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

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I. INTRODUCTION

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

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

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3 Buchanan, supra note 1.
5 Cf., e.g., Julie Dressner & Edwin Martinez, Op- Docs, The Scars of Stop-and-Frisk, N.Y. TIMES (June 13, 2012), http://www.nytimes.com/video/opinion/100000001601732/the-scars-of-stop-and-frisk.html [http://perma.cc/4K42-S8CT] (questioning police misconduct of racial profiling in the application of New York’s stop-and-frisk policy through the story of one black man who was stopped over sixty times before he was eighteen-years-old); Dennis Lynch, Baltimore Riots 2015: Freddie Gray Slammed Head
self-serving officer testimony—are both unreliable methods of obtaining a true picture of events as they unfolded. To shield themselves from unwarranted accusations and build trust with their communities, police departments throughout the country have rapidly begun to adopt the use of police-worn body cameras (PWBCs) to create an objective audio and video record of officer interactions with the public.

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

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


9 See, e.g., Joel Rubin, LAPD Officers Tampered with In-Car Recording Equipment, Records Show, L.A. TIMES (Apr. 7, 2014), http://www.latimes.com/local/la-me-lapd-tamper-20140408-story.html#axzz2yOaKuj8F (describing an internal investigation by the Los Angeles Police Department showing that antennas used
consistently—supported by legitimate repercussions for violations—they are prone to similar issues.

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

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

II. CURRENT USE OF POLICE-WORN BODY CAMERAS

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

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

11 See infra Part IV.B.1.
12 State legislatures across the country have begun to consider, and even pass, legislation excluding footage obtained from PWBCs from public record laws. See, e.g., Abby Simons, Legislation Aims to Make Police Body Cam Footage Mostly Private, STAR TRIB. (Jan. 29, 2015), http://www.startribune.com/politics/statelocal/290287791.html?page=2&c=y [http://perma.cc/7YE6-AJNU]; see also infra note 94.
13 Associated Press, Britain Straps Video Cameras to Police Helmets, NBC NEWS (July 13, 2007) [hereinafter Britain Cameras], http://www.nbcnews.com/id/19750278/ns/world_news-europe/b britain-straps-video-cameras-police-helmets/#.VcphPy11KHz [http://perma.cc/G98Z-RBAQ]. Following the use of PWBCs by Danish police, the UK began testing police worn cameras on a small-scale in its Devon and Cornwall Police Departments in 2005. Id. By 2006, the departments were employing a total of 50 cameras as a part of an extended trial. MARTIN GOODALL, U.K. POLICE & CRIME STANDARDS DIRECTORATE, GUIDANCE FOR THE POLICE USE OF BODY-WORN VIDEO DEVICES 6 (July 2007), http://library.college.police.uk/docs/homeoffice/guidance-body-worn-devices.pdf
Home Office had released a plan to equip officers in all forty-two of the country’s police departments with PWBCs. The UK’s system of central control over the nation’s police departments ensured that each department was subject to a policy over the PWBCs’ use. After gaining nearly six years of experience with the PWBCs, departments finally began equipping all of their officers.

Unlike the UK, the adoption of PWBCs progressed slowly in the United States. While nearly one-third of police departments had experimented with PWBCs to some extent by the end of 2013, as of August 2014, very few police departments were utilizing PWBCs extensively. Furthermore, few studies concerning the effectiveness of PWBCs have been conducted in the United States; however, each study, while small, has shown extremely promising results. While various organizations began publishing supportive
reports on the use of PWBCs, Michael D. White—author of the Department of Justice Office of Justice Programs report (OJP report)—offered a caution to the positive results of his and other studies.

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

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23 Ryman, supra note 21. Like dash cameras, a large portion of the nation’s body cameras have been purchased through private donations to departments. See, e.g., Geetika Rudra, Ferguson Police Receive Body Camera Donation, ABC News (Sept. 1, 2014),
that time, White’s OJP report found nearly one-third of the police departments that responded to his survey self-reported having no policy governing its use of PWBCs.\footnote{MILLER, supra note 8, at 2 (stating that a total of sixty-three police departments self-reported using body cameras).}

The surge to adopt PWBCs reached a new peak with President Obama’s announcement that he would seek to provide $263 million for the purchase of PWBCs and training for police officers on their use.\footnote{Justin Sink, Obama to Provide Funding for 50,000 Police Body Cameras, HILL (Dec. 1, 2014), http://thehill.com/homenews/administration/225583-obama-to-provide-funding-for-50000-police-body-cameras [http://perma.cc/Z8HF-CGE5] (reporting that Obama specifically allocated $75 million for 50,000 body cameras as part of a matching program with police departments). On May 1, 2015, the Department of Justice announced the official PWBC program and made the first $20 million available. Press Release, Office of the Attorney Gen., Justice Department Announces $20 Million in Funding to Support Body-Worn Camera Pilot Program (May 1, 2015), http://www.justice.gov/opa/pr/justice-department-announces-20-million-funding-support-body-worn-camera-pilot-program [http://perma.cc/9SXP-ZMDB]. The program matches a department’s costs to equip and train officers dollar-for-dollar if the department adopts a policy governing the PWBCs’ use, but each department is solely responsible for the on-going costs of data storage. Id.}

White now estimates that all police departments with fifty or more officers will be using PWBCs by 2018.\footnote{Kriston Capps, Police Body Cameras: Coming Everywhere in 3 to 5 Years, ATLANTIC: CITYLAB (July 30, 2015), http://www.citylab.com/crime/2015/07/police-body-cameras-coming-everywhere-in-3-to-5-years/399992/ [http://perma.cc/J7KL-YMBX] (reporting that other estimates predict all police departments with fifty or more officers will be using PWBCs by 2020).}

The nationwide demand for PWBCs will likely continue to increase as they remain a symbol of accountability against improper treatment of minorities. PWBCs are viewed as an important tool to correct institutionalized racism in American policing.\footnote{See Meyer, supra note 18; see also MILLER, supra note 8, at 8 (noting that the San Diego police department adopted PWBCs, in part, “to improve its understanding of incidents involving claims of racial profiling” because the objective record reveals patterns of racial profiling and how they occur); Noura Bayoumi & Janeal Downs, Legislators Want Police to Wear Body Cameras, SW. TIMES (Jan. 30, 2015), http://www.southwesttimes.com/2015/01/legislators-want-police-to-wear-body-cameras/ [http://perma.cc/H8FU-XCQ6] (reporting that HB 2393 would give the Virginia Attorney General the authority to determine which police departments would be required to use body cameras based, in part, on considering each department’s past “rate of occurrence of engaging in biased-based profiling”). But see, e.g., UTILITY, ELIMINATING RACIAL BIAS IN RECORDING BODY-WORN VIDEOS 4 (2014), http://www.utility.com/perch/resources/}
PWBCs as a means of mitigating racial profiling, but the New York Police Department quickly exceeded the scope of the order by equipping a much wider number of officers with cameras. Accordingly, social organizations—like the NAACP and the ACLU—have focused their efforts to spread the use of PWBCs on a concerted nationwide lobby of state legislatures motivated by broad public support, rather than pursuing the slower process of judicial action. In the wake of this nationwide phenomenon and pressure from social groups, Congress and state legislatures scrambled to respond with appropriate legislation as approximately one hundred bills were introduced in thirty-six states and Congress, mostly between December 2014 and February 2015. The initial reaction in many of these legislative bodies was to mandate camera

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


use by all officers while on duty, motivated by public opinion. However, these proposals for strict mandates had been overwhelmingly unsuccessful until Senate Bill 47 was enacted in South Carolina on June 10, 2015. Instead, the legislation that has typically been successful at advancing through legislatures takes a more moderate approach of giving individual departments the discretion to determine whether they will use PWBCs or not, but each bill also requires that if a department chooses to employ PWBCs it must have a policy governing its use. The compromise is often motivated by the financial infeasibility of equipping all officers with body cameras. South Carolina’s bill mandating the use of police body cameras reflects both of these concerns by requiring each department to have a policy governing PWBC use and by the fact the General Assembly did not include a funding source for the state’s “Body-Worn Cameras Fund”. Most importantly, the South Carolina bill requires the state to establish minimum standards for the policies that departments create.

III. BENEFITS OF POLICE-WORN BODY CAMERAS

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

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33 UTILITY, supra note 27, at 4, 6 (stating that nine in ten Americans support an increased use of body cameras, and 72% of Americans support making their use non-discretionary); Petition, Mike Brown Law, WHITE HOUSE, https://petitions.whitehouse.gov/petition/mike-brown-law-requires-all-state-county-and-local-police-wear-camera/8tl5SczF [https://perma.cc/7BVP-AKMP] (showing that nearly 155,000 people signed a petition for the Michael Brown Bill that would make it mandatory for all police officers in the country to wear body cameras).
36 See infra Part IV.A.3.
37 See S.C. S. 47.
38 Id.; accord Ill. S.B. 1304.
39 WHITE, supra note 19, at 6 (“Given the lack of research, there is little evidence to support or refute many of the claims, and there are outstanding questions regarding the impact and consequences of body-worn cameras. Nevertheless, the available studies have provided insight into several areas . . . .”).
study has shown tremendously positive results. Due to the low quantity of empirical studies, many reports on PWBCs consider the following benefits as merely “perceived.” However, there is no question as to whether or not the following benefits are real; instead, the question yet to be answered is the exact degree of each benefit created by PWBCs. Recently, police departments have released meta-data showing a decrease in use-of-force incidents supporting the benefits of PWBCs.

A. Mutual Benefits

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

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

40 See, e.g., MILLER, supra note 8, at 5; WHITE, supra note 19, at 19.
42 See generally FARRAR, supra note 19, at 2–4.
43 Id. at 2.
44 See Floyd v. City of N.Y., 959 F. Supp. 2d 668, 685 n.66 (S.D.N.Y. 2013), aff’d in part, 770 F.3d 1051 (2d Cir. 2014) (justifying her order requiring the body camera pilot program, Judge Scheindlin commented, in part, on the civilizing effect they would have by recognizing that “police do, on occasion, use offensive language—including racial slurs—or act with more force than necessary”; further, she stated “the use of body-worn cameras will inevitably reduce such behavior”).
45 MILLER, supra note 8, at 6 (quoting Chief Superintendent Cullen of New South Wales saying, “After testing out body-worn cameras, the overwhelming response from officers was that the cameras increased their professionalism because they knew that everything they said and did was being recorded.”); RANKIN, supra note 19, at 11 (reporting that 81% of officers stated that wearing a camera improved their behavior while working, and 77% of officers believed that wearing a body camera would improve their colleagues behavior).
46 FARRAR, supra note 19, at 7, 11 (from 60 to 25 instances).
to a physical threat: some colleagues without PWBCs instigated force absent such threats.47

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

B. Public Benefits

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

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47 Id. at 9 (reporting that officers without cameras initiated the force in four of the seventeen use-of-force incidents).
48 WHITE, supra note 19, at 22–23.
49 MILLER, supra note 8, at 6 (“We actually encourage our officers to let people know that they are recording.” (quoting Chief of Police Ken Miller of Greensboro, North Carolina)); see also ODS CONSULTING, supra note 19, at 10 (reporting that of the sixty-two assaults on officers, sixty-one were against officers not wearing cameras and one was against a camera-wearing officer, but proportionally officers wearing body cameras should have experienced a total of eighteen assaults).
50 Two of the four indictments, between January and August of 2015, of police officers for fatal on-duty shootings have resulted from footage captured by the officers’ body-worn cameras. Colin Daileda, Body Cameras Key to Charging Police in Fatal Shootings, MASHABLE (July 30, 2015), http://mashable.com/2015/07/30/body-cameras-officers-fatal-shootings/ [http://perma.cc/Y45D-4872].
51 Id. (reporting that in both indictments for fatal shootings, the officer recounted the scenario in direct contradiction of what was actually shown by the PWBC); see also MILLER, supra note 8, at 5.
by police officers.\textsuperscript{53} PWBC footage has already begun to be utilized by courts to review the constitutionality of officer actions in such circumstances.\textsuperscript{54}

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

\textbf{C. Police Benefits}

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

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

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

\textsuperscript{55} WHITE, supra note 19, at 19 (citing TOM R. TYLER, \textit{WHY PEOPLE OBEY THE LAW} (1990)).

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


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

1. Lawsuits and Civil Complaints

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

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


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

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

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

64 GOODALL, supra note 13, at 7 (“[I]n a number of cases the complainants have reconsidered their complaint after . . . review[ing the video], thus reducing investigation time for unwarranted complaints.”); MILLER, supra note 8, at 6 (quoting Chief of Police Ron Miller of Topeka, Kansas saying, “We’ve actually had citizens come into the department to file a complaint, but after we show them the video, they literally turn and walk back out,” and Chief of Police Michael Frazier of Surprise, Arizona reporting, “Recently we received an allegation that an officer engaged in racial profiling during a traffic stop. The officer was wearing his body-worn camera, and the footage showed that
For this reason, many officers who have a history of complaints filed against them actually request to be included in PWBCs programs to protect themselves against such frivolous claims. On the other hand, PWBCs also provide a benefit when the officer is at fault because departments are able to settle the matter without a lengthy investigation or trial, and the public is able to gain more trust in the police when an officer’s wrongdoing is swiftly recognized.

2. Training

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

3. Efficiency

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

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

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

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

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

69 WHITE, supra note 19, at 25.

application to assist the officer in writing reports;\footnote{Rachel Weiner, \textit{Police Body Cameras Spur Privacy Debate}, 	extit{WASH. POST} (Nov. 10, 2013), http://www.washingtonpost.com/local/crime/police-body-cameras-spur-privacy-debate/2013/11/10/7e9ee504-2549-11e3-b75d-5b7f66349852_story.html [http://perma.cc/7JE4-3WGP].} in one study officers reported a 22% decrease in the time it took to complete paperwork, which led to an additional fifty minutes on patrol during a nine-hour shift.\footnote{GOODALL, \textit{supra} note 13, at 47. \textit{But see KATZ, supra} note 19, at 15, 23 (reporting that the department utilized manual footage downloading and required officers to classify the footage by incident, citation, or department report number—as a result—“only 2.9% of camera officers agreed that they spent less time completing paperwork and 11.8% believed that it makes the officer’s job easier”).} Additionally, PWBCs have been shown to create a dramatic increase in guilty pleas. The resulting decrease of trials—by 70–80\%\footnote{ODS CONSULTING, \textit{supra} note 19, at 10; \textit{see also GOODALL, supra} note 13, at 7.}—significantly decreased officer obligations to testify, in addition to freeing up resources in prosecutor and public defender offices.

4. Context

It was estimated that greater than 80\% of United States citizens would have cell phones capable of recording video by the end of 2014.\footnote{Roy, \textit{supra} note 57, at 1.} Public use of cell phones to record interactions with police is already prevalent in the United States but will continue to increase as organizations promote the concept—as the ACLU has by creating the smartphone app “Police Tape.”\footnote{ACLU-NJ Releases Police Accountability Smartphone App for Summer Beach Season, ACLU-NJ (July 3, 2012), https://www.aclu-nj.org/news/2012/07/03/aclu-nj-releases-police-accountability-app [http://perma.cc/M8G4-FLV3].} Furthermore, private use of stationary surveillance cameras has become pervasive throughout much of society. Accordingly, many police chiefs encourage their officers to always assume that they are on camera.\footnote{WHITE, \textit{supra} note 19, at 12 n.1.}

PWBCs create an objective record of an interaction \textit{from the officer’s point of view}. From a defendant’s rights perspective, PWBC have received criticism for this reason.\footnote{See \textit{Considering Police Body Cameras}, 128 \textit{HARV. L. REV.} 1794, 1812–13 (2015).} In regards to suspect interviews, a study showed juries were more likely to view an interview as non-coercive when only the suspect—as opposed to the officer and suspect—was visible in the recording.\footnote{See Jennifer L. Mnookin, Opinion, 	extit{Can a Jury Believe What It Sees?}, \textit{N.Y. TIMES} (July 13, 2014), http://www.nytimes.com/2014/07/14/opinion/videotaped-confessions-can-be-misleading.html [http://perma.cc/2942-WYVN].} However, this study only compared videos showing either the officer and suspect or just the suspect, not the difference between a first-person PWBC interview and an unrecorded “he said, she said” credibility
determination;79 there has not been a push to replace free-standing cameras in interrogation rooms with PWBCs.

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

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

79 See generally id.
80 But see Considering Police Body Cameras, supra note 77, at 1812–13 (underscoring the value of this fact by indicating that an officer’s view fails to capture the entire context of a scene). Wearing the body camera on glasses, as opposed to the officer’s torso, further minimizes the potential that a recording will miss aspects of a scene that the officer was aware of. Kim Hilsenbeck, Buda Police Adopt High-Tech Body Cameras, HAYS FREE PRESS (June 26, 2015), http://haysfreepress.com/content/buda-police-adopt-high-tech-body-cameras [http://perma.cc/YBT4-TTMP].
81 Martin Kaste, Police Departments Issuing Body Cameras Discover Drawbacks, NPR (Jan. 22, 2015), http://www.npr.org/sections/alltechconsidered/2015/01/22/379095338/how-police-body-camera-videos-are-perceived-can-be-complicated [http://perma.cc/NX6Y-FNDG] (“Take, for instance, the now infamous video of a state trooper shooting a man at a gas station in South Carolina last fall. It shows a man who was reaching for his ID—a completely unprovoked shooting, to a civilian’s eyes. But when an officer watches that video, he sees it differently. ‘I felt my stomach tense up because I’ve seen that—and this has nothing to do with whether the incident was justified or not—but, I’ve seen that kind of quick movement before, where people have emerged with a weapon,’ says San Francisco police Sgt. Adam Plantinga. . . . Sometimes, Plantinga says, ‘[a person] may wipe their hands on their pants, they may lower their head [or] lower their jaw to protect their neckline—sort of unconscious human behavior that means that there could be violence at any time.’” (third alteration in original)).
82 The officer’s actions should be considered from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, Graham v. Conner, 490 U.S. 386, 396 (1989), to determine if the law enforcement officer’s use of deadly force was “objectively reasonable . . . in light of the totality of the circumstances.” Abraham v. Raso, 183 F.3d 279, 289 (3d Cir. 1999).
83 Nelson, supra note 60.
IV. PROBLEMS WITH POLICE-WORN BODY CAMERAS

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

A. Negative Functional Aspects of Adopting Police Body Cameras

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

1. Privacy Rights and Public Disclosure Laws

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

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

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

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

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

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

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


89 Wagner, supra note 87.

90 STANLEY, supra note 20, at 3.


92 Blad, supra note 91.

93 Id.

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

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

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

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

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95 IOWA CODE § 22.7 (2015).
96 Freedom of Information Act, 5 U.S.C. § 552(b)(7) (2012) ("[R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source . . . (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.").
100 But see Blad, supra note 91 (“State open records laws provide varying levels of exemption for materials related to crimes committed by minors.”).
101 See, e.g., STANLEY, supra note 20, at 1–2.
footage of incidents, like the shooting of Michael Brown. Accordingly, the entire reason for adopting the PWBCs—in their eyes—would be eliminated, and the cameras would merely become a tool for the government to monitor the public. However, the ACLU does believe a need for “proper privacy protections” exists, including keeping PWBCs out of schools because the potential for “extreme instances of inappropriate use of physical force by police are far less common than they are on the street.”

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

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

102 Simmons, supra note 94.
105 Blad, supra note 91.
106 Conservative members of many legislatures considering body cameras have raised this issue, but on April 9, 2015, the North Dakota Legislature became the first legislature in the country to pass legislation specifically exempting body camera footage from public records laws. See North Dakota House Bill 1264, LEGISCAN, https://legiscan.com/ND/bill/1264/2015 [http://perma.cc/9RAT-SM78] (reporting that H.B. 1264 passed both chambers of the legislature); see also H.B. 1264, 64th Legis. Assemb., Reg. Sess. (N.D. 2015) (to be codified at N.D. CENT. CODE § 44-04-18.7) (reading in its entirety, “An image taken by a law enforcement officer with a body camera or similar device and which is taken in a private place is an exempt record.”). South Carolina S. 47 went even further by categorically defining PWBC footage as not public records subject to public disclosure laws. S. 47, 121st Leg., Reg. Sess. (S.C. 2015).
107 Volpenhein, supra note 97.
the transparency interest by showing police actions absent the context of what the officers said to justify their actions.

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

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

111 See, e.g., H.B. 1917, 64th Leg., Reg. Sess. (Wash. 2015).
112 Id. at 3–4.
116 Bryce Clayton Newell, Crossing Lenses: Policing’s New Visibility and the Role of “Smartphone Journalism” as a Form of Freedom-Preserving Reciprocal Surveillance, 2014 U. ILL. J.L. TECH. & POL’Y 59, 90 (“[T]he increasing effectiveness of facial recognition software, even in consumer products like Facebook, means that simply recording an image of a person (in a private or public space) can lead to further identification... [PWBCs], paired with facial recognition, could easily become much like the current crop of automated license readers, constantly reading thousands of faces
with police in public, the facial recognition software could also be utilized during officer recordings in private establishments or residences.\textsuperscript{117} The strain PWBCs already threaten to pose to community policing—by potentially alienating members of the community from speaking with police—would increase exponentially if citizens learned their face would be compared to any number of databases anytime they see an officer.\textsuperscript{118} Furthermore, the police could monitor the vast quantity of stored PWBC footage for future investigations or general data collection.\textsuperscript{119} To mitigate these concerns, one state has already banned the use of facial recognition technology with PWBCs.\textsuperscript{120}

A final hesitation expressed by officers and their unions is that PWBCs could be used by supervisors to monitor the actions of officers.\textsuperscript{121} Officers are concerned over policy recommendations that require constant use of PWBCs during shifts because they could be used by supervisors to monitor officers’ daily routines for minor infractions\textsuperscript{122} and potentially be subject to public disclosure laws as well. Furthermore, public disclosure of this footage could reveal personal information about the officers or tactics they employ on the job.\textsuperscript{123} Eugene O’Donnell, a former police officer currently teaching at John Jay College, would not recommend pursuing employment with any department that uses PWBCs because the cameras create an atmosphere of officer distrust.\textsuperscript{124} Many departments are cognizant of these concerns and instruct officers to turn off their cameras while on breaks or in the restroom.\textsuperscript{125}
However, unions typically push for greater guarantees of officer privacy and the ability of officers to review their own footage before giving formal statements on their actions.\textsuperscript{126} Absent these guarantees, some unions have threatened lawsuits based on the changes in working conditions associated with the requirement to use PWBCs.\textsuperscript{127} For these reasons, it is just as important for police departments to involve officers in their policy decisions regarding PWBCs as it is for the departments to involve their communities.\textsuperscript{128}

2. Discretion

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

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

\textsuperscript{127} \textit{Id.}, supra note 19, at 28.

\textsuperscript{128} \textit{Id.} at 28–29.

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

\textsuperscript{130} Simmons, supra note 94.

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

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


\textsuperscript{134} STANLEY, supra note 20, at 2.
Furthermore, the ACLU advised that strict policies be employed to hold officers accountable for failing to record any interactions with the public.\footnote{id. at 3. The ACLU’s recommendation seems justified because the New Orleans police department’s actions were in violation of the department’s policy on the use of body-worn cameras. See OFFICE OF THE NEW ORLEANS CONSENT DECREE MONITOR, THIRD QUARTERLY REPORT OF 2014, at 51 (Dec. 2014), http://www.laed.uscourts.gov/Consent/OCDM_Third_Quarterly_Report_for_2014.pdf [http://perma.cc/3JA5-36WB] (requiring the activation of cameras for all enforcement contacts with the public or the activation as soon as possible during the escalation of a non-enforcement contact); Jarvis DeBerry, New Body Cameras, Same Ol’ New Orleans Police Department, TIMES-PICAYUNE (Sept. 5, 2014), http://www.nola.com/opinions/index.ssf/2014/09/new_body_cameras_same_ol_new_o.html [http://perma.cc/89GB-DF3A]; see also Connie Fossi-Garcia & Dan Lieberman, Investigation of 5 Cities Finds Body Cameras Usually Help Police, FUSION (Dec. 7, 2014), http://fusion.net/story/31986/investigation-of-5-cities-finds-body-cameras-usually-help-police/ [http://perma.cc/3H4P-963K] (finding that the use of PWBCs typically helped officers more than the public in use-of-force incidents of five police departments because officers were in charge of starting the recordings and failed to do so numerous times, including some of the more questionable instances).} This policy recommendation was well warranted because in some cases—like the death of teenager Antonio Martin—once the shooting was deemed justified the issue of punishing the officer for neglecting to engage his PWBC was barely raised.\footnote{Matt Stroud, The Big Problem with Police Body Cameras, BLOOMBERG (Jan. 15, 2015), http://www.bloomberg.com/news/articles/2015-01-15/police-body-camera-policies-wont-work-if-cops-dont-turn-cameras-on [http://perma.cc/GL4U-LLRL].} Accordingly, merely requiring officers to activate their body cameras—without providing tangible consequences for failure to do so—has proven ineffective.\footnote{For example, despite the New Orleans Police Department’s mandate to activate their PWBCs, officers failed to activate their body cameras during use-of-force incidents because a “willful refusal” to record was not a fireable offense.” Martin Kaste, Even Police Body Cameras Can Lose Sight of the Truth, NPR (Aug. 23, 2014), http://www.npr.org/2014/08/23/342623830/even-police-body-cameras-can-lose-sight-of-the-truth [http://perma.cc/9PRW-YEE8].} Punishment recommendations range from meaningful discipline to evidentiary presumptions against officers for charges of misconduct that were not recorded.\footnote{STANLEY, supra note 20, at 3.} The Police Executive Research Forum (PERF) and the majority of police departments have rejected the ACLU recommendation to record every encounter with the public.\footnote{MILLER, supra note 8, at 12; see, e.g., DENVER POLICE DEP’T, BODY-WORN CAMERA—TESTING AND EVALUATION POLICY (Apr. 2014) [hereinafter DENVER POLICY], http://www.sribd.com/doc/238793995/Denver-Police-Body-Camera-Policy [https://perma.cc/C8RE-GE7T]; OAKLAND POLICY, supra note 70.} While too much officer discretion can be problematic, there are reasons why it is necessary in some instances. First, to protect citizens’ privacy, officers occasionally need to disengage their camera.\footnote{See supra notes 86–100.} Second, the use of PWBCs can be harmful to police-community relations in some instances, such as interviewing confidential informants,
victims, witnesses, or merely having an “informal, non-law enforcement interaction[] with [a] member[] of the community.” One crucial aspect of policing is keeping an open dialogue with the community—“if people think that they are going to be recorded every time they talk to an officer, regardless of the context, it is going to damage openness and create barriers to important relationships.” Third, it eliminates an officer’s ability to use discretion in determining whether the individual circumstances of a situation warrant a strict enforcement of the law.

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

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

141 MILLER, supra note 8, at 12.
142 Id. at 13.
143 KATZ, supra note 19, at 3 (“[T]he number of arrests increased by about 17% among the [officers using body-worn cameras] compared to 9% in the comparison group.”).
144 Stanley, supra note 104.
145 Id.
146 Id.; accord MILLER, supra note 8, at 55.
147 MILLER, supra note 8, at 56; see also infra notes 175–76 and accompanying text.
148 Id. at 56–57.
149 Id. at 56.
150 Id. at 56.
officer must explain his reason for doing so in a written report as soon as possible.\textsuperscript{151}

3. Financial

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

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

\textsuperscript{151} Id. at 54.
\textsuperscript{152} Id. at 32 (reporting that departments spend on average $800–$1200 per camera); Stan Finger, \textit{Wichita Police: Grants, Drug Seizure Funds to Pay for Body Cameras}, \textit{WICHITA EAGLE} (Dec. 3, 2014), http://www.kansas.com/news/local/article4256558.html#storylink=cpy [http://perma.cc/9Y6T-964A] (“[B]uying 444 body cameras will cost an estimated $577,000, with another $350,000 for docking stations, equipment and connectivity costs.”).
\textsuperscript{154} See supra note 25.
\textsuperscript{155} Lowry, \textit{supra} note 153 (reporting that the server to store the departments body camera footage cost the department more than twice as much as the cameras).
\textsuperscript{157} MILLER, \textit{supra} note 8, at 33.
\textsuperscript{158} Id. at 16–17.
\textsuperscript{159} Id. at 17.
investigations, which may be kept indefinitely.\textsuperscript{160} Other departments have opted to retain all footage until the statute of limitations on civil complaints against police has expired.\textsuperscript{161}

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

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

\begin{itemize}
\item \textsuperscript{160} Id. at 17, 34.
\item \textsuperscript{161} See, e.g., Roberto Alejandro, Mayor’s Working Group Member Explains City’s Police-Worn Body Camera Recommendations, AFRO (Mar. 4, 2015), http://www.afro.com/aclu-explains-citys-police-worn-body-camera-recommendations/ [http://perma.cc/48WU-XV27]; City of Menlo Park, Staff Report No. 15-014: Review and Discuss the Police Department’s Policy on the Use of Body Cameras and the Retention of Recordings and Determine Whether Council Desires to Adopt a Policy or Ordinance, in City Council Jan. 27, 2015 Meeting Agenda, at 159, 160 [hereinafter Menlo Park Policy], http://www.menlopark.org/ArchiveCenter/ViewFile/Item/2433 [https://perma.cc/F95V-KTNK] (retaining all footage for two and a half years to allow additional time for the city to be served after the two year statute of limitation has expired).
\item \textsuperscript{162} See S.B. 1304, 99th Gen. Assemb., Reg. Sess. (Ill. 2015) (imposing an additional fine, of $15 for every $40 contained in the fine, on traffic and drug offenses and allocating $3 of each $15 fine imposed to pay for PWBCs); see also Doug Finke, State Lawmakers Propose Surcharge to Pay for Police Body Cameras, St. J.-Reg. (Sept. 11, 2014), http://www.sj-r.com/article/20140911/News/140919872 [http://perma.cc/B6VZ-PH29] (adding an additional fine on traffic violations and criminal convictions). But see Daniel Rivero, Politicians Want Minorities to Pay an Unfair Amount for Illinois’ Police Body Cameras, FUSION (May 29, 2015), http://fusion.net/story/141732/politicians-want-minorities-to-pay-an-unfair-amount-for-illinois-police-body-cameras/ [http://perma.cc/2W36-57E2] (“For both traffic and criminal convictions, minorities are disproportionately represented, and would thus be footing an outsized amount of funding for something, which, in the end is meant to protect them from police abuses in the first place.”).
\item \textsuperscript{164} Finger, supra note 152.
\item \textsuperscript{165} Nelson, supra note 60 (“A five-year contract to buy and maintain the cameras and administer the videos they capture will cost $247,000 a year. Savings from reduced liability claims could range from $307,000 to $575,000 a year, Milstead said.”).
\item \textsuperscript{166} According to Robinson Meyer, in a typical PWBC recording there are twenty to thirty frames per minute, which takes approximately four hours to redact. Garfield, supra note 109, at 4:30.
\item \textsuperscript{167} MILLER, supra note 8, at 32.
\end{itemize}
duties to officers for their day’s footage, but this takes a significant amount of time from their shift and offers the potential to miscategorize or alter footage.\textsuperscript{168} While some states’ public records laws allow for shifting the costs of redaction onto requesters, at least one lawsuit has been brought in Florida to challenge a department’s determination that it would cost $18,000 for the 458 hours of requested footage to be prepared because it functionally made the records inaccessible.\textsuperscript{169} The ACLU recommends that un-redacted footage only be released with the consent of the subjects of the footage.\textsuperscript{170}

B. Legal Implications

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

1. State Law Issues

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

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

\textsuperscript{168} \textit{Id.} at 32–33.


\textsuperscript{170} STANLEY, supra note 20, at 5.


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

\textsuperscript{173} Margaret Harding, Corbett Says He Will Sign Legislation Allowing Cameras to be Mounted on Police Officers’ Bodies, TRIBLIVE (Feb. 3, 2014), http://triblive.com/
passed S.B. 57, codified as Pennsylvania Consolidated Statutes, title 18, section 5704(16), to allow the interception and recording of any communication between individuals by an officer “acting in the performance of his official duties.”\textsuperscript{174} However, the consent exception does not apply to recordings that “occur inside the residence of any of the individuals” involved in the communication.\textsuperscript{175} On the other hand, New Hampshire adjusted its wiretapping law to permit the use of PWBCs in certain situations but only if the officer provides notice to the citizens being filmed.\textsuperscript{176} This approach is more in line with the recommendation of the ACLU that has called for notice to citizens “wherever practicable”.\textsuperscript{177} Finally, California resolved this issue by creating an exception for “any [police] officer . . . overhearing or recording any communication that they could lawfully overhear or record.”\textsuperscript{178} Most states, however, have not yet explicitly addressed this issue.

2. Constitutional Issues

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

The First Amendment concerns arise from the potential of police to film individuals peacefully exercising their right to protest.\textsuperscript{180} The fear is that this footage could be requested through public record laws and used against the participants.\textsuperscript{181} However, these groups do recognize the necessity to activate
the PWBCs if protests become violent or there is some reasonable suspicion of criminal activity.\textsuperscript{182}

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

3. Evidence

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

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

\textsuperscript{183} RAMIREZ, supra note 179, at 5–6.
\textsuperscript{184} Id.
\textsuperscript{185} MILLER, supra note 8, at 9.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{190} KATZ, supra note 19, at 37 (finding “cases were more likely to be initiated by the prosecutor’s office (40.9% vs. 34.3%), have charges filed (37.7% vs. 26%), have cases farthered (12.7% vs. 6.2%), result in a guilty plea (4.4% vs. 1.2%), and result in a guilty verdict at trial (4.4% vs. 0.9%)”); MILLER, supra note 8, at 9.
\textsuperscript{191} MILLER, supra note 8, at 9 (first quoting Mike Chitwood, Chief of Police of Daytona Beach, Florida).
still be able to proceed with the charges;\textsuperscript{192} often times, defendants will simply plead guilty after reviewing the footage of the incident.\textsuperscript{193}

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

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

\textsuperscript{192} Id.
\textsuperscript{193} KATZ, supra note 19, at 37 (finding that guilty pleas were nearly four times more likely when PWBC footage existed (4.4\% vs. 1.2\%)); MILLER, supra note 8, at 9.
\textsuperscript{196} See id.
\textsuperscript{197} Scott H. Greenfield, \textit{The Missing Video Presumption, SIMPLE JUSTICE} (Mar. 30, 2014), http://blog.simplejustice.us/2014/03/30/the-missing-video-preservation [http://perma.cc/NLE2-B558]. Of the four possible approaches to determining what happened during an unrecorded incident—“he said, she said” credibility determinations, a presumption in favor of the defendant, a presumption in favor of the officer, or determining fault through litigation—Greenfield thinks a strong, contract construing, presumption in favor of the citizen is most appropriate because, like a contract drafter has complete control over ambiguity, the officer was the only one who had control over the camera. \textit{Id.}
\textsuperscript{198} Stroud, supra note 136.
\textsuperscript{199} See Harris, supra note 53, at 363–64.
policy,\textsuperscript{200} which cures the under-inclusive aspect of Stanley’s recommendation and makes a strong emphasis on proactively ensuring PWBCs remain in working order.

V. POLICY RECOMMENDATIONS FOR LEGISLATIVE ENACTMENTS AND POLICE DEPARTMENTS

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

A. Legislative Recommendations

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

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


\textsuperscript{201} See supra Part IV.B.1.

\textsuperscript{202} CAL. PENAL CODE § 633 (West 2010).

\textsuperscript{203} See supra note 176.

\textsuperscript{204} See supra notes 190–93 and accompanying text.
offset by a notice requirement, stricter public disclosure laws, and department policies on who may access the videos.

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

(1) PWBC footage is a public record exempt from public record disclosure requirements.

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

\textsuperscript{205} See supra note 115 and accompanying text.

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

\textsuperscript{207} S.B. 248, 118th Leg., Reg. Sess. (Fla. 2015); S. 47, 121st Leg., Reg. Sess. (S.C. 2015).
(3) Requests for PWBC footage not qualifying under (2) should be considered by a council of trusted community leaders or legislators. Requests denied by the council should be subject to judicial review. In considering requests, the council and court should consider if the footage: (1) would be of compelling interest to the community; (2) is otherwise legally confidential; (3) contains an egregious violation of privacy; (4) could lead to harm of any of its subjects; and (5) could feasibly be redacted or obscured.\footnote{208}{Fla. S.B. 248.}

(4)(a) PWBC footage distributed through (2)(b)-(c) or (3) may not be further distributed to the public by any recipient of the footage. (b) Unless provided otherwise by council or court order, any footage released should be redacted or obscured to hide dead bodies, nudity, minors, or private personal information.\footnote{209}{See OKLA. STAT. tit. 51, § 24A.8(A)(9) (Supp. 2015).}

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

Third, legislatures need to prohibit the use of personal body cameras by officers. The primary problem with personal body cameras is their potential for officers to manipulate the footage produced.\footnote{210}{MILLER, supra note 8, at 38 (explaining personal BWCs should be prohibited because, in part, “the agency would not own the recorded data, [so] there would be little or no protection against the officer tampering with the videos”).}

Officers using their own cameras have complete discretion as to when to activate and deactivate them in addition to control over what happens to the resulting footage.\footnote{211}{MILLER, supra note 8, at 38; WHITE, supra note 19, at 32.}

Furthermore, the individual officer’s personal possession of the footage would create a chain-of-evidence issue preventing the footage’s introduction in court.\footnote{212}{MILLER, supra note 8, at 38; WHITE, supra note 19, at 53.}

In essence, it eliminates nearly all of the potential benefits of PWBCs and amplifies nearly all of the potential negatives. An additional reason for state legislatures to address this matter is that the use of personal body cameras should be prohibited even if a department has not itself adopted the use of PWBCs and, therefore, a policy concerning their use.\footnote{213}{MILLER, supra note 8, at 38.}

Fourth, the legislature must mandate that any department using PWBCs, in any capacity, is operating under a governing policy. The lack of a policy concerning PWBCs could lead to a number of the same issues associated with the use of personal body cameras—footage manipulation, improper release, chain-of-evidence concerns, etc.—and add an extra layer of liability to departments because misused footage would be government property, rather than personal. Some state and federal lawmakers have begun making the use
of policies and procedures mandatory but the inclusion of such provisions in legislation is still far from wide-spread.\textsuperscript{214}

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

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

\textbf{B. Police Department Policy Recommendations}

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

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


\textsuperscript{216} See supra notes 116–20 and accompanying text.

\textsuperscript{217} See WHITE, supra note 19, at 28–29 and accompanying text. The suggested modifications identified by the Menlo Park City Council provide an example of the benefit
following subsection provides a brief discussion of the sections of the sample policy and provisions contained therein. While each police department should have a policy governing its use of PWBCs, it is also important that the policy be made available to the public. Despite the fact that over 25% of the nation’s police departments now utilize PWBCs, many departments have not made their policies readily accessible to the public. Because transparency is a primary motivation to the adoption of the use of PWBCs, it is important that police departments be transparent as to how they will be used.

1. Purpose & Scope

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

2. Policy

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

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

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

219 See supra note 23 and accompanying text.

See supra Part III.B.


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

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

3. Definition

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

4. Officer Responsibilities

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

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224 See supra notes 80–84 and accompanying text.
225 See supra notes 210–13 and accompanying text.
226 See MINNEAPOLIS POLICY, supra note 221, at 1.
227 MILLER, supra note 8, at 38 (“Policies should clearly state which personnel are assigned or permitted to wear body-worn cameras and under which circumstances.”).
228 Id. (“It is not feasible for PERF to make a specific recommendation about which officers should be required to wear cameras. This decision will depend on an agency’s resources, law enforcement needs, and other factors.”).
alternatives in the form of discipline;\textsuperscript{229} the disciplinary provisions are located in section VIII of the policy because they apply more broadly than to officers alone.

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

5. Prohibited Uses of PWBCs

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

6. Review of PWBC’s Footage

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

\textsuperscript{229} See supra notes 197–200 and accompanying text.
\textsuperscript{230} See e.g., MINNEAPOLIS POLICY, supra note 221, at 3.
\textsuperscript{231} See supra notes 42–43 and accompanying text.
\textsuperscript{232} See supra Part IV.A.1.
\textsuperscript{233} See supra note 90 and accompanying text.
\textsuperscript{234} See supra notes 121–27 and accompanying text.
considered and adopted only with the advice and consent of each of these parties. Appendix A attempts to strike a compromise between competing interests by limiting the ability of both officers and their supervisors to review footage absent necessity. The purpose for this decision is an attempt to maintain the officer/supervisor relationship as it currently exists while still creating the safeguards from frivolous misconduct claims and evidentiary uncertainty. The specific decision not to allow an officer to view footage before completing reports or making statements—but allowing an addendum afterwards—is to prevent an officer from being able to make up a story justifying his actions based on objective view of the scene in hindsight—while still allowing the correction of minor misstatements based on the nature of memory.\textsuperscript{235}

7. PWBC Management System Administration

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

8. Disciplinary Measures

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

\textsuperscript{235} See supra notes 50–51.
\textsuperscript{236} See supra Part IV.B.3.
\textsuperscript{237} See supra Part IV.B.3.
\textsuperscript{238} A culture that has been hard for many departments to create in their initial adoption of the use of PWBCs. See supra notes 133, 135–37 and accompanying text.
\textsuperscript{239} See supra notes 197–200 and accompanying text.
VI. CONCLUSION

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

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

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

243 Maxwell, supra note 241 (reporting that the Lakeway Police Department conducted a beta test of the auto-activation cameras in June 2015).
associated with the use of PWBCs.244 These claims are yet to be proven, but offer an exciting future for the development of policing.

244 See UTILITY, supra note 240, at 6.
Body-Worn Camera Management System

I. PURPOSE & SCOPE

A. This order sets forth Departmental policy and procedures for the Body-Worn Camera Management System (BWCMS), which includes the use of Body-Worn Cameras (BWCs) to document both audio and video field activity of participants in the execution of their duties.\(^{245}\)

B. The Department has adopted BWC technology to further its mission by enabling participants to create audio and video evidence of their actions to increase the accuracy of criminal and administrative investigations and reviews of officer conduct.\(^{246}\)

C. This policy should not be construed to inhibit the lawful actions of officers pursuant to warrants or the use of their dash camera devices while on-duty.\(^{247}\)

II. POLICY

A. All employees of the Department must be familiar with this policy because any employee may be required to interact with a participant or BWC in the course of their duties.\(^{248}\)

B. All employees of the Department must abide by the provisions of this policy.\(^{249}\)

C. No officer shall be permitted to wear a personal body camera.\(^{250}\)

D. [Explicitly designate a unit or individual as the Custodian of Records for all BWC footage.]\(^{251}\)

E. [State the specific product required to be used by contract.] The chosen device should include the following features:

1. The ability to be affixed to an officer’s head to maximize the coverage of what an officer is able to see at all times;\(^{252}\) and

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\(^{245}\) *OAKLAND POLICY*, *supra* note 70, at 1.

\(^{246}\) *Id.*

\(^{247}\) See Menlo Park Policy, *supra* note 161, at 163.

\(^{248}\) *DENVER POLICY*, *supra* note 139, at 1.

\(^{249}\) *OAKLAND POLICY*, *supra* note 70, at 1.

\(^{250}\) *Id.*

\(^{251}\) *Id.*
2. Pre-event buffer mode, which captures the audio and video for the 30 seconds prior to the BWC’s initiation.

F. The Department is required to include in any contract with a third party vendor for the storage of BWC footage: “All data provided to [third party vendor] for storage remains the exclusive property of the [______] Police Department. [Third party vendor] may not provide access or distribute footage to any party except its official contacts at the [______] Police Department.”

III. DEFINITIONS

A. “Body-worn camera” (BWC)—portable audio and video recording device.253

B. “Participant”—any member of the Department selected to be equipped with a BWC.

C. “Personal body camera”—any type of audio or video recording device not supplied by the Department for use during the execution of official duties.

IV. OFFICER RESPONSIBILITIES

A. Training

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

B. Equipment

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

1. Examining his BWC to determine if it is functioning properly and is fully charged. Any obvious damage or malfunction should be immediately reported to a supervisor;255

2. The BWC must be placed in the appropriate mode of operation and properly affixed to the participant to allow it a clear line of sight. The BWC must remain affixed to the participant for the duration of their shift;256

3. Non-uniformed participants should carry the BWC with them and affix it prior to foreseeably engaging in any event detailed in IV.C,
unless doing so would be infeasible under the participant’s assignment;\(^{257}\)

4. The care of each BWC is the responsibility of the participant using it during their shift;\(^{258}\) and

5. Participants must return their cameras at the conclusion of each shift and upload their footage [as required by the chosen system].\(^{259}\)

C. Activation

1. Participants should manually activate both the audio and visual features of their BWC prior to “responding to a call for service or at the initiation of any other law enforcement or investigative encounter between a police officer and a member of the public,”\(^{260}\) unless doing so would be “unsafe, impossible, or impractical.”\(^{261}\)

2. A non-violent protest in-and-of-itself does not constitute a circumstance requiring the use of a BWC.

3. While a situation may not require the activation of the BWC at its inception, the BWC should be activated as soon as practically possible once the criterion of IV.C.1 has been met.\(^{262}\)

4. At the order of a supervisor.\(^{263}\)

5. The preceding list of activation criteria is non-exhaustive. A participant should use discretion to activate his BWC if he believes it necessary to do so and activation would not violate any provision of this policy;\(^{264}\) if uncertain as to whether an instance requires the use of his BWC, an officer is encouraged to record the situation rather than miss recording an incident determined to be recorded in later analysis.\(^{265}\)

D. De-activation

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

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

\(^{258}\)DENVER POLICY, supra note 139, at 2.

\(^{259}\)OAKLAND POLICY, supra note 70, at 7.

\(^{260}\)Stanley, supra note 104 (emphasis omitted).

\(^{261}\)MILLER, supra note 8, at 55; accord MINNEAPOLIS POLICY, supra note 221, at 3.

\(^{262}\)DENVER POLICY, supra note 139, at 3.

\(^{263}\)OAKLAND POLICY, supra note 70, at 2.

\(^{264}\)DENVER POLICY, supra note 139, at 3.

\(^{265}\)BOSTON POLICY, supra note 200, § 5.

\(^{266}\)OAKLAND POLICY, supra note 70, at 3.
informant\textsuperscript{269} and the officer does not believe the circumstances warrant disregarding the request.\textsuperscript{270} Circumstances would warrant disregarding the request if the officer has reasonable suspicion that the party they are speaking with has engaged in criminal activity. An officer should further consider whether disengaging only the audio or video recording would serve the desired privacy objective while continuing to create a record of the potentially dynamic scene;\textsuperscript{271}

b. Absent exigent circumstances, the participant has a reasonable belief that recording in a hospital or while speaking with paramedics, nurses, doctors, psychiatrists, or other medical professional may compromise patient confidentiality;\textsuperscript{272}

c. Upon entering the premises of a public, private, or parochial K-12 school during regular school hours, unless an actual threat to life or health exists;\textsuperscript{273}

d. The initial and subsequent events requiring activation under IV.C have concluded,\textsuperscript{274} and the participant reasonably believes further recording will provide no additional evidentiary value; or

e. They receive an order from a superior.\textsuperscript{275}

2. If a participant mistakenly engages his BWC, he may exercise discretion in de-activating the BWC.\textsuperscript{276}

3. Prior to de-activation, the participant should verbally announce his intention to de-activate the BWC and his reason for doing so.\textsuperscript{277}

4. Once a participant has de-activated her BWC, she is responsible for re-activating the camera should the reason for initial activation remain present or a new situation arise.\textsuperscript{278}

\textsuperscript{267} Id. at 2.
\textsuperscript{268} DENVER POLICY, supra note 139, at 4.
\textsuperscript{269} Menlo Park Policy, supra note 161, at 160.
\textsuperscript{270} MINNEAPOLIS POLICY, supra note 221, at 4 (“If a request is made for a PVR to be turned off by a party being contacted, the officer should take into account the overall circumstances and what is most beneficial to all involved, before deciding to honor the request. For example, an officer may choose to turn off the PVR if its operation is inhibiting a victim or witness from giving a statement. It is up to the officer to make the determination as to what is best for the investigation or contact.”).
\textsuperscript{271} See GREENSBORO POLICY, supra note 99, § 15.11.5; VALDOSTA POLICY, supra note 99, § 1(B).
\textsuperscript{272} DENVER POLICY, supra note 139, at 5; OAKLAND POLICY, supra note 70, at 3.
\textsuperscript{273} ACLU, A MODEL ACT FOR REGULATING THE USE OF WEARABLE BODY CAMERAS BY LAW ENFORCEMENT § 1(h) [hereinafter ACLU MODEL POLICY], https://www.aclu.org/model-act-regulating-use-wearable-body-cameras-law-enforcement [https://perma.cc/AVL9-B9F8].
\textsuperscript{274} OAKLAND POLICY, supra note 70, at 3.
\textsuperscript{275} DENVER POLICY, supra note 139, at 4.
\textsuperscript{276} OAKLAND POLICY, supra note 70, at 4.
\textsuperscript{277} DENVER POLICY, supra note 139, at 4.
\textsuperscript{278} OAKLAND POLICY, supra note 70, at 4.
E. Notice

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

V. PROHIBITED USES OF BWC

Participants are prohibited from:

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

VI. REVIEW OF BWC FOOTAGE

A. Officers

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

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279 ACLU Model Policy, supra note 273, § 1(c).
280 Miller, supra note 8, at 55; accord Minneapolis Policy, supra note 221, at 3.
281 Denver Policy, supra note 139, at 2.
282 Menlo Park Policy, supra note 161, at 160.
283 Id. at 163.
284 ACLU Model Policy, supra note 273, § 1(e).
286 Id. § PR2(i).
287 Austin Policy, supra note 91, at 2.
288 Oakland Policy, supra note 70, at 4.
289 Id. at 5.
construed to interfere with a participant’s ability to review BWC footage to prepare for testifying in a court proceeding.

B. Supervisors

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

VII. BODY-WORN CAMERA MANAGEMENT SYSTEM ADMINISTRATION

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

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

290 DENVER POLICY, supra note 139, at 5. But see OAKLAND POLICY, supra note 70, at 5.
291 DENVER POLICY, supra note 139, at 5.
292 OAKLAND POLICY, supra note 70, at 5.
293 Id. at 6.
294 DENVER POLICY, supra note 139, at 5.
295 OAKLAND POLICY, supra note 70, at 6.
296 See id.
297 DENVER POLICY, supra note 139, at 5.
c. At the request of the citizen subject(s) of the footage if the footage contains no evidentiary value.299
6. Produce BWC footage as required for investigations, evidence in trials, or other related purposes; and
7. Produce and redact BWC footage in compliance with local, state, and federal statutes and disclosure laws.300

VIII. DISCIPLINARY MEASURES

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

299 Boston Policy, supra note 200, § 8.
300 Oakland Policy, supra note 70, at 6.
301 See Boston Policy, supra note 200, § 9 n.2 (making all violations subject to Boston Police Department’s “Rule 109, Section 32, Rule 102 s.10(d): The following offense [is] subject to the Five-Day rule, and may be disciplined by imposition of immediate suspension of not more than five days.” (alteration in original)).
302 Id. § 9.
303 Id.
304 Id.
305 Id.
306 Id. § 10.