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# MORAL PANICS AND BODY CAMERAS

HOWARD M. WASSERMAN\*

## I. INTRODUCTION

Law often results from moral panic. Events occur that are perceived as a threat to the very fabric of society and lawmakers react, frequently with hastily created and ill-advised policy proposals designed to save society from an existential threat and touted to the public as doing so.<sup>1</sup> Laws in areas such as child sexual abuse,<sup>2</sup> child pornography,<sup>3</sup> fetal protection,<sup>4</sup> financial regulation,<sup>5</sup> and illegal drug use<sup>6</sup> have been criticized as overreactions to moral panics, often because the laws represent solutions that are unsuited or wildly disproportionate to the actual problem, although sold to the public as an easy cure-all.

The tragic events in Ferguson, Missouri in August 2014, and the proposed responses, bear some hallmarks of moral panic. The shooting of Michael Brown, an unarmed African-American teen, by Officer Darren Wilson, a white Ferguson police officer, triggered weeks of protests *cum* massive police resistance *cum* riots that turned the city into a present-day Birmingham.<sup>7</sup> Clashes between demonstrators and police were captured on video, triggering conflicts over the First Amendment right of citizens to record police performing their official duties in public.<sup>8</sup> At the time of this

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1. Susan Bandes, *The Lessons of Capturing the Friedmans: Moral Panic, Institutional Denial and Due Process*, 3 J. LAW, CULTURE & HUMAN. 293, 294 (2007); José Gabilondo, *Financial Moral Panic! Sarbanes-Oxley, Financier Folk Devils, and Off-Balance-Sheet Arrangements*, 36 SETON HALL L. REV. 781, 785 (2006).

2. Bandes, *supra* note 1, at 294, 300.

3. Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 231–32 (2001).

4. Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CAL. L. REV. 781, 805 (2014).

5. Gabilondo, *supra* note 1, at 785.

6. Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 40 (2010).

7. Josh Voorhees, *Everything That Went Wrong in Ferguson*, SLATE (Aug. 21, 2014), [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/08/ferguson\\_police\\_timeline\\_a\\_comprehensive\\_chronological\\_accounting\\_of\\_the\\_single.html](http://www.slate.com/articles/news_and_politics/politics/2014/08/ferguson_police_timeline_a_comprehensive_chronological_accounting_of_the_single.html).

8. Byron Tau, *Missouri ACLU, Authorities Reach Agreement on Recording of Police*, POLITICO (Aug. 15, 2014), <http://www.politico.com/blogs/under-the-radar/2014/08/missouri-aclu-authorities-reach-agreement-on-recording-194043.html>; Complaint at 1, *Hussein v. County of St. Louis*, No. 4:14-cv-1410 (E.D. Mo. Aug. 14, 2014), available at <http://ia802308.us.archive.org/10/items/gov.uscourts.moed.135195/gov.uscourts.moed.135195.1.0.pdf>; see also Howard M. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 652 (2009) (arguing for broad First Amendment liberty to record official police activity in public spaces).

Commentary's publication, state and federal officials are investigating events,<sup>9</sup> and prosecutions<sup>10</sup> and civil actions<sup>11</sup> of all stripes are contemplated or pending.

But one significant policy suggestion has emerged from the controversy: equipping police officers with body cameras. If Ferguson officers had such cameras, the argument goes, we would know whether the Brown shooting was justified, and we would know whether Ferguson police overreacted to peaceful, constitutionally protected demonstrations or whether members of the public were engaged in violent rioting warranting forceful police response.<sup>12</sup> Body cameras also may function as a counterweight to increasingly ubiquitous citizen recording of police-citizen encounters.<sup>13</sup>

It might seem odd to describe the body camera proposal as a hasty response to moral panic, on par with the rushed, ill-considered, and often unfounded prosecutions brought in response to bizarre tales of mass ritual child sexual abuse that we saw throughout the '80s and early '90s.<sup>14</sup> Expansive use of body cameras appears, on balance, to be good policy. It has overwhelming support from every stakeholder in the controversy—the

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9. Amanda Sakuma & Zachary Roth, *Ferguson Welcomes Federal Civil Rights Police Investigation*, MSNBC (Sept. 4, 2014), <http://www.msnbc.com/msnbc/doj-open-civil-rights-investigation-ferguson-police>; Sari Horwitz et al., *Justice Dept. to Probe Ferguson Police Force*, WASH. POST, Sept. 3, 2014, [http://www.washingtonpost.com/world/national-security/justice-dept-to-probe-ferguson-police-force/2014/09/03/737dd928-33bc-11e4-a723-fa3895a25d02\\_story.html](http://www.washingtonpost.com/world/national-security/justice-dept-to-probe-ferguson-police-force/2014/09/03/737dd928-33bc-11e4-a723-fa3895a25d02_story.html); Cf. 42 U.S.C. § 14141 (authorizing civil action by the Attorney General seeking equitable relief against law enforcement agencies over a "pattern or practice" of unconstitutional conduct).

10. Kate Levine, *The Ultimate Conflict*, SLATE (Sept. 11, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/09/local\\_prosecutor\\_bob\\_mcculloch\\_should\\_not\\_be\\_the\\_one\\_to\\_decide\\_whether\\_to.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/local_prosecutor_bob_mcculloch_should_not_be_the_one_to_decide_whether_to.html); Cf. 18 U.S.C. § 242 (establishing criminal liability for state and local officials who willfully deprive persons of constitutional rights).

11. Taylor Wofford, *Ferguson Slapped with \$40 Million Civil Rights Lawsuit*, NEWSWEEK, Aug. 29, 2014, <http://www.newsweek.com/ferguson-slapped-40-million-civil-rights-lawsuit-267452>; see Complaint, *White v. Jackson*, No. 4:14-cv-01490 (E.D. Mo. Aug. 28, 2014), available at <https://ia601400.us.archive.org/14/items/gov.uscourts.moed.135403/gov.uscourts.moed.135403.1.0.pdf>.

12. German Lopez, *How Body Cameras Could Change Police*, VOX, Sept. 18, 2014, <http://www.vox.com/2014/9/17/6113045/police-worn-body-cameras-explained>; Justin T. Ready & Jacob T.N. Young, *Three Myths About Police Body Cams*, SLATE (Sept. 2, 2014), [http://www.slate.com/articles/technology/future\\_tense/2014/09/ferguson\\_body\\_cams\\_myths\\_about\\_police\\_body\\_worn\\_recorders.html](http://www.slate.com/articles/technology/future_tense/2014/09/ferguson_body_cams_myths_about_police_body_worn_recorders.html).

13. Kirk Johnson, *Today's Police Put On a Gun and a Camera*, THE N.Y. TIMES, Sept. 28, 2014, [http://www.nytimes.com/2014/09/28/us/todays-police-put-on-a-gun-and-a-camera.html?\\_r=0](http://www.nytimes.com/2014/09/28/us/todays-police-put-on-a-gun-and-a-camera.html?_r=0).

14. Bandes, *supra* note 1, at 293–94; Thomas D. Lyon, *The New Wave in Children's Susceptibility Research: A Critique*, 84 CORNELL L. REV. 1004, 1008, 1030 (1999).

public,<sup>15</sup> the White House,<sup>16</sup> federal legislators,<sup>17</sup> police officials,<sup>18</sup> police unions,<sup>19</sup> and the American Civil Liberties Union.<sup>20</sup>

The problem, instead, is the rhetoric surrounding the proposals. Supporters promote body cameras as a panacea; they are spoken of as the singularly effective solution to the problem, able to prevent “another Ferguson.” And the public perceives them as that comprehensive cure to the problem. Video tells us exactly what happened, entirely eliminates the he-said/he-said ambiguity that often characterizes police-citizen encounters, and deters misbehavior by police and citizens.

Unfortunately, the reality is less certain. In so overstating the case, this rhetoric becomes indistinguishable from the rhetoric surrounding responses to past controversies that may be characterized as moral panics.

This Commentary highlights the limits of body cameras and of video evidence generally. While body cameras are a good idea and police departments should be encouraged and supported in using them, it is nevertheless important not to see them as a magic bullet. The public discussion needs less absolute rhetoric and more open recognition of the limitations of this technology.

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15. Mike Brown Law. *Require All State, County, and Local Police to Wear a Camera*, THE WHITE HOUSE (Aug. 13, 2014), <https://petitions.whitehouse.gov/petition/mike-brown-law-requires-all-state-county-and-local-police-wear-camera/8tLS5czf> (on-line White House petition garnered more than 154,000 signatures) (last visited Sept. 26, 2014); *Vidcie Survey Reveals 77 percent of Americans Would Feel Safer if Police Were Equipped with Body Mounted Cameras*, KEYC NEWS 12, Aug. 21, 2014, <http://www.keyc.com/story/26340609/vidcie-survey-reveals-77-percent-of-americans-would-feel-safer-if-police-were-equipped-with-body-mounted-cameras> [hereinafter *Vidcie Survey*].

16. Roy L. Austin, Jr., *Response to Your Petition on the Use of Body-Worn Cameras*, THE WHITE HOUSE <https://petitions.whitehouse.gov/response/response-your-petition-use-body-worn-cameras> (official White House response to petition).

17. Arthur Delaney, *Adam Schiff Pushes Body Cameras for Cops*, HUFFINGTON POST (Aug. 27, 2014), [http://www.huffingtonpost.com/2014/08/27/body-worn-cameras\\_n\\_5722762.html](http://www.huffingtonpost.com/2014/08/27/body-worn-cameras_n_5722762.html).

18. POLICE EXECUTIVE RESEARCH FORUM, *IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED* (2014), available at [http://www.policeforum.org/assets/docs/Free\\_Online\\_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf](http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf).

19. Doug Wyllie, *Survey: Police Officers Want Body-Worn Cameras*, POLICEONE (Oct. 23, 2012), <http://www.policeone.com/police-products/body-cameras/articles/6017774-Survey-Police-officers-want-body-worn-cameras/>.

20. JAY STANLEY, ACLU, *POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL* (Oct. 2013), available at [https://www.aclu.org/files/assets/police\\_body-mounted\\_cameras.pdf](https://www.aclu.org/files/assets/police_body-mounted_cameras.pdf).

## II. MORAL PANIC

Sociologist Stanley Cohen defined moral panics:

A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible. . . . Sometimes the panic passes over and is forgotten . . . ; at other times it has more serious and long-lasting repercussions and might produce such changes as those in legal and social policy or even in the way society conceives itself.<sup>21</sup>

Moral panics often produce legal responses, whether in the form of punishment of the “deviants” whose behaviors threaten society or in the form of prospective policy changes designed to prevent recurrence of the deviant behavior.

As one commentator describes the process from moral panic,

[A]n incident or pattern catalyzes preexisting social anxiety and an ad hoc issues movement is born. The media fans the flames through sensationalist and reductionist news stories . . . Usually, a hasty legal reform results from the panic. Driven as it is by irrationality, the reforms usually miss the point of the original problem and suffer from disproportionality.<sup>22</sup>

These reforms often reflect broad consensus. As society’s elites coalesce around the idea that some problem poses an existential threat to their values and interests and demands a response, they also coalesce around one bold quick-fix solution, endorsed as the comprehensive answer to the problem, even if that solution is rushed, not fully considered, and often ineffective.<sup>23</sup>

Of course, it may be quite difficult to separate moral panic from legitimate response to serious wrongdoing. Often moral panic is recognized only in retrospect, when, with the benefit of time,

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21. STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* 1 (3d ed. 2002).

22. Gabilondo, *supra* note 1, at 792.

23. Blandes, *supra* note 1, at 298–99; Gabilondo, *supra* note 1, at 792.

policymakers either rethink past laws and punishments that were adopted in haste, or learn the lessons of history and respond to new events without the panicked search for quick fixes.<sup>24</sup> More importantly, perspective may matter. Where some observers see legitimate response to truthful allegations of large-scale wrongdoing, others see moral panic.<sup>25</sup> Like obscenity, there is an unfortunate “I know it when I see it”<sup>26</sup> quality to the concept.

### III. BODY CAMERAS AS MORAL PANIC RESPONSE

Do responses to the events in Ferguson, Missouri in August 2014—the shooting of Michael Brown, the widespread protests that followed, and the massive police resistance to those protests—reflect a moral panic? It may be too early to say, because we do not know how issues will be resolved in the courts or what policy will emerge from the entire controversy. At the time of this Commentary’s publication, state and federal investigations, civil and criminal, remain ongoing—examining the original shooting of Brown, the subsequent protests and police responses to them, and general practices and policies of the Ferguson police.<sup>27</sup> Civil rights lawsuits by arrested protesters have been filed or are in the works.<sup>28</sup> Daily public protests continue more than three months after the initial events. And everyone is preparing for a new round of mass demonstrations and protests, and anticipating them turning violent, should a state grand jury decline to indict Wilson.<sup>29</sup>

Ferguson became a flashpoint for broader concerns about police misconduct, unreasonable force, racial justice, the role of public spaces for First Amendment activity, and how police respond to public First Amendment activity. And the controversy shared some characteristics with moral panics—pervasive and excited 24/7 media coverage,<sup>30</sup> searches for magic policy solutions, and public pressure to prosecute wrongdoers,<sup>31</sup> which in Ferguson has included calls to replace the county prosecutor with

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24. Bandes, *supra* note 1, at 299.

25. *Id.* at 300–01.

26. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

27. *Supra* notes 6–9 and accompanying text.

28. *Supra* note 10.

29. Howard Wasserman, *Inevitable Conflict and the State of the First Amendment*, PRAWFSBLAWG (Nov. 17, 2014), <http://prawfsblawg.blogs.com/prawfsblawg/2014/11/inevitable-conflict-and-the-state-of-the-first-amendment.html>.

30. Gabilondo, *supra* note 1, at 792–93.

31. Bandes, *supra* note 1, at 296, 298–99.

someone, likely a federal prosecutor, perceived as more willing and likely to vigorously pursue charges.<sup>32</sup>

The interesting twist is that there is virtually universal agreement that genuine wrongdoing occurred in Ferguson; the disagreement goes to what that wrongdoing was. Some observers see the unjustified shooting of an unarmed African-American teen by a white police officer who had unnecessarily initiated physical contact over a *de minimis* matter of walking in the street; others see the wrongful tarnishing of a good police officer's reputation for doing his job under difficult conditions, as well as a victim with a possibly criminal past who had recently robbed a convenience store and violently resisted the officer. Some observers see rioting and threats to social order and peace; others see constitutionally protected peaceful demonstrations calling attention to a pattern of racialized police abuses to which a militarized police force overreacted, thereby illustrating the very racialized police abuses the citizens were protesting.

But as in past moral panics, overwhelming consensus has coalesced around a single specific policy recommendation promoted and understood as the singular way to prevent "another Ferguson": equipping police officers with body cameras. More than seventy-five percent of respondents in one survey supported body cameras as an appropriate policy response to these events.<sup>33</sup> The idea has the support of law enforcement and the American Civil Liberties Union. An online White House petition called for federal legislation mandating body cameras for all state and local law enforcement,<sup>34</sup> and the White House responded by touting the role of body cameras in federal grant programs and a recent consent decree with the New Orleans Police Department.<sup>35</sup> Police departments across the country have implemented or are considering purchasing this technology.<sup>36</sup>

The question is whether broad adoption of body cameras is—like most responses to moral panic—another hasty and disproportionate reaction that misses the point of the problem, or at least not the complete solution that proponents suggest and the public hopes. Cameras and the video they provide, the argument goes, would have told us—clearly, neutrally,

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32. Levine, *supra* note 10; *but see* Howard Wasserman, *Federal Control of All Police Prosecutions?*, PRAWFSBLAWG (Sept. 12, 2014), <http://prawfsblawg.blogs.com/prawfsblawg/2014/09/limits-on-federal-involvement.html>.

33. *Vidcie Survey*, *supra* note 15.

34. *Mike Brown Law*, *supra* note 15.

35. Austin, *supra* note 16.

36. POLICE EXECUTIVE RESEARCH FORUM, *supra* note 18, at 1.

certainly, and without question or ambiguity—what happened in the Brown shooting and what happened in the subsequent protests. Supporters reflexively insist that body cameras offer three broad benefits: (1) they will produce objective, unambiguous evidence revealing what happened in future police-citizen encounters; (2) knowing they are being recorded and that the recording may be used as evidence will deter misconduct and prompt police and the public to behave better; and, as a result, (3) there will be fewer citizen complaints, less constitutional litigation, and greater accuracy in any litigation that does arise.

Cameras may well produce some or all of those benefits. The problem is one of rhetoric—the idea and perception of body cameras as panacea, as a comprehensive, unambiguous solution to future incidents of alleged misconduct in police–public encounters. As always, the issue is more complicated and the solution less certain than public conversation recognizes or acknowledges. Even if everyone agrees that widespread adoption of body cameras is a good idea, the surrounding rhetoric and expectations must remain realistic and open about the technology, its true benefits, and its very real limitations.

#### IV. THE LIMITS OF BODY CAMERAS

Having considered the arguments for body cameras, we consider their limits and why they may not offer the complete answer that proponents expect or suggest.

##### *A. Unknown Effects and Unintended Consequences*

We can only speculate whether recording will deter bad behavior and incentivize good behavior by police and the public. The technology and its use by actual police are too new to know its true effects.

Two studies offer some preliminary answers. The first examined a pilot program in Mesa, Arizona, in which 50 officers were given cameras and fifty were not. The study made three key findings: (1) Camera-equipped officers conducted “significantly” fewer stop-and-frisks and made significantly fewer arrests than their non-camera-equipped colleagues; (2) camera-equipped officers wrote more tickets and citations; and (3) camera-equipped officers were more likely to initiate contact with citizens on the street, but less likely than non-camera-equipped colleagues

to respond to dispatched calls.<sup>37</sup> In fact, the percentage difference in stop-and-frisks between the groups was larger than the actual percentage of stop-and-frisks by the camera-equipped officers.<sup>38</sup> Mesa also saw fewer total complaints against officers with cameras and nearly three times as many complaints against officers without cameras.<sup>39</sup>

A second study examined camera use in the Rialto Police Department in California. It found that, when wearing cameras, officers were less likely to use weapons and less likely to initiate physical contact with suspects, doing so only when physically threatened; when not wearing cameras, officers were more likely to initiate physical contact and more likely to use force even when not physically threatened. The study similarly found a significant reduction in citizen complaints and use-of-force incidents compared with the previous twelve months.<sup>40</sup>

The question is what to conclude from such studies. Perhaps they confirm what supporters hope: when wearing body cameras, officers are more proactive, more risk-averse, and more willing to avoid invasive or forceful strategies except where necessary. They think more carefully about whether they have sufficient cause to stop and frisk or arrest before initiating citizen encounters.<sup>41</sup> They also are more cautious about using force, although less cautious about non-invasive actions, such as issuing citations. And the effects carry to citizens, who are less likely to proceed with questionable complaints, knowing that video evidence undermines their version of events. On the other hand, the presence of cameras (from media and camera-toting observers) during the Ferguson demonstrations seems to not have deterred demonstrators or police from apparent misconduct. And the deterrence argument is thrown into serious question by the seemingly regular flow of new videos, captured by camera-wielding witnesses, showing apparent police misconduct, typically unreasonable force or attempts to skirt constitutional limitations on their authority to stop, search, and seize members of the public.<sup>42</sup> Of course, even knowing

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37. Justin T. Ready & Jacob T.N. Young, *The Impact of on-Officer Video Cameras on Police-Citizen Contacts: Findings from the Mesa Field Experiment* 21–22, 24–25 (unpublished manuscript) (on file with author); Ready & Young, *supra* note 12.

38. Ready & Young, *supra* note 37, at 22.

39. POLICE EXECUTIVE RESEARCH FORUM, *supra* note 18, at 6.

40. *Self-Awareness to Being Watched and Socially-Desirable Behavior: A Field Experiment on the Effect of Body-Worn Cameras on Police Use-of-Force* 8–9, POLICE FOUNDATION, <http://www.policefoundation.org/content/body-worn-camera>; *Implementing*, *supra* note 18, at 5.

41. Ready & Young, *supra* note 37, at 24.

42. See, e.g., Andres Jauregui, *NYPD Appears to Slam Pregnant Woman Sandra Amezcuita to Ground*, HUFFINGTON POST (Sept. 24, 2014), <http://www.huffingtonpost.com/2014/09/24/nypd->

that cameras are present does not mean people will not sometimes do unwise things. The point is that the deterrent effect may not be as great as many hope.

Moreover, there may be an unintended negative consequence to the increased transparency that cameras provide—overdeterrence. As organizational-behavior scholar Ethan Bernstein explains, knowing that they are being recorded and evaluated based on the recording, “workers are likely to do *only* what is expected of them, slavishly adhering to even the most picayune protocols.”<sup>43</sup> Bernstein found that assembly-line workers avoided creative time-saving devices or training methods, instead adhering rigidly to precise written policies, fearing having to explain themselves to anyone watching the video.<sup>44</sup>

In the policing context, overdeterrence means “sacrificing the kind of educated risk-taking and problem solving that’s often needed to save lives.”<sup>45</sup> Police officers steer well clear of the constitutional line out of fear of having to explain or justify behavior that, while not unconstitutional, may look questionable on video. These same concerns justify qualified immunity in constitutional litigation, under which executive officials are protected from suit so long as their conduct does not violate clearly established constitutional rights of which a reasonable officer would have been aware. Immunity provides officers breathing space; it ensures that they do not perform their official functions less vigorously or with “unwarranted timidity” and that they do not forego potentially beneficial policing strategies out of fear of personal liability.<sup>46</sup>

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pregnant-woman-video-sandra-amezquita\_n\_5872286.html; Ben Mathis-Lilley, “*I’m Not Your Brother,*” Says Officer Tasing Black Minnesota Man in Front of His Children, SLATE (Aug. 29, 2014), [http://www.slate.com/blogs/the\\_slatest/2014/08/29/minnesota\\_taser\\_video\\_christopher\\_lollie\\_of\\_st\\_paul\\_tased\\_in\\_front\\_of\\_children.html](http://www.slate.com/blogs/the_slatest/2014/08/29/minnesota_taser_video_christopher_lollie_of_st_paul_tased_in_front_of_children.html); Daniel Politi, *Video: New York State Officer Appears to Slap Man Who Didn’t Want Car Searched*, SLATE (Nov. 9, 2014), [http://www.slate.com/blogs/the\\_slatest/2014/11/09/saratoga\\_country\\_officer\\_appears\\_to\\_slap\\_man\\_who\\_didn\\_t\\_want\\_car\\_search\\_ed.html](http://www.slate.com/blogs/the_slatest/2014/11/09/saratoga_country_officer_appears_to_slap_man_who_didn_t_want_car_search_ed.html); Annie-Rose Strasser, *Man Dies After Being Put in Choke-Hold by NYPD*, THINKPROGRESS (July 18, 2014), <http://thinkprogress.org/justice/2014/07/18/3461602/nypd-choke-hold-man-dies/>; Howard Wasserman, *Determining the Effect of Video*, PRAWFSBLAWG (July 8, 2014), <http://prawfsblawg.blogs.com/prawfsblawg/2014/07/determining-the-effect-of-video.html>.

43. Ethan Bernstein, *How Being Filmed Changes Employee Behavior*, HARVARD BUSINESS REVIEW BLOG NETWORK (Sept. 12, 2014), <http://blogs.hbr.org/2014/09/how-being-filmed-changes-employee-behavior/> (emphasis in original).

44. *Id.*; see also Ethan Bernstein, *The Transparency Trap*, HARV. BUS. REV., Oct. 2014, available at <http://hbr.org/2014/10/the-transparency-trap/ar/4>.

45. Bernstein, *supra* note 43.

46. *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012); *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009).

Given the expansion of qualified immunity in recent years,<sup>47</sup> it would be ironic (although not necessarily a negative) if police departments widely adopt a practice that creates the very overdeterrence that qualified immunity is designed to avoid.

### *B. Limits of Video Evidence*

More problematic is the insistence that body cameras will provide video evidence that is always an objective, neutral, certain, and unambiguous representation of what happened in an encounter, leaving no doubts and no he-said/he-said disputes. Unfortunately, and contrary to the Supreme Court's insistence, video does not "speak for itself."<sup>48</sup>

First, as any undergraduate film student knows, what video actually says depends on a number of different considerations—who and what is depicted, who created the images and how, and details of the images themselves (length, clarity, lighting, distance, angle, scope, steadiness, manner of shooting, quality); these affect the inferences that viewers draw from video, allowing for many different possible meanings and conclusions.<sup>49</sup> Second, as Dan Kahan and his co-authors showed, what any viewer "sees"—and the inferences and conclusions she draws—are influenced by the viewer's cultural, demographic, social, political, and ideological characteristics.<sup>50</sup> Video speaks "only against the background of preexisting understandings of social reality that invest those facts with meaning."<sup>51</sup>

Two of Kahan's studies are especially pertinent in thinking about body cameras and video. One study tested whether viewers saw use of force (an officer intentionally ramming his car into a fleeing car to end a high-speed chase) as constitutionally excessive; it found division along political and ideological attitudes.<sup>52</sup> A second study found that viewers' opinions about abortion rights tracked whether they saw a video of events outside a

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47. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (stating that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law") (citation and internal quotation marks omitted).

48. *Compare* *Scott v. Harris*, 550 U.S. 372, 378 n.5 (2007) with Wasserman, *supra* note 8, at 624–25.

49. Wasserman, *supra* note 8, at 618–21, 624–26; Howard M. Wasserman, *Video Evidence and Summary Judgment: The Procedure of Scott v. Harris*, 91 JUDICATURE 180, 182–83 (2008).

50. 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, 879 (2009); *see also* Wasserman, *supra* note 8, at 627.

51. Kahan et al., *supra* note 50, at 883.

52. *Id.* at 841.

reproductive health clinic as depicting peaceful assembly and protest or unlawful and violent attempts to blockade that clinic.<sup>53</sup>

Both questions—whether some force was excessive and whether a gathering was peaceful protest or lawless riot—are precisely at issue in deciding what happened in Ferguson. And there is no reason to believe the results Kahan found would not be replicated with respect to these events. Had Officer Wilson been wearing a body camera when he encountered and shot Michael Brown, opinions about what the video “showed” almost certainly would split along political divisions about race, racial justice, police practices, and concepts of law and order. Similarly, viewer opinions about whether demonstrators were peacefully assembling or unlawfully rioting likely would track opinions about the First Amendment, public protest, the permissible use of the streets for expressive activity, and whether the incident being protested—the Brown shooting—was justified.

Of course, the Supreme Court shows no sign of moving from its view that video can be (and often is) so conclusive and unambiguous that the court can determine its meaning and jury consideration is not required.<sup>54</sup> Paradoxically, body cameras may prove worse for civil rights plaintiffs—more constitutional cases will feature video, offering courts more opportunities to misuse video evidence and more opportunities to keep cases away from civil juries.

### *C. Implementation: The Devil in the Details*

The ultimate effectiveness of body cameras depends on the hard details of implementation. In particular, departments must enact policies covering everything about how cameras should be deployed and used. It is not enough to call for body cameras; public discussion must consider the difficult endeavor of making them work.

That is the takeaway of a 2014 joint report from the Police Executive Research Forum and the United States Department of Justice’s Community Oriented Police Services Program. The report is the product of a yearlong study that included a survey of police departments, interviews with executives in departments that have implemented body

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53. Dan M. Kahan et al., “They Saw a Protest”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 884 (2012).

54. See, e.g., *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021 (2014) (approving summary judgment in favor of defendant based on video of alleged excessive force); *Scott v. Harris*, 550 U.S. 372, 378–80 (2007) (insisting that video of high-speed chase told the complete story of what happened during the chase and did not merit jury consideration).

camera programs, and a one-day conference of law enforcement officials and other policy experts. It offers more than 30 recommendations of protocols for using cameras, recording events, and storing, reviewing, identifying, using, and releasing a potentially enormous volume of recordings. At its heart is recognition that department policies and training materials must provide clear, specific, and detailed guidelines.<sup>55</sup>

Consider, for example, the debate over when officers should record. ACLU representatives argue that officers should record all encounters with the public, because continuous recording eliminates “any possibility that an officer could evade the recording of abuses committed on duty”; law enforcement officials want a more limited approach that leaves officers discretion to keep cameras off during certain encounters, as well as when recording would be “unsafe” or “impossible.”<sup>56</sup> The report recommends that officers record “all calls for service and during all law enforcement-related encounters and activities that occur while the officer is on duty,” subject to a requirement that officers obtain consent from crime victims prior to recording and that officers retain discretion to keep cameras off when talking with victims, witnesses, or other people reporting crimes, particularly in sexual assault or child abuse cases.<sup>57</sup> While siding with the discretionary approach, the report also recommends that officers explain and justify their decision not to record a particular encounter.<sup>58</sup>

Of course, leaving officers with such discretion may create a different unintended consequence—unreasonably heightened expectations producing more opportunities for dispute, complaint, and litigation. As police cameras become more pervasive, it becomes impossible to escape demands—from courts, litigants, juries, citizens, the media, and civilian review boards—that cameras always will be used, that video always will be available, and that the absence of video evidence is itself suspicious and suggestive of misconduct.<sup>59</sup> They also may be disappointed when the video does not provide a single, unambiguous, commonly held understanding about what happened in an encounter. The absence, or ambiguity, of video will itself become a subject of controversy in the media, in police departments and local governments, and in court.

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55. POLICE EXECUTIVE RESEARCH FORUM, *supra* note 18, at 38; Stanley, *supra* note 20, at 1–2.

56. Compare Stanley, *supra* note 20, at 2 with POLICE EXECUTIVE RESEARCH FORUM, *supra* note 18, at 12–13.

57. POLICE EXECUTIVE RESEARCH FORUM, *supra* note 18, at 40–41.

58. *Id.* at 13.

59. *Id.* at 28–29.

## V. CONCLUSION

My point is not to argue against body cameras. They offer numerous benefits and are likely a net positive, especially with members of the public increasingly armed with their own video-recording technology and increasingly concerned about police misconduct and excessive force.

The point instead is that the public debate about body cameras must reflect the nuance and complexity of camera policy, grounded in the limitations of video evidence and the hard questions of implementation. The moral panic framework—in which policy responses are similarly erroneously touted as magic solutions that resolve all problems—highlights the failure to recognize that complexity. And it should prompt government officials and all other stakeholders in the public debate to take a more cautious, realistic, and, likely, more effective approach to body cameras and to video evidence.