exploration of the meaning of photographic evidence. Part III looks at the doctrine that emerged to govern photographic evidence and examines the tensions between the doctrine and actual practice. Part IV shows that this doctrine helped to bring about an expanded category of visual evidence in the courtroom. Part V offers some thoughts on the significance of this case study in understanding the judicial response to new technologies and the role of analogic reasoning as a judicial response to innovation.

I. USES OF PHOTOGRAPHIC EVIDENCE

Louis-Jacques Mandé Daguerre's 1839 invention of a way to fix images permanently onto a silver-coated copper plate caused tremendous excitement on both sides of the Atlantic. By the middle of the 1850s, Americans of all classes had sat for portraits, whether at a sumptuous and elegant photographic salon or in the makeshift studio of an itinerant photographer.[16] By the 1860s, the widespread appreciation of paper photographs, inexpensive tin types, photographic calling cards (known as *cartes de visites*), and three-dimensional

15. For the most interesting recent work on legal analogies, see Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925 (1996); and Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993). For the classic treatment of "case-by-case reasoning," see EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

16. *See* ROBERT TAFT, PHOTOGRAPHY AND THE AMERICAN SCENE 46-49, 76 (1938).

thoughts on the significance of this case study in understanding the judicial response to new technologies and the role of analogic reasoning as a judicial response to innovation.

stereoscopic images had brought a thriving photographic industry into existence.[17] The subjects scrutinized by the camera were nearly unlimited: bourgeois ladies with bits of rouge hand-colored on the photographic plate; the dismal realities of the battlefield; America's natural wonders, from the Natural Bridge to Yellowstone; presidents and paupers. It seemed as if the whole world had become fodder for the photographer.[18] Nor was the display of photographs limited to family albums, photo galleries, and front parlors; rather, photographs made their way into government reports, rogues' galleries, and even the courtroom.

The use of photography in the courtroom is necessarily linked with the history of photographic technologies.[19] Until the early 1850s, the daguerreotype was the dominant photographic form. Daguerreotypes were produced directly onto silver-coated copper plates. They were not made from negatives and, therefore, were unique images—the only way to reproduce a daguerreotype was to take a daguerreotype of it. While this technology produced images of tremendous precision, daguerreotypes could be viewed only straight-on; from an oblique angle, the surface was reflective, like a mirror.[20] Moreover, daguerreotypes were relatively expensive, especially in larger sizes. Although these factors certainly placed limits on its evidentiary utility, the daguerreotype might have been employed in the courtroom nonetheless. Indeed, in 1852 an American photographic journal reported that in France, "the lawyers are using daguerreotypes as a means of convincing the judge and jury more eloquent than their words."[21] It also described an accident in which the victim's lawyer had used "pictures taken upon the spot, which from their reality,

17. *See id.* at 140-44, 160-64, 181-85; *see also* HELMUT GERNSHEIM & ALISON GERNSHEIM, A CONCISE HISTORY OF PHOTOGRAPHY 116-19 (1965) (describing the "*carte de visite* craze" and how photography was no longer "an art for the privileged" but "the art for the millions"); BEAUMONT NEWHALL, THE HISTORY OF PHOTOGRAPHY FROM 1839 TO THE PRESENT DAY 49 (1976) (noting the rise of "cheap" tintypes and "mass production" *carte de visite*).

18. *See generally* GERNSHEIM & GERNSHEIM, *supra* note 17, at 97-190 (describing the great variety of photographic depictions); NEWHALL, *supra* note 17, at 47-80 (describing the rise of portrait photography, art photography, war photography, and survey photography); TAFT, *supra* note 16, at 186-88, 248-76 (describing the great variety of photographic topics recorded in the 1860s, ranging from the first aerial shots taken from a balloon to images of natural wonders and the American frontier); ALAN TRACHTENBERG, READING AMERICAN PHOTOGRAPHS 21-164 (1989) (analyzing Matthew Brady's portrait photography and war photography and T.H. O'Sullivan's survey images).

19. For the history of photographic technologies, see REESE JENKINS, IMAGES AND ENTERPRISE: TECHNOLOGY AND THE AMERICAN PHOTOGRAPHIC INDUSTRY 36-41 (1975); and TAFT, *supra* note 16.

20. For histories of the daguerreotype, see M. SUSAN BARGER, THE DAGUERREOTYPE: NINETEENTH-CENTURY TECHNOLOGY AND MODERN SCIENCE (1991); and BEAUMONT NEWHALL, THE DAGUERREOTYPE IN AMERICA (1961). For a cultural history of the daguerreotype, see RICHARD RUDISILL, MIRROR IMAGE: THE INFLUENCE OF THE DAGUERREOTYPE ON AMERICAN SOCIETY (1971).

21. 4 HUMPHREY'S J. 175, 175 (1852).

means of convincing the judge and jury more eloquent than their words."[21] It also described an accident in which the victim's lawyer had used "pictures taken upon the spot, which from their reality,

explained the whole affair more lucidly than all the oratory of a Cicero or a Demosthenes."[22] But in the United States, no appellate cases record the use of daguerreotypes for evidentiary purposes, and neither is there evidence in the photographic or legal periodical literature of their use in trials. Moreover, the subsequent coverage of legal uses of photography in the photographic press suggests its novelty. It is likely, therefore, that photographic images were rarely used in the American courtroom before the end of the 1850s.

In the early 1850s, a new paper photographic process was invented. The key innovation was a new collodion carrier that adhered to glass plates that functioned as photographic negatives. From these negatives, positive paper prints could be developed. Using this new process, multiple prints could be made from a single negative. The collodion process also quickly lowered costs.[23] By the late 1850s, the process was in general use, and the spread of the innovation coincided with the first uses of photography as evidence in the American courtroom. In many of these earliest cases, photography entered the courtroom with little fanfare; we often know that a photograph was used only through an offhand reference. For example, in an 1857 case in which the boundaries of a land grant were in dispute, the district judge remarked of a particular oak tree: "The photograph exhibited in court shows that its size and isolated situation are such as to strike the eye and arrest the attention of the most casual observer."[24] As this case wended its way through the legal system (it reached the Supreme Court three separate times), photographs continued to provide visual evidence of what the land looked like. Indeed, in the third Supreme Court hearing of the case, the Justices gazed upon seven photographic images that accompanied the deposition of photographer William Shew. Shew described the vantage points from which he had taken his images and attested that "they are correct representations of the appearances of the country as far as they can be represented by photographic views."[25]

22. *Id.* Charles Scott also mentions that unspecified newspaper accounts claimed an extremely early use of the daguerreotype for legal purposes when a husband "succeeded in photographing his wife during a tryst without being discovered and winning a divorce when the daguerreotype was presented as evidence." SCOTT, *supra* note 7, § 1A, at 2 (2d ed. 1969). This story, however, is not at all credible. In 1839, cameras were simply too large and exposure times too long to be used without detection. Indeed, surreptitious photographs were not taken easily until the 1880s. *See infra* notes 42-45 and accompanying text.

23. *See* JENKINS, *supra* note 19, at 36-41; NEWHALL, *supra* note 17, at 47-50.

24. United States v. Fossat, 25 F. Cas. 1157, 1159 (C.C.N.D. Cal.) (No. 15,137), *rev'd on other grounds*, 61 U.S. (19 How.) 413 (1857).

25. Deposition of William Shew, Transcript of Record, Fossat v. United States, 1864 (Case No. 4206, RG 267.3.2, National Archives, Washington, D.C.); *see also* The Fossat or Quicksilver Mine Case, 69 U.S. (2 Wall.) 649. The photographs themselves have not been preserved in the records.

Supreme Court three separate times), photographs continued to provide visual evidence of what the land looked like. Indeed, in the third Supreme Court hearing of the case, the Justices gazed upon

In an 1859 land grant case in which the authenticity of the grant was at issue, photographic copies of a Mexican governor's official seal were used on appeal to the Supreme Court. Both the originals and the photographic copies had been before the trial court, but the photographs offered one distinct advantage over the originals: They allowed a number of different seals to be placed side by side on a single surface, so that indisputably authentic exemplars could easily be compared to the suspected forgery.[26] On appeal, only the photographic copies were used. The Justices noted, "We have ourselves been able to compare these signatures by means of photographic copies, and fully concur (from evidence 'oculis subjecta fidelibus') that the seal and signatures are . . . forgeries."[27]

In another case heard the same year, photographic copies of land grants and signatures were also used.[28] The practice of using photographs to compare multiple exemplars was not limited to the federal courts. In 1860, well-known photographer Albert S. Southworth displayed to a Massachusetts jury photographs of enlarged handwriting samples. The case involved a promissory note on which the defendant claimed his signature had been forged. Southworth testified for the plaintiff as an expert witness, using the photographically magnified signatures to show why he believed the handwriting to be genuine. After the jury found for the plaintiff, the defendant appealed, based in part on the admission of the photographic evidence. This case, *Marcy v. Barnes*, marked the first time that the use of photographic evidence was the explicit subject of an appeal.[29] The defendant argued:

> The photograph specimens of the note in suit and of the admitted genuine handwriting of Barnes, made by the photographer, were not admissible and should not have been allowed to go to the Jury. . . . [T]his is comparing it with a magnified picture or representation of it, if it may not rather be

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26. *See* Transcript of Record, Luco v. United States, 1859 (Case No. 3776, RG 267.3.2, National Archives, Washington D.C.); *see also* Luco v. United States, 64 U.S. (22 How.) 515 (1859). Several authors have erroneously stated that the photographic copies were used only on appeal in *Luco*, and not in the trial court. *See* SCOTT, *supra* note 7, § 1B, at 2-3 (2d ed. 1969); Allen, *supra* note 11, at 330. In fact, both the copies and the originals were used in the court below, but only the copies were sent to the Supreme Court.

27. *Luco*, 64 U.S. (22 How.) at 541.

28. *See* Fuentes v. United States, 63 U.S. (21 How.) 443 (1859).

29. Marcy v. Barnes, 82 Mass. (16 Gray) 161 (1860). Note, however, that this case did not mark the first time that Southworth had used photographic specimens in court. In an address before the National Photographic Association, Southworth claimed credit for "the idea of photographic disputed or questioned handwriting as an aid to its identification and authorship," and said that such photographs came to be used in the courts of Massachusetts, by his introduction, around 1857. ALBERT S. SOUTHWORTH, AN ADDRESS TO THE NATIONAL PHOTOGRAPHIC ASSOCIATION OF THE UNITED STATES, JUNE 1870, *reprinted in* 2 ANTHONY'S PHOTOGRAPHIC BULL. 343, 346 (1871).

time that the use of photographic evidence was the explicit subject of an appeal.[29] The defendant argued:

The photograph specimens of the note in suit and of the

> called a caricature of it. This is an attempt to engraft a new principle upon this branch of the law of evidence.[30]

The plaintiff claimed that photographic enlargements were merely equivalent to viewing the specimens through a magnifying glass, and that the jury would have been allowed to examine the specimens in this way.[31] Although the court found for the plaintiffs on other grounds, it entirely agreed with the defense's argument.[32] The court held: "Under proper precautions in relation to the preliminary proof as to the exactness and accuracy of the copies produced by the art of the photographer, we are unable to perceive any valid objection to the use of such prepared representations."[33]

Over the next two decades, photographs were used in a variety of legal contexts. Photographs of places described the terrain and the exteriors of buildings in a land dispute case,[34] and interior images of a whiskey distillery were used to impeach defense witnesses in a revenue case.[35] Photographs illustrated the scene of an accident.[36] Photographic copies of documents and enlargements of signatures continued to be used and, in at least one case, enlargements of corpuscles of blood were used in an effort to distinguish human blood from animal blood.[37] By the 1870s, photographs were frequently used in criminal cases to prove identity, either of the victim or of the defendant.[38]

Although photographs were common enough for one commentator to assert in 1871 that, "as a witness in the courts of justice, photography is constantly employed in detecting forgery, revealing perjury, and in telling the truth,"[39] photographs in the courtroom

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30. Defendant's Brief, Trial Records, Marcy v. Barnes, 1860 (Supreme Judicial Court Records, Social Law Library, Boston, Mass.).

31. *See id.*

32. *See Marcy*, 82 Mass. (16 Gray) at 163.

33. *Id.*

34. *See* 14 HUMPHREY'S J. 277 (1863).

35. *See Photography in Court*, 6 PHILA. PHOTOGRAPHER 322 (1869). The defense attempted to offer a photographic view of the premises in *Hollenbeck v. Rowley*, 90 Mass. (8 Allen) 473 (1864), but it was rejected by the trial judge.

36. *See* Blair v. Pelham, 118 Mass. 420 (1875); Trial Records, Blair v. Pelham, 1875 (Supreme Judicial Court Records, Social Law Library, Boston, Mass.); *Photography in Court*, 4 PHILA. PHOTOGRAPHER 160 (1867).

37. *See Photography a Detector of Crime*, 15 HUMPHREY'S J. 289 (1864).

38. For the routine and uncontested use of photographs for purposes of establishing identity, see, for example, THE TRIAL OF DANIEL MCFARLAND FOR THE SHOOTING OF ALBERT D. RICHARDSON 35, 88 (New York, W.E. Hilton 1870); and THE TRIAL OF EMIL LOWENSTEIN FOR THE MURDER OF JOHN D. WESTON 135-36, 140 (Albany, William Gould & Son 1874). For cases in which objections were raised to the use of photographs to establish identity, see, for example, *Luke v. Calhoun County*, 52 Ala. 115 (1875); *Ruloff's Case*, 11 Abb. Pr. (n.s.) 245 (N.Y. Sup. Ct. 1871); *Udderzook v. Commonwealth*, 76 Pa. 340 (1874); and THE GOSS-UDDERZOOK TRAGEDY: BEING A STRANGE CASE OF DECEPTION AND MURDER (Baltimore, Baltimore Gazette 1873).

39. *Some of the Modern Appliances of Photography*, 1 PHOTOGRAPHIC TIMES 33, 34 (1871).

photography is constantly employed in detecting forgery, revealing perjury, and in telling the truth,"[39] photographs in the courtroom

were still rare enough for the photographic journals to note their use as something of a novelty. Until the 1880s, photographic techniques required that pictures be developed immediately upon exposure—if the collodion dried before development, the image would be ruined. Moreover, producing a photograph still required a high degree of skill. Taking outdoor photographs in particular required substantial advance preparation; a photographer literally had to carry his darkroom with him to the site and set it up prior to exposing the plate.[40] It is not surprising, therefore, that in this period, studio-made photographs—such as copies of documents and portraits of victims and defendants—were seen more frequently in the courtroom than exterior images. Copies of documents were easily taken in any photography studio. And by the 1870s, many—if not most—Americans had sat for a photographic portrait, so it was a simple-enough matter, logistically, to use these extant photographs in the courtroom.[41]

In the early part of the 1880s, however, the diffusion of a new photographic technology transformed the industry. After several decades of trying to create a stable dry plate for photographs, photographers and inventors succeeded at the end of the 1870s. This innovation meant that photographers no longer had to develop their images immediately; rather, they could take pictures out-of-doors and away from their studios and develop them upon their return. By the early 1880s, photographers could buy high-quality dry plates, and by the middle of the 1880s, photographers could send their plates to the Eastman Company for developing, printing, and enlarging.[42] Taking basic photographs, therefore, came to require far less skill; no longer did the image-taker need to know how to develop the negative or print the image, much less how to coat the photographic plate himself.

Amateur photography began to flourish, and article after article described the anxiety engendered by roving photographers—"that rapidly increasing class of persons known as amateur instantaneous photograph cranks"—who threatened to make a permanent record of any instant.[43] It had even become possible for a photograph to be

40. *See, e.g.*, JENKINS, *supra* note 19, at 39 (noting that "the field photographer needed to be both technically oriented and also sufficiently muscular to bear the burden of his apparatus and small laboratory").

41. *See* RUDISILL, *supra* note 20; TAFT, *supra* note 16; *see also A Voice from the West*, 4 PHILA. PHOTOGRAPHER 15 (1867) (complaining that photographers would soon be out of work because "it cannot be denied that the great mass of the people in this country have had their pictures taken").

42. *See* JENKINS, *supra* note 19, at 109-12.

43. *That Horrid Camera*, PHOTOGRAPHIC EYE, AND THE EYE, Jan. 17, 1885, at 7, 7 (reprinted from S.F. POST); *see also The Amateur Photography Craze*, PHOTOGRAPHIC EYE, AND THE EYE, June 20, 1885, at 8 (reprinted from JUDGE) (describing how roving

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taken without the subject's knowledge.[44] Reports began to circulate of people "caught in the act" by the camera, and incriminating photographs made their way into the courtroom, especially in breach of promise and divorce suits in which the faithlessness of a fiancée or a spouse was captured vividly by a photograph.[45] More generally, the greater ease and increased flexibility brought about by dry-plate technology—and not long thereafter, by the advent of roll film—meant that photographs became more common in a variety of legal contexts. By the end of the nineteenth century, photographs were routinely used in the courtroom, though judges had declared that this form of evidence could be used only for illustrative purposes, rather than as independent proof.[46] Despite this limitation, judges and juries examined enlarged exemplars of handwriting, eyed photographs to gauge resemblance in bastardy cases,[47] saw photographs of property damage, sometimes even comparing images taken "before" and "after,"[48] stared at images of victims as well as defendants,[49] gazed upon scenes of crimes and sites of accidents,[50] and scrutinized pictures of wounds.[51] The photograph had become a significant evidentiary tool.[52]

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photographers may capture more than they bargained for); *The Obtrusive Amateur*, PHOTOGRAPHIC EYE, AND THE EYE, Dec. 9, 1885, at 9, 9 (reprinted from EXCHANGE) (recommending that the "remedy for the amateur photographer" is "to put a brick through his camera whenever you suspect that he has taken you unawares."). For the role that amateur photography played in constructing a legal right to privacy, see Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (suggesting that "[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life" and have spurred the need for greater legal protection of the right "to be let alone").

44. *See, e.g.*, *The Camera in Court*, PHOTOGRAPHIC EYE, AND THE EYE, Oct. 17, 1885, at 3 (showing the use of surreptitiously taken photographs in a nuisance suit); *Photographed on the Fly*, THE PHOTOGRAPHIC EYE, AND THE EYE, Jan. 10, 1885, at 6 (describing a hidden camera used by a detective photographer to take pictures without the subject's knowledge).

45. *See The Amateur Photography Craze*, *supra* note 43, at 8 (describing the potential for incriminating photographs to bring about divorce); Ada S. Ballin, *Photographic Bye-Paths*, PHOTOGRAPHIC EYE, AND THE EYE, Apr. 18, 1885, at 2, 2 (describing an "amusing instance" in which instantaneous photography captured the image of a wife with another man); *That Horrid Camera*, *supra* note 43 (describing a case in which a suspicious fiancé surreptitiously took an image of his betrothed).

46. Estimating with any precision the frequency with which photographs were used is a near-impossible task. By the end of the 1880s, however, the discussions of the legal uses of photography in the photographic press and the legal periodical literature make it clear that it had become common.

47. *See In re* Jessup, 22 P. 742 (Cal. 1889); Farrell v. Weitz, 35 N.E. 783 (Mass. 1894).

48. *See, e.g.*, McGar v. Borough of Bristol, 42 A. 1000 (Conn. 1899); German Theological Sch. v. Dubuque, 17 N.W. 153 (Iowa 1883); Dorsey v. Habersack, 35 A. 96 (Md. 1896); Verran v. Baird, 22 N.E. 630 (Mass. 1889); Roosevelt Hosp. v. New York Elevated R.R., 21 N.Y.S. 205 (N.Y. Sup. Ct. 1892); Cozzens v. Higgens, 33 How. Pr. 439 (N.Y. 1869).

49. *See, e.g.*, Malachi v. State, 8 So. 104 (Ala. 1890); Commonwealth v. Morgan, 34 N.E. 458 (Mass. 1893); Commonwealth v. Campbell, 30 N.E. 72 (Mass. 1892); Stiasny v. Metropolitan St. Ry., 65 N.E. 1122 (N.Y. 1902); People v. Webster, 34 N.E. 730 (N.Y. 1893); People v. Smith, 24 N.E. 852 (N.Y. 1890); Commonwealth v. Connors, 27 A. 366 (Pa. 1893).

50. *See, e.g.*, People v. Phelan, 56 P. 424 (Cal. 1899); Dyson v. New York & N.E.R.R., 17 A. 137 (Conn. 1888); Wabash v. Jenkins, 84 Ill. App. 511 (1899); Chicago & A.R.R. v. Myers, 86 Ill. App. 401 (1894); Cleveland, C.C. & St. L. Ry. v. Monaghan, 41 Ill. App. 498 (1891); Keyes v. State, 23 N.E. 1097 (Ind. 1889); Locke v. Sioux City & P.R.R., 46 Iowa 109 (1877);

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