

# Visual Persuasion for Lawyers

Ticien Marie Sassoubre

In 2014, video images of Michael Brown's body lying in the street in Ferguson, Eric Garner dying in a chokehold, and the shooting of twelve-year-old Tamir Rice prompted a national conversation about law enforcement and race. Video technology was widely heralded as holding the promise of both proving and deterring police misconduct. The same year, the Supreme Court dismissed a wrongful death lawsuit on the ground that video captured by cameras mounted on police vehicles conclusively established the reasonableness of an officer's use of deadly force.<sup>1</sup> This coincidence disclosed a troubling contradiction. On the one hand, the ubiquity of camera phones and various forms of surveillance video seemed to hold the promise of injecting "reality" into legal processes in a way that would protect minorities and safeguard civil rights. On the other, the ubiquity of camera phones and various forms of surveillance video threatened to render unnecessary the very trials protestors were calling for by offering judges apparently objective knowledge about disputed events. The authority the image enjoys in our national media had finally breached legal discourse's long-standing resistance to that authority.<sup>2</sup> And the breach had exposed the incoherence of legal engagements with visual culture.<sup>3</sup> I couldn't imagine teaching my law and film class in the usual way anymore. It was time to develop a course in visual literacy for lawyers.<sup>4</sup>

My first task was to try to understand what, if anything, had changed. After all, though much is made of the multimodal nature of our twenty-first-century

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1. *Plumhoff v. Rickard*, 572 U.S. 765 (2014). The opinion extended a similar holding in *Scott v. Harris*, 550 U.S. 372 (2007).
2. See Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1723-49 (2014). On the cultural authority of the image, see for example, *GETTING THE PICTURE: THE VISUAL CULTURE OF THE NEWS* (Jason E. Hill & Vanessa R. Schwartz eds., 2015); MILES ORVELL, *THE REAL THING: IMITATION AND AUTHENTICITY IN AMERICAN CULTURE, 1880-1940* (1989).
3. On the oscillating legal treatment of photographs and other visual representations in the late nineteenth century, see Jennifer Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1 (1998). Jessica M. Silbey documents the inconsistency of the legal treatment of filmic images in the twentieth century in *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. Mich. J.L. Reform 493 (2004).
4. I was by no means first to come to this conclusion. See Richard K. Sherwin, Neal Feigenson & Christina Spiesel, *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).

digital media, newspapers and magazines were already multimodal—in the sense of combining words and images—by the late nineteenth century.<sup>5</sup> And while early-nineteenth-century Americans gauged truth by a claim’s reasonableness, by the end of the nineteenth century, Americans already tended to believe that what they saw “in a photograph was true—from the finish of a horse race to the nebulae in the sky.”<sup>6</sup> By the mid-twentieth century, video had largely supplanted the photograph as the standard for objective representations of reality, as proof. Evidence and trial advocacy have been grappling with the technological and cultural development of visual representation for more than a century.

Nevertheless, law has until very recently continued to treat visual representations as ancillary to facts, not as facts in and of themselves. Legal persuasion has remained the province of language, tested by reason. And judges have reinforced this hierarchy in their encounters with images. Since digital cameras and the Internet combined to render our experience of the world more or less always visually represented and, for the most part, instantaneously publishable, our expectations of what can be caught on camera are certainly greatly expanded. But that doesn’t explain why visual representations are suddenly making their way into areas like contracts,<sup>7</sup> or why design thinking is now affecting the way legal products (and services) look.<sup>8</sup> If something has changed, the difference is not so much the technology as the transformation of our cultural norms of persuasion.

It became clear to me that a course in visual literacy for lawyers would have to respond to the broad field of visual representational practices that today constitute effective persuasion. But I encountered an immediate difficulty in pinning down just what “visual literacy,” broadly conceived, might be. As art historian James Elkins reminds us, at a basic level, “visual literacy” “can’t possibly mean anything. If it did mean something, then we would be able to read images, to parse them like writing, to read them aloud, to decode them and translate them.”<sup>9</sup> Obviously, we can’t.

And while the humanities have long experience with visual representation, images defy precisely the kind of reduction that general competency would require. There is no single authoritative account of what to see when you look

5. See JAMES ELKINS, *VISUAL STUDIES: A SKEPTICAL INTRODUCTION* 129-36 (2003).

6. WILLIAM M. IVINS, JR., *PRINTS AND VISUAL COMMUNICATION* 94 (1953).

7. See Jay Mitchell, *Whiteboard and Black-Letter: Visual Communication in Commercial Contracts*, 20 U. PA. J. BUS. L. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3057075](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3057075); Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183 (2016).

8. See, e.g., LEGAL DESIGN LAB AT STANFORD, <http://www.legaltechdesign.com>.

9. See ELKINS, *supra* note 5, at 128. Neuroscience has begun to provide us with a physiological explanation for the difference between the way we “read” images and words. See, e.g., BENJAMIN K. BERGEN, *LOUDER THAN WORDS: THE NEW SCIENCE OF HOW THE MIND MAKES MEANING* (2012).

at an image, or even how to make sense of what you perceive.<sup>10</sup> Interdisciplinary borrowing amounts to choosing between overlapping, competing, and contested interpretive theories.<sup>11</sup> The fact that so much of our persuasive communication today is multimodal only exacerbates the problem. Not only is there no one rubric for decoding what images mean on their own, but there is no one rubric for decoding the meaning of words and images or graphics working together.<sup>12</sup>

Elkins proposes an alternate approach to visual culture that reflects both the enormous range of images we encounter and the specificity of each image.<sup>13</sup> Rather than thinking about visual literacy in terms of an interpretive tool kit, he suggests that visual literacy involves acquiring competence in a variety of representational practices, like the making of photographic and digital images and special effects, graphic design and architectural drafting, and the various representational practices employed in the sciences.<sup>14</sup>

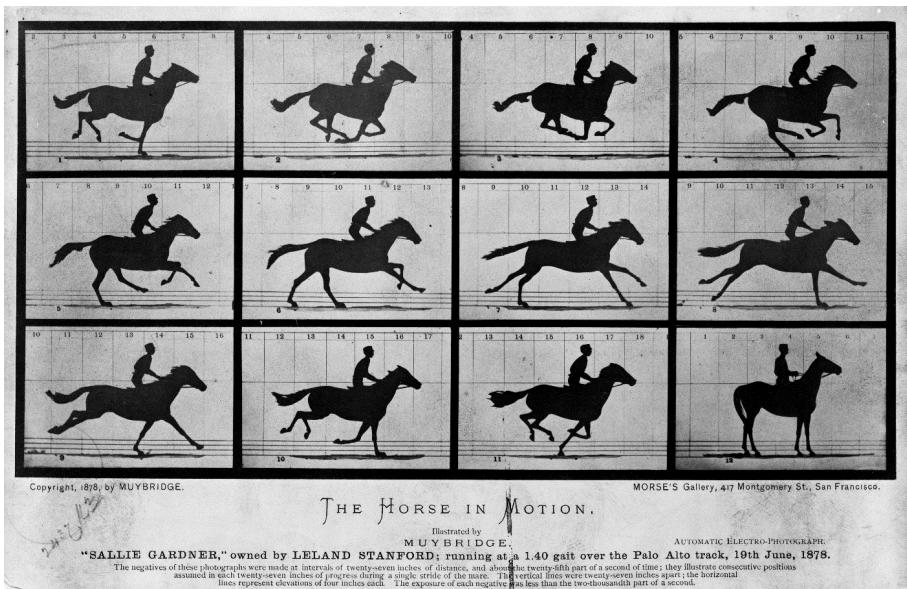
This approach strikes me as especially useful for thinking about law and visual culture because it acknowledges the diversity of images we encounter in legal discourse (e.g., MRIs, surveillance videos, statistical graphs, blueprints, CGI reproductions of accident scenes). Indeed, Jennifer Mnookin has recently begun to explore the legal treatment of what she calls “semi-legible” images—images that require technical competence to decipher, or offer information that is partial and/or ambiguous.<sup>15</sup> The increasing occurrence of visual representations in legal discourse will only amplify the challenge of engaging with those representations competently.<sup>16</sup>

Visual images are made and viewed in particular historical and cultural contexts, embedded in particular fields of knowledge, and produced in dialogue with particular conventions. The version of visual literacy for lawyers that Elkins’ approach suggests requires attention to how an image was produced, what the image was produced for, and the kind of expertise that is

10. The list of possible citations here makes the case. See *THE PHOTOGRAPHY READER: HISTORY AND THEORY* (Liz Wells ed., 2d ed. 2002); *FILM THEORY AND CRITICISM* (Leo Braudy & Marshall Cohen eds., 6th ed. 2004).
11. See *THE VISUAL CULTURE READER* (Nicholas Mirzoeff ed., 2d ed. 1998); *VISUAL CULTURE: THE READER* (Jessica Evans & Stuart Hall eds., 1999). Much of the work in the field assumes a familiarity with continental theory, which can make it challenging for the uninitiated.
12. John A. Bateman offers a relatively accessible survey of the field in *MULTIMODALITY AND GENRE: A FOUNDATION FOR THE SYSTEMATIC ANALYSIS OF MULTIMODAL DOCUMENTS* (2008).
13. See ELKINS, *supra* note 5, at 142-94; see also JENNIFER ROSWELL, *WORKING WITH MULTIMODALITY: RETHINKING LITERACY IN A DIGITAL AGE* (2013).
14. ELKINS, *supra* note 5, 140-87. On the visual culture of the sciences, see *VISUAL CULTURES OF SCIENCE: RETHINKING REPRESENTATIONAL PRACTICES IN KNOWLEDGE BUILDING AND SCIENCE COMMUNICATION* (Luc Pauwels ed., 2006).
15. Jennifer L. Mnookin, *Semi-Legibility and Visual Evidence: An Initial Exploration*, 10 *LAW, CULTURE AND THE HUMANITIES* 43 (2014).
16. As Elkins insists, the fact that visual culture is familiar does not mean that the study of visual culture should be easy. ELKINS, *supra* note 5, at 65.

required or assumed in order to “read” it (for example, a surgeon will defer to a radiologist’s reading of a CT scan). It also requires attention to what’s missing in the image—what is outside the frame of the surveillance camera, the data that have not been plotted. So I designed a course that would train students to ask the right kinds of questions about the knowledge particular images variously create, organize, represent, assume, require, and deny.

Learning to ask the right kinds of questions means practicing on a wide range of images. I start with famous historical photographs: Eadweard Muybridge’s galloping horse, Edward Curtis’s images of Native Americans, Dorothea Lange’s *Migrant Mother*. These pictures helped establish the language of photographic realism we have inherited. They are also distant enough from our experience that it is easier to notice the details that we use to decide what they mean (the curled fist of a child, the frayed hem on a sleeve). Then the class turns to images that are trending at the moment. These have ranged from wedding pictures released by Kanye West and Kim Kardashian West to the 2016 photograph of the five-year-old Syrian boy Omran Daqneesh in an ambulance. We talk about how to assess the veracity or authenticity of these photographs (affect, access, details), the conventions and cultural narratives they invoke or resist, the formal elements that affect our impressions (cropping, color, the interplay of image and text), the persuasive or ideological work particular photographs seem to lend themselves to, and the persuasive or ideological liabilities particular photographs seem to carry.



Next we turn to the way moving pictures are shot and edited. I start by contrasting early films shot in long takes from a single fixed camera with scenes

from D.W. Griffith's *Birth of a Nation* (1915), in which the practice of montage takes its modern form. Montage is the editing together of separate, juxtaposed shots to create an overarching sense of unity or coherence.<sup>17</sup> It is montage that creates the impression of the omnipresence of the camera, which in turn contributes to the problem of naïve realism.<sup>18</sup> Rather than identify with the human actors in the frame, montage editing invites the viewer to identify with the camera. The result is an artificial sense of expertise. The strangeness of these early films helps students recognize editing practices now so familiar that we fail to notice them. But we have to notice them, because the conventions of these editing practices have become our standard for realism. I then contrast a recent TV or movie scene in which the apparent realism and emotional stakes of montage editing are particularly evident, with examples from hand-held cameras and contemporary versions of the long take.<sup>19</sup>

This prepares us to view early-twentieth-century newsreels, recent bodycam, dashcam, and surveillance video, and “day in the life of” videos produced in personal injury and wrongful death cases. It also informs our viewing of footage from the Nuremberg trials. Not only did filmic evidence of atrocities play a central role in the Nuremberg prosecution, but Robert Jackson insisted that the trials themselves be filmed as evidence of their authority and integrity.<sup>20</sup> I assign a wide range of background readings to support these conversations, including photograph and film theory; legal opinions evaluating claims of censorship, the admissibility of photographs and moving pictures, and cameras in the courtroom; and relevant law review articles.

Graphic images are next. We begin with airport signs and apparently straightforward diagrams (an electrical circuit, an organizational chart) before we tackle graphics depicting phenomena like MTBE contamination plumes,<sup>21</sup> natural gas pipeline construction, and traumatic brain injuries. Again, here, I tend to pull from current events and high-profile cases; a wide range of images is readily available online. Background reading for these sessions includes texts on graphic design and Edward Tufte's chilling account of the way Boeing engineers' use of generic PowerPoint templates contributed to the

17. “A montage sequence serves a very useful purpose by condensing important plot points and developments . . . into a shorter, more manageable duration. The audience does not have to watch every aspect of these events to understand their results.” CHRISTOPHER J. BOWEN & ROY THOMPSON, *THE GRAMMAR OF THE EDIT* 106 (3d ed. 2013).
18. See DAVID BORDWELL, *Classical Hollywood Cinema: Narrational Principles and Procedures*, in *NARRATIVE, APPARATUS, IDEOLOGY* 24 (Philip Rosen ed., 1986).
19. I use a scene from the second episode of Season One of the HBO series *The Wire* (2002) as the montage example. For the long take, I use a scene from Episode Four of the first season of *True Detective* (2014) and a scene from *BIRDMAN* (2014).
20. See CHRISTIAN DELAGE, *CAUGHT ON CAMERA: FILM IN THE COURTROOM FROM THE NUREMBERG TRIALS TO THE TRIALS OF THE KHMER ROUGE* (Ralph Schoolcraft & Mary Byrd Kelly eds., 2013).
21. MTBE (methyl tertiary-butyl ether) is a gasoline additive whose seepage into drinking water is known to have dangerous health consequences.

2003 Columbia Space Shuttle disaster by suggesting misleading relationships between findings.<sup>22</sup> As in our conversations about photographic and filmic images, we focus on the way form creates meaning (color, font size, shape, relative location, empty spaces, implied connections). I also invite lawyers from both trial and corporate practice to talk about the use of visual products they (and others) create.<sup>23</sup>

Starting the course with a survey of visual representational forms eases students into a sense of the range of competencies that their practice might require. And students quickly recognize that background knowledge of social practices, stereotypes, and familiar cultural narratives is necessary to make sense of almost any particular image.<sup>24</sup> This recognition effectively pierces the naïve realism—mistaking the mediated, produced representation for a source of objective facts or direct experience of events—embodied in the Supreme Court’s treatment of dashboard camera video in *Scott* and *Plumhoff*.<sup>25</sup> It also helps students grasp the deeper lesson of naïve realism: Not only do people tend to believe that “their own perceptions and interpretations are essentially free of distortion,” but “differences in subjective interpretation . . . have a profound impact on the conduct of everyday social affairs.”<sup>26</sup>

The rest of the course explores this interaction between our subjective experience of images and the law. I assign psychological studies demonstrating that social stereotypes and categories influence the way “perceivers come to organize and structure the visual stimuli to which they are exposed.”<sup>27</sup> For example, a police officer may be quicker to “see” an indistinct object as a gun if he has just seen a black face. These “empirical demonstrations of social influences on vision”<sup>28</sup> inform our discussion of the outcomes in *California v. Powell* (in which a police officer was acquitted despite video of his role in the

22. EDWARD R. TUFTE, *THE COGNITIVE STYLE OF POWERPOINT: PITCHING OUT CORRUPTS WITHIN* (2d. ed. 2006).
23. Guest speakers have included my colleague Jay Mitchell, author of *Picturing Corporate Practice* (2016), and Chris Ritter, author of several books on trial graphics and strategies. <http://www.thefocalpoint.com/about/team/christopher-ritter>.
24. This aspect of visual literacy is related to the importance of cultural literacy for lawyers emphasized by several authors in this symposium. See generally *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (Peter Brooks & Paul Gewirtz eds., 1996); ANTHONY G. AMSTERDAM & JEROME S. BRUNER, *MINDING THE LAW* (2000).
25. See *Plumhoff v. Rickard*, 572 U.S. 765 (2014). On naïve realism in these cases, see Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009); Naomi Mezey, *The Image Cannot Speak for Itself: Film, Summary Judgment, and Visual Literacy*, 48 VAL. U. L. REV. 1 (2013); Jessica Silbey, *Evidence Verité and the Law of Film*, 31 CARDOZO L. REV. 1257 (2010).
26. Lee Ross & Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in *VALUES AND KNOWLEDGE* 117, 104 (Edward S. Reed, Elliot Turiel, & Terrance Brown eds., 1996).
27. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERS. SOC. PSYCH. 876, 878 (2004).
28. *Id.* at 877.

brutal beating of Rodney King) and *The People v. Orenthal James Simpson* (in which Simpson was acquitted to the surprise of many who had watched the trial on TV), as well as recent decisions by grand juries not to indict officers where there has been video evidence of lethal violence against black men. They also invite us to consider the way the representation of race, class, gender, and sexual orientation in our visual culture shapes what will constitute effective persuasion.

Indeed, W.J.T. Mitchell argues compellingly that visual representations generally, while “not reducible to language,” are nevertheless “as important as language in mediating social relations.”<sup>29</sup> On Mitchell’s account, the images and practices that comprise our visual culture act as “‘go-betweens’ in social transactions, as a repertoire of screen images or templates that structure our encounters with other human beings.”<sup>30</sup> In other words, the stereotypes, expectations, and stock stories we use to make sense of what we see now come to us largely through our visual culture. We employ the same practices of “everyday seeing” whether we are browsing through a magazine, viewing a Facebook news feed, choosing whom to ask for directions on the street, or evaluating surveillance video footage.<sup>31</sup>

A police officer does not see differently in his capacity as an officer of the law than he does when he is playing a video game or watching CNN. Nor does a client. Or a judge. As I have argued elsewhere, there is something inherently cinematic about the way Justice Alito (verbally) describes the police pursuit of Rickard’s vehicle in *Plumhoff*.<sup>32</sup> Justice Alito splices together images from three cruiser-mounted cameras to create a single account. And this single account—stripped of the ambiguity generated by multiple, limited viewpoints—forecloses the possibility of reasonable disagreement about the facts. Remarkably, Justice Alito is practicing the conventions of film editing at the same time he is mistaking film for reality.<sup>33</sup> But it is unremarkable that he describes what he sees by practicing montage editing, because montage editing has become a reflexive way of describing what we see—a mode of everyday seeing.

All of this has me convinced that sensitizing lawyers to the ways our visual culture informs legal analysis and the construction of social facts is an essential part of what visual literacy for lawyers must mean. So we read and discuss cases from areas of law where visual culture looms large: privacy, national security, pornography.<sup>34</sup> By this point in the course, students easily recognize

29. W.J.T. MITCHELL, WHAT DO PICTURES WANT? THE LIVES AND LOVES OF IMAGES 47 (2005).

30. *Id.* at 351.

31. *Id.* at 351, 356.

32. *Plumhoff v. Rickard*, 572 U.S. 765 (2014); see Ticien Sassoubre, *Knowing It When We See It: Realism, Melodrama, and the Epistemology of American Film*, in *TRIAL FILMS ON TRIAL* (Austin Sarat et al. eds., 2018).

33. MITCHELL, *supra* note 29, at 356.

34. In this part of the course we also discuss Errol Morris’s *STANDARD OPERATING PROCEDURE*

the inconsistency of the treatment of images in different legal contexts.<sup>35</sup> Sometimes images are treated as unmediated and objective; sometimes they are treated as inherently manipulative; sometimes they are treated as revealing the intentions of the people who made them;<sup>36</sup> sometimes two otherwise indistinguishable images are treated differently based on what a viewer believes about an invisible difference in the actual age of the participants.<sup>37</sup> Some of the inconsistency is related to differences in the way distinct doctrinal areas of law have historically interacted with visual representations: First Amendment claims ask different questions of video than Fourth Amendment claims; PowerPoint slides depicting a red plume of MTBE contamination are much less likely to be deemed prejudicial than graphic photographs of an accident victim's injuries. Some of the inconsistency is related to the near absence of official guidelines.<sup>38</sup> On one level, this inconsistency bears out Elkins' insistence on the diversity and specificity of images. But for our purposes, this part of the class demonstrates the way the conventions, assumptions, expectations, and practices we take for granted in our visual culture both drive and limit legal discourse. Instead of treating visual culture as ancillary to the social reality that is the province of law, lawyers need to understand that visual culture already permeates legal discourse, though in ways that we are unused to noticing.

Not only do visual representations that seem obvious or natural to us comprise the lens through which legal writers describe social facts, but images are present at the level of metaphor. Privacy is protected in a "penumbra" of the First Amendment;<sup>39</sup> "the eye of vigilance perceives the risk of damage" in negligence cases;<sup>40</sup> the list of such examples would be long. And our visual culture informs legal analysis at an even deeper level through the analogic structure of most legal reasoning.<sup>41</sup> In *Riley v. California*, the Court's Fourth Amendment analysis turned on whether looking at the digital information on

(2008); Seymour Hersh's reporting on Abu Ghraib; privacy in the context of data collection by social media platforms as well as the government; and Catharine MacKinnon, *ONLY WORDS* (1993).

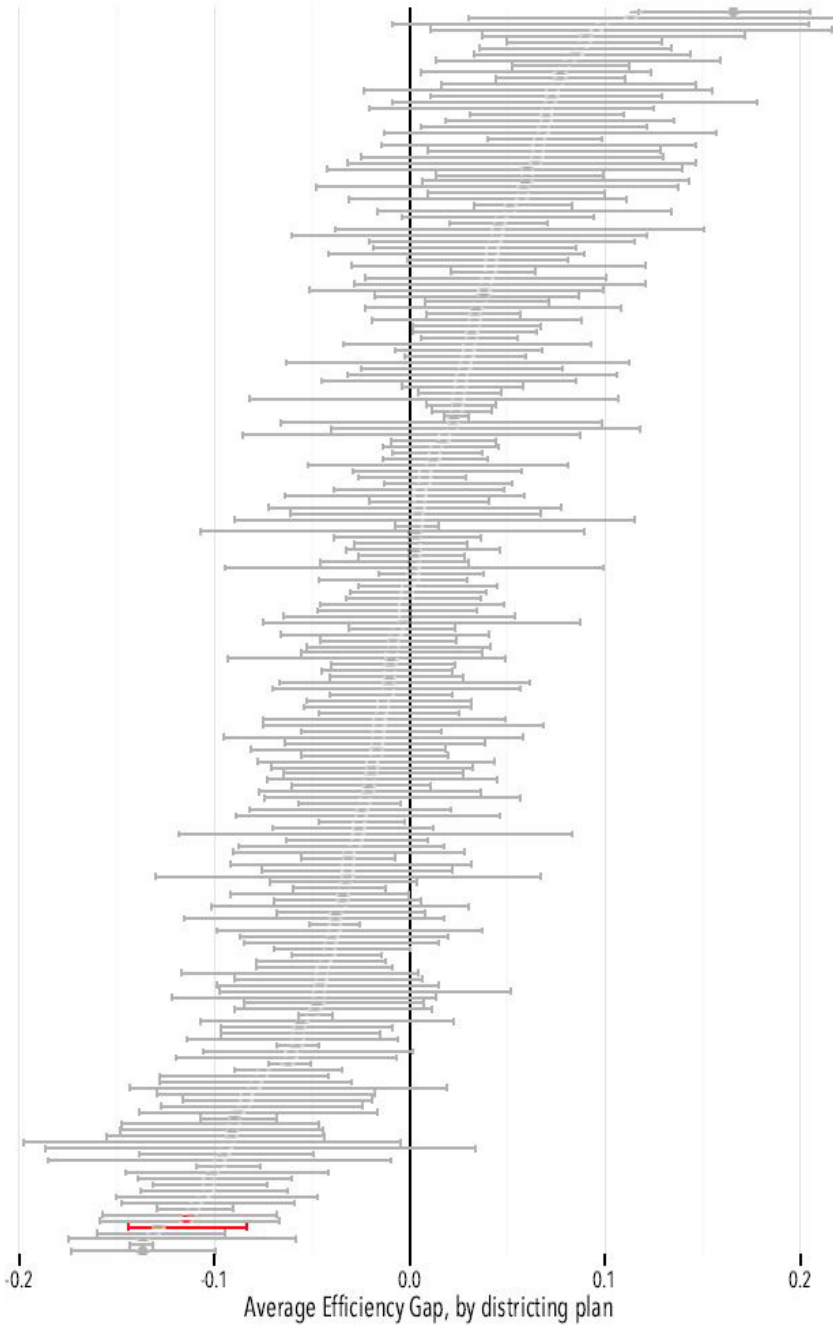
35. This incoherence has been well-documented. See MNOOKIN, *supra* note 3; SILBEY, *supra* note 3; PORTER, *supra* note 2.
36. *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136 (S.D. Cal. 2005).
37. *United States v. Williams*, 553 U.S. 285 (2008).
38. The few exceptions reveal just how rudimentary existing guidelines are. As an example, I assign *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial*, National Institute for Trial Advocacy (2001), <https://public.resource.org/scr/bid/8763731.pdf>.
39. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
40. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928).
41. On the analogic nature of legal reasoning, see Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996).



a person's cell phone is like looking in a physical container.<sup>42</sup> In *Citizens United v. FEC*, Justice Kennedy reasoned that if a movie made by a corporation *looks* like a movie made by Frank Capra, both movies are the same kind of (protected) speech, and a corporation must therefore be the same kind of (protected) speaker as a person.<sup>43</sup> Legal persuasion and visual culture converge where we reason through our habits of everyday seeing.

This year I have added two elements to the course. The first takes into account the effect that virtual reality and augmented reality will have on both our representational practices and our expectations for realism.<sup>44</sup> The second responds to the ascendance of something we might call information culture or big data in our understanding of social reality.<sup>45</sup> Visual forms (charts, graphs, tables) are being adapted to represent them, but information cultures' tools—statistics, probabilities, algorithms—are mathematical. Their operation is invisible until it is converted into visual form. The kind of “truth” that big data promises may soon supplant the authority of the image in our culture. But this kind of “truth” is not necessarily persuasive in the same way that an image is: A photograph invites viewers to experience vicarious expertise; a graph of the average efficiency gap resulting from different voting district plans does not.<sup>46</sup> As big data increasingly influences our visual culture, lawyers and judges will have to become competent in assessing and employing “facts” and arguments that rely on that data as it is visually rendered.

42. The Court decided that these were not the same kind of looking. *Riley v. California*, 134 S. Ct. 2473 (2014).
43. *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310 (2010). The theory of corporate personhood has a long and complicated history, and the holding in *Citizens United* has been criticized on other grounds. My point is to draw attention to the significance of Justice Kennedy's facile reliance on visual similarity. Individuals and corporations are alike, on the Court's account, because the speech of corporations and the speech of individuals share the same media.
44. See, for example, the work of the Stanford Virtual Human Interaction Lab, <https://vhil.stanford.edu>.
45. Here I am following Laura Marks's suggestion that “information culture, which is invisible,” has already supplanted popular culture in important ways. ELKINS, *supra* note 5, at 136; see also LAURA U. MARKS, *TOUCH: SENSUOUS THEORY AND MULTISENSORY MEDIA* (2002); ED FINN, *WHAT ALGORITHMS WANT: IMAGINATION IN THE AGE OF COMPUTING* (2017).
46. A redistricting case before the Court from the just-completed term offers an example. See Brief for Appellees at 15, *Gill v. Whitford*, 138 S. Ct. 1916 (2017).



from *Gill v. Whitford*