

POLICE MISCONDUCT, VIDEO RECORDING, AND PROCEDURAL BARRIERS TO RIGHTS ENFORCEMENT*

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The story of police reform has become the story of video and video evidence, and “record everything to know the truth” has become the singular mantra. Video, both police-created and citizen-created, has become the singular tool for ensuring police accountability, reforming law enforcement, and enforcing the rights of victims of police misconduct. This Article explores procedural problems surrounding the use of video recording and video evidence to counter police misconduct, hold individual officers and governments accountable, and reform departmental policies, regulations, and practices. It considers four issues: (1) the mistaken belief that video can “speak for itself” and the procedural and evidentiary problems flowing from that mistaken belief; (2) the evidentiary advantages video offers police and prosecutors; (3) the effects of video on government decisions to pursue criminal charges against police officers and to settle civil-rights suits alleging police misconduct; and (4) significant procedural limits on efforts to enforce a First Amendment right to record, such as qualified immunity and standing.

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INTRODUCTION

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 mantra. Video has become the singular tool for ensuring police accountability, reforming law-enforcement policies and practices, and vindicating and enforcing the constitutional rights of victims of police misconduct. Video can vindicate the public’s rights against police misconduct, assist the government in punishing misbehaving officers and departments, and enable agencies to reform problematic and constitutionally defective policies and practices. From the law-enforcement perspective, video enables officers to prove that their conduct was constitutionally appropriate, avoiding civil and criminal liability for the officers and their departments. And government can use video to rebut criticism that it is failing to protect the public.

Videos of police-citizen encounters fall into three categories. The first is police-controlled video, which is created from body cameras, dashboard cameras, traffic-light cameras, and other government-controlled and -operated surveillance technology. 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, shared through texts, blogs, and social-networking sites. The third, although less-discussed, is live mainstream media coverage of large or breaking police-public

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.

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encounters,² such as the saturation coverage of the protests *cum* riots in Ferguson in 2014.³ Mainstream 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 [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 identifies 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 body cameras and similar recording technology as the solution to police misconduct and the catalyst of police reform. Fan argues that this universality of

2. See 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).

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. Mary D. Fan, *Democratizing Proof: Pooling Public and Police Body Camera Videos*, 96 N.C. L. REV. 1639, 1643 (2018).

7. Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 391 (2016).

support demonstrates the “interest convergence thesis,” in which the “convergence of diverse interests across unusual bedfellows . . . create[s] a major shift in the recording of police encounters in the United States.”⁸

Broad public support for video technology is reflected in opinion polls⁹ and in support for a WhiteHouse.gov petition begun shortly after the 2014 shooting of Michael Brown and corresponding protests in Ferguson, Missouri.¹⁰ The Obama Administration and the Department of Justice (“DOJ”) under Attorneys General Eric Holder and Loretta Lynch promoted video as a path to police reform. Efforts included grants to law enforcement agencies to establish or enhance body-camera programs, such as \$75 million awarded in December 2014¹¹ and \$20 million awarded to 106 agencies in September 2016.¹² The DOJ entered consent 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 body-camera bills have been offered in Congress.¹⁶ A 2014 joint report by the DOJ and the Police

8. Fan, *supra* note 5, 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/> [https://perma.cc/U9YE-JJ5A].

10. See 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/> [https://perma.cc/P8SS-93UV].

11. David A. Harris, John Murray Faculty Scholar and Professor of Law, University of Pittsburgh School of Law, Collection and Use Panel Discussion at the North Carolina Law Review Symposium (Nov. 3, 2017) (recording available at <https://vimeo.com/groups/275981/videos/24211131> [https://perma.cc/A3L7-BRVF]).

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> [https://perma.cc/36AH-EUYH].

13. See 34 U.S.C.A. § 12601(b) (West 2017) (formerly codified at 42 U.S.C. § 14141). See Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721, 741–44 (2017) (explaining the history and operation of § 14141 civil actions).

14. See Consent Decree at 1, *United States v. City of Ferguson*, No. 4:16-CV-000180-CDP (E.D. Mo. Mar. 17, 2016), <https://www.justice.gov/opa/file/833431/download> [https://perma.cc/2K7J-PHBE].

15. See Consent Decree at 1, *United States v. Police Dep’t of Balt.*, No. 1:17-CV-00099-JKB (D. Md. Jan. 12, 2017), <http://s3.documentcloud.org/documents/3284089/Conset-Decree-Agreement.pdf> [https://perma.cc/JJW2-CWNW].

16. See Police 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 11:55 AM), http://www.huffingtonpost.com/2014/08/27/body-worn-cameras_n_5722762.html [https://perma.cc/2S4S-T5TF].

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Executive Research Forum (“PERF”) offered more than thirty recommendations for state and local departments in 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 identified new policing technology, including cameras, as a pillar of modern policing and recommended expanded study and use.¹⁸ The American Civil Liberties Union (“ACLU”) drafted model body-camera legislation, requiring that officers record 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. 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, fearing officer embarrassment or worse.²⁰

The more problematic holdout is the Trump Administration and the DOJ under Attorney General Jeff Sessions, who reject the basic premise of the need for local police reform or 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,” insisting that the “dangerous anti-police atmosphere in America is wrong [and] the Trump Administration will end it.”²² Early in his tenure, Sessions pledged to

17. See POLICE EXEC. RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 38–49 (2014), http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf [https://perma.cc/4983-AK2Z].

18. OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUSTICE, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 31 (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [https://perma.cc/XY7R-3GC9].

19. *A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement*, ACLU, <https://www.aclu.org/other/model-act-regulating-use-wearable-body-cameras-law-enforcement> [https://perma.cc/DX2S-TU4R].

20. See Bryce Clayton Newell & Ruben Greidanus, *Officer Discretion and the Choice to Record: Officer Attitudes Towards Body-Worn Camera Activation*, 96 N.C. L. REV. 1525, 1549–50 (2018); Michael D. White & Henry F. Fradella, *The Intersection of Law, Policy, and Police Body-Worn Cameras: An Exploration of Critical Issues*, 96 N.C. L. REV. 1579, 1584 (2018).

21. Dara Lind, *Trump’s White House Site Promises to End the “Anti-Police Atmosphere” in America*, VOX (Jan. 20, 2017), <https://www.vox.com/2017/1/20/14338632/trump-whitehouse-gov-blue-lives-matter> [https://www.perma.cc/4NL6-PFKG].

22. *Id.*

pull back from his predecessors' aggressive use of civil 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 officers' 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 cameras and video fit the administration's new mission and focus with respect to police reform—whether they 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 against patterns-and-practices of constitutionally violative behavior in state and local law-enforcement agencies, obtaining consent decrees against more than thirty departments.²⁵ The Trump Administration and Sessions DOJ doubt that patterns and practices of constitutional misconduct exist, as opposed to occasional lone bad actors.²⁶ It remains to be seen how that worldview affects the use of police- or citizen-controlled video. Following the transition to the new administration, the DOJ asked the court for a ninety-day delay in approving the Baltimore consent decree to allow it to revise or reconsider the agreement; the district judge refused, insisting that the time for negotiation had passed.²⁷

Citizen-controlled video has become as prominent and essential to reform efforts as police-controlled video. The Ferguson and Baltimore consent decrees required both departments to recognize, respect, and train officers to protect the right to “observe and record

23. Kevin Johnson, *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/> [<https://perma.cc/CKQ5-HNL5>].

24. Memorandum from Jefferson B. Sessions, Attorney Gen., U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys (Mar. 31, 2017), <https://www.documentcloud.org/documents/3535148-Consentdecreebaltimore.html> [<https://perma.cc/9LZ3-Z2WZ>].

25. Rushin & Edwards, *supra* note 13, at 779.

26. Memorandum from Jefferson B. Sessions, *supra* note 24.

27. Daniel Victor, *Judge Approves Consent Decree to Overhaul Baltimore Police Department*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/baltimore-justice-department-police-consent-decree.html> [<https://perma.cc/PV3T-92VV> (dark archive)].

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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 of appeals—the United States Court of Appeals for 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, the DOJ adopted the litigation position 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

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 citizens’ right to record police-public encounters. This period marks significant technological anniversaries. The iPhone, which has made citizen video pervasive, turned ten in 2017,³⁸ while digital video-recording technology, alone and in cell phones, is about fifteen years old.³⁹ More than half of adults in the United States have smartphones and more than ninety percent have cell phones.⁴⁰ Dashcam technology was introduced in the late 1980s but became prominent approximately twenty years ago in the early

28. Consent Decree, *supra* note 14, at 26.

29. Consent Decree, *supra* note 15, at 84.

30. See Order by Consent at 1, *Hussein v. Cty. of Saint Louis*, No. 4:14-cv-1410-JAR (E.D. Mo. Nov. 21, 2014); Complaint at 1, *Hussein*, No. 4:14-cv-1410 (E.D. Mo. Aug. 14, 2014).

31. *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

32. *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995).

33. *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

34. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012).

35. *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017).

36. *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017).

37. Letter from Jonathan M. Sharp, Chief of Special Litig. Section, U.S. Dep’t of Justice, to Mark H. Grimes, Office of Legal Affairs, Balt. Police Dep’t (May 14, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp_ltr_5-14-12.pdf [<https://perma.cc/U7TH-ZCUV>].

38. Arielle Pardes, *iPhone Turns 10: How It Became the Everything Machine*, WIRED (June 29, 2017, 7:00 AM), <https://www.wired.com/story/iphone-turns-10-how-it-became-the-everything-machine/> [<https://perma.cc/D8UG-RDMU>].

39. 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).

40. Fan, *supra* note 5, at 907.

2000s, promoted through federal funding for recording technology in response to an increase in public assaults on officers and in allegations of police abuse.⁴¹ Body camera technology developed in Britain in 2005 and came to the United States around ten years ago.⁴²

This period 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*⁴³ approved summary judgment based on dashcam video of a police chase, concluding that video evidence can “speak for itself”⁴⁴ in telling a singular story with which no reasonable jury could disagree.⁴⁵ 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 *Scott*, showing that what that video (and, by logical extension, all video) showed depended on who was watching.⁴⁶ And it has been ten years since Simmons’s insight, offered prior to the exponential acceleration of the technological revolution of smartphones and body cameras, about Orwell and the power of the public to watch, record, and check the government.⁴⁷

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, government accountability, and litigation accuracy, while perhaps real, should not

41. Bradley X. Barbour, *Big Budget Productions with Limited Release: Video Retention Issues with Body-Worn Cameras*, 85 *FORDHAM L. REV.* 1725, 1730–31 (2017).

42. *Id.*

43. 550 U.S. 372 (2007).

44. *Id.* at 378 n.5.

45. *Id.* at 380.

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

47. Simmons, *supra* note 4, at 531.

48. Howard M. Wasserman, *The Uncertain Hope of Body Cameras*, in *FERGUSON’S FAULT LINES: THE RACE QUAKE THAT ROCKED A NATION*, *supra* note 3, at 217, 218 [hereinafter Wasserman, *The Uncertain Hope*]; Howard M. Wasserman, *Recording of and by Police: The Good, the Bad, and the Ugly*, 20 *J. GENDER, RACE & JUST.* 543, 547 (2017); Wasserman, *supra* note 3, at 833; Wasserman, *supra* note 2, at 608–09.

be overstated. And “perhaps” is an important qualifier, as a recent 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, however.

This Article approaches the question of video and police reform from a different angle. It explores procedural challenges in using video in civil⁵⁰ and criminal⁵¹ litigation challenging, *ex ante* or *ex post*, law-enforcement misconduct; in the efforts to hold individual officers or departments accountable; and in the 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 the evidentiary advantages video offers law enforcement in civil rights litigation—whether prosecution and police using video in a criminal prosecution against the citizen involved in the encounter or officers using video as defendants in civil 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 in enforcing and vindicating that right. Part IV considers the effects of video outside of litigation; these include executive decisions to pursue criminal charges against police officers for misconduct and to 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

49. White & Fradella, *supra* note 20, at 1586–88; *Randomized Controlled Trial of the Metropolitan Police Dep’t Body-Worn Camera Program*, LAB @ DC, <http://bwc.thelab.dc.gov/> [<https://perma.cc/MLD3-75ZP>]; Amanda Ripley, *A Big Test of Police Body Cameras Defies Expectations*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/upshot/a-big-test-of-police-body-cameras-defies-expectations.html> [<https://perma.cc/JG5Z-6X9T> (dark archive)].

50. 34 U.S.C.A. § 12601 (West 2017) (formerly codified at 42 U.S.C. § 14141); 42 U.S.C. § 1983 (2012).

51. 18 U.S.C. § 242.

52. 550 U.S. 372, 374–75 (2007).

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. 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 record"⁵⁶—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.

The *Scott* Court fundamentally misunderstood video and video evidence. Video does not possess a singular meaning or tell a singular story to all viewers that obviates the need for a factfinder or grants a 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 limited information.⁵⁷

From the front end of what video presents comes the insight familiar to every undergraduate film student—what a 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 Meaning changes with the length of the video, steadiness of the

53. *Id.* at 378 n.5.

54. *Id.* at 379–80.

55. *See id.* at 378–80.

56. *Id.* at 380.

57. *See* Seth W. Stoughton, *Police Body-Worn Cameras*, 96 N.C. L. REV. 1363, 1410–14 (2018).

58. Jessica Silbey, *Cross-Examining Film*, U. MD. L.J. RACE, RELIGION, GENDER & CLASS 17, 29 (2008).

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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, perspectives, and points of view 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 coauthors at Yale’s Cultural Cognition Project⁶⁴ has explored and revealed the nature of and influences on that interpretation.⁶⁵ Their empirical studies expose 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.⁶⁶

Two Kahan studies are relevant to this discussion. The first is the landmark 2009 study in *Whose Eyes are You Going to Believe*, in which the authors took the *Scott* 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 video as the Court had, 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 view of

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

60. Silbey, *supra* note 58, at 38; Silbey, *Filmmaking*, *supra* note 59, at 146; Wasserman, *supra* note 2, at 640.

61. Silbey, *supra* note 58, at 29.

62. Silbey, *Filmmaking*, *supra* note 59, at 147.

63. *Id.* at 173.

64. *Members*, CULTURAL COGNITION PROJECT AT YALE LAW SCH., <http://www.culturalcognition.net/members/> [https://perma.cc/7F7R-9F9U].

65. *See* CULTURAL COGNITION PROJECT AT YALE LAW SCH., <http://www.culturalcognition.net/> [https://perma.cc/7F7R-9F9U].

66. Kahan et al., “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 854–55 (2012); Kahan et al., *supra* note 46, at 841.

the facts.”⁶⁷ The second study is *They Saw a Protest*, in which the participants viewed 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.⁶⁸ 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.⁶⁹

Both studies explain public reactions to high-profile video cases. Positions and experiences on race, class, law-and-order, and the theory of “broken windows” policing influence how viewers interpret video of the strangulation death of Eric Garner at the hands of New York City Police Officer Daniel Pantaleo.⁷⁰ Viewer reactions to video of protests and police attempts to break-up protests—for example, in Ferguson and elsewhere following the shooting death of Michael Brown⁷¹ or the non-indictment of Officer Darren Wilson in the Brown shooting,⁷² or in St. Louis following the 2017 acquittal of Officer Jason Stockley in the shooting death of Anthony Lamar Smith⁷³—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.⁷⁴ A viewer who believes that the protested shooting was wrongful and

67. Kahan et al., *supra* note 46, at 865, 886.

68. Kahan et al., *supra* note 66, at 862–65.

69. *Id.* at 883–85.

70. Joseph Goldstein & Marc Santora, *Staten Island Man Died From Chokehold During Arrest, Autopsy Finds*, N.Y. TIMES, Aug. 2, 2014, at A14.

71. Chad Flanders, *Ferguson and the First Amendment*, in FERGUSON’S FAULT LINES: THE RACE QUAKE THAT ROCKED A NATION, *supra* note 3, at 197, 198, 206–07; see also Anny Shin, *Recalling the Protests, Riots After Fatal Police Shooting of Michael Brown*, WASH. POST (Aug. 3, 2017), https://www.washingtonpost.com/lifestyle/magazine/recalling-the-protests-riots-after-fatal-police-shooting-of-michael-brown/2017/08/01/9992f044-5a8d-11e7-a9f6-7c3296387341_story.html?utm_term=.3a43b565bf10 [https://perma.cc/ZK8M-LFEZ (dark archive)].

72. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> [https://perma.cc/RJK7-XDF5 (dark archive)]; Nicholas St. Fleur, *Scenes From a Ferguson Protest in New York City*, ATLANTIC (Nov. 25, 2014), <https://www.theatlantic.com/national/archive/2014/11/scenes-from-new-york-citys-ferguson-protest/383154/> [https://perma.cc/WVQ8-ZXTK].

73. Mark Berman, Wesley Lowery & 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), <https://www.washingtonpost.com/news/post-nation/wp/2017/09/15/st-louis-tenses-for-verdict-in-murder-trial-of-former-police-officer/> [https://perma.cc/P6NE-X6HF (dark archive)].

74. Flanders, *supra* note 71, at 198.

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that public protest is essential First Amendment activity promoting social change is more likely to see a constitutionally protected peaceful protest broken up by overzealous 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 that evenhandedly reproduces events 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 check the fallibility of human perception, and to allow factfinders to replay and perceive events free of adverseness, passion, and partisanship that plague traditional witness testimony.⁷⁵ 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 and in a manner unfiltered by a third-party account.”⁷⁶ In recognizing a First Amendment right to record, the Third Circuit argued that video “corroborates or lays aside subjective impressions for objective facts.”⁷⁷

The problem is a failure to distinguish persuasiveness from moral certainty. Video may be a more “credible representation[] of that reality” that can “persuade all the more powerfully[,] . . . generat[ing] less counterargument and . . . retain[ing] [the viewers'] belief.”⁷⁸ 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.”⁷⁹ But courts must resist what literature scholar Peter Brooks calls the “reality effect”—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

75. Fan, *supra* note 5, at 955–56; Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 1010 (2016).

76. Marceau & Chen, *supra* note 75, at 1009–10.

77. *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017).

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

79. Marceau & Chen, *supra* note 75, at 1010.

interpret, consider, and use.⁸⁰ The failure to distinguish the concepts undermines the process in which courts resolve disputes.

The Supreme Court repeated its mistake, this time unanimously, in *Plumhoff v. Rickard*.⁸¹ 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 a 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.⁸² As in *Scott*, the Court accepted that the video in the record showed conclusively that the plaintiff posed a threat to the public with his “outrageously reckless driving.”⁸³ 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.⁸⁴ 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.’”⁸⁵ The Court could decide this from its review of the video, with neither further proceedings nor factfinding necessary or appropriate. Unlike *Scott*, *Plumhoff* did not acknowledge the role of video in its decision. 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 and without placing the video on the Court website for the public to watch and consider.⁸⁶ Only references to video during argument⁸⁷ and the Court’s emphasis on *Scott* as controlling precedent revealed the video’s prominent role in the case.

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

80. Peter Brooks, *Scott v. Harris: The Supreme Court’s Reality Effect*, 29 LAW & LITERATURE 143, 147 (2017); see also Silbey, *supra* note 58, at 17–18; Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 36 U. MICH. J. L. REFORM 493, 519 (2004).

81. 134 S. Ct. 2012 (2014).

82. *Id.* at 2017–18, 2021–22; Howard M. Wasserman, *Mixed Signals on Summary Judgment*, 2014 MICH. ST. L. REV. 1331, 1335–36 (2014).

83. *Plumhoff*, 134 S. Ct. at 2021.

84. *Id.* at 2021–22.

85. *Id.* at 2021.

86. *Id.* at 2017–18.

87. Transcript of Oral Argument at 12, *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014) (No. 12-1117), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2013/12-1117_6179.pdf [<https://perma.cc/93EV-QFLQ>].

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does the first video from a body camera's producing a limited-field video that offers little context for a close-up image.⁸⁸ There is a reason that every witness to an incident or to police activities has her phone out—each wants to create and maintain a unique record of events because each recording provides a unique piece of evidence offering a unique story.⁸⁹ But if different videos of the same occurrence tell different stories depending on the internal elements of that video—especially a different angle and different width of visual field—no single video can be correct or can tell the entire story.

Argument in 2017's *Hernandez v. Mesa*⁹⁰ produced an exchange that should have revealed 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.⁹¹ The officer was cleared by a departmental investigation.⁹² Several surveillance cameras captured the incident, with one video from one camera circulating on YouTube.⁹³ During argument, the following colloquy occurred between Justice Sotomayor and counsel for the United States:

JUSTICE SOTOMAYOR: . . . 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.⁹⁴

88. Stoughton, *supra* note 57, at 1401–02; Timothy Williams et al., *Police 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 [<https://perma.cc/W9MQ-JLHN> (dark archive)].

89. Fan, *supra* note 6, at 1653–54.

90. 137 S. Ct. 2003 (2017) (per curiam).

91. *Id.* at 2004–05.

92. *Id.* at 2005.

93. Transcript of Oral Argument at 50–51, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-118_3e04.pdf [<https://perma.cc/65DK-SGAK>].

94. *Id.* at 50–51.

Unfortunately, everyone missed the point and its significance for debates over cameras and video evidence (which were not the issues before the Court). If other videos could justify a different result in the departmental investigation despite one 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.⁹⁵ And if non-video evidence could justify a different outcome in the departmental investigation despite the adverse video, then contradicting non-video evidence should play a similar role in civil rights litigation. A court should not grant summary judgment based on its singular view of what video says while disregarding contrary non-video evidence. As a court on summary judgment cannot choose between competing witness accounts,⁹⁶ so should it not choose between competing videos or between competing video and testimonial evidence. A factfinder should be given an opportunity to review all 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 with publicly disclosed body camera and dashcam evidence illustrates the error of *Scott* and the correctness of Kahan's insights that video can have multiple reasonable meanings and messages.⁹⁷ In a string of notorious shooting cases, decisions not to charge or convict police officers contradicted the wider public perception of the videos, triggering public outrage, protests, and demonstrations.⁹⁸ 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

95. Silbey, *Filmmaking*, *supra* note 59, at 147.

96. 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).

97. Kahan et al., *supra* note 46, at 841, 897.

98. See Berman et al., *supra* note 73; Davey & Bosman, *supra* note 72; Wesley Lowery, *Graphic Video Shows Daniel Shaver Sobbing and Begging Officer for His Life Before 2016 Shooting*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/12/08/graphic-video-shows-daniel-shaver-sobbing-and-begging-officer-for-his-life-before-2016-shooting/?utm_term=.6d90c2cccf95 [https://perma.cc/6R9V-CVHD (dark archive)]; Afi Scruggs, *Tamir Rice Protesters Picket House of Cleveland Prosecutor Timothy McGinty*, GUARDIAN (Jan. 1, 2016, 5:44 PM), <https://www.theguardian.com/us-news/2016/jan/01/tamir-rice-protest-cleveland-prosecutor-timothy-mcginty> [https://perma.cc/UE2R-LFDK]; cf. Josh Saul, *South Carolina Cop Pleads Guilty in Shooting that Sparked Black Lives Matter Protests*, NEWSWEEK (May 2, 2017, 4:21 PM), <http://www.newsweek.com/south-carolina-police-pleads-guilty-shooting-unarmed-black-man-593357> [https://perma.cc/8LHJ-VK9M] (detailing the guilty plea of an officer charged in a police-shooting incident).

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and grounds for protest—the anger must have been based on different perceptions, understandings, and conclusions from the video evidence. And those different perceptions, understandings, and conclusions derived from distinct demographics, political attitudes, and life experiences that Kahan and his coauthors identified as influencing how viewers understand video. That the public could disagree with the prosecutor, 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 affected the prevailing view of the video within the formal proceeding. Either way, video did not present a 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.⁹⁹ It does not matter. The point is that video is subjective and courts, the public, and commentators err in assuming its objectivity and singularity.

The judicial process must recognize and incorporate this insight, as judges are uniquely equipped to do.¹⁰⁰ Courts cannot throw away the ordinary rules of evidence and procedure when video is part of the record. A court on summary judgment cannot view the evidence “in the light depicted by the videotape”¹⁰¹ because the videotape lacks a singular light in which other evidence can be viewed. The video, as 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 judge, based on their distinct attitudes and experiences. And none of those competing viewpoints should be boxed or rejected as unreasonable.¹⁰²

That insight applies beyond summary judgment. At most trials, video evidence will prevail over competing testimonial evidence because factfinders see video as “more salient than verbal descriptions.”¹⁰³ Kahan’s studies about viewer interpretation and scholarship about how video forms and presents its message therefore 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

99. Kahan et al., *supra* note 46, at 881.

100. *Id.* at 897.

101. Scott v. Harris, 550 U.S. 372, 381 (2007).

102. Kahan et al., *supra* note 46, at 884–86; Wasserman, *supra* note 2, at 641, 643–44.

103. Kreimer, *supra* note 39, at 386.

preempts the ordinary civil-litigation process and labels competing understandings of video unreasonable.¹⁰⁴ 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. Video is one piece of evidence among many. Factfinders must decide the case in light of all the evidence, including their subjective and personal interpretations 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.¹⁰⁵ Judges and juries tend to view officers' testimony as more credible than that of citizens in a he-said/he-said contest between one police officer and one suspect,¹⁰⁶ an "ugly battle" that is "highly imbalanced."¹⁰⁷ 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.¹⁰⁸

Advocates argue that video evidence can overcome that imbalance by offering objective information that does not depend on credibility determinations or the subjectivity of adversary proceedings.¹⁰⁹ But the 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 officers' asserted interpretation of the video's singular meaning and story at the expense of a competing narrative of the video's meaning. The Supreme Court did this on summary judgment in *Scott* and *Plumhoff*. Lower courts grant summary judgment for officers by relying on

104. Kahan et al., *supra* note 46, at 884–86; Wasserman, *supra* note 2, at 641, 643–44.

105. David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 471–73 (1999); Mary D. Fan, *Missing Police Body Camera Videos: Remedies, Evidentiary Fairness, and Automatic Activation*, 52 GA. L. REV. 57, 94–96 (2017); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 495 (1998).

106. Dorfman, *supra* note 105, at 471–72; Simmons, *supra* note 4, at 565.

107. Fan, *supra* note 105, at 95.

108. *Id.* at 31; Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1039 (1996).

109. Fan, *supra* note 5, at 955–56.

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ambiguous or apparently police-friendly video¹¹⁰ or by ignoring adverse video.¹¹¹ This tendency has accompanied a shift in law enforcement's view of the purpose of police-controlled video—not to expose official wrongdoing or trigger government accountability, but to obtain evidence for criminal prosecutions of members of the public involved in those police encounters.¹¹²

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 during the chase telling his partner “we’re killing this motherfucker.” Video of the aftermath 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) when he went to Smith’s car the second time.¹¹³

In a bench trial, the judge resolved every video issue in Stockley’s favor. Recorded 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’s 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 blurry citizen video meant that the state had not proven that Stockley planted a second gun.¹¹⁴

110. See *Gillis v. Pollard*, 554 F. App’x 502, 504–05 (7th Cir. 2014); *Kalfus v. N.Y. & Presbyterian Hosp.*, 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).

111. See *Buckley v. Haddock*, 292 F. App’x 791, 792 n.1, 796 (11th Cir. 2008). *But see id.* at 799–801, 804 (Martin, J., dissenting) (emphasizing and detailing video in finding use of force unreasonable).

112. Harris, Collection and Use Panel Discussion at the North Carolina Law Review Symposium, *supra* note 11.

113. Jeremy Stahl, *This Judge’s Excuses for Acquitting Jason Stockley of Murder are Pathetic*, SLATE (Sept. 15, 2017, 6:01 PM), http://www.slate.com/blogs/the_slatest/2017/09/15/this_judge_s_excuses_for_acquitting_jason_stockley_of_murder_are_pathetic.html [<https://perma.cc/98ZK-X7QR>].

114. *Id.*

The Sixth Circuit took a similarly officer-centric approach to video on summary judgment in *Marvin v. City of Taylor*.¹¹⁵ 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, and the court relied on the videos as the sole touchstone for its factual analysis in reversing denial of the defendants' motion for summary judgment.¹¹⁶

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 disregarded plaintiff testimony because the video (as the court viewed it) did not affirmatively support that testimony. The plaintiff alleged that one of the defendant officers pulled him out of the car 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 offering an obstructed 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 the plaintiff's version of events, the video "certainly cast[] strong doubts on [his] characterization."¹¹⁷

The plaintiff in *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 (their interpretation of) the video, the judges concluded that "the officers' conduct cannot reasonably be construed as gratuitous."¹¹⁸ The possibility of an officer-favorable interpretation of the video justified the court adopting that interpretation and granting summary judgment, regardless of differing testimony.

The competing inferences from one video and between video and testimony do work against law enforcement and in favor of the public challenging police conduct.

115. 509 F.3d 234 (6th Cir. 2007).

116. *Id.* at 236–43.

117. *Id.* at 240, 248–49.

118. *Id.*

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One example is the 2017 prosecution of activist Cristina Winsor. Winsor was acquitted of misdemeanor charges of disorderly conduct and walking in a roadway following her arrest during a police-reform protest in New York City.¹¹⁹ The state trial judge found bystander-citizen video showed something “totally different” from what officers said happened.¹²⁰

Winsor’s case is unique and telling in several respects. The judge viewed the officers as “quite credibl[e]” on “first blush,”¹²¹ reflecting the common judicial tendency. That conclusion turned only after the judge viewed the video. The more common case moves in the other direction—video looks bad for the officer (as do many videos of violent encounters and police use of force),¹²² but is overcome by the officer’s testimony as to his belief about things not shown in the video or by his explanation and justification for what the video appears to show.

The contradictions between the officers’ testimony and the video of the protest at which Winsor was arrested were obvious and objective. They 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 whether scaffolding blocked the sidewalks (the officers said there was none, while the video showed some)¹²³ or the presence of white-shirted officers (the officers said none were present, while the video showed white-shirted officers on the scene).¹²⁴ These video images required less interpretation, making them less subject to demographic factors affecting perception and interpretation, compared with video of what might or might not be a peaceful protest or what might or might not constitute excessive force.

The stakes in a proceeding also affect how a trial court approaches and interprets video, as they do other evidentiary and

119. Shayna Jacobs, *Judge Acquits BLM Activist in NYPD Prosecution Case*, N.Y. DAILY NEWS (Oct. 2, 2017, 5:43 PM), <http://www.nydailynews.com/new-york/judge-acquits-blm-activist-nypd-prosecution-case-article-1.3537057> [https://perma.cc/HN77-T7QP].

120. *See id.*; *see also* Transcript of Proceedings at 9, 14–15, *New York v. Winsor*, No. 2016 SN 039363 (N.Y. Crim. Ct. Sept. 20, 2017), <https://www.almcms.com/contrib/content/uploads/documents/292/20206/Winsor-transcript.pdf> [https://perma.cc/S9SJ-EVUQ]; Andrew Denney, *NYPD Investigating Officers’ Alleged Misrepresentations in Court*, N.Y. L.J. (Oct. 4, 2017, 6:01 PM), <https://www.law.com/newyorklawjournal/almID/1202799625742/> [https://perma.cc/5PHE-XEAR].

121. Transcript of Proceedings, *supra* note 120, at 9.

122. Wasserman, *supra* note 2, at 646–47.

123. Jacobs, *supra* note 119.

124. *Id.*

legal judgments.¹²⁵ Judges and juries may be willing to view video less favorably to law enforcement in a misdemeanor summons case such as Winsor's compared with a high-value § 1983 action for excessive use of deadly force by a plaintiff killed¹²⁶ or seriously injured¹²⁷ or a murder prosecution of a police officer arising from performance of his dangerous duties in a dangerous situation.¹²⁸

A second example involves a § 1983 action arising from the use of deadly force in a traffic case, with the court approaching video in the proper way that *Plumhoff* and *Scott* declined. In *Lewis v. Charter Township of Flint*,¹²⁹ the Sixth Circuit reversed summary judgment, rejecting that the video conclusively showed the plaintiff posed any danger to the officer or others in the area and repeatedly insisting that the court must view the video in the light most favorable to the non-moving plaintiff.¹³⁰ The dissent unintentionally captured the competing approaches to video evidence, arguing that the majority's finding of competing possible conclusions "is not the video I have reviewed."¹³¹

The evidentiary advantage may be enhanced when officers do not utilize police-controlled video technology. In her study of the frequency of police recording, Fan finds that officers often ignore departmental regulations for police-controlled recording, fail to record events, or fail to record them fully and completely.¹³² Removing video from the evidentiary record returns the factfinding weight to competing testimony, restoring the officer's evidentiary advantage.

Fan seeks to undo the evidentiary benefit and thus the perverse incentive not to record or not to record fully. 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 inference that the missing video would have provided information supporting the citizen (whether as criminal defendant or civil rights plaintiff) and running against the officer or

125. Cf. *Ziglar v. Abbassi*, 137 S. Ct. 1843, 1884–85 (2017) (Breyer, J., dissenting) (comparing damages and injunctive relief); *Allen v. McCurry*, 449 U.S. 90, 115 (1980) (Blackmun, J., dissenting) (comparing criminal and § 1983 proceedings).

126. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2012–15 (2014).

127. *Scott v. Harris*, 550 U.S. 372, 375 (2007).

128. See *supra* text accompanying notes 81–86.

129. 660 F. App'x 339 (6th Cir. 2017).

130. *Id.* at 344–45.

131. *Id.* at 347 (Batchelder, J., dissenting).

132. Fan, *supra* note 105, at 67–74.

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the state.¹³³ This places a thumb on the evidentiary scale in favor of the public's civil rights without requiring courts to find that an officer intentionally hid or destroyed evidence of misconduct.¹³⁴

III. CITIZEN VIDEO, THE FIRST AMENDMENT, AND THE PROBLEM OF RIGHTS ENFORCEMENT

The trend moves towards having less rather than more publicly visible police-created video by narrowing the frequency of camera use and the availability of resulting video. The 2014 PERF Report recommended that departmental policies give officers discretion over when to record, which has become the common position.¹³⁵ Most departments surveyed adopted a “limited discretion model”; officers were required to record certain enforcement activities and given discretion to record others but given no guidance about whether or when to record consensual encounters, the incidents in which many violations occur.¹³⁶ In Michael White's words, if recording is not mandated, an incident will not be recorded.¹³⁷ That approach comports with the preferences of rank-and-file officers.¹³⁸ Police departments and governments also have resisted making the resulting videos broadly available, adopting “blanket or overly broad exemptions from public disclosure.”¹³⁹ States exempt dashcam and body-camera videos from open-records or FOIA laws,¹⁴⁰ 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, as Fan describes in her studies.¹⁴¹ Officers turn off or fail to engage cameras, whether erroneously or

133. *Id.* at 34–35.

134. *Id.* at 33–34, 36–38.

135. See Wasserman, *The Uncertain Hope*, *supra* note 48, at 227 see Fan, *supra* note 5, at 931; White & Fradella, *supra* note 20, at 1621; POLICE EXEC. RESEARCH FORUM, *supra* note 17, at 40–41.

136. Fan, *supra* note 5, at 931–32; White & Fradella, *supra* note 20, at 1641.

137. White & Fradella, *supra* note 20, at 1628.

138. Newell & Greidanus, *supra* note 20, at 1548; White & Fradella, *supra* note 20, at 1638.

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

140. *Id.* at 411–15; *Nixon Signs Bill Limiting Access to Police Body Cam Videos*, FOX 2 NEWS (July 8, 2016, 4:25 PM), <http://fox2now.com/2016/07/08/nixon-signs-bill-limiting-access-to-police-body-cam-videos/> [<https://perma.cc/Q89U-2EDP>].

141. Fan, *supra* note 105, at 67–74.

intentionally, resulting in non-recording or selective and partial recording of events.¹⁴² 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 in power” between police and the public.¹⁴³

Fan’s proposal that courts adopt inferences adverse to the government where video is inappropriately unavailable reduces some government incentive to limit the creation and availability of video.¹⁴⁴ The broader answer to decreasing police-controlled video must be increasing citizen-created and -controlled video to fill the gap. This ensures 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. 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.

A. *Toward a First Amendment Right to Record*

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—the Eleventh Circuit,¹⁴⁵ Ninth Circuit,¹⁴⁶ First Circuit,¹⁴⁷ Seventh Circuit,¹⁴⁸ Fifth Circuit,¹⁴⁹ and Third Circuit.¹⁵⁰ The lone contrary view came from Judge Posner dissenting in the Seventh Circuit, arguing that the privacy concerns of individuals recorded interacting with police should prevail over any First Amendment interests the recorder may claim in hearing and electronically capturing that interaction.¹⁵¹ But Seth Kreimer argues that at least the early decisions recognized the right to record by assertion more than by explanation or argument.¹⁵²

142. *Id.* at 65, 69–74.

143. *Id.*

144. *See id.* at 98, 100–103; *supra* text accompanying notes 132–34.

145. *See Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

146. *See Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995).

147. *See Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).

148. *See ACLU of Ill. v. Alvarez*, 679 F.3d 583, 586 (7th Cir. 2012).

149. *See Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017).

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

151. *Alvarez*, 679 F.3d at 611 (Posner, J., dissenting).

152. Kreimer, *supra* note 39, at 368–69.

Scholars and courts have moved beyond the early efforts to identify the source, nature, and scope of the constitutional right to record.

1. Scholarly Arguments

No single free-speech theory links the scholarly arguments in support of the First Amendment right to record. But each offers a sound basis for some constitutional right.

a. Seth Kreimer

Kreimer explores the expressive landscape created and defined by the emergence of “pervasive image capture,” the combination of digital photography, ubiquitous 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.¹⁵³

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 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.¹⁵⁴ 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.”¹⁵⁵

Citizen recording is constitutionally essential to balance official police-controlled recording. Images are often more salient than verbal descriptions—more powerful in their persuasive ability,¹⁵⁶ if 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

153. *Id.* at 337.

154. *Id.* at 341–43, 381.

155. *Id.* at 381.

156. See Sherwin, *supra* note 78, at xiv.

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.”¹⁵⁷

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 questions,” such as abortion, food safety, and police misconduct.¹⁵⁸ Recording “adds to the body of knowledge about the most controversial aspects of contemporary society.”¹⁵⁹ And if recording itself is not a species of expression, image capture is conduct “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.¹⁶⁰

The scope of the right that Marceau and Chen define varies by context. The Constitution protects the right to record in locations where the recorder “has a legal right to be present.”¹⁶¹ This includes publicly accessible spaces, on one’s own private property, on another’s private property with that owner’s consent or knowledge, and on private property without owner consent where the recording pertains to a matter of public concern or has a strong connection to public discourse.¹⁶² The right remains subject to reasonable, content-neutral time, place, and manner restrictions,¹⁶³ and it may yield to government interests, including protection of personal privacy.¹⁶⁴ But nondisruptive recording in public—the paradigm for citizens recording police officers performing police functions—should remain immune from government regulation.¹⁶⁵

c. Carol Rice Andrews

Writing before the twenty-first century explosion of citizen-controlled recording technology, Andrews grounds a right to record

157. Kreimer, *supra* note 39, at 386.

158. Marceau & Chen, *supra* note 75, at 1000.

159. *Id.*

160. *Id.* at 1017.

161. *Id.* at 1027–28, 1031.

162. *Id.* at 1032–33, 1038.

163. *Id.* at 1032.

164. *Id.* at 1053–54.

165. *See id.* at 1033–34.

in the First Amendment's Petition Clause, identifying a core right to file winning civil rights claims against government officials in court.¹⁶⁶ 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.¹⁶⁷ The petition right also requires "breathing room" in the form of broader protections for related non-core petition activities.¹⁶⁸ One non-core activity is the right to file losing civil rights suits, a buffer to secure the core right of filing winning suits.¹⁶⁹ That is, an individual can file winning suits only if she retains a right to file all suits and to risk losing.

A second non-core right should be recording the public law-enforcement misconduct giving rise to those winning civil rights claims, whether the recording is created by the injured person or by a bystander observing the encounter. Recording both "captures" the transaction or occurrence giving rise to the winning claim and "preserves" evidence of the event with which a plaintiff may be able to prove 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."¹⁷⁰ She identifies 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."¹⁷¹ This right ensures that government "will not interfere unduly with its constituents learning."¹⁷²

Protecting the creation of knowledge includes protecting electronic data as speech.¹⁷³ 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

166. See Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 663-64 (1999).

167. *Id.* at 685.

168. See *id.* at 680-83.

169. *Id.* at 683.

170. Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 63 (2014).

171. *Id.* at 86.

172. *Id.* at 87.

173. See *id.* at 70.

recordings, not the act of creating those recordings. But the “very purpose of a photography ban is to prevent a wider audience from seeing the scene” photographed, so government-imposed restrictions or bans on photos (and necessarily on video- and audio-recording) must be understood, and declared invalid, as “designed to cut down on communicative potential.”¹⁷⁴ 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.”¹⁷⁵

e. Jud Campbell

Campbell defines “speech-facilitating conduct” as conduct, often non-expressive, that facilitates or enables speech.¹⁷⁶ He adopts an “anti-targeting rule” under which laws regulating non-expressive conduct raise free-speech problems when singling out and targeting speech or the speech process.¹⁷⁷ 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 expression and impose an apparent disproportionate burden on speech.¹⁷⁸

Campbell praises the Seventh Circuit decision in *ACLU of Illinois v. Alvarez*¹⁷⁹ enjoining enforcement of the Illinois eavesdropping statute as applied to listening to and recording police officers performing public functions during public events.¹⁸⁰ The statute operated “at the front end of the speech process by restricting the use of a common, indeed ubiquitous, instrument of communication.”¹⁸¹ The court recognized that the statute burdened First Amendment rights “directly, not incidentally,” by “specifically target[ing] a communication technology.”¹⁸² On Campbell’s model,

174. *Id.* at 83.

175. *Id.* at 90.

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

177. *Id.* at 15.

178. *Id.* at 50–51.

179. 679 F.3d 583 (7th Cir. 2012).

180. *Id.* at 586.

181. *Id.* at 596.

182. *Id.* at 602–03.

the law targeted communication technology that, even if not expressive in every use, had “readily apparent disproportionate effects on speech.”¹⁸³

2. Current Judicial Decisions

In 2017, two federal 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 an amalgam of the right to film, the right to gather information, and the right of listeners to receive information.¹⁸⁴ The Third Circuit added the right to access information about official activities—recording is one way to more accurately observe, see, and hear what officers do in public.¹⁸⁵ That court also emphasized what Vincent Blasi labeled the First Amendment’s “checking value,” under which the press and public speak as a means to expose and stop government misconduct.¹⁸⁶ 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.¹⁸⁷

Both courts also acknowledged the increase in police-controlled recording, which could not be allowed to stand alone. Citizen-controlled video supplements police video in spurring departmental change, aiding and furthering investigations of wrongdoing, and confirming dead-ends where no wrongdoing occurred.¹⁸⁸

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 produced too-limited a right. An individual may not develop the intent to put the recording to expressive use until later, once she has an opportunity to review the recording and to reflect on the story the video tells (in her 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

183. Campbell, *supra* note 176, at 53.

184. See Turner v. Lieutenant Driver, 848 F.3d 678, 687–90 (5th Cir. 2017).

185. Fields v. City of Philadelphia, 862 F.3d 353, 359 (3rd Cir. 2017).

186. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 609–10.

187. Fields, 862 F.3d at 359–60; Wasserman, *supra* note 2, at 615–16.

188. Fields, 862 F.3d at 359–60; Turner, 848 F.3d at 689.

once she knows more about the recording and the events captured and reflected in that recording.¹⁸⁹

B. *Procedural Barriers to Rights Enforcement*

Courts have defined and enforced the right to record in a way that produces an odd paradox. Governments and 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 should restore the balance—if officers do not record and preserve a record, members of the public will.

But police officers have a complementary incentive to limit public recording or disclosure by involved citizens and bystanders, thereby eliminating any video or audio record of an encounter. The result is absence of any record of a police-public encounter gone wrong, leaving proof to the he-said/he-said testimony that favors police and government officials.¹⁹⁰ Mere recognition of that First Amendment right is not sufficient; the right must be vigorous in its scope and in its enforcement. Unfortunately, procedural limitations on civil rights litigation may limit the enforceability of the First Amendment right and its effectiveness in checking police misconduct.

1. Establishing Individual Liability

Constitutional challenges to police efforts to prevent citizens from recording—constitutional claims to vindicate the First Amendment right to record—typically arise in § 1983 actions against individual officers, 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 sued the officer for damages. Recording plaintiffs may find that it is “damages or nothing”¹⁹¹ because no other proceedings allow them to assert and vindicate that right. In most cases, the recorder is not arrested or charged for attempting to record.¹⁹² Or the recorder is released after a brief “conversation,” likely designed to deter the

189. *Fields*, 862 F.3d at 358; *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012).

190. *Dorfman*, *supra* note 105, at 471–72; *Fan*, *supra* note 105, at 94–96; *Leo & Ofshe*, *supra* note 105, at 495; *supra* Part II.

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

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

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person from attempting to record in the future.¹⁹³ Or the recorder is arrested but charges are withdrawn when the arresting officer, recognizing his speciousness, does not appear at the state proceeding¹⁹⁴ or when that proceeding reveals the basis for the charges to be invalid.¹⁹⁵

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 and declaring it clearly established “for the future” without determining whether the officers violated the plaintiff’s rights at the time and on the facts of the case.¹⁹⁶ The court feared that a court could address the constitutional issue only in this case or a procedurally similar damages action, so it availed itself of the opportunity to resolve the merits issue going forward.

But police officers and other executive officials can avoid litigation and liability on all claims for constitutional damages through the defense of qualified immunity. Qualified immunity provides that a government officer can be liable for damages only for conduct that violated a constitutional right that was clearly established at the time of the conduct, such that a reasonable officer would have known that his conduct violated the constitutional right at issue.¹⁹⁷ 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.¹⁹⁸ This followed two Third Circuit decisions in which the court pretermitted the merits of the First Amendment question and held that any constitutional right that might exist had not been clearly established.¹⁹⁹

The Supreme Court has made the qualified-immunity doctrine strongly protective of police officers, particularly on Fourth

193. *Turner*, 848 F.3d at 683–84.

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

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

196. *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), <http://prawfsblawg.blogspot.com/prawfsblawg/2017/02/qualified-immunity-meets-advisory-opinions.html> [<https://perma.cc/43AA-N6PE>].

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

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

199. *True Blue Auctions v. Foster*, 528 F. App’x. 190, 192 (3d Cir. 2013); *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010); *cf.* *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (holding that courts have discretion to consider the merits or the clearly established prong as the first step in the immunity analysis).

Amendment search-and-seizure and excessive-force claims, to the point that it at least appears difficult to impossible to establish officer liability.²⁰⁰ Qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.”²⁰¹ A right is “clearly established” only by a strong consensus of lower-court cases with somewhat similar facts and officers acting in 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.²⁰² The Court has been coy about whether one binding decision from a regional circuit is sufficient to clearly establish the right within that circuit, assuming it might but never finding a right clearly established based on a single lower-court decision.²⁰³ Policies of the relevant executive department may provide officers with notice of clearly established law.²⁰⁴ A right also may be so obvious that it can be clearly established as general principle without factually similar precedent,²⁰⁵ but the bar for obviousness is high.²⁰⁶ The result is the Supreme Court holding that police officers were entitled to qualified immunity in almost a dozen cases in the past decade—several of them summary reversals of lower-court denials of immunity.²⁰⁷

The risk is that courts will apply qualified immunity in First Amendment right-to-record cases in the same officer-protective manner as in Fourth Amendment cases. 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 within the Third Circuit to consider the question.²⁰⁸ It also refused to accept Philadelphia Police Department policies and

200. See William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 101, 104 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6 (2017); see also Schwartz, *supra*, at 50 (“Although qualified immunity is rarely the reason that Section 1983 cases end, there are other ways in which qualified immunity doctrine might influence the litigation of constitutional claims against law enforcement.”).

201. *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam); *Mullenix*, 136 S. Ct. at 308; *Aschcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

202. *White*, 137 S. Ct. at 553; *al-Kidd*, 563 U.S. at 742; *Wilson v. Layne*, 526 U.S. 603, 614–15 (1999).

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

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

205. *Hope*, 536 U.S. at 741.

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

207. See, e.g., *White*, 137 S. Ct. at 553; *Mullenix v. Luna*, 136 S. Ct. 305, 312 (2015) (per curiam); *Reichle*, 566 U.S. at 663; *al-Kidd*, 563 U.S. at 732; Baude, *supra* note 200, at 139–40; Schwartz, *supra* note 200, at 9.

208. *Fields v. City of Philadelphia*, 862 F.3d 353, 361–62 (3d Cir. 2017).

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regulations as a basis for clearly establishing the right. In the wake of prior right-to-record decisions, the department adopted official policies recognizing that citizens enjoyed a First Amendment right 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" in understanding and respecting this developing constitutional right.²⁰⁹ 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.²¹⁰ 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 constitutional violation.²¹¹ It pointed to testimony from one high-ranking department official that, despite the written policies, officers did not understand that there was a constitutional right to record.²¹²

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" consensus²¹³ 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"²¹⁴), as the Supreme Court has never recognized a right as clearly established in a circuit by a single circuit-court decision.

The Third Circuit in *Fields* found the right to record was not clearly established, insisting that no part of a broad canvas of existing law and policy enabled 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 right to record without clear intent to publish that the plaintiffs exercised in this case.²¹⁵ The Seventh Circuit decision in *Alvarez* did not provide sufficient notice, as it involved a constitutional challenge to an eavesdropping law prohibiting listening

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

210. *Id.*

211. *Id.* at 361 (majority opinion).

212. *Id.*

213. See *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (per curiam); *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1778 (2015).

214. *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017).

215. *Fields*, 862 F.3d at 361–62.

and recording without regard to later use or publication of any recording²¹⁶ (Jud Campbell agrees that *Alvarez* should not be characterized as a right-to-record case because the statute prevented only capture, not recording and dissemination).²¹⁷

Even if sufficient to clearly establish, that lone precedent may lack sufficient factual overlap. Distinctions are always possible and seemingly small and insignificant differences between precedent and current factual circumstances may be sufficient to avoid liability in a doctrinal morass that one scholar compared to the “one-bite rule for bad dogs[,] start[ing] over with every change in weather conditions.”²¹⁸

The Third Circuit suggested that there might be a constitutionally meaningful factual distinction between recording a traffic stop and recording a sidewalk confrontation,²¹⁹ rendering the right not clearly established in the different context. Factual distinctions may prevent *Turner v. Lieutenant Driver*²²⁰ from clearly establishing much in the Fifth Circuit. Dissenting, Judge Clement emphasized that the plaintiff had been photographing the police station building, which did not clearly establish the right to video-record the building or the right to photograph or video-record officers performing police functions.²²¹

Any First Amendment right also remains subject to reasonable, content-neutral time, place, and manner restrictions,²²² such as the officer’s needs for security and safety, for himself and others, in performing dangerous functions. This compels a new inquiry in each case into the details of the underlying events and circumstances and whether the officer reasonably could have believed that the recording interfered with his public duties, compared with previous incidents.

Overcoming qualified immunity and establishing constitutional liability leads to a second hurdle—a claim that a police officer prevented plaintiff from recording or momentarily stopped and questioned her actions, although violative of the First Amendment, may not produce substantial injury and may leave the plaintiff to

216. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012).

217. Campbell, *supra* note 176, at 52.

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

219. *Fields*, 862 F.3d at 361; *True Blue Auctions v. Foster*, 528 F. App’x. 190, 192–93 (3d Cir. 2013).

220. 848 F.3d 678 (5th Cir. 2017).

221. *Id.* at 697 (Clement, J., dissenting in part).

222. *Fields*, 862 F.3d at 360; *Turner*, 848 F.3d at 688; Marceau & Chen, *supra* note 75, at 1032.

recover only nominal damages.²²³ This is especially so in the circumstances giving rise to *Fields* and *Turner*, where no arrests or prosecutions followed and any seizures or detentions to prevent the plaintiffs from recording lasted a short time.²²⁴ And liable officers likely will not pay even that nominal-damages judgment, as the government indemnifies officers in virtually all cases.²²⁵ 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 forgo substantial damages and limit their claims to nominal damages in exchange for the elimination of immunity as a defense.²²⁶

Such disincentives or barriers to successful litigation decrease or limit the amount and availability of citizen-controlled video, leaving officers with the incentive to prevent recording where they can. A determined officer might be willing to shut down a citizen's recording efforts. He avoids being recorded and having video of his misconduct emerge (while already declining to activate his own recording technology), 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.

2. Legislative Limitations

Officers are not activating their police-controlled recording even when required to do so by law or department regulation.²²⁷ Two policymaking problems exacerbate that problem. One is inconsistency as to the level at which recording rules and policies should be made—state, municipal, or departmental—producing piecemeal and confusing rules and obligations.²²⁸ The second is that those policymakers, whatever their level, are enacting insufficiently broad recording policies and excessively narrow disclosure policies.²²⁹

Citizen-controlled recording again should fill the gap when formal regulations and practical conduct combine to limit the

223. See *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308–09 n.11 (1986).

224. *Fields*, 862 F.3d at 356; *Turner*, 848 F.3d at 683–84.

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

226. See JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 146–48 (2017).

227. Fan, *supra* note 105, at 71.

228. Fan, *supra* note 5, at 928–29.

229. *Id.*

available video evidence around a police-public incident. 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 recording.

In 2015, Texas Representative Jason Villalba introduced a bill defining the existing crime of interrupting, disrupting, impeding, or interfering with a peace officer to include “filming, recording, photographing, or documenting the officer within twenty-five feet of the officer,” or within one hundred feet if carrying a gun, with an affirmative defense that the recorder was a member of or working for the media.²³⁰ The obvious target, as the media carve-out demonstrated, was citizens recording their police encounters or encounters they witnessed between police and other members of the public.

Such a bill violates the First Amendment, running 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-expressive conduct unconnected to the speech process.²³¹ A person could stand within twenty-five 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.

This bill 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 twenty feet of the officer interferes or impedes more than a non-media member in the same time and place or why media members should be treated more favorably than non-media members engaged in identical expressive (or pre-expressive) conduct.²³² Although the right to record remains subject to content-neutral time, place, and manner restrictions, such

230. H.B. 2918, 84th Leg., Reg. Sess. (Tex. 2015) (amending TEX. PENAL CODE ANN. § 38.15 (West, Westlaw through the end of the 2017 Reg. Sess and First Called Sessions of the 85th Legis.)); Neena Satija, *Texas a Flashpoint in National Debate Over Right to Film Police*, TEX. TRIBUNE (May 9, 2015, 2:01 AM), <https://www.texastribune.org/2015/05/09/reveal-story-1/> [<https://perma.cc/EC3V-6NDG>].

231. Campbell, *supra* note 176, at 15, 53.

232. See *Turner Broad. Sys., Inc. 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.”).

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special disfavored treatment of citizen-controlled recording is not neutral as to speaker or content.²³³

Villalba withdrew the bill after receiving criticism from everyone on all sides of the political spectrum.²³⁴ 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 through competently drafted laws.²³⁵ As long as the First Amendment right to record remains subject to limitations, policymakers may attempt to restrict when or how recording should take place in service of purportedly neutral values such as non-interference, officer safety, public safety, or protection of officer and public privacy.²³⁶

That such legislation violates the First Amendment in the abstract does not resolve the issue. Nor does the argument that the purported governmental interests are either pretext for government wanting to hide matters from public scrutiny or should not be strong enough to justify a ban on public recordings.²³⁷ Right-holders must overcome numerous procedural hurdles to enforce and vindicate that constitutional right and to obtain judicial remedies barring 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 anti-recording law or policy 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 described above—qualified immunity and the nominal value of the claim to a prevailing plaintiff.²³⁸

In fact, this plaintiff faces a greater qualified-immunity hurdle, because the officer can defend his action on the ground that he was enforcing presumptively valid state law²³⁹ or department

233. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 604 (7th Cir. 2012).

234. Allison Wisk, *Bill to Limit Filming of Police Activity Is Dropped*, DALL. NEWS (Apr. 2015), <http://www.dallasnews.com/news/local-politics/2015/04/10/bill-to-limit-filming-of-police-activity-is-dropped> [<https://perma.cc/LY29-M5X6>].

235. *See Fields v. City of Philadelphia*, 862 F.3d 353, 363 (3d Cir. 2017) (Nygaard, J., concurring in part, dissenting in part); Kreimer, *supra* note 39, at 346.

236. *See Marceau & Chen*, *supra* note 75, at 1033–34.

237. *See id.* at 1033.

238. *Supra* text accompanying notes 223–26.

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

regulations,²⁴⁰ he therefore was neither plainly incompetent nor knowingly violating the First Amendment. The plaintiff would have to meet the burden of establishing that the statute or regulation was obviously and blatantly unconstitutional, such that no reasonable or not-plainly incompetent officer could have believed the recording ban could be valid and enforceable.²⁴¹

A plaintiff might instead sue the municipality, arguing that the officer arrested her pursuant to a constitutionally defective formal policy enacted by a final policymaker.²⁴² Municipalities cannot assert immunity defenses,²⁴³ 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 her case and prior cases. But if the challenged recording prohibition derived from a state statute (such as Villalba's bill in Texas), the constitutional violation in a case of arrest by a municipal or county police officer would have been caused by state law.²⁴⁴ Municipal liability requires that the constitutional violation be caused by that municipality's policies or ordinances, not the policies of another entity that the municipality enforced. A local practice or policy of enforcing all state law is not sufficient to establish liability for its enforcement of any particular constitutionally deficient state statute. Unless the municipality took additional steps to adopt the state prohibition against recording as a municipal ordinance or to promulgate a formal local policy of enforcing that specific state law, a plaintiff will be unable to establish entity liability.²⁴⁵

A third option is a pre-enforcement action against state or local officials to enjoin enforcement of the anti-recording law as violating the First Amendment. Qualified immunity does not apply in actions for equitable relief.²⁴⁶ Instead, pre-enforcement plaintiffs face standing problems.

Under *O'Shea v. Littleton*,²⁴⁷ *City of Los Angeles v. Lyons*,²⁴⁸ and *Clapper v. Amnesty International*,²⁴⁹ courts are reluctant to accord

240. See *Wilson v. Layne*, 526 U.S. 603, 617–18 (1999).

241. *Grossman*, 33 F.3d at 1209.

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

243. See *Owen v. City of Independence*, 445 U.S. 622, 650–51 (1980).

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

245. See *Vives*, 524 F.3d at 353; *N.N. v. Madison Metro. Sch. Dist.*, 670 F. Supp. 2d 927, 933–34 (W.D. Wis. 2009).

246. *Pearson v. Callahan*, 555 U.S. 223, 242 (2009); *Wood v. Strickland*, 420 U.S. 308, 315 n.6 (1975); Schwartz, *supra* note 200, at 13.

247. 414 U.S. 488 (1974).

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standing to plaintiffs challenging law-enforcement policies and practices that affect the plaintiffs only when police attempt to enforce other valid substantive laws against them. The plaintiffs in *O'Shea* lacked standing to challenge discriminatory state-court charging, bail, and sentencing practices; the claim required impermissible speculation that at some future point the plaintiff would be arrested for violating a constitutionally valid substantive criminal provision and become subject to the challenged criminal procedures.²⁵⁰ The plaintiff in *Lyons* lacked standing to obtain an injunction barring city police from future use of a constitutionally dubious chokehold; he could not predict if or when he would be stopped by police for a traffic or other legal violation, if or when the encounter would go south, and if or when the chokehold would be applied to him.²⁵¹ The plaintiffs in *Clapper* lacked standing to challenge a federal law permitting certain national-security surveillance; they could not predict if or when they or people they communicated 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.²⁵²

Consider how and when a prohibition on recording would be enforced. An officer seizes or initiates an encounter with a person for some crime, infraction, or matter; that person attempts to record the encounter; and the officer prevents her pursuant to the anti-recording law. Or a person comes upon an officer seizing another person for some crime, infraction, or matter; the person attempts to record that encounter; and the officer breaks from his seizure of the first target to stop the recorder pursuant to the anti-recording law. Standing for any pre-enforcement challenge requires the court to “speculate” that the plaintiff will be seized by police or will witness another person being seized by police for some other conduct or crime, that she will attempt to record, and that she will be prevented from recording that incident by the officer enforcing the recording ban.²⁵³ A court may be unwilling to accommodate such conjecture prior to enforcement, as opposed to in an action in which the police completed the infringement of the First Amendment by preventing recording and

248. 461 U.S. 95 (1983).

249. 133 S. Ct. 1138 (2013).

250. *O'Shea*, 414 U.S. at 496–97.

251. *Lyons*, 461 U.S. at 108.

252. *Clapper*, 133 S. Ct. at 1147–50.

253. *Id.* at 1148–50; *Lyons*, 461 U.S. at 108.

the plaintiff seeks a retroactive remedy (and faces the hurdle of qualified immunity).²⁵⁴

Courts apply more relaxed standing analysis to pre-enforcement First Amendment challenges; judges are more willing to allow plaintiffs to preemptively raise their constitutional 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.²⁵⁵ Even in First Amendment cases, a plaintiff must show “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.”²⁵⁶ She must show a present intention to engage in the statutorily prohibited expressive activity at a specific, imminent future, subjecting herself to likely enforcement.

The ACLU established standing in *Alvarez*, although the court recognized that the organization “does not know precisely when it or its employees would face prosecution or which officers would be involved.”²⁵⁷ The court did not demand a showing of intent to record at any particular imminent protest. It distinguished *Lyons* because the threat of prosecution did not hinge on unknowable future events or details of how a 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.”²⁵⁸ Because such events were certain to occur and because the ACLU’s organizational policy and practice was to attend and record many or all of those events, the organization’s activity and the likelihood of enforcement against them moved beyond speculative, even if it could not identify the date of the event to be recorded.

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 that are certain to occur and at which police may attempt to enforce a statutory recording ban. Of course, media

254. *Cf.* *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017) (describing actual prevention of recording).

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

256. *Susan B. Anthony List v. Driehaus*, 134 S. Ct 2334, 2342 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

257. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 593–94 (7th Cir. 2012).

258. *Id.* at 588.

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organizations and individuals working for media organizations were exempt from Villalba's proposed Texas bill²⁵⁹ and the Illinois law at issue in *Alvarez*,²⁶⁰ and likely would be exempt from similar legislative prohibitions on recording.

Jocelyn Simonson's copwatchers²⁶¹ also may be able to establish standing. They operate 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.²⁶² Video-recording is one recent addition to copwatchers' repertoire²⁶³ and their recording is as deliberate, scheduled, and organized as their patrol activities.²⁶⁴ Like the ACLU and the media, their regular organization and consistent activities allow them to show present intent to record inevitable future events through their regular planned activities, even if the date or place of the events recorded and of enforcement of the recording ban is unknown at the time of litigation.

Ordinary, spontaneous, individual citizen-recorders acting on their own may not be so fortunate. They will be less able to show when or where they will witness or be involved in an individual encounter that they want to record, lacking formal job obligations or organizational plans to attend events or encounters at which recording, and efforts to enforce a recording ban, will occur. Unable to show when or where they 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 *O'Shea*, *Lyons*, and *Clapper*, where the when and how of a future encounter with law enforcement and attempted enforcement of the challenged law 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. 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 tried during the Ferguson protests²⁶⁵), other than by halting the

259. H.B. 2918, 84th Leg., Reg. Sess. (Tex. 2015) (amending TEX. PENAL CODE ANN. § 38.15 (West, Westlaw through the end of the 2017 Reg. Sess and First Called Sessions of the 85th Legis.)).

260. See *Alvarez*, 679 F.3d at 604.

261. Simonson, *supra* note 7, at 408.

262. See *id.* at 408–11.

263. See *id.* at 408.

264. See *id.* at 410.

265. See *Order by Consent*, *supra* note 30, at 1; *Flanders*, *supra* note 71, at 203–05; *Wasserman*, *supra* note 3, at 831–32.

protest event, which raises separate, more fundamental First Amendment concerns.²⁶⁶ Police traditionally accorded media members freer rein in covering protests and other events, although some of that deference was lost in the Ferguson protests and since.²⁶⁷ Citizens who engage in copwatching 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 intimidate the watchers or stop their activities, including recording.²⁶⁸

Spontaneous and isolated individual recorders do not receive similar respect or deference. It is easier for police to prevent a single recorder from capturing a single random encounter, giving officers a greater incentive to do so. 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 prohibition on recording but more difficult for plaintiffs to preemptively challenge its constitutional validity.

3. Municipal Liability for Individuals Encounters

A plaintiff can establish municipal liability by showing that the municipality failed to properly train its officers or to establish sufficient policies guiding their conduct and that this failure caused the officer to violate that plaintiff's rights in an individual encounter.²⁶⁹ Where an individual officer exercises his discretion to prevent an individual from recording, that individual might show that municipal policymakers did not provide constitutionally adequate policies or training to instruct officers that citizens have a First Amendment right to record and that officers must allow such recording to occur.

In *Fields*, the Philadelphia Police Department promulgated regulations and adopted policy statements announcing a constitutional right to recording and reminding officers that they should reasonably expect to be recorded or photographed and that they “shall not” obstruct or prevent recording or disable the

266. ZICK, *supra* note 2, at 257.

267. See Flanders, *supra* note 71, at 203–05; Jonathan Peters, *When a Journalist is Arrested Covering a Protest, What Should the News Outlet Do?*, COLUM. JOURNALISM REV. (Oct. 2, 2017), https://www.cjr.org/united_states_project/protest-arrests-journalism-st-louis.php [<https://perma.cc/R5ZH-J59L>]; Jonathan Peters, *Journalists in Ferguson: Know Your Rights*, COLUM. JOURNALISM REV. (Aug. 21, 2014), https://archives.cjr.org/united_states_project/press_rights_in_ferguson.php [<https://perma.cc/3LFB-Z4GD>].

268. See Simonson, *supra* note 7, at 410.

269. *Connick v. Thompson*, 563 U.S. 51, 61 (2011); *Brown v. Comm'rs of Bryan Cty.*, 520 U.S. 397, 406–07 (1997).

recording devices.²⁷⁰ But the policies were ignored, were ineffective in informing officers that the constitutional right existed, or were not being followed; most officers were not aware the constitutional right existed.²⁷¹ A municipality can be liable for establishing inadequate policies or for disregarding officers who do not adhere to adequate policies. But such failure-to-train liability is for “limited circumstances,” constrained by strict causation and state-of-mind requirements²⁷² making it difficult for plaintiffs to prove.

The *Fields* plaintiffs tried to establish failure to train through evidence of officers ignoring or being unaware of those policies.²⁷³ In this respect, municipal liability becomes the mirror of the individual defense of qualified immunity—what triggers municipal liability supports qualified immunity, while what overcomes qualified immunity suggests the absence of municipal liability. The *Fields* majority criticized the plaintiffs for attempting to use department policies and training to have it both ways—insisting that the policies clearly established the First Amendment right to record while arguing that the policies were “utterly ineffective” in conveying to officers the nature and details of that right.²⁷⁴

C. *The Problem of Officer Discretion*

Police-controlled video is marked by three trends: departments according officers discretion as to whether, what, and when to record;²⁷⁵ officers wielding that discretion in narrow ways;²⁷⁶ and officers failing to follow regulations when required to record.²⁷⁷ The trends are self-reinforcing, as every failure to record can be defended as an exercise of sound discretion.

It is reasonable to expect that officers would be less likely to record—intentionally or otherwise, as a matter of discretion or otherwise—an encounter that has gone sideways and may embarrass the recording officer or his fellow officers. Fan offers 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

270. 862 F.3d, 353, 363 (3d Cir. 2017) (Nygaard, J., concurring in part, dissenting in part).

271. *Id.* at 361 (majority opinion).

272. *Connick*, 563 U.S. at 61–63; *Brown*, 520 U.S. at 407.

273. *Id.*

274. *Fields*, 862 F.3d at 361.

275. POLICE EXEC. RESEARCH FORUM, *supra* note 17, at 40–41; Fan, *supra* note 5, at 931–32; White & Fradella, *supra* note 20, at 1599–1604.

276. Fan, *supra* note 105, at 65, 69–71; Wasserman, *supra* note 48, at 558.

277. Fan, *supra* note 105, at 69–71.

hospitalization; ten of the eleven involved officers failed to activate their body cameras, and the one who activated his camera did so by accident.²⁷⁸

It also is reasonable to expect that officers, vested with similar discretion by legislation or policy, will be inclined to stop a citizen from recording an encounter that has gone sideways and that may produce video embarrassing one or more officers or make them look bad to the viewing public. The unrecorded 2016 incident in San Francisco came to light because a private video-security system captured the incident, and the owners of the system turned the video to the public defender.²⁷⁹ Had the officers been vested with power and discretion to stop that recording or its release, they likely would have exercised it.

Qualified immunity protects executive discretion, to give police officers “breathing room to make reasonable but mistaken judgments”²⁸⁰ and to provide wide latitude for the vigorous exercise of constitutional judgment and discretion, rather than forcing them to steer too clear of the constitutional line out of fear of liability.²⁸¹ Anti-recording legislation vests officers with additional discretion and an additional weapon to control citizens and to eliminate potentially embarrassing video. This undermines the force of citizen-controlled video in establishing or restoring balance between police and the public in capturing images and in ensuring police accountability.²⁸²

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.²⁸³ But discretion is inherent in policing, including as to what laws to enforce, how, and when.²⁸⁴ A plaintiff 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 because of her speech, although pleading and proving intent proves difficult for plaintiffs.²⁸⁵ Campbell’s framework for protecting speech-

278. *Id.* at 69.

279. *Id.*

280. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

281. *Filarsky v. Delia*, 566 U.S. 377, 388–90 (2012); *Wyatt v. Cole*, 504 U.S. 158, 167–68 (1992); *Mitchell v. Forsyth*, 472 U.S. 511, 525–26 (1985).

282. *See Fan*, *supra* note 105, at 95–96; *Kreimer*, *supra* note 39, at 386.

283. *See Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

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

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

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facilitating pre-expressive conduct can map onto that intent standard; subject heightened First Amendment scrutiny applies to laws and regulations that target the speech process by targeting recording as a speech-facilitating activity.²⁸⁶

An officer who prevents a citizen from recording, whether pursuant to a statutory recording ban or his own discretion, targets the speech process when he is motivated by the desire to eliminate video that might expose him or his fellow officers acting in unconstitutional, or simply embarrassing, ways.²⁸⁷ This standard would have been satisfied in the events underlying *Fields*, as police in two separate incidents approached recorders with the intent of stopping otherwise non-interfering recording of potential police misconduct.²⁸⁸

But courts may 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.²⁸⁹ Plaintiffs in citizen-video cases thus face the same proof difficulties in showing that the officer intended to halt recording to avoid being shown performing his public functions in an inappropriate manner, rather than because he reasonably and with probable cause believed the recording interfered with legitimate 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, limits on municipal liability, and limits on proof make enforcement of that right difficult. Those difficulties together limit the force of citizen-controlled video as a tool for police reform or accountability.

286. See Campbell, *supra* note 176, at 15, 50–51.

287. Marceau & Chen, *supra* note 75, at 1033–34.

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

289. *Reichle v. Howards*, 55 U.S. 658, 667–68 (2012); *Hartman v. Moore*, 547 U.S. 250, 251 (2006); *cf. Lozman v. City of Riviera Beach*, 681 F. App'x 746 (11th Cir. 2017), *cert. granted*, 138 S. Ct. 447 (2017) (granting certiorari to decide whether the existence of probable cause defeats a retaliatory-arrest claim as a matter of law).

IV. VIDEO AND REMEDIATION

Video's role 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 and interpretations of that video.²⁹⁰

In responding to incidents of police-involved force, the 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, ideology, political leanings, demographics, and experience. Regardless of how policymakers interpret and understand a recording, they must consider different reactions from a public adopting a different interpretation 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 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 of police.²⁹¹ And it explains efforts to exclude body-camera videos from public disclosure laws.²⁹² In 2016, Missouri enacted a broad, blanket exemption from its open-records laws for body-camera and dashcam video, arguing that making video public would interfere with ongoing police investigations.²⁹³ That decision followed the state attorney general's commission recommendation and the attorney general's warning of technology "lead[ing] to a new era of voyeurism and entertainment television at the expense of Missourians' privacy."²⁹⁴

But as Fan argues, "blanket or overly broad exemptions from public disclosure . . . defeat" the basic transparency and accountability goals of police-controlled recording.²⁹⁵ Video becomes a tool for protecting and exonerating officers against public complaints within

290. See White & Fradella, *supra* note 20, at 1623–28.

291. *Supra* text accompanying notes 230–36.

292. Fan, *supra* note 5, at 942.

293. *Nixon Signs Bill Limiting Access to Police Body Cam Videos*, *supra* note 140.

294. 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 [<https://perma.cc/M5VT-N7PD>].

295. Fan, *supra* note 139, at 442.

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the department,²⁹⁶ without allowing the public into the conversation to see and decide what the video reveals about what happened in an encounter. Alternatively, government adopts 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 (or that the public is likely to view) as adverse to police and government interests.²⁹⁷

A second, more positive, possibility is that public availability of video evidence, however created, prompts institutions to be more aggressive in challenging police misbehavior and seeking accountability for misconduct.²⁹⁸ 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 Garner²⁹⁹ and Cleveland police officers Timothy Loehmann and Frank Garmback were not indicted in the 2014 shooting death of Tamir Rice,³⁰⁰ despite widely circulated video (from non-police sources) of both incidents. More recent cases have resulted in criminal charges and prosecutions—Ray Tensing in the shooting death of Samuel DuBose at the University of Cincinnati,³⁰¹ Yeonimo Yanez in the shooting death of Philando Castile in Minnesota,³⁰² 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.³⁰³ 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 judicial order compelling disclosure, told the

296. Harris, Collection and Use Panel Discussion at the North Carolina Law Review Symposium, *supra* note 11.

297. Wasserman, *Uncertain Hope*, *supra* note 48, at 228–29.

298. See Wasserman, *supra* note 2, at 644–45.

299. 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), <https://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html> [<https://perma.cc/4BAS-7CXS> (dark archive)].

300. Scruggs, *supra* note 98.

301. Jess Bidgood & Richard Pérez-Peña, *Mistrial in Cincinnati Shooting as Officer is Latest Not to Be Convicted*, N.Y. TIMES (June 23, 2017), <https://www.nytimes.com/2017/06/23/us/raymond-tening-samuel-dubose-cincinnati.html> [<https://perma.cc/PM5E-ZL4M> (dark archive)].

302. Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html> [<https://perma.cc/BT74-SBT7> (dark archive)].

303. Berman et al., *supra* note 73; Stahl, *supra* note 113.

public a different story from official accounts and helped expose an attempted cover-up.³⁰⁴ A hung jury in the state homicide prosecution of Michael Slager in the shooting death of Walter Scott in South Carolina led to a federal civil rights prosecution of Slager for depriving Scott of his Fourth Amendment rights,³⁰⁵ a guilty plea, and a twenty-year federal prison sentence.³⁰⁶

The results of these cases may not reflect positive outcomes or what many regard, based on their interpretations of the videos, 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. Acquittals accompanied by graphic video, such as in the Shaver shooting, reinforce the cynical public belief that no amount of evidence is sufficient to convict a police officer. But the increased efforts suggest some limited movement toward success. State and federal prosecutors appear more willing to pursue criminal charges when video evidence, at least viscerally, supports a view that the officer did something constitutionally violative.

Bryce Newell identifies an irony to this evolution. The demand for body-cams and video in police-shooting cases, including among rank-and-file police officers, began following the unrecorded shooting of Michael Brown in Ferguson. Subsequent cases featured video of some sort from some source, resulting in prosecutions but not necessarily accountability, while turning rank-and-file officers against cameras as a law-enforcement tool.³⁰⁷

A third possibility is that video of a police-citizen incident prompts municipalities to expeditiously settle civil rights suits. The government avoids further public viewing, discussion, and debate

304. Catherine Thorbecke, *Chicago Police Officer Charged with Murder of Teen Laquan McDonald Hired by Police Union*, ABC NEWS (Mar. 31, 2016), <http://abcnews.go.com/US/chicago-police-officer-charged-murder-teen-laquan-mcdonald/story?id=38052352> [<https://perma.cc/8P8V-RQRM>].

305. See 18 U.S.C. § 242 (2016).

306. Alan Blinder, *Ex-Officer Who Shot Walter Scott Pleads Guilty in Charleston*, N.Y. TIMES (May 2, 2017), <https://www.nytimes.com/2017/05/02/us/michael-slager-walter-scott-north-charleston-shooting.html> [<https://perma.cc/V5P3-QWXX> (dark archive)]; Steve Osunsami & Emily Shapiro, *Ex-Cop Michael Slager Sentenced to 20 Years for Shooting Death of Walter Scott*, N.Y. TIMES (Dec. 7, 2017), <http://abcnews.go.com/US/cop-michael-slager-faces-19-24-years-prison/story?id=51595376> [<https://perma.cc/29R9-AJVG> (dark archive)].

307. Newell & Greidanus, *supra* note 20, at 1554–57.

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over video that is subjectively perceived as troubling, reducing the potential that anger erupts into public demonstrations.³⁰⁸

Public attention and outrage over a viral video puts the government on its heels; it must defend its officers while 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 subsequent § 1983 or wrongful-death actions. 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,³⁰⁹ even while the officers in each case escaped criminal punishment. Smith’s family settled for \$900,000, although allegations that the state withheld DNA evidence during settlement negotiations (evidence that may have allowed the family to place a higher value on the case) may cause the court to reopen discovery and the settlement.³¹⁰

Katherine MacFarlane describes these civil cases as utilizing “accelerated civil rights settlement.”³¹¹ Plaintiffs bring or threaten small-bore § 1983 claims; they seek damages for the single event at issue, but not systemic departmental reform through broad injunctive relief; and the parties settle before or shortly after filing.³¹² While these lawsuits do not achieve systemic police reform, the settlements are with the municipality (rather than the officers³¹³) and are substantial enough to add-up and incentivize the government to reform its training, supervision, policies, and programs to avoid future lawsuits and payments.³¹⁴ Video, and fear of the public reaction to video that looks “bad,” prompts the government to pursue or accept

308. See Mary D. Fan, *Hacking Qualified Immunity: Camera Power and Civil Rights Settlements*, 8 ALA. C.R. & C.L. L. REV. 51, 63 (2017); Wasserman, *supra* note 2, at 644–45.

309. See Katherine A. MacFarlane, *Accelerated Civil Rights Settlements In the Shadow of Section 1983*, 2018 UTAH L. REV. (forthcoming 2018) (manuscript at 4–13, 15–16); Mitch Smith, *Philando Castile Family Reaches \$3 Million Settlement*, N.Y. TIMES (June 26, 2017), <https://www.nytimes.com/2017/06/26/us/philando-castile-family-settlement.html> [<https://perma.cc/2FNE-KG32> (dark archive)]; Sheryl Gay Stolberg, *University of Cincinnati to Pay \$ 4.85 Million to Family of Man Killed by Officer*, N.Y. TIMES (Jan. 18, 2016), <https://www.nytimes.com/2016/01/19/us/university-of-cincinnati-to-pay-4-85-million-to-family-of-man-killed-by-officer.html> [<https://perma.cc/MD64-VZSW> (dark archive)].

310. Jack Suntrup, *Attorney Moves to Reopen Discovery in Anthony Lamar Smith Civil Suit*, ST. LOUIS POST-DISPATCH (Dec. 18, 2017), http://www.stltoday.com/news/local/crime-and-courts/attorney-moves-to-reopen-discovery-in-anthony-lamar-smith-civil/article_d03e5c92-2322-597b-bc19-d2d17387bb63.html [<https://perma.cc/7V9S-P6UL>].

311. MacFarlane, *supra* note 309, at 1.

312. See *id.* at 5–6, 17.

313. See Schwartz, *supra* note 225, at 890–91.

314. See MacFarlane, *supra* note 309, at 20–21, 32–33, 35.

accelerated settlement, ending the legal dispute and any popular debate and controversy around the video and the problematic police encounter.

A final, ironic, option is for government to undertake the difficult task of warning the public not to 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. In other words, the solution is for government to discuss video in honest and accurate terms.

But if the public's brute-sense impression is that the video is unfavorable to the police, as in the settled high-profile death cases, this argument may prove practically and politically impossible.³¹⁵ This tactic also contradicts the government position, in and out of litigation, when officials are confident in video's officer-supportive message. In those cases, they insist that video is singular, conclusive, objective, unambiguous, and tells one story that exonerates the officer on summary judgment³¹⁶ or justifies the decision not to pursue criminal charges against the officer. The cognitive dissonance and charges of political hypocrisy may be too much to overcome.

CONCLUSION

Public discussion of the benefits of video-recording cannot be disconnected from the legal and judicial processes within which video gets used and in which the benefits of video—police accountability, police reform, and enforcement and vindication of individual rights—will be obtained. Whether video achieves its aims depends on how prosecutors, juries, grand juries, and judges process video and understand how to process video; procedural limitations on enforcement of constitutional rights; and public reactions to the legal process grounded in their own processing of video. It is important to talk about whether law enforcement should establish body-camera programs and the details of those programs; it is important to talk about whether the First Amendment protects a right to record. But it is essential that those conversations consider and account for the procedural problems considered here.

315. Wasserman, *supra* note 2, at 645–47.

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