# *NOTES*

## DEFERENCE IN A DIGITAL AGE: THE VIDEO RECORD AND APPELLATE REVIEW

*Bernadette Mary Donovan*[*]

### INTRODUCTION

WHEN firefighters responded to an April 1997 fire at the home of Antonio Franklin, they found the burned and bloody bodies of his grandmother, grandfather, and uncle inside.[1] Several days later, Franklin signed a *Miranda* waiver and confessed to their murders, claiming he had been raped as a child by his uncle.[2] Franklin was charged with seventeen counts related to the murders and pled not guilty by reason of insanity, but he was deemed competent to stand trial after a pretrial hearing.[3] He was tried before a jury, found guilty, and received three death sentences—one for each murder—and ninety-one years imprisonment.[4] On appeal, Franklin asserted as grounds for relief that he had been incompetent to stand trial and that his "erratic behavior" had constituted sufficient "indicia of incompetence" to require the

[*]J.D. expected 2011, University of Virginia School of Law; B.A. 2007, University of Chicago. I owe my deepest gratitude to Magistrate Judge Michael R. Merz of the United States District Court for the Southern District of Ohio, who not only ignited and encouraged my interest in video review, but also continually inspires the legal community with his unwavering intellectual, judicial, and moral rigor. Greatest thanks also to my family, especially Charles, Margaret, Maria, Dominic, and Charles Jr., all of whom have provided incredible love and support this year. A special thanks, as well, to Judge Mary E. Donovan of the Ohio Second District Court of Appeals for her generosity and insight. I am also thankful for the friendship and hard work of the *Virginia Law Review* editorial board, especially Katie Worden, Elizabeth Horner, and Kasey Levit. Finally, my gratitude to John Cheever, who inspired me to write with the observation that "[a]ll literary men are Red Sox fans." All errors are my own.

[1] State v. Franklin, 776 N.E.2d 26, 32 (Ohio 2002).

[2] *Id.* at 33.

[3] *Id.* At the hearing, the defense presented expert testimony that Franklin was a paranoid schizophrenic. Id. at 35.

[4] Id. at 34.

trial judge to order a second hearing sua sponte to ensure ongoing competence.[5] The Ohio State Supreme Court disagreed, characterizing Franklin's behavior during trial (including outbursts, belching, playing with his tie, and forming shadow puppets) as "a pattern of rudeness rather than incompetency to stand trial."[6]

Franklin petitioned for a writ of habeas corpus, and the magistrate judge in the Southern District of Ohio, acting pursuant to 28 U.S.C. § 636(c), reviewed two videotapes: one of Franklin's pretrial competency hearing and one of his trial.[7] Reviewing the former to determine whether the trial judge had erred in finding Franklin competent, the court concluded that "the visual quality of the tape is so poor that it is impossible to ascertain the facial expressions or body language of any of the hearing participants" and that the tape "provides this Court no means by which to critique the trial judge's determination of the witnesses' credibility . . . nor does it allow this Court to assess Franklin's behavior during the hearing."[8]

The court thus deferred to the trial judge's pretrial finding, noting that the videotape did not provide "the benefit of the full panoply of factors that contribute to a credibility calculation, all of which the trial court observed."[9] Reviewing the trial tape to consider whether the Ohio State Supreme Court had erred in charac-

[5] Id. at 35. The ban on trial of the incompetent has been described by the Supreme Court as "fundamental to an adversary system of justice." Drope v. Missouri, 420 U.S. 162, 172 (1975). The obligation to ensure that a defendant is competent is an ongoing one, and "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required . . . even one of these factors standing alone may, in some circumstances, be sufficient." Id. at 180; see also Pate v. Robinson, 383 U.S. 375, 385–86 (1966).

[6] Franklin v. Bradshaw, No. 3:04-CV-187, 2009 WL 649581, at *18 (S.D. Ohio Mar. 9, 2009).

[7] Id. at *15, *18; see also 28 U.S.C. § 636(c) (2006) (allowing parties to consent to the jurisdiction of a magistrate judge designated by his or her court to preside over and enter final judgment in civil proceedings). Four of Petitioner's fifty-one asserted grounds for relief were directly or indirectly related to his ongoing competency: the first ("Petitioner was tried while incompetent"), second ("the trial court failed to conduct a competency hearing when Petitioner's behavior required it"), third ("Petitioner was incompetent during post conviction proceedings"), and fourteenth ("Failure [of counsel] to seek additional competency hearing"). *Franklin*, 2009 WL 649581, at *1.

[8] Id. at *15.

[9] Id.

terizing Franklin's behavior as rudeness, the court found the tape did not constitute clear and convincing evidence to rebut the presumption of correctness under the Antiterrorism and Effective Death Penalty Act of 1996.[10] The court also noted two technical difficulties with the trial tape: the camera's focus was often on parties other than the petitioner, and the subjects of the tapes were unclear.[11]

Franklin filed a motion seeking to provide the court with new or technologically enhanced copies.[12] At a hearing on the video quality, it was determined that only the copies provided to the court were defective.[13] Because Franklin had filed a notice of appeal to the Sixth Circuit, however, the district court had been divested of jurisdiction.[14] Finding that accurate copies were readily available, the court determined that, were the Sixth Circuit to mandate resolution of the case, the competency grounds would be reconsidered in light of the higher quality videotapes.[15] Because the Sixth Circuit did not remand, however, the court never confronted perhaps the most intriguing questions posed by the videotapes. Should they be used to review determinations based on demeanor and behavior, such as competency or credibility, that are traditionally made by the trial judge? Should tapes of an entire trial be reviewed to determine whether sufficient indicia of incompetence existed to require the trial judge to order a second competency hearing, with or without regard to whether the judge had in fact observed such indicia? Should the tapes be analyzed as evidence or considered the record for habeas and appellate purposes?

[10] 28 U.S.C. § 2254(e)(1).

[11] *Franklin*, 2009 WL 649581, at *19.

[12] Franklin v. Warden, No. 3:04-CV-187, 2009 WL 2243384, at *1 (S.D. Ohio July 22, 2009).

[13] Id.

[14] See Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 379 (1985).

[15] *Franklin*, 2009 WL 2243384, at *1. The Sixth Circuit denied Franklin's motion to remand his case, which remains pending and is listed as "being briefed by the parties" as of April 10, 2010. Sixth Circuit Court of Appeals, Pending Cases—Southern District of Ohio, http://www.ca6.uscourts.gov/case_reports/rptPendingDistrict_OHS.pdf at 14 (last visited Apr. 11, 2010). See also *Franklin v. Bradshaw*, No. 3:04-CV-187, 2009 WL 5167764, at *4 (S.D. Ohio Dec. 18, 2009) (granting Franklin a certificate of appealability on some grounds).

It has been almost thirty years since the potential use of videotapes to create trial records sparked the interest of American court administrators, but many questions linger about the impact of such videotapes on issues related to appellate review.[16] While there has been a recent movement towards replacing traditional stenographic techniques for creating the record with video technology, many states continue to use both methods, and the substitution of cameras for stenographers is highly controversial.[17] Presently, no state uses only videotape to create the trial transcript.[18] Two states, Colorado and South Dakota, use only live stenographers without traditional audio or video recording.[19] Recently, however, it has been argued that all jurisdictions should adopt videotapes as the primary official record and that written transcripts should be created only where necessary.[20]

This Note responds to questionable rationales advanced by advocates of the video record in support of the contention that it is necessarily superior to one generated by traditional stenographic techniques. It first examines the current debate over which method of creating a trial record is preferable and summarizes legal issues thus far confronted in jurisdictions using the video record. It then argues that any transition to the video record must be accompanied or preceded by a framework for appellate review that reflects proper regard for accuracy, the role of the trial judge, and differences in perception of a video representation of an event and the event itself.

[16] To place this Note in conversation with recent scholarship, the terminology "video record" as used herein means "an audiovisual recording of proceedings with video and its inherent audio." Keith A. Gorgos, Comment, Lost in Transcription: Why the Video Record is Actually Verbatim, 57 Buff. L. Rev. 1057, 1058 n.2 (2009). However, as will be discussed further, videotapes of court proceedings are not always considered the official record for appeal and are usually transcribed for review. The "video record" terminology is not intended to suggest that it is widely accepted that videotapes of trial currently are (or ought to be) considered official records.

[17] David B. Rottman & Shauna M. Strickland, U.S. Dep't of Justice Bureau of Justice Statistics, State Court Organization 2004, at 207–11 (2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf.

[18] Id.

[19] Id. at 207, 210. South Dakota, however, uses digital recording to capture audio. Alaska is the only state that uses audio recording in lieu of both a video record and a court stenographer. Id. at 207.

[20] Gorgos, supra note 16, at 1127–28.

Part I examines the current state of the debate, focusing on the history of video recording in the courtroom and major points of contention between advocates of the video record and advocates of stenography, including cost and accuracy. Part II presents a comprehensive overview of the legal issues courts have encountered as a result of the video record, focusing on those pertaining to appellate review.

The central conclusion of Part II is that the video record is most effectively used to answer discrete questions of fact about events that occur during trial and would not be reflected in the stenographic record, usually because the relevant facts are not verbalized by any of the parties to the litigation. In contrast, questions of law that rely in part on the judicial interpretation of visual information are, for theoretical and practical reasons, not as effectively subjected to video review. Some of the reasons for this conclusion are legal (for example, deference to credibility determinations and the values of efficiency and finality), and some of the reasons relate to how perception of events on video differs from perception of the events themselves (for example, limits on visual scope, the possibility of overvaluing, and the tendency of humans to perceive the focal subject of a video as the primary cause of events that unfold). Part II then synthesizes the lessons learned from the case law and proposes a theoretical framework for future review of video records on appeal.

## I. VIDEO OR STENOGRAPHY: THE STATE OF THE DEBATE

### *A. The History of the Debate*

Every federal district court is required to have at least one court reporter, and "[e]ach session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference" and the assent of the presiding judge.[21] Because of the necessity of a "complete and accurate historical account of trial court proceedings for appellate review,"

[21] 28 U.S.C. § 753(a)–(b) (2006).

court reporting has been described as "fundamental to American jurisprudence," and some form of reporting is used in every state and federal jurisdiction.[22] Traditionally, court reporting consisted of a live person generating a transcript in shorthand (the traditional definition of stenography), but technology has altered this model in two fundamental respects: some developments have altered how stenographers create a transcript, and others have replaced stenographers altogether.[23]

Stenography has been used to record events and testimony in the courtroom since the 1800s. The first use of cameras to record a trial for reporting purposes occurred as part of a 1968 experiment in Illinois.[24] In 1982, Kentucky became the first state to use video cameras to produce the official trial record and has since moved entirely to a video-based system.[25] By the early 1990s, experimentation with the video record had become more widespread, often with the explicit goal of replacing stenographers, causing court reporters to organize in response.[26] By 1992, Kentucky's system treated videotapes as the official trial record and did not even require written transcription for appeal, instead using specific times on the official trial videotapes as citations to the record.[27] Other states followed Kentucky's lead in the early 1990s. North Carolina implemented a similar system, Michigan allowed each chief circuit judge to decide whether to videotape trials, and a

[22] William E. Hewitt & Jill Berman-Levy, Nat'l Ctr. for State Courts, Computer-Aided Transcription: Current Technology and Court Applications 3 (1994), available at http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/tech&CISOPTR=0.

[23] Id. at 4.

[24] Georgi-Ann Oshagan, Videotaped Trial Transcripts and Appellate Review: Are Some Courts Favoring Form Over Substance?, 38 Wayne L. Rev. 1639, 1641 (1992).

[25] Id.; Brian Miller, Court Reporting: From Stenography to Technology, Gov't Tech., Mar. 1, 1996, available at http://www.govtech.com/gt/articles/95570.

[26] Oshagan, supra note 24, at 1641–44.

[27] Id. at 1643, 1643 nn.28–30 (citing Special Rules of the Circuit Court, Ky. R. Ct. 98(3), (4)(a) (West 1992)). Ky. R. Civ. P. 98(2)(a) provides:

> Video Recordings. The official record of these court proceedings shall be constituted as follows: 1. two (2) videotape recordings, recorded simultaneously, of court proceedings . . . . Upon the filing of a notice of appeal, one of the two video recordings, or a court-certified copy of that portion thereof recording the court proceeding being appealed shall be filed with the clerk and certified by the clerk as part of the record on appeal. The second video recording, or a court-certified copy of that portion thereof recording the court proceeding being appealed, also shall be retained by the clerk.

New Jersey committee formed by the state supreme court recommended that video technology be used in less complex litigation.[28] Michigan courts require and New Jersey courts prefer, however, a written transcript, in addition to a videotaped record, on appeal.[29]

Court reporting today takes a multitude of forms, and the addition of video has by no means been the only development in reporting technologies since shorthand transcription. The category of electronic recording, as opposed to stenography, encompasses audio recording, video recording, and digital recording (essentially annotated, searchable audio). "Stenomask," or "voice writing," involves the real-time transcription of words heard and repeated by the reporter into a voice-silencing mask. This method has been adopted in twenty-five states because it is convenient and cost-saving, since it does not require subsequent transcription.[30] Stenomask is also the only form of court reporting that is not technically a "species of two basic methodologies: stenography and electronic reporting," because it does not involve traditional shorthand, but does require a live reporter to provide the input.[31]

Computer-aided transcription ("CAT") is the primary mode of modern stenographic reporting and exists in three primary forms: "basic," "real-time reporting," and "real-time reporting practiced in a 'computer-integrated courtroom.'"[32] "Basic" CAT involves a

[28] Oshagan, supra note 24, at 1642–43.

[29] Id. at 1642–43, 1643 n.22. "As of 1993, only eight states permitted non-transcribed videotaped records on appeal. . . . Kentucky is well known for its expansive use of non-transcribed videotape records." Fredric I. Lederer, The Effect of Courtroom Technologies on and in Appellate Proceedings and Courtrooms, 2 J. App. Prac. & Process 251, 256 (2000) (footnote call omitted).

[30] Rottman & Strickland, supra note 17, at 207–11; Gorgos, supra note 16, at 1066–67.

[31] Hewitt & Berman-Levy, supra note 22, at 3. Court reporters also have a notable role in Communication Access Realtime Translation ("CART"), which is a "word-for-word speech-to-text interpreting" system for the hearing impaired explicitly mentioned in the Americans with Disabilities Act ("ADA"). Am. Judges Found. & Nat'l Court Reporters Found., Communication Access Realtime Translation (CART) in the Courtroom: Model Guidelines 4 (2002), http://ncraonline.org/NR/rdonlyres/891C9BAD-1A28-4298-AB6B-D6569196ACAD/0/CARTModelGuidelines.pdf. Although the ADA is not applicable to the federal court system, "in 1996 the Judicial Conference of the United States 'adopted a policy that all federal courts provide reasonable accommodations to persons with communications disabilities.'" Id. CART is similar to captioning for television and video. It is considered a distinct specialty but is also taught at court reporting schools. Id.

[32] Hewitt & Berman-Levy, supra note 22, at 4; Gorgos, supra note 16, at 1067–68.

computerized recording of stenographic input but not real-time transcription, and it was already outdated by the time a 1994 National Center for State Courts study concluded that CAT was preferable to traditional stenographic techniques.[33] "Real-time reporting" CAT, in contrast, consists of one "non-contingent" computerized process that both records and transcribes, thereby producing a real-time transcript.[34] The third form, "real-time reporting practiced in a 'computer-integrated courtroom,'" allows the immediate transcription to be shared by others in the courtroom, most notably the judge, through a computer network.[35] This form of court reporting has obvious advantages, including "backward and forward scrolling, marking text, creation of separate files, and word searches and marker searches."[36] These features allow the judge to read pertinent testimony before ruling on motions, ensure important matters are preserved for appeal, and obtain access to court reporters' notes.[37] Such developments have not, however, proved sufficient to suppress the increasing use of cameras to create a video record of trial.

In the early stages of courtroom video technology, the Third and Fifth Circuits participated in a Federal Judicial Center experiment using videotapes "as the primary medium for reviewing proceedings in the event of an appeal or motion calling for such review."[38] While the results indicated that there was "almost no support for the use of videotape in lieu of transcript on appeal," the report noted that this was due largely to the time-consuming nature of the process and that many judges still supported the creation of a video record.[39] Over time, the video record has become more popular, and a plurality of jurisdictions today implements at least some trial recording.[40] What was originally bulky equipment has become less

[33] See Hewitt & Berman-Levy, supra note 22, at 3–4.
[34] Id. at 4.
[35] Id. at 4, 6, 57.
[36] Id. at 57.
[37] Id. at 74–77.
[38] Memorandum from John Shapard, Fed. Judicial Ctr., to Judicial Conference Comm. on Court Admin. and Case Mgmt. 1 (May 25, 1993), www.fjc.gov/public /pdf.nsf/lookup/ 0021.pdf/$file/0021.pdf.
[39] Id. at 2–3.
[40] A 2004 analysis of data compiled from all states and territories indicates that two use only stenographic reporting methods (including the aforementioned computerized methods), twenty-one use stenographic and audio methods, one uses only audio,

cumbersome, multiple cameras in the courtroom have ostensibly eliminated the problem of limited camera angles, and formatting advancements such as DVD have made video records easier to navigate.[41]

Court reporters have, understandably, viewed visual recording technologies as a threat to their role in the courtroom and have altered training and certification programs in hopes of carving out a new niche for the profession. The need for the court reporting profession to launch an aggressive adaptive response to video technologies was highlighted in a 2002 report by the National Court Reporters Association ("NCRA") that attributed the decline in educational enrollment to three main factors: "[m]edia reports regarding the future of the profession, predicting its imminent replacement by alternative technologies; [n]egative media reports on reporter performance in high-profile cases . . . ; and [n]egative statements from current reporters on declining financial opportunities and working conditions."[42] In 2004, an NCRA background paper distinguished modern electronic recording from the technological experiments of the past, noting that "[e]lectronic recording in the courtroom . . . is not only here to stay, but likely to continue to grow so long as budget constraints plague our legal system."[43] Noting that many people in the stenographic community would argue that there is no place for electronic recording in the courtroom,

and twenty-four use a combination of stenographic, audio, and video methods. Notably, no state or territory uses only video for court reporting. Ohio uses only audio, video, and the stenomask. Maine, Oklahoma, and Puerto Rico did not respond to the survey completely. Rottman & Strickland, supra note 17, at 207–11.

[41] Gorgos, supra note 16, at 1075–78.

[42] Nat'l Court Reporters Ass'n, The Status of Reporter Education: Trends and Analysis 4 (2002) (revised 2003), http://ncraonline.org/NR/rdonlyres/8CAC20BC-7438-4D6E-8E80-5BCDD4C9E103/0/SchoolRptStarRev.pdf [hereinafter NCRA, Education].

[43] David Ward, Nat'l Court Reporters Ass'n, The State of Electronic Recording in the Courts: A Background Paper 2 (2004), http://technology.ncraonline.org/NR/rdonlyres/806906B5-0411-4971-86DF-A72B23A2CC25/0/ERBackgroundPaper.pdf. The background paper also quotes the observations of Steven Townsend ("president of FTR Limited . . . , a leading provider of electronic recording systems in North America") that "even the states most resistant to electronic recording . . . have it in some parts of their judicial system" and that recent estimates indicate that such recording methods are present in "about 50,000 rooms, of which 35,000 are judicial courtrooms and the remaining are hearing rooms such as labor relations hearing rooms." Id. Roughly 5000 of these courtrooms were estimated to be outfitted with video. Id.

the paper considered the idea that there may be a "limited role" for recording where a shortage of reporters exists or where the relatively trivial nature of the proceeding makes it unlikely that a transcript would ever be required.[44]

The NCRA expanded upon these themes in a position paper, asserting that "[c]ourt reporters have been ahead of the rest of the legal system in applying digital technology in the workplace" and that "[e]mbracing technology that supports and enhances the efficient operations of the courts is one thing; naïve dependence on technology and the elimination of human judgment and wisdom is quite another."[45] Court reporting professionals have also focused on the development of Certified Legal Video Specialist positions, arguing that "[w]ithout a transcript videotape is just a jumbled stream of magnetic particles on plastic."[46] Despite the idea that there may be scenarios where electronic reporting is either a preferable or a necessary supplement to stenography, the court reporting community continues to contest two central premises asserted by advocates of electronic reporting: that video reporting systems are cheaper than live stenographers and that they are more accurate.[47]

### *B. Policy Issues*

#### *1. Cost*

The two most forceful arguments in favor of the replacement of stenographers with video cameras are that electronic reporting is

[44] Id. at 3. This limited conclusion, however, is anything but enthusiastic and may be largely informed by shortages of court reporters experienced in many jurisdictions: "[M]ost court systems seem comfortable with the concept of using electronic recording in divorce, traffic, family, and similar lower-level court proceedings. Yet, there are certain weaknesses regarding electronic recording that cannot be rectified even when the environment is considered." Id. The paper also notes the possibility that the shortage of court stenographers is being caused by the fear of impending obsolescence generated by the rise of video technology, and not vice versa. Id. at 7.

[45] Nat'l Court Reporters Ass'n, Electronic/Digital Video Recording, http://technology.ncraonline.org/tech_articles/ElectronicDigital (last visited Feb. 15, 2010) [hereinafter NCRA, Video Recording].

[46] Brian Clune, Nat'l Court Reporters Ass'n, The Written Record is Key to New Technology, http://clvs.ncraonline.org/Articles/record.htm (last visited Feb. 15, 2010).

[47] Gorgos, supra note 16, at 1075, 1120–21.

more cost-effective than a human reporter and that it is more accurate. The two primary reasons that video recording may be more cost-effective are the possibility of amortizing the cost of expensive electronic systems over a number of years and the proposition that "it is less expensive for litigants to obtain a copy of a video record than it is to obtain a transcript."[48] Both of these rationales, however, are the subject of considerable dispute. For example, although one court administrator has argued that "[e]lectronic recording is a one-time cost one-quarter to two-thirds that of one year's salary for a court reporter," resulting in savings compared to salary costs,[49] the obvious and unanswered question (according to NCRA) is "how much of those costs were shifted to the litigants" rather than eliminated altogether.[50] This question is even more important if, as was the case for Antonio Franklin, a written transcript is required by the appellate court but the grounds for appeal rest solely or primarily on the existence of a video record. Not only are the costs of transcript preparation merely shifted to the attorneys and their clients, but review of the videotape may require a substantial amount of time and add legal fees to those already incurred by parties to the litigation. While the vast majority of appellate courts require a written transcript, the increasing tendency of courts to allow review of the video record for extra-testimonial information (discussed in Part II) may mean that attorneys will consider viewing the entire trial tape as a necessary component of ensuring all legal avenues are exhausted, which could lead to increased appellate costs across the board.

Presumably, the greatest opportunities for cost-saving (as opposed to cost-spreading) are in relatively trivial hearings that are unlikely to be appealed.[51] Because a written transcript will often not be required in these cases, it is theoretically possible to simply store a copy of the videotape and never incur a transcription ex-

[48] Id. at 1075–76.

[49] Ward, supra note 43, at 5.

[50] Id. The NCRA also quoted an assertion by Vicki Akenhead-Ruiz, a past NCRA president and New Mexico court reporter, that "it takes three to four as many hours to produce a transcript from a tape as from a court reporter," indicating that costs may not only be shifted, but also increased in the process. Id. at 7.

[51] See id. at 3–4.

pense for any party, although storage itself may be expensive.[52] There may be hidden costs, however, associated with video recording systems that are not yet fully appreciated. For example, the maximum life span of a videotape is thirty years and deterioration occurs consistently and gradually as a tape ages. Such natural deterioration is compounded by factors such as mold, chemicals, air quality, temperature, magnetic fields, and inadequate storage facilities.[53] To elongate the life span of videotapes, it is necessary to invest in adequate facilities and equipment for preservation, monitor environmental conditions, and make a new copy of the tape before it has materially deteriorated if ongoing availability is important.[54] Copying may instead take the form of conversion to a new electronic format, given the rapidity with which visual technologies become obsolete. If, for example, a jurisdiction justified the replacement of stenographers with video technology based on the amortization of the cost over twenty years, the technology might become obsolete before the period of amortization elapses, requiring both new equipment and training and conversion of old records. The potential for such hidden costs means not only that the cost-saving benefits of video technology may have been overestimated, but also that they have been overestimated in part because the amortization periods assigned by court administrators are unrealistically long.

Jurisdictions may consequently be faced with a difficult choice: invest in replacement technology that may rapidly become obsolete or continue to invest in the ongoing copying and storage of videotapes. While proponents of electronic recording have noted that DVDs may be an even more cost-effective method of reporting than videos (because of lower storage costs and ease of navigation for attorneys), a format switch could potentially reduce expenses external to court administrators while increasing internal costs for those jurisdictions that have already invested in video

[52] As noted by Steven Townsend, "[t]he fact is, something in excess of 80 percent of all proceedings that go on in this country that are recorded are never accessed again for any reason. It's recorded and it goes on a shelf some place." Id. at 2–3.

[53] Peter Z. Adelstein, Image Permanence Inst., IPI Media Storage Quick Reference 1, 5–7 (2004), http://www.imagepermanenceinstitute.org/shtml_sub/msqr.pdf; Mona Jimenez & Liss Platt, Tex. Comm'n on the Arts, Videotape Identification and Assessment Guide 37–39 (2004), http://www.arts.state.tx.us/video/pdf/video.pdf.

[54] Adelstein, supra note 53, at 1–2, 5–7.

technology. Such transitions will thus not necessarily serve the budgetary ends that most propel the electronic reporting movement.[55] Similarly, the initial amortization will not typically account for repair or maintenance expenses.

Because of the novelty of electronic reporting and the rapidly developing nature of related technologies, it is not yet clear how greatly the costs of storage, maintenance and repair, obsolescence, and transition will impact budgetary projections. The NCRA's position on electronic reporting, however, is made tenuous by a current crisis in the stenography profession: concerns about the costs associated with employing stenographers inform the movement towards electronic reporting, but the profession is also experiencing difficulty attracting enough students to staff courts, in part because of the perception that reporters are underpaid in comparison to their educational investment. Despite noting that budgetary concerns are the primary motivation for the transition to electronic reporting, the NCRA has been forced to concede that a shortage of reporters also contributes to the problem.[56] And, while the NCRA has attributed declining enrollment in professional schools largely to negative press and fear that the profession will become obsolete, salary concerns are also central to the debate.[57] As the NCRA has noted,

> The challenge in filling reporter positions is often driven not only by location, in which there may be a shortage of reporters in a specific area of the country, but also by the fact that the income potential does not match the qualifications and skills of a highly trained court reporter.[58]

If the problem with stenographers is that they are both too expensive and too scarce, and the only way to fix the scarcity problem is to increase the cost, the stenographic profession has a dilemma that

[55] See Gorgos, supra note 16, at 1075–76 (recounting the potential cost savings realizable through the transition to DVD); see also Ward, supra note 43, at 6 (observing that, while costs are the primary motivation behind the movement away from stenography, "much of the current growth in the [electronic reporting] industry is coming from not court systems making the move from live court reporters to [electronic reporting], but rather from courts upgrading . . . from analog tape to digital recording").

[56] Ward, supra note 43, at 2–3.

[57] Id. at 7; NCRA, Education, supra note 42, at 4–5.

[58] Ward, supra note 43, at 3.

would seem to require either acceptance of supplementation or replacement, or a reduction of educational costs sufficient to maintain or lower salary expectations.

*2. Accuracy*

A second popular argument in favor of the video record is that it is more accurate than stenographic reporting. Proponents of electronic reporting methods note several distinct problems of accuracy inherent in the stenographic system: "human error and decision-making in general and . . . the limitations of the written medium."[59] The former consists of both unconscious errors and conscious decisions, while the latter consists primarily of practical difficulties in transcription.[60] Unconscious, accidental errors may be divided into those that are obvious and those that are not.[61] For obvious human errors, proponents of the video record argue that the availability of a videotape could easily end debates about the proper content of the transcript. Many unobvious errors may be "form errors," not "content errors," and thus do not "significantly alter the meaning of the utterance"; however, proponents of the video record have argued that the ramifications of one misunderstood word have, so far, been underappreciated.[62] Conscious deci-

[59] Gorgos, supra note 16, at 1080–81.

[60] Id.

[61] Id. at 1081.

[62] Id. at 1082–85 (citing William Gillespie & Gary Shank, Jefferson Audio Video Sys., Inc., Technological Innovation and the Quality of Court Records: Comparing Accuracy of Automatic Videotape Recording Systems with Court Reporters (2002), http://web.archive.org/web/20030207124536/http://javs.com/courts/feedback/gillespie_shank.html). Gorgos cites "twenty-three content errors and seven hundred and eighty-three form errors" found in this study, which compared two transcripts from one trial: one generated by a live stenographer, the other transcribed from the video record. Id. at 1084–85. Two individual "verifiers" checked the transcripts against each other and, "since each verifier was allowed to check and re-check his/her work, no rater effects were tested." Gillespie & Shank, supra. There are several reasons to think the results of this study might not be capable of generalization: (1) the sample size was one trial, with transcription limited to "spontaneous oral testimony," (2) the study was commissioned and designed by Jefferson Audio Video Systems, Inc. in support of its product line, and (3) the study design does not control for the possibility that the transcript derived from the video record might contain errors, or that the individual viewing the video record may have misperceived the word or phrase marked as an error, not the stenographer who produced the written transcript. See id. Aside from the ability to rewind the tape if a word or phrase was unclear, there is no apparent reason to as-

sions that may impact accuracy include discretion about choice and location of punctuation, and parenthetical descriptions such as "[laughs]" that indicate a vocalized but nonverbal expression.[63]

Proponents of the video record also argue that it is more accurate than stenographic transcriptions because of the ability to perceive events, rather than words removed from their context, and the ability to see body language and other forms of nonverbal communication.[64] In addition to the limitations of the written transcript relating to courtroom events and nonverbal communication, stenographic records also do not reflect "paralinguistic features such as quality of voice . . . , variations in pitch, intonation, stress, emphasis, breathiness," and other elements of speech.[65] "Paralinguistic features," however, are generally not a problematic omission from the transcript if one believes that these aspects of speech are relevant to the weight and credibility given to testimony, not to its content, for appellate purposes.[66]

Of these proposed types of inaccuracies, content errors are by far the most serious because they alter the meaning of the words that were actually stated. It is not clear, however, that such inaccuracies are any less likely to occur during the process of generating a written transcript from the video record for appellate purposes than they are when a live stenographer produces the written transcript. While an appellate judge could presumably view the videotape to ensure the proper word has been transcribed, three general faults exist with this approach. First, an appellate judge would have to realize the need to check the video record, which is only likely where the transcription is unintelligible (as opposed to where its incorrectness is not facially evident). Second, the videotape may be unclear or susceptible of multiple interpretations. Third, the origi-

sume that the aural perceptions of the videotape reviewer were more accurate than those of the in-court stenographer. By treating the transcript generated from the video record as the "answer sheet" against which the stenographic transcription was measured, the study necessarily assumed some of its conclusions.

[63] Gorgos, supra note 16, at 1100, 1104–05.

[64] Id. at 1111–13.

[65] Id. at 1116–17.

[66] There have been instances, however, where appellate courts have considered these features (primarily in the context of utterances made by parties to the litigation) in order to determine questions such as prejudice. These types of reviews are discussed more thoroughly in Part II.B.

nal transcript may be correct, and the judge's interpretation of the videotape may be incorrect.[67]

The NCRA has also argued that there are ways in which stenographic reporters may ensure accuracy better than a video record. Distinguishing between the recording of sounds and words, the NCRA asserts that "[w]hen several participants in the proceeding speak at once, or there is a great deal of background noise, inaudibles are common, bringing the recording's value and integrity into question. Similar problems arise because what a video camera will record depends on what sounds courtroom microphones acquire."[68] Although proponents of the video record believe that "[a] major benefit of the video camera is that it has limited intelligence" and thus "[i]nterpersonal factors cannot affect its performance," stenographers may improve accuracy through interpersonal interactions because "[r]ealtime court reporters can stop the proceedings to ensure an accurate record is made."[69] Expanding upon this idea, the NCRA asserts that "stenographic reporters can help manage the court proceeding, stepping in when several people are speaking at once to ensure the accuracy and integrity of the record" and "can also interrupt when a lawyer, judge, or witness is speaking too low or too quickly . . . to ensure an accurate transcript."[70] Furthermore, the NCRA notes that live transcription in a computer-integrated courtroom environment allows the judge to view the transcript as it is created, adding an extra level of oversight to its creation.[71]

What is perhaps most striking about the debate over accuracy is that both types of transcripts have the potential to serve as checks on each other: a review of the written transcript could be beneficial when inaudible portions occur on a videotape, and a review of the video record could be helpful when the phrasing of a written tran-

[67] There may even be reason to suspect that a highly trained stenographer is more likely to correctly perceive speech in a live courtroom than a judge is to correctly perceive the same during review of a video record. Ward, supra note 43, at 4 (noting the presence of live stenographers allows for contextualization).

[68] NCRA, Video Recording, supra note 45.

[69] Gorgos, supra note 16, at 1120; NCRA, Video Recording, supra note 45. One response to this argument, however, is to question the frequency or confidence with which court reporters in fact interrupt proceedings.

[70] Ward, supra note 43, at 4.

[71] Id.

script indicates that it may be erroneous. However, neither possibility can rest entirely on the primacy of one modality over the other; necessarily, there will be occasions where the written transcript more accurately represents the occurrences (including verbal events) than the video record, and vice versa. Similarly, in some circumstances it will be clear which record is accurate, and on other occasions it will be debatable; there will always be a question as to how discrepancies should be approached. While video recording has improved in many ways since its introduction (for example, in the development of moving camera angles, accessibility, navigability, and decreased systems failures), the argument that video is more accurate relies heavily on the proposition that difficulties with inaudibility and "cross-speech" have been cured by newer systems. While proponents of the video record argue that different individuals may be assigned to separate microphone-linked "sound channels" in cases of cross-speech, often such confusion occurs when multiple individuals are near the same microphone and thus are not assigned to separate channels (for example, at a sidebar).[72] It is also important to note that the superior accuracy of the video record depends on technological developments that have occurred since the installation of many systems, bolstering the argument that measuring the cost of electronic recording by the initial investment tends to underestimate the true price tag. However, in a long-term cost-benefit analysis, the technology may develop to a point at which the accuracy of existing systems outweighs any benefit to be gained from continued investment in new technology.

## II. LEGAL ISSUES AND THE VIDEO RECORD

As illustrated in Part I, the debate between proponents of the video record and advocates of traditional stenographic methods is by no means settled. Nonetheless, several factors indicate that the future will bring increased reliance on the video record: the general tendency towards technological development, decreasing costs and increasing sophistication of electronic recording technologies, and the fact that stenographers' salaries are too low to attract students and too high for court administrators' budgets. With the court system nearing thirty years of experience with video reporting tech-

[72] See Gorgos, supra note 16, at 1078–79.

nology, Part II of this Note outlines the problematic legal aspects of video records that courts have encountered thus far.

### *A. Credibility*

Although an early study of video records commissioned by the Federal Judicial Center indicated little support for their adoption, the study's author concluded that "possible advantages of videotape recording should be kept in mind. . . . [T]he visual record of proceedings may in some cases, albeit extremely few, prove valuable. Where conduct must be seen to be adequately appreciated, the videotape will afford a reviewer with such appreciation."[73] One area of the law for which the implications of the video record have been considered is appellate review of credibility determinations.[74] There are several schools of thought about how videotaped trial records might or should alter such review. One view is that deference to credibility determinations is no longer necessary with the advent of video technology:

> Appellate courts defer to trial court findings of fact because the trial court views witness demeanor. In the case of jury trials, appellate deference is further justified by the special role of the jury as the community's fact-finding representative. That justification does not apply to bench trials. Accordingly, simple logic suggests that if technology permits us to replicate for the appellate court what the trial judge observed, we ought not to persist in such deference.[75]

Even if perceived as unnecessary because of the video record, deference still serves goals of finality and efficient use of judicial resources; thus, while there is opportunity for alteration of the appellate standard, the use of video recording by no means compels such change. In fact, the Supreme Court has stated reasons for def-

[73] Memorandum from John Shapard, supra note 38, at 5.

[74] See Robert C. Owen & Melissa Mather, Thawing Out the "Cold Record": Some Thoughts on How Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review, 2 J. App. Prac. & Process 411, 412 (2000); Mimi Samuel, Focus on *Batson*: Let the Cameras Roll, 74 Brook. L. Rev. 95, 114–15 (2008); Adele Hedges & Robert Higgason, Videotaped Statements of Facts on Appeal: Parent of the Thirteenth Juror?, Hous. Law., July/Aug. 1995, at 24, 25.

[75] Lederer, supra note 29, at 259–60 (footnote call omitted).

erence to the trial judge that apply regardless of whether the record is written or videotaped: "The trial judge's major role is the determination of fact, and with experience . . . comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources."[76] The Court proceeded to note that the visual perceptions inherent in credibility determinations entitled them to "*even greater* deference" than other findings of fact.[77] The Supreme Court has thus indicated that the standard of deference is not a necessary evil that follows from the lack of appellate visual access to the courtroom; rather, the logic supporting deference is merely bolstered by the practical circumstances. At most, video recording might eliminate the need for "greater deference" and equalize credibility determinations with other findings of fact; the Court's primary rationales for deference would remain. Similarly, deference to the trial judge's role as fact-finder serves an important function in the creation of precedent:

> While a second opportunity to detect and "preserve" error on appeal may be valuable to some litigants, this runs counter to the traditional and fundamental distinction between trial and appellate courts. The historic method by which precedent is created may be inalterably damaged by the subtle psychological shifts resulting from the move from a verbal to a visual record. Our appellate jurisprudence is based on the concept that because the appellate judge was not present during the witness's testimony, the benefit of the doubt must always be given to the factfinder. Furthermore, deference to triers of fact lends a greater universality to the body of appellate decisions; fine-tuning the decisions of

[76] Anderson v. City of Bessemer City, 470 U.S. 564, 574–75 (1985). Obviously, it is possible that the existence of video technology could increase the potential for improved accuracy in determining facts on appeal; however, the Court also relied on the experience of trial judges in making such determinations and the potential for waste of judicial resources. Any increase in the experience of appellate judges in factual determinations would imply an increase in the use of judicial resources, so opening the gates for myriad factual disputes at the appellate level would solve only the former problem while exacerbating the latter.

[77] Id. at 575 (emphasis added).

> the trial court would lead to a diaspora of reasoning much more difficult to apply in predicting future rulings.[78]

A Tennessee court applied similar reasoning in *Mitchell v. Archibald*, one of the few appellate cases to deal with the question of whether to review a witness credibility determination.[79] The *Mitchell* court declined to review testimony despite the existence of an audio record, citing the Supreme Court's reasoning in *Anderson v. City of Bessemer City*. The *Mitchell* court further noted the policy rationale asserted in the 1985 advisory committee note to Federal Rule of Civil Procedure 52(a), which "lists three important policy concerns behind the rule: (1) upholding the legitimacy of the trial courts to litigants; (2) preventing an avalanche of appeals by discouraging appellate retrial of factual issues[;] and (3) maintaining the allocation of judicial authority."[80] The *Mitchell* court also determined that the videotapes, affording only a limited view of the courtroom, were too restricted in scope to provide for a reweighing of witness testimony.[81]

While proponents of the video record have noted that current systems now include a bank of cameras that focus on different areas of the courtroom, the voice-activated nature of these cameras usually implies that only a single camera is recording at a specific time, meaning that the viewer of the video record will often still lack sufficient knowledge regarding what is occurring off-camera to evaluate the context of a witness's behavior.[82] Thus, while the scope of coverage has been expanded in the sense that a trial record now incorporates various areas of the courtroom, the focus of the camera is still limited in scope at any given time. Finally, the court in *Mitchell* determined that the reweighing of credibility determinations where an audio record exists would unfairly provide a subset of potential appellants with a ground for relief not available to the majority, and the possibility of technical failure in the creation of

[78] Hedges & Higgason, supra note 74, at 27.

[79] Mitchell v. Archibald, 971 S.W.2d 25, 26 (Tenn. Ct. App. 1998).

[80] Id. at 29. While Rule 52(a) has since been amended, the amendments are technical and do not affect the reasoning of the advisory committee regarding constraining appellate review. See Fed. R. Civ. P. 52(a).

[81] *Mitchell*, 971 S.W.2d at 29–30.

[82] Gorgos, supra note 16, at 1078–79.

tapes could unjustly bar a portion of that subset from asserting similar grounds.[83]

In a telling footnote, the *Mitchell* court distinguished reviewing credibility determinations from using audio records "either to point out other errors in the trial proceedings . . . or to provide concrete, clear, and convincing evidence that a trial court's conclusions regarding a witness's credibility were erroneous."[84] Given the reasons elucidated by the Supreme Court for deference to credibility determinations, however, it is difficult to imagine what would rise to the level of clear and convincing evidence based on review of the videotapes. As a general proposition, the trial judge's experience with credibility, the values of judicial efficiency and finality, and the limited context provided by a video record militate against the use of the video record to expand upon the current appellate role or to abrogate the tradition of deference to the trial judge's determinations.

### *B. Testimonial vs. Nontestimonial?*

A similar view to that of the *Mitchell* court, not inconsistent with the Supreme Court's analysis in *Anderson*, is that whether and how videotaped trial records are used should depend on the specific content of the tape and the legal questions it is being proffered to resolve. Under this view, there is an important distinction not only between videotaped evidence and videotaped events at trial, but also between "video[s that] would enhance [and videos that would] detract from the court's appellate function given the nature of the legal question before the court."[85] Especially pertinent to the latter analysis, it has been proposed, is "whether the video contains testimonial or non-testimonial evidence and, thus, whether it contains evidence that has an effective non-video analogue."[86] Videotapes proffered as nontestimonial evidence not only "provide[] information that is not as likely to have been captured in a stenographic transcript" but also "will generally not be matters for the jury to

[83] *Mitchell*, 971 S.W.2d at 30. These possibilities necessarily raise questions about fairness and the equal administration of justice.

[84] Id. at 30 n.7.

[85] Samuel, supra note 74, at 111.

[86] Id.

assess . . . thus, the concern that a court will intrude upon the province of the fact-finder . . . is reduced."[87] Under this analysis, credibility determinations remain the province of the finder of fact because they are testimonial in nature, and the inability or refusal of the appellate court to view the testimonial evidence "does no harm to the litigants. . . . because the court has an effective non-video analogue: the stenographic transcript."[88] Events that occur during trial but that are not part of testimony, in contrast, would be susceptible to review.

There is little case law dealing with such "nontestimonial evidence." One example is the determination of a California court that a trial videotape appended to the transcript was not a component of the appellate record where the videotape was proffered to demonstrate, inter alia, that "the trial court spent only 43 seconds examining six documentary exhibits" and that there was at one point "'a very telling silence on the part of the court.'"[89] Describing the transition to video recording as "probably inevitable," the court asserted that "[t]he rules of court do not address the most important implication": the impact on appellate review.[90] Asserting that the primary rationale for a constrained scope of review is the trier of fact's advantage of visual perception, the court nonetheless concluded that:

> A drastic change in the principles of appellate review would be needed before we could base our decisions on appeal on our own evaluation of the sights and sounds of the trial courtroom. Because of the far-reaching implications, any such change must come from the Legislature or from higher judicial authority.[91]

[87] Id. at 115.
[88] Id. at 114.
[89] Moustakas v. Dashevsky, 30 Cal. Rptr. 2d 753, 754 (Ct. App. 1994). I have termed such appellate issues as discrete questions of fact to contrast them with questions of behavioral interpretation (for example, credibility) and questions involving both fact and behavioral interpretation (for example, competency). In this case, however, the issue of how many seconds were spent viewing the exhibits is a question of fact, and the issue of whether or not a "telling silence" occurred would more properly be considered a mixed question.
[90] Id.
[91] Id. at 754–55.

Although the videotape presented a nontestimonial scenario (of judicial misconduct), the court in *Moustakas v. Dashevsky* declined to review the videotape for reasons that apply at least equally to testimonial scenarios such as credibility determinations. Not all courts, however, have declined to distinguish between appellate review of videotapes for the purpose of evaluating testimony and appellate review of videotapes for discerning nontestimonial errors during the course of trial. In discussing *Moustakas*, a Maryland appellate court opined that "[a]s we see it, the California appellate court overlooked the equally important responsibility of an appellate court to apply the clearly erroneous standard to the trial judge's fact-finding."[92] The Maryland court in *Walker v. State* was faced with an abuse of discretion review of a closure order that resulted from a courtroom melee, and because the written transcript was limited to the judge's description of the events after they had occurred, the court reviewed the videotape to determine whether the appellant's right to a public trial had been violated.[93]

The *Walker* court concluded that the trial judge's description of the melee was not completely consistent with the events portrayed in the videotape and, in vacating and remanding the judgment, asserted that "[i]n a sense, the judge relied on her own credibility and reliability as a witness in determining to issue a closure order."[94] The court in *Walker* thus drew a distinction between a trial judge's focused assessment of witness testimony and scenarios where a judge may be more properly thought of as a witness himself, which is tantamount to a distinction between testimonial and nontestimonial evidence. In distinguishing between testimonial and nontestimonial trial occurrences on a theoretical basis, Professor Samuel made a similar observation: "[M]emories, observations, and perceptions [of a trial judge] are not 'evidence' in the legal sense of the term. And, a decision based on personal observation and perception is not necessarily reliable. Therefore, in these cases, the videorecord of in-court events, in fact, is the only 'evidence' available."[95]

[92] Walker v. State, 723 A.2d 922, 926 (Md. Ct. Spec. App. 1999).

[93] Id. at 924–25.

[94] Id. at 925–27, 936.

[95] Samuel, supra note 74, at 119 (footnote calls omitted). For example, Federal Rule of Criminal Procedure 42(a)(1)(C) requires a trial judge to "state the essential facts constituting the charged criminal contempt and describe it as such" for purposes of

*Walker* demonstrates how an appellate court may use a video record not to reweigh testimony but to determine whether a trial judge's action was clearly erroneous based on nontestimonial events that irrefutably conflict with those verbalized for purposes of the written transcript. The *Walker* court cited to its earlier decision in *Suggs v. State* as an example of how this type of review serves the ends of justice "without offending the well-established principles that govern appellate review."[96] In *Suggs*, the court held that comments made by the trial judge about the defendant's attorney were prejudicial to the defendant.[97] A simple but ultimately dispositive issue on appeal was whether the jury was present when the trial judge uttered the prejudicial comments, and the court was easily able to review the videotape to ascertain that it was.[98]

The experience of Kentucky appellate courts in using the video record to review nontestimonial occurrences is similarly instructive. In *Deemer v. Finger*, for example, the Kentucky Supreme Court reversed a malpractice verdict where the video record, reviewed by the plaintiff's attorney after trial, revealed that the judge did not inform counsel of a conversation with the jury forewoman, who indicated she had engaged in inappropriate discussions about the case with her husband.[99] In so holding, the court explained: "We have adopted videotaping technology as a means to further the ends of justice. In the present case, it has revealed a serious trial error which, absent the innovation, might have gone undetected."[100] Both *Walker* and *Deemer* thus reveal how the video record of nontestimonial events may provide the assistance of evidence for which there is no "effective non-video analogue." *Deemer* additionally illustrates how a video record may be useful not only for an appellate court in reviewing a trial court's decision but also for counsel in identifying grounds for appeal.

Similarly, in *Foley v. Commonwealth*, the Kentucky Supreme Court was able to review the video record to determine that the

creating a record. Such observations thus constitute findings of fact, and not "evidence."

[96] *Walker*, 723 A.2d at 925 (citing Suggs v. State, 589 A.2d 551 (Md. Ct. Spec. App. 1991)).

[97] *Suggs*, 589 A.2d at 556.

[98] Id. at n.2.

[99] 817 S.W.2d 435, 436–37 (Ky. 1990).

[100] Id. at 437.

presence of uniformed court security was not prejudicial to the defendant.[101] The court's conclusion was based on the location of the officers and the absence of shackling, discrete questions of fact whose answers would not otherwise have been included in the record.[102] The Kentucky Supreme Court also used the video record to determine, in *USAA Casualty Insurance Co. v. Kramer*, that "the trial judge, in an effort to move the proceedings along quickly, rushed through the formalities which normally follow the close of evidence, and in so doing inadvertently prevented [the prosecutor] from announcing his case was closed and [the defense] from formally moving for a directed verdict."[103] Although whether the judge "rushed" is an issue requiring some interpretation, the question of whether the attorney had time to make his motion can be considered a discrete question of fact. With a written transcript, the cadence and quality of the trial judge's speech would not have been evident, but "because of the unique circumstances surrounding the conclusion of the case at bar," the state supreme court reviewed the issue.[104]

Because Kentucky produces only a video record and does not require a written transcript, it is unsurprising that the Kentucky Supreme Court has declined to ignore visual information that renders soluble assignments of error that could not otherwise be resolved. But the examples noted above may be classified not only as nontestimonial events for which there is no effective non-video analogue, but also as pertaining to discrete questions of fact that cannot be answered without visual access (for example, the course of events during a melee, the location of security officers, and the presence of the jury).

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[101] 953 S.W.2d 924, 939 (Ky. 1997).

[102] Id.

[103] 987 S.W.2d 779, 781 (Ky. 1999).

[104] Id. A somewhat similar issue, presented in *Transit Authority of River City v. Montgomery*, 836 S.W.2d 413, 416 (Ky. 1992), also required interpretation of a judge's behavior; the court found that "[t]he 'body language' . . . , the demeanor, plain physical attitude and tone of voice do not approach or support the vituperative character which appellee attributes to the [trial judge]." *Montgomery*, however, is more similar to a credibility determination in that the meaning of behavior during a trial was analyzed. It thus may be considered an example of how the distinction between testimonial and nontestimonial occurrences for purposes of appellate review may result in overinclusion of nontestimonial events on appeal, and the underinclusion of testimonial occurrences.

### *C. Development of a Theoretical Approach*

The video record provides an appellate court with a more expansive view of the events and testimony that occurred in the trial court. In order to maximize the benefits and minimize the detrimental effects of increased accessibility to visual information, an appellate court could tailor review of the video record to the type of legal issue that arises.[105] One suggestion is that a distinction be made between testimonial and nontestimonial events for which there is no "effective non-video analogue," a distinction that properly excludes credibility determinations from the scope of appellate review.[106] This result is necessary in light of the reasons provided by the Supreme Court for deference to a trial judge's credibility assessments, emphasizing not only visual access, but also judicial economy, finality, and the experience (and expertise) of the trial judge in evaluating testimony.[107] Similarly, most members of society would likely agree that many nontestimonial occurrences should be open for review. Review of such questions have thus far included: whether the jury was present at a given time, whether a judge excluded individuals from a trial based on a fair description of a courtroom melee, and whether an attorney had time to make a motion necessary to preserve a matter for appeal. These circumstances have in common that their review does not infringe upon the deference owed to the trial judge, they may easily be resolved by review of the video record, their resolution is important to the determination of the case, and their resolution would generally seem either to result in protecting the defendant in a criminal case or simply in no harmful effect.

The distinction between nontestimonial and testimonial evidence, however, does not fully take account of potential issues for which a trial video may be proffered. While the distinction is a good starting point for the analysis, it may be underinclusive for testimonial questions that are appropriate for appellate review (for instance, whether a prejudicial comment was uttered) and overinclusive for nontestimonial questions for which there is no effective non-video analogue but which are not appropriate for appellate re-

[105] Samuel, supra note 74, at 111.
[106] Id.
[107] Anderson v. City of Bessemer City, 470 U.S. 564, 574–75 (1985).

view (for example, the ongoing competency of a criminal defendant). Instead, a distinction between discrete questions of fact and questions of fact that require interpretation of nonverbal and verbal cues may be more useful for purposes of determining which issues are appropriate for appellate review. Discrete questions of fact are those questions that we have already recognized are amenable to appellate review of the visual aspects of the video record: issues, often binary in nature, whose resolution is usually simple and rarely in conflict with an explicit finding of the trial judge. Questions that require the interpretation of verbal and nonverbal communicative cues would presumably consist largely of testimonial questions or mixed questions of law and fact. Questions falling in the former category might include whether an utterance occurred (including during testimony, for example, for the review of a prejudicial statement) but would not include the interpretation of witness credibility generally; the majority of questions in this category would likely be similar to those described in *Deemer*, *Moustakas*, *Walker*, and *Suggs*.

Two major reasons for preferring this distinction exist. First, an appellate court could review whether something was said during testimony without requiring an alteration of the standard of appellate deference (despite the existence of a non-video analogue). Second, nontestimonial questions (such as those that arose in the Antonio Franklin case, discussed in the Introduction), would be excluded from appellate review. The case of Antonio Franklin provides an example of an issue that is distinguishable from the aforementioned cases because the evidence under review is nontestimonial in nature and lacks an effective non-video analogue, yet requires an inquiry into ongoing behavior and the interpretation of nonverbal cues. Although uncertainty regarding whether the trial judge in fact observed or analyzed specific behaviors makes competence more akin to the above cases of nontestimonial occurrences than to a credibility determination, the issue requires the interpretation of behavior and body language. This requirement distinguishes competence from questions such as whether the jury was present or how near to the defendant officers were seated during trial.

Questions requiring behavioral interpretation include and share many characteristics of credibility determinations. Because such

questions are marked by the interpretation of behavior in the courtroom, they fall within the traditional purview of the trial judge. Furthermore, because they involve the inference of intention from conduct, they are the subject of the trial judge's expertise and experience. Also, because video cannot account for their full context, they implicate issues of illusory causation and are less amenable to appellate review. Discrete questions, because they are important, not judgment calls, and often resolvable with little or no harm, should be subject to appellate review of the video record. Questions of behavioral interpretation, however, should be treated with the same deference as credibility determinations whenever possible because they fall within the traditional duties of the trial judge, who "is better positioned than another [judicial actor] to decide the issue in question."[108] One possible exception to this general proposition may be for cases where the behavior at issue is that of the trial judge.[109]

The fact that Antonio Franklin's competence was not a discrete question of fact, but rather a question requiring the interpretation of a particular individual, indicates that an appellate analysis of behavior would be more akin to review of a credibility determination than to the resolution of other nontestimonial events. Assuming that the question of competence is like credibility in several relevant ways pertaining to appellate review, the Supreme Court's logic in *Anderson* would apply to Antonio Franklin's appeal: "The trial judge's major role is the determination of fact, and with experience . . . comes expertise."[110] Even if questions of competence and credibility have relevant commonalities, it could be argued that the video record would be of assistance if the trial judge did not observe the behavior of the defendant. Presumably, the trial

[108] Miller v. Fenton, 474 U.S. 104, 114 (1985).

[109] Transit Auth. of River City v. Montgomery, 836 S.W.2d 413 (Ky. 1992). The nontestimonial actions or statements of a judge, although requiring the interpretation of behavior, may for practical reasons require review. Often, however, such issues may be discrete questions of fact (for example, whether the judge was asleep at the bench, or whether the judge uttered certain words). Whether questions such as that at issue in *Montgomery* (the quality and vocal characteristics of the judge's speech) may constitute an exception to the distinction that this Note draws is unclear. However, the quality of the judge's voice alone would not have been grounds for the appeal; the content was at issue as well, and the question was whether the remarks had been "sarcastic or disparaging." Id. at 415.

[110] 470 U.S. at 574.

judge may have been focusing on testimony, counsel, or other parts of the courtroom during Antonio Franklin's erratic behavior. Deference to the trial judge's credibility determinations does not rest entirely, however, on the expectation that she observe witness testimony carefully; the assumption is that the trial judge's courtroom experience also entitles her to deference, as do the virtues of finality and efficiency.[111] Credibility determinations in a bench trial are not, for this reason, subject to appellate review based merely on the possibility that a judge may not have observed all of the witnesses' behaviors. Because the judge is expected to ensure ongoing competency in the same way that she is expected to view witness testimony, it would be a peculiar result to conclude that the former should be susceptible to review and not the latter.

Other reasons exist to suggest that such questions of both fact and interpretation should be treated differently than discrete questions of fact. The quality and scope of videotapes, for example, are especially pertinent to review of such issues for two reasons. First, discrete questions of fact are more likely to be answerable even with poor tape quality or limited scope, so long as the moment or object at issue is discernible. Second, the scope, angle, and quality of the tape may affect appellate interpretation of conduct, regardless of whether it is testimonial or nontestimonial in nature. For example, the quality of the videotape was at issue in a similar nontestimonial matter in *State v. Polnett*, a case in which the appellate court used the video record to review the trial court's denial of a *Batson* challenge.[112] Because the prosecutor's peremptory strike was based on "demeanor and a facial expression," the appellate court reviewed a tape of the voir dire. However, in deferring to the trial court, the *Polnett* court noted that the tape "was not particularly helpful as the view of [the juror] was from some distance and the sound was somewhat poor."[113] The court did not observe the

[111] See, e.g., Uttecht v. Brown, 551 U.S. 1, 7 (2007) (establishing that deference is due to a venire determination because of a trial judge's experience with demeanor and credibility); Miller-El v. Cockrell, 537 U.S. 322, 324 (2003) (establishing that deference is due to factual determinations, including *Batson* determinations regarding discriminatory intent); *Miller*, 474 U.S. at 114 (suggesting that the level of deference may depend in large part on whether "one judicial actor is better positioned than another to decide the issue in question").

[112] No. 43399-7-I, 1999 WL 1054697, at *4 (Wash. Ct. App. Nov. 22, 1999).

[113] Id.

"'smirk'" asserted as grounds for the challenge by the prosecutor, but it did note that "the trial judge would have had a better view of such a subtle change," and that "[t]his is precisely the reason for according great deference to the judge's findings."[114] In a revealing aside, however, the court extended its analysis beyond traditional deference to observe that the video record review "did . . . illustrate the necessarily subjective aspects of jury selection."[115] To the reviewing court, however, "[the juror's] hesitation in answering the questions appeared to be his general characteristic rather than a sign he could not be a fair juror."[116] A willingness to reevaluate the interpretation of verbal peculiarities and nonverbal cues, however, creates difficulties unique to the video record.

The scope and angle of the video record pose problems of both a specific and theoretical nature. The court in *Mitchell*, for example, described the general issue of video scope in declining to reweigh the trial court's credibility determination.[117] Aside from policy concerns, the court noted:

> [V]ideotapes of trial proceedings provide only a narrow view of the trial court proceedings. The current automated cameras focus only on the speaker and cannot record everything going on in the courtroom that the trial court can see. Thus, while the video recording may capture a witness while he or she is testifying, the recording does not preserve the conduct of other participants in the trial or even spectators in the courtroom that may be the cause of the witness's demeanor, voice inflections, or body language.[118]

In contrast, the court in *Walker* was more secure in its decision to review the courtroom melee because the cameras "were not 'static.' . . . [T]hey did not merely capture a 'thin slice' of what occurred. Rather, the video cameras captured the details of the incident in a way that an ordinary eyewitness understandably could not."[119] The court went on to observe that it was able not only to

[114] Id.
[115] Id.
[116] Id.
[117] Mitchell v. Archibald, 971 S.W.2d 25, 29–30 (Tenn. Ct. App. 1998).
[118] Id.
[119] 723 A.2d at 926 (footnote call omitted).

view the events in a calm setting, but also to watch the occurrences repeatedly and "benefit[] from technological aids, such as slow motion and . . . freeze frames."[120]

The question of ongoing competency, exemplified by the *Franklin* case, presents similar problems to those encountered by the *Mitchell* court. Any tape of *Franklin* would necessarily not have shown the entire courtroom, thus leaving open the question of whether other persons or events within the courtroom precipitated Franklin's actions. Franklin's behaviors were not discrete in the sense that they could not be parsed from his overall competency and were also not discrete in the sense that they could not be parsed from an overall courtroom milieu. In response to *Scott v. Harris*, a 2007 Supreme Court decision involving videotaped evidence, Professor George M. Dery III expounded upon several relevant limitations of the video medium.[121] Dery notes that, once a videotape is given more credence than other views or versions of an occurrence, the question becomes "whether in 'speaking for itself' the film as its own witness has any more or less credibility than would a witness who otherwise testifies in court subject to cross-examination."[122] Dery questions the privileging of the *Scott* videotape, which necessarily did not show what the subject of the car

[120] Id.

[121] 550 U.S. 372 (2007). While not pertaining directly to video records, the Court's decision in *Scott* is interesting because the Court relied solely on a patrol car's videotape of a police chase in reversing the denial of summary judgment in favor of an officer responding to a civil suit for excessive force. The Court notes that the video "more closely resembles a Hollywood-style car chase of the most frightening sort" than "the cautious and controlled driver the lower court depicts" and determines that the officer's actions were therefore justified. Id. at 379–80. In Justice Stevens's dissent, he criticizes the majority's reliance on review of the tape: "The Court's justification for this unprecedented departure from our well-settled standard of review . . . is based on its mistaken view that the Court of Appeals' description of the facts was 'blatantly contradicted by the record.'" Id. at 389–90 (Stevens, J., dissenting). In response, Justice Scalia asserted in a footnote that, "Stevens suggests that our reaction to the videotape is somehow idiosyncratic . . . . We are happy to allow the videotape to speak for itself." Id. at 378 n.5. The footnote includes a Supreme Court URL that allows the reader to watch the tape online. A slew of commentary on the case questions the wisdom of the conclusion that a tape can, in fact, "speak for itself." George M. Dery III, The Needless "Slosh" Through the "Morass of Reasonableness": The Supreme Court's Usurpation of Fact Finding Powers in Assessing Reasonable Force in *Scott v. Harris*, 18 Geo. Mason U. Civ. Rts. L.J. 417, 442–44 (2008).

[122] Dery, supra note 121, at 443 (quoting Jessica M. Silbey, Judges as Film Critics: New Approaches to Filmic Evidence, 37 U. Mich. J.L. Reform 493, 541 (2004)).

chase was observing, what other cruiser cameras might have observed, and conditions outside the scope of the video.[123] Finally, Dery concludes that, because of the possible existence of relevant factors outside the scope of the camera angle, the existence of the tape "should not be able to shout down all other views."[124]

Dery also notes that the video medium has been demonstrated in psychological studies to lower viewers' critical instincts. One particularly interesting psychological effect of viewing videotapes is "'illusory causation,' a mental process where people, when witnessing a personal exchange, 'tend to attribute causality to events or individuals that are more noticeable.'"[125] In an experiment with videotaped confessions, for example, "confessions where the camera focused solely on the suspect were deemed 'more voluntary' than the confessions in which the camera 'focused equally on the suspect and interrogator, even when the content was identical.'"[126] In fact, even when study participants were instructed to pay attention to how the angle of the camera might alter their perception, the results remained static.[127]

The application of the idea of "illusory causation" to mixed questions of fact and interpretation is that, insofar as the camera is focused on the individual whose conduct is subject to interpretation, it might falsely appear that his or her behaviors are causally attributable to internal motivations. Motivators outside the scope of the camera, such as the movements or demeanor of witnesses or of the judge, may be eliciting the behavior reviewed but may not be perceived by a viewer of the tape. In scenarios where the cause of behavior is not at issue, such as the discrete factual questions considered by Kentucky appellate courts or the fracas in *Walker*, the impact of illusory causation on the viewer may not be relevant to the reviewing court's determination. However, where the question involves the interpretation of conduct (as it does in assessing wit-

[123] Id.

[124] Id.

[125] Id. at 446 (quoting Sharon Begley, Videocameras, Too, Can Lie, or at Least Create Jury Prejudice, Wall. St. J., Jan. 31, 2003, at B1).

[126] Id. (quoting Sharon Begley, Videocameras, Too, Can Lie, or at Least Create Jury Prejudice, Wall. St. J., Jan. 31, 2003, at B1).

[127] Id. at 447.

ness credibility, voir dire, or ongoing competency), the utility of the video record is inherently limited by its scope and focus.

Perhaps the biggest single danger of implementing the video record, however, is the misconception that viewing the tape is "the same" as being present at trial. Because of facets such as camera angle and scope, as well as subtle psychological processes such as illusory causation, it is not generally the case that a tape can "speak for itself," especially if it only presents one narrow view. It is both common knowledge and a psychological truth that our visual perceptions can and do alter our interpretation of words and behavior. While this idea has been offered as support for the transition to the video record, it is also a powerful force that requires thoughtful consideration of which questions video records are most likely to assist in answering without error and which they might further obfuscate.

## CONCLUSION

The movement towards electronic reporting has gained significant momentum over the past thirty years, driven by reductions in the cost of technology, improved camera systems, and the broader implementation of multimedia in the courtroom. Although it has not been firmly established that the video record is superior to stenography in terms of accuracy and cost-effectiveness, the expansion of electronic recording necessitates the development of a theoretical framework for constraining courts from acting on the assumption that visual review of a tape is equivalent to watching events unfold and individuals interact in real time.

While the video record potentially offers many benefits, it also opens up dangerous possibilities for appellate courts to review previously unreviewable events that are perhaps better off left unreviewable. The courtroom is a complex milieu where extra-testimonial events often occur, and access to a visual record allows appellate courts to resolve previously insoluble discrete questions where there is little or no risk of harm. The video record also offers the opportunity, however, for appellate courts to delve into more complex questions of behavior and causation based on review of the electronic record. This Note has proposed that, for purposes of determining whether review should occur, a distinction between discrete questions of fact and questions of fact that require behav-

ioral interpretation may be more useful than the distinction between testimonial occurrences and nontestimonial occurrences without a non-video analogue. The central reason for preferring this framework of analysis is that the latter distinction may be both underinclusive for testimonial occurrences and overinclusive for nontestimonial occurrences lacking a non-video analogue. Discrete questions of fact, often binary in nature, are usually simple and rarely conflict with an explicit finding of the trial judge; they are thus proper candidates for video review. Questions requiring behavioral interpretation are marked by the interpretation of behavior in the courtroom; the category includes credibility but extends also to situations that similarly implicate the interests of deference, finality, efficiency, and the superiority of actual courtroom presence. Such complex questions should remain outside the purview of appellate review. The video record may "speak for itself," but it does not and cannot speak for the visual input a judge observes and interprets that falls outside the scope of the camera, nor does it filter events and behavior through his or her experience and expertise. This fundamental reasoning behind deference should form the backbone of a theoretical framework for integrating the video record into American jurisprudence.