

**HACKING QUALIFIED IMMUNITY:  
CAMERAS AND CIVIL RIGHTS SETTLEMENTS**

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ABSTRACT

*Excessive force cases are intensely fact-specific. Did the suspect resist, necessitating the use of force? What threat did the suspect pose, if any? Was the use of force excessive in light of the situation? These are judgment calls based on myriad facts that differ from case to case. Establishing what really happened forces courts and juries to wade into a fact-bound morass filled with fiercely conflicting defendant-said, police-said battles. Now an evidentiary transformation is underway. We are in an era where the probability of a police encounter being recorded has never been higher. With the rise of recording — by the public as well as the police — trials of complaints against the police are more likely to occur outside the courtroom, in the arena of public perception. This article is about the power and perils of cameras in deciding civil rights claims against the police and exacting settlements. Many hope that cameras will offer more objective evidence to resolve fierce factual conflicts and reveal the truth of what happened. This contribution explores the volatile power of video evidence to vie for subjective audience perceptions — and potentially short-circuit the qualified immunity hurdle to induce settlements.*

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## I. INTRODUCTION

The probability of being recorded by someone has never been higher any time in human history — and this includes the recording of law enforcement encounters.<sup>1</sup> In an era of widespread “sousveillance,” the watchful gaze and camera recording can come from any ordinary person rather than top-down surveillance.<sup>2</sup> In the United States, 91% of adults have cell phones and frequently deploy their cell phone cameras.<sup>3</sup> Moreover, responding to public outcry, police departments across the country are adopting body cameras to record a wider array of routine encounters than ever before.<sup>4</sup> The rise of recording — perhaps even by competing cameras — has important implications for how civil rights lawsuits and complaints against officers are decided.

Complaints against the police are often a tangled morass thick with police-said, defendant-said conflicts. Did the pretrial detainee resist efforts to remove his handcuffs, necessitating the use of a five-second Taser stun to

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1. Rose Eveleth, *How Many Photographs of You Are Out There in the World?*, THE ATLANTIC (Nov. 2, 2015), <http://www.theatlantic.com/technology/archive/2015/11/how-many-photographs-of-you-are-out-there-in-the-world/413389/>; *When Fatal Arrests Are Caught on Camera*, TIME (July 23, 2014), <http://time.com/3024396/fatal-arrests-police-camera/>.

2. Jean-Gabriel Ganascia, *The Generalized Sousveillance Society*, 49 SOC. SCI. INFO. 489, 489-90 (2010); Steve Mann, *Veillance and Reciprocal Transparency: Surveillance Versus Sousveillance, AR Glass, Lifeglogging, and Wearable Computing*, 2013 PROC. IEEE INT’L SYMP. ON TECH. & SOC’Y 1, 3-4.

3. 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/>.

4. Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. (forthcoming 2016).

the back to secure compliance?<sup>5</sup> Or did county jail officers slam the detainee's head into a concrete bunk, knee him in the back, and then Tase him, even though he did not resist?<sup>6</sup> Were police dutifully doing their job in subduing and arresting a subject who was drunk and belligerent in public?<sup>7</sup> Or did police officers "cold cock[]" the intoxicated young woman and throw her to the ground in "an uncalled for" move?<sup>8</sup> Did the suspect in a traffic stop try to grab the officer's stun gun, forcing the officer to shoot him?<sup>9</sup> Or did the officer shoot someone stopped for a minor traffic offense in the back eight times when he was running away?<sup>10</sup> Did the officer "inappropriately touch[]" a young woman stopped for driving while intoxicated?<sup>11</sup> Or did the woman concoct the complaint after asking someone on her cell phone in the bathroom: "How can I get this officer in trouble?"<sup>12</sup>

Compounding the challenges of fiercely conflicting accounts is the intensely fact-specific nature of claims in civil rights suits against the police. Many complaints against police officers involve allegations of excessive force.<sup>13</sup> Excessive forces claims are judged by a standard of

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5. Kingsley v. Hendrickson, 135 S.Ct. 2466, 2470 (2015).

6. *Id.* at 2470.

7. *Caught on Camera: Officer Accused of Excessive Force Against Woman*, NEWS CHANNEL 8 (Fla.) (Mar. 15, 2016), <http://wfla.com/2016/03/15/caught-on-camera-officer-accused-of-excessive-force-against-woman/>.

8. *Id.*

9. 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/>.

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

11. Uriel J. Garcia, *Local Agencies Aim to Expand Use of Lapel Cameras*, SANTA FE NEW MEXICAN (Dec. 14, 2014), [http://www.santafenewmexican.com/news/local\\_news/local-agencies-aim-to-expand-use-of-lapel-cameras/article\\_44abf0eb-cffe-52c0-b7e7-cf17533936f3.html](http://www.santafenewmexican.com/news/local_news/local-agencies-aim-to-expand-use-of-lapel-cameras/article_44abf0eb-cffe-52c0-b7e7-cf17533936f3.html).

12. *Id.*

13. See e.g. NATIONAL POLICE MISCONDUCT REPORTING PROJECT 2010 ANNUAL REPORT, CATO INSTITUTE,

objective reasonableness from the perspective of what the officers at the scene “knew at the time, not with the 20/20 vision of hindsight.”<sup>14</sup> This standard calls for “careful attention to the facts and circumstances of each particular case” and the “totality of the circumstances.”<sup>15</sup>

Figuring out what really happened in such fact-intensive circumstances fraught with fiercely partisan accounts is a difficult task for courts.<sup>16</sup> As more police encounters are captured on camera, many express hope that better, more objective evidence will be available to reveal the truth.<sup>17</sup> Recordings can help support defendant accounts and deal with the major credibility challenges that defendants often face.<sup>18</sup> Recordings can also help exonerate police officers and sort out or reduce false claims,<sup>19</sup> but

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[http://www.policemisconduct.net/statistics/2010-annual-report/#Misconduct\\_by\\_Type](http://www.policemisconduct.net/statistics/2010-annual-report/#Misconduct_by_Type) (last visited Sep. 21, 2016).

14. *Kingsley*, 135 S.Ct. at 2473.

15. *Graham v. O’Connor*, 490 U.S. 386, 396 (1989) (discussing standard in the context of evaluating the use of force during stops and arrests).

16. Fan, *supra* note 4.

17. *See, e.g.*, AUSTIN POLICE DEP’T, AUSTIN POLICE DEP’T POLICY MANUAL, Policy 303, at 125 (May 1, 2015) (“The use of Body Worn Digital Recording (BWDR) system provides an unbiased audio/video recording of events that employees encounter.”); PHILA. POLICE DEP’T, DIRECTIVE 4.21 (Apr. 20, 2015) (stating that body cameras can “provide an unbiased audio and video recording of events that officers encounter”).

18. Fan, *supra* note 4.

19. POLICE COMPLAINTS BD., ENHANCING POLICE ACCOUNTABILITY THROUGH AN EFFECTIVE ON-BODY CAMERA PROGRAM FOR MPD OFFICERS 3-4 (2014), <http://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/Final%20policy%20rec%20body%20camera.pdf>; POLICE EXECUTIVE RESEARCH FORUM, U.S. DEP’T OF JUSTICE, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 6-7 (2014), <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>. *See also, e.g.*, AUSTIN POLICE DEP’T, *supra* note 17 (stating that body-worn cameras can help protect against false allegations of misconduct); CHICAGO POLICE DEP’T, SPECIAL ORDER S03-14 (Dec. 30, 2015) (effective Jan. 1, 2016) (stating that body-worn cameras “can protect members from false accusations through the objective documentation of interactions between Department members and the public”); *Doug Wyllie, Survey: Police Officers Want Body-Worn Cameras*, POLICEONE (Oct. 23, 2012), <https://www.policeone.com/police-products/body-cameras/articles/6017774-Survey-Police-officers-want-body-worn-cameras/> (reporting the results of a survey, sponsored in part by a maker of body cameras, finding that 85% of the 785 respondents “believe that body-worn cameras reduce false claims of police misconduct, and reduce the likelihood of litigation against the agency.”).

recordings may be less objective guardians of truth than they appear.<sup>20</sup> This symposium contribution discusses the implications of the rise of camera recordings for resolving allegations of civil rights violations by the police. It also discusses the promise and pitfalls of recordings in playing to the audience of public opinion – one of the most powerful juries for exacting settlements out of court.

Part I offers background on the fact-intensive nature of claims against the police brought under 42 U.S.C. § 1983. Part II discusses the rise of recordings as an important source of evidence. Part III argues that the greatest potential power of recording is to encourage officers and members of the public to perform like they are on camera, thus averting the need for resort to § 1983 suits. And when things go wrong, the recordings play to the court of public opinion, short-circuiting the many hurdles to successful § 1983 suits.

## II. DISPUTED DETAILS MATTER: FACT-DEPENDENT STANDARDS IN § 1983 SUITS

One of the earliest axioms that lawyers learn is that facts matter.<sup>21</sup> Facts can shape intuitions of justice and subtly steer the outcomes that may not be predicted by just the formal legal standard alone.<sup>22</sup> In the context of civil rights suits, facts and details are all the more crucial because the legal standards openly and formally depend on the particular facts of each case.

The most common lawsuits against police involve claims of alleged misuse of force and false arrest or imprisonment.<sup>23</sup> These civil rights claims

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20. See, e.g., 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).

21. James Parry Eyster, *Lawyer As Artist: Using Significant Moments and Obtuse Objects to Enhance Advocacy*, 14 LEGAL WRITING: J. OF LEGAL WRITING INST. 87, 93 (2008).

22. Cf., e.g., Lisa S. Blatt, *In Front of the Burgundy Curtain: The Top Ten Lessons I’ve Learned about Advocacy Before the Nation’s Highest Court*, 14 GREEN BAG 2D 9, 11 (2010) (“The third lesson I’ve learned is that facts matter. The Justices are human beings, not wooden scholars who are myopically focused on the legal principle being advanced by the parties.”).

23. Carol Archbold & Edward R. Maguire, *Studying Civil Suits Against the Police: A Serendipitous Finding of Sample Selection Bias*, 5 POLICE QUARTERLY

involve intensely fact-specific inquiries into whether officers committed a constitutional tort potentially warranting damages or injunctive relief. The first step in judging a constitutional tort claim brought under 42 U.S.C. § 1983 is to identify the specific constitutional right infringed.<sup>24</sup> In claims entailing law enforcement use of force, the constitutional provision invoked is usually the Fourth Amendment's prohibition against unreasonable searches and seizures or the Eighth Amendment's ban of cruel and unusual punishments.<sup>25</sup> The applicable standards depend on the source of the right and context of the claim.<sup>26</sup> Challenges in the context of arrests or investigatory stops are viewed as invoking the protections of the Fourth Amendment.<sup>27</sup>

In civil rights suits alleging uses of force that violate the Fourth Amendment, the actions of the officer are judged by a reasonableness standard "not capable of precise definition or mechanical application."<sup>28</sup> The application of the reasonableness standard "requires careful attention to the facts and circumstances of each particular case."<sup>29</sup> Relevant factors to evaluate include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."<sup>30</sup> Such factors call for close attention to details that are frequently hotly disputed between police and suspect, such as whether the suspect was actively resisting or complying and whether the suspect's conduct posed an immediate threat to the safety of officers or others.<sup>31</sup>

After a defendant is convicted, constitutional claims challenging officers' use of force against prisoners are analyzed under the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>32</sup> An unreasonable degree of force used against duly convicted prisoners does not

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222, 224 (2002).

24. *Baker v. McCollan*, 443 U.S. 137, 140 (1979).

25. *Graham*, 490 at 394.

26. *Id.*

27. *Id.*

28. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

29. *Graham*, 490 U.S., at 396.

30. *Id.*

31. *See, e.g., Scott v. Harris*, 550 U.S. 372, 377 (2007) (noting that the officers' "version of events (unsurprisingly) differs substantially" from the plaintiff suspect's version).

32. *Whitley v. Albers*, 475 U.S. 312, 327 (1986).

necessarily amount to an Eighth Amendment violation.<sup>33</sup> Rather, the Eighth Amendment forbids the infliction of “unnecessary and wanton infliction of pain” on prisoners.<sup>34</sup> This prohibition includes the infliction of suffering that is “totally without penological justification.”<sup>35</sup> Where force is used to restore order after a disturbance in the prison, the propriety of the officers’ conduct “turns on ‘whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.’”<sup>36</sup> Prison officials enjoy strong deference from the courts in their efforts to preserve or restore order or prevent breaches.<sup>37</sup> Therefore, the evidence must show more than “a mere dispute over the reasonableness of a particular use of force or the existence of arguably superior alternatives,” and instead, “support a reliable inference of wantonness in the infliction of pain.”<sup>38</sup>

While most use of force claims involve the Fourth or Eighth Amendment, claims of excessive force brought by pretrial detainees are analyzed under the Due Process Clause of the Fourteenth Amendment, if brought against state actors, or of the Fifth Amendment, if brought against federal officials.<sup>39</sup> The Supreme Court clarified that, similar to the reasonableness inquiry in the Fourth Amendment context, the standard for analyzing use of force in the pretrial detainee context is objective reasonableness.<sup>40</sup> Like the reasonableness inquiry for evaluating use of force under the Fourth Amendment, the judgment of use of force in the pretrial detainee context is intensely fact-specific.<sup>41</sup> Relevant factors include: “the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff’s injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and

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33. *Id.* at 319.

34. *Id.*

35. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

36. *Whitley*, 475 U.S. at 320-21.

37. *Id.* at 321--22.

38. *Id.* at 322.

39. *Kingsley*, 135 S. Ct. at 2473; *Graham v. Connor*, 490 U.S. 386, 396 n.10 (1989); *Bell*, 441 U.S. at 535-39.

40. *Kingsley*, 135 S.Ct., at 2472-2474.

41. *Id.* at 2473.

whether the plaintiff was actively resisting.”<sup>42</sup>

Thus, civil rights lawsuits frequently revolve around intensely fact-dependent standards that demand careful consideration of often disputed details.<sup>43</sup> This contrasts with the preference for easier-to-administer bright line rules in criminal procedure where the main remedy is exclusion of wrongfully obtained evidence against the defendant.<sup>44</sup> Factual details make all the difference in civil rights suits, and it is these details that are intensely disputed and hard to reconstruct.<sup>45</sup> The challenge of fiercely conflicting police-said, suspect-said credibility contests in criminal cases is particularly intense in the § 1983 context because of the fact-intensive standards for judging claims.<sup>46</sup>

### III. BEYOND POLICE-SAID, SUSPECT-SAID: WHAT THE RECORDING REVEALS

Citizens are increasingly turning their cameras on police to offer a basis to contest law enforcement accounts, monitor police, and heighten accountability.<sup>47</sup> Sometimes, the recordings of police encounters are part of an organized “copwatching” effort.<sup>48</sup> Sometimes the recordings are incidental or fortuitous.<sup>49</sup> Moreover, responding to repeated national outcries for greater transparency and accountability after the slaying of minority men stopped by the police, departments across the nation are announcing plans to adopt body cameras.<sup>50</sup> Salient cases have illuminated

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42. *Id.*

43. *E. g.*, *Wilson v. Meeks*, 52 F.3d 1547, 1552-53 (10th Cir. 1995).

44. For a discussion, *see*, Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. DAVIS L. REV. 1407, 1415, 1464-67 (2011).

45. *See* examples cited *supra* at notes 5-12.

46. *See* Fan, *supra* note 4 (discussing of the problem of police-said, suspect-said credibility contests in criminal procedure).

47. Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. (forthcoming 2015).

48. *Id.*

49. *See, e.g.*, Wesley Lowery & Elahe Izadi, *Following “Horrible Tragedy,” South Carolina Mayor Pledges Body Cameras for All Police*, WASH. POST (Apr. 8, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/04/08/following-horrible-tragedy-south-carolina-mayor-pledges-body-cameras-for-all-police/> (discussing a bystander’s video contradicting the officers’ account of a shooting).

50. 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/>; Mike Maciag, *Survey: Almost All Police Departments Plan to Use Body Cameras*, GOVERNING

the power of recording to both implicate and exonerate officers.<sup>51</sup>

One of the cases that powerfully seized national attention was the shooting of Walter Scott in South Carolina.<sup>52</sup> Scott died after being pulled over by a police officer for the minor traffic offense of having a broken taillight.<sup>53</sup> The officer involved in the shooting claimed that he fired when Scott tried to grab his stun gun.<sup>54</sup> A bystander's video recorded a different story, however.<sup>55</sup> The recording, broadcast across the nation and the world, shows the officer shooting Scott from an estimated 15 to 20 feet distance as Scott is running away.<sup>56</sup> The witness, a Dominican immigrant, considered deleting the video out of fear for his life because of what he had seen.<sup>57</sup> He ultimately made the difficult decision to give the video to the family of the slain man.<sup>58</sup> Without the recording, the family would have had little recourse to contest the crucial account of what happened. Armed with the video, however, the family of Walter Scott quickly obtained a \$6.5 million settlement from the city of North Charleston, South Carolina.<sup>59</sup>

Another tragedy that gripped the nation, the killing of Michael Brown

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(Jan. 26, 2016), <http://www.governing.com/topics/public-justice-safety/gov-police-body-camera-survey.html>.

51. See, e.g., POLICE COMPLAINTS BD., *supra* note 19 at 3-4 (discussing the power of recording to exonerate officers); Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html> (discussing the import of bystander video in implicating officer charged with shooting a suspect).

52. Lowery & Izadi, *supra* note 49; Schmidt & Apuzzo, *supra* note 51.

53. Alan Blinder & Manny Fernandez, *Residents Trace Police Shooting to a Crime Strategy Gone Awry*, N.Y. TIMES, Apr. 10, 2015, at A1.

54. Berman, *supra* note 9.

55. Schmidt & Apuzzo, *supra* note 51.

56. *Id.*

57. Philip Sherwell, *Walter Scott Killing: Witness Considered Erasing Police Shooting Video Because of Fears*, THE TELEGRAPH (Apr. 9, 2015), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11525951/Walter-Scott-killing-witness-considered-erasing-police-shooting-video-because-of-fears.html>.

58. *Id.*

59. Greg Botelho & Sonia Moghe, *North Charleston Reaches \$6.5 Million Settlement with Family of Walter Scott*, CABLE NEWS NETWORK (Oct. 9, 2015), <http://www.cnn.com/2015/10/08/us/walter-scott-north-charleston-settlement/>.

in Ferguson, Missouri, was a “watershed event” in policing that ignited protests and drew attention to the heightened risk of death that black men and children face in law enforcement encounters.<sup>60</sup> The Brown case also showed law enforcement officers the desirability of making recordings of their own.<sup>61</sup> The shooting occurred when a Ferguson Police Department officer responded to a call about a theft from a convenience store.<sup>62</sup> No camera captured the key details of what happened next.<sup>63</sup>

Instead, in the immediate aftermath, the crucial facts were reconstructed by fiercely conflicting witness stories.<sup>64</sup> Some witnesses claimed that the officer punched and shot Brown in the back even though Brown had his hands up in surrender.<sup>65</sup> Others, including Darren Wilson, the officer who shot Brown, said that Brown punched Wilson, tried to grab the officer’s gun, ran away, but then turned to charge when he was shot.<sup>66</sup> Seven months later, after protests rocked the nation and Wilson resigned because of numerous “credible threats,” he was ultimately cleared of wrongdoing.<sup>67</sup> U.S. Department of Justice investigators specializing in civil

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60. Sandhya Somashekhar, et al., *Black and Unarmed*, WASH. POST (Aug. 8, 2015), <http://www.washingtonpost.com/sf/national/2015/08/08/black-and-unarmed/>.

61. Mara H. Gottfried, *St. Paul Police to Get Body Cameras, Explain Details at Community Meetings*, PIONEER PRESS (Oct. 19, 2015), <http://www.twincities.com/2015/10/19/st-paul-police-to-get-body-cameras-explain-details-at-community-meetings/>.

62. 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 (Mar. 4, 2015) (hereinafter BROWN DEATH INVESTIGATION REPORT), available at [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj\\_report\\_on\\_shooting\\_of\\_michael\\_brown\\_1.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf).

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

64. BROWN DEATH INVESTIGATION REPORT, *supra* note 62, at 6-8 (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).

65. BROWN DEATH INVESTIGATION REPORT, *supra* note 62, at 7-8.

66. *Id.*; Robles & Schmidt, *supra* note 64, at A1.

67. Erik Eckholm & Matt Apuzzo, *Darren Wilson Is Cleared of Rights Violations in Ferguson Shooting*, N.Y. TIMES, Mar. 4, 2015, at A1; Elisha Fieldstadt, *Darren Wilson Resigned Because of ‘Credible Threats’: Lawyer*, NBC

rights enforcement found that the forensic evidence contradicted the accounts of those who claimed that Brown was shot in the back though he had his hands up in surrender.<sup>68</sup>

After Ferguson, numerous prominent civil rights groups such as the NAACP, ACLU, and Lawyers' Committee for Civil Rights under Law, called for police officers to adopt body cameras to promote transparency and accountability.<sup>69</sup> Brown's mother also called for police to adopt body cameras.<sup>70</sup> And in a historic convergence of interests ushering in a major reform, police departments also began seeing the benefits of body cameras after Ferguson.<sup>71</sup> To add extra incentive, the U.S. Department of Justice under President Barack Obama awarded law enforcement agencies across the nation with more than \$23.2 million dollars in grants to spur the adoption of body cameras.<sup>72</sup>

Now a future is fast unfolding where a wider array of law enforcement encounters than ever before will be recorded.<sup>73</sup> The recordings may be on

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NEWS (Dec. 1, 2014), <http://www.nbcnews.com/storyline/michael-brown-shooting/darren-wilson-resigned-because-credible-threats-lawyer-n258516>.

68. BROWN DEATH INVESTIGATION REPORT, *supra* note 62, at 7-8.

69. *Lawyers' Committee for Civil Rights Under Law et al., A Unified Statement of Action to Promote Reform and Stop Police Abuse 2* (Aug. 18, 2014), [https://www.aclu.org/sites/default/files/assets/black\\_leaders\\_joint\\_statement\\_-\\_final\\_-\\_8-18.pdf](https://www.aclu.org/sites/default/files/assets/black_leaders_joint_statement_-_final_-_8-18.pdf); Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All Version 2.0*; AM. C.L. UNION (Mar. 2015), [https://www.aclu.org/sites/default/files/assets/police\\_body-mounted\\_cameras-v2.pdf](https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf).

70. Adam Aton, *Michael Brown's Family Pushes for Missouri Body Camera Bill*, WASH. POST (Feb. 17, 2015), [https://www.washingtonpost.com/national/michael-browns-family-pushes-for-missouri-body-camera-bill/2016/02/17/4e3e83f2-d5ae-11e5-a65b-587e721fb231\\_story.html](https://www.washingtonpost.com/national/michael-browns-family-pushes-for-missouri-body-camera-bill/2016/02/17/4e3e83f2-d5ae-11e5-a65b-587e721fb231_story.html).

71. Fan, *supra* note 4. *Cf.* Derrick A. Bell, Jr., *Comment, Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (discussing convergence-of-interest thesis that change happens when the interests of the powerful converge with those of reformers).

72. Press Release, U.S. Dep't of Just., Justice Department Awards over \$23 Million in Funding for Body Worn Camera Pilot Program to Support Law Enforcement Agencies in 32 States (Sept. 21, 2015), <https://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law>.

73. Fan, *supra* note 4.

police body cameras, by the public, or even both, presenting the prospect of competing video evidence.<sup>74</sup> Recordings can offer an important source of evidence to courts and juries wrestling to apply fact-intensive standards in a context where the stories of police and suspects often differ.<sup>75</sup> There is an oft-expressed hope that recordings will present the truth objectively.<sup>76</sup> But, as discussed in the next Part, some of the greatest power of video is the power to take the competition for swaying subjective perceptions out of the courtroom and into the arena of public opinion. And when things go wrong, video evidence presents the potent power of exacting a civil rights settlement long before the case is decided in a courtroom.

#### IV. THE COURT OF PUBLIC OPINION AND CIVIL RIGHTS SETTLEMENTS

One of the most potent powers of video recording is to suggest a direct window into the truth of what really happened and masking how the images interact with subjective perceptions.<sup>77</sup> We often use the term “the truth” in the singular — as if there were one reality to be revealed and we would agree if we knew what really happened. Images are so seductive in promising to offer a window into the unmediated truth, that when people view a video and disagree in their interpretation of what they saw we may even be startled.<sup>78</sup> For example, many expressed surprise and dismay when grand jurors disagreed with the interpretation of a video recording of the death of Eric Garner, who gasped, “I can’t breathe!” when officers put him in the chokehold that caused his death.<sup>79</sup> Viewing the video, some believed the force was so excessive as to warrant a criminal indictment against the officers and expressed shock that the jurors did not see the same thing similarly.<sup>80</sup>

The interpretation of a police chase video by a majority of the Supreme Court in *Scott v. Harris* is another example that challenges our assumptions that video can reveal a singular objective truth.<sup>81</sup> The case involved a

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74. *See id.* at 9-13.

75. *See* discussion *supra* Part I.

76. *See* Fan *supra* note 4.

77. *See, e.g.*, NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY 8 (2009) (discussing the power of images of seeming to present the unmediated truth).

78. *Id.* at 61.

79. Yee & Johnson, *supra* note 20 at A1.

80. *Id.*

81. *Scott*, 550 U.S. 372.

lawsuit under § 1983 by a plaintiff who claimed that the police used excessive force in halting a high-speed chase he initiated by causing him to crash, leaving him a quadriplegic.<sup>82</sup> After viewing dash camera video of the chase, a majority of the Supreme Court ruled that no reasonable juror could agree with the plaintiff's account that the police used excessive force in the car chase.<sup>83</sup> Prominent scholars expressed dismay at the decision, arguing that the Court had usurped the role of jurors in finding the facts on an issue about which they — and even judges — disagreed.<sup>84</sup>

Beyond the sometimes unrealized promise of presenting the objective truth on which people will agree, the real power of video is to compete for subjective audience perceptions and play to a much wider jury of public opinion.<sup>85</sup> Video has the potent power to escape the confines of the courtroom and take the case straight to the public, thereby short-circuiting law's formal constraints.

One of the biggest formal legal constraints in § 1983 suits against officers is the shield of qualified immunity.<sup>86</sup> Many civil rights complaints are dismissed on summary judgment without any chance of presenting evidence to a jury on qualified immunity grounds.<sup>87</sup> Indeed, suits can be dismissed on qualified immunity grounds without clarifying first whether the conduct alleged violates a constitutional right.<sup>88</sup> To survive summary judgment based on qualified immunity, a plaintiff must allege facts showing a violation of "a statutory or constitutional right that was 'clearly established' at the time of the challenged conduct."<sup>89</sup> To be clearly

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82. *Id.*

83. *Id.* at 386

84. *E.g.* 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).

85. *See id.* at 838 (using the varied responses to the online video posted in *Scott v. Harris* to suggest that people are psychologically inclined to interpret facts in a manner consistent with their group identity).

86. Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93, 120 (2012).

87. *See, e.g., Scott*, 550 U.S. 372; *Pearson v. Callahan*, 555 U.S. 223 (2009).

88. *Pearson*, 555 U.S. 223.

89. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)).

established, “existing precedent must have placed the statutory or constitutional” violation “beyond debate.”<sup>90</sup>

The power of video is to take the case directly to the people, generating pressure to settle cases outside the formal confines of the courtroom and doctrines such as qualified immunity.<sup>91</sup> For example, notwithstanding the grand jury’s refusal to indict after viewing the video of Eric Garner’s death, New York City settled a “pre-litigation claim” with Garner’s family for \$5.9 million.<sup>92</sup> If the Garners had to go to court, they would have faced formidable qualified immunity questions, including whether the use of the chokehold violated any clearly established precedent that put the impropriety “beyond debate.”<sup>93</sup>

For the cases that do make it before a jury, video can viscerally appeal to jurors beyond words.<sup>94</sup> For example, the family of Christopher Sean Harris obtained a \$10 million settlement after jurors viewed a recording of a Sheriff’s Deputy chasing a runaway Harris and shoving him into a wall to stop his flight.<sup>95</sup> Harris’s head hit the wall, resulting in catastrophic brain injury.<sup>96</sup> The settlement came shortly after a paramedic testified that the deputy claimed that Harris had run into the wall headfirst.<sup>97</sup> One of the jurors viewing the video contradicting this account said the footage was “traumatizing” and stated: “It was very emotional. I cried a lot through it. I’m just really happy they got what they deserved.”<sup>98</sup> Another juror said “I don’t care what [Harris] did, he didn’t deserve to be creamed into the wall like that.”<sup>99</sup> Yet another juror said: “If it had not been for that video, they were going to cover it up.”<sup>100</sup>

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90. *Ashcroft*, 563 U.S. at 741.

91. See Kevin Conlon, *NYC Official: City Settles with Eric Garner’s Estate for \$5.9 Million*, CABLE NEWS NETWORK (July 14, 2015), <http://www.cnn.com/2015/07/13/us/garner-nyc-settlement/>; see also Mitch Smith, *Tamir Rice’s Family to Receive \$6 Million From Cleveland*, N.Y. TIMES (Aug. 27, 2016), [http://www.nytimes.com/2016/04/26/us/tamir-rice-family-cleveland-settlement.html?\\_r=0](http://www.nytimes.com/2016/04/26/us/tamir-rice-family-cleveland-settlement.html?_r=0).

92. Conlon, *supra* note 91.

93. *Plumhoff*, 134 S.Ct. at 2023.

94. Sarah Jean Green, *\$10M settlement for man shoved into wall by King Co. deputy; jurors react to video*, SEATTLE TIMES, (Jan. 25, 2011), <http://www.seattletimes.com/seattle-news/10m-settlement-for-man-shoved-into-wall-by-king-co-deputy-jurors-react-to-video/>.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

Beyond formal legal standards, videos have the power to transform civil rights lawsuits against police. Recordings can implicate, exonerate, and rouse strong emotions and generate intense pressure to settle.<sup>101</sup> Recordings can also curb some of the major divergences in stories that officers and suspects tell.<sup>102</sup> By seeming to reveal the unvarnished truth, videos can take cases directly to the people, making every viewer feel like a mini-juror with the capability of judging what really happened. Cameras thus have the volatile power to evade the formal confines of law, including qualified immunity hurdles.

## V. CONCLUSION

While video evidence is not a magic weapon guaranteeing agreement on controversial issues such as whether an officer's use of force is proper, cameras have the power to sidestep formidable legal hurdles and exact settlements.<sup>103</sup> This is a volatile power because it plays on the perceptions of the crowd, unleashed from the discipline of law. There is great promise as well as perils in the rise of recording for § 1983 suits. Regardless of one's views about whether taking civil rights claims directly to the people via video is a positive or negative development, there is a larger goal at stake.

One of the great challenges of our times is to prevent tragedies before they result in lawsuits against the police. Beyond the impact of video evidence in § 1983 suits, one of the greatest hopes for the rise of recording, including the spreading adoption of police body cameras, is that performing to the camera will change officer and public behavior to de-escalate stressful encounters.<sup>104</sup> There is some promising evidence that

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101. *Id.*

102. *Id.*

103. *See id.*; John Bacon, *Tamir Rice family to get \$6M; Cleveland admits no wrong*, USA TODAY (Apr. 25, 2016), <http://www.usatoday.com/story/news/nation/2016/04/25/cleveland-pay-6m-family-tamir-rice/83491392/>; Dan Good, *Chicago police officer Jason Van Dyke emptied his pistol and reloaded as teen Laquan McDonald lay on ground during barrage; cop charged with murder for firing 16 times*, N.Y. DAILY NEWS (Nov. 24, 2015), <http://www.nydailynews.com/news/national/shot-laquan-mcdonald-emotionless-court-arrival-article-1.2445077>.

104. Iesha S. Nunes, *"Hands Up: Don't Shoot": Police Misconduct and the Need for Body Cameras*, 67 FLA. L. REV. 1811, 1842-43 (2015); *see also* Randall Stross,

implementing officer-worn body cameras reduce the number of complaints against the police and uses of force.<sup>105</sup> This is an important question in need of further research. Section 1983 suits ultimately cannot heal the full panoply of harms to the citizens, officers and community after an alleged rights violation, especially the serious uses of force more likely to result in a lawsuit.<sup>106</sup> The ultimate goal should be reducing the need for resort to § 1983 suits by preventing harm in the first place.

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*Wearing a Badge, and a Video Camera*, N.Y. TIMES (April 6, 2013), [http://www.nytimes.com/2013/04/07/business/wearable-video-cameras-for-police-officers.html?\\_r=0](http://www.nytimes.com/2013/04/07/business/wearable-video-cameras-for-police-officers.html?_r=0).

105. E.g., Barak Ariel, et al., *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, 531 (2015); Charles M. Katz et al., *Evaluating the Impact of Officer Worn Body Cameras in the Phoenix Police Department*, ST. UNIV. CTR. FOR VIOLENCE PREVENTION & CMTY, 33 (2014), [https://publicservice.asu.edu/sites/default/files/ppd\\_spi\\_feb\\_20\\_2015\\_final.pdf](https://publicservice.asu.edu/sites/default/files/ppd_spi_feb_20_2015_final.pdf).

106. Richard Emery & Ilan Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 589-90 (2000); Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 882 (2012).