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The Intersection of Law, Policy, and Police Body-Worn Cameras: An Exploration of Critical Issues

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THE INTERSECTION OF LAW, POLICY, AND POLICE BODY-WORN CAMERAS: AN EXPLORATION OF CRITICAL ISSUES*

MICHAEL D. WHITE** & HENRY F. FRADELLA***

Police body-worn cameras (“BWCs”) have diffused rapidly among U.S. law enforcement, in part because of early studies which suggested that the technology could produce important outcomes for police and their communities. The potential for BWCs to produce positive outcomes is affected by a wide range of issues tied to program planning and implementation, as all of the benefits of BWCs can be short-circuited by poor pre-deployment decisions. This Article seeks to inform the continued diffusion of this technology through a deep examination of BWC research and resources. The authors first review the body of research on BWCs and describe best practices for planning and implementing a BWC program. The authors also highlight the importance of administrative policy through a critical review of four controversial BWC policy issues: activation, citizen notification, officer review of footage, and supervisory review of footage. The policy discussion is grounded in reviews of the relevant research and the results of an analysis of 129 BWC policies. Last, the authors suggest the larger discretion control framework in policing offers an important lens for guiding officer BWC decision-making.

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INTRODUCTION

Law enforcement interest in body-worn cameras can be traced back more than a decade. A handful of law enforcement agencies in the United Kingdom began experimenting with the technology as early as 2005,¹ and several North American law enforcement agencies—such as those in Rialto, California; Phoenix, Arizona; and Victoria, British Columbia, Canada—piloted BWCs from 2009–2012.² A Bureau of Justice Statistics survey in 2013 found that approximately one-third of surveyed US law enforcement agencies had already deployed BWCs to some of their officers.³ Though early interest was grounded primarily in the perceived evidentiary value of the cameras, many also recognized the accountability potential of BWCs.⁴ For example, in August 2013 a federal judge included the technology as a remedy in the ruling against the New York City Police Department’s Stop, Question, Frisk (“SQF”) program.⁵

1. See MARTIN GOODALL, POLICE & CRIME STANDARDS DIRECTORATE, GUIDANCE FOR THE POLICE USE OF BODY-WORN VIDEO DEVICES 6, 30 (2007), <http://library.college.police.uk/docs/homeoffice/guidance-body-worn-devices.pdf> [https://perma.cc/GQA6-9HD5].

2. See CHARLES M. KATZ, DAVID E. CHOATE, JUSTIN T. READ, & LIDIA NUÑO, CTR. FOR VIOLENCE PREVENTION AND CMTY. SAFETY, EVALUATING THE IMPACT OF OFFICER WORN BODY CAMERAS IN THE PHOENIX POLICE DEPARTMENT 5–6 (2014), https://publicservice.asu.edu/sites/default/files/ppd_spi_feb_20_2015_final.pdf [https://perma.cc/8TX7-PUTZ]; MICHAEL D. WHITE, OFFICE OF JUSTICE PROGRAMS DIAGNOSTIC CTR., POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 17–18 (2014), <https://ric-zai-inc.com/Publications/cops-p289-pub.pdf> [https://perma.cc/2JSD-Y8ED].

3. BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, LOCAL POLICE DEPARTMENTS, 2013: EQUIPMENT AND TECHNOLOGY 1 (2015), <https://www.bjs.gov/content/pub/pdf/lpd13et.pdf> [https://perma.cc/3Q4Z-JPWM].

4. See WHITE, *supra* note 2, at 7, 19–27.

5. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 563 (S.D.N.Y. 2013) (“To address the violations that I have found, I shall order various remedies including, but not limited to, . . . a trial program requiring the use of body-worn cameras in one precinct per

The focus on BWCs skyrocketed after the summer of 2014 sparked, in large part, by a series of citizen deaths at the hands of the police—especially those of Eric Garner,⁶ Michael Brown,⁷ and Tamir Rice⁸—that generated public outrage and civil disorder in New York City; Ferguson, Missouri; and Cleveland, Ohio, respectively,⁹ leading to calls for police reform from civil rights organizations¹⁰ and grassroots movements like Black Lives Matter.¹¹ In response to this crisis, in late 2014 the White House created the President’s Task Force on 21st Century Policing, and former President Obama “charged the task force with identifying best practices and offering

borough.”). For more detailed information on this case and the SQF practices challenged in it, see MICHAEL D. WHITE & HENRY F. FRADELLA, *STOP AND FRISK: THE USE AND ABUSE OF A CONTROVERSIAL POLICING TACTIC* 89–105 (2016).

6. See Jericka Duncan, *Eric Garner Case: Video of Chokehold’s Aftermath Raises New Questions*, CBS NEWS (Dec. 6, 2014), <http://www.cbsnews.com/news/second-tape-of-nypd-chokehold-raises-new-questions-in-eric-garner-case/> [https://perma.cc/RC7H-656Z]; J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn’t Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html> [https://perma.cc/Q8JY-JKJL (dark archive)].

7. See Jon Swaine, *Michael Brown Protests in Ferguson Met with Rubber Bullets and Teargas*, GUARDIAN (Aug. 14, 2014), <https://www.theguardian.com/world/2014/aug/14/ferguson-police-teargas-rubber-bullets-michael-brown> [https://perma.cc/6F82-HHTY]. For a detailed overview of Michael Brown’s killing and the aftermath of his death, see generally U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [https://perma.cc/MB2Q-GPBH].

8. See Elahe Izadi & Peter Holley, *Video Shows Cleveland Officer Shooting 12-Year-Old Tamir Rice Within Seconds*, WASH. POST (Nov. 26, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/11/26/officials-release-video-names-in-fatal-police-shooting-of-12-year-old-cleveland-boy/?utm_term=.3fb300e7e289 [https://perma.cc/7KQW-P35L].

9. See *supra* notes 6–8. Since 2014, the deaths of Walter Scott, Freddie Gray, Samuel Dubose, and others have similarly caused great controversy in additional cities. See Haeyoun Park & Jasmine C. Lee, *Looking for Accountability in Police-Involved Deaths of Blacks*, N.Y. TIMES (May 3, 2017), <https://www.nytimes.com/interactive/2016/07/12/us/looking-for-accountability-in-police-involved-deaths-of-blacks.html> [https://perma.cc/WQS3-G9TU (dark archive)].

10. See, e.g., Michael Dresser & Luke Broadwater, *NAACP, ACLU, Other Groups Call for Police Reform in Maryland*, BALTIMORE SUN (July 23, 2015); <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-police-panel-20150723-story.html> [https://perma.cc/FN98-2CYV].

11. See, e.g., SUE BRADFORD EDWARDS & DUCHESS HARRIS, *BLACK LIVES MATTER* 88–99 (Arnold Ringstad ed., 2016); CHRISTOPHER J. LEBRON, *THE MAKING OF BLACK LIVES MATTER: A BRIEF HISTORY OF AN IDEA* x–xii (2017); WESLEY LOWERY, “THEY CAN’T KILL US ALL”: FERGUSON, BALTIMORE, AND A NEW ERA IN AMERICA’S RACIAL JUSTICE MOVEMENT 221–36 (2017); KEEANGA-YAMAHTTA TAYLOR, *FROM #BLACKLIVESMATTER TO BLACK LIBERATION* 2–6 (2016).

recommendations” to build community trust and enhance police accountability.¹² In May 2015, the Task Force released a final report with more than sixty recommendations for change.¹³

BWCs have emerged as a mechanism that many believe can alleviate the current crisis. Police BWCs were prominently featured in the final report recommendations of the 2015 President’s Task Force on 21st Century Policing.¹⁴ BWCs were also a central tenet of former President Obama’s community policing plan.¹⁵ Moreover, since 2015 the United States Department of Justice (“US DOJ”) has awarded nearly \$60 million in grant funding to more than 250 law enforcement agencies to deploy BWCs.¹⁶ Some evidence suggests that use of BWCs is supported across a diverse range of other key stakeholders including police leadership organizations,¹⁷ civil rights groups (including the American Civil Liberties Union),¹⁸ police officers themselves,¹⁹ and citizens.²⁰ Though there are no definitive counts of

12. OFFICE OF CMTY. ORIENTED POLICING SERVS., FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 1 (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [<https://perma.cc/ENS5-5LQL>]. The President’s Task Force scheduled public hearings throughout the US and heard testimony from scholars, advocates, citizens, and police leaders. *See id.* at 5.

13. *Id.* at 85–98.

14. *Id.* at 31–32.

15. *See* David Hudson, *Building Trust Between Communities and Local Police*, WHITE HOUSE: BLOG (Dec. 1, 2014), <https://www.whitehouse.gov/blog/2014/12/01/building-trust-between-communities-and-local-police> [<https://perma.cc/92N6-9ZBN>].

16. *See* BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, UPDATE: FISCAL YEAR 2016 (2017), <https://www.bja.gov/bwc/pdfs/BWCPIP-Factsheet-2016-Update-Final.pdf> [<https://perma.cc/N3ZB-VCMM>]. In December 2014, President Obama pledged \$75 million to deploy 50,000 BWCs across the United States. Carrie Dann & Andrew Rafferty, *Obama Requests \$263 Million for Police Body Cameras, Training*, NBC NEWS (Dec. 1, 2014), <https://www.nbcnews.com/politics/first-read/obama-requests-263-million-police-body-cameras-training-n259161> [<https://perma.cc/4YG8-DRLP>].

17. *See* INT’L ASSOC. OF CHIEFS OF POLICE, BODY-WORN CAMERAS MODEL POLICY 1–3 (2014), <http://www.theiacp.org/model-policy/wp-content/uploads/sites/6/2017/07/BodyWornCamerasPolicy.pdf> [<https://perma.cc/3PA7-H9K9>].

18. *See* JAY STANLEY, AM. CIVIL LIBERTIES UNION, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL 2 (2015), https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf [<https://perma.cc/89MU-Y96N>] (“[BWCs] have the potential to be a win-win, helping protect the public against police misconduct, and at the same time helping protect police against false accusations of abuse.”).

19. *See* Janne E. Gaub, David E. Choate, Natalie Todak, Charles M. Katz & Michael D. White, *Officer Perceptions of Body-Worn Cameras Before and After Deployment: A Study of Three Departments*, 19 POLICE Q. 275, 283 (2016) (finding that police officers in all three surveyed police departments “believed that BWCs have evidentiary value”); Wesley G. Jennings, Lorie Fridell & Mathew D. Lynch, *Cops and Cameras: Officer Perceptions of the Use of Body-Worn Cameras in Law Enforcement*, 42 J. CRIM. JUST. 549, 549 (2014) (“[O]fficers generally reported considerably high rates of agreement to questions such as they believe that their agency should adopt body-worn cameras for all of

the number of law enforcement agencies that have deployed BWCs by 2017, some experts estimate that nearly all police departments will adopt the technology within the next three to five years.²¹

The rapid diffusion of BWCs in law enforcement has also been driven by findings from a handful of early research studies, which suggested cameras can lead to substantial reductions in citizen complaints and use of force by police.²² A 2013 evaluation of the Rialto Police Department in California documented a nearly ninety percent drop in citizen complaints against police and an over sixty percent decline in use of force following deployment of BWCs.²³ Other positive results emerged from studies of police departments in Mesa, Arizona,²⁴ Orlando, Florida,²⁵ and Phoenix, Arizona.²⁶ Several other studies also found that BWCs can lead to enhanced court case processing times and outcomes.²⁷

their police officers, and that they would feel comfortable wearing body-worn cameras.”). It should be noted, however, that even in these studies, only some police officers support BWCs, and of those officers, their support is often qualified.

20. See Matthew S. Crow, Jamie A. Snyder, Vaughn J. Crichlow & John Ortiz Smykla, *Community Perceptions of Police Body-Worn Cameras: The Impact of Views on Fairness, Fear, Performance, and Privacy*, 44 CRIM. JUST. & BEHAV. 589, 590 (2017) (“Anecdotal evidence and limited research suggest that the public supports BWCs, but the factors driving public support remain unknown.”); William H. Sousa, Terance D. Miethé & Mari Sakiyama, *Inconsistencies in Public Opinion of Body-Worn Cameras on Police: Transparency, Trust, and Improved Police-Citizen Relationships*, 12 POLICING: J. POL’Y & PRAC. 100, 108 (2018) (analyzing public opinion of BWCs and concluding that “citizens are supportive of BWCs in policing”).

21. Kriston Capps, *Police Body Cameras: Coming Everywhere in 3 to 5 Years*, CITYLAB (July 30, 2015), <http://www.citylab.com/crime/2015/07/police-body-cameras-coming-everywhere-in-3-to-5-years/399992/> [https://perma.cc/5MHU-CSUZ].

22. See WHITE, *supra* note 2, at 20–23.

23. Barak Ariel, William A. Farrar & Alex Sutherland, *The Effect of Police Body-Worn Cameras on Use of Force and Citizens’ Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANTITATIVE CRIMINOLOGY 509, 523–24 (2015).

24. See RYAN STOKES & LEE RANKIN, MESA POLICE DEPARTMENT, PROGRAM EVALUATION AND RECOMMENDATIONS: ON-OFFICER BODY CAMERA SYSTEM 8–9 (2013), <http://www.theiacp.org/Portals/0/documents/pdfs/LEIM/Operational%20Track%20Workshops/O2%20On%20Body%20Cameras.pdf> [https://perma.cc/4CAC-CQCX].

25. See Wesley G. Jennings, Mathew D. Lynch & Lorie Fridell, *Evaluating the Impact of Police Officer Body-Worn Cameras (BWCs) on Response-to-Resistance and Serious External Complaints: Evidence from the Orlando Police Department (OPD) Experience Utilizing a Randomized Controlled Experiment*, 43 J. CRIM. JUST. 480, 485 (2015) (“Taken together, the results from this methodologically rigorous, randomized experiment all point toward the effectiveness of BWCs for improving police-community relations and reducing a host of tragic events that can result from negative police-citizen encounters.”).

26. See KATZ ET AL., *supra* note 2, at 33 (finding a 22.5% decline in officially recorded complaints).

27. See ODS CONSULTING, BODY WORN VIDEO PROJECTS IN PAISLEY AND ABERDEEN 9 (2011), <http://www.bwvsg.com/wp-content/uploads/2013/07/BWV-Scottish-Report.pdf> [https://perma.cc/4HFH-TK3M] (suggesting that BWCs increased the

More recent research, however, demonstrates that positive outcomes are not always guaranteed, and BWCs are not uniformly desired. Several 2015 studies have documented no significant impact on use of force and citizen complaints.²⁸ Ariel and colleagues found a troubling link between BWCs and increased rates of assaults on officers.²⁹ In August 2016, the Boston Police Patrolman's Association sought a court injunction to stop the department leadership from creating a mandatory BWC program, claiming that it would "subject unwilling officers to increased risks."³⁰ More generally, critics of BWCs point to a complex range of issues including: citizen privacy, cost and resource commitment, training and policy requirements, and operational concerns (e.g., failure to activate).³¹

The emerging picture suggests that the potential for BWCs to produce positive outcomes may be affected by a wide range of issues tied to program planning and implementation.³² There is a long

likelihood of guilty pleas in Scotland); CATHERINE OWENS, DAVID MANN & RORY MCKENNA, *THE ESSEX BODY WORN VIDEO TRIAL 1-2* (2014), http://whatworks.college.police.uk/Research/Documents/BWV_Report.pdf [<https://perma.cc/2PSU-547B>] (finding that the presence of a BWC increased the likelihood that an individual would be criminally charged).

28. See EDMONTON POLICE SERV., *BODY WORN VIDEO: CONSIDERING THE EVIDENCE 8* (2015), <http://www.bwvsg.com/wp-content/uploads/2015/06/Edmonton-Police-BWV-Final-Report.pdf> [<https://perma.cc/E4FF-6EVZ>] (finding "no quantitative evidence" suggesting that BWCs impacted complaints or use of force); LYNNE GROSSMITH, CATHERINE OWENS, WILL FINN, DAVID MANN, TOM DAVIES & LAURA BAIKA, *POLICE, CAMERA, EVIDENCE: LONDON'S CLUSTER RANDOMISED CONTROLLED TRIAL OF BODY WORN VIDEO 15, 17* (2015), http://whatworks.college.police.uk/Research/Documents/Police_Camera_Evidence.pdf [<https://perma.cc/C98Y-3ZCT>] (finding BWCs had a small but positive impact on citizen complaints, but no impact on use of force).

29. Barak Ariel et al., *Wearing Body Cameras Increases Assaults Against Officers and Does Not Reduce Police Use of Force: Results from a Global Multi-Site Experiment*, 13 *EUR. J. CRIMINOLOGY* 744, 750 (2016).

30. Order on Motion for Preliminary Injunction at 17, *Boston Police Patrolmen's Ass'n v. City of Boston*, No. 16-2670-B (Mass. Super. Ct. Sept. 9, 2016). In denying the injunction request, the court noted that "[a]t best . . . the state of the research [on BWCs] is inconclusive, particularly as to implementation of BWCs in Boston." *Id.*

31. See Brian Bakst & Ryan J. Foley, *For Police Body Cameras, Big Costs Loom in Storage*, *POLICEONE* (Feb. 6, 2015), <https://www.policeone.com/police-products/body-cameras/articles/8243271-For-police-body-cameras-big-costs-loom-in-storage/> [<https://perma.cc/6XF4-VMD4>]; Andrew Gorosko, *Police Acquisition of Body-Worn Cameras Delayed*, *NEWTOWN BEE* (Jan. 8, 2018), <https://newtownbee.com/police-acquisition-of-body-worn-cameras-delayed/> [<https://perma.cc/2JGD-R2BB>]; Peter Hermann, *Oversight Board Finds Many D.C. Officers Fail to Properly Use Body Cameras*, *WASH. POST* (Oct. 31, 2017), https://www.washingtonpost.com/local/public-safety/oversight-board-finds-many-dc-officers-fail-to-properly-use-body-cameras/2017/10/31/5742ec38-bd81-11e7-8444-a0d4f04b89eb_story.html?utm_term=.6e2861d42de3 [<https://perma.cc/6BFA-UYLU> (dark archive)].

32. Cf. Michael D. White, Janne E. Gaub & Natalie Todak, *Exploring the Potential for Body-Worn Cameras to Reduce Violence in Police-Citizen Encounters*, 12 *POLICING: J.*

history of implementation failures in criminal justice programming³³—sometimes with harmful consequences.³⁴ Given the speed at which law enforcement agencies are adopting BWCs, the consequences of poor BWC program implementation are significant, from resistance among line officers to low usage by downstream criminal justice actors and backlash from citizens. Simply put, all of the benefits of BWCs can quickly be eroded by poor planning, implementation failures, and ill-advised decisions on operational issues covered in policy.

This Article seeks to inform the continued diffusion of this technology through a deep examination of BWC research and resources. In Part I, the authors first review the body of empirical research on BWCs and highlight variation in the planning for and implementation of these cameras as a cause for the mixed findings across studies. With that premise as a backdrop, the authors then describe three critically important factors that will shape the success of an agency's BWC program. First, in Part II, the authors address BWC planning and implementation. In May 2015, the Bureau of Justice Assistance ("BJA") rolled out a national "Body-Worn Camera Toolkit."³⁵ The BJA's Toolkit is designed to provide a wide range of information about BWCs, and it includes a "Law Enforcement Implementation Checklist"³⁶ to serve as a best-practices guide for successful planning and implementation of a BWC program.³⁷ Adherence to the best-practices guide should optimize the likelihood of successful BWC implementation.

POL'Y & PRAC. 66, 73 (2018) (observing that mixed results produced by BWC studies may be partially attributable to the implementation of new policies).

33. See DANIEL P. MEARS, AMERICAN CRIMINAL JUSTICE POLICY: AN EVALUATION APPROACH TO INCREASING ACCOUNTABILITY AND EFFECTIVENESS 131–32 (2010); NAT'L RESEARCH COUNCIL, IMPROVING EVALUATION OF ANTICRIME PROGRAMS 45 (Mark W. Lipsey, John L. Adams, Denise C. Gottfredson, John V. Pepper & David L. Weisburd eds., 2005); Edward E. Rhine, Tina L. Mawhorr & Evalyn C. Parks, *Implementation: The Bane of Effective Correctional Programs*, 5 CRIMINOLOGY & PUB. POL'Y 347, 349–50 (2006).

34. See Brandon C. Welsh & Michael Rocque, *When Crime Prevention Harms: A Review of Systematic Reviews*, 10 J. EXPERIMENTAL CRIMINOLOGY 245, 261–62 (2014).

35. *Body-Worn Camera Program*, BUREAU OF JUSTICE ASSISTANCE'S JUSTICE TODAY (May 2015), https://www.bja.gov/JusticeToday/5_2015_newsletter.html [<https://perma.cc/Q3GR-U55E>]; see *Body-Worn Camera Toolkit*, BUREAU OF JUSTICE ASSISTANCE, <https://www.bja.gov/bwc/> [<https://perma.cc/JM4Z-525L>].

36. BUREAU OF JUSTICE ASSISTANCE, BODY-WORN CAMERA TOOLKIT: LAW ENFORCEMENT IMPLEMENTATION CHECKLIST (2015), <https://www.bja.gov/bwc/pdfs/BWCImplementationChecklist.pdf> [<https://perma.cc/8SVU-YA9L>].

37. One of the authors, Michael D. White, was involved in the creation of the national Body-Worn Camera Toolkit and Law Enforcement Implementation Checklist. He also

Second, the authors place special emphasis on policy development in Part III. The US DOJ has funded a Training and Technical Assistance (“TTA”) team to support law enforcement agencies receiving federal BWC funds.³⁸ One of the core areas of TTA support involves policy development.³⁹ The TTA team has developed a BWC policy review “scorecard” (“BJA Scorecard”) that rates the comprehensiveness of BWC policy across forty-one specific issues, covering eleven general areas.⁴⁰ The US DOJ policy development and review process offers a model for law enforcement agencies to follow in order to optimize the potential for a successful BWC program.

Third, a number of specific BWC policy issues are controversial and complex, drawing on questions of both state and federal law. Agency decisions on specific policy issues are of great importance to the vitality of a BWC program. In Part IV, the authors investigate four controversial BWC policy issues: (1) officer activation of the BWC; (2) citizen notification of the BWC (by the officer); (3) officer authority to review BWC footage; and (4) supervisor review of BWC footage. For each, the authors describe the complex policy and legal issues at play. The authors then describe national trends in agency policy and practice for each issue based on an analysis of 129 BWC policies from agencies funded through the US DOJ. Last, in Part V, the authors place BWC use in a larger discretion control framework and draw on a robust body of policing research to offer recommendations on how to properly guide, manage, and control officer BWC decision-making.

I. BODY-WORN CAMERA RESEARCH TO DATE

Advocates have made numerous claims regarding the benefits of BWCs. One of the most prominent claims is that cameras can reduce violence during police-citizen encounters, resulting in fewer citizen

serves as Co-Director of Training and Technical Assistance to BJA’s BWC funding program (called the “Policy and Implementation Program”).

38. *About Us*, BODY-WORN CAMERA TRAINING & TECH. ASSISTANCE, <http://www.bwctta.com/about-us> [https://perma.cc/YBB5-6LDF].

39. *Training and Technical Assistance*, BODY-WORN CAMERA TRAINING & TECH. ASSISTANCE, <http://www.bwctta.com/training-and-technical-assistance> [https://perma.cc/6VRX-86UE].

40. *Body-Worn Camera Policy Review Scorecard*, BODY-WORN CAMERA TRAINING & TECH. ASSISTANCE, <http://www.bwctta.com/resources/bwc-resources/body-worn-camera-policy-review-scorecard> [https://perma.cc/6533-ZVR2].

complaints against police and less use of force by officers.⁴¹ A number of early studies suggested the technology could produce measurable change with regard to these two important outcomes. For instance, Ariel and colleagues reported dramatic year-to-year declines in citizen complaints (88%) and use of force (58.3%) following deployment of BWCs.⁴² Jennings, Lynch, and Fridell examined “pre-post” rates of force and complaints among a group of forty-six officers, reporting declines of more than 50% for use of force and 65% for citizen complaints following BWC deployment.⁴³ White, Gaub, and Todak conducted a similar study in Spokane, Washington and found similarly positive results, though the declines in complaints and use of force disappeared after six months.⁴⁴ They also found BWCs had no effect on officer injuries. Studies in Mesa, Arizona;⁴⁵ Tampa, Florida;⁴⁶ and the United Kingdom⁴⁷ have also documented consistent reductions in these measures. Hedberg and colleagues estimated the effect of BWCs on citizen complaints in Phoenix, Arizona, and concluded, “if BWCs are employed as prescribed [i.e., 100% activation compliance], a majority of complaints against officers would be eliminated.”⁴⁸

41. See WHITE, *supra* note 2, at 20–23 (citing to several BWC proponents who claim that these cameras “will change police officer behavior during encounters with citizens”).

42. Ariel et al., *supra* note 23, at 524.

43. Jennings et al., *supra* note 25, at 480.

44. White et al., *supra* note 32, at 1, 5–6, 8 (“Following BWC deployment, the percentage of officers with a complaint in each group declined by 50% and 78% (Control and Treatment, respectively); the percentage of officers with a use of force declined notably (39%) for one group only.”).

45. STOKES & RANKIN, *supra* note 24, at 8.

46. Dan Sullivan & Tony Marrero, *USF Study Suggests Tampa Police with Body Cameras Less Likely to Use Force*, TAMPA BAY TIMES (Aug. 24, 2016), <http://www.tampabay.com/news/publicsafety/usf-study-suggests-tampa-police-with-body-cameras-less-likely-to-use-force/2290851> [<https://perma.cc/G4AS-BFQB>] (“The reduction among the 60 officers who wore cameras amounts to about 20 fewer incidents of physical force per year, according to the study. The authors speculate that if the cameras were worn by the entire department, the same reduction would translate to about 250 fewer incidents per year.”).

47. See GOODALL, *supra* note 1, at 7–8 (“In a number of cases the complainants have reconsidered their complaint after this review, thus reducing investigation time for unwarranted complaints.”); TOM ELLIS, CRAIG JENKINS & PAUL SMITH, EVALUATION OF THE INTRODUCTION OF PERSONAL ISSUE BODY WORN VIDEO CAMERAS (OPERATION HYPERION) ON THE ISLE OF WIGHT 2–3 (2015), https://researchportal.port.ac.uk/portal/files/2197790/Operation_Hyperion_Final_Report_to_Hampshire_Constabulary.pdf [<https://perma.cc/5QBQ-AJ74>] (finding that, after BWCs were implemented, the number of low-level and high-level complaints decreased).

48. Eric C. Hedberg, Charles M. Katz & David E. Choate, *Body-Worn Cameras and Citizen Interactions with Police Officers: Estimating Plausible Effects Given Varying Compliance Levels*, 34 JUST. Q. 627, 642 (2017).

Several studies have also highlighted the evidentiary value of BWCs. A Scottish study found that BWC cases were approximately seventy to eighty percent “less likely to go to trial” than cases that did not involve BWCs.⁴⁹ Goodall reported that BWCs led to quicker resolutions of cases, less officer time devoted to paperwork, and more time spent on patrol.⁵⁰ Morrow and colleagues concluded that BWCs enhanced criminal justice outcomes for domestic violence cases in Phoenix, Arizona,⁵¹ and a study in Essex, England, reported similar findings.⁵²

Research has also shown that some police officers are supportive of BWCs, though the level of such support varies by department and tends to increase after deployment.⁵³ Studies have similarly shown that citizen support for BWCs is high, among both the general population⁵⁴ and citizens who have had BWC-recorded encounters with police.⁵⁵ White, Todak, and Gaub found an intriguing connection between citizen awareness of a BWC and increased perceptions of procedural justice, thereby “providing a preliminary piece of evidence that BWCs may be able to deliver on the claim the technology can enhance police legitimacy.”⁵⁶

However, several recent studies have failed to document positive effects across a range of outcomes. A study by the Edmonton, Alberta, Canada, Police Service concluded that BWCs had no measurable impact on citizen complaints or use of force.⁵⁷ Grossmith and colleagues found a statistically significant decline in citizen complaints in only two of the ten London police boroughs

49. ODS CONSULTING, *supra* note 27, at 10.

50. GOODALL, *supra* note 1, at 7.

51. Weston J. Morrow, Charles M. Katz & David E. Choate, *Assessing the Impact of Police Body-Worn Cameras on Arresting, Prosecuting, and Convicting Suspects of Intimate Partner Violence*, 19 POLICE Q. 303, 316–18 (2016) (finding that the evidentiary value of BWCs aids in the prosecution and conviction of domestic violence offenders).

52. OWENS ET AL., *supra* note 27, at 15 (“The data suggest that the presence of the camera increases the probability of an individual being charged (as opposed to other forms of disposal), at all risk levels, but the effect is most noticeable for the lower risk cases.”).

53. See Gaub et al., *supra* note 19, at 283–92; Jennings et al., *supra* note 19, at 552–54.

54. See Crow et al., *supra* note 20, at 599–600; Sousa et al., *supra* note 20, at 4–6.

55. Michael D. White, Natalie Todak & Janne E. Gaub, *Assessing Citizen Perceptions of Body-Worn Cameras After Encounters with Police*, 40 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 689, 694–95 (2017) (surveying citizens who had BWC-recorded encounters and finding that “more than 80 percent agreed/strongly agreed that the officer acted professionally, and 72.9 percent indicated they believed the officer cared about their well-being”).

56. *Id.* at 699.

57. EDMONTON POLICE SERV., *supra* note 28, at 8.

examined.⁵⁸ Ariel and colleagues reported mixed findings regarding use of force across ten BWC studies, leading to an “overall null use-of-force result.”⁵⁹ The same study also found a troubling link between BWCs and increased rates of assaults on officers.⁶⁰ In a subsequent article, Ariel and colleagues argued that the effects of BWCs are determined by a delicate balance between officer discretion and deterrence, and any imbalance between these issues can undermine the benefits of BWCs.⁶¹

Several studies have also highlighted the importance of clear, enforceable guidelines governing BWC use. The Mesa Police Department reported BWC activations declined by 42% after the adoption of a policy that vested officers with high levels of discretion regarding when to activate their BWCs.⁶² Hedberg and colleagues reported that Phoenix police officers failed to turn on their BWCs in more than two-thirds of encounters where activation was required by policy.⁶³ McClure and colleagues reported officer activation rates from as low as 1.5% to as high as 65%, demonstrating how officers within a single department can vary significantly in their levels of compliance with BWC policy.⁶⁴ Ariel and associates tied patterns in use of force to officer decisions on BWC activation.⁶⁵ That is, when officers followed policy—i.e., when they activated the BWC at the start of citizen encounters and advised citizens of the BWC—use of force declined by nearly 40%.⁶⁶ When officers did not follow policy, use of force actually increased by more than 70%.⁶⁷ Several studies have also found that citizens are not always aware of the BWC’s

58. GROSSMITH ET AL., *supra* note 28, at 15.

59. Ariel et al., *supra* note 29, at 750–52.

60. *Id.* at 750–53.

61. Barak Ariel, Alex Sutherland, Darren Henstock, Josh Young & Gabriela Sosinski, *The Deterrence Spectrum: Explaining Why Police Body-Worn Cameras ‘Work’ or ‘Backfire’ in Aggressive Police–Public Encounters*, 12 POLICING: J. POL’Y & PRAC. 6, 6 (2018) (“[T]he deterrent effect of BWCs is a function of discretion, whereby strong discretion is inversely linked to a weak deterrent effect that consequently leads to more use of force, and weak discretion is inversely linked to a strong deterrent effect and less forceful police responses.”).

62. See STOKES & RANKIN, *supra* note 24, at 13.

63. See Hedberg et al., *supra* note 48, at 640, 644–45.

64. DAVE MCCLURE, NANCY LA VIGNE, MATTHEW LYNCH, LAURA GOLIAN, DANIEL LAWRENCE & AILI MALM, HOW BODY CAMERAS AFFECT COMMUNITY MEMBERS’ PERCEPTIONS OF POLICE 7–9 (2017), https://www.urban.org/sites/default/files/publication/91331/2001307-how-body-cameras-affect-community-members-perceptions-of-police_1.pdf [<https://perma.cc/BEG2-9SYH>].

65. See Ariel et al., *supra* note 61, at 9–12.

66. *Id.* at 8.

67. *Id.*

presence during the encounter, either because officers do not announce the camera's presence or because citizens are in a mental or physical state (e.g., angry, intoxicated, mentally ill, in-crisis) that inhibits their understanding of the officer's BWC notification.⁶⁸

Research testing the effect of BWCs on officer activity levels has also been mixed. Two studies from the United Kingdom concluded that BWCs had no significant impact on officer arrest activity.⁶⁹ Katz and colleagues reported increased arrests among BWC officers,⁷⁰ but Ready and Young found BWC officers conducted fewer stops and made fewer arrests but issued more citations.⁷¹ McClure and colleagues also found BWC officers made slightly fewer arrests, compared to non-BWC officers.⁷² Moreover, officers (and their unions) have protested the deployment of BWCs in a handful of major police departments across the country—including Boston, Las Vegas, and New York City—arguing that the technology endangers officer safety or that it must be negotiated through collective bargaining because of its major impact on officers' working conditions.⁷³

The evidentiary value of BWCs can also be short-circuited by both human and technological issues.⁷⁴ First, if an officer forgets or chooses not to activate a BWC, then no evidentiary benefit can be seen from the camera's use. Moreover, even if a camera is activated, the value of this footage may be diminished or eliminated altogether based on the camera angle if, for instance, the officer's "shooting platform" blocks the camera.⁷⁵ Similarly, "[d]uring foot pursuits and struggles with residents, the video from a BWC can become

68. See White et al., *supra* note 55, at 692, 696 (finding that when officers were not required to inform citizens they were being recorded, only twenty-eight percent were aware of BWCs); MCCLURE ET AL., *supra* note 64, at 4–5 (concluding that forty-three percent of citizens who had interacted with officers could not remember whether the officer was wearing a BWC).

69. GROSSMITH ET AL., *supra* note 28, at 13; OWENS ET AL., *supra* note 27, at 1–2.

70. KATZ ET AL., *supra* note 2, at 31–32.

71. Justin T. Ready & Jacob T. N. Young, *The Impact of On-Officer Video Cameras on Police–Citizen Contacts: Findings from a Controlled Experiment in Mesa, AZ*, 11 J. EXPERIMENTAL CRIMINOLOGY 445, 454 (2015).

72. MCCLURE ET AL., *supra* note 64, at 8 ("Officers assigned a BWC made about 0.35 fewer arrests every two weeks (14 days) than those not assigned a BWC.").

73. See WHITE, *supra* note 2, at 28–29; *supra* note 30 and accompanying text.

74. See Michael D. White & James Coldren, *Body-Worn Police Cameras: Separating Fact from Fiction*, PUB. MGMT. (PM) MAGAZINE, Mar. 2017, at 6, 7 (explaining how "expectations must be realistic as BWCs have limitations, both human and technological").

75. *Id.* at 9. A "shooting platform" is described as "a shooting stance with outstretched arms often will block a chest-mounted BWC." *Id.*

unwatchable . . . or the device can fall off the officer.”⁷⁶ Accordingly, the mobility of BWCs, while considered an advantage over dashboard cameras, may ultimately prove to be more of a deficit than a benefit.⁷⁷

II. PLANNING AND IMPLEMENTATION

The mixed findings across BWC studies may be explained, at least in part, by variation in BWC program implementation.⁷⁸ Proper planning and implementation of a BWC program is a necessary precondition for achieving positive outcomes. However, a BWC program is a highly complex undertaking. BWCs require an enormous investment of resources.⁷⁹ The technology touches virtually every aspect of internal and external police operations.⁸⁰ BWCs also bring into play a range of sensitive issues such as citizen privacy, public records laws, and the recording of vulnerable populations.⁸¹ Additionally, BWCs are often adopted in contentious political and social environments.⁸² These difficulties are compounded by the serious consequences of poor BWC program implementation, including resistance among line officers and unions, low BWC activation rates among officers, problems with technology integration and data storage, unintended costs (financial and otherwise), little or no usage by downstream criminal justice actors (i.e., prosecutors), and backlash from citizens.⁸³ In short, BWC implementation comes with both a high degree of difficulty and significant risks if implemented poorly.

Given the gravity of the issues at play, the US DOJ, through the BJA, has developed resources to assist law enforcement agencies with BWC implementation, including a “National Body-Worn Camera Toolkit” (the “Toolkit”) and a “Law Enforcement Implementation

76. *Id.*

77. *Id.*

78. See White et al., *supra* note 32, at 9 (noting that policy changes accompanying BWC implementation may have influenced the study’s results).

79. WHITE, *supra* note 2, at 9. Aside from the “direct costs associated with purchasing the hardware (from \$800 to \$1,000 per camera)[,]” BWC’s also “produce an enormous amount of video data that must be properly and securely stored.” *Id.*

80. *Id.*

81. *Id.* at 7.

82. See *supra* notes 6–11 and accompanying text; see also WHITE, *supra* note 2, at 19 (explaining how BWCs have traditionally been viewed as a way to promote transparency and therefore “increase perceptions of police legitimacy”).

83. See generally NATALIE TODAK, JANNE E. GAUB & MICHAEL D. WHITE, WHAT HAPPENS DOWNSTREAM? EXTERNAL STAKEHOLDER PERCEPTIONS OF BODY-WORN CAMERAS (2017) (detailing external stakeholders’ perceptions of BWCs and how BWCs impact their “daily work practices”).

Checklist” (the “Checklist”).⁸⁴ The Checklist outlines a series of principles that should guide the development of a BWC program.⁸⁵ These BWC principles are consistent with the larger evidence base on successful program implementation in the criminal justice system,⁸⁶ including policing,⁸⁷ courts,⁸⁸ and corrections.⁸⁹ Adherence to these principles should lead to successful BWC implementation, which, in turn, should optimize the likelihood of achieving positive outcomes. In simple terms, the principles delineated in the Checklist provide a roadmap for agencies to follow in order to avoid implementation failure.

As explained in this Part, the Checklist identifies six core principles intended to help guide the creation and implementation of

84. See *Body Worn Camera Program*, *supra* note 35; BUREAU OF JUSTICE ASSISTANCE, *supra* note 36.

85. See BUREAU OF JUSTICE ASSISTANCE, *supra* note 36.

86. See, e.g., AMANDA CISSNER & DONALD J. FAROLE, JR., AVOIDING FAILURES OF IMPLEMENTATION 5 (2009), <http://www.courtinnovation.org/sites/default/files/Failure%20Final.pdf> [<https://perma.cc/UAR4-DXFF>] (emphasizing the importance of a formalized operational model); PEW CHARITABLE TRUSTS, IMPLEMENTATION OVERSIGHT FOR EVIDENCE-BASED PROGRAMS 3–10 (2016), http://www.pewtrusts.org/~media/assets/2016/05/rf_programimplementationbrief.pdf [<https://perma.cc/ZT6R-NVV9>] (recommending “four key steps to strengthen implementation of evidence-based programs”); J. Mitchell Miller & Holly Ventura Miller, *Rethinking Program Fidelity for Criminal Justice*, 14 CRIMINOLOGY & PUB. POL’Y 339, 343 (2015) (noting the US DOJ’s focus on “developing and promoting evidence-driven organizational cultures”).

87. See, e.g., MELISSA REULAND, A GUIDE TO IMPLEMENTING POLICE-BASED DIVERSION PROGRAMS FOR PEOPLE WITH MENTAL ILLNESS 28–31 (2004), <http://www.pacenterofexcellence.pitt.edu/documents/A%20Guide%20to%20Implementing%20Police-Based%20Diversion%20Programs.pdf> [<https://perma.cc/3E6N-TCA2>] (explaining implementation challenges for mental health police-based response model); SUSAN SADD & RANDOLPH M. GRINC, INNOVATIVE NEIGHBORHOOD-ORIENTED POLICING: DESCRIPTIONS OF PROGRAMS IN EIGHT CITIES 1 (1994), https://storage.googleapis.com/vera-web-assets/downloads/Publications/innovative-neighborhood-oriented-policing-descriptions-of-programs-in-eight-cities/legacy_downloads/1268a.pdf [<https://perma.cc/63F2-L423>] (detailing results of eight community policing programs aimed at reducing demand for drugs).

88. See, e.g., PRETRIAL JUSTICE INST., PRETRIAL SERVICES PROGRAM IMPLEMENTATION 14–22 (2010), <https://www.pretrial.org/download/pji-reports/Pretrial%20Services%20Starter%20Kit%20-%20PJI%202010.pdf> [<https://perma.cc/VD7Y-3MP7>] (providing checklist and explaining steps for implementing “a fully functioning pretrial services program”); Lisa S. Nored, Philip E. Carlan & Doug Goodman, *Incentives and Obstacles to Drug Court Implementation: Observations of Drug Court Judges and Administrators*, JUST. POL’Y J., Spring 2009, at 1, 18, http://www.cjcj.org/uploads/cjcj/documents/incentives_and.pdf [<https://perma.cc/Y3KT-874R>] (examining drug court program implementation).

89. See, e.g., JANET RENO, RAYMOND C. FISHER, LAURIE ROBINSON & NANCY E. GIST, CRITICAL ELEMENTS IN THE PLANNING, DEVELOPMENT, AND IMPLEMENTATION OF SUCCESSFUL CORRECTIONAL OPTIONS 27–33 (1998), <https://www.ncjrs.gov/pdffiles/168966.pdf> [<https://perma.cc/QAV5-3MRH>] (providing implementation guidelines for successful, cost-effective correctional options).

BWC programs: learn the fundamentals and develop a plan; form a working group; develop policy; define the technology solution (procurement strategy); communicate with and educate stakeholders; and execute phased roll-out/implementation.⁹⁰

A. Learn the Fundamentals and Develop a Plan

A BWC program should be carefully planned.⁹¹ Agency leadership should identify the outcomes it are seeking to achieve with BWCs (transparency, accountability, etc.), as the specific goals may significantly alter the BWC program's structure.⁹² Agency leaders should have a clear understanding of the benefits and limitations of BWCs, as well as what resources are required to operate a BWC program.⁹³ The Checklist recommends that agency leaders engage all relevant stakeholders, internal and external, in the planning process.⁹⁴ The Checklist also highlights the importance of selecting a project manager and developing a project plan and timeline with milestones.⁹⁵

B. Form a Working Group

The Checklist recommends creating a "Working Group," comprised of stakeholders, to guide the entire BWC planning process.⁹⁶ The Working Group should meet regularly to ensure that the project timeline and budget are maintained.⁹⁷ The Group should include representatives from all units in the agency to gather insights,

90. BUREAU OF JUSTICE ASSISTANCE, *supra* note 36, at 1–3.

91. *Id.* at 1.

92. *Id.*; *see also* PEW CHARITABLE TRUSTS, *supra* note 86, at 4 ("The choice of which programs to implement should be based on a clear vision of the desired outcomes and the underlying causes of the problems, which can vary from one community to the next."); RENO, ET AL., *supra* note 89, at 9 ("[I]t is . . . important to consider the values and goals of the criminal justice system in which the option is being planned.").

93. BUREAU OF JUSTICE ASSISTANCE, *supra* note 36, at 1; BUREAU OF JUSTICE ASSISTANCE, BODY-WORN CAMERA TOOLKIT: FREQUENTLY ASKED QUESTIONS 42 (2015), https://www.bja.gov/bwc/pdfs/BWC_FAQs.pdf [<https://perma.cc/42GM-ENA2>] [hereinafter BJA FAQs].

94. BUREAU OF JUSTICE ASSISTANCE, *supra* note 36, at 1; *see also* CISSNER & FAROLE, *supra* note 86, at 5–6 (suggesting that criminal justice programs "[b]e strategic about when and how to engage stakeholders in the planning process").

95. BUREAU OF JUSTICE ASSISTANCE, *supra* note 36, at 1.

96. *Id.* at 1–2; *see also* RENO, ET AL., *supra* note 89, at 6 (suggesting the formation of a "working group to carry out the daily tasks involved in planning the program").

97. *See* BUREAU OF JUSTICE ASSISTANCE, *supra* note 36, at 1–2; *see also* CISSNER & FAROLE, *supra* note 86, at 7 (noting that timeline adjustments may be necessary if the group begins falling behind schedule).

questions, and concerns from all relevant parties.⁹⁸ Comprehensive participation will help overcome internal resistance and troubleshoot problems as they arise. The Working Group should also engage with external stakeholders, especially the city and county prosecutor, city leadership, advocacy groups, and citizens.⁹⁹

C. *Develop Policy*

A comprehensive administrative policy is critically important for a successful BWC program.¹⁰⁰ The Working Group should review relevant local, state, and federal law.¹⁰¹ The Group should also examine other agency policies, as well as model policies from the International Association of Chiefs of Police (“IACP”) and the United Kingdom Home Office.¹⁰² Policy development should be an inclusive process, and the policy should be flexible as changes may be required based on feedback from stakeholders.¹⁰³ The Checklist highlights six core areas for which BWC policy should be defined: video capture (activation, consent); video viewing (supervisor, officer); video use (evidence); video public release; video storage, and process/data audits and controls.¹⁰⁴ The authors further explore the comprehensiveness of BWC policy in Part IV.

D. *Define the Technology Solution (Procurement)*

Most jurisdictions have developed a formal procurement process to guide the purchase of equipment such as BWCs.¹⁰⁵ The procurement process becomes a central task for the Working Group.¹⁰⁶ This process starts with an assessment of current capabilities, including: the hardware and software needs or limitations

98. See BUREAU OF JUSTICE ASSISTANCE, *supra* note 36, at 1–2; BJA FAQs, *supra* note 93, at 6, 32.

99. BUREAU OF JUSTICE ASSISTANCE, *supra* note 36, at 1–2.

100. See *id.* at 2; BJA FAQs, *supra* note 93, at 26.

101. See BUREAU OF JUSTICE ASSISTANCE, *supra* note 36, at 2; BJA FAQs, *supra* note 93, at 39.

102. BJA FAQs, *supra* note 93, at 26.

103. See BUREAU OF JUSTICE ASSISTANCE, *supra* note 36, at 2.

104. *Id.*

105. See BJA FAQs, *supra* note 93, at 17. For a discussion of procurement issues related to BWCs, see Heather R. Cotter, *Contemporary Issues in Policing: Why Police Need to Strategically Plan for Technology Procurement*, POLICEONE.COM (Nov. 23, 2016), <https://www.policeone.com/police-products/body-cameras/articles/243486006-Why-police-need-to-strategically-plan-for-technology-procurement/> [<https://perma.cc/JW96-CEC6>].

106. See BUREAU OF JUSTICE ASSISTANCE, *supra* note 36, at 2–3; BJA FAQs, *supra* note 93, at 17.

(such as camera resolution); financial constraints; and data storage.¹⁰⁷ These issues are typically delineated in a Request for Proposals (“RFP”) that is released to BWC vendors.¹⁰⁸ Bids submitted by vendors are then reviewed, scored, and discussed among the Working Group until there is consensus on vendor selection.¹⁰⁹

E. Educate Stakeholders

The Checklist recommends a strong communication plan to publicize the BWC program among a diverse array of stakeholders.¹¹⁰ An internally-focused marketing campaign can facilitate BWC deployment by addressing officers’ concerns.¹¹¹ A similar campaign targeted towards external stakeholders can address questions among citizens, advocacy groups, and other criminal justice actors.¹¹² In some cases, the media can be used to publicize and engage the public in the BWC program.¹¹³ The marketing campaign, while best determined by local agencies,¹¹⁴ could focus on the program goals, the administrative policy, the timeline for deployment, and the vendor selection process.

F. Execute Phased Roll-Out/Implementation

The Checklist highlights several key developments in the last step, including the training of officers and continued messaging both internally and externally.¹¹⁵ The Checklist also recommends a phased-in deployment rather than agency-wide rollout because the staggered approach is more measured and allows for flexibility should adjustments be needed.¹¹⁶ The Checklist highlights post-implementation assessments of BWC operations and outcomes, as well as “periodic reviews of policy and training.”¹¹⁷

III. POLICY DEVELOPMENT AND REVIEW

The Checklist is grounded in a robust body of research that, over a period of forty years, has consistently highlighted administrative

107. BUREAU OF JUSTICE ASSISTANCE, *supra* note 36, at 2–3.

108. *Id.* at 3.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*; BJA FAQs, *supra* note 93, at 31–32.

113. BUREAU OF JUSTICE ASSISTANCE, *supra* note 36, at 1; BJA FAQs, *supra* note 93, at 32, 40.

114. BJA FAQs, *supra* note 93, at 32.

115. BUREAU OF JUSTICE ASSISTANCE, *supra* note 36, at 3.

116. *Id.*

117. *Id.*

rulemaking (i.e., policy) as the most effective method for guiding police officer behavior.¹¹⁸ Administrative policy communicates to officers what the department considers acceptable, as well as what is prohibited.¹¹⁹ Police officer behavior can therefore be directly influenced by administrative policy that is clear and widely enforced.¹²⁰ Several organizations, including the IACP, the Commission on Accreditation of Law Enforcement Agencies (“CALEA”), and the American Bar Association, have maintained the importance of thoughtful, written directives as an effective manner in which to guide police discretion.¹²¹

The discretion-control value of administrative policy on a wide range of officer street behaviors has been reinforced consistently by results of empirical research. For example, some research shows that the enforcement of restrictive administrative policies can lead to lower levels of deadly force.¹²² Permissive or unenforced policies, in contrast, have been linked to *higher* rates of officer-involved shootings.¹²³ These results led historian and criminologist Samuel Walker to conclude that “administrative rules have successfully limited police shooting discretion, with positive results in terms of

118. See SAMUEL WALKER & CHARLES M. KATZ, *THE POLICE IN AMERICA: AN INTRODUCTION* 388–97 (9th ed. 2018); Gerald M. Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 L. & CONTEMP. PROBS. 500, 500–02 (1971).

119. WHITE & FRADELLA, *supra* note 5, at 132 (citing VICTOR E. KAPPELER, RICHARD D. SLUDER & GEOFFREY P. ALPERT, *FORCES OF DEVIANCE: UNDERSTANDING THE DARK SIDE OF POLICING* 218 (1998)).

120. *Id.*

121. See *id.*; STANDARDS FOR CRIMINAL JUSTICE: URBAN POLICE FUNCTION § 1-4.3 (AM. BAR ASS’N, 2d ed. 1980) (explaining that administrative rulemaking is essential to the uniform control of police discretion); W. DWAYNE ORRICK, INT’L ASS’N OF CHIEFS OF POLICE, *DEVELOPING A POLICE DEPARTMENT POLICY-PROCEDURE MANUAL 2*, <http://www.theiacp.org/portals/0/pdfs/BP-PolicyProcedures.pdf> [<https://perma.cc/YFP9-HHFX>] (explaining that a police department policy-procedure manual must include “[w]ritten directives related to policy, procedures, rules and regulations”); *The Commission*, CALEA (2010), <http://www.calea.org/content/commission> [<https://perma.cc/34FF-P8AB>] (explaining that CALEA accreditation “require[s] an agency to develop a comprehensive, well thought out, uniform set of written directives” because it represents “one of the most successful methods for reaching administrative and operational goals, while also providing direction to personnel”).

122. WHITE & FRADELLA, *supra* note 5, at 132 (citing James J. Fyfe, *Police Use of Deadly Force: Research and Reform*, 5 JUST. Q. 165, 199–201 (1988)); see also WILLIAM A. GELLER & MICHAEL S. SCOTT, *DEADLY FORCE: WHAT WE KNOW* 257 (1992) (explaining how empirical researchers have concluded that “departments with restrictive shooting policies experienced lower levels of shooting mb officers than departments with more permissive policies”).

123. GELLER & SCOTT, *supra* note 122, at 257; Michael D. White, *Controlling Police Decisions to Use Deadly Force: Reexamining the Importance of Administrative Policy*, 47 CRIME & DELINQ. 131, 145 (2001).

social policy. Fewer people are being shot and killed, racial disparities in shootings have been reduced, and police officers are in no greater danger because of these restrictions.”¹²⁴ Researchers have reported similar effects across other areas of policing, “including high-speed pursuits, use of police dogs, foot pursuits, and responses to domestic violence incidents.”¹²⁵

Given the relative novelty of police BWCs, there is scant empirical research documenting the effect of BWC policy on officers’ use of the technology.¹²⁶ As a result, the US DOJ, through the BJA, has developed a BWC administrative policy review process to provide guidance to law enforcement agencies in this critically important area.¹²⁷ The policy review process, developed by the national TTA team, is grounded in the robust body of evidence documenting the effectiveness of administrative policy in other aspects of police field behavior (e.g., use of force, auto pursuits), as well as the best available evidence on police BWCs.¹²⁸ The BJT Scorecard forms the centerpiece of the policy review process. Evaluators use the BJA Scorecard to rate the overall comprehensive of a proposed BWC policy across eleven general policy areas, encompassing forty-one specific dimensions.¹²⁹ The eleven policy areas are summarized in Table 1.

124. SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990*, at 32 (1992).

125. WHITE & FRADELLA, *supra* note 5, at 134 (citing SAMUEL WALKER & CAROL A. ARCHBOLD, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 84 (2d ed. 2014)); MICHAEL D. WHITE, *CURRENT ISSUES AND CONTROVERSIES IN POLICING* 276–78 (2007); *see also* GEOFFREY P. ALPERT, *POLICE PURSUIT: POLICIES AND TRAINING* 4 (1997), <https://www.ncjrs.gov/pdffiles/164831.pdf> [<https://perma.cc/BN2P-KYVV>] (noting how more restrictive police pursuit policies drastically decreased the number of pursuits); MERRICK J. BOBB & STAFF, *THE LOS ANGELES COUNTY SHERIFF’S DEPARTMENT: 12TH SEMI-ANNUAL REPORT* 40–42 (2000), <https://www.clearinghouse.net/chDocs/public/PN-CA-0001-0012.pdf> [<https://perma.cc/PM3F-ZAM6>] (noting that strict enforcement of canine policies led to fewer dog bites).

126. For an exception, see STOKES & RANKIN, *supra* note 24, at 7.

127. *See Body-Worn Camera Policy Review Scorecard*, *supra* note 40.

128. *See id.*; POLICE EXEC. RESEARCH FORUM, *IMPLEMENTING A BODY-WORN CAMERA PROGRAM* 37, 48–49 (2014), http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf [<https://perma.cc/D6Q7-KEP6>]; WHITE, *supra* note 2, at 8–10.

129. *Body-Worn Camera Policy Review Scorecard*, *supra* note 40.

Policy Development
General Issues
Video Capture – Activation
Video Capture – Deactivation
Data Transfer/Download
Data Storage/Retention
BWC Viewing
BWC Training
Public Release
Policy and Program Evaluation
BWCs and Use of Force

Table 1: Policy Areas on The BJA Scorecard for BWCs

Each of the forty-one items embedded in the eleven areas listed in Table 1 is scored as a “0” or a “1” on the BJA Scorecard, based on whether the issue is addressed in the policy; thus, a score of forty-one out of forty-one points represents a perfect score. Seventeen items on the BJA Scorecard are in red text, indicating that they are of critical importance and should be mandatory in a BWC policy.¹³⁰ The BJA Scorecard therefore allows an agency to examine its policy performance in each of the eleven areas via subtotal scores, as well as its overall performance.

Law enforcement agencies that receive federal funding through BJA’s Body-Worn Camera Policy and Implementation Program

130. *Id.*

(“PIP”) go through a mandatory policy review process at the start of their grant period.¹³¹ The agency can access ten percent of their grant funds immediately upon notification of the award, but the agency cannot access the remaining ninety percent until it passes the policy review process.¹³² Staff from the grantee agency work with TTA team members to score the policy on the BWC policy scorecard. This is typically an iterative, collaborative process that can take several weeks or even months. To pass the policy review process and access the remainder of their grant funds, the agency must score at least an eighty percent overall on the BJA Scorecard (thirty-three or higher out of forty-one possible points), as well as a perfect sub-score of seventeen out of seventeen points for the mandatory items.¹³³

It is important to note that the BJA Scorecard rates comprehensiveness only. Put differently, the BJA Scorecard assesses whether an issue is addressed in policy or not. The BJA Scorecard is not prescriptive or directional in terms of actual policy language. For example, one controversial issue addressed in Part IV is citizen notification: should officers advise citizens that they are being recorded on a BWC?¹³⁴ The BJA Scorecard item on citizen notification states, “Does the policy provide guidance on citizen notification of BWC?” If the policy provides guidance, the item is scored a “1” regardless of the exact nature of that guidance. The policy could mandate that officers notify citizens of the BWC (e.g., officers shall notify). The policy could recommend (but not require) that officers notify citizens of the BWC, or it could simply advise officers they are not required to notify citizens of the BWC. All three of these very different policy positions would receive a score of “1” for the citizen notification item. The US DOJ and the TTA team believe that specific decisions on key policy issues should be made at the local level between the law enforcement agency and all relevant stakeholders, rather than be prescribed by the federal government.

The BJA Scorecard is publicly available as a tool to assist agencies in developing comprehensive BWC policies. Moreover,

131. See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, BODY-WORN CAMERA POLICY AND IMPLEMENTATION PROGRAM FY 2017 COMPETITIVE GRANT ANNOUNCEMENT 10–11 (2016), <https://www.bja.gov/funding/BWCPIP17.pdf> [<https://perma.cc/74BF-XME5>].

132. *Id.* at 6.

133. MICHAEL D. WHITE, JESSICA HERBERT & CHARLES M. KATZ, KEY TRENDS IN BODY-WORN CAMERA POLICY AND PRACTICE 5 (2016), http://bwctta.com/sites/default/files/Files/Resources/BWC%20Policy%20Analysis%20Final%202011-16_0.pdf [<https://perma.cc/CTV6-DM52>].

134. See *infra* Section IV.B.

agencies looking for guidance on specific policy issues can draw on the dozens of agency policies available on the Toolkit,¹³⁵ as well as model policies from police leadership organizations¹³⁶ and advocacy groups.¹³⁷

IV. DIFFICULT POLICY POSITIONS

Although the BJA Scorecard provides a model for developing a comprehensive BWC policy, local decisions on specific policy issues can be quite complicated, and, if poorly thought out, can short circuit the benefits of the technology. Many legal, operational, and policy concerns relevant to BWCs have been raised by scholars, practitioners, and commentators in a variety of forums, including peer-reviewed journal articles,¹³⁸ research reports,¹³⁹ law review articles,¹⁴⁰ articles and editorials in newspapers¹⁴¹ and magazines,¹⁴²

135. See *Policy*, BUREAU OF JUSTICE ASSISTANCE: BODY-WORN CAMERA TOOLKIT, <https://www.bja.gov/bwc/topics-policy.html> [https://perma.cc/R7NP-EMBE].

136. E.g., INT'L ASSOC. OF CHIEFS OF POLICE, *supra* note 17, at 1–2; POLICE EXEC. RESEARCH FORUM, *supra* note 128, at 53–66.

137. E.g., *A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement*, ACLU, <https://www.aclu.org/other/model-act-regulating-use-wearable-body-cameras-law-enforcement> [https://perma.cc/9C7G-R5AJ].

138. See, e.g., Barak Ariel et al., “Contagious Accountability”: A Global Multisite Randomized Controlled Trial on the Effect of Police Body-Worn Cameras on Citizens’ Complaints Against the Police, 44 CRIM. JUST. & BEHAV. 293, 295 (2017) (noting how non-camera officers’ decision-making may be affected the presence of cameras on their co-workers); Ariel et al., *supra* note 29, at 750 (explaining that cameras may affect officer reporting of assaults against them); Ready & Young, *supra* note 71 (describing how officer discretion may be affected differentially, in that some forms of activity may increase (self-initiated) while others decrease (arrests)).

139. See, e.g., KATZ ET AL., *supra* note 2, at 40–41; CYNTHIA LUM, CHRISTOPHER KOPER, LINDA MEROLA, AMBER SCHERER & AMANDA REIOUX, EXISTING AND ONGOING BODY WORN CAMERA RESEARCH: KNOWLEDGE GAPS AND OPPORTUNITIES 19–20 (2015), <http://www.arnoldfoundation.org/wp-content/uploads/Phase-I-Report-Nov-28-2015-FINAL.pdf> [https://perma.cc/37Y8-F9QM]; POLICE EXEC. RESEARCH FORUM, *supra* note 128, at 1–3; STANLEY, *supra* note 18, at 2; WHITE, *supra* note 2, at 27–34.

140. See, e.g., *Developments in the Law—Policing*, 128 HARV. L. REV. 1706, 1800–17 (2015); Richard Lin, Note, *Police Body Worn Cameras and Privacy: Retaining Benefits While Reducing Public Concerns*, 14 DUKE L. & TECH. REV. 346, 349–57 (2016).

141. See, e.g., Mark Bowes, *Police Body Camera Video Strains Chesterfield County Prosecutor*, ROANOKE TIMES (Aug. 17, 2017), http://www.roanoke.com/news/virginia/police-body-camera-video-strains-chesterfield-county-prosecutor/article_acee6e5c-738b-54f6-a9f3-6f6d6ec29be3.html [https://perma.cc/ZT42-NPMV]; Chris Dunn & Donna Lieberman, *Body Cameras Are Key for Police Accountability: We Can’t Let Them Erode Privacy Rights*, WASH. POST. (June 1, 2017), https://www.washingtonpost.com/posteverything/wp/2017/06/01/bodycams-are-key-for-police-accountability-we-cant-let-them-erode-privacy-rights/?utm_term=.80527c3d43d4 [https://perma.cc/FR8Z-D78W (dark archive)]; Mitch Smith, *Minneapolis Police Change Body Camera Policy After Fatal Shooting*, N.Y. TIMES (July 26, 2017), <https://www.nytimes.com/2017/07/26/us/minneapolis->

blogs,¹⁴³ and even podcasts.¹⁴⁴ This Article does not rehash all of these debates. Rather, it highlights four overarching questions that have generated significant controversy among practitioners, researchers, and advocacy groups, each of which subsumes several distinct, but related, issues: (1) when should officers record their interactions with the public (i.e., activation)?; (2) what are the implications of an officer's decision to notify, or his failure to notify, the citizen of the BWC?; (3) what might be the intended and unintended effects of officer review of BWC footage, especially after a critical incident, such as an officer-involved shooting?; and (4) when should supervisors review the BWC footage of their subordinate officers?

A. *Policy Issue 1: When Should Officers Record Their Interactions with the Public?*

In many U.S. jurisdictions, law enforcement officials need to be careful about running afoul of laws governing the recording of communications and other laws intended to safeguard citizens' privacy. As part of the examination of these issues, we begin by summarizing fundamental concepts of privacy under the Fourth Amendment. We then examine specific statutory and constitutional principles that might apply to police use of BWCs.

1. Primer on Privacy

a. *The Property Rights Approach*

The Fourth Amendment guarantees the right of people "to be secure in their persons, houses, papers, and effects, against

police-body-camera-policy-fatal-shooting.html?mcubz=0 [https://perma.cc/YF2V-TYNJ (dark archive)].

142. See, e.g., Robinson Meyer, *Seen It All Before: 10 Predictions About Police Body Cameras*, ATLANTIC (Dec. 5, 2014), <https://www.theatlantic.com/technology/archive/2014/12/seen-it-all-before-10-predictions-about-police-body-cameras/383456/> [https://perma.cc/5ZWM-57J6]; Janet Vertesi, *The Problem with Police Body Cameras*, TIME (May 4, 2015), <http://time.com/3843157/the-problem-with-police-body-cameras/> [https://perma.cc/7LT9-3ZHJ].

143. See, e.g., John V. Berry, *Legal Issues for Police Officers with Body-Worn Cameras*, POLICE L. BLOG (Jan. 9, 2017), <http://www.policelawblog.com/blog/body-worn-cameras/> [https://perma.cc/YP6H-8PKE]; Alex Sutherland & Barak Ariel, *How Police Body Cameras Can Improve Behavior, Ease Tension*, RAND BLOG (Nov. 2, 2016), <https://www.rand.org/blog/2016/11/how-police-body-cameras-can-improve-behavior-ease-tension.html> [https://perma.cc/3D2G-XFTA].

144. The BJA now has its own "BWC Podcast Series," which can be downloaded online. See *BWC Podcast Series*, BUREAU OF JUSTICE ASSISTANCE, <https://www.bja.gov/Publications/podcasts/podcast.html> [https://perma.cc/9Y8Q-PQF].

unreasonable searches and seizures.”¹⁴⁵ Because the express language of the Fourth Amendment stresses the importance of both personal and real property rights,¹⁴⁶ “it is unsurprising that the U.S. Supreme Court initially grounded Fourth Amendment jurisprudence in a property-rights framework.”¹⁴⁷ As *Olmstead v. United States*¹⁴⁸ illustrates, this approach relies on the premise that a “search,” for the purposes of the Fourth Amendment, occurs when governmental actors physically trespass upon a constitutionally protected area.¹⁴⁹

Yet what the Court considers to be a *physical* intrusion is not always intuitive. For example, in *Olmstead*, the evidence used to convict the defendants of conspiracy to violate the National Prohibition Act was obtained through wiretaps of the defendants’ home telephones and their principle place of business.¹⁵⁰ The Court ruled that neither a search nor a seizure had occurred under the Fourth Amendment because “[t]here was no entry of the houses or offices of the defendants”—i.e., because the wiretaps were installed without physically trespassing on the defendants’ property.¹⁵¹ Similarly, in *Goldman v. United States*,¹⁵² the Court again relied on the lack of physical intrusion, finding that the placement of a listening device against a wall adjoining the defendant’s office did not constitute an illegal search or seizure.¹⁵³

On the other hand, the Court has repeatedly affirmed that “[w]hen the Government *physically* invades personal property to gather information, a search occurs.”¹⁵⁴ For example, in *Florida v. Jardines*,¹⁵⁵ the Court concluded that an unlawful search had occurred when police walked their drug-sniffing dog onto the defendant’s porch without a warrant, emphasizing that “the detectives had all four of their feet and all four of their companion’s firmly planted on the constitutionally protected extension of [the defendant’s]

145. U.S. CONST. amend. IV.

146. *See id.* *See generally* BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT (2001) (discussing the importance of historical views on modern property rights).

147. Christine S. Scott-Hayward, Henry F. Fradella & Ryan G. Fischer, *Does Privacy Require Secrecy? Societal Expectations of Privacy in the Digital Age*, 43 AM. J. CRIM. L. 19, 23 (2016).

148. 277 U.S. 438 (1928).

149. *Id.* at 466.

150. *Id.* at 456–57.

151. *Id.* at 464.

152. 316 U.S. 129 (1942).

153. *Id.* at 135–36.

154. *United States v. Jones*, 565 U.S. 400, 414 (2012) (emphasis added).

155. 569 U.S. 1 (2013).

home.”¹⁵⁶ The Court came to a similar result in *Silverman v. United States*.¹⁵⁷ There, the unconstitutional physical intrusion occurred when law enforcement officers pushed a “spike mike” through a common wall until it hit a heating duct in the defendant’s home.¹⁵⁸ Even though the invasion was minimal, the Court found that the Fourth Amendment had been violated based on the fact that the microphone physically invaded the defendant’s premises.¹⁵⁹

b. *The Reasonable Expectation of Privacy Approach*

In *Katz v. United States*,¹⁶⁰ the Supreme Court expanded Fourth Amendment protections to encompass situations in which governmental agents infringe upon someone’s reasonable expectation of privacy even when there is no physical trespass to property.¹⁶¹ *Katz* involved a challenge to the FBI’s warrantless electronic surveillance of the defendant in a public telephone booth as a part of an investigation into illegal gambling.¹⁶² In agreeing that the FBI’s activities “constituted a ‘search and seizure’ within the meaning of the Fourth Amendment,” the Court was careful to emphasize that the Fourth Amendment protects “people, not places.”¹⁶³ Thus, “[t]he fact that the electronic device . . . did not happen to penetrate the wall of the booth can have no constitutional significance”—even though the recording device was used in a public place, its use “violated the privacy upon which [the defendant] justifiably relied” while in the phone booth.”¹⁶⁴ Accordingly, the *Katz* “reasonable expectation of privacy” test, articulated in Justice Harlan’s concurrence and now considered to form the basis of the Court’s subsequent approach to Fourth Amendment searches, states, “there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”¹⁶⁵

Since *Katz*, courts have consistently relied on Justice Harlan’s two-step test when analyzing Fourth Amendment search and seizure

156. *Id.* at 8.

157. 365 U.S. 505 (1961).

158. *Id.* at 506.

159. *Id.* at 509–11.

160. 389 U.S. 347 (1967).

161. *Id.* at 361 (Harlan, J., concurring); *see also* Scott-Hayward et al., *supra* note 147, at 25.

162. *Katz*, 389 U.S. at 352 (majority opinion).

163. *Id.* at 351, 353.

164. *Id.* at 353.

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

claims,¹⁶⁶ “despite the difficulty inherent in ascertaining when a subjective expectation of privacy is ‘reasonable.’”¹⁶⁷ And while the Court has not completely abandoned the *Olmstead* property-based approach, it has nonetheless made clear that the *Katz* approach should apply in all cases not involving physical trespass.¹⁶⁸

Katz’s reasonable expectation of privacy approach to the Fourth Amendment has particular relevance to law enforcement use of recording devices. For example, in *United States v. Paxton*,¹⁶⁹ the Seventh Circuit considered whether arrestees harbored a reasonable expectation of privacy with regard to conversations held while they were detained in a police van.¹⁷⁰ In finding that no objectively reasonable expectation of privacy existed, the court emphasized that “[p]olice surveillance equipment (including both dashboard cameras and body cameras) has become both cheaper and more effective” and thus, “one wonders how much of a reminder a detainee needs that he might be under surveillance—particularly in a marked police vehicle.”¹⁷¹

2. Consent to Record

In addition to the Fourth Amendment, federal and state statutory laws affect any person’s ability to record telephone and in-person conversations. Because BWCs involve the latter, it is imperative that all BWC policies comply with statutes governing the recording of conversations.

To deter improper surveillance by a third party, both federal law and state-level provisions in forty-nine states require that at least one

166. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 739–41 (1979) (explaining *Katz* by referring to Justice Harlan’s two step approach).

167. Scott-Hayward et al., *supra* note 147, at 25.

168. See *id.* (citing *United States v. Jones*, 565 U.S. 400 (2012)). For example, in *United States v. Lambus*, 251 F. Supp. 3d 470 (E.D.N.Y. 2017), the court granted a motion to suppress GPS tracking data, reasoning,

A tracking device search does not end at the moment of physical trespass by installation. Whether conceptualized as one continuous search, or two discrete searches . . . , the use of the tracking device to actually monitor the location of a person or object is a separate search from installation for Fourth Amendment purposes Even if the initial search occasioned by the installation of the device is governed by a limited trespass doctrine, the search occasioned by the use of the device to transmit precise location information is controlled by the broader *Katz* reasonable-expectation-of-privacy test.

Id. at 495.

169. 848 F.3d 803 (7th Cir. 2017).

170. *Id.* at 806.

171. *Id.* at 812–13.

party to a conversation consent to any recording of that conversation.¹⁷² For example, in the year following the decision in *Katz*, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968.¹⁷³ A major effect of this legislation, provided in Title III, was to supersede prior prohibitions on electronic surveillance with a new, limited authorization to use these techniques subject to a warrant requirement.¹⁷⁴ Sometimes referred to as the federal wiretapping laws, Title III generally prohibits the surreptitious interception (recording) of “any wire, oral, or electronic communication.”¹⁷⁵ Title III, its state law counterparts, and the privacy guarantees of the Fourth Amendment are generally aimed at curtailing governmental intrusions—especially those concerning criminal investigations.¹⁷⁶ But these laws are also concerned with protecting people’s privacy—even from eavesdropping under circumstances in which a reasonable person would not have a legitimate expectation of privacy in the conversation.¹⁷⁷ Under such circumstances, at least one party to a conversation must generally consent to it being recorded.¹⁷⁸

172. See Carol M. Bast, *Conflict of Law and Surreptitious Taping of Telephone Conversations*, 54 N.Y. L. SCH. L. REV. 147, 149–50 (2010).

173. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 18 U.S.C. §§ 2510–2522 (2012) and 42 U.S.C. § 3711 (2012)).

174. JOHN N. FERDICO, HENRY F. FRADELLA & CHRISTOPHER D. TOTTEN, *CRIMINAL PROCEDURE FOR THE CRIMINAL JUSTICE PROFESSIONAL* 181–82 (12th ed. 2016). The Act has been amended numerous times, including, *inter alia*, by the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of U.S.C. (2012)); Communications Assistance to Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in scattered sections of 18 U.S.C. (2012)); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, (codified as amended in scattered sections of U.S.C. (2012)); USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of U.S.C. (2012)); USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, 120 Stat. 278 (codified as amended in scattered sections of U.S.C. (2012)); Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261 (2008), 122 Stat. 2436 (codified as amended in scattered sections of 50 U.S.C. (2012)); FISA Sunsets Extension Act of 2011, Pub. L. No. 112-3, 125 Stat. 5; and PATRIOT Sunsets Extension Act of 2011, Pub. L. 112-14, 125 Stat. 216.

175. 18 U.S.C. § 2511(1)(a) (2012); see also §§ 2510–2522.

176. See FERDICO ET AL., *supra* note 174, at 174–202 (detailing the “series of judicially created and statutory rules governing high-tech searches and surveillance”).

177. See Carol M. Bast, *What’s Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 906 (1998); Michael J. Gibson, Comment, *Just Because It’s Legal Doesn’t Mean You Can Do It: The Legality of Employee Eavesdropping and Illinois Workplace Recording Policies*, 46 LOY. U. CHI. L.J. 913, 917–19 (2015).

178. Bast, *supra* note 172, at 150–51.

a. *Eavesdropping When There Is No Reasonable Expectation of Privacy*

As a general rule, when a conversation occurs in a public place where third parties can overhear it, there is no reasonable expectation of privacy as a matter of law.¹⁷⁹ Consider, for example, that the Fifth Circuit in *Kee v. City of Rowlett*¹⁸⁰ upheld the use of recordings of conversations and prayers made at a graveside burial service because the public nature of the outdoor conversations rendered them beyond the scope of any reasonable expectation of privacy.¹⁸¹ Courts have similarly upheld the use of non-privileged recordings made in correctional facilities¹⁸² and inside police vehicles on the basis that the participants in the conversation lacked a reasonable expectation of privacy under the circumstances.¹⁸³ And because, under federal law, telephones themselves are not considered intercepting devices when they are used at home or in offices as part of the ordinary course of business,¹⁸⁴ what family members overhear while eavesdropping on the conversations of other family members using an extension telephone¹⁸⁵ and what employers overhear while monitoring phone conversations over extensions for legitimate business reasons also do not implicate Title III.¹⁸⁶

b. *One-Party Consent*

Under the so-called “one-party consent” approach, so long as one person involved in a conversation is aware of the fact that the

179. See *California v. Ciraolo*, 476 U.S. 207, 215 (1986) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967))); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (“[C]onversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.”); see also *FERDICO ET AL.*, *supra* note 174, at 191.

180. 247 F.3d 206 (5th Cir. 2001).

181. *Id.* at 215–18.

182. See *United States v. Harrelson*, 754 F.2d 1153, 1169–70 (5th Cir. 1985) (“It is unnecessary to consult the case law to conclude that one who expects privacy under the circumstances of prison visiting is, if not actually foolish, exceptionally naïve.”); see also MICH. COMP. LAWS § 750.539g(d) (West, Westlaw through P.A. 2018, No. 10 of the 2018 Reg. Sess., 99th Leg.).

183. See *United States v. Paxton*, 848 F.3d 803, 813 (7th Cir. 2017); *United States v. Dunbar*, 553 F.3d 48, 57 (1st Cir. 2009); *United States v. Turner*, 209 F.3d 1198, 1201 (10th Cir. 2000); *United States v. McKinnon*, 985 F.2d 525, 527–28 (11th Cir. 1993).

184. 18 U.S.C. § 2510(5)(a) (2012).

185. *FERDICO ET AL.*, *supra* note 174, at 191 (citing *Commonwealth v. Vieux*, 671 N.E.2d 989 (Mass. App. Ct. 1996)).

186. *Id.* (citing *O’Sullivan v. NYNEX Corp.*, 687 N.E.2d 1241 (Mass. 1997)).

conversation is being recorded, then his or her consent to such recording satisfies the requirement of both Title III as well as its state law counterparts in roughly four-fifths of states.¹⁸⁷

Thus, a law enforcement officer or a private citizen who is a party to a communication may intercept the communication or permit a law enforcement official to intercept the communication without violating Title III or the Fourth Amendment. This [one-party consent doctrine] allows a law enforcement officer or agent, an informant, an accomplice or co-conspirator, or a victim to wear a body microphone; act as an undercover agent without being wired; or eavesdrop or record a telephone conversation with the permission of the person receiving the call even though the person making the call has no knowledge of this activity. A private citizen, however, may not intercept a communication “for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.”¹⁸⁸

c. *All-Party Consent*

As of March 2018, fifteen states provide more privacy protections than Title III, and the one-party consent approach is used in the remaining U.S. jurisdictions. The laws in these states generally fall into one of two categories: complete all-party consent or partial all-party consent.

First, there are eleven states that provide a high level of privacy for their residents with regard to the recording of communications by private persons. These states include California,¹⁸⁹ Delaware,¹⁹⁰ Florida,¹⁹¹ Georgia,¹⁹² Illinois,¹⁹³ Maryland,¹⁹⁴ Massachusetts,¹⁹⁵

187. *Id.*; Gibson, *supra* note 177, at 917–19.

188. FERDICO ET AL., *supra* note 174, at 191–92 (citation omitted) (quoting 18 U.S.C. § 2511(2)(d)).

189. CAL. PENAL CODE § 632(a) (West, Westlaw through 2017 Reg. Sess.).

190. DEL. CODE ANN. § 1335(a)(4) (West, Westlaw through 81 Laws 2017).

191. FLA. STAT. ANN. § 934.03(2)(d) (West, Westlaw current through 2017 First Reg. Sess. & Special “A” Sess. of the 25th Legislature). *State v. Inciarrano*, 473 So. 2d 1272 (Fla. 1985), carved out a narrow exception to Florida’s all-party consent law in a case in which the victim of a murder had illegally recorded conversations with his murderer. *Id.* at 1274. Although the concurrence argued that the statutory language at issue made it clear that the audio recording should have been suppressed from evidence, *id.* at 1277 (Erllich, J., concurring) (“It is this Court’s tortuous misconstruction of the plain language of the statute which requires the indefensible rationale of the majority opinion.”), the Supreme Court of Florida took a seemingly results-oriented approach when it concluded that the eavesdropping law did not apply in the case. The majority reasoned that the defendant had no reasonable expectation of privacy in his conversation with the deceased victim regarding a business deal in light of “the quasi-public nature of the premises within which

Montana,¹⁹⁶ New Hampshire,¹⁹⁷ Pennsylvania,¹⁹⁸ and Washington.¹⁹⁹ Whenever there is a reasonable expectation of privacy, these states prohibit the recording of most conversations between private

the conversations occurred, the physical proximity and accessibility of the premises to bystanders, and the location and visibility to the unaided eye of the microphone used to record the conversations.” *Id.* at 1274. *Inciarrano* has been followed in cases that mirror the unusual facts of the case, such as when a recording is made in a place of business using recording equipment that is visible. *E.g.*, *State v. Caraballo*, 198 So. 3d 819, 822 (Fla. Dist. Ct. App. 2016) (finding no reasonable expectation of privacy when “conversion occurred at a [public] sales counter . . . and the business was open to the public at the time the recording was made”). Otherwise, Florida cases have generally limited *Inciarrano* by distinguishing its somewhat unique circumstances from other recordings made by victims of crime. *E.g.*, *McDade v. State*, 154 So. 3d 292, 298 (Fla. 2014) (“Because of the differences in the location, visibility of the recording device, and content of the recordings at issue in *Inciarrano*, it presented a set of circumstances that are starkly different from those present here.”); *Abdo v. State*, 144 So. 3d 594, 597 (Fla. Dist. Ct. App. 2014) (finding insufficient evidence that the defendant lacked reasonable expectation of privacy in moving car when it remained unclear “how many people were in the vehicle, whether [the defendant] was aware of the recording, who recorded the video, and what was said on the recording”).

192. GA. CODE ANN. § 16-11-62(2) (West, Westlaw through 2017 Reg. Sess.).

193. 720 ILL. COMP. STAT. ANN. § 5/14-2(a) (West, Westlaw through P.A. 100-576 of 2018 Reg. Sess.). *People v. Beardsley*, 503 N.E.2d 346 (Ill. 1986), reversed an eavesdropping conviction of a defendant who, while in custody in the back seat of a police vehicle, recorded the conversation of the two officers sitting in the front seat. *Id.* at 350. Importantly, the officers knew the defendant had a tape recorder and allowed him to maintain possession of it while in the patrol car. *Id.* Because the officers knew their conversation was not private, the defendant’s recording of that conversation was held not to violate the eavesdropping statute. *Id.* After the *Beardsley* decision, the Illinois legislature felt it necessary to clarify, via statutory amendment, “that no recording could be made absent consent from *all* parties regardless of any lack of expectation of privacy. Thus, the statute now essentially deems all conversations to be private and not subject to recording even if the participants themselves have no expectation of privacy.” *People v. Clark*, 6 N.E.3d 154, 160 (Ill. 2014) (emphasis added).

194. MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(3) (West, Westlaw through 2017 Reg. Sess.).

195. MASS. GEN. LAWS ANN. ch. 272, § 99(B)(4), (C)(1) (West, Westlaw through ch. 175 of 2017 1st Ann. Sess.).

196. MONT. CODE ANN. § 45-8-213(1)(c) (West, Westlaw through 2017 Reg. Sess.).

197. N.H. REV. STAT. ANN. § 570-A:2(I)(a) (West, Westlaw through 2017 Reg. Sess.).

198. 18 PA. STAT. AND CONS. STAT. ANN. § 5704(4) (West, Westlaw through 2017 Reg. Sess.).

199. WASH. REV. CODE ANN. § 9.73.030(1) (West, Westlaw through 2017 3d Spec. Sess.). Washington prohibits the interception or recording of “private conversation[s].” *Id.* To determine whether there is a reasonable expectation of privacy that triggers this eavesdropping law, courts are to consider the “(1) duration and subject matter of the conversation, (2) location of conversation and presence or potential presence of a third party, and (3) role of the non-consenting party and his or her relationship to the consenting party.” *Lewis v. Dep’t of Licensing*, 139 P.3d 1078, 1083 (Wash. 2006). The court in *Lewis* held that “traffic stop conversations are not private[;]” yet, the Washington statute nonetheless requires law enforcement officers to notify drivers that they are being recorded during a traffic stop. *Id.* at 1086.

persons—including in-person, by telephone, or via any electronic or computer-based communication system—without the permission of all the parties. Massachusetts courts have gone even further than most states by requiring consent from all parties to record in-person conversations that occur in public locations.²⁰⁰

Second, another four states require all-party consent for some types of communications, but only one-party consent for others. Connecticut, for example, applies all-party consent to telephone conversations,²⁰¹ but one-party consent to the recording of in-person communications.²⁰² Similarly, unless there is some emergency situation that is later ratified by a court, Nevada typically requires all-party consent to record telephone conversations,²⁰³ but only requires one-party consent to record in-person conversations.²⁰⁴ Conversely, Oregon utilizes the one-party consent for telephone and other forms of wire communications, but requires all-party consent to record an in-person conversation.²⁰⁵

Unlike Connecticut, Nevada, and Oregon, Michigan does not differentiate between in-person, telephone, and electronic communications. Rather, its rules vary depending on who is doing the recording. At first blush, Michigan appears to be an all-party consent state because its eavesdropping law applies to the recording of “any part of the private discourse of others without the permission of *all*” parties to the conversation.²⁰⁶ Michigan law also provides that “[a]ny person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of *all* parties thereto” is guilty of a felony.²⁰⁷ A 1982 decision from the Michigan Court of Appeals,

200. *Commonwealth v. Manzelli*, 864 N.E.2d 566, 568 (Mass. App. Ct. 2007) (upholding conviction of a protestor for secretly audio-taping a conversation with police officer that occurred in public at a political rally).

201. CONN. GEN. STAT. ANN. § 52-570d(a) (West, Westlaw through 2017 June Special Sess.).

202. *Id.* §§ 53a-187, -189 (Westlaw).

203. NEV. REV. STAT. ANN. § 200.620 (West, Westlaw through 2017 Reg. Sess.); *see also* *Lane v. Allstate Ins. Co.*, 969 P.2d 938, 940–41 (Nev. 1998) (finding that § 200.620 requires all-party consent to record private telephone conversations). *But see* *State v. Reyes*, 808 P.2d 544, 547–48 (Nev. 1991) (holding that acquisition of telephone communications, via listening on a telephone extension, by a law enforcement officer in the ordinary course of his duties was not an “interception” for the purposes of the eavesdropping statute).

204. NEV. REV. STAT. ANN. § 200.650.

205. OR. REV. STAT. ANN. § 165.540(1) (West, Westlaw through 2017 Reg. Sess.).

206. MICH. COMP. LAWS ANN. § 750.539a (West, Westlaw through P.A.2018, No. 37 of the 2018 Reg. Sess., 99th Legis.) (emphasis added).

207. *Id.* § 750.539c (Westlaw) (emphasis added).

however, concluded that a participant of the conversation may record that conversation without the consent of other participants, thereby effectively limiting the state's all-party consent statute to third-party recording of communications.²⁰⁸

d. *Criminal Justice Exceptions to All-Party Consent*

Even those jurisdictions that have strict all-party recording laws make some criminal justice exceptions. For example, although California, Illinois, and Washington are all-party consent jurisdictions, all three states permit the recording of a conversation with the consent of one party if certain criminal activity is involved.²⁰⁹ Connecticut provides comparable exceptions to its usual rules of all-party consent to record telephone calls.²¹⁰ Similarly, although Oregon requires all-party consent for the recording of in-person communications, the state dispenses with the requirement if the conversation involves “a felony that endangers human life.”²¹¹

Moreover, as Professor Carol Bast noted, “Private parties are treated much differently than law enforcement officers or informants in the states requiring all-party consent.”²¹² Indeed, as Table 2 illustrates, each of the jurisdictions that typically require all-party consent for the recording of certain types of conversations provide some statutory exceptions to those requirements for law enforcement officers in the course of conducting criminal investigations.

208. *Sullivan v Gray*, 324 N.W.2d 58, 60–61 (Mich. Ct. App. 1982); *see also* *Dickerson v. Raphael*, 564 N.W.2d 85, 88–90 (Mich. Ct. App. 1997) (finding that Michigan statute prevents “third parties from recording covertly, while it occurs, a private conversation in which they are not participants and then rebroadcasting that conversation”); *cf.* *Williams v. Williams*, 581 N.W.2d 777, 780 (Mich. Ct. App. 1998) (declining to allow a parent to consent on behalf of a minor child).

209. *See* CAL. PENAL CODE § 633.5 (West, Westlaw through 2017 Reg. Sess.) (“[California’s wiretapping laws] do not prohibit one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person.”); 720 ILL. COMP. STAT. ANN. § 5/14-3(g)–(i) (West, Westlaw through P.A. 100-576 of 2018 Reg. Sess.) (listing a range of criminal justice exceptions to all-party consent requirement); WASH. REV. CODE ANN. § 9.73.030(2) (West, Westlaw through 2017 3d Spec. Sess.) (providing exception for conversations that “convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands,” hostage-related situations, and calls that occur “anonymously or repeatedly or at an extremely inconvenient hour”).

210. CONN. GEN. STAT. ANN. § 52-570d(b)(3)–(4) (West, Westlaw through 2017 June Spec. Sess.).

211. OR. REV. STAT. ANN. § 165.540(5)(a) (West, Westlaw through 2017 Reg. Sess.).

212. Bast, *supra* note 177, at 869.

State	Law Enforcement Exemption
California	Cal. Penal Code § 633 permits law enforcement to record “any communication that they could lawfully overhear or record prior to the effective date of [the wiretapping and eavesdropping statutes].”
Connecticut	Conn. Gen. Stat. § 52-570d(b)(1) permits law enforcement officers to record private telephonic conversations in the “lawful performance” of their official duties.
Delaware	Del. Code Ann. § 1335(b)(5) exempts police officers from all-party consent requirement.
Florida	Fla. Stat. § 934.03(2)(c) permits law enforcement officers “to intercept a wire, oral, or electronic communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.”
Georgia	Ga. Code Ann. 16-11-62(2)(D) permits law enforcement officers and their agents to use devices in the lawful performance of official duties “to observe, photograph, videotape, or record the activities of persons that occur in the presence of such officer or his or her agent.”
Illinois	720 Ill. Comp. Stat. § 5/14-3(g) exempts law enforcement from the all-party consent requirement when investigating specific criminal offenses (including forcible felonies) so long as prior notification was made “to the State's Attorney of the county in which [the recording] is to occur.”
Maryland	Md. Code Ann., Cts. & Jud. Proc. § 10-402(c)(2)–(6) exempt law enforcement officers from all-party consent requirements when the officer is a party to a conversation; when recordings are made by an officer, informant, or cooperating witness during the investigation of a wide range of enumerated criminal offenses; when a

	recording is made during a traffic stop with notice; and if there is reasonable cause to believe that a law enforcement officer's safety may be in jeopardy during the course of a criminal investigation.
Massachusetts	Mass. Gen. Laws Ann. ch. 272, § 99(B)(4) exempts law enforcement officers from all-party consent requirement when recording or transmitting wire or oral communications "if the officer is a party to such communication" or if the officer has been granted permission by the party being recorded or transmitted during the course of an investigation of certain criminal offenses designated within the statute. Additionally, Mass. Gen. Laws Ann. ch. 272, § 99(D)(1)(e) permits recording performed by an undercover law enforcement officer.
Michigan	Mich. Comp. Laws Ann. § 750.539g specifically exempts "eavesdropping or surveillance not otherwise prohibited by law" by law enforcement officers in performance of official duties.
Montana	Mont. Code Ann. § 45-8-213(1)(c)(i) exempts public officials and public employees if the recording is made in the performance of an official duty. Additionally, Mont. Code Ann. § 45-8-213(1)(c)(iii) allows recording upon consent of one party if the other party is given notice of the recording.
Nevada	Upon petition by the state attorney general or the district attorney of any county, Nev. Rev. Stat. Ann. § 179.460 grants judges the authority to issue orders allowing law enforcement officers to record all types of communications relevant to the investigation of a wide range of enumerated criminal offenses. One-party consent may be sanctioned after the fact if seeking a court order is impracticable as a result of some emergency situation pursuant to Nev. Rev. Stat. Ann. § 200.620. Additionally, Nev. Rev. Stat. Ann. § 179.463 exempts law enforcement officers from all-party consent when recording all types of communications relevant to hostage situations.

	<p>And because § 200.650 requires only one-party consent for a party to an in-person conversation to record it, courts have held that law enforcement may wire an informant and record the transmitted conversation.</p> <p>213</p>
New Hampshire	<p>N.H. Rev. Stat. Ann. § 570-A:2(II)(c)–(h) not only allows law enforcement officers to wear wires that transmit communications while conducting certain types of investigations, but also allows them to record conversations concerning certain enumerated offenses.</p>
Oregon	<p>As previously mentioned, Or. Rev. Stat. Ann. § 165.540(5) allows both civilians and law enforcement personnel to record any conversation concerning a felony that endangers human life. That same statutory provision also allows law enforcement officers to record conversations in which they are a participant while performing official duties.</p>
Pennsylvania	<p>18 Pa. Stat. and Cons. Stat. Ann. § 5704 permits, with the prior permission of the state attorney general or the relevant county prosecutor, law enforcement officers to record conversations relevant to suspected criminal activity in which the officer is a party to the conversation or, alternatively, at least one party to the conversation grants consent.</p>
Washington	<p>Wash. Rev. Code Ann. § 9.73.090 exempts law enforcement officers from the all-party consent requirements if they are a party to the conversation and if prior approval for one-party consent to record a conversation is received from a judicial officer who “shall” approve the interception upon a showing of probable cause. Additionally, Wash. Rev. Code Ann. § 9.73.200 provides,</p> <p style="padding-left: 40px;">conversations regarding illegal drug operations should be intercepted,</p>

213. See, e.g., *Summers v. State*, 718 P.2d 676, 680 (Nev. 1986).

	transmitted, and recorded in certain circumstances without prior judicial approval in order to protect the life and safety of law enforcement personnel and to enhance prosecution of drug offenses, and that that interception and transmission can be done without violating the constitutional guarantees of privacy.
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Table 2: State Criminal Justice Exceptions to All-Party Consent as of March 2018.

e. Specific Legislation Exempting BWCs from Wiretapping and Eavesdropping Laws

According to the National Conference of State Legislatures,²¹⁴ six states—California,²¹⁵ Georgia,²¹⁶ Illinois,²¹⁷ Nevada,²¹⁸ New Hampshire,²¹⁹ and Oregon²²⁰—statutorily exempted BWCs from their

214. See *Body-Worn Camera Data and Eavesdropping Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (Oct. 27, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/body-worn-cameras-interactive-graphic.aspx#/> [<https://perma.cc/JW5T-V7A6>].

215. CAL PENAL CODE § 633.02 (West, Westlaw through 2017 Reg. Sess.) (“Nothing in Section 631, 632, 632.5, 632.6, or 632.7 shall prohibit any POST-certified chief of police, assistant chief of police, or police officer of a university or college campus from using or operating body-worn cameras.”).

216. GA. CODE ANN. § 16-11-62(2)(D) (West, Westlaw through 2017 Reg. Sess.) (“[I]t shall not be unlawful . . . [f]or a law enforcement officer or his or her agent to use a device in the lawful performance of his or her official duties to observe, photograph, videotape, or record the activities of persons that occur in the presence of such officer or his or her agent.”).

217. 720 ILL. COMP. STAT. ANN. § 5/14-3(h)(5) (West, Westlaw through P.A. 100-576 of 2018 Reg. Sess.) (exempting “[r]ecordings of utterances made by a person while in the presence of a uniformed peace officer and while an occupant of a police vehicle including, but not limited to, (i) recordings made simultaneously with the use of an in-car video camera and (ii) recordings made in the presence of the peace officer utilizing video or audio systems, or both, authorized by the law enforcement agency”).

218. NEV. REV. STAT. ANN. § 179.425(3) (West, Westlaw through 2017 Reg. Sess.) (excluding use of “portable recording device, as defined [in other sections authoring police use of body-worn cameras]”).

219. N.H. REV. STAT. ANN. § 570-A:2(II)(c) (West, Westlaw through 2017 Reg. Sess.) (“It shall not be unlawful under this chapter for . . . [a]ny law enforcement officer, when conducting investigations of or making arrests for offenses enumerated in this chapter, to carry on the person an electronic, mechanical or other device which intercepts oral communications and transmits such communications by radio.”); § 570-A:2(II)(j) (“It shall not be unlawful under this chapter for . . . [a] uniformed law enforcement officer to make an audio recording in conjunction with a video recording of a routine stop performed in the ordinary course of patrol duties . . . provided that the officer shall first give notification

state wiretapping and eavesdropping laws by April 1, 2017. Since that time, at least two more states enacted legislation exempting BWCs from their wiretapping and eavesdropping laws, including Maryland²²¹ and Pennsylvania.²²²

f. *Summary*

Law enforcement officers' use of BWCs will not run afoul of Title III or the Fourth Amendment under most circumstances for three important reasons. First, the one-party consent approach to recording conversations means that a law enforcement officer's knowledge that an encounter is being recorded satisfies the requirements of Title III and the overwhelming majority of its state law counterparts.

Second, little of what transpires in public will engender a reasonable expectation of privacy. Thus, as is the case with closed-circuit cameras that are generally used to record events in public areas such as commercial establishments, garages, parking lots, and the like,²²³ and dashboard cameras that only record what transpires outside, BWCs will rarely reach locations in which people have a reasonable expectation of privacy. That being said, BWCs, unlike closed-circuit cameras or dashboard cameras, can also be used in many places in which people reasonably expect privacy, including in their homes. Thus, BWC use might run afoul of laws that prohibit recording conversations where a speaker expects privacy, such as when interviewing victims of certain crimes (especially sex crimes and

of such recording to the party to the communication unless it is not reasonable or practicable under the circumstances.”).

220. OR. REV. STAT. ANN. § 165.540(5)(d)(B) (West, Westlaw through 2017 Reg. Sess.) (exempting a police officer “who is in uniform and displaying a badge and who is operating . . . [a] video camera worn upon the officer’s person that records the officer’s interactions with members of the public while the officer is on duty”).

221. MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(11)(ii) (West, Westlaw through 2017 Reg. Sess.) (“It is lawful under this subtitle for a law enforcement officer in the course of the officer’s regular duty to intercept an oral communication with a body-worn digital recording device or an electronic control device capable of recording video and oral communications.”).

222. 18 PA. STAT. AND CONS. STAT. ANN. § 5702 (West, Westlaw through 2017 Reg. Sess.) (exempting any “communication made in the presence of a law enforcement officer on official duty who is in uniform or otherwise clearly identifiable as a law enforcement officer and who is using an electronic, mechanical or other [approved] device . . . to intercept the communication in the course of law enforcement duties”).

223. See Robert D. Bickel, Susan Brinkley & Wendy White, *Seeing Past Privacy: Will the Development and Application of CCTV and Other Video Security Technology Compromise an Essential Constitutional Right in a Democracy, or Will the Courts Strike a Proper Balance?*, 33 STETSON L. REV. 299, 321–23 (2003).

domestic violence offenses), assisting people who are fully or partially unclothed, talking with people in schools or health care facilities, or speaking to a confidential informant.²²⁴ And, according to the Urban Institute, forty-one states have such laws.²²⁵

Third, as previously explained, the eight states that usually require all-party consent to record conversations have specifically exempted BWCs from the reach of those statutes (California, Georgia, Illinois, Maryland, Nevada, New Hampshire, Oregon, and Pennsylvania).²²⁶ Of the remaining all-party consent states, as Table 2 illustrates, one (Connecticut) does not require all-party consent to record *in-person* conversations (only telephonic communications);²²⁷ four other all-party consent states (Florida, Massachusetts, Michigan, Montana) already had provisions in their laws that carved-out expectations for law enforcement officers from the usual requirements for all-party consent to record conversations.²²⁸ Thus, as a matter of statutory law, all-party consent to record conversations on BWCs does not appear to be problematic in any state other than Washington.

Case law in Washington, however, has established that conversations between people interacting with law enforcement officers acting in their official capacities are not “private” and, therefore, do not fall within the scope of the state’s usual all-party consent requirement.²²⁹ Relying on that case law, the Washington State Attorney General issued a formal opinion in 2014 specifically stating that the Washington Privacy Act does not require consent from a citizen to record a conversation with a law enforcement officer.²³⁰

224. See Mary D. Fan, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 ALA. L. REV. 395, 399–402 (2016) (discussing the tension between the need for transparency and the protection of privacy); see also Thomas K. Bud, *The Rise and Risk of Police Body-Worn Cameras in Canada*, 14 SURVEILLANCE & SOC’Y 117, 118–19 (2016) (questioning whether the presumed gains in police accountability attendant to BWCs are worth the tradeoffs to privacy).

225. *Police Body-Worn Camera Legislation Tracker: State-by-State Breakdown*, URBAN INST. (Jan. 2017), <http://apps.urban.org/features/body-camera-update/> [<https://perma.cc/7BBU-FWQ4>].

226. See *supra* notes 215–22 and accompanying text.

227. See *supra* note 210 and accompanying text.

228. See *supra* notes 191, 195–96, 206–07 and accompanying text.

229. See *Johnson v. Hawe*, 388 F.3d 676, 683–85 (9th Cir. 2004) (applying Washington state law); *Washington v. Flora*, 845 P.2d 1355, 1357–58 (Wash. Ct. App. 1992).

230. Law Enforcement—Privacy—Recording Conversations—Video & Audio Recording of Communications Between Citizens & Law Enforcement Officers Using Body Cameras Attached to Police Uniforms, Wash. Att’y Gen. Op. No. 8 (2014), 2014 WL 6711950, at *1.

The legal requirements of all-party consent statutes notwithstanding, it may be good practice for law enforcement officers to notify people that BWCs are recording their interactions—even if such a notification is not required by law—because “the knowledge that cameras are running can help defuse potentially confrontational situations and improve behavior from all parties.”²³¹ As will be explained later, however, this assumption currently lacks sufficient empirical support to amount to anything more than speculation.

3. BWC Activation in Practice: Results from Our Policy Analysis

We conducted an analysis of 129 BWC policies of law enforcement agencies that have been funded through the US DOJ Body-Worn Camera Policy and Implementation Program. The analysis includes agencies funded in FY 2015 ($n=54$) and FY 2016 ($n=75$), and all agencies had their policies approved via the policy review process we previously outlined.²³² Our review of grantee policies uncovered a significant amount of variation in how departments address the activation issue, particularly regarding the degree of discretion departments give their officers as to when they turn on their BWC.²³³ We classified the degree of discretion permitted in activation on a three-level scale: mandatory (no discretion), discretionary, and restricted.

All of the policies in our analysis describe encounters in which activation of the BWC is mandatory, though departments address this issue in different ways.²³⁴ Some policies provide a list of the types of encounters in which activation is required (e.g., pedestrian stops, searches of vehicles or residences), while others provide a general statement only (e.g., “Officers will activate the BWC to record all contacts with citizens in the performance of calls for service”).²³⁵ Similarly, policies also identify circumstances in which activation is prohibited.²³⁶ For example, many of the policies we reviewed prohibit the recording of privileged conversations, such as those between an

231. POLICE EXEC. RESEARCH FORUM, *supra* note 128, at 14.

232. See *supra* notes 131–37 and accompanying text. For more detail on the policy analysis, see MICHAEL D. WHITE, MICHAELA FLIPPIN & CHARLES M. KATZ, KEY TRENDS IN BODY-WORN CAMERA POLICY AND PRACTICE: A TWO-YEAR POLICY ANALYSIS OF U.S. DEPARTMENT OF JUSTICE-FUNDED LAW ENFORCEMENT AGENCIES 7–8 (2017), <http://bwctta.com/sites/default/files/Files/Resources/Policy%20Analysis%20Year%202%20FINAL.pdf> [https://perma.cc/KQ7L-EME3]

233. *Id.* at 8–10.

234. *Id.* at 9.

235. *Id.*

236. *Id.*

attorney and client.²³⁷ Approximately sixty percent of the policies allow officer discretion in activation if they find themselves in an encounter where neither the mandatory nor the prohibited criteria apply.²³⁸ Typical language in such policies states that officers may activate their BWCs whenever they feel their use would be beneficial to the performance of their official duties.²³⁹

In sum, none of the policies in our analysis allow full officer discretion with activation. Rather, all policies provide certain parameters to guide officer decision-making. This finding demonstrates how police departments are employing administrative policy to guide officer decision-making on BWC activation (rather than leaving the decision solely to the officers). Moreover, most policies allow for discretionary activation under certain circumstances, indicating that many agencies recognize the importance of officer discretion in circumstances that do not meet the mandatory or prohibitory criteria for BWC activation.

B. Policy Issue 2: Citizen Notification

Research suggests that people behave differently when they know they are being observed.²⁴⁰ Specifically, it appears that “knowing with sufficient certainty that our behavior is being observed or judged affects various social cognitive processes: We experience public self-awareness, become more prone to socially acceptable behavior, and sense a heightened need to cooperate with rules.”²⁴¹ For example, people who know they are being observed using security cameras increase “prosocial” behaviors, such as helping someone in need.²⁴² Conversely, video monitoring also decreases

237. *Id.*

238. *Id.*

239. *Id.*

240. See Tayna L. Chartrand & John A. Bargh, *The Chameleon Effect: The Perception–Behavior Link and Social Interaction*, 76 J. PERSONALITY & SOC. PSYCHOL. 893, 893 (1999) (explaining the “chameleon effect” in which people unconsciously mimic “the postures, mannerisms, facial expressions, and other behaviors” of the people with whom they are interacting in a social environment); see also Ethan Bernstein, *How Being Filmed Changes Employee Behavior*, HARV. BUS. REV. (Sept. 12, 2014), <http://blogs.hbr.org/2014/09/how-being-filmed-changes-employee-behavior/> [<https://perma.cc/TR2L-H53C>] (“The most significant impact of bodycams, taxicams, and the like is not reliving the past but, rather, changing behavior in the present. We act differently when we know we’re on camera.”).

241. Ariel et al., *supra* note 138, at 297 (internal citations omitted).

242. Thomas J. L. van Rompay, Dorette J. Vonk & Marieke L. Fransen, *The Eye of the Camera: Effects of Security Cameras on Prosocial Behavior*, 41 ENV'T & BEHAV. 60, 63–64 (2009).

undesirable behaviors, such as employee theft,²⁴³ vandalism on school busses,²⁴⁴ and the commission of certain types of crimes in public areas.²⁴⁵ Collectively, these “observer effect” findings suggest that being recorded can deter undesirable behaviors.

This very premise underlies the purported usefulness of BWCs, insofar as they are expected to promote respectful encounters between police and the people with whom officers interact—“resulting in fewer citizen complaints, less use of force by officers, and fewer assaults on officers.”²⁴⁶ But this premise amounts to little more than an untested assumption with regard to how BWCs actually affect behavior of officers and members of the public.²⁴⁷ At least two major studies are currently underway which endeavor to answer those questions.²⁴⁸

1. Deterrence Theory May Be Inapplicable During High-Stress Critical Incidents

At first blush, it might appear self-evident that BWCs affect behavior.²⁴⁹ Consider, for example, that Professor Saul Kassin and

243. Lamar Pierce, Daniel C. Snow & Andrew McAfee, *Cleaning House: The Impact of Information Technology Monitoring on Employee Theft and Productivity*, 61 MGMT. SCI. 2299, 2300 (2015).

244. Barry Poyner, *Video Cameras and Bus Vandalism*, 11 J. SEC. ADMIN. 44, 46 (1988).

245. NANCY G. LA VIGNE, SAMANTHA S. LOWRY, JOSHUA MARKMAN & ALLISON DWYER, *EVALUATING THE USE OF PUBLIC SURVEILLANCE CAMERAS FOR CRIME CONTROL AND PREVENTION* xii–xiii (2011), http://www.urban.org/research/publication/evaluating-use-public-surveillance-cameras-crime-control-and-prevention/view/full_report [<https://perma.cc/L6N2-KD7T>].

246. NATHAN JAMES, CONG. RESEARCH SERV., IN10142, *CAN BODY WORN CAMERAS SERVE AS A DETERRENT TO POLICE MISCONDUCT?* 1 (2012); *see also* STANLEY, *supra* note 18, at 1–2 (arguing BWCs would decrease the amount of violent police encounters effect while promoting police accountability); Shira A. Scheindlin & Peter K. Manning, *Will the Widespread Use of Police Body Cameras Improve Police Accountability?* AMERICAS Q., Spring 2015, at 24, 26 (hypothesizing the same); WHITE, *supra* note 2, at 35–36 (noting the “civilizing effect” BWCs were expected to facilitate).

247. *See* Ariel et al., *supra* note 138, at 294 (“Similarly, while the theory underpinning the effect of BWCs is relatively straightforward—deterrence theory juxtaposed with observer effects—estimates of the efficacy of BWC are scarce, resembling a void largely filled by conceptual research.” (internal citations omitted)).

248. Nell Greenfieldboyce, *Scientists Hunt Hard Evidence on How Cop Cameras Affect Behavior*, NPR (Apr. 27, 2017), <http://www.npr.org/sections/alltechconsidered/2017/04/27/525081998/scientists-hunt-hard-evidence-on-how-cop-cameras-affect-behavior> [<https://perma.cc/9WFJ-PNMK> (dark archive)].

249. Although not relevant to the policy considerations attendant to citizen notification, it should be noted that psychological research raises a question about an untended consequence of BWCs on police behavior, namely will the technology over-deter police in what researchers have dubbed “the transparency trap.” Ethan Bernstein, *The Transparency Trap*, HARV. BUS. REV., Oct. 2014, at 58, 58. The phenomenon occurs

colleagues found that recording police conduct during interrogations inhibits certain tactics designed to illicit confessions from suspects.²⁵⁰ That study, however, occurred in the relative calm of an experimental field setting; it may or may not be generalizable to actual confessions.²⁵¹ But its generalizability beyond interrogations and confessions to any deterrent effect BWCs might have during critical-incident situations is even more questionable for a few reasons.

First, any type of “deterrence might fail if any societal condition exists that undermines the successful transmission or reception of the deterrence message.”²⁵² That concern underpins the reason why many jurisdictions require or recommend that law enforcement officers notify the members of the public that their interactions are being recorded by BWCs.²⁵³ But a wide range of conditions might hamper the delivery of such reminders. For example, officers may not have time to warn citizens that they are being recorded in emergency-response situations; indeed, they may not even have time to activate their BWCs in certain critical incidents.²⁵⁴ Moreover, depending on the nature of the encounter, officers and citizens alike may be so

when transparency stifles innovative behavior and decreases productivity as a function of the observed person doing only what is expected of them and no more. *See id.* This phenomenon might mean that police sacrifice “the kind of educated risk-taking and problem solving that’s often needed to save lives.” Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 839 (2015) (quoting Bernstein, *supra*).

250. Saul M. Kassin, Jeff Kukucka, Victoria Z. Lawson, John DeCarlo & Margaret Bull Kovera, *Does Video Recording Alter the Behavior of Police During Interrogation? A Mock Crime-and-Investigation Study*, 38 LAW & HUM. BEHAV. 73, 80–81 (2014).

251. *See id.* at 81–82.

252. Kevin C. Kennedy, *A Critical Appraisal of Criminal Deterrence Theory*, 88 DICK. L. REV. 1, 6 (1983); *see also* Michael R. Geerken & Walter R. Gove, *Deterrence: Some Theoretical Considerations*, 9 LAW & SOC’Y REV. 497, 500 (1975) (“In order to be maximally effective or successful, a system of deterrence must transmit its message to all potential offenders.”).

253. Sutherland and Ariel explained why this may be important when they hypothesized,

[A] verbal warning could sensitize people leading them to modify their behavior. It could also serve to remind people of the rules that are in play—politeness being the bare minimum—but other rules such as laws. Similarly, the verbal prompt may jolt individuals into thinking a little more before they act, becoming more deliberative and reflecting on future consequences. In short, there could be lots of mechanisms that account for changes in behavior when camera and verbal warning are used together.

Alex Sutherland & Barak Ariel, *Cameras on Cops: The Jury’s Still Out*, CONVERSATION (Dec. 23, 2014), <https://theconversation.com/cameras-on-cops-the-jurys-still-out-35644> [<https://perma.cc/H2TA-XA8D>].

254. *See* Soo Rin Kim, *Turning on Body-Worn Cameras*, NEWS MEDIA & L., Fall 2015, at 16, 16–18.

upset they forget they are being recorded because acute stress impairs working memory—the part of short-term memory responsible for immediate conscious perceptual and linguistic processing.²⁵⁵

Second, like criminal deterrence generally,²⁵⁶ the presumed deterrent effect of BWCs on undesirable officer and citizen behavior alike is premised on rational thought. But that premise may be inapplicable not only to particular people (such as people with certain types of mental illness)²⁵⁷ but also during critical incidents in which emotion and instinct might overwhelm rationality under the stress of the situation.²⁵⁸ Indeed, rational thought is inevitably impaired when people are in fear for their lives; in such situations, the fight-or-flight response kicks in.²⁵⁹

Third, as Wikström explained, “rationality and an individual’s capability to exercise self-control come into play as factors only when an individual deliberates over action alternatives.”²⁶⁰ In contrast, if one acts out of habit, rather than deliberate choice, then deterrence can be significantly undermined. Because people are often creatures of habit,²⁶¹ the presumed deterrent effect of BWCs may be

255. Mathias Luethi, Beat Meier & Carmen Sandi, *Stress Effects on Working Memory, Explicit Memory, and Implicit Memory for Neutral and Emotional Stimuli in Healthy Men*, FRONTIERS BEHAV. NEUROSCIENCE, Jan. 2009, at 1, 6.

256. See JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 84–104 (1974).

257. See generally ROBERT SCHUG & HENRY F. FRADELLA, MENTAL ILLNESS AND CRIME (2015) (explaining how a variety of mental illnesses impair rational thought in ways that contribute to criminal offending).

258. In fact, even “mild acute uncontrollable stress can cause a rapid and dramatic loss of prefrontal cognitive abilities.” Amy F. T. Arnsten, *Stress Signaling Pathways that Impair Prefrontal Cortex Structure and Function*, 10 NATURE REV. 410, 410 (2009).

259. See generally WALTER CANNON, THE WISDOM OF THE BODY (1932) (originating the term “fight-or-flight response”). This response triggers the sympathetic nervous system to flood the body with adrenaline and cortisol as part of an instinctual reaction designed to move us away from rational thought—including contemplation of the consequences of our actions—and into a mode where we either flee or attack to facilitate our own survival. See Sara F. Dudley, *Paved with Good Intentions: Title IX Campus Sexual Assault Proceedings and the Creation of Admissible Victim Statements*, 46 GOLDEN GATE U.L. REV. 117, 131 (2016); see also Eric Y. Drogin & Ryan Marin, *Extreme Emotional Disturbance (EED), Heat of Passion, and Provocation: A Jurisprudential Science Perspective*, 36 J. PSYCHIATRY & L. 133, 140 (2008) (explaining how extreme stress can contribute to a loss of self-control).

260. Per-Olof Wikström, *Deterrence and Deterrence Experiences—Preventing Crime Through the Threat of Punishment*, in THE INTERNATIONAL HANDBOOK OF PENOLOGY AND CRIMINAL JUSTICE 345, 375 (Shlomo Giora Shoham, Ori Beck & Martin Kett eds., 2008).

261. See Steven A. Sloman, *The Empirical Case for Two Systems of Reasoning*, 119 PSYCHOL. BULL. 3, 6–7 (1996) (positing that habituated actions are a function of an automatic mode of thinking characterized by a rapid, intuitive, and heuristic response that stands in contrast to intentional behaviors that are a function of deliberative and contextualized thought); cf. GERD GIGERENZER, GUT FEELINGS—THE INTELLIGENCE

inapplicable to both select officers and select criminal offenders alike if they habitually act in ways that BWCs are supposed to deter.²⁶²

2. Citizen Notification of the BWC in Practice: Results from Our Policy Analysis

As the preceding summary of psychological research suggests, it remains an open question as to whether citizen notification of BWCs will actually affect the behavior of the officers wearing the cameras or the people with whom they interact. Although the deterrent effects of BWCs remain to be seen, a sizable minority of law enforcement agencies have adopted policies requiring officers to notify members of the public when they are being recorded during encounters with police.²⁶³ Our review of policies from agencies funded through the US DOJ BWC program indicates that twenty-two percent of policies adopted in FY 2015 and thirteen percent adopted in FY 2016 have notification policies requiring officers to “inform all individuals identifiably present as soon as reasonably practical” about the recording.²⁶⁴ In contrast, roughly forty percent of the policies reviewed (in both years) recommend, but do not require, citizen notification.²⁶⁵ The remaining policies neither mandate nor recommend citizen notification—they simply state that notification is not a requirement.²⁶⁶ Thus, these results indicate that agencies are increasingly willing to leave the citizen notification decision in the hands of the officer.²⁶⁷

This trend away from mandatory citizen notification raises serious questions regarding the potential for BWCs to generate a civilizing effect. Setting aside questions related to deterrence and rational thought, a camera can only reasonably be expected to change behavior if the citizen is aware of its presence.

OF THE UNCONSCIOUS 207–29 (2007) (exploring how habit and other cognitive shortcuts act as mechanisms that allow us to bypass the processes of evaluating the potential consequences of engaging in certain behaviors).

262. Cf. Scheindlin & Manning, *supra* note 246, at 25, 27 (debating whether the usual responses of law enforcement officers in potentially violent situations will be deterred by BWCs without other changes to officer training and departmental policies).

263. WHITE ET AL., *supra* note 232, at 10.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

C. *Policy Issues 3 and 4: Officer and Supervisor Review of BWC Footage*

As previously mentioned, law enforcement agencies have been quick to adopt BWCs as part of a presumed solution to the crisis in contemporary policing. But in spite of the seemingly “world-wide uncontrolled social experiment” concerning their use,²⁶⁸ it remains unclear whether BWCs will help or hurt police legitimacy. The answer to that question is likely quite complex. After all, the varying responses to a number of shootings by police that were captured on video indicate that BWC footage may complicate police-community relations instead of improving them.²⁶⁹ Although the end result will turn on a multiplicity of factors in any particular case, psychological research suggests that post-hoc review of BWC footage may create more problems than it solves.

1. How Will Third-Parties Interpret BWC Footage?

How will third parties (e.g., commanding officers, citizen review board members, prosecutors, judges, and jurors) interpret BWC footage? Video from BWCs does not necessarily speak for itself. As Professor Howard Wasserman thoughtfully explained, video footage from BWCs is not any more unambiguous or reliable than eyewitness testimony.²⁷⁰ Indeed, there are at least three reasons why footage may create disputes about the substance of what a BWC may have captured on audio and video.

a. *Temporal Limitations*

Obviously, BWCs cannot capture the events that occurred prior to the start of recording or after recording ends. Similarly, BWCs cannot capture footage when they are not turned on, regardless of whether the failure to activate them was purposeful or unintentional.²⁷¹ If officers are concerned with whether they

268. Ariel et al., *supra* note 29, at 745.

269. See *Body-Worn Cameras Are Not a Panacea for Police-Community Relations*, Police Foundation President Tells Federal Task Force, POLICE FOUND., <https://www.policefoundation.org/body-worn-cameras-are-not-a-panacea-for-police-community-relations-police-foundation-president-tells-federal-task-force/> [https://perma.cc/5BK9-S7LD] (summarizing Police Foundation president Jim Bueermann’s testimony to the President’s Task Force on 21st Century Policing).

270. Howard M. Wasserman, *Recording of and by Police: The Good, the Bad, and the Ugly*, 20 J. GENDER RACE & JUST. 543, 551 (2017). For a review of the shortcomings of eyewitness testimony, see generally Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 FED. CTS. L. REV. 1 (2007).

271. See generally Kim, *supra* note 254 (detailing the issues with BWC inactivation).

remembered to activate their BWCs, that worry may impact the officer's ability to form detailed memories of the situation.²⁷² Indeed, a number of high-profile cases in which officers claimed to have forgotten to activate their BWCs have led to the development of BWCs that start to record as soon as an officer draws a gun.²⁷³ But such devices still suffer from a temporal limitation insofar as their automatic activation does not capture potentially critical information concerning what occurred before a weapon is drawn.

Even if BWCs were always activated (an approach few authorities recommend in light of privacy concerns and resource implications),²⁷⁴ what gets recorded may not tell the whole story since what transpired before officers arrive at a particular scene may be highly relevant to what occurs once they arrive. Moreover, as the next two subsections detail, what BWCs capture may be interpreted in dramatically different ways for a number of psychological reasons.²⁷⁵

b. *Field of Vision*

BWC footage's "length, clarity, distance, angle, steadiness, scope, field, lighting, perspective, field of vision, and completeness all affect what it means."²⁷⁶ This is especially important in light of the inherent limitations of close-range video, like that obtained from BWCs, when compared to better perspective of events that can be discerned from a wider field-of-vision.²⁷⁷ Consider, for example, an experiment *The New York Times* conducted²⁷⁸ in which a "wider field of vision

272. Linda A. Henkel, *Point-and-Shoot Memories: The Influence of Taking Photos on Memory for a Museum Tour*, 25 PSYCHOL. SCI. 396, 399 (2014) (reporting a "photo-taking-impairment effect" in which participants who took photos of objects remembered fewer details about those objects than participants who only observed objects without photographing them).

273. See Laura Diaz-Zuniga, *New Bodycams Start Recording with the Draw of a Gun*, CNN (July 21, 2017), <http://www.cnn.com/2017/07/21/us/bodycams-activate-automatically/index.html> [<https://perma.cc/H4FC-5FEM>].

274. See, e.g., POLICE EXEC. RESEARCH FORUM, *supra* note 128, at 12–14 (explaining PERF's position on when BWCs should and should not be activated); STANLEY, *supra* note 18, at 2–4 (explaining the ACLU's position on the same consideration).

275. See, e.g., Michael Martinez, *Video Shows the Encounter Between Samuel DuBose, Officer Ray Tensing*, CNN (July 29, 2015), <http://www.cnn.com/2015/07/29/us/video-sam-dubose-ray-tenzing-chronology/index.html> [<https://perma.cc/J88P-22QY>] (illustrating the different ways in which video footage can be interpreted in a police shooting case).

276. Wasserman, *supra* note 270, at 552.

277. *Id.*; see also Rémi Boivin, Annie Gendron, Camille Faubert & Bruno Poulin, *The Body-Worn Camera Perspective Bias*, 13 J. EXPERIMENTAL CRIMINOLOGY 125, 136 (2017) (concluding that "BWCs bias distance perception" of police candidates).

278. Timothy Williams, James Thomas, Samuel Jacoby & Damien Cave, *Police Body Cameras: What Do You See?*, N.Y. TIMES (Apr. 1, 2016), <https://www.nytimes.com>

revealed more information about the events, showing a different, innocuous, even friendly encounter, compared with the video from the body camera alone, which suggested a more threatening event.”²⁷⁹ Indeed, courts have noted this limitation of BWCs in actual cases.²⁸⁰

c. *Implicit Bias Affects Video Interpretation*

Another consideration in third-party interpretation of BWC footage is that the “[c]ultural, demographic, social, political, and ideological characteristics and attitudes of the viewer affect what that viewer sees.”²⁸¹ Put differently, the implicit biases of the person watching video evidence will affect how the video is interpreted.²⁸² Consider, for example, a recent study by Roseanna Sommers in which she showed mock jurors actual police footage.²⁸³ She found that viewers’ prior attitudes toward the police significantly affected their interpretations of the recorded events, resulting in considerable polarization on a variety of dimensions.²⁸⁴

2. Participant Credibility in the Face of Differences Between Recorded Footage and Memory

Will BWCs affect the credibility of officers and the people with whom they interact because they remember the events that occurred during critical incidents differently than the ways in which the incident appears to have unfolded as recorded? BWC footage has great potential to create battles concerning witness veracity for

/interactive/2016/04/01/us/police-bodycam-video.html [https://perma.cc/2SZA-LDPF (dark archive)].

279. Wasserman, *supra* note 270, at 552 (citing Williams et al., *supra* note 278); see also Boivin et al., *supra* note 277, at 137 (reporting the results of an experiment suggesting that the more one is trained to evaluate police interventions, the greater the effect of camera perspective distortion).

280. See *Emmons v. City of Escondido*, 168 F. Supp. 3d 1265, 1275 (S.D. Cal. 2016) (“The court notes that if a picture is worth a thousand words, a video from the body-worn camera of a law enforcement officer during a ‘contact’ giving rise to litigation may be worth a thousand pictures. Such is the case here. The video shows that the officers acted professionally and respectfully in their encounter with Plaintiffs. However, at the point of Mr. Emmons arrest, Officer Craig was so close to Mr. Emmons that the videotape does not show the force used when Mr. Emmons was physically taken to, or placed on, the ground. The image is not clear enough to make determinations as a matter of law.”).

281. Wasserman, *supra* note 270, at 553.

282. See L. Song Richardson & Philip Atiba Goff, *The Psychology of Racial Violence*, in *FERGUSON’S FAULT LINES: THE RACE QUAKE THAT ROCKED A NATION* 17, 20 (Kimberly Jade Norwood ed., 2016); see also Roseanna Sommers, Note, *Will Putting Cameras on Police Reduce Polarization?*, 125 *YALE L.J.* 1304, 1314 (2016).

283. Sommers, *supra* note 282, at 1313–14.

284. *Id.* at 1321–24.

reasons that have to do with the complex bio-psychosocial factors that affect memory. Contrary to common misperception, memories—unlike unaltered BWC footage—are not exact recordings of events.²⁸⁵

a. *Perception and Its Relationship to Memory*

Perception is often viewed “in terms of our basic senses—sight, hearing, touch, taste, and smell. But, in reality, perception is a process—the total amalgam of sensory signals received and then processed by an individual at any one time.”²⁸⁶ Of course, perception varies based on the physical environment. For example, different lighting, “especially back lighting, reflections, and shadows,” impacts people’s ability to see, particularly when it comes to fine details.²⁸⁷ Yet, because perception is an “interpretive process,” psychological factors impact perception just as much as physical senses—even under optimal conditions for sensory input.²⁸⁸ In fact, the sensory data we perceive is not only dependent upon perceptual ability and attention, but also upon “experience, learning, preferences, biases, and expectations.”²⁸⁹

First, perception is selective.²⁹⁰ We do not always perceive that which is there for us to see or hear, as any distracted driver can attest.

One of the most important factors affecting our ability to perceive is the volume of sensory stimulation. “Perception is highly selective because the number of signals or amount of information impinging upon the senses is so great that the mind can process only a small fraction of the incoming data.” This means we focus on certain stimuli while filtering out others. This results not only in incomplete acquisition of sensory data,

285. Fradella, *supra* note 270, at 5. See generally R. C. Atkinson & R. M. Shiffrin, *Human Memory: A Proposed System and its Control Processes*, in 2 THE PSYCHOLOGY OF LEARNING AND MOTIVATION: ADVANCES IN RESEARCH AND THEORY 89 (Kenneth W. Spence & Janet T. Spence eds., 1968) (overviewing the various facets of the human memory).

286. Fradella, *supra* note 270, at 5 (quoting Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 181 (1990)).

287. Ralph N. Haber & Lyn Haber, *Experiencing, Remembering and Reporting Events*, 6 PSYCHOL. PUB. POL’Y & L. 1057, 1060 (2000).

288. Fradella, *supra* note 270, at 5 (quoting Robert Buckhout, *Psychology and Eyewitness Identification*, 2 LAW & PSYCHOL. REV. 75, 76 (1976)).

289. *Id.* (quoting Frederick E. Chemay, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721, 724–27 (1985)).

290. *Id.*; see also DANIEL REISBERG, THE SCIENCE OF PERCEPTION AND MEMORY 32–35 (2014).

but also in differential processing and interpretation of events.²⁹¹

Put differently, a person's perception may be incomplete if he or she experiences "sensory overload"—the situation in which people are "overwhelmed with too much information in too short a period of time."²⁹² Accordingly, how these gaps in perception are filled is another important consideration with regard to perception. Indeed, "[w]hen these gaps are filled, the details often fit logically, but inaccurately. The type of stimuli involved also affects perception. In particular, people are poor perceivers of duration (we tend to overestimate how long something takes), time (it 'flies by' or 'drags on'), speed, distance, height, and weight."²⁹³ Thus, because humans unconsciously process sensory information, they are unaware of how perception may vary from person to person. Such variation, in turn, can affect people's memories of critical incidents—a situation that is fraught with the possibility of people being interpreted as untruthful if their memories do not align with BWC footage.

b. *The Three Phases of Memory*

Just as perceptual processes occur unconsciously, so do the processes associated with memory.²⁹⁴ Specifically, memory "is dependent upon three critical stages—acquisition/encoding, retention, and recall/retrieval," all of which "are affected by a number of physical and psychological factors that can taint the accuracy of a memory."²⁹⁵

First is the acquisition (or encoding) stage. During this stage, "sensory data, as perceived by the individual, are encoded in the appropriate areas of the cerebral cortex."²⁹⁶ Thus, because "perception itself is a process dependent on a number of individualized factors, this stage in the process of developing memories is affected by those same factors," including sensory overload.²⁹⁷ Indeed, in this stage, sensory overload can be so extreme that it leads to "confabulation"—"the creation or substitution of false

291. Fradella, *supra* note 270, at 5–6 (quoting Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 181 (1990)).

292. *Id.* at 6 (quoting Frederick E. Chemay, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721, 726 (1985)).

293. *Id.* (citing Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 181 (1990)).

294. *Id.*

295. *Id.*

296. *Id.* at 7 (citing Haber & Haber, *supra* note 287).

297. *Id.*

memories through later suggestion.”²⁹⁸ Additionally, “[a] person's expectations influence the way in which details about an event are encoded. An observer tends to seek out some information and avoid other information, an effect called the confirmation bias. What gets encoded is, therefore, partially dependent on that for which the observer was looking.”²⁹⁹

Next is the retention (or storage) phase, during which “the brain stores the memory until it is called upon for retrieval.”³⁰⁰ The amount of data being encoded and retained therefore affects this phase: “The greater the amount of data presented, especially in shorter periods of time, the less that will be retained.”³⁰¹ Exposure to subsequent information is also relevant to retention and storage of memory.³⁰² In what psychology refers to as the “post-event misinformation effect,” exposure to post-event misinformation can lead people to accept that misinformation “as if it were an accurate account.”³⁰³

The final phase is the retrieval phase, during which “the brain searches for the pertinent information, retrieves it, and communicates it.”³⁰⁴ As the name of this phase implies, retrieval occurs whenever police or members of the public describe what they recall having occurred during an encounter, including when testifying in court.³⁰⁵ Time is one of the most salient factors affecting the ability to recall information from memory: “As a rule, the longer the time period between acquisition, retention, and retrieval, the more difficulty we have retrieving the memory.”³⁰⁶ Additionally, “unconscious transference”—a process in which “different memory images may

298. *Id.* (quoting Frederick E. Chemay, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721, 726 (1985)).

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 8.

303. *Id.* See generally Malwina Szpitalak, Mateusz Polak, Romuald Polczyk & Karolina Dukala, *The Influence of Social, Para-Social, and Nonsocial Misleading Post-Event Sources on Memory Performance: Social Contagion and the Misinformation Effect*, 46 EURO. J. SOC. PSYCHOL. 185 (2016) (measuring the effect of socially-presented information on the post-event misinformation effect).

304. Fradella, *supra* note 270, at 8 (quoting Frederick E. Chemay, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721, 725 (1985)).

305. *Id.*

306. *Id.*; see also CURT R. BARTOL & ANNE M. BARTOL, *PSYCHOLOGY AND LAW: RESEARCH AND PRACTICE* 220 (2015).

become combined or confused with one another³⁰⁷—also affects the retrieval of memories.

Because each of the three phases of memory can be affected by the aforementioned factors, any given person's memory of what transpired during a particular incident may not align with what is captured by BWCs. This disconnect demonstrates additional psychological reasons why BWC footage might be misinterpreted by judges and jurors as evidence that someone is being dishonest.

c. *Event Factors that Affect Memory*

Memories of an event are also affected by a number of factors related to the event itself. Psychological research has identified a number of critical event factors that affect memory formation, including time,³⁰⁸ the effect of injuries,³⁰⁹ whether participants have alcohol or drugs in their system,³¹⁰ the presence or absence of violence,³¹¹ the role of the participant,³¹² and how much stress the event caused the participant to experience.³¹³ Traumatic events, in

307. Fradella, *supra* note 270, at 8 (citing John C. Brigham, Adina W. Wasserman & Christian A. Meissner, *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues*, 36 CT. REV. 12, 15 (1999)).

308. *Id.* at 9–10 (“[T]he longer one has to examine something, the better the memory formation will be and the more accurate recall will be. Conversely, the less time someone has to witness an event, the less complete—and less accurate—both perception and memory will be Given the limitations of human perception, when things happen very quickly, memory can be negatively affected. This is true even when someone has a reasonable period of time to observe an event insofar as attention is focused on processing a fast-moving series of events, rather than on a particular aspect of the occurrence.” (footnotes omitted)).

309. REISBERG, *supra* note 290, at 54–55 (noting how loss of blood can disrupt memory and perception while the event is occurring, as well as retroactively).

310. *Id.* at 55–59 (explaining how drugs and alcohol can disrupt both the formation of new memories and the recall of older memories).

311. For example, if a weapon is present during a critical incident, participant attention is usually drawn to the weapon at the expense of event details. *Id.* at 47. For a review of the “weapon focus” effect, see generally Kerri L. Pickel, *The Influence of Context on the “Weapon Focus” Effect*, 23 LAW & HUM. BEHAV. 299 (1999).

312. Indeed, most people do not remember events accurately; rather, memories are “very personal and self-serving” insofar as they help people make sense of themselves and their own experiences in relation to the rest of the world—a phenomenon described as the “inevitable wrong focus of autobiographical memory.” Haber & Haber, *supra* note 287, at 1066–68.

313. REISBERG, *supra* note 290, at 60; *see also* Kenneth A. Deffenbacher, Brian H. Bornstein, Steven D. Penrod & E. Kiernan McGorty, *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory* 28 LAW & HUM. BEHAV. 687, 699 (2004) (“[W]e have adduced considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details.”); Louis S. Katz & Jeremiah F. Reid, *Expert Testimony on the Fallibility of Eyewitness Identification*, 1 CRIM. JUST. J. 177, 184–86 (1977) (“When an

particular, can lead to “dramatic alterations in memory functioning.”³¹⁴ Although the particular mechanisms of memory impairment are not well understood, many psychologists and neuroscientists nonetheless share the view that trauma (or associated posttraumatic symptoms) can significantly interfere with normal memory functioning through “memory fragmentation or disorganization[,] . . . the dissociation of trauma memories from other autobiographical memories[,] . . . increased susceptibility to memory distortion[,] or impaired retrieval of memories of specific autobiographical events.”³¹⁵

Collectively, the event factors that affect memory encoding, retention, and retrieval suggest that the way in which police officers and members of the public remember particular critical incidents may differ significantly from what is captured on video by BWCs, even though participants may sincerely believe what they recall to be completely accurate. Because such differences between people’s recollections and BWC footage might be interpreted as grounds to doubt witnesses’ veracity, precautions may need to be taken to ensure that judges and jurors understand the psychological phenomena that affect perception and memory. Because jury instructions have often proven insufficient in helping triers-of-fact understand the complexities of perception and memory in the realm of eyewitness (mis)identifications,³¹⁶ expert testimony may be needed to help jurors understand why BWC footage may not align with what critical incident participants recall.

eyewitness is under . . . physical and emotional stress during the commission of the crime, the reliability of his testimony is reduced”); Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT’L J. PSYCHIATRY & L. 265, 274 (2004) (“These data provide robust evidence that eyewitness memory for persons encountered during events that are personally relevant, highly stressful, and realistic in nature may be subject to substantial error.”).

314. Sally A. Moore & Lori A. Zoellner, *Overgeneral Autobiographical Memory and Traumatic Events: An Evaluative Review*, 133 PSYCHOL. BULL. 419, 419 (2007); see also Sharon Dekel & George A. Bonanno, *Changes in Trauma Memory and Patterns of Posttraumatic Stress*, 5 PSYCHOL. TRAUMA 26, 31–32 (2013) (indicating that varying levels of posttraumatic stress affect memory over time). For a more comprehensive overview of the psychological and legal issues related to trauma’s impact on memory, see generally PAUL S. APPELBAUM, LISA A. UYEHARA & MARK R. ELIN, *TRAUMA AND MEMORY: CLINICAL AND LEGAL CONTROVERSIES* (1997) and PETER A. LEVINE, *TRAUMA AND MEMORY: BRAIN AND BODY IN A SEARCH FOR THE LIVING PAST* (2015).

315. Moore & Zoellner, *supra* note 314, at 419 (citations omitted).

316. Fradella, *supra* note 270, at 2–4, 21–23.

3. Policy Implications

The foregoing questions about the interpretation of BWC footage and the potential credibility concerns that such a review may unmask when footage is compared to an officer's notes or recollection about a critical incident give rise to another important policy question: should officers be permitted to review footage from BWCs prior to writing an official police report or giving a statement about a critical incident? The American Civil Liberties Union ("ACLU") has argued that the answer is no, because allowing officers such access "enables lying," "undermines the legitimacy of investigations," "enables cross-contamination of evidence," and generally "impedes the search for truth."³¹⁷

Intentional misrepresentations aside, the psychological issues outlined throughout this Section support the ACLU's position. Specifically, if officers are allowed to review video footage prior to writing a report or giving a statement for an investigation, all the aforementioned issues concerning field of vision limitations and implicit bias are likely to shape what officers write in their reports or say in their statements, which can result in distortions being presented as sincerely-believed fact. These distortions may be particularly salient in critical incidents involving the use of potentially lethal force. Consider, for example, that criminologists David Klinger and Rod Brunson examined the detailed accounts of eighty police officers involved in "113 incidents in which they shot citizens."³¹⁸ Their study found that officers experience multiple types of perceptual distortions—including visual, auditory, and temporal—that may cause officers to behave in a manner inconsistent with the "objective reality of what is occurring at the time they decide to pull the trigger," and instead based on "an altered conception of reality."³¹⁹

On the other hand, if officers are not permitted to review footage before writing a report, any conflicts that arise between an officer's memory—including those that may be based upon perceptual distortions experienced during a potentially lethal use of force incident—and BWC footage "can cause an officer to lose credibility

317. Jay Stanley & Peter Birbring, *Should Officers Be Permitted to View Body Camera Footage Before Writing Their Reports?*, AM. CIVIL LIBERTIES UNION: FREE FUTURE (Jan. 13, 2015), <https://www.aclu.org/blog/free-future/should-officers-be-permitted-view-body-camera-footage-writing-their-reports> [<https://perma.cc/Z63K-U62X>].

318. David A. Klinger & Rod K. Brunson, *Police Officers' Perceptual Distortions During Lethal Force Situations: Informing the Reasonableness Standard*, 8 CRIMINOLOGY & PUB. POL'Y 117, 117 (2009).

319. *Id.* at 118, 127.

or be accused of lying if, for example, an officer's memory is not accurate about some of the critical details of an encounter."³²⁰ This possibility led the prominent Police Executive Research Forum ("PERF") to recommend that officers involved in critical incidents recorded on BWCs be permitted to view the footage *before* giving an official statement about the incident.³²¹ The ACLU counters that allowing such access constitutes poor investigative practice: "Any detective would be the first to say that it's hardly a solid investigative practice to let the subject of an investigation view the video evidence you have over and over before you even ask them what happened."³²²

4. Officer Review of BWC Footage in Practice: Results from Our Policy Analysis

Our review of policies for federally funded agencies indicates that upwards of ninety-eight percent of departments routinely allow officers to review BWC footage for report writing purposes.³²³ In fact, many departments encourage their officers to "review BWC media prior to completing *any* investigative reports."³²⁴ In contrast, this uniformity among departments is lacking in the context of officer review of BWC footage following a use of force incident or after a complaint is filed against an officer. Between one quarter and one third of agencies funded in FYs 2015 and 2016, respectively, permit officers "unrestricted access to their BWC footage during an administrative investigation."³²⁵ A more common policy, however, is to require officers to satisfy certain stipulations—such as a union representative (and/or a commanding officer) being present—before allowing them to access the footage.³²⁶ This conditional review approach was adopted by sixty-six percent of agencies in FY 2015 and fifty-six percent in FY 2016.³²⁷

Review following critical incidents is generally subject to different standards. Fewer than five percent and nine percent of agencies funded in FYs 2015 and 2016, respectively, explicitly *prohibit* an officer from reviewing his or her BWC footage until after a

320. Michael Kashiktchian, *Should Police View Body Worn Cameras Before Writing a Report?*, IN PUB. SAFETY (Feb. 18, 2016), <http://inpublicsafety.com/2016/02/should-police-view-body-worn-cameras-before-writing-a-report/> [<https://perma.cc/UPY8-8W6A>].

321. POLICE EXEC. RESEARCH FORUM, *supra* note 128, at 45.

322. Stanley & Birbring, *supra* note 317.

323. WHITE ET AL., *supra* note 232, at 11.

324. *Id.* (emphasis added).

325. *Id.*

326. *Id.*

327. *Id.*

statement is given.³²⁸ That is to say, the overwhelming majority of agencies allow their officers to review BWC footage of a critical incident prior to giving a statement.

5. Supervisory Review of BWC Footage in Practice: Results from Our Policy Analysis

What should happen with the footage captured by BWCs? This complex question raises a number of distinct concerns, many of which have already been ably delineated elsewhere. For example, scholars, civil rights organizations, and policy think tanks have already weighed in on the need for data retention and public disclosure policies that attempt to strike a balance between transparency and accountability on the one hand and the preservation of privacy and the risk of function creep on the other.³²⁹ We focus on a different question—namely supervisory review of BWC use.

There have been numerous high-profile cases in which officers failed to activate their BWCs under circumstances when they were required to do so. Consider the recent example of Australian Justine Damond, who was fatally shot in Minneapolis, Minnesota, on July 15, 2017:

[E]ven though officials ... gave a brief account of the shooting—saying that officers were startled by a loud noise right before Damond approached their car—her final moments remain shrouded in mystery, in part because the two officers who encountered Damond did not turn on their body cameras as they arrived at the scene, preventing any video from capturing what happened.³³⁰

Since 2014, there have been more than a dozen similarly tragic cases in which law enforcement officers did not activate their BWCs even though departmental policies required their use under the

328. *Id.*

329. See, e.g., STANLEY, *supra* note 18, at 2; see also POLICE EXEC. RESEARCH FORUM, *supra* note 128, at 15–19; WHITE, *supra* note 2, at 32–34; Fanny Coudert, Denis Butin & Daniel Le Métayer, *Body-Worn Cameras for Police Accountability: Opportunities and Risks*, 31 COMPUTER L. & SEC. REV. 749, 760–62 (2015); Meyer, *supra* note 142 (predicting a series of problems with BWC use, including those concerning data retention and access to footage).

330. Mark Berman, *What the Minneapolis Police Shooting Tells Us About the Limits of Body Cameras*, WASH. POST (July 19, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/07/19/what-the-minneapolis-police-shooting-tells-us-about-the-limits-of-body-cameras/?utm_term=.27892c3db477 [<https://perma.cc/PZS2-HGHG> (dark archive)].

relevant circumstances.³³¹ What should happen to officers under such circumstances? Certainly, prosecutors will review such cases and make a determination as to whether officers violated any criminal laws.³³² But what should command-level personnel do to address the situations when officers fail to activate the BWCs—especially in light of research demonstrating low levels of activation compliance,³³³ perhaps as a function of significant numbers of officers not viewing BWCs as a legitimate tool for police accountability?³³⁴

Our review of BWC policies for federally funded agencies identified three common methods of supervisor review.³³⁵ First, nearly all agencies funded in FYs 2015 and 2016 (ninety-four percent and ninety-nine percent, respectively) “allow first-line supervisors to access and review the BWC footage of their officers as part of administrative investigations, such as in response to a citizen complaint or use of force.”³³⁶ Second, supervisors were allowed to randomly or periodically review BWC footage “to insure compliance with BWC policy and procedures” in fifty percent and ninety-three percent of agencies funded in FYs 2015 and 2016, respectively.³³⁷ Third, nearly two-thirds of 2015-funded agencies and ninety-three

331. Scott Forsyth, *Should Officers Be Penalized for Not Using Body Cameras?*, LEGAL NEWS (Dec. 23, 2016), <http://www.legalnews.com/detroit/1436058> [<https://perma.cc/Y65J-ANUS>].

332. It is exceedingly rare for law enforcement officers to be criminally charged, much less convicted, when an officer-involved shooting occurs. *See, e.g.*, Douglas L. Colbert, *Prosecuting Baltimore Police Officers*, 16 U. MD. L.J. RACE, RELIG., GENDER, & CLASS 185, 185 (2016); *see also* Matt Ferner & Nick Wing, *Here’s How Many Cops Got Convicted of Murder Last Year for On-Duty Shootings*, HUFFINGTON POST (Jan. 13, 2016), http://www.huffingtonpost.com/entry/police-shooting-convictions_us_5695968ce4b086bc1cd5d0da [<https://perma.cc/T54U-WV5h>] (reporting that no officers were convicted of murder or manslaughter in 2014 or 2015 for fatal shootings of civilians in the line of duty); Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/> [<https://perma.cc/ML4T-PMNH>] (noting how even the “most extreme instances” of officer killings have not led to serious penalties for officers); Clif Leblanc, *SC Officers Exonerated in More than 200 Shootings*, STATE (Mar. 21, 2015), <http://www.thestate.com/news/local/crime/article15654974.html> [<https://perma.cc/9JG6-9CKG>] (reporting that no South Carolina officers accused of illegally firing their weapons at suspects over a five-year period had been convicted of any crime).

333. Hedberg et al., *supra* note 48, at 644–45.

334. *See* Jacob T. N. Young & Justin T. Ready, *Diffusion of Ideas and Technology the Role of Networks in Influencing the Endorsement and Use of on-Officer Video Cameras*, 31 J. CONTEMP. CRIM. JUST. 243, 244–46 (2015); *see also* Jennings et al., *supra* note 19, at 551 (noting that only 29.7% of surveyed officers believed BWCs would “increase their likelihood of behaving ‘by-the-book’”).

335. WHITE ET AL., *supra* note 232, at 12.

336. *Id.*

337. *Id.*

percent of 2016-funded agencies permit supervisors to review BWC footage for “general performance” purposes—i.e., for reasons unrelated to the use of the BWC.³³⁸

CONCLUSION: APPLYING A DISCRETION-CONTROL FRAMEWORK TO BWC USE

Since the summer of 2014, a series of police killings of citizens have generated public protest, civil disorder, and widespread demand for police reform.³³⁹ In response, BWCs have emerged as a potential solution to the police-community relations crisis.³⁴⁰ Though cameras have diffused rapidly, the current body of research, detailed throughout this Article, suggests that implementation of a BWC program comes with a high degree of difficulty, and the consequences of implementation failure are significant.

This Article informs the continued diffusion of police BWCs through a detailed examination of the research and resources available for program planning, implementation, and management. The authors first addressed the mixed body of research on BWCs and the US DOJ best-practice resources for program planning and implementation³⁴¹ and for policy development.³⁴² With this as context, the authors then critically examined four controversial policy positions related to BWC use: the activation decision, citizen notification, officer authority to review, and supervisor authority to review. For each, we described a complex set of issues that serve as a backdrop for the BWC policy position. We then examined prevailing policy trends based on a review of 129 BWC policies from agencies that have been funded by the US DOJ.

The results of our policy analysis for these four positions were mixed. In some cases, the directionality of agency policy positions is consistent with our review of the research on the complex issues underlying the policy position. For example, agency positions on the activation decision appear to be in line with jurisprudence on citizens’ expectation of privacy and requirements for consent to record.³⁴³ In at least one case, however, the prevailing policy trend is not supported by the research examining the underlying issues. More specifically, policies examined here commonly allow for officer review of BWC

338. *Id.*

339. *See supra* notes 6–11 and accompanying text.

340. *See supra* notes 12–20 and accompanying text.

341. *See* BUREAU OF JUSTICE ASSISTANCE, *supra* note 36; *supra* Part II.

342. *See Body-Worn Camera Policy Review Scorecard, supra* note 40; *supra* Part III.

343. *See supra* Section IV.A.3.

footage of a critical incident before requiring that officer to give a formal statement about the event.³⁴⁴ This policy position is inconsistent with the body of evidence on third-party interpretation of video, implicit bias, perception, and memory.³⁴⁵ The review of these controversial policy positions highlights the critical importance of adhering to the US DOJ guidance on planning and implementation, which addresses all of the issues at hand, as well as a thoughtful, deliberate, and collaborative policy development process.

Formal BWC policy notwithstanding, law enforcement agencies will need to focus their attention on officer compliance with laws and policies concerning BWC use. Officers' failure to follow BWC policy—whether it be for activation, citizen notification, or officer/supervisor review—will undermine the goals of the BWC program and may exacerbate problems between police and citizens. The authors view officer use of BWCs as an exercise in police discretion. Through such a lens, BWC use can and should be regulated using the tools that have proven effective to regulating the exercise of other forms of police discretion.

Among the wide range of conclusions drawn from numerous studies conducted on how to impact officers' situational decision-making during officer-citizen encounters,³⁴⁶ one empirically evident fact is that combating police misconduct is complex and goes far beyond quick fixes (e.g., increased training) or removing a few "rotten apples" that consistently make poor decisions.³⁴⁷ Additionally, various aspects of police culture can further inhibit attempts to stem police misconduct at the department level, considering that "[r]esearch has consistently demonstrated the powerful nature of the informal police culture, particularly with regard to how it can shape officer behavior in the field and how difficult it is to change."³⁴⁸

However, the larger body of research on police discretion offers numerous lessons that can guide effective BWC policy and practice. Police departments should consider adopting changes reflective of the conventional wisdom from nearly five decades of research on police

344. See *supra* Section IV.C.4.

345. See *supra* Section IV.C.1.

346. WHITE & FRADELLA, *supra* note 5, at 117–18.

347. JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 184–89 (1993).

348. WHITE & FRADELLA, *supra* note 5, at 118 (citing SKOLNICK & FYFE, *supra* note 347, at 90–93).

discretion. This body of research, which has been reviewed elsewhere,³⁴⁹ centers on:

- Careful selection of personnel (screening out those are ill-suited for the profession, and screening in those with desired qualities or characteristics);
- Effective training that is realistic and career-long;
- Administrative policies that are clear, detailed, and enforced;
- Appropriate supervision and accountability.

Law enforcement agencies that ground their BWC programs in the lessons from this literature are more likely to both experience positive outcomes and avoid the pitfalls described in this Article. They will also be more likely achieve the goals that prompted their initial decision to implement a BWC program.

349. *Id.* at 117–145.