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Edited by

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# LAW AND THE VISIBLE

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To Ben (A.S.)

## CHAPTER 2

# Eye-Tracking Techniques and Strategies of the Flesh in *The Brother from Another Planet*

*Notes toward a Visual Literacy of Video-Recorded Lethal Police-Civilian Encounters*

KELLI MOORE

## Introduction

For decades, exonerations of police officers accused of fatal overuse of force against civilians of color have persisted;<sup>1</sup> inciting insurrectionary and fugitive forms of public assembly. In particular, reactions to the killings of unarmed Black civilians raise questions about the relationship between US police forces and the history of slavery. Video recordings of unarmed Black people dying constitute a repeating body in which slavery lives its afterlife across the gamut of media forms.<sup>2</sup> In this macabre social media environment, many have struggled with the moment in a text, tweet, or other broadcasting platform when it comes to listing the names of the dead in a way that publicly redresses the importance of the unique individual lost to state violence while also acknowledging the larger structural significance of anti-Black violence as world-making. Along these lines, it has been crucial to work on and work through the gendered nature of state violence toward people of color, as seen in the #SayHerName social media campaign that draws attention to the structural frequency of Black, Brown, Indigenous, and trans women killed, raped, and beaten by police forces.

Critical race and law scholars have long known that anti-blackness is the logic of desire of the police and much of the Anglo-American legal tradition. Saidiya Hartman's description of Black cultural expression identifies a variety of slave laws that position the freedom of Black movement and

vocalization at the whims of the master's whip.<sup>3</sup> In the post-civil rights era, Kimberlé Crenshaw's attention to labor and employment case law demonstrates that law has difficulty in recognizing the legal subject as both Black and female, raced and gendered.<sup>4</sup> Crenshaw's intersectional analysis is a mode of bringing attention to law's blind spots. Her argument accords with Eduardo Bonilla-Silva's observations of the hegemonic discourse of the "colorblind society" that functions as the alibi for structural and institutional racism where anti-blackness is simply projected as a rare negative outcome involving a "few bad eggs."<sup>5</sup> More recently, Sora Han gets at the root of the gaslighting on anti-blackness by tracing the route of psychoanalytic desire and the role of the unconscious to understand the ways law and its subjects are read through colorblind fantasy.<sup>6</sup> Through a reading of the law's letters—what law says—Han shows how anti-blackness is the logic of law's desire.

Despite what critical race and legal scholars know about how anti-Black racism lives in the letter of the law, there are calls for more interdisciplinary conversations about how anti-Black *legal* thought lives in visual culture. Though we are increasingly attuned to the reality of anti-blackness as the dominating logic of law's desire, a number of theorists also point to the new media context in which the law is anchored in visual and digital tools and simulations. This is especially germane to video recordings that capture anti-Black racism "in the act." A plethora of bystander videos and popular art forms circulate about Black Lives Matter (BLM) protests that foster debate about the public consumption of Black pain and suffering. Scholars have not merely pointed out the dearth of conversations about how images and video of black people detained and murdered by police should be read; they have also situated the absence of an interpretive framework within sophisticated mechanisms of advertising revenue streams, news ratings, and other aspects of capitalist production.<sup>7</sup> Those who capture such video content are also acknowledged as racialized media laborers and producers.<sup>8</sup> For example, many have begun to question the meme-ification of Breonna Taylor's murder by Louisville police on March 13, 2020. Quotidian mentions of Taylor's name on social media seem to trivialize her death and the larger structure of anti-blackness; however, as journalism scholar Allissa Richardson finds, meme-ification "may seem like it's a joke or using satire, but it's really just a method to trick the algorithm to talk about [Taylor] again."<sup>9</sup> As social media companies engineer private and state surveillance under the cover of free and open communicative interaction, Taylor's case critically indicts the ways anti-blackness also resides in computational

algorithms that limit the appearance of social media posts about the controversy over Black deaths at the hands of police.<sup>9</sup> In addition to the problem of consuming Black and Indigenous suffering is a growing debate about the distinction between law and culture, exemplified by the simulation of legal evidence by public news outlets. In another example, the *New York Times* reconstructed a timeline of events leading to the murders of Ahmaud Arbery and George Floyd using multiple surveillance and bystander videos. These videos circulate what appears to be visual evidence in the public sphere in ways that mimic the representational techniques utilized by law officials to display visual evidence during criminal trials. Together, the visual culture of law and the history of anti-blackness inform the digital media context in which BLM protests of the murders of Black civilians by police disclose the relationship between the law and the visible. Yet a question of intersubjectivity remains concerning how the individual's apprehension of the field of vision is transformed into the certainty of witnessing "racism in action" that can direct legal fact finding and decision making.

Visual evidence collected from bystanders who record fatal interactions between police and Black civilians have failed to offer hard proof of police overuse of force that would corroborate the anti-Black structure of US policing. Further, incorporating cameras into the police uniform and equipment (e.g., police dashcams), which occurred in several police departments around the United States prior to the previously mentioned high-profile killings, has not emerged as the solution many hoped. Body-worn cameras are plagued with the problems that often befall institutions and organizations implementing new technology among workers and other stakeholders: lack of technical support for police required to use the cameras, lack of oversight concerning the implementation of the cameras, inconsistent camera use, and an absence of clear and swift consequences for officers who fail to record interactions with civilians where force is deployed.<sup>10</sup> On top of these dilemmas, police departments that implemented body-worn cameras have written few if any policies that would regulate their use.

In this context of the failure of video evidence to confirm instances of police brutality and the anti-Black structure of police work, this chapter examines a machine-learning technique used in criminology research, known as eye-tracking, for the ways it discloses the future relationship between law and the visible. Eye-tracking is a form of machine learning used to surveil how much time spectators attend to information presented in the field of vision. In the social sciences, laboratory eye-tracking has become a significant tool for drawing inferences about how spectators interpret

video-recorded exchanges between police and Black civilians. Given law's discovery of new protocols for its own surveillance through video footage, whether appropriated from video-recording bystanders, closed-circuit television, or police dash cameras, perceptual bias experiments are increasingly significant for what they illustrate about potential jurors and courtroom audience members. Perceptual bias research of video recordings that capture anti-Black violence "in the act" heavily relies upon the use of eye-tracking techniques by social scientists. This method has earlier roots in visual culture studies. When anthropologist Charles Goodwin deconstructed the rhetorical deployment of visual evidence in the Rodney King police brutality trial, his analysis of the defense team's use of slides led to the influential finding that members of institutional communities and groups are gathered, trained, and organized into their own ways of seeing.<sup>11</sup> The ability to offer one's "professional vision," i.e., expertise in a particular mode of seeing, is endowed by one's membership to a community of practice. In the recent police overuse-of-force cases in Minnesota, Kentucky, Georgia, Missouri, Oklahoma, Wisconsin, Ohio, South Carolina, New York, and beyond, how do juries see and how are they led into sight?

Over twenty years ago, legal scholar Reva Siegel asked, "What or where is the legal phrase 'in the eyes of the law?'"<sup>12</sup> The tradition of this scopic metaphor illustrates how sight is ascribed to law; it signals law's all-seeing capacity and opens analytical pathways to just how law maintains its commitment to the primacy of its own vision. Not only do the law's eyes embody authority, they do so by adding a corporeal dimension to law's essence, to the status of law as ontology. More important, the authority of the eyes-of-law metaphor affirms disinterested, objective vision, a pure form of sight invulnerable to imperfect vision wrought by bias, predilection, prejudice, and inclination—precisely the issues at play when video-recorded interactions between police and civilians lead to accusations of overuse of force. By considering the inferences made through eye-tracking techniques, this chapter suggests that law may increasingly understand that anti-Black racism is a form of embodied knowledge, conditioning bodily functions of seeing, looking, and witnessing. Further, I comment on the conditions and populations for whom the pursuit of fact-based justice will be reshaped and respatialized when anti-blackness is understood as a form of embodied knowledge.

After a brief history of the eye-tracking device, the chapter analyzes how the technique objectifies the work of human attention. I show how attention, where the eyes roam and rest during the act of looking, is rendered an object of legal analysis by eye-tracking techniques. Scientific inferences

about attention open a new set of inquiries that lie at the intersection between law's use of visual evidence and the architectural environment in which evidence is displayed. Scientific papers are briefly reviewed for the ways eye-tracking techniques objectify attention by breaking down eye movements in terms "optical fixation." In one of these papers, optical fixation evinces two experimental outcomes researchers call "Attention Divides" and "Black Sheep Effect," which are also described. Readers of law and literature may struggle with the technical emphasis of this section. Let me preempt any potential difficulty by briefly addressing the stakes of deconstructing eye-tracking technology. As scholars have shown, the algorithm's computational language operates as both law and literature and is constitutive of the eye-tracking technique.<sup>13</sup> I argue through a cinematic example that the technical affordances of eye-tracking are descendants of *legal emblemata*, iconic representations of law, notably examined by Peter Goodrich.<sup>14</sup> A detour to John Sayles's 1984 film *The Brother from Another Planet* helps situate contemporary eye-tracking techniques within the metaphorical and figurative slave history of the "eye of law."<sup>15</sup> Finally, I also use the film to demonstrate how scientific inferences enabled through eye-tracking suggest the reality of how anti-blackness is lived in and as law. I conclude that positioning the eye-tracking technique within the genealogy of legal vision suggests the future relationship of law and the visible will be computationally mediated but should be guided by dark sousveillance, a practice of counter-vision found in Black freedom struggles.<sup>16</sup>

### Legal Spectatorship

The stakes of the following arguments concern members of the courtroom audience. Although professional vision can tell us about how prosecutors and defense attorneys displayed and discussed video evidence, it does not tell us how courtroom audiences perceive evidence. The conditions through which we see fatal police-civilian interaction is part of a special form of looking I call legal spectatorship. Legal spectatorship "delineates looking practices for courtroom testimony called into being by the interaction of the First and Sixth Amendments of the US Constitution."<sup>17</sup> This concept encompasses the relationship between law and visual literacy beyond realms traditionally associated with law's courtroom environment.<sup>18</sup> "Constitutionally protected through interlocking terms of the Sixth and First Amendments," legal spectators are "instantiated as a central and permanent crowd of witnesses whose spectatorship, conducted from this optimal

classic viewing position in the space of the courtroom, both materially and symbolically fulfills the individual's democratic right to a public trial."<sup>19</sup> The spatial situation of the audience also "affirms the public's combined rights of free speech, free press and free assembly."<sup>20</sup> Legal spectatorship makes explicit the obligatory nature of courtroom looking practices where looking is a public duty through which citizenship is ritually performed. The concept also raises methodological questions and concerns about how the public discovers legal facts from visual evidence in the absence of discussion of literacy about such material. To what kind of visual literacy do we assume the public has access? Is there an implicit value to the silence on visual literacy on the part of constitutional amendments that codify free public assembly and a trial of one's peers? Borrowing a question from legal theorist Marianne Constable, is this silence just?<sup>21</sup> And could such a doctrinal silence be sustained given the saliency of skin color revealed in punishment decisions? Many are equally invested in the freedom to assemble publicly and ensure that US citizens stand trial in public rather than under cover of secrecy. These are crucial forms of spectatorship codified by law.

Yet the frequency of deadlocked juries, mistrials, and acquittals in police brutality cases suggests no standard exists that would guide how law professionals circulate such materials or how court audiences perceive the same. This problem is not only manifested in the absence of protocols for police body and dashboard cameras; it is also manifest in the cinematic representation of automatic reporting devices (also known as machine learning), law, vision, and their structural connection to anti-Black racism and the history of slavery. Legal spectatorship, then, is not only a *de jure* looking practice. In this chapter I focus legal spectatorship on *de facto* looking practices that have stakes for criminal jurisprudence. Posing these questions affirms the general anxieties that automation and predictive technologies pose to law and culture while also acknowledging the literal and metaphorical relationship the "eye of law" and "blind justice" constructs between law and the visible.

### A Brief History of Eye-Tracking Technology

Eye-tracking first emerged in the nineteenth century as a way to study cognitive transformations during the act of reading text. They began as stationary and intrusive apparatuses that combined a contact lens with a cutout for the pupil that was connected to an aluminum pointer that moved in time with the movements of the eye. Its technical development

occurred over a number of technologies from electro-oculography, scleral contact lenses and search coils, photo- and video-ocular, and reflective devices.<sup>22</sup> Eye-trackers evolved into lighter, portable, and less intrusive digital mechanisms that reflect beams of light off the eye, which are then recorded on film. Today, tracking what the eye does while reading is computationally mediated and mapped. Rather than a given text that simply offers up its meaning, tracking techniques reveal that the human eye performs a lot of work to construct meaning through erratic, jerky movements filled with pauses, false starts, and back traces. In addition to rendering visible the eye's perceptual processes through computational constructs, the technique also establishes gaze preferences.

Eye-tracking techniques have evolved into contemporary applications in employee training, market research, and product development. Scientific research on eye-tracking techniques describes their importance to neuro-marketing and technology interface design.<sup>23</sup> Outside the realm of consumer product development, the technique is a primary example of technology of transparency, a Foucauldian term applied in feminist science technology and society studies (STS) to those techniques that play a role in the construction of subjectivity. Likewise, eye-tracker devices may also be characterized as a transparent technology and critiqued for its deployment of an objective scientific gaze that cannot produce knowledge of the body without its disassembly.<sup>24</sup> Feminist STS demonstrates the gendered effects of such technologies, for example, in the polygraph and its ability to "show" the presence of lying. In the case of the polygraph or lie detector, feminine conscience is made transparent by technically rendering, or objectifying, attention. The origins of the polygraph are part of a national obsession with understanding the female mind and its so-called tendency to lie.<sup>25</sup> Like the polygraph, eye-tracking devices are implicated as techniques of truth that recapitulate the Cartesian mind-body division. The devices are part of the techno-cultural history of making attention and conscience visible by disassembling the body, isolating it into part-objects.

These tools render attention visible through idea of "optical fixation." Generally, the concept of fixation occurs in psychoanalysis, denoting the emergence of abnormal sexual traits, for example, voyeurism in the work of Freud. A look at perceptual bias research findings suggests how optical fixation and the psychoanalytic discourse of fixation coalesce. Polynomial (i.e., algorithmic) expressions calculate more than the number of optical fixations; they also calculate duration. Studies using the method divide fixations such that their number illustrates the engagement of attention while the duration of fixation indicates a difficulty disengaging attention.

### Optical Fixation: Calibration and Calculation

In university criminology and psychology laboratories, eye-trackers are stationary objects connected to computer screen displays. Most eye-trackers employ a video-based system that measures the movement of the cornea and pupil. This process works through reflection where infrared light is reflected through a mirror into the subject's eye. A reflection off the cornea and retina is what will emerge as the optical fixation. The location of the participant's eye is calculated from the corneal glint and the retinal reflection.<sup>26</sup> In combination with the algorithm, the eye-tracker is an automatic recording device that reports human vital phenomena. Optical fixations may be further distinguished as observations that "occur each time a specific cluster is entered and exited."<sup>27</sup>

In social science experiments, the gaze is staged as a vital activity whose transformations may be recorded and calculated algorithmically. Polynomial expressions encode, approximate, define, and delineate functions taken from the gaze. They register or make apparent eye position as an utterance, via instantiations of mathematical law. Two approaches define eye-tracking algorithms: feature-based and model-based. The feature-based approach operates by an individual's unique eye features. The model-based approach operates by designating the best-fitting image of a model eye.<sup>28</sup> Investments in the technology are made via transfers at the level of scholarly publication. New journals are devoted to the evaluation of eye-tracking technology, particularly around how to calibrate the apparatus and the relationship between statistically significant results relative to the cost of eye-monitoring technology. Scientific journals are also evaluating the performance of particular algorithms for specific calculations. The Starburst algorithm has emerged as a particularly robust one in studies of perceptual bias, for example.

Calculating the optical fixation is performed at a critical interdisciplinary nexus between the social sciences, humanities, and mathematics/computing. The eye-tracing apparatus is a black box—no printout emerges from the connected devices. The interpretation of the *mise en scène* of optical fixation—the computational construct in which fixation phenomena is produced—is illustrated in published scientific papers. Though the scenes in which optical fixation is calibrated are reported, its visual representation occludes the fact that in experiments of perceptual bias optical fixation must be surreptitiously collected/calculated. Algorithmic calibration captures the gaze patterns in the perceptual bias laboratory with the subject digitally tethered to the device. Optical fixation is a phenomenon of a networked (calibrated) polynomial's mathematical transformations. These

transformations are enabled by the creation of a unit of analysis, the "eye pixel." The compression between those terms "eye" and "pixel" illustrates a parasitic link between human and computer.

### Visual Evidence of Anti-Blackness in Scientific Journals

Research relying on optical fixation suggests evidence for the "attention divides" hypothesis. "Attention divides" refers to the phenomena in which a subject "focusing on a common target will exaggerate bias in punishment decisions among individuals who vary in identification."<sup>29</sup> The authors further flesh out the hypothesis writing:

People direct visual attention towards people that they consider to be threats. . . . Likewise, White Participants directed attention to Black faces over White faces, but this attentional bias was eliminated when the faces displayed averted gaze, which reduced the threatening nature of the faces. In our studies, participants may have considered police and outgroup members threatening, which may have led some to orient attention to them. Moreover, our videos depicted physical altercations, which evoke feelings of realistic threat. Expectations for violence from outgroup members during altercations and motivations to be vigilant for aggression from outgroup members may lead people to direct attention to the source of threat, shape understanding or case facts, and ultimately, lead to harsher punishment decisions.<sup>30</sup>

In contrast to "attention divides," researchers also find the "Black Sheep Effect" produced in the laboratory, in which out-group identifiers punish hypothetical out-group targets more harshly than weak out-group identifiers.<sup>31</sup> Crucial to these findings is how study participants intensify punishment of in-group members they perceive to be deviant. Experimental protocols stimulate participants not only through typed narratives of a hypothetical disciplinary situation. The findings are driven by the inclusion of video simulations of police-civilian interactions into the research protocol. Eye-tracking techniques are then applied to study participants' gaze patterns. Optical fixations are the data that disclose "attention divides" and the "black sheep effect" as criminological hypotheses, both part of an anti-Black ethos of punishment. Perceptual bias studies suggest that the experience of seeing images replayed may increase punishment decisions among spectators. Eye-tracking devices are technologies of vision that track more than the mere fact of reading difference that becomes racialized. The scientific object—optical fixation—further renders the anti-Black character of racial difference, the significance of scene repetition, and its imbrication in the spectator's future punishing behavior.

Suspend the following metaphysical questions about the materiality of optical fixation in order to consider recent jurisprudential hypotheses they underwrite, for the findings are rhetorically compelling despite an ambivalent orientation to the fixation phenomena upon which such research depends: What is the materiality/visuality of the optical fixation as a vital report? What evidence of thought and perception does the technique confirm? How sophisticated does the apparatus need to be to achieve accurate calculations? Whatever the ambivalence about eye-tracking techniques and the calculation of incalculable, the technique makes a visible scientific object out of human attention.<sup>32</sup> Eye-tracking brings the optical fixation and many provocative psycho-physical phenomena into the genealogy of legal vision. They do so through the pervasive language of computation.

I want to take up further the position this form of machine learning occupies in the history of techniques of transparency and truth. Technologies of vision have long played a role in constructing knowledge of femininity and gender difference. Likewise, knowledge of racial difference has always been a part of the visual discourse of truth and is now enabled by machine learning as a matter of routine. The dominant idiom of the algorithm, manifest in the optical fixation and punishing decisions of study participants, demonstrates that the structure of the field of vision and, by extension, of visual competency is always already anti-Black. On a material level, eye-tracking methodology highlights the prevalence of video footage as the dominant matter in criminal jurisprudence. There is a blending of the concepts of film and skin ascendant here, where bystander and police dashboard videos are projected by the public at large and by the state as a strategy of the flesh. The optical fixation discloses the eye's attention (where attention stands in for the political philosophical concept of recognition) to the flesh in a visual field, whose movements are located within the film itself and the spatialized projections of courtroom and personal screens. Previously, scholars interpreted how the defense in the Rodney King police brutality trial broke down the bystander footage, broadcast around the world, still-by-still to construct King as the crazed Black figure controlling the interaction with endangered White police.<sup>33</sup> Eye-tracking methods contribute to a visual pedagogy in a jurisprudential moment in which digital bystander video recordings of lethal police-civilian encounters proliferate. The technique reorients attention away from how the defense displayed visual evidence in the King trial to focus on the spectator's preexisting anti-Black viewing apparatus.

Richard K. Sherwin has commented on the imbrication of law and culture, aesthetics and ethics, arguing that law's visual life exists within a

larger cultural abyss of anxiety and doubt concerning the veracity of the image on one hand and the excess of meaning conveyed by images on the other:<sup>34</sup> "We need a new visual literacy to crack the aesthetic, cognitive, and cultural codes of law as image in the digital age."<sup>35</sup> Eye-tracking techniques expose colorblind racism as the aesthetic, cognitive, and cultural code of law by deploying the discourse of the algorithm to verify anti-blackness as constitutive of both the field of vision and the spectator's interpretation of its recorded activity. The technique suggests there is no such thing as a nonracist or race neutral spectator of law. Colorblind discourse, then, is the alibi for anti-Black practices of looking in law and culture. In this sense, the call for better visual competency of law must conceive of the eye of law and notions of blind justice anew.

In their volume *Genealogies of Legal Vision*, Peter Goodrich and Valérie Hayaert observe that far beyond the letter of law or legal text, law is made accessible through many architectural structures common to the courthouse: "columns and steps, bifold doors and ornamented foyers."<sup>36</sup> These openings serve as portals to law. Further they contend,

The portal to the law is itself an emblem, an image of entry, an opening of the curtain onto the tableau and stage of the juridical. Thus, the figure of law that inaugurates the body of laws is that of a higher power, a super-terrestrial image, such as that of Leviathan for Hobbes or that of the divinity, depicted as a crescendo of light, handing the laws to Moses, to Solon, to Homer, or some further figure of mythological or Christian rule.<sup>37</sup>

Soon after, the authors draw attention to the face as the locus of law's encounter, its portal. They write:

The face is an opening; it is the conduit of breath in Augustinian terms of *pneuma*, of breath and of all the other insufflations that are marked by the diverse facial orifices that allow for the passage from external to internal, from visible to invisible. There is importantly, a dual relay connected to the face in that it opens to and simultaneously or also lets in, imbibes and exhales. If the face is an image, a mobile site of identity and difference, the image is equally a face and in the case of law, it is explicitly *facies altera* [back face, or two faces], the mark of time and judgment.<sup>38</sup>

"I can't breathe," the common refrain improvised by protests against the anti-Black structure of law and policing, suggests the need for an alternate portal into law than the face or body that is more explicitly future-oriented than Goodrich and Hayaert's analysis. The civilian's inability to breathe due to the weight of the police officer is not merely physical but a historical and metaphorical manifestation of Western politics. Their conception of

law's two faces (*facies altera*), rather than explicitly indicating the colorblind neutrality of the ancient Western juridical tableau, is in danger of eliding the explicitly anti-Black structure of law and the "higher power" that serves as guarantor. While I take the author's point, I want to pivot away from the Eurocentric image and face of law they draw and instead imagine the physical and metaphorical encounter with law as a looking practice comprising a strategy of the flesh. In the next section, I examine the film *The Brother from Another Planet* for how it marks the alterity of time and judgment in order to reimagine law's visual competency that attends to Black feminist inquiry about the flesh.

### *The Brother from Another Planet*

While the use of eye-tracking techniques to study perceptual bias and the incitement to punish positions human attention and bystander video recordings as objects of critical legal pedagogy, disciplining the eye of law is frequently modeled in popular cinema. The ideal representation of legal knowledge is borne out in the history of the eye and is prominently featured in the science fiction genre. In this genre, what happens to people's eyes is suggestive of the future of legal pedagogy. Famous examples, namely *A Clockwork Orange* and *Bladerunner*, represent the future entanglement between law and the visible. Recall how the Ludovico eye technique and Voight-Kampf methods, respectively, used in these films represent the eye of law in terms of disciplinary apparatuses of the corporate state.<sup>39</sup>

*The Brother from Another Planet* stages a break from the eye of the law legal fiction by dispensing with the mechanical representation of the transparency apparatus to an embodied version, one where the eyes of the law reside in the Black alien male. *The Brother from Another Planet* is about an alien escaped from origins unknown, played by the Black American actor Joe Morton. The film explores two dualities: one between the inseparability of Black flesh from body and the other being how "alien" references both immigration status and extraterrestrial being. Alienated in this world, Black flesh signifies extraordinary commodity value. The Brother, for example, regenerates his lower leg and foot that was severed upon his entry to Earth, hitting upon the historical association between blackness and hyper-analgesic qualities and endless rejuvenation. Such qualities are those precisely at issue when the cries of Black civilians are ignored by police officers. These are remarkable abilities the protagonist sells to electronics stores for cash under the table. The Brother lives his life as a mute boarder



in a Harlem apartment building, communicating through nonverbal gesture to neighbors, and is pursued by two White intergalactic immigration offices, Men in Black. The Brother is illegal, and his crime is being.

The Brother's feet present a strategy of the flesh in which the foot embodies his difference from the humans upon whose planet he has crashed landed, a few clicks from the Statue of Liberty. The Black community adopts him, presumably based on shared phenotype; however, the Brother's strange feet will walk an alternate path toward the making of law and punishment. The film introduces the foot as evidence of community membership into the hieroglyphics of legal emblems. Another example of the film's revelation of flesh is the disembodied immigrant and refugee voices the Brother can hear from the past, the many tongues inhabiting the halls of Ellis Island. The Statue of Liberty and Ellis Island suture a relation between freedom and community difference whose path the Brother will traverse in the film.

Reva Siegel argues that legal fiction, such as the eyes of law, "may itself be a figure of speech that naturalizes the rich variety of ways that the language of the law constructs the social world we inhabit."<sup>40</sup> While continuing to evade the Men in Black, the Brother conducts his own investigation into the corporate-sponsored drug traffic that is killing his neighbors in Harlem. One afternoon his surveillance of local drug dealers is interrupted by the presence of a police officer. The Brother dislodges his right eye and places it in a planter, angling it toward the dealer's building. Once removed from his body, the eye functions as a pulsating surveillance camera whose footage he can reinsert into his body to play. Later, when the police officer has gone, he recovers and replays the footage by returning the eye to its socket; the Brother becomes a video recorder, playing back the film collected by his detachable camera-eye. It is through corporeal disassembly and reassembly, taking apart a piece of the body and putting it back together, that the Brother locates a fugitive and insurgent "eye of law" within Black interiority. This is a position counter to how the state deploys "eyes of the law" through the evaluation of Black exteriority in ways that subject Black people as a class to legal exceptions that are frequently fatal and always stigmatizing and victimizing.

Staged within the film is a distinction between flesh and body made by cultural critic Hortense Spillers in her widely influential essay, "Mama's Baby, Papa's Maybe: An American Grammar Book."<sup>41</sup> Spillers's formulation implicates both colonial and slave laws that legitimized the systematic use of violence by the master class. The authority and legitimacy of the hieroglyphics of the flesh, the scars meted out by White masters upon Black slaves, were gradually transferred to the hands of police after the Civil War,

stretching to contemporary everyday interactions between police and Black and Brown civilians.<sup>42</sup> *The Brother from Another Planet* portrays this afterlife of slave fugitivity. Peter Goodrich's erudite description of legal emblems is also concerned with the hieroglyphic. His analysis of Anglo-European legal desiderata decodes the visual hieroglyphs that construct the values, powers, righteousness, ambiguity, and the authority of Western governance.<sup>43</sup> Hovering eyes, hands, pierced hearts, and other symbols abound in emblem books that visualize how law shall govern. These media forms and their hieroglyphic messages were encoded for those individuals initiated into governance roles by status. The visual culture examined in his text ranges from the mid-1500s to the late 1600s, the opening century of the transatlantic slave trade.<sup>44</sup> While this fact goes unmentioned by Goodrich, his analysis nonetheless helps to lay bare the other side of the visual hieroglyphics Spillers draws upon to inform her theory of the violent process of Black enslavement. "Lawyers played a crucial role in the structuring of vision, in making power visible and so providing models, patterns, and in short accessible exempla, emblems of the licit modes of disposition and behavior" through these media forms.<sup>45</sup> Guided by Spillers's emphasis on the way enslavement makes flesh out of the person, the models' patterns of law were made visible in more than the legal emblem book. The anti-Black logic of the Anglo-European legal and cultural tradition is borne upon Black body rendered as mere flesh. Thus, the production and circulation of this cult classic film illustrates the hieroglyphics of the flesh Spillers named decades ago and the hieroglyphics of the emblem book Goodrich deconstructs more recently.<sup>46</sup>

Yet one of the interventions of Black feminists who keep fugitive struggles in mind has been to expand Spillers's notion of the violence against the body. In this way, anti-blackness is imposed through strategies of the flesh that take seriously the alterity subjects of anti-blackness, who often employ it to create knowledge about self and word, including law and visual culture.<sup>47</sup> Consider Simone Browne, quoting Steven Mann: "Before approximately 50 years ago—and going back millions of years—we have what we call the 'sousveillance era' because the only veillance was sousveillance which was given by the body-borne camera formed by the eye, and the body-borne recording device comprised of the mind and brain."<sup>48</sup> Dark sousveillance can be an organized and improvised strategy that "entails an active subversion of the power relations that surveillance entails."<sup>49</sup> Its fleshy strategy may assume many material and ephemeral forms. The recording by Darnella Frazier of the suffocation of George Floyd by a Minneapolis police officer is another example of sousveillance in a long line of bystander videos.



FIGURE 1. Rookie cop speaks to the Brother, who is rigid with discomfort. Courtesy of the author.

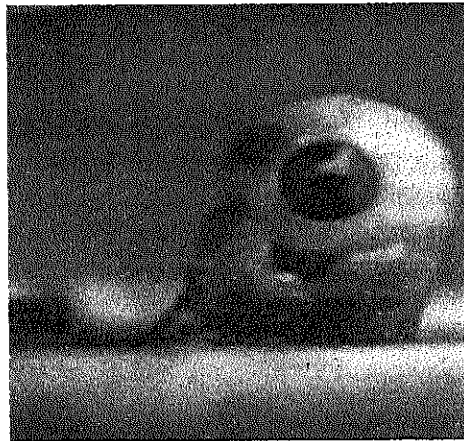


FIGURE 2. The Brother deposits his eye in the planter. Courtesy of the author.



FIGURE 3. The Brother's eye sousveiling the neighborhood. Courtesy of the author.

These flesh-film recordings function as citizen undersight in a visual field dominated by state and corporate oversight. *The Brother from Another Planet* and eye-tracking techniques converge at the bystander recording to imagine the kind of visual literacy legal spectators will develop to read them in and outside courtroom settings.

On the stoop of a brownstone, the Brother has a one-sided exchange with a White rookie police officer. The officer relays that his colleagues have warned him about the racialized perils of his beat: "How long you been up here, pal? You a native or what? My first day in this precinct. Partner upstairs been handing me all kinds of horror stories like, you know, they are going to cook me alive if I don't look out what I'm doing. Can't be all that bad I figure? Pretty damn nice to me, Harlem. You know people are people, right? You put on a uniform, it's not like you hand in your status as a human being. I mean we're here to protect and serve, right? Like it says on the LA cruisers on Adam 12. They never should have taken that show off the air. So, what do you think?" The Brother does not engage the officer's words; instead, he silently walks away.

As the Brother shuns the officer, he leaves his alien eye behind to record the community on his own. He models a strategy of the flesh in which the separation of the "eye of law" from its Black alien inhabitant discloses a distributed and doubled model of knowing justice from that of the police offer. The Brother's detached eye is a fleshy example of dark sousveillance. As cultural critic Tavia Nyong'o imparts about the film, the Brother's eyes are an "emblem of black counter-surveillance."<sup>50</sup> The Brother's eye is fixated on his community. Once returned to his body, his recordings become embodied knowledge that counter the forms of knowledge generated by eye-tracking techniques in the implicit bias experiments discussed earlier. *The Brother from Another Planet* prefigures the use of eye-tracking technology in a way that brings the fleshy strategy of the Brother's counter-sousveillance into conversation with the kind of nonrepresentational vision understood experimentally as optical fixation. The Brother has indeed plodded a different path with his odd feet. Between his detachable eye and optical fixation, the hieroglyphics associated with the "eye of law" found in legal emblemata are extended to celluloid, digital film, and other computational constructs.

## Conclusion

What will be the doctrinal significance of the human attention system, rendered knowable through eye-tracking techniques? This chapter has performed the bridgework necessary to further link critical race and legal

studies to visual culture and media. Digital bystander footage is a political and social form of visual evidence: political because it implicates the state and police in centuries of long and violent repression of Black freedom, and social because it performs solidarity among the bystander, a member of the viewing public, and the victims of police lethality through the cinematic apparatus. The vernacular media practices that bring digital bystander footage into being thus resist interpretations governed solely by traditional indicators of film genre or histories of photography. Detailing the use of eye-tracking techniques in experiments about implicit bias in police-civilian encounters illustrated the optical fixation's status as a media form and technique rather than a genre element in visual studies that concern law.

Although eye-tracking and optical fixation are presaged in the science fiction genre, I have suggested, through Black feminist theory of the flesh, the significance of film as a form of flesh deployed strategically to resist anti-Black logics that inform the eyes of law and blind justice tropes. *The Brother from Another Planet* depicts this flesh-bound strategy of dark sousveillance where community undersight challenges the authority and legitimacy claims of state and police oversight. Here, state and police oversight include police body and dashboard cameras offered as a reform measure to placate an increasingly angry public. I want to make clear that I am extremely dubious that implicit bias training or body and dashboard cams for police will be helpful. For these are reform measures, repairs that do not redress the logic of anti-blackness of Anglo-American legal and cultural tradition. In other words, the state's decision to record its own lethality is not constitutive of a commitment to Black freedom's struggle. Visual evidence captured of police by the state can institutionally propagate better visual literacy; however, it will be a visual competency in which the legal spectator is educated in how to read police attention to superficial procedural norms. There is no reason not to think that increased scrutiny of bystander and police body and dashboard footage would still support cultural amnesia of the historical opposition between Anglo-American law and the history of anti-blackness and slavery. Why would we want better visual literacy of the law's field of vision without Black freedom's struggle?

Eye-tracking is a strategy of the flesh emerging in critical approaches to analyzing police-civilian encounter videos. But we must temper these findings with the fact that the technique is part of the ascendant discourse of the algorithm that digitally constructs predictive relationships between law and the visible. Algorithmic language tools emerge in a context of ongoing struggles for liberation. But there are others. In this chapter, I have argued that the community of legal spectators in courtrooms are the

real stakeholders, to whom calls for better visual competency—one that imagines the goal alongside Black liberation struggles—should be directed. In their discussion of the iconography of justice, legal scholars Judith Resnik and Dennis Curtis ask, "How might one materialize commitments to the multiplicity of vantage points legitimately to be taken into account" in matters of legal fact-finding?<sup>51</sup> In the "Courtwatch" movement, citizens exercise their constitutional right of assembly to *critically observe* criminal courtroom procedures. Court-watching is a form of critical observation of legal processes discussed since at least the nineteenth century in the United States.<sup>52</sup> The programs involve members of voluntary civic associations and traditionally include mothers, students, and retirees. Recent examples of court-watching practices build critical milieus among legal spectators to practice visual competency in and around official courtroom spaces. We might understand these assemblies as responding to the revelations of the optical fixation in implicit bias studies. For their focus is not upon the precision of what the eye sees. Rather, emphasis is on the collective situatedness of courtroom presence, whose reflections—a crucial element of the activity—are typically shared in writing, message board posts, and community gatherings after courtroom observation activities. As court-watching groups sit together, side-by-side in courtrooms across the country, their sousveillance practices are constitutive of the strategies of the flesh found at the intersection of scientific experiment and cinema.

## Notes

1. See Kimberly Juanita Brown, *The Repeating Body: Slavery's Visual Resonance in the Contemporary* (Durham, NC: Duke University Press, 2015).
2. Saidiya Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth Century America* (New York: Oxford University Press, 1997).
3. Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color," *Stanford Law Review* 43, no. 6 (July 1991): 1241–99.
4. Eduardo Bonilla-Silva, *Racism without Racists: Colorblind Racism and the Persistence of Racial Inequality in the United States* (Lanham, MD: Rowman and Littlefield, 2010).
5. Sora Han, *Letters of the Law: Race and the Fantasy of Colorblindness in American Law* (Stanford, CA: Stanford University Press, 2015).
6. See Safiya Umoja Noble, "Critical Surveillance Literacy in Social Media: Interrogating Black Death and Dying Online," *Black Camera* 9, no. 2 (Spring 2018): 147–160. For the relationship between contemporary bystander footage and twentieth-century lynching photos, see Erin Gray, "The Incendiary Image of Lynching: Now! And the Red Summer of 1965," *Black Camera, Special Issue: Contemporary Cuban Cinema* (forthcoming, Spring 2021).
7. See Roopali Mukherjee, "Bio-Work in the Blacking Factory: Police Videos and the Ethics of Seeing and Being Seen," *Black Camera* 9, no. 2 (Spring 2018): 132–46.
8. Travis M. Andrews, "The Debate around Breonna Taylor Memes: Do They Bring Attention to the Cause or Trivialize Her Death?," *Washington Post*, July 3, 2020,

- <https://www.washingtonpost.com/newssearch/?query=The%20debate%20around%20Breonna%20Taylor%20memes&sort=Relevance&datefilter=All%20Since%202005>. See also Allissa Richardson, *Bearing Witness While Black: African Americans, Smartphones, and the New Protest # Journalism* (New York: Oxford University Press, 2020).
9. For critical scholarship on computational algorithms, see Meredith Broussard, *Artificial Intelligence: How Computers Misunderstand the World* (Cambridge, MA: MIT Press, 2018). See also Safiya Umoja Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism* (New York: New York University Press, 2018).
  10. US Department of Justice Civil Rights Division Findings Regarding the Albuquerque Police Department (4/10/14) at p. 6, [http://www.justice.gov/crt/about/spl/documents/apd\\_findings\\_4-10-14.pdf](http://www.justice.gov/crt/about/spl/documents/apd_findings_4-10-14.pdf).
  11. Charles Goodwin, "Professional Vision," *American Anthropologist* 96, no. 3 (1994): 606–33.
  12. Reva B. Siegel, "In the Eyes of Law: Reflections on the Authority of Legal Discourse," in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz (New Haven, CT: Yale University Press, 1996), 229.
  13. Scholarship analyzing the linguistic performance of the algorithm across culture and technology include Arjun Appadurai, *Banking on Words: The Failure of Language in the Age of Derivative Finance* (Chicago: University of Chicago Press, 2016); *Fear of Small Numbers: An Essay on the Geography of Anger* (Durham, NC: Duke University Press, 2006); Andrew Culp, "Non-Constitutive Rhetoric: Or the Banality of Control" (2015), <https://non.copyriot.com/non-constitutive-rhetoric-or-the-banality-of-control/>; Maurizio Lazzarato, *Signs and Machines: Capitalism and the Production of Subjectivity*, trans. Joshua David Jordan (Los Angeles: Semiotext(e), 2014); Michel Callon, ed., *The Laws of the Markets* (Malden, MA: Blackwell Publishers, Sociological Review, 1998).
  14. For contemporary work on the study of legal emblemata, see Peter Goodrich, *Legal Emblems and the Art of Law: Orbita Depicta as the Vision of Governance* (Cambridge: Cambridge University Press, 2013).
  15. *The Brother from Another Planet*, dir. John Sayles (1984; Santa Monica, CA: MCM Home Entertainment, 2003), DVD.
  16. Cultural critic Simone Browne develops the mode of sousveillance in *Dark Matters: On the Surveillance of Blackness* (Durham, NC: Duke University Press, 2015).
  17. Kelli Moore, "Affective Architectures: Photographic Evidence and the Evolution of Courtroom Visuality," *Journal of Visual Culture: Special Issue Affect at the Limits of Photography* 17, no. 2, ed. Lisa Cartwright and Elizabeth Wolfson (August 2018): 208. See also Jocelyn Simonson, "The Criminal Court Audience in a Post-Trial World," *Harvard Law Review* 127, no. 8 (2015): 2174–2232.
  18. Exemplary scholarship on this topic includes Dwight Conquergood, "Lethal Theater: Performance, Punishment, and the Death Penalty," *Theater Journal* 54, no. 3 (2002): 359–67; Neil Feigenson, "The Visual in Law: Some Problems for Legal Theory," *Law, Culture & the Humanities* 10, no. 1 (2014): 13–23; Neil Feigenson and Christina Spiesel, *Law on Display: The Digital Transformation of Legal Persuasion and Judgment* (New York: New York University Press, 2009); Philip Auslander, *Liveness: Performance in a Mediatized Culture* (New York: Routledge, 2008); Richard K. Sherwin, *Visualizing Law in the Age of the Digital Baroque: Arabesques and Entanglements* (New York: Routledge, 2011); Judith Resnik and Dennis E. Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (New Haven, CT: Yale University Press, 2011).
  19. Moore, "Affective Architectures," 209.
  20. Moore, 209.

21. Marianne Constable, *Just Silences: The Limits and Possibilities of Modern Law* (Princeton, NJ: Princeton University Press, 2005).
22. Chris M. Anson and Robert A. Schwegler, "Tracking the Mind's Eye: A New Technology for Researching Twenty-First-Century Writing and Reading Processes," *College Composition and Communication* 64, no. 1 (2012): 153. See also Andrew T. Duchowski, *Eye Tracking Methodology: Theory and Practice* (London: Springer, 2003).
23. Tanya Schneider and Steven Woolgar analyze the symbolic manipulation of scientific instruments in the nascent field of neuromarketing. Neuroscience techniques—brain imaging and other measurement technologies—are used to learn about subjects' responses to consumer products. They demonstrate how a concept of the consumer is enacted through these technologies that "simultaneously reveal and enact a particular version of the consumer that depends on achieved contrast between what appears to be the case—consumer's accounts of why they prefer certain products over others—and what can be shown to be the case as a result of the application of the [neuromarketing] technology." The statistically powerful "revelations" wrought by these tools are ironic "in the technical sense that justification for the use of these technologies depends on a constructed incongruity between what is expected and what actually is the case." Technologies of ironic revelation describe precisely the translation of eye-tracking events in perceptual bias experiments into visual representations in scientific journals where experimental conditions are typically represented as drawn models, often taking the form of cartoons or comics that feature a little homunculus seated at a computer. The subtle humor of these representations ironically refers to the experimental instrument, the footage shown to subjects. Yet a greater representational irony is afoot. The communication modeled in these studies stand in for information that cannot be represented because they are acquired surreptitiously. Optical fixations are recorded vital reports of subject's gazing behavior. Recordings of unconscious gaze patterns discover a new form of information akin to the "data-double." The significance of optical fixation is the potential social life of this data. Fixations are the product of the subject's machinic enslavement to the eye-tracker during the experiment. Optical fixations are ironic revelations of consciousness. See "Technologies of Ironic Revelation: Enacting Consumers in Neuromarkets," *Consumption Markets and Culture* 15, no. 2 (2012): 171, doi.org/10.1080/10253866.2012.654959. See also Yannjy Yang and Chih-Chien Wang, "Trend of Using Eye Tracking Technology in Business Research," *Journal of Economics, Business and Management* 3, no. 4 (April 2015): 447–51, doi: 10.7763/joebm.2015.v3.226.
24. For feminist scholarship on techniques of transparency involving the scientific disclosure of gender and disease, see Constance Penley, *Close Encounters: Film, Feminism, and Science Fiction* (Minneapolis: University of Minnesota Press, 1991); Carol Stabile, *Feminism and the Technological Fix* (New York: St. Martin's Press, 1994); Lisa Cartwright, *Screening the Body: Tracing Medicine's Visual Culture* (Minneapolis: University of Minnesota Press, 1995). See also Paula Treichler, Lisa Cartwright, and Constance Penley, eds., *The Visible Woman: Imaging Technologies, Gender, and Science* (New York: New York University Press, 1998).
25. Ken Alder, *The Lie Detectors: The History of an American Obsession* (New York: Free Press, 2007). See also Geoffrey C. Bunn, *The Truth Machine: A Social History of the Lie Detector* (Baltimore: Johns Hopkins University Press, 2012).
26. Anson and Schwegler, "Tracking the Mind's Eye."
27. Davide Massaro, Federica Savazzi, Cinzia Di Dio, David Freedberg, Vittorio Gallese, Gabriella Gilli, and Antonella Marchetti, "When Art Moves the Eye: A Behavioral and Eye-Tracking Study," *PLoS ONE* 7 no. 5 (2012): 3, doi.org/10.1371/journal.pone.0037285.

28. R. Nagesh, "Eye Tracking Computer Control—A Review," *International Research Journal of Engineering and Technology* 2, no. 8 (November 2015): 954–58.
29. Yael Granot, Emily Balctis, Kristin E. Schneider, and Tom R. Tyler, "Justice Is Not Blind: Visual Attention Exaggerates Effects of Group Identification on Legal Punishment," *Journal of Experimental Psychology: General* 143, no. 6 (2014): 2197. <https://doi.org/10.1037/a0037893>
30. Granot et al., 2205.
31. Granot et al.; Jose M. Marques and Dario Paez, "The 'Black Sheep Effect': Social Categorization, Rejection of Ingroup Deviates, and Perception of Group Variability," *European Review of Social Psychology* 5 (1994): 37–68, doi:10.1080/14792779543000011; Jan-Willem Van Prooijen and Jerome Lam, "Retributive Justice and Social Categorizations: The Perceived Fairness of Punishment Depends on Intergroup Status," *European Journal of Social Psychology* 37 (November/December 2007): 1244–55, doi:10.1002/ejsp.421.
32. Optical fixation is the value rendered by the eye-tracking apparatus, which includes the device, algorithms that transform vital data collected off the looking practice of the subject physically engaged to the apparatus. The recorded fixations occur faster than the speed of human consciousness. Paradoxically, then, the optical fixation is a unit of value assigned to the incalculable. Its calculation is made possible through Big Data techniques that unsettle the scientific method by calculating ever more infinitesimal quantities and instrumentalizing them for predictive analyses. Big Data approaches mark a shift in the history of perception from its origins beginning with the ancients who focused on perception and the senses, to optical perception conceived as the sum of added sensations, to psychological queries of gestalt meaning, to the contemporary computationally programmed vision whose features may be observed through the computer construct that is neuroimaging. Each of these approaches is organized by experimental and theoretical protocols that privilege the visual system. Similarly, the logic of Big Data appropriates from the body an endless source of data manufacturing and manufactured data. The (im)material quality of this data requires a scientific instrument, typically a networked computer, to make its appearance as visible phenomena.
33. See Judith Butler, "Endangered/Endangering: Schematic Racism and White Paranoia," in *Reading Rodney King / Reading Urban Uprising*, ed. Robert Gooding-Williams (New York: Routledge, 1993), 15–22. Further, Allen Feldman breaks through propensity toward cultural amnesia by connecting the political violence documented in the video of the Rodney King beating to the state's everyday routines of visible pain-making. The King video renders state violence in the very moment the violence of Desert Storm imagery erased the political violence upon Muslim peoples. See "On Cultural Amnesia: From Desert Storm to Rodney King," *American Ethnologist* 21, no. 2 (May 1994): 404–18. See also Brian Martin's "The Beating of Rodney King: The Dynamics of Backfire," *Critical Criminology* 13 (2005): 307–26.
34. Richard K. Sherwin, *Visualizing Law in the Age of the Digital Baroque: Arabesques and Entanglements* (New York: Routledge, 2011).
35. Sherwin, 11.
36. Peter Goodrich and Valérie Hayaert, eds., *Genealogies of Legal Vision* (New York: Routledge, 2015), 3.
37. Goodrich and Hayaert, 3.
38. Goodrich and Hayaert, 4.
39. In *A Clockwork Orange* (1971), Alex DeLarge is a juvenile delinquent who leads ultraviolent crime sprees with his gang of friends. When the Ministry eventually apprehends

him, Alex is offered a chance at rehabilitation and presumably redemption. He agrees to undergo the Ministry's Ludovico technique, consisting of a headgear apparatus that attaches restraints to the eyelids, keeping them open as a montage of violent images is played for the viewer. Alex is subjected to horrifying images set to Beethoven's Ninth Symphony. *Bladerunner* (1982) describes a future world in which commercial robots, called Replicants, illegally masquerade as human beings, sometimes unknowingly. The Voight-Kampff technique of truth is deployed forensically, consisting of a spoken interview with a subject seated before the apparatus, a small camcorder attached to a mechanical arm. Voight-Kampff combines interview questions with data collection of human eye movements. Police officer Rick Deckard pursues Replicant escapees on behalf of Tyrell Corporation. In a revealing scene, Deckard administers the test before Edmond Tyrell, the corporation's CEO, in order to test Voight-Kampff's accuracy. Narrative exposition tells us that normal interviews produce a result within twenty to thirty questions. Rachel, a subject of Voight-Kampff interrogation, requires "more than a hundred questions" from Deckard, and Tyrell confirms she is an experimental android who believes she is human.

40. Siegel, "In the Eyes of Law," 228.
41. Here readers may also be reminded of Deleuze and Guattari's idea of the "body without organs," a metaphor for a subject freed from the repressive ideological state apparatuses that organize and territorialize the self. I prefer Spillers's flesh-body distinction because it is an explicit response to the violent historical practices involved in colonialism and the process of racial enslavement, whereas the former centers its flight or detour away from repression around a colorblind reading of the human, even in its attempt at offering a critique of the same. See *A Thousand Plateaus: Capitalism and Schizophrenia* (Minneapolis: University of Minnesota Press, 1987).
42. Properly understood policing starts with slave patrols protecting the interests of plantation owners who were outnumbered by mobile slave populations. See Alex Vitale, "The Myth of Liberal Policing," *New Inquiry*, April 5, 2017, <https://thenewinquiry.com/the-myth-of-liberal-policing/>. See also Jill Lepore, "The Invention of the Police," *New Yorker*, July 13, 2020, <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police>.
43. Goodrich, *Legal Emblems and the Art of Law*.
44. See Goodrich, vi–xiv.
45. Goodrich, xv.
46. As Goodrich describes (xv), the emblem book "was at base a mix of military and theologico-legal inventions that rapidly set out to use the printing press to make law visible, manifest, and present in the newly enlarged public sphere, in the republic of printed letters and graven images."
47. With the term "strategies of the flesh," I am thinking of Alexander Weheliye's argument about how the enfleshments of the transatlantic slave trade do not simply impose blackness; the violence of enslavement is also generative of ways and techniques of living. See Weheliye, *Habeas Viscus: Racializing Assemblages, Biopolitics and Black Feminist Theories of the Human* (Durham, NC: Duke University Press, 2014).
48. Simone Browne, *Dark Matters*, 20.
49. Browne, 19.
50. Tavia Nyong'o, *Afro-Fabulations: The Queer Drama of Black Life* (New York: New York University Press, 2019), 212.
51. Judith Resnik and Dennis Curtis, "Epistemological Doubt and Visual Puzzles of Sight, Knowledge, and Judgment: Reflections on Clear-Sighted and Blindfolded Justices," in Peter Goodrich and Valérie Hayaert, *Genealogies of Legal Vision*, 238.

52. See Marianne Stecich, "Keeping an Eye on the Courts: A Survey of Court Observer Programs," *Judicature* 58, no. 10 (May 1975). See also Candace McCoy and Galma Jahic, "Familiarity Breed Respect: Organizing and Studying a Courtwatch," *Justice System Journal*, 27, no. 1 (2006). See also Clare Cushman, *Courtwatchers: Eyewitness Accounts of Supreme Court History* (Lanham, MD: Rowan and Littlefield, 2011).

## CHAPTER 3

# Mediating Responsibility

## *Visualizing Bystander Participation in Sexual Violence*

CARRIE A. RENTSCHLER

There is almost *no* disagreement in our society about the existence of a moral requirement to rescue. The disagreement is only over the question of whether this acknowledged *moral* duty should be enforced as a legal duty.

—Jeremy Waldron, "On the Road: Good Samaritans and Compelling Duties"

In 2012, mobile phone recordings and text messages around the kidnapping and sexual assault of a 16-year-old West Virginia girl in Steubenville, Ohio, achieved broad circulation and, in turn, catalyzed public outrage that continues to fuel major debates about the responsibility of bystanders for sexual violence. Other cases have followed, but the Steubenville case was the first to bring major public attention to "the growing use of social media content as evidence" of sexual assault, where "digital evidence" in the form of recordings and photographs could perform the role of witness to a series of assaults in which the victim herself was made unconscious.<sup>1</sup> In addition to picturing the assault, these forms of digital evidence made visible the participants who enacted the violence, and who contributed to additional harms against victims in their circulation and use of the recordings.

Since then, bystander participation in sexual assaults has become more visible in the press and in court cases as a result of recordings, helping to draw attention to the scale of the problem, and to the unique forms of victim harm recordings cause. In an age in which mobile phone recording is increasingly understood as a means of bearing witness to live events, recent cases of livestreamed and digitally recorded sexual violence test