

INDEPENDENT LENS

*Toward
Transparency,
Accountability, &
Effectiveness in
Police Tactics*

Independent Lens: Toward Transparency, Accountability, and Effectiveness in Police Tactics

Model State Legislation for Body-Worn Cameras

The Harvard Black Law Students Association

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April 2015

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EXECUTIVE SUMMARY

Since the 1980s, many police departments have operated according to the notion of community policing — a philosophy that emphasizes close relationships characterized by mutual trust between police and communities as the foundation for proportionate, efficient, and effective police work. This emphasis on mutual trust notwithstanding, high-profile incidents of misconduct, high levels of complaints against police, and costly settlements and litigation have highlighted the divisions that exist between police and citizens and have spurred a national conversation on policing and police-community relations. This Report focuses on the viability and implementation of measures aimed at mending the evidently fractured relationships between police officers and communities across the nation. The Report argues that body-worn cameras, when appropriately integrated into existing police practices and supported by a detailed regulatory architecture, can be a key tool for reinvigorating community policing and reducing costs stemming from complaints, litigation, and settlements, as well as an important first step in mending relationships between law enforcement and communities nationwide.

Police complaints, litigation, and settlements impose significant costs on municipalities and communities. It is unquestionable that police misconduct, police complaints, and police-involved litigation and settlements are costly for municipalities and taxpayers.

- In 2013, Chicago paid \$84.6 million in police misconduct settlements, judgments, and legal fees.¹
- According to Oakland Police Department expenditure records, the total legal costs of ongoing police officer misconduct totaled \$13,149,000 in fiscal year 2010–11, including approximately \$12,271,000 that was set aside to pay settlements stemming from police brutality, illegal searches, injuries, false arrests, and related civil-rights violations.²
- In Denver, settling police and sheriff claims has cost over \$16 million since 2004.³
- In 2011, New York spent \$119 million for police misconduct and civil-rights violations.⁴ Claim payouts alleging abusive police conduct were \$136 million in 2010 according to the city comptroller's office.⁵

To the extent that use of body-worn cameras can curb police misconduct, reduce the incidence of complaints, and reduce the amounts spent on litigation and settlements, such use likely merits serious consideration. At least 63 law enforcement agencies nationwide already utilize body-worn cameras in some capacity.⁶ In particular, the body-worn camera programs of Denver, Los Angeles, and New Orleans provide insight into current trends surrounding the adoption of cameras as their use expands in the United States.

Legislation at the state level is the most appropriate vehicle for implementation of a body-worn camera program. While local police departments continue to implement their own body-worn camera programs, piecemeal programming is

¹ Andy Shaw, *City Pays Heavy Price for Police Brutality*, CHICAGO SUN TIMES (Apr. 14, 2014), <http://politics.suntimes.com/article/chicago/city-pays-heavy-price-police-brutality/fri-04112014-1002pm>.

² Ali Winston, *Police-Related Legal Costs Spike in Oakland*, EAST BAY EXPRESS (June 27, 2012), <http://www.eastbayexpress.com/oakland/police-related-legal-costs-spike-in-oakland/Content?oid=3260236>; see also Abraham Hyatt, *Oakland Spent \$74 Million Settling 417 Police Brutality Lawsuits*, OAKLAND POLICE BEAT (Apr. 9, 2014), <http://oaklandpolicebeat.com/2014/04/oakland-spent-74-million-settling-417-police-brutality-lawsuits>.

³ Jon Murray, *Denver Pays Millions to Settle Abuse Claims Against Police and Sheriff*, DENVER POST (Aug. 3, 2014), http://www.denverpost.com/politics/ci_26266070/denver-pays-millions-settle-abuse-claims-against-police.

⁴ Henry Goldman, *NYPD Abuse Increases Settlements Costing City \$735 Million*, BLOOMBERG (Sept. 4, 2014), <http://www.bloomberg.com/news/2012-09-04/nyc-police-abuse-joins-pothole-settlements-costing-735-million.html>.

⁵ *Id.*

⁶ LINDSAY MILLER & JESSICA TOLIVER, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED, DEPARTMENT OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES (2014) available at <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

unable to take advantage of economies of scale, common best practices and minimum standards, and independent review from an outside governing body. On the other hand, although legislation at the federal level would likely produce the ultimate economies of scale, the current political climate in Congress makes securing passage of this legislation unlikely. State legislation can provide comprehensive guidance to municipal police departments, help formulate common minimum standards, and incorporate a funding mechanism (a distinct advantage over police department-run programs). Moreover, states implementing such programs may be able to take advantage of President Obama's proposed body-worn camera grant program, which encourages the passage of state legislation and the formulation of local policies regarding body-worn cameras through a fund-matching mechanism. In sum, comprehensive state legislation provides for the most effective and efficient implementation of body-worn camera technology.

Body-worn camera programs are consistent with existing constitutional and statutory frameworks. Due to the novelty of the technology, case law does not directly address several legal issues surrounding the state and federal constitutionality of body-worn camera programs. However, legal analysis reveals that state legislation regarding body-worn camera programs would survive judicial scrutiny as it relates to federal constitutional law on privacy and public surveillance. In some states — such as Massachusetts and Montana — the legislation would need to include a wiretapping waiver to meet the two-party consent threshold, a higher bar than federal wiretapping law currently imposes.

Body-worn camera programs must account for any and all relevant policy considerations. A plethora of policy considerations impact the adoption and administration of body-worn camera programs at the state level. In order to ensure state legislation of appropriate strength and comprehensiveness, the following points must be considered:

- **Funding.** — Legislation should not take the form of an unfunded mandate. Funding sources may vary from state to state, but the legislation should include quality, nonpartisan funding mechanisms that avoid disproportionate impact on lower-income citizens.
- **Scale.** — Because the needs of communities may differ greatly, the coverage scale of any given program must be considered prior to the rollout of body-worn cameras. Moreover, if funding is an issue for any particular state, the legislation should take that into account in determining the scale of any program.
- **Public Access to Recordings.** — States should consider the potential for interaction between body-worn camera statutes and public access statutes such as state “sunshine laws” and FOIA.
- **Privacy Concerns.** — Numerous privacy concerns emerge with any surveillance-related police activity or technology. In this case, some of the concerns include the specific policy details, such as in-home recording. Other privacy concerns center on particular legal requirements, such as affirmative warnings to civilians and the integration of body-worn camera use with wiretapping laws.
- **Camera Function.** — Functionality standards must strike a balance between the impulse to standardize in order to provide the benefits of a camera program to all on an equal basis and the desire to provide flexibility to individual police departments to tailor programs to their particular needs. On September 12, 2014, the Department of Justice released a report identifying promising practices and lessons learned from the field and produced a set of functionality guidelines for agencies interested in implementing a body-worn camera program. The standards discussed in this Report form the basis of the functionality sections of the model legislation proposed here and are worth considering in the implementation of any program.
- **Data Storage.** — The value of body-worn cameras is not only derived from the effect that the cameras have on police/citizen interactions but also from the evidentiary data that the devices produce. Minimum standards for retention time, filing and designation protocols, and management of the data are required to maximize the benefits of the new technology.

- **Oversight.** — Body-worn cameras can be misused. The camera can be switched off at key moments, and the evidence it produces can be manipulated. The legislation must consider what mixture of punitive and prescriptive measures are necessary to prevent such misuse and secure compliance with the purpose of the body-worn camera program.

While the model state legislation proposed in this Report addresses the majority of policy concerns at some level, it also reflects a conscious decision to allow flexibility for police department-specific protocols to shape the use of body-worn camera technology. Recognizing that not all issues can be addressed directly through legislation, legislative committees and executive bodies on both the state and local level must do their part by assisting police departments in enumerating and examining procedures during implementation and beyond.

We must remain aware of the limitations of body-worn camera technology. Body-worn cameras are an initial step toward injecting greater transparency and accountability into police/citizen interactions and can help to deter police misconduct. However, they are not a solution to all policing problems. Despite improving the quality of evidentiary data, they cannot ensure complete fairness in all aspects of the criminal justice system. For one, the potential impact of the audio/video evidence that cameras would provide has minimal bearing on the implicit bias that, as scholars have shown, has effects at all levels of the criminal justice system. Implicit bias is a positive or negative mental association that a person holds at an unconscious level and directs toward a person, thing, or group. Implicit biases need not map onto consciously-held opinions — a person may consciously express a neutral or positive opinion of a social group while unconsciously holding a negative opinion of that same group. Actors within the criminal justice system — jurors, for example — reviewing the video evidence of the cameras will still bring these biases to bear. While well-developed implementation programs that incorporate compliance measures, such as oversight and sanction provisions, can bolster the power of cameras as a deterrent, the next step on the path to effective community policing likely requires formulation of appropriate legal standards for review of the evidence that cameras produce and the formulation of a strategy to confront the implicit bias pervading the criminal justice system as a whole.

CONTENTS

This Report proposes a model state statute requiring state and municipal police departments to equip their officers with body-worn cameras. These cameras would record and create video evidence of most interactions between the public and law enforcement in the hopes that the existence and availability of audio-video evidence would enhance accountability for citizens and officers alike and mitigate hostilities between members of these groups. It is conceded that not all state legislatures would enact legislation of the sort proposed here. Yet even if our proposal were to form the basis of legislation in only *some* states, we are optimistic that community-police relations would improve across the country. The Report is divided into three Parts:

- **Part I** contains our analysis of the problems that a body-worn camera program may help to solve. Section A explains some of the issues surrounding the relationships between law enforcement and communities of color, examines community-police relations in high-crime areas, and discusses the monetized costs of complaints, litigation, and settlements stemming from interactions with communities inhabiting these and other areas. Section B turns to body-worn cameras and their potential impact as a best practice law enforcement policy, extrapolating from the typical behavioral effects of surveillance to estimate the potential effects of body-worn cameras. Section C examines the current state of body-worn camera programs in major cities around the country (and beyond) and reviews the legal landscape surrounding the issue, primarily focusing on wiretapping and Freedom of Information Act (FOIA) implications.
- **Part II** discusses the policy considerations informing our model state legislation: compliance and oversight, privacy concerns, funding, camera functionality, and data storage capability.
- **Part III** consists of the model state legislation itself, which incorporates the policy considerations reviewed in Part II.

I. THE REPORT

A. BODY-WORN CAMERAS ARE AN IMPORTANT MEANS OF REINVIGORATING COMMUNITY POLICING AND MENDING FRACTURED RELATIONSHIPS BETWEEN LAW ENFORCEMENT AND COMMUNITIES NATIONWIDE.

Over the past thirty years the notion of “community policing” has been proclaimed the most significant and progressive reform in policing philosophy.⁷ “Community policing” refers to a mode of policing in which positive community-police relations — epitomized by mutual trust and collaboration between citizens and officers — are critical to building and maintaining safe communities.⁸ For departments operating according to a community policing model, building and maintaining that trust is indispensable.

Community policing originated as police departments faced continuing problems with respect to communities of color. Since the 1970s, virtually every police department has faced allegations of racial discrimination, involving unjustified use of deadly force, racial profiling, excessive physical force, and/or failure to provide adequate police services.⁹ These instances of institutional misconduct influence the “public’s perceptions of the fairness of police practices, as experienced by citizens in their personal encounters with police, [and] shape judgments of police legitimacy.”¹⁰ Over time, continued instances of misconduct led to a major rethinking of the police role. Academic and policy research revealed that police are dependent on the members of the community for awareness of problems, awareness of the character and impact of police responses to those problems, and ultimately for their successful functioning as a department.¹¹ These insights were eventually incorporated into what we know today as “community policing.”¹² Widely embraced since the 1980s as a solution to poor police-community relations, community policing stresses a move away from paramilitary organizational structures and police isolation from the community and toward a rehabilitated role for the police — including greater trust building between police and community members in order to address persistent violence and crime.¹³

Community policing proceeds from the understanding that successful policing needs to be community-oriented, and that police departments need to develop the appropriate organizational and programmatic strategies to enhance relations with communities and their residents.¹⁴ While community policing has come to refer to a wide variety of police initiatives,¹⁵ it is most important to remember that “[a]t its core,

⁷ Veena Dubal, *The Demise of Community Policing? The Impact of Post-9/11 Federal Surveillance Programs on Local Law Enforcement*, 19 ASIAN AM. L.J. 35, 35 (2012).

⁸ The authors recognize that the idealizing notions of “community” are controversial in their own right. We do not assume the existence of a singular identifiable community view within inner-cities, and instead recognize that a diversity of opinion exists among residents of color regarding crime, police, and competing policy priorities. See, e.g., Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 1005–1007 (2003) (noting that the term “community” is perhaps “imprecise” and potentially “idealized”). Our position is that our model legislation has relevance regardless of the diversity of opinion across neighborhoods and geographical areas, insofar as it promotes the ideals of transparency and accountability — broad principles of justice that have applicability anywhere.

⁹ Samuel Walker, *Science and Politics in Police Research: Reflections on Their Tangled Relationship*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 137, 146 (2004).

¹⁰ David A. Harris, *How Accountability-Based Policing Can Reinforce-or Replace-the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 163 (2009).

¹¹ *Id.* at 210.

¹² See Walker, *supra* note 9, at 146.

¹³ See Dubal, *supra* note 7, at 35–36.

¹⁴ See Walker, *supra* note 9, at 147.

¹⁵ James Forman, Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1, 7 (2004) (noting that community policing “means different things to different people — public relations campaigns, shopfront and mini-police stations, rescaled patrol beats, liaison with ethnic groups, permission for the rank-and-file to speak to the press, Neighborhood Watch, foot patrols, patrol-detective

community policing is not a set of tactics, but instead is an organizational strategy for running a department.”¹⁶ Even today, as local police become more embedded in the proliferation of national security initiatives,¹⁷ both local and federal law enforcement officials continue to espouse community-policing principles and agree that police-community trust remains vital to the success of policing efforts.¹⁸

Implementation of a body-worn camera program integrates well with the strategies and goals of community policing.¹⁹ The use of body-worn cameras generates trust in the minds of the public through enhanced transparency regarding the daily interactions of police with members of the community. Improvements in transparency also align with community policing’s call for law enforcement to work intimately with civil society and forge public-private partnerships.²⁰

1. IN MUNICIPALITIES ACROSS THE COUNTRY, RELATIONSHIPS BETWEEN LOCAL LAW ENFORCEMENT AND COMMUNITIES OF COLOR ARE BROKEN.

Community policing not only offers ways for communities to mobilize against disorder and crime,²¹ but also plays an integral role in supporting efforts to reduce incidents of police misconduct involving residents of color.²² Currently, many individuals in Black and Latino communities perceive law enforcement officers in a negative light — much more so than whites.²³ Residents of communities of color often distrust police because of what they perceive as widespread racially discriminatory policing practices.²⁴ Police brutality harms police-community relations when the “victimized groups see a particular incident of excessive force as typical of the police and vent their anger against the continuation of th[at] discriminatory pattern of brutality.”²⁵ However, it is important to note that practitioners have found that residents of color do not dislike all individual law enforcement officials, but rather those whom they believe are abusive, disrespectful, and racist.²⁶

teams, and door-to-door visits by police officers” (citing David H. Bayley, *Community Policing: A Report from the Devil’s Advocate*, in *COMMUNITY POLICING: RHETORIC OR REALITY* 225, 225 (Jack Greene & Stephen D. Mastrofski eds., 1988)).

¹⁶ See Forman, *supra* note 15, at 7.

¹⁷ See generally Matthew C. Waxman, *Police and National Security: American Local Law Enforcement and Counterterrorism After 9/11*, 3 J. NAT’L SECURITY L. & POL’Y 377 (2009) (examining three national security law challenges resulting from greater involvement of state and local police agencies in protecting national security, especially in combating terrorism).

¹⁸ See Dubal, *supra* note 7, at 36.

¹⁹ See Harris, *supra* note 10, at 176 (explaining the role of body-worn cameras in bettering community-police relations).

²⁰ David Thacher, *Conflicting Values in Community Policing*, 35 LAW & SOC’Y REV. 765, 766 (2001).

²¹ See Forman, *supra* note 15, at 2 (citing Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513, 1527–30 (2002); Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593 (2002)).

²² See Forman, *supra* note 15; CHARLES OGLETREE ET AL., *BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES* 127–30 (1995); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 1010 (1999) (advocating “a race-conscious community policing model”).

²³ Carmen Solis et. al., *Latino Youths’ Experiences with and Perceptions of Involuntary Police Encounters*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 41 (2009) (citing Ronald Weitzer & Steven Tuch, *RACE AND POLICING IN AMERICA: CONFLICT AND REFORM* (2006)); Darius Charney et al., *Suspect Fits Description: Responses to Racial Profiling in New York City*, 14 CUNY L. REV. 57, 67 (2010) (“When we ask them, ‘How many of y’all hate police officers,’ 99.9% of them raise their hands, ‘I hate police officers.’”); Carol A. Brook, *Racial Disparity Under the Federal Sentencing Guidelines*, 35 LITIG. 15, 15 (2008) (“Every fall I teach constitutional law to high school students from the Chicago Public Schools. The students are mostly African-American and Hispanic. When I ask them whether they believe the criminal justice system is fair to people of color, they mostly say no. My clients, also mostly African-American and Hispanic, say the same thing.”).

²⁴ See Solis, *supra* note 23, at 40–41.

²⁵ Rob Yale, *Searching for the Consequences of Police Brutality*, 70 S. CAL. L. REV. 1841, 1843 (1997) (citations omitted).

²⁶ See Charney, *supra* note 23, at 67 (2010); see also Yale, *supra* note 25, at 1842 (noting that “victims develop hostility toward police as they watch offending officers go unpunished”). According to the Christopher Commission, “a ‘problem group’ of officers use [sic] force, and are the subject of complaints alleging excessive or improper force, far more frequently than most other officers.” REPORT OF THE INDEPENDENT COMM’N ON THE L.A. POLICE DEP’T. 32, 35–39 (1991). In the Los Angeles County Sheriff’s Department, a

Body-worn camera policies provide a proactive response to civilian perceptions of systematic injustices. As the Police Foundation put it in a recent report:

Police administrators should proactively institute and enforce strong policies governing conduct, as well as systems to collect and analyze data relative to police-citizen contacts such as complaints, use of force incidents, and traffic stops. Such efforts would inform policy, guide recruitment and training, and build accountability necessary to restore and maintain public trust in the police. It is the lack of internal, systemic controls, and not “a few rotten apples,” that perpetuates problems of misconduct and abuse by police. Most of America’s police officers are honest, dedicated, hard-working public servants, and it is they, as well as the public they serve, who are victims of the “bad” cop.²⁷

Body-worn camera legislation, particularly at the state level, would support efforts of departments to restore and maintain public trust in the police. Communities of color continuously request *better* policing—rather than aggressive policing—in their neighborhoods.²⁸ The use of camera technology is an innovative law enforcement practice designed to help fulfill the requests of diverse communities and to improve community-police relations.

2. POLICE COMPLAINTS, LITIGATION, AND SETTLEMENTS IMPOSE SIGNIFICANT COSTS ON MUNICIPALITIES AND COMMUNITIES.

Police misconduct imposes both social and financial costs. Social costs include the erosion of trust between community residents and police officers and the difficulty of building or rebuilding that trust in an environment characterized by uncertainty and animosity. Financial costs include those pecuniary losses brought about by legal entanglements, including complaints, litigation, and settlements. These pecuniary losses represent a major burden on taxpayers,²⁹ and are especially problematic for municipal governments, which are typically burdened with the fallout from police misconduct most directly.³⁰ As one researcher put it, “one agency of government (the police) perpetrates the harm, another agency defends it in court (the law department), and a third agency writes the check (the treasurer).”³¹ These costs and their relationship to local and municipal governments are discussed in more detail below.

SURVEY OF THE COSTS OF POLICE MISCONDUCT FOR MUNICIPALITIES

Reducing incidents of police misconduct and excessive force saves local governments money that could be reinvested in law enforcement.³² In 2013, Chicago paid \$84.6 million in police misconduct settlements, judgments, and legal fees.³³ According to Oakland Police Department expenditure records, the total legal costs of ongoing police officer misconduct totaled \$13,149,000 in fiscal year 2010–11. Most of this, approximately \$12,271,000, was set aside to pay settlements stemming from police brutality, illegal searches,

“group of 62 [were] responsible for nearly 500 separate Force/Harassment investigations.” JAMES G. KOLTS & STAFF, L.A. CNTY. SHERIFF’S DEP’T 160 (1992).

²⁷ DAVID WEISBURD ET AL., POLICE FOUND., THE ABUSE OF POLICE AUTHORITY: A NATIONAL STUDY OF POLICE OFFICERS’ ATTITUDES 11 (2001), available at <http://www.policefoundation.org/sites/pfptest1.drupalgardens.com/files/AOAFull.pdf>.

²⁸ See Solis, *supra* note 23, at 43.

²⁹ Yale, *supra* note 25, at 1844.

³⁰ See Harris, *supra* note 10, at 157 (“In the typical municipal government in the United States, the agency that does the damage does not pay for the damage.”).

³¹ *Id.* (footnote omitted).

³² See Yale, *supra* note 25, at 1845.

³³ Shaw, *supra* note 1.

injuries, false arrests, and related civil-rights violations.³⁴ In Denver, settling police and sheriff claims cost \$10 million from 2002 to 2011.³⁵

In 2011, New York spent \$119 million for police misconduct and civil-rights violations.³⁶ Claim payouts alleging abusive police conduct increased 46% from 2006 to 2010, to \$136 million in 2010, according to the city comptroller's office.³⁷ According to a June 2011 report, there were 8,104 claims filed against New York police that year, a record high.³⁸ Civil-rights claims against the police and other city departments totaled 2,657 in fiscal 2010, a 35% increase over the previous year.³⁹

Although these steep payments rarely come directly from *departmental* budgets,⁴⁰ the impact they have on *municipal* budgets is blistering. By deterring the misconduct of citizens and officers alike, and by producing concrete evidence to more efficiently test the legitimacy of complaints, the use of body-worn cameras can alleviate the burden on states and municipalities by reducing the costs of complaints, settlements, and litigation. Viewing the matter from this angle reveals that in funding body-worn camera programs, states and municipalities can save themselves astronomical costs. In turn, this means that states would be able to redirect money presently earmarked to resolve the legal entanglements of police misconduct or complaints toward a body-worn camera initiative. In other words, not only does a body-worn camera program promise to increase police accountability, but it also promises to pay for itself over time.

3. CURRENT LAW ENFORCEMENT STRATEGIES FOR CONSTITUTIONAL COMPLIANCE ARE INEFFICIENT AND WASTE VALUABLE RESOURCES.

Fourth Amendment compliance is critical to trustworthy, reliable, and efficient policing.⁴¹ In the search and seizure context, “the Fourth Amendment exclusionary rule, generally stated, excludes evidence from criminal trials when that evidence is obtained as a direct result of police conducting an illegal search or seizure in violation of the Fourth Amendment.”⁴² As such, the exclusionary rule is designed to deter future police misconduct.⁴³ In an effort to support the aims of the Fourth Amendment, body-worn cameras can help to ensure better compliance with these requirements.⁴⁴

³⁴ Winston, *supra* note 2; *see also* Hyatt, *supra* note 2.

³⁵ Joel Warner, *Settling Police and Sheriff Claims Cost Denver \$10 Million Since 2002*, *ACLU Finds*, WESTWORD (Sept. 4, 2011), http://blogs.westword.com/latestword/2011/05/excessive_force_lawsuits_denver_10_million_2002.php.

³⁶ Goldman, *supra* note 4.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*; *see also* Op-Ed, *The Cost of Police Brutality*, N.Y. TIMES, (Apr. 22, 1995), <http://www.nytimes.com/1995/04/22/opinion/the-cost-of-police-brutality.html>.

⁴⁰ *See* Harris, *supra* note 10, at 181 (recommending that “any damage awards resulting from police misconduct lawsuits must be payable only out of the budget of the police department itself”); Rachel M. Cohen, *City Coffers, Not Police Budgets, Hit Hard By the High Cost of Brutality*, AM. PROSPECT (Sept. 26, 2014), <http://prospect.org/article/city-coffers-not-police-budgets-hit-hard-high-cost-brutality>.

⁴¹ This section of the Report focuses on the exclusion of evidence based on violations of the Fourth Amendment. Ensuring constitutional compliance for law enforcement involves “several different rules and theories for exclusion[,] based on the type and nature of the governmental misconduct at issue and the rights thereby transgressed.” Eugene Milhizer, *The Exclusionary Rule Lottery*, 39 U. TOL. L. REV. 755, 755 (2008); *see id.* (noting suppression can result from violations of the Sixth Amendment, Fourteenth Amendment, and other constitutional or statutory violations).

⁴² Matthew Allan Josephson, *To Exclude or Not to Exclude: The Future of the Exclusionary Rule After Herring v. United States*, 43 CREIGHTON L. REV. 175, 179 (2009) (citing *Weeks v. United States*, 232 U.S. 383, 398 (1914)).

⁴³ *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011) (“The rule’s sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.”); *Herring v. United States*, 555 U.S. 135, 144 (2009) (“As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”); *see also* Thomas K. Clancy, *The Fourth Amendment’s Exclusionary Rule As A Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357 (2013) (noting the purpose of the exclusionary rule).

⁴⁴ *See* Harris, *supra* note 10, at 178 (explaining the role of body-worn cameras in bettering community-police relations).

Research suggests that current constitutional compliance strategies are inefficient and can waste resources. Indeed, there are several “costs” associated with Fourth Amendment protections, including the costs of complying with the amendment’s reasonableness standard (securing a warrant, conducting additional investigations to secure probable cause, etc.) and the societal costs of “forgone arrests and convictions.”⁴⁵ Nonetheless, the current legal rule works to mitigate the cost of Fourth Amendment compliance by releasing law enforcement officials from strict adherence to the amendment’s requirements. To this end, officers are allowed weigh the Fourth Amendment requirements in a given situation and then proceed with the lowest cost route.⁴⁶

The discretionary approach to lowering policing “costs” does not lead to effective constitutional compliance. Observational studies of officer behavior have shown, using conservative estimates, that police violate the Constitution in 30% of the searches or seizures they conduct.⁴⁷ Moreover, the vast majority of these unconstitutional searches or seizures —97% —produce no evidence.⁴⁸ As a result, in such instances where no evidence is obtained, police misconduct goes undeterred because there is no use of the exclusionary rule as a shield against the offending officer’s unconstitutional actions. This outcome illustrates the need for an out-of-court deterrent that can reduce the incidences of the constitutional violations in the first instance. Body-worn cameras could, if used within a suitable framework of rules, go a long way toward ensuring that police follow search and seizure standards.⁴⁹

B. POLICE DEPARTMENT USE OF BODY-WORN VIDEO CAMERAS FOR EFFECTIVE LAW ENFORCEMENT

Law enforcement agencies increasingly agree that the use of body-worn camera technology is associated with several benefits.⁵⁰ To begin with, body-worn cameras aid officers in collecting evidence,⁵¹ and some videos can be used as effective tools for training new recruits in the police force.⁵² Camera recordings of interactions between citizens and the police can deter abuses of power⁵³ and provide transparency during periods of instability in community relations. Furthermore, research has shown that body cameras not only reduce the use of excessive force by police officers but also significantly reduce complaints by members of the community.⁵⁴ Overall, research suggests that the use of body-worn cameras by police officers “encourage[s]

⁴⁵ William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 793 (2006).

⁴⁶ Elizabeth Canter, *A Fourth Amendment Metamorphosis: How Fourth Amendment Remedies and Regulations Facilitated the Expansion of the Threshold Inquiry*, 95 VA. L. REV. 155, 203 (2009).

⁴⁷ David A. Harris, *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) (citing Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL’Y 315, 331 (2004)) [hereinafter Harris, *Picture This*].

⁴⁸ *Id.*

⁴⁹ See Harris, *supra* note 10, at 178 (“Video and audio recording equipment . . . [i]f used as part of a suitable framework of rules, go a long way toward ensuring that police follow search and seizure standards.”).

⁵⁰ See Press Release, Int’l. Assoc. of Chiefs of Police, IACP Leads the Way on Body-Worn Camera Policies (June 9, 2014), <http://www.theiacp.org/ViewResult?SearchID=2414> (noting a growing number of law enforcement agencies adopting body-worn cameras and the benefits for resolving complaints, creating compelling evidence, and influencing police behavior); MICHAEL D. WHITE, U.S. DEP’T OF JUSTICE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 6 (2014), *available at* <https://ojpdiagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf>.

⁵¹ Harris, *supra* note 10, at 178; see also John Simerman, *Federal Judge Presses NOPD on Use of Body, Car Cameras*, THE ADVOCATE (Sept. 29, 2014), <http://theadvocate.com/news/neworleans/10357896-148/federal-judge-presses-nopd-on> (“The cameras also are expected to help the consent decree monitors assess the accuracy of police reporting of incidents and of the information they write on field interview cards — an area where the monitoring team . . . has found ‘a stunning lack of consistency.’”).

⁵² WHITE, *supra* note 50, at 10.

⁵³ *Id.*

⁵⁴ See *id.* at 6 (“discussing several of the empirical studies that documented substantial decreases in citizen complaints”).

lawful and respectful interactions between police and suspects”⁵⁵ and that body cameras can help rebuild the fractured trust between police departments and the communities they serve.

FINDINGS FROM RIALTO, CALIFORNIA

From February 2012 to July 2013, a Cambridge University study examined the effects of “wearable” video cameras on patrol officers’ compliance rates in Rialto, California.⁵⁶ Rialto’s randomized controlled study offered encouraging findings: after cameras were introduced in February 2012, public complaints against officers plunged 88% compared with the previous 12 months.⁵⁷ Officers’ use of force fell by 60%.⁵⁸

FINDINGS FROM MESA, ARIZONA

The Mesa Police Department conducted a program evaluation of “on-officer” body-worn cameras from October 2012 to September 2013.⁵⁹ In this study, 50 police officers equipped with body-worn cameras were compared to 50 demographically similar officers who did not wear body-worn cameras.⁶⁰ The pilot study yielded a 40% decrease in complaints and a 75% decrease in use-of-force incidents across study officers.⁶¹

FINDINGS FROM PLYMOUTH, ENGLAND

In a pilot program in Plymouth, England from 2005 and 2006, more than three hundred officers used fifty body-worn camera units.⁶² The government-commissioned report evaluating the study found six key benefits of the devices:

- Creating evidence for the courts that is “far more accurate than was previously possible . . . and [minimizing] doubts as to what was done or said by any person present”;
- Increasing police officer efficiency by decreasing manual record keeping;
- Reducing public order offenses due to the presence of the camera;
- Assisting in the prosecution of domestic violence cases;
- Detailing the record of officers who deployed their firearm; and
- Increasing the number of complainants later reconsidered and withdrawn after review of the video.⁶³

⁵⁵ Andrew Grossman, *Judge Orders NYPD to Add Cameras to Officers’ Gear*, WALL ST. J., Aug. 12, 2013, *available at* <http://online.wsj.com/article/SB10001424127887324085304579009131128679174.html?mod=e2tw>; *Floyd v. City of New York*, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013) (ordering the New York Police Department to institute a trial program requiring the use of body-worn cameras in one precinct per borough).

⁵⁶ TONY FARRAR, POLICE FOUND., SELF-AWARENESS TO BEING WATCHED AND SOCIALLY-DESIRABLE BEHAVIOR: A FIELD EXPERIMENT ON THE EFFECT OF BODY-WORN CAMERAS ON POLICE USE OF FORCE, *available at* <http://www.policefoundation.org/sites/g/files/g798246/f/201303/The%20Effect%20of%20Body-Worn%20Cameras%20on%20Police%20Use-of-Force.pdf>.

⁵⁷ *Id.* at 8.

⁵⁸ *Id.*

⁵⁹ ALLYSON ROY, ON-OFFICER BODY CAMERA SYSTEM: PROGRAM EVALUATION AND RECOMMENDATIONS (2013), *available at* <http://urbanaillinois.us/sites/default/files/attachments/officer-video-cameras-roy.pdf>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² POLICE & CRIME STANDARDS DIRECTORATE, HOME OFFICE OF THE U.K, GUIDANCE FOR THE POLICE USE OF BODY-WORN VIDEO DEVICES 6 (July 2007), *available at* <http://library.college.police.uk/docs/homeoffice/guidance-body-worn-devices.pdf>; *see also* Harris, *supra* note 10, at 178 (describing the study and its findings).

⁶³ POLICE & CRIME STANDARDS, *supra* note 62, at 7–8.

FINDINGS FROM PHOENIX, ARIZONA

Starting in April 2013, the Phoenix Police Department equipped 56 officers with body-worn cameras and compared them to 50 control officers for one year. The study examined the effects of body-worn cameras on police officer complaints, as well as their impact on citizen-officer interactions.⁶⁴ According to preliminary results, self-reported data indicated that most officers were comfortable wearing body-worn cameras, yet did not believe they should be adopted for all frontline personnel in the department.⁶⁵ Also, self-reported police officer productivity increased for officers wearing body-worn cameras, while self-reported complaints against officers decreased by 60% during the study period. Official records also indicated a 44% decrease in complaints against officers.⁶⁶

FINDINGS FROM SAN DIEGO, CALIFORNIA

The San Diego Police Department conducted a two-phase approach to implementing its body-worn camera program.⁶⁷ Phase One began on January 6, 2014 with the deployment of 300 cameras in a field test concluding on March 7, 2014.⁶⁸ The second phase and implementation of the full program began June 30, 2014, with an additional 300 cameras deployed.⁶⁹ Comparing the complaints and allegations from the first six months of 2014 — before the implementation of the program in those districts with the last six months — San Diego noted a 40.54% reduction in complaints against the police and a 59.76% reduction in allegations.⁷⁰ In a comparison of use of force tactics from November to January of the previous year, the department saw a 46.5% reduction in personal body weapon usage and a 30.5% reduction in chemical agent usage.⁷¹ While the raw data supporting those percentage reductions were not included in the summary sheet to the city council, the March 3, 2015 executive summary of the program concluded, “[a]lthough only implemented for a relatively short period of time, the results are very promising, showing a reduction in citizen complaints, allegations, and a reduction of some use of force applications.”⁷²

EFFECTS OF VIDEO SURVEILLANCE ON CHANGING BEHAVIOR

The behavioral dynamics that explain the complaints and use of force trends (as described above) in the body-worn camera pilot programs are by no means clear.⁷³ The decline in complaints and use of force may be tied to improved citizen behavior, improved police officer behavior, or a combination of the two.⁷⁴ Given the lack of solid empirical evidence that parses out the causation trends more minutely, we rely on already-existing psychological and behavioral research to predict the implications of large-scale police surveillance.⁷⁵ In particular, research concerning public surveillance of different types provides insight into the likely behavioral effects of cameras and video recording. Specifically, surveillance acts as (1) a deterrent mechanism and (2) a means of curtailing anonymity to trigger self-awareness.

⁶⁴ Dennis P. Rosebaum et al., *Attitudes Toward the Police: The Effects of Direct and Vicarious Experience*, 8 POLICE Q. 343 (2005).

⁶⁵ WHITE, *supra* note 50.

⁶⁶ Charles Katz, & Mike Kurtenbach, *Deploying Officer Body-Worn Cameras in Phoenix*, OFFICE OF JUSTICE PROGRAMS DIAGNOSTIC CENTER (Aug. 8, 2014), <https://www.ojpdagnosticcenter.org/blog/deploying-officer-body-worn-cameras-phoenix>.

⁶⁷ COUNCIL ACTION EXECUTIVE SUMMARY SHEET, CITY OF SAN DIEGO (2015), *available at* http://docs.sandiego.gov/councilcomm_agendas_attach/2015/psln_150318_2.pdf.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ WHITE, *supra* note 50.

⁷⁴ *Id.*

⁷⁵ See Stephen Rushin, *The Judicial Response to Mass Police Surveillance*, 2011 U. ILL. J.L. TECH. & POL’Y, 281, 299 (extrapolating from behavioral research in predicting the effects of automated license review tactics).

(1) Deterrence. An analogy between traffic cameras and body-worn cameras provides insight as to the possible deterrent function of the proposed legislation. In the traffic violation context, evidence of a psychological link between the perceived likelihood of sanctions and criminal deterrence has been observed in instances where visible police surveillance decreases the likelihood that an individual will commit a traffic violation.⁷⁶ Specifically, two psychological deterrent effects have been found to manifest themselves in relation to police surveillance: on-view effects and general halo effects.⁷⁷ Under the on-view effect, individuals are less likely to break the law when in *direct* view of policing surveillance.⁷⁸ For example, a driver is less likely to speed or drive through a red light while in the direct purview of a known speeding or red-light traffic camera. The halo effect describes a person’s likelihood to engage in less illegal behavior *in general* after witnessing the presence of police surveillance; the individual not only avoids illegal behavior in the vicinity of the surveillance, but also avoids illegal behavior generally because of the observed surveillance.⁷⁹

The similarity of the causative dynamic in the type of study reviewed above to the body-worn camera context makes it possible to hazard some projections. The behavior of citizens may change when the police officer gives an affirmative warning that the citizen is being filmed. The behavior of the officer may also change, as he or she knows that his or her actions are also being recorded, albeit less directly due to the vantage point of the camera. The halo effect may also occur with body-worn cameras, as officers may behave in a different manner when they know that, because of departmental policies ensuring the availability and impartial review of camera evidence, their actions will be subject to increased transparency and accountability.

Memory effects, a third insight from the traffic study, describe situations in which “individuals are less likely to engage in illegal behavior in a certain location when they have previously seen police surveillance at that location in the past.”⁸⁰ Although our model legislation calls for body-worn cameras to be worn during all police-citizen interactions, even if some officers do not wear body-worn cameras, memory effects may still occur. Both citizens and police officers may behave as if a body camera were deployed in a particular situation because they have become used to cameras being deployed in other, similar situations.

Ultimately, the strength of a deterrence mechanism is derived from the potential for meaningful enforcement. Meaningful enforcement in turn requires clear, predictable, and meaningful legal standards. This means that body-cameras can take us only so far as the law does — while body-worn cameras can produce a unique evidentiary record, the ability of cameras to produce desirable behaviors and encourage avoidance of undesirable ones depends on the robustness of the legal standards governing the conduct captured on video. The more that legal standards defer to officer discretion and avoid close scrutiny of officer conduct that from the perspective of citizens may be questionable, the less effective cameras designed to deter that questionable conduct will be — since officers will fail to perceive any significant probability of meaningful sanction. The erosion of the deterrent function of the exclusionary rule is an example of this dynamic. As previously noted, “the Fourth Amendment exclusionary rule, generally stated, excludes evidence from criminal trials when that evidence is obtained as a direct result of police conducting an illegal search or seizure in violation of the Fourth Amendment.”⁸¹ Yet, as the law of search and seizure becomes more deferential to the discretion of law enforcement and less concerned with aligning officers’ behavioral incentives with ethical standards through close scrutiny of officer conduct, the more the exclusionary rule’s deterrent function vis-à-vis misconduct is undermined.⁸² To avoid this outcome in the body-worn camera context and to capture the full

⁷⁶ *Id.* at 297 (citing Talib Rothengatter, *The Effects of Police Surveillance and Law Enforcement on Driver Behaviour*, 2 CURRENT PSYCHOL. REV. 349, 351 (1982)).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Josephson, *supra* note 42.

⁸² See Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1227 (2012) (positing that the Supreme Court is reassessing the exclusionary rule in a manner that

benefits of a body-worn camera program, one must attend not only to the technical aspects of implementing but also to areas of substantive law pertaining to review of officer conduct.

(2) Decrease in anonymity. The second projected effect of body-worn cameras, a decrease in anonymity, similarly affects both civilians and officers. This effect has been found to counteract ‘deindividuation,’ a psychological state usually found in the electronic surveillance context “where, under conditions of anonymity, people become less-self regulated and thus more likely to commit certain crimes.”⁸³ Deindividuation theory potentially supports the use of body-worn cameras as measures to decrease anonymity, which can lower the likelihood of criminal activity by increasing the likelihood that perpetrators will be identified with that activity.⁸⁴ In a slightly more attenuated sense than the deterrence theory, body-worn cameras may create conditions for decreased anonymity for both the officer and the civilian. For the police officer in particular, the personalized visual and audio recording of their civilian interactions may decrease aggressive, dangerous, or reckless behavior.⁸⁵

Similarly, philosopher Jeffrey Reiman states that “[w]hen you know you are being observed, you naturally identify with the outside observer’s viewpoint, and add that alongside your own viewpoint on your action.”⁸⁶ Anecdotes suggest that officers on duty in areas under surveillance are more concerned about cameras monitoring the police officer rather than the public. According to one officer, “Cops weren’t thrilled with it. They were watching the cameras to see if they were being watched instead of watching the street.”⁸⁷ Generally, law enforcement officers are aware of how they are perceived on film. Chief Superintendent Cullen of New South Wales said, “After testing out body-worn cameras, the overwhelming response from officers was that the cameras increased their professionalism because they knew that everything they said and did was being recorded.”⁸⁸ Decreasing anonymity can have positive effects on law enforcement interactions with civilians.

While decreasing anonymity may bring benefits, it may also bring significant privacy costs. Given the ability of body-worn cameras to decrease anonymity of the civilian in particular, deployment of this public surveillance measure must be coupled with strong policies surrounding data retention, notice procedures, specified uses of the camera, and minimally invasive public disclosure. Body-worn camera policy must address “the tension between [the cameras’] potential to invade privacy and their strong benefit in promoting police accountability.”⁸⁹

will erode all of its value). Candace C. Kilpinen, *Herring v. United States: A Threat to Fourth Amendment Rights?*, 44 VAL. U. L. REV. 747, 756 (2010) (evaluating *Herring v. United States* and suggesting “an underlying intent to eliminate the exclusionary rule.”); Eleanor De Golian, *Davis and the Good Faith Exception: Pushing Exclusion to Extinction?*, 63 MERCER L. REV. 751, 766 (2012) (explaining that *Davis v. United States* “arguably weakened the good faith exception, potentially paving the way for an end to the exclusionary rule”).

⁸³ Rushin, *supra* note 75, at 295 (citing Leon Festinger et al., *Some Consequences of De-individuation in a Group*, 47 J. ABNORMAL & SOC. PSYCHOL. 382, 389 (1952)).

⁸⁴ *Id.* at 296.

⁸⁵ *Id.* (citing Edward Diener et al., *Effects of Deindividuation Variables on Stealing Among Halloween Trick-or-Treaters*, 33 J. PERSONALITY & SOC. PSYCHOL. 178, 178 (1976) (discussing Festinger’s findings that “when identification of group members decreased” members were more likely to take part in unacceptable behavior)); Patricia A. Ellison et al., *Anonymity and Aggressive Driving Behavior: A Field Study*, 10 J. SOC. BEHAVIOR & PERSONALITY 265, 270–71 (1995) (discussing how the anonymity of being in a vehicle “facilitate[s] aggressive behavior”); Jurgen Rehm et al., *Wearing Uniforms and Aggression: A Field Experiment*, 17 EUROPEAN J. SOC. PSYCHOL. 357, 358 (1987) (stating that “decreased personal identifiability leads to usually proscribed behavior”).

⁸⁶ Jeffrey H. Reiman, *Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future*, 11 SANTA CLARA COMPUTER & HIGH TECH. L. J. 27, 38 (1995). According to Reiman, “[t]o the extent that a person experiences himself as subject to public observation, he naturally experiences himself as subject to public review. As a consequence, he will tend to act in ways that are publicly acceptable.” *Id.* at 41.

⁸⁷ Jennifer Mulhern Granholm, *Video Surveillance on Public Streets: The Constitutionality of Invisible Citizen Searches*, 64 U. DET. L. REV. 687, 688–89 (1987).

⁸⁸ Miller et al., *supra* note 6.

⁸⁹ ACLU, *Police Body-Mounted Cameras: With Right Policies in Place, a Win For All* (Oct. 9, 2013), <https://www.aclu.org/technology-and-liberty/police-body-mounted-cameras-right-policies-place-win-all>.

C. THE CURRENT STATE OF COPS AND CAMERAS

In the last few years, metropolitan police departments have displayed a remarkable trend towards adoption of body-worn camera technology. In this section, we review evidence of this trend in select metropolitan centers across the United States and beyond. Although this list is certainly not exhaustive, we believe it is sufficiently comprehensive to serve as a snapshot of the extent of developments to date.

1. SURVEY OF MUNICIPAL POLICE DEPARTMENTS AND BODY-WORN CAMERAS

Baltimore. The *Baltimore Sun* reports that the City Council is considering a bill (sponsored by City Council President Jack Young and Councilman Warren Branch) to require members of the Baltimore Police Department (BPD) to wear body cameras in response to the events in Ferguson and to Baltimore's own recent experience with police brutality.⁹⁰ If enacted, the less-than-two-page bill would ultimately require all 3,000 of Baltimore's sworn police officers to wear cameras to record audio and video of their interactions with the public. As currently written, the bill would be phased in over a year, with new patrol hires being provided cameras immediately. After that first year has passed, *all* officers would be required to wear cameras. However, the bill does not explicitly address the cost of implementing the program, or any of the other myriad policy considerations bearing on deployment of body-worn cameras.⁹¹ BPD estimates that deployment of the cameras could require \$7 million up front with a \$2 million operating cost,⁹² while the Mayors' office has estimated the cost to be around \$10 million.⁹³

Washington, D.C. The *Washington Post* reports that the city's Metropolitan Police Department (MPD) began a six-month \$1 million dollar pilot program on October 1, 2014, outfitting 165 officers with body cameras located on the eyeglass frame, collar, or front of the shirt.⁹⁴ The program is designed to test five different camera models in each of the city's seven police districts.⁹⁵ Under departmental policy, officers are required to turn on the camera as soon as they receive a call for service or other request for assistance, and will need to leave it on until the call is finished.⁹⁶ Meanwhile, video that is not retained for investigative purposes will be deleted after 90 days.⁹⁷ Cathy L. Lanier, Chief of Police, has listed implementation of a pilot project "to test the use of body cameras" as one of her "top priorities" since at least February of 2014.⁹⁸ She views the cameras as "a tool . . . to establish a record of police actions,"⁹⁹ and considers that "[t]hese records can help to protect the public in cases of officer misconduct . . . [and] protect[] officers from spurious complaints."¹⁰⁰ Implementation of the pilot project also follows on the heels of a recommendation by the Police Complaints Board, which, in a publicly available report directed toward the mayor and Chief of Police, identified several benefits likely to be derived from a body-worn camera program. Those benefits include:

⁹⁰ Luke Broadwater & Yvonne Wenger, *City Council Members Seek Body Cameras for Police*, BALT. SUN (Sept. 22, 2014), http://articles.baltimoresun.com/2014-09-22/news/bs-md-ci-police-cameras-20140922_1_body-cameras-police-brutality-baltimore-police-officer.

⁹¹ See Bill 14-0443, City of Baltimore City Council (2014).

⁹² Lisa Robinson, *Baltimore Bill Addresses Police Body Cameras*, WBALTV (Sept. 23, 2014), <http://www.wbalte.com/news/baltimore-mayor-talks-body-cameras-for-officers/28185080>.

⁹³ Broadwater & Wenger, *supra* note 90.

⁹⁴ Mike DeBonis & Victoria St. Martin, *D.C. Police Will Wear Body Cameras as Part of Pilot Program*, WASH. POST (Sept. 24, 2014), http://www.washingtonpost.com/local/crime/dc-police-will-wear-body-cameras-as-part-of-pilot-program/2014/09/24/405f7f5c-43e7-11e4-b437-1a7368204804_story.html.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Letter from Cathy L. Lanier, Chief of Police, Metropolitan Police Dep't, to Tommy Wells, Chairperson, District Council Comm. on the Judiciary and Pub. Safety, 37 (Feb. 10, 2014), *available at* http://dccouncil.us/files/performance_oversight/Resubmission_FINAL_MPD_Response_With_Attachments_Perf_Hrg_02_20_14.pdf.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

- **Reducing Misconduct Complaints through Improved Police-Citizen Encounters.** Citing the Rialto study, the Board notes that “when officers and citizens are being recorded, both are less likely to engage in the type of conduct that leads to complaints.”¹⁰¹ The Board estimates that “[t]he use of a body-worn camera system by MPD should be able to reduce the incidence of complaint-generating events and potentially help to foster a culture of more polite and respectful interactions between police and the public.”¹⁰²
- **Facilitating Citizen Complaint Resolution.** The Board emphasizes that “[v]ideo and audio recordings of police-citizen interactions would provide additional evidence for use in investigating and resolving complaints of police misconduct . . . that would . . . be objective and remain accurate over time . . . [and] could also speed the resolution of complaints” by helping investigators to make more accurate findings.¹⁰³ In particular, many complaints are currently resolved by a “credibility determination as between the complainant and one or more of the officers involved.”¹⁰⁴ Objective evidence would help investigators shape better interview questions, which will help sort out officers who have violated the law or department policy from those who have not misconducted themselves.¹⁰⁵ The cameras would especially help with five types of allegations: (1) use of demeanor or tone that is insulting, demeaning, or humiliating; (2) issuing a bad ticket; (3) using threats; (4) using profanity; and (5) unlawfully stopping a vehicle.¹⁰⁶ These five account for “over one third of all allegations that the [Office of Police Complaints (OPC)] must resolve,” and so improving the speed with which assessments can be made about the validity of allegations will have an impact on a “substantial percentage” of the cases that OPC handles.¹⁰⁷ Moreover, other frequently made allegations like excessive or unnecessary force; unlawful stops, searches, and frisks; and unlawful arrests could be made easier to prove or disprove, to the extent that cameras can capture not only what the officer said and did, but “also what they observed prior to taking action.”¹⁰⁸
- **Officer Training.** Body camera recordings might be used to correct the behavior of individual officers or for remedial training.¹⁰⁹ Moreover, even when officers behave in accordance with policy but still generate complaints, supervisors can gain new insight as to how duties could have been fulfilled without generating a complaint, which gives MPD the ability to “improve the service it provides and further reduce the number of future complaints.”¹¹⁰
- **Reducing Civil Liability.** The idea is that fewer incidents of police misconduct, improved investigations, and more effective training will result at some point in a decrease in the number of suits against the District for police officer actions.¹¹¹ Moreover, the video evidence might resolve disputes over facts and encourage settlements, as well as deter the filing of frivolous claims.¹¹²
- **Improving the Criminal Justice System.** Cameras also have the potential to improve other aspects of the criminal justice system at large. In particular, “devices should capture objective evidence relating to whether a confession was voluntary, a search was consented to or justified, or a physical description

¹⁰¹ POLICE COMPLAINTS BD., ENHANCING POLICE ACCOUNTABILITY THROUGH AN EFFECTIVE ON-BODY CAMERA PROGRAM FOR MPD OFFICERS 3 (2014), *available at* <http://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/Final%20policy%20rec%20body%20camera.pdf>.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 3–4.

¹⁰⁶ *Id.* at 4.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 4.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 5.

¹¹¹ *Id.*

¹¹² *Id.*

matched a 'lookout,' among other scenarios."¹¹³ The cameras can also be used to jog officers' memories of an incident and/or to verify the accuracy of written reports and statements about an incident.¹¹⁴

New Orleans. New Orleans began implementing a body-worn camera program in April of 2013.¹¹⁵ The program was a voluntary addition to the requirements of a consent decree concluded between Mayor Mitch Landrieu and the Department of Justice (DOJ) after widespread DOJ findings of police misconduct in the wake of Hurricane Katrina.¹¹⁶ The program aims to create an independent and unbiased record of events during police encounters.¹¹⁷ To effectuate the program, the police department entered into a 5-year contract which included 420 cameras (320 box-like AXON cameras and 100 of the sleeker and more flexible AXON Flex cameras), replacements to broken devices, and digital storage on Evidence.com for about \$290,000 a year.¹¹⁸ Despite these innovations, recent reports of ineffective management of the city's *dashboard* camera program (mandated by the consent decree) have cast doubt on the management of the body-worn camera program. The court-appointed monitor in charge of overseeing compliance with the consent decree found that only 34% of all use-of-force events were actually recorded by dashboard cameras, meaning that in all others either no video was shot, no video was preserved, or it could not be determined whether any recording had been made.¹¹⁹ These findings are especially troubling for what they may imply in terms of management of the *body-worn* camera program. Indeed, management concerns are especially poignant in light of the recent shooting of a 26-year-old man during a traffic stop that was not caught on camera because the officer switched off her body-worn camera just prior to the incident.¹²⁰

New York. Independent of the judge-ordered trial run stemming from the stop-and-frisk controversy, NYPD is planning to roll out a test program for the use of body-worn cameras in certain locations.¹²¹ The city is planning to deploy 60 cameras to certain high-crime precincts (Harlem; Northeastern Staten Island (where Eric Garner was suffocated); South Bronx; Brooklyn (East New York); and Jamaica, Queens) in all five boroughs.¹²² Officers will participate voluntarily, and the department aims to have at least one officer wearing a camera on each shift at the selected precincts.¹²³ The program began this fall, but it is not known how long it will last. The cost of beginning it totals \$60,000.¹²⁴

New Jersey. According to the *Wall Street Journal (WSJ)*, Governor Chris Christie signed legislation on September 10, 2014 that required local police departments to install video cameras in newly purchased patrol cars or to equip officers with body cameras while they are on their beats.¹²⁵ According to *WSJ*, New Jersey is the first state to mandate use of these cameras statewide. Critics worry that local police departments are adopting these cameras without rules, and that this bill amounts to an unfunded mandate. The bill does not

¹¹³ *Id.*

¹¹⁴ *Id.* at 6.

¹¹⁵ Juliet Linderman, *NOPD Implements Mandatory Body Cameras for Field Officers*, TIMES-PICAYUNE (Apr. 2, 2014), http://www.nola.com/crime/index.ssf/2014/04/nopd_unveils_mandatory_body_ca.html.

¹¹⁶ Brendan McCarthy, *Sweeping NOPD Reform Strategy Outlined in Federal Consent Decree*, TIMES-PICAYUNE (July 24, 2012), http://www.nola.com/crime/index.ssf/2012/07/federal_consent_decree_outline.html.

¹¹⁷ Jim Mustian, *Body Cameras to Record All NOPD Public Interactions*, THE ADVOCATE (Apr. 7, 2014), <http://www.theneworleansadvocate.com/home/8799320-172/body-cameras-to-record-all>.

¹¹⁸ *Id.*

¹¹⁹ Ken Daley, *Cameras Not On Most of the Time When NOPD Uses Force, Monitor Finds*, TIMES-PICAYUNE (Sept. 4, 2014), http://www.nola.com/crime/index.ssf/2014/09/cameras_not_on_most_of_the_tim.html.

¹²⁰ *Officer Involved in Monday Shooting Had Body Cam Turned Off*, WVUE FOX 8 (Aug. 18, 2014), <http://www.fox8live.com/story/26283883/officer-involved-in-monday-shooting-had-body-cam-turned-off>.

¹²¹ J. David Goodman, *New York Police Officers to Start Using Body Cameras in a Pilot Program*, N.Y. TIMES (Sept. 4, 2014), http://www.nytimes.com/2014/09/05/nyregion/new-york-police-officers-to-begin-wearing-body-cameras-in-pilot-program.html?_r=0.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*; see also Henry Goldman, *NYC to Test Body-Worn Cameras for Police, De Blasio Says*, BLOOMBERG (Dec. 4, 2014), <http://www.bloomberg.com/news/articles/2014-12-03/nyc-to-test-body-worn-video-cameras-for-police-de-blasio-says>.

¹²⁵ Heather Haddon, *N.J. Mandates Cameras for Its New Police Cars*, WALL ST. J. (Sept. 11, 2014), <http://online.wsj.com/articles/n-j-mandates-cameras-for-its-new-police-cars-1410488158>.

come with any additional authorized spending, although it does include heightened fines for DWI, the proceeds of which are to be put towards purchasing the new cameras. According to *WSJ*, the State Office of Legislative Services estimated that this would raise about \$577, 000.¹²⁶

- **Relevant Statutory Language:** “[. . .] Every new or used municipal police vehicle purchased, leased, or otherwise acquired on or after the effective date of P.L. , c. (C.) (pending before the Legislature as this bill) which is primarily used for traffic stops shall be equipped with a mobile video recording system. As used in this section ‘mobile video recording system’ means a device or system installed or used in a police vehicle or worn or otherwise used by an officer that electronically records visual images depicting activities that take place during a motor vehicle stop or other law enforcement action.”¹²⁷

Philadelphia. Police Commissioner Charles Ramsey has indicated that he hopes to begin a body-worn camera pilot program in Philadelphia by the end of 2014 or by early 2015.¹²⁸ Although details remain scant, Commissioner Ramsey has indicated that “a small number of officers” would be equipped with the cameras and that much policy development surrounding video retention and operating procedure will need to occur going forward.¹²⁹

Denver. According to the *Denver Post*, Denver began evaluating the use of body-worn cameras in early 2013, eventually implementing an ongoing six-month pilot program for officers patrolling District 6, an area of the city with a high volume of activity.¹³⁰ The study is being administered by Taser International and researchers from the University of Cambridge.¹³¹ Based on the successes seen so far in Denver, on August 27, 2014, Chief of Police Robert White announced plans to equip 800 officers, including all patrol and traffic officers, with body cameras in 2015.¹³² Such a task will cost an estimated \$1.5 million, an expense that the City Council still must approve.¹³³ If approved, officers would wear the cameras on their glasses or lapels, and all footage would be stored in the cloud.¹³⁴

Los Angeles. The Los Angeles Police Department (LAPD) launched a pilot program to test the use of three different types of body-worn cameras worn on the belt, collar or sunglasses of about 30 officers as early as January 2014.¹³⁵ The \$1.3 million in funding for the trial, soon to expand to about 600 cameras, was secured by way of private donations, arranged by Police Commission President Steve Soboroff.¹³⁶ Notable donators include, *inter alia*, Director Steven Spielberg and the Los Angeles Dodgers.¹³⁷ It has been reported that Soboroff hopes that after the first two trial years the Los Angeles City Council would provide funds to fully expand the project and maintain it over the long term.¹³⁸ The Los Angeles County Sheriff's Department has also launched its own pilot program to test four types of body-worn cameras, one of which can be clipped onto sunglasses, caps, helmets or collars, and the rest of which are attached to the officers' shirts.¹³⁹

¹²⁶ *Id.*

¹²⁷ Act of Sept. 10, 2014, ch.54, P.L. 2014, available at http://www.njleg.state.nj.us/2014/Bills/PL14/54_PDF (mandating use of mobile video recording devices for all police vehicles in New Jersey).

¹²⁸ Tony Hanson, *Philadelphia Police to Begin Testing Officer-Worn Video Cameras*, CBS (Aug. 15, 2014),

<http://philadelphia.cbslocal.com/2014/08/15/philadelphia-police-to-begin-testing-officer-worn-video-cameras/>.

¹²⁹ *Id.*

¹³⁰ Kirk Mitchell, *Denver Police Are Asking for 800 Body Cameras for Officers*, DENVER POST (Aug. 27, 2014),

http://www.denverpost.com/news/ci_26417279/denver-police-are-asking-800-body-cameras-officers?source=infinite.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Los Angeles Police Department Officers Begin Wearing Body Cameras*, ABC7 (Jan. 15, 2014), <http://abc7.com/archive/9395264/>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Joel Rubin, *Dodgers' Big Gift Moves LAPD Closer to On-Body Video Cameras*, L.A. TIMES (Oct. 1, 2013),

<http://www.latimes.com/local/la-me-dodgers-lapd-20131002-story.html>.

¹³⁹ Cindy Chang, *L.A. County Sheriff's Deputies Test 4 Types of Body Cameras*, L.A. TIMES (Sept. 21, 2014),

<http://www.latimes.com/local/la-me-sheriff-body-cameras-20140922-story.html>.

London. Citing relatively recent events such as the killing of Mark Duggan, which triggered the 2011 London riots, on May 8, 2014 the Metropolitan Police announced a pilot project in which 500 cameras were distributed to officers for use in 10 London Boroughs at a cost of £815,000¹⁴⁰ — a trial advertised to be the world’s largest.¹⁴¹ Police officials lauded the potential for transparency and accountability that the cameras bring, and noted that a failure to switch on the cameras at the appropriate times will be treated as a disciplinary offense,¹⁴² though no officer will have their camera running at all times because of the level of data storage that such a policy would require.¹⁴³ Finally, although suspects cannot decline to be recorded, victims are afforded that right.¹⁴⁴

Toronto. Since at least September 2014, there have been plans to test the use of body cameras among Toronto police officers.¹⁴⁵ Beginning mid-December, 100 cameras were deployed on officers across the city as part of a pilot project.¹⁴⁶ While no decisions have yet been made about permanent use of the technology, police officials are hopeful that the cameras will lead to better and more objective evidence of the circumstances surrounding police encounters.¹⁴⁷

2. LEGAL LANDSCAPE

Three significant legal implications must be considered before the implementation of overarching body-worn camera legislation: (1) federal and state constitutional law regarding privacy and public surveillance¹⁴⁸; (2) FOIA and similar state laws regarding the data created by body-worn cameras; and (3) the storage and use of the data as evidence.

CONSTITUTIONAL LAW ON PRIVACY AND SURVEILLANCE

The Fourth Amendment protects citizens against unreasonable searches and seizures of their persons, houses, papers and effects.¹⁴⁹ However, it was not until *Katz v. United States*¹⁵⁰ that the Court rejected the idea that an unreasonable search only occurred when there was a physical trespass into the home.¹⁵¹ Instead, the Court expanded Fourth Amendment protections to situations that engendered a reasonable expectation of privacy.¹⁵² However, the extension of the reasonable expectation of privacy to public spaces was limited. The *Katz* Court stated that “[w]hat a person exposes to the public . . . is not a subject of Fourth Amendment protection.”¹⁵³ In his concurrence, Justice Harlan articulated a two-part test to determine whether an individual’s expectation of privacy was reasonable: (1) the person exhibited an actual (subjective) expectation of privacy and (2) the expectation is one that society is prepared to recognize as reasonable.¹⁵⁴ Justice Harlan

¹⁴⁰ About \$1 million U.S. Dollars. FX Exchange Rate *available at* <http://eur.fxexchangerate.com/usd/815000-currency-rates.html>.

¹⁴¹ Josh Halliday, *Met Police Trial of Body-Worn Cameras Backed by David Davis*, THE GUARDIAN (May 8, 2014), <http://www.theguardian.com/uk-news/2014/may/08/police-london-issued-body-worn-cameras>.

¹⁴² *Id.*

¹⁴³ *Metropolitan Police Officers Start Wearing Body Cameras*, BBC (May 8, 2014), <http://www.bbc.com/news/uk-england-london-27313500>.

¹⁴⁴ *Id.*

¹⁴⁵ Maryam Shah, *Toronto Police to Test Body-Mounted Cameras*, TORONTO SUN (Sept. 22, 2014), <http://www.torontosun.com/2014/09/22/toronto-police-body-cameras-coming-in-november#>.

¹⁴⁶ Maryam Shah, *Toronto Police Prepare for Body Camera Pilot Project*, TORONTO SUN (Oct. 4, 2014), <http://www.torontosun.com/2014/10/04/toronto-police-prepare-for-body-camera-pilot-project#>.

¹⁴⁷ *Id.*

¹⁴⁸ The general principle of American surveillance law is that surveillance is legal unless forbidden. Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1942 (2013) Although American law governing surveillance is piecemeal, the Fourth Amendment provides the most relevant protection for the purposes of law enforcement tactics.

¹⁴⁹ U.S. CONST. amend. IV.

¹⁵⁰ 389 U.S. 347 (1967).

¹⁵¹ Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourteenth Amendment to a World That Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1368 (2004).

¹⁵² *Id.* at 1368.

¹⁵³ *Katz*, 389 U.S. at 351.

¹⁵⁴ *Id.* at 361 (Harlan, J., concurring).

further explained that activities that an individual exposes to the “plain view” of outsiders are not protected because this signifies the person’s lack of intent to keep his actions private.¹⁵⁵ Under this rubric of individual intent, a conversation in a telephone booth could not be intercepted without warrant because the booth’s occupant is entitled to assume that when he closes the door the telephone booth temporarily becomes a private place where the expectation of privacy is recognized as reasonable.¹⁵⁶

Most courts have followed Justice Harlan’s test when defining the scope of the reasonable expectation of privacy.¹⁵⁷ The line of cases that followed *Katz* clarified that almost any action exposed to a third party could defeat a reasonable expectation of privacy.¹⁵⁸ Indeed, courts have almost always found the Fourth Amendment inapplicable where a defendant has complained of being videotaped in public.¹⁵⁹ Further, under current Fourth Amendment jurisprudence, a police officer is free to observe a person or activity when there is no reasonable suspicion of criminality, as long as the activity does not amount to a search or seizure.¹⁶⁰ Taken together, there is a strong presumption that body cameras capturing videos in a public space viewable to third-parties would not amount to a constitutional violation.

In private spaces, the filming officer would have to be in compliance with Fourth Amendment search and seizure requirements to avoid constitutional issues surrounding the filming of civilian interactions.¹⁶¹ With a valid search warrant, body camera recordings of individuals in a private setting would mitigate, but not eviscerate,¹⁶² constitutional concerns.¹⁶³

WIRETAPPING STATUTES

The federal wiretapping statute¹⁶⁴ most related to body-worn cameras is included in the Wiretap Act¹⁶⁵, a portion of the USA Patriot Act of 2001¹⁶⁶ amending the Electronic Communications Privacy Act of 1986 (“ECPA”).¹⁶⁷ Notably, silent video surveillance is not covered under ECPA.¹⁶⁸ Audio recording included in

¹⁵⁵ *Id.*

¹⁵⁶ *See id.*; *see also* United States v. Taketa, 923 F.2d 665, 677 (9th Cir. 1991) (noting that “[p]ersons may create temporary zones of privacy within which they may not reasonably be videotaped . . . even when that zone is a place they do not own or normally control”).

¹⁵⁷ Blitz, *supra* note 151, at 1369.

¹⁵⁸ I. Bennett Capers, *Crime, Surveillance, and Communities*, 40 FORDHAM URB. L.J. 959, 965 (2013).

¹⁵⁹ Blitz, *supra* note 151, at 1378; *see also* Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 270 (2002) (“Under this caselaw, it would be difficult to argue that monitoring an individual with a camera is a seizure.”). For examples of cases, *see* United States v. McIver, 186 F.3d 1119, 1125–26 (9th Cir. 1999) (holding that images captured by a government agent’s installation of a hidden video camera placed on public, national forest lands, which are open to the public, do not violate the Fourth Amendment); *Taketa* 923 F.2d at 677 (“Video surveillance does not in itself violate a reasonable expectation of privacy. Videotaping of suspects in public places, such as banks, does not violate the fourth amendment; the police may record what they normally may view with the naked eye.”).

¹⁶⁰ *See* Texas v. Brown, 460 U.S. 730, 738 n.4 (1983).

¹⁶¹ *See also* J. Amy Dillard, *Big Brother Is Watching: The Reality Show You Didn’t Audition for*, 63 OKLA. L. REV. 461, 502 (2011) (“[T]he Supreme Court’s decision in *Kyllo v. United States* suggests that the use of technology in general . . . to enhance surveillance can affect the Fourth Amendment analysis of a potential search.”).

¹⁶² United States v. Torres, 751 F.2d 875, 883 (7th Cir. 1984) (“[A] search could be unreasonable, though conducted pursuant to an otherwise valid warrant, by intruding on personal privacy to an extent disproportionate to the likely benefits from obtaining fuller compliance with the law. ‘[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.’”) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536–37 (1967)).

¹⁶³ United States v. Cuevas-Sanchez, 821 F.2d 248 (5th Cir. 1987) (video surveillance of home constituted search, warrant required).

¹⁶⁴ For a comprehensive history of American surveillance law, *see generally* Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1270–78 (2004).

¹⁶⁵ 18 U.S.C. §§ 2510–2522 (2012).

¹⁶⁶ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

¹⁶⁷ Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848. The statute was originally enacted as the Omnibus Crime Control and Safe Streets Act of 1968. Pub. L. 90-351, § 802, 82 Stat. 212 (current version at 18 U.S.C. §§ 2510-2520 (2012)).

¹⁶⁸ *See, e.g.*, United States v. Falls, 34 F.3d 674, 680 (8th Cir. 1994); United States v. Koyomejian, 970 F.2d 536, 540 (9th Cir. 1992); United States v. Biasuci, 786 F.2d 504, 508 (2d Cir. 1986).

the video surveillance recommended for a body-worn camera statute would not fall under the statutory protection of the Wiretap Act because the recording would be in a public space, not implicating the protections of the statute or the Fourth Amendment.

Even after passing the constitutional standard for visual public surveillance, every state, except Vermont, and the United States government has criminalized some forms of nonconsensual interception of oral communications through electronic recording devices.¹⁶⁹ However, the statutes vary on three important provisions:

- (1) [W]hether criminal punishment requires a surreptitious or otherwise concealed recording or whether open recording is still prohibited;
- (2) Whether the consent of one party to the conversation, typically the recording party, insulates the recorder from criminal liability or whether the interception remains illicit absent the consent of all parties to the communication; and
- (3) Whether the statute’s penalties apply when the party recorded owns no “reasonable expectation of privacy” or is otherwise exempted by virtue of the party’s status as a public official or police officer.¹⁷⁰

While the federal wiretapping statute set a floor on wiretapping restrictions, many of the states have more narrowly regulated the use of wiretapping within their borders. The federal statute prohibits the interception and disclosure of any oral, wire, or electronic communication unless the recorder is a party to the communication, or one party to the communication offers their consent prior to being recorded.¹⁷¹ Courts have interpreted the statute to punish the recording of oral communication only where the recorded party demonstrated an objective and subjective expectation of privacy—in keeping with *Katz*.¹⁷²

However, some states have forgone the reasonable expectation of privacy standard in their wiretapping statutes and require that all parties consent to be recorded. Both requirements represent a bar that goes beyond what the federal legislation mandates. The two states that require all-party consent are Massachusetts and Montana.¹⁷³ Despite these stringent requirements, the statutes in both states only apply to recordings made in secret.¹⁷⁴

Massachusetts. The Massachusetts statute applies to law enforcement officials, unless they obtain a court order to investigate an enumerated list of crimes committed in furtherance of an organized criminal enterprise.¹⁷⁵

Montana. The Montana statute contains an exception for public employees who record an interaction while performing their official duties.¹⁷⁶ Despite the exception, the state’s supreme court has noted that the constitutional right to privacy that Montana’s citizens are given under the state constitution narrows the range

¹⁶⁹ Jesse Harlan Alderman, *Police Privacy in the iPhone Era?: The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian’s Right to Record Police Activity*, 9 FIRST AMEND. L. REV. 487, 489 (2011). Although Vermont does not have a wiretapping statute, the state’s supreme court “has held that the state constitution’s privacy provision protects individuals from certain types of wiretapping or illicit recordation.” *Id.* at 489 n.3.

¹⁷⁰ *Id.* at 490.

¹⁷¹ 18 U.S.C. §§ 2511(2)(c)–(d) (2012).

¹⁷² Alderman, *supra* note 169, at 493.

¹⁷³ In the 2013, the Montana Supreme Court in *State v. Dugan*, 303 P.3d 755 (Mont. 2013), partially struck down the state’s privacy in communication law. *See id.* at 772. The court decided that the statute’s prima facie provision was unconstitutionally overbroad. *Id.*

¹⁷⁴ Mass Gen. Laws ch. 272 § 99(B); Mont. Code Ann. § 45-8-213(1)(c), *invalidated in part by* Dugan, 303 P.3d.

¹⁷⁵ *Id.* § 99(D)–(N).

¹⁷⁶ Mont. Code Ann. § 45-8-213(1)(c)(1).

of warrantless searches that may be under the federal constitution¹⁷⁷— a holding that implies that an unwarranted police recording of communications may still violate the state constitution.¹⁷⁸

Illinois. Until March 2014, Illinois had the most restrictive wiretapping statute in the country. The Illinois Eavesdropping Act¹⁷⁹ imposed criminal penalties on any person, including police officers, who used an eavesdropping device to record part or all of any conversation unless the recorder had gained the consent of all parties.¹⁸⁰ The statute defined “conversation” as “any oral communication between [two] or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation.”¹⁸¹ Further, the statute applied to both open and secret recordings.¹⁸² Finally, the Illinois law provided a narrow exception for police who obtained a court order and for any person who recorded a meeting under the state’s Open Meetings Statute.¹⁸³

However, the Illinois Supreme Court ruled the statute unconstitutional in *People v. Melongo*.¹⁸⁴ The court reasoned that since the statute as written deemed all conversation to be private and, as a result, not subject to recording absent the consent of all parties, even the participants had no expectation of privacy, thus criminalizing a wide range of innocent conduct in recording conversations.¹⁸⁵ The court said that the statute criminalized, for example, “a loud argument on the street, a political debate on a college quad, yelling fans at an athletic event, or any conversation loud enough that the speakers should expect to be heard by others;” none of which implicated privacy concerns but the recording of which was made a crime under the law.¹⁸⁶ Therefore, the Illinois Supreme Court held that the recording provision of the statute was unconstitutional on its face because a “substantial number of its applications” violated the First Amendment.¹⁸⁷

Taken together, the Massachusetts statute, the Montana statute, and the unconstitutional Illinois statute provide guideposts for how to draft legislation that will meet state constitutional challenges.

IMPLICATIONS OF THE FREEDOM OF INFORMATION ACT AND STATE SUNSHINE LAWS ON VIDEO SURVEILLANCE

FOIA applies to records of the federal government’s Executive Branch and does not apply to the records of, among other entities, state or local government agencies.¹⁸⁸ As a result, each state has their own open record laws that govern the disclosure process for information kept by their respective governments. A number of states explicitly define public records to include audiovisual recordings. For example, in California, a public record includes “every . . . means of recording upon any tangible thing any form of communication or representation, including . . . words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.”¹⁸⁹ In contrast to the explicit wording in the above statute, many other states’ definitions of public records can be read to include audiovisual recordings. As an example, Delaware’s open records statute defines a public record as:

¹⁷⁷ *State v. Goetz*, 191 P.3d 489, 494 (Mont. 2008).

¹⁷⁸ Alderman, *supra* note 169, at 509.

¹⁷⁹ 720 Ill. Comp. Stat §§ 5/14-1–2, *invalidated by* *People v. Melongo*, 6 N.E.3d. 120 (Ill. 2014).

¹⁸⁰ *Id.* § 5/14-2(a)(1)(A).

¹⁸¹ *Id.* § 5/14-1(d).

¹⁸² *Id.*

¹⁸³ *Id.* § 5/14-2(b).

¹⁸⁴ 6 N.E.3d. 120 (Ill. 2014).

¹⁸⁵ *Id.* at 126.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 127.

¹⁸⁸ *FOIA Reference Guide*, DEP’T. OF JUSTICE (Jan. 2010), <http://www.justice.gov/oip/department-justice-freedom-information-act-reference-guide-january-2010>.

¹⁸⁹ Cal Gov’t Code § 6252(g); *see also id.* § 6252(e).

[I]nformation of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.¹⁹⁰

Although the definitions for what constitutes a public record vary among the states, the language generally falls between that of the California and Delaware open records laws.

Like FOIA, many of the states' open records statutes contain exemptions to what government records must be available for disclosure. Every state statute contains an exemption for the release of police records; however, some states provide exemptions that are broader than others. On the more restrictive end of the spectrum, Pennsylvania's open records statute creates a broad exemption for agency records that relate to or result in a criminal investigation.¹⁹¹ On the other extreme, Arizona's open records law generally allows for the release of police records. Under the statute, "[p]ublic records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours."¹⁹² Despite the large gap in these two forms of statutory language, most states' open records laws tend toward exempting police records that relate to active investigations.¹⁹³

3. VIDEO FOOTAGE AS EVIDENCE

One of the most significant questions asked by opponents of surveillance systems is "[w]hat will the police department do with the film?"¹⁹⁴ Data management is an issue most fittingly addressed by municipal police departments adhering to state-promulgated standards, as the large amounts of organizing, filing, and designation will likely be handled by the recording officer. However, the interdepartmental sharing of video data and the use of video footage in court are issues addressed in other contexts and by case law.

Movies and videos are admissible in evidence on the same evidentiary basis as photographs.¹⁹⁵ Generally, strict proof of the chain of custody for video evidence is not necessary in many courts;¹⁹⁶ the proponent may establish the chain of custody through testimony.¹⁹⁷ While body-worn cameras typically upload the footage directly to the database minimizing chain of custody issues, consistent with the purpose of a body-worn camera program to create transparency and accountability, a state statute may require a stronger chain of custody requirements to ensure proper uploading and consistency in procedures. When an arrest is made on the basis of video evidence, the film is admissible at the trial of the suspect who was filmed.¹⁹⁸ Courts have been willing to admit the filmed evidence in criminal cases where the officer had probable cause to believe that a crime had been committed.¹⁹⁹

¹⁹⁰ 29 Del. C. § 10002(l).

¹⁹¹ 65 P.S. Public Officers § 67.708(b)(16).

¹⁹² A.R.S. § 39-121.

¹⁹³ CHRISTINE BECKETT, PRIVATE EYES: CONFIDENTIALITY ISSUES AND ACCESS TO POLICE INVESTIGATION RECORDS, REPORTERS COMM. FOR FREEDOM OF THE PRESS 2 (2010) ("Most states . . . have provisions that ongoing investigations into criminal conduct exempt.").

¹⁹⁴ Granholm, *supra* note 87, at 706.

¹⁹⁵ Hon. James P. Flannery, Jr., *Using Videos at Trial: The Big Picture What Foundation Is Needed to Introduce A Video at Trial in Illinois? Are Videos Subject to Discovery? What Special Rules Apply to Day-in-the-Life and Surveillance Videos?* *The Author*, 95 ILL. B.J. 642, 643 (2007).

¹⁹⁶ 2 LAW OF ELECTRONIC SURVEILLANCE § 7:59 (citing *People v. Taylor*, 956 N.E.2d 431, 440 (Ill. 2011)).

¹⁹⁷ *Id.* (citing *Wells v. State*, 604 So. 2d 271, 277 (Miss. 1992); *State v. Day*, 447 S.E.2d 576, 579 (W. Va. 1994)).

¹⁹⁸ Granholm, *supra* note 87, at 706–07 (citing *People v. Barker*, 300 N.W.2d 648 (Mich. Ct. App. 1980); *People v. Heading*, 197 N.W.2d 325 (Mich. Ct. App. 1972); *People v. Mines*, 270 N.E.2d 265 (Ill. App. Ct. 1971)). *See generally* 16 AM. JUR. PROOF OF FACTS 3d 493 (1992) ("Case law thus regularly supports the proposition that duly verified videotapes are admissible in evidence on the same basis as motion picture films and subject to the same rules applicable to photographic evidence generally.") (citations omitted); Annotated, *Admissibility of Visual Recording of Event or Matter Giving Rise to Litigation or Prosecution*, 41 A.L.R. 4TH 812, § 16 (1985).

¹⁹⁹ *Id.*

The state's duty to preserve potentially useful evidence in criminal cases arises under the Fourteenth Amendment's guarantee of due process.²⁰⁰ However, this duty is extremely limited under the Constitution, as "a defendant must show that evidence was destroyed in bad faith by showing that it was potentially useful, and therefore its destruction deprived the defendant of due process."²⁰¹ When the exculpatory value of the evidence is apparent (a higher bar than *Youngblood's* "potentially useful" standard), the defendant need not establish good faith.²⁰² Under state constitutions, many jurisdictions hold that good or bad faith is not dispositive of whether a defendant received due process of law.²⁰³

Similarly, the statute should also consider civil litigation implications of data retention policies.²⁰⁴ Specific retention policies for video evidence can comply with other routine destruction of evidence doctrines in that state,²⁰⁵ which would limit the collection of indiscriminate data²⁰⁶ and eradicate indefinite retention.²⁰⁷ Because a major benefit to body-worn cameras is providing an evidentiary record for citizen complaints, the statute of limitations requirements should influence video retention policies. The statutory mandate for deletion of video footage must work in concert with the timeline for filing an action under applicable statutes of limitations for a police civil rights action.²⁰⁸ The retention guidelines mandated by state legislation must strike a balance between the value of the evidence for litigation and privacy concerns.

²⁰⁰ See *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) ("[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."). In the Federal context with some overlap in state courts, six distinct doctrines control the destruction of evidence by the prosecution: (1) the spoliation inference; (2) Constitutional limits on evidence destruction; (3) The Jencks Act; (4) Federal Rule of Criminal Procedure 16; (5) the supervisory powers of the courts over police and prosecutor; and (6) Common law or constitutional tort. JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE, § 6.1 Routine Destruction of Evidence: Introduction (2014).

²⁰¹ Catherine Greene Burnett, *"If Only": Best Practices for Evidence Retention in the Wake of the DNA Revolution*, 52 S. TEX. L. REV. 335, 339 (2011) (citing *Youngblood*, 488 U.S. at 58). *Youngblood* has evolved in "at least ten states [that] have either explicitly or implicitly rejected the bad-faith standard of due process analysis . . . in favor of a totality-of-circumstances, multi-factor balancing test that shifts focus from the conduct of the police to the nature of the evidence including its materiality and impact on the defense case." *Id.* at 344.

²⁰² *California v. Trombetta*, 467 U.S. 479, 489 (1984).

²⁰³ Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U.L. REV. 241, 287 (2008) (noting that in the decade following *Youngblood*, ten states, either explicitly or implicitly, spurned *Youngblood's* bad faith standard in interpreting due process under their own constitutions) (citations omitted); see also 40 A.L.R. 5th 113 (citing *State v. Morales*, 657 A.2d 585 (Conn. 1995)).

²⁰⁴ GORELICK, *supra* note 200 at § 8.1 ("[C]avalier operation of document-destruction programs carries grave risks. Organizations make themselves vulnerable to sanctions when they fail to suspend their programs and destroy evidence relevant to pending, imminent, or reasonably foreseeable litigation. They also expose themselves to sanctions when they destroy records systematically requested in the course of litigation customary to their lines of business.").

²⁰⁵ See generally *United States v. Gomez*, 191 F.3d 1214, 1219 (10th Cir. 1999) ("[D]estruction of evidence in accordance with an established procedure precludes a finding of bad faith absent other compelling evidence.") (quoting *United States v. Deaner*, 1 F.3d 192, 202 (3d Cir. 1993)); *State v. Casselman*, 114 P.3d 150, 154 (Idaho Ct. App. 2005) (finding that police who destroy evidence while acting according to procedure are, at most, negligent); *State v. Schexnayder*, 685 So.2d 357, 366 (La. Ct. App. 1996) (use of "standard operating procedures" in handling evidence not bad faith); *Patterson v. State*, 741 A.2d 1119, 1129 (Md. 1999) (following "standard police procedure" not bad faith); *State v. Hall*, 768 P.2d 349, 350 (Nev. 1989) (stating that there is no bad faith where a chemist saved a blood sample "for a reasonable period of time and then disposed of it in accordance with his routine practice and for a legitimate purpose"); *State v. Wittenbarger*, 880 P.2d 517, 522 (Wash. 1994) ("[C]ompliance with . . . established policy regarding the evidence at issue . . . [is] determinative of good faith.").

²⁰⁶ See N.H. Rev. Stat. § 236:130 and Me. Rev. Stat. 29-A, § 2117-A (limiting the collection of indiscriminate data from Automatic License Plate Recognition technology); see also *Rushin*, *supra* note 75, at 286 (discussing legislative efforts to limiting the collection of indiscriminate data from Automatic License Plate Recognition technology); *Cuevas-Sanchez*, 821 F.2d at 251 ("This type of surveillance provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the spectre of the Orwellian state.").

²⁰⁷ Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 25 n.61 (2008) (noting that our surveillance and information privacy laws say little about data retention and that much of what they say provides incentives for indefinite retention) (citations omitted).

²⁰⁸ Michael E. Rosati, *Wrestling with Technology in the Defense of Police Civil Rights and Liability*, in REPRESENTING MUNICIPALITIES IN LITIGATION 6, 2013 WL 9703 (2013).

A complex issue surrounding video footage as evidence occurs when film is treated as a “depiction of reality.”²⁰⁹ The power of visual evidence²¹⁰ in criminal outcomes is apparent, as “[s]tudies have shown that the mere presence of a photograph at trial (even a neutral one) significantly increases the conviction rate compared to when no photos are shown (up to 38% from only 8.8%).”²¹¹ Both implicit bias and camera perspective bias influence the evidentiary value of video footage.

Camera Perspective Bias. “Camera perspective bias” is a problematic feature of video footage in the evidentiary record. A recent New York Times article articulated concerns that body cameras may more closely mirror the officer’s subjective experience than the victim’s. This might potentially lead individuals reviewing the footage to inadvertently disregard officers’ aggressive behavior. As the article explains:

In a series of experiments led by the psychologist G. Daniel Lassiter of Ohio University, mock juries were shown exactly the same interrogation, but some saw only the defendant, while others had a wider-angle view that included the interrogator. When the interrogator isn’t shown on camera, jurors are significantly less likely to find an interrogation coercive, and more likely to believe in the truth and accuracy of the confession that they hear — even when the interrogator explicitly threatens the defendant.²¹²

Visual jurisprudence²¹³ and its role in in fact-based justice have been similarly questioned:

As viewers, we may think we are getting the whole picture, but every camera frames its own point of view. With equal certainty we may believe in the digital images that we see, but how can we be sure of their basis in reality?²¹⁴

Because a body-worn camera is of necessity pointed outwards, away from the police officer, policy or statutory tools are limited in their ability to address camera perspective bias resulting from body-camera use. However, limiting officer discretion regarding the on-off switch can prevent some of the drawbacks of camera framing because policies can ensure that the video captures the entirety of the police-citizen interaction from start to finish.²¹⁵

Implicit Bias. Current science “demonstrates that disparate treatment can result not only from the deliberate application of consciously endorsed prejudiced beliefs, but also from the unwitting and uncorrected influence of implicit attitudes and associations in the social-perception process.”²¹⁶ The foremost diagnostic of unconscious bias finds that most people have an implicit bias against members of traditionally disadvantaged

²⁰⁹ Jessica Silbey, *Cross-Examining Film*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 17 (2008).

²¹⁰ Richard K. Sherwin, *Visual Jurisprudence*, 57 N.Y.L. SCH. L. REV. 11, 15 (2013) (“[I]mages do not merely add to words. They are transformative, both qualitatively and quantitatively, which is to say, both in terms of the content that they display and the efficacy of emotion and belief that they evoke.”).

²¹¹ *Id.* at 30 (2013) (citing D.A. Bright & J. Goodman-Delahunty, *Grossome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, in LAW AND HUMAN BEHAVIOR 183 (2006)).

²¹² *Can a Jury Believe What It Sees?*, N.Y. TIMES (July 13, 2014), http://www.nytimes.com/2014/07/14/opinion/videotaped-confessions-can-be-misleading.html?_r=0 (citing G. Daniel Lassiter et al., *Videotaped Interrogations and Confessions: A Simple Change in Camera Perspective Alters Verdicts in Simulated Trials* 87 J. APPLIED PSYCH. 867 (2002)).

²¹³ Visual jurisprudence is the vast array of visual evidence or the production of argument using visual structures such as charts, drawings, digital simulations, computer displays, or videos.

²¹⁴ Sherwin, *supra* note 210, at 14.

²¹⁵ *Id.* at 24 n.49 (“As legendary cinematographer Haskell Wexler once put it, when the camera turns on—beginning at one discrete point in time and ending in another—reality is changed.” (citing Conference, *Visual Evidence VII*, U.C.L.A. (Aug. 20, 1999))); *see also, e.g.*, DON IHDE, TECHNOLOGY AND THE LIFE WORLD 42, 46 (1990) (discussing the extent to which we are situated in the world, and see as a particularly situated person from a particular vantage, toward others otherwise situated).

²¹⁶ Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1034 (2006).

groups.²¹⁷ Not only are implicit biases pervasive, but they are “especially problematic, because they can produce behavior that diverges from a person’s avowed or endorsed beliefs or principles.”²¹⁸

In evaluating video footage and the evidentiary record, this same bias is implicated.²¹⁹ As exemplified in the Supreme Court’s evaluation of dashboard camera footage in *Scott v. Harris*, the recordings of police search and seizure conduct might not impress all viewers the same way.²²⁰ Some judges viewing the images may tend to see the police actions as justified, even if others would not.²²¹ Without having some correction for implicit bias, body-worn cameras might not actually influence Fourth Amendment compliance in litigation outcomes.²²² More importantly, evaluators of the footage may consider the video and themselves to be “objective” without understanding that internal biases play an important role in any evaluation.²²³

In the criminal justice context, correcting for implicit bias through litigation is difficult within the confines of current antidiscrimination law.²²⁴ For example in racial profiling cases, the Fourth Amendment’s standard of reasonable suspicion allows for implicit bias to go unchecked and unpunished. Claims of discrimination would be litigated under the Equal Protection clause, which requires the claimants to show intentional discrimination.²²⁵ Implicit bias and evidence of intentional discrimination are incompatible.²²⁶

Because implicit bias pervades the criminal justice system, corrective measures can be taken through legal standards that consider the shortcomings of visual evidence. In order to capture the maximum benefits from body-worn cameras, “[w]e need to incorporate new visual benchmarks into the rhetoric of law in order to cope with the epistemological, ontological, and metaphysical quandaries that accompany law’s migration to the screen.”²²⁷ Legislatures should pay close attention to the best available evidence about people’s actual evaluations of video evidence in light of legal rules.²²⁸ While the data created by body-worn cameras create a stronger evidentiary record for criminal and civil litigation, the applicable laws in the proceeding must also recognize the limitations of this video evidence. Overall, the benefits of the data from body-worn cameras as evidence may be limited due to its form as video evidence and the pervasiveness of implicit bias.

²¹⁷ Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006).

²¹⁸ Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006).

²¹⁹ Silbey, *supra* note 209, at 37 (noting the partiality and bias inherent in all film).

²²⁰ See Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 47 AKRON L. REV. 693, 733 (2014) (discussing *Scott v. Harris* as another Fourth Amendment case in which the Supreme Court had to “slosh its way through the factbound morass of reasonableness” and describing the justices differing views of the footage) (citations omitted).

²²¹ See generally, Dan M. Kahan, et. al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

²²² See Harris, *Picture This*, *supra* note 47, at 367–68.

²²³ “Technological advances that can put appellate judges in shoes that very much resemble those of jurors and trial judges raise questions about whether appellate courts should defer to judges and juries as they traditionally have done” Joan Steinman, *Appellate Courts As First Responders: The Constitutionality and Propriety of Appellate Courts’ Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1524 (2012). See generally, Dan M. Kahan et al., *supra* note 221, at 841–42. (critiquing the Supreme Court’s circumvention of jury’s role as a result of its interpretation of police dashboard video).

²²⁴ Jolls & Sunstein, *supra* note 217, at 996 n.45 (citing voluminous scholarly literature critiquing existing antidiscrimination law, both constitutional and statutory, for its general failure to address the problem of implicit bias).

²²⁵ See *Whren v. United States*, 517 U.S. 806, 813 (1996) (“But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”).

²²⁶ See Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 25, 29 (2011) (substantiating these claims is extremely difficult especially in light of *Whren* and its allowance of race-neutral reasons to stop suspects).

²²⁷ Sherwin, *supra* note 210, at 38.

²²⁸ Jolls & Sunstein, *supra* note 217, at 972.

II. INCORPORATING POLICY CONSIDERATIONS INTO STATE LEGISLATION

A legislative mandate cannot address all of the deep contours of body-worn camera policy in its implementation phase. However, it is important to create a common core to address the minimum standards that police departments must meet to obtain the benefits and reduce the costs of body-worn cameras. Additionally, delegating authority, such as through the creation of a commission and independent ombudsmen, produces flexibility to create and facilitate standards appropriate for individual police departments without jeopardizing the core of the initiative.

POLICY CONSIDERATIONS

The model state legislation presented in this document addresses the majority of policy concerns at some level, but also reflects a conscious decision to allow flexibility for police department-specific protocols to shape use of the technology. Recognizing that not all issues can be addressed directly through the legislation, legislative committees and executive bodies on both the state and local level must fulfill their duties by assisting police departments in enumerating and examining procedures during execution stages.

1. FUNDING

Law enforcement's use of body-worn cameras implicates myriad policy concerns. Policy concerns surrounding funding and scalability are particularly relevant following a White House initiative to purchase 50,000 body-worn cameras.²²⁹

As with other public sector organizations, the 2008 economic crisis impacted police departments across the country. Many states and municipalities cut their budgets deeply in response to the economic headwinds that the recession caused, and police departments were not spared from the spending reductions. Police organizations have estimated that as many as 15,000 police officers lost their jobs in the years following the Great Recession.²³⁰ Even though the economy is growing and tax revenue is increasing, spending needs have been anticipated to outpace revenue growth.²³¹ This fiscal reality means that, absent a concurrent increase in revenue, states will not have extra room to increase spending on new ventures that could be deemed non-essential expenditures. The upshot of all this is that states cannot afford to be subject to unfunded or underfunded mandates in their implementation of police-worn body cameras.

Given the political difficulty of raising taxes, some current legislation calls for an increase in fees and penalties as a means of financing the purchase, maintenance, and update of body-cameras. A policy considered by this Report (but not adopted) was an increase in the fees charged to sex offenders and in the fees and penalties associated with other, more mundane activities, such as parking tickets or driver's license renewals. This policy was modeled on the proposed New Jersey legislation that mandates police body-worn cameras.²³² Ultimately, however, we determined that this option implicated at least two significant equality concerns: (1) there is a concern that even if legislation looks to increase the penalties for offenses devoid of police discretion (such as parking tickets), a disproportionate number of the individuals who will come into contact with police officers will be low-income residents of color; (2) there is a concern that any increase in fees

²²⁹ *Fact Sheet: Strengthening Community Policing*, WHITE HOUSE (Dec. 01, 2014)

<http://www.whitehouse.gov/the-press-office/2014/12/01/fact-sheet-strengthening-community-policing>.

²³⁰ THE IMPACT OF THE ECONOMIC DOWNTURN ON AMERICAN POLICE AGENCIES, DEP'T OF JUSTICE 13 (2011).

²³¹ See *State Budget Actions FY 2013 and FY 2014*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/fiscal-policy/state-budget-actions-fy2013-and-fy2014.aspx> (last visited Nov. 30, 2014).

²³² S.B 2518, 216th Leg (N.J. 2014), available at http://www.njleg.state.nj.us/2014/Bills/S3000/2518_I1.HTM.

would be borne most heavily by low-income residents of all ethnic backgrounds who already struggle to cover fees and penalties at their current level. While states will have various options for a funding mechanism, one possible solution to the above mentioned issues is to limit the number of individuals who would be subject to any increased penalties used to fund body-worn camera legislation. Specifically, increased penalties could only be applied to individuals with incomes above two-hundred percent of the federal poverty limit; those offenders whose incomes fall below two-hundred percent of the federal poverty level would only be subject to current penalties.

Finally, another potential source of funds for states to administer body-worn camera programs is President Obama's Body Worn Camera Partnership Program. The President's proposal would provide a fifty percent match to states or localities that purchase body-worn cameras and data storage.²³³ The program would provide \$75 million over three years to help purchase 50,000 body-worn cameras.²³⁴

SCALE

In order to maximize returns while trying to keep costs low, policymakers might be attracted to adjusting the scale of camera programs by concentrating camera deployment in high-crime areas and in areas with high rates of citizen complaints, based on the theory that targeting such areas will yield the greatest return on state or municipal investment in terms of deterring and disposing of baseless citizen complaints and improving officer conduct. Moreover, confining deployment of cameras to these areas might also reduce the number of cameras that need to be purchased as well as the amount of data requiring storage, which in turn might help to alleviate some of the strain on state, municipal, and departmental budgets.

Despite these attractions, there is reason to be wary of this "targeting" approach. Below we set out several factors that weigh against adopting such an approach to camera deployment:

- **The primary goal of implementing a body-worn camera program is to improve police-citizen interactions for *all*.** The proposed legislation accompanying this Report is premised on the idea that all stakeholders — communities, departments, municipalities, and states alike — stand to benefit from integrating body-worn cameras into police practice as a regular and expected part of everyday policing. This regularization cannot occur in a "targeting" scenario, where cameras are deployed essentially as an extraordinary tool reserved for the "worst" communities.
- **The "targeting" approach might stigmatize targeted communities.** To the extent that communities are targeted based on some undesirable characteristic, over time body-worn cameras may come to be viewed as a source of stigma. Should they be viewed this way, communities may shun them as indicative of undesirability, which would disrupt the regularization of camera use. The issue of stigma may be particularly problematic if the basis for targeting results in the deployment of cameras at higher rates in communities of color, where stigmatization based on other characteristics may already be a concern. Note also that despite their many benefits, body-worn cameras do impose costs in the form of reductions of privacy and potential for misuse. To the extent that a "targeting" approach might concentrate these costs in certain communities, there may be a sense that deployment of body-worn cameras constitutes a sort of punishment; a sentiment that would likely contribute to resentment toward body-worn camera programs.
- **The "targeting" approach would hold members of targeted communities to a higher behavioral standard than that to which members of other communities are held.** The use of body-worn cameras effectively sets a new behavioral standard for citizens and officers alike. Faced with the

²³³ *Fact Sheet: Strengthening Community Policing*, *supra* note 229.

²³⁴ *Id.*

knowledge that their conduct is being memorialized in an audio/video recording, citizens and officers are motivated to behave in as professional and/or courteous a manner as possible. While this is a chief benefit of a camera program, a certain degree of inequity comes into play if members of other communities are not held to the same standard. To put it bluntly, it hardly seems fair that the mistakes or misconduct of some citizens would be memorialized in a recording that can be used against them, while the mistakes or misconduct of citizens in other communities are not. In as far as the selective deployment of body-worn cameras has the potential for this sort of inequity, we find it problematic.

It is in light of the foregoing concerns that the legislation proposed in this Report would impose an obligation on *all* officers to utilize body-worn cameras. Although we recognize that many departments have initiated pilot programs in particular areas under their jurisdiction, we recommend that the implementation of full-scale programs include a requirement for officers in *all* areas to use cameras in the regular course of their duty.

2. PUBLIC ACCESS TO RECORDINGS

Compliance with the federal and state constitutions is arguably the floor for policy considerations surrounding public access to video recordings.

In some jurisdictions, municipal police departments deny public requests for body-camera video footage when departments claim the footage is not part of the public record.²³⁵ Furthermore, the police claim that the footage is not admissible in court, which diminishes the statute's goals of ensuring transparency and the availability of thorough evidence.²³⁶ The degree to which footage should actually be viewable by public records request or in a courtroom is currently being debated across the country, including in Ohio,²³⁷ Washington,²³⁸ and Colorado.²³⁹ The need for transparency must be weighed against both legitimate police and citizen concerns about making every interaction recorded by the police a matter of public record.

A statutory mandate is a means to decide just how broadly accessible the footage will be. Any state statute, along with municipal policies, should counter the work of some police departments to keep footage out of people's hands when the footage is needed most.

3. PRIVACY CONCERNS

The third issue concerns the matter of the "legitimizing role of crime prevention," or as other critics have posited, "To what extent does crime prevention legitimise impinging on any interests of privacy or anonymity in public space?"²⁴⁰ While the purpose of the mandatory use of police body cameras is intended to increase officer accountability, use of the cameras may have consequences that implicate the privacy interests of the public. While an increase in public surveillance in itself is not unconstitutional, a growth in the surveillance state is the most direct negative consequence that may result from increasing use of police body cameras.

²³⁵ Sara Libby, *Even When Police Do Wear Cameras, Don't Count on Seeing the Footage*, THE ATLANTIC (Aug. 18, 2014), <http://www.citylab.com/crime/2014/08/even-when-police-do-wear-cameras-you-cant-count-on-ever-seeing-the-footage/378690/>.

²³⁶ *Id.*

²³⁷ Jeremy Pelzer, *Could Cleveland Police Keep Body-Camera Footage Secret? Ohio Law Is Unclear*, CLEVELAND.COM (Oct. 16, 2014), http://www.cleveland.com/open/index.ssf/2014/10/could_cleveland_police_keep_bo.html.

²³⁸ Op-Ed, *What Limits Should Go on Police Body Cam Footage?*, NEWS TRIB., (Nov. 19, 2014), http://www.thenewtribune.com/2014/11/19/3495634_what-limits-should-go-on-police.html?rh=1.

²³⁹ Noelle Phillips, *Citizens Question Denver Police Oversight of Body Camera Footage*, DENVER POST (Sept. 7, 2014), http://www.denverpost.com/news/ci_26483675/citizens-question-denver-police-oversight-body-camera-footage.

²⁴⁰ See A. von Hirsch, *The Ethics of Public Television Surveillance*, in ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION 59–76 (A. von Hirsch, D. Garland & A. Wakefield eds., 2000).

Further, increased surveillance caused by the proliferation of police body cameras would disproportionately impact low-income and communities of color in which there are already heavy police presences.

The Rialto study confirmed that policy concerns such as privacy and data security are better addressed through state legislation than through piecemeal policies implemented by individual police departments.²⁴¹ The model legislation proposed here contemplates ways to mitigate surveillance concerns. The model legislation also contemplates the proliferation of body-worn cameras by confining their use to sworn officers. This means that agencies such as parking enforcement would not be allowed to operate body-worn cameras. Most significantly, the model legislation clearly details the circumstances in which a body-worn camera *must* be turned on. To account for creative interpretations arrived at through use of the interpretative canons of construction, inclusive words like “including” and “such as” were left out to make it clear that the legislation presents an *exclusive list* of moments when a body-worn camera should be activated. As such, police officers are not at liberty to have their cameras on at all times and in all places, a fact which somewhat mitigates the concern of ubiquitous surveillance.

Another privacy concern is related to access to the recorded material once it is created. Even with restrictions on the circumstances when police officers are mandated to record their interaction with civilians, ready public access to the recorded material would be detrimental to the privacy interests of those civilians involved in the interaction as well as those of the citizens who were captured on video but were *not* involved in the interaction. Because material recorded by the police is considered a public record, it is subject to open records statutes that allow the public to request government material. The model legislation seeks to address this issue by including a provision that adds material recorded by police body-worn cameras to the list of exemptions that states’ open records statutes include. However, this exemption would not prevent requests for the recorded material from the individuals who were primary participants in an interaction with the police.

AFFIRMATIVE WARNING?

Related to privacy concerns, under a body-worn camera regime it is important for citizens to know that their interactions with police officers will be recorded.²⁴² As such, police officers with body-worn cameras should notify the civilians with whom they are interacting about the use of the camera during the interaction. There are a number of considerations that support the issuance of an affirmative warning before the use of a body-worn camera. As a matter of privacy policy, citizens should be made aware when their actions can be captured on film and potentially viewed at a later time. Given that some states require that all parties must give their consent before being recorded, it is important that any statute regulating the recording of police-civilian interactions deals with the requirements for consent to be recorded found in the states’ wiretapping laws. Finally, an affirmative warning can have a positive effect on police interactions. Lieutenant Harold Rankin, who oversaw the body-worn camera program in Mesa agrees, “When our officers encounter a confrontational situation, they’ll tell the person that the camera is running. That’s often enough to deescalate the situation.”²⁴³

²⁴¹ See J. David Goodman, *New York Police Officers to Start Using Body Cameras in a Pilot Program*, N.Y. TIMES (Sept. 4, 2014), http://www.nytimes.com/2014/09/05/nyregion/new-york-police-officers-to-begin-wearing-body-cameras-in-pilot-program.html?_r=0 (“So far, departments around the country have been largely on their own in drafting policies over basic questions, like when the cameras should be turned on.”); see also Devin Coldewey, *Cop Watch: Who Benefits When Law Enforcement Gets Body Cams?*, NBC NEWS (Aug. 19, 2013), <http://www.cnbc.com/id/100971859> (“While the cameras seem to impact police and citizen behaviors when on, exactly when they’re on varies by police department. Some are automatic, others are triggered at the discretion of the officer, which can raise questions about what officers choose to record — or not.”).

²⁴² U.S. v. Falls, 34 F.3d 674, 680 (8th Cir. 1994) (noting that “silent video surveillance . . . results in a very serious, some say Orwellian, invasion of privacy”).

²⁴³ Miller et al., *supra* note 6.

WIRETAPPING LAWS

Language in body-worn camera legislation can exempt the program from regulations that states have placed on most recordings.

4. CAMERA FUNCTION

Legislation of general applicability mandating the use of body-worn camera technology must mediate between two seemingly conflicting impulses. On the one hand, it seems fundamental that the aim of any legislation mandating the use of body-worn cameras should be to improve access to quality policing for *all*. This suggests that a certain amount of standardization is necessary across departments — to ensure that preexisting resource differentials do not translate into over-large disparities in program quality that would concentrate the program’s benefits in more resource-rich jurisdictions while leaving less-endowed jurisdictions able to capture comparatively few. However, it is also important to recognize relevant differences across jurisdictions and to maintain enough flexibility in the language of the legislation to allow individual departments to tailor aspects of their program to their own unique challenges. In order to mediate between the impulse to standardize and the impulse to maintain flexibility, the model act presented in this Report selects a *minimum core* set of obligations regarding camera functionality and camera program management. The minimum core reflects those program characteristics that are viewed as reasonably necessary to obtaining the benefits of a body-worn camera program anywhere. These include items such as minimum resolution, night vision, battery runtime, camera focal width, and memory size, and appropriate legislation should require adherence to certain technical standards for each of these. Meanwhile, certain other decisions — such as the precise model to be purchased by individual police departments, and what features above and beyond the minimum core that those police departments may wish to deploy to meet the unique challenges of their jurisdictions — remain within departmental discretion.

5. DATA STORAGE

One of the more important policy considerations is data storage and retention. Increased surveillance with video cameras “amplifies concerns that if not properly regulated, the collection of personal surveillance data could present two unique threats of police abuse: the potential for unscrupulous fishing expeditions and the use of data for ulterior, nefarious purposes.”²⁴⁴ Stemming from that high-level apprehension, storage issues, such as how long and who has access to the recordings must also be considered. Furthermore, state record retention laws dictate how long recordings must be stored based on the type of content and how or whether it is used in court.²⁴⁵ This is one of the most important policy items for an agency to consider, as this can be a significant cost to a department. Not only must the data be protected and backed up regularly, but it must be accessible to all parties involved. Some data need to be retained forever; other data can be deleted quickly.

²⁴⁴ Rushin, *supra* note 75, at 301.

²⁴⁵ See e.g., COMMONWEALTH OF MASSACHUSETTS, MASSACHUSETTS STATEWIDE RECORDS RETENTION SCHEDULE (AS AMENDED THROUGH AUGUST 2012) (2012), *available at* <http://www.sec.state.ma.us/arc/arcpdf/0211.pdf> (requiring use of force reports and videos to be retained for 10 years, all murder and rape evidence to be retained for 50 years, and other evidence to be retained for 6 years after the case and any appeal have closed); STATE OF FLORIDA, GENERAL RECORDS SCHEDULE GS2 FOR LAW ENFORCEMENT, CORRECTIONAL FACILITIES, AND MEDICAL EXAMINERS (2015), *available at* <http://dos.myflorida.com/media/693578/gS02.pdf> (requiring video recordings of patrol units to be retained for 30 days unless they become part of an applicable Criminal Investigative Records item, which would trigger the applicable retention standards); STATE OF NORTH CAROLINA, NORTH CAROLINA RECORDS RETENTION AND DISPOSITION SCHEDULE: COUNTY SHERIFF’S OFFICE (2008), *available at* http://www.ncdcr.gov/Portals/26/PDF/schedules/Sheriff_Schedule_2008.pdf (requiring dashboard camera video to be destroyed after 30 days, unless other another applicable record series applies, such as Case History File: Felonies, Case History File: Misdemeanors, or Citizen Complaints/Administrative Investigation Record). See generally Brittany Ericksen, *Evidence Retention Laws: A State-By-State Comparison*, VICTIMSOFCRIME.ORG (Aug. 21, 2013), <http://victimsofcrime.org/docs/default-source/dna-resource-center-documents/evidence-retention-check-chart-9-5.pdf?sfvrsn=2> (documenting state retention laws for evidence in particular criminal investigations).

Even video of standard officer interactions may be retained for a default period of time to cover potential performance complaints. Generally, recordings must be managed by thorough department-level policies that align with the standards of the legislature or commissioned body.

RETENTION TIME

Retention policies should be uniform across the state. The ACLU recommends that the back-office data storage system for video evidence must be secure and accessible to lawyers and defendants — and yet also automatically delete recordings of no interest after 30 days.²⁴⁶ As previously articulated, retention policies should be influenced by the goals of transparency and accountability (by considering statute of limitations implications) as well as the legal restraint of evidence destruction law. Lastly, some benefits of the aggregation of data can also be considered when drafting retention policies. The aggregation of the video data may assist in increased police statistics and reporting on the police-citizen interactions. The mandatory incident reporting included in our model legislation augments other efforts to increase transparency and accountability through the mandatory documentation of police-civilian interactions.

FILING AND DESIGNATION

A robust set of procedures governing the filing of audio/video recordings and the categorization of those recordings according to the sort of incident that they document is crucial to obtaining the full benefits of a body-worn camera program. Points particularly worthy of consideration include the need to account for and maintain the integrity of the chain of custody, the need to store and categorize recordings as soon as possible after the events they capture occur (while memories are still fresh), the need to secure recordings from tamper, release, or unauthorized access and distribution, and the need to secure data pertinent to potentially controversial officer-involved events from the individual officers involved, both to ensure that audio/video evidence is preserved and to protect the integrity and legitimacy of the camera program and the police department as a whole. In the model legislation accompanying this Report, we address these concerns by including provisions within the minimum core standards that require departments to (1) adopt written policies ensuring prompt storage and categorization immediately after each shift, (2) adopt written policies to prevent tampering and unauthorized access, and (3) adopt policies requiring individual officers' supervisors to take responsibility for footage immediately after any incident with an officer that results in a person's bodily harm or death.

Evidentiary restrictions for body-worn camera data can address the potential for officers to use body-worn cameras as a way to conduct extensive surveillance. While legislation can require extensive use of the body-worn cameras to record during an officer's shift, limiting the use of the data can offset extensive public surveillance that would greatly expand police power. Although not provided for in this model legislation, evidentiary rules must limit the availability of the footage for specific instances, including but not limited to civilian complaints, officer disciplinary proceedings, and motions to suppress.

RELEASING RECORDED DATA

With certain limited exceptions, body-worn camera video footage should be made available to the public upon request, demonstrating transparency and openness in police interactions with members of the community. Exemptions to public disclosure, as expressed in departmental guidelines, should include footage taken inside private home and images of juveniles' faces. Other than exceptions enumerated in department policy, other footage should be released as requested by the public.

²⁴⁶ Paul Marks, *Police, Camera, Action*, NEW SCIENTIST, Oct. 23, 2013, 21–22.

6. COMPLIANCE & OVERSIGHT

Although body-worn cameras can be an important accountability measure, their benefits can be undermined if body-worn cameras are used to extend the power of police officers. Put frankly, “Police cameras are useless if not used properly.”²⁴⁷ Body cameras have the potential to protect people from the police, but they are not going to solve the underlying problems of oversight and abuse. Without proper oversight and implementation, body cameras could become just another tool used against the public citizenry.

One of the most difficult issues with body-worn camera legislation is the manual nature of the “on-off” switch. While one might wish to give discretion to the officer when his or her safety is in jeopardy, life-threatening situations are the types of instances where it would be useful to have a video record. Similarly, the manipulation of the “on-off” switch could allow an officer to shape the narrative of their interaction. For example, an officer could turn the camera on only after the civilian with whom he is interacting became aggressive, allowing the officer to justify his use of force without providing context regarding the source of the aggression. The model legislation contemplates such manipulation and requires officers to turn on their cameras at the beginning of a list of specified interactions and to detail why their cameras were turned off if done so during an interaction. These provisions were included to mitigate officer discretion in the use of their cameras.

Even when discretion is limited, current policies still require an officer to turn on his audio-video recording device. Under New Orleans Police Department policy, the body-worn cameras must be turned on for most interactions with the public, including traffic stops, vehicle pursuits, arrests, emergency responses, pedestrian checks, domestic violence calls and DWIs. This sharply contrasts with the policies and technologies associated with the majority of dashboard cameras, which record when the emergency lights of the police vehicle are used.²⁴⁸ Automation would limit discretion, and ensure complete compliance with an “on-off” mandate. Through statutory mandate, a policy that limits police discretion for activation of surveillance technologies like body-worn cameras may reduce racial or ethnic profiling.²⁴⁹

The New Orleans Police Department again provides guidance for possible disciplinary actions when individual police officers are out of compliance with the body-worn camera procedures. New Orleans relies on a tiered disciplinary system for officers who fail to activate the cameras, based in part on what happens during the incident. For instance, officers who fail to turn on the cameras and end up using force could face major consequences, including dismissal. Police unions have cautioned against immediate strict discipline, instead recommending the ramping up of discipline over time: “[Police officers] still haven’t gotten to the point where it’s automatic, muscle memory: You get out of the car, you turn on the camera. Eventually that’ll just be a habit, and some of these things don’t become a problem.”²⁵⁰

To ensure department-wide compliance, a statute can mandate tools such as an independent review board, a citizen review board, or ombudsmen. When body-worn cameras and dashboard cameras are included in consent decrees following legislation, the court is able to appoint a monitor to review and report on outcomes and compliance. Regardless of the chosen review method, the compliance mechanism must

²⁴⁷ Ken Daley, *Cameras Not on Most of the Time When NOPD Uses Force, Monitor Finds*, TIMES-PICAYUNE (Sept. 4, 2014) http://www.nola.com/crime/index.ssf/2014/09/cameras_not_on_most_of_the_tim.html (citing NEW ORLEANS CONSENT DECREE MONITOR: THIRD QUARTERLY REPORT 2:12-CV-01924-SM-JCW, Document 400-1 (Aug. 31, 2014) available at http://media.nola.com/crime_impact/other/NOPD-DECREE-0814-REPORT.pdf).

²⁴⁸ See, e.g., James Chilton, *City Officers: Dash-cams Valuable for Police, Public*, WYO. TRIB. EAGLE (Aug. 27, 2014), http://www.wyomingnews.com/articles/2014/08/28/news/20local_08-28-14.txt#.VRi81x5kuE (“[I]n-car cameras begin recording any time a patrol car activates its emergency lights, though the cameras can also be programmed to operate under a variety of other conditions based on time of day or vehicle location.”).

²⁴⁹ See Rushin, *supra* note 75, at 298 (discussing the benefits of automated license plate readers in the traffic stop context).

²⁵⁰ See Simerman, *supra* note 51.

maintain independence from the police departments to ensure objectivity in reviewing the reports, evidence, and actions of the officers.

CONCLUSION

While body-worn cameras are an important tool in the fight to end police misconduct and brutality and to reduce the costs of complaints and litigation, it is important to understand that cameras alone cannot be the ultimate solution. Video evidence is not always sufficient to ensure accountability — for citizens or for officers. Take the case of Eric Garner: although the inappropriate actions of the officer responsible for his death were caught on tape, the grand jury nevertheless failed to find sufficient evidence to indict that officer.²⁵¹ Surely, the mere existence of video evidence is not enough.

Yet the role of video evidence cannot be underappreciated. One must never forget that only because there *is* video of the interaction that resulted in Garner's death do citizens enjoy such clarity as to the events of that day. Indeed, commentators from all sides of the ideological spectrum have agreed that the nonindictment was a mistake²⁵² — agreement that is rare in today's hyperpolarized political environment, and which would not have been possible without the clarity produced by video of the incident. We submit that while cameras are no panacea, they are certainly a first step toward the progress that our communities, our officers, and our nation deserve.

We hope that the bipartisan outrage sparked by the Eric Garner incident and by other sobering incidents across the country can create the room necessary to institute reforms that may have a significant impact on policing issues. We have humbly sought to contribute to that reform through the Report and model legislation presented here. We hope that our efforts will not be in vain.

²⁵¹ Josh Sanburn, *Behind the Video of Eric Garner's Deadly Confrontation With New York Police*, TIME (July 22, 2014) <http://time.com/3016326/eric-garner-video-police-chokehold-death/>.

²⁵² Danny Vinik, *Why the Left and Right Are Both Angry at Eric Garner's Death*, NEW REPUBLIC (Dec. 4, 2014), <http://www.newrepublic.com/article/120479/eric-garners-death-refocuses-attention-laws-police-brutality>.

III. MODEL STATE LEGISLATION

Section I — *Purpose and Definitions*

1. **Purpose or Legislative Declarations.** This bill aims to provide a framework for integrating audio-video technologies into policing in a way that supports the effectiveness of the community-policing model. It aims to improve interactions between police and members of the community by encouraging civility in officer–citizen interactions and by providing objective evidence of police–citizen encounters with a view towards:
 - 1.1. Protecting officers from unfounded citizen complaints;
 - 1.2. Protecting citizens from potential officer misconduct.
2. **Definitions.**
 - A. Personal audio-video recording device
 1. Personal audio-video recording devices are small video cameras—typically attached to an officer’s clothing, helmet, or sunglasses—that can capture, from an officer’s point of view, video and audio recordings of activities, including traffic stops, arrests, searches, interrogations, and critical incidents such as officer-involved shootings.
 - B. Community policing
 1. Community policing is a philosophy that emphasizes close relationships characterized by mutual trust between police and communities as the foundation for proportionate, efficient, and effective police work. The philosophy entails a police management style and set of operational strategies that make use of police–community partnerships and account for community needs, all while recognizing that the powers of law enforcement are democratically derived from the values of the community.
 - C. Police Officer (“officer”)
 1. Police Officer is a member of the [Insert State] State Police, a sheriff, a deputy sheriff, a city police officer or a law enforcement officer employed by a service district established under [insert relevant state statute].
 2. For the purposes of this statute, police officer shall not include:
 - a) Employees of the police department who solely or primarily engage in parking enforcement and are not equipped with firearms or;
 - b) Crossing guards who are not equipped with firearms.
 - D. Malfunction
 1. Any inability of the personal audio-video recording device for any technical reason to record audio, video, or both.

Section II — *Interdepartmental Commission*

- A. This governing statute creates the [Insert State] interdepartmental commission on personal audio-video recording devices (“the Commission”).

- B. Appointment — The Commission shall consist of a representative appointed by each of the following member departments and agencies:
 - 1. [Department of Public Safety]
 - 2. [Department of Health]
 - 3. [Attorney General]
 - 4. [Comptroller]
 - 5. [Office of the Governor]
- C. Term — Representatives shall serve six (6) year terms. No representative shall serve more than a total of twelve (12) years. Vacancies occurring on the Commission shall be filled for the unexpired term by the same appointing department that made the original appointment. Representatives shall serve until their successors are appointed and qualified.
- D. Procedure — The governor shall designate one of the representatives to be the chairperson of the Commission. A majority vote of three representatives of the Commission shall be required for any action of the Commission. The Commission may adopt rules to govern its proceedings and may provide for such officers other than the chairperson as it may determine. The Commission shall meet at least twice each quarter, and also shall meet on call of its chairperson or any three members of the Commission. Members of the Commission attending meetings of such Commission, or attending a subcommittee meeting thereof authorized by such Commission, shall be paid compensation, subsistence allowances, mileage and other expenses as provided in subsections of [Insert State Reimbursement Statute], and amendments thereto.
- E. Appointment of Ombudsman — The Commission must appoint an ombudsman to review the complaints of citizens who have exhausted administrative remedies within a police department regarding the release of audio-video recordings. The ombudsman shall periodically review a police department's handling of audio-visual recording materials at a time to be determined by the ombudsman. The ombudsman is entitled to employ support staff to execute her or his statutory obligations.
- F. Staff — The Commission may also employ such other staff and attorneys as it determines, within amounts appropriated to the Commission, all of whom shall be in the unclassified service and shall receive compensation fixed by the Commission and not subject to approval by the governor.
- G. Reporting — The Commission shall submit a triennial report including recommendations in relation to the Minimum Core Standards to the governor and to the legislative coordinating council on or before December 1 of the required year. The legislative coordinating council shall transmit such report and recommendations to the legislature.
- H. Funding Formula — The Commission shall set the funding formula as established in Section IV(4).
- I. Access to Recordings — At its disposal, the Commission shall have access to all audio and video recordings generated by the audio-visual recording devices of each Police Department.

Section III — *Implementation*

- 1. **General Obligation.** Each Police Officer in this State must be equipped with a personal audio-video recording device. Each Police Department with primary enforcement authority over any jurisdiction

within this state must undertake to establish a plan or program effective to carry out the foregoing obligation in accordance with Subsection 2 below.

1.1. **Applicability to [current state wire-tapping statutes].**

- (A) All uses of an officer's personal audio-video recording device must be made in plain view of the civilian or civilians who are being recorded during an interaction with the officer.
- (B) Officers using personal audio-visual recording devices must inform the civilian or civilians who are being recorded that the audio and visual content of the interaction is being captured on film. An officer who uses a personal audio-visual recording device is considered to have given his or her consent to being recorded. Within two (2) months of the passage of this legislation, the Commission shall draft the statement of notification to be used by officers in each jurisdiction within the state.
- (C) If a civilian does not want his or her interaction with an officer captured on a personal audio-video recording device, and the civilian audibly denies his or her consent to be filmed, the officer or officers interacting with the civilian shall turn-off their personal audio-video recording device after having provided the reason for turning off the personal audio-video recording device in accordance with Section III(2.2)(D)(e).
- (D) An officer will not be required to obtain a warrant to record an interaction with civilian who has given his or her consent to be recorded.
 - a. Refusal of consent to be recorded cannot in and of itself create probable cause or reasonable suspicion to search or arrest.

1.2. **Exception to [state's current open records statute]**

- (A) All audio-visual recordings that are captured during an interaction between a civilian or civilians and an officer or officers are subject to the government records disclosure exceptions that are provided in [section of the relevant state open records law]
- (B) This exception shall not be applied to civilians filmed in the captured interaction, their legal representatives, or family members who intend to use the captured interaction in a legal action against the filming officer or department.

2. **Minimum Core Standards.** This subsection describes the basic standards to which the specifications of personal audio-video devices and the programs governing or establishing rules, regulations, or procedures with regard to the use of such devices must adhere.

2.1. All personal audio-video recording devices in use in this State must meet the following standards:

- (A) **Picture Quality/Resolution.** The resolution should be at least 640 x 480 pixels.
- (B) **Frame Rate.** The frame rate should be at least 25 frames per second.
- (C) **Battery Runtime.** The camera should be equipped with a battery that permits the device to record continuously for at least 3 hours. All officers should also be equipped with a spare battery and/or a means of recharging the camera while on duty.
- (D) **Camera Focal Width.** The camera must employ a wide point of view.

- (E) **Memory Specifications.** At the lowest quality setting, the camera's storage capacity must permit at least 3 hours of recording.
- (F) **Night Visibility.** The camera should have a low lux rating and/or an IR illuminator for recording targets in low light.

However, the responsibility for deciding the specific model or models of audio-video device to employ, and/or what features in excess of the Minimum Core Standards said devices are to have, rests with individual police departments. In the absence of manifestly absurd decisions or actions, or decisions or actions that have the aim or effect of contradicting, nullifying, lessening, or rendering less potent any of the obligations imposed by this statute, or decisions or actions that have the aim or effect of contradicting, impairing, or frustrating any part of this statute's object and purpose, decisions or actions of the police department made in the discharge of this responsibility are to be accorded significant deference.

2.2. All programs within police departments governing or establishing rules, regulations, or procedures with regard to the use of personal audio-video recording devices must meet the following standards:

- (A) Cameras must be deployed at the beginning of an interaction if police officers are engaged in or responding to any of the following:
 - a. Primary response (patrol in vehicle or during bicycle or motorcycle patrol)
 - b. Self-initiated public contacts/foot patrol
 - c. Emergency Response
 - d. Vehicle or Site Searches
 - e. SWAT
 - f. Police officers engaged in taking citizens into custody
 - g. Traffic stops
 - h. Suspicious vehicle stops
 - i. Suspicious person stops
 - j. Motor-vehicle accident scenes
 - k. During all interrogations of suspected criminals or persons of interest
 - l. While in the process of an arrest
 - m. Vehicle pursuits
 - n. Crimes in progress

Cameras must also be deployed whenever so ordered by a supervisor.

- (B) Within the policy of the individual police department, police officers may be given discretion to not record in instances:
 - a. Involving sensitive crimes including rape and sexual assault
 - b. Involving a fully-unclothed civilian
 - c. Involving a need to protect the identity of an officer in an undercover capacity and
 - d. Involving a need to protect the identity of a confidential informant.
- (C) Training — Personal audio-video recording device training is to be provided for all Police Officers, Supervisors, Record Management/Evidence personnel, and all other personnel who may use or otherwise be involved with police-operated personal audio-video recording devices.
- (D) Compliance:

- a. Malfunction — Individual police departments shall set a policy regarding technical malfunctions that shall ensure as little interruption in recording as possible. The policy shall require that police officer whose personal audio-video recording device fails to record shall report the malfunction to the supervisor immediately at the time the device has malfunctioned.
- b. Upload — Individual police departments shall set a policy requiring that police officers shall upload the data from their personal audio-video recording devices each working day within two hours of the end of the officer's shift.
- c. Classification — Individual police departments shall apply already existing policies regarding traditional evidence to evidence derived from the use of personal audio-video recording devices. Individual police departments shall require that the use of the personal audio-video recording device be included in all incident reports.
- d. Incident Report — Individual police departments shall apply already existing policies regarding documentation of civilian-police interactions and additional policies as the department sees fit. An officer shall note the following in his/her report:
 - i. Whether audio or video evidence was gathered relating to the events described in the report.
 - ii. Any malfunction occurring during the situation that is the subject of the report.
 - iii. Any instances of deactivation as required by section (e) below.
- e. Deactivation — Before a personal audio-video recording device has been turned off in an instance where policy and statute require the device to record, the reason for not using the personal audio-video recording device must be articulated verbally on-camera. If the officer is unable to verbally articulate his/her reason, then the officer shall file a written report expressing his/her reason for switching the device off within two hours of the end of the officer's shift when the incident occurred or include that reason within the regularly filed written incident report describing an interaction with a civilian. This verbal or written articulation shall be reviewed by both the supervising officer and the ombudsman for the department.
- f. Internal audit — Policies shall include the requirement of periodic, random monitoring of video footage generated by personal audio-video recording devices by each agency's internal audit unit.
- g. Disciplinary Measures — Policies shall include, but not be limited to, disciplinary measures for:
 - i. Failure to wear a personal audio-video recording device while on duty
 - ii. Failure to properly maintain the personal audio-video recording device during a shift
 - iii. Failure to keep the personal audio-video recording device on during an interaction with a civilian in accordance with this statute

- iv. Failure to produce written or verbal communication of reason for not turning on the personal audio-video recording device or turning the personal audio-video recording device off during a civilian interaction, as mandated by the incident report requirement of this statute
 - v. Any other breaches of departmental policies as enumerated within the departmental policies.
 - h. In disciplinary proceedings, including civilian or citizen review boards, judicial proceedings, or arbitration, the fact-finder may adopt a negative inference against the officer in cases in which the officer's personal audio-video recording device is turned off during an interaction with a civilian, except where the officer's action is provided for under Section III.2.2(B) of this statute, provided that all requirements of that Section are met.
- 2.3. All programs within police departments governing or establishing rules, regulations, or procedures with regard to the data storage of video and audio recordings derived from the use of personal audio-video recording devices must meet the following standards and must have their specific policies be approved by the Commission on a biennial basis:
- (A) All rules, regulations, procedures, or policies respecting the storage of or access to data obtained through use of body-worn cameras should be made available in written form to all officers and staff within each department.
 - (B) Policies should require data to be downloaded from the body-worn camera by the end of the shift in which the camera was used, and audio/video recordings should be appropriately tagged and stored according to the type of event captured.
 - (C) Policies should clearly require an officer's supervisor to take physical custody of the camera and assume responsibility for downloading the data contained therein in cases of officer-involved shootings, in-custody deaths, or other incidents involving the officer that result in a person's bodily harm or death.
 - (D) Policies should clearly state where body-worn camera videos are to be stored.
 - (E) Policies should specifically require the retention of the recorded data in compliance with all relevant laws and adequately preserve evidentiary chain of custody.
 - (F) Policies should require the deletion of the recorded data after thirty (30) calendar days if civil contact is made but no enforcement action is taken or complaint has been filed.
 - (G) Policies should include specific measures to prevent data tampering, deleting, and copying.
 - (H) Policies should clearly describe the circumstances in which supervisors will be authorized to review an officer's body-worn camera footage.
 - (I) Policies should include specific measures for preventing unauthorized access or release of recorded data.
 - (J) Policies should specifically account for and enumerate those situations in which data might be made available to other departments for evidentiary purposes.
 - (K) Policies shall include clear and consistent protocols for releasing recorded data
 - a. externally to the public and the news media
 - b. for easy accessibility to lawyers and defendants
 - c. for easy accessibility to citizen review boards

- (L) Each department's policy must be in compliance with [insert State]'s public disclosure laws.

Individual police departments shall promulgate their personal audio-video recording device policies within three (3) months of the enactment of this statute.

However, the responsibility for deciding where on the body the audio-video device is to be mounted, as well as the appropriateness of using the device in other citizen-police interactions apart from those listed in the Minimum Core Standards above, rests with individual police departments. In the absence of manifestly absurd decisions or actions, or decisions or actions that have the aim or effect of contradicting, nullifying, lessening, or rendering less potent any of the obligations imposed by this statute, or decisions or actions that have the aim or effect of contradicting, impairing, or frustrating any part of this statute's object and purpose, these decisions are to be accorded significant deference.

Section IV — *Funding*

1. Initial appropriation

- A. The legislature shall appropriate [insert dollar amount] in order to carry out the purposes of this legislation. The appropriation shall be from the state's [name of general fund].
 - B. The appropriated funds shall be disseminated to municipalities through a grant program created from the funds, which shall be dedicated to implementation of police-operated personal audio-video recording devices statewide. The use of the funds shall be limited to the following:
 - i. The procurement of police-operated personal audio-video recording device;
 - ii. Training on the use of police-operated personal audio-video recording device;
 - iii. Maintenance and repair of the police-operated personal audio-video recording device;
 - iv. Costs related to the storage of the audio-visual data that is kept according to the standards set out in Section III(2)(2.2), including but not limited to,
 1. Data systems that contain the audio-visual information and
 2. The salary of any individuals who may be hired to monitor, archive, or classify the data that is received, including but not limited to an ombudsman.
2. **Subsequent appropriations.** The legislature shall continue to appropriate an amount sufficient to carry out the purposes of this legislation in subsequent budget years. These subsequent appropriations shall be disseminated in the manner and for the purposes specified in Section IV(1)(B) above.
 3. **Funding Formula**
 - A. The size of the grants from the Fund shall be determined by a funding formula to be drafted by the Commission as set forth above in Section II — *Interdepartmental Commission*.
 - i. The formula shall be used for the initial appropriation.
 - ii. The formula must take into account the population size of the municipalities over which each Police Department has jurisdiction, so that larger municipalities will receive funding in accordance with their size relative to other incorporated areas in

the state. To take account for population changes, the formula shall be modified in conjunction with the national census.

- iii. Six (6) months after the passage of this Bill, a funding formula shall be promulgated.

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