

Note: These articles are provided if you would like to delve more deeply into the issues discussed during our time together on Saturday. There is no need to read in advance! If you would like to skim a part of the article, the most relevant portions are the overview in the Introduction, and Part III. I look forward to your insights, experiences, and expertise.

JUSTICE VISUALIZED: COURTS AND THE BODY CAMERA REVOLUTION

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ABSTRACT

What really happened? For centuries, courts have been magisterially blind, cloistered far away from the contested events that they adjudicate, relying primarily on testimony to get the story – or competing stories. Whether oral or written, this testimony is profoundly human, with all the passions, partisanship and imperfections of human perception. Now a revolution is coming. Across the nation, police departments are deploying body cameras. Much of the current focus is on how body cameras will impact policing and public opinion. Yet there is another important audience for body camera footage – the courts that forge constitutional criminal procedure, the primary conduct rules for police. This article explores what the coming power to replay a wider array of police enforcement actions than ever before means for judicial review and criminal procedure law. The body camera revolution means an evidentiary revolution for courts, transforming the traditional reliance on reports and testimony and filling in gaps in a domain where defendants are often silent.

The article envisions a future where much of the main staple events of criminal procedure law will be recorded. Analyzing body camera policies from departments across the nation reveals that this future is unfolding now. The article proposes rules of judicial review to cultivate regular use of the audiovisual record in criminal procedure cases and discourage gaps and omissions due to selective recording. The article also offers rules of restraint against the seductive power of video to seem to depict the unmediated truth. Camera perspective can subtly shape judgments. Personal worldviews impact image interpretation. And there is often a difference between the legally relevant truth and the depiction captured on video. Care must be taken therefore to apply the proper perceptual yardsticks and reserve interpretive questions for the appropriate fact-finders.

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When justice removes the blindfold, vision of injustice is actually possible. Just as the veil is an obfuscation, so is the blindfold. . . . [B]lindness is no romantic trait.

— Imani Perry¹

INTRODUCTION

In the half-century since the rights revolution created constitutional criminal procedure, courts have been the central referees adjudicating what is fair or foul play in the “competitive enterprise of ferreting out crime.”² Unlike a referee on the field, however, courts must make the calls far removed in time and place from the actual hotly contested events.³ Magisterially blind and cloistered away, courts are frequently reliant on deeply divergent and partisan accounts.⁴

¹ Imani Perry, *Occupying the Universal, Embodying the Subject*, 17 L. & LIT. 97, 116 (2005).

² This game metaphor is oft-recurring in constitutional criminal procedure. *E.g.*, *Riley v. Cal.*, 143 S. Ct. 2473, 2482 (2014); *Pa. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 368 (1998); *Ill. v. Krull*, 480 U.S. 340, 350 (1987); *Johnson v. United States*, 333 U.S. 10, 14 (1948). For a discussion of the role of courts in framing conduct rules for police see Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470-2490 (1996). For accounts of the genesis of constitutional criminal procedure in the 1960s civil rights revolution see, *e.g.*, Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1156-1160 (1998); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 50-71 (2000); Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 155-171 (1980) Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 438-445 (1980).

³ See, *e.g.*, *Ryburn v. Huff*, 132 S. Ct. 987, 991 (2012) (per curiam) (noting that appellate courts are “far removed from the scene” where officers operate); *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1255 (2012) (Sotomayor, dissenting) (“We have repeatedly and recently warned appellate courts, ‘far removed from the scene,’ against second-guessing the judgments made by the police”).

⁴ Cf. JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 91 (2011) (discussing the representation of justice as blindfolded); Imani Perry, *Occupying the Universal, Embodying the Subject: African American Literary Jurisprudence*, 17 L. & LIT.

Did Walter's girlfriend Roxanne consent to a search of their home or did police coerce her into letting them in by threatening to take away her child if she did not?⁵ Did Andre interfere with the capture of a runaway suspect while screaming profanities, then push and try to fight an officer?⁶ Or was Andre actually a witness to police beating a suspect and arrested on the pretext that he smelled of weed when he tried to speak up?⁷ Did E.E. undergo physical and mental abuse and sleep-deprivation for 36 hours, or was he "cool," "calm," "collected," and "normal" when he confessed to murder?⁸ And did he even confess or did police make up a confession when he refused to crack?⁹ After being pulled over for having a broken taillight, did Walter try to grab the officer's stun gun forcing the officer to shoot him?¹⁰ Or did the officer shoot Walter in the back eight times when he was running away?¹¹ Did police discover — or plant — the murder victim Teresa's car keys in Steven's bedroom and Steven's blood in the victim's car?¹²

Blind justice, or justice guided heavily by testimony in a system where

97, 116 (2005) (disputing the romantic notion of blind justice).

⁵ See *Fernandez v. Cal.*, 134 S. Ct. 1126, 1143 & n.5 (2014) (Ginsburg, J., dissenting) (noting conflicting accounts between police officers and the defendant's battered girlfriend over whether she consented to a search or acquiesced when threatened with removal of her child).

⁶ *Jones v. United States*, 16 A.3d 966, 967-969 (D.C. Ct. Apps. 2011).

⁷ *Id.* at 968.

⁸ See *Ashcraft v. Tenn.*, 322 U.S. 143, 151-152 (1944) (noting sharply divergent accounts between the defendant and the police).

⁹ *Id.* at 150 (noting the defendant's claim that he did not confess).

¹⁰ Alan Blinder & Manny Fernandez, *Residents Trace Police Shooting to A Crime Strategy Gone Awry*, N.Y. TIMES, Apr. 10, 2015, at A1; Mark Berman, *S.C. Investigators Say They Thought Fatal Police Shooting Was Suspicious Before Video Emerged*, WASH. POST, (Apr. 10, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/04/10/south-carolina-investigators-say-they-thought-fatal-police-shooting-was-suspicious-before-video-emerged/>.

¹¹ Matt Apuzzo & Timothy Williams, *Video of Walter Scott Shooting Reignites Debate on Police Tactics*, N.Y. TIMES, Apr. 9, 2015, at A1.

¹² See *Wisconsin v. Avery*, No. 2010AP411-CR Brief of Defendant-Appellant, at 8 (Wis. Ct. Apps., Div. II, June 25, 2010), available at 2010 WL 2691415 (recounting the defense theory that the police planted the evidence); *Making A Murderer* (Laura Ricciardi & Moira Demos, directors) (Netflix 2015) (suggesting the police planted the evidence). See also, e.g., *Reed v. State*, No. 62117, 2013 WL 3256317, at 1 (Nev. 2013) (unpublished op.) (discussing the defendant's argument that his defense counsel was deficient for not contending the search of his car was non-consensual and that the police planted the evidence); *Comm. v. Sparks*, 746 N.E.2d 133, 138 (Mass. 2001) (alleging that police planted evidence found in his living quarters); *State v. Pogue*, 17 P.3d 1272, 1275 (Wash. Ct. App. Div. 1 2015) (discussing the defendant's claim that the police planted the drug evidence during a vehicle search); *People v. McGirt*, 198 A.D.2d 101, 102 (N.Y. Sup. Ct. App. Div. 1st Dep't 1993) (discussing defendant's claim that that the police "hassle" him every day and that on the day of his arrest, they planted evidence on him after using a ruse to get him out of his parents' apartment to search him").

one party is often silent and both sides wage fierce credibility wars, poses the risk of being incomplete justice.¹³ What if courts had the capacity to replay what happened? The event replay power is becoming a reality for a wider array of investigative activities than ever before as a wave of police departments around the country begin deploying police-worn body cameras.¹⁴ Small enough to be worn on the head, ear, or chest, a body camera can go everywhere officers go, providing audiovisual recording of what officers see, hear and do.¹⁵ Spurred by the turmoil around the nation over policing practices, a police body camera revolution is fast unfolding, with numerous departments announcing body camera programs in 2015.¹⁶ Many major police departments are planning to start or expand body camera programs throughout their forces in 2016.¹⁷ There are important open policy questions and different approaches surrounding body cameras, including what officers will be required to record, or not record, and the discretionary model in each jurisdiction.¹⁸

This article envisions a future where many of the most contested events in criminal procedure will be recorded as body camera uptake spreads.¹⁹

¹³ See discussion, *infra*, Part I.

¹⁴ See, *infra*, Part II.B. and tbl.1 (presenting results of research on plans to deploy body cameras in the 100 largest cities in the United States).

¹⁵ See, e.g., U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE, A PRIMER ON BODY-WORN CAMERAS FOR LAW ENFORCEMENT 5-6 (Sept. 2012), <https://www.justnet.org/pdf/00-Body-Worn-Cameras-508.pdf> (hereinafter NIJ, *Body-Worn Cameras*) (discussing size, wearability and audiovisual capacity of body-worn cameras); San Francisco Police Dep't, *Body Worn Cameras Policy, Recommended Draft*, at 1 (Dec. 2, 2015) (defining a body-worn cameras as "a small audio-video recorder with the singular purpose of recording audio/visual files, specifically designed to be mounted on a person.").

¹⁶ See *infra*, Part I.B. for a discussion. See also, e.g., Max Ehrenfreund, *Body Cameras for Cops Could Be the Biggest Change to Come Out of the Ferguson Protests*, WASH. POST (Dec. 2, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/12/02/body-cameras-for-cops-could-be-the-biggest-change-to-come-out-of-the-ferguson-protests/> (discussing rapidly spreading movement to adopt body cameras); Josh Sanburn, *The One Battle Michael Brown's Family Will Win*, TIME (Nov. 24, 2014), available at <http://time.com/3606376/police-cameras-ferguson-evidence> (discussing the building movement toward body cameras).

¹⁷ See *infra*, Part II.B. and tbl.1 for a discussion.

¹⁸ See, e.g., Development in the Law, *Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1805-1808 (2015) (noting numerous important open questions about body cameras that remain to be answered).

¹⁹ See *infra*, Part II. See also, e.g., Chicago Police Dep't, *Special Order S03-14*, at § V.E. (Dec. 30, 2015) (effective Jan. 1, 2016) (on file with author) (requiring recording of routine calls for service, investigatory stops, foot pursuits, search warrant execution, and "any other instance when enforcing the law," as well as traffic stops, vehicle pursuits and emergency driving situations); Los Angeles Police Dep't *Intradepartmental Correspondence from the Chief of Police to the Board of Police Commissioners*, at 2 (Apr. 23, 2015) (on file with author) (requiring activation of body-worn video equipment during calls for service, pedestrian stops, "officer-initiated consensual encounters," foot pursuits,

Based on the study's analysis of body camera policies for police departments in the nation's 100 largest cities, this future is unfolding now. While body camera policies tend to differ widely on privacy and victim protection shut-off provisions, there is greater convergence regarding enforcement activities required to be recorded.²⁰ Numerous policies provide that, at a minimum, stops, searches, responses to calls for service, pursuits, uses of force, arrests, and transportation of arrestees will now be recorded.²¹ This article explores what the capacity to replay body camera footage of a wider array of police enforcement actions than ever before means for judicial review and criminal procedure law.

The body camera revolution poses a major paradigm shift for courts in criminal cases for three reasons: comprehensiveness, detail and volume. In an increasing number of jurisdictions, courts have access to recordings of police interrogations.²² Patrol vehicle dash cameras can also yield relevant footage, albeit sometimes at an awkward distance or angle.²³ But body-

searches, arrests, uses of force, in-custody transports, victim and witness interviews, and crowd management, as well as vehicle stops); New York Police Department Operations Order No. 48, at 2 (Dec. 2, 2014) (on file with author) (providing that officers participating in the body-worn camera pilot program shall activate the cameras during stops and frisks, enforcement encounters involving violations or petty offenses, attempts to take persons into custody, "[a]ny public interaction regardless of context, that escalates and becomes adversarial," uses of force, "[a]ll interior vertical patrols of non-Housing Authority buildings and Housing Authority buildings, as well as vehicle stops"); Phila. Police Dep't, Directive 4.21, at § 2B (Apr. 20, 2015) (eff. Apr. 20, 2015) (on file with author) (requiring recording during any pedestrian investigation, when initiating an arrest or citation, or handling a disturbance or crisis, at any protest or demonstration and "[w]hen confronted by any member of the general public that is or may become confrontational, antagonistic or hostile"); Washington, DC Metropolitan Police, Gen. Order 302, No 13, at 6-7 (June 29, 2015) (on file with author) (requiring officers to initiate body-worn cameras when responding to calls for service, "at the beginning of any self-initiated police action," "[a]ll contacts initiated pursuant to a law enforcement investigation, whether criminal or civil," all stops, all pursuits, use of force situations, arrests, searches, prisoner transports and an array of other enforcement activities).

²⁰ See *infra*, Part II (reporting findings of convergence around activities required to be recorded). For a discussion of the privacy and public disclosure balances being struck, see Mary D. Fan, *Privacy, Public Disclosure, and Police Body Cameras: The National Policy Split*, 68 ALA. L. REV. ___ (forthcoming 2016), available at <http://ssrn.com/abstract=2773938>.

²¹ See *infra*, Part II.A. and tbl. 2.

²² See G. Daniel Lassiter, Patrick J. Munhall, Andrew L. Geers, Paul E. Weiland & Ian M. Handley, *Accountability and the Camera Perspective Bias in Videotaped Confessions*, 1 ANALYSIS SOC. ISSUES & PUB. POL'Y 53, 54 (2001) (noting estimates that more than half of law enforcement agencies videotape some interrogations).

²³ See, e.g., *Lard v. State*, 431 S.W.3d 249, 255, 264-265 (Ark. 2014) (holding that the trial court did not err in allowing the government to play dash camera footage of the defendant killing a police officer in a capital case); *Commonwealth v. Favinger*, No. 1678 MDA 2013, 2014 WL 10987112, at *7 (Sup. Ct. Pa. 2014) (mem. op.) (noting that the trial court adjudicating the suppression motion reviewed the dash camera video to determine whether there was probable cause to stop the defendant for not driving in his lane but "it

worn video will cover a much wider array of police enforcement activities than interrogations or encounters that happen near a police vehicle.²⁴ Body-worn cameras can go to places police cars cannot – such as porches, homes, on foot patrol, while executing warrants, and more.²⁵

The events will be filmed closer up, yielding more detail than ever before captured by testimony or a dash camera.²⁶ Compare, for instance the two stills below from video of police responding to a call about a man at the side of the road armed with a knife who had stabbed himself in the stomach.²⁷ The still on the left is from the dash camera. The still on the right is from the body-worn video of one of the officers involved.

was very difficult to see from the video the distance” the defendant was traveling over the line and therefore the court relied on testimony).

²⁴ See *infra*, Part II.B. and *supra*, note 19. See also, e.g., Atlanta Police Dep’t Policy Manual, Special Order APD.SO.14.05, at 2-3 (Sept. 1, 2014) (on file with author) (requiring recording of pedestrian stops, field interviews, foot pursuits, search warrant executions, victim and witness interviews as well as traffic-related law enforcement activities); Austin Police Dep’t, Austin Police Department Policy Manual, Policy 303, at 126 (May 4, 2015) (on file with author) (requiring recording of warrant service, investigatory stops, and “any contact that becomes adversarial in an incident that would not otherwise require recording” as well as traffic stops); Houston Police Dep’t Draft Gen. Order 400-28, at 5-6 (Nov. 20, 2015) (on file with author) (requiring body-worn camera activation when “[a]rriving on scene at any call for service,” [s]elf-initiating a law enforcement activity”, initiating a stop, conducting searches, during transportation after arrest, while interviewing witnesses and complainants as well as during vehicular stops and pursuits); San Francisco Police Dep’t, Body Worn Cameras Policy, Recommended Draft, at 2-3 (Dec. 2, 2015) (on file with author) (requiring recording of detention and arrests, “consensual encounters,” pedestrian stops, foot pursuits, service of search or arrest warrants, consent-based as well as suspicion-based searches, transportation of arrestees and detainees, and “[d]uring any citizen encounter that becomes hostile” as well as vehicle pursuits and traffic stops).

²⁵ See, e.g., NIJ, BODY-WORN CAMERAS, *supra* note 15, at 5-6 (discussing small size, portability and wearability of body-worn cameras). See also *supra*, notes 19-24 (offering examples of where officers must activate their body-worn cameras).

²⁶ See, e.g., Chicago Police Dep’t, *supra* note 19, at § V.E (requiring recording of the entire incident); Los Angeles Police Dep’t Intradepartmental Correspondence from the Chief of Police to the Board of Police Commissioners, *supra* note 19, at 2 (requiring recording of the entire contact); Oakland Police Dep’t Gen. Order I-15.1, Portable Video Management System, at 3-4 (July 16, 2015) (requiring body camera activation prior to a long list of enforcement activities and continued recording until the conclusion of the event unless privacy exceptions apply). See also, e.g., NIJ, BODY-WORN CAMERAS, *supra* note 15, at 6 (describing body-worn camera resolution specifications and mounting considerations to capture data).

²⁷ The videos are available at *Police Release Videos of Fatal Shooting*, YOUTUBE (Sept. 26, 2015), <https://www.youtube.com/watch?v=0-iWN7UfoJQ>. Pursuant to a records request, the New Hampshire Attorney General released four videos of the shooting: one from a vehicle equipped with a dash camera and three body-worn camera videos. Mike Cronin, *Dashboard Video Shows Fatal Shooting of Man Who Ran At Police*, WMUR9 ABC (Sept. 25, 2015), <http://www.wmur.com/news/dashboard-video-shows-fatal-shooting-of-man-who-ran-at-police/35488864>.



The much greater comprehensiveness of coverage exponentially expands the volume of video relevant to search and seizure suppression issues that courts and litigants will be able to access as a routine matter.²⁸ With rapidly spreading uptake, body cameras have the potential to be disruptive technology in the sense of having the transformative power to shake up old ways of analyzing criminal procedure cases.²⁹ Events previously reconstructed primarily by testimony readily reducible to text for appellate review will now be captured on video that offers trial and appellate judges the opportunity — and temptation — to see and decide for themselves what happened.³⁰

When the Supreme Court decided the fate of a civil suit against police based on police vehicle dash camera footage, scholars expressed concern.³¹

²⁸ See, e.g., Josh Sanburn, *Storing Body Cam Data Is the Next Big Challenge for Police*, TIME (Jan. 25, 2016), <http://time.com/4180889/police-body-cameras-viewu-taser/> (reporting estimate that big-city police departments are generating more than 10,000 hours of video a week).

²⁹ See CLAYTON M. CHRISTENSEN, *THE INNOVATOR'S DILEMMA* 8-33 (3d ed. 2003) (discussing the concept of disruptive technology in the private sector); Tom Casady, *Hidden Cost of Body Cameras*, THE DIRECTOR'S DESK (Oct. 31, 2014), <http://lpd304.blogspot.com/2014/10/hidden-cost-of-body-worn-cameras.html> (“In some ways, [body-worn video] is a disruptive technology: a game-changer that leap frogs vehicle-mounted systems.”).

³⁰ Cf. Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 534 (1992) (“The model of contemporary law remains largely print-based.”).

³¹ *Scott v. Harris*, 550 U.S. 372 (2007). See, e.g., Erwin Chemerinsky, *A Troubling Take on Excessive-Force Claims*, TRIAL, July 2007, at 74 (“[I]t is deeply troubling when an appellate court, acting on its own, watches a tape and decides the facts of a case for itself.”); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841-42 (2009) (arguing the Court was wrong to privilege its own view of the video and deny jurors the opportunity to

In *Scott v. Harris*, the Court ruled that no reasonable juror could agree with the plaintiff's account that the police used excessive force in the car chase and upheld summary judgment for the government.³² Scholars wrote that the Court was overstepping the role of an appellate court and depriving jurors of a chance to decide.³³ Neither *Scott v. Harris* nor the debate over it has explored the larger question of how trial and appellate courts should exercise the event replay power in the much more frequent context of deciding search and seizure suppression motions where judges rather than juries find the facts and forge the bulk of criminal procedure law.³⁴

An examination of the implications of body camera footage for judicial review and criminal procedure law is needed as potentially millions of hours of video evidence covering events previously relegated to competing witness accounts becomes available to courts and litigants.³⁵ This article fills that gap, exploring the implications of the event replay power that body-worn cameras will give courts.

Part I discusses the problems with the primacy of orality and text in the criminal procedure context, where part of the story is often missing because of the formidable reasons for defendants to remain silent. This part also discusses the growing evidence of the frailties of human perception and the fierce intractable credibility contests that ensue when defendants contest the government's account. This part discusses how body cameras are disruptive technology with the potential to transform this tradition.

Part II presents findings from a study of the body camera practices and recording policies among police departments serving the largest 100 cities in America to show what is in store for courts and litigants. The findings show the prevalence of a limited discretion model whereby police are required to record the law enforcement encounters that are central to the daily work of courts adjudicating criminal procedure questions. This means that the body camera revolution will also be an evidentiary revolution for

interpret it based on their worldviews).

³² 550 U.S. 372 (2007).

³³ *E.g.*, Chemerinsky, *supra* note 31, at 74; Kahan et al., *supra* note 31, at 841-42.

³⁴ *See, e.g.*, FED. R. EVID. 104(a) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible."); *United States v. Simpson*, 992 F.2d 1224, 1227 (D.C. Cir. 1993) (discussing fact-finding by judge at suppression hearing); *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981) (discussing standards of review for factual findings by the trial judge at a suppression hearing).

³⁵ *See, e.g.*, Chemerinsky, *supra* note 31, at 74 (predicting that judicial decision-making that entails reviewing videotape of the contested incident "is likely to become a trend" and "raises serious questions about what is appropriate evidence for appeals courts to consider"); Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1524 (2012) ("Technological advances that can put appellate judges in shoes that very much resemble those of jurors and trial judges raise questions about whether appellate courts should defer to judges and juries as they traditionally have done").

courts.

Part III argues that in deciding search and seizure suppression matters, where criminal procedure law is primarily forged and applied, trial and appellate courts should regularly consult the audiovisual as well as textual record. To discourage selective recording and non-recording, courts should also inquire into why video footage that should be present under departmental policy is missing. Body-worn video can give courts a better vantage about what happens on the ground to more accurately judge what counts as fair or foul play. Body-worn video is a particularly important source of information in a system where the defendant often has strong disincentives to testify and may stay silent rather than risk taking the stand in a suppression hearing or trial.³⁶ This part also addresses conflicting positions taken by appellate courts over whether to review videos admitted below and confusion over the proper role of appellate courts when it comes to the audiovisual record.

While the ability to clarify opaque areas of the law and get a fuller sense of what happened can be beneficial, audiovisual literacy and rules of restraint are also needed. Part III discusses the myth of camera objectivity and presents scientific evidence and cinematic theory on subtle persuasion effects in camera perspective. This Part also argues for judicial restraint and caution in indulging the ability to see and decide for oneself in two important contexts. The first is on factual questions properly reserved for a jury, such as matters that go to guilt, innocence or liability. The second is on criminal procedure questions where the relevant truth is what actors perceived and believed at the time, not what a camera's angle — free of stress and fear and viewed coolly in hindsight — can catch.

I. THE CAMERA CULTURAL REVOLUTION

*"I wouldn't know what to say to officers who didn't think they were on camera all the time, everywhere. At this point, you would just look at them and you say, "Seriously?" And then maybe sit him in a room for a day and have him read the newspaper. I think there is a general understanding that cameras are everywhere all the time."*³⁷

Small portable cameras are everywhere, part of the cell phones that

³⁶ See, e.g., Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1449-1450, 1458 (2005) ("The United States's criminal justice system is shaped by a fundamental absence: Criminal defendants rarely speak. From the first Miranda warnings through trial until sentencing, defendants are constantly encouraged to be quiet. . . . No government actor is permitted to obtain information from them, and they are largely expected to remain silent in court as well.").

³⁷ Interview with Lt. Joel Guay, Seattle Police Dep't (Jan. 25, 2015) (video of interview on file with author).

people wear like bodily appendages.³⁸ In the United States, 91% of adults have cell phones.³⁹ And not just any old clunky cell phone — 56% of adults have smartphones.⁴⁰ More than any time in human history, people live their lives under a camera’s eye — in selfies, in home-made video clips, caught on someone else’s camera.⁴¹ Every day on average in 2014, people uploaded 1.8 billion digital images — a total of 657 billion photos a year.⁴²

Steve Mann famously termed the small cameras affixed to small entities such as individuals and ubiquitously deployed today “sousveillance devices.”⁴³ The term sousveillance captures the shift in power relations between the persons conducting the observation or recording and the subject, as well as the re-positioning of the cameras so that it is not necessarily hovering from a building or other entity above.⁴⁴ The entity doing the recording or observing is no longer in a superior position of power over the subject — for example citizens may record police and police may be required to record themselves to facilitate community control.⁴⁵ In a society of voluntary sousveillance — where everybody is watching everybody, taking photos, and recording video — perhaps what is more remarkable is that so many enforcement encounters still have to be reconstructed in court through testimony and reports *without* event replay.⁴⁶

This part begins by discussing the challenges of establishing what actually happened in adjudicating criminal procedure questions in a system where testimony and text reign supreme. Defendants face dilemmas about whether to remain silent or offer their side of the story. When the questions are contested, ugly credibility contests can ensue, where the defendant and the police are accused of malfeasance and lying. Especially in criminal

³⁸ See Aaron Smith, *The Best (and Worst) of Mobile Connectivity*, PEW RES. CTR. (Nov. 30, 2012), <http://www.pewinternet.org/2012/11/30/the-best-and-worst-of-mobile-connectivity/>.

³⁹ Lee Rainie, *Cell Phone Ownership Hits 91% of Adults*, PEW RES. CTR. (June 6, 2013), <http://www.pewresearch.org/fact-tank/2013/06/06/cell-phone-ownership-hits-91-of-adults/>.

⁴⁰ Aaron Smith, *Smartphone Ownership 2013*, PEW RES. CTR. (June 5, 2013), <http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013/>.

⁴¹ NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY 14 (2009); Rose Eveleth, *How Many Photographs of You Are Out There in the World?*, THE ATLANTIC (Nov. 2, 2015), <http://www.theatlantic.com/technology/archive/2015/11/how-many-photographs-of-you-are-out-there-in-the-world/413389/>.

⁴² Eveleth, *supra* note 41.

⁴³ Steve Mann, *Veillance and Reciprocal Transparency: Surveillance Versus Sousveillance, AR Glass, Lifeglogging, and Wearable Computing*, 2013 PROC. IEEE INT’L SYMP. ON TECH. & SOC’Y 1, 3-4.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Cf. Jean-Gabriel Ganascia, *The Generalized Sousveillance Society*, 49 SOC. SCI. INFO. 489, 489-90 (2010) (theorizing sousveillance as “the present state of modern technological societies where anybody may take photos or videos of any person or event, and then diffuse the information freely all over the world”).

cases, where the human stakes are high, the reliability of testimony and the partisan nature of human perception are under fire. We then turn to the recent convergence in interests of an array of unlikely bedfellows to spread the use of body cameras across the nation, ushering in a new era of evidence in criminal procedure cases.

A. The Problems with the Primacy of Testimony and Text

The case sounds like any of the legions of drug possession cases commonplace in the courts and criminal procedure canon.⁴⁷ The basis for the arrest was possession of a controlled substance.⁴⁸ Officers initially stopped Kenneth Simmons for riding a bicycle in the park at night without his lights on.⁴⁹ When the officers approached him, Simmons pedaled his bike rapidly away and did not stop when ordered to do so.⁵⁰ The police report states that when officers apprehended him, Simmons rolled around, flopped his legs, tried to kick officers, and pulled out a knife, which officers removed.⁵¹ Regarding the search that ultimately yielded the contraband, the report stated:

I saw Simmons grabbing towards his right pants pocket. We were able to gain control of Simmons. I grabbed Simmons [sic] right hand and started to search Simmons. When I would search his right pocket he would try rolling over so I could not search him. I was able to search his picket and did not find any controlled substances or weapons. I search [sic] Simmons right coin pocket and discovered a clear plastic baggy with a rock like substance that I recognized as a controlled substance.⁵²

At the preliminary hearing, the officers involved similarly testified as to the chase, the struggle, and the discovery of the drugs in the suspect's pocket.⁵³

Now view and listen to the body camera video.⁵⁴ Because a video

⁴⁷ See, e.g., MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 39-40 (1992) (discussing the main staple cases in a criminal court); Hon. Peggy Fulton Hora, Hon. William G. Schma, John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 449 (1999) (discussing the cyclical nature of addiction and criminal prosecution and the large judicial workload due to drug and alcohol abuse-related cases).

⁴⁸ See Cal. Health & Safety Code § 11350(A) (West 2014) (prohibiting possession of a controlled substance).

⁴⁹ San Diego Regional Officer's Report Narrative, Incident Number 14050033181 (May 17, 2014) (hereinafter Simmons Police Report) (on file with author).

⁵⁰ *Id.*

⁵¹ *Id.* at 4.

⁵² *Id.*

⁵³ *People v. Simmons*, Case No. SCD-256148, Preliminary Hearing and Arraignment Transcript, June 4, 2014, at 6-9.

⁵⁴ Available at Allison Ash, *Raw Video from SDPD Officer's Body Camera Shows Man's Arrest at Park*, ABC10 NEWS (Jun. 17, 2015),

cannot be reproduced in text, stills from the video are offered below. Like all the other stills from body camera footage presented in this article, the images are in the public domain, released to the public pursuant to public records requests or pursuant to departmental policy.



During much of the search, Simmons's pants are pulled down and his

<https://www.youtube.com/watch?v=OvbgZFQYG18> (hereinafter Simmons Body Camera Video). The video first shows officers pulling Simmons off his bike and arresting him. The search begins at 2:35 in the video.

buttocks are exposed.⁵⁵ As multiple officers involved in the search lift, turn and search him, he is crying out, panting, and voicing fear.⁵⁶ There are indications that he may have defecated in fear.⁵⁷ Most of the search footage is focused on Simmons's buttocks and groin region, indicating the area of focus by the officer wearing the camera, but later we finally see Simmons' face, swollen and bloody.⁵⁸

The summary in the report does not capture the full experience of the search shown in the video – nor even what two stills from the video can convey. The contrast between video, testimony, and report dramatically captures how the camera can reveal far more than testimony or reports. Even a factually accurate summary of events from the officer's perception may leave out important facts.⁵⁹ Yet most criminal procedure cases are decided based on testimony or declarations — including hearsay testimony from persons without personal knowledge of the events relying on police reports.⁶⁰ At suppression hearings to determine the admissibility of evidence, the rules of evidence applicable in criminal trials do not apply.⁶¹ There are at least three major troubles with the reliance on testimony and reports in criminal procedure cases: (2) the frequent silence of one side, (2) the growing evidence of the partiality and fallibility of perceptions, and (3) ugly credibility contests in which neither the defendant nor the police emerge unscathed.

1. Defendant Silence

When reading constitutional criminal procedure cases, one sometimes marvels at the facts —and the information gaps between the facts. How did Michael Whren just happen to be holding two large plastic bags of cocaine boldly in plain view when the police officers who tailed him and then

⁵⁵ *Id.* at 2:58-6:36.

⁵⁶ *Id.*

⁵⁷ *Id.* at 4:38-4:55. *See also* Simmons v. San Diego, Case No. 30-2015-00803397-CU-PO-CJC, Second Amended Complaint for Damages and Demand for Jury Trial, at 7 (Nov. 12, 2015) (hereinafter Simmons v. San Diego, Second Amended Complaint) (alleging he partially defecated in fear).

⁵⁸ *Id.* at 7:19-7:30.

⁵⁹ In the Simmons case, there is a pending lawsuit over whether the report and testimony by the officers accurately captured the events. *See* Simmons v. San Diego, *supra* note 57, at 7-8. This article does not take a stand on the accuracy of the testimony or reports but simply points out that even assuming the reports and testimony are accurate from the officer's perception, many important details are lost in the reconstruction by reports and testimony.

⁶⁰ *See, e.g.,* United States v. Matlock, 415 U.S. 164, 172 (1974) (explaining that hearsay is admissible at hearings to determine the admissibility of evidence); FED. R. EVID. 104(a) (stating that a court deciding preliminary questions such as the admissibility of evidence “is not bound by evidence rules, except those on privilege.”).

⁶¹ FED. R. EVID. 104(a).

pulled him over walked up to his car?⁶² When Officer Lang asked Christopher Drayton “Mind if I check you?” after arresting Drayton’s travel companion and Drayton lifted his hands eight inches from his legs, was that really an expression of consent or submission to authority?⁶³ It seems that one part of the story – one whole side of the story – is missing.⁶⁴ Why?

One major reason for the seeming one-sidedness of the facts in many criminal procedure cases is that the other key party to the event – the defendant – has several formidable reasons to stay silent. A defendant who takes the stand loses the shelter of the Fifth Amendment privilege against self-incrimination and may be cross-examined by the prosecution on issues reasonably related to his direct testimony.⁶⁵ A decision by the defendant to testify is thus also a decision to “waive his privilege completely” and “having once cast aside the cloak of immunity he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing.”⁶⁶

Deciding to speak and becoming subject to cross-examination can be more than just inconvenient or embarrassing for a defendant – it can destroy his case and credibility. A testifying defendant faces the risk of impeachment by reference to his prior convictions.⁶⁷ The testifying defendant also incurs the risk of impeachment by evidence suppressed

⁶² *Whren v. United States*, 517 U.S. 806, 808-809 (1996).

⁶³ *United States v. Drayton*, 536 U.S. 194, 199 (2002).

⁶⁴ Neither Whren nor Drayton testified at the suppression hearings contesting the seizure and searches yielding the evidence. Kevin R. Johnson, *The Song Remains the Same: The Story of Whren v. United States*, in *RACE LAW STORIES* 419, 428-429 (Rachel F. Moran & Devon Wayne Carbado eds., 2008). Scholars have also suggested the officers’ side of the story in *Whren* is improbable and needs greater scrutiny and adversarial examination. See, e.g., I. Bennet Capers, Book Review, *The Fourth Problem*, 49 *TULSA L. REV.* 431, 435 n.34 (2013) (discussing “the improbability of the officers’ version of the events and the likelihood that they in fact engaged in ‘testilying’” in *Whren* and noting that “both officers have been the subject of misconduct allegations, including allegations of planting evidence and providing false testimony”); Tracey Maclin, *Race and the Fourth Amendment*, 51 *VANDERBILT L. REV.* 333, 384 (1998) (discussing concern over police perjury in a case like *Whren*).

⁶⁵ See, e.g., *McGautha v. California*, 402 U.S. 183, 215 (1971) (“It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. . . . It is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination.”); *Rogers v. United States*, 340 U.S. 367, 373 (1951) (“[I]f the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure.”) (quoting *Brown v. Walker*, 161 U.S. 591, 597 (1896)).

⁶⁶ *Grunewald v. United States*, 353 U.S. 391, 419 (1957).

⁶⁷ See, e.g., *Ohler v. United States*, 529 U.S. 753, 759 (2000) (“It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like.”) (quoting *McGautha v. California*, 402 U.S. 183, 215 (1971)).

because it was taken in violation of the defendant's Fourth Amendment rights.⁶⁸ Defendant testimony at a suppression hearing also presents special challenges because inconsistencies in testimony at the suppression hearing can be used to impeach him if he testifies at trial, though his suppression hearing testimony cannot be used as substantive evidence of guilt at trial.⁶⁹

If a defendant stays silent, the prosecution may not suggest that adverse inferences be drawn from that silence.⁷⁰ Indeed a defendant is entitled to an instruction that no adverse inferences may be drawn from silence.⁷¹ But if the defendant chooses to testify, "his failure to deny or explain evidence of incriminating circumstances of which he may have knowledge may be the basis of adverse inference, and the jury may be so instructed."⁷²

A defendant who wants to tell his side of the story must weigh the benefits against the substantial potential costs of taking the stand.⁷³ The balance of costs and benefits is such that lawyers often advise defendants to not take the stand and remain silent.⁷⁴ Thus, defendant silence is prevalent throughout the criminal process, including at hearings to contest the admissibility of evidence when search and seizure claims are presented.⁷⁵ This means that judges dependent on traditional testimony hear one side of the story more prominently than the other.

Sometimes snippets of the defendant's voice emerge – memorialized as evidence by the government. For example the police report in Simmons' case stated that Simmons told officers: "I did not know you were the police. I had my headphones in. I never looked back. I could not hear you yelling at me. I knew that I had rocks on me. I only knew that you were the police when we were fighting."⁷⁶ What the police report states is important

⁶⁸ United States v. Havens, 446 U.S. 620, 628 (1980).

⁶⁹ Compare Simmons v. United States, 390 U.S. 377 (1968) ("[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection."), with, e.g., People v. Douglas, 136 Cal. Rptr. 358, 363 (Cal. Ct. App. 1977) ("We conclude that defendant's testimony at a suppression hearing may be used for impeachment purposes if he takes the stand at his trial and testifies in a manner inconsistent with his pretrial testimony."); People v. Mahone, 614 N.Y.S. 2d 409, 411 (N.Y. App. Div. 1994) ("It was not improper for the prosecutor to use inconsistencies between defendant's testimony at the suppression hearing and at trial to impeach him.").

⁷⁰ Griffin v. California, 380 U.S. 609, 614 (1965).

⁷¹ Carter v. Kentucky, 450 U.S. 288, (1981).

⁷² Raffel v. United States, 271 U.S., 494 (1926).

⁷³ See, e.g., Ohler v. United States, 529 U.S. 753, 759 (2000) ("[I]t is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify.").

⁷⁴ Natapoff, *supra* note 36, at 1449-1450, 1458.

⁷⁵ *Id.*

⁷⁶ Simmons Police Report, *supra* note 49, at 5.

because it is what prosecutors, defense attorneys and officers consult to understand or recall a case from myriad others.⁷⁷ When you view the body camera video you hear that Simmons said a lot more about the search and seizure.⁷⁸ But what is memorialized is what has evidentiary value in the government's case.⁷⁹ Even when the defendant's voice is heard, it is filtered through reports as potential evidence.

2. The Partiality and Fallibility of Perception

A second challenge of dependence on testimony and police reports is that it relies on memory, often under stress.⁸⁰ A large body of important work has illuminated how our memory is not as trustworthy a record as we believe, even when we are trying earnestly to tell the truth.⁸¹ While much of the evidence is in the context of the accuracy of eyewitness identification, the insights about memory apply to other testimonial contexts.⁸² Despite the common perception that we are better at remembering situations “burned into our memory” because they occurred in high-stress situations, the scientific evidence indicates that high stress actually negatively impacts memory.⁸³ When emotional arousal is intense,

⁷⁷ Consider this compelling account:

And for the defender, the flow of cases is endless; a limitless stream of files. A dozen or so clean, raw files appear on their desks in the morning, at most containing a police report and the defendant's application for indigent defense. Into court they come, stack of files in hand, yelling to determine if their clients have even shown up. “Is there a Mr. Firmen here? Is Ms. Nonce in court?”

John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1240-1241 (1994).

⁷⁸ Simmons Body Camera Video, *supra* note 54, at 2:35-6:36.

⁷⁹ Simmons Police Report, *supra* note 49, at 5.

⁸⁰ See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (“Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment”).

⁸¹ See, e.g., BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY AND THE LAW* 68 (1995) (reporting that more than 2,000 studies have been performed illuminating the problems with memory, perception and eyewitness identification); ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* 52-133 (1996) (discussing seminal studies and memory processes).

⁸² Cf. Jack B. Weinstein, Book Review, *Eyewitness Testimony*, 81 COLUMBIA L. REV. 441, 442-443 (1981) (discussing insights from eyewitness memory studies for other evidentiary contexts).

⁸³ See, e.g., LOFTUS, *supra* note 81, at 33; Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 L. & HUM. BEHAV. 687, 699 (2004); Charles A. Morgan, III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L J. L. & PSYCH. 265, 265-67 (2004); Richard S. Schmechel, Timothy P. O'Toole, Catherine Easterly, Elizabeth F. Loftus, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability*, 46 JURIMETRICS J. 177, 179 (2006). See also, e.g., JENNIFER THOMPSON-CANNINO, RONALD COTTON, ERIN TORNEO, *PICKING COTTON: OUR MEMOIR OF INJUSTICE*

performance on memory tasks significantly decrease in accuracy.⁸⁴ Responding to stressful situations divides our attention and reduces our capacity to process and remember events.⁸⁵

Whether stressed or not, humans are also vulnerable to confirmation bias, the cognitive tendency to ignore facts that are inconsistent with our hypotheses or beliefs and focus on details that support them.⁸⁶ If one suspects someone is guilty of a crime, one is more likely to focus on information supporting that suspicion and overlook information that would disconfirm the view.⁸⁷ Confirmation bias is not limited to police officers, of course. For example, commentators have noted that judges also display confirmation bias, tending to find errors harmless or not depending on whether the court believes a defendant is guilty.⁸⁸

We reason from schemata, mental categories for how situations will play out based on our experiences and beliefs.⁸⁹ If someone or some situation resembles one previously experienced, these schemata shape our expectancies and shape our perceptions to confirm our beliefs.⁹⁰ In ambiguous situations where information is missing, schemata fill in the gaps, leading people to believe or perceive based on past experiences and beliefs.⁹¹ To translate in terms of operations in the field, an officer may reason thusly: I've caught a lot of guilty guys who look like this one, in this high-crime area, and this one looks guilty too.⁹²

AND REDEMPTION 15-20 (2010) (describing attempt to memorize every detail of assailant and certitude of identification that proved wrong).

⁸⁴ LOFTUS, *supra* note 81, at 33; Deffenbacher et al., *supra* note 83, at 699.

⁸⁵ Sven-Ake Christianson, *Emotional Stress and Eyewitness Memory: A Critical Review*, 112 PSYCH. BULL. 284, 284-305 (1992); Maria S. Zaragoza & Sean M. Lane, *Processing Resources and Eyewitness Suggestibility*, 3 LEGAL & CRIMINOLOGICAL PSYCH. 305, 305-308 (1998).

⁸⁶ THOMAS GILOVICH, HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE 33 (1991); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175, 198-199 (1998).

⁸⁷ For a discussion and examples in the criminal context see, e.g., Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 296-316 (2006).

⁸⁸ Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1187 (1995); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 349-50 (2006).

⁸⁹ D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1, 14 (2002).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Cf.*, e.g., John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOCIAL PSYCH. 20, 20-33 (1983) (finding evidence that social labeling creates expectancies about true dispositions or capabilities). *See also*, e.g., Andrew Guthrie Ferguson, *The "High-Crime Area" Question: Requiring Verifiable*

When a search or seizure yields evidence, perceptions can also be reshaped by hindsight bias and outcome bias. Hindsight bias is a “knew-it-all-along” effect in which the outcome seems more likely in retrospect.⁹³ Hindsight bias arises when we “update” our memory with the new information, subtly reshaping our memory of what happened to make the outcome appear more certain.⁹⁴ Outcome bias is a related but different cognitive distortion in which the outcome influences our judgment about whether the judgment call was sound or wrong.⁹⁵ The reiterative effect of documenting one’s judgment calls – in reports, in testimony, for example – can further entrench subtly reshaped memories because reiteration heightens the perception of certainty.⁹⁶

Hearing all sides of the story is thus all the more important because of the fallibility of human perception and tendency toward unwitting distortions of perception.⁹⁷ Yet as discussed in Part I.A.1, one of the key participants, the defendant, has strong reasons to stay silent, leaving part of the story untold.⁹⁸ This compounds the problems with reliance on testimony in reconstructing the facts and the need for other sources of information that can show more of the story.

3. Ugly Credibility Contests

The third challenge of traditional reliance on testimony and reports is the ugly credibility contests that often ensue if the defendant does dispute officer accounts. Neither side emerges unscathed – defendants are often

and *Quantifiable Evidence for Fourth Amendment Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1595-1604 (2008) (discussing the use of a claim that an encounter occurs in a high-crime area in supporting reasonable suspicion).

⁹³ Baruch Fischhoff, *Hindsight Is Not Equal to Foresight: The Effect of Outcome on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCH. 288, 288-293, 296-297 (1975); Erin M. Harley, Keri A. Carlsen & Geoffrey R. Loftus, *The “Saw-It-All-Along” Effect: Demonstrations of Visual Hindsight Bias*, 30 J. EXPERIMENTAL PSYCHOL. 960, 962-964 (2004); Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past Events After the Outcomes Are Known*, 107 PSYCH. BULL. 311, 311-313 (1990); Ulrich Hoffrage, Ralph Hertwig & Gerd Gigerenzer, *Hindsight Bias: A By-Product of Knowledge Updating?*, 26 J. EXPERIMENTAL PSYCHOL. 566, 566-567 (2000); Lawrence J. Sanna, Norbert Schwarz, Eulena M. Small, *Accessibility Experiences and the Hindsight Bias: I Knew It All Along Versus It Could Never Have Happened*, 30 MEMORY & COGNITION 1288, 1288-1289 (2002).

⁹⁴ Ulrich Hoffrage & Ralph Hertwig, *Hindsight Bias: A Price Worth Paying for Fast and Frugal Memory*, in GERD GIGERENZER, PETER M. TODD & THE ABC RESEARCH GROUP, SIMPLE HEURISTICS THAT MAKE US SMART at 191 (1999).

⁹⁵ Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. PERSONALITY & SOC. PSYCHOL. 569, 569-573 (1988).

⁹⁶ Ralph Hertwig, Gerd Gigerenzer & Ulrich Hoffrage, *The Reiteration Effect in Hindsight Bias*, 104 PSYCHOL. REV. 194, 194-196 (1997).

⁹⁷ See discussion and sources, *supra*, at notes 81-96.

⁹⁸ See discussion and sources, *supra*, at notes 65-75.

assumed to be lying criminals with serious credibility problems.⁹⁹ The police are impugned as liars, evidence planters, and abusers of power.¹⁰⁰ Courts are also burdened, awash in deeply partisan and divergent stories in which both sides are smeared.¹⁰¹

The credibility contest is an uneven one. Stories proffered by defendants are more likely to be discounted; indeed defendants were historically deemed unqualified to testify under oath.¹⁰² Claiming the officer is lying is a risky move because it risks alienating the fact-finder.¹⁰³ Moreover, judges are keenly aware of the consequences of suggesting that the officer is a liar, which can end a career by rendering the officer unusable as a witness.¹⁰⁴ There are powerful institutional pressures against making such a finding.¹⁰⁵

There are good reasons why mistakes may arise from people trying in good faith to recount their perceptions in the stress and heat of the moment.¹⁰⁶ People recalling events in conscious good faith may have perceptions unwittingly skewed by confirmation, hindsight, and outcome biases.¹⁰⁷ Yet faced with deeply divergent stories and no other way to reconstruct the event, courts have difficulty spotting and supporting findings of potential mistakes in perception.

Increasingly, criminal procedure doctrine has developed a phalanx of

⁹⁹ See, e.g., Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665, 1695 (1987) (discussing the credibility difficulties defendants face).

¹⁰⁰ See, e.g., *Fernandez v. Cal.*, 134 S. Ct. 1126, 1143 & n.5 (2014) (Ginsburg, J., dissenting) (noting the account of the defendant's battered girlfriend that police coerced her into letting them into the house by threatening to take her child away); *Jones v. United States*, 16 A.3d 966, 967-969 (D.C. Ct. App. 2011) (discussing defendant's allegation that the police arrested him and roughed him up because he witnessed them beating a suspect and tried to speak up); *Comm. v. Sparks*, 746 N.E.2d 133, 138 (Mass. 2001) (discussing the defendant's allegation that police planted the evidence found during the search of his home); *State v. Pogue*, 17 P.3d 1272, 1275 (Wash. Ct. App. Div. 1 2015) (noting the defendant's claim that the police planted the drug evidence during a vehicle search); *People v. McGirt*, 198 A.D.2d 101, 102 (N.Y. Sup. Ct. App. Div. 1st Dep't 1993) (discussing defendant's claim that that the planted evidence on him after using a ruse to get him out of his parents' apartment to search him).

¹⁰¹ See, e.g., *Thompson v. Keohane*, 516 U.S. 99, 118 (1995) (noting that "the trial judge will often have to weigh conflicting accounts of what transpired").

¹⁰² *Portuondo v. Agard*, 529 U.S. 61, 66 (2000).

¹⁰³ See, e.g., John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85, 116 (1999) (discussing how defendants face risks when telling stories that clash with the schemata harbored by jurors).

¹⁰⁴ Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1352 (1996); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1043-1047 (1996).

¹⁰⁵ Slobogin, *supra* note 104, at 1043-1047.

¹⁰⁶ See discussion, *supra* in the text and sources at notes 81-96.

¹⁰⁷ See discussion, *supra*, Part I.A.2.

rules that reduce the need to have to delve into competing accounts.¹⁰⁸ One of the most oft-reiterated positions in constitutional criminal procedure is that courts will not delve into pretext or subjective intent so long as an objective basis exists to justify the officer's conduct.¹⁰⁹ Even where an officer's stated rationale for a search or seizure is incorrect, so long as another basis to justify the exercise of power can be found, the court will inquire no further.¹¹⁰ Among the oft-stated rationales for the limits on judicial inquiry are the administrative difficulties and inefficiencies of case-by-case inquiry into the mystery of police motives.¹¹¹

The consequences of judicial reluctance to inquire for socioeconomically disadvantaged minority communities bearing the heaviest burden of searches and seizures are intensely controversial.¹¹² Scholars have argued that cases such as *Whren v. United States*, which declined to inquire into whether a stop for a minor offense was actually a pretext to target young black men for a search, create "a license to make racial distinctions."¹¹³ Recently, Devon Carbado has argued that the tolerance of racial profiling in constitutional criminal procedure is a contributing cause of the heightened risk of minority community members being killed by the police.¹¹⁴ The lack of scrutiny or a remedy undermines trust and perceptions of legitimacy, and can lead to what Bennet Capers terms "small rebellions."¹¹⁵ And, as discussed in the next section, trust may become so eroded that interests may shift and converge toward a paradigm shift in police regulation with important implications for how courts adjudicate criminal procedure questions.

B. Odd Bedfellows Converge in Interests on Cameras

¹⁰⁸ For a discussion see Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. DAVIS L. REV. 1407, 1424-1428 (2011).

¹⁰⁹ *E.g.*, *Brendlin v. California*, 551 U.S. 249, 260 (2007); *Devenpeck v. Alford*, 543 U.S. 146, 153-154 (2004); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); *Whren v. United States*, 517 U.S. 806, 806 (1996); *United States v. Robinson*, 414 U.S. 218, 221 & n.1, 235 (1973).

¹¹⁰ *Heien v. North Carolina*, 135 S. Ct. 530, 536-540 (2014); *Devenpeck v. Alford*, 543 U.S. 146, 153-154 (2004).

¹¹¹ *E.g.*, *Rakas v. Illinois*, 439 U.S. 128, 136-137 (1978); *United States v. Robinson*, 414 U.S. 218, 235 (1973).

¹¹² For critiques see, *e.g.*, DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE CRIMINAL JUSTICE SYSTEM* 27-41, 48-52 (1999); I. Bennett Capers, *Policing, Race and Place*, 44 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 43, 56-72 (2009); Devon W. Carbado & Rachel F. Moran, *The Story of Law and American Racial Consciousness: Building a Canon One Case at a Time*, 76 U. MISSOURI KANSAS CITY L. REV. 851, 873-874 (2008).

¹¹³ Carbado & Moran, *supra* note 112, at 873-874.

¹¹⁴ Devon Carbado, *The Legalization of Racial Profiling: Setting the Stage for Police Violence* (Feb. 18, 2016) (unpublished manuscript) (on file with the author).

¹¹⁵ Bennet Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 865 (2008).

No one likes being the object of surveillance – and that includes the masters of surveillance, the police.¹¹⁶ Historically, police departments resisted recording even a portion of their work – interrogations – because of concerns that videotaping would prevent suspects from talking and reveal strategies that might be unpalatable to judges and juries.¹¹⁷ In recent years, as more investigators have gained experience with recording suspect interviews, there has been a shift toward appreciating the benefits of recording interrogations.¹¹⁸ Because of a combination of legislation, judicial and prosecutorial encouragement, and voluntary departmental action, more than half of law enforcement agencies now record at least some interrogations, according to estimates.¹¹⁹

Putting body cameras on officers is much more pervasive and intrusive because a wider range of officer conduct and much more of an officer's day are recorded.¹²⁰ The logic of regulation by body camera resembles the brilliance of Jeremy Bentham's Panopticon idea – get people to behave because an eye could be on them at any time.¹²¹ The problem is that the Panopticon was an idea for a prison.¹²² Non-prisoners are likely to resist. Many officers and police unions have expressed numerous concerns over body cameras such as chilling communications with witnesses and victims and trampling the privacy of officers and the public.¹²³ A July 2013 of a

¹¹⁶ FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY, BRIAN C. JAYNE, *CRIMINAL INTERROGATION AND CONFESSIONS* 45-51 (2001) (discussing resistance to recording); Richard A. Leo & Kimberly D. Richman, *Mandate the Electronic Recording of Police Interrogations*, 6 *CRIMINOLOGY & PUB. POL'Y* 791, 791 (2007) (noting that many police departments continue to resist recording interrogations though electronic recording has become increasingly common).

¹¹⁷ INBAU, REID, BUCKLEY, JAYNE, *supra* note 116, at 49-51; Saul M. Kassin, Richard A. Leo, Christian M. Meissner et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 *L. & HUM. BEHAV.* 381, 385 (2007).

¹¹⁸ Saul M. Kassin, Richard A. Leo, Christian M. Meissner et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 *L. & HUM. BEHAV.* 381, 396 (2007).

¹¹⁹ G. Daniel Lassiter, Patrick J. Munhall, Andrew L. Geers, Paul E. Weiland & Ian M. Handley, *Accountability and the Camera Perspective Bias in Videotaped Confessions*, 1 *ANALYSIS SOC. ISSUES & PUB. POL'Y* 53, 54 (2001); Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 *AM. CRIM. L. REV.* 1297, 1311-12 (2008).

¹²⁰ For the results of our study of body camera policy provisions on what police actions must be recorded see *infra*, Part II.

¹²¹ See Miran Božovič, *Introduction* to JEREMY BENTHAM, *THE PANOPTICON WRITINGS* 13–17 (Miran Božovič ed., 1995) (explaining Bentham's idea of the Panopticon, which would enable more efficient and effective governance of prison inmates by creating a structure that permitted the perfect visibility of prisoners arrayed around an opaque watchtower).

¹²² *Id.*

¹²³ See, e.g., Douglas Hanks, *For Police Cameras, Going Dark Can Be A Challenge*, *MIAMI HERALD* (Dec. 14, 2014), <http://www.miamiherald.com/news/local/community/miami-dade/article4480249.html> (discussing concerns among officers, including recording community members on some of

sample of 254 police departments across the United States found that less than a quarter of the responding departments used body cameras.¹²⁴

Then came what the executive director of the organization representing rank-and-file police officers calls “a watershed event in policing” — the national turmoil over the shooting of Michael Brown in Ferguson.¹²⁵ Witnesses offered polarized and dramatically divergent accounts of what happened.¹²⁶ Some witnesses said Brown was punched and shot in the back by Officer Darren Wilson though he held his hands up in surrender.¹²⁷ In an account supported by some other witnesses, Wilson said Brown punched him, tried to grab his gun, then ran away, but turned to charge him when Wilson pursued him and Wilson shot in fear for his life.¹²⁸ It was another deeply divergent painful credibility contest — with no camera recording the key events to show what unfolded.¹²⁹

One of the biggest reforms associated with the Ferguson turmoil are body cameras for police officers.¹³⁰ Protests erupted after a grand jury refused to indict Wilson, drawing national and international attention to the heightened risk of being killed by the police that black men in America face.¹³¹ Seven months later, the U.S. Department of Justice would conclude

the worst days of their lives).

¹²⁴ POLICE EXECUTIVE RESEARCH FORUM, U.S. DEP'T OF JUSTICE, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 2 (2014), <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

¹²⁵ Quoted in Sandhya Somashekhar, Wesley Lowery, Keith L. Alexander, Kimberly Kindy, Julie Tate, *Black and Unarmed*, WASH. POST (Aug. 8, 2015), <http://www.washingtonpost.com/sf/national/2015/08/08/black-and-unarmed/>.

¹²⁶ See U.S. DEPARTMENT OF JUSTICE, REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 6-8 (Mar. 4, 2015) (hereinafter BROWN DEATH INVESTIGATION REPORT), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf (summarizing conflicting witness accounts about what happened); Frances Robles & Michael S. Schmidt, *Shooting Accounts Differ as Holder Schedules Visit to Ferguson*, N.Y. TIMES, Aug. 20, 2014, at A1 (reporting on divergent witness accounts).

¹²⁷ BROWN DEATH INVESTIGATION REPORT, *supra* note 126, at 7-8.

¹²⁸ *Id.*; Robles & Schmidt, *supra* note 126, at A1.

¹²⁹ Josh Sanburn, *The One Battle Michael Brown's Family Will Win*, TIME, Nov. 24, 2014, available at <http://time.com/3606376/police-cameras-ferguson-evidence/>.

¹³⁰ Max Ehrenfreund, *Body Cameras for Cops Could Be the Biggest Change to Come Out of the Ferguson Protests*, WASH. POST (Dec. 2, 2014) <https://www.washingtonpost.com/news/wonk/wp/2014/12/02/body-cameras-for-cops-could-be-the-biggest-change-to-come-out-of-the-ferguson-protests/>; Sanburn, *supra* note 129.

¹³¹ Jon Swaine, Oliver Laughland, Jamiles Lartey & Ciara McCarthy, *Young Black Men Killed by US Police at Highest Rate in Year of 1,134 Deaths*, THE GUARDIAN (Dec. 31, 2015) <http://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-young-black-men>; Monica Davey & Julia Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES, Nov. 25, 2014, at A1; Brianna Lee & Michelle Florcruz, *Ferguson, Missouri, Protests: International Newspapers, Media Showcase*

that forensic evidence was inconsistent with claims that Brown was shot in the back with his hands up in surrender.¹³² But by then, police had realized that public support and trust was turning sharply against law enforcement officers.¹³³

Several police departments had been considering or piloting a shift to police body cameras before but Ferguson provided a compelling push.¹³⁴ Proponents of body cameras frequently point with hope to studies indicating that deploying body cameras reduces the frequency of complaints against officers and uses of force by officers.¹³⁵ Trust-building and protection is an oft-stated rationale for adopting body cameras.¹³⁶ Advocates of adopting body cameras also argue that officers and the public behave better when they know they are being recorded.¹³⁷ Proponents also believe that

Violence, Destruction, Flames, INT'L BUS. TIMES (Nov. 24, 2014), <http://www.ibtimes.com/ferguson-missouri-protests-international-newspapers-media-showcase-violence-1729216>; Jill Reilly, Louise Boyle, Ashley Collman, David Martokso, Dan Bates, *Ferguson Burns*, DAILY MAIL (Nov. 2, 2014), <http://www.dailymail.co.uk/news/article-2844491/Ferguson-Missouri-Police-officer-Darren-Wilson-NOT-face-charges-shooting-unarmed-black-teen-Michael-Brown.html>.

¹³² BROWN DEATH INVESTIGATION REPORT, *supra* note 126, at 7-8; Somashekhar et al., *supra* note 125.

¹³³ Somashekhar et al., *supra* note 125.

¹³⁴ See, e.g., Michael Blasky, Press Release, Conduct on Camera, University of Nevada, Las Vegas (Mar. 11, 2015), <https://www.unlv.edu/news/article/conduct-camera> (reporting findings that officers initially skeptical of body cameras changed their views after Ferguson because they realized that wearing a camera might help exonerate them); William Crum, *Oklahoma City Police Take 'Huge Step' Toward Body Cameras for Officers*, THE OKLAHOMAN (Sept. 5, 2015), <http://newsok.com/article/5444779> (noting the department had been considering whether to adopt body cameras but Ferguson spurred action).

¹³⁵ E.g., POLICE EXECUTIVE RESEARCH FORUM, *supra* note 124, at 5-6; EUGENE P. RAMIREZ, A REPORT ON BODY WORN CAMERAS 3-4 (2015), https://www.bja.gov/bwc/pdfs/14-005_Report_BODY_WORN_CAMERAS.pdf; MICHAEL D. WHITE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 17 (2014), <https://ojpdiagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf>.

¹³⁶ E.g., DC Body-Worn Camera Program Regulations Amendment Act of 2015, section 3900.2 (“The intent of the BWC program is to promote the public trust, enhance service to the community by accurately documenting events and any interactions and statements made during encounters between MPD officers and the public, and ensure the safety of both MPD officers and the public.”); Phila. Police Dep’t, Directive 4.21, at § 1.A.2 (Apr. 20, 2015) (eff. Apr. 20, 2015); San Diego Police Dep’t Procedure No. 1.49, at 1 (July 8 2015) (“Cameras provide additional documentation of police/public encounters and may be an important tool for collecting evidence and maintaining public trust.”); San Francisco Police Dep’t, Body Worn Cameras Policy, Recommended Draft, at 1 (Dec. 2, 2015) (on file with author) (“The use of Body Worn Cameras (BWC) is an effective tool a law enforcement agency can use to demonstrate its commitment to transparency, ensure the accountability of its members, increase the public’s trust in officers, and protect its members from unjustified complaints of misconduct.”).

¹³⁷ POLICE COMPLAINTS BD., ENHANCING POLICE ACCOUNTABILITY THROUGH AN

recording events reduces unfounded complaints.¹³⁸

The first and most frequently cited scientific evidence for the benefits of body cameras comes from a study that randomly assigned half of the 54 officers of the Rialto, California police department to wearing body cameras.¹³⁹ During the study period, officers without body cameras had twice the incidence of uses of force compared to the group using body cameras.¹⁴⁰ The between-groups difference in complaints was not statistically significant largely due to the low number of complaints against either group in the small department and community.¹⁴¹ However, comparing the number of complaints during the body camera study period to those before body cameras were implemented indicated a significant reduction in the number of complaints of more than 90%.¹⁴² A later study of the Phoenix, Arizona Police Department found that complaints against officers in a precinct deploying body cameras declined by 22.5%, during a period in which complaints against officers in other comparable precincts without body cameras rose.¹⁴³ A study of Mesa, Arizona police officers also found a reduction in complaints against officers wearing body cameras.¹⁴⁴ The San Diego police department also reported a reduction in uses of force and complaints against police deploying body cameras.¹⁴⁵ Other studies are ongoing.¹⁴⁶

Groups that often take opposing positions on policing and surveillance debates have united to usher in an era of rapid transition to body cameras.¹⁴⁷ Galvanized by the events in Ferguson, major civil rights and civil liberties

EFFECTIVE ON-BODY CAMERA PROGRAM FOR MPD OFFICERS 3 (2014); POLICE EXECUTIVE RESEARCH FORUM, *supra* note 124, at 6.

¹³⁸ POLICE EXECUTIVE RESEARCH FORUM, *supra* note 124, at 6.

¹³⁹ Barak Ariel, William A. Farrar, Alex Sutherland, *The Effect of Police Body-Worn Cameras on Use of Force and Citizens' Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANTITATIVE CRIMINOLOGY 509 (2015).

¹⁴⁰ *Id.* at 523.

¹⁴¹ *Id.* at 524.

¹⁴² *Id.*

¹⁴³ CHARLES M. KATZ ET AL., EVALUATING THE IMPACT OF OFFICER WORN BODY CAMERAS IN THE PHOENIX POLICE DEPARTMENT 33 (2014), https://publicservice.asu.edu/sites/default/files/ppd_spi_feb_20_2015_final.pdf.

¹⁴⁴ WHITE, *supra* note 135, at 21-22.

¹⁴⁵ E.g., San Diego City Council Action, Executive Summary Sheet: SDPD Body Worn Camera Program, at 10-11 (Mar. 3, 2015), http://docs.sandiego.gov/councilcomm_agendas_attach/2015/psln_150318_2.pdf.

¹⁴⁶ See, e.g., Blasky, *supra* note 134.

¹⁴⁷ See, e.g., Mike Maciag, *Survey: Almost All Police Departments Plan to Use Body Cameras*, GOVERNING (Jan. 26, 2016), <http://www.governing.com/topics/public-justice-safety/gov-police-body-camera-survey.html> (reporting on the plans of police departments across the United States to deploy body cameras); NAACP, Civil Rights Coalition Urges National Reforms and Recommendations to Address Police Abuse (2015), <http://www.naacp.org/news/entry/civil-rights-coalition-urges-national-reforms-and-recommendations-to-address> (urging the adoption of body cameras).

groups united to call for the required use of body cameras and other reforms.¹⁴⁸ Even the ACLU, which has a track record of opposing extending surveillance and strong concern for privacy, joined the call for putting body cameras on the police.¹⁴⁹ Civil rights and civil liberties groups supported body cameras as a way to police the police, promote greater transparency, and reduce the risk of injuries and deaths in law enforcement encounters.¹⁵⁰

Also galvanized by the events in Ferguson, police departments began to see the benefits of body cameras.¹⁵¹ Police chiefs who might have been reluctant five years ago to adopt body cameras realized their utility in offering evidence of what happened, re-building trust, and reducing unfounded complaints.¹⁵² A recent study of officer perceptions of body cameras, based on surveys of Orlando police officers, also found a widespread belief that recording might improve the behavior of the public toward officers.¹⁵³ Officers who were previously skeptical of body cameras are also realizing that body cameras can help exonerate them if they are falsely accused of wrongdoing.¹⁵⁴

¹⁴⁸ Lawyers' Committee for Civil Rights Under Law et al., A Unified Statement of Action to Promote Reform and Stop Police Abuse 2 (Aug. 18, 2014), https://www.aclu.org/sites/default/files/assets/black_leaders_joint_statement_-_final_-_8-18.pdf.

¹⁴⁹ Lawyers' Committee for Civil Rights Under Law et al., *supra* note 148; Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All*, ACLU (Oct. 9, 2013), <https://www.aclu.org/technology-and-liberty/police-body-mounted-cameras-right-policies-place-win-all>.

¹⁵⁰ Lawyers' Committee for Civil Rights Under Law et al., *supra* note 148.

¹⁵¹ *See, e.g.*, POLICE EXECUTIVE RESEARCH FORUM, *supra* note 124, at 6 (reporting on changing perceptions); Mara H. Gottfried, *St. Paul Police to Get Body Cameras, Explain Details at Community Meetings*, <http://www.twincities.com/2015/10/19/st-paul-police-to-get-body-cameras-explain-details-at-community-meetings/> (reporting on shifts in police opinion).

¹⁵² *E.g.* POLICE EXECUTIVE RESEARCH FORUM, *supra* note 124, at 6; Statement of Andy Skoogman, Executive Director, Police Chiefs Association, *quoted in* Gottfried, *supra* note 151.

¹⁵³ Wesley G. Jennings, Lorie A. Fridell, Mathew D. Lynch, *Cops and Cameras: Officer Perceptions of the Use of Body-Worn Cameras in Law Enforcement*, 42 J. CRIM. JUST. 549, 552 (2014).

¹⁵⁴ POLICE COMPLAINTS BD., *supra* note 137, at 3-4; POLICE EXECUTIVE RESEARCH FORUM, *supra* note 124, at 6-7. *See also, e.g.*, Austin Police Dep't, Austin Police Department Policy Manual, Policy 303, at 125 (May 4, 2015) (stating that body-worn cameras can help protect against false allegations of misconduct); Chicago Police Dep't, Special Order S03-14 (Dec. 30, 2015) (effective Jan. 1, 2016) (stating that body-worn cameras "can protect members from false accusations through the objective documentation of interactions between Department members and the public"); Doug Wyllie, *Survey: Police Officers Want Body-Worn Cameras*, POLICEONE (Oct. 23, 2012), <https://www.policeone.com/police-products/body-cameras/articles/6017774-Survey-Police-officers-want-body-worn-cameras/> (reporting the results of a survey, sponsored in part by a maker of body cameras, finding that 85% of the 785 respondents "believe that body-worn

Body cameras offer a powerful example of Derrick Bell's interest-convergence thesis that progress for the powerless occurs when the reform converges with the interests of the powerful.¹⁵⁵ The adoption of body cameras by police departments has accelerated rapidly across the nation. After Ferguson, sales of police-worn body cameras leaped 70%.¹⁵⁶ Stock prices surged for Taser International, maker of one of the most popular brands of body cameras and a cloud-based service to store the footage.¹⁵⁷ A recent survey by the Major Cities Chiefs Association and Major County Sheriffs' Association found that 95% of 70 law enforcement agencies surveyed have either committed to putting body cameras on officers or have already done so.¹⁵⁸ The convergence of diverse interests across unusual bedfellows has thus created a major shift in the recording of police encounters in the United States.

II. THE FUTURE WILL BE RECORDED



Body camera footage of police officers responding to calls about loud yelling in an apartment from someone who may be mentally ill. Officers are engaging in a knock and talk consensual encounter with the subject of the complaints.

The spurt of police body cameras hitting the streets presents important policy questions about what will be recorded or not, public disclosure,

cameras reduce false claims of police misconduct, and reduce the likelihood of litigation against the agency.”).

¹⁵⁵ Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

¹⁵⁶ Alan Gomez, *After Ferguson, Police Rush to Buy Body Cameras*, USA TODAY (Oct. 11, 2014), <http://www.usatoday.com/story/news/nation/2014/10/11/police-body-cameras-ferguson-privacy-concerns/16587679/>.

¹⁵⁷ *Id.*

¹⁵⁸ Maciag, *supra* note 147.

privacy, and witness protection.¹⁵⁹ Many state legislatures are considering bills to help answer the host of questions raised by putting hundreds or thousands of cameras into the community on police.¹⁶⁰ Only a few legislatures have succeeded in passing legislation to provide some guidelines for the police departments and communities in their state.¹⁶¹ Legislators in other jurisdictions are wrestling with disagreements over police discretion, privacy protection, and public disclosure.¹⁶² Even though a historic convergence of interest ushered in the body camera era, the groups come from very different perspectives on police discretion, privacy and how the public is best protected.¹⁶³ In the absence of legislatively prescribed rules, police departments have taken the lead in drafting policies on body-worn cameras addressing the important questions.¹⁶⁴ The policies vary in communities across the United States.¹⁶⁵

This section reports findings from the first study to code and analyze body camera policies among police departments in the 100 largest cities in the United States. The results reported in this article focus on policies

¹⁵⁹ See, e.g., Development in the Law, *Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1805-1808 (2015) (noting the numerous important open policy questions about body cameras).

¹⁶⁰ See, e.g., National Conference of State Legislatures, *Law Enforcement Overview: Body Cameras* (May 29, 2015), [http://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx#Police use of body-cameras](http://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx#Police%20use%20of%20body-cameras) (noting that 34 states as of May 15 were considering body-worn camera legislation). See also, e.g., Jeremy Brilliant, *Bill Would Keep Most Police Body Cam Video Secret*, WTHR 13 (Indiana) (Jan. 20, 2016), <http://www.wthr.com/story/31014061/indiana-bill-would-give-police-departments-option-of-not-releasing-video-footage> (reporting on pending legislation in Indiana to exempt body camera footage from public disclosure to protect privacy).

¹⁶¹ See, e.g., SB 1304, art. 10, Law Enforcement Officer-Worn Body Camera Act, 99th Gen. Assembly (effective Jan. 1, 2016) (providing guidelines on recording); OR. REV. STAT. § 165.540 (2016) (prescribing limits on recording vis body camera); S.C. CODE ANN. § 23-1-240 (2016) (prescribing body camera guidelines for South Carolina law enforcement agencies); TEX. GOV'T CODE § 411.441-448 (West 2016) (prescribing recording policies).

¹⁶² See, e.g., Rachel Alexander, *Body Camera Clarity Sought: Bills Seek to Balance Rights of Individuals, Public*, SPOKESMAN-REV. Feb. 19, 2015, available at 2015 WLNR 5052803 (describing competing bills and perspectives); Barbara Rodriguez, *Bills on Body Cameras in Iowa Showcase Looming Challenges*, DES MOINES REGISTER (Feb. 21, 2016), <http://www.desmoinesregister.com/story/news/politics/2016/02/21/bills-body-cameras-iowa-showcase-looming-challenges/80708172/> (reporting on heated debate over how to protect privacy); Dennis Romboy, *Legislators Wrestling with Police Body Cam Laws*, DESERET NEWS, Feb. 18, 2016, available at 2016 WLNR 5050778 (discussing major disagreements over minimum standards for police use of body cameras and questions about personal privacy).

¹⁶³ See, e.g., Tanzina Vega, *Rights Groups: Police Use of Body Cambers Raises Privacy Concerns*, CNN (May 15, 2015), <http://www.cnn.com/2015/05/15/politics/body-cameras-civil-rights-privacy-coalition/> (discussing policy disagreements).

¹⁶⁴ See examples of body camera policies cited, *supra*, at notes 24, 26.

¹⁶⁵ See discussion, *infra*, Part II.A and summaries in Tables 2-3.

regarding what activities must be recorded.¹⁶⁶ While there is heterogeneity in departmental requirements, the results reveal a coming future where most law enforcement encounters — including some of the most opaque domains of criminal procedure — will be illuminated. The hundreds of thousands of hours of footage will be linked to the police reports that land on lawyers’ desks to start a criminal case, offering litigants a rich source of evidence for introduction and courts greater power than ever before to replay events in contested criminal procedure contexts.¹⁶⁷

A. Body Camera Policies on What Must Be Recorded

The police body camera revolution implicates some of the greatest dilemmas of modern organized society, including how much discretion to accord the police and the right balance between surveillance and privacy. Because the law often lags behind technology in policing, departments across the nation have had to take the first pass at crafting policies that address important questions of privacy, police discretion and public safety.¹⁶⁸ To shed light on the future that is emerging, this study collected and coded body camera policies issued by police departments serving the 100 largest cities in the United States.

While smaller jurisdictions such as Rialto, Ferguson, and Spokane are also deploying body cameras, this study focused on the largest cities because their policies impact the most people and can set the standards for others to emulate.¹⁶⁹ These cities also generate the largest volume of business for the increasingly lucrative body camera hardware and software industry.¹⁷⁰ The technology needs arising from these super-players will thus have an outsize influence on the development of technology in response to law and policy requirements, such as redaction software and recording settings.

Table 1 summarizes the status of body camera adoption in the 100 municipal departments examined. The vast majority of the police departments examined — 88 out of 100 — have piloted or used police body cameras or have plans to do so. Of those, the great majority — 69 out of the 88 — launched or will launch body cameras in 2014 or later, showing the very recent nature of the major shift.

¹⁶⁶ Findings from the portion of this empirical study dealing with privacy policies are reported separately in another project focused on privacy questions.

¹⁶⁷ See discussion, *infra*, Part II.B.

¹⁶⁸ See examples of body camera policies cited, *supra*, at notes 24, 26.

¹⁶⁹ See, e.g., Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 840-851 (2008) (discussing mechanisms of policy diffusion by emulation).

¹⁷⁰ See, e.g., Robinson Meyer, *The Big Money in Police Body Cameras*, THE ATLANTIC (Apr. 30, 2015), <http://www.theatlantic.com/technology/archive/2015/04/the-big-money-in-police-body-cameras/392009/> (discussing lucrative technology contracts).

Table 1. Body Camera Adoption Status among Police Departments in the 100 Largest U.S. Cities

Body Camera Adoption Status	Number of Departments
Does not use officer-worn body cameras	12
Has piloted or is piloting the use of body cameras	36
Plans to pilot or use body cameras in the future	24
Extending body camera use throughout force	28

Among those 88 departments that have used or plan to use body cameras, 39 had publicly available body camera policies. In addition, three departments were in states that had enacted body camera legislation that gives some guidelines about recording policy. The final sample for coding was therefore 42 — just under half of the police departments that either are considering using body cameras or have piloted or deployed them.

Among the departments with available laws and policies for coding, the most popular model of police recording discretion is a limited discretion model. Under a limited discretion model, police are directed to record specified enforcement activities and given discretion over whether to record at other times.¹⁷¹ The vast majority of the available policies — 34 out of 42 — spell out a limited discretion model. The remaining eight departmental policies coded have adopted a highly limited discretion model requiring that body cameras be on during all enforcement encounters with the public, unless an exception applies.

Table 2 lists enforcement events and the number of departments among the 42 coded that require recording of the event. The enforcement events are listed by order of frequency of specification in policies requiring recording. Nearly all the departments mandate recording of *Terry* and traffic stops, searches, arrests, pursuits, and responses to calls for service. Most require the recording of use of force or encounters that escalate, becoming adversarial. In light of the controversy over the death of Freddie Gray during transportation while in custody, it is also notable that most of the policies mandate recordings of transportation of suspects in custody.¹⁷²

¹⁷¹ See, e.g., NEW YORK CITY DEP'T OF INVESTIGATION, OFFICE OF THE INSPECTOR GENERAL FOR THE NYPD, BODY-WORN CAMERAS IN NYC: AN ASSESSMENT OF NYPD'S PILOT PROGRAM AND RECOMMENDATIONS TO PROMOTE ACCOUNTABILITY *ii* (July 2015), <http://www.nyc.gov/html/oignypd/assets/downloads/pdf/nypd-body-camera-report.pdf> (defining a limited discretion model).

¹⁷² See, e.g., Sheryl Gay Stolberg & Jess Bidgood, *Starkly Different Accounts of Freddie Gray's Death as Trial of Officer Begins*, N.Y. TIMES, Dec. 3, 2015, at A20 (discussing the controversy and mystery over Freddie Gray's death while being transported in custody).

Table 2. Events to be Recorded According to the 42 Publicly Available Body Camera Recording Policies and Laws Coded¹⁷³

Enforcement Activity	Mandatory: Number of Departments	Discretionary: Number of Departments
Terry stops	39	1
Traffic stops	39	1
Arrests	39	0
Pursuits, foot or traffic	38	0
Responding to calls for service	36	1
Searches	36	0
Encounters that escalate or get adversarial	34	2
Use of force	34	1
Transporting persons in custody	33	1
Minor crimes/infraction enforcement	31	0
Consensual encounters	11	17

What is not as consistently mandated is the recording of consensual encounters. In criminal procedure and police parlance, a consensual encounter is the initiation of an encounter by an officer, typically in situations where there is either no articulable basis yet for reasonable suspicion or it is unclear if there is a sufficient basis.¹⁷⁴ Consensual encounters are unregulated by the Fourth Amendment because they are not deemed a seizure.¹⁷⁵ Targeting for a consensual encounter is intensely controversial because of the lack of regulation or scrutiny.¹⁷⁶ Given the tendency of people to comply when approached by police officers, the consensual part of a “consensual encounter” can resemble a legal fiction.¹⁷⁷ Because the selection of persons for consensual encounters is unregulated, the risk of targeting due to hunches based on a person’s race, gender, age

¹⁷³ The numbers in the right-most two columns may not add up to 42 because some policies may not specify a position on the issue.

¹⁷⁴ See, e.g., *United States v. Avery*, 137 F.3d 343, 352 (6th Cir. 1997) (describing the unregulated nature of consensual encounters, “which may be initiated without any objective level of suspicion”).

¹⁷⁵ *Fla. v. Rodriguez*, 469 U.S. 1, 5-6 (1984).

¹⁷⁶ See, e.g., I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. CIV. LIB. CIV. RTS. L. REV. 1, 40 (2011) (discussing controversies).

¹⁷⁷ See, e.g., Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 156 (“[T]he Court’s Fourth Amendment consent jurisprudence is either based on serious errors about human behavior and judgment, or else has devolved into a legal fiction of the crudest sort--a mere device for attaining the desired legal consequence.”).

and socioeconomic background is heightened.¹⁷⁸

Recording consensual encounters is an important step toward illuminating a controversial and opaque domain. Given the unregulated and controversial nature of consensual encounters, perhaps what is more remarkable is that nearly half of the departments with policies coded mandate the recording of consensual encounters. Well over half either provide for discretionary or mandatory recording of such encounters. While a good step forward, wider-spread mandating that consensual encounters be recorded would better serve the goals of increasing trust and transparency that are oft-stated in body camera policies.

The early movers in framing body camera recording policies play an important role as exemplars for other jurisdictions joining the body camera bandwagon.¹⁷⁹ The body camera policies are also exemplars for legislatures about what policies are feasible and already being deployed in the field.¹⁸⁰ When it comes to new technology, courts and legislatures often trail behind practice, and may end up accepting or adjusting the practice that has been forged in the field.¹⁸¹ Examining the early and major jurisdiction movers in forging body camera recording policy reveals a future where many of the main staples of criminal procedure — stops, searches, arrests, responses to calls for service, uses of force, and even the enforcement of minor crimes or infractions — will be recorded. Indeed, there appears to be much more consensus about required recording of enforcement encounters than the private and sensitive contexts that should not be captured on camera.

B. The Coming Replay Power: Bigger and Better than Before

The recording of the main staple events contested in criminal procedure law has important implications for lawyers and courts as well as the police. The nature of the evidence and information available to reconstruct events will be powerfully changed. Currently, when a new case lands in the hands of a prosecutor or defense attorney, the police report is often the first guide to the attorneys on both sides to figure out what the case about.¹⁸² The

¹⁷⁸ Capers, *supra* note 176, at 40.

¹⁷⁹ See, e.g., Frances Stokes Berry & William D. Berry, *Innovation and Diffusion Models in Policy Research*, in THEORIES OF THE POLICY PROCESS 307, 310-350 (Paul A. Sabatier & Christopher M. Weible eds. (3d ed. 2014) (discussing models of emulation, early and late adoption); Jill Clark, *Policy Diffusion and Program Scope: Research Directions*, 15 PUBLIUS: THE JOURNAL OF FEDERALISM 61 (1985) (discussing leaders and laggards in policy diffusion).

¹⁸⁰ See, e.g., Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POLITICAL SCI. REV. 1174 (1973) (offering a model of diffusion).

¹⁸¹ Cf. Orin Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 539-542 (2011) (discussing the benefits of judicial delay when it comes to new technologies in law enforcement).

¹⁸² See, e.g., Mitchell, *supra* note 77, at 1240-1241 (discussing how overburdened

police report also guides later officer testimony because officers rely on their reports to refresh their memory when they testify after the event.¹⁸³ Indeed before testifying, officers are often seen in the hallway of courthouses reading their police reports to revive memories blurred by time and numerous other encounters.¹⁸⁴ Particularly in run-of-the-mill cases, officer testimony is often limited to what is in the report.¹⁸⁵

The report that has such power in framing a criminal case from its inception is limited by its one-dimensional nature, committed to paper as a summary of the perceptions of the officer involved. As the Simmons case study at the outset of Part I illustrates, this perspective is driven by what is of evidentiary value to the government. Many details do not make it into the report, which is necessarily a summary focused on justifying the enforcement action and documenting the evidence obtained from it.

In jurisdictions where officers use body cameras, this thin paper account will be supplemented by multimedia capturing a fuller range of details from a broader perspective. Most of the departmental policies coded in this study explicitly specify that police reports must note that there is accompanying video of the incident.¹⁸⁶ Defendants may also request disclosure of the video in discovery.¹⁸⁷ This video can speak beyond officer accounts at suppression hearings even when the defendant does not speak. The availability of video thus can address the challenges of a criminal justice system where one party to disputed events is repeatedly advised to stay silent.¹⁸⁸

The availability of video will also influence officer report-writing and testimony. Most of the jurisdictions coded explicitly state that the officer can review the body camera video in preparation for testimony and while writing reports. Indeed some departments require review of the video in

attorneys often first get to know what the case is about through the police report contained in a thin file).

¹⁸³ Darren T. Kavinoky, *Strategies for Defending DUO Cases in California*, ASPATORE, 2008 WL 5689409, at *11.

¹⁸⁴ *See id.* (“We see them in the hallways reading those reports and trying to refresh their recollection.”).

¹⁸⁵ *See id.* (“There is usually a significant lag time between the time the person is arrested and the time the case goes to trial. During that time, the officer has forgotten that client and the specific details . . . so we know when the officers get on the stand that they will testify to what is included in the police report--no more and no less.”).

¹⁸⁶ Specifically, 31 out of the 42 body camera policies coded specify linkage between the report and the video.

¹⁸⁷ *See, e.g.,* *Brady v. Maryland*, 373 U.S. 83, 86-87 (1963) (requiring disclosure of evidence favorable to the accused and material to guilt or punishment); James W. McGee, Jr., *DWI Discovery Trends in North Carolina*, ASPATORE, 2015 WL 4975016, at *1 (noting that as a defense attorney in a jurisdiction with dash cameras and body cameras, he always makes a *Brady* request for the videotape).

¹⁸⁸ *See* discussion, *supra*, at Part I.A.1.

preparing to testify.¹⁸⁹ None of the policies limit officer review of the body camera video in preparing to testify. Where policies are silent, officers are free to review the body camera video in preparation to testify and competent officers and prosecutors will review that video in preparation for court.

Through introduction and dispute by the parties, courts will also have access to the video of contested encounters. The availability of video generates for the courts a power to replay events to help reconstruct what happened rather than depend on partisan and often one-sided testimony. The audiovisual recording of a wider array of law enforcement activities than ever before is a major development for courts adjudicating criminal cases. The event replay power will also be greater than ever before.

To date, courts tend to have video access to only a small portion of the contested law enforcement encounters they adjudicate. Interrogations may be recorded in more than half of the jurisdictions in the United States, but that is only part of the evidence in a criminal case.¹⁹⁰ Much of the evidence – and the entire case – may come from searches and seizures. Before body cameras, the main video window courts had into the search and seizure disputed in criminal procedure cases was through dash cameras.¹⁹¹ These dash camera videos yield only partial snapshots, often from a distant angle that misses important details.¹⁹²

Even in traffic stops, a dash camera does not capture the relevant details of what might give police probable cause for a search of the vehicle or an arrest of the person inside it. Compare for instance, the two stills below from video of the same traffic stop.¹⁹³ The still on the left is from the patrol vehicle dash camera. The still on the right is from the officer's body camera. Now imagine if this traffic stop had been the one in Michael Whren's case.¹⁹⁴

¹⁸⁹ See, e.g., Director T. Armstrong, Memphis Police Dep't, Policy and Procedure Information and Updates, Serial 12-16 (Sept. 23, 2015) (requiring that officers review body-worn camera footage before writing reports); San Diego Police Dep't Procedure No. 1.49, at 11 (July 8 2015) (requiring that officers review digital evidence before completing reports to prime their recollection but "shall not write their reports based solely on what they viewed from the BWC recording").

¹⁹⁰ See, e.g., Lassiter et al., *supra* note 119, at 154 (citing estimates).

¹⁹¹ See, e.g., State v. O'Neal, 7 So.3d 182, 185 (La. Ct. App. 2009) (noting use of dash camera footage at suppression hearing); State v. Munsey, 424 S.W.3d 767, 796 (Tex. Ct. App. 2014) (similar).

¹⁹² See discussion and video example, *supra* at notes 26-27.

¹⁹³ Sterling Police Department, *The Difference A Camera Can Make*, YOUTUBE (Sept. 12, 2014), <https://www.youtube.com/watch?v=ZXy17SIzpbQ>.

¹⁹⁴ Whren v. United States, 517 U.S. 806, 808-809 (1996).



View from patrol vehicle dash camera

View from officer-worn body camera

Recall that in *Whren v. United States*, the Court recounts that when the officer decided to pull over Whren and his friend James Brown in their Pathfinder vehicle for minor traffic infractions, this occurred:

The policemen followed, and in a short while overtook the Pathfinder when it stopped behind other traffic at a red light. They pulled up alongside, and Officer Ephraim Soto stepped out and approached the driver's door, identifying himself as a police officer and directing the driver, petitioner Brown, to put the vehicle in park. When Soto drew up to the driver's window, he immediately observed two large plastic bags of what appeared to be crack cocaine in petitioner Whren's hands.¹⁹⁵

Let's return to the question in Part I.A.1.¹⁹⁶ Why were the two large plastic bags sitting boldly in plain view in Whren's hands when Whren and Brown knew officers had been tailing them and were nervous enough to try to drive sharply away? The question has vexed scholars who have suggested that the facts in *Whren* are an example of testilying that the Court ignores.¹⁹⁷ Yet without the defendant's testimony offering a contrary story at the suppression hearing, nor video, there is not much a court can do. The evidence in the record is the officers' testimony. As the still photos above indicate, even if the officers in Whren's case had dash camera footage, it would not tell the lawyers or the court much. We cannot see what was in Whren's lap. But the body camera footage would give the court much greater ability to replay the stop and check the story, even if the defendant does not speak.

¹⁹⁵ *Id.* at 808-809.

¹⁹⁶ See text, *supra* at note 62.

¹⁹⁷ See, e.g., Capers, *supra* note 64, at 435 n.34; Maclin, *supra* note 64, at 384.

III. RULES OF USE AND RESTRAINT FOR THE JUDICIAL POWER TO REPLAY

The body camera revolution is also an evidentiary revolution for courts, enabling courts to see for themselves more of what happened beyond the partiality, perceptual frailties, and gaps of oral or written statements. It takes seeing to spur action. Images can jolt people with power into concern. It was images of crowds grinning at lynchings and mob domination of justice that spurred judges sitting far removed, in the serene space of courts, into action to generate the body of constitutional criminal procedure regulating the police.¹⁹⁸ And it was images of mass protests, of the slain, of the events preceding death, and of children offering hugs and seeking a safer future that spurred the body camera revolution.¹⁹⁹

Beyond the headlines, in the daily work of courts, body camera video has an important role to play in improving the accuracy and quality of justice in criminal procedure cases. This Part proposes rules of judicial review to cultivate regular use of the audiovisual record in criminal procedure cases and discourage gaps and omissions due to selective recording. While this Part argues for the normalization of judicial reliance on the audiovisual record, it also offers rules of judicial restraint so that the audiovisual record is properly used.

A. *Standardizing the Audiovisual Record, Questioning Absences*

The transformation of the evidentiary record by body camera video in criminal procedure cases is an important advance to address the problems with traditional reliance on testimony and text and the frequent absence of the defendant's voice. Cameras can help prove accurate claims, disprove false claims, and give judges and juries a better sense of how quickly and stressfully events can unfold for officers and suspects – as well as what it is like to be on the receiving end of a search or seizure.²⁰⁰ Video replay can be an important improvement over reconstruction by error-prone memory and ugly credibility contests.²⁰¹ Event replay can also fill information gaps

¹⁹⁸ See, e.g., MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 35-38 (2000) (discussing how the images were used in Cold War era propaganda against the United States and the influence on the Court); JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 30-59 (1994) (discussing how media images of violence influenced civil rights).

¹⁹⁹ See discussion *supra*, Part I.B.

²⁰⁰ See, e.g., POLICE EXECUTIVE RESEARCH FORUM, *supra* note 124, at 6 (reporting agencies' experience that having body cameras leads to a quicker and more accurate resolution and reduces unfounded complaints). See also *supra*, Part I (discussing how video bettered captured an invasive search experience than police reports or testimony).

²⁰¹ See discussion, *supra*, Part I.B.2-3.

in a system where the defendant has strong incentives to remain silent.²⁰²

Judges should regularly consult videos in adjudicating search and seizure suppression issues, where much of criminal procedure law is forged. On preliminary matters, such as whether evidence must be suppressed because it was seized in violation of the defendant's rights, judges are the designated fact-finders who must resolve disputed questions of fact as well as law.²⁰³ Body camera footage can be an important aid in this duty. The ability to replay what happened on the ground also serves an important communicative and educative function in a system where the judges adjudicating criminal procedure questions tend to come from very different backgrounds and experiences than the people involved in criminal procedure cases.²⁰⁴ As Judge Kozinski put it:

Judges, regardless of race, ethnicity or sex, are selected from the class of people who don't live in trailers or urban ghettos. The everyday problems of people who live in poverty are not close to our hearts and minds because that's not how we and our friends live.²⁰⁵

Judges are less likely to have ever experienced a stop, search or arrest beyond a brief traffic stop, or the patdown and bag searches at the entrance to airports or entertainment venues. Judges are also unlikely to have to have had experience responding to an emergency call about a crime in progress, or any of the myriad stressful situations that officers face. Body camera footage can convey the realities both defendants and officers face.

Event replay and video evidence can better inform the work of appellate judges as well as magistrate judges and trial judges.²⁰⁶ In appeals of search and seizure suppression matters, appellate courts review the trial court's factual findings for clear error.²⁰⁷ Mixed questions of law and fact are

²⁰² See discussion, *supra*, Part I.B.1.

²⁰³ See, e.g., FED. R. EVID. 104(a) (“The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.”); *Fields v. Bagley*, 275 F.3d 478, 485 n.5 (6th Cir. 2001) (noting that the trial court’s factual findings must be “supported by clear and credible evidence”).

²⁰⁴ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting) ([T]he Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School . . . [It is] a select, patrician, highly unrepresentative panel”).

²⁰⁵ *United States v. Pineda-Moreno*, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, dissenting from the denial of rehearing en banc).

²⁰⁶ In the federal system, magistrate judges have the power to make proposed findings of fact and recommendations to district court judges. *United States v. Raddatz*, 447 U.S. 667, 684 (1980). These proposed findings and recommendations are given “such weight as [their] merit commands and the sound discretion of the judge warrants.” *Id.* (quoting *Mathews v. Weber*, 423 U.S. 261, 275 (1976)).

²⁰⁷ E.g., *United States v. French*, 291 F.3d 945, 950-951 (7th Cir. 2002); *United*

reviewed de novo.²⁰⁸ While appellate courts are typically viewed as confined to paper records, reviewing video files gives appellate courts the full basis to assess whether factual findings below were clearly erroneous and to review mixed questions of fact and law de novo.²⁰⁹ Video reviewed and admitted below should be as much a part of the relevant record on appeal as traditional paper transcripts of testimony.²¹⁰

Yet current practice varies as to whether videos are viewed by courts — or even transmitted with the paper record.²¹¹ Some courts have explicitly held that video evidence admitted in the trial courts is a necessary part of the record on appeal.²¹² Remarkably, however, some appellate courts still do not even get the video as part of the record transmitted on appeal, even though it was shown in the suppression hearing below.²¹³ And even if they receive the video in the record on appeal, some appellate judges refuse to view them in reviewing suppression questions though the video was admitted below.²¹⁴

Part of the reason for varying practices is confusion over whether the very act of viewing the video constitutes a reweighing of the evidence.²¹⁵ The position is puzzling. Appellate judges still have a duty to determine if the factual findings were clearly erroneous if defendants contest the suppression hearing findings on appeal. Moreover, on mixed questions of law and fact, appellate judges have the duty of reviewing the suppression issue de novo.²¹⁶ Why should judges blind themselves to an important part

States v. Williamson, 1 F.3d 1134, 1136 (10th Cir. 1993).

²⁰⁸ *Id.*

²⁰⁹ *See, e.g.*, United States v. Williams, 69 F.3d 27, 28 (5th Cir. 1995) (explaining that courts reviewing a motion to suppress based on live testimony accepts the trial court’s factual findings unless clearly erroneous).

²¹⁰ *See, e.g.*, United States v. Alvarez, 68 F.3d 1242, 1243 (10th Cir. 1995) (noting that the entire contested police encounter was recorded on video with audio and this tape was admitted into evidence and designated as part of the record on appeal and that “[a]ll facts recited [in the opinion’s statement of the facts] that are not accompanied by a record cite have been taken from the video-audio recording”).

²¹¹ *See, e.g.*, Robinson v. State, 5 N.E.3d 362, 365 (Ind. 2014) (“We consider video evidence admitted in the trial court to be a necessary part of the record on appeal, just like any other type of evidence.”); State v. Lyon, 862 N.W.2d 391, 393 n.1 (Iowa 2015) (viewing dash camera footage on appeal and finding it inconclusive on the issues); State v. Reid, 722 S.E. 2d 364, 365 (Ga. Ct. App. 2012) (“The stop was recorded on video, and the video was shown to the court below at the hearing on the motion to suppress, but no copy of the video appears in the record on appeal.”); State v. Rascon, No. 30,561, 2011 WL 704472 at *2 (N. M. Ct. App. Jan. 14, 2011) (table) (refusing to view video on appeal).

²¹² *E.g.*, Robinson v. State, 5 N.E.3d 362, 365 (Ind. 2014)

²¹³ *See, e.g.*, Reid, 722 S.E.2d, at 365 & n. 2 (noting the absence of the video even though the parties discuss the video and the video was viewed by the trial court).

²¹⁴ *See, e.g.*, Rascon, No. 30,561, 2011 WL 704472, at *2 (refusing to view video on appeal).

²¹⁵ For a discussion see, e.g., Robinson, 5 N.E.3d, at 365-367.

²¹⁶ *E.g.*, United States v. French, 291 F.3d 945, 950-951 (7th Cir. 2002); United

of the record in carrying out their duty of review? It is similar to reviewing whether the testimony and other evidence adduced at the suppression hearing directly contradicts the trial court's findings, rendering them clearly erroneous. The fear of the audiovisual record seems to reflect the traditional association of text with rationality and the fallacy that "thinking in words is the only kind of thinking there is."²¹⁷ Traditional text-bound courts are puzzled about how to incorporate the explosion of images that technology permits.²¹⁸

Another reason for variations in whether appellate courts review video introduced below is simply mechanical – the video may not have been transmitted in the record on appeal with the paper file.²¹⁹ Where the video is missing from the record, it should be supplemented *sua sponte* even if the parties fail to request supplementation.²²⁰ In a time of transition from traditional paper records to multimedia records, it is important for courts to take the lead even if the parties are uncertain or confused to ensure that the appellate record is complete.

Trial and appellate judges also have an important role to play in protecting against selective recording. In jurisdictions that require recording, where video is missing or part of an event is unrecorded, judges should inquire into the reasons for the gaps and omissions. The unavailability of video evidence despite departmental policy requiring recording is relevant in drawing inferences on disputed questions of fact. Drawing inferences based on omissions is a practice elsewhere in the law. For example, in the context of toxic tort and environmental litigation, spoliation of evidence – the failure to preserve evidence potentially favorable to an adversary in reasonably foreseeable litigation – can be the basis of adverse inferences.²²¹ Regular judicial inquiry into gaps and omissions can help deter selective recording. Such selective recording defeats the purpose of transitioning to body cameras in promoting public trust and greater transparency and reliability of evidence. Anticipation of

States v. Williamson, 1 F.3d 1134, 1136 (10th Cir. 1993).

²¹⁷ FEIGENSON & CHRISTINA SPIESEL, *supra* note 41, at 4.

²¹⁸ See Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUMBIA L. REV. 1687, 1691-1692, 1715-1716 (2014) (discussing how textbound courts are lagging behind the proliferation of images).

²¹⁹ See, e.g., State v. Reid, 722 S.E. 2d 364, 365 (Ga. Ct. App. 2012) (noting "no copy of the video appears in the record on appeal" though it was viewed at the suppression hearing and is argued by the defendant in his brief).

²²⁰ Cf. *id.*, 722 S.E.2d, at 365 & n. 2 ("No one has asked us to order the supplementation of the record, and under the circumstances of this case, we decline to exercise our discretion to do so *sua sponte*. . . . [I]t is not the responsibility of this Court to ensure that the appellate record is complete.")

²²¹ E.g., *Enstrom v. Garden Place Hotel*, 811 N.Y.S.2d 263, 264-265 (N.Y. App. Div. 2006); James O'Toole, *Spoliation Concerns in Environmental, Toxic Tort Litigation*, Law360 (Nov. 19, 2008), <http://www.law360.com/articles/77528/spoliation-concerns-in-enviro-toxic-tort-litigation>.

regular judicial inquiry gives departments a nudge to realize the full potential of the benefits of body camera evidence.

Judicial nudges should not become penalty sticks that deter police departments from transitioning to body cameras, however. Despite the spreading of body cameras in departments across the nation, some police chiefs are adopting a wait and see approach, concerned about suffering the slings and arrows of technological malfunctions. As one chief put it:

This reminds me of a similar effort to get cameras into police cars in the mid 1990's. The technology of the time, usually a consumer-grade camera recording to 8mm tape, was really not up to the task, and many departments plunged headlong into video systems only to find that they had inadvertently created their own nightmare. They didn't plan for such things as the cost and logistics of storing and retrieving video, training, tagging evidentiary clips, installing, maintaining, and replacing equipment.

By the end of the decade, you could commonly read news stories about departments where half of the cameras were out of service at any given time, or the department was scrambling to find money to replace broken and outdated equipment. The problem abated as some departments scaled back their installations to a manageable number, and as the technology improved. Today, digital in-car camera systems are a much more mature technology, and though expensive, we've learned the lessons of the 1990s on how to make such a program work. I'm glad in hindsight that we didn't dive into the water too early in Lincoln, and waited until the technology improved.²²²

Technology is fallible. The technology is also new and takes time to master. For now, the training wheels are on and judicial inquiry into omissions and gaps should reflect sensitivity to this transition phase. Inquiry can be a nudge but a penalty for omissions can be a cudgel to deter uptake of body cameras and policies that require recording of a broader swathe of enforcement activities.

Moreover, good reasons may exist to turn off the camera to protect privacy or victims and witnesses. The privacy-focused portion of this study found remarkable variations on when and where cameras should be turned *off* to protect victims and witnesses.²²³ In the absence of consensus or even explicit guidance in many jurisdictions, officer discretion may be the only safeguard for victims, witnesses and minors ending up having their most painful moments posted on Youtube.²²⁴ Inquiry into gaps and omissions in recording should thus be sensitive to this reality.

²²² Casady, *supra* note 29.

²²³ The privacy protection-focused aspects of this study are reported in Fan, *supra* note 20.

²²⁴ *Id.*

B. Rules of Judicial Restraint for Multimedia Interpretation

The replay power coming to courts, while bigger and better than ever before, has important limitations. Replay via body camera footage is not like instant replay in sports.²²⁵ Modern-day instant replay in sports relies on several camera angles mounted on stable positions to optimize clarity and viewing vantage.²²⁶ In contrast, body cameras are mounted on officers in motion.²²⁷ The camera catches a single perspective at an angle.²²⁸ The vantage point from an officer's head or chest is much better than previously available via dash camera but that does not mean it is capable of catching the full truth, or even the relevant truth.²²⁹ Thus while body camera footage should be regularly consulted, it should be consulted with care and understanding about the limits of video evidence.

1. Objectivity, Subjectivity and the Camera Eye

Camera footage is often portrayed as better than human accounts at capturing the objective truth. The oft-expressed hope for body cameras is to “provide an unbiased audio and video recording of events that officers encounter.”²³⁰ Images seem to represent a direct window into reality unsullied by human manipulation or misperception of the truth.²³¹ Images have the power to persuade by suggesting a transparent depiction of reality without discernible resort to rhetoric.²³² The seductive power of images obscures the fact that the meaning one derives is structured by camera framing, and by one's own worldviews and experiences.²³³ Moreover, the

²²⁵ See, e.g., National Football League, *History of Instant Replay* (last viewed Feb. 20, 2016), <http://operations.nfl.com/the-game/history-of-instant-replay/> (offering history of the evolution of instant replay to the sophisticated system today).

²²⁶ *Id.*

²²⁷ See NIJ, BODY-WORN CAMERAS, *supra* note 15, at 6 (describing body-worn camera resolution specifications and mounting considerations to capture data).

²²⁸ *Id.*

²²⁹ See, e.g., Dallas Police Dep't Gen. Order 3XX.00 Body Worn Cameras, at 1 (undated) (“The department recognizes that BWC images have a limited field of view and cannot always show the full story, nor do video images capture an entire scene.”)

²³⁰ Phila. Police Dep't, Directive 4.21 (Apr. 20, 2015) (eff. Apr. 20, 2015). See also, e.g., Austin Police Dep't, Austin Police Department Policy Manual, Policy 303, at 125 (May 4, 2015) (“The use of Body Worn Digital Recording (BWDR) system provides an unbiased audio/video recording of events that employees encounter.”).

²³¹ FEIGENSON & CHRISTINA SPIESEL, *supra* note 41, at 8.

²³² Rebecca Tushnet, *Worth A Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 692 (2012).

²³³ *Id.* See also Vivian Yee & Kirk Johnson, *Body Cameras Worn by Police Officers Are No ‘Safeguard of Truth,’ Experts Say*, N.Y. TIMES, Dec. 7, 2014, at A1 (discussing divergent interpretations of video).

relevant truth may not be the camera's depiction.²³⁴

While the camera seems to be an unbiased eye, camera perspective can powerfully shape viewer judgments without the viewer realizing this effect.²³⁵ The key studies of the impact of camera perspective on viewer judgment in the criminal procedure context come from studies of videotaped interrogations.²³⁶ Psychologists found that pointing the camera so that the viewer is directly facing the suspect makes the viewer more likely to believe the suspect's statements during interrogation are voluntarily made.²³⁷ This subtle shaping of decision making by camera perspective arises because of a phenomenon called illusory causation.²³⁸ People attribute more causal influence over an exchange to the person they are facing simply because that person is more salient, a cognitive bias also dubbed the salience effect.²³⁹

Professional expertise apparently does not defuse the power of camera perspective.²⁴⁰ Judges and law enforcement officers are also susceptible to the camera perspective effect.²⁴¹ Viewers are most likely to rate a confession to be coerced if the camera is pointing at the detective and least likely if the camera is pointed at the suspect.²⁴² Focusing a camera on the suspect and detective equally moderates this point-of-view bias.²⁴³

The impact of body camera perspective remains to be studied. We can draw some insights from cinematic theory as well as the camera perspective studies in the interrogation context. Unlike the camera in the interrogation context, body cameras are highly mobile rather than a fixed stationary perspective trained on the suspect. An important feature of body cameras is that it conveys the story from the officer's point of view, especially if the camera is placed at eye level. In cinematic storytelling, a point of view shot is created by placing the camera lens at the eye level of the character whose

²³⁴ See discussion, *infra*, Part III.B.2.

²³⁵ Daniel Lassiter, Shari Seidman Diamond, Heather C. Schmidt and Jennifer K. Elek, *Evaluating Videotaped Confessions: Expertise Provides No Defense Against the Camera-Perspective Effect*, 18 PSYCH. SCI. 224, 224-225 (2007); G. Daniel Lassiter et al., *Attributional Complexity and the Camera Perspective Bias in Videotaped Confessions*, 27 BASIC & APPLIED PSYCH. 27, 28-30 (2005); G. Daniel Lassiter et al., *Further Evidence of A Robust Point-of-View Bias in Videotaped Confessions*, 21 CURRENT PSYCHOLOGY: DEVELOPMENTAL, LEARNING, PERSONALITY 265, 266-284 (2002).

²³⁶ Lassiter et al., *Attributional Complexity*, *supra* note at 235, at 28-30; Lassiter et al., *Further Evidence*, *supra* note at 235, at 266-284; Lassiter et al., *Evaluating Videotaped Confessions*, *supra* note at 235, at 224-225.

²³⁷ Lassiter et al., *Attributional Complexity*, *supra* note at 235, at 28-30.

²³⁸ *Id.*

²³⁹ *Id.*; Lassiter et al., *Further Evidence*, *supra* note at 235, at 267.

²⁴⁰ Lassiter et al., *Evaluating Videotaped Confessions*, *supra* note at 235, at 225.

²⁴¹ *Id.*

²⁴² Lassiter et al., *Further Evidence*, *supra* note at 235, at 268.

²⁴³ *Id.* at 269; Lassiter et al., *Evaluating Videotaped Confessions*, *supra* note at 235, at 224-225.

point of view we are seeing.²⁴⁴ When watch what is unfolding from a point-of-view shot — the officer’s point of view, in the body camera context — we get a sense of intimacy from seeing things from his subjective point of view.²⁴⁵ This intimacy heightens sympathy for the officer’s perspective because we have the sense of seeing through his eyes.²⁴⁶

The sympathy likely to be elicited by framing is not all one-sided, however. In a body camera frame, the officer is necessarily disembodied, out of frame, except for perhaps a pair of hands gesturing, or a knee or leg extending. Often, what is pictured close-up is the suspect. Close ups are also a framing technique that elicits sympathy.²⁴⁷ The closer-up we get, and the longer the close-up, the more sympathy is likely to be elicited because of the physical proximity associated with intimacy.²⁴⁸ So the close-up focus on suspects may elicit sympathy — and likely a lot more sympathy than comes from reading a police report about the encounter. On the other hand, if the officer is focused on the suspect and pointing the camera directly at him, then this perspective may trigger the illusory causation effect that renders the viewer less likely to find the exchange involuntary.²⁴⁹

When we listen to testimony or read written affidavits or reports, we readily take into consideration the source and make the appropriate credibility assessments and discounts for partiality. The persuasion by camera perspective is not as readily understandable or known, however. As the audiovisual record becomes a regular part of review, fact-finders need to become more adept at understanding and interpreting images as portrayals and discerning persuasion effects.

2. The Proper Perceptual Yardsticks and Fact-Finders

Cameras may also tempt us to ignore the relevant standard on legal questions where the proper yardstick should be what each person perceived, not what a mounted machine can capture. Criminal procedure standards often are based on human perceptions or what was known to the officer at the time of the event.²⁵⁰ For example the legal standard for whether officers

²⁴⁴ JENNIFER VAN SIJLL, *CINEMATIC STORYTELLING* 156 (2005).

²⁴⁵ *See id.* (“POV shots give audiences an exaggerated sense of intimacy with the character.”).

²⁴⁶ *See id.* at 156, 170 (“The POV shot generally lends sympathy to the protagonist by allowing us to see through the character’s eyes.”)

²⁴⁷ *Id.* at 148.

²⁴⁸ *Id.*

²⁴⁹ Lassiter et al., *Attributional Complexity*, *supra* note at 235, at 28-30; Lassiter et al., *Further Evidence*, *supra* note at 235, at 266-284; Lassiter et al., *Evaluating Videotaped Confessions*, *supra* note at 235, at 224-225.

²⁵⁰ *See, e.g.,* Ornelas v. United States, 517 U.S. 690, 701 (1996) (“As the Court recognizes, determinations of probable cause and reasonable suspicion involve a two-step process. First, a court must identify all of the relevant historical facts known to the officer

are engaging in interrogation or its functional equivalent examines “the perceptions of the suspect” as well as the officers’ conduct.²⁵¹ Whether there was probable cause to arrest a suspect is based on “the facts known to the arresting officer at the time of the arrest.”²⁵² Whether there was reasonable articulable suspicion for a stop is also examined in light of the facts known to the officer at the time.²⁵³ Whether there is a reasonable basis for a safety search of a vehicle is also based on the facts known to the officer at the time.²⁵⁴ And whether use of force is reasonable is also judged from the perspective of the reasonable officer at the scene, knowing what the officer knew at the time.²⁵⁵

Body-worn cameras may capture only part of what officers and suspects see – or more than the parties can perceive, especially in stressful law enforcement situations. The San Diego Police Department’s policy provides an important caution applicable to courts as well as officers:

Video cannot always show the full story nor does it capture an entire scene. . . . Persons reviewing recordings must also be cautious before conclusions are reached about what the video shows. . . .

BWCs [body-worn cameras] have a field of vision of either 75 degrees for the Flex or 130 degrees for the Axon. While human beings have a field of vision of 180 degrees, the human brain has a field of attention of 50-60 degrees. Under stress, this field can narrow down to a ½ degree. Stress also induces auditory exclusion and prevents the brain from analyzing and remembering all the stimuli that it takes in through the senses.

Officers make decisions based on the totality of the human senses. An officer’s recollection of specific details may be different than what is captured in digital evidence since BWCs only capture audio and video.²⁵⁶

If video is elevated as the objective truth – and officers are regularly encouraged or even required to view the video before writing reports – then there is intense pressure to conform memory and accounts to the video even when human perceptions may have been different than what was recorded.²⁵⁷ Courts as well as officers need to understand why good-faith

at the time of the stop or search; and second, it must decide whether, under a standard of objective reasonableness, those facts would give rise to a reasonable suspicion justifying a stop or probable cause to search.”).

²⁵¹ Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

²⁵² Devenpeck v. Alford, 543 U.S. 146, 152-153 (2004).

²⁵³ Terry v. Ohio, 392 U.S. 1, 21-22 (1968); Adams v. Williams, 407 U.S. 143, 146 (1972).

²⁵⁴ Michigan v. Long, 463 U.S. 1032, 1047 n.11 (1983).

²⁵⁵ Graham v. Connor, 490 U.S. 386, 396 (1989).

²⁵⁶ San Diego Police Dep’t Procedure No. 1.49, at 1, 11 (July 8 2015).

²⁵⁷ See, e.g., Director T. Armstrong, Memphis Police Dep’t, Policy and Procedure Information and Updates, Serial 12-16 (Sept. 23, 2015) (requiring that officers review

testimony may diverge from camera recording and avoid pressures to force-fit human recollections into a machine recording. Moreover, where the appropriate yardstick are the knowledge and the perceptions of persons at the time of the event, the temptation to privilege what is captured on video as the higher truth must be resisted.

Another important issue in determining the relevant truth is the appropriate fact-finder, which differs depending on the procedural posture of the case and the type of criminal procedure issue raised. On factual questions properly reserved for a jury, such as matters that go to guilt, innocence or liability, judicial restraint is required to resist substituting the interpretations of judges for the interpretation of juries. What might seem to obviously meet a standard to one viewer may be interpreted differently by another because image interpretation is filtered through the worldview and experiences of the perceiver.²⁵⁸

The distinction between video interpretation properly reserved for the courts versus the jury is raised by the Supreme Court's reliance on dash camera video in *Scott v. Harris*.²⁵⁹ The Court ruled that no reasonable juror could agree with the plaintiff's account that the police used excessive force to stop him during a high-speed vehicle pursuit captured on dash camera.²⁶⁰ Scholars expressed concern that an appellate court was usurping the role of jurors in interpreting facts portrayed by images subject to divergent interpretations.²⁶¹

Many of the factual disputes in criminal procedure cases are resolved by judges rather than juries, however, because the exclusionary rule remains the central remedy to enforce constitutional criminal procedure protections.²⁶² Determining whether evidence is admissible is the province of judges.²⁶³ In evaluating admissibility, including whether the exclusionary remedy applies, judges play the key role in resolving disputed

body-worn camera footage before writing reports); San Diego Police Dep't Procedure No. 1.49, at 11 (July 8 2015) (requiring that officers review digital evidence before completing reports to prime their recollection but "shall not write their reports based solely on what they viewed from the BWC recording").

²⁵⁸ Kahan et al., *supra* note 31, at 840-47, 865-880.

²⁵⁹ 550 U.S. 372 (2007). See Chemerinsky, *supra* note 35, at 74 ("[I]t is deeply troubling when an appellate court, acting on its own, watches a tape and decides the facts of a case for itself."); Kahan et al., *supra* note 31, at 841-842 (arguing the Court was wrong to privilege its own view of the video and deny jurors the opportunity to interpret it based on their worldviews).

²⁶⁰ 550 U.S. 372 (2007).

²⁶¹ Chemerinsky, *supra* note 35, at 74 Kahan et al., *supra* note 31, at 841-842.

²⁶² See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 652 (1961) (noting "the obvious futility of relegating the Fourth Amendment to the protection of other remedies"); Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 360 (1974) (stating the exclusionary rule is "the primary instrument for enforcing the [F]ourth [A]mendment").

²⁶³ FED. R. EVID. 104(A).

questions of fact central to determining whether constitutional rights were violated.²⁶⁴ On such questions, trial and appellate judges should be able to replay contested events captured on video and interpret their legal significance to improve the accuracy of justice and lift the traditional blinders.

CONCLUSION: JUDICIAL CULTIVATION AND UPTAKE

Much of the current focus is on how body cameras will play in the court of public opinion to rebuild public trust and demonstrate police accountability.²⁶⁵ Yet there is another crucial audience for body camera video footage – the judicial courts that for more than half a century have forged criminal procedure law, the primary rules governing police.²⁶⁶ The hundreds of thousands of hours of video footage coming to courts from the body camera revolution have the potential to transform the traditional reliance on testimony and text in adjudicating the search and seizure disputes that shape the course of criminal procedure law.²⁶⁷

Salient stories and dramatic events, such as officer-involved shootings or alleged body cavity searches at the roadside, tend to seize public attention.²⁶⁸ Yet most of the hundreds of thousands of hours of video

²⁶⁴ See sources cited, *supra*, at notes 34, 60, 203.

²⁶⁵ E.g., Associated Press, *Police Need Body Cameras to Build Trust with Public, Obama Says*, NEW ORLEANS TIMES PICAYUNE (Dec. 1, 2014), http://www.nola.com/crime/index.ssf/2014/12/obama_police_body_cameras.html; Neill Franklin, *Body Cameras Could Restore Trust in the Police*, N.Y. TIMES, (Oct. 22, 2013), <http://www.nytimes.com/roomfordebate/2013/10/22/should-police-wear-cameras/body-cameras-could-restore-trust-in-police>; Adam A. Marshall & Katie Townsend, *A Tool to Gain the Public's Trust*, WASH. POST (May 15, 2015), https://www.washingtonpost.com/opinions/a-tool-to-gain-the-publics-trust/2015/05/15/f7f9ad14-f4f8-11e4-84a6-6d7c67c50db0_story.html; U.S. Department of Justice, Press Release, Justice Department Announces \$20 Million in Funding to Support Body-Worn Camera Pilot Program (May 1, 2015), <http://www.justice.gov/opa/pr/justice-department-announces-20-million-funding-support-body-worn-camera-pilot-program>.

²⁶⁶ See, e.g., Steiker, *supra* note 2, at 2470-2490 (discussing how constitutional criminal procedure is a chief source of the conduct rules for police).

²⁶⁷ See discussion, *supra*, Parts I-II.

²⁶⁸ See, e.g., Randy Balko, *These Videos of a Texas Police Shooting Show How Body Cameras Can Vindicate Good Cops*, WASH. POST. (July 2, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/07/02/these-videos-of-a-texas-police-shooting-show-how-body-cameras-can-vindicate-good-cops/>; Deborah Hastings, *Texas State Troopers Caught on Camera Probing Women's Privates Aren't Isolated Incidents*, N.Y. DAILY NEWS, Aug. 2, 2013, <http://www.nydailynews.com/news/national/troopers-texas-probe-genitals-women-traffic-stops-article-1.1414668>; *Video: Dramatic Police Shooting in Las Vegas Caught on Body Camera*, ABC7 (Las Vegas) (July 16, 2015), <http://www.nydailynews.com/news/national/troopers-texas-probe-genitals-women-traffic-stops-article-1.1414668>; AJ Vicens & Jaeah Lee, *Here are 13 Killings by Police Captured on Video in the Past Year*, Mother Jones (May 20, 2015),

footage that police departments across the nation will generate are of everyday law enforcement activities such as initiating consensual encounters, stops, and patdowns, often in response to calls for service from the community.²⁶⁹ These everyday searches and seizures are the main staples of criminal procedure and the criminal justice system and are of great import to courts.

Consider the still below from body camera video.²⁷⁰ The camera footage is from a consensual encounter.²⁷¹ The officers received three calls for service, each reporting what the caller believes to be a suspicious-looking man, possibly intoxicated, on the sidewalk in front of a service center for women and children.²⁷² The callers indicated they saw the man put his hand inside his pants, then remove the hand.²⁷³ Is the man lawfully hanging out on a public street and scratching his groin? Or is there some potential criminality or danger? To investigate, the officers approach the man and ask a series of questions about where he is going, where he has been and why he happens to be on that street corner, to confirm or dispel whether there is reasonable suspicion for a stop and frisk or probable cause for an arrest.²⁷⁴



Body camera footage of officers responding to calls for service about a suspicious person and engaging in a consensual encounter.

<http://www.motherjones.com/politics/2015/05/police-shootings-caught-on-tape-video>.

²⁶⁹ See discussion, *supra*, Part IIB.

²⁷⁰ Police Video Requests, *Suspicious Person*, YOUTUBE (Dec. 10, 2014), <https://www.youtube.com/watch?v=yFbu1tdG0rQ> (hereinafter *Suspicious Person Call for Service Body Camera Video*).

²⁷¹ See discussion of consensual encounters, *supra*, at notes 174-177.

²⁷² *Suspicious Person Call for Service Body Camera Video*, *supra* note 270, at 0:41-0:50.

²⁷³ *Id.*

²⁷⁴ *Id.* at 1:23-8:29.

The video of this consensual encounter is not as dramatic as those that tend to get the most air play in the court of public opinion. Yet such video footage is crucial to the work of courts adjudicating common questions such as whether officer had reasonable articulable suspicion for stop and frisk²⁷⁵ or probable cause for an arrest²⁷⁶ and thus a proper basis for a search incident to arrest.²⁷⁷ One of the goals of this article's coding and analysis of body camera policies in police departments serving the 100 largest cities is to show this major paradigm shift in the evidence available to courts in body camera jurisdictions.²⁷⁸

The body camera revolution is thus also potentially revolutionary for courts, relieving the traditional reliability on testimony – often just from one side – to reconstruct events.²⁷⁹ When the defendant disputes the account of what happened in officer reports and testimony, the court has another source of information besides deeply divergent stories and ugly credibility contests that leave neither officer nor defendant unscathed.²⁸⁰ Video offers a check on the fallibility of human perception, giving adjudicators the ability to replay events and perceive them free of the passions and partisanship of being one of the adversarial parties.²⁸¹

Courts have an important role to play in cultivating the spread of body cameras and the normalization of the audiovisual record in adjudicating search and seizure suppression motions.²⁸² In jurisdictions with mandatory body camera recording policies, body camera video should be an important source of information for judges in finding the facts and deciding suppression motions.²⁸³ The increasing utilization of video viewing can reduce the need to sort through wildly divergent accounts because the parties are constrained in what they can claim by the audiovisual record.²⁸⁴ Where recording is required but the disputed enforcement event is unrecorded, courts should inquire into the reason why.²⁸⁵ Judicial nudges should not be cudgels to deter voluntary police department uptake of body cameras, however. Technology is fallible.²⁸⁶ Cameras may fail or risk

²⁷⁵ Terry v. Ohio, 392 U.S. 1, 21-22 (1968); Adams v. Williams, 407 U.S. 143, 146 (1972).

²⁷⁶ United States v. Watson, 423 U.S. 311, 417-423 (1976).

²⁷⁷ United States v. Robinson, 414 U.S. 218, 228-235(1973).

²⁷⁸ See discussion, *supra*, Part II.

²⁷⁹ See discussion, *supra*, Part I.A.1.

²⁸⁰ See discussion, *supra*, Part I.A.3.

²⁸¹ See discussion, *supra*, Part I.A.2

²⁸² See discussion, *supra*, Part III.A.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ See discussion, *supra*, at note 222.

violating the privacy or safety of victims and witnesses.²⁸⁷ Reasonable explanations should be accepted without penalty lest other departments considering adopting body cameras be deterred from voluntarily undertaking reform.

Finally, rules of judicial restraint are also needed as body camera video replay becomes a regular part of judicial review. The power to replay events is an important evidentiary advance but it also has pitfalls.²⁸⁸ While there is a tendency to privilege the video as revealing the truth impartially, what a camera can capture may not always be the relevant truth, nor convey one story free of framing effects and the subjectivity of viewer perception.²⁸⁹ In criminal procedure, people are judged by what was reasonable and known to them at the time, in the heat and stress of the moment, rather than all that a machine can dispassionately capture.²⁹⁰ Just as one reads testimony and considers the perspective of the perceiver and the proper fact-finder for resolving disputes, one should interpret video and consider the perspective from which it is mounted and the proper fact-finder for resolving interpretative disputes. The great promise of body camera video evidence should be cultivated with care against succumbing to its seductions by abdicating the proper perceptual yardsticks and rules of restraint.

²⁸⁷ *Id.*

²⁸⁸ See discussion, *supra* Part III.B.1-2.

²⁸⁹ See discussion, *supra* Part III.B.1.

²⁹⁰ See discussion, *supra*, at notes 250-255.