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## Police Body Cameras - A Lesson in Objectivity and Accountability or a Tool Without a Scientific Basis?

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**POLICE BODY CAMERAS – A LESSON IN OBJECTIVITY  
AND ACCOUNTABILITY OR A TOOL WITHOUT A  
SCIENTIFIC BASIS?**

Samuel D. Hodge, Jr.\* and Rachel Ortiz\*\*

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*If officers and citizens are being watched, we  
are both more liable to do the right thing.*

---Travis Easter

San Diego Police Department

[1] August 9, 2014 is not a date most remember as being significant, but the events that day transformed standard police practices. Michael Brown and a friend were walking down the middle of a street in Ferguson, Missouri when a police officer told them to use the sidewalk.<sup>1</sup> Words were traded and a clash ensued that led to the police officer shooting Michael Brown, an unarmed African-American teen.<sup>2</sup> Individuals dispute how the events unfolded. However, two things are clear: the officer was not wearing a body camera, and the police account differed from eyewitness testimony.<sup>3</sup> The incident caused protests to erupt that engulfed the region for weeks. Several months later, a grand jury voted not to charge the officer.<sup>4</sup> This decision caused renewed demonstration, violence, fires, and gunshots.<sup>5</sup> Marches of support mushroomed across the nation: from Boston to Chicago to New York City, people flooded the streets to insist upon change from the government.<sup>6</sup> President Obama subsequently addressed the nation and

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<sup>1</sup> *Timeline of Events in Shooting of Michael Brown in Ferguson*, THE ASSOCIATED PRESS (Aug. 8, 2019), <https://apnews.com/9aa32033692547699a3b61da8fd1fc62> [<https://perma.cc/DC89-2MN7>].

<sup>2</sup> *Id.*

<sup>3</sup> Anne Ryman, *Police Body Cameras: 5 Facts About the Technology*, AZCENTRAL (Jan. 15, 2015, 11:58 AM), <https://www.azcentral.com/story/news/local/arizona/2015/01/11/police-body-cameras-five-factstechnology/21616039/> [<https://perma.cc/HNW2-86MX>].

<sup>4</sup> *See* Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <https://nyti.ms/1yNsywu> [<https://perma.cc/GC9E-XAET>].

<sup>5</sup> *See id.*

<sup>6</sup> *Developments in the Law—Considering Police Body Cameras*, 128 HARV. L. R. 1794, 1794 (2015).

noted that “the racial strains exposed by the turmoil in Ferguson,” show that “a deep distrust exists between law enforcement and communities of color” but the events are no excuse for violence.<sup>7</sup> As one commentator noted, “[O]ne immediate lesson from Ferguson is that the police should be collecting more evidence all of the time – by means of body cameras worn by police officers.”<sup>8</sup>

[2] This journalist was correct in his assessment, because the Ferguson tragedy became the impetus that caused law enforcement agencies throughout the United States to start buying police body-worn cameras (BWC).<sup>9</sup> An uptick in the purchase of these units occurred soon after Mr. Brown’s death, but the real growth happened eighteen months later when President Obama offered grants through the Department of Justice to help police departments pay for the equipment.<sup>10</sup> With federal funds available, the question was no longer whether or not to equip police officers with body cameras, but rather how fast can officers be equipped with them, and in what ways will they be most helpful.<sup>11</sup> Federal funding resulted in about

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<sup>7</sup> Tracy Connor et. al., *Ferguson Cop Darren Wilson Not Indicted in Shooting of Michael Brown*, NBC NEWS (Nov. 25, 2014, 2:21 AM), <https://www.nbcnews.com/storyline/michael-brown-shooting/ferguson-cop-darren-wilson-not-indicted-shootingmichael-brown-n255391> [<https://perma.cc/6PX7-ZL62>].

<sup>8</sup> *The Ferguson Decision Underscores the Need for Police Body Cameras*, WASH. POST (Nov. 25, 2014), [https://www.washingtonpost.com/opinions/the-ferguson-decision-underscores-the-need-for-police-body-cameras/2014/11/25/828caca-74f4-11e4-9d9b-86d397daad27\\_story.html](https://www.washingtonpost.com/opinions/the-ferguson-decision-underscores-the-need-for-police-body-cameras/2014/11/25/828caca-74f4-11e4-9d9b-86d397daad27_story.html) [<https://perma.cc/YA28-ENXP>].

<sup>9</sup> Ben Miller, *Data Pinpoints the Moment When Police Body Cameras Took Off*, GOVTECH (Jan. 28, 2019), <https://www.govtech.com/data/Data-Pinpoints-the-Moment-When-Police-Body-Cameras-Took-Off.html> [<https://perma.cc/N5AJ-HWBV>].

<sup>10</sup> *Id.*

<sup>11</sup> Gary E. Lippman, *Will Police Body Cameras Be a Mandatory Subject of Bargaining in Florida?*, 90 FLA. BAR J. 57 (2016), <https://www.floridabar.org/the-florida-bar-journal/will-police-body-cameras-be-a-mandatory-subject-of-bargaining-in-florida/#:~:text=Law%20enforcement%20agencies'%20persistence%20in,an%20%E2%8>

80% of the largest police department in this country obtaining BWC equipment that, until 2014, were considered novel. Law enforcement agencies in countries including the United Kingdom, Australia, and Canada initiated BWC programs.<sup>12</sup>

[3] Despite many observers predicting them to be an early adopter of the system, the New York Police department has been slow [or reluctant?] in embracing the technology.<sup>13</sup> That is because a federal district judge in response to improper stops and searches of Black and Latino men ordered the New York police to establish a pilot camera program in five precincts.<sup>14</sup> Three years after the decision, not one of 35,800 officers in the affected areas was wearing the device.<sup>15</sup> The department claims that it failed to comply with the court's order because of the city's purchasing procedures and the need to obtain the proper equipment.<sup>16</sup>

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0%9Centrepreneurial%20concern%E2%80%9D%20sufficiently%20to  
[<https://perma.cc/GDJ7-HFM7>].

<sup>12</sup> Jon Maskaly et al., *The Effects of Body-Worn Cameras (BWCs) on Police and Citizen Outcomes*, 40 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 672, 673 (2017).

<sup>13</sup> Joseph Goldstein, *Not One New York Police Officer Has a Body Camera*, N.Y. TIMES (Oct. 4, 2016), <https://www.nytimes.com/2016/10/04/nyregion/despite-national-trend-new-york-police-are-slow-to-adopt-body-cameras.html> [<https://perma.cc/YVT4-NZZB>].

<sup>14</sup> Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), <https://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html?smid=pl-share> [<https://perma.cc/R4G9-HAWJ>].

<sup>15</sup> Goldstein, *Not One New York Policy Officer*, *supra* note 14.

<sup>16</sup> *Id.*; Ashley Southall, *Police Body Camera Bursts Into Flames; New York Pulls 2,990 From Use*, N.Y. TIMES (Oct. 21, 2018), <https://nyti.ms/2AmM5gS> [<https://perma.cc/NN65-HL4W>] (explaining how the New York City Police Department outfitted nearly 3,000 officers with body cameras but removed them after one exploded in flames).

[4] Federal agents are not required to wear body cameras, but a 2019 pilot program allowed agents serving search and arrest warrants or making arrests with local and state agency task forces to wear them.<sup>17</sup> In response to calls for police reform after George Floyd's killing and the nationwide demonstrations that followed, Congressional Democrats are pushing for body camera usage by all federal law enforcement agents.<sup>18</sup>

[5] Widespread adoption of body cameras demonstrates the human propensity, in periods of social unrest, to clasp on to the most readily obtainable answer to a multifaceted problem.<sup>19</sup> That remedial, readily obtained answer is to purchase BWCs to increase accountability and efficiency of law enforcement officials; however, the effectiveness of the equipment is debatable.<sup>20</sup> The widespread integration of body-worn cameras into law enforcement has had some negative results on individuals whom the video systems are designed to protect.<sup>21</sup>

[6] The push for BWCs is not unexpected given the larger technological developments which have generated video camera applications in daily

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<sup>17</sup> Neal Augenstein, *Federal Police Officers to Wear Body Cameras – In Certain Circumstances*, WTOP NEWS (Oct. 30, 2019, 1:37 PM), <https://wtop.com/government/2019/10/federal-police-officers-to-wear-body-cameras-in-certain-circumstances/> [https://perma.cc/LMB6-SKHF].

<sup>18</sup> Eric Katz, *Democrats Push Body Cameras for Federal Officers as Part of Police Reform Legislation*, GOV'T EXEC. (June 8, 2020), <https://www.govexec.com/workforce/2020/06/democrats-push-body-cameras-federal-officers-part-police-reform-legislation/165999/> [https://perma.cc/X93W-4MS9].

<sup>19</sup> *Developments in the Law*, *supra* note 6, at 1796.

<sup>20</sup> Jennifer L. Doleac, *Do Body-Worn Cameras Improve Police Behavior?*, BROOKINGS (Oct. 25, 2017), <https://www.brookings.edu/blog/up-front/2017/10/25/do-body-worn-cameras-improve-police-behavior/> [https://perma.cc/LG7Z-JNYP].

<sup>21</sup> *Developments in the Law*, *supra* note 6, at 1796.

operational settings.<sup>22</sup> As the result, funding has been devoted to the problem, existing body-camera systems have been enlarged, and new camera initiatives have been started.<sup>23</sup> These actions require insufficiently funded police departments to swiftly adopt, implement, and maintain the rapidly developing technology.<sup>24</sup> This development coupled with the capacity to preserve and retrieve recorded videos has made BWCs an ostensible “quick fix” for political leaders and police managers alike.<sup>25</sup>

[7] This article will explore police body cameras, advantages and disadvantages of the technology, and their overall utility. The appropriate legal issues and court cases surrounding their use will also be presented.

## I. INTRODUCTION

[8] Cameras have become part of our daily lives. People routinely use cell phones cameras to record everyday events, and citizens tend to act more reasonably when they realize they are being filmed.<sup>26</sup> The mere knowledge of surveillance influences the behavior of most people, providing the

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<sup>22</sup> Andrea M. Headley et al., *A Field Experiment of the Impact of Body-Worn Cameras (BWCs) on Police Officer Behavior and Perceptions*, 53 J. CRIM. JUST. 102, 102 (2017).

<sup>23</sup> See, e.g., *Law Enforcement Body Camera Grant*, LGIT, <https://www.lgit.org/732/Law-Enforcement-Body-Camera-Grant> [<https://perma.cc/6MMQ-FLAY>] (outlining a special equipment grant helping agencies buy officer BWCs); Jake Grovum, *How Are States Going to Pay for Those Police Body Cameras?*, GOVERNING (May 1, 2015), <https://www.governing.com/topics/public-justice-safety/how-are-states-going-to-pay-for-all-of-those-police-body-cameras.html> [<https://perma.cc/HG7V-PZP6>] (outlining funding mechanisms, states that adopted BWCs, and states that are starting a BWC programs).

<sup>24</sup> See Grovum, *supra* note 24.

<sup>25</sup> Headley et al., *supra* note 23.

<sup>26</sup> Vuk Velebit, *Pros and Cons of Police Body-Worn Cameras*, POINTPULSE (Jan. 29, 2018), <https://pointpulse.net/magazine/pros-and-cons-of-police-body-worn-cameras/> [<https://perma.cc/947E-J2XG>].

foundation for using BWCs.<sup>27</sup> These devices are touted as a way to deter police abuses and document encounters with citizens.<sup>28</sup> They have also become one of the most prevalent remedies to offset racial unfairness in law enforcement practices and improper use of force by police.<sup>29</sup>

[9] People from both sides of the debate recognize the advantages of BWCs, and law enforcement agencies are attracted to their use because they can prevent false claims filed against the police.<sup>30</sup> Nevertheless, a variety of questions exist concerning the effectiveness of body cameras. For instance, what type of encounters should be memorialized? How will the recordings be stored and used? How does one protect the privacy rights of citizens, and what access, if any, do those filmed have to videos of themselves?<sup>31</sup>

[10] Police departments and officers have also raised the following concerns about body-worn cameras:

- Purchasing the equipment and handling the data;
- The privacy rights of people since body-worn cameras can encroach on society's expectation of privacy;
- Prosecutors and defense counsel will seek to examine video footage about their cases;
- The establishment of policies about the use of the videos;
- The training requirements needed for camera use, video examination, and video redaction; and

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<sup>27</sup> *Id.*

<sup>28</sup> *See id.*

<sup>29</sup> Kelly Freund, *When Cameras are Rolling: Privacy Implications of Body-Mounted Cameras on Police*, 49 COLUM. J. L. & SOC. PROBS. 92, 93 (2015).

<sup>30</sup> *Id.* at 93–94.

<sup>31</sup> Velebit, *supra* note 27.



- Legal considerations, such as victim privacy rights that arise in juvenile, domestic violence, and sexual assault cases.<sup>32</sup>

[11] Some police representatives have even registered their objections in court. For instance, in 2016, the Boston Police Patrolmen’s Association sued the city over a pilot program requiring the wearing of body cameras by 100 officers.<sup>33</sup> They asserted that using cameras “increased risk of harm to officers” based upon research that revealed that ~~those~~ police officers in the United States and England who wore body cameras were 15% more likely to be assaulted.<sup>34</sup>

## II. POLICE BODY CAMERAS

[12] Law enforcement use of video cameras is not a novel concept.. In the 1980s, cameras were installed in police vehicles for surveillance purposes.<sup>35</sup> Known as “dashboard cams,” these units are still used, but the view is restricted to what can be seen through the windshield of a police

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<sup>32</sup> 160 AM. JUR. *Trials* 1 § 2, Westlaw (database updated Oct. 2020).

<sup>33</sup> Jan Ransom, *Body Camera Ruling Due by Friday*, BOS. GLOBE (Sept. 7, 2016, 10:11 AM), <https://www.bostonglobe.com/metro/2016/09/07/battle-over-body-cameras-return-boston-courtroom/rJurUz5bgER4NJkBttKoaN/story.html> [<https://perma.cc/3ZYV-XQUF>].

<sup>34</sup> Candice Norwood, *Body Cameras are Seen as Key to Police Reform. But Do They Increase Accountability?*, PBS NEWS HOUR (June 25, 2020, 4:41 PM), <https://www.pbs.org/newshour/politics/body-cameras-are-seen-as-key-to-police-reform-but-do-they-increase-accountability> [<https://perma.cc/98AJ-725Q>].

<sup>35</sup> JESSICA MACARI, BODY-WORN CAMERAS: CONCERNS AND CONSIDERATIONS (2015), [https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/north-carolina-district-attorneys\\_best-practices-committee\\_body-worn-cameras-concerns-and-considerations.pdf](https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/north-carolina-district-attorneys_best-practices-committee_body-worn-cameras-concerns-and-considerations.pdf) [<https://perma.cc/8HYH-9A4S>].

cruiser.<sup>36</sup> Statistically, 72% of all police vehicles have this equipment,<sup>37</sup> but some dashboard units lack audio recording capabilities.<sup>38</sup>

[13] Body cameras, on the other hand, have a variety of names such as body-worn video, body-worn cameras, or wearable cameras<sup>39</sup> and consist of small, mobile units worn by officers to document their interactions with the public.<sup>40</sup> Law enforcement first used this technology in the late 1990s, but these initial cameras were cumbersome and difficult to carry because they resembled large camcorders from that time.<sup>41</sup> England was the first country to employ police body cameras on a national level.<sup>42</sup> In 2006, their Domestic Violence Enforcement officers “were equipped with head cameras which led to the ‘preservation of good-quality first disclosure evidence from the victim,’” and the film became a valuable prosecution tool

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<sup>36</sup> *Id.*

<sup>37</sup> *Four Important Facts About Police Cameras*, 10–8 VIDEO SYS. (2020), <https://www.10-8video.com/blog/four-important-facts-about-police-cameras/> [<https://perma.cc/QD3X-XG5Y>].

<sup>38</sup> See R. Christopher Jones, *What You Need to Know About Dash Cams in Virginia*, ALLEN, ALLEN, ALLEN, & ALLEN: BLOG (Nov. 28, 2016), <https://allenandallen.com/what-you-need-to-know-about-dash-cams-in-virginia/> [<https://perma.cc/3VUE-UUFT>].

<sup>39</sup> *Body Camera*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Body\\_camera](https://en.wikipedia.org/wiki/Body_camera) [<https://perma.cc/RSY3-PZ2Y>].

<sup>40</sup> HYLAND, *supra* note 12.

<sup>41</sup> Natalie Regoli, *18 Major Pros and Cons of Police Body Cameras*, CONNECTUS (Oct. 16, 2019), <https://connectusfund.org/18-major-pros-and-cons-of-police-body-cameras> [<https://perma.cc/KX8L-DAU3>].

<sup>42</sup> Thomas Gardiner & Patrick Molinari, *Body Cameras: A New Era in Policing*, 30 DCBA BRIEF, May 2018, <https://www.dcba.org/mpage/v30gardinermolinari> [<https://perma.cc/5JDD-RNG3>].

especially when the victim was unwilling to file charges.<sup>43</sup> This camera program received widespread acclaim and was seen to have more beneficial use than just evidence gathering.<sup>44</sup>

[14] In 2012, the Police Department in Rialto, California was one of the first agencies in the United States to use body cameras.<sup>45</sup> Fifty-four officers were arbitrarily split into two groups, those wearing BWCs and those not.<sup>46</sup> The experiment demonstrated that when wearing BWCs the use of force by police was reduced by over 50%, and grievances against officers went down 88%.<sup>47</sup>

[15] Since their early days, these devices have undergone a metamorphous, evolving into small wearable tools affixed to the officer's clothing, helmet, or sunglasses that can generate video and audio recordings.<sup>48</sup> There are a variety of models available for purchase, but BWCs generally consist of two parts: a small raised button that the officer clicks to begin the recording, and a lipstick-sized camera that is attached to the body by a magnetic mount.<sup>49</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See Barak Ariel et al., *The Effect of Police Body-Worn Cameras on Use of Force and Citizens' Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANTITATIVE CRIMINOLOGY 509, 510 (2015).

<sup>46</sup> *Id.* at 511, 518–19.

<sup>47</sup> *Id.* at 524.

<sup>48</sup> See Regoli, *supra* note 42; see also *Police Body Cameras: Top 3 Pros and Cons*, PROCON.ORG (Aug. 14, 2020), <https://www.procon.org/headlines/police-body-cameras-top-3-pros-and-cons/> (describing body cameras and their functions) [<https://perma.cc/6PDE-SKS5>].

<sup>49</sup> Shirley Li, *The Big Picture: How Do Police Body Cameras Work?*, THE ATLANTIC (Aug. 25, 2014), <https://www.theatlantic.com/national/archive/2014/08/how-do-police-body-camera-work/378940/> [<https://perma.cc/WV7Z-LWAW>].

[16] The devices weigh about five ounces, and some remain on at all times while others are motion sensor activated.<sup>50</sup> The implementation costs vary based upon the size of the department, but the expense can be substantial.<sup>51</sup> One study concluded that the median annual cost of a BWC program is \$4,000 in camera associated expenses plus \$1,000 in outlays related to the storage of the electronic video files.<sup>52</sup> The costs for large department utilization, however, can run into the millions of dollars.<sup>53</sup> The most expensive program in the survey cost the department \$1,334,717 annually for the body camera equipment, as well as \$4,000,000 to store the video files.<sup>54</sup>

[17] Many departments store their recorded video files in the cloud, requiring police departments to buy new equipment or a subscription to a cloud-based storage system, usually maintained by private vendors.<sup>55</sup> These costs are only compounded because storage issues are collective since many retention laws mandate police departments to maintain certain videos for years or even indefinitely.<sup>56</sup> This creates a core set of videos that require annual maintenance in addition to new footage.<sup>57</sup> Extra personnel may prove necessary to examine and tag video, classify incident suitability,

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<sup>50</sup> See Regoli, *supra* note 42.

<sup>51</sup> See *id.*

<sup>52</sup> POLICE EXEC. RSCH. F., COST AND BENEFITS OF BODY-WORN CAMERA DEPLOYMENTS 9 (2018), <https://www.policeforum.org/assets/BWCCostBenefit.pdf> [<https://perma.cc/5BW2-536N>].

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 16.

<sup>56</sup> See *id.*

<sup>57</sup> *Id.*

index locations, and to satisfy video demands by the media and individuals.<sup>58</sup> One must not overlook the administrative expenses that accompany BWC programs, which commonly include securing contracts, equipment, and personnel, creating policies, and program supervision.<sup>59</sup>

### A. Pros and Cons to Body Camera Usage

[18] Police utilization of body cameras is a relatively new phenomenon and their assessment is ongoing. The devices, however, continue to become part of the customary gear used by the police.<sup>60</sup> This “all-in” approach occurs while legislatures across the country assess and argue the advantages and disadvantages of uniformly equipping officers with BWCs.<sup>61</sup> Supporters of body cameras maintain they offer a host of advantages including improved openness and accountability.<sup>62</sup>

[19] When a police department is agreeable to launching a body camera program, this potentially demonstrates that the department is dedicated to objectivity and accountability.<sup>63</sup> They can also foster better conduct on the part of police officers and the public since people behave in a better fashion when they know they are being recorded. In turn, this will lower incidents of aggression, civil unrest, use of force, and attacks on officers while on

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<sup>58</sup> POLICE EXECUTIVE RESEARCH F., *supra* note 53.

<sup>59</sup> *Id.*

<sup>60</sup> Michael Kissiah, *Police Body Cameras: Do They Reduce Complaints of Officer Misconduct?*, EINVESTIGATOR (Apr. 29, 2020), <https://www.einvestigator.com/police-body-cameras/> [<https://perma.cc/A4JG-UL5N>].

<sup>61</sup> *Id.*

<sup>62</sup> *See* Headley et al., *supra* note 23.

<sup>63</sup> *See* Sherine E. Thomas, *Body Cams – An Imperfect Solution*, in TEX. CLE ADVANCED GOV'T L. (2016).

patrol.<sup>64</sup> These conclusions are supported by a University of Cambridge study which ascertained that the use of violence diminished by 50% when police wore BWCs, providing proof that more cameras correlate to less violence.<sup>65</sup>

[20] BWCs are particularly useful because they can record the events in real-time, thereby offering reviewable visual and audio evidence of what happened during an incident.<sup>66</sup> This ability makes it easier for law enforcement officials, the public, and juries to interpret or visualize what happened instead of relying on the subjective narration of the parties or witnesses.<sup>67</sup> The footage can also be utilized as a training tool to reinforce good police practices and how to better defuse a difficult situation.<sup>68</sup> Some police departments strongly support the police use of video cameras, perhaps because studies have shown that the presence of these cameras has the potential to reduce community complaints about police interactions by up to 90%.<sup>69</sup> This frees up valuable funds because there are fewer grievances<sup>70</sup> to investigate which translates into more money to spend on other police matters.<sup>71</sup>

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<sup>64</sup> See Ariel et al., *supra* note 46.

<sup>65</sup> See *id.*

<sup>66</sup> See *Police Body Cameras: Top 3 Pros and Cons*, *supra* note 49.

<sup>67</sup> Will Erstad, *Police Perspective: The Pros & Cons of Police Body Cameras*, RASMUSSEN COLL.: JUST. STUD. BLOG (Jan. 25, 2016), <https://www.rasmussen.edu/degrees/justice-studies/blog/pros-and-cons-of-police-body-cameras/> [<https://perma.cc/NQX7-QG9Z>].

<sup>68</sup> See Regoli, *supra* note 42.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See *id.*

[21] Critics are just as vocal about the ineffectiveness of BWC programs. Recent research demonstrates an increasing awareness that BWCs fail to significantly impact the behavior of police officers or how citizens view the police.<sup>72</sup> Experts note that cameras “should not be expected to single-handedly improve police accountability.”<sup>73</sup> Rather, the evidence demonstrates that these systems are only as useful as the departments which employ them.<sup>74</sup>

[22] Body cameras may also stop witnesses from coming forward because of fear of retaliation or apprehension of public exposure.<sup>75</sup> Some individuals react hostilely to being filmed, especially those who may be intoxicated, on drugs, or mentally deranged.<sup>76</sup> One study even revealed that assaults on law enforcement officials increased by 14% when body cameras were employed.<sup>77</sup> This phenomenon occurs because the cameras may be psychologically harmful to the officers since “nobody does well to be under constant surveillance.”<sup>78</sup> Other studies revealed that BWCs had no quantifiable bearing on the use of force or citizen grievances against

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<sup>72</sup> Lindsey Van Ness, *Body Cameras May Not Be the Easy Answer Everyone Was Looking For*, STATELINE (Jan. 14, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/01/14/body-cameras-may-not-be-the-easy-answer-everyone-was-looking-for> [<https://perma.cc/7SBX-J6LB>].

<sup>73</sup> P.R. Lockhart, *Body Cameras Were Supposed To Help Improve Policing. They Aren't Living Up To the Hype.*, VOX (Mar. 27, 2019, 11:10 AM), <https://www.vox.com/2019/3/27/18282737/body-camera-police-effectiveness-study-georgemason> [<https://perma.cc/2SPD-DLRH>].

<sup>74</sup> *Id.*

<sup>75</sup> Kissiah, *supra* note 61.

<sup>76</sup> *Police Body Cameras: Top 3 Pros and Cons*, *supra* note 49.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

police.<sup>79</sup> They also discovered a disconcerting link between body camera use and higher levels of assaults on officers.<sup>80</sup>

[23] Since BWCs only capture that which is occurring directly in front of the device, important details of an incident occurring out of view of the BWC's lens are often omitted. This is an important inadequacy of BWCs in practice.<sup>81</sup> The shooting of Mary Hawkes, a disturbed young woman suspected of stealing a vehicle, illustrates the weakness of police cameras.<sup>82</sup> This should have been a classic case supporting the benefits of BWCs. After all, the witnesses and shooter were police officers equipped with body cameras.<sup>83</sup> However, three years after the fatal encounter, the incident became a wake-up call concerning the ability of new technology to confuse rather than clarify, particularly when the police determine what is filmed and revealed to the public.<sup>84</sup>

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<sup>79</sup> See David Yokum et al., *Evaluating the Effects of Police Body-Worm Cameras: A Randomized Controlled Trial*, THE LAB, Oct. 2017, at 11; Michael Durkheimer, *Why Don't Police Body Cameras Work Like We Expected?*, FORBES (Oct. 23, 2017, 1:00 PM), <https://www.forbes.com/sites/michaeldurkheimer/2017/10/23/why-dont-police-body-cameras-work-like-we-expected/?sh=6701c8481244> [https://perma.cc/CQS4-JFSW].

<sup>80</sup> Paul Peluso, *Study: Body Cams Cause More Assaults on Cops*, OFFICER.COM NEWS (May 17, 2016), <https://www.officer.com/command-hq/technology/news/12209084/study-body-cameras-increase-assaults-against-officers#:~:text=Averaged%20over%2010%20trials%2C%20body%20cameras%20had%20no,compared%20to%20when%20they%20weren%E2%80%99t%20wearing%20the%20cameras> [https://perma.cc/2JGZ-L27L].

<sup>81</sup> See Regoli, *supra* note 42.

<sup>82</sup> Craig Timberg, *A Cop Fires. A Teen Dies. Yet Six Police Body Cameras Somehow Miss What Happens*, WASH. POST (Mar. 20, 2017), [https://www.washingtonpost.com/business/technology/a-cop-fires-a-teen-dies-yet-six-police-body-cameras-somehow-miss-what-happens/2017/03/20/c7d801a8-0824-11e7-b77c-0047d15a24e0\\_story.html](https://www.washingtonpost.com/business/technology/a-cop-fires-a-teen-dies-yet-six-police-body-cameras-somehow-miss-what-happens/2017/03/20/c7d801a8-0824-11e7-b77c-0047d15a24e0_story.html) [https://perma.cc/UZ6Y-KT32].

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*



[24] Federal authorities investigated allegations that the police altered the recording thereby calling into question about whether utilization of body cameras is achieving the goal of greater accountability.<sup>85</sup> As it turned out, the police department in question routinely deleted, altered, or refused to release the footage because of political calculations.<sup>86</sup>

[25] Police accountability is another area where BWC investigation has produced mixed results. Twenty studies assessing grievances by citizens and body cameras revealed a “sizable reduction” in complaints against officers wearing cameras.<sup>87</sup> The wearing of a body camera, however, has little impact on whether disciplinary action is taken against an officer.<sup>88</sup>

[26] The threat to privacy also poses a major concern regarding body camera usage. Those who are the focus of police encounters are most notably affected by the use of BWCs, which may show the subject in a compromising position or document others in the area who have no involvement in the incident.<sup>89</sup> At times, BWC filming captures footage in private locations, such as a home or bathroom, thereby allowing the footage to be viewed by others when the encounter was not in a public location.<sup>90</sup> These privacy concerns are only made exacerbated during an illegal search—since the police have no lawful right to be on the premises but the

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Norwood, *supra* note 35.

<sup>88</sup> *Id.*

<sup>89</sup> Ethan Thomas, Note, *The Privacy Case for Body Cameras: The Need for a Privacy-Centric Approach to Body Camera Policymaking*, 50 COLUM. J. L. & SOC. PROBS. 192, 196 (2017).

<sup>90</sup> *Id.* at 220.

body camera allows others who look at the video to observe this legally protected area.<sup>91</sup>

### B. When to Activate Body Cameras

[27] The effectiveness of a BWC program often hinges on when the officer is required to turn the camera on, whether they must watch the film before authoring an incident report, and whether the footage is available for public review.<sup>92</sup> No federal rule exists concerning the use of body cameras or when they have to be activated. Instead, they are regulated by each police unit, although some statewide protocols exist.<sup>93</sup>

[28] There are two schools of thought concerning the activation of body cameras. The first is to film everything and to turn the camera off only when the officer is on break or not carrying out official duties.<sup>94</sup> The advantage of this position is that the officer cannot be accused of being selective concerning what to record.<sup>95</sup>

[29] The alternative position is to provide the officer with discretion in what to film knowing that not everything will be captured.<sup>96</sup> Proponents argue that this option offers the police discretion in not filming juvenile encounters, incidents dealing with nudity, domestic disputes, contact with informants, matters involving mental health, and interactions with people

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<sup>91</sup> *Id.* at 196.

<sup>92</sup> Van Ness, *supra* note 73.

<sup>93</sup> Molly Zilli, *Can Police Turn Off Body Cameras?*, FINDLAW (Apr. 5, 2018), <https://blogs.findlaw.com/blotter/2018/04/can-police-turn-off-body-cameras.html> [<https://perma.cc/UB24-UMXA>].

<sup>94</sup> MACARI, *supra* note 36.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

who have no involvement with police matters.<sup>97</sup> Nevertheless, giving the officer discretion to turn off their BWC subjects that officer to potential improper conduct allegations for controversial incidents that went unrecorded.<sup>98</sup>

[30] A Philadelphia Police Department Directive provides an example of an approach to address the concerns with body cameras. The policy requires officers to place their BWCs in a “stand-by” status immediately after obtaining the units at the start of a tour.<sup>99</sup> The cameras must be activated before responding to all calls for service, during police-related encounters, and throughout all actions concerning the general public.<sup>100</sup>

### C. Video Retention

[31] BWC footage is not just a report, but also evidence, and as such BWC footage must be protected and remain unmodified in any fashion.<sup>101</sup> Therefore, a video retention policy is critically important to a police department’s BWC program.<sup>102</sup> The amount of time the film must be stored not only impacts legal proceedings, but also implicates budget, community,

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> PHILA. POLICE DEP’T, DIRECTIVE 4.21 (Jun. 13, 2018), <https://www.phillypolice.com/assets/directives/D4.21BodyWornCameras-rev1.pdf> [<https://perma.cc/8JFV-HBAK>].

<sup>100</sup> *Id.*

<sup>101</sup> AM. JUR. *Trials* 1 § 2, *supra* note 33.

<sup>102</sup> 3 *Key Considerations for Creating Your Agency’s Retention Policy*, POLICE1 (March 13, 2015), <https://www.policeone.com/police-products/body-cameras/articles/3-key-considerations-for-creating-your-agencys-retention-policy-O9SIM2avqie4cbgv/> [<https://perma.cc/ASC6-R7K4>].

and privacy concerns.<sup>103</sup> Generally, there is no legal mandate that requires the storage of video for a specified period, the decision as to whether or not to warehouse the film is made by the municipality subject to the constraints of state law.<sup>104</sup>

[32] The Albuquerque Police Department was a pioneer in the establishment of BWC programs, beginning in 2011.<sup>105</sup> Within five years, it had one of the most wide-ranging video retention policies in the country.<sup>106</sup> However, for the first three years of the program, Albuquerque officers could decide to delete footage from their cameras after a shift ended.<sup>107</sup> This policy was roundly criticized by the American Civil Liberties Union because the officers continually failed to hand-in videos for

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<sup>103</sup> *Id.*

<sup>104</sup> Kevin McCullough, *Body Worn Video and Records Retention*, OMAG, <https://www.omag.org/news/2017/8/23/body-worn-video-and-records-retention> [<https://perma.cc/X8GP-73YP>].

<sup>105</sup> See Alex Pasternack, *Why Body Camera Programs Fail*, FASTCOMPANY (Oct. 27, 2016), <https://www.fastcompany.com/3062837/it-fell-off-body-camera-problems> [<https://perma.cc/J4DU-7VLH>] (“[T]he Albuquerque police department equipped all of its officers with body cameras by early 2011 . . .”).

<sup>106</sup> See PAUL GUERIN ET AL., CITY OF ALBUQUERQUE POLICE DEPARTMENT ON BODY CAMERA SYSTEM RESEARCH 5, 10 (2016) (reporting that although the average period for footage retention is between 60 and 90 days, the Albuquerque Police Department retains footage for “no less than 120 days.”).

<sup>107</sup> Bradley X. Barbour, *Big Budget Productions with Limited Release: Video Retention Issues with Body-Worn Cameras*, 85 FORDHAM L REV. 1725 (2017).

review.<sup>108</sup> The organization noted that “the Albuquerque experience shows just how badly body camera oversight is needed.”<sup>109</sup>

[33] Generally, the average retention period for non-evidentiary video is between 60 to 90 days, but this time frame varies significantly by jurisdiction.<sup>110</sup> For example, Georgia law provides that video recordings from BWCs or dashboard cams must be kept for 180 days from the date of recording.<sup>111</sup> The caveat is that “such video related to criminal investigations, vehicular accidents, detainments, arrests, use of force, or pending litigation must be held 30 months from the date of the recording, as should video recordings related to commenced litigation, which are to be held until adjudication.”<sup>112</sup> By comparison, Philadelphia has a shorter retention policy which requires BWC footage to be maintained for no less than seventy-five days unless the recording is needed for evidentiary purposes or additional review.<sup>113</sup>

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<sup>108</sup> See Jay Stanley, *Police Body Cameras: The Lessons of Albuquerque*, ACLU (Mar. 24, 2015), <https://www.aclu.org/blog/police-body-cameras-lessons-albuquerque> [<https://perma.cc/SD7D-EF2E>] (stating that due to officers’ mishandling of video footage, more oversight is needed).

<sup>109</sup> Barbour, *supra* note 108, at 1742.

<sup>110</sup> See GUERIN ET AL., *supra* note 107, at 10.

<sup>111</sup> See *New Law Affects Police Video Storage and Retention*, GA. MUN. ASS’N. (Aug. 25, 2016), <https://www.gacities.com/Resources/Reference-Articles/New-Law-Affects-Police-Video-Storage-and-Retention.aspx> [<https://perma.cc/D8BK-B7ST>] (“[V]ideo recordings from law enforcement body-worn devices or devices located on or inside of law enforcement vehicles shall be retained for 180 days from the date of such recording.”).

<sup>112</sup> *Id.*

<sup>113</sup> See DIRECTIVE 4.21, *supra* note 100 (“Unless a specific incident or event is marked as evidence or tagged for further review, digital recordings captured on BWCs shall be retained for no less than seventy-five (75) days from the date of the incident or event.”) (emphasis omitted).

[34] The examination and classification of body-worn camera video also cause logistical difficulties.<sup>114</sup> This film is usually categorized as “evidentiary” or “non-evidentiary” after the officer’s shift.<sup>115</sup> The film must then be identified by the particular event it records, which could be influenced by evidentiary requirements in a particular jurisdiction.<sup>116</sup> These evidentiary requirements are notable because, as alluded to in the Philadelphia example, police video retention policies usually mandate disparate storage times for evidentiary and non-evidentiary videos.<sup>117</sup> Retention is a procedure that can require considerable organizational costs and officer time.<sup>118</sup> Therefore, common sense suggests that it is usual for many police departments to establish video programs without first creating rules about film retention.<sup>119</sup>

#### D. Public Review of Footage

[35] The Freedom of Information Act (“FOIA”) and its state-level equivalents “are a product of the ‘open government’ climate brought about by distrust of government accountability and by misuse of government power during the civil rights and Vietnam protest era.”<sup>120</sup> BWCs raise similar privacy concerns to those implicated by FOIA in two ways: (1) their capacity to record video and audio anywhere law enforcement officials go,

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<sup>114</sup> Barbour, *supra* note 108, at 1743.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *See id.* at 1743–44.

<sup>120</sup> Richard Lin, *Police Body Worn Cameras and Privacy: Retaining Benefits While Reducing Public Concerns*, 14 DUKE L. & TECH. REV. 346, 350 (2016).

regardless of purpose; and (2) because of the fact that the footage may constitute a public record subject to release upon demand.<sup>121</sup> While BWCs and other forms of similar technology, such as dashboard cameras and closed circuit televisions, may seem comparable, BWCs are actually different from those technologies in the sense that they suffer from different problems.<sup>122</sup>

[36] For example, dashboard cameras usually record the area in front of a police vehicle, and their disclosure is frequently regulated by state-level government accountability and disclosure laws.<sup>123</sup> Nevertheless, their BWC counterpart raises a more significant privacy conundrum because of the mobility of these small devices, the larger amount of video recorded, and requirements for cameras that are “always on.”<sup>124</sup> Dashboard video is also limited to the area in front of the hood while the vehicle is stationary.<sup>125</sup> This means that the detail and video quality of a body-mounted camera is far superior and much more detailed.<sup>126</sup> This makes it much simpler to identify individuals shown in BCW recordings in comparison to the individuals shown in the more remote dashboard camera videos.<sup>127</sup>

[37] A fundamental problem concerning the use of BWCs is that, while the technology continues to be more widely adopted, few laws actually

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 355.

<sup>124</sup> *See id.*

<sup>125</sup> *See id.*

<sup>126</sup> Lin, *supra* note 121, at 355.

<sup>127</sup> *See id.*

control who can access the footage outside of police departments.<sup>128</sup> This has resulted in the growing opinion that body camera video is designed to assist the needs of law enforcement and not the public.<sup>129</sup> The pros and cons of releasing the footage are fairly straight forward. The decision to deny public access to the video does little to incentivize better behavior. Abuses go unnoticed or contested, and the film is transformed into a surveillance tool.<sup>130</sup> Instead of creating an air of transparency and objectivity, the public perceives arbitrariness which is reinforced when police departments suppress video of alleged police wrongdoing while they are quick to release film that places officers in a positive light.<sup>131</sup> Therefore, acquiring access to BWC videos has become an unclear and difficult task for third parties such as the media.<sup>132</sup> Conversely, public access provides third parties with the opportunity to observe police actions, the news outlets become de facto overseers, society can urge law enforcement to implement prudent procedures about video retention, and help stop deep-rooted systems of misbehavior or abuse.<sup>133</sup>

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<sup>128</sup> See Kate Wheeling, *Should Police Body Camera Footage Be Public Record?*, PACIFIC STANDARD (June 15, 2017), <https://psmag.com/news/should-police-body-camera-footage-be-public-record> [<https://perma.cc/S5X3-4LWM>].

<sup>129</sup> See Martin Kaste, *Should The Police Control Their Own Body Camera Footage?*, NPR (May 25, 2017), <https://www.npr.org/2017/05/25/529905669/should-the-police-control-their-own-body-camera-footage> [<https://perma.cc/7B9R-5MBT>].

<sup>130</sup> See THE MEDIA FREEDOM & INFO. ACCESS CLINIC, *POLICE BODY CAM FOOTAGE: JUST ANOTHER PUBLIC RECORD 4* (2015), <https://pceinc.org/wp-content/uploads/2019/11/20151200-Police-Body-Camera-Footage-Just-Another-Public-Record-Clinic.pdf> [<https://perma.cc/Z2RL-F5H4>].

<sup>131</sup> See Kaste, *supra* note 130.

<sup>132</sup> See Adam Marshall, *Police Bodycam Videos: The Wild West of Open Records Requests*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/bodycam-video-access/> [<https://perma.cc/3J9J-PKM4>].

<sup>133</sup> See *id.*



[38] Unfortunately, many law enforcement agencies are obtaining body cameras before developing rules or practices that are consistent with the statutes on open records thereby causing uneven disclosure between jurisdictions.<sup>134</sup> While sizable departments typically have rules and designated personnel to deal with disclosure requests, BWC videos present unique problems and privacy concerns.<sup>135</sup>

[39] Generally, a “public record” is broad term that includes data saved in a mixture of formats, which should include police videos.<sup>136</sup> Florida’s public records law provides an example when it defines a public record as any medium “regardless of the physical form, characteristics, or means of transmission made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.”<sup>137</sup> Logic suggests that body-camera video should be classified as a public record under disclosure laws. Most jurisdictions, however, have exclusions for matters concerning ongoing investigations.<sup>138</sup> The problem is that the meaning of an “investigation” is flexible, and courts may be predisposed to use the judgment of police officers in determining issues of public safety.<sup>139</sup> Therefore, it is not surprising that some courts have determined

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<sup>134</sup> See THE MEDIA FREEDOM & INFO. ACCESS CLINIC, *supra* note 131 at 4.

<sup>135</sup> See *Police Body Camera Policies: Retention and Release*, BRENNAN CENTER FOR JUSTICE (Aug. 3, 2016), <https://www.brennancenter.org/our-work/research-reports/police-body-camera-policies-retention-and-release> [<https://perma.cc/NM94-XKZN>].

<sup>136</sup> See *Public Records and You!*, TAYLOR COUNTY, [https://www.taylorcountygov.com/departments/technology\\_department/public\\_records\\_and\\_you!.php](https://www.taylorcountygov.com/departments/technology_department/public_records_and_you!.php). [<https://perma.cc/MLW6-PVMR>].

<sup>137</sup> *Id.*

<sup>138</sup> *Developments in the Law—Considering Police Body Cameras*, *supra* note 6, at 1807.

<sup>139</sup> *Id.*

that police video does not have to be disclosed as part of an exclusion for criminal investigatory records.<sup>140</sup>

[40] Research by the National Conference of State Legislatures reveals that twenty-three states and the District of Columbia have passed laws on how BWC data is covered by open record statutes.<sup>141</sup> Some jurisdictions enumerate measures for how individuals may request videos and which types of video may or may not be distributed to the public.<sup>142</sup> Connecticut, Nevada, North Dakota, Oklahoma, and Texas handle BWC videos as public records but offer rules and limitations for when law enforcement may refuse to release, redact, or restrict certain films.<sup>143</sup> For example, Nevada provides that individual requests for footage can be made on a per-incident basis and are accessible for review at the location where the video is kept if the film includes confidential data that cannot be redacted.<sup>144</sup> Oklahoma's law makes the video subject to its open records law but identifies those cases where footage must be redacted before it may be released such as matters involving the death of an individual, nudity, or if the footage shows a person younger than 16 years old.<sup>145</sup>

[41] On the other hand, Florida, Georgia, Illinois, Oregon, and South Carolina exclude the videos from open record requests but allow exceptions for access to the footage by specific persons or in specific situations.<sup>146</sup>

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<sup>140</sup> *See id.*

<sup>141</sup> *See Body-Worn Camera Laws Database*, NCSL (Feb. 28, 2020), <https://www.ncsl.org/research/civil-and-criminal-justice/body-worncameras-interactive-graphic.aspx#/> [<https://perma.cc/3MHQ-KG8C>].

<sup>142</sup> *See id.*

<sup>143</sup> *See id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

Oregon provides an example where its law provides that body camera footage may be disclosed if necessary for the public interest.<sup>147</sup> Requests, however, must provide approximate dates and times and be modified in a way that makes all faces unidentifiable.<sup>148</sup> South Carolina’s law notes that “data recorded by a body-worn camera is not a public record subject to disclosure under the Freedom of Information Act.”<sup>149</sup> However, the film may be obtained by the person who is the subject of the video, a defendant in a criminal action, a civil litigant if the recording is relevant to a lawsuit, and an individual whose property has been seized or damaged in a crime to which the recording is relevant.<sup>150</sup>

[42] In cases of police shootings, some departments object to the release of the footage to the public. This is demonstrated by a lawsuit filed in the State Supreme Court of New York by the city’s police union to block the release of certain footage without a court order.<sup>151</sup> The union president explained the action: “This footage has serious implications not only for the safety and due process rights of [the] police officers, but for the privacy and rights of members of the public, as well.”<sup>152</sup> This objection is consistent with the position of the police unions in Boston and Seattle.<sup>153</sup>

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<sup>147</sup> See NCSL, *supra* note 142.

<sup>148</sup> *Id.*

<sup>149</sup> See *Id.*

<sup>150</sup> S.C. CODE ANN. § 23-1-240.

<sup>151</sup> Ashley Southall, *Police Union Lawsuit Fights Releasing Videos from Body Cameras*, THE N.Y. TIMES (Jan. 10, 2018), <https://www.nytimes.com/2018/01/09/nyregion/new-york-police-union-body-camera-lawsuit.html> [<https://perma.cc/N6GW-9CAS>].

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

### III. WHEN OFFICERS FAIL TO PROPERLY ACTIVATE BODY-WORN CAMERAS

[43] In 2015, shortly after the Obama administration announced that it would offer \$263 million in federal funding for law enforcement agencies to purchase body-worn cameras, scholars began cautioning against allowing individual police departments to haphazardly implement body-worn camera programs.<sup>154</sup> These commentators recognized that:

[b]alancing the benefits and drawbacks of this powerful new technology is not an easy task, and the decision to equip police departments with cameras should not be made lightly. Once such a program is deployed, it is increasingly difficult to have second thoughts or to scale back. Expedient adoption therefore should not be prioritized over reasoned policymaking.<sup>155</sup>

An example of such policymaking, critics maintain that the courts can correct improper BWC usage through jury instructions.<sup>156</sup> For instance, the ACLU asserts that laws should be enacted to require judges to instruct juries to discount or ignore a police officer's testimony if, in their determination, the officer unreasonably failed to record the interaction with an individual.<sup>157</sup> This type of jury charge is not an extreme suggestion. The courts in Alaska, Arkansas, Indiana, Massachusetts, Minnesota, New

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<sup>154</sup> See *Developments in the Law—Considering Police Body Cameras*, *supra* note 6, at 1795–96, 1817.

<sup>155</sup> *Id.* at 1817 (internal quotations omitted).

<sup>156</sup> See Matthew Segal, *If Cops Don't Turn on Their Body Cameras, Courts Should Instruct Juries to Think Twice about Their Testimony*, ACLU (Dec. 1, 2016), <https://www.aclu.org/blog/criminal-law-reform/reforming-police/ifcops-dont-turn-their-body-cameras-courts-should> [<https://perma.cc/ERA8-BUKE>].

<sup>157</sup> See *id.*

Jersey, Utah, and Wisconsin allow evidentiary penalties when officers fail to record the questioning of suspects.<sup>158</sup> Currently, no such laws addressing improper BWC usage exist.<sup>159</sup>

[44] Since 2016, notwithstanding a lack of legislation on the issue, have been confronted with issues of police officers failing to properly activate BWCs in violation of internal police policies and procedures.<sup>160</sup> Specifically, criminal defendants have unsuccessfully moved to dismiss charges or suppress evidence acquired during police encounters where the officers failed to properly activate their body-worn cameras, arguing that the failure amounted to a due process violation for failure to collect evidence.<sup>161</sup> With some success, defendants have introduced evidence attacking officers' credibility and motivation when they fail to properly activate their body-worn cameras in accordance with internal policies and procedures.<sup>162</sup> This section discusses how the common law is beginning to evolve concerning the improper usage of BWCs in the absence of reasoned policymaking.

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<sup>158</sup> *See id.*

<sup>159</sup> *See No Tape, No Testimony How Courts Can Ensure the Responsible Use of Body Cameras*, ACLU & BERKELEY L. 2, 13, 15 (Nov. 29, 2016), [https://www.law.berkeley.edu/wp-content/uploads/2016/11/SLTPPC\\_ACLU\\_BodyCameras\\_Final.pdf](https://www.law.berkeley.edu/wp-content/uploads/2016/11/SLTPPC_ACLU_BodyCameras_Final.pdf) [<https://perma.cc/DGS6-RBQP>].

<sup>160</sup> *See Linda Merola et al., Body Worn Cameras and the Courts: A National Survey of State Prosecutors*, 16 GEO. MASON U. CTR. FOR EVIDENCE-BASED CRIME POL'Y (2016), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/bwcprosecutors.pdf> [<https://perma.cc/A6VQ-6LTQ>].

<sup>161</sup> *See infra* Part III.A (discussing cases involving unsuccessful attempts to establish a due process violation for an officer's failure to properly collect evidence with their body-worn camera.).

<sup>162</sup> *See infra* Parts III.B and I.C (discussing cases involving attempts to use an officer's failure to properly activate his body-worn camera as an attack on the officer's credibility and motivations.).

### A. Early, Unsuccessful Attempts to Establish a Due Process Violation

[45] Criminal defendants initially attempted to establish that an officer's failure to activate a body-worn camera was a due process violation for failure to collect evidence.<sup>163</sup> However, federal district courts have consistently held that a mere failure to turn on a BWC, in violation of the officer's local police department policies, does not constitute a due process clause violation.<sup>164</sup>

[46] In *United States v. Brown*, one of the first cases to address the issue, a magistrate judge from the United States District Court for the District of Nevada issued a report and recommendation to deny the defendant's motion to dismiss or suppress evidence.<sup>165</sup> The motion was predicated upon law enforcement's failure to record parts of an encounter with the suspect using body-worn cameras, which was a violation of internal police policies and procedures.<sup>166</sup> The magistrate judge's recommendation to deny the motion was adopted by the district court.<sup>167</sup>

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<sup>163</sup> See *United States v. Brown*, 2017 WL 8941247, (D. Nev. Aug. 14, 2017), *report and recommendation adopted*, 2018 WL 451556 (D. Nev. Jan. 16, 2018) (citing *Miller v. Vasquez*, 868 F.2d 1116, 1120 (1989)) (declining to find bad faith but noting that "body cameras are new devices that officers ... are still getting acclimated to using" and that as cameras "become more pervasive, and their use more ingrained in the culture and day-to-day routines of police officers, the Court cannot say that the absence of video evidence in violation of internal police procedures can never be suspicious or suggestive of misconduct" (internal quotation marks omitted)).

<sup>164</sup> *United States v. Taylor*, 312 F. Supp. 3d 170, 178 (D.D.C. 2018).

<sup>165</sup> *Brown*, 2017 WL 8941247, at \*1.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

[47] In *Brown*, officers responded to a report of a stolen vehicle that had been spotted in a parking lot.<sup>168</sup> Before the officers arrived, the defendant, Mr. Brown, who had been a passenger in the vehicle, removed personal property from the car and set it outside the passenger-side window.<sup>169</sup> Upon arrival at the parking lot, officers detained Brown in their patrol vehicle to investigate the scene.<sup>170</sup> Officers ran a records check on Brown which showed that he had an outstanding warrant for a traffic offense; they placed him under arrest for the warrant offense.<sup>171</sup> The police searched the vehicle and property that the defendant had placed outside the automobile and discovered a firearm in one of the bags placed outside the car.<sup>172</sup> The defendant was subsequently charged with possession of a firearm by a convicted.<sup>173</sup> Officers failed to record the full encounter with Brown on their BWCs, as they were required to do by local police policies and procedures.<sup>174</sup>

[48] Brown argued that his case should have been dismissed because the failure to record the incident “constituted a bad faith failure to preserve material and potentially exculpatory evidence in violation of [his] due

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<sup>168</sup> *Id.* at \*2.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at \*2–3.

<sup>171</sup> *Brown*, 2017 WL 8941247, at \*3.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 1.

process rights.”<sup>175</sup> Brown alternatively argued that the firearm should be suppressed as a sanction for failure to properly use the BWCs.<sup>176</sup>

[49] In *Arizona v. Youngblood*,<sup>177</sup> the United States Supreme Court found that police officers who, in bad faith, fail to *preserve* physical evidence that could be useful to a defendant violate a defendant’s due process rights.<sup>178</sup> In the Ninth Circuit, “the Supreme Court’s holding and analysis in *Arizona v. Youngblood* applies with equal force to law enforcement’s collection of evidence.”<sup>179</sup> Thus, Brown argued that the officers’ failure to properly activate their body-worn cameras and collect video evidence of the encounter was a bad faith failure to collect material.<sup>180</sup> To constitute a due process violation, *Youngblood* requires that the evidence be material exculpatory evidence and that the officers acted in bad faith.<sup>181</sup> The court went on to determine that Brown had failed to introduce evidence that the body-worn camera footage would have produced material exculpatory evidence, and that the officers acted in bad faith.<sup>182</sup>

[50] The court in *Youngblood* opined that a mere failure to collect evidence did not establish bad faith.<sup>183</sup> Rather, it was indicative of

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<sup>175</sup> *Id.* at 13.

<sup>176</sup> *Id.*

<sup>177</sup> *Arizona v. Youngblood*, 488 U.S. 51 (1988).

<sup>178</sup> *Id.* at 58.

<sup>179</sup> *Brown*, 2017 WL 8941247, at \*13.

<sup>180</sup> *See id.* at \*1.

<sup>181</sup> *See Youngblood*, 488 U.S. at 58.

<sup>182</sup> *Brown*, 2017 WL 8941247, at \*15.

<sup>183</sup> *See Youngblood*, 488 U.S. at 58.



negligence, which did not rise to the level of a due process violation for failure to collect evidence.<sup>184</sup> The *Youngblood* court, however, put police departments on notice that certain kinds of procedure might lead to a misconduct finding: “As BWCs become more pervasive, and their use more ingrained in the culture and day-to-day routines of police officers, the Court cannot say that the absence of video evidence in violation of internal police procedures can never be suspicious or suggestive of misconduct.”<sup>185</sup> The court denied Brown’s motion to suppress the firearm as a sanction because the prejudice to Brown resulting from the failure to activate the body-worn cameras was minimal.<sup>186</sup>

[51] The following year, in 2018, the United States District Court for the District of Columbia considered similar issues in *United States v. Taylor*; specifically, whether a police officer’s failure to activate his body-worn camera in accordance with internal police policies was a Fifth Amendment due process clause violation.<sup>187</sup> In *Taylor*, officers arrived at the defendant’s apartment to execute a writ of restitution.<sup>188</sup> One of the officers involved in the eviction notice failed to turn on their body-worn camera while examining the suspect’s apartment even though department policies required him to do so.<sup>189</sup> During the investigation, incriminating evidence was found (allegedly in plain view).<sup>190</sup>

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<sup>184</sup> *See id.*

<sup>185</sup> *Brown*, 2017 WL 8941247, at \*16.

<sup>186</sup> *Brown*, 2017 WL 8941247, at \*17.

<sup>187</sup> *United States v. Taylor*, 312 F. Supp. 3d. 170, 173 (D.C. 2018).

<sup>188</sup> *Id.* at 173–74.

<sup>189</sup> *Id.* at 178.

<sup>190</sup> *Id.* at 174.

[52] The *Taylor* court noted that in considering the due process violation: “The few courts that have considered whether the failure of police officers to activate body-worn cameras is indicative of bad faith . . . have declined to reach such a conclusion on the basis of the mere failure to follow relatively new departmental policies, as was the case here.”<sup>191</sup> It cited Third Circuit precedent: “Absent some proof of ill-will, a failure to follow procedure is insufficient to support a finding of government bad faith.”<sup>192</sup> Further, the *Taylor* court emphasized the fact that the officer who failed to activate his BWC arrived after most of the incriminating evidence had been found, and so the footage likely would not have been of the material exculpatory kind.<sup>193</sup>

[53] During the same year, the United States District Court for the Eastern District of Washington denied a motion to suppress evidence collected during a traffic stop in which law enforcement officers failed to properly activate body-worn cameras.<sup>194</sup> In *United States v. Griffin*, the defendant was indicted on a felon in possession charge.<sup>195</sup> He moved to suppress the collected evidence from the traffic stop that led to the discovery of the firearm, alleging that the officers involved lacked probable cause for the stop.<sup>196</sup> Further, Griffin argued that the officers involved in the stop failed to activate their BWCs in violation of internal police policies and that

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<sup>191</sup> *Id.* at 178.

<sup>192</sup> *Id.*

<sup>193</sup> *United States v. Taylor*, 312 F. Supp. 3d. at 178.

<sup>194</sup> See *United States v. Griffin*, No. 18-cr-100-pp, 2018 WL 4929397, at \*1 (E.D. Wis. Oct. 11, 2018).

<sup>195</sup> *Id.* at \*1.

<sup>196</sup> *Id.* at \*1, \*5.

the footage would have proven that the officers lacked probable cause for the stop.<sup>197</sup>

[54] *Griffin* pushed the Wisconsin court further than the previously decided cases, as one of the officers involved in the stop, Milone, had a documented history of failing to properly activate his body-worn camera.<sup>198</sup> Up until the *Griffin* decision, courts had been relying on the novelty of BWC programs to justify a police officer's failure to properly activate the cameras. In *Griffin*, it had been documented in at least three other cases that Officer Milone had failed to properly activate his BWC, and he had been disciplined for that behavior. While the court was concerned with the officer's behavior, it declined to suppress the evidence against the defendant because Milone's testimony was corroborated by a second officer who didn't have the same history as Milone, and the second officer's credibility could not be attacked.<sup>199</sup> However, the court noted that they "underst[ood] the defendant's concern" regarding the officer's failure to properly activate his body-worn camera.<sup>200</sup>

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<sup>197</sup> *Id.* at \*5.

<sup>198</sup> *Id.* Milone failed to properly activate his body-worn camera in the following cases. *United States v. Jones*, 889 F.3d 876 (7th Cir. 2018); *United States v. Richmond*, No. 16-cr-197-pp, 2017 WL 3701216 (E.D. Wis. Aug. 28, 2017) (order adopting magistrate judge recommendation); *United States v. Brantley*, No. 16-CR-188, 2017 U.S. Dist. LEXIS 220618, at \*5 (E.D. Wis. Mar. 13, 2017) (report and recommendation).

<sup>199</sup> *Griffin*, 2018 WL 4929397 at \*6 ("The defendant has not demonstrated that Kwiatowski [(the second officer)] has a history of failing to activate his body camera. There is no evidence to contradict Kwiatkowski's testimony that he didn't activate his camera right away because he had observed the defendant "digging around" with his hand near the car door, and was concerned about getting the defendant out of the car quickly. The defendant has not given the court a reason to discredit Kwiatkowski's testimony, and Kwiatkowski's testimony corroborates Milone's.").

<sup>200</sup> *Id.* at \*5.

## B. Lack of Body-Worn Camera Footage as an Attack on Officers' Credibility

[55] In 2019, a judge for the New York Supreme Court for the County of Monroe refused to accept a police officer's testimony where the officer failed to properly activate his body-worn camera (BWC).<sup>201</sup> In *People v. Hawkins*,<sup>202</sup> two officers approached a group of men sitting on a lawn, and one of the men reacted by fleeing the scene.<sup>203</sup> The officers pursued the individual on foot, detained him, and recovered incriminating evidence.<sup>204</sup> Neither officer activated their BWC during the encounter as required.<sup>205</sup> Only one of the officers testified in the case and "the court concluded that it could not accept [that officer's] testimony as 'truthful and accurate' because of a pattern it had witnessed regarding officers' failure to activate their bodyworn cameras in cases involving apprehensions."<sup>206</sup>

[56] In 2020, a federal district court in New York cited *Hawkins* when a criminal defendant argued in a motion to suppress hearing that an officer's failure to properly activate his body-worn camera warranted an adverse inference against an officer's testimony.<sup>207</sup> In *United States v. Tillard*, two Rochester policemen were patrolling a "high-crime area" when they

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<sup>201</sup> See *United States v. Tillard*, No. 18-CR-6091-FPG, 2020 WL 57198, at \*7 (W.D.N.Y. Jan. 6, 2020) (citing *People v. Hawkins*, No. 20190482, 1988 WL 70334 (N.Y. Sup. Ct. Nov. 21, 2019)).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> See *Tillard*, 2020 WL 57198, at \*7.

attempted to pull Defendant Tillard over during a routine traffic stop.<sup>208</sup> Mr. Tillard failed to pull over initially, drove until he reached a dead end, and then jumped out of his vehicle and fled on foot.<sup>209</sup> Tillard was apprehended and made incriminating statements to the officers.<sup>210</sup> In an objection to a magistrate judge’s report and recommendation, the defendant asked the court to reconsider whether the officers’ failure to properly activate their body-worn camera warranted an adverse inference against their truthfulness.<sup>211</sup>

[57] The district court rejected the argument that the officers’ behavior warranted an adverse inference because the Rochester police department had not demonstrated a pattern of failing to properly activate their BWCs.<sup>212</sup> The court recognized that: (1) “the officers in *Hawkins* had a much longer period to familiarize themselves with their body-worn cameras” (as *Hawkins* occurred more recently than *Tillard*), and (2) the court had “not been confronted with a similar pattern of Rochester Police Department officers failing to activate their body-worn cameras.”<sup>213</sup>

[58] The Rochester police department made national headlines a few months after *Tillard* was decided when their police chief was abruptly fired for allegedly covering up the killing of an unarmed African-American man by one of the department’s officers.<sup>214</sup> On March 23, 2020, Daniel Purdue,

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<sup>208</sup> *Id.* at \*1.

<sup>209</sup> *Id.*

<sup>210</sup> *See id.* at \*1–\*2.

<sup>211</sup> *See id.* at \*2.

<sup>212</sup> *Id.* at \*7.

<sup>213</sup> *Tillard*, 2020 WL 57198 at \*7.

<sup>214</sup> Michael Wilson & Edgar Sandoval, *Rochester Mayor Abruptly Fires Police Chief Over Daniel Prude’s Death*, N.Y. TIMES (Sept. 14, 2020),

high on PCP, was forcibly restrained by Rochester police officers and subsequently died on the scene in police custody.<sup>215</sup> His autopsy indicated that his death was the result of complications of asphyxia, with PCP as a contributing factor.<sup>216</sup> However, the police department quickly adopted a narrative that the death was caused by an overdose. Purdue's death was the subject of a complex cover-up by the Rochester police that included falsifying and even manipulating police reports, as well as misleading the mayor of the city as to the facts and circumstances concerning Purdue's death.<sup>217</sup>

[59] The encounter was captured by responding officers' body-worn cameras.<sup>218</sup> Unrelenting efforts by the family to obtain and publicly release the camera footage brought renewed attention to the case, which had been closed by the Rochester police department after an investigation cleared the officers of any wrongdoing.<sup>219</sup> After viewing the film, the mayor publicly announced that Mr. Purdue's death "has shown what so many have suspected, that we have a pervasive problem in the Rochester Police Department."<sup>220</sup>

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<https://www.nytimes.com/2020/09/14/nyregion/daniel-prude-rochester-police-chief.html>  
[<https://perma.cc/S9YP-RRCJ>].

<sup>215</sup> Michael Wilson et al., *Daniel Prude's Death: Police Silence and Accusations of a Cover-Up*, N.Y. TIMES (Sept. 4, 2020),  
<https://www.nytimes.com/2020/09/04/nyregion/rochester-police-daniel-prude.html>  
[<https://perma.cc/67NU-QJH5>].

<sup>216</sup> *Id.*

<sup>217</sup> Wilson & Sandoval, *supra* note 216.

<sup>218</sup> Wilson et al., *supra* note 217.

<sup>219</sup> *See id.*

<sup>220</sup> Wilson & Sandoval, *supra* note 216.

[60] The Rochester Police Department's conduct may be taken as a cautionary tale against a hands-off approach to enforcing body-worn camera policies by the legislature and the courts. The decedent's cover-up was exposed because body-worn camera footage existed and was released.<sup>221</sup> Consistent with the ACLU's view, strong language by the courts (such as that used in *Hawkins* and *Tillard*) puts the police on notice that the courts are watching, increases the proper use of body-worn cameras, and helps to ensure that the programs achieve their stated goals of accountability and transparency.<sup>222</sup>

[61] A Maryland court confronted issues of officer credibility related to properly activating body-worn cameras differently than New York, where the *Hawkins* court refused to accept an officer's testimony because of a pattern of failing to use BWCs within the police department.<sup>223</sup> Maryland required that an officer intentionally fail to properly activate his body-worn camera to discredit his testimony.<sup>224</sup> In *Harris v. State*, Maryland's Court of Special Appeals was asked to rule that a trial court abused its discretion in preventing defense counsel from cross-examining an arresting officer about prior failures to properly activate his body-worn camera.<sup>225</sup> The court found that the trial court did not abuse its discretion in refusing to allow the evidence.<sup>226</sup>

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<sup>221</sup> Wilson, et. al, *supra* note 217.

<sup>222</sup> *See id.* at 9.

<sup>223</sup> *See* United States v. Tillard, 2020 WL 57198, at \*7 (W.D.N.Y. Jan. 6, 2020) (citing *People v. Hawkins*, No. 20190482 (N.Y. Sup. Ct. 2019)).

<sup>224</sup> *See* *Harris v. State*, 2020 WL 433379, at \*4 (Md. Ct. Spec. App. Jan. 28, 2020), cert. denied, 2020 WL 5351879 (Md. Aug. 21, 2020).

<sup>225</sup> *See id.* at \*1.

<sup>226</sup> *See Harris*, 2020 WL 433379, at \*1–2.

[62] In *Harris*, the defendant requested that he be permitted to introduce evidence of three previous complaints filed with the Baltimore Police Department's Internal Affairs Division alleging that a single officer failed to activate his body-worn camera.<sup>227</sup> The court looked to Maryland's Rule of Evidence 5-608(b) on impeachment by examination regarding a witness's prior conduct not resulting in convictions.<sup>228</sup> According to the rule, a witness may be examined on their prior conduct if that conduct is probative of a character trait for untruthfulness.<sup>229</sup> The court determined that only where counsel introduces evidence that an officer intentionally failed to activate a body-worn camera could the evidence be admissible under Rule 5-608(b) "because it might indicate an intent to suppress material evidence."<sup>230</sup> The court opined that simple negligence would not be sufficient to introduce impeachment evidence of this kind, as negligence is not probative of a character trait for truthfulness.<sup>231</sup> The court offered no help on how a defendant might be able to prove that an officer intentionally failed to activate a body-worn camera.

### C. Lack of Body-Worn Camera Footage in a Civil Suit

[63] A wrongful death suit filed in 2016 with the United States District Court for the District of Colorado presented the issue of whether an officer's failure to activate his body-worn camera in a fatal police-involved shooting of a White teenager was admissible.<sup>232</sup> The facts show that a Fountain,

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<sup>227</sup> *See id.* at \*1.

<sup>228</sup> *See* MD. CODE ANN., Rules § 5-608(b) (West 2020).

<sup>229</sup> *Id.*

<sup>230</sup> *Harris*, 2020 WL 433379, at \*4.

<sup>231</sup> *See id.*

<sup>232</sup> Alvar v. Kay, No. 16-cv-00548-RM-KLM, 2018 WL 2730673, at \*4 (D. Colo. Jan. 29, 2018); Kaitlin Durbin, *Settlement Reached in 2015 Fountain Police Shooting of 17-year-old Patrick O'Grady*, GAZETTE (Aug. 16, 2018), <https://gazette.com/news/settlement-reached-in-2015-fountain-police-shooting-of-17->



Colorado, police officer fatally shot 17-year-old Patrick O’Grady as he stood naked in the bathroom of his parents’ home about to get into the shower.<sup>233</sup> The officer that shot and killed the teenager claimed that he confronted O’Grady, ordered him to put his clothes on, but the victim responded by reaching for a gun and pointing it at the officer.<sup>234</sup> The decedent’s family ultimately settled the wrongful death suit with the city of Fountain in early July 2020 for \$450,000.<sup>235</sup>

[64] The homicide was determined to be justified by the district attorney’s office and the officer was cleared of all wrongdoing.<sup>236</sup> The officer, however, had failed to activate his body-worn camera before the incident, a violation of local police department policies.<sup>237</sup>

[65] Both the plaintiff and defendant wanted to introduce expert testimony concerning the standard practices regarding body-worn cameras.<sup>238</sup> The court would not allow the police officer’s expert to offer the opinion that: “even if policy was violated with respect to the body-worn camera (which the Court assume[d] mean[t]: even if there was no reasonable explanation for the body-worn camera being off), it would have

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year-oldpatrick-ograde/article\_145e6588-a0d8-11e8-99fb-d751198a2882.html  
[<https://perma.cc/FL83-N2SD>].

<sup>233</sup> Durbin, *supra* note 234.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> Ryan M. Handy, *Fountain police officer cleared in fatal shooting of teen*, GAZETTE (Aug. 5, 2019), [https://gazette.com/crime/fountain-police-officer-cleared-in-fatal-shooting-of-teen/article\\_a2cced3c-05c7-59eb-bdfc-211a20bf7159.html](https://gazette.com/crime/fountain-police-officer-cleared-in-fatal-shooting-of-teen/article_a2cced3c-05c7-59eb-bdfc-211a20bf7159.html) [<https://perma.cc/8F25-UBFE>].

<sup>237</sup> Durbin, *supra* note 234; *see Alvar*, 2018 WL 2730673, at \*7.

<sup>238</sup> *Alvar*, 2018 WL 2730673, at \*4,\*7.

no bearing on the appropriateness of defendant's confrontation with the victim."<sup>239</sup> The court said, "if there was an ulterior explanation for the body-worn camera being off, then a jury could quite easily construe from this an ulterior motive to defendant's confrontation with the victim and/or cast doubt on defendant's recollection of events."<sup>240</sup>

[66] Nevertheless, the court did allow both the plaintiff and defendant to introduce experts to testify as to generally accepted police customs and practices surrounding body-worn cameras, and how the defendant's behavior comported with those standards.<sup>241</sup> The court rejected the police officer's argument that "the activation of a body-worn camera and waiting for back-up [was] irrelevant."<sup>242</sup> As the court noted: "If [the] defendant failed to activate his body-worn camera or wait for back-up, a jury could view such facts as circumstantial evidence that defendant acted as he did for a reason. For example, defendant did not turn on his body camera because he did not want a recording of the shooting."<sup>243</sup> The court found that it was up to the jury to make any inference about the officer's credibility and motivation when he failed to activate his body-worn camera.<sup>244</sup>

[67] In sum, courts are just beginning to confront issues of improper use of BWCs. Early attempts to establish that the improper use constituted a due process violation proved unsuccessful, but courts seem more open to attacks on an officer's credibility and motivation when they fail to properly activate their cameras under established policies and procedures. Courts are

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<sup>239</sup> *Id.* at \*4.

<sup>240</sup> *Id.* at \*4.

<sup>241</sup> *Id.* at \*7.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *See Alvar*, 2018 WL 2730673, at \*4,\*7.

becoming sensitive when officers have a documented history of failing to properly activate their body-worn cameras.<sup>245</sup>

#### IV. DO POLICE BODY-WORN CAMERAS RAISE INVASION OF PRIVACY CONCERNS?

[68] In May 2009, Christopher Sean Harris was chased by two sheriff's deputies wearing black tactical uniforms through the streets of King County, Washington.<sup>246</sup> After a 2.5-block pursuit, Mr. Harris slowed down, appeared to raise his hands to surrender, and was shoved into a concrete wall by one of the deputies.<sup>247</sup> The shove resulted in a catastrophic brain injury that left Harris paralyzed and unable to speak; he required around the clock care until his death six years later in 2015.<sup>248</sup>

[69] The incident was captured on a theater surveillance camera, and played for a jury in an excessive force civil suit.<sup>249</sup> At trial, one of the paramedics responding to the incident testified that he heard an officer say that Harris ran headfirst into the wall.<sup>250</sup> Hours after the paramedic's

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<sup>245</sup> *See id.*

<sup>246</sup> Sarah Jean Green, *\$10M Settlement for Man Shoved into Wall by King Co. Deputy; Jurors React to Video*, SEATTLE TIMES (Jan. 25, 2011), <http://www.seattletimes.com/seattle-news/10m-settlement-for-man-shoved-into-wall-byking-co-deputy-jurors-react-to-video/> [https://perma.cc/ED8Y-K7ZK].

<sup>247</sup> *See id.*

<sup>248</sup> Christine Clarridge and Sara Jean Green, *Man Dies 6 Years After He was Slammed into Wall by Deputy, Disabled*, SEATTLE TIMES (Dec. 11, 2015), <https://www.seattletimes.com/seattle-news/crime/man-dies-6-years-after-he-was-slammed-into-wall-by-deputy-disabled/> [https://perma.cc/G84H-3K4A].

<sup>249</sup> *Id.*

<sup>250</sup> Green, *supra* note 248.

testimony, the case settled.<sup>251</sup> The prosecutor’s office declined to press criminal charges against the officer that shoved Mr. Harris.<sup>252</sup> Asked about the video that they watched of the incident, one juror said, “If it had not been for that video, they were going to cover it up.”<sup>253</sup> Another juror said that the video was “traumatizing.”<sup>254</sup>

[70] Incidents of police brutality, such as the one experienced by Christopher Harris, foster deep distrust between law enforcement and the communities they serve. The King County police department maintains that the sheriff’s deputy “delivered a hard shove that fell within legal bounds.”<sup>255</sup> Sarah Harris, Christopher’s wife, who settled with the city for \$10 million said, “I don’t know how they can pay that amount and say something isn’t wrong.”<sup>256</sup> All too often videos such as these, depicting excessive force, are the only thing that stand between a police department and a successful coverup. Desperation and lack of faith in the system has compelled many victims of police brutality and their families to demand the public release of private, “traumatizing” body-worn camera footage in hopes of effecting change through transparency.<sup>257</sup> There are a myriad of privacy concerns, however, related to body-worn cameras.<sup>258</sup> The footage often impinges

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<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *See id.*

<sup>255</sup> *Id.*

<sup>256</sup> Green, *supra* note 248.

<sup>257</sup> *See id.*

<sup>258</sup> *See* Bureau of Justice Assistance, *Body-Worn Camera FAQs*, DEP’T OF JUST., <https://bja.ojp.gov/program/bwc/resources-faqs/faqs#faq-what-are-some-of-the-concerns-with-a-body-worn> [<https://perma.cc/PQ35-EU73>].

upon the privacy rights of the victims of crime and their families, police officers, and the public in the form of witnesses and bystanders.<sup>259</sup> This section outlines the response by policymakers to protecting privacy related to body-worn camera footage, and details the issues facing the courts related to that footage and privacy concerns.

### A. The Legislature's Response to BWC Privacy Concerns

[71] In 2015, the Center for Democracy and Technology (CDT) provided privacy recommendations related to body-worn cameras to President Obama's Task Force on Twenty-first Century Policing.<sup>260</sup> The recommendations are one of the "featured resources" on the Bureau of Justice Assistance's webpage on privacy related to body-worn cameras.<sup>261</sup> The CDT identified five issues that should be addressed related to privacy, including establishing (1) requirements and limits for recording, (2) rules for notification and opting-out, (3) requirements and limits on retention, (4) limits and protections regarding dissemination, and (5) limits on use of facial recognition.<sup>262</sup>

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<sup>259</sup> See Kelly Freund, *When Cameras Are Rolling: Privacy Implications of Body-Mounted Cameras on Police*, 49 COLUM. J.L. & SOC. PROBS. 91, 92 (2015) (introducing some of the practical implications of recording certain police officer encounters and conversations, and how the presence of a camera could influence both officer and citizen behavior).

<sup>260</sup> See Letter from the Center for Democracy & Technology (CDT) to President's Task Force on 21<sup>st</sup> Century Policing (2015), [https://cdt.org/wp-content/uploads/2015/02/CDT-Body-Camera-Letter\\_Blog-Format.pdf](https://cdt.org/wp-content/uploads/2015/02/CDT-Body-Camera-Letter_Blog-Format.pdf) [<https://perma.cc/A5J5-LJLV>] [hereinafter Letter from the CDT].

<sup>261</sup> See Bureau of Justice Assistance, *Privacy: Body-Worn Camera Toolkit*, DEP'T OF JUST., <https://bja.ojp.gov/program/bwc/topics/privacy> [<https://perma.cc/TAA2-EPPF>].

<sup>262</sup> See Letter from the CDT, *supra* note 262.

[72] The CDT identified the issue of establishing requirements for, and limits on, recording as the most fundamental policy concern related to privacy and body-worn cameras.<sup>263</sup> In 2020, researchers at the Urban Institute in Washington, D.C., echoed the sentiment after years of studying the issue. They claimed that “the effectiveness of the cameras depends on when officers are required to turn them on, whether they must review the video before they write incident reports, and whether videos are released to people involved in an incident or to the public. A camera alone . . . isn’t going to drastically change how police operate.”<sup>264</sup> Further, research shows that when officers have more discretion (which typically hinges on privacy and safety concerns) with respect to when and where they activate their cameras, there is a substantial decrease in video recordings—one study found a 42 percent decrease in video recordings in the same police department under a more discretionary policy.<sup>265</sup> Thus, lack of consistent, detailed guidance on when an officer is required to activate his or her BWC that has carefully considered privacy implications has the potential to frustrate the policy reasons behind adopting body-worn cameras.

[73] In light of this research, states are increasingly enacting statutes that relate to where, when, and how body-worn cameras must be used.<sup>266</sup> These statutes vary by state and often are not comprehensive guidance on camera use,<sup>267</sup> but rather only touch on a few of the issues outlined by the Center

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<sup>263</sup> *See id.*

<sup>264</sup> *See* Van Ness, *supra* note 73.

<sup>265</sup> *See* Letter from the CDT, *supra* note 262.

<sup>266</sup> *See Police Body-Worn Camera Legislation Tracker, State-by-State Breakdown*, URB. INST. (Oct. 29, 2018), <https://apps.urban.org/features/body-camera-update/> [<https://perma.cc/2N5B-BFBK>].

<sup>267</sup> *See States Impose Wildly Different Policies in Releasing Police Videos*, PEW (Oct. 11, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/10/11/states-impose-wildly-different-policies-in-releasing-police-videos> [<https://perma.cc/VR7X-9MVS>].

for Democracy and Technology. Most commonly, state legislatures simply require police departments to publish internal policies on when and where they require their officers to activate their body-worn cameras.<sup>268</sup>

[74] Likely the most effective approach, some states are mandating a study before they draft policy on when and where body-worn cameras will be used. In 2019, state Senator Susan Deschambault (D-Me.) introduced a bill to require all police officers to wear body cameras in Maine.<sup>269</sup> Police chiefs, municipal and county commissioners, and the ACLU quickly voiced opposition to the bill.<sup>270</sup> Police chiefs were concerned with a blanket requirement, mandating all police officers to wear cameras; municipal and county commissioners were concerned with the high costs; and the ACLU, with the benefit of trial and error in other states, requested that the bill be amended after the issue was studied in the state.<sup>271</sup> The legislature formed a working group to study the issue.<sup>272</sup> “Maine’s cautious approach reflects a growing awareness, backed by several new studies, that body cameras don’t necessarily have a huge effect on police officers’ behavior or how residents view the police,”<sup>273</sup> especially when policies are not designed for the unique realities of each jurisdiction.

[75] Studying BWCs prior to drafting policies allows a state to narrowly tailor their law to most effectively balance all of the competing interests. Consider, Salem, Illinois, where a city councilperson asked the police

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<sup>268</sup> *See id.*

<sup>269</sup> *See* Van Ness, *supra* note 73; *Harris v. Maryland*, No. 3433, 2020 WL 43379, at \*4 (Md. Ct. Spec. App. 2018).

<sup>270</sup> *See* Van Ness, *supra* note 73.

<sup>271</sup> *See id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

department to look into a BWC program for its twenty-person department.<sup>274</sup> The department was quoted \$5,000 to use and store data from one camera over five years, a price that did not make sense for their department.<sup>275</sup> The police chief argued that the police department had an effective working relationship with the community.<sup>276</sup> In Salem, the cost and privacy implications of mandating universal body-worn camera use arguably did not outweigh the need for greater transparency in officer-citizen interactions. Instead, after careful consideration, the police chief opted for gun-mounted cameras that would automatically activate when the weapon was used; they cost about \$800 over five years.<sup>277</sup>

[76] As noted in Part II, states and municipalities have adopted disparate privacy policies governing public release of BWC footage.<sup>278</sup> For example, in California, Nevada, and Maryland, police BWC footage is classified as a public record, which allows for expansive access to the footage.<sup>279</sup> States that adopt a more transparent approach to BWC footage grapple with issues of privacy related to minors, victims of crime, and numerous other unreasonable invasions of privacy. In Illinois, Alabama, and South Carolina, police body-worn camera footage is considered privileged communication and protected from disclosure.<sup>280</sup> States with more

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<sup>274</sup> See Labor Relations Information System, *Gun-Mounted Cameras Could Be The Alternative To Expensive Police Body Cams*, LRIS (Nov. 9, 2020), <https://lris.com/2019/07/08/gun-mounted-cameras-could-be-the-alternative-to-expensive-police-body-cams/> [https://perma.cc/ZX6M-L2L5].

<sup>275</sup> See Van Ness, *supra* note 73.

<sup>276</sup> See *id.*

<sup>277</sup> See *id.*

<sup>278</sup> See *id.*

<sup>279</sup> See *Police Body-Worn Camera Legislation Tracker*, *supra* note 268.

<sup>280</sup> See *id.*



restrictive laws are criticized for “thwart[ing] the intended purpose of the cameras—to ascertain the truth, deter excessive police force, and provide justice when it is required.”<sup>281</sup>

### **B. Privacy in the Courts: Protective Orders**

[77] As policymakers confront issues of public access to body-worn camera footage, the courts are being confronted with protecting the privacy of victims, witness, alleged perpetrators, and law enforcement officers when body-worn camera footage is used as evidence in the courts. These cameras represent “an evidentiary revolution for courts, transforming the traditional reliance on reports and testimony and filling in gaps in a domain where defendants are often silent.”<sup>282</sup> Increased evidentiary reliance on body-worn cameras has led to an increase in prosecutors requesting protective orders with respect to the footage captured by officers, often grounded in privacy concerns.

[78] By way of example, in *United States v. Dixon*, the government moved for a protective order “to limit the viewing, use, dissemination, and post-litigation retention of police body-worn camera material.”<sup>283</sup> Federal Rule of Criminal Procedure 16(d) allows a court to issue a protective or modifying order denying, restricting, or deferring otherwise discoverable evidence for good cause.<sup>284</sup>

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<sup>281</sup> Taylor Emory, *Barring Access to the Truth: North Carolina's Limiting Approach to Police Body-Camera Footage*, CAMPBELL L. REV. 483, 497 (2019).

<sup>282</sup> Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. 897, 898 (2017).

<sup>283</sup> See *United States v. Dixon*, 355 F. Supp. 3d 1, 1 (D.D.C. 2019).

<sup>284</sup> FED. R. EVID 16(d).

[79] In *Dixon*, the defendant allegedly robbed a Grubhub delivery person at gunpoint after ordering food from the company.<sup>285</sup> The court was concerned with the Crime Victim Rights Act,<sup>286</sup> which guarantees victims of crimes the right “to be reasonably protected from the accused,” and to “be treated with fairness and with respect for dignity and privacy.”<sup>287</sup> The court granted the motion for a protective order over the body-worn camera footage, significantly limiting its use, to protect the victim’s privacy, and in turn their safety under these facts and circumstances.<sup>288</sup> In *United States v. Johnson*, same court took a more conservative approach to a protective order.<sup>289</sup> *Johnson* involved a prosecution for a felon in possession of a firearm.<sup>259</sup> Over twelve hours of relevant BWC footage existed of the incident.<sup>290</sup> Issues of whose resources should be expended to redact such a large amount of footage were raised. The court held that the prosecution in *Johnson* failed to show good cause for why the footage could only be used for the defendant’s case and that the footage had to be destroyed after the case.<sup>291</sup> The court only found good cause for the prosecution’s proposal prohibiting the defendant from disclosing the footage to the public at large.<sup>292</sup> The court allowed the defender’s office to keep the footage and share it throughout the federal defender’s office to potentially use in other cases against the same police officer.

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<sup>285</sup> *Id.* at 1.

<sup>286</sup> *See* 18 U.S.C. § 3771 (2018).

<sup>287</sup> *See Dixon*, 355 F. Supp. 3d at 5 (quoting 18 U.S.C. § 3771(a)(1), (8) (West 2018))

<sup>288</sup> *See id.* at 10.

<sup>289</sup> *See United States v. Johnson*, 314 F. Supp.3d 248, 250 (D.D.C. 2018).

<sup>290</sup> *See id.*

<sup>291</sup> *See id.* at 257.

<sup>292</sup> *See id.*

[80] With disparate laws and policies governing when and where police officers are required to record, (and since officers are often afforded discretion), courts will be asked to fill in the gaps and protect reasonable expectations of privacy.<sup>293</sup> Courts can do so through protective orders requiring redaction of private footage, sealing evidence, or prohibiting dissemination of footage that implicates a reasonable expectation of privacy that was used during a judicial proceeding.<sup>294</sup> However, the courts must carefully balance privacy, the resources required to redact footage, and the ability to use the footage (or lack of footage) to hold police officers accountable, or risk disrupting the policy justifications for BWCs.

## V. CONCLUSION

[81] Police body-worn cameras promised objectivity and ultimately accountability for a nation that was reeling six years ago after the police involved shooting of Michael Brown in Ferguson, Missouri. Well-intentioned policy and decisionmakers began flooding their police departments with BWCs without fully understanding the issues—privacy, cost, safety—first. Implementation was based on anecdotes and commonsense for what many thought was a straightforward issue. However, since 2014, it has become clear that effectively implementing the tool requires careful study and a balancing of the cost and privacy implications against a better understanding of the transparency benefits that result from the use of BWCs. For the courts, it also means effectively adapting in a thoughtful and consistent manner to the use of this new evidence and to situations when law enforcement officers fail to properly activate their devices. BWCs are only as effective as the policies governing their use, and states should take pause, as Maine did in 2019,<sup>295</sup> to study the

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<sup>293</sup> See Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. 897, 946 (2017).

<sup>294</sup> See *id.*

<sup>295</sup> Tammy Wells, *Bill to Mandate Police Body Cameras may Instead Result in Study*, PORTLAND PRESS HERALD (Mar. 22, 2019),

issue before committing to a program that is difficult to unwind once begun. Issues concerning the use of police body-worn cameras and the disclosure of the footage will be litigated for years to come as more and more people become aware of the evidence captured by these devices. It is now common for citizens to demand the release of the footage in cases of death or allegations of excessive force involving police arrests. Officers' narratives are no longer being accepted at face value, and BWC footage has been shown to be a double-edged sword; the footage can support the justifiable use of force by a police officer, or it can show that the officer engaged in overzealous and wrongful conduct. Regardless of how the thorny legal issues presented by police cameras are decided by the courts, the devices are now a routine part of law enforcement activity.

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<https://www.pressherald.com/2019/03/22/bill-to-mandate-police-body-cameras-may-instead-result-in-study/> [<https://perma.cc/R2XY-JZGS>].