

# ValpoScholar

## Valparaiso University Law Review

Volume 48  
Number 1 Fall 2013

pp.1-39

Fall 2013

### The Image Cannot Speak for Itself: Film, Summary Judgment, and Visual Literacy

Naomi Mezey

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

#### Recommended Citation

Naomi Mezey, *The Image Cannot Speak for Itself: Film, Summary Judgment, and Visual Literacy*, 48 Val. U. L. Rev. 1 (2013).

Available at: <https://scholar.valpo.edu/vulr/vol48/iss1/1>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at [scholar@valpo.edu](mailto:scholar@valpo.edu).



## Articles

### THE IMAGE CANNOT SPEAK FOR ITSELF: FILM, SUMMARY JUDGMENT, AND VISUAL LITERACY

Naomi Mezey\*

#### I. INTRODUCTION

In 2007, the Supreme Court held that a Georgia police officer did not violate the Fourth Amendment rights of the plaintiff, who was fleeing police, when the officer intentionally caused the plaintiff's car to crash and rendered the plaintiff quadriplegic.<sup>1</sup> The most striking aspect of *Scott v. Harris* is that the existence of video evidence changed the Court's approach not only to the facts but to the legal analysis. The question before the Court was whether summary judgment was proper. The lower courts had found conflicting material facts, but the Supreme Court concluded that summary judgment could be granted on the basis of the video evidence alone.<sup>2</sup> The decision relied on the video taken of the chase from the squad car's "dash-mounted video camera."<sup>3</sup> The Court announced that it was pleased "to allow the videotape to speak for itself."<sup>4</sup> For the first time, the Court cited to a video link in an opinion and posted the video on the Supreme Court webpage to assure its public availability.<sup>5</sup>

Video images saturate our public and private lives. Moving images are the norm of entertainment and advertising – on city streets, subways, and personal screens – as they are increasingly the norm within intimate

---

\* Professor of Law, Georgetown University Law Center. A much earlier version of this Article was originally presented as the Seegers Lecture on Jurisprudence at Valparaiso University Law School in November 2011. I am indebted to the intelligent and diligent research assistance of Gabe Lezra and Matthew Murrell, the insightful comments of Lisa Heinzerling, Marty Lederman, Nina Pillard, Mike Seidman, Gerry Spann, and Larry Solum, as well as fruitful conversation on the topic with colleagues at Valparaiso, University of Virginia, and Georgetown law schools.

<sup>1</sup> *Scott v. Harris*, 550 U.S. 372, 375, 381 (2007) (concluding that no reasonable juror could find that the fleeing driver did not pose a deadly risk to the public).

<sup>2</sup> *Id.* at 378–81.

<sup>3</sup> *Id.* at 380–81; *see id.* at 391 n.3 (Stevens, J., dissenting) (recognizing that the "dash-mounted video camera" was activated automatically when the police officer turned on his lights).

<sup>4</sup> *Id.* at 378 n.5 (majority opinion).

<sup>5</sup> *Id.*; *see* VIDEO RESOURCES, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/media/media.aspx>.

## 2 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48]

spaces and private communication as well. Images “surround us in the same way as a language surrounds us.”<sup>6</sup> Images are a language, a form of visual communication, and they deserve and require the same attention we give to language. As the realities of our own lives are increasingly dominated by images, it is not surprising that they have become ubiquitous within the law, presented in litigation and other law-related contexts as photographs, film, illustrations, diagrams, reenactments, visual aids, displays of physical evidence, computer animation, x-rays, and fingerprints. Video images specifically are also increasingly common within what was once the primarily textual and oral domain of the law. The most pervasive examples are the videos produced by security cameras as well as the cameras placed on the inside and outside of police officers’ cars and clipped on officers’ bodies;<sup>7</sup> along with the images from personal cell phones, these cameras capture many conflicts, large and small, that make their way to the courtroom.<sup>8</sup> In the legal encounter with the image, there is a recurring assumption that images assist us in seeing more clearly and, in seeing more clearly, we get closer to “the truth.”<sup>9</sup> But images produced by cameras and computers are always mediated, their meaning influenced by aspects of the medium, the context of viewing, and the perceptions of the viewer. That mediation is still frequently overlooked and was overlooked in *Scott v. Harris*. In this Article, I call for greater sensitivity to the distance between seeing and knowing and to how we make images speak, not to mention what we have them say.

---

<sup>6</sup> JOHN BERGER, *WAYS OF SEEING* 32 (1972). Even Freud’s classic “mirror stage” has become animated. See PHILIPPE JULIEN, *JACQUES LACAN’S RETURN TO FREUD 48–52* (Devra Beck Simiu trans., 1994) (discussing the “mirror stage” as initially presented by Lacan and influenced by Freud). The child with the mirror has become the child taking videos of herself on a computer.

<sup>7</sup> Erica Goode, *Video, a New Tool for the Police, Poses New Legal Issues, Too*, N.Y. TIMES, Oct. 12, 2011, at A14, available at [http://www.nytimes.com/2011/10/12/us/police-using-body-mounted-video-cameras.html?\\_r=1&emc=eta1](http://www.nytimes.com/2011/10/12/us/police-using-body-mounted-video-cameras.html?_r=1&emc=eta1) (discussing the use of body- and dash-mounted video cameras to document arrests, traffic stops, and shootings).

<sup>8</sup> *Id.* (recognizing that judges are now faced with issues raised by new technologies, such as police conduct videos recorded by citizens and later promptly uploaded to YouTube).

<sup>9</sup> I am neither committed to the proposition that there is “a truth” of the matter in any given legal dispute nor to the conviction that there is not such a truth. For purposes of this Article, I am agnostic on this point and concerned more with the ways in which video evidence can guide judicial judgment about what facts need to be known. This determination usually both assumes an underlying truth and that the video can offer clarity on it.

Despite a common-sense awareness that images do not always “tell the truth,” courts still routinely find video evidence to be conclusive.<sup>10</sup> Even when they see conflicting images or hear conflicting interpretations of images, courts offer very little analysis of video evidence, instead assuming that unaltered images—either as a whole or broken down into their constituent frames—provide direct and accurate access to the reality they seem to convey.<sup>11</sup> This is the problem that motivates this Article: courts and legal actors lack a critical vocabulary of the visual, and without visual literacy, they are more likely to be unduly credulous in the face of images.

The lack of visual literacy is especially and problematically evident at summary judgment, when judges can end cases if they find that there is no genuine factual dispute.<sup>12</sup> Without a vocabulary for interpreting and interrogating visual images, video evidence is more likely to be seen as conclusive and used to grant summary judgment where it otherwise would not be. Indeed, this assumption that videos have a reliable factual conclusiveness has not only been modeled by the Supreme Court but has been used to alter the standard summary judgment analysis.

In *Scott v. Harris*, eight Justices used a police video to justify departing from the traditional summary judgment standard, which requires that courts refrain from weighing evidence and view the facts in the light most favorable to the nonmoving party.<sup>13</sup> The Court believed that the video allowed it to see accurately what occurred during the chase and noted that there was no indication that “what it depict[ed] differ[ed] from what actually happened.”<sup>14</sup> The Court did not apply the well-established lens that requires courts to view the evidence “in the light most favorable to the nonmoving party,” here, the victim of the police’s use of force; instead, the Supreme Court announced what we must read as a new summary judgment standard and admonished the court of appeals for not viewing the facts “in the light depicted by the videotape.”<sup>15</sup>

However, the Court fails to acknowledge that “the light depicted by the videotape” is left to the perception of the viewing judge. Without the assumption that videotapes, like eyewitnesses, have only one perspective, and without a critical vocabulary of the sort used to analyze human fallibility or textual ambiguity, this new standard invites judges

---

<sup>10</sup> See, e.g., *supra* text accompanying notes 1–5 (discussing the use of video evidence in *Scott v. Harris*).

<sup>11</sup> See, e.g., *Scott v. Harris*, 550 U.S. 372, 378 (2007).

<sup>12</sup> FED. R. CIV. P. 56(a).

<sup>13</sup> *Scott*, 550 U.S. at 373, 380–81.

<sup>14</sup> *Id.* at 378.

<sup>15</sup> *Id.* at 380–81.

## 4 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48]

to displace the jury even when the facts depicted by the video are disputed by the parties. Not surprisingly, the Court's approach to video evidence at summary judgment appears to have been very influential, especially in the context of police misconduct and excessive force claims.<sup>16</sup> Moreover, the Court heard *Plumhoff v. Rickard* in March 2014.<sup>17</sup> This excessive force case, factually quite similar to *Scott v. Harris* and likewise based on video evidence, seems to ensure that the Supreme Court will continue to model its impoverished approach to the legal interpretation of images.

Others have noted the need for a visual jurisprudence and have started on that endeavor.<sup>18</sup> My approach adds to the larger project of resisting the legal authority of the image and providing some interpretive tools with which to dismantle the undue credulity of courts in the face of visual evidence. It takes its inspiration as much from film as from law because film studies and visual culture have a long tradition of making sense of images and providing a vocabulary of visual literacy.<sup>19</sup> One of the best examples of a film that conveys why it is important for the law to have a critical visual vocabulary is the 2002 movie *Minority Report*,<sup>20</sup> with its sophisticated reflection on the legal uses and abuses of visual evidence.

---

<sup>16</sup> See Martin A. Schwartz et al., *Analysis of Videotape Evidence in Police Misconduct Cases*, 25 TOURO L. REV. 857, 863 (2009) ("The lower federal courts have latched on to *Scott*. There are more and more rulings on summary judgment in favor of police officers based on videotape evidence."); Nina Frank, Note, *Such Visible Fiction: The Expansion of Scott v. Harris to Prisoner Eighth Amendment Excessive Force Claims*, 32 CARDOZO L. REV. 1481, 1485-86, 1497-1502 (2011) (discussing several cases with varying fact patterns where district courts have relied on the standard in *Scott* to grant or deny summary judgment for defendant correctional officers). But see, e.g., *Moore v. Casselberry*, 584 F. Supp. 2d 580, 585-87 (W.D.N.Y. 2008) (refusing to grant summary judgment in an excessive force case, reasoning that "although the credibility of plaintiff's testimony concerning the alleged assault [was] certainly inconsistent with [video] evidence and [was] subject to serious question, it [was] not so blatantly false that the Court may simply reject it as a matter of law").

<sup>17</sup> *Plumhoff v. Rickard*, No. 12-1117 (U.S. argued Mar. 4, 2014) (presenting the question whether it was error to deny qualified immunity in a case nearly identical to *Scott v. Harris*).

<sup>18</sup> See generally NEAL FEIGENSON & CHRISTINA SPIESEL, *LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT* (2009); Richard K. Sherwin, *Visual Jurisprudence*, 57 N.Y.L. SCH. L. REV. 11 (2012-2013).

<sup>19</sup> See, e.g., *FILM THEORY AND CRITICISM 1-7* (Leo Braudy & Marshall Cohen eds., 5th ed. 1999) (discussing the ways in which film is a language); RICHARD HOWELLS & JOAQUIM NEGREIROS, *VISUAL CULTURE 1* (2d ed. 2012) (noting the importance of learning to read visual texts using the same rigor with which we read printed texts).

<sup>20</sup> *MINORITY REPORT* (Twentieth Century Fox Film Corporation 2002); *Synopsis for Minority Report*, IMDB, <http://www.imdb.com/title/tt0181689/synopsis> (last updated Aug. 2013). Plot descriptions are those of the author.

Set in Washington D.C. in 2054, *Minority Report* focuses on a “precrime” police unit that arrests people just before they commit murder. The police know who the perpetrators are because of the visions of the three precognitives (“precogs”)—the three sibling seers who lie in a state of suspended animation in a pool of photon milk with headgear that projects their prescient visions onto a big screen to be viewed by the police. Police sort through the images on a screen by “scrubbing” them, literally pushing aside and culling out the relevant details from an overabundance of visual evidence, to determine the location of the approaching crime so they can apprehend the perpetrator before it happens. Within the police world of the movie, the images appear to “speak for themselves” even when they have the inchoate character of dreams. Despite the fact that the precrime unit recognizes that some visual details are not relevant, the officers operate under the assumption that the images are fully reliable and always “tell the truth.”

The plot is driven by the fact that John Anderton, the chief of the precrime unit, finds his own name inscribed as the perpetrator of an imminent murder and sets out to prove his innocence before the crime happens. He finds the woman who discovered the precogs’ abilities, and she tells him the secret that saves him and kills the program: while the precogs are never wrong about what they see, sometimes they disagree when one of them sees things differently from the other two. These dissenting interpretations are the visual “minority reports,” which are instantly destroyed because for precrime to function “there can’t be any suggestion of fallibility. After all, what good is a Justice system that instills doubt?”<sup>21</sup>

As this interpretive fallibility comes to light—its revelation projected onto a screen within the movie—the program collapses, as does a commitment to the truth of the image. Thus, the secret of the film is also the secret of law’s faith in the infallibility of the image, and the film’s solution provides a vital lesson for the law: even the most reliable images have at least one minority report—another way of seeing—that ought to be considered before video evidence seduces courts into an undue credulity that images depict “what actually happened” and can provide legal actors with the truth of contested events. Like the fictional precrime unit, the Supreme Court is committed to a fantasy of the truth of the image that encourages judges’ ways of seeing to displace juries’ ways of seeing.

---

<sup>21</sup> MINORITY REPORT, *supra* note 20. The *Minority Report* script is available at [http://www.dailyscript.com/scripts/MINORITY\\_REPORT\\_--\\_May\\_16th\\_2001\\_revised\\_draft\\_by\\_Scott\\_Frank.html](http://www.dailyscript.com/scripts/MINORITY_REPORT_--_May_16th_2001_revised_draft_by_Scott_Frank.html).

6 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48

In law, it is utterly ordinary for us to see and argue about the ambiguity of language and text; whereas, it is extraordinary for us to see—let alone argue about—the ambiguity of the image. However, in the last decade or so, there has been a tremendous growth in scholarship at the intersection of law and the visual.<sup>22</sup> While this scholarship is varied, all of it attests to the fact that the visual has occasioned a paradigm shift in the way legal meaning is constructed. The law itself, however, has yet to acknowledge or account for this shift in any serious way. Even while the law reflects scant attention to the insights of other fields, popular culture has a much longer tradition of taking law seriously and not so seriously; legal shows and movies have been a mainstay of the film and television industries for over half a century.<sup>23</sup> Whether the visual appears within the spaces of the law or the law within the visual media, their mutual engagement is a source of important inquiry for legal scholars and lawyers. The aim here is to advocate for the importance of, and sketch one approach to, a visual literacy that could provide us with ways to critically assess the use of images within the law generally and at summary judgment in particular.

This Article urges a visual vocabulary that is attentive to the cinematic and cultural mediations of video evidence; accounts for the medium, the act of viewing, and the viewer; and reads images as if they were a minority report or another interpretive perspective. The term “minority” in this context is meant to convey a double meaning, not only a dissenting view but also a different way of seeing informed by different lived experiences, including the history and contexts of minority perspectives.<sup>24</sup> A critical visual literacy can help us visualize how we might give legal images multiple voices and narrate their multiple ways of seeing.

I approach this topic by borrowing ideas from art, film, and cultural theory to help lay a foundation for visual literacy within the law. This Article proceeds in three parts. Part II provides a brief discussion of visuality and the ways the image has been thought to apprehend reality and hence “tell the truth.” Part III reviews how the image has been taken up by the law and its uneasy role as evidence. Last, Part IV

---

<sup>22</sup> The scholars whose work has influenced me most strongly are Amy Adler, Neal Feigenson, Rebecca Johnson, Orit Kamir, Jennifer Mnookin, Austin Sarat, Richard Sherwin, Jessica Silbey, Martha Umphrey, and Alison Young, to name only a few.

<sup>23</sup> See Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 114–66 (2005) (describing the history of television shows and movies about law).

<sup>24</sup> See, e.g., Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 897–98, 903 (2009) (explaining how the Court ignores others’ beliefs).

provides a comparison of three paradigmatic approaches to the use of documentary images at summary judgment and reassesses them from the vantage point of visual literacy: *Scott v. Harris* and the more recent cases of *Gilfand v. Planey* and *McDowell v. Sherrer*. These three cases are similar in that they are all excessive force cases that turn primarily on video evidence; together they provide the framework for contrasting different approaches to visual representation in the law and considering what a critical visual literacy would add to the law's use of filmic evidence.

The Article's first claim is simple, yet too often ignored by legal actors and flatly contradicted by the Supreme Court: the image cannot speak for itself. An undue credulity in the image will lead to more injustice as judges assume that the camera provides them with an unmediated perception of events, a perception that is necessarily the product of their own experience. I do not go so far as to claim video images never provide reliable information that speaks to a material issue from which a court could grant summary judgment, but only that much of the time the depictions of the video are themselves open to interpretive dispute and ought to be critically examined like text or testimony. The Article's second claim is that images produce an excess of information, an "orgy of evidence,"<sup>25</sup> and that by seeming to say so much, images appear to say more than they do. In the face of images, courts are more likely to think they can answer a relevant legal question in a case or to frame the legal question through the available evidence. If the legal profession remains visually illiterate and fails to appreciate the many ways images speak, as well as the limitations of what those images can say, it risks sacrificing the crucial role of the law in interpretation, judgment, and justice.

## II. WAYS OF SEEING AND APPREHENSIONS OF THE REAL

Art critic and novelist John Berger began his influential book *Ways of Seeing* with the following observation: "Seeing comes before words. The child looks and recognizes before it can speak."<sup>26</sup> Seeing does have a place of privilege within the law, as exemplified by the eyewitness—the quintessential bearer of evidentiary information. Yet with the eyewitness, we know to question the relationship between what is seen and what is known. We accept that perceptions differ and that people have ways of seeing, recalling, and narrating that influence what is seen and known.

---

<sup>25</sup> MINORITY REPORT, *supra* note 20.

<sup>26</sup> BERGER, *supra* note 6, at 7.



8 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48

When the camera is the eyewitness, however, we often lose these critical instincts. In the face of mechanical reproduction of the world, we tend to forget two important things: first, even unmanned surveillance cameras have ways of seeing, framing, and distorting the events they capture and that they have modes of perception; and second, when viewers watch the images cameras produce, visual interpretation is multiplied. As Berger says, “although every image embodies a way of seeing, our perception or appreciation of an image depends also upon our own way of seeing.”<sup>27</sup> In other words, the sight captured in the image produces at least one way of seeing—though often more—and excludes others, and our viewing of the image produces at least another way of seeing—though often more—and excludes others.

Enlightenment, modernity, and postmodernity have all contributed to structuring, deconstructing, and multiplying our ways of seeing, not to mention our understandings of truth, reality, and representation. According to Berger, the conventions of the European oil painting defined our understanding of the visual image for 400 years.<sup>28</sup> Its way of seeing was based on the technique of perspective, in which the viewer is placed at the all-seeing center, and the “visible world is arranged for the spectator as the universe was once thought to be arranged for God.”<sup>29</sup> In the twentieth century, however, the camera and modernity fractured our fundamental sense of the visual into a multiplicity that depended on positionality.<sup>30</sup> It made it possible to imagine countless different images of the same scene.

Every drawing or painting that used perspective proposed to the spectator that he was the unique centre of the world. The camera—and more particularly the movie camera—demonstrated that there was no centre.

The invention of the camera changed the way men saw. The visible came to mean something different to them.<sup>31</sup>

Berger’s is certainly not the only theory of perception and visual culture, and it is not my aim to canvas the various approaches to visual theory in this Article. I use both Berger’s terminology and his argument because it helps clarify my larger point—that images cannot speak for themselves because both the images and their viewers have multiple

---

<sup>27</sup> *Id.* at 10.

<sup>28</sup> *Id.* at 84.

<sup>29</sup> *Id.* at 16.

<sup>30</sup> *Id.* at 18.

<sup>31</sup> *Id.*

ways of seeing. On the one hand, the history of Western art is the history of how Westerners have been taught to be viewers. Enlightenment art both mimicked and made a particular reality. We have learned to perceive the world as if we were at the center of what there was to see. On the other hand, the camera's ubiquitous presence continues to encourage us to believe that we can see everything. Most viewers of evidentiary images bring with them cultural assumptions that inform what is visible and how it is visible.

Modern and postmodern artists and visual theorists have continued to try to teach us new ways of seeing, though these lessons have not been fully learned in part because they involve unlearning deeply engrained Enlightenment understandings. Modernism took the ruptures occasioned by both the camera and capitalism, among other things, and used them to question the nature of the image, perception, and representation. Impressionism, cubism, and surrealism were all engaged with making evident and reflecting on new ways of seeing and knowing, as well as new relationships between the image, the viewer, and the object of the image.

René Magritte's famous realistic painting of the pipe is now the classic case in point.<sup>32</sup> He wrote on the canvas beneath the picture, "Ceci n'est pas une pipe," or "This is not a pipe," to force the viewer to consider the difference between an image and its referent and to see the painting not as a pipe but more precisely as a painting of a pipe.<sup>33</sup> As Magritte said of this painting, appropriately entitled *The Treachery of Images*: "How people reproached me for it! And yet, could you stuff my pipe? No, it's just a representation, is it not? So if I had written on my picture 'This is a pipe,' I'd have been lying!"<sup>34</sup> Magritte's own statement pushes the point—would it have been lying to have written below the picture, "This is a pipe"? What is the truth of this image? And how does Magritte's narration of the image change its possible meanings?

---

<sup>32</sup> RENÉ MAGRITTE, *THE TREACHERY OF IMAGES* (1929), reproduced at <http://www.rene-magritte.org/the-treachery-of-images.jsp> (last visited Sept. 14, 2013).

<sup>33</sup> *Id.*; see Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 689 (2012) (discussing the meanings of *The Treachery of Images*).

<sup>34</sup> HARRY TORCZYNER, *MAGRITTE: IDEAS AND IMAGES* 118 (John P. O'Neill & Ellen Schwartz eds., Richard Miller trans., 1977). Not surprisingly, Michel Foucault wrote an essay also entitled *This is Not a Pipe* about the contradictions between the text and image in Magritte's painting. MICHEL FOUCAULT, *THIS IS NOT A PIPE* (James Harkness ed. & trans., 2d ed. 2008).



*The Treachery of Images*, by René Magritte, 1929

If modernity was concerned with representation and ways of seeing, postmodernity might be said to be concerned with epistemology and ways of knowing. If Magritte's painting has a postmodern successor, it is the work *This is a Pipe*, by anonymous English street artist Banksy,<sup>35</sup> known for his stenciled graffiti, paintings, social satire, and the film *Exit Through the Giftshop*.<sup>36</sup> *This is a Pipe* is a "painting" in which the frame partly encloses a painted wall with a pipe and spigot coming out of it. Beneath the pipe is written "This is a pipe," in the same style Magritte used in his painting. The reference is clear, but the humor is reversed and multiplied. While Magritte insisted that representation was something different from its referent, such that a painting of a pipe is a painting rather than a pipe, Banksy suggests that we see both the pipe and the painting as real and the commercial production of art as the medium through which each is given meaning. The frame makes the "real" pipe a painting, but the frame is placed inside the edges of the wall so that we see its artifice and must acknowledge its power to change our perception. In addition to asking us to reflect on representation, Banksy asks us to reflect on presentation, framing, the meaning of art, and epistemology. Banksy's pipe can also be seen as a metaphor for how the camera frames images and how the context in which we view them—

<sup>35</sup> BANKSY, THIS IS A PIPE, reproduced at [http://1.bp.blogspot.com/-UyQfKdhx7K8/T04SYnjOeuI/AAAAAAAAEPE/nMv1C\\_beCjk/s1600/Banksy-this-is-a-pipe.jpg](http://1.bp.blogspot.com/-UyQfKdhx7K8/T04SYnjOeuI/AAAAAAAAEPE/nMv1C_beCjk/s1600/Banksy-this-is-a-pipe.jpg) (last visited Oct. 16, 2013).

<sup>36</sup> EXIT THROUGH THE GIFT SHOP (Paranoid Pictures 2010).

2013]

*The Image Cannot Speak for Itself*

11

courtroom, movie theater, office, etc.—changes how we make sense of what we see.



*This is a Pipe, by Banksy*

It may well be that like Banksy's pipe, film and computer-aided video images are as much the paradigm of postmodern representation as Magritte's *The Treachery of Images* was for modernist representation. Film technologies have ushered in new disruptions of the real and of representation and show more vividly in their motion, animation, and juxtaposition, the discursive power of moving images. Film not only represents but narrates, and in so doing, brings into being new forms of seeing and meaning-making that should be distinguished from enlightenment painting, modern art, and even the photograph.<sup>37</sup>

We have all become viewers who are used to seeing edited films and accept film editing as a kind of narration. Film editors choose and sequence images and scenes, cut out the images that are not necessary to the story, and do it in a way that is usually unnoticeable to the viewer. In his brilliant book on film editing, Walter Murch explores the mystery of the "cut," the most basic tool of film editing, and why it works "even

---

<sup>37</sup> Richard Sherwin argues that different screen technologies should also be distinguished from each other. Richard K. Sherwin, *What Screen Do You Have in Mind? Contesting the Visual Context of Law and Film Studies*, in 46 *STUDIES IN LAW, POLITICS, AND SOCIETY* 3, 5 (Austin Sarat ed., 2009).

12 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48

though it represents a total and instantaneous displacement of one field of vision with another, a displacement that sometimes also entails a jump forward or backward in time as well as space.”<sup>38</sup> One explanation for why the cut’s disruption of reality works in film is because at its most violent it mimics how we jump between and juxtapose images in dreams. At its most subtle it operates like the blink of an eye—an interruption of visual continuity that we do not even notice.<sup>39</sup> The result is that film editing works, and it works on us, making us into viewers who both see and do not see the way images narrate, even when the framing and cutting are not the products of deliberate choices.

Notably, these various disruptions of the real—as I have called them—are not a clichéd postmodern claim that there is no reality and no truth. Both modernity and postmodernity have insisted, at the very least, on multiple realities and multiple truths, which ought to prompt us to look for minority reports. As John Fiske explains:

The . . . realities of postmodernity are both pluralized and extend along two axes—one of the discourse into which reality is put and by which it is known to be real, and the other of the social conditions of those who experience that reality as their own, and who experience it as real, although it may differ from the reality experienced by those positioned differently.<sup>40</sup>

Fiske, like Berger, wants to make evident that images do not come with ready-made meaning but are understood through the “discourses” into which they are put, or what I have been calling their multiple mediations.

We can and should be more attentive to the ways in which images are made meaningful by reflecting on the different techniques of visual interpretation evident in the medium, viewing context, and individual viewer. For example, film as a medium is understood through its two key “grammatical components: the shot and the edit. The shot is completed inside the camera and is the most fundamental grammatical unit of the cinema. The edit is the order and way the shots are put together.”<sup>41</sup>

---

<sup>38</sup> WALTER MURCH, *IN THE BLINK OF AN EYE: A PERSPECTIVE ON FILM EDITING* 5 (2d ed. 2001).

<sup>39</sup> *Id.* at 58–60.

<sup>40</sup> John Fiske, *Admissible Postmodernity: Some Remarks on Rodney King, O.J. Simpson, and Contemporary Culture*, 30 U.S.F. L. REV. 917, 917–18 (1996).

<sup>41</sup> HOWELLS & NEGREIROS, *supra* note 19, at 212.

Thus, we cannot fully assess the significance of video evidence without thinking about the medium's own way of seeing. We might consider the shot by asking about the position of the camera, the angle, and the way the images are framed. Likewise, the selection of the images by either machine or human is a kind of edit undertaken in law usually by the parties, the lawyers, or the judge. In addition to the film medium, meaning is influenced by the environment in which the image is experienced: the museum, the Hollywood premiere, the classroom, or the courtroom.<sup>42</sup> Finally, images are experienced and understood with reference to the lived "social conditions" that inform the perceptions of the viewer, the audience, or the jurors. Each of these techniques of visual interpretation that emphasize the medium, the viewing context, and the audience, creates an opportunity for alternative perspectives, and each contributes to the possible narratives through which we make sense of the images. Both law and film are powerful discourses that frame and narrate images in particular ways and, hence, partly shape our understandings and expectations of what we can see in a given context. Likewise, the camera and computer have helped to create their own ways of seeing and, in a sense, their own viewers, as we, their spectators, have arranged our understandings of the visual accordingly.

Within the discourse of law, however, without a critical visual vocabulary, we often insist on not seeing what art and technologies have taught us. We forget that cameras frame the images they capture and render unseen those things outside the frame; that they always situate the viewer relative to the image; that film and video narrate as well as depict; and that images have different meanings in different contexts to people with different ways of seeing. We see images differently when we see them in a classroom, in a bedroom, or on a city street. For example, the images I discuss in this Article will have a different meaning than they would if they were not illustrating my words in a law review article and if they were not being used in the service of my own argument.<sup>43</sup> In other words, the images speak powerfully, but they *cannot*, despite Justice Scalia's insistence to the contrary, speak for themselves.

---

<sup>42</sup> LOUIS-GEORGES SCHWARTZ, *MECHANICAL WITNESS: A HISTORY OF MOTION PICTURE EVIDENCE IN U.S. COURTS* 10 (2009) ("The moving image . . . always appears within a particular institution and is conditioned by that institution's pragmatic requirements and history.").

<sup>43</sup> Berger makes this argument with respect to his own essay. "In this essay each image reproduced has become part of an argument which has little or nothing to do with the painting's original independent meaning. The words have quoted the paintings to confirm their own verbal authority." BERGER, *supra* note 6, at 28.

III. THE PROMISE AND THREAT OF THE LEGAL IMAGE

Art history, cultural theory, and film itself have long understood that in the face of images the viewer feels like a witness to a scene which has simply been revealed rather than deliberately choreographed; the law, however, lacks such a history of critical engagement with the visual. Instead, law has simply fluctuated between two convictions: visual evidence is either self-evidently probative or deeply prejudicial. What law lacks is the courage of its own critical history. Legal theories—particularly Legal Realism, critical legal studies, and critical race studies—have provided a tradition of questioning the coherence of standard legal categories and of exposing the interpretations, assumptions, and positionality on which analogic reasoning and legal judgment depend. Law and humanities scholarship now provides a rich vocabulary and a set of methodologies for reading images within law. A visual literacy within law must draw on these critical traditions that already exist within legal scholarship and deploy the complimentary insights of other fields. The question remains whether legal practice can take the developing visual jurisprudence to heart.

The following section borrows generally from law and humanities scholarship and specifically from the work of Jennifer Mnookin and Jessica Silbey to briefly recount the history and practice of visual evidence. Thereafter, this Article considers the most famous example of visual evidence—the Rodney King video—from the perspective of critical race theory, to begin to explore one possibility of what minority reporting might mean when applied to legal images.

A. *Legal Evidence*

Within the domain of law, the image has operated as both a promise and a threat. Its promise is as proof, in which the photograph or film provides direct access to the thing or event it depicts. From its inception, the photograph's allure was that it promised to be more witness than hearsay, and as a witness, more reliable than an eyewitness who was human and hence fallible.<sup>44</sup> It seemed to represent the truth through the mechanical ingenuity of the camera, untouched by human subjectivity and intervention. Indeed, the photograph could be thought of as replicating rather than representing what it captures. As Roland Barthes said of the photograph, its "essence is to ratify what it represents."<sup>45</sup>

---

<sup>44</sup> Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1, 18-19 (1998).

<sup>45</sup> ROLAND BARTHES, CAMERA LUCIDA: REFLECTIONS ON PHOTOGRAPHY 85 (Richard Howard trans., 1981).

Indeed, the seduction of the photograph is that it appears not to “represent” at all, but instead narrows the distance between image and object.<sup>46</sup> It appears to allow us to see the object with our own eyes.

The power of photographic and video evidence, much like that of rhetoric, is also what makes it a threat to law. As Jennifer Mnookin noted in her astute history of photographic evidence, “mechanically generated images were simultaneously viewed as offering privileged access to truth and as potentially misleading and manipulable.”<sup>47</sup> Mnookin argues that photographic images are threatening in at least three ways. First, if they are treated as proof objects that portray an incontestable truth, they could potentially displace the trial altogether.<sup>48</sup> Second, to the extent images are manipulable, they could evade the truth through appeal to sensation and prejudice; their very vividness threatening to produce an emotional rather than a rational response.<sup>49</sup> Lastly, photographs are also seen as products of human action and judgment, subject to distortion and manipulation.<sup>50</sup> As judges attempted to domesticate both the power and threat of photographic images by developing the category of “demonstrative evidence,” a change in what counted as effective proof was also taking place.<sup>51</sup> The photographic image had effectuated a shift in legal ways of seeing so that “proving something now often required letting a jury see for itself, appealing to jurors not only through argument, but directly through the senses. . . . At least to a certain extent, seeing had become believing.”<sup>52</sup>

Contained in the legal category of demonstrative evidence was the paradox of the photographic image as both “mere illustration” –like any other diagram, map, or visual aid that complements verbal testimony – and as compelling access to an underlying “truth.”<sup>53</sup> Thus, it is not surprising that visual images also came to be admitted, not merely as guides to organizing or understanding testimony or documentary evidence, but as substantive evidence available as proof supporting disputed facts. Now that images have moved from the periphery to

---

<sup>46</sup> See JACQUES DERRIDA, *THE POST CARD: FROM SOCRATES TO FREUD AND BEYOND* 35 (1987).

<sup>47</sup> Mnookin, *supra* note 44, at 7.

<sup>48</sup> *Id.* at 20.

<sup>49</sup> *Id.* at 20–21, 65–66.

<sup>50</sup> *Id.* at 20–21.

<sup>51</sup> *Id.* at 5–6.

<sup>52</sup> *Id.* at 66.

<sup>53</sup> *Id.* at 69–70.



## 16 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48]

become a central form of legal evidence, lawyers, judges and the media must become more adept at assessing their legibility.<sup>54</sup>

As legal evidence, images are not always a good fit with the process by which law turns contested facts into knowledge and judgment.<sup>55</sup> Jessica Silbey has argued that because filmic evidence gives the powerful illusion of reality and suggests that viewers can simply draw their own conclusions, as if they were witnesses, film evidence ought to be cross-examined with the same critical scrutiny as are other witnesses.<sup>56</sup> Especially true when images seem most self-evident and legible, courts may be inclined to think those images tell us more than they do about the legal questions before them. As a result, courts may make errors about where to fit visual evidence into their assessment of the case. One of Silbey's significant scholarly contributions has been to introduce more of the grammar and history of film—from montage, angle, and editing on the one hand, to the critical history of cinema studies on the other—to encourage lawyers and judges to interrogate filmic evidence.<sup>57</sup> Yet when images become objects of forensic scrutiny and evidential examination, their examination still tends to be minimal—urging the viewer to trust, or not trust, what she sees. The problem, as I see it, goes far beyond the courtroom; it is pervasive in law offices, classrooms, and the media. Visual literacy must begin earlier and be reinforced in law school if we want lawyers and judges to be capable critics of the image.

In the face of images, a visual literacy must ask the important questions suggested by all the scholars I have mentioned: In what ways do images themselves see, speak, and narrate (film theory)? What do images portray? What do the portrayals mean? In what way are they relevant to the legal questions before the court (legal and linguistic

---

<sup>54</sup> Jennifer L. Mnookin, *Semi-Legibility and Visual Evidence: An Initial Exploration*, 2012 L. CULTURE & HUMAN. 1, 6 (“This notion of semi-legibility usefully focuses our attention on the ways that much visual evidence neither speaks for itself nor permits unbounded interpretations, but rather, has a range of plausible—and potentially inconsistent—readings.”).

<sup>55</sup> Jessica Silbey, *Images in/of Law*, 57 N.Y.L. SCH. L. REV. 171, 172 (2012–2013).

<sup>56</sup> Jessica Silbey, *Cross-Examining Film*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 17, 19 (2008).

<sup>57</sup> See, e.g., Jessica Silbey, *Evidence Verité and the Law of Film*, 31 CARDOZO L. REV. 1257, 1280–81 (2010) [hereinafter Silbey, *Evidence Verité*] (“The law requires this kind of critical evaluation when assessing evidence. But what does it mean to critically evaluate a photograph?”); Silbey, *supra* note 55, at 181 (describing how film theory can be integrated into the existing legal framework); Jessica Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493, 506, 540–41, 561–62, 570 (2004) [hereinafter Silbey, *Judges as Film Critics*] (discussing problems with accepting film evidence as substantive proof of a material fact); Jessica Silbey, *Persuasive Visions: Film and Memory*, 2012 L. CULTURE & HUMAN. 1, 4, 6–9 (2012) [hereinafter Silbey, *Persuasive Visions*] (discussing the self-critiquing nature of film).

interpretation)? And how do different audiences see, read, and make sense of images (critical race and reception theories)? In addition, we should ask how images are given meaning by placing them in different contexts or weaving them into larger social and political discourses. Lastly, we should reverse these questions to ask what the image does *not* show and how the image might fail to answer the material legal questions in any given case.

The image is excessive in its realities, its fictions, and in the medium itself. It shows us more than we can absorb and less than we hope. Its excess helps explain both the probative and prejudicial qualities of the image. As the image comes to serve as evidence, it provides so much information that we must be especially careful to recognize what information it does not provide. Its excesses tend to mask its limitations. The image presents an “orgy of evidence.” This phrase comes from a scene in *Minority Report*, when the main character—and the audience—comes across a bed strewn with photographs.<sup>58</sup> They are almost immediately comprehensible to the viewer, but we later learn that we have not comprehended them properly. Indeed, we are told we should have been suspicious of this “orgy of evidence” precisely because it appeared to tell us exactly what we wanted to know. It is no accident that the orgy of evidence in the film is comprised of images. Particularly when seen in an environment like the courtroom—comprised of texts and documents—images appear to provide more powerful and direct access to facts and events.<sup>59</sup> Because the image gives us so much information, it tends to seduce us into thinking that it is also the information we need. It can be easy to forget that there are crucial questions it may fail to answer. Each time the image is used as evidence, we must be sure to ask, “evidence of what?”

---

<sup>58</sup> *Synopsis for Minority Report*, *supra* note 20.

<sup>59</sup> SCHWARTZ, *supra* note 42, at 78–79 (“Video appeared as a window onto events rather than as one evidentiary medium among others.”).



*An Orgy of Evidence: Minority Report* (Twentieth Century Fox Film Corporation 2002)

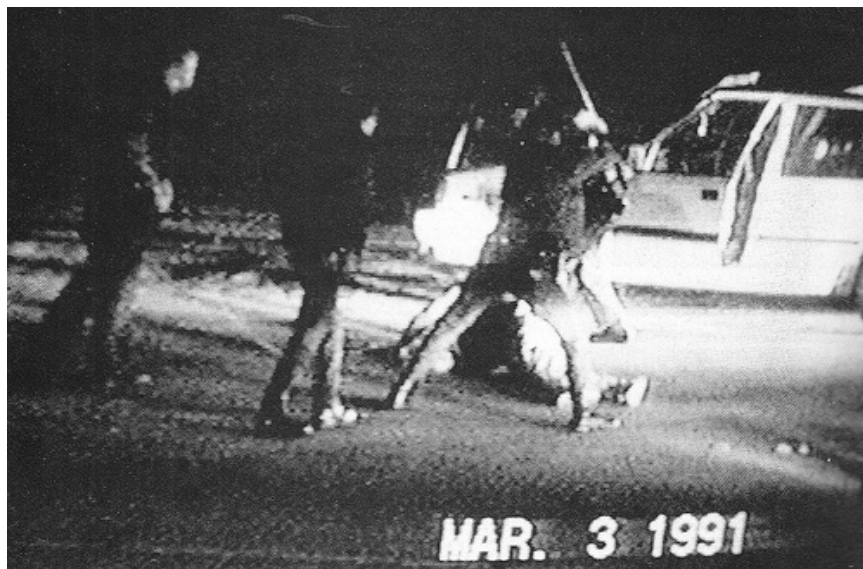
*B. Rodney King and Minority Reporting*

What might it mean to take minority reports seriously, especially if “minority” also carries its racial meaning and we apply the insights of critical race theory? The video of Rodney King’s beating by Los Angeles police officers is a ready-made example as well as a crucial moment in the history of video evidence more broadly. This video is one of the earliest, and certainly the most famous, instances of the now common linkage between law, video, and racial violence. In 1991, after a high-speed chase, Rodney King was beaten by Los Angeles Police Department Officers, and most of the incident was captured on videotape by George Holliday, a local resident who filmed the scene from his balcony.<sup>60</sup> It was the video—broadcasted nationally on network television before Internet use was common—showing police beating a black man, helpless on the ground, that ignited widespread anger about police brutality against African Americans. The broadcast of that video turned the subsequent criminal trial into a national event and the acquittal of the officers into a regional riot.<sup>61</sup> Most television viewers—whether white or black—felt that the video spoke for itself and that it showed racially

<sup>60</sup> The Learning Network, *May 1, 1992: Rodney King Asks, ‘Can We All Get Along?’*, N.Y. TIMES (May 1, 2012, 4:08 AM), [http://learning.blogs.nytimes.com/2012/05/01/may-1-1992-victim-rodney-kings-asks-can-we-all-get-along/?\\_r=0](http://learning.blogs.nytimes.com/2012/05/01/may-1-1992-victim-rodney-kings-asks-can-we-all-get-along/?_r=0).

<sup>61</sup> *Id.*

charged excessive force on the part of the police.<sup>62</sup> This faith in images was shared by prosecutors, who made the video their central piece of evidence at trial.<sup>63</sup> “The force of the Holiday [sic] tape’s testimonial appearance on television, outside the courtroom, led the prosecution to assume that the tape would speak for itself in court.”<sup>64</sup>



*Still from Rodney King Video*

The defense’s ability to interrogate and re-interpret the video images is widely credited with its victory.<sup>65</sup> In response to the public and prosecutorial faith in the video’s ability to speak for itself, defense attorneys broke up and transformed the video into slow-motion movements, stills, and fractions of body parts to present a visual counter-narrative of the event.<sup>66</sup> That counter-narrative relied on

<sup>62</sup> SCHWARTZ, *supra* note 42, at 107 (noting that a *Los Angeles Times* poll taken a week after the event showed that ninety-two percent of city residents believed the police used excessive force); Kimberle Crenshaw & Gary Peller, *Reel Time/Real Justice*, 70 *DENV. U.L. REV.* 283, 291 (1993).

<sup>63</sup> Seth Mydans, *Los Angeles Policemen Acquitted in Taped Beating*, *N.Y. TIMES* (Apr. 30, 1992), <http://www.nytimes.com/books/98/02/08/home/rodney-verdict.html>.

<sup>64</sup> SCHWARTZ, *supra* note 42, at 118.

<sup>65</sup> See, e.g., Mydans, *supra* note 63 (attributing the officers’ acquittal to the defense’s use of the videotape showing King being beaten).

<sup>66</sup> Walter Goodman, *Critic’s Notebook; Defendants Contend with Video*, *N.Y. TIMES* (Mar. 11, 1992), <http://www.nytimes.com/1992/03/11/news/critic-s-notebook-defendants-contend-with-video.html>. Defendants also testified to events which happened outside the

## 20 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48]

unearthing crucial visual details that were not visible in the real-time video, suggesting that the experience of watching the video as a whole was actually misleading. This most basic technique of visual interrogation, breaking down the image into a selection of isolated details, certainly seems to “contradict the judicial faith in images.”<sup>67</sup> The technique disrupts the standard claim of the film image as a perfect representation that allows the viewer to effectively see the event with her own eyes and deprives the image of much of its emotional force. Breaking down the image into its constituent frames in order to reframe it does not, however, displace the image as a truth object. This standard technique of the sports replay merely suggests that sometimes the truth requires technological evidence. At most, it simply allows a different narrative about “the truth” of what the video shows.<sup>68</sup> The jury acquitted the officers involved in the Rodney King beating because the defense employed a more sophisticated visual literacy. It did not make them right, but it made them better lawyers.

How might prosecutors have used visual literacy to present the video or respond to the counter-narrative? One approach would have been to mimic the defense technique by unearthing details that supported their case or showing why the technique itself was misleading. Another possibility would have been to speak for the video by explaining *why* people were right to see it as excessive force by police. In this instance, being willing to name race and narrate minority experience is a form of visual interpretation; it highlights the role of context, audience, and perception, and gives meaning to the image by placing it in a larger discourse. In the context of many excessive force and civil rights cases against police, part of the minority report is often the unspoken but implicit discourse of race and power. As Kimberle Crenshaw and Gary Peller have argued with respect to the Rodney King video: “Both the perception of the tape as showing a “reasonable exercise of force” and the perception of the tape as showing “racist brutality” depend, not simply on the physiology of visual perception, but rather on *interpretation*, on the mediation of perception with background narratives that give visual images meaning.”<sup>69</sup> Crenshaw and Peller argue that crucial to understanding the perception of the video is the background reality and lived experience of racism in which

---

frame before the video began to help mute the power of the video. SCHWARTZ, *supra* note 42, at 118-19.

<sup>67</sup> Piyel Haldar, *Law and the Evidential Image*, 4 L. CULTURE & HUMAN. 139, 140 (2008).

<sup>68</sup> *But see id.* at 151-54 (arguing that details of evidential images are like psychoanalytic symptoms or textual gaps that once unmoored as detail no longer function as “an object of representation and . . . resist[] the mimetic basis upon which testimony and proof rest”).

<sup>69</sup> Crenshaw & Peller, *supra* note 62, at 292.

countless ordinary victims of police brutality never bring claims because there is no video to give them even a fighting chance of success.<sup>70</sup>

Another critical race approach to visual interpretation is offered by Judith Butler who, in her reading of the Rodney King video and trial, argues that visibility itself is already racially saturated.<sup>71</sup> For Butler, the only way to explain how a video of a man surrounded and brutally beaten by police can come to be seen as a video of a man who is himself the source of danger and control is by taking account of how white people's perception of black bodies is already pre-loaded with racial meaning.

This is not a simple seeing, an act of direct perception, but the racial production of the visible, the workings of racial constraints on what it means to "see." Indeed, the trial calls to be read not only as instruction in racist modes of seeing but as a repeated and ritualistic production of blackness . . . .<sup>72</sup>

A visual jurisprudence informed by racially informed minority reports would explore, as Butler and critical race theorists do, the many ways in which visibility, like law itself, "is not neutral to the question of race" but participates in the creation of racial knowledge and judgment.<sup>73</sup>

#### IV. THREE ENCOUNTERS WITH THE IMAGE

I turn now to three judicial encounters between law and the image. The examples are all different uses of filmic evidence at summary judgment where what is at stake is the right to trial. I begin with *Scott v. Harris* before discussing the more recent cases of *Gilfand v. Planey* and *McDowell v. Sherrer*. Each case takes a slightly different approach to how they link up video images with key legal questions, though all share missed opportunities for employing techniques of visual interpretation. The video evidence I am looking at is all documentary, or what Jessica Silbey would call "*evidence verité*."<sup>74</sup> There is no argument that the images have been consciously altered or manipulated in any way. It is precisely because this type of evidence is potentially deeply probative,

---

<sup>70</sup> *Id.* at 293.

<sup>71</sup> Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia, in* READING RODNEY KING: READING URBAN UPRISING 15, 16 (Robert Gooding-Williams ed., 1993).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 17.

<sup>74</sup> Silbey, *Evidence Verité*, *supra* note 57, at 1257.

## 22 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48]

and seems to invite the viewer to suspend critical judgment in the face of the authority of the image, that it inspires the least interrogation and presents the hardest kind of case. I use these cases to explore the ways of seeing they produce and to reconsider how documentary visual evidence might be more fully interrogated and narrated using a critical visual literacy.

A. *Scott v. Harris*

Others have written well about *Scott v. Harris*,<sup>75</sup> but the case is instructive for the argument I want to make, and at the moment it is the most powerful legal precedent on the use and import of visual evidence. As noted earlier, the question in *Scott* was whether Officer Scott used excessive force by pushing Victor Harris's car off the road in order to end a high-speed chase, causing his car to flip and leaving him a quadriplegic at age nineteen.<sup>76</sup> Harris was clocked speeding on a road in suburban Georgia by Officer Reynolds.<sup>77</sup> When Harris failed to pull over and attempted to flee, Reynolds gave chase.<sup>78</sup> Part way through the chase, Officer Scott joined in and asked to take the lead.<sup>79</sup> Officer Scott was not aware of the underlying offense when he asked and was given permission to force Harris off the road.<sup>80</sup> Part of the evidence introduced were the two videos taken by the cameras mounted on Reynolds' and Scott's police cars; these cameras began recording automatically when the siren and lights went on.<sup>81</sup>

The officers moved for summary judgment on Harris's claim of excessive use of force, and in considering the motion, the federal district court had to determine whether there was a genuine factual dispute about whether Officer Scott's actions were objectively reasonable under the circumstances.<sup>82</sup> As noted earlier, the federal rules allow a judge to grant summary judgment in a case where there is insufficient factual

---

<sup>75</sup> See, e.g., FEIGENSON & SPIESEL, *supra* note 18, at 36-49 (discussing the role played by two digital videos in *Scott v. Harris*); Silbey, *supra* note 56, at 18-19, 24-25 (discussing the treatment of video footage in *Scott v. Harris* as substantive evidence).

<sup>76</sup> *Supra* note 1 and accompanying text.

<sup>77</sup> *Scott v. Harris*, 550 U.S. 372, 374 (2007). According to the record, the county deputy clocked Harris as traveling seventy-three miles per hour in a fifty-five-mile-per-hour speed limit. *Id.*

<sup>78</sup> *Id.* at 374-75.

<sup>79</sup> *Id.* at 375.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 391 n.3 (Stevens, J., dissenting).

<sup>82</sup> *Harris v. Coweta Cnty., Ga.*, No. CIV 3:01CV148 WBH, 2003 WL 25419527, at \*1, \*4 (N.D. Ga. Sept. 25, 2003), *aff'd in part, rev'd in part*, 433 F.3d 807 (11th Cir. 2005), *rev'd sub nom. Scott*, 550 U.S. 372.

disagreement on an essential element and the fact-finding function of the jury is unnecessary.<sup>83</sup> Because the burden for demonstrating the absence of a genuine issue is on the party moving for summary judgment,<sup>84</sup> courts view the facts in the light most favorable to the party opposing summary judgment.<sup>85</sup> Courts often frame the inquiry by importing the same question that is asked later on a motion for judgment as a matter of law: whether a reasonable jury could find for the non-moving party.<sup>86</sup>

Applying this standard, the district court concluded that there was sufficient disagreement in the record about whether the chase posed a serious threat to public safety that a reasonable jury could find for Harris; in other words, there was sufficient evidence from which a jury could find that Officer Scott's actions were not objectively reasonable but rather an excessive use of force, thus rendering summary judgment inappropriate.<sup>87</sup> The court noted that it was influenced by the fact that "prior to Reynolds' decision to instigate a high-speed chase, Harris's only crime was driving 73 miles per hour in a 55 miles-per-hour zone."<sup>88</sup> It then considered additional aspects of the record:

Defendants argue that the crash in the parking lot between Harris's car and Scott's cruiser demonstrated that Harris presented a significant danger to others. Viewing the facts in Harris's favor, however, it appears that either Scott hit Harris, or that the crash was an accident. According to the official report submitted by Sgt. Mark Brown of the Peachtree City Police Department as well as the testimony of Harris, Scott rammed Harris's car. These facts rebut Defendants' assertion that Harris aggressively used his vehicle to strike Scott's cruiser. Additionally, the decision to ram the vehicle came minutes later, when Harris was driving away from officers, and when there were no other motorists or pedestrians nearby, thus casting doubt on Defendants' assertion that at the time of the ramming, Harris posed an immediate threat of harm to others. Finally, the Court has also considered the fact that the

---

<sup>83</sup> FED. R. CIV. P. 56(a); *see supra* text accompanying notes 12–15 (considering how the Supreme Court of the United States altered the summary judgment standard in *Scott v. Harris*).

<sup>84</sup> FED. R. CIV. P. 56(a).

<sup>85</sup> *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

<sup>86</sup> FED. R. CIV. P. 50(a)(1); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

<sup>87</sup> *Harris*, 2003 WL 25419527 at \*5.

<sup>88</sup> *Id.*



24 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48

officers had the license plate number for Harris's vehicle, and the vehicle had not been reported stolen. Reasonable officers, therefore, would have known that they could have followed up on the license plate information at a later time.<sup>89</sup>

The court of appeals affirmed the district court's denial of summary judgment.<sup>90</sup>

Writing for eight Justices of the Supreme Court, Justice Scalia subtly, but significantly, used the videotape to revise the summary judgment standard, shifting it away from a fact-intensive inquiry based on the entire record and conducted primarily at the district court level, at least when there is persuasive visual evidence. The Court noted that, while motions for summary judgment usually require the court to view the facts in the light most favorable to the non-moving party and that in qualified immunity cases this means adopting the plaintiff's version of the facts, an undoctored videotape changes the summary judgment equation: "There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened."<sup>91</sup>

For the *Scott* majority, the videotape showed an unmediated reality of "what actually happened,"<sup>92</sup> one they felt allowed them to view the events with their own eyes.<sup>93</sup> This conviction, that undoctored documentary videotapes are not subject to alternative interpretations and can therefore resolve all disputes over material facts, appears to alter the traditional summary judgment analysis. "Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; *it should have viewed the facts in the light depicted by the videotape.*"<sup>94</sup> Viewing the facts in the light depicted by a police video

---

<sup>89</sup> *Id.*

<sup>90</sup> *Harris v. Coweta Cnty, Ga.*, 433 F.3d 807, 821-22 (11th Cir. 2005), *vacated and superseded on reh'g*, 406 F.3d 1307 (11th Cir. 2005), *rev'd sub nom. Scott v. Harris*, 550 U.S. 372 (2007).

<sup>91</sup> *Scott*, 550 U.S. at 378.

<sup>92</sup> *Id.*

<sup>93</sup> Justice Breyer in oral argument asserted that "[i]f the [lower] court says that isn't what happened, and I see with my eyes that is what happened, what am I supposed to do?" Transcript of Oral Argument at 45, *Scott*, 550 U.S. 372 (No. 05-1631), *available at* [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/05-1631.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-1631.pdf).

<sup>94</sup> *Scott*, 550 U.S. at 380-81 (emphasis added). The phrase "visible fiction" is richly ironic in this context. Justice Scalia must mean the apparent fiction of assuming Harris's version

is indeed a new wrinkle in summary judgment; it displaces the presumption in favor of the non-moving party and implicitly asks the court to weigh the rest of the record against “the truth” of the videotape. Moreover, this revision of summary judgment has been widely adopted by courts of appeals.<sup>95</sup>

The Court’s approach in *Scott* not only disrupts the summary judgment standard but likewise ignores the venerable tradition of a judicial commitment to the rule of law through giving reasons.<sup>96</sup> At a minimum, giving reasons means explaining why one argument is more persuasive than another or making the case for why one way of seeing makes more sense than another. One cannot simply say, “your way of seeing makes no sense; mine is better.” Despite Justice Stevens’ dissent and the two lower court judgments, the *Scott* majority does not even concede there are other ways of viewing the video.<sup>97</sup> Justice Scalia disparaged the court of appeals’ assertion that Harris did not pose a serious threat to others: “[R]eading the lower court’s opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test.”<sup>98</sup> The one affirmative claim for the majority’s reading of the video relies on a visual referent of the most fictional sort—the Hollywood movie: “what we see on the video more closely resembles a Hollywood-style car chase of the most frightening

---

of the facts in the face of visible evidence to the contrary; but, he misses the ironic possibility that the visible evidence might also induce fictions of its own.

<sup>95</sup> See, e.g., *Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013) (finding that the forensic evidence offered did not so utterly discredit the testimony that a reasonable jury could not believe the version of events); *Austin v. Redford Twp. Police Dep’t*, 690 F.3d 490, 493 (6th Cir. 2012) (finding that *Scott* allows the court of appeals to overlook the evidence accepted by the district court to the extent that in the “light depicted by the videotape” the evidence is “blatantly contradicted” (quoting *Scott*, 550 U.S. at 380–81)); *Carnaby v. City of Hous.*, 636 F.3d 183, 187 (5th Cir. 2011) (explaining that the plaintiff’s version of facts need not be relied upon, and the standard of review must simply be “the facts in the light depicted by the videotape” (quoting *Scott*, 550 U.S. at 381)); *Wallingford v. Olson*, 592 F.3d 888, 892 (8th Cir. 2010) (holding that the videotape evidence contradicted plaintiff’s version of events and thus the court must view the evidence “in the light depicted by the videotape” (quoting *Scott*, 550 U.S. at 381)).

<sup>96</sup> This commitment to giving reasons is evident in many contexts, such as the Legal Process version embodied in “reasoned elaboration.” See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 161, 165–68 (Cambridge Tentative ed. 1958); see also G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973) (providing a history of “[r]easoned [e]laboration”).

<sup>97</sup> I have conducted an exercise based on *Scott v. Harris* with hundreds of civil procedure students, and there is always dramatic disagreement on whether the video allows for summary judgment.

<sup>98</sup> *Scott*, 550 U.S. at 378–79.

26 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48

sort, placing police officers and innocent bystanders alike at great risk of serious injury.”<sup>99</sup>

By not differentiating between the chase, different narratives of the chase, and a visual representation of the chase, the Justices enhanced their own powers of sight and judgment. They were not only convinced that the video had a ready-made meaning entirely apart from their own perceptions—that it spoke for itself—but that this indisputable meaning so thoroughly contradicted all competing facts in the record that they could decide the summary judgment question themselves without remand to the district court.<sup>100</sup> The record before the Court did not consist of the video alone, but for the majority, the persuasive power of the video trumped everything else in the record. This suggested that such video evidence can function as a meta-fact through which all other facts should be viewed and evaluated rather than as yet another piece of evidence subject to competing interpretations. Based on this understanding, the Court held that the “reality” of the video showed that the car chase posed so substantial a risk of injury to others that no reasonable jury could conclude otherwise.<sup>101</sup>

The common law, in particular, has a long tradition of minority reports—they are the dissenting opinions in which alternative interpretations are incorporated into the law. Justice Stevens, writing in dissent, offered alternative arguments that he believed could have formed the basis of a reasonable jury decision. From Justice Stevens’ perspective, the video provided evidence that supported Harris’s version of the facts and that, in conjunction with other parts of the record, made it much less clear whether there was a serious risk of injury to the police or the public.<sup>102</sup> He noted facts not mentioned by the majority—like the fact that police had already blocked off many intersections, Harris never drove in the opposite lane, when Harris could not pass a car in front of him safely, he slowed down, and when he did pass he used his turn signal.<sup>103</sup> Stevens further chides his “colleagues on the jury” for speculating about the facts and substituting the summary judgment posture with its own reading of the video.<sup>104</sup> Justice Stevens’ dissent demonstrates a more sophisticated visual literacy by recognizing that the video images are potentially ambiguous, require interpretation, and belong to a larger factual record. It also demonstrates a firmer

---

<sup>99</sup> *Id.* at 380.

<sup>100</sup> *Id.* at 380–81.

<sup>101</sup> *Id.* at 378, 380.

<sup>102</sup> *Id.* at 390–94 (Stevens, J., dissenting).

<sup>103</sup> *Id.* at 391–92.

<sup>104</sup> *Id.* at 392, 394.

commitment to the traditional posture of summary judgment. Yet even Justice Stevens was tempted into believing that the video told a material truth, even if it was a different truth than the one the majority insisted on, when he insisted that the video “actually confirms, rather than contradicts, the lower courts’ appraisal of the factual questions at issue.”<sup>105</sup> That is a version of the seduction of excessive visual data—that it seems to confirm far more than it possibly can.

One way in which the *Scott* majority displayed a pronounced visual illiteracy was in assuming that the video showed them precisely what they were looking for. At issue in *Scott* was whether the chase posed such a threat to public safety that Officer Scott’s actions were objectively reasonable and therefore did not constitute excessive force as a matter of law.<sup>106</sup> While the video shows us many things and is potentially probative on many issues involving the chase, one thing that it does not clearly show is how dangerous the chase was and, therefore, whether Officer Scott’s actions were reasonable to protect other drivers. We can fill in missing details from what we might know about car chases, although that knowledge is itself mostly the product of visual fictions such as movies and television shows. We can also surmise from other facts available in the record, which Justice Stevens does in his dissent,<sup>107</sup> but the images do not tell us much about the danger the chase posed for others. It is very hard to tell from the video whether the other traffic is stopped or moving or how close Harris and the police are to the other cars. We do not know if the area was likely to have pedestrians or which intersections were already blocked off. More generally, we do not know under what conditions police should give chase in the first instance. For all the video shows, it does not provide much evidence about “the circumstances” from which courts are to determine reasonableness. In the face of the orgy of evidence that the video provides, all the Justices fail to appreciate what the video is unable to say.

So what might a critical and visually literate reading of the videotape in *Scott* look like? For starters, the video could be considered in light of the techniques of visual interpretation I have discussed, asking how the medium, the viewing context, and the audience might inform or distort our perception. For example, the dash-cam video places the viewer in the position of the police. Given the placement of the shot, these videos do not quite put the viewer in the driver’s seat but on the hood of the

---

<sup>105</sup> *Id.* at 390.

<sup>106</sup> See *supra* text accompanying notes 87–94 (discussing the issue and standard articulated in *Scott*).

<sup>107</sup> *Supra* text accompanying note 102.

## 28 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48]

squad car,<sup>108</sup> implicitly asking the audience to see the images from the perspective of law enforcement. Even if we recognize this influence, it is hard to escape it for it is part of how these images create their own ways of seeing, and we have no alternative perspectives. One need only imagine how different a video taken from the back of Harris's car, from the side of the road, or from a helicopter might look to appreciate how differently each would capture the scene. To the extent *Scott* reframes excessive force cases in light of the video, it tilts the view of the events in favor of the police.

Similarly, the dash-cam technology determines and limits the frame in part because we do not have the field of vision or a sense of the periphery we would have if we were in the squad car. The lack of color, the distorted lights, and the sounds of the police radio all influence our perception. And with respect to the frame, one should always ask: What can't be seen? What is happening off-camera? Is it important?

In this case, what is going on at the edge and outside the frame seems very important. At a minimum we might want to know how much traffic there was, if it was stopped, and what the road conditions were, in order to assess the dangers the chase posed. Presented with evidentiary images, one should also ask: How were the images selected? Why do they begin and end where they do? Here, there were two pursuing police cars and two separate videos. Were both considered in their entirety? For example, the collision between Harris and Scott in the shopping center looks very different in the two videos. The one taken from Scott's car makes it look as though Scott turned his cruiser into Harris's car in order to stop him. Likewise, the viewing environment—in a courthouse in Georgia or Washington, D.C., in a classroom, or on YouTube—and who the viewers are, especially their experience with and assumptions about police, changes the way the video is seen.

In their excellent discussion of the *Scott* case, Feigenson and Spiesel accuse the majority of naïve realism—the belief that the images spoke the truth about the chase and that the words Justice Scalia used to translate the images into a judicial opinion could forestall further dispute about their meaning.<sup>109</sup> They note that, while posting the videos on the Supreme Court website was evidence of the Court's naïve conviction that everyone would come to the same conclusion, those images have had the opposite effect.<sup>110</sup> “Because we can watch the same material ourselves, however, the Court's opinion fails to constrain our view. Its

---

<sup>108</sup> See FEIGENSON & SPIESEL, *supra* note 18, at 40 (suggesting that the point of view of the camera is not exactly the driver of the car but the player of a video game).

<sup>109</sup> *Id.* at 48.

<sup>110</sup> *Id.* at 46.

decision becomes less convincing, more subject to question, because of discrepancies between what we can see and what we are told to see. The pictures continue to speak.”<sup>111</sup> While I agree that the popularization of legal images allows those images to see and speak in multiple and continually evolving ways, I want to reiterate that the images cannot do so by themselves. Images themselves cannot determine their reception by their myriad viewers whose perceptions are always informed by their individual experiences and interpretive positions.<sup>112</sup>

#### B. *Gilfand v. Planey*

The fact that a video is part of the record on a motion for summary judgment does not mean it will always be read by the court to support summary judgment, even in the context of excessive use of force cases in which there is often a motion for summary judgment brought by the defending officers. Widespread visual illiteracy within the law suggests that courts will read visual evidence poorly, over-estimating what it does say and under-estimating what it does not say, but it does not tell us which way these misreadings cut in a case. In *Gilfand v. Planey*,<sup>113</sup> a federal district court judge in Chicago, Illinois relied primarily on multiple videos recorded by a bar’s security cameras to deny summary judgment.<sup>114</sup> In this instance, a lack of visual literacy did not jeopardize the plaintiffs’ right to a jury, but it perpetuated the notion that images speak for themselves and, in doing so, contributed to an erosion of a fulsome summary judgment assessment in which the record is considered as a whole.

The *Gilfand* dispute arose at a Chicago bar called the Jefferson Tap around 3:30 a.m. as the bar was closing.<sup>115</sup> Brothers Barry and Aaron Gilfand were playing pool with two friends while a handful of off-duty police officers were nearby at the bar.<sup>116</sup> There is no evidence on how the conflict began beyond the conflicting testimony of the parties about exchanged insults, and, as the court notes, the issue is not dispositive of

---

<sup>111</sup> *Id.* at 48. Feigenson and Spiesel also make the important point that the Supreme Court altered the videotapes without mentioning this fact on the website. *See id.* at 46 (pointing out the differences between the online video and the one submitted in evidence and implying that these differences were not mentioned on the website).

<sup>112</sup> *See* Dan M. Kahan et al., *supra* note 24, at 897, 903 (stating that what a video shows depends on its viewer and that the viewer’s cultural and other ideological commitments help him see the video in a particular way).

<sup>113</sup> No. 07 C 2566, 2011 WL 4036110 (N.D. Ill. Sept. 9, 2011).

<sup>114</sup> *Id.* at \*1.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

## 30 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48]

an excessive use of force claim.<sup>117</sup> What is relatively clear is that the off-duty officers forcibly ended the pool game and violently confronted the plaintiffs.<sup>118</sup> By the end of the fight, Aaron Gilfand had a broken nose, and both Barry Gilfand and plaintiff Scott Lowrance may have suffered physical injuries from being attacked by defendants.<sup>119</sup> Based on the events in the bar, plaintiffs brought an excessive use of force claim against the officers and the City of Chicago, a failure to intervene claim against the same defendants and a number of responding officers, as well as various state law claims.<sup>120</sup> All the defendants moved for summary judgment on all counts.<sup>121</sup>

As in *Scott v. Harris*, the videos appear to have assumed an outsized role in the assessment of the evidence. After viewing the videos taken from at least three different security cameras, the judge narrated what he was able to see, including a good deal of violence against plaintiffs both inside and outside the bar.<sup>122</sup> He concluded that not only should the summary judgment motions be denied but that they were “overreaching attempts to redefine the legal standards for summary judgment” in the face of “copious *video* evidence [that] shows the Defendant Officers fighting with Plaintiffs.”<sup>123</sup> In support of their motion, defendants pointed to numerous inconsistent or implausible statements made by plaintiffs and some evidence that Barry Gilfand did not suffer any injury.<sup>124</sup> In the face of conflicting evidence that suggests a genuine issue of material fact, it is undoubtedly right to deny summary judgment. My concern is not with the finding that summary judgment was improper but that it was improper because the video was self-evident and its very clarity allowed it to trump conflicting evidence. According to the judge, the relevant “portions of the video . . . speak for themselves.”<sup>125</sup>

Noteworthy in *Gilfand* is the relationship between video and other evidence. The defendants sought to argue that their supporting evidence so clearly refuted plaintiffs’ evidence that the motion should be granted.<sup>126</sup> More than once, however, the court insisted that other pieces of the record cannot “erase [the] video evidence,”<sup>127</sup> and it even implied

---

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at \*1-2.

<sup>119</sup> *Id.* at \*3-5.

<sup>120</sup> *Id.* at \*4.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at \*5.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* (citing *Scott v. Harris*, 550 U.S. 372, 378 n.5 (2007)).

<sup>126</sup> *Id.* at \*6.

<sup>127</sup> *Id.* at \*5-6.

that video evidence may be able to refute other sources of evidence, but it is unlikely to work in reverse:

Defendants argue that the evidence outside of the video contradicts Plaintiffs' story to such an extent that a ruling of summary judgment in their favor is warranted. Contrary to their argument, *Scott v. Harris* does not support their Motions. In *Scott*, the Supreme Court used a video that showed the respondent driving so fast and recklessly that the video clearly refuted the respondent's argument that he did not drive in a manner that endangered human life. . . . The record does not so blatantly contradict Plaintiffs' story so as to preclude such a jury verdict.<sup>128</sup>

In a sense, this confusion over the summary judgment standard—a confusion that the court in *Gilfand* attributes to defendants<sup>129</sup>—is the logical extension of the confusion sowed by *Scott v. Harris* where unclear facts and conflicting interpretations are represented not as genuine issues of fact but as irrefutable visual evidence.

Unlike *Scott*, greater visual literacy in *Gilfand* would have been unlikely to change the outcome, but it could have certainly helped to minimize rather than perpetuate the ongoing confusion about the role of video evidence at summary judgment. A small portion of the video evidence that the *Gilfand* court considered is available on the Internet.<sup>130</sup> It shows many of the acts of force that the court described in its order; yet, applying the techniques of visual interpretation, I have suggested, illuminate other things that ought to be taken into account. For one, the security cameras here are elevated above the scene, so that the viewer is not watching the action from the perspective of any participant but in a position of a detached observer. As is common with security cameras, the image quality is not good and there is no audio. The elevated angle also tends to obscure some of the action that takes place on the floor. The various camera shots capture many parts of the bar and the sidewalk out front, but they do not necessarily capture important aspects of the

---

<sup>128</sup> *Id.* at \*6 (citation omitted).

<sup>129</sup> *Id.* (“Defendants ask the Court to create a novel standard for summary judgment . . . .”); *supra* text accompanying note 124.

<sup>130</sup> ChicagoCopwatch, *Men Beaten by Chicago Cops Were ‘Defenseless,’* YOUTUBE (Mar. 23, 2009), <http://www.youtube.com/watch?v=g9ZIGsLJqdo>.



## 32 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48]

action, and in some key moments the fighting occurs outside the frame entirely.<sup>131</sup>

In addition, the court says nothing about how the images were selected and by whom, so we do not know whose judgment determined which images were considered relevant. The portions of the video online are embedded in a news program, so a television producer made the selection available to the public and for purposes quite distinct from those animating civil discovery.<sup>132</sup> Relatedly, the context in which the public can view the videos, with the reporter's voiceover about the case, presents a dramatically different viewing context than the environment in which the judge viewed the videos or in which the jury watched them once the case went to trial.<sup>133</sup>

As always, the experiences, attitudes, and perspectives of each viewer also inform the way any image is perceived. I offer these additional readings of slices of the video images to model a very basic visual literacy, to show the ways in which the videos in this case could not speak for themselves, and to illuminate how the judicial assumption that they could speak for themselves perpetuated the confusion about the legal standard for summary judgment inherited from *Scott v. Harris*.

## C. McDowell v. Sherrer

Lastly, I want to highlight another recent case, in which there were two videos and two competing court interpretations, to show how even when the visual evidence itself is contradictory, judges lacking a critical visual literacy can still insist that the images speak for themselves. However, in this case there is interpretive tension between the two different videos and between the trial and appellate courts, and in this interpretive tension is the promise of different ways of seeing and reading legal images.

In *McDowell v. Sherrer*,<sup>134</sup> two inmates at the Northern State Prison in New Jersey—Steven McDowell and Carlos Cruz—were released from their cell in the early morning hours of November 8, 2004, after complaints that Cruz was ill and vomiting.<sup>135</sup> After their release, events

<sup>131</sup> *Gilfand*, 2011 WL 4036110, at \*2-3 (noting that the fight in the vestibule as well as other incidents were not captured by the security cameras at all).

<sup>132</sup> See *ChicagoCopwatch*, *supra* note 130.

<sup>133</sup> See *Verdict in Jefferson Tap Civil Case Faults 4 Officers for Brawl*, CBS CHI. (May 18, 2012, 7:27 PM), <http://chicago.cbslocal.com/2012/05/18/verdict-in-jefferson-tap-civil-case-faults-4-officers-for-brawl/> (reporting that plaintiffs recovered more than \$33,000 from the officers in the federal civil trial).

<sup>134</sup> No. 04-6089 (KSH), 2008 WL 4542475, at \*1 (D.N.J. Oct. 7, 2008), *rev'd in part*, 374 F. App'x 288 (3d Cir. 2010).

<sup>135</sup> *Id.* at \*3.

become unclear. The State claimed that both inmates were immediately violent and had feigned illness to be released.<sup>136</sup> McDowell and Cruz claimed that they were seeking medical attention but conceded that they did not submit to handcuffing and did not return to their cell.<sup>137</sup> In response, prison guards formed heavily armed “extraction teams” to corral the two inmates, remove them from the “tier,” and forcibly put them back in their cell.<sup>138</sup> The question before the court was whether McDowell’s excessive force claim could be dismissed on summary judgment.<sup>139</sup> Much like the flight in *Scott v. Harris*, cell extraction invites a police response, but even where plaintiff’s conduct begins the exchange with correctional officers, the officers are under a constitutional obligation to avoid excessive force.<sup>140</sup>

In *McDowell*, the interaction between the inmates and the extraction teams was caught on film by two different cameras, one in the hands of another inmate, Omar Broadway,<sup>141</sup> and the other used by prison officials to film the cell extraction.<sup>142</sup> The district court order on the State’s motion for summary judgment represents a clear articulation of the power of video evidence: “If a picture is worth a thousand words, two live-action videos are good for at least a million.”<sup>143</sup> Relying on *Scott v. Harris*, the district court assumed that the presence of video evidence augmented the summary judgment standard and quoted a long passage from *Scott* to show “how the preexisting summary judgment framework must accommodate video evidence.”<sup>144</sup> Even with multiple and contradictory videos, the judge believed the visual evidence allowed her to witness the event in person. The district court noted that “the

<sup>136</sup> *McDowell v. Sheerer* [sic], 374 Fed. App’x 288, 290–91 (3d Cir. 2010), *rev’g in part*, No. 04-6089 (KSH), 2008 WL 4542475 (D.N.J. Oct. 7, 2008).

<sup>137</sup> *Id.*

<sup>138</sup> *McDowell*, 2008 WL 4542475, at \*3–4.

<sup>139</sup> *Id.* at \*1.

<sup>140</sup> *See id.* at \*11 (“Where a prisoner alleges that officers used excessive force upon him, ‘the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a *good faith effort* [sic] to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.’” (quoting *Hudson v. McMillian*, 503 U.S. 1, 6 (1992))). In this case, the district court conceded that the officers used significant force but found it significant that “McDowell and Cruz, as revealed by the videos, had visibly taunted corrections officers, flouted prison rules and disobeyed commands, shielded themselves from pepper spray, and had further invited a violent confrontation.” *Id.* at \*12.

<sup>141</sup> *Id.* at \*5. Broadway’s recordings, including excerpts of the video at issue in *McDowell*, became a documentary film about prison violence entitled, *An Omar Broadway Film*. *Id.* at \*5 n.3; AN OMAR BROADWAY FILM (4th Row Films 2008).

<sup>142</sup> *McDowell*, 2008 WL 4542475, at \*4.

<sup>143</sup> *Id.* at \*1.

<sup>144</sup> *Id.* at \*1–2.

## 34 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48]

[ordinary summary judgment] standards are challenging enough. Here, however, the Court has before it two videos . . . and therefore must apply the governing summary judgment standards having witnessed *with its own eyes* the events at the core of this litigation.<sup>145</sup> Once a judge believes herself to be a witness, it becomes extremely difficult to apply a summary judgment standard that asks the trial court not to weigh the evidence, view it in the light most favorable to the non-moving party, and dispassionately assess whether a reasonable jury could find for that party.

Indeed, the district court's reading of the videos evinces the difficulty of being both witness and judge. Repeatedly throughout the order, the court found that the videos "'blatantly contradict[],'" "flatly contradict[]," and "manifestly disprove[]" evidence supporting plaintiff's version of events while "revealing" what actually happened.<sup>146</sup> Rather than viewing the evidence in the light most favorable to McDowell, the court used the videos to discount plaintiff's allegations of what occurred by referring to them as a "story spun" and a "tale."<sup>147</sup> The court concluded that "the videos contradict the entire tenor of McDowell's account."<sup>148</sup>

The Third Circuit's opinion,<sup>149</sup> in contrast, disagreed with the district court not only over what the videos said but how they should be read in light of the summary judgment standard. In reversing the district court, the Third Circuit concluded that because "neither of the videos 'blatantly contradict[s]' McDowell's account such that no reasonable jury could believe it," summary judgment was improper.<sup>150</sup> One key difference between the courts' analyses with respect to summary judgment is that the court of appeals made a point of noting the portions of the videos that appeared to support McDowell's account:

In both videos, McDowell can be heard yelling "I am not resisting" when he is underneath the officers. Second, the video recorded by the inmate shows that an officer who was standing near McDowell's body did have a nightstick in his hand—consistent with McDowell's testimony that he was hit in the head repeatedly by nightsticks. Additionally, when McDowell is led away

---

<sup>145</sup> *Id.* at \*1.

<sup>146</sup> *Id.* at \*12–13, \*16.

<sup>147</sup> *Id.* at \*12–13.

<sup>148</sup> *Id.* at \*15.

<sup>149</sup> *McDowell v. Sheerer* [sic], 374 F. App'x 288, 292–93 (3d Cir. 2010), *rev'g in part*, No. 04-6089 (KSH), 2008 WL 4542475 (D.N.J. Oct. 7, 2008).

<sup>150</sup> *Id.*

from the tier, his face is covered with blood, suggesting that he suffered an injury during the extraction. As McDowell is led off the tier floor, an officer has his arm around McDowell's neck and McDowell is pressed against the wall. The officers thereafter lay McDowell to the ground, as if he is not able to stand on his own. These events are consistent with McDowell's testimony that he was choked until he was unconscious.<sup>151</sup>

The fundamental difference between the courts is in their approach to visual interpretation. The Third Circuit's analysis was noteworthy not for its sophistication in reading the images but for its interpretive restraint and lack of credulity. The court of appeals admitted that while the videos showed McDowell and Cruz yelling at the officers, it was "unable to determine from the videos whether McDowell [was] resisting the officers or to determine the amount of force used on him. . . . because McDowell [was] forced to the ground early in the confrontation, and the view of his body is completely obstructed."<sup>152</sup> The court employed the kernels of a visual literacy when it recognized what the camera *does* and *does not* show. The camera, the Third Circuit noted, "simply do[es] not show what happened during these crucial moments."<sup>153</sup> In this way, the court of appeals' order is based on different premises with respect to both the legal standard and visual interpretation, rejecting the district court's over-reliance on both the image and the Supreme Court decision in *Scott*.<sup>154</sup> The Third Circuit recognized that the camera is often severely limited with respect to the exact questions courts must answer and that even witnessing something "with our own eyes" can be complicated *if we cannot really see what is happening*.

The appellate court's analysis would have been stronger had it employed the techniques of visual interpretation for which I have argued. The only publicly available excerpts of the video evidence in *McDowell* are on YouTube and incorporated into a trailer for *An Omar Broadway Film*,<sup>155</sup> a film that was screened at the 2008 Tribeca Film

---

<sup>151</sup> *Id.* at 293.

<sup>152</sup> *Id.* at 292-93.

<sup>153</sup> *Id.* at 293.

<sup>154</sup> *Id.* at 292 (relying on the Supreme Court's decision in *Scott* for the proposition that the videos at issue "blatantly contradict[ed]" McDowell's version of the events).

<sup>155</sup> 4thRow Films, *An Omar Broadway Film Trailer*, YOUTUBE (July 7, 2010), <http://www.youtube.com/watch?v=OK-tbfE-yts&list=PL49E86EB7D4D4E86B>.

Festival and aired on HBO.<sup>156</sup> Because these excerpts are very short and don't include any portions of the video shot by the prison officials, my analysis is brief and admittedly speculative. The influence of the medium is striking in Omar Broadway's video: the video camera was kept hidden and the shots are very constrained, penned in by the physical space of the cell, or taken from between the bars and often at a disorienting angle. Like the dash-cam video in *Scott v. Harris*, both videos in *McDowell v. Sherrer* have a point of view, each placing the viewer in the position of either the guards or an inmate. The fact that both were available in the case is noteworthy; Broadway's video formed a visual rebuttal to the video shot by the extraction team and may have had something to do with the Third Circuit's reversal. While viewing the videos in a courtroom or chambers and in the context of a summary judgment motion is common to all these cases, the other contexts in which portions of the videos can be seen is illuminating. In *An Omar Broadway Film* the videos are embedded in a dramatized documentary about the violence, danger, and boredom of prison life. The trailers, like the film, are narrated, edited, and put to music in ways that emphasize the gritty realities of prison and the vulnerabilities of the inmates.

Consider how different the same images may look when viewed on HBO or YouTube as entertainment or assessed by federal courts as evidence. Attention to this difference in viewing environment may help judges realize that to read videos as legal evidence is to read them through an established interpretive lens that changes the ways images are seen. Lastly, the viewers—law clerk, judge, student, inmate, television executive, etc.—all come with their own ways of seeing that is informed by experience, identity, and social conditions. The different perceptions of the audience allows for multiple minority reports. Lawyers will do better by their clients at summary judgment if they have more interpretive techniques at their disposal, and courts will do better by the litigants if they have the visual literacy to allow videos the same range of meaning they allow to text and testimony.

#### V. CONCLUSION AND A RETURN TO *MINORITY REPORT*

In conclusion, I return to *Minority Report* to contrast the film's approach to law's reliance on video evidence with the law's own approach. Film has a long history of critiquing its own forms of

---

<sup>156</sup> Tambay, *On HBO – "An Omar Broadway Film" (Prisoner Sneaks Camera into Prison to Record Abuse)*, SHADOW AND ACT (July 12, 2010, 9:30 AM), <http://www.shadowandact.com/?p=27064>.

representation,<sup>157</sup> but it is more unusual for it to critique law's use of film. In many ways, *Minority Report* can be read as a critique of the seductive role of visual evidence within the law and the tendency to believe the accuracy and totality of what we see in the face of the excessiveness of the image. *Minority Report* is most often discussed in legal literature as a vision of a dystopic surveillance state. It is certainly that, but it is also a meditation on the power and abuse of sight and visuality. In this sense, it is a parable about the dangers of readily believing what we see and of lacking a critical visual literacy.

The world of 2054 is portrayed as one in which the saturation of images we experience today has only been enhanced and compounded by new technologies. Everyone is eye-scanned as they enter buildings, stores, and subway stations; as they walk through public spaces, video billboards address them personally and magazines sport moving images.<sup>158</sup> Video is not only projected in 3-D, but the red-light pleasure-palaces use images to create simulated fantasies individually tailored to each person.<sup>159</sup> Moreover, there are verbal refrains throughout the movie about sight, blindness, and knowledge. Agatha, the most gifted of the precogs, repeatedly says, "Can't you see?" – a phrase which captures our common-sense conflation of sight and understanding.<sup>160</sup> Both the plot and the images of the movie are about the tricks of sight, the power of images, and the law's fatally blind over-reliance on them. The shots, editing, and lighting of the movie are often disorienting, drawing the viewers' attention to the unreality and unreliability of what they are seeing on the screen. The movie also layers images on top of each other so that we see characters seeing images, as in the still of Anderton examining the visions of the precogs.<sup>161</sup> However, the transparency of the screen within the film allows a double viewing and draws the viewer into the world and surveillance plot of the film: the viewer sees Anderton viewing the images on screen but also has the sensation of being viewed through the screen as well. In this way the film projects the problems of seeing and believing out into the world of the audience.

---

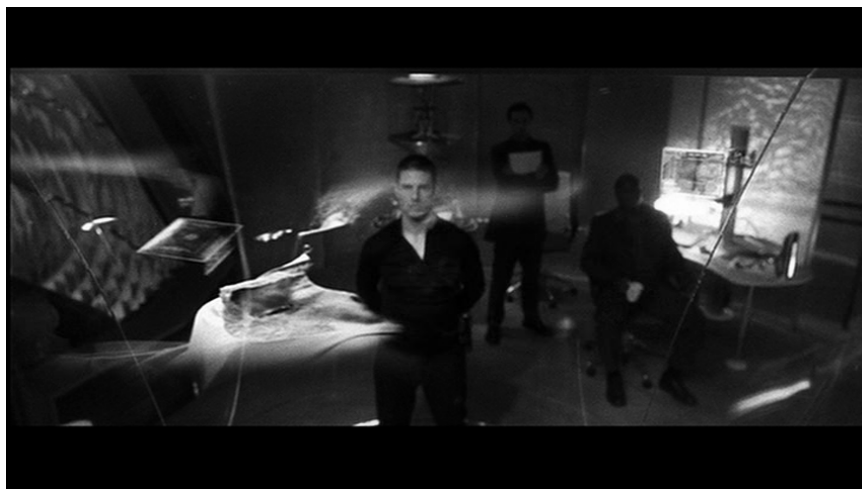
<sup>157</sup> Silbey, *supra* note 56, at 31. *Black Swan* is one of the most recent examples. BLACK SWAN (Fox Searchlight Pictures 2010).

<sup>158</sup> MINORITY REPORT, *supra* note 20; see also *Synopsis for Minority Report*, *supra* note 20 (discussing the use of "iris scans" in the movie).

<sup>159</sup> MINORITY REPORT, *supra* note 20.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*



*The Transparent Screen: Minority Report* (Twentieth Century Fox Film Corp. 2002)

The many shots of Anderton viewing the visions of the precogs are shots of law enforcement reading visual evidence. The film draws our attention to the “technologies” through which the images *within* the movie and the images *of* the movie are manipulated, arranged, given significance, and made to speak. The visual evidence within the film is quite literally manipulated and arranged by Anderton with high-tech equipment that allows him to sort through the images of the precogs for the legally relevant details. Likewise, the film images themselves are arranged and given meaning through cinematic technologies. The audience experiences different ways of seeing and not seeing through the use of perspective, framing, lighting, movement, sound, pacing, and plot. The dramatic chase scene in the mall toward the end of the movie encapsulates this cinematic lesson; the slightest adjustments of angle, timing, and chance dramatically change what we are able to see.

The critique launched by the movie against the law’s use of images is one the law ought to take seriously: that desire for clarity and truth encourages a willful denial of the fallibility of sight and the inevitable variety in ways of seeing and narrating the image. It suggests that in our dedication to apparent truth and our naïve reliance on the image, we countenance injustice. In *Minority Report*, the existence of a minority report meant that alternative futures were available for some of the people imprisoned for murders they had not yet committed. Given the excess information that images bring to the courtroom and the paltry interpretive tools that lawyers and judges bring to images, we need to

2013]                      *The Image Cannot Speak for Itself*                      39

imagine alternative futures to the one that the Supreme Court condemned us to in *Scott v. Harris*—a future in which we abandon our critical thinking and visual judgment and let the image speak for itself.