



THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

GUIDELINES FOR THE USE OF BODY-WORN CAMERAS BY LAW ENFORCEMENT

A Guide to Protecting Communities and Preserving Civil Liberties

December 2016

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A NOTE FROM THE CONSTITUTION PROJECT

While police shootings in America are not a new phenomenon, YouTube and cell phone videos are. As a result, individuals across the country who have never witnessed violent, sometimes fatal, interactions with police, now see these occurrences with some regularity, and as a profound matter that our country must address. This has generated a national debate over policing and led to significant public activism, such as the Black Lives Matter movement.

Perhaps because videos of police shootings appear to be the spark creating a firestorm of attention to this issue, or perhaps because of the certainty that videos seem to offer about the events in dispute, many now believe that body-worn cameras are the primary means to improve police-community relations and prevent police misconduct.

Proponents of body-worn cameras have circulated data, albeit limited, suggesting that such cameras can enhance accountability and reduce the use of force. They may also increase public transparency about how law enforcement operates, and can foster invaluable public discourse on police tactics and community interactions.

However, despite their potential, body-worn cameras present risks. They are not a panacea, and we should not expect them—or any other single, isolated reform—to singlehandedly resolve issues of excessive use of force and police misconduct.

Absent effective rules to require consistent use and proper disclosure, body-worn cameras may actually create perceptions of obstructing legitimate oversight of police actions. They may also strain police-community relations, as recently occurred in cases of undisclosed videos of the fatal shootings of Laquan McDonald in Chicago, Illinois and Keith Lamont Scott in Charlotte, North Carolina. Further, we also face important concerns about powerful new surveillance tools and a rapid expansion of video surveillance—often in communities of color that are already subject to disproportionate surveillance and interactions with police. It is critical that body-worn cameras not be co-opted as a surveillance tool that improperly infringes upon privacy.

In order to identify and address the constitutional, legal, and policy concerns implicated by these trends in American policing, The Constitution Project (TCP) convened a bipartisan Committee on Policing Reforms (Committee), comprising over thirty former and current law enforcement and military personnel; legal scholars; civil rights experts and advocates; and former judges, prosecutors, and defense attorneys. The wide range of the Committee's expertise ensures that its final, consensus-based recommendations can provide practical assistance to policymakers and law enforcement agencies as they are revising federal, state, and local policies to emphasize building trust and strengthening the relationship between communities and police.

This report begins with a description of the ongoing adoption of body-worn cameras by law enforcement agencies throughout the country. It then examines the different constitutional rights and values affected by the use of body-worn cameras, and the effect of various policies and issues regarding use of such cameras and their footage on these values, including examination of law enforcement accountability, privacy, due process, government transparency, equal protection, and other policy considerations. Based on this examination, the report then provides analysis on implementation issues, and a series of recommendations for law enforcement agencies that choose to adopt a body-worn camera program.

The Committee and TCP owe extraordinary thanks to a number of individuals who helped make this report possible. First, we are so grateful to the law firm of Morgan, Lewis & Bockius LLP for its incredible support for this project. Notably, we thank attorneys Mark Krotoski and Scott Tester, who provided significant legal and policy analysis critical throughout the development of this report. We also thank the following individuals, who provided support and feedback as the Committee researched, deliberated, and finalized its recommendations: Louis Michael Seidman, Erik Kosa, Kayla Haran, Aisha Rahman, Rita Siemion, Vincent Southerland, Monique Dixon, and former TCP interns Louise Conner, Esha Kamboj, John Myers, Alyssa Dunbar, Carly Fabian, and Rachel Margolis.

To be clear, we do not take a stance on whether law enforcement agencies should or should not employ bodyworn cameras, but recognize that when such equipment is employed, it is critical that community input be incorporated, and appropriate policies be adopted. This is a complex issue, one that requires continual and meaningful community engagement, and observation of technological developments. We believe that the guiding principles and policies set forth in this report can ensure that body-worn cameras are both more effective and more protective of individual rights. We strongly hope that this report and its 23 recommendations will guide law enforcement agencies and policymakers considering adoption of and policies regarding bodyworn cameras, and will ensure that their use aids both the police and the communities they serve, and supports the constitutional rights and ideals that all Americans value.

Sincerely,



Virginia E. Sloan
President
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EXECUTIVE SUMMARY

Police body-worn cameras have recently gained increased attention among law enforcement professionals, and a significant number of U.S. law enforcement agencies now state that they either are implementing a body-worn camera program or have committed to doing so.

However, body-worn cameras are not a panacea. Implementation without proper policies in place can result in significant detriments to law enforcement agencies and the communities they serve. Among these concerns is the potential impact on a broad range of constitutional rights and values. Accordingly, agencies must weigh the benefits and detriments of body cameras when deciding whether and how to implement them.

This report describes a number of the most significant issues that law enforcement agencies and their communities may encounter when implementing body-worn camera programs. The Constitution Project Committee on Policing Reforms (Committee) provides recommendations that it believes can resolve or mitigate these issues. The recommendations are summarized below:

Implementation

- Body-worn cameras should only be used to further a narrowly defined and clearly articulated purpose.
- Policymakers should engage with the community in making body camera rules.
- Policymakers should engage with law enforcement personnel as body cameras are introduced.

When to Record

- A clear policy should require officers to record most law enforcement activities.
- Officers should be required to notify subjects they are being recorded.
- Officers should generally stop recording upon an individual's request.
- Policies should be clear about each officer's obligations regarding recording, and the potential administrative penalties for violating the policy should be laid out.

Data Maintenance and Use

- Videos important to police accountability or evidence should be flagged for retention.
- Videos that are not "flagged" or necessary for evidentiary purposes should be deleted after a reasonably short period of time.
- The chain of custody for videos must be clearly preserved and recorded.
- Officer access to videos should be properly limited and recorded.
- Officers should be permitted to review their footage after writing an initial report.
- Proper data security standards and auditing systems must be used to prevent improper access and malicious hacking.
- Effective audit systems should exist to prevent improper access or tampering.

"Tagging" Technologies

- Use of "tagging" technologies should be strongly limited and require judicial authorization.

In-Government Sharing

- Any in-government sharing of footage should require the receiving entity to employ the policies of the sharing entity.

Public Data Access

- Any person captured by the footage should be permitted to review video of an incident in which he or she was involved.
- Release of footage as a public record request should generally be permitted with appropriate redactions.
- Release of video in connection with legal proceedings should follow standard evidentiary rules.

Training

- Proper training should be required for those using body cameras and footage.

Availability of Policies and Changes

- All policies regarding body cameras should be written and publicly available.
- Departments should be open to revision of policies with public input and notification.

Appropriate Policies in Conjunction with Federal Funding

- Federal funding should be contingent on adoption of specific, effective policies.

The Committee does not recommend that law enforcement agencies either adopt or abstain from using body-worn cameras; that decision must be made with input from the communities that will be impacted by such programs. However, the Committee believes that for those departments that do use body-worn cameras, following the above recommendations will best ensure that programs uphold constitutional rights and values.

I. INTRODUCTION

Body-worn cameras have gained increased attention and use among law enforcement professionals, given their potential—through provision of a supplemental account of police actions—to improve law enforcement accountability, transparency, and relations between police and communities. This report outlines the legal issues and potential benefits and disadvantages of adopting police body-worn cameras. It then provides recommendations for communities that choose to implement body-worn cameras.

The use of technology for law enforcement surveillance is not new. In the early 1990s, dashboard cameras emerged as a method for capturing encounters between the police and the public.¹ Despite early resistance, dashboard cameras gained widespread acceptance as research demonstrated their positive effects on officer safety and accountability and their reduction of agency liability.² Closed circuit surveillance systems have also become increasingly popular as tools for criminal investigations.³ Moreover, the proliferation of smartphones has dramatically increased citizens' ability to record police officers performing their duties.⁴ Accordingly, a recent survey indicated that the vast majority of Americans generally support police wearing body cameras.⁵

Law enforcement agencies across the country are increasingly using body-worn cameras, while others are considering pilot programs and implementation. A recent survey of the nation's largest police departments, conducted by the Major Cities Chiefs Police Association and Major County Sheriffs Association, found that 95 percent of law enforcement agencies either implemented body-worn cameras or committed to having them.⁶ Body-worn camera programs are also in place in several smaller police departments across the country, including Rialto, California⁷ and Mesa, Arizona.⁸ Larger jurisdictions such as Los Angeles,⁹ Chicago,¹⁰ San Francisco,¹¹ and New York City¹² are also now testing body-worn cameras in pilot programs with the goal of eventually expanding camera use department-wide.¹³

¹ White, Michael D. *Police Officer Body-Worn Cameras: Assessing the Evidence* (Washington, DC: Office of Community Oriented Policing Services, 2014), 11.

² *Id.*, at 11; Hayes, Jonathan; Ericson, Lars. *A Primer on Body-Worn Cameras for Law Enforcement* (U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice, 2012), 3.

³ White, *supra* note 1 at 12; see also Ramirez, Eugene. *A Report on Body Worn Cameras* (Manning & Kass, Ellrod, Ramirez, Trester LLP), 11; see also, The Constitution Project, *Guidelines for Public Video Surveillance* (2007), <http://www.constitutionproject.org/wp-content/uploads/2012/09/54.pdf>.

⁴ White, *supra* note 1 at 12.

⁵ Sousa, William H, Terance D. Mieth, and Mari Sakiyama, UNLV Center for Crime and Justice Policy, "Body Worn Cameras on Police: Results from a National Survey of Public Attitudes" (July 2015), https://www.unlv.edu/sites/default/files/page_files/27/BodyWornCameras.pdf ("[May 2015 s]urvey respondents were generally supportive of BWCs on police officers. 85% of the sample thought that police should wear body cameras.")

⁶ See Maciag, Mike, "Survey: Almost All Police Departments Plan to Use Body Cameras" (January 26, 2016), <http://www.governing.com/topics/public-justice-safety/gov-police-body-camera-survey.html>.

⁷ See Miller, Lindsay, Jessica Toliver, and Police Executive Research Forum. 2014. *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*. Washington, DC: Office of Community Oriented Policing Services at 5, http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20bodyworn%20camera%20program.pdf, [hereinafter PERF Report].

⁸ See *id.*, at 5.

⁹ *Id.*, at 9.

¹⁰ See Chicago Police Department, Body Worn Camera Pilot Program department notice (Jun 1, 2016), <http://directives.chicagopolice.org/directives/data/a7a57b73-14af4bb0-e1214-af4b-b44b0d70f0964db3.html?hl=true> (accessed Aug 09, 2016) (expanding body worn camera trial to include additional Chicago police officers).

¹¹ See San Francisco Police Department Body Worn Camera Policy (Jun 1, 2016), <http://sanfranciscopolice.org/body-worn-camera-policy> (accessed Aug 9, 2016).

¹² See Trianna, Francesca and Salima Koroma, "NYPD Official Explains When Body Cameras Will Be Recording," Time, June 3, 2015 (<http://time.com/3904723/watch-nypd-official-explains-when-body-cameras-will-be-recording/>).

¹³ See *id.* (showing NYPD an official explaining that its test is designed to scale and opining that all 35,000 NYC police officers may eventually wear cameras).

There are a number of body-worn camera manufacturers, including Panasonic, VIEVU, TASER International, WatchGuard, and Wolfcom Enterprises.¹⁴ The technology includes several components that vary across manufacturers.¹⁵ For example, TASER International's AXON system includes a small camera worn by the officer on a shirt lapel, hat, or sunglasses that captures what the officer sees, as well as a device that records the video, a battery pack that lasts typically 12-14 hours, and an on/off switch for recording.¹⁶ The AXON system comes with a cloud-based data storage service allowing the officer to place the camera in a dock at the end of the shift after which the footage is uploaded to the cloud.¹⁷ The VIEVU system is a self-contained, pager-sized device that officers wear on their torsos, and also includes a docking station for downloading video footage.¹⁸

The increased availability of this technology presents challenging issues, such as when to record, standards for data storage and use, disclosure, and potential use in combination with "tagging" technologies, such as facial recognition.¹⁹ Many communities may determine that the costs (including both financial costs and the impact on the community) outweigh the benefits, and will choose not to adopt a body-worn camera program. Other communities may determine that the benefits of body-worn cameras justify their use. The aim of this report is to guide communities that choose to implement body-worn camera programs. Thus the report takes no stance on whether body-worn camera programs should be adopted. Instead, it seeks to provide input on what policies are necessary and most effective for ensuring that body-worn camera programs fulfill their goals and protect civil rights and civil liberties.

There are numerous advantages and disadvantages to police body-worn cameras with important constitutional implications, as discussed herein. Some specific issues departments should consider are:

- privacy concerns of both officers and community members
- police officer accountability
- effects on officer and public behavior
- effects on discrimination, both within law enforcement agencies and when interacting with civilians
- opportunities for police training
- resolution of complaints against police officers or departments
- departmental transparency
- potential evidence for use by both prosecutors and defendants
- "video bias" by juries and police departments
- logistical requirements, including human resource and financial costs

¹⁴ See Hayes, *supra* note 2, at 15 (depicting chart of available body-worn cameras). The Constitution Project does not endorse or recommend any brand of body-worn camera, but recognizes that all camera systems are not equal. Additionally, body-camera technology is improving and new companies are entering the market. Communities that have decided to implement body-camera programs are recommended to research the current makes and models of cameras.

¹⁵ See Ramirez, *supra* note 3, at 10 (depicting one commonly used body-worn camera).

¹⁶ White, *supra* note 1, at 12. See also AXON flex on-officer video, TASER.COM, <http://www.taser.com/products/onofficer-video/ax-on-flex-on-officer-video> (accessed Jan 14, 2015).

¹⁷ White, *supra* note 1, at 12. See also AXON flex on-officer video, TASER.COM, <http://www.taser.com/products/onofficer-video/ax-on-flex-on-officer-video> (accessed Jan 14, 2015).

¹⁸ White, *supra* note 1, at 12. See also VIEVU Products, Choose the VIEVU Camera for you!, VIEVU.COM, <http://www.viewu.com/viewu-products/hardware/> (accessed Jan 14, 2015).

¹⁹ Tagging technologies refers to technologies that can identify individuals in an automated matter. See *infra* for more details on tagging technologies, their use, and potential interaction with body cameras.

These issues are each separately discussed in the following sections of this report.

More widespread adoption of video recording technology can threaten the privacy of those captured in the footage, including the police officers themselves. Without proper safeguards, body-worn cameras could be used for generalized surveillance. Such surveillance could disproportionately impact minorities and other groups subject to higher rates of police interaction. These are not novel issues. In 2007, The Constitution Project developed a report to emphasize the need for balancing the benefits of public video surveillance with the need to protect our core constitutional rights, including privacy, government accountability, equal protection, and free speech.²⁰ As the 2007 report states, “new technologies may help protect the public, but they also enable authorities to more deeply intrude upon these rights.”²¹

It is important to note that research on body cameras will continue in the future. As President Barack Obama stated in March 2015, while “there is a role for technology to play” in improving policing, body-worn cameras are “not a panacea” and must “be embedded in a broader change in culture” to ensure that both police and the communities they serve feel comfortable with the implementation of such technologies.^{22,23} More recently, then New York Police Commissioner Bill Bratton explained that “[the NYPD has] been purposefully moving very slowly on this issue” to make sure that they “have the policies in place” and that they have “political,” “media,” and “public understanding[s] in place” “before [they] move to 1,000 cameras.”²⁴ On the same day as President Obama’s remarks, the Laura and John Arnold Foundation announced a \$1.6 million investment to fund four studies on body-worn cameras.²⁵ These studies will conclude in 2016 and 2017.²⁶ Accordingly, it is expected that significant additional data regarding the advantages and drawbacks of using body-worn cameras will be available in the next few years.

²⁰ *The Constitution Project, Guidelines for Public Video Surveillance: A Guide to Protecting Communities and Preserving Civil Liberties* (2007), <http://www.constitutionproject.org/wp-content/uploads/2012/09/54.pdf> (accessed Jul 16, 2015).

²¹ *Id.*, at xi.

²² Remarks by the President after Meeting with Task Force on 21st Century Policing (Mar 2, 2015), <https://www.whitehouse.gov/the-press-office/2015/03/02/remarks-president-after-meeting-task-force-21st-century-policing> (accessed Mar 24, 2015).

²³ According to a recent study, police body cameras did not decrease use of force by law enforcement. Keith Humphreys, *The Washington Post*, *It turns out the most hyped solution for police brutality doesn't work* (Jun 16, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/06/16/it-turns-out-the-most-hyped-solution-for-police-brutality-doesnt-work/>.

²⁴ See Fox, Alison, “NYPD Body Camera Survey Seeks Public Comment On Program” (Jun 29, 2016), <http://www.amny.com/news/nypd-body-camera-survey-seeks-public-comment-on-program-1.11986316> (accessed Aug 09, 2016); see also NYPD and NYU Policing Project, “NYPD Body-Worn Camera Questionnaire,” <https://policingproject.org/nypd-body-worn-camera-feedback/> (June 2016) (soliciting community feedback on NYPD BWC program expansion).

²⁵ Walsh, Leila, *Laura and John Arnold Foundation Makes Landmark Investment in Police Body-Worn Cameras Research* (Mar 2, 2015), <http://www.arnoldfoundation.org/laura-and-john-arnold-foundation-makes-landmark-investment-police-body-worn-cameras-research> (accessed Mar 24, 2015).

²⁶ Initial report data is <http://www.arnoldfoundation.org/wp-content/uploads/Phase-I-Report-Nov-28-2015-FINAL.pdf>; *id.* at 7-10 (listing current studies); see also <http://www.arnoldfoundation.org/new-report-identifies-gaps-opportunities-existing-research-police-body-worn-cameras/> (Dec 15, 2015).

II. CONSTITUTIONAL VALUES AND LEGAL ISSUES AT STAKE

Police body-worn cameras present novel questions about the collection, use, retention, and sharing of the video data they capture. Proponents of body-worn cameras suggest these devices can protect due process and equal protection values while promoting police accountability. However, any new use of surveillance technology and recording devices implicates significant privacy concerns, and the scale on which body-worn cameras could be deployed magnifies these concerns. If a law enforcement agency chooses to implement a body-worn camera program, it must carefully consider the program's impact on privacy and constitutional rights.

A. ACCOUNTABILITY FOR LAW ENFORCEMENT ACTIONS

“TRUST BETWEEN LAW
ENFORCEMENT AGENCIES
AND THE PEOPLE THEY
PROTECT AND SERVE IS
ESSENTIAL IN A DEMOCRACY.”

– TASK FORCE ON 21ST CENTURY POLICING

In December 2014, amid a public outcry for police accountability following the deaths of multiple black men at the hands of law enforcement, President Obama convened a Task Force on 21st Century Policing (“Task Force”) to study the relationship between law enforcement and communities. In its final report, issued in May 2015, the Task Force wrote: “Trust between law enforcement agencies and the people they protect and serve is essential in a democracy. It is key to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services.”²⁷ As the Task Force repeatedly emphasized throughout its report, individuals should be able to expect that they will be treated fairly by law enforcement and the criminal justice system. Government accountability and public confidence in law enforcement remain essential.²⁸

The public has a strong interest in high standards of oversight and accountability for law enforcement. Police officers are uniquely empowered to arrest and detain individuals, to conduct searches of individuals and their property absent consent, and to use violent force for reasons other than self-defense. Body cameras offer the chance to improve accountability and behavior through proper resolution of issues, as well as to expedite the correct adjudication of complaints.

1. Improved Accountability and Officer Behavior

Historically, there has been little evidence generated during encounters between police officers and the public beyond the testimony of witnesses and the parties involved. Encounters between the police and the public sometimes result in searches, violence, arrests and charges against individuals, and complaints against police officers. The ability to record these encounters holds great potential for reducing unnecessary uses of force, improper arrests, unfounded complaints against police, unnecessary litigation, and strained relations between police departments and their communities.

²⁷ President's Task Force on 21st Century Policing, *Final Report of Presidential Task Force on 21st Century Policing* (May 2015), http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf, at 1.

²⁸ See *id.*; see also Speech: Assistant Attorney General Leslie R. Caldwell Speaks at Cybercrime 2020 Symposium (Dec 4, 2014) (observing “a growing public distrust of law enforcement surveillance and high-tech investigative techniques” that “can hamper investigations” which may be based on “misconceptions about the technical abilities of the law enforcement tools and the manners in which they are used”), <http://www.justice.gov/opa/speech/assistantattorney-general-leslie-r-caldwell-speaks-cybercrime-2020-symposium> (accessed Jan 16, 2015); see also *Interim Report of the President's Task Force on 21st Century Policing* at 1, http://www.cops.usdoj.gov/pdf/taskforce/Interim_TF_Report.pdf (“Trust between law enforcement agencies and the people they protect and serve is essential in a democracy. It is key to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services.”) [hereinafter *Presidential Interim Report*].

²⁹ See *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 576 n.3 (2d Cir. 2003) (“videotape can also be used to serve the legitimate government purpose of protecting individuals from police abuse...”).

With respect to officer behavior, body cameras may deter officer misconduct, including improper use of force, unjustified stops or arrests, and other violations of the law or department policy.²⁹

There is some evidence that use of body-worn cameras may limit the unnecessary use of force.³⁰ In 2012, the Rialto, California Police Department assigned cameras randomly to officers across 988 shifts. Rialto is a mid-sized police department with, at the time of the study, 115 sworn officers and 42 non-sworn personnel serving 100,000 residents.³¹ They found a 59 percent reduction in officer use-of-force incidents during the trial.³² The control group (i.e., shifts without cameras) experienced twice as many use-of-force incidents compared to shifts with cameras.³³ The study also showed an 88 percent reduction in citizen complaints compared to the year before the camera program.³⁴

The Mesa, Arizona Police Department has also been studying the effects of body-worn cameras. Officer attitudes toward the use of body-worn cameras are positive, with 77 percent of officers believing that cameras cause officers to behave more professionally.³⁵ The Mesa police force also evaluated officer behavior by examining trends in citizen complaints. The first part of the study compared 50 officers who wore cameras to 50 non-camera-wearing officers.³⁶ Those who wore cameras generated eight complaints; those without were the subject of 23 complaints.³⁷ This study also tracked complaint trends before and after officers began wearing cameras. In the year before the camera project began, these officers were subject to 30 complaints; during the study, the frequency of citizen complaints dropped by roughly half.³⁸ In 2015 the San Diego, California Police Department reported that after officers started wearing body cameras, complaints fell over 40 percent.³⁹ Importantly, in addition to tracking complaints, this report noted marked decreases in the use of “personal body” force by officers (46.5 percent decrease) and in the use of pepper spray (30.5 percent decrease).⁴⁰ However, a more recent study found declines in police force only when police body cameras were running constantly, as opposed to when officers had discretion to turn them off.⁴¹ A just-released study by the University of Cambridge’s Institute of Criminology of departments in the United States and the United Kingdom found body-worn cameras led to a 93 percent reduction in complaints.⁴²

IN 2015 THE SAN DIEGO, CALIFORNIA POLICE DEPARTMENT REPORTED THAT AFTER OFFICERS STARTED WEARING BODY CAMERAS, COMPLAINTS FELL OVER 40%.

²⁹ See generally Ariel, Barak; Farrar, William A.; Sutherland, Alex. *The Effect of Police Body-Worn Cameras on Use of Force and Citizens’ Complaints Against the Police: A Randomized Controlled Trial* (New York: J. Quant. Criminal, 2014).

³¹ Farrar, Tony. *Self-awareness to being watched and socially-desirable behavior: A field experiment on the effect of body-worn cameras on police use-of-force*, at 5, Police Foundation (2013) [hereinafter Police Foundation Report], available at: <http://www.policefoundation.org/content/body-worn-camera> (accessed Jan 14, 2015).

³² PERF Report, *supra* note 7, at 5; Ramirez, *supra* note 3, at 7.

³³ PERF Report, *supra* note 7, at 5; Ramirez, *supra* note 3 at 7.

³⁴ PERF Report, *supra* note 7, at 5; Ramirez, *supra* note 3, at 7.

³⁵ White, *supra* note 1, at 21.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ San Diego Police Report for Public Safety and Livable Neighborhoods Committee (Mar 18, 2015), http://docs.sandiego.gov/councilcomm_agendas_attach/2015/psln_150318_2.pdf (accessed Apr 9, 2015).

⁴⁰ *Id.*

⁴¹ RAND Corporation, “Body-Worn Cameras Associated with Increased Assaults Against Police, and Increase in Use-of-Force If Officers Choose When to Turn on Body-Worn Cameras,” <http://www.rand.org/news/press/2016/05/17.html> (accessed Aug 1, 2016) (“Researchers found that during shifts with cameras in which officers stuck closer to the protocol, police use-of-force fell by 37% over camera-free shifts. During shifts in which officers tended to use their discretion, police use-of-force actually rose 71% over camera-free shifts.”).

⁴² Barak Ariel, et al. *Contagious Accountability: Global Multisite Randomized Controlled Trial on the Effect of Police Body-Worn Cameras on Citizens’ Complaints Against the Police* (Sep 22, 2016) <http://cjb.sagepub.com/content/early/2016/09/21/0093854816668218.full.pdf+html>.

These studies are consistent with research conducted on “dash-mounted” camera systems, in which officers with dashboard cameras reported higher professionalism and attention to following agency protocols.⁴³

It is important to note that the causal factors of these trends are unclear. These studies do not answer whether cameras lead to improved individual behavior, improved police behavior, or a mixture of both.⁴⁴ Available research cannot distinguish between these effects; therefore, more research is needed.⁴⁵ Additional studies are being conducted with the police departments of Spokane (Washington), Tempe (Arizona), Arlington (Texas), Anaheim (California), Pittsburgh (Pennsylvania), Las Vegas (Nevada), and Los Angeles (California), which should provide additional data to answer this question.⁴⁶ Even though the causal factors have not yet been determined, the data presented by the studies indicates that there is at least a perceived improvement in police behavior, which, regardless of the cause, benefits the department and the community.

2. Proper and Efficient Resolution of Complaints Against Law Enforcement

The use of police body-worn cameras may substantiate and expedite legitimate complaints, as well as discredit and reduce frivolous complaints against police officers. In the case of wrongdoing by police, the officers in question may be less likely to challenge the case. Rialto’s chief of police has noted in interviews that access to video has expedited the resolution of complaints.⁴⁷ More importantly, video footage can assist in investigating an incident when there are differing accounts. This opportunity allows law enforcement agencies to more efficiently allocate time and resources. Police departments devote considerable resources to resolving citizen complaints and litigation.⁴⁸

VIDEO EVIDENCE, BOTH FROM POLICE BODY-WORN CAMERAS, AS WELL AS CITIZEN-GENERATED VIDEO, CAN REDUCE RELIANCE ON OFTEN CONFLICTING EYEWITNESS ACCOUNTS.

However, complaints against police officers are often stymied by the fact that there are no witnesses and the complaint simply pits the officer’s word against the citizen’s.⁴⁹ Video evidence, from both police body-worn cameras, and citizen-generated video, changes this dynamic.⁵⁰ Further, this increased efficiency allows departments to more rapidly take appropriate disciplinary action in response to misconduct.

As an example, in July 2015, a university public safety officer was indicted in the shooting death of Samuel Dubose, an unarmed black man, during a traffic stop after the officer’s body-worn camera captured the incident. Prior to the release of the video, the officer had stated that he shot to avoid being “dragged” by the suspect’s car and “was almost run over.”⁵¹ Two other police officers’ reports corroborated the officer’s story. However, based on body-worn camera footage,

⁴³ Harris, David A., *Picture This: Body-Worn Video Devices (Head Cams) As Tools for Ensuring Fourth Amendment Compliance by Police*, 43 Tex. Tech L. Rev. 357, 360 (2010).

⁴⁴ White, *supra* note 1, at 6; Ariel, Farrar, and Sutherland 2014 at 19 (“Just Another Hawthorne Effect?”).

⁴⁵ See White, *supra* note 1, at 6. See generally Ariel, Farrar, and Sutherland 2014 at 21-23 (“Research Limitations”).

⁴⁶ Walsh, Leila, *Laura and John Arnold Foundation Makes Landmark Investment in Police Body-Worn Cameras Research* (Mar 2, 2015), <http://www.arnoldfoundation.org/laura-and-john-arnold-foundation-makes-landmarkinvestment-police-body-worn-cameras-research> (accessed Mar 24, 2015); National Institute of Justice, *Research on the Impact of Technology on Policing Strategies* (2013), <http://www.nij.gov/topics/law-enforcement/technology/pages/body-worn-cameras.aspx#ongoing> (accessed July 16, 2015).

⁴⁷ White, *supra* note 1, at 24.

⁴⁸ *Id.*, at 23.

⁵⁰ See generally Jonathan Peters, *Columbia Journalism Review*, “Could Facebook Live change the way courts think about privacy law?,” Jul 14, 2016, http://www.cjr.org/united_states_project/facebook_live_streaming_video_privacy_law.php (accessed Aug 1, 2016) (noting the impact of citizen-generated video).

⁵¹ Pérez-Peña, Richard, “University of Cincinnati Officer Indicted in Shooting Death of Samuel Dubose,” *New York Times*, July 29, 2015 (http://www.nytimes.com/2015/07/30/us/university-of-cincinnati-officer-indicted-in-shootingdeath-of-motorist.html?_r=0).

police were able to determine that the officer's statement, along with the corroborating testimony from his fellow officers, was false; the officer was subsequently indicted for the murder of Mr. Dubose.⁵² After the footage was released, law enforcement and community members agreed that the evidence provided by body-worn cameras was necessary for the officer's indictment.⁵³ The county prosecutor emphasized that body-worn cameras are a "good idea" because "nine times out of 10 it clears [law enforcement officers] of wrongdoing. And in this case, it obviously led to an indictment for murder."⁵⁴

Conversely, community members may also be less likely to file frivolous complaints knowing that video evidence may refute their claims—and less likely to succeed when they do. As the Second Circuit noted over a decade ago, "videotape can also be used to serve the legitimate government purpose of... protecting police from false accusations of abuse."⁵⁵ Several departments have noted that officers who have high numbers of complaints are actively volunteering to wear body cameras. The former police chief of Greenville, North Carolina, Hassan Aden, noted that many of these officers "have come in to request body-worn cameras so that they can be protected [against improper complaints] in the future."⁵⁶ Indeed, body-worn camera video has cleared numerous officers of alleged wrongdoing.⁵⁷

There is evidence that body-worn cameras help resolve complaints against police officers.⁵⁸ However, no research has tested the technology's impact on lawsuits against law enforcement officers.⁵⁹ Unfortunately, there is insufficient evidence to assess this factor outside of anecdotal reports in the media and preliminary results from a few evaluations.⁶⁰ However, there is a rich body of evidence showing that people—both law enforcement officials and the general public—tend to embrace commonly accepted social norms when they are aware they are being watched.⁶¹ In addition to aiding in the resolution of citizen complaints, body-worn cameras provide police departments with the ability to identify officers who abuse their authority even in the absence of formal citizen complaints. After receiving a complaint about an officer in Phoenix, Arizona, police were able to search through other encounters involving this officer, resulting in his termination.⁶² As Phoenix Assistant Chief of Police Dave Harvey explained, the overall conduct of the officer throughout different incidents "clearly shocked the conscience."⁶³ Policies requiring that law enforcement actions be recorded and preserved will allow departments to proactively review officers' behavior, search for misconduct, and take corrective action. This could both prevent future misconduct and offset costly citizen complaints.⁶⁴

⁵² *Id.*

⁵³ Jeremy Stahl, "The Sam Dubose Police Report is Full of Falsehoods from Ray Tensing's Fellow Officers," *Slate*, Jul 29, 2015, http://www.slate.com/blogs/the_slate/2015/07/29/the_sam_dubose_police_report_is_full_of_falsehoods_from_ray_tensing_s_colleagues.html (quoting the victim's sister, law enforcement, and the mayor regarding the advantages of body-worn cameras).

⁵⁴ *Id.*

⁵⁵ *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 576 n.3 (2d Cir. 2003).

⁵⁶ PERF Report, *supra* note 7, at 7.

⁵⁷ See Thaxton, Zach, "Body cam video clears Trinidad officer in deadly officer-involved shooting," Jun 24, 2015, <http://www.koaa.com/story/29403328/body-cam-video-clears-trinidad-officer-in-deadly-officer-involved-shooting> ("The body camera video is really the only thing we have that confirms this is what the officer saw when he made the decision to fire his duty weapon," said District Attorney Frank Ruybalid.") (accessed Aug 2, 2016); see also PoliceOne, "Video: Ala. officer cleared after body cam shows shooting," Jan 2, 2015, <https://www.policeone.com/police-products/body-cameras/articles/8068034-Video-Ala-officer-cleared-after-bodycam-shows-shooting/> (accessed Aug 2, 2016)

⁵⁸ White, *supra* note 1, at 7; Presidential Interim Report, *supra* note 28, at 31-32.

⁵⁹ White, *supra* note 1, at 7.

⁶⁰ *Id.*, at 22.

⁶¹ Police Foundation Report, *supra* note 31, at 2.

⁶² PERF Report, *supra* note 7, at 8.

⁶³ *Id.*

⁶⁴ Law enforcement organizations (and the governments that supervise them) need to also consider the impacts on officers' privacy that result from this. This is discussed in section II.b.3, *infra*. Additionally, while many police officer unions support body-worn cameras, some have expressed concerns regarding videotaping, especially when officers are off duty. See generally White, *supra* note 1, at 8.

B. PRIVACY AND ANONYMITY

1. Individual Privacy Rights and Protections

Police body-worn cameras have significant potential to impact individuals' privacy and anonymity. Many crime victims will expect traumatic events to remain private due to the sensitive nature of their experiences. Video and sounds of bystanders may be captured in the recordings, often in sensitive locations and situations. This puts body cameras among a variety of technologies with potential to store, catalog, search, and correlate vast amounts of data in a manner that fundamentally alters the balance between government and individuals. As technology continues to alter government power, it is important for policymakers, the judiciary, and law enforcement to remain mindful of how long-standing constitutional values of privacy, freedom of association, and freedom of expression may necessitate new norms regarding government rules and practices.

Privacy and anonymity are critical to many aspects of individuals' lives in public, from having conversations in public places to frequenting places and events that one may not want to associate with publicly, such as attending protests, going to religious ceremonies, participating in addiction counseling, or visiting fertility clinics.⁶⁵ The privacy in public that anonymity provides for these and other sensitive activities could not easily survive widespread surveillance in public life.⁶⁶ This in turn risks the government attaining unprecedented power to persecute select groups, as well as chilling individuals, deterring them from exercising basic rights of expression and association out of fear of government surveillance.

While many cases have considered whether an expectation of privacy in a given place was reasonable,⁶⁷ the constitutional implications of the right to privacy in public places are shifting based on the emergence of new technologies. In a landmark decision on location privacy *United States v. Jones*, two United States Supreme Court justices wrote in favor of a general privacy right to individuals' public location, at least for a prolonged period of time.⁶⁸ Justice Sonia Sotomayor's concurring opinion highlighted that technological advances may change long-standing assumptions that there is no reasonable expectation of privacy in public, as unrestricted use of new surveillance technologies could "by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track... alter the relationship between citizen and government in a way that is inimical to democratic society."⁶⁹ Justice Sotomayor emphasized that "[a]wareness that the Government may be watching chills associational and expressive freedoms" and that a fundamental purpose of the Fourth Amendment is "to curb arbitrary exercises of police power to and prevent a 'too permeating police surveillance.'"⁷⁰

However, the GPS-device technology at issue in *Jones* is already being replaced with more pervasive surveillance technologies, and courts and lawmakers are struggling to grapple with how to balance their use with privacy needs.

⁶⁵ Blitz, Marc Jonathan. *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 Tex. L. Rev. 1349, 1481 (2001).

⁶⁶ *Id.*

⁶⁷ See, e.g., *Patel v. City of Los Angeles*, 738 F.3d 1058, 1060 (9th Cir. 2013) cert. granted *sub nom. City of Los Angeles, Cal. v. Patel*, 135 S. Ct. 400, 190 L. Ed. 2d 288 (2014); *United States v. Maestas*, 639 F.3d 1032, 1033 (10th Cir. 2011); see also *Katz v. United States*, 389 U.S. 347, 360, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring).

⁶⁸ Although the opinion of the Court was prefaced on a trespass violation due to placement of a GPS device on a vehicle, these concurring opinions may indicate heightened importance of collecting invasive information regarding public activities, and provide guidance—though not binding precedent—for future cases relating to privacy rights in public locations. See *United States v. Jones*, 132 S. Ct. 945, 956 (2012).

⁶⁹ See *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring).

⁷⁰ See *id.*

Some concerns have been raised that without proper safeguards, body-worn cameras could be used for generalized surveillance.⁷¹ For example, the technology could—whether intentionally or not—film demonstrations or other activities protected by the First Amendment. Expanded government surveillance, without appropriate safeguards, could chill free speech, religious practice, and association.⁷² Additionally, where there is a reasonable expectation of anonymity enjoyed by the subject(s) of the video,⁷³ including both the intended target and bystanders caught in-frame, such recording may infringe on the citizens’ privacy rights. In addition to invasive surveillance or persecution, individuals may fear inappropriate conduct by individual officers, as similar issues have been raised involving officers’ use of officer-controlled video equipment.⁷⁴ The technology thus has the potential to undermine trust in casual encounters or foment distrust of officers engaged in community policing.⁷⁵

SOME CONCERNS HAVE BEEN RAISED THAT WITHOUT PROPER SAFEGUARDS, BODY-WORN CAMERAS COULD BE USED FOR GENERALIZED SURVEILLANCE.

Additionally, body-worn cameras may capture in real time the traumatic experiences of crime victims, citizens experiencing medical trauma, and those being detained or arrested.⁷⁶ Recording these events may exacerbate citizens’ trauma. Victims, witnesses, and confidential informants may be less likely to offer information to police if they are being recorded.⁷⁷ Requiring officers to obtain the consent of those recorded will not only protect privacy but also preserve trust in important interactions between individuals and law enforcement.

If body-worn cameras are implemented, strict rules should exist for the treatment of both cameras and footage. Written policies can establish discipline guidelines resulting from misusing body-worn camera equipment. Moreover, once video has been properly transferred to the department’s archives, policies must restrict officers from improperly accessing, sharing, deleting, or using footage. Communities could consider storing footage with a trusted third party such as an independent agency rather than the department itself to guard against these risks. Concerns regarding misuse can be mitigated through written policies and technical restrictions preventing officers from directly accessing raw video footage prior to uploading and requiring date, time, and personnel logging of access to the uploaded video, as well as consequences for failure to upload footage. As discussed in Section I, *supra*, and Section II.c.1, *infra*, technology from various vendors can prevent officers from avoiding upload of captured video, or at least make it more apparent that video that should have been uploaded was not. Similarly, metadata on the video will inhibit officers from mischaracterizing the date and time a video was taken. All of the concerns above make effective community engagement—including a pilot program that allows for community and stakeholder feedback during the implementation phase—essential to the adoption of police body-worn cameras.

⁷¹ See Joh, Elizabeth E., *Harvard Law & Policy Review*, “The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing,” at 15-17, (Vol. 10, Feb 2016).

⁷² Buttar, Shahid. *Police Violence? Body Cams Are No Solution*, TRUTH-OUT.ORG (Jan 6, 2015), <http://truthout.org/opinion/item/28357-police-violence-body-cams-are-no-solution> (accessed Jan 14, 2015).

⁷³ See generally Granholm, Jennifer Mulhern, *Video Surveillance on Public Streets: The Constitutionality of Invisible Citizen Searches*, 64 U. Det. L. Rev. 687, 694-95 (1987); Burrows, Quentin, *Scowl Because You’re on Candid Camera: Privacy and Video Surveillance*, 31 Val. U. L. Rev. 1079, 1090 (1997); see also *Katz v. United States*, 389 U.S. 347, 360, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring).

⁷⁴ See *Sawyer v. Nicholson*, No. 06-CV-5907, 2010 WL 4510954, at *5 (N.D. Ill. 2010) (discussing police misconduct resulting from using security cameras “to zoom in on female body parts”); *Carter-Galica v. Town of Warren*, 76 Mass. App. Ct. 1134, 926 N.E.2d 1201 (2010) (discussing suit against officer for disseminating crime scene photos electronically along with “derogatory racial language”).

⁷⁵ PERF Report, *supra* note 7, at 1.

⁷⁶ White, *supra* note 1, at 7.

⁷⁷ White, *supra* note 1, at 27.

BY COMBINING BODY CAMERAS WITH TAGGING TECHNOLOGIES, GOVERNMENT AGENCIES COULD TAKE VIDEOS OF AND CATALOG EVERY INDIVIDUAL ATTENDING A PROTEST, PARTICIPATING IN A RELIGIOUS CEREMONY, GOING TO A UNION MEETING, OR ENTERING A HEALTH CLINIC.

2. Amplified Surveillance Via “Tagging Technologies”

Use of body cameras by all officers in a city could potentially flood departments with videos, which could in turn be used in combination with “tagging” technologies⁷⁸—which associate images with specific individuals in a rapid, automated manner—to identify individuals en masse. Tagging technologies strongly implicate privacy because they have the potential to end anonymity, catalog every person at a sensitive location or event, and even facilitate pervasive location tracking of an individual over a prolonged period of time.⁷⁹ The FBI currently maintains a facial recognition database including millions of face prints that local law enforcement may use,⁸⁰ and large departments such as San Diego are already incorporating facial recognition into routine police activities.⁸¹

By combining body cameras with tagging technologies, government agencies could take videos of and catalog every individual attending a protest, participating in a religious ceremony, going to a union meeting, or entering a health clinic.⁸² An existing face print could also be sent to every officer’s body camera throughout a city to track an individ-

ual’s location in real time.^{83,84} Such a measure could occur on a mass scale, allowing police to place a digital “tail” on hundreds of individuals without any suspicion of wrongdoing. These privacy concerns are immense, yet vendors are highlighting the capacity to incorporate facial recognition into their body cameras,⁸⁵ and police in foreign countries have already begun the practice.⁸⁶ Recently, the CEO of one of the United States’ largest body camera producers announced intentions to incorporate facial recognition and real-time analytics into its cameras in coming years.⁸⁷ Accordingly, communities considering implementing body-worn camera programs should consider not only current facial recognition abilities, but potential future tracking technology that can be applied to previously stored video footage.

⁷⁸ For the purposes of this report “tagging” technology refers to technologies that can use an automated process to identify specific persons in a photo or video. Tagging technologies include but are not limited to facial recognition software, license plate readers, and gait recognition technology.

⁷⁹ See Joh, Elizabeth E., *Harvard Law & Policy Review*, “The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing” (Vol. 10, Feb 2016), at 15-16 (noting that “[n]ew technologies have altered surveillance discretion by lowering its costs and increasing the capabilities of the police to identify suspicious persons” and “soon it will be feasible and affordable for the government to record, store, and analyze nearly everything people do.”).

⁸⁰ Government Accountability Office, *Facial Recognition Technology: FBI Should Better Ensure Privacy and Accuracy* (May 2016), <http://www.gao.gov/assets/680/677098.pdf>.

⁸¹ Timothy Williams, *The New York Times*, “Facial Recognition Software Moves From Overseas Wars to Local Police” (August 12, 2015), http://www.nytimes.com/2015/08/13/us/facial-recognition-software-moves-fromoverseas-wars-to-local-police.html?_r=1.

⁸² The FBI currently maintains a database including hundreds of millions of photos for use in developing face prints and using facial recognition. This database is significantly supplemented by photos provided by state and local law enforcement, and could be augmented by footage from body cameras. See United States Government Accountability Office, *GAO-16-267, Face Recognition Technology: FBI Should Better Ensure Privacy and Accountability* (May 2016), <http://www.gao.gov/assets/680/677098.pdf>.

⁸³ This is especially concerning with regard to large cities that have dense police populations. Chicago and Washington DC contain on average over 50 officers per square mile, while New York City contains an average of 119 officers per square mile. Whet Moser, *City Size and Police Presence*, *Chicago Magazine* (Aug 30, 2012), <http://www.chicagogmag.com/Chicago-Magazine/The-312/August-2012/City-Size-and-Police-Presence/>.

⁸⁴ The FBI facial recognition database, which includes face prints that can identify tens of millions of people, can be used by state and local law enforcement for law enforcement purposes. See United States Government Accountability Office, *GAO-16-267, Face Recognition Technology: FBI Should Better Ensure Privacy and Accountability* (May 2016), <http://www.gao.gov/assets/680/677098.pdf>.

⁸⁵ See Martin Kaste, NPR, *Stealth Mode? Built-In Monitor? Not All Body Cameras Are Created Equal* (Nov 2, 2015), <http://www.npr.org/sections/alltechconsidered/2015/10/30/453210272/stealth-mode-built-in-monitor-not-all-bodycameras-are-created-equal> (“The Strategic Systems Alliance cameras can read license plates and faces”); see also Strategic Systems Alliance Online Exhibitor Directory, <https://apps.interpolworld.com/Directory/Main/Details.aspx?id=37a0d571-280d-4f17-ab01-582117ffffc6> (“The Strategic Systems Alliance delivers ... Streaming intelligent body worn camera systems capable of running its facial recognition and ANPR systems in real time while live streaming video over the built-in 4G connection to its Integrity video management system”) (emphasis added).

⁸⁶ Lily Hay Newman, *Slate*, *Dubai Police Will Wear Google Glass With Facial Recognition Software to ID Crooks* (Oct 3, 2014), http://www.slate.com/blogs/future_tense/2014/10/03/dubai_police_will_use_facial_recognition_and_google_glass_to_look_for_wanted.html; see also Matt Brian, *Engadget*, *UK Police Begin Trailing the World’s Fastest Face Recognition Tech* (Jul 16, 2014), <http://www.engadget.com/2014/07/16/uk-police-first-trialface-recognition-tech/>.

⁸⁷ Matt Stroud, *Motherboard*, *Taser Plans to Livestream Police Body Camera Footage to the Cloud by 2017* (Jul 18, 2016), <http://motherboard.vice.com/read/taser-axon-police-body-camera-livestream> (“Taser’s CEO, Rick Smith, told Businessweek that the company plans to begin live-streaming body camera footage to the cloud by 2017, and that facial recognition could arrive soon after that”).

3. Officer Privacy

Officer privacy must also be considered. Law enforcement personnel would find it problematic to have every minute of an officer's day recorded, especially as officers build professional relationships with one another and with the communities they police.⁸⁸ Further, the added requirement that cameras be turned on in certain situations creates additional liability if an incident occurs while the camera is turned off, raising questions about why the officer did not activate it.⁸⁹ Some police unions even maintain that the use of cameras represents a change in working conditions that must be negotiated during contract talks.⁹⁰ In addition, there may even be situations where only a partial recording of an encounter exists—whether accidentally or purposefully—which will raise additional questions about evidentiary weight and the officer's conduct. It is therefore critical to establish when cameras should be turned off and on.

However, many departments have reported that officers with histories of complaints are actively volunteering to wear cameras, apparently willing to accept the privacy tradeoffs for protection against frivolous complaints.⁹¹ Additionally, as body-worn cameras become more common and officers see how the videos are being used, concerns may decrease.

4. State Consent Laws

In addition to the broader privacy values at stake, some state laws also protect privacy in ways that could conflict with the use of body-worn cameras. Roughly eleven⁹² state statutes require the consent of both parties before the recording of a conversation.⁹³ These "two-party consent" statutes could prevent the use of police body-worn cameras, and restrict the use of audio-capable body-worn cameras in certain places. While some two-party consent laws recognize a law enforcement exception,⁹⁴ departments should carefully examine these laws given the novel issues body-worn cameras present.

⁸⁸ White, *supra* note 1, at 8.

⁸⁹ See Harris, David A., *Picture This: Body-Worn Video Devices (Head Cams) As Tools for Ensuring Fourth Amendment Compliance by Police*, 43 Tex. Tech L. Rev. 357, 363 (2010); Mitchell, Russ, *Police Head Cameras Capture Action, Evidence*. CBS News (Apr 4. 2010).

⁹⁰ White, *supra* note 1, at 8.

⁹¹ See PERF Report, *supra* note 7, at 7.

⁹² Illinois' two-party consent statute was held unconstitutional. See *People v. Melongo*, 2014 IL 114852 (2014). Accordingly, Illinois may, as of the time of this report, be considered to be a one-party consent state.

⁹³ Many of the states listed below maintain one-party consent for in-person communications, under which the use of body-worn cameras would fall. For example, Connecticut is considered a two-party consent state because the state's laws require consent from all parties before a telecommunication recording can be made. However, Connecticut requires only the consent of one person involved in a conversation for in-person communications. Furthermore, many two-party consent states hold exceptions to the rule if there is not a "reasonable expectation to privacy." With that in mind, the following are considered "two-party consent" states for having some version of a two-party consent statute: California (Cal. Penal Code § 632(a)), Connecticut (Conn. Gen. Stat. Ann. § 52-570d(a)), Florida (Fla. Stat. ch. 934.03), Illinois (720 Ill. Comp. Stat. 5/14-2(a)), Maryland (Md. Code Ann., Cts. & Jud. Proc. § 10-402), Massachusetts (Mass. Ann. Laws ch. 272, § 99), Michigan (Mich. Comp. Laws § 750.539c), Montana (Mont. Code Ann. § 45-8-213), Nevada (Nev. Rev. Stat. §§ 200.620, 200.650), New Hampshire (N.H. Rev. Stat. Ann. § 570-A:2), PA (18 Pa. Cons. Stat. Ann. § 5704), and WA (Wash. Rev. Code Ann. § 9.73.030). However, some states' laws make this distinction even less clear and several court decisions have further complicated the issue. See *U.S. v. Vespe*, 389 F. Supp. 1359 (D. Del. 1975) (while Delaware's wiretapping and surveillance laws do not require two-party consent, the state's privacy laws ostensibly do. Still, the court held that an individual can record his own conversation without the other party's consent); *Sullivan v. Gray*, 342 N.W. 2d 58, 60-61 (Mich. Ct. App. 1982) (defines eavesdropping as applying only to third parties to an in-person communication); Wash. Rev. Code § 9.73.030(3) ("[C]onsent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded."). Note that state laws are subject to change and local laws may further restrict recordings. Accordingly, law enforcement agencies are advised to seek advice of counsel regarding the laws applicable to them.

⁹⁴ See, e.g., Nev. Rev. Stat. Ann § 179.410 (makes an exception for law enforcement in the event of an emergency where obtaining a court order would be impractical); 720 Ill. Comp. Stat. 5/14-2(b)(1) (allows an exception to the two-party consent law for law enforcement).

C. PROCEDURAL SAFEGUARDS AND DUE PROCESS

Police body cameras will produce a substantial amount of evidence, both in the form of footage from instances of potential misconduct, and also more generally by creating a video record of the vast majority of law enforcement actions. This can aid accountability through proper resolution of complaints, and police investigatory efforts as a whole. However, given the magnitude of this new form of evidence, and the degree to which individuals frequently defer to video, it is critical to consider the importance of procedural safeguards and due process issues.

1. Proper Treatment, Chain of Custody, Access to Evidence

Ensuring the proper chain of custody and treatment of evidence—in terms of preventing both improper review of footage and any form of tampering—is essential. In order for footage to have evidentiary value and thereby provide accountability as well as aid investigations, confidence must exist in the authenticity of footage and in the propriety of any law enforcement use of footage. This can only occur with strict controls on the treatment of stored video. Limits on access, logs of video review, and strict prohibitions on any editing or unscheduled deletion will all be necessary. Independent audits will be required to ensure compliance with such rules. Departments considering implementation of body cameras should consider how such requirements would affect existing department practices, as well as the potential need for additional staff. Departments should also be careful that their decisions on whether to store footage locally or with a third-party vendor (and, if the latter, in choosing a vendor) ensure that protections will be in place to ensure proper treatment of evidence. Finally, storing and archiving of footage must account for interoperability and the capability to convert to modern viewing platforms at a later time. Departments and communities should also account for financial and training costs associated with such conversions and upgrades. Departments should also consider the importance of discovery and defendants' access to evidence in crafting body camera policies. In federal cases, the Jencks Act⁹⁵ requires turning over to the defense all statements made or otherwise adopted by the witnesses. Court decisions interpreting the Jencks Act prohibit the destruction of such statements, including recorded statements, and even if such destruction is done as per an established process.⁹⁶ And more broadly, *Brady v. Maryland*⁹⁷ and *Giglio v. United States*⁹⁸ require turning over possibly exculpatory material and prohibit the destruction of such material.⁹⁹ Courts have held that where the failure to disclose a recording was inadvertent, it would only justify a new trial "if there is a significant chance that this added item, developed by skilled counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction."¹⁰⁰ If the recording has been destroyed, a prosecutor will be limited in his or her ability to argue that it would not constitute exculpatory evidence.

2. Undue Reliance on Video Footage by Triers-of-Fact

Courts increasingly embrace admission of video evidence, even to the exclusion of other testimony,¹⁰¹ based on the presumed objective nature of video. However, there is a large body of social science research that indicates

⁹⁵ 18 U.S.C. § 3500.

⁹⁶ See *United States v. Carrasco*, 537 F.2d 372, 377 (9th Cir. 1976) (following established procedures to destroy old notes violated Jencks Act); *Slye v. United States*, 602 A.2d 135, 138 (D.C. 1992) (failure to preserve 911 recording violated Jencks Act).

⁹⁷ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁹⁸ *Giglio v. United States*, 405 U.S. 150 (1972).

⁹⁹ See *Carrasco*, 537 F.2d at 377; *Slye*, 602 A.2d at 138; see also U.S. Atty. Man. 9-5.001(C) (requiring U.S. attorneys to disclose information beyond that deemed "material" to guilt or innocence).

¹⁰⁰ *United States v. Zhao Wu Chen*, 322 F. App'x 43, 48 (2d Cir. 2009); see *United States v. Bailey*, 123 F.3d 1381, 1396 (11th Cir. 1997) (inadvertent destruction of a three-year-old taped recording and non-deceitful denial of its existence not grounds for perjury).

¹⁰¹ See Robinson, Dustin F., *Bad Footage: Surveillance Laws, Police Misconduct, and the Internet*, 100 Geo. L.J. 1399, 1415 (2012); Silbey, Jessica, *Evidence Verité and the Law of Film*, 31 Cardozo L. Rev. 1257 (2010) (noting that videos are often considered the "best evidence"); see also *Scott v. Harris*, 550 U.S. 372, 384, 127 S. Ct. 1769, 1778, 167 L. Ed. 2d 686 (2007) (relying primarily on video evidence to determine that no reasonable juror could find that police use of force was improper).

lay people give undue weight to video evidence and do not fully appreciate what is not shown in the video. This poses multiple problems.

Body-worn camera evidence, like other evidence, must be considered in context by a jury, who will decide what weight to give it, if any, based on jury instructions and arguments by attorneys.¹⁰² Although video is often more accurate than eyewitness accounts presented from memory, individuals—including jurors—may be overly inclined to trust a video, despite the fact that camera footage may not capture an entire scene or encounter.¹⁰³ Additionally, perspective biases may affect how individuals interpret the video recordings. In one study, participants who watched a confession with the camera focused on the suspect were more likely to find the suspect guilty than those who watched the version of the same confession in which the camera focused on the interrogator.¹⁰⁴ In addition, officers with body cameras may be able to influence viewers' perceptions of events by surreptitiously keeping incriminating evidence out of the camera's view.¹⁰⁵

This is compounded because while most people understand that a given camera angle cannot pick up everything, jurors may not appreciate that the perspective from which a video is shot results in conveying a bias. Even if jurors are informed of the effects of camera perspective bias, the effects are not diminished.¹⁰⁶

Several judges have noted that video may be incomplete or be open to interpretation.¹⁰⁷ But the issue is not whether some content may be lost, but what content is lost (or missed). Multiple studies have determined that a video shot from the perspective of an officer will convey a bias favoring the officer, whereas one shot from the perspective of a community member will convey the opposite.¹⁰⁸ Accordingly, jurors confronted with video taken by an officer, coupled only with testimony from a suspect, will be more inclined to rely on the video (as will prosecutors and police internal affairs investigators). Conversely, as filming by suspects and bystanders increases, police video will assist in preventing camera perspective bias from adversely impacting officers.

SEVERAL JUDGES HAVE NOTED THAT VIDEO FROM BODY-WORN CAMERAS MAY BE INCOMPLETE OR BE OPEN TO INTERPRETATION.

¹⁰² See *Perry v. New Hampshire*, 132 S. Ct. 716, 728-29, 181 L. Ed. 2d 694 (2012); see also *United States v. Santos*, 403 F.3d 1120, 1128 (10th Cir. 2005) ("The increasing availability of videotapes of traffic stops due to cameras mounted on patrol cars does not deprive district courts of their expertise as finders of fact, or alter our precedent to the effect that appellate courts owe deference to the factual findings of district courts.").

¹⁰³ See Schwartz, Martin A. et. al., *Analysis of Videotape Evidence in Police Misconduct Cases*, 25 *Touro L. Rev.* 857, 858 (2009); see also *Perry v. New Hampshire*, 132 S. Ct. 716, 728, 181 L. Ed. 2d 694 (2012) (recognizing that "the jury, not the judge, traditionally determines the reliability of evidence"). See also Fan, Mary D., *Justice Visualized: Courts and the Body Camera Revolution* (May 2, 2016). *UC Davis Law Review*, Vol. 50, Forthcoming; University of Washington School of Law Research Paper No. 2016-11, <http://ssrn.com/abstract=2773886> ("While the camera seems to be an unbiased eye, camera perspective can powerfully shape viewer judgments without the viewer realizing this effect Body-worn cameras may capture only part of what officers and suspects see – or more than the parties can perceive, especially in stressful law enforcement situations").

¹⁰⁴ Lassiter, Daniel G. et al., *Legal and Criminological Psychology*, 157 (2009).

¹⁰⁵ For instance, bystander video of the April 2015 shooting and death of Walter Scott in South Carolina showed the officer appeared to deliberately place his TASER electroshock device next to the body of the victim. It is unclear that, without outside footage, body camera footage would have included that key detail. <http://www.washingtonpost.com/news/morning-mix/wp/2015/04/08/how-a-cell-phone-video-led-to-murder-charges-against-a-cop-in-north-charleston-s-c/>

¹⁰⁶ See Lassiter, G. Daniel et al, *Evaluating Videotaped Confessions: Expertise Provides No Defense Against the Camera-Perspective Effect*, 18 *Psychol. Sci.* 224, 225 (2007); Benforado, Adam, *Frames of Injustice: The Bias We Overlook*, 85 *Ind. L.J.* 1333, 1351 (2010).

¹⁰⁷ *Ford v. City of Yakima*, 706 F.3d 1188, 1201-02 (9th Cir. 2013) (Callahan, J., dissenting); see *Waterman v. Batton*, 393 F.3d 471, 475 n.5 (4th Cir. 2005); *Holland v. City of San Francisco*, 2013 WL 968295, at *4 (N.D. Cal. 2013).

¹⁰⁸ See Benforado, Adam, *Frames of Injustice: The Bias We Overlook*, 85 *Ind. L.J.* 1333, 1346 (2010) (discussing how "camera perspective bias" can affect viewers' perceptions of the conduct being recorded).

Officers of the courts need to understand the impact of camera perspective bias and consider what additional steps should be taken when admitting body-worn camera video footage, such as providing cautionary jury instructions regarding perspective bias. Similarly, police departments need to consider these effects when evaluating body-worn video (and video taken by targets and bystanders) during police misconduct investigations.

3. Undue Reliance on Video Footage by Police

Use of body cameras also risks over-reliance on video by officers. Some officers have reported that rather than taking notes during encounters, they review the videos of their interviews and create their notes and reports based on the video.¹⁰⁹ Thus, perceptions an officer may have that are not detected in the video may never be recorded. Further, some officers have reported that they feel their interviewing and note taking skills have declined due to video reliance.¹¹⁰ Additionally, pre-report review could encourage overly aggressive action absent proper cause, given the ability to find justification in footage at a later time.¹¹¹ Further, access to video prior to filing an initial report could result in officers having unnaturally detailed depictions of events compared to other witnesses, creating bias in favor of law enforcement accounts when weighing testimony at trial.¹¹²

D. GOVERNMENT TRANSPARENCY AND PUBLIC TRUST

Evidence and video footage gathered by police officers may become public through the criminal justice process or public records requests. Many states have broad public record laws that could include body camera footage.¹¹³ The importance of accountability and transparency in adopting body camera programs may necessitate expanding access to footage even further. However, while allowing public access could enhance government accountability and transparency, it could also undermine the privacy rights of individuals, necessitating a careful balance of interests. Moreover, there is an expectation that video footage will be destroyed once its purpose has been served,¹¹⁴ yet proper maintenance of video prior to such regulated deletion is essential.

The nature of citizen support for body-worn cameras remains untested, as do its effects on the perceived legitimacy of police actions.¹¹⁵ However, transparency is considered an important benefit of body-worn cameras. It can demonstrate to the community that officers act in a fair and just manner. In her ruling on New York's stop-and-frisk program, Judge Shira A. Scheindlin wrote that "recordings should... alleviate some of the mistrust that has developed between the police and the black and Hispanic communities, based on the belief that stops and frisks are overwhelmingly and unjustifiably directed at members of these communities."¹¹⁶ However, this claim has not been sufficiently tested. There have been virtually no studies on citizens' views of this new technology.¹¹⁷

¹⁰⁹ Westphal, *infra* note 135.

¹¹⁰ *Id.*

¹¹¹ See Jake Laperruque, *Just Security, The Government Should Stop Rewarding Bad Policies for Police Body Cameras* (Nov 24, 2015), <https://www.justsecurity.org/27896/government-stop-rewarding-bad-policies-police-bodycameras/> ("Body cameras could encourage officers to search footage for justifications after the incident, opening the door to a "search first, find reasonable suspicion later" approach").

¹¹² See Fan, Mary D., *Justice Visualized: Courts and the Body Camera Revolution* (May 2, 2016). UC Davis Law Review, Vol. 50, Forthcoming; University of Washington School of Law Research Paper No. 2016-11, <http://ssrn.com/abstract=2773886> ("The availability of video will also influence officer report-writing and testimony.... If video is elevated as the objective truth – and officers are regularly encouraged or even required to view the video before writing reports – then there is intense pressure to conform memory and accounts to the video even when human perceptions may have been different than what was recorded").

¹¹³ See Sophie Winkler and Jacqueline Byers, *National Association of Counties, Open Records Laws: A State by State Report* (Dec 2010), <http://www.naco.org/sites/default/files/documents/Open%20Records%20Laws%20A%20State%20by%20State%20Report.pdf>.

¹¹⁴ See Blitz, Marc J., *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to A World That Tracks Image and Identity*, 82 Tex. L. Rev. 1349, 1411 (2004); cf. GAO, *Report to Congressional Investigators: INFORMATION SHARING: Additional Actions Could Help Ensure That Efforts to Share Terrorism-Related Suspicious Activity Reports Are Effective* (Mar 2012), p34 n. 32 <http://www.gao.gov/assets/660/652995.pdf> (accessed Jul 26, 2015) (noting that FBI officials have stated that "ISE-SARs that are removed from eGuardian are still retained in Guardian and other FBI systems in accordance with their retention schedules").

¹¹⁵ White, *supra* note 1, at 20.

¹¹⁶ *Floyd v. City of New York*, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013).

¹¹⁷ White, *supra* note 1, at 6.

Transparency requires that proper procedures be in place to capture and upload/store the videos to ensure that the videos are not deleted, edited, or otherwise tampered with prior to or after uploading. Several vendors offer automatic upload and “secure” cloud storage services for police departments.¹¹⁸ To promote transparency (and to avoid spoliation concerns, should the evidence be needed at an eventual trial), whatever solution is chosen must provide the public with assurance that the video footage is original and has not been tampered with by the agency or by others.

Making video publicly available also enhances transparency. While individuals filmed have the strongest stake in seeing the content of footage, there is also a general public interest in using footage to evaluate the legitimacy of police actions.^{119,120} Limiting access beyond individuals filmed could stop affected persons from drawing desired public attention to an encounter. Further public access to incidents can promote positive discourse and debate on community-police relations, and desired policies on issues ranging from use of officer discretion to use of force. Finally, if video of improper police action is withheld from the public, it has the potential to be seen as sweeping misconduct under the rug, and shatter trust in law enforcement.¹²¹ But public access must be weighed against the privacy of those recorded, and the costs and challenges to effectively redacting private information in footage. Production fees employed for public records requests for video footage may serve as an effective means to harmonize public interest in access to footage with logistical costs and obstacles.¹²²

IF VIDEO OF IMPROPER POLICE ACTION IS WITHHELD FROM THE PUBLIC, IT HAS THE POTENTIAL TO BE SEEN AS SWEEPING MISCONDUCT UNDER THE RUG, AND SHATTER TRUST IN LAW ENFORCEMENT.

However, despite these complex concerns, states are rapidly moving to enact restrictions on public access. Twelve states have passed laws and an additional twelve states are considering legislation that restricts public access to police body camera footage.¹²³

¹¹⁸ Martin Kaste (NPR), “As Police Body Cameras Increase, What About All That Video?,” *All Tech Considered*, May 29, 2015, <http://www.npr.org/sections/alltechconsidered/2015/05/29/410572605/as-police-body-camerasincrease-what-about-all-that-video> (accessed Jul 26, 2015). *But see also* Matt Stroud, “Taser Is Charging Stunning Fees to Handle Police Video,” *BloomBerg*, Jun 16, 2015, <http://www.bloomberg.com/news/articles/2015-06-16/taser-is-charging-stunning-fees-to-handle-police-video> (noting that fees for such systems are higher than traditional cloud storage systems, such as Amazon’s); Christian de Looper, “Cloud Hacking isn’t as Hard as Most Would Think,” *Tech Times*, Sep 3, 2014, <http://www.techtimes.com/articles/14800/20140903/cloud-hacking-isnthard-think.htm> (discussing generally security risks with common cloud storage).

¹¹⁹ See Fan, Mary D., *Justice Visualized: Courts and the Body Camera Revolution* (May 2, 2016). UC Davis Law Review, Vol. 50, Forthcoming; University of Washington School of Law Research Paper No. 2016-11, <http://ssrn.com/abstract=2773886> (“Images can jolt people with power into concern. It was images of crowds grinning at lynchings and mob domination of justice that spurred judges sitting far removed, in the serene space of courts, into action to generate the body of constitutional criminal procedure regulating the police. And it was images of mass protests, of the slain, of the events preceding death, and of children offering hugs and seeking a safer future that spurred the body camera revolution”).

¹²⁰ Additionally, the concern must be taken into account that if access to video is limited to only individuals recorded rather than the public, departments could be incentivized to reach civil settlements with individuals requiring nondisclosure of controversial videos. This would shift public funds towards limiting transparency and public evaluation of law enforcement.

¹²¹ See, e.g., Don Babwin, AP, *Skeptics doubt new Chicago video policy will rebuild trust* (Feb 18, 2016), <http://bigstory.ap.org/article/086aa8ab42524dbab20fb1fd0cdf250/skeptics-doubt-new-chicago-video-policy-willrebuild-trust>.

¹²² For example, Washington state recently passed a law refining its public records request laws to account for body camera footage requests. Under the new system, individuals involved in incidents may request footage absent any fees, while other parties may request footage but must pay redaction and production costs. This policy gives unrestricted access for affected individuals to use body camera footage, while also permitting public access by media and watchdog groups, by using production fees to balance transparency needs with logistical and cost issues raised by large-scale requests. See H.B. 2362, Washington, 2016.

¹²³ See the Urban Institute, “Police-Worn Body Cameras: Where Your State Stands,” <http://apps.urban.org/features/body-camera/>.

To further promote transparency, community members should not be restricted from recording the police; rather, they should be encouraged to do so. Like officer body camera video, which provides a video perspective as generally seen by the officer, community video provides a perspective as seen by the recording citizen (who may be the subject or a bystander). Community video has confirmed and contradicted police accounts. For example, the shooting death of Walter Scott in South Carolina was captured by a bystander who released the video after recognizing that it differed from the official police account.¹²⁴ There is no federal law against recording images of the police in public places, although, as discussed supra, state laws may vary based on place (e.g., in public places outside or private inside areas) and type (i.e., audio-video or video only).¹²⁵ However, multiple U.S. Circuit courts have upheld a constitutional right to record police.¹²⁶ Law enforcement agencies should encourage citizens to record interactions with officers and report the video immediately. The American Civil Liberties Union (“ACLU”) provides a smartphone application to record and upload (to the user’s local ACLU chapter) such videos, minimizing the chances for edits and deletions prior to uploading due to confiscations of phones by police.¹²⁷

E. EQUAL PROTECTION AND ANTI-DISCRIMINATION

Amid widespread reports of higher rates of excessive use of force and over-policing in communities of color, advocates of police body-worn cameras stress the benefit of a more complete record of police interaction with the public, both to deter allegations of abuse and to improve police relations.¹²⁸ For example, a New York City judge ordered the NYC police department to implement a body-worn camera program, due in part to allegations of racial discrimination.¹²⁹ However, this benefit must be balanced against the risk that such video may be used to bolster or encourage discrimination by enhancing surveillance of minority communities. Potential use of body cameras in combination with tagging technologies augments this concern; absent reasonable limits, a department could use body camera footage to register every individual seen entering a house of worship or participating in a civil rights protest. Additionally, the importance of deleting captured video to protect privacy must be weighed against the videos’ potential value not only for use in individual complaints of misconduct, but also in civil rights lawsuits alleging unconstitutional patterns of conduct and practices by law enforcement. Finally, body cameras might lead to stricter compliance with “broken windows” law enforcement policies that can disproportionately affect minority communities.¹³⁰

F. OTHER POLICY CONSIDERATIONS

Body cameras will have a broad impact on police activities. While the previously described values should be of paramount importance to departments and legislatures in deliberating on policies, there are also issues not tied to these values but of significant public policy consideration. Given the potential effects described below, their consideration in the development of proper guidelines would be highly beneficial.

¹²⁴ See Electronic Frontier Foundation (Sophia Cope), “Police Must Respect the Right of Citizens to Record Them,” Apr 16, 2015, <https://www.eff.org/deeplinks/2015/04/police-must-respect-right-citizens-record-them>.

¹²⁵ See ACLU-PA, “Know Your Rights When Taking Photos and Making Video and Audio Recordings,” <http://www.aclupa.org/issues/policepractices/your-right-record-and-observe-police/taking-photos-video-and-audio/>.

¹²⁶ *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78(1st Cir. 2011).

¹²⁷ Rose Hackman, “New app aims to help citizens record police brutality using cellphones,” *The Guardian*, May 7, 2015 <http://www.theguardian.com/us-news/2015/may/07/new-app-citizens-record-police-brutality-cellphones> (accessed Jul 26, 2015).

¹²⁸ See Lawyers’ Committee for Civil Rights Press Release: “A Unified Statement of Action to Promote Reform and Stop Police Abuse,” Aug 18, 2014 (joint statement by Lawyers’ Committee for Civil Rights Under Law, A. Phillip Randolph Institute, Advancement Project, ACLU, Hip Hop Caucus, Leadership Conference on Civil and Human Rights, National Action Network, NAACP, NAACP Legal Defense Fund, National Coalition on Black Civic Participation, Black Women’s Roundtable, National Bar Association, National Urban League, and Rainbow Push Coalition), http://www.lawyerscommittee.org/newsroom/press_releases?id=0494 (accessed Jan 16, 2015).

¹²⁹ See Long, Colleen, *NYPD Ordered To Start Using Officer-Worn Cameras*, Associated Press / PoliceOne, August 13, 2013 (<http://www.police-one.com/police-products/body-cameras/articles/6386513-NYPD-ordered-to-start-using-officer-worn-cameras/>); *Floyd v. City of New York*, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013), appeal dismissed (2013), appeal withdrawn (2013).

¹³⁰ See *infra*, Section II.f.3.

1. Increased Opportunities for Police Training

Many agencies use cameras to identify and correct problems with police training, often using cameras as a tool to evaluate new officers and identify where training is needed.¹³¹ Cameras can also be useful in evaluating and taking action against officers with a history of complaints.¹³² For example, the Miami Police Department has been using body-worn cameras as part of its training academy since 2012. Miami Police Major Ian Moffitt stated that “we can record a situation, a scenario in training, and then go back and look at it and show the student, the recruit, the officer what they did good, what they did bad, and [what they can] improve on.”¹³³ Cameras can help departments under consent decrees with the Department of Justice and other agencies demonstrate compliance.¹³⁴ But the effectiveness of cameras on police training remains mostly untested.¹³⁵

Similarly, officers are professionals and may independently wish to improve their interactions with individuals. A 2002 study commissioned by the International Association of Chiefs of Police found that an overwhelming majority of officers reviewed dashboard camera footage to self-critique their interactions.¹³⁶ Departments may consider providing officers with view-only access to their camera footage upon request so that officers can review their own conduct and make corrections, even in absence of any formal complaints or investigations. However, such access could be viewed as inappropriate if a complaint or investigation commences and an officer has the opportunity to tailor his or her statement or formal report to what the video establishes.

2. Logistical and resource requirements

Officers who wear cameras need to be trained in their use, including when to record and proper maintenance and access. This includes not only how to activate and deactivate recording, but how to upload videos and how to determine when the camera battery is low or its storage is “full.” Departments should develop clear administrative policies and have resources available to assist officers who are less familiar with the camera technology.¹³⁷ And, of course, cameras require funding: Popular current camera system prices range from \$800 to \$1,000.¹³⁸ Relevant footage must also be stored, and held within databases with sufficiently sophisticated security to prevent improper external access, and monitor against internal misuse or tampering. Finally, discovery and public record production costs, which may involve reviewing and redacting data, could raise the costs of body camera programs significantly,¹³⁹ although this could be offset by policies similar to the production fees included in many states’ public record laws.¹⁴⁰

DEPARTMENTS SHOULD DEVELOP CLEAR ADMINISTRATIVE POLICIES AND HAVE RESOURCES AVAILABLE TO ASSIST OFFICERS WHO ARE LESS FAMILIAR WITH THE CAMERA TECHNOLOGY.

¹³¹ PERF Report, *supra* note 7, at 7.

¹³² PERF Report, *supra* note 7, at 8; White at 7; see Presidential Interim Report at 60.

¹³³ White, *supra* note 1, at 25.

¹³⁴ PERF Report, *supra* note 7, at 8.

¹³⁵ White, *supra* note 1, at 7.

¹³⁶ Westphal, Lonnie J., “The in-car camera: Value and Impact”, *Police Chief* (Nov 10, 2004), <http://www.policeone.com/police-products/vehicle-equipment/in-car-video/articles/93475/> (accessed Mar 23, 2015).

¹³⁷ Presidential Interim Report at 33; see generally *Hancock v. City of Moultrie, Ga.*, No. 7:13-CV-21 HL, 2014 WL3810642, at *2 (M.D. Ga. 2014) (officer suspended for policy violation of having a body-worn camera malfunction “because its memory card was full”).

¹³⁸ White, *supra* note 1, at 9.

¹³⁹ See, e.g., Mayor Rawlings-Blake’s Working Group, *The Use and Implementation of Body-Worn Cameras* (Feb 18, 2015) available at: <http://mayor.baltimorecity.gov/sites/default/files/20150218BWCWorkingGroupRecommendations.pdf> (accessed Jul 16, 2015).

¹⁴⁰ See Sophie Winkler and Jacqueline Byers, National Association of Counties, *Open Records Laws: A State by State Report* (Dec 2010), <http://www.naco.org/sites/default/files/documents/Open%20Records%20Laws%20A%20State%20by%20State%20Report.pdf>.

3. Loss of Discretion Not to Take Action

Related to the issue of failure to take action in response to recorded police misconduct, discussed in Section II.a.2, *supra*, there is a concern that officers being recorded will lose their discretion in the field not to take action when, in their best judgment, no action should be taken. As discussed in Section II.a.1, *supra*, officers with body cameras may be more likely to follow written policies as they know deviations from them are more likely to be noticed. While, as discussed in those sections, this is often a positive, there are times in which it may benefit the community for an officer to use his discretion not to enforce a law. For example, officers whose department policies instruct them to make arrests for minor offenses may wish to instead divert individuals away from the criminal justice system by issuing citations or declining to make arrests in order to build community relations.¹⁴¹

Many department policies formally provide officers with discretion not to enforce minor offenses and should not be affected by this issue, as choosing not to enforce minor infractions would not be a violation of department policy. However, departments that employ strict standards might see an uptick in arrests resulting from implementation of body cameras, with potential harms to allocation of resources and officer-community relations. Of special concern, minority communities subject to a disproportionately large police presence could be disproportionately affected by the increase in arrests that could stem from introduction of body cameras into a department with a low-discretion policy. Departments with strict rules for arrests may wish to consider reviewing or revising this policy prior to the adoption of body cameras in light of these risks.

¹⁴¹ See generally Illya Lichtenberg, "Police Discretion and Traffic Enforcement: A Government of Men?," *Cleveland State Law Review* at 14 (2003), <http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1349&context=clevstlrev> (noting that "[m]any persons who are stopped by police for a traffic violation do not even receive a ticket because the police choose to deal with the offense informally or ignore it altogether.").

III. IMPLEMENTATION QUESTIONS

If body-worn camera programs are implemented, agencies must craft policies that capture the benefits of the technology without unduly exposing the agency and the public to the potential harms. Lawmakers and agencies must decide numerous important questions, including when encounters should be recorded, whether or how programs should be implemented in “two-party consent” states, when the public should be allowed access to the footage, how long footage will be stored, who will have access to it and why, what role written policies will play, and who will be responsible for ensuring compliance with them. Additionally, it will be critical to draw the line between what should be mandated at the federal and state levels and to what extent police departments should be given the freedom to develop their own procedures.

A. WHEN SHOULD ENCOUNTERS BE RECORDED?

Possibilities range from requiring officers to record their entire shifts, all interactions with the public, or only certain interactions relevant to law enforcement activities and investigations. Any decision on implementation should be clearly defined in a written policy and with opportunity for stakeholder and community feedback during implementation. The Police Executive Research Forum (“PERF”) surveyed police departments across the country on the use of body-worn cameras. Most of the departments PERF surveyed that use the technology require officers to activate cameras when responding to law enforcement-related calls for service or interactions: calls for service, traffic stops, arrests, searches, interrogations, and pursuits.¹⁴²

OFFICERS MAY NEED TO HAVE SOME DISCRETION TO NOT RECORD CERTAIN SENSITIVE SITUATIONS.

Officers may need to have some discretion to not record certain sensitive situations. Both PERF and the ACLU advocate this approach to protect community privacy rights, such as when talking with crime victims, when a witness is concerned with retaliation if the witness is known to be cooperating with police, and during everyday interactions with community members.^{143,144} If officers have discretion on when to record interviews with witnesses, it will give witnesses the incentive to come forward. Many departments, including in Rialto, California; Mesa, Arizona; and Fort Collins, Colorado give officers discretion whether to record while investigating sensitive crimes such as rape and abuse.¹⁴⁵ Many departments will also want exceptions for when activation is unsafe or impractical.¹⁴⁶ However, officers may sometimes view contacts as “ordinary” or not “law enforcement-related,” while the individuals the officers are interacting with view them differently. Law enforcement agencies may wish to limit officers’ discretion when a situation could reasonably be viewed as a law enforcement-related interaction.

When officers are granted this exception and given discretion over when and whether to use their cameras, camera use has been observed to drop precipitously. One study has shown that recording dropped by as much as 42 percent when officers were granted discretion to deactivate their cameras when they deemed

¹⁴² PERF Report, *supra* note 7, at 13.

¹⁴³ *Id.*, at 12.

¹⁴⁴ Jay Stanley, The American Civil Liberties Union, *Police Body-Mounted Cameras: With Right Policies in Place, a Win For All* (March, 2015), https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf.

¹⁴⁵ PERF Report, *supra* note 1, at 13.

¹⁴⁶ *Id.*, at 40.

doing so appropriate.¹⁴⁷ While the circumstances of a search should be considered when determining whether to record, there is no rule prohibiting videotaping a search pursuant to a valid search warrant.¹⁴⁸

Another highly sensitive situation involves recording First Amendment-protected activities such as protests, public demonstrations, and religious ceremonies. Use of police body cameras in these scenarios raises questions over how to most effectively protect civil liberties.¹⁴⁹ On the one hand, protests are among the most important situations in which to prevent misconduct, a chief goal of body cameras, given the potential to cause not just harm but an irreparable prior restraint. On the other hand, even if effective policies would prevent improper use of footage of protesters, mere fear of the cataloging of participants at a demonstration could chill participation and undermine First Amendment rights. Police departments and lawmakers should work closely with community groups and advocates in a multi-stakeholder process to determine the most effective policies for protecting and encouraging First Amendment activities.

Policymakers and agency leaders will also need to decide what consequences apply if alleged misconduct or use of force occurs when a camera should have been recording but the footage is missing. Clearly written policies and statutory guidelines will need to define what penalties, including evidentiary presumptions or inadmissibility, should be in place for such cases. In some cases, courts will have the power to make such decisions themselves.¹⁵⁰

B. WHAT ACCESS TO FOOTAGE SHOULD BE PERMITTED?

Records made and created during an investigation may become available to others during the course of the criminal justice process or through public records act requests. Crime victims and other individuals often will not want their images broadcast in the media. Individuals may also be sensitive to recording when officers are inside their homes.¹⁵¹

Agencies must also consider how the release of videos interacts with state open records laws. Many law enforcement agencies take the position that so long as the officer has a right to be in a home, the encounter may be recorded.¹⁵² But in many states, unless a record is part of an ongoing investigation, it will be subject to open records requests, subjecting many private recordings to public inspection.¹⁵³ Law enforcement agencies should consider that body camera video may need to be released to preserve both the accountability and transparency goals of body-worn cameras. Privacy needs may require redaction of private information in this footage, which could create significant resource costs.

¹⁴⁷ White, *supra* note 1, at 9. Although the rate of recording drops, there isn't an indication that officers' failure to record is inappropriate or illegitimate. Indeed, there appears to be no data suggesting that discretion is normally exercised with ill-intent, simply because we do not know what would have appeared on the video otherwise.

¹⁴⁸ See, e.g., *Marks v. Clarke*, 102 F.3d 1012, 1033 n.37 (9th Cir. 1996), *as amended on denial of reh'g* (Feb 26, 1997); *United States v. Willis*, 759 F.2d 1486, 1501 (11th Cir. 1985); *United States v. Guzman*, 75 F.3d 1090, 1092 (6th Cir. 1996).

¹⁴⁹ See Emily Hong and Jake Laperruque, The Open Technology Institute, *Hands Up, Don't Film: Body Worn Cameras and Protests* (Oct 9, 2015), <https://www.newamerica.org/oti/hands-up-dont-film-body-worn-cameras-andprotests/>.

¹⁵⁰ Courts have previously required a cautionary jury instruction concerning the use of a custodial interrogation as evidence if police did not record the interrogation. Similar qualifying instructions could be given based on circumstances surrounding failure to use body cameras. See *Commonwealth v. DiGiambattista*, 442 Mass 423 (SJC Mass. 2004).

¹⁵¹ PERF Report, *supra* note 7, at 15, 18.

¹⁵² *Id.*, at 15.

¹⁵³ *Id.*

Some agencies are already exploring innovative methods of less costly data retention, redaction, and fulfillment of public access requests to assist with this problem. For example, the Seattle Police Department held a community hackathon in which technology companies, professionals, and other individuals were invited to present ideas on how to redact video footage captured by body-worn cameras and police dash cams.¹⁵⁴ Several ideas were introduced at the hackathon and have been explored by other agencies, such as the use of open-source tools for automated facial redaction.¹⁵⁵

Moreover, video footage will necessarily be used in investigations and criminal proceedings. Body-worn camera footage will be treated similarly to other analogous types of evidence, such as photographs. The public availability of evidence in criminal proceedings changes depending upon the stage of the proceeding. If evidence is collected during an investigation but no charges are filed, it may eventually be subject to disclosure through open records laws.¹⁵⁶ If evidence is collected during an investigation and charges are filed, the following guidelines generally apply: (a) during the discovery phase, evidence is available only to the government and the defendant. Constitutional and statutory standards govern such availability; and¹⁵⁷ (b) if evidence is used during court proceedings, the First and Sixth amendments, as well as the common law, may provide the public, including criminal defendants, potential plaintiffs, and the media, a qualified right to access these records.¹⁵⁸

Law enforcement must also remain mindful of the consequences of recording inside private homes. In *Wilson v. Layne*,¹⁵⁹ the Supreme Court held that inviting media who filmed the inside of a house while a warrant was executed, violated the Fourth Amendment. While the Court's opinion expressly distinguished filming by the police themselves for quality control or to preserve evidence,¹⁶⁰ subsequent circuit decisions have clarified that where a warrant does not authorize filming in a home, such filming may be a Fourth Amendment violation.¹⁶¹ Further, it is conceivable that the release of the in-home video images would violate the Court's decision in *Wilson*. There have been few cases evaluating officer filming in homes post-*Wilson*. However, circuit courts have held (or assumed without holding) that video recording by police during execution of a valid search warrant is permissible,¹⁶² and that video recording by an agent of the police who is authorized to be in the home is treated no differently than audio recording, and is not a per se Fourth Amendment violation.¹⁶³

¹⁵⁴ Schrier, Bill, *Inside the Seattle Police hackathon: A substantial first step*, Geekwire (Dec 20, 2014), <http://www.geekwire.com/2014/seattle-police-hackathon-substantial-first-step/> (accessed Jul 16, 2015).

¹⁵⁵ *Id.*; see also Adams, Eric A., *Gun Safety in New York: Deploying Common Sense Technology*, N.Y. Times (2015), <http://graphics8.nytimes.com/packages/pdf/opinion/editorial/Gun-Safety-Report.pdf> (accessed Jul 17, 2015) (makes recommendations to reduce the amount of footage stored by using micro-stamping technology which automates the videoing process, activating the camera when an officer's gun is drawn).

¹⁵⁶ See Stanley, Jay, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All*, ACLU (Oct 2013) ("ACLU Report"), 5; PERF Report, *supra* note 7, at 17.

¹⁵⁷ See, e.g., Fed. R. Crim. P. 16 (federal criminal discovery standards); U.S.A.M. 9-5.001 (standards of conduct for U.S. Attorneys).

¹⁵⁸ See *Press-Enter. Co. v. Superior Court of California for Riverside Cnty.*, 478 U.S. 1, 11, 106 S. Ct. 2735, 2742, 92 L. Ed. 2d 1 (1986) (a qualified right of public access exists for evidence suppression hearings); cf. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 610, 98 S. Ct. 1306, 1318, 55 L. Ed. 2d 570 (1978) (no absolute right under First Amendment, Sixth Amendment, or common law, for press to copy recordings used as evidence in trial); see generally Reagan, Robert T. *Sealing Court Records and Proceedings: A Pocket Guide* (Washington, DC: Federal Judicial Center, 2010), 2-5.

¹⁵⁹ 526 U.S. 603 (1999).

¹⁶⁰ *Id.*, at 613.

¹⁶¹ See *Bray v. Planned Parenthood Columbia-Willamette Inc.*, 746 F.3d 229, 237 (6th Cir. 2014).

¹⁶² See, e.g., *Marks v. Clarke*, 102 F.3d 1012, 1033 n. 37 (9th Cir. 1996);

¹⁶³ *United States v. Wahchumwah*, 710 F.3d 862, 868 (9th Cir. 2013); *United States v. Brathwaite*, 458 F.3d 376, 380-81 (5th Cir. 2006); *United States v. Davis*, 326 F.3d 361, 366 (2d Cir. 2003); see also *United States v. Lee*, 359 F.3d 194, 202 (3d Cir. 2004) ("Although video surveillance may involve a greater intrusion on privacy than audio surveillance, the difference is not nearly as great as the difference between testimony about a conversation and audio recordings of conversations."); cf. *Bray v. Planned Parenthood Columbia-Willamette Inc.*, 746 F.3d 229, 237 (6th Cir. 2014) (because third-party cameraman was not authorized to accompany officers into the home, filming by the cameraman was likewise impermissible).

Agencies should consider providing officers with access upon request to support self-training and note taking.¹⁶⁴ To mitigate the risk of improper use of videos, departments should consider providing this access only in department-controlled viewing rooms. Additional policies, such as prohibiting officers to bring cameras into the viewing rooms, should be considered. Recognizing that body camera video may assist an officer in recalling the details of his or her interactions, police departments may wish to require that officers provide their notes prior to viewing the video tape, as cameras may not capture everything and officers may choose to include (or exclude) relevant information to bring their reports into conformity with the video, thus negating the benefit of the reports.

1. Discovery Requirements and Disclosure

The discovery and disclosure rules discussed *supra* suggest that there should be a strong presumption in favor of preserving material that could ever possibly become part of a criminal proceeding, even if the officer does not consider the person being recorded to be a person-of-interest. Police departments, defense attorneys, and prosecutors may analogize video evidence from body-worn cameras to video from CCTV and police dash cameras. The rules of evidence and constitutional and due process rights cannot be dismissed when determining how long to retain material, and lessons learned from older technologies can help agencies craft their body-worn camera policies accordingly.

Beyond preservation for potential use in an initial prosecution, departments using body cameras must consider the need to preserve evidence for any post-trial actions or appeals. As with preservation before a potential trial, procedural rights necessitate erring on the side of preserving video in the same manner as any other material evidence. States employ preservation rules that should serve as effective guides, and often require longer preservation for evidence used in prosecution of more serious offenses. For example, a state may require permanent retention of all evidence used in capital cases.¹⁶⁵

C. HOW LONG SHOULD VIDEOS BE STORED?

While storage of video is essential to ensure that body cameras achieve the goal of enhancing accountability, it also creates costs and concerns. Departments spend significant resources responding to open records requests. Given the large amount of data body-worn cameras will produce, departments could be inundated with too many open records requests for their resources to handle, given the time necessary to review and redact information before release.¹⁶⁶ Because data storage incurs significant costs,^{167, 168} the length of storage time dramatically affects personnel hours and direct costs associated with the storage device.¹⁶⁹ Additionally, as the length of storage time increases and the quantity of video increases, resources necessary for indexing and locating specific video segments increases.

¹⁶⁴ See Westphal, *supra* note 135.

¹⁶⁵ See, e.g., Cal. Gov. Code § 68152(e)(1).

¹⁶⁶ White, *supra* note 1, at 33-34.

¹⁶⁷ See Matt Stroud, "Taser Is Charging Stunning Fees to Handle Police Video," Bloomberg, Jun 16, 2015, <http://www.bloomberg.com/news/articles/2015-06-16/taser-is-charging-stunning-fees-to-handle-police-video>; Brian Bakst and Ryan J. Foley, "For Police Body Cameras, Big Costs Loom in Storage," *PoliceOne*, Feb 6, 2015, <http://www.policeone.com/police-products/body-cameras/articles/8243271-For-police-body-cameras-big-costsloom-in-storage/>.

¹⁶⁸ TASER's Director of Legal Services and Government affairs stated the cost of storing the video data is about \$95,000 a year for the average enforcement agency. See Haggard, Amanda, "Law Enforcement Complain Body Cameras Will Lead To Costly Records Requests" (Oct 20, 2015), <http://www.nashvillescene.com/news/article/13061734/law-enforcement-complain-body-cameras-will-lead-to-costly-records-requests>.

¹⁶⁹ Presidential Interim Report, *supra* note 28, at 34; White, *supra* note 1, at 32-33.

Law enforcement agencies considering a body-worn camera program should also consider the data security of their videos. Data breach of unredacted videos could result in significant privacy harm to individuals filmed. Data security failures may result in loss of video footage or videos whose chain of custody is no longer established, resulting in them being inadmissible at trial. Additionally, the loss (or release) of police body camera footage could erode public trust in the police department.¹⁷⁰ Further, risks of having videos appear online may deter victims or informants from speaking with officers wearing body cameras. The FBI has required for years that all cloud products sold to U.S. law enforcement agencies comply with the FBI's Criminal Justice Information Systems (CJIS) security requirements.¹⁷¹ However, depending on the type of interaction, other data protection standards may apply.¹⁷² Accordingly, law enforcement agencies should limit their selection of cloud service providers to those that meet not only the CJIS standard, but standards such as the Health Insurance Portability and Accountability Act ("HIPAA"), which may apply when body-worn cameras capture patient data of victims or doctors being interviewed in a hospital.

ALL VIDEO SHOULD BE INITIALLY REVIEWED AND FLAGGED IF IT INCLUDES ANY LAW ENFORCEMENT ACTION THAT COULD SERVE AS THE BASIS OF A PUBLIC COMPLAINT.

These issues justify promptly deleting videos that do not have the potential for individual use as part of a complaint or serve any evidentiary purpose. All video should be initially reviewed and flagged if it includes any law enforcement action that could serve as the basis of a public complaint (even an unsubstantiated one, given the value of footage to more effectively address frivolous complaints). If flagged, video must be available for at least the time available to file a complaint, or the accountability goal of body cameras will be undermined. It is important that during such a retention period proper archiving occurs. Archiving data and retaining it in accessible form can be both logistically challenging and resource-intensive, but proper retention—without compression that could impair later access—is essential, which may require consultation of technical experts with knowledge of video archiving techniques that properly preserve video in

accessible form, and who can advise departments as to the long-term costs of such retention. Videos that are not flagged should be deleted after a short period of time.

With regard to videos taken as a part of a police investigation, most agencies have policies regarding when to destroy evidence after the completion of a trial and appeals process.¹⁷³ Video evidence from body-worn cameras should not be treated differently than other evidence and should be destroyed pursuant to the department's policies and in accordance with constitutional and evidentiary law. Departments wishing to keep certain videos beyond their original purpose should have, and be able to communicate to the public, a clearly defined purpose for preserving the video evidence after the original investigation and subsequent litigation has completed. Such departments should recognize that in the event the videos (or evidence resulting from viewing the videos) are used at a future trial, they may need to defend the use of the videos and the storage methods used to preserve them.

¹⁷⁰ See generally Katie Lansford, "The Public Relations Side of a Data Breach," *Platform Magazine* (Nov 5, 2014), <http://www.platformmagazine.org/2014/11/the-public-relations-side-of-a-data-breach/> (discussing customer trust issues for commercial companies that have experienced public data breaches).

¹⁷¹ Jaikumar Vijayan, "FBI Declares Cloud Vendors Must Meet CJIS Security Rules," *Computerworld* (Feb 7, 2012), <http://www.computerworld.com/article/2501156/cloud-computing/fbi-declares-cloud-vendors-must-meetcjis-security-rules.html> (accessed on Sep 15, 2016).

¹⁷² See Stuart McKee, "Is the Cloud Ready for Body-Cam Video? (Industry Perspective): Let's hold cloud storage for law enforcement video to the highest security standards" (Mar 27, 2015), <http://www.govtech.com/opinion/Is-the-Cloud-Ready-for-Body-Cam-Video.html>.

¹⁷³ See, e.g., L.A.P.D. Manual, at §§ 552-570, http://www.lapdonline.org/lapd_manual (last visited Apr 8, 2015).

D. AT WHAT LEVEL OF GOVERNMENT SHOULD POLICIES BE WRITTEN?

Body-worn camera programs must have clear written policies that are consistently enforced in order to be effective. Yet of the 63 agencies from across the country that reported using body worn cameras in one study, nearly one-third did not have written policies governing the practice.¹⁷⁴ A more recent survey of 24 state and local police departments implementing body-worn cameras found that ten did not have policies regarding retention of video data.¹⁷⁵ Many reported a lack of guidance on what the policies should include.¹⁷⁶ It is important for policymakers to answer the implementation questions in development of written policies to ensure the consequences of body-worn camera programs are predictable and perceived as legitimate by all stakeholders. These policies should also clearly explain what happens if the policies are violated.

DEPARTMENTS RECEIVING THE LARGEST FEDERAL GRANTS IN 2015 HAVE BEEN RATED AS HAVING AMONG THE WORST POLICIES ON KEY ACCOUNTABILITY AND CIVIL LIBERTIES ISSUES.

If a presumption in favor of written policies does occur, it is important to determine what level of government should oversee their creation. Policies will usually be adopted at the local and state levels given the jurisdiction of law enforcement policy, and the role of local community and law enforcement input. However, federal funding may accelerate adoption of body camera programs absent due consideration for necessary policies at the local level. Departments receiving the largest federal grants in 2015 have been rated as having among the worst policies on key police accountability and civil liberties issues.¹⁷⁷ According to a policy evaluation by the Leadership Conference and Upturn,¹⁷⁸ the six departments that received the maximum million-dollar body camera grant had more failing than positive policy rankings on key issues such as privacy, retention, access, and potential misuse. Two of these departments did not receive a positive rating on a single key issue. With federal funds these cities will be able to rapidly deploy department-wide body camera programs without soliciting public input or local funds.

Beyond the direct harms of unnaturally accelerating implementation without effective policies, if departments with ineffective policies receive significant funding, other localities may improperly view these policies as an appropriate benchmark, or simply imitate these policies with the hope of acquiring future funding, which would exacerbate the problem.

Federal funds should, at minimum, ensure that a receiving locality is adopting body cameras in a thoughtful and responsible manner, and, at best, serve as an example for other departments. Yet in the absence of required policies for funds, the opposite is occurring. Therefore, development of written policies at the federal level may be necessary, at least with regard to departments that would accept federal funding.

¹⁷⁴ PERF Report, *supra* note 7, at 2.

¹⁷⁵ Brennan Center for Justice at NYU School of Law, "Police Body Camera Policies: Retention and Release," Feb 5, 2016, https://www.brennancenter.org/sites/default/files/Retention_and_Release.pdf (accessed Aug 2, 2016). The survey indicated that the Denver, CO police department had a records retention schedule, but it was not public. Accordingly, it is being counted as not having a policy. See *id.*, at 3.

¹⁷⁶ PERF Report, *supra* note 7, at 2.

¹⁷⁷ See, Jake Laperruque, Just Security, *The Government Should Stop Rewarding Bad Policies for Police Body Cameras* (Nov 24, 2015), <https://www.justsecurity.org/27896/government-stop-rewarding-bad-policies-police-bodycameras/>.

¹⁷⁸ Leadership Conference & Upturn, "Police Body Worn Cameras: A Policy Scorecard" (Aug 2016), <https://www.bwcorescorecard.org>.

IV. RECOMMENDATIONS

The following recommendations are intended to guide policymakers when they are considering how to implement body-worn camera programs in a manner that strikes the appropriate balance between the potential advantages and disadvantages of mandating this technology.

In forming these recommendations, The Constitution Project Committee on Policing Reforms reviewed a number of recommendations from other organizations, including recommendations put forth by PERF, the President's Task Force on 21st Century Policing, and civil rights and civil liberties organizations and experts. Many of our recommendations align with theirs, but considering the issues discussed above, there is some divergence.

Many of the potential issues noted below will be mitigated or eliminated by the clear definition of narrowly defined law enforcement purpose(s) for the initial capturing, use, and continued preservation of the body-worn videos. Defining such purposes up front defines the scope of the use of the videos and militates against misuse. If the videos are to be retained after the initial law enforcement purpose(s) have expired,¹⁷⁹ the law enforcement agency must have an articulable purpose for retaining the video, as well as an anticipated time to destroy it. As explained in detail below, these purposes should be documented in departmental policies and communicated to the community.

A. IMPLEMENTATION

Before implementing a program, law enforcement agencies should consider the benefits, costs, and uses of body-worn cameras and identify the objectives for using the technology.

1. Body-worn cameras should only be used to further a narrowly defined and clearly articulated purpose:

Having a narrowly defined purpose addresses many of the legal issues regarding when to capture video, when to make video available, when to use video in criminal proceedings, and when to destroy the video. It is important that law enforcement agencies define and articulate the purpose prior to collecting video. This will ensure that ad hoc decisions are not later made regarding the maintenance and use of the video. Law enforcement agencies should assess the impact of body-worn cameras on constitutional rights and values before implementation. If implemented, body-worn camera programs should be designed to minimize any negative impact on constitutional rights and values.

2. Policymakers should engage with the community in making body camera rules:

The decision to create a police body-worn camera program, as well as major decisions affecting its implementation, should be made through an open and publicly accountable process. The community should be consulted about how their local law enforcement agencies use body-worn cameras. Policies should be posted online.

- Moreover, engagement should also extend to others within government and beyond law enforcement (e.g., local elected officials), who should be directly involved in the implementation of any body-worn camera program.
- A community considering a police body-worn camera program should consider its cost in comparison to alternative uses of those same resources.

¹⁷⁹ These law enforcement purposes include not only use for investigations and prosecutions, but also post-trial retention for appellate review, consistent with the appropriate state's evidence preservation laws. These policies can vary between states, and are based upon the severity of crimes and punishments. For example, permanent retention is often required for evidence used in capital cases.

- The purpose for gathering the videos should be explained to the community, along with the department's policies for access to the videos, how the videos will be used, and when the videos will be destroyed.
- It is critical to obtain the input of community organizations and civil rights and civil liberties groups, especially regarding issues that create conflict in achieving civil rights and civil liberties goals, such as recording during protests. Further, such groups should be involved in evaluation of existing policies that will be affected by body cameras, such as discretion for arrest of minor offenses.

3. Policymakers should engage with law enforcement personnel as body cameras are introduced:

Body-worn cameras should be introduced to agencies incrementally, starting with pilot programs and engaging officers during implementation. There should also be robust data gathering during pilot programs with an eye toward assessment and a willingness to revise written policies accordingly. This will allow for crafting strong policies that balance accountability, privacy, transparency, and community relationships.

B. WHEN TO RECORD

The following are general guidelines for when to start and stop recording, and exceptions to the general policy.

4. A clear policy should require officers to record most law enforcement activities:

Presumptions that recording should begin during law enforcement actions such as calls for service and any law enforcement-related encounter should be considered.

- There must be a clear written policy spelling out and defining what requires activation of the cameras. The policy should state that when ambiguity exists, officers should record. One factor that officers should consider when determining whether to begin recording is whether they are about to engage in an activity that will potentially result in a law enforcement action, such as an arrest or Terry stop. If so, this factor should strongly weigh in favor of recording.
- Cameras and recording rules should apply to both uniformed and plainclothes officers, although exceptions should be permitted when essential for officer safety, such as for undercover agents.
- Departments should use body-worn cameras that include "pre-event buffers," which allow the cameras to store footage for a short period of time before the camera is turned on. This will better ensure that relevant material is not missed if an officer is unable to turn a camera on the moment a law enforcement action begins.
- Whether recordings are permitted during protests and other First Amendment-protected activities should be determined by discussions with community groups, grassroots demonstrators, and civil rights and civil liberties advocates to establish what policy would most effectively protect First Amendment rights.
- Recording should always continue until the conclusion of the law enforcement activity or until an exception (such as a request by an individual not to record)¹⁸⁰ requires the camera be turned off. Limited discretion with a strong presumption in favor of recording should not only guide officers in turning cameras on, but also in leaving cameras on for the full duration of an interaction.
- It is important to note that with the widespread adoption of smartphones, citizens are also able to film police.

While officers may not wish to be filmed, citizens have an established right to record the police.¹⁸¹ Department policies should note that citizens have the right to film police in the performance of their public duties too, and police officers should not order someone to cease recording or arrest someone for the act of recording.

¹⁸⁰ See *infra* Recommendation 6.

¹⁸¹ See *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011) (filming officers in public space protected by First Amendment); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (same); *Kelly v. Borough of Carlisle*, 544 F. App'x 129, 131 (3d Cir. 2013) (officer does not have expectation of privacy against being recorded by citizens when officer is recording the interaction); see also *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012) (issuing preliminary injunction against enforcing Illinois two-party consent statute against videotaping police).

5. Officers should be required to notify subjects they are being recorded:

- Generally, officers should notify individuals when they are being recorded, unless doing so would be unsafe, impractical, or impossible.
- Departments should also seek to use body-worn cameras that signal when they are in use, such as with recording light indicators. However, this should supplement, not replace, notification by officers.
- Because of the uniquely intrusive nature of police recordings made inside private homes, officers should be required to be especially clear about providing notice of the presence of a camera while inside a home.

6. Officers should generally stop recording per an individual's request:

Interviewing crime victims is especially sensitive (particularly in rape and domestic violence cases) given the information discussed and fear of retribution. Confidential informants and witnesses may face similar concerns, and be reluctant to speak on camera. Giving individuals authority to opt out of recordings enhances autonomy, protects privacy, and better allows officers to perform their duties.

- Any request not to be recorded should itself be documented on a body-worn camera before it is turned off to ensure that this consent rule does not become a means of engaging in unrecorded misconduct.
- Engaging in use of force, an arrest, or an execution of a search should always require recording, given the significance of these actions and potential harms.
- Opt-out requests should not obstruct other individuals' ability to have their encounters recorded. If conflicting requests are given—one individual being recorded requests a camera be turned off while another requests it stays on—the officer should continue recording. However, officers should attempt to honor all requests to the extent feasible in such situations.

7. Policies should be clear about each officer's obligations regarding recording and the potential administrative penalties for violating the policy laid out:

- Failure to preserve potentially useful evidence may also constitute a violation of a defendant's due process rights if a court concludes that the police acted in bad faith.¹⁸²

C. DATA MAINTENANCE AND USE**8. Videos important to police accountability should be flagged for retention:**

The following types of footage should be automatically flagged for retention: (1) those involving a use of force; (2) those that lead to or include detention or arrest; (3) those that lead to or include a search of a person or an individual's property; or (4) where either a formal or informal complaint has been registered against an officer.

- Any subject of a recording should be able to flag the recording for retention, even if not filing a complaint or initiating an investigation. Accordingly, law enforcement agencies should determine a minimum retention period for all video to provide individuals opportunities to speak with counsel and determine if they wish to flag a recording for retention. This time should be at least 30 days.
- Police department personnel should also be able to flag a recording for retention if they have a reasonable basis to believe police misconduct has occurred or have reasonable suspicion that the video contains evidence of a serious crime.
- If useful evidence is obtained during an authorized recording, the recording should be retained under the same rules as any other evidence gathered during an investigation, so as to consistently support preservation of evidence for post-trial action and appellate review.¹⁸³

¹⁸² See *Arizona v. Youngblood*, 488 U.S. 51 (1988); *United States v. Carrasco*, 537 F.2d 372, 377 (9th Cir. 1976); *Slye v. United States*, 602 A.2d 135, 138 (D.C. 1992); *United States v. Zhao Wu Chen*, 322 F. App'x 43, 48 (2d Cir. 2009).

¹⁸³ Such preservation rules can vary by state and severity of the offense. For example, some states require permanent retention for capital cases.

- All video should be retained in a form that remains accessible for later viewing, and archiving of video should not degrade or compromise content.¹⁸⁴
- Deletion of evidentiary and “flagged” video should not occur until it has been independently established that the footage no longer serves any law enforcement function—including any internal investigations based on flagging—but should be promptly deleted after its law enforcement purpose has expired. Policies should clearly state the length of time data is to be retained.
- When deletion does occur, it should be logged for auditing purposes, and overseen by a designated official to ensure compliance.

9. Videos that are not “flagged” or necessary for evidentiary purposes should be deleted after a reasonably short period of time:

The retention period of nonevidentiary footage should be significantly shorter than for evidentiary and flagged footage. Most existing policies retain such footage between 60-90 days. If a department wishes to establish policies including a shorter period for nonevidentiary footage, it must be consistent with maximum time allowed for individuals to file complaints. Policies should clearly state the length of time data is to be retained. Deletion in accordance with department policy should be logged for auditing purposes, and overseen by a designated official to ensure compliance.

10. The chain of custody must be clearly preserved and recorded:

- Policies should clearly lay the responsibility of turning in and downloading recorded data on the officer, except for certain clearly defined incidents (such as officer shootings or use of force), in which case the officer’s supervisor should take physical custody of the camera.
- Recorded data should be downloaded at the end of each shift. Data should be properly categorized by type of event captured: If the camera recorded a law enforcement-related event, it should be tagged as “evidentiary”; if not, it should be tagged as “non-event.”
- Policies should also clearly state where and how data is to be stored.

11. Officer access to videos should be properly limited and recorded:

- Officer review of footage should be limited to specific investigative purposes, including internal investigations in response to complaints. General review of footage absent a specific investigative purpose should not be permitted.
- Supervisors should be allowed to review officer footage, e.g., to investigate a complaint against the officer or a specific incident in which the officer was involved, or to identify videos for training purposes.
- Policies should specifically forbid personnel from accessing or releasing videos for personal use.
- Systems should be designed to log all officer review of stored footage.
- Systems should be designed to prevent any editing of footage.
- Systems should be designed to prevent deletion by individual officers or their colleagues.

¹⁸⁴ For example, video compression should not occur in a manner that constrains future viewing and analysis of video. Similarly, metadata associated with the videos should not be removed.

12. Officers should be permitted to review their footage after writing an initial report:

Officers should be permitted to review their footage for writing reports of law enforcement activities. This will help officers remember events more clearly. However, officers should first prepare a separate initial report to avoid tailoring their report to the video.¹⁸⁵ The video may be used to make change-tracked edits or addenda to the report.

13. Proper data security standards must exist to prevent improper access and malicious hacking:

- Effective data security standards are critical regardless of whether storage is maintained internally by a department or managed by a third-party vendor.
- Physical access to data storage facilities should be limited to authorized and screened personnel.
- Regular scheduled review should occur to ensure that storage meets with evolving data security standards as technologies and potential threats advance.

14. Effective audit systems should exist to prevent improper access or tampering:

- An agency's internal audit unit, not an officer's direct chain of command, should conduct random review of footage to monitor compliance with the program.
- Agencies should collect statistical data concerning camera usage, including when video footage is used in criminal prosecutions and internal affairs matters. Agencies should conduct studies evaluating the financial impact of camera programs, including the cost of purchasing equipment, cost savings (including legal fees in defending lawsuits), and complaints against officers.
- Agencies should conduct periodic reviews to assess the efficacy of their body-worn camera programs.

D. "TAGGING" TECHNOLOGIES**15. Use of "tagging" technologies should be strongly limited and require judicial authorization:**

Authorizing "tagging" technologies such as facial recognition software and license plate readers risks use for cataloging individuals engaged in First Amendment-protected activities, and could chill such activities due to mere potential for tagging and cataloging. Strong limits should exist to prevent this.

- Use of "tagging" technologies in combination with body cameras or footage from body cameras should not be permitted without judicial authorization based on a probable cause standard, with clear boundaries on the use included in the authorization. Appropriate emergency exceptions should exist for imminent threats of death or serious bodily harm.
- Use of tagging technologies in combination with body cameras should also be permitted in at least some situations regarding identification profiles (such as face prints or gait profiles) of individuals for whom an active arrest warrant exists.^{186,187}
- This limit should apply to both the development of identification profiles (such as face prints) from footage, and running existing identification profiles against stored footage or footage of body cameras in real-time.

¹⁸⁵ Departments have existing and often varying policies on potential review of other recordings, such as in department interrogations. Our recommendations are limited to officer review of body camera footage, and should not alter or be dependent upon rules regarding other types of footage.

¹⁸⁶ Given the potential for unnecessarily aggressive arrests for minor offenses—potentially disproportionately in certain communities—departments should consider only permitting use of tagging technologies to identify individuals for whom an active arrest warrant for a serious offense exists. Such a limit could be modeled on existing laws limiting police action based on seriousness of an offense in certain states. See, e.g., Cal. Penal Code § 840 (authorizing felony arrest warrants to be executed at any time, while generally limiting execution of misdemeanor arrest warrants to times between the hours of 6:00 am and 10:00 pm); see also Wash. Rev. Code. Ann. § 10.31.100 (permitting officers to make an arrest absent a warrant for felony offenses based on reasonable cause, but limiting arrest absent a warrant for misdemeanor offenses to situations in which the crime has actually been committed in the presence of an officer).

¹⁸⁷ The Constitution Project does not presume that a face print match should in itself constitute probable cause for arrest. Accuracy of facial recognition technology varies greatly based on the software used and other factors. Courts should conduct a thorough review of specific technology to be employed before letting it serve as a means of establishing probable cause of an individual's identity.

E. IN-GOVERNMENT SHARING

16. Any in-government sharing of footage should require the receiving entity to employ the policies of the sharing entity:

The ability of the recommended policies to effectively enhance accountability and preserve civil rights and civil liberties would be undermined if video could simply be sent to another governmental entity with less effective policies.¹⁸⁸

- As a prerequisite to sharing, any government entity that wishes to receive body camera footage from a department should be required to adopt the policies of the sharing department for maintenance and use of all shared video.
- Any in-government sharing should be documented for auditing purposes. Such documentation should include data on what video is shared, what entities receive the video, the purpose of sharing, and confirmation that receiving entities will comply with the sharing department's policies for maintenance and use.
- Any department that engages in in-government sharing should make publicly available a list of all government entities with which it shares body camera footage.

F. PUBLIC DATA ACCESS

17. Any person captured by the footage should be permitted to review video of an incident in which they were involved:

Ability to engage in review of footage is critical to allowing individuals to make an informed choice as to whether they want to "flag" a video or file a complaint.

18. Release of footage as a public records request should generally be permitted with appropriate redactions:

Permitting videos to be released per public request will enhance the accountability and transparency goals of body cameras; however, privacy needs will necessitate redactions.

- Video release should generally be permitted upon request to members of the public and media for public interest purposes.
- Appropriate redactions of personally identifiable information should be made prior to release to protect privacy. This could range from blurring faces to redacting all images from inside a private residence. Individuals recorded should have authority to waive redactions of their personally identifiable information, and to receive videos in unredacted form (with regard to their own private information).
- Departments should take reasonable measures to ensure that release and redaction processes do not impossibly burden departments. Production fees incorporated into state open records laws with exceptions for affected individuals and certain public interest purposes could serve as an effective model¹⁸⁹ until more efficient means of review and redaction are developed.¹⁹⁰
- Departments should be transparent regarding the expected timeline and fees for responding to requests.

19. Release of video in connection with legal proceedings should follow standard evidentiary rules:

In both criminal and civil proceedings, disclosure of footage to relevant parties should follow the applicable rules of discovery and production of evidence.

¹⁸⁸ For example, the FBI maintains a photo database for facial recognition with few limits on retention and use built with photos from state and local agencies, such as mugshots and driver's licenses. This database could be expanded to store and use body camera footage, which, without limits tied to sharing, could undermine local policies on retention and use. See, United States Government Accountability Office, GAO-16-267, Face Recognition Technology: FBI Should Better Ensure Privacy and Accountability (May, 2016), <http://www.gao.gov/assets/680/677098.pdf>.

¹⁸⁹ See *supra* Sections II.d and II.f.2, (discussing fees for production costs included in many state open records laws).

¹⁹⁰ See *supra* Section III.c, (discussing development of innovative methods to reduce costs and logistical challenges to retain, review, and redact footage).

G. TRAINING

20. Proper training should be required for those using body cameras and footage:

- Training should be required for all personnel who wear cameras, including supervisors, auditors, etc. Training should include: (1) all practices included in the agency's policy; (2) an overview of relevant state laws governing consent, evidence, privacy, and public disclosure; (3) procedures for operating the equipment effectively; and (4) scenario-based exercises that replicate situations officers may face in the field.
- All personnel with access to stored data should undergo a training program covering both the technical operation of the camera system, including transferring or uploading videos, and applicable laws and rules regarding the system. Training should include a discussion of sanctions for misuse and abuse of the camera, associated systems, or recorded footage.

H. AVAILABILITY OF POLICIES AND CHANGES

21. All policies regarding body cameras should be written and publicly available:

Written policies should exist clearly laying out how the cameras are to be used and the footage maintained. These policies should be publicly available in readily accessible formats, including but not limited to department websites.

22. Departments should be open to revision of policies with public input and notification:

- There remains insufficient empirical research to fully support or refute many claims made about police body-worn cameras. Police departments implementing body-worn camera programs should be flexible in the development of their policies and willing to learn from other departments and make adjustments as needed.
- Departments should generally provide public notice of policy changes under consideration and solicit community input.
- If policies are updated, public notification should occur. Written departmental policies should always be publicly available in current form. Departments should maintain a history of policy changes, along with enacted and effective dates, to avoid issues regarding the potential use of video after policies regarding its capture/storage have changed.

I. APPROPRIATE POLICIES IN CONJUNCTION WITH FEDERAL FUNDING

23. Federal funding should be contingent on adoption of specific, effective policies:

Given its potential to unnaturally accelerate adoption of body camera programs absent proper local effort to develop policies, federal funding for body cameras should require that receiving entities have effective policies in place. Federal funding should be contingent on specific policies, rather than general principles. However, given differences between departments with existing body camera programs and policies that may seek funding, offering flexibility on logistical matters that would not undermine policy goals is reasonable.

- Contingent adoption of effective policies can incorporate methods such as rolling funding and scheduled reviews to provide departments with necessary flexibility in preparation and adoption, especially regarding policies that would require substantial costs or changes to departmental activities.

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

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