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EMPIRICAL STUDY / ANALYSIS

The Documentary Method of [Video] Interpretation: A Paradoxical Verdict in a Police-Involved Shooting and Its Consequences for Understanding Crime on Camera

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Abstract On July 27th, 2013, Sammy Yatim was shot and killed by Toronto Police Services' Constable James Forcillo during a verbal confrontation on a streetcar as Yatim brandished a switchblade knife. Forcillo was charged, initially with second degree murder, and later attempted murder—a decision that confused media commentators as attempted murder is a lesser-and-included offense to second degree murder in Canadian law. In January 2016, Forcillo was found not guilty of second degree murder and guilty of attempted murder. Video evidence, recovered from the streetcar's onboard security cameras, was described by the presiding judge, Justice Edward Then, as proving beyond a reasonable doubt that Forcillo's testimony was unreliable, especially in light of other evidence. This paper examines the use of video evidence to arrive at a 'compromise verdict' (Gillis in 'Compromise' verdict in James Forcillo trial gets mixed reaction. Toronto Star, 25 January, 2016) and the paradox of being convicted of attempting to murder someone who was killed.

Keywords Video · Evidence · Perception · Socio-legal studies · Police-involved shootings · Ethnomethodology

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Introduction

At approximately 11:45 pm on July 26th, 2013, 18-year old Sammy Yatim boarded the Toronto Transit Commission (TTC) Westbound Dundas Streetcar. Shortly after boarding, Yatim withdrew and brandished a 12 cm (4-inch) switchblade knife, used it to swipe at a number of passengers, and ordered all passengers off the vehicle. Moments later, just after midnight, Toronto Police Services Constable James Forcillo and his partner Constable Iris Fleckheisen arrived in response to a 'hot shot' service call for crime-in-progress. They approached the then-empty street car and Forcillo repeatedly ordered Yatim to drop the knife, as a number of other officers arrived. Yatim ignored the order and hurled a slew of insults at Forcillo and other responding officers, calling them 'pussies' and 'cowards'. Approximately 50-s after arriving, Yatim disregarded an order by Forcillo to not approach the streetcar doors; Yatim moved along the street car's elevated deck toward Forcillo, and Forcillo shot Yatim three times, knocking Yatim onto his back in the streetcar doorway. Forcillo was approximately 15-feet from Yatim when he opened fire. Following a five-and-a-half second pause, Forcillo then shot Yatim six more times. The incident was recorded by a number of bystanders on cell phone cameras, as well as TTC security cameras—two cameras in particular, one positioned on the ceiling of the streetcar near the rear door looking forward, and one behind the operator's station looking out the front door. At least one cell phone video was posted to YouTube shortly after the incident and 'went viral' within hours.

On August 19th, 2013, the Province of Ontario's Special Investigations Unit (SIU)—a civilian, arm's length agency that investigates reports involving the police where there has been a death, serious injury or allegations of sexual assault—found cause to charge Forcillo with second degree murder. In the summer of 2014, after a pre-trial hearing that committed Forcillo to stand trial for second degree murder, the Crown Prosecution Service (CPS) added a second charge of attempted murder. It was reported that this additional charge 'puzzled' legal experts; first, Forcillo had killed Yatim, so attempted murder seemed a paradoxical accusation given the outcome. Secondly, attempted murder is a lesser and included offense in Canadian law, and if the CPS did not think they could convict on the second-degree murder charge, they could ask the jury to consider attempted murder as an alternative (Kari 2014). On October 19th, 2015, Forcillo's trial began at the Ontario Superior Court of Justice in Toronto. In his opening statement, Crown Prosecutor Milan Rupic informed the jury that Forcillo's actions comprised two separate 'transactions': the first volley of three bullets and the second volley of six bullets. The five-and-a-half second pause served as a marker to denote severance of the two transactions through 'common-sense' interpretation, the standard by which Canadian courts decide of what a transaction is comprised.[1] Rupic informed the jury that Count 1, second degree murder, was tied exclusively to the first transaction, and Count 2, attempted

[1] That Count 2 is 'severed' from Count 1 is itself an interesting legal phenomenon that goes beyond the scope or explanatory capacity in the space allotted to this paper. A second paper on the issues of 'severance and joinder' is being prepared in concert with this paper, and a conference presentation that discusses the case law precedents for establishing the parameters of transactions in Canada is available on the author's academia.edu page.

murder, was tied exclusively to the second transaction. On January 25th, 2016, the jury found Forcillo not guilty of second degree murder, and guilty of attempted murder. The jury's finding was described as a 'compromise verdict' by both defense counsel (Hasham 2016) and Jennifer Chambers, a mental health advocate at Toronto's Center for Addiction and Mental Health, who also noted that "Juries don't like to convict cops" (Gillis 2016).[2]

On July 28th, 2016, Justice Then sentenced Forcillo to 6 years in prison for the attempted murder of Yatim. Sentencing hearings provide an opportunity for Canadian judges to interpret a jury's finding (section 649 of the Canadian Criminal Code [CCC] forbids jury members from public disclosure of legal proceedings). Justice Then described several pieces of evidence that he believed led the jury to their verdict:

The first factor in the jury's decision was that medical evidence, as presented through the coroner's report and Yatim's autopsy results, indicated Yatim was mortally wounded and paralyzed only in the first transaction. The second transaction did not contribute to or accelerate Yatim's death, and Yatim could not feel the bullets because of his paralyzed state, although he was alive throughout the second volley.

A second body of evidence referenced by Justice Then was Forcillo's sworn testimony, in which Forcillo stated that in the five-and-a-half second pause between the first and second transactions, he 'subjectively perceived' Yatim to rearm himself with the switchblade knife (which was knocked from Yatim's hand during the first transaction) and raise his body to a 45° angle. However, while under examination, Forcillo acknowledged that his 'subjective perception' was in fact a 'misperception' in light of the coroner's medical evidence, although he maintained his misperception was reasonable in light of the environmental factors he experienced.

Finally, Justice Then refers to the video evidence—the TTC security footage—which he states "establishes beyond a reasonable doubt… Yatim did not raise himself up to a 45°…" (ONSC 4850; para 19); "… the video is powerful evidence that demonstrates conclusively that what Forcillo says occurred did not occur" (para 23), and "Based on the video which proves that Mr. Yatim made no attempt to get to his feet…" (para 41). We note here that Justice Then foregrounds the video as settling the matter of 'did Yatim actually raise his body to 45° or not?' and that an inattentive reading of these statements would lead us to conclude that any debate about the type of threat Yatim comprised was settled by the video alone and not the accompanying evidence and testimony. In other words, an inattentive reading would lead us to the conclusion that this is a simple 'reality disjuncture' (Pollner 1975) where the coroner's report claims one thing, Forcillo claims another, and 'objective reality' is recovered through viewings of the video showing that Yatim did not move as Forcillo claimed he did. While the video was given significant attention in Justice Then's Reason for Sentence, in news media reports, and in statements from the attorneys involved, there is a great deal of circumstance that was not given such

[2] We include this not to either validate or contest the veracity of this claim, but rather to further illustrate the nature of Crown counsel's working life as informed by local folklore, off-the-cuff remarks, shop talk, and so forth. For detailed analyses of juries' tendencies to give the police officer's the benefit of the doubt, the reader might refer to the extensive work of Philip Stinson.

foregrounding. As such the complicated work of lawyer's interpreting and theorizing what is seen on video, in our opinion, gets lost along the way. We will argue that a better understanding of lawyer's interpretive work goes much further in building not only an understanding of this case, but also the role video plays in general when used as evidence. We review the video as a (series of) problem(s) for counsel, rather than a solution for jurors to recover the 'real, objective reality' of what occurred during the Yatim–Forcillo incident. We argue that rather than settling the 'objective reality' of the case, the video is merely another evidential instrument at the jury's disposal for coming to terms with the Crown Prosecutor's theory of the incident.

Video as a Problem

It would be difficult to argue against the powerful impact videos have for assessing crime incidents. Following Forcillo's conviction, Julian Falconer, the lawyer representing the Yatim family, stated that convictions of police officers are nearly impossible without video evidence (Janus 2016). In Rupic's opening statement, he informed the jury that "… virtually every event of consequence was recorded on video… I expect the video and audio recordings will assist you not only in knowing what happened, but also in evaluating the accuracy of what the witnesses have to say about what happened" (2015: 8, para 23, 25). The Yatim–Forcillo incident led Toronto Police Chief Bill Blair commissioned a study of 'Police Encounters with People in Crisis' which was carried out by retired Supreme Court of Canada Justice Frank Iacobucci (2014). The report recommended all front-line police officers in Toronto be equipped with body-worn cameras. Schneider (2016) examined comments posted on the Yatim YouTube video page and the expression of sense made of the incidents seen on camera via various discursive and interpretive practices, including adding information about Yatim himself, the weapon he was carrying, his toxicology reports and other indicators of fault or innocence on his part. Taking another tack, Campeau (2015) and Sandhu (2017) examine the impression increased video surveillance, both official and unofficial citizen video, leaves on police officers themselves.

Of course, the canonical ethnomethodological case is Goodwin's *Professional Vision* (1994) which considers the treatment of the Rodney King video in two different trials (a criminal trial and a civil rights trial) and how counsel, through expert witnesses, used formalized police use-of-force schemes to interpret the video rendition of the incident. A series of studies have built on Goodwin's initial work. For instance, Mair et al. (2012, 2013) and Elsey et al. (2016) examine the work of military inquiry boards in reviewing video to make sense of an incident of friendly fire, in particular highlighting the manner in which the video is incapable of providing an 'objective, real world' account of what the pilots involved in the incident were 'actually' doing. Mair et al. (2016) also analyze the "disclosive" and "revelatory" effects of annotated or "marked-up" video and the "politics of evidence" it represents a constitutive move within. This work links with another recent study, that of Vertesi (2015), who similarly discusses the way in which work

with visual materials complicates questions of evidence and veridicality: evidence for whom, of what, when, under what conditions and to which practical ends. As Vertesi points out, along lines similar to those sketched by Mair et al., evidence is always evidence of something because it is evidence for something; it is evidence-in-use (in, e.g., a trial, a press release, an analytical discussion, an argument between opposing sides, and so on). Within such parameters, then, video evidence has a particular status, becoming relevant in a particular, not just any way (see Hart and Honoré 1985: 11). While studies critical of an overreliance on videos as explanatory devices do exist (i.e., Doyle 2003), there is a problem, brought out by the studies above, that videos pose that we believe has been understated.

Videos are, in effect, too often treated as what Garfinkel refers to as 'Docile Texts' (2002: 200; see also Baccus 1986; Rouncefield and Tolmie 2016). While videos have observable beginnings and endings and happen to show things, they do not explain what those things are or accord them significance. As Schneider's aforementioned analysis showed, what a video could be said to *show* or *mean*, according to YouTube commenters, was equivocal and rested on the myriad of factors any given reading of that video might bring into play, either by direct appeal to the video itself or via appeals to matters of consequence evidenced elsewhere. When it comes to interpreting videos for the purposes of legal adjudication, the first thing we might note is that even in instances where videos, *prima facie* (Jayyusi 2015: 276), show the occurrence of a crime, they fail to indicate precisely what sections of the criminal code are explicitly being broken (see Dupret 2011). As such, an overreliance on video, we argue, significantly underappreciates the complex task, undertaken by legal counsel (both Crown and defense), in interpreting how what is *seen* on video is *seen as* (Wittgenstein 1953; Coulter and Parsons 1990; Vertesi 2015) an infraction against the generalized codes and expectations set in legal statutes. The question left unanswered, for example, is how does *seeing* an incident such as a shooting become *seen as* a first-degree murder?

Secondly, while videos depict aspects of incidents, they are not a replacement for, or an equivalent to, what a human police officer is observing, perceiving, or experiencing throughout an interaction, even if that is the impression videos may leave viewers (see Mieszkowski 2012). Again, the issue of 'subjective perception' referred to above is demonstrative; according to Canadian law, Forcillo's defense counsel do not need to prove that his perception is 'right' and the coroner's perception is 'wrong' (or vice versa for Crown counsel) but rather, were there reasonable grounds for Forcillo to 'misperceive' Yatim's bodily motions as he did? One aspect of the security videos used as evidence in this case was they were shot along the length of the streetcar and out the streetcars front door, and, as a result, produce a point-of-view organized around different angles of composition to that of Forcillo (see Eglin 1979; Mair et al. 2013; Vertesi 2015: 142–154 for a discussion of how angle and positioning can be used as a practical resource for resolving how different perceptions were arrived at). This means that neither the video nor the coroner's report stand as a straight resolution to the reality disjuncture (Pollner 1975): "Did Yatim raise himself to a 45° angle as Forcillo claimed to subjectively perceive, or was it impossible for him to do so as the coroner suggests?". Instead, the question jurors are asked to consider is "was there a reasonable explanation,

evidenced in any of the video, the coroner's report, or Forcillo's testimony, that explains the nature of his 'misperception' in a way that would excuse his use of lethal force in a second transaction?" (Fig. 1).

As a result of these considerations, we argue that videos, rather than unproblematically providing a solution, pose a *problem* for prosecution and defense counsel, a problem reminiscent of Garfinkel's (2002) *Shop Floor Problems*. Legal counsel are responsible for examining the specifics and details of what is recorded in video and relating these details to abstract and general permissions and prohibitions as formalized in law. We will proceed by examining the legal arguments made by both Crown and Defense counsel in the Yatim/Forcillo case and argue that the *Shop Floor Problem* of determining how what is seen in *just-this-video* is resolved by counsel by undertaking a procedure of gathering 'documentary' evidence of events and using that evidence to inform an 'instructed viewing' (Garfinkel 2002; Mair et al. 2013, 2016) of video in correspondence with both non-video evidence and legal statutes. In doing so, we argue that rather than treating video as explicatory of social phenomena, we instead treat it as *signifying* the lived experience of those elements of social life either caught or not caught on camera in a way congruous to any other form of evidence (see Baccus 1986).

Relevant Legal Codes and Factors to the Forcillo Case

Initially, Forcillo was charged with second degree murder pursuant to section 229(a)(ii) of the CCC (henceforth demarcated as s.229(a)(ii) etc.) which states "Culpable homicide is murder where the person who causes the death of a human being means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not". Forcillo was charged with second degree murder partially in response to the diminished responsibility that police officers face when responding to emergency calls in Canadian law. As police officers cannot or do not *plan* to kill in a premeditated manner while on duty, they are typically not charged with first degree murder. Count 2 of attempted murder was pursuant to s.229(a)(i) "Culpable homicide is murder where the person who causes the death of a human being means to cause his death," and the jury's instructions from Justice Then included finding specific intent on Forcillo's part in carrying out this prohibited act. Forcillo did not contest either of these charges directly, but rather

Fig. 1 **a**, **b** The camera angles most attended to in court proceedings

used the 'defense of justification' afforded to police officers in s.25(1) of the CCC which states "Everyone who is required or authorized by law to do anything in the administration or enforcement of the law… is, if he [sic] acts *on reasonable grounds*, justified in doing what he is required or authorized to do and using as much force as is necessary for that purpose" (italics added) and the 'defense of self-preservation' as detailed in s.34(1)(a) which states "A person is not guilty of an offence if they *believe on reasonable grounds* that force is being used against them or another person or that a threat of force is being made against them or another person" (italics added). The reasonable grounds clause in s.25(1) and s.34(1) are clarified in s.25(3) and s.34(2) respectively, which both stipulate how reasonable force may or may not be interpreted. Reasonable circumstances for lethal use of force occur when an individual believes *and has reasonable grounds to believe* that a threat of death or grievous harm is 'imminent,' although imminent is not given any formal specification.

In relation to s.25(3) and s.34(2), police officers are trained to evaluate threats into two categories: imminent and potential. As mentioned briefly above, an imminent threat is one where the individual comprising the threat has means to carry out that threat. An individual both possessing a weapon and being in a position to use that weapon is lawfully perceived as an imminent threat, and at that point it is deemed reasonable and lawful for a police officer to utilize lethal force. Alternatively, an individual may possess a weapon but not be in a position to use that weapon, and as a result, they comprise a potential threat and lethal force is deemed unreasonable and is excluded.

How an individual is understood as being in a position to use a weapon, and thus be escalated from a potential to imminent threat, is not formally codified, but is, rather, to be argued on a case-by-case basis (see Austin 1956: 21f.). The basis upon which a particular case is decided is largely interpreted in relation to the officer's subjective experience of fear in relation to the individual they are confronting,[3] the weapon they are carrying, the location of the incident, and so forth. For edged weapons such as knives, a common '21-foot rule' is often employed as a guideline. The 21-foot rule was established by Lt. John Tueller of the Salt Lake City Police Department, who found that an officer could reasonably expect to draw a holstered side arm and prevent an attack by a knife-wielding assailant if that assailant was 20 feet or more from the officer at the point of detection (Martinelli 2014). However mitigating circumstances in the Yatim/Forcillo incident run both ways: Forcillo had drawn his service weapon upon arriving on scene and had it trained on Yatim throughout their interaction; Yatim was in an elevated position on the streetcar deck and could potentially use that position to leverage an attack; Forcillo testified that, upon arriving on scene, he perceived Yatim to be 'in crisis' and suspected he was under the influence of drugs, thus escalating the nature of threat Yatim could pose to Forcillo and others; Constable Fleckheisen, upon arriving on scene, asked if Yatim

[3] Fear, in this trial, was treated in a relatively unscientific or un-psychological manner. While defense counsel employed an expert witness, Dr. Miller, a specialist in the psychology of stress and the potential impacts on individual perception, Dr. Miller did not examine Forcillo and could not speak to his state during or following the incident. For an examination of the legal reception of scientific evidence related to fear and perception, see Burns (2008).

was alone on the streetcar, indicating that responding officers were perhaps not aware that the streetcar had been evacuated and whether Yatim may have posed a threat to someone onboard who responding officers could not see.[4] Toronto police officers are specifically trained not to treat use of force guidelines 'as a cookbook,' in an 'unthinking automated' way, or 'using formulaic strict dictates,' but rather 'to be aware of what's going on and make informed decisions' (Rupic 2015: 35, para 110).

Ultimately, it is up to courts to decide when deployment of lethal force is deemed to be reasonable and when it is not. Hester and Eglin note that Garfinkel's 'rule of practical circumstance' is a useful heuristic for understanding the assessment of specific situated incidents through recourse to abstract and general codes:

> This relationship between a common understanding or agreement or, more simply, a rule and the considerations relevant to its application on any occasion of its use is itself immediately applicable to the law. For it is just the 'work of bringing present circumstances under the rule of previously agreed activity' that describes what the courts (and police and citizens) do, and what they are for. And this shows immediately how, for ethnomethodology, the law is, in a real sense, its application. Thus, the courts decide what 'in the end' and 'for all practical purposes' really happened, and register convictions under the rule of law, by 'bringing present circumstances under the rule of previously agreed activity'. (2017: 207)

In evaluating the propriety of Forcillo's response to the threat he testified to subjectively perceiving in Yatim's actions and comportment, the jury had no recourse to formulaic instructions such as "if a person is this close or holding a knife in this manner, they comprise an imminent threat". Instead, it is left for counsel to argue and convince the jury that the culmination of factors around the incident indicate that what Forcillo testified to having 'subjectively perceived' was something that was reasonable for a police officer to perceive in those circumstances (see Lynch and Bogen's reworking of Gluckman's study of the 'reasonable man in Barotse law,' 1996: 168f.).

The Arguments and Their Outcomes

Crown Counsel's opening address laid before the jury the issues that they believed indicated Forcillo did not have reasonable grounds to believe Yatim was an imminent threat. Rupic informed the jury that Forcillo and Fleckheisen were the first dispatched to the scene, and just before arriving they were informed that no one on the streetcar had been injured. He also noted that, as Forcillo and Fleckheisen approached the streetcar, and before any other police officers arrived, Fleckheisen, as 22-year veteran of TPS, re-holstered her weapon, perhaps indicating the

[4] Another interpretation of Fleckheisen's question was that she was initiating a 'de-escalation procedure' by engaging Yatim in conversation. This interpretation was used against Forcillo by Crown Prosecutors; he made no effort to engage Yatim in conversation at all, contrary to his de-escalation training, and as such, the Crown argued he was acting in an unprofessional and reckless manner.

unreasonableness of perceiving Yatim as an imminent threat. He informed the jury that Yatim made no verbal threats to police, although he was belligerent and called them 'pussies'. He stated that although Yatim had opportunity to slash or stab passengers or prevent them from leaving the streetcar, Yatim did not act on those opportunities, and Yatim's movements both preceding and during the interaction with the police were slow, never running, lunging, or stepping down the streetcar's stairs. Rupic informed the jury that, throughout the second volley, security video indicates that Yatim's right shoulder is never raised from the streetcar's floor and his feet were pointed toward Forcillo, drawing into question perception of threat Forcillo might reasonably have perceived. Throughout the trial, the Crown advanced the theory that Forcillo was enraged by Yatim's belligerent insults and refusal to drop his knife, and it was this, not the subjective perception of imminent threat, that led Forcillo to shoot Yatim.

As discussed above, Forcillo did not contest that he was responsible for killing Yatim. Instead his counsel argued Forcillo was justified in shooting Yatim because he was an imminent threat and Forcillo had legal rights to use lethal force when facing such a threat. The defense argued that in the first volley it was appropriate to perceive Yatim as an imminent threat because he possessed the knife and was moving toward Forcillo after being ordered not to. In the five-and-a-half second pause between the first volley and the second volley, Forcillo testified that he perceived Yatim lying on his back, reaching over his body with his left hand, and placing the knife, which had been knocked out of his right hand during the first volley, back into his right hand. Further, Forcillo perceived Yatim to make menacing facial gestures while raising his body to a 45° angle. As such, Forcillo's counsel argued he had subjectively perceived that Yatim had rearmed himself and moved into position to attack again, and as such posed a second imminent threat. Because this testimony was contradicted at least in part by the security camera footage[5] and the coroner's report, Forcillo acknowledged that he had 'misperceived' Yatim's bodily motions, but that there were reasonable explanations for this misperception, in that Yatim was in an elevated position, and the flashing emergency lights on the police vehicles on scene altered his perception. Forcillo's counsel argued that this diminished his moral blameworthiness as another reasonable person in the same circumstances and position could draw the same conclusions.

Ultimately the jury accepted the defence's first argument, that by possessing a weapon and moving toward a police officer with it, Yatim could reasonably be interpreted as an imminent threat and that lethal force was justified. In relation to Count 2, the jury found that Forcillo could not have reasonably believed that Yatim comprised a second imminent threat, and that lethal force was not justified. In his interpretation of sentence, Justice Then outlined the factors of the case that he

[5] Viewers of the video encounter several difficulties in following Yatim's movements through the security video. The first is that Yatim is wearing a black t-shirt and is positioned against a dark back-drop, making it difficult to tell if Yatim's right shoulder ever leaves the streetcar floor. Compounding this, the security camera was some distance away and Yatim's face is obscured. Based on repeated viewings, it certainly appears that Yatim does not raise his body as Forcillo testified, but we are much more confident in making that statement given the coroner's findings.

believed were consistent with the jury's verdict. In a perhaps ironic twist, Justice Then determined that due to the congruence between Forcillo's testimony about Yatim rearming himself and what is perceived on the video, as well as the detail in his testimony about the expression on Yatim's face, Forcillo had indicated that he had paid *too much* attention to Yatim's movements to have *honestly and reasonably* perceived Yatim to raise his body to a 45° angle (2016: 7, para 22). Justice Then goes on to state that while there was no way to prove that Forcillo was lying, his account of Yatim's bodily movements was inconsistent; Forcillo's *accurate-according-to-what-is-seen-on-the-video* testimony of Yatim rearming himself, and his specific testimony about Yatim's facial expression, precluded the honest and reasonable perception of Yatim raising his body to comprise a second imminent threat. Therefore, Forcillo acted only in response to Yatim rearming himself, meaning Yatim was *only* a potential threat and lethal force was excluded (2016: 7, para 23).

Here we find some of the problems with video evidence discussed earlier coming to the fore: it makes aspects of the interaction salient for post hoc assessment, but it does not recover the incident in itself as experienced by those experiencing it (Mieszkowski 2012; Mair et al. 2013). When the criteria by which we decide if an action is reasonable or not is the subjective perception of fear or threat experienced by an individual participating in that action, we cannot count on video to provide a definitive account of that experience; fear does not show up on video in a verifiable way. Instead, video is used as a method to check the reliability of testimony about the nature of the subjective experience of fear. As this cannot be accomplished with video alone, it becomes necessary to look elsewhere to establish what the video shows and ends up acquiring sense in light of what is otherwise known about such incidents. A useful way of approaching this problem is by considering the documentary method of interpretation (Mannheim 1936; Garfinkel 1967; see also Bohnsack 2009, 2013) and its use by prosecutors and defenders served with video evidence.

The Documentary Method as a Way of Understanding Counsel's Use of Video Evidence

Upon reaching the conclusion that there is *prima facie* evidence a crime has been committed, sufficient to warrant charges being brought against an accused, the SIU typically hands off an investigation file to the Crown Prosecutor assigned to the case. The SIU typically works in close concert with the CPS, discussing the case and those aspects of the available evidence they deem relevant to securing a conviction (Martino 2016). The investigation file will typically contain all relevant evidential materials such as, in this case, the coroner's report, Forcillo's service record, witness statements, and the streetcar security camera footage which, at the time, had not yet been made public. While bystander videos uploaded to social networks certainly brought enormous public attention to the case, the degree to which those videos informed the Crown's understanding of the incident is questionable. As noted above, videos were not the only place that the two different volleys of bullets

were noted and treated as two separate transactions. The coroner's report also concluded there were two separate volleys, evidenced by the location and angle at which the first three bullets entered Yatim's body in contrast to the second six bullets.[6] We leave it to the reader to speculate if, in the absence of video evidence, Forcillo may have been called to testify about the reason for these separate volleys.

One thing the video does make explicitly witnessable is the length of the pause between the first and second volley. The video enhances the 'interphenomenal integrity' (Winch 1958; Baccus 1986) of the 6-s pause *as a pause that distinguishes one action from another* and demands an account for both transactions *as distinct transactions*. Following Baccus:

> Central to the notion of interphenomenal integrity is that what is looked at has properties internal to it which must be taken into account; moreover, the very selection of phenomena and the looking itself are to provide for phenomenal integrity… Adherence to operations of social theorizing which preserve interphenomenal integrity makes that theorizing more 'real' in that it enhances, and relies on, the strong visibility of these properties by emphasizing the very properties which are naturally available to members, either *actually observationally or imaginably so*. Note that observational availability refers to the accountable features of a phenomenon. These are used as elements of the theorizing, they are the 'data' from which the account (analytic or practical) is produced and to which it, the account, is reflexively referential. (1986: 4, italics added)

That the five-and-a-half second pause exists invites some reflection on the social properties internal to the pause such as Forcillo's 'subjective perceptions' over that timeframe and how those perceptions may be contrasted with the moments just prior to the first volley. The visible five-and-a-half second pause makes Forcillo's subjective perceptions noteworthy matters for further inquiry. The video thus serves to enhance the interphenomenal integrity of both the differentiation between acts and the logical conclusion resulting from that severance of acts, that different things are being perceived by Forcillo at different times. Again from Baccus:

> That visibility is a 'criterion' for the real-worldliness of social objects is to say that social objects, the objects of analytic social theorizing, are constituted so as to provide for their visibility via *some means*. One such 'means' is the establishment of sign-reading and indication as an account of their visibility to analysis, i.e., those analytic practices of social theorizing engaged in by investigators which produce visible topics of analysis are accountably seen as 'indication' or sign-reading practices. (1986: 6, italics original)

[6] It is not clear whether the Coroner would have had access to, and been able to review, the security camera footage in arriving at this conclusion, but we also suggest that this would be superfluous given how the coroner's report presented its findings. The coroner's report made reference to the separate volleys in relation to autopsy results rather than any other evidence. In Rupic's opening statement, he explains to the jury that the Province of Ontario's Chief Pathologist, Dr. Michael Pollanen, draws conclusions about Forcillo's and Yatim's positions during the shooting by examining Yatim's wounds and the trajectories the bullets would have had to have been on in order to produce wounds in that pattern (2015: 23, para 72).

The work of Crown counsel is literally the work of theorizing the accused's motives for and thoughts in performing an action (i.e., theorizing about how this event came about in reference to all the available evidence and how relevant particulars of this case are reflective of what has been codified in law, rather than theorizing in the scientific use of the term, see Hart and Honore 1985). That the Crown can rely on video to elaborate their theory by making those motives and thoughts more—but not fully—accountable points us in the direction of the type of problem video poses for (at least) prosecutors; videos are partial renditions of the events they depict. They conceal or only partially display factors such as subjective perceptions, experiences of fear, motives, the 'true' threat an individual comprises, etc. In short, videos are *re-presentations* of what has occurred, rather than perfect records thereof. The task the prosecutor faces is assembling these re-presentations with the other evidence related to a crime incident in order to create a convincing theory for the jury, to achieve and/or actualize the interphenomenal integrity of the not-directly-witness-able-but-relevant aspects of the incidents *as a crime* (see Goodwin 1994). Video is a puzzle piece that has to be put together with other puzzle pieces as part of assembling a case that secures a conviction or deflects one, rather than a treasure map that leads to a verdict.

When we treat video as partial re-presentations we move away from reductive or deterministic accounts of videos' place in legal proceedings (i.e., where the video is ascribed the capacity to fix its own interpretation) and highlight the work necessary to understand how codified laws and the assumed bodies of social and/or psychological knowledge they rest upon are referenced in after-the-fact interrogations of the specifics of incidents. The process of accounting for events witnessed on video and presenting that witnessing as explanations of the events through evidence is reflective of Garfinkel's (1967) remarks on the *documentary method of interpretation*. Garfinkel states: "It is misleading… to think of the documentary method as a procedure whereby propositions are accorded membership in a scientific corpus. Rather the documentary method developed the advice so as to be continually 'membershipping' it" (1967: 94). Videos do not clearly signpost the breaches of laws that may be said to be depicted in them, they are used to decide whether candidate actions portrayed on video are in correspondence with or defiance of the law. Equally, counsel must use, in a reciprocal manner, the evidence, the word of law, the perceived intent (spirit) of the law, and the implied accounts of action and understanding to develop, for the jury, the conditions that make their theory of the relevant precipitating factors to a crime event hold. One aspect of the practice of (prosecutorial) law that is made salient through the Forcillo examination is that outcomes of incidents do not determine the sections of law that have been breached; that Yatim was, in the end, killed by Forcillo did not preclude the legal conclusion that Forcillo had also *attempted* to kill Yatim. Faced with the difficult task of convicting an on-duty police officer responding to a man wielding a weapon, the Crown sought and argued alternative understandings of the evidence that opened other opportunities for the jury to understand Forcillo's actions as unwarranted. The timeline, the year that separated Count 1 of second degree murder and Count 2 of attempted murder, points to the possibility that, upon review of statutes and evidence, the Crown concluded that the outcome of Yatim's death was immaterial

to an aspect of Forcillo's conduct. All of this is to say that laws as written do not anticipate every incidence of their use, nor do outcomes determine the applicability of any given law; as Garfinkel writes; "… it frequently happens that in order for the investigator to decide what he is now looking at he must wait for future developments" (1967: 77). Equally with law, statutes are invoked where seemingly appropriate to the local conditions and explanatory accounts under discussion. The documentary method of interpretation in law involves situating what is perceived in the 'actual appearance' of a crime incident as 'pointing to' the presupposed underlying pattern of prohibited acts (see Garfinkel 1967: 78). As Dupret (2011: 161) discusses in reference to Cicourel (1968), the mistake is assuming laws, through their codified written form, anticipate the various conditions that will fall under them. Instead, evidence, codified law, and explanatory accounts are drawn together in order to present a compelling account for an incident under legal scrutiny, and video evidence is only another piece of the documentary method of interpretation. We see this in relation how video was used in the Forcillo case; the material legal significance of Forcillo's actions were not depicted in the video itself, rather they became recoverable from the video through interpretations of, and arguments around, how the actions depicted in those videos might be understood as either reasonable or unreasonable when considered alongside the other evidence and explanations as to how it all tied together.

Conclusion: The Problem Video Cannot Solve

We have argued that, at least prosecutors, and likely all legal counsel, are engaged in finding ways of working through a *shop floor problem* posed by the availability of video of incidents and trying to determine its significance with reference to abstract formalized codes of law. A version of Garfinkel's documentary method of interpretation is useful in describing the task (at least) prosecutors undertake in addressing that problem, assembling what is seen in, and to be said of, video by comparing and contrasting video evidence with other evidence and statements, ultimately subsuming the different parts of the puzzle under an explanatory narrative in support of a prosecution. While videos can serve an important role in making visible the interphenomenal integrity of what would otherwise likely be invisible, there is nevertheless a procedure for finding, interpreting, collating and presenting accompanying evidence that, for prosecutors, proves the accompanying narrative account beyond a reasonable doubt. The task is not to simply *see* what is on the video, but rather to take what is seen and *see it as* a crime (see Wittgenstein 1953). The Forcillo case, with its paradoxical verdict of attempted murder in an incident that, on face value, is more readily understood as a homicide that succeeded through the attempt, makes evident the complexity of this interpretive work. Faced with the task of prosecuting a police officer, and fully aware of the complexity of obtaining a guilty verdict in such cases, Crown Prosecutor Milan Rupic used an ingenious reading of the CCC, the events depicted in video, coroner's, and witness evidence. Rupic was able to come up with a rendition of events that bolstered the veracity of his explanatory account that Forcillo had been angered by Yatim's

belligerence and acted out of spite as a result, increasing the moral blameworthiness of his actions. The video was demonstrative of that explanatory account, not formative. While the jury found the mitigating circumstances—that Yatim held a knife and was in position to use it—compelling enough to acquit Forcillo on the second-degree murder charge, they did not agree that those circumstances extended to the second transaction.

We see here an aspect of the documentary method of interpretation as a useful way to understand how prosecutors use video to achieve practical ends. Rupic highlighted salient aspects of the transactions as a collection and asked the jury to consider how his explanatory account was able to subsume the particulars under the general models of crimes according to the CCC in reflection of that collection of evidence. The task for both the prosecutor and the jury was coming to understand the incident as being a member of the candidate types 'second-degree murder' and 'attempted murder,' employing both technical and common-sense 'rules' (Winch 1958) for deciding that equivalency of the specific case and the generalized abstract rules of law, through the evidence to hand (see also Pinch 2009 for discussion of comparing candidate events as members of a class). Video was useful in drawing attention to the existence of unseen and unseeable aspects of the interaction, such as the reasonableness of Forcillo's account of his subjective perception at the time of the second volley. However, to use video as such was by no means a straightforward affair, involving significant reference to the other evidence about Yatim's physical condition at the time of the second volley that, again, was not readily depicted on the video. Here we are most concerned with the production of a legal-factual account (Smith 1978) not as something unproblematically recorded on video, but worked through by parties in interaction with video evidence.

References

Austin, J. L. (1956). A plea for excuses: The presidential address. *Proceedings of the Aristotelian Society, 57*(1), 1–30.

Baccus, M. D. (1986). Sociological indication and the visibility criterion of real world social theorizing. In H. Garfinkel (Ed.), *Ethnomethodological studies of work* (pp. 1–19). London: Routledge.

Bohnsack, R. (2009). The interpretation of pictures and the documentary method. *Historical Social Research, 34*(2), 296–321.

Bohnsack, R. (2013). Documentary method. In U. Flick (Ed.), *The sage handbook of qualitative data analysis* (pp. 217–233). Thousand Oaks: Sage.

Burns, S. L. (2008). Demonstrating "reasonable fear" at trial: Is it science or junk science? *Human Studies, 31*(2), 107–131.

Campeau, H. (2015). 'Police culture' at work: Making sense of police oversight. *British Journal of Criminology, 55*(4), 669–687.

Cicourel, A. (1968). *The social organization of juvenile justice*. New York: Wiley.

Coulter, J., & Parsons, E. D. (1990). The praxiology of perception: Visual orientation and practical action. *Inquiry, 33*(3), 251–272.

Doyle, A. (2003). *Arresting images: Crime and policing in front of the camera*. Toronto: University of Toronto Press.

Dupret, B. (2011). *Adjudication in action: An ethnomethodology of law, morality and justice*. Farnham: Ashgate.

Eglin, P. (1979). Resolving reality disjunctures on telegraph avenue: A study of practical reasoning. *Canadian Journal of Sociology, 4*(4), 359–377.

Elsey, C., Mair, M., Smith, P. V., & Watson, P. G. (2016). Ethnomethodology, conversation analysis and the study of action-in-interaction in military settings. In A. J. Williams, K. N. Jenkings, M. F. Rech, & R. Woodward (Eds.), *The Routledge companion to military research methods* (pp. 180–195). London: Routledge.

Garfinkel, H. (1967). *Studies in ethnomethodology*. Englewood Cliffs: Prentice-Hall.

Garfinkel, H. (2002). *Ethnomethodology's program: Working out Durkheim's aphorism.* Lanham: Rowman & Littlefield.

Gillis, W. (2016). 'Compromise' verdict in James Forcillo trial gets mixed reaction. *Toronto Star*, 25 January.

Goodwin, C. (1994). Professional vision. *American Anthropologist, 96*(3), 606–633.

Hart, H. L. A., & Honore, T. (1985). *Causation in the law*. Oxford: Oxford University Press.

Hasham, A. (2016). Forcillo guilty of attempted murder in shooting death of Sammy Yatim. *The Toronto Star*, 25 January.

Hester, S., & Eglin, P. (2017). *A sociology of crime* (2nd ed.). London: Routledge.

Iacobucci, F. (2014). *Police encounters with people in crisis*. Toronto: Toronto Police Service.

Janus, A. (2016). Yatim family lawyers deny Forcillo had 'trial by YouTube' after fatal streetcar shooting. *CBC News*, 28 July.

Jayyusi, L. (2015). Discursive cartographies, moral practices: International law and the Gaza war. In B. Dupret, M. Lynch, & T. Berard (Eds.), *Law at work: Studies in legal ethnomethods* (pp. 273–298). Oxford: Oxford University Press.

Kari, S. (2014). Attempted murder charge in Forcillo trial continues to puzzle legal experts. *The Globe and Mail*, 24 September.

Lynch, M., & Bogen, D. (1996). *The spectacle of history: Speech, text, and memory at the Iran-Contra Hearings*. Durham, NC: Duke University Press.

Mair, M., Elsey, C., Smith, P. V., & Watson, P. G. (2016). The violence you were/n't meant to see. In R. McGarry & S. Walklate (Eds.), *The Palgrave handbook on criminology and war* (pp. 425–443). London: Palgrave.

Mair, M., Elsey, C., Watson, P. G., & Smith, P. V. (2013). Interpretive asymmetry, retrospective inquiry and the explication of an incident of friendly fire. *Symbolic Interaction, 36*(4), 398–416.

Mair, M., Watson, P. G., Elsey, C., & Smith, P. V. (2012). War-making and sense-making: Some technical reflections on an instance of 'friendly fire'. *British Journal of Sociology, 63*(1), 75–96.

Mannheim, K. (1936). On the interpretation of 'weltanschauung'. In P. Kecskemeti (Ed.), *Essays on the sociology of knowledge* (pp. 33–84). New York: Routeldge.

Martinelli, R. (2014). Revisiting the "21-Foot Rule". *Police: The Law Enforcement Magazine*, 18 September.

Martino, J. (2016). *SIU Counsel* [Interview] (21 October 2016).

Mieszkowski, J. (2012). *Watching war.* Stanford: Stanford University Press.

Pinch, T. (2009). "Testing-one, two, three… testing!": Toward a sociology of testing. *Science, Technology, and Human Values, 18*(1), 25–41.

Pollner, M. (1975). 'The very coinage of your brain': The anatomy of a reality disjuncture. *Philosophy of the Social Sciences, 5,* 411–430.

Rouncefield, M., & Tolmie, P. (2016). Overview: Garfinkel's Bastards at play. In P. Tolmie & M. Rouncefield (Eds.), *Ethnomethodology at play*. London: Routledge.

Rupic, M. (2015). *Crown's Opening Address*. R. v. Forcillo 2016 ONSC4850.

Sandhu, A. (2017). 'I'm glad that was on camera': A case study of police officers' perceptions of cameras. *Policing and Society, 1,* 1–13.

Schneider, C. (2016). *Policing and social media: Social control in an era of new media.* Lanham: Lexington.

Smith, D. (1978). 'K is Mentally Ill': The anatomy of a factual account. *Sociology, 12*(1), 23–53.

Then, E. (2016). *Reasons for Sentence.* R. v. Forcillo 2016 ONSC4050.

Vertesi, J. (2015). *Seeing like a rover: How robots, teams, and images craft knowledge of mars*. Chicago: University of Chicago Press.

Winch, P. (1958). *The idea of a social science and its relation to philosophy*. London: Routledge & Kegan Paul.

Wittgenstein, L. (1953). *Philosophical investigations* (G. E. M. Anscomb, Trans. and Ed.). Oxford: Blackwell.