"Ocular Proof": Photographs as Legal Evidence*

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RÉSUMÉ Ce texte retrace les règlements qui gouvernent l'admissibilité des photographies en tant que preuves dans les cours de justice au Canada, aux États-Unis et en Grande-Bretagne. L'auteur base son analyse sur le discours de l'objectivité photographique du XIXe siècle, et des exemples de jurisprudence et de législation sont utilisés pour montrer l'évolution de la réponse des tribunaux. Il examine la valeur légale de la preuve photographique à partir de la fin du XIXe siècle jusqu'à présent, en soulignant les préoccupations du XXIe siècle par rapport à l'authenticité et à l'admissibilité de la photographie numérique.

ABSTRACT This article traces the rules governing the admissibility of photographs into evidence in the courts of law of Canada, the United States, and Britain. The discussion is grounded in the nineteenth-century discourse of photographic objectivity, and examples of case law and legislation are cited to show the evolving response of the courts. The legal understanding of photographic evidence is examined from the late nineteenth century onward, and the twenty-first-century concerns surrounding the authenticity and admissibility of digital photographs are highlighted.

> "Photographs cannot tell stories.
> They can only provide evidence of stories, and evidence is mute;
> it demands investigation and interpretation."[1]

Introduction

The potential value of photography to law enforcement agencies and the role it could play in the judicial process was evident from early in its history, begin-

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1 Philip Gourevitch, "The Abu Ghraib We Cannot See," *The New York Times* (24 May 2009), p. WK10, previously published, in a slightly modified form, in Philip Gourevitch and Errol Morris, *Standard Operating Procedure* (New York, 2008), p. 148.

ning in the late nineteenth century. In the one hundred and fifty years since their first documented uses in the courtroom, photographs have played an indispensable role as evidence in the legal system. However, Anglo-American courts took some time in definitively asserting what role photographs would and could play as evidence in trials and in defining the nature of photographic evidence. Within and between jurisdictions, courts ruled that photographs were the product of scientific processes and that they were accurate representations of the world while, at the same time, requiring them to be authenticated by a knowledgeable witness. The objectivity of photography – the relationship between the images and the world they depict – has been, and continues to be, an issue of debate within the legal realm. A debate also took place within the wider photographic discourse beginning in the mid-nineteenth century and continuing well into the twentieth century, over photography's status as a tool of science or as a subjective, artistic product.

This article traces the history of photography as evidence in the Anglo-American justice system, examining case law and legal scholarship from Britain, the United States, and Canada, from the first instances of photographs being submitted as evidence in the courts in the latter half of the nineteenth century up to the first years of the twenty-first century where issues surrounding the reliability of digital images threaten to undermine photography's usefulness as evidence.

Evidence, Admissibility, and Authenticity

In order to be admitted in a court of law in Canada, and in other jurisdictions based on the common law tradition, evidence must meet a minimum standard of relevance and materiality as established by the trier of law or judge. First, the evidence must be relevant to a material issue in the case at hand. It has to be shown that the evidence relates to the matter at trial for it to be admissible, assuming that no exclusionary rules can be applied, such as the rules governing hearsay or prejudicial testimony.[2] For "real evidence," tangible items exhibited in the courtroom, including objects, documents, and audiovisual material, a minimum standard of authenticity must be met, such as authentication by witness testimony. For real evidence, it must be demonstrated that the evidence is what it purports to be, although it need not be demonstrated beyond a reasonable doubt, just that there is evidence to show that the item is in fact what the counsel claims it is.[3]

2 David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 4th ed. (Toronto, 2005), pp. 24–31.

3 Ibid., pp. 411–13; A.F. Sheppard, "Records and Archives in Court," *Archivaria* 19 (Winter 1984–85), p. 197.

Once evidence has been deemed relevant and material, it must meet two additional tests before being admitted: the evidence cannot be hearsay and it must be considered the "best evidence." Hearsay evidence is an out-of-court written, oral, or implied statement, which is offered as proof of the truth of what the statement asserts. Hearsay cannot be cross-examined and, therefore, its reliability cannot be tested in the courtroom. Unless there is an applicable exception, hearsay evidence is not admissible in Canadian courts.[4]

Finally, when the content of a document is disputed, the best evidence rule states that the original must be introduced or the court must be satisfied that the original is unavailable. Secondary evidence, such as a copy or oral testimony, may not be admitted to prove the content of a document except where the originals cannot be produced in court.[5]

For archivists, ascertaining and preserving the reliability and authenticity of records is at the core of much of their work, particularly in arranging and describing records. While authenticity is of paramount concern for archivists, it is not a primary issue dealt with by the judge in a case. If the evidence meets the minimum criteria of admissibility, questions about authenticity and reliability do not exclude the evidence from being tendered in court. Concerns raised by opposing counsel about the authenticity or reliability of testimony, documentary, or other evidence, impact the weight of the evidence, which the jury or triers of fact would have to consider in reaching their verdict.[6]

The rules for admissibility apply equally to testimony presented, as well as to tangible items, or "real" evidence. Real evidence can be either "original," that is, directly linked to the charges, or may be "demonstrative evidence," which is used to help witnesses illustrate their testimony.[7] Photographs may serve in either role. For example, if a person were charged with possession of child pornography, the images seized would be directly related to the criminal charge. Alternatively, if a photograph were taken at the scene of a car accident and used by a witness to illustrate the position of the vehicles immediately following the accident, it would serve as demonstrative evidence. The consideration of photographs as demonstrative evidence is the focus of this article.

4 Sheppard, p. 198; Paciocco and Stuesser, pp. 95–97.

5 Paciocco and Stuesser, pp. 419–20; Sheppard, p. 197.

6 Paciocco and Stuesser, pp. 17–18; Sheppard, p. 197.

7 Paciocco and Stuesser, pp. 411–12. Jennifer Mnookin argues that the introduction of photographic evidence into the courtroom greatly contributed to the current understanding of the category of "demonstrative evidence"; see Jennifer L. Mnookin, "The Image of Truth: Photographic Evidence and the Power of Analogy," *Yale Journal of Law and the Humanities*, vol. 10, no. 1 (1998), pp. 59–70.

"Evidence of a Novel Kind": Photography and Objectivity

Photography's utility in law enforcement was recognized early in the technology's history. Police used photographs to create "rogues galleries" to identify criminals and to prevent recidivism. In Paris, police included daguerreotypes of criminals in their files as early as 1841, only two years after the announcement of the process. By the end of the decade, prisons in both the United States and the United Kingdom were photographing inmates. In Canada, this practice was introduced in 1898.[8] Photographing criminals, according to Marcus Aurelius Root, writing in 1864, had helped secure the public order, as the convicts "will find it not easy to resume their criminal careers, while their faces and general aspects are familiar to so many, especially to the keen-sighted detective police."[9] The systematic photographing of criminals became standardized with the Bertillon system, introduced in Paris in 1872 and widely adopted internationally, which specified a series of physical measurements and descriptions to be recorded and included along with front- and profile-view photographs.[10]

Photography's impact in the courtroom, however, was not as immediate. Technical limitations, which required long exposures of immobile subjects under strong light, restricted the potential subject matter for photographs and, as a result, limited photography's usefulness as evidence. In the first two decades after the announcement of photography's invention in 1839, there may have been rare instances in which photographs were presented as evidence in lower courts. These admissions, however, went unchallenged and therefore were not recorded in case law. Adding to the uncertainty about the earliest use of photographic evidence is the fact that there are no reports of photographs being used in courts in either the photographic or legal journals until the late 1860s, with the exception of an 1852 report of the use of daguerreotypes in French courts.[11] According to George Lawyer, writing in 1895, photography was "many years old before any attorney had displayed sufficient temerity to ask a court for the ruling on the subject."[12] It was not until the late 1850s in the United States, the

8 See Sandra S. Phillips, "Identifying the Criminal," in *Police Pictures: The Photograph as Evidence*, eds. Sandra S. Phillips, Mark Haworth-Booth, and Carol Squiers (San Francisco, 1997) and Sarah Stacy, "The Legalization of the Photography of Canadian Prisoners," *Archivaria* 65 (Spring 2008), pp. 107–23.

9 Marcus Aurelius Root, *The Camera and the Pencil; or the Heliographic Art, Its Theory and Practice on all its Various Branches* […] (Philadelphia, 1864), pp. 420–21.

10 Allan Sekula, "The Body and the Archive," *October*, vol. 39 (Winter 1986), pp. 17–37.

11 Thomas Thurston, "Hearsay of the Sun: Photography, Identity, and the Law of Evidence in Nineteenth-Century American Courts," *Hypertext Scholarship in American Studies, American Quarterly* (1996), para. 2, http://chnm.gmu.edu/aq/photos/frames/essay01.htm (accessed on 15 June 2009); Mnookin, pp. 8–9.

12 George Lawyer, "Photographs as Evidence," *Central Law Journal*, vol. 4, no. 5 (2 August 1895), p. 92.

early 1860s in Great Britain, and the early twentieth century in Canada that photographic evidence was mentioned in cases that were challenged, and that reports discussing rulings on photographs began appearing in appellate court case records and in contemporary legal journals.

From the mid-nineteenth century, and continuing well into the latter part of the twentieth century, a dominant strain of the discourse surrounding photography centred on its ability to objectively reproduce what was before the lens. Given its technological origins in optics and chemistry, photography was viewed as being the product of a scientific, and therefore truthful, process,[13] and the earliest texts announcing the invention of photography in France and Britain emphasize its mechanical nature.[14] In a bill presented on 15 June 1839 to the French Chamber of Deputies (recommending that Louis-Jacques-Mandé Daguerre and the estate of Joseph Nicéphore Niépce be granted an annual stipend in exchange for allowing the details of their invention, the daguerreotype, to be made public), the Minister of the Interior, Comte Tanneguay Duchâtel, underscored the mathematical basis of the photographic process, which led to the "most perfect reproduction of nature." According to the text of the bill,

> … in four or five minutes, by the power of light drawings, in which, the objects preserve their mathematical delineation in its most minute details, and in which the effects of linear perspective, and the diminution of shades arising from aerial perspective, are produced with a degree of nicety quite unprecedented.[15]

A month and a half later, in his "Report made to the Chamber of Peers," Joseph Louis Gay-Lussac also highlighted the importance of optics and chemical processes in the production of the truthful images.

> It is certain that through M. Daguerre's invention physics is today in possession of a reagent extraordinarily sensitive to the influence of light, a new instrument which will be to the study of the intensity of light and of luminous phenomena what the microscope is in the study of minute objects, and it will furnish the nucleus around which new researches and discoveries will be made..…
>
> The Chamber had the opportunity to convince itself from the exhibits that basreliefs, statues, and monuments, in one word, inanimate nature, are reproduced with a perfection unattainable by the ordinary methods of drawing and painting, equal to

13 See Joan M. Schwartz, "'Records of Simple Truth and Precision': Photography, Archives, and the Illusion of Control," *Archivaria* 50 (Fall 2000), esp. pp. 22–26.

14 Joel Snyder argues that the use of the term "mechanical" to describe photographs refers not to the machinery involved in their production but, rather, derives from the usage of the term as employed in contemporary art criticism to refer, typically derogatorily, to precise (and unimaginative) copies. See Joel Snyder, "*Res Ipsa Loquitur*," in *Things that Talk: Object Lessons from Art and Science*, ed. Lorraine Daston (New York, 2008), esp. pp. 197–204.

15 "Bill Presented to the Chamber of Deputies, France, June 15, 1839," in *Photography in Print: Writings from 1816 to the Present*, ed. Vicki Goldberg (Albuquerque, 1981), p. 32.

nature itself, because in fact M. Daguerre's pictures are nothing other than the veritable images.

The perspective of the landscape and of each object is delineated with mathematical exactness; each incident, each detail, even if imperceptible, cannot escape the eye and the brush of this new painter...[16]

The discourse surrounding photographs from the very beginning focused on the role science and technology played in the production of the images and in their objectivity. In the earliest accounts of daguerreotypes published in newspapers, journalists reported on the marvelous invention where truthful images produced by light were permanently captured.[17] The hand of the photographer is conspicuously absent and the sun or nature is given agency in their production.

The same year Daguerre's invention was announced, Englishman William Henry Fox Talbot described his process in very similar terms. Recounting his early experiments, Talbot highlighted the chemical process inherent in the creation of his deceptively accurate "photogenic drawings." He stated that a picture, which "would take the most skillful artist days or weeks of labour to trace or to copy, is effected by the boundless powers of natural chemistry in the space of a few seconds."[18] Furthermore, photographic images were described as being created by nature itself. In describing the photographs he took of his home in 1835, Talbot emphasized the causal genesis of the image: "And this building I believe to be the first that was ever known *to have drawn its own picture*."[19] Talbot referred to his photographs as "Sun Pictures,"[20] and photography as "the Pencil of Nature."[21]

In his description of a calotype of a group of ornate china objects, Talbot likened his photographic process to human vision, with the lens serving as the pupil and prepared paper as the retina, the camera "eye" taking in all it sees. In this passage, he also ascribed a legal value to the image, for if a thief were to steal an object, the photograph could serve much more effectively as proof of ownership than a written description. Talbot wrote that, "... if the mute testimony of the picture were to be produced against [the thief] in court

16 Joseph-Louis Gay-Lussac, "Report made to the Chamber of Peers" in "Bill for the purchase of the Invention of Daguerreotypy by the French government, which donates it to the world at large," in *History of Photography*, ed. Joseph Maria Eder, trans. Edward Epstean (New York, 1978), p. 242.

17 See Snyder, pp. 197–98; see also transcriptions of early accounts of the daguerreotype online: "Daguerreian Texts: The first two years (1839–1840)," *The Daguerreian Society*, http://www.daguerre.org/resource/first2.html (accessed on 9 April 2009).

18 William Henry Fox Talbot, "'Some Account on the Art of Photogenic Drawing,' 1839," in *Photography in Print*, p. 39.

19 Ibid., p. 46.

20 William Henry Fox Talbot, *Sun Pictures in Scotland* (London, 1845).

21 William Henry Fox Talbot, *The Pencil of Nature* (London, 1844–1846).

– it would certainly be evidence of a novel kind"; although he was unsure what the reaction to this novel evidence might be, he continued by saying: "what the judge and jury might say to it, is a matter which I leave to the speculation of those who possess legal acumen."[22] Other commentators similarly described the photograph as heliography or "Sun-sketching,"[23] and "nature's drawing."[24] In all of these descriptions, the photographic process was seen as being entirely natural, the unmediated results of light reacting with silver, and therefore truthful.

Contemporary with the first documented instances of photography's use as evidence in legal proceedings in the late 1850s, authors on both sides of the English Channel noted how the objectivity of photography undermined its artistic possibilities. This, according to John Tagg, was the product of a negotiation between photography's privilege and its power, whereby photography could serve as proof in a scientific context only by renouncing its artistic privilege.[25] Lady Elizabeth Eastlake, writing anonymously in the April 1857 issue of London's *Quarterly Review*, argued that photographic images were too technically and aesthetically limited to qualify as art. While criticizing photography's pretensions as art, Eastlake did allow that photographs served a great purpose in providing truthful, slavishly accurate reproductions. Eastlake wrote that photography "is made for the present age," in which the majority of the population cares little for art but craves "cheap, prompt, and correct facts." She went on to say that, "Photography is the purveyor of such knowledge to the world. She is the sworn witness of everything presented to her view … Her business is to give evidence of facts, as minutely and as impartially as, to our shame, only an unreasoning machine can give."[26] Two years later, in his review of the Paris Salon of 1859, Charles Baudelaire echoed these sentiments, although much more stridently. While acknowledging photography's utility in accurately reproducing objects and views in front of the camera with "absolute factual exactitude,"[27] Baudelaire thundered against photography's inclusion among the arts and derided those who believed that art was merely "the exact reproduction of Nature." Baudelaire stated the public's belief that, "since Photography gives us every guarantee of exactitude that we could desire (they really

22 Ibid., pl. 3; see Sekula, "The Body and the Archive," pp. 5–6.

23 Root, p. xviii.

24 William Lake Price, *A Manual of Photographic Manipulation, Treating of the Practice of the Art; and its Various Applications to Nature*, 2nd ed. (London, 1868), p. 2.

25 John Tagg, *The Burden of Representation: Essays on Photographies and Histories* (Minneapolis, 1988), p. 67.

26 Lady Elizabeth Eastlake, "A Review in the *London Quarterly Review*, 1857, An Excerpt," in *Photography in Print*, pp. 96–97.

27 Charles Baudelaire, "The Salon of 1859: An Excerpt," trans. Jonathan Mayne, in *Photography in Print*, p. 125.

believe that, the mad fools!), then Photography and Art are the same thing."[28] Both Eastlake and Baudelaire argued that while photography was useful in some arenas, because of its indiscriminate, mechanical realism, it could not be considered art, as art required imagination, skill, and taste, all of which, these authors argued, photography was lacking.

The realism of the stereoscope heightened the rhetoric surrounding photography's truthfulness. In a June 1861 article entitled "Sun-Painting and Sun-Sculpture" published in *Atlantic Monthly,* Oliver Wendell Holmes argued that it was impossible to tamper with stereoscopic images. He remarked that any attempt to alter the images would be immediately apparent, as the marks would stand out. He wrote that the stereograph "differs from every other delineation in the character of its evidence.… The impossibility of the stereograph perjuring itself is a curious illustration of the law of evidence."[29] Holmes was by no means alone in this conviction. A writer in *The Art-Journal* in 1860 affirmed that, "The photograph, however, cannot deceive; in nothing can it extenuate; there is no power in this marvellous machine either to add to or take from: we know that what we see *must* be TRUE."[30] It seemed inconceivable to these writers that the photograph could be anything less than transparent, truthful, and accurate or that the camera could be made to deceive.

Photographs in the Courts: Truthful Representations or "Hearsay of the Sun"

Amid these claims asserting photography's accuracy, truthfulness, and objectivity, photography made its first appearance in the courts. In American jurisprudence, the 1859 Supreme Court Case *Luco v. the United States* set the earliest precedent for the use of photographic evidence.[31] In this case, photographic reproductions of seals and signatures were presented to prove that the signature on the land grant in question was a forgery. The status of the photographs was not challenged, and they were accepted to facilitate the comparison of documents, with, according to the counsel, "the same certainty as if all the originals were present, and with even more convenience and satisfaction."[32] In his

28 Ibid., pp. 123–24.

29 Quoted in Eve Blau, "Patterns of Fact: Photography and the Transformation of the Early Industrial City," in *Architecture and Its Image: Four Centuries of Architectural Representation: Works from the Collection of the Canadian Centre for Architecture*, eds. Eve Blau and Edward Kaufman (Montreal, 1989), p. 44.

30 "America in the Stereoscope," *The Art-Journal*, new series vol. 6 [vol. 22] (1 July 1860), p. 221.

31 *Luco v. United States* [1859] 1859 U.S. LEXIS 805. Mnookin cites *United States v. Fossat*, [1857] 25 F. Cas. 1157, as an earlier instance where photographs were used as evidence although this case does not get quoted as precedent in later trials; see Mnookin, p. 9.

32 *Luco v. United States* [1859] 1859 U.S. LEXIS 805 at 26–27.

opinion, Justice Grier declared that, after examining the photographic copies provided, the court was able to "fully concur (from evidence '*oculis subjecta fidelibus*')" that the seal and signature were forgeries.[33] By being presented with this visual evidence, which according to the counsel possessed the same weight as the original documents, the court was able to reach a decision that verbal testimony alone would not have allowed. In the years to follow, the use of photographic reproductions of signatures would be one of the main uses of photographs as evidence. This ruling served as a precedent, although it would be challenged in subsequent cases.

In addition to providing copies of documents, photographs were also frequently employed in the 1860s in cases of disputed identity and were used to show exterior views of property and scenes of accidents. It was in these capacities that photographs were employed in the two earliest documented cases of photographic evidence in the United Kingdom. In the 1861 case of *R. v. The United Kingdom Electric Telegraph Company (Limited)*, photographs were entered into evidence by both the Crown and the defence showing a stretch of road where the Telegraph Company had installed poles that illegally obstructed the highway and created a public nuisance.[34] The photographs were used to explain testimony given by witnesses and, as was the case in the American Luco trial, their use was not given any particular mention in the report and their admission went unchallenged.

The English court provided more commentary on the inclusion of photographs as evidence in the 1864 bigamy case of *R. v. Tolson*, in which a photograph was introduced to prove the identity of the first husband of the accused. In the instructions to the jury, Justice Willes equated photographs with memory and put them on the same scale as verbal testimony. He stated that photographs were admissible as they are "only a visible representation of the image or impression made upon the minds of the witnesses by sight of the person or object it represents; and, therefore is, in reality, only another species of the evidence which persons give of identity, when they speak merely from memory."[35] In this instance, the photograph serves as an *aide-mémoire* to the witness; what is captured by the camera is asserted to be the same as what a witness present at the scene would have seen.

While photographs were entered into evidence with increasing frequency from the 1860s to the 1880s in Anglo-American courts, the rules governing their admissibility were still evolving. Legal commentators, however, enthusiastically endorsed the use of photography in the pursuit of justice. An 1869 article published in *The American Law Register* suggested a myriad of uses

33 *Luco v. United States*, [1859] 1859 U.S. LEXIS 805 at 541.
34 *R. v. The United Kingdom Electric Telegraph Company (Limited)*, [1861] 3 F. & F. 73.
35 *R. v. Tolson*, [1864] 4 F. & F. 104.

for photography, including: identification in banking transactions; proof of citizenship; the accurate description of real estate and goods being sold; proving the creation of legal documents; recording crime scenes; and surveillance, particularly during riots in order to capture the likenesses of those involved in disturbing the peace. The author also recommended photographing witnesses on the stand and those accused of crimes while being interrogated in order to "preserve the lineaments of guilt or innocence," while testifying.[36] Many of these proposed uses have come to pass, although some contemporary commentators were unsure how realistic these suggestions were. The editor of an English law journal that reprinted the first half of the aforementioned article, for example, skeptically stated "This appears to be not a humorous piece, but serious suggestion."[37]

As cases employing photographs as evidence increased, legal scholars were able to cite rulings that supported their belief in the objectivity and utility of photographs in legal proceedings. In 1873, the *Albany Law Journal* reprinted portions of the 1869 article, updating and strengthening the pro-photography argument. The author's conviction that photography could serve as a multifaceted instrument of justice was unwavering. The article stated that, "The rapidity and reliability of the photographic art is likely to render it pre-eminently useful in the prevention and proof of wrongs public and private, criminal and civil."[38] Others echoed the notion that the use of photography in collecting evidence at crime scenes was a logical and extremely beneficial application of the technology. If photographs were taken before the scene was disturbed by the police, the images "would enable the court and jury to arrive at a conclusion more satisfactory than from the statements of the accused, the conflicting testimony of the witnesses and the rude plans of incompetent draughtsmen"[39] alone. There was the belief that, as a truthful representation of the world, the photograph, unlike witnesses, would not confuse facts. Furthermore, as an objective technology, it could not repress any detail due to either the willful distortion of truth, or the failure of memory of witnesses, or the personal limitations of the individual charged with the duty of recording the scene.

The technology was particularly useful in cases where the situation had changed since the photograph was taken,[40] or where it was impossible for the

36 J.A.J., "The Legal Relations of Photographs," *The American Law Register*, vol. 17, no. 1 (January 1869), pp. 1–4, quotation on p. 3.

37 "The Legal Purposes of Photography," *The Solicitors' Journal & Reporter*, vol. 13 (27 March 1869), p. 425. The *American Law Register* article can be found reprinted, in part and without attribution, in legal journals as late as 1885.

38 "The Legal Relations of Photography," *The Albany Law Journal*, vol. 7 (25 January 1873), p. 50.

39 "Legal Uses of Photography," *The Irish Law Times and Solicitor's Journal*, vol. 19 (7 November 1885), p. 577.

40 "Photography in Court," *The Ohio Law Journal*, vol. 4, no. 6 (22 September 1883), p. 151

jury to travel to the location of the event at issue to see the scene.[41] It was argued that, due to its foundations on scientific principles, a photograph was even more reliable than a witness. According to the *Albany Law Journal*,

> … the art has already been recognized in our courts as being of considerable importance in the establishment of asserted facts … Things transitory and non-producible, when represented by a process completely true and accurate in its results, can be proved by no better or more reliable than such a representation. The human eye and memory may be easily conceived to be less likely to take and retain perfect images of an object, a person, a set of surroundings, than a photographic instrument. The superiority of photographs over mere hearsay evidence, and their claim to be the very best secondary evidence, if not original evidence, is not unfounded, but altogether reasonable, and particularly scientific.[42]

The question of photography's status as original, secondary, or hearsay evidence was very much before the courts at the time. In the 1865 Massachusetts trial examining the legitimacy of the will of Sylvia Ann Howland, whose estate was valued at over $2 million, a battery of experts was introduced to testify to the authenticity of the will. The expert witnesses brought in to testify on both sides included photographers who submitted "a pile of innumerable photographic exhibits."[43] Contradictory testimony regarding the photographs submitted into evidence was given, leading the plaintiff's counsel to argue that, as the conditions surrounding the creation of the images could not be ascertained, all testimony derived from the photographs was inadmissible as the photographs were nothing but "hearsay of the sun."[44]

The author of the 1869 *American Law Register* article, known only as "J.A.J.," forcefully disputed the notion that photographic evidence was hearsay, arguing that it

> … is wholly free from the infirmity which causes the rejection of hearsay evidence, namely the uncertainty whether or not it is an exact repetition of what was said by him whose testimony is repeated by the witness. In the picture we have before us, at the trial, precisely what the apparatus did say. Its language is repeated to us, syllable for syllable.[45]

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citing the case of *Reddin v. Gates* (1879) 52 Ia. 210, where photographs were taken of the injuries to the plaintiff who was assaulted. The appellate court ruled that "if it had been possible it would have been competent for the jury to have examined the back of the plaintiff at the time the picture was taken, for the purpose of more readily understanding the other evidence …" and that the photograph taken was a valid substitute.

41 "Photography in Court," p. 152 citing *Church vs. The City of Milwaukee* (1872) 31 Wis. 512.

42 "The Legal Relations of Photography," pp. 50–51.

43 "The Howland Will Case," *American Legal Review*, vol. 4 (July 1870), p. 625.

44 Ibid., p. 653.

45 J.A.J., "The Legal Relations of Photographs," p. 6.

The author employs language similar to that of Justice Willes in the 1864 British case *R. v. Tolson,* who, five years previously, drew the connections between the image created by a camera's lens and recorded as a photographic record, and the image formed by the eye of the witness and preserved in their memory. However, while Justice Willes stated that the two forms of evidence were of equal weight, J.A.J. asserted that eye witnesses can be mistaken and forgetful, and yet their evidence accepted by the court as original, whereas the photograph, free from bias and failures of memory or vision, records unquestionably what was placed before the camera. As a result, J.A.J. argued that photographs "are so veracious as to entitle them to rank, not as hearsay or secondary, but as original, evidence."[46] As a consequence of the understanding of photography's objectivity and truthfulness, based on its foundation from the sciences of optics and chemistry, photographs were considered here not only original evidence, but as even stronger evidence than the verbal testimony of witnesses whose evidence was based on potentially incorrect memories.

This line of reasoning, which argued for the reliability of photographic representations resulting from the scientific process, received its strongest endorsement in the courts in the mid-1870s. First, in his 1874 decision in *Udderzook v. The Commonwealth*, Chief Justice Daniel Agnew of the Supreme Court of Pennsylvania, wrote that after "nearly a generation's experience" with photographs he could state:

> It has become a customary and a common mode of taking and preserving views as well as the likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science; that the images on the plate, made by the rays of light through the camera, are dependent on the same general laws which produce the images of outward forms upon the retina through the lenses of the eye. The process has become one in general use, so common that we cannot refuse to take judicial cognisance [*sic*] of it as a proper means of producing correct likenesses.[47]

Chief Justice Agnew stopped short of making a definitive statement on the status of photographs, however, as the identity of the man attested to by the photograph offered into evidence could be ascertained by other means, and a ruling on this point of law was not needed. The following year, the Supreme Court of Alabama, citing Chief Justice Agnew's decision in the Udderzook case and employing similar terms, gave the opinion that the lower court was incorrect to exclude a photograph that the defence sought to use to prove the identity of a British man residing in Canada who was lynched in Alabama. Here, the Chief Justice wrote:

46 Ibid., p. 7.
47 *Udderzook v. The Commonwealth*, [1874] 76 Pa. 340 at 353.

A court cannot refuse to take judicial cognizance that photography is the art producing fac-similes, or representations of objects by the action of light on a prepared surface.… As such it has been so long recognized, the mechanical and chemical process employed, and the scientific principles on which it is based are so generally known, that it would be vain for a court to decline cognizance of it.[48]

While photography may not have been very common in the courtroom at this point, the general popularity of the medium and the common understanding of the nature of the photographic process led the court to state that the photographic likenesses should have been seen by the jury, which would have allowed for the positive identification of the murdered man.

All courts, however, did not consider photography as original evidence. The Supreme Court of Texas took an especially skeptical view of photographs. In the 1877 ruling in *Eborn v. Zimpelman*, where photographic copies of disputed documents were entered into evidence, the court stated that, despite an eloquent argument based on legal precedent and on the scientific exactness of photographs, photography was not infallible. This court was of the opinion that the photographic representations of the documents in question were, like letterpress copies, dependent on the materials used in the production and the conditions under which the photograph was taken. They were, as a result, not the perfect replicas the attorneys asserted they were. While the Associate Justice did state that photographic copies could be admitted to evidence where the originals were not available, they should only be considered as secondary evidence.[49] Other judgments also focused attention on how photographs were created. The judge in the *Taylor Will Case*, heard in New York's Surrogate Court in 1871, demonstrated a relatively sophisticated knowledge of photography and stated that for the court to be able to ensure the reliability of the evidence, the lens, the angle at which the photograph was taken, the sensitivity of the plate, the accuracy of the focus, and the skill of the photographer would all have to be called into question.[50] A decade later, the opinion delivered in *Crowley v. People*, in the Court of Appeal of New York, acknowledged that the skill of the operator was crucial in ensuring that a "faithful likeness" is produced, and that camera settings, atmospheric conditions, the lighting, the length of the exposure, and the positioning of the subject all factor into the production of truthful representation.[51]

Staged and manipulated photographs – including photographs that had their negatives retouched, combined, or otherwise tampered with – were widely

48 *Luke v. Calhoun County*, [1875] 52 Ala. 115 at 119.

49 *William Eborn v. George B. Zimpelman, Adm'r, &c.*, [1877] 47 Tex. 503 at 519–21.

50 *Taylor Will Case* (1871) 10 Abb. Pr. Rp. (N.S.) 300, quoted in "The Legal Relations of Photography," p. 51.

51 *Crowley v. People*, [1881] 83 N.Y. 464, at 477–78.

created and circulated from the very beginning of photographic history, and contemporaries readily understood the artifice employed in the creation of the images.[52] However, early legal scholars did not typically discuss the implications of these photographic fictions on the status of photographs as evidence. With the increased use of photographic evidence, an awareness of manipulation of the images grew. American courts in the 1870s, for example, heard testimony that photographs entered into evidence had been tampered with, were blurry, or otherwise misleading.[53] Overall, however, judges did not initially comment on the impact that photographic manipulation could have on the ability of photographs to serve as evidence.

Exposing photographs' ability to mislead, while maintaining the appearance of truthfulness, was the aim of an article published in *Photographic News* and reprinted in *The Albany Law Journal* in 1886. Entitled "The Photograph as a False Witness," the article decried the use of photographs to misrepresent the facts. It described methods used by photographers to deceive viewers, including the careful composition of the frame, the selection of the lens (which could be used to distort the scene), and the use of photographic plates that are sensitive to some colours but not to others. The author warned against the fallacy that the camera could not lie, stating that, "perhaps we may say that though the sun does not lie, the liar may use the sun as a tool.… Let them all then beware of the liar who lies in the name of truth."[54] With the growing awareness in the 1880s of photographic manipulation, the courts became increasingly skeptical with regards to photographic evidence. In order to avoid deception and to be able to be assured that the scenes depicted in photographs were what they purported to be, the courts codified the rulings: they could not accept photographs into evidence on their own without some corroborating testimony.

The Standard of Admissibility

Common law tradition was based on oral testimony; photographic evidence, as non-verbal, real evidence, did not fit neatly into this custom. As most courts did not accept the notion that photographs were original evidence, they required that the photographs be used as descriptive evidence, like plans or maps, and that photographs be accompanied by the testimony of a witness who could testify to their accuracy and authenticity, and who could also be cross-exam-

52 See Lori Pauli, "Setting the Scene," and Marta Weiss, "Staged Photography in the Victorian Album," in *Acting the Part: Photography as Theatre*, ed. Lori Pauli (Ottawa, 2006); see also Jordan Bear, "Look Again: The Multiples of Photographic Discernment and Production," *Photography & Culture*, vol. 2, no. 1 (March 2009), pp. 51–76.

53 "The Howland Will Case," p. 653; *In re Foster* (1876) 34 Mich. 21.

54 "The Photograph as a False Witness," *The Albany Law Journal*, vol. 34 (4 December 1886), pp. 457–58.

ined. By aligning photographs with other visual evidence, the question of photography's special testimonial powers was circumvented; this new medium of documentary evidence could be made to fit within existing evidential standards. Legal scholar Jennifer Mnookin argues that by equating photographs to maps and diagrams, the judicial system created a justifiable, if not perfectly satisfactory, solution. In allowing photographs to be accepted as evidence through this analogy, judges were able to provide photographic evidence with a comfortable pre-history, allowing the novelty of the medium to be defused while, at the same time, protecting both the common law tradition and the importance of verbal testimony in the court.[55]

Some courts explicitly made the connection between photographs and other visual representation while, at the same time, allowing the admissibility of both, provided that they were admitted as part of a witness' testimony. In the 1881 *Crowley v. People* decision, Chief Justice Folger of the Court of Appeals of New York stated:

> So the signs of the portrait and the photograph, if authenticated by other testimony, may give truthful representations. When shown by such testimony to be correct resemblances of a person, we see not why they may not be shown to the triers of the facts, not as conclusive, but as aids in determining the matter in issue, still being open, like other proofs of identity or similar matter, to rebuttal or doubt.[56]

Chief Justice Folger was very careful to emphasize that both the images must be presented to aid a witness' testimony and that photographic evidence is not inherently irrefutable. This decision was bolstered at the beginning of the twentieth century with John Wigmore's influential text, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law.* In his section on non-verbal testimony dealing with models, maps, diagrams, and photographs, Wigmore forcefully argued against the tendency to allow for documents to speak for themselves.

> We are to remember, then, that a document purporting to be a map, picture, or diagram is, for evidential purposes simply nothing, except so far as it has a human being's credit to support it. It is mere waste paper, – a testimonial nonentity. It speaks to us no more than a stock or a stone.… We must somehow put a testimonial human being behind it (as it were) before it can be treated as having testimonial standing in court. It is *somebody's testimony*, – or it is nothing.… [W]henever such a document is offered as proving *a thing therein to be represented*, then it is offered testimonially, and it *must be associated with a testifier.*[57]

55 Mnookin, pp. 53–59.

56 *Crowley v. People*, 464, at 478.

57 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law including The Statutes and Judicial Decisions of All Jurisdictions of the*

Wigmore's assertion was very clear: visual evidence, including photographs, is unable to stand on its own. Photographs must be used to illustrate a witness' testimony and the weight given to the images by the jury must be determined on the basis of that testimony, not on the actual content of the image. A photograph is "a witness' pictured expression of the data observed by him and therein communicated to the tribunal more accurately than by words."[58] Wigmore, citing case law in both the United States and the United Kingdom, stated that the photographer did not necessarily have to be the one who verified the image; rather, the photographic evidence may be submitted in conjunction with the testimony of any qualified individual who could competently speak to the photograph's creation, content, and meaning.[59]

This standard of the admissibility of photographs, which was in place in the United States by the 1880s and in the United Kingdom by the mid-1890s,[60] was also applied in Canada. In the earliest Canadian decision on the matter, the Appeals Division of the New Brunswick Supreme Court held in 1936 in *R. v. Bannister* that autopsy photographs of the charred remains of a murdered man were admissible in conjunction with the testimony of the doctor who performed the post-mortem examination and the testimony of a second doctor. It was determined that issues such as where the photographs were taken and who developed the images (cited as part of the grounds for appeal) were "immaterial" as long as the witnesses could testify to the photographs' accuracy.[61] Citing the 1936 ruling, the Canadian courts issued a definitive statement on the admissibility of photographic evidence in the 1967 Supreme Court of Nova Scotia Appellate Division judgment in *R. v. Creemer and Cormier*. Justice McKinnon stated:

> All the cases dealing with the admissibility of photographs go to show that such admissibility depends on (1) their accuracy in truly representing the facts; (2) their fairness and absence of any intention to mislead; (3) their verification on oath by a person

United States and Canada, 2nd ed., Vol. II (1904; Boston, 1923), §790, pp. 89–90, emphasis in the original. See also Francis Wharton, *A Treatise on the Law of Evidence In Criminal Issues*, 10th ed. by Hon. O.N. Hilton, Vol. II (Rochester, 1912), §544a, pp. 1130–31.

58 Wigmore, §792, p. 93.

59 Ibid., §792–94, pp. 98–101.

60 Elliott Goldstein states that the case *Hindson v. Ashbey*, [1896] 176 E.R. 488 serves as the English authority that photographs are inadmissible unless verified under oath. Elliott Goldstein, *Visual Evidence: A Practitioner's Manual*, Vol. 1 (Toronto, 1991/2005 [2008, Release 3]), p. 3–3.

61 *R. v. Bannister*, [1936] N.B.J. No. 2, 66 C.C.C. 38 at 4. While this was the first Canadian case to rule on verification, it was not the first Canadian case to deal with the admissibility of photographs. The first Canadian criminal court case to deal with this was *R. v. O'Donnell*, [1936] O.J. No. 248, 65 C.C.C. 299, which issued its decision four days prior to the judgment of *R. v. Bannister*. The first civil case to be decided was *Brock v. Van Horne*, [1949] 2 W.W.R. 1157. See Goldstein, p. 2–4.3.

capable to do so.[62]

This statement remains the authority for the admissibility of photographs into evidence in Canada.

Assuming the photographs being offered into evidence are materially relevant to the case, there are exceptions that may (as with all evidence) lead to their exclusion even if they otherwise meet the standards for admissibility. The admissibility of photographic evidence can be challenged on the basis that it will unduly prejudice the jury against the accused if it is determined that the prejudicial effects outweigh the evidence's probative value.[63] Images that are believed to be inflammatory to the jury may be excluded, with "gruesome" photographs, such as crime scene and autopsy photographs, being at the centre of many challenges in Canada and the United States.[64] However, simply being shocking or otherwise prejudicial does not necessarily preclude admission. If the judge determines that the probative value of the photographic evidence outweighs the prejudicial consequences of allowing the jury to see the images, the photographs may be admitted. This was the case in the two earliest Canadian appellate decisions to examine the issue, *R. v. O'Donnell* and *R. v. Bannister* (both decided in 1936). *R. v. O'Donnell* involved particularly graphic crime scene photographs showing the body of Ruth Taylor, who was raped and murdered. In the case, Sir William Mullock, Chief Justice of the Supreme Court of Ontario, held that, "[t]he photographs in question served the useful purpose of corroborating the evidence as to the treatment to which Ruth Taylor was subjected by her assailant. It is not believable that the sight of these photographs prejudiced the jury against the accused."[65] Citing the authority of the two 1936 cases, the 1967 ruling in *R. v. Creemer and Cormier* reaffirmed that the possibility of being prejudicial is not reason enough to exclude photographs if they exhibit sufficient probative value.[66]

62 *R. v. Creemer and Cormier*, [1967] 1 C.R.N.S. 146 at 18.

63 Wigmore, §792–94, p. 97; Paciocco and Stuesser, pp. 415–18.

64 See, for example, R.J.S., "Admissibility of Gruesome Photographs of Deceased," *Tulane Law Review*, vol. 22 (1947), pp. 327–28, and "Admission of Gruesome and Shocking Photographs of Victim at Murder Trial Held Reversible Error," *De Paul Law Review*, vol. 8 (1958–1959), pp. 418–22.

65 *R. v. O'Donnell*, 299 at 26; See *R. v. Bannister*, 38 at 5. Despite assertions such as this, research conducted with mock juries has shown that jurors viewing graphic photographs are emotionally affected, and are more likely to find the defendant guilty when shown gruesome photographs than jurors who do not receive the images. See Kevin S. Douglas, David R. Lyon, and James R.P. Ogloff, "The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?" *Law and Human Behavior*, vol. 21, no. 5 (October 1997), pp. 485–501.

66 *R. v. Creemer and Cormier*, 146 at 17–19.

The Cautious Approach to Digital Photographs as Evidence

Since the 1990s, with the increasing prevalence of digital imaging technologies, critics have argued that due to the ease of photographic manipulation in the digital – or "post-photographic" – era, the basis for trusting photographs would be eroded completely.[67] In reaction to this apparent crisis of authenticity, certain legal scholars demanded drastic modifications to the rules of admissibility. Because images could be seamlessly manipulated, some scholars, particularly in the United States, argued that all photographic evidence must be called into question, with some scholars arguing that all digital photographs be excluded unless there is incontrovertible proof of their accuracy.[68] While certain legal scholars allowed for the admission of some digital images, other commentators called for amendments to the rules of evidence through legislative means to ensure strict legal criteria for their authentication. These commentators believed that legislative changes were required as the courts moved too slowly to enact change. Furthermore, they argued that, as case law allowed for interpretation in decisions about admissibility, rulings based on precedent could provide too much leeway to the triers of law in deciding which digital images could be entered into evidence.[69]

In the 1990s, some photo theorists argued that photography's meaning depended on an understanding of its ability to accurately depict the world. As digital imaging "abandons even the rhetoric of truth that has been such an important part of photography's cultural success,"[70] photography would no longer be viewed as a trusted medium; metaphorically at least, it would be considered dead and the ascendant digital processes would be understood as being distinct from traditional, chemical-based photography. As digital photographs have become commonplace, however, it is apparent that the declarations made by these photo theorists – and repeated by some legal scholars – that the "death of photography" was imminent, has not come to pass. Photographs continue to be relied upon to serve the societal function they always had: to provide what is

67 See, for example, William J. Mitchell, *The Reconfigured Eye: Visual Truth in the Post-Photographic Era* (Cambridge, MA, 2001).

68 Christine A. Guilshan, "A Picture is Worth a Thousand Lies: Electronic Imaging and the Future of the Admissibility of Photographs into Evidence," *Rutgers Computer & Technology Law Journal*, vol. 18 (1992), p. 380; Mike Tonsing, "Digital Photographic Evidence Presents Challenges," *The Federal Lawyer*, vol. 49, no. 8 (September 2002), p. 19.

69 See, for example, Judge Victor E. Bianchini and Harvey Bass, "A Paradigm for the Authentication of Photographic Evidence in the Digital Age," *Thomas Jefferson Law Review*, vol. 20, no. 2 (1998), pp. 320–21; Jill Witkowski, "Can Juries Really Believe What They See? New Foundational Requirements for the Authentication of Digital Images," *Washington University Journal of Law and Policy*, vol. 10 (2002), pp. 287–93; Guilshan, pp. 378–80.

70 Geoffrey Batchen, "Ectoplasm," in Batchen, *Each Wild Idea: Writing, Photography, History* (Cambridge, MA, 2002), p. 134.

understood to be truthful representations of reality.[71]

British, American, and Canadian courts have been slow to react to the introduction of digital photographs as evidence. All have had a tempered response to the issue of authenticity of digital images. Instead of amendments to legislation, the common law rules determining the admissibility of photographs, entrenched since the late nineteenth century, remain in use. As with traditional photography, the potential for manipulation exists, and the development of sophisticated image editing software that is inexpensive and simple to use means that photographic manipulations could be more prevalent than ever before – and even harder to detect. Nevertheless, the principles governing the admissibility of demonstrative evidence remain applicable. Digital photographs still need to be authenticated by a witness and it is up to opposing counsel to question the authenticity of the evidence. Should there be any indication that the photograph is not what the witness states it represents, the evidence can be accorded less probative value or weight by the jury.

Upon examining the issue of digital images as evidence, the Select Committee of the British House of Lords discovered that the issues it believed it would find when confronting digital photography were not apparent. In order to ensure the reliability of photographic evidence, the Committee recommended that the government not establish specific, evidential requirements for authentication. Instead, the Committee called for a greater awareness among the judiciary about issues concerning the acceptability of digital photographs so that judges could knowledgably instruct their juries about potential uncertainties. Furthermore, the Committee encouraged the development of procedures, the use of authentication technologies, and the creation of secure audit trails by law enforcement agencies in order to alleviate some concerns about the authenticity of digital photographs.[72] In practice, the Committee determined that the rules concerning the admissibility of digital photographs do not differ from those governing traditional photographs.

This is also the case in Canada and the United States. Both Canadian and American evidence statutes leave the matter of digital photographs undefined. In the *Canada Evidence Act* and its provincial/territorial counterparts, no specific mention is made of digital photographs. The definition states that, "'photographic film' includes any photographic plate, microphotographic film and photostatic negative," but does not specify digital files.[73] They could, however,

71 Bernd Steigler, "Photography as the Medium of Reflection," in *The Meaning of Photography*, eds. Robin Kelsey and Blake Stimson (New Haven, 2008), p. 195.

72 House of Lords Select Committee on Science and Technology, *Fifth Report: Digital Images as Evidence – Summary and Recommendations* (3 February 1998), http://www.parliament.the-stationery-office.co.uk/pa/ld199798/ldselect/ldsctech/064v/st0508.htm (accessed on 5 November 2008).

73 *Canada Evidence Act*, R.S., 1985, C-5, §31(1) (current to 22 June 2009).

fall under the electronic evidence provisions. In order to be admissible, the Act holds that the party submitting the electronic files must satisfy the burden of proof that the files are what they purport to be, and must testify to the integrity of the electronic systems in which the files are stored.[74] In the American *Federal Rules of Evidence*, digital photography is, likewise, not explicitly mentioned but, again, other provisions contained therein allow for its admission. Authentication of evidence requiring testimony by a knowledgeable witness is outlined in Rule 901. Furthermore, Rule 1001, which deals with writings, recordings, and photographs states that, "an 'original' of a photograph includes the negative or any print therefrom. If data is stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original'."[75] The current rules for admissibility in Canada, the United States, and the United Kingdom, as Nathan Wiebe has shown, are able to deal with the issues surrounding the authentication of digital images while, at the same time, are able to accommodate the evolving nature of technology.[76]

As was the case in the first years following the invention of photography – when the introduction of photographs into evidence went unchallenged and therefore unrecorded in the legal literature – there have been no significant instances of case law that challenge the admissibility of digital photographs. Existing precedent for admissibility dating back to the nineteenth century, tempered by admissibility standards governing electronic records, have been used to ensure that digital photographs are still admissible in courts of law. In the United States, cases in which digital photographs are entered into evidence rely on the provisions established for entering demonstrative evidence as part of witness testimony. The 2007 Maryland case, *Lorraine and Mack v. Markel American Insurance Company*, for example, undertakes an extensive review of the admissibility of digital photographs according to the *Federal Rules of Evidence*. Following a careful discussion of the applicable laws of evidence, Chief Judge Paul W. Grimm concluded that computer-generated evidence, including digital photographs, is admissible provided that the attorneys "establish the authenticity of their exhibits, resolve potential hearsay issues, comply with the original writing rule, and demonstrate the absence of unfair prejudice."[77] No further requirements are placed on the digital photographs. The only instance in American case law in which a ruling has been made with regard to digital

74 Ibid., §31.2–31.4.

75 *United States Code: Title 28a, Federal Rules of Evidence* (2009), §1001. On the applicability of the American code to digital photographs see Christopher J. Buccafusco, "Gaining/Losing Perspective on the Law, or Keeping Visual Evidence in Perspective," *University of Miami Law Review*, vol. 58 (2004), pp. 622–27.

76 Nathan Wiebe, "Regarding Digital Images: Determining Courtroom Admissibility Standards," *Manitoba Law Journal*, vol. 28, no. 1 (2000), pp. 72–83.

77 *Jack R. Lorraine and Beverly Mack v. Markel American Insurance Company*, [2007] 241 F.R.D. 534 at 585.

images is in relation to enhanced digital images; in cases in which experts have used digital means to highlight certain aspects of the images to better illustrate their argument, enhanced photographs are admissible, provided they are properly admitted as part of testimony by an expert who is knowledgeable about the process used, and who can testify to the operations of the computer and the software.[78]

As in the United States, admissibility of digital photographs in Canadian courts has not been challenged and, as a result, no precedent-setting decision exists. Case law does exist, however, where digital photographs are unquestioningly accepted into evidence.[79] In these cases, careful attention is given by the witnesses to providing descriptions of the method of creation of the digital images, the chain of custody, and in affirming that no manipulation of the images has occurred.[80] In cases where digital photographs are submitted into evidence, the traditional common law standard of admissibility for demonstrative evidence remains in place.

Photographs, Context, and the Courts

In Shakespeare's *Othello*, the title character demands "ocular proof" from Iago of Desdemona's unfaithfulness.[81] Iago complies, setting up a scene and then providing the context for its interpretation. What Othello is led to believe is not the truth, but he receives the "proof" he requires and, with the certainty gained from what he witnessed, acts. As in the play, the evidence gained from the "ocular proof" of photographs is not self-evident. Photographic proof is subject to innocent misinterpretation and can be used, as Iago does in constructing the context for Othello's witnessing, to deliberately deceive.

A tension arises from the introduction of photographs as evidence in courts, where the indexical nature of images (the assumption of objectivity, neutrality, and truthfulness of photographs that have been with the medium since its inception) conflicts with the status assigned to them as evidential objects

78 James M. Campbell, "Evidentiary Requirements for the Admission of Enhanced Digital Photographs," *Defense Counsel Journal*, vol. 74 (January 2007), pp. 12–21, citing *State v. Swinton*, [2004] 847 A.2d 921.

79 See, for example, *R. v. Hill*, [2005] NSCA 108, where the Nova Scotia Court of Appeal discussed the use of digital security camera photographs. The admissibility of the photographs was not at issue, as they were properly introduced as part of a witness testimony, but their usefulness for the purposes of identification, that is their content, was not sufficient enough to support a conviction, and the trial judge's ruling was overturned.

80 See, for example, *Ministry of Labour v. C.S. Bachly Builders Limited et al.*, [2007] ONCJ 120 at 12.

81 William Shakespeare, *Othello, the Moor of Venice* (ca. 1603), III.iii.357; the connection between *Othello*, context, evidence, and photography is made in Gourevitch and Morris, p. 261.

(purely illustrative exhibits with no probative value on their own). Common law rules dictate that photographs serve as explanatory tools, not as proof in and of themselves. This is acknowledged in some cases, but often judges attempt to make the evidence fit the mould of demonstrative evidence.[82]

Trial decisions from the late nineteenth century acknowledged, and attempted to reinforce, the idea that photographs are "messages without a code."[83] Critical historians and theorists of photography have demonstrated that, while photographs have a special relationship to the world they depict and do provide evidence or facts, the meaning of photography is contestable and malleable. The meaning of a photograph is determined by how it is used and how it is framed by language, including captions and oral descriptions (e.g., witnesses' testimony). Susan Sontag states that photographs are objects in context and that, following Wittgenstein, "the meaning *is* the use."[84] Similarly, according to Allan Sekula, the meaning of any photograph is "necessarily context determined" and photographs internally contain "merely the *possibility* of meaning."[85] The necessity of language for understanding photographs is highlighted by Roland Barthes, who argues that viewers require text to anchor the meaning of photographs and to guide understanding by eliminating conflicting, possible meanings that can be found in the photographs.[86] As these theorists argue, photographic meaning is never straightforward or neutral; photographs only gain meaning from the language that frames them.

In the courts, rules governing the admissibility of photographs appear to innately recognize this, stating explicitly that photographic images cannot stand as proof objects on their own but rather they require witnesses' oral testimony to provide them with meaning. This meaning is contested upon cross-examination or through the submission of different photographs and other expert witnesses' testimony. It is then left to the jury to make a determination about the value of the evidence based on the conflicting narratives provided.

From an early date, the legal discourse surrounding photography oscillated between a belief in the objectivity of photographs and skepticism about the role of this class of evidence as proof objects. Commentators argued that photographs could be "the most dangerous perjurer" by using the sun as a tool to lie[87] or, as photographer Lewis Hine stated, "[…] while photographs may not lie, liars may photograph."[88] While stating that photographs were scientifically

82 Mnookin, pp. 45–50.

83 Roland Barthes, "Rhetoric of the Image," in *The Photography Reader*, ed. Liz Wells (New York, 2003), p. 116.

84 Susan Sontag, *On Photography* (New York, 2001), p. 106, emphasis in the original.

85 Allan Sekula, "On the Invention of Photographic Meaning," in Sekula, *Photography Against the Grain: Essays and Photoworks 1973–1983* (Halifax, 1984), pp. 4, 7.

86 Barthes, p. 118.

87 "The Photograph as a False Witness," pp. 457–58.

88 Lewis W. Hine, "Social Photography," in *Classic Essays on Photography*, ed. Alan

produced and therefore truthful representations, the courts required external verification of the facts that were produced by the action of the sun. As a photographer instructed a lawyer in 1886, photographs can be created to prove a particular point and, in order to counter damaging photographic evidence, the counsel was advised to get photographs produced on his side of the case.[89] Wigmore also recognized that photographs could convey a false impression, but he argued that photographs that misrepresent what they showed were not necessarily inadmissible. Just like the unreliable witness, the questionable image should be allowed to enter into evidence upon witness verification. Any doubt about its authenticity or meaning could be brought out during cross-examination and the jury could determine how much weight should be accorded to the evidence. If a judge believes the photograph is misleading, all she or he can do is instruct the jury about the possibilities of deception.[90]

Recent commentators argue that judges should go beyond this. Echoing the argument of John Tagg that photographic knowledge is irrevocably tied to the societal power structures that led to the photographs' creation, impact their circulation, and guide their interpretation,[91] David Sternbach argued that the courts should focus on the significance or relevance of the image, which is externally supplied through narrative. He proposed that a much more nuanced understanding of the social and cultural mechanisms underlying the creation and reception of photographs is needed in the courts.[92]

Conclusion: Evidence, Authenticity, and Archivists

In tracing the reception and understanding of photographs as evidence in the legal context, it becomes clear how the courts have adjusted their thinking, albeit slowly, to allow for new forms of record creation to serve as evidence. Jurists have grappled with notions of truth and meaning, but they are not alone in this quest for understanding records. Archivists, as experts on records and recordkeeping, can bring invaluable understanding to the meaning of documentary evidence. They possess specialized knowledge on matters of reliability and authenticity of records generally; they have developed particular strategies to further the understanding of the contexts of creation, use, and dissemination of records, including photographs and other specific record types.[93] As such,

Trachtenberg (New Haven, 1980), p. 111.

89 "The Photograph as a False Witness," p. 457.

90 Wigmore, §792, pp. 97–98.

91 Tagg, pp. 61–102.

92 David Sternbach, "Hanging Pictures: Photographic Theory and the Framing of Images of Execution," *New York University Law Review*, vol. 70 (November 1995), pp. 1141–43.

93 See Joan M. Schwartz, "'We make our tools and our tools make us': Lessons from Photographs for the Practice, Politics, and Poetics of Diplomatics," *Archivaria* 40 (Fall 1995), pp. 40–74.

archivists are uniquely positioned to address questions about the meaning, limitations, and evidentiary power of photographs and other records.

Issues of authenticity, records, and the role archives play in preserving authentic records have been explored in great depth in the work of Heather MacNeil. In a series of articles published over the last decade, MacNeil has investigated how the archival practices of preservation, arrangement, and description relate to authenticity, and offered alternative ways of thinking about what it means for records to be authentic. She demonstrates that archives assume the role of guarantor of authenticity by documenting a chain of custody and, particularly for electronic records, a chain of preservation. Archivists have developed systems for the preservation of documents in which the integrity of a document's necessary attributes is maintained in the storage, retrieval, and presentation of the records. By creating appropriate systems for the preservation of records, and through the careful documentation and testing of the system, archives can attest to the fact that the records remain authentic across space and time.[94] MacNeil notes, however, that archives cannot restore integrity to records whose authenticity is in question. At best, they must maintain the level of authenticity of records when transferred into archival custody and prevent any further degradation.[95]

MacNeil also explains how the core archival functions of arrangement and description were designed to preserve the authenticity of the records. In classical archival theory, the maintenance or reconstruction of the original order of records preserves the bond between records, and between the documents and their creators. The order of the records is believed to reflect the events that led to the documents' creation and, as a result, the preservation of this original order preserves the authenticity of the records as a whole.[96]

Following on from the arrangement of the records, MacNeil argues, is archival description; description communicates the original order of the records. She states that "archival description serves as a collective attestation of the authenticity of a fonds," as it stabilizes and perpetuates the relationships between the records.[97] By recording information about the creators in admin-

94 Heather MacNeil, "Providing Grounds for Trust II: The Findings of the Authenticity Task Force of InterPARES," *Archivaria* 54 (Fall 2002), pp. 27–29.

95 Heather MacNeil, "Providing Grounds for Trust: Developing Conceptual Requirements for the Long-Term Preservation of Authentic Electronic Records," *Archivaria* 50 (Fall 2000), p. 75.

96 Heather MacNeil, "Archivalterity: Rethinking Original Order," *Archivaria* 66 (Fall 2008), pp. 9–14. After tracing classical archival thinking on original order, MacNeil argues that a singular original order is a fiction and that archivists should be careful to pay attention to the multiple orders records have over time to more fully appreciate the meaning of the records at different points in their history.

97 Heather MacNeil, "Picking Our Text: Archival Description, Authenticity, and the Archivist as Editor," *The American Archivist*, vol. 68, no. 2 (Fall/Winter 2005), p. 272.

istrative histories and biographical sketches, about the custodial history of the records, and by documenting the contexts of creation and use of records in scope and content fields,[98] archivists articulate the links between the records and their creators, preserving their authenticity and trustworthiness.

In the common law judicial system, authenticity plays a role in the admissibility of evidence and weight afforded to it. While the requirements for authentication in admissibility are not overly stringent, issues of authenticity can significantly influence the weight afforded to the evidence by the jury as the record's trustworthiness is examined and interpreted in the course of a trial.[99] Archivists are perennially concerned with understanding the contexts of creation and use of documents, including photographs. The methodologies developed for creating archival descriptions to document knowledge about the creators, owners, and users of photographs, perform a testimonial function, which echoes that found in the courts. The meaning of a photograph, that is, its evidential value, only becomes visible in the process of archival description, with the metadata captured elevating the "inert" facts, which resist interpretation, to the status of "evidence, or facts with significance."[100] In their archival descriptions, archivists attest to how, why, and by whom the images were created, imbuing the images with significance by outlining, to the best of their knowledge, the accuracy of the photographs, the intentions of the creators and subsequent users, and the technological, cultural, or other limitations that influence the creation, use, and, ultimately, the meaning of the photographs.

By employing the tools developed by archivists, the legal system can obtain a more nuanced understanding of records, which, as Sternbach argued, is needed to fully comprehend their meaning and significance.[101] Likewise, through an understanding of how another discipline approaches the question of documentary evidence, the archival understanding of the nature of evidence and meaning for photographs can be enriched.

98 See, for example, description practices such as Planning Committee on Descriptive Standards, *Rules for Archival Description*, rev. ed. (Ottawa, 2008), esp. §1.7, and Committee on Descriptive Standards, *ISAD(G): General International Standard Archival Description*, 2nd ed. (Ottawa, 2000), esp. §3.2 and §3.3.

99 Sheppard, p. 202; Heather MacNeil and Bonnie Mak, "Constructions of Authenticity," *Library Trends*, vol. 56, no. 1 (Summer 2007), pp. 41–44.

100 Lorraine Daston, "Marvelous Facts and Miraculous Evidence in Early Modern Europe," *Critical Inquiry*, vol. 18, no. 1 (Autumn 1991), p. 93.

101 Sternbach, p. 1142.