

Dialogue | The Need for Visual Information Policy

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Abstract

This paper briefly maps the tension between doctrine and practice surrounding visual evidence and the necessity to consider images as a mode of information relay on their own terms. In doing so, it argues that visual information policy is becoming an important area of study for scholars working at the intersection of media, communication, information studies, surveillance studies, and the law.

Introduction

This paper argues that visual information policy is becoming an important area of study for scholars working at the intersection of media, communication, information studies, surveillance studies, and the law. US courtrooms have used visual evidence for over a century. Yet, the proliferation of visual technologies over the last three decades—state and private surveillance cameras, facial recognition technologies, dashboard cameras, police body cameras, handheld recorders, and smart phones—has not only marked a significant shift in how societies think about surveillance and countersurveillance practices, but it has also amplified the need to consider critically the role and scope of visual evidence in law and policy.

The exponential growth of various visual surveillance and countersurveillance practices has demonstrated that images are becoming centrally implicated in the law's claim to truth-based judgment. Yet, the law has long overlooked the particularities of visual modes of information relay. As Porter (2014: 1690) writes, "tradition governs every aspect of a court opinion, from structure and content to citations and font. And according to that tradition... images have a peripheral or, more typically, nonexistent role." Federal rules of evidence in the US relegate images to the realm of demonstrative evidence, drawing analogies between distinct visual media like photography, film, and video. In other words, visual media predominantly play the role of illustrative evidence that needs the words of witnesses to anchor its legal meaning. Images, however, are increasingly performing functions of substantive evidence as well, despite the lack of clear standards and practices for visual evidence. As a result, inconsistency has become the staple of the legal treatment of images.

According to Tushnet (2012: 688–689), "because courts don't like to think about images... the temptation is to treat them as not requiring (or not being able to sustain) the interpretative energy the law devotes to words.... Because images do require interpretation... the mismatch between expectations and reality leads to incoherent results." Visual modes of knowing operate via relational logic that differs from the linear logic of words. Images thus necessitate a separate set of interpretative tools to tackle their evidentiary contributions in law and policy. Images and words also vary in how they hold emotions, as both Bock and Spiesel discuss in their essays for this Dialogue Section. Furthermore, cognitive processing of visual

information affects the perception and appraisal of images in court in unique ways that need to be accounted for by legal practice (e.g., Granot et al. 2018).

The sidelining of images is also reflected in the evidence curricula of law schools around the country, which consider images only tangentially, failing to take notice of and critique visual arguments (Austin 2006; Porter 2018). Even the highest US court has discussed video in language that would not be considered appropriate for other forms of evidence. In *Scott v. Harris* (2007, 550 US 372), a well-known example that illustrates this point, the US Supreme Court had to decide whether a particular police car chase violated constitutional protection against unreasonable seizure. The eight to one ruling relied heavily on footage recorded by a dashboard camera on the police car. The majority held that the case was “clear from the videotape,” and that “what we see on the video more closely resembles a Hollywood style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury” (*Scott v. Harris* 2007, 550 US 372: 380). Judge Scalia even compared the dashcam video to the movie *The French Connection*. And, in an unprecedented move, the court uploaded the video to its website, inviting the public to make up their own minds after viewing it. Social psychologists accepted the court’s unusual invitation by conducting a set of experiments that showed differences of opinion along cultural and ideological lines (Kahan, Hoffman, and Braman 2009). In other words, when courts fail to take images seriously, they may “needlessly invest the law with culturally partisan overtones that detract from the law’s legitimacy” (Kahan, Hoffman, and Braman 2009: 838).

Any discussion of surveillance is inextricably infused with human rights and civil liberties concerns. Visual evidence deriving from surveillance technologies is simply introducing another layer of complexity to such concerns. The impact of visual meaning making on the pursuit of justice thus necessitates rigorous thinking about the nature and function of visual information in law and policy more broadly. For Braman (2011: 3), “information policy is comprised of laws, regulations, and doctrinal positions—and other decision making and practices with society-wide constitutive effects—involving information creation, processing, flows, access, and use.” This paper borrows her definition of information policy to draw attention to the specificity of visual information in its multiple permutations. By briefly mapping the tension between doctrine and practice surrounding visual evidence and the necessity to consider images as a unique mode of information relay, this paper argues that visual information policy is an important area of study within information policy.

The Tension between Doctrine and Practice

Photography, film, and video have long been used in court as evidence that demonstrates what witnesses say. Mnookin (1998: 65) argues that the introduction of photography in the nineteenth century “brought into existence a new epistemic category that hovered uncomfortably on the boundary between illustration and proof.” The legal rendering of photography as a visual aid to testimony contained the complex communicative reach of images in the background, defining demonstration as the governing principle for visual evidence. Images, however, surface in the law in much more complicated ways than what the doctrinal thinking permits. From cell phone videos shot by activists and bystanders that seek to expose potential state wrongdoings to police body cameras and facial recognition technologies that amount to pervasive surveillance practices and various civil liberties concerns—images substantively shape legal decision making.

The lack of clear standards about the creation, processing, storage, and use of visual evidence highlights a critical tension between doctrine and practice: images are undervalued but overused in ways that oscillate between mere illustrations and privileged forms of truth (e.g., Feigenson and Spiesel 2009; Ristovska 2017; Sherwin 2012). As Tushnet (2012) shows, courts still think of images as either opaque or transparent. Such renditions deny that visual interpretation is possible or necessary, generating “the source of much bad law” (Tushnet 2012: 687). The need to take images seriously as evidence that operates via complementary, but different, logics from words is of utmost importance. Otherwise, judges, lawyers, and juries are left with what they perceive to be intuitive ways of seeing when assessing visual evidence, a dangerous move for a

profession that seeks to distinguish between legal judgment and lay reasoning. *Scott vs. Harris* (2007, 550 US 372)—discussed above—is just one example that clearly illustrates this tension.

Taking Images Seriously

Taking images seriously means accounting for the particularities of different modes of visual evidence. US courts, for example, tend to think of video as a combination of audio and photography (Wexler 2018). The current iteration of digital video, however, has affordances that make it a unique mode of knowledge production that incorporates sound, moving images, and metadata (e.g., Ristovska, forthcoming). Drawing parallels between photography, audio, and video has profound consequences for surveillance and privacy considerations. Video today is a type of surveillance technology that collects simultaneously and indiscriminately information of all kinds. In her essay for this Dialogue Section, Gates alludes to how surveillance media render the subject and the evidence visible in response to a question. This observation is highly relevant because unfolding surveillance practices mark a departure from the panopticon models that involve deliberate action on preidentified subjects.¹ Thinking of video as an indiscriminate sensor-data collection device is necessary for current discussions about surveillance. For example, such understanding of video can upend ways of thinking about privacy and constitutional searches in the context of police body cameras (Wexler 2018).

Scrutinizing images as a unique mode of information relay is important for understanding how, under which circumstances, and to what ends different kinds of visual evidence facilitate knowledge in law and policy. This need is only amplified by the fact that looking has never been intuitive. An extensive body of scholarship has tackled the interpretative visual battles in and beyond the courtroom through the prism of critical race, gender, and postcolonial theories, unpacking how our various ways of looking operate as a kind of parallel to the history of the struggle for human rights itself (e.g., Butler 1993; Crenshaw 2012; Sliwinski 2018). In other words, our ways of looking are reflective of different social practices that place images in systems of social power (e.g., Berger 1972; Mirzoeff 2011; Sturken and Cartwright 2018). And yet, as Feigenson and Spiesel (2018) document, jurors (as well as judges and lawyers) lack visual training and are prone to consider surveillance and countersurveillance videos through the lens of naive realism, remaining largely unaware of the various influences on how they construe what they see and hear. To remain an important vehicle for justice, the law can no longer afford to sideline images.

Conclusion

The tension between doctrine and practice and the need to take images seriously shed light on how and why visual information policy is becoming an urgent task. There is an increasing need for critical court measures for the evidentiary inclusion and exclusion of visual evidence, standards for authenticity and proof, discussions about what is and is not constructed in different forms of visual evidence, and careful considerations of the underlying human rights and civil liberties implications. When the law assumes that seeing is intuitive, it risks replicating, and indeed justifying, a wider politics of exclusion. Justice may need to be seen in order to be done, but we need sensible standards to help guide our ways of looking in court that preserve the legitimacy of the law and ensure the protection of human rights and civil liberties.

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