

Imagining Law: Visual Thinking Across the Law School Curriculum

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We are in the midst of a visual media revolution, and that revolution is spreading quickly into written law. Two examples from cases recently decided by the Supreme Court:

1) The government's brief in the Fourth Amendment case *Carpenter v. United States* used maps to argue that the cell site data-gathered by law enforcement in the case did not pinpoint the defendant's precise location in a way that would violate the defendant's reasonable expectation of privacy. At least one of these images—an "illustrative map of buildings" in the area where defendant was surveilled—was not in the record below.¹ Both of the illustrations are highly effective, contextualizing the government's position and simplifying what would otherwise be a wordy, complicated explanation of the positioning of cell towers in relation to the law enforcement activity at issue.²

2) An amicus brief that was (at least purportedly) filed on behalf of neither party in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* contained almost forty full-color images of wedding and celebration cakes.³ The photos support the idea on which the petitioner baker relied—that wedding cakes are works of art that should be subject to First Amendment protection. The brief's strong visual appeal could only have helped the Court reach its conclusion in favor of the baker.

These examples are not anomalies. Just like everything else, written law—despite a long tradition of black-and-white stodginess—is going multimedia. Lawyers and judges are now integrating images into briefs, judicial opinions,

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1. See Brief of Respondent at 25-26, *Carpenter v. United States*, No. 16-1402 (U.S., Sept. 25, 2017), 2017 WL 4311113.
2. See EDWARD TUFTE, *BEAUTIFUL EVIDENCE* 13 (2006) ("Sensibly mapped pictures nearly always outperform purely pictorial representations for presenting, explaining, and documenting evidence.").
3. See *passim*, Brief of Cake Artists as Amici Curiae in Support of Neither Party, *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4004524.

and pleadings.⁴ In the administrative realm, agencies are using sophisticated social media to inform citizens about proposed and final rules, and critics of those rules are deploying similar visual tactics to rally the opposition.⁵ Yet most law students might be surprised to learn of this multimedia legal culture based on their education and their textbooks. Students spend years on textual interpretation; images are relegated to the margins, if that. With few exceptions, the law school curriculum remains in thrall to the logocentric traditions of a century ago.

There are good reasons for our faithfulness to pedagogical tradition. Much of what bills itself as digital education seems to be all flash and no substance—wholly antithetical to the elegant complexity of Langdell’s enduring vision.⁶ And the digital world is an ever-present, often shallow, distraction.⁷ In fact, many law school instructors focus their efforts on keeping students *off* of the Internet, rather than encouraging further multimedia exploration.⁸ Moreover, most instructors are happy enough with their textbooks (or at least are used to their shortcomings) and have no wish for a total overhaul for a digital platform that sounds like it might be 1) expensive; 2) time consuming to adopt; and/or 3) gimmicky.

Notwithstanding these reservations, it’s time, thoughtfully, to integrate visual literacy and visual advocacy throughout the law school curriculum. Images are powerful tools both for teaching and for the practice of law. Visuals are an efficient and effective way to teach students legal concepts. People grasp images much more quickly than they grasp text, and they may better remember what they learned—although those very advantages carry their own interpretive risks.⁹ Mapping offers context and scale, combined with the visual ease of an image.¹⁰ Learning is enhanced by viewing maps and other

4. See Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1723-49 (2014) (showing examples of images in litigation documents).
5. See generally Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183 (2016) (documenting and critiquing the rise of visual media in the rulemaking realm).
6. See *Reimagining the Role of Technology in Education*, DEP’T OF ED. OFFICE OF EDUCATIONAL TECH. 7 (2017), <http://web.mit.edu/xtalks/Mitchell-US-Dept-Ed-xTalk-1-12-17.pdf> (noting the “digital use divide” between “learners who are using technology in active, creative ways to support their learning and those who predominantly use technology for passive content consumption”).
7. See generally NICHOLAS CARR, *THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS* (2010).
8. See, e.g., Kevin Yamamoto, *Banning Laptops in the Classroom: Is It Worth the Hassles?*, 57 J. LEGAL EDUC. 477 (2007) (noting that “use of laptops is linked not only to poor classroom discussion but also to decreased bar passage rates across the country”).
9. See generally Porter, *Taking Images Seriously*, *supra* note 4; Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 690 (2012) (noting that “because we process images so quickly and generally, we may stop looking before we realize that critical thought should be applied to them”).
10. See TUFTE, *supra* note 2, at 45 (stating that “[w]ell-designed and thoughtfully mapped pictures combine the direct visual evidence of images with the power of diagrams”).

visuals, but also by creating them: Visualization—including sketching, making diagrams and mapping—is a proven method for understanding and retaining complex information.¹¹ And these tools are widely applicable to law school learning. To take a notable example, Jay Mitchell’s beautiful book *Picturing Corporate Practice* uses a series of elegant visuals to teach corporate law from transaction planning to deals to board meetings.¹²

Beyond their role as learning tools, visuals are becoming a vital tool for the everyday practice of law.¹³ Photos, videos, or infographics may now be defining pieces of evidence—evidence that may be used by courts at very early stages of a case.¹⁴ In fact, in a very lawyerly twist, some advocates have successfully used images of documents as important visual evidence. For example, lawyers for death-row inmate Timothy Foster embedded color images of prosecutors’ notes into his petition for certiorari to support the claim that his murder conviction was unconstitutional on *Batson* grounds.¹⁵ The embedded images instantly conveyed—with an immediacy that mere verbal descriptions of those documents could not—that the prosecutors had conducted voir dire with the purpose of excluding black people from the jury. The Supreme Court granted Foster’s petition and ultimately agreed that Foster’s conviction was unconstitutional.¹⁶ As *Harris* and *Foster* demonstrate, visuals are doing heavy argumentative lifting in both civil and criminal litigation, and at very early—and very late—stages of cases. With ongoing technological advancements, this trend is likely to increase, and competent lawyers must be prepared to embrace it.

This essay suggests change through evolution, not revolution. It argues that it is possible—and worthwhile—to integrate visual learning and visual analysis into doctrinal, clinical, and writing courses without tossing your textbooks or reconceptualizing your pedagogical methods. And you don’t need to kill yourself, or even expose yourself to ennui, doing it. In that vein, this essay

11. See DANIEL L. SCHWARTZ, JESSICA M. TSANG & KRISTEN P. BLAIR, *THE ABCS OF HOW WE LEARN: 26 SCIENTIFICALLY PROVEN APPROACHES, HOW THEY WORK, AND WHEN TO USE THEM* 277 (2016) (explaining that “spatial representations help people see structure and search for relations across different pieces of information”); see also *id.* at 279 (arguing that visualization is a form of “distributed cognition” because it “offloads the demands of maintaining too much information in one’s mind simultaneously”).
12. JAY MITCHELL, *PICTURING CORPORATE PRACTICE* (2016).
13. See BRYAN GARNER, *THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS* 328 (3d ed. 2014) (“A picture can be worth . . . well, it can help win a lawsuit.”)
14. See, e.g., *Scott v. Harris*, 550 U.S. 372, 383–84 (2009) (finding no Fourth Amendment violation where it was “clear from the videotape that [the fleeing motorist] posted an actual and imminent threat” to others).
15. See Petition for Certiorari at 5–8, *Foster v. Chatman*, 136 S. Ct. 1737 (2016) (No. 14–8349), 2015 WL 2457657; see also Elizabeth Porter, *PROPS 17: Visual Appeals* (Sept. 2017), <http://propspaper.com/issues/issue-17/issue-17> (discussing impact of images in *Foster*).
16. *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016) (resting decision that Foster’s conviction was unconstitutional in part on “the persistent focus on race in the prosecution’s files”).

offers three low-friction, hands-on ways to incorporate a visual element into whichever courses you teach. Use these visually inspired ideas for topics that interest you, or when you see a video or photo in a case or in the news that captures your imagination.

If you find it difficult to deviate from your tried-and-true methods, it's OK to be a slacker about the visual. If you pay just a bit of attention to images in your courses, your students will grasp their significance immediately, and soon they will be taking the lead. After all, visual communication feels natural—easy, straightforward, accessible. It's important to ask students to get beyond that glossy surface to the ambiguities and complexities of visual presentations. At the same time, a slight sense of ease is no bad thing in law school.

I. Seeing the Obvious

The surest way to add a visual layer to your course is simply to give images some airtime. A few possible techniques:

a) Integrate images into your class presentations. Colorful PowerPoint slides with clip art don't count—the point is to use visuals to provoke active learning.

a. For example, have students look at examples of complaints or briefs or opinions that incorporate images. You can use documents that address legal issues you are currently covering, or you might prefer to select a compelling case from the current news cycle. Because I teach torts and civil procedure, I often use a complaint from a Ninth Circuit case in which a plaintiff police officer sued Burger King when employees spit on his Whopper at the drive-thru.¹⁷ It raises questions of products liability, personal and subject matter jurisdiction, choice of law, statutory interpretation, punitive damages, emotional distress damages, and certification to state courts. But the complaint is an easy read, at least on an empty stomach. Why? The centerpiece of the short complaint is a memorable—though thankfully low-resolution—camera-phone photo of the offending burger.¹⁸

Most of you might prefer something more highbrow, especially for an after-lunch class. And you can always include a document that makes an immediate visual impression, like the infamous three-page summary judgment motion in *Hillwood Investment Properties III, Ltd. v. Radical Mavericks Management, LLC*, which is essentially a photo with caption and signature block¹⁹—

17. See *Bylsma v. Burger King Corp.*, 706 F.3d 930 (9th Cir. 2013).

18. See Complaint for Damages, para. 2.5, at 3, *Bylsma v. Burger King Corp.*, 2010 WL 4702296 (D. Or. Apr. 13, 2010) (No. 10-CV-403), 2010 WL 2825380.

19. See World Champion Dallas Mavericks & Radical Mavericks Management's Motion for Summary Judgment at 2, *Hillwood Inv. Props. III, Ltd. v. Radical Mavericks Mgmt., LLC*, No. 10-05639 (Tex. Dist. Ct. June 22, 2011).

though the Mavericks example risks turning visual analysis into a punchline unless you accompany it with a more serious summary judgment brief (which the defendants in *Hillwood* in fact did). The important thing is to use unedited documents so that students work with legal arguments outside the casebook format. Ask students to analyze the role of the visual in the document. Where is the visual element in the document placed, and what work does it do in the argument? Who created it, and when? What time period does it cover? Could it have been edited, and if so, how? Is it evidence? If not, why is it included?

b. In addition to examining traditional images, such as photos, ask students to analyze a legal document that features a map, a graph, or another visual that was created by a party or by the court.

c. If time permits, have students find the local rules for your jurisdiction and determine whether the documents conform to their formatting requirements. What do the local rules say about the inclusion of an image in the document? (Likely answer: not much.)

b) Visual analysis is not limited to visual-intensive documents. Ask your students to analyze traditional words-only documents from a visual perspective too.²⁰ Try not to let doctrine weigh down this discussion. Instead, invite students to focus on the form and structure of the documents.

a. How do margins, spacing, justification, font, paragraph size, subheadings, and other typographic choices influence students' impression of a document?

b. Is the argument credible and well-supported? Does it evoke an emotional response? Is the formatting hiding a lack of substance?

c. Can you think of an image that might effectively advance the writer's aims?

c) Finally, ask students to use visual tools to demonstrate and organize their understanding of complex information. In many courses, there isn't time during class to do extensive writing assignments—but diagrams are quicker to create. Whether the topic is Fourth Amendment searches or Fifth Amendment takings, students can both test and demonstrate their learning through simple sketching.²¹ In addition, these student-created sketches can easily be shown to the class as a foundation for further discussion.

20. See MATTHEW BUTTERICK, *TYPOGRAPHY FOR LAWYERS: ESSENTIAL TOOLS FOR POLISHED & PERSUASIVE DOCUMENTS* (2010) (analyzing typography of legal documents in a startlingly interesting way).

21. See Lee Anne Fennell, *Picturing Takings*, 88 NOTRE DAME L. REV. 57 (2012) (using diagrams to elucidate takings law theory).

Studying legal documents as visual material will start students thinking about how stylistic choices—including the use of images but also subheadings, paragraph size, font choices, sentence length, and footnotes—enhance or denigrate legal arguments.

II. Interpreting Images

Another effective way to incorporate the visual into the classroom is to use images or videos to give students practice spotting and analyzing legal issues. The police dashcam video in *Scott v. Harris* provides a quintessential example, allowing students to discuss the summary judgment standard, qualified immunity, the Fourth Amendment, critical race theory, the jury system, appellate review, and the role of the Supreme Court, among other matters, by watching the video link in the opinion and reading the Court’s analysis of it.²² But there is no need to confine visuals to litigated cases. The late Professor Paul Miller, a master teacher at my law school, would have students watch clips from television shows each week and then assign them to write short papers identifying and analyzing all of the possible tort issues in each clip. In the digital era, endless materials are available to analyze—everything from news stories to excerpts from *Harry Potter* films (several of which are visual catalogs of due process violations). Students can either view the material together during class, or they can watch it at home and perform the analysis in class—perhaps applying what they learned to a second, similar video or image. When relevant, ask students to pay attention to cinematic qualities such as lighting, camera angle, music, viewpoint, narration, and production value. How do the creator’s aesthetic choices influence the viewer’s perception of what happened?

This type of on-the-spot visual analysis strengthens analytical muscles. And students may remember legal concepts better when those concepts are linked to visual—rather than merely textual—stories.²³ As is true with written materials, please keep in mind that some videos and images, particularly those involving graphic injuries, death, or severe emotional harm, may be severely disturbing to watch. Use of graphic visuals requires context and sensitivity.

Once again, this does not have to be a weekly or even a regular part of a course. Use visuals to provoke issue spotting and analysis when doing so fits within your other pedagogical plans. Students will continue to exercise these analytical skills when they view media on their own time.

22. 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, 848 (2009) (describing a study in which participants were asked to take “the *Scott* challenge” by watching the video and analyzing the actions of the police officer and the fleeing motorist).
23. See ULRICH BOSER, *LEARN BETTER: MASTERING THE SKILLS FOR SUCCESS IN LIFE, BUSINESS, AND SCHOOL, OR, HOW TO BECOME AN EXPERT IN JUST ABOUT ANYTHING* (2017) (explaining efficacy of visual learning).

III. Student-Led Visual Hypotheticals

Finally, you can inspire students to think visually about legal issues by soliciting visual examples from them. Assign students to find and submit an image from the news that captures a legal concept they are learning. The act of selecting an image and writing a brief analysis of its relevance is an effective way to help students learn and remember abstract concepts. Torts is particularly suitable for this: the newspaper will almost always feature something quirky, whether it's a video of an overturned container of hagfish caused by a negligent truck driver,²⁴ or a snapshot of a man attempting to set a swimming record in the Arctic sea.²⁵ But once students are focused on visualizing legal concepts, they will find relevant and often funny examples for even the most abstract elements of the law.

Once you have gathered student submissions, you might begin each class with a hypothetical based on a student's photo or video. The student responsible for submitting the image can serve as an expert on that idea. These visual hypos can provide an ideal writing prompt. Regardless of how you use them, student-created visual hypotheticals get students thinking in a complex, engaged way.

Conclusion

The above sampling of ideas demonstrates that visual learning—and visual advocacy—can easily and effectively be added to a wide range of law school courses without the need for a curricular overhaul. Once students begin to conceive of the law in visual terms, they will immediately notice and critique visual arguments, and many of them will instinctively reach for images in their legal writing. Today's students are fluent in, and saturated with, the visual vernacular of the modern era. They likely have sophisticated ideas of how this vernacular could be applied to the law. If students aren't doing this already, it's because all they see in law school is text. It's time for that to change. Law school classrooms, and law school students, are stuffed with multimedia potential. We can and should unlock it.

24. See Alex Horton, *Overtured Truck of "Slime Eels" Transforms Oregon Road into Highway of Nightmares*, WASHINGTON POST (July 14, 2017), https://www.washingtonpost.com/news/dr-gridlock/wp/2017/07/14/overtured-truck-of-slime-eels-transforms-oregon-road-into-highway-of-nightmares/?utm_term=.e2e4680fic83.

25. See Jonah Engel Bromwich, *A Freezing Swim to Call Attention to Warming Waters*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/world/europe/arctic-swim-lewis-pugh.html>.