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Orwell's Vision: Video and the Future of Civil Rights Enforcement

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ORWELL'S VISION: VIDEO AND THE FUTURE OF CIVIL RIGHTS ENFORCEMENT

Howard M. Wasserman*

Abstract

The future of the enforcement of civil rights and civil liberties is linked to video. The proliferation of recording technology enables everyone—law enforcement, suspects, and bystanders—to record police-public encounters on the streets and in the stationhouse. The result is a balance of power in which all sides can record most police-public encounters—Big Brother is watching the public, but the public is able to watch Big Brother. The effect of this balanced proliferation of technology is to place video (and audio) recording at the heart of much modern civil-rights litigation and the enforcement of constitutional liberties.

Video plays two roles in civil-rights enforcement, one at the back end and one at the front end of constitutional disputes arising from encounters between police and members of the public. At the back end is the question of what role those recordings play in enforcing constitutional rights and remedying constitutional violations captured on audio and video—as evidence in constitutional litigation (at trial and during pre-trial processes) under § 1983 and its federal equivalent, and as the basis for non-litigation remediation of any constitutional misconduct by government officials, such as settling lawsuits, disciplining offending officers, and creating or altering government policies to avoid similar misconduct in the future. Back-end use of video for civil-rights enforcement is complicated by two related considerations. First, film and literary theory show that it is a myth that video evidence is an unambiguous, objective, conclusive, singular, and clear reproduction of reality; in fact video evidence must be interpreted and construed (as with all evidence) and what a piece of video evidence means or signifies depends on who is watching, perceiving, and interpreting. Second is the recent path breaking *Harvard Law Review* study by Dan Kahan, Dave Hoffman, and Dan Braman, showing that video evidence is uniquely ripe for the effects of what they label cultural cognition, where the viewer's interpretation or the message she draws will be highly contextualized and individualized and likely affected by a viewer's identity-defining cultural characteristics of race, age, sex, socio-economic status, education, cultural orientation, ideology, and party affiliation. These insights together demand a level of caution—a degree of judicial humility in how certain they should be about what they (believe they) understand from the recording and the appropriate legal and policy steps to take in response. Most importantly, courts must not allow misunderstandings about video to expand the use of summary judgment to pull a case from the jury; it is for the jury to interpret video and decide video's meaning. Government policy makers and lawyers should be similarly cautious in using video in making non-litigation remedial decisions, especially in disciplining officers and settling litigation.

At the front end is the question of whether individuals possess a right to record police-public encounters as they occur and whether government can limit people's ability to use modern technology to create their own records of events. Government might restrict public recording in either of two ways—specific prohibitions on unconsented-to recording of conversations that include conversations by police officers performing official functions or enforcement of general rules of public conduct as to people attempting to record police-public encounters. The front-end question is whether the First Amendment provides the people a liberty to record such events in public spaces, to be the source of video evidence of police misconduct that will be used to resolve the underlying constitutional dispute. The answer to this question must be “yes,” in order to maintain that balance of power in availability and control of video evidence. Video still plays, and as technology advances increasingly will play, a substantial role in civil rights enforcement. Government therefore cannot have a monopoly on the ability to record police-public encounters.

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ORWELL'S VISION: VIDEO AND THE FUTURE OF CIVIL RIGHTS ENFORCEMENT

It is now evident that Orwell's vision was wrong. Modern technology has turned out to be the totalitarian state's worst enemy. . . . [I]t is the people who are watching the government, not the other way around.[†]

Introduction

Ric Simmons is half right on this point. "Video cameras are indeed everywhere, but they are embedded into cell phones and wielded by millions of individual citizens."¹ New portable technology—digital cameras, camera-ready cell phones, MP3 recorders, and other technology—enables the People to produce their own personal record of their lives and environment, including a record of their own confrontations with police and of encounters they witness between government officials and other members of the public.² And an ever-expanding bevy of internet sites—particularly You Tube, blogs, video blog ("vlogs"), and social-networking sites—enable them to disseminate those recordings directly to the world and to see and respond to what others have recorded.³

Law enforcement has responded by equipping itself with recording technology. Agencies use video to provide a record of encounters between officers and members of the public—interrogations and confessions,⁴ traffic stops,⁵ and high-speed chases⁶--with the multiple goals of deterring police misconduct and creating an objective evidentiary record of real-world events to establish whether a violation occurred.⁷ Police also are using their own hand-held surveillance cameras to observe, and preserve an evidentiary record of, public activities, including political protests.⁸

The result is a balance of power in which all sides can record most police-public encounters occurring on the street and in the stationhouse—Big Brother is watching the people, but the people are watching

[†] Ric Simmons, *Why 2007 is not Like 1984: A Broader Perspective on Technology's Effect on Privacy and Fourth Amendment Jurisprudence*, 97 J. CRIM. L. & CRIMINOLOGY 531, 533 (2007).

¹ Simmon, *supra* note ___, at 533.

² DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR AND PRIVACY ON THE INTERNET 164 (2007); TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 248 (2008); Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 638-39 (2004); Jessica Silbey, *Cross-Examining Film*, ___ MD. L. REV. ___, ___ (2008) (M.4) [hereinafter Silbey, *Cross-Examining*]; Simmons, *supra* note ___, at 532-33.

³ SOLOVE *supra* note ___, at 164; ZICK, *supra* note ___, at 213; Simmons, *supra* note ___, at 533 & n.5.

⁴ Drizin and Reich, *supra* note ___, at 641; Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 494-95 (1998); Jessica Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 COLUM. J.L. & ARTS 107, 116 & Appendix A (2005); Simmons, *supra* note ___, at 566; *see also* Justice Project, *supra* note ___, at 2.

⁵ Simmons, *supra* note ___, at 566 ("In fact, as video technology gets cheaper and smaller, it will soon become feasible to record everything a police officer driving a squad car sees and hears—as well as everything that police officer does during a traffic stop."); *see also* Bureau of Justice Statistics, *supra* note ___, at 28; SMART Briefs, *supra* note ___, at 1.

⁶ Scott v. Harris, 127 S. Ct. 1769 (2007); Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. ___ (2008) (M.2-4, 7-10) [hereinafter Kahan]; Silbey, *Cross-Examining*, *supra* note ___, at ___ (M.1-2).

⁷ Leo & Ofshe, *supra* note ___, at 494-95; Silbey, *Filmmaking*, *supra* note ___, at 116, 123-24; Simmons, *supra* note ___, at 566; Drizin and Reich, *supra* note ___, at 624.

⁸ ZICK, *supra* note ___, at 248; *see* Handschu v. Spec. Servs. Div., 2007 WL 1711775, *4 (S.D.N.Y. 2007) (describing police recording of protest rally by homeless advocacy group outside mayoral residence).

him. The effect of this balanced proliferation of technology is to place video recording⁹ at the heart of modern civil-rights litigation and the enforcement of constitutional liberties in controversies arising from police-public encounters. There is a self-reinforcing expansion in the amount of recording by all sides, the amount of public dissemination of those recordings, the amount of constitutional litigation that centers on video and audio recording evidence, and the degree to which enforcement of civil rights centers on video and audio recording.

This balance triggers two questions, one at the back end and one at the front end of any constitutional controversy. At the front end is the question of whether individuals can record police-public encounters as they occur and whether government can limit people's ability to use modern technology to create their own records of events. At the back end is the question of what role those recordings play in enforcing constitutional rights and remedying constitutional violations.

Consider a number of examples of the back-end role of video, in which individual encounters between police and members of the public have been captured on video and the video is used to determine what happened in the real-world events and the legality of the recorded conduct.

- In March 2001, Victor Harris lead Georgia county sheriffs on a six-minute, ten-mile nighttime chase at speeds up to 85-mph, proceeding largely along two-lane county roads and in and around a mall parking lot. At times the cars crossed the center line and wove around other cars. The chase ended when the pursuing officer, Deputy Timothy Scott, bumped the rear of Harris' car, causing the car to leave the roadway and crash down an embankment; the crash left Harris a quadriplegic. The entire chase was captured by a dash-mounted video camera in Scott's pursuing vehicle that began recording when Scott switched on his siren.¹⁰
- In September 2007, Brett Darrow was confronted by an officer in the St. George, Missouri, Police Department while Darrow was sitting in his car in a deserted commuter parking lot around 2 a.m. Darrow had a video camera mounted in the back of his car (installed, he claimed, following prior traffic confrontations with area police) that captured a profane tirade by the officer. The officer repeatedly threatened to arrest Darrow on any number of charges the officer could make up and to "ruin his fucking night." Darrow posted the video on the internet and the encounter quickly became a local and national story. The officer was fired shortly after the incident, largely on the strength of the city's review of the video; in March 2008, Darrow filed a § 1983 action against St. George and several officers.¹¹

⁹ Video cameras and the creation of video is complemented by the widespread availability of audio recording devices in the hands of millions of people. Both enable real-time recording of public events, recordings that can be used as evidence in litigation. Everything that can be said, good and bad, about video recording of public events and about video evidence is largely true of audio-recording evidence as well. *But see* Stewart v. City of New York, 2008 WL 1699797, *8 (S.D.N.Y. 2008) ("[T]he issue is not what Stewart said, but what he intended. Unlike the speed of a car, the meaning behind Stewart's statements is not capable of being captured on a videotape or audiotape.").

¹⁰ Scott v. Harris, 127 S. Ct. 1769, 1773-75 (2007); *see also* Beshers v. Harrison, 495 F.3d 1260, 1263 (11th Cir. 2007). The Scott Court decided to "let the video speak for itself," posting it on the Court's web site and including the link in the opinion. *See* Scott, 127 S. Ct. at 1775 n.5.

¹¹ Teresa Woodard, *St. George Police Officer Fired*, KTVI-myFOXstl.com, <http://www.myfoxstl.com/myfox/pages/News/Detail?contentId=4425068&version=1&locale=EN-US&layoutCode=TSTY&pageId=3.2.1> *Camera Rolls During Police Officer's Tirade*. For video, *see* <http://www.livevideo.com/video/PoliceBrutality/E50F08E74AD54B53AAF5C05137DF22E4/missouri-police-threaten-det.aspx>.

- In December 2005, Erik Crespo, a New York teen, allegedly shot a man in the face. Prior to charges being filed, a New York City detective interrogated Crespo at the police station about the shooting (which Crespo insisted had been in self-defense) and about the whereabouts of the gun used, and he tried to get Crespo to provide a written statement so the detective would not be accused of lying at trial. Crespo did not give a written statement. Testifying at trial, the detective denied this interrogation had taken place. Unbeknownst to the detective, however, Crespo had recorded the hour-and-fifteen minute interrogation on an MP3 recorder in his pocket; the recording was turned over to prosecutors and used as the basis for twelve counts of perjury against the detective.¹²
- In November 2007, the squad-car video of a traffic stop in Utah showed a state patrolman tasing an unarmed driver and shouting at the driver's pregnant wife when she attempted to intervene. Numerous copies of the video were uploaded to YouTube and viewed more than three million times. Review of the video convinced prosecutors that the driver had done nothing warranting an arrest and the state settled the driver's § 1983 action for \$ 40,000. But officials also concluded that the video did not show any misconduct by the officer warranting departmental punishment.¹³
- In May 2008, more than twelve Philadelphia police officers were caught on video pulling three men from a car during a traffic stop and beating and kicking them. The stop and beating were filmed by an overhead news helicopter and the encounter immediately became a national news story. Police officials used the videotape to identify the officers and most were removed from street duty almost immediately. The Philadelphia police commissioner stated that, based on a surface view of the video, it looked like the amount of force used was excessive, but that it was important not to rush to judgment.¹⁴ Four officers were fired and four others disciplined less than one month after the incident.¹⁵

The influence of video evidence extends beyond cases of individual police-citizen encounters to large-scale confrontations, usually public parades, protests, rallies, and other expressive public gatherings, that have devolved into confrontation, chaos, and often violence between police and protesters.¹⁶ Again, consider several illustrative examples:

Darrow's stunt apparently angered local law-enforcement officers and he reported them staking out his house days later. See http://governmentdirt.com/cops_gone_wild_st_george_county_missouri_cop_caught_on_video. Darrow's § 1983 complaint can be found at <http://www.aclu-em.org/pressroom/2008pressreleases/031808aclufilesuitinpolice.htm>.

¹² Jim Dwyer, *A Switch is Flipped, and Justice Listens In*, THE N.Y. TIMES, Dec. 8, 2007; Sean Gardiner, Transcript: Bronx Teen Catches NYPD Lies on MP3-Player, THE VILLAGE VOICE, Dec. 11, 2007.

¹³ Mike Nizza, *\$ 40,000 for Man Tasered on YouTube*, THE NEW YORK TIMES: THE LEDE, Mar. 11, 2008, <http://thelede.blogs.nytimes.com/2008/03/11/40000-for-man-tasered-on-youtube/index.html?hp>. The video copy viewed almost two million times on YouTube is at

http://www.youtube.com/watch?v=IMaMYL_shxc&eurl=http://www.volokh.com/posts/chain_1197068663.shtml. Orin Kerr wrote several blog posts discussing the ambiguity of the video. See Posting of Orin Kerr on the Volokh Conspiracy, http://volokh.com/archives/archive_2007_12_09-2007_12_15.shtml#1197327587 (Dec. 10, 2007).

¹⁴ Jon Hurdle, *Police Beating of Suspects is Taped by TV Station in Philadelphia*, THE N.Y. TIMES, May 8, 2008; Patrick Walters, *Philly Police Beating Caught on TV Video*, ASSOCIATED PRESS, May 7, 2008, available at <http://abcnews.go.com/TheLaw/wireStory?id=4801701>; http://www.huffingtonpost.com/2008/05/08/philadelphia-police-offic_n_100802.html. For on-line video, see <http://www.youtube.com/watch?v=OzFEY8u1rRw>.

¹⁵ Jon Hurdle, *Four Philadelphia police fired over filmed beating*, REUTERS, May 19, 2008, <http://www.reuters.com/article/domesticNews/idUSN1956317820080519>.

¹⁶ ZICK, *supra* note ____, at 187.

• *“Battle in Seattle:” The World Trade Organization conference in Seattle in 1999.* Tens of thousands of protesters descended on Seattle in the days leading up to the WTO meeting, engaging in parades, marches, and protest rallies, both permitted and within designated areas, as well as in violation of permissible regulations. While much protest activity was peaceful, a number of people engaged in violence against property in the downtown area and against police officers present to help keep the peace. Police responded not with expected “passive resistance” or large-scale arrests, but instead with non-lethal weapons (tear-gas, pepper spray, and rubber bullets) in attempts to disperse even peaceful crowds. The mayor then declared a civil emergency and imposed a general curfew and a limited curfew in the core area downtown where the convention was taking place and convention delegates were staying. Police enforced the last element by prohibiting “any demonstrations within that core area” for the rest of the conference,¹⁷ which one commentator describes as “effectively making it illegal for a time to express anti-WTO opinions in a large section of downtown Seattle.”¹⁸ There were more than 300 arrests of people who gathered in the restricted zone in violation of the limited curfew. Many of the encounters between protesters and police were captured on video and the video played a significant evidentiary role in subsequent litigation. The city prevailed on many (but not all) claims on summary judgment and eventually settled a number of lawsuits by peaceful protesters for \$ 1 million.¹⁹

• *Free Trade Area of the Americas (“FTAA”) meeting in Miami in 2003.* Other cities learned the lessons of Seattle, the result being “something of a siege mentality at public democratic events. At critical moments in public politics dissent is subject to a level of repression beyond the ordinary.”²⁰ One example of this lesson was the City of Miami in 2003, which anticipated the FTAA meeting by enacting a series of measures restricting protest and public expression in downtown Miami, all sunseting at the end of the meeting. Police rolled out a massive presence—more than 2500 officers patrolling the streets of downtown, decked out in riot gear—that generally attempted to push protesters out of the downtown area, using both non-lethal weapons to disperse crowds and executing mass arrests (approximately 230 people in all), almost all on charges that were dropped. Twenty-one protesters settled with the City of Miami, Miami-Dade County, and several other jurisdictions that provided police services, for more than \$ 560,000.²¹

• *Immigration Rally in May 2007 in Los Angeles’ MacArthur Park.* In May 2007, a large group of people planned a series of marches and rallies in support of changing immigration policies, all to culminate in a final rally in MacArthur Park. A crowd of 6000-7000 people gathered at the entrance to the park in late afternoon; police began pushing and compressing the crowd to keep it together and move it into the park, causing tensions to rise and the situation to devolve into confrontations between police and a small handful of protesters. Ultimately, police on the scene, dressed in riot gear, decided to disperse the crowd and clear the park, using batons and non-lethal munitions against protesters, peaceful and otherwise, as well as against members of the media, an effort captured on a number of videos.²² In the end, officers drove thousands of people from the

¹⁷ *Menotti v. City of Seattle*, 409 F.3d 1113, 1125 (9th Cir. 2005).

¹⁸ ZICK, *supra* note ____, at 188.

¹⁹ *Menotti*, 409 F.3d at 1120-26; ZICK, *supra* note ____, at 187-88.

²⁰ ZICK, *supra* note ____, at 186.

²¹ Michael Vasquez, *Miami OK’s Payout to FTAA Protesters*, CommonDreams.org, Oct. 12, 2007, <http://www.commondreams.org/archive/2007/10/12/4508/>; Tamara Lush, *FTAA Settlement Reached*, New Times, Oct. 4, 2007, <http://www.miaminewtimes.com/2007-10-04/news/ftaa-settlement-reached>. For on-line video, see <http://www.youtube.com/watch?v=e9g7FNcJ39U>; <http://www.youtube.com/watch?v=6qTJwEz7U3A&feature=related>.

²² LAPD Report, *supra* note ____, at 6-9.

park, deployed more than 140 less-lethal munitions and more than 100 uses of batons, causing injuries to 246 people.²³ A departmental report on the incident relied heavily on multiple videos of the events, created by both the news media and rally participants.²⁴

- In July 2008, during the monthly “Critical Mass” protest bike ride in New York City, a rookie uniformed officer picked out and tackled one rider, who then was arrested and held on charges of attempted assault and resisting arrest. A bystander video-recorded the ride and the tackle, which seemed to show the officer taking several steps from the middle of the road towards the curb and using his shoulder to knock the rider down. The video was viewed almost 1.2 million times in its first four days on YouTube, then picked up by news blogs and many mainstream media publications, including the New York Daily News. In addition, the officer filed an affidavit stating that the rider had aimed the bicycle at the officer and ridden into him, knocking them both down, a statement contradicted by the most common public take on the video. The officer initially was placed on modified assignment, pending investigation.²⁵

Together, these examples demonstrate two ways in which video, audio, and other new communications technology affect the framing and understanding of public interactions between the public and law police and of civil rights disputes arising from those interactions. First, video evidence alters the litigation and resolution of civil rights claims in constitutional litigation under § 1983 and its federal equivalent.²⁶ Courts approach video cases with a strong belief that video is a singularly powerful and unambiguous source of proof, one that holds great sway with fact-finders and that may be difficult for a party to overcome.²⁷ Video is the “proverbial smoking gun,” providing evidentiary certainty as to what happened in the real world.²⁸ More fundamentally, video is seen as a truthful, unbiased, objective, and unambiguous reproduction of reality, deserving of controlling and dispositive weight.²⁹ It may be taken as so singular and powerful that it obviates trials and fact-finders altogether. Judges may become increasingly willing to conclude, based on personal viewing and assessment, that a video recording of a law-enforcement encounter is capable of bearing only one reasonable meaning or message, that no reasonable juror could see anything different on that video during trial, and that conflicting non-video evidence can be discredited and ignored.³⁰

²³ LAPD Report, *supra* note ___, at 6-9.

²⁴ LAPD Report, *supra* note ___, at 69. For on-line video, see http://www.youtube.com/watch?v=gJvIqmw5_1s; <http://www.youtube.com/watch?v=QYVWAqSRBUU&feature=related>; <http://www.youtube.com/watch?v=ivn8PrZlAXo&feature=related>.

²⁵ See Sewell Chan, *Police Investigate Officer in Critical Mass Video*, THE NEW YORK TIMES, July 28, 2008, <http://cityroom.blogs.nytimes.com/2008/07/28/police-investigate-officer-in-critical-mass-video/index.html?hp>; See Affidavit of Police Officer Patrick Pogan in *People of the State of New York v. Long*, available at <http://www.thesmokinggun.com/archive/years/2008/0729081bike1.html>. For on-line video, see http://www.youtube.com/watch?v=oUkiyBVyTRQ&eurl=http://www.concurringopinions.com/archives/2008/07/saved_by_pervas.html (video posted July 27, 2008; viewing statistics as of July 31, 2008); see also Posting of Frank Pasquale on Concurring Opinions, http://www.concurringopinions.com/archives/2008/07/saved_by_pervas.html#more (July 28, 2008).

²⁶ *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

²⁷ Silbey, *Cross-Examining*, *supra* note ___, at ___ (M.2); Jessica Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493, 508-09 (2004) (hereinafter Silbey, *Critics*).

²⁸ Silbey, *Critics*, *supra* note ___, at 550;

²⁹ Silbey, *Cross-Examining*, *supra* note ___, at ___ (M.2); Silbey, *Filmmaking*, *supra* note ___, at 111; Silbey, *Critics*, *supra* note ___, at 508-09.

³⁰ See *infra* notes ___ and accompanying text.

Such was the case in *Scott v. Harris*,³¹ where the Supreme Court held that the video of the high-speed chase justified summary judgment in favor of the defendant police officer on an excessive-force claim, because all non-video evidence and all competing interpretations of the video were “plainly contradicted” by what the Court understood as the video’s singular message.³² Several lower courts have wielded this new power to consider summary judgment on “brute sense impressions”³³ of video, with varying results.³⁴ The open question, post-*Scott*, go to how far courts will take this power and in what direction.³⁵

Second, video triggers a range of non-litigation responses and resolutions by government lawyers and policy makers to the recorded encounter. These may include settlement of litigation, as in many of the protester cases;³⁶ dropping criminal charges; administrative and personnel actions against the officers involved (firing, suspending, reassigning), as in the wake of the LAPD report;³⁷ and changes to departmental policies, training, and procedures.³⁸ Video also enables members of the public to frame the public perception of a police encounter.³⁹

But assumptions about the conclusiveness of video may be more myth than reality.⁴⁰ Jessica Silbey applies ideas of film and literary theory to argue that film, “like any representational form, must be interpreted, and its specific language and its way of constructing meaning must be accounted for.”⁴¹ What a piece of video evidence means or signifies depends on who is watching, perceiving, and interpreting.⁴² Moreover, a recent *Harvard Law Review* study by Dan Kahan, Dave Hoffman, and Dan Braman reveals that video evidence is uniquely ripe for highly contextualized and individualized interpretations, understandings likely affected by a viewer’s identity-defining cultural characteristics of race, age, sex, socio-economic status, education, cultural orientation, ideology, and party affiliation.⁴³ These arguments together suggest that video evidence should not blithely be accepted as unambiguous, singular, and objective, and thus an entirely truthful reproduction of real-world events.

Armed with a clearer understanding of video and audio recording and its evidentiary function, judges, jurors, policymakers, and members of the public should better understand how to appropriately use video. A level of caution is necessary—a degree of humility in how certain viewers should be about what they

³¹ 127 S. Ct. 1769 (2008).

³² *Id.* at 1775-76; Kahan, *supra* note ____, at ____ (M.9).

³³ Kahan, *supra* note ____, at ____ (M.63).

³⁴ *See, e.g.*, *Marvin v. City of Taylor*, 509 F.3d 234, 239 (6th Cir. 2007); *Beshers v. Harrison*, 495 F.3d 1260, 1267 (11th Cir. 2007); *Marion v. City of Corydon*, 2008 WL 763211, *1 & n.1 (S.D. Ind. 2008); *but see Green v. New Jersey State Police*, 246 Fed. Appx. 158, 159 & n.1 (3d Cir. 2007).

³⁵ Kahan, *supra* note ____, at ____ (M.60) (“In the aftermath, too, of *Scott*, judges might well feel emboldened to give more decisive weight to the factual inferences they themselves are inclined to draw from videos or photographs.”).

³⁶ ZICK, *supra* note ____, at 210; *see Nizza, supra* note ____ (discussing settlement in Utah taser case); Vasquez, *supra* note ____ (discussing settlement in Miami FTAA cases).

³⁷ LAPD Report, *supra* note ____, at 70.

³⁸ *Id.* at 70-77.

³⁹ *See ZICK, supra* note ____, at 248.

⁴⁰ Silbey, *Cross-Examining, supra* note ____, at ____ (M.11).

⁴¹ Silbey, *Critics, supra* note ____, at 519.

⁴² *Id.*

⁴³ Kahan, *supra* note ____, at ____ (M.38).

(believe they) see or understand from the recording and the appropriate steps to take in response.⁴⁴ As Silbey argues, filmic evidence is important and beneficial and it promotes justice, but it is not a cure-all, being merely “one version of the events . . . of which there are likely to be many.”⁴⁵ A healthy respect for procedural details, for other actors in the process, and for diverse cultural characteristics within society further counsels judicial caution, a “mental double-check” before a court grants summary judgment in the face of culturally based interpretative differences.⁴⁶ It is a mistake to over-emphasize or over-weigh video’s evidentiary usefulness. And it is a mistake to depart ordinary procedures, as by expanding summary judgment, given the real (but not fully acknowledged) limits on video as a type of proof.⁴⁷

At the front end of civil-rights disputes, the video/civil rights link lies in determining who has the power, right, and ability to record events in public and to create evidence of police-public encounters. This question implicates distinct constitutional concerns. The increasing numbers of people equipped at all times with recording devices means that “everyone can snap up images, becoming amateur paparazzi.”⁴⁸ Alternatively, and more positively, we might say everyone can become a chronicler of life.⁴⁹ This includes becoming a chronicler of coercive and arguably unlawful confrontations between law enforcement and the public and the creator of the newly important video evidence when those confrontations produce litigation.

The antecedent constitutional question is whether members of the public have a positive liberty, grounded in the First Amendment, to record public-police encounters in public spaces and to be the source of video evidence of police misconduct, whether for litigation, public dissemination, or both. For Simmons’s basic point—the People are using technology to watch, and thus to check, government—to hold, the answer must be yes, so as to maintain the balance of power in control of video evidence. Big Brother cannot stop the People from watching him.

Courts will answer this question through constitutional challenges to police interference—either express prohibitions on recording or through enforcement of general rules of public conduct—with efforts by members of the public to record their own or others’ public encounters with police. The outcomes of these “secondary” challenges to restrictions on public video and audio recording at the front end of the dispute determine the real effect that recorded evidence, including evidence from the “People who are watching the government,”⁵⁰ will have on “primary” litigation over the constitutionality of the initial police-public encounter at the back end.

Again, some examples:

⁴⁴ See *infra* notes ___ and accompanying text.

⁴⁵ Silbey, *Critics*, *supra* note ___, at 114 & n.21.

⁴⁶ Kahan, *supra* note ___, at ___ (M.59); *id.* at ___ (M.44).

⁴⁷ See *infra* notes ___ and accompanying text.

⁴⁸ SOLOVE, *supra* note ___, at 164.

⁴⁹ *Id.* (quoting Katie Dean)

⁵⁰ Simmons, *supra* note ___, at 533.

- In October 1998, Michael Hyde was pulled over while driving for having an excessively loud exhaust system and an unlit rear light. The stop quickly became confrontational, either because Hyde was loud, argumentative, and uncooperative, or because everyone involved was bickering and using profanity. Hyde was pat-searched and items pulled from the car and inspected. Because the stop “had gone so sour,” Hyde was allowed to leave with a verbal warning. Unbeknownst to the officers, however, Hyde recorded the entire encounter with a hand-held tape recorder. Several days later, Hyde filed a formal departmental complaint against the officers involved in the stop and submitted the audio tape as substantiating evidence. The officers were exonerated following an internal investigation. Meanwhile, Hyde was charged and convicted on four counts of illegal wiretapping under Massachusetts law, which prohibits all secret or unauthorized recording of oral conversations and allows of no exceptions for communications with law-enforcement officers.⁵¹

- In October 2002, Allen Robinson videotaped state police officers conducting searches of trucks along a public highway while he was standing 20-30 feet away on private property, with the owner’s permission. The plaintiff previously had complained to a state legislator about the allegedly unsafe manner in which state police conduct these searches and the video was in further support of his petition activities.⁵² His prior efforts to record these inspections, two years earlier, had resulted in his arrest and conviction for harassment. This time, police again ordered Robinson to stop filming, confiscated his camera, threatened to erase the tape, arrested him, and cited him for harassment, charges that ultimately were dismissed at trial.⁵³

Recording evidence is beneficial to civil rights enforcement and to the ability of the public to call government to account for its officers’ misconduct. Ultimately, video and audio recording does and should play a role in civil-rights litigation and civil-rights policymaking, as important probative evidence to be used at the back end of litigating, determining, and remediating constitutional misconduct. The details of that role depend on rules that strike a proper evidentiary and procedural balance between video’s benefits and its limitations. Having recognized that recording evidence will play some (and increasingly prominent) role at the back end of police-public encounters, positive legal rules and law enforcement actions cannot limit the availability of recording evidence by restricting members of the public from using the resources and technology at their disposal to obtain and disseminate video at the front end of those encounters.

II. Civil Rights and Video

A. Civil Rights Litigation

The illustrative civil-rights incidents described in the Introduction divide into three broad categories of claims in which video plays a real-world or evidentiary role.⁵⁴ Video and audio recording will be central to all three categories of cases—at the front-end for its role in the real-world events triggering the

⁵¹ Commonwealth v. Hyde, 750 N.E.2d 963, 964-65, 966 (Mass. 2001).

⁵² Robinson v. Fetterman, 378 F. Supp. 2d 534, 538-39 (E.D. Pa. 2005)

⁵³ *Id.*

⁵⁴ For present purposes, I limit the focus to controversies of allegedly unconstitutional conduct by law-enforcement officials.

police-public confrontation and at the back-end in evidentiary use of recordings in remedying the purported constitutional violation captured on film.

The first category involves straight-forward Fourth and Fifth Amendment claims based on primarily individual interactions between police and members of the public, particularly criminal suspects. We can sub-divide this category further: interactions occurring indoors, namely custodial interrogations and confessions,⁵⁵ and interactions occurring in public, involving traffic stops, high-speed chases, *Terry* stops, and other personal on-the-street encounters.⁵⁶

The second category includes claims arising from political parades, rallies, protests, and other expressive public gatherings that devolve into conflict, confrontation, and occasionally violence. This category typically involves hybrid claims. There is a Fourth Amendment component, with individuals claiming they were subject to wrongful arrest or excessive force, and a First Amendment component, with protesters claiming that officers acted in a way that abridged their liberty to speak.⁵⁷ The hybrid nature, as well as the larger number of people involved in mass-protest cases, requires this be a distinct category. The free-speech element places a different gloss on events, because the propriety of the arrest or use of force for Fourth Amendment purposes depends in part on whether the citizen was engaged in protected expressive activity and the details of the police response to that activity. The First Amendment claim often is more difficult to prove, as courts require proof that the officer was motivated to chill or deter protected speech because of opposition to the speaker's message.⁵⁸ And the unique circumstances of a large, crowded public protest creates both increased opportunities for unconstitutional interactions between police and the public, as well as increased opportunities for recording evidence by multiple sources than in the typical individual Fourth Amendment interrogation or traffic-stop case.

This category grows out of the evolution of public space and the devaluation of public protest in those spaces. Timothy Zick argues that public expression and public contention have been “institutionalized,” whereby most public protest has been managed into a routinized and neutered state.⁵⁹ Protests occur under a regime of “negotiated management” between protesters and government, where protester and protest target agree to minute details as to the timing, routes, locations, participation, and all aspects of large-scale expressive events.⁶⁰ As a result, public expression is less spontaneous, more

⁵⁵ Drizin and Reich, *supra* note ____, at 641; Leo & Ofshe, *supra* note ____, at 494-95; Silbey, *Filmmaking*, *supra* note ____, at 116 & Appendix A; Simmons, *supra* note ____, at 566; *see also* Justice Project, *supra* note ____, at 2.

⁵⁶ *See* Simmons, *supra* note ____, at 566 (“In fact, as video technology gets cheaper and smaller, it will soon become feasible to record everything a police officer driving a squad car sees and hears—as well as everything that police officer does during a traffic stop.”); *see also* Bureau of Justice Statistics, *supra* note ____, at 28; SMART Briefs, *supra* note ____, at 1; *supra* notes __ and accompanying text.

⁵⁷ *See* *Menotti v. City of Seattle*, 409 F.3d 1113, 1149-50, 1151-55 (9th Cir. 2005).

⁵⁸ *Id.* at 1155.

⁵⁹ ZICK, *supra* note ____, at 168.

⁶⁰ *Id.* at 169-70.

organized, more professional, and more controlled in terms of where protesters can go and when and how.⁶¹ And protest speech carries less sting.⁶²

Complementing this development is what Zick calls the “militarization” of public spaces,⁶³ which increases the likelihood of police-protester confrontations and clashes. Protest crowds likely will be larger; given the requirement of permits and elaborately negotiated details, there will be fewer rallies and marches and the single professional, organized rally may constitute the lone opportunity for members of the public to speak and be heard on the streets.⁶⁴ Recognizing the likelihood of larger crowds, police respond with a massive presence and a willingness (if not explicit policy) to use quickly escalating force, to disperse crowds (even peaceful ones), and to effect large-scale mass arrests whenever protests move, in numbers or actions, beyond what had been negotiated or expected.⁶⁵ Zick argues that much of what happened in Seattle—police were caught off-guard and too willing to jump quickly to the use of force and crowd dispersal, resulting in an escalation of conflict.⁶⁶ The lesson for other cities from Seattle was to similarly move directly to force, crowd dispersal, and mass arrests at the first sign of large crowds.⁶⁷ Under such conditions, confrontation between police and protesters becomes almost inevitable, because when “officials gird for battle and commit to maintaining a certain kind of public order the incidence of force or violence may increase.”⁶⁸

The final category includes what I call secondary civil rights cases, in which the constitutional challenge is to police effects at the front end to prevent member of the public from recording a law-enforcement encounter, whether her own encounter or an encounter between police and other members of the public.⁶⁹ The question here is to what extent government can prohibit surreptitious or unconsented-to recording of police officers performing their official functions in public.⁷⁰ Or, absent a direct prohibition, to what extent can officers stop or interfere with individuals’ efforts to record officers performing public functions, as by ordering them to stop recording, confiscating the camera or recorder, and, perhaps, arresting them? The answers move us into uncharted and under-theorized First Amendment issues.⁷¹

B. Finding Video

Video recordings for use as back-end evidence may come from any or all of three sources.

⁶¹ *Id.* at 170.

⁶² *Id.* at 169 (“The overarching aim of negotiated management is to achieve predictability for public protests.”); *id.* at 170.

⁶³ *Id.* at 183.

⁶⁴ *Id.* at 169-70, 212.

⁶⁵ *Id.* at 187.

⁶⁶ *Id.* at 187.

⁶⁷ LAPD Report, *supra* note ___, at 32-33.

⁶⁸ ZICK, *supra* note ___, at 210.

⁶⁹ See *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005); *supra*.

⁷⁰ See *Commonwealth v. Hyde*, 750 N.E. 2d 963, 964-65 (Mass. 2001).

⁷¹ Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 Ohio St. L.J. 249, 254-55 (2004); *infra* Part V.

The most common source, particularly in individual police-citizen encounters, is law enforcement itself. Several states require electronic recording (audio or video) of all interrogations and confessions and a number of other states have considered or are considering similar legislation.⁷² In addition, many individual police departments and sheriff offices throughout the country have adopted individualized recording policies.⁷³ Commentators view recording as the solution to protecting against unfounded claims of false and coerced confessions, as well as to preventing and deterring officer misconduct and ensuring department accountability for actual misconduct, all by providing objective proof of what happened in the interrogation room.⁷⁴ There has been a similar trend towards equipping police cars with video cameras, again with the goal of accurately capturing the encounter and deterring police violations. According to the most recent report by the Bureau of Justice Statistics, 60 % of all local police departments and 66 % of sheriffs' offices used video cameras in public, most commonly in patrol cars.⁷⁵ Costs often are cited as the reason that car-mounted cameras are not more widespread, suggesting a broader desire to make use of such video evidence.⁷⁶ We can expect the decision in *Scott*, where the officer's defense to the excessive-force claim was dispositively established by the presence of video, to accelerate the use of car video.⁷⁷ Law enforcement also has begun using video for broader public surveillance of political protests and rallies, relying on both mounted stationary cameras and hand-held equipment.⁷⁸

The second source is the news media that cover public encounters. Media coverage of public expression, and government response to public expression, has a storied interaction with the enforcement of civil rights. Television coverage of peaceful protesters in the civil-rights era South attacked with police dogs and fire hoses is widely credited with rousing northern whites to support the cause of civil rights, leading ultimately to the Civil Rights Act of 1964.⁷⁹ Media footage also frequently provides police, prosecutors, and the court with important evidence.⁸⁰ News agencies typically are willing to share

⁷² Five states and the District of Columbia presently require electronic recording of interrogation and/or confessions for all or certain crimes. See Silbey, *Filmmaking*, *supra* note ____, at 175 (Appendix); Justice Project, *supra* note ____, at 1; cf. Hyde, 750 N.E.2d at 969 n.9 (citing Commonwealth v. Diaz, 661 N.E.2d 1326 (Mass. 1996)) (recognizing police-controlled recording as "good practice").

⁷³ Justice Project, *supra* note ____, at 1.

⁷⁴ Drizin & Reich, *supra* note ____, at 622; Silbey, *Filmmaking*, *supra* note ____, at 121-24; Simmons, *supra* note ____, at 566; see also Justice Project, *supra* note ____, at 1; SMART, *supra* note ____, at 2.

⁷⁵ BJS Report, *supra* note ____, at 28.

⁷⁶ SMART, *supra* note ____, at 1.

⁷⁷ See *infra* notes __ and accompanying text.

⁷⁸ ZICK, *supra* note ____, at 247-48; see Handschu v. Spec. Servs. Div., 2007 WL 1711775, *4 (S.D.N.Y. 2007) (describing police recording of protest rally outside mayoral residence by homeless-advocacy group); but see ZICK, *supra* note ____, at 254-55 (arguing that government surveillance of peaceful expressive activities raising serious First Amendment chilling concerns on protest speech).

⁷⁹ MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 435 (2004); Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1518-19 (2006); Joel K. Goldstein, *Approaches to Brown v. Board of Education: Some Notes on Teaching a Seminal Case*, 49 ST. LOUIS U. L.J. 777, 801 (2005).

⁸⁰ In *United States v. Guerrero*, 667 F.2d 862 (10th Cir. 1982), the defendant was charged with assaulting a member of Congress by throwing eggs at Congressman John Anderson, who at the time was an independent presidential candidate. The prosecution offered media-shot video footage of eggs being thrown from the off-camera area in which Guerrero has been standing, although it did not show who had thrown them. The jury convicted, in part on the strength of the video. *Id.* at ____. Silbey holds *Guerrero* as an example of court and jury tendency to over-weigh video evidence. The video did not show who had thrown the eggs (only that they had come

outtakes with law enforcement and, in any event, reporters' unused materials typically are subject to subpoena.⁸¹

The import of the media as a source of video evidence ties to the new institutionalization of public protest. Protests are fewer and larger, subject to greater restrictions, controls, and limitations in advance, and met with substantial presence of police seeking to maintain order, all of which increases the likelihood of confrontation between police and protesters.⁸² The potential for conflict makes political rallies more attractive media events, resulting in more press coverage.⁸³

The third, and increasingly common, source is the public itself, the key to Simmons's counter-Orwellianism. Equipped with small recording devices (cameras with camera and recording capability, MP3 recorders, hand-held digital cameras, microscopic tape recorders), individuals are able to record the world around them—the events they witness and the events in which they take part.⁸⁴ These events include individual encounters with police or political rallies in which the recorder is a participant. This is not necessarily a new phenomenon; in *Fordyce v. City of Seattle*, the plaintiff, a member of the parading group, had volunteered to video the march for “local television production,” presumably public-access cable, when he scuffled with, and was arrested by, police who attempted to dissuade and prevent him from recording the events.⁸⁵

Recording technology now is smaller, easier to operate, easier to hide, and more pervasive, expanding personal opportunities to record events.⁸⁶ That expansion combines with the development of new means of disseminating audio and video recordings to a mass audience.⁸⁷ The most prominent of these is the web site YouTube,⁸⁸ which draws more than one hundred million viewers each day and which hosted an average of 65,000 new videos per day in 2006.⁸⁹ Additionally, a vast array of blogs, vlogs (video blogs), social-networking sites, and other internet sites have developed as information-distribution sources.⁹⁰ Many are dedicated to posting photos and videos from ordinary people for wide public viewing and discussion, all with the goal of getting new and wider information to the world, whether of broad

from a crowd of people in Guerrero's direction) and there was no strong witness testimony that it had been the defendant. But, Silbey argues, the video made it easy for the court to decide the defendant's guilt by providing the last and best word as to what happened. Silbey, *Critics*, *supra* note ___, at 515-16.

⁸¹ *Zurcher v. The Stanford Daily*, 436 U.S. 547, 565 (1978); In re Grand Jury Subpoena, 201 Fed. Appx. 430, 431-32 (9th Cir. 2006) (affirming contempt-of-court citation against person who refused to appear before grand jury and provide copies of video footage of public protest); *but see Ore. videographer vows to defy subpoena for footage*, ASSOCIATED PRESS, July 13, 2008 (discussing independent videographer refusing to turn footage of protest rally and stun-gun arrest over to grand jury).

⁸² ZICK, *supra* note ___, at 169-70, 210; *supra* notes ___ and accompanying text.

⁸³ ZICK, *supra* note ___, at 213.

⁸⁴ SOLOVE, *supra* note ___, at 164; ZICK, *supra* note ___, at 248; Drizin and Reich, *supra* note ___, at 638-39; Silbey, *Cross-Examining*, *supra* note ___, at ___ (M.4); Simmons, *supra* note ___, at 532-33.

⁸⁵ *Fordyce v. City of Seattle*, 55 F.3d 436, 438 (9th Cir. 1995).

⁸⁶ ZICK, *supra* note ___, at 248; Silbey, *Cross-Examining*, *supra* note ___, at ___ (M.4); Simmons, *supra* note ___, at 532.

⁸⁷ The expansion in who can record and disseminate information blurs the lines between recording by news media and recording by members of the public. Such blurring of lines only matters if laws, such as reporter shield laws, attempt to draw distinctions between journalists and others as to who must comply with orders to turn over to the courts potential video evidence. That is beyond the scope of this paper, although might present an interesting future avenue of discussion.

⁸⁸ www.youtube.com.

⁸⁹ SOLOVE, *supra* note ___, at 164.

⁹⁰ *Id.* at 21-30; Simmons, *supra* note ___, at 532.

public interest or narrow private interest.⁹¹ The person recording a police-public encounter need no longer be even a purported free-lance journalist seeking to capture events for mainstream news sources.⁹² Every person is a potential recorder.

One might deride these developments as enabling everyone to become “amateur paparazzi.”⁹³ Or one might welcome them as empowering the public as a whole to become empowered to document how government treats its community and, where appropriate, to expose government misconduct to the nation and to call government officials to account.⁹⁴ It also shows how far society has come in the acquisition and dissemination of recorded evidence. The infamous case of Rodney King—a bystander happened upon LAPD officers using apparently excessive force in arresting a driver and videotaped the incident for public consumption⁹⁵--arguably was an outlier in 1991, dependent on the mainstream media running with the video and the story. Technological improvement means that recorded evidence of police-public encounters, good and bad, will be a more-frequent occurrence and more widely disseminated, within and without the news media.⁹⁶ Many of the incidents discussed in the Introduction became national stories after video appeared in non-mainstream media sites.⁹⁷

Timothy Zick argues that new technologies for recording and disseminating expression enable groups to overcome the ever-increasing limits on public speech that trigger speech-based confrontations between police and protest groups. Expressive groups get their messages and images out immediately, reaching a wide audience with their own narrative about the encounter with police, unfiltered and unaltered, by mainstream media or the police.⁹⁸ Videos purporting to show abridgments on a group’s expression (especially violent abridgements) become part of the group’s broader message⁹⁹—this is what we wanted to say and this is how the police prevented us from expressing our ideas and making ourselves heard.

C. The Nature and Myth of Video Evidence

Video is uniquely important in civil-rights actions arising from police-public confrontations. These often are he-said/he-said cases, turning on competing testimony of officer and citizen, the only witnesses to contested events in the interrogation room or on a deserted parking lot.¹⁰⁰ There often are disparities in witness credibility determinations, notably a strong tendency of courts and juries to believe police officers in excessive-force cases.¹⁰¹ Protest cases involve rapidly developing events in a large crowd of people,

⁹¹ SOLOVE, *supra* note ____, at 163-64.

⁹² See *Fordyce*, 55 F. 3d at 438; *Connell v. Town of Hudson*, 733 F. Supp. 465, 466 (D.N.H. 1990).

⁹³ SOLOVE, *supra* note ____, at 164.

⁹⁴ *Id.*; Simmons, *supra* note ____, at 533.

⁹⁵ **Book on King**; Simmons, *supra* note ____, at 533 n.5; see also *Commonwealth v. Hyde*, 750 N.E. 2d 963, 971-72 & nn.1-2 (Mass. 2001) (Marshall, C.J., dissenting).

⁹⁶ Silbey, *Cross-Examining*, *supra* note ____, at ____ (M.4).

⁹⁷ See *supra* notes ____ and accompanying text; see *infra* notes ____ and accompanying text.s

⁹⁸ ZICK, *supra* note ____, at 213; see also SOLOVE, *supra* note ____, at 164.

⁹⁹ ZICK, *supra* note ____, at 213.

¹⁰⁰ Drizin & Reich, *supra* note ____, at 624-25; Simmons, *supra* note ____, at 565.

¹⁰¹ David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 472 (1999); Leo & Ofhse, *supra* note ____, at 594; Simmons, *supra* note ____, at 565; but see Silbey, *Filmmaking*, *supra* note ____, at 123-24.

making perception difficult and perhaps less than fully accurate. Video might capture a broader picture of events at a public rally, providing more information than a few individual witnesses might. The officer's state of mind may play a significant evidentiary role, looking at whether the officer acted with the intent of chilling or suppressing the expression of ideas,¹⁰² or whether the officer is entitled to qualified immunity because, based on the facts known at the time, a reasonable officer would not have known he was acting in an unconstitutional manner.¹⁰³

As with much civil litigation, we never are truly certain what happened in these encounters;¹⁰⁴ speculation by the fact-finder is inevitable over which witnesses to believe and which testimony and evidence to credit. In such cases, Martin Redish argues, we “refer to the jury’s verdict as the ‘accurate’ result, but this is simply a convenient method by which we operationalize accuracy, because we simply have no choice.”¹⁰⁵ But calling the result accurate does not change that some amount of speculation and guesswork underlie the decision.

But we want certainty. And video evidence purports to offer that by replacing he-said/he-said proof with proof that at least purports to make the fact-finder an eyewitness, having first-hand experience of events as they occurred in the real world.¹⁰⁶ Video images appear to offer a “direct, unmediated view of the reality they depict,” making the viewer more likely to accept them as credible representations, if not the only representations, of reality.¹⁰⁷ Video images, Richard Sherwin argues, “transform argument,” giving them the apparent capacity to “persuade all the more powerfully,” generating less counterargument and likely retaining the viewers’ belief.¹⁰⁸ Video purports to be an objective, unbiased, transparent observer of events that evenhandedly reproduces reality for the viewer; it purports to be raw, unambiguous, and unbiased evidence incontrovertibly showing what happened in the real world.¹⁰⁹ From an evidentiary standpoint, video often will be overwhelming proof at trial and throughout litigation, more likely to convince the jury, more likely to convince the court, and, perhaps, more likely to convince the parties in making strategic choices, fearful of the difficulty of countering video with competing evidence and argument.

But the certainty that video provides is more myth than reality. Jessica Silbey calls video proof “*evidence verite*, filmic evidence that purports to be unmediated and unselfconscious film footage of

¹⁰² Menotti v. City of Seattle, 409 F.3d 1113, 1155 (9th Cir. 2005).

¹⁰³ Scott v. Harris, 127 S. Ct. 1769, 1776 (2007); Saucier v. Katz, 533 U.S. 194, 201 (2001).

¹⁰⁴ Simmons, *supra* note ___, at 565.

¹⁰⁵ Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1352 (2005).

¹⁰⁶ RICHARD SHERWIN, *supra* note ___, at ___ (M.7); Silbey, *Cross-Examining* *supra* note ___, at ___ (M.6-7); Silbey, *Critics*, *supra* note ___, at 519; Silbey, *Filmmaking*, *supra* note ___, at 124; Simmons, *supra* note ___, at 566-67.

¹⁰⁷ SHERWIN, *supra* note ___, at ___ (M.7-8); Silbey, *Cross-Examining*, *supra* note ___, at ___ (M.6-7); Silbey, *Critics*, *supra* note ___, at 550.

¹⁰⁸ SHERWIN, *supra* note ___, at ___ (M.7); *see also id.* at ___ (M.7) (arguing that video images persuade more effectively because video tends to arouse cognitive and emotional responses and persuasion works through emotion as well as reason).

¹⁰⁹ Silbey, *Cross-Examining*, *supra* note ___, at ___ (M.2, 6); Silbey, *Filmmaking*, *supra* note ___, at 111, 127; Silbey, *Critics*, *supra* note ___, at 508, 550.

actual events.”¹¹⁰ But this assumes that video is the event itself, when, in fact, video is only further evidence (beyond direct witness testimony and documentary evidence) of the event.¹¹¹ Video perhaps is more persuasive evidence because of its cognitive power, but it remains simply another form of evidence.¹¹² And video, “like any representational form, must be interpreted, and its specific language and its way of constructing meaning accounted for.”¹¹³ The meaning and significance of video is not singular or unambiguous; it must be judged and interpreted by the viewer, as with any other form of evidence and testimony.¹¹⁴ And interpretation must overcome the inherent limits of what any video depicts; for example, the picture may not show what happened outside the camera’s view or the causation for actions shown in the image or what things are blocked from the camera’s view or what things depend on the camera’s perspective (the size of the frame or the angle from which it is shot).¹¹⁵

None of this is to reject all use of video evidence, inside or outside the courtroom. Within litigation, additional probative evidence always is welcome as a step forward in the search for truth. Video constitutes an important addition, an adjunct to or contradiction of, witness testimony and other evidence. Recording evidence promotes justice and should be encouraged as beneficial to the search for truth.¹¹⁶ Thus do commentators support efforts to increase police-controlled recording of interrogations, confessions, and public encounters.¹¹⁷ And thus should legal rules protect the public’s ability to make its own recordings, making more video evidence available.¹¹⁸

But this is to urge a degree of caution in when and how video is used, a degree of humility on the viewer’s part, and a reluctance to treat video as the final, unambiguous word.¹¹⁹ Recording evidence should not be treated as the “proverbial smoking gun,” as an unimpeachable witness “testifying to the only version of what happened.”¹²⁰ Nor should video be an excuse for the jury or the court to respond to, and decide cases on, “brute sense impressions” of the video.¹²¹ We cannot throw away ordinary rules of evidence and procedure when dealing with video. We must make decisions—judicial, evidentiary, strategic, policy, and litigant—striking a careful balance between video as an important and appropriate evidentiary and expressive tool, while recognizing video’s limitations, and potentially overweening power, as evidence.¹²²

¹¹⁰ Silbey, *Critics*, *supra* note ____, at 507.

¹¹¹ Silbey, *Cross-Examining*, *supra* note ____, at 6-7; Silbey, *Critics*, *supra* note ____, at 519.

¹¹² Silbey, *Cross-Examining*, *supra* note ____, at ____ (M.7).

¹¹³ Silbey, *Critics*, *supra* note ____, at 519.

¹¹⁴ Silbey, *Cross-Examining*, *supra* note ____, at ____ (M.22) (“It is but a slice of that event, necessarily partial and therefore no more immune to critical analysis for prejudice and probative value than any other documentary or testimonial proffer.”); *id.* at ____ (M.7); Silbey, *Critics*, *supra* note ____, at 519; Silbey, *Filmmaking*, *supra* note ____, at 111.

¹¹⁵ Silbey, *Cross-Examining*, *supra* note ____, at ____ (M.7, 15-16).

¹¹⁶ Silbey, *Filmmaking*, *supra* note ____, at 114.

¹¹⁷ See *supra* notes ____ and accompanying text.

¹¹⁸ See *infra* notes ____ and accompanying text.

¹¹⁹ Kahan, *supra* note ____, at ____ (M.59); Silbey, *Cross-Examining*, *supra* note ____, at ____ (M.6).

¹²⁰ Silbey, *Critics*, *supra* note ____, at 519, 550; see also Silbey, *Cross-Examining*, *supra* note ____, at ____ (M.1).

¹²¹ Kahan, *supra* note ____, at ____ (M. 63).

¹²² Silbey, *Cross-Examining*, *supra* note ____, at ____ (M.7); Silbey, *Filmmaking*, *supra* note ____, at 114.

III. Video Evidence and Summary Judgment: *Scott v. Harris* and its Discontents

Modern technology enables the people to watch government and the government to watch the people, providing useful evidence when events being watched form the basis of constitutional litigation. But limits on the evidentiary usefulness of the resulting video cannot be ignored and must be incorporated into our basic understanding of the litigation process. The increasing prevalence of recordings of police-public encounters, from all different sources, necessarily increases the back-end importance as video proof in § 1983 litigation arising from such encounters. The interaction of the power of recorded evidence and the myths and fallacies that surround it affects civil-rights litigation in several respects.

The goal in civil-rights and constitutional controversies must be to harness the evidentiary power of video without falling prey to those weaknesses. We can adopt a broader version of a point from Jessica Silbey: Recording all types of police-public interactions promotes justice and should be encouraged, but the recording of a police-public encounter is merely “one version of events,” of which “there are likely to be many.”¹²³

Silbey has argued at length that courts and juries over-emphasize video proof at trial, giving it great, arguably undue, weight in finding facts and reaching decisions.¹²⁴ Constitutional cases force us to take the question back one step to how courts handle video evidence in pre-trial processes such as summary judgment—where the goal is not to weigh evidence or to find facts, but to preview evidence in the case, including video, to determine whether there are factual disputes worthy of trial.¹²⁵ Indeed, summary judgment activity has become increasingly common in civil rights cases. Statistics from the Federal Judicial Center showed summary judgment activity in 28 of every 100 civil rights cases, with 68 percent granted, in whole or in part.¹²⁶ It is a small step for misuse and abuse of video to further expand summary judgment use in this class of cases.

A. *Scott v. Harris* and Summary Judgment

Scott was a Fourth Amendment excessive-force claim arising from a ten-mile, six-minute, high-speed police chase that ended when the pursuing officer rammed the suspect’s car from behind, causing the suspect to lose control of the car, which left the roadway, went down the embankment, and overturned, rendering the driver a quadriplegic.¹²⁷ The defendant officer moved for summary judgment, arguing that his use of deadly force (ramming the suspect’s car) was reasonable, thus not violative of the Fourth

¹²³ Silbey, *Cross-Examining*, *supra* note ____, at ____ (M.10); *Filmmaking*, *supra* note ____, at 114.

¹²⁴ Silbey, *Cross-Examining*, *supra* note ____, at ____ (M.22); *see* United States v. Guerrero, 667 F.2d 862, ____ (10th Cir. 1982); *supra* notes __ and accompanying text.

¹²⁵ Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 653-55 (2005) (tracing the steps in pre-trial previews of the merits of civil claims).

¹²⁶ FJC Statistics. Section 1983 cases involving police apparently fall in the category of “Other Civil Rights.” According to the study, in Fiscal Year 2006 more than 14,000 such cases were filed and more than 3900 summary judgment motions filed. The overall numbers for all non-prisoner civil-rights claims showed summary judgment activity in 28 out of 100 cases and a grant rate of 70 %. *See also* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 529, 537 (2007).

¹²⁷ *Scott v. Harris*, 127 S. Ct. 1769, 1772-73 (2007).

Amendment, because the suspect, in leading police on the high-speed chase, posed an immediate threat to pedestrians, drivers, police, and property in the area.¹²⁸

The driver, Harris, and the officer, Deputy Scott, presented sharply distinct versions of the chase.¹²⁹ This ordinarily precludes summary judgment, as it should be for the fact-finder to pick between competing witness versions; the court must view all facts and draws reasonable inferences in the light most favorable to the plaintiff, requiring the court to adopt the non-movant's version of events and to construe each piece of evidence to favor that party.¹³⁰ As a formal descriptive matter, a court on summary judgment should not choose between the parties' conflicting testimony and should not make credibility determinations;¹³¹ it should assume the jury would believe the non-movant's story and disbelieve the non-movant's, then consider whether a reasonable jury could resolve the case in the non-movant's favor based on that evidence.¹³² *Scott* appeared the quintessential he-said/he-said case precluding summary judgment and demanding resolution by a jury.

But the Court granted summary judgment because of the case's "added wrinkle"—a video of the chase, taken from the pursuing squad car.¹³³ Video changed the analysis. The Court insisted, without citation, that when opposing parties tell different stories and one of those stories is "blatantly contradicted" by the record, a court must disregard the "visible fiction" of the non-movant's testimony and his now-discredited version of events.¹³⁴ Video told the Court a different story, one that "quite clearly contradicts [Harris's] version."¹³⁵ Based on that view of the tape, the ordinary requirement that the court view facts and evidence in favor of the non-movant gave way to a rule that the court view the facts "in the light depicted by the videotape."¹³⁶ Writing for the majority, Justice Scalia found in the video a "Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury."¹³⁷ The Court's video-driven conclusion was that no Fourth Amendment violation had occurred.¹³⁸

In relying on the chase video to grant the defendant summary judgment, the majority departed typical (and arguably appropriate) summary judgment analysis in two respects. First, the Court ignored the plaintiff's testimony in favor of the video; testimonial evidence simply was inaccurate and wrong and

¹²⁸ *Id.* at 1773-74.

¹²⁹ *Id.* at 1774.

¹³⁰ *Id.* at 1774-75; *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

¹³¹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 255 (1986).

¹³² Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 781 (1988) ("The court must assume, for purposes of the motion, that a trier of fact would not believe any of the moving party's witnesses.").

¹³³ *Scott*, 127 S. Ct. at 1775.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 1776.

¹³⁷ *Id.* at 1775-76.

¹³⁸ *Id.* at 1776. The precise issue in *Scott* was whether the officer's affirmative defense of qualified immunity, which a two-part analysis: 1) Whether the facts and evidence showed that the officer's conduct violated a constitutional right and 2) If so, whether the right was clearly established at the time, in light of the specific factual context of the case, and not defined at too high a level of generality, such that a reasonable officer would have known that his conduct violated that right. *Scott*, 127 S. Ct. at 1774.

could be disregarded because it conflicted with what the Court itself saw in the video.¹³⁹ The video told the majority a single incontrovertible story that could not be disputed or questioned by the plaintiff's mere testimony. The video constituted such strong, singular, objective, and conclusive proof that it eliminated all factual disputes created by itself and by non-video evidence. The video was true, completely, fully contextual, and accurate, depicting one clear and obvious set of facts and telling one singular story; other evidence and other interpretations of that video were, necessarily, inaccurate. No reasonable jury could believe the plaintiff's version of events, as told on the stand, in the face of the contrary story obviously and plainly told by watching the recording. All evidence other than the video was procedurally irrelevant and none could make the case trial-worthy.

Second, the Court decided for itself what the video evidence showed and meant, disregarding as "unreasonable" any alternate interpretations or understandings of the video.¹⁴⁰ But this is inconsistent with summary judgment's requirement that each individual piece of evidence be construed in the light most favorable to the non-movant. If the video reasonably could have been interpreted in a way that would tell a story favorable to the plaintiff's claim, the Court was obligated to adopt that understanding of it for summary judgment purposes. Stated differently, the majority's view of the video was the only reasonable one; any other understanding of the video and its story was unreasonable, as was any juror who could hold such an understanding.¹⁴¹

Both departures reflect a procedural faith in video evidence, standing alone, as an unassailable source of proof, enabling the Court to conclude that video obviated a fact-finder. In other words, Justice Scalia bought into all the myths of video evidence. But, as Silbey argues, there is no singular and complete set of facts depicted in any photo, video, or audio recording.¹⁴² Video cannot "speak for itself," as Justice Scalia suggested it should.¹⁴³ It requires interpretation, inference, and exegesis by the viewer to understand what the video is saying.¹⁴⁴ Nor is the story the video told necessarily complete or fully contextual—it did not show what was happening off-camera, what happened before the camera began running, or the cause of the actions we see and hear on the video.¹⁴⁵

This was the larger point in Justice Stevens' sharp dissent. He watched the same video, but saw a different event—not only was there no unquestionable danger to pedestrians, drivers, parked cars, or property from the chase, there were not even any "close calls."¹⁴⁶ The differences between what the video said to the majority and what it said to Justice Stevens go to the singularity and completeness of the

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Kahan, *supra* note ___, at ___ (M. 57).

¹⁴² Silbey, *Cross-Examining*, *supra* note ___, at ___ (M. 7).

¹⁴³ *Scott*, 127 S. Ct. at 1775 n.5; Silbey, *Cross-Examining*, *supra* note ___, at ___ (M.6).

¹⁴⁴ Silbey, *Cross-Examining*, *supra* note ___, at ___ (M.7); *supra* notes ___ and accompanying text.

¹⁴⁵ Silbey, *Cross-Examining*, *supra* note ___, at ___ (M.15); *supra* notes ___ and accompanying text.

¹⁴⁶ *Scott*, 127 S. Ct. at 1783 (Stevens, J., dissenting).

video's story.¹⁴⁷ Consider several examples. The majority insisted that the suspect ran several red lights, while Stevens concluded that the video showed only that the lights were red when the pursuing police car went through them, but not the status of the lights when the lead car went through them, some distance ahead.¹⁴⁸ The majority saw the chase threatening other cars and drivers, who had to quickly pull to the side to get out of the way of the speeding suspect, while Stevens viewed most of the cars as already having pulled over, perhaps (the video cannot tell us this) in response to the police siren.¹⁴⁹ The majority saw Harris swerving into uncoming traffic, while Stevens saw him signaling and making a routine passing maneuver on a two-lane road, albeit at a high rate of speed.¹⁵⁰

One video told the majority and dissent two stories. The majority's insistence that courts view facts and evidence "in the light depicted by the videotape" is incoherent because there is no single, unambiguous, and complete set of facts depicted in the videotape. The video's meaning, and its consistency with any testimony, depended on interpretation; different interpretations of the video, and thus of its consistency with Harris' testimony, reasonably were possible by reasonable viewers. The Court was procedurally obligated to recognize the possibility of some interpretation of the video favorable to the plaintiff and consistent with his testimony. That interpretation at least leaves a genuine issue of material fact as to whether Harris posed an immediate threat to persons and property, thus whether Scott's actions in ramming Harris' car comported with the Fourth Amendment, all rendering summary judgment inappropriate.¹⁵¹

B. An Empirical Take on Scott: Effects of Culture on Cognition

If Silbey's insight is that *Scott* is problematic because video evidence is typically ambiguous and has meaning only through viewer interpretation and construction,¹⁵² the substantial insight from the forthcoming *Harvard Law Review* study by Dan Kahan, Dave Hoffman, and Dan Braman is that *Scott* is problematic because this interpretation and construction will be highly contextualized and individualized, affected by viewers' identity-defining characteristics, such as race, age, sex, socio-economic status, education, cultural orientation, ideology, and political-party affiliation.¹⁵³

Kahan, Hoffman, and Braman showed the video to a diverse, nationally representative sample of individuals (i.e., potential jurors, had such a case gotten past summary judgment and proceeded to trial), then asked a series of questions about the video that roughly tracked the basic factual issues underlying

¹⁴⁷ Silbey, *Cross-Examining*, *supra* note ___, at ___ (M.2) ("Only Justice Stevens seemed to understand that whereas film appeared to be mono-ocular, the chase itself – the reality of the event to be adjudicated – was by its nature multi-ocular.").

¹⁴⁸ *Compare Scott*, 127 S. Ct. at 1775 *with id.* at 1782 (Stevens, J., dissenting).

¹⁴⁹ *Compare id.* at 1775 *with id.* at 1782 (Stevens, J., dissenting).

¹⁵⁰ *Compare id.* at 1775 *with id.* at 1783 (Stevens, J., dissenting).

¹⁵¹ At least as to whether a violation had occurred. Had the Court recognized the reasonableness of a more plaintiff-favorable interpretation of the video, it still could have granted summary judgment on a finding that there was no clearly established right to be free of the use of deadly force in the context of a high-speed chase in which the officer perceived the fleeing driver to pose a threat to persons and property in the vicinity.

¹⁵² Silbey, *Cross-Examining*, *supra* note ___, at ___ (M.2, 6); Silbey, *Critics*, *supra* note ___, at 507.

¹⁵³ Kahan, *supra* note ___, at ___ (M.38).

the material fact of whether Harris, by leading police on this chase, endangered the public, making Deputy Scott's use of force reasonable for Fourth Amendment and qualified immunity purposes.¹⁵⁴ They then used statistical applications to generate four model jurors, possessing different combinations of cultural and demographic characteristics, and showed how those four jurors viewed the video.¹⁵⁵

The study found what the authors called "constrained dissensus."¹⁵⁶ A "very sizable majority" agreed with the *Scott* majority as to most of the underlying questions about the threat Harris posed to the public and as to the ultimate conclusion that the officer's use of deadly force was reasonable.¹⁵⁷ But the extremes of the spectrum—the small minority who disagreed about the appropriateness of deadly force, and the minority who agreed most unequivocally with Justice Scalia's majority opinion—all were connected by core of identity-defining characteristics. Race, income, education, ideology, cultural worldviews, and party affiliation all corresponded with variations in perception of the images depicted and story told in the video.¹⁵⁸ Subjects "tended toward the view of the facts that best cohered with emotional appraisals one would expect persons these sorts to experience in relation to the contested social meanings inherent in an encounter between police and an individual citizen." The *Scott* video, as with other facts and other evidence, did not speak for itself; it spoke "only against the background of pre-existing understanding of social reality that invest[ed] those facts with meaning."¹⁵⁹

These results lead the authors to conclude that the *Scott* Court was wrong to grant summary judgment. By insisting that the tape supported only "one reasonable view of the facts," the Court effectively told those who might draw a different story from the video that their viewpoint was unreasonable.¹⁶⁰ The Court thus rendered a decision "symptomatic of a kind of cognitive bias endemic to legal and political decisionmaking and that needlessly magnifies cultural conflict over and discontent with the law."¹⁶¹

The authors identify and emphasize a broader problem with the procedural posture of *Scott*. It was not simply that Justice Scalia failed to interpret the video in the light most favorable to the plaintiff, ignoring possible disagreements as to the video's meaning and possible contrary evidence, and thus a possible variance of jury results.¹⁶² The problem was the nature of the dissensus surrounding the facts revealed by the video and the interpretation of those facts. The video and the facts on the ground would be interpreted "against the background of competing, subcommunity understandings of social reality."¹⁶³

¹⁵⁴ See Kahan, *supra* note ____, at ____ (M. 17-21).

¹⁵⁵ Kahan, *supra* note ____, at ____ (M. 29-31).

¹⁵⁶ *Id.* at ____ (M.38).

¹⁵⁷ *Id.* at ____ (M.39).

¹⁵⁸ *Id.* at ____ (M. 38-39).

¹⁵⁹ *Id.* at ____ (M.42).

¹⁶⁰ *Id.* at ____ (M. 40).

¹⁶¹ *Id.* at ____ (M.40).

¹⁶² *Supra* notes ____ and accompanying text.

¹⁶³ Kahan, *supra* note ____, at ____ (M. 47).

Rather than being mere “idiosyncratic statistical outliers,” study participants who interpreted the video and its story differently were members of groups “who share a distinctive understanding of social reality against which the facts have a different meaning from what it has for the majority.”¹⁶⁴ In granting summary judgment in the face of such sub-community-specific disagreement—in telling dissenters that their different, community-specific views of the video’s facts were unreasonable—the Court “inevitably called into question the integrity, intelligence, and competence of identifiable subcommunities whose members in fact hold those dissenting beliefs.”¹⁶⁵ That, in turn, causes those dissenters, and members of the public who share their identity-defining characteristics, to question the legitimacy of resulting law.¹⁶⁶

The study leads the authors to broader normative conclusions about summary judgment.¹⁶⁷ Kahan, Hoffman, and Braman argue for a form of “judicial humility” on summary judgment, under which a judge performs a “mental double-check” before granting summary judgment based on her sensory reactions to evidence, precisely to avoid decisions turning on simple brute-sense impressions that may be culturally bound.¹⁶⁸ The judge must imagine potential jurors and if “they are people who bear recognizable identity-defining characteristics—demographic, cultural, political, or otherwise—she should stop and think hard.”¹⁶⁹ Judges should at least hesitate before endorsing any “culturally partisan view of facts” or summarily deciding cases that likely would feature “culturally polarized understandings of fact.”¹⁷⁰ We might understand this humility as a procedural form of Bickel’s “passive virtues,” in which courts hesitate in exercising even the unquestioned power to decide a case on summary judgment, in some deference to concerns for public perceptions of, and respect for the legitimacy of, law and courts.¹⁷¹

The authors do try to downplay the limits this new concern for cultural cognition imposes on summary judgment, arguing that courts should rarely feel obligated to apply this “prudential brake” in a case otherwise fit for summary disposition. As they explain:

there’s nothing problematic about a court deciding summarily based on its sensory impressions when the factual inferences it is drawing isn’t one that is likely to divide potential jurors on cultural lines . . . By the same token, where a factual inference *would* likely provoke cultural dissensus, our argument would counsel the judge not to draw it even if the basis for the inference is something more than her mere sense impression.¹⁷²

But their normative conclusion—judges must avoid stigmatizing cultural dissensus by labeling it unreasonable through granting summary judgment—necessarily leads to the conclusion that summary

¹⁶⁴ *Id.* at ___ (M. 46).

¹⁶⁵ *Id.* at ___ (M.57); *id.* at ___ (M.47) (stating that the decision “denied that dissenting group the respect it is owed”).

¹⁶⁶ *Id.* at ___ (M. 57-58, 59).

¹⁶⁷ And all summary adjudication procedures, including judgment as a matter of law (which utilizes the same standard as summary judgment) and failure to state a claim upon which relief can be granted.

¹⁶⁸ *Id.* at ___ (M. 59)

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at ___ (M.59-60).

¹⁷¹ *Id.* at ___ (M. 59-60) (discussing Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962)).

¹⁷² Kahan, *supra* note ___, at ___ (M.61).

judgment rarely (perhaps virtually never) will be appropriate in civil rights and civil liberties actions, particularly cases arising from police-public encounters that are “fraught with competing connotations in our society.”¹⁷³ Nothing obviously distinguishes *Scott* from cases arising from any fraught, coercive police-public encounter, any of which can be a “potentially divisive matter in our society.”¹⁷⁴ Concerns of race, class, and gender color all experiences with law enforcement. Political-party affiliation and ideology affect views of the type and manner of political expression that should be protected and whether police acted appropriately in dispersing a protesting crowd (or mob, depending on one’s politically tinged perspective) or in arresting protesters. Ideology influences one’s views on the entire the freedom-order-security divide, thus one’s views of the propriety of all limits and restrictions on unpopular speech in public spaces. And because civil rights actions arising from police-public encounters are especially likely to feature video evidence and to require the judge to utilize sensory impressions in evaluating evidence on summary judgment, it follows that this prudential brake becomes especially necessary in a substantial number of video cases, where culturally based cognition affects an individual viewer’s understanding of the recording, and thus its meaning.

Which is not necessarily to disagree with that normative conclusion. Summary judgment arguably is granted too readily in § 1983 actions. Scholarly criticism of summary judgment is on the rise, concurrent with the overall increase in summary judgment activity in federal court.¹⁷⁵ And many critics focus particular attention on the disparate use of the procedure in civil rights litigation.¹⁷⁶

But the prudential brake that Kahan, Hoffman, and Braman propose bucks a twenty-five-year doctrinal trend in which summary judgment has been made more obtainable in § 1983 actions. In *Harlow v. Fitzgerald*¹⁷⁷ in 1983, the Supreme Court altered the standard for the defense of executive qualified immunity, shifting from a focus on the defendant’s subjective intent to violate a person’s rights to an objective focus on whether a reasonable officer would have known, in light of the current state of the law (a legal question to be decided by the court), that his conduct violated the plaintiff’s clearly established constitutional rights.¹⁷⁸ Denials of summary judgment on official and governmental immunity grounds are subject to immediate appellate review, a departure from the ordinary requirement of a final judgment.¹⁷⁹ This gives the court of appeals (and perhaps the Supreme Court) a second crack at viewing and

¹⁷³ *Id.* at ___ (M.46).

¹⁷⁴ *Id.* at ___ (M. 57).

¹⁷⁵ Bronsteen, *supra* note ___, at 526; Burbank, *supra* note ___, at 622; Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 89 (199); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1063 (2003); Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 139 (2007); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1938 (1998) (“This unseemly rush to summary judgment may cause the legal profession, and the public at large, to conclude that disfavored plaintiffs are apt to be hustled out of the courthouse.”).

¹⁷⁶ Thomas, *supra* note ___, at 141; *see also* Miller, *supra* note ___, at 1133; *cf. FJC statistics on summary judgment in civil rights cases.*

¹⁷⁷ 457 U.S. 800 (1982).

¹⁷⁸ *Id.* at 818-19.

¹⁷⁹ *See* Will v. Hallock, 546 U.S. 345, 350 (2006); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

interpreting the video evidence. The express purpose of all these doctrinal moves was to make it easier for officers to defeat weak constitutional claims at the summary judgment stage, enabling officers to get out of the case at the earliest possible moment and to get on with performing their public duties without the distractions of civil litigation.¹⁸⁰

C. Lower Courts Post-Scott

One expected consequence of *Scott* is that lower-court “judges might well feel emboldened to give more decisive weight to the factual inferences they themselves are inclined to draw from videos.”¹⁸¹ And a sampling of cases since *Scott* shows lower-court judges vigorously wielding this new power.¹⁸² Some courts do recognize that context matters, that recordings may not tell the entire story¹⁸³ and may require viewer interpretation that injects ambiguity into the video.¹⁸⁴ Or maybe courts recognize ambiguity in theory, but apply the absolute rule of *Scott* in fact. One district court agreed that, “video recording reflects a particular point of view and has its limits,” but granted summary judgment based on the video anyway, because these “basic elements of hermeneutic theory” do not prevent a court from granting summary judgment when video is uncontradicted.¹⁸⁵

A good example of how lower courts have run with the *Scott*-sanctioned power to grant summary judgment largely on brute-sense judicial perception of video is the Sixth Circuit’s decision in *Marvin v. City of Taylor*.¹⁸⁶ The case involved claims of excessive force in arresting the plaintiff on a DUI charge, transporting him to the police station, and booking and processing him there; most of the events at the station house were videotaped.¹⁸⁷ In reversing denial of defendants’ motion for summary judgment, the court used the videos as the sole touchstone for its factual analysis.¹⁸⁸

The court actually went beyond *Scott*, utilizing an approach under which a plaintiff only could survive summary judgment if the video, as the court viewed and understood it, affirmatively showed what the court viewed as excessive force. Two portions of the opinion are particularly troubling. First, the plaintiff alleged that one of the defendant officers pulled him out of the car at the station house and threw him to the ground, and the plaintiff insisted that the video supported this contention.¹⁸⁹ But the court held that the video did not show this so clearly. On the court’s interpretation, the video, taken from the

¹⁸⁰ *Saucier v. Katz*, 533 U.S. 194, 200-01 (2005); *Mitchell*, 572 U.S. at 525-26; see also Miller, *supra* note ___, at 1133.

¹⁸¹ Kahan, *supra* note ___, at ___ (M.60).

¹⁸² See *Marvin v. City of Taylor*, 509 F.3d 234 (6th Cir. 2007); *Mecham v. Frazier*, 500 F.3d 1200, 1202 n.2 (10th Cir. 2007); *Beshers v. Harrison*, 495 F.3d 1260, 1267-68 (11th Cir. 2007); *Marion v. City of Corydon*, 2008 WL 763211, *1 (S.D. Ind. 2008).

¹⁸³ *York v. City of Las Cruces*, 523 F.3d 1205, 1210-11 (10th Cir. 2008).

¹⁸⁴ *Jones v. City of Cincinnati*, 521 F.3d 555, 561 (6th Cir. 2008); see also *Green v. New Jersey State Police*, 246 Fed. Appx. 158, 159 (3d Cir. 2007); *Stewart v. City of New York*, 2008 WL 1699797, *8 (S.D.N.Y. 2008) (“Here, by comparison, the issue is not what [plaintiff] said, but what he intended. Unlike the speed of a car, the meaning behind [plaintiff]’s statements is not capable of being captured on a videotape or audiotape.”).

¹⁸⁵ *Marion*, 2008 WL 763211, *1 & n.1. d

¹⁸⁶ 509 F.3d 234 (6th Cir. 2007).

¹⁸⁷ *Id.* at 237-43.

¹⁸⁸ *Id.* at 239-40.

¹⁸⁹ *Id.* at 240, 248-49.

opposite side of the car and not offering a clear shot, only showed the officer opening the door, reaching into the car, closing the door, then bending down and helping the plaintiff to his feet; it did not show the police “abusing” the plaintiff. Thus, although the video did not blatantly contradict the plaintiff’s assertions, it did not support his testimony and, by not supporting his version, it “certainly cast[] strong doubts on his characterization.”¹⁹⁰

Second, the plaintiff testified that the officers had gratuitously pulled his injured arm into the small of his back while taking off the handcuffs from behind. According to the court, while the video appeared to show the plaintiff’s arms being raised into the small of his back, the officer also could be seen crouching to insert the key to unlock the cuffs, presumably to avoid making the plaintiff raise his arms. Based on the video, “the officers’ conduct cannot reasonably be construed as gratuitous.”¹⁹¹

But nothing requires the recording to affirmatively support the plaintiff’s version of events; his testimony about being shoved to the floor should be enough to get that issue to the jury, at least absent the type of video contradiction purportedly present in *Scott*.¹⁹² Moreover, the video shows the plaintiff having to be picked up off the ground by the officer, although it does not show why he was on the ground. Viewing the video in the light most favorable to the plaintiff, as the court should be obligated to do, presents the reasonable inference that the plaintiff was on the ground and had to be picked up because, per the plaintiff’s testimony, the officer had pushed him down (as opposed to being on the ground because the plaintiff fell). In other words, a reasonable plaintiff-sided interpretation of the video, which is inconclusive because of the limits of what the camera captured, is fully consistent with his testimony. Similarly, to the extent the video shows both the plaintiff’s injured arms being lifted into the small of his back and the officer bending down to unlock the handcuffs, the video is ambiguous and capable of an interpretation that supports either side, requiring the court to accept the plaintiff’s version for purposes of summary judgment.

Scott and its progeny arguably have erred in permitting judicial determination of video’s meaning to trump witness testimony, failing to recognize the possibility of competing reasonable constructions of video under which a plaintiff might prevail at trial.¹⁹³ But *Marvin* takes this procedural faith a step further by elevating video evidence to the only competent evidence on summary judgment. The court expected, in fact demanded, video that unassailably establishes the facts in the plaintiff’s favor; absent video that did so, the plaintiff’s claim did not warrant trial, regardless of what any non-video testimonial evidence showed and regardless of any ambiguity or uncertainty about the video. If video is in the record, ordinary

¹⁹⁰ *Id.* at 248-49.

¹⁹¹ *Id.* at 240-41.

¹⁹² *Cf.* *York v. City of Las Cruces*, 523 F.3d 1205, 1210-11 (10th Cir. 2008) (stating that, where plaintiff’s testimony is not blatantly contradicted by recording, the recording does not alone establish defendants’ entitlement to summary judgment).

¹⁹³ *But cf.* *Beshers*, 495 F.3d at 1269-71 (Presnell, J., concurring) (attempting to frame facts from police-chase video in light most favorable to plaintiff and concluding that the plaintiff’s conduct “was not particularly heinous”); *supra* notes ___ and accompanying text.

testimony, especially by the plaintiff himself, no longer is sufficient; the video alone must prove the plaintiff's case to the court's satisfaction in order to proceed beyond summary adjudication.

D. The Flip Side of Summary Judgment

But what if we turn *Scott* on its head—imagine a case in which brute-sense impressions suggest the video supports the plaintiff's version of events and shows a constitutional violation or in which it is the defendant's testimony that is “blatantly contradicted” by the video. If a court can ignore as a “visible fiction” plaintiff testimony that is contradicted by the video, why should the court not be able to do the same with similarly incredible or contradicted testimony from the defendant? If the court must interpret facts in light of the video, why should it not do the same with a video that, on its brute-sense viewing, seems to disfavor the defendant's story?

At a minimum, this compels the court to deny the defendant-officer's request for summary judgment. For example, in *Combs v. City of Davie*,¹⁹⁴ the court denied summary judgment in an excessive-force case because it found that details contained in the officer's testimony (such as his statements that the suspect punched and kicked him) were not shown in the video and scenes depicted in the video (such as the suspect fleeing) were not mentioned in the officer's otherwise comprehensive recitation of events, all of which caused the court to question the officer's credibility, thus establishing an issue for trial.¹⁹⁵

But summary judgment is a neutral procedure, available to both parties whenever the record, including audio or video evidence, shows there is no genuine dispute as to some material fact and the moving party is entitled to judgment as a matter of law.¹⁹⁶ The open question is whether a court could use its brute-sense impressions of the video or use that blatant contradiction and loss of credibility as a basis for granting a plaintiff's motion for summary judgment. In *Combs*, having concluded that the video does not show the plaintiff fighting back, could the court (on a proper motion) disregard the defendant's testimony altogether and decide that the video actually does show excessive force?¹⁹⁷

The answer properly may turn on the greater burden a plaintiff (as the party with the ultimate burden of persuasion at trial) bears in seeking summary judgment on a claim. Martin Louis long ago argued that courts should grant summary judgment less readily when the moving party seeks to establish as undisputed an essential element on which she will bear the burden of proof at trial.¹⁹⁸ A movant-plaintiff must shift the burden of production, presenting to the court such strong and undisputed evidence on each element of a claim that no fact-finder could reasonably find against her.¹⁹⁹ This is a more substantial

¹⁹⁴ *Combs v. Town of Davie*, 2007 WL 870426 (S.D. Fla. 2007).

¹⁹⁵ *Id.* at *5.

¹⁹⁶ Fed. R. Civ. P. 56(a) with Fed. R. Civ. P. 56(b). Even if it is overwhelmingly a defense motion. See Bronsteen, *supra* note ____, at 523 n.10; see also *id.* at 538 (criticizing the one-sided, defendant-biased nature of summary judgment); Issacharoff & Loewenstein, *supra* note ____, at 75.

¹⁹⁷ *Combs* was decided several months prior to *Scott*. The judge certainly would not have felt the same freedom to disregard testimony in favor of video, thus it is hard to know how a similar case might play post-*Scott*.

¹⁹⁸ Louis, *supra* note ____, at 748.

¹⁹⁹ *Id.* at 748-49.

burden than that borne by a movant-defendant, who only must point out to the court, without substantial (if any) support, the absence of evidence from the plaintiff establishing just one essential element, forcing the plaintiff to produce probative affirmative evidence that will convince the court that a reasonable juror could find in her favor.²⁰⁰

But if a summary-judgment court can make brute-sense evaluations of video and audio evidence and decide the unambiguous meaning of the recording, as *Scott* and its progeny show courts doing, the different burden of production should be irrelevant. If a court can decide the video's singular message, it should be as able to do so when that message favors the plaintiff. If the court decides that the video is capable of only one reasonable interpretation in the plaintiff's favor, it should be equally able to disregard defendant's testimony that is blatantly contradicted by the face of the video evidence. And absent the defendant's testimony providing a different version of the video or the events, the video standing alone (given that it is singular and unambiguous and capable of only one reasonable interpretation) would be sufficient to establish the elements of the plaintiff's case without need for a jury.

Of course, a court might say, as the Ninth Circuit did in the pre-*Scott* case arising from the Seattle protests, that on a plaintiff's motion for summary judgment, evidence, including video, must be viewed in light most favorable to the defendant.²⁰¹ But *Scott* hinged on the inability of a reasonable viewer to find any meaning or message other than the Court's interpretation in favor of the moving party. The point was that video was so singular in its narrative that there is no reasonable chance the jury can "disbelieve" the video—that is, draw a different story and meaning from the video than did the court. To the extent courts accept this understanding of video evidence, however fallacious,²⁰² nothing turns on who is the moving party. There is no descriptive reason a court could not make the same determination about the video's meaning on a plaintiff's motion, disregard alternate interpretations and competing evidence, and grant summary judgment for the plaintiff.

Assuming some § 1983 action arises from the Critical Mass incident, it might present this procedural situation. A brute-sense viewing of the video supports the rider's version of events—the video seems to show the officer moving several steps from the center of the street to nearer the curb to get close to the rider passing and threw his arm out to hit the rider—and contradicts the officer's initial statements that the rider had steered the bicycle towards the officer and ridden into him.²⁰³ On the other hand, because the plaintiff-movant must affirmatively foreclose any evidentiary basis for finding in the defendant's favor, the officer might remain freer than the plaintiff in *Scott* to produce evidence justifying his conduct that

²⁰⁰ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); Friedenthal, *supra* note ___, at 779; Redish, *supra* note ___, at 1344-45, 1351.

²⁰¹ *Menotti v. City of Seattle*, 409 F.3d 1113, 1154 n.74 (9th Cir. 2005).

²⁰² See *supra* notes ___ and accompanying text.

²⁰³ See Affidavit of Police Officer Patrick Pogan in *People of the State of New York v. Long*, available at <http://www.thesmokinggun.com/archive/years/2008/0729081bike1.html>; see *supra* notes ___ and accompanying text.

cannot be seen in the video because of its angle and scope (for example, testimony that the officer noticed the plaintiff holding something in his hands or that the plaintiff said something to him as he rode up to him).

E. Video and Summary Judgment: Some Stopping Points

Courts on summary judgment must hesitate before getting swept away with the purported objectivity, completeness, and clarity of video.²⁰⁴ But Kahan, Hoffman, and Braman also are correct that there must be a stopping point to this reluctance to grant summary judgment in video cases—“the upshot can’t be that judges should *never* trust their own perceptions of the facts when determining whether to resolve cases summarily.”²⁰⁵ Or that judges never can grant summary judgment in civil-rights video cases, particularly as such cases increase in number with the spread of recording technology among all actors. The point is not the elimination of video evidence, which does promote justice, if only by providing additional probative evidence.²⁰⁶ Video replaces the he-said/he-said trial by providing additional evidence for the fact-finder to balance against the competing testimonial versions of events. The point, again, is caution—a degree of humility in how certain courts are about what they (believe they) see or understand from the recording and hesitancy before letting video evidence overwhelm the analysis.

Several considerations explain that caution and illuminate the boundaries between appropriate use of probative recording evidence and courts taking summary judgment too far by falling prey to the myths of video evidence.

First, much turns on the type and complexity of the facts being proven through video. The material fact in deadly-force cases—the reasonableness of the use of deadly force in a police-public encounter²⁰⁷—is a complex and layered issue. It depends on underlying factual considerations of whether the suspect posed an immediate threat to police, persons, and property in the surrounding area, which in turn depends on a series of prior factual conclusions about the real-world events on the ground drawn from viewing the video.²⁰⁸ Complex, layered factual determinations will be more dependent on viewer interpretation of video, thus more subject to culturally based differences in perception of that video; a court therefore should be less willing to rely solely on its brute-sense impressions of the video’s singularity of meaning in the face of possible (culturally grounded) alternative meanings. Justice Stevens’ argument was that portions of the *Scott* video could be viewed consistent with Harris’ testimony that he remained in control of his car at all times—the video showed that he did signal his lane changes and that many cars did appear

²⁰⁴ See Kahan, *supra* note ___, at ___ (M.59); Silbey, *Cross-Examining*, *supra* note ___, at ___ (M.7); Silbey, *Filmmaking*, *supra* note ___, at 114; *supra* notes ___ and accompanying text.

²⁰⁵ Kahan, *supra* note ___, at ___ (M.55).

²⁰⁶ See Leo & Ofshe, *supra* note ___, at 494-95; Silbey, *Cross-Examining*, *supra* note ___, at ___ (M.7); Silbey, *Filmmaking*, *supra* note ___, at 114 & n.21, 116, 123-24; Simmons, *supra* note ___, at 566; Drizin and Reich, *supra* note ___, at 624; *supra* notes ___ and accompanying text.

²⁰⁷ *Scott v. Harris*, 127 S. Ct. 1769, 1778 (2007); *Beshers v. Harrison*, 495 F.3d 1260, 1266 (11th Cir. 2007).

²⁰⁸ *Scott*, 127 S. Ct. at 1778-79; Kahan, Hoffman, and Braman structured the study to capture that pyramid of facts. See Kahan, *supra* note ___, at 17-20.

to have pulled over before the speeding cars reached them.²⁰⁹ Similarly, in *Beshers v. Harrison*,²¹⁰ a filmed high-speed police chase case on all fours with *Scott*, the concurring judge sought to emphasize portions of the video showing that the fleeing suspect made an effort to avoid hitting other cars during the chase, suggesting he posed less of a danger to the public.²¹¹ Alternatively, even if the underlying events (what actually occurred on the ground) depicted in the video are undisputed, the objective reasonableness of the police actions in those events should remain an open issue for the jury.²¹²

On the other hand, some video, or the factual issues proven by video, might be simple and unequivocal, both at the level of events on the ground and their constitutional meaning. Consider a different landmark summary judgment case: *Adickes v. S.H. Kress*,²¹³ a § 1983 action alleging that the owners of a Mississippi lunch counter conspired with police to deny a white civil rights worker service and to have her arrested for vagrancy.²¹⁴ The issue on summary judgment was whether there had been agreement between the officer and a store employee not to serve the plaintiff and to have her arrested outside the store.²¹⁵ Underlying that was the fact issue of whether the officer was present in the store, which, according to the court, permitted the jury to infer, from his presence, a meeting of the minds between the officer and Kress employees.²¹⁶

But suppose the store had been equipped with a surveillance camera and videos did not show police officers in the store. Could a summary-judgment court ignore testimonial evidence that they had been present, writing it off as a visible fiction? This surveillance video seems truly unequivocal on that small point, more so than the *Scott* or *Beshers* videos. But the fact to be drawn from the video also is simpler and more easily determined. It should be clear from watching the video (assuming no gaps in time or frame) whether an officer came into the store at the relevant time. The video also would be less likely subject to cultural dissensus—experiences of race, gender, and ideology likely will not affect whether one sees on the video a uniformed officer standing somewhere in the store.

Change the hypothetical slightly. Suppose the surveillance video did show a police officer in the store, looking in the general direction of the waitress and, perhaps, even making eye contact. Now the facts on the ground are less clear—was their eye contact? And even if the facts on the ground are clear—an officer was in the store and made eye contact with an employee—their constitutional meaning remains

²⁰⁹ *Scott*, 127 S. Ct. at 1782-83 (Stevens, J., dissenting); *supra* notes ____ and accompanying text.

²¹⁰ 495 F.3d 1260 (11th Cir. 2007).

²¹¹ *Id.* at 1269 n.4 (Presnell, J., concurring).

²¹² *Mecham v. Frazier*, 500 F.3d 1200, 1203 (10th Cir. 2007).

²¹³ 398 U.S. 144 (1971).

²¹⁴ *Id.* at 149-50.

²¹⁵ *Id.* at 152 This state-private conspiracy was necessary in order to make the private store into a state actor, such that it can be liable under the Fourteenth Amendment, which limits its obligations only to the state, and § 1983, which limits itself only to persons acting under color of state law. *See id.* at 151-52.

²¹⁶ *Id.* at 158-59; Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 123 (2006); *but see id.* at 125 (questioning whether the officer's mere presence in the store, without more, permitted the inference of conspiracy); David P. Currie, *Thoughts on Directed Verdicts and Summary Judgment*, 45 U. CHI. L. REV. 72, 77-78 (1977) (same).

open to differing reasonable interpretations. The factual issue becomes whether that eye contact constituted communication between them and whether the message communicated established a meeting of the minds not to serve plaintiff or to have her arrested. The video does not and cannot tell us that; it becomes narratively ambiguous, in that the video's images are clear, but it is ambiguous as to its significance for the competing stories being told.²¹⁷ And whether eye contact between a store owner or employee and a police officer during a lunch-counter sit-in in 1962 Jim Crow Mississippi suggests an agreement not to serve a white woman sitting with black students certainly would be affected by a viewer's race, gender, politics, and cultural experience. Resolution of this ambiguity thus should be for the jury.

A second consideration is that video does not necessarily tell the full story of the real-world events, given its limited narrative—it does not necessarily show what happened outside the camera's view or the causation for actions shown in the video or what things are blocked from the camera's view or what things depend on the camera's perspective (the size of the frame or the angle from which video is shot).²¹⁸ This was a key point for Justice Stevens in *Scott*²¹⁹ and some courts at least attempt to remain aware of this fact in analyzing video. In *Marvin*, the court acknowledged that the surveillance camera's location at the front/right of the car could not show what actually happened at the back/left of the car behind an open car door.²²⁰ But that ambiguity should cause the court to deny summary judgment, where the video leaves the non-moving party's explanation unchallenged.

Third is the issue of multiple or dueling audio or video evidence. As the number and variety of sources of recording evidence expands, multiple videos from multiple sources become increasingly likely.²²¹ Competing videos potentially tell multiple stories about events; what each video says depends on the distance from which footage is taken, the angle from which it captures events, the scope and size of the shot, and how much of the surrounding context is captured in the shot.²²² A court on summary judgment cannot pick one video over another as more "accurate" or revealing a "truer" version of events and adopt that recording as the accepted story. Differences in angles, distances, or perspectives between different versions mean each video tells a different story, but it tells us nothing about the accuracy of one story or another. In fact all videos might simply be different perspectives on the same "true" story.²²³

²¹⁷ Silbey, *Cross-Examining*, *supra* note ____, at ____ (M. 16, 17).

²¹⁸ Silbey, *Cross-Examining*, *supra* note ____, at ____ (M. 7, 15-16); Silbey, *Filmmaking*, *supra* note ____, at 161; *supra* notes ____ and accompanying text.

²¹⁹ *Scott*, 127 S. Ct. at 1783 (Stevens, J., dissenting).

²²⁰ *Marvin v. City of Taylor*, 509 F.3d 234, 248-49 (6th Cir. 2007).

²²¹ *Supra* notes ____ and accompanying text.

²²² Silbey, *Cross-Examining*, *supra* note ____, at ____ (M.16-17); Silbey, *Filmmaking*, *supra* note ____, at 147.

²²³ Silbey, *Cross-Examining*, *supra* note ____, at ____ (M.13) (arguing that films "appear to be telling only one story when in fact they, like all films, tell more than one story and less than the whole story"); Silbey, *Filmmaking*, *supra* note ____, at 147 (discussing the "by-now obvious fact that all stories, even true ones, can be truthfully told from different morals and objectives").

Choices must be made among competing stories or versions of stories as reflect in the various videos. Again, however, those choices are for a fact-finder at trial, not a court on summary judgment.

The source of a recording also might affect viewer perception; a viewer might understand images differently depending on whether the recording comes from the police, the institutional press (whose role is to produce lasting, objective historical records), third-party bystanders (who also may be acting akin to journalists as creators of lasting objective historical records), or the citizen involved in the encounter.²²⁴ Silbey explains this as the essence of video documentary. With “narrative comes the development of voice, or point of view. It is unavoidable that films have such a voice that there is always a filmmaker whose perspective—and not others—is being captured by the camera.”²²⁵ The audience (the jury) must judge the authority of the film voice to fully understand what it depicts, in part by considering the film source.²²⁶

Video evidence functions more like testimony, in that competing sources with competing perspectives, and the credibility of each, affects the truth that a fact-finder determines. Just as a summary-judgment court ordinarily is precluded from deciding the credibility of competing witnesses or from adopting one testimonial version over another,²²⁷ it should be precluded from doing so with competing recordings. If source and perspective of the recording is one key to understanding the message and meaning of the video, it remains a question for the jury.

Note that the insight about video perspective as to multiple videos actually proves the larger point about the need for hesitation on summary judgment. If perspective matters, then no single video tells a complete, singular, unambiguous, objective story to the exclusion of all other videos. It follows that a single video does not necessarily tell a complete, singular, unambiguous, objective story to the exclusion of all other evidence, at least as to more complex, multi-layered factual issues.

Finally, a “prudential brake” on summary judgment in video and audio civil rights cases means only that more cases continue. Most settle in any event, while some move forward to jury trial. But this is not unique. While fewer than two of every 100 civil cases actually proceeds to trial,²²⁸ civil rights cases actually constitute a significant portion of those cases that do get tried.²²⁹

On one hand, trying the case may not make much practical difference. The Kahan-Hoffman-Braman study showed that a “very sizable majority” agreed that the plaintiff in *Scott* had posed a threat to persons

²²⁴ Simmons implicitly downplays the source issue by talking about police-produced video (from interrogation rooms or dashboard cameras) as an example of the People watching government. See Simmons, *supra* note ___, at 533.

²²⁵ Silbey, *Filmmaking*, *supra* note ___, at 147; see also Silbey, *Cross-Examining*, *supra* note ___, at ___ (M. 9).

²²⁶ Silbey, *Filmmaking*, *supra* note ___, at 147.

²²⁷ Richard L. Marcus, *Competing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 772 (1989) (describing bromide that, for purposes of summary judgment, “a single scoundrel’s testimony may outweigh that of forty bishops”); *supra* notes ___ and accompanying text.

²²⁸ Galanter, *supra* note ___, at 459-60; Catherine T. Struve, *Constitutional Decision Rules for Juries*, 37 Colum. Hum. Rts. L. Rev. 659, 662 n.9 (2006).

²²⁹ Struve, *supra* note ___, at 661-62 & nn. 9-10.

in the surrounding area and that the use of deadly force was appropriate.²³⁰ This suggests that the *Scott* defendant would have prevailed anyway had the case been tried to any jury composed of citizens similar to the study subjects.

On the other hand, trial itself can undermine the supposedly fixed, transparent, and uncontroversial meaning of film, because the manner in which video is viewed may change its meaning. The most famous example of this is the state criminal trial of the LAPD officers accused in the Rodney King beating, where the officers were acquitted in the face of video evidence of the assault. One explanation for the acquittal was defense success in attaching a new narrative and new meaning to the video. They did this, in part, by slowing the video for frame-by-frame review and having the officers testify to each individual action by each actor.²³¹ The result was a reinterpretation of the video. Defense counsel essentially cross-examined the video, drawing from it a different message, creating ambiguity as to its meaning, and allowing the video to corroborate, rather than contradict, the officers' version of events.²³² One could imagine a similar trial tactic with close examination of the chase videos in *Scott* or *Beshers* or any of the growing number of video cases.

Of course, both sides will utilize this tactic to get the video to express their most-favorable understanding of the events to the jury.²³³ But that is the point of trial with live witnesses, cross examination, and a finder of fact empowered to decide credibility and choose between legitimate competing versions of events. The video is rendered neutral and ambiguous, its meaning tied back to the testimony and credibility of competing witnesses.²³⁴ The case again becomes a he-said/he-said dispute turning on competing witness accounts, requiring jury resolution.²³⁵

Ultimately, the justification for Kahan's prudential brake on summary judgment, and the critique of *Scott*, tracks the justification for jury trial, particularly the notion that jurors beneficially bring ordinary community morals and perspectives to produce just results.²³⁶ Law must arise from a "*process* that shows the due respect for their understanding of reality and hence for their identities."²³⁷ A legal result often is acceptable to the public, or part of the public, as more democratically legitimate because ordinary

²³⁰ Kahan, *supra* note ___, at ___ (M. 38).

²³¹ BILL ICHOLS, *BLURRED BOUNDARIES: QUESTIONS OF MEANING IN CONTEMPORARY CULTURE* 22-25 (1994); Silbey, *Critics*, *supra* note ___, at 550.

²³² Silbey, *Critics*, *supra* note ___, at 550; *see also* Silbey, *Cross-Examining*, *supra* note ___, at ___ (M.2-3).

²³³ Silbey, *Cross-Examining*, *supra* note ___, at ___ (M.18) ("Advocates use the film to put their story in the best possible light, trying to exploit what is perceived to be the film's clarity and objectivity. And yet their battle over the film's determinacy only highlights the relative weakness of each side's story and the indeterminacy of the film.")

²³⁴ Silbey, *Cross-Examining*, *supra* note ___, at (M.12-13).

²³⁵ *Id.* at ___ (M.21); *see also id.* at ___ (M. 18) (arguing that each side's goal is to "destabilize the dominant story the film appears to be telling, either as it appears to speak for itself through its ideological relationship to reality or as it is narrated by the witness on the stand").

²³⁶ ABRAMSON, *supra* note ___, at 18; Kahan, *supra* note ___, at ___ (M.42); Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 618 (1993) (arguing that the jury "serves, as a political check on the judiciary, an infuser of democratic principles into the adjudicatory process, a barrier to oppressive conduct, and a preserver of humanity and common sense in decisionmaking"); Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 55 (2001).

²³⁷ Kahan, *supra* note ___, at ___ (M.45) (emphasis in original).

citizens' played the necessary role to produce the outcome.²³⁸ Factfinding, when performed by jurors of diverse identities and experiences, is one procedural strategy to ensure respect for outcomes, and their democratic legitimacy, by bringing these diverse identities and perspectives into the decision making mix.²³⁹

The process of jury deliberation preserves and promotes democratic legitimacy in cases of true cultural dissensus, when any decision necessarily requires the elevation of one contested view of the world over another, by ensuring that these culturally based dissents are included and considered in the decision-making process.²⁴⁰ Legitimacy is lost when courts, over-reacting to the presumed objectivity and conclusiveness of recording evidence, take cases away from the jury, depriving that composite of members of sub-communities the opportunity to participate in often-culturally sensitive decisions as to the meaning of video.²⁴¹

IV. Video Evidence and Non-litigation Remediation

Video evidence also affects the strategic responses of government defendants and policymakers to an arguably unconstitutional police-public encounter. Government might respond to video in two ways, beyond defending constitutional claims in litigation. First, policymakers might remedy deficiencies in revealed by the violations at issue, especially by punishing the officers involved (firing, suspending, reassigning, or otherwise disciplining) or by altering departmental rules, policies, and operations to deter and prevent future violations. Within days of the videotaped beating in May 2008, the Philadelphia Police Department had taken thirteen officers off street duty pending further investigation and further review of the video by the department and prosecutors.²⁴² Within one month, eight officers had been fired or otherwise disciplined.²⁴³ The verbally abusive police officer caught on tape threatening Brett Darrow was fired within a few weeks.²⁴⁴ The NYPD placed the officer who tackled the bicyclist on modified assignment, a routine non-disciplinary action to freeze matters pending investigation, although we might infer that the Department acted, at least in part, because of the video and the expected brute-sense public impression that it revealed misconduct.²⁴⁵

Administrative and policy changes can be made on a grander scale. Following the May 2007 immigration rally-gone-awry, the LAPD undertook a six-month study, including review of the many video sources. The department reassigned or fired all eight of the supervisory officers on the scene. It also recommended changes in a host of policies, including those governing how the department uses video to

²³⁸ Kahan, *supra* note ___, at ___ (M.43-44).

²³⁹ *Id.* at ___ (M.43, 45-46); *see also* Landsman, *supra* note ___, at 619.

²⁴⁰ Kahan, *supra* note ___, at ___ (M.46).

²⁴¹ *Id.*

²⁴² *See supra* notes ___ and accompanying text.

²⁴³ Hurdle, *supra* note ___; Walters, *supra* note ___.

²⁴⁴ *See supra* notes ___ and accompanying text.

²⁴⁵ *See* Chan, *supra* note ___.

document public rallies, how the department deals with media members covering and recording public protest rallies, and how officers choose between using targeted arrests as opposed to mass arrest and crowd-dispersal to control crowds.²⁴⁶

Second, government can settle litigation. In fact, if Kahan-Hoffman-Braman's goal is increased judicial hesitancy to grant summary judgment on brute-sense understandings of video, the consequence may be increased settlement, because settlement frequently is a defendant's immediate move after summary judgment is denied.²⁴⁷ Seattle settled claims against it for more than \$ 1 million; Miami settled claims against it for more than \$ 500,000.²⁴⁸

It seems logical, although not empirically provable, that settlement and other remediation are more likely in video cases. Public attention, and outrage, produces government action; attention and outrage are more likely when video is being devoured and dissected on YouTube, blogs, and the mainstream news media, and where visceral public reaction to the video reflects a wide popular interpretation of the video as showing some governmental misconduct. A widely disseminated video puts government on its heels, forced to publicly defend its officers (at least initially), while also recognizing that, because of the video, the people have formed knowing perceptions and conclusions about the incident, perceptions that officials must respect (or at least consider) in making administrative decisions.²⁴⁹ These non-litigation effects reflect the import of Zick's argument about expressive groups using new technologies to record and disseminate images of their protests and public confrontations with police as part of one overall message. They can call attention to government efforts to limit the group's expression, and by doing so, force changes in government behavior and policy that might allow for freer expression in the future.²⁵⁰

Government officials and government lawyers must watch a video in a different manner when analyzing whether to settle or whether to take remedial policy steps, as compared with a court on summary judgment. They are not deciding whether a case is worthy of a fact-finder, which should require a more-open-minded and non-determinative examination of the video.²⁵¹ Rather, they act as fact-finders of sorts, interpreting the video and deciding what it means and what story it tells; that conclusion guides their litigation and policy strategies. They analyze the video as a jury would: drawing inferences and

²⁴⁶ See *supra* notes ___ and accompanying text.

²⁴⁷ See Bronsteen, *supra* note ___, at 529; Issacharoff & Loewenstein, *supra* note ___, at 94.

²⁴⁸ See *supra* notes ___ and accompanying text.

²⁴⁹ Colin Moynihan, *The Officer, the Bicyclist and the Video*, *The New York Times*, July 30, 2008, <http://cityroom.blogs.nytimes.com/2008/07/29/the-officer-the-bicyclist-and-the-video/?scp=3&sq=Critical%20Mass&st=cse> (quoting New York City Mayor Michael Bloomberg, in talking about officer knocking bike rider down, emphasizing the need for the police department to have time to investigate and gather all the facts, but acknowledging that the officer's actions shown in the video "certainly looked—inappropriate is a nice way to phrase it"); Walters, *supra* note ___ (describing calls by police commissioner for public patience and further departmental review, while also acknowledging, based on the video, that the force used "seemed excessive"); *supra* notes ___ and accompanying text.

²⁵⁰ ZICK, *supra* note ___, at 213; see also Moynihan, *supra* note ___ (describing efforts of Critical Mass to routinely collect video accounts of confrontations with police and to obtain video from unknown tourist who shot the events of July 2008); *supra* notes ___ and accompanying text.

²⁵¹ *Supra* notes ___ and accompanying text.

reaching factual conclusions as to what the video actually shows and means, and what the official response should be to that meaning and message.

At the same time, government must recognize and account for the brute-sense impressions that members of the public and of a potential jury might develop upon viewing the same video. The Kahan-Hoffman-Braman analysis has much to offer here. Policymakers must recognize and account for the possibility of public dissensus as to the video's narrative. In other words, regardless of how policymakers themselves interpret and understand the video, they also must consider whether the public or some subcommunity (united by demographics, ideology, political concerns, or some combination) will see in the video unconstitutional behavior. At the policy level, officials must decide whether that subcommunity is large enough or politically influential enough to force policy or personnel changes that officials might not otherwise be inclined to make were they acting solely on their own interpretation of the video. At the litigation level, lawyers must anticipate the composition of the jury and how, given that composition, it likely will interpret the video's message. Lawyers also might take account of the interpretation of the public at large (or some culturally linked subset of the public) in making settlement choices. If some vocal portion of the public sees unconstitutional conduct in its viewing of the video (similarly acting as finders of fact), those individuals might wonder why government continues to defend the case and the misbehaving officers at public cost, rather than settling the case and moving forward. Policymakers can engage the difficult task of explaining to the public that video is incomplete and open to interpretation, explaining how they interpret or understand a video and how and why the story they see in the images departs from the common public story. But if the recording looks so viscerally unfavorable to the police (as with the Critical Mass, Philadelphia, or Brett Darrow recordings), this may be practically and politically impossible.

Officials making litigation, policy, and personnel choices must exercise the same caution against over-emphasizing video as should judges and jurors in reaching adjudicative decisions. At bottom, everyone is involved in a similar underlying inquiry—determining what happened in the real-world police-public encounter and what the video suggests happened. Accepting that video does not always or necessarily provide unambiguous, unbiased, objective, transparent, singular certainty,²⁵² hesitancy and prudence should be the rule as to every legal and political actor who must make legal decisions based on that recording. Deciding whether to settle or whether to discipline an officer or whether to change departmental approaches to political rallies should no more be based on false assumptions about video's unquestioned and unambiguous "truth" than should a summary-judgment determination.

Sometimes this produces a split response. In the Utah taser case, the State declined to punish the officer, obviously because its review of the video told it that no constitutional wrongdoing had

²⁵² *Supra* notes ___ and accompanying text.

occurred.²⁵³ But it also settled the driver's § 1983 action, perhaps anticipating how a jury likely would view that video at trial and taking the path of least expense.²⁵⁴

V. Restricting the Creation of Video

Our analysis thus shifts to the front end of when and how video and audio recordings of public encounters can be made, for a range of purposes, including litigation, public dissemination, or governmental change. The real effect of video and audio evidence on civil-rights enforcement and vindication depends on the antecedent question of the availability of video, which in turn depends on the number and range of sources of video.

Ric Simmons's basic point—Orwell's vision was wrong because modern technology enables the public to watch government and check official misconduct²⁵⁵—only is accurate if there are constitutional and policy protections for members of the public using technology to record public events to which they are parties or witnesses. Perhaps video is not, and should not be treated as, the overwhelming, objective, unambiguous, singular, and conclusive proof that courts and the public believe it to be.²⁵⁶ But the descriptive reality, for the moment, is that courts,²⁵⁷ government officials,²⁵⁸ and the public²⁵⁹ all treat it as if it is. And even if not perfect evidence, it remains probative evidence that is beneficial to the truth-finding process.²⁶⁰ We maintain the balance of power in control and availability of video and audio recording of public encounters only by recognizing a right to record—by recognizing that Big Brother cannot interfere with the public's ability to watch him.

Government might stop people from recording public encounters in two ways. One is through enactment and enforcement of express prohibitions on secret or unconsented-to recording of persons and conversations. The other is through officers' efforts to move filmers away from the scene, to confiscate equipment, and, perhaps, to arrest filmers, enforcing non-speech laws of general applicability.²⁶¹

Any official efforts to halt public recording of police-public encounters then become the basis for independent, "secondary" constitutional challenges to limits on recording. The success of such secondary challenges ultimately determines the real effect that video evidence will have in civil rights enforcement, in primary constitutional challenges to the underlying public police misconduct captured on audio or

²⁵³ For an argument that the video is at least ambiguous as to whether the officer acted unconstitutionally, see Posting of Orin Kerr to Volokh Conspiracy, http://volokh.com/archives/archive_2007_12_09-2007_12_15.shtml#1197327587 (Dec. 10, 2007).

²⁵⁴ *Supra* note ___ and accompanying text.

²⁵⁵ Simmons, *supra* note ___, at 533.

²⁵⁶ *Supra* notes ___ and accompanying text.

²⁵⁷ Scott v. Harris, 127 S. Ct. 1765 (2007); Marvin v. City of Taylor, 509 F.3d 234 (6th Cir. 2007); Beshers v. Harrison, 495 F.3d 1260 (11th Cir. 2007).

²⁵⁸ *Supra* Part IV.

²⁵⁹ Kahan, *supra* note ___, at ___ (M.38) Silbey, *Cross-Examining*, *supra* note ___, at ___ (M. 6-7); *supra* notes ___ and accompanying text.

²⁶⁰ See *supra* notes ___ and accompanying text.

²⁶¹ See Robinson v. Fetterman, 378 F. Supp. 2d 534 (E.D. Pa. 2005); *infra* notes ___ and accompanying text.

video, whether the recording is used in litigation or in policy decisions.²⁶² The greater the constitutional liberty of the People and press to record police-public encounters, the greater effect video evidence has on primary civil rights enforcement against police misconduct. And the more we can say that the People truly are able to watch the government in a significant way. This determines whether Simmons's optimism about technology—that it enables the public to watch government as much as the other way around—is warranted.

A. Privacy Protections and Wiretap Laws

Government might broadly prohibit all surreptitious or unconsented recording, with that prohibition extending to conversations involving police officers performing their official functions. In *Commonwealth v. Hyde*,²⁶³ the Massachusetts Supreme Judicial Court affirmed a state-law wiretapping conviction against a motorist who secretly used a hand-held tape player to record a traffic stop that went “sour.”²⁶⁴ Massachusetts law prohibits “secretly hear[ing], secretly record[ing] . . . any wire or oral communication by any person other than a person given prior authority by all parties.”²⁶⁵ The court read that absolute prohibition as an expression of the “Legislature’s unambiguous intent to prohibit the secret recording of the speech by anyone,” including police officers performing their official duties in public.²⁶⁶ *Hyde* has provided the legal basis for other instances in which individuals in Massachusetts were prosecuted for recording public confrontations with members of law enforcement.²⁶⁷

It is questionable whether law-enforcement officers ought to have protectable privacy interests when performing official functions, especially in the context of adversarial encounters with members of the public. Privacy rights should not extend so far as to enable officers to insulate their unlawful conduct from challenge. In fact, the government only learned that Hyde had recorded the encounter because he presented the tape to the police department as corroborating evidence in support of his formal department complaint about the officers’ conduct during the recorded encounter.²⁶⁸

Massachusetts law is unique, a point the *Hyde* majority emphasized; similar anti-wiretap provisions in other states require that the recorded conversation be private or that the participants have a legitimate expectation of privacy, which generally excludes conversations that are part of official law-enforcement conduct.²⁶⁹ Thus the very different results in the Crespo case in New York or the Darrow case in

²⁶² Robinson was videotaping the truck searches because he believed police were conducting them in an unsafe manner and he wanted to bring the misconduct to the attention of his state representative. *Robinson*, 378 F. Supp. 2d at 538-39, 541. The arrest at issue in the § 1983 action was the second time that police had attempted to stop Robinson from recording these searches for this purpose. *Id.* at 539.

²⁶³ 750 N.E.2d _963(Mass. 2001).

²⁶⁴ *Id.* at 965.

²⁶⁵ *Id.* at 966; MA. G.L. ch. 272 § 99B4.

²⁶⁶ *Id.* at 966.

²⁶⁷ See James O'Brien, *Illegal taping conviction*, Boston Now, Mar. 27, 2008, <http://www.bostonnow.com/news/local/2007/12/10/illegal-taping-conviction>; Posting of Eugene Volokh to The Volokh Conspiracy, <http://www.volokh.com/posts/1201752162.shtml> (Jan. 31, 2008).

²⁶⁸ *Hyde*, 750 N.E.2d at 965.

²⁶⁹ *Id.* at 967 n.5 (citing laws from several states).

Missouri, where the surreptitious or unconsented-to audio recording did not result in charges against the citizen-recorder and was used as a basis for punishing the recorded police misconduct, through personnel actions and § 1983 litigation.²⁷⁰

The privacy protection recognized in *Hyde* prohibits not only recordings by the person involved in the police encounter, but also recordings by third-party members of the public who witness the encounter. The *Hyde* dissent argued that the majority's rationale thus would have rendered unlawful the video of the Rodney King beating, the paradigm of surreptitious recording of police misconduct; that video was made by a third-party civilian witness to events, similarly without the officers' knowledge or consent, in violation of their privacy rights as defined by the majority.²⁷¹ In response, the majority emphasized differences between Massachusetts and California law, with the latter exempting recordings of events and conversations in which there is no expectation of privacy.²⁷² But that response misses the larger policy point about the appropriate scope of privacy-protecting legal rules and the unintended negative consequences of broad privacy protection.²⁷³

The majority objected that arguments for protecting surreptitious citizen recording reflected a belief that “police officers routinely act illegally or abusively, to the degree that public policy strongly requires documentation of details of contacts between the police and members of the public to protect important rights.”²⁷⁴ But, as the dissent properly argued, it is “the recognition of the potential for abuse that has caused our society, and law enforcement leadership, to insist that citizens have the right to demand the most of those who hold such awesome powers.”²⁷⁵

Clearly, the basic act of recording officers in the performance of their official duties does not burden the officers or interfere with their ability to execute their offices—after all, police make their own recordings of many of these encounters, without concerns for interference with the officer's ability to perform his job.²⁷⁶ A surreptitious recording, by the person involved or by a bystander, does not then become such an intrusion simply because the police did not know about or control the video.

Indeed, advocates for police recording argue that video reveals the “truth” of events by providing additional, purportedly objective, evidence; it exposes police misconduct or lies about police misconduct, deters it by increasing the likelihood of being caught, and protects officers from false claims of excessive force or coercion by providing definitive evidence.²⁷⁷ Those policy goals mean all sources of recording

²⁷⁰ See *supra* notes ___ and accompanying text.

²⁷¹ *Hyde*, 750 N.E.2d at 971-72 (Marshall, C.J., dissenting). It also would have made a misdemeanor of the current-day version of the King video, the recording of the assault on the rider at the 2008 Critical Mass rally. *Supra* note ___ and accompanying text.

²⁷² *Id.* at 970-71.

²⁷³ See Posting of Eugene Volokh to The Volokh Conspiracy, <http://www.volokh.com/posts/1201752162.shtml> (Jan. 31, 2008) (arguing that privacy-protecting rules are not uniformly positive and may have undesirable consequences).

²⁷⁴ *Hyde*, 750 N.E.2d at 969.

²⁷⁵ *Hyde*, 750 N.E. 2d at 977 (Marshall, C.J., dissenting).

²⁷⁶ See *Hyde*, 750 N.E. 2d at 969 n.9 (citing *Commonwealth v. Diaz*, 661 N.E.2d 1326 (Mass. 1996)) (recognizing police-controlled recording as “good practice”).

²⁷⁷ See *supra* notes ___ and accompanying text.

should be protected and available; any video, regardless of its source, functions as potential evidence of the police-public encounter and helps to tell a complete story. Consider that the NYPD officer who tackled the Critical Mass rider stated in an affidavit that the defendant had ridden his bicycle into him, a statement “blatantly contradicted” by the video that seems to show the officer edging towards the curb to hit the defendant.²⁷⁸ One explanation for this contradiction might be that the officer was unaware that his actions had been recorded, thus unaware that some evidence (other than the word of the individual involved in the confrontation) might challenge his statements. Increasing the possibility and availability of video is essential in making such challenges possible.

We also should gain deterrence benefits because police know that members of the public—either the individuals involved or bystander-witnesses to the event—might be carrying recording devices. In fact, real deterrence might come from the officers never knowing who or when someone may be recording the encounter.²⁷⁹

If the goal is that everyone be able to watch everyone, government cannot maintain monopoly control over the ability to record confrontations. More video from more sources must be the norm and individuals must remain unconstrained in their ability to capture, in powerful sensory form, details of official law-enforcement conduct that might be the subject of civil or criminal litigation

B. First Amendment and Restrictions on Video Recording

Beyond policy-level appropriateness of wiretap laws is whether the Constitution affords the press and public a front-end liberty to record police-citizen encounters in public spaces. Stated differently, the question is whether and how government officials could even attempt to prohibit members of the public from recording public police activities.

Courts are split as to whether, and to what extent, the First Amendment provides a liberty to gather information on public events.²⁸⁰ Several lower courts have recognized a right to photograph and record events in public spaces, so long as recorders do not interfere with police efforts, as by getting too close to the events or otherwise being disruptive of government functions.²⁸¹ Pursuant to a consent decree, the LAPD has expressly agreed to take steps to protect the media’s vital First Amendment role in reporting on public protest events and on the conduct of law enforcement at those events, and to not unduly interfere with press coverage.²⁸² If the press and public have liberty to record government interactions

²⁷⁸ See *supra* notes ___ and accompanying text.

²⁷⁹ Interestingly, the officer who confronted Brett Darrow saw the video camera in Darrow’s car and even asked him why he had the camera. Darrow explained that he installed it because of prior confrontations with police. The officer proceeded to verbally abuse and threaten Darrow anyway, even knowing the camera was running. See *supra* notes ___ and accompanying text.

²⁸⁰ McDonald, *supra* note ___, at 252.

²⁸¹ Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995); Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005); Connell v. Town of Hudson, 733 F. Supp. 465, 468 (D. N.H. 1990).

²⁸² LAPD Report, *supra* note ___, at 48-49. One of the Report’s key findings was that officers on the scene of the May Day protest had not done enough to protect the press during the rally.

with others, there is no reason not to accord the same protection when an individual records her own public encounter with police.

Consider *Robinson v. Fetterman*. The plaintiff was videotaping state police officers conducting searches of trucks along a public highway, while standing 20-30 feet away, on private property, with the owner's permission.²⁸³ Officers ordered Robinson to stop filming, confiscated his camera, arrested him, and cited him for harassment, charges that eventually were dropped.²⁸⁴ In a bench trial in his subsequent § 1983 action claiming First and Fourth Amendment violations, the district court found that Robinson's videotaping was protected First Amendment activity, both as a "legitimate means for gathering information for public dissemination" and as a source of "cogent evidence," in this case as part of Robinson's efforts to show that police were conducting the truck searches in an inappropriate manner.²⁸⁵ The court concluded that no reasonable officer could have believed that Robinson's videotaping events was unlawful, making his arrest a First Amendment violation, in turn making the arrest without probable cause in violation of the Fourth Amendment.²⁸⁶ The court awarded the plaintiff more than \$ 40,000 in compensatory and punitive damages.²⁸⁷

The outcome in *Robinson* contrasts with one effect of the broad anti-wiretap law at issue in *Hyde* and reveals constitutional concerns with that broad prohibition. A law as broad as the one in Massachusetts means that any party to a conversation is free to withhold or withdraw consent to recording. It thus empowers officers to order bystanders to stop recording or to leave the scene; these stop orders effectively work a denial or withdrawal of consent to record. Police might prohibit members of the public from documenting purported police misconduct, for no other reason than to protect officers' own personal privacy interests. Had the truck searches in *Robinson* occurred in Massachusetts, the wiretap law would have provided a lawful basis for the officers to stop Robinson from recording, to confiscate his camera, and to arrest him.

C. Toward a First Amendment Right to Record

Robinson is an example of a secondary constitutional challenge to government restrictions on individual efforts to record police activities occurring in public. The success of such secondary challenges ultimately determines the real effect that video evidence will have in civil rights enforcement, in primary constitutional challenges to the underlying public police misconduct captured on audio or video, whether the recording is used in litigation or in policy decisions.²⁸⁸ The greater the constitutional liberty of the

²⁸³ *Robinson*, 378 F. Supp. 2d at 539; *supra* notes ____ and accompanying text.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 541.

²⁸⁶ *Id.* at 541-42.

²⁸⁷ *Id.* at 545-46.

²⁸⁸ Robinson was videotaping the truck searches because he believed police were conducting them in an unsafe manner and he wanted to bring the misconduct to the attention of his state representative. *Robinson*, 378 F. Supp. 2d at 538-39, 541. The arrest at issue in the § 1983 action was the second time that police had attempted to stop Robinson from recording these searches for this purpose. *Id.* at 539.

People and press to record police-public encounters, the greater effect video evidence has on primary civil rights enforcement against police misconduct. And the more we can say that the People truly are able to watch the government in a significant way.

That connection suggests the need for a fully developed First Amendment liberty to record public events. That need increases with the continued development of smaller, easily used recording equipment and the technological ability of large numbers of people to gather and disseminate information.²⁸⁹ And the need increases as the evidentiary importance of, and judicial demand for, conclusive video evidence increases.²⁹⁰

Unfortunately, the source of this liberty to record has not been fully theorized. Most courts base it on some version of a free-speech liberty to gather information on matters of public interest occurring in public²⁹¹ or on the right of access to public spaces and meetings.²⁹² At a visceral level, “[t]aking photographs at a public event is a facially innocent act” that should not form the basis for arrest or liability.²⁹³ And that might be doctrinally sufficient in the main run of public-protest cases in which a rally participant records police halting public expression through dispersals and mass arrests.

But, as Barry MacDonald has argued, this fragmented and incomplete understanding of the basis for the right to gather information, particularly in public, may “denigrate core First Amendment values . . . and threaten to eliminate any sort of meaningful protection for the gathering of important information about other public affairs.”²⁹⁴ McDonald rejects the unthinking links to the First Amendment’s Free Speech Clause, because the conduct at issue—using camera, audio and video recorders, and computers to gather information for dissemination—cannot, in itself, be characterized as expressive activity.²⁹⁵

An additional problem with this lack of firm constitutional grounding is the potentially distinct nature of distinct rights to record police-public encounters—the right may be different when asserted by a member of the institutional press as opposed to an ordinary member of the public and there may be analytical differences between a bystander filming someone else’s confrontation with police and a person recording her own confrontation. The purpose of the recording also might matter. It thus is worth considering two potential sources of a First Amendment liberty to video and audio record police-public encounters.

1. Free Press Clause

²⁸⁹ ZICK, *supra* note ____, at 213; McDonald, *supra* note ____, at 262-63; *supra* notes ____ and accompanying text.

²⁹⁰ See Marvin v. City of Taylor, 509 F.3d 234, 248-49 (6th Cir. 2007); *infra* notes ____ and accompanying text; *supra* notes ____ and accompanying text.

²⁹¹ See Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000); Robinson; Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995); Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005).

²⁹² See Whiteland Woods L.P. v. Township of West Whiteland, 193 F.3d 177, 183 (3d Cir. 1999).

²⁹³ See Williamson v. Mills, 65 F.3d 155, 158 (11th Cir. 1995).

²⁹⁴ McDonald, *supra* note ____, at 355.

²⁹⁵ *Id.* at 270.

McDonald grounded a general right to gather information in the Free Press Clause, which he argues operates as an independent source of liberty for all individuals and organizations (not only the institutional press) to gather information of public value for purposes of public dissemination.²⁹⁶ The Speech Clause protects dissemination of recorded information of its own force; the Press Clause does independent work by protecting the often-structured process of antecedent information-gathering conduct.²⁹⁷ His proposed right has two elements. First, the information recorded must be the type of content that “could reasonably be said to foster or promote” societal interests in informed democratic self-governance, including information about the operations and affairs of government²⁹⁸ and official and public conduct of law enforcement.²⁹⁹ Second, the events or information recorded must be “sought *for the purpose* of disseminating it to the public, and not just for individual consumption or dissemination to a limited audience selected for personal reasons.”³⁰⁰

McDonald’s standard plainly protects news media filming public political rallies and other police-citizen encounters, such as the protests in Miami or Los Angeles.³⁰¹ That standard also is consistent with acknowledged law-enforcement obligations to guarantee media access and opportunity to record public events as they occur.³⁰² It also seems to guarantee the ability of others on the scene to observe, record, and bear witness to events, even if not formally part of the institutional press.³⁰³ And it should protect the plaintiff in *Robinson*, who recorded the truck searches to create a record of what he considered inappropriate police conduct, planning to present the recorded evidence to the state legislature.³⁰⁴ This right prohibits police from halting or dissuading recording. And it prohibits enforcement of Massachusetts’ broad anti-wiretap law.

It is less clear whether McDonald’s right extends to members of a protest group recording their own encounters with police. Protesters often are less concerned with information-dissemination and their purpose may not be primarily to inform the public. This again recalls Zick’s argument that recording and disseminating information about government efforts to halt or restrict public expression should become part of that organization’s expression.³⁰⁵ If government restrictions on recording of public expression become part of the group’s public expression, McDonald’s model protects the recording itself, at least where some dissemination follows. Indeed, the Ninth Circuit in *Fordyce* accepted, albeit without discussion or contours, the idea that a member of the protest group, who also was recording the march for

²⁹⁶ *Id.* at 141.

²⁹⁷ *Id.* at 354.

²⁹⁸ *Id.* at 345.

²⁹⁹ *Id.* at 341.

³⁰⁰ *Id.* at 348 (emphasis in original).

³⁰¹ *Supra* notes ___ and accompanying text.

³⁰² LAPD Report, *supra* note ___, at 48-49.

³⁰³ *Cf.* *Connell v. Town of Hudson*, 733 F. Supp. 465, 466 (D.N.H. 1990) (involving claim by free-lance photographer attempting to record police handling of traffic accident).

³⁰⁴ *Robinson*, 378 F. Supp. 2d at 541; *supra* notes ___ and accompanying text.

³⁰⁵ *ZICK*, *supra* note ___, at 213; *supra* notes ___ and accompanying text.

dissemination on cable-access television, was entitled to First Amendment protection in his videotaping.³⁰⁶

This position is less certain than with media and third-party recorders. And McDonald's conceived right certainly will not protect the individual driver or arrestee with an MP3 player in his pocket or a video camera mounted in his car, whose purpose in recording the encounter (i.e., in gathering information) is for potential use in whatever criminal or civil rights litigation arises from this confrontation and who likely is not thinking (at least primarily) about disseminating what he records of the encounter.

Of course, we might argue that civil litigation, especially actions against government and government officials, is a means of disseminating information about official misconduct—perhaps even a more important and more effective way of doing so.³⁰⁷ Civil litigation is an open and public process, particularly at the trial stage.³⁰⁸ Video and audio recordings in the evidentiary record are disseminated to the public for consideration, viewing, and reaction. In fact, we might argue that, given the expressive nature of civil-rights litigation,³⁰⁹ McDonald's proposed standard should accord constitutional protection to all public recording of police conduct, even where the initial intended use of the video is evidentiary and litigation-based.

2. *Petition Clause*

A different liberty to record could be grounded in the First Amendment's Petition Clause.³¹⁰ The court in *Hyde* rejected this argument, concluding that Hyde had freely exercised his right to petition by bringing his complaint of police misconduct to the department, which investigated the incident, including by reviewing the audiotape of the encounter.³¹¹ Of course, it was the very petition (or the evidence presented in support of that petition) that led to his prosecution.³¹² The court unfortunately did not acknowledge an individual's need to document his police encounter antecedent to petitioning, blithely asserting that Hyde "was not prosecuted for making the recording; he was prosecuted for doing so

³⁰⁶ *Fordyce*, 55 F.3d at 438.

³⁰⁷ Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 685 (1999).

³⁰⁸ See Howard M. Erichson, *Court-Ordered Confidentiality*, 81 CHI.-KENT L. REV. 357, 361-62 (2006) (arguing that litigation is a public process, but focusing the public on trial and adjudication); see also Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 50-53 (1983) (arguing for a narrow rule of public access to pre-trial discovery in certain cases arising from, and revealing, government misconduct).

³⁰⁹ See Paul B. Stephan, *A Becoming Modesty—U.S. in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 644 (2002):

In articulating a sense of justice, both in the specific context of the lawsuit and in a broad normative sense of what the lawsuit teaches, litigation speaks to society as a whole. It both responds to and shapes broad intuitions of what is normatively just. It reaches into the past to build a sense of appropriateness and, at the same time, shapes our understanding of the past to strengthen our belief in the inevitability of its outcomes.

³¹⁰ U.S. CONST. amend. I; Andrews, *supra* note ____, at 557-58; Pfander, *supra* note ____, at 899.

³¹¹ *Hyde*, 750 N.E.2d 969.

³¹² *Id.* at 965; *supra* notes ____ and accompanying text.

secretly.”³¹³ Of course, this response ignores that Massachusetts law is not about secrecy, it is about privacy and consent. State law would have empowered officers to halt even open recording; officers could have ordered Hyde to turn the recorder off, thereby denying their consent to be recorded in the name of their unadorned privacy rights against unwanted recording.³¹⁴

But the Petition Clause, properly conceptualized, might get us where McDonald’s Press-Clause model does not, defining a complete liberty of information gathering that covers all recording of law-enforcement encounters. Civil litigation against government and government officials is recognized as protected petition activity, a form of calling on government to answer to, and provide redress for, grievances.³¹⁵ This includes judicial determinations that government officials have acted unlawfully.³¹⁶

Carol Rice Andrews proposes a narrow Petition liberty to file winning claims in court, a right which would subject all direct restrictions on court access to strict scrutiny.³¹⁷ Further, this core liberty to file winning suits requires “breathing room” to avoid a chilling effect, in the form of broader protections for other, related non-core activity.³¹⁸ Breathing room would demand some protection for the filing of some losing suits as a buffer to the core right.³¹⁹

The question is whether this liberty, so conceived, protects members of the public in recording public encounters between police and citizens (themselves or others) for the primary or exclusive purpose of creating evidence to prove or disprove a subsequent constitutional claim against government and government officials. Evidence gathering is not at the core of the right Andrews proposes, since it is not tied to filing and pursuing winning claims. But protecting evidence gathering would give that core liberty breathing space, protected as incident to filing a winning claim. Recording encounters and using the recording as evidence strengthens the plaintiff’s ability to prove his claim—making it more likely the type of “winning case” he has the right to file.

Even if video is not, and should not be treated as, the overwhelming, objective, unambiguous, singular, and conclusive proof that courts and the public believe it to be,³²⁰ the descriptive reality, for the moment, is that courts,³²¹ government officials,³²² and the public³²³ all treat it as if it is. If video carries

³¹³ *Id.* at 969.

³¹⁴ *Supra* notes ___ and accompanying text.

³¹⁵ Andrews, *supra* note ___, at 685; James E. Pfander, *Sovereign Immunity and the Right to petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 962 (1997); *id.* at 960 (arguing that the First Amendment “adopt[ed] language that appears to authorize individuals to pursue judicial determination of claims against the government”); *see also* McDonald v. Smith, 472 U.S. 479, 484 (1984) (“[F]iling a complaint in court is a form of petitioning activity.”); California Motor Transport v. Trucking Unlimited, 408 U.S. 508, 510 (1972) (“The right of access to the courts is indeed but one aspect of the right of petition.”); Andrews, *supra* note ___, at 587.

³¹⁶ Pfander, *supra* note ___, at 983.

³¹⁷ Andrews, *supra* note ___, at 663-64, 679.

³¹⁸ *Id.* at 680, 683.

³¹⁹ *Id.* at 683.

³²⁰ *Supra* notes ___ and accompanying text.

³²¹ Scott v. Harris, 127 S. Ct. 1765 (2007); Marvin v. City of Taylor, 509 F.3d 234 (6th Cir. 2007); Beshers v. Harrison, 495 F.3d 1260 (11th Cir. 2007).

³²² *Supra* Part IV.

such evidentiary weight and significance, an individual, seeking to exercise his First Amendment liberty to file winning lawsuits, cannot be limited or prevented altogether from obtaining, in public spaces and in a non-interfering manner, persuasive evidence to support the claim (to make into a winning claim) arising out of her encounter with police.

Several considerations bolster this conclusion. First, law enforcement itself may be recording the encounter, so the plaintiff's recording simply provides additional probative evidence.³²⁴ Second, absent any recording evidence, the he-said/he-said nature of the case typically works against plaintiffs and in favor of police.³²⁵ Video evidence, balanced against testimony, moves the case away from the he-said/he-said field. Third, the burden of a case such as the Sixth Circuit's decision in *Marvin v. City of Taylor*³²⁶ cannot be overlooked. The court went beyond looking at video for consistency with the plaintiff's version, but granted summary judgment against the plaintiff when the video did not affirmatively establish his claim.³²⁷ If that is the burden of production that the plaintiff carries to get by summary judgment with his "winning claim," he only can satisfy that burden if he has a strong front-end liberty to obtain that video evidence through his own efforts.

The result of this conception of the Petition Clause is that any limitations on the ability of individuals to record public encounters—whether a statute such as the Massachusetts wiretap law at issue in *Hyde* or police officers ordering someone to put away her camera or arresting someone for attempting to record an encounter as in *Robinson*—must be subject to some First Amendment scrutiny, in light of the potential effect the recording will have on subsequent primary civil rights litigation over the recorded events and the possibility that the video will enhance the plaintiff's winning constitutional claim.

On the other hand, the Court has held that the newsgathering right does not necessarily include the most effective way to gather information in government spaces and meetings.³²⁸ So one might argue that the right to file (and prove) winning claims is vindicated so long as a witness to the encounter is able to testify to events, without any additional right to record. Two things weigh against this argument. First, Andrews's point is not that all right-of-court-access rules are unconstitutional, only that they must satisfy some level of First Amendment scrutiny.³²⁹ This shifts the burden of persuasion onto government to justify the limitation on recording, something it likely cannot do as to recording in public spaces. Second, and related, government will be recording many of these same public encounters.³³⁰ Thus, a public right

³²³ Kahan, *supra* note ___, at ___ (M.38) Silbey, *Cross-Examining*, *supra* note ___, at ___ (M. 6-7); *supra* notes ___ and accompanying text.

³²⁴ *Supra* notes ___ and accompanying text.

³²⁵ *Supra* notes ___ and accompanying text.

³²⁶ 509 F.3d 234 (6th Cir. 2007).

³²⁷ *Id.* at 240, 248-49; *supra* notes ___ and accompanying text.

³²⁸ **Sources in McDonald – Estes and Nixon.**

³²⁹ **See Andrews on this point.**

³³⁰ *See supra* notes ___ and accompanying text.

to record is necessary to maintain the balance of evidentiary power—to ensure that the public can watch Big Brother just as Big Brother watches the public.