The Use of Amateur Videotapes as Evidence in Criminal Prosecutions: Citizen Empowerment or Little Brother's New Silver Platter

Nicholas R. Mack

Follow this and additional works at: https://repository.uchastings.edu/hastings_comm_ent_law_journal

Part of the Communications Law Commons, Entertainment, Arts, and Sports Law Commons, and the Intellectual Property Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol15/iss3/8
The Use of Amateur Videotapes as Evidence in Criminal Prosecutions: Citizen Empowerment or Little Brother’s New Silver Platter?

by
NICHOLAS R. MACK*

Table of Contents

I. Background .............................................. 799
   A. The Home Movie Camera ............................ 799
   B. The Camcorder .................................... 799
   C. Using Videotape as Evidence ..................... 801
II. Recent Explosion of Cases ................................ 802
   A. The Rodney King Case ............................ 802
   B. Before King: Other Amateur Videos ............... 807
   C. The Future for Camcorders ....................... 810
III. Case Law and Statutory Controls ........................ 811
    A. Authentication .................................... 812
    B. Relevance ........................................ 813
    C. Probative Value v. Potential Prejudice .......... 814
    D. Videotape’s Strengths ............................ 815
    E. Videotape’s Limitations ......................... 816
IV. Constitutional Issues—Fourth and Fourteenth Amendments .............................................. 818
V. A Modern Approach: Commonwealth v. Kean ............ 820
VI. Suggestions for the Future ........................... 825
VII. Conclusion ............................................. 827

* B.A., American Government, 1990, Georgetown University, College of Arts and Sciences; J.D. 1993, University of California, Hastings College of the Law.
Introduction

The rapid pace of technological development in the twentieth century has made modern American society the most fluid and dynamic in human history. This extends to our system of criminal law, which has experienced radical technical changes over the past eighty years. Innovations such as computer databases, DNA fingerprinting, electronic surveillance, and polygraphs have become more accepted and widely-used in our nation's law enforcement community. These technologies can be expensive and complicated, remaining outside the reach and comprehension of average citizens.

Despite the advancement of law enforcement capabilities in this century, crime remains a fixture of daily life. Citizens grapple with their inability to reduce criminal activity within their communities without resorting to dangerous and illegal acts of vigilantism. Technology, however, may provide a powerful new weapon for private citizens who want to fight crime without risking their lives or their freedom. Citizens can now expand their traditional role as witnesses through a uniquely modern example of home electronics—the video camera.

This Note examines the rising popularity of the hand-held video camera/recorder (the camcorder), which has become increasingly available to consumers with moderate incomes. This Note focuses on recent, well-publicized accounts of private citizens using their video cameras to record criminal activity. It discusses the impact and effectiveness of this novel type of evidence, as well as its inherent limitations, in light of events such as the recorded beating of Rodney King by members of the Los Angeles Police Department (L.A.P.D.).

An examination of the relevant statutes and case law provides the background for this Note's conclusion that use of camcorders will revolutionize popular participation in fighting crime, but may pose significant dangers to individuals' privacy rights. The same attributes that make amateur videotape so exciting also make it potentially intrusive. Few statutory controls exist, as technology outpaces American law. Current case law indicates that private citizens, armed with camcorders, may disregard privacy rights when videotaping evidence. They may turn their tapes over to prosecuting authorities. This leads to a new "silver platter," allowing prosecutors to admit evidence obtained despite constitutional abuses. Lawmakers around the country should consider regulating this flourishing body of evidence, perhaps by extending wiretapping prohibitions to include visual images, to protect the constitutional rights of citizens.
I

Background

A. The Home Movie Camera

For years, home movies have been a part of American culture. Grainy, unsteady, and soundless, eight millimeter home movie cameras and their kin have recorded thousands of weddings and graduations, summer picnics, and homecomings. However popular eight millimeter home movie cameras have been, they are poorly suited as a medium for spontaneously capturing evidence. Due to the expense of purchasing the stock and developing exposed footage, amateur photographers are unlikely to shoot eight millimeter film randomly.¹ Eight millimeter film spools have only a few precious minutes of film and are not reusable, because they are developed like still photographic film.² Most commercial eight millimeter film cannot capture poorly-lit images, because specific A.S.A. (light sensitivity) ratings require a relatively narrow range of light intensity for the film to capture a clear image.³

The combination of recurring expenses and uncompromising equipment has meant that amateur camera operators of the past successfully recorded mostly anticipated events. However, some amateurs have still managed to capture the unforeseen. Abraham Zapruder, perhaps the most famous amateur photographer to capture evidence of a criminal act, intended to film a parade. Instead, he stood by President John F. Kennedy's passing motorcade in Dallas on November 22, 1963, and filmed President Kennedy's assassination with his eight millimeter camera.⁴ Although serious questions about this event remain unanswered, Zapruder's film has helped provide some clues about the murder of a President.

B. The Camcorder

During the last ten years the successor to the home movie camera, the video camera, has appeared on the consumer electronics market. Though originally bulky and expensive, the video camera has become compact, efficient, and affordable to the public. When combined with a miniaturized video tape recorder, the lightweight, easily operated "camcorder" can record up to six hours on reusable videotape.

3. Id.
Today’s camcorders generally weigh under two pounds, have built-in telephoto lenses, and can capture images without extra lighting. Sales statistics for camcorders indicate their rising public availability and popularity. In 1985, approximately 517,000 units were sold; this figure jumped to 1.9 million in the first nine months of 1990, and sales for 1991 were expected to reach 3.25 million. Estimates from the Electronic Industries Association indicate that eight percent of all American homes in 1989 contained a camcorder.

In recent years, the camcorder has benefitted from technological advances in miniaturization and light sensitivity, getting smaller and more able to record dimly-lit scenes. The VHS camcorder, once the industry standard, now faces stiff competition from smaller formats, such as VHS-C and Video 8. These newer models can weigh as little as two pounds and can record up to two hours at the fastest (highest quality) tape speed setting, and even longer at slower speeds. Almost all camcorders have built-in telephoto lenses capable of magnification ratios of up to 8:1. The newest models feature auto-focus lenses and high speed shutters, as well as digital image stabilization, a new option that allows a camcorder’s computer to adjust for unintended camera movement.

More significantly, prices have dropped rapidly, a trend aided by the current recession’s price wars. While a basic camcorder may once have cost as much as $2000, current sale prices have dipped as low as $650. Affordable prices will increase yearly sales.

Global trends indicate that consumers increasingly seek the advantages of camcorders over home movie cameras because of camcorders’ superior features: ease of use, increased filming time per cassette, re-usable tape, and better lenses, as well as “on-board” features such as titles and chronometers, auto-focus, higher shutter speeds for sharper action shots, quieter operation, instant playback through the viewfinder or on any television, easier editing, and stereo sound recording capabilities. With increasingly sophisticated camcorders costing less each year, a growing pool of well-equipped amateur photographers will undoubtedly provide a wellspring of evidentiary videotapes.

8. Baig, supra note 5.
9. Id.
10. Id.
11. Floor demonstration models and second-hand units are even less expensive.
C. Using Videotape as Evidence

During its relatively short popular existence, videotape technology has gained a large degree of judicial acceptance, both as a useful new courtroom tool and a source of evidence. Around the nation, video cameras have appeared at depositions, in court for use in creating trial transcripts, and as a means of protecting abused children by allowing them to testify via one-way closed circuit video hook-ups. Videotaped evidence also has been used demonstratively in the form of re-enactments and as "real" evidence of criminal activity when taken from security cameras and surveillance set-ups.

The range of applications of compact video recording technology to criminal law is still growing. Law enforcement agencies around the nation are currently exploring the possibility of installing camcorders in patrol cars to record arrests and traffic stops, as well as establishing their own corps of video-equipped observers.

As a result of camcorders' rapid rise in sales, their ease of use, adaptability to a wide range of filming conditions, low cost of use once purchased, and appeal to the inquisitive side of human nature, a new breed of citizen has arisen—the video vigilante. American courts have grown more accustomed to videotaped evidence as private citizens increasingly record events through the lenses of their camcorders. Recent news coverage from around the nation shows a rise in amateur camera operators capturing important events on tape, which in turn spurs future video vigilantes by inundating them with stories emphasizing the power and financial gain concomitant with a cool head and a camcorder.

The camcorder exhibits remarkable potential as a weapon and as a means of citizen empowerment in fighting crime. However, possible abuses of privacy rights by video vigilantes remain unchecked by current legal prohibitions. Under our legal system, an audiotape recording of someone's bedroom activities would be inadmissible in court, regardless of the identity of the eavesdropper, because the Electronic Communica-

---

13. See generally Jack B. Weinstein & Margaret Berger, 5 Weinstein's Evidence § 1001(2)[03] (1991). The constitutional and statutory implications of private citizens' videotapes of criminal activity are significantly different from government actors' videotapes, a thornier issue involving government invasions of privacy and specifically implicating the Fourth and Fourteenth Amendments. This Note focuses on amateur citizen camera operators.
15. This term has been drawn from a cover story by the same name. Beck et al., supra note 4. The author owes a debt of inspiration to this article's authors.
16. These incidents will be discussed more thoroughly infra.
tions Privacy Act of 1986\(^1\) strictly controls such audio surveillance. A videotape of the same bedroom would be admissible, however, if the videotaper were a private citizen acting on his or her own.\(^1\) This disturbing inconsistency indicates that American legislators and courts must examine statutory controls on this revolutionary form of evidence and bring the laws up to date with consumer technology.

## II

### Recent Explosion of Cases

#### A. The Rodney King Case

In 1991, America received a crash course on the power of camcorders and videotaped evidence of crimes. One man's misfortune outraged the nation, rocked the administration of one of the nation's largest police forces, rekindled cries of racism and brutality against minorities, and graphically displayed our capability for acts of alarming violence. The subsequent verdicts in the state police brutality trial spawned the worst riots in two decades and have called into question any progress this nation has made in interracial relations. The power of videotape may not have prevailed in the courtroom, but the nation's convulsive reaction to a perceived miscarriage of justice indicates a deeper and more powerful effect that videotapes may have on our legal system.

In the early morning hours of March 3, 1991, Rodney King, an African-American, engaged the California Highway Patrol in a high-speed chase that began in the north San Fernando Valley and ended in the Lake View Terrace area of Los Angeles.\(^{19}\) Officers of the Los Angeles Police Department had participated in the chase, and once King's car was stopped, the L.A.P.D. took over. According to the arrest report filed for the incident, King made threatening gestures and hostile approaches towards the officers conducting the arrest.\(^{20}\) He "struggl[ed] and... spit[] at officers and paramedics even after being told to stop."\(^ {21}\) The arresting officers, in their reports, stated that King actively resisted arrest and that they used force in self-defense to incapacitate the arrestee.\(^ {22}\)


\(^{18}\) See Burdeau v. McDowell, 256 U.S. 465 (1921) (Fourth Amendment only applies to government actions).


\(^{20}\) Id.

\(^{21}\) Id.

\(^{22}\) Id.
Unknown to the arresting officers, a resident of Lake View Terrace, George Holliday, watched the arrest. Mr. Holliday, a 31-year-old plumbing store manager, had recently purchased a video camera and wanted “to test the camera’s low-light capability.” Instead of a test, Holliday recorded history, and he was “transformed from a casual bystander into a commanding eyewitness. So unequivocal was the evidence, it was quickly seen not just as a convincing chronicle of the police assault on King, but as a defining symbol of police brutality.”

Holliday’s videotape showed King being struck up to fifty-six times by officers wielding their police batons. Officers “[took] turns swinging their nightsticks like baseball bats . . . as [King] lay on the ground . . . .” The videotape was replayed countless times by almost every television station across the nation, and polls indicated that as of April, 1991, approximately eighty percent of Americans had seen the King videotape.

The discrepancies between the arrest report filed by the officers and the videotaped evidence of the actual arrest led to cries of a cover-up. Two of the police officers involved, Officers Powell and Koon, were indicted on a felony charge of filing a false report, which carries a prison term of one to three years. In addition, they, along with Officers Wind and Briseno, were charged with assault.

Reaction to this incident was uniformly one of outrage and disgust. The graphic portrayal of police brutality even prompted then-President George Bush to comment that “[i]t was sickening to see the beating that was rendered, and there’s no way, there’s no way, in my view, to explain that away . . . . It was outrageous.” However, the attention surrounding King’s beating is not without irony, as commentators acknowledge that the existence of the videotape made the critical difference. It has been suggested that if George Holliday had not decided to bring his camcorder with him when he stepped onto his balcony to observe the

---

commotion outside, Rodney King would have been just another angry
voice. 30

King was released from custody on March 7, 1991, and no charges
were filed against him.31 He had sustained serious injuries and received
therapy and treatment for memory loss, frequent nightmares, slurred
speech, blurred vision, facial nerve damage, and a limp.32

The first trial of the four officers charged in the King beating ended
on April 29, 1992 with verdicts that sparked outrage and riots across the
nation. The four officers were acquitted of all charges, with the exception
of one assault charge against Officer Powell, on which the jury dead-
locked.33 The resulting Los Angeles riots, widely considered to be the
worst incident of civil unrest in the United States since the Watts riots of
1965, left over fifty people dead and over 600 buildings completely de-
stroyed.34 Smaller disturbances flared in almost every major city across
the nation, prompting curfews and mobilizations of National Guard
units.

The overwhelming condemnation of the jury’s verdicts centered on
the videotape: how could any juror in her right mind discount what the
public could see with its own eyes? In the eyes of the American public,
the Holliday video seemed so damning as to negate any possibility of
acquittal. How could the jury decide otherwise? Popular explanations
include charges of racist jurors, inappropriate venue, fears of violent
crime, and sympathies for police in a community known for its substan-
tial number of retired officers and fire fighters. These factors may have
influenced the outcome, yet a significant answer lies in the trial tactics of
the defense, specifically in their use of the video testimony.

30. Karol Heppe, executive director of the Police Misconduct Lawyers Referral Service,
noted the irony of the publicity surrounding the King incident: “It’s horrible, but I must tell
you that we receive complaints in this office of that kind of conduct on a weekly basis, if not on
a daily basis . . . . The difference this time is that there was somebody there to videotape it.
That’s the only difference.” Mydans, supra note 26. See also Seth Mydans, Los Angeles Of-
ficers Plead Not Guilty in Beating of Motorist, N.Y. TIMES, Mar. 27, 1991, at A20; Incomplete
at Brooklyn Law School and a member of the Board of Directors of the A.C.L.U., commented,
“Obviously something like the videotape of the incident in L.A. has been more persuasive than
hundreds of eyewitnesses could be. They complain all the time about police brutality, and
their complaints often are not credited.” Wilson, supra note 24.


32. Seth Mydans, Officers Go on Trial Today in Beating of Black Driver, N.Y. TIMES, Feb.

33. Richard A. Serrano & Tracy Wilkinson, All 4 in King Beating Acquitted; Violence

34. Seth Mydans, Wheels of Justice Lurch After Los Angeles Riots, N.Y. TIMES, Oct. 13,
During the course of the trial, defense attorneys for the four officers relied on a two-pronged strategy of putting jurors “in the shoes” of an arresting officer and dissecting the videotape frame-by-frame with the support of expert testimony. By stressing repeatedly that King appeared to be on PCP, a powerful hallucinogen that often makes users violent and irrational, and that King appeared to be resisting arrest, the defense attorneys defused the damning effect of the videotape, the prosecution’s central piece of evidence. Through slow motion and frame-by-frame analysis, in conjunction with expert testimony from Sergeant Charles Duke and Captain Robert Michael of the L.A.P.D., the combined defense broke the video down into a string of isolated escalations and de-escalations of force separated by “assessment periods,” allegedly in accordance with L.A.P.D. policy.

This approach de-emphasized the shocking violence of the beating and accentuated the defense argument that, although brutal, the use of force on a resisting suspect who appeared to be under the influence of PCP was “managed” and “controlled.” Sergeant Duke testified that it appeared that the officers had to beat King in order to avoid using deadly force.

The prosecution, led by Deputy District Attorney Terry White, attempted to keep the jury’s focus on the tape as a whole, challenging the defense to play the entire video for the jury. King himself did not testify, and his absence apparently weakened the prosecution’s case. Ultimately, one can only speculate on the jury’s reasons for the verdicts;

35. Information on trial tactics has been drawn from an excellent videotape summary of the proceedings, *The Rodney King Case: What the Jury Saw in California v. Powell* (Courtroom Television Network 1992). This tape was procured from Accuracy In Media. A.I.M. can be reached at (202) 371-6710.

36. *Id.* This strategy of dissecting a videotape to the point of diffusing its impact is similar to the concept of “technological closure,” which strips videotapes and other electronic media of their unique, self-explanatory, context-oriented qualities and reduces them to the same level as print media. See Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 549-50 (1992).

37. A prosecution rebuttal expert witness, Commander Michael Bostic, also of the L.A.P.D. and author of the department’s use of force policy, attempted to use frame-by-frame analysis to indicate the point where the use of force became excessive. However, he was discredited in part by defense cross-examination that elicited his lack of field experience and close ties with Chief Darryl Gates. *The Rodney King Case: What the Jury Saw in California v. Powell*, supra note 35.

38. In his closing argument, White referred to the videotape numerous times, playing it one last time for the jury and stressing its believability and objectivity, saying, “What more could you ask for? You have the videotape that shows objectively, without bias, impartially, what happened that night. The videotape shows conclusively what happened that night. It can’t be rebutted . . . . Now who do you believe, the defendants or your own eyes?” Seth Mydans, *Prosecutor in Beating Case Urges Jury to Rely on Tape*, N.Y. TIMES, Apr. 21, 1992, at A7.
however, interviews with some of the jurors indicate that the defense strategy worked.  

Ironically, the riots following the verdicts generated a new set of videotapes of criminal activity. Amateurs as well as news organizations and police departments taped thousands of assaults, lootings, gun battles, and fires during the three days of lawlessness. One video made by a helicopter news crew, which recorded the assault on truck driver Reginald Denny, has achieved exposure almost equalling that of the King video. These videos, as well as still photographs, represent an unprecedented source of evidence to law enforcement organizations. They could also spell the end for any cloak of impartiality for an observer carrying a camera. Successful demands by prosecution authorities for the images captured by amateurs and news camera operators would endanger the traditional "neutrality" of the press and bystanders and make them potential targets for angry spectators.

Despite the defense victory in the criminal trial, perhaps the strongest lesson that can be drawn from the King incident is that a camcorder can make the difference between credibility and casual dismissal. Although the prosecution failed to obtain criminal convictions, deeply emotional reactions to the verdicts, ranging from despair to widespread rioting, indicated how deeply a majority of the public believed that the police officers were guilty. Eighty-one seconds of videotape galvanized communities and laid the foundation for the outrage that surfaced upon the perceived failure of the criminal law system to do justice. In effect, the video allowed the public to act as a national jury, and the verdict was unmistakable.

39. One juror interviewed after the trial stated that the police were simply doing their job in arresting a resisting suspect, the video was unsteady and out of focus, and the blows delivered by the police could not have been connecting with King's body, based on the juror's perception that, "when you looked at King's body three days after the incident, not that much damage was done." Seth Mydans, Los Angeles Policemen Acquitted in Taped Beating, N.Y. TIMES, Apr. 30, 1992, at A1. See also Lou Cannon & Leef Smith, A Case of Haunting Images and Perplexing Questions; Jurors Found Videotape "Appalling" But in the End Believed the Defense, WASH. POST, May 1, 1992, at A29.


B. Before King: Other Amateur Videos

Although the King beating focused national attention on the potential of amateur videotapes, other notable precedents exist. In the aftermath of the King incident, KCBS-TV, a local Los Angeles television station, broadcast a similar videotape of a previously unreported police brutality episode. The three-year-old tape showed a police officer, Andrew Teague, chase a man onto his front porch and beat him. On the scene, Officer Teague demanded the surrender of the amateur videotape taken by onlooker Anthony Ennis, but Ennis managed to slip the officer a blank tape instead. As in the King incident, serious discrepancies existed between the police report filed on June 29, 1988 and the actual videotape of the event, including an apparently false statement that the arrestee, Sonny David Flores, violently resisted arrest and struck Teague. As a result of the broadcast, the L.A.P.D. launched an investigation into the incident.

A more famous incident occurred in August of 1988, when New York City officials subjected Tompkins Square Park to a one a.m. curfew in an effort to clean up the drug traffic rampant in the area. The backlash of protest culminated in a full-scale riot on August 6, in which at least fifty-two police officers and eighteen civilians required treatment for injuries. The riot prompted an investigation into N.Y.P.D. crowd control techniques and 120 accusations of police brutality were filed. Robert Arihood, a construction contractor who lived near the park, filed one of the complaints. Clayton Patterson, also a neighborhood resident, videotaped the police beating Arihood. Patterson turned the videotape over to a local news station and eventually to the Manhattan District Attorney’s Office. The two officers were suspended without pay and were indicted on assault charges.

Police brutality has not been the only crime captured on camcorders. On October 28, 1989, five men went on a robbery spree in Washington, D.C. They videotaped their crimes for their own amusement. All five were subsequently found guilty of assault and robbery.

43. Id.
45. Id.
46. Id. Patterson originally refused to turn over his videotape and was jailed for several days on charges of civil contempt for refusing to comply with a subpoena. His intent was to force officials outside of the New York City area, such as Rep. John Conyers (D-MI), to investigate police brutality charges. Les Payne, “Private Eyes” Lose Faith in the System, NEWSDAY, Sept. 11, 1988, Ideas, at 11.
47. The two officers have since been acquitted. Two Police Officers Acquitted in Melee, N.Y. TIMES, Dec. 13, 1989, at B7.
The cameraman, Joel Carrero, was sentenced to nine to twenty-seven years in jail for his part in the attacks on the two victims. A bail bondsman, who was looking for Carrero after he skipped town on a drug charge, found the eight minute tape in Carrero's New York apartment.\footnote{48. Catherine Toups, "Director" Gets 9 to 27 Years in Taped Robberies, WASH. TIMES, July 30, 1991, at B1. It appears that emerging video technology also provides a new way to shoot yourself in the foot: Michael J. Schmidt, 29, set up a hidden video camera at his home near Superior, Wis., in October because he had been burglarized several times and thought he could catch the culprits in the act. The burglars came back and were captured on tape, which Schmidt turned over to the sheriff. Among the items the burglars were seen taking from Schmidt's house was a box containing eight marijuana plants. Schmidt was charged with misdemeanor drug possession. Chuck Shepherd, Panhandler's Lawsuit Begs for Break on Income Tax, STAR TRIB., Dec. 10, 1992, at 4E.}{49. }\footnote{Tracie L. Thompson, Hate Crime Charges in Taped Assault, S.F. CHRON., June 19, 1991, at A15.} 48 Hours (CBS television broadcast, Oct. 30, 1991).

On June 11, 1991, a San Jose, California resident, William Kiley, set up a camcorder in his living room window before going across the street to water the lawn of a rental property he owned. Kiley had been involved in a feud with his neighbors, especially with their seventeen-year-old son, and had set up the camcorder because his neighbors had been harassing him.\footnote{50. 48 Hours (CBS television broadcast, Oct. 30, 1991).} Kiley's fears of harassment were well-founded. The June 11th tape shows the seventeen-year old neighbor yelling "fag" and "queer" at Kiley, who is homosexual, and then punching him. After the assault, Kiley used the camcorder to document his injuries—a broken nose and two black eyes. Charged with assault, battery, and a hate crime, the teenager received a ten-month prison sentence, to be served in a California Youth Authority center.\footnote{51. Beck et al., supra note 4.} 50

On June 28, 1991, at least six women attacked JoAnne Was, her two adult daughters, and two female friends while they were in a crowd leaving the annual International Freedom Festival fireworks show in Detroit. Several women in the crowd confronted them, shouting racial taunts and then attacking Was. Members of the group then turned on another woman, who had just stopped a would-be chain snatcher, and battered her as well.\footnote{52. 6 Black Teenagers Held in Attacks on Whites, WASH. POST, July 3, 1991, at A2.}{53. Was's reaction to her ordeal echoes that of commentators: "We were totally ignored ... Nobody saw anything. Nobody could help us. All of a sudden, it's on a video, and I've got the Detroit police calling me and saying, 'Did something happen?'" Id. Five of the women arrested in the incident pleaded no contest to charges, while the sixth was acquitted by a
On July 7, 1991, a resident of South Gate in Los Angeles was awakened at 4 a.m. by fighting outside his home. The man, who remains anonymous, grabbed his video camera. He captured on tape a full-scale gang battle fought with knives, broken bottles, and guns. When the police arrived, only three wounded teenagers were left behind, and they would not cooperate with officers on the scene. The tape may provide useful information despite its poor quality, as the Los Angeles County Sheriff's Department will process it using enhancing equipment.54

On August 10, 1991, a nineteen-year-old woman reported an acquaintance rape to police in Danbury, Connecticut. She stated that two college students repeatedly raped her while she was incapacitated by alcohol, and that they had videotaped the event in an attempt to blackmail her. The police obtained a search warrant and recovered the tape, arresting Beau Kotach and Chester Hrosteck III and charging them with sexual assault. "This story exemplifies the growing presence of amateur video cameras at crime scenes."55

Camcorders have even affected international affairs. On December 14, 1989, Bulgarian President Petar Mladenov faced a massive antigovernment protest, part of the reformist wave sweeping Eastern Europe. Although a reformist himself, Mladenov considered using military force to silence the protest. He said to an aide, "Let the tanks come."56 Although the protest later dispersed peacefully, an amateur cameraman caught Mladenov's comment on videotape. The Union of Democratic Forces broadcast the tape on national television prior to the June 17, 1990 parliamentary run-off elections. As a result, trade unions, newspapers, and opposition parties demanded Mladenov's resignation. Mladenov aggravated the crisis by challenging the authenticity of the tape. When the tape was verified, Mladenov continued to insist that his words were taken out of context. On July 6, bowing to an ultimatum from thousands of striking student protesters, Mladenov resigned from office after having been in power for little more than a year.57
C. The Future for Camcorders

Given the growing numbers of camcorder owners in America and the recent rise in media coverage of amateur videotapes, one can predict a rapid increase of amateur camera operators recording evidence of criminal activity and turning their tapes over to television stations and, eventually, to prosecutors. Statistics of camcorder ownership show that more than one in ten American citizens now has the capability to become another George Holliday.\(^5\) Along with the means, the motive for people to start recording at every scream or siren is being supplied daily by media reports exalting the importance of videotapes such as Holliday’s.

More direct encouragement to video camera owners exists as well. Television stations such as KNSD-TV in San Diego actively encouraged people to become amateur photojournalists well before the Rodney King incident, offering fifty dollars for footage actually used during news broadcasts.\(^5\) National networks now compete for viewers of “infotainment” or “videotainment” programs such as “I Witness Video.”\(^6\)

Calls for amateur videotaping have come from sources more directly interested in fighting crime and brutality than news organizations. Community leader Father George H. Clements has waged a private war on drug traffic in poor neighborhoods in Chicago by using video cameras, “a new tool to empower citizens whose neighborhoods have been overrun by drugs.”\(^6\) Perhaps the most ambitious attempt at fighting brutality with camcorders is WITNESS, a new program headed by international music star and human rights activist Peter Gabriel and organized by the Lawyers Committee on Human Rights.\(^6\) WITNESS will be distributing camcorders to residents of nations known for human rights abuses, as well as establishing a system for dispatching semiprofessional observers armed with camcorders to the scenes of flare-ups of brutality and unrest.

\(^{58}\) See Lieberman, supra note 7. Four years ago, eight percent of all households in America contained a camcorder, and sales have remained brisk. \(\textit{Id}\).

\(^{59}\) Kevin Brass, \textit{Channel 39 Sends Viewers on Video Search for News}, \textit{L.A. Times}, Oct. 29, 1990, at F2. Although KNSD-TV’s management recognized that “newsbreakers” are not trained in journalistic ethics or crime scene procedures, it did not see “any contradiction in encouraging people to shoot dramatic video while discouraging them from taking any risks.” \(\textit{Id}\).

\(^{60}\) Marvin Kitman, \textit{A Camcorder is the Star}, \textit{NEWSDAY}, Aug. 16, 1992, Fanfare, at 19.

\(^{61}\) Eric Harrison, \textit{Priest Seeking to Spotlight Drug Dealers; A Maverick Prelate in Chicago Calls on People to Use Video Cameras To Help Catch Criminals}, \textit{L.A. Times}, Apr. 30, 1991, at A5. Leader of one of the largest Catholic African-American parishes in the nation, Clements says that he was inspired by the Rodney King incident and began taping drug deals himself as well as calling for the general populace of Chicago to do the same. Teresa Wiltz, \textit{Residents Urged to Be “Eyes Of Police,”} \textit{CHI. TRIB.}, Mar. 23, 1991, at A5. Police have been less enthusiastic, noting the dangers posed to amateur crime-fighters as well as the insufficiency of other evidence to prosecute most taped drug transactions.

\(^{62}\) \textit{Good Morning America} (NBC television broadcast, Mar. 23, 1992).
The program will supply camcorders and train users in an attempt to document abuses, with the goal of creating an archive of powerful footage to use in lobbying for sanctions, embargoes, and other forms of international censure. The program has received a $100,000 seed grant from the Reebok Corporation.63

III
Case Law and Statutory Controls

The use of still photographs and motion pictures as evidence has been accepted in courts around the nation. Specific Federal Rules of Evidence and various state evidence codes address the admissibility of motion pictures and photographs.64 Videotapes are now equally accepted by American courts as evidence, trial records, and demonstrative exhibits.65 The progression from older media to videotaped evidence has been relatively smooth, due in part to the categorization of videotaped evidence as visual rather than auditory.

Admissibility into trial of real evidence videotapes has been established predominantly under standards for rules of evidence used for photographs and moving pictures, rather than the more stringent requirements for admission of an audio tape recording. The tapes have been admitted on the condition that some witness authenticate them by testifying as to the circumstances of the recording and to the accuracy and relevancy of the events portrayed.66

63. Id.
64. See, e.g., FED. R. EVID. 1001-02; CAL. EVID. CODE § 250 (West 1992).
65. For an excellent summary of the legal system’s acceptance of videotapes, see Collins & Skover, supra note 36, at 510-12.

The stringent regulations on audio recordings stem primarily from Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1970) (now amended and known as the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-2520 (1988)), which contains strict warrant requirements for electronic surveillance and wiretapping and specifies remedies, including exclusion of illegally gathered evidence as well as civil tort actions. This act has been interpreted as not restricting video surveillance in any way:

Appellants correctly note that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 . . . does not authorize federal courts to permit visual electronic surveillance of private premises . . . . On the other hand, nothing in Title III . . . indicates that Congress intended to prohibit video surveillance in domestic criminal investigations. Thus, all that can be said is that Congress has not yet enacted any legislation explicitly authorizing domestic electronic video surveillance. Prior to the 1968 enactment of Title III, there was similarly no specific statutory authorization for wiretapping or electronic eavesdropping. Nevertheless, the Supreme Court had approved the court-ordered use of a concealed electronic device to record conversations, holding that the government had satisfied Fourth Amendment requirements. United States v. Biasucci, 786 F.2d 504, 508-509 (2d Cir.), cert. denied, 479 U.S. 827 (1986). See United States v. Koyomejian, 946 F.2d 1450, 1453 (9th Cir. 1991) (video surveillance was regulated by 18 U.S.C. §§ 2510-20 because absence of specific mention of video technology was
Duly verified sound or silent videotapes of relevant subjects are admissible in evidence in both civil and criminal cases on the same basis as motion picture films and are subject to the same rules generally applicable to photographic evidence. In other words, "videotape films, if relating to otherwise competent evidence, are admissible, providing a proper foundation is laid for their admission."

A. Authentication

Like other visual evidence, videotapes must pass through a statutory gauntlet, facing issues of authentication, relevance, and the balance of probative value against potential prejudice. The Federal Rules of Evidence refer to videotape evidence under the general category of photographs, which "include[s] still photographs, x-ray films, video tapes, and motion pictures." Authentication of videotapes must conform to the requirements of Rule 901 ("Requirement of Authentication or Identification").

Although testimony by the actual camera operator provides the strongest means of authentication, testimony from others present at the scene who possess sufficient personal knowledge about the crime may be weighed by overall intent of legislation, vacated, 970 F.2d 536 (9th Cir. 1992). See generally Kent Greenfield, Cameras in Teddy Bears: Electronic Visual Surveillance and the Fourth Amendment, 58 U. CHI. L. REV. 1045 (1991); David P. Hodges, Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother?, 3 HASTINGS CONST. L.Q. 261 (1976). For a state statute analogous to the Electronic Communications Privacy Act, see CAL. PENAL CODE §§ 630-37.6 (West 1988).


69. In the discussion of evidence statutes, this note focuses only on the Federal Rules of Evidence.

70. 29 AM. JUR. 2D Evidence § 801 (1967).
71. FED. R. EVID. 1001(2).
72. Federal Rule of Evidence 901 states in part:
   (a) GENERAL PROVISION. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
   (b) ILLUSTRATIONS. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
   (1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be . . . .
   (4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
   (5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon
also suffice for authentication purposes. A sufficient foundation generally exists "where it [is] shown that the operator of the device, or a participant in the filmed conversation or occurrence, or both, testified to the authenticity and accuracy of the film." In this regard, it is important that the authenticating witness(es) also be able to testify as to the videotape's unedited, unaltered condition.

An additional possibility, self-authentication, is appealing because camera operators need not expose themselves to the dangers of a public trial. Authentication methods offered in both sections (b)(4) and (b)(9) of Rule 901 do not require that the proponent produce the private citizen witness who created the videotape. It may be necessary to establish a chain of custody for the evidence, but eyewitness verification of the accuracy of the video’s contents may make this requirement unwarranted.

B. Relevance

Amateur videotapes may face closer scrutiny on the question of relevance. Federal Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Even to the casual observer, the potential relevance of a videotape of a crime in progress is manifest. In most criminal trials the central question of fact revolves around the conduct charged and the identity of the alleged criminal. Without proof beyond a reasonable doubt of these factual issues, a defendant cannot be convicted.

---


74. Drechsler, supra note 68, at 337.

75. Id. at 338.

76. Although it is an attractive method of encouraging citizen participation with lower risk than appearing at trial, authenticating and admitting a videotape without testimony from the camera operator could conceivably implicate a defendant's right of confrontation. Only the camera operator would be able to answer questions concerning filming conditions, camera angles, and events not captured on tape. See supra note 72.

77. 32B AM. JUR. 2D Federal Rules of Evidence § 275 (1982) (citing United States v. Richardson, 562 F.2d 476 (7th Cir. 1977), cert. denied, 434 U.S. 1021 (1978)).

78. FED. R. EVID. 401.

Whereas most criminal trials rely on eyewitness testimony, corroborating physical evidence, and evidence of motive or related criminal conduct, videotaped evidence can present the trier of fact with evidence of a quality rarely available in the past. Eyewitness accounts and similar testimonial evidence are subject to the gamut of human failings, from clouded memory to fabrication. Videotape plays back verbatim what was recorded through the lens and carries the additional impact of bringing an observer into the context of the taped scene.  

C. Probative Value v. Potential Prejudice

A videotape may prove relevant to a trial, but is it overly prejudicial? While Federal Rule 403 imposes this balancing question on every item of evidence offered, videotapes offer some unique problems. The power of videotape depicting crimes has not gone unnoticed by the United States Supreme Court, although the Court has yet to rule on a case involving amateur footage of a crime in progress. Justice Kennedy acknowledged the potential impact of videotapes in describing the damaging effect of a confession: "[T]he court conducting a harmless-error inquiry must appreciate the indelible impact a full confession may have on the trier of fact . . . . Apart, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence."  

The potential prejudice of videotape emanates from its character as "real proof." The danger of real proof is that "[t]here is a general mental tendency, when a corporeal object is produced as proving something, to assume, on sight of the object, all else that is implied in the case about it." This is especially true with videotaped evidence, due to its visual nature and aura of unimpeachability. It may be relied on as indicative of "the truth," despite contrary evidence.  

---

[80] The emotional impact of visual images, as opposed to oral testimony, cannot be overstated. For an extensive discussion of the unique characteristics of videotape and other visual electronic media, see Collins & Skover, supra note 36, at 535-46.  

[81] Federal Rule of Evidence 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.  


[83] WEINSTEIN & BERGER, supra note 13, ¶ 403[05].  


In addition, particularly brutal or graphic video may inflame emotions and raise passions, distorting the fact-finding process. However, "[i]f the mere gruesomeness of the evidence were ground for its exclusion, then it would have to be said that the more gruesome the crime, the greater the difficulty of the prosecution in proving its case."\textsuperscript{86} Generally, modern jurisprudence adheres to Rule 403's bias in favor of admission of relevant evidence, even where its graphic nature may present potential dangers.\textsuperscript{87} Indicative precedent shows that "[w]here probative value outweighs the danger of undue prejudice, the federal courts have admitted photographs and moving pictures of such unsavory objects and events as murder victims, rape victims . . . and the actual commission of a crime."\textsuperscript{88}

Over twenty-five years ago, the Second Circuit foreshadowed the issue of the potential prejudicial effect of "new" technology in \textit{United States v. Birnbaum}\textsuperscript{89} by stating that

in this day and age of photographic and recording devices, there is no reason why relevant conversations and scenes should not be brought before the jury by these means. The trial judge in balancing the probative value of the evidence against its possibly prejudicial effect is vested with broad discretion.\textsuperscript{90}

This broad discretion ultimately lets the trial judge decide; given the bias towards admission, amateur videotapes are not likely to be excluded on grounds of prejudice when they contain any relevant evidence.

\textbf{D. Videotape's Strengths}

Amateur videotape possesses valuable evidentiary strengths that make for easier admissibility and greater impact than most types of testi-

\textsuperscript{87} If audio or visual presentation is calculated to assist the jury, the court should not discourage the use of it. Modern techniques of presentation should not be excluded merely because they are effective . . . . Jurors, exposed as they are to television, the movies, and picture magazines, are fairly sophisticated. With proper instruction, the danger of their overvaluing such proof is slight. \textit{WEINSTEIN & BERGER, supra} note 13, § 403[05], at 403-88 (citations omitted).
\textsuperscript{88} \textit{Id.} at 403-89 to 403-96. \textit{See, e.g., United States v. Whitfield,} 715 F.2d 145 (4th Cir. 1983) (admission of photographs of murder victim's wounds upheld); United States v. Jackson, 712 F.2d 1283 (8th Cir. 1983) (admission of small photographs of automobile accident victims not an abuse of discretion); United States v. One Feather, 702 F.2d 736 (8th Cir. 1983) (photographs of rape victim's scrapes and bruises relevant to credibility of witness and not unfairly prejudicial); Papp v. Jago, 656 F.2d 221 (6th Cir.) (colored autopsy slides of rape victim's intimate parts of anatomy not prejudicial to defendant's right to a fair trial), \textit{cert. denied}, 454 U.S. 1035 (1981); United States v. Birnbaum, 337 F.2d 490 (2d Cir. 1964) (motion picture depicting money passing in IRS bribery case admissible).
\textsuperscript{89} 337 F.2d 490 (2d Cir. 1964).
\textsuperscript{90} \textit{Id.} at 496.
Properly maintained, videotape can last for years with little deterioration of image quality. The primary danger to a videotape is a magnetic field that can erase its contents. Simple precautions in storage and use, as well as the availability of back-up copies, can conceivably give videotaped evidence an indefinite life, unlike human memory.

Videotape also has excellent narrative qualities. What it records is played back unerringly on the screen; however, camcorders may not always be able to capture a dimly-lit scene. Amateurs might frequently be situated far away from the action, using the telephoto ("zoom") lens feature to its fullest and causing a corresponding loss of light-gathering capability. More importantly, there is no guarantee that camcorders will be on the scene from start to finish or that they will capture every important element of the conduct in question.

E. Videotape's Limitations

Videotape of potential criminal conduct relies on the perceptive abilities of the camera operator. "Distortion based on the location and timing" may be the predominant challenge to videotape evidence. In an incident reminiscent of the Rodney King beating, a Fort Worth resident videotaped a police officer beating a handcuffed suspect by the side of an interstate. The resident gave the videotape to a local television station, which broadcast the taped beating. The police department suspended the officer and the D.A. charged him with assault with a deadly weapon. The videotape, however, did not show the suspect kicking out the rear window of the patrol car and trying to escape. The prisoner's actions justified the use of force, and a grand jury declined to indict the officer.

Even more sinister, people may fabricate videotape evidence. According to popular belief, "the camera never lies." Yet seemingly une-
quivocal videotape evidence can be forged. Besides the potential danger of taped scenes being taken out of context, more complicated and potentially deceptive methods, such as misleading editing, sound dubbing, or even digital image manipulation, have developed in the past decade.\textsuperscript{97} With the increasing sophistication of video technology, the camera “will be able to lie a thousand percent better than it was ever able to before . . . . There is no negative, so you would be able to store things that never happened.”\textsuperscript{98}

Fortunately, altering moving images, rather than still frames, is significantly more difficult because of the algorithms needed to connect altered frames of video convincingly.\textsuperscript{99} The possibility of fabricated or altered amateur videotape is much less likely, given the expense and technological sophistication required to produce undetectable results.\textsuperscript{100}

Finally, as media accounts of the impact of amateur videotape become more prevalent, and greater numbers of Americans contemplate the possibility of being the next George Holliday, one must wonder whether a subtle influence will work to “make it happen for the camera.” Given the rewards involved, the incentive to capture something exciting or shocking on video cannot be underestimated. Where the camera operator has gone to great lengths to prepare for an event, such as in the San Jose assault case,\textsuperscript{101} might there exist an impetus to make the event occur, to give it a little encouragement? Although this would not be a factor with distant third-party observers, in cases where the camera operator is one of the involved parties, with the adrenaline of anticipation flowing, the possibility exists.\textsuperscript{102}

\textsuperscript{97} Eric Nagourney, \textit{Focusing on the Future: There'll Always Be Film, But Now They're Talking Electronic Still Cameras with TV Linkage}, \textit{Newsdaily}, Nov. 19, 1989, Magazine, at 18 (still video cameras, a technological brother of video cameras, may replace the photojournalist’s ubiquitous single-lens reflex 35 mm camera).

\textsuperscript{98} Id. (quoting Herbert Keppler, publishing director of \textit{American Photographer} and \textit{Popular Photography} magazines, commenting on still video camera technology).

\textsuperscript{99} Comm. Daily, Dec. 11, 1991, at 4 (quoting Raymond Fielding, Dean of School of Motion Picture, TV & Recording Arts, Florida State University).

\textsuperscript{100} See Geoffrey Cowley et al., \textit{Frames or Frame-Ups: Can the Camera Lie?}, Newsweek, July 22, 1991, at 44-45.

\textsuperscript{101} See 48 Hours, supra note 50, and accompanying text.

IV
Constitutional Issues—Fourth and Fourteenth Amendments

Perhaps more troubling than the opportunity for distortion or fabrication is the danger that the search for incriminating video footage will lead to invasions of privacy. The resulting evidence, which would not be admissible if the government acted alone in obtaining it, may end up offered by prosecutors in criminal trials. The emergence of legions of amateur videotapers creates a potential invasion of the right to privacy. It is not clear that the Bill of Rights, as currently interpreted, would exclude evidence obtained by an amateur videotaper who invades another’s privacy in documenting offensive or criminal acts.

Two significant limitations on the Fourth Amendment indicate that amateur videotape offered into evidence may receive favorable treatment in courts. In Katz v. United States, the Supreme Court held that the Fourth Amendment’s protection of privacy is limited to “people, not places.” It does not cover that which “a person knowingly exposes to the public, even in [one’s] own home or office.” In his now-famous concurrence, Justice Harlan articulated what became accepted as the Katz analysis, writing that “there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”

A major corollary of the Katz analysis is the “plain view” doctrine, which sets forth three requirements for warrantless seizures of incriminating evidence by an officer: 1) the officer must not be violating the Fourth Amendment in arriving at the place from which the evidence can plainly be viewed; 2) the incriminating character of the evidence in question must be immediately apparent; and 3) the officer must not only be

103. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .” U.S. Const. amend. IV. The U.S. Supreme Court has long held that the Fourth Amendment’s guarantees include protection against government invasions of the “sanctity of a man’s home and the privacies of life.” Boyd v. United States, 116 U.S. 616, 632 (1886).
104. See infra notes 111-115 and accompanying text.
106. Id. at 351.
107. Id.
108. Id. at 361 (Harlan, J., concurring). Since Katz, the Court has carved out several areas where “reasonable” expectations of privacy do not apply. See, e.g., Oliver v. United States, 466 U.S. 170, 177 (1984)(in “open fields” outside the “curtilage of one’s home”); United States v. Dunn, 480 U.S. 294, 300-01 (1987)(when illegal activity can be seen with the naked eye from an aircraft flying within public airspace); California v. Ciraolo, 476 U.S. 207, 213-14 (1986) (helicopters flying at 400 foot altitude are not “sufficiently rare” to support respondent’s claim of a reasonable expectation of privacy).
able to see the evidence from a legal vantage point, but must also have a lawful right of access to it.\textsuperscript{109}

The \textit{Katz} analysis and the plain view doctrine indicate that when criminal activity occurs in the open, any expectation of privacy on the actor's part is unreasonable. Therefore, an amateur videotape made under such circumstances would not be excluded on the basis of unconstitutionality. If the majority of amateur videotapes of criminal activity capture scenes out in the open, such as in the police brutality cases discussed earlier, there should be little constitutional opposition to their admission.

In addition to the limits on Fourth Amendment protections dictated by \textit{Katz} and the plain view doctrine, there is a second major limitation. The fundamental tenet of constitutional interpretation that the Fourth Amendment applies only to governmental actors leaves few restrictions on the activities of private citizens.\textsuperscript{110} In \textit{Burdeau v. McDowell},\textsuperscript{111} the Supreme Court limited the application of Fourth Amendment rights:

The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies . . . . In the present case . . . there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another.\textsuperscript{112}

\textit{Burdeau} and its progeny indicate an added facet of the "silver platter" doctrine. This doctrine allowed federal agents to use evidence illegally seized by state authorities and vice-versa. "The federal courts were not required to apply the exclusionary rule to evidence seized in violation of the fourth amendment if that evidence had originally been obtained by state officers without any federal involvement. Evidence handed over to federal prosecutors by state police was thus admissible in federal court."\textsuperscript{113} While that loophole has since been

\textsuperscript{110} See, e.g., United States v. McGuire, 381 F.2d 306, 313 n.5 (2d Cir. 1967) and People v. Tarantino, 290 P.2d 505, 509 (Cal. 1955) (both citing Burdeau v. McDowell, 256 U.S. 465, 475 (1921)).
\textsuperscript{111} 256 U.S. 465 (1921).
\textsuperscript{112} \textit{Id.} at 475. See \textit{supra} note 66 for a discussion of regulation of video surveillance.
closed.第114段 Burdeau 允许私人个体被扣留的证据在任何情况下都可被采纳，而这种证据可能在由政府取得的情况下是不可采纳的。第115段 即使一个业余摄影师，以非政府的独立身份，非法地拍摄了某人的隐私，按照当代标准，按照Katz和其后裔的标准，第四修正案也不会阻止对摄像机的采纳。

V
A Modern Approach: Commonwealth v. Kean

Although there are few cases involving amateur videotape, one state appellate court opinion addresses the use of such evidence when gathered in a facially unconstitutional manner. In Commonwealth v. Kean,第116段 the Pennsylvania Supreme Court confronted the evidentiary problem that arose when two juveniles surreptitiously filmed their sexual encounters with an adult neighborhood couple.第117段 The mother of one of the boys learned of the existence of the tape and had her father screen it to confirm its contents.第118段 She turned the tape over to a Pennsylvania State Police officer investigating an anonymous report concerning the Kean's sexual practices.第119段 The police arrested the couple and charged each of them with two counts of conspiracy to commit involuntary deviate sexual intercourse and two counts of corruption of minors.第120段 The videotape was admitted at trial, and the defendants were found guilty on all counts.第121段

114. The Elkins Court severely limited the doctrine, holding that evidence seized during a search by state officers is inadmissible in federal court if the search would have been unreasonable if conducted by federal officers. 364 U.S. at 208-14. Mapp v. Ohio, 367 U.S. 643, 655 (1961), finished off the doctrine by making the exclusionary rule applicable to the states. "[A]ll evidence obtained [by a state] by searches and seizures in violation of the Constitution is inadmissible." Id.

115. See supra notes 110-113 and accompanying text. This principle has been cited in more recent cases. United States v. Malbrough, 922 F.2d 458, 461-62 (8th Cir. 1990) (a private citizen may testify concerning what he witnesses while trespassing); United States v. Attson, 900 F.2d 1427, 1433 (9th Cir. 1990) (medical person acting for purposes other than government's benefit is not engaging in a Fourth Amendment search or seizure). See also United States v. Pierce, 893 F.2d 669, 672-73 (5th Cir. 1990) (admitting as evidence rock cocaine that airline employee found in a package); Pleasant v. Lovell, 876 F.2d 787 (10th Cir. 1989); United States v. Gleave, 786 F. Supp. 258 (W.D.N.Y. 1992).


117. Id. at 376.

118. Id.

119. Id. at 377.

120. Id. Mrs. Kean was also charged with two counts of involuntary sexual intercourse.

121. Id. at 375-77.
Several facts complicated the court's task. The boys broke into the Keans' residence to plant the camcorder in the Keans' bedroom; they also broke in to retrieve the camcorder and its videotape. The boys had shown the video to several friends, and several weeks passed between the time the mother learned of the tape's contents and when she decided to turn it over to the investigating officer. The officer subsequently viewed the tape without a warrant. The Keans appealed on the basis of the Fourth Amendment of the U.S. Constitution and on Article I, Section 8 of the Pennsylvania Constitution.

The Pennsylvania Constitution's language is remarkably similar to that of the Fourth Amendment. The Pennsylvania Constitution provides:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

This similarity extends to its construction, and "[l]ike the fourth amendment, this provision has been interpreted as protecting 'those zones where one has a reasonable expectation of privacy.'" The Kean court emphasized, however, that it was "not bound by fourth amendment precedents when construing claims raised under article 1, section 8. The Pennsylvania Constitution provides broader coverage than its federal counterpart, and an expectation of privacy which is deemed unreasonable by federal courts may be recognized as legitimate in this jurisdiction."

However, the Kean court recognized the limitation imposed by Burdeau and its progeny, stating that "both state and federal constitutional limitations on 'unreasonable searches and seizures' apply exclusively to the conduct of persons who are acting as instruments or agents of the state." This limitation did not preclude the court's finding that the Keans "had a reasonable expectation of privacy in the place which was videotaped—the bedroom of their home... [and] that this expectation of privacy was transferred to the videotape itself at the time of its crea-

122. Id. at 376.
123. Id.
124. Id. at 377.
125. Id.
128. Id.
tion." The court cited the sanctity of the marital bedroom in Fourth Amendment jurisprudence and the heightened intrusiveness of video images, "likely to contain a richness of detail which could not be successfully communicated by even the most articulate of observers. One does not need a law degree in order to understand that a picture is worth a thousand words."

The crucial question for the court was whether the expectation of privacy, transferred to the boys' videotape, was still intact when the investigating officer viewed it without a warrant. If so, the officer's viewing of the tape constituted grounds for its exclusion. The court concluded that although the expectation transferred with the images, the tape was admissible for purposes of the Fourth Amendment:

\[\text{We find that appellants' privacy interest in the tape was not substantially eroded when the tape was viewed by private parties before coming into police custody. We conclude, however, that appellants' privacy interest in the tape was extinguished when the mother of one of the juveniles handed the tape over to the police.}\]

In spite of the constitutional grounds for excluding the evidence, the Kean court rationalized its admission, using the concept of third-party consent to a search:

\[\text{[W]e act with awareness of the dangers posed by the increasingly widespread dissemination of video cameras and video recorders among the general public. We hold that appellants had a legitimate expectation of privacy not only in their home, but also in the reflection of their home that the videotape captured and preserved.}\]

130. Id. at 379-80. The court commented on the distinctive nature of the contested evidence, saying "we act with awareness of the dangers posed by the increasingly widespread dissemination of video cameras and video recorders among the general public. We hold that appellants had a legitimate expectation of privacy not only in their home, but also in the reflection of their home that the videotape captured and preserved." Id. at 384.

131. Id. at 380; see Griswold v. Connecticut, 381 U.S. 479 (1965).

132. Kean, 556 A.2d at 382. The court elaborated on this point:

The value of the videotape as a prosecution exhibit was that it embodied images of and information concerning what went on inside the appellants' residence and it was these images and this information that the appellants sought to keep private when they excluded the general public from their home. Moreover, the very nature of the videotape was such that a screening of the tape was a visual inspection of the home—a visual inspection which was at least as revealing as an actual entry into the home on the night of appellants' crime would have been. For purposes of the law of search and seizure, the videotape cannot be considered wholly apart from the place whose imprint it bears; an examination of the videotape was a search of the home.

Id. at 383.

133. Id. at 379.

134. Id.


[T]he majority opinion in Jacobsen apparently authorizes the warrantless police viewing of films which previously have been examined by private citizens. In the instant case, we may assume arguendo that when Alan and Steve viewed the videotape of their encounter with the Keans, they extinguished any fourth amendment interest which the Keans might otherwise have had in the videotape. However, this does not settle the issue of whether the viewing of the videotape extinguished the Keans' privacy interest under article I, section 8 of the Pennsylvania Constitution.

Kean, 556 A.2d at 386.
Viewed in the light most favorable to the Commonwealth, the prevailing party at the suppression hearing, the record indicates that [the mother] implicitly consented to Officer Lloyd's subsequent viewing of the videotape.... Both the federal and state constitutions allow for a third party consent search exception to the warrant requirement.... [T]he Pennsylvania Supreme Court recognized that in certain exceptional circumstances, a third party may consent to a search of effects which the defendant did not knowingly place under the third party's control.... [E]ven where the defendant has not voluntarily assumed the risk that a third party will consent to a search, the search may be valid if: 1) the third party has lawfully acquired direct physical control over the objects searched; and 2) the third party has no consensual relationship of any kind with the defendant. These conditions are satisfied in the case sub judice.136

The result in Kean is disturbingly reminiscent of "silver platter" cases of the past.137 Even though the tape may have been inadmissible if it had been given directly to Officer Lloyd by the boys,138 or if he had acquired it in any other nonconsensual manner, e.g., in plain view, the fact that the mother voluntarily handed it over removed its unconstitutional taint and rendered it admissible at trial.139 Thus, Kean may indicate that amateur videotapes are constitutionally foolproof, so long as they go through the hands of a consenting third party in reaching prosecuting authorities.140 Conceivably, where the videotaper is an uninvolved observer, he or she might qualify as "the third party."

The question of the "involvement" of a videotaper can determine whether Fourth Amendment protections apply. If the videotaper is acting as an "agent or instrument of the government," then the Fourth Amendment applies.141 Whether a private citizen is acting as such is to be determined after considering all the facts and circumstances of the case.142 Two factors govern this determination: "whether the government knew of and acquiesced in the intrusive conduct" and "whether the

137. See supra notes 112-14 and accompanying text.
138. This possibility was left unaddressed by the Kean court.
139. The Kean court did not address whether the police could have viewed the videotape without a warrant, absent the mother's permission, once it was under her control. It therefore left open the question of whether a knowing and voluntary decision by a third party to hand a videotape over is required for the tape to be admissible. Kean, 556 A.2d at 388 n.12.
140. This may not be true if an objecting party could prove that a third party was acting as an agent for government officials, "by virtue of their suggestion, order, request, or participation for purposes of criminal investigation." 68 AM. JUR. 2D SEARCHES AND SEIZURES § 14 (1973).
141. United States v. Malbrough, 922 F.2d 458, 462 (8th Cir. 1990); see supra note 115.
party performing the search intended to assist law enforcement officials or to further [his or her] own ends."  

In the scenario of an amateur videotaper eager to become famous like George Holliday, government knowledge and acquiescence would be difficult to establish. In fact, one can argue in the King case that the government, as represented by the L.A.P.D., would never have acqui-

esced to Holliday's actions. Also, most tapes originate from unpredictable conjunctions of means and opportunity, foreclosing the possibility of government knowledge and acquiescence. The second element of the agency test, the intent of the videotaper, might present a more difficult problem; however, both of the factors are required to establish a citizen's status as an agent or instrument of the government. The subjective intent of a videotaper may stem from multiple motives, some of which may suffice to establish agency. Where fighting crime and assisting the police coincide with the desire for fame and fortune, it would be difficult to decide which motive dominated. Only in a situation such as Father George Clements' proposal to regularly videotape criminal activities in Chicago could an argument be made as to both government knowledge and acquiescence and requisite intent on the part of the citizens involved. Father Clements appears to represent the minority of "video vigilantes."  

Since video technology, in its ability to capture inculpatory evidence by covert means, seems analogous to wiretaps and microphones, the protections afforded by Title III of the Omnibus Crime Control and Safe Streets Act, as amended by the Electronic Communications Privacy Act of 1986 (the Act), would appear to apply. Only the Ninth Circuit has held that video surveillance is regulated by the 1986 Act, and then only implicitly; the Act does not explicitly refer to video technology.  

143. United States v. Miller, 688 F.2d 652, 657 (9th Cir. 1982) (citing United States v. Walther, 652 F.2d 788, 791-92 (9th Cir. 1981)). See Malbrough, 922 F.2d at 462; United States v. Pierce, 893 F.2d 669, 673 (5th Cir. 1990); Pleasant, 876 F.2d at 797.  

144. See supra note 61 and accompanying text. If the Chicago Police know of and acqui-
esce in Father Clements' video surveillance activities, would there be a sufficient relationship to make Father Clements and his supporters agents of the police?  


148. United States v. Koyomejian, 946 F.2d 1450, 1457-59 (9th Cir. 1991), vacated, 970 F.2d 536 (9th Cir. 1992).
However, in a rehearing *en banc*, the Ninth Circuit vacated this decision and held that video surveillance is not regulated by the 1986 Act.¹⁴⁹

This result is disturbing because it indicates a loophole in the right of privacy. Camcorders, now widely available, provide any citizen with a means of gathering distinctly damaging evidence. Amateur videotapes may provide a basis for criminal charges regardless of any invasions of privacy occurring while shooting the tape. If the same citizen bent on gathering evidence were to eavesdrop using a directional microphone or a wiretap, the controls and sanctions of the 1986 Act would apply to prevent admission of any evidence gathered and impose civil and criminal penalties.¹⁵⁰ Yet video cameras, a potentially more intrusive technology, escape the explicit regulations of the Act.

VI
Suggestions for the Future

Camcorders may represent only one facet of an information revolution that is changing modern society at geometric rates. As weapons in fighting crime, they provide a qualitatively superior means of providing evidence, easily surpassing eyewitness testimony in terms of reliability. The impact of videotape is undeniable, as it leaves little to the imagination. Camcorders may indeed be the outlet for a new breed of vigilantes, acting legally to supplement the limited resources of overburdened law enforcement agencies (who themselves may appear in the viewfinder). *Newsweek*’s cover story on Video Vigilantes has popularly highlighted the growing phenomenon of “high-tech witnesses to crime and corruption,”¹⁵¹ the result of rising frustration about crime along with an increasingly available technological solution. The appeals of videotape advocates like Father George Clements and Peter Gabriel will not fall on deaf ears. If eight out of ten Americans have seen the Rodney King video,¹⁵² and nearly one out of ten American households contain camcorders,¹⁵³ the conjunction of motivation and means foretells a growing body of amateur evidentiary videotapes.

¹⁴⁹. 970 F.2d at 541. See also United States v. Biasucci, 786 F.2d 504, 508-09 (2d Cir.) (Electronic Communications Privacy Act held not to restrict video surveillance), cert. denied, 479 U.S. 827 (1986).

¹⁵⁰. See, e.g., 18 U.S.C. § 2511 (“interception and disclosure of wire and oral communications prohibited”); *id.* § 2511(4)(a)(4) (fines and maximum five-year prison term); *id.* § 2515 (“prohibition of use as evidence of intercepted wire or oral communications”); *id.* § 2520 (“recovery of civil damages authorized”).

¹⁵¹. Beck et al., *supra* note 4, at 42.

¹⁵². *L.A. Beating Tape Affects Other Cases, supra* note 27.

As a means of empowering citizens in our nation and others, camcorders are less dangerous and legally questionable than taking up firearms or baseball bats. One videotape can replace many reluctant witnesses, and avoids human imperfections such as embellishment, fading memory, or intimidation by interested parties. Standard telephoto lenses can provide the distance necessary to keep videotapers away from the action. And self-authentication avoids the problem of a videotaper too frightened of community reaction to testify.

Exciting as its prospects may be, amateur videotape faces significant problems. The price of camcorders, while steadily decreasing, may still prove to be too expensive to put them in the hands of those who might benefit from them the most. Local police, like those in Father Clements's Chicago, may display disinterest or even hostility at the prospect of citizens bombarding them with tape after tape. Not only will police be burdened with a more accurate account of undeniable crimes, but they also may react defensively, because of both the encroachment on their profession and the implication of police departments' ineffectiveness.

On a more fundamental level, taped evidence may not be sufficient to accomplish anything. The outcome in the state trial of the King beating stands as a reminder that seemingly incontrovertible evidence does not guarantee a conviction, and some consider the subsequent federal convictions to be weak solace. There are serious legal questions invoked by amateur videotapes, raising evidentiary and constitutional issues. Will the mere existence of a videotape documenting a suspect's criminal activities suffice for a prosecution? Without other corroborating evidence, most likely it will not.

In terms of privacy, the image of swarms of nosy neighbors brandishing loaded camcorders threatens to make George Orwell's vision of the future perversely accurate, although it will be Little Brother, not Big Brother, who is watching. As George Washington University law professor Johnathan Turley remarked, "Big Brother is now your neighbor . . . . The video camera has made private citizens more of a threat than the government ever was. There are proper uses of a video camera to combat crime. But the laws haven't caught up to the technology. The technology is way ahead." The idea of a new "silver platter" serving otherwise inadmissible evidence to prosecutors conjures up that which we have condemned in our past and in other nations' present. When subtle encouragement to videotape leads to an increase in amateur surveillance, the resulting infringement on privacy may prove as serious as if local police forces mounted video cameras on every street. As Professor

155. McDonald, supra note 101.
Turley further noted, "We were appalled by the fact that the Romanians kept their outdoors—sidewalk cafes, whatever—under photo surveillance . . . . But in this country, our Sonys are doing what the Romanian secret service could never hope to."\(^{156}\)

One simple solution to the potential invasiveness of video technology is to extend to videotaping the protections afforded under the Electronic Communications Privacy Act of 1986. It already forbids wiretapping and eavesdropping; video technology seems a logical extension of its list of regulated techniques for gathering evidence.

VII
Conclusion

The best use of amateur videotapes lies in their value as powerful corroborative evidence. In conjunction with physical evidence, eyewitness testimony, and statements by police investigators, amateur videotapes can provide the final brick in the wall, sealing up a conviction. Questions of mistaken identity, exaggeration of alleged conduct, and conflicting accounts of what occurred can be answered by a videotape. A witness's narrative is prone to embellishment, a characteristic favorable to story-telling but undesirable in the courtroom where the facts are paramount. Videotapes do not embellish or suffer from memory loss; their electronic signals are truly objective. While the issue of context will always surround videotaped evidence, a clear videotape of a crime from start to finish could prove more damaging than confessions, fingerprints, eyewitness accounts, or any other traditional form of evidence.

Videotape's greatest strength is also its greatest potential danger, as the images captured by the cold eye of cameras wielded by private citizens can surface at criminal trials, unhampered by the controls that would exclude the identical images if captured by a government agent's camera. Neighbor could become star witness against neighbor, leaving only civil remedies as recourse.

Videotapes have electrified the American public with images of brutality, lawlessness, and confrontation. Would the public be happy knowing that the cameras could be turned on them? Orwell's Big Brother has fortunately not come to pass, but equally insidious is the notion of a nation of Little Brothers, eagerly taping every intriguing scene they encounter. The current lack of case law and statutory controls on this issue, having fallen behind the rapid pace of technological innovation, has left the door open to alarming invasions of privacy.

\(^{156}\) Beck et al., supra note 4, at 45.