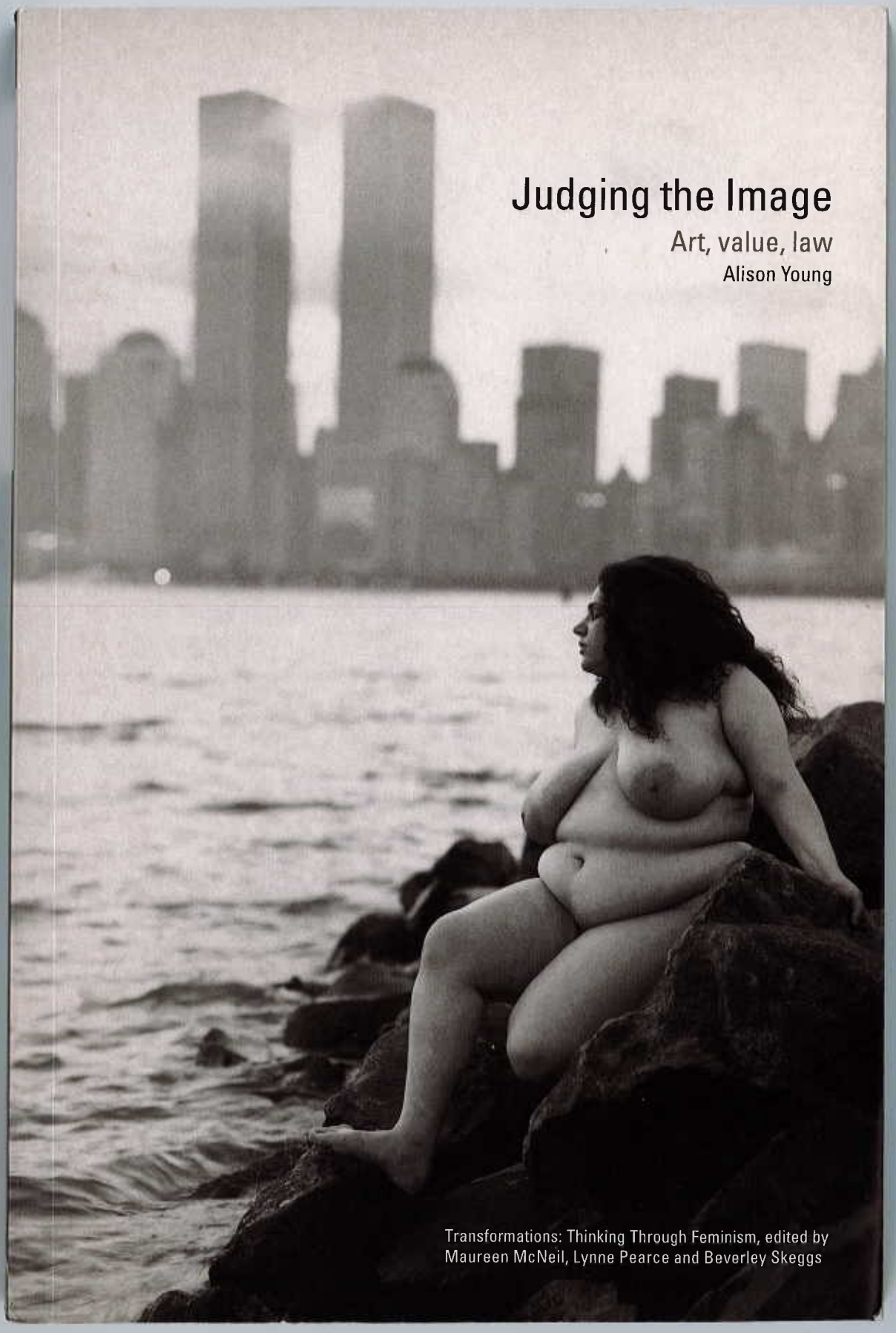
Judging the Image
Art, value, law
Alison Young
Transformations: Thinking Through Feminism, edited by
Maureen McNeil, Lynne Pearce and Beverley Skeggs

Earlier versions of two of the chapters in this book have been published elsewhere: Chapter 2 as 'Aesthetic vertigo and the jurisprudence of disgust', *Law and Critique* (2000) 11 (3): 241–65, and Chapter 4 as '"Into the blue": the image written on law', *Yale Journal of Law and the Humanities* (2001) 13: 101–33 and (in shortened form) as 'Compassionate judgments: the cinematic possibility of judgment with passion', in L. Moran (ed.) (2004) *Law's Moving Image*, London: Cavendish.

The space and time to write and think have become incredibly scarce resources for academics, especially in many Australian institutions. Research leave provided the means to begin, develop and then finally to finish this book. I'm very thankful for the generosity of two institutions in hosting me as a visitor during the researching and writing of this book. Amherst College awarded me the Karl Loewenstein Fellowship in Political Science and Jurisprudence, allowing me the chance to spend six months there in 1998 and six months in 2000. During my visits there, I enjoyed conversations with many people – a more thoroughly engaged and engaging group of academics it would be hard to imagine. My time in Amherst was a wonderful intellectual gift. Completion of the project was made possible by sabbatical leave from my department and the opportunity to be a research visitor at the Faculty of Law, Melbourne University, which offered uninterrupted space in which to revise the final manuscript.

Throughout this project, I have benefited from ongoing conversations with a series of supportive friends and academics, who gave up their time and energy to read chapters, suggest ideas or listen to my arguments. My thanks to you all: Mieke Bal, Jennifer Culbert, Tom Dumm, Nasser Hussain, Peter Hutchings, Bill MacNeil, Shaun McVeigh, Nina Philadelphoff-Puren, Austin Sarat, Rebecca Scott Bray, Richard Sherwin. Nasser Hussain, both in Amherst and in the virtual realms of email and telephone, encouraged me at every stage of this project. And Peter Rush lived with this book's intrusions into the everyday, as I agonized about its writing and non-writing. He read and reread each word, and is the most generous of interlocutors. My very greatest admiration and thanks for his intellectual spirit.

This book is dedicated to two people: to Peter, for his art of companionship, and to Sophie, who transformed the text and everything else.

1 The capture of the subject

> That illusion, in the final analysis, determines the laws of society cannot and must not be seen.
>
> (Luce Irigaray, *Marine Lover of Friedrich Nietzsche*)

> I think an enlightened culture is one that respects the body and doesn't consider it a crime or put a body in jail just because there's an artist working with the nude in public.
>
> (Spencer Tunick)

Becoming image

It's 10 a.m. on a sunny Wednesday morning, and I'm lying naked on a rock at the end of the North Wharf under the Bolte Bridge in Melbourne. I'm in the middle of discovering that, as bell hooks (1995: 136) says, 'writing about art, making art, is not the same as being the subject of art'.

I am naked on this rock because I'm one of more than 200 women who are being photographed by Spencer Tunick, the New York-based artist whose work centres on documenting nude individuals (either solo or as mass groups) in public spaces with photography and video.[1] Tunick is in Melbourne for the Melbourne Fringe Festival, and as part of his *nudeadrift* project, which involves travelling around all seven continents, photographing people naked in public. In the last week, he has already had one installation: he hoped to gather approximately 3,000 people at dawn on the banks of the Yarra River (in fact over 4,000 participants turned up).

Today's event is a closed-to-media, women-only event. I found out about it just this morning, when Tunick called me, in response to my emailed request to carry out an interview with him. He has invited me to interview him afterwards. I turned up at the location – ambitiously called the 'Oriental Gardens' but in reality a concreted stretch of disused wharf past a series of warehouses – intending simply to observe the installation and take notes on what was happening, but now here I am, surrounded by strangers, all of us naked, holding a pose while Tunick shoots the scene.

The participants constitute a formidably diverse group of women. It is

supposed to be an event for women aged over 35; most of those present are in the 35–40 age range, a few look younger, and there's a sizeable proportion of older women. The sun is shining fiercely, a strong breeze gusts up from the water. It looks as though there are well over 200 women here.

Upon my arrival, I introduced myself to Tunick. He said, 'Feel free to join in if you like'. I was startled, then transfixed by the idea of sliding from critic into participant. I try to imagine myself taking my clothes off here, in the sun, in this group. I'm apprehensive, but I decided that I would do it. I watched Tunick checking out different sites for him to stand while taking the photographs. Eventually it was decided; he told the group that there will be three locations. We are to take our clothes off and walk to the first; then walk naked to the second; then walk back to our clothes and dress. We will then walk a few hundred metres to the third location, undress again, and pose for a final time.

Everything's ready, his assistant calls out for us to undress. Some women whoop loudly, others are laughing, there's a buzzing noise of excitement as we strip, bundling clothes into bags, stuffing watches and jewellery into pockets. I feel intensely aware of every piece of clothing and every movement necessary to remove it. The T-shirt pulled over my head. The jeans unbuttoned and bundled up. The act of undressing was never so self-conscious for me, so freighted with significance. I look at some of the people undressing around me: there's a tall woman who carries a naked baby with her. A group of three older women remove their clothes to reveal – on their lower backs, hidden in everyday life – tattoos. And *I* feel as though I am both exposing and hiding something: I'm eight weeks pregnant, and standing completely unclothed in public seems like a display of my internally transformed body, although no-one looking at me would yet be able to tell from my body's exterior.

We walk to the first location – rocks by the river's edge, directly under the massive Bolte Bridge ferrying traffic over our heads. Every step I take feels as though I am moving in slow motion. I feel the scratch of gravel under the soft soles of my feet. A film crew, which is documenting Tunick's progress around the world, is filming us.[2] They are standing on the edge of the flowing river of naked women. I walk past one cameraman. I manage not to look at the lens.

We have been told to lie on the rocks, leaning back. Tunick calls instructions: legs to be bent, legs to lean away from the camera, faces to be turned away. He repeats over and over: do not look at the camera. (Tunick's mass photographs are characterized by facelessness, the subjects' heads averted from Tunick's camera.) There are so many of us that we are lying very close to and sometimes touching each other. I'm leaning back on a stranger's lower legs; another stranger's haunches are inches from my face. Women are still laughing and chatting, the buzzing still sounds as we settle into the pose, then silence takes over as Tunick takes the photographs. Tunick takes the photographs and our status as objects of art becomes *subjectified*. We are the objects of the image and we also become subjects by way of the immensity of the act of lying naked on a rock in public in a group of strangers. The experience of becoming image is a movement of subjectification that

interrupts the everyday sense of ourselves as individuals separated from the public and its gaze and institutions. Participation in Tunick's installation has enfolded each of us into public space and has infused that space with unexpected intimacy: the shrugging off of clothes, the touch of skin on skin, the immobility of the pose. The silence surrounds us; our bodies could not be less objectified in this moment, the result of a sequence of movements beginning with the removal of clothing, continuing through the walk to the installation location, and held, now, in the sovereign moment of the pose.

It's so quiet while Tunick takes the photographs. I can hear the wind rushing over us, the river paddling at the rocks, the traffic trudging overhead. I can hear my breath. The sun and breeze on my naked skin are shocking. Two hundred naked strangers hold a pose for several minutes. Tunick takes the photographs. It's over; Tunick tells us we can move, there's an outburst of cheering and clapping.

We repeat this twice more. From the rocks, we walk, gingerly over the rough ground, to a disused jetty, and lie down in rows upon the wooden planks. The jetty is covered in gravel; tiny fragments of glass glint in the dirt. I unfold my naked body and lie on my back, head turned away from the camera, feeling the harsh wood, tiny stones and rubble engrave themselves upon my skin. This is not a critical writing *about* art; instead, this is art as the writing of bodies, of my body.

The third location requires a longer walk, through a throng of wharf workers, and so we dress hurriedly in the basics of clothing (jeans but no underwear, T-shirt but no bra) and move to an open space which backs on to the glistening blue harbour, with the prongs of the city's buildings jutting along the horizon. At each location, the same phenomenon: a buzz of excitement, then, as Tunick takes the photographs, the uncanny, beautiful silence, followed by cheers and laughter. People dress and depart, returning to everyday life. Some remain naked, posing for snapshots with Tunick. Many, many women want to hug him and thank him.

Finally, the crowd is gone; Tunick, his assistants, the documentary film crew, myself, and some women who are going to pose in individual installations later in the day remain. We return to Tunick's hotel to do the interview. The film crew wants to film me interviewing Tunick, for possible inclusion of the scene in their documentary. And so I ask him questions and he answers, generously, thoughtfully. I have a brief list of questions to ask, with my usual interview technique being to use them as improvisational tools, so that I can move the interview in particular directions that seem interesting once the conversation has begun. However, the presence of the camera, silently swivelling between myself and Tunick, oscillating with each question and each answer, inhibits my thinking and I can feel myself getting more and more mechanical with the format, mind blanking as the answer comes, unable to generate impromptu questions. Tunick remains completely composed, but when it's over, I'm sweating and pink-faced. As I say my goodbyes, he returns to discussing with a prospective model the locations for his next installation.

I'm left with the enigma of the ground's roughness against my body, of the soft air and the sunlight touching my skin, of the sudden open secret of two hundred naked bodies in a public place. I am writing about art, and I have just made myself the object of art. In the shift from subject to object, what affective dislocation has been achieved? In a performance that reconfigures the anonymous public sphere as intimate, what judgment is involved?

Art as performance: participation/regulation

Subject/object. It is simpler to occupy one side or other of that dividing line than to waver between the two. Attempting to interview Tunick while being filmed doing so was a brief and uncomfortable experience of that oscillation; however, Tunick's great achievement as an artist is that his work is premised upon offering individuals the uncanny experience of being simultaneously the object of the image and the subject of a performance. Tunick remains in control of the event and of the resulting image: it is he who selects locations, who dictates poses, who sets the time of day for the event. It is he who develops the film, crops the image, discards some in favour of others. As photographer, of course, he is the subject of the artistic process; the individuals he photographs, whether alone or in their thousands, are objects of the camera's gaze.[3] And yet: Tunick's photo-sessions are distinguished from those of other photographers by their performative dimension.[4] In electing to photograph people nude in public spaces, Tunick asks of his models a willingness to put themselves on display, in an event existing prior to and independent of the final image. The performance begins as people disrobe and ends as they reclothe themselves. In between those two temporal points (akin to the opening and closing of curtains on a stage), the participants have redefined their bodily relationship to urban space and to other individuals and have enacted a discrete role in a brief drama which problematizes skin, concrete, strangeness and intimacy.

The performative dimension is perhaps the most significant aspect of Tunick's work. The finished images certainly attract attention: when exhibited, they are reviewed in the usual way as completed artworks, without much dwelling on the process of their production.[5] However, in focusing on the product, these responses ignore the effort, risk and effects of how these artworks *came to be*. In accounts given (such as mine above) of posing for Tunick, individuals tend not to speak of the excitement or interest of contributing to an art object that will be displayed in a gallery or book. Rather, it is the experience of performing as nude bodies in public space that is found to be meaningful, remarkable, memorable, transformative. Participants in the Melbourne events described their experience as 'one of the singularly most inspiring things I've ever done';[6] 'it was beautiful';[7] 'we were part of something more beautiful than it was possible to imagine before the event';[8] and 'it made me feel good about being a human being'.[9] One recounted:

> There is a feeling of ridiculous, extravagant joie-de-vivre, of fraternal grins and sheepish acknowledgment of complicity. People jump up and down and hug themselves or if they're fortunate, hug a friend, and there is a sweetness, an innocence in this instinctive desire to keep the goose-bumps at bay. Without the accoutrements of class and status, you start thinking about abstract nouns like liberation and democratization.[10]

Participants in Tunick's massed events speak of their performance in terms of beauty, collectivity, personal affirmation and abstraction.[11] Pleasure is found in the displacement of their individuality into the experience of belonging to a larger whole. In contrast, those who have posed for Tunick in his solo portraits describe the experience as a means of expressing something about themselves as individuals, often with a distinctly therapeutic component. The documentary film *Naked States*, which accompanied Tunick in his (successful) attempt to photograph individuals naked (alone or en masse) in every American state, features many models whose comments exemplify this: a woman in Boston states that posing for Tunick 'was ninety per cent of [her] self-therapy', after having been raped; an older man characterizes his decision to pose as a rejection of the conventions of ageing; and an obese woman, who has suffered constant public humiliation and physical assaults related to her bodily size, described posing naked for Tunick: 'To be naked right before sunrise on the rocks at the Hudson River and the breeze was coming up – it was really wonderful'. Of the resulting photograph, she has stated:

> For me, there is some privacy in the photograph . . . Not everyone is always poking at me and saying things to me and stopping me and grabbing me. So I think maybe I find a lot of pleasure in the sort of 'public solitude' of the photo.[12]

And these accounts would seem to confirm Tunick's objectives in undertaking this type of art practice; as he says, 'I'm not trying to make spectacles. I'm trying to create art events that are spectacular for the participants'.[13]

For others, such as the police or municipal authorities, the performative dimension is also crucial, although in a far more troubling way than that experienced by the participants. For example, Tunick's attempts to take photographs in New York have repeatedly led to his being arrested.[14] The first such occasion was in 1994, while Tunick was photographing a naked man posing on top of an 8-foot Christmas tree bauble alongside the famous Rockefeller Center Christmas tree. Another arrest came when Tunick was photographing two individuals in a snowstorm. The documentary *Naked States* depicts one of Tunick's mass installations (in Times Square) being interrupted as he is arrested by police officers, and also shows him facing charges of lewd behaviour and public exposure in court (which his lawyer succeeds in having dismissed). In all, Tunick had been arrested five times in

New York, before a ruling was sought in the state courts as to whether Tunick's art practices were exempted from state laws banning public nudity. In 1999, however, police responses to Tunick's events were becoming more aggressive. On 25 April, Tunick was pulled away from his camera and handcuffed before he had even begun to photograph the dozens of people lying naked in Times Square.[15] Charges on this occasion included unlawful assembly, creating a violent act, disorderly conduct, public exposure and reckless endangerment. And on 6 June, when Tunick and the participants arrived to begin the installation, police officers were already waiting for him, displaying handcuffs and an extensive line-up of police wagons, making it clear that if Tunick attempted to take photographs he, and perhaps the participants, would be arrested.

As a result, Tunick's lawyer, Ron Kuby, filed for an injunction preventing the New York Police Department and the City of New York from arresting him as he worked. The injunction was granted by the Federal District Court, and Tunick's next installation was scheduled for 18 July. The City of New York, however, obtained a stay of the injunction at an emergency court hearing on 17 July, and the event was thus prevented from taking place as planned, although Tunick photographed a hundred clothed participants and one naked baby. Police officers stood by in case anyone removed their clothes.[16]

The federal court was then asked to decide whether Tunick's work was exempt from state anti-nudity laws (Tunick's claim being that artistic enterprises were indeed exempt; the City of New York arguing that such exemptions were restricted to indoor performances). The federal court refused to decide the issue, claiming it was a matter for the state, and sent the case to the state courts to decide on three issues: whether Tunick's photo-installations constituted entertainment or a performance in a play, exhibition or show; if they did, whether the exemptions to the state's anti-nudity laws were limited to indoor activities (the current interpretation of the statute); and finally whether an exemption to the law which included Tunick's photo-installations would be valid under the United States Constitution.

On 24 March 2000, the Court of Appeals for the Second Circuit in Manhattan stated that there were inadequate precedents to enable it to decide how to interpret the statute on public nudity, although the judges warned that the City of New York's actions in recent years had generated a 'relentless onslaught' of litigation over the First Amendment right to freedom of speech and expression,[17] and that police officers' decision to stop Tunick taking photographs in the absence of any clear rule against the practice was 'a variation on the classic theme of censorship'.[18] The case was then passed to the New York State Court of Appeals, and on 19 May 2000, a ruling was made in favour of Tunick and stating that the New York Police Department was barred from arresting Tunick as he carried out his art practices. The City of New York then appealed to the United States Supreme Court, asking it to overturn this decision.

Such an action is perfectly consonant with the City's attitude in recent years to both 'controversial' artwork and questions of nudity and sexuality. In the latter years of the 1990s, the then Mayor Rudy Giuliani enacted a series of local laws relating to the advertisement of sexual services and sexual entertainment and restricting the provision of sexual services through the city's brothels. Giuliani also made very public protests against the 'Sensation' exhibition at the Brooklyn Museum in 1999, and attempted to harness the legal process to his criticisms, a move which culminated in Giuliani being found to have violated the Constitution by withholding funds from the museum as a punitive response to its exhibition of such 'controversial' artwork (discussed further in Chapter 2). In relation to Tunick's installations, the Supreme Court refused to allow the City of New York to appeal against the lower court's ruling: Tunick's installation involving 100 nude individuals beneath the Williamsburg Bridge was able to take place on 4 June, and in 2001 the Federal District Court in Manhattan ordered the City of New York to pay Tunick $33,368.75 for his legal fees.[19]

Since 2000, then, in principle Tunick has been able to photograph in New York without interference. However, despite the court victory Tunick and his volunteers are still threatened with arrest and imprisonment by the City of New York, whose Department of Film and Television has continued to refuse to grant a permit for Tunick to work in New York City.[20] Commenting on his struggles with the City of New York, Tunick states: 'I think an enlightened culture is one that respects the body and doesn't consider it a crime, or put a body in jail, just because there's an artist working with the nude in public'.[21]

Tunick's New York images therefore come to exist as part of a struggle between municipal and state agencies, which regard their mode of production as offensive, and the artist and participants who regard these practices as art and the resulting performance as beautiful. The struggle thus takes place around the image's manner of production, or the process of its performance at a moment prior to completion: unlike the artworks discussed in Chapter 2 of this book, there has been no controversy attached to the finished images that Tunick exhibits.

As noted above, participants characterize the event of posing in terms of its beauty or its liberating effects. Tunick himself has described the mass events as 'a way of juxtaposing the human body with a public place so that a living organism of 100 bodies forms a landscape',[22] as 'performance installations',[23] and 'a flood of flesh, like pink water',[24] and the resulting images as arising from an interest in 'the anonymity of public space and the vulnerability of human nakedness'.[25] Michael Hess, lawyer for the City of New York, acknowledged that no complaints had ever been made about Tunick's photographic practices, but asserted that 'people who do not choose to watch it are being exposed to it'.[26] Hess is here invoking the conventional trope about forms of 'offensive' display in public, manifested since *Hicklin*: that pornography or offensive literature or images is particularly problematic when it is available or visible to groups who would ordinarily never seek out such material.[27]

Thus the performance dimension of Tunick's work is elevated, without the emphasis on beauty, stillness, or affirmation that characterizes accounts given by participants. Instead, following the precepts of the modern law of obscenity, the performance is converted into exhibition: thus, naked bodies are being put on display in a public place, a place which should contain only clothed bodies. Performance is made exhibition, and exhibition is quickly translated into exhibitionism with all its attendant lack of propriety and appropriateness.

Thus, we can see in relation to Tunick's aesthetic practice, the resulting images, and responses to them, a series of dichotomies such as public/private, clothed/naked, voluntary/compulsory, art/offence, beauty/obscenity. Underlying all of these is the opposition law/image, which assumes that the realm of the cultural is subject to legal processes and is the object of law's subjective governance. Tunick's work, however, manages to subvert this unidirectional story of law and the image. The naked participants feel empowered rather than objectified by their experiences; the images render the fleshiness of human corporeality abstract and sculptural through their sheer multiplication of bodies; the disorderliness of mass public disrobing results in a silent, meditative stillness; and the apparent obviousness of the transgression (public nudity) becomes an authorized aspect of artistic production.

To a certain extent, it is possible to recount Tunick's engagements with the police and the courts as a story of legal governance: that previously illegal aesthetic practices were recategorized as legitimate thanks to the invocation and intervention of the legal process. However, this story of legal governance leaves out and covers over a number of striking features relating to Tunick's work. Most notably, it erases the performative dimension of the artist's photographic practice, of the subject's role in being photographed, and of the official reception of the artworks. And when it comes to the law, this story of legal governance has no resources to give an account of either the contingency of the law's role in responding to these images or of the indifference towards the legal institution manifested by both the artist, in his courageous persistence, and the participants, in their self-pleasure. A reading of Tunick's photographs provides a site from which it becomes possible to launch a study that questions the place of law in the production of an imaginary domain. Legal discourse represents itself as able to respond to art in a series of modes playing out different aspects of the story of the legal governance of art (as sovereign arbiter of taste, neutral judge of disputes, embodiment of community attitudes). Such a story is too incomplete: so how should we read the tense and tensed relations of law and the image?

Law in/of the realm of art

> Law has always had a visual policy and understood the importance of the governance of images for the maintenance of the social bond. Law's force depends partly on the inscription on the soul of a regime of images. Religion and law have a long history of policing images, coupled with an economy of permitted images or icons, an iconomy, and a criminology of dangerous fallen or graven images, an idolatry.
>
> (Douzinas and Nead 1999a: 9)

Tunick's work is notable for its complication of the dichotomy between object and subject. As an art practice, Tunick's photography is also usually discussed in a profoundly dichotomized manner: commentators tend to focus on either the artistic significance of the artworks or on the ways in which Tunick's practice challenged and was challenged by socio-legal norms about behaviour in public space. The latter type of commentary thus focuses on the various court cases Tunick had faced, varying attitudes to public nudity, and Tunick's place in the panoply of artists whose art practices had led them into conflict with the authorities. There is, then, a marked split between 'law' and 'aesthetics' in the way in which Tunick's work has been discussed.

Such a split is not confined to the reception of Tunick's work; rather, it can be said to characterize much of the discourse on images and law, art and judgment. Acceptance of this dichotomy has a lengthy history and is deeply embedded in both the legal and artistic institutions: Douzinas and Nead note 'the programmatic separation of law and art' and the ways in which

> Law pretends that it can close itself off from other discourses and practices, attain a condition of total self-presence and purity, and keep outside its domain the nonlegal, the extraneous, the other – in particular the aesthetic, the beautiful and the image.
>
> (Douzinas and Nead 1999a: 4)

However, such a strenuous separation cannot be maintained. As Goodrich writes:

> The memory of law – as custom and tradition, as precedent and antiquity – is held and 'sealed' in images, imprinted through visual depiction or textual figures that bind, work and persist through the power of the image, through a vision, for example, of 'neighborhood', 'reasonableness', 'national security' or simple 'authority'.
>
> (Goodrich 1996: 96)

Legal discourse is irrevocably tied to the insistence and reiteration of the image in law. This may be identified in the metaphorical and analogical techniques of legal discourse and legal reasoning (how do we imagine a family? If we allowed a claim to succeed in that situation, should we also allow it in this, similar, situation?), but also in law's love of images of itself: of the iconography of justice. Courtroom architecture is dedicated to the reproduction and maintenance of a certain appearance: upon entering a courtroom, the architecture and aesthetics of the space do not simply say 'workplace', 'serious

business conducted here' or 'state authority resides here' (which could be said of many businesses or public bodies). Rather, they also speak of 'justice' (the statue, the sword, the scales), of a certain kind of 'authority' (which is embodied in the judge, and in the silence or hushed tones used by personnel, and more generally in the affective mood of the buildings), and of 'equity' (a symmetrically organized room with the bench in the middle).[28]

Thus we are at a point of paradox: on the one hand, the legal institution disavows any connection with the aesthetic, or with the imaginary; on the other hand, it relies on a regime of images to found and enforce its authority and to carry on its mode of reasoning and judgment.[29] When an interest in the imaginary or the aesthetic is acknowledged within legal discourse or the legal institution, it tends to be limited to 'specialist' areas, such as copyright law (who owns the image?) or censorship (how far can we go in controlling the production, distribution and replication of images?). Debates on issues such as law's intervention in blasphemy, obscenity and pornography tend to take place without self-reflexiveness: law's ability to control, to intervene, to categorize certain images is taken for granted, obvious. The story of legal governance is reiterated as unproblematic – the image is law's object, and no relation or dialogue between the two can be imagined or admitted.

Both the law/image dichotomy and the paradox that law loves its images while appearing to restrict them function together to render invisible the question of the *implication* of law in the image and the image in law. The relation between law and the image is so much more complicated than the story of legal governance would claim, confining the legal imaginary to a brief roll call of technical topic areas. It is a relation of complexity and complication; indeed, I would suggest that it is one of *co-implication*, in which law and the image are enfolded within each other, their contours and substances passing through and around each other. The task undertaken in this book is to read the conjunction of law and the image, of jurisprudence and aesthetics, while maintaining the relationship between the two as one of co-implication.

Aesthetics and/as jurisprudence

To carry out such a reading interrupts the straightforward story of legal governance and bypasses it in favour of a more uncomfortable one. Immediately, certain penalties might seem to arise – as if speaking thus of the image could be a crime within the laws of a tradition. And if law and legal studies has a tradition, aesthetics might be seen as its betrayal. Legal practice and legal studies involve topics, methods and theory that are generally agreed on and accepted (although accounts of how they should be interpreted or what they might mean would vary). Legal studies constitutes a canon and aesthetics is outside it. So it is with all traditions; for every interiority there must be an externality, for every centre there are many margins. Law has for decades conducted border disputes with psychiatry, history, science, psychology, sociology among others. Is another dispute being staged in the division between legal studies and aesthetics? Does aesthetics betray the legal tradition?

Tradition is always already subject to revision and threat. Tradition, etymologically, suggests 'a handing over or surrender, even betrayal (as in *trahison*); Tacitus uses *traditor* to mean a traitor' (Murphy 1994: 72). The notion of tradition is only ever metaphorical, a relation through which one hands something on or over to another. Since 'tradition' means both passing on (as in necessary or accredited knowledge) and giving up (as in betrayal, defeat, loss), the legal tradition's handing over of its knowledge embodies within itself its own betrayal, its own apparent loss to an outsider.

Just as the relation between law and the image tends to be represented as a series of encounters in which the legal institution governs the practices of art, the relation between legal studies and aesthetics is usually constructed as a hierarchy between two unequal parties, with the legal tradition dominating the marginal domain of aesthetics.[30] In this book, I imagine instead a conversation without such a hierarchy and stage some tropic instances within this imaginary dialogue, asking how are we to imagine the relation between jurisprudence and aesthetics? For some, there is an overlap between the domains. Similarities can be identified, and thus we proceed by means of the relations of resemblance, similarity and substitution – that is, of metaphor. Law might be like art; aesthetics might work in similar ways to jurisprudence.[31]

Legal reasoning, as all law students are taught, proceeds by analogy, by the identification of resemblances between factual situations (so that 'like' cases can be treated alike, according to the same rules and principles) and the identification of difference, so that exclusions can be justified. 'This' can be said to resemble 'that', while 'X' can be disavowed as 'not Y'.[32] When this system of analogical classification is brought to bear upon the domain of aesthetics, many resemblances might appear: as Gearey puts it,

> It may be that aesthetics can cast light on law's rule-based nature . . . Indeed, it might be thought that the artist is like the lawyer, in that both have a working knowledge of rules. Their product, art or legal argument, represents a mature understanding of the ways in which they are constrained and the opportunities to be creative.
>
> (Gearey 2001: 1)

Limits to such a process of comparison might soon become apparent, however. Many artists would baulk at the notion that they were 'like the lawyer', and many lawyers would also resist the comparison. For law students toiling over case reports in the library, the difference between those texts and the delights of the art object are only too obvious. And the defendant being sentenced to a term of imprisonment can immediately explain the difference between an art critic and a judge.

To write *as if law were art* would allow us to speak of the *plaisir du texte* which permeates all legal processes, the pleasures and desires and horrors which structure the trial, the statute, the judgment. To write *as if law were art* would reverse the standard hierarchy whereby law is able to govern and regulate artistic production and is thus much more threatening, provoking the fear that

law might be *only* an image. Easier to turn the metaphor around and ask aesthetics to proceed with the analysis of cultural artefacts *as if art were law*, so that cultural forms could be seen to conform to certain rules, to uphold the concept of law because their interpretation would validate it, require it, perpetuate it. Cultural production would be subject to the law of a law; and culture would be subordinated *to* law.

These inclusions and exclusions, however, still operate within a fixed sense of disciplinary and institutional boundaries. The metaphorical systems of contiguity and resemblance that I propose neither force an unsustainable analogy between law and art nor efface the points of distinction between them. Instead, they acknowledge the repressed lines of flight moving between the body of law and the terrain of aesthetics, and they begin to do so at the point where comparison between them becomes *abject*.[33] The co-implication of law and the image, of jurisprudence and aesthetics, engenders discomfort in its juxtaposition of such different terrains, entities and experiences: this is the discomfort of abjection, when one encounters something that has been hidden, evacuated, repressed. The abject locates that which we would rather not see, or reveal, or touch. In the abject discomfort of a co-implicated relation between jurisprudence and aesthetics, we find that which the legal tradition would prefer not to be revealed – uncertainty, affectivity, contingency, difference, the peripatetic and nomadic, the marginal, the image.[34]

And in the repressed recesses of that relation, we find the workings of a legal imaginary. The imaginary quality of law is that which is most repressed within its own discourses and practices, repressed and acknowledged to appear only in its most impoverished and caricatured forms (wigs, insignia, courtroom architecture, uniforms, bowing and ritual). Its chosen form of self-representation is antithetical to an engagement with the imaginary: reason, science, deduction, are all founded, ironically, upon the appearance or image of non-imaginary substances, rules, decrees and regulations. As the most repressed, the image in law exerts a powerful influence: case reports, statutes and so on depend upon and require the written word, the written tradition (the word being, of course, the signifier which imports meaning, the image which contains the decision, the rule, the finding). Similarly, law's reliance on legal personality inspires a system of masks, personae, places from which to speak, which are representations of the authority or standing or (il)legitimacy of the speaker.

Although the legal institution claims to confine its engagement with the image to a purported relation of governance and technical regulation, law founds its authority in a system of the imaginary. As Hachamovitch writes: 'An object of judgement is retained by attaching it to a visual image; it is the visual image which accumulates sense; and alongside sense, the image accrues a series of judgements or perceptions, it is made into a new objectivity' (1994: 42). The image is lost as it acquires 'sense', or meaning, and is then transformed into objectivity, the rule, logic, judgment. Legal discourse takes pleasure in its self-representation as detached, passionless, thorough,

impartial, rule based. It has no place for the image, for the imprecise and uncertain creativity of art. Yet such a sense of exclusion is only the expression of a rhetorical wish. The translation of affect into law, into judgment and jurisdiction, takes place precisely through the workings of images, of the imaginary and the imagination.

Ethics and possibilities: looking, performing, judging

Law's relation with art has been continually disavowed within the legal institution and legal discourse, despite law's reliance on a regime of images founding legal authority, language, reasoning and politics. This book offers a reading of the law/art relation that circumvents this central paradox and concentrates instead on the embedded and enfolded relation of law and art. Before introducing the series of readings which follow in subsequent chapters, let me situate them in relation to my accounts of Tunick's performative art, law's aporetic relation to art and my argument for envisioning the law/art relation as one of co-implication.

A number of convictions have animated my reading of these images and law's judgment of them. First: the affective and effective force of the image. Again and again in the following chapters there will arise instances of a spectator moved to violence by an image, or discomfited by an artwork, or overwhelmed by its beauty. Viewing art is a profoundly emotional experience, no matter what level of 'expertise' the viewer has, no matter what one's politics may be. Looking at an image requires an acknowledgement on the part of the viewer that representation exists in the world, that appearance has a place and a force within society. Most viewing experiences do not provoke in the viewer the joy of recognition – 'there I am!' Rather, they arouse the shock and anxiety of an encounter with the Other – 'there I am not'. This unsettling quality in the image, and its effect on the spectator, is sometimes highlighted by commentators on art and social controversy. Dubin, for example, states:

> Serrano's photos taught me a great deal about the force of some images, a latent power which is activated and released by what each person brings to their viewing because of their biography, their present mood, past experiences with art, and a wide variety of additional factors. I left the gallery both confused and enlightened . . . I was some curious amalgam of contradictory feelings and impulses. I was unnerved, but I reveled in that state for some time: I respected a body of work that was able to puncture my sense of smugness to such a degree.
>
> (Dubin 1992: 6)

Here the affective force of the image is foregrounded, although it is trumped by the determinism that is accorded to the spectator's approach to the image, with the experience of viewing the image rendered a product of a number of relative factors (biography, temperament, history). I share with

Dubin an emphasis on the powerful responses that can be engendered in the spectator by looking at an image; however, in this book I have broadened the ambit of response from Dubin's focus on individual reaction and social controversy to include also both the responses offered by law's judgment of various images and also the sense that responses are the product of more than the relativism of individual factors such as mood and experience.[35] Thus, for my argument, response arises within a matrix of intersections between the spectator, the artwork and the context of reception, with perhaps the most important factor in any instance being the possibility that the spectator – including the legal institution as well as the individual – feels *addressed* by the artwork and thus bound up in a relation with it.

It should be stressed that this book does not define 'art' or 'artwork' in the conventional way. Some of the events discussed in subsequent chapters relate to artworks which hang on gallery walls; others do not. 'Art' is defined generously. This is partly because I have endeavoured to examine images in several different cultural realms and resulting from differing cultural practices. Thus, my analysis deals at various points with paintings, photographs, film, installations, performance, buildings and text. But my aim has been not simply to cast a wide net over the cultural realm in order to dredge up a variety of images for analysis. Rather, it is my intention to show the manifest ubiquity of the image and the centrality of the image to contemporary life. The aesthetic has been contested, debated and judged in locations such as city streets, museums, theatres, cinema and the ruined foundations of a destroyed building. Art exists not just in gallery space, but in every corner of quotidian life. To that extent, I would echo bell hooks' rallying call to aesthetics:

> We need to place aesthetics on the agenda. We need to theorize the meaning of beauty in our lives so that we can educate for critical consciousness, talking through the issues: how we acquire and spend money, how we feel about beauty, what the place of beauty is in our lives when we lack material privilege and even basic resources for living, the meaning and significance of luxury and the politics of envy.
>
> (hooks 1995: 124)

Part of that agenda must include a reflexive consideration of the process of interpretation. It will have become obvious that this book does not subscribe to any approach endorsing law's straightforward 'right' to judge the image, or award (members of) society any particular power to censor or control image-making. Rather, my interest is in analysing the means by which any such judgments and controls come into existence as responses to interpretations of the image. That process of interpretation is one of entanglement and implication. The image does not exist in isolation from the spectator (or from law) – looking (and thus interpreting) has a dynamism; responses are, by definition, responsive. The subsequent readings of art and the image deal with the responsive *dance* that ensues between the artwork, the law and the

spectator from the moment that the image is created, displayed or sometimes even simply imagined. Bal (1999: 36) calls this 'displac[ing] the object of interpretation from work to process'.

In these displacements and in my argument that law and art exist in a relation of co-implication, we find what could be called the traces of a politics. Writers on law and aesthetics have often asserted a political dimension to their analyses. For example, Gearey uses his thesis on law, aesthetics and poetry to issue an imperative to critical legal thinkers: 'make it new' (2001: 124); while Manderson argues that

> taking aesthetics seriously [has] normative implications . . . [I attempt to] conjoin the ideas of legal pluralism with the changing aesthetic tenor of our times in order to find new approaches to law and new metaphors through which to give them life.
>
> (Manderson 2000: ix)

Underlying this book is a conviction that we must add to the politics of social change and legal transformation the significance of an ethics of visual interpretation, which responds to the project of signification and values the manifold instances of the imaginary in contemporary life. hooks speaks of the need to theorize the meanings of beauty in our lives; let us also give the name beauty to the transformative potential of art, a potential which is continually contested and continually desired:

> Our capacity to signify beauty has no limits. It is born of a loss which can never be adequately named, and whose consequence is, quite simply, the human imperative to engage in a ceaseless signification . . . It is a call to which none of us is adequate by ourselves . . . Only as a collectivity can we be equal to the demand not only to find beauty in all of the world's forms, but to sing forever and in a constantly new way the jubilant song of that beauty.
>
> (Silverman 2000: 146)

Contested beauty: the struggles over Tunick's practice of photographing nudes in public places and the struggles recounted throughout this book represent various attempts to legislate the meaning of beauty in the world. As Bal (1999) indicates, there can be no *one* definition (or judgment) of beauty, and nor should there be. Instead, the continual struggle to make images and the continual contestation of their beauty, legality and propriety constitute us as visual subjects, engaged in an entangling dance of vision, interpretation and judgment.

Affective bodies: image/judgment

In this book, my reading of various cultural or aesthetic events seeks to elaborate upon this dance, thus expanding the sense of the enfolding of

judgment and the image and the co-implication of law and art. In doing so, it traverses a series of different terrains and concerns. Each chapter displaces – at times explicitly and at others with indifference – the law-as-governance model of analysis, and provides a more nuanced reading of law's investment in the image and the image's involvement with the structures of law. Chapter 2 begins at the conventional intersection of law and art: a site where an image has been deemed problematic and law has been invoked as the means to regulate that problem and the potential transgression it embodies for the normative order of society. Thus, the chapter studies works by Andres Serrano, Chris Ofili, Robert Mapplethorpe and Marcus Harvey. In most instances, a particular image has come to stand in for the artistic enterprise of the individual artist. For Serrano, it is *Piss Christ*; for Ofili his portrait of the *Holy Virgin Mary*; for Harvey, the attention to his painting of a murderer (*Myra*) has eclipsed any attention given to his other works; while the notoriety of Mapplethorpe's *X Portfolio* outstrips awareness of his portrait photography or his images of flowers.

I situate these artworks in terms of the response and responsibility engendered in relation to contemporary artistic practices. In each instance, the force of law was brought to bear on the image. This force took various forms: a civil lawsuit to prevent a gallery from displaying the artwork, criminal prosecution, vandalism by spectators, the removal of an artwork from display, and so on. Rather than figuring these and related responses in terms of an opposition between 'freedom of expression' and 'community interests' (a construction which reduces the events to cognitive operations structured around the context and content of the artwork and the authorial expression of self through art), this chapter instead explores the artworks and the law's responses to them in terms of their affective or emotional dimension. In particular, it suggests that these aesthetico-legal events are best read as performances of disgust.

Crucial to the regulation of art is the question of exhibition space. Controversial artworks such as those of Serrano and Mapplethorpe become subject to the legal process partly as a result of their display in museum space. Chapter 3 develops the idea of the appropriateness of certain spaces as spaces of display by investigating graffiti as an aesthetic phenomenon within the contemporary city. Graffiti is almost always illegal (unless done with the property owner's permission) and aims to display the writer's identity within a carefully camouflaged aesthetic vocabulary. The writer is on display, yet hidden; while the resulting graffiti manifests a rejection of the codes of propriety and ownership regulating practices of signification in urban space. The chapter examines both public discourse surrounding graffiti and also elaborates writers' experiences of an aesthetic practice deemed illegal by virtue of its being 'out of place'.

Chapter 2 provides a response to the question of what in the artwork – more than the artwork itself – provokes a disgusted response in law. Chapter 3 proceeds from the other direction and considers the legal regulation and

cultural understanding of imagistic writing in public space. Whereas these two chapters primarily read the artwork (albeit in the context of a legal response), Chapter 4 turns initially to a reading of the imagistic writing of law. In addition to its interest in literal images (artworks), legal discourse creates its own images, to be put to work in the processes of judgment. And legal discourse manifests a desire for fixity of its created images. Chapter 4 reads several cases in which the images invoked in judgment act as rigid frames around the already marginalized figures who have been brought before the judge. These cases involve law's images of the gay man, and of the HIV positive gay man, and show the power of the image in working to effect repressive judgment. Against these cases, in which the law makes images *appear*, I offer a reading of the aesthetic enterprise of Felix Gonzalez-Torres and the cinematic revisions of Derek Jarman. Both deal in the art of *disappearance*; in the creation of an image which is elsewhere and otherwise than seeing, using the bodily sensations of touch and hearing to invoke a different way of responding to the HIV positive body.

The difficulties and responsibilities of the *visual* in art are further examined in Chapter 5. The artists considered there share the characteristic of exhibiting injury to and for the spectator. Two of the artists, Chris Burden and Ron Athey, either actually injure themselves or invite the audience to injure them, as part of their performances. The third artist, Jenny Holzer, provides a recounting of the experiences of injury from the perspectives of victim, perpetrator and observer. All three explicitly invoke violence as part of their art practices. My main interest is in the demands that are then made upon the spectator. How is one to watch such a performance or approach such an artwork? The chapter interrogates the art of injury and the experience of looking at injury as a forensic event, in which injury becomes testimony and spectatorship becomes witnessing. Chapter 6 follows on from these concerns by considering how the forensic nature of artistic practices can raise questions about how art responds to the violent interruption of the law's smooth surface that is constituted by a mass terrorist attack. The aesthetic enterprise has a lengthy history of providing memorials for violent events or for the victims of violence, injury and death. The final chapter of this book examines the competing tensions of the struggle to create memorial images in the wake of the World Trade Center attacks in New York City, enfolding survivors, architects and citizens in a matrix of trauma, memory and ruins.

Other such implicatory enfoldings can be identified as crucial to the book's argument. The blurring of the boundary between subject and object is crucial for understanding the work of Spencer Tunick (as discussed already in this chapter); and the implication of the art object in the legal subject is an issue that recurs throughout subsequent chapters (see especially Chapters 2, 3 and 4). Thus, witnessing a crime and perpetration of a crime are often taken as markedly separate phenomena: however, a number of artists have refused to uphold this separation, instead sheeting home to the spectator the similarities between looking and doing (see Chapter 5). The persistent separation of

public and private spheres finds its own version in relation to art: artworks are generally thought of as for exhibition in gallery space, with a specific name reserved for art which is displayed in public ('public art'). Various chapters demonstrate the confusion and anxiety that can occur when the hurly burly of public life enters the cloistered atmosphere of the gallery (as when protesters smash an image, or prosecute a gallery owner) and when the private activity of art is placed in full public view (as in the case of graffiti, whose illegitimacy derives from its location, unauthorized, in the public sphere). And underlying each of these intersections and each of the chapters is a sense of the co-implication of law and art, of the entwining of judgment and the image. Finally, while each chapter makes explicit how we come to an understanding of these interleavings through the process of looking, the dynamic role of the spectator needs to be highlighted, both in subsequent individual chapters and in the overall structure of the book.

Interleaved between the chapters are short sections entitled *viewing (de)positions*. In each of these, I recount a number of experiences as a spectator. The first deals with various ambivalent exhibitions of the work of Andres Serrano, and the percussive effects of viewing his images. The second begins with an instance of contested public discourse on graffiti and moves into the city space in order to view graffiti as a form of urban writing. Generosity and donation are the subjects of the third piece: focusing particularly on the artist's gift of an image or sensation to the spectator. And in the final section, spectatorship becomes something that is more than 'just looking', when particular representations transform the artwork into testimony and the spectator into forensic interlocutor.

I have named these short pieces viewing (de)positions for a number of reasons. First, I wish to emphasize the *experience* of looking, a prior state which necessarily antedates the critical moment and the distance of analysis. Looking at artworks finds the individual addressed by the image, engaged in a process of projection and interpretation. Such a process can be affected by the gallery space (which provides a frame for the image), the positioning of an artwork next to or near other artworks (perhaps other works in a series, or by juxtaposition with contrasting images), by a lack of legitimizing gallery space (as in public art, or graffiti), or by the expectations raised when the artwork is 'supposed' to bear a certain kind of message (as in 'art about AIDS' or 'memorial art'). All of these issues can be approached indirectly (as in Chapters 2 to 6), through 'third person' critique of the individual work or artist; however, an account of the viewing position itself restores a missing moment in the artwork's aura – that moment when the viewer first sees and is seen by the image, with all the attendant emotions, associations and responses that may flow from there.

Second, viewing is a practice which brings response and responsibilities; the (de)positions foreground the inevitability, pleasures and tensions of looking. In addition to being about viewing and spectatorship, these pieces are de-positions: they recount experiences in which I as a viewing subject was

de-posed, unseated, unable to find a secure or comfortable position from which to look. And finally, to that extent, the viewer is always thoroughly implicated in the process of looking. Spectatorship is often perceived to be a comfortably distanced experience: a passive reception of an already existing image without the responsibility of interpretation and projection. One of the aims of this book, however, is to stage a series of readings and viewings derived from the *spectator*'s implication in the processes of judgment of the image.

All viewing positions are, of course, freighted with value and consequence. No moment of first sight can be 'innocent' or independent of cultural structures and devices. To acknowledge this lack of 'innocence', this state of cultural responsibility from which we view images, I wish these short accounts to be regarded as *depositions*: declarations under oath or acts of testimony during a trial. For our viewing experience is a forensic one: it has prosecutorial potential, it can indict and convict. That moment of first sighting the artwork binds the spectator to law and law to the image, inviting condemnation or approval, generating narratives of understanding or dismissal, meting out punishment or reward. These four short pieces, then, should be understood also as snatches of evidence given during the perpetual prosecution of the artwork, and judgment of the image.

In writing this book, I wished to move away from the conventional position of critic and towards a more mobile oscillation between roles. Rather than simply providing my reading of various artworks, legal cases and events surrounding them, it has been my objective to incorporate other positions from which to speak about law, the image, and the cultural frame that enjoins interpretation. Thus some chapters are written as conventional pieces of criticism, while in others I speak as a viewer, from a prior moment of address by the artwork. And, in addition, this opening chapter has attempted to engage with the experience of being the *subjective object* of art, of being in the artwork. Taking part in Tunick's installation for me confounded the phenomena both of viewing art and of writing about art and law. At the original time of writing, I had not seen any of the images taken by Tunick that day (it would be two or three months before I saw one of the images from that day, posted on his website, and later would receive a copy of another for inclusion in this book as Figure 1). When writing this chapter, I had no image of how the images would look. I could only recount an experience from inside the frame, a phenomenological story of presenting one's body for re-presentation by the artist. And in posing with two hundred other women, the body of this critic lost its authorial voice and became a single point within the artwork, a mute but evocative single trait participating in a larger whole. There was no image to which I could relate my experience in order to generate a final analysis of the event; there was only the memory of the bright sunshine, the shock of cool breeze on skin, the mind's juddering between the contemporary experience of being naked in public and the traces of texts analysing Tunick's work. And, as Tunick took the photographs, the descending silence which confirms *the capture of the subject*, for aesthetics and law, in the moment of signification.