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

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

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It is now evident that Orwell's vision was wrong. Modern technology has turned out to be the totalitarian state's worst enemy . . . . [I]t is the people who are watching the government, not the other way around.[1]

I. INTRODUCTION

Ric Simmons is half right on this point. "Video cameras are indeed everywhere, but they are embedded into cell phones and wielded by millions of individual citizens."[2] New portable technology—digital cameras, camera-ready cell phones, MP3 recorders, and other technology—enables people to produce their own personal records of their lives and environment, including their confrontations with police and encounters between government officials and other members of the public.[3] And an ever-expanding bevy of internet sites—particularly YouTube, blogs, video blog ("vlogs"), and social-networking sites—enable them to disseminate those recordings directly to the world and to see and respond to what others have recorded.[4]

Law enforcement has responded by equipping itself with recording technology. Agencies use video to provide a record of encounters between officers and members of the public—interrogations and con-

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1. Ric Simmons, *Why 2007 Is Not Like* 1984*: A Broader Perspective on Technology's Effect on Privacy and Fourth Amendment Jurisprudence*, 97 J. CRIM. L. & CRIMINOLOGY 531, 532 (2007).

2. *Id.*

3. DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR AND PRIVACY ON THE INTERNET 164 (2007); TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 294 (2009); Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 638–39 (2004); Jessica M. Silbey, *Cross-Examining Film*, 8 U. MD. L.J. RACE, REL., GENDER & CLASS 17, 22 (2008) [hereinafter Silbey, *Cross-Examining*]; Simmons, *supra* note 1, at 532–33. R

4. SOLOVE, *supra* note 3, at 164; ZICK, *supra* note 3, at 257; Simmons, *supra* note 1, at 532–33 & n.5. R

fessions,[5] traffic stops,[6] and high-speed chases[7]—with the multiple goals of deterring police misconduct and creating an objective evidentiary record of real-world events to establish whether a violation occurred.[8] Police also use their own hand-held surveillance cameras to observe and preserve an evidentiary record of public activities, including political protests.[9]

The result is a balance of power in which all sides can record most police-public encounters occurring on the street and in the stationhouse. Big Brother is watching the people, but the people are watching him. The effect of this balanced proliferation of technology is to place video recording[10] at the heart of modern civil rights litigation and the enforcement of constitutional liberties in controversies arising from police-public encounters. There is a self-reinforcing expansion in the amount of recording by all sides, the amount of public dissemination of those recordings, the amount of constitutional litiga-

5. Drizin & Reich, *supra* note 3, at 641; Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 494 & n.542 (1998); Jessica M. Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 COLUM. J.L. & ARTS 107, 116 & app. (2005) [hereinafter Silbey, *Filmmaking*]; Simmons, *supra* note 1, at 566–67; The Justice Project, Electronic Recording of Custodial Interrogations: A Policy Review 2 [hereinafter Justice Project], *available at* http://www.thejusticeproject.org/wp-content/uploads/polpack_recording-fin2.pdf (last visited Mar. 30, 2009). R R

6. Simmons, *supra* note 1, at 566 ("In fact, as video technology gets cheaper and smaller, it will soon become feasible to record everything a police officer driving a squad car sees and hears—as well as everything that police officer does during the traffic stop."); *see also* MATTHEW J. HICKMAN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2003, at 28 (2006) [hereinafter BUREAU OF JUSTICE STATISTICS], *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/lpd03.pdf; TARA ROSE & GARY CORDNER, JUSTICE & SAFETY CTR., SMART BRIEFS, SURVEY NO. 6—IN-CAR CAMERAS 1 (2006), http://www.justnet.org/Lists/JUSTNET%20Resources/Attachments/594/SMART_Brief_6.pdf [hereinafter SMART BRIEFS]. R

7. Scott v. Harris, 127 S. Ct. 1769, 1775–76 (2007); 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, 845–47 (2009); Silbey, *Cross-Examining*, *supra* note 3, at 17. R

8. Leo & Ofshe, *supra* note 5, at 494–95; Silbey, *Filmmaking*, *supra* note 5, at 116, 123–24; Simmons, *supra* note 1, at 566–67; Drizin & Reich, *supra* note 3, at 624. R R

9. ZICK, *supra* note 3, at 318; *see* Handschu v. Special Servs. Div., No. 71 Civ. 2203(CSH), 2007 WL 1711775, at *4 (S.D.N.Y. June 13, 2007) (describing police video recording of protest rally by homeless advocacy group outside mayoral residence). R

10. Video recording is complemented by the similarly widespread availability of audio recording devices. Both enable real-time recording of public events that can be used as evidence in litigation. Everything that can be said, good and bad, about video recording of public events and about video evidence is largely true of audio-recording evidence as well. *But see* Stewart v. City of New York, No. 06 Civ. 15490(RMB)(FM), 2008 WL 1699797, at *8 (S.D.N.Y. April 9, 2008) ("[T]he issue is not what Stewart said, but what he intended. Unlike the speed of a car, the meaning behind Stewart's statements is not capable of being captured on a videotape or audiotape.").

tion that centers on video and audio recording evidence, and the degree to which enforcement of civil rights centers on video and audio recording.

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

Consider a number of examples of video's back-end role in which individual encounters between police and members of the public have been captured on video and the video has been used in subsequent constitutional claims to determine what happened in the real-world events that occurred and the legality of the recorded conduct:

- In March 2001, Victor Harris led Georgia County sheriffs on a six-minute, ten-mile nighttime chase at speeds up to eighty-five miles per hour, proceeding largely along two-lane county roads and in and around a mall parking lot. At times the cars crossed the center line and wove around other cars. The chase ended when the pursuing officer, Deputy Timothy Scott, bumped the rear of Harris's car, causing the car to leave the roadway and crash down an embankment; the crash left Harris a quadriplegic. The entire chase was captured by a dash-mounted video camera in Deputy Scott's pursuing vehicle that began recording when Scott switched on his siren.[11]
- In December 2005, Erik Crespo, a New York teen, allegedly shot a man in the face. Prior to charges being filed, a New York City detective interrogated Crespo at the police station about the shooting (which Crespo insisted had been in self-defense) and about the whereabouts of the gun used. The detective tried to get Crespo to provide a written statement so the detective would not be accused of lying at trial. Crespo did not give a written statement. Testifying at trial, the detective denied this interrogation had taken place. Unbeknownst to the detective, however, Crespo had recorded the hour-and-

11. *Scott*, 127 S. Ct. at 1772–73, 1775. The *Scott* Court decided to "allow the videotape to speak for itself," posting it on the Court's website and including the link in the opinion. *See id.* at 1775 n.5; *see also* Beshers v. Harrison, 495 F.3d 1260, 1262–63 (11th Cir. 2007) (describing video recording of similar high-speed car chase incident which resulted in the fleeing suspect's death).

fifteen minute interrogation on an MP3 recorder in his pocket. The recording was turned over to prosecutors and used as the basis for twelve counts of perjury against the detective.[12]

- In September 2007, an officer from the St. George, Missouri, Police Department confronted Brett Darrow while he sat in his car in a deserted commuter parking lot around 2 a.m. Darrow had a video camera mounted in the back of his car (installed, he claimed, following prior traffic confrontations with area police) that captured a profane tirade by the officer. The officer repeatedly threatened to arrest Darrow on any number of charges the officer could make up and to "ruin [his] fucking night." Darrow posted the video on the internet and the encounter quickly became a local and national story. The officer was fired shortly after the incident, a decision made on the strength of the video. In March 2008, Darrow filed a Section 1983 action against St. George and several officers.[13]
- In November 2007, squad car video of a traffic stop in Utah showed a state patrolman tasering an unarmed driver and shouting at the driver's pregnant wife when she attempted to intervene. Numerous copies of the video were uploaded to YouTube and viewed more than two million times. Review of the video convinced prosecutors that the driver had done nothing to warrant an arrest and the state settled the driver's action for $40,000. But officials also concluded that the video did not show any misconduct by the officer warranting departmental punishment.[14]

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12. Jim Dwyer, *A Switch Is Flipped, and Justice Listens In*, N.Y. TIMES, Dec. 8, 2007, at B1; Sean Gardiner, *Transcripts: Bronx Teen Catches NYPD Lies on MP3-Player*, THE VILLAGE VOICE, Dec. 11, 2007, *available at* http://blogs.villagevoice.com/runninscared/archives/2007/12/transcripts_bro.php.

13. Teresa Woodard, *St. George Police Officer Fired*, KTVI-myFOXstl.com, Sept. 21, 2007, http://www.myfoxstl.com/myfox/pages/News/Detail?contentId=4425068&version=1&locale=EN-US&layoutCode=TSTY&pageId=3.2.1. The video is available at http://www.livevideo.com/video/PoliceBrutality/E50F08E74AD54B53AAF5C05137DF22E4/missouri-police-threaten-det.aspx (last visited Mar. 30, 2009). Darrow's stunt apparently angered local law enforcement officers; he reported them staking out his house days later. *See* Posting to Government Dirt, *Cops Gone Wild – St. George County Missouri Cop – Caught on Video*, http://governmentdirt.com/cops_gone_wild_st_george_county_missouri_cop_caught_von_video (last visited Mar. 30, 2009). Darrow's § 1983 complaint can be found at http://www.acluem.org/downloads/ComplaintFileStamped.pdf (last visited Mar. 30, 2009).

14. Mike Nizza, *$40,000 for Man Tasered on YouTube*, N.Y. TIMES: THE LEDE, Mar. 11, 2008, *available at* http://thelede.blogs.nytimes.com/2008/03/11/40000-for-man-tasered-on-youtube/index.html?hp. The video viewed over two million times on YouTube is availa-

- In May 2008, more than twelve Philadelphia police officers were caught on video pulling three men from a car during a traffic stop and beating and kicking them. The actions were filmed by an overhead news helicopter and the encounter immediately became a national news story. Police officials used the videotape to identify the officers and most were removed from street duty almost immediately. The Philadelphia Police Commissioner stated that, based on a surface view of the video, it looked like the amount of force used was excessive, but that it was important not to rush to judgment.[15] Four officers were fired and four others disciplined less than one month after the incident.[16]

The influence of video evidence extends beyond cases of individual police-citizen encounters to large-scale encounters—usually public parades, protests, rallies, and other expressive public gatherings—that have devolved into confrontation, chaos, and often violence between police and protesters.[17] Again, consider several illustrative examples:

- *"Battle in Seattle": The 1999 World Trade Organization ("WTO") conference in Seattle.* Tens of thousands of protesters descended upon Seattle in the days leading up to the WTO meeting, engaging in parades, marches, and protest rallies, both permitted and within designated areas, as well as in violation of permissible regulations. While much protest activity was peaceful, a number of people engaged in violence against property in the downtown area and against police officers present to help keep the peace. Police responded not with expected "passive resistance" or large-scale arrests, but instead with non-lethal weapons (tear gas, pepper spray, and rubber bullets) to disperse even peaceful crowds. The mayor then declared a civil emergency and imposed a general curfew and a limited curfew in the core area downtown where the convention was taking place and convention delegates were stay-

ble at http://www.youtube.com/watch?v=IMaMYL_shxc&eurl=http://www.volokh.com/posts/chain_1197068663.shtml (last visited Mar. 13, 2009). For a discussion of the ambiguity of the video, see Posting of Orin Kerr to The Volokh Conspiracy, http://volokh.com/archives/archive_2007_12_09-2007_12_15.shtml#1197327587 (Dec. 10, 2007, 21:40 EST).

15. Jon Hurdle, *Police Beating of Suspects Is Taped by TV Station in Philadelphia*, N.Y. TIMES, May 8, 2008, at A29; Patrick Walters, *Philly Police Beating Caught on TV Video*, ABCNEWS, May 7, 2008, *available at* http://abcnews.go.com/TheLaw/wireStory?id=4801701. This video is available at http://www.youtube.com/watch?v=OzFEY8u1rRw (last visited Mar. 13, 2009).

16. Jon Hurdle, *Four Philadelphia Police Fired Over Filmed Beating*, REUTERS, May 19, 2008, http://www.reuters.com/article/domesticNews/idUSN1956317820080519.

17. *See* ZICK, *supra* note 3, at 221–26. R

ing. Police enforced the last element by prohibiting "any demonstrations within that core area" for the rest of the conference,[18] which one commentator described as "effectively making it illegal for a time to express 'anti-WTO' opinions in a large section of downtown Seattle."[19] There were more than 300 arrests of people who gathered in the restricted zone in violation of the limited curfew. Many encounters between protesters and police were captured on video and video played a significant evidentiary role in subsequent litigation. The city prevailed on many (but not all) claims on summary judgment and eventually settled a number of lawsuits by peaceful protesters for $1 million.[20]

- *Free Trade Area of the Americas ("FTAA") 2003 meeting in Miami.* Other cities learned the lessons of Seattle, resulting in a siege mentality of sorts at public political events.[21] One example of this lesson in action took place in Miami in 2003. The city anticipated the FTAA meeting by enacting a series of measures restricting protest and public expression in downtown Miami, all sunsetting at the end of the meeting. Police rolled out a massive presence—more than 2,500 officers patrolling the streets of downtown, decked out in riot gear—that generally attempted to push protesters out of the downtown area, using both non-lethal weapons to disperse crowds and executing approximately 230 arrests, almost all on charges that were dropped. Twenty-one protesters settled with the City of Miami, Miami-Dade County, and several other jurisdictions that provided police services, for more than $560,000.[22]
- *May Day Immigration Rally in Los Angeles's MacArthur Park.* In May 2007, a series of marches and rallies were planned in support of changing immigration policies, all to culminate in a final rally in MacArthur Park. A crowd of 6,000 to 7,000 people gathered at the entrance to the park in late afternoon.

18. Menotti v. City of Seattle, 409 F.3d 1113, 1120–25 (9th Cir. 2005).

19. ZICK, *supra* note 3, at 223. R

20. *Menotti*, 409 F.3d at 1126–27; ZICK, *supra* note 3, at 223. R

21. *See* ZICK, *supra* note 3, at 226, 249 (arguing that the militarization of public places at critical democratic moments has a chilling effect on public dissent). R

22. Michael Vasquez, *Miami OK's Payout to FTAA Protesters*, CommonDreams.org, Oct. 12, 2007, http://www.commondreams.org/archive/2007/10/12/4508/; *see* Tamara Lush, *FTAA Settlement Reached*, MIAMI NEW TIMES, Oct. 4, 2007, *available at* http://www.miaminewtimes.com/2007-10-04/news/ftaa-settlement-reached. This video is available at http://www.youtube.com/watch?v=e9g7FNcJ39U (last visited Mar. 13, 2009), and http://www.youtube.com/watch?v=6qTJwEz7U3A&feature=related (last visited Mar. 13, 2009).

Police began pushing and compressing the crowd to keep it together and move it into the park, causing tensions to rise and the situation to devolve into confrontations between police and a small handful of protesters. Ultimately, in an effort captured on a number of videos, police on the scene, dressed in riot gear, decided to disperse the crowd and clear the park using batons and non-lethal munitions against protesters—peaceful and otherwise—and members of the media. In the end, officers drove thousands of people from the park, deployed more than 140 less-lethal munitions and more than 100 uses of batons, and caused injuries to 246 people. A departmental report on the incident relied heavily on multiple videos of the events, created by both the news media and rally participants.[23]

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

23. LOS ANGELES POLICE DEPARTMENT, REPORT TO THE BOARD OF POLICE COMMISSIONERS: "AN EXAMINATION OF MAY DAY 2007," at 7–9, 69 (2007) (on file with author) [hereinafter LAPD REPORT]. This video is available at http://www.youtube.com/watch?v=gJvIqnw5_1s (last visited Mar. 13, 2009), http://www.youtube.com/watch?v=QYVWAqSRBUU&feature=related (last visited Mar. 13, 2009), and http://www.youtube.com/watch?v=ivn8PrZlAXo&feature=related (last visited Mar. 13, 2009).

modified assignment, pending investigation.[24] He ultimately was fired.[25]

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

Such was the case in *Scott v. Harris*,[31] where the Supreme Court held that the video of a high-speed chase justified summary judgment in favor of the defendant police officer on an excessive-force claim

24. Sewell Chan, *Police Investigate Officer in Critical Mass Video*, N.Y. TIMES: CITY ROOM, July 28, 2008, http://cityroom.blogs.nytimes.com/2008/07/28/police-investigate-officer-in-critical-mass-video/index.html?hp; Affidavit of Police Officer Patrick Pogan, New York v. Long [hereinafter Pogan Affidavit], *available at* http://www.thesmokinggun.com/archive/years/2008/0729081bike1.html (last visited Mar. 13, 2009); Posting of Frank Pasquale to Concurring Opinions, http://www.concurringopinions.com/archives/2008/07/saved_by_pervas.html#more (July 28, 2008, 20:00 EST). This video is available at http://www.youtube.com/watch?v=oUkiyBVytRQ (last visited Mar. 13, 2009). The video was posted July 27, 2008, and as of July 31, 2008, 1.2 million people had viewed it.

25. Trymaine Lee, *Police Officer Who Shoved a Bicyclist Is Off the Job*, N.Y. TIMES, Feb. 20, 2009, at A24.

26. The federal equivalent of the § 1983 cause of action was established by *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971).

27. Silbey, *Cross-Examining*, *supra* note 3, at 17; Jessica M. Silbey, *Judges As Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493, 508–09 (2004) [hereinafter Silbey, *Critics*]. R

28. Silbey, *Critics*, *supra* note 27, at 550. R

29. *Id.* at 508–09; Silbey, *Cross-Examining*, *supra* note 3, at 18; Silbey, *Filmmaking*, *supra* note 5, at 111. R R

30. *See infra* Part III.

31. 127 S. Ct. 1769 (2007).

because all non-video evidence and all competing interpretations of the video were "blatantly contradicted" by what the Court understood as the video's singular message.[32] Several lower courts have wielded this new power to decide summary judgment on "brute sense impressions"[33] of video, with varying results.[34] The open question, post-*Scott*, is how far courts will take this power and in what direction.[35]

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

But assumptions about the conclusiveness of video may be more myth than reality.[40] Jessica Silbey applies ideas of film and literary theory to argue that film, "like any representational form, must be interpreted, and its specific language and its way of constructing meaning must be accounted for."[41] What a piece of video evidence means or signifies depends on who is watching, perceiving, and interpreting.[42] Supplementing that insight, Dan Kahan, David Hoffman, and Donald Braman demonstrate that video evidence is uniquely ripe for highly contextualized and individualized interpretations, likely affected by a viewer's identity-defining cultural characteristics of race,

32. *Id.* at 1775–76, 1779; Kahan et al., *supra* note 7, at 840. R

33. Kahan et al., *supra* note 7, at 903. R

34. *See, e.g.*, Marvin v. City of Taylor, 509 F.3d 234, 236, 239 (6th Cir. 2007) (relying on video to reverse lower court's denial of summary judgment); Beshers v. Harrison, 495 F.3d 1260, 1262 (11th Cir. 2007) (relying on video evidence to affirm the grant of summary judgment); Marion v. City of Corydon, No. 4:07-cv-0003-DFH-WGH, 2008 WL 763211, at *1 & n.1 (S.D. Ind. March 20, 2008) (same). *But see* Green v. N.J. State Police, 246 F. App'x 158, 159 & n.1 (3d Cir. 2007) (explaining that the video evidence is "inconclusive on several of the key disputed facts," precluding summary judgment).

35. *See* Kahan et al., *supra* note 7, at 900 ("In the aftermath, too, of *Scott*, judges might well feel emboldened to give more decisive weight to the factual inferences they themselves are inclined to draw from videos or photographs."). R

36. ZICK, *supra* note 3, at 223; *see* Nizza, *supra* note 14 (discussing settlement in Utah taser case); Vasquez, *supra* note 22 (discussing settlement in FTAA case). R R

37. *See* LAPD REPORT, *supra* note 23, at 70. R

38. *See id.* at 70–77.

39. *See* ZICK, *supra* note 3, at 295. R

40. Silbey, *Cross-Examining*, *supra* note 3, at 18. R

41. Silbey, *Critics*, *supra* note 27, at 534. R

42. *See id.*

age, sex, socio-economic status, education, cultural orientation, ideology, and party affiliation.[43] These complementary insights suggest that video evidence should not blithely be accepted as an unambiguous, singular, and objective, and thus entirely truthful, reproduction of real-world events.

Armed with a clearer understanding of video and audio recording and its evidentiary function, judges, jurors, policymakers, and members of the public should better understand the appropriate role of video. A level of caution and a degree of humility are necessary with respect to viewers' beliefs about what they see, what they understand from the recording, and what steps to take in response.[44] As Silbey argues, filmic evidence is important and beneficial and it promotes justice, but it is not a cure-all, being merely "one version of . . . events," of which there are likely to be many.[45] A healthy respect for procedural details, for other actors in the process, and for diverse cultural characteristics within society further counsels judicial caution, a "mental double-check" before a court grants summary judgment in the face of culturally based interpretative differences.[46] It is a mistake to overemphasize video's evidentiary usefulness. And it is a mistake to depart from ordinary procedures, as by expanding the use of summary judgment, given the real, albeit not fully acknowledged, limits on video as a type of proof.[47]

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

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43. Kahan et al., *supra* note 7, at 903. R

44. *See infra* Part II.A.

45. Silbey, *Filmmaking*, *supra* note 5, at 114. R

46. Kahan et al., *supra* note 7, at 898, 901. R

47. *See infra* Part III.E.

48. SOLOVE, *supra* note 3, at 164. R

49. *Id.*

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

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

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

50. Simmons, *supra* note 1, at 532. R

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

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

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

II. CIVIL RIGHTS AND VIDEO

A. Civil Rights Litigation

The illustrative civil rights incidents described in the Introduction divide into three broad categories of claims in which video plays a real-world or evidentiary role.[53] Video and audio recording will be central to all three categories of cases—at the front end for its role in real-world events triggering police-public confrontation and at the back end for evidentiary use of recordings in remedying the purported constitutional violation captured on film.

The first category involves straightforward Fourth and Fifth Amendment claims based on primarily individual interactions be-

52. Robinson v. Fetterman, 378 F. Supp. 2d 534, 538–40 (E.D. Pa. 2005).

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

tween police and members of the public, particularly criminal suspects. We can subdivide this category further: interactions occurring indoors, namely custodial interrogations and confessions,[54] and interactions occurring in public, involving traffic stops, high-speed chases, *Terry* stops, and other personal on-the-street encounters.[55]

The second category includes claims arising from political parades, rallies, protests, and other expressive public gatherings that devolve into conflict, confrontation, and occasionally violence. This category typically involves hybrid claims: There is a Fourth Amendment component, with individuals claiming they were subject to wrongful arrest or excessive force, and a First Amendment component, with protesters claiming that officers acted in a way that abridged their liberty to speak.[56]

The hybrid nature, as well as the larger number of people involved in mass-protest claims, requires these cases to be grouped in a distinct category. The free-speech element places a different gloss on events because the propriety of the arrest or use of force under the Fourth Amendment takes into account whether the citizen was engaged in protected expressive activity and the details of police response to that activity. The First Amendment claim often is more difficult to prove, as courts require proof that the officer was motivated to chill or deter protected speech because of opposition to the speaker's message.[57] And the unique circumstances of a large, crowded public protest create both increased opportunities for unconstitutional interaction between police and the public, as well as increased opportunities for recording evidence by multiple sources.

This category is a product of the evolution of public space and the devaluation of public protest in those spaces. Timothy Zick argues

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54. *See* Drizin & Reich, *supra* note 3, at 641 (describing "growing movement among law enforcement agencies . . . to record interrogations"); Leo & Ofshe, *supra* note 5, at 494–95 (describing benefits of recording interrogations); Silbey, *Filmmaking*, *supra* note 5, at 116 & app. A (reviewing state policies on recording interrogations and discussing the benefits of recording interrogations); Simmons, *supra* note 1, at 566 (same); *see also* Justice Project, *supra* note 5, at 2 (same). R R R R

55. *See* Simmons, *supra* note 1, at 566 ("In fact, as video technology gets cheaper and smaller, it will soon become feasible to record everything a police officer driving a squad car sees and hears—as well as everything that police officer does during the traffic stop."); *see also* BUREAU OF JUSTICE STATISTICS, *supra* note 6, at 28 (providing statistics on uses of video cameras by local police departments); SMART BRIEFS, *supra* note 6, at 1 (providing statistics on the use of in-car cameras). R R R

56. *See, e.g.*, Menotti v. City of Seattle, 409 F.3d 1113, 1151 (9th Cir. 2005) (involving First and Fourth Amendment claims arising from the arrest of a protester at the WTO conference).

57. *Id.* at 1155.

that public expression and public contention have been "institutionalized," whereby most public protest has been managed into a routinized and neutered state.[58] Protests occur under a regime of "negotiated management" between protesters and government, where protester and protest target agree to minute details as to the timing, routes, locations, participation, and all aspects of large-scale expressive events.[59] As a result, public expression is less spontaneous, more organized, more professional, and more controlled in terms of how, when, and where protesters can go.[60] But the result is that protest speech carries less of a sting.[61]

Complementing this development is what Zick calls the "militarization" of public spaces,[62] which increases the likelihood of police-protester confrontations and clashes. Protest crowds likely will be larger because, given the requirement of permits and elaborately negotiated details,[63] there will be fewer rallies and marches, and the single professional, organized rally may constitute the lone opportunity for members of the public to speak and be heard on the streets. Recognizing the likelihood of larger crowds, police respond with a massive presence and a willingness (if not explicit policy) to use quickly escalating force to disperse crowds (even peaceful ones), and to effect large-scale mass arrests whenever protests move, in numbers or actions, beyond what had been negotiated or expected.[64] In Seattle, police were caught off-guard and were too willing to jump quickly to the use of force and crowd dispersal.[65] The lesson for other cities was to similarly move directly to the use of force, crowd dispersal, and mass arrests at the first sign of large crowds.[66] Under such conditions, confrontation between police and protesters becomes almost inevitable because, when officials "gird for battle" and commit to maintaining a

58. ZICK, *supra* note 3, at 196. R

59. *Id.* at 197, 198.

60. *Id.* at 198–99.

61. *See id.* at 197 ("The overarching aim of 'negotiated management' . . . is to achieve predictability and public order during public protests and other events."); *id.* at 198 (arguing that pre-event planning and advanced negotiation have routinized protest and removed much of its sting).

62. *Id.* at 223.

63. *See id.* at 198, 240 (arguing that the negotiated management of public protests, including permit schemes and time, place, and manner restrictions, have made public demonstrations largely "institutionalized" displays).

64. *See id.* at 222 (describing the use of escalated force and violence by police when Seattle protesters moved beyond designated protest zones).

65. *Id.*

66. LAPD REPORT, *supra* note 23, at 7–9. R

certain kind of public order, the incidence of force or violence may increase.[67]

The final category includes what I call secondary civil rights cases, in which the constitutional challenge is to front-end efforts to prevent members of the public from recording a law enforcement encounter, whether their own or one involving other members of the public.[68] The question here is to what extent government can prohibit surreptitious or unconsented-to recording of police officers performing their official functions in public.[69] Or, absent a direct prohibition, to what extent officers may halt or interfere with individuals' efforts to record officers performing public functions by ordering them to cease recording, confiscating the camera or recorder, and, perhaps, arresting them. The answers to these questions move us into an uncharted and under-theorized First Amendment realm.[70]

B. Finding Video

Video recordings for use as back-end evidence may come from any or all of three sources. The most common source, particularly in individual police-public encounters, is law enforcement itself. Several states require electronic recording (audio or video) of all interrogations and confessions and a number of other states have considered or are considering similar legislation.[71] In addition, many individual police departments and sheriff offices throughout the country have adopted individualized recording policies.[72] Commentators view recording as the way to protect against unfounded claims of false and coerced confessions, prevent and deter officer misconduct, and ensure department accountability for actual misconduct, all by providing

67. ZICK, *supra* note 3, at 255 (arguing that escalated force may "result in escalated disruption and public disorder as activists react to aggressive police tactics and militarization techniques"). R

68. *See* Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (arising from police efforts to prevent individual from recording street protest); Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (arising from individual recording Pennsylvania state trooper actions from private property).

69. *See* Commonwealth v. Hyde, 750 N.E.2d 963, 964–65 (Mass. 2001) (prosecution under state wiretap statute).

70. *See* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 254–56 & n.26 (2004); *see infra* Part V.

71. Five states and the District of Columbia presently require electronic recording of interrogation and/or confessions for all or certain crimes. *See* Silbey, *Filmmaking*, *supra* note 5, at 175; Justice Project, *supra* note 5, at 2; *cf. Hyde*, 750 N.E.2d at 969 n.9 (citing Commonwealth v. Diaz, 661 N.E.2d 1326, 1327–29 (Mass. 1996)) (recognizing police-controlled recording as "good practice"). R

72. Justice Project, *supra* note 5, at 2. R

objective proof of what happened in the interrogation room.[73] There has been a similar trend towards equipping police cars with video cameras, again with the goal of accurately capturing the encounter and deterring police violations. According to recent reports, sixty percent of local police departments and sixty-six percent of sheriffs' offices use video cameras in public, most commonly in patrol cars.[74] Cost often is cited as the reason that car-mounted cameras are not more widespread, suggesting a broader desire to make use of such video evidence.[75] We can expect the decision in *Scott*—where the officer's defense to the excessive force claim was dispositively established by the presence of video—to accelerate the use of car video. Law enforcement also has begun using video for broader public surveillance of political protests and rallies, relying on both mounted stationary cameras and hand-held equipment.[76]

The second source is the news media that cover public encounters. Media coverage of public expression and government response to public expression has a storied interaction with the enforcement of civil rights. Television coverage of peaceful protesters attacked by police dogs and fire hoses in the civil rights-era South is widely credited with rousing northern whites to support the cause of civil rights, leading ultimately to the Civil Rights Act of 1964.[77] Media footage also frequently provides police, prosecutors, and the court with important evidence.[78] News agencies typically are willing to

73. Drizin & Reich, *supra* note 3, at 622; Silbey, *Filmmaking*, *supra* note 5, at 121–24; Simmons, *supra* note 1, at 566; *see also* Justice Project, *supra* note 5, at 2 (arguing that creating an electronic recording of an interrogation provides an objective record akin to DNA evidence); SMART BRIEFS, *supra* note 6, at 2 ("In-car cameras provide an objective recording of interactions between law enforcement and citizens.").

74. BUREAU OF JUSTICE STATISTICS, *supra* note 6, at 28; SMART BRIEFS, *supra* note 6, at 2.

75. SMART BRIEFS, *supra* note 6, at 1.

76. ZICK, *supra* note 3, at 294; *see* Handschu v. Special Servs. Div., No. 71 Civ. 2203(CSH), 2007 WL 1711775, at *4 (S.D.N.Y. June 13, 2007) (describing police recording of protest rally outside mayoral residence by homeless advocacy group). *But see* ZICK, *supra* note 3, at 303 (arguing that government surveillance of peaceful expressive activities raises serious First Amendment concerns with respect to protest speech).

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

78. In *United States v. Guerrero*, 667 F.2d 862 (10th Cir. 1982), the defendant was charged with assaulting a member of Congress after throwing eggs at Congressman John Anderson, who at the time was a presidential candidate. *Id.* at 864. The prosecution presented media-shot video footage of eggs coming from the off-camera area in which Guerrero had been standing, although it did not show who had thrown them. *Id.* at 864–65. The jury convicted, in part on the strength of the video. *Id.* at 865. Silbey holds

share outtakes with law enforcement and, in any event, reporters' unused materials typically are subject to subpoena.[79]

The import of the media as a source of video evidence ties to the new institutionalization of public protest. Protests are fewer and larger, subject to greater restrictions, controls, and limitations in advance, and met with police seeking to maintain order, all of which increase the likelihood of confrontation between police and protesters.[80] The potential for conflict makes political rallies more attractive media events, resulting in more press coverage.[81]

The third, and increasingly common, source of video evidence is the public itself, the key to Simmons's counter-Orwellianism. Equipped with small recording devices—phones with picture-taking and video-recording capability, MP3 recorders, hand-held digital cameras, microscopic tape recorders—individuals are able to record the world around them.[82] That world includes individual encounters with police and political rallies in which the recorder is a participant. This is not necessarily a new phenomenon. In *Fordyce v. City of Seattle*,[83] the plaintiff, a member of the parading group, had volunteered to video a 1990 march for "local television production"—presumably public-access cable—when he scuffled with, and was arrested by, police attempting to dissuade and prevent him from recording the events.[84]

Recording technology now is smaller, cheaper, easier to operate, easier to hide, and more pervasive, expanding personal opportunities to record events.[85] That expansion combines with the development

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out *Guerrero* as an example of court and jury tendency to overweigh video evidence. Silbey, *Critics*, *supra* note 27, at 515–16. The video did not show who had thrown the eggs—only that they had come from a crowd of people in Guerrero's direction—and there was no strong witness testimony that it had been the defendant. *Id.* at 515. But, Silbey argues, the video made it easy for the court to decide the defendant's guilt by providing "the last and best word" as to what happened. *Id.* at 516. R

79. *See* Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978) (upholding issuance of warrant to search for evidence at premises of newspaper); *In re* Grand Jury Subpoena, 201 F. App'x 430, 431–32 (9th Cir. 2006) (affirming contempt citation against person who refused to appear before grand jury and provide copies of video footage of public protest). *But see* First Amendment Center, Ore. Videographer Vows to Defy Subpoena for Footage (July 13, 2008), http://www.firstamendmentcenter.org/news.aspx?id=20291 (discussing independent videographer's refusal to turn over footage of protest rally and stun-gun arrest to grand jury).

80. ZICK, *supra* note 3, at 255; *see supra* notes 58–67 and accompanying text. R

81. ZICK, *supra* note 3, at 257. R

82. SOLOVE, *supra* note 3, at 164; ZICK, *supra* note 3, at 294; Drizin & Reich, *supra* note 3, at 638–39; Silbey, *Cross-Examining*, *supra* note 3, at 22; Simmons, *supra* note 1, at 532–33. R R

83. 55 F.3d 436 (9th Cir. 1995).

84. *Id.* at 438.

85. ZICK, *supra* note 3, at 294; Silbey, *Cross-Examining*, *supra* note 3, at 22; Simmons, *supra* note 1, at 532. R R

of new means of disseminating audio and video recordings to a mass audience.[86] The most prominent of these is the website YouTube,[87] which draws more than 100 million viewers each day and which hosted an average of 65,000 new videos per day in 2006.[88] Additionally, a vast array of blogs, vlogs, social-networking sites (such as Facebook), and other internet sites have developed as information distribution sources.[89] Many are dedicated to posting photos and videos from ordinary people for wide public viewing and discussion, all with the goal of getting new information to the world, whether of broad public or narrow private interest.[90] The person recording a police-public encounter need no longer be even a purported freelance journalist seeking to capture and report events for mainstream news sources.[91] Every person is a potential reporter.

One might deride these developments as enabling everyone to become "amateur paparazzi."[92] Or one might welcome them as empowering the public as a whole to document how government treats its community and, where appropriate, to expose government misconduct to the nation and to call government officials to account.[93] It also shows how far society has come in the acquisition and dissemination of recorded evidence. The infamous case of Rodney King, in which a bystander happened upon LAPD officers using apparently excessive force in arresting a driver and videotaped the incident for public consumption,[94] arguably was an outlier in 1991, dependent on the then-rare fortuity of an individual having a video camera and on the mainstream media running with the video and the story. Technological improvement means that recorded evidence of police-public en-

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

87. YouTube Home Page, http://www.youtube.com (last visited Mar. 30, 2009).

88. SOLOVE, *supra* note 3, at 164. R

89. *Id.* at 21–30, 164; Simmons, *supra* note 1, at 532–33. R

90. SOLOVE, *supra* note 3, at 163–64. R

91. *See* Fordyce v. City of Seattle, 55 F.3d 436, 438 (9th Cir. 1995) (involving affiliated volunteer's efforts to record police activity for local cable cast); Connell v. Town of Hudson, 733 F. Supp. 465, 466 (D.N.H. 1990) (involving freelance photographer's efforts to record accident scene).

92. SOLOVE, *supra* note 3, at 164. R

93. *Id.*; Simmons, *supra* note 1, at 532–33. R

94. Simmons, *supra* note 1, at 532–33 n.5; *see also* Commonwealth v. Hyde, 750 N.E.2d 963, 971–72 & nn.1–2 (Mass. 2001) (Marshall, C.J., dissenting) (discussing benefit of bystander videotape of the Rodney King beating). R

counters, good and bad, will be the norm, more frequent and more widely disseminated, within and without the news media.[95] Many of the incidents discussed in the Introduction became national stories after video appeared on non-mainstream internet sites.[96]

Zick argues that new technologies for recording and disseminating expression enable groups to overcome the ever-increasing limits on public speech that trigger speech-based confrontations between police and protest groups. Expressive groups get their messages and images out immediately, reaching a wide audience with their own narrative about the encounter with police, unfiltered and unaltered by mainstream media or the police.[97] Videos purporting to show abridgments of a group's expression (especially violent abridgements) become part of the group's broader message:[98] This is what we wanted to say and this is how the police prevented us from expressing our ideas and making ourselves heard.

C. The Nature and Myth of Video Evidence

Video evidence is uniquely important in civil rights actions arising from police-public confrontations. Police-public confrontations often are he-said, she-said cases, turning on the competing testimony of the officer and the citizen, who are the only two witnesses to the contested events.[99] There is a notably strong tendency for courts and juries to view the police officer's testimony as more credible.[100] Similarly, protest cases involve rapidly developing events in a large crowd of people, making perception difficult and potentially less than fully accurate. Video might capture a broader picture of events at a public rally, providing more information than a few individual witnesses could convey.

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95. *See* Silbey, *Cross-Examining*, *supra* note 3, at 22. R

96. *See supra* notes 13–16, 22, 23–24 and accompanying text. R

97. ZICK, *supra* note 3, at 257; s*ee also* SOLOVE, *supra* note 3, at 164 (emphasizing the ease with which people can post pictures and videos). R

98. ZICK, *supra* note 3, at 255–57. R

99. *See* Drizin & Reich, *supra* note 3, at 624–25 (arguing that, absent police interrogations being monitored, courts must "rely heavily on swearing contests between the officers and suspects," with courts being forced to decide "whose version of what occurred in the interrogation room was more credible"); Simmons, *supra* note 1, at 565 (stating that most police conduct cases involve only two witnesses: the police officer and the suspect). R

100. David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 471–72 (1999); Leo & Ofshe, *supra* note 5, at 495; Simmons, *supra* note 1, at 565. *But see* Silbey, *Filmmaking*, *supra* note 5, at 123–24 (suggesting that legislative proposals requiring the recording of custodial interrogations reflect "a general distrust of police tactics and a fear of wrongly accused or convicted defendants"). R R

As with much civil litigation, there rarely is complete certainty with regard to what happened in these encounters;[101] speculation by the fact-finder is inevitable in determining which witnesses to believe and which evidence to credit. In such cases, Martin Redish argues, "[w]e refer to the jury's verdict as the 'accurate' result, but this is simply a convenient method by which we operationalize accuracy, because we simply have no choice."[102] But calling the result accurate does not change that some amount of speculation and guesswork underlie the decision.

We purportedly want certainty, however. Video evidence purports to offer greater certainty by replacing he-said, she-said proof with proof that at least seems to make the fact-finder an eyewitness with first-hand experience of the events as they occurred in the real world.[103] Because video images appear to provide a "direct, unmediated view of the reality they depict," viewers are more likely to accept them as "credible representations" of reality.[104] Video images, Richard Sherwin argues, "transform argument" and thus can "persuade all the more powerfully," generating less counterargument and retaining the viewers' belief.[105] Video purports to be an objective, unbiased, transparent observer of events that evenhandedly reproduces reality for the viewer; it purports to be raw, unambiguous, and unbiased evidence incontrovertibly showing what happened in the real world.[106] From an evidentiary standpoint, video evidence often will be overwhelming proof at trial and throughout litigation, as it is more likely to convince the jury and the court. It also may be more likely to convince the parties to make strategic choices, fearing the difficulty of countering the persuasive power of video evidence.

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101. *See* Simmons, *supra* note 1, at 565 ("A recurring problem in regulating the practice of law enforcement agents . . . is . . . simply determining exactly what happened."). R

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

103. *See* Richard K. Sherwin, *Introduction*, *in* POPULAR CULTURE AND LAW xiv (Richard K. Sherwin ed., 2006) (discussing the "peculiar efficacy of . . . visual persuasion" and viewers' "belief that they are perceiving reality"); Silbey, *Critics*, *supra* note 27, at 519 (arguing that courts treat surveillance tapes as if video was an "unimpeachable eyewitness" or "merely an extension of the jury's eye"); Silbey, *Filmmaking*, *supra* note 5, at 124 (arguing that viewers of custodial interrogation recordings "believe [that] they are witnessing the events"); Simmons, *supra* note 1, at 567 (arguing that video evidence provides judges with "a clear, neutral factual record"). R R R

104. Sherwin, *supra* note 103, at xiv. R

105. *Id.* Sherwin also argues that video evidence persuades more effectively because video tends to arouse cognitive and emotional responses, and persuasion works through reason and emotion. *Id.*

106. Silbey, *Critics*, *supra* note 27, at 508–09; Silbey, *Cross-Examining*, *supra* note 3, at 18; Silbey, *Filmmaking*, *supra* note 5, at 111, 127. R R

The certainty that video purports to provide, however, is more myth than reality. Silbey calls video proof "*evidence verité*, filmic evidence that purports to be unmediated and unselfconscious film footage of actual events."[107] Courts and advocates frequently assume that video is the event itself, when, in fact, it only is further evidence of the event.[108] Video may be more persuasive because of its cognitive power to "transform[ ] viewers into eyewitnesses," but it remains simply another form of evidence.[109] Video, "like any representational form, must be interpreted," accounting for "its specific language, [and] its ways of making meaning."[110] No video is unambiguous or singular in its meaning or significance; the viewer of a video must evaluate and interpret its message, as with any other form of evidence or testimony.[111] And interpretation must overcome the inherent limits of the video's frame; for example, the video's picture may not show what happened outside the camera's view or the causation for actions shown or what depended on "the camera's perspective (angles) and breadth of view (wide shots and focus)."[112]

This is not to reject all video evidence, inside or outside the courtroom. Within litigation, additional probative evidence is always desirable in the search for truth. Video constitutes an important complement to witness testimony and other evidence, providing additional supporting or competing evidence.[113] Many commentators thus support efforts to increase police-controlled recording of interrogations, confessions, and public encounters.[114] And legal rules should protect the public's ability to make recordings.[115]

This is to urge a degree of caution with respect to the use of video evidence, a degree of humility on the viewer's part, and a reluctance to treat video evidence as the final, unambiguous account of events.[116] Courts should not treat recording evidence as the "proverbial smok-

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107. Silbey, *Critics*, *supra* note 27, at 507. R

108. *Id.* at 519; Silbey, *Cross-Examining*, *supra* note 3, at 17–18, 20. R

109. Silbey, *Cross-Examining*, *supra* note 3, at 25. R

110. Silbey, *Filmmaking*, *supra* note 5, at 173. R

111. Silbey, *Critics*, *supra* note 27, at 519; Silbey, *Cross-Examining*, *supra* note 3, at 25–26, 45 ("[Video] is but a slice of that occurrence; it is necessarily partial and, therefore, no more immune to critical analysis regarding prejudice and probative value than any other documentary or testimonial proffer."). R

112. Silbey, *Cross-Examining*, *supra* note 3, at 29, 38. R

113. *See* Silbey, *Filmmaking*, *supra* note 5, at 114 (arguing that video is useful in that it provides another version of the events). R

114. *See supra* notes 5–9, 54–55 and accompanying text. R

115. *See infra* Part V.

116. *See* Kahan et al., *supra* note 7, at 897–99 (arguing that courts should exert "a form of judicial *humility*" in order to "compensate for the partiality" and to "avoid cultural partisanship"); Silbey, *Cross-Examining*, *supra* note 3, at 26 (arguing that courts should treat R

ing gun," as an unimpeachable witness "testifying to the only version of what happened."[117] Nor should the jury or the court use video as an excuse to respond to, and decide cases on, "brute sense impressions" of the video.[118] We cannot disregard the ordinary rules of evidence and procedure when dealing with video evidence. Instead, the judiciary, litigants, and policymakers must strike a careful balance between using video as an important evidentiary and expressive tool, while recognizing video's limitations, and potentially overweening power, as evidence.[119]

III. VIDEO EVIDENCE AND SUMMARY JUDGMENT: *SCOTT V. HARRIS* AND ITS DISCONTENTS

Modern technology enables the people to watch the government and the government to watch the people, providing useful evidence when events being watched form the basis of constitutional litigation. But limits on the evidentiary usefulness of such video cannot be ignored and must be incorporated into our basic understanding of the litigation process. The increasing prevalence of recordings of police-public encounters from various sources heightens the back-end importance of video proof in Section 1983 litigation arising from such encounters. The tension between the persuasive power and the myths regarding video evidence affects civil rights litigation in several respects.

The goal in civil rights and constitutional litigation must be to harness the evidentiary power of video without falling prey to its weaknesses. We can adopt an extension of an argument made by Silbey: Although recording all types of police-public interactions promotes justice and should be encouraged, the recording of a police-public encounter is merely "one version of the events . . . of which there are likely many."[120]

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video evidence as presenting "the same types of testimonial risks that traditional hearsay restrictions attempt to minimize").

117. Silbey, *Critics*, *supra* note 27, at 519, 550; *see also* Silbey, *Cross-Examining*, *supra* note 3, at 19 (contending that, due to the assertive nature of video evidence, an advocate should cross-examine film just as an advocate would cross-examine a witness). R R

118. Kahan et al., *supra* note 7, at 903. R

119. *See* Silbey, *Cross-Examining*, *supra* note 3, at 26 (arguing that video "requires the same cross-examination as a percipient witness to test its truth and accuracy"); Silbey, *Filmmaking*, *supra* note 5, at 114 (arguing that recorded interrogatories are best seen as a limited, "state-sponsored documentary"). R R

120. Silbey, *Filmmaking*, *supra* note 5, at 114; *see also* Silbey, *Cross-Examining*, *supra* note 3, at 25–26 (arguing that film is only one version of the events). R

Silbey has argued at length that courts and juries over-emphasize video proof at trial, giving it great, arguably undue, weight in finding facts and reaching decisions.[121] To analyze the impact in constitutional cases, it is necessary to examine how courts handle video evidence in pre-trial processes such as summary judgment, where the goal is not to weigh evidence or to find facts, but to preview evidence to determine if there are any genuine factual disputes worthy of trial.[122] Indeed, summary judgment activity has become increasingly common in civil rights cases. A recent Federal Judicial Center study reported summary judgment activity in twenty-eight of every one hundred civil rights cases, with seventy percent of summary judgment motions being granted in whole or in part in these cases.[123] The potential misuse and abuse of video threatens to further expand summary judgment in civil rights cases.

A. Scott v. Harris *and Summary Judgment*

Scott was a Fourth Amendment excessive force claim arising from a ten-mile, six-minute, high-speed police chase that ended when the pursuing officer rammed the suspect's car from behind, causing the suspect to lose control of the car, which then left the roadway, went down an embankment, and overturned, rendering the driver a quadriplegic.[124] The defendant officer moved for summary judgment based on qualified immunity.[125]

The driver, Harris, and the officer, Deputy Scott, presented sharply divergent versions of the chase.[126] Conflicting witness accounts ordinarily preclude summary judgment, as the fact-finder should choose between competing testimony.[127] Indeed, on a motion

121. *Silbey*, *Cross-Examining*, *supra* note 3, at 24 (arguing that too many courts grant video evidence conclusive weight, viewing video evidence as "perfectly clear" and unbiased); *see, e.g.*, United States v. Guerrero, 667 F.2d 862, 867 (10th Cir. 1981) (finding no error in the trial court's admittance of the videotape). R

122. *See* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 653–54 (2005) (tracing steps in pre-trial previews of the merits of civil claims).

123. Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to the Honorable Michael Baylson, at 6 tbl.3 (June 15, 2007), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf. Section 1983 cases involving police apparently fall in the category of "other civil rights." According to this Federal Judicial Center study, in Fiscal Year 2006, there were more than 14,000 "other civil rights" cases, and more than 3,900 summary judgment motions filed in these cases. *Id.*; *see also* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 529 & n.38, 537 (2007) (discussing the frequency of summary judgment motions).

124. Scott v. Harris, 127 S. Ct. 1769, 1773 (2007).

125. *Id.* at 1773.

126. *Id.* at 1774.

127. *Id.*

for summary judgment, the court must view all facts and draw reasonable inferences in the light most favorable to the non-movant.[128] In qualified immunity cases, this means that the court adopts the plaintiff's version of the facts.[129] When evaluating a motion for summary judgment, a court should not weigh evidence or make credibility determinations.[130] Instead, the court should assume that the jury "would not believe any of the moving party's witnesses" and would believe the non-movant's witnesses, and evaluate whether a reasonable jury could resolve the case in the non-movant's favor based on the evidence viewed accordingly.[131]

But the *Scott* Court granted summary judgment because of the case's "added wrinkle"—a video of the chase, taken from the pursuing squad car.[132] The Court insisted, without citation, that when opposing parties tell divergent stories but one of those stories is "blatantly contradicted by the record," a court should not rely on a "visible fiction," a version of events "so utterly discredited by the record," when ruling on a motion for summary judgment.[133] The video told the Court a story that "quite clearly contradict[ed] [Harris's] . . . version."[134] Based on that view of the video, the Court disregarded the ordinary requirement that the court view facts and evidence in favor of the non-movant, holding instead that the court view the facts "in the light depicted by the videotape."[135] Writing for the majority, Justice Scalia saw in the video "a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury."[136] The video-driven conclusion was that no Fourth Amendment violation had occurred.[137]

In relying on the chase video to grant the defendant summary judgment, the majority departed from typical, and arguably appropri-

128. *Id.* at 1774–75; Adickes v. S.H. Kress & Co., 398 U.S. 144, 158–59 (1970).

129. *Scott*, 127 S. Ct. at 1775.

130. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 255 (1986).

131. Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 781–82 (1988).

132. *Scott*, 127 S. Ct. at 1775–76.

133. *Id.* at 1776.

134. *Id.* at 1775.

135. *See id.* at 1776.

136. *Id.* at 1775–76.

137. *Id.* at 1776. The precise issue in *Scott* was whether the court should have found that the officer was entitled to qualified immunity, which involved a two-part analysis: (1) whether the presented facts demonstrated that the officer's conduct violated a constitutional right; and (2) if so, whether that right "'was clearly established [at the time] . . . in light of the specific factual context of the case.'" *Id.* at 1774 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)). *But cf.* Pearson v. Callahan, 129 S. Ct. 808, 818 (2009) (holding that a merits-first approach to qualified immunity no longer is mandatory).

ate, summary judgment analysis in two respects. First, the Court ignored the plaintiff's testimony in favor of the video; testimonial evidence simply was inaccurate and wrong and could be disregarded because it conflicted with what the Court itself saw in the video.[138] The video told the majority a single incontrovertible story that could not be disputed or questioned by the plaintiff's mere testimony. The video constituted such strong, singular, objective, and conclusive proof that it eliminated all factual disputes created. The video was true, complete, fully contextual, and accurate, and depicted one clear and obvious set of facts that told one story. Other evidence and interpretations of the video were necessarily inaccurate. No reasonable jury could believe the plaintiff's version of events, if told on the witness stand, in the face of the contrary story affirmed by watching the recording. All evidence other than the video was procedurally irrelevant and none could make the case worthy of trial.

Second, the Court decided what the video evidence demonstrated and meant, and disregarded any alternate interpretations or understandings of the video.[139] This is inconsistent with the summary judgment requirement that individual pieces of evidence be construed in the light most favorable to the non-movant. If the video reasonably could have been interpreted in a way that would tell a story favorable to the plaintiff's claim, the Court was obligated to adopt that understanding for summary judgment purposes. Stated differently, the majority's view of the video was the only reasonable one; any other understanding of the video and its story was unreasonable, as was any juror who could hold such an understanding.[140]

Both departures reflect a procedural faith in video evidence, standing alone, as an unassailable source of proof, enabling the Court to conclude that video obviated a fact-finder. In other words, Justice Scalia bought into the myths of video evidence. As Silbey argues, there is no singular and complete set of facts depicted in any photo, video, or audio recording.[141] Video cannot "speak for itself," as Justice Scalia suggested it should.[142] It requires interpretation, inference, and exegesis by the viewer to understand what the video is saying.[143] Nor is the story the video told necessarily complete or fully

138. *Scott*, 127 S. Ct. at 1776.

139. *Id.* at 1774–76.

140. *See* Kahan et al., *supra* note 7, at 897–98. R

141. *See* Silbey, *Cross-Examining*, *supra* note 3, at 25 (arguing that "[f]ilmic evidence is not an unambiguous representation of events"). R

142. *Scott*, 127 S. Ct. at 1775 n.5; Silbey, *Cross-Examining*, *supra* note 3, at 25. R

143. *See* Silbey, *Cross-Examining*, *supra* note 3, at 26 (explaining that film images must be evaluated and tested); *supra* notes 100–119 and accompanying text. R R

contextual—it did not show what was happening off-camera, what happened before the camera began running, or the cause of the actions we see and hear on the video.[144]

This was the larger point in Justice Stevens's sharp dissent. He watched the same video, but saw a different event—not only did he doubt the presence of danger to pedestrians, drivers, parked cars, or property from the chase, he did not see any "close calls."[145] The differences between what the video said to the majority and what it said to Justice Stevens go to the singularity and completeness of the video's story.[146] Consider several examples. The majority insisted that the suspect ran several red lights, while Justice Stevens concluded that the video merely showed that the lights were red when the pursuing police car went through them, but did not show the lights when the lead car went through some distance ahead.[147] The majority saw the chase threatening other cars and drivers, who had to quickly pull to the side to get out of the way of the speeding suspect, while Justice Stevens viewed most of the cars as already having pulled over, possibly in response to the police siren.[148] The majority saw Harris swerving into oncoming traffic, while Justice Stevens saw him signaling and making a routine passing maneuver on a two-lane road, albeit at a high rate of speed.[149]

One video told the majority and the dissent two stories. The majority's insistence that courts view facts and evidence "in the light depicted by the videotape" is incoherent because there is no single, unambiguous, and complete set of facts depicted in the videotape. The video's meaning, and its consistency with testimony, depended on interpretation; different interpretations of the video, and thus of its consistency with Harris' testimony, were possible by reasonable viewers. The Court therefore was procedurally obligated to recognize

144. *See* Silbey, *Cross-Examining*, *supra* note 3, at 28–29, 38–39. R

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

146. Silbey, *Cross-Examining*, *supra* note 3, at 19 ("Justice Stevens recognized that a filmic representation of events is monocular, but the chase itself—and the reality of the event that is at the heart of the adjudicatory proceeding—is, by its nature, multi-ocular."). R

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

148. *Compare id.* at 1775 (majority opinion), *with id.* at 1782 & n.1 (Stevens, J., dissenting) ("I can only conclude that my colleagues were unduly frightened by two or three images on the tape that looked like bursts of lightning or explosions, but were in fact merely the headlights of vehicles zooming by in the opposite lane. Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slow-poke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately.").

149. *Compare id.* at 1775 (majority opinion), *with id.* at 1783 (Stevens, J., dissenting).

the possibility of some interpretation of the video favorable to the plaintiff and consistent with his testimony. Such an interpretation leaves a genuine issue of material fact as to whether Harris posed an immediate threat to persons and property and, therefore, whether Deputy Scott acted in accordance with the Fourth Amendment when he rammed Harris's car, all rendering summary judgment inappropriate.[150]

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

If Silbey's insight is that *Scott* is problematic because video evidence is typically ambiguous and has meaning only through viewer interpretation and construction,[151] then the substantial insight from the study conducted by Dan Kahan, Dave Hoffman, and Dan Braman is that *Scott* is problematic because this interpretation and construction will be highly contextualized and individualized, affected by viewers' identity-defining characteristics, such as race, age, sex, socioeconomic status, education, cultural orientation, ideology, and political party affiliation.[152]

Kahan, Hoffman, and Braman showed the video to a diverse, nationally representative sample of individuals (i.e., potential jurors, had such a case gotten past summary judgment and proceeded to trial), and then asked a series of questions about the video that roughly tracked the basic factual issues underlying the material fact of whether Harris, by leading police on this chase, endangered the public, thereby making Deputy Scott's use of force reasonable for Fourth Amendment and qualified immunity purposes.[153] They then used innovative statistical applications to generate four model jurors, possessing different combinations of cultural and demographic characteristics, and showed how these four jurors viewed the video.[154]

The study found what the authors called "constrained dissensus."[155] A "very sizable majority" agreed with the *Scott* majority as to

150. Summary judgment was inappropriate at least as to whether a violation had occurred. Had the Court recognized the reasonableness of a more plaintiff-favorable interpretation of the video, it still could have granted summary judgment on a finding that the right to be free of the use of deadly force in the context of a high-speed chase in which the officer perceived the fleeing driver to pose a threat to persons and property in the vicinity was not clearly established.

151. *See* Silbey, *Critics*, *supra* note 27, at 508; Silbey, *Cross-Examining*, *supra* note 3, at 18, 25. R

152. Kahan et al., *supra* note 7, at 879. R

153. *Id.* at 854–56.

154. *Id.* at 870–79.

155. *Id.* at 879.

most of the underlying questions about the threat Harris posed to the public and as to the ultimate conclusion that the officer's use of deadly force was reasonable.[156] However, the extremes of the spectrum—the small minority who disagreed about the appropriateness of deadly force and the minority who agreed most unequivocally with Justice Scalia's majority opinion—all were connected by core identity-defining characteristics. Race, income, education, ideology, cultural worldviews, and party affiliation all corresponded with variations in perception of the images depicted and story told in the video.[157] The *Scott* video, as with other facts and other evidence, did not speak for itself; it spoke "only against the background of pre-existing understandings of social reality that invest[ed] those facts with meaning."[158]

These results led the authors to conclude that the *Scott* Court was wrong to grant summary judgment. By insisting that the video supported only "one 'reasonable' view of the facts," the Court effectively told those who might draw a different story from the video that their viewpoint was unreasonable.[159] The Court thus rendered a decision "symptomatic of a kind of cognitive bias that is endemic to legal and political decision-making and that needlessly magnifies cultural conflict over and discontent with the law."[160]

The authors identify and emphasize a broader problem with the procedural posture of *Scott*. It was not simply that Justice Scalia failed to interpret the video in the light most favorable to the plaintiff, ignoring possible disagreements as to the video's meaning, possible contrary evidence, and possible variance of jury results.[161] The problem was the nature of the dissensus surrounding the facts revealed by the video and the interpretation of those facts. The video and the facts on the ground would be interpreted "against the background of competing, subcommunity understandings of social reality."[162] Rather than being mere "idiosyncratic statistical outliers," study participants who interpreted the video and its story differently were members of groups "who share a distinctive understanding of social reality against which the facts have a meaning different . . . from what it has for the majority."[163] In granting summary judgment in the face of such subcommunity-specific disagreement, the Court "inevitably called into

156. *Id.*
157. *Id.*
158. *Id.* at 883.
159. *Id.* at 902.
160. *Id.* at 881.
161. *See supra* notes 137–150 and accompanying text. R
162. Kahan et al., *supra* note 7, at 883. R
163. *Id.* at 886.

question the integrity, intelligence, and competence of identifiable subcommunities whose members in fact held those dissenting beliefs."[164] That, in turn, causes those dissenters, and members of the public who share their identity-defining characteristics, to question the legitimacy of resulting law.[165]

The study led the authors to broader normative conclusions about summary judgment.[166] Kahan, Hoffman, and Braman argued for a form of "judicial humility" on summary judgment, under which a judge performs a "mental double-check" before granting summary judgment based on her sensory reactions to evidence, precisely to avoid decisions turning on simple brute-sense impressions that may be culturally bound.[167] The judge must imagine potential jurors and if "they are people who bear recognizable identity-defining characteristics—demographic, cultural, political, or otherwise—she should stop and think hard."[168] Judges should at least hesitate before endorsing any "culturally partisan views of facts" or summarily deciding cases that likely would feature "culturally polarized understandings of fact."[169] This humility is a procedural form of Alexander Bickel's "passive virtues," in which courts use caution in exercising even the unquestioned power to decide a case on summary judgment, with some deference to concerns for public perceptions of, and respect for the legitimacy of, law and courts.[170]

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

> [T]here's nothing problematic about a court deciding summarily based on its sensory impressions when the factual inference it is drawing isn't one that is likely to divide potential

164. *Id.* at 897; *see also id.* at 887 (stating that the decision "denied a dissenting group of citizens the respect they are owed").

165. *Id.* at 887. *But see* Christopher Slobogin, *The Perils of the Fight Against Cognitive Illiberalism*, 122 HARV. L. REV. F. 1, 3 (2009), http://www.harvardlawreview.org/forum/issues/122/jan09/slobogin.shtml (expressing doubt that the public would be outraged by, or likely to question the legitimacy of, a Fourth Amendment case such as *Scott*).

166. This is true of all summary adjudication procedures, including judgment as a matter of law, which utilizes the same standard as summary judgment, and failure to state a claim upon which relief can be granted. *See* Kahan et al., *supra* note 7, at 881–82 n.129. R

167. *Id.* at 897–98.

168. *Id.* at 898.

169. *Id.* at 899–900.

170. *Id.* at 899 (discussing ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962)). *But see* Slobogin, *supra* note 165, at 3. R

> jurors on cultural lines . . . . By the same token, where a factual inference *would* likely provoke cultural dissensus, our argument would counsel the judge not to draw it even if the basis for the inference is something other than her mere sensory impression.[171]

But their normative argument for caution in the face of stigmatizing cultural dissensus leads to the more dramatic conclusion that summary judgment will be far less appropriate in civil rights and civil liberties actions. This is particularly true for cases arising from police-public encounters that are "fraught with competing connotations in our society."[172] Nothing obviously distinguishes *Scott* from cases arising from other fraught, coercive police-public encounters, any of which can be a "potentially divisive matter in our society."[173] Concerns of race, class, and gender color all experiences with law enforcement. Political party affiliation and ideology affect views on appropriate political expression and whether police acted appropriately when dealing with protesters. Ideology influences views on the entire freedom-order-security divide, and thus one's views on the propriety of limits and restrictions on unpopular speech in public spaces. This "prudential brake" becomes especially prominent in a substantial number of civil rights video cases, where culturally based cognition affects an individual viewer's understanding of the recording and its story.

Which is not necessarily to disagree with that normative conclusion. Scholarly criticism of summary judgment is on the rise, concurrent with the overall increase in summary judgment activity in federal court.[174] Many critics focus particular attention on the disparately

171. Kahan et al., *supra* note 7, at 900–01. R

172. *Id.* at 886.

173. *Id.* at 896.

174. *See* Bronsteen, *supra* note 123, at 526 (arguing for the abandonment of summary judgment "*even if we are not constitutionally obligated to do so*"); Stephen Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Towards Bethlehem or Gomorrah,* 1 J. EMPIRICAL LEGAL STUD. 591, 622 (2004) (discussing recent scholarship demonstrating that "something is amiss, perhaps gravely amiss, in the approaches that some courts take to the interpretation and application of Rule 56"); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 89 (1990) (discussing evidence that shows that "summary judgment has moved beyond its originally intended role as a guarantor of the existence of material issues to be resolved at trial and has been transformed into a mechanism to assess the plaintiff's likelihood of prevailing at trial"); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1063 (2003) (arguing that it is "rare for a court to find that the party seeking summary judgment has failed to discharge its initial burden of showing the absence of a genuine issue of material fact"); Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. R

heavy use of the procedure in civil rights litigation.[175]

But the "prudential brake" that Kahan, Hoffman, and Braman propose bucks a twenty-five-year doctrinal trend in which summary judgment has been made more obtainable in Section 1983 actions. In *Harlow v. Fitzgerald*,[176] the Supreme Court altered the standard for the defense of executive qualified immunity by shifting from a focus on the defendant's subjective intent to violate rights to an objective focus on whether a reasonable officer would have known, in light of the current state of the law, that his conduct violated the plaintiff's clearly established constitutional rights.[177] Denials of summary judgment on official and governmental immunity grounds are subject to immediate appellate review, a departure from the ordinary requirement of a final judgment.[178] This gives the court of appeals, and perhaps the Supreme Court, a second crack at viewing and interpreting the video evidence. The express purpose of these doctrinal moves was to make it easier for officers to defeat weak constitutional claims at the summary judgment stage, enabling them to get out of litigation at the earliest possible moment and to get on with performing their public duties without the distractions of civil litigation.[179]

C. *Lower Courts Post-*Scott

One expected consequence of *Scott* is that lower court "judges might well feel emboldened to give more decisive weight to the factual inferences they themselves are inclined to draw from videos."[180] In fact, a sampling of cases since *Scott* shows lower court judges vigorously

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REV. 139, 140 (2007) (arguing that summary judgment is unconstitutional); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1938 (1998) ("This unseemly rush to summary judgment may cause the legal profession, and the public at large, to conclude that disfavored plaintiffs are apt to be hustled out of the courthouse.").

175. Thomas, *supra* note 174, at 141; *see also* Miller, *supra* note 174, at 1133 (arguing that "an unfettered commitment to 'efficiency' in the pretrial disposition context . . . will erode other systemic values"); *cf. supra* note 123 and accompanying text. R R

176. 457 U.S. 800 (1982).

177. *Id.* at 818–19.

178. *See* Will v. Hallock, 546 U.S. 345, 350 (2006) (providing that orders denying qualified immunity are immediately appealable); Mitchell v. Forsyth, 472 U.S. 511, 526–27 (1985) (stating that the same reasoning that supports the immediate appealability of denials of absolute immunity applies to qualified immunity).

179. Saucier v. Katz, 533 U.S. 194, 200–01 (2001); *Mitchell*, 472 U.S. at 525–26; *see also* Miller, *supra* note 174, at 1133 (arguing that courts have been directed "to increase the disposition of cases under Rule 56 either to protect defendants or to achieve systemic efficiency"). R

180. Kahan et al., *supra* note 7, at 59. R

wielding this new power.[181] Some courts do recognize that context matters, that recordings may not tell the entire story[182] and may require viewer interpretation that injects ambiguity into the video.[183] Other courts recognize ambiguity in theory, but apply the absolute rule of *Scott* in fact. One district court agreed that "video recording reflects a particular point of view and has its limitations," but granted summary judgment based on the video anyway, because "[t]hese basic elements of hermeneutic theory" did not prevent a court from granting summary judgment when video was uncontradicted.[184]

A good example of how lower courts have run with the *Scott*-sanctioned power to grant summary judgment largely on brute-sense judicial perception of video is the United States Court of Appeals for the Sixth Circuit's decision in *Marvin v. City of Taylor*.[185] The case involved claims of excessive force in arresting the plaintiff on a DUI charge and transporting him to the police station, where he was booked and processed.[186] Most of the events at the station house were videotaped and, in reversing the denial of the defendants' motion for summary judgment, the court used the videos as the sole touchstone for its factual analysis.[187]

The court actually went beyond *Scott*, utilizing an approach under which a plaintiff could only survive summary judgment if the video, as the court viewed and understood it, affirmatively showed what the court viewed as excessive force. Two portions of the opinion are particularly troubling. First, the plaintiff alleged that one of the defendant officers pulled him out of the car at the station house and threw him to the ground, and the plaintiff insisted that the video supported this contention.[188] But the court held that the video did not show this so clearly. Rather, according to the court, the video, taken from the

181. *See* Marvin v. City of Taylor, 509 F.3d 234, 239 (6th Cir. 2007); Mecham v. Frazier, 500 F.3d 1200, 1202 n.2 (10th Cir. 2007); Beshers v. Harrison, 495 F.3d 1260, 1262 n.1, 1263 nn.2–3 (11th Cir. 2007); Marion v. City of Corydon, No. 4:07-cv-0003-DFH-WGH, 2008 WL 763211, at *1 & n.1 (S.D. Ind. Mar. 20, 2008).

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

183. Jones v. City of Cincinnati, 521 F.3d 555, 561–62 (6th Cir. 2008); *see also* Green v. N.J. State Police, 246 F. App'x 158, 159 n.1 (3d Cir. 2007) ("Unlike in *Scott* . . . the videotape evidence is inconclusive on several of the key disputed facts."); Stewart v. City of New York, No. 06 Civ. 15490(RMB)(FM), 2008 WL 1699797, at *8 (S.D.N.Y. Apr. 9, 2008) ("Here, by comparison, the issue is not what [plaintiff] said, but what he intended. Unlike the speed of a car, the meaning behind [plaintiff]'s statements is not capable of being captured on a videotape or audiotape.").

184. *Marion*, 2008 WL 763211, at *1 & n.1.

185. 509 F.3d 234 (6th Cir. 2007).

186. *Id.* at 237–43.

187. *Id.* at 239–42.

188. *Id.* at 240, 248.

opposite side of the car and not offering a clear view, only showed the officer opening the door, reaching into the car, closing the door, then bending down and helping the plaintiff to his feet; it did not show the police "abusing" the plaintiff.[189] Thus, although the video did not blatantly contradict the plaintiff's assertions, it did not support them and, by not supporting his version, it "certainly cast[ ] strong doubts on [his] characterization."[190]

Second, the plaintiff testified that the officers had gratuitously pulled his injured arm into the small of his back while taking off the handcuffs from behind.[191] According to the court, while the video appeared to show the plaintiff's arms being raised into the small of his back, the officer also could be seen crouching to insert the key to unlock the cuffs, presumably to avoid making the plaintiff raise his arms.[192] Based on the video, the court concluded that "the officers' conduct cannot reasonably be construed as gratuitous."[193]

Nothing requires the recording to affirmatively support the plaintiff's version of events; his testimony about being shoved to the floor should be enough to get that issue to the jury, at least absent the type of video contradiction purportedly present in *Scott*.[194] Moreover, the video shows the plaintiff having to be picked up off the ground by the officer, although it does not show why he was on the ground.[195] Viewing the video in the light most favorable to the plaintiff, as the court should be obligated to do, gives rise to a reasonable inference that the plaintiff was on the ground and had to be picked up because, per the plaintiff's testimony, the officer had pushed him down. In other words, a reasonable "plaintiff-sided" interpretation of the video, which is inconclusive because of the limits of the video frame, is fully consistent with the plaintiff's testimony. Similarly, to the extent the video shows both the plaintiff's injured arms being lifted into the small of his back and the officer bending down to unlock the handcuffs, the video is ambiguous and capable of an interpretation that supports either side, requiring the court to accept the plaintiff-favorable interpretation for purposes of summary judgment.

189. *Id.* at 248–49.

190. *Id.*

191. *Id.* at 240–41.

192. *Id.* at 241.

193. *Id.* at 240–41.

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

195. *Marvin*, 509 F.3d at 248–49.

Scott and its progeny err in permitting judicial determination of videos' meanings to trump witness testimony, failing to recognize the possibility of competing reasonable constructions of video, consistent with that testimony, under which a plaintiff might prevail at trial.[196] *Marvin* takes this procedural faith a step further by elevating video evidence to the only competent evidence on summary judgment. The court expected, and in fact demanded, video that unassailably established the facts in the plaintiff's favor; absent video that did so, the plaintiff's claim did not warrant trial, regardless of what any non-video testimonial evidence showed and regardless of any ambiguity or uncertainty about the video. If video is in the record, ordinary testimony, especially by the plaintiff himself, is no longer sufficient. The video alone must prove the plaintiff's case to the court's satisfaction in order to proceed beyond summary adjudication.

D. The Flip Side of Summary Judgment

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

At a minimum, this compels the court to deny the defendant-officer's request for summary judgment. For example, in *Combs v. Town of Davie*,[197] the district court denied summary judgment in an excessive force case because it found that details contained in the officer's testimony (such as his statements that the suspect punched and kicked him) were not reflected in the video, and scenes depicted in the video (such as the suspect fleeing) were not mentioned in the officer's otherwise comprehensive recitation of events.[198] This led the court to question the officer's credibility and established an issue for trial.[199]

196. *But cf.* Beshers v. Harrison, 495 F.3d 1260, 1269–71 & nn.3, 7–10 (Presnell, J., concurring) (attempting to frame facts from police chase video in light most favorable to plaintiff and concluding that the plaintiff's conduct "was not particularly heinous").

197. No. 06-60946-CIV-COHN/SNOW, 2007 WL 879426 (S.D. Fla. Mar. 20, 2007).

198. *Id.* at *5.

199. *Id.*

But summary judgment is a neutral procedure, available to both parties whenever the record, including audio or video evidence, shows there is no genuine dispute as to some material fact, and the moving party is entitled to judgment as a matter of law.[200] The open question is whether a court could use its brute-sense impressions of the video or use that blatant contradiction and loss of credibility as a basis for granting a plaintiff's motion for summary judgment. In *Combs*, having concluded that the video does not show the plaintiff punching or kicking the officer, could the court, on a proper motion, disregard the defendant's testimony altogether and decide that the video actually shows excessive force?[201] Again, as a normative matter of appropriate summary judgment processes, a court should never grant summary judgment, in favor of either party, by interpreting and assigning meaning to video. Still, should a court, taking *Scott* at its word, have equal latitude in granting summary judgment for the plaintiff?

The answer may properly turn on the greater burden a plaintiff bears in seeking summary judgment on a claim as the party with the ultimate burden of persuasion at trial. Martin Louis long ago argued that courts should grant summary judgment less readily when the moving party seeks to establish as undisputed an essential element on which she will bear the burden of proof at trial.[202] A movant-plaintiff must shift the burden of production, presenting to the court such strong and undisputed affirmative evidence on each element of a claim that no fact-finder could reasonably find against her.[203] This is a more substantial burden than that borne by a movant-defendant, who only must point out to the court, without substantial support, the absence of evidence from the plaintiff to establish just one essential element, forcing the plaintiff to produce probative evidence that will convince the court that a reasonable juror could find in her favor.[204]

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200. FED. R. CIV. P. 56(a)–(b). In practice, however, it is overwhelmingly a defense motion. *See* Bronsteen, *supra* note 123, at 523 n.10; *see also id.* at 538 (criticizing the one-sided, defendant-biased nature of summary judgment); Issacharoff & Loewenstein, *supra* note 174, at 75 (arguing that summary judgment results in a "wealth transfer from plaintiffs as a class to defendants as a class"). R R

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

202. Martin B. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 748 (1974).

203. *Id.* at 748–49.

204. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Friedenthal, *supra* note 131, at 779; Redish, *supra* note 102, at 1344–45, 1351 n.81. R

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

Of course, a court might say, as the Ninth Circuit did in the pre-*Scott* case arising from the Seattle protests, that on a plaintiff's motion for summary judgment, evidence, including video, must be viewed in the light most favorable to the defendant.[205] But *Scott* hinged on the inability of a reasonable viewer to find another meaning or message in the video. The point was that video was so singular in its narrative that there was no reasonable chance the jury could "disbelieve" the video as interpreted by the court. In other words, the jury could not draw a different story from the video than did the court. To the extent courts accept this understanding of video evidence, however fallacious, nothing turns on who is the moving party. There is no descriptive reason a court could not make the same determination about the video's meaning on a plaintiff's motion, disregard alternate interpretations and competing testimony, and grant summary judgment for the plaintiff.

Any Section 1983 action arising from the Critical Mass incident[206] might squarely present this procedural situation. A brute-sense viewing of that video supports the rider's version of events. Indeed, the video seems to show that the officer moved several steps from the center of the street to get close to the rider and that he threw his arm out to hit the rider; the video thereby contradicts the officer's initial statements that the rider had steered the bicycle towards the officer and rode into him.[207] On the other hand, because the plaintiff-movant must affirmatively foreclose any evidentiary basis for finding in the defendant's favor, the officer might remain freer than the plaintiff

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

206. *See supra* notes 24–25 and accompanying text. R

207. *See* Pogan Affidavit, *supra* note 24. R

in *Scott* to defeat summary judgment by producing evidence justifying his conduct that cannot be seen in the video because of its angle and scope or because of information the video does not show.

Alternatively, a court might rely less heavily on video, as the Eleventh Circuit did in a recent unpublished opinion.[208] A dash-mounted camera captured an encounter on the side of a highway, during which the officer attempted to get a seemingly drunk, despondent, and incoherent individual into the squad car.[209] The man remained seated on the side of the road and passively refused to be moved; the officer tasered the suspect three times.[210] In reversing the denial of the officer's motion for summary judgment on qualified immunity, the majority provided a relatively sparse, undetailed, and cold recitation of the facts (much as a court might from a written record devoid of video evidence), accepting the officer's testimony as true, and focusing on the legal issue of Fourth Amendment reasonableness.[211] Little was said of the video. On the other hand, the dissent made hay out of the video in arguing that summary judgment was inappropriate and trial necessary,[212] describing the events on the video in great detail, including those points in the video that appeared to contradict both the officer's testimony and the purportedly undisputed facts that the majority accepted.[213] This convenient non-reliance on video evidence that appears to favor the plaintiff may be more problematic than its misuse on summary judgment.

E. Video and Summary Judgment: Some Stopping Points

Courts on summary judgment must hesitate before getting swept away with the purported objectivity, completeness, and clarity of video.[214] But Kahan, Hoffman, and Braman also are correct that there must be a stopping point to this reluctance to grant summary

208. Buckley v. Haddock, No. 07-10988, 2008 WL 4140297, at *1 n.1 (11th Cir. Sept. 9, 2008).

209. *Id.* at *1–*2.

210. *Id.* The video was posted to YouTube shortly after the decision was released. *See* http://www.youtube.com/watch?v=SWC7iSGCk-s (last visited Mar. 17, 2009).

211. *Buckley*, 2008 WL 4140297, at *1–*3.

212. The dissent did not address whether the plaintiff should be entitled to summary judgment had he moved for it.

213. *Buckley*, 2008 WL 4140297, at *10 & nn.6–7 (Martin, J., dissenting).

214. *See* Kahan et al., *supra* note 7, at 899 (arguing that "judges pause to consider whether what strikes them as an 'obvious' matter of fact might in fact be viewed otherwise by a discrete and identifiable subcommunity"); Silbey, *Cross-Examining*, *supra* note 3, at 22–23; Silbey, *Filmmaking*, *supra* note 5, at 114 (arguing that film should be considered "as one version of the events . . . of which there are likely many"); *supra* notes 107–119 and accompanying text. R R R R

judgment in video cases—"the upshot can't be that judges should *never* trust their own perceptions of the facts when determining whether to resolve cases summarily."[215] Nor should it be that judges never can grant summary judgment in civil rights video cases, particularly as such cases increase in number with the spread of recording technology among all actors. The point is not the elimination of video evidence, which does promote justice, if only by providing additional probative evidence.[216] Video replaces the he-said, he-said trial by providing additional evidence for the fact-finder to balance against competing testimonial versions of events. The point, again, is caution—a degree of humility in how courts respond to what they see or understand from the recording and hesitancy before letting video evidence overwhelm the analysis.

Several considerations illuminate the boundaries of summary judgment and demonstrate how courts exceed those boundaries by over-relying on judicial perceptions of video evidence, especially as to police misconduct cases.

First, much turns on the type and complexity of the facts being proven through video. The material fact in deadly force cases such as *Scott*—the reasonableness of the use of deadly force in a police-public encounter[217]—is a complex and layered issue. It depends on a host of underlying factual considerations. These include whether the suspect posed an immediate threat to police, persons, and property in the surrounding area, which in turn depends on a series of prior factual conclusions about the real-world events on the ground drawn from viewing the video.[218] Such complex, layered factual determinations are particularly dependent on viewer interpretation of video, thus more subject to culturally and demographically based differences in perception of that video; a court in that case should be less willing to rely solely on its brute-sense impressions of the video's singularity of

215. Kahan et al., *supra* note 7, at 894. R

216. *See* Drizin & Reich, *supra* note 3, at 624 ("[R]ecordings of interrogations . . . allow factfinders, prosecutors, and experts the ability to determine for themselves the reliability of the confession."); Leo & Ofshe, *supra* note 5, at 494–95 (noting that in the context of interrogations, "[t]he existence of an exact record . . . is crucial for determining the voluntariness and reliability of any confession statement"); Silbey, *Filmmaking*, *supra* note 5, at 114 n.21, 116, 123–24 (providing examples of how video recordings promote criminal justice); Simmons, *supra* note 1, at 565–66 (arguing that recordings of interrogations make it easier to "determin[e] exactly what happened"); *supra* notes 113–115 and accompanying text. R R R R

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

218. *Scott*, 127 S. Ct. at 1778–79. Kahan, Hoffman, and Braman structured their study to capture that pyramid of facts. *See* Kahan et al., *supra* note 7, at 854–58. R

meaning in the face of possible, culturally grounded alternative meanings.

Justice Stevens's argument in *Scott* was that portions of the video could be viewed as consistent with Harris's testimony that he remained in control of his car at all times; the video showed that he did signal his lane changes and that many cars appeared to have pulled over before the speeding cars reached them.[219] Similarly, in *Beshers v. Harrison*,[220] a filmed high-speed police chase case on all fours with *Scott*, the concurring judge emphasized portions of the video showing that the fleeing suspect made an effort to avoid hitting other cars during the chase, suggesting he posed less of a danger to the public.[221] Alternatively, even if the underlying events depicted in the video are undisputed, the objective reasonableness of the officer's actions, for Fourth Amendment and qualified immunity purposes, remain an open issue.[222]

Conversely, some video, or the factual issues proven by video, might be simple and unequivocal at the level of both depicted events and constitutional meaning. Consider a different landmark summary judgment case: *Adickes v. S.H. Kress & Co.*[223] Plaintiffs alleged a conspiracy between police and employees of a private restaurant to deny service to a white civil rights worker and her African-American companions and to have her arrested for vagrancy, all in violation of the Fourteenth Amendment.[224] The conspiracy claim turned on the factual issue of whether a police officer was present in the store during the events at issue, which, according to the Court, permitted the jury to infer a meeting of the minds between the officer and Kress employees.[225]

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219. *Scott*, 127 S. Ct. at 1782–83 (Stevens, J., dissenting); *supra* notes 145–151 and accompanying text. R

220. 495 F.3d 1260 (11th Cir. 2007).

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

222. *See* Mecham v. Frazier, 500 F.3d 1200, 1203 (10th Cir. 2007) ("[T]he question of objective reasonableness is *not* for the jury to decide where the facts are uncontroverted.").

223. 398 U.S. 144 (1970).

224. *Id.* at 149–50, 154. This state-private conspiracy was necessary to make the private store into a state actor such that it can be liable under the Fourteenth Amendment, which limits its obligations only to the state, and § 1983, which limits itself only to persons acting under color of state law. *See id.* at 151–52.

225. *Id.* at 158–59; *see also* Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 123 (2006) (describing the *Adickes* Court's decision to uphold the plaintiff's argument on appeal that the defendant failed to offer affirmative evidence to disprove a necessary condition of the plaintiff's claim). *But see id.* at 125 (questioning whether the officer's mere presence in the store, without more, permitted the inference of conspiracy); David P. Cur-

Suppose the store had been equipped with a surveillance camera and video did not show police officers in the store. Could a summary judgment court ignore testimonial evidence that they had been present, writing it off as a visible fiction "blatantly contradicted by the video record?" This surveillance video seems truly unequivocal on that small point, assuming no gaps in time or frame. But the fact to be drawn from the video also is simpler and more easily determined. The video also would be less subject to cultural dissensus—experiences of race, gender, and ideology likely would not affect whether one sees on the video a uniformed officer standing somewhere in the store.

Change the hypothetical slightly. Suppose the surveillance video did show a police officer in the store, looking in the general direction of the waitress. Now the facts on the ground are less clear—was there eye contact between them? And even if the facts on the ground are clear that an officer was in the store and made eye contact with an employee, their constitutional meaning remains open to differing reasonable interpretations. Did that eye contact constitute communication between them? Did communicative eye contact establish a meeting of the minds not to serve plaintiff or to have her arrested? The video does not and cannot tell us this. It is "narratively ambiguous" in that the images are clear, but their legal significance for the competing stories being told is ambiguous.[226] These ambiguities will be filled in by culturally and identity-determined interpretation. A viewer's race, gender, politics, and cultural experiences will color her conclusions as to whether eye contact between a store owner or employee and a police officer during a lunch-counter sit-in in 1962 Jim Crow Mississippi suggests a conspiracy not to serve a white woman sitting with black students.

A second consideration is that video does not necessarily tell the full story of the real-world events, given its limited narrative—it does not necessarily show what happened outside the camera's view, the causation for actions shown in the video, what things are blocked from the camera's view, or what depends on the camera's perspective, frame, distance, and angle.[227] This was a key point for Justice Stevens

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rie, *Thoughts on Directed Verdicts and Summary Judgment*, 45 U. CHI. L. REV. 72, 77–78 (1977) (same).

226. *See* Silbey, *Cross-Examining*, *supra* note 3, at 33, 41 (discussing trial in which video produces competing stories and vigorous advocacy to influence a jury's interpretation of the film). R

227. *Id.* at 38; Silbey, *Filmmaking*, *supra* note 5, at 147, 161; *supra* notes 107–112 and accompanying text. R

in *Scott*[228] and some courts at least attempt to remain aware of this fact in analyzing video. In *Marvin*, the court acknowledged that the surveillance camera's location at the front-right of the car could not show what actually happened at the rear-left of the car behind an open car door.[229] But that ambiguity should have prompted the court to deny summary judgment where the video leaves the non-moving party's explanation unchallenged.

Third is the issue of multiple or dueling audio or video evidence. As the number and variety of sources of recording evidence expands, multiple videos from multiple sources become increasingly likely.[230] Competing videos often tell multiple stories. What each video says depends on differences in angles, frames, distances, and perspectives.[231] A court on summary judgment cannot pick one video over another as more "accurate" or revealing a "truer" version of events and adopt that recording as the accepted story, just as the court cannot pick one of two competing witness accounts. That each video tells a different story says nothing about the accuracy of one story or another. In fact, all videos might simply be different perspectives on the same "true" story.[232] Choices must be made among competing stories or versions of stories reflected in the various videos. Again, however, those choices are for a fact-finder at trial, not a court on summary judgment.

The source of a recording also might affect viewer perception: A viewer might interpret images differently depending on whether the recording comes from the police, the institutional press (whose role is to produce lasting, objective historical records), third-party bystanders (who also may be acting akin to journalists as creators of lasting objective historical records), or the citizen involved in the encounter. Silbey explains this as the essence of video documentary. "With narrative comes the development of voice, or point of view. It is unavoidable that films have such a voice: there is always a filmmaker whose perspective—and not others—is being captured by the camera."[233]

228. *See* Scott v. Harris, 127 S. Ct. 1769, 1782–83 (Stevens, J., dissenting) (criticizing majority's characterization of the danger to other motorists).

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

230. *See supra* notes 71–97 and accompanying text. R

231. *See supra* notes 227–229 and accompanying text. R

232. Silbey, *Cross-Examining*, *supra* note 3, at 34 (arguing "films that appear to tell only one story when in fact, like all films, they tell more than one story and less than the whole story"); Silbey, *Filmmaking*, *supra* note 5, at 147 (discussing the "by-now obvious fact that all stories, even true ones, can be truthfully told from different angles, with different morals and objectives"). R R

233. Silbey, *Filmmaking*, *supra* note 5, at 147; *see also* Silbey, *Cross-Examining*, *supra* note 3, at 29 (arguing that "[a]ll films have a point of view or voice"). R

The audience (i.e., the jury) must judge the authority of the film's voice to fully understand what it depicts, in part by considering the film's source.[234]

Video evidence functions more like testimony in that competing sources with competing perspectives, and the credibility of each perspective, affect what a fact-finder determines to be true. Just as a summary judgment court ordinarily is precluded from deciding the credibility of competing witnesses or from adopting one testimonial version over another,[235] it also should be precluded from doing so with competing recordings. If a recording's source and perspective are key to understanding the message and meaning of the video, it remains a question for the jury.

The insight about video perspective as to multiple videos actually proves the larger point about hesitancy and mental double-checks on summary judgment. If perspective matters, then no single video tells a complete, singular, unambiguous, and objective story to the exclusion of all other videos. It follows that a single video does not necessarily tell a complete, singular, unambiguous, and objective story to the exclusion of all other evidence, at least as to more complex, multilayered factual issues. Construction and interpretation, culturally affected as they are, remain essential.

Finally, a "prudential brake"[236] on summary judgment in video and audio civil rights cases means only that more cases continue beyond dispositive motion. Most settle, while some move forward to jury trial.[237] Trial may not make much practical difference. The Kahan-Hoffman-Braman study showed that a "very sizable majority" agreed that the plaintiff in *Scott* had posed a threat to persons in the surrounding area and that the use of deadly force was appropriate.[238] This suggests the officer would have prevailed anyway had the case been tried by a jury composed of citizens similar to the study subjects or to the study's statistically modeled jurors.

Trial itself can undermine the supposedly fixed, transparent, and uncontroversial meaning of film because the manner in which video is

234. Silbey, *Filmmaking*, *supra* note 5, at 147. R

235. *See* Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 772 (1989) (repeating bromide that, for purposes of summary judgment, "a single scoundrel's testimony may outweigh that of forty bishops").

236. Kahan et al., *supra* note 7, at 900. R

237. *See* Fed. Judicial Ctr., 2007 Judicial Facts and Figures, Table 4.10, www.uscourts.gov/judicialfactsfigures/2007/all2007judicialfactsfigures.pdf/ (last visited Mar. 17, 2009) (indicating that 4.1% of civil actions went to trial in 2007).

238. Kahan et al., *supra* note 7, at 879. R

viewed may change its meaning. The most famous example of this is the state criminal trial of the LAPD officers accused in the Rodney King beating, where the officers were acquitted in the face of video evidence of the assault. One explanation for the acquittal was defense success in attaching a new narrative and new meaning to the video. They did this, in part, by slowing the video for frame-by-frame review and having the officers testify to each individual action by each actor.[239] Defense counsel essentially cross-examined the film, drawing from it a different message, creating ambiguity as to its meaning, and allowing the video to corroborate, rather than contradict, the officers' version of events.[240] One could imagine a similar trial tactic with close examination of the chase videos in *Scott* or *Beshers* or any of the growing number of video cases.

Of course, both sides will utilize this tactic to get the video to express their most favorable understanding of the events to the jury.[241] But that is the point of trial with live witnesses, cross examination, and a finder of fact empowered to decide credibility and choose between legitimate competing versions of events. Video is rendered neutral and ambiguous, its meaning tied back to the testimony and credibility of competing witnesses.[242] The case again becomes a he-said, he-said dispute turning on competing witness accounts, supported by competing interpretations of a video's story, all requiring jury resolution.[243]

Because video records of police-public encounters are becoming more common[244] and because video can be so quickly and widely disseminated and shared,[245] a greater portion of the public is likely to

239. BILL NICHOLS, BLURRED BOUNDARIES: QUESTIONS OF MEANING IN CONTEMPORARY CULTURE 22–23 (1994); *see also* Silbey, *Critics*, *supra* note 27, at 550–52 (discussing Nichols's conclusions about the use of videotape in the Rodney King trial). R

240. Silbey, *Critics*, *supra* note 27, at 550–52; *see also* Silbey, *Cross-Examining*, *supra* note 3, at 45 ("An effective examination of the film would have shifted the focus of the trial to all the other evidence marshaled by the parties, most of which had more probative value than the film itself."). R

241. Silbey, *Cross-Examining*, *supra* note 3, at 41 ("Advocates use film to put their story in the best possible light, trying to exploit what is perceived as the film's clarity and objectivity. . . . [T]he battle over the film's determinacy only highlighted the relative weaknesses of each side's story and the indeterminacy of the film."). R

242. *Id.* at 45.

243. *See id.* at 25–26 (arguing that video evidence is not unambiguous and should be tested for truth and accuracy at trial); *see also id.* at 41–42 (arguing that each side's goal is to "fortify or destabilize the dominant story the film appears to be telling . . . by attacking either the story that the film seems to tell through its representation of reality, or the story that a witness on the stand narrates").

244. *See supra* notes 71–81 and accompanying text. R

245. *See supra* notes 85–96 and accompanying text. R

see video and form conclusions as to what the video shows and means. A decision granting summary judgment on a viewing that diverges from that of some portion of the viewing population—that labels that population's view unreasonable—simply will offend more people.[246]

Ultimately, Kahan, Hoffman, and Braman make a process point. The justification for the "prudential brake" on summary judgment, and the critique of *Scott*, tracks the justifications for jury trial, particularly the notion that jurors beneficially bring ordinary community morals and perspectives to produce just results.[247] Law must arise from a "*process* that shows due respect for their understanding of reality and hence for their identities."[248] A legal result often is acceptable to the public, or part of the public, as more democratically legitimate precisely because ordinary citizens played the necessary role to produce the outcome.[249] Factfinding, when performed by jurors of diverse identities and experiences, is one procedural strategy to ensure broad respect for outcomes and their democratic legitimacy, by bringing diverse identities and perspectives into the decision-making mix.[250]

The process of jury deliberation preserves and promotes democratic legitimacy in cases of true cultural dissensus, when any decision necessarily requires the elevation of one contested view of the world over another, by ensuring that these culturally based dissents are included and considered in the decision-making process.[251] Legitimacy is lost when courts, overreacting to the presumed objectivity and conclusiveness of recording evidence, take cases away from the jury, depriving that composite of subcommunities the opportunity to

246. Posting of Dave Hoffman to Concurring Opinions, http://www.concurringopinions.com/archives/2009/03/liptak_writes_o.html (Mar. 2, 2009, 19:40 EST). *But see* Slobogin, *supra* note 165, at 3. R

247. JEFFREY B. ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 18 (2000); *see also* Kahan et al., *supra* note 7, at 884–86 (arguing that juries consisting of ordinary citizens bring a particular means of analysis into the justice system and lend legitimacy to the law); Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 618 (1993) (arguing that the jury "serves[ ] as a political check on the judiciary, an infuser of democratic principles into the adjudicatory process, a barrier to oppressive conduct, and a preserver of humanity and common sense in decision-making"); Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 55 (2001) (discussing jury's collateral purposes of bringing a sense of the community's standards and morals into the justice system). R

248. Kahan et al., *supra* note 7, at 885. R

249. *Id.* at 884.

250. *Id.* at 884–85; *see also* Landsman, *supra* note 247, at 619 (discussing Alexis de Tocqueville's positive impression of the American jury system) (citing 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 281 (Alfred A. Knopf ed., 15th ed. 1985) (1830)). R

251. Kahan et al., *supra* note 7, at 885–86. R

participate in culturally sensitive decisions about the meaning of video, and thus about the law.[252]

Jury treatment of video evidence remains problematic, particularly jury tendency to treat video as objective, conclusive and overly persuasive, and to over-emphasize video to the exclusion of other probative evidence.[253] But culturally and demographically individualized interpretation of video evidence might be procedurally acceptable from jurors, whose specific charge is to bring their lay personal perspectives (culturally determined, of course) to resolve factual disputes on behalf of the community. Which is not to say that a verdict that was based on an understanding of video evidence dramatically different from that of some significant (culturally defined) portion of the public would not be controversial. That verdict would be met with greater outrage because more people will have seen and formed their own (culturally bound) conclusions about what it shows; this explains much of the violence after the first Rodney King verdict. But that perhaps can be overcome through (hopefully) culturally representative juries. Summary judgment on brute-sense video impression, as in *Scott* and other cases, remains uniquely problematic in labeling competing views as unreasonable.

IV. VIDEO EVIDENCE AND NON-LITIGATION REMEDIATION

Video evidence also affects strategic responses of government defendants and policymakers to an arguably unconstitutional police-public encounter. Government might respond to video in two ways, beyond using it to defend against constitutional claims in litigation. First, policymakers may remedy deficiencies revealed by the violations at issue, especially by punishing the officers involved through firing, suspending, reassigning, or otherwise disciplining, and by altering departmental rules, policies, and operations to deter and prevent future violations. For example, within days of the videotaped beating in May 2008, the Philadelphia Police Department removed thirteen officers from street duty pending further investigation and review of the video by the department and prosecutors.[254] Within one month, eight officers had been fired or otherwise disciplined.[255] The verbally abusive police officer caught on tape threatening Brett Darrow was fired within a few weeks.[256] The officer who tackled the bicyclist in the Crit-

252. *Id.*
253. *See supra* notes 107–119 and accompanying text. R
254. *See supra* notes 15–16 and accompanying text. R
255. Hurdle, *supra* note 16. R
256. *See* Woodward, *supra* note 13. R

ical Mass incident was placed on modified assignment—a routine non-disciplinary action to freeze matters pending investigation—although we might infer that the NYPD acted, at least in part, because of the attention that the video garnered and the expected brute-sense public impression that it revealed misconduct.[257]

Administrative and policy changes can be made on a grander scale. Following the May 2007 immigration rally-gone-awry, the LAPD undertook a six-month study, including the review of many video sources. The department reassigned or fired all eight of the supervisory officers on the scene. It also recommended a host of policies changes, including how the department uses video to document public rallies, how the department deals with the media covering and recording public protest rallies, and how officers decide on targeted arrests as opposed to mass arrests and crowd-dispersal as a means to control public gatherings.[258]

Second, government may settle litigation. In fact, if Kahan, Hoffman, and Braman's goal is increased judicial hesitancy to grant summary judgment on brute-sense understandings of video, the consequence may be increased settlement because settlement frequently is a defendant's immediate move after summary judgment is denied.[259] Indeed, in response to the incidents in Seattle and Miami, Seattle settled claims against it for more than $1 million and Miami settled claims against it for more than $500,000.[260]

It seems logical, although not empirically provable, that settlement and other remediation are more likely in video cases. Public attention and outrage produces government action; attention and outrage are more likely when video has gone "viral" and is being devoured and dissected on YouTube, blogs, and the mainstream news media, and where visceral public reaction to the video reflects a wide popular interpretation of the video as showing governmental misconduct. A viral video puts government on its heels, forcing it to publicly defend its officers (at least initially), while also recognizing that, because of the video, the people have developed informed perceptions and conclusions about the incident—perceptions that officials must respect (or at least consider) in making administrative decisions.[261]

257. *See* Chan, *supra* note 24; *supra* notes 24–25 and accompanying text. R

258. *See* LAPD REPORT, *supra* note 23, at 70–80, 85. R

259. *See* Bronsteen, *supra* note 123, at 529 & n.39; Issacharoff & Loewenstein, *supra* note 174, at 94. R R

260. *See supra* notes 20–22 and accompanying text. R

261. Addressing the controversy over the police officer who tackled the bicycle rider, Mayor Michael Bloomberg emphasized the police department's need for time to investigate and gather all the facts, while also acknowledging that the officer's actions, as shown

This is especially true when deciding whether to settle. These non-litigation effects reflect the import of Zick's argument about expressive groups using new technologies to record and disseminate images of their protests and public confrontations with police as part of one overall message. They can call attention to government efforts to limit the group's expression; in doing so, they both strengthen their litigation positions on any constitutional claims and force changes in government behavior and policy that might allow for freer expression in the future.[262]

Government officials and government lawyers watch a video with a different eye when analyzing whether to settle or take remedial policy steps. They are not deciding whether a case is worthy of a fact-finder, which should require a more open-minded and non-determinative examination of the video.[263] Rather, they act as fact-finders of sorts, interpreting the video and deciding what it means and what story it tells, and the story they draw guides their litigation and policy strategies. They analyze the video as a jury would: drawing inferences and reaching factual conclusions as to what the video actually means and what the official response should be to that message.

At the same time, government must recognize and account for the brute-sense impressions that members of the public and of a potential jury might develop upon viewing the same video. The Kahan-Hoffman-Braman analysis has much to offer here. Policymakers must recognize and account for the possibility of public dissensus as to the video's narrative. In other words, regardless of how policymakers themselves interpret and understand the video, they must consider whether the public or some subcommunity (united by demographics, ideology, political concerns, or some combination) will see unconstitutional behavior. At the policy level, officials must decide whether that subcommunity is sufficiently large and/or politically influential to force policy or personnel changes that officials might not otherwise be inclined to make were they acting solely on their own interpretation

in the video, "certainly looked like—inappropriate is a nice way to phrase it." Colin Moynihan, *The Officer, the Bicyclist and the Video*, N.Y. Times, July 29, 2008, *available at* http://cityroom.blogs.nytimes.com/2008/07/29/the-officer-the-bicyclist-and-the-video/?scp=3&sq=Critical%20Mass&st=cse; *see supra* notes 24–25 and accompanying text; *see also* Walters, *supra* note 15 (describing calls by the Philadelphia police commissioner for public patience and further department review, while acknowledging that the video suggested that force seemed excessive); *supra* notes 15–16 and accompanying text. R R R

262. ZICK, *supra* note 3, at 220, 256–57; *see also* Moynihan, *supra* note 261 (describing group's efforts to routinely collect video accounts of confrontations with police and to obtain video from unknown tourist who captured the officer showing a bicyclist on tape); *supra* notes 97–98 and accompanying text. R R

263. *See supra* notes 166–179, 214–252 and accompanying text. R

of the video. At the litigation level, lawyers must anticipate the composition of the jury and how, given that composition, it likely would interpret the video's message. Lawyers also might take account of the understanding of the public at large (or some culturally linked subset of the public) in making settlement choices. If a vocal portion of the public sees unconstitutional conduct in its viewing of the video, those people might wonder why the government continues to defend the case and the misbehaving officers at public cost, rather than settling the case and moving forward.

Policymakers might engage the difficult task of explaining to the public that video is incomplete and open to interpretation, explaining how they interpret or understand a video and how and why the story they see in the images departs from the common public story. But if the recording looks so viscerally unfavorable to the police, as with the Critical Mass, Philadelphia, or Brett Darrow recordings, this may be practically and politically impossible.

Government officials should make litigation, policy, and personnel choices with the same caution against over-emphasizing video as should judges and jurors in making adjudicative decisions.[264] At bottom, everyone is involved in a similar underlying inquiry—determining what happened in the real-world police-public encounter and what the video suggests happened. Accepting that video does not always or necessarily provide unambiguous, unbiased, objective, transparent, and singular certainty,[265] hesitancy and prudence should be the rule for every legal and political actor who must make decisions based on that recording. Determining whether to settle or whether to discipline an officer or whether to change departmental approaches to political rallies should no more be based on false assumptions about video's unquestioned and unambiguous "truth" than should a summary judgment determination.

Sometimes this produces a split response. In the Utah taser case, the state declined to punish the officer, obviously because its review of the video indicated that no constitutional wrongdoing had occurred.[266] But it also settled the driver's Section 1983 action, perhaps

264. *See supra* Part III.E.

265. *See supra* notes 40–43, 107–112 and accompanying text. R

266. Nizza, *supra* note 14. For an argument that the video is at least ambiguous as to whether the officer acted unconstitutionally, see Posting of Orin Kerr on The Volokh Conspiracy, http://volokh.com/archives/archive_2007_12_09-2007_12_15.shtml#1197327587 (Dec. 10, 2007, 21:40 EST). R

anticipating how a jury likely would view that video at trial and taking the path of least expense.[267]

V. RESTRICTING THE CREATION OF VIDEO

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

Ric Simmons's basic point—Orwell's vision was wrong because modern technology enables the public to watch government and check official misconduct[268]—is accurate only if there are constitutional and policy protections for members of the public using technology to record public events to which they are parties or witnesses. Perhaps video is not, and should not be treated as, the overwhelming, objective, unambiguous, singular, and conclusive proof that courts and the public believe it to be. But the descriptive reality is that courts,[269] government officials,[270] and the public[271] all treat it as if it is. And even if it is not perfect evidence, it remains probative evidence that is beneficial to the truth-finding process.[272] We maintain the balance of power over availability of video and audio recording of public encounters only by recognizing a liberty to record—that is, recognizing that Big Brother cannot interfere with the public's ability to watch him.

Government might stop people from recording public encounters in two ways. One is through enactment and enforcement of express prohibitions on secret or unconsented-to recording of persons and conversations.[273] The other is through officers' efforts to move filmers away from the scene, to confiscate equipment, and, per-

267. *See supra* note 14 and accompanying text. R

268. Simmons, *supra* note 1, at 532. R

269. *See, e.g.*, Scott v. Harris, 127 S. Ct. 1769, 1775–76 (2007); Marvin v. City of Taylor, 509 F.3d 234, 239, 241 (6th Cir. 2007); Beshers v. Harrison, 495 F.3d 1260, 1262 n.1 (11th Cir. 2007).

270. *See supra* Part IV.

271. *See, e.g.*, Silbey, *Cross-Examining*, *supra* note 3, at 24–25; *supra* notes 28–30 and accompanying text. R

272. *See supra* notes 113–115 and accompanying text. R

273. *See* Commonwealth v. Hyde, 750 N.E.2d 963, 966 (Mass. 2001); *see also infra* Part V.A.

haps, to arrest filmers for violating non-speech laws of general applicability.[274]

Official efforts to halt public recording of police-public encounters become the basis for independent, "secondary" constitutional challenges to limits on recording. The success of such secondary challenges ultimately determines the real effect that video evidence will have in civil rights enforcement, in resolving (with or without litigation) primary constitutional challenges to the underlying public police misconduct captured on audio or video.[275] The more robust constitutional liberty of the people and the press to record police-public encounters, the greater the effect that video evidence has on primary civil rights enforcement against police misconduct, and the more we can say that the People truly are able to watch the government in a meaningful way. This determines whether Simmons's optimism about technology—that it enables the public to watch government as much as the other way around—is warranted.

A. Privacy Protections and Wiretap Laws

Government might broadly prohibit all surreptitious or unconsented-to recording, extending that prohibition to conversations involving police officers performing their official functions. In *Commonwealth v. Hyde*,[276] the Massachusetts Supreme Judicial Court affirmed a state-law wiretapping conviction against a motorist who secretly used a hand-held recorder during a traffic stop that went "sour."[277] Massachusetts law prohibits "secretly hear[ing], secretly record[ing] . . . any wire or oral communication . . . by any person other than a person given prior authority by all parties."[278] The court read that absolute prohibition as an expression of the legislature's unambiguous intent "to prohibit the secret recording of the speech of anyone," including police officers performing their official duties in public.[279] Eugene Volokh suggests that *Hyde* provides the legal basis for other instances in which individuals in Massachusetts could be

274. *See* Robinson v. Fetterman, 378 F. Supp. 2d 534, 538–40 (E.D. Pa. 2005); *see also infra* Part V.B.

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

276. 750 N.E.2d 963.

277. *Id.* at 965, 971.

278. *Id.* at 966; *see* MASS. GEN. LAWS ANN. ch. 272, § 99(B)(4) (West 2000).

279. *Hyde*, 750 N.E.2d at 966.

prosecuted for recording public confrontations with members of law enforcement.[280]

It is inconsistent with democracy and democratic political accountability for government officials to have protectable privacy interests when performing official functions, especially in the context of adversarial encounters with members of the public. Privacy rights should not extend so far as to enable officers to hide their unlawful conduct and insulate it from challenge. In fact, the government only learned that Hyde had recorded the encounter because he presented the tape to the police department as corroborating evidence in support of his formal department complaint about the officers' conduct during the recorded encounter.[281] In other words, Hyde got in trouble when he initiated a primary constitutional challenge to the underlying police misconduct and tried to use video evidence to support that claim.

Massachusetts law is unique, a point the *Hyde* majority emphasized; similar anti-wiretap provisions in other states require that the recorded conversation be private or that the participants have a legitimate expectation of privacy, which typically excludes conversations that are part of official law enforcement conduct.[282] Thus, there were very different results in the Crespo case in New York or the Darrow case in Missouri, where the surreptitious or unconsented-to audio recording did not result in charges against the citizen-recorder and could be used as a basis for punishing the recorded police misconduct.[283]

The privacy protection recognized in *Hyde* prohibits not only recordings by the person involved in the police encounter, but also recordings by third-party members of the public who witness the encounter. The *Hyde* dissent thus argued that the majority's rationale would have rendered unlawful the video of the Rodney King beating, the paradigm of surreptitious recording of police misconduct; that video was made by a third-party civilian witness to events, similarly without the officers' knowledge or consent and in violation of their privacy rights as defined by the *Hyde* majority.[284] In response, the ma-

280. Posting of Eugene Volokh on The Volokh Conspiracy, http://www.volokh.com/posts/1201752162.shtml (Jan. 31, 2008, 00:05 EST).

281. *Hyde*, 750 N.E.2d at 965.

282. *Id.* at 967 n.5 (citing eavesdropping or wiretapping laws from several states).

283. *See supra* notes 13–12 and accompanying text. R

284. *Hyde*, 750 N.E.2d at 971–72 (Marshall, C.J., dissenting). It also would have made a misdemeanor of the current-day version of the Rodney King video and the recording of the assault on the rider at the 2008 Critical Mass rally. *See supra* note 24 and accompanying text. R

jority emphasized differences between Massachusetts and California law, with the latter exempting recordings of events and conversations in which there is no expectation of privacy.[285] But that response misses the larger policy point about the appropriate scope of privacy-protecting legal rules and the unintended negative consequences of broad privacy protection.[286]

According to the *Hyde* majority, arguments for protecting surreptitious citizen recording reflected a belief that "police officers routinely act illegally or abusively, to the degree that public policy strongly requires documentation of details of contacts between the police and members of the public to protect important rights."[287] But, as the dissent properly argued, it is "the recognition of the potential for abuse of power that has caused our society, and law enforcement leadership, to insist that citizens have the right to demand the most of those who hold such awesome powers."[288]

Clearly, the basic act of recording officers in the performance of their official duties does not burden the officers or interfere with their ability to execute their offices. After all, police make their own recordings of many of these encounters, without concern that the recording will interfere with the officer's job.[289] A surreptitious recording, by the person involved or by a bystander, does not become such an intrusion simply because the police did not know about or control the video.

Indeed, advocates for police recording argue that video reveals the "truth" of events by providing additional, purportedly objective, evidence; it exposes police misconduct or lies about police misconduct, deters it by increasing the likelihood of being caught, and protects officers from false claims of excessive force by providing definitive evidence.[290] Those policy goals are furthered by all video from all sources; any video, regardless of its source, functions as evidence of the police-public encounter and helps to tell a complete story. Consider that the NYPD officer who tackled the Critical Mass rider stated in an affidavit that the defendant had ridden his bicycle into him, a statement "blatantly contradicted" by the video that seems

285. *Hyde*, 750 N.E.2d at 970–71 (majority opinion).

286. *See* Volokh, *supra* note 280 (arguing that privacy-protecting rules are not uniformly positive and may have undesirable consequences). R

287. *Hyde*, 750 N.E.2d at 969.

288. *Id.* at 977 (Marshall, C.J., dissenting).

289. *See id.* at 969 n.9 (majority opinion) (citing Commonwealth v. Diaz, 661 N.E.2d 1326, 1328–29 (Mass. 1996)) (recognizing police controlled recording as a "good practice").

290. *See supra* notes 5–9 and accompanying text. R

to show the officer edging towards the curb to hit the defendant.[291] One explanation for this contradiction might be that the officer was unaware that his actions had been recorded and thus unaware that some evidence (other than the word of the individual involved in the confrontation) might challenge his statements. Expanding the possibility and availability of video is essential to challenging such false statements and exposing unconstitutional conduct.

We also gain deterrence because police know that members of the public—either the individuals involved or bystander-witnesses to the event—might be carrying recording devices. In fact, real deterrence comes from the officers never knowing who or when someone may be recording the encounter.[292]

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

B. First Amendment and Restrictions on Video Recording

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

Courts are split as to whether, and to what extent, the First Amendment accords liberty to gather information on public events.[293] Several lower courts have recognized a right to photograph and record events in public spaces, so long as recorders do not interfere with police efforts, as by getting too close to the events or otherwise disrupting government functions.[294] Pursuant to a consent decree, the

291. *See supra* notes 24–25 and accompanying text. R

292. Interestingly, the officer who confronted Brett Darrow saw the video camera in Darrow's car and even asked him why he had the camera. Darrow explained that he installed it because of prior confrontations with police. The officer proceeded to verbally abuse and threaten Darrow anyway, even while aware that the camera was running. *See supra* note 13 and accompanying text. R

293. McDonald, *supra* note 70, at 251–53. R

294. *See* Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (stating that plaintiffs had "a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct"); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (stating that plaintiff had a "First Amendment right to film

LAPD expressly agreed to take steps to protect the media's vital First Amendment role in reporting on public protest events and law enforcement conduct at those events, and to not unduly interfere with press coverage.[295] If the press and public enjoy liberty to record government interactions with others, there is no reason not to accord the same protection when an individual records her own public encounter with police.

Consider *Robinson v. Fetterman*.[296] The plaintiff was videotaping state police officers conducting searches of trucks along a public highway, while standing twenty to thirty feet away, on private property, with the owner's permission.[297] Officers ordered Robinson to stop filming, confiscated his camera, arrested him, and cited him for harassment, charges that eventually were dismissed.[298] In a bench trial in his subsequent Section 1983 action claiming First and Fourth Amendment violations, the district court found that Robinson's videotaping was protected First Amendment activity, both as a "legitimate means of gathering information for public dissemination" and as a source of "cogent evidence," in this case as part of Robinson's efforts to show that police were conducting the truck searches in an inappropriate manner.[299] The court concluded that no reasonable officer could have believed that Robinson's unobtrusive videotaping was unlawful, making his arrest a First Amendment violation and, in turn, making the arrest without probable cause in violation of the Fourth Amendment.[300] The court awarded the plaintiff more than $40,000 in compensatory and punitive damages.[301]

The outcome in *Robinson* contrasts with one effect of the broad anti-wiretap law in *Hyde* and reveals constitutional concerns with that broad prohibition. A law as broad as Massachusetts's means that any party to an event is free to withhold or withdraw consent to recording.

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matters of public interest"); Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (recognizing that plaintiff who was standing twenty to thirty feet away from state troopers conducting truck inspections had a First Amendment right to videotape); Connell v. Town of Hudson, 733 F. Supp. 465, 468–69 (D.N.H. 1990) (stating that news gathering is protected by the First Amendment "so long as [it] do[es] not unreasonably obstruct or interfere with [police efforts]").

295. LAPD REPORT, *supra* note 23, at 48–49. One of the Report's key findings was that officers on the scene of the May Day protest had not done enough to protect the press during the rally. R

296. 378 F. Supp. 2d 534.

297. *Id.* at 539; *see also supra* note 52 and accompanying text. R

298. *Robinson*, 378 F. Supp. 2d at 539–40.

299. *Id.* at 541.

300. *Id.* at 541–43, 545.

301. *Id.* at 545–46.

It thus empowers officers to order bystanders to stop recording or to leave the scene; these stop orders effectively work a denial or withdrawal of consent to record. Police might prohibit members of the public from documenting purported police misconduct for no other reason than to protect officers' own personal privacy interests. Therefore, had the truck searches in *Robinson* occurred in Massachusetts, the wiretap law would have provided a lawful basis for the officers to stop Robinson from recording, to confiscate his camera, and to arrest him, all robbing us of probative (even if not conclusive) evidence of police misconduct.

C. Toward a First Amendment Right to Record

Robinson is the paradigm of a secondary constitutional challenge to government restrictions on individual efforts to record police activities occurring in public. The success of such secondary challenges ultimately determines the real effect that video evidence will have in primary constitutional challenges to alleged police misconduct captured on audio or video, whether the recording is used in litigation or in policy decisions.[302] The greater the constitutional liberty of the people and the press to record police-public encounters, the greater the effect that video evidence has on primary civil rights enforcement against police misconduct, and the more we can say that the people truly are able to watch the government in a significant way.

These connections suggest the need for a fully developed First Amendment liberty to record public events, a need that increases with the continued development of smaller, easily used recording equipment and the technological ability of large numbers of people to gather and disseminate audio and video.[303] The need also increases as the evidentiary importance of, and judicial demand for, conclusive video evidence increases.[304]

Unfortunately, the source of this liberty to record has not been fully theorized. Most courts base it on some form of free speech lib-

302. Robinson was videotaping the truck searches, as a form of petition activity, because he believed police were conducting them in an unsafe manner and he wanted to bring the misconduct to the attention of his state representative. *Id.* at 538–39, 541. The arrest at issue in the § 1983 action was the second time that police had attempted to stop Robinson from recording these searches for this purpose. *Id.* at 539; *see supra* note 52 and accompanying text. R

303. ZICK, *supra* note 3, at 294; McDonald, *supra* note 70, at 262–63; *supra* notes 85–98 and accompanying text. R

304. *See* Marvin v. City of Taylor, 509 F.3d 234, 248–49 (6th Cir. 2007) (concluding that police did not violate arrestee's constitutional rights because video did not clearly depict excessive force as plaintiff described).

erty to gather information on matters of public interest occurring in public[305] or on the right of access to public spaces and meetings.[306] At a visceral level, "[t]aking photographs at a public event is a facially innocent act" that should not form the basis for arrest or liability.[307] And that might be doctrinally sufficient in the main run of public protest cases in which a rally participant records police halting public expression through dispersals and mass arrests.

As Barry McDonald has argued, however, this fragmented and incomplete understanding of the basis for the right to gather information, particularly in public, may "denigrate core First Amendment values" and "threaten to eliminate any sort of meaningful protection for the gathering of important information about other public affairs."[308] McDonald rejects the unthinking link to the First Amendment's Free Speech Clause because the conduct at issue—using cameras, audio and video recorders, and computers to gather information for dissemination—cannot, in itself, be characterized as "expressive activity."[309]

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

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305. *See* Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) ("The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing protester's "First Amendment right to film matters of public interest"); *Robinson*, 378 F. Supp. 2d at 541 (recognizing plaintiff's videotaping of state troopers as a "legitimate means of gathering information for public dissemination").

306. *See* Whiteland Woods L.P. v. Township of W. Whiteland, 193 F.3d 177, 183–84 (3d Cir. 1999) (holding that plaintiff's First Amendment right of access to public meeting was not violated by prohibition on videotaping where plaintiff was able "to compile a full record of the proceedings . . . [by] audiotaping").

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

308. McDonald, *supra* note 70, at 355. **R**

309. *Id.* at 270.

1. Free Press Clause

McDonald grounds a general right in the Free Press Clause, which he argues operates as an independent source of liberty for all individuals and organizations (not only the institutional press) to gather information of public value for purposes of public dissemination.[310] The Speech Clause protects dissemination of recorded information of its own force; the Press Clause does independent work by protecting the often-structured process of antecedent information-gathering conduct.[311] This proposed right has two elements. First, the information recorded must be the type of content that "could reasonably be said to foster or promote societal interests" in "informed democratic self-governance," including information about the operations and affairs of government[312] and official and public conduct of law enforcement.[313] Second, the events or information recorded must be "sought *for the purpose* of disseminating it to the public, and not just for individual consumption or dissemination to a limited audience selected for personal reasons."[314]

McDonald's standard plainly protects news media filming public political rallies, such as the protests in Miami or Los Angeles.[315] That standard also is consistent with acknowledged law enforcement obligations to guarantee media access and opportunity to record public events as they occur.[316] It also guarantees the ability of others on the scene to observe, record, and bear witness to events, even if not formally part of the institutional press.[317] And it should protect the plaintiff in *Robinson*, who recorded the truck searches to create a record of what he considered inappropriate police conduct, intending to present the recorded evidence to the state legislature.[318] This right prohibits police from halting or dissuading recording or from enforcing broad anti-wiretap laws, such as the one in Massachusetts.

It is less clear that McDonald's right extends to members of a protest group recording their own encounters with police. Protesters often are less concerned with information dissemination and their

310. *Id.* at 354.
311. *Id.*
312. *Id.* at 345.
313. *Id.* at 341–42.
314. *Id.* at 348.
315. *See supra* notes 21–23 and accompanying text. R
316. LAPD REPORT, *supra* note 23, at 48–49. R
317. *Cf.* Connell v. Town of Hudson, 733 F. Supp. 465, 466 (D.N.H. 1990) (entailing claim by free-lance photographer attempting to record police handling of traffic accident).
318. Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005); *see supra* notes 52, 302 and accompanying text. R R

purpose may not be primarily to inform the public. This again recalls Zick's argument that recording and disseminating information about government efforts to halt or restrict public expression should become part of a group's expression.[319] McDonald's model protects the recording itself, at least where some dissemination follows. Indeed, the Ninth Circuit in *Fordyce* accepted, albeit without discussion or contours, the idea that a member of a protest group who also was recording the march for dissemination on cable-access television was entitled to First Amendment protection in his videotaping.[320]

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

Of course, we might argue that civil litigation, especially constitutional claims against government and government officials, is a means of disseminating information about official misconduct—perhaps even a more important and more effective way of doing so.[321] Civil litigation is an open and public process, particularly at the trial stage.[322] Video and audio recordings that are part of the evidentiary record thus are disseminated to the public for consideration, viewing, and reaction. Civil rights litigation is inherently expressive.[323] McDonald's proposed standard thus could accord constitutional protection to all public recording of police conduct, even where the initial intended use of the video is for evidence in litigation.

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319. ZICK, *supra* note 3, at 257; *supra* notes 97–98. R

320. Fordyce v. City of Seattle, 55 F.3d 436, 438, 442 (9th Cir. 1995).

321. *See* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 685 (1999) ("Civil rights actions against the government present issues, at least as important, if not more so, than general speech about public officials.").

322. *See* Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT L. REV. 357, 361–62 (2006) (arguing that litigation is a public process, requiring public access to "the information that drives adjudication"); *see also* Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 50–53 (1984) (arguing for a narrow rule of public access to pre-trial discovery in certain cases where there is a substantial public interest, usually involving government misconduct).

323. *See* Paul B. Stephan, *A Becoming Modesty—U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 644 (2002) ("In articulating a sense of justice, both in the specific context of the lawsuit and in a broad normative sense of what the lawsuit teaches, litigation speaks to society as a whole.").

2. Petition Clause

A different liberty to record could be grounded in the First Amendment's Petition Clause.[324] The *Hyde* court rejected this argument, concluding that Hyde had freely exercised his right to petition for redress by bringing his complaint of police misconduct to the department, which investigated the incident, including a review of the audiotape of the encounter.[325] But it was the very petition (or the evidence presented in support of that petition) that led to his prosecution.[326] The court unfortunately did not acknowledge the need to document the police encounter antecedent to petitioning, blithely asserting that Hyde "was not prosecuted for making the recording; he was prosecuted for doing so secretly."[327] Of course, this response ignores that Massachusetts law is not about secrecy; it is about privacy and consent. State law would have empowered officers to halt even open recording; officers could have ordered Hyde to turn the recorder off, thereby denying their consent to be recorded in the name of their unadorned privacy rights against unwanted recording.[328]

The Petition Clause, properly conceptualized, might get us where McDonald's Press Clause model does not: defining a complete liberty of information gathering that covers all recording of law enforcement encounters. Civil litigation against government and government officials is recognized as protected petition activity, a form of calling on government to answer to, and provide redress for, grievances.[329] This includes judicial determinations that government officials have acted unlawfully.[330]

Carol Rice Andrews proposes a narrow petition liberty to file winning claims in court, a right which would subject all direct restrictions

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324. U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."); *see* Andrews, *supra* note 321, at 557–59 (recognizing Petition Clause as a basis for an individual's right of access to the courts); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 899 (1997) (arguing that the Petition Clause should be interpreted as a "guaranteed right to pursue judicial remedies for unlawful government conduct"). R

325. Commonwealth v. Hyde, 750 N.E.2d 963, 969 (Mass. 2001).

326. *Id.* at 965.

327. *Id.* at 969.

328. *See supra* notes 280–289 and accompanying text. R

329. Andrews, *supra* note 321, at 685; *see also* McDonald v. Smith, 472 U.S. 479, 484 (1985) ("[F]iling a complaint in court is a form of petitioning activity."); Cal. Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) ("The right of access to the courts is indeed but one aspect of the right of petition."); Andrews, *supra* note 321, at 587 ("[T]he Petition Clause independently protects access to court."). R R

330. Pfander, *supra* note 324, at 983. R

on court access to strict scrutiny.[331] Further, this core liberty to file winning suits requires "breathing room" to avoid a chilling effect, in the form of broader protections, for related non-core activity.[332] Breathing room demands some limited protection for the filing of losing suits as a buffer to the core right.[333]

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

Even if video is not, and should not be treated as, the overwhelming, objective, unambiguous, singular, and conclusive proof that courts and the public believe it to be, the descriptive reality, for the moment, is that courts, government officials, and the public all treat it as if it is. If video carries such evidentiary weight and significance, an individual, seeking to exercise his First Amendment liberty to file winning lawsuits, cannot be limited or prevented altogether from obtaining, in public spaces and in a non-interfering manner, persuasive evidence to support (to make into winning) claims arising out of his encounter with police.

Several considerations bolster this conclusion. First, law enforcement itself may be recording the encounter, so the plaintiff's recording simply provides additional probative evidence.[334] Second, absent any recording evidence, the he-said, she-said nature of the case typically works against plaintiffs and in favor of police.[335] Video evidence, balanced against testimony, moves the case away from the he-said, she-said field. Third, the burden of a case such as the Sixth Circuit's decision in *Marvin v. City of Taylor* cannot be overlooked. The *Marvin* court went beyond looking at video for consistency with the plaintiff's version, but granted summary judgment against the plaintiff when the

331. Andrews, *supra* note 321, at 663–64, 676–77. R
332. *Id.* at 680–83.
333. *Id.* at 683.
334. *See supra* notes 5–9, 216 and accompanying text. R
335. *See supra* note 100 and accompanying text. R

video did not affirmatively establish his claim.[336] If that is the burden of production that the plaintiff carries to get by summary judgment with his "winning claim," he only can satisfy that burden if he has a strong front-end liberty to obtain that video evidence through his own efforts.

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

The Supreme Court has held that the news gathering right does not necessarily guarantee the most effective way to gather information in government spaces and meetings.[337] One might argue that the right to file (and prove) winning claims is vindicated so long as a witness to the encounter is able to testify to events, without any additional right to bolster the evidentiary record with video or audio. Two things weigh against this argument. First, Andrews's point is not that all right-of-court-access rules are unconstitutional, only that they must satisfy some level of First Amendment scrutiny.[338] This shifts the burden of persuasion onto government to justify limitations on recording, something it likely cannot do as to recording in public spaces. Second, and related, government will be recording many of these same public encounters. Thus, a public right to record is necessary to maintain the balance of evidentiary power—to ensure that the public can watch Big Brother, just as Big Brother watches the public.

VI. CONCLUSION

Video is increasingly pervasive in society, as more and more people gain the ability to record the people and events around them. Video also is increasingly pervasive in law, as more and more of the events recorded in public become the basis for civil and criminal litigation and come to be used as evidence in that litigation.

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336. Marvin v. City of Taylor, 509 F.3d 234, 240, 248–49 (6th Cir. 2007); *see supra* notes 185–196 and accompanying text. R

337. *See* Estes v. Texas, 381 U.S. 532, 538, 550 (1965) (holding that court may place restrictions on types of news gathering inside courthouse).

338. *See* Andrews, *supra* note 321, at 560–62. R

Like much else in the law, video is neither an unadorned good nor an unadorned bad; the reality is far more complex. As evidence, it has high probative value in advancing the search for truth, but not so high that it should dominate a jury and its deliberations. It is important evidence, but not an unassailable source of proof, not the objective, true, singular, unambiguous evidence it so often is thought to be. And it should not be an excuse for courts to disregard ordinary procedure and rely on their own interpretations of video to take cases away from juries on summary judgment.

The goal here has been a proper, and properly nuanced, understanding of the role of video at the front end and back end of civil rights enforcement. At the front end, we must recognize the contours of a First Amendment liberty to video- and audio-record events occurring in public, one that guarantees individuals the right to record their own encounters with police and those encounters they witness. At the back end, we must understand the appropriate use to which video should be put as a source of proof in civil rights litigation arising from those police-public encounters.

Only with a clear and accurate understanding of these twin roles of video can we conclude that Ric Simmons was correct and Orwell incorrect—that technology has enabled the people to watch, and hold accountable, the government and not the other way around.