

JUSTICES IN THE JURY BOX:  
VIDEO EVIDENCE AND SUMMARY JUDGMENT IN  
*SCOTT V. HARRIS*, 127 S. Ct. 1769 (2007)

Some scholars have expressed concern that judges are encroaching on the fact-finding role of the jury through the use of summary judgment.<sup>1</sup> This concern is more acute in cases that turn on fact-specific inquiries, such as lawsuits where the defense claims qualified immunity.<sup>2</sup> Last term, in *Scott v. Harris*,<sup>3</sup> the Supreme Court overturned the decisions of the district and appellate courts, which had denied summary judgment to a defendant who claimed qualified immunity.<sup>4</sup> In *Harris*, the plaintiff

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1. See, e.g., Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003); Patricia Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1917 (1998) (describing summary judgment as "a potential juggernaut which, if not carefully monitored, could threaten the relatively small residue of civil trials that remain"). But see John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 525 (2007) (explaining that "detractors have been all but drowned out in a sea of support for" summary judgment); Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1853 (2004) (arguing for mandatory summary judgment in some cases).

2. Qualified immunity is a defense available to government officials if they are sued over conduct committed during the discharge of their duties. Qualified immunity "offers complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." *Harris v. Coweta County*, 433 F.3d 807, 811 (11th Cir. 2005) (internal quotation marks omitted). Qualified immunity analysis is fact-intensive. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (explaining that qualified immunity cases involve "objective (albeit fact-specific) question[s]"); *Armstrong v. City of Melvindale*, 432 F.3d 695, 699 (6th Cir. 2006) ("Whether qualified immunity applies [is] viewed on a fact-specific, case-by-case basis."); see also Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. UNIV. L. REV. 1, 6 (1997) ("[F]actual issues are an inherent part of the qualified immunity inquiry, notwithstanding the formal designation of qualified immunity as an issue of law.").

3. 127 S. Ct. 1769 (2007).

4. The doctrines of qualified immunity and summary judgment interact in many qualified immunity cases. To determine if an official merits qualified immunity, courts ask whether the official's actions violated a constitutional right and, if a violation occurred, if that right was "clearly established." *Saucier v. Katz*, 533 U.S.

argued that he had been unreasonably seized by a police officer who had rammed the plaintiff's car off the road to end a high speed car chase, leaving the plaintiff paralyzed.<sup>5</sup> After reviewing video footage of the chase,<sup>6</sup> the Court determined that there was no genuine issue of material fact as to whether the plaintiff posed a danger to the community, making the officer's seizure of the plaintiff objectively reasonable.<sup>7</sup> Because an objectively reasonable seizure does not violate clearly established Fourth Amendment rights, the officer enjoyed qualified immunity from the suit. This Comment argues that the Court's decision in *Harris* encroached on the jury's role. Indeed, the number of judges who disagreed with the Court and the nature of the video evidence on which the Court relied suggest that a genuine issue of material fact did exist. Moreover, the Court's reliance on video evidence raises the concern that use of such evidence in summary judgment proceedings will lead judges to assume the jury's fact-finding role.

On the night of March 29, 2001, a Georgia police officer clocked nineteen-year-old Victor Harris's car speeding at 73 miles-per-hour in a zone with a 55 mile-per-hour speed limit.<sup>8</sup> The officer turned on his flashing blue lights as he followed Harris's car, but Harris refused to slow down.<sup>9</sup> Other police

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194, 201 (2001). The official can be sued only if his conduct violated a clearly established constitutional right. *See id.* The first step in determining if a constitutional right has been violated is to "determine the relevant facts." *Harris*, 127 S. Ct. at 1774. When qualified immunity is invoked during summary judgment, the district court applies summary judgment principles to the determination of the facts needed for the qualified immunity analysis. *See id.* at 1774-75. The court views facts and draws inferences in favor of the non-moving party, *see, e.g.,* *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam), and the suit must go to trial unless there are no genuine issues of material fact, *see, e.g.,* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) ("[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; . . . there [must] be no genuine issue of material fact.").

5. *Harris*, 127 S. Ct. at 1773.

6. Because the majority relied so heavily on the video in its decision, it is instructive to watch the video, which is available at [http://www.supremecourtus.gov/opinions/video/scott\\_v\\_harris.rmvb](http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb).

7. *Harris*, 127 S. Ct. at 1778.

8. *Harris v. Coweta County*, No. CIV 3:01-CV-148-WBH, 2003 WL 25419527, at \*1 (N.D. Ga. Sept. 25, 2003).

9. *Id.*

officers, including Deputy Timothy Scott, joined in the pursuit.<sup>10</sup> At one point in the chase, Harris pulled his car into a parking lot and was nearly trapped by police cars.<sup>11</sup> He managed to get his car back on the highway, colliding with Scott's car in the process.<sup>12</sup> Scott, leading the pursuit at that point, then requested and received permission to disable Harris's car, and proceeded to push his bumper into Harris's vehicle.<sup>13</sup> Harris lost control of his car, ran off the road, crashed, and suffered injuries that left him a quadriplegic.<sup>14</sup> Harris filed suit, alleging, among other things, that Scott used excessive force to end the chase and thereby unreasonably seized Harris in violation of the Fourth Amendment.<sup>15</sup> Scott responded by filing a motion for summary judgment based on a defense of qualified immunity.<sup>16</sup>

The District Court denied Scott's motion for summary judgment because it believed that the case presented "material issues of fact" that a jury would have to resolve.<sup>17</sup> The court first decided that Harris had been seized.<sup>18</sup> Drawing all disputed facts in favor of Harris, the court next determined that a jury could find the seizure to be objectively unreasonable. According to the court, a jury could find that Harris's initial speeding did not pose an immediate threat to others, and that his subsequent conduct during the chase, in which he "did not use his vehicle in an aggressive manner," did not create such a threat.<sup>19</sup> Finally, the court considered whether Scott was protected by qualified immunity for his alleged violation of Harris's Fourth

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10. *Harris*, 127 S. Ct. at 1773.

11. *Id.*

12. *Id.* There is some dispute about whether Scott hit Harris or Harris hit Scott. See *Harris*, 2003 WL 25419527, at \*1 n.2.

13. *Harris*, 2003 WL 25419527, at \*2.

14. *Id.*

15. *Id.* Harris's suit included various claims against other police officers and Coweta County itself. See *id.* at \*3.

16. *Harris*, 127 S. Ct. at 1773.

17. *Harris*, 2003 WL 25419527, at \*6 ("[T]here [were] material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury."). The District Court resolved all of Harris's other claims via summary judgment, except for Harris's claims against Coweta County for failure to train its employees and negligence based on the acts of the police deputies. See *id.* at \*12.

18. *Id.* at \*4, \*6.

19. *Id.* at \*5.

Amendment right. Scott would not be entitled to such immunity if a jury determined that “it would have been clear to a reasonable officer that Scott’s conduct was unlawful.”<sup>20</sup> The court held that a reasonable jury could find that Scott did not know Harris’s underlying crime, and that the evidence suggested that Harris posed little danger to officers or civilians.<sup>21</sup> Because these findings created a genuine issue of material fact, the court denied summary judgment.<sup>22</sup>

The Eleventh Circuit affirmed the District Court’s decision to deny Scott summary judgment against Harris.<sup>23</sup> With Judge Rosemary Barkett writing, a unanimous panel<sup>24</sup> agreed with the District Court that Scott had seized Harris.<sup>25</sup> The panel also concluded that the question whether Harris’s conduct “pose[d] a threat of serious physical harm, either to the officer or to others”<sup>26</sup> was “a disputed issue to be resolved by a jury.”<sup>27</sup> A jury could find that Harris

remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. . . . Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.<sup>28</sup>

Because a jury could find that Harris posed no immediate threat, the Eleventh Circuit panel agreed with the District

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20. *Id.* at \*6.

21. *Id.*

22. *Id.*

23. *Harris v. Coweta County*, 433 F.3d 807, 821 (11th Cir. 2005). Sergeant Mark Fenninger, who authorized Scott to disable Harris’s car, also appealed the District Court’s denial of summary judgment; Judge Barkett concluded that the District Court erred in denying Fenninger summary judgment. *Id.* at 817.

24. Judge Barkett was joined by Judges Birch and Cox.

25. *Harris*, 433 F.3d at 813.

26. *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

27. *Id.* at 815.

28. *Id.* at 815–16 (citations omitted).

Court that the jury could find Scott's use of deadly force to seize Harris to be unreasonable.<sup>29</sup>

The Supreme Court reversed. Writing for the Court, Justice Scalia<sup>30</sup> explained that the Court, when reviewing a summary judgment motion, "view[s] the facts and draw[s] *reasonable* inferences 'in the light most favorable to the party opposing the [summary judgment] motion.'"<sup>31</sup> But where the opposing party's story is "blatantly contradicted by the record,"<sup>32</sup> there is no genuine issue of material fact and summary judgment is appropriate.<sup>33</sup> In this case, the videotape of the chase created an "added wrinkle" because it "quite clearly contradict[ed]" the respondent's story and the findings of the district and appellate courts.<sup>34</sup> The Court found that Harris moved "shockingly fast" down narrow roads, "force[d] cars" to the shoulder, and engaged in "hazardous maneuvers" as he led the police in a "Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury."<sup>35</sup> In light of the video evidence, "[r]espondent's version of events [was] so utterly discredited by the record that no reasonable jury could have believed him."<sup>36</sup>

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29. *See id.* at 820 ("A reasonable police officer would have known in 2001 that a vehicle could be used to apply deadly force, could be used to effectuate a seizure, and that deadly force could not be used to apprehend a fleeing suspect unless the conditions set out in *Garner* existed." (citations omitted)).

30. Justice Scalia was joined by Chief Justice Roberts and Justices Kennedy, Souter, Thomas, Ginsburg, Breyer, and Alito.

31. *Harris*, 127 S. Ct. at 1774 (emphasis added) (quotation marks omitted).

32. *Id.* at 1776.

33. *See id.*

34. *Id.* at 1775.

35. *Id.* at 1775–76. Even this description of Harris's actions makes him seem much less dangerous than the fleeing suspects in other car-chase cases in which appellate courts have found no genuine issue of material fact about the suspect's dangerousness. *See, e.g.,* *Cole v. Bone*, 993 F.2d 1328, 1333–34 (8th Cir. 1993) (holding use of deadly force to be reasonable where an officer knew that a truck had been speeding for more than fifty miles down a crowded interstate, had run several road blocks, had survived shots at its tires and radiator, had tried to force police cars off the road, and had attempted to ram a police vehicle); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (holding use of deadly force to be reasonable where an officer shot and killed a suspect who had "proven he would do almost anything to avoid capture," and when, after a 90-mile-per-hour chase through residential streets, the suspect charged his car out of a dead-end alley at police officers).

36. *Harris*, 127 S. Ct. at 1776.

The Court next held that, given the facts of the chase, Scott's seizure of Harris was objectively reasonable and therefore did not violate the Fourth Amendment.<sup>37</sup> The Court balanced Scott's goal, elimination of the "imminent" threat to pedestrians and motorists, with his method, the use of deadly force against Harris.<sup>38</sup> Given Harris's dangerous driving, the Court found Scott's actions to be reasonable.<sup>39</sup> Finally, Justice Scalia dismissed the argument that the police should have let Harris go and tracked him down later, explaining that such an approach would create a perverse incentive for lawbreakers to initiate high-speed chases.<sup>40</sup>

Justices Ginsburg and Breyer both concurred. Justice Ginsburg asserted that the Court's decision did not create a *per se* rule that the use of deadly force by police officers to prevent harm to civilians during a high speed chase was always reasonable.<sup>41</sup> She explained that each situation requires a factual inquiry into such questions as "[w]ere the lives and well-being of others (motorists, pedestrians, police officers) at risk?"<sup>42</sup> Justice Breyer observed that the "video footage of the car chase made a difference to my own view of the case" and encouraged readers of the opinion to view the video.<sup>43</sup> He also agreed with Justice Ginsburg that the Court had not established a *per se* rule.<sup>44</sup>

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37. *Id.* at 1776–79. The Court rejected Harris's contention that the analysis of whether use of deadly force was reasonable had to be guided by the conditions laid out in *Tennessee v. Garner*, 471 U.S. 1, 9–12 (1985): that the suspect posed an immediate threat of serious physical harm, that the deadly force was necessary to prevent escape, and that the officer gave the suspect a warning if feasible. *See Harris*, 127 S. Ct. at 1777. Instead, Justice Scalia explained that the test was simply whether Scott's actions were generally reasonable. *See id.*

38. *See Harris*, 127 S. Ct. at 1778.

39. *Id.*

40. *Id.* at 1778–79.

41. *Id.* at 1779 (Ginsburg, J., concurring). Justice Ginsburg disagreed with Justice Breyer that this case presented the opportunity to alter the order of inquiry in qualified immunity cases laid out in *Saucier v. Katz*, 533 U.S. 194 (2001). *See id.*

42. *Id.*

43. *Id.* at 1780 (Breyer, J., concurring).

44. *See id.* Justice Breyer also argued that the Court should change the requirement in *Saucier* that the qualified immunity inquiry must always begin with the question whether a constitutional right was violated. *See id.*

Justice Stevens dissented. He argued that “the tape actually confirms, rather than contradicts, the lower courts’ appraisal of the factual questions at issue.”<sup>45</sup> He offered his own interpretation of the video evidence, suggesting that Harris posed no immediate danger to the officers or pedestrians. Reiterating Judge Barkett’s analysis, Justice Stevens explained that most of the cars on the road had pulled to the side after hearing police sirens, the parking lot at the closed shopping center was empty at 11 p.m., and the video showed no pedestrians, sidewalks, or residences at any point.<sup>46</sup> The driver appeared to “retain[] full control of his vehicle,”<sup>47</sup> waiting for cars to pass in the other direction and using his turn signal—“hardly the stuff of Hollywood.”<sup>48</sup> The video did not show whether Harris ran any red lights,<sup>49</sup> and there was no evidence to indicate that Harris would have remained a danger if the police had let him go and looked for him later.<sup>50</sup>

Justice Stevens further argued that the differing interpretations of the tape, offered by the district and appellate courts on one side, and the majority on the other, demonstrated the existence of a genuine issue of material fact.<sup>51</sup> Referring to his “colleagues on the jury,”<sup>52</sup> he contended that the majority had “usurped the jury’s factfinding function.”<sup>53</sup> Justice Stevens argued that the majority’s analysis of the video was not “dispassionate” enough.<sup>54</sup> For example, he suggested that the majority lacked experience driving on two-lane roads at night.<sup>55</sup> The dis-

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45. *See id.* at 1781 (Stevens, J., dissenting).

46. *Id.* at 1782.

47. *Id.*

48. *Id.* at 1783.

49. *Id.* at 1782.

50. *Id.* at 1784.

51. *See id.* at 1785 (“If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court’s characterization of events.”).

52. *Id.* at 1782.

53. *Id.* at 1784.

54. *Id.* at 1781 n.1.

55. *See id.* (“Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slow-poke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately.”).

strict and appellate courts, along with a Georgia jury, would be better able to evaluate conduct on roads with which they were more familiar.<sup>56</sup>

The majority's decision in *Scott v. Harris* encroached on the traditional role of the jury and raises concerns about the use of video evidence in deciding motions for summary judgment. This Comment focuses on the circumstances surrounding the decision, and concludes that those circumstances suggest that there was a genuine issue of material fact, and that the case therefore should have gone to the jury. One reason the majority appears to have kept the case from the jury is its reliance on video evidence. This case illustrates the danger that such evidence—used with greater frequency and greater centrality at many trials—may lead judges to be too confident in their own interpretations of a video and less likely to defer to the non-moving party.

The strong disagreement about the facts of the case among the various federal judges who reviewed the video belies the majority's determination that no reasonable jury could believe Harris's articulation of the facts. Significantly, five federal judges<sup>57</sup> interpreted the "facts" in the videotape in a way that directly conflicted with the majority's interpretation of that recording.<sup>58</sup> This factual disagreement among reasonable judges suggests that there were multiple conclusions a reasonable jury

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56. *See id.* at 1781 ("[T]he judges on both the District Court and the Court of Appeals . . . are surely more familiar with the hazards of driving on Georgia roads than we are.").

57. The district judge, three circuit judges, and Justice Stevens.

58. The chase described by Justice Scalia, *Harris*, 127 S. Ct. at 1775–76 ("Hollywood-style car chase of the most frightening sort"), sounds quite different from the one described by the district court judge, *Harris v. Coweta County*, No. CIV 3:01-CV-148-WBH, 2003 WL 25419527, at \*5 (N.D. Ga. Sept. 25, 2003) ("did not use his vehicle in an aggressive manner"), the Eleventh Circuit judges, *Harris v. Coweta County*, 433 F.3d 807, 815–16 (11th Cir. 2005) ("remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns"), and Justice Stevens, *Harris*, 127 S. Ct. at 1783 (Stevens, J., dissenting) ("[P]assing a slower vehicle on a two-lane road always involves some degree of swerving and is not especially dangerous if there are no cars coming from the opposite direction. At no point during the chase did respondent pull into the opposite lane other than to pass a car in front of him; he did the latter no more than five times and, on most of those occasions, used his turn signal. On none of these occasions was there a car traveling in the opposite direction.").

could have drawn from the video.<sup>59</sup> In addition, the eight Justices who came to the legal conclusion that there existed no genuine issue of material fact have no special ability, when compared to trial judges, to determine whether there was a genuine issue of material fact in this case.<sup>60</sup> There will sometimes be close cases in which judges disagree about the existence of a genuine issue for trial, but in this case the clear disagreement among federal judges suggests that there is more than “[t]he mere existence of a scintilla of evidence in support of”<sup>61</sup> Harris’s position. The disagreements about both facts and law suggest that the Court reached the wrong conclusion.

In addition, the judges with the greater local knowledge believed that Harris’s interpretation of the video and events was plausible.<sup>62</sup> Local knowledge may have played a role in the lower courts’ decisions because judges in those courts may have better understood what it was like to drive on a Georgia

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59. See *Harris*, 127 S. Ct. at 1785 (Stevens, J., dissenting); see also Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 180–81 (2000) (“Considering that the standard for summary judgment is whether there exists a genuine issue of material fact for a reasonable jury or judge to decide, it is anomalous that the majority judges in these cases [upholding summary judgment] apparently regard their dissenting colleagues’ views as irrational.”).

60. See *Johnson v. Jones*, 515 U.S. 304, 316 (1995) (“[T]he issue here at stake—the existence, or nonexistence, of a triable issue of fact—is the kind of issue that trial judges, not appellate judges, confront almost daily. Institutionally speaking, appellate judges enjoy no comparative expertise in such matters.”). *But see* Mollica, *supra* note 59, at 180 (arguing that the large number—35.5 percent—of appellate reversals of district court summary judgment grants should “humble anyone who believes that district court judges can routinely pick out the cases worthy of trial or deserving of summary judgment”).

61. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

62. *Harris*, 433 F.3d at 815 (“We reject the defendants’ argument that Harris’ driving must, as a matter of law, be considered sufficiently reckless to give Scott probable cause to believe that he posed a substantial threat of imminent physical harm to motorists and pedestrians. This is a disputed issue to be resolved by a jury.”); *Harris*, 2003 WL 25419527, at \*5 (“[A] fact finder could conclude that when Scott rammed Harris’s vehicle, he faced a fleeing suspect who, but for the chase, did not present an immediate threat to the safety of others since the underlying crime was driving 73 miles per hour in a 55 miles-per-hour zone. A jury could also find that Scott’s use of force—ramming the car while traveling at high speeds—was not in proportion to the risk that Harris posed, and therefore was objectively unreasonable.”).

road at night.<sup>63</sup> By extension, these judges were also better able to imagine how a Georgia jury would weigh the video evidence and Harris's contentions. Furthermore, as in all trials, the district judge was the only judge who heard all the witnesses, so he was best positioned to evaluate the tape in the context of the entire record. The Court's rejection of this perspective suggests that the majority's "personal sense of whether [the] plaintiff's claim seems 'implausible' . . . subconsciously infiltrate[d]" its objective summary judgment analysis.<sup>64</sup>

The Court's decision raises a concern that reliance on video evidence in summary judgment determinations may lead courts to assume the fact-finding role of the jury. In summary judgment, a court considers whether a reasonable jury could believe the non-moving party's story.<sup>65</sup> In answering that question, courts do not "find" the facts but rather view the facts and draw all inferences in favor of the non-moving party,<sup>66</sup> unless those inferences are implausible and unsupported by the rest of the evidence.<sup>67</sup>

Courts are less likely to evaluate video evidence with as much deference to the non-moving party as they would other evidence. Video evidence, like that encountered by the Court in *Harris*, is seductive. Unlike witness testimony, courts "experience" video evidence firsthand, just as it was experienced by the actors involved in the case. This may lead courts to believe—overconfidently—that how they view the evidence with their own eyes<sup>68</sup> is the correct (and only) version of what hap-

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63. See *Harris*, 127 S. Ct. at 1781 (Stevens, J., dissenting) ("[T]he judges on both the District Court and the Court of Appeals . . . are surely more familiar with the hazards of driving on Georgia roads than we are.").

64. Miller, *supra* note 1, at 1071.

65. See, e.g., *Anderson*, 477 U.S. at 249 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."). Cf. *Saucier v. Katz*, 533 U.S. 194, 216 (2001) (Ginsburg, J., concurring) ("Of course, if an excessive force claim turns on which of two conflicting stories best captures what happened on the street, [our decisions] will not permit summary judgment in favor of the defendant official. And that is as it should be.").

66. See, e.g., *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam).

67. See, e.g., *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("[The] opponent must do more than simply show that there is some metaphysical doubt as to the material facts.").

68. As Justice Scalia explained, the Court should view the facts "in the light depicted by the videotape." *Harris*, 127 S. Ct. at 1776.

pened.<sup>69</sup> Faced with such readily accessible evidence, judges “may be tempted to treat the evidence in a piecemeal rather than cumulative fashion, draw inferences against the nonmoving party, or discount the nonmoving party’s evidence by weighing it against contradictory evidence.”<sup>70</sup> Video evidence makes it more likely that judges will fall into what Judge Posner has identified as the first “trap” of summary judgment cases: “to weigh conflicting evidence (the job of the jury).”<sup>71</sup> It is possible that the majority in *Scott v. Harris* fell victim to this “trap” and inappropriately ventured into the jury box when it relied heavily on the video of the police chase.

The tendency of video evidence to push courts towards an improper fact-finding role deserves particular attention because such evidence is likely to become more common in the courtroom. As technology proliferates, evidence from police cameras, recorded testimony, cellular phones, and surveillance cameras<sup>72</sup> will appear more frequently at trial. For example, several recent decisions in the appellate<sup>73</sup> and district<sup>74</sup> courts

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69. Here courts are essentially weighing the credibility of their own interpretation of the video. Similar subjective weighing of witness testimony is forbidden at the summary judgment stage because it crosses into the realm of the jury. See *Anderson*, 477 U.S. at 255.

70. Miller, *supra* note 1, at 1071.

71. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002).

72. For example, investigations into the recent terrorist bombings in London and Glasgow were based on information from closed-circuit cameras. See Stephen Fidler, *Police hunt for West End car bomber*, FIN. TIMES, June 30, 2007, at 1 (“Police were . . . beginning to plough through CCTV footage of the area. . . . Central London is one of the most intensively photographed and video-taped areas in the world, and every driver that enters the centre of the city is photographed.”); Janet Stobart & Sebastian Rotella, *British manhunt widens; Three physicians are among eight suspects now held in bomb plots*, L.A. TIMES, July 3, 2007, at A1 (“The police had quickly pinpointed the suspects’ location using . . . surveillance footage from cameras in London and on highways beyond . . . .”); see also Graham Bowley, *The British Are Watching, Very Closely*, N.Y. TIMES, July 1, 2007, § 4, at 2 (“British cities have also been arrayed with closed-circuit television cameras focused on lobbies, sidewalks, roads and public spaces. There are more than 6,000 of the cameras on the London subway network alone.”). It is not difficult to imagine the use of such evidence in the United States as the networks of surveillance cameras in major cities expand. See, e.g., Spencer S. Hsu & Mary Beth Sheridan, *D.C., New York Get Biggest Increases in Counterterrorism Aid*, WASH. POST, July 19, 2007, at A1 (“DHS has been keen to finance . . . an expanded surveillance camera program in New York that is similar to ones in Chicago and Washington.”).

73. See, e.g., *Schneider v. Merritt*, No. 05-16317, 2007 WL 1853359, at \*1 (9th Cir. June 26, 2007) (relying on police videos to find that there was no Fourteenth

featured video evidence similar to the evidence considered in *Harris*. The nation's highest court now seems willing to entertain that video evidence.<sup>75</sup> The Justices found the impact of video evidence significant in *Harris*.<sup>76</sup> Justices Scalia and Breyer encouraged readers of their opinion to view the video, and Justice Scalia had it posted on the Supreme Court's website.<sup>77</sup>

The Court's decision in *Scott v. Harris* represents an improper invasion of judges into the jury box through the mechanism of summary judgment. The majority's decision that no genuine issue of material fact existed is questionable in light of the number of judges who disagreed and the nature of the video evidence on which the court relied. More broadly, *Harris* raises the concern that the seductive quality of video evidence may lead courts to conclude too quickly that genuine issues of material fact are absent, thereby usurping the jury's fact-finding role. The precedent set by *Harris* allows appellate courts to decide more cases involving video evidence during summary

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Amendment claim because "[a] reasonable jury could not find anything beyond mere negligence on this record").

74. See, e.g., *Sharp v. Fisher*, No. 406-CV-020, 2007 WL 2177123, at \*1 (S.D. Ga. July 26, 2007) ("[B]ecause [the] evidence includes three different videos of the incident in question, the Court 'views the facts in the light depicted by the video[s].'"); *Miller v. Jensen*, No. 06-CV-0328-CVE-SAJ, 2007 WL 1574761, at \*4 (N.D. Okla. May 29, 2007) ("Here, as in *Scott v. Harris*, . . . there is 'an added wrinkle in the case: existence in the record . . . of videotape[s] capturing the [car chase] in question.'" (quoting *Scott v. Harris*, 127 S. Ct. 1769, 1775 (2007))); *Parker v. City of S. Portland*, No. 06-129-P-S, 2007 WL 1468658, at \*10 n.41 (D. Me. May 18, 2007) (examining a videotape of police using a Taser on an individual to evaluate a claim of excessive use of force).

75. Though rare, *Harris* is not the first time the Court has considered video evidence. See *Cox v. Louisiana*, 379 U.S. 536, 547 (1965) ("Our conclusion that the entire meeting from the beginning until its dispersal by tear gas was orderly and not riotous is confirmed by a film of the events taken by a television news photographer, which was offered in evidence as a state exhibit. We have viewed the film, and it reveals that the students, though they undoubtedly cheered and clapped, were well-behaved throughout.").

76. Justice Breyer, for instance, noted that the video "made a difference to [his] own view of the case." *Harris*, 127 S. Ct. at 1780 (Breyer, J., concurring). The video's impact on the Justices raises an additional concern. If video evidence in *Harris* changed the Justices' view of the case, then perhaps video evidence would have also "made a difference" in other qualified immunity cases heard by the Court. Must the Court now seek out video evidence in every future case or risk getting those cases "wrong" as well?

77. See *Harris*, 127 S. Ct. at 1775 n.5.

judgment.<sup>78</sup> As use of video evidence becomes even more common, it is imperative that courts resist the urge simply to believe what they see with their own limited vision. Courts should allow juries to see with their own eyes.

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78. See Posting of Lawrence Lassiter to Scott & Scott LLP Business and Technology Law Blog, Supreme Court Grants Summary Judgment Based on Video Evidence, [http://blawg.scottandscottllp.com/businessandtechnologylaw/2007/05/supreme\\_court\\_grants\\_summary\\_j.html](http://blawg.scottandscottllp.com/businessandtechnologylaw/2007/05/supreme_court_grants_summary_j.html) (May 8, 2007 8:54 EDT). This ability of the appellate courts to use their own interpretations of the evidence is particularly problematic given that many of those courts have held that they can uphold a decision to grant summary judgment based on any evidence in the record regardless of whether that evidence was briefed or argued in the district court. See *id.*; see also *Iverson v. City of Boston*, 452 F.3d 94, 98 (1st Cir. 2006); *Reasonover v. St. Louis*, 447 F.3d 569, 578–79 (8th Cir. 2006).

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