Ways of seeing: The power and limitation of video evidence across law and policy
by Sandra Ristovska

Abstract
Legal and policy considerations about the mechanisms driving visual attention, perception, and interpretation have not always kept pace with the ever-increasing use of video as evidence. Discussing existing and emerging challenges with the authentication and interpretation of video as evidence, this article argues that a critical understanding of visual epistemologies across law and policy domains remains a critical task. Drawing on research presented in each of the articles in this special issue, it suggests that sound policy, guidance, and education on the wide-ranging evidentiary functions and limitations of video may be especially important at this critical juncture when generative AI threatens to exacerbate existing challenges with visual meaning making more broadly.

Contents
Introduction
The intricacies of seeing
Outline of the special issue

Introduction
The proliferation of visual technologies and digital platforms has been changing law and policy domains, where video is now a common feature of evidentiary displays. Yet legal and policy considerations about the mechanisms driving visual attention, perception, and interpretation have not always kept pace with the ever-increasing use of video as evidence. The underlying assumption that video can speak for itself still prevails in circumstances as diverse as police officers reviewing body camera footage (e.g., Newell, 2021), lawyers facilitating fact-finding in court (e.g., Feigenson and Spiesel, 2018), or citizens participating in cop-watching (e.g., Bock, 2021). Commonly described as naïve realism (e.g., Feigenson and Spiesel, 2009), this assumption continues to sideline the intricacies of seeing that shape how people understand images like video. Not everyone who sees a video interprets it in the same way. Jessica Silbey (2012) thus cautions, “If we cannot be clear about the manner in which we interpret and use images in the pursuit of justice, and if we fail to justify our interpretive choices, we undermine the system’s procedures and corrupt its ends” [1]. A failure to properly account for the unique nature of the distinct modes of visual evidence like video can therefore have profound consequences for the pursuit of justice at times when digital media are centrally implicated in the production of facts, knowledge, and judgment.
Over the last two decades, legal scholars have launched an important critique about the lack of transparency surrounding the interpretation of visual evidence, as opposed to textual or testimonial evidence, warning about the consequences of naïve realism (e.g., Austin, 2006; Feigenson, 2021; Sherwin, 2011; Sherwin, et al., 2007; Silbey, 2004). An early cautionary tale was Scott v. Harris (2007), a renowned U.S. Supreme Court case that set “the most powerful legal precedent” about the role of video evidence in summary judgment.[2] It remains critical for discussions about visual legal interpretation more broadly. In this oft-cited case, the court had to decide whether a police car chase, which left a Black driver paralyzed, violated the constitutional protection against unreasonable seizure. The car chase was recorded on two dashboard cameras. Lower courts ruled that reasonable jurors could differ as to whether the police had used unreasonable force to end the chase, requiring a jury trial. The U.S. Supreme Court, though, ruled eight to one in favor of the officer, explaining that the case was “clear from the videotape,” and that no reasonable juror could agree with the plaintiff’s account that the police had used excessive force to stop the vehicle. In an unprecedented move, the Court uploaded the video to its Web site, inviting the public to confirm that the video “speak[s] for itself.”[3] Dan M. Kahan, et al. (2009) accepted the challenge and conducted an experimental study that showed that people interpreted the video and the reasonableness of the police’s behavior differently depending on their cultural and ideological backgrounds, such as racial identity, education, income level, and political affiliation. Kahan, et al. (2009) thus famously state that what a video says “depends on to whom it is speaking”[4]. Scott v. Harris is just one well-known example that demonstrates the intricacies of video evidence and how courts may interpret it differently, even within the lifespan of the same case.

It is also worth mentioning authentication as an important first step for interpreting and using video as evidence. Though the public awareness of inauthentic images like purposefully manipulated or faked videos has grown exponentially, neither editing software early on nor generative AI today have become regular fodder for undercutting the evidentiary potential of video. While the full scope of the challenges that AI and deepfakes may pose across law and policy is yet to be seen and understood, legal scholar Riana Pfefferkorn (2022) argues that there is no need (for now) to raise the bar for authenticating videos and that courts have handled authentication challenges before, from handwritten documents to digital media. On the other hand, recent popular culture representations tend to depict easy technical solutions that can quickly detect a deepfake as shown, for example, in the third episode of the last season of the legal drama The Good Fight which aired in 2022.

Technical standards for authenticating videos are indeed critical. There have been important developments in this area from software and forensics services provided by companies like Medex Forensics that provide contextual analysis of the video file beyond just the metadata to industry-wide collaborations like the Coalition for Content Provenance and Authenticity (C2PA) led by Adobe, Arm, BBC, Intel, Microsoft, and others. Technical solutions on their own, however, cannot address all the challenges with video evidence—whether real or fake (e.g., Ristovska, 2022). A recent case from Myanmar is an instructive example. In 2021, the military government used what appeared to be a confession video of a prominent imprisoned politician to accuse the former leader Aung San Suu Kyi of corruption. Though many in the country believed that the video was a deepfake, media forensic experts and detection algorithms have differed in their interpretation of the authenticity of the low-quality footage. On the other hand, human rights experts familiar with Myanmar raised the possibility of a real recording of a staged and coerced confession, a well-known tactic used by those who violate human rights (see also Gregory, 2021). This example is therefore an astute reminder of how questions about the power of visual persuasion and the challenges with visual interpretation may only be amplified in an age of synthetic media.

To ensure that justice works for the public good, a critical understanding of visual epistemologies across institutional and legal decision-making settings remains necessary. This special issue addresses visual epistemologies head on as it explores how and why video matters for justice evermore. Through a theoretical and empirical engagement with the benefits and challenges with video evidence, it highlights that images and words are complementary, yet distinct, modes of knowing that merit attention in their own right. Bringing together established and emerging experts from across media studies, communication, journalism, law, information policy, criminology, and social psychology, this special issue comes at a
critical time when images are becoming a more central means through which human rights claims receive recognition and restitution around the world (Dubberley, et al., 2020; Fuller and Weizman, 2021; Richardson, 2020; Ristovska, 2021; Ristovska and Price, 2018).

Each article in this special issue recognizes that both the media and the law, as distinct institutions, can interact in ways that have practical effects on humans and thus on civil rights and human rights. This special issue is therefore informed by dialogues taking place both inside and outside the academy, namely at the intersection of media, law, and policy, about issues affecting the public. Together, the articles make the case for why law and policy domains need clear guidelines and applications for treating video as evidence at this critical juncture when generative AI threatens to exacerbate existing challenges with visual persuasion and interpretation more broadly. Though focused on the U.S. legal system to account for its particularities, the contents of this special issue hope to inspire further international dialogue on best practices and doctrines that consider the complexities of seeing across jurisdictions.

The intricacies of seeing

Seeing involves not only what the eyes physically see, but the experiences and ideas that the viewer brings to the image. On the one hand, what the eyes physically see is shaped by cognition. About 50 percent of the cerebral cortex is dedicated to processing visual information. The optic nerve has over one million fibers compared to the 30,000 fibers in the auditory nerve, helping the brain process visual information very quickly (e.g., Chalupa and Werner, 2004). As the brain’s anatomy and functions prioritize visual information, psychology and neuroscience research has examined a variety of cognitive processes that influence how people attend to and perceive images like video across law and policy settings (for an overview see Granot, et al., 2018).

On the other hand, seeing is also reflective of different social practices that place images in systems of social power. John Berger (1972) famously coined the phrase ways of seeing to describe how what people see is affected by what they already know and believe. Visual culture scholars have long shown how gendered, racial, and anti-colonial struggles are centrally implicated in the social history of the different ways of seeing (e.g., Browne, 2015; Mirzoff, 2011; Moore, 2022; Sliwinski, 2018; Ward, 2022). In this context, Frantz Fanon’s (1967) widely cited example of a white boy who felt frightened just by looking at a Black man speaks to a longer history of seeing that has framed Black people as less than human. It illustrates how seeing is influenced by power and other difference that shape the conditions of human existence. The legal and policy failure to systematically account for the different ways of seeing thus risks replicating, and even justifying, a wider politics of exclusion based on markers of identity and belonging.

Fanon’s anecdote reverberates in the defense attorneys’ strategic deconstruction of video evidence used in the well-known trial of Los Angeles Police Department officers charged with assault and excessive use of force against Rodney King in 1992. The video, of course, was the famous recording by George Holliday who saw the incident from the balcony of his apartment. The defense attorneys slowed down the video, presenting a frame-by-frame analysis as they sought to explain the officers’ actions as appropriate response to King’s allegedly frightening actions. During the closing argument, lead prosecutor Terry White resorted to naïve realism when replaying the video and asking the jurors: “Now who do you believe, the defendant or your own eyes?” [5]. Much has been written about the interpretative battle over the meaning of this video and why the jurors found the defense’s framing more believable, which resulted in the acquittal of the officers in the district court trial (e.g., Crenshaw and Peller, 1993; Gooding-Williams, 1993; Nichols, 1994). This bystander footage, though, is also important for another reason: it precipitated a shift in the role of video evidence in court and foresaw the rise of media forensics.

Throughout the twentieth century — from the initial occasional use of film in the 1910s to the steady growth of video in the 1980s — motion picture evidence has typically been produced by or on behalf of
professionals, including law enforcement agents and insurance companies, for the purposes of a specific courtroom trial (Schwartz, 2009). Today, such evidence is produced by a range of individuals, as well as automated surveillance cameras, for purposes as wide-ranging as trial evidence, forensic record, victim-impact video, parole and clemency video, deposition, legal argumentation, and content for policy debate. Furthermore, media forensics strategies, which were already at display at the trial involving the beating of Rodney King (Jeffay, 2023), have been further institutionalized by police departments (Gates, 2016) and turned into a counter-hegemonic practice by human rights collectives (Ristovska, 2021; Weizman, 2017).

At its core, though, forensic decision-making is subject to cognitive and social influences just like visual interpretation writ large (e.g., Dror, et al., 2021; Growns and Kukucka, 2021; Kassin, et al., 2013).

Despite these challenges, the U.S. legal system has not yet incorporated consistent safeguards for visual interpretation. Though there have been important developments regarding the cross-examination of film, as suggested by legal scholars like Jessica Silbey (2004), the overall inconsistent treatment of video evidence remains. The varied use of video in numerous widely publicized cases involving police use of excessive and fatal force over the last decade provides just one set of examples that pose critical questions about whether and/or how such inconsistency may differentially influence legal outcomes, potentially exacerbating the already documented racial disparities in the U.S. legal system (e.g., Kovera, 2019). As a result, interdisciplinary research into guidance for video evidence is important. Such guidance cannot presume the objectivity of the law; rather, it needs to provide and inspire rigorous analysis of the disparate assessment of video across law and policy domains and the different types of justice that may consequently ensue. The articles in this special issue are a step in that direction.

Outline of the special issue

With a view to maximizing the evidentiary and policy benefits of video while minimizing biases and errors in judgment, this special issue brings together nine experts whose work raises important questions about how the use of video as evidence shapes the pursuit of justice. From a closer scrutiny of U.S. courts to broader calls for visual literacy, from a discussion about the viability of instructions for jurors to an analysis of the relationship between report writing and images, the contents of this special issue cross disciplinary silos urging judges, attorneys, policy-makers, and citizens to take the intricacies of seeing seriously. The core argument is that an underlying understanding of how these sometimes conflicting ways of seeing operate across decision-making contexts is necessary for informing policies and best practices for the use of video as evidence so that justice is indeed equal and fair to all.

The first two contributions focus on the role of visual evidence broadly and video specifically. The special issue starts with an interview with Jennifer L. Mnookin, a leading evidence scholar, who has studied questions about visual and forensic evidence for almost three decades. Reflecting on her work, she discusses how courts have considered the ontology and epistemology of visual evidence and how the legal treatment of images has evolved over time. Mnookin acknowledges that courts have not yet found appropriate answers to the challenges that images pose for the justice system. A former law school dean, she concludes, “We should work harder to ensure that our students gain meaningful exposure to working with and understanding both numbers and images, both the interpretative challenges they raise and how to use them as effective tools for advocacy.” The rapid scientific and technological advancements continue to make it clear that the legal profession cannot remain focused only on words.

Legal issues arising from the use of technology-based evidence like video have real human impacts. Sandra Ristovska thus provides an overview of the factors that contribute to the inconsistent treatment of video evidence: the shifting and uncertain categories under which video is admitted as evidence, the discrepancies in how video is perceived and interpreted, and the still insufficient attention to legal training in visual literacy. Together, these factors contribute to an environment where seeing remains determined by beliefs and feelings rather than an understanding of how video works. Warning that the legal system’s unregulated
Ways of seeing: The power and limitation of video evidence across law and policy

approach to video evidence may come at the expense of civil rights and human rights, Ristovska proposes the development of archival legal standards for video evidence. Preserving the footage can facilitate access to court records, thus enabling empirical and systematic research on court trials and the video evidence used in each case.

The next set of contributions shifts to interrogating the mechanisms needed for a better public understanding of images. Claiming that “there is no room for naïve realism in today’s digital public sphere,” Mary Angela Bock makes a compelling case for a specific visual literacy program to be incorporated in existing media literacy curricula not only in schools but also in senior centers, community groups, and places of worship. In a legal system where jurors play a critical role, Bock’s analysis of the importance of images like video to citizenship and the fundamental value of visual literacy training is of critical importance for the pursuit of justice.

Yael Granot and David Igliozzi take on the broader question of visual literacy in the specific context of jury trials, suggesting that people tend to overweight the information they see in video, underweight the information they do not see, and are overconfident about their own interpretation of what they see. Probing the feasibility of jury instructions, Granot and Igliozzi present data from a pilot study that involves viewing the same incident on dashcam footage, police body camera, and the same video with instructions. They find some variability in how people assign blame for the police officer’s behavior depending on the viewing condition. Though the pilot study focuses on what is commonly known as the camera perspective bias, Granot and Igliozzi propose further areas of research on the impact of instructions for visual meaning making in court.

Following the discussion about visual literacy and viewing instructions, the issue’s focus moves to the relationship between images and text in crime reporting. Considering police body cameras as techno-regulatory tools that can influence behavior, Bryce Clayton Newell and Marthinus C. Koen examine officers’ decisions about whether and under which circumstances to review footage prior to writing incident reports. Drawing on survey data and interviews with officers at a police department in midwestern U.S., Newell and Koen discuss how, when, and why body camera footage might alter the written report. They thus argue that “police practitioners and policy-makers should provide clearer policy guidance to officers about how body camera footage should be used in the report writing process and that police administrators, policy-makers, and researchers should directly consider the role that technology might play in regulating officer behavior, even in unintended ways.” In other words, consistent guidelines that account for the role and scope of video are necessary.

Kelli Moore brings the discussion about report writing and visual evidence more broadly to sexual assault cases on college campuses in the U.S. Looking into the limitations of visual evidence in domestic violence cases, where photographs of external bodily injuries and the spaces where the violence has occurred are the norm, Moore suggests moving beyond these dominant legal ways of seeing. She examines Callistro, a sexual assault reporting application, as an important model of popular evidence that may facilitate different considerations of the legal notion of proof in the context of target rape. In her own words, “Through Callistro, victims matched to a mutual offender might introduce a novel technology into the legal evidence paradigms that challenges the primacy of the visual and ‘he said/she said logic’. Moore thus offers an important intervention, urging both scholars and legal practitioners to look beyond photorealistic images — despite their omnipresence — so that they can better attend to the kind of crimes that often happen out of public sight.

Sandra Braman, a leading communication scholar who defined the field of information policy, concludes with her reflections on and analysis of the debates brought up in the special issue. At times of generative AI, Braman astutely observes that “the referential validity of images in the digital environment today is, overall, dropping but their ‘evidential force’ remains.” Her afterword charts how thinking about the role of video evidence in law and policy interacts with other trends in the changing nature of facticity: the social orientation around the fact, whether towards or away. In doing so, she contends that underlying the problems with visual evidence writ large are critical questions about the blurring of genre, of what she
discusses as the dissolution of the distinction between description and evidence, between being an interpretation and requiring interpretation, between knowledge and perception, as well as between argument and evidence. Practices of discernment thus continue to matter for law and policy.

Together, these contributions foster dialogue across fields and disciplines, contending that there remains an urgent need for the development of sound policy, guidance, and education on the wide-ranging evidentiary functions and limitations of video across law and policy domains so that civil rights and human rights are recognized and upheld.

About the author

Sandra Ristovska is an Assistant Professor of Media Studies at the College of Media, Communication, and Information at the University of Colorado Boulder. Her research examines how, under what circumstances, and to what ends images shape the pursuit of justice and human rights in institutional and legal contexts nationally and internationally. A 2021 Mellon/ACLS Scholars & Society Fellow, Ristovska is the author of the award-winning monograph *Seeing human rights: Video activism as a proxy profession* (Cambridge, Mass.: MIT Press, 2021) and co-editor of *Visual imagery and human rights practice* (Palgrave, 2018). E-mail: sandra [dot] ristovska [at] colorado [dot] edu

Acknowledgements

The work on this special issue was facilitated by a 2020 seed grant from the Research and Innovation Office at the University of Colorado Boulder. The guest editor would like to thank the reviewers who provided thoughtful feedback to the articles in this special issue as well as Cathy Hannabach and her team at Ideas on Fire for their assistance with copyediting.

Notes


References


Ways of seeing: The power and limitation of video evidence across law and policy


doi: https://doi.org/10.1007/978-3-319-75987-6, accessed 14 June 2023.


---

**Editorial history**

Received 12 June 2023; accepted 14 June 2023.

---

This paper is licensed under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License.

Ways of seeing: The power and limitation of video evidence across law and policy
by Sandra Ristovska.
*First Monday*, volume 28, number 7 (July 2023).
doi: https://dx.doi.org/10.5210/fm.v28i7.13226
Ways of seeing: The power and limitation of video evidence across law and policy