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Collateral Visibility: A Socio-Legal Study of Police Body Camera Adoption, Privacy, and Public Disclosure in Washington State

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Collateral Visibility: A Socio-Legal Study of Police Body-Camera Adoption, Privacy, and Public Disclosure in Washington State*

BRYCE CLAYTON NEWELL[†]

Law enforcement use of body-worn cameras has become a subject of significant public and scholarly debate in recent years. This Article presents findings from a study of the legal and social implications of body-worn camera adoption by two police departments in Washington State. In particular, this study focuses on the public disclosure of body-worn camera footage under Washington State's public records act, state privacy law, and original empirical findings related to officer attitudes about—and perceptions of—the impact of these laws on their work, their own personal privacy, and the privacy of the citizens they serve. The law in Washington State requires law enforcement agencies to disclose substantial amounts of body-camera footage—although important new exemptions were added to state law in 2016—and options for withholding footage based on privacy grounds are limited under the state's Public Records Act and disclosure-friendly decisions of the Washington State Supreme Court. Additionally, broad requests for body-worn camera footage have posed significant problems for civilian privacy. Police officers report strong concerns about public disclosure of their footage, largely because of the potential for such footage to impact civilian privacy interests, and officers also report high levels of disagreement with laws requiring the disclosure of most footage to any member of the public. However, officers are supportive of limited access policies that would allow individuals connected to an incident to obtain footage. This Article concludes by making a normative argument for restricting public access to some body-worn camera footage on privacy grounds while still preserving adequate space for robust civilian oversight and police accountability.

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I personally would never provide my personal information to an officer with a camera. It all ends up on the internet. That is wrong, and unsafe.

Patrol Officer

Body-worn videos are the new cat videos.

Police Department IT Director

INTRODUCTION

September 2014. *Inside the headquarters of a municipal police department in Washington State.*

I sit against the wall in an overcrowded room as about two dozen police officers pull small black cameras out of square white boxes. Most of them appear eager to see what is inside, and they begin to talk excitedly amongst themselves as they try to figure out how to attach the cameras to their uniforms. A representative from the camera manufacturer¹ explains to the officers what to expect from their new body-worn cameras. As the trainer explains how to activate and deactivate the cameras, electronic beeps fill the room as a number of the officers initiate their first recordings. All of the officers, except two, have volunteered to wear the cameras as part of the department's initial body-camera pilot program. The other two, just as all other new recruits and lateral transfers into the department, are required to begin using a camera as soon as their field training is complete. The officers have a variety of reasons for volunteering to wear the cameras, but many claim they want to be able to document evidence and counter unfounded claims of misconduct. Others hope that the footage will show citizens just how mundane most police work actually is, and that most police officers are not hell-bent on violating peoples' rights.

As the trainer shows sample videos of officers using electronic control devices (for example, TASERS) to subdue uncooperative suspects, the officers in the room express excitement about the video they see on the screen, and ask how they should mount their own cameras to get a similar perspective. As they try out various mounts, one officer turns to another and, as he struggles to get the camera situated on his uniform, says to the other, "Don't look at me like I'm a monkey; I'm just bad with technology." Another officer turns to his neighbor and says, "I guess I won't say anything stupid; I'm sure at least one person in the room is recording right now." The good humor in the room is evident as the officers play with the cameras for another few minutes. Eventually, one officer asks jokingly, "Where's the direct-to-YouTube button?" The subsequent commentary makes it obvious that some of the officers feel that they should have the ability to post videos of citizens to YouTube, just as citizens have been doing—with videos of the police—for years. "If citizens can do it," another officer tells me after the training, "why can't we also benefit from the ability to record in public places?"

In fact, just a few days after this initial training meeting, the department (and others across the state) received a blanket request, under state access to information law, for all video footage generated by body-worn cameras or dashboard cameras mounted in patrol vehicles (for the text of this request, see Figure 1, below). Armed

1. The department chose to purchase and use cameras marketed by TASER International, Inc., sold under the AXON label.

with legal advice from their city's legal office that almost all of the footage must be disclosed without any form of redaction, the department struggles to process hundreds of hours of early footage, a process that takes them three times longer than the length of the video itself.

This is a public records request for the police department.
 I'm requesting all dash and body camera videos not involved in pending litigation.
 I would like the requested videos to be uploaded to Youtube by the department at [https://www.youtube.com/user/\[redacted\]](https://www.youtube.com/user/[redacted]) or another channel. If the department doesn't want to upload them to its own Youtube account then I would like it to consider uploading it to Youtube via an account I create and maintain. If uninterested in doing that I would like it to consider uploading the videos to a website, FTP server or cloud storage system like Dropbox or Google Drive.
 I would like the videos uploaded in installments beginning with the oldest.

Figure 1. Text of the public records request received by the department in Sept. 2014.²

Within a couple of months, the department had disclosed all of the test videos created by the officers during this training meeting, along with many other videos recorded by the officers in the next few weeks as they interacted with civilians during their shifts. As the department disclosed the footage, the (then) anonymous requestor uploaded it directly to his YouTube channel. Within weeks, it became clear that the state's freedom of information law was functioning—in this case—as a legally sanctioned direct-to-YouTube alternative for police body-camera footage, albeit pushed online by private actors and not the police officers themselves.

After the initial disclosures hit YouTube, the commentary offered by officers at the outset of my subsequent ride-alongs changed dramatically. During my very earliest rides with officers at this and one other department in the state, officers were generally quite vocal about the benefits they expected to see from the cameras (for example, that they would capture evidence of criminal wrongdoing by civilians and give the officers an increased ability to counter false claims of misconduct). However, after the blanket request for all footage became common knowledge, the dominant refrain I heard at the outset of rides over the next few months was the officers' dismay that all of their footage is likely bound to be visible to anyone on the internet. The officers target their frustration at what they perceive as a significant violation of privacy; however, they are not only concerned about violations of their own privacy,

2. Videos disclosed to this requestor were posted to an anonymous YouTube channel at <https://www.youtube.com/user/policevideorequests>. The Seattle Police Department responded by holding a hackathon and ultimately hiring the person who had filed the original request (Tim Clemans). See Jessica Glenza, *Seattle Police Post Blurry Body-Camera Videos to YouTube in Transparency Bid*, GUARDIAN (Mar. 9, 2015, 4:39 PM), <http://www.theguardian.com/us-news/2015/mar/09/seattle-police-posting-body-camera-footage-youtube-transparency> [https://perma.cc/6PLX-29WP].

but also the privacy of the citizens they contact during their shifts. As one Police Sergeant explained:

I feel that it is important to document how well our officers perform their duties and their high level of professionalism while at work. My only reservation about the [body-camera] program is that all the footage is subject to a public records request and could possibly put a victim into further harm or ridicule if the footage is viewed by a person [who] does not have any legitimate interest in the incident.

A few months later, while sitting around a table eating lunch with a group of five officers in a different part of the state, an officer loads a video that he recorded a few weeks earlier onto his laptop. He stands and places the laptop on the table in front of me and says, emphatically, “Here, tell me this should be on YouTube.” On the screen, I see the view from the officer’s chest as he quickly exits his vehicle and runs across a lawn and through the open front door of a private home. As he enters the house, I hear multiple people screaming and a woman wailing loudly. Quite a few people are crowded into the small living room. Suddenly, I see the officer turn and take a small infant (who I later learn was two months old) from the wailing woman. The infant’s head and arms hang limply as the officer carefully transfers the baby’s body to the floor and begins to attempt to resuscitate it, unsuccessfully. In the background, I see a couple of additional small children, held back by another adult, before I turn away from the screen in shock at what I have just seen. *There is no legitimate reason for the public to access this video*, the officer claims. The officers around the table nod and quietly voice their agreement.³

A day or two later, I stand inside a couple’s living room with two officers as the couple tries to explain why the wife had called 911 and accused the husband of threatening violence. The husband is drunk—and drinking continuously while talking to an officer wearing a camera on his chest—and tells a rambling story about how much trouble his wife has caused him over the years. *Perhaps he should leave her and move on. Perhaps he loves her. On the other hand, she has caused him nothing but grief, and she makes his life miserable.* Accepting the officer’s “if you think that’s what needs to be done, then what are you going to do about it?” as an affirmation of his tentative plan to leave his wife, the man says, “Now, don’t try to force me into anything . . . I see what you are trying to do here.” Moments later, he says, “Maybe what I really should do is stop drinking”—and he takes another sip from his beer can. Turning to me, he asks, “Who are you?” I have been in the room as long as the officer has been, about ten minutes at this point, but this is the first time the man has really noticed me standing off to the side. He stares at me intently for a few moments. “He’s with us,” the officer says. “He’s evaluating how we work while wearing these cameras.” “Oh, that’s good,” the man replies, and his attention moves back to the officer. Even if he were sober, he probably would not realize that this conversation was likely bound for YouTube and virtually unlimited visibility. If he did, would he or his wife (who was talking to a second officer in the far corner of the

3. Interestingly, as noted in Part IV, *infra*, footage of the bodies of deceased persons was made exempt from public disclosure in Washington State as of June 9, 2016.

small living room) have let the police into their house in the first place? Would the wife have even called to report her husband's threats?

During the course of my ride-alongs and interviews with dozens of officers over the next year and a half, it became intensely clear that many officers—especially the veterans—are extremely knowledgeable about the practical ins and outs of many laws that regulate their conduct, in particular those relating to when officers can stop or detain individuals, make arrests, conduct searches, or seize property. Because they frequently find themselves the subjects of citizens' smartphone cameras, officers also clearly understand that citizens have a legal right to film them while they work. However, the advent of body-worn camera programs in these two departments has forced officers into the middle of a situation filled with legal ambiguity and uncertainty, and it is not clear to officers where, how often, and when they need to record—and when they should not—or what role public disclosure and privacy laws ought to play in these decisions. Department policies provide some guidance, but officers remain concerned about the legal ambiguity that exists because no state laws clearly address these questions (at least at the outset of the programs). Additionally, the fact that members of the public have broad access to most of the officers' videos—including those filmed inside homes and with citizens in very sensitive personal situations—makes many officers uncomfortable. These concerns have led a number of officers to express sentiments similar to the following statement by a Police Captain:

Not everything should be filmed (i.e., rape victim or child abuse interviews), and our public disclosure laws are too liberal to keep those [videos] out of the hands of people who would exploit or abuse such video[s].

In some circumstances, however, the ability of an officer to choose *not to record* a citizen contact may have significant (positive) implications for a citizen's privacy interests. However, officers express the concern that, if they choose not to record an interaction, the media and the public will distrust their decision and assume the officer was acting badly. Additionally, by not recording, the officers will not capture potentially exculpatory evidence to ward off unfounded complaints of misconduct. This state of affairs led one officer to explain:

Right now (in the state of Washington) officers are making discretionary decisions to turn off the camera to protect the public's privacy (due to the freedom of information act). In reality, officers shouldn't be the ones having to make that decision. Recordings should only be for people legally attached to a case, not for YouTube videos. If an officer decides to turn a camera off because they are taking a sexual assault case, there is going to be serious argument by the defense once it goes to trial.

The combination of legal ambiguity, questions about the long-term impacts the cameras will have on police practice and officer-citizen interactions, and the privacy implications of broad public disclosure laws, suggests the need for empirically grounded and evidence-driven policy reform. Although body-worn camera adoption in the United States may have been initially perceived as a response to officer-involved violence and a need to capture evidence of officer misconduct—or deter such conduct in the first place—usage of the cameras may end up significantly impacting the nature of police-civilian interactions in ways not intended or even

envisioned at the time the technology was deployed—and the wide public release of body-worn camera footage will likely contribute to these changes. Indeed, despite early empirical research indicating that the use of body cameras has resulted in decreased use of force by officers,⁴ subsequent research has found that this may only be true when officers are not allowed much discretion about when to turn cameras on,⁵ and that wearing a camera may—in some circumstances—also increase the risk of assaults on officers by civilians.⁶

This Article presents the findings from an empirical examination of the legal and social implications of body-worn camera adoption by two police departments in Washington State from September 2014 to June 2016. In particular, this study focuses on the public disclosure of body-worn camera footage under Washington State's Public Records Act (PRA),⁷ provides an analysis of state privacy and access to information law, and presents empirical findings related to officer attitudes towards—and perceptions of—the impact of these laws on their work, their own personal privacy, and the privacy of the citizens they serve. The motivating questions behind this research are: What are the legal and social implications of body-worn camera adoption in a jurisdiction with liberal public disclosure laws (and particularly under Washington State law)? How do frontline police officers in these two departments understand the legal and practical implications of public disclosure law in this context? And, finally, what implications does body-camera adoption have on officer and civilian privacy? The research reported here is multidisciplinary, drawing on law, legal theory, and legal research; empirical fieldwork conducted with police officers, including interviews, ride-alongs, and surveys of police officers in two departments that have recently begun using body-worn cameras; and the application of theory and/or conceptual methodologies from the fields of surveillance studies and criminology/criminal justice.

The remainder of this Article proceeds as follows: Part I briefly outlines some of the increasing tensions between police surveillance and civilian-initiated inverse surveillance (of which requesting public records is only one small part of a much larger picture) and the particularly important questions raised by public disclosure of police surveillance video under public records laws. Part II outlines much of the major existing scholarly literature on the implications of body-worn cameras,

4. See BARAK ARIEL & TONY FARRAR, POLICE FOUNDATION, SELF-AWARENESS TO BEING WATCHED AND SOCIALLY-DESIRABLE BEHAVIOR: A FIELD EXPERIMENT ON THE EFFECT OF BODY-WORN CAMERAS ON POLICE USE-OF-FORCE (2013); Barak Ariel, William A. Farrar & Alex Sutherland, *The Effect of Police Body-Worn Cameras on Use of Force and Citizens' Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANT CRIMINOLOGY 509 (2015).

5. Barak Ariel, Alex Sutherland, Darren Henstock, Josh Young, Paul Drover, Jayne Sykes, Simon Megicks & Ryan Henderson, *Report: Increases in Police Use of Force in the Presence of Body-Worn Cameras are Driven by Officer Discretion: A Protocol-Based Subgroup Analysis of Ten Randomized Experiments*, 12 J. EXPERIMENTAL CRIMINOLOGY 453 (2016).

6. Barak Ariel, Alex Sutherland, Darren Henstock, Josh Young, Paul Drover, Jayne Sykes, Simon Megicks & Ryan Henderson, *Wearing Body Cameras Increases Assaults Against Officers and Does Not Reduce Police Use of Force: Results from a Global Multi-Site Experiment*, 13 EUR. J. CRIMINOLOGY 744 (2016).

7. WASH. REV. CODE ANN. § 42.56.001 (2017).

primarily from an empirical perspective and the criminal justice/criminology literature, but also from legal scholarship. Part III provides detailed information about the methodology employed throughout this study (both legal and empirical), including the theoretical commitments that underlie the choice of methods and analysis. Part IV provides an in-depth legal analysis of Washington State public records and privacy law in the context of body-worn camera use by law enforcement. Part V presents empirical findings drawn from interviews, observations, and an analysis of survey responses from police officers (building on the narrative introduction at the outset of the paper). Part VI integrates the legal, theoretical, and empirical components of this study and summarizes the implications that this study has for broader public policy and legal change. Finally, in conclusion, I present a normative argument for limiting public access to body-worn camera footage to some degree while still maintaining adequate space for robust civilian oversight and police accountability.

I. INCREASING (AND COLLATERAL) VISIBILITIES

In the aftermath of police-involved killings in Ferguson, Missouri, and New York, in 2014, the adoption of body-worn camera technologies by police departments around the country has come under much greater scrutiny. The racial tensions between nonwhite communities and their local law enforcement agencies around the country were exacerbated by the deaths of Michael Brown, Eric Garner, Walter Scott, and others at the hands of white police officers. Violent protests often followed, and calls for mandatory camera adoption started to become a common occurrence in the media. Post-Ferguson, civil liberties organizations, communities, and a variety of commentators came out publicly in favor of outfitting officers with body-worn cameras.

Information, seen as some “thing” that facilitates knowledge⁸ and grants power to its holder over the information subject,⁹ can enable power of some over others. Through vertical surveillance, police gain evidentiary information (as “knowledge”)¹⁰—and possibly investigatory information through subsequent analysis, if allowed—about civilians. And through public disclosure of footage in which other civilians are the primary subjects, citizens can engage in increasingly revealing forms of horizontal surveillance, potentially generating shifts in power relationships among ordinary people.

The use of wearable cameras also has the potential to alter or disrupt the nature of nonreported, “peacekeeping” aspects of policing and the attendant discretion that officers have historically had for their activities not resulting in arrests. Wearable cameras may serve to exacerbate the compromised position of the patrol officer, who is often under the “dual pressure[s] to ‘be right’ and to ‘do something,’” even in stressful or dangerous situations).¹¹ The use of body-worn cameras can be a two-edged sword. It promises some benefits, but also poses important problems. The use

8. Michael K. Buckland, *Information as Thing*, 42 J. AM. SOC'Y INFO. SCI. 351 (1991).

9. See CRAIG FORCESE & AARON FREEMAN, *THE LAWS OF GOVERNMENT: THE LEGAL FOUNDATIONS OF CANADIAN DEMOCRACY* 481–84 (2d ed. 2011).

10. See Buckland, *supra* note 8, at 351.

11. See EGON BITTNER, *ASPECTS OF POLICE WORK* 97 (1990).

of such systems is not necessarily inimical to freedom (and its attendant privacy and speech concerns), but significant checks need to be employed to ensure against the possibility of arbitrary interference and the improper use of power generated through the accumulation of information and potential intimidation implicit in these surveillance practices. In a modern society where surveillance has become a stable and accepted element of everyday life, it is appropriate to consider the role of research “to make surveillance strange again, and therefore open to rigorous examination and possibly change.”¹²

In the United States, the rights of citizens to document government action and access public records have a strong foundation in First Amendment principles. However, states also have legitimate interests in collecting certain types of information to promote efficiency, public safety, and law enforcement. These interests are also regulated by constitutional law (for example, the Fourth Amendment¹³) and other personal privacy rights scattered among various state and federal laws. Often the types of “personal information” that law and/or courts consider “public” or “private” is dependent on spatial and property-based considerations, and courts commonly refer to notions of property when deciding these cases.¹⁴ As state surveillance continues to capture more and more potentially sensitive personal information about individual citizens (or noncitizen residents and others), broad freedom of information (FOI) laws and other transparency initiatives may come into significant tension with individual privacy rights when they would require states to disclose sensitive personal information about individual citizens simply because the information happens to be included within a government record.¹⁵

Additionally, as police officers are outfitted with mobile surveillance devices, such as body-worn cameras, which are not constrained by property or spatial limitations (that is, they can be worn into private residences or anywhere else the officer chooses to be), the tensions between privacy, state surveillance, and public access become increasingly escalated. Sensitive personal information captured in video footage from officers’ cameras has already begun to appear on YouTube, Facebook, and other online repositories as a consequence of access-prioritizing FOI laws in some states—and notably in Washington State where these tensions have been felt very acutely in the past couple of years. Breakdowns between law and policy, on one hand, and technological development, on the other, require us to rethink our information policy—that is, from a legal and regulatory standpoint, how should we balance information access and information control in a way that properly balances public access to records and democratic oversight with personal privacy and an effective criminal justice system?

Despite longstanding tensions between government power and citizen oversight, public record keeping is a relatively recent phenomenon that largely emerged in the

12. David Murakami Wood & C. William R. Webster, *Living in Surveillance Societies: The Normalisation of Surveillance in Europe and the Threat of Britain’s Bad Example*, 5 J. CONTEMP. EUR. RES. 259, 260 (2009).

13. U.S. CONST. amend. IV.

14. See, e.g., *Florida v. Jardines*, 133 S. Ct. 1409 (2013); *United States v. Jones*, 565 U.S. 400 (2012).

15. See Daniel J. Solove, *Access and Aggregation: Privacy, Public Records, and the Constitution*, 86 MINN. L. REV. 1137 (2002).

twentieth century.¹⁶ Public access to this information is often a prerequisite to citizens exercising power or seeking redress for potential rights violations stemming from secret (or not highly visible) activities of others.¹⁷ As such, an imbalance in information access between a people and their government can tip the scales of power and limit the ability of the people to exercise democratic oversight and control those they have put in power to represent them.¹⁸ FOI laws often provide a great deal of access to government records and can serve as a powerful and effective means for empowering oversight by journalists and ordinary citizens. In a very real sense, these laws provide a legal mechanism for citizen-initiated surveillance from underneath—sometimes called *sousveillance*, *inverse surveillance*,¹⁹ or *reciprocal surveillance*.²⁰ The concept of inverse or reciprocal surveillance (which may take numerous forms) grants citizens greater power to check government abuse and force even greater transparency.²¹

Watching the watchers, of course, may involve numerous methodologies beyond just requesting and analyzing public records. The miniaturization and decreasing cost of camera technologies has also empowered citizens to record matters of public interest, including the actions of police officers and other public officials. YouTube and Facebook (et al.) are replete with images and video of police officers interacting with civilians, and provide a platform for the “secondary visibility”²² of official police (mis)conduct. On the other hand, these same technological developments have also led to increased information acquisition about individual persons by states (vertical surveillance) as well as by other civilians (horizontal surveillance). In some ways, access to information has increased dramatically in recent decades; in others, political implementation of information policies has created what Jaeger calls “information politics,” meaning “the manipulation of information access for political

16. *Id.*

17. FORCESE & FREEMAN, *supra* note 9.

18. *Id.*

19. Steve Mann, Jason Nolan & Barry Wellman, *Sousveillance: Inventing and Using Wearable Computing Devices for Data Collection in Surveillance Environments*, 1 SURVEILLANCE & SOC’Y 331 (2003).

20. DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM?* (1998); KEVIN D. HAGGERTY & RICHARD V. ERICSON, *THE NEW POLITICS OF SURVEILLANCE AND VISIBILITY* 10 (2006); Gary T. Marx, *Surveillance and Society*, in 2 *ENCYCLOPEDIA OF SOCIAL THEORY* 8156 (George Ritzer ed., 2005).

21. See 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 [hereinafter Newell, *Crossing Lenses*]; Bryce Clayton Newell, *Local Law Enforcement Jumps on the Big Data Bandwagon: Automated License Plate Recognition Systems, Information Privacy, and Access to Government Information*, 66 ME. L. REV. 397 (2014) [hereinafter Newell, *Big Data Bandwagon*]; Bryce Clayton Newell, *Technopolicing, Surveillance, and Citizen Oversight: A Neorepublican Theory of Liberty and Information Control*, 31 GOV’T. INFO. Q. 421 (2014); Bryce Clayton Newell, *The Massive Metadata Machine: Liberty, Power, and Secret Mass Surveillance in the U.S. and Europe*, 10 ISJLP 481 (2014).

22. Andrew John Goldsmith, *Policing’s New Visibility*, 50 BRIT. J. CRIMINOLOGY 914 (2010).

gain.”²³ However, the reality cuts both ways: governments and citizens both potentially have much greater access to information about the activities of the other than they have in the past—and this information has the potential to produce and influence power on both sides.²⁴

As described in the beginning paragraphs of this Article, requests for body-camera footage under state FOI law began almost immediately after agencies began deploying cameras. Within months, sensitive video footage of interviews with alleged prostitutes in hotel rooms, and other officer-citizen interactions and arrests, began to be posted to YouTube after the agencies were required to disclose almost every recording made by the cameras under broad state FOI law. Beyond body-camera footage, automated license plate recognition (ALPR) and facial recognition (and other biometric) technologies have also advanced to the point where vehicles and individuals can be identified, located, and tracked in public (and even not-so-public) spaces in real (or nearly-real) time, resulting in large databases of information about individuals’ movements being held by various public and private entities, much of which is also publicly accessible under some state FOI regimes.²⁵ In Washington and a few other states, databases like these have been released to members of the public under state FOI laws, and the controversy surrounding the public disclosure of the information has resulted in some states exempting ALPR data from future release. If sensitive personal information is disclosed by public agencies (including the police) under legal FOI requirements, this information could easily contribute to violations of individual privacy interests. Under some current regulatory frameworks, the visibility of individual citizens (innocent, presumed innocent, or guilty) is inextricably tied to the visibility of the state.

This reality is closely connected to the doctrine of “practical obscurity,” first incorporated into U.S. law by the U.S. Supreme Court in the context of federal Freedom of Information Act litigation in 1989.²⁶ The doctrine is based on the presumption that the disclosure of certain *public records* in aggregated form “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”²⁷ In *U.S. Dep’t of Justice v. Reporters Committee*, the U.S. Supreme Court stated that

the issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.²⁸

23. Paul T. Jaeger, *Information Policy, Information Access, and Democratic Participation: The National and International Implications of the Bush Administration's Information Policies*, 24 *GOV'T. INFO. Q.* 840, 851 (2007).

24. See FORCESE & FREEMAN, *supra* note 9.

25. See Newell, *Big Data Bandwagon*, *supra* note 21.

26. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989).

27. *Id.* at 779.

28. *Id.* at 764.

As Hartzog and Stutzman have put it, “[T]he Supreme Court found a privacy interest in information that was technically available to the public, but could only be found by spending a burdensome and unrealistic amount of time and effort in obtaining it.”²⁹ In that sense, the personal information contained in the otherwise disclosable public records was “practically obscure because of the extremely high cost” to privacy and the “low likelihood of the information being compiled by the public.”³⁰

On the other hand, the collateral social consequences of criminal justice involvement in various social processes have been documented in a variety of contexts.³¹ These so-called collateral consequences

refer to the negative effects of criminal justice involvement that typically manifest outside of the traditional sentencing framework. Rather than being imposed by the decision of a sentencing court, these effects occur by default through associated social processes.³²

When personally identifying information captured by an officer’s body-worn camera is subject to public disclosure under FOI laws designed to keep government power in check, violations of individual privacy become part of the unintended collateral damage to these ends of transparency and accountability. The combination of police use of body-worn cameras and liberal public disclosure rules and agency disclosure practices is making, or has the potential to make, civilians increasingly visible (and their interactions with the police less obscure) in the process of routine police work—a form of what I term *collateral visibility*. This increased visibility of both states and citizens has been driven, at least in part, by advancements in technology and the methods of surveillance that such technological change has enabled. As such, *collateral visibility* is a direct result of police technology adoption within a social context devoid of adequate³³ ex ante legal regulation—that is, when the adoption and deployment of technology works as a form of policy making by procurement on the part of the police department. The consequences of these developments (and our society’s legal, technological, and political responses) have important ramifications for individual freedom and highlight tensions between individual interests in free speech, privacy, and security.

29. Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CALIF. L. REV. 1, 21 (2013).

30. *Id.*

31. See, e.g., Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15 (Marc Mauer & Meda Chesney-Lind eds., 2002); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121 (1999); Forrest Stuart, *Becoming “Copwise”: Policing, Culture, and the Collateral Consequences of Street-Level Criminalization*, 50 L. & SOC’Y REV. 279 (2016).

32. Stuart, *supra* note 31, at 280–81 (emphasis omitted) (citations omitted).

33. By “adequate,” I mean the existing law doesn’t provide clear and satisfactory legal guidance to agencies, individual officers tasked with using the technology, courts, or the public as to how the surveillance technology at issue should (or should not) be used or regulated within the context of the broader legal framework into which the technology has been, or will be, deployed.

Footage from a body camera may well have provided better evidence of what transpired between Michael Brown and Officer Darren Wilson than what was actually available from conflicting eyewitness testimony and after-the-fact civilian video. However, the potential for police body cameras to increase transparency and accountability needs to be considered side by side with a consideration of the privacy risks inherent in the use of such technologies, as well as the inherent limitations of the technology itself to stand in as a neutral observer (which is questionable). It is also important that little or no research has yet addressed many of the questions that surround the adoption of body-worn cameras,³⁴ including the impact of access to information law on police department administration, personal privacy, and other civil liberties. When technologies touted as tools to make law enforcement officers more visible in cases where alleged misconduct occurs also lead to drastic increases in civilian visibility, we need to think critically about how to regulate the use of these systems of surveillance. We cannot ignore the unintended consequences—such as the *collateral visibility* and horizontal surveillance of and between civilians enabled by public disclosure—that make our lives more transparent, not just to government agents, but also to our neighbors and the world at large. If not, we may find that the walls of our homes become transparent to the world anytime we invite a police officer through the front door.

II. PRIOR RESEARCH ON BODY-WORN CAMERAS

Research on the technical, social, political, and legal aspects of body-worn camera adoption is becoming increasingly common, although much work needs to be done to fully understand the full ramifications of police use of these technologies. In the early years of body-worn camera adoption in the United States, the empirical literature was fairly sparse, although we have now seen the results of a number of important studies, and many other related research projects are currently ongoing in multiple countries around the world.³⁵ However, to date, very little research has been conducted on the impact that public disclosure of body-worn camera footage might have on police officers, law enforcement agencies, or members of the public who happen to be caught on tape. Likewise, these and more general questions about what happens (or should happen) to the data generated by police body cameras have also become important issues for further research.³⁶

34. See MICHAEL D. WHITE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 6 (2014).

35. See CYNTHIA LUM, CHRISTOPHER KOPER, LINDA MEROLA, AMBER SCHERER & AMANDA REIOUX, EXISTING AND ONGOING BODY WORN CAMERA RESEARCH: KNOWLEDGE GAPS AND OPPORTUNITIES (2015).

36. See Elizabeth E. Joh, *Beyond Surveillance: Data Control and Body Cameras*, 14 SURVEILLANCE & SOC'Y 133, 136 (2016) (“[I]n the rush to respond to calls for greater police accountability, many American police departments lack consistent, clear, or—in some cases—any, formal policies regarding how to control that data. Without clear limits, body-worn cameras may become just another tool for law enforcement rather than a mechanism for police accountability.”); Randy K. Lippert & Bryce Clayton Newell, *Debate Introduction: The Privacy and Surveillance Implications of Police Body Cameras*, 14 SURVEILLANCE & SOC'Y 113, 114 (2016) (“Both empirical evidence and critical evaluation of the possible effect of body-

Generally, the perceived benefits of body-worn cameras include increased transparency and accountability, improved citizen perceptions of police, more civil police-citizen interactions, evidentiary benefits in criminal prosecutions or for countering claims of misconduct, and improving police officer training.³⁷ On the other hand, oft-cited potential problems include the invasion of citizen and/or police officer privacy, health and safety concerns due to wearing head-mounted cameras over long periods of time, and the need for significant investment in training, policy development, and technical infrastructure.³⁸ Earlier research investigating the effects of in-car cameras claimed substantial value to law enforcement, including enhancing officer safety, improving agency accountability, reducing agency liability, simplifying incident review, enhancing new recruit and in-service training (post-incident use of videos), improving community/media perceptions, strengthening police leadership, advancing prosecution/case resolution, enhancing officer performance and professionalism, increasing homeland security, and upgrading technology policies and procedures.³⁹

A growing number of studies have been conducted to examine various implications of police use of body-worn cameras, and studies are currently ongoing (or findings are

worn camera adoption should play a role in setting future policies for possible camera deployment and for managing the downstream impacts—for example, the redaction and public disclosure of body-camera images.”); Alexandra Mateescu, Alex Rosenblat & danah boyd, *Dreams of Accountability, Guaranteed Surveillance: The Promises and Costs of Body-Worn Cameras*, 14 SURVEILLANCE & SOC’Y 122, 125 (2016) (“[B]ody-worn cameras have already been at the center of the same protracted disputes over interpretation and authoritativeness as the dashboard camera and citizen video recording footage that have been capturing police incidents for decades. The difference from the latter is that video data remains in the often-guarded hands of law enforcement.”); Emmeline Taylor, *Lights, Camera, Redaction . . . Police Body-Worn Cameras: Autonomy, Discretion and Accountability*, 14 SURVEILLANCE & SOC’Y 128, 131 (2016) (“Cameras could be considered the equivalent of the police notebook, but only if it is accepted that pages of the notebook can be rewritten, edited, modified; even torn out entirely. That is why redaction, or more specifically, limiting the discretion of police officers to select when to record, is critical to ensuring they bring greater transparency, fairness and accountability.”).

37. WHITE, *supra* note 34, at 6–7.

38. *Id.* at 7–9.

39. INT’L ASS’N CHIEFS POLICE, THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING (2005); *see also* INT’L ASS’N CHIEFS POLICE, IMPACT OF VIDEO EVIDENCE ON MODERN POLICING (2003); INT’L ASS’N CHIEFS POLICE, IMPACT OF VIDEO EVIDENCE ON MODERN POLICING: RESEARCH AND BEST PRACTICES FROM THE IACP STUDY ON IN-CAR CAMERAS (2004).

forthcoming) in multiple states, including Florida,⁴⁰ Arizona,⁴¹ Nevada,⁴² California,⁴³ and Washington⁴⁴ (as well as additional projects in the UK,⁴⁵ Brazil,⁴⁶ South Africa,⁴⁷ and Kenya⁴⁸). Generally, these studies have been designed to test hypotheses through the application of quantitative methodologies, from randomized control trials to the administration of survey questionnaires. Qualitative approaches to these questions have, to this point, been rather rare, and if they have been employed, have been used only to supplement quantitative analyses.⁴⁹ Despite the emergence of some new studies in recent years, at least one prominent researcher in this space concluded as recently as 2014 that we still have “little evidence to support or refute many of the claims” of either the proponents or critics of body-camera adoption because there are still so many “outstanding questions regarding the impact and consequences of body-worn cameras.”⁵⁰ A number of important studies have been published since that time, but many questions still remain unanswered, and many existing results have not been replicated.

In sum, we have some evidence that body camera usage may reduce and help resolve citizen complaints⁵¹ (although we don’t always know exactly why), result in

40. See Wesley G. Jennings, Lorie A. Fridell & Mathew D. Lynch, *Cops and Cameras: Officer Perceptions of the Use of Body-Worn Cameras in Law Enforcement*, 42 J. CRIM. JUST. 549, 550–56 (2014) (noting ongoing study with the Orlando Police Department).

41. Paul Atkinson, *ASU Studies Impact of Police Body Cameras in Arizona*, WASHINGTON, ASU NEWS (Apr. 29, 2015), <https://asunews.asu.edu/20150429-michael-white-body-worn-cameras-study> [<https://perma.cc/ZAF5-FUZP>].

42. Colton Lochhead, *400 Officers Involved in Metro Body Camera Study*, LAS VEGAS REVIEW-JOURNAL (Nov. 12, 2014), <http://www.reviewjournal.com/news/las-vegas/400-officers-involved-in-metro-body-camera-study-video> [<https://perma.cc/2JVC-GCQ7>].

43. *Research on Body-Worn Cameras and Law Enforcement*, NAT’L INST. JUST. (Jan. 3, 2017), <http://www.nij.gov/topics/law-enforcement/technology/pages/body-worn-cameras.aspx> [<https://perma.cc/N48M-EL9L>].

44. See Rachel Alexander, *Police Body Cameras Focus of Two Studies*, SPOKESMAN-REV. (May 10, 2015), <http://www.spokesman.com/stories/2015/may/10/police-body-cameras-focus-of-two-studies> [<https://perma.cc/5HE9-CQ5E>]; *Body Camera Pilot Program and Academic Phase*, SPOKANE CITY: POLICE DEP’T, <https://my.spokanecity.org/police/accountability/body-cameras> [<https://perma.cc/62MJ-UQPB>].

45. Natalie Davison, *College of Policing Researchers Help Met Police with Body Worn Video Pilot*, COLLEGE OF POLICING (May 8, 2014), <http://college.pressofficeadmin.com/component/content/article/45-press-releases/737> [<https://perma.cc/KY74-9TZ8>].

46. GRAHAM DENYER WILLIS, ROBERT MUGGAH, JUSTIN KOSSLYN & FELIPE LEUSIN, *SMARTER POLICING: TRACKING THE INFLUENCE OF NEW INFORMATION TECHNOLOGY IN RIO DE JANEIRO* (2013).

47. DAVID BRUCE & SEAN TAIT, *A ‘THIRD UMPIRE’ FOR POLICING IN SOUTH AFRICA: APPLYING BODY CAMERAS IN THE WESTERN CAPE* (2015).

48. *Smart Policing*, IGARAPÉ INST., <https://igarape.org.br/en/apps/smart-policing/> [<https://perma.cc/X4GQ-GLFQ>].

49. Additionally, corporate evaluation firms or police department personnel have managed many of these studies, and only a few have been designed and run by independent academic researchers. Other studies have been managed by think tanks, such as the Igarapé Institute, in collaboration with commercial entities like Google Ideas.

50. WHITE, *supra* note 34, at 6.

51. See, e.g., ARIEL & FARRAR, *supra* note 4; LYNNE GROSSMITH, CATHERINE OWENS,

decreased use of force⁵² (at least when officers don't have wide discretion to turn on and off their cameras), provide useful evidence to support criminal prosecutions and guilty pleas⁵³ (although some of this evidence is only anecdotal or based on self-reported feedback from officers), and increase rates of citations when officers might otherwise exercise their discretion to merely issue warnings while also decreasing rates of arrests and stop-and-frisks.⁵⁴ We also have evidence that officers generally become more approving of the cameras after having used them or after having worked with officers who have used them,⁵⁵ but we also have conflicting evidence about whether cameras actually civilize police-citizen encounters or provoke more violence from civilians.⁵⁶ Body-camera footage has also been useful in documenting police misconduct—although not all states and departments have been especially eager to release such footage—as well as providing exculpatory evidence for officers subject to false or misleading complaints.

Recent reports have summarized much of the current body of relevant empirical research.⁵⁷ However, these summaries have generally been published outside traditional venues for U.S. legal scholarship. To situate my current project within this literature, but also to describe this literature for a legal audience, I outline below some of the major notable findings from studies based on research conducted both in and outside the United States.

WILL FINN, DAVID MANN, TOM DAVIES & LAURA BAIKA, COLLEGE OF POLICING AND THE MAYOR'S OFFICE FOR POLICING AND CRIME, POLICE, CAMERA, EVIDENCE: LONDON'S CLUSTER RANDOMISED CONTROLLED TRIAL OF BODY WORN VIDEO (2015); Barak Ariel, Alex Sutherland, Darren Henstock, Josh Young, Paul Drover, Jayne Sykes, Simon Megicks & Ryan Henderson, "Contagious Accountability": A Global Multisite Randomized Controlled Trial on the Effect of Police Body-Worn Cameras on Citizens' Complaints Against the Police, 44 CRIM. JUST. & BEHAV. 293 (2017); Ariel et al., *supra* note 4; Wesley G. Jennings, Mathew D. Lynch & Lorie A. Fridell, *Evaluating the Impact of Police Officer Body-Worn Cameras (BWCs) on Response-to-Resistance and Serious External Complaints: Evidence from the Orlando Police Department (OPD) Experience Utilizing a Randomized Controlled Experiment*, 43 J. CRIM. JUSTICE 480 (2015).

52. See, e.g., ARIEL & FARRAR, *supra* note 4, at 8–9; Ariel et al., *supra* note 5, at 454; Ariel, et al., *supra* note 4, at 510.

53. See, e.g., GROSSMITH ET AL., *supra* note 51, at 20–24; CATHERINE OWENS, DAVID MANN & RORY MCKENNA, COLLEGE OF POLICING, THE ESSEX BODY WORN VIDEO TRIAL: THE IMPACT OF BODY WORN VIDEO ON CRIMINAL JUSTICE OUTCOMES OF DOMESTIC ABUSE INCIDENTS 1–2 (2014).

54. See, e.g., Justin T. Ready & Jacob T.N. Young, *The Impact of On-Officer Video Cameras on Police–Citizen Contacts: Findings From a Controlled Experiment in Mesa, AZ*, J. EXPERIMENTAL CRIMINOLOGY 445 (2015).

55. See, e.g., Jennings et al., *supra* note 40, at 551–55.

56. See, e.g., Ariel et al., *supra* note 6, at 750–53.

57. See, e.g., LUM ET AL., *supra* note 35, at 5–19; Timothy I.C. Cubitt, Rebecca Lesic, Gemma L Myers & Robert Cory, *Body-Worn Video: A Systematic Review of Literature*, AUSTL. & N.Z. J. CRIMINOLOGY, 1, 18 (2016).

1. Studies Based Outside the United States

In the United Kingdom, body-worn cameras have been utilized and studied for a number of years. In 2007, the Home Office's Police and Crime Standards Directorate summarized internal research conducted during the Plymouth Basic Command Unit's (BCU) Head Camera Project.⁵⁸ In their forward to the report, Ministers McNulty and Scotland outline a glowingly positive vision for the future of body-worn video, focusing on the potential for the footage to provide evidence and to prevent crime.⁵⁹ They claim that because "[a] picture paints a thousand words," the resulting video recordings of police-citizen interactions

will capture compelling evidence of the activities of suspects and will enable the raw emotion and action from the scene to be replayed in the courts in a manner that could never be captured in written statements. The courts can see and hear the incident through the eyes and ears of the officer at the scene, thereby gaining a real understanding of the actions of the accused and the challenges that face the Police Service today.⁶⁰

The BCU's initial testing began in 2005, with a single head-mounted camera used by a police sergeant in the Devon and Cornwall Constabulary.⁶¹ In early 2006, another head-mounted camera was used as part of a domestic violence enforcement initiative that led to international media attention after footage was used as part of a successful prosecution in March of that year.⁶² Another five cameras were deployed shortly thereafter.⁶³ Initial findings from these early deployments included a significant increase in the quality of evidence gathered at incidents.⁶⁴ These early positive findings led to a number of additional body-camera pilots around the country, and the BCU began an extended trial in October of 2006 that included the use of fifty additional head-mounted cameras.⁶⁵ Following a Home Office evaluation of the extended trial, the directorate found that body-worn video had provided more accurate evidence, served as a valuable training tool, saved time in a variety of situations (for example, by reducing the need for elaborate written reports, increasing guilty pleas, and deterring complaints), provided important context surrounding the use of deadly or nonlethal force by officers, caused reluctant witnesses to testify in domestic violence cases and strengthened the ability of prosecutors to prosecute these cases, and decreased antisocial behavior by those subject to the recordings.⁶⁶ Potential drawbacks reported were minimal, largely limited to the needed technical infrastructure

58. MARTIN GOODALL, POLICE AND CRIME STANDARDS DIRECTORATE, GUIDANCE FOR THE POLICE USE OF BODY-WORN VIDEO DEVICES 30–33 (2007).

59. *See id.* at 5.

60. *Id.*

61. *Id.* at 6, 30.

62. *Id.* at 30.

63. *Id.*

64. *Id.* at 6.

65. *Id.* at 6, 30.

66. *Id.* at 7–8, 32–33.

(that is, data storage capabilities) and related personnel requirements,⁶⁷ or other technical problems.⁶⁸

In another report published in 2011, a consulting group evaluated body-worn camera programs by police in Aberdeen and Renfrewshire, Scotland.⁶⁹ In Renfrewshire, the Strathclyde Police had begun using three head-mounted cameras in 2006, expanding to thirty-eight in 2009.⁷⁰ In Aberdeen, eighteen cameras were initially deployed by the Grampian Police in 2010, quickly expanding to thirty-nine.⁷¹ The evaluation indicated a decrease in incidents of crime in the areas most saturated with cameras compared to the previous year and in comparison to the larger area as a whole, though these results cannot be considered a causal outcome of the body-worn camera pilot due to the nonexperimental nature of the study.⁷² As in the earlier Home Office study, ODS Consulting also reported anecdotal evidence that the use of the cameras contributed to an increase in guilty pleas by defendants in criminal prosecutions,⁷³ as well as some evidence that the video was useful to counter complaints of misconduct.⁷⁴

In 2014, the College of Policing (UK) conducted a four-month randomized controlled trial (RCT) of body-camera adoption on domestic abuse outcomes in the criminal justice system in Essex, UK.⁷⁵ In that RCT, seventy officers wore cameras as part of the treatment group, and another 238 were assigned to the control (no camera) group.⁷⁶ The researchers found some evidence that body-worn camera use in domestic abuse incidents increased the number of criminal charges filed, but cautioned that officers reported not always turning on their cameras during these incidents as well as technical problems.⁷⁷ In that study, officers also reported that having body-worn cameras increased their confidence in their ability to get convictions, improved evidence gathering, and increased officer accountability.⁷⁸ Officers also reported that the existence of body-worn camera footage of an initial domestic abuse incident made victims and witnesses more confident and more likely to stay in the criminal justice process.⁷⁹

In another example, the Igarapé Institute's Smart Policing project has outfitted officers in Brazil, South Africa, and Kenya with body-camera systems consisting of smartphones and open-source recording, streaming, and management software⁸⁰

67. *Id.* at 8.

68. *Id.* at 33.

69. ODS CONSULTING, BODY WORN VIDEO PROJECTS IN PAISLEY AND ABERDEEN: SELF EVALUATION 1 (2011), <http://www.bwvsg.com/wp-content/uploads/2013/07/BWV-Scottish-Report.pdf> [<https://perma.cc/GN6Z-KG47>].

70. *Id.*

71. *Id.* at 5.

72. *Id.* at 7–8.

73. *Id.* at 9.

74. *Id.* at 1–12.

75. OWENS ET AL., *supra* note 53, at 1.

76. *Id.*

77. *Id.* at 1–2, 14–18.

78. *Id.* at 2, 5.

79. *Id.* at 5, 17.

80. BRUCE & TAIT, *supra* note 47, at 12; *see also* WILLIS ET AL., *supra* note 46, at 2; *Smart Policing*, *supra* note 48.

called “CopCast.”⁸¹ The system allows for passive, on-device recording, as well as live streaming via Wi-Fi or 3G/4G connections.⁸² In the South African context, an initial review of the CopCast pilot found that officers reported that “suspects tend to be more respectful and calm during routine traffic checks” when they realize officers are wearing a camera, and that officers also feel more confident and safer knowing that an incident will be recorded.⁸³ Reportedly, officers were generally enthusiastic about the cameras, primarily for reasons related to obtaining cooperation from civilians and collecting evidence to support arrest and prosecution.⁸⁴ Bruce and Tait also heard from officers that they have changed behavior to ensure encounters are recorded.⁸⁵ One officer mentioned that during traffic stops: “I tell the motorist that my supervisor is watching the entire process via live video streaming. People seldom feel the need to negotiate when they know they are being watched.”⁸⁶

Bruce and Tait also discuss privacy concerns raised by the use of body-worn cameras and the potential for public access to body-worn camera footage, finding good reasons to “protect members of the public against gratuitous embarrassment.”⁸⁷ Officer privacy was also raised as a potential roadblock to successful adoption, especially when officers might have reasons to resist or subvert the requirement to wear a camera.⁸⁸

More recently, Ariel and Sutherland et al. replicated the methodology of the controversial Rialto study (discussed *infra* in Part II.2) in seven police agencies in various parts of the United States and United Kingdom.⁸⁹ The study was designed as a randomized control trial to test for statistically significant differences in rates of formal complaints filed against officers as a consequence of the presence of body-worn cameras and on rates of officer use of force. In regards to complaints, the researchers found significant reductions in the total number of formal complaints (93%), although “posttreatment between-group differences were not statistically significant”—a finding the researchers explained by reference to their idea of “contagious accountability.” As described in their article,

[w]hatever the precise mechanism of the deterrence effect of being watched and, by implication, accountability, all officers in the departments were acutely aware of being observed more closely, with an enhanced transparency apparatus that has never been seen before in day-to-day policing operations. Everyone was affected by it, even when the

81. The open-source code for the CopCast project is available at <https://github.com/igarape> [<https://perma.cc/8VYG-H5NE>]. The CopCast project also involved collaboration from Google Ideas (now Jigsaw) in New York City and a number of local partners in Brazil, South Africa, and Kenya. *Smart Policing*, *supra* note 48.

82. BRUCE & TAIT, *supra* note 47, at 28.

83. *Id.* at 17.

84. *Id.* at 24.

85. *Id.* at 18.

86. *Id.*

87. *Id.* at 20–21.

88. *Id.* at 30.

89. Ariel et al., *supra* note 51, at 298.

cameras were not in use, and collectively everyone in the department(s) attracted fewer complaints.⁹⁰

In regards to officer use of force, the researchers found no overwhelming evidence of reduction due to the deployment of body-worn cameras, with some departments experiencing decreases and others experiencing increases.⁹¹ However, they did find that officers wearing cameras were more likely to be assaulted by civilians than officers who were not wearing cameras.⁹²

Finally, in another recent article, Drover and Ariel documented the development of a randomized controlled trial within the West Midlands Police (UK) and discussed lessons and challenges, primarily targeted at police department administrators interested in implementing a body-worn camera program and/or experimental evaluation.⁹³

2. Studies Based in the United States

In the United States, both academic and commercial studies of body-camera adoption have been conducted over the past few years. In perhaps the most widely cited study to date within the United States, researchers from Cambridge University partnered with the Police Chief at the Rialto (California) Police Department to conduct a randomized controlled trial (RCT) of that department's body-camera program, beginning in 2012.⁹⁴ The most prominent findings from that study, namely significant decreases in officer use of force as well as the number of formal citizen complaints, were initially published in a report on the Police Foundation's website in early 2013.⁹⁵ Coming just months prior to the police-involved killing of Michael Brown in Ferguson, Missouri, and a federal district court judgment in New York requiring the NYPD to begin piloting cameras,⁹⁶ these findings have been cited routinely in media reports and by advocacy groups in support of requiring officers to wear body cameras. However, as mentioned earlier, more recent research by some of the same researchers has significantly tempered (or at least refined) the positive implications reported in the earlier study, finding that camera use did not decrease use of force (and in some cases it increased)⁹⁷ and that assaults against officers increased in some cases.⁹⁸

In the early Rialto Study, the researchers randomly assigned police shifts to either experimental (treatment) or control conditions, during which officers were required to wear or not wear body-cameras during the experimental shifts.⁹⁹ The experimental

90. *Id.* at 301, 306.

91. Ariel et al., *supra* note 5, at 460–61.

92. Ariel et al., *supra* note 6, at 750.

93. Paul Drover & Barak Ariel, *Leading an Experiment in Police Body-Worn Video Cameras*, 25 INT'L CRIM. JUST. REV. 80, 80–81 (2015).

94. ARIEL & FARRAR, *supra* note 4, at 2; Ariel et al., *supra* note 4, at 510–11.

95. ARIEL & FARRAR, *supra* note 4.

96. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013); *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013), *vacated in part*, *Ligon v. City of New York*, 743 F.3d 362 (2d Cir. 2014).

97. Ariel et al., *supra* note 5, at 459–61.

98. Ariel et al., *supra* note 6, at 750–52.

99. Ariel et al., *supra* note 4, at 510–11.

design involved all front-line patrol officers in the department ($n = 54$), and was primarily aimed at determining the effect of body-worn camera usage on use of force and citizen complaint numbers.¹⁰⁰ Interestingly, the researchers found that officers used force roughly half as often during shifts assigned to the treatment condition than they did on shifts when they were not wearing cameras.¹⁰¹ There was also a significant reduction in overall uses of force across conditions, ranging from a 64.3% to 58.3% decrease compared to the previous three years (twenty-five instances during the twelve month study period, compared to seventy, sixty-five, and sixty-seven in each of the preceding years, respectively).¹⁰²

In terms of citizen complaints, the reported between-groups treatment effect was not statistically significant, largely due to the low number of total complaints filed during the study period ($n = 3$; two during treatment, one during control conditions).¹⁰³ However, the decrease in total complaints compared with the previous three years was significant, dropping between 88% and 94%, or from “0.7 complaints per 1,000 [total citizen] contacts to 0.07 per 1,000 contacts.”¹⁰⁴ Despite generally proposing that body-worn cameras present largely positive results, the researchers also cautioned that additional research is needed to determine whether the presence of a camera reduces the likelihood of victims reporting crimes, as well as questions about victims’ rights.¹⁰⁵

In 2013, the Police Executive Research Forum (PERF) conducted a large-scale survey of police department use of body-worn cameras with support from the U.S. Department of Justice’s Office of Community Oriented Policing Services (COPS).¹⁰⁶ PERF sent surveys to 500 police departments—receiving responses from 254 agencies for a 51% response rate—finding that, as of July 2013, over 75% of reporting agencies did not use body-worn cameras, and nearly one-third of agencies that did use cameras did not have any written policy.¹⁰⁷ The PERF research team also interviewed forty police executives and convened a conference for more than 200 police agency representatives.¹⁰⁸ Police administrators generally cited greater accountability and transparency as positive outcomes from body-worn camera deployment, including fewer complaints against officers—both through civilizing police-civilian encounters at the outset and by decreasing formal complaints by showing footage to civilians who come to the department seeking to file a complaint, resulting in civilians “literally turn[ing] and walk[ing] back out.”¹⁰⁹

100. *Id.* at 519.

101. *Id.* at 523.

102. *Id.* at 524.

103. *Id.*

104. *Id.*

105. *Id.* at 525.

106. LINDSAY MILLER & JESSICA TOLIVER, POLICE EXEC. RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED (2014).

107. *Id.* at 2.

108. *Id.*

109. *Id.* at 5.

PERF also reported that body-worn camera footage can be used as a useful training tool, allowing easier identification and correction of internal problems,¹¹⁰ and as a useful tool for collecting better evidence for use in investigations and court proceedings.¹¹¹ The PERF report discusses a number of privacy implications raised by body-worn camera use, including the potential for cameras to enter private homes, to gather up-close surveillance footage that could be incorporated into facial recognition programs, or to enable voyeurism (for example, a “person [might] be able to obtain video that was recorded inside a neighbor’s home”) through liberal public disclosure or posting to online repositories,¹¹² and the privacy intrusions possibly generated by certain data storage, retention, and disclosure policies.¹¹³ In addition to these privacy-based concerns, PERF recommends against “always-on” recording policies, partially based on privacy concerns, suggesting that “[t]here are situations in which not recording is a reasonable decision.”¹¹⁴

In its research, PERF found that most agencies with formal policies did not require officers to have their cameras always recording.¹¹⁵ Most commonly, agency policies allowed for some level of officer discretion, and directed officers to record encounters during “calls for service and during law enforcement-related encounters and activities, such as traffic stops, arrests, searches, interrogations, and pursuits.”¹¹⁶ PERF also reported that at least one state has changed its all-party consent requirement for officers wearing body-worn cameras and that a number of agencies are requiring officers to announce that they are recording—although in others, such as Kansas, police only tell civilians the cameras are recording if they are asked.¹¹⁷

In another study, completed between October 2012 and September 2013, the Mesa (Arizona) Police Department deployed fifty TASER Axon Flex (head-mounted) cameras, primarily to study “the system’s impact on reducing civil liability, addressing departmental complaints and enhancing criminal prosecution.”¹¹⁸ The study design required fifty officers to wear cameras (nearly half volunteered and the rest were assigned) and compared these officers with another set of “demographically similar” officers in the same department¹¹⁹ (presumably, all of these officers had chosen not to volunteer). In a final report compiled by the police department, the research found that those officers who had volunteered were 60.5% more likely to activate and use the body cameras than the officers who had been assigned.¹²⁰ Additionally, after the department modified its body-camera policy to allow officers

110. *Id.* at 7–8.

111. *Id.* at 9.

112. *Id.* at 11. It appears that a neighbor could request this sort of footage in at least a couple of states (Washington and New Mexico, for example). *Id.* at 15.

113. *Id.* at 15–16.

114. *Id.* at 12.

115. *Id.* at 13.

116. *Id.*

117. *Id.* at 14.

118. LEE RANKIN, MESA POLICE DEP’T, END OF PROGRAM EVALUATION/RECOMMENDATIONS: ON-OFFICER BODY CAMERA SYSTEM 1 (2013), http://issuu.com/leerankin6/docs/final_axon_flex_evaluation_12-3-13-; WHITE, *supra* note 34, at 17 (citation omitted).

119. WHITE, *supra* note 34, at 18.

120. RANKIN, *supra* note 118, at 1.

greater discretion about when to record (from “[w]hen practical, officers will make every effort to activate the on-officer body camera when responding to a call or have any contact with the public” to activating the cameras when the officers “deem it appropriate”), the rate of use dropped by 42%.¹²¹ Officers wearing the cameras also received fewer departmental complaints (40% decrease) and use of force complaints (75% decrease) during the study period, compared to the prior twelve months.¹²²

Interestingly, at the outset of the study, the Mesa Police Department evaluation team identified the single biggest challenge to body camera adoption as integrating the footage into the public disclosure process under Arizona state law.¹²³ In particular, the department’s records supervisors insisted that “they are unable to complete the review of on-officer video,” primarily because “the process is extremely time consuming and they do not have the personnel to absorb the increased workload.”¹²⁴ As a consequence, the individual officers who filmed the video in the first place are sent the footage and are required to “review the video in its entirety” and identify elements of the video that need to be redacted, including “NCIC/ACJIS information, personal biographical information, juvenile faces, undercover officers, informants, nudity, and other sensitive information as determined by the staff attorney.”¹²⁵ The patrol officers are required to provide descriptions of materials to be redacted as well as timestamp information before redaction can take place.¹²⁶ During the study period, the department reported receiving an average of three to four requests for body-camera footage per month.¹²⁷ Of these thirty-six to forty-eight requests (the exact total is not reported) over the twelve-month period, only three videos were forwarded by officers to the department’s video unit for redaction, amounting to less than six hours of total footage requiring some redaction.¹²⁸ However, the total time to complete the redaction of these three clips took department personnel approximately 30.5 hours,¹²⁹ more than five times the total running length of the videos.

An initial survey of officers participating in the body camera program conducted by the department in conjunction with researchers at Arizona State University revealed that over 80% of officers felt the cameras would produce better evidence; over 76% felt the footage would be helpful to prosecute domestic violence cases where victims were unwilling to testify; 45% felt citizens would act more respectfully towards officers wearing cameras; almost 77% felt the cameras would make them act more professionally; 81% indicated the cameras would make them more cautious when making decisions; and fewer than half of the respondents believed their fellow officers would be receptive to having a camera on scene.¹³⁰ However, only 23.5% indicated that the department should adopt body cameras.¹³¹

121. WHITE, *supra* note 34, at 31 (citation omitted).

122. RANKIN, *supra* note 118, at 1.

123. *Id.* at 5.

124. *Id.* at 12.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 12–13.

129. *Id.* at 13.

130. *Id.* at 11.

131. *Id.*

In another recently published quasi-experimental study with the Mesa Police Department, Ready and Young found that officers assigned to wear body-worn cameras were more likely to initiate contacts with civilians and issue citations but less likely to make arrests or conduct stop-and-frisks.¹³² In their study, involving 100 officers, Ready and Young had officers fill in field contact reports on random days throughout a ten-month period.¹³³ Analysis of the completed forms also revealed that officers were more likely to make arrests during the period when camera activation was discretionary (by departmental policy) compared to when activation was mandatory.¹³⁴ Officers who wore cameras were more likely than those who did not to report the cameras were helpful, and officers who had volunteered to wear a camera were more likely to report that the cameras were helpful than those who were assigned to wear a camera non-voluntarily.¹³⁵ Importantly, this study provides evidence that when police officers are wearing body-worn cameras they “are more risk averse and cautious about their actions.”¹³⁶

In an ongoing body-worn camera study with the Orlando (Florida) Police Department, Jennings, Fridell, and Lynch have reported findings from an initial survey of officers.¹³⁷ In their study, Jennings, Fridell, and Lynch received ninety-one responses to a survey (voluntary response, out of ninety-five officers who volunteered to participate in the research and almost 400 eligible officers) of patrol officers in the Phoenix Police Department designed to examine officer perceptions about body-worn cameras.¹³⁸ The survey was distributed before officers began using cameras in the field, to serve as a baseline for further research.¹³⁹ Officers were asked to respond to questions measuring their level of agreement with various statements on a Likert scale, from one to five (“strongly disagree” to “strongly agree”).¹⁴⁰ Responses indicated that 62.7% of officers agreed or strongly agreed that their department ought to adopt body-worn cameras, 77% said they would feel comfortable wearing body-worn cameras, and 18.7% agreed that body-worn cameras would increase officer safety.¹⁴¹ Fewer than half (40.7%) of the officers felt that body-worn cameras would “improve citizen behavior,” and only 19.8% felt body-worn cameras “would improve their own behavior”—though 29.7% felt it would promote their own “by-the-book” behavior, and 42.9% felt it would promote “‘by-the-book’ behavior of other officers.”¹⁴² Most (84.4%) believed body-worn cameras would not decrease “their likelihood of responding to calls for service.”¹⁴³ In terms of use of force, few officers (3.3%) believed that body-worn cameras would decrease “their own use of

132. Ready & Young, *supra* note 54, at 445.

133. *Id.* at 448–49.

134. *Id.* at 452.

135. *Id.*

136. *Id.* at 454.

137. Jennings et al., *supra* note 40, at 550–51.

138. *Id.*

139. *Id.* at 550.

140. *Id.* at 551.

141. *Id.*

142. *Id.*

143. *Id.*

force,” though more felt they would decrease external (30.8%) and internal (27.5%) complaints against officers.¹⁴⁴

In preliminary results from research with the Phoenix (Arizona) Police Department, in which researchers equipped half of the 100 patrol officers in the department’s Maryvale Precinct with body-worn cameras, officers reported concerns about the “potential negative impact” that the cameras might have for officers, including internal “fishing expeditions” and internal investigations of misconduct not generated by citizens.¹⁴⁵ Katz and Kurtenbach also reported increased productivity (daily arrests per officer with body-worn camera increased by 16%) and decreased complaints against officers wearing body-worn cameras (44%).¹⁴⁶

B. Legal Scholarship

In legal scholarship, body-worn camera use by law enforcement has received some attention and, although much of the literature discussing the cameras is normative in nature, it is not generally empirical or substantively doctrinal. Rather than providing in-depth legal analysis of the implications raised by body-worn cameras or new empirical findings, many of these articles reference body-worn camera use either as an element of broader police reform arguments,¹⁴⁷ in reference to the decisions in the *Floyd v. City of New York*¹⁴⁸ case about the NYPD’s stop and frisk policy,¹⁴⁹ or in discussions about police oversight or accountability.¹⁵⁰ However, a few pieces of scholarship have addressed body-worn camera adoption head on. The

144. *Id.* Jennings, Fridell, and Lynch also address a number of additional questions not summarized here, and perform analysis on differences by demographic variables. *See id.* at 551–52.

145. Charles Katz & Mike Kurtenbach, *Deploying Officer Body-Worn Cameras in Phoenix*, OFF. JUST. PROGRAMS DIAGNOSTIC CTR. (Aug. 6, 2014), <https://www.ojpdiaagnosticcenter.org/blog/deploying-officer-body-worn-cameras-phoenix> [<https://perma.cc/UK3Y-GCDR>].

146. *Id.*

147. *See, e.g.*, Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1421 (2015) (citing body cameras as a possible way to ensure police accountability and oversight).

148. *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013); *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013).

149. *See, e.g.*, Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870 (2015); Kami Chavis Simmons, *The Legacy of Stop and Frisk: Addressing the Vestiges of a Violent Police Culture*, 49 WAKE FOREST L. REV. 849 (2014); Waleska Suero, Note, *Lessons from Floyd v. City of New York: Designing Race-Based Remedies for Equal Protection Violations in Stop & Frisk Cases*, 7 GEO. J.L. & MOD. CRITICAL RACE PERSP. 139 (2015).

150. *See, e.g.*, Martina Kitzmueller, *Are You Recording This?: Enforcement of Police Videotaping*, 47 CONN. L. REV. 167, 178 (2014) (examining the push for body worn cameras after the 2014 Michael Brown shooting in Ferguson, Missouri, in the context of an analysis of law enforcement video and evidence retention requirements); Newell, *Crossing Lenses*, *supra* note 21, at 84–92; *Developments in the Law—Policing Immigrant Communities*, 128 HARV. L. REV. 1706, 1771 (2015) (body cameras as a response to border policing violence); Travis S. Triano, Note, *Who Watches the Watchmen? Big Brother’s Use of Wiretap Statutes To Place Civilians in Timeout*, 34 CARDOZO L. REV. 389, 412–14 (2012) (exceptions to eavesdropping laws for police body cameras would defeat the purpose of the law and provide the state with imbalanced power to record civilians relative to the right of civilians to record police).

following paragraphs summarize a few, but not all, of these articles.

Most directly relevant to the issues of privacy and public disclosure, Fan provides a useful and insightful analysis of body camera-related policies and laws relevant to the one hundred largest police agencies in the United States, with a focus on issues of public disclosure, overexemption of body-camera footage from disclosure, and privacy.¹⁵¹ Fan argues that overbroad exemptions for body-camera footage reduces incentives to adequately “reconcile the important values of privacy and transparency” at issue, while also “defeating the key purposes behind public support for body cameras” (for example, transparency and accountability).¹⁵² Fan also argues for a “default rule” requiring police officers to ask permission from victims and witnesses prior to recording, “rather than put[ting] the burden on victims and witnesses to request that recording cease.”¹⁵³

In earlier work, Harris argued that body-worn cameras provide a possible way to help ensure Fourth Amendment compliance by police officers,¹⁵⁴ but that the cameras in themselves would not be a panacea.¹⁵⁵ Harris claimed that the “versatility” of body-worn cameras in police practice “makes the idea one of the most promising possibilities for assuring police accountability and compliance with the law to come along in many years,”¹⁵⁶ and that “any mechanism we can find that might enhance Fourth Amendment compliance by police seems worth exploring.”¹⁵⁷ Harris supported these arguments by presenting anecdotal evidence (drawn from news stories) of police officer acceptance and appreciation of the cameras, and of the potential benefits to both evidence collection and accountability.¹⁵⁸ To ensure the body-worn cameras achieved the intended purpose (Fourth Amendment compliance), Harris argues that (1) “commanding officers [should] have unfettered access to all recordings” for accountability, training, and other purposes;¹⁵⁹ (2) footage and cameras should be tamperproof to some degree;¹⁶⁰ and (3) law or policy must “require officers to record every interaction with citizens.”¹⁶¹ This latter requirement should be supported, in Harris’s view, by a presumption in favor of the defendant’s version of events in cases where the arresting officer did not activate their camera or when footage of the arrest is not available.¹⁶²

151. Mary D. Fan, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 ALA. L. REV. 395 (2016). In a student note, Farden has also provided an analysis of Washington State privacy law in the context of body-worn camera deployment within the state. Katie Farden, Note, *Recording a New Frontier in Evidence-Gathering: Police Body-Worn Cameras and Privacy Doctrines in Washington State*, 40 SEATTLE U. L. REV. 271 (2016).

152. Fan, *supra* note 151.

153. *Id.*

154. David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH L. REV. 357, 359–60 (2010).

155. *Id.* at 366–71.

156. *Id.* at 359–60.

157. *Id.* at 363–64.

158. *Id.* at 362–63.

159. *Id.* at 364–65.

160. *Id.* at 366.

161. *Id.* at 365 (emphasis in original).

162. *Id.*

In a criminal case in which the legality of the search and seizure is at issue because it produced evidence the state wishes to have admitted against the defendant in court, absence of a recording of the relevant search and seizure would give rise to a presumption that the defendant's version of events should be accepted, absent (1) a compelling reason explaining the failure to record, and (2) a finding that the defendant's version of events could not be believed by a reasonable person.¹⁶³

Finally, Harris offered some words of caution, citing a study by Kahan, Hoffman, and Braman,¹⁶⁴ showing evidence that different groups of people were likely to have different interpretations of the appropriateness of police officer conduct depicted in video footage and, specifically, that certain groups of individuals were less likely to agree with the Supreme Court's conclusion that police dash camera footage at issue in *Scott v. Harris*¹⁶⁵ demonstrated that the officer's choice to use deadly force was quite clearly justified.¹⁶⁶ Nevertheless, Harris continued to promote a positive image of the role of body-worn cameras as an accountability tool.¹⁶⁷

More recently, Professor Howard Wasserman has written a short series of essays framing the call for greater body-worn camera adoption after Michael Brown was shot by Officer Darren Wilson in Ferguson, Missouri, as the result of a "moral panic."¹⁶⁸ Despite this generally negative premise, Wasserman states that, "Expansive use of body cameras appears, on balance, to be good policy,"¹⁶⁹ but emphasizes that the problem is the rhetoric that would have us believe that body-worn cameras are a "magic bullet" or panacea.¹⁷⁰ Wasserman also argues that expansive adoption may have unintended consequences because (1) we don't have much empirical evidence about the impacts of body-worn camera adoption; (2) video footage is limited in its ability to serve as an unbiased, objective, and all-seeing witness and people are

163. *Id.*

164. Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009).

165. *Scott v. Harris*, 550 U.S. 372 (2007).

166. Harris, *supra* note 154, at 368–69.

167. *Id.* at 369 ("But even so, this should not keep us from seeing the advantages of [body-worn video] as a tool for Fourth Amendment compliance because what is most important is that head cams can improve police behavior when officers know their actions can be observed.").

168. Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 831 (2015) [hereinafter Wasserman, *Moral Panics*]; Howard M. Wasserman, *Epilogue: Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 845 (2015) [hereinafter Wasserman, *Epilogue*].

169. Wasserman, *Moral Panics*, *supra* note 168, at 832. Wasserman later states that, "While body cameras are a good idea and police departments should be encouraged and supported in using them, it is nevertheless important not to see them as a magic bullet. The public discussion needs less absolute rhetoric and more open recognition of the limitations of this technology." *Id.* at 833.

170. *Id.* at 833.

also prone to interpret video evidence differently; and (3) we don't know the implications of various policy choices that need to be made during the implementation of a body-worn camera program.¹⁷¹

Elsewhere, I have tried to situate discussion about body-worn cameras within a broader literature and by including theory and research from criminology, criminal justice, and surveillance studies research.¹⁷² Some of this work has specifically focused on the relationship between citizen (bystander) video and the adoption of body-worn cameras by police. In these discussions about the privacy implications of body-worn cameras, I have argued for limited public disclosure of body-worn camera footage (especially when it depicts the inside of a private residence or other private space), limited data retention, and limited use of the cameras inside private homes.¹⁷³

In an unsigned (anonymous) student note in the Harvard Law Review, the author(s) of that piece argue that body-worn cameras (in comparison to citizen video) offer accountability benefits at an “unprecedented scale” as a consequence of the amount of evidence police-mounted cameras would provide, but that this benefit may be outweighed or underappreciated due to the “locus of control” remaining with “the very organization[s] meant to be held accountable.”¹⁷⁴ The essay also describes drawbacks related to privacy, administrative burden (cost), the questionable objectivity of video evidence, and the general rise of the surveillance state.¹⁷⁵

Finally, in a series of debate pieces, a number of scholars from law, criminology, and other fields have argued that the positive benefits from body-camera adoption may hinge on whether or not usage policies (or law) limit officer discretion,¹⁷⁶ that current privacy laws and police practices are inadequate to properly protect privacy rights,¹⁷⁷ and that current police accountability regimes must be modified by more than just the addition of body-mounted cameras in order to really contribute to increased police accountability and transparency¹⁷⁸—including significant updates to data retention and sharing policies.¹⁷⁹

171. *Id.* at 837–42. Relatedly, Wasserman elaborated in his follow-up essay, where he discussed the video of an NYPD officer choking and killing Eric Garner, stating that “the Garner case highlights the need to avoid the moral panic trap and to be realistic in our expectations. It reminds us that video never speaks for itself. No matter the wide public perception of the story told in the Garner video, most or all of the grand jurors saw something different and decided accordingly. It also reminds us that video must be viewed in conjunction with witness testimony, not as a substitute for testimony or as a basis for ignoring testimony in favor of a singular video narrative.” Wasserman, *Epilogue*, *supra* note 168, at 847.

172. See Lippert & Newell, *supra* note 36; Newell, *Crossing Lenses*, *supra* note 21, at 84–89.

173. Newell, *Crossing Lenses*, *supra* note 21, at 89–90, 92–93.

174. *Developments in the Law—Considering Police Body Cameras*, 128 HARV. L. REV. 128 HARV. L. REV. 1794, 1805 (2015).

175. *Id.* at 1808–14.

176. Taylor, *supra* note 36, at 131.

177. See Thomas K. Bud, *The Rise and Risks of Police Body-Worn Cameras in Canada*, 14 SURVEILLANCE & SOC'Y 117, 118 (2016); Darren Palmer, *The Mythical Properties of Police Body-Worn Cameras: A Solution in the Search of a Problem*, 14 SURVEILLANCE & SOC'Y 138, 142 (2016); Tjerk Timan, *The Body-Worn Camera as a Transitional Technology*, 14 SURVEILLANCE & SOC'Y 145, 148 (2016).

178. Mateescu et al., *supra* note 36, at 123–26; Palmer, *supra* note 177, at 142–43.

179. Joh, *supra* note 36, at 136.

III. METHODOLOGY

In this article, I draw upon legal research and findings from original empirical fieldwork and data collection with police officers in two municipal police departments in Washington State from September 2014 to June 2016. The empirical data presented herein is only a small part of the data collected in a larger study of body-camera adoption in these departments, and is limited to data relevant to the intersecting questions about body-worn cameras, privacy, and public access to body-worn camera footage raised in this article. Below, I first outline some of the theoretical underpinnings that have informed the choice of methods and analysis. Subsequently, I discuss each method individually in some detail.

Washington State provides a particularly useful jurisdictional boundary for this research because of a confluence of factors, including the breadth of the state's public records law and its recently confirmed precedence over state privacy law,¹⁸⁰ provisions in the state's Privacy Act¹⁸¹ that restrict audio recording in some circumstances without the consent of all parties to a conversation, and the fact that the recent release of largely unredacted body-worn camera footage to members of the public within the state has forced questions about privacy versus disclosure into the public spotlight—and, in 2016, resulted in a number of additional body-camera related exemptions being added to the state's public disclosure law. To be sure, Washington is not alone in experiencing the ramifications of the adoption of body-worn cameras, but the conflicts between privacy and public disclosure have come to a head in Washington like in no other state to date, and the lessons learnt in Washington have the potential to inform the regulation of body-camera use in other jurisdictions.

A. New Legal Realism and Socio-Legal Research

This current research fits well into the tradition of the law and society movement, active for the past few decades in the United States, and is informed by movements within legal and socio-legal philosophy that privilege an empirical account of law. Some of the more quantitative aspects of this work are informed by the Empirical Legal Studies (ELS) movement, which has been primarily driven by large-*n* quantitative studies focused directly on law itself. However, much of this study's more qualitative and interdisciplinary focus draws inspiration from the philosophy embedded in a separate, though less well known, empirical socio-legal studies movement, namely New Legal Realism (NLR). NLR privileges an interdisciplinary and multi-method approach to understanding law in a broader social context, and is related in many ways to Tamanaha's proposals for a social theory of law based in pragmatism and realist thought.¹⁸² NLR is a form of socio-legal research that "is ultimately optimistic, maintaining that law is a world of action and our responsibility is to participate in it."¹⁸³

180. See *Fisher Broadcasting—Seattle TV LLC v. City of Seattle*, 326 P.3d 688 (Wash. 2014).

181. See Privacy Act, WASH. REV. CODE ANN. §§ 9.73.010–.270 (West Supp. 2016).

182. BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW 26–57 (1997).

183. Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 137 (2009).

These movements toward more empirical scholarship in law have been driven by efforts to push back on the legal formalism and legal positivism that dominated legal philosophy at least until “old” Legal Realism took hold in the United States in the 1920s. NLR is also opposed to the new formalism advanced by neoclassical law and economics, or the “straightforward application of microeconomic (or price-theoretic) analysis to the law.”¹⁸⁴ This neoclassical law and economics approach, championed by Richard Posner and the Chicago School, prioritizes the economic incentive of wealth maximization and the rational actor.¹⁸⁵

As a point of clarity, the NLR movement itself is not entirely homogenous. Nourse and Shaffer have divided NLR into three camps of researchers: the behaviorists, contextualists, and institutionalists.¹⁸⁶ The research presented in this Article fits most clearly within the contextualist account of NLR, an account that broadly encompasses most of the law and society movement (as opposed to the predominantly quantitative ELS and to other socio-legal approaches primarily initiated outside the legal academy—for example, within sociology or anthropology).

NLR is an emerging philosophical tradition in legal philosophy. It extends and modifies “old” legal realist thought, from a top-down focus on courts, judges, and legal institutions, to a bottom-up approach that seeks to understand the law first by focusing on the impact and everyday interactions of laypersons with the law.¹⁸⁷ Despite its bottom-up focus, NLR also values the integrated study of “law on the books,” legal practice, legal institutions, and the lawmaking process. NLR also espouses an interdisciplinary empirical approach to legal scholarship that combines both quantitative and qualitative methods to achieve a better understanding of the human experience and the dilemmas facing the rule of law and legal institutions. In this sense, it fits within post-positivistic empiricism and also contains aspects of certain types of pragmatism, or the blending of practical and theoretical accounts of law in society.

Competing traditions within socio-legal studies have prioritized either quantitative (positivist) or qualitative (interpretivist) methodologies in studying law and its role and impact in society, reflecting the differing epistemological positions claimed by these movements. This study attempts to balance the weaknesses and strengths of these opposing views by pragmatically prioritizing “what works” to uncover “what is” (facts or truth, though not necessarily absolute) and how my participants (that is, police officers) ascribe meaning (and what that meaning is, as best as I can tell based on my perception of it) to the world of variables (legal and otherwise) that surround the use of body-worn cameras. This approach is generally aligned with the contextualist account of NLR¹⁸⁸ and Tamanaha’s pragmatic and realistic social theory of law.¹⁸⁹

Based on these methodological and epistemological commitments, the data collection methods (field observations, interviews, surveys, legal research) and meth-

184. *Id.* at 64–65.

185. *Id.* at 65–66.

186. *Id.* at 70.

187. *See id.*

188. *Id.* at 79–85.

189. TAMANAHA, *supra* note 182.

ods of analysis (grounded theory and doctrinal legal analysis) employed in this project have been conducted iteratively throughout the project. For example, earlier interviews and survey responses informed changes to the focus areas of subsequent interviews and survey questions. The purpose of the multiple surveys over time was not purely to collect quantitative data for longitudinal comparison, but also to inform the other forms of data collection occurring at the same time (and vice versa in regards to other methods). This iterative and reflective approach to data collection was designed to complement and inform the different stages of coding and data analysis (grounded theory) that developed as the project progressed.

B. Legal Research

Doctrinal legal research is the study and analysis of legal texts (for example, statutes and judicial decisions) and rules with the aim of developing and understanding legal doctrine.¹⁹⁰ It involves “a synthesis of various rules, principles, norms, interpretive guidelines and values.”¹⁹¹ However, knowing doctrine itself does not provide a complete picture of the law—that requires application of legal rules and doctrine “to the particular facts of the situation under consideration.”¹⁹² Doctrinal legal research has long dominated the legal academy—of which it is the “core legal research method”—but “[u]ntil relatively recently there has been no necessity to explain or classify it within any broader cross-disciplinary research framework.”¹⁹³ Relatedly, very little academic legal research contains any methodological description, and when it does—typically when the research is interdisciplinary, it involves empirical data collection or is comparative—an article’s methods section only describes the social scientific methodologies employed (for example, sampling, case selection, etc.). As stated by Hutchinson and Duncan, “the doctrinal method is often so implicit and so tacit that many working within the legal paradigm consider that it is unnecessary to verbalise the process.”¹⁹⁴ That is not to say the method should not be described in any detail, but merely to situate the method within its real-world context: well-utilized and practiced by lawyers and legal academics, but under theorized and under critiqued within and outside the discipline.

In the instant research, I conducted legal research into the regulation of the use of body-worn camera technologies by law enforcement agencies in Washington State, including state constitutional law, statutory law, decisions by Washington State courts, and federal case law related to the Fourth Amendment to the United States Constitution. To this end, I searched Washington law using Westlaw®, and I also conducted general Google and Google Scholar (case law) searches to identify other relevant issues and sources. For comparison, I also conducted searches of Westlaw’s legal database and referred to various state legislature websites and news sources to

190. See Paul Chynoweth, *Legal Research*, in *ADVANCED RESEARCH METHODS IN THE BUILT ENVIRONMENT* 28, 29 (Andrew Knight & Les Ruddock eds., 2008).

191. Terry Hutchinson & Nigel Duncan, *Defining and Describing What We Do: Doctrinal Legal Research*, 17 *DEAKIN L. REV.* 83, 84 (2012) (quoting *AUSTRALIAN LAW DICTIONARY* 197 (Trischa Mann & Audrey Blunden eds., 2010)).

192. Chynoweth, *supra* note 190.

193. Hutchinson & Duncan, *supra* note 191, at 85.

194. *Id.* at 99.

determine whether legislatures in other states had proposed or adopted statutory laws regulating body-worn camera use (or public access to footage) in their jurisdictions. In Westlaw, I searched for statutes and cases using the following search string:

“body worn camera!” OR “body worn video” OR “body camera!” OR
“on-officer camera!” OR “on-officer video”

C. Empirical Data Collection and Analysis

In this project, I draw upon some of the findings from my own on-going empirical project, including fieldwork conducted with police officers in the Spokane and Bellingham (Washington) police departments. The findings presented herein are primarily sourced from interviews, observational data, and three surveys administered during both departments’ on-going body-worn camera programs, which each began in September 2014. The three surveys were conducted, respectively, in fall 2014, May/June 2015, and June 2016, and the qualitative fieldwork occurred during the same timeframe.

At the midpoint of the study, the Bellingham Police Department (BPD) employed over 110 sworn personnel, with over 60 personnel assigned to patrol (including K-9), and over 50 nonsworn civilian personnel. The department has jurisdiction of 31.7 square miles, and serves a population of over 83,000 citizens. The Spokane Police Department (SPD) employed over 310 sworn personnel, with over 140 personnel assigned to Patrol, and just over 100 non-sworn civilian personnel. The department has jurisdiction of roughly 76 square miles, and serves a population of over 210,000 citizens.

No experimental (that is, treatment/control) conditions were implemented during the initial rollout of either department’s body-worn camera program although the SPD implemented an experimental deployment starting in May 2015, partway through the current study. Instead, each department allowed most officers to volunteer (opt-in) to wear a camera (BPD only mandated camera use by new recruits and lateral transfers to the department). Both departments used TASER AXON Flex cameras and/or TASER AXON Body cameras¹⁹⁵ and the departments also utilized TASER’s Evidence.com digital evidence management platform for storage, access, and analysis of the captured footage.

The surveys were designed primarily to elicit police officer attitudes and perceptions about body-worn cameras, and also included questions about privacy and public disclosure of body-worn camera footage under state FOI law (that is, the Washington State PRA). The research was approved by the University of Washington’s Human Subjects Division (IRB), and the electronic versions of the survey questionnaires were administered using the University of Washington’s proprietary Catalyst survey system under the “anonymous/IRB” setting, which does not track IP addresses or timestamp information related to responses. Participation in all research procedures was voluntary, and respondents were asked to agree only after being

195. For more information about these particular cameras, see *Axon Body 2*, AXON, <https://www.taser.com/products/on-officer-video> [<https://perma.cc/LYQ4-FFVC>].

presented with an information statement outlining the nature of the research as well as the possible risks and benefits of participation.

1. The First Survey

The first questionnaire (Survey 1) was administered in the fall of 2014, just at—or shortly after—the point when each department began issuing body-worn cameras to officers.¹⁹⁶ The first set of questionnaires was distributed on paper to BPD officers attending a body-camera orientation and training meeting in September 2014, just prior to the cameras being deployed into the field as part of the department's body-camera program. Twenty-nine officers returned valid responses to the paper administration, with twenty-four of those reporting that they were going to be wearing cameras during the upcoming deployment. Subsequently, a link to an electronic version of the questionnaire was emailed to the remaining officers in the department, resulting in twenty-one additional valid responses prior to the survey closing on December 22, 2014. As a consequence, some of these responses were received just prior to the camera deployment ($n = 29$) and some were received afterwards, during the first three months of the program ($n = 21$).

At SPD, the first survey was distributed electronically to officers via email on October 20, 2014 (about 1.5 months after the department's body-worn camera program began) and closed on December 22, 2014. Ninety-eight officers returned valid responses during this two-month period, with twenty-one respondents (21.4%) reporting they were already wearing cameras, and another sixty-five (66.3%) reporting they expected to wear one in the future during the ongoing deployment.

The initial questionnaire contained thirty-one questions, although some matrix questions contained multiple rows, resulting in a total number of requested response items of forty-six to forty-eight depending on responses to certain demographic questions. Three of these questions asked for qualitative written answers and the rest were presented in the form of multiple-choice questions or as five-point Likert scales. Roughly four of the survey questions related to public disclosure of body-worn camera footage¹⁹⁷ and a number of additional questions asked about other privacy-related issues. The questionnaire did not ask respondents for their names and the electronic version did not track IP addresses. In total, 148 valid responses were received for Survey 1 across both departments.

2. The Second Survey

The second survey (Survey 2), which was a modified and expanded version of the first, was administered entirely online in both departments. It was available from May 23, 2015, to June 29, 2015. Officers were emailed a link to the questionnaire and were asked to participate in the follow-up survey, regardless of whether they had

196. The timing of the survey distributions was impacted by a number of considerations, including finalizing access to the departments for purposes of the research. It would have been ideal to administer the first questionnaire prior to any deployment by each department, but it was not possible to do so for the SPD.

197. Additionally, some of the officers' responses to one of the free response questions also encompassed concerns about public disclosure.

taken the first. The questionnaire included most of the questions from the first (to facilitate some longitudinal comparison) as well as some additional questions that emerged during the qualitative fieldwork or that sought information about how officers had used the cameras (for those who had) during the intervening months between the surveys.

The base questionnaire included forty-three to forty-five items (for those who had not used a camera), four of which sought a qualitative response, with an additional twelve items asked only of those officers who had previously been assigned a camera. One new question related to public disclosure was added. The questionnaire, like the first, did not ask respondents for their names and did not track IP addresses. In total, 133 valid responses were received for Survey 2, forty-nine from BPD (40.8% of whom reported having previously used a body-worn camera) and eighty-four from SPD (41.7% having previously used a body-worn camera).

3. The Third Survey

The third survey (Survey 3) was also largely based on the earlier questionnaires but included some modifications (again, building on additional issues of interest that emerged from the qualitative research). Survey 3 was available from June 1, 2016, to June 30, 2016. Officers were emailed a link to the questionnaire and were asked to participate in a follow-up survey, regardless of whether they had taken either of the previous surveys. In addition to questions from the earlier surveys, this questionnaire also included some additional questions based on legislative developments in the interim and that were designed to elicit more specific responses to questions about how (or whether) officers inform civilians about the presence of the cameras and the attendant public disclosure risks, how officers perceive citizens react to the presence of the cameras, use of cameras in medical facilities or to record victim or witness statements, and how officers reacted to recent changes in state public disclosure law.

The base questionnaire included fifty-seven to fifty-nine items (for those who had not used a camera), four of which sought a qualitative response, with an additional eighteen items asked only of those officers who indicated they had previously been (or currently were) assigned a camera. The questionnaire, like the first two, did not ask respondents for their names and did not track IP addresses. In total, 126 valid responses were received for Survey 3, fifty-six from BPD (67.9% reporting having used a body-worn camera) and seventy from SPD (72.9% reporting body-worn camera use).

In addition to the addition of items (questions), the format of some of the Likert-scale response items were also modified—whereas the first two surveys included neutral responses as the fifth and final response choice (generally labeled “unsure” or “neutral”), the neutral response option for these questions on the third survey was presented as the median (for example, third of five) response choice (and was labeled, for example, “neither agree nor disagree” or “neither a positive nor a negative development”). The choice to alter the format of these Likert-scale items was made to enable additional comparison between the results from Survey 3 and recently reported results presented by other researchers studying officer attitudes in other police

agencies.¹⁹⁸ However, the movement of the neutral option from position five to position three, and the change in label, do complicate (and compromise, to some extent) the validity of internal comparisons between the first two surveys and Survey 3. In fact, on Survey 3, the neutral response choice was often selected more frequently per question than on the first two surveys, indicating that the earlier placement had the effect of forcing respondents to commit to a more polarized position on the first two surveys. Thus, when the neutral choice was selected more frequently, the percentages of respondents indicating, for example, that they agreed or disagreed with a particular statement fell. This methodological limitation should be considered when interpreting the results presented below.

4. Qualitative Fieldwork

In addition to the surveys described above, I also conducted ride-alongs with officers in both departments—and while doing so observed the officers throughout the course of their shifts and conducted informal interviews with officers. Some additional data was collected during short, informal conversations with other officers inside the police stations or when small groups of officers gathered for breaks or meals. The introduction to this Article is one example of the analysis generated by this qualitative work. I was generally announced to officers during shift briefing meetings (roll call) or by email before a shift, and was often able to approach officers on my own (either in person or via email) and request to ride with particular officers. In some cases, and especially in the early stages of the research, a supervisor would email a set of officers who were wearing cameras and ask them to accommodate me as a rider during a shift. Most officers who responded to my requests were willing to allow me to accompany them. Over time, some officers recognized me when I showed up at the station, and this recognition also led to additional requests for rides (and subsequent rides) with a number of officers. At a late stage in the project, two graduate students also completed ride-alongs (using the same general methodology) and contributed to the project. In total, the project encompassed forty ride-alongs with twenty-nine different officers, ranging from a few hours to entire ten-hour-and-forty-minute shifts, as well as numerous informal discussions with other officers and department administrators. In all cases, we made simple field notes during breaks or downtimes during a shift, which we developed further and expanded after a shift had ended (generally within a few hours).

IV. THE LEGAL IMPLICATIONS OF BODY-WORN CAMERAS

The use of body-worn cameras implicates a number of privacy concerns, despite potentially providing significant evidence for oversight and police accountability purposes. These privacy concerns can be divided into two main areas: (1) privacy violations stemming from the surveillance activities of the state, including the collection of evidence via body-worn camera recordings and the nature of consent or notice

198. See, e.g., Jennings et al., *supra* note 40. This comparison will be made in another paper, as many of the affected response items are outside the scope of the findings reported in this Article.

required for such recording to occur in the first place, and (2) privacy violations occurring as a consequence of subsequent access to the recordings, including the public disclosure of body-worn camera footage. In this Article, I primarily address the second of these two concerns. The following three subsections address the legislative response to body-camera adoption in Washington State, followed by a broader discussion of the privacy implications raised by the use of body-worn cameras within the state. As of August 1, 2015, only a few states had enacted legislation directly applicable, and in response to, the possibility (or reality) of body-worn camera adoption,¹⁹⁹ but by early 2016 legislatures around the country had begun to propose and debate a variety of potential laws,²⁰⁰ although some of these do not directly relate to privacy or public disclosure issues. Of course, body-camera recordings are also subject to public disclosure exemptions in many states through provisions that are not specifically targeted at body cameras, including restrictions on disclosing private information (such as names, addresses, social security numbers, motor vehicle information, etc.), law enforcement investigatory records, and aural communications, among others. However, in the following paragraphs, I outline and summarize the body-camera specific provisions in state laws that exempt footage from public disclosure.²⁰¹

199. In 2014, Pennsylvania enacted legislation that explicitly allows officers enforcing fish and game laws to wear body cameras and exempts officers enforcing these laws from the state's all-party consent requirements. 30 PA. STAT. AND CONS. STATE. ANN. § 901(c) (2014); 34 PA. STAT. AND CONS. STAT. ANN. § 901(b.1) (2014). Additionally, in Vermont, the legislature has enacted a law requiring the state's Law Enforcement Advisory Board to "study and make recommendations as to whether officers authorized to carry electronic control devices [e.g. TASERS] should be required to wear body cameras." VT. STAT. ANN. tit. 20 § 2367(g)(1) (2016). In Arizona, the legislature enacted a law that establishes a "body camera study committee" tasked with researching body camera usage in the state and recommending policy. S.B. 1300, 52d Leg., 1st Reg. Sess. (Ariz. 2015) (the committee has the power to seek cooperation from public agencies, including police departments within the state). A 2015 California bill, approved in June, paves the way for the California Highway Patrol to conduct a body camera program. S.B. 85, 2015 Leg. (Ca. 2015). In May 2015, Colorado enacted a body-worn camera grant program. COLO. REV. STAT. ANN. § 24-33.5-519 (2015); cf. MD. CODE ANN. PUB. SAFETY § 3-511 (2015) (tasking the Maryland Police Training Commission to establish and publish a body-camera policy); OR. REV. STAT. § 133.741 (2015) (requiring police agencies to develop policies for body-worn camera use); UTAH CODE ANN. § 77-23-210 (LexisNexis Supp. 2015) (requiring police department policy to include language requiring officers to wear body-worn cameras while executing warrants); H.B. 7103, 2015 Leg., June Special Sess. (Conn. 2015) (requiring "training in the use of body-worn recording equipment and the retention of data created by such equipment" as part of use of force reforms).

200. For a nice summary, see Fiona Blackshaw & Dan Matos, *Police Body-Worn Cameras: Where Your State Stands*, URB. INST. (last updated Jan. 1, 2017), <http://apps-staging.urban.org/features/body-camera-update/> [<https://perma.cc/DL4U-QGJG>]. See also ABRAMS INST., POLICE BODY CAM FOOTAGE: JUST ANOTHER PUBLIC RECORD (2015), http://isp.yale.edu/sites/default/files/publications/police_body_camera_footage-_just_another_public_record.pdf [<https://perma.cc/SS67-NPD2>].

201. The discussion includes all state statutory provisions discoverable in Westlaw using the search string defined above as of July 1, 2016.

A. Public Disclosure Exemptions for Body-Worn Video in Other States

In May 2015, Florida enacted legal exemptions for body-worn camera footage under the state's freedom of information law. Under Florida Statute section 119.071, body-camera footage is exempt from disclosure if it was (1) recorded inside a "private residence," (2) recorded inside a "facility that offers health care, mental health care, or social services," or (3) recorded "in a place that a reasonable person would expect to be private."²⁰² A number of exceptions apply, however, including general exceptions for law enforcement agencies acting in accordance with their official duties and for sharing with other government entities.²⁰³ Law enforcement officers are also required to disclose body-worn camera footage to persons recorded by a body-worn camera,²⁰⁴ a legal representative of such a person,²⁰⁵ or a person who "lawfully resided, dwelled, or lodged" at the property where and when the recording took place.²⁰⁶ Recordings may also be disclosed pursuant to a court order in a number of circumstances.²⁰⁷

Oklahoma state law was updated in June 2015 to make body-camera recordings clearly subject to public disclosure when they capture certain types of incidents or content, including the use of force by a police officer, pursuits, traffic stops, arrests (and events leading to arrests), detentions, and any other "exercise of authority by a law enforcement officer that deprives a citizen of his or her liberty," among others.²⁰⁸ On the other hand, the law also outlines types of information contained in audio-visual records that *may* be redacted by law enforcement prior to disclosure, such as recordings that contain nudity, death or deceased bodies, certain nonpublic personal and medical information, certain acts of violence, and information that would identify a minor or that would identify a police officer subject to an internal investigation.²⁰⁹

Effective June 10, 2015, a South Carolina law exempts body-camera footage from the public record,²¹⁰ providing only narrow exemptions requiring disclosure to subjects of a recording, criminal defendants when the video is related to their case, civil

202. FLA. STAT. ANN. § 119.071(2)(1)(2) (West Supp. 2016).

203. § 119.071(2)(1)(3).

204. § 119.071(2)(1)(4)(a).

205. § 119.071(2)(1)(4)(b).

206. § 119.071(2)(1)(4)(c).

207. § 119.071(2)(1)(4)(d)(I) ("In addition to any other grounds the court may consider in determining whether to order that a body camera recording be disclosed, the court shall consider whether: (A) Disclosure is necessary to advance a compelling interest; (B) The recording contains information that is otherwise exempt or confidential and exempt under the law; (C) The person requesting disclosure is seeking to obtain evidence to determine legal issues in a case in which the person is a party; (D) Disclosure would reveal information regarding a person that is of a highly sensitive personal nature; (E) Disclosure may harm the reputation or jeopardize the safety of a person depicted in the recording; (F) Confidentiality is necessary to prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice; (G) The recording could be redacted to protect privacy interests; and (H) There is good cause to disclose all or portions of a recording.").

208. OKLA. STAT. tit. 51 § 24A.8(10.a) (West Supp. 2017).

209. § 24A.8(9).

210. S.C. CODE ANN. § 23-1-240(G)(1) (West Supp. 2016) ("Data recorded by a body-worn

litigants when the video is related to their pending civil action, and persons who have had property seized or damaged during incidents captured on footage.²¹¹ The law also allows law enforcement agencies the ability to release other footage at the agency's discretion.²¹²

Oregon updated its public records act, effective June 25, 2015, to exempt all audio and video records created by on-officer body cameras, by default, "unless the public interest requires disclosure in the particular instance."²¹³ When footage is subject to disclosure under the public-interest exception, the law requires the disclosing agency to edit the video "in a manner as to render the faces of all persons within the recording unidentifiable."²¹⁴

Connecticut law also exempts some body-worn camera footage from disclosure under a new law effective as of July 6, 2015,²¹⁵ although this exemption only applies to six defined situations (and the law also prohibits police officers from using body-worn cameras in these contexts unless authorized by an agreement between the agency and the federal government).²¹⁶

In New Jersey, the legislature has not adopted new body-camera-specific legislation related to public disclosure, but the state Attorney General issued a directive in 2015 that situated certain body-worn camera videos as exempt from disclosure under preexisting exemptions for records; for example, videos that would reveal surveillance and tactical information are exempt.²¹⁷ Additionally, the directive states

camera is not a public record subject to disclosure under the Freedom of Information Act.").

211. § 23-1-240(G)(5)(a)-(f) (West Supp. 2016).

212. § 23-1-240(G)(3) (West Supp. 2016).

213. OR. REV. STAT. § 192.501 (2015).

214. § 192.501(40)(c).

215. See CONN. GEN. STAT. § 29-6d(g)(2) (Supp. 2016) ("No record created using body-worn recording equipment of an occurrence or situation described in subdivisions (1) to (6), inclusive, of this subsection shall be deemed a public record for purposes of section 1-210 of the general statutes. No record created by a police officer using body-worn recording equipment of (A) the scene of an incident that involves a victim of domestic or sexual abuse, or (B) a victim of homicide or suicide or a deceased victim of an accident, shall be subject to disclosure under the provisions of section 1-210 of the general statutes to the extent that disclosure of such record could reasonably be expected to constitute an unwarranted invasion of personal privacy.").

216. The statute defines these six situations as follows: "[N]o police officer shall use body-worn recording equipment to intentionally record (1) a communication with other law enforcement agency personnel, except that which may be recorded as the officer performs his or her duties, (2) an encounter with an undercover officer or informant, (3) when an officer is on break or is otherwise engaged in a personal activity, (4) a person undergoing a medical or psychological evaluation, procedure or treatment, (5) any person other than a suspect to a crime if an officer is wearing such equipment in a hospital or other medical facility setting, or (6) in a mental health facility, unless responding to a call involving a suspect to a crime who is thought to be present in the facility." § 29-6d(g)(1).

217. JOHN J. HOFFMAN, ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2015-1, 16 (July 28, 2015), http://www.nj.gov/oag/dcj/agguide/directives/2015-1_BWC.pdf [<https://perma.cc/25EN-XFJW>] (citing N.J. STAT. ANN. § 47:1A-1.1 (West 2015) (exempting records that reveal "security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons"); N.J. ADMIN. CODE § 13:1E-3.2(2) (2016) (exempting records that may reveal "surveillance, security, tactical, investigative, or operational techniques").

that agencies should not “show or disseminate the recording to a civilian or a non-law enforcement entity, or to disseminate it to the public” unless “the County Prosecutor or designee, or Director of the Division of Criminal Justice or designee, determines that disclosure to that particular person entity or the public is warranted because the person's/entity's/public's need for access outweighs the law enforcement interest in maintaining confidentiality.”²¹⁸

Texas law, effective September 1, 2015, requires certain agencies to develop policies that cover public-disclosure issues,²¹⁹ establishes specific requirements that must be met by members of the public to request body-camera footage, and exempts from disclosure footage that was not required to be filmed under the law or the relevant agency's usage policy (or that “does not relate to a law enforcement purpose”)²²⁰ as well as

any portion of a recording made in a private space, or of a recording involving the investigation of conduct that constitutes a misdemeanor punishable by fine only and does not result in arrest, without written authorization from the person who is the subject of that portion of the recording or, if the person is deceased, from the person's authorized representative.²²¹

The law also exempts footage related to incidents where police use deadly force, unless the agency determines release furthers a law enforcement purpose or after all criminal and administrative matters have concluded,²²² and makes nonapproved release of body-camera footage by a police department employee a criminal (misdemeanor) offense.²²³

As of January 1, 2016, Illinois law, among other things, exempts most body-camera footage from public disclosure and requires redaction (rather than withholding) in those circumstances where footage is subject to release.²²⁴ The general presumption of nondisclosure applies to all body-camera footage, but the law does allow for disclosure to the subject of the police-citizen encounter captured on the

218. *Id.* at 20–21.

219. TEX. OCC. CODE ANN. § 1701.655(b)(4) (West Supp. 2016) (requiring agencies receiving grants to purchase body cameras to develop policies that include “guidelines for public access, through open records requests, to recordings that are public information”); *see also* § 1701.662 (outlining procedures for agencies to follow if they want to withhold body-camera footage from public disclosure, by seeking an opinion from the state Attorney General); § 1701.663 (establishing procedures for agency public information personnel to respond to “voluminous requests” for body-camera footage); *cf.* UTAH CODE ANN. § 77-7a-105(2) (West Supp. 2016) (requiring agencies using body cameras to make their usage policies publicly accessible).

220. TEX. OCC. CODE ANN. § 1701.661(h) (West Supp. 2016).

221. § 1701.661(f).

222. § 1701.660.

223. § 1701.659. A 2016 Utah law also prohibits officers from “duplicating or distributing a recording except as authorized by the employing law enforcement agency.” UTAH CODE ANN. § 77-7a-106(4) (West Supp. 2016).

224. 50 ILL. COMP. STAT. ANN. § 706/10-20(b); 5 ILL. COMP. STAT. ANN. 140/7.5(cc) (West Supp. 2017).

requested video,²²⁵ as well as the disclosure of “any recording which is flagged due to the filing of a complaint, discharge of a firearm, use of force, arrest or detention, or resulting death or bodily harm”²²⁶ except those in which the subject of the encounter maintains a “reasonable expectation of privacy, at the time of the recording” (unless the subject consents to disclosure in writing).²²⁷ Interestingly, these exemptions only protect the privacy interests of the *subject of the police encounter*, not bystanders or others caught on video who were not specifically subject to police attention at the time of the recording. Additionally, if the subject was *arrested* during the recorded incident (regardless of whether the arrest was legal or the suspect is ultimately judged guilty for an offense), the suspect loses his or her reasonable expectation of privacy²²⁸—meaning that the video is disclosable and not subject to withholding from public disclosure.

Also effective on January 1, 2016, a Nevada law defines records made by a body-worn camera as a public record subject only to certain exceptions; namely, such records can only be “[r]equested on a per incident basis,” and, if a record contains “confidential information” that cannot be redacted, it must only be made available for inspection.²²⁹

In Washington, D.C., a 2016 law exempts from disclosure all body-camera footage filmed by the Metropolitan Police Department inside private residences or related to incidents “involving domestic violence . . . stalking . . . or sexual assault.”²³⁰ The District’s mayor is also required to publicly disclose information about various aspects of the Metropolitan Police Department’s body-camera program, including information about public requests and agency disclosure determinations.²³¹ D.C. law also establishes some guidelines for agencies to deal with public requests for footage²³² and requires the Mayor to establish rules about public access to footage.²³³

Utah law, effective as of May 10, 2016, exempts from public disclosure all “audio and video recordings created by a body-worn camera” inside a home or residence, except when the recording depicts the commission of a crime, any law enforcement action that results in bodily injury or death, any incident where an officer discharges a weapon, any instance in which an “officer [is] involved in a critical incident,” or any time the recording is related to any complaint against the officer or agency or has been requested by a “subject featured in the recording.”²³⁴

225. 50 ILL. COMP. STAT. ANN. § 706/10-20(b)(3) (West Supp. 2016).

226. § 706/10-20(b)(2).

227. § 706/10-20(b)(1).

228. § 706/10-20(b).

229. NEV. REV. STAT. ANN. § 480.365(2) (LexisNexis Supp. 2016).

230. D.C. CODE § 2-534(a)(2a) (Supp. 2016).

231. § 5-116.33(a).

232. § 2-532(c)(2) (outlining general guidelines); § 2-532(d)(2)(C) (extending time required for the production of records in circumstances where the agency’s “inability to procure a vendor” able to redact requested video within the statutory 25-day time period).

233. § 5-116.32.

234. UTAH CODE ANN. § 63G-2-302(2)(g) (West Supp. 2016).

North Dakota law specifically exempts from disclosure any “image” captured by a law enforcement officer or firefighter that is recorded in a “private place”²³⁵ (presumably meaning that the audio from such recordings is not also exempt).

A Kansas law, effective July 1, 2016, defines body-worn video as a “criminal investigation record” under the state open records act.²³⁶ Such a designation makes disclosure subject to both general exemptions²³⁷ and specific exemptions for criminal investigation records under the law.²³⁸ As a general matter, criminal investigation records are not publicly disclosable under the open records act, and access may only be granted by a court order, which is also subject to a specific balancing test.²³⁹ In addition to these requirements, the 2016 law additionally restricts disclosure to persons who are “a subject of the recording,” their “parent or legal guardian” (if the subject of the recording is a minor), an attorney for the person or their legal guardian, or an heir, executor, or administrator of the estate (if the subject of the recording is deceased).²⁴⁰ On top of all of these restrictions, the Kansas Open Records Act only requires agencies to provide requestors with the right to *inspect* (watch or listen to) body-worn camera recordings²⁴¹ but not to provide copies of the video files themselves,²⁴² and it also allows agencies to require fees for providing such inspection (as a service).²⁴³

North Carolina amended its public records law, effective October 1, 2016, largely restricting public access to recordings and granting law enforcement agencies significant discretion in deciding when to disclose them.²⁴⁴ Notably, the new law states that body-worn video recordings are “not public records” or “personnel records” under the public records act and other state laws,²⁴⁵ meaning that agencies are under no legal obligation under the public records law to disclose (that is, to provide for *inspection*, not copies) or release (meaning to disclose a copy of) a recording. In addition to the discretion the law grants to agencies about whether they comply with

235. N.D. CENT. CODE § 44-04-18.7(9) (2015).

236. KAN. STAT. ANN. §§ 45-254(a), 45-217(c) (West, Westlaw through 2016 Reg. and Spec. Legis. Sess.).

237. Such exemptions include “a request [that] places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency.” § 45-218(e).

238. § 45-221(a)(10).

239. *Id.*

240. § 45-254(c).

241. § 45-218(a).

242. § 45-219(a) (“A public agency shall not be required to provide copies of radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations or similar audio or visual items or devices, unless such items or devices were shown or played to a public meeting of the governing body thereof”); § 45-254(b) (“The law enforcement agency shall allow the person to listen to the requested audio recording or to view the requested video recording.”).

243. § 45-254(b) (noting that, in regards to providing requestors the right to view or listen to recordings, agencies “may charge a reasonable fee for such services provided by the law enforcement agency”).

244. *See* N.C. GEN. STAT. ANN. § 132-1.4A(b) (West Supp. 2016).

245. *Id.*

a request in the first instance, the law limits the agencies' ability to disclose (willingly) to anyone other than those persons who are subjects of a recording or their legal representatives.²⁴⁶ In responding to requests from such persons, the law provides a number of optional considerations that agencies may use as the basis to deny access,²⁴⁷ and courts may only overturn agency denials based on these factors when it determines that an agency has "abused its discretion" in denying the request for inspection.²⁴⁸ Copies of recordings may only be disclosed pursuant to a court order and where a particular standard applies to justify the release (for example, when "[r]elease is necessary to advance a compelling public interest").²⁴⁹ Persons who are granted access to view or listen to a recording under the disclosure/inspection provision are explicitly not allowed to "record or copy the recording," and a court order under that section cannot require release.²⁵⁰

Quite a few states have also recently proposed legislation to regulate the use of body-worn cameras or exempt body-worn camera footage from public disclosure, and judicial decisions are also beginning to note the presence of body-worn cameras, or deal with the issues raised by body-worn camera use in cases brought to court.²⁵¹ In 2015, two bills were introduced into the Washington State Legislature that would have regulated the use of body-worn cameras; both bills proposed to limit public access to body-worn camera footage.²⁵² Both of these bills ultimately died in the legislature, but in March 2016, the legislature passed a new law exempting certain body-camera recordings from public access that became effective June 9, 2016. The following subsections outline public disclosure law in Washington State, generally and specifically in regards to body-camera footage.

B. Public Disclosure Law in Washington

Washington State has a very broad public records law. It was adopted in 1972 by popular vote²⁵³ as part of a larger antisecrecy and government transparency measure.²⁵⁴ The Washington Supreme Court has called the Public Records Act (PRA) a "strongly-worded mandate for broad disclosure of public records."²⁵⁵ The PRA is

246. § 132-1.4A(c).

247. § 132-1.4A(d).

248. § 132-1.4A(e).

249. § 132-1.4A(g)(1).

250. § 132-1.4A(c).

251. It should be noted that body cameras have been used by police in cases beginning in the late 1990s. For the earliest cases discussing body camera use, see *United States v. Davis*, 326 F.3d 361 (2d. Cir. 2003) and *Smith v. State*, 494 S.E.2d 371 (Ga. Ct. App. 1997).

252. See H.B. 1917, 64th Leg., 1st Reg. Sess. (Wash. 2015); H.B. 1917 (Substituted Bill), 64th Leg., 1st Reg. Sess. (Wash. 2015); H.B. 1910, 64th Leg., 1st Reg. Sess. (Wash. 2015); S.B. 5732, 64th Leg., 1st Reg. Sess. (Wash. 2015).

253. Initiative Measure No. 276, ch. 1, 1973 Wash. Sess. Laws 1, 31 (1972), https://archive.org/stream/810223-1972-initiative-no-276/810223-1972-initiative-no-276_djvu.txt [<https://perma.cc/86LL-EMB3>]; see *Nast v. Michels*, 730 P.2d 54, 60 (Wash. 1986).

254. William D. Richard, Comment, *Procedural Rules Under Washington's Public Records Act: The Case for Agency Discretion*, 85 WASH. L. REV. 493, 495 (2010).

255. *Hearst Corp. v. Hoppe*, 580 P.2d 246, 249 (Wash. 1978).

subject to a number of exceptions, most not directly relevant to body-camera recordings, and its purpose is stated clearly in the Revised Code of Washington (RCW):

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.²⁵⁶

All public agencies are required to make public records available:

Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of [subsection 9] of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.²⁵⁷

Under the Act, a “public record” is defined broadly as “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics” with certain exceptions for legislative records held by the state Senate and House of Representatives.²⁵⁸ The Washington Public Records Act is somewhat unique due to a confluence of several factors. First, agencies may not charge for searching, redacting, or otherwise processing requests, but only for the actual cost of copying *physical* records.²⁵⁹ Second, agencies cannot justify withholding *identifiable* records because requests are overbroad.²⁶⁰ Third, databases (such as ALPR databases) are fully subject to public disclosure, even when disclosure requires agency personnel to export data into new files.²⁶¹ Fourth, privacy protections under the PRA are very limited, generally require redaction rather than withholding, and do not cover privacy violations stemming from the aggregation of multiple pieces of information.²⁶² Fifth, litigants and their attorneys may submit PRA requests for records related to litigation while also pursuing discovery at the same time. And finally, sixth, agencies are subject to strict liability for violations (for example, withholding disclosable records or redacting disclosable parts of records), meaning that even disclosure-related violations made

256. WASH. REV. CODE ANN. § 42.56.030 (West Supp. 2016).

257. § 42.56.070(1) (West 2006).

258. § 42.56.010(3).

259. § 42.56.120.

260. § 42.56.080.

261. Fisher Broadcasting v. City of Seattle, 326 P.3d 688 (Wash. 2014).

262. The general privacy section of the PRA is found at RCW section 42.56.050.

in error or good faith may result in financial penalties.²⁶³

According to one general study of government transparency across a variety of categories (of which public-records access is only one), Washington State ranked third overall when compared with the other fifty states.²⁶⁴ Further analysis of the published dataset from the Public Integrity Investigation survey also confirms that Washington also ranks third (tied) when only considering the Public Access to Information category from that broader survey (see Table 1 below). As additional, though purely anecdotal, evidence of the broad reach of Washington's PRA, while conducting fieldwork with police agencies in Washington over the past few months, I have heard a number of police officials make the claim that their perception is that Washington law—as it relates to police disclosure of records—is the most transparent in the country.²⁶⁵

Washington courts have interpreted the PRA under the presumption that “full access to information concerning the conduct of every level of government is a fundamental and necessary precondition to the sound governance of a free society.”²⁶⁶ In line with its broadly encompassing purpose, access-promoting portions of the law are to be “liberally construed” while exemptions to the law should be “narrowly construed” to protect and promote the public interest.²⁶⁷ Additionally, the PRA is designed to trump other laws (such as the state Privacy Act²⁶⁸) when they conflict with its open-access prerogatives,²⁶⁹ although other laws that specifically exempt certain records are held to supplement the PRA rather than as being in conflict.²⁷⁰ Agencies bear the burden of proving that an exemption is appropriate or that denying a request is within the law, and courts will presume that disclosure is otherwise required absent such a showing.²⁷¹

In one recent—and particularly relevant—case, the Supreme Court of Washington held that a particular exemption under the Privacy Act relating to nondisclosure of police audio and video recordings made by in-car recording systems (so called “dash-cam” or “dashboard cameras”) prior to the end of litigation was to be narrowly construed to include only cases “where the videos relate to actual, pending litigation.”²⁷² As such, potential litigation (for example, where a person *could* bring a suit but had

263. See WASH. REV. CODE ANN. § 42.56.550 (West 2016).

264. Vickie Kilgore, *Washington Gets B-Grade in 2012 State Integrity Investigation*, *CTR. FOR PUB. INTEGRITY*, (Nov. 2, 2015, 5:06 PM), http://www.stateintegrity.org/washington_story_subpage [<https://perma.cc/4KRH-373S>].

265. This of course, is a statement that requires detailed empirical study—and I hope my future research will begin to answer this and other related questions. However, it does reflect the perception among many of the administrators and officers with whom I spoke.

266. *Nissen v. Pierce Cty.*, 333 P.3d 577, 581 (Wash. Ct. App. 2014) (citing *Neighborhood All. v. Spokane Cty.*, 261 P.3d 119, 125 (Wash. 2011)).

267. WASH. REV. CODE ANN. § 42.56.030 (West Supp. 2016).

268. §§ 9.73.010–.270 (West 2010).

269. § 42.56.030 (West Supp. 2016).

270. *Bldg. Indus. Ass'n of Wash. v. State Dep't. of Labor & Indus.*, 98 P.3d 537, 541 (Wash. Ct. App. 2004).

271. *In re Rosier*, 717 P.2d 1353, 1356 (Wash. 1986).

272. *Fisher Broadcasting v. Seattle*, 326 P.3d 688, 694 (Wash. 2014); see also WASH. REV. CODE ANN. § 42.56 (West 2006).

Table 1. Ranking (top ten) of the most transparent states²⁷³

Rank	State	FOI Score	Rank	State	FOI Score
1	Connecticut	166.67	6	Illinois	145.83
2	Nebraska	162.50	6	Pennsylvania	145.83
3	Washington	150.00	8	New Jersey	141.67
3	North Dakota	150.00	9	Idaho	141.67
3	Rhode Island	150.00	10	Arizona	133.33

not actually filed a complaint at the time of the public disclosure response by the agency) was not a bar to disclosure.

On the other hand, Washington courts have held that the PRA does not trump constitutional protections.²⁷⁴ This essentially means that the constitutional rights of Washington citizens under Article I, Section 7 of the state constitution²⁷⁵ (including government employees), to be free from unwarranted “searches and intrusions into their private affairs” outweighs public disclosure interests.²⁷⁶

The PRA also recognizes the right to privacy as a possible exemption from disclosure, though the exemption is narrower than it might appear at first blush. Under the Act, privacy violations are defined as instances where “disclosure of information about [a] person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.”²⁷⁷ However, the PRA limits the application of this right to privacy to the express provisions of the Act²⁷⁸ that provide limited grounds for redaction or denial.

273. This ranking is based on scores given to states in the State Integrity Investigation under that study’s first category: Public Access to Information. This table represents my own analysis of the data, which is publicly available online. Dataset available at *State Integrity Investigation*, CTR. FOR PUB. INTEGRITY, http://www.stateintegrity.org/corruption_risk_index_raw_data [https://perma.cc/5MG7-HHPU].

274. *Nissen v. Pierce Cty.*, 333 P.3d 577, 581–82 (Wash. Ct. App. 2014); *Freedom Found. v. Gregoire*, 310 P.3d 1252, 1257 (Wash. 2013).

275. *See* WASH. CONST. art. I, § 7.

276. *Nissen*, 333 P.3d at 581–82 (citing *Freedom Found.*, 310 P.3d at 1256).

277. WASH. REV. CODE ANN. § 42.56.050 (West 2006). This two-part test originates from the Restatement (Second) of Torts § 652 (Am. Law. Inst. 1977). According to one interpretation provided to me by a city attorney within Washington State:

[A] court will look to the Restatement in analyzing whether disclosure of particular information will violate an individual’s right of privacy. The Restatement specifically provides that “no right to privacy exists for facts that are matters of public record, such as a person’s date of birth, the fact of his marriage, his military record, and the fact that he is admitted to the practice of medicine or is licensed to drive a taxicab. By contrast, disclosure of a person’s sexual relations, family quarrels, unpleasant or humiliating illnesses, intimate personal letters, and most details of a person’s life at home could give rise to a right of privacy.” (Restatement (Second) of Torts at § 652D, comment b). Thus, disclosing a person’s date of birth will not violate his or her right of privacy.

Privacy and the PRA, legal memo from [undisclosed] city attorney’s office, on file with the author.

278. WASH. REV. CODE ANN. § 42.56.050 (West 2006).

There are, as a general rule, only three such express privacy-related provisions within the PRA: (1) RCW section 42.56.230(3), which exempts “[p]ersonal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy;”²⁷⁹ (2) RCW section 42.56.230(4), which exempts,

[i]nformation required of any taxpayer in connection with the assessment or collection of any tax if the disclosure of the information to other persons would (a) Be prohibited to such persons [under certain state laws]; or (b) violate the taxpayer’s right to privacy or result in unfair competitive disadvantage to the taxpayer.²⁸⁰

and (3) RCW section 42.56.240(1), which exempts “[s]pecific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies . . . the nondisclosure of which is essential to effective law enforcement or for the protection of any person’s right to privacy.”²⁸¹

Thus, if an express exemption does not exist within the PRA itself, privacy cannot be used as a reason to refuse disclosure. In cases where an express privacy exemption applies, the information must still meet the requirements of RCW section 42.56.050, stated above. In other cases, specific exemptions apply to bar the release of other sensitive information, such as information revealing the identity of minors who have been victims of sexual assault.²⁸² According to the statute, “[i]dentifying information means the child victim’s name, address, location, photograph, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator.”²⁸³

Other information contained in police reports or other records (presumably to include body-worn camera footage) are not exempt and must be disclosed.²⁸⁴ According to the Supreme Court of Washington, even sexually explicit material contained in such reports must be disclosed, regardless of whether such disclosure would be “highly offensive to a reasonable person” under section 42.56.050, because the “the legislature considered the ability to gauge the performance of law enforcement as more than a ‘slight benefit’ to the public, describing it as ‘necessary.’”²⁸⁵

This limitation on a more general privacy exemption to the PRA was a conscious choice by the Washington legislature. Section 42.56.050 (formerly RCW section 42.17) was adopted by the legislature in 1987. The text of the bill inserting that provision into the PRA stated that

279. § 42.56.230(2) (West Supp. 2016).

280. § 42.56.230(3).

281. § 42.56.240(1).

282. § 42.56.240(5); *Koenig v. City of Des Moines*, 142 P.3d 162, 164–65 (Wash. 2006).

283. § 42.56.240(5).

284. *See Koenig*, 142 P.3d at 168.

285. *Id.* at 167–68. This is true even in cases where a requestor seeks records related to a sexual assault by naming the victim in the request. In such a case, the identifying information of a child victim must be disclosed (even though the requestor knew it) and the remaining information about the crime must be disclosed. *Id.*

[t]he legislature intends to restore the law relating to the release of public records largely to that which existed prior to the Washington Supreme Court decision in *In Re Rosier*, 105 Wn.2d 606 (1986). The intent of this legislation is to make clear that: (1) Absent statutory provisions to the contrary, agencies possessing records should in responding to requests for disclosure not make any distinctions in releasing or not releasing records based upon the identity of the person or agency which requested the records, and (2) agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide public records.²⁸⁶

In the case of *In re Rosier*, the Supreme Court of Washington had found that the PRA included a general privacy exemption.²⁸⁷ Subsequent to the legislative change, courts have limited the privacy-based exemptions to those explicitly enumerated in the act.²⁸⁸ These exceptions have been “narrowly tailored to specific situations in which privacy rights or vital governmental interests require protection.”²⁸⁹ Should one of these privacy exemptions apply to a record, agencies may not simply deny a request. Rather, they must redact the exempt information and disclose the remainder of the responsive record. As interpreted by one City Attorney’s Office within Washington State, “[i]dentifying information generally includes name, residential and business address, telephone number[,] cell phone number, date of birth, other unique identifying information, such as a unique job title (e.g., the only person with the title) or particular relationship to a person whose identity is exempt (e.g., a parent).”²⁹⁰

Driver’s license numbers are also exempt.²⁹¹ As such, police agencies in Washington State have recently been required to disclose entire databases of ALPR scans (including unredacted license plate numbers of every vehicle scanned by the system along with precise geolocation and timestamp information, as well as information about plate numbers counted as a “hit” against government watch lists)²⁹² as well as dash-camera and body-camera footage. Some of the information contained in these disclosed files is potentially sensitive personal information about individuals not being charged with crimes—or, if they are being charged, have not been found

286. Act of May 18, 1987, vol. 2, ch. 403, sec. 1, 1987 Wash. Sess. Laws 1547.

287. *In re Rosier*, 717 P.2d 1353, 1359 (Wash. 1986).

288. See *City of Lakewood v. Koenig*, 343 P.3d 335, 338 (Wash. 2014) (“The PRA contains no general exemptions from disclosure to protect individual privacy or vital government functions.” (citing *Progressive Animal Welfare Soc’y. v. Univ. of Wash.*, 884 P.2d 592 (Wash. 1994))).

289. *Lakewood*, 343 P.3d at 338 (quoting *Resident Action Council v. Seattle Hous. Auth.*, 300 P.3d 376, 383 (Wash. 2013)).

290. *Privacy and the PRA*, *supra* note 277.

291. Section 42.56.230(5) exempts “[c]redit card numbers, debit card numbers, electronic check numbers, card expiration dates, or bank or other financial information as defined in RCW section 9.35.005 including social security numbers, except when disclosure is expressly required by or governed by other law. . . .” WASH. REV. CODE ANN. § 42.56.230(5) (West Supp. 2016). RCW section 9.35.005(1)(c) includes driver’s license numbers in the definition of “financial information.” § 9.35.005(1)(c) (West 2006).

292. See *Newell, Big Data Bandwagon*, *supra* note 21.

guilty. On top of privacy concerns related to the disclosure of the personal information of civilians, these records also disclose very detailed and precise information about the movements and actions of individual police officers—including when they are not on duty and/or when they have not been accused of any wrongdoing.

C. Public Disclosure of Body-Worn Camera Footage in Washington

As just discussed, Washington State has a very broad and inclusive public disclosure law.²⁹³ Body-worn camera footage is generally subject to disclosure under the PRA,²⁹⁴ although certain exemptions became effective in June 2016. However, even despite these considerable new grounds for redacting parts of video recordings, many of the exemptions to the PRA are unlikely to apply to body-worn camera footage on a routine basis. Agency personnel responsible for responding to public disclosure requests are required to review (and redact, when needed) both the video and audio of recorded body-worn camera footage prior to disclosure, and this process takes a tremendous amount of time and agency resources.²⁹⁵

The following paragraphs first present the state of the law as it existed at the beginning of the study, concluding with a summary of the recently adopted exemptions for certain body-camera recordings.

1. PRA Exemptions Prior to House Bill 2362

In late 2014, requests for body-worn camera footage, like that discussed above in the Introduction to this Article, triggered quite a stir amongst Washington police agencies. The request caused some departments to halt body-worn camera deployment²⁹⁶ or consider shelving cameras, and lead the Seattle Police Department to collaborate with local technologists in its first-ever Hackathon to work towards a software-based mechanism to automatically redact footage prior to disclosure.²⁹⁷ The Seattle Police Department subsequently started proactively posting over-redacted footage²⁹⁸ to a public YouTube channel.²⁹⁹ Additionally, the liberal disclosure of

293. WASH. REV. CODE ANN. § 42.56.001 (West 2006).

294. See Bill Lucia, *Massive Public Records Requests Cause Police To Hit Pause on Body Cam Programs*, CROSSCUT (Nov. 10, 2014), <http://crosscut.com/2014/11/body-cams-washington-seattle-privacy-disclosure/> [https://perma.cc/4MNL-S56P]; Jennifer Sullivan, *Man Drops Massive Records Requests, Will Help Seattle Police with Video Technology*, SEATTLE TIMES (Nov. 21, 2014, 9:19 PM), <http://www.seattletimes.com/seattle-news/man-drops-massive-records-requests-will-help-seattle-police-with-video-technology/> [https://perma.cc/ZRT2-L75B].

295. See RANKIN, *supra* note 118, at 5, 12.

296. See Lucia, *supra* note 294.

297. Jennifer Sullivan, *'Hackathon' Asks Techies To Aid SPD on Sensitive-Video Issues*, SEATTLE TIMES, (Dec. 14, 2014, 8:48 PM), <http://www.seattletimes.com/seattle-news/hackathon-asks-techies-to-aid-spd-on-sensitive-video-issues/> [https://perma.cc/5W9X-4Q5M].

298. The SPD has applied a few different types of redaction to this footage. Generally, however, their “over-redaction” has consisted of applying a Gaussian blur to the whole frame of video and removing the audio stream entirely.

299. Seattle Police Department, *SPD Launches YouTube Channel for Bodyworn Video*, SPD BLOTTER (Feb. 25, 2015, 2:03 PM), <http://spdblotter.seattle.gov/2015/02/25/spd>

body-worn camera footage was further motivated by the fact that the PRA defaults to a position that records should be disclosed, and placed the burden on government agencies to articulate why redaction or denials are appropriate under one of the applicable exemptions,³⁰⁰ and because the law penalized overbroad secrecy but not generally over-disclosure.³⁰¹

Just months prior to the initial roll out of cameras in both departments that participated in this study, the Washington Supreme Court decided *Fisher Broadcasting*,³⁰² in which the Court held that dash-camera videos were subject to the PRA, and that the Seattle Police Department violated the law when it refused to disclose videos to a reporter who had requested them.³⁰³ In that case, the police department argued that privacy provisions of the state Privacy Act, specifically RCW section 9.73.030(1)(c), limited their ability to produce the requested dash camera videos.³⁰⁴ The police department argued that the Privacy Act operated as an “other statute” under the PRA³⁰⁵—which would have effectively made it a legitimate basis for an exemption to disclosure. However, the majority of the court concluded that RCW section 9.73.090(1)(c), “is a limited exception to immediate disclosure under the PRA, but it is one that applies only where there is actual, pending litigation.”³⁰⁶ This decision effectively confirms that all police footage is publicly disclosable absent explicit statutory exemptions, and that the Privacy Act cannot bar such disclosure except when criminal or civil litigation related to the footage has been filed and is actually ongoing. Indeed, there is no general privacy exemption to the PRA in Washington law, and the privacy provisions of the PRA itself³⁰⁷ cannot be claimed as a stand-alone exemption.³⁰⁸ That provision reads:

A person’s “right to privacy,” “right of privacy,” “privacy,” or “personal privacy,” as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. The provisions of this chapter dealing with the right to privacy

-launches-youtube-channel-for-bodyworn-video/ [https://perma.cc/K78N-DEZ5]. The particular YouTube channel is accessible online at SPD BodyWornVideo, *SPD Blotter Channel*, YOUTUBE, <https://www.youtube.com/channel/UCcdSPRNt1HmzkTL9aSDfKuA> [https://perma.cc/83SA-ACQZ] (last updated Oct. 6, 2016).

300. *Fisher Broadcasting v. Seattle*, 326 P.3d 688, 691–92 (Wash. 2014); *In re Rosier*, 717 P.2d 1353, 1356–57 (Wash. 1986).

301. Indeed, the PRA explicitly absolves agencies of liability for harm caused by disclosure as long as they acted in “good faith.” WASH. REV. CODE ANN. § 42.56.060 (West 2006) (“No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter.”).

302. 326 P.3d at 688.

303. *Id.* at 694–95.

304. *Id.* at 694.

305. WASH. REV. CODE ANN. § 42.56.070(1) (West 2006).

306. *Fisher Broadcasting*, 326 P.3d at 695.

307. WASH. REV. CODE ANN. § 42.56.050 (West 2006).

308. WASH. ADMIN. CODE § 44-14-06002(2) (2015).

in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine, or copy public records.³⁰⁹

As such, any explicitly stated exemption from disclosure on privacy grounds was limited to the extent the above criteria was also met; that is, that the purportedly exempt information—based on the express provisions in another section of the Act or another law—must also be “highly offensive to a reasonable person” and “not of legitimate concern to the public.”³¹⁰ If not, it must be disclosed. And, while footage itself may be disclosable under the PRA, certain additional exemptions did apply that would require redaction. For example, the federal Driver Privacy Protection Act³¹¹ makes it unlawful for state agencies to disclose personal information connected to a motor vehicle record (including driver's licenses). Under Washington law, it is also unlawful for agencies to disclose “[i]nformation revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the commission, if disclosure would endanger any person's life, physical safety, or property.”³¹² Victims, witnesses, or complainants may also indicate “a desire for disclosure or nondisclosure,” and their stated desire should govern decisions about disclosure.³¹³ However, even a stated desire for nondisclosure may be subject to the test enumerated in RCW section 42.56.050 (requiring the disclosure to be highly offensive and not of public concern).³¹⁴

State law also exempts certain investigative records compiled by law enforcement agencies when nondisclosure “is essential to effective law enforcement or for the protection of any person's right to privacy.”³¹⁵ However, the Washington Supreme Court has held that this provision should be construed narrowly (like all exemptions) and did not always constitute a categorical exemption.³¹⁶ A categorical exemption might apply to body-worn camera footage when the footage is an integral part of an investigative file in an unsolved and ongoing criminal investigation where charges

309. § 42.56.050.

310. *Id.*

311. 18 U.S.C. §§ 2721–2725 (2012).

312. WASH. REV. CODE ANN. § 42.56.240(2) (West 2006). This is one provision among a few additional provision, most of which are not directly applicable to body-worn camera footage. *See* § 42.56.240 for others.

313. § 42.56.240(2).

314. *See* *Martin v. Riverside Sch. Dist.* No. 416, 329 P.3d 911, 914 (Wash. Ct. App. 2014). Although for many possible complainants, the section 42.56.050 question is only triggered if RCW sections 42.56.230(3), .230(4), or .240(1) also apply to the case. *See* *Sargent v. Seattle Police Dep't*, 314 P.3d 1093, 1101–02 (Wash. 2013) (“RCW 42.56.240(2) provides separate protection by exempting witness identities where ‘disclosure would endanger any person's life, physical safety, or property’ or where the witness requests nondisclosure” and police departments bear “the burden to show that nondisclosure [is] essential to effective law enforcement . . . or that disclosure would endanger a person's life, physical safety, or property, or that a witness had requested nondisclosure under RCW 42.56.240(2).”)

315. § 42.56.240(1).

316. *Sargent*, 314 P.3d at 1097–98.

had not yet been filed.³¹⁷ However, in cases where defendants have been identified and the investigative file has been referred to the prosecuting authority to determine whether charges will be filed, “nondisclosure is not categorical and automatic” and legitimate reasons for nondisclosure must be proved by the agency “on a document-by-document basis.”³¹⁸ Because, presumably, most body-worn camera footage will not be essential to criminal investigations, this exemption may only apply to a small subset of all recorded videos.

Additionally, section RCW 42.56.230 exempted certain personal information from disclosure, including information about “students in public schools, patients or clients of public institutions or public health agencies, or welfare recipients,”³¹⁹ children enrolled in early care or certain youth programs,³²⁰ personnel files for “employees, appointees, or elected officials” of public agencies,³²¹ certain information related to tax preparation,³²² certain financial information,³²³ records “used to prove identity, age, residential address, social security number, or other personal information required to apply for a driver’s license or identicard . . . that indicates that an applicant declined to register with the selective service system” and other records “pertaining to a vehicle license plate, driver’s license, or identicard” or vessel registration,³²⁴ and “information related to individual claims resolution structured settlement agreements submitted to the board of industrial insurance appeals.”³²⁵

2. The Exemptions Adopted in House Bill 2362 in 2016

The public disclosure exemptions for body-camera footage enacted in early 2016, and effective June 9 of that year, exempt all “[b]ody worn camera recordings to the extent nondisclosure is essential for the protection of any person’s right to privacy,” a test met by recordings that are considered “highly offensive to a reasonable person” under the Act, including footage that depicts parts of medical, counseling, or therapy

317. *See id.* at 1098 (citing *Newman v. King Cty.*, 947 P.2d 712, 716 (Wash. 1997)).

318. *Id.* at 1098 (citing *Cowles Publ’g Co. v. Spokane Police Dep’t*, 987 P.2d 620, 623 (Wash. 1999)).

319. WASH. REV. CODE ANN. § 42.56.230(1) (2006).

320. § 42.56.230(2)(a) (Supp. 2017).

321. § 42.56.230(3).

322. § 42.56.230(4).

323. § 42.56.230(5)–(6).

324. § 42.56.230(7)(a)–(c).

325. § 42.56.230(8). Other exemptions apply to information related to employment and licensing, section 42.56.250, real estate appraisals, section 42.56.260, other financial and commercial information, section 42.56.270, preliminary drafts, notes, and intra-agency memorandums, section 42.56.280, locations of archaeological sites, section 42.56.300, library patron records, section 42.56.310, educational information, section 42.56.320, certain public utility information, section 42.56.330, and health care information, section 42.56.360, and some personal information about health care professionals, section 42.56.350, client records of domestic violence or sexual assault recovery programs, section 42.56.370, certain information about agricultural and livestock operations, section 42.56.380, persons in emergency or transitional housing, section 42.56.390, certain information held by insurance and financial institutions, section 42.56.400, and a variety of other reasons.

facilities where patients receive or wait for treatment or where “[h]ealth care information is shared with patients,” as well as

protected health information . . . ; . . . [t]he interior of a place of residence where a person has a reasonable expectation of privacy; . . . [a]n intimate image [as defined in state law]; . . . [a] minor; . . . [t]he body of a deceased person; . . . [t]he identity of or communications from a victim or witness of an incident involving domestic violence . . . or sexual assault . . . ; or . . . [t]he identifiable location information of a community-based domestic violence program . . . or emergency shelter³²⁶

However, the law also allows requestors to overcome the presumption of nondisclosure by providing “specific evidence in individual cases” that would refute the expectations of privacy in regards to particular recordings.³²⁷ The law also requires requestors to provide specific types of information about the recording sought, including the name of a person involved in the recorded incident; the case number assigned to the incident; the date, time, and location of the incident; or the name or identity of a police officer involved in the incident.³²⁸ Additionally, in a radical departure from the historic openness of the Washington PRA, the new law also imposes potentially substantial fees for most requestors,³²⁹ requiring them to “pay the reasonable costs of redacting, altering, distorting, pixelating, suppressing, or otherwise obscuring any portion of the body worn camera recording prior to disclosure . . . to the extent necessary to comply with the exemptions.”³³⁰

The Act also enables agencies to require identification from requestors who request fee waivers to ensure they are eligible under the Act to receive recordings under such conditions.³³¹ On the other hand, the Act also requires agencies to “use redaction technology that provides the least costly commercially available method of redacting body worn camera recordings, to the extent possible and reasonable.”³³²

These new provisions provide significant limits, compared with the prior state of the law, in regard to the public disclosure of some body-camera recordings, and many of these limits are consistent with the opinions of officers who I interviewed and surveyed throughout this study.

326. § 42.56.240(14)(a)(i)–(vii).

327. § 42.56.240(14)(b).

328. § 42.56.240(14)(d).

329. Those exempt from fees include persons “directly involved in an incident recorded by the requested body worn camera recording” or their attorney, “a person or his or her attorney who requests a body worn camera recording relevant to a criminal case involving that person,” an attorney representing “a person regarding a potential or existing civil cause of action involving the denial of civil rights,” or “the executive director from either the Washington state commission on African-American affairs, Asian Pacific American affairs, or Hispanic affairs.” § 42.56.240(14)(e)(i).

330. § 42.56.240(14)(f)(i).

331. § 42.56.240(14)(e)(iii).

332. § 42.56.240(14)(f)(ii).

V. EMPIRICAL FINDINGS

In the following sections, I present results from an analysis of survey and interview responses. The first Subpart outlines various demographic characteristics of the respondents to the surveys (and interviews), and the second presents findings related to officer attitudes towards (and perceptions of) the implications that body cameras might have on public disclosure and privacy. As part of a broader questionnaire, respondents were asked a few closed-ended (usually Likert scale based) questions on each survey related to these particular issues. More specifically, officers were asked to provide responses to questions about officer and civilian privacy, the appropriateness of civilians gaining access to officer body-worn camera footage under state public records laws, and the appropriateness citizens then posting these videos to the internet (for example, on Youtube.com). On the latter two surveys (and in later ride-alongs), respondents were asked about the possibility of their department proactively posting over-redacted body-camera video to the Internet. On the third survey, respondents were also asked how they felt about newly enacted legal exemptions for certain body-camera footage contained in House Bill 2362.³³³

A. Demographics of the Sample

Sex. Across all three surveys, the vast majority of respondents were male (about 87–88%), ranging from 83.7% (BPD, survey 2) to 90.5% (SPD, Survey 2). The low number of female respondents (ranging from 5.7% to 16.3% by department per survey) does limit the generalizability of analyzing results by sex, but the response rate does generally reflect the overall demographic composition of the two departments. The total population of sworn officers at BPD were approximately 84.0% male and 16.0% female, and the total population of SPD employees (not just sworn officers) was 75.6% male and 24.4% female.³³⁴ Qualitative interviews and ride-alongs were also conducted with a sample of officers that generally matched these populations (predominantly male, but including some female officers as well; five ride-alongs were conducted with three different female officers).

Table 2. Sex of respondents (by department) across three surveys.

Agency	Survey	<i>n</i>	Male	Female	No response (NR)
BPD	1	50	88.0%	12.0%	—
	2	49	83.7%	16.3%	—
	3	56	85.7%	12.5%	1.8%
SPD	1	98	88.8%	9.2%	2.0%
	2	84	90.5%	7.1%	2.4%
	3	70	88.6%	5.7%	5.7%
Combined	1	148	88.5%	10.1%	1.4%
	2	133	88.0%	10.5%	1.5%
	3	126	87.3%	8.7%	4.0%

333. *See supra*, Part IV(c)(2).

334. It is likely that the percentage of male sworn officers is higher than this (and female lower), but I was not able to get precise numbers for just the sworn personnel at SPD.

Age and amount of law enforcement experience. Across surveys, a large majority of respondents generally reported being between thirty-five and fifty-four years of age, with very few reporting being under twenty-four or older than sixty-four. Similarly, the qualitative interviews were conducted with officers that were generally between the ages of twenty-four and fifty-four.

Table 3. Ages of respondents across all three surveys.

Survey	<i>n</i>	18–24	25–34	35–44	45–54	55–64	65+	NR
1	148	0.7%	16.2%	42.6%	33.1%	5.4%	—	2.0%
2	133	—	9.0%	43.6%	37.6%	7.5%	0.8%	1.5%
3	126	0.8%	8.7%	33.3%	44.4%	8.7%	—	4.0%

In terms of years of professional law enforcement experience, the majority of respondents on each survey reported having worked in a law enforcement capacity for more than ten years, with only a very small number reporting less than five years of professional law enforcement experience. In ride-alongs, most officers had more than five years of experience, but a few were also newer officers (a couple having only recently completed their field training).

Table 4. Reported time in law enforcement across all three surveys.

Survey	<i>n</i>	< 1 yr	1–2 yrs	3–5 yrs	5–10 yrs	> 10 yrs	NR
1	148	2.0%	0.7%	5.4%	21.6%	68.9%	1.4%
2	133	—	1.5%	1.5%	13.5%	82.0%	1.5%
3	126	—	0.8%	2.4%	14.3%	79.4%	3.2%

Rank/Position. Across the three surveys, regular officers (patrol, traffic, crime prevention, etc., including both junior and senior patrol officers) constituted between 48.1% and 62.9% of all respondents. Between 24.2% and 28.6% of respondents on each survey reported serving in higher ranking positions (designated “Supervisor” in Figure 2), including corporal (SPD only), sergeant, lieutenant, and captain (SPD only). Additionally, between 7.9% and 10.2% of respondents reported being detectives or investigators. Ride-alongs were conducted primarily with regular patrol officers, but also included three sergeants, two corporals, and one crime scene investigator. Additional interviews and informal conversations were conducted with higher ranking members of the departments’ command staff, civilian staff, and additional patrol officers.

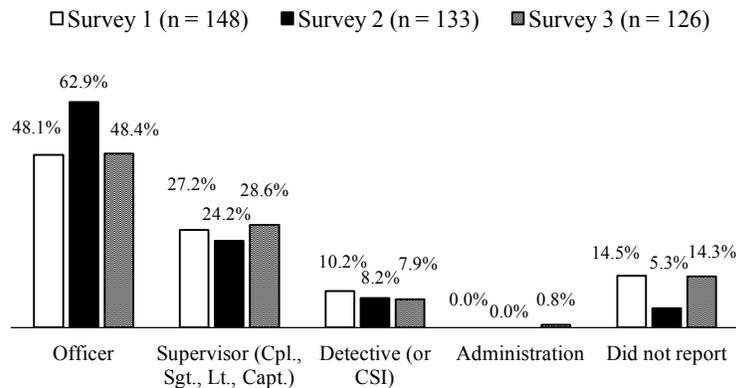


Figure 2. Reported rank (or position), by survey.

Formal education. In terms of formal education, all respondents on each survey reported having attended college or university, with a majority on each survey having earned a four-year (baccalaureate) degree. Roughly 20% of respondents reported having obtained a two-year (associates) degree, and between 2.7% and 6.8% having obtained a graduate degree. This question was not typically asked during informal interviews.

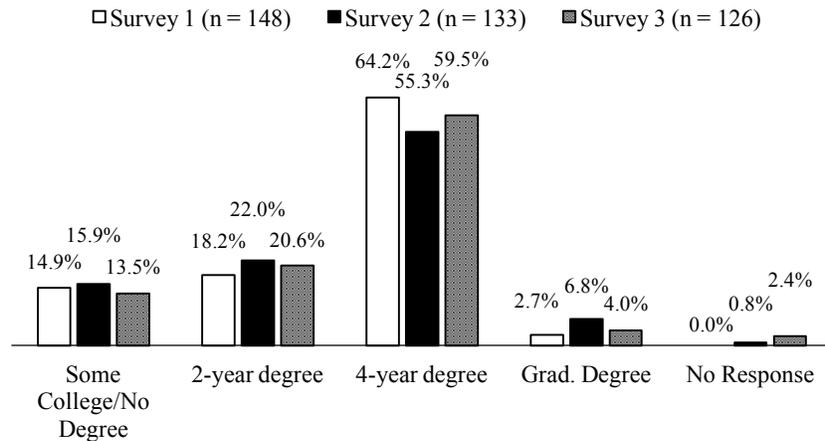


Figure 3. Amount of reported formal education, by survey.

Race/Ethnicity. In regards to race, roughly 85% to 87% of respondents on each survey reported being “White,” with small percentages of respondents identifying as “Hispanic,” “Black/African-American,” “American Indian/Alaska Native,” “Asian,” or “Hawaiian/Pacific Islander” (see Table 5, below). These responses generally match the populations at both departments fairly well, as BPD’s population is approximately 90% White, 5.4% Asian and Pacific Islander, and 4.5% Black/African-American (with a few employees who identify as Hispanic in addition to one of the previous categories). On the other hand, SPD’s population is approximately 91.9% White, 3.0% Hispanic, 1.5% Black/African-American, 1.5%

American Indian/Alaska Native, and 1.8% Asian/Hawaiian/Pacific Islander (with another 1.0% “Other”). Ride-alongs were primarily conducted with white officers, although some informal interviews were conducted with nonwhite officers.

Table 5. Reported racial/ethnic backgrounds of respondents, by survey

Response(s)	Survey 1		Survey 2		Survey 3	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
White	130	87.8%	116	87.2%	107	84.9%
Black/African American	3	2.0%	2	1.5%	2	1.6%
Asian	2*	1.4%	2	1.5%	3***	2.4%
Hispanic	5*	3.4%	3*	2.3%	2*	1.6%
Am. Indian/Alaska Native	3*	2.0%	4*	3.0%	2	1.6%
Hawaiian/Pacific Islander	1	0.7%	1	0.8%	1***	0.8%
Other	2**	1.4%	4**	3.0%	3**	2.4%
No Response	6	4.1%	7	5.3%	11	8.7%
Total	148	-	133	-	126	-

* Includes one or more response where “White” was also selected as a primary racial category.

** Responses include: [blank], “American,” “Merican,” and “Human.”

*** Includes one response indicating both “Asian” and “Native Hawaiian/Pacific Islander.”

Politics. In terms of politics, the highest percentages of respondents generally reported their political leanings as being “conservative” (25.6% to 32.5% across surveys) or “moderate conservative” (27.7% to 31.0%), followed by a smaller number of respondents who reported being “moderate” (16.7% to 22.6%). Only very small numbers of respondents (fewer than 6%) reported being on the “liberal” side of the political spectrum, while 7.9% to 10.5% reported being “very conservative.” This question was not generally discussed during informal interviews.

B. Police Officer Attitudes Towards Cameras, Public Disclosure, and Privacy

At the outset of the body camera deployment, the officers who volunteered to wear cameras were generally quite positive about the new devices. In one early incident, captured on an officer’s body camera during the initial trial and evaluation of the cameras, a man was recorded arguing with an officer prior to leading the officer on a lengthy foot chase. After the man originally pleaded not guilty for crimes captured on tape, the department provided his defense attorney a copy of the footage, resulting in a speedy change of plea. Some of the officers saw these events as strong evidence that the cameras would capture important evidence and improve their work, and positive stories like this one influenced initial perceptions of the cameras to some extent.

On the other hand, many officers continued to feel opposed to the cameras for a variety of reasons. One officer stated, “[a] witch-hunt is about to begin and the cameras will be used to show us doing something—anything—wrong.” Others had experiences with the cameras that either improved or eroded their confidence in the cameras. Privacy concerns in connection to liberal public disclosure rules was a common refrain, and a number of officers felt that the current public disclosure law

was inadequate to accommodate the realities faced by the officers and their departments and the related privacy concerns. A number of officers wanted public disclosure law to strike a balance between prohibiting broad disclosure and allowing law enforcement the ability to freely record in order to fulfill their responsibilities.

1. Access to Footage and Civilian Privacy

During rides with officers, I was repeatedly told that officers didn't mind persons involved in contacts getting access to footage but, in many cases, officers were generally adamant about not wanting "any anonymous person" to be able to access their footage, especially as officers felt much of the footage they recorded contained sensitive information about the people they contacted.³³⁵ To a survey question about what concerns body-worn cameras raise in the minds of officers, one officer responded, "I have very significant concerns about WA State's [public disclosure] laws. I do not believe that the inherent privacy issues of citizens are being addressed. It is unfair for a family's personal laundry to be immediately accessible on U-tube, etc."

These feelings were expressed by a number of respondents on open-ended questions across the three surveys and in the informal interviews, and were supported by responses to closed (Likert-scale) questions. The refrain, "We see a lot of bad people, and good people, on their worst day," seemed to pervade many officers' sense that public disclosure law allowed too much access (in terms of content) and also made access too easy (both in the breadth of requests and in allowing requests from any member of the public who wanted access).

Officers frequently expressed concern that footage subject to public disclosure (and the attendant increased visibility for individuals captured on video) could cause additional harm to victims, especially when "the footage is viewed by a person that does not have any legitimate interest into the incident."

I worry about public disclosure laws and victims['] personal horrors being released for the public to watch like it is a TV show, or now perpetrators being able to see the inside of victims['] homes, etc. The public should not be able to get online and watch what happened to their neighbor during the police contact just because they are nosey.

In particular, multiple officers made statements to the effect that "rape victim[s'] statements should not be accessible through public disclosure requests," because release "could victimize them further." Alternatively, one officer stated that "victims should have the option of not being recorded," because "a public records request could devastate" them and open their home to the view of anyone who watches the video. Some officers modified their behavior and often chose not to record certain situations (or inside homes) when they felt doing so could jeopardize a victim's or witness's privacy. One officer, explaining why he often chose not to activate his camera when inside private homes, stated (while pointing at his camera), "because I know where this goes."³³⁶

335. See the Introduction to this Article for a narrative description of some of the responses I received from officers during the course of the research.

336. Importantly, the 2016 legislation, which was proposed and enacted after much of the

One officer who recorded a lengthy interview with a young woman detained during a prostitution sting explained to me how he spent time after the video was posted to YouTube (by the anonymous public records requestor) trying to figure out how, and whether, he could request the video be taken down for privacy reasons. He couldn't believe that such a sensitive interview could be disclosed and published without being redacted to protect the young woman's privacy. The interview, which remained on the internet for almost two years, included the woman stating her name and talking about her boyfriend and family, as well as the events and activities that led to her arrest for prostitution. Other officers also reacted quite strongly to these instances of public disclosure. A sergeant stated:

I feel that it is important to document how well our officers perform their duties and their high level of professionalism while at work. My only reservation about the [body camera] program is that all the footage is subject to a public records request and could possibly put a victim into further harm or ridicule if the footage is viewed by a person [who] does not have any legitimate interest in the incident.

Over half of the respondents on each survey indicated that they agreed to some extent that police use of body-worn cameras would intrude on the privacy interests of citizens, while disagreement was reported by 37.8%, 36.9%, and 31.0% of respondents, respectively by survey (see Figure 4). Interestingly, however, this level of agreement was not shared across both police agencies. When analyzed by department, SPD respondents reported substantially higher rates of agreement that the cameras would likely invade civilian privacy, ranging from a low of 55.7% (on Survey 3) to a high of 75.0% (on Survey 2).³³⁷ On the other hand, fewer than half of BPD respondents agreed with this proposition on all three surveys, ranging from a low of 34.7% (on Survey 2) to a high of 48.0% (on Survey 1).³³⁸

fieldwork was conducted, now provides a categorical exemption for the statements of victims of sexual assault or domestic violence. *See* WASH. REV. CODE ANN. § 42.56.240(14)(a)(vi)–(vii) (2006 & Supp. 2017).

337. The level of agreement on Survey 2 was 64.3%.

338. The level of agreement on Survey 3 was 44.6%.

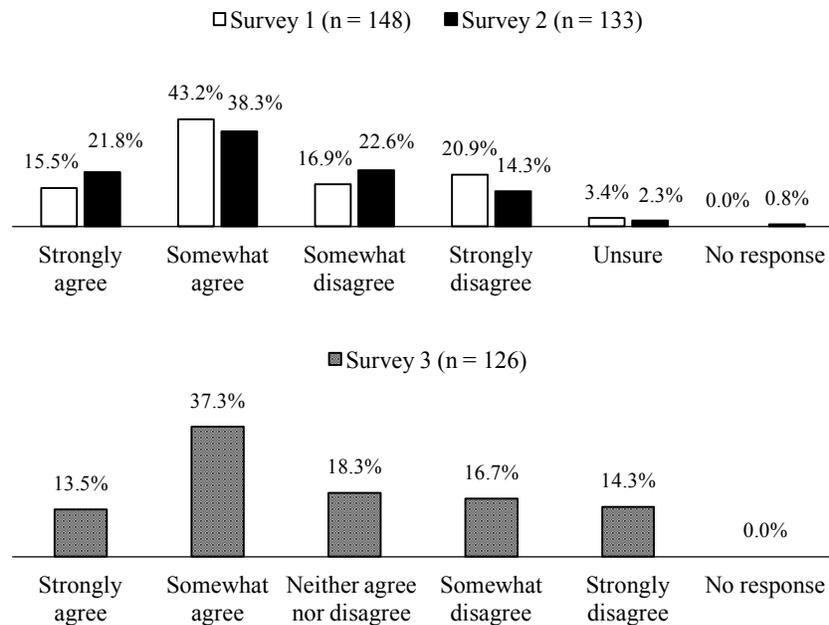


Figure 4. Level of agreement that body camera use would intrude on citizens' privacy

2. Access to Footage and Officer Privacy

Officers were also asked whether they thought that body-worn camera use would intrude on the privacy of individual police officers. Often, officers' concerns about their own privacy was related to supervisory review directed at finding small policy infractions (such as using profanity), the need for privacy in regards to things officers might say while venting after stressful incidents or in regards to critical comments an officer might make about a supervisor in the presence of a trusted colleague, or the perceived risk of "Monday-morning quarterbacking" and critique of officers' actions (by the media and the public) made possible by broad public disclosure rules.

On the surveys, the general distribution of responses to this question was similar to the distribution of responses about civilian privacy, with roughly half of respondents indicating agreement that body-worn camera use would result in intrusions to officer privacy (see Figure 5). Responses by the departments were generally more alike than in regards to the previous question, with the exception of the responses to Survey 2, where BPD respondents indicated only 36.8% agreement (compared to 56.0% at SPD) and just over 50.0% disagreement.

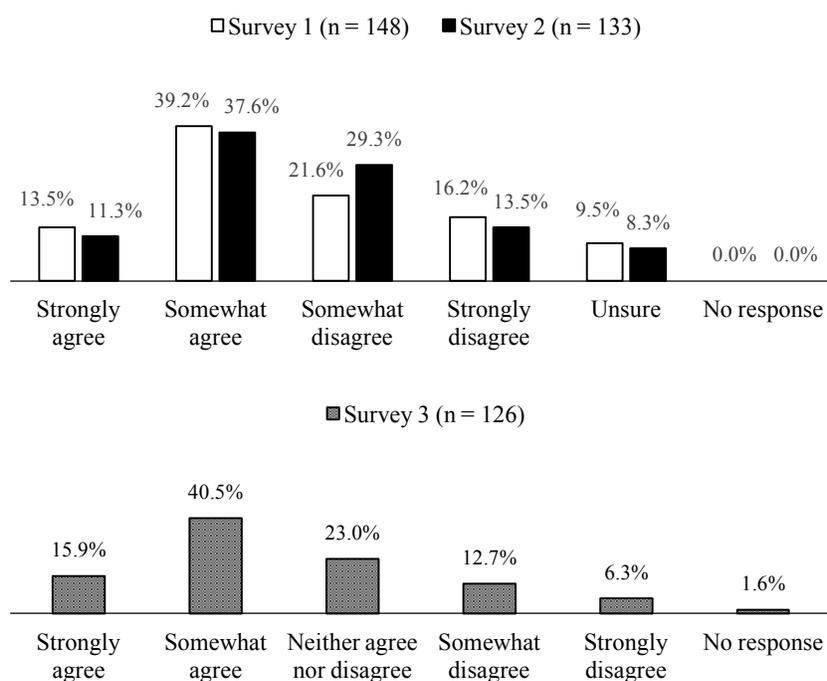


Figure 5. Level of agreement that body camera use would intrude on officers' privacy.

3. Public Access to Body-Worn Video

Officers generally appear much more accepting of limited-access public disclosure policies than they are of the broad and all-encompassing public records law that currently exists in Washington State under the Public Records Act. Some officers indicated a concern about the costs and personnel required to adequately handle public disclosure requests. A number of officers also indicated that providing entertainment to the public was not an appropriate reason to release footage, and some expressed concern that disclosed video would be edited and taken out of context before being placed online, ultimately giving an inaccurate depiction of events. Other officers cited safety concerns, attorneys trolling through footage looking for potential lawsuits, and increased scrutiny from departmental administrations as issues of concern. One officer stated:

Many times officers seek privately given intelligence from informants and other persons that is essential to the mission and should not be subject to public records request . . . not all body camera video should be subject to public records request. This video WILL be abused by news media, lawyers, and all the troll citizens that spend their days trying to defame police.

Officers also repeatedly made connections between policy discussions about when and where officers should or should not record and the risk of public disclosure. A majority of these responses (as well as other discussions I had with officers during the study) indicated that officers generally felt they should record (or were recording) less often in certain situations because of concerns about privacy and public disclosure. Relatedly, these officers felt that they “should have a fair amount of discretion” about when to activate their camera and record, but that “interviews of victims, children, social contacts, etc., should not usually be recorded due to public disclosure laws.” Another officer stated that

Any officer initiated contact should be videotaped . . . this is really what the public is looking for and provides true transparency into [an] officer’s own enforcement actions. [However,] officers should have discretion when responding to private calls. Should my neighbors be able to view my personal family issues just because a police officer shows up to my house? What if my autistic son is having a breakdown? How about a juvenile who is suicidal or arguing with parents over doing the dishes . . . should this video forever be [accessible] by prospective employers for all time?

On the other hand, one respondent stated:

If you are going to record, why not record everything? I am not necessarily for the cameras but if we are going to wear them, record it all! Then maybe public disclosure laws will change so victims don’t become victims again with their calls being posted for all to see.

When asked whether they would choose to wear a body-worn camera if they had the choice all over again (or, for the first time if they hadn’t made a decision in the past), officers responded with mixed impressions. However, for those who indicated they would not choose to wear a camera, public disclosure and privacy concerns were a commonly cited reason. Officers frequently stated that there needs to be “better laws addressing disclosure of the videos.” One officer stated, “[A]lthough I believe body cameras can be an incredibly useful tool, correct legislation regarding public disclosure requests and body cameras is not in place at this time.”

Finally, the quotation below evinces a common refrain among those who stated they would not choose to wear a camera if given the choice again: “I would not wear a camera today despite the benefits it offers. Right now there are too many unresolved issues dealing with who, when, and where to record as well as the public disclosure fiasco.”

In survey responses, when asked how appropriate the respondents felt it was for citizens to gain access to recordings made by an officer’s body-worn camera, there was some noticeable difference between the different survey administrations. On

Survey 1, 38.5% of officers indicated that broad public access to body-camera footage was either “somewhat appropriate” or “very appropriate,” but this percentage of positive responses fell substantially to 28.6% on Survey 2 and 12.7% on Survey 3. Conversely, negative responses (either “somewhat inappropriate” or “not at all appropriate”) increased slightly from 58.1% on Survey 1 to 66.1% and 61.1% on the subsequent surveys, respectively.³³⁹ Notably, very few officers felt it was “very appropriate” for citizens to access police body-worn camera video footage (fewer than 6% across all three surveys).

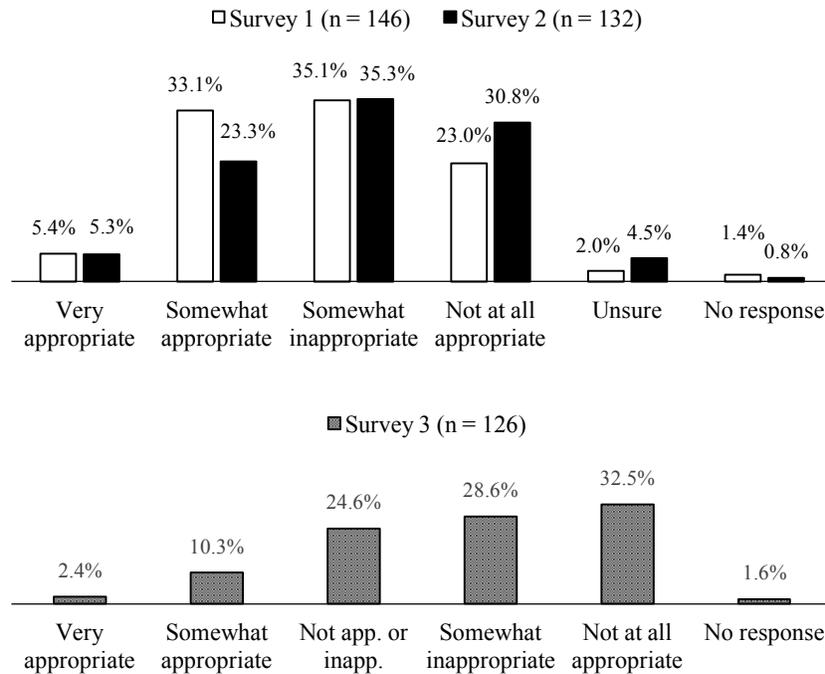


Figure 6. Appropriateness of citizens accessing body-camera footage under FOI law.

When asked a similar question, phrased in terms of agreement that body-worn camera footage should be accessible under state FOI law, respondents overwhelmingly indicated that they disagreed that officer body-worn camera footage should be accessible to all members of the public. Similarly, we also see the percentages of positive responses (“strongly agree” or “somewhat agree”) decreasing over time, from 20.3% (on Survey 1) to 5.6% (on Survey 3). These trends correspond to the shift in responses seen above, suggesting that officers became more wary of public disclosure over time.

339. One important note regarding this question’s modified format on Survey 3 should be made here, as neutral responses increased dramatically on this question, from below 5% to almost 25% on the third survey. It appears likely that the placement of the neutral response choice to the middle of the five-point spectrum influenced the frequency at which respondents chose this option.

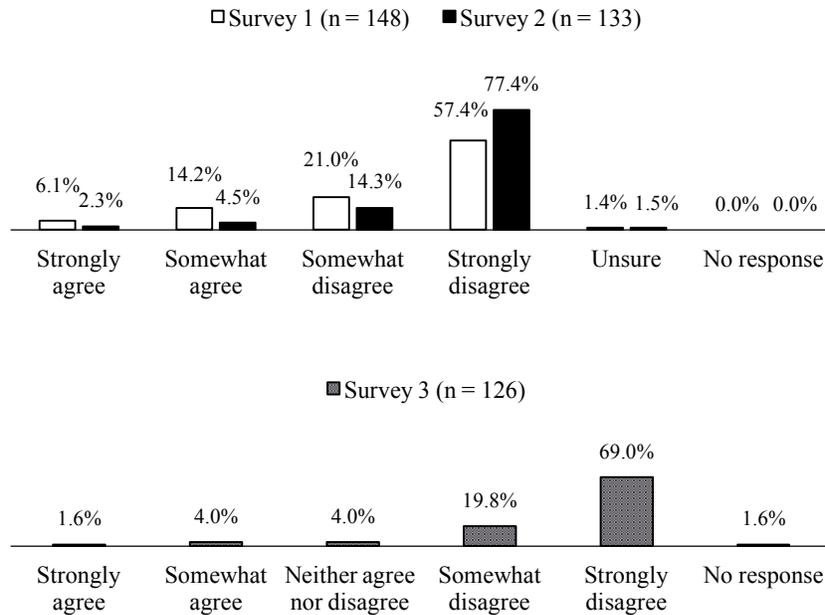


Figure 7. Level of agreement that body-worn camera footage should be accessible to all members of the public under public disclosure (FOI) law.

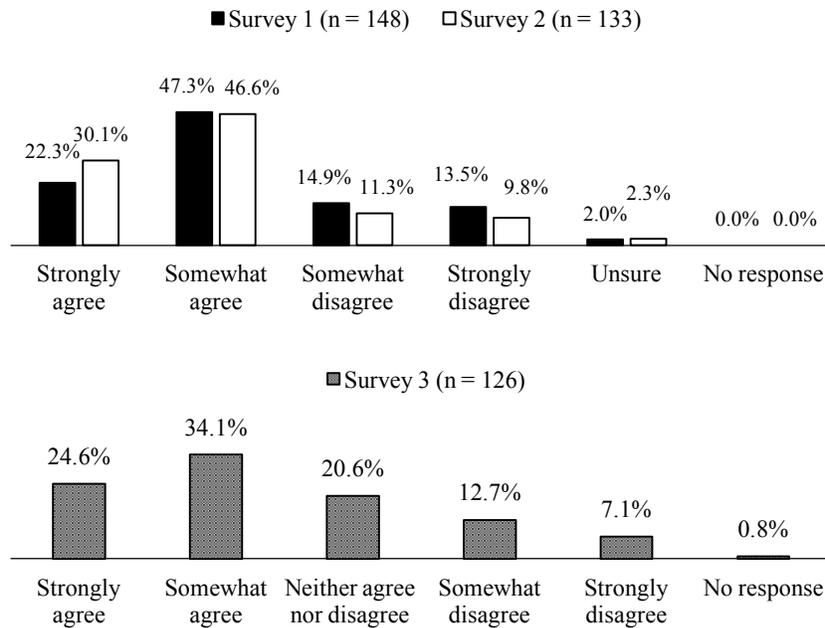


Figure 8. Level of agreement that body-worn camera footage should be accessible to members of the public who are captured on the requested footage.

However, when presented with a slightly altered version of the previous question (framed as access *only to those individuals who were captured on the body-worn camera footage itself* rather than any member of the public), officers were much more supportive of disclosure across all three surveys. A majority of respondents on each survey reported agreement (either “strongly agree” or “somewhat agree”) that disclosure to these individuals *was* appropriate. Positive responses increased from 69.6% on Survey 1 to 76.7% on Survey 2, falling somewhat to 58.7% on Survey 3.³⁴⁰ Correspondingly, officers who chose one of the two negative options (either “strongly disagree” or “somewhat disagree”) dropped from a high of 28.4% on Survey 1 to a low of 19.8% on Survey 3. These findings suggest that officers may have become less averse to *limited* public disclosure over time, even while generally becoming more critical of wide public disclosure, as discussed above.

4. Initial Summary of Findings

After the high-profile blanket requests for footage were filed in late 2014, public disclosure and privacy became a couple of the most commonly cited and discussed concerns that officers had about the cameras. These concerns may be leading officers to record less frequently over time, as they fear exposing sensitive information about the civilians with whom they interact on a daily basis. The findings presented above do begin to shed light on how officers within the departments studied feel about the public disclosure issues raised by body-worn camera adoption. These are also the first empirical findings to address these questions, and more research obviously needs to be done to give us a better picture of how public disclosure issues are impacting officers and departments across the country. While other published and ongoing research has focused primarily on other important variables, public disclosure issues do have the potential to cause significant issues for police administrators³⁴¹ as well as officers and the general public. In the two departments that participated in this current project, as well as other agencies within the state (e.g. the Seattle Police Department), public disclosure quickly became a serious issue after the first blanket request was filed by Tim Clemans in September 2014.³⁴² One person charged with responding to records requests for footage confirmed that the process of previewing and redacting footage took up to three times longer than the length of the footage itself, and that current staffing levels could not support a high volume of requests or, indeed, even a single broad request like that filed by Clemans.³⁴³ In one of the two departments in this study, the threat of the broad request caused

340. However, we also see neutral responses increasing sharply on Survey 3, as noted above at *supra* note 339, suggesting that this decline in positive responses may (or may not) be attributable to the changed placement of the neutral response choice in the Likert scale, rather than due to any meaningful change in respondent attitudes. Regardless, the results clearly indicate a much stronger level of agreement with limited public access than in regards to more liberal access policies.

341. See RANKIN, *supra* note 118, at 5, 12–13.

342. See Glenza, *supra* note 2.

343. The Mesa Police Department came to a similar conclusion in an earlier study. RANKIN, *supra* note 118, at 12–13.

administration to briefly consider halting or cancelling the program, due to the potential administrative and fiscal burden of responding to such requests over time.

VI. DISCUSSION

Police use of body-worn cameras implicates privacy interests both by recording police interactions with civilians and by the subsequent use and/or public disclosure of the resulting footage, which raises sharp tensions between these privacy interests and access to government information for oversight or transparency purposes. In the case of body-worn cameras, despite the public-facing rationale for adopting the cameras as police oversight tools, the primary subjects of the original recordings are actually the civilians—officers generally acting off screen, behind the cameras mounted on their bodies. The publication of body-worn camera recordings to the internet or through other media channels by police agencies or civilians functions—just like the publication of ALPR data³⁴⁴ or civilian video³⁴⁵—as a form of secondary visibility of police officers and of civilians alike. The public disclosure of these videos offers the potential for significant privacy harms.

The use of body-worn camera systems does have the obvious effect of documenting more encounters, which can then serve as evidence for or against officer or citizen misconduct. However, too much reliance on audio-visual evidence could also decontextualize events and also, possibly, diminish the recognition given by the public and courts to the realities that confront police officers on the ground. In short, it may lead to judgments about the wrongness/rightness of police action based on small windows of reality that ignore some relevant context. This may also affect policing by further diminishing the amount of discretion available to officers. Indeed, as Bittner found, police have historically kept few records of procedures that do not involve making arrests³⁴⁶ and the nature of their work has unavoidably led to officers having a great deal of discretionary freedom.³⁴⁷ These facts, combined with the reality that police work has long been divided into both law enforcement and peace-keeping activities (which involves officer discretion and action outside the domain of making arrests),³⁴⁸ suggest that wearable cameras (especially those operating under policies that require frequent or constant recording) might begin to document wide swaths of police conduct that have heretofore been largely left to the officers themselves. Thus, in the context of skid row policing investigated by Bittner, the fact that officers use force to effectuate arrests on the basis of risk (considered in the aggregate for the area) and personal knowledge, rather than mere individual culpability, may be antithetical to the wider public's notions about legitimate police work.

Bittner stated:

When arrests are made, there exist, at least in the ideal, certain criteria by reference to which the arrest can be judged as having been made more or less properly, and there are some persons who, in the natural course

344. See Newell, *Big Data Bandwagon*, *supra* note 21, at 398–99.

345. See Newell, *Crossing Lenses*, *supra* note 21, at 60.

346. See BITTNER, *supra* note 11.

347. *Id.* at 48.

348. *Id.* at 31–32.

of events, actually judge the performance. But for actions not resulting in arrest there are no such criteria and no such judges.³⁴⁹

However, with the rise in the number of cameras present in public, and the advent of the officer-mounted wearable camera, these nonarrest situations are becoming increasingly documented and, as a consequence, there are potentially numerous judges (police administrators, elected officials, the media, or the public) and a variety of criteria against which individual officer conduct may begin to be judged. Indeed, this reality sits behind the concerns that officers frequently expressed about “Monday morning quarterbacking” and being judged by evidence that is taken out of context or that fails to capture the officer’s subjective experience of a situation. These realities are exacerbated by the ease of uploading footage to the internet and the availability of police records under public disclosure and freedom of information laws. The resultant footage can be viewed, searched, and analyzed by superiors, and when accessible to the public under state disclosure laws, provides very broad-ranging access to records of such police work. This reality also suggests that what it means to do a good job “keeping the peace” could be defined more by outside forces than by the officers themselves. This will likely create tensions between the officers’ self-perception as separate and distinct “skilled practitioners” and the public’s preferred perception of police as subservient to society.³⁵⁰

Some argue that wearable cameras promise to document police abuse and also preserve evidence to exonerate officers falsely accused of improper conduct.³⁵¹ A transparent monitoring system, this argument suggests, would encourage proper behavior on both sides and restore trust in policing. Others argue that police would only behave more appropriately under surveillance if they know someone is actually going to watch what their cameras record (that is, active monitoring/oversight) and

349. *Id.* at 37.

350. *See id.* at 33; Steve Herbert, *Tangled Up in Blue: Conflicting Paths to Police Legitimacy*, 10 THEORETICAL CRIMINOLOGY 481, 481–82 (2006). Additionally, whether officers engage in forms of resistance to mandated surveillance or citizen-initiated surveillance (for example, by selectively recording interactions with citizens, confiscating cameras/cellphones, and/or destroying footage) also poses some fascinating, and important, empirical research questions that bear heavily on any attempts to normatively define proper policies, laws, or regulations. *See, e.g.*, HAGGERTY & ERICSON, *supra* note 20; Andrew Grenville, *Shunning Surveillance or Welcoming the Watcher? Exploring How People Traverse the Path of Resistance*, in SURVEILLANCE, PRIVACY, AND THE GLOBALIZATION OF PERSONAL INFORMATION (Elia Zureik et al. eds., 2010); Gary T. Marx, *A Tack in the Shoe and Taking Off the Shoe: Neutralization and Counter-neutralization Dynamics*, 6 SURVEILLANCE & SOC’Y 294, 296 (2009); Gary T. Marx, *A Tack in the Shoe: Neutralizing and Resisting the New Surveillance*, 59 J. SOC. ISSUES 369, 369–71 (2003); Torin Monahan, *Counter-Surveillance as Political Intervention?*, 16 SOC. SEMIOTICS 515, 515 (2006); Lisa A. Shay, Gregory Conti & Woodrow Hartzog, *Beyond Sunglasses and Spray Paint: A Taxonomy of Surveillance Countermeasures*, 2013 IEEE INT’L SYMP. ON TECH. & SOC’Y 191, 191; Dean Wilson & Tanya Serisier, *Video Activism and the Ambiguities of Counter-Surveillance*, 8 SURVEILLANCE & SOC’Y 166, 166–67 (2010).

351. *See, e.g.*, Neill Franklin, *Body Cameras Could Restore Trust in Police*, N.Y. TIMES: ROOM FOR DEBATE (Oct. 22, 2013, 4:44 PM), <http://www.nytimes.com/roomfordebate/2013/10/22/should-police-wear-cameras/body-cameras-could-restore-trust-in-police> [<https://perma.cc/PJ8L-89XG>].

that wearable cameras shouldn't replace written reports including legal justifications for officer actions.³⁵²

As we see from the empirical findings presented in Part V, *infra*, officers may not be strongly opposed to all forms of public disclosure and public accountability, but they do appear to maintain an interest in their own *practical obscurity* and in capturing and providing audio and video evidence that can at least provide *more* (if not the full) context from a contested police-citizen interaction. That is, they disapprove of policies and legal requirements that would make their day-to-day work activities much more directly visible to the public (for example, liberal public access to recordings and proactive disclosure to YouTube), but they don't generally object to visibility in all its forms (for example, they often approve of limited disclosure to persons depicted in the recordings). These findings can be seen as a reflection of the officers' conceptions of themselves as "skilled practitioners" who ought to be shielded from unnecessary outside meddling. In the case at hand, limiting public disclosure of certain (parts of) body-worn camera recordings because of the ease of discovery and vast nature of potential visibility, does make both the officers and the civilians they encounter more practically obscure. In that regard, the recent legislative action to exempt certain types of body-camera footage from public disclosure is a positive step forward. However, the legislative choice to limit the applicability of the new law to body-worn camera recordings, rather than all forms of police video, is an unfortunate one, as it lacks the ability to adequately address future developments—or even current use of dashboard cameras, drones, or other recording devices—that may also generate recordings of the type prohibited if the camera is worn on an officer's body.

Relatedly, preserving the rights of citizens to conduct reciprocal surveillance is also an important aspect of this overall question.³⁵³ Significant questions also remain about whether (and to what extent) these cameras could also be used to intimidate or chill legitimate speech and other protected activities or even whether individuals will be less likely to report crime or call the police for assistance because of the additional collateral visibility that would be foisted upon them due to a liberal public disclosure regime. Additionally, long-term storage and archiving of police footage could pose a threat to privacy interests of innocent citizens, as the release of such footage under state disclosure laws threatens to "embarrass" innocent bystanders caught on tape or individuals who ask police for help in sensitive circumstances (while also serving the ends of citizen oversight as a form of reciprocal surveillance). Despite these concerns, the ACLU originally claimed that wearable police cameras are a "win-win" situation, stating that, "Although we [the ACLU] generally take a dim view of the proliferation of surveillance cameras in American life, police on-body cameras are

352. See, e.g., Nancy La Vigne, *Body Cameras for Police Could Be One Smart Step*, N.Y. TIMES: ROOM FOR DEBATE (Oct. 23, 2013, 3:22 PM), <http://www.nytimes.com/roomfordebate/2013/10/22/should-police-wear-cameras/body-cameras-for-police-could-be-one-smart-step> [<https://perma.cc/6TJR-WHMT>].

353. See, e.g., Andy Sellars, *Empower Civilians To Record the Police*, N.Y. TIMES: ROOM FOR DEBATE (Oct. 22, 2013), <http://www.nytimes.com/roomfordebate/2013/10/22/should-police-wear-cameras/empower-civilians-to-record-the-police> [<https://perma.cc/RB6Z-T3XG>]; see also Newell, *Crossing Lenses*, *supra* note 21, at 87; Newell, *Big Data Bandwagon*, *supra* note 21, at 399.

different because of their potential to serve as a check against the abuse of power by police officers.”³⁵⁴

This is not a claim that should be made lightly without a deeper empirical understanding of the effect of these systems in society (and the forms of police officer resistance to the surveillance attendant in body-worn camera deployment that may become clear from such research).

Many of the proposed benefits of body cameras, as well as significant causes for concern, are tied to the concept of police visibility (with its potential to change the dynamics of police-citizen encounters, to either exonerate or implicate officers in wrongdoing, or to provide evidence of citizen misconduct). Police departments have “a clear interest in *how* their personnel and activities become visible to others and in *what* is revealed as a result to outsiders,”³⁵⁵ implicating the “information politics” imagined by Jaeger.³⁵⁶ Left to their own devices, a move towards secrecy is obviously a strong possibility—a possibility that is limited by robust access laws. This reality points towards the importance of understanding police conduct (and possible reactions to body-worn camera deployment) through the lens of criminological theory and concepts, such as those offered by Goldsmith’s articulation of “policing’s new visibility” and his argument that any value to the police of increased visibility was contingent “upon maintaining ‘normal appearances’ and delivering ‘proper performances.’”³⁵⁷ Herbert’s theory about how subservience, separateness, and generativity affect and are interwoven into police officer conduct,³⁵⁸ and a recognition of how body-worn cameras and increased visibility might impact officer discretion during what Bittner called the “peacekeeping” aspects of policing—potentially restricting officers’ abilities to “act alternatively” to diffuse situations without issuing citations or making arrests.³⁵⁹

CONCLUSION

Despite decades of increasingly safer streets and fewer instances of serious police-citizen violence in America,³⁶⁰ the police continue to hold a highly criticized role in society.³⁶¹ Indeed, most recent press about police use of new technologies has focused on the negative implications that these developments have on citizen privacy—which is an important concern—but less attention has been given to balancing these privacy interests with the important societal interest in promoting effective and efficient police work. The tensions between these competing—and legitimate—aims

354. JAY STANLEY, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL 1 (2013), https://www.aclu.org/files/assets/police_body-mounted_cameras.pdf [<https://perma.cc/BHS8-X789>].

355. Goldsmith, *supra* note 22, at 915 (emphasis in original).

356. See Jaeger, *supra* note 23, at 840.

357. Goldsmith, *supra* note 22, at 915 (internal citations omitted).

358. Herbert, *supra* note 350, at 482–83.

359. BITTNER, *supra* note 11, at 36.

360. See COMMUNITY RELATIONS SERVICE, U.S. DEP’T OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS (2003), <http://www.justice.gov/archive/crs/pubs/principlesofgoodpolicingfinal092003.pdf> [<https://perma.cc/V6ND-KMA4>].

361. This is, of course, not a new phenomenon. See BITTNER, *supra* note 11, at 89–102.

is substantial. In the context of police use of wearable camera systems, limiting the scope of law enforcement data collection and retention to protect citizen privacy might also protect the privacy of the police officers using these systems (both for better and for worse): disclosure of the resultant footage to the public under freedom of information laws or through proactive agency disclosure practices can allow citizens to track the historical policing patterns of individual officers and scrutinize officer conduct, especially if the systems are always on or include metadata (for example, GPS data). Thus, wearable cameras become a useful means of watching the officers themselves. In this context, the more recognizable tensions between protecting privacy and ensuring efficacious policing are compounded by a direct tension between privacy interests and freedom of information as citizen oversight—an important form of freedom-preserving reciprocal surveillance. This form of checking government power resists the reification of potential domination.

One possible response, limiting public access to footage (as done in Washington as well as elsewhere in recent months), protects the privacy of innocent individuals and police officers, but it also limits the ability of the public to conduct oversight. Such oversight, with its attendant right to access information about government action, also serves important First Amendment interests in facilitating informed speech and enhancing democratic governance. As Fan has argued, overbroad access limitations are antithetical to the transparency and accountability arguments that motivated the adoption of the cameras in the first place (at least by civil society actors, as law enforcement may well have had alternative reasons).³⁶² Exempting footage from disclosure, to some extent, should be required, but beyond targeted and thoughtfully crafted exemptions, broad limitations are more like a Band-Aid than an actual solution—they don't really cure the problem and they get in the way of allowing us to see what's really underneath.

Additionally, the answer may not lie completely at the level of limiting or allowing access in state or federal freedom of information laws, with courts assigned a primary adjudication role. We may want to consider other models, such as external review boards or something like Fan's "bounded access" model,³⁶³ allowing tiered levels of disclosure to those whose interests are at stake or who may play a role in adjudicating claims. However, regardless of the approach—whether carefully drafted and targeted exemptions or alternative oversight/access models—there are a few variables that must be accounted for to properly determine whether footage should be publicly accessible through FOI mechanisms. Each of these recommendations seeks to limit the potential for domination as well as the risks of collateral visibility by balancing oversight interests with the obscurity of personal information not necessary to that oversight. These recommendations are based on the theory that "the achievement of privacy for individuals, families, and groups in modern society has become a matter of freedom rather than the product of necessity,"³⁶⁴ that "freedom

362. Mary D. Fan, *Private Data, Public Safety: A Bounded Access Model of Disclosure*, 94 N.C. L. REV. 161 (2015).

363. *Id.* at 206–07.

364. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 21–22 (1967).

from surveillance, whether public or private, is foundational to the practice of informed and reflective citizenship,³⁶⁵ and that “[p]rivacy . . . is an indispensable structural feature of liberal democratic political systems.”³⁶⁶

First, access should always be granted to the individual(s) depicted in the footage, especially the subjects of the police-citizen interactions depicted. Without this rule, body-worn cameras would play the part of state surveillance with no corresponding oversight function—eviscerating the very possibility of oversight by those directly harmed by the police. This rule allows those charged with crimes or claiming police misconduct to bring evidence to light that may (or may not) help prove their case and it also respects the rights of individuals to be informed about what information the state’s surveillance has captured about them so that they can exercise their right to control subsequent use of such information. Because the personal information of bystanders, victims, witnesses, and even suspects, are not likely to be needed to demonstrate police misconduct, blurring, or otherwise obscuring or redacting identifiable information about these individuals prior to disclosure should be built into public disclosure laws and agency policies.

Second, excluding wider public access to the recorded footage may sometimes restrict the ability of the public and news media to serve important functions as watchdogs. This limit to citizen oversight, at a basic level, reduces the effective antipower³⁶⁷ available to society and risks reifying dominating structures within government and law enforcement agencies. When the footage is recorded in public spaces, because of the claim that presence in public may involve a waiver of the right to limit access to such information, the public’s interest in access to footage may outweigh the full denial of requests for that footage, but this concern can be accommodated by requiring the anonymization of the faces of those individuals whose identities are not key to the oversight purposes of such access (innocent bystanders, for example).³⁶⁸

Third, footage captured within a person’s home (or other private areas such as medical or mental health facilities or, perhaps, homeless shelters) should, by default, be protected more stringently than footage captured in public spaces or less sensitive locations. I do not discuss the notion of property much at all in this article, but property rights, like speech and privacy rights, also serve important liberty interests. Property rights also (rightly) encapsulate privacy interests—and in this case, spatial property rights should protect informational privacy interests in footage filmed in nonpublic spaces, and particularly inside private homes. Likewise, because of the enhanced claim to privacy in a person’s home as opposed to in a public space (for example, a park or public sidewalk), public access to such footage under FOI laws should only be allowed when the person whose property and privacy interests are at issue consents to such disclosure.

365. Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1905 (2013).

366. *Id.*; see also JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE (2012); Andrew Roberts, *A Republican Account of the Value of Privacy*, 14 EUROPEAN J. POL. THEORY 320, 321 (2015).

367. Philip Pettit, *Freedom as Antipower*, 106 ETHICS 576, 588 (1996).

368. I recognize that this undoubtedly places significant pressure and administrative burden on agencies subject to disclosure laws, but I believe decisions about adopting body-worn cameras should be made with these requirements in mind.

Fourth, recordings that pertain to sensitive conversations or contexts (for example, statements by victims of crime, and especially of domestic violence or sexual offenses; certain witnesses; confidential informants; and minors) should also generally be exempt or at least redacted—and this redaction should be broad enough to limit the risk of re-identification of individuals captured on video, including through re-identification techniques not yet realized but that are likely on the near-to-mid-term horizon (that is, those that are reasonably predictable within the relevant scientific domain).

These limits to public disclosure would protect individuals from interference and domination by states or private agents, as well as from the prying eyes of neighbors and the voyeuristic tendencies of strangers. These recommendations do require that we push back against (generally) applauded transparency initiatives and limit the applicability of FOI regimes (as Washington and some other states have recently done) and the ability of police agencies to proactively publish certain recordings without first taking steps to redact sensitive personal information. However, the gain in privacy protections for innocent individuals is worth the cost.