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When Discretion to Record Becomes Assertive: Body Camera Footage as Hearsay

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When Discretion to Record Becomes Assertive: Body Camera Footage as Hearsay

ABSTRACT

As police body camera footage pervades courtrooms across the country as evidence in criminal trials, courts must reevaluate whether, and under which evidentiary frameworks, they will admit the footage to prove that what the footage depicts is true. This Note analyzes the frameworks under which courts have historically admitted filmic evidence: namely, through authentication and as demonstrative evidence. It concludes that body camera footage is distinct from evidence traditionally admitted through those frameworks because body camera footage is akin to an officer's assertive statement—the officer has discretion to activate and aim the body camera. Courts should therefore exclude the footage as hearsay when it is offered to prove the truth of the matter depicted in the video. This Note proposes two practical frameworks under which courts could nevertheless admit the footage should they classify it as hearsay: the present sense impression exception to hearsay, or as corroborative evidence that is not offered for the truth of the matter asserted. Both frameworks make the police officer who recorded the footage available for cross-examination. Once the officer is on the stand, a defense attorney may cross-examine that officer to mitigate the reliability concerns that body camera footage presents.

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In July 2017, the *Baltimore Sun* reported that a public defender had come across an unusual piece of body camera footage.¹ The video, like all body camera videos recorded by Baltimore City police officers, begins with thirty seconds of silent footage, which is the camera’s visual data from the thirty seconds prior to activation.² This particular video depicts—from Officer A’s point of view—Officer A holding a clear plastic bag of a white substance in an alley. Officer A places the bag inside a can, placing the can into a trash pile in the alley. Officer B and Officer C stand nearby, watching. The three officers walk out of the alley. Officer A’s hand comes into view as he activates his body camera, and precisely at the thirty-second mark, the sound comes on. Officer A says, “Let me go check here, hold on,”

1. See Justin Fenton & Kevin Rector, *Body Camera Footage Shows Officer Planting Drugs, Public Defender Says*, BALT. SUN (July 19, 2017, 2:30 PM), <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-body-camera-footage-20170719-story.html> [<https://perma.cc/KJ7X-SRB4>]. The footage is available online embedded in the *Baltimore Sun*’s article concerning the incident, along with supplemental footage released by the Baltimore police. See *id.*

2. *Id.* Because body camera footage takes up an enormous amount of data and battery life, the cameras do not begin to save the footage captured until an officer activates the camera. GREG HURLEY, NAT’L CTR. FOR STATE COURTS, *BODY-WORN CAMERAS AND THE COURTS* 3 (2016), <http://www.courtstoday.com/pdf/269.pdf> [<https://perma.cc/N62A-5B4A>]. When an officer presses the button to activate, the camera saves the prior thirty seconds of video with no sound and begins recording and saving both video and sound at the moment of activation. Fenton & Rector, *supra* note 1.

reentering the same alley, as a voice in the background asks, “Was that thirty?” Officer A soon “finds” the same bag of white substance hidden in the can. After the public defender brought the video to the prosecutor’s attention, the state dropped the heroin possession charges against the defendant.³ The Baltimore Police Commissioner issued a statement suggesting that the police officers were simply “re-creating” the discovery of evidence that led to a legitimate arrest rather than planting evidence.⁴

What if the officer had actually waited thirty seconds before activating his camera, choosing to record his “discovery” after the device already discarded his prior actions forever? Even accepting the Police Commissioner’s explanation that the officers “re-created” the evidentiary find, the Baltimore footage highlights the salience of presenting body camera evidence in context.⁵ Defendants surely have an interest in cross-examining the police officer if they observed the police officer “re-creating” evidence, which the state otherwise presents to a jury as objective, contemporaneous truth of an encounter during trial. The current evidentiary regime does not contemplate problems like video framing⁶ or the officer’s discretion to activate a camera, which have the potential to greatly influence the video’s reliability. While proponents laud police body cameras for their potential to capture “objective” evidence of police misconduct,⁷ state and federal rules of evidence fail to account for their shortcomings. The lack of context with which courts admit body camera footage undercuts the footage as an objective source of proof in criminal prosecutions.⁸ If a prosecutor chooses not to call the police officer who

3. Fenton & Rector, *supra* note 1. The state’s attorney dropped the charges in over forty criminal cases involving the testimony of the officers depicted in this video. Kevin Rector, *Analysts: Whether Planting Evidence or ‘Re-Creating’ a Find, Baltimore Body Camera Footage Shows Police Misconduct*, BALT. SUN (Aug. 7, 2017, 6:20 PM), <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-body-camera-react-folo-20170807-story.html> [https://perma.cc/729B-N6RZ].

4. Rector, *supra* note 3.

5. See Andrea Roth, *Machine Testimony*, 126 YALE L.J. 1972, 2008 (2017).

6. In this Note, “video framing” refers to the limited field of vision captured by the camera as well as the perspective from which it is presented. See Jessica Silbey, *Cross-Examining Film*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 17, 38 (2008) (“Consider first the film’s frame: what is visible in the film and what is not, due to its beginning, ending, and spatial attributes—its borders, its point of view and its mechanical capacity.”).

7. See ACLU FOUND. OF MASS. & UNIV. OF CAL., BERKELEY, SCH. OF LAW, NO TAPE, NO TESTIMONY: HOW COURTS CAN ENSURE THE RESPONSIBLE USE OF BODY CAMERAS 9 (2016) [hereinafter NO TAPE, NO TESTIMONY] (“But police departments are not the only stakeholders that should have an interest in encouraging the use of body cameras to create objective records of police-civilian encounters.”).

8. See Roth, *supra* note 5, at 2007–08.

recorded the footage to testify,⁹ the defense is at a loss for a witness to cross-examine about the narrative which the footage presents. Or if another officer testifies instead, the defense has a substantially less effective cross-examination.¹⁰ With the officer who recorded the body camera footage (the “recording officer”) on the stand, the defense can question the officer’s record of conduct, question what happened before and after the recording, and raise doubt about events potentially occurring off camera or beyond its range.

With video recordings—such as body camera footage—increasingly offered against defendants as proof in court in lieu of live witness testimony,¹¹ the limitations of what constitutes a “statement”¹² and to whom it is attributed deserve serious consideration. Unlike prior forms of proof such as photographs, surveillance videos, and data output from machines analyzing forensic evidence that are historically “not hearsay,”¹³ body cameras afford their operators a large amount of discretion to record certain portions of interactions from a subjective viewpoint—the recording officer’s¹⁴—during crucial points in an officer-suspect interaction.

Courts have yet to address the argument that body camera footage, in and of itself, is hearsay.¹⁵ While some have argued for hearsay recognition training so officers avoid recording verbal statements on the footage, such proposals fail to address the

9. For example, a prosecutor may not call the officer when the charge is relatively minor, to save time and resources, or because the officer is otherwise unavailable. The prosecutor may not think the officer would be a credible witness for a host of potential reasons, like past misconduct. Some police departments do not outfit all of their officers with body cameras, which makes it more likely that an officer would not be outfitted with a body camera but may nevertheless be a valuable prosecution witness. See *Police Body Camera Policies: Recording Circumstances*, BRENNAN CTR. FOR JUST. (Aug. 3, 2016), <https://www.brennancenter.org/analysis/police-body-camera-policies-recording-circumstances> [<https://perma.cc/MC3Z-X6PZ>] (listing departmental policies dictating which officers wear body cameras).

10. See *infra* Part II.C.

11. See Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493, 500 (2004) (“One anxiety is the growing trend toward replacing the traditional testimony of live witnesses in court with communications via video and film technology.”).

12. See FED. R. EVID. 801–02 (defining “statement” and rendering a statement offered for “the truth of the matter asserted” inadmissible hearsay).

13. See *infra* Part I.A.

14. HURLEY, *supra* note 2, at 3 (“A head-mounted unit will capture the areas where the officer is looking, while a body-mounted unit will only capture video in front of the officer’s body.”).

15. As of Feb. 17, 2018, a search on both Westlaw and LexisAdvance with the terms (“body camera” /s hearsay) returns only opinions ruling on the admissibility of statements recorded on the body camera footage, not the footage itself.

possibility that the video itself may be categorized as hearsay.¹⁶ Federal hearsay jurisprudence recognizes assertive intent as the defining feature of a statement,¹⁷ and this Note argues that body camera videos comport to this assertion-based framework. The videos are essentially assertions by the recording officer to the effect of, “This recording reflects all relevant portions of my interaction with a suspect, it is a true version of how events transpired, and what I recorded is significant in the criminal investigation.” At least one commentator has suggested that body camera footage may be hearsay, concluding that it would likely be admissible under the public records exception to the rule.¹⁸ This Note disagrees, arguing that body camera footage is inadmissible hearsay that may be offered either as a present sense impression or as corroborative evidence of an officer’s in-court testimony.

This Note argues that the most effective way to address reliability dangers posed by body camera footage is by treating each video as the recording officer’s statement under Federal Rule of Evidence 801.¹⁹ Thus, if the recording officer does not testify, courts should treat the video as inadmissible hearsay. If the officer instead takes the stand and testifies that she recorded the video and that its depictions are accurate, then she authenticates the video—rendering it admissible as long as it is not offered for the truth of the matter asserted or falls under an exception to the hearsay rule.²⁰ Part I of this Note assesses the current state of hearsay jurisprudence and analyzes when discretion to present conduct or human framing of nonverbal events creates a “statement.” Part II argues that current authentication procedures for video evidence alone are inadequate to ensure that police body camera footage is reliable. Part III argues that an officer’s decision to activate a body camera is assertive conduct sufficient to constitute a statement and is thus hearsay. Part IV

16. See David K. Bakardjiev, Comment, *Officer Body-Worn Cameras—Capturing Objective Evidence with Quality Technology and Focused Policies*, 56 JURIMETRICS J. 79, 88–89 (2015).

17. See FED. R. EVID. 801(a).

18. Dru S. Letourneau, Comment, *Police Body Cameras: Implementation with Caution, Forethought, and Policy*, 50 U. RICH. L. REV. 439, 461 (2015) (“Though records produced by officer-worn cameras may themselves be, or at least contain, hearsay statements, they could have the effect of making the actions of officers a matter of public record.”).

19. FED. R. EVID. 801(a) (defining a “statement” as “a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.”).

20. See *id.* 801(c)(2) (defining “hearsay” as a statement offered “to prove the truth of the matter asserted.”); *id.* 802 (stating that hearsay is inadmissible unless a statute or rule permits admission).

proposes that courts remedy the “hearsay dangers”²¹ that body camera footage presents by considering two frameworks for admissibility. If the footage is admitted as a present sense impression, the officer who wore the camera that generated the footage that the prosecution seeks to introduce must testify and be available for cross-examination, due to Confrontation Clause concerns. The footage is then admissible as substantive evidence. Alternatively, a prosecutor may offer the footage as corroborative of the officer’s testimony, which legitimizes the officer’s oral account. If the footage is admitted as corroborative evidence, the recording officer must likewise testify and be available for cross-examination. This would convert the body camera footage into nonhearsay evidence, offered not for the truth of the matter asserted but instead to corroborate the officer’s testimony. Under both frameworks, the defendant may effectively challenge the narrative presented to the jury via cross-examination and the prosecutor may still reap the benefits of body camera footage. Part V analyzes the practical implications of each framework.

While this Note addresses the inadequacy of authentication procedures for body camera footage, it acknowledges that the failure of one evidentiary safeguard does not necessarily mean that another is more appropriate. Indeed, evidence containing hearsay must also be authenticated. But in the context of body camera footage, authentication’s inability to ensure reliable evidence indicates that something more is required. This Note posits that the “something more” is the safeguards present in the hearsay rules.

Finally, it is crucial to note that for body camera videos, the assertive conduct is the *creation* of the video, not the conduct depicted in the video. Courts often use imprecise language in opinions addressing hearsay conduct depicted within videos by referring to the conduct in the video as the video itself.²² In this Note, “the video” means the actual body camera video resulting from the officer’s choice to record a suspect’s conduct. This Note will not address whether a suspect’s conduct itself is assertive as depicted in the video, as the inquiry will vary case by case and is highly fact dependent.

21. Such dangers include “insincerity, inarticulateness, erroneous memory, and faulty perception.” Roth, *supra* note 5, at 1985.

22. See *Grimes v. Emp’rs Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 611 (D. Alaska 1977). *But see State v. Steinle ex rel. Cty. of Maricopa*, 372 P.3d 939, 944 (Ariz. 2016) (distinguishing correctly between a third party’s cell phone video recording and the defendant’s “conduct” depicted in the video).

I. DEFINING THE BOUNDS OF HEARSAY

The Federal Rules of Evidence (FRE) broadly define hearsay as encompassing intentional assertions ranging from verbal and written utterances to an actor's nonverbal conduct.²³ Determining whether a piece of evidence is a statement by a person is a threshold inquiry to the hearsay question that may later arise.²⁴ If the court finds that proposed testimony is a statement by a person pursuant to Rule 801(a), then it begins the hearsay analysis outlined in Rules 802 and 803.²⁵ As Rule 801(a) makes clear, any conduct by a person intended as an assertion qualifies as a statement.²⁶ This in-depth inquiry is necessary before analyzing body camera footage under the various hearsay frameworks. As Part II explains, understanding where the FRE draw the line for what is and is not hearsay—and why—is crucial to classifying body camera footage.

As technology evolves, so does the jurisprudence surrounding the definition of prohibited “statements.”²⁷ With the proliferation of video recording comes the question of *who* the declarant is—and if it is a machine, can a machine actually intend to assert something? The overwhelming answer from courts is “no,” except in a few unique instances.²⁸

If the court finds that the proposed testimony is a machine-generated statement rather than a person's statement, then the statement is not hearsay.²⁹ In such cases, the court turns to authentication³⁰ to ensure reliability.³¹ When dealing with images or data produced by unmanned machines³² or machines that require minimal human activation, most courts turn to a “silent witness” theory of authentication.³³ Some scholars rightly acknowledge that

23. See FED. R. EVID. 801(a).

24. See *id.*

25. See *id.* 801–03.

26. See *id.* 801(a) (“Statement’ means a person’s oral assertion, written assertion, or nonverbal conduct, *if the person intended it as an assertion.*” (emphasis added)).

27. See *infra* Part I.A.

28. See *infra* Part I.A.

29. See FED. R. EVID. 801(a)–(c).

30. See *id.* 901.

31. Roth, *supra* note 5, at 2008–09.

32. Surveillance cameras are often silent witnesses because they record without human operation, input, or interference. See *infra* Part I.A; see also *People v. Harvey*, Nos. 319482, 319483, 2015 WL 8953522, at *8 (Mich. Ct. App. Dec. 15, 2015); *People v. Ham*, 993 N.Y.S.2d 645, 2014 WL 2438434, at *3 (Crim. Ct. 2014) (“[T]he visual component of a videotape is not usually hearsay.”); *People v. Patten*, 927 N.Y.S.2d 542, 545–46 (City Ct. 2011).

33. In 1979, for example, the Court of Appeals of Indiana adopted the silent witness theory, noting that it was joining “good company” because of the numerous jurisdictions that

photographs and video are easily manipulated by framing, light, angle, and a host of other factors controlled by the human operator of the camera;³⁴ a more critical admission process should reflect these realities.³⁵ As the Section below explains, courts have yet to adopt this nuanced consideration in applying the silent witness theory.³⁶

A. Not Hearsay: Nonhuman Statements Offered for the Truth of the Matter Asserted

As technology becomes more pervasive within the court system, courts struggle to adapt their analyses to the role of machines in evidence production.³⁷ Because a statement is made “by a person” according to Rule 801, most courts do not consider machine output a statement.³⁸ For example, the Court of Appeals of Michigan flatly refused to consider machine output as statements in *People v. Dinardo* because “a machine is not a person and therefore not a declarant capable of making a statement.”³⁹

When a court finds that a statement is a machine’s, it avoids hearsay analysis altogether.⁴⁰ Even though courts do not classify this evidence as hearsay, they still subject it to reliability safeguards through authentication.⁴¹ Authentication may be satisfied through the testimony of a witness with knowledge⁴² or through the silent witness theory. With roots in Rule 901, which permits authentication

previously adopted the theory. See *Bergner v. State*, 397 N.E.2d 1012, 1016 (Ind. Ct. App. 1979) (citing to nineteen jurisdictions, both federal and state).

34. Roth, *supra* note 5, at 2007–08 (suggesting that authentication is sufficient to address those concerns); Silbey, *supra* note 11, at 555.

35. See Silbey, *supra* note 6, at 19.

36. *Id.* at 25.

37. See Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1, 54 (1998) (explaining that since photographs first gained popularity, courts have struggled to analogize them to other types of evidence and create a framework for admissibility).

38. FED. R. EVID. 801; see, e.g., *United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1109–10 (9th Cir. 2015) (“Here, the relevant assertion isn’t made by a person; it’s made by the Google Earth program.”); *United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008) (“The physician’s diagnosis is testimonial, but the lab’s raw results are not, because data are not ‘statements’ in any useful sense.”); *Boothe ex rel. K.C. v. Sherman*, 190 F. Supp. 3d 788, 793 (N.D. Ill. 2016) (collecting cases) (“Thus, the time stamps on the video footage, which are raw data generated by a machine rather than statements by a declarant, are not hearsay.”).

39. *People v. Dinardo*, 801 N.W.2d 73, 79 (Mich. Ct. App. 2010).

40. See *id.*; see also FED. R. EVID. 801(a).

41. FED. R. EVID. 901; see, e.g., *United States v. Perea*, No. 4:16-CR-00176-MAC-CAN, 2018 WL 771361, at *1 (E.D. Tex. Jan. 22, 2018) (“A party seeking to admit an item into evidence—including a video recording—must first establish the item’s genuineness.”).

42. FED. R. EVID. 901(b)(1).

through testimony about the reliability of a “process,”⁴³ the silent witness theory allows a witness without knowledge of the events recorded but with knowledge of the device’s reliability to authenticate the evidence.⁴⁴ Courts do not subject photographs taken by humans to silent witness analysis as long as a witness with knowledge can testify that the photograph is a fair and accurate depiction of what the proponent purports it to show.⁴⁵ In the alternative, courts often admit photographs without a sponsoring witness because a photograph is self-authenticating—it can “speak for itself.”⁴⁶ Under the silent witness theory, the inquiry shifts: a witness who can testify to the mechanics of the instrument that make the output reliable replaces the reliability of a witness with actual knowledge of the event depicted.⁴⁷ Notably, though, courts usually employ the silent witness theory only when there is no witness with actual knowledge of the events available to testify.⁴⁸ This often is the case when motion or some other triggering event automatically activates the camera in question.⁴⁹ The application of the silent witness theory is logical because automatic activation leading to a recording is akin to a *machine’s* declaration that “something noteworthy is going on and here is what actually happened.”

In *United States v. Taylor*, the US Court of Appeals for the Fifth Circuit addressed the admissibility of film (and the resulting contact prints) produced by a surveillance camera that bank robbers automatically triggered after they locked bank employees inside a vault during a robbery.⁵⁰ Trapped in the vault, the employees were unable to authenticate the images as they did not see what happened

43. *Id.* 901(b)(9).

44. *United States v. Harris*, 55 M.J. 433, 436 (C.A.A.F. 2001) (“This theory allows authentication of photographs by the reliability of the process that created them, without the need of a human witness to the events shown by the film.”). In *Harris*, the court also discussed that Rule 901(b)(9) of the Military Rules of Evidence, which has substantially the same text as FRE 901, supports the silent witness theory. *Id.* at 438–39; *see also* FED. R. EVID. 901.

45. *Id.* at 438; *see* FED. R. EVID. 901(b)(1); *Bergner v. State*, 397 N.E.2d 1012, 1015 (Ind. Ct. App. 1979).

46. Roth, *supra* note 5, at 2009.

47. Tracy Bateman Farrell, Annotation, *Construction and Application of Silent Witness Theory*, 116 A.L.R.5th 373, § 2[a] (2004).

48. *See* JORDAN S. GRUBER, *Foundation for Contemporaneous Videotape Evidence*, in 16 AM. JUR. 3D *Proof of Facts* 493, § 5 (2018). Otherwise, the witness authenticating the video would have knowledge of the events, and the video would most likely be illustrative evidence, rather than substantive. *See, e.g.,* *Washington v. State*, 961 A.2d 1110, 1117 (Md. 2008) (“In the instant case, the State offered the videotape and still photographs as probative evidence in themselves, and not as illustrative evidence to support the testimony of an eye-witness.”).

49. Farrell, *supra* note 47, § 2[a].

50. *United States v. Taylor*, 530 F.2d 639, 640–41 (5th Cir. 1976).

during the rest of the robbery.⁵¹ The proponent instead authenticated the images through a witness who “testified as to the manner in which the film was installed in the camera, how the camera was activated, the fact that the film was removed immediately after the robbery, the chain of its possession, and the fact that it was properly developed and contact prints [were] made from it.”⁵² Though the court did not mention silent witness theory by name, federal and state courts consistently consider these factors as indicia of reliability for silent witnesses.⁵³

B. Not Hearsay: Filmic Demonstrative Evidence

1. Generally

When there is a sponsoring witness, courts often admit video evidence as demonstrative evidence.⁵⁴ When a witness with knowledge of certain events takes the stand to testify as to the events, she may utilize a demonstrative aid to help convey her testimony to the jury.⁵⁵ Demonstrative evidence falls in an evidentiary in-between—the proponent does not offer it to prove a fact by itself; rather, the proponent uses the demonstrative evidence to communicate a concept to the jury, making the underlying testimony more digestible.⁵⁶ Demonstrative evidence therefore carries no probative value of its own—a witness has to give it meaning.⁵⁷ An expert may present a chart to explain a complicated concept, for

51. *Id.* at 641.

52. *Id.* at 641–42.

53. *See, e.g.*, *United States v. Harris*, 55 M.J. 433, 438–39 (C.A.A.F. 2001) (adopting the silent witness theory for military courts, as long as the following elements are satisfied: “(1) the system was reliable; (2) the system was in working order when the photo was taken; and (3) the film was handled and safeguarded properly from the time it was removed from the camera until the time of trial”); *State v. Haight-Gyuro*, 186 P.3d 33, 36 (Ariz. Ct. App. 2008) (collecting cases). The mechanics, triggering events, and post-collection process are the cornerstones of the analysis. *E.g.*, *Harris*, 55 M.J. at 438–39; *Haight-Gyuro*, 186 P.3d at 36.

54. *See* KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5172.6 (2d ed. 2017) (collecting cases). For a general description of demonstrative evidence, see VICTOR JAMES GOLD, *FEDERAL PRACTICE AND PROCEDURE* § 6164(a) n.97 (2d ed. 2017) (“The term ‘demonstrative evidence’ refers to a tangible item, such as a chart, diagram, or a courtroom reenactment of an event, that illustrates the testimony of a witness.”).

55. GOLD, *supra* note 54 § 6164(a).

56. *See id.*; *see also* *Grimes v. Emp’rs Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 610–11 (D. Alaska 1977) (explaining that demonstrative evidence is generally admissible because “the verifying witness is merely using the film as a means of communicating his observations”).

57. *See* GRAHAM, *supra* note 54, § 5172; GRUBER, *supra* note 48, § 5 (“The traditional view of real, demonstrative, photographic evidence was that it had no independent significance apart from its ability to illustrate facts testified to by a witness.”).

example.⁵⁸ As a result, the jury cannot review demonstrative evidence during deliberations.⁵⁹ The following overview of filmic demonstrative evidence identifies the purpose of demonstrative evidence and its practical limitations in the courtroom. Identifying the line where demonstrative evidence becomes assertive and thus hearsay provides necessary context for analyzing the evidentiary status of body camera footage.

2. After-the-Fact Videos: When Evidence Becomes Assertive and Not Demonstrative

Attorneys utilize video technology to introduce creative types of demonstrative evidence of their clients' injuries.⁶⁰ Sometimes, the filmic evidence crosses the line into substantive evidence rather than demonstrative.⁶¹ "Day in the life" videos, for example, often cross that line. First utilized in early 1970s civil litigation,⁶² a plaintiff may present a "day in the life" video during a trial's damages portion to establish pain and suffering.⁶³ When words will not adequately convey the effect of an injury on a plaintiff, the videos allow plaintiffs to *show* the jury day-to-day hardships they face.⁶⁴ When damages include pain and suffering, videos may include depictions of plaintiffs struggling to perform daily tasks or experiencing pain during rehabilitative medical treatments.⁶⁵

When a party introduces a video that crosses the line from being illustrative of a witness's testimony to assertive of substantive evidence, the contents of the video may be a "statement" and thus inadmissible hearsay.⁶⁶ In *Grimes v. Employers Mutual Liability*

58. See *State v. Lord*, 822 P.2d 177, 193 (Wash. 1991).

59. See Maureen A. Howard & Jeffery C. Barnum, *Bringing Demonstrative Evidence in from the Cold: The Academy's Role in Developing Model Rules*, 88 TEMP. L. REV. 513, 516 (2016) (citing *Baugh ex rel. Baugh v. Cuprum S.A. De C.V.*, 730 F.3d 701, 703 (7th Cir. 2013)); Jennifer L. Mnookin, *Repeat Play Evidence: Jack Weinstein, "Pedagogical Devices," Technology, and Evidence*, 64 DEPAUL L. REV. 571, 581 (2015).

60. See Jane A. Kalinski, Note, *Jurors at the Movies: Day-in-the-Life Videos as Effective Evidentiary Tool or Unfairly Prejudicial Device?*, 27 SUFFOLK U. L. REV. 789, 790, 801 (1993).

61. See GRAHAM, *supra* note 54, § 5172.

62. The earliest judicial references to "day in the life" videos appeared in *Fruit v. Schreiner*, 502 P.2d 133, 143 (Alaska 1972), and *Ward v. Hester*, 288 N.E.2d 840, 843 (Ohio Ct. App. 1972), *aff'd*, 303 N.E.2d 861 (Ohio 1973).

63. Kalinski, *supra* note 60, at 790, 801.

64. See *id.* at 797–98.

65. See *id.* at 789.

66. See *Grimes v. Emp'rs Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 611 (D. Alaska 1977).

Insurance Co.,⁶⁷ a federal district court held that depictions in a “day in the life” video crossed the threshold into substantive evidence, acknowledging the assertive intent of the plaintiff’s supposed demonstrative evidence.⁶⁸ The “day in the life” video depicted the plaintiff doing daily activities around his home and also included two sections where he performed movement tests related to his injury.⁶⁹

Unfortunately, the *Grimes* court skirted the question of whether the video itself was hearsay—even though it wrote the *video* is hearsay, the court based its reasoning on the assertive conduct depicted *in* the video.⁷⁰ The court found that the conduct depicted in the video was clearly assertive because the plaintiff knew he was being filmed and knew that the purpose of the filming was to convey his daily struggles to the jury.⁷¹ It admitted the video’s contents under the residual exception to hearsay⁷² because of the “[g]uarantees of trustworthiness” present—mainly the plaintiff’s availability for cross-examination.⁷³ It is unclear whether the court employed this analysis, rather than admitting the video as demonstrative evidence, because the plaintiff sought to introduce the video as substantive evidence of pain and suffering rather than demonstrative evidence.⁷⁴

Demonstrative evidence constantly evolves with technology.⁷⁵ More recently, attorneys working closely with medical experts have developed unique methods for injured plaintiffs to recreate their injuries for a jury.⁷⁶ For example, in *Devadas v. Niksarli*, an attorney recruited a photo-editing specialist to alter a photograph of a scene to reflect how the plaintiff would see it after a failed LASIK procedure.⁷⁷

67. *Id.* *Grimes* highlights the in-between status of filmic demonstrative evidence. While usually offered as illustrative demonstrative evidence, the normal dangers of filmic evidence (framing, discretionary presentation, and lack of context) lurk in the background and may, at a tipping point, become assertive. *See id.*; Kalinski, *supra* note 60, at 816.

68. *See Grimes*, 73 F.R.D. at 611.

69. *Id.* at 609.

70. *See id.* at 610–11. The court probably avoided that hearsay question because the video itself was authenticated by the plaintiff and the videographer through the silent witness theory. *See id.* at 609.

71. *See id.* at 611 (“[A] film offered by the plaintiff showing the plaintiff performing tasks to exhibit his disability is like a witness testifying about assertive conduct.”).

72. *See id.*; *see also* FED. R. EVID. 807.

73. *Grimes*, 73 F.R.D. at 611.

74. *See id.* at 610–11.

75. Caitlin O. Young, Note, *Employing Virtual Reality Technology at Trial: New Issues Posed by Rapid Technological Advances and Their Effects on Jurors’ Search for “The Truth”*, 93 TEX. L. REV. 257, 259 (2014).

76. NEAL FEIGENSON, EXPERIENCING OTHER MINDS IN THE COURTROOM 2 (2016).

77. *Id.* at 35–36.

Corroboration by a sponsoring witness is paramount for evidence purporting to be “demonstrative.”⁷⁸ Neal Feigenson criticizes these subjective forms of demonstrative evidence not only because they present themselves as “independent proof” of harm under the guise of demonstrative evidence⁷⁹ but also because they are unreliably “grounded” only in the accuracy of the witness who guides the expert’s creation of the simulation.⁸⁰ In *Smith v. Jones*, an attorney commissioned a videographer to create depictions of the plaintiff’s visual condition.⁸¹ Unlike in *Devadas*, the plaintiff’s ophthalmologist, who had conducted visual field tests on the plaintiff, was able to confirm the reliability independent of the plaintiff’s testimony.⁸² Comparing *Devadas*, where the exhibit’s accuracy rested solely upon the plaintiff’s word, to *Smith*, where the demonstrative evidence was objectively verifiable, Feigenson’s concerns are warranted.⁸³ Without a witness to corroborate the demonstrative evidence’s accuracy, the evidence resembles “proof” of a plaintiff’s condition⁸⁴ or, in the most extreme case, a plaintiff’s assertive statement.⁸⁵

Even when simulative demonstrative evidence can be corroborated, the evidence may go too far by “invit[ing] jurors to occupy the plaintiff’s position.”⁸⁶ One potential check on this danger is to balance the probative value of the video against the danger of unfair prejudice pursuant to Rule 403.⁸⁷ The Tenth Circuit adopted this approach in *Bannister v. Town of Noble* for a “day in the life” video, where the court did not conduct a hearsay analysis but instead found that the probative value of the film outweighed the danger of unfair prejudice to the defendant.⁸⁸ The court found that the

78. See Karen D. Butera, *Seeing Is Believing: A Practitioner’s Guide to the Admissibility of Demonstrative Computer Evidence*, 46 CLEV. ST. L. REV. 511, 514–15 (1998) (“Unlike substantive evidence, demonstrative evidence can only illustrate or explain other testimonial, documentary or real evidence.”); see also FEIGENSON, *supra* note 76, at 128.

79. For an argument that parallels Jessica Silbey’s criticism of how courts treat substantive filmic evidence, see FEIGENSON, *supra* note 76, at 34, 39. See also Silbey, *supra* note 6.

80. Edward Cheng, *Neal Feigenson, Experiencing Other Minds in the Courtroom*, EXCITED UTTERANCE 12:12 (Sept. 25, 2017), <https://www.excitedutterancepodcast.com/listen/2017/9/25/34-neal-feigenson> [<https://perma.cc/DFX6-L7LC>] [hereinafter EXCITED UTTERANCE] (discussing the same case studies).

81. FEIGENSON, *supra* note 76, at 73–74.

82. *Id.* at 74.

83. See EXCITED UTTERANCE, *supra* note 80, at 16:50.

84. FEIGENSON, *supra* note 76, at 128.

85. See *id.* at 26 n.12; see also FED. R. EVID. 801(a).

86. EXCITED UTTERANCE, *supra* note 80, at 20:10.

87. See FEIGENSON, *supra* note 76, at 136.

88. *Bannister v. Town of Noble*, 812 F.2d 1265, 1270 (10th Cir. 1987).

plaintiff's availability for cross-examination mitigated the danger of prejudice and affirmed the admission of the video.⁸⁹ This analysis mimics the *Grimes* court's residual exception language,⁹⁰ though notably does not require classifying the plaintiff's conduct in the "day in the life" video as an assertive statement subject to Rule 802.

Courts often purport to admit videos as demonstrative evidence but draw facts from them as if the videos are substantive evidence.⁹¹ The murky nature of demonstrative testimony makes the scope of the permitted use unclear.⁹² The problem, then, is that courts do not adequately screen filmic demonstrative evidence for reliability.⁹³ Jessica Silbey, who has written extensively on the persuasive nature of filmic evidence, highlights the particularly assertive nature of crime scene footage created by investigators after the fact.⁹⁴ Silbey eventually concludes that all filmic evidence is assertive in nature⁹⁵ because of the assertive nature of "light, angle [including point-of-view], focus, and editing"⁹⁶ inherently present in video production. Body camera footage is a clear example of filmic evidence that is inherently assertive because the body camera is supposed to capture an entire interaction from the beginning of suspicion to the apprehension of a suspect or conclusion of the encounter.⁹⁷ However, the assertive factors that Silbey identifies are even more prevalent in body camera footage than after-the-fact crime scene footage. The perspective of the footage and the fact that the footage presents only

89. *Id.* at 1270–71.

90. *Compare* *Grimes v. Emp'rs Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 611 (D. Alaska 1977) (finding video admissible under FRE 803(24) (now 807) based on its probative value, timeliness, and accuracy and based on the fact that the plaintiff depicted in the video was available to be cross-examined), *with* *Bannister*, 812 F.2d at 1269–70 (finding video admissible under FRE 403 after considering the accuracy of the film, its self-serving nature, the dominating nature of film evidence, and the availability of cross examination).

91. GRAHAM, *supra* note 54, § 5127 & n.17; Silbey, *supra* note 11, at 499.

92. *See* Silbey, *supra* note 11, at 502.

93. *Id.* at 505–06.

94. *Id.* at 542–57 (describing, in detail, the assertive nature of films admitted in a variety of cases).

95. *Id.* at 499.

96. *Id.* at 555.

97. *See* THE LEADERSHIP CONFERENCE ON CIVIL & HUMAN RIGHTS & UPTURN, POLICE BODY WORN CAMERAS: A POLICY SCORECARD 5 (2017), <https://www.bwccscorecard.org/static/pdfs/LCCHR%20and%20Upturn%20-%20BWC%20Scorecard%20v.3.04.pdf> [<https://perma.cc/D2ZJ-E2HR>] ("One of the main selling points for [body] cameras is their potential to provide transparency into some police interactions . . ."); Silbey, *supra* note 11, at 499 (describing the inherently assertive nature of police produced films).

one side of an interaction are features inherent in body camera footage that influence the narrative.⁹⁸

In one instance, Silbey describes a crime scene video recorded by an investigator walking through a house where a burglar killed the homeowner.⁹⁹ The court admitted the video as demonstrative evidence.¹⁰⁰ Silbey noted that even after the court rendered the audio portion inadmissible, the court failed to consider the assertive nature of the video when admitting it into evidence: “[T]here remained a narrated and opinionated content to the film from the perspective of the camera: its focus, angle, and movement; and, unlike the photographs, the film told a purposeful and pointed story about the violence of the burglary from the point of view of the filming, investigative officer.”¹⁰¹ The concurring judge in the case agreed, writing separately to criticize the filmic evidence’s testimonial nature.¹⁰²

C. Inadmissible Hearsay: Statements by a Person

To be hearsay, a statement must belong to a person.¹⁰³ Because people communicate in ways beyond simple verbal utterances, hearsay jurisprudence evolved to ensure the reliability of all statements by people, both verbal and nonverbal.¹⁰⁴ The one element that each type of statement shares is assertive intent: the declarant intends to convey a certain message with her actions, words, or lack thereof.¹⁰⁵ This Section analyzes discretionary actions’ role in establishing assertive conduct.

The FRE define a statement as “a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an

98. See 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> [<https://perma.cc/MNQ7-WRKB>] (illustrating the inherent bias of police body cameras through a variety of videos).

99. Silbey, *supra* note 11, at 512–15.

100. *Id.* at 514 (“The first justification fairly explains the filmic proffer as demonstrative evidence, while the second one suggests the film is testimonial or substantive evidence of some kind, but fails to explain the basis for admitting an out of court statement for the facts and truth it asserts.”).

101. *Id.* at 547.

102. *Id.* at 548 (citing *Virgin Islands v. Albert*, 241 F.3d 344, 349 (3d Cir. 2001) (Fullam, J., concurring in part and dissenting in part)).

103. FED. R. EVID. 801(a).

104. See *id.*

105. *Id.*; see also FED. R. EVID. 801(a) advisory committee’s note to 1972 proposed rules (“Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement.”).

assertion."¹⁰⁶ Thus, the cornerstone of a "statement" is the declarant's assertive intent.¹⁰⁷ Without the intention to communicate, even a verbal utterance is not, as a matter of law, a statement. Precedent widely accepts that nonverbal actions can constitute hearsay as long as the actor intended to assert something by her action.

The classic example of discerning communicative action is the ship captain dicta from *Wright v. Tatham*,¹⁰⁸ where the judge posited a hypothetical situation about a ship captain preparing his ship for voyage. The judge explained that the captain's inspection and subsequent boarding of the ship would be hearsay if a witness testified to it because it would be offered for the purpose of asserting that the captain believed the ship was seaworthy.¹⁰⁹ But the FRE look for more than the existence of such an inference before excluding nonverbal conduct as hearsay: they look for the actor's intent to communicate.¹¹⁰ The FRE would only consider the *Wright* captain's conduct hearsay if the captain intended to use his inspection and decision to board the ship to communicate to onlookers that the ship was safe.¹¹¹ The distinction is logical because if the actor does not mean to communicate something to an audience, then the traditional hearsay risk of insincerity disappears.¹¹²

In certain instances of nonverbal conduct, discerning the actor's assertive intent is relatively straightforward. Nodding one's head in response to a question indicates that the declarant answers in the affirmative.¹¹³ Pointing to a suspect in a lineup is hearsay because the actor intended for her actions to convey that the suspect to whom she points is the perpetrator.¹¹⁴ Similarly, a child pointing to sensitive

106. FED. R. EVID. 801(a) ("Statement" means a person's oral assertion, written assertion, or nonverbal conduct, *if the person intended it as an assertion.*" (emphasis added)).

107. FED. R. EVID. 801(a) advisory committee's note to 1972 proposed rules ("The key to the definition is that nothing is an assertion unless intended to be one.").

108. Paul F. Kirgis, *Meaning, Intention, and the Hearsay Rule*, 43 WM. & MARY L. REV. 275, 277-78 (2001) (citing *Wright v. Tatham* (1837) 112 Eng. Rep. 488 (KB)).

109. *Id.*

110. FED. R. EVID. 801(a); Kirgis, *supra* note 108, at 281-84.

111. *See* FED. R. EVID. 801(a), Kirgis, *supra* note 108, at 282.

112. Kirgis, *supra* note 108, at 283. Paul Kirgis is less convinced that sincerity should be the chief concern for hearsay evidence. *See id.* at 282-83. Instead, he posits that "modern cognitive research teaches that problems of misperception and poor memory are probably much more significant . . ." *Id.* Kirgis also questions whether courts should derive a declarant's intent from a subjective or objective standard based on her nonverbal actions. *Id.* at 292-94.

113. *See, e.g.,* *United States v. Katsougrakis*, 715 F.2d 769, 775 (2d Cir. 1983) ("The 'nods' clearly tended to subject Chrisanthou to criminal liability—by affirmative nod he admitted complicity in the criminal undertaking.").

114. FED. R. EVID. 801 advisory committee's note to 1972 proposed rules ("Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement.").

areas on a doll in the presence of a social worker is hearsay because the child intends to convey that something happened to her body at those locations.¹¹⁵ All of these recognized instances of nonverbal hearsay have a common feature: the presence of an audience.¹¹⁶

Thus, the two key components in nonverbal hearsay analysis are (1) the presence of an audience and (2) the affirmative choice of the declarant to do some act with knowledge of the significance attached to it.¹¹⁷ In all of the examples above, the declarant made a conscious choice to move her body in a way that objectively communicates to a third party with knowledge that the third party is present. As a further example, take a man's choice to don a wedding ring in public.¹¹⁸ If the man intended to wear the ring to signal to others that he is in a committed relationship, then the nonverbal conduct has all the markings of hearsay.¹¹⁹ A court would thus prohibit a witness from testifying to the truth of the matter asserted, which is that the ring proves that the man is in a committed relationship.

Technology challenges the way that the FRE approach hearsay analysis. New forms of communication stretch the boundaries of "statements" and communicative intent. However, other aspects of technological communication still fit well within existing hearsay analysis. The fixed and mechanistic nature of text messages, emails, and other social media posts seems more reliable than the strictly verbal hearsay of the past partly because the virtual world preserves

115. *Souder v. Commonwealth*, 719 S.W.2d 730, 734 (Ky. 1986), *overruled on other grounds by B.B. v. Commonwealth*, 226 S.W.3d 47 (Ky. 2007) ("There is no recognized exception to the hearsay rule for social workers or the results of their investigations. This includes the pointing and demonstrating performed by the child in the presence of the social worker, using a so-called 'anatomically correct' doll, because hearsay includes 'nonverbal conduct of a person, if it is intended by him as an assertion.'").

116. See Kirgis, *supra* note 108, at 291; see also Jeffrey Bellin, *eHearsay*, 98 MINN. L. REV. 7, 40 & n.127 (2013) ("For example, diary entries, memos-to-file, draft emails or 'notes to self' could constitute 'statements,' but not 'communications' if the statements, when uttered, were not intended for any audience.").

117. This is where the FRE differ from the *Wright* court's analysis. Compare FED. R. EVID. 801, with *Wright v. Tatham* (1837) 112 Eng. Rep. 488 (KB). The presence of an audience alone is not enough to transform action into hearsay. Kirgis, *supra* note 108, at 291–92.

118. See Peter Nicolas, *Left Hand, Third Finger: The Wearing of Wedding (or Other) Rings as a Form of Assertive Conduct Under the Hearsay Rule*, 30 WOMEN'S RTS. L. REP. 526, 534–35 (2009).

119. *Id.* at 534–35, 537 (noting that the nonverbal act of wearing, or possibly even not removing, a wedding ring satisfies the definition of hearsay). This example poses an interesting hypothetical for Kirgis's discussion about discerning communicative intent with subjective versus objective standards. See Kirgis, *supra* note 108, at 292–94. Peter Nicolas's discussion of the different cultural norms that inform where and when people wear wedding rings seems to advocate for an objective standard. See Nicolas, *supra* note 118, at 533–34.

them in their original form indefinitely.¹²⁰ But this distinction is superficial since books, reports, affidavits, medical records, and letters also exist in a fixed medium, yet courts still treat them as hearsay—and for good reason. Fabrication or memory failure is not the ultimate concern with these types of evidence. Rather, the broader inability to cross-examine the declarant remains the chief danger.¹²¹

II. BODY CAMERA FOOTAGE UNDER CURRENT EVIDENTIARY FRAMEWORKS

The following Section applies the evidentiary frameworks defined in Part I to body camera footage. By comparing body camera footage to evidence normally authenticated under the silent witness theory or admitted as demonstrative evidence, this Note examines whether those safeguards are sufficient to ensure that body camera footage is reliable. This Note concludes they are not, for body camera footage is more akin to a hearsay statement than are videos of the past.

A. A Primer on Body Cameras

US police departments began implementing body camera policies largely in response to police shootings and claims of police brutality when video footage was released in a significant number of cases showing the police fabricated accounts of the deadly encounters after-the-fact.¹²² Many citizens—93 percent according to one survey—view body cameras as a tool for police accountability,¹²³ and police departments view the cameras as both a crime-fighting tool and as proof that their officers acted properly in citizen encounters.¹²⁴

Most body cameras are always on and gathering visual data, waiting to be activated by an officer.¹²⁵ Some come equipped with a “preevent buffer,” during which the camera can recall up to two

120. Bellin, *supra* note 116, at 19–20.

121. *Cf. id.* at 19–20, 24 (focusing on the fixed nature of statements in electronic media as mitigating some reliability concerns).

122. See NO TAPE, NO TESTIMONY, *supra* note 7, at 1–4.

123. *Id.* at 8 (citing Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance*, PEW RES. CTR. (Sept. 29, 2016), <http://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance/> [<https://perma.cc/U87J-8MRV>]).

124. CMTY. ORIENTED POLICING SERVS., DEPT OF JUSTICE, POLICE EXEC. RES. F., IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 6 (2014) <https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf> [<https://perma.cc/VRB7-76SH>].

125. *E.g.*, HURLEY, *supra* note 2.

minutes of footage recorded before an officer activates the camera.¹²⁶ In these body cameras, if the officer does not activate the camera after a preprogrammed amount of time (which departments set), then the data are erased.¹²⁷ The Baltimore police had their preevent buffer configured to thirty seconds, resulting in the controversial footage discussed above.¹²⁸ When an officer presses the button to activate the camera, the camera begins recording audio as soon as it is activated and saves the video data beginning at the preevent buffer time.¹²⁹

Departmental policies vary regarding the amount of discretion an officer has to activate the body camera.¹³⁰ The most common variant is the limited discretion policy.¹³¹ In these departments, “police are directed to record specified enforcement activities and given discretion over whether to record at other times.”¹³² All of the departments define certain situations that should trigger mandatory activations.¹³³ Usually this happens in a written departmental policy, containing a broad statement such as, “Bearing this in mind, all user officers/supervisors who arrive on a scene or engage in an enforcement contact must place their VIEVU PVR- LE2 camera in the ‘On/Record’ Mode as soon as it is safe and practical to do so.”¹³⁴ For the aid of the officers, the policies usually list certain triggering events, after which officers are expected to record.¹³⁵

The Brennan Center for Justice at New York University Law School found that some common triggers listed in departmental policies across the country are as follows:

1. All calls for service and while en-route to emergency calls.
2. Pedestrian stops, including consensual encounters and “Terry stops” (a brief detention of a person by police on reasonable suspicion of involvement in criminal activity).

126. *Id.*

127. AXON ENTER., AXON BODY 2 (2017), https://prismic-io.s3.amazonaws.com/axon%2F342f04af-f9bc-4971-a7bf-28f2d7896945_04172017+product+card+-+axon+body+2.pdf [<https://perma.cc/EY94-PEZF>].

128. Fenton & Rector, *supra* note 1.

129. *See id.*

130. For a collection of links to departmental policies, see *Police Body Camera Policies: Recording Circumstances*, *supra* note 9.

131. Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. 897, 931–32 (2017).

132. *Id.* at 931.

133. *Id.*

134. *See, e.g.*, PHX. POLICE DEP’T, BODY WORN VIDEO TECHNOLOGY—PILOT 2 (2013), <https://static.spokanecity.org/documents/police/accountability/bodycamera/phoenix-policy.pdf> [<https://perma.cc/A4VT-T6FE>].

135. Fan, *supra* note 131, at 931–32.

3. Traffic stops.
4. Foot and vehicle pursuits.
5. Consensual or warrantless searches.
6. Executing search warrants.
7. Arrests and detentions.
8. Transports (driving with a prisoner).
9. Other adversarial encounters or situations where criminal activity is likely to be recorded.¹³⁶

Notably, the officer does not activate the camera until *after* the triggering event occurs. Therefore, the triggering event is rarely, or more likely never, recorded on the video. This is relevant to analyzing which evidentiary category body camera footage falls into because the officer activates her camera in response to these particular guidelines.

B. Body Camera as a (Not So) Silent Witness: The Shortcomings of Authentication

Body cameras are distinct from types of machine output routinely authenticated under the silent witness theory. Human influence is less likely to taint outputs from machine and camera “silent witnesses” than body camera footage. Unlike automated security cameras,¹³⁷ humans directly operate body cameras and the video produced is intended to depict what the human operator experiences.¹³⁸ All machines require and rely on human input at some level.¹³⁹ Computers and forensic machines function as a result of human coding,¹⁴⁰ like cameras capturing a picture of where the human operator aims.¹⁴¹ Some scholars argue that this level of human input should subject the products of these machines to a more rigorous admissibility standard than traditional authentication.¹⁴² This Note agrees. Courts largely ignore the nuance of this argument, electing instead to believe that forms of machine testimony are not fallible like

136. *Police Body Camera Policies: Recording Circumstances*, *supra* note 9.

137. *See* United States v. Taylor, 530 F.2d 639, 641–42 (5th Cir. 1976).

138. *See supra* Part II.A.

139. Roth, *supra* note 5, at 1976–78.

140. *Id.* at 1977–78.

141. *See* Mnookin, *supra* note 37, at 21 (noting that early photographers emphasized their role in the photographic process, which required extensive retouching and manipulation of the lens); Brian Sites, *Rise of the Machines: Machine-Generated Data and the Confrontation Clause*, 16 COLUM. SCI. & TECH. L. REV. 36, 58–59 (2014) (“And at least for forensic photographs, the images are often the photographer’s assertion about reality: ‘this is the crime scene,’ ‘this is the wound at issue,’ ‘this is the defendant,’ and so on.”).

142. Silbey, *supra* note 11, at 499.

human statements are.¹⁴³ However, the case for heightened standards is even stronger for body cameras.

The shortcomings of the silent witness theory are worth noting before examining why body camera footage falls outside its bounds. Such shortcomings are amplified in the body camera context, making this theory of authentication inadequate to ensure the footage is reliable. Viewed critically, silent witnesses are subject to human manipulation—especially when considering the degree of human control operators have over a machine.¹⁴⁴ Jennifer Mnookin notes that in early photographic evidentiary jurisprudence, judges were hesitant to admit photographic evidence because parties could not cross-examine the photograph.¹⁴⁵ Likewise, it is impossible to cross-examine body camera footage without a sponsoring witness.¹⁴⁶ The authentication requirement attempted to remedy this evidentiary shortcoming. The most effective avenue for authentication is the production of a “witness with knowledge” of the content of the picture for testimony and cross-examination.¹⁴⁷ The silent witness theory, though, does not guarantee a witness for a defendant to cross-examine with specific knowledge of the relevant facts to contextualize a body camera video for the jury.¹⁴⁸ While some view photographs and videos as objective,¹⁴⁹ that view overlooks the human input that produced them.¹⁵⁰

143. See *People v. Holowko*, 486 N.E.2d 877, 879 (Ill. 1985) (“There can be no question that computer science has created many devices, the reliability of which can scarcely be questioned. We should therefore apply the rule that its accuracy and reliability is judicially noticeable, requiring only proof of the accuracy and proper operation of the particular device under consideration.”); *State v. Pulphus*, 465 A.2d 153, 161 (R.I. 1983) (“We believe there is no logic in excluding a photograph that records an event with minute accuracy and precision, when the taking of the photograph has been reliably established.”).

144. See *Roth*, *supra* note 5, at 1977–78, 2007–08; *Silbey*, *supra* note 6, at 29–30.

145. Mnookin, *supra* note 37, at 55.

146. See *Silbey*, *supra* note 6, at 41–42 (“Obviously, a lawyer cannot literally cross-examine a film; rather, a lawyer either examines or cross-examines a witness about the film in evidence.”).

147. See FED. R. EVID. 901. Note the similarity between substituting the “witness with knowledge” of the factual depiction of the photograph’s testimony and the silent witness theory’s substitution of a witness with knowledge of the camera’s mechanical process. See *id.* Both witnesses substitute their testimony for that of the photographer, who could presumably testify to both the actual content of the photograph and the camera’s mechanical reliability.

148. See *supra* Part I.A.

149. See *People v. Holowko*, 486 N.E.2d 877, 879 (Ill. 1985); *State v. Pulphus*, 465 A.2d 153, 161 (R.I. 1983); *NO TAPE, NO TESTIMONY*, *supra* note 7, at 1–4.

150. *Silbey*, *supra* note 6, at 18.

1. Undue Perception of Objectivity and Completeness

Although video footage and photographs appear to present a “mechanical objectivity”¹⁵¹ independent of their operators, introducing videos in criminal prosecutions does not always clear up factual disputes. As Silbey states, a video of a police encounter “does not lie,” but also “does not tell the whole story.”¹⁵² Unlike evidence authenticated via the silent witness theory, body camera footage is incapable of “speaking for itself.”¹⁵³ As a result, Silbey asserts that these types of contemporaneously recorded police videos are in need of “explanation.”¹⁵⁴ The explanation would address natural but not necessarily obvious questions that the jury should consider: What happened outside of the camera frame? Does the camera’s angle make a subject appear closer, farther, larger, or otherwise different than they would appear in real life?¹⁵⁵ Such explanation is easy to come by in police brutality claims where officers have a motive to take the stand in their own defense, especially in light of the partially subjective standards by which their conduct is judged.¹⁵⁶ The same is not true when the prosecution introduces such footage against a nonofficer criminal defendant.¹⁵⁷ If an officer does not testify, the defendant cannot add narrative context through cross-examination. Additionally, if an officer does not testify, the defendant may feel undue pressure to take the stand to explain her version of events.¹⁵⁸ Placing this burden on criminal defendants to take the stand incentivizes defendants to waive their Fifth Amendment rights¹⁵⁹

151. Mnookin, *supra* note 37, at 1–2.

152. Jessica Silbey, *Persuasive Visions: Film and Memory*, 10 LAW CULTURE & HUM. 24, 33 (2014).

153. *See id. Contra* Roth, *supra* note 5, at 2009.

154. Silbey, *supra* note 152, at 33 (explaining that officer narration accompanying footage in a police brutality case is necessary to understand the footage).

155. *See* Note, *Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1812–13 (2015) [hereinafter *Considering Police Body Cameras*].

156. *See* Silbey, *supra* note 152, at 33 (describing a case where the officers did testify); David J. Oliveiri, Annotation, *Defense of Good Faith in Action for Damages Against Law Enforcement Official Under 42 U.S.C.A. § 1983, Providing for Liability of Person Who, Under Color of Law, Subjects Another to Deprivation of Rights*, 61 A.L.R. Fed. 7 (1983).

157. As Mnookin rightly notes, parties cannot cross-examine a photograph. Mnookin, *supra* note 37, at 55–56 (identifying the inability to cross-examine photographs as a possible reason for historical judicial hesitancy to admit them). *But see* Silbey, *supra* note 11, at 548 (suggesting that courts instruct the jury to engage in cross-examination-like interrogation of the video to remind the jury that the video is not an objective truth).

158. *See* Fan, *supra* note 131, at 919.

159. *See id.* at 914–15 (explaining the numerous reasons defendants may invoke their Fifth Amendment right).

when cross-examining a state witness—the police officer—would achieve the same result.

Similarly, proponents of body camera footage emphasize their ability to provide “objective” evidence of probable cause, reasonable suspicion, or consent to a search.¹⁶⁰ However, all of these standards are notoriously fact intensive.¹⁶¹ Body camera footage is unlikely to capture all of those facts,¹⁶² since the cameras begin recording only after certain triggering events¹⁶³ and capture only the recording officer’s point of view. For example, a key factor in whether a seizure occurred is whether a suspect felt she could leave a police encounter,¹⁶⁴ but that critical fact is unaccounted for by a police officer’s body camera video.

2. Human Interference with the “Silent Witness”

While courts have repeatedly held that cameras—both manually operated and automatic—may be authenticated as silent witnesses,¹⁶⁵ body cameras present a unique challenge to authentication that is distinguishable from cameras of the past. First, unlike typical surveillance cameras, body cameras are controlled by a human actor who has a role in the adversarial process, so the footage should be subject to more stringent reliability inquiries. Second, body cameras are uniquely positioned to record from the officer’s perspective, subjecting the jury to potential cognitive biases.¹⁶⁶ The most effective way to remedy this cognitive bias is an effective cross-examination of the officer wearing the camera.¹⁶⁷ Because of both challenges, the footage is unable to “speak for itself”¹⁶⁸ and the testimony of a technician familiar with the camera, but who was not operating it at the time of the recording, is unlikely to add value.

While Andrea Roth rejects the argument that machines bear the credibility of their programmer,¹⁶⁹ body cameras are significantly

160. See *Considering Police Body Cameras*, *supra* note 155, at 1803.

161. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (assessing voluntariness of consent by considering the “totality of all the circumstances”).

162. The *Bustamonte* Court considered factors like education, youth, intelligence, deprivation of sleep, and repeated nature of questioning that are unlikely to be represented on body camera footage. See *id.* at 226.

163. See *supra* Part II.A.

164. See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

165. See *supra* Part I.A.

166. Caren Myers Morrison, *Body Camera Obscura: The Semiotics of Police Video*, 54 AM. CRIM. L. REV. 791, 801 (2017).

167. See *infra* Part IV.

168. See Roth, *supra* note 5, at 2009.

169. *Id.* at 1986.

different from lab machines or automatically activated surveillance cameras programmed prior to the event in question. Roth argues that just because the programmer “has designed a machine to behold and report events does not mean the programmer herself has borne witness to those events.”¹⁷⁰ Therefore, calling the programmer to the stand is unnecessary.¹⁷¹

However, body camera operators necessarily bear witness and initiate the machine output,¹⁷² distinguishing officers from Roth’s programmers. Officers’ testimony directly connects their own operation of the body camera to the events they recorded.

The common vein that runs throughout the silent witness analysis of videos is the lack of human interference with the recording process.¹⁷³ With such machine statements, the recording function is either always recording or triggered to record by an automated process within the machine.¹⁷⁴ The same is not true for body camera footage, which is triggered only by a human in response to human-recognized triggering events.¹⁷⁵ Yet body camera videos prepared by a human for law enforcement purposes are currently only subject to the same authentication requirements as surveillance videos recorded in a retail store’s everyday operations.¹⁷⁶

Body cameras capture a limited point of view: that of the person wearing them.¹⁷⁷ This point of view has the potential to elicit sympathy for the police officer from the jury, who will naturally identify with the officer when viewing the image through the officer’s eyes.¹⁷⁸ Body camera footage presents police-suspect interactions with a “deceptive intensity” by reducing a confrontation to a singular lens

170. *Id.*

171. *Id.*

172. *See supra* Part II.A.

173. *See supra* Part I.A.

174. *See supra* Part I.A.

175. *See supra* Part II.A.

176. *See* FED. R. EVID. 901.

177. Fan, *supra* note 131, at 947.

178. *Id.* at 948–49. In some jurisdictions, viewing the footage is almost literally seeing “through an officer’s eyes” because the cameras are mounted on their sunglasses. *See* Adam Benforado, *The Hidden Bias of Cameras*, SLATE (Aug. 12, 2015, 1:43 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/08/police_body_and_dashboard_cameras_how_camera_perspective_bias_can_limit.html [<https://perma.cc/B245-8VAT>]. Neal Feigenson makes the same perspective-based warning for subjective demonstrative evidence because of the danger that the jury literally sees through the plaintiff’s perspective. EXCITED UTTERANCE, *supra* note 80, at 20:50. A leading seller of body cameras, Axon, actually markets their glasses-mounted body camera as “the leading point of view camera,” advertising to officers that, “[t]hat way, you’ll be able to capture your perspective without feeling held back by your camera.” *Axon Flex 2*, AXON, <https://www.axon.com/products/flex-2> [<https://perma.cc/7KFFQ-5CN5>] (last visited Apr. 7, 2018).

and presenting only the high-intensity parts of the encounter.¹⁷⁹ Body camera footage is naturally prone to this type of bias because of law enforcement policy mandating activation of the camera only after certain triggering events.¹⁸⁰ The format of a narrative video also raises potential “naïve realism” cognitive biases in fact-finders.¹⁸¹ In other words, a jury may accept a video as objectively truthful rather than perceiving its evidentiary limitations, such as lack of context or perspective bias.¹⁸²

Perspective is a particularly salient consideration in the criminal justice context when videos depict interactions between the police and suspects or arrestees. Academics who study the effects of camera positioning on police interrogation videos caution that even a stationary video camera “should not be considered a passive bystander, objectively recording what is said and done.”¹⁸³ Variables like camera angle and whom the camera focuses on affect the viewer’s perception of the subject’s guilt and credibility—to the detriment of the subject recorded.¹⁸⁴

Former police officer and current law professor Seth W. Stoughton produced a video series that depicts how the framing and perspective of body camera videos have the potential to portray false or misleading narratives.¹⁸⁵ One video, for example, depicts a suspect from an officer’s point of view, close up, and making jerky movements near the officer.¹⁸⁶ Thirty-two percent of 80,858 *New York Times* readers who watched the video believed the officer faced a “[v]ery threatening” situation.¹⁸⁷ A second video of the same actions filmed from a third party’s perspective shows that the officer was actually dancing with the suspect.¹⁸⁸ Stoughton’s videos do not address

179. Morrison, *supra* note 166, at 800.

180. See *supra* Part II.A.

181. Morrison, *supra* note 166, at 801.

182. *Id.*

183. Sara Landström, Emma Roos af Hjelmsäter & Pär Anders Granhag, *The Camera Perspective Bias: A Case Study*, 4 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 199, 200 (2007).

184. *Id.*; Fan, *supra* note 131, at 947–48.

185. Williams et al., *supra* note 98 (displaying Stoughton’s video series).

186. *Id.*

187. To make the responses viewable, click on a response in the survey. Responses are still being tabulated through the survey, so the results may change over time. *Id.*; see Katie Farden, Note, *Recording a New Frontier in Evidence-Gathering: Police Body-Worn Cameras and Privacy Doctrines in Washington State*, 40 SEATTLE U. L. REV. 271, 294 (2016) (reflecting a similar percentage and sample size in the *New York Times* data when cited in 2016).

188. Williams et al., *supra* note 98.

possible shot-framing concerns that arise from officers having discretion to turn cameras on and off—another potential concern.¹⁸⁹

Courts must be increasingly aware of body camera limitations in these contexts, particularly when they are controlled by a human actor.¹⁹⁰ The most effective way for them to acknowledge these limitations is to reject the silent witness theory of authentication as independently sufficient to admit body camera footage into evidence. Courts have yet to decide whether body cameras are silent witnesses,¹⁹¹ likely because it is widely accepted¹⁹² that video evidence falls within the silent witness category. However, silent witness theory is inadequate to ensure the reliability of body camera footage because the footage is distinguishable from videos of the past in both its perspective and its operation.

C. Body Camera Footage Is Not Demonstrative Evidence

There is a tenuous argument that body camera videos are demonstrative evidence. If a police officer testified that she was present at the time the footage was recorded and that the body camera footage would aid in explaining the events to the jury, the footage *might* satisfy the definition of demonstrative evidence.¹⁹³ In this scenario, treating body camera footage as demonstrative evidence does, notably, remedy one concern that the footage presents: If the footage is demonstrative evidence, the proponent would have to produce a witness with knowledge to show it to the jury.¹⁹⁴ A defendant would then be able to cross-examine a witness with at least some knowledge of the events depicted in the footage.

189. *See id.*

190. *See Fan, supra* note 131, at 947–48.

191. A search done on April 8, 2018, using the terms (body /1 camera) & “silent witness” in both Westlaw and LexisAdvance returned only two cases: *Gemeil v. State*, No. 05–K–15–10807, 2017 WL 5171600, at *7 (Md. Ct. Spec. App. Nov. 8, 2017), and *People v. Spencer*, 2017 IL App. (4th) 160569-U, ¶ 31 (Ill. App. Ct. Aug. 10, 2017). In *Gemeil*, the court mentioned body camera footage in its factual summary of the case, but such footage was immaterial to the issue on appeal regarding the admission of bank surveillance camera footage. In *Spencer*, the defendant argued that the police officer who narrated the content of body camera footage without personal knowledge of the events therein violated the silent witness rule that the evidence speaks for itself. *Spencer*, 2017 IL App (4th) 160569-U, ¶ 31. The court did not address the argument, though, because the defendant did not preserve the issue for appeal. *Id.* ¶ 32. Regardless, this argument is misguided because the silent witness rule does not prohibit contemporaneous testimony. Practically speaking, it appears that the defense argued that the narration was not helpful to the jury under Rule 701. *See People v. Sykes*, 972 N.E.2d 1272, 1278–79, 1281 (Ill. App. Ct. 2012) (making a similar argument).

192. *See supra* Part I.A.

193. *See supra* Part I.B.

194. *See* FED. R. EVID. 901.

However, the blurry lines of what constitutes “demonstrative evidence”¹⁹⁵ may encourage proponents of body camera footage to stretch the knowledge prong of admissibility¹⁹⁶ beyond the limits of an effective cross-examination. For example, it is unclear whether a court would find that an expert witness who was not physically present when the video was recorded possessed requisite “knowledge” of the events based on a forensic analysis of the video. In such circumstances, the defendant’s sole recourse would be to establish through cross-examination that the witness was not physically present and therefore cannot reliably testify as to the potential for only a partial depiction of events. The defendant will be unable to cross-examine the witness in order to affirmatively establish any facts about the recording’s depictions.

A similar problem arises when one officer who was present at the time of the recording but was not the recording officer testifies at trial. Under a demonstrative evidence framework, an on-scene officer almost certainly possesses the requisite knowledge to authenticate the video.¹⁹⁷ But the defendant is unable to cross-examine the testifying officer about the recording officer’s choices to begin recording, aim the camera in a certain direction, or end recording. Additionally, the testifying officer likely observed the events from a different angle. If so, the cross-examination may be less effective compared to a cross-examination of the recording officer given that the defendant needs to establish key facts that a third party simply cannot establish.

Body camera footage is distinguishable from evidence admitted for “demonstrative” purposes. Whereas an expert-created chart or simulation is prepared for use during witness testimony, one of the main reasons police wear body cameras is to capture contemporaneous evidence specifically for later use in criminal prosecutions.¹⁹⁸ Demonstrative evidence, by nature, usually comes into existence after events central to litigation have transpired because it is dependent upon a witness’s after-the-fact testimony about those events.¹⁹⁹ Neither contemporaneous nor after-the-fact video evidence can stand alone in court without authentication by a sponsoring witness.²⁰⁰

195. See Howard & Barnum, *supra* note 59, at 531–32.

196. See FED. R. EVID. 901.

197. See *id.*

198. See NO TAPE, NO TESTIMONY, *supra* note 7, at 10–11.

199. See FEIGENSON, *supra* note 76, at 21–23 (describing different kinds of demonstrative simulation evidence, including artists’ sketches, computer animations, and digitally edited images).

200. See FED. R. EVID. 901.

However, the problem with classifying body camera footage as demonstrative evidence is the low threshold for admissibility.²⁰¹

Feigenson's concerns about the shortcomings of authentication for "simulations of subjective experience"²⁰² apply to body camera footage as well. Feigenson argues that simulations of a party's perception are less reliable than other demonstrative evidence when there is no way beyond the party's own testimony to corroborate whether the simulation is accurate.²⁰³ Police body camera footage is similar in that only the recording officer can testify to the circumstances surrounding the recording because it depicts her particular point of view and reflects her choice to commence and end recording. Lack of corroboration remains a chief concern when admitting body camera footage and precludes proponents from offering footage as only demonstrative evidence (absent the recording officer's testimony).

Courts are likely to misclassify body camera footage, like "day in the life" videos, as demonstrative evidence when the video is actually assertive.²⁰⁴ While some courts treat "day in the life" videos as demonstrative evidence, others acknowledge their assertive intent and admit them as substantive evidence.²⁰⁵ In *Grimes*, plaintiffs offered the videos as substantive evidence of their pain and suffering, giving the court a unique opportunity to conduct a hearsay analysis of the videos for their assertive conduct.²⁰⁶ In both *Grimes* and *Bannister*, courts admitted "day in the life" videos contingent on the plaintiff's availability for cross-examination despite the fact that the videos were prepared solely for use at trial and depicted the plaintiff acting assertively. In *Grimes*, the court admitted the video as substantive rather than demonstrative evidence.²⁰⁷ The court determined the video was reliable because the defendant would have the opportunity to cross-examine the plaintiff as to the video's accuracy, tipping the scale in favor of admission under the residual exception.²⁰⁸ In *Bannister*, the court admitted the video as purely demonstrative evidence under a similar rationale: that the proponent

201. See *id.* 901(a) (requiring only "evidence sufficient to support a finding that the item is what the proponent claims it is").

202. EXCITED UTTERANCE, *supra* note 80, at 3:58.

203. FEIGENSON, *supra* note 76, at 128.

204. See *supra* Part I.B.2.

205. See *Grimes v. Emp'rs Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 611 (D. Alaska 1977) (analyzing a video as hearsay rather than demonstrative evidence, potentially so that it may be offered as substantive evidence).

206. *Id.* at 609–611.

207. Silbey, *supra* note 11, at 565–69.

208. *Grimes*, 73 F.R.D. at 611.

of the video would be available for cross-examination.²⁰⁹ The indicia of reliability in these cases—the defendant’s ability to cross-examine the plaintiff—do not apply to body camera footage because the state would not necessarily involve the recording officer in the criminal prosecution.

Unlike in civil suits, where “problems with perception, memory, or meaning, and any sincerity problems can be solved by having the verifying witness and the plaintiff-actor subject to cross-examination,”²¹⁰ in criminal prosecutions the imbalance of power and resources between the state and the defendant²¹¹ makes the officer’s availability for cross-examination less predictable. Plaintiffs in civil litigation have a motive to testify: establishing damages. In a criminal prosecution, defendants have no guarantee that the officer will testify. Moreover, if there was more than one officer present at the time of arrest, the defendant cannot be assured that all—or even more than one officer—will testify.

Otherwise admissible demonstrative evidence must be authenticated by a witness with knowledge.²¹² However, the authentication requirement does not effectively remedy the unique challenges that body camera footage presents, particularly (1) presentation of the videos within narrative context²¹³ and (2) affording the defendant an adequate opportunity to cross-examine the officer who created the video.²¹⁴

Silbey recommends treating the “demonstrative” video itself as testimony and instructing the jury to engage in the kind of critical analysis of the video in which an attorney would engage.²¹⁵ This Note proposes taking Silbey’s solution a step further. If the video is truly assertive, as this Note posits that body camera footage is, then an attorney must be able to cross-examine its creator.²¹⁶ A jury is ill equipped to engage, without assistance, in a critical analysis of so-called demonstrative evidence that is contemporaneously recorded in body camera form. It is unable to identify problematic features of videos without first possessing an awareness of the cognitive biases,

209. *Bannister v. Town of Noble*, 812 F.2d 1265, 1269–70 (10th Cir. 1987). “The possibility that a film will be prejudicial is significantly reduced when the subject of that film can be cross-examined at trial.” *Id.* at 1270.

210. *Grimes*, 73 F.R.D. at 611.

211. *See* NO TAPE, NO TESTIMONY, *supra* note 7, at 11.

212. *See* Kalinski, *supra* note 60, at 818.

213. *See* Roth, *supra* note 5, at 2007–08.

214. *See* Silbey, *supra* note 11, at 548.

215. *Id.*

216. *Infra* Part III.

like perspective bias and framing concerns,²¹⁷ that the videos present and judges themselves routinely overlook in admitting borderline-substantive “demonstrative” evidence.²¹⁸

Body camera footage bears an even stronger assertive nature than after-the-fact video of a crime scene because of its contemporaneity. After-the-fact footage is evidentiarily suspect because of the testimonial factors—such as framing, focus, angle, and narration, among others—that influence viewer perception.²¹⁹ The principal danger of after-the-fact footage is that the jury takes the video—which is more akin to an “investigative hypothesis”—as the *truth* of what occurred.²²⁰ Body camera footage is suspect for the same reasons: contemporaneous framing, focus, angle, and narration limit the viewers’ perception of reality and funnel their vicarious experiences solely through the lens of the recording officer.²²¹ The principal danger of admitting body camera footage without accompanying testimony is that the fact-finder believes the camera is the *complete* objective truth of what occurred.

III. BODY CAMERA FOOTAGE IS HEARSAY

A hearsay framework provides the best evidentiary analysis of body camera footage. Under this framework, the relevant components are (1) the officer, as the declarant; (2) the camera, as her conduit;²²² (3) the officer’s choice to start recording, end recording, and position the camera lens, as the assertive intent to form a nonverbal statement; and (4) the video, as the statement. The officer’s assertive conduct is the creation of the video, not the conduct depicted in the video. The truth of the matter asserted is generally that (1) the recording reflects all relevant portions of an officer’s interaction with a suspect; (2) the recording is significant in the criminal investigation; and (3) the recording represents a true, complete version of how events transpired according to that officer. Besides comporting to the definitions and encompassing the structure of a nonverbal hearsay statement, the same reliability dangers lurk in body camera footage as in a typical hearsay statement.

217. See Morrison, *supra* note 166, at 801.

218. See Howard & Barnum, *supra* note 59, at 533–34.

219. See Silbey, *supra* note 11, at 546.

220. See *id.* at 547–48.

221. See *id.*

222. See Roth, *supra* note 5, at 2002.

The FRE do not prohibit hearsay solely because of the potential for a witness to fabricate a hearsay statement.²²³ Similarly, if fabrication were the only concern for evidence generally, body camera footage would be among the best possible tools for ensuring reliability because it provides at least one contemporaneously recorded account of the interaction that could shed light on situations where eyewitnesses disagree. Instead, more nuanced dangers accompany the obvious danger of fabrication.²²⁴ The primary evidentiary dangers are “(1) faulty perception (the danger of inaccurate observation)[,] (2) faulty memory (the danger of faulty recollection)[,] (3) faulty narration (the danger of ambiguity)[,] and (4) insincerity (the danger of fabrication).”²²⁵

Body camera footage is particularly vulnerable to faulty perception and faulty narration because of limitations of camera framing, which are not necessarily the result of bad faith action or failure to follow protocol but are inherent in the device’s design.²²⁶ Departmental policies addressing body camera use also give officers an incredible amount of discretion in deciding when to begin recording and when to end, opening the door to potential faulty perception.²²⁷ Because body cameras are incapable—at least currently—of recording every moment of every day, they do not store data unless activated.²²⁸ As a result, the viewer has no insight into the events that transpired before the recording activations or the events that occurred after recording ended.

The hearsay rule is an effective tool to regulate admission of body camera footage because it evaluates evidence based on underlying indicia of reliability present in the evidence. There is no need to adapt or alter the rules of evidence to specifically address body camera footage. In Part III.B, this Note analyzes Maryland’s adoption of Rule 5-803(b)(8)(C) as a case study showing that attempts to make rules around body cameras are muddled and imprecise.²²⁹ The hearsay rule allows the chief inquiry to rest on the declarant’s manifested intent²³⁰ and not on the nature of the evidence itself,

223. FED. R. EVID. 801(a) advisory committee’s note to 1972 proposed rules (citing Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 214, 217 (1948)) (listing “perception, memory, and narration (or their equivalents)” among other hearsay dangers).

224. *See id.*

225. Nicolas, *supra* note 118, at 537.

226. *See supra* Part II.A.

227. *See supra* Part II.A.

228. *See supra* Part II.A.

229. *See infra* Part III.B.

230. *See* FED. R. EVID. 801(a).

rendering the rule malleable and able to assess numerous forms of evidence—tangible, verbal, or virtual. As such, legislating around body camera footage is irrational and impractical when the evidence fits within the well-tested, existing hearsay framework.

A. Choosing to Record Is Assertive: Indicia of Intent to Communicate Present in Body Camera Operators

As noted in Part I.C, a “hearsay statement” must be the product of an intentional assertion.²³¹ The two cornerstones of nonverbal assertions are present in body camera footage: the presence of an audience, combined with a person’s affirmative choice to act with intent to communicate.²³² These two factors blend together because the presence of an audience is a reliable indicator that a person intends to communicate to the person in her presence. This Section analogizes body camera footage to existing forms of nonverbal hearsay. Courts have found three factors particularly salient when assessing whether a declarant intended to assert a statement: whether the party who created the evidence has a stake in the litigation, whether the video was created for litigation, and whether the person acted for an audience.²³³ These factors are all indicia that an actor meant to convey something with her action.²³⁴

A party’s stake in litigation and the purpose for which the video was created are significant indicators of a declarant’s communicative intent.²³⁵ In *Grimes*, the defendant challenged the

231. See *id.* 801; *supra* Part I.C.

232. See *supra* Part I.C. This Note does not distinguish between Kirgis’s objective intent and subjective intent to communicate because an officer’s choice to record theoretically satisfies both. See Kirgis, *supra* note 108, at 291–95. An objective onlooker would realize the officer’s intent to communicate because collecting evidence is a function of police work. Subjectively, officers are not recording for posterity, but for the sole goal of recording the events for their supervisor, a prosecutor, or a jury to review.

233. See, e.g., *United States v. Katsougrakis*, 715 F.2d 769, 775 (2d Cir. 1983); *Grimes v. Emp’rs Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 611 (D. Alaska 1977). Action for an audience may, at times, have two components. First, the audience may have asked a question to which the declarant responded with nonverbal action. See *Katsougrakis*, 715 F.2d at 775 (nodding in response to a question is an assertion); *Souder v. Commonwealth*, 719 S.W.2d 730, 734 (Ky. 1986) (a child pointing to a social worker’s doll is assertive), *overruled on other grounds* by *B.B. v. Commonwealth*, 226 S.W.3d 47 (Ky. 2007). Second, the presence of an audience, alone, may indicate that a declarant intended for the conduct to be assertive.

234. When evaluating “day in the life” videos, courts also consider the same factors in analyzing whether the videos violate Rule 403. See Kalinski, *supra* note 60, at 810–11.

235. This trend runs throughout the FRE. Rule 702 disfavors methods developed solely for litigation. See FED. R. EVID. 702 advisory committee’s note to 2000 amendments. Rule 901(b)(2) disfavors nonexpert opinions about handwriting when the witness’s familiarity with the handwriting was acquired for the litigation at issue. See FED. R. EVID. 901(b)(2). Similarly,

content of the plaintiff's "day in the life" video because it portrayed the plaintiff engaged in assertive action. The court did not simply examine the content of the video to determine whether the video was assertive.²³⁶ Instead, the court found it important that the *plaintiff* had offered the video in order to prove pain and suffering.²³⁷ Because the plaintiff had a stake in the litigation, it was more likely that the plaintiff acted intending to assert his daily struggles to the jury.²³⁸ Similarly, the court found the contents of the video were more likely to be assertive because the video was prepared in anticipation of litigation.²³⁹

Like plaintiffs in a civil action, police have a stake in the adversarial process because of their close working relationship²⁴⁰ with prosecutors. Some may argue that police are more insulated from motives that eventual prosecution creates because the prosecutor's failure is not necessarily the officer's failure.²⁴¹ But officers have an undeniable stake in litigation. Police and prosecutors work together to enforce laws, gather evidence, and present that evidence in court. They are united in their symbiotic relationship,²⁴² where officers provide evidence and prosecutors seek convictions based on that

whether evidence meets the Confrontation Clause's "testimonial" requirement partly hinges on whether a piece of evidence was prepared with the defendant's prosecution in mind. *See infra* text accompanying note 261; *see also* *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321–22 (2009).

236. *See Grimes*, 73 F.R.D. at 611.

237. *Id.* ("[A] film offered by the plaintiff showing the plaintiff performing tasks to exhibit his disability is like a witness testifying about assertive conduct.").

238. *See id.*

239. *See id.*

240. *See* Letitia James, *Prosecutors and Police: The Inherent Conflict in Our Courts*, MSNBC (Dec. 5, 2014, 10:46 AM), <http://www.msnbc.com/msnbc/prosecutors-police-inherent-conflict-our-courts> [<https://perma.cc/2DVT-9TY3>] (highlighting that this working relationship complicates prosecution of police brutality cases).

241. Dallin Oaks raised a similar argument regarding the ineffectiveness of the exclusionary rule's deterrent effect on police conduct. *See* Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 726–32 (1970). Because of the supposed disconnect between police and prosecutors, the rule requiring exclusion of the prosecutor's evidence may not deter police from conducting illegal searches and seizures. *Id.* However, other studies show that the exclusionary rule may incentivize police to work even more closely with prosecutors to ensure that warrants are constitutionally sufficient. Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and "Lost Cases": The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034, 1065–66 (1991).

242. John Buchanan, *Police-Prosecutor Teams: Innovations in Several Jurisdictions*, NIJ REP., May–June 1989, at 1, 2, <https://www.ncjrs.gov/pdffiles1/Digitization/120288NCJRS.pdf> [<https://perma.cc/C7YE-XVYV>] (explaining a "cross pollination" of methods from police and prosecutors' offices, in which both organizations operate with both the investigation and the trial in mind rather than bifurcating the police's investigation and the prosecutor's trial).

evidence.²⁴³ The fact that officers are often repeat witnesses in prosecutors' courtrooms is an indicator that police body camera footage is assertive.²⁴⁴ It gives officers a motive to support the prosecutor's case: to keep the working relationship positive and mutually beneficial. Because police officers are called as state witnesses in prosecutions, or their evidence is presented in the state's case in chief, they have a stake in the outcome of the prosecution.²⁴⁵ Just as a plaintiff's conduct is more likely to be assertive when she offers it in a video she created,²⁴⁶ an officer's conduct is more likely assertive when she knows her job is to capture evidence of wrongdoing on her camera. Whereas a plaintiff's assertion is that "I endured serious pain and suffering," the officer's assertion is that "this is a true depiction of what I encountered, and it is evidence of wrongdoing."

Courts have repeatedly found that a declarant's nonverbal conduct is assertive when she acts in the presence of an audience—for example, nodding in response to a question, pointing to a suspect in a lineup, and pointing to a body part on a doll were all deemed inadmissible hearsay unless they fell under an exception to the rule.²⁴⁷ Police know they are recording encounters with suspects for an audience: first the prosecutor, then a judge, and eventually a jury. That police officers choose to record at certain times with knowledge of a future audience is a strong indicator of communicative intent.²⁴⁸ The officer's conduct is also similar to a person nodding in response to a question.²⁴⁹ Departments mandate in their body camera guidelines that officers record certain interactions.²⁵⁰ When officers do activate their camera in response to these guidelines, they are answering the department's constant, lingering question: "Have any of these significant events occurred during your patrol?" When the officer presses the "activate" button, she is answering, "Yes, and here is a recording of it."

243. JOAN E. JACOBY, PETER S. GILCHRIST, III & EDWARD C. RATLEDGE, JEFFERSON INST. FOR JUSTICE STUDIES, PROMOTING INNOVATION IN PROSECUTION: PROSECUTOR'S GUIDE TO POLICE-PROSECUTOR RELATIONS 8 (1999), <http://www.jiis.org/publications/prospubs/police-pros.pdf> [<https://perma.cc/L92K-BDCE>].

244. See Jon Swaine et al., *Ties That Bind*, GUARDIAN (Dec. 31, 2015, 8:00 AM), <https://www.theguardian.com/us-news/2015/dec/31/ties-that-bind-conflicts-of-interest-police-killings> [<https://perma.cc/95C4-NJAY>].

245. See *id.*

246. See *Grimes v. Emp'rs Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 611 (D. Alaska 1977).

247. See *supra* Part I.C.

248. See FED. R. EVID. 801(a); *supra* Part I.C.

249. See *United States v. Katsougrakis*, 715 F.2d 769, 775 (2d Cir. 1983).

250. See *supra* Part II.A.

B. Interpreting a Rule Aimed at Body Cameras

In April 2017, Maryland adopted a new rule of evidence to address evidentiary challenges to body cameras. This Section examines that rule to illustrate the difficulty of trying to legislate around hearsay evidence that already conforms to established evidentiary frameworks.

Like the FRE,²⁵¹ Maryland's Rule 5-803(b)(8) makes public records admissible,²⁵² and Rule 5-803(b)(8)(C) creates an exception to that exception, deeming "record[s] of matters observed by a law enforcement person" inadmissible.²⁵³ Amended Rule 5-803(b)(8)(D) reads as follows:

(D) Subject to Rule 5-805, an electronic recording of a matter made by a body camera worn by a law enforcement person or by another type of recording device employed by a law enforcement agency may be admitted when offered against an accused if (i) it is properly authenticated, (ii) it was made contemporaneously with the matter recorded, and (iii) circumstances do not indicate a lack of trustworthiness.²⁵⁴

Maryland based its exception on the contemporaneous nature of body camera footage.²⁵⁵ During consideration of the proposed amendment, Judge Frederic Smalkin briefed the Court of Appeals Standing Committee on Rules of Practice and Procedure (the "Standing Committee") on the proposed amendment.²⁵⁶ Judge Smalkin communicated that because body camera footage is recorded contemporaneously with the events it depicts, it is more reliable than after-the-fact police reports.²⁵⁷ The Standing Committee agreed, emphasizing the technological advances (like automatic cloud storage) that distinguish body camera footage from the hearsay dangers²⁵⁸ that lurk in police reports.²⁵⁹ But police reports were not excluded solely

251. See FED. R. EVID. 803(8)(A)(ii).

252. MD. CODE ANN., Maryland Rules § 5-803(b)(8) (West 2012).

253. *Id.* § 5-803(b)(8)(C).

254. *Id.* § 5-803(b)(8)(D).

255. COURT OF APPEALS STANDING COMM. ON RULES OF PRACTICE AND PROCEDURE, MINUTES OF A MEETING OF THE RULES COMMITTEE 17-19 (2016) [hereinafter MINUTES OF MARYLAND RULES COMMITTEE], <https://mdcourts.gov/sites/default/files/minutes-rules/20160108.pdf> [<https://perma.cc/5NA2-77FL>].

256. *Id.* at 17-18, 28. Judge Frederic Smalkin is a former judge on the US District Court for the District of Maryland and current professor of law at the University of Baltimore. *Id.* at 16-17; Fredric C. Smalkin, U. BALT. <http://law.ubalt.edu/faculty/profiles/smalkin.cfm> [<https://perma.cc/R7BE-6FED>] (last visited Apr. 7, 2018).

257. *Id.* at 16-18.

258. Roth, *supra* note 5, at 1985 (listing "insincerity, inarticulateness, erroneous memory, and faulty perception" as the dangers of hearsay).

259. MINUTES OF MARYLAND RULES COMMITTEE, *supra* note 255, at 18-19, 28.

for reliability concerns as with private business documents prepared by nonstate actors—FRE 803(8)(A)(ii) and Maryland Rule 5-803(b)(8)(C) render police reports inadmissible because their admission into evidence would violate the Confrontation Clause.²⁶⁰

Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. . . . The analysts' certificates—like police reports generated by law enforcement officials—do not qualify as business or public records for precisely the same reason.²⁶¹

Maryland Rule 5-803(b)(8)(C) is notable first and foremost because the text and structure of the Rule acknowledge that body camera footage itself is hearsay. Two factors make this clear. First, the Standing Committee acknowledged that the video itself constitutes a “record of matters observed by a law enforcement person” under a broad, textual reading of the existing hearsay prohibition.²⁶² Second, the Standing Committee proposed the adopted Rule as an exception to hearsay rather than amending the definition of hearsay to exclude body camera footage.²⁶³ The latter action would have been a clear statement by the Standing Committee that body camera footage is not hearsay. Instead, it opted to create an exception under Maryland Rule 5-803 titled “Hearsay Exceptions: Unavailability of the Declarant Not Required.”²⁶⁴ A predicate to creating an exception to the hearsay rule is that the exception would have otherwise been hearsay.

However, the Standing Committee itself would likely resist the classification of body camera footage as hearsay.²⁶⁵ In its discussion of the proposed Rule on January 8, 2016, the Standing Committee recorded in its minutes that “[t]heoretically, the visual footage should have been able to come in anyhow. The chair noted that it is not

260. See Paul W. Grimm, Jerome E. Deise & John R. Grimm, *The Confrontation Clause and the Hearsay Rule: What Hearsay Exceptions are Testimonial?*, 40 U. BALT. L.F. 155, 184 (2010) (“By definition, fact findings resulting from investigations authorized by law are created in anticipation of use in litigation, not for the internal administration of the affairs of the creating agency.”).

261. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321–22 (2009) (citations omitted); see also *id.* at 316 (“Though the witness’s statements in *Davis* were ‘near-contemporaneous’ to the events she reported, we nevertheless held that they could *not* be admitted absent an opportunity to confront the witness.”).

262. MINUTES OF MARYLAND RULES COMMITTEE, *supra* note 255, at 17.

263. See MD. CODE ANN., Maryland Rules § 5-803(b)(8)(D) (West 2012).

264. See *id.*

265. MINUTES OF MARYLAND RULES COMMITTEE, *supra* note 255, at 22.

hearsay. The audio portion is hearsay.”²⁶⁶ Yet the Standing Committee adopted the amended language that exempted “an electronic recording of a matter made by a body camera worn by a law enforcement person” from the prohibition against hearsay.²⁶⁷ Notably, the Rule’s text exempts the “recording,” not the “audio portion” of the recording.

Maryland’s analysis of whether body camera footage should constitute hearsay shows that the footage is closely related to hearsay jurisprudence surrounding public records. Dru Letourneau argued that although body camera footage may be hearsay, courts may find that it falls within FRE 803(8)’s public record exception to hearsay.²⁶⁸ However, Letourneau fails to address FRE 803(8)(A)(ii)’s caveat—rendering inadmissible “in a criminal case, a matter observed by law-enforcement personnel.”²⁶⁹ In short, the Standing Committee was right—body camera footage is textually a “matter observed by law enforcement personnel”²⁷⁰ and is thus inadmissible if a court agrees that the video is a statement. But the Committee was shortsighted both in failing to consider that the video portion itself may be hearsay and in relying on contemporaneity as grounds for admitting the body camera footage. The key to properly admitting body camera footage is consistency: Courts must treat the body camera footage as any other type of hearsay and render it inadmissible but for an exception.

IV. A PATH TO ADMISSIBILITY

To remedy the hearsay dangers that body camera footage presents, courts must consider the footage hearsay when offered for the truth of the matter asserted.²⁷¹ As with all hearsay, parties are not precluded from admitting the footage as evidence, nor does the classification pose an insurmountable burden to prosecutors presenting their cases. Rather, there are two clear routes for admissibility—both of which hinge on the recording officer’s testimony. The first is for the recording officer to testify, admitting

266. *Id.* (discussing whether the proposed amendment would make recordings from crime scene technicians’ body cameras admissible if they had no sound and only depicted visual footage).

267. See Maryland Rules § 5-803(b)(8)(C).

268. Letourneau, *supra* note 18, at 460.

269. FED. R. EVID. 803(8)(A)(ii).

270. See Maryland Rules § 5-803(b)(8)(C).

271. See FED. R. EVID. 801.

the officer's prior statement as a present sense impression.²⁷² The second route is for the recording officer to testify, both authenticating the evidence and offering the footage not for the truth of the matter asserted but as evidence corroborating the officer's oral testimony. The officer would first testify verbally to what happened the day of the officer-suspect interaction. Then, the prosecutor may admit the body camera video to establish consistency with the officer's version of events. The Sections below explains how each admission would function, and the benefits of each.

A. Body Camera Footage as a Present Sense Impression

Under Rule 803(1), the proponent offering body camera footage into evidence has a strong case that the footage is a present sense impression, defined as “[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.”²⁷³ Body camera footage's contemporaneity makes it perhaps the most literal present sense impression that the Rule could have contemplated. The footage “describes” an event made while the declarant, the officer, perceived it.²⁷⁴

If body camera footage were a present sense impression and therefore admissible hearsay (if offered for the truth of the matter asserted), the footage would still likely be inadmissible under the Confrontation Clause unless the recording officer testified.²⁷⁵ Under the Confrontation Clause, testimonial statements²⁷⁶ are inadmissible unless the criminal defendant is able to cross-examine the declarant.²⁷⁷ The inquiry then becomes whether body camera footage is testimonial. If the footage is testimonial, the prosecutor is constitutionally required to produce the recording officer for the defendant to cross-examine for the footage to be admissible.²⁷⁸

When the evidence at issue is the product of a witness statement to a police officer, whether evidence is testimonial depends upon the “primary purpose” of the interrogation.²⁷⁹ In the case of body

272. See *United States v. Morfin-Martinez*, 2 F. App'x 650, 652 (8th Cir. 2001) (holding a statement admissible when offered not for the truth of the matter asserted but for establishing consistency between a witness's in-court testimony and a tape-recorded hearsay statement).

273. FED. R. EVID. 803(1).

274. See *id.*

275. See U.S. CONST. amend. VI.

276. See Pamela R. Metzger, *Confrontation as a Rule of Production*, 24 WM. & MARY BILL RTS. J. 995, 998 n.18 (2016).

277. See *Michigan v. Bryant*, 562 U.S. 344, 354 (2011).

278. See *id.*

279. *Id.* at 358–59.

camera footage, there is no interrogation; the police officer is the declarant. The more pertinent inquiry is whether the statement—in this case, the footage—is testimonial by virtue of its preparation for use in litigation.²⁸⁰

Body camera footage is certainly prepared in anticipation of litigation, as it is touted as an evidence-gathering tool for police and prosecutors.²⁸¹ The officer's discretionary action to begin recording in response to enumerated triggering events is communicative, similar to an officer creating a written record in a police report.²⁸² Because of its testimonial nature, body camera footage is subject to the Confrontation Clause. Therefore, it is only admissible if the officer testifies.

This solution is beneficial because the Confrontation Clause requirement forces the recording officer to the stand, since she is the declarant of the testimonial statement. Therefore, the defendant is able to more effectively cross-examine the officer.

B. Body Camera Footage as Corroborative Evidence

The second approach to admitting body camera footage under a hearsay framework is to admit it to corroborate the recording officer's account of the situation, not for the truth of the matter asserted. Whether evidence is hearsay, by definition, depends upon the purpose for which the evidence is offered.²⁸³ Only evidence offered for the truth of the matter asserted is inadmissible hearsay.²⁸⁴ Evidence offered for a purpose other than the truth of the matter asserted is admissible under Rule 801 as long as it is admissible under the rest of the FRE.²⁸⁵ For example, a statement may be admissible to establish that a party was on notice that a statement *was said*, even if the statement isn't true.²⁸⁶ Similarly, impeachments by prior inconsistent out-of-court statements are admissible because they are not offered for

280. See *supra* text accompanying note 261; see also *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321–22 (2009).

281. See *supra* Part II.A.

282. See *Melendez-Diaz*, 557 U.S. at 321–22.

283. See FED. R. EVID. 801(c); FED. R. EVID. 801 advisory committee's note to 1972 proposed rules ("If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay.").

284. FED. R. EVID. 801(c); *id.* 802.

285. *Id.*

286. *George v. Celotex Corp.*, 914 F.2d 26, 30 (2d Cir. 1990) ("To be sure, an out of court statement offered not for the truth of the matter asserted, but merely to show that the defendant was on notice of a danger, is not hearsay.").

the truth of the matter asserted.²⁸⁷ Prior inconsistent statements are offered instead to attack the witness's credibility: Because the witness said two different things at two different times, one of those times they must have been untruthful.²⁸⁸ Therefore, the witness is not credible.

Corroborative evidence of a prior consistent statement, which bolsters credibility, is functionally the opposite of a prior inconsistent statement, which impeaches credibility, but it is admissible under the same framework. Like a prior inconsistent statement, a prior consistent statement is not offered to prove the truth of the matter asserted. Therefore, it is not hearsay. Instead, corroborative evidence is offered to show consistency in a witness's statements: that a witness made the same statement numerous times. This consistency translates to witness credibility. Because a declarant said the same thing more than once, but on different occasions, it is more likely to be true.²⁸⁹

Admitting body camera footage as corroborative evidence benefits both sides in litigation. When a court admits the body camera footage as corroborative evidence, the prosecution is able to bolster the officer's in-court testimony (assuming that it aligns with the footage) as credible and worthy of belief.²⁹⁰ The defendant is likewise better-off, free to effectively challenge the narrative the footage presents to the jury via cross-examination. The footage offered for a purpose other than the truth of the matter asserted is notable because it (theoretically) limits the purposes for which the jury may consider the video. Footage offered as corroborative rather than substantive evidence mitigates the concerns about a jury taking the footage as objective truth more so than does admitting the footage as substantive

287. See FED. R. EVID. 801(c)(2).

288. *Firemen's Fund Ins. Co. v. Thien*, 8 F.3d 1307, 1311–12 (8th Cir. 1993); see FED. R. EVID. 801(c)(2). Prior inconsistent statements offered solely for impeachment purposes are similar, but not identical, to prior inconsistent statements given “under penalty of perjury at a trial, hearing, or other proceeding or in a deposition.” See FED. R. EVID. 801(d)(1)(A) (rendering the latter admissible as substantive evidence).

289. See *United States v. Morfin-Martinez*, 2 F. App'x 650, 651–52 (8th Cir. 2001); *State v. Caplan*, 353 A.2d 172, 176 (Me. 1976).

290. Additionally, the prosecutor is able to admit the footage as substantive evidence if the defense challenges the officer's in-court testimony by alleging “that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying.” See FED. R. EVID. 801(d)(1)(B)(i). The FRE adopted the requirements in *Tome v. United States*, 513 U.S. 150, 158 (1995) for prior inconsistent statements: “[A] consistent statement offered to rebut a charge of recent fabrication of improper influence or motive must have been made before the alleged fabrication or improper inference or motive arose.” FED. R. EVID. 801(d)(1)(B)(i) advisory committee's note to 2014 proposed amendment. Body camera footage satisfies *Tome's* rule: an officer records it before testifying in court about the events she perceived, and the courtroom is where the defense would allege fabrication occurred. See *Tome*, 513 U.S. at 158.

evidence under the present sense impression exception. This is especially true if a judge issues a limiting instruction, instructing the jury not to consider the video for the truth of the matter within.²⁹¹

V. CONCLUSION: PRACTICAL IMPLICATIONS OF THE FRAMEWORKS

The routes to admissibility described above are intended to ensure that the body camera evidence the jury sees is as reliable as possible. Both accomplish this goal by ensuring the defendant's access to two resources the current evidentiary standards do not yet guarantee: (1) admission of footage predicated on availability of cross-examination and (2) availability of the officer who recorded the footage.

Under each framework, a defense attorney may address evidentiary flaws in the footage through cross-examination. With the recording officer on the stand, the defense can question the officer's record of conduct, question events preceding and following the recording, and raise doubt about events potentially occurring off camera or beyond its range.²⁹² Silbey similarly advocates for "cross-examining film" as an effective way to prevent the "constructed medium" of film (in her case study, a dash camera video of a police encounter) from masquerading as objective truth.²⁹³ Silbey's proposal assumes that a witness will be on the stand to cross-examine.²⁹⁴ When courts treat body camera footage as a hearsay statement, criminal defendants can use Silbey's techniques²⁹⁵ to cross-examine the declarant, the recording officer. Cross-examination of an officer who records body camera footage is particularly salient for the reasons listed in Part II. Body camera footage is riddled with potential cognitive biases that the jury is ill-equipped to address alone (more so than other types of video evidence).²⁹⁶ The defendant's attorney can help the jury to understand those biases and the limitations of video footage during cross-examination.²⁹⁷

When the footage is offered as corroborative evidence, a defense attorney has added tools with which to mitigate concerns present in body camera footage. She may request a limiting instruction from the judge explaining why the video is admissible only to corroborate in-

291. See FED. R. EVID. 105.

292. See Silbey, *supra* note 6, at 41–42.

293. *Id.* at 17–18.

294. *Id.* at 41–42.

295. *Id.* at 41–45 (including "[l]ock[ing] in [t]estimony and [c]ontrast[ing] it with the [f]ilm" and "[e]xploit[ing] [f]ilmic [f]ragments.").

296. See Morrison, *supra* note 166, at 801.

297. See *id.*

court testimony and should not be taken as an account of what occurred.²⁹⁸ In extreme cases, the attorney may object under Rule 403 for complete exclusion of the video when the danger of unfair prejudice (the jury taking the video for the truth of what it depicts) substantially outweighs its probative value (corroborating the officer's testimony).²⁹⁹ This will likely only be successful when the prosecutor uses the officer's testimony as pretext to show the jury especially harmful footage, if it is ever successful at all.³⁰⁰

However, cross-examination alone is insufficient if the witness is not the recording officer. As noted in Part I, Rule 901 authentication requirements for videos typically consist of a witness with knowledge testifying that the contents of the video are what the witness says they are.³⁰¹ Or, in the case that no person was present for the events depicted in the video, the silent witness theory allows a witness to testify to the camera's reliability.³⁰² However, in criminal prosecutions, prosecutors must only present enough evidence to prove the defendant's guilt beyond a reasonable doubt—not *all* of the evidence.³⁰³ Therefore, a prosecutor may not call all the police officers present at a scene to testify,³⁰⁴ nor should they. Some officers patrol in pairs,³⁰⁵ and many more may be present in an arrest where an officer calls for backup.³⁰⁶ A host of factors may influence a prosecutor's decision to call one police officer over another to testify, including credibility, past performance (good or bad) at trial, or a perceived danger of the officer being impeached.

Officers may also observe different portions of an event from different vantages. This is why the current authentication requirements, standing alone, fail to ensure that body camera footage

298. See FED. R. EVID. 105.

299. See *id.* 403.

300. See *id.* (requiring that the danger of unfair prejudice *substantially* outweigh the evidence's probative value).

301. See *supra* Part I.A.

302. See *supra* Part I.A.

303. See *In re Winship*, 397 U.S. 358, 362 (1970).

304. See, e.g., *Anatomy of a Criminal Case*, OFF. DISTRICT ATT'Y, COUNTY SANTA CLARA (Dec. 19, 2012, 5:14 PM), <https://www.sccgov.org/sites/da/prosecution/anatomyofcriminalcase/Pages/default.aspx> [https://perma.cc/4ZRH-Q78X] ("The prosecutor calls all the witnesses *necessary* to prove the crime." (emphasis added)).

305. Christina Sterbenz, *Police Around the Country Are Making a Complicated Call to Increase Officer Safety in the Wake of Dallas and Baton Rouge*, BUS. INSIDER (July 19, 2016, 7:24 PM), <http://www.businessinsider.com/problems-of-police-working-in-pairs-2016-7> [https://perma.cc/K28G-Y3LA].

306. See Donald R. Weaver, *Calling for Backup: Changing Law Enforcement Culture so Officers Are Not Afraid to Ask for Help*, LEXIPOL (Jan. 25, 2017), <http://www.lexipol.com/news/calling-for-backup-changing-law-enforcement-culture/> [https://perma.cc/C854-53F4].

is reliable evidence.³⁰⁷ The defendant's cross-examination is limited to challenging what that officer perceived rather than the recording officer herself. A defendant's cross-examination is far less effective when the nonrecording officer's answer to a question is "I don't know" or "I couldn't see" rather than more definitive, factual answers the recording officer can provide. Instead, when the recording officer testifies to the version of events she perceived and then shows the jury her body camera video corroborating her testimony, the defense may effectively cross-examine her based on consistencies, or perceived inconsistencies.

When a prosecutor admits a video as a present sense impression, the recording officer must testify to satisfy the defendant's Confrontation Clause rights.³⁰⁸ Offering the body camera footage to corroborate the testifying officer's oral account of an event is similarly beneficial because it forces the recording officer to the stand. Corroborative evidence must be consistent with the declarant's testimony.³⁰⁹ A nonrecording officer would not be the "declarant" of the video and would therefore not be able to corroborate her own current testimony with another officer's prior statement.³¹⁰ This ensures that the defendant has the ability to conduct the most effective cross-examination of the officer.

Critics may be rightfully wary of treating an officer's statement as hearsay in the event that a defendant seeks to introduce it at trial. If the defendant seeks to introduce the evidence to impeach the officer's version of events, she may do so as an impeachment.³¹¹ In the Baltimore police example above, the defendant (had the state not dropped the charges) could still have introduced the body camera footage for impeachment purposes had the officer testified that the video depicted the officer finding the drugs for the first time. In a civil action against a police officer, a plaintiff may admit the video under Rule 801(d)(2)(A) as a statement by a party opponent as long as a witness to the scene of recording (including the plaintiff) can authenticate it.³¹² In a criminal use of force case where the officer is a defendant, the footage is admissible through the same avenue with the same authentication caveat.³¹³

307. See *supra* Part II.B.

308. See *supra* Part IV.A.

309. See *Tome v. United States*, 513 U.S. 150, 157–58 (1995).

310. See FED. R. EVID. 801(b).

311. See *id.* 613(b).

312. See *id.* 801(d)(2)(A), 901.

313. See *id.* 801(d)(2)(A), 901.

Although these frameworks do not remedy every concern body camera footage presents, they mitigate reliability concerns by not presenting body camera footage as the be-all and end-all of the police-citizen encounter. Police witnesses have more information than the body cameras because they were present for the uninterrupted entirety of the police encounter. As a result, their testimony is valuable to defendants who seek to cross-examine them.

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