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Justice Visualized: Courts and the Body Camera Revolution

Mary D. Fan[*]

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. Analyzing body camera policies from police departments across the nation, the article reveals an unfolding future where much of the main staple events of criminal procedure law will be recorded. 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

[*] Copyright © 2016 Mary D. Fan. Henry M. Jackson Professor of Law, University of Washington School of Law. Many thanks to Ed Cheng, Tiffany L. Camp, Sarah E. Dunaway, Elisa Hahn, Sophie Jin, Taryn Jones, Cheryl Nyberg, Emily Siess, Sandra Sivinski, Mary Whisner, and Alena Wolotira for excellent teamwork on policy-gathering and coding. I am also very grateful to Andrew Crespo, Thomas Clancy, Aya Gruber, Richard McAdams, Robert Mikos, Eric Miller, Richard Myers, Chris Slobogin and the participants at the Vanderbilt Criminal Justice Roundtable for superb insights and to Kimberly Procida and the team at the *UC Davis Law Review* for excellent editing.

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 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 influence 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 Perry[1]

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]

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

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

[2] This game metaphor is oft-recurring in constitutional criminal procedure. *E.g.*, Riley v. California, 134 S. Ct. 2473, 2482 (2014); Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 368 (1998); Illinois v. Krull, 480 U.S. 340, 351 (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, 2471-503 (1996). For accounts of the genesis of constitutional criminal procedure in the 1960s civil rights revolution, see, for example, Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1156-60 (1998); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 50-77 (2000); Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 159-73 (1980); Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 438-46 (1980).

[3] *See, e.g.*, Messerschmidt v. Millender, 132 S. Ct. 1255 (2012) (Sotomayor, J., dissenting) ("We have repeatedly and recently warned appellate courts, 'far removed from the scene,' against second-guessing the judgments made by the police . . . ."); Ryburn v. Huff, 565 U.S. 469, 475 (2012) (per curiam) (noting that appellate courts are "far removed from the scene" where officers operate).

[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); Perry, *supra* note 1, at 116.

[5] *See* Fernandez v. California, 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).

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 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

[6] *See* Jones v. United States, 16 A.3d 966, 968-69 (D.C. 2011).

[7] *See id.* at 968.

[8] *See* Ashcraft v. Tennessee, 322 U.S. 143, 151-52 (1944) (noting sharply divergent accounts between the defendant and the police).

[9] *See id.* at 150 (noting the defendant's claim that he did not confess).

[10] *See* 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, *Citizen's Videos Raise Questions on Police Claims*, N.Y. TIMES, Apr. 9, 2015, at A1.

[12] *See* Brief of Defendant-Appellant at 8, Wisconsin v. Avery, No. 2010AP411-CR (Wis. Ct. App. June 25, 2010), 2010 WL 2691415 (recounting the defense theory that the police planted the evidence); *Making a Murderer* (Netflix 2015) (suggesting the police planted the evidence); *see also, e.g.*, Commonwealth v. Sparks, 746 N.E.2d 133, 138 (Mass. 2001) (alleging that police planted evidence found in his living quarters); Reed v. State, No. 62117, 2013 WL 3256317, at *1 (Nev. June 12, 2013) (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); People v. McGirt, 603 N.Y.S.2d 164, 165 (App. Div. 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"); State v. Pogue, 17 P.3d 1272, 1275 (Wash. Ct. App. 2015) (discussing the defendant's claim that the police planted the drug evidence during a vehicle search).

[13] *See* discussion *infra* Part I.A.

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]

Based on an analysis of the available body camera policies from police departments serving the 100 largest cities in the nation, this article envisions a future where police officers will be able to record many of the most contested events in criminal procedure.[19] While

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

[15] *See, e.g.*, NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, A PRIMER ON BODY-WORN CAMERAS FOR LAW ENFORCEMENT 5-6 (2012), https://www.justnet.org/pdf/00-Body-Worn-Cameras-508.pdf (discussing size, wearability and audiovisual capacity of body-worn cameras); S.F. POLICE DEP'T, BODY WORN CAMERAS POLICY, RECOMMENDED DRAFT 1 (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), http://time.com/3606376/police-cameras-ferguson-evidence (discussing the building movement toward body cameras).

[17] See *infra* Part II.B and Table 1 for a discussion.

[18] *See, e.g.*, Developments in the Law, *Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1805-14 (2015) (noting numerous important open questions about body cameras that remain to be answered).

[19] *See infra* Part II; *see also, e.g.*, CHI. POLICE DEP'T, SPECIAL ORDER S03-14 § 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); D.C. METRO. POLICE, GEN. ORDER 302, NO. 13, at 6-8 (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);

body camera policies tend to differ widely on privacy and victim protection shut-off provisions, there is greater convergence regarding enforcement activities that officers must record.[20] Numerous policies provide that, at a minimum, police officers will now record stops, searches, responses to calls for service, pursuits, uses of force, arrests, and transportation of arrestees.[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-worn video will cover a much wider

Intradepartmental Correspondence from the Chief of Police, L.A. Police Dep't, to the Honorable Board of Police Commissioners, L.A. Police Dep't 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, searches, arrests, uses of force, in-custody transports, victim and witness interviews, and crowd management, as well as vehicle stops); N.Y. POLICE DEPT., OPERATIONS ORDER NO. 48 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 § 4A (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").

[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. 395 (2016) [hereinafter *Police Body Cameras*].

[21] *See infra* Part II.A and Table 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 ANALYSES SOC. ISSUES & PUB. POL'Y 53, 54 (2001) [hereinafter *Camera Perspective Bias*] (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, 264-65 (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 (Pa. Super. Ct. 2014) (noting that the trial court adjudicating the suppression motion reviewed the dash camera video to

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]

Body cameras record events 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

determine whether there was probable cause to stop the defendant for not driving in his lane but "it 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, ATLANTA POLICE DEPARTMENT POLICY MANUAL, SPECIAL ORDER APD.SO.14.05, at 2-3 (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 125-26 (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 5-6 (2015) (on file with author) (requiring body-worn camera activation when "[a]rriving on scene to 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); S.F. POLICE DEP'T, *supra* note 15, at 2-3 (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.*, NAT'L INST. OF JUSTICE, *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.*, CHI. POLICE DEP'T, *supra* note 19, § V.E. (requiring recording of the entire incident); OAKLAND POLICE DEP'T, DEPARTMENTAL GENERAL ORDER I-15.1, PORTABLE VIDEO MANAGEMENT SYSTEM 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); Intradepartmental Correspondence from the Chief of Police, L.A. Police Dep't, to the Honorable Board of Police Commissioners, L.A. Police Dep't, *supra* note 19, at 2 (requiring recording of the entire contact); *see also, e.g.*, NAT'L INST. OF JUSTICE, *supra* note 15, at 6 (describing body-worn camera resolution specifications and mounting considerations to capture data).

[27] The videos are available at Raw Leak, *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*

camera. The still on the right is from the body-worn video of one of the officers involved.

View from patrol vehicle dash camera

View from officer-worn body camera

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

Who Ran at Police, WMUR9 ABC, http://www.wmur.com/news/dashboard-video-shows-fatal-shooting-of-man-who-ran-at-police/35488864 (last updated Sept. 25, 2015, 11:55 PM).

[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-vievu-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 7-28 (3d ed. 2003) (discussing the concept of disruptive technology in the private sector); Tom Casady, *Hidden Cost of Body Cameras*, DIRECTOR'S DESK (Oct. 31, 2014, 6:12 AM), 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.").

— 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] 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 granted 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.

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[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*, 43 TRIAL 74, 76 (2007) ("[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 interpret it based on their worldviews).

[32] *Scott*, 550 U.S. at 386.

[33] *See, e.g.*, Chemerinsky, *supra* note 31, at 76; 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

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 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, there is a need for audiovisual literacy and rules of restraint. Part III discusses the myth of camera objectivity and presents scientific evidence and cinematic

traditionally have done . . . .").

[36] *See, e.g.*, Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1449-50, 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.").

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 them in a room for a day and have them 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 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

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[37] Interview with Lt. Joel Guay, Seattle Police Dep't (Jan. 25, 2016) (video of interview on file with author).

[38] *See generally* 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 Update*, PEW RES. CTR. (June 5, 2013), http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013/.

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

[42] Eveleth, *supra* note 41.

"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 — citizens exercise bottom-up control when recording the police to monitor the watchmen.[45]

Going further than the sousveillance imagery, I suggest that our modern condition is one of toutveillance. Toutveillance is not the top-down of surveillance, nor the bottom-up of sousveillance, but a modern condition where everyone has incentive to record to contest or control the narrative. Any ordinary Chris,[46] Feidin,[47] or Ramsey[48] can record the police and release a viral video shot from his point of view. Police departments in turn have incentive to deploy body cameras to offer a competing visual depiction shot from their perspective.[49] In a toutveillance society — 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.[50]

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[43] Steve Mann, *Veillance and Reciprocal Transparency: Surveillance Versus Sousveilance, AR Glass, Lifeglogging, and Wearable Computing*, 2013 PROC. IEEE INT'L SYMP. ON TECH. & SOC'Y 1, 1.

[44] *Id.* at 3-4.

[45] *Id.*

[46] Air Reserve Base worker Chris LeDay played an important role in disseminating the video of the shooting of Alton Sterling to the public. Peter Holley, *'Super-Fishy': Man Who Posted Video of Alton Sterling Killing Claims Employer Still Refusing to Let Him Work*, WASH. POST (July 24, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/07/13/man-who-posted-video-of-alton-sterling-killing-claims-he-was-targeted-by-vengeful-police/?utm_term=.2c4e3f596bee.

[47] Immigrant barber Feidin Santana recorded the shooting of Walter Scott in South Carolina. *Feidin Santana, Who Recorded Police Shooting of Walter Scott, Speaks Out*, NBC NEWS (Apr. 8, 2015), http://www.nbcnews.com/news/latino/feidin-santana-who-recorded-man-shot-police-officer-speaks-out-n338171.

[48] Deli worker Ramsey Orta filmed the death of Eric Garner. J. David Goodman, *Man Who Filmed Fatal Police Chokehold Is Arrested on Weapons Charges*, N.Y. TIMES, Aug. 4, 2014, at A19.

[49] *See, e.g.*, POLICE COMPLAINTS BD., ENHANCING POLICE ACCOUNTABILITY THROUGH AN EFFECTIVE ON-BODY CAMERA PROGRAM FOR MPD OFFICERS 3-4 (2014) (discussing hopes that body cameras will offer more accurate evidence); Editorial, *Dueling Cameras*, BALT. SUN, Nov. 13, 2006, at 10A (discussing issues with competitive and selective filming).

[50] *Cf.* Jean-Gabriel Ganascia, *The Generalized Sousveillance Society*, 49 SOC. SCI.

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 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.[51] The basis for the arrest was possession of a controlled substance.[52] Officers initially stopped Kenneth Simmons for riding a bicycle in the park at night without his lights on.[53] When the officers approached him, Simmons pedaled his bike rapidly away and did not stop when ordered to do so.[54] 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.[55] Regarding the search that ultimately yielded the contraband, the report stated:

INFO. 489, 489 (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").

[51] *See, e.g.*, MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 38-43 (1992) (discussing the main staple cases in a criminal court); Peggy Fulton Hora, 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, 448-49 (1999) (discussing the cyclical nature of addiction and criminal prosecution and the large judicial workload due to drug and alcohol abuse-related cases).

[52] *See* CAL. HEALTH & SAFETY CODE § 11350(a) (2016) (prohibiting possession of a controlled substance).

[53] San Diego Reg'l Officer's Report Narrative, Incident No. 14050033181, from Officer Robles and Officer Williams (May 17, 2014) [hereinafter Simmons Police Report] (on file with author).

[54] *Id.*

[55] *Id.* at 3-4.

> 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.[56]

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.[57]

Now view and listen to the body camera video.[58] Because a video 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.

[56] *Id.* at 4.

[57] Preliminary Hearing and Arraignment Transcript at 6-10, People v. Simmons, No. SCD-256148 (Cal. Super. Ct. June 4, 2014).

[58] Allison Ash, *Raw Video from SDPD Officer's Body Camera Shows Man's Arrest at Park*, YOUTUBE (Jun. 17, 2015) [hereinafter Simmons Body Camera Video], https://www.youtube.com/watch?v=OvbgZFQYG18 (containing footage originally shown on ABC10 News). The video first shows officers pulling Simmons off his bike and arresting him. The search begins at 2:35 in the video.

During much of the search, Simmons's pants are pulled down and his buttocks are exposed.[59] As multiple officers involved in the search lift, turn and search him, he is crying out, panting, and voicing fear.[60] There are indications that he may have defecated in fear.[61] 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.[62]

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.[63] Yet judges decide most criminal procedure cases based on testimony or declarations — including hearsay testimony from persons without personal knowledge of the events relying on police reports.[64] At suppression hearings to determine the admissibility of evidence, the rules of evidence applicable in criminal trials do not apply.[65] There are at least three major troubles with the reliance on testimony and reports in criminal procedure cases: (1) 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.

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[59] *Id.* at 2:58–6:36.

[60] *Id.*

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

[62] Simmons Body Camera Video, *supra* note 58, at 7:19–7:30.

[63] In the Simmons case, there is a pending lawsuit over whether the report and testimony by the officers accurately captured the events. *See* Second Amended Complaint, *supra* note 61, 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.

[64] *See, e.g.*, 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"); United States v. Matlock, 415 U.S. 164, 172-73 (1974) (explaining that hearsay is admissible at hearings to determine the admissibility of evidence).

[65] *See* FED. R. EVID. 104(a).

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 he saw tailing him pulled him over and walked up to his car?[66] 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?[67] It seems that one part of the story — one whole side of the story — is missing.[68] 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.[69] A decision by the defendant to testify is thus also a

[66] *See* Whren v. United States, 517 U.S. 806, 808-09 (1996).

[67] *See* United States v. Drayton, 536 U.S. 194, 199 (2002).

[68] From the filings, it appears that the testifying persons at the suppression hearings were all government agents, not the defendants. *See* Brief for Petitioner at 3, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 75758, at *3-4 (discussing the lineup of witnesses at the suppression hearing); Brief for Appellant at 6-8, Brown v. United States, 231 F.3d 787 (2000) (No. 99-15152-I), 1999 WL 33616942, at *6-8; *see also, e.g.,* Kevin R. Johnson, *The Song Remains the Same: The Story of* Whren v. United States, *in* RACE LAW STORIES 419, 428-29 (Rachel F. Moran & Devon Wayne Carbado eds., 2008) (discussing the suppression hearing generally). Scholars have also suggested the officers' side of the story in *Whren* is improbable and needs greater scrutiny and adversarial examination. *See, e.g.*, Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 384 (1998) (discussing concern over police perjury in a case like *Whren*); I. Bennet Capers, *The Fourth Problem*, 49 TULSA L. REV. 431, 435 n.34 (2013) (book review) [hereinafter *Fourth Problem*] (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").

[69] *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." (citations omitted)); 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

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."[70]

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.[71] The testifying defendant also incurs the risk of impeachment by evidence suppressed because of a search or seizure in violation of the defendant's Fourth Amendment rights.[72] Defendant testimony at a suppression hearing also presents special challenges because prosecutors can use inconsistencies in testimony at the suppression hearing to impeach him if he testifies at trial, though suppression hearing testimony cannot be used as substantive evidence of guilt at trial.[73]

If a defendant stays silent, the prosecution may not suggest that adverse inferences be drawn from that silence.[74] Indeed a defendant is entitled to a jury instruction that no adverse inferences may be drawn from silence.[75] 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."[76]

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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))).

[70] Grunewald v. United States, 353 U.S. 391, 419 (1957).

[71] *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*, 402 U.S. at 215)).

[72] *See* United States v. Havens, 446 U.S. 620, 628 (1980).

[73] *Compare* Simmons v. United States, 390 U.S. 377, 394 (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* 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."), *and* 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.").

[74] *See* Griffin v. California, 380 U.S. 609, 614 (1965).

[75] Carter v. Kentucky, 450 U.S. 288, 305 (1981).

[76] Raffel v. United States, 271 U.S. 494, 494 (1926).

A defendant who wants to tell his side of the story must weigh the benefits against the substantial potential costs of taking the stand.[77] The balance of costs and benefits is such that lawyers often advise defendants to not take the stand and remain silent.[78] Thus, defendant silence is prevalent throughout the criminal process, including at hearings to contest the admissibility of evidence based on claims of wrongful search or seizure.[79] This typically 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.[80] 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."[81] What the police report states is important because it is what prosecutors, defense attorneys and officers consult to understand or recall a case from myriad others.[82] When you view the body camera video you hear that Simmons said a lot more about the search and seizure.[83] But what is

[77] *See, e.g.*, Ohler v. United States, 529 U.S. 753, 759-60 (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.").

[78] Natapoff, *supra* note 36, at 1458.

[79] *See id.*

[80] *See, e.g.*, People v. Austin, No. 112721-U, 2013 WL 2302080, at * 3 (Ill. App. Ct. May 24, 2013) (noting that while the defendant's statements to the officer were not taped, videorecorded or memorialized in report the "substance of the interview" was included in the police report); State v. Ingram, 774 S.E.2d 433, 437 (N.C. Ct. App. 2015) (reporting that the defendant's statements while in the hospital after he shot at officers and officers shot him were recorded in the police report); Sambolin v. State, 387 S.W.2d 817, 819 (Tenn. 1965) (noting that the defendants' oral admissions were made a part of the police report and discussing the admissibility of the statements against the defendants).

[81] Simmons Police Report, *supra* note 53, at 5.

[82] 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, 1240-41 (1994) [hereinafter *Redefining*].

[83] Simmons Body Camera Video, *supra* note 58, at 2:35–6:36.

memorialized is what has evidentiary value in the government's case.[84] Thus, without cameras, 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.[85] 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.[86] While much of the evidence is in the context of the accuracy of eyewitness identification, the insights about memory apply to other testimonial contexts.[87] 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.[88] When

[84] *See* Simmons Police Report, *supra* note 53, at 5.

[85] *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"); *see also, e.g.*, WOODLAND POLICE DEP'T, GEN. ORDER. 4.09.03 (2009), http://www.cityofwoodland.org/gov/depts/police/secure/order%20manual.pdf ("The arresting officer is responsible for the completion and submission for approval of all arrest reports before the end of his/her shift."); Terry A. Beehr et al., *Working in a Violent Environment: The Accuracy of Police Officers' Reports About Shooting Incidents*, 77 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 217, 230, 232 (2004) (discussing the impact of stress on event recall by officers and the implications for police reports and testimony).

[86] *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); Elizabeth F. Loftus, *Make-Believe Memories*, 58 AM. PSYCHOL. 867, 868-71 (2003) (reviewing findings on faulty eyewitness memory).

[87] *Cf.* Jack B. Weinstein, *Eyewitness Testimony*, 81 COLUM. L. REV. 441, 442-43 (1981) (book review) (discussing insights from eyewitness memory studies for other evidentiary contexts).

[88] *See, e.g.*, LOFTUS, *supra* note 86, at 33; Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & 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. & PSYCHIATRY 265, 265-67 (2004); Richard S. Schmechel et al., *Beyond the Ken?: Testing Jurors' Understanding of Eyewitness Reliability*, 46 JURIMETRICS J. 177, 179 (2006); *see also, e.g.*, JENNIFER THOMPSON-CANNINO ET AL., PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION 15-20 (2010) (describing attempt to memorize every detail of assailant and certitude of identification that proved wrong).

emotional arousal is intense, performance on memory tasks significantly decreases in accuracy.[89] Responding to stressful situations divides our attention and reduces our capacity to process and remember events.[90]

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.[91] 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.[92] Confirmation bias is not limited to police officers, of course — it is a human cognitive tendency common to lay and professional persons.[93] 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.[94]

We reason from schemata, mental categories for how situations will play out based on our experiences and beliefs.[95] If someone or some situation resembles one previously experienced, these schemata shape our expectancies and shape our perceptions to confirm our beliefs.[96] In ambiguous situations where information is missing, schemata fill in

[89] LOFTUS, *supra* note 86, at 33; Deffenbacher et al., *supra* note 88.

[90] *See* Sven-Åke Christianson, *Emotional Stress and Eyewitness Memory: A Critical Review*, 112 PSYCHOL. BULL. 284, 284-304 (1992); Maria S. Zaragoza & Sean M. Lane, *Processing Resources and Eyewitness Suggestibility*, 3 LEGAL & CRIMINOLOGICAL PSYCHOL. 305, 307-10 (1998).

[91] *See* 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. PSYCHOL. 175, 198-99 (1998).

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

[93] *See* Anna Harvey & Michael J. Woodruff, *Confirmation Bias in the United States Supreme Court Judicial Database*, 29 J.L. ECON. & ORG., 414, 421-28 (2011); James Friedrich, *Primary Error Detection and Minimization (PEDMIN) Strategies in Social Cognition: A Reinterpretation of Confirmation Bias Phenomena*, 100 PSYCHOL. REV. 298, 298 (1993); Nickerson, *supra* note 91, at 175-218; Matthew Rabin & Joel L. Schrag, *First Impressions Matter: A Model of Confirmatory Bias*, 114 Q.J. ECON. 37, 41-48 (1999).

[94] 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); Findley & Scott, *supra* note 92, at 349-50.

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

[96] *See id.*

the gaps, leading people to believe or perceive based on past experiences and beliefs.[97] 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.[98]

When a search or seizure yields evidence, hindsight bias and outcome bias can reshape perceptions. Hindsight bias is a "knew-it-all-along" effect in which the outcome seems more likely in retrospect.[99] 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.[100] 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.[101] 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.[102]

Hearing all sides of the story is thus all the more important because of the fallibility of human perception and tendency toward unwitting

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[97] *See id.*

[98] *See also, e.g.*, Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable 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); *cf.*, *e.g.*, John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 20-21 (1983) (finding evidence that social labeling creates expectancies about true dispositions or capabilities).

[99] *See* Baruch Fischhoff, *Hindsight Is Not Equal to Foresight: The Effect of Outcome on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL. 288, 293, 296-97 (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, 962-64 (2004); Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past Events After the Outcomes Are Known*, 107 PSYCHOL. BULL. 311, 311 (1990); Ulrich Hoffrage, Ralph Hertwig & Gerd Gigerenzer, *Hindsight Bias: A By-Product of Knowledge Updating?*, 26 J. EXPERIMENTAL PSYCHOL. 566, 566-67 (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, 1288-89 (2002).

[100] *See* Ulrich Hoffrage & Ralph Hertwig, *Hindsight Bias: A Price Worth Paying for Fast and Frugal Memory*, *in* SIMPLE HEURISTICS THAT MAKE US SMART 191 (1999).

[101] *See* Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. PERSONALITY & SOC. PSYCHOL. 569, 569-73 (1988).

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

distortions of perception.[103] 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.[104] 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 assumed to be lying criminals with serious credibility problems.[105] The police are impugned as liars, evidence planters, and abusers of power.[106] Courts are also burdened, awash in deeply partisan and divergent stories in which both sides are smeared.[107]

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.[108] Claiming the officer is lying is a risky move because it risks alienating the fact-finder.[109] Moreover, judges are keenly aware of the consequences of

103 *See* discussion and sources cited *supra* notes 86–102.

104 *See* discussion and sources cited *supra* notes 69–79.

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

106 *See, e.g.*, Fernandez v. California, 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, 968-69 (D.C. 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); Commonwealth 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); People v. McGirt, 603 N.Y.S.2d 164, 165 (N.Y. App. Div. 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); State v. Pogue, 17 P.3d 1272, 1275 (Wash. Ct. App. 2015) (noting the defendant's claim that the police planted the drug evidence during a vehicle search).

107 *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").

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

109 *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).

suggesting that the officer is a liar, which can end a career by rendering the officer unusable as a witness.[110] There are powerful institutional pressures against making such a finding.[111]

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.[112] People recalling events in conscious good faith may have perceptions unwittingly skewed by confirmation, hindsight, and outcome biases.[113] 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.[114]

Increasingly, criminal procedure doctrine has developed a phalanx of rules that reduce the need to have to delve into competing accounts.[115] 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.[116] 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.[117] 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.[118]

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[110] *Cf.* Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1352 (1996); *see* Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1043-47 (1996).

[111] Slobogin, *supra* note 110.

[112] *See* discussion in text and sources cited *supra* notes 86–102.

[113] *See* discussion *supra* Part I.A.2.

[114] *See, e.g.*, Fuzzard v. State, 13 P.3d 1163, 1165-67 (Alaska Ct. App. 2000) (discussing difficulties posed by conflicting witness and defendant accounts in the context of domestic violence cases); People v. Naylor, 893 N.E.2d 653, 668 (Ill. 2008) (finding that the trial court committed reversible error when, "the trial court was faced with two different versions of events, both of which were credible" and decided to believe the officers over the defendant based on erroneously admitted evidence used to impeach the defendant); State v. Mangrum, 403 S.W.3d 152, 167 (Tenn. 2013) (discussing difficulty determining the proper charges because of conflicting accounts).

[115] For a discussion, see Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 UC DAVIS L. REV. 1407, 1421-26 (2011).

[116] *See e.g.*, Brendlin v. California, 551 U.S. 249, 260 (2007); Devenpeck v. Alford, 543 U.S. 146, 153-54 (2004); Atwater v. City of Lago Vista, 532 U.S. 318, 363 (2001); Whren v. United States, 517 U.S. 806, 813 (1996); United States v. Robinson, 414 U.S. 218, 220-21, 235 n.1 (1973).

[117] *See* Heien v. North Carolina, 135 S. Ct. 530, 536-40 (2014); *Devenpeck*, 543 U.S. at 153-54.

[118] *E.g.,* Rakas v. Illinois, 439 U.S. 128, 136-37 (1978); *Robinson*, 414 U.S. at 235.

The consequences of judicial reluctance to inquire for socioeconomically disadvantaged minority communities bearing the heaviest burden of searches and seizures are intensely controversial.[119] 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."[120] 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.[121] The lack of scrutiny or a remedy undermines trust and perceptions of legitimacy, and can lead to what Bennet Capers terms "small rebellions."[122] 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

No one likes being the object of surveillance — and that includes the masters of surveillance, the police.[123] Historically, police departments resisted recording even a portion of their work — interrogations — because of concerns that videotaping would be costly, prevent suspects from talking, and reveal strategies that might be unpalatable to judges and juries.[124] In recent years, as more

[119] For critiques see, for example, 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. C.R-C.L. 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 UMKC L. REV. 851, 873-74 (2008).

[120] Carbado & Moran, *supra* note 119, at 873-74.

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

[122] I. Bennet Capers, *Crime, Legitimacy, and Testilying,* 83 IND. L.J. 835, 865 (2008).

[123] *See, e.g.,* Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 629 (2004) (discussing debate over the need for police privacy in interrogation and the concern that opening up the interrogation to public scrutiny would cripple the power to obtain confessions); Richard A. Leo & Kimberly D. Richman, *Mandate the Electronic Recording of Police Interrogations*, 6 CRIMINOLOGY & PUB. POL'Y 791, 792 (2007) (noting that many police departments continue to resist recording interrogations though electronic recording has become increasingly common).

[124] WILLIAM A. GELLER, NAT'L INST. OF JUSTICE, VIDEOTAPING INTERROGATIONS AND CONFESSIONS 3, 6 (1993); Saul M. Kassin et al., *Police Interviewing and Interrogation: A*

investigators have gained experience with recording suspect interviews, there has been a shift toward appreciating the benefits of recording interrogations.[125] 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.[126]

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.[127] 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.[128] The problem is that the Panopticon was an idea for a prison.[129] Non-prisoners are likely to resist.

Officers, police unions, and civil liberties groups have expressed concerns over body cameras such as chilling communications with witnesses and victims and trampling the privacy of the public and officers.[130] People face having their most painful, stressful and embarrassing moments preserved for replay when law enforcement encounters are recorded.[131] Public disclosure laws also pose the risk that such painful and embarrassing videos may be ordered disclosed to individuals who may even post the video on YouTube or some other public platform for consumption.[132]

A July 2013 study of a sample of 254 police departments across the United States found that less than a quarter of the responding

Self-Report Survey of Police Practices and Beliefs, 31 LAW & HUM. BEHAV. 381, 385 (2007).

125 *See* Kassin et al., *supra* note 124, at 396.

126 *See* Lassiter et al., *Camera Perspective Bias*, *supra* note 22, at 54; Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297, 1311-12 (2008).

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

128 *See* Miran Božovič, *Introduction* to JEREMY BENTHAM, THE PANOPTICON WRITINGS 13-18 (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).

129 *See id.* at 8.

130 *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 the worst days of their lives).

131 Fan, *Police Body Cameras*, *supra* note 20, at 397-409.

132 *Id.* at 397-98, 404-06.

departments used body cameras.[133] Then came what the executive director of the organization representing rank-and-file police officers calls "a watershed moment in policing" — the national turmoil over the shooting of Michael Brown in Ferguson.[134] Witnesses offered polarized and dramatically divergent accounts of what happened.[135] Some witnesses said Officer Darren Wilson punched and shot Brown in the back even though Brown held his hands up in surrender.[136] 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.[137] It was another deeply divergent painful credibility contest — with no camera recording the key events to show what unfolded.[138]

One of the biggest reforms associated with the Ferguson turmoil are body cameras for police officers.[139] 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.[140] Seven months later, the U.S. Department of Justice

[133] POLICE EXEC. 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.

[134] 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/.

[135] *See* U.S. DEP'T 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], 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).

[136] *See* BROWN DEATH INVESTIGATION REPORT, *supra* note 135, at 7-8.

[137] *See id.* at 6-8; Robles & Schmidt, *supra* note 135, at A1.

[138] Sanburn, *supra* note 16.

[139] Ehrenfreund, *supra* note 16; *see* Sanburn, *supra* note 16.

[140] 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 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; Jon Swaine, Oliver Laughland, Jamiles Lartey & Ciara McCarthy, *Young Black Men Killed by US Police at Highest Rate in Year of 1,134 Deaths*, GUARDIAN (Dec. 31, 2015), http://www.theguardian.com/us-news/2015/dec/31/the-

would conclude that forensic evidence was inconsistent with claims that Brown was shot in the back with his hands up in surrender.[141] But by then, police had realized that public support and trust was turning sharply against law enforcement officers.[142]

Several police departments had been considering or piloting a shift to police body cameras before, but Ferguson provided a compelling push.[143] 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.[144] Trust-building and protection is an oft-stated rationale for adopting body cameras.[145] Advocates of adopting body cameras also argue that officers and the public behave better when they know they are being

counted-police-killings-2015-young-black-men.

[141] *See* BROWN DEATH INVESTIGATION REPORT, *supra* note 135, at 7-8; Somashekhar et al., *supra* note 134.

[142] Somashekhar et al., *supra* note 134.

[143] *See, e.g.*, Michael Blasky, *Conduct on Camera*, U. NEV., 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*, OKLAHOMAN (Sept. 5, 2015), http://newsok.com/article/5444779 (noting the department had been considering whether to adopt body cameras but Ferguson spurred action).

[144] *See, e.g.*, POLICE EXEC. RESEARCH FORUM, *supra* note 133, 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 20 (2014), https://ojpdiagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf.

[145] *See, e.g.*, DC BODY-WORN CAMERA PROGRAM REGULATIONS AMENDMENT ACT OF 2015, § 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 (2015) (effective Apr. 20, 2015); SAN DIEGO POLICE DEP'T PROCEDURE NO. 1.49, at 1 (2015) ("Cameras provide additional documentation of police/public encounters and may be an important tool for collecting evidence and maintaining public trust."); S.F. POLICE DEP'T, BODY WORN CAMERAS POLICY, Recommended Draft, at 1 (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.").

recorded.[146] Proponents also believe that recording events reduces unfounded complaints.[147]

The first and most frequently cited scientific evidence for the benefits of body cameras comes from a study that randomly assigned half of the fifty-four officers of the Rialto, California police department to wearing body cameras.[148] During the study period, officers without body cameras had twice the incidence of uses of force compared to the group using body cameras.[149] 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.[150] 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%.[151] 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.[152] A study of Mesa, Arizona police officers also found a reduction in complaints against officers wearing body cameras.[153] The San Diego police department also reported a reduction in uses of force and complaints against police deploying body cameras.[154] Other studies are ongoing.[155]

Groups that often take opposing positions on policing and surveillance debates have united to usher in an era of rapid transition to body cameras.[156] Galvanized by the events in Ferguson, major civil

146 *See* POLICE COMPLAINTS BD., *supra* note 49, at 3; POLICE EXEC. RESEARCH FORUM, *supra* note 133, at 6.

147 POLICE EXEC. RESEARCH FORUM, *supra* note 133, at 6.

148 *See* 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, 518-19 (2015).

149 *Id.* at 523.

150 *Id.* at 524.

151 *Id.*

152 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.

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

154 SAN DIEGO CITY COUNCIL ACTION, EXECUTIVE SUMMARY SHEET: SDPD BODY WORN CAMERA PROGRAM, 10-11 (2015), http://docs.sandiego.gov/councilcomm_agendas_attach/2015/psln_150318_2.pdf.

155 *See, e.g.*, Blasky, *supra* note 143.

156 *See, e.g.*, *Civil Rights Coalition Urges National Reforms and Recommendations to Address Police Abuse*, NAACP (2015), http://www.naacp.org/news/entry/civil-rights-

rights and civil liberties groups united to call for the required use of body cameras and other reforms.[157] 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.[158] 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.[159]

Also motivated by the events in Ferguson, police departments began to see the benefits of body cameras.[160] Police chiefs who might 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.[161] 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.[162] 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.[163]

coalition-urges-national-reforms-and-recommendations-to-addres (urging the adoption of body cameras); 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).

157 LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW ET AL., A UNIFIED STATEMENT OF ACTION TO PROMOTE REFORM AND STOP POLICE ABUSE 1-3 (Aug. 18, 2014), https://www.aclu.org/sites/default/files/assets/black_leaders_joint_statement_-_final_-_8-18.pdf.

158 *See* LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW ET AL., *supra* note 157; 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.

159 *See* LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW ET AL., *supra* note 157.

160 *See, e.g.*, POLICE EXEC. RESEARCH FORUM, *supra* note 133, at 7 (reporting on changing perceptions); Mara H. Gottfried, *St. Paul Police to Get Body Cameras, Explain Details at Community Meetings*, PIONEER PRESS (Oct. 19, 2015, 11:01 PM), 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).

161 *E.g.*, POLICE EXEC. RESEARCH FORUM, *supra* note 133, at 6; Gottfried, *supra* note 160 (quoting Andy Skoogman, Executive Director of Police Chiefs Association).

162 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).

163 *See* POLICE COMPLAINTS BD., *supra* note 49, at 3-4; POLICE EXEC. RESEARCH FORUM, *supra* note 133, at 6-7; *see also, e.g.*, AUSTIN POLICE DEP'T, *supra* note 24 (stating that body-worn cameras can help protect against false allegations of misconduct); CHI. POLICE DEP'T, SPECIAL ORDER S03-14 (2015) (effective Jan. 1, 2016) (stating that body-worn cameras "can protect members from false accusations through

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.[164] Police departments across the nation have announced plans to adopt body cameras, resulting in a surge of sales of police-worn body cameras.[165] 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, and other companies in the body camera business.[166] 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.[167] The convergence of diverse interests across unusual bedfellows has thus created a major shift in the recording of police encounters in the United States.

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

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

[165] 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/.

[166] James DeTar, *Taser, Digital Ally Stocks Helped by Ferguson Unrest*, INVESTOR'S BUS. DAILY, Aug. 21, 2014, 2014 WLNR 23081989; Jeff Stone, *Getting Past the 'Don't Taze Me Bro!' Stigma: Building Relationships with Cops Is Paying off for Taser, Which Sees Police Body Cameras as a Way to Reinvent Itself*, INT'L BUS. TIMES NEWS, Dec. 5, 2014, 2014 WLNR 34496372; *TASER International Continues to Climb on Ferguson Unrest; Shares Jump 10% to 11-Week High*, MIDNIGHT TRADER, Aug. 18, 2014, 2014 WLNR 22672056; Zacks Research Staff, *After Ferguson, Is TASER's Stock Price Surge Justified?*, ZACKS INV. RES., Aug. 20, 2014, 2014 WLNR 22813921.

[167] Maciag, *supra* note 156.

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, privacy, and witness protection.[168] 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.[169] A small but growing number of legislatures have succeeded in passing legislation to provide some guidelines for the police departments and communities in their state.[170] Legislators in other jurisdictions are wrestling with disagreements over police discretion, privacy protection, and public disclosure.[171] Even though a historic

168 *See, e.g.*, Developments in the Law, *Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1805-08 (2015) (noting the numerous important open policy questions about body cameras).

169 *See, e.g.*, Nat'l Conference of State Legislatures, *Lawmakers Focus on Police Body-Worn Cameras* (Aug. 5, 2015), http://www.ncsl.org/blog/2015/08/05/lawmakers-focus-on-police-body-worn-cameras.aspx (noting that at least 37 states as of August 2015 had considered body-worn camera legislation); *see also, e.g.*, Jeremy Brilliant, *Bill Would Keep Most Police Body Cam Video Secret*, WTHR 13 (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).

170 *See, e.g.*, CONN. STAT. ANN. § 29-6d(g) (2016) (specifying circumstances when recording by body-worn cameras is prohibited); NEV. REV. STAT. ANN. § 480.365 (2016) (giving agencies guidance on when portable recording devices must be activated or deactivated); 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 § 411.441-48 (2016) (prescribing recording policies); Gen. Assemb. 1304, art. 10, 99th Gen. Assemb. (Ill. 2015) (effective Jan. 1, 2016) (providing guidelines on recording).

171 *See, e.g.*, Rachel Alexander, *Body Camera Clarity Sought: Bills Seek to Balance Rights of Individuals, Public*, SPOKESMAN-REV., Feb. 19, 2015, 2015 WLNR 5052803 (describing competing bills and perspectives); Barbara Rodriguez, *Bills on Body*

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.[172]

In the absence of legislatively prescribed rules, or based on delegations of power to frame specific policies, many police departments have taken the lead in drafting policies on body-worn cameras addressing the important questions.[173] The policies vary in communities across the United States.[174] This section reports findings from the first study to code and analyze the available body camera policies among police departments serving the 100 largest cities in the United States.[175] The policies collected and coded were those obtainable as of December 2015. The results reported in this article focus on policies regarding what activities police must record.[176] 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.[177]

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

Cameras in Iowa Showcase Looming Challenges, DES MOINES REG. (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, 2016 WLNR 5050778 (discussing major disagreements over minimum standards for police use of body cameras and questions about personal privacy).

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

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

174 *See* discussion *infra* Part II.A and summaries in Tables 1, 2.

175 As discussed, *infra*, Part II, not all municipal police departments have adopted body cameras, or have formulated or made available body camera policies yet. We therefore coded the policies from the jurisdictions listed in Appendix 1.

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

177 *See* discussion *infra* Part II.B.

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.[178] 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 as of December 2015.

Data collection focused on municipal police departments, because the scope of work and municipal coverage is generally broadest with these primary agencies compared to other specialized agencies that may also serve the region.[179] Examining the 100 largest cities offered diversity of region and city size while still focusing on areas where more people will be affected. The cities ranged in size from more than 8.4 million people in New York, to places with less than 250,000 such as Fremont, California or Chesapeake, Virginia.[180] 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.[181] These cities also generate the largest volume of business for the increasingly lucrative body camera hardware and software industry.[182]

A team of eight persons investigated the body camera adoption status of each jurisdiction. If the city had plans to adopt body cameras or had deployed them, the investigators sought a copy of the body camera policy and coded the policies as well as the proffered reasons for adopting body cameras.[183] Through an iterative process based on

[178] *See* examples of body camera policies cited *supra* notes 24, 26.

[179] *See, e.g.*, David N. Falcone & L. Edward Wells, *The County Sheriff as A Distinctive Policing Modality*, 14 AM. J. POLICE 123, 123-25 (1995) (discussing the different agencies that may serve a region and their respective scopes of work).

[180] *See The Largest US Cities: Cities Ranked 1 to 100*, CITY MAYORS, http://www.citymayors.com/gratis/uscities_100.html (last visited Feb. 18, 2016); *Top 100 Metropolitan Areas – Ranked by Population, 2014 Estimates*, BARUCH COLL. (July 1, 2014), http://www.baruch.cuny.edu/nycdata/world_cities/largest_cities-usa.htm; *Top 100 Biggest Cities*, CITY-DATA, http://www.city-data.com/top1.html (last visited Feb. 18, 2016).

[181] *See, e.g.*, Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 840-51 (2008) (discussing mechanisms of policy diffusion by emulation).

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

[183] The Brennan Center and the Reporters Committee for Freedom of Press offer

review of the scope of issues and positions covered by the body camera policies, we generated a policy codebook with 51 variables. The variables covered issues such as the extent of officer discretion regarding what to record, what types of situations must be recorded, when recording must stop, public and officer access to recordings and data retention, redaction and storage issues.

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.

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.[184] The vast majority of the available

excellent resources for linking researchers to body camera policies. *See Police Body Camera Policies,* BRENNAN CTR. FOR JUST. (Jan. 1, 2016), https://www.brennancenter.org/body-cam-city-map; *Access to Police Body-Worn Camera Video*, REPORTERS COMM. FOR FREEDOM PRESS, https://www.rcfp.org/bodycams (last visited Feb. 20, 2016). We searched these and other department-specific sites and where policies could not be located, we contacted individual departments.

[184] *See, e.g.*, N.Y. CITY DEP'T OF INVESTIGATION, OFFICE OF THE INSPECTOR GEN. FOR THE NYPD, BODY-WORN CAMERAS IN NYC: AN ASSESSMENT OF NYPD'S PILOT PROGRAM

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.[185]

Table 2. Events to be Recorded According to the 42 Publicly Available Body Camera Recording Policies and Laws Coded[186]

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

AND RECOMMENDATIONS TO PROMOTE ACCOUNTABILITY ii (2015), http://www.nyc.gov/html/oignypd/assets/downloads/pdf/nypd-body-camera-report.pdf (defining a limited discretion model).

185 *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).

186 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.

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.[187] Consensual encounters are unregulated by the Fourth Amendment because they are not deemed a seizure.[188] Targeting for a consensual encounter is intensely controversial because of the lack of regulation or scrutiny.[189] Given the tendency of people to comply when approached by police officers, the consensual part of a "consensual encounter" can resemble a legal fiction.[190] 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 and socioeconomic background is heightened.[191]

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

[187] *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").

[188] *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 434-36 (1991) ("Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. . . . The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature."); Florida v. Rodriguez, 469 U.S. 1, 5-6 (1984) ("The initial contact between the officers and respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest.").

[189] *See, e.g.*, I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.L.-C.R. L. REV. 1, 40 (2011) (discussing controversies due to racial biases).

[190] *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.").

[191] *See, e.g.*, Margaret Raymond, *The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 BUFF. L. REV. 1483, 1486 (2007) ("Police are free to initiate a consensual encounter with an individual for any reason or no reason, perhaps based on a whim or a "hunch" that cannot be supported by specific and articulable facts."); Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 509 (2001) ("Requiring no objective indication of criminality, a consensual encounter can be initiated for no reason or for any reason at all, including the kind of inchoate hunches and suspicions disallowed even for stops, the least intrusive form of seizure.")

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.[192] The body camera policies are also exemplars for legislatures about what policies are feasible and already deployed in the field.[193] 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.[194] 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 powerfully change. 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.[195] The police report also

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[192] *See, e.g.*, Frances Stokes Berry & William D. Berry, *Innovation and Diffusion Models in Policy Research*, *in* THEORIES OF THE POLICY PROCESS 307, 310-27 (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 61 (1985) (discussing leaders and laggards in policy diffusion).

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

[194] *Cf.* Orin Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 539-42 (2011) (discussing the benefits of judicial delay when it comes to new technologies in law enforcement).

[195] *See, e.g.*, Mitchell, *Redefining*, *supra* note 82, at 1240-41 (discussing how overburdened attorneys often first get to know what the case is about through the police report contained in a thin file).

guides later officer testimony because officers rely on their reports to refresh their memory when they testify after the event.[196] Indeed, before testifying, officers often read their police reports in the courthouse hallways to revive memories blurred by time and numerous other encounters.[197] Particularly in run-of-the-mill cases, officer testimony is often limited to what is in the report.[198]

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.[199] 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.[200]

In jurisdictions where officers use body cameras, this thin paper account is 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.[201] Defendants may also request disclosure of the video in discovery.[202] 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.[203]

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196 Darren T. Kavinoky, *Knowledge as the Foundation*, *in* STRATEGIES FOR DEFENDING DUI CASES IN CALIFORNIA (Aspatore ed., 2008), 2008 WL 5689409, at *11.

197 *See id.* ("We see them in the hallways, reading those reports and trying to refresh their recollection.").

198 *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.").

199 *See* discussion *supra* notes 52–63.

200 *See, e.g.*, People v. Ellis, No. 1–10–3661, 2012 WL 6861254, at *15 (Ill. App. Ct. Dec. 28, 2012) (noting that a police report is a summary and may omit some information).

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

202 *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*, TRENDS IN DUI DISCOVERY, Sept. 2015, at 81, 82 (noting that as a defense attorney in a jurisdiction with dash cameras and body cameras, he always makes a *Brady* request for the videotape).

203 *See* discussion *supra* Part I.A.1.

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 preparing to testify.[204] 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. Most of the progress on recording has occurred in the context of police interrogations, which more than half of U.S. jurisdictions now record.[205] But much of the evidence — and in some cases, the entire basis for prosecution — may come from searches and seizures or observations during police encounters in the non-interrogation context. Before body cameras, the main video window courts had into the search and seizure disputed in criminal procedure cases was through dash cameras.[206] These dash camera videos yield only partial snapshots, often from a distant angle that misses important details.[207]

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

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[204] *See, e.g.*, Memorandum from T. Armstrong, Dir., Memphis Police Department to All Personnel (Sept. 23, 2015) (requiring that officers review body-worn camera footage before writing reports); Memorandum from Operational Support, San Diego Police Department 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").

[205] *See, e.g.*, Lassiter et al., *Camera Perspective Bias*, *supra* note 22, at 154 (citing estimates).

[206] *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, 769 (Tex. Ct. App. 2014).

[207] *See* discussion and video example *supra* notes 26–27.

two stills below from video of the same traffic stop.[208] The still on the left is from the patrol vehicle dash camera.[209] The still on the right is from the officer's body camera.[210]

View from patrol vehicle dash camera

View from officer-worn body camera

Now imagine if this traffic stop had been the one in Michael Whren's case.[211] 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

[208] Sterling Police Dep't, *The Difference a Camera Can Make,* YOUTUBE (Sept. 12, 2014), https://www.youtube.com/watch?v=ZXy17SIzpbQ.

[209] *Id.* at 1:00.

[210] *Id.* at 2:30.

[211] Whren v. United States, 517 U.S. 806, 808-09 (1996).

> what appeared to be crack cocaine in petitioner Whren's hands.[212]

Let's return to the question in Part I.A.1.[213] 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?[214] The question has vexed scholars who have suggested that the facts in *Whren* are an example of testilying — telling a more legally palatable tale to avoid suppression of the evidence — that the Court ignores.[215] 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 — and perhaps view the stop from a different perspective that includes a lap view — even if the defendant does not speak.

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

The body camera revolution is also an evidentiary revolution. It may enable judges to see for themselves more of what occurred, beyond the partiality, perceptual frailties, and gaps of oral or written statements. Throughout American history, images have powerfully communicated calls for change.[216] 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 shocked the conscience of the nation and spurred the criminal procedure revolution.[217] And it

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[212] *Id.*

[213] *See supra* text accompanying note 66.

[214] *Whren*, 517 U.S. at 808-09.

[215] *See, e.g.*, Maclin, *supra* note 68, at 384; Capers, *Fourth Problem*, *supra* note 68, at 435 n.34.

[216] *See, e.g.*, NAT'L MUSEUM OF AFRICAN AM. HISTORY & CULTURE, DOUBLE EXPOSURE: CIVIL RIGHTS AND THE PROMISE OF EQUALITY 10-55 (Laura Coyle & Michèle Gates Moresi eds., 2015) (offering examples of iconic photographs in the struggle for civil rights).

[217] *See, e.g.*, Klarman, *supra* note 2, at 56-57, 61, 69 (discussing linkages between the birth of modern criminal procedure and mob-dominated trials in the shadow of the threat of lynchings, documented by newspapers); *see also, 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

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.[218]

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.[219] Features on video storage systems regulate and track access to the video and can prevent editing and tampering.[220] Policies may also limit officers' ability to access or edit the stored video and ensure proper chain-of-custody for the evidence.[221] Video replay can be an important improvement over

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).

218 *See, e.g.*, Ehrenfreund, *supra* note 16 (discussing how the most major reform to arise from the Ferguson protests may be body cameras for police officers); Sanburn, *supra* note 16 (discussing the call for body cameras by Michael Brown's family, presenting protest images, and noting the rapid uptake of body camera reforms).

219 *See, e.g.*, POLICE EXEC. RESEARCH FORUM, *supra* note 133, 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).

220 *See, e.g.*, Alexander Mateescu, Alex Rosenblat, Danah Boyd, *Police Body-Worn Cameras* 6 (Data & Soc'y Research Inst., Working Paper, 2015), http://www.datasociety.net/pubs/dcr/PoliceBodyWornCameras.pdf (discussing the security features of various systems).

221 *See, e.g.*, CHULA VISTA POLICE DEP'T, POLICY MANUAL § 449.8 (2015), https://www.bja.gov/bwc/pdfs/ChulaVistaPD_CA-BWC-Policy.pdf ("All audio and video recordings are part of the investigative record and shall be preserved in their original format without deletion, editing or tampering according to the retention

reconstruction by error-prone memory and ugly credibility contests.[222] Event replay can also fill information gaps in a system where the defendant has strong incentives to remain silent.[223]

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.[224] 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.[225] 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.[226]

schedule. . . . Unauthorized tampering, editing or deletion of a video may result in discipline, up to and including termination."); GREENSBORO POLICE DEP'T, GREENSBORO POLICE DEPARTMENT DIRECTIVES MANUAL, DIRECTIVE NO. 5.11 (2014), https://rcfp.org/bodycam_policies/NC/Greensboro_BWC_Policy.pdf ("No officer shall attempt to erase, edit or otherwise alter any data captured by a BWC."); NORFOLK POLICE DEP'T, ADMINISTRATIVE SPECIAL ORDER 15-001: BODY-WORN CAMERAS 2 (2015), https://acluva.org/wp-content/uploads/2015/09/2015NorfolkPDPolicy.pdf ("Officers shall not edit, erase, duplicate, copy, share, or otherwise distribute in any manner BWC recordings without prior written authorization and approval by the Chief of Police.").

222 *See* discussion *supra* Sections I.A.2–.3.

223 *See* discussion *supra* Section I.A.1.

224 *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 competent and credible evidence").

225 *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting) ("[T]the 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 . . . .").

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

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 outside the courtroom.

As body camera evidence accumulates, it can be a valuable source of big data for courts to inform decision-making and evaluate rules of constitutional criminal procedure. Andrew Crespo has illuminated the potential of what he terms systemic facts to redress criminal courts' transactional myopia — the case-specific focus on the facts rather than the larger pattern of data stored by courts.[227] Systemic facts refer to data that courts acquire over time by processing a stream of cases.[228] This is a conceptually distinct from the traditional categories of adjudicative (case-specific) facts and legislative facts (externally generated general facts about the world).[229] Courts have privileged access to systemic facts stored in filing cabinets, online data systems and transcripts, which can be amassed and analyzed to shed light into opaque and important criminal procedure issues.[230] For example, search warrant affidavits and returns listing any items seized can be digitized and searched by full-text, high-speed software to evaluate issues such as boilerplate recitation, descriptive accuracy and even predictive accuracy.[231] Audio and images from video provide an even richer trove of information besides searchable databases of text and numbers.[232] Such videos may be a powerful source of relevant information beyond a single case featuring the parties recorded because of the systemic facts that the accumulated data reveals.

Event replay and video evidence can better inform the work of appellate judges as well as magistrate judges and trial judges.[233] In

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[227] Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2016).

[228] *See id*. at 2066-68.

[229] *Id*. at 2066. For a review of the differences between adjudicative and legislative facts, see Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942); Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955).

[230] Crespo, *supra* note 227, at 2072-75.

[231] *Id*. at 2074-85.

[232] *See supra* Part I.A., discussing the problems with the primacy of one-dimensional text.

[233] In the federal system, magistrate judges have the power to make proposed findings of fact and recommendations to district court judges. United States v.

appeals of search and seizure suppression matters, appellate courts review the trial court's factual findings for clear error.[234] Mixed questions of law and fact are reviewed de novo.[235] 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.[236] Video reviewed and admitted below should be as much a part of the relevant record on appeal as traditional paper transcripts of testimony.[237]

Yet practices regarding viewing video — or even whether the record on review even includes video — vary among courts.[238] Some courts have explicitly held that video evidence admitted in the trial courts is a necessary part of the record on appeal.[239] Remarkably, however, some appellate courts still do not even get the video as part of the record transmitted on appeal, even though the parties showed the video in the suppression hearing below.[240] And even if they receive the video in the record on appeal, some appellate judges refuse to view them in

Raddatz, 447 U.S. 667, 682-83 (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)).

234 *E.g.*, United States v. French, 291 F.3d 945, 950-51 (7th Cir. 2002); United States v. Williamson, 1 F.3d 1134, 1136 (10th Cir. 1993).

235 *French*, 291 F.3d at 950-51; *Williamson*, 1 F.3d at 1136.

236 *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 accept the trial court's factual findings unless clearly erroneous).

237 *See, e.g.*, United States v. Alvarez, 68 F.3d 1242, 1243 n.1 (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").

238 *See, e.g.*, 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."); Robinson v. State, 5 N.E.3d 362, 366 (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. Rascon, No. 30,561, 2011 WL 704472 at *2 (N.M. Ct. App. Jan. 14, 2011) (refusing to view video on appeal).

239 *E.g.*, *Robinson*, 5 N.E.3d, at 366.

240 *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).

reviewing suppression questions though the judge admitted the video below.[241]

Part of the reason for varying practices is confusion over whether the very act of viewing the video constitutes a reweighing of the evidence.[242] 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.[243] Moreover, on mixed questions of law and fact, appellate judges have the duty of reviewing the suppression issue de novo.[244] Why should judges blind themselves to an important part 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."[245] Traditional text-bound courts are puzzled about how to incorporate the explosion of images that technology permits.[246]

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.[247] Where the video is missing from the record, it should be supplemented *sua sponte* even if the parties fail to request supplementation.[248] In a time of transition from traditional paper

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[241] *See, e.g.*, *Rascon*, 2011 WL 704472, at *2 (refusing to view video on appeal).

[242] For a discussion see, for example, *Robinson*, 5 N.E.3d, at 365-67.

[243] *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 699 (1996) (holding that determinations of whether there was probable cause or reasonable articulable suspicion for a search or seizure should be reviewed de novo while findings of historical fact are reviewed for clear error); Frazier v. Commonwealth, 406 S.W.3d 448, 452 (Ky. 2013) ("In reviewing a trial court's ruling on a suppression motion, an appellate court must first determine if the trial court's factual findings are not clearly erroneous and are supported by substantial evidence. . . . A *de novo* review of the trial court's application of the law to the facts completes the analysis." (citations omitted)).

[244] *E.g.*, United States v. French, 291 F.3d 945, 950-51 (7th Cir. 2002); United States v. Williamson, 1 F.3d 1134, 1136 (10th Cir. 1993).

[245] FEIGENSON & SPIESEL, *supra* note 41, at 4.

[246] *See* Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1691-92, 1715-16 (2014) (discussing how textbound courts are lagging behind the proliferation of images).

[247] *See, e.g.*, State v. Reid, 722 S.E.2d 364, 365 n.2 (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).

[248] *Cf. id.* ("No one has asked us to order the supplementation of the record, and

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.[249] 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 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.

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.").

[249] *E.g.*, Enstrom v. Garden Place Hotel, 811 N.Y.S.2d 263, 264-65 (N.Y. App. Div. 2006); Roberta R. Wilson & James O'Toole, Jr., *Spoliation Concerns in Enviro, Toxic Tort Litigation*, LAW360 (Nov. 19, 2008, 12:00 AM), http://www.law360.com/articles/77528/spoliation-concerns-in-enviro-toxic-tort-litigation.

> 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.[250]

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.

B. The Judicial Role in Reducing Privacy Harms

While potentially beneficial, body-worn cameras also represent the multiplication of pervasive surveillance devices on the streets and even in homes when people call for help or officers execute warrants.[251] Good reasons may exist to turn off the camera to protect privacy or victims and witnesses — particularly because public disclosure laws in some states may subject recordings to release.[252] The privacy arm of this study found substantial variation on when cameras should be turned off to protect privacy.[253] While provisions requiring camera shut-off in restrooms, hospitals, and with informants are prevalent, there is much less consensus on sensitive contexts such as recording of minors, witnesses, and victims, including sexual assault or domestic violence victims.[254]

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[250] Casady, *supra* note 29.

[251] *Cf. Suggested Guidelines on Use of Body Cameras by Police*, ACLU (Sept. 8, 2014, 8:40 AM), http://www.aclu-il.org/statement-regarding-use-of-body-cameras-by-police/ (discussing the need for privacy-protective policies that prevent "the use of body cams from becoming another broad surveillance tool").

[252] Fan, *Police Body Cameras*, *supra* note 20, at 397-404, 411-12.

[253] The results are reported, and the tension between privacy and public disclosure laws is analyzed, in *id.* at 426-30.

[254] *Id.* at 428-29.

In the absence of consensus or even explicit guidance, officer discretion may be the only safeguard for victims, witnesses and minors having their most painful moments posted on Youtube.[255] Judicial inquiry into gaps and omissions in recording should thus be sensitive to this reality. Officers should not be deterred from protecting minors or victims of painful or intimate crimes by the risk of censure in court. The lack of recording should be acceptable to courts where officers have a reasonable articulable privacy reason for why the camera was shut off.

Courts already have experience applying the reasonable articulable basis standard in the context of reviewing *Terry* stops and cursory searches for officer safety.[256] The standard is lower than probable cause because of the protective and preventative nature of the power.[257] In the case of justified non-recording, the protective purpose is the privacy of victims and witnesses rather than officer safety. The requirement of an objective basis beyond a conclusory assertion but one that is not so high as to chill protective efforts is similarly useful in this context.

Courts can also supplement gaps in law, policy and discretion when vulnerable victims and embarrassing moments are caught on camera. Judges may order redaction of addresses and people's faces so that they are not readily identifiable.[258] Courts also have the power to seal evidence from general public disclosure and prohibit the parties from disseminating privacy-intrusive recordings released for purposes of judicial proceedings.[259]

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[255] *Id.* at 397-404, 411-12.

[256] *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119, 123 (2000) ("In *Terry,* we held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, . . . [we require] at least a minimal level of objective justification . . . .").

[257] Maryland v. Buie, 494 U.S. 325, 329, 332-36 (1990).

[258] *See, e.g.*, Showing Animals Respect & Kindness v. U.S. Dep't of the Interior, 730 F. Supp. 2d 180, 196-97 (D.D.C. 2010) (ordering redactions of video to protect privacy); Cape Publ'ns v. City of Louisville, 147 S.W.3d 731, 732-35 (Ky. Ct. App. 2003) (holding that sexual assault victim information could be redacted from police reports to protect privacy); State v. Densmore, 624 A.2d 1138, 1144 (Vt. 1993) (noting that the privacy interests of victims may justify redactions).

[259] *See, e.g.*, *In re* N.Y. Times Co., 834 F.2d 1152, 1154 (2d Cir. 1987) (noting that sealing or redaction may be warranted to protect privacy); Dampman v. Morgenthau, 599 N.Y.S.2d 390, 398-99 (N.Y. App. Term 1993) (noting that courts may seal records to protect the privacy of victims, witnesses, and the defendant).

C. 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.[260] Modern-day instant replay in sports relies on several camera angles mounted on stable positions to optimize clarity and viewing vantage.[261] In contrast, body cameras are mounted on officers in motion.[262] The camera catches a single perspective at an angle.[263] 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.[264] 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."[265] Images seem to represent a direct window into reality unsullied by human manipulation or misperception of the truth.[266] Images have the power to persuade by suggesting a transparent depiction of reality without discernible resort to rhetoric. [267] The seductive power of images obscures the fact that the meaning one derives is structured by camera framing, and by one's

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[260] *See, e.g.*, *History of Instant Replay*, NFL FOOTBALL OPERATIONS, http://operations.nfl.com/the-game/history-of-instant-replay/ (last visited Feb. 20, 2016), (offering history of the evolution of instant replay to the sophisticated system today).

[261] *Id.*

[262] *See* NAT'L INST. OF JUSTICE, *supra* note 15, at 6 (describing body-worn camera resolution specifications and mounting considerations to capture data).

[263] *See id.*

[264] *See, e.g.*, DALL. POLICE DEP'T, GEN. ORDER 3XX.00 BODY WORN CAMERAS 1 ("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.").

[265] PHILA. POLICE DEP'T, DIRECTIVE 4.21 (2015); *see also, e.g.*, AUSTIN POLICE DEP'T, POLICY MANUAL, POLICY 303, at 132 (2015) ("The use of Body Worn Digital Recording (BWDR) system provides an unbiased audio/video recording of events that employees encounter.").

[266] FEIGENSON & SPIESEL, *supra* note 41, at 8.

[267] Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 692 (2012).

own worldviews and experiences.[268] Moreover, the relevant truth may not be the camera's depiction.[269]

While the camera seems to be an unbiased eye, camera perspective can powerfully shape viewer judgments without the viewer realizing this effect.[270] The key studies of the impact of camera perspective on viewer judgment in the criminal procedure context come from studies of videotaped interrogations.[271] Psychologists found that pointing the camera so that the viewer is directly facing the suspect makes the viewer more likely to believe the suspect voluntarily made the statements during interrogation.[272] This subtle shaping of decision making by camera perspective arises because of a phenomenon called illusory causation.[273] 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.[274]

Professional expertise apparently does not defuse the power of camera perspective.[275] Judges and law enforcement officers are also susceptible to the camera perspective effect.[276] Viewers are most likely to rate a confession as coerced if the camera is pointing at the detective and least likely if the camera is pointed at the suspect.[277] Focusing a camera on the suspect and detective equally moderates this point-of-view bias.[278]

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[268] *Id.* at 689-90; *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).

[269] *See* discussion *infra* Part III.C.2.

[270] G. Daniel Lassiter, Shari Seidman Diamond, Heather C. Schmidt & Jennifer K. Elek, *Evaluating Videotaped Confessions: Expertise Provides No Defense Against the Camera-Perspective Effect*, 18 PSYCHOL. SCI. 224, 224-25 (2007) [hereinafter *Evaluating Videotaped Confessions*]; G. Daniel Lassiter et al., *Further Evidence of a Robust Point-of-View Bias in Videotaped Confessions*, 21 CURRENT PSYCHOL. 265, 267 (2002) [hereinafter *Further Evidence*]; *see* G. Daniel Lassiter et al., *Attributional Complexity and the Camera Perspective Bias in Videotaped Confessions*, 27 BASIC & APPLIED SOC. PSYCHOL. 27, 28-29 (2005) [hereinafter *Attributional Complexity*].

[271] Lassiter et al., *Further Evidence*, *supra* note 270, at 266-84; *see* Lassiter et al., *Attributional Complexity*, *supra* note 270, at 28-29; Lassiter et al., *Evaluating Videotaped Confessions*, *supra* note 270, at 224.

[272] Lassiter et al., *Attributional Complexity*, *supra* note 270, at 28.

[273] *Id.* at 27-28.

[274] *Id.*; Lassiter et al., *Further Evidence*, *supra* note 270, at 267.

[275] Lassiter et al., *Evaluating Videotaped Confessions*, *supra* note 270, at 225.

[276] *Id.* at 224-25.

[277] Lassiter et al., *Further Evidence*, *supra* note 270, at 268-69.

[278] *Id.* at 269; *see* Lassiter et al., *Evaluating Videotaped Confessions*, *supra* note 270, at 224-25.

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 point of view we are seeing.[279] When we 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.[280] This intimacy heightens sympathy for the officer's perspective because we have the sense of seeing through his eyes.[281]

Framing is likely to elicit more than just one-sided sympathy, 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.[282] Close-ups are also a framing technique that elicits sympathy.[283] 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.[284] 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.[285]

When we listen to testimony or read affidavits or reports, we take into consideration the source and make credibility assessments and discounts for partiality.[286] While our "common-sense" readings of

[279] JENNIFER VAN SIJLL, CINEMATIC STORYTELLING 156 (Paul Norlen ed., 2005).

[280] *See id.* ("POV shots give audiences an exaggerated sense of intimacy with the character.").

[281] *See id.* at 156, 170 ("The POV shot generally lends sympathy to the protagonist by allowing us to see through the character's eyes.").

[282] For examples, see the stills, *supra* notes 58–59.

[283] VAN SIJLL, *supra* note 279, at 148.

[284] *Id.*

[285] Lassiter et al., *Attributional Complexity*, *supra* note 270, at 28; Lassiter et al., *Evaluating Videotaped Confessions*, *supra* note 270, at 224; Lassiter et al., *Further Evidence*, *supra* note 270, at 268-69.

[286] Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*,

witness credibility may be skewed by factors such as the witness appearance, we are at least making judgments about the source's motives to present facts in a particular light.[287] 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 the officer knew at the time of the event.[288] For example the legal standard for whether officers are engaging in interrogation or its functional equivalent examines "the perceptions of the suspect" as well as the officers' conduct.[289] Whether the officer had probable cause to arrest a suspect is based on "the facts known to the arresting officer at the time of the arrest."[290] Whether there was reasonable articulable suspicion for a stop is also examined in light of the facts known to the officer at the time.[291] 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.[292] 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.[293]

Body-worn cameras may capture only part of what officers and suspects see — or more than the parties can perceive, especially in

40 CASE W. RES. L. REV. 165, 174-77 (1990).

[287] *See, e.g.*, Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1078-82 (1991) (discussing perceptual frailties in evaluating demeanor).

[288] *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 700-01 (1996) (Scalia, J., dissenting) ("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 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.").

[289] Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

[290] Devenpeck v. Alford, 543 U.S. 146, 152-53 (2004).

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

[292] Michigan v. Long, 463 U.S. 1032, 1047 n.11 (1983).

[293] Graham v. Connor, 490 U.S. 386, 396 (1989).

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. [294]

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.[295] Courts as well as officers need to understand why good-faith 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

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[294] CITY OF SAN DIEGO, SAN DIEGO POLICE DEP'T PROCEDURE NO. 1.49 1, 11 (2015).

[295] *See, e.g.*, DIR. T. ARMSTRONG, MEMPHIS POLICE DEP'T, POLICY AND PROCEDURE INFORMATION AND UPDATES, SERIAL 12-15 § IV.F (2015) (requiring that officers review body-worn camera footage before writing reports);CITY OF SAN DIEGO, *supra* note 294, at 11 (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").

to guilt, innocence or liability, judicial restraint is required to resist substituting the interpretations of judges for the interpretation of juries.[296] 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.[297]

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*.[298] The plaintiff in the case sued the police after he crashed and became a quadriplegic when police tried to halt his high-speed flight by executing a maneuver that causes cars to spin to a stop.[299] The district court denied the officers' motion for summary judgment and the Eleventh Circuit affirmed on interlocutory appeal, ruling that there was a sufficient basis to proceed to trial on whether the force used by police was reasonable.[300]

Granting certiorari, the Supreme Court disagreed with both lower courts.[301] 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.[302] The dash camera videos of the chase played a crucial role in the Supreme Court's decision.[303] Scholars expressed concern that an appellate court was usurping the role of jurors in interpreting facts portrayed by images subject to divergent interpretations.[304]

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.[305] Determining whether evidence is

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[296] *See, e.g.*, United States v. Pope, 613 F.3d 1255, 1259 (10th Cir. 2010) ("The jury is, of course, charged with determining the general issue of a defendant's guilt or innocence. Fact-finding by the district court based on evidence that goes to this question can risk trespassing on territory reserved to the jury as the ultimate finder of fact in our criminal justice system.").

[297] Kahan et al., *supra* note 31, at 840-47, 865-80.

[298] Scott v. Harris, 550 U.S. 372 (2007); *see* Chemerinsky, *supra* note 31, 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 841-42 (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).

[299] *Scott*, 550 U.S. at 375-76.

[300] *Id.* at 376.

[301] *Id.*

[302] *Id.* at 386.

[303] *See id.* at 378-79.

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

[305] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 652 (1961) (noting "the obvious futility

admissible is the province of judges.[306] In evaluating admissibility, including whether the exclusionary remedy applies, judges play the key role in resolving disputed questions of fact central to determining whether constitutional rights were violated.[307] 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.[308] Yet there is another crucial audience for body camera video footage — the courts that forge criminal procedure law, the primary rules governing police.[309] 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.[310]

Salient stories and dramatic events, such as officer-involved shootings or alleged body cavity searches at the roadside, tend to seize public attention.[311] Yet most of the hundreds of thousands of hours of

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").

306 FED. R. EVID. 104(a).

307 *See* sources cited *supra* notes 34, 64, 224.

308 *E.g.*, 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; Nedra Pickler, 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; *Justice Department Announces $20 Million in Funding to Support Body-Worn Camera Pilot Program*, DEPT. JUST. (May 1, 2015), http://www.justice.gov/opa/pr/justice-department-announces-20-million-funding-support-body-worn-camera-pilot-program.

309 *See, e.g.*, Steiker, *supra* note 2, at 2470-90 (discussing how constitutional criminal procedure is a chief source of the conduct rules for police).

310 *See* discussion *supra* Parts I, II.

311 *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.

video 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.[312] These everyday searches and seizures are the main staples of criminal procedure and the criminal justice system and are of great importance to courts.

Consider the still below from body camera video.[313] The camera footage is from a consensual encounter.[314] 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.[315] The callers indicated they saw the man put his hand inside his pants, then remove the hand.[316] 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.[317]

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, 5:45 PM), 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), http://www.motherjones.com/politics/2015/05/police-shootings-caught-on-tape-video; *Video: Dramatic Police Shooting in Las Vegas Caught on Body Camera*, ABC7 (Las Vegas) (July 16, 2015), http://abc7.com/news/video-dramatic-police-shooting-in-vegas-caught-on-body-cam/855728/.

312 *See* discussion *supra* Part II.B.

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

314 *See generally supra* text accompanying notes 187–191.

315 *Suspicious Person Call for Service Body Camera Video*, *supra* note 313, at 0:41-0:50.

316 *Id.*

317 *Id.* at 1:23-8:29.

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

The video of this consensual encounter is not as dramatic as those that tend to get the most airplay 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 frisk[318] or probable cause for an arrest[319] and thus a proper basis for a search incident to arrest.[320] 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.[321]

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.[322] 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

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

319 *See* United States v. Watson, 423 U.S. 411, 417-23 (1976).

320 *See* United States v. Robinson, 414 U.S. 218, 228-35 (1973).

321 *See* discussion *supra* Part II.

322 *See* discussion *supra* Section I.A.1.

nor defendant unscathed.[323] 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.[324]

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.[325] 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.[326] 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.[327] Where recording is required but the disputed enforcement event is unrecorded, courts should inquire into the reason why.[328] Judicial nudges should not be cudgels to deter voluntary police department uptake of body cameras, however. Technology is fallible.[329] Cameras may fail or risk violating the privacy or safety of victims and witnesses.[330] Courts should accept reasonable explanations 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.[331] 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.[332] 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.[333] Just as one reads testimony and considers

323 *See* discussion *supra* Section I.A.3.
324 *See* discussion *supra* Section I.A.2.
325 *See* discussion *supra* Part III.A.
326 *See* discussion *supra* Part III.A.
327 *See* discussion *supra* Part III.A.
328 *See* discussion *supra* Part III.A.
329 *See* discussion *supra* note 250.
330 *See* discussion *supra* notes 249–53 and accompanying text.
331 *See* discussion *supra* Sections III.C.1–2.
332 *See* discussion *supra* Section III.C.1.
333 *See* discussion *supra* notes 288–93.

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 to realize its promise without abdicating the proper perceptual yardsticks and judicial restraint.

APPENDIX

Police Departments Serving One of the 100 Largest Cities in the United States with Obtainable Body Camera Policies Coded in this Study.

1. New York, NY
2. Los Angeles, CA
3. Chicago, IL
4. Houston, TX
5. Philadelphia, PA
6. Phoenix, AZ
7. San Diego, CA
8. Dallas, TX
9. San Jose, CA
10. Austin, TX
11. San Francisco, CA
12. Fort Worth, TX
13. Charlotte, NC
14. Memphis, TN
15. Seattle, WA
16. Denver, CO
17. Washington, DC
18. Baltimore, MD
19. Louisville, KY
20. Portland, OR (no departmental policy at the time of coding, but we coded Oregon legislation)
21. Milwaukee, WI
22. Las Vegas, NV
23. Albuquerque, NM
24. Tucson, AZ
25. Fresno, CA
26. Atlanta, GA
27. Miami, FL
28. Oakland, CA
29. Cleveland, OH
30. Wichita, KS
31. New Orleans, LA
32. Anaheim, CA
33. Corpus Christi, TX (no departmental policy at the time of coding, but we coded Texas legislation)
34. Greensboro, NC
35. Chula Vista, CA

36. Norfolk, VA
37. Chandler, AZ
38. Durham, NC
39. Winston-Salem, NC
40. Chesapeake, VA
41. Scottsdale, AZ
42. Fremont, CA
43. Gilbert, AZ