Teaching Images

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My early attempts at teaching students summary judgment taught me how complex the topic is. I remember trying to convey the deceptively simple task of deciding whether material facts were in genuine dispute. It was hard enough for students to maneuver procedural standards in the suddenly fact-intensive, post-discovery environment. In the ontology of legal process, facts are at once ordinary and mystical, concrete and fluid, everywhere and nowhere. Once embedded in a lawsuit, facts are both overdetermined and undercontextualized, flattened and shorn of their social meaning. But in addition, summary judgment demands that facts be curated; they have to be material to a claim. Materiality is a concept that, with the injection of substantive law into the analysis, often confounds the first-year student. In helping my students navigate the rich landscape of facts, I found it especially difficult to get the students to appreciate how judges confronted a somewhat contradictory task: to ask if a reasonable jury could find for the nonmoving party and yet not to usurp the role of the jury by weighing the evidence.

Federal Rule of Civil Procedure 56(a) sets out the standard for granting motions for summary judgment, requiring courts to take cases away from juries and enter judgment as a matter of law when "there is no genuine dispute as to any material fact."[1] Because disputes over facts are the unique province of the jury, another way to frame the question of whether there is a genuine factual dispute is to ask if a jury could reasonably find for the nonmoving party given the material in the record.[2] If so, the case should not be disposed of by the judge. For an issue to be genuine, the nonmoving party has to show facts that put that issue in dispute, and the judge has to assess the proof.[3] That judicial assessment is necessary because a genuine dispute is one that is worthy of a jury; the modern standard requires that to defeat a motion for summary judgment, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."[4] Moreover, the Supreme Court has held that assessing the record on summary judgment "necessarily

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1. Fed. R. Civ. P. 56(a).
2. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).
3. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).
4. *Id.* at 586.

implicates the substantive evidentiary standard of proof that would apply at the trial on the merits."[5] In other words, at summary judgment, a judge must assess the evidence in light of the standard of proof and from the perspective of a rational jury but must not usurp the role of the jury by weighing the evidence.[6] Applying this Zen koan is quite a bit to ask of a federal judge and can be positively mind-bending for first-year students.

Disputes of Fact

To unravel the riddle of summary judgment, I often pose the most basic of hypotheticals about a dispute over whether the traffic light was red or green when the defendant went through it, causing an accident. The plaintiff's theory is that defendant was negligent in running a red light.[7] The hypothetical poses different kinds and degrees of factual evidence for each side to test the easy cases of clear factual disputes, the easy cases of no factual disputes, and the difficult cases of significantly unequal evidence. For example, I ask students how the judge should rule on a motion for summary judgment by the defendant if the defendant, in support of his motion, submits affidavits from ten witnesses who say the light for defendant was green, and the plaintiff, in opposing the motion, submits her own affidavit stating that she observed the light and it was red. This is a hard question for students; viewing the evidence in the light most favorable to the nonmoving party and through the lens of the burden of proof, the plaintiff's affidavit surely does more than a raise a metaphysical doubt. Yet, putting aside the credibility of the witnesses, which is clearly the job of a jury, could a reasonable jury find for the plaintiff?

As the students are struggling with that last question, I offer them an alternative. They can ignore the confounding phantasm of the ten hypothetical witnesses for the defendant. What if the defendant supports his motion for summary judgment with a single video that suggests that his light was green, and the plaintiff responds with her own affidavit again that she observed the defendant's light to be red. Relief spreads through the class. A video changes everything. They overwhelmingly conclude that the judge should grant defendant's motion for summary judgment. No rational jury could find for the plaintiff in the face of evidence so compelling and infallible as a video.

Sometimes there is a lone dissenter, or a smattering of skeptics. Sometimes not. Digital experts though they are, my students tend to be visually guileless. Their first assumption is that a video is more conclusive than other demonstrative or documentary evidence and certainly more reliable than testimonial evidence. Their reactions suggest that the videos that circulate on the Internet, uploaded from cell phones or police body cameras, are a new kind

5. *Anderson*, 477 U.S. at 252.

6. *Id.* at 249.

7. This hypothetical initially came from the Freer & Perdue civil procedure casebook, Richard D. Freer & Wendy Collins Perdue, Civil Procedure: Cases, Materials, and Questions 485 (5th ed. 2008), but I tweak it a little each year.

of evidence, perhaps "experiential" evidence in that the images allow them to experience the event.[8] They are fairly confident that summary judgment would be appropriate in the face of a factual dispute in which one side has experiential evidence and the other side does not. So I ask them questions that I hope will lead them to reassess their confidence in the imagined images on the defendant's video. I ask them what it means for a video "to suggest" the light was green. What do they imagine the video showed? What kinds of images would be most compelling? What kinds of images would speak to material facts? Do they need additional information about the video to assess its reliability? Can they assess its reliability without weighing the evidence? A few change their minds, but it's a hypothetical about a hypothetical video. It is far too abstract, and they imagine anything they want.

So I show them a real video. It is the video from the Supreme Court's case of *Scott v. Harris*.[9] But before they know anything about that video, I give the students the following exercise developed from the case.

An Exercise

At 10:42 p.m. on March 29, 2001, Deputy Sheriff Clinton Reynolds was stationed on Georgia Highway 34 when he clocked a vehicle traveling at seventy-three miles per hour in a fifty-five mile-per-hour zone. Although Reynolds flashed his blue lights, the driver refused to slow down and continued driving. Reynolds made a decision to pursue the driver.

Through his radio, Reynolds learned that the car was registered to Victor Harris, and it was not stolen. It is undisputed that Harris, who was also the driver, had registered the car at his own address. Reynolds did not report that he was pursuing the vehicle because the driver had been speeding.

Reynolds followed Harris, using his flashing lights in an attempt to get Harris to pull over. When Harris did not stop, Reynolds turned on his lights and siren, which activated his video camera. Harris not only refused to stop but sped up, beginning a high-speed chase. According to Harris, whose testimony was not disputed, he didn't stop because he was scared, wanted to get home, and was hoping to avoid an impound fee for his car. Harris admits that during the course of the pursuit, he drove well in excess of the speed limits, passed vehicles on a double yellow line, and ran a green light. Despite these traffic violations, Harris used his turn signals when passing or turning, maintained control of his car, and slowed before passing cars in his lane to check for oncoming traffic.

Officer Timothy Scott, who had heard Reynolds' radio communication, decided to join the pursuit. At one point, Harris slowed, signaled, and turned into the parking lot of a shopping complex. There were no pedestrians or other vehicles in the parking lot. Reynolds followed Harris, and Scott proceeded to

8. Jessica Silbey calls this "evidence verité." Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. Mich. J.L. Reform 493 (2004).

9. Scott v. Harris, 550 U.S. 372 (2007).

the opposite side of the complex in an attempt to cut Harris off. As Harris attempted to exit the parking lot and Scott attempted to hem him in, the two vehicles came into contact, causing minor damage to Scott's cruiser. Harris re-entered Highway 34 and continued to flee. The police blocked all intersections ahead of Harris so that no traffic would cross the highway as Scott, now the lead police vehicle, pursued Harris.

Scott radioed his sergeant for permission to make physical contact with Harris's vehicle in what is termed a "PIT" (precise intervention technique) maneuver. A PIT maneuver is a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point which throws the car into a spin the driver cannot control, bringing the car to a stop. Neither Scott nor the sergeant knew why the chase had been initiated, but Scott wanted to end the chase as soon as possible because he felt that Harris was acting in a reckless and dangerous manner. At the time of Scott's request, there were no motorists or pedestrians in the area because of the decision to blockade intersections.

In granting Scott permission to make contact with Harris's vehicle, the sergeant stated over the radio, "Go ahead and take him out. Take him out." Scott determined that he could not perform the PIT maneuver because he was going too fast. Instead, he decided to ram Harris's rear bumper. As a result, Harris lost control of his vehicle, which left the roadway, ran down an embankment, and crashed. Harris was rendered a quadriplegic. No one else was injured.

Under the vehicle pursuit policy of the Sheriff's Office in effect at the time of the incident, decisions regarding the initiation, continuation, and termination of pursuits were left to the discretion of the officer and supervisor in the field. The policy cautioned, however, that an officer should discontinue the pursuit when "upon weighing the pertinent factors, the gravity of the offense and the prospect of losing the suspect will not balance with the hazards to the Deputy and the public" or "upon receipt of additional information once the pursuit has begun that would allow later apprehension and successful prosecution." Most police departments across the country had such a policy in force at the time of the incident.

Additionally, the policy stated that "the pursuing deputy should keep in mind his personal safety and try everything within his authority to apprehend the violator without resorting to a high-speed chase." The Sheriff's Office admitted that officers did not receive training on these policies, including the pursuit policy, nor were they trained to determine whether to make contact with fleeing vehicles or in how to make such contact safely.

In October 2001, Harris sued Scott for violating his Fourth Amendment rights to reasonable seizures by using excessive force to stop his vehicle. Scott moved for summary judgment on Harris's Fourth Amendment claim that he was subjected to an *unreasonable* seizure because of Scott's use of excessive

force. Under established precedent it is clear that a seizure occurred when Scott rammed Harris's vehicle.

Claims of excessive force are subject to an objective reasonableness inquiry established in *Graham v. Connor* in 1989. Under *Graham*,

> the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation . . . . The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.[10]

Graham instructs that the trier of fact must examine the facts carefully and provides three examples of questions relevant to the inquiry: (1) how severe was the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether he was attempting to evade arrest by flight.[11]

In support of his motion, Scott contended that there was no factual dispute about whether there was a constitutional violation because his use of force was objectively reasonable given that Harris was driving recklessly at high speeds and had hit Scott's vehicle. In opposing the motion, Harris argued that ramming his vehicle was unreasonable because Scott used excessive force to stop Harris, who was merely a traffic offender, and because the officers could have used alternative means to arrest him at a later time.

How should the Court rule on the motion for summary judgment?

Class Discussion

A classroom discussion of this scenario may be structured in many ways based on one's pedagogical goals.[12] My goals are twofold: to help my students understand how to apply the summary judgment standard in a fact-specific context, and to teach them how to read images critically. I focus here on the second goal.

10. Graham v. Connor, 490 U.S. 386, 396-97 (1989).

11. *Id.* at 396.

12. My colleague Philip Schrag uses his own version of this exercise that is entirely interactive. He has groups of students argue for Scott and Harris and then vote on summary judgment without the video. After showing the video, he has them vote again. Then he gradually reveals what happened in the actual case, providing excerpts from the district court, the Supreme Court majority, and the Supreme Court dissent. Last, he provides the students with an excerpt from Jessica Silbey's article about studies of filmed confessions and asks the students to vote one last time. *See* Jessica M. Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 Colum. J.L. & Arts 107, 162-63 (2005).

As a way for the students to increase their comfort with the summary judgment standard, as well as with the law and the facts described in the exercise, I begin the class by asking them first to articulate the best arguments for granting summary judgment and then to articulate the best arguments for denying summary judgment. I poll the class on how they would rule if they were the district court judge.

Then I tell the students to assume that as part of his evidence on the summary judgment motion, Scott includes the videos taken from the dashcams of the two police cars that pursued Harris, first Reynolds's and then Scott's once he took over the lead. I warn them that in the video they will see the crash that ended the chase. I show enough of the video that they get a sense of both the dullness and the drama, making sure to include the detour into the parking lot where Scott takes over the pursuit.

I ask my students if the video changed anyone's mind about whether to grant or deny the motion for summary judgment, and I follow up with the whole class about why it might. I lecture briefly about film and visual literacy to provide students with a basic vocabulary for interpreting and interrogating visual images.[13] I try to impress upon them that this is now an important tool for lawyers, and especially litigators, as images and film have come to play a key role in legal proof and persuasion. Without a critical visual vocabulary, I suggest, they will be more likely to "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."[14]

We discuss how videos, like eyewitnesses, have one dominant perspective, and that it is important to ask how the medium, the viewing context, and the audience might inform (or distort) our perception. I guide them in thinking about how they might assess film and video; they often suggest considering the position of the camera, the angle, the way the images are framed, selected, and edited. If I have laid the foundation properly, the students see that the very techniques they are suggesting create opportunities for alternative narratives of images and enhance their abilities as lawyers.

At this point I turn to the majority opinion in *Scott v. Harris*,[15] and the students are primed to see the visual naiveté of the *Scott* majority. They can identify how eight Justices failed to differentiate between the chase itself, the

13. I primarily use my article *The Image Cannot Speak for Itself*, but also incorporate the foundational ideas of Jessica Silbey and Jennifer Mnookin. *See* Naomi Mezey, *The Image Cannot Speak for Itself: Film, Summary Judgment, and Visual Literacy,* 48 Val. U. L. Rev. 1 (2013). Much of the discussion that follows comes from ideas in that article.

14. Mezey, *supra* note 13, at 13.

15. Seven justices joined Scalia's opinion for the Court reversing the lower courts and concluding that Officer Scott acted reasonably in terminating the chase and was entitled to summary judgment. 550 U.S. at 380-81. Ginsburg and Breyer also wrote concurring opinions. *Id.* at 386-87. Stevens was the lone dissenter. *Id.* at 389.

different testimonial narratives of the chase, and the video of the chase. It is now striking to them that the Justices "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."[16] Most students see how odd it is in the context of summary judgment for the video to operate "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."[17]

I ask them to consider how they might have critically engaged and reoriented the possible meaning of the dashcam video if they had been Harris's lawyer. Someone will mention that the video, shot from the squad car, places the viewer in the position of law enforcement. I supplement this insight by asking them to imagine how different the scene might have looked in a video taken from the back of Harris's car, from the side of the road, or from a helicopter. Often a student will think about the framing of the video, appreciating that the dashcam technology limits the field of vision, introduces distortions, and makes some things in the periphery invisible. They will usually identify that the lack of color, the confusing lights, and the sounds of the police radio all influence our perception.

The question remains, will more sophisticated analysis of visual evidence change how judges and juries view it? Empirical work done by Dan Kahan, David Hoffman, and Donald Braman suggests that it might.[18] These scholars accepted the Supreme Court's invitation to the public to "see for themselves" that the *Scott* video was conclusive. Kahan and his coauthors showed the *Scott v. Harris* video to a diverse group of 1350 Americans. They found significant differences in factual perception based on group identity and underlying cultural and ideological values. These findings indicate that lawyers can help translate visual evidence to juries and judges in ways that minimize and make visible the cognitive biases that otherwise limit their reading of the image.

I conclude our classroom work on visuality by integrating that discussion with the earlier doctrinal question of factual disputes at summary judgment and the difficulties posed by the protean nature of facts. We return to the material facts we had identified in discussing the reasonableness of the seizure: whether the suspect posed an immediate threat to the safety of the officers or the public. The important question is whether the video provides conclusive evidence of those facts, and the class is usually split on this question. If they are split, wouldn't it be likely that a jury would be as well? And if a jury would be split, isn't that precisely when a factual dispute is genuine and not ripe for summary judgment? I'm curious whether they think that facts embodied in

16. *Id.* at 26.

17. *Id.*

18. Dan M. Kahan, David A. Hoffman, & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism,* 122 Harv. L. Rev. 837 (2009).

visual evidence are more likely to seem material. I ask because I suspect that this was partly what was going on in *Scott*—that the majority assumed it showed them exactly what they were looking for. Yet for all the video did show—and it could well be potentially probative on many issues—it is less than conclusive on how necessary and dangerous the chase was and, therefore, on whether Officer Scott's actions were reasonable.[19]

In addition to allowing me to introduce my students to the complexity and richness of summary judgment determinations, to the ambiguous role of facts in relation to law, and to a set of critical tools for reading images, *Scott v. Harris* also allows my students to see the violence of the law. They read about and see the violent encounter between the Georgia police and Victor Harris. The exercise, however, makes them aware of the normative violence of the Supreme Court's reading and resolution of that encounter in a way that would be less accessible to them without it.[20]

19. Mezey, *supra* note 13, at 27.

20. Robert M. Cover, *Violence and the Word,* 95 Yale L.J. 1601 (1986).