



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY



Issue Brief

**Police Body-Worn Cameras:
Evidentiary Benefits and Privacy Threats**

Marc Jonathan Blitz

May 2015

Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats

Marc Jonathan Blitz

Should police departments require officers to wear cameras that record their interactions with the public? If so, when and how should these recordings take place? Who should have access to the video data police gather, and under what circumstances?

These questions are not entirely new. The Oakland police force began using body-worn cameras in 2010,¹ and the debate over their merits goes back even further. But in the wake of widespread protests that followed the police-involved killings of Michael Brown in Ferguson, Missouri, Eric Garner in Staten Island, New York, Walter Scott, in North Charleston, South Carolina, and Freddy Gray, in Baltimore, Maryland, body-worn cameras have become a central policy proposal. Numerous police departments, including Ferguson's, have begun requiring police to use body-worn cameras.² Many other departments are considering their adoption. Even the federal government has weighed in. In the wake of intense protests over the grand jury finding in the Ferguson case, President Obama proposed a "Body Worn Camera Partnership Program," in which the federal government would spend \$75 million to help local governments "purchase 50,000 body worn cameras."³

Proponents of police body-worn cameras argue that they represent a game changing technology that can improve police accountability. A visual record of what occurs during a police encounter makes it more difficult for officers to deny excessive use of force or other abuse when it happens and more difficult for accusers of police to fabricate abuse or misconduct where it is absent. These benefits come not only in the form of more accurate fact-finding after an incident, but also in deterrence of wrongdoing beforehand. As one police chief said of the cameras used by his department, "Everyone is on their best behavior when the cameras are running. The officers, the public, everyone."⁴ Moreover, like other video footage gathered by law enforcement cameras—such as those mounted above city streets or on the dashboards of police vehicles—footage from body-worn cameras can provide valuable evidence in solving crimes.

But the rush to adopt and implement body-worn cameras has also generated intense skepticism and criticism. Police body-worn cameras, critics point out, threaten privacy in much the same way the state threatens citizens' privacy anytime it records their activities. Such a threat is especially worrisome where police cameras record details from inside people's homes or other private areas. But it may also raise privacy concerns, albeit less significant ones, where cameras record people in public spaces.

¹ Matier & Ross, *Police Body Cameras Don't Catch People at Their Finest Hour*, THE SAN FRANCISCO CHRONICLE, (May 3, 2015), <http://www.sfchronicle.com/bayarea/article/Police-body-cameras-don-t-catch-folks-at-their-6239647.php>.

² See Elisha Fieldstadt, *Should Every Police Officer Be Outfitted with a Body-worn camera?*, NBC NEWS (Nov. 26, 2014), <http://www.nbcnews.com/storyline/michael-brown-shooting/should-every-police-officer-be-outfitted-body-worn-camera-n256881> (noting that Ferguson police began wearing body cameras after the Michael Brown shooting); Drew Harwell, *The body-worn camera industry is 'feeling phenomenal' after Ferguson*, THE WASHINGTON POST (Dec. 3, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/12/03/the-body-worn-camera-industry-is-feeling-phenomenal-after-ferguson/>.

³ Andrea Peterson, *President Obama Wants to Spend \$75 Million to Buy Police Bodycams*, THE WASHINGTON POST (Dec. 1, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/01/president-obama-wants-to-spend-75-million-to-buy-police-bodycams/>.

⁴ POLICE EXEC. RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED (2014) [hereinafter POLICE EXEC. RESEARCH FORUM], available at <http://ric-zai-inc.com/Publications/cops-p296-pub.pdf>.

Citizens' expectations of privacy are, of course, lower in streets and parks than they are at home, and they cannot insist that their actions in these places remain free from police monitoring. This doesn't mean, however, that they should expect that every encounter with the police will be part of a permanent video record, accessible to anyone who wishes to obtain it through an open records law, or Freedom of Information Act, request.

What makes such sacrifices in privacy even worse, in the view of critics, is that society may receive far less in return than some proponents of the body-worn cameras believe. Videos from body-worn cameras are not the objective, dispute-ending evidence that some regard them as. When a police body-worn camera records an event, it will record only from a certain location and angle. Some of what occurs during a police encounter may occur outside the camera's field of view or in conditions too dark to capture in detail. A camera on a police officer's uniform will show what happens in front of the police officer, but not the officer. And if the camera needs to be triggered before it starts recording, it may miss the precipitating event that would provide greater context for and clarity to the encounter.

How then should citizens and government officials respond to these differing stances on body-worn cameras? The most common response seems to be a middle ground that encourages police to adopt the cameras, but to do so thoughtfully. This includes awareness of these cameras' limits and a system of robust safeguards to protect the privacy of those they record. Police organizations, civil rights groups, and policy centers all embrace such a middle ground. The Police Executive Research Forum ("PERF"), for example, notes that while cameras have numerous potential benefits, "departments must anticipate a number of difficult questions—questions with no easy answers."⁵ The ACLU, likewise, argues that the cameras can improve police accountability but "*only* if they are deployed within a framework of strong policies to ensure they protect the public without becoming yet another system for routine surveillance *of* the public, and maintain public confidence in the integrity of those privacy protections."⁶ The Constitution Project also stresses that "[t]he use of body-worn cameras worn by law enforcement agencies presents a number of potential benefits as well as risks." As Professor Howard Wasserman writes, in his own call for careful implementation, the "ultimate effectiveness of body-worn cameras depends on the hard details of implementation."⁷

This Issue Brief endorses this increasingly popular middle ground position, emphasizing two points that deserve close attention from policy-makers, citizens, and courts as police body-worn camera programs take shape. First, while it is important not to treat body-worn cameras as a "magic bullet" that will solve all problems in police interaction with citizens,⁸ it is equally important not to overstate their disadvantages. Cameras do not provide a neutral window into reality, but they do provide visual evidence that is often far better than what fact-finders would have otherwise. Even when camera evidence is flawed, it is often far better than eyewitness accounts, especially when such eyewitness accounts are given long after the events. Moreover, properly educated police and courts can take stock of body-worn cameras' limitations when creating departmental policies and legal rules about the use of cameras and the video they generate.

⁵ *Id.*

⁶ Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All*, THE ACLU (Oct. 9, 2013), <https://www.aclu.org/technology-and-liberty/police-body-mounted-cameras-right-policies-place-win-all>.

⁷ Howard Wasserman, *Moral Panics and Body-worn Cameras*, WASH. U. L. REV. 1, 10 (Forthcoming 2015).

⁸ *See id.* at 3 (stating that "[w]hile body-worn cameras are a good idea and police departments should be encouraged and supported in using them, it is nevertheless important not to see them as a magic bullet."); *See* Neil Richards, *Can Technology Prevent Another Ferguson*, CNN (Sept. 2, 2014, 3:29 PM), <http://www.cnn.com/2014/09/02/opinion/richards-ferguson-cameras/> (arguing that "[t]he rhetoric surrounding [] the police cameras . . . suffers from" the belief that technology can fix every social problem.).

Second, camera evidence does carry significant risks to privacy, may chill police-citizen interactions, and may enable other misuses of government-controlled videos. Once video evidence is available, public officials, journalists and ordinary citizens may well want to view it for purposes beyond those the body-worn cameras were adopted to meet. A body-worn camera policy that gives adequate weight to privacy may sometimes have to limit access to video recordings. Members of the public may wish to see an unredacted video of another citizen's encounter with a police officer (over the objection of the citizen filmed). Some might insist that any video captured by a police body-worn camera be available to the public under open records laws, but as The Constitution Project points out, "most state open records laws were written before the use of body-worn cameras and may not take into account the privacy issues presented by their use."⁹ There may thus be good reason to prevent wide dissemination of "unredacted or unflagged" video, unless the citizens recorded agree to such dissemination.¹⁰ Police may understandably want to use video not just for investigations of violent encounters, but also to train police or periodically assess their on-the-job performance.¹¹ But an adequate privacy protection regime requires strong safeguards for the privacy of the citizens and, to some extent, the police officers depicted.

I. A Brief Overview of Body-Worn Cameras and Body-Worn Camera Policies

Before looking at the benefits and risks of police body-worn cameras, it is useful to understand the technology and policies police departments have adopted, and other organizations have suggested, for use of such cameras. As the name suggests, a body-worn camera is a small camera that is clipped to a police officer's uniform, on his chest or possibly to head-gear, such as glasses or a head-mount. It can then record video of the area in front of it and audio of the surrounding environment. The camera is either activated by the officer wearing it or automatically triggered by a sound, movement, or other stimulus. There are two brands that are currently the market leaders in the body-worn camera industry: Taser's AXON Body-worn cameras and VieVu's PVR. Other companies offering body-worn camera technology include FirstVu, Scorpion, Wolfcom USA, and Mutiview.

Body-worn cameras are hardly the first technology police have used to gather video evidence for investigations. Police experimented with installing closed-circuit TV ("CCTV") cameras over public streets in the 1970s and 1980s.¹² The video captured by these cameras was often too grainy to be useful. But CCTV cameras gained renewed popularity in 1990s and 2000s, when numerous cities took advantages of powerful new camera and computer technology to record large stretches of urban public space.¹³ Washington, D.C., New York, and Chicago, all embraced such public cameras systems, as did many small communities.¹⁴ Police also embraced mobile cameras in the 1980s and 1990s, by fitting the dashboards of police vehicles with a camera (or "dashcam") to record traffic stops and other police encounters on the road.

⁹ THE CONSTITUTION PROJECT, *THE USE OF BODY-WORN CAMERAS BY LAW ENFORCEMENT* 5 (2015).

¹⁰ *Id.*

¹¹ See POLICE EXEC. RESEARCH FORUM, *supra* note 4, at 7 ("Many police agencies are discovering that body-worn cameras can serve as a useful training tool to help improve officer performance."); INT'L ASS'N OF CHIEFS OF POLICE, *CONCEPTS AND ISSUES PAPER: BODY-WORN CAMERAS* 5 (2014), available at <http://www.aele.org/iacp-bwc-mp.pdf> ("Unusual or even routine events recorded on tape can be used in basic academy and in-service training to reinforce appropriate behavior and procedures, to demonstrate inappropriate practices and procedures, to enhance interpersonal skills and officer safety habits, and to augment the instructional routines of field training officers and supervisory personnel.").

¹² See Quentin Burrows, *Scowl Because You're On Candid Camera: Privacy and Video Surveillance*, 31 Val. U.L. Rev. 1079, 1103 (1997).

¹³ See Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space, Fitting the Fourth Amendment to a World That Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1350-54 (2004).

¹⁴ See Marc Jonathan Blitz, *The Fourth Amendment Future of Public Surveillance Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21, 24-25 (2013).

In their primer on police-worn body-worn cameras, Alex Mateescu, Alex Rosenblat, and danah boyd observe that body-worn cameras are only the latest step in a decades-long experimentation by police with various forms of video surveillance.¹⁵ Even before the recent, intense news coverage of deadly police encounters, many police and other officials considered body-worn cameras a possible answer to the problem that dashcams recordings cover only those law enforcement encounters occurring near a police vehicle. Many cities, including Oakland, California, Rialto, California and Mesa, Arizona have adopted body-worn camera programs.

Rialto and Mesa are the sites of the most prominent pilot studies done to date in the United States to measure the effect of body-worn cameras.¹⁶ Both studies found the use of the cameras correlated with significant reductions in complaints about police and use-of-force incidents,¹⁷ although Mateescu, Rosenblat and boyd warn that drawing general conclusions may be premature.¹⁸ Michael White similarly warns that these pilot studies leave certain questions unanswered and calls for more research. Discussing the Rialto and Mesa studies, as well as other body-worn camera studies performed internationally,¹⁹ White notes that “several of the empirical studies have documented substantial decreases in citizen complaints as well as in use of force by police and assaults on officers.”²⁰ However, it is unclear precisely how body-worn cameras might generate such outcomes.²¹

Despite these unanswered questions, the past year has seen far more calls for widespread adoption of body-worn camera programs—including from residents in cities where some of the widely reported police shootings occurred and from the White House. Where body-worn cameras were not previously used, government officials have advocated or, in some cases, insisted on them. In 2013, for example, Judge Shira Scheindlin ordered New York City police officers to wear cameras as part of a one-year pilot program in her ruling on stop-and-frisk searches.²² Articulating criticism that is now raised more frequently, New York’s mayor at the time, Michael Bloomberg, responded that the cameras were “a solution that is not a solution to the problem” and would not prevent disputes from arising over whether police frisks were justified.²³

¹⁵ Alexandra Mateescu, et al., POLICE-WORN BODY-WORN CAMERAS, WORKING PAPER, DATA & SOCIETY RESEARCH INSTITUTE 4-5 (2015).

¹⁶ POLICE FOUND., SELF-AWARENESS TO BEING WATCHED AND SOCIALLY DESIRABLE BEHAVIOR: A FIELD EXPERIMENT ON THE EFFECT OF BODY-WORN CAMERAS ON POLICE USE OF FORCE (2013) (describing the results of a large-field experiment in Rialto, California), *available at* <http://www.policefoundation.org/sites/g/files/g798246/f/201303/The%20Effect%20of%20Body-Worn%20Cameras%20on%20Police%20Use-of-Force.pdf>; HAROLD RANKIN, END OF PROGRAM EVALUATION AND RECOMMENDATIONS: ON-OFFICER BODY CAMERA SYSTEM (Mesa Police Department, 2013) (describing results of Mesa, Arizona on-body camera study); *see also* POLICE EXEC. RESEARCH FORUM, *supra* note 4, at 5-6.

¹⁷ *See* RANKIN, *supra* note 16; *see* POLICE FOUND., *supra* note 16, at 8 (finding, in a study of Rialto Police Department’s use of cameras, that “[s]hifts without cameras experienced twice as many incidents of use of force as shifts with cameras”).

¹⁸ *See* Mateescu, *supra* note 15, at 7.

¹⁹ Studies have been conducted in cities including Phoenix, Arizona, Plymouth, England, and Renfrewshire/Aberdeen, Scotland. *See* MICHAEL D. WHITE, POLICE BODY-WORN CAMERAS: ASSESSING THE EVIDENCE, DEPARTMENT OF JUSTICE: OFFICE OF JUSTICE PROGRAMS 5-6 (2014).

²⁰ *Id.*

²¹ *Id.*

²² *Floyd v. City of New York*, 959 F. Supp. 2d 540, 563 (S.D.N.Y. 2013) (finding New York use of stop-and-frisk searches violated the Constitution, and ordering remedies including “a trial program requiring the use of body-worn cameras in one precinct per borough.”).

²³ *See* Joseph Goldstein, *Judge Rejects New York Stop-and-Frisk Policy*, NEW YORK TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html> (the City

While there are still many unanswered questions about how body-worn cameras will operate and how effective they will be, studies and analyses by PERF and others in the last few years have already begun to identify and address some of the key challenges body-worn cameras raise.²⁴ This work thus helps reduce, to at least some extent, the risk Wasserman warned against, that police will adopt body-worn cameras as part of a “moral panic,” without adequate consideration of their limits and dangers.²⁵ This Issue Brief will address these questions, including when recording should be permitted or mandated, how recordings should be stored, and who should have access to the recordings. It will also offer recommendations regarding these concerns.

II. The Potential Benefits and Limits of Video Surveillance

Those concerned with the rush to adopt police body-worn cameras warn that the hopes placed on them are likely to far outweigh their real benefits. Professor Neil Richards, for example, cautions against seeking a quick “technological fix” for deep-seated “cultural and social problems” such as “[p]olice brutality, profiling, racism and economic inequality.”²⁶ Professor Justin Hansford takes an even dimmer view of police body-worn cameras, noting that in many cases they “could do more harm than good to the cause of protecting citizens from police violence,” because their “footage provides a one-sided view of the interaction, allowing outsiders to scrutinize the citizens’ every move, but leaving them blind to the police officers’ behavior.”²⁷

Such critiques provide an invaluable warning that body-worn camera evidence is unlikely to deliver all of the benefits some expect. But still it may—even with its limits and flaws—be valuable for two major reasons. First, it may be a significant improvement on the evidentiary record that jurors and others normally have in a world *without* such video evidence. Second, a body-worn camera program can be structured in a way that partly accounts for these limits instead of ignoring them.

A. Video Evidence vs. Eyewitness Accounts

Even if it cannot provide a decisive, dispute-ending answer to the question of what happened during a police encounter, a video record of an encounter can at least give jurors a starting point. While subject to interpretation, video may provide a far more solid foundation for further investigation than eyewitness testimony, the reliability of which has been called into serious question in recent years.²⁸ These mental recordings are, in many respects, far more problematic as evidence than video footage. First, eyewitness testimony is constrained by the psychological limits on human attention. Human beings cannot consciously focus on, and remember, everything that happens in front of them. They typically focus only on those elements of the action that are prominent or otherwise important. In the absence of video surveillance, eyewitness testimony is generally the only kind of “visual” evidence that fact-finders will have of a police encounter.

To be sure, this failure to notice an important detail can also affect the way a fact-finder perceives and understands the sequence of events captured in a video. Video, however, has features that make it easier to correct for this problem. A court can rewind and rescreen a video for jurors, who might notice

appealed Judge Scheindlin’s rule but ultimately agreed to voluntarily dismiss its appeal); *See Floyd v. City of New York*, 770 F.3d 1051, 1056 (2d Cir. 2014).

²⁴ *See* POLICE EXEC. RESEARCH FORUM, *supra* note 4.

²⁵ Howard Wasserman, *Moral Panics and Body-Worn Cameras*, WASH. U. L. REV. 1, 7 (Forthcoming 2015).

²⁶ Neil Richards, *Can Technology Prevent Another Ferguson*, CNN (Sept. 2, 2014, 3:29 PM), <http://www.cnn.com/2014/09/02/opinion/richards-ferguson-cameras/>.

²⁷ Justin Hansford, *Body-worn Cameras Won’t Stop Police Brutality. Eric Garner is Only One of Several Reasons Why*, THE WASHINGTON POST (Dec. 4, 2014), <http://www.washingtonpost.com/posteverything/wp/2014/12/04/body-worn-cameras-wont-stop-police-brutality-eric-garner-is-only-one-of-several-reasons-why/>.

²⁸ *See State v. Henderson*, 27 A.3d 872 (N.J. 2011).

elements of the event on a second or third viewing that they did not notice on a first. Moreover, a detail missed or misunderstood by one fact-finder watching a video might be noticed, or more accurately understood, by another. By contrast, while effective cross-examination might reveal the flaws in a witness's perception or memory, jurors or judges cannot—in the absence of a video—compare it against any raw visual data to reach an independent conclusion about what happened.

Such video can still be subject to biased interpretation (as discussed below). But in the case of eyewitness testimony, the viewer's biases do not simply exert a powerful influence on how visual data is interpreted; they shape the visual data itself. Biases are built into the eyewitness record in a way they are not built into a video of the scene. Video, of course, is far from a comprehensive record of what occurred, but it is less likely (absent very careful and conscious manipulation of the camera or microphone) to be as skewed by emotions or personal loyalties as human memory.

In fact, many of the same features that make video evidence more potentially damaging for privacy than unrecorded human observation also make it far better as evidence. As Justice Harlan wrote in *United States v. White*, recording technology creates a record that insures “full and accurate” capture of “all that is said, free of the possibility of error and oversight that inheres in human reporting.”²⁹ This overstates the objectivity of video evidence, but it correctly emphasizes that a detailed video record threatens privacy far more than does a witness's recounting. This may be, in part, because video is more vivid than a retelling. But it is also because the video record provides more information, and cannot be accused of misremembering or fabricating events in the way human memory can. A video or audio recording of a conversation or event leaves room for interpretation. But it typically does not leave the person it records the freedom to deny that the recorded words were ever spoken or the recorded events ever happened. For example, when former LA Clippers' owner Donald Sterling was recorded making racist statements in a phone conversation, he could claim that the words were misunderstood or out of context, but (unless he attacked the authenticity of the recording) he could not deny that the words were his. Thus, as Justice Harlan points out, a recorded individual is not as free to “reformulate a conversation”—or tell a more favorable account—as he would be if it was merely his word against someone else's. He is constrained by the need to make any narrative he provided fit with “a documented record.”³⁰

While this constraint is sometimes undesirable, in criminal investigations it is better to prevent people from being able to “reformulate a conversation” or retell a narrative free of documented evidence's constraints. This is precisely the kind of constraint that evidentiary systems are designed to impose on their participants when it subjects them to oath, observation, and cross-examination. Whatever its imperfections, then, video evidence is often a significant improvement upon the evidence that would be available without it, such as eyewitness testimony. This is significant for judicial hearings where, as Professor Frederick Schauer points out, what matters is not whether the evidence is inherently strong or weak, but whether it is better than the alternative.³¹

Moreover, when video cameras are monitoring police, they are also a potentially valuable constraint on misuse of state power. As author and technologist David Brin emphasizes, by giving citizens access to video feeds showing police and other government actors, video technology becomes a

²⁹ *United States v. White*, 410 U.S. 745, 787 (1971).

³⁰ *Id.* at 788.

³¹ Frederick Schauer, *Can Bad Science Be Good Evidence? Neuroscience, Lie Detection, and Beyond*, 95 CORNELL L. REV. 1191, 1213 (2010) (“The question is . . . whether there are sound reasons to prohibit the use of evidence of witness veracity that is likely better, and is at least no worse, than the evidence of witness veracity that now dominates the litigation process.”).

key tool by which citizens can make sure that government does not abuse its power when it is using force, or when it is watching individuals with an eye to possible arrest or other government action.³²

Joshua Fairfield and Eric Luna similarly note that when “government and corporate entities gather and tap the stores of information about the populace, [t]his creates a dangerous imbalance where only the most powerful public and private actors may draw upon data about the general population.”³³ Correcting this imbalance, they argue, is especially important in cases where camera footage or other digital evidence can exonerate a criminal defendant. “The defense bar,” they note, “recognize[s] that a client being on camera, or being recorded, or being geo-located, can be . . . an important tool for establishing innocence.”³⁴

The availability of video may also prove valuable in helping to address racial bias and excessive use of force by providing evidence that is, in some ways, better than eyewitness testimony. Video evidence seems to have been important in prompting South Carolina prosecutors to file murder charges in a police officer’s April 4, 2015 shooting of Walter Scott.³⁵ Moreover, while the video footage of the chokehold that killed Eric Garner did not result in judicial accountability, it did subject the police to a kind of democratic accountability. Because the video was not confined to the grand jury room, it resulted in widespread criticism of police in the media, including conservative commentators who were far more willing to give the officer the benefit of the doubt in the Ferguson killing, where there was no video. In fact, a Bloomberg News polls showed that “60 percent of Americans disagree with the lack of an indictment against officer Daniel Pantaleo, whose chokehold apparently led to Garner’s death in July,” whereas only 36 percent felt that Darren Wilson should have been indicted for the death of Mike Brown in Ferguson.³⁶ According to some observers, it is camera footage that accounts for this difference. As the differing reactions to the Brown case compared to the Garner and Scott cases suggest, video footage is far more able than eyewitness testimony to shift the debate from questions about what occurred in a police encounter to questions about how a just and well-functioning society should prevent excessive use of police force. While public opinion alone does not assure that laws or government policies will change, it is often a necessary precondition to provoke such change. Consequently, video footage may better catalyze strong public opinion, increasing the odds for policy reform.

B. The Evidentiary Limits of Video Surveillance

There is ample reason to think that video footage of police encounters can offer significant benefits in monitoring police and holding them accountable, as well as exonerating those officers who are subject to false accusations of wrongdoing. As noted earlier, the pilot studies in Rialto, California and Mesa, Arizona offer some support for this expectation.

But a documented record cannot serve as a constraint on fact-finders if the judicial system allows fact-finders to ignore it or interpret it in a way viewers would normally find implausible or unreasonable. Many media reports reflected such concerns after a grand jury decided not to indict New York police officer Dan Pantaleo after the death of Eric Garner. CNN reported that “police use of force has remained

³² See DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM* (1999).

³³ Joshua Fairfield A.T. and Eric Luna, *Digital Innocence*, 99 CORNELL L. REV. 981, 985 (2014).

³⁴ *Id.* at 988-989.

³⁵ See Alan Blinder and Marc Santora, *Officer Who Killed Walter Scott is Fired, and Police Chief Denounces Shooting*, NEW YORK TIMES (Apr. 8, 2015), http://www.nytimes.com/2015/04/09/us/walter-scott-shooting-video-stopped-case-from-being-swept-under-rug-family-says.html?_r=0 (noting “swift action taken by local prosecutors after the video surfaced”).

³⁶ Aaron Blake, *Why Eric Garner is the Turning Point Ferguson Never Was*, THE WASHINGTON POST (Dec. 8, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/12/08/why-eric-garner-is-the-turning-point-ferguson-never-was/>.

relatively static despite the increasing popularity of camera phones over the years,³⁷ and that people “took to Twitter to question the usefulness of body-worn cameras if a grand jury won’t indict an officer who was caught on video using a maneuver banned by his own police department.”³⁸ The New York Times likewise quoted experts who observed that police body-worn cameras “are no ‘safeguard of truth,’” noting that it was not only “the footage of Eric Garner’s death” and the subsequent failure to indict which revealed “the shortcoming of video as evidence,” but also the video of “Rodney King’s 1991 beating by Los Angeles police officers.”³⁹ More specifically, say some critics, even video that clearly depicts police use of excessive force will not give police the sense that they are accountable for their actions where: (1) the substantive law makes it difficult for a jury to find police guilty in such case, regardless of video evidence;⁴⁰ and (2) state or local government will not act vigorously to hold officers accountable for excessive use of force.

In addition, although video is superior in many ways to the unreliable memories of eyewitnesses, its purported accuracy may lull jurors into ignoring its limits. Even events visible in the camera footage will almost always require interpretation, and jurors will only engage in such interpretation after lawyers (or parties or witnesses) provide information necessary to place the video in a larger narrative. Viewers of video, just like eyewitnesses, may simply fail to notice important details, events or objects when their attention is focused elsewhere, perhaps by lawyers or witnesses explaining the scene. Moreover, to a far greater extent than eyewitness testimony, video likely provides jurors with an illusion of objectivity. Jurors recognize that witnesses can lie or misremember, especially if cross-examination of a witness reveals awkwardness, inconsistencies, or lapses in memory. Jurors may well be less aware of how video evidence can be selective and subject to interpretation, including interpretations which distort, rather than clarify what happened in a police encounter. Jurors are more likely to believe that seeing events in a video is akin to witnessing the events with their own eyes.

Jurors may also bring biases to interpreting a video. Furthermore, they might be oblivious to these biases and believe, wrongly, that video “speaks for itself” by providing an undistorted picture of the events it depicts. Commentators, for example, have harshly criticized a 2007 Supreme Court decision, *Scott v. Harris*,⁴¹ for treating a video of a police chase as establishing—with enough certainty to justify summary judgment in favor of the police—that the plaintiff’s own reckless driving had caused the accident that left him a quadriplegic.⁴² The Court posted the video and insisted that it “speak[s] for itself,” but Justice Stevens’ dissent found the video was subject to multiple interpretations.⁴³ So too did

³⁷ Eliot C. McLaughlin, *After Eric Garner: What’s the Point of Police Body-worn Cameras*, CNN (Dec. 8, 2014, 7:41 PM), <http://www.cnn.com/2014/12/04/us/eric-garner-ferguson-body-worn-cameras-debate/>.

³⁸ *Id.*

³⁹ Vivian Yee and Kirk Johnson, *Body-worn Cameras Worn by Police Officers Are No ‘Safeguard of Truth,’ Experts Say*, THE NEW YORK TIMES (Dec. 6, 2014), http://www.nytimes.com/2014/12/07/nyregion/body-worn-cameras-worn-by-police-officers-are-no-safeguard-of-truth-experts-say.html?_r=0.

⁴⁰ See Carol D. Leonnig, *Current Law Gives Police Wide Latitude to Use Deadly Force*, THE WASHINGTON POST (Aug. 28, 2014), http://www.washingtonpost.com/politics/current-law-gives-police-wide-latitude-to-use-deadly-force/2014/08/28/768090c4-2d64-11e4-994d-202962a9150c_story.html (noting that “[t]he law that determines when police can use deadly force generally gives officers considerable leeway.”); Ian Ayres and Daniel Markovitz, *Ending Excessive Police Use of Force Starts with New Rules of Engagement*, THE WASHINGTON POST (Dec. 25, 2014), http://www.washingtonpost.com/opinions/ending-excessive-police-force-starts-with-new-rules-of-engagement/2014/12/25/7fa379c0-8a1e-11e4-a085-34e9b9f09a58_story.html (“existing rules of engagement for police in the United States invite violence, not just when officers act abusively but also when their conduct falls clearly within the limits of the law.”).

⁴¹ 550 U.S. 372 (2007).

⁴² *Id.* at n.5.

⁴³ *Id.* (Stevens, J. dissenting) (noting that although the Court believed “no reasonable person could view the videotape and come to the conclusion that deadly force was unjustified . . . the three judges on the Court of Appeals panel apparently did view the videotapes entered into evidence and described a very different version of events.”).

commentators. A study by Professors Daniel Kahan, David Kauffman, and Donald Braman, found that different subjects of an experiment interpreted the video in different ways. Some subjects found that the plaintiff was behaving recklessly, but others saw the video as showing the police at fault.⁴⁴ This may suggest that video must be subject to close analysis by fact-finders who are informed of how video is created and its limits.

Still, video evidence from other sources has long been admissible in spite of these concerns and will continue to be a part of judicial proceedings. Even those scholars who, in the wake of *Scott v. Harris*, highlighted the dangers of video's false objectivity, have not argued for denying jurors and judges the chance to see video evidence. They have instead argued for measures that would help fact-finders view evidence more skeptically and evaluate it more carefully. They have explored, for example, how opposing parties' might clarify—in cross-examination—how videos might be subject to alternative interpretations, or how such courtroom discussions might make jurors more aware of what the video failed to capture. The same approach seems warranted for video evidence that comes from police body-worn cameras. A thorough answer to this challenge requires a more detailed consideration of fact-finders' psychology and perception of video evidence than there is space for here, but it is helpful to explore one of the more pressing issues, which is how to address partial or absent body-worn camera evidence.⁴⁵

The potential value of video evidence has a downside. Its absence, or failure to capture a particular event, may unfairly harm one side of a dispute. This possibility worries both parties in a legal forum. When body-worn cameras are switched off (or left off) during uses of police force, they fail to capture evidence that might be crucial to a court determining whether police misconduct occurred.⁴⁶ In Albuquerque, New Mexico for example, body-worn cameras were mandated by police rules but have “been used sporadically—police use cameras when it suits them, and they don't when it doesn't.”⁴⁷ A lack of video evidence can also unfairly undercut a police officer's account. Even where a body-worn camera program is in place, cameras might fail to record, not because police turn them off, but because they malfunction.⁴⁸ In some circumstances, police may have good reason to turn off their camera—to avoid capturing video or audio of an informant, to protect the privacy of a victim or a witness who would otherwise refrain from speaking with them, or to avoid capturing the inside of a home they are searching.⁴⁹ Some model body-worn camera rules, in fact, not only allow police to turn off cameras in

⁴⁴ See Daniel M. Kahan, et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

⁴⁵ One other question that has generated some disagreement is whether police should be able to rely on body-worn camera evidence in documenting a use-of-force or other incident and, if so, whether they should have access only to their own body-worn camera evidence, or that generated by other officers' cameras. This Issue Brief does not examine this topic, but it is worth noting that where body-worn camera rules do allow police to use body-worn camera evidence in writing reports, it should be made clear to fact-finders that that the documentation is not an entirely independent source of evidence based solely on the officers' memory of the event and interviews with witnesses. See POLICE EXEC. RESEARCH FORUM, *supra* note 4; see Letter from Wade Henderson, Pres. & CEO, The Leadership Conference, to President's Task Force on 21st Century Policing (Jan. 30, 2015), available at <http://civilrightsdocs.info/pdf/policy/letters/2015-01-30-letter-to-task-force-on-21st-century-policing.pdf>.

⁴⁶ See Jay Stanley, *Police Body-worn cameras: The Lessons of Albuquerque*, THE ACLU (Mar. 24, 2015, 11:25 AM), <https://www.aclu.org/blog/free-future/police-body-cameras-lessons-albuquerque?ct=ga&cd=CAEYACoUMTUzMDMwNTkzODUzMTgyNzYxMzgyGjkwNzAzZGRlZjJmM2YzZWm6Y29tOmVuOjVt&usg=AFQjCNHUKPgmnWSnJrw9O8hwxAJcA5sSbw&redirect=blog/criminal-law-reform-immigrants-rights-technology-and-liberty-free-speech/police-body-cameras-le>; see NAT'L LAW ENFORCEMENT POLICY CENTER, CONCEPTS AND ISSUES PAPER (2014).

⁴⁷ See Stanley, *Lesson of Albuquerque*, *supra* note 46.

⁴⁸ POLICE EXEC. RESEARCH FORUM, *supra* note 4, at 28.

⁴⁹ *Id.* at 23-24.

such situations, but require them to do so.⁵⁰ However, where jurors come to expect cameras, they may simply assume that in the absence of video evidence, nothing can convincingly corroborate a police officer's account.

To address these concerns, current and proposed rules for body-worn cameras contain before-the-fact protections intended to assure completeness and impartiality of recordings at the time a police officer decides to capture an event on camera. The International Association of Chiefs of Police ("IACP") model rules, for example, mandate recording "all contacts with citizens in the performance of official duties,"⁵¹ except in specified circumstances where recording is forbidden – such as recording undercover officers or informants or where a subject enjoys a reasonable expectation of privacy.⁵² They also specify that deactivation of the camera is permitted when the event has concluded or an officer's contact with a witness, victim, suspect, or arrestee has ended.⁵³ Other model rules give officers more leeway to make their own judgments about when recording is appropriate.⁵⁴ The IACP model rules also require police to document their reasons for turning a camera off.⁵⁵ As the PERF report notes, police may typically do so either by making a statement explaining their action just before the camera is switched off, or by documenting their reasons soon afterwards. The rules also require immediate reporting of a malfunction or loss of a camera.⁵⁶

Such rules regarding when to record have generated some debate. The ACLU, for example, advocated for a regime in which cameras operate almost all of the time. This would prevent officers from being tempted to switch the cameras off in situations that could adversely impact the officer or his colleagues. However, PERF is likely correct that officers will sometimes have to be left with some discretion to switch off cameras. This would admittedly come with a high risk to a body-worn camera program's legitimacy. As PERF notes, if citizens come to expect that police encounters will be captured on video, they may well be skeptical when police rely on justification for not recording an event that is later in dispute, especially if there is ambiguity in what counts as justification for turning off a camera.⁵⁷

Protections against selective video evidence might also come in the form of technological safeguards, which can include the camera design itself. As Mateescu, Rosenblat, and Boyd note:

Many body-worn camera models offer various safeguards to ensure that the data is not manipulated. The AXON Body by TASER International forbids users from deleting a video on the camera and marks the video with a security hash, which verifies that the video hasn't been tampered with. The FirstVu HD from Digital Alley offers optional software that logs each use of the video and generates a chain of custody report.⁵⁸

The after-the-fact protections are less controversial. To ensure that footage is quickly and safely preserved, the model body-worn camera rules require that video footage be "securely downloaded no later than the end of the officer's shift. Each file shall contain information related to the date, body-worn

⁵⁰ INT'L ASS'N. OF CHIEFS OF POLICE, BODY-WORN CAMERAS MODEL POLICY 1 (2014), *available at* <http://www.aele.org/iacp-bwc-mp.pdf>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ POLICE EXEC. RESEARCH FORUM, *supra* note 4, at 22-23.

⁵⁵ INT'L ASS'N. OF CHIEFS OF POLICE, *supra* note 50, at 2.

⁵⁶ *Id.*

⁵⁷ POLICE EXEC. RESEARCH FORUM, *supra* note 4, at 28 (noting that "people often expect that officers using body-worn cameras will record video of everything that happens while they are on duty" and that "these expectations can undermine an officer's credibility if questions arise about an incident that was not captured on video.").

⁵⁸ Mateescu, *supra* note 15, at 6.

camera identifier, and assigned officer.”⁵⁹ The rules state, “Officers shall not *edit, alter, erase*, duplicate, copy, share, or otherwise distribute in any manner body-worn camera images and information without the prior written approval of the chief or the chief’s designee.”⁶⁰ They also strictly limit attempts to delete video footage, stating that “[r]equests for deletion of portions of a recording from a body-worn camera (e.g., in the event of a privileged or personal recording) must be submitted in writing to the chief in accordance with state records retention laws.”⁶¹ As IACP says in its explanation for its model rules:

Officers should never erase or in any manner alter recordings. The agency must maintain strict managerial control over all devices and recorded content so that it can ensure the integrity of recordings made by officers. Failure of officers to assist in this effort or the agency to take managerial control over recordings can risk the credibility of the program and threaten its continuation as a source of credible information and evidence.⁶²

Courts and legal rules also provide some means for addressing the problems of missing or deleted videos. Of course, where incomplete video evidence raises significant dangers of unfair prejudice, courts may use some of the same rules—from the Federal Rules of Evidence (FRE) or its state analogues—that they use to address other problematic evidence. Under Rule 403 of the FRE, courts may exclude evidence even where it is relevant “if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”⁶³ Under Rule 106, they can require a party to show a complete version of a video from which they have used only a segment.⁶⁴

Courts might also use adverse jury instructions, or impose other sanctions, to discourage police from unjustifiably turning off body-worn cameras. As a general matter, when “potentially relevant evidence is destroyed prior to the commencement of litigation or the service of a discovery request under the Federal Rules of Civil Procedure, the court may sanction the party responsible for the destruction of evidence pursuant to its inherent authority.”⁶⁵ Such a sanction may consist of “giving an adverse jury instruction,” but in serious cases, courts may also grant the sanction of dismissal or default against the party that destroyed the evidence. Just as courts often instruct the jury to presume that intentionally destroyed evidence was unfavorable to the party destroying it, so they could instruct juries to presume that a gap in video footage of a police confrontation is unfavorable to a police officer who has turned off a body-worn camera or dashcam, unless that officer can supply a justification for turning off the camera, or explain that it was due to a malfunction or otherwise unintentional.

This rule has sometimes been invoked to sanction the destruction of evidence from police dashboard cameras. In *Peschel v. City of Missoula*, for example, the district court sanctioned the city for failing to preserve evidence recorded by a dashcam. The court noted that the dashcam video was the “best evidence [of] what occurred during the arrest” that led to Peschel’s suit against the police for excessive

⁵⁹ LABOR RELATIONS INFORMATION SYSTEM, BODY-WORN CAMERAS POLICY (2014), <http://www.lris.com/wp-content/uploads/2014/09/Model-Body-Camera-Policy.pdf>.

⁶⁰ *Id.* (emphasis added).

⁶¹ *Id.*

⁶² See NAT’L LAW ENFORCEMENT POLICY CENTER, *supra* note 46.

⁶³ FED. R. EVID. 403.

⁶⁴ FED. R. EVID. 106 (“[i]f a party introduces all or part of a writing (or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.”). A court might apply this rule not only to “statements,” but to video recordings, as some state courts have for analogous state rules of evidence. *E.g.*, *Bunch v. State*, 123 So. 3d 484, 493 (2013) (citing *Wells v. State*, 604 So. 2d 271, 277-78 (Miss. 1992)) (stating that while the rule refers “only to writings and recorded statements,” Mississippi law “applies the rule equally to video recordings.”).

⁶⁵ *Maxim v. E.P. Holdings*, 2014 WL 200545, at *2 (D. Nevada 2014).

use of force.⁶⁶ In other cases, courts refused to apply sanctions (or dismiss a government’s claim or charge) because there was insufficient evidence that: 1) dashcam video existed;⁶⁷ 2) police’s destruction of the video was done in bad faith; or 3) some other improper motive existed to justify a sanction.⁶⁸

Courts could conceivably apply such sanctions not simply to destruction of video created by body-worn cameras, but also in circumstances where an officer fails to capture such video by turning the camera off. The New York Civil Liberties Union, for example, has suggested that “department disciplinary rules should create a presumption against the officer for failing to record an interaction when required to do so (rebuttable through evidence of mechanical malfunction). In court proceedings, a presumption against the officer’s version of events could be employed to encourage recording of interactions.”⁶⁹

One question courts would confront under such a regime is precisely when a failure to record would trigger such a presumption. PERF and others have suggested that there are circumstances where police officers might justifiably turn off cameras. The New York Civil Liberties Union rule, in comparison, is more limited, allowing only evidence of malfunction to rebut the presumption. Importantly, if a department’s body-worn camera policies incorporate reasonable justifications for turning off a camera, courts should rightly be expected to take these policies into account when considering evidentiary presumptions.

In many cases, one of the best antidotes to the potential confusion generated by body-worn cameras might come from *other* cameras. Consider a recent New Jersey case in which footage from a dashboard camera seemed consistent with police accounts that a suspect had responded to police with violence.⁷⁰ The video showed police yelling at the suspect to “stop resisting” and stop trying to take the officer’s gun.⁷¹ The suspect was charged with “eluding police, resisting arrest, and aggravated assault on an officer.”⁷² But prosecutors dropped the charges upon finding video evidence from a second patrol car showed that the suspect “sat peacefully in his car with his hands in the air as the officers broke the window.”⁷³ This case dramatically demonstrates both the limits of video evidence (from the first, original dashcam) as well as its value (in the later-discovered second dashcam). Just as there were multiple dashcam videos for police officials and prosecutors to review in this case, there are likely to be multiple body-worn camera videos when more than one officer is on the scene. Moreover, as CCTV cameras, cell phone cameras, and perhaps aerial surveillance video become more common, courts, prosecutors and defense attorneys will have still more video evidence to draw upon, raising the possibility that gaps in one video will be filled in by information from another video.

⁶⁶ *Peschel v. City of Missoula*, 664 F. Supp. 2d 1137, 141-1145 (D. Mont. 2009).

⁶⁷ *E.g.*, *Clayton v. Columbia Casualty Co.*, 547 Fed.Appx. 645, 652 (2013) (refusing to apply sanctions for alleged destruction of video from a “dashboard camera” because “[a]ppellants have not provided any evidence the video existed.”).

⁶⁸ *Martin v. State*, 2011 WL 3518050 *4; *5 (Tex. Ct. App., 2011) (memorandum opinion) (finding lack of evidence that police officer’s “decision not to mark the tape as evidence” was done in bad faith in ruling on a motion to suppress evidence).

⁶⁹ *Listening Session on Technology and Social Media: President’s Task Force on 21st Century Policing*, NYCLU (January 31, 2015), <http://www.nyclu.org/content/testimony-regarding-risks-of-police-body-worn-cameras>.

⁷⁰ Sasha Goldstein, *Police Dash Cam Video Exonerates New Jersey Man, Indicts Cops*, NEW YORK DAILY NEWS (Feb. 25, 2014, 8:14 PM), <http://www.nydailynews.com/news/crime/police-dash-cam-video-exonerates-nj-man-implicates-cops-article-1.1701763>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

III. Protecting Privacy Rights in a Police Body-Worn Camera Program

A. Fourth Amendment Limits

Whatever their benefits for insuring police accountability, video cameras carry costs for our privacy. Like all cameras that capture citizens as they go about their lives, cameras worn by police may transform ephemeral and forgettable actions into permanent and easily shared records of our activity. Moreover, because these records would involve interaction with law enforcement, the segments of our lives they capture might be among those we are least comfortable sharing with others.

Some critics of body-worn cameras have warned that by routinely recording the activities of citizens that unfold in front of a police officer, government would be engaging in a Fourth Amendment search.⁷⁴ Such a search is generally impermissible under the Constitution, unless police obtain a warrant based upon probable cause, or can otherwise demonstrate the search is reasonable. However, police body-worn cameras are unlikely, in most circumstances, to raise Fourth Amendment concerns. Under the Fourth Amendment, the Supreme Court has said repeatedly that police officers are not required to “close their eyes” to action that is visible to everyone else. As Justice Scalia recently wrote, the Court has never “deviated from the understanding that mere visual observation does not constitute a search.”⁷⁵ Nor has the Court held that officers violate the Fourth Amendment by taking pictures of that which is already visible to them.⁷⁶ In short, where an officer has a right to be, he generally may look at, photograph, or record his surroundings, free of Fourth Amendment limitations. His doing so reduces individuals’ privacy somewhat, but according to the Court’s precedent, not in a way that intrudes upon the private space that the Fourth Amendment is meant to shield from government surveillance.

When a person is in a private space, like a home, he is protected not only from police observation, but also from police presence.⁷⁷ An officer cannot even enter the home, let alone view and record it, without either a search warrant or a resident’s permission. On the other hand, if an officer is already in a place that she has a right to be—walking or driving on the streets she is charged with patrolling—or she has permissibly entered a private space, the police officer no longer has to worry about crossing a boundary that the Fourth Amendment generally bars her from crossing.

There are, however, two reasons that police body-worn cameras might in some circumstances raise Fourth Amendment problems. First, when police enter a home pursuant to a valid search warrant, that warrant typically does not give them a right to examine *everything* in a home. Rather, the Fourth Amendment’s language itself requires that a warrant specify “the place to be searched, or the person or things to be seized.”⁷⁸ For example, a search warrant may allow police officers to search a home’s garage for evidence of methamphetamine production, but not give police authority to search any other part of the home. Or a warrant may give police authority to search an entire home for guns or other weapons, but not give them the right to rummage through spaces within the home—computers, personal diaries, or small desk drawers—where such weapons could not possibly be found. One problem with police body-worn cameras, or other video footage police take of a home search is that it can allow police to exceed the scope of their warrant by capturing footage that may reveal evidence from areas of the home they are not

⁷⁴ “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

⁷⁵ *United States v. Jones*, 132 S. Ct. 945, 953 (2012).

⁷⁶ See *Jackson*, 213 F.3d 1269, 1280 (10th Cir. 2000) (“The use of video equipment and cameras to record activity visible to the naked eye does not ordinarily violate the Fourth Amendment.”).

⁷⁷ See *Payton v. New York*, 445 U.S. 573, 586 (1980) (“[S]earches and seizures inside a home without a warrant are presumptively unreasonable.”).

⁷⁸ U.S. Const. amend. IV.

permitted to examine. For example, if police video footage records papers that are lying on a table when they enter, they may later be able to magnify the images they capture and read documents they would not have been permitted to read during the course of their search.

Under the “plain view” exception to the warrant requirement, police are typically permitted to examine items in, or areas of, a home that are outside the scope of their warrant if two conditions are met: (1) the item or area is visible to them from where they have a right to be; and (2) the incriminating character of the object they wish to examine is “immediately apparent.”⁷⁹ Body-worn cameras, however, would allow police to capture footage of visible items, the incriminating character of which is *not* immediately apparent, but becomes apparent only when the video is viewed, paused, rewound, and then subjected to further magnification or analysis. Moreover, even where police body-worn cameras avoid capturing any evidence outside the warrant’s scope, the footage they capture can intensify the privacy harm resulting from a search. Even when they stay scrupulously within the scope of their warrant, a person may well feel that his or her privacy has been far more violated when police not only enter their home, but create a potentially permanent record of the details within it. As the Court recognized in *Kyllo v. United States*, the Fourth Amendment is based upon the assumption that the home is a bastion of privacy, observing, “In the home . . . all details are intimate details, because the entire area is held safe from prying government eyes.”⁸⁰ It seems odd that the same constitutional privacy protections that allow “prying government eyes” into our houses only briefly, and with unusually compelling reasons to enter, would let them make a permanent record of it.

In *Wilson v. Layne*, the Supreme Court found that police violated a suspect’s right to be free from unreasonable search and seizure when they not only entered a house after obtaining a warrant for arrest, but brought with them a reporter and a photographer from the *Washington Post*. They filmed and broadcasted the police’s entrance into the home and the encounter with the suspect’s parents, who owned and lived in the home.⁸¹ The *Wilson* Court stated that the Fourth Amendment “require[s] that police actions in execution of a warrant be related to the objectives of the authorized intrusion,” and that “the presence of reporters inside the home was not related to the objectives of the authorized intrusion.”⁸² By contrast, where police are donning the same body-worn cameras that they are supposed to wear in all encounters with the public – especially in encounters that might involve violence – they would have a much stronger argument that the use of the camera *is* related to the objectives of an authorized intrusion.⁸³

Perhaps because of the legal uncertainty surrounding in-home recording, some police departments have taken the position that they will only record from body-worn cameras within a home when they have permission from a home’s occupant.⁸⁴ This is one possible solution to the problem because consent can allow a search of areas or items that would otherwise be off limits to police. In such cases, there is no need to try to stretch the “plain view” doctrine beyond its natural limits. It is important, however, that such consent not only encompass the search itself, but also the video recording that comes with it. Of course, some police departments may worry that this will deprive them of valuable evidence. A violent encounter between a police officer and a suspect may occur within a house, during a search. A suspect may claim that police failed to accurately identify themselves and that the suspect used force to counter what he believed to be a break in and attack. Police may dispute this account. It may be, given the cost to

⁷⁹ See *Arizona v. Hicks*, 480 U.S. 321 (1987).

⁸⁰ *Kyllo v. United States*, 533 U.S. 27, 37 (2001).

⁸¹ See *Wilson v. Layne*, 526 U.S. 603 (1999).

⁸² *Id.* at 611.

⁸³ See *United States v. Fautz*, 812 F. Supp. 2d 570, 616 (2011) (finding that videotaping of a suspect’s apartment during a search was permissible under the Fourth Amendment, given that officers’ purpose in videotaping was “to protect themselves against potential claims of liability for damage or disruption to personal property.”).

⁸⁴ See POLICE EXEC. RESEARCH FORUM, *supra* note 4.

privacy from an unauthorized in-home recording, that in these circumstances, fact-finders will have to rely primarily on other evidence to decide which side is telling the truth.

Alternatively, police, courts and citizens can consider other privacy protection regimes and analyze whether they comply with Fourth Amendment requirements. Police may adopt a policy that their body-worn cameras *will* routinely record their surroundings as they search, but that *no one* will preserve or view this video footage unless a violent encounter or other basis for a complaint has arisen shortly after the search. It is true that video footage may capture images of items police do not have a right to search, or allow for the possibility of a detailed analysis of items they have a right to view during the search but not to seize. However this may not raise Fourth Amendment problems if there are strict protocols in place that prevent any government officials from ever viewing such a video, except where an emergency has arisen, requiring this evidence. In any event, recordings in homes or other private areas raise the most serious Fourth Amendment and privacy concerns.

It is also conceivable that Fourth Amendment problems will arise even where police use body-worn cameras in public. The Supreme Court has repeatedly held that even where police use technology to enhance or record observations in public spaces, they are not conducting a search because individuals cannot expect that their public movements and actions will be shielded from observation.⁸⁵ If someone walks or drives on a public street, or strolls through a park, they cannot justifiably express surprise or objection when they are viewed by others who have a right to be in these places, including police officers whose job it is to patrol them.

In recent years, however, many Court observers have argued that while our privacy expectations in public areas may be much lower than they are in our houses, they are not non-existent. Routine government surveillance and tracking of our public activities may reveal much we do not want to share with the world. Indeed, in 2012, five Supreme Court justices, concurring in *United States v. Jones*,⁸⁶ stressed that we do not expect to be subjected to ongoing warrantless surveillance in public spaces.⁸⁷ As Justice Sotomayor wrote, our reasonable expectations of privacy may well be violated by GPS surveillance that “generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.”⁸⁸

For two reasons, however, these arguments for extending the Fourth Amendment to cover public activities do not place significant limits on police body-worn cameras. First, they are just hints and arguments, not holdings that the Supreme Court has reached in any Fourth Amendment case. To be sure, a number of lower courts have, in the wake of *Jones*, applied what Professor Orin Kerr calls “the mosaic theory” to hold that when government collects too much information about a person’s movements and activities, it may trigger Fourth Amendment protections.⁸⁹ But it is unclear if the Supreme Court will endorse this view of the Fourth Amendment. The Justices in *Jones* did so only in concurring opinions and postponed much of the analysis they would need to make this a workable doctrine.

⁸⁵ See, e.g., *Knotts v. United States*, 480 U.S. 276, 281 (1983) (“A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”).

⁸⁶ 132 S. Ct. 945 (2012).

⁸⁷ *Id.*

⁸⁸ *Id.* at 955. The author of this Issue Brief has previously argued that the Fourth Amendment should be extended to protect against certain forms of intrusive surveillance in public, particularly, any time the government engages in “remote recording” of activities outside an official’s natural field of vision and hearing. This would include the government using a drone-mounted camera to record things its operator could not otherwise see. See Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space, Fitting the Fourth Amendment to a World That Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1350-54 (2004); see Marc Jonathan Blitz, *The Fourth Amendment Future of Public Surveillance Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21, 24-25 (2013).

⁸⁹ See Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2012).

In any event, there is a second reason that even the lower court holdings applying the mosaic theory are unlikely to apply it to police body-worn cameras. Unlike a GPS device attached to a person's car, as was the case in *Jones*, police body-worn cameras generally do not follow a target from place to place, unless the police officer bearing that camera is following a suspect continuously. Body-worn cameras do not allow the government to create a comprehensive, days-long record of his activities without committing staff to such a tracking project. Indeed, in the case of body-worn cameras, the government can be said to be focusing its cameras not only on any one civilian's activity, but on its *own* activity. This is something government likely has a right to do without Fourth Amendment restraint. It can keep records of how its officials behave and, to the extent that these records occasionally and briefly sweep in video footage of citizens, this is a necessary incident to monitoring government officials.

Matters might be different if police do not merely capture footage, but also aggregate the footage they obtain from body-worn cameras, and perhaps combine it with footage captured from dashcams, CCTV cameras, or other evidence of a person's transactions. While an individual officer's camera is unlikely to capture anything close to a days-long record of a person's activity, it can gather evidence that might contribute to such a record. To the extent that this raises a Fourth Amendment or other privacy problem, however, it is a problem raised not primarily by capture of the video, but by what is done with it afterwards.

B. Rules for Recording: Triggers, Storage, and Dissemination of Video Footage

Since the Fourth Amendment likely places few restrictions on the use of police body-worn cameras in public spaces, the privacy risks created by body-worn cameras must be addressed in other ways, including: (1) state and local law; (2) police rules and privacy policies; and (3) norms and judgments made by police officers. Some of these privacy safeguards might shield citizens (or their effects) from the camera's gaze. Others place controls on what occurs after the police make the recording by limiting how long police may keep the recording, who may access it (either within or outside the police department), and what uses government may make of the recording in court or elsewhere.

1. Triggers

First, state law might prevent police from employing body-worn cameras. In some states, for example, wiretap laws require that both parties consent to recording of audio conversations. Such laws could conceivably make it illegal for police in some circumstances to record interactions with citizens without their consent. As the Police Executive Research Forum ("PERF") report notes, many police departments in such states have "successfully worked with their state legislatures to have the consent requirement waived for body-worn cameras."⁹⁰

Second, many police departments are adopting policies that require officers to activate their body-worn cameras only during specific types of encounters. PERF notes that a common approach among jurisdictions that have adopted body-worn cameras "is to require officers activate their cameras when responding to calls for service and during law-enforcement related encounters and activities, such as traffic stops, arrests, searches, interrogations, and pursuits."⁹¹ Police departments also frequently give officers discretion to turn cameras off, so long as the officer provides a reason for doing so, giving police leeway to minimize the damage to citizens' privacy. Moreover, even with controls on use (discussed below), once a police encounter is recorded, there is at least some chance the video will become public, making it important to carefully consider what police record with their on-body cameras.

⁹⁰ POLICE EXEC. RESEARCH FORUM, *supra* note 4.

⁹¹ *Id.*

Perhaps surprisingly, the ACLU, despite its long-standing criticism of government surveillance, has argued for more extensive recording by police. “The ideal policy for body-worn cameras . . . would be for continuous recording throughout a police officer’s shift, eliminating any possibility that an officer could evade the recording of abuses committed on duty.”⁹² Given discretion, officers might manipulate the recording, “undermining their core purpose of detecting police misconduct.”⁹³ The ACLU position finds support in some of the points considered earlier regarding jurors’ perceptions of such evidence.

There are at least two significant problems with a regime of continuous recording. First, as the ACLU acknowledges, such a system would assure that the video captures some record of everything an officer does on the job. Even though the camera is pointed away from the officer, it will capture some visual and audio record that contains a comprehensive record of movements, activities, and statements throughout the day. There is, of course, a lower expectation of privacy in this or other government-related work than there is in people’s lives outside the workplace. But that does not mean police officers should have every word they say recorded for possible review. Especially when they are not interacting with citizens, police may have as legitimate an expectation to privacy in their activities as others. Second, a sense of privacy may be crucial not only to police officers’ morale, but to their ability to collect evidence important to solving crimes. Some potential witnesses will be far less likely to talk with a camera running, especially if they fear retaliation from others in the community for their cooperation. While concerns regarding police privacy might be resolved by strict controls on video access, such controls likely would not be enough to ease the fears of a witness unwilling to talk with a camera running.

For these reasons, even those—like the ACLU—who favor continuous recording have been open to systems that allow for interruptions, so long as they are well-protected against manipulation. The ACLU, for example, suggests police explore an automated recording system where cameras are triggered not by a human decision, but by loud voices, the movements associated with a pursuit, or other external stimuli indicating the presence of a confrontation.⁹⁴ Chicago’s extensive system of street cameras alerts observers when the camera detects movement possibly associated with dangerous activity. Such a system, however, may sometimes fail to start when it is needed. Even if such an automated system is not the right one for police body-worn cameras, the ACLU remains correct that any system for protecting privacy interests should limit police discretion to turn off cameras when the footage is necessary. One additional possibility is for the judicial system and police departments to adopt rules that penalize police officers for shutting off cameras without grounds to do so. As noted above, many police departments already require a police officer to explain in writing, or on the camera recording itself, why he stopped recording. So long as courts and police departments independently and thoroughly assess these justifications, this might be sufficient to assure cameras are off only when they need to be. As discussed in Part II, an alternative incentive to keep the cameras on when necessary can come from rules of evidence.

2. *Storage*

Apart from rules about when the cameras should record, states and police departments will also need laws or regulations to determine how video footage is handled after the recording. Here, PERF, the ACLU, and many others appear to be in agreement that police should generally keep videos no longer than necessary to assure police accountability or to adjudicate a claim of police abuse. They should also keep a careful record of who accesses any video footage and allow such access only for a legitimate purpose. Much of a police officer’s day may not involve encounters with citizens, let alone any confrontations. And where police peacefully interact with citizens, the potential for a complaint or charge may be extremely low. In such cases, the PERF report suggests that departments keep video for only 60

⁹² See Stanley, *Police Body-Mounted Cameras*, *supra* note 6.

⁹³ *Id.*

⁹⁴ *Id.*

to 90 days.⁹⁵ The ACLU likewise argues that in cases where confrontations have not occurred, the storage time for video should be days or weeks, not months or years.⁹⁶

3. *Dissemination and Use*

Access should likewise be carefully controlled to assure against the “mission creep” that often occurs when an official decides that surveillance tools employed and justified for an important public safety purpose can also be helpful in addressing another, far less significant government end. Professor Jeffrey Rosen points out that CCTV cameras were initially justified in England as tools for fighting terrorism, but then grew to be more often used by authorities to target shoplifters and loiterers.⁹⁷ Some skeptics have argued that the same shift can happen and is happening with body-worn cameras, with some police departments using footage not to detect, deter, or stop abuses of police power, but to discipline minor deviations from other rules, such as uniform policy. While sacrificing some privacy to reveal criminal violence or government abuse of force may be justifiable, it is not as clear that it is worth better information about minor disciplinary infractions.

Perhaps the most difficult challenge facing state and local governments as they try to control what happens to recorded and stored police videos stems from state open records laws. Such laws could potentially allow citizens, or Internet trolls, to mine video for embarrassing footage. Under such circumstances, video that is captured to stop police abuse instead becomes a tool for a different kind of abuse that citizens inflict on each other: to hurt political or workplace rivals; to use against an opponent in a civil lawsuit; or simply to attract attention on YouTube or other sites. One article, for example, notes that “[d]isturbing outtakes from Cop Candid Camera get out too easily in some places,” and notes that a video of a man admitting to marijuana possession to a police officer ended up on YouTube.⁹⁸

Defenders of open records law are understandably reluctant to roll them back. Police video footage will often contain information that is of tremendous importance for police watchdogs.⁹⁹ While police departments can and do monitor their own officers’ behavior, modern democracies do not typically trust the state to monitor itself. They sometimes need investigative journalists or reform advocates to uncover information about practices that the government itself has ignored, overlooked, or hidden. But where state open records laws place no limits on access to and malicious use of footage of a traffic stop, the possible privacy damage from police body-worn cameras will be far more significant. It thus makes sense to consider laws that place significant limits on individuals’ access to police video that does not depict them. For example, The Constitution Project and the Center for Democracy and Technology have proposed that police generally be barred from disseminating “unredacted or unflagged” video of citizens’ encounters with police, unless such dissemination is agreed to by citizens shown in the video.¹⁰⁰

⁹⁵ POLICE EXEC. RESEARCH FORUM, *supra* note 4.

⁹⁶ See Stanley, *Police Body-Mounted Cameras*, *supra* note 6.

⁹⁷ Jeffrey Rosen, *A Cautionary Tale for a New Age of Surveillance*, NEW YORK TIMES (Oct. 7 2001), <http://www.nytimes.com/2001/10/07/magazine/07SURVEILLANCE.html?pagewanted=6>.

⁹⁸ Kashmir Hill, *A Future in Which Every Police Officer Wears a Body Cam Isn't Entirely Rosy*, FORBES (Nov. 5, 2014, 3:54 PM), <http://www.forbes.com/sites/kashmirhill/2014/11/05/a-future-in-which-every-police-officer-wears-a-body-cam-isnt-entirely-rosy/>.

⁹⁹ See Toby McIntosh and Lauren Harper, *Backlash Develops Over Body Cam Footage*, FREEDOM INFO (Feb. 26, 2015), <http://www.freedominfo.org/2015/02/backlash-develops-over-release-of-body-cam-footage/> (noting that, “[i]f the footage isn’t available, “body cam” supporters say, the promise of having silent watchdogs over police-citizen interactions will go unfulfilled.”).

¹⁰⁰ THE CONSTITUTION PROJECT, *supra* note 9; *Comments to President’s Task Force on 21st Policing*, CENTER FOR DEMOCRACY AND TECHNOLOGY (Jan. 21, 2015), http://www.cops.usdoj.gov/pdf/taskforce/01-31-2015/Public_Testimony_January_31.pdf.

IV. Conclusion

State surveillance cameras sometimes trigger worries about an Orwellian future. Writers have expressed alarm at the possibility of being subject to monitoring everywhere in public space, from cameras mounted above streets or fixed in police-operated drones. But cameras can also provide a safeguard against public abuse of power. The current enthusiasm for body-worn cameras is at least, in part, an embrace of this possibility. As University of Pittsburgh School of Law Professor David A. Harris suggests, rather than providing a means of unconstitutional surveillance, body-worn cameras might help assure that police respect the demands of the Fourth Amendment by documenting police searches and seizures.¹⁰¹ Although the ACLU usually opposes expanded government surveillance, it notes that body-worn cameras can serve as an important check against police brutality.¹⁰² With such benefits in mind, numerous police departments and government officials, including President Obama, have quickly embraced body-worn cameras. However, critics warn that this embrace of police video focuses too much on using technology to solve policing problems that instead require social and cultural changes and ignores the ways in which body-worn cameras, like other more familiar surveillance cameras, give the state power to watch over citizens without giving citizens power to watch back.

In examining some of the key issues law enforcement currently face in the use of body-worn cameras, this Issue Brief concludes that critics are mistaken when they dismiss or minimize body-worn cameras' potential benefits as evidence. But police departments, courts and other government entities that adopt and use body-worn camera evidence will have to work hard to realize these benefits and minimize the risks to privacy they entail. To accomplish this, police departments and other government entities may have to adopt robust evidentiary and privacy safeguards together with the cameras' innovative technology.

¹⁰¹ See David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) As Tools for Ensuring Fourth Amendment Compliance By Police*, 43 TEXAS TECH. L REV. 357, 359 (2010).

¹⁰² See Stanley, *Police Body-Mounted Cameras*, *supra* note 6.