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PRIVACY, PUBLIC DISCLOSURE, POLICE BODY CAMERAS: POLICY SPLITS

*Mary D. Fan**

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ABSTRACT

When you call the police for help—or someone calls the police on you—do you bear the risk that your worst moments will be posted on YouTube for public viewing? Police officers enter some of the most intimate incidences of our lives—after an assault, when we are drunk and disorderly, when someone we love dies in an accident, when we are distraught, enraged, fighting, and more. As police officers around the nation begin wearing body cameras in response to calls for greater transparency, communities are wrestling with how to balance privacy with public disclosure. This Article sheds light on the balances being struck in state laws and in the body camera policies of police departments serving the 100 largest cities in the nation. The evaluation illuminates two emerging areas of concern—the enactment of blanket or overbroad exemptions of body camera footage from public disclosure, and silence on victim and witness protection in many policies.

The Article offers two proposals to address the challenges. First, the Article argues for legal safe harbors to foster the development of new redaction technologies to automate the removal of private details rather than exempting body camera video from disclosure. Blanket or broad exemptions from public disclosure disable much of the promised benefits of the body camera revolution. Nondisclosure also destroys the incentive to develop technology to reconcile the important values of transparency and privacy. Second, the Article argues for giving victims and witnesses control over whether officers may record them, rather than putting the burden on victims and witnesses to request that recording cease. This approach better protects against the perverse unintended consequence of deterring victims from seeking help and witnesses from coming forward, and reduces the risk of inflicting further privacy harms from seeking justice.



Police investigation in a bedroom publicly disclosed on YouTube.¹

INTRODUCTION

You call the police to report stalking by an ex-partner.² Officers come to your home to take your statement.³ You reveal personal details about your relationship, your employment, your nightly fear, how you sought a protection order.⁴ All of this information—plus your address and intimate details inside your home—are recorded on police body camera by the responding officers.⁵ This video of you ends up posted on YouTube, obtained pursuant to a sweeping public disclosure request for all police body camera video by someone you have never met.⁶

1. Police Video Requests, *Bellingham Washington Police Body Camera: Prostitution Part 01*, YOUTUBE (Nov. 5, 2014), <https://www.youtube.com/watch?v=CpPR3zw2aUs>. The videos were part of a large-volume request for body camera videos by a “notorious” requester. See, e.g., Elisa Hahn, *Cities Give in to Notorious Records Requester*, KING5 NEWS (Jan. 8, 2016, 11:18 AM), <http://www.king5.com/story/news/local/2016/01/07/cities-give-notorious-records-requester/78442010/> (interviewing requester); Martin Kaste, *Transparency vs. Privacy: What to Do with Police Video Cameras?*, NPR (Dec. 19, 2014, 5:02 AM), <http://www.npr.org/2014/12/19/371821093/transparency-vs-privacy-what-to-do-with-police-camera-videos> (discussing requests).

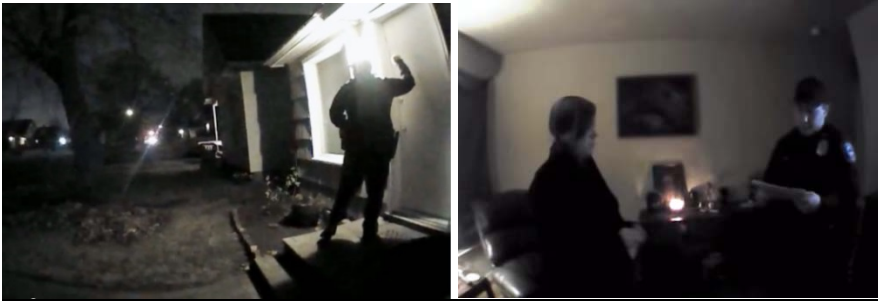
2. Police Video Requests, *Spokane Police Body Camera: Dvopv*, YOUTUBE (Dec. 22, 2014), <https://www.youtube.com/watch?v=hegpD6WBs34>.

3. *Id.* at 0:46–3:10.

4. *Id.* at 3:15–16:11.

5. *Id.*

6. *Id.*; see also, e.g., Hahn, *supra* note 1 (discussing how police departments are struggling to comply with sweeping public disclosure requests); Kaste, *supra* note 1 (interviewing the public records requester); Jennifer Sullivan, *SPD Tech Officer Quits, Files 200 More Public-Records Requests*, SEATTLE TIMES (Oct. 29, 2015, 8:36 PM), <http://www.seattletimes.com/seattle-news/spd-tech-officer-resigns-resumes-public-records-requests/> (detailing saga of the large-scale public disclosure requests).



*Police video of stalking and harassment call publicly disclosed on YouTube.*⁷

Communities across the nation are wrestling with how to deal with such clashes between transparency and privacy as a wave of police departments across the nation begin deploying officer-worn body cameras.⁸ Body cameras are small enough to wear at an officer's eye level, head level, or chest, and are capable of going everywhere police can go to record what the officer sees and does.⁹ A body camera revolution is spreading across the nation as a historic convergence of interest between civil liberties and civil rights groups and law enforcement agencies, spurred by rapid uptake of the technology.¹⁰

As protests erupted over policing practices, a broad coalition of groups such as the NAACP, ACLU, and the Lawyers' Committee for Civil Rights called for police forces to start wearing body cameras to pierce opacity and improve accountability and transparency.¹¹ Responding to the national

7. Police Video Requests, *supra* note 2.

8. See, e.g., Zusha Elinson & Dan Frosch, *Police Cameras Bring Problems of Their Own*, WALL ST. J. (Apr. 9, 2015), <http://www.wsj.com/articles/police-cameras-bring-problems-of-their-own-1428612804> (discussing how departments are struggling with vast volumes of video footage and how to respond to freedom-of-information requests from the public and media).

9. See, e.g., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, A PRIMER ON BODY-WORN CAMERAS FOR LAW ENFORCEMENT 5–6 (2012), <https://www.justnet.org/pdf/00-Body-Worn-Cameras-508.pdf> [hereinafter NIJ, BODY-WORN CAMERAS] (discussing body-worn camera specifications).

10. See discussion *infra* Part I.A; see also, e.g., Max Ehrenfreund, *Body Cameras for Cops Could Be the Biggest Change to Come Out of the Ferguson Protests*, WASH. POST: WONKBLOG (Dec. 2, 2014) <https://www.washingtonpost.com/news/wonk/wp/2014/12/02/body-cameras-for-cops-could-be-the-biggest-change-to-come-out-of-the-ferguson-protests> (describing spread of body cameras among police forces); Mike Maciag, *Survey: Almost All Police Departments Plan to Use Body Cameras*, GOVERNING (Jan. 26, 2016), <http://www.governing.com/topics/public-justice-safety/gov-police-body-camera-survey.html> (reporting on the plans of police departments across the United States to deploy body cameras).

11. Press Release, NAACP, Civil Rights Coalition Urges National Reforms and Recommendations to Address Police Abuse (Sept. 24, 2014), <http://www.naacp.org/latest/civil-rights-coalition-urges-national-reforms-and-recommendations-to-address/> (urging the adoption of body cameras); Lawyers' Comm. for Civil Rights Under Law et al., *A Unified Statement of Action to*

turmoil, the U.S. Department of Justice under President Barack Obama has awarded more than \$32 million dollars in grants to law enforcement agencies across the nation to encourage the adoption of body cameras.¹² Law enforcement agencies are rapidly getting on the body camera bandwagon because officers are realizing that recording encounters can help rebuild public trust, improve public as well as officer behavior, and protect against false complaints.¹³

Like many major social goods, however, body cameras exact a privacy price. Police officers enter some of our most private places and intervene at some of the worst moments of our lives.¹⁴ We call the police because of intimate partner violence, sexual assaults, fights, home invasions, hurt loved ones, and much more.¹⁵ Police see us when we are battered and bleeding, drunk and disorderly, distraught, traumatized, enraged, hopped up on drugs or stoned, and worse.¹⁶

While groups from diverse perspectives are agreeing on implementing body cameras, there are deep disagreements about how to balance public

Promote Reform and Stop Police Abuse, ACLU (Aug. 18, 2014), https://www.aclu.org/sites/default/files/field_document/black_leaders_joint_statement_-_final.pdf.

12. Press Release, U.S. Dep't of Justice, Justice Department Awards Over \$23 Million in Funding for Body Worn Camera Pilot Program to Support Local Law Enforcement Agencies in 32 States (Sept. 21, 2015), <https://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law>.

13. See, e.g., Wesley G. Jennings, Lorie A. Fridell & Mathew D. Lynch, *Cops and Cameras: Officer Perceptions of the Use of Body-Worn Cameras in Law Enforcement*, 42 J. CRIM. JUST. 549, 552 (2014) (reporting results of a survey among Orlando police officers about perceptions of body cameras); POLICE COMPLAINTS BD., ENHANCING POLICE ACCOUNTABILITY THROUGH AN EFFECTIVE ON-BODY CAMERA PROGRAM FOR MPD OFFICERS 3-4 (2014), <http://policecomplaints.dc.gov/node/828122> (follow "attachment" link to PDF version) (reporting the benefits of body cameras to police officers); POLICE EXEC. RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 6-7 (2014), <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf> (reporting on changing law enforcement views on body cameras).

14. See, e.g., Abby Simons, *Legislation Aims to Make Police Body Cam Footage Mostly Private*, STAR TRIB. (Jan. 29, 2015), <http://www.startribune.com/legislation-aims-to-make-police-body-cam-footage-mostly-private/290287791/> (statement of Andy Skoogman, Executive Director, Minnesota Chiefs of Police Association) (noting that police officers see people in the "worst moments of their lives" and arguing "[t]here has to be a reasonable expectation of privacy for people in this state and in this country").

15. See, e.g., SANDRA TIBBETTS MURPHY, BATTERED WOMEN'S JUSTICE PROJECT, POLICE BODY CAMERAS IN DOMESTIC AND SEXUAL ASSAULT INVESTIGATIONS: CONSIDERATIONS AND UNANSWERED QUESTIONS 3-7 (2015), <http://www.bwjp.org/assets/documents/pdfs/police-body-cams-in-domestic-and-sexual-assault-inve.pdf> (discussing concerns with the impact of recording on aid to battered persons and sexual assault victims by police officers).

16. See, e.g., Matt Pearce, *Growing Use of Police Body Cameras Raises Privacy Concerns*, L.A. TIMES (Sept. 27, 2014), <http://www.latimes.com/nation/la-na-body-cameras-20140927-story.html> (statement of Jay Stanley, Senior Policy Analyst, ACLU) (stating that the body camera video "sometimes captures people at the worst moments of their lives You don't want to see videos of that uploaded to the Internet for titillation and gawking.").

disclosure obligations with privacy.¹⁷ Every state and the federal government have freedom of information laws that provide for public disclosure of many classes of government records.¹⁸ Many of these laws were enacted long before police body camera video—or even patrol vehicle dash cameras. As police departments begin deploying body cameras, questions are arising over whether police must release video footage and the major privacy issues raised by public disclosure. Some states have very broad and strong public disclosure laws and limited exceptions, posing the risk of large-scale privacy intrusions.¹⁹

Only a few states have succeeded in enacting legislation defining the rules for public disclosure of body camera footage containing private information.²⁰ Other state legislatures have explicitly delegated the job of

17. See, e.g., Peter Hermann & Aaron C. Davis, *As Police Body Cameras Catch On, a Debate Surfaces: Who Gets to Watch?*, WASH. POST (Apr. 17, 2015), https://www.washingtonpost.com/local/crime/as-police-body-cameras-catch-on-a-debate-surfaces-who-gets-to-watch/2015/04/17/c4ef64f8-e360-11e4-81ea-0649268f729e_story.html (discussing debates).

18. E.g., MEDIA FREEDOM & INFO. ACCESS CLINIC, YALE LAW SCHOOL, POLICE BODY CAM FOOTAGE: JUST ANOTHER PUBLIC RECORD 8–10 (Dec. 2015), http://isp.yale.edu/sites/default/files/publications/police_body_camera_footage_just_another_public_record.pdf.

19. See, e.g., WASH. REV. CODE ANN. § 42.56.030 (West Supp. 2016) (stating that the public disclosure requirements “shall be liberally construed and its exemptions narrowly construed” to promote the policy of an informed public); Fisher Broad.-Seattle TV L.L.C. v. City of Seattle, 326 P.3d 688, 691 (Wash. 2014) (discussing how the Public Records Act mandates “broad public disclosure” (quoting Sargent v. Seattle Police Dep’t, 314 P.3d 1093, 1097 (Wash. 2013))); see also, e.g., *Police Body-Worn Cameras: Where Your State Stands*, URBAN INST., <http://apps.urban.org/features/body-camera/> (last modified Jan. 1, 2016) (statement by Jay Stanley, Senior Policy Analyst, ACLU) (“There are certain states whose public records laws are very broad and basically make all the video releasable, and we think that could be a real privacy problem.”).

20. See, e.g., FLA. STAT. ANN. § 119.071(2)(1)(2) (West Supp. 2016) (exempting from disclosure recordings made inside a private residence, healthcare or mental health or social services facility, or any place where a person would have a reasonable expectation of privacy); 50 ILL. COMP. STAT. ANN. 706/10-20(b) (West Supp. 2016) (exempting most body camera recordings from disclosure); N.D. CENT. CODE § 44-04-18.7(9) (Supp. 2016) (exempting from public disclosure footage recorded “in a private place”); OKLA. STAT. ANN. tit. 51, § 24A.8(A)(9)–(10) (West Supp. 2016) (prescribing what kinds of audio and video recordings by police must be disclosed and what must be redacted); ORE. REV. STAT. § 192.502(41a) (2016) (exempting body-worn video from disclosure unless consent from each person recorded is obtained and the video involves a use of force and disclosure is in the public interest); S.C. CODE ANN. § 23-1-240(G)(1)–(5) (Supp. 2015) (exempting body-worn video from disclosure and leaving release to the discretion of the South Carolina Law Enforcement Division); TEX. OCC. CODE ANN. § 1701.655, .661(c)–(d) (West Supp. 2016) (exempting body-worn footage from disclosure except where it is used as evidence in a criminal case); H.B. 7103, 2015 Gen. Assemb., June Spec. Sess. § 7(g) (Conn. 2015) (exempting from disclosure recordings of sexual or domestic abuse victims, or a homicide, suicide or fatal accident, if disclosure would constitute an “unwarranted invasion of personal privacy”); S.B. 94, 2015–2016 Gen. Assemb., Reg. Sess. § 5, 2015 Ga. Laws 173 (exempting body camera video taken where there is a reasonable expectation of privacy and no pending investigation from disclosure subject to only a few exceptions); Assemb. B. 162, 2015 Leg., 78th Reg. Sess. § 1 (Nev. 2015) (requiring that police body camera policies have provisions protecting the privacy of persons in a private residence seeking to report a crime or provide information about a crime anonymously, or claiming to be a victim of a crime, and providing that body camera video is a public

fleshing out the details of body camera policies to law enforcement officials.²¹ And many states have not reached a legislative solution, with competing bills tangled in fierce disputes over how to best balance transparency with privacy and how to protect the public.²² State legislation is also embroiled in questions about whether it is better to leave the development of body camera policies to each police department.²³ The question of how to balance the two revered democratic values of transparency and privacy is so difficult that there are even splits in the policy recommendations by the national and local offices of the ACLU.²⁴

As debates continue, balances between transparency and privacy protection are already being struck on the ground in body camera policies issued by police departments deploying body cameras.²⁵ These policies are

record that may only be requested on a per-incident basis and inspected at the location where the record is held “if the record contains confidential information that may not otherwise be redacted”).

21. See, e.g., TEX. OCC. CODE ANN. § 1701.655(a)–(b) (West Supp. 2016) (requiring law enforcement agencies receiving state body camera grants to promulgate a policy that contains guidelines for when officers must record or deactivate recording to protect privacy); S.B. 85, 2015–2016 Leg., Reg. Sess. § 1 (Cal. 2015) (directing the Highway Patrol to formulate a plan for implementing body-worn cameras); H.B. 15-1285, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015) (directing the Department of Public Safety to appoint a task force to study polices and best practices on body-worn cameras); H.B. 0533, 2015 Gen. Assemb., Reg. Sess. (Md. 2015) (requiring the Maryland Police Training Commission to develop and publish a body camera policy); S.B. 82, 61st Leg., 2015 Gen. Sess. (Utah 2015) (providing that officers executing warrants “shall comply with the . . . agency’s body worn camera policy when the officer is equipped with a body worn camera” and that agency policy shall “include a provision that an officer executing a warrant . . . shall wear a body worn camera when a camera is available, except in exigent circumstances where it is not practicable to do so”).

22. For a list of pending legislation, see, for example, *Police Body-Worn Cameras: Where Your State Stands*, *supra* note 19; Ryan J. Foley, *State Bills Would Limit Access to Officer Body Camera Videos*, WASH. TIMES (Mar. 20, 2015), <http://www.washingtontimes.com/news/2015/mar/20/state-bills-would-limit-access-to-officer-body-cam/?page=all> (discussing pending legislation and competing approaches).

23. Megan Cassidy, *Arizona Senate Committee Rejects State Rules on Police Body-Cameras*, ARIZ. REPUBLIC (Dec. 10, 2015), <http://www.azcentral.com/story/news/arizona/politics/2015/12/10/arizona-senate-committee-rejects-state-rules-police-body-cameras/77124350/>.

24. Compare ACLU, A MODEL ACT FOR REGULATING THE USE OF WEARABLE BODY CAMERAS BY LAW ENFORCEMENT 1–2 (May 2015), https://www.aclu.org/files/field_document/aclu_police_body_cameras_model_legislation_may_2015.pdf (providing that body cameras must be activated at the initiation of any law enforcement or investigative encounter between an officer and the public but providing exceptions for exigent circumstances and to protect privacy), with S.B. 5732, 64th Leg., Reg. Sess. § 3 (Wash.) (as introduced by Senate, Jan. 30, 2015) (bill requires continuous recording when officer is on duty and only deactivates if the officer goes to the bathroom or on break), and Josh Feit, *Seattle State Senator, ACLU Call for Tougher Body Cam Guidelines than in SPD Pilot*, SEATTLE MET (Feb. 9, 2015), <http://www.seattlemet.com/articles/2015/2/9/aclu-body-cam-bill-calls-for-tougher-oversight-than-spd-version-february-2015> (discussing how S.B. 5732 is backed by the ACLU of Washington state).

25. See, e.g., Chi. Police Dep’t, Special Order S03-14, § V.E, V.H (May 10, 2016), <http://directives.chicagopolice.org/directives/data/a7a57b38-151f3872-56415-1f38-89ce6c22d026d090.pdf?hl=true> (requiring recording of several law enforcement activities but prohibiting recording inside restrooms and other places where there is a reasonable expectation of privacy; inside medical facilities; and when sensitive body parts are exposed unless for evidence); N.Y.

often enacted with some community input, whether through community meetings, online surveys, or both.²⁶ The balances struck in body camera policies are important to investigate because they are governing how body cameras are being deployed on the ground. Legislatures and the courts often trail behind technology, leaving law enforcement to establish the baseline rules that courts and legislatures codify, approve, or amend in some respects.²⁷ To understand the future balance between public disclosure and privacy, it is important to look beyond the few formal laws on the books to the many more departmental policies guiding practices on the ground.

This Article sheds empirical light on the balances being struck between transparency and privacy and illuminates two problems in need of redress. First, the Article categorizes the balances struck in the few states that have succeeded in passing body camera laws.²⁸ Injecting a comparative perspective, the Article also examines the evolution of body camera

Police Dep't, Operations Order 48, at 2–3 (Dec. 12, 2014), https://rcfp.org/bodycam_policies/NY/NYPD_BWC_Policy.pdf (mandating recording by participating pilot program officers in several circumstances, but prohibiting recording in places where there is a reasonable expectation of privacy, such as restrooms; where a potential witness asks to speak anonymously; or where a victim or witness requests not to be recorded); Phila. Police Dep't, Directive 4.21, § 2B, C (Apr. 20, 2015), <http://www.phillypolice.com/assets/directives/D4.21-BodyWornCameras.pdf> (requiring recording numerous law enforcement activities but prohibiting recording in restrooms and other locations where there is a reasonable expectation of privacy; during strip searches; during conversations with confidential informants and undercover officers; when discussing operational strategy; and during routine administrative activities by fellow employees or supervisors); Intradepartmental Correspondence from Chief of Police, L.A. Police Dep't, to the Bd. of Police Comm'rs 3 (Apr. 23, 2015), http://www.lapdpolicecom.lacity.org/042815/BPC_15-0115.pdf (requiring recording of several types of law enforcement activities but providing exceptions to recording where a victim or witness refuses to provide a statement if recorded; the officer judges that recording would be inappropriate because of sensitive circumstances such as a sexual assault or the young age of the victim; where recording would jeopardize informants or undercover officers; and at in-patient care facilities, including rape treatment centers).

26. See, e.g., Mark Schultz, *Durham Police Release Draft Body-Camera Policy*, NEWS & OBSERVER (Dec. 17, 2015), <http://www.newsobserver.com/news/local/community/durham-news/article50230550.html> (noting calls for public comment on draft body camera policy by phone or online survey); Jennifer Sullivan, *Hit 'Pause' on Body-Cam Decision, Panel Says*, SEATTLE TIMES (Feb. 13, 2015), <http://www.seattletimes.com/seattle-news/hit-pause-on-police-body-cam-decision-panel-says/> (discussing stay of plans to implement body cameras to gain more community input); *LA Police Commission Wants Public Opinion on How Body Cameras Should Be Used*, CBS L.A. (Dec. 22, 2014, 3:17 PM), <http://losangeles.cbslocal.com/2014/12/22/la-police-commission-solicits-public-comment-for-body-camera-usage/> (discussing the use of a survey and community meetings to get public input on body camera policies); *Body-Worn Camera Project — Rochester Police Department*, CITY OF ROCHESTER (last visited Feb. 20, 2016), <http://www.cityofrochester.gov/RPDBodyWornCamera/> (describing input obtained from a telephone town hall poll, a city council survey, and community group commentary).

27. Cf. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 539–42 (2011) (discussing the benefits of judicial delay when it comes to new technologies in law enforcement).

28. See *infra* Part I.B.1.

policies in the pioneering nation to deploy body cameras widely throughout its police forces, the United Kingdom.²⁹ The Article then reports findings from the first study to systematically code and analyze trends in body camera policies issued by the police departments serving the 100 largest cities in the United States.³⁰ The empirical evaluation reveals two problems that should be of national concern: (1) the enactment of blanket or broad exemptions of body camera video from disclosure, and (2) the neglect of victim and witness protection in many body camera policies.

The pressure to enact exemptions to public disclosure laws for body camera video stems in part from current technological limitations.³¹ Public disclosure requests for body camera video necessitate numerous hours of officer time to painstakingly review and redact video.³² Current automated redaction technology has more than 90% accuracy on surveillance videos generated by stable still cameras, but has difficulty discerning relevant information from images generated by cameras in motion.³³ Public disclosure exemptions may seem like the only way to protect privacy while making it feasible for departments to deploy body cameras without incurring crippling costs to respond to public disclosure requests.³⁴ But public disclosure exemptions would deny the public the promised benefits of putting exponentially more surveillance cameras on the streets.³⁵

This Article proposes a path out of this forced choice. New redaction technology deploying machine learning is in the works to automate redaction.³⁶ Automated redaction of private information from publicly disclosed body camera videos reconciles the interest in transparency and privacy without sacrificing either value or breaking the bank of

29. See *infra* Part I.B.2; see also, e.g., Fanny Coudert, Denis Butin & Daniel Le Métayer, *Body-Worn Cameras for Police Accountability: Opportunities and Risks*, 31 COMPUTER L. & SEC. REV. 749, 750–51 (2015) (noting that the use of body-worn cameras “has so far mainly taken place in the US and in the UK,” with the earlier and more comprehensive uptake of body cameras in the UK).

30. See *infra* Part II.

31. See, e.g., Robinson Meyer, *What Good Is a Video You Can't See?*, THE ATLANTIC (Apr. 26, 2015), <http://www.theatlantic.com/technology/archive/2015/04/what-good-is-a-video-you-cant-see/391421/> (discussing the technological challenges with redaction, necessitating costly human time).

32. *Id.*

33. Interview with Mahesh Punyamurthula, Dir. of Tech. Strategy, Pub. Safety, Nat'l Sec. & Def., Microsoft, at Microsoft Headquarters, 1 Microsoft Way, Redmond, Wash. 98052 (Feb. 19, 2016).

34. See, e.g., Sarah Breitenbach, *States Grapple with Public Disclosure of Police Body-Camera Footage*, PEW CHARITABLE TRUSTS (Sept. 22, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/09/22/states-grapple-with-public-disclosure-of-police-body-camera-footage> (discussing the impetus behind proposals to exempt body camera footage from disclosure).

35. See, e.g., Meyer, *supra* note 31 (discussing the dilemma between protecting privacy and restricting access).

36. See discussion *infra* Part III.A.

communities interested in deploying body cameras.³⁷ The Article argues that to cultivate such technological innovation, legislatures should enact safe harbor provisions similar to those that enabled the successful development of the Internet and the networked world we live in today.³⁸

The second issue of concern illuminated by the empirical study of body camera policies is gaps in the protection of victims and witnesses.³⁹ Many body camera policies are silent on how to protect victims and witnesses from ending up on YouTube or other public sites.⁴⁰ Even those policies that address the issue generally place the burden on the victim or witness to demand that recording cease, or leave the decision to the discretion of the officer.⁴¹ This underprotection poses the risk of perverse unintended consequences, including deterring victims and witnesses from seeking help and justice.⁴²

This Article argues that the hidden price for the benefits of body cameras should not be the infliction of further privacy harms on those who seek help.⁴³ It is unrealistic to expect victims and witnesses to order an authority figure to stop recording, especially after a traumatizing or high-stress experience.⁴⁴ In contrast to the current prevalent approach, this Article argues that body camera policies should put the burden on officers to ask victims and witnesses if they may record.⁴⁵

The Article proceeds in three parts. Part I provides background about the body camera revolution and the conflict between privacy and public disclosure that communities across the nation are facing. This Part examines the very different approaches taken in the few state laws that address the issue. This Part also looks comparatively at how the United Kingdom, the earliest major body camera adopter, struck the balance.

Part II sheds empirical light on how body camera policies are balancing privacy and transparency values. There is convergence on the issue of which law enforcement events must be recorded but more divergence on

37. See discussion *infra* Part III.A.

38. See discussion *infra* Part III.A.

39. See discussion *infra* Parts II.B., III.B.

40. See discussion *infra* Parts II.B., III.B.

41. See discussion *infra* Parts II.B., III.B.

42. See discussion *infra* Part III.B.

43. See discussion *infra* Part III.B.

44. See discussion *infra* Part III.B; see also, e.g., Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 283–92 (1993) (discussing the problems with demanding a strong and assertive objection and the correlations between powerlessness and speaking in what she terms the “female register,” which eschews such direct assertions); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155 (discussing compliance with authority and fear of objecting).

45. See discussion *infra* Part III.B.

the important issue of when recording should cease to protect privacy.⁴⁶ The most prevalent provisions focus on privacy in places, especially restrooms. Policies are much less consistent on whether recording should stop to prevent harm to victims and witnesses.

Part III presents the normative component of this project. This Part argues for incentivizing the development of new redaction technologies rather than enacting blanket disclosure exemptions. Cultivating a technological solution would better accommodate privacy and public disclosure without sacrificing either value. Finally, the Article also proposes better protections for victims and witnesses, especially in sensitive crimes where intimate details are likely to emerge and where concerns for deterring victims and witnesses from seeking justice and for inflicting further privacy harms are greatest.

I. AFTER THE REVOLUTION: PRIVACY AND PUBLIC DISCLOSURE DILEMMAS

The police department gets a call from someone reporting an assault.⁴⁷ Officers arrive at the caller's home to take her statement.⁴⁸ She describes intimate details about her family.⁴⁹ She is the stepmother to her husband's six-year-old child.⁵⁰ The biological mother gave up the child when he was only one year old.⁵¹ She talks about their custody arrangements, court battles, and parenting plans.⁵² The alleged assault occurred when the biological mother came to pick up the child.⁵³ She lifts her shirt to show scratches from the fight.⁵⁴ She details other fights filled with spitting and scratching between the two of them.⁵⁵

Everything is recorded on a police body camera video, which includes the stills below from when she lifts her shirt to display her injuries.⁵⁶ The officer even advises her to get a camera to record better evidence for family

46. For findings and a discussion regarding the coming future where most of the main staple events of criminal procedure will be recorded, and the implications for judicial review, see Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. (forthcoming 2016–2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773886.

47. Police Video Requests, *Spokane Police Body Camera: Assault*, YOUTUBE (Dec. 22, 2014), <https://www.youtube.com/watch?v=AuDebOUdo0Q>.

48. *Id.* at 0:53–1:00.

49. *Id.* at 1:18–12:40.

50. *Id.* at 3:41–3:49.

51. *Id.* at 3:45–3:50.

52. *Id.* at 3:41–5:20.

53. *Id.* at 5:25–5:35.

54. *Id.* at 5:55–6:20.

55. *Id.* at 11:55–12:05.

56. *Id.* at 1:00–13:55.

court, saying: “Something you might be able to do, too, is get your own little video surveillance. I mean it’s very cheap. You can go . . . [to] Costco [or] Wal-Mart.”⁵⁷

Such is our modern condition.



We live in a time of exponentially expanded surveillance, more accurately characterized as “sousveillance.”⁵⁸ Sousveillance captures how recording is no longer conducted overhead by someone with power over the subject, a directionality formerly denoted by the French preposition *sur* in surveillance, evoking a watchful gaze over or above the subject.⁵⁹ Rather, in modern technological societies the power of recording people or events is put in the hands of everyday people who can cheaply acquire a small sousveillance device, such as a cell phone camera, and disseminate the recordings and images all over the world via the Internet.⁶⁰ People are recorded on camera more than any time in human history—in selfies, in group photos, in recorded events, and more.⁶¹ And these images are often shared: on average in 2014, every day people uploaded 1.8 billion digital images—a total of 657 billion photos a year.⁶²

57. *Id.* at 12:53–12:55.

58. See, e.g., Jean-Gabriel Ganascia, *The Generalized Sousveillance Society*, 49 SOC. SCI. INFO. 489, 489–90 (2010) (theorizing sousveillance as “the present state of modern technological societies where anybody may take photos or videos of any person or event, and then diffuse the information freely all over the world”).

59. Steve Mann, *Veillance and Reciprocal Transparency: Surveillance Versus Sousveillance, AR Glass, Lifeglogging, and Wearable Computing*, IEEE XPLORE 3–4 (2013), <http://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=6613094>.

60. Ganascia, *supra* note 58, at 489–90.

61. NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT 14 (2009); Rose Eveleth, *How Many Photographs of You Are Out There in the World?*, ATLANTIC (Nov. 2, 2015), <http://www.theatlantic.com/technology/archive/2015/11/how-many-photographs-of-you-are-out-there-in-the-world/413389/>.

62. Eveleth, *supra* note 61.

Body cameras are a form of sousveillance in the sense that they are mechanisms of control by the people using transparency to check power holders.⁶³ But, this elegant technological strategy of control has privacy costs. This Part begins by discussing the genesis and aims of the body camera revolution and then turns to the clash between transparency and privacy and the varying approaches on how to reconcile the two important values.

A. *The Police-Worn Body Camera Revolution*

Regulation by body camera resembles a modern technological form of Jeremy Bentham's famous idea of the Panopticon.⁶⁴ The idea of the Panopticon is to induce prisoner compliance not through brute force but through transparency, by putting people under a watchful gaze monitoring their behavior.⁶⁵ Such a strategy exacts large privacy costs for all under the gaze—whether it is the prisoners in Bentham's Panopticon prison, or the police officers and members of the public recorded on body cameras.⁶⁶

For officers, wearing body cameras is much more pervasive and intrusive than other forms of regulation or recording because a wider range of officer conduct and much more of an officer's day are recorded.⁶⁷ Officers and police unions have expressed concerns about the privacy problems posed by body cameras.⁶⁸ A survey of 254 police departments across the nation conducted in July 2013 found that less than a quarter of the responding departments used body cameras.⁶⁹

Then came the protests across the nation over the death of Michael Brown, an unarmed teen, shot by a Ferguson Police Department officer

63. Cf., e.g., Mann, *supra* note 59, at 3–4 (describing public recordings of police officers as a form of sousveillance—watching over the power holders by the subjects).

64. See Miran Božovič, *Introduction to JEREMY BENTHAM, THE PANOPTICON WRITINGS* 1, 13–17 (Miran Božovič ed., Verso 1995) (1787) (explaining Bentham's idea of the Panopticon, which would enable more efficient and effective governance of prison inmates by creating a structure that permitted the perfect visibility of prisoners arrayed around an opaque watchtower).

65. *Id.*

66. Cf., e.g., Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 *MISS. L.J.* 213, 240–46 (2002) (discussing privacy costs for society under Panoptic-style government surveillance).

67. See, e.g., *supra* note 25 (listing examples of body camera policies specifying recording of many routine law enforcement activities).

68. See, e.g., Douglas Hanks, *For Police Cameras, Going Dark Can Be A Challenge*, *MIAMI HERALD* (Dec. 14, 2014), <http://www.miamiherald.com/news/local/community/miamidade/article4480249.html> (discussing concerns among officers, including recording community members on some of the worst days of their lives).

69. POLICE EXEC. RESEARCH FORUM, *supra* note 13, at 2.

responding to a call about a convenience store theft.⁷⁰ Ferguson has been termed “a watershed moment in policing” by police leaders.⁷¹ The protests drew national attention to the longstanding problem of the heightened risk of death that African-American men face in police encounters.⁷² The protests that exploded when a Ferguson grand jury refused to indict Officer Wilson transfixed people across the nation and the world.⁷³

Witnesses gave deeply conflicting accounts of the shooting death.⁷⁴ Some witnesses stated that Officer Darren Wilson punched Brown and shot him in the back though he held his hands up in surrender.⁷⁵ Wilson and other witnesses indicated that it was Brown who punched Wilson and tried to grab his gun, then ran away, but turned to charge at Wilson when he

70. See, e.g., Elisha Fieldstadt, Kristen Welker, Tom Winter & Daniella Silva, *Thousands March Across Nation to Protest Police Killings of Black Men*, NBC NEWS (Dec. 14, 2014, 10:09 AM), <http://www.nbcnews.com/storyline/michael-brown-shooting/thousands-march-across-nation-protest-police-killings-black-men-n267806> (detailing protests); Diantha Parker, *Protests Around the Country Mark the Moment of Ferguson Shooting*, N.Y. TIMES (Dec. 1, 2014), <http://www.nytimes.com/2014/12/02/us/protests-around-the-country-mark-the-moment-of-ferguson-shooting.html> (similar).

71. Sandhya Somashekhar et al., *Black and Unarmed*, WASH. POST (Aug. 8, 2015), <http://www.washingtonpost.com/sf/national/2015/08/08/black-and-unarmed/>; see also, e.g., Jeremy Ashkenas & Haeyoun Park, *The Race Gap in America's Police Departments*, N.Y. TIMES (Apr. 8, 2015), http://www.nytimes.com/interactive/2014/09/03/us/the-race-gap-in-americas-police-departments.html?_r=1 (discussing the demographics of the majority-minority Ferguson community and majority-white police force).

72. Somashekhar et al., *supra* note 71; see also, e.g., Mary D. Fan, *Violence and Police Diversity: A Call for Research*, 2015 B.Y.U. L. REV. 875, 897–98 (presenting data on disproportionality by race in the risk of deaths in police encounters); James J. Fyfe, *Police Use of Deadly Force: Research and Reform*, 5 JUST. Q. 165, 165, 189 (1988) (discussing literature and findings on police use of force).

73. See Monica Davey & Julia Bosman, *Grand Jury Declines to Indict Police Officer in Ferguson Killing*, N.Y. TIMES, Nov. 25, 2014, at A1; Brianna Lee & Michelle Florcruz, *Ferguson, Missouri, Protests: International Newspapers, Media Showcase Violence, Destruction, Flames*, INT'L BUS. TIMES (Nov. 24, 2014, 1:51 PM), <http://www.ibtimes.com/ferguson-missouri-protests-international-newspapers-media-showcase-violence-1729216>; Jill Reilly, Louise Boyle, Ashley Collman, David Martokso & Dan Bates, *Ferguson, Missouri Burns as Darren Wilson Will Not Face Charges*, DAILYMAIL.COM (Nov. 24, 2014, 9:26 PM), <http://www.dailymail.co.uk/news/article-2844491/Ferguson-Missouri-Police-officer-Darren-Wilson-NOT-face-charges-shooting-unarmed-black-teen-Michael-Brown.html>; Jon Swaine, Oliver Laughland, Jamiles Lartey & Ciara McCarthy, *Young Black Men Killed by US Police at Highest Rate in Year of 1,134 Deaths*, GUARDIAN (Dec. 31, 2015, 3:00 PM) <http://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-young-black-men>.

74. See 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 6–8 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [hereinafter BROWN DEATH INVESTIGATION REPORT] (summarizing conflicting witness accounts about what happened); Frances Robles & Michael S. Schmidt, *Shooting Accounts Differ as Holder Schedules Visit*, N.Y. TIMES, Aug. 20, 2014, at A1 (reporting on divergent witness accounts).

75. BROWN DEATH INVESTIGATION REPORT, *supra* note 74, at 7–8.

fired the ultimately fatal shots.⁷⁶ There was no video capturing the encounter.⁷⁷

Michael Brown's grieving mother called for police to wear body cameras, saying, "This is not a black or white issue. This is a right and wrong issue."⁷⁸ A national opinion poll conducted around the time of the protests found disagreements in perceptions of the police along racial lines—but agreement across racial lines supporting body cameras.⁷⁹ The biggest reform to emerge from the national turmoil is body cameras for police officers.⁸⁰

Seven months after the turmoil, the U.S. Department of Justice concluded that the forensic evidence did not support accounts that Brown was shot in the back with his hands up in surrender.⁸¹ This turn of events underscored all the more to police the potential benefits of having body cameras to rebuild public trust and generate evidence that might exonerate rather than implicate officers.⁸² Ferguson and its aftermath convinced a wave of law enforcement agencies to adopt body cameras.⁸³ According to a recent survey by the Major Cities Chiefs Association and Major County Sheriffs' Association, 95% of seventy law enforcement agencies surveyed have either committed to putting body cameras on officers or have already done so.⁸⁴

76. *Id.*; Robles & Schmidt, *supra* note 74.

77. Josh Sanburn, *The One Battle Michael Brown's Family Will Win*, TIME (Nov. 25, 2014), <http://time.com/3606376/police-cameras-ferguson-evidence/>.

78. Adam Aton, *Michael Brown's Family Pushes for Missouri Body Camera Bill*, STAR TRIB. (Feb. 17, 2016), <https://www.startribune.com/michael-brown-s-family-pushes-for-missouri-body-camera-bill/369149641/>.

79. Max Ehrenfreund, *Blacks and Whites Agree on Body Cameras for Cops, if Little Else*, WASH. POST: WONKBLOG PRESS (Dec. 29, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/12/29/wonkbook-blacks-and-whites-agree-on-body-cameras-for-cops-if-little-else/>.

80. Ehrenfreund, *supra* note 10; Sanburn, *supra* note 77.

81. BROWN DEATH INVESTIGATION REPORT, *supra* note 74, at 7–8; Somashekhar et al., *supra* note 72.

82. POLICE EXEC. RESEARCH FORUM, *supra* note 13, at 6 (reporting on changing perceptions); Mara H. Gottfried, *St. Paul Police to Get Body Cameras, Explain Details at Community Meetings*, TWIN CITIES PIONEER PRESS (Dec. 17, 2015), <http://www.twincities.com/2015/10/19/st-paul-police-to-get-body-cameras-explain-details-at-community-meetings/> (discussing changing perceptions); Somashekhar et al., *supra* note 72 (discussing the spread of body cameras).

83. *See, e.g.*, Michael Blasky, *Conduct on Camera*, UNLV MAG., Spring 2015, at 33, <https://issuu.com/university.of.nevada.las.vegas/docs/unlvmagazinespring2015> (reporting findings that officers initially skeptical of body cameras changed their views after Ferguson because they realized that wearing a camera might help exonerate them); William Crum, *Oklahoma City Police Take 'Huge Step' Toward Body Cameras for Officers*, OKLAHOMAN (Sept. 5, 2015, 1:00 PM), <http://newsok.com/article/5444779> (noting the department had been considering whether to adopt body cameras but Ferguson spurred action).

84. Maciag, *supra* note 10.

The rapidity of the shift illustrates the interest-convergence thesis that progress occurs when the interests of the powerful converge with the interests of those demanding change.⁸⁵ Civil rights and civil liberties groups such as the NAACP and ACLU urged the adoption of police body cameras as a way to monitor the police, promote accountability, and reduce the risk of injuries and death in police encounters.⁸⁶ Police chiefs increasingly realized that body cameras have benefits in offering evidence, rebuilding trust, reducing unfounded complaints, and potentially exonerating officers.⁸⁷ Both sides hope that recording encounters will improve the behavior of members of the public as well as officers, reducing the risk that encounters escalate in danger.⁸⁸

The most oft-cited and earliest evidence for the benefits of body cameras comes from a study that randomly assigned half of the fifty-four officers of the Rialto, California Police Department to wearing body cameras.⁸⁹ The study found that officers not randomly selected to wear body cameras had twice the incidence of uses of force compared to the group using body cameras.⁹⁰ The between-groups difference in complaints was not statistically significant, mainly because of the low number of

85. See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

86. Lawyers' Comm. for Civil Rights Under Law et al., *supra* note 11; Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All*, ACLU (Mar. 2015), https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf.

87. *E.g.*, POLICE EXEC. RESEARCH FORUM, *supra* note 13, at 6; Gottfried, *supra* note 82 (reporting on shifts in police opinion); *see also, e.g.*, D.C. Mun. Regs. tit. 24, § 3900.2 (2016) ("The intent of the BWC is to promote accountability and transparency, foster improved police-community relations, and ensure the safety of both MPD members . . . and the public."); Phila. Police Dep't, Directive 4.21, § 1.A.2 (Apr. 20, 2015), <http://www.phillypolice.com/assets/directives/D4.21-BodyWornCameras.pdf>; San Diego Police Dep't, Procedure No. 1.49, at 1 (July 8, 2015), https://rcfp.org/bodycam_policies/CA/SanDiegoBWCPolicy_update.pdf ("Cameras provide additional documentation of police/public encounters and may be an important tool for collecting evidence and maintaining public trust."); S.F. Police Dep't, Department General Order 10.11, at 1 (June 1, 2016), <https://sanfranciscopolice.org/sites/default/files/Documents/PoliceCommission/AgendaDocuments/COMMISSION-DGO-10.11-BODYWORNCAMERAS.pdf> ("The use of Body Worn Cameras (BWC) is an effective tool a law enforcement agency can use to demonstrate its commitment to transparency, ensure the accountability of its members, increase the public's trust in officers, and protect its members from unjustified complaints of misconduct.").

88. POLICE COMPLAINTS BD., *supra* note 13, at 3; POLICE EXEC. RESEARCH FORUM, *supra* note 13, at 5–6; EUGENE P. RAMIREZ, A REPORT ON BODY WORN CAMERAS 3–4, https://www.bja.gov/bwc/pdfs/14-005_Report_BODY_WORN_CAMERAS.pdf; MICHAEL D. WHITE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 17–18 (2014), <https://ojpdiagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf>; Jennings, Fridell & Lynch, *supra* note 13, at 552.

89. 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 (2015).

90. *Id.* at 523.

complaints against either group.⁹¹ But, a before-and-after comparison of the number of complaints during the body camera study period to those before body cameras were implemented showed a reduction of more than 90% in the number of complaints.⁹² While the Rialto study is promising, more research needs to be done, and additional studies are planned.⁹³

Some results are already coming from a few other jurisdictions. A study of body camera use in the Phoenix Police Department found that complaints against officers in a precinct deploying body cameras declined by 22.5%, whereas complaints against officers in other comparable precincts without body cameras rose.⁹⁴ A study of officers wearing body cameras in Mesa, Arizona also found a significant reduction in complaints.⁹⁵ The San Diego police department has also reported a reduction in uses of force and complaints against police after putting body cameras on officers.⁹⁶

B. The Clash Between Privacy and Public Disclosure

Across the world and in the United States, freedom of information laws give people the right to demand access to records held by the government to facilitate transparency, guard against abuses, and build public trust.⁹⁷ The most well-known freedom of information law in the United States is the federal Freedom of Information Act (FOIA).⁹⁸ FOIA was enacted during the demand for “open government” in the 1960s, led by the press, which was concerned about denials of access to information about governmental decision-making.⁹⁹ Today, every state has a freedom of information law permitting citizens to obtain records from state and local

91. *Id.* at 524.

92. *Id.*

93. *See, e.g.,* Blasky, *supra* note 83.

94. CHARLES M. KATZ ET AL., CTR. FOR VIOLENCE PREVENTION & CMTY. SAFETY, ARIZ. STATE UNIV., EVALUATING THE IMPACT OF OFFICER WORN BODY CAMERAS IN THE PHOENIX POLICE DEPARTMENT 33 (2014), publicservice.asu.edu/sites/default/files/ppd_spi_feb_20_2015_final.pdf.

95. WHITE, *supra* note 88, at 21–22.

96. *E.g., Request for Council Action*, CITY OF SAN DIEGO (Mar. 3, 2015), http://docs.sandiego.gov/councilcomm_agendas_attach/2015/psln_150318_2.pdf.

97. *See, e.g.,* DAVID BANISAR, THE FREEDOMINFO.ORG GLOBAL SURVEY: FREEDOM OF INFORMATION AND ACCESS TO GOVERNMENT RECORDS AROUND THE WORLD 2–3 (2002), https://www.ndi.org/files/freeinfo_010504.pdf.

98. *See, e.g.,* Freedom of Information Act of 1966, 5 U.S.C. § 522 (2012) (requiring federal agencies to maintain and disclose their records, subject to specific exemptions).

99. For a history, see, for example, Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 650–54 (1984).

governments.¹⁰⁰ Also called sunshine laws and open records laws, freedom of information laws build on Justice Louis Brandeis's famous line about the power of transparency to prevent corruption and wrongdoing: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."¹⁰¹

Police-worn body cameras pit the two revered democratic values of privacy and transparency against each other. Should some of the most stigmatizing and painful moments of a person's life be recorded on body camera for potential public disclosure as the price of seeking help from the police?¹⁰² Should a drunken night's belligerent misbehavior also be preserved in humiliating audio and visual detail—and also broadcast on YouTube by someone requesting police video pursuant to freedom of information laws?¹⁰³ Should there be limits on transparency by body camera recording and public disclosure laws to protect privacy and victims and witnesses?

Communities across the United States are struggling to answer these important questions.¹⁰⁴ The few states that have enacted legislation to answer these questions have reached very different positions.¹⁰⁵ The trade-off is so tough that there are even disagreements within the ACLU about the best approach, with national experts and local experts urging different policy approaches.¹⁰⁶ This Subpart discusses the varying approaches in the handful of states to successfully enact legislation addressing the question. This Subpart also takes a comparative perspective by examining the approach taken in the United Kingdom, which also has a freedom of information law and was the first country to deploy body cameras on a large scale.¹⁰⁷

100. See, e.g., NAT'L ASS'N OF COUNTIES, OPEN RECORDS LAWS: A STATE BY STATE REPORT (2010), <http://www.naco.org/sites/default/files/documents/Open%20Records%20Laws%20A%20State%20by%20State%20Report.pdf>.

101. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914); see also Adriana S. Cordis & Patrick L. Warren, *Sunshine as Disinfectant: The Effect of State Freedom of Information Laws on Public Corruption*, 115 J. PUB. ECON. 18, 23–24, 35 (2014) (discussing the impact of state sunshine laws on preventing public corruption).

102. Pearce, *supra* note 16; Simons, *supra* note 14.

103. E.g., Police Video Requests, *AXON Body Video 2014 11 05 2124 BAC Assault*, YOUTUBE (Dec. 2, 2014), <https://www.youtube.com/watch?v=qIP62IO28kw>.

104. Elinson & Frosch, *supra* note 8.

105. See laws cited, *supra* note 20, and discussion *infra* Part I.B.1.

106. See *supra* note 24.

107. Coudert, Butin & Le Métayer, *supra* note 29, at 750–51; Karson Kampfe, Note, *Police-Worn Body Cameras: Balancing Privacy and Accountability Through State and Police Department Action*, 76 OHIO ST. L.J. 1153, 1156–57 (2015).

1. *Early-Mover States Strike Different Balances*

At the end of 2015, only a few states had enacted legislation giving guidelines about the balance between transparency and privacy.¹⁰⁸ By October 2016, the number of states with body camera legislation addressing privacy protections rose to nearly half of states.¹⁰⁹ Privacy protections in body camera laws and policies generally fall into three main types: (1) provisions requiring the cessation of recording to protect privacy; (2) provisions exempting some or all body camera video from public disclosure; and (3) provisions requiring redaction of publicly disclosed materials to protect privacy. The approaches taken by the early-moving states differ markedly on the balance between transparency and privacy protections.

a. *Nondisclosure*

At one extreme, South Carolina's body camera law provides a blanket exemption against disclosure, stating that "[d]ata recorded by a body-worn camera is not a public record subject to disclosure under the Freedom of Information Act."¹¹⁰ Disclosure is left to the discretion of the State Law Enforcement Division, the Attorney General, or a circuit solicitor.¹¹¹ South Carolina's blanket exemption from public disclosure is particularly striking because one of the major impetuses for body cameras was the killing of Walter Scott, captured by a bystander on video.¹¹² The officer, a member of

108. CAL. PENAL CODE ANN. § 832.18(b)(8) (West Supp. 2016); CONN. STAT. ANN. § 29-6d(g) (West Supp. 2016); FLA. STAT. ANN. § 119.071(2)(1)(2) (West Supp. 2016); 50 ILL. COMP. STAT. ANN. 706/10-20(b) (West Supp. 2016); NEV. REV. STAT. ANN. § 480.365 (West Supp. 2016); N.C. GEN. STAT. § 132-1.4A (West Supp. 2016); N.D. CENT. CODE § 44-04-18.7(9) (Supp. 2016); OKLA. STAT. ANN. tit. 51, § 24A.8(A)(9)–(10) (West Supp. 2016); ORE. REV. STAT. § 192.502(41a) (2016); S.C. CODE ANN. § 23-1-240(G)(1)–(5) (Supp. 2015); TEX. OCC. CODE ANN. § 1701.655, .661(c)–(d) (West Supp. 2016); S.B. 94, 2015–2016 Gen Assemb., Reg. Sess. § 5, 2015 Ga. Laws 173; Legis. B. 1000, 104th Leg., 2nd Reg. Sess. (Neb. 2016); see also *Police Body-Worn Cameras: Where Your State Stands*, *supra* note 19 (showing status of state legislation). The list above excludes states that merely require law enforcement agencies to have a policy on the use of the body cameras without specifying what protections should be in the policies.

109. For the latest list of state legislation, see *Body-Worn Cameras Interactive Graphic*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/body-worn-cameras-interactive-graphic.aspx#/> (last visited Oct. 21, 2016). In the count, states that merely require law enforcement agencies to adopt a policy are not included as a jurisdiction that has offered substantive guidelines on the right balance between privacy and transparency.

110. S.C. CODE ANN. § 23-1-240(G)(1).

111. *Id.* § 23-1-240(G)(3).

112. Wesley Lowery & Elahe Izadi, *Following 'Horrible Tragedy,' South Carolina Mayor Pledges Body Cameras for All Police*, WASH. POST (Apr. 8, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/04/08/following-horrible-tragedy-south-carolina-mayor-pledges-body-cameras-for-all-police/>.

the North Charleston Police Department in South Carolina, claimed he fired the shots, after stopping Scott for a broken taillight, because Scott tried to grab his Taser.¹¹³ The bystander's video revealed a different story—Scott was shot when he was 15 to 20 feet away from the officer and fleeing.¹¹⁴ The power of body cameras to prevent and provide accountability for such deaths is seriously stunted by the inability of the public to get such video, leaving release to the discretion of law enforcement.

North Carolina also enacted legislation providing that body camera recordings are not public records subject to disclosure.¹¹⁵ The law generally provides for disclosure only to persons involved in the recording or their personal representatives.¹¹⁶ The agency or members of the public may petition a court for disclosure, arguing that release is necessary to advance a compelling interest or other good cause that outweighs countervailing interests.¹¹⁷ Soon after enacting the exemption, the problems with nondisclosure became dramatically apparent. Intense controversy and turmoil erupted over the initial refusal of the Charlotte Police Department to publicly release video of the fatal shooting of Keith Scott.¹¹⁸ Only after protests rocked the community and politicians intervened did police release the videos of the shooting from dash and body cameras.¹¹⁹

While not as extreme as the Carolinas' legislation, Louisiana, Texas, Illinois, and Oregon offer examples of states that have adopted broad body camera video exemptions from public disclosure. Texas exempts body camera video from public disclosure unless it is used as evidence in a criminal prosecution.¹²⁰ Texas further prohibits police departments from requiring continuous recording throughout an officer's shift.¹²¹ Oregon amended its law to exempt body camera videos from disclosure unless "the public interest requires disclosure" and the video is "edited in a manner to render the faces of all persons within the recording unidentifiable."¹²²

113. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>.

114. *Id.*

115. N.C. GEN. STAT. § 132-1.4A(b) (West Supp. 2016).

116. *Id.* § 132-1.4A(c).

117. *Id.* § 132-1.4A(f)(1).

118. Alan Blinder, Niraj Chokshi & Richard Pérez-Peña, *Dead Man's Family Sees Video and Says Public Should, Too*, N.Y. TIMES, Sept. 23, 2016, at A19.

119. Richard Fausset, Alan Blinder & Yamiche Alcindor, *Police Release Videos in Killing of Carolina Man*, N.Y. TIMES, Sept. 25, 2016, at A1.

120. TEX. OCC. CODE ANN. § 1701.661(c)–(d) (West Supp. 2016).

121. *Id.* § 1701.655(c).

122. OR. REV. STAT. § 192.501(40) (2016).

Illinois prohibits the disclosure of recordings made by body cameras under the Freedom of Information Act except for recordings that are “flagged, due to the filing of a complaint, discharge of a firearm, use of force, arrest or detention, or resulting death or bodily harm.”¹²³ Flagged recordings due to complaints, firearms discharge, use of force or injury or death must be disclosed except that if the subject of the encounter is a victim or witness and has a reasonable expectation of privacy, the law enforcement agency must obtain the written permission of the subject or his or her representative.¹²⁴

b. Filtered Disclosure

Other states take a middle approach of protecting sensitive information from disclosure but giving the public access to a broader range of information. Minnesota’s recently enacted legislation provides an example.¹²⁵ Though data taken by a “portable recording system” is classified as private and nonpublic, there are larger exceptions, such as for recordings of arrests, citations, use of force by officers, and other substantial deprivations of liberty.¹²⁶ Police departments also may release otherwise private nonpublic data “if the agency determines that the access will aid the law enforcement process, promote public safety, or dispel widespread rumor or unrest.”¹²⁷

Another approach, reflected in Louisiana’s new law, is to give law enforcement more control over whether to disclose videos.¹²⁸ Louisiana provides that videos that the law enforcement custodian deems to violate “an individual’s reasonable expectation of privacy” are not subject to disclosure.¹²⁹ But the custodian does not have wholly unreviewable interpretive discretion. A court may order disclosure of video determined by a custodian to violate privacy expectations.¹³⁰

Another approach to protecting privacy is to exempt from disclosure certain categories of body camera recordings involving private situations or places. North Dakota simply exempts from public disclosure body camera

123. 50 ILL. COMP. STAT. ANN. 706/10-20(b)(2) (West Supp. 2016).

124. *Id.* 706/10-20(b)(1).

125. S.F. 498, 89th Sess. (Minn. 2016), https://www.revisor.mn.gov/bills/text.php?number=SF498&session_year=2016&session_number=0&version=latest&format=pdf.

126. *Id.* §§ 1, 5.

127. *Id.* § 4.

128. LA. STAT. ANN. § 44:3 (West Supp. 2016).

129. *Id.* § 44:3(A)(8).

130. *Id.* § 44:3(A)(8)(b).

footage recorded “in a private place.”¹³¹ Georgia exempts body camera video taken in places where there is a reasonable expectation of privacy from disclosure if there is no pending investigation, subject to a few exceptions.¹³² Connecticut’s body camera law provides a double protection, prohibiting officers from recording unless the recording is pursuant to an agreement with the federal government, and exempting from disclosure recordings of the following situations:

- (1) a communication with other law enforcement agency personnel, except that which may be recorded as the officer performs his or her duties,
- (2) an encounter with an undercover officer or informant,
- (3) when an officer is on break or is otherwise engaged in a personal activity,
- (4) a person undergoing a medical or psychological evaluation, procedure or treatment,
- (5) any person other than a suspect to a crime if an officer is wearing such equipment in a hospital or other medical facility setting, or
- (6) in a mental health facility, unless responding to a call involving a suspect to a crime who is thought to be present in the facility.¹³³

In addition, Connecticut’s newly enacted law also prohibits the disclosure of body-worn recordings of “(A) the scene of an incident that involves a victim of domestic or sexual abuse, or (B) a victim of homicide or suicide or a deceased victim of an accident . . . to the extent that disclosure of such record could reasonably be expected to constitute an unwarranted invasion of personal privacy.”¹³⁴ Like Illinois, the Connecticut law is salutary in terms of the detailed guidelines for officers and police departments in the state, framed by a democratically elected body.

Florida law exempts from disclosure recordings (1) taken in the interior of private residences, (2) taken inside mental health care, health care, or social services facilities, and (3) taken inside places where a reasonable person would expect privacy.¹³⁵ However, law enforcement agencies have discretion to disclose such recordings to persons recorded, or their representative, and to persons not depicted but who are dwelling in the

131. N.D. CENT. CODE § 44-04-18.7(9) (Supp. 2016).

132. S.B. 94, 2015–2016 Gen. Assemb., Reg. Sess. § 5, 2015 Ga. Laws 173.

133. H.B. 7103, 2015 Gen. Assemb., June Spec. Sess. § 7(g) (Conn. 2015).

134. *Id.*

135. FLA. STAT. ANN. § 119.071(2)(1)(2) (West Supp. 2016).

place depicted.¹³⁶ Moreover, courts may order disclosure considering factors such as whether it is “necessary to advance a compelling interest,” whether there are potential privacy harms from disclosure, and whether the disclosed recording may be redacted to protect privacy interests.¹³⁷

Another filtered disclosure approach specifies redaction to protect privacy. Oklahoma’s new body camera law takes this approach, disclosing body camera video provided that before release the law enforcement agency redacts numerous categories of provided information.¹³⁸ For example, depictions of nudity or severe violence resulting in great bodily injury; images enabling identification of minors under sixteen; and personal medical information must be redacted.¹³⁹ Minnesota’s new law also authorizes law enforcement agencies to redact footage otherwise subject to public disclosure where it is “clearly offensive to common sensibilities.”¹⁴⁰ Members of the public may also petition a court to order redaction of such offensive video.¹⁴¹

c. Camera Turn-Off and Turn-On Legislation

Some states provide some guidance regarding front-end protections for privacy by specifying when cameras must be turned off. For example, Illinois legislation gives law enforcement agencies guidelines on when to record—and when not to record—law enforcement activities.¹⁴² The Illinois body camera law contains a strong requirement that officers record “at all times when the officer is in uniform and is responding to calls for service or engaged in any law enforcement-related encounter or activity, that occurs while the officer is on duty.”¹⁴³ The law also contains body camera shut-off provisions to protect privacy when:

(A) the victim of a crime requests that the camera be turned off, and unless impractical or impossible, that request is made on the recording;

136. *Id.* § 119.071(2)(1)(4).

137. *Id.* § 119.071(2)(1)(4)(d).

138. OKLA. STAT. ANN. tit. 51 § 24A.8(A)(9)–(10) (West Supp. 2016).

139. *Id.*

140. S.F. 498, 89th Sess. (Minn. 2016), https://www.revisor.mn.gov/bills/text.php?number=Sf498&session_year=2016&session_number=0&version=latest&format=pdf.

141. *Id.*

142. *Id.* 706/10-20(a)(3)–(4).

143. *Id.* 706/10-20(a)(3).

(B) a witness of a crime or a community member who wishes to report a crime requests that the camera be turned off, and unless impractical or impossible that request is made on the recording; or
(C) the officer is interacting with a confidential informant used by the law enforcement agency.¹⁴⁴

The exception to required turn-off is if the officer has reasonable, articulable suspicion that the victim, witness, or confidential informant is in the process of committing a crime or has committed a crime.¹⁴⁵ Illinois law also gives officers discretion to turn off cameras when engaged in community caretaking functions, again unless there is reasonable, articulable suspicion of a crime.¹⁴⁶ Moreover, the law requires officers to provide notice of recording “to any person if the person has a reasonable expectation of privacy and proof of notice must be evident in the recording” unless exigent circumstances excuse the lack of notice.¹⁴⁷ Whether one agrees or disagrees with the balance struck, the Illinois body camera law is laudable for democratically deciding the right balance and providing detailed guidelines for police departments and officers. Some states delegate much or all of the duty of fleshing out policies about when cameras must be on or off to law enforcement agencies or an advisory board.¹⁴⁸ Nevada’s new body camera law offers an example of a state that delegates the responsibility to law enforcement agencies but provides some parameters.¹⁴⁹ The law requires agencies deploying body cameras to have policies guiding their use in place.¹⁵⁰ Such policies must require activation of body camera recording when officers respond to a call for service or during any other encounter between an officer and a member of the public.¹⁵¹ However, agencies must have provisions “[p]rotecting the privacy of persons: (1) [i]n a private residence; (2) [s]eeking to report a crime or provide information regarding a crime or ongoing investigation anonymously; or (3) [c]laiming to be a victim of a crime.”¹⁵² How the agency’s policies are to carry out the privacy protections is not clear from

144. *Id.* 706/10-20(a)(4).

145. *Id.*

146. *Id.* 706/10-20(a)(4.5).

147. *Id.* 706/10-20(a)(5).

148. *E.g.*, UTAH CODE ANN. § 77-7a-102(1) (West Supp. 2016); S. 174, 2015-2016 Sess., § 1 (Vt. 2016), legislature.vermont.gov/assets/Documents/2016/Docs/ACTS/ACT163/ACT163%20As%20Enacted.pdf.

149. Assemb. B. 162, 2015 Leg., 78th Reg. Sess. § 1 (Nev. 2015).

150. *Id.*

151. *Id.* § 1(a).

152. *Id.* § 1(d).

the legislation, which explicitly requires agencies to prohibit recording “general activity,” but does not use the language of prohibiting recording when it comes to “protecting the privacy of persons.”¹⁵³ The more open-textured framing of the duty to protect the privacy of persons leaves open the possibility of not recording—but also the possibility of recording and redacting.¹⁵⁴

2. *Comparative Perspective: How the U.K. Strikes the Balance*

The United Kingdom and the United States are the two main nations thus far to deploy police body-worn cameras in their forces.¹⁵⁵ The U.K. was the earlier mover in wide-scale adoption of body cameras and framing policies.¹⁵⁶ Even before the deployment of an estimated 2,000 additional cameras worn by police officers, Britain was said to have among the world’s most extensive video surveillance in the world, with a network of four million closed-circuit cameras.¹⁵⁷ In 2007, Britain’s Home Office allocated \$6 million to equip the nation’s forty-two police forces with body cameras.¹⁵⁸ Uptake of body cameras was swift. Today, half of all police agencies in the U.K. equip their officers with body-worn cameras.¹⁵⁹

In 2007, the Home Office also issued guidelines to police agencies on recording policies and privacy protections in connection with body-worn cameras.¹⁶⁰ The guidelines were developed in consultation with officers in Plymouth, who had piloted body cameras, and other officers in the U.K. who had been early movers in using body cameras.¹⁶¹ The guidelines were also framed to be consistent with the U.K. Data Protection Act of 1998 legislation that regulated “personal data” captured on computer, closed-circuit television (CCTV), still cameras, and other media.¹⁶² The first

153. *Id.* § 1(c)–(d).

154. For a further discussion, see *infra* Part III.A.

155. Coudert, Butin & Le Métayer, *supra* note 29, at 750; *Britain Straps Video Cameras to Police Helmets*, NBC NEWS (July 13, 2007, 5:32 PM), http://www.nbcnews.com/id/19750278/ns/world_news-europe/t/britain-straps-video-cameras-police-helmets/#.VtOp6032bcv. Other nations, such as Denmark, have tested the use of body-worn cameras. *Id.*

156. Coudert, Butin & Le Métayer, *supra* note 29, at 751; Kampfe, *supra* note 107, at 1156.

157. *Britain Straps Video Cameras to Police Helmets*, *supra* note 155.

158. *Id.*

159. Coudert, Butin & Le Métayer, *supra* note 29, at 751.

160. POLICE & CRIME STANDARDS DIRECTORATE, U.K. HOME OFFICE, GUIDANCE FOR THE POLICE USE OF BODY-WORN VIDEO DEVICES (2007), <http://library.college.police.uk/docs/homeoffice/guidance-body-worn-devices.pdf> [hereinafter U.K. HOME OFFICE, 2007 GUIDANCE].

161. *Id.* at 6.

162. Data Protection Act 1998, c. 29 (UK), http://www.legislation.gov.uk/ukpga/1998/29/pdfs/ukpga_19980029_en.pdf.

principle of the Data Protection Act is that subjects whose data is being taken must know (1) the identity of the data controller, (2) the purpose of the footage, and (3) any additional information necessary for fairness.¹⁶³

The 2007 Home Office guidance advises agencies to notify the public that body cameras will be deployed and alert the public by clearly wearing uniforms and overtly visible cameras.¹⁶⁴ Officers are directed to announce where possible or practicable that recording is occurring and record the encounter in its entirety.¹⁶⁵ The 2007 Directive stated that officers should record in private dwellings similarly as other incidents are recorded.¹⁶⁶ Where people object to the recording, officers are instructed to “continue to record while explaining the reasons for recording continuously,” such as safeguarding the evidence and the parties.¹⁶⁷ The directive to continue recording applies even in situations of “domestic abuse.”¹⁶⁸ Officers may turn off recording if “it becomes clear that the incident is not a police matter (e.g. not an allegation of a suspected or potential offence).”¹⁶⁹ If not used in a criminal investigation or prosecution, footage inside a private dwelling “should be deleted as soon as practicable.”¹⁷⁰

The 2007 Guidance contained only a few limitations on recording, primarily for “[i]ntimate searches” where “persons are in a state of undress.”¹⁷¹ There is also a limitation on recording information subject to legal privileges.¹⁷² Notwithstanding the hard-line stance on continuing to record even upon objection in a private dwelling, and even in a domestic abuse case, officers are also advised to consider the right to private and family life under the European Convention on Human Rights and “not record beyond what is necessary for the evidential requirements of the case.”¹⁷³

In 2014, the U.K. College of Policing issued guidance updating and replacing the 2007 Home Office guidance.¹⁷⁴ The new guidance explicitly forbids “[c]ontinuous, non-specific recording,” instead mandating that the

163. *See id.* § 7.

164. U.K. HOME OFFICE, 2007 GUIDANCE, *supra* note 160, at 9–10.

165. *Id.* at 10.

166. *Id.* at 14.

167. *Id.* at 14–15.

168. *Id.*

169. *Id.* at 15.

170. *Id.*

171. *Id.* at 23.

172. *Id.*

173. *Id.*

174. COLL. OF POLICING, BODY-WORN VIDEO 4 (2014), <http://library.college.police.uk/docs/college-of-policing/Body-worn-video-guidance-2014.pdf>.

use of body cameras be “proportionate, legitimate and necessary.”¹⁷⁵ Recording by body-worn video must be “incident specific” based on officers’ “common sense and sound judgment . . . in support of the principles of best evidence.”¹⁷⁶ The change in approach to rein back some of the intrusiveness of recording reflects the need to adhere to the Surveillance Camera Code of Practice issued by the Home Office in June 2013.¹⁷⁷ The Surveillance Camera Code of Practice was presented to Parliament as directed under the U.K. Protection of Freedoms Act of 2012.¹⁷⁸

Also reflecting a major shift in favor of privacy, the new policy states that “[u]nder normal circumstances, officers should not use BWV [body-worn video] in private dwellings.”¹⁷⁹ However, officers present in a private dwelling “for a genuine policing purpose” still may record using body-worn video “in the same way as they would record any other incident.”¹⁸⁰ Officers are cautioned to “exercise discretion and record only when it is relevant to the incident and necessary for gathering evidence, where other reasonable means of doing so are not available.”¹⁸¹ If people inside the dwelling object to recording, but “an incident is taking place or allegations of a criminal nature are being made,” officers are still instructed to “continue recording but explain their reasons for doing so.”¹⁸²

In contrast to the passing admonition to continue recording even in situations of domestic abuse in the 2007 guidance, the new guidance now has a section devoted to responding to calls regarding domestic abuse.¹⁸³ The section details the benefits of body-worn video in domestic abuse cases to capture the immediate harms and strengthen the prosecution’s case, especially because victims may later prove reluctant or hostile in cooperating in a case.¹⁸⁴ Officers are advised, however, to use body-worn video cautiously, “on a case-by-case basis” where they “observe no injuries or other evidence of note.”¹⁸⁵ The guidance explains that injuries such as

175. *Id.* at 5.

176. *Id.*

177. U.K. HOME OFFICE, SURVEILLANCE CAMERA CODE OF PRACTICE 4 (2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/204775/Surveillance_Camera_Code_of_Practice_WEB.pdf.

178. Protection of Freedoms Act 2012, c. 9, §§ 29–30(1)(a), (Eng. & Wales), http://www.legislation.gov.uk/ukpga/2012/9/pdfs/ukpga_20120009_en.pdf.

179. COLL. OF POLICING, *supra* note 174, at 18.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 20.

184. *Id.*

185. *Id.*

bruises may take time to appear so body-worn video at the scene may not tell the whole story and “may be neutral in conveying what happened during the incident, or may even be used to undermine a prosecution case and assist the defence.”¹⁸⁶

Like the United States, the U.K. also has a Freedom of Information Act (“U.K. FOIA”).¹⁸⁷ The U.K. FOIA creates a right of access to information held by public authorities, subject to exemptions.¹⁸⁸ The body-worn video guidance instructs officers that the right to access “may include digital images recorded” by body-worn video.¹⁸⁹ Law enforcement agencies are advised that “third-party redaction may be necessary to prevent collateral intrusion.”¹⁹⁰ Thus, the U.K. has shifted from a model verging on requiring nearly continuous recording toward a model somewhat reining back the pervasiveness of recording by depending more on officer discretion and judgment to record no more than necessary for evidentiary purposes.¹⁹¹ Under either model, U.K. guidance relies on redaction of recordings disclosed under the U.K. FOIA to protect privacy.¹⁹²

II. THE BALANCES BEING STRUCK IN BODY CAMERA POLICIES

Body camera policies are much more decentralized in the United States compared to the United Kingdom, reflecting the view that criminal law enforcement is a “traditional state function[.]”¹⁹³ There are benefits to decentralization on difficult questions balancing competing values because tastes for privacy and transparency can vary from state to state and even between different regions within a single state.¹⁹⁴ To date, few states have succeeded in passing comprehensive codes governing when body cameras

186. *Id.*

187. *Id.* at 10; UK HOME OFFICE, 2007 GUIDANCE, *supra* note 160, at 11.

188. Freedom of Information Act 2000, c. 36, § 1 (UK), http://www.legislation.gov.uk/ukpga/2000/36/pdfs/ukpga_20000036_en.pdf.

189. COLLEGE OF POLICING, *supra* note 174, at 10.

190. *Id.*

191. *See supra* text accompanying notes 165–82.

192. COLLEGE OF POLICING, *supra* note 174, at 10; UK HOME OFFICE, 2007 GUIDANCE, *supra* note 160, at 11.

193. *See, e.g.*, Mary De Ming Fan, *Reforming the Criminal Rap Sheet: Federal Timidity and the Traditional State Functions Doctrine*, 33 AM. J. CRIM. L. 31, 33–49 (2005) (discussing the traditional state functions doctrine in the context of criminal law enforcement and the resulting patchwork of state and local laws and policies).

194. *See, e.g.*, JOEL PADDOCK, STATE & NATIONAL PARTIES & AMERICAN DEMOCRACY 22 (2005) (discussing regional divisions in political attitudes even within a single state); *cf.* Joseph Cortright, *The Economic Importance of Being Different: Regional Variations in Tastes, Increasing Returns, and the Dynamics of Development*, 16 ECON. DEV. Q. 3, 6, 8–11 (2002) (discussing regional variations in tastes in fueling economic growth and activity).

must be turned on in the interest of transparency and turned off in the interest of privacy.¹⁹⁵ Even in the states that have passed body camera legislation, important details are delegated to police departments to define.¹⁹⁶

Courts and even legislatures often trail behind technological developments in policing.¹⁹⁷ To understand the balances being struck between transparency and privacy, it is therefore important to look beyond the formal laws on the books.¹⁹⁸ Police departments are not democratically elected like state legislators.¹⁹⁹ However, police departments are accountable to elected city and town leaders.²⁰⁰ Moreover, because municipal police departments represent smaller jurisdictional units, they are able to get closer direct feedback through community meetings, town halls, and online surveys.²⁰¹ This Part presents findings that shed empirical light into how communities are resolving the difficult values clash posed by body cameras.

A. *Collection and Coding Methods*

This study of body camera policies collected and coded as of December 2015 focuses on the municipal police departments that are the primary law enforcement providers for the 100 largest cities in the United States. A metropolitan area may be served by different kinds of law enforcement agencies, such as county sheriff's departments for certain

195. See discussion *supra* Part I.B.1.

196. *E.g.*, TEX. OCC. CODE ANN. § 1701.655(a)–(b) (West Supp. 2016); S.B. 85, 2015–2016 Leg., Reg. Sess. § 1 (Cal. 2015); H.B. 15-1285, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015); S.B. 82, 61st Leg., 2015 Gen. Sess. (Utah 2015).

197. See, *e.g.*, Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36 HARV. J.L. & PUB. POL'Y 403, 403–04 (2013) (discussing the challenges lawmakers face in keeping up with changing technology).

198. See, *e.g.*, Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247, 259 (2011) (discussing the import of looking beyond the privacy laws on the books to privacy practices in the field and on the ground).

199. See, *e.g.*, Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1843 (2015) (discussing how “the usual requisites of democratic authorization are lacking with policing”).

200. See, *e.g.*, Lee Demetrius Walker & Richard W. Waterman, *Elections as Focusing Events: Explaining Attitudes Toward the Police and the Government in Comparative Perspective*, 42 LAW & SOC'Y REV. 337, 346–47 (2008) (noting that in the United States, “[l]ocal police are generally accountable to the mayor and city council” and “many cities have established nonpartisan local elections to aid in the oversight of the police”).

201. See sources and examples cited *supra* note 26.

regions, and by specialized agencies, such as the state highway patrol.²⁰² The data collection focused on the primary police department serving each city because the portfolio of law enforcement activities by the municipal police department is broader than specialized agencies.²⁰³ Moreover, the primary municipal police agency typically serves the greater portion of the city area and more people.²⁰⁴

Focusing on the 100 largest cities yielded diversity in terms of region of the United States and size of the city, while still maintaining focus on policies that will affect the largest number of people. The sizes of the cities ranged from more than 8.4 million people in New York City to less than 250,000 people in cities such as Fremont, California; Scottsdale, Arizona; Chesapeake, Virginia; and Madison, Wisconsin.²⁰⁵ In addition to containing more affected people, prominent cities help set the standards for others to emulate.²⁰⁶ Large cities also have a greater market power to influence the technology surrounding body cameras, including redaction software.²⁰⁷

For the 100 largest cities, a team of eight obtained information on:

- (1) whether the main municipal police department serving that jurisdiction is considering adopting, has plans to adopt, or has already deployed body cameras;
- (2) the rationale(s) for the plans to adopt or adoption of body cameras; and
- (3) whether the municipal police department has a publicly available body camera policy governing the use of body cameras.²⁰⁸

202. See, e.g., David N. Falcone & L. Edward Wells, *The County Sheriff as a Distinctive Policing Modality*, 14 AM. J. POLICE 123, 123–26 (1995) (distinguishing county-level policing from municipal policing).

203. *Id.*

204. *Id.*

205. See *The Largest US Cities: Cities Ranked 1 to 100*, CITY MAYORS STATISTICS http://www.citymayors.com/gratis/uscities_100.html (last visited Feb. 18, 2016); *Top 100 Biggest Cities*, CITY-DATA.COM, <http://www.city-data.com/top1.html> (last visited Feb. 18, 2016); Weissman Ctr. for Int'l Bus., Baruch Coll., *Top 100 Metropolitan Areas – Ranked by Population*, NYCDATA, http://www.baruch.cuny.edu/nycdata/world_cities/largest_cities-usa.htm (last updated July 1, 2015).

206. See, e.g., Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 840–51 (2008) (discussing mechanisms of policy diffusion by emulation).

207. See, e.g., Robinson Meyer, *The Big Money in Police Body Cameras*, ATLANTIC (Apr. 30, 2015), <http://www.theatlantic.com/technology/archive/2015/04/the-big-money-in-police-body-cameras/392009/> (discussing lucrative technology contracts).

208. We are grateful to the Brennan Center, which offered the excellent resource of linking to body camera policies in twenty-two of the jurisdictions examined as well as two other cities not among the one hundred largest in the United States, Rialto and Ferguson. *Police Body-Worn Camera Policies*,

The answers to each of the above questions were coded. Body camera policies were also collected for further coding. Where policies were not readily available through searches of online materials, team members called the department directly to obtain a copy of the policy or ascertain if one existed.

A policy codebook was generated through an iterative process based on an examination of the main recurring provisions and approaches taken in the body camera policies.²⁰⁹ The codebook contained fifty-one variable categories. Thirteen of the variables concerned the policy position on officer discretion regarding recording and mandates on what types of law enforcement encounters to record. Twelve of the variables concerned contexts where at least some body camera policies require that recording cease. Three of the variables concerned public and law enforcement access to recordings. Several other variables captured various other policy aspects such as data storage, redaction and retention provisions, and safeguards to ensure officer compliance.

Each policy was coded by a team of two. Inter-rater reliability was evaluated by computing Cohen's kappa using Stata 14 SE statistical software.²¹⁰ Inter-rater reliability assesses the consistency of coding between two or more coders.²¹¹ The evaluation found substantial agreement between the initial coding. Finally, after evaluating inter-rater reliability, we examined coding conflicts in a third review to resolve conflicts that may be due to coding error rather than the ambiguity of policy provisions and codes.

In our review, we found that eighty-eight out of the one hundred major municipal police departments examined have piloted or used body cameras, or have plans to do so. The distribution of the body camera adoption status is summarized in Table 1 below.

BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/body-cam-city-map> (last updated Sept. 26, 2016). The Brennan Center has also done a laudable job of summarizing some key approaches in the twenty-two jurisdictions. We are also grateful to the Reporters Committee for Freedom of the Press, which generated an excellent body-worn camera legislation and policy map linking to policies across the nation. *Access to Police Body-Worn Camera Video*, REPS. COMMITTEE FOR FREEDOM PRESS, <https://www.rcfp.org/bodycams> (last visited Feb. 20, 2016).

209. For a discussion of constructing variables and coding laws, see, for example, Charles Tremper, Sue Thomas & Alexander C. Wagenaar, *Measuring Law for Evaluation Research*, 34 EVAL. REV. 242, 252–55 (2010).

210. See STATA, www.stata.com. For an overview of the kappa statistic, a frequently used test of inter-rater reliability, see, for example, Kevin A. Hallgren, *Computing Inter-Rater Reliability for Observational Data: An Overview and Tutorial*, 8 TUTOR QUANT METHODS PSYCHOL. 23, 23–30 (2012); Anthony J. Viera & Joanne M. Garrett, *Understanding Interobserver Agreement: The Kappa Statistic*, 37 FAMILY MED. 360, 360–62 (2005).

211. Hallgren, *supra* note 210, at 24–25; see also Viera & Garrett, *supra* note 210, at 362.

Table 1. Body Camera Adoption Status Among Police Departments in the 100 Largest U.S. Cities

Body Camera Adoption Status	Number of Departments
Does not use officer-worn body cameras	12
Has piloted or is piloting the use of body cameras	36
Plans to pilot or use body cameras in the future	24
Extending body camera use throughout force	28

Local controversies involving the police departments spurred at least sixteen of the jurisdictions to pilot body cameras. National controversies over use of force, especially the Ferguson protests, figured heavily in the decisions of twenty-four jurisdictions to adopt body cameras. Another oft-cited reason for adopting body cameras was the general interest in improving accountability, transparency, and trust in the police.

In all, we were able to obtain thirty-nine police department policies for coding. In addition, three police departments without publicly available body camera policies were in states with legislation available for coding.²¹² For these three departments we coded the state law because it offers the baseline rules for all police departments in the state. Therefore, we coded policies governing the deployment of police-worn body cameras by the municipal police departments serving forty-two jurisdictions.

B. Policy Splits Over Privacy Protection

One of the major body camera policy debates is how much discretion officers will have in deciding when to record or not.²¹³ The two polar extremes of discretion are complete officer discretion or no discretion at all, because of mandated continuous recording.²¹⁴ Continuous recording is controversial to privacy proponents and law enforcement officers because of the heavy burden on the privacy of officers and members of the public they encounter.²¹⁵ Continuous recording is advocated by the ACLU of

212. *See supra* text accompanying notes 120–53.

213. *See, e.g.,* Stanley, *supra* note 86, at 2–3 (“Perhaps most importantly, policies and technology must be designed to ensure that police cannot ‘edit on the fly’ — i.e., choose which encounters to record with limitless discretion. If police are free to turn the cameras on and off as they please, the cameras’ role in providing a check and balance against police power will shrink and they will no longer become a net benefit.”)

214. *See id.*

215. *Id.* at 3.

Washington State, but not the national office of the ACLU.²¹⁶ Texas, one of only a handful of states to enact body camera legislation, delegates a lot of the details of what policies to adopt to law enforcement agencies—but mandates that agencies may not adopt a continuous recording model.²¹⁷

Even as debates continue, a consensus is appearing in the body camera policies that takes a middle-ground approach on discretion. The most prevalent model of police recording discretion—followed in 80% of the jurisdictions coded—is a limited-discretion model.²¹⁸ A limited-discretion model curtails officer discretion by requiring recording of several specified law enforcement activities, while leaving some situations up to officer discretion.²¹⁹ Of the remainder of the jurisdictions coded, 19% follow a highly-limited-discretion model. This highly-limited-discretion approach requires that body cameras record during all law enforcement encounters with the public, with only limited exceptions.²²⁰

There is also a general consensus regarding the mandatory recording of several of the most commonplace and potentially controversial types of law enforcement encounters.²²¹ Almost all the departments coded mandate recording of terry stops, traffic stops, arrests, and pursuits.²²² Most also mandate the recording of responses to calls for service, searches, uses of force, and encounters that escalate or get adversarial.²²³ Notably, in light of the national controversy over the death of Freddie Gray in Baltimore during

216. *See supra* note 24.

217. TEX. OCC. CODE ANN. § 1701.655(a)–(b) (West Supp. 2016).

218. Out of the forty-two jurisdictions coded, thirty-four follow a limited-discretion model.

219. *See, e.g.*, MARK G. PETERS & PHILIP K. EURE, BODY-WORN CAMERAS IN NYC: AN ASSESSMENT OF NYPD'S PILOT PROGRAM AND RECOMMENDATIONS TO PROMOTE ACCOUNTABILITY ii (2015), <http://www.nyc.gov/html/oignypd/assets/downloads/pdf/nypd-body-camera-report.pdf> (defining a limited-discretion model).

220. *See, e.g.*, Charlotte-Mecklenburg Police Dep't, Directive 400-006 (Apr. 29, 2015), <http://www.cjin.nc.gov/infoSharing/Presentations/BWC%20Directive%20400-006.pdf> (“While on duty, BWCs shall be turned on and activated to record responses to calls for service and interactions with citizens.”); Phila. Police Dep't, Directive 4.21, § 4 (Apr. 20, 2015), <http://www.phillypolice.com/assets/directives/D4.21-BodyWornCameras.pdf> (“Body-Worn Cameras shall be activated when responding to all calls for service and during all law enforcement related encounters and activities involving the general public.”); Phx. Police Dep't, Operations Order 4.49, at 2 (Apr. 2013), <https://www.bwscorecard.org/static/policies/2013-04%20Phoenix%20-%20BWC%20Policy.pdf> (“The VIEVU PVR-LE2 camera must be activated during all investigative or enforcement contacts.”).

221. For a discussion of the implications of the body camera recording policies for the transformation of evidence available to courts, see Fan, *supra* note 46.

222. *Id.*

223. *Id.*

transportation by the police, many body camera policies require recording of suspect transportation.²²⁴

There is much less consensus, however, in body camera policies about when recording should cease to protect privacy of victims and witnesses. The distribution of policy positions on the main privacy contexts is given in Table 2.

Table 2. Events that Should Not Be Recorded According to the Forty-two Publicly Available Body Camera Recording Policies and Laws Coded²²⁵

Context	Mandatory: Number of Departments	Discretionary: Number of Departments	If Requested: Number of Departments
Restrooms ²²⁶	30	0	0
General provision on places where there is a reasonable expectation of privacy	25	2	0
Surreptitious recording of conversations	22	3	3
Informants	22	3	3
Hospitals ²²⁷	20	9	2
Nudity or strip searches	12	2	0
Home	6	2	4
Sensitive circumstances generally	4	10	0
Victim/Witnesses, General	2	11	11

224. See, e.g., Sheryl Gay Stolberg & Jess Bidgood, *Starkly Different Accounts of Freddie Gray's Death as Trial of Officer Begins*, N.Y. TIMES, Dec. 3, 2015, at A20 (discussing the controversy and mystery over Freddie Gray's death while being transported in custody).

225. The numbers in the right-most two columns may not add up to forty-two because some policies may not specify a position on the issue.

226. Two departments state that officers may not record unless there is a crime, criminal investigation, or call for service in progress.

227. Two departments state that recording is allowed but officers should try to avoid capturing intimate details such as being in a state of undress. These are counted as discretionary. Eleven departments prohibit recording unless there is a crime, criminal investigation, or call for service in progress. These are counted as mandatory jurisdictions.

Table 2. Events that Should Not Be Recorded According to the Forty-two Publicly Available Body Camera Recording Policies and Laws Coded Continued

Context	Mandatory: Number of Departments	Discretionary: Number of Departments	If Requested: Number of Departments
Sexual Assault Victims ²²⁸	4	7	4
Community caretaking	4	8	0
Minors	2	3	0

As the table summarizes, jurisdictions around the nation seem to agree widely that restrooms are a private place and that recording should cease there. The widespread consensus on restrooms is not surprising given that concerns about recording officers in bathrooms were often raised by police unions.²²⁹ Finally, a majority of policies also have provisions protecting privacy in medical facilities and for informants.

Two other privacy protections in a majority of policies reflect compliance with state laws governing privacy torts and forbidding wiretapping. Many policies require that recording cease in places where there is a reasonable expectation of privacy. Such provisions ensure that officers do not run afoul of common law privacy torts for intrusion upon seclusion and publicizing the private life of another.²³⁰ Another widespread prohibition bars the surreptitious recording of private conversations. This complies with provisions in many state anti-wiretapping statutes forbidding surreptitious recording without the consent of a party to the conversation.²³¹ In practice, because body cameras are visibly worn by officers, surreptitious recording is usually not a problem because the recording is made overtly.

228. Two jurisdictions provide that officers may record, but should try to avoid capturing intimate details such as being in a state of undress. This is counted as discretionary.

229. *E.g.*, *Police Body Cameras Raise Privacy Concerns*, N.Y. DAILY NEWS (Mar. 15, 2014), <http://www.nydailynews.com/news/national/cops-body-cameras-raise-privacy-concerns-article-1.1722969>; O’Ryan Johnson & Erin Smith, *Boston Brass, Police Union Fear Body Cams on Cops*, POLICEONE.COM (Dec. 3, 2014), <https://www.policeone.com/police-products/body-cameras/articles/7921491-Boston-brass-police-union-fear-body-cams-on-cops/>.

230. For an overview, see RESTATEMENT (SECOND) OF TORTS §§ 652B–D (AM. LAW INST. 1977).

231. *See, e.g.*, Chi. Police Dep’t, Special Order S03-14, § IV.E (May 10, 2016), <http://directives.chicagopolice.org/directives/data/a7a57b38-151f3872-56415-1f38-89ce6c22d026d090.pdf?hl=true> (“The surreptitious audio recording of a private conversation is prohibited by law.” (emphasis omitted)).

What is particularly striking is how few policies have provisions protecting victims and witnesses. Even the policies that do contain provisions on victims and witnesses tend to either give officers discretion to decide whether to cease recording, or put the burden on the victim or witness to request that recording cease. There is a sparsity of provisions protecting even the victims of sensitive crimes, where victim reporting has historically been a concern, such as sexual assault. Finally, few provisions address the protection of minors despite the nation's tradition, albeit eroding, of keeping juvenile records confidential so youths will not be haunted for the rest of their lives by mistakes made when young.²³²

III. A PAIR OF PROPOSALS TO ADDRESS TWO DISTURBING TRENDS

The body camera policy coding and analysis found greater convergence among policies promulgated by diverse communities across the nation than among the few states to legislate on the issue of how to balance transparency and privacy.²³³ The body camera policies have a generally similar structure in terms of defining law enforcement events where recording is required and private or sensitive contexts where recording must cease.²³⁴ This strategy of protecting privacy by controlling police discretion regarding when to record or not is similar to the most comprehensive body camera legislation enacted to date, that of Illinois.²³⁵ Framed by democratically elected legislators rather than police officials, the Illinois legislation strikes a similar balance in limiting discretion by mandating when body cameras must record and when recording must cease to safeguard privacy.²³⁶

The early-moving legislatures and police departments to publicly promulgate body camera policies play an important role in offering a choice of legal templates for other jurisdictions.²³⁷ The laws and policies

232. RIYA SAHA SHAH, LAUREN FINE & JAMIE GULLEN, JUVENILE LAW CTR., JUVENILE RECORDS: A NATIONAL REVIEW OF STATE LAWS ON CONFIDENTIALITY, SEALING AND EXPUNGEMENT 6, 8 (2014) (discussing the history of, and widespread belief in, the confidentiality of juvenile records to preserve the ability for youths to make a fresh start and the reality of eroding confidentiality since the 1990s).

233. Compare *supra* Part I.B.1, with *supra* Part II.B.

234. See discussion *supra* Part II.B.

235. See *supra* text accompanying notes 123–30.

236. *Id.*

237. See, e.g., Frances Stokes Berry & William D. Berry, *Innovation and Diffusion Models in Policy Research*, in THEORIES OF THE POLICY PROCESS 307, 310–50 (Paul A. Sabatier & Christopher M. Weible eds., 3d ed. 2014) (discussing models of emulation, early and late adoption); Jill Clark, *Policy Diffusion and Program Scope: Research Directions*, 15 PUBLIUS 61 (1985) (discussing leaders and laggards in policy diffusion).

guiding deployment of body cameras on the ground show what is feasible in the field.²³⁸ Examining these laws and policies offers a window into how communities are balancing the apparent conflict between transparency and privacy. The empirical evaluation also illuminates areas of concern in need of address.

This Part discusses two problematic issues and proposes two approaches that better balance transparency and privacy. The first is the disturbing approach of some states to offer blanket or broad exemptions for body camera video from public disclosure, defeating the key purposes behind public support for body cameras.²³⁹ This Part argues that redaction rather than blanket or broad exemptions from public disclosure is the better approach to reconcile the important values of privacy and transparency without sacrificing either.²⁴⁰ This Part discusses the technological challenges with redacting body camera video, which involves images in motion. The Article argues that rather than abandoning or stunting technological innovation by favoring exemptions from disclosure, the law should foster the development of technology that offers a better solution.

The second area of concern illuminated by the empirical evaluation of body camera policies is the fractures and gaps in the protection of victims and witnesses.²⁴¹ Currently, to the extent the body camera policies address the issue at all, they generally either put the burden on victims and witnesses to ask officers to cease recording or rely on officer discretion.²⁴² To better address the risk of privacy and other harms to victims and witnesses, and prevent the chilling of reporting and seeking help, the Article advocates for a default rule that officers ask victims and witnesses if they may record rather than put the burden on victims and witnesses to request that recording cease.²⁴³

A. *Automated Redaction Rather than Broad or Blanket Exemptions*

A disturbing legislative trend is to carve blanket or broad exemptions in public disclosure laws for body camera video.²⁴⁴ Among the earliest states to successfully pass legislation, five states have enacted either a

238. See, e.g., Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POL. SCI. REV. 1174 (1973) (offering a model of diffusion).

239. See *supra* text accompanying notes 110–24.

240. See discussion *infra* Part III.A.

241. See discussion *supra* Part II.B.

242. See discussion *supra* Part II.B.

243. See discussion *infra* Part III.B.

244. See, e.g., Simons, *supra* note 14 (discussing legislation to broadly exempt body camera footage from public disclosure).

blanket or a broad exemption for body camera footage from public disclosure laws.²⁴⁵ Numerous bills to broadly exempt body camera footage from disclosure are pending in other states.²⁴⁶ The legislation vary in approach from wholly exempting body camera video from public disclosure, to allowing access only in a few instances, to creating several high hurdles to obtaining the footage, and even then only in certain circumstances.²⁴⁷

Blanket or broad exemptions from public disclosure defeat several of the primary purposes of the body camera revolution—regulation by transparency, rebuilding public trust, and ensuring accountability.²⁴⁸ The benefits of body cameras become one-sided, providing better evidence for prosecutions.²⁴⁹ Also one-sidedly, body camera footage may be used to exonerate officers from wrongdoing—but the ability to alert the public to wrongdoing is disabled.²⁵⁰ The ability of body cameras to better inform the public about central issues of public concern is stunted.²⁵¹

It is cruelly ironic that South Carolina, site of the Walter Scott shooting where the officer’s account was disproved by bystander video, is an exemplar of the approach of creating a blanket exemption to disclosure.²⁵² The Walter Scott shooting is a cautionary tale about the need for video to

245. See *supra* text accompanying notes 110–24.

246. See, e.g., Hermann & Davis, *supra* note 17 (reporting that more than a dozen states and the District of Columbia are considering proposals to completely withhold or restrict access to body camera footage).

247. *Id.*

248. MEDIA FREEDOM & INFO. ACCESS CLINIC, *supra* note 18, at 10.

249. See, e.g., TEX. OCC. CODE ANN. § 1701.661(c)–(d) (West Supp. 2016) (exempting body camera video from public disclosure unless it is used as evidence in a criminal prosecution); Chi. Police Dep’t, Special Order S03-14, § II (May 10, 2016), <http://directives.chicagopolice.org/directives/data/a7a57b38-151f3872-56415-1f38-89ce6c22d026d090.pdf?hl=true> (“Recordings from the BWC can provide members with an invaluable instrument to enhance criminal prosecution.”); Dall. Police Dep’t, General Order 3XX.00 Body Worn Cameras, at 1, https://rcfp.org/bodycam_policies/TX/Dallas_BWC_Policy.pdf (“The Department has adopted the use of Body Worn Cameras (BWC) to enhance our citizen interactions and provide additional investigatory evidence.”).

250. See, e.g., Austin Police Dep’t, Policy 303, at 125 (May 1, 2015), <https://www.documentcloud.org/documents/2661319-Austin-Police-Department-Policy-Manual-2015.html> (stating that body cameras can protect officers from “false allegations of misconduct”); Chi. Police Dep’t, Special Order S03-14, § II (May 10, 2016), <http://directives.chicagopolice.org/directives/data/a7a57b38-151f3872-56415-1f38-89ce6c22d026d090.pdf?hl=true> (stating that body-worn cameras “can protect members from false accusations through the objective documentation of interactions between Department members and the public”).

251. See, e.g., MEDIA FREEDOM & INFO. ACCESS CLINIC, *supra* note 18, at 10 (“Exempting body cam footage . . . ignore[s] the crucial oversight function for which FOIL was designed—and they ignore it in precisely the realm of government functioning that most requires accountability.”).

252. See *supra* text accompanying notes 112–14.

reveal crucial details to the public.²⁵³ The Scott shooting jolted the state into considering body cameras.²⁵⁴ Yet the South Carolina legislation deprives the public of the crucial video, instead leaving it to the discretion of law enforcement officers about whether to share video.²⁵⁵

One of the major reasons for enacting exemptions is because redaction is expensive and challenging in the body camera context.²⁵⁶ Outfitting fifty officers with body cameras generates the equivalent of 1.6 million feature-length movies in data.²⁵⁷ When a request for video of an incident is filed, an officer must sit for an estimated two hours just to review the video and figure out what must be redacted—and then take another estimated ten hours to complete the redaction.²⁵⁸ Matters get much worse if a requester makes a large-volume demand for public disclosure. To take a famous example, in Seattle, a “notorious requester” sought all “360-plus terabytes” of police video.²⁵⁹ Officials estimated that responding to that single person’s request and manually redacting private information would cost “thousands of person-years, and hundreds of millions of dollars.”²⁶⁰ Numerous police departments have indicated that the potentially crippling costs are deterring them from adopting body cameras.²⁶¹ Departments that face expensive body camera video public disclosure requests are pressing for exemptions.²⁶²

Automating redaction through software relying on machine learning is the best path out of the dilemma of broad exemptions to disclosure or crippling costly human redaction. Currently, software can redact footage from surveillance cameras mounted on a stable, still surface with more than

253. Schmidt & Apuzzo, *supra* note 113.

254. Lowery & Izadi, *supra* note 112.

255. S.C. CODE ANN. § 23-1-240(G)(3) (Supp. 2015).

256. See, e.g., St. John Barned-Smith, *Body Cams on Police Pose Logistical Woes*, Hous. Chron., Apr. 17, 2015, at A1 (discussing high costs of manual redaction for the colossal amounts of data generated).

257. *Id.*

258. POLICE EXEC. RESEARCH FORUM, *supra* note 13, at 33.

259. *Seattle Police Body Camera Program Highlights Unexpected Issues*, NPR (Apr. 15, 2015 5:36 PM), <http://www.npr.org/2015/04/15/399937749/seattle-police-body-camera-program-highlights-unexpected-issues>.

260. Mark Harris, *The Body Cam Hacker Who Schooled the Police*, BACKCHANNEL (May 22, 2015), <https://medium.com/backchannel/the-body-cam-hacker-who-schooled-the-police-c046ff7f6f13>.

261. POLICE EXEC. RESEARCH FORUM, *supra* note 13, at 31; Timothy Williams, *Police Cam Downside: Your Arrest Hits YouTube*, N.Y. TIMES, Apr. 27, 2015, at A1.

262. Bill Lucia, *Massive Public Records Requests Cause Police to Hit Pause on Body Cam Programs*, CROSSCUT.COM (Nov. 10, 2014), <http://crosscut.com/2014/11/body-cams-washington-seattle-privacy-disclosure/>; Hannah Bloch-Wehba & Adam Marshall, *State Legislatures Seek to Exempt Policy Body Camera Footage from Open Records Laws*, REPS. COMMITTEE FOR FREEDOM PRESS (Apr. 1, 2015), <http://www.rcfp.org/browse-media-law-resources/news/state-legislatures-seek-exempt-police-body-camera-footage-open-recor>.

ninety percent accuracy.²⁶³ The technological challenge with automating the redaction of body camera footage is that the images are taken by a camera in motion, reducing the precision of software in recognizing faces and other information that must be redacted.²⁶⁴ To try to spur innovation, a major city police department has even hosted a hack-a-thon to deal with the body camera video redaction challenge.²⁶⁵ In the interim, to cope with large-scale public disclosure requests, the department resorted to blurring all the footage in videos released.²⁶⁶ As one observer aptly put it: “The result looks like surveillance conducted by a drunk ghost.”²⁶⁷ The videos essentially lose nearly all their informational value because it is virtually impossible to discern what is going on under the ghostly blur, as indicated in the still below.²⁶⁸



Major technology companies such as Microsoft are working on designing redaction software that can redact private information from body camera footage.²⁶⁹ The most promising approaches involve machine

263. Interview with Mahesh Punyamurthula, *supra* note 33.

264. *Id.*

265. Bill Schrier, *Inside the Seattle Police Hackathon: A Substantial First Step*, GEEKWIRE (Dec. 20, 2014 7:24 AM), <http://www.geekwire.com/2014/seattle-police-hackathon-substantial-first-step/>.

266. Jessica Glenza, *Seattle Police Post Blurry Body-Camera Videos to YouTube in Transparency Bid*, GUARDIAN (Mar. 9, 2015, 4:49 PM), <http://www.theguardian.com/us-news/2015/mar/09/seattle-police-posting-body-camera-footage-youtube-transparency>.

267. Kate Knibbs, *Seattle Police Put Redacted Body Cam Footage on YouTube*, GIZMODO (Mar. 3, 2015, 10:40 AM), <http://gizmodo.com/seattle-police-put-redacted-body-cam-footage-on-youtube-1689139204>.

268. SPD BodyWornVideo, *Seattle Police Body Worn Video from Martin Luther King Jr. Protest (Video 2)*, YOUTUBE (Feb. 25, 2015), <https://www.youtube.com/watch?v=mUiMLRTSEoQ>.

269. Interview with Mahesh Punyamurthula, *supra* note 33.

learning to “teach” systems to discern what to redact.²⁷⁰ The principle behind machine learning is to train systems to perform tasks through examples rather than laboriously programming specific algorithms for each task.²⁷¹ In the domain of artificial intelligence, machine learning is used to design software that runs such complex tasks as speech recognition, robot control, natural language processing, and computer vision.²⁷² Or to take a readily recognizable example, when your Gmail or Outlook inbox sorts out spam offering sexual pleasure enhancers, fantastical prize winnings, and the like, the technology is deploying machine learning to discern what is spam and what is not.²⁷³

New redaction technology adapted to cameras in motion can help remove private information while preserving the key video narrative to inform the public.²⁷⁴ Such an approach is preferable to starving the public of crucial information and disabling much of the innovation and benefits of body cameras. Exemptions would also destroy the incentives to improve technology to better accommodate the values of transparency by public disclosure and privacy without sacrificing either. Rather than enacting exemptions, a better approach would be to enact laws that foster technological innovation. Such laws should include safe harbors for the use of redaction technology to encourage technological innovation and use.

The safe-harbor strategy was successfully deployed to foster the explosive growth of the Internet and the benefits of a networked world that we enjoy today.²⁷⁵ To encourage technological innovation, Congress in 1998 passed the Digital Millennium Copyright Act (DMCA), which included five safe harbors.²⁷⁶ Four of the safe harbors immunized Internet

270. Cf., e.g., Chad Cumby & Rayid Ghani, *A Machine Learning Based System for Semi-Automatically Redacting Documents*, ASS'N FOR ADVANCEMENT ARTIFICIAL INTELLIGENCE 1629–30 (2011), <http://www.aaai.org/ocs/index.php/IAAI/IAAI-11/paper/view/3528/4031> (detailing a machine learning based approach to redacting documents).

271. M.I. Jordan & T.M. Mitchell, *Machine Learning: Trends, Perspectives and Prospects*, SCIENCE, July 17, 2015, at 255–60, <http://science.sciencemag.org/content/349/6245/255.full>; see MACHINE LEARNING: AN ARTIFICIAL INTELLIGENCE APPROACH 5–6 (Ryszard S. Michalski, Jaime G. Carbonell & Tom M. Mitchell eds., 1983).

272. Jordan & Mitchell, *supra* note 271.

273. Cade Metz, *Google Says Its AI Catches 99.9 Percent of Spam*, WIRED (July 9, 2015, 2:00 PM), <http://www.wired.com/2015/07/google-says-ai-catches-99-9-percent-gmail-spam/>; Dave Strickler, *Artificial Intelligence Scopes Out Spam*, NETWORK WORLD (Apr. 14, 2003, 1:00 AM), <http://www.networkworld.com/article/2341829/tech-primers/artificial-intelligence-scopes-out-spam.html>.

274. Interview with Mahesh Punyamurthula, *supra* note 33.

275. For a discussion, see, for example, Nicholas W. Bramble, *Safe Harbors and the National Information Infrastructure*, 64 HASTINGS L.J. 325, 332–43, 350–63 (2013); Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 235–38 (2009); Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101, 104–05 (2007).

276. Digital Millennium Copyright Act, 17 U.S.C. § 512(a)–(e) (2012).

service providers from monetary damages for providing key services to the infrastructure of the Internet.²⁷⁷ The crucial services include (1) providing Internet access, (2) providing temporary storage or caching of data, (3) passively storing or hosting user materials, and (4) giving users location tools, such as linking to content on various web sites.²⁷⁸ A fifth safe harbor immunizes public or nonprofit institutions of higher education that act as Internet service providers from infringing acts by faculty members and graduate students.²⁷⁹ Another example of a statutory safe harbor to encourage the development of the Internet and foster online expression comes in the Lanham Act, as amended to give online providers who host content written by others a safe harbor from liability for trademark infringement.²⁸⁰

To optimize both the benefits of public disclosure and protect privacy, safe harbors should incentivize the development of redaction technology. Redaction services providers, and the law enforcement departments that use them, should be immunized from monetary liability for inadvertent disclosures of private information after automated redaction, at least in the earlier days of such technology. For those who are concerned with immunity that outlasts the training-wheels period of technology, such safe-harbor provisions can contain a sunset clause. Sunset clauses deal with the problem of laws that linger even when the needs of the time no longer require them.²⁸¹ To overcome inertia and the difficulties of repealing the status quo, sunset laws program into laws expiration dates for when the aims of the law are deemed served.²⁸² Such a strategy to foster technological innovation is preferable to blanket or broad exemptions from public disclosure that destroy the incentives for innovation and deprive the public of much of the benefits of the body camera revolution.

Body camera laws and policies should take the Oklahoma approach of authorizing public disclosure of body camera recordings with redaction to protect privacy rather than the South Carolina approach of exempting body camera footage from disclosure altogether.²⁸³ The Oklahoma law requires

277. *Id.* § 512(a)–(d).

278. *Id.*

279. *Id.* § 512(e).

280. Lanham Act, 15 U.S.C. § 1114(2) (2012).

281. *See, e.g.*, AM. ENTERPRISE INST. FOR PUB. POL'Y RES., ZERO-BASED BUDGETING AND SUNSET LEGISLATION 25 (1978) (detailing aims of sunset provisions); Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 249–56 (2007) (discussing sunset approaches); Richard E. Myers, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1357–60 (2008) (discussing sunset provisions).

282. Gersen, *supra* note 281, at 248–53.

283. *See* OKLA. STAT. ANN. tit. 51 § 24A.8(A)(9)–(10) (West Supp. 2016) (“Law enforcement agencies shall make available for public inspection and copying, if kept, the following

that law enforcement agencies make available for public disclosure body camera recordings that depict ten categories of law enforcement encounters, such as uses of force, detentions of any length, and traffic stops.²⁸⁴ To protect privacy while promoting public disclosure, the law requires the redaction or obscuring of portions of the recording that depict sensitive or private situations.²⁸⁵ Examples of information that must be redacted include depictions of dead bodies or nudity; the identification of minors under sixteen or other information that would undermine the legal requirement to keep juvenile records confidential; and images that would enable the identification of victims of sex crimes or domestic violence.²⁸⁶ Such an approach optimizes the values of public disclosure without sacrificing privacy or the need to protect community members.

B. Giving Victims and Witnesses Control over Whether to Record

The empirical evaluation of body camera policies across the nation in Part II.B illuminated the lack of attention to the protection of victims and witnesses. Only a little over half of the body camera policies coded even address victim and witness protection.²⁸⁷ Less than half of the policies coded have provisions concerning the revelation of the identity and other intimate details of sexual assault victims.²⁸⁸ This is particularly remarkable given that states have recognized the strong interest in protecting the identity of sexual assault victims and have even created causes of action to sue if public officials release their identity information.²⁸⁹ Moreover, to the extent policies even address the issue, most either put the burden on the

records: . . . Audio and video recordings from recording equipment attached to law enforcement vehicles or associated audio recordings from recording equipment on the person of a law enforcement officer; provided, the law enforcement agency may, before releasing any audio or video recording provided for in this paragraph, redact or obscure specific portions of the recording which [involve sensitive or private information in enumerated contexts.]; S.C. CODE ANN. § 23-1-240(G)(1) (Supp. 2015).

284. OKLA. STAT. ANN. tit. 51 § 24A.8(A)(10).

285. *Id.* § 24A.8(A)(10)(b).

286. *Id.*

287. See discussion *supra* Part II.B and Table 2.

288. *Id.*

289. See, e.g., N.Y. CIV. RIGHTS LAW § 50-c (McKinney 2009) (giving sexual assault victims a right to sue for damages for the revelation of their identity by public officials); see also, e.g., *Doe v. Bd. of Regents*, 452 S.E.2d 776, 780 (Ga. Ct. App. 1994) (discussing state-law prohibitions on disclosing the identity of a sexual assault victim); *Doe v. N.Y. Univ.*, 786 N.Y.S.2d 892, 903–04 (N.Y. Sup. Ct. 2004) (granting sexual assault victims' requests to seal their identities as confidential notwithstanding objection by news organization); Paul Marcus & Tara L. McMahon, *Limiting the Disclosure of Rape Victims' Identities*, 64 S. CAL. L. REV. 1019, 1021–35 (1991) (discussing constitutionality of state laws limiting the identification of sexual assault victims).

victim or witness to tell the officer to stop recording or leave the decision to cease in the discretion of the officer.²⁹⁰

Even when policies address the interest in protecting victims and witnesses, the focus on enhancing evidence for prosecution may trump the need to protect the victim in the case. For example, the San Diego Police Department policy provides that “[v]ictim and witness interviews will generally not be recorded.”²⁹¹ However, the policy of protection is inverted for domestic violence victims on the following rationale:

Domestic violence victims often recant their statements as early as the following morning after a crime. Some victims go so far as to testify that the officer fabricated their statement. Victims may also make their children unavailable for investigators or court to avoid their providing statements. For these reasons, domestic violence victims of violent felonies such as strangulation, assault with a deadly weapon, or anything requiring hospitalization should be recorded. Officers should also record the statements of children of domestic violence victims who are witnesses in these types of cases.²⁹²

The evidentiary dilemma in domestic violence cases that the San Diego Police Department describes is well-known and difficult.²⁹³ Domestic violence cases are often dropped or pled down because of victim recantation or refusal to testify after pressure from batterers.²⁹⁴ Nor is this a uniquely American challenge. Indeed, as discussed in Part I.B.2, current body camera guidelines in the United Kingdom similarly emphasize the particular need for recording in domestic abuse cases because victims may later refuse to cooperate or become hostile witnesses.²⁹⁵

Another important consideration beyond gathering evidence for a particular prosecution, however, is the risk of deterring victims from seeking help at all.²⁹⁶ If the price of calling the police after a battering or a

290. See discussion *supra* Part II.B and Table 2.

291. San Diego Police Dep’t, Procedure No. 1.49, at 7 (July 8, 2015), https://rcfp.org/bodycam_policies/CA/SanDiegoBWCPolicy_update.pdf.

292. *Id.*

293. See, e.g., Deborah Tuerkheimer, Crawford’s Triangle: Domestic Violence and the Right of Confrontation, 85 N.C. L. REV. 1, 14–16 (2006) (discussing how the conduct of batterers often causes victims to resist the later prosecution of batterers through recantation, refusal to testify, disappearance, or refusal to “press charges”).

294. *Id.*

295. See *supra* text accompanying notes 179–86.

296. See, e.g., Deborah S. v. Diorio, 583 N.Y.S.2d 872, 880 (N.Y. Civ. Ct. 1992) (“Concerns pertaining to privacy sometimes result in a victim failing to report a sexual offense. In its final report,

sexual assault is to have one's most painful moments recorded and to have one's children recorded, victims may be even more reluctant to call 911.²⁹⁷ The dangers are aggravated further by the fact that most body camera policies are silent about the protection of minors captured on video.²⁹⁸ If children are at the scene of a domestic violence incident, the victim may further fear calling the police because of the risks of child removal and liability for exposing children to domestic violence.²⁹⁹

Courts and experts have expressed concern about the underreporting of serious crimes, such as assault, child abuse, intimate partner violence, sexual assault, and elder abuse.³⁰⁰ Psychologists and scholars have called for attention to how seeking justice can impose further harms on victims.³⁰¹ The major societal costs of victim deterrence from seeking help must also be weighed against evidentiary benefits. The price of seeking help should not be further harm and intimidation. Moreover, the risks of further privacy harms should not regressively heighten for the most vulnerable and injured and for victims historically most overlooked by the justice system.³⁰²

the Governor's Task Force on Rape and Sexual Assault documented that sexual offenses are vastly underreported. Undoubtedly, there is even less incentive for a victim to report the sexual assault if his or her identity may become public.”), *aff'd as modified*, 612 N.Y.S.2d 542 (N.Y. App. Term 1994).

297. *See id.*

298. *See discussion supra* Part II.B.

299. *See, e.g.,* Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, 123–29 (2001) (discussing the risks of interpreting child abuse statutes to include exposure to domestic violence as a form of maltreatment).

300. *See, e.g.,* Deborah S., 583 N.Y.S.2d at 880 (discussing findings of “vast[] underreporting” of sexual assault by task force); INST. OF MED. & NAT'L RESEARCH COUNCIL, NEW DIRECTIONS IN CHILD ABUSE AND NEGLECT RESEARCH 38 (Anne C. Petersen et al. eds., 2014) (discussing the hidden problem of child abuse and underreporting); NAT'L CTR. ON ELDER ABUSE, NATIONAL ELDER ABUSE INCIDENCE STUDY 3 (1998), http://aoa.gov/AoA_Programs/Elder_Rights/Elder_Abuse/docs/ABuseReport_Full.pdf (discussing underreporting of elder abuse); RICHARD FELSON & PAUL-PHILIPPE PARÉ, THE REPORTING OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT BY NONSTRANGERS TO THE POLICE 7–8, 22–23 (2005) (discussing underreporting of assaults and sexual assaults if the victim knows the assailant in any way).

301. *See, e.g.,* Mary Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protection*, 55 B.C. L. REV. 775, 783–91 (2014) (discussing how victims of violent crimes face the risk of further harms when seeking justice in an adversarial system); Patricia A. Frazier & Beth Haney, *Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives*, 20 LAW & HUM. BEHAV. 607, 620 (1996) (discussing the survey data on the adverse experiences victims have seeking justice); Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 159–60 (2003) (discussing major risks and obstacles for victims who seek justice); Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOC. JUST. RES. 313, 315–16, 321 (2002) (discussing how criminal proceedings can frequently prove to be a “second[] victimization” for the crime victims involved).

302. *See generally* Reva B. Siegel, “*The Rule of Love*”: *Wife Beating As Prerogative and Privacy*, 105 YALE L.J. 2117, 2150–70 (1996) (discussing historical justice system refusal to intervene in intimate partner violence cases).

Moreover, recording may also interfere with privileged communications between victims and social services providers.³⁰³ Over the years, law enforcement agencies have partnered with social services and victim advocate groups to match injured and vulnerable persons with care to prevent future injury and violence.³⁰⁴ Numerous states have explicitly recognized that the communication between the victim and advocates is privileged and confidential.³⁰⁵ Moreover, medical and mental health information is also privileged and confidential.³⁰⁶ Placing cameras on the scene of the attack may undermine the confidentiality of such important communications.³⁰⁷

Better balancing the benefits of recording victims and witnesses against the substantial risks of harm does not necessarily mean that recording should cease. Rather, a preferable approach is to put control over whether to record or not in the hands of the victim. The ACLU's model policy contains a salutary strategy to protect the privacy of victims and witnesses:

(2) When interacting with an apparent crime victim, a law enforcement officer shall, as soon as practicable, ask the apparent crime victim, if the apparent crime victim wants the officer to discontinue use of the officer's body camera. If the apparent crime victim responds affirmatively, the law enforcement officer shall immediately discontinue use of the body camera; and

(3) When interacting with a person seeking to anonymously report a crime or assist in an ongoing law enforcement investigation, a law enforcement officer shall, as soon as practicable, ask the person seeking to remain anonymous, if the person seeking to remain anonymous wants the officer to discontinue use of the officer's body camera. If the person seeking to remain anonymous

303. MURPHY, *supra* note 15, at 3–5.

304. See, e.g., CHARLES W. DEAN, RICHARD C. LUMB & KEVIN PROCTOR, SOCIAL WORK AND POLICE PARTNERSHIP: A SUMMONS TO THE VILLAGE STRATEGIES AND EFFECTIVE PRACTICES 14, 17 (2000), http://digitalcommons.brockport.edu/cgi/viewcontent.cgi?article=1000&context=crj_facpub (discussing the intersection of law enforcement and social work and responses to domestic violence); George Karabakakis, Social Work and Police Partnership, INT'L ASS'N CHIEFS POLICE (2009), <http://www.theiacp.org/Portals/0/pdfs/NationalPolicySummit2009/VTSocialWorkandPolicePartnership.pdf> (discussing partnership and results).

305. MURPHY, *supra* note 15, at 5.

306. See, e.g., Jeffrey R. Baker, *Necessary Third Parties: Multidisciplinary Collaboration and Inadequate Professional Privileges in Domestic Violence Practice*, 21 COLUM. J. GENDER & L. 283, 345–50 (2011) (discussing applicable privileges in the domestic violence context and gaps in protection of confidentiality).

307. MURPHY, *supra* note 15, at 3–5.

responds affirmatively, the law enforcement officer shall immediately discontinue use of the body camera.³⁰⁸

The burden of requesting that recording stop should not be placed on victims and witnesses. The well-known hesitation of people to assert their rights and preferences against authority figures is particularly intensified for victims and witnesses, especially those exposed to traumatizing experiences.³⁰⁹ The lack of realism in demanding an assertion of rights is especially problematic given the gendered nature of crimes such as sexual assault and domestic violence and what Janet Ainsworth has termed “the female register,” which avoids assertive, emphatic, and imperative terms.³¹⁰ Putting the burden on the officer to ask a victim or witness for permission to record—or at least to ask if recording may continue—is the better approach. The victim or witness should hold control over whether to be recorded, rather than bearing the burden of speaking out if they wish not to be recorded.

Encouragingly, some of the state body camera laws framed by democratically elected legislators demonstrate concern for protecting against disclosure of victim and witness information.³¹¹ A recently enacted New Hampshire law instructs officers not to record crime victim interviews “unless his or her express consent has been obtained before the recording is made.”³¹² Recordings also must comply with state protocols providing protections in sexual assault, domestic violence, stalking, harassment and child abuse or neglect cases.³¹³ Nebraska’s law takes the approach of requiring redaction of such information.³¹⁴ Illinois requires officers to cease recording at the requests of crime victims and witnesses.³¹⁵ Connecticut law prohibits disclosure of body-worn recordings of “the scene of an incident that involves a victim of domestic or sexual abuse.”³¹⁶ Oklahoma law requires redaction of images and information involving victims and witnesses from body camera video released pursuant to public disclosure

308. ACLU, *supra* note 24, at 2.

309. *See, e.g.*, Nadler, *supra* note 44, at 156 (discussing compliance with authority figures and hesitance to resist).

310. Ainsworth, *supra* note 44, at 284.

311. 50 ILL. COMP. STAT. ANN. 706/10-20(a)(4) (West Supp. 2016); OKLA. STAT. ANN. tit. 51, § 24A.8(A)(9)–(10) (West Supp. 2016); H.B. 7103, 2015 Gen. Assemb., June Spec. Sess. § 7(g) (Conn. 2015); Assemb. B. 162, 2015 Leg., 78th Reg. Sess. § 1(d) (Nev. 2015).

312. N.H. REV. STAT. § 105-D:2(VII)(d) (West Supp. 2016).

313. *Id.*

314. Legis. B. 1000, 104th Leg., 2nd Reg. Sess. (Neb. 2016).

315. 50 ILL. COMP. STAT. ANN. 706/10-20(a)(4).

316. Conn. H.B. 7103, § 7(g).

requests.³¹⁷ Nevada directs its police departments to protect the privacy of victims and witnesses.³¹⁸

This difference between democratically framed protections and those designed by police departments is important to highlight. Several states expressly delegate policy details down to police departments.³¹⁹ Others leave the task of defining body camera protocols to police departments by default, through the lack of statutory guidance. Even if police departments are left to fill in the details of body camera policies, it is important to examine what democratically accountable legislatures are doing when they do give detailed guidance because this may illuminate issues that police department body camera policies may be overlooking. The benefits of body cameras should not come at the price of deterring victims and witnesses from reporting or adding privacy harms to the injuries that victims have already experienced.

CONCLUSION

Privacy erosion is the price that people in modern technological society often pay for important social goods.³²⁰ That does not mean we should overpay. When you call 911 for help, the cost should not be the risk of your most painful and vulnerable moments ending up on YouTube for future employers, neighbors, and the world at large to see.³²¹ How to prevent this horrible—already happening to people—is one of the great dilemmas confronting communities across the nation after the body camera revolution.³²² This Article shed empirical light on how the conflict between privacy and police regulation by transparency is being resolved and illuminates two problems that should be of national concern.

The first issue is the enactment of blanket or overly broad exemptions from public disclosure that defeat much of the main goals of the body camera revolution.³²³ It is rare when civil liberties and civil rights proponents support putting more surveillance cameras on the street. The selling point of body cameras was sousveillance power—control by the

317. OKLA. STAT. ANN. tit. 51, § 24A.8(9)–(10).

318. Nev. Assemb. B. 162, § 1(d).

319. See *supra* text accompanying notes 21, 84.

320. See, e.g., Tamara Dinev & Paul Hart, *An Extended Privacy Calculus Model for E-Commerce Transactions*, 17 INFO. SYSTEMS RES. 61 (2006) (discussing the calculus of surrendering a degree of information privacy in exchange for benefits such as the ability to conduct transactions over the Internet).

321. See *supra* examples accompanying notes 1–2, 47, 103.

322. Elinson & Frosch, *supra* note 8.

323. See discussion *supra* Part III.A.

people and regulation by transparency, rather than just better evidence and intelligence-gathering by the authorities.³²⁴ Blanket or broad exemptions rob the people of the promised benefits of putting more cameras on the streets.

This Article proposes a path out of the forced choice between protecting privacy and public disclosure of important information. The Article argues that rather than carving out exemptions, legislatures should be fostering the development of new redaction technologies that enable privacy protection without sacrificing the important value of informing the public.³²⁵ From hack-a-thons to the hallways of major technology businesses, efforts are already underway to address the technological challenge of accurately redacting body camera footage.³²⁶ To incentivize such innovations, legislatures should create safe-harbor laws similar to those that fostered the successful development of the Internet and the many benefits of the networked world we enjoy today.³²⁷ Sunset provisions can address concerns over safe-harbor laws that linger too long after the training wheels on technology should be removed.³²⁸

The second problem illuminated by the empirical study of body camera policies around the nation is the frequent neglect of the need to protect victims and witnesses.³²⁹ To the extent that body camera policies even address protecting victims and witnesses, the policies either place the burden on the victim or witness to demand that recording cease, or leave the decision to the discretion of the officer.³³⁰ The price of the benefits of body cameras should not be the deterrence of victims and witnesses from seeking help and coming forward. Nor should the price be inflicting further privacy harms on those who seek help. The Article argues that the better approach is to put the burden on officers to ask victims and witnesses if they may record, rather than unrealistically expect victims and witnesses to order an authority figure to stop.³³¹

Because tastes for privacy and transparency may vary from community to community even within a single state, the heterogeneity and hyper-localism of body camera policies makes some sense.³³² But baseline principles are needed to guard against the risk of eroding privacy without

324. See discussion *supra* Part I.A.

325. See discussion *supra* Part III.A.

326. See discussion *supra* Part III.A.

327. See *supra* text accompanying notes 275–80.

328. See *supra* text accompanying notes 281–82.

329. See discussion *supra* Part III.B.

330. See discussion *supra* Part II.B.

331. See discussion *supra* Part III.B.

332. See *supra* text accompanying notes 194–99.

the promised benefits of greater accountability and transparency, and to protect against unintended consequences for victims and witnesses. Legislative strategies should see beyond the technological limitations of today to foster better solutions that are already under development. Body camera policies should reflect the whole mission of a police department—not just evidence generation and fighting fires when controversies arise, but also preventing harm to victims and witnesses.