When believing can be seeing: The unregulated approach to video evidence in U.S. courts and the need for archival legal standards

by Sandra Ristovska

Abstract

This paper examines the unregulated approach to video evidence in U.S. courts. It provides an overview of three key factors that contribute to the inconsistent treatment of video as evidence: the shifting and uncertain categories under which video is admitted as evidence, the discrepancies in how video is perceived and interpreted, and the lack of widespread legal training in visual literacy. Together, these factors exacerbate the challenges that visual perception and interpretation pose in court, as illustrated by the analysis of the varied use of video by district and appellate courts at summary judgment in McDowell v. Sherrer, a case involving an Eighth Amendment excessive force claim. By discussing these challenges, the paper argues for the necessity of archival legal standards, which could facilitate research into uniform guidance and applications for treating video as evidence. Otherwise, civil rights and human rights may be disparately recognized and upheld.

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Introduction

From cell phones to police body cameras, today’s courts increasingly use video as evidence. The Bureau of Justice Assistance (2016) at the U.S. Department of Justice estimates that video appears in about 80 percent of criminal cases. Yet U.S. courts, at all levels, still lack clear guidelines on how video can be used and presented as evidence. The underlying pervasive assumption has been that video evidence need not be governed by unified standards because seeing is intuitive — specifically, that what we see in video is the truth. This prevalent misconception has prevented court systems from incorporating consistent safeguards to ensure rigorous visual interpretation. As a result, judges, attorneys, and jurors treat video in highly varied ways that can lead to uneven and unfair renderings of justice.

This paper examines the unregulated approach to video evidence in U.S. courts. Specifically, it provides an overview of three key factors that contribute to the inconsistent treatment of video as evidence: the shifting
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and uncertain categories under which video is admitted as evidence, the discrepancies in how video is perceived and interpreted, and the lack of widespread legal training in visual literacy. Together, these factors exacerbate the challenges that visual perception and interpretation pose in court, contributing to an environment where, to echo Errol Morris (2011), believing can be seeing. What is shown and what is seen in court can be determined by beliefs, feelings, and a range of other biases rather than an understanding of how video works.

The proliferation of video is therefore outstripping the existing legal practices regarding its presentation and use as evidence. To better understand how these challenges play out in court, the paper moves to an analysis of the varied use of video by district and appellate courts at summary judgment in *McDowell v. Sherrrr*, a case involving an Eighth Amendment excessive force claim. In doing so, the paper maps areas that need further legal and scholarly attention. It argues that archival legal standards for video evidence are necessary so that the public can access the footage just like they can access other court records. Systematic archiving and availability of the footage used in state and federal trials is an important first step that could provide the basis for legal guidance and model jury instructions for video evidence by facilitating research into legal patterns of use and misuse, common mistakes, and successful trial strategies. Otherwise, without empirically grounded and theoretically sound guidance for video evidence, civil rights and human rights may be disparately recognized and upheld.

### The use of video as evidence

From Rodney King to George Floyd, prosecutors have told jurors to believe their eyes. These high-profile cases demonstrate how the opportunity to see a video in court can often be presented as equivalent to witnessing an event directly from the scene of its unfolding. It is not surprising, then, that the logic of naïve realism (e.g., Feigenson and Spiesel, 2009; Ross and Ward, 1996) can be observed, albeit differently, in both cases. What is particularly interesting is that naïve realism can shape the rhetorical framing of video despite the simultaneous reliance on different visual and verbal strategies that render the footage meaningful as evidence. “You have the videotape that shows objectively, without bias, impartially, what happened that night,” famously stated the lead prosecutor in his closing statement in the district court trial of the Los Angeles Police Department officers for the beating of Rodney King [1]. It is well-known that the defense counsel called on expert witnesses and played the video in slow motion, dissecting it frame-by-frame to convince the jurors that the officers were seemingly doing their job. Not only is video — like other forms of evidence — subject to interpretation but experimental studies show that even the speed at which video is played can alter judgment (Caruso, et al., 2016). Yet, to this day, courts have not fully accounted for such procedural matters regarding the presentation of video.

Three decades after Rodney King, the underlying faith that video can provide direct and reliable proof of the event in question, so jurors should believe what they see, remains. In the trial of police officer Derek Chauvin for the murder of George Floyd, the prosecutor told the jurors, “This case is exactly what you thought when you saw it first, when you saw the video. It is exactly that. You can believe your eyes” (*State v. Chauvin*, 2021). This time, though, the prosecutors too used visual and verbal strategies to discuss the evidentiary meaning of the video. For example, they called on expert witnesses and introduced multiple videos from different cameras and angles (e.g., bystanders’ cell phones, police body cameras, and security cameras) to establish and corroborate factually relevant information. With recent moves to restrict the right to record both in the U.S. and around the world (e.g., Okeowo, 2022), it may become more difficult for legal cases to have multiple videos. It is thus even more critical that every case is governed by clear mechanisms that ensure consistency and fairness in the presentation and use of video as evidence.

The cases against the officers involved in King’s beating and Floyd’s murder are acute reminders how, with wide latitude, video can be used differently by different legal parties who talk about the evidence and call on experts to clarify its meaning all the while seemingly letting the video speak for itself. In other words,
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Despite the rhetoric of naïve realism, video’s varied status as evidence continues to depend on the individuals and practices that render it meaningful in court (e.g., Bock, 2021; Ristovska, 2021; Tagg, 1988). At the same time, the disparate assessment of video by courts can lead to inconsistent renderings of justice that may undermine the legal process. Three related factors have contributed to the varying treatment of video: the uncertainty within the legal system regarding the classification of video as evidence, the tendency to conflate what a video shows with how a viewer interprets it, and the insufficient attention to visual legal literacy.

**Video’s uncertain classification as evidence**

Video’s classification as evidence is important because it can shape how judges decide on video’s admissibility or how attorneys interact with the footage in court (e.g., Granot, et al., 2018; Silbey, 2004). With the introduction of photography in the nineteenth century, demonstrative evidence emerged as a category to govern the use of visual imagery as evidence (Mnookin, 1998). Under this view, an image cannot prove facts on its own. It can merely illustrate what witnesses say or be used to support other evidence. However, demonstrative evidence has always been an uncertain category oscillating between mere illustration and proof (Mnookin, 1998). It remains an ambiguous term, with both courts and legal scholars disagreeing about its meaning (e.g., Feigenson, 2016; Howard and Barnum, 2016). Video can be used as an illustrative aid but its role as direct evidence, capable of independently proving facts, is also widespread. Additionally, video has always been subject to the “silent witness” exception when recording events no one else was around to see (e.g., Mosteller, et al., 2020). At the heart of these shifting and ambivalent categories under which video can be admitted as evidence is an uncertainty about how to evaluate video’s probative value, or the degree to which it can prove the facts it is offered to prove.

Furthermore, video is now a technology that affords the concurrent processing of sound, image, and metadata (e.g., data about the digital file itself, such as date, time, and GPS coordinates of the place of recording). Rebecca Wexler (2018) thus argues that video evidence like police body camera footage should be considered alongside other bulk data-collection technologies that indiscriminately record information, which is then stored on private servers, upending ways of thinking about both audiovisual evidence and privacy. Key here is the understanding that video can no longer be considered analogous to sound and image but needs to be interrogated as a distinct form of evidence. Short of a theory-based and empirically sound guidance to inform how video evidence is assessed under the law in criminal and civil matters, the legal system may be resorting to existing frames of analysis that may no longer be adequate.

**Discrepancies in visual perception and interpretation**

Despite decades of visual communication research, judges, lawyers, and jurors remain largely unaware of the various influences on how they construe what they see and hear in video (Feigenson and Spies, 2018). Naïve realism explains the tendency to conflate what a video shows with how a viewer interprets it. This tendency is well known in the world of filmmaking. As early as the 1920s, Russian filmmaker Lev Kuleshov conducted a famous experiment where he took a shot of an actor and intercut it with three different clips showing a coffin, a bowl of hot soup, and a young woman. He found that audiences interpreted the same clip, and indeed the same neutral expression, as portraying sadness, hunger, or lust, respectively (e.g., Gillespie, 2000). This “Kuleshov Effect” illustrates just one way in which people’s interpretations of video may, without their conscious awareness, be influenced by factors other than the content of the moving image itself — in this case, the visual context of images shown after the clip in question.

How people see and interpret video is driven by cognitive and social factors. The legal system’s unregulated approach to video evidence thus risks uneven, and even erroneous, interpretations. Decades of psychology research demonstrate that perception may be selective (e.g., Simons and Chabris, 1999), biased (e.g., Tittle, et al., 1995), and shaped by motivated reasoning (e.g., Balcetis and Dunning, 2006), to name just a few variables. Furthermore, a growing body of interdisciplinary research has examined the influence of endogenous biases (e.g., prior attitudes and group identity) and exogenous biases (e.g., features of the
medium or the viewing context) on the interpretation of video. For example, identification with police affects interpretation of video of police-civilian altercation (Sommers, 2016). Cultural and political worldviews predict interpretations and legal judgments regarding video of protest (Kahan, et al., 2012).

Even the qualities of video, like replay speed and camera perspective, can shape interpretation and judgment. Research shows that videos played in slow motion, compared to normal speed, result in greater judgment of intentionality in the depicted action (Caruso, et al., 2016). Moreover, the camera perspective from which a criminal confession is recorded can influence assessment of the confession’s voluntariness and the suspect’s guilt (Lassiter, et al., 2001). The camera perspective bias may also be influencing why viewers of body camera footage, which is recorded from the police officer’s perspective, are less likely to judge the officer as having acted intentionally than those who watch dashboard camera footage, which has a wider angle and perspective (Turner, et al., 2019). The variations in the judgment of intent here are partially attributed to the differences in the visual salience of the focal actor. Unlike dashboard cameras, body cameras cannot show the police officer. Overall, the discrepancies in perception and the judgments that ensue from the presentation and type of video can be highly consequential in a criminal court trial where intent needs to be proven beyond reasonable doubt. Additionally, the perspective of body cameras may worsen racial biases in viewers of videos showing police use of force. White viewers perceive dark-skinned individuals more negatively than light-skinned individuals when the body camera makes them the subject of primary focus (Bailey, et al., 2021).

A common assumption is that repeated viewing can assist people to focus on information they may have missed on the first viewing, seemingly helping them better evaluate the depicted event. During trial, jurors may have multiple opportunities to see the same video. However, an eye-tracking study demonstrates that people engage in visual confirmation bias. The eyes follow a very similar pattern of visual attention, making people overconfident about their initial perception of the video in question (Qu-Lee, et al., 2022). In other words, multiple viewing opportunities on their own are unlikely to reduce biases that may already exist, though, active questioning and cross-examination can be helpful strategies (e.g., Feigenson and Spiesel, 2009; Silbey, 2004).

According to Granot, et al. (2018), the “blind” faith typically extended to video within the U.S. legal system increases the potential for error in the interpretation of video as evidence. First, they show, people place too much trust in their own interpretation. Second, people struggle with how to distinguish between legally relevant and irrelevant information in video. Lastly, people lack awareness of their own potential for bias when evaluating video even though they acknowledge that biases exist. At the same time, instruction-based interventions have focused on mitigating the influence of a specific bias and demonstrated mixed results (e.g., Lassiter, et al., 2002; Nash, 2018). Granot, et al. (2018) thus call for more research on guidelines that can optimize the overall consideration of video as evidence.

At times when visual media are increasingly helping people bear witness to an alleged crime or civil violation in court, understanding the mechanisms by which video can be interpreted is critical for the pursuit of equal and fair justice. Visual communication research has long established that interpretation depends in large part on the experiences, expectations, preferences, and blind spots that a viewer brings to an image (e.g., Messaris, 1994; Morris, 2011; Sturken and Cartwright, 2017; Zelizer, 2010). According to Vikki Goldberg (1991), “[t]he viewer is outside the frame of the photograph but inside the frame of its meaning” [2]. Her argument applies to visual meaning making more broadly. This is why visuality is seen as distinct from vision — the physiological capacity to see — and is commonly understood as a discursive practice that has material effects on how social, political, and legal power is classified, aestheticized, and ultimately enacted (e.g., Mirzoeff, 2011).

It is in this context that Sharon Sliwinski (2018) argues that the history of our ways of seeing is centrally implicated in the global struggles for human rights. LaCharles Ward (2022) further reminds us that the legal doctrine that emerged with the introduction of photography necessitated a witness to testify to the evidentiary meaning of images. Yet at that same time, U.S. courts ruled that Black people were “beings of an inferior order,” thus unable to be witnesses in court [3]. In other words, as LaCharles Ward astutely
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argues, the legal doctrine for visual evidence solidified a way of seeing that was fundamentally anti-Black. The historical development of Black witnessing as a unique practice with its own moral, legal, and spiritual weight over the last 200 years can be seen as a struggle to claim looking as a deeply existential act of rebellion against civil rights and human rights violations (Richardson, 2020). A unified guidance for the evaluation of video as evidence may thus be an important step for ensuring that civil rights and human rights are upheld by court systems today.

Visual literacy training

By sidestepping the cognitive and social influences on visual interpretation and judgment in court, the current approach to video evidence continues to raise a critical question about how the law can fulfill its commitment to equal and fair justice in the digital age. Yet, despite the discrepancies between people’s intuitive faith in the objectivity of their interpretations — their belief that video simply gives them the truth of the matter — and the fact that those interpretations can vary widely and are subject to a host of influences of which people remain largely unaware, the legal profession has not given video the same attention as it gives to textual and testimonial evidence. Though there are more trial advocacy programs today that teach how to analyze video, visual literacy training is still not broadly represented in law school curricula and professional programs (Austin, 2006; Mezey, 2013; Porter, 2018; Sherwin, 2018). Elizabeth Porter (2014) has thus cautioned, “I know it when I see it’ is not merely an aphorism: It’s the reigning, if not sole, canon of visual interpretation in law” [4] that extends far beyond trial practice. The right to publicity and copyright are just some examples of how courts continue to struggle with the regulation of photographic and videographic images across areas of the law (Tushnet, 2015; 2012).

Visual literacy for the legal profession remains an important call for it can help judges and attorneys learn how to analyze video as evidence — how to probe and ask relevant questions of the underlying content. According to Richard Sherwin (2018), “[o]nly with this knowledge can such visuals be capably interpreted and impeached. Likewise, only visual literacy will allow judgments concerning admissibility to be intelligently made and consistently applied” [5]. In other words, more widely adopted visual literacy training holds the potential to empower current and future legal professionals to be better informed decision-makers.

In summation, the uncertain categories under which video is admitted as evidence, the inconsistencies with how video is perceived and interpreted, and the lack of broadly implemented training programs in visual literacy show that video does not provide a simple path to the truth in a legal case. People’s beliefs can both defeat and overvalue sensory information. As a result, contrary to the popular maxim that seeing is believing, the rhetorical reliance on naïve realism may still be creating an environment where, to borrow from Errol Morris (2011), believing can be seeing. Video produces evidence, but visual interpretation is a complicated task. What psychologists call “wishful seeing” — the phenomenon explaining how people’s preferences can influence perceptual experiences (Dunning and Balcetis, 2013) — can affect legal outcomes as well. Beliefs may drive visual interpretation and meaning making writ large: “Our beliefs do not determine what is true or false. They do not determine objective reality. But they can determine what we ‘see’” [6]. It is also important to highlight that the various biases in the perception and interpretation of video may be particularly pernicious to people of color (e.g., Brown-Iannuzzi, et al., 2014; Granot, et al., 2014; Mirzoeff, 2016) within a legal system that is already shaped by persistent racial disparities (e.g., Hetey and Eberhardt, 2018; Kovera, 2019).

To better understand the overall challenges that video poses in court, the following section closely examines the use of video as evidence at summary judgment in McDowell v. Sherrer, a case involving claims of correctional officers’ excessive use of force against a Black inmate. Specifically, the paper tracks the varied interpretations of two videos by two different courts. In doing so, it highlights the challenges that scholars experience when researching the legal use of video as evidence. It concludes by underscoring the need for archival legal standards for video.
Video’s use in *McDowell v. Sherrer*

*McDowell v. Sherrer* is a case primarily centered on an Eighth Amendment (of the U.S. Constitution) excessive force claim. The plaintiff, a Black inmate, alleged that he was subjected to excessive force during an incident that happened while he was incarcerated at Northern State Prison (NSP) in New Jersey. Steven McDowell and another inmate, Carlos Cruz, were released from their cell after complaints that Cruz had stomach problems and trouble breathing. According to McDowell and Cruz, they tried to seek medical attention but failed to submit to handcuffing and did not return to their cell when asked. The correctional officers claimed that both inmates faked illness and were violent. As a result, the prison guards had to form so-called extraction teams to get McDowell and Cruz back in their prison cell. The violent altercation between the two inmates and the extraction teams was recorded on video by an NSP official and another inmate, Omar Broadway, who had smuggled a camera into the prison. Both videos were key evidence in the legal case that followed.

The U.S. District Court for the District of New Jersey was asked to decide whether McDowell’s excessive force claim could be dismissed on summary judgment. In other words, the court had to evaluate whether there could be any disputes about the material facts in the case that would warrant a jury trial. The court ultimately granted the motion for summary judgment to the defendants (the correctional officers) on all of McDowell’s claims. The videos were instrumental in the court’s decision. Judge Katharine Hayden famously wrote: “If a picture is worth a thousand words, two live-action videos are good for at least a million” [7]. Her statement is a great example of how courts tend to believe that video evidence can be easily and effectively translated into words despite the lack of clear mechanisms through which that translation can be confidently pursued (e.g., Silbey, 2013). Judge Hayden’s underlying understanding in this case was that the videos provided direct evidence that could not be disputed. Though any video may reveal some information while concealing other, the court believed that it had to “apply governing summary judgment standards having witnessed *with its own eyes* the events at the core of this litigation” [8]. Video can indeed turn its viewers into witnesses, giving them the impression that they are transported directly to the event in question (e.g., Ristovska, 2017) so much so that even judges may believe that to see a video is as if those in court could see the real event unmediated by any technology. By considering video evidence in this light, judges may even fail to properly account for other potentially credible evidence.

In this case, the existence of two videos from two distinct perspectives — the one of a prison guard and the other of an inmate — prevented the court from adopting the plaintiff’s testimony as typically done in qualified immunity cases (e.g., Frank, 2011; Mezey, 2013). The district court instead referenced the Supreme Court ruling in *Scott v. Harris* (2007) which allowed a videotape to speak for itself because it was assumed that the footage “blatantly contradict[ed]” the plaintiff’s account that was supposedly “visible fiction.” Using the Supreme Court precedent that disputed facts should be viewed “in the light depicted by the videotape,” the district court’s analysis of the videos and the ruling that ensued could be summarized in Judge Hayden’s words:

> The Court declines to engage in a freeze-frame constitutional analysis and second-guess every individual movement of each defendant without considering the attendant circumstances. Instead, the proper inquiry focuses the Court’s scrutiny on the continuum of events as they unfolded from the beginning of the incident to the end. Viewed thus, in context and under the totality of the circumstances, defendants’ actions were reasonable and taken in good faith. The videos “blatantly contradict” the story spun by McDowell — that the officers maliciously and sadistically used force in extracting him. [2]

This case is among many that demonstrate how *Scott v. Harris* effectively altered the summary judgment
standards not only in Fourth Amendment but also in Eighth Amendment cases, making it easier for courts to dismiss inmate claims of excessive force by correctional officers as a matter of law (Frank, 2011). Though this development runs parallel to efforts to use video evidence to surmount barriers to civil damages (Fan, 2019), the district court in McDowell v. Sherrer applied a standard that failed to acknowledge that video could be neither a transparent nor opaque form of evidence but an opportunity to ask important questions, just as with any other type of evidence.

McDowell appealed the District Court’s order with respect to his Eight Amendment excessive force claim. The U.S. Court of Appeals for the Third Circuit concluded that “neither of the videos ‘blatantly contradict[s]’ McDowell’s account such that no reasonable jury could believe it” [10]. The appellate court interpreted the video evidence differently from the district court. The appellate judges focused on how they could not determine from the videos whether McDowell resisted the officers and how much force was used on him because the officers’ bodies blocked the camera’s view. The judges’ interpretation of what they could see was based on those aspects of the videos that were indeed consistent with McDowell’s testimony. They wrote:

In both videos, McDowell can be heard yelling “I am not resisting” when he is underneath the officers. Second, the video recorded by the inmate shows that an officer who was standing near McDowell’s body did have a nightstick in his hand — consistent with McDowell’s testimony that he was hit in the head repeatedly by nightsticks. Additionally, when McDowell is led away from the tier, his face is covered with blood, suggesting that he suffered an injury during the extraction. As McDowell is led off the tier floor, an officer has his arm around McDowell’s neck and McDowell is pressed against the wall. The officers thereafter lay McDowell to the ground, as if he is not able to stand on his own. These events are consistent with McDowell’s testimony that he was choked until he was unconscious. [11]

The appellate judges thus raised an issue of material fact that would require a jury to decide whether McDowell’s constitutional rights were violated. The judges saw the videos as potentially unclear and ambiguous enough that reasonable jurors could disagree on their interpretations of the facts involved in the case.

McDowell v. Sherrer is just one case that underscores the uneven treatment of video as evidence in court. It speaks directly to the uncertain classification of video as demonstrative and substantive evidence as well as to the resulting ambivalence about how to evaluate video’s probative value. The interplay between images and sounds that video enables can facilitate different evidentiary interpretations even within the lifecycle of the same case. The district judge focused on those aspects of the audio and the visual that could be interpreted as supportive of the officers’ claims. The appellate judges, in turn, focused on those aspects that were consistent with the plaintiff’s account. The different interpretations underline that analyzing video, just like other forms of evidence, is important and that widespread visual legal literacy is necessary (e.g., Silbey, 2004; Sherwin, 2018). Any evidence needs to be interrogated, so judges, just like attorneys and jurors, could benefit from visual literacy in making informed decisions about the admissibility and use of video as evidence especially at times when generative AI threatens to amplify the problems with visual persuasion writ large. The legal profession cannot risk falling victim to the inversed maxim for visual interpretation, one that cautions how believing may be seeing.

When granting the motion for summary judgment in McDowell v. Sherrer, Judge Hayden believed that the video evidence enabled the court to witness with its own eyes. Video indeed gives the impression of a firsthand experience of events as opposed to eyewitness testimony which facilitates witnessing through someone else’s eyes. Yet, as John Durham Peters (2001) famously claims, a “witness is the paradigm case
of a medium: the means by which experience is supplied to others who lack the original” [12]. Whether the medium is a person or a video, the act of witnessing indicates an inherently fragile communicative practice: “the journey from experience (the seen) into words (the said) is precarious” [13]. In other words, there is a gap between an experience and the ability to express it in language. After all, it is difficult to translate sensory experiences into shared words, sounds, and images. Witnessing involves processes of translation that occur at the crossroad between the event and the discourse about it, the meaning inferred from the discourse, and the judgement that ensues. It is not surprising, then, that courts have struggled both with eyewitness testimony (e.g., Kassin, 2008) and video evidence.

Eyewitness testimony, like video, is subject to numerous influences. Granot, et al. (2018) productively analyze the similarities and differences between these two forms of evidence. Both video and eyewitness testimony are typically introduced as evidence without expert analysis, meaning that judges and jurors need to assess the credibility of the evidence on their own. Yet factors relating both to how the evidence is gathered (e.g., available light, field of view, camera angle) and to the person assessing it can affect the perceived credibility of the evidence in question. In the context of eyewitness identification, it is well-known that the confidence of the witness directly relates to the jurors’ judgments of the accuracy of the testimony irrespective of the actual accuracy (Wells, et al., 1979). Video may even worsen the misleading connection between confidence and accuracy because the viewer relies on their own confidence not the perception of someone else’s confidence. Furthermore, interpreting video as evidence is often a much more complex cognitive task than deciphering the distinction between a true or false eyewitness identification.

Over 30 years of research has documented the variables shaping judgment regarding both videotaped confessions and eyewitness testimony (e.g., Drizin and Leo, 2004; Kassin, 2014; Lassiter, et al., 2001). Though it is unclear whether filming confessions and verifying eyewitness testimony have rendered the criminal justice system less biased or more accurate, there have been some notable developments. As of now, for example, 25 states have incorporated procedural reforms to improve the accuracy of eyewitness identification through legislation, court action, or substantial voluntary compliance (Innocence Project, n.d.). The sheer proliferation of video as evidence in court urgently necessitates parallel procedural considerations. The relationship between seeing and believing is not as intuitive as it sounds, so uniform guidance and applications for treating video as evidence are much needed in the U.S. legal system today. Empirical research that systematically examines the use of video as evidence in state and federal trial cases could be valuable in helping to identify the most common variables that shape visual interpretation and judgment in court so that appropriate procedural reforms can be developed, tested, and implemented. In this context, McDowell v. Sherrer serves as an important reference, illustrating some of the challenges currently involved in such research: the limited availability of the videos used as evidence in court.

Archival standards for video evidence

Unlike international criminal courts, such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court, the U.S. legal system does not have a readily available database of the video evidence used at its state and federal trials. Consistent archival standards across state and federal courts in accordance with professional records management practices for video are lacking, though, the materials can be potentially obtained through requests for footage from courts at a fee or by contacting the attorneys involved in the case. In McDowell v. Sherrer, for example, only a small portion of the video recorded by the inmate is readily available, though recontextualized for another purpose, in An Omar Broadway Film (Broadway and Tirola, 2008), a documentary which premiered at the 2008 Tribeca Film Festival and was released by HBO. There is not a readily available copy of the prison guard’s footage either. As a result, it is difficult to conduct an independent analysis of the video evidence in conjunction with the legal documents.

The sheer lack of public availability of the videos used as evidence in U.S. courts has limited the scope of
research in this area. Obtaining court trial transcripts and other legal documents can also be a costly and time-consuming endeavor. Visual legal analysis has therefore been based primarily on case studies, which tend to focus on high-profile trials and those with news visibility (e.g., Nichols, 1994; Porter, 2014; Mezey, 2013). Systematic research that goes beyond the limitations of case studies is largely absent except for recent work that focuses on specific legal issues, such as body camera footage in excessive force cases, relying primarily on the written records (e.g., Zamoff, 2019). At the same time, systematic research is necessary both to specify the challenges that video evidence creates in a methodical manner and to understand the scope of the challenges, as well as their significance for the pursuit of justice, using empirical data. Such research is also critical because video evidence is ripe for systematic biases in interpretation that may be disproportionately affecting people of color.

Michele Foucault (1972) famously defined archives as “the law of what can be said, the system which governs the appearance of statements as unique events” [14]. By structuring what can and cannot be said, archives have a discursive function, producing knowledge which shapes how the world is understood and how things are done in it. It is not surprising, then, that Foucault was interested in tracing the discursive rules that govern different epistemes throughout history. Though the lack of consistent archival legal standards for video evidence can be attributed to the law’s long prioritization of words over images, the consequences are noteworthy. The critiques of video evidence have been clearly established by now, but change has been slow. A call to more access to the evidence could facilitate more studies into how video has mattered in trial cases (e.g., patterns of use and misuse, common variables that shape interpretation and judgment, and effective trial strategies). Such research may be well positioned to provide the basis for theoretically grounded and empirically sound guidelines for video evidence as well as for effective jury instructions and legal training in visual literacy.

Though the problem of bias and the challenges with interpretation are endemic in all forms of evidence, this paper has focused on video to account for its specificity. Surveying research from across the humanities, social sciences, and the law, the paper has called for archival legal standards for video evidence which could further facilitate systematic research into legal guidance. Such research is not merely a thought experiment. It holds the potential to improve people’s lives by promoting consistency, equality, and fairness for those who use the courts.

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**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

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