

The Sharpest Tool in the Toolbox: Visual Legal Rhetoric

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I. Teaching visual legal rhetoric

Visual briefs and other forms of visual rhetoric in legal communication may eventually become the norm in legal practice¹ because of the enormous communicative and rhetorical power of visual media.² I have discussed the uses of visual legal rhetoric and the ensuing ethical and professional considerations elsewhere.³ Here, I will focus on providing instruction to law students and lawyers regarding proper and effective usage of visual legal rhetoric.⁴

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1. See generally NEAL FEIGENSON & CHRISTINA SPIESEL, *LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT* (2009); Lenora Ledwon, *Understanding Visual Metaphors: What Graphic Novels Can Teach Lawyers About Visual Storytelling*, 63 *DRAKE L. REV.* 193, 237 (2015); Christina O. Spiesel, Richard K. Sherwin & Neal Feigenson, *Law in the Age of Images: The Challenge of Visual Imagery*, in *CONTEMPORARY ISSUES OF THE SEMIOTICS OF LAW* 231 (Anne Wagner et al. eds., 2005); Richard K. Sherwin, *A Manifesto for Visual Legal Realism*, 40 *LOY. L.A. L. REV.* 719, 724-36 (2007).
2. See, e.g., Fred Galves, *Where the Not-So-Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance*, 13 *HARV. J. L. & TECH.* 161, 190 (2000); Michael J. Higdon, *Oral Argument and Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience*, 57 *U. KAN. L. REV.* 631 (2009); Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 *S. CAL. INTERDISC. L.J.* 237, 264-66 (2010); David S. Santee, *More than Words: Rethinking the Role of Modern Demonstrative Evidence*, 52 *SANTA CLARA L. REV.* 105, 108 (2012); Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 *OR. L. REV.* 305 (2011); Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 *RUTGERS L. REV.* 381 (2008); Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 *MICH. ST. L. REV.* 411 (2006).
3. Michael D. Murray, *Visual Rhetoric: Topics of Invention and Arrangement and Tropes of Style*, 21 *LEGAL WRITING: J. LEGAL WRITING INST.* 185 (2016); Michael D. Murray, *Leaping Language and Cultural Barriers with Visual Legal Rhetoric*, 49 *U.S.F.L. REV.* 61 (2015); Michael D. Murray, *The Ethics of Visual Legal Rhetoric*, 13 *LEGAL COMM. & RHETORIC: JALWD* 107 (2016).
4. Visual legal rhetoric is a certain category (more particularly, a topic of invention or arrangement, or a trope of style) within the larger field of rhetoric. See Murray, *Visual Rhetoric*,

Brain science demonstrates that visual devices work rapidly, almost immediately, to communicate ideas and attain the audience's adherence to the meaning and truth of the ideas communicated, and thus to persuade the audience of the truth and propriety of the speaker's communication. Visual representation is also associated with greater perception, comprehension, and retention of information.⁵ Visual imagery is not only faster than words, it is better than words.

Law students and lawyers should be aware that the tool of visual rhetoric is very sharp. Its edges cut in multiple directions because of the audience's precognitive and cognitive brain functions in interpreting and understanding the message of visual works, which often process and draw meaning, reactions, and motivations from images without active "thinking." To avoid intentional or inadvertent misleading of the audience when using visual rhetorical devices, these unconscious processes require special attention.

This article offers guidance with regard to: (A) the analysis of when to use or not use a visual rhetorical device; (B) the concept of *mise en scène* and the manipulation of visual devices; (C) the decision to use color or not to use color; and (D) the advisability of focus groups, and testing a visual device before a wider and more diverse test audience.

A. When to use visual rhetorical devices

Professors Steve Johansen and Ruth Anne Robbins have developed a rubric for determining when to employ visual rhetorical devices in legal contexts, both in terms of advisability and potential effectiveness of the use, and in terms of ethics and professionalism in the service of proper and truthful lawyering.⁶ The rubric asks the following questions regarding the determination:

supra note 3.

5. See generally Stephen M. Kosslyn et al., *Visual Images Preserve Metric Spatial Information: Evidence from Studies of Image Scanning*, 4 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 47, 57-59 (1978); Carrie Leonetti & Jeremy Bailenson, *High-Tech View: The Use of Immersive Virtual Environments in Jury Trials*, 93 MARQ. L. REV. 1073, 1074-75 & n.18 (2010); ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (5th ed. 2015); ELIZABETH LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS AND THE EXPERT WHO PUTS MEMORY ON TRIAL 14-30 (1991); EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 272 (Gary L. Wells & Elizabeth Loftus eds., 1984).
6. Steve Johansen & Ruth Anne Robbins, *Art-iculating the Analysis: Systemizing the Decision to Use Visuals as Legal Reasoning*, 20 LEGAL WRITING: J. LEGAL WRITING INST. 57, 86-93 (2015).

Is the idea of the visual effective at enhancing the reader's comprehension of the analysis?	The goal of rhetoric should be to construct knowledge and comprehension in the audience, so the rubric asks if the visual is designed to aid comprehension. Johansen and Robbins set a continuum between decorative works that are extraneous to the analysis, and transformative works that are highly effective at communicating the analysis. If the visuals are unconnected to the message of the communication, they are either decorative or potentially misleading.
Does the visual improve the document's overall design?	Johansen and Robbins evaluate the effectiveness of the visual as a design element. A visual may enhance a work by organizing data, examples, or other information in a manner that allows better or more rapid communication of the information through symbolic imagery or spatial arrangement of the information. On the other hand, a visual may clutter the page, disguise or obfuscate parts of the information, or befuddle comprehension.
Does the visual meet professionalism norms?	Johansen and Robbins subject each visual to an ethical and professional analysis. ⁷ Ethical and professional uses do not hide or obscure information, and instead promote knowledge and understanding. Professionalism requires attorneys to scrutinize each work to ensure that it is not inadvertently ambiguous or misleading.
In or out? The verdict.	By using Johansen and Robbins' rubric, the attorney will have made a careful analysis of the potential efficacy and persuasiveness of the visual, and also met ethical and professional requirements to avoid using the work to obfuscate information and to confuse or mislead the audience.

Lawyers and law students may be tempted to decorate a brief with colorful images, especially now in the age of electronic filing when judges can view documents in color.⁸ But decorative use is not recommended; the use must add

7. *Id.* at 65 & n.30.

8. *See, e.g.*, Brief for Cake Artists as Amici Curiae in Support of Neither Party, *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL

value to the document by aiding the perception, reception, and understanding of the message of the communication. One should not throw a flowery, textual metaphor into a legal document just for its poetic beauty and graceful language; each use of a stylistic trope should be meaningful, functional, and helpful in communicating the message to the audience. Similarly, graphics that merely show off an attractive scene without aiding the reader's perception, reception, and cognition of the message are superfluous, and potentially distracting or misleading.

B. *Mise en scène and the manipulation of images*

All visual works are mediated, meaning that all visual works are authored and created, and all authors must follow principles of *mise en scène* in the creation of visual rhetorical devices. *Mise en scène* literally translates from the French as “setting the stage” in the sense of staging or placing a scene in a production.⁹ In a theatrical, photographic, or audiovisual work (including film, television, or video) it pertains to framing, composition, set, costume, lighting, makeup, and visual design, and considers both what is included in the scene and what is excluded beyond the frame or the lens.¹⁰ The attorney planning to use a visual work is an author,¹¹ and with every visual work the author will decide the content of the image: what image to use; how much and what parts of the scene to include in the visual work; how long a segment to display of a preexisting video work; what exhibits should be assembled and created for the communication; what perspective on the subject matter will be observed; which details will remain in the frame and which excluded. Framing, cropping, composition, and choice of perspective may not seem to be the most remarkable and creative authorship decisions of a legal communication. But each of these *mise-en-scène* decisions is real and frequently involves a choice among many options, making a difference in what is communicated to and received by the audience.

Beyond the decisions described above is the question of whether the attorney-author should manipulate or alter the contents of the work for presentation to the audience, for example, to:

4004524, https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-2017-2018/16-111-amicus-np-cake-artists.authcheckdam.pdf.

9. See DAVID BORDWELL & KRISTIN THOMPSON, *FILM ART: AN INTRODUCTION* 112 (8th ed. 2008); TIMOTHY CORRIGAN & PATRICIA WHITE, *THE FILM EXPERIENCE: AN INTRODUCTION* 521 (2004).
10. See College Film & Media Studies, *Mise en scène*, collegefilmandmediastudies.com (last visited Dec. 1, 2017), <https://collegefilmandmediastudies.com/mise-en-scene-2/>; JILL MARSHALL & ANGELA WERNDLY, *THE LANGUAGE OF TELEVISION* 84 (2002); Gabe Moura, *Mise-en-scène*, *The Elements of Cinema* (Jul. 1, 2014), <http://www.elementsofcinema.com/directing/mise-en-scene-in-films/>. See also Kimberlianne Podlas, *The Tales Television Tells: Understanding the Nomos Through Television*, 13 *TEX. WESLEYAN L. REV.* 31, 41 (2006).
11. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884); Michael D. Murray, *Post-Myriad Genetics Copyright of Synthetic Biology and Living Media*, 10 *OKLA. J.L. & TECH.* 71, 77 (2014).

- Sharpen and clarify the image or video (i.e., to remove fuzziness, blurriness, “snow,” or other obscuring matter);
- Change the focus or composition of the image or video (i.e., to show a portion or to zoom in on a certain portion);
- Edit and reconnect parts of a video (an analog wording would be “cut and splice”);
- Combine parts of images into a composite.

As with other *mise-en-scène* issues, the question here comes down to the same factors that are presented in every rhetorical situation¹²:

- Is the manipulation designed to improve the knowledge and understanding of the audience by making it easier for the audience to perceive and process the communication?
- Is the speaker’s intent to improve the communication’s ability to instruct or persuade, or is it something else—to confuse, obfuscate, or mislead the audience?

In addition to these questions regarding the efficacy and propriety of altering the content of a visual or audiovisual work, any manipulation of a work runs the risk of throwing the ethics and integrity of the attorney-author into question;¹³ it also creates issues under evidence law as to the authenticity and admissibility of the altered work.¹⁴

C. Color, or not color?

In many instances, the decision to use or not use color images and graphics is dictated by the subject matter and purpose for the use. In recent years, as electronic filing and transmission of documents have become the norm, judges and law clerks are as likely to view your pleadings and briefs on a computer or tablet screen as they are to take hold of a paper filing. The decision on whether to use color images and diagrams is now as relevant as the decision to use a certain font in the text. Visual rhetoric encompasses these decisions on font, margins (white space), diagrams, tables, and the use of color or grayscale visual devices, because these decisions affect the perception, reception, and persuasiveness of the author’s presentation.¹⁵ Cases that previously suffered

12. See generally Murray, *Ethics of Visual Legal Rhetoric*, *supra* note 3.

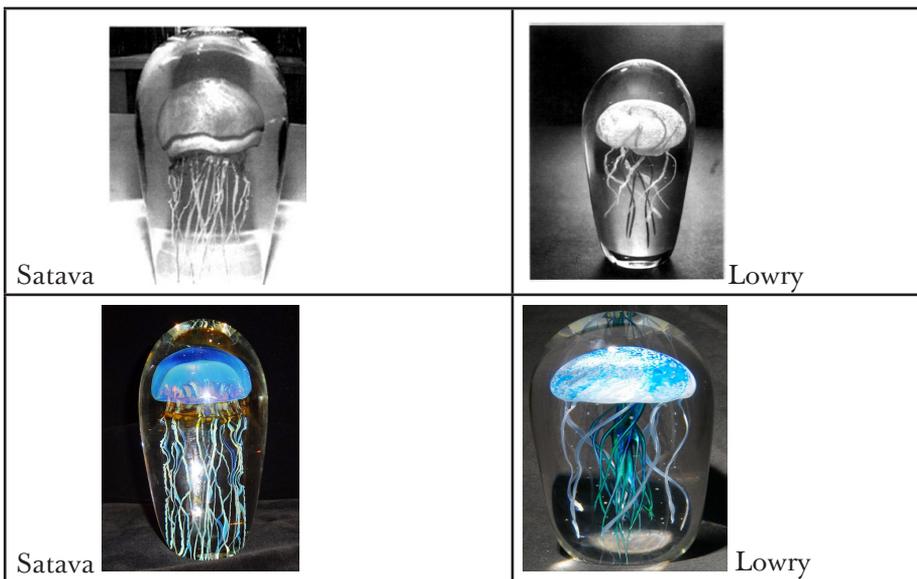
13. A real-life example discussed in the *Ethics of Visual Rhetoric* article, *id.* at 146-50, is the case of Sandra Bland’s traffic stop, in which the Texas Department of Public Safety released an altered video that called into question the accuracy and integrity of the department’s account of the events that ultimately led to Ms. Bland’s apparent suicide while in police custody. See *id.*

14. *Id.* at 113-22 (evidence law issues with visual rhetorical devices).

15. See generally Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout*

from a grayscale and black-and-white-only universe might have different outcomes when finders of fact and adjudicators are able to see the subject matter of disputes in color.

For example, in copyright law, two cases that might have been affected by the lack of color exhibits are the Ninth Circuit's opinion in *Satava v. Lowry*¹⁶ and the Second Circuit's opinion in *Rogers v. Koons*.¹⁷ Both cases considered whether the second work in each case, by Lowry and Koons, respectively, infringed the first works by Satava and Rogers. Comparison of the black-and-white (grayscale) images might cause viewers to draw one conclusion about similarity (or dissimilarity) that may not be supported by color images¹⁸:

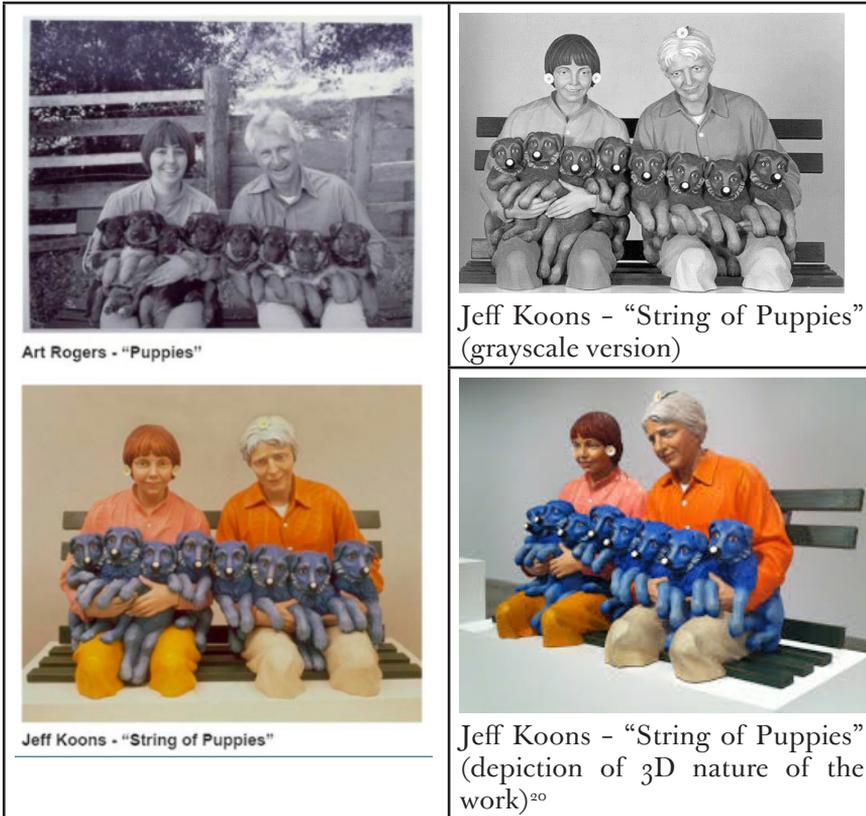


The difference is even more distinct in *Rogers v. Koons*. Here, a two-dimensional black-and-white (grayscale) photograph was allegedly infringed by a three-dimensional color sculpture. When viewing the works in a similar medium—two-dimensional grayscale photographs viewed face-on—the similarity is fairly obvious, but when viewed in color, and especially when

Design into the Text of Legal Writing Documents, 2 J. ASS'N LEGAL WRITING DIRECTORS 108 (2004); *Visual Rhetoric: Overview*, PURDUE ONLINE WRITING LAB (OWL), <https://owl.english.purdue.edu/owl/owlprint/691/>; *Using Fonts with Purpose*, PURDUE ONLINE WRITING LAB (OWL), <https://owl.english.purdue.edu/owl/resource/705/02/> (2015-2018).

16. *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003).
17. *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).
18. This lesson will not be evident from the images in the print version of this Journal of Legal Education article, which will be printed in grayscale, not color, but see the online version, <https://ssrn.com/abstract=3040952>.

Koons's three-dimensional sculpture is viewed from an angle to display its three-dimensional qualities, the differences brought about in Koons's transformation of the work are revealed in a totally new colorful media.¹⁹



The dilemma in a criminal prosecution or personal injury case (or any case with physical injuries to people, especially children and vulnerable adults) is whether to use extremely graphic color images that display in gory detail the full extent of the injuries. On the one hand, the gory or prurient display may cause a sympathetic reaction in the viewers that motivates them to award damages in a higher amount or assign blame more readily because the injuries look so painful, bloody, and extensive, and the crime appears to be so terrible. The color media allow this reaction by vividly depicting the pain and suffering.

19. *Rogers*, 960 F.2d 301, predates the change in copyright fair use brought about by the adoption of the "transformative test" by *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). Koons's work was found to be an unauthorized derivative work of the original Rogers photograph that did not enjoy fair-use protection. See generally *Rogers*, 960 F.2d at 309-12.
20. Michael D. Murray, Collage of four thumbnail depictions of the original Art Rogers photograph "Puppies," and the Jeff Koons sculpture "String of Puppies," which are the subject matter of *Rogers*, 960 F.2d 301.

But on the other hand, gory, bloody, or prurient images may provoke an extremely hostile and negative reaction in viewers, who might lash out not at the injustice of the injuries but at the cruelty of the author, the attorney, who forced the audience to witness these terrible images.

In two examples, images from the Boston Marathon bombing terrorist attack and from the McDonald's coffee spill case (*Liebeck v. McDonald's*)²¹ are shown here in black and white (grayscale) because the original color photographs are extremely graphic and arresting.²²



Boston Marathon bombing, 2013²³

Liebeck v. McDonald's, 1992²⁴

21. *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. 93-CV-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994), *order on motion to vacate*, 1994 WL 16777704 (N.M. Dist. Nov. 28, 1994).
22. I have retained the color images for comparison, and readers may request them by e-mailing professormichaelmurray@gmail.com.
23. These images are derived from the original photograph of Woman Victim of Boston Marathon Bombing Sitting on Ground (c) 2013 by John Tlumacki, The Boston Globe (Apr. 16, 2013), http://archive.boston.com/bigpicture/2013/04/terror_at_the_boston_marathon.html; and from the original photograph of Amputee Victim of Boston Marathon Bombing, photographer unknown (Apr. 17, 2013), <http://hispanicnewsnetwork.blogspot.com/2013/04/lu-richard-and-campbell-KILLED-IN.HTML>.
24. These images are derived from original photographs labeled Stella1 and Stella2, photographer unknown, depicting the injuries of Stella Liebeck in *Liebeck v. McDonald's*, <http://justicebeforecharity.org/images/stella/stella1.png>; and at <http://justicebeforecharity.org/images/stella/stella2.jpg>.

Color images may well demonstrate the extent and severity of the damages and the pain and suffering endured by the victim much more effectively than grayscale versions of the images. But students and attorneys must judge well their audience and the audience's likely reaction to viciously graphic and gory color images, and whether that reaction may be to turn against the attorney-author and her client in reaction to having been subjected to the viewing of graphic, gory images.

D. Focus groups, and testing with a wider audience

A lawyer should expand the evaluation of images to persons other than the lawyer herself. Part of the nature of visual media is that the audience plays a keen role in the perception and reception of images. Each audience member brings his or her values, biases, and heuristics to the reception and cognition of the images. Visual rhetoric is a form of symbolic communication. As Justice Robert Jackson stated in 1943, "A person gets from a symbol the meaning he puts into it."²⁵ So with visual media. The audience's potentially diverse reactions to images cause this sharp tool to cut multiple ways all at the same time.

Visual rhetoric is perceived and received first by the reptile brain (fight or flight, preservation reaction), and then rapidly thereafter by the mammalian brain (the "emotional brain," or limbic system), causing the viewer's first impression of a piece of visual rhetoric to be an emotional perception.²⁶ And the emotional take is stubborn.²⁷ Cognitive functions lag behind sensory perception, and when they catch up, studies of brain science show, viewers most often make a cognitive decision justifying and sustaining the emotional take on the visual device. It is difficult, but not impossible, for the cognitive brain to overturn the emotional decision.²⁸ All of which makes it critical for law students and attorneys to make sure they are apprised of the possible

25. *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632-33 (1943).

26. See, e.g., Robert K. Naumann, Janie M. Ondracek et al., *The Reptilian Brain*, *CURRENT BIOLOGY* (Apr 20, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4406946/>, and sources cited therein.

27. See, e.g., Lynn Johnson, Ph.D., *Effective Stress Management*, UTAH B.J., August/September 2003, at 28 (discussing the triune brain theory of reptile, mammalian/limbic system, and neocortex, and the elaborate steps necessary for the cognitive brain to overturn emotional reactions held by the "lower-order" brain functions). It is also true that "emotions are a crucial part of the decision-making process A brain that can't feel can't make up its mind." JONAH LEHRER, *HOW WE DECIDE* 15 (2009).

28. This characterization of the interaction of the conscious aspects of cognition and unconscious aspects of brain activity is an issue of active debate in the scientific community. See, e.g., Joseph E. LeDoux, *Evolution of Human Emotion—A View Through Fear*, *PROGRESS IN BRAIN RESEARCH* (Mar. 18, 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3600914/>; Louis J. Sirico, Jr., *The Trial Lawyer and the Reptilian Brain: A Critique*, 65 *CLEV. ST. L. REV.* 411, 417 (2017); Gerald Wiest, *Neural and Mental Hierarchies*, *FRONTIERS IN PSYCHOLOGY* (Nov. 26, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3505872/>.

emotional reactions of different members of the audience who will view the video or images.

There is a well-developed literature on the use of focus groups in analyzing media—it just is not well-developed in the legal academy. Psychology and marketing provide the primary sources law students and attorneys should consult.²⁹

Picking your control group members should be done with attention to the possible constituencies of the audience, whether it be judges and jury members, the chair and members of an administrative board, a government official or committee, or other groups of decision-makers who will view the image. In other words, do not simply show your video or images to other attorneys. Consider different backgrounds, ages, levels of education, racial and ethnic demographics, and socioeconomic factors.

Show the video or images to the focus group or chosen subjects first without setup, without explaining your goal or intended message—in other words, without “priming” your audience to receive and perceive the images a certain way. You should want to receive their immediate emotional take on the visuals. This is especially true if the visual is particularly graphic, gory, or disturbing, as in the Boston Marathon bombing photos, or the *Liebeck v. McDonald’s* photos referenced above. It is true that in actual use, you will have the opportunity to engage in priming, to set up the images or video and prepare the audience to receive and perceive them a certain way. But it is better not to include within the presentation of the evidence or the brief images that will significantly interfere with the cognitive task of accepting the images for the purpose you intended them by provoking strong emotional reactions from a significant number of viewers.

II. Conclusion

The recognition that visual rhetoric is rapid, efficient, constructive, and persuasive reveals the potential of visual rhetorical devices to serve as topics and tropes in legal discourse to construct meaning and to inform and persuade legal audiences. Visual rhetorical topics and tropes inspire inventive thinking about the law that constructs meaning for the author and the audience. But visual topics and tropes are subject to abuse and must be used ethically. Those introducing a visual image should give careful regard to the propriety of the image as a tool to create meaning and inspire imagination and not as a tool of deception or obfuscation within the rhetorical situation at hand. This, of course, is true of all legal discourse, whether comprising words, or a mixture of words and visual devices.

29. See, e.g., References and Selected Bibliography: Focus Groups, COUNCIL ON LIBRARY AND INFORMATION RESOURCES (2014), <https://www.clir.org/pubs/reports/pub105/appendixa.html>.