

Police-Worn Body Cameras: Balancing Privacy and Accountability Through State and Police Department Action

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I. INTRODUCTION

Michael Brown—an unarmed, black eighteen-year-old male—was shot and killed by a white police officer in Ferguson, Missouri.¹ The conflicting officer and eye-witness accounts create an uncertain picture of the circumstances surrounding Michael Brown's death.² While it is certain the incident began in the officer's police car, several critical facts—including what was said to instigate the dispute and whether Michael Brown was fleeing, surrendering, or approaching the officer when fired upon—remain unclear.³ However, the undisputed fact that an unarmed black teenager died at the hands of a white police officer sparked a firestorm of protests and accusations of a racial motivation.⁴

Situations calling police conduct into question have gained increased media attention in the United States, especially when minority victims are involved.⁵ Notoriously inaccurate eyewitness testimony—as well as inherently

¹ Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0 [http://perma.cc/558D-4583].

² *Id.*; Elisha Fieldstadt & Pete Williams, *Officer Darren Wilson's Account of Michael Brown Shooting Stirs Critics*, NBC NEWS (Oct. 18, 2014), <http://www.nbcnews.com/storyline/michael-brown-shooting/officer-darren-wilsons-account-michael-brown-shooting-stirs-critics-n228856> [http://perma.cc/6ZUD-8AWW].

³ Buchanan, *supra* note 1.

⁴ See, e.g., Christina Coleman, *Ferguson PD Arrests 8 Protesters, Hunts for Cop Shooter*, USA TODAY (Sept. 29, 2014), <http://www.usatoday.com/story/news/nation/2014/09/29/ferguson-manhunt-continues/16411871/> [http://perma.cc/52F6-L6VF] (reporting that the National Guard was called into St. Louis and a state of emergency and curfew were declared in the city in response to riots that included lootings and assaults on police); Alastair Jamieson, *Ferguson 'Moral Monday' Protesters Unfurl Banner at Rams Game*, NBC NEWS (Oct. 24, 2014), <http://www.nbcnews.com/storyline/michael-brown-shooting/ferguson-moral-monday-protesters-unfurl-banner-rams-game-n225166> [http://perma.cc/H26H-QL8K] (reporting that a coordinated set of protests, termed "Moral Monday," saw forty-nine people arrested throughout St. Louis and a banner displayed at a St. Louis Rams game reading "Rams Fans Know, On and Off the Field, Black Lives Matter"); Erin McClam, *State Senator Jamilah Nasheed Arrested in Latest Ferguson Protest*, NBC NEWS (Oct. 21, 2014), <http://www.nbcnews.com/storyline/michael-brown-shooting/state-senator-jamilah-nasheed-arrested-latest-ferguson-protest-n230411> [http://perma.cc/L7VT-Y4SS] (reporting that State Senator Jamilah Nasheed was arrested during protest and refused bond as a means of further non-violent protest).

⁵ Cf., e.g., Julie Dressner & Edwin Martinez, Op-Docs, *The Scars of Stop-and-Frisk*, N.Y. TIMES (June 13, 2012), <http://www.nytimes.com/video/opinion/100000001601732/the-scars-of-stop-and-frisk.html> [http://perma.cc/4K42-S8CT] (questioning police misconduct of racial profiling in the application of New York's stop-and-frisk policy through the story of one black man who was stopped over sixty times before he was eighteen-years-old); Dennis Lynch, *Baltimore Riots 2015: Freddie Gray Slammed Head*

self-serving officer testimony—are both unreliable methods of obtaining a true picture of events as they unfolded.⁶ To shield themselves from unwarranted accusations and build trust with their communities, police departments throughout the country have rapidly begun to adopt the use of police-worn body cameras (PWBCs) to create an objective audio and video record of officer interactions with the public.⁷

However, in their rush to satisfy public pressure and discount future allegations of police misconduct, some police departments are employing PWBCs without implementing policies to govern the use of this new technology.⁸ Police discretion on when it is appropriate to use PWBCs can create misleading evidence and evoke an even greater negative response from the public.⁹ Furthermore, history has shown technologies intended to monitor police actions are often disabled when an officer plans to do something unethical.¹⁰ Without express requirements that PWBCs are used

into Police Van, Causing Fatal Injury, Report Says, INT'L BUS. TIMES (Apr. 30, 2015), <http://www.ibtimes.com/baltimore-riots-2015-freddie-gray-slammed-head-police-van-causing-fatal-injury-report-1904371> [<http://perma.cc/XFM5-5U98>] (reporting that riots erupted after a black man received severe injuries, notably the severing of his spinal cord, while in police custody); Curtis Skinner, *NYC Official Wants Police to Wear Cameras After Choke-Hold Death*, REUTERS (Aug. 12, 2014), <http://www.reuters.com/article/2014/08/12/us-usa-new-york-chokehold-idUSKBN0GC00J20140812> [<http://perma.cc/3X88-DC57>] (reporting that New York police officer's deadly use of a prohibited choke hold to subdue a seemingly calm black man, selling cigarettes in front of a beauty salon, as he gasped to say "I can't breathe" caused the second major nationwide outcry for police accountability).

⁶ For a comprehensive discussion on the unreliability of eyewitness testimony see generally Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 FED. CTS. L. REV. 1 (2007); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

⁷ Sales of PWBCs have increased by nearly 70% since the incident in Ferguson, Missouri. Alan Gomez, *After Ferguson, Police Rush to Buy Body Cameras*, USA TODAY (Oct. 11, 2014), <http://www.usatoday.com/story/news/nation/2014/10/11/police-body-cameras-ferguson-privacy-concerns/16587679/> [<http://perma.cc/U4HF-LNNF>] (describing how the Ferguson Police Department has been outfitted with body cameras and a one million dollar purchase order has been approved to outfit the Miami-Dade County Police Department with PWBCs).

⁸ LINDSAY MILLER ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 2 (2014), <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf> [<http://perma.cc/HRS3-DH7>]. A United States Department of Justice Community Oriented Policing Services nationwide survey of police departments using PWBCs found that nearly one-third of the responding police departments using PWBCs had no written policy concerning their use. *Id.*

⁹ See *infra* Part IV.A.2.

¹⁰ See, e.g., Joel Rubin, *LAPD Officers Tampered with In-Car Recording Equipment, Records Show*, L.A. TIMES (Apr. 7, 2014), <http://www.latimes.com/local/la-me-lapdtamper-20140408-story.html#axzz2yOaKuj8F> [<http://perma.cc/2558-HAKS>] (describing an internal investigation by the Los Angeles Police Department showing that antennas used

consistently—supported by legitimate repercussions for violations—they are prone to similar issues.

The rapid adoption of PWBCs has also raised various legal issues in many states where the legislatures have failed to keep pace with police department adoptions. For example, wiretapping and consent laws may make the use of PWBCs illegal, at least in certain circumstances.¹¹ Additionally, broad public record laws have led to privacy concerns because the overwhelming amount of PWBC footage is publically available.¹²

This Note examines the legal and social implications of police departments adopting the use of PWBCs in order to inform state legislatures and police departments on the laws and policies necessary to facilitate the continued use of PWBCs. Part II describes the current usage of PWBCs throughout the country. Part III assesses the benefits of adopting PWBCs to police departments and society at-large. Part IV examines problems with PWBCs and the legal implications of their use. Part V then recommends specific laws and policies state legislatures and police departments should employ to govern the use of PWBCs. Part VI concludes by discussing the second generation PWBCs and the impact they will have on the PWBC debate in the near future. Finally, Appendix A provides a model PWBC policy that incorporates the issues discussed throughout this Note.

II. CURRENT USE OF POLICE-WORN BODY CAMERAS

In order to discuss the issues now facing the use of PWBCs, it is valuable to examine the progression from their initial adoption by police departments to their current state of use.

During the mid-2000s, European police departments became the first police departments to employ PWBCs.¹³ By 2007, the United Kingdom's

to activate audio recorders worn by police officers were intentionally destroyed in over fifty police cruisers; over half of the equipped cruisers in one community heavily populated by minorities were destroyed).

¹¹ See *infra* Part IV.B.1.

¹² State legislatures across the country have begun to consider, and even pass, legislation excluding footage obtained from PWBCs from public record laws. See, e.g., Abby Simons, *Legislation Aims to Make Police Body Cam Footage Mostly Private*, STAR TRIB. (Jan. 29, 2015), <http://www.startribune.com/politics/statelocal/290287791.html?page=2&c=y> [http://perma.cc/7YE6-AJNU]; see also *infra* note 94.

¹³ Associated Press, *Britain Straps Video Cameras to Police Helmets*, NBC NEWS (July 13, 2007) [hereinafter *Britain Cameras*], http://www.nbcnews.com/id/19750278/ns/world_news-europe/t/britain-straps-video-cameras-police-helmets/#.VcpbPyT1KHq [http://perma.cc/G98Z-RBAQ]. Following the use of PWBCs by Danish police, the UK began testing police worn body cameras on a small-scale in its Devon and Cornwall Police Departments in 2005. *Id.* By 2006, the departments were employing a total of 50 cameras as a part of an extended trial. MARTIN GOODALL, U.K. POLICE & CRIME STANDARDS DIRECTORATE, GUIDANCE FOR THE POLICE USE OF BODY-WORN VIDEO DEVICES 6 (July 2007), <http://library.college.police.uk/docs/homeoffice/guidance-body-worn-devices.pdf>

Home Office had released a plan to equip officers in all forty-two of the country's police departments with PWBCs.¹⁴ The UK's system of central control over the nation's police departments ensured that each department was subject to a policy over the PWBCs' use.¹⁵ After gaining nearly six years of experience with the PWBCs, departments finally began equipping all of their officers.¹⁶

Unlike the UK, the adoption of PWBCs progressed slowly in the United States. While nearly one-third of police departments had experimented with PWBCs to some extent by the end of 2013,¹⁷ as of August 2014, very few police departments were utilizing PWBCs extensively.¹⁸ Furthermore, few studies concerning the effectiveness of PWBCs have been conducted in the United States; however, each study, while small, has shown extremely promising results.¹⁹ While various organizations began publishing supportive

[<http://perma.cc/RA7G-WBWE>] (providing the first empirical data on PWBCs).

¹⁴ *Britain Cameras*, *supra* note 13 (allocating six million dollars to fund the purchase of more than 2,000 body cameras).

¹⁵ See *id.* The UK procedures for the use of body camera are governed pursuant to the country's broad policy on video surveillance. Cf. UK HOME OFFICE, POLICE TRANSPARENCY UNIT, SURVEILLANCE CAMERA CODE OF PRACTICE 4 (June 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/282774/SurveillanceCameraCodePractice.pdf [<http://perma.cc/5H3D-X7UN>]. While the UK policy provides a valuable resource to the scope of this Note, the centralized control of body worn cameras and pervasive video monitoring throughout the country create a much more liberal set of policies than would likely be accepted in the United States. See *Britain Cameras*, *supra* note 13 ("Britain's web of video surveillance [is] already the most extensive in the world.").

¹⁶ Jack Doyle, *Body Camera on Every PC's Lapel: Force Equips Officers Because Video Footage Is More Effective in Securing Convictions*, DAILY MAIL (Oct. 14, 2013), <http://www.dailymail.co.uk/news/article-2459991/Police-force-equip-officers-body-worn-video-cameras.html> [<http://perma.cc/8WA5-RBBT>] (reporting that the Staffordshire Police Department became the first police force in Europe to equip all of its officers with PWBCs in 2013).

¹⁷ BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, LOCAL POLICE DEPARTMENTS, 2013: EQUIPMENT AND TECHNOLOGY 4 (July 2015), <http://www.bjs.gov/content/pub/pdf/lpd13et.pdf> [<http://perma.cc/FK96-4CZE>].

¹⁸ See Robinson Meyer, *Seen It All Before: 10 Predictions About Police Body Cameras*, ATLANTIC (Dec. 5, 2014), <http://www.theatlantic.com/technology/archive/2014/12/seen-it-all-before-10-predictions-about-police-body-cameras/383456/> [<http://perma.cc/VCJ4-GTU9>] (reporting that use of dash cameras increased significantly through grants by insurance companies and Mothers Against Drunk Driving, who sought to deter drunk driving through increased conviction rates); cf. Josh Sanburn, *Why Cops in Ferguson Don't Have Body Cameras*, TIME (Aug. 14, 2014), <http://time.com/3114329/ferguson-michael-brown-police-body-cameras/> [<http://perma.cc/L48M-6KGB>]. One explanation for the slow adoption of PWBCs is that they saw the same initial push back as police dash cameras but were seen as even more invasive of privacy and did not have the same special interest support.

¹⁹ See generally WILLIAM FARRAR, POLICE FOUND., SELF-AWARENESS TO BEING WATCHED AND SOCIALLY-DESIRABLE BEHAVIOR: A FIELD EXPERIMENT ON THE EFFECT OF

reports on the use of PWBCs,²⁰ Michael D. White—author of the Department of Justice Office of Justice Programs report (OJP report)—offered a caution to the positive results of his and other studies.²¹

Despite the uncertain potential of PWBCs, the shooting of Michael Brown and other instances of possible police misconduct spawned an exponential increase in demand for the use of PWBCs.²² In less than one year it was estimated nearly 25% of the United States' police departments had begun equipping large numbers of officers with body cameras.²³ However, during

BODY-WORN CAMERAS ON POLICE USE-OF-FORCE (Mar. 2013), <http://www.policefoundation.org/wp-content/uploads/2015/06/The-Effect-of-Body-Worn-Cameras-on-Police-Use-of-Force.pdf> [http://perma.cc/7WM5-RBCL]; CHARLES M. KATZ ET AL., ARIZ. STATE UNIV. CTR. FOR VIOLENCE PREVENTION & CMTY. SAFETY, EVALUATING THE IMPACT OF OFFICER WORN BODY CAMERAS IN THE PHOENIX POLICE DEPARTMENT (Dec. 2014), https://publicservice.asu.edu/sites/default/files/ppd_spi_feb_20_2015_final.pdf [http://perma.cc/W6PK-ZBET]; LEE RANKIN, MESA, ARIZ. POLICE DEP'T, AXON FLEX PROGRAM EVALUATION & RECOMMENDATIONS: ON-OFFICER BODY CAMERA SYSTEM (Dec. 2013), http://issuu.com/leerankin6/docs/final_axon_flex_evaluation_12-3-13- [http://perma.cc/4FVV-CVPS]; ASU Ctr. for Violence Prevention & Cmtty. Safety, *SPI: Phoenix Police Department Body-Worn Camera Project*, ARIZ. ST. UNIV. SCH. CRIMINOLOGY & CRIM. JUST., <http://coppfs3.asu.edu/news-events/news/spi-phoenix-police-department-body-worn-camera-project> [http://perma.cc/7R5F-P3KP].

In addition to two small studies in UK police departments, these are the only studies using police body cameras that have been performed. MICHAEL D. WHITE, U.S. DEP'T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 6 (2014), <https://ojpdiagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf> [https://perma.cc/Z239-G7KY]. See generally GOODALL, *supra* note 13; ODS CONSULTING, SCOT. CMTY. SAFETY UNIT, SELF EVALUATION: BODY WORN VIDEO PROJECTS IN PAISLEY AND ABERDEEN 1 (July 2011), <http://www.bwvsg.com/wp-content/uploads/2013/07/BWV-Scottish-Report.pdf> [http://perma.cc/W3BP-AVUF].

²⁰ See generally MILLER, *supra* note 8; JAY STANLEY, ACLU, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL (ver. 1, Oct. 2013), https://www.aclu.org/files/assets/police_body-mounted_cameras.pdf [http://perma.cc/N9TH-N2LQ].

²¹ Anne Ryman, *Police Body Cameras: 5 Facts About the Technology*, ARIZ. REPUBLIC (Jan. 15, 2015), <http://www.azcentral.com/story/news/local/arizona/2015/01/11/police-body-cameras-five-facts-technology/21616039/> [http://perma.cc/LS79-G8NM] (“Many of the studies had significant research limitations because they didn’t include a comparison group or were carried out internally by the law-enforcement agency adopting the cameras”); see also WHITE, *supra* note 19.

²² Joshua Brustein, *With Obama’s Support, Police Body Cameras Could Become the New Normal*, BLOOMBERG (Dec. 2, 2014), <http://www.bloomberg.com/bw/articles/2014-12-02/obamas-plan-would-almost-double-use-of-police-body-cams> [http://perma.cc/8P72-KWHP] (reporting that days after the Michael Brown shooting, a petition for the “Michael Brown Law,” requiring all police to wear body cameras, garnered nearly 155,000 signatures on whitehouse.gov); see Skinner, *supra* note 5.

²³ Ryman, *supra* note 21. Like dash cameras, a large portion of the nation’s body cameras have been purchased through private donations to departments. See, e.g., Geetika Rudra, *Ferguson Police Receive Body Camera Donation*, ABC NEWS (Sept. 1, 2014),

that time, White's OJP report found nearly one-third of the police departments that responded to his survey self-reported having no policy governing its use of PWBCs.²⁴

The surge to adopt PWBCs reached a new peak with President Obama's announcement that he would seek to provide \$263 million for the purchase of PWBCs and training for police officers on their use.²⁵ White now estimates that all police departments with fifty or more officers will be using PWBCs by 2018.²⁶

The nationwide demand for PWBCs will likely continue to increase as they remain a symbol of accountability against improper treatment of minorities. PWBCs are viewed as an important tool to correct institutionalized racism in American policing.²⁷ One New York court attempted to employ

<http://abcnews.go.com/US/ferguson-police-body-cameras-donation/story?id=25204118> [<http://perma.cc/KDD6-U8HN>] (reporting that a body camera manufacturing company donated body cameras to outfit police in Ferguson, Missouri); Richard Winton & Kate Mather, *L.A. Will Buy 7,000 Body Cameras for Police Officers*, L.A. TIMES (Dec. 16, 2014), <http://www.latimes.com/local/lanow/la-me-ln-mayor-to-announce-onbody-camera-rol-lout-for-lapd-20141216-story.html> [<http://perma.cc/Z3Z9-6PLU>] (reporting that the president of the Los Angeles Police Commission raised over \$1 million).

²⁴ MILLER, *supra* note 8, at 2 (stating that a total of sixty-three police departments self-reported using body cameras).

²⁵ Justin Sink, *Obama to Provide Funding for 50,000 Police Body Cameras*, HILL (Dec. 1, 2014), <http://thehill.com/homenews/administration/225583-obama-to-provide-funding-for-50000-police-body-cameras> [<http://perma.cc/Z8HF-CGE5>] (reporting that Obama specifically allocated \$75 million for 50,000 body cameras as part of a matching program with police departments). On May 1, 2015, the Department of Justice announced the official PWBC program and made the first \$20 million available. Press Release, Office of the Attorney Gen., Justice Department Announces \$20 Million in Funding to Support Body-Worn Camera Pilot Program (May 1, 2015), <http://www.justice.gov/opa/pr/justice-department-announces-20-million-funding-support-body-worn-camera-pilot-program> [<http://perma.cc/9SXP-ZMDB>]. The program matches a department's costs to equip and train officers dollar-for-dollar if the department adopts a policy governing the PWBCs' use, but each department is solely responsible for the on-going costs of data storage. *Id.*

²⁶ Kriston Capps, *Police Body Cameras: Coming Everywhere in 3 to 5 Years*, ATLANTIC: CITYLAB (July 30, 2015), <http://www.citylab.com/crime/2015/07/police-body-cameras-coming-everywhere-in-3-to-5-years/399992/> [<http://perma.cc/J7KL-YMBX>] (reporting that other estimates predict all police departments with fifty or more officers will be using PWBCs by 2020).

²⁷ See Meyer, *supra* note 18; see also MILLER, *supra* note 8, at 8 (noting that the San Diego police department adopted PWBCs, in part, "to improve its understanding of incidents involving claims of racial profiling" because the objective record reveals patterns of racial profiling and how they occur); Noura Bayoumi & Janeal Downs, *Legislators Want Police to Wear Body Cameras*, SW. TIMES (Jan. 30, 2015), <http://www.southwesttimes.com/2015/01/legislators-want-police-to-wear-body-cameras/> [<http://perma.cc/H8FU-XCQ6>] (reporting that HB 2393 would give the Virginia Attorney General the authority to determine which police departments would be required to use body cameras based, in part, on considering each department's past "rate of occurrence of engaging in biased-based profiling"). But see, e.g., UTILITY, ELIMINATING RACIAL BIAS IN RECORDING BODY-WORN VIDEOS 4 (2014), <http://www.utility.com/perch/resources/>

PWBCs as a means of mitigating racial profiling,²⁸ but the New York Police Department quickly exceeded the scope of the order by equipping a much wider number of officers with cameras.²⁹ Accordingly, social organizations—like the NAACP and the ACLU—have focused their efforts to spread the use of PWBCs on a concerted nationwide lobby of state legislatures motivated by broad public support,³⁰ rather than pursuing the slower process of judicial action. In the wake of this nationwide phenomenon and pressure from social groups, Congress and state legislatures scrambled to respond with appropriate legislation as approximately one hundred bills were introduced in thirty-six states and Congress, mostly between December 2014 and February 2015.³¹ The initial reaction in many of these legislative bodies was to mandate camera

eliminatingracialbiasinpolicebody-wornvideos.pdf [<http://perma.cc/ZD2B-VK8T>] (arguing that institutionalized racism will only be impacted if discretionary use by officers is prohibited); Meyer, *supra* note 18 (arguing that reformists' perceptions on the utility of dash cameras to curb institutional racism are incorrect and the use of PWBCs will also likely fail to solve the problem); Shaun Ossei-Owusu, *The Problem with Body Cameras*, JACOBIN (Dec. 7, 2014), <https://www.jacobinmag.com/2014/12/the-problem-with-body-cameras/> [<http://perma.cc/H8FU-XCQ6>] (arguing that institutionalized racism will only be impacted if discretionary use by officers is prohibited).

²⁸ Floyd v. City of N.Y., 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013), *vacated sub nom.* Ligon v. City of N.Y., 743 F.3d 362 (2d Cir. 2014), *original decision re-instated sub nom.* Floyd v. City of N.Y., 302 F.R.D. 69 (S.D.N.Y. 2014), *aff'd in part*, 770 F.3d 1051 (2d Cir. 2014). The remedy of the initial case included the requirement that New York institute a one-year pilot program for PWBCs; the remedy was later stayed and reversed but eventually reinstated, in the part that contained the body camera mandate.

²⁹ Adi Robertson, *New York Police Officers to Start Testing Body Cameras this Week*, VERGE (Dec. 3, 2014), <http://www.theverge.com/2014/12/3/7327035/new-york-police-officers-to-start-wearing-body-cameras> [<http://perma.cc/TF9Q-3HHG>].

³⁰ Aaron Morrison, *Al Sharpton Calls for National Law Requiring Police Body Cameras After Walter Scott Shooting*, INT'L BUS. TIMES (Apr. 8, 2015), <http://www.ibtimes.com/al-sharpton-calls-national-law-requiring-police-body-cameras-after-walter-scott-1874422> [<http://perma.cc/MP8J-XPPR>] (describing Al Sharpton explaining that the National Action Network intends to go from state to state to advocate for a national policing policy); Reid Wilson, *Police Accountability Measures Flood State Legislatures After Ferguson, Staten Island*, WASH. POST (Feb. 4, 2015), <http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/04/police-accountability-measures-flood-state-legislatures-after-ferguson-staten-island/> [<http://perma.cc/KJX4-S6ZT>] (quoting Cornell Brooks, president and chief executive of the NAACP, saying, "There is a concrete coherent legislative agenda that we are pushing for. We've been doing this from state capital to state capital, as well as here in Washington, D.C.").

³¹ Brian Heaton, *Body-Worn Camera Legislation Spikes in State Legislatures*, GOV'T TECH. (June 1, 2015), <http://www.govtech.com/Body-Worn-Camera-Legislation-Spikes-in-State-Legislatures.html> [<https://perma.cc/MAZ6-FW3H>]; *see also* Camera Authorization and Maintenance Act of 2014, H.R. 5865, 113th Cong. (2014); H.B. 455, 84th Leg., Reg. Sess. (Tex. 2015); H.B. 474, 84th Leg., Reg. Sess. (Tex. 2015); H.B. 1521, 2015 Gen. Assemb., Reg. Sess. (Va. 2015); H.B. 1534, 2015 Gen. Assemb., Reg. Sess. (Va. 2015); H.B. 2280, 2015 Gen. Assemb., Reg. Sess. (Va. 2015); H.B. 2393, 2015 Gen. Assemb., Reg. Sess. (Va. 2015).

use by all officers while on duty,³² motivated by public opinion.³³ However, these proposals for strict mandates had been overwhelmingly unsuccessful until Senate Bill 47 was enacted in South Carolina on June 10, 2015.³⁴ Instead, the legislation that has typically been successful at advancing through legislatures takes a more moderate approach of giving individual departments the discretion to determine whether they will use PWBCs or not, but each bill also requires that if a department chooses to employ PWBCs it *must* have a policy governing its use of the PWBCs.³⁵ The compromise is often motivated by the financial infeasibility of equipping all officers with body cameras.³⁶ South Carolina's bill mandating the use of police body cameras reflects both of these concerns by requiring each department to have a policy governing PWBC use and by the fact the General Assembly did not include a funding source for the state's "Body-Worn Cameras Fund".³⁷ Most importantly, the South Carolina bill requires the state to establish minimum standards for the policies that departments create.³⁸

III. BENEFITS OF POLICE-WORN BODY CAMERAS

The recent widespread adoption of PWBCs can be attributed to the numerous benefits of their use to both the public and police departments. While the scientific research on the benefits of PWBCs is minimal,³⁹ each

³² See, e.g., Camera Authorization and Maintenance Act of 2014, H.R. 5865; H.B. 57, 118th Leg., Reg. Sess. (Fla. 2015) (as introduced).

³³ UTILITY, *supra* note 27, at 4, 6 (stating that nine in ten Americans support an increased use of body cameras, and 72% of Americans support making their use non-discretionary); Petition, *Mike Brown Law*, WHITE HOUSE, <https://petitions.whitehouse.gov/petition/mike-brown-law-requires-all-state-county-and-local-police-wear-camera/8tlS5czf> [<https://perma.cc/7BVP-AKMP>] (showing that nearly 155,000 people signed a petition for the Michael Brown Bill that would make it mandatory for all police officers in the country to wear body cameras).

³⁴ See, e.g., Camera Authorization and Maintenance Act of 2014, H.R. 5865 (died in committee). *But see* S. 47, 121st Leg., Reg. Sess. (S.C. 2015). Typically even attempts to allow the use of body cameras too widely have failed. H.B. 2178, 2013–2014 Gen. Assemb., Reg. Sess. (Pa. 2014) (attempting to extend the statutory allowance of police officers to use body cameras to waterway conservation and game officers; tabled in the Pennsylvania Senate).

³⁵ See, e.g., Fla. H.B. 57 (as amended and reported favorably out of committee by a unanimous vote); S.B. 1304, 99th Gen. Assemb., Reg. Sess. (Ill. 2015); H.B. 0116, 2014 Gen. Assemb., Reg. Sess. (Md. 2014) (as amended and reported favorably out of committee).

³⁶ See *infra* Part IV.A.3.

³⁷ See S.C. S. 47.

³⁸ *Id.*; accord Ill. S.B. 1304.

³⁹ WHITE, *supra* note 19, at 6 ("Given the lack of research, there is little evidence to support or refute many of the claims, and there are outstanding questions regarding the impact and consequences of body-worn cameras. Nevertheless, the available studies have provided insight into several areas . . .").

study has shown tremendously positive results. Due to the low quantity of empirical studies, many reports on PWBCs consider the following benefits as merely “perceived.”⁴⁰ However, there is no question as to whether or not the following benefits are *real*; instead, the question yet to be answered is the exact *degree* of each benefit created by PWBCs. Recently, police departments have released meta-data showing a decrease in use-of-force incidents supporting the benefits of PWBCs.⁴¹

A. Mutual Benefits

The most consistent finding between studies on the use of PWBCs is their potential as a civilizing device for police officers and the citizens they interact with. Scholars have explained this phenomenon through the concept of self-awareness.⁴² The theory of self-awareness states that if people know that they are being watched, then they are less likely to engage in socially undesirable behavior.⁴³

Police officers do not always conduct themselves in a professional manner,⁴⁴ and officers themselves recognize the positive effect that the cameras have on their conduct while working.⁴⁵ As a result, instances of police use-of-force have been shown to decrease by as much as fifty-eight percent by employing PWBCs.⁴⁶ William Farrar stated one reason use-of-force incidents decreased was that officers using the body cameras *only* used force in response

⁴⁰ See, e.g., MILLER, *supra* note 8, at 5; WHITE, *supra* note 19, at 19.

⁴¹ See, e.g., Kevin Dupzyk, *Inside the Future of the Police Body Camera*, POPULAR MECHANICS (Apr. 3, 2015), <http://www.popularmechanics.com/technology/security/a14833/popular-mechanics-podcast-police-body-cameras/> [https://perma.cc/V5Y2-HWMH] (“Oakland, California, has seen a drop off in forcible arrests from 2,186 in 2009 to 600 in 2014, and exhibited a drastic decline in the number of complaints against officers.”).

⁴² See generally FARRAR, *supra* note 19, at 2–4.

⁴³ *Id.* at 2.

⁴⁴ See Floyd v. City of N.Y., 959 F. Supp. 2d 668, 685 n.66 (S.D.N.Y. 2013), *aff’d in part*, 770 F.3d 1051 (2d Cir. 2014) (justifying her order requiring the body camera pilot program, Judge Scheindlin commented, in part, on the civilizing effect they would have by recognizing that “police do, on occasion, use offensive language—including racial slurs—or act with more force than necessary”; further, she stated “the use of body-worn cameras will inevitably reduce such behavior”).

⁴⁵ MILLER, *supra* note 8, at 6 (quoting Chief Superintendent Cullen of New South Wales saying, “After testing out body-worn cameras, the overwhelming response from officers was that the cameras increased their professionalism because they knew that everything they said and did was being recorded.”); RANKIN, *supra* note 19, at 11 (reporting that 81% of officers stated that wearing a camera improved their behavior while working, and 77% of officers believed that wearing a body camera would improve their colleagues behavior).

⁴⁶ FARRAR, *supra* note 19, at 7, 11 (from 60 to 25 instances).

to a physical threat: some colleagues without PWBCs instigated force absent such threats.⁴⁷

The decrease in officer use-of-force is also likely the result of more restrained behavior by the citizens they interact with because of the PWBC's presence.⁴⁸ One reason that officers are encouraged to announce that they are equipped with a body camera is to notify citizens as a way to preemptively de-escalate situations.⁴⁹

B. Public Benefits

As the demand for PWBCs increases in response to public distrust of police officers, the most important benefit of PWBCs to the public is the accountability and transparency they can provide.⁵⁰ By creating an objective and reviewable record, the PWBCs help resolve questions following otherwise suspect encounters between officer and members of the public.⁵¹ The primary types of encounters that the public is concerned with are those where officers engage in use-of-force, especially officer involved shootings.⁵² However, a less publicized—but more prevalent—problem that could be diminished by using PWBCs is the amount of unconstitutional search and seizures performed

⁴⁷ *Id.* at 9 (reporting that officers without cameras initiated the force in four of the seventeen use-of-force incidents).

⁴⁸ WHITE, *supra* note 19, at 22–23.

⁴⁹ MILLER, *supra* note 8, at 6 (“We actually encourage our officers to let people know that they are recording.” (quoting Chief of Police Ken Miller of Greensboro, North Carolina)); *see also* ODS CONSULTING, *supra* note 19, at 10 (reporting that of the sixty-two assaults on officers, sixty-one were against officers not wearing cameras and one was against a camera-wearing officer, but proportionally officers wearing body cameras should have experienced a total of eighteen assaults).

⁵⁰ Two of the four indictments, between January and August of 2015, of police officers for fatal on-duty shootings have resulted from footage captured by the officers' body-worn cameras. Colin Daileda, *Body Cameras Key to Charging Police in Fatal Shootings*, MASHABLE (July 30, 2015), <http://mashable.com/2015/07/30/body-cameras-officers-fatal-shootings/> [http://perma.cc/Y45D-4872].

⁵¹ *Id.* (reporting that in both indictments for fatal shootings, the officer recounted the scenario in direct contradiction of what was actually shown by the PWBC); *see also* MILLER, *supra* note 8, at 5.

⁵² See generally Mark W. Clark, *On-Body Video: Eye Witness or Big Brother?*, POLICE MAG. (July 8, 2013), <http://www.policemag.com/channel/technology/articles/2013/07/on-body-video-eye-witness-or-big-brother.aspx> [http://perma.cc/99H8-7DGU].

by police officers.⁵³ PWBC footage has already begun to be utilized by courts to review the constitutionality of officer actions in such circumstances.⁵⁴

Increased transparency in these situations demonstrates fairness and justice, leading to a perception of greater legitimacy of police.⁵⁵ This legitimacy creates greater public trust of the police because research shows it is interactions between the police and the public—rather than the outcomes of those interactions—that are most influential to public opinions.⁵⁶ Furthermore, as the public’s opinion of police becomes more positive, citizens become more compliant and crime rates decrease.⁵⁷

C. Police Benefits

“Body cameras in the long run will help the police far better than they’ll help the community,” according to former New York Police Commissioner Bernie Kerik.⁵⁸ One reason that police departments and officers have also embraced the use of PWBCs is that they offer an exceptional layer of protection to the majority of officers who perform their duties in an

⁵³ David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH. L. REV. 357, 363–64 (2010) (finding that approximately 30% of police searches are unconstitutional but only 3% of those searches produce usable evidence, and arguing that where the exclusionary rule would fail to provide an adequate remedy the objective account from a PWBC would provide evidence for disciplinary action against an officer).

⁵⁴ United States v. Fonseca, 744 F.3d 674, 681 (10th Cir. 2014) (“[T]he court viewed the [PWBC] video recording of the encounter and could permissibly make its own factual determinations regarding the suspiciousness of Defendant’s actions and communications with the officer.”).

⁵⁵ WHITE, *supra* note 19, at 19 (citing TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990)).

⁵⁶ James Frank et al., *Exploring the Basis of Citizens’ Attitudes Toward the Police*, 8 POLICE Q. 206, 222–23 (2005); see also GOODALL, *supra* note 13, at 66–68 (reporting that of 36 crime victims surveyed in the Plymouth Head Camera Project 29 [81%] reported the officer’s use of a body-worn camera made them feel safer and 26 [72%] believed the camera’s presence improved the overall encounter); JEANNE LEBLANC ET AL., ACLU, PROTECT, SERVE AND LISTEN: ACCEPTING CIVILIAN COMPLAINTS AT CONNECTICUT POLICE DEPARTMENTS 1 (2012), http://aclct.org/wp-content/uploads/2012/12/protectserve_listen.pdf [<http://perma.cc/M537-XEWL>].

⁵⁷ Allyson Roy, *On-Officer Video Cameras: Examining the Effects of Police Department Policy and Assignment on Camera Use and Activation* 9 (May 2014) (unpublished M.S. thesis, Arizona State University), <http://urbanailinois.us/sites/default/files/attachments/officer-video-cameras-roy.pdf> [<http://perma.cc/J8UA-2LKY>] (citing Lawrence W. Sherman, *Policing for Crime Prevention*, in PREVENTING CRIME: WHAT WORKS, WHAT DOESN’T, WHAT’S PROMISING—A REPORT TO THE ATTORNEY GENERAL OF THE UNITED STATES (Lawrence W. Sherman et al. eds., 1997)).

⁵⁸ Melissa Clyne, *Bernie Kerik: Body Cameras Will Protect Police More Than Citizens*, NEWSMAX (Mar. 2, 2015), <http://www.newsmax.com/Newsmax-Tv/Bernie-Kerik-Law-enforcement-body-cameras-security/2015/03/02/id/627749/#ixzz3TkZabxnP> [<http://perma.cc/C94D-U2UU>].

appropriate manner.⁵⁹ They also provide a tremendous amount of administrative benefits to departments.

1. *Lawsuits and Civil Complaints*

The costs of liability claim payouts through lawsuits account for a tremendous expense to police departments, averaging \$2.5 billion annually.⁶⁰ Even departments that rarely see officer complaints progress to court must expend a substantial amount of time and money on investigating complaints against their officers.⁶¹ Departments that have adopted the use of PWBCs have seen a significant drop in the number of complaints filed and sustained against officers.⁶² In fact, empirical studies have shown the number of complaints against officers reduced between fourteen and approximately 89%.⁶³

Many departments have seen citizens withdraw frivolous complaints immediately upon viewing the footage of their interaction with the officer.⁶⁴

⁵⁹ See, e.g., *Baltimore Police Union President Backs City's Approach Toward Body Cameras*, WMAR BALTIMORE (Feb. 19, 2015), <http://www.abc2news.com/news/region/baltimore-city/baltimore-police-union-president-backs-citys-approach-toward-body-cameras> [http://perma.cc/ZYK5-YCAZ].

⁶⁰ Gary Nelson, *Mesa Sees Body Cameras as Practical Police Tool*, ARIZ. REPUBLIC (Feb. 6, 2014), <http://www.azcentral.com/community/mesa/articles/20140206mesa-sees-body-cameras-practical-police-tool.html> [http://perma.cc/78YJ-WACR] (reporting that Mesa, Arizona alone “averages about \$767,000 a year in liability payouts”); see, e.g., Joel Rubin et al., *Legal Payouts in LAPD Lawsuits*, L.A. TIMES (Jan. 22, 2012), <http://spreadsheets.latimes.com/lapd-settlements/> [http://perma.cc/RW8Y-3RR7] (reporting that the LAPD paid over an aggregate of \$138 million in 1,000 lawsuits between January 2002 and October 2011).

⁶¹ WHITE, *supra* note 19, at 23 (citing SAMUEL WALKER & CHARLES KATZ, THE POLICE IN AMERICA: AN INTRODUCTION (8th ed. 2013)).

⁶² KATZ, *supra* note 19, at 3, 40–41 (reporting that despite a 17% increase in arrests, “[c]omplaints against officers who wore the cameras declined by 23%, compared to a 10.6% increase among comparison officers and 45.1% increase among patrol officers in other precincts,” and that complaints that were filed against officers wearing body cameras were significantly less likely to be sustained); see also MILLER, *supra* note 8, at 6 (quoting Chief of Police Ron Miller of Topeka, Kansas saying, “There’s absolutely no doubt that having body-worn cameras reduces the number of complaints against officers.”).

⁶³ GOODALL, *supra* note 13, at 47 (reporting over 14% fewer citizen complaints, and further, that during the project no complaints filed against officers wearing head cameras were found legitimate); see FARRAR, *supra* note 19, at 8–9 (reporting over 89% fewer citizen complaints, a decrease from twenty-eight to three).

⁶⁴ GOODALL, *supra* note 13, at 7 (“[I]n a number of cases the complainants have reconsidered their complaint after . . . review[ing the video], thus reducing investigation time for unwarranted complaints.”); MILLER, *supra* note 8, at 6 (quoting Chief of Police Ron Miller of Topeka, Kansas saying, “We’ve actually had citizens come into the department to file a complaint, but after we show them the video, they literally turn and walk back out,” and Chief of Police Michael Frazier of Surprise, Arizona reporting, “Recently we received an allegation that an officer engaged in racial profiling during a traffic stop. The officer was wearing his body-worn camera, and the footage showed that

For this reason, many officers who have a history of complaints filed against them actually request to be included in PWBCs programs to protect themselves against such frivolous claims.⁶⁵ On the other hand, PWBCs also provide a benefit when the officer is at fault because departments are able to settle the matter without a lengthy investigation or trial, and the public is able to gain more trust in the police when an officer's wrongdoing is swiftly recognized.⁶⁶

2. Training

One extremely important administrative feature of using PWBCs is that it allows officers to observe how to react in real situations and provides supervisors the opportunity to critique their officers' ability to react in those situations.⁶⁷ Ninety-four percent of the respondents in the DOJ study reported that they "use body-worn camera footage to provide scenario-based training, evaluate the performance of new officers in the field, and to identify new areas in which training is needed."⁶⁸ One respondent stated the training has improved their tactical abilities, communication, and customer service.⁶⁹ The value police departments place on being able to use the footage for training is reflected by the express allowance to do so in many department policies.⁷⁰

3. Efficiency

PWBCs can significantly lessen the burden of administrative work on officers and allow them to use their extra time in the community. Many PWBCs allow the day's footage to be automatically downloaded to a phone

the allegation was completely unfounded. After reviewing the tape, the complainants admitted that they have never been treated unfavorably by any officers in my department.").

⁶⁵ MILLER, *supra* note 8, at 7 (quoting Chief of Police Hassan Aden of Greenville, North Carolina saying, "We all have our small percentage of officers with a history of complaints. Internal Affairs has told me that these officers have come in to request body-worn cameras so that they can be protected in the future.").

⁶⁶ *Id.* at 7–8 (reporting that a Phoenix officer was fired after a complaint, which led to the review of his body camera footage revealing "repeated instances of verbal abuse, profanity, and threats against members of the public").

⁶⁷ GOODALL, *supra* note 13, at 8; Harris, *supra* note 53, at 364–65.

⁶⁸ MILLER, *supra* note 8, at 7; accord WHITE, *supra* note 19, at 25 (describing the benefit of using PWBCs at the training academy, "Miami Police Major Ian Moffitt stated that 'we can record a situation, a scenario in training, and then go back and look at it and show the student, the recruit, the officer what they did good, what they did bad, and [what they can] improve on'" (alteration in original)).

⁶⁹ WHITE, *supra* note 19, at 25.

⁷⁰ See, e.g., OAKLAND POLICE DEP'T, ORDER I-15.1: PORTABLE VIDEO MANAGEMENT SYSTEM 5 (Mar. 2014), https://www.aclu.org/sites/default/files/assets/mar_14_pdrd_policy.pdf [<https://perma.cc/4B6B-678F>] [hereinafter OAKLAND POLICY].

application to assist the officer in writing reports;⁷¹ in one study officers reported a 22% decrease in the time it took to complete paperwork, which led to an additional fifty minutes on patrol during a nine-hour shift.⁷² Additionally, PWBCs have been shown to create a dramatic increase in guilty pleas. The resulting decrease of trials—by 70–80%⁷³—significantly decreased officer obligations to testify, in addition to freeing up resources in prosecutor and public defender offices.

4. Context

It was estimated that greater than 80% of United States citizens would have cell phones capable of recording video by the end of 2014.⁷⁴ Public use of cell phones to record interactions with police is already prevalent in the United States but will continue to increase as organizations promote the concept—as the ACLU has by creating the smartphone app “Police Tape.”⁷⁵ Furthermore, private use of stationary surveillance cameras has become pervasive throughout much of society. Accordingly, many police chiefs encourage their officers to always assume that they are on camera.⁷⁶

PWBCs create an objective record of an interaction *from the officer’s point of view*. From a defendant’s rights perspective, PWBC have received criticism for this reason.⁷⁷ In regards to suspect interviews, a study showed juries were more likely to view an interview as non-coercive when only the suspect—as opposed to the officer and suspect—was visible in the recording.⁷⁸ However, this study only compared videos showing either the officer and suspect or just the suspect, not the difference between a first-person PWBC interview and an unrecorded “he said, she said” credibility

⁷¹ Rachel Weiner, *Police Body Cameras Spur Privacy Debate*, WASH. POST (Nov. 10, 2013), http://www.washingtonpost.com/local/crime/police-body-cameras-spur-privacy-debate/2013/11/10/7e9ee504-2549-11e3-b75d-5b7f66349852_story.html [http://perma.cc/7JE4-3WGP].

⁷² GOODALL, *supra* note 13, at 47. *But see* KATZ, *supra* note 19, at 15, 23 (reporting that the department utilized manual footage downloading and required officers to classify the footage by incident, citation, or department report number—as a result—“only 2.9% of camera officers agreed that they spent less time completing paperwork and 11.8% believed that it makes the officer’s job easier”).

⁷³ ODS CONSULTING, *supra* note 19, at 10; *see also* GOODALL, *supra* note 13, at 7.

⁷⁴ Roy, *supra* note 57, at 1.

⁷⁵ ACLU-NJ Releases Police Accountability Smartphone App for Summer Beach Season, ACLU-NJ (July 3, 2012), <https://www.aclu-nj.org/news/2012/07/03/aclu-nj-releases-police-accountability-app> [http://perma.cc/M8G4-FLV3].

⁷⁶ WHITE, *supra* note 19, at 12 n.1.

⁷⁷ See *Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1812–13 (2015).

⁷⁸ See Jennifer L. Mnookin, Opinion, *Can a Jury Believe What It Sees?*, N.Y. TIMES (July 13, 2014), <http://www.nytimes.com/2014/07/14/opinion/videotaped-confessions-can-be-misleading.html> [http://perma.cc/2942-WYVN].

determination;⁷⁹ there has not been a push to replace free-standing cameras in interrogation rooms with PWBCs.

Additionally, the primary objective of PWBCs is to increase the accountability of officer conduct. A recording of a situation from the officer's point of view produces a means of assessing whether the officer's actions were justified from his perception.⁸⁰ A seemingly innocuous action from the public's perspective could compel a completely different reaction from an officer.⁸¹ In excessive force cases, it is the officer's point of view that is important in determining if a reasonable officer would have acted similarly.⁸² For this reason, it is important departments require PWBCs be on an officer's head, rather than their body; cameras attached to an officer's torso are not able to show exactly what the officers was seeing at any given moment, if he was not looking where his body was facing.

Beyond changing the point of view of recordings, PWBCs will capture the entire interaction. Traditionally, recordings of use-of-force incidents show only a "provocative piece" of the encounter;⁸³ however, PWBCs will "give[] police an opportunity to move away from focusing on the final frame of an incident."⁸⁴

⁷⁹ See generally *id.*

⁸⁰ But see *Considering Police Body Cameras*, *supra* note 77, at 1812–13 (underscoring the value of this fact by indicating that an officer's view fails to capture the entire context of a scene). Wearing the body camera on glasses, as opposed to the officer's torso, further minimizes the potential that a recording will miss aspects of a scene that the officer was aware of. Kim Hilsenbeck, *Buda Police Adopt High-Tech Body Cameras*, HAYS FREE PRESS (June 26, 2015), <http://haysfreepress.com/content/buda-police-adopt-high-tech-body-cameras> [<http://perma.cc/YBT4-TTMP>].

⁸¹ Martin Kaste, *Police Departments Issuing Body Cameras Discover Drawbacks*, NPR (Jan. 22, 2015), <http://www.npr.org/sections/alltechconsidered/2015/01/22/37909533/8/how-police-body-camera-videos-are-perceived-can-be-complicated> [<http://perma.cc/NX6Y-FNDG>] ("Take, for instance, the now infamous video of a state trooper shooting a man at a gas station in South Carolina last fall. It shows a man who was reaching for his ID—a completely unprovoked shooting, to a civilian's eyes. But when an officer watches that video, he sees it differently. 'I felt my stomach tense up because I've seen that—and this has nothing to do with whether the incident was justified or not—but, I've seen that kind of quick movement before, where people have emerged with a weapon,' says San Francisco police Sgt. Adam Plantinga. . . . Sometimes, Plantinga says, '[a person] may wipe their hands on their pants, they may lower their head [or] lower their jaw to protect their neckline—sort of unconscious human behavior that means that there could be violence at any time.'") (third alteration in original)).

⁸² The officer's actions should be considered from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, *Graham v. Conner*, 490 U.S. 386, 396 (1989), to determine if the law enforcement officer's use of deadly force was "objectively reasonable . . . in light of the totality of the circumstances." *Abraham v. Raso*, 183 F.3d 279, 289 (3d Cir. 1999).

⁸³ Nelson, *supra* note 60.

⁸⁴ Roy, *supra* note 57, at 10; accord Martin Kaste, *As More Police Wear Cameras, Policy Questions Arise*, NPR (Nov. 7, 2011), <http://www.npr.org/2011/11/07/142016109/smile-youre-on-cop-camera> [<http://perma.cc/CPQ3-C8HU>].

IV. PROBLEMS WITH POLICE-WORN BODY CAMERAS

Despite the tangible benefits of PWBCs, they also present a number of potential deterrents to their adoption in both functional and legal aspects. Functionally, PWBCs pose harms to the departments and communities that adopt them; the rapid employment of the cameras have created such significant problems that a bill was introduced in the Minnesota Legislature to prohibit the use of PWBCs for one year, allowing legislators and police departments time to consider strategies to mitigate their negative financial and privacy impacts.⁸⁵ Questions about the legality of using PWBCs in certain situations have also been raised.

A. Negative Functional Aspects of Adopting Police Body Cameras

Since PWBCs were first introduced, opponents have expressed three major areas of concern. First, there has been a concern that cameras will be detrimental to the privacy rights of citizens, in part, because of the presence of public disclosure laws. Second, many are concerned about giving an officer the discretion to decide when to activate the PWBC that is supposed to be monitoring his actions for misconduct. Finally, the financial impact of storing the astronomical amount of footage created has generated increasing concern as the financial burden becomes more severe on departments.

1. Privacy Rights and Public Disclosure Laws

“Imagine having a police officer wearing a lapel camera sitting down at your dining room table to ask a few questions. Then imagine video of the interview landing on the Internet for anyone to watch.”⁸⁶

“I did not want to see my son being killed. That image would affect me for the rest of my life.”⁸⁷

These situations emphasize the very real risks that PWBCs pose to citizens’ privacy. Officers typically encounter people during the worst

⁸⁵ Abby Simons, *Senator Proposes One-Year Moratorium on Police Body Cameras*, STAR TRIB. (Feb. 11, 2015), <http://www.startribune.com/politics/statelocal/291572541.html> [<http://perma.cc/7UH8-CF58>] (explaining the legislation would ban PWBC use during official duties through May 31, 2016). See generally S.B. 754, 89th Leg., Reg. Sess. (Minn. 2015).

⁸⁶ William Crum, *Police Body Camera Videos Raise Oklahoma Public Records Issues*, OKLAHOMAN (Jan. 20, 2015), <http://newsok.com/police-body-camera-videos-raise-oklahoma-public-records-issues/article/5386085> [<http://perma.cc/9ZUR-KTN6>].

⁸⁷ Meg Wagner, *Police Body-Cameras Promote Transparency, but Horrific Footage Leaves Families Shaken and Questioning Why Standards Have Not Been Adopted*, N.Y. DAILY NEWS (Feb. 16, 2015), <http://www.nydailynews.com/news/national/police-bodycam-footage-stings-survivors-killed-article-1.2115051> [<http://perma.cc/36TQ-HJP2>] (quoting Cassandra Walker, whose son was shot by a police officer wearing a body-mounted camera in Oklahoma).

moments of their lives.⁸⁸ A recent victim's feelings of being violated, exposed, and vulnerable could be amplified by the presence of a camera while the police come to their aid. Moreover, the footage of their home, injuries, or interview appearing on the news could intensify the trauma they just encountered. This risk extends to the families of victims who might not want to see their loved one in those circumstances and certainly do not want the rest of the world to.⁸⁹

On the other hand, a person suspected of a crime could have his or her driver's license, home interior, and criminal record captured by PWBCs for only a minor infraction, like a traffic violation or noise complaint. Furthermore, the impact of a person's criminal behavior becoming publicized, as dash cam videos of DWI stops are, can create a far greater impact on a person's future than a conviction alone.⁹⁰

Recently, PWBCs have even begun to make their way into several states' high schools.⁹¹ This footage would not be confidential under the Family and Educational Rights and Privacy Act, which keeps most student data held by school police private.⁹² Therefore, the footage of students could also become public and militate against any future opportunities the student might have.⁹³

The problem is that under many states' public record laws, the PWBC footage in all of these situations could be a public record. Many states' public records laws vary from classifying all PWBC footage as a public record to providing significant exceptions for the footage that is subject to release. Minnesota's broad public disclosure law, for example, makes all PWBC footage a matter of public record.⁹⁴ On the other hand, Iowa's public

⁸⁸ Jennifer McDermott, *Legislator Wants Body Cameras for Rhode Island Police*, WASH. TIMES (Jan. 14, 2015), <http://www.washingtontimes.com/news/2015/jan/14/legislator-wants-body-cameras-for-rhode-island-pol/> [http://perma.cc/ZEN5-XQHR].

⁸⁹ Wagner, *supra* note 87.

⁹⁰ STANLEY, *supra* note 20, at 3.

⁹¹ AUSTIN INDEP. SCH. DIST. POLICE DEP'T, POLICY AND PROCEDURE MANUAL: POLICY 4.18 B, DIGITAL RECORDINGS—PORTABLE VIDEO SYSTEMS (Nov. 2010), http://www.austinisd.org/sites/default/files/dept/police/docs/Policy/4.18_B_Digital_Recordings-_Portable_Video_Systems_Revised_8-26-14.pdf [http://perma.cc/8NJZ-64Q4] [hereinafter AUSTIN POLICY] (Texas); Evie Blad, *Body Cameras on School Police Spark Student Privacy Concerns*, EDUC. WEEK (Mar. 3, 2015), <http://www.edweek.org/ew/articles/2015/03/04/body-cameras-on-school-police-spark-student.html> [http://perma.cc/XFQ7-RRG4] (Kansas, Iowa, and Tennessee); Donna Lowry, *Clayton County School Police Use Body Cameras*, WXIA-TV/11ALIVE (Aug. 10, 2015), <http://www.11alive.com/story/news/2015/08/10/clayton-schools-police-body-cameras/31439861/> [http://perma.cc/39L4-DYM7] (Georgia).

⁹² Blad, *supra* note 91.

⁹³ *Id.*

⁹⁴ Taj Simmons, *Proposal to Make Minnesota Police Body Cameras Private Raises Concern*, KTTC (Feb. 19, 2015), <http://www.kttc.com/story/28153921/2015/02/19/proposal-to-make-minnesota-police-body-cameras-private-raises-concern> [http://perma.cc/67HE-4WCW]; *see also* MINN. STAT. ANN. § 13.03 (West 2013) ("All government data collected, created, received, maintained or disseminated by a government entity shall be public unless [otherwise exempt].").

disclosure law is much narrower, providing exemptions for any record categorized as an investigative report even if it is not part of an ongoing investigation.⁹⁵ The federal Freedom of Information Act exempts footage that is part of an ongoing investigation, threatens to reveal confidential sources or law enforcement techniques or procedures, would constitute an egregious violation of privacy, or could lead to the harm of any individual.⁹⁶

Some police departments have attempted to mitigate these concerns through their PWBC policies by giving officers discretion to determine what is inappropriate to film, such as when nudity is present⁹⁷ or while interviewing a confidential informant.⁹⁸ Other departments instead require the use of only audio recording in these situations.⁹⁹ However, the main push to enhance privacy protections has come through calls to alter public disclosure laws. While some exemptions garner broad public support—for dead bodies, minors,¹⁰⁰ and nudity, for example—the overall stances on whether exceptions should be expanded or contracted fall mostly on party lines.

Liberal groups, like the ACLU, are more prone to overlooking the potential invasion of privacy for the greater social interest of increasing the transparency of police actions.¹⁰¹ These organizations are concerned that narrow public disclosure laws will prevent the public from ever seeing the

⁹⁵ IOWA CODE § 22.7 (2015).

⁹⁶ Freedom of Information Act, 5 U.S.C. § 552(b)(7) (2012) (“[R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source . . . (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.”).

⁹⁷ See, e.g., Sarah Volpenhein, *North Dakota Bill Would Keep Some Police Body Camera Images from Public Eye*, TWIN CITIES (Jan. 29, 2015), http://www.twincities.com/politics/ci_27417720/north-dakota-bill-would-keep-some-police-body [http://perma.cc/C6Y8-UQM5] (discussing the Grand Forks Police Department policy).

⁹⁸ See Rhea Mahbubani, *Police Use of Body-Worn Cameras Questioned by Menlo Park Council Members*, SAN JOSE MERCURY NEWS (Jan. 30, 2015), http://www.mercurynews.com/peninsula/ci_27423404/police-use-body-worn-cameras-questioned-by-menlo [http://perma.cc/QU5W-FAGS].

⁹⁹ See GREENSBORO POLICE DEP’T, DIRECTIVES MANUAL: BODY WORN CAMERAS (BWC) § 15.11.5 (Aug. 2013) [hereinafter GREENSBORO POLICY], https://rcfp.org/bodycam_policies/NC/Greensboro_BWC_Policy.pdf [https://perma.cc/76N8-VWBG]; VALDOSTA POLICE DEP’T, GENERAL ORDER 300-21: AUDIO/VIDEO RECORDING PROCEDURES § I(B) (Nov. 1998), https://rcfp.org/bodycam_policies/GA/Valdosta_BWC_Policy.pdf [https://perma.cc/QJ9D-QKNJ] [hereinafter VALDOSTA POLICY].

¹⁰⁰ But see Blad, *supra* note 91 (“State open records laws provide varying levels of exemption for materials related to crimes committed by minors.”).

¹⁰¹ See, e.g., STANLEY, *supra* note 20, at 1–2.

footage of incidents, like the shooting of Michael Brown.¹⁰² Accordingly, the entire reason for adopting the PWBCs—in their eyes—would be eliminated, and the cameras would merely become a tool for the government to monitor the public.¹⁰³ However, the ACLU does believe a need for “proper privacy protections”¹⁰⁴ exists, including keeping PWBCs out of schools because the potential for “extreme instances of inappropriate use of physical force by police are far less common than they are on the street.”¹⁰⁵

Alternatively, conservative lawmakers focus primarily on exempting as much PWBC footage from public disclosure laws as possible to protect public privacy.¹⁰⁶ In response to arguments that this approach would be over-inclusive and harm transparency interests, they argue that police departments may still release any footage they obtain at their own discretion.¹⁰⁷

In order to bridge the gap between these divergent opinions, a number of different compromises have been proposed. On one extreme, the Seattle Police Department has begun posting all of its PWBC footage to its YouTube channel.¹⁰⁸ To mitigate privacy and cost concerns, the department developed more efficient technology to blur the faces in the footage and the department also removes all sound.¹⁰⁹ However, this solution is problematic because it does not hide other protected interests, like the inside of a home, and it harms

¹⁰² Simmons, *supra* note 94.

¹⁰³ Kyle Potter, *On Body Cameras, Minnesota Lawmakers Weigh Privacy Versus Transparency*, TWIN CITIES (Feb. 19, 2015), http://www.twincities.com/localnews/ci_27557482/minnesota-hearing-police-body-cameras-stirs-black-lives [http://perma.cc/GZX8-CELN].

¹⁰⁴ Jay Stanley, *Police Officer Discretion in the Use of Body Worn Cameras*, ACLU (Feb. 2, 2015), <https://www.aclu.org/blog/free-future/police-officer-discretion-use-body-worn-cameras> [https://perma.cc/VQ5U-VYXM].

¹⁰⁵ Blad, *supra* note 91.

¹⁰⁶ Conservative members of many legislatures considering body cameras have raised this issue, but on April 9, 2015, the North Dakota Legislature became the first legislature in the country to pass legislation specifically exempting body camera footage from public records laws. See *North Dakota House Bill 1264*, LEGISCAN, <https://legiscan.com/ND/bill/1264/2015> [http://perma.cc/9RAT-SM78] (reporting that H.B. 1264 passed both chambers of the legislature); see also H.B. 1264, 64th Legis. Assemb., Reg. Sess. (N.D. 2015) (to be codified at N.D. CENT. CODE § 44-04-18.7) (reading in its entirety, “An image taken by a law enforcement officer with a body camera or similar device and which is taken in a private place is an exempt record.”). South Carolina S. 47 went even further by categorically defining PWBC footage as not public records subject to public disclosure laws. S. 47, 121st Leg., Reg. Sess. (S.C. 2015).

¹⁰⁷ Volpenhein, *supra* note 97.

¹⁰⁸ Victoria Cavalieri, *Seattle Police Begin Posting Body Camera Footage on YouTube Channel*, REUTERS (Feb. 26, 2015), <http://www.reuters.com/article/2015/02/26/us-usa-police-seattle-idUSKBN0LU2C220150226> [http://perma.cc/8MUV-W6S6].

¹⁰⁹ *Id.* But see Bob Garfield, *The Police Body Cam Conundrum*, ON MEDIA (May 8, 2015), <http://www.onthemedia.org/story/police-body-cam-conundrum/> [http://perma.cc/4PZ8-LKK5] (describing the Seattle PD’s auto-redaction technology as worthless because it makes the footage so blurring a viewer cannot see anything).

the transparency interest by showing police actions absent the context of what the officers said to justify their actions.

Another suggestion is that the departments themselves should have no say in what footage is released to the public, and that there should be separate policies governing the released footage taken in public and private places.¹¹⁰ Several legislatures have charted a third course, namely putting the power in the hands of the subjects of the footage and the courts.¹¹¹ This concept allows the release of footage with the consent of its subject or a court order based on a determination that the public interest value of the footage is greater than the privacy interest.¹¹² Because these proposals also limit future disclosure, they have been criticized as having a “chilling effect” on the media, but proponents argue that these are similar restraints already imposed for information concerning crime victims and witnesses.¹¹³ This method has also been criticized for placing a tremendous burden on the court system.¹¹⁴ To negate this concern and increase the legitimacy of undisclosed footage, a final proposal allows for a council of citizens or legislators to view any requested footage to determine if the public’s need justifies its release, without the need for a court order.¹¹⁵

An additional concern for citizens is the potential for PWBCs to be used in concert with facial recognition technology. Bryce Clayton Newell explained that PWBCs could be used on the street or in crowds as a way to indiscriminately compare every citizen passing an officer against criminal, DMV, or other databases in real-time.¹¹⁶ Beyond the unjustified interaction

¹¹⁰ Kevin Drum, *LA Is Adopting Bodycams for Its Police Force. But Who Gets to See the Footage?*, MOTHER JONES (Feb. 5, 2015), <http://www.motherjones.com/kevin-drum/2015/02/la-adopting-bodycams-its-police-force-who-gets-see-footage> [http://perma.cc/5B8P-RDYV].

¹¹¹ See, e.g., H.B. 1917, 64th Leg., Reg. Sess. (Wash. 2015).

¹¹² *Id.* at 3–4.

¹¹³ Jordan Schrader, *Bills Address Police Body Cameras, Records*, OLYMPIAN (Feb. 2, 2015), <http://www.theolympian.com/news/local/politics-government/article26106172.html> [http://perma.cc/HMZ9-GCF5].

¹¹⁴ Derrick Nunnally, *Police Body-Camera Bill Spurs Debate in State Legislature*, KOMO NEWS (Feb. 25, 2015), <http://www.komonews.com/news/local/Body-cameras-bill-spurs-debate-in-Washington-Legislature-294138931.html> [http://perma.cc/TSB6-GU2C].

¹¹⁵ Alexis Zotos, *Koster Recommends Restrictions on Who Can View Police Body Camera Footage*, KMOV (Feb. 6, 2015), <http://www.kmov.com/special-coverage-001/Koster-recommends-restrictions-on-who-can-view-police-body-camera-footage-291129171.html#ixzz3RZxYGQGZ> [http://perma.cc/8W2N-TMDV] (describing this concept that was first proposed by Rasheen Aldridge of the Ferguson Commission).

¹¹⁶ Bryce Clayton Newell, *Crossing Lenses: Policing’s New Visibility and the Role of “Smartphone Journalism” as a Form of Freedom-Preserving Reciprocal Surveillance*, 2014 U. ILL. J.L. TECH. & POL’Y 59, 90 (“[T]he increasing effectiveness of facial recognition software, even in consumer products like Facebook, means that simply recording an image of a person (in a private or public space) can lead to further identification. . . . [PWBCs], paired with facial recognition, could easily become much like the current crop of automated license readers, constantly reading thousands of faces

with police in public, the facial recognition software could also be utilized during officer recordings in private establishments or residences.¹¹⁷ The strain PWBCs already threaten to pose to community policing—by potentially alienating members of the community from speaking with police—would increase exponentially if citizens learned their face would be compared to any number of databases anytime they see an officer.¹¹⁸ Furthermore, the police could monitor the vast quantity of stored PWBC footage for future investigations or general data collection.¹¹⁹ To mitigate these concerns, one state has already banned the use of facial recognition technology with PWBCs.¹²⁰

A final hesitation expressed by officers and their unions is that PWBCs could be used by supervisors to monitor the actions of officers.¹²¹ Officers are concerned over policy recommendations that require constant use of PWBCs during shifts because they could be used by supervisors to monitor officers' daily routines for minor infractions¹²² and potentially be subject to public disclosure laws as well. Furthermore, public disclosure of this footage could reveal personal information about the officers or tactics they employ on the job.¹²³ Eugene O'Donnell, a former police officer currently teaching at John Jay College, would not recommend pursuing employment with any department that uses PWBCs because the cameras create an atmosphere of officer distrust.¹²⁴ Many departments are cognizant of these concerns and instruct officers to turn off their cameras while on breaks or in the restroom.¹²⁵

(license plates), interpreting identity (plate number), and cross-checking this information against national and local crime databases in real-time.”).

¹¹⁷ Newell suggests requiring police to get explicit permission to use PWBCs during the execution of a search warrant. *Id.*

¹¹⁸ Cf. Michelle Alexander, FACEBOOK (Dec. 10, 2014), https://www.facebook.com/permalink.php?story_fbid=728748387213121&id=168304409924191 [https://perma.cc/G8QM-T5FU] (discussing her apprehension to PWBCs because of their inability to address the root causes of improper officer use-of-force incidents and their potential to create a surveillance state that only empowers the criminal justice machine).

¹¹⁹ *Id.*; accord Stephen Rushin, *The Judicial Response to Mass Police Surveillance*, 2011 U. ILL. J.L. TECH. & POL'Y 281, 288, 291 (explaining that facial recognition technology could be used to analyze video footage to “log the identity, time, and location of” every person indiscriminately recorded by a PWBC, “regardless of any suspicious behavior . . . into an extensive database, which could be searched for information in future police investigations”—the primary deterrent to such actions in the past was the costs of data storage; police departments would now have ample amounts of footage available to review at no additional cost).

¹²⁰ H.B. 2571, 78th Legis. Assemb., Reg. Sess. (Or. 2015).

¹²¹ WHITE, *supra* note 19, at 28.

¹²² *Id.*

¹²³ Tami Abdollah, *Officers Fear Body Cameras Raise Privacy Concerns*, POLICE ONE (Mar. 15, 2014), <http://www.policeone.com/police-products/body-cameras/articles/6976369-Officers-fear-body-cameras-raise-privacy-concerns/> [http://perma.cc/48NB-74M2].

¹²⁴ Kaste, *supra* note 81.

¹²⁵ See, e.g., Volpenhein, *supra* note 97.

However, unions typically push for greater guarantees of officer privacy and the ability of officers to review their own footage before giving formal statements on their actions.¹²⁶ Absent these guarantees, some unions have threatened lawsuits based on the changes in working conditions associated with the requirement to use PWBCs.¹²⁷ For these reasons, it is just as important for police departments to involve officers in their policy decisions regarding PWBCs as it is for the departments to involve their communities.¹²⁸

2. Discretion

Early in the adoption of PWBCs, giving officers any discretion over their use was looked at with great skepticism.¹²⁹ Social organizations advocated for the use of PWBCs to hold officers accountable for instances of misconduct.¹³⁰ However, prior attempts to hold officers accountable by equipping them with microphones,¹³¹ dash cameras,¹³² and even body cameras gave reason for concern because of the rampant abuse.¹³³ Accordingly, the ACLU made an initial recommendation that an ideal police body-worn camera policy, from an oversight standpoint, would remove all officer discretion and require continuous recording by officers while on duty or at least require officers to record the entirety of *every* interaction with the public.¹³⁴

¹²⁶ Kaste, *supra* note 84. Even when body camera policies include these kinds of exceptions, officers can still face an up-hill battle trying to enforce them. *Id.* (explaining the Oakland Police Department's policy allowed officers to review their footage before making statements, but when an officer was involved in a shooting his request to review the footage of the incident was denied).

¹²⁷ WHITE, *supra* note 19, at 28.

¹²⁸ *Id.* at 28–29.

¹²⁹ STANLEY, *supra* note 20, at 3; see also RANKIN, *supra* note 19, at 3 (finding officers who volunteered to use PWBCs were 60.5% more likely to activate their body cameras than officers who were required to use body cameras, and all officers were 42% less likely to activate their body cameras when doing so was optional, as opposed to mandatory).

¹³⁰ Simmons, *supra* note 94.

¹³¹ The LAPD had a significant problem with officers tampering with automatically activated audio recorders when they became mandatory, especially in minority communities. See Elise Hu, *Using Technology to Counter Police Mistrust Is Complicated*, NPR (Sept. 2, 2014), <http://www.npr.org/sections/alltechconsidered/2014/09/02/345208359/using-technology-to-counter-police-mistrust-is-complicated> [<http://perma.cc/6DDX-YNNZ>].

¹³² STANLEY, *supra* note 20, at 2 (“[I]n the case of two Seattle men who filed a claim for excessive force and wrongful arrest. Parts of the arrest were captured by a dashcam, but parts that should have been captured were mysteriously missing.”).

¹³³ Ken Daley, *Cameras Not on Most of the Time When NOPD Uses Force, Monitor Finds*, TIMES-PICAYUNE (Sept. 4, 2014), http://www.nola.com/crime/index.ssf/2014/09/cameras_not_on_most_of_the_time.html [<http://perma.cc/EHR6-7RMZ>] (reporting that in New Orleans, 145 use-of-force incidents involved officers wearing cameras but only 1/3 of the incidents were recorded).

¹³⁴ STANLEY, *supra* note 20, at 2.

Furthermore, the ACLU advised that strict policies be employed to hold officers accountable for failing to record any interactions with the public.¹³⁵ This policy recommendation was well warranted because in some cases—like the death of teenager Antonio Martin—once the shooting was deemed justified the issue of punishing the officer for neglecting to engage his PWBC was barely raised.¹³⁶ Accordingly, merely requiring officers to activate their body cameras—without providing tangible consequences for failure to do so—has proven ineffective.¹³⁷ Punishment recommendations range from meaningful discipline to evidentiary presumptions against officers for charges of misconduct that were not recorded.¹³⁸

The Police Executive Research Forum (PERF) and the majority of police departments have rejected the ACLU recommendation to record every encounter with the public.¹³⁹ While too much officer discretion can be problematic, there are reasons why it is necessary in some instances. First, to protect citizens' privacy, officers occasionally need to disengage their camera.¹⁴⁰ Second, the use of PWBCs can be harmful to police-community relations in some instances, such as interviewing confidential informants,

¹³⁵ *Id.* at 3. The ACLU's recommendation seems justified because the New Orleans police department's actions were in violation of the department's policy on the use of body-worn cameras. See OFFICE OF THE NEW ORLEANS CONSENT DECREE MONITOR, THIRD QUARTERLY REPORT OF 2014, at 51 (Dec. 2014), http://www.laed.uscourts.gov/Consent/OCDM_Third_Quarterly_Report_for_2014.pdf [http://perma.cc/3JA5-36WB] (requiring the activation of cameras for all enforcement contacts with the public or the activation as soon as possible during the escalation of a non-enforcement contact); Jarvis DeBerry, *New Body Cameras, Same Ol' New Orleans Police Department*, TIMES-PICAYUNE (Sept. 5, 2014), http://www.nola.com/opinions/index.ssf/2014/09/new_body_cameras_same.ol_new.o.html [http://perma.cc/89GB-DF3A]; see also Connie Foss-Garcia & Dan Lieberman, *Investigation of 5 Cities Finds Body Cameras Usually Help Police*, FUSION (Dec. 7, 2014), <http://fusion.net/story/31986/investigation-of-5-cities-finds-body-cameras-usually-help-police/> [http://perma.cc/3H4P-963K] (finding that the use of PWBCs typically helped officers more than the public in use-of-force incidents of five police departments because officers were in charge of starting the recordings and failed to do so numerous times, including some of the more questionable instances).

¹³⁶ Matt Stroud, *The Big Problem with Police Body Cameras*, BLOOMBERG (Jan. 15, 2015), <http://www.bloomberg.com/news/articles/2015-01-15/police-body-camera-policies-wont-work-if-cops-dont-turn-cameras-on> [http://perma.cc/GL4U-LLRL].

¹³⁷ For example, despite the New Orleans Police Department's mandate to activate their PWBCs, officers failed to activate their body cameras during use-of-force incidents because a "willful refus[al] to record [was] not a fireable offense." Martin Kaste, *Even Police Body Cameras Can Lose Sight of the Truth*, NPR (Aug. 23, 2014), <http://www.npr.org/2014/08/23/342623830/even-police-body-cameras-can-lose-sight-of-the-truth> [http://perma.cc/9PRW-YEE8].

¹³⁸ STANLEY, *supra* note 20, at 3.

¹³⁹ MILLER, *supra* note 8, at 12; see, e.g., DENVER POLICE DEP'T, BODY-WORN CAMERA—TESTING AND EVALUATION POLICY (Apr. 2014) [hereinafter DENVER POLICY], <http://www.sribd.com/doc/238793995/Denver-Police-Body-Camera-Policy> [https://perma.cc/C8RE-GE7T]; OAKLAND POLICY, *supra* note 70.

¹⁴⁰ See *supra* notes 86–100.

victims, witnesses, or merely having an “informal, non-law enforcement interaction[] with [a] member[] of the community.”¹⁴¹ One crucial aspect of policing is keeping an open dialogue with the community—“[i]f people think that they are going to be recorded every time they talk to an officer, regardless of the context, it is going to damage openness and create barriers to important relationships.”¹⁴² Third, it eliminates an officer’s ability to use discretion in determining whether the individual circumstances of a situation warrant a strict enforcement of the law.¹⁴³

The ACLU has since updated its policy recommendations to be more in line with the suggestions of other organizations.¹⁴⁴ One important consideration in backing away from a record-all-interactions policy was to reconcile the ACLU’s support of PWBCs use and broad public disclosure laws.¹⁴⁵ The ACLU did not initially intend the footage to be subject to complete disclosure to the public, and rather than advocate for more restrictive public record laws, the ACLU has decided that less oppressive PWBC policies will ensure that only footage the public has an interest in viewing will be captured.¹⁴⁶ Accordingly, the ACLU now makes a similar recommendation to PERF, “that an officer [should] activate his or her camera *when responding to a call for service or at the initiation of any other law enforcement or investigative encounter between a police officer and a member of the public.*”¹⁴⁷

PERF also recommends a number of clarifications and exceptions that departments should employ to this general rule. First, the officer should notify those being recorded as soon as possible “unless doing so would be unsafe, impractical, or impossible.”¹⁴⁸ Second, an officer should record interviews with witnesses, victims, and informants unless they believe doing so would endanger the citizen or she has made an on-camera request to not be recorded and the officer determines obtaining the information is more important than the recording.¹⁴⁹ Third, once a camera has been activated, it should remain activated until the incident has concluded, the officer has been ordered to deactivate it by a supervisor, or the officer has obtained a request to disengage the PWBC by a valid party.¹⁵⁰ However, PERF makes it clear that any instance where an officer fails to record an otherwise required encounter, the

¹⁴¹ MILLER, *supra* note 8, at 12.

¹⁴² *Id.* at 13.

¹⁴³ KATZ, *supra* note 19, at 3 (“[T]he number of arrests increased by about 17% among the [officers using body-worn cameras] compared to 9% in the comparison group.”).

¹⁴⁴ Stanley, *supra* note 104.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*; accord MILLER, *supra* note 8, at 55.

¹⁴⁸ MILLER, *supra* note 8, at 56; see also *infra* notes 175–76 and accompanying text.

¹⁴⁹ MILLER, *supra* note 8, at 56–57.

¹⁵⁰ *Id.* at 56.

officer must explain his reason for doing so in a written report as soon as possible.¹⁵¹

3. Financial

The financial implications of PWBCs come in three main stages: initial cost of purchasing cameras and training, data storage, and redaction. First, departments must find a substantial amount of money to purchase the PWBCs and ancillary gear to initially equip their officers.¹⁵² This has been a major flaw in much of the legislation that would mandate all officers in a state to adopt their use.¹⁵³ However, President Obama's proposal to create a matching program for departments could provide substantial relief for these initial costs.¹⁵⁴

The most substantial cost of employing PWBCs lies in the fee for storing the footage on secure servers.¹⁵⁵ This was a cost overlooked by many police departments who adopted PWBCs early on.¹⁵⁶ Departments have attempted to mitigate these costs by limiting the amount of time officers are required to use their cameras, and the length of time for which they retain footage.¹⁵⁷ Consequently, many departments classify footage as either "evidentiary" or "non-evidentiary"—based on whether any enforcement actions were taken—and determine retention dates accordingly.¹⁵⁸ Departments delete the majority of their footage, the "non-evidentiary" footage, relatively quickly, anywhere from thirty days to one year.¹⁵⁹ The "evidentiary" footage is retained for a longer period of time and may be further subcategorized to footage related to

¹⁵¹ *Id.* at 54.

¹⁵² *Id.* at 32 (reporting that departments spend on average \$800–\$1200 per camera); Stan Finger, *Wichita Police: Grants, Drug Seizure Funds to Pay for Body Cameras*, WICHITA EAGLE (Dec. 3, 2014), <http://www.kansas.com/news/local/article4256558.html#storylink=cpy> [http://perma.cc/9Y6T-964A] ("[B]uying 444 body cameras will cost an estimated \$577,000, with another \$350,000 for docking stations, equipment and connectivity costs.").

¹⁵³ See e.g., Bryan Lowry, *Activists Urge Lawmakers to Move Ahead with Police Body Camera Bill*, WICHITA EAGLE (Jan. 29, 2015), <http://www.kansas.com/news/politics-government/article8571488.html#storylink=cpy> [http://perma.cc/9WVB-6RUG]; Ty Russell, *Fla. Lawmaker Proposes Body Cameras for All Law Enforcement*, NBC-2 (Dec. 5, 2014), <http://www.nbc-2.com/story/27561212/fla-lawmaker-proposes-body-cameras-for-all-law-enforcement#.VOOsngB0yP8> [http://perma.cc/MR4T-V2GA].

¹⁵⁴ See *supra* note 25.

¹⁵⁵ Lowry, *supra* note 153 (reporting that the server to store the departments body camera footage cost the department more than twice as much as the cameras).

¹⁵⁶ Adam Wright, *Cost of Storing Body Camera Footage Could Cripple Police Departments*, WINK NEWS (Feb. 11, 2015), <http://www.winknews.com/2015/02/11/cost-of-storing-body-camera-footage-could-cripple-police-departments/> [http://perma.cc/Z7DW-CEJN].

¹⁵⁷ MILLER, *supra* note 8, at 33.

¹⁵⁸ *Id.* at 16–17.

¹⁵⁹ *Id.* at 17.

investigations, which may be kept indefinitely.¹⁶⁰ Other departments have opted to retain all footage until the statute of limitations on civil complaints against police has expired.¹⁶¹

Many states have looked to creative solutions to fund their investments with money from surcharges on criminal offenses,¹⁶² taxes,¹⁶³ drug forfeitures, or budget allocations from other programs to help ease the burden on departments.¹⁶⁴ Mesa Police Chief Frank Milstead believes that the savings from liability suits against his department alone would more than cover the annual costs of the PWBCs.¹⁶⁵

The cost of reviewing footage for the purposes of redaction and classification also poses a tremendous burden on police departments.¹⁶⁶ Many departments employ at least one full-time staff member to manage their program.¹⁶⁷ To save administrative costs, some departments shift classification

¹⁶⁰ *Id.* at 17, 34.

¹⁶¹ See, e.g., Roberto Alejandro, *Mayor's Working Group Member Explains City's Police-Worn Body Camera Recommendations*, AFRO (Mar. 4, 2015), <http://www.afro.com/aclu-explains-citys-police-worn-body-camera-recommendations/> [http://perma.cc/48WU-XV27]; City of Menlo Park, Staff Report No. 15-014: Review and Discuss the Police Department's Policy on the Use of Body Cameras and the Retention of Recordings and Determine Whether Council Desires to Adopt a Policy or Ordinance, *in* City Council Jan. 27, 2015 Meeting Agenda, at 159, 160 [hereinafter Menlo Park Policy], <http://www.menlopark.org/ArchiveCenter/ViewFile/Item/2433> [https://perma.cc/F95V-KTNK] (retaining all footage for two and a half years to allow additional time for the city to be served after the two year statute of limitation has expired).

¹⁶² See S.B. 1304, 99th Gen. Assemb., Reg. Sess. (Ill. 2015) (imposing an additional fine, of \$15 for every \$40 contained in the fine, on traffic and drug offenses and allocating \$3 of each \$15 fine imposed to pay for PWBCs); see also Doug Finke, *State Lawmakers Propose Surcharge to Pay for Police Body Cameras*, ST. J.-REG. (Sept. 11, 2014), <http://www.sj-r.com/article/20140911/News/140919872> [http://perma.cc/B6VZ-PH29] (adding an additional fine on traffic violations and criminal convictions). But see Daniel Rivero, *Politicians Want Minorities to Pay an Unfair Amount for Illinois' Police Body Cameras*, FUSION (May 29, 2015), <http://fusion.net/story/141732/politicians-want-minorities-to-pay-an-unfair-amount-for-illinois-police-body-cameras/> [http://perma.cc/2W36-57E2] ("For both traffic and criminal convictions, minorities are disproportionately represented, and would thus be footing an outsized amount of funding for something, which, in the end is meant to protect them from police abuses in the first place.").

¹⁶³ Cheryl K. Chumley, *NRA Slams Missouri Gun-Tax Plan to Pay for Police Body Cameras*, WASH. TIMES (Jan. 13, 2015), <http://www.washingtontimes.com/news/2015/jan/13/nra-slams-missouri-gun-tax-plan-to-pay-for-police-> [http://perma.cc/PST2-HJPW] (describing a Missouri lawmaker's proposed gun tax to fund body cameras).

¹⁶⁴ Finger, *supra* note 152.

¹⁶⁵ Nelson, *supra* note 60 ("A five-year contract to buy and maintain the cameras and administer the videos they capture will cost \$247,000 a year. Savings from reduced liability claims could range from \$307,000 to \$575,000 a year, Milstead said.").

¹⁶⁶ According to Robinson Meyer, in a typical PWBC recording there are twenty to thirty frames per minute, which takes approximately four hours to redact. Garfield, *supra* note 109, at 4:30.

¹⁶⁷ MILLER, *supra* note 8, at 32.

duties to officers for their day's footage, but this takes a significant amount of time from their shift and offers the potential to miscategorize or alter footage.¹⁶⁸ While some states' public records laws allow for shifting the costs of redaction onto requesters, at least one lawsuit has been brought in Florida to challenge a department's determination that it would cost \$18,000 for the 458 hours of requested footage to be prepared because it functionally made the records inaccessible.¹⁶⁹ The ACLU recommends that un-redacted footage only be released with the consent of the subjects of the footage.¹⁷⁰

B. Legal Implications

Concerns over the legality of employing PWBCs have been raised in regards to both state law and the Constitution. The state law concerns have proven to be the most valid, as PWBCs conflict with many states' wiretapping laws. The suggested conflicts between the use of PWBCs and the Constitution are more matters of policy than actionable claims. Finally, the evidentiary value of PWBC footage has started to emerge but there are still a number of questions concerning its eventual integration into the rules of evidence.

1. State Law Issues

The most widespread state law issue for PWBCs concerns state wiretapping laws. State wiretapping laws either require the consent of one or both (all) parties subject to the recorded communication. States with single-party consent laws face no general issues with PWBCs because an officer would be able to record any conversation they are subject to.¹⁷¹ Two-party consent wiretapping laws, however, require all parties to a communication consent to being recorded.¹⁷² Accordingly, the use of PWBCs in states with two-party consent laws is illegal unless officers obtain the consent of all citizens they interact with.

Several two-party consent states have begun to address the issue by creating exceptions for law enforcement officers in certain circumstances. For example, the initial use of PWBCs in Pennsylvania were determined to be in violation of the state's wiretapping law, which only created an exception for dashboard cameras.¹⁷³ In response the General Assembly of Pennsylvania

¹⁶⁸Id. at 32–33.

¹⁶⁹Susannah Nesmith, *With More Police Wearing Cameras, the Fight over Footage Has Begun in Florida*, COLUM. JOURNALISM REV. (Mar. 9, 2015), http://www.ejr.org/united_states_project/florida_police_body_cameras.php [http://perma.cc/TD9J-PCVT].

¹⁷⁰STANLEY, *supra* note 20, at 5.

¹⁷¹See, e.g., ALA. CODE § 13A-11-30 (2006).

¹⁷²See, e.g., N.H. REV. STAT. ANN. § 570-A:2(I) (Supp. 2015).

¹⁷³Margaret Harding, *Corbett Says He Will Sign Legislation Allowing Cameras to be Mounted on Police Officers' Bodies*, TRIBLIVE (Feb. 3, 2014), <http://triblive.com/>

passed S.B. 57, codified as Pennsylvania Consolidated Statutes, title 18, section 5704(16), to allow the interception and recording of any communication between individuals by an officer “acting in the performance of his official duties.”¹⁷⁴ However, the consent exception does not apply to recordings that “occur inside the residence of any of the individuals” involved in the communication.¹⁷⁵ On the other hand, New Hampshire adjusted its wiretapping law to permit the use of PWBCs in certain situations but only if the officer provides notice to the citizens being filmed.¹⁷⁶ This approach is more in line with the recommendation of the ACLU that has called for notice to citizens “wherever practicable”.¹⁷⁷ Finally, California resolved this issue by creating an exception for “any [police] officer . . . overhearing or recording any communication that they could lawfully overhear or record.”¹⁷⁸ Most states, however, have not yet explicitly addressed this issue.

2. Constitutional Issues

The use of PWBCs has created concerns that they will interfere with individuals’ First, Fourth, and Sixth Amendment rights. These concerns, however, are more questions of when police should use body cameras because it is a long standing principal that there is no reasonable expectation of privacy to what could normally be perceived by an officer’s naked senses.¹⁷⁹

The First Amendment concerns arise from the potential of police to film individuals peacefully exercising their right to protest.¹⁸⁰ The fear is that this footage could be requested through public record laws and used against the participants.¹⁸¹ However, these groups do recognize the necessity to activate

news/allegeny/5526897-74/police-cameras-officers#axzz3DVuVLknJ [http://perma.cc/TVQ3-6GSU].

¹⁷⁴ S.B. 57, 2013 Gen. Assemb., Reg. Sess. (Pa. 2013) (codified at 18 PA. STAT. AND CONS. STAT. ANN. § 5704(16) (West Supp. 2015)); *accord* Harding, *supra* note 173.

¹⁷⁵ Pa. S.B. 57; *see also* 18 PA. STAT. AND CONS. STAT. ANN. § 5704(16).

¹⁷⁶ N.H. REV. STAT. ANN. § 570-A:2(II)(j), (l) (permitting PWBCs *only* during “routine stop[s] performed in the ordinary course of patrol duties . . . provided that the officer shall first give notification of such recording to the party to the communication” and in “conjunction with a TASER or other similar electroshock device” if the subject is informed the video exists).

¹⁷⁷ STANLEY, *supra* note 20, at 4 (suggesting that “an easily visible pin or sticker saying ‘lapel camera in operation’ or words to that effect” could be sufficient to provide notice without interfering with officers’ duties).

¹⁷⁸ CAL. PENAL CODE § 633 (West 2010); *accord* EUGENE P. RAMIREZ, A REPORT ON BODY WORN CAMERAS 5 (2014), https://www.bja.gov/bwc/pdfs/14-005_Report_BODY_WORN_CAMERAS.pdf [https://perma.cc/HE9N-VJVG].

¹⁷⁹ RAMIREZ, *supra* note 179, at 5–6.

¹⁸⁰ Stanley, *supra* note 104.

¹⁸¹ *Id.*

the PWBCs if protests become violent or there is some reasonable suspicion of criminal activity.¹⁸²

The Fourth and Sixth Amendment concerns on the other hand could be violated by the use of PWBCs, but only if the use were exacerbated to an unreasonable degree. Existing precedent on police video and audio recordings could easily be extended to allow PWBC footage where officers are lawfully present.¹⁸³ A reasonable expectation of privacy is instead violated by more extreme circumstances of hidden cameras or twenty-four hour surveillance.¹⁸⁴

3. Evidence

Underscoring these legal issues is the role that PWBC footage will be able to play as evidence in trials. “[B]ody-worn cameras capture everything that happens as officers travel around the scene and interview multiple people,” according to Dalton, Georgia’s Police Chief Jason Parker.¹⁸⁵ “The body-worn cameras have been incredibly useful in accurately preserving information,” he continued.¹⁸⁶ The objective record of an accident scene is particularly relevant because an officer’s first priority is performing life-saving measures and ensuring the scene is secure.¹⁸⁷ As a result, witness and victim statements may contain inaccuracies or important information later forgotten in the midst of the confusion.¹⁸⁸ The video provides certainty to the content of excited utterances that can bolster or contradict witness testimony in court.¹⁸⁹

Officers have found the PWBCs to be most useful, however, in prosecuting domestic violence cases, where the victim often refuses to testify at trial.¹⁹⁰ The footage regularly documents “first-hand the victim’s injuries, demeanor, . . . immediate reactions” and “[i]n some cases, officers capture the assault itself.”¹⁹¹ Therefore, even if the victim refuses to testify, the state may

¹⁸² Edwin C. Yohnka, *Getting It Right on Police Body Cameras*, CHI. TRIB. (Sept. 24, 2014), <http://www.chicagotribune.com/news/opinion/commentary/ct-police-cameras-perspective-0925-20140924-story.html> [http://perma.cc/KG7Y-MQF5].

¹⁸³ RAMIREZ, *supra* note 179, at 5–6.

¹⁸⁴ *Id.*

¹⁸⁵ MILLER, *supra* note 8, at 9.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Keith L. Alexander, *Lawyers See New Benefit to D.C. Police Body Cameras—As Evidence for Trials*, WASH. POST (Jan. 25, 2015), https://www.washingtonpost.com/local/crime/lawyers-see-new-benefit-to-dc-police-body-cameras--as-evidence-for-trials/2015/01/25/c0d89f06-9c11-11e4-bcfb-059ec7a93ddc_story.html [http://perma.cc/XA3J-5XGF].

¹⁹⁰ KATZ, *supra* note 19, at 37 (finding “cases were more likely to be initiated by the prosecutor’s office (40.9% vs. 34.3%), have charges filed (37.7% vs. 26%), have cases furthered (12.7% vs. 6.2%), result in a guilty plea (4.4% vs. 1.2%), and result in a guilty verdict at trial (4.4% vs. 0.9%)”); MILLER, *supra* note 8, at 9.

¹⁹¹ MILLER, *supra* note 8, at 9 (first quoting Mike Chitwood, Chief of Police of Daytona Beach, Florida).

still be able to proceed with the charges;¹⁹² often times, defendants will simply plead guilty after reviewing the footage of the incident.¹⁹³

The use of PWBCs in first response situations has led to questions about the admissibility of the footage as evidence. Professor Jeff Bellin, for example, has asked whether the presence of a PWBC during initial interviews at a scene could transform these excited utterances into inadmissible testimonial statements under the Confrontation Clause.¹⁹⁴ However, the issue is not merely academic; early court cases have addressed whether police footage could violate a suspect's privacy rights and justify suppressing any evidence captured by the video. One such case, in Burlington, Vermont, determined that an officer's use of a PWBC while entering a private home without a warrant and interviewing a suspect, in response to a domestic violence call, was justified by exigent circumstances.¹⁹⁵ Accordingly, the body camera footage did not violate the defendant's right to privacy and was admissible in his criminal trial.¹⁹⁶

A final issue concerning PWBC footage as evidence is the situation where officers fail to engage their PWBCs. Scott Greenfield has recommended implementing a presumption that PWBC footage "would corroborate the defendant's account" if an officer had video capabilities but failed to record the incident.¹⁹⁷ Additionally, Jay Stanley has advocated for expanding the exclusionary rule to cover "any evidence obtained in an unrecorded encounter."¹⁹⁸ While Stanley's position could deter officer behavior, this bright-line standard seems both over- and under-inclusive by covering situations where PWBCs legitimately malfunction, while providing no remedy to the victims of unreasonable searches, 97% of which produce no relevant evidence.¹⁹⁹ However, Greenfield's proposal would encourage officers to keep their cameras working properly and support a citizen complaint of officer misconduct. Boston has incorporated both recommendations into their PWBC

¹⁹² *Id.*

¹⁹³ KATZ, *supra* note 19, at 37 (finding that guilty pleas were nearly four times more likely when PWBC footage existed (4.4% vs. 1.2%)); MILLER, *supra* note 8, at 9.

¹⁹⁴ Jeff Bellin, *Police Body Camera Videos as Evidence*, EVIDENCEPROF BLOG (Jan. 26, 2015), <http://lawprofessors.typepad.com/evidenceprof/2015/01/police-body-camera-videos-as-evidence.html> [http://perma.cc/8MJN-RGNR].

¹⁹⁵ State v. Scarola, No. 4240-9-13, at 17–18 (Vt. Super. Ct. Dec. 31, 2014).

¹⁹⁶ See *id.*

¹⁹⁷ Scott H. Greenfield, *The Missing Video Presumption*, SIMPLE JUSTICE (Mar. 30, 2014), <http://blog.simplejustice.us/2014/03/30/the-missing-video-presumption> [http://perma.cc/NLE2-B558]. Of the four possible approaches to determining what happened during an unrecorded incident—"he said, she said" credibility determinations, a presumption in favor of the defendant, a presumption in favor of the officer, or determining fault through litigation—Greenfield thinks a strong, contract construing, presumption in favor of the citizen is most appropriate because, like a contract drafter has complete control over ambiguity, the officer was the only one who had control over the camera. *Id.*

¹⁹⁸ Stroud, *supra* note 136.

¹⁹⁹ See Harris, *supra* note 53, at 363–64.

policy,²⁰⁰ which cures the under-inclusive aspect of Stanley's recommendation and makes a strong emphasis on proactively ensuring PWBCs remain in working order.

V. POLICY RECOMMENDATIONS FOR LEGISLATIVE ENACTMENTS AND POLICE DEPARTMENTS

PWBCs offer to make a significant impact in policing; however, their benefit will only be seen through the implementation of appropriate policies to govern their use. Legislative action is necessary for two reasons: local policies cannot address the broader issues governed by state law and some issues are important enough that local departments should not have discretion over their inclusion in department policies. But local departments should be given control over the majority of decisions to determine what is most appropriate for their officers and community; therefore, states should only address the most essential issues.

A. *Legislative Recommendations*

There are a number of important changes in state laws that need to occur in order to facilitate the continued use of PWBCs. First, states need to ensure their existing wiretapping laws contain exceptions for police in the performance of official and valid duties.²⁰¹ California Penal Code Section 633 provides an example of this: "Nothing . . . prohibits . . . any officer . . . acting within the scope of his or her authority, from overhearing or recording any communication that they could lawfully overhear or record . . ."²⁰² Without such changes, police departments could face legal challenges concerning the use of PWBC footage as evidence in court and potentially face an injunction against the continued use of PWBCs.

California's approach is superior to that of other states, such as New Hampshire,²⁰³ because it allows the PWBCs to be utilized to their fullest extent and ensures accountability behind closed doors where the potential for an officer to use excessive force or conduct an unconstitutional search is just as likely as in public. Furthermore, allowing recordings in private residence will continue to further one of the most positive results of body cameras: PWBCs provide evidence that has greatly increased convictions in domestic violence cases.²⁰⁴ The extra opportunity for intrusions of privacy should be

²⁰⁰ BOSTON POLICE CAMERA ACTION TEAM, THE RULES AND PROCEDURES FOR BODY CAMERAS FOR OFFICERS OF THE BOSTON POLICE DEPARTMENT §§ 5, 10 (Feb. 2015) [hereinafter BOSTON POLICY], https://rcfp.org/bodycam_policies/MA/Boston_BWC_Policy.pdf [<https://perma.cc/A69H-NLUN>].

²⁰¹ See *supra* Part IV.B.1.

²⁰² CAL. PENAL CODE § 633 (West 2010).

²⁰³ See *supra* note 176.

²⁰⁴ See *supra* notes 190–93 and accompanying text.

offset by a notice requirement, stricter public disclosure laws, and department policies on who may access the videos.

Second, legislatures need to create broader exceptions to their states' public records laws in order to prevent the public release of most PWBC footage. While the primary goal of PWBCs is to increase the accountability of police actions, broadly allowing anyone to view any scene does nothing to further accountability and only hurts privacy; ensuring every citizen has access to the recording of their own interaction with police, however, does give that person the ability to protect himself. If there is a broader public interest in the public seeing any footage, then a request should be considered by a council of trusted community leaders or legislators who can weigh the pros and cons of releasing any footage, subject to judicial review.²⁰⁵ Even if the footage is released it is important to ensure some level of privacy is still maintained by obscuring nudity, private personal information, dead bodies, and minors.²⁰⁶ By focusing the control of footage to those individuals involved in the incident and a trusted group of individuals, with an understanding of the broader impact of any footage, the goals of accountability and privacy can both be served. Finally, due to the time considerations required to review the multitude of officer recordings, a requirement that requests be reasonably specific—providing the day and approximate time or the incident—is an equitable restraint. However, requesters should not be required to incur the expense of redaction, obstruction, or locating the footage because such costs would pose an unreasonable hurdle in the furtherance of accountability. While taking local considerations into account, consider the following sample revision to state law:

- (1) PWBC footage is a public record exempt from public record disclosure requirements.
- (2) Exceptions. Notwithstanding (1), PWBC footage should be released by a police department, subject to (4), if: (a) all non-law enforcement parties have consented to the release; (b) another law enforcement agency shows the release is necessary for the purpose of assisting in an investigation; or (c) requested by: (1) a subject of the recording; (2) a parent or legal guardian of a minor subject of the recording; (3) the spouse or next of kin of a deceased subject of a recording; (4) the attorney of any of the preceding parties; or (5) a court order: (i) for a party in a civil or criminal trial, if the footage is relevant to the case or (ii) the owner of the private enclosure in which the footage was taken.²⁰⁷

²⁰⁵ See *supra* note 115 and accompanying text.

²⁰⁶ The process of expunging the record of a juvenile would have little benefit if the footage of those incidents was publically available. However, in conduct meriting a determination by a court to prosecute the minor as an adult, the public benefit could outweigh the deleterious effect on the juvenile's future.

²⁰⁷ S.B. 248, 118th Leg., Reg. Sess. (Fla. 2015); S. 47, 121st Leg., Reg. Sess. (S.C. 2015).

(3) Requests for PWBC footage not qualifying under (2) should be considered by a council of trusted community leaders or legislators. Requests denied by the council should be subject to judicial review. In considering requests, the council and court should consider if the footage: (1) would be of compelling interest to the community; (2) is otherwise legally confidential; (3) contains an egregious violation of privacy; (4) could lead to harm of any of its subjects; and (5) could feasibly be redacted or obscured.²⁰⁸

(4)(a) PWBC footage distributed through (2)(b)-(c) or (3) may not be further distributed to the public by any recipient of the footage. (b) Unless provided otherwise by council or court order, any footage released should be redacted or obscured to hide dead bodies, nudity, minors, or private personal information.²⁰⁹

(5) Upon receiving a valid, specific request for footage, the department must provide a reasonably prompt inspection at no cost or provide a copy at the actual cost for the hardware required for the transfer.

Third, legislatures need to prohibit the use of personal body cameras by officers. The primary problem with personal body cameras is their potential for officers to manipulate the footage produced.²¹⁰ Officers using their own cameras have complete discretion as to when to activate and deactivate them in addition to control over what happens to the resulting footage.²¹¹ Furthermore, the individual officer's personal possession of the footage would create a chain-of-evidence issue preventing the footage's introduction in court.²¹² In essence, it eliminates nearly all of the potential benefits of PWBCs and amplifies nearly all of the potential negatives. An additional reason for state legislatures to address this matter is that the use of personal body cameras should be prohibited even if a department has not itself adopted the use of PWBCs and, therefore, a policy concerning their use.²¹³

Fourth, the legislature must mandate that any department using PWBCs, in any capacity, is operating under a governing policy. The lack of a policy concerning PWBCs could lead to a number of the same issues associated with the use of personal body cameras—footage manipulation, improper release, chain-of-evidence concerns, etc.—and add an extra layer of liability to departments because misused footage would be government property, rather than personal. Some state and federal lawmakers have begun making the use

²⁰⁸ Fla. S.B. 248.

²⁰⁹ See OKLA. STAT. tit. 51, § 24A.8(A)(9) (Supp. 2015).

²¹⁰ MILLER, *supra* note 8, at 38 (explaining personal BWCs should be prohibited because, in part, “the agency would not own the recorded data, [so] there would be little or no protection against the officer tampering with the videos”).

²¹¹ MILLER, *supra* note 8, at 38; WHITE, *supra* note 19, at 32.

²¹² MILLER, *supra* note 8, at 38; WHITE, *supra* note 19, at 53.

²¹³ MILLER, *supra* note 8, at 38.

of policies and procedures mandatory but the inclusion of such provisions in legislation is still far from wide-spread.²¹⁴

Rather than mandating the exact policy provisions a department must use, states should merely require minimum topics that a policy should cover to preserve the ability of local police departments to determine what is necessary for them, based on the input of their respective communities and officers.²¹⁵ Crucial topics that should be covered in every policy include: when the cameras must be activated and deactivated, data retention and storage, explicit language in any contract with a third party vendor that any stored data remains the property of the department, who has access to footage and when, the procedure to follow in case a camera malfunctions in the field, notice and consent requirements, and meaningful repercussions for failing to follow the policy.

Finally, states should follow Oregon's lead in prohibiting the use of facial recognition technology in conjunction with PWBC footage. Using facial recognition technology through PWBCs would undermine community policing and forever create an irreparable divide between officers and citizens.²¹⁶

B. Police Department Policy Recommendations

While no policy will be a perfect fit for all departments, the sample policy in Appendix A attempts to bridge the gaps between theoretical recommendations, actual department policies, and the interests of varying social groups. Almost every provision of the policy was adapted from police department policies already in use, of which the selection for inclusion in the model policy was informed by the proceeding discussions. However, the most important method in adopting a policy is through extensive input from the community and officers that will be directly affected by the policy.²¹⁷ The

²¹⁴ See S.B. 1304, 99th Gen. Assemb., Reg. Sess. (Ill. 2015) (requiring all departments using PWBCs have a policy addressing specific areas); *see also* Police CAMERA Act, S. 877, 114th Cong. § 3201(d)(1) (2015) (requiring, as a pre-condition to receiving grants, that all departments have a policy addressing specific areas). *But see* Safer Officers and Safer Citizens Act of 2015, S. 1897, 114th Cong. § 3201(c) (2015) (making the existence of a department PWBC policy only a preference for the receiving of grants, rather than a requirement). *See generally* S.B. 248, 118th Leg., Reg. Sess. (Fla. 2015) (containing no requirement or suggestion that departments operate under a PWBC policy).

²¹⁵ D.C. POLICE COMPLAINTS BD., ENHANCING POLICE ACCOUNTABILITY THROUGH AN EFFECTIVE ON-BODY CAMERA PROGRAM FOR MPD OFFICERS 2 (May 2014), <http://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/Final%20policy%20rec%20body%20camera.pdf> [http://perma.cc/D4WA-DLQU] (stating the importance of having all local stakeholders' input involved in the process).

²¹⁶ *See supra* notes 116–20 and accompanying text.

²¹⁷ *See* WHITE, *supra* note 19, at 28–29 and accompanying text. The suggested modifications identified by the Menlo Park City Council provide an example of the benefit

following subsection provides a brief discussion of the sections of the sample policy and provisions contained therein. While each police department should have a policy governing its use of PWBCs,²¹⁸ it is also important that the policy be made available to the public. Despite the fact that over 25% of the nation's police departments now utilize PWBCs,²¹⁹ many departments have not made their policies readily accessible to the public. Because transparency is a primary motivation to the adoption of the use of PWBCs,²²⁰ it is important that police departments be transparent as to how they will be used.

1. Purpose & Scope

This section provides a police department an opportunity to convey its underlying motivation for adopting PWBCs to its community and officers. Whether the department wishes to increase transparency, decrease officer misconduct, or otherwise, it is an important consideration for the individual or group tasked with revising the policy in the future. While police departments take varying approaches to the section's utility,²²¹ it is important to minimize subjective statements of purpose in favor of more definite provisions later in the policy.²²² The discussion of the policy's scope is an exception to this principle because it is helpful to state exactly what is and is not governed under a specific policy, which may overlap with policies governing other things.²²³

2. Policy

The policy section allows the department to include broad directives, requirements, and assignments concerning the overarching PWBC program that would not fit in the narrower procedural sections following. For example,

of engaging a wide breadth of opinions in determining the exact coverage of a department's policy. Menlo Park Policy, *supra* note 161, at 159 (determining that important features—including criteria for activation and de-activation of PWBCs, officer discretion in maintaining informant confidentiality, and notification of the existence of relevant PWBC footage to a case or report—had been overlooked).

²¹⁸ MILLER, *supra* note 8, at 37 ("PERF recommends that each agency develop its own comprehensive written policy to govern body-worn camera usage.").

²¹⁹ See *supra* note 23 and accompanying text.

²²⁰ See *supra* Part III.B.

²²¹ Compare MINNEAPOLIS POLICE DEP'T, BODY CAMERA SOP 1 (Nov. 2014) [hereinafter MINNEAPOLIS POLICY], <http://www.ci.minneapolis.mn.us/www/groups/public/@mpd/documents/webcontent/wcms1p-133495.pdf> [<http://perma.cc/6URV-U9GT>] (providing an entire page of often conflicting purposes), with Menlo Park Policy, *supra* note 161, at 159 (providing a single, direct purpose).

²²² Cf. WHITE, *supra* note 19, at 43 (providing a brief, focused recommended purpose statement).

²²³ *Id.* ("This policy covers all aspects of the use of BWV equipment by members of staff and the subsequent management of any images obtained.").

the model of camera used and any contract requirements with the PWBC distributor or third-party data storage company should be placed here. The specific recommendations for camera features—pre-event buffering and head attachment capabilities—are important because they greatly add to the utility of PWBCs; if a PWBC is unable to see what the officer sees or what circumstances led to the PWBC’s engagement, by storing the 30-seconds of footage before engagement, then the accountability objective of the PWBCs will be undermined significantly.²²⁴ Furthermore, the section notifies department employees who are in charge of the policy and to whom the policy applies. Finally, it notifies officers that personal Body-Worn Cameras (BWCs) are not permitted even if the officer abides by the remaining provisions of the policy.²²⁵

3. Definition

Ensuring that no ambiguity exists among the specific terms of the policy is a crucial consideration. The necessity is even more important where broad use of purpose language could be open to varying interpretations.²²⁶ The most important clarification in any policy, however, is clearly conveying which members of the department are included within the PWBC program.²²⁷ The definition of “participant” in Appendix A is not intended to be a recommendation for any policy, only a place holder, because this determination is an intensely fact based one that will be different for nearly all police departments.²²⁸

4. Officer Responsibilities

As the actual users of the PWBCs, officers play a dual role as ambassadors to the community and gatekeepers to the collection of footage. To prevent the negligent or intentional misuse of PWBCs, it is important to specifically detail each of the officers’ responsibilities to ensure the adequate collection of footage. While a policy that does not require constant activation of a PWBC is inherently discretionary, appropriately broad usage guidance coupled with explicit exceptions will ensure there is a clear understanding of when PWBCs should be engaged. However, a department can only guarantee compliance in situations that could disadvantage an officer with even less desirable

²²⁴ See *supra* notes 80–84 and accompanying text.

²²⁵ See *supra* notes 210–13 and accompanying text.

²²⁶ See MINNEAPOLIS POLICY, *supra* note 221, at 1.

²²⁷ MILLER, *supra* note 8, at 38 (“Policies should clearly state which personnel are assigned or permitted to wear body-worn cameras and under which circumstances.”).

²²⁸ *Id.* (“It is not feasible for PERF to make a specific recommendation about which officers should be required to wear cameras. This decision will depend on an agency’s resources, law enforcement needs, and other factors.”).

alternatives in the form of discipline;²²⁹ the disciplinary provisions are located in section VIII of the policy because they apply more broadly than to officers alone.

It is crucial that officers are trained in how to operate, inspect, and prevent malfunctions in their PWBCs—in addition to how to use them in the field and interact with the public while using them—because the officers will be ultimately responsible for recording and uploading all footage. Additionally, while some policies contain an explicit list of times PWBCs must be used,²³⁰ it is more prudent to establish a standard of when PWBCs must be used and to encourage their over-use in circumstances of uncertainty; so, the officer may determine if usage is required in any situation he may encounter. Furthermore, the policy should include circumstances where the department has determined privacy concerns are always greater than the need to record—including certain medical and K-12 interactions—or when that determination is up to officers—select citizen contacts. If, for any reason, an officer fails to record an interaction that would require PWBC use, it is important the officer explain the reason for failing to do so immediately in case the incident becomes the subject of a later investigation. Finally, officers should be required to provide notice to citizens during any encounter where a PWBC is in use—to maximize the civilizing effects of the cameras—if possible.²³¹

5. Prohibited Uses of PWBCs

Absent clearly prohibited actions in connection with the use of PWBCs and the footage produced, the privacy concerns associated with their use would be too great.²³² The amplified invasion of privacy created from PWBCs, compared to dash cameras, cannot be permitted to fall prey to the same unpermitted disclosure of footage.²³³ While state laws offer varying levels of access to PWBC footage, the details of each law is a policy decision by the lawmakers of that state and not appropriate for the discretion of lone officers. Furthermore, officers must be prohibited from using cameras for any purpose beyond enhancing public accountability and legitimate police functions, such as public intimidation or information gathering.

6. Review of PWBCs Footage

The policy provision concerning who is able to review PWBC footage and for what purpose is likely to be a contentious issue between police departments, officers, and unions.²³⁴ Each provision of this section should be

²²⁹ See *supra* notes 197–200 and accompanying text.

²³⁰ See e.g., MINNEAPOLIS POLICY, *supra* note 221, at 3.

²³¹ See *supra* notes 42–43 and accompanying text.

²³² See *supra* Part IV.A.1.

²³³ See *supra* note 90 and accompanying text.

²³⁴ See *supra* notes 121–27 and accompanying text.

considered and adopted only with the advice and consent of each of these parties. Appendix A attempts to strike a compromise between competing interests by limiting the ability of both officers and their supervisors to review footage absent necessity. The purpose for this decision is an attempt to maintain the officer/supervisor relationship as it currently exists while still creating the safeguards from frivolous misconduct claims and evidentiary uncertainty. The specific decision not to allow an officer to view footage before completing reports or making statements—but allowing an addendum afterwards—is to prevent an officer from being able to make up a story justifying his actions based on objective view of the scene in hindsight—while still allowing the correction of minor misstatements based on the nature of memory.²³⁵

7. PWBC Management System Administration

It is important to clearly establish the procedures for data retention, distribution, and deletion. These tasks should be assigned to a central officer or individual to ensure consistent compliance. Data retention is again a very fact specific provision that departments need to establish in consultation with local laws.²³⁶ However, because of the tremendous expense involved with data storage, retention should be as narrowly tailored to such laws as possible.²³⁷ Furthermore, it is important to provide for the prompt deletion of footage no longer needed or that contains no intrinsic value of any kind. One way to identify unneeded footage is by allowing citizens to request the deletion of any footage they are in that is not the subject of an investigation.

8. Disciplinary Measures

Finally, to insure compliance with the PWBC policy, police departments need to establish meaningful punishments for policy violations. While the department should maintain the discretion to determine the amount of punishment required for the type of violation and officer intention, officers should be held accountable for every violation to create a culture of proper usage.²³⁸ Departments should create presumptions of misconduct and bright-line rules of excluding evidence when cameras are intentionally or avoidably not used to record a citizen interaction;²³⁹ this will create a large change in policing but it is an inevitable change towards accountability, backed by the billions of dollars now spent to equip officers with PWBCs.

²³⁵ See *supra* notes 50–51.

²³⁶ See *supra* Part IV.B.3.

²³⁷ See *supra* Part IV.B.3.

²³⁸ A culture that has been hard for many departments to create in their initial adoption of the use of PWBCs. See *supra* notes 133, 135–37 and accompanying text.

²³⁹ See *supra* notes 197–200 and accompanying text.

VI. CONCLUSION

The use of PWBCs is now well-engrained in the United States and will only continue to grow in the coming years. Despite the rapid adoption, there is still much to learn about how PWBCs will affect policing and society at large. As of now, however, the benefits of employing PWBCs appear to outweigh the potential costs, but only if state legislatures and police departments take the necessary steps to protect society. While best practices will remain open to debate for years to come there are two issues that should remain uncontested: the use of PWBCs needs to be legal and police departments need to adopt policies governing their use.

The next frontier for PWBCs has already begun to emerge through the development of second generation cameras that stand to change the entire field before it has even been established.²⁴⁰ It is unclear when the full second generation cameras will be released, but various features—far exceeding the capabilities of first generation PWBCs—have already begun to make their debut.²⁴¹ Developers have sought ways to integrate the new features into existing cameras to facilitate a cost-effective transition for the hundreds of departments that have already invested in PWBCs.²⁴² While there are currently no full studies exploring the use of these new cameras, several select departments throughout the country have run pilot programs testing the various features to come with great success.²⁴³ In fact, developers promise the new cameras are capable of resolving nearly all of the problems currently

²⁴⁰ See UTILITY, GENERATION 2 BODY-WORN CAMERAS AND THE EVIDENCE ECOSYSTEM 6 (2014), <http://www.utility.com/perch/resources/generation-2-bodyworn-camera-white-paper.pdf> [http://perma.cc/F8AN-E4E2].

²⁴¹ Bluetooth-enabled body cameras are now beginning to run auto-activation technology. Robert Maxwell, *Lakeway Police First to Use Automatic Body Cameras*, KXAN (June 12, 2015), <http://kxan.com/2015/06/12/lakeway-police-first-to-use-automatic-body-cameras/> [http://perma.cc/V7HD-ES7P]. The cameras are programmed to connect wirelessly to ports integrated with a vehicle's lights, siren, brake system, airbag, dome light, or doors so the cameras are activated automatically in response to an engagement of these other features, eliminating the need to remember to engage cameras manually. *Id.* Developers have also stated that auto-activation technology will work with other devices, like stun-guns. See Dupzyk, *supra* note 41, at 4:50–5:30. Furthermore, the signal will be able to engage all body cameras within a designated distance from the emanating source. Coupled with the exiting constant 30-second loop feature—body cameras record constantly and retain 30 seconds of footage which are stored automatically only upon the camera's engagement—cameras will be able to capture all serious police encounters under high-levels of stress and the moments of escalation automatically. *Id.* Axon is also working on biometric sensors to link camera activation with an officer's heartbeat. See Hilsenbeck, *supra* note 80.

²⁴² See Dupzyk, *supra* note 41, at 4:50–5:30 (discussing how the auto-activation technology update will be integrated into reverse-compatible battery packs).

²⁴³ Maxwell, *supra* note 241 (reporting that the Lakeway Police Department conducted a beta test of the auto-activation cameras in June 2015).

associated with the use of PWBCs.²⁴⁴ These claims are yet to be proven, but offer an exciting future for the development of policing.

²⁴⁴See UTILITY, *supra* note 240, at 6.

APPENDIX A

DEPARTMENTAL GENERAL ORDER [#]

Body-Worn Camera Management System
Automatic Revision Cycle:

[Effective Date]
2 Years

Body-Worn Camera Management System

I. PURPOSE & SCOPE

- A. This order sets forth Departmental policy and procedures for the Body-Worn Camera Management System (BWCMS), which includes the use of Body-Worn Cameras (BWCs) to document both audio and video field activity of participants in the execution of their duties.²⁴⁵
- B. The Department has adopted BWC technology to further its mission by enabling participants to create audio and video evidence of their actions to increase the accuracy of criminal and administrative investigations and reviews of officer conduct.²⁴⁶
- C. This policy should not be construed to inhibit the lawful actions of officers pursuant to warrants or the use of their dash camera devices while on-duty.²⁴⁷

II. POLICY

- A. All employees of the Department must be familiar with this policy because any employee may be required to interact with a participant or BWC in the course of their duties.²⁴⁸
- B. All employees of the Department must abide by the provisions of this policy.²⁴⁹
- C. No officer shall be permitted to wear a personal body camera.²⁵⁰
- D. [Explicitly designate a unit or individual as the Custodian of Records for all BWC footage.]²⁵¹
- E. [State the specific product required to be used by contract.] The chosen device should include the following features:
 1. The ability to be affixed to an officer's head to maximize the coverage of what an officer is able to see at all times;²⁵² and

²⁴⁵ OAKLAND POLICY, *supra* note 70, at 1.

²⁴⁶ *Id.*

²⁴⁷ See Menlo Park Policy, *supra* note 161, at 163.

²⁴⁸ DENVER POLICY, *supra* note 139, at 1.

²⁴⁹ OAKLAND POLICY, *supra* note 70, at 1.

²⁵⁰ *Id.*

²⁵¹ *Id.*

2. Pre-event buffer mode, which captures the audio and video for the 30 seconds prior to the BWC's initiation.
- F. The Department is required to include in any contract with a third party vendor for the storage of BWC footage: "All data provided to [*third party vendor*] for storage remains the exclusive property of the [_____] Police Department. [*Third party vendor*] may not provide access or distribute footage to any party except its official contacts at the [_____] Police Department."

III. DEFINITIONS

- A. "Body-worn camera" (BWC)—portable audio and video recording device.²⁵³
- B. "Participant"—any member of the Department selected to be equipped with a BWC.
- C. "Personal body camera"—any type of audio or video recording device not supplied by the Department for use during the execution of official duties.

IV. OFFICER RESPONSIBILITIES

A. *Training*

Participants will not be permitted to use a BWC until they have successfully completed all required trainings concerning the use of BWCs.²⁵⁴

B. *Equipment*

At the beginning of each shift, each participant will be responsible for:

1. Examining his BWC to determine if it is functioning properly and is fully charged. Any obvious damage or malfunction should be immediately reported to a supervisor;²⁵⁵
2. The BWC must be placed in the appropriate mode of operation and properly affixed to the participant to allow it a clear line of sight. The BWC must remain affixed to the participant for the duration of their shift;²⁵⁶
3. Non-uniformed participants should carry the BWC with them and affix it prior to foreseeably engaging in any event detailed in IV.C,

²⁵² ORLANDO POLICE DEP'T, POLICY AND PROCEDURE 1140.0: MOBILE VIDEO RECORDING SYSTEMS § 3 (Feb. 2014), https://rcfp.org/bodycam_policies/FL/Orlando_BWC_Policy.pdf [<https://perma.cc/KM3R-9P7U>].

²⁵³ MILLER, *supra* note 8, at 2.

²⁵⁴ DENVER POLICY, *supra* note 139, at 2.

²⁵⁵ OAKLAND POLICY, *supra* note 70, at 9.

²⁵⁶ DENVER POLICY, *supra* note 139, at 2.

- unless doing so would be infeasible under the participant's assignment;²⁵⁷
4. The care of each BWC is the responsibility of the participant using it during their shift;²⁵⁸ and
 5. Participants must return their cameras at the conclusion of each shift and upload their footage [*as required by the chosen system*].²⁵⁹

C. Activation

1. Participants should manually activate both the audio and visual features of their BWC prior to "responding to a call for service or at the initiation of any other law enforcement or investigative encounter between a police officer and a member of the public,"²⁶⁰ unless doing so would be "unsafe, impossible, or impractical."²⁶¹
2. A non-violent protest in-and-of-itself does not constitute a circumstance requiring the use of a BWC.
3. While a situation may not require the activation of the BWC at its inception, the BWC should be activated as soon as practically possible once the criterion of IV.C.1 has been met.²⁶²
4. At the order of a supervisor.²⁶³
5. The preceding list of activation criteria is non-exhaustive. A participant should use discretion to activate his BWC if he believes it necessary to do so and activation would not violate any provision of this policy;²⁶⁴ if uncertain as to whether an instance requires the use of his BWC, an officer is encouraged to record the situation rather than miss recording an incident determined to be recorded in later analysis.²⁶⁵

D. De-activation

1. Once activated, participants may not de-activate their BWC until:²⁶⁶
 - a. A participant receives a request, on camera, to not record a conversation with a victim,²⁶⁷ witness,²⁶⁸ or confidential

²⁵⁷ PEORIA POLICE DEP'T, POLICY 450: USE OF PORTABLE RECORDERS § 450.3 (July 2013), https://www.peoriaaz.gov/uploadedFiles/NewPeoriaAZ/City_Departments/Police_Department/Administration/Policies/Policy_450_Use_of_Portable_Recorders.pdf [https://perma.cc/9ZLR-ANZY].

²⁵⁸ DENVER POLICY, *supra* note 139, at 2.

²⁵⁹ OAKLAND POLICY, *supra* note 70, at 7.

²⁶⁰ STANLEY, *supra* note 104 (emphasis omitted).

²⁶¹ MILLER, *supra* note 8, at 55; accord MINNEAPOLIS POLICY, *supra* note 221, at 3.

²⁶² DENVER POLICY, *supra* note 139, at 3.

²⁶³ OAKLAND POLICY, *supra* note 70, at 2.

²⁶⁴ DENVER POLICY, *supra* note 139, at 3.

²⁶⁵ BOSTON POLICY, *supra* note 200, § 5.

²⁶⁶ OAKLAND POLICY, *supra* note 70, at 3.

- informant²⁶⁹ and the officer does not believe the circumstances warrant disregarding the request.²⁷⁰ Circumstances would warrant disregarding the request if the officer has reasonable suspicious that the party they are speaking with has engaged in criminal activity. An officer should further consider whether disengaging only the audio or video recording would serve the desired privacy objective while continuing to create a record of the potentially dynamic scene;²⁷¹
- b. Absent exigent circumstances, the participant has a reasonable belief that recording in a hospital or while speaking with paramedics, nurses, doctors, psychiatrists, or other medical professional may compromise patient confidentiality;²⁷²
 - c. Upon entering the premises of a public, private, or parochial K-12 school during regular school hours, unless an actual threat to life or health exists;²⁷³
 - d. The initial and subsequent events requiring activation under IV.C have concluded,²⁷⁴ and the participant reasonably believes further recording will provide no additional evidentiary value; or
 - e. They receive an order from a superior.²⁷⁵
2. If a participant mistakenly engages his BWC, he may exercise discretion in de-activating the BWC.²⁷⁶
 3. Prior to de-activation, the participant should verbally announce his intention to de-activate the BWC and his reason for doing so.²⁷⁷
 4. Once a participant has de-activated her BWC, she is responsible for re-activating the camera should the reason for initial activation remain present or a new situation arise.²⁷⁸

²⁶⁷ *Id.* at 2.

²⁶⁸ DENVER POLICY, *supra* note 139, at 4.

²⁶⁹ Menlo Park Policy, *supra* note 161, at 160.

²⁷⁰ MINNEAPOLIS POLICY, *supra* note 221, at 4 (“If a request is made for a PVR to be turned off by a party being contacted, the officer should take into account the overall circumstances and what is most beneficial to all involved, before deciding to honor the request. For example, an officer may choose to turn off the PVR if its operation is inhibiting a victim or witness from giving a statement. It is up to the officer to make the determination as to what is best for the investigation or contact.”).

²⁷¹ See GREENSBORO POLICY, *supra* note 99, § 15.11.5; VALDOSTA POLICY, *supra* note 99, § I(B).

²⁷² DENVER POLICY, *supra* note 139, at 5; OAKLAND POLICY, *supra* note 70, at 3.

²⁷³ ACLU, A MODEL ACT FOR REGULATING THE USE OF WEARABLE BODY CAMERAS BY LAW ENFORCEMENT § 1(h) [hereinafter ACLU MODEL POLICY], <https://www.aclu.org/model-act-regulating-use-wearable-body-cameras-law-enforcement> [<https://perma.cc/AVL9-B9F8>].

²⁷⁴ OAKLAND POLICY, *supra* note 70, at 3.

²⁷⁵ DENVER POLICY, *supra* note 139, at 4.

²⁷⁶ OAKLAND POLICY, *supra* note 70, at 4.

²⁷⁷ DENVER POLICY, *supra* note 139, at 4.

²⁷⁸ OAKLAND POLICY, *supra* note 70, at 4.

E. *Notice*

1. A participant shall notify all citizen(s) they are being recorded,²⁷⁹ unless doing so would be “unsafe, impossible, or impractical.”²⁸⁰
2. Participants shall report the use of their BWC in corresponding documents to the situation it was engaged for.²⁸¹
3. Participants must also report any situations where they failed to activate the BWC—due to malfunction, discretion, or inability to do so—and explain why the incident was not recorded.²⁸²

V. PROHIBITED USES OF BWC

Participants are prohibited from:

1. Using a BWC for any purpose not permitted under this policy, including:²⁸³
 - a. Gathering intelligence on citizens when the circumstances of IV.C have not been established;²⁸⁴ and
 - b. Discouraging a citizen from observing officer actions, engaging an officer, or making a complaint against an officer.²⁸⁵
2. Retaining copies of BWC footage or transferring BWC footage to any source other than the Department’s specified storage drive;²⁸⁶ and
3. Tampering with, altering, or destroying any BWC or the footage captured by it.²⁸⁷

VI. REVIEW OF BWC FOOTAGE

A. *Officers*

A participant shall not be permitted to review any audio or video recordings pertaining to a particular incident until he has completed a formal report and/or has been interviewed by the appropriate investigator.²⁸⁸ After viewing his footage of the incident, the participant may submit an addendum to his initial report explaining any inconsistencies.²⁸⁹ This provision should not be

²⁷⁹ ACLU MODEL POLICY, *supra* note 273, § 1(c).

²⁸⁰ MILLER, *supra* note 8, at 55; accord MINNEAPOLIS POLICY, *supra* note 221, at 3.

²⁸¹ DENVER POLICY, *supra* note 139, at 2.

²⁸² Menlo Park Policy, *supra* note 161, at 160.

²⁸³ *Id.* at 163.

²⁸⁴ ACLU MODEL POLICY, *supra* note 273, § 1(e).

²⁸⁵ FRATERNAL ORDER OF POLICE, BODY-WORN CAMERA (“BWC”) RECOMMENDED BEST PRACTICES § 3(4) (Oct. 2014), <http://www.fop.net/programs/education/webinar/BestPracticesBWC.pdf> [http://perma.cc/AZ32-KZEJ].

²⁸⁶ *Id.* § PR2(i).

²⁸⁷ AUSTIN POLICY, *supra* note 91, at 2.

²⁸⁸ OAKLAND POLICY, *supra* note 70, at 4.

²⁸⁹ *Id.* at 5.

construed to interfere with a participant's ability to review BWC footage to prepare for testifying in a court proceeding.

B. Supervisors

1. Supervisors are not permitted to perform random audits of BWC footage to evaluate officer performance.²⁹⁰
2. Supervisors may review BWC footage:
 - a. In response to a specific claim of misconduct;²⁹¹
 - b. To resolve discrepancies in written reports;²⁹²
 - c. To assess whether the reason for an activation delay or de-activating the BWC was valid under the circumstances;²⁹³
A determination that activation delay or de-activating was NOT valid warrants appropriate disciplinary action based on the supervisors' discretionary opinion of the nature of incident omitted and the intention of the officer.
 - d. Pursuant to a detailed performance improvement plan; or²⁹⁴
 - e. With the participant's consent to consider the participant's actions for commendations or training purposes.

VII. BODY-WORN CAMERA MANAGEMENT SYSTEM ADMINISTRATION

The BWCMS administrator has oversight responsibilities over the following non-exclusive list of duties:

1. Review and evaluation of this policy at the specified interval;²⁹⁵
2. File claims for the replacement of lost, stolen, or damaged equipment and coordinate the repair/replacement of such equipment;
3. Maintain BWC footage for the determined retention period [*at least three months longer than the statute of limitations for civil complaints*];²⁹⁶
4. Moving any BWC footage related to an evidentiary or administrative investigation to a long-term storage system for permanent retention;²⁹⁷
5. Deletion of footage:
 - a. After the mandatory retention deadline has passed;
 - b. At the request of an officer because footage was taken mistakenly and contains no evidentiary value;²⁹⁸ and

²⁹⁰DENVER POLICY, *supra* note 139, at 5. *But see* OAKLAND POLICY, *supra* note 70, at 5.

²⁹¹DENVER POLICY, *supra* note 139, at 5.

²⁹²OAKLAND POLICY, *supra* note 70, at 5.

²⁹³*Id.* at 6.

²⁹⁴DENVER POLICY, *supra* note 139, at 5.

²⁹⁵OAKLAND POLICY, *supra* note 70, at 6.

²⁹⁶*See id.*

²⁹⁷DENVER POLICY, *supra* note 139, at 5.

- c. At the request of the citizen subject(s) of the footage if the footage contains no evidentiary value.²⁹⁹
6. Produce BWC footage as required for investigations, evidence in trials, or other related purposes; and
7. Produce and redact BWC footage in compliance with local, state, and federal statutes and disclosure laws.³⁰⁰

VIII. DISCIPLINARY MEASURES

- A. Department staff will be suspended pursuant to [*department discipline policy*] for failing to:³⁰¹
 1. Properly affix the BWC while on patrol;³⁰²
 2. Record an interaction with a citizen consenting to the recording with no legitimate excuse;³⁰³
 3. Adequately justify not activating the BWC in a situation requiring activation under this policy;³⁰⁴
 4. Adequately justify not de-activating the BWC in a situation requiring de-activation under this policy; or
 5. Comply with an affirmative requirement or prohibitions of this policy.
- B. “Any evidence obtained in an unrecorded encounter [requiring the use of a BWC under] this policy” shall be excluded.³⁰⁵
- C. If a participant is accused of misconduct and he failed to record the incident, then there shall be a rebuttable presumption that the officer is guilty.³⁰⁶ Evidence of a legitimate BWC malfunction will remove the presumption if the malfunction could not have been detected by a prudent pre-shift examination of the BWC as required by this policy.

²⁹⁸ FRESNO STATE, UNIVERSITY POLICY ON VIDEO MONITORING AND SURVEILLANCE ACTIVITIES 4 (Jan. 2008), <http://www.fresnostate.edu/academics/aps/documents/apm/648.pdf> [<http://perma.cc/E5V8-E3H2>].

²⁹⁹ BOSTON POLICY, *supra* note 200, § 8.

³⁰⁰ OAKLAND POLICY, *supra* note 70, at 6.

³⁰¹ See BOSTON POLICY, *supra* note 200, § 9 n.2 (making all violations subject to Boston Police Department’s “Rule 109, Section 32, Rule 102 s.10(d): The following offense [is] subject to the Five-Day rule, and may be disciplined by imposition of immediate suspension of not more than five days.” (alteration in original)).

³⁰² *Id.* § 9.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.* § 10.