

Introduction

Evidence obtained by remote electronic traffic devices is taking on increasing importance as evidenced by the struggle over restrictions on the devices¹ as well as the Supreme Court's recent unusual step of linking to a video featuring footage from a police officer chasing after a speeding driver.² As law enforcement officials rely more and more on this type of evidence to issue citations and defend against criminal proceedings, courts must grapple with the admissibility of photographic and video evidence obtained from red light cameras, speeding cameras, and black boxes or cameras on a police car.

This article focuses on the rationales of evidence exclusion and notes that as an intrinsic rule, or a rule focused on the pursuit of truth, when determining whether to admit the evidence one must consider the three foundational factors of 1) materiality and relevance, 2) authenticity, and 3) competence.³ On balance, in civil cases, courts should almost always admit the evidence unless it is clear that it is fabricated or flawed. They should also follow the approaches of case law and err on the side of admitting the evidence but allowing the defendant to argue issues as to the authenticity when determining the weight of the evidence. However, the balance changes in criminal cases which implicate the jury and therefore also implicate jury risks. In these circumstances, courts should still almost always admit the evidence, but they should recognize the potential prejudice of video taped evidence in particular and take steps to mitigate it such as reviewing the evidence early on the proceeding to make sure the evidence is not especially prejudicial. In the special case of summary judgment or other instances where

¹ See Robin Miller, *Automated Traffic Enforcement Systems*, 26 A.L.R. 179, § 2 (2007).

² *Scott v. Harris*, 550 U.S. 372 (2007).

³ See Jordan S. Gruber, *Videotape Evidence*, 44 AM. JUR. TRIALS 171, § 4 (2009).

the court takes the decision out of the hands of the jury, the court should be especially careful to preserve legitimacy because juries serve important goals. More specifically, courts should recognize the differing viewpoints of the parties as well as the viewpoints that the evidence might elicit in jurors, particularly if the evidence is in the form of a video. They should also avoid a sensorial jurisprudence which uses language that hints the judges themselves have fallen prey to the biasing effects of the evidence. Both of these steps will help the court retain legitimacy and therefore give the court a way to admit the evidence without placing undue import on it.

Part I briefly discusses the goals of evidence law and focuses on the concerns underlying intrinsic rules which are focused on the pursuit of truth. Part II briefly outlines my proposal. Part IIA. discusses civil law and concludes that on balance, this type of evidence should almost always be admitted. In addition, as current case law dictates, courts should also allow parties to raise questions regarding the accuracy of the evidence at trial. Part IIB. turns to criminal law with the added wrinkle of a jury. It begins by acknowledging that while the balance regarding the potential prejudicial effect of the evidence alters slightly because videos that are powerful forms of evidence are more likely to surface in this context, procedural safeguards are sufficient to counteract these biases and evidence should still almost always be admissible. Next, this article turns to jury risks and likewise concludes that these risks do not necessitate the exclusion of evidence. It continues by discussing how current case law supports these conclusions as well as providing guidance for courts in this dilemma. Finally, this article concludes by drawing lessons from *Scott v. Harris*, a Supreme Court case involving video footage from a police officer driving after a speeding defendant, and argues that courts should

refrain from putting too much weight on the admitted evidence which results in a sensorial jurisprudence, and instead be careful to preserve its legitimacy.

I. Background: Intrinsic Rules and the Foundation Requirements of Materiality and Relevance, Authenticity, and Competence

Before discussing the admissibility of evidence obtained by remote electronic devices, one must first understand evidence law's underlying goals. Rules of evidence are divided into two categories: intrinsic and extrinsic rules.⁴ Intrinsic rules are concerned with facilitating the pursuit of truth. In contrast, extrinsic rules are concerned with advancing other policies as exemplified by the rules regarding privilege.⁵ The rules governing admissions of evidence obtained from remote electronic traffic devices are intrinsic rules because they focus on the pursuit of truth. As just one example, consider the best evidence rule in federal and state evidence law which requires photographs, including videos, to be the original in order to prove its contents.⁶ Although "original" has been defined as "any print" of a photograph and thus videos can be any videotape of acceptable quality,⁷ the essential concern about the authenticity of the evidence remains.

Given that evidence obtained by remote electronic traffic devices are governed by intrinsic rules, judges consider foundational requirements which are focused on the pursuit of truth when determining whether to admit the evidence. These three factors are:

⁴ See Lisa Dufraimont, *Evidence Law and the Jury: A Reassessment*, 53 MCGILL L.J. 199, 205 (2008). See also MIRJAN R. DAMA KA, *EVIDENCE LAW ADRIFT* 12-17 (1997).

⁵ See 1 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* 689 (Peter Tillers ed., 1983).

⁶ See GREGORY P. JOSEPH, *MODERN VISUAL EVIDENCE* § 4.02[5] (1984).

⁷ See *id.*

1) materiality and relevance, 2) authenticity, and 3) competence.⁸ Materiality and relevance are closely tied because evidence cannot be relevant without being material. Material evidence must relate to a substantive issue in the case, or in other words, be “material to the question in controversy.”⁹ Relevant evidence is “evidence having any tendency to make the existence of [a material fact] more probable or less probable than it would be without the evidence.”¹⁰ Authenticity relates to whether the evidence itself is authentic. Finally, competence refers to whether the evidence violates “any legislative or evidentiary exclusionary policy” which in this context primarily focuses on the Rule 403 and parallel state rules regarding exclusion of evidence due to prejudice to the defendant.¹¹ Against this backdrop, this article now turns to assessing the admissibility of evidence obtained by remote electronic traffic devices in civil and criminal cases.

II. Proposal: Courts Should Almost Always Admit Evidence Obtained by Remote Electronic Traffic Devices

When considering the three foundational factors, it becomes clear that courts should almost always admit evidence obtained by remote electronic traffic devices in civil contexts. However, courts should allow questions as to the authenticity of the evidence go towards the weight of the evidence after admitting it. In the criminal context, the weighing of the three foundational factors changes because video is more likely to be introduced, thereby increasing the prejudicial effects on the defendant. However, on balance, the evidence should still be admissible because of procedural

⁸ See Gruber, *supra* note 3, at § 4.

⁹ *Id.* at § 54.

¹⁰ *Id.* (quoting FED. R. EVID. 401).

¹¹ *Id.*

safeguards mitigating this risk as well as the great probative value of the evidence. Jury risks do not necessitate the exclusion of the evidence either, and indeed, current case law supports this conclusion as well as suggesting guidelines such as routinely reviewing the evidence prior to admitting it. Finally, when faced with a summary judgment case involving this type of evidence, courts should be very cognizant of the rationales behind why juries are in place. Indeed, to preserve legitimacy, courts should do a mental check or engage in judicial humility to be careful to word their opinion neutrally so that they credit the viewpoints of the driver and potential jurors as well as being careful to avoid falling prey to unduly relying on the evidence and coming out with a sensorial jurisprudence.

A. Civil Law Context

In civil cases, courts should almost always admit evidence obtained by remote electronic traffic devices. Indeed, the only time that the court should not be admitting the evidence is if it is clearly fabricated, which is highly unlikely.¹² If there are minor disputes as to the authenticity of the evidence, the court should err on the side of admitting it, but allow the defendant to raise those arguments at trial to dispute the weight of the evidence.

At the outset, it is important to understand that traffic citations are infractions and thus will usually be heard in traffic court or the lowest level state court. While there are some variations among the states in their treatment of the citations, it is safe to assume

¹² It is difficult to imagine officers purposefully manipulating images even if techniques are available to do so.

that the case will be heard in front of one judge.¹³ Thus, because juries are not implicated in these civil cases, the balance struck will differ from that of criminal cases.

i. Evidence obtained by remote electronic devices almost always satisfies the three foundational factors of materiality and relevance, authenticity, and competence

When considering the three factors of materiality and relevance, authenticity, and competence, it becomes clear that evidence obtained by remote electronic traffic devices should almost always be admitted.

First, this type of evidence easily satisfies the materiality and relevance factors because the photos or videos are contemporaneous depictions of the moment the violation occurred. The evidence is thus material to the legal issue, and also relevant because the photograph or video's existence makes it more probable that the violation occurred.

Evidence obtained by remote electronic traffic devices also satisfies the authenticity test. First of all, this type of evidence is contemporaneous direct evidence, which is evidence that records the moment in controversy and proves an issuable proposition in the case without needing intermediate inferences.¹⁴ Thus, they are in essence "silent witnesses"¹⁵ and courts can almost always safely admit the evidence when the government verifies the fairness and accuracy. The government can easily do so through showing that the video was not altered while going through a known chain-of-custody, bringing in a photographic or video expert who can testify that nothing was

¹³ See generally Note, The Philadelphia Traffic Court, 109 U. PA. L. REV. 848 (1961).

¹⁴ Gruber, *supra* note 3, at § 44.

¹⁵ Most courts support the silent witness theory now and have abandoned prior requirements such as a seven prong test. See *id.* at §§ 59-60.

altered or faked,¹⁶ or even just citing which speed camera was used, as one state has recently required in an effort to address authenticity concerns.¹⁷

Finally, when considering competence, the probative value of the evidence outweighs the potential prejudice against the defendant. As discussed earlier, photos or videos are contemporaneous direct evidence and so they have a very strong probative value.¹⁸ Weighed against this is the potential prejudice against the defendant. Here, it is unlikely that the defendant would be unfairly prejudiced by the admission of the evidence. Although it is true that videos in particular may cause viewers to overvalue the evidence,¹⁹ the fact remains that in civil matters, such biases are not as prevalent because these cases deal with small traffic infractions. It is difficult to imagine that a photo or video of a car driving through a red light can cause too much sensationalism in the viewer. Moreover, the concern about the bias is not as relevant with traffic court judges who have some experience after regularly dealing with these types of cases. Indeed, one study even found that magistrate judges seemed to dismiss the charges with great frequency,²⁰ and so although there have been very few studies on the bias of individual judges, it is probably safe to assume that it seems unlikely that admitting the evidence

¹⁶ *See id.* at § 60. Indeed, studies show that red light cameras for instance are usually very accurate. *See generally* Christina M. Mulligan, *Perfect Enforcement of Law: When to Limit and When to Use Technology*, 14 RICH J.L. & TECH. 13 (2008).

¹⁷ Florida's recent rule requires officers to list the type and serial number of the speed measuring device in citations. *See* Thomas A. Cobitz, *Annual Reports of Florida Bar Committees*, 82 FLA. B.J. 34, 76 (2008).

¹⁸ *See* Gruber, *supra* note 3, at § 62.

¹⁹ Part IIB. discusses the powerful effects of videos in greater depth.

would unfairly prejudice the defendant. Moreover, while the concern may take on greater weight with appeals courts where judges may not be as experienced with traffic matters, it is probably safe to assume that most cases end in traffic court and it would thus be illogical to exclude the evidence just because there is a slight chance that an appeals judge would be prejudiced against the defendant. Because as contemporaneous direct evidence it is extremely probative and the potential for unfair prejudice is not very salient, evidence obtained by remote electronic traffic device satisfies all three foundational requirements and thus should almost always be admitted into evidence in civil cases.

ii. Current case law supports admitting evidence obtained by remote electronic traffic devices and suggests that minor authenticity disputes should only go towards the weight of the evidence instead of its admissibility

Current case law also overwhelmingly supports admitting evidence obtained by remote electronic traffic devices. In state after state, courts generally admit the evidence.²¹ Although there is some variance in how much the state has relaxed its authentication requirements with some still requiring a proof of the chain-of-custody for instance,²² the government usually easily fulfills these requirements and so courts consistently continue to admit the evidence.

These cases also give some guidance for how courts should be treating minor challenges to the evidence's authenticity. In general, courts would do better to admit the

²⁰ See Note, *supra* note 13, at 864-68 (finding that magistrate judges regularly dismissed citations due to personal and political pressures because they were elected officials).

²¹ See Gruber, *supra* note 3, at § 62.

²² See *id.*

evidence and then have the parties raise points about the authenticity in court instead of excluding the evidence altogether. Indeed, appellate courts have shown a “great reluctance”²³ to limit the trial court’s discretion, particularly because of the subjective nature of the weighing. Moreover, appellate courts frequently affirm a lower court’s decision to find a violation even when the defendant protested the admission and reliability of the evidence such as a defendant’s protestation over an admission of a photo-speed recorder²⁴ or that the device was being used for the first time.²⁵ In contrast, appellate courts are more likely to reverse when the trial court finds the evidence insufficient,²⁶ as exemplified by one appellate court that reversed the trial court’s finding that the dispute about the technician’s response regarding calibration of the device was enough to find no violation.²⁷ The same pattern rises when looking at cases involving video tapes with courts often finding that minor disputes as to authenticity should not go towards admissibility. Indeed, many video taped based cases have found that even when the tape is edited, it should still be admitted with the determinations as to the authenticity going towards the weight or credibility of the evidence.²⁸ By analogy, although the government should certainly try to avoid editing the photo or video, these principals should also be applied to this context. Overall, case law dealing with both evidence obtained from remote electronic traffic devices as well as cases just dealing with video

²³ *See id.* at § 53.

²⁴ *See Com. v. Buxton*, 205 Mass. 49, 91 N.E. 128 (1910).

²⁵ *See People v. Pett*, 13 Misc. 2d 975, 178 N.Y.S.2d 550 (Police Ct. 1958).

²⁶ *See Gruber*, *supra* note 3, at § 53.

²⁷ *See City of Wilmington v. Minella*, 879 A.2d 656 (Del. Super. Ct. 2005).

²⁸ *See Gruber*, *supra* note 3, at § 53.

tape evidence both support the proposition that courts should admit this type of evidence, but allow defendants to raise minor disputes about the authenticity at trial.

B. Criminal Law Context

The balance struck in civil cases involving evidence obtained from remote electronic traffic devices changes in criminal cases because a jury is now introduced into the equation. In this situation, courts should still admit the evidence, again allowing defendants to dispute authenticity issues in trial. However, in cases where the court takes the decision away from the jury as with summary judgment, the court should take special care when giving its opinion to avoid losing legitimacy.

i. Evidence obtained by remote electronic devices almost always satisfies the three factors of materiality and relevance, authenticity, and competence, although admittedly the balance does alter slightly when evaluating competence

In criminal law cases, the same three foundational requirements of materiality and relevance, authenticity, and competence must still be satisfied. Materiality and relevance as well as authenticity are still easily satisfied as discussed in Part IIA. However, while overall the competence factor still weighs in favor of admission, introducing a jury will give more weight to the prejudicial effects on the defendant, particularly in the case of video taped evidence obtained from a remote electronic traffic device.

As discussed earlier, video tape evidence is by its nature “extremely persuasive, vivid, and unforgettable.”²⁹ However, while civil cases typically involve non-sensationalist evidence such as photos of a car running a red light, criminal cases are more likely to involve videos of a car chase or other potentially provocative images.

²⁹ *Id.* at § 74.

Studies show that viewers are generally likely to accept the contents of the video as truth.³⁰ In addition, there have been startling studies which demonstrate that viewers are more likely to see a confession as more voluntary and correspondingly that the defendant is more guilty when the video shows only the defendant as opposed to when it shows both the defendant and the police officer eliciting the confession.³¹ While no such similar studies have been done with car chases for instance, it may well be possible that a view from the dashboard of a police car will cause viewers to be more likely to view the defendant as the one voluntarily beginning the car chase and therefore more at fault, which may impact fourth amendment cases which require jurors to determine the relative culpability of the parties.³² However, a critical difference between video taped confessions and video obtained from remote electronic traffic devices is that law enforcement cannot significantly alter the placement of the camera. Thus, even if there were a bias in car chase or arrest scenarios, there seems to be little that can be done to avoid it. Such instances are more spontaneous, and it would seem strange to pause the chase in order to have a police car drive to the side of both vehicles or to have a

³⁰ See Comment, *Computer Simulations and Video Re-Enactments: Fact, Fantasy and Admission Standards*, 17 OHIO N. UNIV. L. REV. 145, 146 (1990).

³¹ See Sharon Begley, *Videocameras, Too, Can Lie, or at Least Create Jury Prejudice*, WALL ST. J., Jan. 31, 2003, at B1.

³² See George M. Derry III, *The Needless "Slosh" Through the "Morass of Reasonableness": The Supreme Court's Usurpation of Fact Finding Powers in Assessing Reasonable Force in Scott v. Harris*, 18 Geo. Mason U. Civ. Rts. L.J. 417, 444 (2008) (discussing *Scott v. Harris* and noting that viewing the scene from the cop's point of view may cause viewers to identify with the cop).

helicopter flying overhead in order to get a wider view and avoid a potential bias. Even if the concerns about the bias have greater strength because the viewer is a lay juror instead of the more experienced and inured judges in traffic court, the party will have the opportunity to counteract this bias through giving his or her version of events at trial with the added benefit that he or she will be much more likely to tell the truth because of the admission of this evidence. In the end, as contemporaneous direct evidence, these videos hold great probative weight, and as such, courts should continue to admit them into evidence when balancing it against its prejudicial effects. Thus, while the potential prejudicial effect of the evidence has greater weight in the criminal context, overall, the evidence should still be introduced because it satisfies the foundational requirements.

ii. Exclusion of evidence as a form of jury control

With the introduction of a jury, it becomes necessary to also discuss the risks attendant with that jury and why such risks do not necessitate the exclusion of evidence obtained from remote electronic traffic devices. Indeed, although evidence law can be explained through a combination of theories, the jury-oriented one is the most orthodox and indeed the most relevant concern, particularly in exclusion of evidence contexts.³³ In general, there are three risks associated with juries: 1) bias, 2) lawlessness, and 3) adjudicative incompetence. Bias is the concern that jurors have pre-existing biases because of their backgrounds and that these biases will influence their judgment. Lawlessness is the concern that juries in their discretion may sometimes flout the law. Finally, adjudicative incompetence is the concern that as lay people, jurors will misunderstand the value of the evidence or fail to understand the legal instructions and

³³ See Dufraimont, *supra* note 4, at 220-21.

therefore come to the wrong conclusion.³⁴ All of these risks could and indeed should be counteracted if the court follows certain procedures and thus they do not necessitate that the evidence obtained from remote electronic traffic devices be excluded.

First, bias is often dealt with in voir dire or the jury selection process. In fact, one could even show the evidence, particularly if it is video tape evidence, to the potential jurors in voir dire to determine whether some jurors have particularly strong biases toward the video.³⁵ However, quite frankly, jurors probably would not have an especially strong prejudicial reaction solely due to a photo of a car running through a red light. The same likely holds true even if the evidence is a video of a car chase because again, prior biases would likely be uncovered in the normal jury selection process and it seems unlikely that a juror would have such a strong individualized reaction to seeing the video that he or she should be individually removed through the challenge-for-cause process. Thus, the normal jury selection process should probably be enough to counter bias concerns even in this context.

Second is the concern about lawlessness, which again is dealt with through jury-control processes. To make sure juries follow the law, jurors swear an oath to do so and legal instructions will instruct them on what to do.³⁶ In conjunction with this is the negative control of not telling juries about their power to potentially ignore law,³⁷ and

³⁴ *See id.* at 214-15.

³⁵ *See* Gruber, *supra* note 3, at § 74.

³⁶ *See* Dufraimont, *supra* note 4, at 217.

³⁷ *See, e.g.,* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677, 700 (1995).

instead leaving the decision up to them.³⁸ Although these controls are somewhat weak, there is not much else to be done about them because the system itself is ambivalent about the jury's power which is both lawlessness and a defensive safeguard at once.³⁹

Finally, there is the concern about adjudicative incompetence. To begin, one must have a point of comparison: namely, what standard of competence are we comparing the jury's to? Some might frame the issue by comparing jurors to a competent individual judge such as perhaps those in the traffic court.⁴⁰ However, a better starting point is to recognize that all jurors and judges have some biases or frailties in reasoning that might lead them to make faulty decisions,⁴¹ and thus, any decision to admit or exclude evidence must be justified because it will eliminate much of these problems.

In the context of evidence obtained by remote electronic traffic devices, photos do not seem to be the type of evidence that is difficult to evaluate and might cause either jurors or judges to make a faulty decision. However, video taped evidence is of greater concern because of its more persuasive effect as discussed earlier in this article.

Nevertheless, there are procedural safeguards in place to address this problem such as allowing the party to raise arguments about the weight of the evidence, which in turn should ideally make it easier for jurors to evaluate that evidence. Moreover, judges have the power to overturn a verdict if they truly believe the jury has erred. These and other procedural safeguards are enough to counter this potential risk, and given the great

³⁸ *See, e.g.,* Sparf v. United States, 156 U.S. 51 (1895).

³⁹ *See* Dufraimont, *supra* note 4, at 217.

⁴⁰ For more detailed discussions about the point of comparison, see Dufraimont, *supra* note 4, at 227-29.

⁴¹ *See id.* at 230.

probative value of the evidence, it should still be admitted. In sum, although the introduction of juries into the criminal context has also introduced the three attendant risks of bias, lawlessness, and adjudicative incompetence, steps can be taken to reduce these risks and therefore they do not necessitate an exclusion of evidence obtained by remote electronic traffic devices.

iii. Current case law: A trend in admitting evidence and a source of guidance for ways to counter the bias effect

As in civil cases, courts also generally admit evidence obtained by remote electronic traffic devices in the criminal context.⁴² More importantly though, cases dealing with video tape evidence have recognized the bias effect of the video and have taken steps to counteract it, thereby giving guidance to how courts should respond in this context. These solutions can easily be applied to video tape evidence obtained from remote electronic traffic devices, and particularly video taped evidence obtained from a police car dashboard such as when the police officer is chasing after a car⁴³ or even arresting a person during a traffic stop⁴⁴ where the concerns about bias are most salient.

Courts should take several steps to deal with video taped evidence in criminal contexts. First, they should do a preliminary in-camera or in chambers review of the evidence to avoid exposing jurors to potentially inadmissible video tape evidence.⁴⁵

⁴² See, e.g., *Scott v. Harris*, 550 U.S. 372 (2007), *Buckley v. Haddock*, 292 Fed.Appx. 791 (11th Cir. 2008).

⁴³ See, e.g., *Harris*, 550 U.S. 372.

⁴⁴ See, e.g., *Buckley*, 292 Fed. Appx. 791 (considering video taken from police's car of person refusing to obey the police's orders at a road side stop and being tasered by cop).

⁴⁵ See *Gruber*, *supra* note 3, at § 74.

Indeed, such a review has become a common procedure followed by many courts⁴⁶ and should always take place if the opposing party had made an objection to the evidence⁴⁷ or made a request for the in-camera review.⁴⁸ Such review can take place either before the trial, at the very beginning of the trial if the party makes a motion in limine, or during the trial but prior to the time the jury will view the video.⁴⁹ Nevertheless, earlier in the trial is better both to give parties time to prepare and to conduct any editing if necessary.⁵⁰

Courts should also conduct the review under the same conditions that the jury will view the evidence⁵¹ so in other words, if the jury is only able to view the video once, then the court should do the same. Ideally though, both the judge and the jury should be able to view the evidence as many times as needed, particularly during deliberations so that initial impressions of a high speed chase for example do not overwhelm the viewer and cloud his or her judgment. Indeed, courts often do such preliminary reviews already⁵² and while the case law suggests that it is not reversible error not to review the video prior to playing it back for the jury,⁵³ particularly if it would have been admissible regardless,⁵⁴

⁴⁶ See McCORMICK ON EVIDENCE § 214 (3d ed. 1984).

⁴⁷ See *Lee v. State*, 526 N.E.2d 963 (Ind. 1988).

⁴⁸ See *Bailey v. Valtec Hydraulics, Inc.*, 748 S.W.2d 805 (Mo. App. 1988).

⁴⁹ See Gruber, *supra* note 3, at § 74.

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See 3 Scott, *Photographic Evidence* (2d ed.) § 1299 n.54.5 (citing cases).

⁵³ See *State v. Burdges*, 434 So. 2d 1062 (La. 1983).

⁵⁴ See *Brandt v. French*, 638 F.2d 209 (10th Cir. 1981).

the preliminary review is the better and recommended option for courts.⁵⁵ Overall, even in the criminal context, case law shows that courts are admitting evidence obtained from remote electronic traffic devices, and like in the civil context courts should also allow defendants to raise questions as to the authenticity of the video. However, with the introduction of the jury, they should follow the steps courts have taken in other video tape cases and do a preliminary in-camera review under the same viewing circumstances that the jury would have in order to limit the potential prejudicial effects of introducing the video into evidence.

iv. Summary judgment and its implications

This article would not be complete without discussing *Scott v. Harris*, a Supreme Court case where the justices entered summary judgment in favor of the defendant officer, but relied heavily on a video from the perspective of the police officer who chased after the speeding driver and eventually rammed his police car into the driver's car.⁵⁶ This case demonstrates the power of video evidence and indeed provides many important lessons about how judges should approach summary judgment cases involving videos taken from remote electronic traffic devices. However, before getting to that, this article will first generally discuss the rationales for having a jury and the dangers of admitting a video into evidence and subsequently relying too much on it when taking a decision out of the hands of the jury.

1. Background: The rationales for having a jury

At the outset, it is important to understand why the criminal system has a jury in the first place because it is only through understanding the jury's function that one can

⁵⁵ See *State v. Newman*, 484 P.2d 473 (Wash. App. 1971).

⁵⁶ See *Scott v. Harris*, 550 U.S. 372 (2007).

understand what will be lost when a court takes a decision away from the jury. While there are several rationales for having a jury, this article will only discuss three of them: 1) they are good fact-finders, 2) they temper the law on behalf of the community, and 3) they legitimize the legal system.⁵⁷ The first rationale is a controversial one, and while there has been an endless debate over whether jurors are in fact good fact-finders,⁵⁸ this article will assume that they are fairly good fact-finders primarily because they have advantages as a group. For instance, group deliberation encourages more thorough analysis and accurate verdicts, collectively they remember more of the evidence, their differing backgrounds allows them to do a better job interpreting the weight and import of evidence, and most importantly, lingering biases that exist amongst the jurors can be cancelled out in the jury room.⁵⁹ The second rationale is the counterpart to the earlier discussed risk of lawlessness. This rationale views the jury as a defensive shield which can infuse the community's values while flexibly applying the law.⁶⁰ Finally, the third

⁵⁷ Dufraimont, *supra* note 4, at 210-13. Another common rationale is that juries educate the public because jury service is a form of political participation where the public can learn about the justice system. *See id.* However, again, this article will not discuss this and other rationales because they are not very relevant to this context.

⁵⁸ For more detailed analysis of this debate, see generally JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898). However, this debate is beyond the scope of this article.

⁵⁹ *See* Dufraimont, *supra* note 4, at 210-11; RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 42-51 (2003); REID HASTIE ET AL., INSIDE THE JURY 81, 230 (1983).

⁶⁰ *See* Dufraimont, *supra* note 4, at 211.

and most important rationale is that a decision by jurors has more legitimacy because the public views decisions by members of its own community more favorably.⁶¹

2. Problems with admission of evidence in summary judgment contexts

Applying these rationales to the problem of summary judgment, it is clear that by admitting evidence, particularly video taped evidence, and then bypassing the procedural safeguards or rationales for having a jury, new problems emerge because the evidence may now unduly influence the judges such that they come to an incorrect or biased decision, or a decision at odds with what the local community might have ruled. At the heart of all of this is the central concern that the court's decision will lack legitimacy.

If the jury as a group is a good fact-finder, by extension, many of the group benefits are lost with summary judgment. This in turn means that the biases of the judges will be magnified, which can be problematic given the power of video evidence, and potentially lead them to make an incorrect or biased decision. Recall that one of the most important advantages of a group is that individual preexisting biases can be cancelled out in deliberations. These biases still linger even with jury selection and can be important, as demonstrated by one study which determined that when viewing a video tape of evidence taken from a police dashboard chasing after a speeding party, African Americans, low-income workers, Democrats, and residents of the Northeast were significantly more likely to favor the party being chased by the cop.⁶² Jury deliberation

⁶¹ *See id.*

⁶² *See* Dan M. Kahan et al., *Whose Eyes are you Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 838, 841 (2009) (“African Americans, low-income workers, and residents of the Northeast [including liberals and Democrats] tended to form more pro-plaintiff views of the facts . . .”).

allows jurors to air their viewpoints and come to a group consensus about the verdict without being overly swayed by the video. However, in summary judgment, only one or a few judges make a decision. That means that if the trial judge happens to be a lower-income Democrat, he or she might rule in favor of the speeding party. In other words, the judge's individual preexisting bias becomes magnified in summary judgment contexts.

Summary judgment involving video tape evidence is also problematic with regards to the second rationale for juries, that the jury tempers the law on behalf of the community. For instance, perhaps residents of a Southern state might have different views than the judges on an appeals court or other higher court,⁶³ particularly when judges may have more privileged backgrounds than the local community and thus view the video differently. Thus, admission of the video into evidence can potentially cause a rift in the verdict a jury or a judge might give.

Finally, summary judgment involving video tape evidence is problematic when considering the last rationale for juries, that they provide legitimacy to the system. As mentioned earlier, the public believes a decision to be legitimate when members of its group deliver a verdict, particularly because even if jurors have differing viewpoints, the winning party was obliged to listen during the critical moment of deliberations which in turn allows the losing party to accept the verdict without experiencing a sense of domination or subjugation.⁶⁴ However, when a court gives a verdict or a view of the

⁶³ See *Scott v. Harris*, 550 U.S. 372, 389 (2007) (Stevens, J., dissenting) (“[E]ight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are.”).

⁶⁴ See Kahan, *supra* note 62, at 885-86.

evidence that the public may not credit, the decision arguably loses legitimacy because differing viewpoints are not even heard through the jury process. By bypassing the jury through summary judgment, the admission of the evidence obtained by the remote electronic traffic device becomes a much bigger concern, and courts must be cautious when dealing with this situation or risk losing legitimacy.

3. Scott v. Harris and its lessons: What approach courts should follow

Given that admitting video tape evidence obtained from a remote electronic traffic device can cause many problems in the summary judgment context, what is the best solution? Excluding the evidence is not ideal for all the reasons discussed earlier in this article. However, taking a closer look at the Scott v. Harris case can provide many lessons for what to do and what not to do for any court facing this dilemma.

In Scott v. Harris, a police officer filmed a high-speed chase from a camera on his dashboard and subsequently bumped the escaping driver's car in the rear and caused the car to crash. The driver became a quadriplegic as a result of the incident and sued the police officer under 42 U.S.C. § 1983 alleging that using deadly force to terminate the chase was unreasonable seizure under the Fourth Amendment.⁶⁵ In an opinion that seemed to give great weight to the evidence obtained from the remote traffic device as exemplified by such statements as “[we] are happy to allow the video tape to speak for itself”⁶⁶ and even providing a link to the video with the invitation to “see for yourself”, the Supreme Court reversed the lower courts' findings denying summary judgment.

⁶⁵ See Scott v. Harris, 550 U.S. at 374-76 (majority opinion).

⁶⁶ *Id.* at 378 n.5.

Scott v. Harris gives several important lessons on what judges should and should not do when faced with a summary judgment case involving evidence obtained from a remote electronic traffic device. Although this article will not delve into the intricacies of alternatives that the Court might have done,⁶⁷ it will extrapolate some general principles for courts facing summary judgment cases involving video taped evidence.

First, judges faced with video tape evidence should be aware of the potential biases and differing viewpoints that prospective jurors might have. As one study suggests, the Court in Scott v. Harris was prone to naïve realism, which means that people are good at detecting group commitments animating other people's beliefs, but correspondingly naïve or poor at detecting this in themselves.⁶⁸ To counteract this problem, judges should perform a judicial humility mental check, or ask themselves to imagine who might disagree with their viewpoint.⁶⁹ If the other views are mere outliers, then summary judgment is appropriate.⁷⁰ However, in more borderline cases where summary judgment may still have been appropriate as it arguably might have been in Harris because a study demonstrated that people did indeed come to the same conclusion as the judges,⁷¹ the judges should be careful in their opinion to moderate their language. Phrases such as “no reasonable jury could conclude otherwise”⁷² could probably have

⁶⁷ Kahan, *supra* note 62, at 894-903.

⁶⁸ *See id.* at 895.

⁶⁹ *See id.* at 898-900.

⁷⁰ *See id.*

⁷¹ The debate about whether the case should indeed have been decided the way it was decided is beyond the scope of this article. For further reading, see *id.* at 887-94.

⁷² Scott v. Harris, 550 U.S. 372, 386 (2007).

been avoided. In addition, perhaps more deference should have been given to the speeding driver's point of view instead of hinting that the video told one set truth because such language indicates it is the judge's view of the video that is being imposed onto the case. Again, this is undesirable because it hits at the legitimacy of the opinion itself.

Second, judges facing this situation should avoid sensorial jurisprudence. In other words, they should not accord excessive weight to evidence and use such strong phrases as "[t]he videotape tells quite a different story," or repeated repetitions of what "we see" and describing the chase as a "Hollywood-style car chase of the most frightening sort."⁷³ These phrases indicate the judge may have indeed fallen prey to the inherent biasing effects of the video which again hits at legitimacy. While arguably appellate judges can constrain trial judges, there is nowhere left to go if the case reaches the Supreme Court, and so higher courts in particular should be careful about placing too much weight on the video, especially because video evidence is known to be particularly powerful.

Scott v. Harris provides important lessons for any court faced with a summary judgment case. Regardless of why a court decides to take a decision outside of the hands of the jury, it must be careful to avoid writing an opinion that detracts from its legitimacy. Courts should take steps to be more neutral in their writing, to give credence to the differing viewpoints of the parties as well as the viewpoints that the evidence might elicit in jurors, and to avoid language that hints that the judges themselves have fallen prey to the inherent biasing effects of the video. Such measures would be a good start to preserving legitimacy when the court bypasses the jury and its attendant justifications and indeed, these lessons apply to any case involving evidence obtained by remote electronic traffic devices which takes the decision out of the hands of the jury.

⁷³ *Id.* at 379-80.

Conclusion

Like it or not, evidence obtained from remote electronic traffic devices are here to stay and courts should be responsive to concerns about its admissibility. Although it seems fairly simple to conclude that courts should almost always admit such evidence in civil cases while allowing issues of authenticity to go towards the weight of the evidence, the arguments for admissibility change significantly in the criminal context which features juries. Nevertheless, even there courts should almost admit evidence. Although the weighing of the three foundational factors alters slightly in the criminal context, procedural safeguards as well as the great probative value of the evidence still weigh in favor of admitting the evidence. Moreover, the risks that come with the introduction of a jury can be mitigated through other means and are not enough to justify exclusion of the evidence. Indeed, even case law supports the conclusion that the evidence should be admitted while simultaneously providing guidelines for future courts. Finally, with summary judgment, the recent Supreme Court case of *Scott v. Harris* perhaps serves as a cautionary tale of letting the admitted evidence leading the judges to make almost inflammatory comments which seemed to give little credence to the driver's or potential jurors' points of view and indeed seemed to suggest the judges themselves had fallen prey to the inherent biasing effects of the video. Courts facing a situation where they are bypassing the jury, and therefore bypassing the attendant rationales for a jury, should instead engage in a mental check or judicial humility to be sure that they are not themselves being unduly influenced by the evidence and therefore preserve legitimacy. Evidence obtained from remote electronic traffic devices will only continue to take on

greater importance in the coming years and while courts should continue to admit the evidence, they should also be highly cognizant of setting limits and guidelines for it.