

‘As this painting suggests’:

The Power and Perspective of the Visual in Law and History

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Over ten years ago now Peter Burke, an early-modern European historian, wrote that ‘historians still do not take the evidence of the image seriously enough’, leading others to speak of the ‘invisibility of the visual’ and the ‘condescension towards images’, which this implies. ‘Relatively few historians’, he pointed out, ‘work in photographic archives, compared to the numbers who work in repositories of written and typewritten documents. Relatively few historical journals carry illustrations and when they do, relatively few contributors take advantage of this opportunity.’¹

This, despite the fact that social historians such as Raphael Samuel in the UK became aware of the value of photographs for exploring ‘history from below’ in the mid-1960s.² Historians had discovered that the visual records of documentary photography were sometimes all they had for the poor and illiterate subjects of social histories.³ Meanwhile art historians had taken up the challenge to write the social history of art.⁴ Nevertheless the use of images for historical analysis was confined to a small group of scholars and slow to move into the mainstream. While the use and analysis of

¹ Peter Burke, *Eyewitnessing: The Use of Images as Historical Texts* (Ithaca: Cornell University Press, 2001), 9–10.

² Burke, 12; Raphael Samuel, *Theatres of Memory* (London: 1994); Boyd Tonkin, ‘Icons of the dispossessed’, *History Workshop Journal* (24 Autumn 1987).

³ Diane Kirkby, ‘Writing the history of women working: photographic evidence and the “disreputable occupation of barmaid”’, *Labour History* 61, (November 1991): 3–16.

⁴ T. J. Clark, *Image of the People: Gustave Courbet and the 1848 Revolution* (London: Thames & Hudson, 1973); Michael Baxandall, *Painting and Experience in Renaissance Italy: A Primer in the Social History of Pictorial Style* (Oxford: Clarendon, 1972); Margaret Iverson and Stephen Melville, *Writing Art History: Disciplinary Departures* (Chicago: University of Chicago Press, 2010).

photographs by historians has undoubtedly increased over the decade since Burke wrote, the recognition of art's value remains muted, and for legal historians even more obscure. What historians were still not inclined to do, according to Burke in 2001, was 'to allow for the impact of the image on the historical imagination.'⁵ This is a claim that can still be made.

'As this painting suggests' is a phrase taken from a US history textbook produced in 2006, using paintings to illustrate, as a straight factual representation the rapid growth of cities in the late nineteenth century, the historical narrative the text was constructing. That phrase is the problematic Burke identified. While undoubtedly paintings, photographs, cartoons, visual images of various genres, can and do 'suggest' in ways that can further historical understanding, their value to the historian goes beyond their illustration of events to their potential to reveal deeper meanings than written words convey. Taking images on their own terms as visual sources, at least equal to and in some cases superior to, or more powerful than, the textual documentary sources, allows access to historical knowledge not attainable through written texts alone. This then is an argument against the functionality of images for a prioritised written text, indeed for taking the aesthetic expression in creative works as sources of knowledge. It is an argument for seeing law through the visual.

In Indigenous Australian communities scholars say painting is the way of telling law stories, creating an Indigenous jurisprudence. Aboriginal paintings are legal texts and not simply works of art. Rather they are documents that detail the system of law, and the rights and responsibilities within the law of individuals. Making art is painting the

⁵ Burke, 13.

law, and the artist may often be the senior law man of his people.⁶ While this is not to suggest the same is true in the western legal tradition, it is well to remember that Plato believed art and law were the same, that legislation and lawmaking is, like painting, itself a work of art.⁷ For literate societies, as well as those with an oral tradition, art contains the symbolism and metaphors of a visual language which conveys meaning and creates legal knowledge in other ways. The aesthetic quality of a creative work has the power to evoke a response in the viewer which creates new ways of knowing, new ways of imagining the future.⁸ This affords insight into key moments of change in values, political undercurrents, and unspoken tensions in ways official written legal sources cannot.

Burke speaks of ‘the power of visual representations in the religious and political life of past cultures.’⁹ He explains their persuasiveness as sources of direct evidence for otherwise inaccessible knowledge. Images bring historians face-to-face with the belief systems, values and pleasures of past cultures and allow the historian to glimpse their meaning, to gain new perspective on the relationship between (past) image or object and (present) contemporary questions. Art enables historians to go beyond the functional, purely illustrative, dimensions of images, to seek their cultural impact and significance beneath particular events, and to trace their continuing meaning into the future.

⁶ Christine Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (New York: Routledge, 2011); N. Bruce Duthu, ‘Painting the Law: Understanding the Law Stories in Aboriginal Art’ in Stephen Gilchrist (ed.), *Crossing Cultures* (Hood Museum of Art, Dartmouth College, 2012).

⁷ Eugenio Benitez, ‘Plato’s Analogy Between Law and Painting: *Laws* VI.769a-771a’, *Philosophical Inquiry* 32 (2010): 1–19.

⁸ Michel Foucault, *Manet and the Object of Painting* (London: Tate Publishing, 2009).

⁹ Burke, 13.

Recognising that the conventions of artistic creation are more than legal historians are usually trained to bring to their sources, this paper contends that exploring the aesthetic can nevertheless yield new knowledge and alternative narratives of law and legal cultures. Indeed, law and legality is itself often the subject of artwork, as the study of women's work in the late nineteenth to early twentieth century demonstrates.

Visualising Working Women

'It has', Peter Burke said, 'become virtually unthinkable to ignore the topic of gender when analysing images, just as it was once difficult to ignore the question of class.'¹⁰

Labour reformers in Chicago and New York of the early twentieth century relied on the documentary photographs of Lewis Hine and Jacob Riis as true documents of the social problems and poverty of the immigrant workforce that women reformers were living amongst and helping to organise into trade unions.¹¹ Indeed, reformers used those photographs for their political purposes, and reproduced them in their publications, as they campaigned for changes to industrial laws. That documentary style of photography thus created an archive that historians could later draw on to illuminate the need for the progressive reform movement, to identify the individuals involved in that movement, and to evoke the lived experience of the workers. Scholars are now probing more deeply into the history of documentary photography and its aestheticism, seeing a relationship between photography and painting that was previously overlooked.¹²

¹⁰ Burke, 179.

¹¹ Jacob Riis, *How the Other Half Lives*; Lewis Hine, *Photographs*; Diane Kirkby, *Alice Henry: the Power of Pen and Voice* (Cambridge: Cambridge University Press, 1991).

¹² Maren Stange, 'From Sensation to Science: Documentary Photography at the Turn of the Century' in *Symbols of Ideal Life: Social Documentary Photography in America 1890–1950* (Cambridge: Cambridge University Press, 1989), 16–26.

In an important study of art and labour in mid-Victorian Britain, art historian Tim Barringer posed several key questions that would seem to lay the ground rules for research in this area: ‘What is the relation of labour to beauty, to aesthetic value? What is the status of the labouring body as the subject of art? How did artists ... create meanings for work?’ Barringer explored a key moment in history as Britain underwent significant transformation in industrialisation, and the complex interplay of art and labour in the lives of Victorians. In what he termed ‘an aesthetic of labour’, which he traced to social investigator Henry Mayhew’s expression ‘the artistic quality of labour’, Barringer focused on the male labouring body which he said, ‘provided the most powerful and significant formulation of work and a nexus of ethical and aesthetic value.’¹³ Barringer’s focus on the aesthetic of the labouring body can equally apply to women workers.

Women’s work is often located in the informal economy that escapes official documentation. For historians of women, visual images often convey evidence about women’s experiences that cannot be found in written sources or other documents. Images of women workers often appear in street scenes of everyday life, not intentionally as the subject of the work, but because their presence is part of the whole. The fact of their presence and the detail provided in the picture can be revealing but needs to be read with the knowledge of the period and the purpose of the artwork. It needs to answer Barringer’s question, how did artists create meanings of that work.

¹³ Tim Barringer, *Men at Work: Art and Labour in Victorian Britain* (New Haven: Yale University Press, 2005), 1–2.

The woman worker's body is paramount in defining working women. Feminist labour historians have always been aware of the importance of prostitution as a source of income for poor women, and the permeable border between legal waged work and illegal work, prostitution. For US labour reformers early in the twentieth century prostitution was the undesirable alternative for low-paid women unable to make ends meet on their below-subsistence wages. Lewis Hine's photographs hinted at this and showed prostitution to be a furtive, surreptitious activity.¹⁴ The spectre of the prostitute and women's likely 'fall' into prostitution was a reason reformers gave for raising female wage rates, legislating for minimum wages and giving women equal pay. In the service occupations, where most women were concentrated, the line between waged work and prostitution was barely drawn, especially in the perception and representation of the work, and the knowledge thus created of the women workers, a problematic pursued in the history of women's work as barmaids.¹⁵

Prostitutes have also figured prominently in art. They were the subject of much French impressionist painting, both overtly in the work of Toulouse-Lautrec and Edgar Degas, who painted women working in brothels, and also covertly either as working women visible on the streets, or as women working in 'suspicious occupations', such as millinery shops, which were purportedly a front for prostitution as they paid wages that were totally inadequate to live on without engaging in occasional prostitution.¹⁶ Independently of the numbers of women actually working as prostitutes, historian Hollis Clayson has written, 'There was an outbreak of male

¹⁴ Lewis Hine, 'Red-Light District at Noon, Chicago, 1911' in Lewis Hine, *America* (New York: Aperture, 1977).

¹⁵ Diane Kirkby, *Barmaids; A History of Women's Work in Pubs* (Cambridge: Cambridge University Press, 1997).

¹⁶ Hollis Clayson, *Painted Love: Prostitution in French Art of the Impressionist Era* (New Haven: Yale University Press, 1991), 113–21.

interest in women prostitutes in French art and culture of the 1870s and earlier 1880s' and she speaks of a 'contradictory dialectic of disgust and fascination.'¹⁷

The products of the male artists' fascination now helps evoke a history of the lives of working women and the meaning attached to their work. Several of the major impressionists painted millinery workers. Manet and Renoir saw the milliner as contemporary working woman who was nevertheless eroticized even while at the same time they left aside any telltale signs of milliners' legendary corruption. As Clayson says, 'for some late nineteenth century Parisians, the millinery shop seems to have always denoted elusive, commercialized sex, and it is a matter of importance for us that painters of the Impressionist circle were drawn to the subject of milliners when the profession was so firmly enveloped by an erotic legend.'¹⁸ Degas was another who painted millinery workers and Clayson reads the tension in his work as acknowledging the 'legend of the millinery shop as a *magasin-pretexte*.' Thus even where particular paintings do not overtly sexualize the millinery worker and her commerce, they do affirm the strong connection between avant-garde definitions of modernity and the subject matter of sexualized, commodified anonymous working women. 'A woman who made and sold objects of adornment for a living was also reputed to be for sale herself: to men.'¹⁹ The milliner had a distinctly ambiguous identity in these paintings which depicted a labourer in a profession known to denote commercialized sex and in doing so, the painters helped constitute and shore up a

¹⁷ Clayson, xviii

¹⁸ Clayson, 128, 131

¹⁹ Clayson, 131

belief in working-class female sexuality. Importantly ‘art was itself complicit in the regulation of sexualities.’²⁰

Even more explicit than millinery as prostitution was the work of women waiters in the new beer halls of Paris. Starting in the late 1870s, countless visual images of these beer halls were produced—Manet did three paintings of waitresses in beer halls. In them he featured the waitress but did little or nothing to explore her conventional significance—yet critics received the paintings as ‘bad taste’ and pointedly called the waitress a ‘*fille de brasserie*’, an epithet with explicit overtones of prostitution. Their reactions and descriptions were more to the actual beer halls than Manet’s pictures of it, indecency (immorality) was more on the mind of critics viewing the pictures than it was in the actual picture. Thus Manet’s ‘simultaneous confrontation with and avoidance of key trademarks’ of beer hall women, suggests to Clayson ‘that these paintings exemplify that peculiar avant-garde enterprise of the late 1870s and early 1880s: constructing an imagery of modernity out of the eroticized, commercialized working-class woman.’ Clayson goes on to say that the ambiguous way Manet has painted the women ‘makes their sexual morality an issue, because it is left as a constantly nagging open question. ...A deadpan treatment of such a subject will always raise the question “is she or isn’t she?”’²¹

The impact that such a provocative image can have on lawmaking is illustrated in the work of Australian barmaids. The Royal Commission set up in Victoria in 1881 to investigate the conditions of women working in hotels brought down an interim report in 1883 which argued that legislation regulating employers was needed to improve

²⁰ Clayson, xviii

²¹ Clayson, 151

women's very poor working conditions. A year later, however, the final report of the commission held not that employers would be the focus of legislation, but that the legislation should remove women from the industry because it was an unsuitable place of work for them.²² The question is, what happened in that year to change the mind of the commissioners about the suitability of the work for women? One answer is, Manet's painting *A Bar at the Folies Bergere* (1881–82) went on display in London.²³

There is no textual evidence to demonstrate the impact of this image on the Royal Commissioners in colonial Victoria, but the power of the painting's display had a shock effect in creating knowledge that would undoubtedly have reached them. Put simply, Manet enabled a new way of seeing and thinking. This was Manet's last major painting, and is today 'a widely admired icon of modernist uncertainty ... [which] exemplifies ... ambiguous Impressionist representations of covert prostitution.'²⁴ In Clayson's view:

That the picture actively addresses the possible double profession of the barmaid—serving and prostitution—was clear to observers in 1882 ... drawing upon their personal knowledge of the *Folies Bergere* nightclub, but their assumption that Manet's painting posed explicit questions about the server's morality was encouraged and sustained by the famous conundrum of the double woman. The frontal barmaid stands upright and appears cool detached and aloof, whereas the reflected woman leans forward slightly and acts subservient to the adjacent, looming male customer ... the commercial transaction at the bar is eroticized by being provided with two possible outcomes. In one she does, in the other she doesn't.²⁵

²² Kirkby, *Barmaids*.

²³ T. J. Clark, *The Painting of Modern Life: Paris in the Art of Manet and His Followers* (New York: Knopf, 1984); <http://www.courtauld.ac.uk/gallery/collections/paintings/imppostimp/manet.shtml>

²⁴ Clayson, 151

²⁵ *Ibid*

Clayson argues strongly that rather than avoiding the inscription of sexual attitudes, French modernism's emphasis on ambiguity and indeterminacy (does she? doesn't she? was she? wasn't she?) actually 'has a vivid and pronounced sexual politics' that fixes the morality and character of the women 'when the types of women regularly chosen for representation were already stigmatized by the culture as prostitutes.' By proposing that female sexual availability was a matter of doubt and ambiguity these artists 'met the alleged prominence of clandestine prostitutes in the modern city with a strategy of elusiveness, incompleteness, and offhandedness, with an apparent refusal to corroborate stereotypes or to narrate precise social transactions.' While it might, seemingly, acknowledge 'the ambiguities of public identity that had resulted from an increase and changing character of clandestine prostitution,' the focus on cafes, millinery shops, nightclubs—sites commonly associated with covert prostitution and therefore suggestive of uncertainty—'the avant garde actually reinforced reductive female stereotypes and exacerbated the commodification of public female identity that prostitution epitomized.'²⁶

US artists of the Ash Can school, as the US history textbook discussed at the beginning of this paper was pleased to point out, painted the gritty realities of daily life and work in the cities in a way that was close to the substance of Hines' and Riis's photography. Ash Can artists similarly took urban women as their subject matter and, like the social documentary photographers, their work is being read more critically. Artist John Sloan's 'predilection for tawdry urban scenes' means he 'explored social issues more vigorously than any other Ash Can artist' and he

²⁶ Clayson, 153

frequently took working women as his subject.²⁷ His politics had him depicting the immigrant communities of Manhattan's Lower East Side. While his 'images of the working poor are endowed with nostalgia and admiration for a spirit he believed was unspoiled by middle class American values,' his representations of working women were deemed 'not fit for the living room' by the arbiters of taste.²⁸ When he tried to have his painting (*Home From Work 3A.M.*)²⁹ exhibited in the National Academy of Design in 1910, it was deemed 'too frank and too vulgar' because, like Manet, he had taken as his subject the working woman as prostitute. At a time when print journalism and muckraking reformism in the US spoke of little else, prostitution was nevertheless unacceptable visually: it was still considered objectionable to incorporate the theme into American art. In thus choosing to do so John Sloan, according to at least one scholar, 'was consciously reinforcing his reputation as the quintessential realist painter of the early twentieth-century urban scene.'³⁰ His paintings documented the conditions surrounding the prostitute—where she lived, what she wore, what kind of men bought her service—but his choice of subject also signified changing urban values and jolted US art and society out of genteel complacency.

Perhaps most important was his attempt to convey the humanity and vitality of working women amid tawdry circumstances, the camaraderie of women, their beauty, grace and desire for amusement. Sloan sees pleasure in these women, 'the bits of joy' women are capable of bringing in to their own lives and those of others, and the

²⁷ Patricia Hills, 'John Sloan's Images of Working Class Women', *Prospects* vol. 5 (October 1980): 157–96.

²⁸ *Ibid*

²⁹ <http://www.philamuseum.org/collections/permanent/49982.html>

³⁰ *Ibid*

respect and sympathy with which he treats his subject. There is no ambiguity here.³¹ Sloan embodies the intersection between art and politics that is at the core of my concerns. Sloan was not just a painter, he was also a newspaper illustrator, a member of the Socialist Party and in 1912 he became arts editor of *The Masses*, where he worked alongside Max Eastman and John Reed and produced these sorts of images.

Making women the subject of painting has been a means of both creating and subverting gendered prescriptions, and enables an insight into political and legal cultures. Robert Henri and John Sloan promoted a democratic art based on lived experience.³² This coincided with the politics of social reform and urban living enjoyed by feminist labour reformers in the settlement houses of Chicago and New York. It generated a considerable amount of visual imagery for the historian to analyse, much of it by women as well as men.³³ It has also provided an alternative narrative to that of the print media.

Sometimes, however, the painting is not what it seems. A well-known nineteenth-century portraitist Eastman Johnson, in a painting of a domestic interior, *Little Girl With Golden Hair (Family Cares)*, 1873, appears to be presenting an unproblematic depiction of nineteenth century girlhood in the child's harmless, apolitical, feminine pursuit of playing with dolls. A closer reading of the detail, however, showing that the child has hung her black doll, reveals a subtext that makes a direct reference to a

³¹ John Sloan, 'The Return From Toil', cover of *The Masses*, 4 July 1913, Tamiment Institute Library, New York University.

³² Rebecca Zurier, *Picturing the City: Urban Vision and the Ashcan School* (Berkeley: University of California Press, 2006); Allan Antliff, *Anarchist Modernism: Art, Politics, and the First American Avant-Garde* (Chicago: University of Chicago Press, 2001).

³³ Marian Wardle (ed.), *American Women Modernists: the Legacy of Robert Henri, 1910–1945* (New Brunswick, NJ: Rutgers University Press, 2005).

process of lawmaking, viz: the failure of reconstruction in the post-Civil War South and the passage of Jim Crow laws which also brought a spate of lynchings.³⁴

‘The Law’ was the title of an ink drawing work done by Jewish communist artist Hyman Warsager in 1934, a specifically anti-lynching work published among many others by the SPA periodical *New Masses*. Warsager captured ‘contemporary [1930s] leftist arguments that racial violence was a predictable outcome of America’s corruption by both fascism and capitalism.’³⁵ Warsager has indicated there is a close link between lynching and racism with other forms of systemic oppression in American society—in the swastika on the court building which is built around the roots and branches of the tree holding the hanged man. It is not only an attack on racist violence but a condemnation of Congress for failing to pass antilynching legislation, thereby supporting mob violence and white supremacy.³⁶

There were many anti-lynching works, part of an organised political campaign in the 1930s employing artists to arouse public feeling to get the law changed, partly as a response to the rape trial of a group of African-American youth (the Scottsboro boys).³⁷ While many of these works were by left-wing, sometimes Communist Party artists with a particular political perspective, they provide a knowledge of ‘the law’ that was not written into legislation. Helen Langa argues that ‘to read the complex possibilities of iconographic and semiotic meaning conveyed by [works of art] current viewers must understand the cultural and political contexts that framed that process

³⁴ Teresa Carbone, Teresa and Patricia Hills, *Eastman Johnson: Painting America* (New York: Brooklyn Museum of Art in association with Rizzoli International Publications, c.1999).

³⁵ Helen Langa, *Radical Art: Printmaking and the Left in the 1930s* (University of California Press, 2004), 146.

³⁶ *Ibid*

³⁷ Marlene Park, ‘Lynching and Antilynching: Art and Politics in the 1930s’, *Prospects vol. 18* (October 1993): 311–65.

... to also question what was absent from the surviving evidence, left unstated or deliberately omitted, and whether artists ... avoided or never even considered some subjects.³⁸ Lynching was until the 1920s one of those subjects. That African-American organisations such as the NAACP used art to promote political awareness of the legal issue prompts us to do the same, to recognise the power and perspective of visual imagery in creating and disseminating knowledge of the law.³⁹

Other notable examples from the US of the importance of the visual in relation to the legal imagination are those referencing specific legal events: Jack Levine's *The Trial* (1953–54),⁴⁰ Andy Warhol's series of electric chair paintings from the 1960s, and Peter Saul's *Ethel Rosenberg in the Electric Chair* (1987),⁴¹ all relate to the trial and execution of Julius and Ethel Rosenberg at the height of the Cold War.⁴² Taking these works as sources means the aesthetic is one way of accessing issues of debate and conflict and paradox, which are the historian's staple diet. They give us a way of taking the study of law out of the courtroom, beyond the law reports and the corridors of power and parliament, into the realm of wider understandings and interpretation. They also give us access to moments of rupture and changes of direction.⁴³

³⁸ Langa, 9.

³⁹ Dora Apel, *Imagery of Lynching: Black Men, White Women and the Mob* (New Brunswick: Rutgers University Press, 2004).

⁴⁰ http://www.artic.edu/aic/collections/artwork/80827?search_no=1&index=1

⁴¹ <http://artsy.net/artwork/andy-warhol-little-electric-chair>; http://artpace.org/wp-content/themes/BLANK-Theme/slideshow_exh.php?axid=78, slide 3.

⁴² Andrew Hemingway, *Artists of the Left: American Artists and the Communist Movement, 1926–1956* (New Haven: Yale University Press, 2002), 256–57; Andy Warhol, *Little Electric Chair Paintings* (New York: Stellan Holm Gallery, 2001); Rob Okun (ed.), *The Rosenbergs: Collected Visions of Artists and Writers* (New York: Universe Books, 1990).

⁴³ Foucault's argument about Manet.

Images have the power to not just evoke the past but to construct and convey meaning of that past in the present.⁴⁴ ‘The inescapable relationship’ between historical awareness that a work of art was produced in a particular time and place in the past, and the aesthetic response we now have to that work in the present, promises a new, possibly deeper, way of knowing.⁴⁵ Art historian Helen Langa’s proposition that ‘... works of art are understood both as historically situated material objects and as “texts” whose meanings are created anew by each individual who approaches them’, offers exciting possibilities for historians. ‘The act of opening up interpretive possibilities does not’, she claims, ‘mean yielding such works to problematic claims of transhistorical mutability. Instead it calls us to engage in a process centred on the structural and iconographic details of the works themselves, in order to see how they resonate within their historical conditions of production, circulation and reception.’⁴⁶

Moxey takes this further in a discussion of the interaction between viewer and object in which ‘objects of visual interest persist in circulating through history, demanding radically different forms of understanding and engendering new narratives as they wander.’⁴⁷

The historians’ retreat from an instrumental view of visual images offers much complexity, many more questions about spectatorship, and a retrieval of the value of aesthetics to understanding political and legal cultures, and the racialised and gendered practices at law’s core. Reading visual sources can advance our knowledge of the context in which lawmaking occurs, by embedding lawmaking within culture

⁴⁴ For an elaboration of the complexity of this relationship see Keith Moxey, *Visual Time: The Image in History* (Durham and London: Duke University Press, 2013).

⁴⁵ Moxey, 37, 53 et seq.

⁴⁶ Langa, 9.

⁴⁷ Moxey, 71.

and society, and revealing the catalysts for change outside the narrow processes in which lawmaking occurs. This way historians can realize their potential to tell another story of law.