

BODY CAMERAS, POLICE VIOLENCE, AND RACIAL CREDIBILITY

*Katheryn Russell-Brown**

“Who you gonna believe, me or your lying eyes?”¹

Iesha Nunes’s thoughtful and thorough Note, “*Hands Up, Don’t Shoot*”: *Police Misconduct and the Need for Body Cameras*, asks us to consider how to address the problem of police violence tied to racial profiling.² Using the rallying cry at the heart of the 2014 police shooting death of Michael Brown in Ferguson, Missouri—“Hands up. Don’t shoot.”—Nunes’s piece focuses on the difficulty of holding police criminally accountable for assault.³ The legal critique focuses on the fact that eyewitness testimony is notoriously unreliable.⁴ This testimony produces a two-fold problem: Some officers who have used excessive force will escape conviction and punishment and some officers who have not used excessive force will be wrongfully convicted. Nunes’s solution? Arm all law enforcement officers with body cameras⁵: “Body cameras are a viable solution to police misconduct, and they ensure the fair and accurate administration of justice for those who pursue the aid of the court system to remedy violated constitutional rights due to allegations of excessive force.”⁶

Requiring law enforcement to have body cameras, Nunes argues, would cause a fundamental shift in how the police do their work. Specifically, it would create a disincentive for “testilying” (when officers lie on the witness stand)⁷ and it would lower the blue wall of silence (officers’ reluctance to tell on another officer).⁸ It would also provide courts with more accurate information in 42 U.S.C. § 1983 lawsuits (e.g., cases charging officers with violating someone’s constitutional rights), and lead to an overall increase in police accountability.⁹ On balance,

* Chesterfield Smith Professor of Law, University of Florida, Levin College of Law. My thanks to the *Florida Law Review Forum* for the invitation to write this Essay.

1. This comedic expression is attributed to various people, including comedians Richard Pryor and the Marx Brothers. Pryor used the line in a stand-up comedy routine. RICHARD PRYOR: LIVE ON THE SUNSET STRIP (Columbia Pictures 1982).

2. Iesha S. Nunes, “*Hands Up, Don’t Shoot*”: *Police Misconduct and the Need for Body Cameras*, 67 FLA. L. REV. 1811 (2015).

3. *See id.* at 1815.

4. *Id.* at 1814.

5. *See id.* at 1833 (2015). Beyond line officers, Nunes argues for correctional and detention officers using body cameras. *Id.*

6. *Id.* at 1842.

7. *Id.* at 1825.

8. *Id.* at 1827.

9. *Id.* at 1821–23.

Nunes concludes that the benefits outweigh the costs associated with having police wear body cameras (e.g., privacy and cost of implementation and storage).¹⁰ Nunes makes the case that an evidentiary intervention is necessary because the harm caused by unlawful and unnecessary police violence is so great.¹¹ Nunes correctly observes that fear of police abuse deepens the void of trust between police and citizens in general.¹² This is particularly true for citizens of color. For Black communities in particular, the fear of police abuse affects the levels of trust toward law enforcement, perceptions of safety, and police credibility.

Nunes reviews older cases involving police violence, as well as contemporary ones.¹³ This discussion serves as a reminder that over the decades, there have been countless cases involving police use of excessive force. Nunes highlights the 1991 Rodney King case.¹⁴ It is the most well-known incident during its time period because King's beating by Los Angeles police officers was caught on camera.¹⁵ However, during the late 1980s through the early 2000s, there were many high-profile cases involving police violence against African Americans, including Amadou Diallo, Abner Louima, Malice Green, Patrick Dorismond, Sean Bell, Tyisha Miller, and Prince Jones.¹⁶ Likewise, while Nunes highlights Michael Brown's death,¹⁷ there have been scores of cases involving allegations of excessive force by police that happened around the same time as Michael Brown's killing. These include Oscar Grant,¹⁸ Mario Woods,¹⁹ Tamir Rice,²⁰ Eric Garner,²¹ Laquan McDonald,²² Walter

10. *Id.* at 1841.

11. *Id.* at 1842.

12. *See id.* at 1833.

13. *See id.* at 1815–21.

14. *See id.* at 1815–16.

15. *Id.* at 1815.

16. For a lengthier discussion of racial profiling cases, see KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME* 53–74 (2d ed. 1998). Nunes states that her focus is not on race and excessive force by police. However, the long line of police abuse cases referenced herein strengthens her argument for body cameras. Nunes, *supra* note 5, at 1821.

17. Nunes, *supra* note 1, at 1813.

18. Laura Anthony, *Oscar Grant Remembered on BART Fatal Shooting Anniversary in Oakland*, ABC (Jan. 1, 2015), <http://abc7news.com/news/oscar-grant-remembered-on-bart-shooting-anniversary-/458575/>.

19. Catherine E. Shoichet, *Mario Woods Shot More Than 20 Times in San Francisco, Autopsy Says*, CNN (Feb. 12, 2016), <http://www.cnn.com/2016/02/11/us/san-francisco-police-shooting-mario-woods-autopsy/>.

20. Ashley Fantz, Steve Almasy & Catherine E. Shoichet, *Tamir Rice Shooting: No Charges for Officers*, CNN (Dec. 28, 2015), <http://www.cnn.com/2015/12/28/us/tamir-rice-shooting/>.

21. Melanie Eversley, *NYPD Sergeant Charged in Eric Garner Case*, USA TODAY (Jan. 9, 2016), <http://www.usatoday.com/story/news/2016/01/08/nypd-sergeant-charged-eric-garner-case/78532476/>.

22. *Dash-Cam Video Released Showing Laquan McDonald's Fatal Shooting*, NBC (Nov.

Scott,²³ Bettie Jones,²⁴ Freddie Gray,²⁵ Sam DuBose,²⁶ John Crawford,²⁷ Corey Jones,²⁸ and Rekia Boyd.²⁹ All told, the fact that race-based police violence has deep historical roots makes the call for solutions all the more urgent. Part of the problem is that until recently, the scope of police killings was unknown. Neither the federal government nor the states are required to keep statistics on police killings. This has prompted two world-renowned news agencies, *The Washington Post* and *The Guardian*, to independently gather and report national data on police killings.³⁰

Their data show that police killings occur in every region of the country and disproportionately impact African Americans. Of the 990 documented police killings in 2015, twenty-six percent involved African American victims.³¹ The harm of police assault extends beyond the individual victims and their families. The ripple effects of this violence are seen in the disproportionately high number of African Americans who express fear, distrust, and disdain for the police.³² Given the magnitude

24, 2015), <http://www.nbcchicago.com/news/local/Police-Release-Disturbing-Video-of-Officer-Fatally-Shooting-Chicago-Teen-352231921.html>.

23. Erin McClam, *Walter Scott Shooting: Grand Jury Returns Murder Indictment Against Cop*, NBC (June 8, 2015), <http://www.nbcnews.com/storyline/walter-scott-shooting/walter-scott-shooting-grand-jury-returns-murder-indictment-against-cop-n371626>.

24. Diane Pathieu & Sarah Schulte, *Aldermen Urge City to Settle Bettie Jones Shooting Lawsuit*, ABC (Feb. 8, 2016), <http://abc7chicago.com/news/aldermen-urge-city-to-settle-bettie-jones-shooting-lawsuit/1191580/>.

25. Jess Bidgood & Sheryl Gay Stolberg, *Acquittal in Freddie Gray Case Casts Doubts About Future Trials*, NY TIMES (June 23, 2016), http://www.nytimes.com/2016/06/24/us/verdict-freddie-gray-caesar-goodson-baltimore.html?_r=1.

26. Dana Ford & Ed Payne, *Ex-University Cop in Samuel DuBose Shooting Death Pleads Not Guilty*, CNN (July 31, 2015), <http://www.cnn.com/2015/07/30/us/ohio-sam-dubose-tensing/>.

27. Catherine E. Shoichet & Nick Valencia, *Cops Killed Man At Walmart, Then Interrogated Girlfriend*, CNN (Dec. 16, 2014), <http://www.cnn.com/2014/12/16/justice/walmart-shooting-john-crawford/>.

28. Steve Almasy, *Corey Jones Shooting Heads to Florida Grand Jury*, CNN (Apr. 27, 2016), <http://www.cnn.com/2016/04/27/us/florida-corey-jones-shooting-death/>.

29. Kimberly Hutcherson & Tina Burnside, *Chicago Officer Should Be Fired in Death of Rekia Boyd, Superintendent Says*, CNN (Nov. 24, 2015), <http://www.cnn.com/2015/11/24/us/rekia-boyd-shooting/>.

30. See *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2016/> (last visited June 5, 2016); *The Counted*, THE GUARDIAN, <http://www.theguardian.com/us-news/series/counted-us-police-killings> (last visited June 5, 2016).

31. See *Fatal Force*, *supra* note 6. African Americans, who constitute approximately thirteen percent of the U.S. population, are represented at a rate two times as high as their population. When parsed further by gender, Black men who comprise about six percent of the U.S. population, make up about twenty-five percent of the people killed by police (a rate four times as high as their percentage in the population). Latinos constituted seventeen percent of the victims of police killings and Whites were fifty percent. See *id.*

32. See Frank Newport, *Gallup Review: Black and White Attitudes Towards Police*, GALLUP (Aug. 20, 2014), <http://www.gallup.com/poll/175088/gallup-review-black-white->

of the problem, Nunes's urgency to identify a broad-scale remedy for police violence is understandable. Nunes states, "body cameras will not only help to increase accountability on behalf of law enforcement, but will also increase the public's trust in those whose duty it is to protect and serve."³³

Unfortunately, Nunes's optimism about the curative impact of body cameras is not yet borne out by the empirical data. According to various studies, officers' use of body cameras has clear benefits. For instance, they reduce the number of citizen complaints³⁴ and when they are in use, officers are less likely to discharge their weapons.³⁵ Additionally, it appears that where video evidence is available, law enforcement officers are more likely to face some legal consequence—such as a grand jury hearing or a criminal charge.³⁶ However, a couple of observations are noteworthy. First, while some officers have faced legal action for incidents involving allegations of excessive force where video evidence was available, most are not charged with a crime. Second, in many cases where video evidence has been available, it has come from *bystanders*,

attitudes-toward-police.aspx; Tom Tyler, *Policing in Black and White: Ethnic Group Differences in Trust and Confidence in the Police*, 8 POLICE Q. 322, 323 (2005). African Americans also report greater contact with police and their encounters are more likely to involve force. See, LYNN LANGTON & MATTHEW DUROSE, U.S. DEP'T OF JUSTICE, NCJ242937, POLICE BEHAVIOR DURING TRAFFIC STOPS AND STREET STOPS, 2011 1 (2013); *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558–59 (S.D.N.Y. 2013).

33. Nunes, *supra* note 5, at 1815.

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

35. *Id.*

36. There are several examples of this, including the Walter Scott and Eric Garner cases. In 2015, Walter Scott, a South Carolina man, was gunned down by an officer as he fled, following a traffic stop. Scott was shot in the back eight times by officer Michael Slager. Slager falsely reported that he fired because Scott had taken his taser. The incident was captured on a passerby's cellphone. Slager can be seen running behind Scott and firing multiple times. After Scott is laying on the ground, Slager looks around and places the taser gun next to Scott's body. Slager now faces state (murder) and federal charges (civil rights violations) in Scott's death. See Mark Berman & Wesley Lowery, *Former South Carolina Police Officer Who Fatally Shot Walter Scott Indicted on Federal Civil Rights Violation*, WASH. POST (May 11, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/05/11/former-north-charleston-officer-who-shot-walter-scott-indicted-on-federal-civil-rights-violation>. In the 2014 Eric Garner case, Garner is stopped by New York police for allegedly selling loose cigarettes. Video evidence shows Garner being choked to death by a New York police officer. Garner can heard saying "I can't breathe" a dozen times. The evidence, however, did not compel a grand jury indictment. See David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, WASH. POST (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0. Other examples include the cases of Laquan McDonald and Freddie Gray. See *supra* notes 22 and 25.

not officers.³⁷ So, while there is some indication that the use of body cameras increases the likelihood that an officer will face a legal repercussion or some other legal consequence (such as a decline in citizen complaints), it has not been established that officers are the ones who have to have the cameras. Thus, police body cameras *or other types of video evidence used by private citizens*, may increase the likelihood that officers will face legal consequences for using excessive force.

On the other hand, the more video evidence that is available following an incident (body cameras, cell phones, etc.)—regardless of who gathers it—the more evidentiary proof there is for that case, and the greater the likelihood that police will be held accountable. Nunes cites a study showing that the presence of body cameras is associated with an eighty-eight percent reduction in the number of complaints filed against officers.³⁸ This raises the question at the heart of Nunes’s recommendation—what is the *impact* of police use of body cameras on justice system outcomes? Notably, we cannot solve the problem of police abuse by relying upon bystanders to witness and record incidents of police violence. Based on existing research, the use of police body cameras is shown to correlate with positive outcomes. As noted, these include a decline in officers’ use of force against citizens, a decline in citizens’ use of force against officers, and a decline in citizen complaints against officers—referred to as a “civilizing effect.”³⁹

Assessing the impact of police body cameras, however, requires further unpacking. An important issue for consideration is what these studies do *not* establish. Two points bear noting. One, the research does not unequivocally establish that arming police with body cameras will lead to dramatic reductions in the number of excessive force cases, specifically police killings.⁴⁰ Two, there is no clear indication that an increase in officer body cameras will lead to a marked increase in the number of officers *punished* for excessive force.

These delineations are important because they force us to consider the parameters of the proposed solution. Following the identification of a national problem, there is typically a public outcry to solve the problem. A widely-heralded, all-encompassing solution—a quick fix⁴¹—is usually

37. See, e.g., *supra* notes 15 and 36 and accompanying text.

38. Nunes, *supra* note 5, at 1832 (citing Stross, *supra* note 34).

39. MICHAEL D. WHITE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 6, 18 (2014).

40. One research review concludes that there is “. . . reason to be skeptical that video footage will necessarily lead to more just outcomes in excessive-force cases.” *Developments in the Law: Policing*, 128 HARV. L. REV. 1706 (2015).

41. Another example is the widespread call to mandate implicit racial bias training for police officers, in the wake of high-profile shooting deaths of African Americans by police officers. For a discussion of implicit bias and police killings, see KATHERYN RUSSELL-BROWN, *The Fatal Relationship Between Black Men and the Police: A Consideration of Implicit Bias* in

identified. A quick fix operates to calm the public but does not necessarily provide a long-term solution. The broad call for police body cameras⁴² could be termed a quick fix. As already noted, the research findings on the impact of police body cameras are consistent, though limited in scope.⁴³ Also, although there is growing interest in having police wear body cameras, it is unlikely that the majority of the nation's more than 12,000 local police agencies will be required to use them.⁴⁴ As a result, the degree to which body cameras could solve or severely reduce police assault would be limited to select jurisdictions. Thus, circumspection and caution are called for regarding assessments of the potential impact of body cameras on police violence. Nunes's piece urges a consideration of whether body cameras for all law enforcement is a good enough response. Without question, mandated body cameras would do some good—at a significant fiscal cost.⁴⁵ However, an increase in police body cameras will not eliminate the problem of police violence.

Nunes's argument for body cameras is valuable in another important way. It indirectly highlights the fact that many of the proposed solutions to the problem of police violence (including body cameras) are largely reactive. More than just reactive, they pivot away from the core problem, which is the credibility of Black voices when compared with the voices of law enforcement. For decades, African Americans have complained about race-based police harassment and violence in their communities. In large measure, these concerns have been minimized and ignored. That is,

POLICING BLACK MEN: ARREST, PROSECUTION AND PRISON (Angela J. Davis, ed., 2017) (on file with author).

42. See Press Release, U.S. Dep't of Justice, Justice Department Announces \$20 Million in Funding to Support Body-Worn Camera Pilot Program (May 1, 2015), <https://www.justice.gov/opa/pr/justice-department-announces-20-million-funding-support-body-worn-camera-pilot-program>; Marty Knollenberg, *On-Body Cameras Will Protect Citizens and Police*, DETROIT FREE PRESS (Dec. 11, 2014). See generally *Developments in the Law: Policing*, *supra* note 40 (discussing the move to initiate police body cameras). As Nunes notes, in December 2015, President Obama announced a \$263 million investment package that would increase the use of officer body-worn cameras (including the purchase of 50,000 body cameras). See Nunes, *supra* note 5, at 1835.

43. See generally White, *supra* note 39 (presenting research on police-worn body cameras). See also *supra* note 40 and accompanying text.

44. A 2015 Bureau of Justice Statistics report states that in 2013, thirty-two percent of police officers working in local police departments were outfitted with body-worn cameras. Press Release, Bureau of Justice Statistics, An Estimated 32 Percent of Local Police Departments Were Using Body-Worn Cameras in 2013 (July 7, 2015), <http://www.bjs.gov/content/pub/press/lpd13etpr.cfm>. As Nunes states, the total number of all police agencies is approximately 18,000. This includes local law enforcement, sheriff's offices, primary state law enforcement offices, and special jurisdiction agencies. Nunes, *supra* note 5, at 1834 & n.195.

45. See White, *supra* note 39, at 9. Nunes cites Department of Justice research indicating that “[e]ven though initially it will be expensive to purchase body cameras, in the long run it may actually save agencies money.” Nunes, *supra* note 5, at 184.

the testimony of violence offered by Blacks has been treated as non-credible. At core, the dismissal of these experiences is tied to the nation's history of race-based testimonial incapacity.⁴⁶ This racial reality is highlighted by the trick question at the beginning of this essay. Members of some communities have been told that their negative (sometimes criminal) encounters with law enforcement were not real and not their lived experiences—that their eyes were “lying.” The popularity of body cameras as a solution to police violence underscores this racialized vision: Video evidence is necessary to “prove” what many people, particularly those in poor, Black communities, have been saying for decades.

Requiring police to wear body cameras may do some good. However, we must address why Black claims of state violence have historically been dismissed as incredible, non-critical, and rare. We cannot look to cameras (or other technologies), to solve a problem that has historical roots in racial discrimination. Until then, perhaps the call should be for everyone to remain at the ready with their camera phones.

46. See, e.g., Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. Rev. 450, 465–77 (2016); Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. OF RACE & LAW 261, 267–76 (1996); Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verité and the Pedagogy of Vincent Chin*, 1 MICH. J. OF RACE & LAW 347, 367 (1996).