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## EPILOGUE: MORAL PANICS AND BODY CAMERAS

HOWARD M. WASSERMAN\*

*Moral Panics and Body Cameras* appeared on the *Washington University Law Review Commentaries* website on November 18, 2014.<sup>1</sup> In the two weeks that followed, relevant events exploded, simultaneously illustrating, supporting, and undermining arguments about body cameras. These events demonstrate the twin ends of the moral panic surrounding body cameras—they are treated either as the complete solution to police-citizen conflicts or as an ineffectual waste of time and a bad idea. As with all moral panics and the public policy made in response to them, the answer lies somewhere in the middle.

On November 24, a St. Louis County grand jury declined to indict Ferguson police officer Darren Wilson in the Michael Brown shooting.<sup>2</sup> The decision, announced on a Monday evening, sparked immediate protests that turned violent, with hundreds of arrests and millions of dollars in property damages over the next few days.<sup>3</sup> Sympathy protests were held in cities across the nation, also producing scores of arrests.<sup>4</sup>

Those angered by the grand jury decision and seeking greater police accountability turned their attention to body cameras. Perhaps the non-indictment could be explained by the absence of video of the encounter;

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1. Howard M. Wasserman, *Moral Panics and Body Cameras*, WASH. U. L. REV. COMMENTARIES (Nov. 18, 2014), [http://openscholarship.wustl.edu/law\\_lawreview\\_commentaries/26](http://openscholarship.wustl.edu/law_lawreview_commentaries/26).

2. Elliot Hannon, *Darren Wilson Will Not Be Indicted for Killing Michael Brown*, SLATE (Nov. 24, 2014, 9:30 PM), [http://www.slate.com/blogs/the\\_slatest/2014/11/24/darren\\_wilson\\_not\\_indicted\\_grand\\_jury\\_decision\\_announced.html](http://www.slate.com/blogs/the_slatest/2014/11/24/darren_wilson_not_indicted_grand_jury_decision_announced.html).

3. Holly Allen, *Scenes from Ferguson—and Beyond*, SLATE (Nov. 25, 2014, 12:53 AM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/11/ferguson\\_protest\\_photos\\_grand\\_jury\\_decides\\_not\\_to\\_indict\\_darren\\_wilson\\_in.html](http://www.slate.com/articles/news_and_politics/politics/2014/11/ferguson_protest_photos_grand_jury_decides_not_to_indict_darren_wilson_in.html); Ben Unglesbee, *Buildings Destroyed in Ferguson Riots Worth Millions*, ST. LOUIS BUS. J. (Dec. 4, 2014, 1:37 PM), <http://www.bizjournals.com/stlouis/news/2014/12/04/buildings-destroyed-in-ferguson-riots-worth.html?page=all>; Ellen Wulffhorst, Daniel Wallis & Edward McAllister, *More than 400 Arrested as Ferguson Protests Spread to Other Cities*, REUTERS (Nov. 26, 2014, 6:40 PM), available at <http://www.reuters.com/article/2014/11/26/us-usa-missouri-shooting-idUSKCN0J80PR20141126>.

4. Natalie Neysa Alund, *Ferguson Protest: 92 Arrests in Oakland During 2nd Night of Looting, Vandalism*, SAN JOSE MERCURY NEWS (Nov. 26, 2014, 3:16 AM), available at [http://www.mercurynews.com/crime-courts/ci\\_27016139/ferguson-protest-oakland-cleans-up-after-2nd-night](http://www.mercurynews.com/crime-courts/ci_27016139/ferguson-protest-oakland-cleans-up-after-2nd-night); Jason Kandel & Michael Larkin, *Nearly 200 Arrested in LA on Second Day of Ferguson Demonstrations*, NBC4 LOS ANGELES (Nov. 26, 2014, 10:53 AM), <http://www.nbclosangeles.com/news/local/Los-Angeles-Ferguson-Michael-Brown-Protests-Arrests-283833841.html>; Amanda Terkel, *Thousands Protest Nationwide After Ferguson Grand Jury Decision*, HUFFINGTON POST (Nov. 24, 2014, 11:56 PM), [http://www.huffingtonpost.com/2014/11/25/ferguson-protests\\_n\\_6216234.html](http://www.huffingtonpost.com/2014/11/25/ferguson-protests_n_6216234.html).

the grand jury only had the testimony of Wilson and a host of witnesses, many of whom told inconsistent stories. One week after the non-indictment, President Obama announced a \$263 million community-policing initiative, which included \$75 million in matching funds to help local police departments nationwide establish body-camera programs.<sup>5</sup>

Two days later, however, a New York grand jury declined to indict New York City police officer Daniel Pantaleo in the death of Eric Garner during an arrest for selling loose cigarettes. A bystander had captured the altercation on video, which seemed to show Pantaleo placing Garner in a chokehold (a tactic prohibited by NYPD regulations) and Garner repeatedly saying he couldn't breathe as Pantaleo and several other officers brought him to the ground and lay on top of him.<sup>6</sup> More protests followed across the nation.<sup>7</sup> "I Can't Breathe" entered the lexicon as a rallying cry against police abuse and for greater police accountability.<sup>8</sup>

If one conclusion from the Brown decision was that things might have been different had Officer Wilson been wearing a camera, one conclusion from the Garner decision was that body cameras make no difference, thereby casting doubt on their efficacy as a response to police-public conflicts. After all, the outcome was the same in both cases, video or not. If the Garner video was not sufficient to secure even an indictment (much less a conviction) in what many viewers saw as a clear case of excessive force against an unarmed, non-resisting suspect stopped on a "broken windows" violation, accountability is unattainable. And body cameras and video do not change or improve anything.

But just as we should not be overly optimistic, neither should video's acknowledged limitations warrant entirely rejecting body cameras as a useful policy choice.

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5. Dylan Scott, *Obama Wants \$75 Million for Police Body Cameras After Ferguson*, TALKING POINTS MEMO (Dec. 1, 2014, 1:00 PM), [talkingpointsmemo.com/livewire/white-house-263-million-police-body-cameras](http://talkingpointsmemo.com/livewire/white-house-263-million-police-body-cameras).

6. J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), available at [http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?\\_r=0](http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0).

7. *Id.*; Howard Koplowitz, *Week of Outrage Protests: Full List of Michael Brown, Eric Garner Demonstration Sites by State, Plus Justice for All March Details*, INT'L BUS. TIMES (Dec. 12, 2014, 2:05 PM), <http://www.ibtimes.com/week-outrage-protests-full-list-michael-brown-eric-garner-demonstration-sites-state-1751517>.

8. Travis Waldron, *'I Can't Breathe' Protest Spreads Across Pro Sports*, THINKPROGRESS (Dec. 8, 2014, 9:27 AM), <http://thinkprogress.org/sports/2014/12/08/3600602/pro-athletes-protest-eric-garners-death-with-i-cant-breathe-messages/>.

Rather, the Garner case highlights the need to avoid the moral panic trap and to be realistic in our expectations. It reminds us that video never speaks for itself. No matter the wide public perception of the story told in the Garner video, most or all of the grand jurors saw something different and decided accordingly. It also reminds us that video must be viewed in conjunction with witness testimony, not as a substitute for testimony or as a basis for ignoring testimony in favor of a singular video narrative.<sup>9</sup>

The Garner case also shows the scope of video's inherent subjectivity and ambiguity. My previous discussions have focused largely on summary judgment in § 1983 actions against police officers, the impropriety of judges deciding at that stage what video shows, and the need for courts to allow cases to proceed to trial so a jury can view and interpret the video.<sup>10</sup> But video remains indeterminate in both criminal and civil proceedings and even when a factfinder<sup>11</sup> is given an opportunity to see the video and resolve the case.<sup>12</sup> A jury may view the video differently than does the public, prompting the same disagreements, the same outrage, and the same concerns about police non-accountability.

Finally, the Garner case reminds us of video's significant extra-judicial effects and benefits—it is about how video affects not only judicial proceedings, but also the public conversation.<sup>13</sup> In one December poll, opinion about the Brown non-indictment split sharply along racial and political lines, while a cross-racial majority believed—no doubt based on the video—that the Garner grand jury got it wrong (although the strength of the belief varied sharply along racial lines).<sup>14</sup> Criminal indictment aside, public preferences and perceptions of that video may affect other responses to Garner's death. The Department of Justice continues to investigate possible federal civil rights charges against Pantaleo, a strategy that appears more promising given the chance that a different grand or

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9. Compare Howard M. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 625–26, 633 (2009) with *Scott v. Harris*, 550 U.S. 372, 380–81 (2007).

10. Wasserman, *supra* note 9, at 630–31, 637–38; Wasserman, *supra* note 1.

11. One can debate whether the Garner or Brown grand juries were used in ordinary or appropriate ways, in which the grand jury follows the prosecutor's lead based on the state's strongest evidence, or whether they were used in an atypical manner as factfinders outside an open and adversarial trial process. See Dahlia Lithwick & Sonja West, *Shadow Trial*, SLATE (Nov. 26, 2014, 4:35 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/11/ferguson\\_grand\\_jury\\_investigation\\_a\\_shadow\\_trial\\_violates\\_the\\_public\\_s\\_right.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/11/ferguson_grand_jury_investigation_a_shadow_trial_violates_the_public_s_right.html).

12. Wasserman, *supra* note 9, at 643–44.

13. *Id.* at 644–48.

14. *Sharp Racial Divisions in Reactions to Brown, Garner Decisions*, PEW RES. CENTER FOR PEOPLE & PRESS (Dec. 8, 2014), available at <http://www.people-press.org/2014/12/08/sharp-racial-divisions-in-reactions-to-brown-garner-decisions/> [hereinafter "*Sharp Racial Divisions*"].

petit jury (drawn from a broader pool of an entire federal district) may view and interpret that video differently.<sup>15</sup> The New York Police Department's internal affairs division is also investigating Pantaleo's actions.<sup>16</sup> A civil action by Garner's family, presumptively bolstered by the video, remains possible.

Through it all, overwhelming majorities of all ethnicities and political leanings continue to strongly support body cameras.<sup>17</sup> Paradoxically, then, the body-camera debate may benefit from the necessary dose of realism these events offer, enabling us to avoid moral panic and the mistakes it precipitates. Even as recent events confirm that body cameras (and the resulting video) are not the infallible solution to police misconduct or to disputes over police-citizen encounters, they reaffirm cameras as worthwhile public policy offering some help in understanding and resolving conflicts between police and their communities.

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15. Attorney General Eric Holder, Statement by Attorney General Holder on Federal Investigation into the Death of Eric Garner, (Dec. 3, 2014), <http://www.justice.gov/opa/speech/statement-attorney-general-holder-federal-investigation-death-eric-garner>; Howard Wasserman, *Video and Public Opinion*, PRAWFSBLAWG (Dec. 11, 2014, 9:10 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2014/12/video-and-public-opinion.html>; Howard Wasserman, *Prosecuting Police—the Role of the Grand Jury Pool*, PRAWFSBLAWG (Dec. 4, 2014, 5:41 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2014/12/prosecuting-police-the-role-of-the-grand-jury-pool.html>.

Lacking a video of the Brown shooting, DOJ officials investigated, but declined to bring civil rights charges against Wilson. See Matt Apuzzo & Michael S. Schmidt, *U.S. Not Expected to Fault Officer in Ferguson Case*, N.Y. TIMES (Jan. 21, 2015), available at [http://www.nytimes.com/2015/01/22/us/justice-department-ferguson-civil-rights-darren-wilson.html?hp&action=click&pgtype=Homepage&module=first-column-region&region=top-news&WT.nav=top-news&\\_r=0](http://www.nytimes.com/2015/01/22/us/justice-department-ferguson-civil-rights-darren-wilson.html?hp&action=click&pgtype=Homepage&module=first-column-region&region=top-news&WT.nav=top-news&_r=0).

16. Hilary Hanson, *NYPD Investigators Question Chokehold Officer for More than 2 Hours*, HUFFINGTON POST (Dec. 10, 2014, 5:59 PM), [http://www.huffingtonpost.com/2014/12/10/nypd-investigation-eric-garner-daniel-pantaleo\\_n\\_6304874.html](http://www.huffingtonpost.com/2014/12/10/nypd-investigation-eric-garner-daniel-pantaleo_n_6304874.html).

17. *Sharp Racial Divisions*, *supra* note 14.