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## Picture This: Body Worn Video Devices ('Head Cams') as Tools for Ensuring Fourth Amendment Compliance by Police

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# PICTURE THIS: BODY-WORN VIDEO DEVICES (HEAD CAMS) AS TOOLS FOR ENSURING FOURTH AMENDMENT COMPLIANCE BY POLICE

*David A. Harris*<sup>†</sup>

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## I. INTRODUCTION

Picture this: a police officer shoots a civilian in the back in a public place. The police officer says that the man assaulted him, resisted arrest, and appeared to have a gun, leaving the officer no choice but to fire. In the last fraction of a second, the man turned away from the officer to hide the gun—perhaps to try to conceal the gun—which resulted in the shot in the back. Witnesses said that they saw no gun in the man’s hand and that the officer fired on the man as he ran from the officer. The shooting victim’s companions insist he had no weapon and that police planted the gun found underneath the body. Faced with these two diametrically opposed stories, and with no physical evidence to support the claims of planted evidence, the authorities either credit the police officer’s account or decide that insufficient evidence exists to allow them to come to any conclusion about what happened. Either way, the officer faces no charges or consequences; community members become angry, cynical, and lose trust in the police department.

This imaginary scenario will ring true to many because it is so familiar that it could have come from news reports in almost any American city. The details change, but the outline remains the same: an encounter between a police officer and a citizen turns deadly, and the stories of police and civilian witnesses vary widely. Police investigators and prosecutorial authorities side with police officers, either because they find the police stories more credible or because no evidence exists that can demonstrate

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<sup>†</sup> Distinguished Faculty Scholar and Professor of Law, University of Pittsburgh. I would like to thank Professor Arnold Loewy of Texas Tech University School of Law for the opportunity to present this material at the annual Texas Tech Criminal Law Symposium on April 9, 2010. I would also like to thank Christopher Jeanson and the other members of the *Texas Tech Law Review*, who helped make the event such a great success.

definitively what happened. But what if, instead, investigators and prosecutors—as well as community members—could look at audio and video recordings of the incident? What if these recordings became par for the course in nearly all police-civilian encounters? Would such a development not have the potential to change the dynamics of many conflicts between officers and members of the public?

Consider an example that emerged from New York City recently. Periodically, New York City finds itself playing host to large, group bicycle rides called Critical Mass.<sup>1</sup> These rides sometimes feature hundreds of riders and effectively take over the city streets that the bicyclists use as their route; they do this without prior warning to the authorities and without legal niceties such as permits.<sup>2</sup> This has made the Critical Mass bicyclists outlaws in the eyes of the New York Police Department.<sup>3</sup> During one Critical Mass ride in 2008, a police officer arrested a rider and charged the man with various crimes alleged to have occurred when the man assaulted the officer during the ride.<sup>4</sup> The officer stated in his arrest report that the rider used his bicycle as an offensive weapon to knock the officer down, resulting in an injury to the officer's arm.<sup>5</sup> Another person standing nearby, unnoticed by the officer, recorded the entire interaction on a cell phone video camera.<sup>6</sup> After the officer made his report and charged the bicyclist, the recording came to light.<sup>7</sup> The recording made it obvious that the officer had lied about every aspect of the encounter.<sup>8</sup> The rider had not assaulted, imperiled, or confronted the officer at all.<sup>9</sup> Rather, the officer had gone out

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1. See Ben McGrath, *Holy Rollers*, THE NEW YORKER, Nov. 13, 2006, at 44, 44 (characterizing Critical Mass as a social movement and the monthly rides in New York as “monthly political-protest rides”). New York is only one of the many cities around the world playing host to Critical Mass rides. See, e.g., Richard Madden, *London: How Cyclists Around the World Put a Spoke in the Motorist's Wheel*, DAILY TELEGRAPH (Dec. 16, 2003, 12:01 AM), <http://www.telegraph.co.uk/travel/729324/London-How-cyclists-around-the-world-put-a-spoke-in-the-motorists-wheel.html>.

2. See McGrath, *supra* note 1, at 44-45.

3. James Barron, *Police and a Cyclists' Group, and Four Years of Clashes*, N.Y. TIMES, Aug. 4, 2008, at B1, available at [http://www.nytimes.com/2008/08/04/nyregion/04critical.html?\\_r=1](http://www.nytimes.com/2008/08/04/nyregion/04critical.html?_r=1) (describing long-running tensions between Critical Mass riders and the police who view the riders as lawbreakers). Even before the incident caught by a cell phone camera described above, other incidents had occurred in which NYPD officers were accused of inappropriate actions, false arrests, and excessive force against Critical Mass riders. See, e.g., *City Reaches Settlement Over Critical Mass Arrest*, NY1 (March 30, 2010, 5:45 PM), [http://www.ny1.com/5-manhattan-news-content/top\\_stories/116112/city-reaches-settlement-over-critical-mass-arrest](http://www.ny1.com/5-manhattan-news-content/top_stories/116112/city-reaches-settlement-over-critical-mass-arrest) (describing settlement of lawsuit by five Critical Mass riders against NYPD officers for wrongful arrest and excessive force—the settlement totaled nearly \$98,000).

4. Murray Weiss, Kati Cornell & Kyle Murphy, *Rookie Cop Slammed for Cycle of Violence*, N.Y. POST, July 29, 2008, at 5, available at [http://www.nypost.com/seven/07292008/news/regionalnews/rookie\\_cop\\_slammed\\_for\\_cycle\\_of\\_violence\\_122079.htm](http://www.nypost.com/seven/07292008/news/regionalnews/rookie_cop_slammed_for_cycle_of_violence_122079.htm) (stating that the police officer arrested the rider for attempted third degree assault on the officer, resisting arrest, and disorderly conduct).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

of his way to assault the rider with considerable force, pushing him off his bicycle and onto the ground.<sup>10</sup> The cell phone video, which quickly found its way to YouTube, directly contradicted the officer's statement in his official report and the charges he had sworn out against the cyclist.<sup>11</sup> As a result, the prosecutor dropped all charges against the rider, and the police officer was investigated and indicted for his conduct.<sup>12</sup>

This incident signals more than simply the ability to use technology to correct a single rank injustice against an individual citizen. It demonstrates how cheap, widely available technology "has ended a monopoly on the history of public gatherings that was limited to the official narratives, like the sworn documents created by police officers and prosecutors."<sup>13</sup> For police officers and the agencies in which they serve, this revolution represents a huge change as many may feel that the public has them "under surveillance," or at the very least, under observation.<sup>14</sup> The possibility that videos of police-citizen incidents will surface after the fact, as well as the wide availability of these videos on services such as YouTube, means that police must take seriously the possibility that irrefutable images of their actions on the job may contradict their own versions of what happened.<sup>15</sup> This risk now looms large enough that commanding officers in some departments discuss it during training and at roll calls.<sup>16</sup>

This raises an intriguing possibility—increasing police compliance with Fourth Amendment rules by making video and audio recording of search and seizure incidents a part of routine police practice, wherever and however these actions occur. The technology that could allow this to happen has arrived, and it seems ideally suited to this task.<sup>17</sup> What is more, this technology can serve numerous other functions that police will find not

10. *Id.*

11. See *Critical Mass Bicyclist Assaulted by NYPD*, YOUTUBE (July 25, 2008), <http://www.youtube.com/watch?v=oUkiyBVytrQ>.

12. John Eligon & Colin Moynihan, *Police Officer Seen on Tape Shoving a Bicyclist Is Indicted*, N.Y. TIMES, Dec. 16, 2008, at A33, available at <http://www.nytimes.com/2008/12/16/nyregion/16critical.html?fta=y>. The officer, who resigned from the force after the incident, was convicted of lying; the judge elected not to impose jail time or probation. John Eligon, *No Jail for Ex-Officer in Encounter With Bicyclist*, N.Y. TIMES, July 15, 2010, at A26, available at <http://www.nytimes.com/2010/07/15/nyregion/15pogan.html>.

13. Jim Dwyer, *When Official Truth Collides with Cheap Digital Technology*, N.Y. TIMES, July 30, 2008, at B1, available at <http://www.nytimes.com/2008/07/30/nyregion/30about.html?fta=y>. The Critical Mass incident is only one example demonstrating this. See *id.* At the 2004 Republican National Convention in New York City, police arrested a large number of people. *Id.* But "[h]undreds of cases . . . collapsed under an avalanche of videotaped evidence that either completely contradicted police accounts, or raised significant questions about their reliability. The videotapes were made by people involved in the protests, bystanders, tourists and police officers." *Id.*

14. See Mary Erpenbach, *The Whole World Is Watching: Camera Phones Put Law Enforcement Under Surveillance*, L. ENFORCEMENT TECH., Feb. 2008, at 40, 41.

15. See *id.*

16. See *id.* at 43 (citing one supervisor as saying that he addresses it with trainees and another recommending that this possibility should be addressed at roll call or in training).

17. See *id.*

just useful, but welcome.<sup>18</sup> This versatility makes the idea one of the most promising possibilities for assuring police accountability and compliance with the law to come along in many years.<sup>19</sup>

## II. THE TECHNOLOGY: BODY-WORN VIDEO (BWV)

By now, most people know that police often have camera systems installed in their vehicles.<sup>20</sup> These systems now use digital technology that allows them to be much smaller and much more popular with police officers and their departments.<sup>21</sup> A study by the International Association of Chiefs of Police found that the installation and use of cameras had an overwhelmingly positive impact across multiple dimensions—camera use enhanced officer safety, improved agency accountability, and reduced agency liability, among other effects.<sup>22</sup> Officers tend to resist the cameras at first, feeling that they do not want “big brother” spying on them, but after a short time, most see that the cameras protect them by preserving evidence and backing up their versions of events.<sup>23</sup> Most importantly for our purposes, officers reported that recording their actions increased professionalism and performance in the sense that it forced officers to give more attention to following agency protocols in their dealings with citizens and suspects; citizens supported the use of the cameras as a way to change police behavior and to hold officers accountable.<sup>24</sup>

Given the universal trend in technology for digital devices to become both more capable and smaller over time, recording systems for police have become so small that instead of mounting these units on police car dashboards, we can now mount them on police officers themselves.<sup>25</sup> First used in the United Kingdom, police there referred to the equipment as “head cameras,” or more formally, Body-Worn Video (BWV).<sup>26</sup> BWV consists of video and audio recording equipment “attached to the officer” in the way one might wear a wireless cell phone ear piece.<sup>27</sup> At least two

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18. See generally *infra* note 25 (describing new body-worn devices as beneficial to police work).

19. See *infra* note 24.

20. See, e.g., Rachel Conway, *Caught on Camera: Suburban Police Departments Realize Benefits of “Cruiser Cams,”* PITTSBURGH POST-GAZETTE, Apr. 15, 2010, at E2-1 (detailing use of in-car cameras “for decades” with cameras installed in squad cars in the majority of police departments).

21. See *id.*

22. See *The Impact of Video Enhancement on Modern Policing*, THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, 13-26 (2003), [http://www.cops.usdoj.gov/files/ric/publications/video\\_evidence.pdf](http://www.cops.usdoj.gov/files/ric/publications/video_evidence.pdf).

23. L. Pilant, *Spotlight on In-Car Video Systems*, POLICE CHIEF, Apr. 1995, at 30.

24. See Lonnie J. Westphal, *The In-Car Camera: Value and Impact*, POLICE CHIEF, Aug. 2004, at 8.

25. See *A Watching Brief with Body-Worn Devices*, BAPCO J., Aug. 2007, [http://www.bapcojournal.com/news/fullstory.php/aid/752/A\\_watching\\_brief\\_with\\_body-worn\\_video\\_devices.html](http://www.bapcojournal.com/news/fullstory.php/aid/752/A_watching_brief_with_body-worn_video_devices.html).

26. See *id.*

27. See generally *id.* (describing various device technologies).

American companies manufacture versions of these devices, and they have begun to appear in small numbers in U.S. police agencies.<sup>28</sup>

British police departments became the first to show an interest in BWV devices, and they began to conduct field tests on them as early as 2005.<sup>29</sup> The initial pilot studies, small in size, took place in Plymouth, England, in 2005 and 2006.<sup>30</sup> The head cams showed great promise in these tests, so police then conducted a full-scale study in Plymouth, lasting seventeen months, in which 300 officers tested BWV.<sup>31</sup> The U.K. Home Office (the equivalent of the U.S. Department of Justice) then commissioned an independent assessment of the Plymouth studies to identify issues of concern and to evaluate the benefits of the devices.<sup>32</sup> The evaluators' final report on the subject stated that the pilot studies demonstrated that police received significant benefits from the use of BWV.<sup>33</sup> In 2007, the U.K. Home Office used the findings to publish *Guidance for the Police Use of Body-Worn Video Devices (Guidance)*.<sup>34</sup> In its key findings, *Guidance* explains how BWV helps police.<sup>35</sup> First, using BWV enabled officers to record evidence in real time, with far more accuracy than other methods allowed and much less doubt about what happened or what was said.<sup>36</sup> Second, officers could quickly make and keep records, causing a more rapid resolution of cases through guilty pleas and allowing officers more time on the street.<sup>37</sup> Third, when the public saw officers wearing BWV, it reduced public order offenses; when such offenses were committed, they were resolved faster.<sup>38</sup> Fourth, officers

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28. See Taser, <http://www.taser.com/products/law/Pages/taseraxon.aspx> (last visited Sept. 3, 2010). Taser International, the manufacturer of the eponymous taser weapon, manufactures its own BWV device, which uses a camera mounted on a headpiece. *Id.* The manufacturer describes its device, the Taser AXON, as "a tactical networkable computer combining advanced audio-video record/capture capabilities worn by first responders." *Id.* The company claims that "AXON significantly changes officer efficiency by reducing report documentation workload while increasing accuracy and accountability" and describes the device as a way of combating "false allegations and complaints that question their integrity and honor." *Id.* Another model, called the VIEVU, comes from a company of the same name in Seattle, Washington. See VIEVU, <http://www.viewu.com> (last visited Sept. 3, 2010). The company describes its device as "easy to wear and use," and it makes different versions for civilians and law enforcement. *Id.* The VIEVU is roughly the size and shape of a pager and clips to the officer's shirt, jacket pocket, or hat. *Id.*

29. See generally "Smile, You're on Camera!" Police to Get "Head Cams," LONDON EVENING STANDARD (Dec. 7, 2007), <http://www.thisislondon.co.uk/news/article-23403984-smile-youre-on-camera-police-to-get-head-cams.do> (describing early prototypes of head cameras).

30. See *A Watching Brief with Body-Worn Devices*, *supra* note 25.

31. POLICE & CRIME STANDARDS DIRECTORATE, HOME OFFICE OF THE U.K., GUIDANCE FOR THE POLICE USE OF BODY-WORN VIDEO DEVICES 6 (July 2007), <http://www.audaxuk.com/products/documents/HomeOfficeReport-guidance-body-worn-devices.pdf>.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 7.

37. *Id.*

38. *Id.* at 7-8.

found recording of events via BWV especially helpful for the prosecution of domestic violence cases.<sup>39</sup> Last, when officers discharged firearms in the course of police business, the use of BWV created a finely-detailed record for investigation of these critical incidents.<sup>40</sup>

While the United States has not conducted a formal evaluation of the devices, police departments are testing them in Cincinnati, San Jose, San Diego, and the smaller jurisdictions of Aberdeen, South Dakota, and Fort Smith, Arkansas.<sup>41</sup> American police departments that have used the head cams have shown great enthusiasm for them, and video taken from BWV has begun to show up in television news reports.<sup>42</sup> For example, in a recent CBS News television report, an officer in the Cincinnati Police Department used the head cam to capture exactly what she saw as she received a radio call and began to pursue a person reportedly carrying a gun into an apartment complex.<sup>43</sup> Another recording in the report shows a different officer pursuing a man into an alley yelling, "Put your hands up now!" with his gun pointed at the suspect; the man surrendered and was arrested.<sup>44</sup> Another recording showed what happened when a disturbed individual resisted a police officer's efforts to detain him and took control of the officer's Taser.<sup>45</sup> The video and audio record has a remarkable clarity, even the images taken at night; it also shows a full picture of the event, including the other officers involved.<sup>46</sup>

All of these examples help explain why police officers and their leaders strongly support the use of head cams.<sup>47</sup> Officer Melissa Cummins, the first Cincinnati police officer to use a head cam in the field, says, "It's going to help us as law enforcement officers through this country to be able to capture that actual moment, what we're seeing. . . . Instead of a jury or a judge taking my word, now you can hear [and see] it."<sup>48</sup> Officer Cummins's unabashed support for use of head cams is matched by the enthusiasm of her department's chief, Tom Streicher, who especially appreciates the capacity of the device to record any incident as it really happens and to supply evidence in criminal cases in the form of the recording.<sup>49</sup> "It is the real thing. It is the evidence. It is the incident as it's

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39. *Id.* at 8.

40. *Id.* at 7.

41. See Russ Mitchell, *Police Head Cameras Capture Action, Evidence*, CBS NEWS (Apr. 4, 2010), <http://www.cbsnews.com/stories/2010/04/04/eveningnews/main6363152.shtml>.

42. See *id.*

43. See Russ Mitchell, *Are Cop-Cams the Future?*, CBS NEWS (Apr. 4, 2010, 3:56 PM), <http://www.cbsnews.com/video/watch/?id=6363119n&tag=related;photovideo>.

44. *Id.*

45. See *id.*

46. *Id.*

47. *Id.*

48. Mitchell, *Police Head Cameras Capture Action, Evidence*, *supra* note 41.

49. See *id.*

unfolding,” Streicher says.<sup>50</sup> Evidence of what the suspect and the officer did appearing in an unrehearsed, spontaneous recording will, without doubt, prove superior to any other kind of post-hoc report, which by its nature would contain only the word of the officer. But Streicher would take the use of BWV further than just the production of evidence; he would extend it to the arena of police accountability.<sup>51</sup>

Citizens sometimes file complaints and even lawsuits against police officers, alleging everything from rudeness to brutality.<sup>52</sup> In some cases, supervising officers may suspect—either because of a complaint, but sometimes for other reasons—that the officer did not follow proper protocol or procedures.<sup>53</sup> With a working head cam system, the officer’s supervisor can see for himself what really happened.<sup>54</sup> As Chief Streicher says, “What better way of evaluating that officer’s conduct [than] by taking a look at what the officer is seeing?”<sup>55</sup> On the other hand, the devices may raise expectations of citizens; for example, some worry that “a police officer’s word may be trusted only when there is video to support it,” making the police effectively prisoners of the technology, instead of having the technology serve them.<sup>56</sup> Other skeptics voice concern that making a recording of every interaction with citizens “could make some witnesses reluctant to speak to cops.”<sup>57</sup> Streicher embraces BWV despite these fears, and he does so without hesitation: “I think that every uniformed officer working, that’s out on the street, should be wearing this.”<sup>58</sup>

Beyond improvements in police work and police accountability, BWV can also help improve police compliance with the Fourth Amendment and its strictures. Researchers using observational studies of officer behavior have shown, using conservative assumptions, that police violate the Constitution in 30% of the searches or seizures they conduct.<sup>59</sup> Moreover, the vast majority of these unconstitutional searches or seizures—97%—produce no evidence.<sup>60</sup> This means that citizens suffering unconstitutional police actions can obtain no relief through the exclusionary rule of the Fourth Amendment—no evidence exists to suppress.<sup>61</sup> Thus, any mechanism we can find that might enhance Fourth Amendment compliance

50. *Id.*

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. See Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 *CRIMINOLOGY & PUB. POL.* 315, 331 (2004).

60. *Id.* at 332.

61. *See id.*

by police seems worth exploring.<sup>62</sup>

We can find clues regarding how BWV could help increase police compliance with Fourth Amendment rules in the U.K. Home Office's *Guidance* on the use of these devices.<sup>63</sup> Among other aspects of the use of BWV, *Guidance* discusses how the technology has helped police departments vis-à-vis the handling of complaints by citizens regarding misconduct by police officers.<sup>64</sup> When a citizen wants to make a complaint about the conduct of an officer, the recording of the incident made with the officer's head cam can play a central role.<sup>65</sup> Police agencies have shown BWV recordings "to those wishing to make complaints about police action at the scene. . . . In a number of cases the complainants have reconsidered their complaint [sic] after this review, thus reducing investigation time for unwarranted complaints."<sup>66</sup> This is, unequivocally, a good thing.<sup>67</sup> If citizens can see that they were perhaps mistaken, that they did not understand the situation from the officer's point of view, or that they did not have all the facts, they may come away with a better grasp of the situation and not continue with the complaint process. Also according to *Guidance*, BWV reduced the number of baseless complaints, allowing the resources needed to work through these complaints to become available for other police purposes.<sup>68</sup>

But even if we assume that in most cases, the recording supports the officer's version of events and not the citizen's, the opposite will surely be true some of the time—that is, sometimes the recordings will support citizens' complaints. In such a case, the officer can be held accountable for mistakes made or violations committed. Thus, understanding that a commanding officer or internal affairs agent could investigate any search or seizure conduct based not on the (naturally self-serving) *ex post* report or court testimony of the officer, but on a spontaneous recording of the event made in real time, should minimize not just phony citizen complaints, but also incorrect or illegal behavior by officers.<sup>69</sup> To make this work, commanding officers would have to have unfettered access to all recordings. This would build a level of accountability into the system never before seen; in addition, supervisors could use the recordings for more general (i.e., not complaint responsive) assessment, training, and

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62. See generally David A. Harris, *How Accountability-Based Policing Can Reinforce—or Replace—the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 149-215 (2009) (providing a fully fleshed-out exploration of how to enhance Fourth Amendment compliance by police, and how BWV might fit into it).

63. POLICE & CRIME STANDARDS DIRECTORATE, *supra* note 31, at 6.

64. *Id.*

65. *Id.*

66. *Id.* at 7.

67. *Id.*

68. *Id.*

69. See Harris, *supra* note 62, at 179.

disciplinary decisions. This would go not just for search and seizure related conduct, but officer conduct of any kind. This has the potential to transform search and seizure conduct and compliance. With the knowledge that the camera will record all such actions, police behavior would likely change for the better, with higher levels of compliance with Fourth Amendment law, as well as internal departmental regulations.

In order for recordings of search and seizure encounters to have this kind of effect, the law, departmental rules, or both would have to *require* officers to record *every* interaction with citizens. Activation of head cams would need to become absolutely routine for any encounter between a police officer and a citizen: any frisk, arrest, or search of a car, a bag, or a house. This can be accomplished by crafting a presumption for use in cases in which a search or seizure plays an important role, for example, a search that results in the recovery of evidence from the defendant's pocket, which is then used to prosecute the defendant. In a criminal case in which the legality of the search and seizure is at issue because it produced evidence the state wishes to have admitted against the defendant in court, absence of a recording of the relevant search and seizure would give rise to a presumption that the defendant's version of events should be accepted, absent (1) a compelling reason explaining the failure to record, and (2) a finding that the defendant's version of events could not be believed by a reasonable person.<sup>70</sup> In a civil case alleging a violation of the Fourth Amendment—for example, a *Bivens* action based on a wrongful search—the absence of a recording would raise a similar presumption or entitle the plaintiff to a jury instruction of the same nature.<sup>71</sup> These simple presumptions would change the equation; the default method of proceeding on street patrol would include the use and activation of head cams, so that, along with the benefits police would get with these devices—evidence gathering, protection against false claims, and the like—they would do another important job at the same time by increasing police compliance with the Fourth Amendment.

A system in which BWV would play so central a role would require that two issues receive satisfactory attention: tampering and technical dependability.<sup>72</sup> With small-scale use of head cams now beginning in the United States, following comprehensive field testing in Britain, issues of technical dependability have presumably gotten, and will continue to get, the kind of scrutiny they deserve.<sup>73</sup> If the units show high levels of malfunctions and failure, police administrators like Chief Tom Streicher of Cincinnati will not want them and will condemn them instead of singing

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70. *Id.*

71. *See generally* *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (creating an implied cause of action for the conduct of federal officers who violated the Fourth Amendment).

72. *See* Mitchell, *Police Head Cameras Capture Action, Evidence*, *supra* note 41.

73. *Id.*

their praises; the movement toward adoption would then wilt and fade.<sup>74</sup>

Tampering is at least as important a concern as dependability. In order for BWV systems to do the good that the public anticipates, people will have to conclude that officers cannot tamper with the recordings once made.<sup>75</sup> This seems to be addressed in the case of the device made by Taser; at the end of a shift, the officer “docks” the device into a computer and the recordings are automatically downloaded and securely stored off-site, putting them out of reach of anyone who might wish to alter or erase the recordings.<sup>76</sup> At least as important, departments deploying head cams must have a mechanism to assure that the recording equipment is activated in every encounter with a citizen. This could be accomplished by requiring that officers keep them on during the entire time an officer is on shift, excluding times when an officer calls in that he is “out of service” (on a lunch break, in the restroom, etc.). Another possibility is to key the devices into the officer’s use of other emergency equipment—using a technological tie-in so that the device switches on whenever the squad car’s emergency lights or siren are used. Departments might also tackle the problem by creating a mandatory requirement that the officer turn the device on in any emergency and whenever an encounter with a citizen takes place.<sup>77</sup> Without ways to handle these issues, the public will doubt the trustworthiness of the devices, and the efforts to use them to ensure police accountability and Fourth Amendment compliance will come to nothing.

### III. NOT A PANACEA, BUT A POSSIBILITY

The use of head cams as a way to create more Fourth Amendment compliance by police would not, by any means, solve the whole problem of police behavior that violates search and seizure rules. Technology rarely solves the whole of a complex human problem. It can help, but often creates its own new issues; this has happened in law enforcement in the past.<sup>78</sup> The two most important technological innovations in police work in the twentieth century, the automobile and the two-way radio, revolutionized and re-invented what police could do.<sup>79</sup> Police officers could swoop in on

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74. *See id.*

75. *See id.*

76. *Id.*

77. *See* Peter Hildebrandt, *Dash-Cams Keep Records: Recording Officers’ Interactions with the Public with Mobile Video Isn’t Enough*, L. ENFORCEMENT TECH., Feb. 2009, at 10, available at [http://www.officer.com/print/Law-Enforcement-Technology/Dash-Cams-Keep-Record/1\\$45824](http://www.officer.com/print/Law-Enforcement-Technology/Dash-Cams-Keep-Record/1$45824). For example, policy in the South Carolina Department of Public Safety states that officers driving a patrol car with in-car video recording technology must activate the recording system as soon as the vehicle’s emergency lights and siren go on, and must remain active during the entire interaction with the person stopped. *Id.* Similar rules would work, and be just as necessary, for BWV.

78. DAVID A. HARRIS, *GOOD COPS: THE CASE FOR PREVENTIVE POLICING* 18-19 (2005).

79. *Id.* at 19.

criminals, swiftly and stealthily, when dispatched by radio and transported by motorized vehicles; no longer did police response depend on how many officers might run or ride horseback to the scene of a crime or disturbance after an audible alert or alarm.<sup>80</sup> This new level of speed and mobility clearly constituted a huge step forward, and experts hailed it as such.<sup>81</sup>

But it also created a new set of problems. Officers had formerly walked their beats, and this limited a beat to the size of what an average person could cover on foot.<sup>82</sup> This meant seeing and interacting with many of the same people day after day.<sup>83</sup> With radio cars, beats now covered much larger areas, and instead of walking the streets and talking with people who lived and worked there, police officers rolled through in cars, visible only from the shoulders up, seldom interacting with anyone except at the worst possible times: addressing emergencies, making arrests, and the like.<sup>84</sup> Thus, the unanticipated consequence of the greater mobility and speed of the modern police force has been that officers have been cut off from the best source of intelligence they have—the people who live and work in the neighborhoods they patrol—and have become at best unknown to, and at worst alienated from, those they serve.<sup>85</sup>

The use of BWV may have unanticipated consequences too. Some worry that fewer people will talk with police officers if they know that a recording of the interaction will happen automatically, though there is no evidence to prove any such effect might occur.<sup>86</sup> But the greater concern is that BWV might not actually influence Fourth Amendment compliance in the positive direction anticipated here. It could be, for example, that the recordings of police search and seizure conduct might not impress all viewers the same way—that is, perhaps judges viewing the images would tend to see the police actions as justified, even if others would not. That is the implication one might draw from a study by Dan M. Kahan, David A.

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80. See NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON POLICE 90-98 (1931) (discussing how vehicles and police radios would change policing).

81. HARRIS, *supra* note 78, at 19 (quoting August Vollmer, one of the twentieth century's greatest proponents of modern, technologically-assisted policing, concerning "the advent of the radio equipped car" bringing the criminal to the realization that "a few moments may bring [police officers in radio cars] down about him like a swarm of bees . . . lightning swift. . .").

82. *Id.* at 20.

83. *Id.*

84. *Id.* at 20-21.

85. *Id.*

86. See Mitchell, *Police Head Cameras Capture Action, Evidence*, *supra* note 41 (pointing out that some in law enforcement harbor concerns that witnesses or suspects might be intimidated by the presence of the cameras and not talk to officers because of it). In a related context, fears that suspects under interrogation will refuse to talk or cooperate during routine interrogations have proven unfounded. Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, NORTHWESTERN SCHOOL OF LAW CENTER ON WRONGFUL CONVICTIONS 19-23 (2004), [http://www.innocenceproject.org/docs/Police\\_Experiences\\_Recording\\_Interrogations.pdf](http://www.innocenceproject.org/docs/Police_Experiences_Recording_Interrogations.pdf).

Hoffman, and Donald Braman, called *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*.<sup>87</sup>

The article focused on the recent *Scott* case, in which the Supreme Court decided that a police officer did not violate the Fourth Amendment when he deliberately rammed his patrol car into the car of a fleeing motorist who was leading the officer on a high-speed chase.<sup>88</sup> The ramming forced the motorist's car into a catastrophic accident, resulting in the motorist becoming a quadriplegic.<sup>89</sup> A recording of the chase, from the police officer's in-car camera, became part of the record in the lower court.<sup>90</sup> While the lower court found that there was a genuine issue of material fact on the question of whether the danger posed by the motorist's flight justified the use of deadly force by the officer, the Supreme Court majority disagreed, based on its view of the recording.<sup>91</sup> Normally, "courts are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion,'" the Justices stated, but in this case, watching the videotape had convinced them that the motorist had driven in so dangerous a fashion during the chase that his story—and the findings of the court below that had sided with him—lacked all plausibility.<sup>92</sup> "Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him," the Court said.<sup>93</sup> Casting aside any need for further legal reasoning, the Justices did something the Court had never done in an opinion before: they posted the entire recording of the chase to the Court's website, gave the web address, and stated, "We are happy to allow the videotape to speak for itself."<sup>94</sup>

Kahan and colleagues took the Court's challenge: they decided to conduct an empirical study to see what the recording of the chase said to people viewing it.<sup>95</sup> To do this, the researchers showed the tape to a sample of 1,350 Americans and studied their reactions to what they saw.<sup>96</sup> In short, not everyone looking at the tape saw the same thing, and opinions on what the tape showed tended to have much to do with who the viewer was.<sup>97</sup> The authors reported that a "fairly substantial majority" interpreted the tape as the Court did: the fleeing motorist had posed a danger grave enough to

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87. See Dan M. Kahan, David A. Hoffman, & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 837 (2009).

88. *Scott v. Harris*, 550 U.S. 372, 374-76 (2007).

89. *Id.* at 375.

90. *Id.* at 378.

91. *Id.*

92. *Id.* at 378-79.

93. *Id.* at 380.

94. *Id.* at 378 n.5.

95. Kahan, Hoffman, & Braman, *supra* note 87, at 841.

96. *Id.*

97. *See id.*

justify the police officer's use of deadly force.<sup>98</sup> But other viewers did not agree.<sup>99</sup> They saw the motorist's flight as less dangerous; indeed, they viewed the conduct of the officer in chasing the motorist as the factor creating the danger in the situation and found the officer's ramming of the motorist's car unnecessary and unjustified.<sup>100</sup> Those who disagreed with the Court fell into certain identifiable groups: African Americans, low-wage workers, residents of the Northeastern U.S., liberals, and Democrats.<sup>101</sup> As the researchers saw it, the correct question that emerged from their results was not, as the Court had said, whether to believe one's own eyes, but rather *through whose eyes* the law should view an incident "when identifiable groups of citizens form competing factual perceptions."<sup>102</sup> Thus, Kahan and his colleagues argued that the Court was incorrect to privilege one view of the incident—the majority's—over all other possible views, because this deprived the other views of any opportunity to be heard at trial and delegitimized the decision in the eyes of everyone who viewed the facts differently than the majority did.<sup>103</sup>

The work of Kahan, Hoffman, and Braman alerts us to the fact that, in the case of BWV, we should not expect or assume any particular outcome from a recording via BWV of a search or seizure interaction between an officer and a citizen. It is possible that some viewers might view a particular scenario as unconstitutional, but others—perhaps most—might disagree. More to the point, one cannot be certain that judges hearing motions to suppress, aided by BWV video, would necessarily find police conduct unconstitutional, even if, when tested via the method Kahan et al. used, the majority of Americans would find the search or seizure unconstitutional. Having the recording guarantees no particular results; judges may continue to decide cases in roughly the same patterns they always have.

But even so, this should not keep us from seeing the advantages of BWV as a tool for Fourth Amendment compliance because what is most important is that head cams can improve police behavior when officers know their actions can be observed. Put another way, any particular set of facts recorded by BWV may sway a judge one way or another. But if the presence of the camera has an effect on the behavior of police officers, making them more likely to hew to proper legal and constitutional standards, that is reason enough to move toward the use of these devices. As officers told researchers concerning the use of in-car cameras, knowing that their supervisors might review the recordings as part of performance

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98. *See id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 841-42.

reviews or in investigations of citizen complaints or lawsuits had the effect of moving them toward greater attention to, and compliance with, all manner of departmental rules and regulations.<sup>104</sup> Extrapolating from these studies, there is every reason to think that this could also occur with head cams, in the context of Fourth Amendment behavior: officers who know they are watched will behave better and will perform searches and seizures according to applicable constitutional rules. Beyond assuring compliance with departmental performance standards, or for purposes of addressing citizen complaints, the recordings could be called upon as evidence for search and seizure suppression motions in court.<sup>105</sup> Coupled with the presumption described above, this could have the type of effect on Fourth Amendment compliance sought here.<sup>106</sup>

At least one other point bears mentioning. Of all the ways which one might imagine handling the issue of Fourth Amendment compliance, BWV has a major advantage: there is a realistic possibility that it could happen.<sup>107</sup> Given the large number of purposes benefiting police that might cause departments to adopt BWV, one can easily imagine that law enforcement might actually welcome the wide use of these devices.<sup>108</sup> As in Britain, head cams would likely produce evidence for use in court, defend officers against baseless complaints and lawsuits, speed up the resolution of criminal charges, and even deter some crime that might otherwise occur.<sup>109</sup> Moreover, head cams have undergone study and field-testing by law enforcement—something that police take very seriously.<sup>110</sup> None of this may have anything to do with the reason that the author might wish to see head cams in wide use: to ensure police compliance with the Fourth Amendment. In other words, while both police and people who want greater police compliance with the law might agree on little else, they could agree on the utility and desirability of deploying BWV. In this sense, head cams may present an instance of interest convergence—a case in which two parties, usually on different sides of an issue, find common ground for their

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104. See Westphal, *supra* note 24, at 8.

105. This point, of course, holds true only if some form of the Fourth Amendment exclusionary rule stays in place in the law. And this may not necessarily be true much longer. See *Hudson v. Michigan*, 547 U.S. 586, 595-603 (2006). Part of Justice Scalia's opinion for the Court in *Hudson* would have overturned the exclusionary rule, *id.* at 595-99, but for Justice Kennedy withholding his vote from that section of the opinion, *id.* at 603 (Kennedy, J., concurring). In *Herring v. United States*, 129 S. Ct. 695 (2009), a majority of the Court, including Justice Kennedy, voted to limit the exclusionary rule's application in ways that may be far reaching. See Craig M. Bradley, *Reconceiving the Fourth Amendment and the Exclusionary Rule*, 85 CHI.-KENT L. REV. 315 (2010). I thank my friend and colleague Professor Jack Chin of the University of Arizona Rogers College of Law for this insight.

106. See *supra* notes 31-40 and accompanying text.

107. See Harris, *supra* note 62, at 198-209.

108. See *id.* at 178 (listing benefits of BWV).

109. *Id.*

110. *Id.*

own very different reasons.<sup>111</sup> Agreeing on the same solution for very different problems may not be ideal, but it is agreement nonetheless; the reasons for it are less important.

#### IV. CONCLUSION

We know one thing for certain: when a technology useful to law enforcement becomes available, law enforcement will attempt to make use of it. Head cams have arrived, and they can certainly serve a number of important functions for police officers and their departments. They can also serve other purposes. Accountability of officers for their actions with citizens—most of which would never have become visible in any way except via an officer's own written, and possibly self-serving, reports—is one purpose that leaps out at anyone looking for ways to assure greater compliance with the law in the course of enforcing it. No one would argue that BWV will solve deep-seated problems of police abuse or misconduct. Surely, however, having a permanent factual record of interactions between officers and citizens could at least help us begin to address the issues.

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111. See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518 (1980) (explaining that the flowering of civil rights served different, but converging, interests as between African Americans and the U.S. Government).

