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ANALYSIS OF VIDEOTAPE EVIDENCE IN POLICE MISCONDUCT CASES

I. EVIDENTIARY PRINCIPLES GOVERNING VIDEO AND COMPUTER SIMULATION EVIDENCE

A. *Martin A. Schwartz**

Many evidentiary issues arise with respect to videotape evidence and computer generated simulations. I will begin with the issues that concern the admissibility of videotape evidence, then the role of a videotape on summary judgment, and lastly, evidentiary issues with respect to computer generated simulations.

Let us start with the admissibility issues pertaining to videotape evidence. There are several issues that may arise with respect to the admissibility of videotape evidence that also arise for many other types of evidence. The videotape must meet the test of relevance, which means there must be a sufficient relationship between the videotape and some issue in the particular litigation. The next hurdle is Rule 403 of the Federal Rules of Evidence; the question of whether probative value of the videotape is substantially outweighed by such

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dangers as misleading the jury, confusing the jury, wasting time, or creating unfair prejudice.¹ Rule 403 applies to a very high percentage of evidence sought to be introduced in federal court. It should also be noted that the same relevance and 403 issues arise when videotape evidence in a state court is sought to be introduced.²

The proponent of a videotape must also lay a foundation, which is summed up in terms of identification and accuracy.³ Traditionally, the proponent needs to produce a witness who can identify what the videotape depicts, and testify that the videotape is a fair and accurate depiction of what actually occurred.⁴

This question of identification and accuracy overlaps with Rule 403 because, the more accurate the videotape, the higher its probative value is high, and the less likely the videotape would cause unfair prejudice, mislead, or confuse.

Videotapes, of course, have the potential to distort. There could be issues, for example, with the angle from which the videotape was taken, the lighting during the recording of the videotape, or the speed at which events are depicted. Further, the pace might be accurate, but there might be a change in conditions between the time of the event and the time the videotape was made. This is unlikely to be an issue in police misconduct cases because the videotape is typically of a particular encounter with a law enforcement officer.

There could also be a chain of custody issue if the videotape

¹ FED. R. EVID. 403.

² *Id.*

³ *See generally* FED. R. EVID. 901(a).

⁴ *Id.*

was handled by a number of individuals. Part of the foundation that has to be laid is, to the extent possible, accounting for each possession of the videotape. Ultimately, the proponent has to convince the trial judge there was not a substantial likelihood that the videotape was exchanged or altered.⁵

If there were an audio component to the videotape, the foundation must include voice identification. There must be a witness who can identify the voice of the speaker and provide the basis for such knowledge.⁶ Of course, an audio component could lead to the dreaded hearsay problem. All audio components to the video are out-of-court statements. If offered for the truth of what it asserts, there is a hearsay issue and the proponent would have to find a hearsay exemption or exception to get the audio component admitted.⁷

Those are the evidence issues that normally arise with videotape evidence. There is case law supporting an alternative foundation that the proponent may lay. If the proponent cannot produce a witness to identify what the videotape depicts and testify to the accuracy, he may be able to lay the foundation by showing how the videotape was produced, what type of equipment was used, and who produced the videotape.⁸

⁵ See CHRISTOPHER B. MUELLER AND LAIRD C. KIRKPATRICK, EVIDENCE § 9.5 (3d ed. 2003).

⁶ FED. R. EVID. 901(b)(5) (“Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.”).

⁷ FED. R. EVID. 801, 803, 804.

⁸ *United States v. Sarro*, 742 F.2d 1286, 1292 (11th Cir. 1984) (holding that the proponent must show “(1) the competency of the operator [of the recording equipment]; (2) the fidelity of the recording equipment; (3) the absence of material deletions, additions, or alterations in the relevant part of the tape; and (4) the identification of the relevant speakers” (citing *United States v. Biggins*, 551 F.2d 64, 66 (5th Cir. 1977))). See also *Fischer v. State*, 643

The second issue is the role of the videotape on summary judgment. In 2007, the Supreme Court decided *Scott v. Harris*,⁹ involving a high-speed police pursuit of nineteen-year-old Harris.¹⁰ As typically happens, the pursuit escalated. The pursuit terminated when pursuing officer Scott rammed Harris' vehicle from behind.¹¹ Harris' vehicle went down an embankment, turned over, and rendered Harris a quadriplegic.¹² Harris brought a Section 1983 excessive force claim alleging a violation of the Fourth Amendment.¹³ The officer moved for summary judgment on the basis of qualified immunity, relying in part on videotapes of the chase made from two pursuing police cruisers. Nevertheless, the district court judge held there were factual questions for the jury as to whether officer's ramming of Harris' vehicle was objectively reasonable.¹⁴

Officer Scott appealed to the Eleventh Circuit Court of Appeals.¹⁵ This circuit has generally been unfriendly territory for those who sue law enforcement officers.¹⁶ The three circuit judges agreed that there were factual issues the jury had to resolve in order to determine whether the officer acted in an objectively reasonable fash-

S.W.2d 571 (Ark. 1982).

⁹550 U.S. 372 (2007).

¹⁰ *Id.* at 374-75.

¹¹ *Id.* at 375.

¹² *Id.*

¹³ *Id.* at 375-76.

¹⁴ *Harris v. Coweta County, Ga.*, No. CIVA 3:01CV148 WBH, 2003 WL 25419527 at *4 (N.D. Ga. 2003).

¹⁵ *Harris v. Coweta County, Ga.*, 406 F.3d 1307 (11th Cir. 2005).

¹⁶ The Eleventh Circuit determined that where a government official establishes eligibility for qualified immunity, "the burden then shifts to the plaintiff to show that the qualified immunity is not appropriate." *Id.* at 1312-13.

ion.¹⁷ Therefore, four lower court judges—the district judge and three circuit judges—who found that a jury should determine the objective reasonableness of the officers’ use of force.

The United States Supreme Court, however, reversed, eight-to-one.¹⁸ The Supreme Court found that this case did not require a jury because the summary judgment record included the videotape of the police chase and there were “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.”¹⁹ The Supreme Court posted the videotape on its web site.²⁰ That was a rare move for the Supreme Court.²¹ In fact, it is the only time such a posting has occurred.

Justice Scalia, who wrote the majority opinion for the Court,²² said, “What we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort.”²³ At the oral argument, Justice Scalia had stated this was the most frightening police chase he had seen since the movie “The French Connection.”²⁴ The majority said that based upon the videotape, a reasonable jury could

¹⁷ *Id.* at 1317.

¹⁸ *Scott*, 550 U.S. 373.

¹⁹ *Id.* at 378.

²⁰ Archive.org, *Scott v. Harris Decision Record Video*, http://www.archive.org/details/opinion_video2 (last visited Feb.12, 2009).

²¹ Sophia Stadnyk, *Supreme Court Rules on Police Chases, Flow Control*, A.B.A. SEC. STATE & LOCAL GOV'T LAW, <http://www.abanet.org/statelocal/lawnews/summer07/supreme.html> (“In a very unusual move, the Court included a videotape of the chase with its decision, and the videotape played a central role in the ruling.”).

²² *Scott*, 550 U.S. at 373.

²³ *Id.* at 380.

²⁴ Transcript of Oral Argument at 28, *Scott*, 550 U.S. 372 (No. 05-1631) (“He created the scariest chase I ever saw since ‘The French Connection.’”).

find only that Officer Scott acted in an objectively reasonable fashion.²⁵ Justice Stevens dissented and said he did not find the chase frightening at all.²⁶ He said the problem was he was older than his colleagues.²⁷ When he learned to drive, one-lane roads were common, and it was common for those driving on these one-lane roads to go over to the other side of the road.²⁸ He believed his colleagues did not realize this. More fundamentally, he opined that the objective reasonableness of an officer's use of force should normally be an issue for the jury.²⁹ He accused his colleagues of usurping the function of the jury.

So, all told, five federal court jurists found that the case presented an issue for the jury, but eight Supreme Court Justices found that there was no need for a jury. My initial reaction was that the majority got it right, because the court had the videotape. Why do we need a jury? However, the more I thought about this issue, and after seeing a videotape that Jack Ryan presented at last year's Practising Law Institute Section 1983 Litigation program depicting the use of a taser,³⁰ I became more and more convinced that the Supreme Court did not get it right. Jack Ryan was good enough to provide me with a copy of the video he showed of a police officer using a taser.³¹ I have shown it to a number of individuals. Some of them you might char-

²⁵ *Scott*, 550 U.S. at 384.

²⁶ *Id.* at 389-90, 392 (Stevens, J., dissenting).

²⁷ *See id.* at 390 n.1.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Karen M. Blum & Jack Ryan, *Recent Developments in the Use of Excessive Force by Law Enforcement*, 24 TOURO L. REV. 569 (2008).

³¹ The video came from the case of *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004).

acterize as fairly liberal, some fairly conservative, and some in-between. The responses from these individuals have been varied.

Reasonable people can look at the same video and see different things. Certainly, they can characterize what they see differently. They can draw different inferences from what they see. They can reach different overall conclusions. So, I ultimately concluded that despite the existence of a videotape, the jury should normally be the finder of the facts. The benefit of the doubt should be in favor of allowing the jury to fulfill its traditional function of finder of the facts.

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.³² *Scott* makes it much more difficult for plaintiffs' lawyers to get their Section 1983 excessive force claims to the jury. That is very significant because, as plaintiffs' lawyers quickly learn, if the plaintiff can get the case to the jury there is a much greater probability of settling the case.

The third question is the admissibility of computer-generated simulations. Assuming the computer-generated simulation is relevant to an issue being litigated, Federal Rule of Evidence 403 becomes the big issue.³³ What is the probative value of this computer-generated

³² See, e.g., Martin A. Schwartz, *Videotape Evidence in Excessive Force Cases: Parts 1-2* 239 N.Y.L.J. 3 (2008); see also *Schneider v. Merritt*, No. 05-16317, 2007 WL 1853359 at *1 (9th Cir. June 26, 2007) (relying on *Scott v. Harris* and stating “[p]laintiffs’ Fourteenth Amendment claims . . . fail because the record before us, including the police videotapes, does not evidence a constitutional violation”); *Miller v. Jensen*, No. 06-CV-0328-CVE-SAJ, 2007 WL 1574761 at *4 (N.D. Okla. May 29, 2007) (relying on *Scott v. Harris* and stating “the [c]ourt will not adopt plaintiff’s version of the facts if it clearly contradicts the factual depictions in the videotapes”).

³³ Fred Galves, *Where The Not-So-Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance*, 13 HARV. J.L. & TECH. 161, 170-71 (2000).

simulation? What is the danger for creating unfair prejudice and confusing and misleading the jury? I will use one case to illustrate the point. This case raises an issue I consider to be difficult. The case is *Datskow v. Teledyne Continental Motors Aircraft Products*.³⁴ It is not a Section 1983 case, but it illustrates the evidentiary issues. There was an airplane crash in which four people died, and the plaintiffs brought suit against the manufacturer of the engine.³⁵ The plaintiffs had an expert witness, who was a mechanical engineer with a background in accident reconstruction. He testified that the engine caught fire during the flight.³⁶ The expert gave an opinion as to what caused the engine to catch fire and how the fire spread.³⁷ To illustrate his theory of this airplane fire, the plaintiffs' lawyer wanted to show a computer-generated simulation in conjunction with the expert's testimony.³⁸ The plaintiffs' lawyers wanted to show this simulation superimposed with the actual audiotape recording of the communications from the pilot to the airport control tower.³⁹ The defendants were not too thrilled about this, and argued that the computer-generated simulation should be excluded under Rule 403.⁴⁰ The district judge ruled under Rule 403 that the computer-generated simulation was admissible, but that there was potential for its creating

³⁴ 826 F. Supp. 677 (W.D.N.Y. 1993).

³⁵ *Id.* at 681.

³⁶ *Id.* at 682.

³⁷ *Id.* (“[A] fuel nozzle inside the engine had become clogged, causing fuel to leak out and catch fire during the flight.”).

³⁸ *Id.*

³⁹ *Datskow*, 826 F. Supp. at 685.

⁴⁰ *Id.* (arguing the video was not merely an illustration of the witness' opinion, but served the purpose of re-creating the accident which would unduly prejudice the defendants).

unfair prejudice and misleading the jury.⁴¹

The district judge decided to take two steps in an attempt to eliminate or at least minimize these concerns. The first step, and this, I think, is not the controversial part of the opinion, was to allow the computer-generated simulation to be shown without the audio component.⁴² The district judge thought allowing the audio radio communications might give the jury a misimpression that the simulation is the real thing, and not just a simulation created by a computer.⁴³ The second step is the interesting one, namely, the district judge instructed the jury that the computer-generated simulation was not meant to be a recreation of the incident, but only a device to “help the jury understand the expert’s opinion.”⁴⁴

This was the distinction that the district judge drew. The defendants’ attorney, however, argued that it was not a meaningful distinction.⁴⁵ The judge disagreed, finding a significant distinction between a computer generated simulation introduced with the purpose of recreating what took place, and a computer-generated simulation introduced only to illustrate an expert’s opinion.⁴⁶ I think we can agree that this is a distinction, but I wonder whether it is meaningful. Realistically, was not the plaintiffs’ computer-generated simulation introduced with plaintiffs’ expert testimony an attempt by plaintiffs

⁴¹ *Id.* (“It’s [one thing] to allow the jury to conceptualize and appreciate the expert’s opinion as to what happened here. [But] [t]o reduce the possibility that the jury might interpret it as a re-creation of the accident . . . the volume [must be] turned off . . .”).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Datskow*, 826 F. Supp. at 685 (noting the importance of avoiding unfair prejudice to the opponent in exhibiting evidence introduced by the proponent).

⁴⁵ *Id.* at 686.

⁴⁶ *Id.*

to recreate the plaintiffs' version of the incident? After all, the plaintiffs' expert was attempting to sell the the jury plaintiffs' version of what occurred. Viewed in this light, the distinction drawn by the district court does not seem especially meaningful.

II. ANALYSIS OF VIDEO EVIDENCE THROUGH FILM SCHOLARSHIP

A. *Jessica Silbey**

I am glad we started off with *Scott*. While I am now a law professor, I have been thinking about law and film for a long time. My career started as a film scholar. For any of you who have thought or considered film as an art form, as well as a piece of evidence, what I talk about today might seem commonsensical. Interestingly enough, it is far from common in the courts. I am going to discuss the history of film as a background way to think more about how you might take apart or cross examine film as evidence—either as a plaintiff's attorney or a defendant's attorney—in order to show how film is never unambiguous in its meaning or import. I will do so by focusing particularly on police films (confessions, interrogations, crime stops, arrests).

We started with *Scott*. To my knowledge, this is the first time the Supreme Court has posted a link on its web site to a video at issue. I found this case particularly distressing because not only was summary judgment granted because of the videotape, but in discuss-

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ing the evidence presented on the videotape during oral argument, Justice Breyer noted, “I see with my eyes that is what happened, what am I supposed to do?”⁴⁷ Justice Scalia’s majority opinion indicated that the standard for summary judgment when you have videotape evidence of this kind is that the facts should be considered in the light depicted by the videotape.⁴⁸ This is a best evidence problem. The questions are how persuasive and how accurate is a videotape taken from a camera mounted on a police car (or on an ATM machine, or on a tollbooth)?⁴⁹ Importantly, persuasion and accuracy are not necessarily linked.⁵⁰ What are the undisputed and disputed facts this videotape might contain?

Justice Stevens was the lone dissenter and he recognized a nuance that his eight other colleagues did not: a film’s appearance of reality is only just that—an appearance.⁵¹ It is merely one representation of the event. It is what we call “monocular.” It is not multi-ocular, which is what all of our experiences of reality are together. The videotape of the event is one singular perspective of the event. The Court in *Scott v. Harris* mistakenly characterized it as the *best* perspective that ought to be considered. Justice Stevens recognized the chase might not have been as scary as it appeared on film, and that there are other perspectives that would have borne on the issue of

⁴⁷ Transcript of Oral Argument at 45, *Scott*, 127 S. Ct. 1769 (No. 05-1631).

⁴⁸ *Scott*, 550 U.S. at 380-81.

⁴⁹ Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493, 508-09, 515-20 (2004) (describing problems and contradictions that occur when judges act as film critics when determining the admissibility and weight of film evidence).

⁵⁰ *Id.*

⁵¹ See *Scott*, 550 U.S. at 389-93 (Stevens, J., dissenting).

excessive force that were not captured by the videotape that should have been considered by the rest of the Court (as they were by the trial court on summary judgment).⁵²

What could the attorneys have done differently in *Scott*? The practical ramification is the real question here. What should the attorneys have done to deflect what Justice Scalia said, “[h]e created the scariest chase I ever saw since ‘The French Connection?’”⁵³ The attorneys should have brought to bear the critical tools we all use when we cross-examine witnesses and when we evaluate documentary evidence. These tools can and should be utilized on film evidence. Film does not speak for itself anymore than a testifying witness does. Film is representational. It has a perspective, an angle, a point of view and a voice. Film has inherent biases: it is a restricted view. Examining those biases undercuts the persuasive force of film’s dominant story. The attorneys should have cross-examined the film. In what follows, I will explain how this might occur.

Before we go through tools and methods of cross-examining film, however, I begin with a brief background on film as an art form. Before talking about how to debunk the myth of film as wholly revealing, transparent and unambiguous, this history will introduce the problem of film as always already subjective and ambiguous. The *Scott* majority thought the film was unambiguous as to its meaning

⁵² *Id.* at 390-92. Justice Stevens pointed to the fact that the film obscured the portion of the car chase that took place on a four-lane highway, not a two-lane highway. This would affect the “dangerousness” element of the legal inquiry. He also explained how the film’s distance from traffic lights made it difficult to discern the color of the signals, also relevant to dangerousness. He then criticized the court’s minimization of the significance of the police sirens because the sound recording on the film was low, possibly because of soundproofing in the officer’s vehicle. *Id.*

⁵³ Transcript of Oral Argument at 28, *Scott*, 550 U.S. 372 (No. 05-1631).

and its content.⁵⁴ Eight justices agreed on what they thought the videotape showed as a probative matter. This evidences the myth of film as a form of communication that it is revelatory and clear. I am going to talk about this in more detail and then present a problem based on a videotape of an arrest that was used at a 2003 trial in the Western District of Texas. It was used at trial by both sides of the case to assert that their legal position—liable or not—was right. It is an interesting example of where one film takes on two diametrically opposed meanings. I will show you this film and then use it to demonstrate various techniques or theories of cross-examination to either emphasize the dominant narrative in the film or to undercut that narrative.

Preliminarily, let's consider all the different kinds of film evidence that might be offered at trial. The most common form I call "*evidence verité*" after cinema *verité*, a genre of film that purports to be a representation of reality but really is self-consciously distorting it.⁵⁵ There are many kinds of *evidence verité* out there. There is surveillance footage, taken with a handheld camera by the police, with a mounted camera on the cruiser dash, or automatically as in the cases of ATMs and toll booths. *Evidence verité* also includes after-the-fact crime footage such as filmed confessions and footage taken at the scene of the crime. After-the-fact crime scene footage is often partially narrated by a police officer or by an interrogator. Surveillance footage tends to be real time and unedited, although it is framed by a beginning and an end. Surveillance footage is the hardest to debunk

⁵⁴ *Scott*, 550 U.S. at 380.

⁵⁵ *Silbey*, *supra* note 49, at 507.

because it feels the most real. As we will see, however, that feeling is part of the myth of film.

Other kinds of common film evidence are day-in-the-life films and expert demonstrations. I call these different kinds of films “staged and scripted.” These films are made in expectation of a trial. They are clearly advocacy because they are taken to make a point, to assert a fact in issue. One might wonder what the difference is between a film that is allegedly demonstrative of an expert’s testimony (showing the likely mobility of a limb after an injury) and a film that allegedly shows the extent of the injury (filming the victim). Because the trial is supposed to adjudicate what happened based on all the relevant, admissible evidence, and because a film of the injury (or its reenactment) is a representation of one side’s argument about what happened and the injuries, film should never be taken at face value (whatever that could be said to mean). When you admit film evidence, the subjective portion of the film is easily forgotten in light of its persuasive power. With day-in-the-life films and expert demonstrations, there are out-takes or edited portions. A smart attorney will seek, through discovery requests, such outtakes or edits. Such discovery requests will seek the reasons for the exclusion of some film and the inclusion of others. Requests or examination will ask why the film started at point X and not point Y. Attorneys should inquire as to all aspects of the film process. Often times, however, these requests are never made or they are contested as work product. But if work product is the objection, this simply confirms the premise that the film has been constructed for trial—it is literally fictional (from

the Latin *ingere* which means “to form or make”) rather than real.

In light of these varied forms of film, it is also important to think about how we are all filmmakers. We have camera phones. We rely on MRI's, FMRI's, CAT scans, PET scans, and other variants of moving image technology. The breadth of what constitutes filmic evidence is growing. With cameras on laptops and phones, the growth of filmic evidence is exponential,⁵⁶ therefore, we must concentrate our critical capacities on this growing kind of evidence to better understand its influence and its drawbacks. We must not allow it to dominate all the other evidence at trial, especially as it is not necessarily any more trustworthy.

If you look at the case law and all the cases that are considering filmic evidence—the admissibility of filmic evidence or the prejudice of filmic evidence—the cases tend to admit it despite a Rule 403 objection.⁵⁷ Sometimes there are jury instructions, sometimes not. It is up to the attorneys in the case to recharacterize the film's significance and meaning as disputed. We can draw on popular culture in doing so. We watch film all the time. When we go to the movies we do not necessarily believe Michael Moore's version of

⁵⁶ See Katie Hafner, *Film Drop-Off Sites Fade Against Digital Cameras*, N.Y. TIMES, Oct. 9, 2007, at C1. Moreover, serendipitous film footage of citizen encounters with police abounds. A simple search of the website YouTube turns up thousands of police videos. For example, in *Jones v. City of Cincinnati*, 521 F.3d 555, 561-62 (6th Cir. 2008), the court, on a motion to dismiss, disregarded footage from a police cruiser's dash-cam that captured the arrest of Nathaniel Jones, but the film is on YouTube.com. YouTube, Cincinnati Police, <http://www.youtube.com/watch?v=o3-MrFOLXFs> (last visited Feb 4, 2009). See also Press Release, Suffolk County Dist. Attorney's Office, Investigation into the Death of Victoria Snelgrove and Other Uses of the FN303 on Lansdowne Street on October 20-21, 2004 (Sept. 12, 2005), available at <http://www.mass.gov/dasuffolk/docs/091205a.html> (noting the use of video footage in an investigation of an incident in which a Boston Red Sox fan died after police shot her with rubber pellets).

⁵⁷ See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 9.14, 1020-1021 (3d ed. 2003).

the truth as sacrosanct. We can easily motivate our critical capacities when it comes to Hollywood versions or independent documentaries. Why are we not critical of filmic evidence? We all have the capacity to be film critics. And yet for some reason when judges and attorneys face a piece of police footage, that critical capacity dissipates. Film evidence should not be left undisputed. By drawing on our critical capacities, we can tell alternative stories embedded in the film or that the film has omitted. Doing so goes a long way to deflating the power of film's illusion of reality.

Film's playful illusion of reality began at its birth in 1895.⁵⁸ This is the story of the first film shown to a movie audience, in the Grand Café in Paris, demonstrating how film created in viewers a sense of reality, what we call the "myth of total cinema."⁵⁹ Viewers were made to feel like witnesses, seeing with their eyes whatever was on screen. The story of the first film is of a movie called "The Arrival of a Train at a Station."⁶⁰ It is an *actualité* film, which is essentially a short documentary film.⁶¹ The film was of a train arriving into a station, the train getting bigger and bigger on the screen as it got closer and closer to the station.⁶² As the train grew larger on screen, the audience of this film jumped up and ran out of the theatre. They were afraid the train was going to run them down.⁶³

⁵⁸ GERALD MAST, A SHORT HISTORY OF THE MOVIES 21 (Macmillan Publishing 1986) (1971); L'ARRIVEE D'UN TRAIN EN GARE DE LA CIOTAT (Lumière 1895), available at http://en.wikipedia.org/wiki/L'Arrivée_d'un_train_en_gare_de_La_Ciotat.

⁵⁹ ANDRE BAZIN, WHAT IS CINEMA? 21 (Hugh Gray ed. & trans., Univ. of Calif. Press 2005) (1967).

⁶⁰ MAST, *supra* note 58 at 21.

⁶¹ DAVID BORDWELL, ON THE HISTORY OF FILM STYLE 13 (Harvard Univ. Press 1997).

⁶² MAST, *supra* note 58 at 21.

⁶³ *Id.*

With this experience of the train coming at them, the feeling of the film as real and revelatory and unambiguous was born. These are the feelings we enjoy when watching film. And this is why it is incredibly difficult to undermine film as a piece of evidence. With the changing film technologies to better capture film's illusion of reality, film became even more powerful as entertainment and rhetoric. One of the first narrative films, "The Great Train Robbery" in 1903 by Edwin Porter,⁶⁴ was dubbed one of the first pseudo-documentaries. Its purported subject was "how to rob a train."⁶⁵ With this film came the fears and hopes that have not abated today: that film is an incredibly effective teaching tool. This is the beginning of film's corrupting power. It appears to tell us how life really is, what we should be doing. It tells us about the truth of life. Capitalizing on this incredibly persuasive and pleasurable power, many pseudo-documentaries would follow. I am thinking here of the by-now famously staged documentary "Nanook of the North,"⁶⁶ also of Dziga Vertov's newsreel montages describing the Bolshevik Revolution with news clips that piece together a story under the guise of a documentary.⁶⁷ Leni Reifenstahl's "Triumph of the Will"⁶⁸ is another

⁶⁴ THE GREAT TRAIN ROBBERY (Thomas A. Edison, Inc. 1903).

⁶⁵ MAST, *supra* note 58, at 42.

⁶⁶ NANOOK OF THE NORTH (Revillon Frères 1922) (documenting the daily life of an Inuit man). See Louis Menand, *Nanook and Me, "Fahrenheit 9/11" and the Documentary Tradition*, THE NEW YORKER, Aug. 9, 2004, at 90-92 (comparing the origins of documentary film with the contemporary resurgence of the genre).

⁶⁷ CHELOVEK S. KINO-APPARATOM [MAN WITH A MOVIE CAMERA] (VUFKU 1929) (documenting the daily lives of citizens in Soviet cities); see also Vlada Petric, *Cinematic Abstraction as a Means of Conveying Ideological Messages in The Man with the Movie Camera*, in THE RED SCREEN: POLITICS, SOCIETY, ART IN SOVIET CINEMA 90 (Anna Lawton ed., Routledge 1992).

⁶⁸ TRIUMPH DES WILLENS [TRIUMPH OF THE WILL] (Leni Riefenstahl-Produktion 1935) (documenting the Nazi party's 1934 Congress at Nuremberg).

example, glorifying the Nazi regime. Recently, we see examples with Michael Moore's films.⁶⁹ Moore's are clearly advocacy-based documentaries. My point is not that there is something real or not real about documentaries. The point is that all film is a form of rhetoric. This was plain from the very beginning. And today, that seems quite obvious. All film, fictional or not, is a representation and by its nature it is partial.

Edwin Porter's "The Great Train Robbery" also contributed to the development of film form through its editing structure. Porter's "The Great Train Robbery" taught us that film can create a specific meaning by juxtaposing different shots that would otherwise be discontinuous.⁷⁰ The Soviet filmmaker Kuleshov proved this principle by stringing together otherwise unrelated images to show how the same image, when framed differently, can take on entirely new meaning.⁷¹ He conducted a series of experiments with images of a bowl of soup next to a head shot of man, a picture of a corpse next to the same image of a man, and a picture of a woman reclining next to the same man. When the audience is shown these images, the man looks hungry next to the bowl of soup, mournful next to the corpse, and desirous next to the woman.⁷² It is the same image each time, but it has a different meaning depending on what precedes it. Here, the audience brings meaning to the film. It is not the film that inherently

⁶⁹ See Jessica M. Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 COLUM. J.L. & ARTS 107, 116 (2005) (observing that film is increasingly being used as a policing tool to monitor police and suspect interactions because it appears to provide an objective and unambiguous representation of past events).

⁷⁰ BORDWELL, *supra* note 61, at 13.

⁷¹ MAST, *supra* note 58, at 156.

⁷² *Id.*

has meaning.⁷³ Part of cross-examining film requires that you ask questions about its framing: would these images mean something else if started at a different place? If it was preceded by some other image? In film theory, we call this montage.⁷⁴ The point is simply that the same shot means different things depending on its relationship to the images that it precedes and follows.

Other than montage, there is also camera angle: wide angle, depth of field, long shots, and pan shots. D.W. Griffith was the originator of this kind of film grammar.⁷⁵ Close-ups create feelings of intimacy. Many after-the-crime scene footage have close-ups—long pans with a static close-up on a corpse or on a bloody stain. This creates narrative emphasis; it makes the audience feel differently about that bloody stain or that corpse, even though the fact of the stain or corpse has not changed at all. In one case I studied, the static shot on a corpse was fourteen minutes long in a film that was only twenty-five minutes. The film in no way distorts the facts of the case, it nonetheless expresses an emphatic and overwhelming subjective point of view through its use of angle and framing.

A film's point of view is yet another feature of its rhetorical form (in addition to the shape of the frame, the angle of the frame, and the editing).⁷⁶ Point of view is the way in which the film develops a narrative voice. The first person narrative film developed very

⁷³ See MAST, *supra* note 58, at 176; L'ARRIVE D'UN TRAIN EN GARE DE LA CIOTAT, *supra* note 58, at 21 (“[T]he audience shrieked and ducked when it saw the train hurtling toward them.”).

⁷⁴ MAST, *supra* note 58, at 176.

⁷⁵ DAVID BORDWELL, *supra* note 61, at 13-14; see also MAST, *supra* note 58, at 57-58.

⁷⁶ See MAST, *supra* note 58, at 30-31.

early in film's history.⁷⁷ The first person narrative form helps perpetuate a feeling of singularity and wholeness in the story. The cohering effect of this narrative voice, however, was immediately problematized from the earliest of films. For example, in "The Cabinet of Doctor Caligari," the audience hears a long drawn out story about the life of the main character.⁷⁸ In the end of the film, the audience learns the narrator, whom we have come to trust as the voice in our own head, speaks from inside an insane asylum.⁷⁹ Learning this taints the perspective, the story and its truth value.⁸⁰ We do not trust the narrator, and, because he has been the eyes through which we see and experience the story, we don't trust ourselves. This is a credibility problem. Narrative point of view in film has everything to do with the credibility of the narrator. No film is omniscient. Every film has a point of view.

Not twenty years after the birth of film, the development of the first person narrative was already problematizing this idea of film's mistaken omniscience. Instead of seeing with their own eyes, viewing audiences very early in film culture were being trained to ask "with whose eyes am I actually seeing?" This is precisely the question you want to be asking yourself when dealing with film evidence. It is unavoidable that films have a point of view. There is always going to be a filmmaker and a camera whose perspective is being captured. This may feel troubling if we are dealing with documentary

⁷⁷ See *id.* at 30.

⁷⁸ *Id.* at 137 (citing *DAS CABINET DES DR. CALIGARI* [THE CABINET OF DOCTOR CALIGARI] (Decla-Bioscop AG 1920)).

⁷⁹ *Id.* at 138.

⁸⁰ *Id.*

films or *evidence verité*, but it is unavoidable. It is, indeed, the nature of all adjudicative disputes: settling differences between different versions of the same event. Film versions are but one of many. They should not dominate the search for truth at law. They should not be the only perspective we rely on.

The critique of film's illusion of reality and of its completeness is all but lost if you look at the court cases that deal with filmic evidence.⁸¹ Despite our surveillance society, where film records life twenty-four hours a day seven days a week, film is not a mechanism for witnessing. Its capacity to wholly and truthfully reveal the world is a myth that is based in the early days of film. Film reveals one perspective of the world. Without bringing our critical capacities to its form, its dominant images may exercise undue control over our judgment. So our goal, then, is to transform the viewing experience from seeing with our own eyes—this illusion of bearing witness to the car chase for example—to “the more you watch, the less sure you are of what you are seeing.” Our goal is also to recognize the competing stories that animate the film's images. This transformation from “seeing with our own eyes” to “the more you watch the less sure you are of what you see” will go a long way to debunking the mistaken assumptions about film that animate so many of these court cases. This transformation would put pressure on the myths that film is transparent, that it is morally objective, and that it exposes the truth of the matter.

I am now going to discuss a short film clip at the center of the

⁸¹ See, e.g., *Scott*, 550 U.S. at 379-80.

court case *Patric v. Visi*.⁸² Jason Patric, the Hollywood film actor, was celebrating the wrap of a film in Austin, Texas. After he emerged from a bar with a bunch of friends, he was arrested for being drunk and disorderly, and then for resisting arrest.⁸³ Both charges were dropped, but he alleges that during the arrest the police used excessive force.⁸⁴ So he filed a civil rights claim against the City of Austin and its police department.⁸⁵ A camera, positioned on the dashboard of the police car nearby and running serendipitously, captured much of the altercation and the arrest.⁸⁶ Both sides used the film to help prove their case. Patric used it to show that he was unlawfully arrested and abused,⁸⁷ and the City of Austin used it to show that the police followed the proper protocol when arresting Patric.⁸⁸

I am going to show you the film now and in so doing try to narrate it bit. The film is of very poor visual quality. This is typical of a lot of police films. The angles tend to be awkward because most police films are taken from stationary cameras and are of events in motion. The pictorial quality is often very poor because many arrests occur at night in the dark without proper film lighting. But this is the

⁸² See *Patric v. Visi*, No. A-05-CA-022 AA, 2006 WL 5266759, at *1 (W.D. Tex. Feb. 10, 2006).

⁸³ Eric Gay, *Alamo' Actor Patric Arrested in Texas*, USA TODAY, Mar. 30, 2004; *Actor Jason Patric Arrested*, KANSAS CITY STAR, March 30, 2004, at A2.

⁸⁴ Plaintiff's Second Amended Complaint at para. 17, *Patric*, No. A-05-CA-022-AWA, 2006 WL 5266759, (W.D. Tex. Aug. 22, 2005).

⁸⁵ *Id.* at para. 22.

⁸⁶ See Transcript of Trial Proceedings at 33, *Patric*, No. A-05-CA-022-AWA, 2006 WL 5266759, (W.D. Tex. Feb. 14, 2006) [hereinafter *Patric* Transcript] (Trial transcripts from February 14, 15 and 16, 2006 are on file with author).

⁸⁷ See *id.* at 71 (Plaintiff's case); *id.* at 149-50 (Defendant's case).

⁸⁸ *Id.*

kind of evidence lawyers will have to deal with. These films are not made under ideal conditions.⁸⁹ There is the group coming down the street. That is Patric in the white shirt. Now you are going to see someone try to hail a cab and the police are going to tell him to get back on the curb. There is Patric going out to meet the man hailing the cab. Here comes the police officer. Whether Patric gets up on the curb is a subject of dispute, as the curb is not visible behind the crowd.⁹⁰ There is Patric trying to walk away from the police. It is very hard to see as the crowd and the car block our view, but both sides make a big issue of that small arm movement and his avoidance of the police.⁹¹ And there is where he falls to the ground under the police's force. After this, he is being walked back to the police cruiser and you hear his friend pleading for Patric's release and apologizing for him.

So what would you do if you were faced with this film? This is a difficult film; it is shot from the worst possible angle. It is hard to see anything of relevance. But both sides, if you can imagine, used it to prove their case.⁹² So these are the issues. Did Patric disobey the officer when the officer told him to get on the curb? Did the officer actually say, "you are under arrest?" And when Patric walked away from the officer was he resisting arrest sufficient to justify the

⁸⁹ *Patric*, Video Clip, available at <http://www.law.suffolk.edu/faculty/directories/faculty.cfm?InstructorID=819> (click "View film click here" hyperlink under Cross Examining Film article) [hereinafter Video Clip]. The relevant portion of the video is very short, approximately three minutes, beginning at 2:32:48 and ending at approximately 2:35:54.

⁹⁰ *Id.*

⁹¹ See *Patric*, Transcript, *supra* note 86, at 43-67, 94-122, 132-61.

⁹² *Id.*

police's use of force to arrest him?⁹³ How would you use this film if you were going to prove that the police did not have probable cause to arrest Patric for public intoxication, and that the police officer's actions are the cause in fact of Patric's injury?

First, as a lawyer with filmic evidence, you have to decide whether to use it in the first instance. It is a hard decision, but a very important one. As claims against police departments go, Patric had a pretty good claim without the film. The sole witness against him was a police officer whose credibility would be tested for lying to a superior officer in the past.⁹⁴ Patric had a lot of witnesses on his behalf to say he followed the police's orders and that he was neither drunk nor belligerent.⁹⁵ The case seemed to rise and fall on whether the police officer actually said, "you are under arrest," but the film is silent on that point so why bother bringing it in?⁹⁶

In fact, I think Patric's sole problem as a witness was his ego. If you read through the transcript of the case, he is fairly arrogant on the stand. The film does not help him temper this affect. The film shows his shirt untucked and his cuffs undone. In some ways, this is the problem with a film that is too complete. It may do some good for Patric. It tends to lend some credibility to his case, but also contains images⁹⁷ that are unhelpful if not outright prejudicial. If I were Patric's lawyer, I would not have used the film at all. This goes against instinct, I realize; we want to use the film because it is so en-

⁹³ *Id.*

⁹⁴ *Id.* at 4.

⁹⁵ *Patric*, Docket No. 60 (Combined Witness and Exhibit List from Jury Trial). *See also Patric*, Transcript, *supra* note 86, at 56 (listing Patric's witnesses).

⁹⁶ *Patric*, Transcript, *supra* note 86, at 55-56.

ting and it is so captivating. And yet it is precisely that kind of power that might be used against you when mobilized by someone with skill. And that is what happened in this case. Patric's lawyer fell into this trap and used the film on direct as an aid to Patric's testimony.⁹⁷ Doing that leads to problems. The lawyer was forced to ask clarifying questions of Patric: "is this where you stepped up on the curb," "is this where the officer threw you down?" Because the film is not clear on these points, the direct examination of Patric on these crucial issues lacks persuasion. Here, the use of film weakens otherwise good testimonial evidence. For this reason, it is not always a good idea to admit it when you have other valuable, reliable evidence.

If you decide to use the film, however, or you are faced with your opponent's use of the film, what do you do? The first thing you do is consider the film frame. Where did it begin, where did it end, and what are its spatial attributes? The film tells us nothing here about whether Patric smelled of alcohol. It does not capture that kind of real evidence, which may be probative evidence. The film's point of view is not optimal. Because of its position, relevant portions of the altercation crucial to determinations of the issues in the case are outside of the film frame. Similarly, the film can tell us nothing about how many beers Patric had, or exactly what he looked like when he left the bar. We can only imagine these things based on watching the film or discover them in other ways.

Coming up with relevant facts that are not in the film is likely

⁹⁷ *Id.* at 102.

to change how we would tell the story on our client's behalf. Articulating these details that are not in the film, but that change the assessment of liability would go a long way towards undermining the dominance of the film as evidence. Challenge yourself to come up with these extra-filmic facts that might be present in the case. Would your assessment of Patric's behavior change if you knew that he only had one beer at the bar? Would your assessment of the arrest as seen on the film change if you knew the curb, blocked from our view, was broken or slippery? These are the kind of questions that help change what we think we see on the film.

Focus on the aspects of the film that are unclear. There are two ways the film can be unclear. It can be unclear in focus or sound—blurry images or inaudible sound—or it can be unclear in terms of narrative ambiguity. As to the first, we do not see him hit the sidewalk because the curb is out of sight. We do not know whether his fall was accidental or intentional because the crowd is blocking our view of the police officers. We do not hear the police officer say “you are under arrest” because the sound quality is poor. All of this is very much what the case is about. And yet the film is unclear on these crucial points.

With regard to narrative ambiguity, we do see Patric take a few steps away from the officers. It is undisputed that Patric did this. It is the significance of Patric walking away that is disputed. Here, there is a fact of film that is undisputed—Patric walking away from the police. But that fact has competing roles in two different stories, the defense story and the plaintiff story. Patric's story was that he

was resisting the police as an impulse, a human response to force and power. “The police were targeting me,” he said. “I was the Alpha dog in the pack and they were going to show how they were in control so they threw me down. I was simply resisting this brute force.” The police told a different story. They said they heard Patric say, “fucking pigs, fucking Nazis” as he moved from the crosswalk toward the curb. We do not hear this on film of course, but the police said Patric’s aggressive language led them to believe he was out of control. When he moved away, they perceived it as an affirmative push, at which time they had to get control of the situation. They grabbed him and took him down to handcuff him.

These two stories evidence the narrative ambiguity of the film. The existence of two plausible readings of the film—the Alpha dog story and the police-taking-control-of-the-crowd story—remain unconfirmed by the film’s images. Pieces of the film can be strung together to tell either of these stories fairly convincingly. It is not the film’s content that convinces the jury, it’s the lawyer’s storytelling (e.g., advocacy) about the film that persuades us. Film does not have inherent meaning. Its audience (lawyers and fact finders) provide for it.

This film is a particularly good example of filmic ambiguity. But most films can be treated this way: a film of a confession, a film of an ATM robbery, a film of a crime scene. When confronted with filmic evidence, there are some basic questions that you want to ask. Do you use film at all? Are there prejudicial statements in this film that would be lethal if used by the other side? Editing the film raises

questions of lack of completeness and doctoring; failing to edit the film leads to all sorts of problems of prejudice and hearsay. Sometimes omitting the film all together is the best option. Is there other evidence that is just as good or better so that you do not have to worry about prejudicial aspects of the film? What is not in the film that might be relevant that would help you tell a different story than the one the film appears to be telling? Challenge yourself to come up with those facts and renarrate the film's images incorporating them. What is unclear in the film? Is it out of focus or is it narratively ambiguous? Push on those points of ambiguity to undermine the film's dispositive force as evidence.

All of these tools focus on the problem of storytelling and the inevitability of competing narratives that might structure one set of facts. Successfully asking these questions of film can be a powerful tool, especially in light of film's dominance as a storytelling medium in our society. The value of filmic narrative is not only its ability to cohere a story for the purpose of persuasion and judgment, but, in the hands of a skilled attorney, the value of filmic evidence is its capacity to tell multiple and sometimes conflicting stories. There is always more than one story to be told. That is why we have trials. Finding the alternative stories that a film tells or could have told will go a long way to demystifying the overwhelming effect of filmic evidence and to furthering the law's promises of due process and of justice.

III. EVALUATION OF VIDEOTAPES OF POLICE ENCOUNTERS WITH CITIZENS FROM THE LEGAL AND LAW ENFORCEMENT PERSPECTIVES

A. *Jack Ryan**

Twenty years of experience in law enforcement had a major impact on my psyche. When I saw the picture of the guy with the soup and then the guy with the corpse and the woman, I was certain he had poisoned them with the soup and he had murdered him to get the woman. I want to talk a little bit about what we look at. I do an awful lot of work as an expert witness and a lot of training of police officers around the country. I perform many case evaluations, including work for the insurance pools that work with police agencies and insure police agencies. I get to look at and evaluate a wide variety of video and audiotape evidence. The following are some of the things you should think about, especially if you are on the defense side. If you are on the defense side, you ought to know what exists. If you are on the plaintiff's side, you ought to be looking for evidence that may be available to help prove your case. For example, we are all familiar with the mobile video recorders in police cars. They have gotten a lot better. I am going to show you some video from some old video recorders—not so great. Then I will show you some newer recordings, which are so much better.

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Recently I visited Gainesville, Georgia, where the police department purchased cameras attached to microphones, which go on the epaulet of the officer's shoulders. They are pretty neat because they do not have the fixed perspective of the police car cameras that Professor Silbey talked about. Obviously, those cameras cause problems because they remain stationary and are unable to capture all of the events occurring at the scene. However, the cameras purchased by the Gainesville police actually travel with the officer and capture, at a minimum, everything in front of them.

Additionally, an amazing trend has started to take place. In a lot of cases, I receive video from third party sources such as businesses. For example, I had an excessive force case recently where an officer made an arrest outside of a convenience store. Interestingly, I also had video from a Wal-Mart across the street, and I also had video from the gas station that adjoined the parking lot. There were many different perspectives to look at on that video. Increasingly, the cases I work on have footage posted on YouTube. I have had numerous attorneys call me on different cases and ask me if I would get involved in a case. The attorneys tell me to visit YouTube and plug in "taser" and "this town." The footage is available because there are people in the crowd videotaping with their cell phones.

There are a couple of other things I think you ought to be aware exists. There is an awful lot of audio recording that officers do as well. There are many police departments around the country that issue belt tapes. I know our focus here is on video, but some of this is very helpful in a case.

The other thing is video from stations, jails, and interrogation rooms. I have a case now where an officer got into an altercation at a station and ended up in a deadly force situation in the police station. The entire incident is captured on video because it was in the holding cell area. This is just another example of how we see a lot of video out there that we can get our hands on to evaluate.

There are also two things in almost every case you should never miss. One is the 911 call, unless the officer self-initiated the contact. The 911 call will tell you a lot of things. For example, you can hear things in people's voices. I was recently involved in a shooting case involving the Las Vegas metro. The officer approached a door and a man had actually come out of the door after the officers knocked with a gun. One of the arguments in the case was that the SWAT team should have been called. The subject was barricaded and the police knew the guy had a gun. I wanted to listen to the 911 tape, and I also wanted to listen to the radio traffic between the officers. Not many people have ever listened to a police radio, but it is absolutely amazing to me when you hear an officer say he guesses this guy was upset with the solicitor that was going door-to-door knocking. He apparently came out with a gun. I will make contact with him and see what is going on. That is one scenario. The other scenario is hearing a scream. When you hear that, they should have called the SWAT team. There is this distinction that we see. This is a very valuable lesson when looking at these cases. Do not just look at video. Listen to the audio that is available. Many times you know that a mobile video recorder is running in the police car

and the officer totally forgets it is running. The officer is out of the car dealing with some contact on the side of the road and the video recorder is running.

I recently had an excessive force case in Michigan. A man, who was a completely unrelated witness to the excessive force, came over to an officer and said, "Hey, look, I saw what happened. That was awful. The guy that got arrested, he didn't do anything. Why did that cop toss him on his face after he handcuffed him?" That was unbelievable. None of that was in the police report. In fact, the officer said something like, "Hey pal, I wasn't here. I didn't see what happened. See you later." No name on the police report, none of that.

I looked at another case on the defense side. Officers had gone to a house of a suicidal young man. There was a situation where he was down in a kind of basement, family room. Some officers had him semi-blocked in. Everybody was out of the house. He had a knife so the officers were coming up with a plan. One officer said if he tried to come up the stairs take this rake. Take the rake? Yes, take the rake. If he tried to come up the stairs, push him back downstairs with the rake. "Wait, wait, wait," he said, "What if he grabs the rake?" Meanwhile, this was all captured on the audio recorder that was running. The other cop said. "Well, let it go. Didn't you ever play tug of war when you were a kid? He'll go flying down the stairs and that will be the end of that." At one point one of the officers said, "Listen, I don't fight knives with rakes. I don't fight knives with pepper spray. If he comes up those stairs I'm going to

kill him.” Guess what happens. He comes up the stairs and the officer fires about ten times. The kid was coming at the officer with a knife, so it is a difficult case. Defendable? Maybe. The kid was coming at him with a knife. The bottom line is do you think that case ever went to trial? That case never went to trial, it was settled because of the audio. You have to be aware of that.

I recently had a defense case where a man alleged he was beaten badly when the officers arrested him. However, it was clear from the audio that there was nothing going on. It was a very congenial atmosphere. He actually fired a shotgun at the officers. The judge allowed the tape to be played and the jury came back in forty minutes in that case. Remember that mobile video recording is from a fixed position. In order to demonstrate this, it is useful to evaluate the same incident from different perspectives. Let us look at this one first. At the end of this pursuit the suspect is right in front of the car. You see a scene that leads you to believe that an execution took place. From a different car at the scene, we obtain a much different perspective. From the second recording, we see the man turn. Fixed perspective, two different perspectives. You have to be aware this may exist. In the second video it looked like he was pointing something back at the officers, and two guys shooting him in the back. It turned out to be a cell phone in that case, but you could not tell.

We watch a lot of use of force video, and in doing so we are looking for a lot of different things, such as for the officer’s conduct and the use of force continuum.⁹⁸ In evaluating these videos, we look

⁹⁸ The use of force continuum is broken down into six levels, ranging from officer’s pres-

for some sort of a threat. Maybe there is a lack of threat. Maybe there are a lot of officers there. If you have video and you are on the defense side, whether you like this or not, police use of force is ugly. Jurors tend to get their impression of use of force from where? TV, and on TV five cops do not generally jump on top of the guy. In real life five cops jump on top of the guy. There are no fair fights in real life. We want to be able to look at this and determine whether there was a real threat. Was there a lack of threat? How many people were present? Were there weapons? Was the person a threat to the public? Those are the kinds of things we are going to look for in a video.

Let us evaluate another video. Here, the officer has already had contact with a suspect. The officer wants to arrest him for public intoxication. He tells him to turn around and put his hands on his back, and knees him because the guy grabs hold of him. Now he tries pepper spraying him. When different experts evaluated this, there was an agreement on both sides that the officer had done some things right and some things improperly. What you do not see, and what you cannot see, is that the officer struck the guy about twelve times with his baton. They were light strikes, and the officer was actually striking him with what they call a continuation strike that he learned in the police academy. The chief of police saw this video and fired him immediately. He was criminally charged in this particular case, but in the subsequent civil case, the judge held that the officer had qualified immunity based on the video. I guess the judge relied on

ence and verbal commands to less lethal and deadly force. George Godoy, *Police Oral Boards and the Use of Force Continuum*, POLICE TEST, at http://www.policetest.info/FORCE_CONTINUUM_POLICE_USE_OF_FORCE.htm (last visited Jan. 26, 2009).

his interpretation of the video more than the video itself.

An additional consideration is whether to enhance a video. In fact, Professor Silbey made a comment that was kind of interesting. She said to tie down the testimony.⁹⁹ Sometimes we see where the testimony gets tied down in a different way. In this particular video from within the last year, the officer was actually criminally charged with assault on the suspect. Probably the biggest turning point in the whole case was the testimony of the suspect. He was a witness in the officer's criminal trial and was adamant that he never, ever tried to kick the officer. He never did anything to the officer because the officer's story is that the suspect kicked him as he was trying to close the car door. I will tell you when you watch the full speed video you cannot see it. In this case the attorneys slowed the video down and walked through it frame by frame and then you see a little bit of a different story. There are two or three versions, but you can actually see his foot come out and kick the officer. Again, the video was specifically used for purposes of undermining his testimony that there was in fact no kick given.

One other thing to consider when you are handling these cases is what is the policy of the agency. How many have asked for video and all of a sudden you are told it was not working, which may be as helpful to plaintiffs as when they have video or they are told that the tape has already been re-used. So you want to get your hands on a policy. Most agencies now have a policy. The problem with most agency policies is they ought to be looking at videotape or digital im-

⁹⁹ See *supra* Part II.

ages on a regular basis.

I was in Corpus Christi, Texas recently and I spoke to 515 police officers. I asked when they looked at videotapes. They stated that they look at videotape after something happens. Sometimes these police agencies do not know if a camera is not working because nobody ever looks at it and realizes it is broken. Sometimes it is a case where the officers know what happened but it never comes to the supervisory level. I have a case in Connecticut where the officer describes how the car hit him, ran him over, and how he shot into the car. The fact of the matter is that there is video from another police car that shows he was nowhere near the car when he was shooting it, and that the car never hit him. However he did not know the tape existed.

We want to be aware that there is a tape out there. The other thing is, if they tell you there is no tape, and again whichever side you are on, you better make sure tapes do not exist before and after the event. That will be a red flag for you if just the important one is missing. The other thing I always say is, "is there a repair order for the missing tape?" I will get a case and they will tell me they do not have the tape because the camera was not working. Does the camera work today? Oh, yes, it works today. When did you get it fixed? I will tell you one thing about government; we cannot buy pencils without putting through an invoice of some sort. There should be some paperwork on getting something like a camera fixed. Again, is there a supervisor review mechanism? If you look at the New Jersey State Police Department of Justice consent decree, one of the things

that was required by the New Jersey State Police was that supervisors had to look at a certain number of tapes per month.¹⁰⁰ Think about this for a second.

Like I said, I do a lot of training. I recommend this to agencies all over the country. If you call Bank of America this afternoon, before you speak to a person, you are going to get something that says this call may be monitored or recorded for quality assurance purposes. Customer Service call centers actually do that. They have a checklist. Did the person say, “Good morning, this is Bank of America?” Did they get three forms of identification before they gave Jack any information about his accounts to make sure it actually is Jack? They have a checklist. I ask departments all over the country why we do not do that? Why do we not do quality control on our people to make sure they are doing it right? I tell them there are lots of things you can pick up on by doing a checklist of important questions.

I know an agency that started doing the supervisory review mechanism. They found that one of their officers was only stopping young, pretty, blond women. That was it. The chief said that apparently the officer thinks PC, probable cause, does not stand for probable cause. It stands for pretty cute. So again, the supervisory mechanism might pick some of this stuff up. By the way, if a supervisor is reviewing them, it is going to be harder for you to prove deliberate indifference if you are on the plaintiff’s side. But if nobody is reviewing them, might that cut towards deliberate indifference in

¹⁰⁰ N.J. Exec. Order 29 (Dec. 30, 1999), available at <http://www.nj.gov/infobank/circular/eojsc29.htm>. (last visited Jan. 26, 2009).

supervisory practices? Again, we have that possibility as well.

IV. COMPUTER-GENERATED SIMULATIONS AND ILLUSTRATIONS

A. *Gail Donoghue**

I am going to talk about reconstructions in police shooting cases. There is a great temptation to think about reconstructions in shooting cases because they are quite intense and emotional and generally involve high stakes. The applicable standard, as you all know, is: Was the shooting reasonable? The reasonableness turns on all the facts and circumstances that existed at the time of the shooting. Defense lawyers generally understand that it is very important to communicate the intensity of the situation to the jury, but they do not always know how to go about doing that. I think that a lot of times they repeat those famous words about split second decisions and second-guessing in the cold light of the courtroom. I do not know whether this persuades anybody or if it has an impact on the jury. It is important to convince the jury there is something more than rhetoric or closing arguments. I think that what you need to do is to be able to focus on facts that are supportable and can be corroborated.

In some of the videos shown, it seems that while the video may be ambiguous, there were certain facts those videos corrobora-

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rated. An average juror is going to look at that as a human being, trusting her own senses of what she is seeing. While interpretations can differ, people were in certain frames. They were there and those facts are irrefutable. When you are making up the video or attempting to come up with an exhibit, it is different than when you are using video that is actually being taken at the scene. So as your mind drifts off to how you are going to convince the jury about the intensity of the decision that the officers face, it is easy to start to think about video.

In order to illustrate what is possible, a demonstration video was made by a group that concentrates in this area. Watching the video is exciting and gives the viewer a lot of ideas about what is possible. It is important to pay attention to the faces that relate to an arrest and to a shooting. Then ask yourself if those visual images were at least engaging and interesting, and if they got you focused in some way. The video makes one realize that there are tremendous possibilities for demonstrating cases to a jury in using these techniques. In my career, I certainly went down that road a number of times and what I want to do today is share with you some of the things that I think are good to consider before you take on that kind of a project.

So, to recreate or not to recreate? The first thing to consider is that working on these demonstrations will take up a tremendous amount of attorney time. It might be tempting for a lawyer to just give the project to the experts and let them handle it because after all, they are the experts. But it is not as simple as that because you have

to collect the evidence for them. Attorneys have to spend a lot of time talking with experts about the case, their theory of the case, what it is they want the reconstruction or animation to show, and how they can possibly accomplish that purpose. If the attorneys do not spend this time, then they are very likely to get unpredictable results. In fact, even when they do spend the time, it is possible that they will not like what the expert has formulated. This happened in the cases in which we attempted to do reconstructions. We spent a lot of time with the experts, but we did not like the reconstructions because they either minimized some of the most important circumstances in our case, or were not able to encompass them in the final product.

A second consideration is the physical characteristics that existed at the time of the incident. They may be such that an animation is bound to produce a bad result. Consideration must be given to the situation as it existed in physical terms, to see if it is possible to be able to recreate it in a way that will be persuasive and convincing. Attorney time becomes an issue because reconstruction has to be based on evidence, testimony, photographs, and measurement, not only for admissibility purposes, but also for persuasiveness purposes. If your expert cannot refer to facts and evidence in the case where a jury is likely to think it is believable, then he may not be able to persuade the jury that what he created does in fact represent reality.

The expert also has to use recognized techniques. In the case of most animations, a reconstruction's software must be recognized and the expert has to be able to testify about these facts. The lawyer must be able to direct that testimony. The lawyer must learn about

the software from the experts, including its operation and whether it is accepted and recognized in the field, and what possible pitfalls there might be on cross-examination. This is a considerable project that requires significant time to develop and which may require additional reading. Sometimes experts are not particularly good at explaining these processes and another expert may need to be consulted who is better at explaining software and hardware, and how animation is really created.

The third thing the lawyer must do is examine the credentials of the expert to include a search with today's databases.¹⁰¹ If there is something out there about a person who has some sort of public life, it is likely to be discoverable and findable on some database.¹⁰² We had this happen in one of our cases. We hired an expert who seemed to have reliable credentials. We looked at those credentials on paper but we did not do a Google search until late in the day. Unfortunately, we discovered some very serious legal issues that were collateral for sure, but would nevertheless provide some fodder for cross-examination. This type of credential search has to be done before the decision is made to take the project on.

With limited time, it is best to try to do a limited demonstra-

¹⁰¹ Vincent Di Maio, *GUNSHOT WOUNDS: PRACTICAL ASPECTS OF FIREARMS, BALLISTICS, AND FORENSIC TECHNIQUES* 256-57 (CDC, 2d ed. 1999) (1998).

¹⁰² See Press Release, Acurian, Acurian Announces Release of Clinical Trial Social Networking Application, Click it Forward (Jan. 19, 2009), available at https://www.acurian.com/pr_clickitforward.pdf (noting that "Facebook and MySpace together have nearly 200 million registered users"); Thomas Lee, *Social Networks Evolve for Job Hunting*, MYRTLE BEACH SUN NEWS, Jan. 24, 2009, at D2 (describing LinkedIn, a social networking site which has profiles of nearly thirty million resumes from professionals); G. Mahadevan, *Let Us Know What's Up*, THE HINDU, Dec. 30, 2008, at 2 (describing a social networking site which allows students to "tap into a database of papers, reports and assignments that have already been done by hundreds of other students").

tion so that it can be done well and thoughtfully, and so that it can be secured against cross-examination. Even with ample time, the expert should be consulted about how the incident will be reconstructed. For example, very often lighting conditions are crucial in a shooting situation when visibility may be obscured.¹⁰³ If there is darkness, then the question becomes how do you convey the feeling of darkness while at the same time having sufficient light in the demonstration for the audience to see and perceive the events as they are unfolding?¹⁰⁴ That is a difficult thing to do. Conditions such as darkness are best left to jurors' imaginations rather than to try to include them in a recreation because some aspect of the reconstruction is going to fall apart. Either the darkness will not be there or the jury will not be able to perceive the events if the darkness is simulated with the accuracy occurring at the time.

The lawyer may have very difficult issues that present themselves because of lighting conditions, which are a crucial part of the circumstances that affected the police officer's judgment. Therefore, I would be very wary about trying to reconstruct those. As everyone has discussed today, people can perceive the demonstration or the video differently. What one might think of as dark, others may not think of as dark. When the word "dark" is used, and a jury knows the time of day, their imagination and their life experience will fill in the

¹⁰³ See Anne G. Copay & Michael T. Charles, *Handgun Shooting Accuracy in Low Light Conditions*, 24 *POLICING: AN INT'L J. OF POLICE STRAT. & MGMT.* 595, 600 (2001) (indicating there is a great difference in shooting accuracy between shooting with night sights, and shooting with a flashlight).

¹⁰⁴ *Lopez v. Foremost Paving, Inc.*, 796 S.W.2d 473, 479-81 (Tex. 1990). The case was remanded because the computer generation failed to show any fog or darkness from when the accident occurred, instead shooting the generation from a brightly-lit surface.

meaning of darkness. I think that is lost if it is illustrated in a concrete way.

Lapsed time is another circumstance that is very crucial in most shooting cases.¹⁰⁵ Things happen quickly, as you saw in some of the videos today. We had a case that we took to trial where the shooting occurred within six seconds of the police arriving at the scene. We went through the preparation stage of this case, including listening to the 911 communications before we clocked it. When we clocked it, it seemed to us that it was devastating to the plaintiff's case because of the existing elements of urgency and surprise. Rapidly evolving circumstances were very vividly portrayed by the lapsed time on police communication tapes. If we had made a video that went on for six seconds, it might have seemed like a lot longer than six seconds. Where you have that urgency, it might be better to not reconstruct it into a video because the video can be stopped. Once a video is admitted into evidence, there is no reason why a plaintiff cannot stop it or freeze-frame it, and it can wind up looking like an hour. Therefore, this is another consideration that I would think about before jumping on this bandwagon.

Confusion at the scene is another circumstance.¹⁰⁶ The reason I would be reluctant to demonstrate a scene where there was confu-

¹⁰⁵ See, e.g., FOX News, *The Big Story with John Gibson* (Dec. 6, 2007) (transcript on file with *Touro Law Review*) (reporting that police were unable to respond to a mall shooting which killed eight despite a rapid police arrival).

¹⁰⁶ See Ian Bailey, *Dziekanski 'Didn't Attract Any Attention' on Flight*, *GLOBE AND MAIL*, Jan. 20, 2009, at S1 (reporting an airplane passenger was tasered by police after confusion over an airline seat); Chuck Biedra, *Three Quickly Arrested in Brackenridge Home Invasion*, *VALLEY NEWS DISPATCH*, Jan. 15, 2009 (citing confusion over whether there were any victims in a home invasion); Paddy Shennan, *Nightmare of Confusion*, *LIVERPOOL ECHO*, Jan. 24, 2009, at 12 (describing police confusion as to whether they made a positive identification before shooting).

sion is that it can cut both ways. Yes, it could support that the circumstances were rapidly changing and evolving, but it may also suggest police officer incompetence or police officer ineptness. Thus, I would be reluctant to demonstrate that to the jury if it existed.

We heard statements that use of force by police is not pretty—this is very true.¹⁰⁷ For example, I was standing on a subway station with my spouse one night and the police took somebody down on the other side of the platform. My husband, who has lived with a defense attorney on police cases for a long time, said, “Oh my God, did you see that? That was horrible. Why did they do that?” I explained to him that because the suspect was running away from them, how else were the police supposed to get this person contained? There is the possibility that this person was armed. I asked him “Do you know if this person was armed?” He said, “No, I don’t know.” Maybe the cops knew. Maybe they didn’t. What about that? Of course once I walked him through it he understood. But if I demonstrate that on a video, it may not look so good and may do more harm than good.

There are also conflicts in testimony.¹⁰⁸ Because human beings will react to situations in different ways, I always tell attorneys not to hide from it, not to be ashamed of it, not to cringe, not to think they had a terrible case because people had different perceptions.

¹⁰⁷ See Bob Egelko & Marisa Lagos, *Lawyer Tells Why BART Cop Hit Oscar Grant*, SAN FRAN. CHRON., Feb. 1, 2009, at B1; Judi Villa, *Incidents Put Police Brutality in Spotlight; But Complaints Actually Down 13.6 Percent in '08*, DENVER ROCKY MOUNTAIN NEWS, Feb. 2, 2009, at 12;.

¹⁰⁸ See Mike Allen, *Murder Charge Stands*, ROANOKE TIMES, Jan. 24, 2009, at B1 (certifying a murder charge despite conflicting accounts of incident); Bethann Stewart, *Eagle Developer Acquitted in Sex Case*, IDAHO STATESMAN, Jan. 31, 2009, at 1 (acquitting a person of sexual battery after conflicts in testimony of the alleged victims).

However, what does that do to the creation of an incident on film? Which versions of the events should be used in the reconstruction? I may be harming the case and the officer's credibility if I have to then explain to a jury in closing that some things were left out because we thought one officer's version was more correct than another officer's version. That is another situation where I would be disinclined to produce a reconstruction video.

Distance is another factor. I think we would all agree distance is not accurately portrayed on film. Anybody who takes pictures knows that the lens on the camera can compress distance or extend distance.¹⁰⁹ If you think distance is crucial and you cannot get an accurate portrayal of that distance, you may be undercutting the circumstances that justify the defense or prosecution of your case.

Words spoken and volume are also very, very crucial factors.¹¹⁰ If an independent evidentiary basis for words spoken is necessary, it may not be possible to get them into evidence because it may be that they are bolstering words and it will not be admitted over a hearsay objection. The absence of the words and the absence of the sound may have a very negative impact on the portrayal of the events. I think it may be better in that instance to use live testimony, which describes the events and includes or interjects what was being said as the events were unfolding. Most of the problems we encountered during the two reconstructions had an impact on our dissatisfac-

¹⁰⁹ For an explanation on how cameras may distort distance, see STsite.com, Still Photography Camera Guide—Telephoto and Wide-angle Lens, <http://www.stsite.com/camera/telephoto-wideangle.php> (last visited Feb. 2, 2009).

¹¹⁰ See *Datskow*, 826 F. Supp. at 685 (noting that the judge ordered the animation to be played with the volume off to reduce possibility the jury would interpret it as a re-creation of the incident).

tion with the final result.

Another dilemma faced in reconstructing scenes is creating physical characteristics.¹¹¹ How do you decide how the characters or the figures, for lack of a better word, in the video are going to appear? A person's face or image has a tremendous impact on the way other people respond emotionally to that person. It can become a precarious situation because it can be dehumanizing to have no faces appear on the figures. I call them figures because that is what they look like—this is not a hockey video game. This is a reconstruction of a very serious matter. Do you want to dehumanize a situation like that? If facial features are used, you run the risk of tremendous objections because the facial features may not be becoming or they may be perfectly fine facial features but misleading in terms of youth or general overall appearance. There may be very significant objections to using visual facial images that do not exactly correspond to the live persons, especially if this is being offered as a reconstruction of the event.

All of these potential dilemmas must be thought about when creating a reconstruction of the event. In my mind, all of these weigh *against* undertaking reconstructions. But that is not to say that I do not think the computer techniques that you saw in the video are not tremendous aids to presenting a case. They work very well when you have a more limited purpose and they support that limited purpose. I am going to give you some examples of what I mean.

¹¹¹ See John Caher, *Murder Verdict Upset Over Jury Charge Error*, 236 N.Y.L.J. 1 (2006) (noting a first-degree murder conviction was reversed because the jury charge asked the jury to consider the physical characteristics of all persons involved).

Many years ago, we made a video in a shooting case where the police officer pursued somebody who had stolen a car. The technology was not very good. The police officers struggled with a young man for his gun in a stairwell. The young man was younger and fit. We all know many police officers are not fit. The officer shot him intentionally because he believed his life was in danger. We had crime scene photos that showed the area where it occurred, including the bloodstains on the pavement, and we were able to make a reconstruction of how it happened. Our objective was to show the closeness of the struggle, the proximity of the two people, and the speed with which it occurred. We produced the video and all we could focus on was the blood. It was terrible. The video did not get offered. The case did not go to trial. Ultimately, the video was helpful in assessing our own case because the reality or the impact of all the blood in the crime scene reached us in the video, even though it did not reach us in the crime scene photos.

In another case, a famous case that was talked about at this conference last year, *Busch v. City of New York*,¹¹² an emotionally disturbed man was wielding a hammer at police officers.¹¹³ In response, four officers fired their guns at Busch.¹¹⁴ They were standing at various positions on the sidewalk that could be construed as a semi-circle. We wanted to show that the most important aspect of our case was that everybody agreed that he had a hammer and that he

¹¹² For a discussion of Ms. Donoghue's analysis of *Busch*, see Gail Donoghue, *Busch v. City of New York*, 764 P.L.I. 565 (2007).

¹¹³ *Id.* at 570.

¹¹⁴ *Id.* at 571.

had the hammer over his head. There was no dispute about that.¹¹⁵ We thought that the issue of whether Busch could have reached the officers with the hammer was crucial to the legal standard of whether or not it was reasonable for the officers to think they could inflict death or serious bodily harm.¹¹⁶ There were many witnesses on the street when this happened and their testimony sounded as if he was quite far away from the officers. The distances between people and objects were very distorted in the photographs.¹¹⁷ The impression was that he could never have reached the officers with a hammer. This was a big problem for us.

We wanted a reconstruction. We got one. We spent a lot of time with the expert. When we got it, the reconstruction portrayed the fact that the hammer could have reached any one of those officers and inflicted a deadly blow. But it also looked like an execution because the semi-circle of officers with their guns drawn is what appeared on the video earlier. So we scrapped that video. What was effective in that case was having a forensic examiner look at the crime scene and make calculations based on locations. There was unrefuted evidence about ballistics damage, the location of spent shell casings, the location of cars in the area, a fence, and a building. So we had scientific calculations of the bullet trajectories from the various officers' guns. It was very important because through that calculation, the expert was able to testify that Busch was between two and

¹¹⁵ *Id.* ("It was undisputed among the witnesses that Busch was holding the hammer over his head and screaming.").

¹¹⁶ *Id.* at 577.

¹¹⁷ Donoghue, *supra* note 112, at 571.

four feet from the officers at the time he was shot. That put him clearly within range of being able to inflict a deadly blow. What we regretfully did not do, and what I am recommending today, is a demonstration of his testimony. The expert was very good, but it was still difficult for the jury to visualize. We worked for days preparing his testimony so that he would go step-by-step. He had some illustrations that he prepared, but it would have been wonderful if we had video of the bullet trajectories, the location of the police officers, and the person who was shot in the demonstration. That would have allowed the jury to visualize the scientific testimony that was coming in through this forensic examiner.

That is the kind of thing I recommend the lawyer consider in these cases. Decide the key crucial facts that are needed to support the defense to win. What we needed in my last example was the reality of the possibility of death or injury. It is worth it to find a method to demonstrate those facts through forensic evidence and computer animation. I think it is very effective and I think it is a tool that is manageable.

Another way to do things is to create a still exhibit through computer technology to depict things you do not have photographs of. For example, in another shooting case, the officer was at the top of the stairs while the person that was shot was at the bottom of the stairs. The officer's story was that as he was coming home, he heard someone say, "turn around, you know what this is." The person pointed an oozie at him from the bottom of the stairs. It was a robbery. As the officer threw down his money and his jewelry, the indi-

vidual started to move up the stairs to collect the items. The officer took out his service revolver and shot him and paralyzed him. The plaintiff's version was that he was just walking along the street at night in the rain. He had a plastic water gun in his pants that was an exact replication of an oozie. He bumped into the officer who was walking in the other direction and the plastic oozie fell to the ground. The officer got scared and shot him. So the two versions were radically different in terms of the location and the distance between the officer and the person who was shot. This case went to trial. We could not settle it.

I wanted the jury to see what it looked like to the officer when he was confronted. I also wanted to establish that the ballistics evidence supported the distance between the officer and the person who was shot. They were not in close proximity on the sidewalk. There was a crime scene photo of ballistic damage to the lower portion of a door of a car that was parked across the street. A composite image was put together with the cars and the view of the officer from the top of the steps to try to convey the trajectory that the bullet took when it hit the car. There was a pink car and also a silver car across the street. We argued that the ballistic damage could not have occurred had the plaintiff and the defendant been in close proximity on the sidewalk. We had another image to show that if the officer was coming in from the street, as alleged, he would not have bumped into the individual because he would have had a clear view of the sidewalk given the cars parked on the street. These were simple exhibits, but we needed to have the expert who prepared them testify at trial about

the measurements he made, about the software he used, and about what these exhibits represented. The judge in particular was very, very meticulous in making sure that there was a solid evidentiary foundation. My recommendation is to think small, but definitely consider these tools because they are very helpful in allowing a jury to visualize the event.¹¹⁸ Thank you.

¹¹⁸ Gail Donoghue, *12th Annual Section 1983 Civil Rights Litigation*, P.L.I. 509, 511 (1996).

