Visual Literacy for the Legal Profession

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"With each technological advancement, the practice of law becomes more sophisticated and, commensurate with this progress, the legal system must adapt."[1]

Digital technology has transformed the way we communicate. Swept along on a digital tide, words, sounds, and images easily and often flow together. This state of affairs has radically affected not only our commercial and political practices in society, but also the way we practice law. Unfortunately, legal education and legal theory have not kept up. Inconsistencies and unpredictability in the way courts ascertain the admissibility of various kinds of visual evidence and visual argumentation, lapses in the cross-examination of visual evidence at trial, and inadequately theorized notions of visual meaning and the epistemology of affect tell us that the status quo in legal education is untenable. Law teachers today have an obligation to provide their students with the rudiments of visual literacy.

So what do I mean by visual literacy for the legal profession? Being at ease with the digital flow, or being quick on the uptake of visual data from the screen, or even being able to parse and technically manipulate moving images,[2] is not necessarily a sign of visual literacy in the sense I advocate here. Literacy presupposes a critical/reflexive capacity in conjunction with an appropriately informed conceptual and rhetorical tool kit, which taken together enable a more meaningful assessment of how words, sounds, and images construct and convey meaning. Simply put, visual literacy for the legal profession requires a comprehensive framework for strategic visual thinking in specific case contexts. It means that lawyers and judges know how to both construct and deconstruct visual evidence and visual advocacy. Only 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. Seat-of-the-pants intuitions, the predominant state

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1. Commonwealth of Pennsylvania v. Serge, 896 A.2d 1170 (2006).

2. *Cf.* Kevin Kelly, *Becoming Screen Literate*, N.Y. Times (Nov. 21, 2008), http://www.nytimes.com/2008/11/23/magazine/23wwln-future-t.html.

of visual affairs in our current legal system, invite error, irrationality, and a curtailed ability to attain just outcomes. Tried-and-true traditions, such as the adversarial search for truth at trial within the proverbial crucible of clashing evidence and competing narrative accounts, will have to adapt to the times.

But what does it mean to meaningfully examine and cross-examine a car chase video, or a day-in-the-life minidocumentary in a personal liability case, or a video of a crime scene walk-through, or a victim-impact video, or a digitally animated simulation of a crime or accident—to mention just a few of the visual mediations now commonly featured in court? At the very least, more sophisticated testing of visual evidence requires an understanding of the cultural and cognitive elements of visual meaning-making in general and visual storytelling in particular. For that to occur, the conceptual and rhetorical tools that lawyers and judges carry around in their professional tool kits must be expanded. Let's consider, for a moment, the tools that are required for visual storytelling.

Stories rehearse the various strands of local knowledge that make up ordinary common sense.[3] We rely on these resources (often unconsciously) to gauge expectations about what constitutes normality in a given situation. In its most distilled form, a story typically starts out with a situational norm, which is then disrupted by the introduction of some source of Trouble. Then, after a series of conflicts and vicissitudes, we either return to the opening status quo (with the protagonist having valiantly vanquished the Trouble that disturbed it) or, alternatively, we arrive at a transformed state of affairs in which a new status quo prevails.[4] Trial lawyers, certainly the successful ones, understand this. They announce clear, well-known story themes in their openings, like the prosecutor's opening narrative frame in the federal corruption trial of New Jersey Senator Robert Menendez: Here is a man who spent seven years enjoying "a life of luxury he could not afford" in return for acting as the personal senator to a wealthy ophthalmologist in Florida. The defense's counternarrative was equally distilled: Ladies and gentlemen, this is a case about friendship, and after all, "acting out of friendship is not improper, it is not corrupt, it is not illegal."[5] Of course, supportive evidentiary strands subsequently introduced at trial have to back up these opening narrative forays, culminating in even more comprehensive accounts when the time comes for closing arguments.

3. *See* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 Cardozo L. Rev. 519 (1991); W. Lance Bennett & Martha S. Feldman, Reconstructing Reality in the Courtroom (1981); Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. Sch. L. Rev. 55 (1992).

4. *See* Anthony G. Amsterdam & Jerome Bruner, Minding the Law (2000).

5. Nick Corasaniti, *Opening Arguments in Menendez Trial Focus on the Meaning of Friendship*, New York Times (Sept. 6, 2017), https://www.nytimes.com/2017/09/06/nyregion/senator-robert-menendez-trial-melgen.html; *see generally* Avi J. Stachenfeld & Christopher M. Nicholson, *Blurred Boundaries: An Analysis of the Close Relationship Between Popular Culture and the Practice of Law*, 30 U.S.F. L. Rev. 903 (1996).

Knowing what informs and structures the common sense of a given community at a given point in time helps to guide expectations concerning what kinds of stories may be told under a particular set of circumstances. Our local, culturally attuned common sense also tells us how the genre to which a given story belongs typically unfolds. For example, mysteries get solved in the end because, having added up the clues, we now know whodunit. This genre, not surprisingly, is a favorite among prosecutors. Hero quest stories, on the other hand, show up more often within defense repertoires.[6] The hero genre is designed to inspire decision-makers to "do the right thing" (like policing the police[7]) and to heroically fulfill the oath they swore as jurors to uphold as the appropriate standard of proof. Sorely tempted by the state's dastardly ploys, seeking to get them to abandon their quest, heroic jurors must resist if they are to take home the grail of justice. This is how hero tales empower jurors to transform the status quo, replacing injustice with justice, if they choose the right verdict.

Visual stories do the same sorts of things as word-based ones—but not in the same way. Consider, for example, the following ways in which word-based and visual thinking and communication differ[8]:

> 1. Visuals can convey more information more vividly than words alone[9] and enable viewers to not only understand more, but also feel more strongly about what is being communicated. For example, computer-animated reconstructions of events can represent with clarity and precision small but legally significant changes within a given period (such as the relative positions and speeds of vehicles before a collision). These factual details might remain difficult for a decision-maker to imagine and thus harder to understand if left to verbal descriptions alone.[10]
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> 2. Photorealistic pictures tend to arouse cognitive and emotional responses similar to those aroused by the real thing. For example, a

6. Amsterdam & Hertz, *supra* note 3.

7. This was, of course, a key defense strategy in the O.J. Simpson double murder trial. *See* Justin Wm. Moyer, *Johnnie Cochran: We see him in the same light as we do Nelson Mandela and Martin Luther King*,' The Washington Post (Feb. 3, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/02/03/remembering-johnnie-cochran-the-mandela-who-freed-o-j-simpson/?utm_term=.dd815331235e.

8. The six examples that follow are more fully developed in Richard K. Sherwin et al., *Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law,* 12 B.U. J. Sci. & Tech. L. 227 (2006).

9. Consider, for example, the courts' disparate treatment of labeling visual evidence. *Compare* New York v. Anderson, 74 N.E.3d 639 (N.Y. App. 2017), *with* Missouri v. Walter, 479 S.W.3d 118 (2016) (en banc), *and* Watters v. Nevada, 313 P.3d 243 (2013) (booking photos overlaid with the word guilty). *See generally* Matthew S. Robertson, *Guilty as Photoshopped: An Examination of Recent Case Law and Scholarship Regading the Use of Non-Probative Images in the Courtroom*, 55 Washburn L. J. 731 (2016).

10. *See* Sherwin et al., *supra* note 8.

3D movie of a roller-coaster ride can induce vertigo in viewers who would remain unruffled by a verbal description.[11]

3. Unlike words, which are obviously constructed by the speaker and thus are understood to be at one remove from the reality they describe, photorealistic photographs, videos, and film can appear to be caused by the external world without the taint of human mediation or authorial interpretation. Consequently, they tend to be accepted as highly credible evidence of the reality they depict, even though they lack the other sensory modalities that the viewer would encounter in real life.[12]

4. When people take in photorealistic pictures, they tend to believe that they have gotten all there is to get. Consequently, they are disinclined to pursue the matter further. This sense of communicative efficacy is even stronger in time-based media, such as film, video, and computer animation, which offer the eye rapid, visual sequences. These tend to disable critical thinking because viewers are too busy attending to the picture immediately before their eyes to reflect on those that have gone before. As a result, compared with words, visual communications tend to generate less counterargument and hence more confidence in the judgments they support.[13]

5. Pictures cannot be reduced to explicit verbal propositions. In this respect pictures are well-suited to leaving intended meanings unspoken, as would-be persuaders may prefer to do – especially when evidentiary rules or social conventions forbid making a given claim explicitly.[14]

6. Finally, pictures, more than words, convey meaning through associational logic, which operates in large part subconsciously, especially through its emotional appeal. Thus, a person may be aware that a picture is strongly linked to an emotional response without

11. *Id*.

12. *See* Andreas Kuersten, *When a Picture Is Not Worth a Thousand Words*, 84 Geo. Wash. L. Rev. Arguendo 178 (2016).

13. Consider, for example, the prosecution for battery of the four LAPD officers who beat motorist Rodney King. The defense used a digital version of George Holliday's amateur videotape of the beating that was deliberately designed to construct the perception of causation: Every time King appeared to rise up, the police batons came down; every time he assumed the prone position, as ordered by police, the batons went up again. The prosecutor never countered–perhaps he never noticed–the defense's visual narrative of how King "caused" his own beating. *See* Richard K. Sherwin, Visualizing Law in the Age of the Digital Baroque: Arabesques and Entanglements 37-38 (2011).

14. *See* Stachenfeld & Nicholson, *supra* note 5 (on the use of pop cultural images and story archetypes to unconsciously cue strategic responses in viewers that effectively bypass and mask impermissible forms of argumentation).

> knowing or understanding what the connection is. And when the emotional underpinnings of judgment remain outside of awareness, they are less susceptible to effective critique and counterargument.[15]

There can be no gainsaying that smart visual graphics (like visual timelines), compelling surveillance, and amateur videos or animated reenactments, among various other forms of visual evidence and visual argumentation, often serve as vivid sources of accurate, fact-based judgment. Many such examples may be offered.[16] Problems arise, however, when opposing counsel, not to mention presiding trial and appellate judges, fail to comprehend the many ways in which images take us unawares. This mischief is especially acute when impeachment efforts fail and admissibility criteria go wobbly.

Among court cases, the poster child for naïve judicial decision-making regarding visual evidence may well be *Scott v. Harris*.[17] The case involved a police chase of a car that was traveling seventy-three miles per hour in a fifty-five-mile-per-hour speed zone. When the driver, Victor Harris, failed to stop, the state police pursued. They ultimately terminated the chase by bumping against Harris's car from the rear. This police action caused the car to go off the road, overturn, and catch fire. In the process, Harris's neck was broken, and he was rendered a quadriplegic. The sole issue the case presented was whether the lower court's summary judgment ruling ought to be overturned. Is this an instance of excessive force in the making of an arrest? If reasonable jurors could disagree about the propriety of the level of force exercised by police, then summary judgment is inappropriate—the matter ought to go before a jury to determine whether Harris's Fourth Amendment rights had been violated.

The Eleventh Circuit Court ruled that reasonable minds could differ on whether lethal force was called for in this situation.[18] But the U.S. Supreme Court, by an eight-to-one ruling, disagreed. Justice Scalia and the majority watched the same state patrol car video recordings of the car chase as had the court below and concluded that no reasonable juror could find lethal force was *not* required under these circumstances. During oral argument, Justice Scalia said that Harris "created the scariest chase scene I ever saw since 'The French

15. Of course, on occasion emotional responses to vivid images may be highly cogent. Consider, for example, Justice Kennedy's use in *Brown v. Plata* of a stark photograph of prisoners held in metal cages, or the controversial use of highly graphic images on cigarette packages to warn consumers of the consequences of smoking. 563 U.S. 493 (2011). *See* Rebecca Tushnet, *More Than a Feeling: Emotion and the First Amendment*, 127 Harv. L. Rev. 2392, 2412 (2014). That courts sometimes treat emotional responses to visual displays as noncognitive and thus perhaps less worthy of state protection illustrates a persistent confusion regarding the cognitive import of emotions. *Id.* at 2425 ("Because emotion and reason are inextricable, emotional appeals should be fair game for the government as well as for private parties, unless the emotion is tied to factual deception.").

16. *See generally Visual Persuasion Project*, New York Law School, http://www.visualpersuasionproject.com/.

17. Scott v. Harris, 550 U.S. 372 (2007).

18. Harris v. Coweta Cnty., 433 F.3d 807 (11th Cir. 2005).

Connection.'"[19] Justice Breyer later told Harris's attorney, "I look at the tape and I end up with Chico Marx's old question . . . Who do you believe, me or your own eyes?"[20] Doubling down on his position that the video bore but one obvious interpretation,[21] Scalia downloaded a copy to the Supreme Court's website, observing in a footnote: "We are happy to allow the videotape to speak for itself."[22]

But as Dan Kahan and his co-researchers subsequently showed, the belief that videos speak for themselves is an illusion.[23] The Supreme Court majority was taken in by a mental phenomenon that social scientists call "naïve realism": the natural tendency to spot other people's biases, but not your own. No one's perceptions are perfectly neutral. They are at least to some extent shaped by beliefs and expectations, which in turn are influenced by such factors as education, social and cultural background, and ideology—all of which help us to construct the reality we see. By ruling that no reasonable juror could see anything other than what the majority of the Supreme Court saw when they watched the chase video, the justices consigned the Eleventh Circuit majority and Justice Stevens, together with all citizens who happen to share a similar set of perceptual and cognitive characteristics, to a special kind of cognitive purgatory. They cordoned off a no man's zone for people whose perceptions don't count. This is what Kahan means by "cognitive illiberalism." Judges overconfident in their capacity to interpret audiovisual evidence risk unduly eroding the constitutional fact-finding role of the jury.[24]

The prevalence of naïve realism, together with the many other ways in which people unconsciously apply hidden heuristics or other mental categories or beliefs to situations requiring fact-finding judgments, is incompatible with the assertion that visuals speak for themselves.[25] Images on the screen are not windows onto reality. Visual meaning-making involves complex, typically unreflexive processes of interpretation and affective association.

19. Visualizing Law, *supra* note 13, at 62.

20. *Id.* at 39.

21. *Scott*, 550 U.S. at 380-81 ("Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.").

22. *Id.* at 378 n.5.

23. Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 Harv. L. Rev. 837 (2009).

24. *See* Denise K. Barry, *Snap Judgment: Recognizing the Propriety and Pitfalls of Direct Judicial Review of Audiovisual Evidence at Summary Judgment*, 83 Fordham L. Rev. 3343, 3387 (2015) (arguing that "judges must undergo further education regarding the near impossibility of experiencing audiovisual evidence objectively" and that, given the variety of their viewpoints and perspectives, juries are usually the appropriate body to review such evidence).

25. The seminal references here are Daniel Kahneman, Thinking, Fast and Slow (2011) and Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124, 1124-31 (1974).

Understanding those processes requires interdisciplinary knowledge as well as a capacity and willingness to exercise critical reflection. This is what visual literacy offers. When it is lacking, the crucible effect of cross-examining images, not to mention the coveted judicial function of informed, deliberate, and consistent rulings in the face of contested visual evidence, may cease to operate as it should inside the courtroom.

So how does one teach visual literacy to the legal profession? The first obstacle that must be overcome in order to achieve this goal, as Justice Scalia's opinion in *Scott v. Harris* shows, is convincing jurists that there is more to the act of understanding or critically interpreting images on the screen than just watching.[26] Avoiding being taken in requires humility, a willingness to accept that legal professionals need to cultivate certain kinds of specialized knowledge.[27] Law schools typically spend far too little time helping students develop the practical skill set they need to construct and deconstruct oral and written narratives. The situation is even worse when it comes to constructing and deconstructing *visual* narratives (including visual evidence and visual argumentation).

In short, our visual literacy tool kit must come to include insights from such diverse disciplines as advertising, anthropology, art history, psychology, and rhetoric. These fields teach how to cognitively and culturally decode various processes of visual uptake and dissemination. That is why in my visual persuasion seminar I assign readings by Jerome Bruner, George Lakoff, Antonio Damasio, Anne Marie Seward, and Anthony Amsterdam, as well as popular texts such as Robert McKee's classic work on writing screenplays.[28] And, of course, I show many, many legal visuals: demonstrative evidence, graphics, animated reenactments, surveillance videos (including digitally altered versions), victim-impact videos, and personal injury day-in-the-life minidocumentaries, together with a variety of visual closing arguments. Acquiring multidisciplinary forms of knowledge teaches students to see how evidentiary visuals have been fashioned and what they have been designed to do. This contributes to more self-reflective visual interpretation, which in turn enhances students' capacity to think through, and intelligently express, why a particular visual should or should not be allowed into court, or how it should

26. *See* Tamsin Shaw, *Invisible Manipulators of Your Mind*, The N.Y. Rev. of Books 62-65 (April 20, 2017) (tracing the potent adaption of dual-process cognitive theory to the vicissitudes of advertising, especially in the data-rich context of social media); *see also* Richard K. Sherwin, *Visual Jurisprudence*, 57 N.Y. L. Sch. L. Rev. 11 (2012) (symposium issue on "Visualizing Law in the Digital Age"); Richard K. Sherwin, *A Manifesto for Visual Legal Realism*, 40 Loy. L.A. L. Rev. 719 (2007).

27. *See* Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright Law*, 125 Harv. L. Rev. 683, 758 (2012) ("We must reject the prevailing assumption that images are so transparent (or so meaningless) that judges don't need any guidance from theory to evaluate them.").

28. For an early version of a Visual Persuasion in the Law seminar syllabus (subsequently revised) go to: Richard K. Sherwin, *About the Course: Visual Persuasion in the Law Seminar*, New York Law School, http://www.visualpersuasionproject.com/visual_legal_training/about_the_course/.

be countered, or changed, to meet existing standards of probative value and undue prejudice.

Over the years, I have also found that hands-on practice is extremely valuable, perhaps essential, to acquiring visual literacy. Such practices include asking students to place images into a sequence, and seeing what happens when one alters that sequence. Having the class function as a focus group helps students grasp the potential range of shareable emotional associations as well as perceptual and cognitive responses among their peers. In this way, students develop greater sensitivity to the differences among idiosyncratic visual associations, such as personal fantasies, as opposed to more widely shared and hence more predictable associations by their intended audience. In other words, visual exercises inside the classroom teach students not only how to think and express themselves visually, but also how to recognize those visuals that are more likely to jibe with the stories and images that people typically carry around in their heads. These kinds of associative visual exercises make evident to law students that successful lawyering entails more than the inductive and deductive logical functions that typify rules-based reasoning in a case-driven legal curriculum. In the course of learning the ways of associative logic, students also quickly realize how visuals are suffused with, and empowered by, emotion. Such intense affective associations may not always be predictable, much less controllable. But visual literacy skills (aided by relevant analytical expertise[29]) increase one's capacity to anticipate a reasonably constrained range of emotions within a given demographic or community.

Ideally, as part of their visual literacy training, students will film images on their own and then experience what it is like to edit images and sounds (including voice-overs) in the postproduction process. Only this experience can truly convey the profound power over reality that arises from editorial decision-making: how juxtaposing one image or sound with another can in effect shape reality. Such hands-on activities, informed by broad multidisciplinary readings and viewings, set within a classroom culture that primes students for collaboration and critical feedback, enhance technical knowledge regarding the specific visual technologies in question. Respect for diverse modes of perceptual and cognitive assimilation serves as an important check on naïve realism and provides an essential lesson in advance of jury selection when a particular kind of visual uptake may be preferred. Needless to say, for this kind

29. Manipulating affect in an effort to shape belief has a long and controversial history, going back to the sophists of ancient Athens, attaining unprecedented influence during the twentieth century from public relations practitioners such as Edward Bernays and George Gallup, and dramatically ramping up its impact through present-day social media manipulation by state intelligence agencies (such as Russia's GRU [*Glavnoye Razvedyvatel'noye Upravleniye*]) and private political consulting firms (such as Cambridge Analytica). See, for example, Stuart Ewen, PR! A Social History of Spin (1996); Massimo Calabresi, *Inside Russia's Social Media War on America*, Time (May 18, 2017), http://time.com/4783932/inside-russia-social-media-war-america/; Cecilia Kang & Sheera Frenkel, *Facebook Says Cambridge Analytica Harvested Data of Up to 87 Million Users,* The New York Times (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/technology/mark-zuckerberg-testify-congress.html.

of decentered pedagogy to succeed, law teachers must model openness to the varieties of experience, learning styles, and acculturated habits of thought and feeling that help to shape and inform judgment.[30]

Conclusion

Absent adequate levels of visual literacy, instead of a crucible for truth-testing, today's screen-dominated courtrooms risk becoming multiplexes that display whatever seems "truthy" enough.[31] The rule of law requires more. In the current visual digital age, lawyers, judges, and law teachers alike must ask not only how visual digital technologies are changing the way we understand what's real or true or just inside the courtroom (as well as in the court of public opinion), but also how we effectively engage in and teach visual meaning-making practices consistent with the highest possible standards of visually literate judgment.

30. *See* Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. Legal Education 591 (1982).

31. *See* E.J. Newman et al., *Nonprobative Photographs (Or Words) Inflate Truthiness*, 19 Psychon. Bull. Rev. 969 (2012).