

POLICE BODY-WORN CAMERA POLICY:  
BALANCING THE TENSION BETWEEN PRIVACY  
AND PUBLIC ACCESS IN STATE LAWS

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INTRODUCTION

“The system failed us again.”<sup>1</sup> The sounds of gunshots and broken glass swirled in air full of smoke and tear gas. On November 24, 2014, the streets of Ferguson, Missouri, erupted into “a new wave of anger” after a St. Louis grand jury refused to indict Officer Darren Wilson, who fatally shot unarmed teenager Michael Brown a few months prior.<sup>2</sup>

On August 9, 2014, Wilson observed Brown walking down the middle of the street and ordered him to the sidewalk.<sup>3</sup> Seconds later, a physical struggle emerged through the open driver-side window of Wilson’s police vehicle.<sup>4</sup> Many witnesses agreed that Wilson’s firearm went off inside the vehicle, causing Brown to flee, and Wilson to pursue on foot.<sup>5</sup> At this critical juncture—just moments before the fatal shooting—accounts drastically diverged.<sup>6</sup> Some witnesses recalled Brown moving toward Wilson “possibly in a threatening manner,” while others asserted Brown “was not moving and may even have had his hands up when he was killed.”<sup>7</sup> The inability to recon-

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1 Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>.

2 *Id.*

3 *Tracking the Events in the Wake of Michael Brown’s Shooting*, N.Y. TIMES, [http://www.nytimes.com/interactive/2014/11/09/us/10ferguson-michael-brown-shooting-grand-jury-darren-wilson.html#/#time354\\_10512](http://www.nytimes.com/interactive/2014/11/09/us/10ferguson-michael-brown-shooting-grand-jury-darren-wilson.html#/#time354_10512) (last updated Nov. 24, 2014).

4 *Id.*

5 Frances Robles & Michael S. Schmidt, *Shooting Accounts Differ as Holder Schedules Visit to Ferguson*, N.Y. TIMES (Aug. 19, 2014), <http://www.nytimes.com/2014/08/20/us/shooting-accounts-differ-as-holder-schedules-visit.html>.

6 *Id.*

7 *Id.*

cile these conflicting accounts is, perhaps, the dispositive reason why the grand jury refused to indict.<sup>8</sup>

Outrage on the streets of Ferguson represented “the latest illustration of deep divisions between minorities and police that have simmered for generations”<sup>9</sup>—the result of “a gulf of mistrust exist[ing] between local residents and law enforcement.”<sup>10</sup> The wake of Brown’s shooting led to calls for policing reforms. At the forefront: the implementation of police body-worn cameras,<sup>11</sup> which the White House believes will “help strengthen accountability and transparency” because “officers and civilians [will] both act in a more positive manner when they’re aware that a camera is present.”<sup>12</sup>

Despite political pressures calling for cameras, and their many apparent benefits, legal scholars and policy experts warn against rapid implementation<sup>13</sup> occurring at law enforcement agencies around the country, because

8 See Davey & Bosman, *supra* note 1 (reporting that St. Louis County prosecutor Robert McCulloch chose “to present ‘absolutely everything’—rather than a witness or two to the grand jury,” and in his press conference reporting the refusal to indict, “pointed to inconsistent and changing statements from witnesses, including observations about the position of Mr. Brown’s hands”). For a list of documents used in the grand jury proceedings against Officer Wilson, see *Documents Released in the Ferguson Case*, N.Y. TIMES, <http://www.nytimes.com/interactive/2014/11/25/us/evidence-released-in-michael-brown-case.html> (last updated Dec. 15, 2014).

9 *Deep National Mistrust of Police by Minorities Exposed in Ferguson, Missouri*, CBS NEWS (Aug. 19, 2014), <http://www.cbsnews.com/news/ferguson-missouri-highlights-deep-national-mistrust-of-police-by-minorities/>.

10 Press Release, Office of the Press Sec’y, White House, Statement by the President (Aug. 18, 2014), <https://www.whitehouse.gov/the-press-office/2014/08/18/statement-president>.

11 See, e.g., Farhad Manjoo, *Police Cameras Can Shed Light, but Raise Privacy Concerns*, N.Y. TIMES (Aug. 20, 2014), <http://www.nytimes.com/2014/08/21/technology/personaltech/police-cameras-can-shed-light-but-raise-privacy-concerns.html> (arguing—only eleven days after the Brown shooting—that police body cameras could have provided a solution to recapturing events of criminal activity); Michael McAuliff, *Police Body Cameras Seen as a Fix for Ferguson-Style Killings*, HUFFINGTON POST (Nov. 25, 2014, 6:34 PM), [http://www.huffingtonpost.com/2014/11/25/ferguson-body-cameras\\_n\\_6221558.html](http://www.huffingtonpost.com/2014/11/25/ferguson-body-cameras_n_6221558.html) (highlighting existing use of police body cameras in Dallas and New York, in Ferguson after Brown’s shooting, and additional support for body camera use by politicians and activist groups).

12 David Hudson, *Building Trust Between Communities and Local Police*, WHITE HOUSE (Dec. 1, 2014, 8:25 PM) (citing LINDSAY MILLER ET AL., POLICE EXEC. RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED (2014), <http://ric-zai-inc.com/Publications/cops-p296-pub.pdf>), <https://www.whitehouse.gov/blog/2014/12/01/building-trust-between-communities-and-local-police>.

13 See MICHAEL D. WHITE, DEP’T OF JUSTICE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 35 (2014), <https://www.ojpdiagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf> (“Simply put, there is not enough evidence to offer a definitive recommendation regarding the adoption of body-worn cameras by police. Departments considering body-worn cameras should proceed cautiously . . . .”); Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 836–37 (2015) (“The question is whether broad adoption of body cameras is—like most responses to moral panic—another hasty and disproportionate reaction that misses the point of the problem, or at least not the complete solution that pro-  
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many important policy questions remain unanswered. For example, what interactions should police record? Who will have access to observe recordings? Or disclose video recordings to the public? And how will privacy interests be respected?<sup>14</sup>

Body camera implementation remains in its infancy stage. As such, there is a dearth of legal scholarship analyzing the policy considerations associated with body cameras. Instead of raising the issues involved and assessing arguments for and against implementation, this Note assumes body cameras are a force for good and are here to stay for the long haul. Consequently, the goal of this Note is to *analyze* various issues involved in administering body cameras against a backdrop of recently enacted state legislation—focusing specifically on the tension between protecting privacy interests while also ensuring public access to recordings. This Note examines these competing values and makes limited policy judgments, and in light of these determinations, outlines recent body camera legislation and assesses to what degree current laws conform to these standards. This Note argues state laws have identified and sought to remedy the core issues created by body cameras; however, only some state laws strike a proper balance between respecting privacy interests and granting the public access to video recordings. Thus, many state laws continue to leave important gaps in their body camera policies.

Part I examines various visual technologies utilized by law enforcement and compares them to body-worn camera technology, identifying what makes body cameras unique and worthy of careful policy considerations. Part II discusses the benefits and drawbacks of body cameras, in order to contextualize the challenges of implementing policies. This Part functions in two ways. First, it assesses the benefits to understand why the technology is desired and rapidly being adopted. And second, it provides an overview of two major concerns body cameras create—privacy protections, and public access—and makes limited judgments about how policies should address these factors. Finally, Part III outlines newly enacted state legislation governing body cameras, focusing specifically on how cameras are used by law enforcement and the scope of viewing access granted to the public. Part III further analyzes these statutes in light of the policy judgments made in Part II and assesses where state laws are strong or in need of improvement.

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nents suggest and the public hopes. . . . As always, the issue is more complicated and the solution less certain than public conversation recognizes or acknowledges.”); *Developments in the Law—Policing*, 128 HARV. L. REV. 1706, 1797 (2015) (“[P]roper implementation of this new policing tool requires careful consideration of current policy proposals, rather than the rapid, reactionary adoptions currently taking place nationwide.”).

14 See Theodore Simon, *Questions, but Few Answers, Surround Police Body-Worn Cameras*, 39 CHAMPION 5 (2015); see also Alexandra Mateescu et al., *Police Body-Worn Cameras* 8 (Feb. 24, 2015) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2569481](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2569481) (discussing variety of important policy questions created by implementation of police body cameras).

## I. THE RISE OF POLICE BODY-WORN CAMERAS

Law enforcement has utilized many visual technologies over the last several decades to effectively police and prosecute crime.<sup>15</sup> Visual technologies were first utilized in the form of stationary surveillance, known as closed circuit television (CCTV) cameras, to protect public and private property.<sup>16</sup> Stationary visual technologies have expanded in recent years with the proliferation of red light cameras to enforce traffic laws, as well as automatic license plate reader (ALPR) cameras.<sup>17</sup> ALPR cameras photograph license plates, convert the photo into a digital file, transmit the file to a database, and then run the license plate numbers against “lists of stolen automobiles, active arrest warrants, and AMBER alerts . . . [and] compare[s] them to known criminal databases, [to] flag suspected offenders.”<sup>18</sup>

Law enforcement has also effectuated mobile visual surveillance technologies. In the 1960s, the Connecticut State Police became the first law enforcement agency in the United States to attempt installing a camera inside a patrol car.<sup>19</sup> At that time, however, “the equipment was far too cumbersome to make it practical for routine use.”<sup>20</sup> The miniaturization of technology in the 1980s, though, coincided with affordability and “catapulted audio/visual recordings into the mainstream of policing.”<sup>21</sup> Law enforcement agencies across the country began to install and use dashboard cameras to record driving infractions, and in many cases, field sobriety tests.<sup>22</sup> Rapidly, video evidence became “the most effective method of providing the necessary evidence to support a conviction.”<sup>23</sup>

In the 1990s, video evidence from dashboard cameras helped jurors determine important factual questions, such as whether defendants consented to vehicle searches, or whether traffic stops were predicated on the basis of racial bias or prejudice.<sup>24</sup> The advantages dashboard cameras pro-

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15 Visual technologies derive their effectiveness from deterring potential crime because “awareness of being scrutinized . . . deter[s] potential criminals for fear of apprehension.” Mateescu et al., *supra* note 14, at 4 (citing Clive Norris, *The Success of Failure: Accounting for the Global Growth of CCTV*, in ROUTLEDGE HANDBOOK OF SURVEILLANCE STUDIES 252 (Kirstie Ball et al. eds., 2012)).

16 *Id.*

17 Stephen Rushin, *The Legislative Response to Mass Police Surveillance*, 79 BROOK. L. REV. 1, 1 (2013).

18 Stephen Rushin, *The Judicial Response to Mass Police Surveillance*, U. ILL. J.L. TECH. & POL'Y 281, 285 (2011).

19 INT'L ASS'N OF CHIEFS OF POLICE, THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING 5 (2003), <http://www.theiacp.org/portals/0/pdfs/IACPIn-CarCameraReport.pdf>.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 See Alan C. Nash & Jason L. Scarberry, *Let's Have a Look at the Footage*, OFFICER.COM (Mar. 11, 2014), <http://www.officer.com/article/11302594/lets-have-a-look-at-the-footage> (“In the 1990s, during America’s ‘War on Drugs,’ dash cam footage was used to show juries that defendants had consented to the search of their vehicles during traffic stops. The

vided for resolving legal disputes,<sup>25</sup> combined with the large increase in allegations of racial profiling, led the Department of Justice's Office of Community Oriented Policing Services (COPS) to establish the In-Car Camera Incentive Program.<sup>26</sup> The main goal of the program was to "provide [ ] financial aid to state police and highway patrol agencies for the sole purpose of purchasing and installing in-car camera systems."<sup>27</sup>

In 2002, COPS and the International Association of Chiefs of Police (IACP) conducted an eighteen-month nationwide study of in-car cameras, focusing on COPS grant recipients. The impact evaluation of the value of cameras to police agencies supported some of the reasons for expanding funding in the first place, such as addressing the rising number of racial profiling claims.<sup>28</sup> The data demonstrated that when officers were accused of misconduct, and "video evidence was available, the officer was exonerated 93% of the time; in 5% of the cases the complaint was sustained."<sup>29</sup> The study also concluded that dashboard cameras made incident review and prosecution more efficient, reduced agency liability, enhanced officer performance and professionalism, and improved community perceptions.<sup>30</sup> Overall, the IACP believes "in-car camera[s] enjoy[ ] overwhelming public support and can enhance an agency's image while ensuring integrity and accountability."<sup>31</sup>

Today's modern technological innovations have propelled mobile visual surveillance into a new spectrum, as miniaturization and other technological enhancements since the 2000s have given law enforcement new tools to police and prosecute crime.<sup>32</sup> These innovations have changed the dynamic

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technology was also utilized to address sensitive issues such as racial profiling in traffic stops and assaults on police officers.").

25 Even the Supreme Court has explicitly recognized the advantages of video evidence. In *Scott v. Harris*, the plaintiff brought a 42 U.S.C. § 1983 (2012) claim against a Georgia county deputy for use of excessive force, when the deputy applied a "Precision Intervention Technique" to bring the plaintiff's fleeing vehicle to a stop. 550 U.S. 372, 375–76 (2007). The contact between the vehicles caused wreckage, resulting in the plaintiff becoming a quadriplegic. *Id.* at 375. Relying on the videotape of the dashboard camera, the Court noted, "it is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase," *id.* at 384, and accordingly, the Court was "happy to allow the videotape to speak for itself." *Id.* at 378 n.5.

26 Lonnie J. Westphal, *The In-Car Camera: Value and Impact*, 71 POLICE CHIEF, no. 8, Aug. 2004, [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article\\_id=358](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=358). COPS helped purchase more than 5000 dashboard cameras nationwide. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 19, at 1.

27 Westphal, *supra* note 26.

28 INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 19, at 1.

29 *Id.* at 15.

30 *Id.* at 2.

31 *Id.* at 29.

32 It is worth noting that in the future, law enforcement may be able to employ drones to provide cheap visual surveillance due to enhanced technology. *See generally* Jennifer

of policing in ways CCTV, red-light, ALPR, and dashboard cameras<sup>33</sup> have not. By equipping officers with “small, pager-sized cameras that clip on to an officer’s uniform or are worn as a headset,” police can “*record audio and video of [their] interactions with the public.*”<sup>34</sup> The cameras provide “a record of interrogations and arrests, how officers conduct themselves, and what they witness at crime scenes.”<sup>35</sup> It is, thus, the intimate nature of the interactions between citizens and police that have set body cameras apart from other surveillance technologies and propelled society into a new realm of modern policing.

The first major experimentation of body cameras occurred in the United Kingdom in late 2005 with the Plymouth Basic Command Unit (BCU).<sup>36</sup> Officers utilized a prototype over a weekend shift<sup>37</sup> and saw “great promise” in the test runs.<sup>38</sup> This prompted the start of a pilot program to “fully test the technology and its potential effectiveness for the Police Service nationally.”<sup>39</sup> The pilot program, known as the “Plymouth Head Camera Project,” commenced in October 2006 with three hundred trained officers and fifty head-mounted cameras,<sup>40</sup> and lasted for seventeen months.<sup>41</sup> Plymouth BCU praised the initial pilot program, noting the cameras brought benefits of “detering bad behavior and providing excellent evidence against crooks.”<sup>42</sup> They also observed that “rowdy youths quickly calmed when they

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O’Brien, Note, *Warrantless Government Drone Surveillance: A Challenge to the Fourth Amendment*, 30 J. MARSHALL J. INFO. TECH. & PRIVACY L. 155 (2013). In fact:

The Federal Aviation Administration Modernization and Reform Act of 2012 aims to integrate drones into the United States national airspace by 2015. While the thought of prevalent private and public daily drone use might seem implausible now, the combination of this new legislation and the increasing availability of inexpensive, technologically advanced small drones will make it a reality.

*Id.* at 155.

33 A dashboard camera’s “utility is limited to interactions within the camera’s view that take place around vehicles, unlike mobile body-worn cameras, which accompany police throughout the course of their duties.” Mateescu et al., *supra* note 14, at 4.

34 JAY STANLEY, ACLU, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL VERSION 2.0, at 1 (2015) (emphasis added), [https://www.aclu.org/sites/default/files/assets/police\\_body-mounted\\_cameras-v2.pdf](https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf).

35 Kevin Davis, *Candid Cameras: After Ferguson and North Charleston, More Police to Deal with Wearing Body Cams*, 101 A.B.A. J. 15, 16 (2015).

36 MARTIN GOODALL, POLICE & CRIME STANDARDS DIRECTORATE, HOME OFFICE OF THE U.K., GUIDANCE FOR THE POLICE USE OF BODY-WORN VIDEO DEVICES 30 (2007), <http://library.college.police.uk/docs/homeoffice/guidance-body-worn-devices.pdf>.

37 *Id.*

38 David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH L. REV. 357, 361 (2010).

39 GOODALL, *supra* note 36, at 30.

40 *Id.* at 6; *see also* WHITE, *supra* note 13, at 16.

41 Harris, *supra* note 38.

42 *Britain Straps Video Cameras to Police Helmets*, NBC NEWS (July 13, 2007), [http://www.nbcnews.com/id/19750278/ns/world\\_news-europe/t/britain-straps-video-cameras-police-helmets/#.Vi\\_o1da6\\_wx](http://www.nbcnews.com/id/19750278/ns/world_news-europe/t/britain-straps-video-cameras-police-helmets/#.Vi_o1da6_wx).

realized they were being filmed, and those arrested for drunkenness seldom challenged police when shown videos of their behavior.”<sup>43</sup>

The U.K. Home Office then commissioned an independent assessment of the pilot program “to identify issues of concern and to evaluate the benefits of the devices.”<sup>44</sup> In 2007, the Home Office published its findings in *Guidance for the Police Use of Body-Worn Video Devices*, and concluded that the “use of head cameras is a positive step that will make a difference to detection rates and crime levels for violent crime and disorder in particular.”<sup>45</sup> Premised on these perceived benefits, the Home Office made long-term body camera plans when it announced a “national rollout” plan for head-mounted cameras, calling for an allocation of “\$6 million to fund the devices for Britain’s 42 police forces—enough to buy more than 2,000 cameras.”<sup>46</sup>

Implementation of body cameras in the United States has lagged behind the United Kingdom. For instance, law enforcement agencies in Rialto, California, and Mesa, Arizona, only began testing use of body cameras in 2012.<sup>47</sup> Judicial and political pressures, however, have fueled real implementation efforts. In 2013, the United States District Court for the Southern District of New York ordered “a trial program requiring the use of body-worn cameras in one precinct per borough”<sup>48</sup> when it ruled in a § 1983 class action claim alleging New York City’s stop-and-frisk policy violated the Fourth and Fourteenth Amendments.<sup>49</sup> The court recognized the reasons why body camera recordings can play a vital role in resolving the constitutionality of criminal procedures, noting:

[E]valuating a stop in hindsight is an imperfect procedure. Because there is no contemporaneous recording of the stop (such as could be achieved through the use of a body-worn camera), I am relegated to finding facts based on the often conflicting testimony of eyewitnesses. This task is not easy, as every witness has an interest in the outcome of the case, which may consciously or unconsciously affect the veracity of his or her testimony. Nonetheless, a judge is tasked with making decisions and I judged the evidence of each stop to the best of my ability.<sup>50</sup>

Political pressures have been a catalyst for body camera implementation—particularly following the events in Ferguson. After the grand jury refused to indict Officer Wilson, the Brown family made a public declaration: “Join with us in our campaign to ensure that every police officer working the streets in this country wears a body camera.”<sup>51</sup> In fact, officers in Ferguson

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43 *Id.*

44 Harris, *supra* note 38, at 361.

45 GOODALL, *supra* note 36, at 89.

46 *Britain Straps Video Cameras to Police Helmets*, *supra* note 42.

47 *See infra* notes 68–85.

48 Floyd v. City of New York, 959 F. Supp. 2d. 540, 563 (S.D.N.Y. 2013).

49 *Id.* at 556.

50 *Id.* at 562.

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

began wearing body cameras just twenty-three days after the shooting,<sup>52</sup> and officers in Denver, Miami Beach, Washington, D.C., and Anaheim, followed in subsequent weeks.<sup>53</sup> And as of October 2016, the Albuquerque,<sup>54</sup> Austin, Dallas, Las Vegas, Los Angeles, New Orleans, Orlando, Tampa, and San Diego police departments have equipped officers with cameras, while the Atlanta, Baltimore, Chicago, Minneapolis, New York, and Seattle police departments are currently running pilot programs.<sup>55</sup>

Political pressures in various localities have jump-started the federal government to appropriate funding for local law enforcement agencies. In December 2014, President Obama proposed a \$263 million initiative to “increase use of body-worn cameras, expand training for law enforcement agencies . . . [and] add more resources for police department reform.”<sup>56</sup> The proposal included a \$75 million investment to purchase 50,000 body cameras for local law enforcement by providing a fifty percent match to agencies’ purchases of cameras and storage.<sup>57</sup> As part of the President’s proposal, in May 2015 the Department of Justice announced the Body-Worn Camera Pilot Partnership Program to “respond to the immediate needs of local and tribal law enforcement organizations,” by providing \$17 million in competitive grants and \$3 million in training and development of evaluation tools.<sup>58</sup>

Body camera implementation is a tidal wave that cannot be stopped. Overwhelming political and judicial support has answered the question whether officers should (or will) be equipped with cameras. Now, the question is how *soon* can officers be equipped. These political and judicial pressures are creating urgency for local law enforcement to equip their officers. Such pressures are simultaneously forcing state and local authorities to implement legal regimes capable of capitalizing upon the benefits body cameras bring to modern policing—but also to carefully craft policies to balance privacy concerns with ensuring adequate public access to recordings. As the time has come for state and local law enforcement agencies to develop policies regulating use of body cameras, an overview of benefits and drawbacks of

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52 William Cummings, *Ferguson Police Begin Using Body Cameras*, USA TODAY (Sept. 1, 2014), <http://www.usatoday.com/story/news/nation/2014/09/01/ferguson-police-cameras/14920587/>.

53 Sanburn, *supra* note 51.

54 Dana Liebelson & Nick Wing, *Most Major Cities Still Don't Have Body Cameras for Cops*, HUFFINGTON POST (Aug. 17, 2015, 4:25 PM), [http://www.huffingtonpost.com/entry/police-body-cameras\\_55cbaac7e4b0f1cbf1e740f9](http://www.huffingtonpost.com/entry/police-body-cameras_55cbaac7e4b0f1cbf1e740f9).

55 *Police Body-Worn Camera Policies*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/body-cam-city-map> (last updated Sept. 26, 2016).

56 Press Release, Office of the Press Sec’y, White House, Fact Sheet: Strengthening Community Policing (Dec. 1, 2014), <https://www.whitehouse.gov/the-press-office/2014/12/01/fact-sheet-strengthening-community-policing>.

57 *Id.*

58 Press Release, Office of Pub. Affairs, Dep’t of Justice, Justice Department Announces \$20 Million in Funding to Support Body-Worn Camera Pilot Program (May 1, 2015), <http://www.justice.gov/opa/pr/justice-department-announces-20-million-funding-support-body-worn-camera-pilot-program>.



body camera implementation provides a valuable context to understanding how policies should be designed.

## II. BENEFITS AND SHORTCOMINGS

This Part discusses the benefits and drawbacks of body camera implementation. At first blush, body cameras appear to provide many benefits, namely: deterring police misconduct and meritless citizen complaints,<sup>59</sup> improving resolution of legal disputes,<sup>60</sup> and enhancing police transparency and accountability.<sup>61</sup> However, implementing body cameras is not the panacea for modern policing issues.<sup>62</sup> Policy experts and legal professionals caution against rapid implementation<sup>63</sup> primarily because many important policy questions remain unanswered.<sup>64</sup> For example, how will privacy interests be protected?<sup>65</sup> And what kind of access will be available to media, members of the public, or subjects of recordings?<sup>66</sup> However, while “we should not be overly optimistic, neither should video’s acknowledged limitations warrant entirely rejecting body cameras as a useful policy choice.”<sup>67</sup>

This Note’s baseline position is that body cameras are a force for good, and indeed, here to stay long-term. So, the most important question is, how should body camera policies be designed to achieve positive results? To answer this question, it is important to categorize and discuss the benefits and concerns created by body cameras in order to help construct and implement a viable policy capable of achieving the body camera’s vast potential to reinforce community trust, while also minimizing its shortcomings.

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59 See *infra* notes 75–82.

60 *Developments in the Law—Policing*, *supra* note 13, at 1795 (“The hope was that video recordings of police-civilian interactions would deter officer misconduct and eliminate the ambiguity present in cases like Michael Brown’s, making it easier to punish officers’ use of excessive force.” (citing McAuliff, *supra* note 11)).

61 *Id.* at 1797.

62 Wasserman, *supra* note 13, at 837.

63 See *supra* note 13.

64 See Simon, *supra* note 14, at 5 (discussing the variety of important policy questions created by implementation of policy body cameras).

65 STANLEY, *supra* note 34, at 5–9.

66 *Developments in the Law—Policing*, *supra* note 13, at 1807–08 (“[P]ressing concerns about public access remain. Many police departments currently do not allow private individuals or the media to access footage, and the open-records laws in most states make it possible for departments to deny access indefinitely. While body-camera footage should constitute a public record under disclosure laws, most states have disclosure exemptions for records involved in a law enforcement investigation. . . . Some courts have ruled that law enforcement video footage does not fall under the exemption for criminal investigatory records; however, this type of litigation is in its early stages, and in many states the public (including individuals featured on the tapes) may remain unable to access the footage.” (footnotes omitted)).

67 Howard M. Wasserman, *Epilogue: Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 845, 846 (2015).

### A. *The Need for Body Cameras*

#### 1. Civilizing Interaction Between Citizens and Law Enforcement

The presence of body cameras has a “civilizing” effect on interactions between citizens and law enforcement.<sup>68</sup> When individuals know they “are being recorded and that the recording *may be used as evidence*” it will “deter misconduct and prompt police and the public to behave better.”<sup>69</sup> The results, advocates claim, are a reduction in both use-of-force by police, and complaints filed against officers. Recent studies in California and Arizona support these hypotheses.

Perhaps the most well-known study of police camera impacts on behavior in the United States was conducted in Rialto, California, beginning in February 2012.<sup>70</sup> There, researchers equipped fifty-four front-line officers with body cameras and assigned 988 shifts over a twelve-month period. Nearly half of these shifts utilized body cameras (labeled as experimental shifts) and the rest did not (known as control shifts).<sup>71</sup> Researchers studied the impact of body cameras on use-of-force by law enforcement and citizen complaints by comparing officers not wearing the cameras over the same time period.<sup>72</sup> The study defined use-of-force as “encompass[ing] physical force that is greater than basic control” or police use of OC spray, baton, Taser, canine bite, or firearm.<sup>73</sup> Citizen complaints were characterized as “a grievance for alleged misconduct or . . . poor performance.”<sup>74</sup>

The results in Rialto were very encouraging. Use-of-force incidents declined 62%, from sixty-seven reported incidents in 2011–2012 to only twenty-five incidents in 2012–2013.<sup>75</sup> Moreover, half as many use-of-force incidents occurred when an officer was wearing a body camera than when an officer was *not* equipped with a camera.<sup>76</sup> There was also a large reduction in citizen complaints; in fact, an 87% decline in complaints against officers—from twenty-four complaints in 2011–2012 to only three complaints in 2012–2013.<sup>77</sup> Researchers concluded “evidence collected in this randomized

68 See, e.g., MILLER ET AL., *supra* note 12, at 6; *Developments in the Law—Policing*, *supra* note 13, at 1801.

69 Wasserman, *supra* note 13, at 837 (emphasis added); see also *Floyd v. City of New York*, 959 F. Supp. 2d 668, 685 n.66 (S.D.N.Y. 2013) (“If, in fact, the police do, on occasion, use offensive language—including racial slurs—or act with more force than necessary, the use of body-worn cameras will inevitably reduce such behavior.”).

70 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, 520 (2015).

71 *Id.*

72 WHITE, *supra* note 13, at 17.

73 Ariel et al., *supra* note 70, at 521.

74 *Id.* at 522.

75 *Id.* at 524 tbl.3.

76 Of the twenty-five use-of-force incidents, seventeen occurred during shifts without cameras, and only eight occurred during shifts with cameras. See *id.*

77 *Id.* at 524.

controlled field trial . . . suggest[s] that police body-worn-cameras reduce the prevalence of use-of-force by the police as well as the incidence of citizens' complaints against the police."<sup>78</sup>

A comparable study by the Mesa Arizona Police Department reached a similar conclusion. Mesa police conducted a program evaluating the effects of body-worn cameras on use-of-force incidents and citizen complaints as well.<sup>79</sup> The study ran from October 2012 until September 2013.<sup>80</sup> This study compared fifty officers wearing body cameras to fifty officers (demographically similar in age, race, and gender) who did not wear cameras.<sup>81</sup> The results from Mesa were substantially similar to Rialto. Mesa observed a 75% reduction in use-of-force incidents and a 40% decline in filed citizen complaints, as compared to the previous calendar year.<sup>82</sup>

Empirical research suggests body cameras do have a civilizing effect on relations between law enforcement and the community. As Lieutenant Harold Rankin of the Mesa Police Department observed, "[a]nytime you know you're being recorded, it's going to have an impact on your behavior."<sup>83</sup> This is true for law enforcement and citizens alike, as officers "increase [ ] their professionalism because they [know] that everything they [say] and [do is] being recorded,"<sup>84</sup> and conversely, informing citizens a camera is running is "often enough to deescalate the situation."<sup>85</sup>

## 2. Improving Resolution of Legal Disputes

A video recording of encounters between citizens and law enforcement can also help lead to quicker resolutions of legal disputes before trial and assist factual determinations during legal proceedings. As the adage goes, "a picture is worth a thousand words." In the context of civil actions, "[c]itizens may be less likely to file 'frivolous' or untruthful complaints against officers wearing cameras because citizens know that the video evidence can instantly refute their claims."<sup>86</sup> This, perhaps, explains the decline in filed citizen complaints seen in Rialto and Mesa.<sup>87</sup> This was precisely the situation in

78 *Id.* at 531.

79 LEE RANKIN, MESA POLICE DEP'T, END OF PROGRAM EVALUATION & RECOMMENDATIONS: ON-OFFICER BODY CAMERA SYSTEM 1 (2013).

80 *Id.*

81 *Id.* at 12.

82 *Id.*

83 MILLER ET AL., *supra* note 12, at 6.

84 *Id.*

85 *Id.*; see also *Developments in the Law—Policing*, *supra* note 13, at 1801 ("This civilizing effect may also extend to (or stem from) civilians who know they are being filmed, as some police officials believe 'the visible presence of a camera [can] . . . compel highly agitated people to calm down more quickly.'" (alterations in original) (quoting David O'Reilly, *Evesham Police Chief Calls Cameras a 'Game Changer'*, PHILA. INQUIRER (Aug. 7, 2014), [http://articles.philly.com/2014-08-07/news/52519341\\_1\\_body-cameras-security-cameras-evesham-police-chief](http://articles.philly.com/2014-08-07/news/52519341_1_body-cameras-security-cameras-evesham-police-chief))).

86 WHITE, *supra* note 13, at 24.

87 See *supra* subsection II.A.1.

Albuquerque, New Mexico, where a twenty-three year-old woman was stopped and arrested for a DWI after failing a field sobriety test.<sup>88</sup> The video captured the woman accusing the officer of sexual misconduct, claiming: “[You were] inappropriately touching me while I was waiting in the car.”<sup>89</sup> The officer informed the woman the entire incident was filmed and a full investigation quickly cleared the officer of any wrongdoing.<sup>90</sup>

In criminal cases, a “permanent record of the events that transpired” will resolve cases “through guilty pleas rather than criminal trials.”<sup>91</sup> This occurred in Taunton, Massachusetts, where a thirty-four year-old man pleaded guilty to operating under the influence (OUI), after an officer wearing a body camera recorded the man almost hitting multiple vehicles, stumbling out of the vehicle, and refusing to take a field sobriety test.<sup>92</sup> Officer Walsh who made the arrest noted, “It’s tough to prove an OUI—it’s a very difficult thing to get a conviction on. But they (prosecutors) had irrefutable evidence.”<sup>93</sup> Accordingly, body cameras have the potential to eliminate legal disputes before they arise, which has the additional benefit of “sav[ing] departments the significant amounts of time and money spent on lengthy investigations and lawsuits.”<sup>94</sup>

Body camera evidence can also lead to arguably more “just” resolutions in legal proceedings. Many claims against law enforcement have “no witnesses” and involve “the officer’s word against the citizen’s.”<sup>95</sup> Video evidence “changes this dynamic”<sup>96</sup> by creating a “record of interrogations and arrests, as well as what officers witness at crime scenes,”<sup>97</sup> and can also be utilized to ensure Fourth Amendment search and seizure compliance.<sup>98</sup>

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88 Radley Balko, *Body Cameras Can Vindicate Cops, Too*, WASH. POST (Oct. 22, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/10/22/body-cameras-can-vindicate-cops-too/>.

89 *Id.* (alteration in original).

90 *Id.* For a video of the events, see Zach Noble, *Drunk Woman Says Cop Sexually Assaulted Her, Cop Shuts Her Down with Video Evidence*, BLAZE (Oct. 20, 2014), <http://www.theblaze.com/stories/2014/10/20/drunk-woman-says-cop-sexually-assaulted-her-cop-shuts-her-down-with-video-evidence/>.

91 WHITE, *supra* note 13, at 24 (citing GOODALL, *supra* note 36).

92 Charles Winokoor, *Taunton Police Chief Touts Body Cameras After OUI Guilty Plea*, TAUNTON DAILY GAZETTE (Aug. 19, 2015), <http://taunton.wickedlocal.com/article/20150818/NEWS/150816667>.

93 *Id.*

94 MILLER ET AL., *supra* note 12, at 6.

95 WHITE, *supra* note 13, at 23.

96 *Id.*

97 MILLER ET AL., *supra* note 12, at 9; see also *Developments in the Law—Policing*, *supra* note 13, at 1803 (“Footage from body cameras may help both prosecutors and defense attorneys by providing “objective evidence relating to whether a confession was voluntary, a search was consented to or justified, or a physical description matched a ‘lookout.’” (quoting POLICE COMPLAINTS BD., D.C., ENHANCING POLICE ACCOUNTABILITY THROUGH AN EFFECTIVE ON-BODY CAMERA PROGRAM FOR MPD OFFICERS 5 (2014))).

98 See generally Harris, *supra* note 38, at 363 (noting a body camera supporter’s argument).

Now, triers of fact are given higher-quality evidence through the opportunity to observe “what happened” (at least from the officer’s point of view) and judge the credibility of testifying witnesses.<sup>99</sup> Appellate courts also benefit from video evidence.<sup>100</sup>

It is important to remember, though, that video evidence is not a “magic bullet.”<sup>101</sup> While advocates argue body camera video “will produce objective, unambiguous evidence revealing what happened in . . . police-citizen encounters,”<sup>102</sup> overreliance is worrisome. For example, the camera may not capture important images because of its perspective, angle, and zoom.<sup>103</sup> Indeed, jurors may discount other forms of evidence because visual evidence is so compelling.<sup>104</sup> So, while video evidence is not the “be-all end-all,” it provides triers of fact a new perspective that can—at minimum—aid their final decisions.

### 3. Enhancing Transparency, Police Legitimacy

Perhaps the greatest benefit of body cameras is the ability to restore faith and confidence in law enforcement. After all, the impetus behind body camera implementation is promoting justice or, put differently, ensuring that questionable or wrongful use-of-force by law enforcement does not go unpunished.<sup>105</sup> Police legitimacy derives from two elements: law enforce-

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99 See *infra* notes 110–13 (introducing a situation where police body camera evidence will be used to prosecute an officer charged with murder and voluntary manslaughter during an on-duty shooting, but where the prosecution and defense have viable arguments, and the factfinder will be able to assess the truth by virtue of the video evidence). The prosecutor describes the events in the video as “the most asinine act” he has “seen a police officer make—totally unwarranted,” though the officer’s counsel argues he “feared for his life. . . . [because] [h]e thought he was going to be sucked under the car that was pulling away from him.” Dana Ford & Ed Payne, *Ex-University Cop in Samuel DuBose Shooting Death Pleads Not Guilty*, CNN (July 31, 2015), <http://www.cnn.com/2015/07/30/us/ohio-sam-dubose-tensing/>.

100 See *supra* note 25 (discussing the Supreme Court’s use of video recorded evidence from a patrol car to resolve the constitutional question in *Scott v. Harris*). Video evidence would be particularly helpful in resolving sufficiency of evidence claims, or reviewing any relevant issues under the clear error or abuse of discretion standards.

101 Wasserman, *supra* note 13, at 833.

102 *Id.* at 837.

103 *Developments in the Law—Policing*, *supra* note 13, at 1813.

104 *Id.* at 1803; see also Mateescu et al., *supra* note 14, at 27 (“[S]tudies have shown that viewers tend to have an exaggerated confidence in their ability to understand visual evidence.” (citing Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1754 (2014) (“There are potential dangers to this quick-witted visual intelligence, however, particularly in the realm of written law, which lacks both formal and cultural rules for mitigating these dangers. Images ‘feel’ real—as if they are transparent windows onto reality, rather than curated, edited, visual arguments. As a result, ‘we tend to read images using naïve theories of realism and representation’—that is, as if they don’t require interpretation at all.”(citation omitted)))).

105 For example, the public’s reaction to the failure to indict Officer Wilson in the fatal shooting of Michael Brown.

ment performing its traditional role of ensuring public safety and being held accountable for its misconduct. A prerequisite to accountability, however, is transparency—the public’s ability to observe policing in action. Currently, general police mistrust stems largely from the inability to assess exactly “what happened” in situations where police apply force. Body cameras change the dynamic by serving as a watchful eye over police conduct.

Law enforcement becomes more transparent when it “open[s] itself up to outside scrutiny”<sup>106</sup> and enables the public to observe police in action. Because body cameras record police interactions with the public, when the videos are released, the public has the opportunity to observe what law enforcement does on a day-to-day basis, how it operates, and how conflicts are resolved.<sup>107</sup> This provides the chance to understand and assess police action, which “leads to public trust,” and “trust benefits the community.”<sup>108</sup>

Certainly, some police activity caught through the lens of body cameras can lead to distrust. This is where transparency enters and balances the equation. When the public is able to access and observe police misconduct, it possesses the power to use legal institutions to hold such misconduct accountable (and in a more efficient manner too).<sup>109</sup> This opportunity has presented itself in the shooting of Samuel Dubose by University of Cincinnati police officer Ray Tensing in July 2015. Tensing fatally shot DuBose during a routine traffic stop gone awry, leading to an indictment for murder.<sup>110</sup> Tensing was wearing a body camera at the time of the shooting<sup>111</sup>—evidence that will assuredly be used to prosecute him. The video evidence is crucial in this case, as the Dubose family attorney claimed “[i]f there wasn’t a video, I do not believe we would have had an indictment.”<sup>112</sup> While the trial date is set for October 25, 2016,<sup>113</sup> the video evidence will be given to the jury to decide if Tensing should be held lawfully accountable.

Transparency—and ultimately accountability—is contingent upon the public having access to video records. Placing an eye on what really happens to the public, though, presents the issue of adequately protecting the privacy

106 WHITE, *supra* note 13, at 19.

107 Increasing transparency has the additional benefits of “helping to prevent problems from arising in the first place by increasing officer professionalism, helping agencies evaluate and improve officer performance, and allowing agencies to identify and correct larger structural problems.” MILLER ET AL., *supra* note 12, at 5.

108 WHITE, *supra* note 13, at 19 (quoting Mark W. Clark, *On-Body Video: Eye Witness or Big Brother?* POLICE MAGAZINE (July 8, 2013), <http://www.policemag.com/channel/technology/articles/2013/07/on-body-video-eye-witness-or-big-brother.aspx>).

109 See *supra* subsection II.A.2 (discussing the benefit of resolving legal disputes).

110 Michael Martinez, *Video Shows the Encounter Between Samuel Dubose, Officer Ray Tensing*, CNN (July 29, 2015), <http://www.cnn.com/2015/07/29/us/video-sam-dubose-ray-tenzing-chronology/index.html>.

111 *Id.*

112 *Id.* (statements of attorney Mark O’Mara).

113 Kevin Grasha, *Tensing Trial Now Set to Begin Oct. 25*, CINCINNATI ENQUIRER (Aug. 23, 2016), <http://www.cincinnati.com/story/news/2016/08/23/tenzing-trial-now-set-begin-oct-25/89200878/>.

of individuals captured in recordings. Balancing these two factors remains a major hurdle in the race to establish workable policies.

### B. *Cautious Optimism: Important Policy Concerns*

Body cameras have the potential to improve police and citizen behavior, reduce the number of legal disputes and aid their resolution, and improve the relations between law enforcement and the community, thereby legitimizing police action. This Section does not seek to advance arguments against body cameras—rather, it seeks to identify particular areas of concern and advance arguments to augment these apparent weaknesses. As mentioned previously, this Note assumes body cameras are a force for good, so long as they are properly administered. Accordingly, in order to make proper policy judgments, it is necessary to identify and understand the troublesome byproducts body cameras create.

This Section will focus on two major issues body cameras present: respecting privacy and providing public access to recordings. At the outset, it is import to highlight the tension between these two components. The more access provided to the public, media, and subjects of videos, the more opportunity for intrusion into the privacy interests of those persons and places recorded on video.<sup>114</sup> On the other hand, policies that strongly protect privacy interests have the potential to strangle the public’s ability to hold police accountable for misconduct. Policymakers, thus, must strike the right balance. Consequently, understanding the types of situations where privacy concerns are greatest and identifying how to tactfully manage these circumstances is paramount. A corollary is being mindful of the myriad of issues involved in providing public access; and awareness of each factor is essential to constructing a policy that can strike an ideal balance.

#### 1. Privacy Concerns

The ability of body cameras to record “intimate interactions” raises important privacy concerns and thus requires carefully crafted policies to ensure sufficient protection. The fact is, body cameras “capture in real time the potentially traumatic experiences of citizens who are victims of a crime, those who are involved in medical emergencies and accidents, or those who are being detained or arrested,”<sup>115</sup> and “capturing that on video . . . [could make it] a public record.”<sup>116</sup> Accordingly, this Note argues recording poli-

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114 *Developments in the Law—Policing*, *supra* note 13, at 1808 (“Privacy is a counterpoint to access: increasing transparency necessarily means more people will view body-camera footage, which will frequently feature civilians who may not want the recordings of themselves shared.”).

115 WHITE, *supra* note 13, at 27.

116 *Id.* (internal quotation marks omitted) (quoting Kate Hinds, *Some Police Departments Embrace Body Cameras*, WNYC NEWS (Aug. 13, 2013), <http://www.wnyc.org/story/312260-police-departments-and-body-cameras/>).

cies must reflect respect for privacy interests by restricting recording in situations where privacy interests are threatened most.

Policymakers have two primary mechanisms to regulate body camera use in situations where privacy is more at stake: (1) mandating when a camera must be turned on and off, and (2) imposing notice and consent requirements. Taking these factors in turn, what should the default position of the camera be? Non-continuously running cameras raise issues of “edit[ing] on the fly,” or “choos[ing] which encounters to record with limitless discretion.”<sup>117</sup> Should officers, then, record for the full duration of their shift? Continuously running cameras would be the “ideal policy” purely from an “accountability perspective” because it would “eliminat[e] any possibility that an officer could evade the recording of abuses committed on duty.”<sup>118</sup> And there are examples of officers circumventing technology (and in some cases deliberately trying to avoid liability).<sup>119</sup> This Note argues that continuously running cameras would raise a variety of other concerns, such as mass surveillance, greater privacy exposure, chilling officer speech and their interpersonal relationships with colleagues,<sup>120</sup> and also creating voluminous amounts of data to store and maintain.<sup>121</sup> Furthermore, if officers are required to record all situations and citizens know this, “it is going to damage openness and create barriers,”<sup>122</sup> which will create a “potential[ly] negative impact on community relationships”—the opposite of why cameras are being employed

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117 STANLEY, *supra* note 34, at 2; see also Alexis Sobel Fitts, *It's Almost Impossible To Tell If Police Camera Footage Has Been Edited*, HUFFINGTON POST (Aug. 7, 2015, 7:31 AM), [http://www.huffingtonpost.com/entry/fake-police-cam-footage\\_55c23782e4b0f7f0bebb2b5c](http://www.huffingtonpost.com/entry/fake-police-cam-footage_55c23782e4b0f7f0bebb2b5c) (raising the issue that video recordings can be edited after the fact to conceal police activity).

118 STANLEY, *supra* note 34, at 3.

119 See Joel Rubin, *LAPD Officers Tamped with In-Car Recording Equipment, Records Show*, L.A. TIMES (Apr. 7, 2014), <http://articles.latimes.com/2014/apr/07/local/la-me-lapd-tamper-20140408> (LAPD officers removed antennas from audio recording equipment in patrol cars, raising concerns officers were “conceal[ing] what occurred in the field”); see also Robinson Meyer, *Seen It All Before: 10 Predictions About Police Body Cameras*, ATLANTIC (Dec. 5, 2014), <http://www.theatlantic.com/technology/archive/2014/12/seen-it-all-before-10-predictions-about-police-body-cameras/383456/> (citing research by a sociologist who concluded at least twenty-three percent of a specific police department’s VHS archive of dashboard camera recordings were “blank or static,” likely in part due to video evidence rooms remaining unlocked). In another situation, an officer was under scrutiny for not having his camera turned on during the fatal shooting of a nineteen year-old woman, and subsequently fired for “insubordination and untruthfulness” over the uniform camera issue after an internal probe,” though he was not fired for the shooting itself. Joseph J. Kolb, *Albuquerque Policeman Who Shot Woman Fired Over Camera Lapse*, REUTERS (Dec. 1, 2014), <http://www.reuters.com/article/us-usa-police-new-mexico-idUSKCN0JG04N20141202#HPq12jCDflbWX8ar.97> (quoting Police Chief Gorden Eden).

120 STANLEY, *supra* note 34, at 3; see also MILLER ET AL., *supra* note 12, at 14 (“[R]equiring officers to record all encounters can signal a lack of trust in officers, which is problematic for any department that wants to encourage its officers to be thoughtful and to show initiative.”).

121 MILLER ET AL., *supra* note 12, at 17.

122 *Id.* at 13 (statements of Chief of Police Ken Miller of Greensboro, North Carolina).



in the first place.<sup>123</sup> Luckily, states with body camera legislation have heeded these concerns, and the dominant policy approach is to pursue a non-continuously running camera policy.<sup>124</sup>

In general, a non-continuously running camera policy requires officers to activate their cameras when “responding to a call for service or at the initiation of any other law enforcement or investigative encounter between a police officer and a member of the public.”<sup>125</sup> This approach requires policymakers to outline specifically what constitutes a “law enforcement-related encounter[ ] [or] activit[y].”<sup>126</sup> While a major weakness is that officers are left with abundant discretion to decide what to record and when to record it, disciplinary and judicial checks can be utilized to offset negative impacts of such discretion. For example, internal police department procedures can discipline officers for noncompliance with policies. From a judicial standpoint, a court could permit evidentiary presumptions in favor of criminal defendants when it appears exculpatory evidence was concealed in the recording, or in favor of civil plaintiffs in police misconduct cases.<sup>127</sup> States, through legislation or common law, could also extend the exclusionary rule to preclude admissibility of evidence produced by a body camera where an officer unlawfully tampers with the camera or conceals events from the camera’s view. Accordingly, the negative byproducts of discretion can be counteracted, making non-continuously running camera policies an attractive option.

So, what are the types of situations where body cameras *must* adjust for privacy concerns? This Note argues that a body camera must account for situations where citizens are particularly vulnerable, such as interviews with children, victims of child or sexual abuse, victims of domestic or sexual violence, or confidential informants. Furthermore, policies must prevent recordings from taking place within a private residence, unless the parties consent to recording or exigent circumstances demand it. These choices reflect respect for the significant fact that many interactions involve police “seeing people on the worst day of their lives”<sup>128</sup> and body cameras drastically increase the “potential for . . . embarrassing and titillating releases of video.”<sup>129</sup> Restricting recording in private residences—save for consent or exigencies—reflects the widely accepted view that a man’s home is his castle, and the details within are not meant for the government’s eye.<sup>130</sup> Finally, the desire to conceal these images from the public eye is all the more important

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123 *Id.*

124 *See infra* Section III.A.

125 STANLEY, *supra* note 34, at 4 (emphasis omitted).

126 MILLER ET AL., *supra* note 12, at 13 (noting traffic stops, arrests, searches, interrogations, and pursuits).

127 STANLEY, *supra* note 34, at 4–5.

128 WHITE, *supra* note 13, at 27 (quoting Hinds, *supra* note 116)

129 STANLEY, *supra* note 34, at 5.

130 *See Kyllo v. United States*, 533 U.S. 27, 37 (2001) (“In the home . . . all details are intimate details, because the entire area is held safe from prying government eyes.”).

given that digitalization of media permits wide dissemination of recorded images across the Internet, creating an essentially permanent record.

Recordings should *not* be barred in situations where parties are not particularly vulnerable, or where a person lacks a reasonable expectation of privacy,<sup>131</sup> such as during *Terry* stops,<sup>132</sup> traffic stops, or even bystanders or witnesses to a crime or crime scene. The reasoning is twofold. First, limiting use of cameras during *Terry* and traffic stops would render cameras useless in the situations where they are most needed—intimate interactions with the public—particularly when carrying out vital policing techniques, such as a stop and frisk. Second, courts recognize an individual lacks a reasonable expectation of privacy in actions they knowingly expose to the public.<sup>133</sup> Crime victims' family members, though, do have a strong interest in ensuring respect for their family member's dignity if they are killed or significantly harmed on camera,<sup>134</sup> and recording policies should reflect respect for these circumstances by requiring consent before public disclosure.

Policymakers should also require officers to provide notice to citizens when recordings are in progress.<sup>135</sup> Notice is important to avoid community mistrust and ensure privacy interests are respected,<sup>136</sup> particularly because some citizens fail to notice body-worn cameras.<sup>137</sup> Notice provides the additional incentive for all parties in an event to act in a civilized manner, thereby

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131 The Supreme Court has ruled an expectation of privacy is reasonable when, first, an individual “exhibit[s] an actual (subjective) expectation of privacy,” and second, when the “individual’s subjective expectation of privacy is ‘one that society is prepared to recognize as ‘reasonable.’” *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

132 In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that the Fourth Amendment is not violated when a police officer conducts a reasonable stop and search of a suspect on the street, with “reasonableness” turning on the officer’s suspicions of criminal activity and belief in the suspect’s dangerousness.

133 See *Katz*, 389 U.S. at 351 (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” (first citing *Lewis v. United States*, 385 U.S. 206, 210 (1966); and then citing *United States v. Lee*, 274 U.S. 559, 563 (1927))).

134 See Kim Bellware, *Chicago Releases ‘Chilling’ Video of Cop Shooting Teen 16 Times*, HUFFINGTON POST (Nov. 24, 2015, 6:29 PM), [http://www.huffingtonpost.com/entry/laquan-mcdonald-video\\_5654e329e4b079b281897fc2](http://www.huffingtonpost.com/entry/laquan-mcdonald-video_5654e329e4b079b281897fc2) (noting the family of Laquan McDonald, an African American teenager shot sixteen times by a Chicago police officer in 2014, did not want the video released and urged viewers not to “resort to violence in Laquan’s name”).

135 Some states already require notice under existing laws, which require two-party consent for audio and video recordings. See MILLER ET AL., *supra* note 12, at 14. For a list of two-party consent states, see JONATHAN HAYES & LARS ERICSON, NAT’L INST. OF JUSTICE, U.S. DEP’T. OF JUSTICE, A PRIMER ON BODY-WORN CAMERAS FOR LAW ENFORCEMENT 7–8 (2012), <https://www.justnet.org/pdf/00-Body-Worn-Cameras-508.pdf>.

136 Indeed, in the context of dashboard cameras, the International Association of Police Chiefs has concluded there is strong public support for notice, as “71% [of citizens surveyed] suggested that they should be informed when they are being videotaped.” INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 19, at 20.

137 MILLER ET AL., *supra* note 12, at 20.

reducing the possibility of police force.<sup>138</sup> The impression of a surveillance state is also weakened through notice requirements because it will preclude officers from surreptitiously recording citizens on the street.<sup>139</sup> Finally, providing adequate notice is not an onerous requirement, as it can simply be given verbally, or through visible markers, such as a pin or sticker indicating recording is in process.<sup>140</sup> For the same reasons notice should be required, states should also first require consent from individuals before recording, particularly in situations where privacy interests are most vulnerable.

Ultimately, policymakers must decide which situations garner more protection and require greater camera use restrictions. Knowing the situations where privacy interests are most at stake allows policymakers to carefully craft regulations. While there are mechanisms for ensuring privacy protections *ex ante*, there are *ex post* mechanisms as well, such as regulating public access.

## 2. “Access” to Recordings

An equally important consideration is the scope of “access” to video recordings. As the privacy concerns illustrate, it is vital to limit the scope of persons or organizations capable of acquiring recordings of certain situations. However, it is equally crucial to ensure the public has the opportunity to access videos to carry out its watchdog role and ensure accountability. “Access” to recordings encompasses a variety of facets, including: retention, storage, viewing, public disclosure, and redaction. Because it is important to understand how these various features interact, they will be given appropriate discussion here. However, for the purposes of later analysis, particular attention will be placed only on viewing, public disclosure, and redaction. This Note argues that access policies must be driven by the goal of maximizing accountability (though not at the expense of privacy) because enhancing community trust in law enforcement is the impetus for adopting body cameras in the first place, and trust cannot exist without holding culpable actors accountable.

The first “access” question is, what recordings should be *retained*? The American Civil Liberties Union (ACLU) argues videos should automatically be “flagged” when an incident involves “use of force,” “leads to detention or arrest; or . . . a formal or informal complaint has been registered.”<sup>141</sup> This view is somewhat underinclusive though, and seemingly fails to account for the usefulness of recordings in resolving legal disputes,<sup>142</sup> particularly when determining the legality of searches, whether crimes occurred and by whom, and capturing non-force incidents that could be actionable. Arguing for a broader understanding, the Leadership Conference on Civil and Human

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138 See WHITE, *supra* note 13, at 23.

139 For example, Maryland has already passed legislation preventing officers from intercepting oral communication unless the officer is part of the oral communication. MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(11)(ii)(3) (West 2015).

140 See STANLEY, *supra* note 34, at 5.

141 *Id.* at 6.

142 See *supra* subsection II.A.2.

Rights (LCCHR) asserts videos should be retained “as long as it might become relevant to a timely-filed citizen complaint; [as well as] evidentiary video of crimes, arrests, citations, searches, uses of force and confrontations.”<sup>143</sup> This view better accounts for the potential benefits body cameras bring for resolving legal disputes. Ultimately, however, the answer chosen by any given jurisdiction must encapsulate recordings of incidents where alleged misconduct is more likely to occur. The LCCHR’s broader definition better captures this purpose and should be used as a template for state legislatures.

The second “access” inquiry is, how long should recordings be *stored*? First and foremost, any non-flagged recording should be discarded within a reasonable amount of time. The reasonable time period should reflect the ability for citizens or law enforcement agencies to flag recordings. The ACLU argues retention periods “should be measured in weeks not years” and recordings should be discarded unless they are flagged.<sup>144</sup> Similar time periods have been adopted by at least two states.<sup>145</sup> Shorter storage times for non-useful recordings are preferred because they “reduce the window of opportunity for requests for release of video footage that would serve no legitimate purpose”<sup>146</sup> and reduce costs created by data storage.<sup>147</sup> Once a recording has been “flagged” or deemed worthy of “evidentiary value,” the retention time should be extended and deleted only “at the conclusion of . . . [the] investigation[s], court proceeding[s], or administrative hearing[s] for which they were used.”<sup>148</sup>

As the storage summary illustrates, the capability of flagging recordings is imperative to ensuring transparency, because otherwise recordings with a legitimate societal purpose may be lost forever. While law enforcement agencies should retain the authority to flag recordings for their own internal investigations and suspicions of police misconduct, this is not enough. Any legitimate body camera “access” policy must provide subjects of recordings

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143 Letter from Wade Henderson and Nancy Zirkin, Leadership Conference on Civil and Human Rights, to the President’s Task Force on 21st Century Policing, U.S. Dep’t of Justice 3 (Jan. 30, 2015), <http://civilrightsdocs.info/pdf/policy/letters/2015/2015-01-30-letter-to-task-force-on-21st-century-policing.pdf>. The Police Executive Research Forum report takes a similar view, arguing “footage of an incident or encounter that could prove useful for investigative purposes, such as a crime, an arrest or citation, a search, a use of force incident, or a confrontational encounter with a member of the public,” should be retained. MILLER ET AL., *supra* note 12, at 16.

144 STANLEY, *supra* note 34, at 6.

145 For example, California law creates a sixty-day storage period for non-flagged recordings before they are destroyed, CAL. PENAL CODE § 832.18(b)(5)(A) (West 2015), and Illinois law mandates a ninety-day minimum storage requirement, 50 ILL. COMP. STAT. ANN. 706/10-20(a)(7) (West 2015).

146 MILLER ET AL., *supra* note 12, at 18.

147 *Id.* at 17.

148 *Id.* This is also the policy in California and Illinois. See CAL. PENAL CODE § 832.18(b)(5)(B) (“Evidentiary data . . . should be retained for a minimum of two years . . .”); 50 ILL. COMP. STAT. ANN. 706/10-20(a)(7)(C) (“Under no circumstances shall any recording made with an officer-worn body camera relating to a flagged encounter be altered or destroyed prior to 2 years after the recording was flagged.”).

the ability to flag videos and serve as a check on law enforcement discretion.<sup>149</sup> Without this structural safeguard, the public loses its vital watchdog role and reinforces the—unfortunate—status quo era characterized by mistrust of police.<sup>150</sup> However, policies should require, at minimum, that the requestor provide background facts sufficient to indicate they were recorded, or have intimate knowledge of the events they seek to flag. Such a requirement prevents random parties from “routinely flag[g]ing” all recordings in order to circumvent the retention limit[s].<sup>151</sup>

The third major “access” issue is the ability to *view* recordings. The chance to observe a recording should not be confused with disclosure—the act of making something known to the public—which is a separate issue. The primary inquiry here is, who should be able to view recordings? The public? Law enforcement? Both? This Note argues both should be permitted to view recordings. First, only individuals who can meet the requirements of “flagging” a particular recording should be permitted to view, as “wholesale public access would likely prove undesirable.”<sup>152</sup> Furthermore, the government should allow viewing only on the premises where the copies are stored. The government should not be permitted to distribute copies, in order to protect the privacy of subjects in the recordings.<sup>153</sup> Second, likewise for law enforcement and in fairness to their duties, officers should be permitted to observe videos before making statements on the record regarding recorded events. While there is salient debate on this issue,<sup>154</sup> permitting *ex*

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149 See STANLEY, *supra* note 34, at 6 (“[T]hird parties should also be able to flag an incident if they have some basis to believe police misconduct has occurred or have reasonable suspicion that the video contains evidence of a crime.”). It is worth noting the judiciary is not in the best position to flag recordings; rather it plays a greater role in deciding whether recordings should be disclosed. This reinforces the need for citizens to play a watchdog role and retain the power to flag recordings.

150 See *Developments in the Law—Policing*, *supra* note 13, at 1806 (“[O]nce the locus of control shifts to the officers, the very organization meant to be held accountable will be able to prevent these videos from being . . . shared after the fact.”).

151 STANLEY, *supra* note 34, at 6. This approach has been adopted by Georgia, South Carolina, and Texas. See GA. CODE ANN. § 50-18-72(a)(26.2)(A)–(F) (West 2015); S.C. CODE ANN. § 23-1-240(G)(5)(a)–(f) (West 2015); TEX. OCC. CODE ANN. § 1701.661(a)(1)–(3) (West 2015).

152 *Developments in the Law—Policing*, *supra* note 13, at 1808.

153 While the government could redact portions of the video before providing copies, it would impose a very high cost in time and money to redact and to review recordings prior to distributing a copy. While states could impose costs upon requestors of public information, ultimately privacy considerations should prevail in light of ongoing investigations or legal proceedings, which could be jeopardized or otherwise negatively impacted by release of recordings.

154 See MILLER ET AL., *supra* note 12, at 29 (“According to many police executives, the primary benefit to officer review is that it allows officers to recall events more clearly, which helps get to the truth of what really happened. Some police executives, on the other hand, said that it is better for an officer’s statement to reflect what he or she perceived during the event, rather than what the camera footage revealed. The majority of police executives consulted by PERF are in favor of allowing officers to review body-worn camera footage

*ante* review reflects the view that “[a]n officer should be given the chance to make a statement using all of the evidence available; otherwise, it looks like . . . trying to catch an officer in a lie.”<sup>155</sup> To offset an officer from tailoring a statement to what they observe when reviewing the video, the factfinder should be informed that the officer reviewed the video before his or her official statement—thus allowing the factfinder to judge the credibility of the officer’s testimony.

Fourth, and perhaps the most noteworthy “access” issue, is *public disclosure*. The biggest question governing this issue is whether video recordings should be subject to, or exempt from, state freedom of information laws. Put differently, the question is, which legal regime can better balance privacy protections with providing enough disclosure for transparency, to achieve the goal of greater accountability and improved community trust. The optimal answer is a difficult one. This Note argues for a presumption in favor of privacy rights over public disclosure, unless identities are redacted or consent is given to publicly disclose the recording. This Note therefore favors body camera recordings being exempt from freedom of information laws. This presumption in favor of privacy interests over public disclosure stems from the notion that privacy interests cannot be recovered or repaired once exposed, particularly given the broad dissemination capabilities of the Internet, and the fact public disclosure will ultimately occur at the end of investigations or judicial proceedings. Accordingly, while this Note recognizes that “broad disclosure policies can promote police agency transparency and accountability,”<sup>156</sup> it concludes the “significant implications for the public’s privacy rights”<sup>157</sup> are more compelling to protect.

One way to balance these values is to “minimize invasiveness” where possible,<sup>158</sup> which is done first by distinguishing between flagged and non-flagged recordings. Any non-flagged recording should not be disclosed without the consent of the subjects captured in the recording, unless the subject’s identity is redacted.<sup>159</sup> This reflects privacy for individuals without undermining the downstream goal of ensuring accountability (because presumably an issue of misconduct would be covered by a flagged recording), while also leaving open the option to show police practices in action.

Flagged recordings are more problematic. These recordings “are those for which there is the highest likelihood of misconduct, and thus the ones where public oversight is most needed”<sup>160</sup> and are accordingly very likely to be the subject of legal proceedings or investigations (initiated by citizens or law enforcement). While the demand for public disclosure for such record-

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prior to making a statement about an incident in which they were involved. They believe that this approach provides the best evidence of what actually took place.”).

155 *Id.* (comments of Chief Ron Miller of the Topeka Police Department).

156 *Id.* at 17.

157 *Id.* at 18.

158 STANLEY, *supra* note 34, at 7.

159 *Id.*

160 *Id.* at 8.

ings is much higher, the need to ensure adequate due process in conjunction with privacy interests necessitates a greater propensity to prevent disclosure in order to avoid jeopardizing ongoing legal proceedings or investigations—at least until those procedures are complete. Consequently, the primary “locus of control”<sup>161</sup> should reside in the hands of the government. However, states should create a legal mechanism for citizens and the press to file an application for a court order requesting public disclosure of recordings.<sup>162</sup> Body camera policies must also allow law enforcement agencies to publicly disclose recordings (which encourages agencies to consider the political consequences of their decisions to disclose), subject to redacting identities of video subjects unless consent is given.<sup>163</sup> Policies should also create a check on law enforcement discretion by enabling the judiciary to override an agency’s refusal to disclose recordings where the public interest demands it,<sup>164</sup> but recordings should be redacted where applicable when a court order is granted. Ultimately, though, all flagged recordings should be publicly disclosed once when legal proceedings or police investigations conclude in order to make police practices fully transparent.

The final “access” issue is *redaction*. Redaction requires “blurring or blacking out of portions of video and/or distortion of audio to obscure the identity of subjects.”<sup>165</sup> As mentioned previously, redaction should be required for disclosure of all non-flagged recordings, unless a subject consents to their identity being known. Flagged recordings should take an identical approach. Because the government has the “locus of control”<sup>166</sup> to make final public disclosure decisions, video subjects are entitled to have their identity redacted. In the interest of efficiency, however, policies should require law enforcement agencies only to make good faith efforts to identify recorded persons and seek consent within a specific time frame.

As one legal scholar has noted, “[a]s police cameras become more pervasive, it becomes impossible to escape demands—from courts, litigants, juries, citizens, the media, and civilian review boards—that cameras always will be used, that video always will be available, and that the absence of video evi-

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161 *Developments in the Law—Policing*, *supra* note 13, at 1806.

162 Such is the case in Nevada. See NEV. REV. STAT. ANN. § 239.011(1) (West 2015) (“If a request for inspection, copying or copies of a public book or record open to inspection and copying is denied, the requester may apply to the district court in the county in which the book or record is located for an order: (a) Permitting the requester to inspect or copy the book or record; or (b) Requiring the person who has legal custody or control of the public book or record to provide a copy to the requester . . .”).

163 See STANLEY, *supra* note 34, at 7 (stating that the ACLU takes the position that “[p]ublic disclosure of any recording should be allowed with the consent of the subjects” and “[i]f recordings are redacted, they should be discloseable”).

164 This has been Florida’s approach. See FLA. STAT. ANN. § 119.071(2)(1)(4)(d) (West 2105) (requiring that a body camera recording must be disclosed by a law enforcement agency “[p]ursuant to a court order”). Florida also provides a list of factors courts can use to determine whether to issue an order. See *id.* § 119.071(2)(1)(4)(d)(I)(A)–(H).

165 STANLEY, *supra* note 34, at 7.

166 *Developments in the Law—Policing*, *supra* note 13, at 1806.

dence is itself suspicious and suggestive of misconduct.”<sup>167</sup> Policymakers must fight the urge to give in to such demands and avoid sweeping disclosures that would significantly damage privacy interests. Instead, the government should retain control over ultimate public disclosure to prevent widespread dissemination of video images by members of the public and to yield respect for ongoing legal proceedings and police investigations.

### III. OVERVIEW AND ANALYSIS OF STATE LEGISLATION

Twenty-five state legislatures have devised legislation addressing “officer use” and/or “access” to video recordings for intrastate law enforcement agencies, as of August 2016.<sup>168</sup> This Part provides a general review of this legisla-

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167 Wasserman, *supra* note 13, at 842 (citing MILLER ET AL., *supra* note 12, at 40–41).

168 Two states’ legislatures, Delaware and Louisiana, passed resolutions. See H.R. Con. Res. 46, 148th Gen. Assem., (Del. 2015); H.R. Con. Res. 59, 2016 Leg., 42nd Reg. Sess. (La. 2016). The remaining states have properly enacted laws. See, e.g., Arizona, An Act Establishing a Law Enforcement Officer Body Camera Study Committee, 2015 Ariz. Sess. Laws Ch. 161 (establishing a committee to study body cameras, with a sunset provision ending June 30, 2016); California, CAL. PENAL CODE § 832.18 (West 2015); Colorado, An Act Concerning Use of Body-Worn Cameras by Law Enforcement, and, in Connection Therewith, Establishing a Grant Program and a Study Group to Recommend Policies on the Use of Body-Worn Cameras, 2015 Colo. Legis. Serv. Ch. 214 (West) (codified at COLO. REV. STAT. ANN. § 24-33.5-519 (West 2015)); Connecticut, An Act Concerning Excessive Use of Force, 2016 Conn. Legis. Serv. 15-4 (West) (codified at CONN. GEN. STAT. ANN. § 29-6d (West 2016)); Florida, Act of April 24, 2015, Fla. Sess. Law Serv. Ch. 2015-41 (West) (codified at FLA. STAT. ANN. § 119.071 (West 2015)); Georgia, Act of May 6, 2015, 2015 Ga. Code Ann. Adv. Legis. Serv. 173 (West) (codified at GA. CODE ANN. § 50-18-72(a)(26.2) (West 2015)); Illinois, An Act Concerning Criminal Law, 2015 Ill. Legis. Serv. P.A. 99-0352 (West) (codified at 50 ILL. COMP. STAT. ANN. 706/10-10 to 706/10-20 (West 2015)); Indiana, An Act to Amend the Indiana Code Concerning State and Local Administration, 2016 Ind. Legis. Serv. P.L. 58-2016 (West); Maryland, An Act Concerning Public Safety—Law Enforcement Officers—Body-Worn Digital Recording Device and Electronic Control Device, 2015 Md. Legis. Serv. 129 (West) (codified at MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (West 2015)); MD. CODE ANN., PUB. SAFETY § 3-511 (West 2015)); Minnesota, Act of May 22, 2016, 2016 Minn. Sess. Law Serv. S0498-4 (codified at MINN. STAT. ANN. § 626.8473, subd. 3 (West 2016)); Missouri, Act of July 8, 2016, S.B. 732, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); Nebraska, An Act Relating to Law Enforcement, L.B. 1000, 104th Leg., Second Sess. (Neb. 2016) (codified at NEB. REV. STAT. §§ 81-1452 to -1454 (West 2016)); Nevada, NEV. REV. STAT. ANN. § 239.010 (West 2015)); New Hampshire, An Act Relative to Body-Worn Cameras for Law Enforcement Officers, 2016 N.H. Legis. Serv. 322 (codified at N.H. REV. STAT. ANN. § 105-D (2016)); North Carolina, Law Enforcement Agencies—Tape and Sound Recordings—Disposition, 2016 N.C. Legis. Serv. S.L. 2016-88; North Dakota, N.D. CENT. CODE ANN. § 44-04-18.7 (West 2015); Oklahoma, An Act Relating to the Oklahoma Open Records Act, 2015 Okla. Sess. Law Serv. 370 (codified at OKLA. STAT. ANN. tit. 51, § 24A.8 (West 2015)); Oregon, An Act Relating to Video Cameras Worn Upon Police Officer’s Person; Creating New Provisions; and Declaring an Emergency, 2015 Or. Legis. Serv. Ch. 550 (H.B. 2571) (West) (codified at OR. REV. STAT. ANN. §§ 41.910, 136.295, 165.540, 192.501 (West 2015)); South Carolina, An Act to Amend the Code of Laws of South Carolina, 2015 S.C. Acts 71 (West) (codified at S.C. CODE ANN. § 23-1-240 (West 2015)); Texas, An Act Relating to a Body Worn Camera Program for Certain Law Enforcement Agencies in this State; Creating a Criminal Offense; Authorizing a Fee, 2015 Tex.



tion and analyzes “officer use” and “access” policies in light of the limited policy judgments reached in Part II. “Officer use” policies address when and how to use cameras, while “access” provisions govern who can access recordings and under what conditions. This Note will not analyze every legislative action, but rather discuss a number of statutes in order to sketch a landscape of the policy structures states can and have utilized.

### A. *Officer Use*

Nineteen state legislatures have created legislation governing “officer use” of body cameras.<sup>169</sup> Specifically, “officer use” policies cover the default on/off position of the camera, under what circumstances the default on/off position may change, procedures for changing the default position, and what kind of notice must be given, or consent required when interviewing particular persons.

States have taken two approaches to regulating officer use. “Guidelines” states have prescribed, to varying degrees, specific state-wide rules and procedures for law enforcement to follow while delegating authority to local agencies to fill the remaining gaps. In contrast, “Pure Delegation”<sup>170</sup> states have—in their entirety—delegated the authority of prescribing rules to an executive agency or local law enforcement entity. Some “Pure Delegation” state legislative acts require the rule creating entity to address specific topics, while others do not provide any topical guidance. Where executive agencies or other commissions issue policy guidelines or recommendations, state and local authorities are bound by such rules. The following subsections will review and analyze these approaches with particular emphasis on privacy considerations.

#### 1. “Guidelines” States

Eight states have enacted statutes prescribing requirements regarding use of body cameras.<sup>171</sup> The analysis begins with Illinois’ comprehensive Law

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Gen. Laws 1134 (codified at TEX. OCC. CODE ANN. §§ 1701.651–1701.663 (West 2015)); Utah, An Act Modifying the Utah Code of Criminal Procedure to Address the Use of Body-Worn Cameras by Law Enforcement Officers, 2016 Utah. Legis. Serv. Ch. 410 (West) (codified at UTAH CODE ANN. §§ 63G-2-302(2)(g), 77-7a-102 to -107, 77-23-210(6)(a)–(b) (West 2015)); Vermont, An Act Relating to a Model State Policy for Use of Body Cameras by Law Enforcement Officers, 2016 Vt. Acts & Resolves 163; Washington, Law Enforcement and Corrections Officers—Video and Sound Recordings—Disclosure, 2016 Wash. Sess. Laws 163.

169 These states include: Arizona, Colorado, Connecticut, Delaware, Georgia, Illinois, Louisiana, Maryland, Minnesota, Nebraska, Nevada, New Hampshire, North Carolina, Oregon, South Carolina, Texas, Utah, Vermont, and Washington.

170 The term “Pure” is used to separate “Guidelines” states, which delegate gap filling to other entities, from those “Pure Delegation” states that delegate rule creation entirely. The distinction is subtle, but conceptually important to recognize.

171 These states include: Connecticut, Georgia, Illinois, Nevada, New Hampshire, Oregon, Texas, and Utah.

Enforcement Officer-Worn Body Camera Act, which was enacted in 2015.<sup>172</sup> The law delegates guideline creation authority to the Illinois Law Enforcement Standards Board, but requires the Board to meet several minimum requirements.<sup>173</sup> For example, cameras “must be turned on at all times when the officer is in uniform and is responding to calls for service or engaged in any law enforcement-related encounter or activity.”<sup>174</sup> Law enforcement encounters or activities include, among others, “traffic . . . [and] pedestrian stops, arrests, searches, interrogations, [and] investigations.”<sup>175</sup> The Illinois law also provides privacy protections by mandating officers to deactivate cameras in particular circumstances (barring impracticality or impossibility), such as when interviewing a “victim of a crime,” “a witness of a crime or a community member who wishes to report a crime,” or “a confidential informant,” and that person requests that the camera be turned off.<sup>176</sup> Further, the law also requires officers to “provide notice of recording to any person if the person has a reasonable expectation of privacy” and to demonstrate proof that notice was given in the recording.<sup>177</sup> Finally, the Illinois law creates a system of internal checks on law enforcement discretion to record by imposing discipline only where: “(A) a formal or informal complaint of misconduct has been made; (B) a use of force incident has occurred; . . . or as corroboration of other evidence of misconduct.”<sup>178</sup>

Illinois’ body camera law provides robust privacy protection by explicitly requiring officers to give notice when individuals have a reasonable expectation of privacy, thereby extending privacy protections to the home. The law further protects privacy interests by requiring officers to deactivate cameras when dealing with victims of crimes, witnesses, and confidential informants. While the law does not explicitly include children, the broad use of “victims” and “witnesses” should cover situations where officers interview children. A large gap, though, is the lack of a consent requirement when interviewing persons. Not only does Illinois not require notice in these situations (barring a reasonable expectation of privacy), but Illinois law places the onus on the interviewee to end the recording—instead of first acquiring the interviewee’s explicit consent—and further, the law does not require officers to inform such witnesses of their right to end the recording.<sup>179</sup>

In sum, the Illinois law should also be commended for three key features. First, the flexibility it gives officers when complying with the law would

172 Law Enforcement Officer-Worn Body Camera Act, 2015 Ill. Pub. Act. 99-0352 (codified as amended at 50 ILL. COMP. STAT. ANN. 706/10 (West 2015)).

173 See 50 ILL. COMP. STAT. ANN. 706/10-20(a).

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

175 *Id.* 706/10-10.

176 *Id.* 706/10-20(a)(4)(A)–(C).

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

178 *Id.* 706/10-20(a)(9)(A)–(B), (D).

179 Perhaps this policy judgment reflects a greater desire for further factfinding than the position taken by this Note, while still permitting an individual to invoke their rights.

be “impractical or impossible” or where exigent circumstances exist. Second, for the internal checks it creates by subjecting officers to discipline only in limited circumstances to deter inappropriate use of cameras. And finally, the recognition of varying circumstances where privacy concerns are greater. Overall, while the law properly acknowledges situations where privacy interests should be respected most and prescribes requirements to protect those interests, the law could impose a consent requirement for recording to further augment its privacy protections.

The state of New Hampshire also provides a comprehensive “officer use” statutory scheme. In New Hampshire, officers are required to activate their cameras at the occurrence of a law enforcement-related encounter or activity, which is defined by statute as including, but not limited to, “traffic stops, pedestrian stops, arrests, searches, interrogations, investigations, pursuits, crowd control, traffic control, non-community caretaking interactions with an individual while on patrol, or any other instance in which the officer is enforcing the laws.”<sup>180</sup> The law, however, grants a right not to be recorded without consent to crime victims,<sup>181</sup> persons anonymously reporting crimes,<sup>182</sup> or “where an individual has a reasonable expectation of privacy”<sup>183</sup> (thereby accounting for recordings in private residences). The statute also accounts for recording interviews with juveniles, and victims of sexual abuse or domestic violence, by subjecting recordings to already existing attorney general protocols for handling those situations.<sup>184</sup> The law goes further to protect confidential informants<sup>185</sup> and private officer communications<sup>186</sup> from recordings. Finally and importantly, the statute imposes an across-the-board notice requirement to subjects of recordings by mandating that officers “inform an individual that he or she is being recorded as soon as practicable,”<sup>187</sup> thus filling any privacy protection gaps in the statute.

The most notable features of New Hampshire’s law are the mechanisms for ensuring transparency and statutory compliance. First, the law requires that cameras “remain activated until the event is completed in order to ensure the integrity of the recording”<sup>188</sup> and “[i]f an officer fails to activate the [body-worn camera], fails to record the entire contact, interrupts the recording, or if the [body-worn camera] malfunctions” the officer is required to “document why a recording was not made, was interrupted, or was termi-

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180 N.H. REV. STAT. ANN. § 105-D:1(VI) (West 2016).

181 *Id.* § 105-D:2(VII)(d).

182 *Id.* § 105-D:2(VII)(e).

183 *Id.* § 105-D:2(IX).

184 *Id.* § 105-D:2(VII)(d).

185 *Id.* § 105-D:2(VII)(b).

186 *Id.* § 105-D:2(VII)(g).

187 *See id.* § 105-D:2(VIII). When officers fail to notify citizens of recordings, “the recording officer shall note the reason for non-notification within the associated report.” *Id.*

188 *Id.* § 105-D:2(X).

nated as part of the associated police report.”<sup>189</sup> The law also allows agencies to “limit or restrict an officer from viewing the video file” “[i]f an officer is suspected of wrongdoing or involved in an officer-involved shooting or other use of deadly force.”<sup>190</sup> These provisions are not without bite, however. The statute penalizes noncompliance by demanding that “[a]ny recording undertaken in violation of this chapter or any other applicable law shall be immediately destroyed.”<sup>191</sup> Furthermore, recordings taken in violation of the statute are “not . . . admissible as evidence in any criminal or civil legal or administrative proceeding, except in a proceeding against an officer for violating the [statute].”<sup>192</sup>

Like the Illinois statute, New Hampshire’s comprehensive state-wide officer-use policy targets and accounts for situations where privacy interests are most at stake. The New Hampshire law goes further than Illinois, though, by imposing a requirement to notify citizens of recordings “as soon as practicable,”<sup>193</sup> coupled with a citizen right not to be recorded if they are a crime victim or they are reporting a crime. Finally and notably, New Hampshire bolsters the viability of its law with mechanisms for ensuring accountability by punishing noncompliance.

## 2. “Pure Delegation” States

These twelve states<sup>194</sup> have taken action by completely delegating the creation of officer-use policies to executive agencies, new commissions, or local law enforcement agencies. Some state legislatures have required the delegated entity to address specific use-related topics,<sup>195</sup> while Arizona, Montana, Nebraska, and North Carolina have delegated without guidance. Until these states announce their guidelines, however, it is impossible to determine the extent to which they balance privacy and access. The purpose here is only to highlight delegation as an available policy option for state legislatures.

### B. Access

Eighteen states have enacted legislation specifically governing public access to body camera recordings.<sup>196</sup> Access policies address who may view or disclose video recordings and what requirements are necessary to do so.

189 *Id.* § 105-D:2(XI).

190 *Id.* § 105-D:2(XIV).

191 *Id.* § 105-D:2(XVIII).

192 *Id.*

193 *Id.* § 105-D:2(VIII).

194 These states include: Arizona, Colorado, Delaware, Louisiana, Maryland, Minnesota, Nebraska, North Carolina, South Carolina, Vermont, and Washington.

195 These states include: Colorado, Delaware, Louisiana, Maryland, Minnesota, South Carolina, Vermont, and Washington.

196 These states include: California, Connecticut, Florida, Georgia, Illinois, Indiana, Minnesota, Missouri, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, Texas, Utah, and Washington.

States have taken two approaches to access policies. “Exemption” states, by default, exempt body camera recordings from state public records laws. These states delineate specific situations where access will be provided, or where exceptions to the default exemption exist. “Public Record” states make body camera recordings public records by default, and in some cases provide exceptions for when access will be restricted. The following subsections will discuss and highlight these approaches with an eye toward balancing respect for privacy with sufficient access, to achieve desired transparency.

### 1. “Exemption” States

Thirteen states have taken action to exempt body camera recordings from state public records laws.<sup>197</sup> South Carolina,<sup>198</sup> for starters, provides a variety of disclosure mechanisms. The law permits various law enforcement agencies, the state Law Enforcement Division, attorney general, or a circuit solicitor to release recorded data in its discretion.<sup>199</sup> Certain members of the public are permitted to acquire copies of recordings if they are a subject of camera footage, a criminal defendant, civil litigant, owner of seized or damaged property captured in the recording, a legal guardian of a video subject or criminal defendant, or an attorney for any of the aforementioned.<sup>200</sup>

Because South Carolina has deferred its “use” policies and some “access” policies to the Law Enforcement Training Council (LETC),<sup>201</sup> determining which recordings will be flagged and who has the authority to flag them is unclear. What is clear, however, is the law currently permits executive agencies to publicly disclose recordings, but lacks a judicial or citizen initiated mechanism for public disclosure. The addition of either mechanism would enhance the state’s transparency. Furthermore, the law is completely silent on the issue of redaction where recordings will be disclosed to the public. This is unsettling because copies can be disclosed to qualifying subjects of recordings, who then may disclose recordings to the media. South Carolina’s law is strong in access because it permits disclosure by executive actions and to subjects of recordings; however, the current lack of redaction policies (prior to the LETC’s guidelines) is a glaring privacy weakness.

Illinois exempts recordings from the state freedom of information law (FOIA), but has created a multi-layered structure for access to recordings, which adjusts for varying levels of privacy interests.<sup>202</sup> In general, any recording “flagged” because a complaint was filed, a firearm discharged, the police used force, or the event recorded resulted in arrest, detention, death, or bod-

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197 These states comprise of: Connecticut, Florida, Georgia, Illinois, Minnesota, Missouri, New Hampshire, North Carolina, North Dakota, Oregon, South Carolina, Utah, and Washington.

198 See S.C. CODE ANN. § 23-1-240(G)(1) (West 2015).

199 *Id.* § 23-1-240(G)(3).

200 *Id.* § 23-1-240(G)(5)(a)–(f).

201 *Id.* § 23-1-240(C).

202 50 ILL. COMP. STAT. ANN. 706/10-20(b) (West 2015).

ily harm, is subject to disclosure under the Illinois FOIA.<sup>203</sup> The statute imposes additional requirements, though, based on the privacy concern at issue. When a subject (victim or witness) of a flagged recording has a reasonable expectation of privacy, the recording will be disclosed when the subject gives “written permission” to the law enforcement agency.<sup>204</sup> That said, subjects lose a reasonable expectation of privacy if they are arrested during the encounter.<sup>205</sup> On the other hand, when there is no reasonable expectation of privacy, a flagged recording is disclosed in accordance with FOIA,<sup>206</sup> and to the subject of the recording upon request.<sup>207</sup> The Illinois statute goes further to ensure privacy protections by redacting identities of persons who are not subjects, officers, or otherwise “directly involved in the encounter,” from all recordings subject to FOIA.<sup>208</sup> In sum, the Illinois statute creates transparency by disclosing recordings where complaints are filed, force is used, or firearms are discharged—the exact situations where transparency is most needed.

Florida provides another variation on public access. Florida creates a quasi-categorical exemption from public disclosure laws, where a recording takes place within an individual’s private residence, healthcare and social services facilities, or where a person has a reasonable expectation of privacy.<sup>209</sup> Notwithstanding this exemption, the law allows law enforcement agencies to disclose such recordings in the “furtherance of [their] official duties and responsibilities.”<sup>210</sup> Interestingly, the law requires disclosure to individuals recorded, their personal representative, or an individual who lawfully resides, dwells, or lodges in a place where the recording takes place—to the extent these individuals or their property is recorded by law enforcement.<sup>211</sup> Finally, Florida law also permits disclosure pursuant to a court order,<sup>212</sup> and provides courts a list of factors to assess in determining whether to issue the order.<sup>213</sup>

Florida takes a balanced approach to providing access. It provides the executive and judicial branches the ability to publicly disclose recordings—very worthwhile provisions—but it fails to promulgate redaction requirements or procedures. In fact, the law only makes one reference to redaction for public disclosure, noting that from a court order standpoint, the court takes into account whether the “recording could be redacted to protect privacy interests.”<sup>214</sup> Florida’s law could be enhanced by an amendment per-

203 *Id.* 706/10-20(b)(1)–(2).

204 *Id.* 706/10-20(b)(1)(A)–(B).

205 *Id.* 706/10-20(b)(3).

206 *Id.* 706/10-20(b)(2).

207 *Id.* 706/10-20(b)(3).

208 *Id.*

209 FLA. STAT. ANN. § 119.071(2)(1)(2)(a)–(c) (West 2015).

210 *Id.* § 119.071(2)(1)(3)(a).

211 *Id.* § 119.071(2)(1)(4)(a)–(c).

212 *Id.* § 119.071(2)(1)(4)(d).

213 *Id.* § 119.071(2)(1)(4)(d)(I)(A)–(H).

214 *Id.* § 119.071(2)(1)(4)(d)(I)(G).

mitting citizens and media to file applications requesting for court-ordered disclosure of recordings. While the law is weak on redaction policies, it is strong on enabling subjects to view recordings by mandating disclosure to parties captured in recordings to the extent they are recorded. This does not create public disclosure problems because these parties consent to full disclosure if they take recordings to the media. This does, however, have the perverse potential effect of impacting ongoing court proceedings or police investigations. In sum, Florida is strong in providing disclosure in proper circumstances and to proper parties, all the while balancing privacy interests, but it could enhance privacy protection with more specific redaction policies.

## 2. “Public Record” States

Five states have enacted legislation subjecting recordings to state public access laws, by default. Nevada and California<sup>215</sup> provide few privacy protections by making all recordings public records of the state, while Indiana, Oklahoma, and Texas impose limitations for members of the public seeking access.

Nevada designates body camera recordings made by peace officers<sup>216</sup> and Nevada Highway Patrol<sup>217</sup> as public records subject to the state’s public records laws. Both statutes permit disclosure only on a “per incident basis” and limit inspection to the location where the record is held, if confidential information cannot be redacted.<sup>218</sup> There does not appear to be an exemption for judicial proceedings or police investigations in Nevada’s public records laws.<sup>219</sup> Moreover, Nevada public records laws permit distribution of public records to members upon request.<sup>220</sup> Nevada does account for redaction of confidential information prior to distribution, though under a separate provision from the body camera statute, which remains silent on redaction.<sup>221</sup>

Nevada’s public records laws live up their purpose of “foster[ing] democratic principles”<sup>222</sup> and providing liberal, sweeping access to body camera

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215 Analysis of California’s public records statute will not occur here because it is substantially similar to Nevada law. See CAL. PENAL CODE § 832.18(d) (West 2015) (“Nothing in this section shall be interpreted to limit the public’s right to access recorded data under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code).”). For California’s entire body camera statute, see *id.* § 832.18.

216 NEV. REV. STAT. ANN. § 289.830(2) (West 2015).

217 *Id.* § 480.365(2) (effective Jan. 1, 2017).

218 See *id.* §§ 289.830(2) (a)–(b), 480.365(2) (a)–(b).

219 See *id.* §§ 239.001–239.330 (defining Nevada’s public records laws); see also *id.* § 239.0105 (outlining “[c]onfidentiality of certain records of local governmental entities”).

220 *Id.* § 239.010(4) (effective July 2, 2017).

221 See *id.* § 239.010(3) (establishing that the government may not deny a request for a public record “if the governmental entity can redact, delete, conceal or separate the confidential information from the information included in the public book or record that is not otherwise confidential”).

222 *Id.* § 239.001(1).

recordings. Given Nevada's presumption of "constru[ing] liberally" provisions of its information laws to fulfill its democratic purpose,<sup>223</sup> the lack of disclosure exceptions for law enforcement investigations and judicial proceedings is discouraging, and suggests the law is geared more toward transparency and less toward ensuring privacy protections.

On the other hand, Oklahoma has subjected body camera recordings to its public records law, while providing numerous exceptions to ensure privacy protections where they are needed most.<sup>224</sup> The 2015 Oklahoma law amended the Oklahoma Open Records Act to encompass video recordings from police body cameras.<sup>225</sup> The law subjects a wide range of incidents to public records laws, including recordings of: "use of any physical force or violence by a law enforcement officer," pursuits, traffic stops, persons being arrested or cited, and detentions for investigative purposes.<sup>226</sup> The law counteracts the breadth of its public access, however, by allowing the state to "redact or obscure specific portions of the recording" in a variety of different circumstances.<sup>227</sup> These situations include, among others, the death of a person not caused by law enforcement, identifying minors under sixteen years of age, identifying victims of sex crimes or domestic abuse, witnesses providing information to law enforcement, confidential informants, information that would "materially" compromise an ongoing law enforcement investigation, and identities of officers subject to internal investigation.<sup>228</sup> Notably, the statute does not redact or obscure identities in a video depicting the death of a person, acts of severe violence, and depictions of great bodily injury if law enforcement officers effectuate such events.<sup>229</sup>

Oklahoma's body camera law strikes a balance between disclosure and ensuring privacy. Oklahoma emphasizes public access in a wide range of incidents where complaints against officers and use-of-force are likely to occur, while providing redaction in instances where subjects are most vulnerable—such as victims, witnesses, and children—and also allows an exception for "ongoing criminal investigation[s] or . . . criminal prosecution[s]."<sup>230</sup> While situations of death and severe violence are not redacted, disclosure indicates an emphasis on transparency where it is needed most. Victims have an interest in privacy in these situations, so an additional provision requiring consent to disclosure could enhance Oklahoma's law without significantly hindering transparency. This combination demonstrates a strong balance

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223 *Id.* § 239.001(2).

224 *See* An Act Relating to the Oklahoma Open Records Act, 2015 Okla. Sess. Laws 4–13 (codified at OKLA. STAT. ANN. tit. 51, § 24A.8 (West)).

225 OKLA. STAT. ANN. tit. 51, § 24A.8(10)(a).

226 *Id.* § 24A.8(10)(a)(1)–(4), (6). For the remaining situations, see *id.* § 24A.8(10)(a)(5), (7)–(10).

227 *Id.* § 24A.8(10)(b).

228 *Id.* § 24A.8(10)(b)(1), (3), (8)–(10), (12)–(13).

229 *Id.* § 24A.8(10)(b)(1), (4)–(5).

230 *Id.* § 24A.8(10)(b)(12).



between transparency where it is likely needed and privacy protections where they matter most.

The Nevada and Oklahoma statutes demonstrate that subjecting body camera recordings to public disclosure laws can have two drastically different impacts on privacy rights—with Oklahoma providing greater privacy protections than Nevada. Accordingly, this Note argues the decision to subject recordings to state freedom of information laws *does not* determine whether privacy is adequately protected. Rather, the aforementioned analysis demonstrates states can implement a variety of structural mechanisms, by way of exemptions to public disclosure, strict redacting policies, or even judicial orders, to properly walk the line between public access and privacy interests.

#### CONCLUSION

Body camera technology has propelled society into a new realm of modern policing. The capacity to record intimate interactions between citizens and law enforcement has vast potential to remedy the broken trust that defines this current relationship. With this great potential to heal, however, come several side effects; and the great rehabilitative possibilities can only be realized if the negative effects are managed carefully. This means states must fashion body camera laws in a manner that properly balances privacy interests and access to recordings.

State laws must respect the privacy of individuals when they are most vulnerable by mandating officers provide notice and then acquire consent before recording—otherwise the camera should be deactivated altogether. These situations include interviewing victims or witnesses of crimes, confidential informants, and recordings inside private residences. However, where intimate privacy interests are not at risk, such as during pedestrian stops, traffic stops, or arrests—the very situations most likely to lead to law enforcement use-of-force—recordings should continue to roll in order to civilize police and citizen interactions and also create an evidentiary record necessary to exonerate proper police conduct and punish unlawful use-of-force. Once recordings are created, states must develop a public access infrastructure that balances the privacy interests of individuals captured in footage with the public's interest in observing police practices. This requires first empowering state actors and citizens alike to “flag” recordings for alleged misconduct. It then requires restricting video observation only to parties affected by the events in recordings and law enforcement. Finally, accountability is only achieved through transparency of police practices. Recordings must be publicly disclosed at the conclusion of police investigations and judicial proceedings, or when law enforcement and subjects in recordings consent to disclosure. Identities of individuals must also be redacted upon disclosure, unless consent is given.

Through recent legislation, states have created a variety of legal regimes regulating the use of cameras and access to their recordings. Within the parameters of policy judgments advanced by this Note, state legislation has produced mixed results. While many states have specifically accounted for

privacy interests where recording subjects are vulnerable, some have failed in this regard. Further, almost across the board, states are deficient in mandating notice and consent requirements for interviews. On the access side, states are weak in prescribing redaction policies, but strong in enabling law enforcement to publicly disclose recordings and allowing subjects of recordings to access footage.

As a cohesive whole, states have managed to identify and address the privacy and access concerns this Note has highlighted. However, individual states continue to have gaps in policy, with some larger than others. Ultimately, body camera implementation is still in its infancy and states have to start somewhere. Justice Brandeis once wrote that one of the great features of federalism is that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>231</sup> This idea permeates through the wide range of policy structures states have created. There is strong optimism in that states have identified and sought to remedy the most pressing concerns body cameras create. Through the passage of time and experimentation, the optimal balance of privacy protections and public access is likely to be achieved.

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231 *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).