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Shreya H. Shah

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Should Technology be Trusted? The Detrimental Role of Video Footage in a Qualified Immunity Analysis *

I. INTRODUCTION

Mr. Sureshbhai Patel, an Indian grandfather, experienced a traumatic encounter with law enforcement while walking peacefully in his neighborhood.¹ During the encounter, the officer used excessive force and rendered Patel forever partially paralyzed.² Confident in the fact that two dashboard cameras equipped with audio and video capabilities captured the incident, Patel introduced the footage to the court. Despite overcoming qualified immunity on summary judgment, Patel's hopes that the footage would provide clear and accurate imaging of the incident quickly faded away. Whether using a body camera, dashboard camera, bystander cell phone, or an affixed video surveillance camera, these devices are intended to provide safety and protection, but they are falling short of their call. Rather than clarifying these incidents, cameras, especially those of subpar quality, are proving to be a hindrance in qualified immunity cases.

The United States Court of Appeals for the Eleventh Circuit has addressed qualified immunity countless times, but the increased use of camera footage has made overcoming a qualified immunity defense a greater challenge. With video footage highlighting minute-by-minute detail, finding a factually similar case, a critical step in a qualified

* A special thanks to Dean Daisy Floyd who has guided me since the beginning of my law school journey and provided me with sound advice and insight in completing my Casenote. My heartfelt gratitude to Sandhya and Harshad Shah, my parents, and Mahadev and Ansuya Desai, my grandparents, for always being present, pushing for tenacity, and providing unconditional love and support. Thank you to my mentors, friends, and classmates who have shared their words of advice and encouragement.

¹ Patel v. City of Madison, Alabama, 959 F.3d 1330 (11th Cir. 2020).

² *Id.* at 1335.

immunity analysis, becomes more like a needle in a haystack, should the needle even exist. Similarly, evaluating whether an officer's actions clearly and obviously violated a constitutionally protected right is increasingly difficult when the blurred actions of the figure in the video footage is far from indicative. The notion that cameras will help offer protection to those relying on them is quickly fading and its application in legal analysis is suboptimal as applied to a qualified immunity analysis.

II. FACTUAL BACKGROUND

Mr. Sureshbhai Patel, a fifty-seven-year-old Indian national, had recently retired as a farmer in his native home, Gujarat, India. Despite knowing little to no English, Patel relocated overseas to reside with his son in Madison, Alabama. Patel had been living in the United States for only one week when one encounter with the police altered his life forever.³

Upon arriving in the United States, Patel frequently walked in his neighborhood. On the morning of February 6, 2015, Patel left the house wearing a light-colored sweater, jeans, and a toboggan hat and commenced his usual neighborhood stroll. One neighbor, who was unfamiliar with the new Indian resident, called the Police Department and reported that a "black man" in his thirties "[was] walking . . . close to the garage," and urged the dispatcher to send "somebody to talk to the unidentified man." Officer Parker responded to the "check subject call" along with his partner Officer Slaughter, who was still undergoing training.⁴

When the officers arrived at the scene, they spotted Patel walking on the sidewalk but simultaneously noticed Patel was neither black nor in his thirties. The officers parked the police cruiser behind Patel and turned on the dashboard camera which was equipped with both audio and video capabilities. Parker and Slaughter exited the vehicle and immediately called after Patel, asking him to "come here" and inquired "what's going on?" Patel walked towards the officers and said, "India . . . no English . . . my house, my house, 148, walking, India," while simultaneously pointing in the direction he was heading. Slaughter responded, "I can't understand you . . . where is your address . . . where do you live . . . stop walking. Stop walking."⁵

³ *Id.* at 1333.

⁴ *Id.*

⁵ *Id.* at 1334.

The officers believed that Patel kept suspiciously reaching into his pockets during the encounter. As a result, they took hold of Patel's hands and forced them together behind his back. Patel testified that he did not move while Parker had his hands restrained and that Parker frisked both of Patel's pockets. In contrast, Parker testified that Patel pulled his left-hand free four times during the pocket search, rendering Parker unable to complete frisking one of the pockets. Parker claimed that Patel "stepped forward, turned his head toward the officers, and moved his shoulder . . ." In response, Parker barked loudly, "[d]o not jerk away from me again. If you do, I am going to put you on the ground . . . do you understand what I am saying to you?"⁶

Parker immediately attempted to pat down Patel's left pant pocket again. As Parker began, Patel allegedly took a step forward and turned his head. Parker reacted by using his leg to sweep Patel's left leg out from under him. Patel's leg flew back behind him with such force, it caused his shoe to fly off. Parker continued to hold Patel's hands behind Patel's back as he performed the takedown maneuver. Patel hit the ground without the use of his hands to arrest his fall and struck the ground with his face and left shoulder. Parker admitted he did not know how to properly perform a leg sweep.⁷

Officer Spence, another Madison County Officer, had responded to the scene at some point during the altercation. Spence parked his car and activated his dashboard camera before the takedown had occurred. This second dashboard camera captured a video of the incident from an opposing angle to that of the responding officers' dashboard camera. Spence testified that Patel, "appeared to be in his 70s." He also testified that he witnessed Parker, the responding officer, get on his hands and knees on top of Patel, after the takedown, and yell, "stop trying to jerk away from me." However, Patel was unresponsive. One of the officers then said to Spence, "he don't speak a lick of English." Spence testified that when he arrived on the scene before the takedown, he did not witness anything that would have caused him to "lay hands on . . . Patel."⁸

Patel was hospitalized as a result of the violent takedown, and he was rendered permanently partially paralyzed. Patel filed a civil lawsuit against Parker and the City of Madison under 42 U.S.C. § 1983 for "illegal seizure, unlawful search, and excessive force in violation of the Fourth and Fourteenth Amendments to the United States

⁶ *Id.* at 1335.

⁷ *Id.*

⁸ *Id.* at 1334–35.

Constitution.”⁹ Patel argued that the footage from both dashboard cameras showed that he did not resist before Parker conducted the takedown maneuver.¹⁰ Patel filed for summary judgment. The United States District Court for the Northern District of Alabama denied Patel’s motion.¹¹

Parker argued that he was entitled to qualified immunity from all of Patel’s claims because he was acting within the scope of his duty. The district court denied Parker qualified immunity on Patel’s excessive force claims under the Fourth Amendment because several disputed issues of fact remained. Parker filed an appeal on the district court’s denial of summary judgment. On appeal, The United States Court of Appeals for the Eleventh Circuit applied a *de novo* standard of review, affording no deference to the lower court’s decision. The Court ruled that the dashboard video camera recordings were inconclusive and that they were unable to resolve the factual discrepancies between the parties.¹² The Court affirmed the district court’s denial of summary judgment to Parker.¹³

III. LEGAL BACKGROUND

A. *What is Qualified Immunity?*

Qualified immunity is a legal defense that shields public officers and government officials from liability for civil damages for violations committed during the course and scope of their official role.¹⁴ The protection offered to these officials is limited “insofar as their conduct does not violate [a] clearly established statutory or constitutional right of which a reasonable person would have known.”¹⁵ The purpose of this legal defense is to shield officials from “harassment, distraction, and liability when they perform their duties *reasonably*.”¹⁶ As a result, courts consider whether the official’s actions, at the time of the violation, were taken either pursuant to the performance of their duties,

⁹ *Id.* Patel also asserted claims under Alabama law which will not be considered for this Casenote.

¹⁰ *Id.* at 1336.

¹¹ *Id.*

¹² *Id.* at 1332.

¹³ *Id.* at 1333.

¹⁴ *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).

¹⁵ *Id.* at 818.

¹⁶ *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (emphasis added).

or within the scope of their authority.¹⁷ In the case of police officers, the law recognizes that an officer's job may sometimes be dangerous and must often depend on snap judgements which can result in the difference between life and death.¹⁸ As a result, the qualified immunity defense allows them to work without the fear of liability, while still holding accountable those who plainly or knowingly violate the law.¹⁹

In order to overcome an official's qualified immunity defense, the plaintiff must show (1) the official's conduct violated a constitutionally protected right, and (2) that right had been clearly established at the time of the misconduct such that the official had fair notice that their actions violated another's rights.²⁰ Before an official loses the protections of qualified immunity, the plaintiff must satisfy both prongs of the test.²¹

B. Overcoming Qualified Immunity: The Two Prong Analysis

1. The Official's Conduct Violated a Constitutionally Protected Right

Graham v. Connor,²² states that an analysis of the first prong begins by identifying "the specific constitutional right allegedly infringed."²³ A typical qualified immunity analysis may consider rights under the Fourth and Fourteenth Amendments.²⁴ The Fourteenth Amendment guards against the use of excessive force against arrestees and pretrial detainees.²⁵ The Fourth Amendment governs, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."²⁶ In considering only the Fourth

¹⁷ *Jordan v. Doe*, 38 F.3d 1559, 1566 (11th Cir. 1994) (citing *Rich v. Dollar*, 841 F.2d 1558, 1564 (11th Cir. 1988)).

¹⁸ *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

¹⁹ *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

²⁰ *Melton v. Abston*, 841 F.3d 1207, 1221 (11th Cir. 2016) (citing *Pearson*, 555 U.S. at 232; *Grider v. City of Auburn*, 618 F.3d 1240, 1254 (11th Cir. 2010)); *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001).

²¹ *Melton*, 841 F.3d at 1221; *Grider*, 618 F.3d at 1254 (the court may consider the prongs in either order).

²² 490 U.S. 386.

²³ *Id.* at 394.

²⁴ *Corbitt v. Vickers*, 929 F.3d 1304, 1313 (11th Cir. 2019).

²⁵ U.S. CONST. amend. XIV, § 1; *see Corbitt*, 929 F.3d at 1313 (citing *J.W. v. Birmingham Bd. Of Educ.*, 904 F.3d 1248, 1259 (11th Cir. 2018)).

²⁶ U.S. CONST. amend. IV.

Amendment, the alleged violation is evaluated using a “reasonable standard test.”²⁷

a. *The Fourth Amendment Reasonable Standard Test*

A reasonable standard test weighs the defendant’s right to be free from excessive force against the government’s rationale for using the excessive force.²⁸ In examining the defendant’s right, the court asks whether the officer’s actions were objectively reasonable considering the defendant’s actions and the specific circumstances surrounding the incident.²⁹ In examining the government’s rationale, the court asks what a reasonable officer would do under similar circumstances.³⁰ “Reasonableness” must be determined from the perspective of a reasonable officer on the scene and not by using the “20/20 vision of hindsight.”³¹

b. *Acceptable Use of Force Under the Fourth Amendment*

Not every push or shove violates the Fourth Amendment.³² It is reasonable for an officer to use some degree of force, “physical coercion[,] or [a] threat.”³³ Courts give great deference to an officer’s judgement due to the uncertain and evolving circumstances ever prevalent in their roles.³⁴ In addition, courts do not consider an officer’s mental intentions when evaluating a potential violation.³⁵ Courts only evaluate the officer’s actions.³⁶ If an officer conducts themselves with malicious or evil intent but their actions are reasonable, there is no Fourth Amendment violation.³⁷ In contrast, an officer’s good intentions will not protect them should their actions constitute an unreasonable use of force.³⁸

In determining whether an officer’s actions are unreasonable, the Supreme Court has identified six key factors to weigh in a balancing test: (1) the severity of the crime, (2) whether the individual posed a threat to the officers on the scene or others, (3) whether the individual

²⁷ *Graham*, 490 U.S. at 395.

²⁸ *Id.* at 396.

²⁹ *Vinyard v. Wilson*, 311 F.3d 1340, 1347 (11th Cir. 2002).

³⁰ *Graham*, 490 U.S. at 387.

³¹ *Id.* at 396.

³² *Id.* (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir. 1973)).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 397 (citing *Scott v. United States*, 436 U.S. 128, 138 (1978)).

³⁶ *Id.*

³⁷ *Id.* (citing *Scott*, 436 U.S. at 138).

³⁸ *Id.* (citing *Scott*, 436 U.S. at 138).

resisted or evaded arrest, (4) the need for force to be applied, (5) the amount and type of force applied in light of the need, and (6) the severity of the injury.³⁹

2. The Constitutional Right has been Clearly Established at the Time of the Incident

In addition to showing a violation of a constitutionally protected right, the plaintiff must also show that the constitutional right was “clearly established” at the time of the incident.⁴⁰ Determining whether a right was clearly established rests upon evaluating whether the official had “fair warning” that their conduct violated the Fourth Amendment.⁴¹ A law enforcement officer has had fair warning if the case law is readily apparent to all government officials such that they know or should have known that their actions violate federal law.⁴² However, an “official’s awareness of the existence of an abstract right . . . does not equate to knowledge that *his* conduct infringes the right.”⁴³ As a result, the unlawfulness should be obvious and based on “materially similar” cases.⁴⁴

a. Fair Warning

A plaintiff may show that the law gives officials fair warning of a clearly established right in three ways.⁴⁵ First, the plaintiff can point to a substantially similar case in which the force was unlawful.⁴⁶ In applying this first method, a case-by-case comparison is required because judicial precedent is tied to particularized facts.⁴⁷ For example, in cases where an officer treats an obedient, under control, and unresisting suspect with excessive and brute force, the Eleventh Circuit has repeatedly held that the officer has clearly violated the Fourth Amendment and will be denied qualified immunity.⁴⁸ In *Stephens v. DeGiovanni*, the Eleventh Circuit denied an officer qualified immunity when he inflicted forceful blows to the chest and threw the compliant

³⁹ See *Graham*, 490 U.S. at 396; see also *Lee v. Ferraro*, 284 F.3d 1188, 1197–98 (2002).

⁴⁰ *Priester v. City of Riviera Beach, Florida*, 208 F.3d 919, 925 (11th Cir. 2000) (citing *Harlow*, 457 U.S. at 818).

⁴¹ *Coffin v. Brandau*, 642 F.3d 999, 1013 (11th Cir. 2011) (quoting *McClish v. Nugent*, 483 F.3d 1231, 1248 (11th Cir. 2007)).

⁴² *Coffin*, 642 F.3d at 1013 (citing *Vinyard*, 311 F.3d at 1350).

⁴³ *Corbitt*, 929 F.3d at 1312 (quoting *Coffin*, 642 F.3d at 1015 (emphasis added)).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See *Stephens v. DeGiovanni*, 852 F.3d 1298, 1327–28 (11th Cir. 2017).

defendant against the car door.⁴⁹ In *Slicker v. Jackson*,⁵⁰ the Eleventh Circuit denied an officer qualified immunity when he kicked the ribs of a handcuffed and non-resisting defendant and subsequently beat his head on the ground.⁵¹ Courts have reevaluated *Slicker* and clarified that a defendant does not need to be in handcuffs in order to be considered “under control.”⁵² In *Lee v. Ferraro*, the Eleventh Circuit denied an officer qualified immunity when he slammed the head of a handcuffed and non-violent defendant onto the hood of the car.⁵³ In reaching its conclusion in each of these cases, the court compared the amount of force used by the officer and the actions of the defendant leading up to the use of the excessive force.⁵⁴

Second, the plaintiff can show that a broader, clearly established principle, should control the novel facts of the case.⁵⁵ The principle must be established with obvious clarity such that the official would instantly know their actions violated a constitutional right.⁵⁶ Third, the plaintiff can show that the actions of the officer “so obviously violate[d] the constitution that prior case law is unnecessary.”⁵⁷ The distinction between the last two is narrow but it is unnecessary to untangle when the focus remains on the first of the three showings. Typically, if case law has not paved a bright line rule on similar facts, qualified immunity will often protect the defendant.⁵⁸

⁴⁹ *Id.* at 1326.

⁵⁰ 215 F.3d 1225 (11th Cir. 2000).

⁵¹ *Id.* at 1233.

⁵² *Stephens*, 852 F.3d at 1326 n.33 (the court also held that a defendant will not be deprived of pursuing an excessive force claim simply because they escaped without serious injury).

⁵³ *Lee*, 284 F.3d at 1198.

⁵⁴ *Saunders v. Duke*, 766 F.3d 1262, 1269 (11th Cir. 2014) (the court compared the defendant’s lifting of their head off of the hot pavement to the officer’s action of slamming their head back down onto the pavement. In reaching its conclusion, the court considered that the defendant held their head off of the ground for long periods of time and made no sudden head jerks which could be perceived as a threat. Ultimately, they ruled that the minor transgressions or deviations from the officer’s order was not sufficient to warrant the use of excessive force in this case).

⁵⁵ *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005).

⁵⁶ *Priester*, 208 F.3d at 926 (obvious clarity is when an official’s conduct is so obviously a violation of the Fourth Amendment, the violation should be readily apparent to the official).

⁵⁷ *Corbitt*, 929 F.3d at 1312 (quoting *Mercado*, 407 F.3d at 1159).

⁵⁸ *Id.*

C. A New Approach to Qualified Immunity: The Introduction of Camera Footage

The introduction of camera footage has changed the way courts approach fact finding and has altered the amount of deference given to either the plaintiff or defendant.⁵⁹ In *Scott v. Harris*, Officer Scott attempted to stop Harris for speeding, but Harris began evading the officer and commenced a dangerous car chase. During the chase, the officer used a common police technique that causes a fleeing vehicle to spin to a stop. The maneuver caused Harris' car to run down an embankment, overturn, crash, and rendered him a quadriplegic. Harris brought a claim for excessive force and claimed that before the police intervention he was driving normally, slowed for curves on the road, used his indicator for turns, and that he did not run any motorists off the road. Officer Scott raised the qualified immunity defense. The United States District Court for the Northern District of Georgia and the United States Court of Appeals for the Eleventh Circuit, while accepting Harris' version of events, rejected Officer Scott's motion for summary judgment based on qualified immunity. Officer Scott appealed to the United States Supreme Court.⁶⁰ In conducting its analysis, the Supreme Court examined the available dashboard camera footage.⁶¹ The footage showed Harris swerving around more than a dozen cars, crossing the double yellow lines, forcing cars to take refuge on the shoulder of the road, and running through multiple red lights.⁶² The court rejected normal procedure because of the clear and convincing videotape evidence.

In that case, the Supreme Court concluded that the lower courts should have "viewed the facts in the light depicted by the videotape."⁶³ In doing so, the court was almost able to bypass the qualified immunity analysis by stating that the substantially similar cases raised by the plaintiff could be easily dismissed due to the vastly different facts apparent from the camera footage.⁶⁴ The court concluded that the officer's conduct did not violate the Fourth Amendment because video footage demonstrates as much.⁶⁵ The court did not reach the constitutional question and did not complete the qualified immunity analysis it would have undertaken but for the video footage.

⁵⁹ See *Scott v. Harris*, 550 U.S. 372 (2007).

⁶⁰ *Id.* at 374–76, 379.

⁶¹ *Id.* at 378.

⁶² *Id.* at 379–80.

⁶³ *Id.* at 380–81.

⁶⁴ *Id.* at 384.

⁶⁵ *Id.* at 387 (Ginsburg, J., concurring).

While video footage more often than not falls far below the quality and clarity of the footage in *Scott*, courts continue to use video footage during a qualified immunity analysis. In a recent video footage case, the United States District Court for the Tenth Circuit found that, “[d]ue to the lack of contrast between [the plaintiff’s] shirt, the pavement, and the car door,” it is difficult to discern what occurred.⁶⁶ In shifting to whether the constitutional right was clearly established, the court ruled that “[t]he video evidence at issue . . . presents no analogue,” to any other case.⁶⁷ As a result, the plaintiff failed to demonstrate the clearly established law and the defendant was entitled to immunity.⁶⁸ Many courts have followed this trend of viewing and evaluating facts in the light most favorable to either the video footage or the Plaintiff,⁶⁹ and are using the footage as an indicator for obvious clarity and factual similarities.⁷⁰

IV. COURT’S RATIONALE

In *Patel v. City of Madison, Alabama*, the United States Court of Appeals for the Eleventh Circuit, through a unanimous opinion written by Justice Rosenbaum, revisited the application of qualified immunity and applied it to a nuanced set of facts involving opposing testimonies between the parties and two sets of dashboard cameras.⁷¹ The court concluded that the dashboard video camera recordings were inconclusive and that they did not help resolve the factual discrepancies between the parties.⁷² The court affirmed the district court’s denial of summary judgment to Parker.⁷³ In reaching this conclusion, the court conducted a full qualified immunity analysis.

To begin its analysis, the court looked at whether Parker was acting within the scope of his duties when the incident occurred. The court looked at whether Parker’s actions were taken (1) pursuant to the performance of his duties, or (2) were within the scope of his

⁶⁶ *Kapinski v. City of Albuquerque*, 964 F.3d 900, 907 (10th Cir. 2020).

⁶⁷ *Id.* at 912.

⁶⁸ *Id.*

⁶⁹ *Cunningham v. Shelby County*, 218-CV-02185, 2020 WL 1609508, at *21 (W.D. Tenn. Apr. 1, 2020).

⁷⁰ See generally *Cunningham v. City of Chicago*, No. 17C5070, 2020 WL 1503580, at *9–10 (N.D. Ill. Mar. 30, 2020); *Boothe v. Wheeling Police Officer Sherman (Star #155)*, 190 F. Supp. 3d 788, 799 (N.D. Ill. 2016).

⁷¹ *Patel*, 959 F.3d at 1332.

⁷² *Id.* at 1333.

⁷³ *Id.*

authority.⁷⁴ Here, Parker responded to the scene after a “check subject call” was issued from the dispatcher.⁷⁵ Without a clear indication of which actions are required under a check subject call, Parker’s interaction with Patel seemed to fall within his duty to conduct investigative functions.⁷⁶ As a result, Parker’s actions were pursuant to the performance of his duties.⁷⁷

Once Parker made a successful showing that his actions were a part of his official duty, the burden shifted to Patel to prove that the defense of qualified immunity was inappropriate under the circumstances.⁷⁸ In doing so, Patel had to overcome both prongs of the test by showing (1) Parker violated Patel’s constitutional right to be free from excessive force, and (2) Patel’s right was clearly established at the time of Parker’s actions.⁷⁹

In evaluating the first prong, whether Parker violated Patel’s right to be free from excessive force, the court construed the facts in a light most favorable to Patel.⁸⁰ The court concluded that Patel was not resisting arrest in the moments leading up to and including the time of the excessive forceful leg sweep. In reviewing the dashboard video, Justice Rosenbaum penned that Patel’s hands were visible and moved at his midsection, not suspiciously in or around his pockets as Parker claimed.⁸¹ The court reasoned that the jury would also likely find that Patel never engaged in suspicious activity, his greatest crime was merely walking down the sidewalk.⁸²

In its deliberation, the court also considered that the officers were aware and acknowledged that Patel did not speak nor understand much English.⁸³ The court concluded that the officers could not have reasonably anticipated Patel to follow their orders exactly.⁸⁴ In considering the video footage again, the court admitted that any evidence of Patel forcibly wrenching his hands out of Parker’s grip is indistinguishable from other movements.⁸⁵ Since Patel’s alleged wrenching of the hands out of Parker’s grip was unremarkable, it is

⁷⁴ *Jordan*, 38 F.3d at 1566.

⁷⁵ *Patel*, 959 F.3d at 1333.

⁷⁶ *Id.* at 1338.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 1339.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 1335.

clear that it was not done with the force and aggression painted by Parker's testimony. The video showed Parker was successfully able to frisk Patel's right pant leg from the pocket to the shoe once Patel's hands were restrained behind his back. As Parker attempted to pat Patel's left pant leg, the video footage shows Patel made a movement with his leg. The court remarked that it is unlikely that the movement was a step as Parker alleges.⁸⁶ Instead, the court concluded that the footage revealed that Patel adjusted his foot at most one inch to the side in an effort to maintain his balance. The court reasoned that because Patel had not resisted, Parker had no reason to use excessive force.⁸⁷

Parker argued that the movements together—Patel's minor foot adjustment and the turning of his head—could be perceived as resistance. However, the court outright denied this and listed prior precedent that clearly states that the presence of minor transgressions by the defendant does not open the doors to excessive force nor qualified immunity.⁸⁸ The court thoroughly analyzed the video by slowing the footage to quarter-speed.⁸⁹ By viewing Patel's movements in exhaustive detail, the court held that Patel turned his head halfway in response to Officer Spence's arrival at the scene.⁹⁰ The court did not explicitly convey how they interpreted this visual, but from the context of the opinion, it is clear that the court treated this as they did the minor foot movement, as a natural reaction and hardly a show of force, retaliation, or fleeing.

The court concluded in its first prong that Parker violated Patel's constitutional right to be free from excessive force as Patel's minor movements did not warrant and were not proportionate to the takedown.⁹¹ The court acknowledged two main issues with the video footage, (1) the footage from one camera is blocked by the positioning of the officers,⁹² and (2) the footage from the second camera is grainy and distant.⁹³ Ultimately, the court concluded that (1) Patel was not resisting Parker's orders, (2) Patel was seriously and permanently injured, and (3) the force of Parker's leg sweep, all culminated in a violation of Patel's right to be free from excessive force.⁹⁴

⁸⁶ *Id.* at 1340.

⁸⁷ *Id.* at 1339–40.

⁸⁸ *Id.* at 1340.

⁸⁹ *Id.* at 1335.

⁹⁰ *Id.*

⁹¹ *Id.* at 1336.

⁹² *Id.* at 1334.

⁹³ *Id.* at 1334–35.

⁹⁴ *Id.* at 1342.

In evaluating the second prong, whether a law had clearly established that Parker's force was unconstitutional, Patel showed that a broader principle should control the facts of the case, and that this was a case of obvious clarity.⁹⁵ The court reasoned that Parker knew or should have known that he was violating Patel's rights when he threw Patel to the ground.⁹⁶ The court concluded that no reasonable officer would have swept Patel's legs out from underneath him because Patel was frail, he was not resisting, and he was not attempting to flee.⁹⁷ As a result, the law clearly forbade Parker's actions.⁹⁸ This conclusion adds significant weight to Officer Spence's testimony when he stated that he did not witness anything that would have caused him to "lay hands on...Patel."⁹⁹

After conducting a full qualified immunity analysis, the court rendered summary judgment inappropriate because three factual disputes remained.¹⁰⁰ First, whether Patel jerked his hands free from Parker. Second, whether Patel's actions prevented Parker from handcuffing Patel. Third, whether Parker had finished his frisk before leg sweeping Patel. If a jury were to decide these questions in Patel's favor, Patel's right to be free from excessive force would be clearly established. For these reasons, the court denied summary judgment to Parker.¹⁰¹

V. IMPLICATIONS

Technology is driving a wedge between traditional legal analysis and the need to modernize, adapt, and adopt. Decades of jurisprudence holds that in a qualified immunity analysis, the "clearly established law" must be particularized to the facts of the case or established by obvious clarity. For many plaintiffs, presenting factually similar cases is already a difficult task because of the unique circumstances surrounding each incident of excessive force. However, with technology highlighting those differences in stark detail, the task will become almost impossible. The Supreme Court has insisted that exact factual similarities or a case on point is not necessary. However, they equally insist that "existing precedent must have placed the statutory or

⁹⁵ *Id.* at 1342–43.

⁹⁶ *Id.* at 1343.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1344.

⁹⁹ *Id.* at 1335.

¹⁰⁰ *Id.* at 1336.

¹⁰¹ *Id.* at 1331.

constitutional question beyond debate.”¹⁰² The juxtaposition of standards creates an impossible task for the plaintiff and makes overcoming the qualified immunity defense exceedingly difficult.

Patel argued that the law against excessive force in his case was clearly established due to obvious clarity rather than through factually similar cases. Showing obvious clarity using video footage that is grainy, distant, and unclear, is a difficult task. However, in Patel’s case perhaps it was a strategic move as the presence of the video footage practically eliminates the ability to draw factual similarities. In most cases, video footage and cameras are not likely to be a sufficient solution to solve the problem of qualified immunity. In theory, the presence and use of dashboard and body cameras would be extremely valuable as they provide an unfiltered and unedited version of the events. However, in reality, cameras are making it impossible to analogize cases. In the case of low-resolution cameras, their use only further compounds factual discrepancies.

With the availability of a visual record, every action or reaction is another basis upon which cases can be distinguished. While some of these minor differences are immaterial when introduced through witness testimony, cameras do not allow a detail to go unnoticed. Video footage has the ability to distort the image, introduce distracting peripheral images, and change the perspective.¹⁰³ Even unmanned cameras see, frame, and distort the images they capture. When viewers see images produced by the cameras, the layers of visual interpretation are magnified. There is rarely enough time to draw a viewer’s attention to the angle or context of the footage let alone point out the implicit biases each viewer imposes upon the images that they see.

The use of video footage has interrupted time-honored legal procedure. For example, the purpose of a jury is to observe demeanor and hear witness testimony with pauses and intonation. Justice Stevens, writing for the dissent in *Scott v. Harris*, claimed that allowing a videotape to speak for itself usurped the function of the jury.¹⁰⁴ What the court in *Scott* failed to consider when making its decision is that videos rarely accurately and completely capture the events as they did in that particular case. Fortunately, courts subsequent to *Scott* have treated it as an exception to the rule. Similarly, the digital nature of video footage has given courts the power to view detailed breakdowns of the video sequence, potentially violating the legal tests courts seek to

¹⁰² *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

¹⁰³ Naomi Mezey, *The Image Cannot Speak for Itself: Film, Summary Judgment, and Visual Literacy*, 48 Val. U. L. Rev. 1 (2013).

¹⁰⁴ *Scott*, 550 U.S. at 397 (Stevens J., dissenting).

apply. For example, a frame-by-frame analysis of the incident in question could potentially infringe on the court's attempts to avoid using 20/20 hindsight when reviewing footage.¹⁰⁵ Viewing each movement, facial expression, or peripheral factor in micro-moments provides the court with detailed information that the parties themselves potentially did not know or realize at the time of the incident.

While video cameras help place judges and jurors in the shoes of both the plaintiff and the defendant, we are trusting these tools in place of the testimony of the parties. This is leading to a breakdown of legal principles and societal goals. Principles such as honesty, integrity, and justice for all are notions important to every community and neighborhood around the country and usage of video footage in the court room seems to undermine the trust we should have in our fellow citizens. Our hope that government-issued dashboard cameras or body cameras will help clarify altercations remains unfounded as demonstrated in Patel's case.

The good intentions with which the use of cameras became common place has been doing more harm than good. United States Supreme Court Justice, Sonia Sotomayor, has often shared her concerns that the court is developing a "disturbing trend" because it has "not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force . . . [b]ut [it] rarely intervene[s] when courts wrongly afford officers the benefit of qualified immunity in these same cases."¹⁰⁶ In addition, originalists, the late Supreme Court Justice Antonin Scalia, and sitting Justice Clarence Thomas, believe qualified immunity is a legislative task ill-suited for the court.¹⁰⁷ An unchecked and irreversible granting of qualified immunity is on the horizon should courts continue to substitute legal analysis in lieu of video footage. For each case where drawing factual

¹⁰⁵ See *Graham*, 490 U.S. at 396.

¹⁰⁶ Robert Barnes, *Sotomayor Sees "disturbing trend" of Unequal Treatment Regarding Police, Alleged Victims*, Washington Post (Apr. 24, 2017), https://www.washingtonpost.com/politics/courts_law/sotomayor-sees-disturbing-trend-of-unequal-treatment-regarding-police-alleged-victims/2017/04/24/dfe8c368-2912-11e7-b605-33413c691853_story.html?noredirect=on.

¹⁰⁷ See *Crawford-El v. Britton*, 523 U.S. 574, 611–12 (1998) (Scalia J., dissenting) (Justice Scalia comments that the crafting of the qualified immunity doctrine that "we have invented," is an "essentially legislative activity," which overshadows the "appl[ication] of common law embodied in the [Constitution]"); see also *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part) (Justice Thomas urges the court to reconsider the qualified immunity doctrine because it advances the court's policy preferences rather than "the mandates of Congress").

similarities becomes an unreachable bar or where obvious clarity is obfuscated by the images themselves, courts will continue to grant qualified immunity at an alarming and potentially unwarranted rate.

Shreya H. Shah