



2017

Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement

Howard M. Wasserman

Florida International University College of Law, howard.wasserman@fiu.edu

Follow this and additional works at: http://ecollections.law.fiu.edu/faculty_publications

 Part of the [Civil Procedure Commons](#), and the [First Amendment Commons](#)

Recommended Citation

Howard M. Wasserman, Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement, 96 N.C. L. Rev. 1313, 1362 (2018).

This Article is brought to you for free and open access by the Faculty Scholarship at eCollections @ FIU Law Library. It has been accepted for inclusion in Faculty Publications by an authorized administrator of eCollections @ FIU Law Library. For more information, please contact lisdavis@fiu.edu.

Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement

Howard M. Wasserman†

The story of police reform and of “policing the police” has become the story of video and video evidence. “Record everything to know the truth” has become the singular mantra and video has become the singular tool for ensuring police accountability and reform and for enforcing the rights of victims of police misconduct. Video can vindicate the public’s rights against police misconduct, assist government in punishing misbehaving officers and departments, and enable agencies to reform problematic and constitutionally defective policies and practices. From the government’s perspective, video enables officers to prove that their conduct was constitutionally appropriate, avoiding civil and criminal liability for the officers and the departments. And it allows governments to rebut criticism that it is failing to protect the public.

Three broad categories of video of police-citizen encounters have emerged. The first is police-controlled video, including body cameras, dashboard cameras, traffic-light cameras, and other government-controlled and -operated surveillance. The second is citizen¹-controlled video, created from smart phones and cell phones, small digital video and audio recorders, private-business surveillance cameras, and similar privately owned, controlled, and operated recording technology, distributed through blogs and social-networking sites. The third, although less-discussed, is live mainstream media coverage of large or breaking police-public encounters,² such as the saturation coverage of the protests *cum* riots in Ferguson in 2014.³ The media also enhances the power and force of the first two categories by publicizing and distributing “viral” videos created by other sources.

Arming everyone, public and private, with recording devices produces a balance of power in which all sides record police-public encounters. Big Brother is watching the people, but the people are watching Big Brother. Ric Simmons recognized the special potential role of citizen-controlled video in ensuring government accountability: “It is now evident that Orwell’s vision was wrong. Modern technology has turned out to be the totalitarian state’s worst enemy

† Professor of Law, FIU College of Law. Thanks to Jud Campbell and Margot Kaminsky for comments on early drafts. Thanks to David Ardia and Mary-Rose Papandrea and the editors of the North Carolina Law Review for inviting me to participate in this symposium.

¹ I use the word “citizen” to mean all members of the public, without intending to distinguish individuals who are citizens of the United States and individuals who are otherwise present in the United States, lawfully or otherwise.

² TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 257-58 (2009); Howard M. Wasserman, *Orwell’s Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 604 (2009).

³ Candice Norwood, *Media Framing in Black and White: The Construction of Black Male Identity, in Ferguson’s Fault Lines: The Race Quake That Rocked a Nation* 167, 167-68 (Kimberly Jade Norwood, ed., 2016); Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 832-33 (2015).

[I]t is the people who are watching the government, not the other way around.”⁴ Mary Fan praises this balanced “modern condition where everyone has incentive to record to contest or control the narrative.”⁵ She explains that

people and the police are recording each other from all directions, making everyone at once surveilled and surveiller. I am recording you, you are recording me, and the police are recording us too, because the people demand it. The lines of power and control radiate from all directions as people seek to document their perceptions and thus shape the narrative.⁶

Jocelyn Simonson offers an example of institutionalized mutual surveillance in the practice of “organized copwatching—groups of local residents who wear uniforms, carry visible recording devices, patrol neighborhoods, and film police-citizen interactions in an effort to hold police departments accountable to the populations they police.”⁷

Multiple constituencies support expanded use of bodycams and similar technology as the solution to police misconduct and the source of police reform. Fan argues that this universality of support demonstrates the “interest convergence thesis,” in which the “convergence of diverse interests across strange bedfellows produces major shifts in policy.”⁸

Broad public support is reflected in opinion polls⁹ and in support for a WhiteHouse.gov petition shortly after the 2014 shooting of Michael Brown and corresponding protests in Ferguson, Missouri.¹⁰ The Obama Administration and the Department of Justice under attorneys general Eric Holder and Loretta Lynch promoted video, by police and the public, as a major path to police reform. Promotion efforts included grants to law-enforcement agencies to establish or enhance body-camera programs, such as \$ 75-million award in December 2014¹¹ and a \$20-million to 106 agencies in September 2016.¹² DOJ entered consent

⁴ 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).

⁵ Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. 897, 908 (2017).

⁶ **Introduction to Prof. Fan's UNC contribution**

⁷ Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. 391, 393, 408 (2016).

⁸ Fan, *supra* note ___, at 927.

⁹ *Sharp Racial Divisions in Reactions to Brown, Garner Decisions: Many Blacks Expect Police–Minority Relations to Worsen*, PEW RES. CTR. (Dec. 8, 2014), <http://www.people-press.org/2014/12/08/sharp-racial-divisions-in-reactions-to-brown-garner-decisions/>

¹⁰ Aja J. Williams, *Petition Asking Cops to Wear Body Cameras Passes 100K*, USA TODAY (Aug. 20, 2014, 12:11 PM), <http://www.usatoday.com/story/news/politics/2014/08/20/mike-brown-law-petition/14336311/>.

¹¹ **Prof. Harris UNC Contribution**

¹² *Department of Justice Awards Over \$20 Million to Law Enforcement Body-Worn Camera Programs*, DEP'T OF JUSTICE (Sept. 26, 2016), <https://www.justice.gov/opa/pr/department-justice-awards-over-20-million-law-enforcement-body-worn-camera-programs>.

decrees in civil-rights actions¹³ against police departments in Ferguson¹⁴ and Baltimore¹⁵ that required both departments to establish and maintain effective body-camera programs. Federal legislators have offered bodycam proposals.¹⁶ A 2014 joint report by the Department of Justice and the Police Executive Research Forum (“PERF”) offered more than 30 recommendations for state and local departments establishing body cameras, the central point being that agency policies and training materials must provide clear, specific, and detailed guidelines on all aspects of the use of cameras.¹⁷ The 2015 Final Report of the President’s Task Force on 21st-Century Policing highlighted the potential for new policing technology, including cameras, as one of the pillars of modern policing and recommended expanded study and use.¹⁸ The American Civil Liberties Union drafted model body-camera legislation, requiring recording of all encounters, subject to limited exceptions, with broad disclosure of videos.¹⁹

Two stakeholders do not share this enthusiasm. One is rank-and-file police officers and officer unions. While initially supportive, they have backed away, concerned with lack of control over the decision when to record and over subsequent release and use of the resulting video, which may cause officers embarrassment or worse.²⁰

The more problematic holdout is the Trump Administration and the Department of Justice under Attorney General Jeff Sessions, who reject the basic premise of the need for police reform or the propriety of federal oversight as a vehicle for achieving it. Shortly after President Trump’s inauguration, the White House web page announced a policy of “Standing Up For Our Law Enforcement Community.”²¹ The new Administration would “honor our men and women in uniform and . . . support their mission of protecting the public,” and recognized that the “dangerous anti-police atmosphere in America is wrong [and] the Trump

¹³ See 42 U.S.C. § 14141; Stephen Rushin and Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721, 741-44 (2017).

¹⁴ Consent Decree, *United States v. City of Ferguson* (E.D. Mo. 2016) (No. 4:16-CV-00180-CDP), <https://www.justice.gov/opa/file/833431/download>

¹⁵ Consent Decree, *United States v. Police Dep’t of Baltimore* (D. Md. 2017) (No. 1:17-CV-00099-JKB), <http://s3.documentcloud.org/documents/3284089/Conset-Decree-Agreement.pdf>

¹⁶ Creating Accountability by Making Effective Recording Available Act of 2015 (Police CAMERA Act), H.R. 1680, 114th Cong. (2015); Arthur Delaney, *Adam Schiff Pushes Body Cameras for Cops*, HUFFINGTON POST (Aug. 27, 2014), http://www.huffingtonpost.com/2014/08/27/body-worn-cameras_n_5722762.html.

¹⁷ POLICE EXECUTIVE RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED (2014), available at http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf

¹⁸ https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf (Pillar 3).

¹⁹ A MODEL ACT FOR REGULATING THE USE OF WEARABLE BODY CAMERAS BY LAW ENFORCEMENT (AM. C.L. UNION 2017), <https://www.aclu.org/other/model-act-regulating-use-wearable-body-cameras-law-enforcement>.

²⁰ **Harris UNC Contribution; White UNC Contribution**

²¹ *Standing Up For Our Law Enforcement Community*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/law-enforcement-community> (last visited Mar. 9, 2017).

Administration will end it.”²² Early in his tenure as Attorney General, Sessions pledged to pull back from his predecessors’ aggressive use of § 14141 actions and consent decrees imposing federal judicial oversight of local police departments, in favor of helping police officers better perform their jobs without undermining respect for law enforcement or making their jobs more difficult.²³ Sessions later issued a memorandum identifying a series of principles the department would seek to advance, including promoting officer safety, officer morale, and public respect for police work.²⁴ It is not clear how body cameras fit the administration’s new mission and focus with respect to police reform—whether cameras and video help police better perform their jobs or whether they reflect an anti-police attitude and a new means of interfering and undermining respect for police.

The Trump Administration’s recalcitrance on police-controlled recording places in stark relief the dramatic and immediate change from the Obama Administration with respect to all federal efforts at police reform. The ancien administration made extensive use of § 14141 civil actions for equitable relief agaisny patterns-and-practices of constitutionally violative behavior in state and local law-enforcement agencies, obtaining consent decrees against almost twenty departments.²⁵ The Trump Administration and Sessions DOJ have rejected the premise of federal oversight of local police departments or that patterns-and-practices of constitutional misconduct exist, as opposed to occasional lone bad actors.²⁶ Again, it remains to be seen how that affects the use of police- or citizen-controlled video. The department sought a 90-day delay so it could reconsider or revise the Baltimore consent decree; the district judge refused, insisting that the time for negotiation had passed.²⁷

Citizen-controlled video has become as prominent and essential as police-controlled video in reform efforts. The Ferguson and Baltimore consent decrees required the departments to recognize, respect, and train officers to protect the right to “observe and record officers in the public discharge of their duties in all traditionally public spaces”²⁸ and to “peacefully photograph or record police officers performing their law enforcement duties in public.”²⁹ Ferguson previously acknowledged First Amendment protection for the right to record in a consent decree resolving a § 1983 action arising from the 2014 protests.³⁰ Six federal courts

²² *Id.*

²³ *Attorney General Jeff Sessions: “We Are In Danger” of Rising Violence*, USA TODAY (Feb. 28, 2017, 12:39 PM), <http://www.usatoday.com/story/news/politics/2017/02/28/attorney-general-jeff-sessions-we-danger-rising-violence/98524544/>.

²⁴ Jeffrey B. Sessions, *Supporting Federal, State, Local, and Tribale Law Enforcement*, DEP’T OF JUSTICE (Mar. 31, 2017), <https://www.documentcloud.org/documents/3535148-Consentdecreebaltimore.html>.

²⁵ Rushin and Edwards, *supra* note 779, App. B.

²⁶ Sessions Memo; *supra*.

²⁷ Daniel Victor, *Judge Approves Consent Decree to Overhaul Baltimore Police Department*, N.Y. TIMES (Apr. 7, 2017).

²⁸ Consent Decree, *United States v. City of Ferguson*, *supra* note ____.

²⁹ Consent Decree, *United States v. Police Dep’t of Baltimore*, *supra* note ____.

³⁰ Consent Decree, *Hussein v. Cty. of St. Louis*, No. 4:14-cv-1410 (E.D. Mo. Nov. 21, 2014).

of appeals—the Eleventh Circuit,³¹ Ninth Circuit,³² First Circuit,³³ Seventh Circuit,³⁴ Fifth Circuit,³⁵ and Third Circuit³⁶—have recognized a First Amendment right for members of the public to record police and other public officials performing their public functions in public spaces. In 2012, DOJ argued in litigation that “[r]ecording governmental officers engaged in public duties is a form of speech through which private individuals may gather and disseminate information of public concern, including the conduct of law enforcement officers.”³⁷

The period of late 2017-2018 offers an opportune moment to consider video and its role in police reform, in criminal prosecution, and in civil-rights litigation surrounding.

This year marks significant technological anniversaries.³⁸ The iPhone, which has made citizen video pervasive, turned ten in 2017,³⁹ while digital video-recording technology, alone and in cell phones, is about 15 years old.⁴⁰ More than half of adults in the United States have smartphones and more than 90% have cell phones.⁴¹ Dashcam technology was introduced in the late 1980s, but became prominent approximately 20 years ago in the early ‘00s, promoted through federal funding for recording technology in response to an increase in public assaults on officers and in allegations of police abuse.⁴² Body-camera technology developed in Britain in 2005 and came to the United States around 10 years ago.⁴³

This year also marks significant legal and political anniversaries. The transition in civil-rights enforcement commitments from Obama to Trump is in full swing more than one year into the Trump presidency. It has been ten years since the Supreme Court in *Scott v. Harris*⁴⁴ approved summary judgment based on dashcam video of a police chase, concluding that video evidence can “speak for itself”⁴⁵ in telling a singular story with which no reasonable jury could disagree.⁴⁶ It has been eight years since publication of the Harvard Law Review article in which Dan Kahan, David Hoffman, and Daniel Braman destroyed the underlying premise of

³¹ *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000).

³² *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 2005).

³³ *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011).

³⁴ *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012).

³⁵ *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017).

³⁶ *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017).

³⁷ Letter of U.S. Dep’t of Justice in *Sharp v. Baltimore City Police Dep’t*, May 14, 2012.

³⁸ **Cite to Stoughton UNC Contribution throughout this section**

³⁹ Arielle Pardes, *iPhone Turns 10: How It Became the Everything Machine*, WIREd, June 29, 2017.

⁴⁰ Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 339-40 (2011).

⁴¹ Fan, *supra* note ___, at 907.

⁴² Bradley X. Barbour, Note, *Big Budget Productions with Limited Release: Video Retention Issues With Body-Worn Cameras*, 85 FORDHAM L. REV. 1725, 1730-32 (2017).

⁴³ *Id.*; Mary D. Fan, *Missing Body Camera Videos: Evidentiary Fairness Beyond Blame*, 52 GA. L. REV. ___, 9 (forthcoming 2018).

⁴⁴ 550 U.S. 372 (2007).

⁴⁵ *Id.* at 1775 n.5.

⁴⁶ *Id.* at 1775-76.

Scott, showing that what the *Scott* video (and, by logical extension, all video) showed depended on who was watching.⁴⁷ And it has been ten years since Simmons’ insight, prior to the exponential acceleration of the technological revolution of smartphones and body-cams, about Orwell and the power of the public to watch, record, and check the government.

I have written about video evidence, in particular the insistence that body cameras offer the solution to the problem of police misconduct. I have described my position as uncertain-but-cautious hope and support—cameras are a good idea, but the details of how camera programs operate and how video evidence is used in litigation and public debate matter.⁴⁸ The rhetoric surrounding recording of police must reflect the reality—the benefits of video and video evidence in providing police transparency, accountability, and accuracy in litigation, while perhaps real, should not be overstated. And “perhaps” is an important qualifier, as a study of body cameras involving more than 2000 officers in Washington, D.C. showed no “detectable average effects” on documented uses of force, citizen complaints, or behavior by police or citizens in public encounters.⁴⁹ The more-mixed empirical record has not dampened the technological enthusiasm.

This Article approaches the problem of video evidence and recording of police from a different angle. It explores procedural issues surrounding video recording and video evidence as they arise in civil⁵⁰ and criminal⁵¹ litigation challenging, *ex ante* or *ex post*, police misconduct; efforts to hold individual officers or departments accountable; and efforts to reform departmental policies, regulations, and practices. Part I criticizes the continued belief among courts, government officials, and commentators that video “speaks for itself,” the procedural and evidentiary errors to which that belief leads, and the problems it creates for civil-rights enforcement. Part II considers how video creates evidentiary advantages for the government—whether prosecution and police in a criminal prosecution or defendant officers in civil-rights litigation. Part III explores the promise and limits of citizen-created and –controlled video, considering the existence and nature of a First Amendment right to record police performing their public duties in public and the problems individuals encounter in attempting to enforce and vindicate that right. Part IV considers the effects video has outside of litigation; these include executive decisions to pursue criminal charges against police officers for misconduct and to

⁴⁷ Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes Are You Going to Believe?* *Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009).

⁴⁸ Howard M. Wasserman, *The Uncertain Hope of Body Cameras*, in FERGUSON’S FAULT LINES: THE RACE QUAKE THAT ROCKED A NATION 217, 218 (2016); Howard M. Wasserman, *Recording of and by Police: The Good, the Bad, and the Ugly*, 20 J. GENDER, RACE & JUST. 543, 547 (2017); Wasserman, *Moral Panics*, *supra* note ___, at 832-33; Wasserman, *Orwell’s Vision*, *supra* note ___, at 608-09.

⁴⁹ *Randomized Controlled Trial of the Metropolitan Police Dep’t Body-Worn Camera Program*, THE LAB@DC, <http://bwc.thelab.dc.gov/>; Amanda Ripley, *A Big Test of Police Body Cameras Defies Expectations*, N.Y. TIMES (Oct. 20, 2017); **White UNC Contribution**

⁵⁰ 42 U.S.C. § 1983; *id.* at § 14141

⁵¹ 18 U.S.C. § 242.

settle civil-rights litigation in response to public outrage at a video-recorded incident.

I. “Allow the Video to Speak for Itself”

Scott v. Harris was a § 1983 action arising from a high-speed police chase that ended when the pursuing officer intentionally rammed the fleeing car, causing it to careen off the road and into a ravine, leaving the driver permanently paralyzed.⁵² The primary evidence in the record was dashcam video from the pursuing officer’s squad car, which the Court posted to its website so it could “speak for itself.”⁵³ With only Justice Stevens dissenting, the Court held that summary judgment in favor of the officer was proper on the driver’s Fourth Amendment claim, because the video told only one, “quite . . . different” story from the driver’s testimony—that the driver, traveling at a high rate of speed and weaving in and out of traffic, posed an imminent risk to persons in the immediate area, making constitutionally reasonable the use of force to terminate the chase and end the threat to the public.⁵⁴ Video, in the Court’s telling, provided conclusive objective evidence telling a singular story. That single story overrode, and allowed the court on summary judgment to disregard, all competing evidence, including the victim’s testimony that he was driving safely (if fast) and did not pose a threat to the public because the roads were empty.⁵⁵ The Court could disregard that testimony because it was “blatantly contradicted” by the record⁵⁶—that is, by the video, which possessed one objective, obvious meaning that a court could determine and that no reasonable jury could understand differently, regardless of how it judged the victim’s testimony and credibility.

Scott fundamentally misunderstood video and video evidence. Video does not possess a singular meaning or present a singular story to all viewers that obviates a factfinder or allows the court such leeway on summary judgment. Video functions as any other piece of evidence—it captures and offers limited information and its meaning must be processed and understood by whoever views or hears that information.⁵⁷

From the front end of what video presents comes the insight familiar to every undergraduate film student—what video “says” or “means” is limited by what is inside and outside the camera’s frame, what is included or not included in the image, and the “camera’s perspective (angles) and breadth of view (wide shots and focus).”⁵⁸ The meaning of a video changes with the length of the video, steadiness

⁵² *Id.* at 374-75.

⁵³ *Id.* at 378 n.5.

⁵⁴ *Id.* at 379-80.

⁵⁵ *Id.* at 378-79.

⁵⁶ *Id.* at 380.

⁵⁷ **Stoughton UNC Contribution**

⁵⁸ Jessica M. Silbey, *Cross-Examining Film*, U. MD. L.J. RACE, REL., GENDER & Class 17, 29, 38 (2008).

of the camera,⁵⁹ and other details of the recording, such as distances, perspectives, light, color, sound, sound quality, visual quality, and angles.⁶⁰ “All films have a point of view or voice,”⁶¹ but the voice and story change from different angles, details, and perspectives reflected in different videos.⁶²

The back end recognizes that video, like any other piece of evidence, must be processed, interpreted, and understood by the factfinder.⁶³ The work of Dan Kahan and his co-authors at Yale’s Cultural Cognition Project⁶⁴ has explored and revealed the nature of and influences on that interpretation. Their empirical studies have exposed the fallacy of *Scott* and those who insist that video offers an absolute truth or singularity. They show that video does not speak for itself; what video “says” depends on who is watching and the “priors” each viewer brings with her. Video’s meaning is affected by a complex combination of cultural, demographic, social, political, racial, gender, ideological, and experiential characteristics. That is, reasonable jurors could disagree about the meaning of a video because that meaning is influenced, if not determined, by the personal and political characteristics each juror brings to her task of viewing, interpreting, and understanding.⁶⁵

Two Kahan studies are particularly relevant to this discussion. The first is the original 2009 study in *Whose Eyes are You Going to Believe*, in which researchers took the Court up on its offer to let video speak for itself by showing the chase video to study participants. While the majority of viewers in the study interpreted the *Scott* video as the Court did, the minority of viewers who disagreed with the Court’s view shared demographic and ideological characteristics and “a distinctive understanding of social reality that informs their views of the facts.”⁶⁶ The second study is *They Saw a Protest*, in which the authors showed video depicting a crowd outside a building that was alternately identified as a reproductive-health clinic or a military recruitment center during the period in which openly LGBT persons were barred from military service. Opinions about abortion and about LGBT rights corresponded with whether a viewer saw a peaceful-but-emphatic protest or a riot and threatening blockade of the building.⁶⁷

Both studies explain public reactions to high-profile video cases. Viewer positions and experiences on race, class, law-and-order, and the theory of “broken

⁵⁹ *Id.* at 38; Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 COLUM. J.L. & ARTS 107, 147, 161 (2005); Jessica Silbey, *Criminal Performance: Film, Autobiography, and Confession* 37 N.M. L. REV. 189, 202-03, 214 (2007).

⁶⁰ Silbey, *Cross-Examining*, *supra* note ____, at 38; Silbey, *Filmmaking*, *supra* note ____, at 146; Wasserman, *Orwell’s Vision*, *supra* note ____, at 640.

⁶¹ Silbey, *Cross-Examining*, at 29

⁶² Silbey, *Filmmaking*, at 147.

⁶³ *Id.* at 173.

⁶⁴ *The Cultural Cognition Project* at Yale Law School, <http://www.culturalcognition.net/>.

⁶⁵ Dan M. Kahan, David A. Hoffman, Donald Braman, and Danieli Evans, “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN L. REV. 851, 854-55 (2012); Kahan, Hoffman, and Braman, *supra* note ____, at 841.

⁶⁶ Kahan, Hoffman, and Braman, *supra* note ____, at 865, 886.

⁶⁷ Kahan, Hoffman, Braman, and Evans, *supra* note ____, at 883-85.

windows” policing influence interpretations of video of the strangulation death of Eric Garner at the hands of New York City Police Officer Daniel Pantaleo.⁶⁸ Reactions to video of protests and police attempts to break-up protests—in Ferguson and elsewhere following the shooting death of Michael Brown,⁶⁹ the non-indictment of Officer Darren Wilson in the Brown shooting,⁷⁰ or in St. Louis following the 2017 acquittal of Officer Jason Stockley in the shooting death of Anthony Lamar Smith⁷¹—track viewer positions on law-and-order, the freedom of speech, the propriety of public protest in public spaces, and, likely, the underlying events and judicial decisions being protested.⁷² A viewer who believes that the protested shooting was wrongful and that public protest is essential First Amendment activity promoting social change is more likely to see a constitutionally protected peaceful protest broken up by over-zealous police; a viewer who believes the shooting was justified is more likely to see outnumbered police struggling to maintain order against a lawless riot.

Nevertheless, courts and commentators continue to espouse *Scott’s* mistaken position on the “truth” of recording evidence and how it can be used in litigation. Video continues to be treated as an objective, unbiased, transparent observer of events that evenhandedly reproduces reality for the viewer, providing raw, unambiguous, and unbiased evidence showing conclusively and certainly what happened in the real world. Courts continue to use video to relieve themselves of traditional reliance on one-sided testimony to reconstruct events, to find a necessary check on the fallibility of human perception, and to allow factfinders to replay and perceive events free of adverseness, passion, and partisanship that plagues traditional witness testimony.⁷³ Video continues to be seen as more likely to be “much more accurate than other means of conveying information,” which “increases the credibility and reliability of expression but also may allow more information to be translated quickly in a manner unfiltered by a third-party account.”⁷⁴ In recognizing a First Amendment right to record, the Third Circuit argued that “to record what there is the right for the eye to see or the ear to hear corroborates or lays aside subjective impressions for objective facts. Hence to record is to see and hear more accurately.”⁷⁵

⁶⁸ Joseph Goldstein & Marc Santora, *Staten Island Man Died from Chokehold During Arrest, Autopsy Finds*, N.Y. TIMES (Aug. 1, 2014).

⁶⁹ Annys Shin, *Recalling the protests, riots after fatal police shooting of Michael Brown*, N.Y. TIMES MAGAZINE (Aug. 3, 2017); Chad Flanders, *Ferguson and the First Amendment*, in FERGUSON’S FAULT LINES, *supra* note ___, at 198, 206-07.

⁷⁰ Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer is Not Indicted*, N.Y. TIMES (Nov. 24, 2014); Nicholas St. Fleus, *Scenes From a Ferguson Protest in New York City*, THE ATLANTIC (Nov. 25, 2014).

⁷¹ Mark Berman, Wesley Lowery, and Andrew deGrandpre, *Police and protesters clash in St. Louis after former officer who shot black driver acquitted on murder charges*, WASH. POST (Sept. 16, 2017).

⁷² Flanders, *supra* note ___, at 198.

⁷³ Fan, *supra* note ___, at 955; Justin Marceau and Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 1010 (2016).

⁷⁴ Marceau and Chen, *supra* note ___, at 1009-10.

⁷⁵ *Fields v. City of Philadelphia*, 862 F.3d 35, 3593 (3d Cir. 2017).

The problem is a failure to distinguish persuasiveness from moral certainty. Video may be a more “credible representation of reality” that can “persuade all the more powerfully, generating less counterargument and retaining the viewers’ belief.”⁷⁶ Video can “validate or undermine” accounts of events and “help resolve the conflict not only for the parties immediately involved but also in the interests of the broader community.”⁷⁷ But courts must resist what literature scholar Peter Brooks calls the “reality effect,” the idea that video is, in and of itself, the thing or event depicted, rather than one more piece of evidence of the thing depicted that a factfinder can consider and use.⁷⁸ The failure to distinguish the concepts undermines the process in which courts resolve disputes.

The Supreme Court repeated its mistake, this time unanimously, in *Plumbhoff v. Rickard*.⁷⁹ The Court again approved summary judgment in favor of the defendant officers on a Fourth Amendment excessive-force claim arising from a high-speed chase, again understanding the dashcam video as telling one obvious story of the plaintiff posing a grave risk to public safety that officers properly terminated with deadly force, even at the risk of serious injury or death to the “fleeing” motorist.⁸⁰ As in *Scott*, the Court accepted the video in the record to show conclusively that the plaintiff posed a threat to the public with his “outrageously reckless” driving.⁸¹ The video “conclusively disprove[d]” the plaintiff’s allegations about whether the chase was over, whether he intended to resume flight, and whether he still was maneuvering the car.⁸² And the video showed that the driver was “obviously pushing down on the accelerator” and that he threw the car into reverse “in an attempt to escape.”⁸³ The Court could decide this from its review of the video, with no further proceedings or factfinder consideration necessary or appropriate. *Plumbhoff* did not acknowledge the role of video in its decision, as had *Scott*. Justice Alito’s majority opinion recited facts and described what happened during the chase, without identifying video as the source of its facts or conclusions or placing the video on the Court website for the public to watch and consider. Only references to video during argument⁸⁴ and the Court’s reliance on *Scott* as controlling precedent indicated video’s prominent role in the case.

The evidentiary limits of video become clear in cases with multiple or competing videos. Several studies show that a second video, taken from a different and often broader angle, tells a different, often contradictory, story than does a

⁷⁶ Richard K. Sherwin, *Introduction*, in *POPULAR CULTURE AND LAW* xiv (Richard K. Sherwin ed., 2006).

⁷⁷ Marceau & Chen, *supra* note ____, at 1010.

⁷⁸ Peter Brooks, *Scott v. Harris: The Supreme Court’s Reality Effect*, 29 *L. & LITERATURE* 143, 147 (2017); Silbey, *Critics*, *supra* note ____, at 519; Silbey, *Cross-Examining*, *supra* note ____, at 17-18, 20.

⁷⁹ 134 S. Ct. 2012 (2014).

⁸⁰ *Id.* at 2017-18, 2021-22; Wasserman, *Summary Judgment*, *supra* note ____, at 1335-36.

⁸¹ *Plumbhoff*, 134 S. Ct. at 2021.

⁸² *Id.*

⁸³ *Id.* at 2021-22.

⁸⁴ Transcript of Oral Argument at 12, *Plumbhoff v. Rickard*, 134 S. Ct. 2012 (2014) (No. 12-1117).

single, narrow body-camera video.⁸⁵ There is a reason that every witness to an incident or to police activities has her phone out—each wants to create and keep a unique record of events because each resulting video is a unique piece of evidence.⁸⁶ But if different videos of the same occurrence can tell different stories depending on the internal elements of that video—especially a different angle or different width of visual field—no one video can be correct or tell the entire story.

During argument in 2017's *Hernandez v. Mesa*,⁸⁷ the Court ignored an example that should have shown how courts have gone astray in their reliance on video. *Hernandez* was a *Bivens* action against a border-patrol officer arising from a cross-border shooting—the officer was standing in the United States when he fired, while the victim, a Mexican national, was standing at or near the Rio Grande culvert marking the U.S./Mexico border. The officer was cleared by a departmental investigation.⁸⁸ The incident was captured by several surveillance cameras, with one video from one camera circulating on YouTube. During argument, the following exchange occurred between Justice Sotomayor and counsel for the United States:

JUSTICE SOTOMAYOR: -- go back to my hypothetical. Border policemen are shooting indiscriminately from within the United States across the border. This is the allegation in this complaint. And I understand you say the government has investigated and sees the facts differently. Have you seen the -- the film that appeared on the YouTube?

MR. KNEEDLER: I have.

JUSTICE SOTOMAYOR: I did, and I can't square the police officer's account of this incident with that film.

MR. KNEEDLER: There were other videos. The -- the -- the press release -- nothing in the record and nothing in a -- in a public account -- * * * ---there was other evidence and other video-surveillance videos that were taken into account in the investigation.⁸⁹

Unfortunately, everyone missed the point and its significance for the debates over cameras and video evidence. If other videos could justify a different result in the departmental investigation despite adverse video, no single video can be conclusive as a matter of law. Every video offers one unique perspective out of multiple perspectives on one story, none necessarily truer than another.⁹⁰ If other (non-video) evidence could justify a different outcome in the departmental

⁸⁵ **Stoughton UNC Contribution**; Timothy Williams, et al., *Body Cameras: What Do You See?*, N.Y. Times (Apr. 1, 2016) https://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html?_r=0.

⁸⁶ **Stoughton UNC Contribution? Or Fan UNC Contribution**

⁸⁷ 137 S. Ct. 2003 (2017) (per curiam).

⁸⁸ *Id.* at 2004-06.

⁸⁹ Transcript of Oral Argument at 50-51, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118).

⁹⁰ Silbey, *Filmmaking*, *supra* note ____, at 147.

investigation despite the adverse video, then contradicting non-video evidence should play a similar role in civil-rights litigation, precluding summary judgment based on the court's singular view of what video says and disregard for contrary non-video evidence. As a court on summary judgment cannot choose between competing witness accounts,⁹¹ so should it not choose between competing videos or between competing video and testimonial evidence. A litigation factfinder should be given an opportunity to review all of disparate pieces of evidence, determine their meaning and credibility, and make its decision.

The public reaction to the outcomes of prosecutions of police officers in cases involving publicly disclosed body-cam and dashcam evidence illustrates the error of *Scott* and the correctness of Kahan's insights that video can have multiple reasonable meanings and messages.⁹² In a string of notorious cases, officers have been not charged or not convicted in shooting cases where the incident was recorded and the judicial decision contradicted the wider public perception of the video, triggering public outrage, protests, and demonstrations.⁹³ Accepting that the public was not protesting the outcome simpliciter—a white police officer was not convicted of shooting an African-American person, *ergo* the outcome was unjust and grounds for protest—the anger must have been based on different perceptions and understandings of the video evidence. And those different perceptions and understandings derived from the viewers' distinct demographics, political attitudes, and life experiences that Kahan and his co-authors identified as influencing viewer understanding of video. That the public could disagree with the grand jury, jury, or judge means video cannot be singular—either different viewers reached different conclusions about the meaning of the video or other evidence changed the prevailing view of the video in the formal proceeding. Either way, video did not present the single truth, but could be and was overcome by something beyond the images themselves.

It is not clear who reached the “correct” or “accurate” result in these cases—the non-convicting factfinders or the righteously indignant public.⁹⁴ It does not matter. The point is that video is subjective and the assumption of the video's objective singularity is wrong.

The judicial process must recognize and incorporate this insight, as judges are uniquely equipped to do.⁹⁵ Courts cannot throw away the ordinary rules of evidence and procedure when video is part of the record. A court on summary

⁹¹ 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).

⁹² Kahan, Hoffman, and Braman, *supra* note ___, at 897.

⁹³ Davey & Bosman, *supra* note ___; Wesley Lowery, *Graphic video shows Daniel Shaver sobbing and begging officer for his life before 2016 shooting*, WASH. POST (Dec. 8, 2017); Berman, Lowery, & deGrandpre, *supra* note ___; Josh Saul, *South Carolina Cop Pleads Guilty in Shooting that Sparked Black Lives Matter Protests*, NEWSWEEK (May 2, 2017); Afi Scruggs, *Tamir Rice protesters picket house of Cleveland prosecutor Timothy McGinty*, THE GUARDIAN (Jan. 1, 2016).

⁹⁴ Kahan, Hoffman, and Braman, *supra* note ___, at 881.

⁹⁵ *Id.* at 897.

judgment cannot view the evidence “in the light depicted by the videotape”⁹⁶ because the videotape lacks a singular meaning in which other evidence can be viewed. The video, as with any other piece of evidence, must be viewed in the light most favorable to the non-movant on summary judgment because the jury (or individual jurors) may (and statistically, some will) view the video differently than the court, based on their attitudes and experiences. And none of those competing viewpoints should be boxed or rejected as unreasonable.

That insight applies beyond summary judgment. It is true that at most trials, video evidence will prevail with factfinders over competing testimonial evidence, who see it a more salient than verbal descriptions.⁹⁷ But Kahan’s studies about viewer interpretation and scholarship about how video forms and presents its message remain significant at trial. They should remind courts that the place for subjective interpretations of video and comparison with non-video evidence is a trial before a factfinder, not summary judgment that preempts the ordinary civil-litigation process and labels competing understandings of video unreasonable.⁹⁸ They also should remind factfinders in civil and criminal proceedings not to place blind faith in video, but to recognize its limitations and its connections with and complementarity to non-video evidence. Factfinders must decide the case in light of all the evidence, including their subjective interpretation in understanding and applying video evidence.

II. Evidentiary Advantages for Law Enforcement

Commentators have described the evidentiary advantages that police officers enjoy in litigation, as witnesses in criminal prosecutions against arrestees and as defendants in civil and criminal proceedings.⁹⁹ Judges and juries tend to view officer’s testimony as more credible than that of citizens in a he-said/he-said contest between one police officer and one suspect,¹⁰⁰ an “ugly battle” that is “highly imbalanced in power.”¹⁰¹ Judges and juries are reluctant to openly discredit law-enforcement officer testimony, where an adverse finding that the officer is lying or is not credible could destroy a career.¹⁰²

Advocates argue that video evidence can overcome that imbalance by offering objective information that does not depend on credibility determinations or the

⁹⁶ *Scott*, 550 U.S. at 381.

⁹⁷ Kreimer, *supra* note ____, at 951.

⁹⁸ Kahan, Hoffman, and Braman, *supra* note ____, at 884-85; Wasserman, *Orwell’s Vision*, *supra* note ____, at 641, 643-44

⁹⁹ David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 471-72 (1999); Fan, *supra* note ____, at 31-32; Richard A. Leo and Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogations*, 88 J. CRIM. L. & CRIMINOLOGY 429, 495 (1998).

¹⁰⁰ Dorfman, *supra* note ____, at 471-72; Simmons, *supra* note ____, at 565.

¹⁰¹ Fan, *supra* note ____, at 32.

¹⁰² *Id.* at 31; Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1043 (1996).

subjectivity of adversary proceedings.¹⁰³ But that tendency to believe law-enforcement testimony has migrated into how courts view video evidence, with the jury or court (on summary judgment) more likely to adopt police officers' asserted interpretation of the video's singular meaning and story, at the expense of a competing narrative of the video's meaning. The Court did this on summary judgment in *Scott* and *Plumbhoff*. Lower courts grant summary judgment for officers by relying on ambiguous or apparently police-friendly video¹⁰⁴ or by ignoring adverse video.¹⁰⁵ This tendency accompanies a shift in law enforcement's view of the purpose of police-controlled video—not to reveal official wrongdoing or gain government accountability, but to obtain evidence for criminal prosecutions of members of the public.¹⁰⁶

The 2017 acquittal of former St. Louis police officer Michael Stockley illustrates the tendency. Stockley was charged in state-court with murder arising from the shooting death of Anthony Lamar Smith following a high-speed chase. The case presented numerous recording-evidence issues. Dashcam video of the chase captured Stockley telling his partner “we’re killing this motherfucker, count on it” during the chase. Video of the aftermath of the chase showed Stockley walking to the victim’s car, firing five shots, returning to his squad car and rifling through a bag, then returning to Smith’s car. At that point, another officer turned the dashcam off, leaving only a blurry cellphone video, taken by a bystander, as evidence. That citizen-controlled video did not clearly show whether Stockley was carrying a second gun (the prosecution alleged that Stockley planted a gun in Smith’s car to set-up a self-defense defense).¹⁰⁷

In a bench trial, the judge resolved every video issue in Stockley’s favor. Comments about “killing” Smith were ambiguous, a means of releasing tension during the chase rather than a statement of intent. The court drew no adverse inferences from officers turning the dashcam off or from Stockley violating department procedure in rifling through a bag in his car or moving back and forth between Smith’s car and the squad car. And the ambiguity of the citizen video meant that government had not proven that Stockley planted a second gun.¹⁰⁸

The Sixth Circuit took a similarly officer-centric approach to video on summary judgment in *Marvin v. City of Taylor*.¹⁰⁹ The case involved claims of excessive force arising from the arrest of the plaintiff on a DUI charge and his transportation to the police station. Events at the station house were videotaped,

¹⁰³ Fan, *supra* note ____, at 955.

¹⁰⁴ *Gillis v. Pollard*, 554 F. App’x 502, 504 (7th Cir. 2014); *Kalfus v. City of Syracuse*, 476 F. App’x 877, 880-81 (2d Cir. 2012); *Marvin v. City of Taylor*, 509 F.3d 234, 239, 248-49 (6th Cir. 2007);

¹⁰⁵ *Buckley v. Haddock*, 292 F. App’x 791, 796 (11th Cir. 2008); *but see id.* at 799-801, 804 (Dubina, J., dissenting) (emphasizing and detailing video in finding use of force unreasonable).

¹⁰⁶ **Harris UNC Contribution**

¹⁰⁷ Jeremy Stahl, *This Judge’s Excuses for Acquitting Jason Stockley of Murder are Pathetic*, SLATE (Sept. 15, 2017).

¹⁰⁸ *Id.*

¹⁰⁹ 509 F.3d 234 (6th Cir. 2007).

and the court relied on the videos as the sole touchstone for its factual analysis in reversing the denial of the defendants' motion for summary judgment.¹¹⁰

But the court went a step beyond *Scott*. It demanded that the video affirmatively corroborate plaintiff's testimony and show what the court viewed as excessive force; it felt free to ignore plaintiff testimony because the court's view of the video did not affirmatively support that testimony. 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, but the court insisted that the video did not clearly show this and refused to credit the plaintiff's testimony as a supplement. The video, taken from the opposite side of the car and not offering an unobstructed 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 officer "abusing" the plaintiff. Although the video, as understood, did not blatantly contradict the plaintiff's assertions as in *Scott*, it did not support them. And by not supporting his version, it "certainly cast[] strong doubts on [his] characterization."¹¹¹ Plaintiff's testimony was not enough.

Marvin also testified that the officers had gratuitously pulled his injured arm into the small of his back while taking off the handcuffs from behind. According to the court, while the video appeared to show the plaintiff's arms being raised into the small of his back, the officer also could be seen crouching when inserting the key to unlock the cuffs, presumably to avoid making the plaintiff raise his arms. Based on (the judges' interpretation of) the video, the court concluded that "the officers' conduct cannot reasonably be construed as gratuitous."¹¹² The possibility of an officer-favorable interpretation of the video justified the court adopting that interpretation and granting summary judgment for the officers.

The competing inferences from one video and between video and testimony could work against law enforcement and in favor of members of the public challenging police conduct, as the 2017 prosecution of police-reform activist Cristina Winsor illustrates. Winsor was acquitted of misdemeanor charges of disorderly conduct and walking in a roadway, stemming from her arrest during a police-reform protest in New York City. The state trial judge found bystander-citizen video showed something "totally different" from what officers said happened.¹¹³

¹¹⁰ *Id.* at 237-43.

¹¹¹ *Id.* at 240, 248-49.

¹¹² *Id.* at 240-41.

¹¹³ Shayna Jacobs, *Judge acquits BLM activist in NYPD prosecution case*, N.Y. DAILY NEWS (Oct. 2, 2017); Andrew Denney, *NYPD Investigating Officers' Alleged Misrepresentations in Court*, N.Y. LAW JOURNAL (Oct. 4, 2017); see also Transcript of Proceedings in *The People of the State of New York v. Cristina Winsor*, No. 2016 SN 039373, at 9, 14-15, (Criminal Ct. Sept. 27, 2017). The department and the district attorney investigated the officers' misstatement at the judge's urging following the acquittal. Denney, *supra* note _____. The case is unusual because police lawyers served as prosecutors in these misdemeanor matters, pursuant to a delegation from the DA, an arrangement that Winsor and others challenged in a civil action. *Id.*; Jacobs, *supra* note _____.

Winsor’s case is unique and telling in several respects. The judge viewed the officers as “quite credibl[e]” on “first blush,”¹¹⁴ reflecting the common judicial tendency and turning only after the judge viewed the video. The more common case moves in the other direction—video may look bad for the officer (as do many videos of violent encounters and police use of force),¹¹⁵ but is overcome by the officer’s testimony as to his belief about things not necessarily shown in the video or his explanation and justification for what the video seems to show.

The contradictions between the officers’ testimony and the video of the protest at which Winsor was arrested were obvious and objective. The conflicts did not revolve around issues of discretion, judgments of what was reasonable in the moment, or questions of what the officer might have subjectively feared from the suspect. They were about objective elements in the video such as scaffolding blocking the sidewalks (the officers said there was none, while the video showed some)¹¹⁶ or the presence of white-shirted officers (the officers said none were present, while the video showed an officer wearing a white shirt making an arrest).¹¹⁷ These video images required less interpretation, so were less subject to demographic factors affecting perception and interpretation, compared with video of events that might or might not be a peaceful protest or that might or might not constitute excessive force.

The stakes in play in a proceeding also affect how a trial court approaches and interprets video, as it does other evidentiary and legal judgments.¹¹⁸ Judges and juries may be willing to view the video differently, and less favorably to law enforcement, in a misdemeanor summons case such as *Winsor* compared with a high-value § 1983 action for excessive force by a plaintiff killed¹¹⁹ or seriously injured¹²⁰ or a prosecution of a police officer for murder arising from performance of his dangerous duties in a dangerous situation.¹²¹

The evidentiary advantage may be enhanced when officers fail to utilize police-controlled video technology. In her study of the frequency of police failures to record, Fan finds that officers often fail to follow departmental regulations for police-controlled recording, fail to record events, or fail to record them fully and completely.¹²² Removing video from the evidentiary record returns the factfinding weight to competing testimony, restoring the potential officer advantage.

Fan’s solution to the problem is to undo the evidentiary benefit. She proposes that courts exclude partial or incomplete recordings (where the officer improperly failed to record all appropriate portions of the encounter) and impose a positive

¹¹⁴ Transcript, at 9.

¹¹⁵ Wasserman, *Orwell’s Vision*, *supra* note ____, at 646-47.

¹¹⁶ *Id.* at 14-15.

¹¹⁷ *Id.* at 9.

¹¹⁸ *Cf.* *Ziglar v. Abassi*, 137 S. Ct. 1843, 1884-85 (2017) (Breyer, J., dissenting); *Allen v. McCurry*, 449 U.S. 90, 115 (Blackmun, J., dissenting).

¹¹⁹ *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014).

¹²⁰ *Scott v. Harris*, 550 U.S. 372, 379-80 (2007).

¹²¹ *Supra* notes ____.

¹²² Fan, *supra* note ____, at 9-12.

inference that the missing video would have provided information supporting the member of the public (whether as defendant in a criminal prosecution or plaintiff in a civil action) and running against the officer. This places a thumb on the evidentiary scale in favor of the public's civil rights, without requiring courts to find that the officer intentionally hid or destroyed evidence of misconduct.¹²³

III. Citizen Video, the First Amendment, and the Problem of Rights Enforcement

The trend is towards less publicly visible police-created video rather than more—narrowing both the frequency of camera use and the availability of video. The 2014 PERF Report recommended that departmental policies give officers discretion over when to record, the position that most departments have adopted.¹²⁴ Most departments surveyed adopted a “limited discretion model;” officers were required to record certain enforcement activities and given discretion whether to record others, but given no guidance about whether or when to record consensual encounters, the incidents in which many violations occur.¹²⁵ In Michael White's words, if recording is not mandated, an incident will not be recorded.¹²⁶ That approach comports with the preferences of rank-and-file officers.¹²⁷ Police departments and governments also have resisted making the resulting videos broadly available, adopting “blanket, overly broad exemptions from public disclosure.”¹²⁸ State and local governments have exempted dashcam and bodycam videos from open-records or FOIA laws,¹²⁹ with departments using video more for internal training than for public awareness of police activity or for establishing police liability and accountability to the public.

Exacerbating that problem is officers failing to record (or to record fully and completely), even when required to do so by laws and department regulations.¹³⁰ Studies and departmental investigations have revealed officers turning off or failing to engage cameras, whether erroneously or intentionally, resulting in non-recording or selective and partial recording of events.¹³¹ Formal departmental policies, even those requiring broader recording, yield to officer practices on the ground, undermining the accountability and transparency goals and amplifying the “gross imbalance of power” between police and the public.¹³² Fan's proposal for requiring courts to adopt inferences adverse to the government where video is

¹²³ Fan, *supra* note ____, at 33-34, 36-38.

¹²⁴ PERF Report, *supra* note ____, at 40-41; Wasserman, *Uncertain*, *supra* note ____, at 227.

¹²⁵ Fan, *supra* note ____, at 931-32; **White UNC contribution**

¹²⁶ **White UNC Contribution**

¹²⁷ **Newell UNC Contribution; White UNC contribution**

¹²⁸ Mary D. Fan, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 ALA. L. REV. 395, 442-43 (2016).

¹²⁹ *Id.* at 442; *Nixon Signs Bill Limiting Access to Police Body Cam Videos*, FOX 2 NOW (July 8, 2016).

¹³⁰ Fan, *Missing*, *supra* note ____, at 9-12.

¹³¹ *Id.* at 10-13.

¹³² *Id.* at 12.

inappropriately unavailable reduces some government incentive to limit the amount of video.¹³³

The answer to decreased police-controlled video—whether because of narrow departmental recording regulations or because of officer disregard for those regulations—must be increased citizen-created and-controlled video to fill the gap. It ensures that there will be recordings of many police-public encounters regardless of departmental policies or officers’ conformity with policies. But citizen-video fills those gaps only if members of the public are constitutionally entitled and practically able to record police activity and their interactions with officers. And that may prove more difficult than it appears.

Six federal courts of appeals agree that the First Amendment grants individuals the right to record police and other officials in the course of performing their public duties in public spaces—Eleventh Circuit,¹³⁴ Ninth Circuit,¹³⁵ First Circuit,¹³⁶ Seventh Circuit,¹³⁷ Fifth Circuit,¹³⁸ and Third Circuit.¹³⁹ The lone contrary view came from Judge Posner dissenting in the Seventh Circuit, arguing that the privacy concerns of the individuals interacting with police in the recordings should prevail over any First Amendment interests the recorder may claim in hearing and electronically capturing that interaction.¹⁴⁰ But Seth Kreimer argues that at least the early decisions recognized the right to record by assertion more than by explanation or argument.¹⁴¹ Several scholars have gone beyond the courts to identify the source, nature, and scope of the constitutional right to record. No single free-speech theory links these arguments. But each offers a sound theoretical basis for some constitutional right to record.

A. Toward a First Amendment Right to Record

The First Amendment does and should protect a citizen’s right to record police performing public functions in public. The goal in this Article is not to take or defend a normative position on the right or to evaluate the bases that courts or scholars have used to support that right. Taking as a given the existence of the right as elaborated by courts and commentators, this Part considers the problems in recognizing, enforcing, and vindicating that right, whatever its nature, source, and scope.

1. Scholarly Arguments

¹³³ Fan, *supra* note ____, at 33-34, 36-38.

¹³⁴ *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000).

¹³⁵ *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 2005).

¹³⁶ *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011).

¹³⁷ *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012).

¹³⁸ *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017).

¹³⁹ *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017).

¹⁴⁰ *Alvarez*, 679 F.3d at 610-11 (Posner, J., dissenting).

¹⁴¹ Kreimer, *supra* note ____, at 368-69.

This section considers five leading scholarly arguments for the right.

a. Seth Kreimer. Kreimer explores the expressive landscape created and defined by the emergence of “pervasive image capture,” the combination of digital photography, pervasive cell-phone cameras, and online venues for image sharing. The result is that

almost any image we observe can be costlessly recorded, freely reproduced, and instantly transmitted worldwide. We live, relate, work, and decide in a world where image capture from life is routine, and captured images are part of ongoing discourse, both public and private. Capture of images has become an adjunct to memory and an accepted medium of connection and correspondence.¹⁴²

Like words inscribed on parchment, captured images are expressive, part of the cultural and political discourse. First Amendment protection attaches to all such expressive images, whether used publicly or whether the individual creates the images with the intent to use them. Pervasive image capture allows individuals to record and reflect on their memories and experiences, an essential component of the freedom of thought the First Amendment guarantees.¹⁴³ And the technological ease of capturing and recording those images cannot be disaggregated from the technological ease of disseminating them, as both are part of a “broader digital ecology of communication.”¹⁴⁴

Citizen recording is constitutionally essential to balance official police-controlled recording. Images are often more salient than verbal descriptions—which is to say more powerful in their persuasive ability,¹⁴⁵ not necessarily more accurate or more singular in meaning. “Participants in public dialogue who are barred from capturing images are at a substantial discursive disadvantage vis-à-vis those who can record from life. Officials engage in virtually unchecked surveillance of public encounters. A rule that bars citizens from capturing images gives unbalanced authority to official framing.”¹⁴⁶

b. Justin Marceau and Alan Chen. Building off Kreimer’s argument about advancements in digital recording and distribution, Marceau and Chen argue that this “creates transformative ways for individuals to participate in democracy and inform public discourse about not only political and social issues but also broader understandings about the truths of the universe, including complex moral

¹⁴² *Id.* at 337.

¹⁴³ *Id.* at 341-43, 381.

¹⁴⁴ *Id.* at 381.

¹⁴⁵ Sherwin, *supra* note ____, at xiv.

¹⁴⁶ Kreimer, *supra* note ____, at 386.

questions,” such as abortion, food safety, and police misconduct.¹⁴⁷ Recording “add[s] to the body of knowledge about the most controversial aspects of contemporary society.”¹⁴⁸ And if recording itself is not a species of expression, image capture is conduct that is “essential to speech;” as writing, speaking, and other conduct used for expression are speech, so is the creation and production of images that may be exhibited and viewed.¹⁴⁹

Marceau and Chen define the scope of the right to vary by context. The Constitution protects the right to record in locations where the recorder has a legal right to be present.¹⁵⁰ This includes publicly accessible spaces, on one’s own private property, on another’s property with that owner’s consent or knowledge, and on private property without consent where the recording pertains to a matter of public concern or has a strong connection to public discourse.¹⁵¹ The right remains subject to reasonable, content-neutral time, place, and manner restrictions.¹⁵² And it may yield to government interests, including protection of personal privacy,¹⁵³ although nondisruptive recording in public (the paradigm for recording police officers performing police functions) should remain immune from government regulation.¹⁵⁴

c. Carol Rice Andrews. Writing before the 21st-century explosion of citizen-recording technology, Andrews grounds a right to record in the First Amendment’s Petition Clause, identifying a core right to file winning civil-rights claims against government officials in court.¹⁵⁵ That right to seek and obtain legal remedies from government officials through formal government channels is at least as important as the right to engage in general public speech about those officials.¹⁵⁶ The Petition right also requires “breathing room,” in the form of broader protections for related non-core petition activities.¹⁵⁷ One non-core activity is the right to file losing civil-rights suits as a buffer for the core right of filing winning suits.¹⁵⁸ That is, an individual can file winning suits only if she remains free to file all suits and to risk losing.

A second non-core right should be recording the public police misconduct that gives rise to those winning civil-rights claims by those injured by that misconduct, whether the recording is created by the injured person or by a bystander observing the encounter. Either provides evidentiary value for subsequent litigation.

¹⁴⁷ Marceau and Chen, *supra* note ____, at 1000.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1017.

¹⁵⁰ *Id.* at 1027-28, 1031.

¹⁵¹ *Id.* at 1032-33, 1038.

¹⁵² *Id.* at 1032.

¹⁵³ *Id.* at 1053-54.

¹⁵⁴ *Id.* at 1033-34.

¹⁵⁵ 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, 663-64, 676-77 (1999).

¹⁵⁶ *Id.* at 685.

¹⁵⁷ *Id.* at 680-83.

¹⁵⁸ *Id.* at 683.

Recording both “captures” the transaction or occurrence giving rise to the winning claim and “preserves” evidence of the event that will be necessary to proving that winning claim.

d. Jane Bambauer. Bambauer begins from the premise that the First Amendment protects the “creation of knowledge. Expanded knowledge is an end goal of American speech rights, and accurate information, along with other, more subjective expressions, provides the fuel.”¹⁵⁹ She defines a negative “right to create knowledge” as a “latent prerequisite for free expression. Speech does very little for a government’s constituents if it is not supported by commitments to free thought and information flow.”¹⁶⁰ This right ensures that government will not interfere unduly with its constituents learning.¹⁶¹

Protecting the creation of knowledge includes protecting electronic data as speech.¹⁶² Speaking of photography with reasoning that applies to live-action video and audio recording, Bambauer argues that the First Amendment protects the photographs or other recordings, not the act of creating those recordings. The “very purpose of a photography ban is to prevent a wider audience from seeing the scene” photographed, so a government-imposed restriction or ban on photos (and necessarily on video- and audio-recording) must be understood, and declared invalid, as “designed to cut down on communicative potential.”¹⁶³ A “law prohibiting the creation, maintenance, or distribution of digital information attempts to achieve its social goals by limiting the accumulation of knowledge. Data privacy laws strive to give individuals the power to decide who does and does not get to learn about them.”¹⁶⁴

e. Jud Campbell. Campbell defines “speech-facilitating conduct” as conduct, often non-expressive, that facilitates or enables speech.¹⁶⁵ He argues for a negative “anti-targeting rule,” under which laws regulating non-expressive conduct raise free-speech problems when singling out and targeting speech or the speech process.¹⁶⁶ This anti-targeting rule best explains protection for recording:

Cameras and other audiovisual recording devices are conventional means of communication—that is, they are conventionally used for communicative purposes. Targeted regulations of audiovisual recording thus single out conduct commonly associated with

¹⁵⁹ *Id.* at 63

¹⁶⁰ *Id.* at 86.

¹⁶¹ *Id.* at 87.

¹⁶² Jane Bambauer, *Is Data Speech?*, 66 STAN L. REV. 57, 70 (2014).

¹⁶³ *Id.* at 83

¹⁶⁴ *Id.* at 90.

¹⁶⁵ Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 5 (2016).

¹⁶⁶ *Id.* 15.

expression and impose an apparent disproportionate burden on speech.¹⁶⁷

Campbell praises the Seventh Circuit decision in *Alvarez* that enjoined enforcement of a state eavesdropping statute as applied to listening to and recording of police officers performing public functions in public.¹⁶⁸ The statute operated “at the front end of the speech process by restricting the use of a common, indeed ubiquitous, instrument of communication.”¹⁶⁹ The Seventh Circuit recognized that the statute burdened First Amendment rights “directly, not incidentally,” by “specifically targeting a communication technology.”¹⁷⁰ On Campbell’s model, the law targeted communication technology that, even if not expressive in every use, had “readily apparent disproportionate effects on speech.”¹⁷¹

2. Recent Judicial Decisions

In 2017, two courts of appeals sought to move beyond Kreimer’s criticism that the right to record had been announced but not explained, by locating the right to record within existing First Amendment doctrinal and scholarly norms.

The Fifth Circuit identified the right as an amalgam of the right to film, the right to gather information, and the right of listeners to receive information.¹⁷² The Third Circuit also placed it within the First Amendment right to access information about official activities—recording is one way to observe, see, and hear what officers do in public more accurately.¹⁷³ That court also emphasized what Vincent Blasi labeled the First Amendment’s “checking function” on government misconduct, under which the press and public speak as a means to check, expose, and stop government misconduct.¹⁷⁴ Citizen-controlled video offers new and different perspectives that compete with official versions of events, enabling members of the public to perform a role similar to that of the news media.¹⁷⁵

Both courts also acknowledged the increase in police-controlled recording. Citizen-controlled video supplemented other video in spurring departmental change, aiding and furthering investigations of wrongdoing, and confirming dead-ends where no wrongdoing occurred.¹⁷⁶

¹⁶⁷ *Id.* 50-51

¹⁶⁸ *Alvarez*, 679 F.3d 586.

¹⁶⁹ *Id.* at 589.

¹⁷⁰ *Id.* at 602-03.

¹⁷¹ Campbell, *supra* note ____, at 53.

¹⁷² *Turner*, 848 F.3d at 687-90.

¹⁷³ *Fields*, 862 F.3d at 359.

¹⁷⁴ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521, 609-10.

¹⁷⁵ *Fields*, 862 F.3d at 359-60; Wasserman, *Video*, *supra* note ____, at 615-16

¹⁷⁶ *Fields*, 862 F.3d at 359-60; *Turner*, 848 F.3d at 689.

By framing the right in this way, the Third Circuit removed from the constitutional calculus whether the recording citizen intended to disseminate or use the resulting video. Requiring intent would produce too-limited a right. Intent to publish may develop only later, once the recorder has an opportunity to review the recording and to reflect on the story the video tells (in his subjective and politically determined view). It makes no constitutional sense to allow officers to prevent an individual from recording based on that individual's present intent, thereby depriving her of the opportunity to develop different intent to put the recording to expressive use once she knows more about the recording and the events captured and reflected in that recording.¹⁷⁷

Nevertheless, the way courts have defined the right to record produces an odd paradox. Government officials have a perverse incentive to record or to require recording of as few encounters as possible and to disclose as little video as possible, whether through policies, officer discretion, or officer disregard for their regulatory obligations. Uniform recognition of a First Amendment right to record would seem to restore the balance. If officers do not record and preserve a record, members of the public will. But police officers have a complementary incentive also to limit public recording or disclosure by involved citizens and bystanders, thereby removing any video or audio record of an encounter.

Those incentives combine to eliminate any record of a police-public encounter gone wrong, leaving proof to the he-said/he-said testimony that routinely favors police and government officials. And procedural limitations on civil rights litigation may mean that the mere fact of constitutional protection for citizen-controlled recording may be insufficient to overcome perverse incentives or to prevent a determined government or individual officer from deterring or stopping all recording by all sources.

B. *The Problem of Qualified Immunity*

Constitutional challenges to police efforts to prevent a citizen from recording—constitutional claims to vindicate the First Amendment right to record—typically arise in § 1983 actions seeking damages for past, completed rights violations.

In the typical right-to-record case, officers prevented an individual from recording a completed encounter, then the individual sues the officer and/or the municipality for which the officer worked for damages. Where no other proceedings would allow them to assert their First Amendment rights, recording plaintiffs may find that it is “damages or nothing.”¹⁷⁸ In most cases, the recorder was not arrested or charged for attempting to record.¹⁷⁹ Or the recorder was released after a brief “conversation,” likely designed to deter the person from

¹⁷⁷ *Fields*, 862 F.3d at 358; *Alvarez*, 598 F.3d at 597.

¹⁷⁸ *Cf. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment).

¹⁷⁹ *See Fields*, 862 F.3d at 356 (discussing consolidated case of Amanda Geraci)

attempting to record again.¹⁸⁰ Or the recorder was arrested, but charges were withdrawn when the arresting officer, recognizing their speciousness, did not appear at the state proceeding¹⁸¹ or when the basis for the charges was revealed to be invalid in that proceeding.¹⁸²

The Fifth Circuit cited this procedural posture to justify taking the odd (and arguably inappropriate) step of determining and announcing the scope of the First Amendment right as clearly established “for the future,” without determining whether the officers actually violated the plaintiff’s rights at the time and on the facts at issue in the case.¹⁸³ It feared this case or a procedurally similar damages action provided the only opportunity to address the constitutional issue.

But executive officials, such as police officers, can avoid litigation and liability on all claims for constitutional damages through the defense of qualified immunity. Qualified immunity provides that a government official can be liable for damages only for conduct that violated a constitutional right that was clearly established, such that a reasonable officer would have known that his conduct violated the constitutional right at issue.¹⁸⁴ No officer in the Fifth or Third Circuit cases was held liable; all were granted qualified immunity, because the right to record was not clearly established at the time of the challenged events.¹⁸⁵ This followed two Third Circuit decisions in which the court pretermitted analysis of the merits of the First Amendment question and held that any constitutional right that might exist had not been clearly established.¹⁸⁶

The Supreme Court has made qualified-immunity doctrine strongly protective of police officers, particularly on Fourth Amendment search-and-seizure and excessive-force claims, to the point that it has become difficult-to-impossible to establish officer liability.¹⁸⁷ It has held that police officers were entitled to qualified immunity in almost a dozen cases in the past decade, several of them summary reversals.¹⁸⁸ Qualified immunity protects “all but the plainly incompetent and those who knowingly violate rights.”¹⁸⁹ A right is “clearly established” only by a strong consensus of lower-court cases with somewhat similar facts and officers acting in

¹⁸⁰ *Turner*, 848 F.3d at 683-84.

¹⁸¹ *Fields*, 862 F.3d at 356 (discussing case of Richard Fields)

¹⁸² *Glik v. Cunniffe*, 655 F.3d 78, 80 (1st Cir. 2011).

¹⁸³ *Turner*, 848 F.3d at 687-88; *but see id.* at 697 (Clement, J., dissenting in part) (questioning the propriety of the court announcing a constitutional right in this way); Howard M. Wasserman, *Qualified immunity meets advisory opinions*, PRAWFSBLAWG (Feb. 27, 2017).

¹⁸⁴ *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam); *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012).

¹⁸⁵ *Fields*, 862 F.3d at 360; *Turner*, 848 F.3d at 687.

¹⁸⁶ *True Blue Auctions v. Foster*, 528 F. App’x. 190 (3d Cir. 2013); *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010).

¹⁸⁷ William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. ____, 4 (forthcoming 2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6 (2017)

¹⁸⁸ *See, e.g., White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam) *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam); *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011); *Reichle v. Howards*, 566 U.S. 658 (2012); Baude, *supra* note ____, at 39-40, app. (forthcoming 2018); Schwartz, *supra* note ____, at 9.

¹⁸⁹ *White*, 137 S. Ct. at 551; *Mullenix*, 136 S. Ct. at 308; *al-Kidd*, 563 U.S. at 743.

similar circumstances, defining the right in light of the facts of which the defendant officer was aware and not at too high a level of generality.¹⁹⁰ The Court has been coy about whether one binding decision from a regional circuit is sufficient to clearly establish within that circuit, assuming it might but never finding the right clearly established based on a single case.¹⁹¹ Policies of the relevant executive department may provide officers with notice of clearly established law.¹⁹² A right also may be so obvious that it can be clearly established as general principle without factually similar precedent,¹⁹³ but the bar for obviousness is high.¹⁹⁴

The risk is that courts will apply qualified immunity in First Amendment right-to-record cases in a similarly officer-protective manner. The Third Circuit in *Fields* concluded that the right to record was not clearly established despite the unanimous view of (at the time) five sister circuits and every district court in the Third Circuit to consider the question.¹⁹⁵ It also refused to accept Philadelphia Police Department policies and regulations as a basis for clearly establishing the right. In the wake of prior right-to-record decisions, the department adopted official policies recognizing a First Amendment right of citizens to record police in public; the policy statements sought to eliminate officers' confusion on the street, to ensure officers knew their duties, and to place the department "on the forefront rather than on the back end."¹⁹⁶ A Commissioner's Memorandum stated that officers should reasonably expect to be recorded or photographed and that they "shall not" obstruct or prevent recording or disable the recording devices.¹⁹⁷ But the majority emphasized evidence that the policies were ignored, were ineffective in informing officers that the constitutional right existed, or were not being followed, meaning the existence of the regulations could not show a knowing violation of the First Amendment.¹⁹⁸

Despite recent decisions and scholarly consensus, future § 1983 plaintiffs seeking damages for the denial of the right to record may encounter a number of problems. It is unclear whether six circuits provide a sufficiently "robust" consensus¹⁹⁹ to clearly establish the right. It is not certain that the right is even clearly established in the Third Circuit or the Fifth Circuit (despite the latter's insistence that it was clearly establishing the right "for the future"²⁰⁰), as the

¹⁹⁰ *White*, 137 S. Ct. at 552; *al-Kidd*, 563 U.S. at 742; *Wilson v. Layne*, 526 U.S. 603, 614-15 (1999).

¹⁹¹ *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam); *Reichle v. Howards*, 132 S. Ct. 2088, 2095 (2012).

¹⁹² *Hope v. Pelzer*, 536 U.S. 730, 744 (2002); *Wilson*, 526 U.S. at 617.

¹⁹³ *Hope*, 536 U.S. at 741.

¹⁹⁴ *White*, 137 S. Ct. at 552; *Shafer v. Cty. of Santa Barbara*, 868 F.3d 1110, 1117-18 & n.3 (9th Cir. 2017).

¹⁹⁵ *Fields*, 862 F.3d at 361-62.

¹⁹⁶ *Id.* at 363 (Nygaard, J., concurring in part, dissenting in part).

¹⁹⁷ *Id.* at 363-64 (Nygaard, J., concurring in part, dissenting in part).

¹⁹⁸ *Id.* at 361.

¹⁹⁹ *Taylor v. Barks*, 135 S. Ct. 2042, 2044 (2015) (per curiam); *City and Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1778 (2015).

²⁰⁰ *Turner*, 848 F.3d at 688.

Supreme has assumed, but never decided, that a right was clearly established in a circuit by a single circuit-court decision.

Even if sufficient to clearly establish, precedent may lack sufficient factual overlap. Distinctions are always possible and seemingly small and insignificant differences may be sufficient to avoid liability in a doctrinal morass that one scholar compared to the one-bite rule for bad dogs starting over with every change in weather conditions.²⁰¹

The Third Circuit in *Fields* found the right to record not clearly established, insisting that no part of a broad canvas of existing law and policy allowed the defendant officers to understand their conduct to be unlawful. Prior cases recognizing the right involved individuals who recorded with the intent to publish or use the video, establishing a right different from the one at issue in the current case, where the plaintiffs recorded without clear intent to publish.²⁰² The Seventh Circuit decision in *Alvarez* did not provide sufficient notice, as it involved a constitutional challenge to an eavesdropping law prohibiting listening and recording, without regard to later use or publication of any recording.²⁰³ (Jud Campbell argues that *Alvarez* should not be characterized as a right-to-record case, because the statute prevented only capture, not dissemination).²⁰⁴ And the Third Circuit suggested that there might be a constitutionally meaningful factual distinction between recording a traffic stop and recording a sidewalk confrontation,²⁰⁵ rendering the right not clearly established in the different context.

Factual distinctions prevented *Turner* from clearly establishing much. Dissenting, Judge Clement emphasized that the plaintiff had been photographing the police station building, which did not clearly establish the right to video-record or to record police officers performing police functions.²⁰⁶

Any First Amendment right also remains subject to reasonable, content-neutral time, place, manner restrictions,²⁰⁷ such as the officer's needs for security and safety, for himself and others, in performing public functions. This compels a new inquiry in each case into the details of the events at issue and whether the officer reasonably could have believed that having someone recording interfered with his public duties, compared with previous incidents.

Even if the plaintiff can overcome qualified immunity and establish liability, a plaintiff's claim that a police officer prevented her from recording or momentarily stopped and questioned her actions, although violative of the First Amendment, may not produce substantial damages and may leave the plaintiff to recover only nominal damages.²⁰⁸ This is especially so in circumstances such as those giving rise to *Fields* and *Turner*, where no arrest or prosecution followed and any seizure or

²⁰¹ Cf. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 256 (2013).

²⁰² *Fields*, 862 F.3d. at 361-62.

²⁰³ *Alvarez*, 598 F.3d at 597.

²⁰⁴ Campbell, *supra* note ___, at 52.

²⁰⁵ *Fields*, 862 F.3d at 361; *True Blue Auctions*, 528 F. App'x. at 192-93.

²⁰⁶ *Turner*, 848 F.3d at 697 (Clement, J., dissenting in part).

²⁰⁷ *Fields*, 862 F.3d at 360; *Turner*, 848 F.3d at 688; Marceau and Chen, *supra* note ___, at 1032.

²⁰⁸ *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 308-09 & n.11 (1986).

detention to stop the plaintiff from recording lasted a short time.²⁰⁹ The limited remedy may remove the incentive for an individual to bring the lawsuit, especially faced with overcoming qualified immunity. Right-to-record plaintiffs would benefit from James Pfander's proposal to allow § 1983 plaintiffs to forego substantial damages and limit their claims to nominal damages in exchange for the elimination of immunity as a defense.²¹⁰ And liable officers likely will not pay even that nominal-damages judgment, as government indemnify officers in virtually all cases.²¹¹

Such disincentives or barriers to successful litigation decrease or limit the amount and availability of citizen-controlled video. A determined officer might be willing to shut down a person's recording efforts, allowing him to avoid being recorded (while not recording himself) and taking a chance that some legal or factual distinction will allow him to avoid liability in the subsequent § 1983 action or that any judgment will be *de minimis* and paid by the municipality rather than out of his pocket.

C. Legislative Limitations

Officers are not recording even when required to do so by law or department regulation.²¹² That issue is exacerbated by two policymaking problems. One is inconsistency as to the level at which rules and policies should be made—whether at the state, municipal, or departmental level, producing piecemeal and confusing rules and obligations.²¹³ The second is that those policymakers, whatever their level, are enacting insufficiently broad recording policies and excessively narrow disclosure policies.²¹⁴

Citizen-controlled recording should fill the gap when formal regulations and practical conduct combine to limit the amount of video evidence. But the same state, local, and departmental legislative efforts that limit the creation and availability of police-controlled recording could be aimed at citizen-controlled video.

In 2015, Texas Representative Jason Villalba introduced a bill that would have defined the existing crime of interrupting, disrupting, impeding, or interfering with a peace officer to include “filming, recording, photographing, or documenting the officer within 25 feet of the officer,” or within 100 feet if carrying a gun, with an affirmative defense that the recorder was a member of or working for the media.²¹⁵

²⁰⁹ *Fields*, 862 F.3d at 356; *Turner*, 848 F.3d at 683-84.

²¹⁰ JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 146-48 (2017).

²¹¹ Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890-91 (2014).

²¹² Fan, *supra* note ____, at 12.

²¹³ Fan, *Justice Visualized*, *supra* note ____, at 928-27.

²¹⁴ *Id.* at 928-29.

²¹⁵ *A Bill to be Entitled An Act relating to the prosecution of the offense of interference with public duties; increasing a penalty*, H.B. No. 2918 (Mar. 2015); Neena Satija, *Texas a Flashpoint in National Debate Over Right to Film Police*, TEX. TRIB. (May 9, 2015, 2:01 AM), <https://www.texastribune.org/2015/05/09/reveal-story-1/>.

The obvious target, as the media carve-out demonstrated, was citizens recording their police encounters or encounters they witness between police and other members of the public .

Such a bill almost certainly violates the First Amendment. It runs afoul of the newly recognized right to record, including in the Fifth Circuit. It treats expressive conduct less favorably than non-expressive conduct—or, in Jud Campbell’s framing, it treats non-expressive conduct that facilitates speech less favorably than non-express conduct unconnected to the speech process.²¹⁶ A person could be within 25 feet of a peace officer, even when carrying a gun, if not otherwise impeding the officer, so long as not engaged in the (expressive or pre-expressive) act of recording; the identical person operating a recording device breaks the law. But either person implicates the purported interest in non-interference with police functions caused by citizen recording.

The legislation also treats media members more favorably than non-media persons performing the same recording function. It is not clear how a media member recording within 20 feet of the officer interferes or impedes more than a non-media member in the same place or why media members should be treated differently than non-media members engaged in identical expressive (or pre-expressive) conduct.²¹⁷ Although the right to record remains subject to content-neutral time, place, manner restrictions, the special disfavored treatment of citizen-controlled recording was not neutral as to speaker or content.²¹⁸

Villalba withdrew the bill after receiving criticism from everyone on all sides of the spectrum.²¹⁹ But his failed effort does not mean that state, local, or department officials lack the identical motivation to protect officers from the perceived harassment and negative attention that comes from being subject to constant recording,²²⁰ or to attempt similar, more competently drafted laws. As long as the First Amendment right remains subject to neutral limitations, similar legislative efforts can be expected to restrict when or how recording should take place, in service of a purportedly neutral value such as non-interference, officer safety, public safety, or protection of officer or public privacy.²²¹

The inquiry does not end with the conclusion that such legislation violates the First Amendment in the abstract. The inquiry does not end with the conclusion that the purported interests described above are either pretext for government wanting to hide matters from public scrutiny or should not be strong enough to

²¹⁶ Campbell, *supra* note ____, at 15, 53.

²¹⁷ See *Alvarez*, 679 F.3d at 604 (considering, but not deciding whether media exemption raised First Amendment problems); see also *Turner Broadcasting Co. v. FCC*, 512 U.S. 622, 659 (1994) (“Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns.”).

²¹⁸ *Alvarez*, 589 F.3d at 604.

²¹⁹ Allison Wisk, *Bill to Limit Filming of Police Activity Is Dropped*, DALLAS NEWS (Apr. 2015), <http://www.dallasnews.com/news/local-politics/2015/04/10/bill-to-limit-filming-of-police-activity-is-dropped>.

²²⁰ *Fields*, 862 F.3d at 363 (Nygaard, J., concurring in part, dissenting in part); Kreimer, *supra* note ____, at 346.

²²¹ Chen & Marceau, *supra* note ____, at 1033-34.

justify a ban on public recordings.²²² Right-holders must overcome procedural hurdles in enforcing and vindicating that right and in obtaining constitutional judicial remedies against enforcement of these formal laws, at least without having to endure state enforcement and prosecution for attempting to record.

A person arrested or prevented from recording a police encounter pursuant to a formal law or policy prohibiting recording could sue the arresting officer for damages for violating her First Amendment rights (the same strategy as those prevented from recording by an officer exercising individual discretion). That plaintiff confronts the same problems—qualified immunity and the claim not being worth significant money to even a prevailing plaintiff able to overcome qualified immunity.²²³

In fact, this plaintiff encounters a greater qualified-immunity burden, because the officer can defend his action on the ground that he was enforcing presumptively valid state law²²⁴ or department regulation;²²⁵ he therefore was neither plainly incompetent nor knowingly violating the First Amendment. The plaintiff would have to establish that the statute or regulation was obviously and blatantly unconstitutional, such that no reasonable officer could have believed the recording ban he was enforcing could be valid and enforceable,²²⁶ a high burden for a plaintiff to satisfy to avoid the officer's immunity defense.

A plaintiff might instead sue the municipality, arguing that the officer arrested him pursuant to a constitutionally defective formal municipal policy.²²⁷ Municipalities cannot assert immunity defenses,²²⁸ so the plaintiff could recover (if only nominal damages) for the violation, even if the right was not clearly established or if there are factual distinctions between his case and prior cases. But if the challenged recording prohibition derived from a state statute (such as Villalba's bill in Texas), the violation in a case of arrest by a municipal or county police officer would have been caused by state law, rather than municipal policy.²²⁹ Municipal liability requires that the constitutional violation be caused by the policy of that municipality, not the policy of another entity that the municipality enforced. A local practice or policy of generally enforcing state law is not sufficient to establish liability for its enforcement of any particular constitutionally deficient statute. Unless the municipality took additional steps to adopt the state prohibition on recording as a municipal ordinance or department regulation or to promulgate a

²²² *Id.* at 1033.

²²³ *Supra* notes ____ and accompanying text.

²²⁴ *Grossman v. City of Portland*, 33 F.3d 1200, 1209-10 (9th Cir. 1994).

²²⁵ *Wilson v. Layne*, 526 U.S. 603, 617-18 (1999).

²²⁶ *Grossman*, 33 F.3d at 1209.

²²⁷ *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

²²⁸ *Owen v. City of Independence*, 445 U.S. 622, 650-51 (1980).

²²⁹ *Los Angeles County v. Humphries*, 131 S. Ct. 447, 450 (2010); *Vives v. City of New York*, 524 F.3d 346, 350-51 (2d Cir. 2008).

formal policy of enforcing that particular law, it likely is not sufficient to establish municipal liability.²³⁰

A third option is a pre-enforcement action against state or local officials to enjoin enforcement of the recording ban as violating the First Amendment. But pre-enforcement plaintiffs may face standing problems.

Under *City of Los Angeles v. Lyons*,²³¹ and *Clapper v. Amnesty International*,²³² courts are reluctant to accord standing to challenge law-enforcement policies and practices that affect individuals only through attempts to enforce other substantive laws against them. The plaintiff in *Lyons* lacked standing to obtain an injunction barring city police from employing a constitutionally dubious chokehold in the future, because he could not predict if or when he would be stopped by police for a traffic or other violation, if or when the encounter would go south, and if or when the chokehold would be applied.²³³ The plaintiffs in *Clapper* lacked standing to challenge a federal law permitting certain national-security surveillance, because they could not predict if or when they or people they communicate with would be targeted for surveillance, successfully surveilled, and surveilled through the challenged law, in government efforts to enforce other federal criminal and national-security laws.²³⁴

A prohibition on recording only would be enforced against a person who was arrested or seized by an officer and attempted to record their encounter or who witnessed another person's encounter and attempted to record it. Standing would require courts to "speculate" that the plaintiff will be seized by police or will witness another person being seized by police, that he will try to record the encounter, and that he will be prevented from recording the encounter by an officer arresting him or otherwise attempting to enforce that statutory recording ban.²³⁵ A court may be unwilling to accommodate such conjecture in a pre-enforcement challenge, as opposed to an action in which the police completed the violation of the right by preventing recording.²³⁶

Courts may apply more relaxed standing analysis to pre-enforcement First Amendment challenges, being more willing to allow plaintiffs to preemptively raise their constitution rights, rather than requiring them to engage in the targeted expressive (or pre-expressive) conduct and risk arrest and enforcement of the constitutionally suspect law.²³⁷ But even in First Amendment cases, standing requires that the plaintiff have an "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and

²³⁰ *Vines*, 524 F.3d at 351-52, 353; *N.N. v. Madison Metropolitan Sch. Dist.*, 670 F. Supp. 2d 927, 933-34 W.D. Wis. 2009).

²³¹ 461 U.S. 95 (1983).

²³² 133 S. Ct. 1138 (2013).

²³³ *Lyons*, 461 U.S. at 108.

²³⁴ *Clapper*, 133 S. Ct. at 1147-50.

²³⁵ *Clapper*, 133 S. Ct. at 1148-50; *Lyons*, 461 U.S. at 108.

²³⁶ *Cf. Fields*, 862 F.3d at 356.

²³⁷ *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010).

there exists a credible threat of prosecution thereunder.”²³⁸ A plaintiff must show a present intention to engage in the statutorily prohibited expressive activity at a specific, imminent future, subjecting himself to likely enforcement.

The ACLU established standing in *Alvarez* despite the court recognizing that the organization “does not know precisely when it or its employees would face prosecution or which officers would be involved.”²³⁹ The court did not demand a showing of intent to record at any particular imminent protest. It distinguished *Lions*, because this was not a case in which the threat of prosecution hinged on unknowable future events or details of how the violation would occur. The ACLU sought to implement an organizational program of recording police at future “expressive activity” events—protests and demonstrations—in public fora in and around the Chicago area.”²⁴⁰ Because the ACLU planned to attend many or all of those events as organizational policy and practice and because such events were certain to occur, the organization’s activity and the likelihood of enforcement moved beyond speculative.

Media members might be able to establish standing along similar lines. The media’s job is to observe, record, and report on public events, so enforcement of the statute against them is less speculative; they will report on and attempt to record future events such as public protests or rallies at which police might enforce the recording ban and those rallies or protests are certain to occur. Of course, media organizations and individuals working for media organizations were exempt from Villalba’s proposed Texas bill²⁴¹ and the Illinois law in *Alvarez*,²⁴² and likely would be exempt from similar legislative prohibitions on recording.

Jocelyn Simonson’s copwatchers²⁴³ also may be able to establish standing. They work in organized groups of local residents patrolling neighborhoods in planned times, places, and manners, monitoring police conduct, educating citizens, and undertaking other efforts to deter police misconduct before it occurs.²⁴⁴ Video-recording is one recent addition to copwatchers’ repertoire,²⁴⁵ and their recording is as deliberate, scheduled, and organized as their patrol activities.²⁴⁶ Like the ACLU and the media, their regular organization and consistent activities allow them to show the same present intent to record inevitable events on a regular basis through their regular planned activities, even if the date or place of the events recorded and of enforcement of the law is unknown at the time of litigation.

Ordinary, spontaneous, individual citizen-recorders working on their own may not be so fortunate. They will be less able to show when or where they will be involved in or will witness an individual encounter that they want to record, lacking

²³⁸ Susan B. Anthony List v. Driehaus, 134 S. Ct 2334, 2342 (2014).

²³⁹ *Id.* at 593-94.

²⁴⁰ American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583, 588 (7th Cir. 2012).

²⁴¹ *A Bill*, *supra* note ____ (amending § 38.15(g) of Texas Penal Code).

²⁴² *Alvarez*, 679 F.3d at 604.

²⁴³ Simonson, *supra* note ____, at 408.

²⁴⁴ *Id.* at 408-11.

²⁴⁵ *Id.* at 408.

²⁴⁶ *Id.* at 410.

formal job obligations or organizational plans to be at all or any events in which recording, and efforts to enforce a recording ban, might occur. Unable to show when or where they will want to record an encounter, they will be less able to show when or where the recording ban will be enforced against them. Those isolated, individual events look more like *Lyons* and *Clapper*, where the when and how of a future encounter with police and attempted enforcement is less known and more speculative or conjectural.

But the individual right to record police is most essential in these below-the-radar individual police-public engagements, in which police incentive and power to stop a single recording or to arrest a lone recorder are greatest. It is difficult to stop dozens of media members or hundreds of protesters with cameras from recording a public protest or expressive event (although police in Ferguson certainly tried²⁴⁷), other than by halting the protest event, which raises separate, more fundamental First Amendment concerns.²⁴⁸ Copwatchers describe a mutual respect between themselves and the officers they observe, a sense that both sides are doing their jobs, with no sign of officers trying to intimate the watchers or stop their activities, including recording.²⁴⁹ Police historically gave media members freer reign in covering protests and other events, although some of that deference was lost in the Ferguson protests and since.²⁵⁰

Spontaneous, isolated, and individual recorders do not receive similar respect or deference. It is easier for police to prevent a single recorder from capturing a single encounter, whether her own or one she happens upon. Yet standing doctrine may place these encounters beyond pre-enforcement constitutional challenge. The result is a paradox—it is easier for police to enforce an arguably constitutionally violative law, but more difficult for plaintiffs to preemptively challenge its constitutional validity.

D. The Problem of Officer Discretion

Police-controlled video is marked by two trends: Departments according officers discretion as to whether, what, and when to record²⁵¹ and officers failing to follow regulations when required to record.²⁵² The trends are self-reinforcing, as the failure to record can be defended as an exercise of discretion. The potential limits on citizen recording described above enhance the power of official discretion in halting citizen and police recording.

²⁴⁷ Flanders, *supra* note ____, at 203-05; Wasserman, *Moral Panics*, *supra* note ____, at 831-32; Consent Decree, *Hussein v. Cty. of St. Louis*.

²⁴⁸ **ZICK, *supra* note ____, at 257 (better page cite here).**

²⁴⁹ Simonson, *supra* note ____, at 410.

²⁵⁰ Flanders, *supra* note ____, at 203-05; Jonathan Peters, *When a journalist is arrested covering a protest, what should the news outlet do?*, COL. JOUR. REV. (Oct. 2, 2017); Jonathan Peters, *Journalists in Ferguson: Know your rights*, COL. JOUR. REV. (Aug. 21, 2014).

²⁵¹ PERF Report, *supra* note ____, at 40-41; Fan, *supra* note ____, at 931-32; **White UNC contribution**

²⁵² Fan, *supra* note ____, at 9-12.

It is reasonable to expect that officers would be more likely to fail to record—intentionally or otherwise, as a matter of discretion or otherwise—an encounter that has gone sideways and likely will embarrass the recording officer or his fellow officers. Fan gives an example of a 2016 incident in San Francisco, in which sheriff’s deputies beat a suspect with metal batons, inflicting head and arm injuries requiring twelve days of hospitalization; ten of the eleven involved officers failed to activate their bodycams and the one who activated his camera did so by accident.²⁵³

It is similarly reasonable to expect that officers, vested with similar discretion by legislation or policy, will be similarly inclined to stop a citizen from recording an encounter that has gone sideways, producing video that might embarrass one or more of the officers or make them look bad to the viewing public. The unrecorded 2016 incident in San Francisco came to light only when a private video-security system captured the incident, and the owners of the system gave the video to the public defender.²⁵⁴ And one can expect that, had the officers been vested with power and discretion to stop that recording or its release, they would have exercised it.

The purpose of qualified immunity is to protect executive discretion, to give police officers “breathing room to make reasonable but mistaken judgments,”²⁵⁵ and to give them wide latitude in the vigorous exercise of that constitutional judgment and discretion, rather than forcing them to steer too clear of the constitutional line out of fear of liability.²⁵⁶ Legislators such as Rep. Villalba enact statutory prohibitions on some recording to vest officers with additional discretion and an additional weapon to control citizens and potentially embarrassing video. The result undermines the force of citizen-controlled video in establishing or restoring a better balance between police and the public in capturing images and in ensuring police accountability.²⁵⁷

It is not clear how First Amendment doctrine might respond to this problem. Executive officers cannot wield unbridled and untrammelled enforcement discretion with respect to speech, as in granting parade permits.²⁵⁸ But discretion is inherent in policing, including as to what laws to enforce, how, and when.²⁵⁹ Plaintiffs can state a First Amendment claim by showing that adverse police action was motivated by animus or disagreement with the message or content of her speech and with the intent to stop or retaliate against the speaker because of her speech, although pleading and proving intent proves difficult for plaintiffs.²⁶⁰ Campbell’s framework for protecting speech-facilitating conduct, such as recording, can map onto that intent standard, by subjecting to heightened First

²⁵³ Fan, *supra* note ____, at 12.

²⁵⁴ *Id.*

²⁵⁵ *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011).

²⁵⁶ *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012); *Wyatt v. Cole*, 504 U.S. 158, 167-68 (1992); *Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985).

²⁵⁷ Fan, *supra* note ____, at 32; Kreimer, *supra* note ____, at 386.

²⁵⁸ *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

²⁵⁹ *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005).

²⁶⁰ *Wood v. Moss*, 134 S. Ct. 2056, 2069 (2014); *McGuire v. Reilly*, 386 F.3d 45, 62-64 (1st Cir. 2004).

Amendment scrutiny laws and regulations that target the speech process by targeting speech-facilitating activities such as recording for regulation or restriction.²⁶¹

An officer who wields that discretion to prevent a citizen from recording, whether pursuant to a statutory recording ban or his own discretion, targets the speech process when he is motivated by concern for, and a desire to stop, video that might expose him or his fellow officers acting in constitutionally wrongful, or simply embarrassing, ways.²⁶² That standard was satisfied with respect to the events underlying *Fields*, as police in two separate incidents approached both plaintiffs with the intent of stopping otherwise-non-interfering recording.²⁶³

Courts overlook content-discriminatory animus in retaliatory-arrest or retaliatory-prosecution cases where the officer had probable cause to arrest, because the causal connection between animus and injury (the arrest or prosecution) becomes more attenuated when probable cause exists.²⁶⁴ Plaintiffs in video-recording thus face the same proof problems in showing that the officer intended to halt recording to avoid being recorded performing his public functions in a way that may subject him to embarrassment or liability, rather because he reasonably and with probable cause believed the recording was interfering with law-enforcement activities.

* * *

Citizen-controlled video, enhanced by a vigorous First Amendment right to record government officials performing official functions in public spaces, should be the answer to limits on the amount and availability of police-controlled video. But procedural realities of qualified immunity, limits on standing, unavailability of substantial damages make enforcement of that right difficult, and expansive police discretion. And those difficulties together may limit the force of citizen-controlled video as a tool for police reform.

IV. Video and Remediation

The significance of video is not limited to litigation or the courtroom; it affects how government and the public react to police-public encounters and the public policy response to those encounters. The public takes to the streets to protest what it perceives as injustice. And the public is more likely to take to the streets when people can see and interpret video and when the results of formal legal processes do not match their assessments of that video.²⁶⁵

In responding to incidents of police-involved force, government must account for the public's visceral, brute-sense impressions and interpretations of a video, recognizing the Kahan insight that those impressions are determined by identity,

²⁶¹ Campbell, *supra* note ___, at 15, 50-51.

²⁶² Marceau and Chen, *supra* note ___, at 1033-34.

²⁶³ *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017).

²⁶⁴ *Reichle v. Howards*, 132 S. Ct. 2088, 2095-96 (2012); *Hartman v. Moore*, 547 U.S. 250, ___ (2006).

²⁶⁵ **White UNC Contribution**

ideology, political leanings, demographics, and experience. Regardless of how policymakers interpret and understand a recording, they must consider different reactions from a public that interprets a recording as showing police misconduct and that becomes more outraged if government and government institutions do not respond in (what the viewing public regards as) an appropriate fashion.

Governments respond to video and this concern in several ways. One is to attempt to change the laws to keep video from becoming public, thereby limiting the public response and public outrage. This explains Jason Villalba's legislative effort to ban citizen recording.²⁶⁶ And it explains efforts to exclude body-camera videos from public disclosure laws.²⁶⁷ In 2016, Missouri enacted a broad, blanket exemption from its open-records laws for bodycam and dashcam video, concluding that making video public would interfere with ongoing police investigations.²⁶⁸ That decision followed the state attorney general's commission recommendation that data from any "mobile video recorder" should be classified as "closed records," not subject to public request and accessible only to those involved in the incident for purposes of civil litigation or by court order. The attorney general warned of technology "lead[ing] to a new era of voyeurism and entertainment television at the expense of Missourians' privacy."²⁶⁹

But as Fan argues, blanket, overly broad exemptions from public disclosure defeat the basic transparency and accountability goals of police-controlled recording.²⁷⁰ Video becomes a tool for protecting and exonerating officers against public complaints within the department,²⁷¹ without allowing the public into the conversation to see and decide what happened and what the video reveals. Alternatively, government may adopt a one-way disclosure policy, publicizing and speaking out about video that (in its view) supports its officers and shows no misconduct, while refusing to disclose images and recordings it views (and that the public is likely to view) as adverse to police and government interests.²⁷²

A second, more positive, possibility is that public availability of video evidence, however created, prompts institutions to be more aggressive in challenging police behavior and seeking accountability for misconduct.²⁷³ There arguably has been a gradual shift in prosecutorial aggressiveness against police violence, especially in video cases, moving from the relative dark ages of 2014 to the present.

NYPD officer Daniel Pantaleo was not indicted for the 2014 strangulation death of Eric Garner,²⁷⁴ and Cleveland police officers Timothy Loehmann and

²⁶⁶ *Supra* notes ___ and accompanying text.

²⁶⁷ Fan, *Justice Visualized*, *supra* note ___, at 442.

²⁶⁸ *Nixon Signs Bill*, *supra* note ___.

²⁶⁹ Jesse Rifkin, *After Ferguson, Missouri Legislator Wants to Keep Police Videos Private*, HUFFINGTON POST (Feb. 23, 2015, 1:09 PM), http://www.huffingtonpost.com/2015/02/23/ferguson-police-body-camera-videos_n_6735600.html.

²⁷⁰ Fan, *Justice Visualized* *supra* note ___, at 442.

²⁷¹ **Harris UNC Contribution**

²⁷² **Iowa or Book.**

²⁷³ Wasserman, *Orwell's Vision*, *supra* note ___, at 644-45.

²⁷⁴ J. David Goodman & Al Baker, *Wave of Protests after Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014).

Frank Garmback were not indicted in the 2014 shooting death of Tamir Rice,²⁷⁵ despite widely circulated video (from non-police sources) of both incidents. But more recent cases have resulted in criminal charges and prosecutions—Ray Tensing in the shooting death of Samuel DuBose at the University of Cincinnati,²⁷⁶ Yeonimo Yanez in the shooting death of Philando Castile in Minnesota,²⁷⁷ Jason Stockley in the shooting death of Anthony Lamar Smith in St. Louis, and Philip Brailsford in the shooting death of Daniel Shaver in Mesa, Arizona.²⁷⁸ Charges remain pending against multiple Chicago police officers for the 2015 shooting death of Laquan McDonald, where dashcam video, produced only after a state-court suit and order compelling disclosure, helped expose an attempted cover-up.²⁷⁹ A hung jury in the state homicide prosecution of Michael Slager in the shooting of Walter Scott in South Carolina led to a federal civil-rights²⁸⁰ prosecution of Slager for depriving Scott of his Fourth Amendment rights, a guilty plea, and a twenty-year prison sentence.²⁸¹

The results of these cases may not reflect positive outcomes or what many regard, based on their interpretation of the video, as justice. Each prosecution in the first list was unsuccessful, resulting in acquittals or hung juries (sometimes multiple hung juries). Only Slager seems likely to serve prison time. But the increased efforts suggest some limited movement toward success. State and federal prosecutors appear more likely to pursue criminal charges when video evidence, at least viscerally, supports a view that the officer did something wrong. Unfortunately, acquittals accompanied by graphic video, such as in the Shaver shooting, reinforce the public belief that nothing is sufficient to convict a police officer.

Bryce Newell describes an irony to this evolution. The demand for body-cams and video, including among police officers, began following the unrecorded shooting of Michael Brown. Subsequent cases featured video of some sort from some source, resulting in prosecutions but not necessarily accountability, while turning rank-and-file law enforcement off to cameras.²⁸²

A third possibility is that video of a police-citizen incident may prompt municipalities to settle civil-rights suits more promptly to avoid further public viewing, discussion, and debate over video that is subjectively perceived as

²⁷⁵ Skruggs, *supra* note ____.

²⁷⁶ Jess Bidgood, and Richard Perez-Pena, *Mistrial in Cincinnati Shooting as Officer is Latest Not to Be Convicted*, N.Y. TIMES (June 23, 2017).

²⁷⁷ Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017).

²⁷⁸ Berman, Lowery, and DeGrandpre, *supra* note ____; Stahl, *supra* note ____.

²⁷⁹ Catherine Thorbecke, *Chicago Police Officer Charged with Murder of Teen Laquan McDonald Hired by Police Union*, ABC NEWS (Mar. 31, 2016); Fan, *Missing*, *supra* note ____, at 12-13.

²⁸⁰ 18 U.S.C. § 242.

²⁸¹ Steve Osunsami and Emily Shapiro, *Ex-Cop Michael Slager sentenced to 20 years for shooting death of Walter Scott*, N.Y. TIMES (Dec. 7, 2017); Alan Blinder, *Ex-Officer Who Shot Walter Scott Pleads Guilty in Charleston*, N.Y. TIMES (May 2, 2017).

²⁸² **Newell UNC Contribution**

troubling and to avoid the potential for anger erupting into public demonstrations.²⁸³

Public attention and outrage over a viral video puts government on its heels and prompts action; it must defend its officers while also reacting to adverse public perceptions and conclusions. The result is a split response—no criminal, administrative, or employment actions against the officers, but settlement as the path of least resistance in civil litigation. The families of Scott, McDonald, Garner, DuBose, and Castile settled with the officers and municipalities for anywhere from \$3 million to \$6.5 million, often before or just after filing the lawsuit,²⁸⁴ even while the officers in each case escaped criminal punishment.

Katherine MacFarlane describes these civil cases as utilizing “accelerated civil rights settlement.”²⁸⁵ Plaintiffs bring or threaten bring small-bore § 1983 claims; they seek only damages for the single event at issue, rather than systemic departmental reform through broad injunctive relief; and the parties settle before or shortly after filing.²⁸⁶ While these lawsuits do not achieve systemic police reform—as would a § 1983 action seeking to enjoin a department’s stop-and-frisk policy²⁸⁷—the settlements are with the municipality (rather than the officers²⁸⁸) and are sufficiently substantial that the numbers might begin to add-up and prompt policy reform to avoid future lawsuits and payments.²⁸⁹ Video, and government fear of the public reaction to video that looks “bad” prompts it to pursue or accept accelerated settlement and to end the legal dispute, and with it the popular conversation and controversy around the video and the problematic police encounter.

A final, ironic, option is for government to undertake the difficult task of explaining to the public that it should not jump to conclusions about what happened because video is incomplete, non-objective, subject to the limits of the video frame, and open to varying interpretations based on the viewer’s political and personal perspectives. Officials can urge the public to accept that one video does not tell the whole story and to wait until they see and hear more video, more evidence, and more sides to the story. But if the public’s brute-sense impression is that the video is unfavorable to the police, as was the case in the settled high-profile death cases, this may prove practically and politically impossible.²⁹⁰ This tactic also contradicts the government position, in and out of litigation, when officials are confident in video’s officer-supportive message—then they insist that

²⁸³ Mary D. Fan, *Hacking Qualified Immunity: Camera Power and Civil Rights Settlements*, 8 ALA. C.R. & C.L. L. REV. 51, 63 (2017); Wasserman, *Orwell’s Vision*, *supra* note at 644-45; **White UNC Contribution**

²⁸⁴ Katherine A. MacFarlane, *Accelerated Civil Rights Settlements In the Shadow of Section 1983*, ___ UTAH L. REV. ___ (forthcoming 2017) (4-13, 15-16); Mitch Smith, *Philando Castile Family Reaches \$ 3 Million Settlement*, N.Y. TIMES (June 26, 2017); Sheryl Gay Stolberg, *University of Cincinnati to Pay \$ 4.85 Million to Family of Man Killed by Officer*, N.Y. TIMES (Jan. 18, 2016).

²⁸⁵ MacFarlane, *supra* note ___, at 2.

²⁸⁶ *Id.* at 5-6, 17.

²⁸⁷ *Id.* at 16-17.

²⁸⁸ Schwartz, *supra* note ___, at 890-91.

²⁸⁹ MacFarlane, *supra* note ___, at 20-21, 32-33, 35.

²⁹⁰ Wasserman, *Orwell’s Vision*, *supra* note ___, at 645-47.

video is singular, conclusive, objective, unambiguous, and tells one story that exonerates the officer on summary judgment²⁹¹ or that justifies not pursuing criminal charges against the officer. The cognitive dissonance and charges of hypocrisy may be too much too overcome.

²⁹¹ Plumhoff v. Rickard, 134 S. Ct. 2012, 2021-22 (2014); Scott v. Harris, 550 U.S. 372, 379-80 (2007).