

# SLOW YOUR ROLL OUT OF BODY-WORN CAMERAS: PRIVACY CONCERNS AND THE TENSION BETWEEN TRANSPARENCY AND SURVEILLANCE IN ARIZONA

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*Body-Worn Camera (BWC) programs are becoming increasingly popular. In 2015 and 2016, the Department of Justice awarded more than \$40 million in funding for BWCs to law-enforcement agencies, and most major cities have adopted them or plan to in the coming years. However, there are a number of fundamental problems: BWCs raise important privacy concerns, but there is no coherent national policy governing their use, and local departments often have only remedial policies. Furthermore, recent studies have called into question whether BWCs actually reduce the use of force by police, and BWC programs entail high initial and continuing costs. The policies that the Tucson, Mesa, and Phoenix Police Departments currently use implicate serious privacy concerns and need to be addressed. Therefore, this Note proposes that police departments act prospectively: they should study the need to implement a BWC program, or the need to expand one, and flesh out detailed guidelines before equipping more officers. These policies should preserve the privacy of individuals and the public while increasing the accountability of police actions.*

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### INTRODUCTION

The 2014 shooting of Michael Brown in Ferguson, Missouri sparked public outrage and renewed scrutiny of police violence.<sup>1</sup> Body-worn cameras (BWCs) are heralded as a potential solution:<sup>2</sup> these neutral devices are capable of shedding objective light on split-second decisions, heated moments, and contested facts. In 2015 and 2016, under President Barack Obama, the Department of Justice awarded law-enforcement programs more than \$40 million in funding for BWCs,<sup>3</sup> with state and local authorities spending millions more.<sup>4</sup>

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1. See, e.g., Donovan X. Ramsey, *Tracking Police Violence A Year After Ferguson*, FIVETHIRTYEIGHT (Aug. 7, 2015), <https://fivethirtyeight.com/features/ferguson-michael-brown-measuring-police-killings/>; see also Astrid Galvan, *Arizona Police Face Scrutiny After Video Shows a Man Being Beaten*, TIME (June 8, 2018), <http://time.com/5305607/arizona-police-robert-johnson-video/>; Daniel Funke & Tina Susman, *From Ferguson To Baton Rouge: Deaths of Black Men And Women At The Hands Of Police*, L.A. TIMES (July 12, 2016), <http://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmlstory.html>.

2. Maya Wiley, *Body Cameras Help Everyone — Including the Police*, TIME (May 9, 2017), <http://time.com/4771417/jordan-edwards-body-cameras-police/>.

3. See *Justice Department Awards over \$23 Million in Funding for Body Worn Camera Pilot Program to Support Law Enforcement Agencies in 32 States*, U.S. DEP'T JUST. (Sept. 21, 2015), <https://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law>; *Department of Justice Awards Over \$20 Million to Law Enforcement Body-Worn Camera Programs*, U.S. DEP'T JUST. (Sept. 26, 2016), <https://www.justice.gov/opa/pr/department-justice-awards-over-20-million-law-enforcement-body-worn-camera-programs> (announcing “awards totaling over \$20 million to 106 state, city, tribal and municipal law enforcement agencies to establish and enhance law enforcement body-worn camera programs across the United States”); *National Landscape*, BUREAU JUST. ASSISTANCE (2015), <https://www.bja.gov/bwc/topics-nationallandscape.html> (“In 2015, at least 37 states and the District of Columbia considered body camera legislation, while 20 of those states and the District enacted new laws. Fifteen states have statutes that require or recommend the audio and visual recording of statements made by persons in police custody, and another four are considering legislation addressing the recording of custodial interrogations. In 2016, 22 states and the District are considering body camera legislation, and five of those states - Florida, Minnesota, Indiana, Utah, Washington - and the District enacted new laws. Twenty-five states in total have created laws for body cameras.”).

4. Amanda Ripley & Timothy Williams, *Body Cameras Have Little Effect on Police Behavior*, *Study Says*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/>

However, there are a number of problems with this new-found popularity of BWCs. First, there is no coherent national policy governing the use of BWCs.<sup>5</sup> Second, according to a 2014 federal survey of more than 60 police departments using BWCs, nearly a third of them had no written policy.<sup>6</sup> Third, recent, large, randomized controlled trials have called into question BWC programs' efficacy in actually reducing the use of force by police.<sup>7</sup> Fourth, many police departments do not have technological infrastructure capable of handling and storing large amounts of video data.<sup>8</sup> And fifth, BWC programs entail high initial and continuing costs.<sup>9</sup> In the summer of 2015, a joint report by the Major Cities Chiefs<sup>10</sup> and Major County Sheriffs<sup>11</sup> offered a broad snapshot of these issues: only about 19% of surveyed police departments indicated that their BWC programs were "fully operational."<sup>12</sup> At the same time, in 2015, 95% of large police departments in America indicated that they were already using BWCs or that they planned to adopt them in the near

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2017/10/20/us/police-body-camera-study.html; *see also* Jennifer L. Doleac, *Do Body-Worn Cameras Improve Police Behavior?*, BROOKINGS: UP FRONT (Oct. 25, 2017), <https://www.brookings.edu/blog/up-front/2017/10/25/do-body-worn-cameras-improve-police-behavior/> (noting that "DC spent \$1 million dollars on cameras, and will spend an additional \$2 million each year for data storage going forward"); Martin Austerhuhle, *Almost Every D.C. Cop Is Getting A Body Camera. Here's What You Need to Know*, NPR (Dec. 15, 2015), [https://wamu.org/story/15/12/15/just\\_about\\_every\\_dc\\_cop\\_will\\_soon\\_have\\_a\\_body\\_camera\\_heres\\_what\\_you\\_need\\_to\\_know/](https://wamu.org/story/15/12/15/just_about_every_dc_cop_will_soon_have_a_body_camera_heres_what_you_need_to_know/) (reporting that D.C. mayor proposed \$5 million in her 2016 budget to outfit all 2,800 officers with BWCs, though the budget was ultimately stalled on a related issue).

5. *See Police Body Camera Policies: Privacy and First Amendment Protections*, BRENNAN CTR. FOR JUST. (Aug. 3, 2016), <https://www.brennancenter.org/analysis/police-body-camera-policies-privacy-and-first-amendment-protections>.

6. Matt Pearce, *Growing Use of Police Body Cameras Raises Privacy Concerns*, L.A. TIMES (Sept. 27, 2014), <http://www.latimes.com/nation/la-na-body-cameras-20140927-story.html>.

7. *Randomized Controlled Trial of the Metropolitan Police Department Body-Worn Camera Program*, LAB @ D.C. (Oct. 2, 2017), <http://bwc.thelab.dc.gov/> (seeing no "civilizing" effect at all in the most recent and largest empirical study of BWCs: police officers outfitted with BWCs reported statistically identical levels of use-of-force incidents and civilian complaints as officers without).

8. MAJOR CITIES CHIEFS & MAJOR COUNTY SHERIFFS, TECHNOLOGY NEEDS – BODY WORN CAMERAS 2–3 (2015), <https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rvnT.EAJQwK4/v0>.

9. Washington, D.C. spent \$1 million on setting up its BWC program in 2015 and budgeted about \$2 million each year for data storage going forward. Doleac, *supra* note 4.

10. "The Major Cities Chiefs (MCCA) is a professional organization of police executives representing the largest cities in the United States and Canada." *About the Major Cities Chiefs Association*, MAJOR CITIES CHIEFS ASS'N, <https://www.majorcitieschiefs.com/about.php> (last visited Jan. 14, 2018).

11. "The Major County Sheriffs of America (MCSA) is a professional law enforcement association of elected sheriffs representing counties or parishes with 500,000 population or more . . . [Its] membership represents over 100 million Americans." *Welcome, MAJOR COUNTY SHERIFFS AM.*, <http://www.mcsheriffs.com/> (last visited Jan. 14, 2018).

12. MAJOR CITIES CHIEFS & MAJOR COUNTY SHERIFFS, *supra* note 8, at ii.

future.<sup>13</sup> Police departments' evident commitments to using BWCs, coupled with a clear lack of comprehensive policy at both a national level and a local level, raise concerns that "in many cases the devices are being rolled out faster than departments are able to create policies to govern their use."<sup>14</sup>

The high cost, contested efficacy, and absence of comprehensive policy are troubling because BWCs implicate serious privacy concerns. These concerns include technologically augmented plain-view searches;<sup>15</sup> the requirement for consent to being recorded by BWCs;<sup>16</sup> the potential for facial-recognition technology (FRT) to invade reasonable expectations of privacy; FRT's ability to capture biometric information;<sup>17</sup> and BWC recording of highly sensitive encounters, such as domestic violence or other personal encounters with the police that are

13. *Id.*; see also Ripley & Williams, *supra* note 4 (referencing MAJOR CITIES CHIEFS & MAJOR COUNTY SHERIFFS, *supra* note 8).

14. Tami Abdollah, *Officers Fear Body Cameras Raise Privacy Concerns*, POLICE ONE (Mar. 15, 2014), <https://www.policeone.com/police-products/body-cameras/articles/6976369-Officers-fear-body-cameras-raise-privacy-concerns/>.

15. As will be discussed later in this Note, BWCs allow police officers to record an interaction—in a home, in a car, or on the street—and later review the footage in much greater detail than they would normally be able to sift through with an eyes-only, plain-view search. See *infra* Part II.

16. For example, the Philadelphia Police Department's 2017 policy required officers to turn off their cameras when entering an individual's residence, unless they are granted consent. PHILA. POLICE DEP'T, DIRECTIVE 4.21 § 4(B)(1) (updated June 21, 2016), <https://www.bwccscorecard.org/static/policies/2016-06-21%20Philadelphia%20-%20BWC%20Policy.pdf> ("7-F. Prior to entering the residence of any individual, unless prior consent is provided and recorded with the Body-Worn Camera, the Body-Worn Camera shall be deactivated."). However, the policy has been updated and no longer contains that language, and it only prohibits BWCs where one has a reasonable expectation of privacy. PHILA. POLICE DEP'T, DIRECTIVE 4.21 § 4(C)(1)(b) (last updated June 13, 2018) <https://www.phillypolice.com/assets/directives/D4.21-BodyWornCameras.pdf>.

17. FRT "implies a degree of surveillance of which the average person may not be aware." Mark Lanterman, *Facial Recognition Technology Brings Security & Privacy Concerns*, BENCH & B. MINN., Oct. 2017, at 12. Furthermore, "[p]rivacy advocates worry that combining BWCs with facial recognition could create an unprecedented level of intrusion into private moments and everyday activities, effectively eliminating anonymity in public." *Police Body Camera Policies: Privacy and First Amendment Protections*, *supra* note 5. At the same time, though there is not a substantial body of case law regarding FRT, "[i]n most contexts the use of facial recognition would seem to take place in areas and situations wherein the individual has little to no expectation of privacy." Sharon Nakar & Dov Greenbaum, *Now You See Me. Now You Still Do: Facial Recognition Technology and the Growing Lack of Privacy*, 23 B.U. J. SCI. & TECH. L. 88, 104 (2017). Of note, none of the police departments in Tucson, Ariz.; Mesa, Ariz.; nor Phoenix, Ariz. had any policy regarding FRT. According to the BWC Scorecard, as of August 14, 2018, only 7 departments of the 50 surveyed had any guidelines, and all of these were considered inadequate. *Police Body Worn Cameras: A Policy Scorecard*, BWC SCORECARD, <https://www.bwccscorecard.org> (last updated Nov. 2017) [hereinafter BWC SCORECARD]; see also *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that where "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant").

ideally kept away from public access.<sup>18</sup> The twin goals of transparency and accountability are intertwined with these issues: BWCs should ideally increase the public's trust in police officers' work by offering accessible footage of incidents. In large part, this is why police departments have embraced them.<sup>19</sup> However, increasing transparency and accountability comes at the cost of exposing moments that individuals might not want released.<sup>20</sup>

In this regard, police departments in Arizona have been found sorely lacking in their policy guidelines for BWC privacy concerns and accountability, flunking one BWC-policy report.<sup>21</sup> Furthermore, limited case law and statutory law address these concerns; only a few cases in Arizona address BWC privacy concerns tangentially, though more cases examine privacy concerns of general video recordings.<sup>22</sup> However, BWC usage is rapidly rising: in the past year, the Tucson

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18. Section 4(B)(3) of the Philadelphia Police Department Directive on BWCs states that officers should turn off their cameras “[w]hen the recording would capture gruesome images, persons nude that are not involved in criminal activity or when private areas of the human body are exposed and there is no legitimate law enforcement need to capture the images.” PHILA. POLICE DEP’T, DIRECTIVE 4.21 § 4(B)(1) (updated June 21, 2016), *supra* note 16. Compare this to Tucson Police Department’s vaguer statement: police are not to record “in places where privacy would be expected, such as locker/dressing rooms or restrooms, except in the official performance of a law enforcement function.” *Volume 3 General Operating Procedures*, TUCSON POLICE DEPARTMENT GENERAL ORDERS 29 § 3764.3, <https://www.bwcorecard.org/static/policies/2017-02-07%20Tucson%20BWC%20Policy.pdf> (last modified Feb. 7, 2017)

19. Matt Gutman & Seni Tienabeso, *Body Cameras Gain Popularity with Cops on Patrol*, POLICE ONE (June 20, 2013), <https://www.policeone.com/police-products/body-cameras/articles/6285742-Body-cameras-gain-popularity-with-cops-on-patrol/>. As an example, “[t]he Los Angeles Police Department, which has jurisdiction in the Harbor Area and Westside, is spending \$57.6 million to outfit 7,000 officers with body-worn cameras.” Chris Haire, Larry Altman & Sean Emery, *Police Body Cameras Make Gains in Popularity, But Transparency Is Up for Debate*, BEACH REP. (Mar. 13, 2017), [http://tbrnews.com/news/manhattan\\_beach/police-body-cameras-make-gains-in-popularity-but-transparency-is/article\\_93e71154-082e-11e7-b47f-43aded8ec7fe.html](http://tbrnews.com/news/manhattan_beach/police-body-cameras-make-gains-in-popularity-but-transparency-is/article_93e71154-082e-11e7-b47f-43aded8ec7fe.html). Furthermore, BWCs often offer unparalleled evidence of a defendant’s guilt. *E.g.*, Laura Lane, *Body Camera Footage Plays Vital Role as Evidence*, GOV’T TECH. (Mar. 20, 2017), <http://www.govtech.com/public-safety/Body-Cameras-Play-Vital-Role-as-Evidence.html>.

20. For example, how will a local BWC policy handle video footage of domestic violence, abuse, or drunken behavior? Furthermore, a bystander who is not part of the incident in question can be exposed for certain behavior that would not otherwise be made public.

21. See Sophia Kunthara, *Report: Arizona Police Forces Fall Short in Body-Camera Policies*, TUCSON.COM (Aug. 6, 2016), [http://tucson.com/news/local/crime/report-arizona-police-forces-fall-short-in-body-camera-policies/article\\_8a9d530f-a6a4-538e-8f78-b81665b0faa0.html](http://tucson.com/news/local/crime/report-arizona-police-forces-fall-short-in-body-camera-policies/article_8a9d530f-a6a4-538e-8f78-b81665b0faa0.html).

22. See ARIZ. REV. STAT. § 13-3019(C)(1) (surreptitious videotaping does not apply where the “recording equipment is clearly posted in the location and the location is one in which the person has a reasonable expectation of privacy”); see also *Brailsford v. Foster*, 242 Ariz. 77, 83, ¶ 18 (App. 2017), *review denied* (Sept. 12, 2017) (relying on BWC footage as evidence); *Martinez v. Smith*, CV-15-00117-TUC-JGZ, 2017 WL 1210595, \*3 (D. Ariz. Mar. 31, 2017) (same); *Anthony v. Morgan*, 2 CA-CV 2015-0071, 2016 WL 3364989, \*4 ¶ 20 (Ariz. Ct. App. June 16, 2016), *review denied* (Dec. 13, 2016) (holding that the interest

Police Department has increased its BWC usage from 70<sup>23</sup> to 300 BWCs through a city-wide sales-tax initiative.<sup>24</sup> The only legislative response so far has been a 2017 bill that protects police officers under investigation for use of force if there is available BWC footage of the event.<sup>25</sup> Therefore, in Arizona, the time is ripe to set a comprehensive standard that handles privacy concerns while encouraging accountability and transparency of police behavior.

The Introduction of this Note examines the backdrop of policing in America that has prompted a national push from the public, legislators, and police departments to adopt BWCs. Part I examines the practical concerns that recent studies have raised. Parts II and III examine the legal privacy and transparency standards that BWCs trigger. In Part IV, I propose four important policy changes that Arizona police departments should implement to preserve the privacy of individuals and the public while increasing the accountability of police actions.

Ultimately, this Note recommends that Arizona's police departments overhaul their uses of BWCs. The Tucson Police Department's, Phoenix Police Department's, and Mesa Police Department's BWC policies lack important components that ensure the protection of civil rights and the privacy of the community.<sup>26</sup> This Note recommends additions to these existing policies based on comparisons to other states as well as proposals outlined by the International Association of Chiefs of Police,<sup>27</sup> the Brennan Center for Justice,<sup>28</sup> the American

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of privacy for deceased federal law-enforcement officer's family outweighed the general policy of open access to public record, enjoining county medical examiner from disclosing autopsy photographs).

23. Zoe Wolkowitz, *Will Arizona Follow the National Trend in Banning Police Body Worn Camera Footage?*, ARIZ. CAPITOL TIMES (Feb. 28, 2017), <http://azcapitoltimes.com/news/2017/02/28/will-arizona-follow-the-national-trend-in-banning-police-body-worn-camera-footage/>.

24. *Tucson Police Department Gets Body-Worn Cameras*, CITY OF TUCSON (Oct. 30, 2017), <https://www.tucsonaz.gov/newsnet/tucson-police-department-gets-body-worn-cameras>.

25. ARIZ. REV. STAT. § 38-1116. The statute requires the officer to watch the BWC footage before making a statement:

The law enforcement officer must be read the following notice before viewing the recorded video: Video evidence has limitations and may depict events differently than you recall. The video evidence may assist your memory and may assist in explaining your state of mind at the time of the incident. Viewing video evidence may or may not provide additional clarity to what you remember. You should not feel in any way compelled or obligated to explain any difference in what you remember and acted on from what viewing the additional evidence provides you.

ARIZ. REV. STAT. § 38-1116(A)(2).

26. *See infra* Part IV.

27. *Body-Worn Cameras Model Policy*, INT'L ASS'N CHIEFS OF POLICE 1 (Apr. 2014), <http://www.theiacp.org/model-policy/wp-content/uploads/sites/6/2017/07/BodyWornCamerasPolicy.pdf>.

28. *See Police Body Camera Policies: Privacy and First Amendment Protections*, *supra* note 5.

Civil Liberties Union,<sup>29</sup> the National Organization of Police Chiefs,<sup>30</sup> and the Department of Justice,<sup>31</sup> each of which prioritize different aspects within the tension between transparency and privacy.<sup>32</sup> This Note proposes further pilot programs in Tucson, Arizona in order to address whether BWCs are truly appropriate for the city.<sup>33</sup> This pilot program will address whether BWCs have a potential civilizing effect on both police officers and individuals, are worth the financial costs, and aid in building community relationships through transparency. This Note also proposes further studies in Mesa and Phoenix: though these departments conducted initial BWC pilot programs,<sup>34</sup> further study into the efficacy of BWCs is necessary. In general, more pilot programs are encouraged because they grant each department a chance to test the effectiveness and value of adopting BWCs while, at the same time, giving each department sufficient time to craft detailed policy guidelines for their use. These policy guidelines should address the following issues: limits for recordings made during sensitive interactions, asking for consent when entering a home while recording, guidelines for officers reviewing footage, public access to footage, and biometric use of information gathered.

## I. BWCs: FAR FROM THE PERFECT TOOL

### A. A Lack of Policy Coherence

BWCs raise important legal privacy questions; therefore, the lack of a clear national policy is concerning. In 2016, 95% of large police departments had either committed to deploying BWCs or completed their implementation; nearly every department had its own policy guidelines.<sup>35</sup> Often, one department's policy highlights one concern but completely ignores another.<sup>36</sup> Large organizations such

29. See *A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement*, AM. C.L. UNION (May 2015), [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_police\\_body\\_cameras\\_model\\_legislation\\_may\\_2015\\_0.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_police_body_cameras_model_legislation_may_2015_0.pdf).

30. See *Implementing a Body-Worn Camera Program Recommendations and Lessons Learned*, POLICE EXECUTIVE RES. F. (2014), [http://www.policeforum.org/assets/docs/Free\\_Online\\_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf](http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf).

31. See, e.g., *Body Worn Camera Toolkit*, BUREAU JUST. ASSISTANCE, DEP'T OF JUST. (2015), [https://www.bja.gov/bwc/pdfs/bwc\\_faqs.pdf](https://www.bja.gov/bwc/pdfs/bwc_faqs.pdf).

32. See generally BWC SCORECARD, *supra* note 17.

33. See *infra* Part IV.

34. Mesa and Phoenix have already conducted their own pilot programs. See Charles M. Katz et al., *Evaluating the Impact of Officer Worn Body Cameras in the Phoenix Police Department*, C. PUB. SERV. & COMMUNITY SOLUTIONS 14 (Dec. 2014), [https://publicservice.asu.edu/sites/default/files/ppd\\_spi\\_feb\\_20\\_2015\\_final.pdf](https://publicservice.asu.edu/sites/default/files/ppd_spi_feb_20_2015_final.pdf).

35. Taking a look at different models makes the divergence in policies clear. *Compare Body-Worn Cameras Model Policy*, *supra* note 27 and *Evaluating the Impact of Police Body Cameras*, URBAN INST. (Aug. 5, 2015), <https://www.urban.org/debates/evaluating-impact-police-body-cameras>, with *Police Body Camera Policies: Privacy and First Amendment Protections*, *supra* note 5.

36. See Katz et al., *supra* note 34. Take any policy from the BWC SCORECARD, *supra* note 17, as another example.

as the National Organization of Police Chiefs,<sup>37</sup> the International Association of Chiefs of Police,<sup>38</sup> the Brennan Center for Justice,<sup>39</sup> and the American Civil Liberties Union,<sup>40</sup> have weighed in on recommendations for BWC policy guidelines, but still little national consensus exists.<sup>41</sup>

Though varied BWC policies allow each department to tailor its procedures toward the needs of the community it serves, internal BWC guidelines often have glaring gaps in policy with regards to privacy and transparency.<sup>42</sup> A recent national report highlights these concerns: most police departments received low scores on their BWC-policy guidelines.<sup>43</sup> The Leadership Conference, a broad national coalition of civil rights, privacy, and media groups, developed this report, the BWC Scorecard, in 2015 in order to examine police departments' BWC policies and hold departments accountable.<sup>44</sup> As of 2018, the report has evaluated more than 70 local police departments' BWC policies according to eight metrics<sup>45</sup> and found mixed results; even where a department has a strong policy in one area, such as limiting officer discretion about when to record, the department struggles in another area, such as allowing an officer to view the footage before writing a report.<sup>46</sup> Not one local policy satisfied more than six out of the eight identified metrics.<sup>47</sup> This general concern raised by the Leadership Conference is also apparent when these department policies are compared to the International Association of Chiefs of Police's model policy, which sets some similar privacy standards.<sup>48</sup> In general, departments can and should do more.

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37. *See Implementing a Body-Worn Camera Program Recommendations and Lessons Learned*, *supra* note 30.

38. *Body-Worn Cameras Model Policy*, *supra* note 27.

39. *Police Body Camera Policies: Privacy and First Amendment Protections*, *supra* note 5.

40. *A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement*, *supra* note 29.

41. *See* Katz et al., *supra* note 34.

42. *See, e.g.*, BWC SCORECARD, *supra* note 17.

43. *Id.*

44. A list of signors can be found at the end of the webpage and includes the American Civil Liberties Union, The Lawyers' Committee for Civil Rights Under Law, the NAACP, and the Center for Democracy and Technology, among many others. *Id.*

45. The eight primary metrics are: "Makes the Department Policy Publicly and Readily Available," "Limits Officer Discretion on When to Record, Addresses Personal Privacy Concerns," "Prohibits Officer Pre-Report Viewing, Limits Retention of Footage," "Protects Footage Against Tampering and Misuse," "Makes Footage Available to Individuals Filing Complaints," "Limits the Use of Biometric Technologies." *Id.*

46. *E.g., id.* (Charlotte-Mecklenburg Police Department).

47. *Id.*

48. *Body-Worn Cameras Model Policy*, *supra* note 27. For instance, § B(2) states that:

Whenever possible, officers should inform individuals that they are being recorded. In locations where individuals have a reasonable expectation of privacy, such as a residence, they may decline to be recorded unless the recording is being made in pursuant to an arrest or search of the residence or the individuals.



Furthermore, many departments do not have readily and publicly accessible policies, “which hinders robust public debate about how body cameras should be used.”<sup>49</sup> The BWC Scorecard, which criticized the Mesa, Phoenix, and Tucson Police Departments—along with many other cities—highlights the concern that cameras will merely intensify surveillance of communities instead of increasing transparency, trust, and accountability—BWCs’ touted goals.<sup>50</sup> According to some experts, this is particularly concerning in low-income, minority neighborhoods where the police spend a considerable amount of time.<sup>51</sup> This concern is exacerbated by the possibility that BWCs might integrate facial-recognition software, increasingly turning BWCs into surveillance tools.<sup>52</sup>

***B. Contested Effectiveness: The Importance of Randomized Controlled Trials and Unexpected Financial Costs***

Fundamental concerns call into question the very need for BWCs. A recent resolution in the U.S. House of Representatives “encourages State and local law enforcement agencies to consider the use of body-worn cameras.”<sup>53</sup> This resolution relied on a 12-month study conducted in the United Kingdom that “estimated that the cameras led to a 50 percent reduction in the use of force, and in addition, complaints against police fell approximately by 90 percent.”<sup>54</sup> Though such a resolution is commendable, it makes a dangerous mistake. The most recent<sup>55</sup> and largest empirical randomized controlled trial (RCT)<sup>56</sup> of BWCs to date indicates that

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*Id.* This standard is similar to one that this Note recommends in Part IV for Arizona Police Departments.

49. BWC SCORECARD, *supra* note 17.

50. See Gina Cherehus, *U.S. Police Body Camera Policies Put Civil Rights at Risk: Study*, REUTERS (Aug. 2, 2016), <https://www.reuters.com/article/us-usa-police-cameras/u-s-police-body-camera-policies-put-civil-rights-at-risk-study-idUSKCN10D2AC> (“Body cameras carry the promise of officer accountability, but accountability is far from automatic,” said Harlan Yu, principal of Upturn).

51. See, e.g., Ripley & Williams, *supra* note 4.

52. *Id.*

53. H.R. Res. 16, 115th Cong. (2017).

54. *Id.*

55. The study was released October 20, 2017.

56. Randomized controlled trials (RCTs) are statistical studies that measure change compared to a normal baseline:

Participants are randomly assigned to a treatment group, in which they receive the program (e.g., officers assigned to wear BWCs), or to a control group, in which they do not receive the program (e.g., officers assigned to not wear BWCs). This random assignment process involves a computer program but occurs in a manner similar to flipping a coin: heads, you get assigned to treatment; tails, you get assigned to control. This process leaves us with two groups—treatment and control—that look the same on average. The groups would be expected to have the same proportions of males and females, the same distribution of ages or years of service, and so forth. Because the two groups are the same on average, except for the one thing we control to be different—namely, whether or not an officer wears a camera—we can infer, as rigorously as a scientist can infer, that

BWCs might not have any “civilizing” effect at all: police officers in Washington, D.C. who were outfitted with BWCs reported statistically identical levels of use-of-force incidents and civilian complaints as officers without BWCs.<sup>57</sup> As the authors of the study cautioned, “these results suggest we should recalibrate our expectations” of BWCs.<sup>58</sup>

The study that the U.S. House of Representatives’ resolution relied on is not the only research that is now called into question by the RCT in Washington, D.C. In 2015, the Bureau of Justice Assistance, a component of the Department of Justice, released a report claiming that then-current research indicated that BWCs contributed “to a substantial and significant reduction of complaints against law enforcement officers.”<sup>59</sup> It cited a well-known and highly-touted<sup>60</sup> study in Rialto, California, where complaints against officers dropped by 88% after BWCs were adopted.<sup>61</sup> Furthermore, a pilot program in Mesa, Arizona, indicated that BWCs were correlated with a 60% decrease in complaints against law enforcement.<sup>62</sup> Similarly, during a pilot program in Phoenix, Arizona, complaints against officers equipped with BWCs declined by 23%.<sup>63</sup>

However, the new study in Washington, D.C. was conducted on a much larger scale and over a longer period of time. More than 2,200 officers were involved

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any observed differences between the two groups are caused by the BWCs.

*About the Approach*, LAB @ DC, <http://bwc.thelab.dc.gov/approach.html> (last visited Feb. 22, 2018).

57. *Conclusions*, LAB @ DC, <http://bwc.thelab.dc.gov/conclusions.html> (last visited Feb. 22, 2018).

58. Ripley & Williams, *supra* note 4.

59. *Body Worn Camera Toolkit*, *supra* note 31.

60. Ripley & Williams, *supra* note 4 (“The Rialto study had a big impact in policing. Axon (formerly known as Taser International) has sold more than 300,000 police cameras worldwide and cites the Rialto study on its website.”).

61. See 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. QUANTITATIVE CRIMINOLOGY 509, 524 (2015), <https://link.springer.com/article/10.1007/s10940-014-9236-3> (for the original study); see also *Body Worn Camera Toolkit*, *supra* note 31; 7 *Findings From First-Ever Study On Body Cameras*, POLICEONE (Feb. 2, 2015), <https://www.policeone.com/use-of-force/articles/8218374-7-findings-from-first-ever-study-on-body-cameras/>; *The Rialto Police Department’s Body-Worn Video Camera Experiment: Operation “Candid Camera”*, DEP’T CRIMINOLOGY & CRIM. JUST. U. MD. 24 (Apr. 29, 2013), [https://ccjs.umd.edu/sites/ccjs.umd.edu/files/Wearable\\_Cameras\\_Capitol\\_Hill\\_Final\\_Presentation\\_Jerry\\_Lee\\_Symposium\\_2013.pdf](https://ccjs.umd.edu/sites/ccjs.umd.edu/files/Wearable_Cameras_Capitol_Hill_Final_Presentation_Jerry_Lee_Symposium_2013.pdf).

62. *Body Worn Camera Toolkit*, *supra* note 31, at 9; Michael D. White, *Police Officer Body-Worn Cameras: Assessing the Evidence*, OFF. JUST. PROGRAMS, U.S. DEP’T OF JUST. 21 (2014), <https://ric-zai-inc.com/Publications/cops-p289-pub.pdf>; Ryan Stokes & Lee Rankin, *Program Evaluation & Recommendations On-Officer Body Camera System*, MESA POLICE DEP’T (Sept. 30, 2013), <http://www.theiacp.org/Portals/0/documents/pdfs/LEIM/Operational%20Track%20Workshops/O2%20On%20Body%20Cameras.pdf>.

63. Katz et al., *supra* note 34, at 6.

in the Washington, D.C. study over a period of 18 months, compared to a mere 54 officers over 12 months in the Rialto, California, study; 100 officers over 12 months in the Mesa, Arizona, study; and the 56 cameras over 15 months in the Phoenix, Arizona, study.<sup>64</sup> For each of the metrics tracked (use-of-force incidents, civilian complaints, and charging decisions by prosecutors, among other outcomes) the Washington, D.C. study did not find any statistically significant differences indicating a change in either police or civilian behavior after adopting BWCs.<sup>65</sup> The Washington, D.C. study, at a minimum, indicates that the efficacy of BWCs is not as clear cut as indicated by earlier and smaller studies.

Police departments should also curb their enthusiasm regarding BWCs because the financial costs of adopting a BWC program—particularly for storing and managing BWC footage—are far from incidental. For instance, in 2015 Washington, D.C. invested \$1 million on the camera hardware and budgeted \$2 million annually for data storage.<sup>66</sup> In the Mesa study, the department ran into unexpected administration costs: video-redaction requests averaged more than ten hours of labor per request.<sup>67</sup> In Washington, D.C., the mayor wanted to restrict public access to BWC footage, arguing that review and redaction labor would be too expensive—annual costs for review and redaction were estimated to be more than \$4.5 million per year.<sup>68</sup> In the Phoenix study, the police department “had to devote considerable staff and resources to manage the video data internally, to conduct video redaction for publicly requested files, and to coordinate with the city and county prosecutor offices.”<sup>69</sup> At the same time, in Rialto, California, proponents of BWCs argued that the city saved the costs associated with 21 complaints against officers over the course of the study—totaling roughly \$400,000—which was much greater than the total initial investment and upkeep costs.<sup>70</sup> However, if a city such as Washington, D.C. sees no statistical change in behavior or reduction of complaints, this potential financial benefit drops away. Therefore, due to both the uncertainty regarding the effectiveness of BWCs as well as the high costs associated with both implementing them and then maintaining such a system, police departments should carefully consider their plans to adopt such BWC programs. This does not take into account some of the thorny privacy issues discussed subsequently in this Note.

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64. *Randomized Controlled Trial of The Metropolitan Police Department Body-Worn Camera Program*, *supra* note 7; Katz et al., *supra* note 34, at 8.

65. *Conclusions*, *supra* note 57.

66. Doleac, *supra* note 4; Austermuhle, *supra* note 4.

67. Katz et al., *supra* note 34, at 7 (though these numbers should be expected to drop as departments become more efficient and skilled at handling such requests).

68. Austermuhle, *supra* note 4.

69. White, *supra* note 62, at 33.

70. Eugene P. Ramirez, *A Report on Body Worn Cameras*, BUREAU JUST. ASSISTANCE 10, [https://www.bja.gov/bwc/pdfs/14-005\\_Report\\_BODY\\_WORN\\_CAMERAS.pdf](https://www.bja.gov/bwc/pdfs/14-005_Report_BODY_WORN_CAMERAS.pdf) (last visited Feb. 22, 2018).

Despite the Washington, D.C. report's findings, the Metropolitan Police Department of D.C. still advocates for BWCs.<sup>71</sup> Although the Metropolitan Chief of Police was surprised by the results of the study, he stated, "I am a little concerned that people might misconstrue the information and suggest that the body-worn cameras have no value. I don't think that this study suggests that at all."<sup>72</sup> Instead, the Chief of Police claimed that BWCs have helped his department with intangibles like increasing transparency, accountability, and community trust.<sup>73</sup> "You have to be legitimate and trusted," he said.<sup>74</sup> "You can't underestimate the value these cameras bring to that."<sup>75</sup>

Others have suggested that the lack of measurable results from the Washington, D.C. study is due to the city's policing history: the department has a good reputation for the training and supervision of its officers;<sup>76</sup> and the department has already gone through an era of reform following a scathing report by the *Washington Post* in 1998 revealing Washington, D.C. as one of the nation's leading cities for police shootings and use of force, leading to a long period of oversight by the Department of Justice.<sup>77</sup> These factors indicate that cities that have already seen a transformation in policing practices might not benefit from BWCs as much as cities like Rialto, California, where "the Rialto Police Department had been reeling from a series of [policing] scandals [and high use of force] when the Rialto study showed a large impact from cameras."<sup>78</sup> Criminologists and other experts have come up with other possibilities and further hypotheses<sup>79</sup> for the lack of a discernable

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71. Nell Greenfieldboyce, *Body Cam Study Shows No Effect on Police Use of Force or Citizen Complaints*, NPR (Oct. 20, 2017), <https://www.npr.org/sections/thetwo-way/2017/10/20/558832090/body-cam-study-shows-no-effect-on-police-use-of-force-or-citizen-complaints>.

72. *Id.*

73.

In his view, the cameras have helped his department enormously after contentious encounters like a recent one on Christmas, when police officers fatally shot a man who was brandishing a knife. Some had suggested the man was not armed, but Newsham says the video shows otherwise. "I think it's really important for legitimacy for the police department," says Newsham, "when we say something to be able to back it up with a real-world view that others can see."

*Id.*

74. Ripley & Williams, *supra* note 4.

75. *Id.*

76. *Id.*

77. Jeff Leen et al., *District Police Lead Nation in Shootings*, WASHINGTON POST (Nov. 15, 1998), <http://www.washingtonpost.com/wp-srv/local/longterm/dcpolice/deadlyforce/police1full.htm?noredirect=on>.

78. Amanda Ripley, *A Big Test of Police Body Cameras Defies Expectations*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/upshot/a-big-test-of-police-body-cameras-defies-expectations.html>.

79. There are several hypotheses: one is that "officers got used to the cameras and became desensitized to" their BWCs. *Id.* However, "the researchers saw no difference in behavior during the initial phase, when the cameras were new. (The researchers also checked the data to make sure officers were turning their cameras on when they were supposed to, and

impact of BWCs in Washington, D.C., but the study mainly suggests that BWCs are not necessarily appropriate for all cities and all situations—police departments should hesitate to adopt such a program and are encouraged to engage in thorough pilot studies to test the local efficacy and appropriateness of BWCs.

### C. BWCs: Truly Objective?

Finally, not only have studies challenged the efficacy of BWCs' abilities to change police behavior, but reports have also questioned the objectivity of video footage.<sup>80</sup> The general understanding is that “[v]ideo purports to be an objective, unbiased, transparent observer of events that evenhandedly reproduces reality for the viewer.”<sup>81</sup> Therefore, BWCs are popular because their footage can play a decisive role in resolving disputes involving police confrontations, which often devolve into competing testimony of only a limited number of witnesses: “From an evidentiary standpoint, video evidence often will be overwhelming proof at trial.”<sup>82</sup> In *Scott v. Harris*,<sup>83</sup> the Supreme Court held that evidence presented by dashcam video footage of a high-speed police chase—footage which “blatantly contradicted” the plaintiff’s interpretation of the events—justified summary judgment for the police officer because it “[was] clear from the videotape that [the plaintiff being chased] posed an actual and imminent threat.”<sup>84</sup> However, studies have shown that “video evidence is uniquely ripe for highly contextualized and individualized interpretations, likely affected by a viewer’s identity-defining cultural characteristics of race, age, sex, socio-economic status, education, cultural orientation, ideology, and party affiliation.”<sup>85</sup>

One study in particular challenged the reasoning behind *Scott v. Harris*.<sup>86</sup> The study showed the video used as evidence in *Scott v. Harris* to 1,350 people: “Overall, a majority [of viewers] agreed with the Court’s resolution of the key issues, but within the sample there were sharp differences of opinion along cultural, ideological, and other lines.”<sup>87</sup> Therefore, though the authors of the study agreed with the end result of the Court’s decision, they argued that the reasoning was flawed because the Court’s “insistence that there was only one ‘reasonable’ view of the facts itself reflected a form of bias—cognitive illiberalism—that consists in the

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found a very high level of compliance.)” *Id.* Another hypothesis is that those without a BWC “were acting like officers *with* cameras, simply because they knew other officers had the devices.” *Id.*

80. E.g., Bryce Clayton Newell, *Context, Visibility and Control: Contesting the Objectivity of Visual (Video) Records of Police-Citizen Interactions*, ASS’N FOR INFO. SCI. & TECH. (Oct. 24, 2017), <http://onlinelibrary.wiley.com/doi/10.1002/pa2.2017.14505401149/abstract>.

81. Howard M. Wasserman, *Orwell’s Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 620 (2009).

82. *Id.*

83. 550 U.S. 372, 372 (2007).

84. *Id.* at 383 (emphasis added).

85. Wasserman, *supra* note 81, at 608–09.

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

87. *Id.* at 838.

failure to recognize the connection between perceptions of societal risk and contested visions of the ideal society.”<sup>88</sup>

The danger of BWCs, and video footage in general, is that it is easy to “assume that video is the event itself, when, in fact, it only is further evidence of the event.”<sup>89</sup> Video footage is inherently limited by its own frame of reference; it offers an incomplete perspective on events: “[F]or example, the video’s picture may not show what happened outside the camera’s view or the causation for actions shown or what depended on ‘the camera’s perspective (angles) and breadth of view (wide shots and focus).”<sup>90</sup> The Arizona State Legislature has openly acknowledged the inherent subjectivity of BWC footage in a preliminary version of a pro-officer BWC bill:

Video evidence has limitations and may depict events differently than you recall and may not depict any or all of the events as seen or heard by you. Video has a limited field of view and may not capture events normally seen by the human eye. The frame rate of video may limit the camera’s ability to capture movements normally seen by the human eye. Videos are a two-dimensional medium and may not capture depth, distance or positional orientation as well as the human eye . . . .<sup>91</sup>

The limited perspective of video footage has caused jurors to struggle with interpreting what actually happened. In 2016, the police officer involved in the fatal shooting of Philando Castile in Minnesota was acquitted even though he was captured by dashcam footage firing seven shots at Castile at point-blank range.<sup>92</sup> The officer had pulled Castile over for a broken tail light and, mistaking Castile’s attempt to grab his ID as an attempt to access a gun, abruptly shot Castile while his girlfriend and young daughter looked on in horror from inside the car.<sup>93</sup> However, the jurors apparently struggled with what they could not see from the dashcam video: because the patrol car was parked behind Castile’s vehicle, the dashcam footage showed only a rear view of the vehicle and two officers positioned on either side of

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88. *Id.*

89. Wasserman, *supra* note 81.

90. *Id.* (citing Jessica M. Silbey, *Cross-Examining Film*, 8 U. MD. L.J. RACE, REL., GENDER & CLASS 17, 29, 38 (2008)).

91. Proposed Amendment to S.B. 1253, 53rd Leg. Comm. and Pub. Safety - 1st Reg. Sess. (Ariz. Feb. 1, 2017) (Senator Sonny Borrelli).

92. Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N. Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html>; Tim Nelson, *Jury Acquits Minnesota Officer in Shooting Death of Philando Castile*, NPR (June 16, 2017), <https://www.npr.org/2017/06/16/533255552/jury-acquits-minnesota-officer-in-shooting-death-of-philando-castile>.

93. Smith, *supra* note 92; Nelson, *supra* note 92; *Philando Castile Death: Aftermath of Police Shooting Streamed Live*, BBC NEWS (July 7, 2016), <http://www.bbc.com/news/world-us-canada-36732908>.

it, obscuring any view of the passengers.<sup>94</sup> The footage made it unclear whether Castile was reaching for his ID or for a gun because the footage did not clearly depict the front seat, and only Castile's voice could be heard.<sup>95</sup> Though a BWC would offer an officer's perspective and might have made the situation clearer in the Castile shooting, BWC footage is still susceptible to multiple interpretations.

The speed at which footage is played can also create different perspectives. For instance, in a fatal police shooting in Milwaukee in 2016, a slowed-down version of BWC footage clarified that the suspect did not have a weapon at the time he was fatally shot; however, the same video played at a normal rate demonstrated the chaotic and confusing nature of the event.<sup>96</sup> Typically, in these moments of ambiguity, a defendant officer's claims of fearing for his or her life prevails, and the officer is acquitted.<sup>97</sup> Other factors leading to acquittal include that the BWC video footage is taken from the officers' perspectives<sup>98</sup> and that the officers' testimony is typically given more weight because of their perceived authority.<sup>99</sup>

The national fervor surrounding BWC usage has prompted nearly every large police department to either adopt or plan to adopt BWCs,<sup>100</sup> but as often happens with a "new technology, courts and legislatures often trail behind practice, and may end up accepting or adjusting the practice that has been forged in the field."<sup>101</sup> Hopefully, the recent RCT in Washington, D.C., the growing awareness of the costs, and the potential evidentiary inadequacies of video footage will slow the

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94. *Dash Camera Shows Moment Philando Castile Is Shot*, N.Y. TIMES VIDEO (Jun. 20, 2017), <https://www.nytimes.com/video/us/100000005176538/dash-camera-shows-moment-philando-castile-is-killed.html>.

95. *Police Dashcam Footage of Philando Castile Fatal Shooting*, YOUTUBE (June 20, 2017), <https://www.youtube.com/watch?v=PMKcWz5nNoM> (video footage of the event); Julie Bosman, Mitch Smith & Michael Winesjune, *Jurors Find Video Isn't Providing 20/20 Vision in Police Shootings*, N.Y. TIMES (June 25, 2017), <https://www.nytimes.com/2017/06/25/us/police-shootings-trials-video-body-cam.html>.

96. Darran Simon & Tony Marco, *Sylville Smith's Family Sobs at Body Cam Footage of Fatal Police Shooting*, CNN (June 15, 2017), <https://www.cnn.com/2017/06/15/us/sylville-smith-heaggan-brown-body-cam-video/index.html> (showing BWC footage) ("Body camera footage from a second officer showed that [the officer] fired a second, and fatal, shot after Smith hurled his weapon over a fence and that Smith had his hands near his head, an earlier complaint said. According to the complaint, 1.69 seconds separated the two shots."); Bosman et al., *supra* note 95.

97. Bosman et al., *supra* note 95.

98. *Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1813 (2015).

99. *See, e.g.*, Joseph Goldstein, *Is a Police Shooting a Crime? It Depends on the Officer's Point of View*, N.Y. TIMES (July 28, 2016), <https://www.nytimes.com/2016/07/29/nyregion/is-a-police-shooting-a-crime-it-depends-on-the-officers-point-of-view.html> ("What matters is the perspective of the officer, with an officer's sense of danger given significant weight.").

100. In 2015, 95% of large police departments in America indicated that they are already using BWCs or that they planned to adopt them in the near future. MAJOR CITIES CHIEFS & MAJOR COUNTY SHERIFFS, *supra* note 8, at 6; *see also* Ripley & Williams, *supra* note 4 (referring to MAJOR CITIES CHIEFS & MAJOR COUNTY SHERIFFS, *supra* note 8).

101. Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. 897, 934 (2017).

rapid deployment of BWCs. This is especially important because one study from 2016 indicated that poor policies, particularly ones allowing officers discretion for when to turn a BWC off and on, can increase use-of-force incidents.<sup>102</sup> The study found that when officers did not have discretion for turning BWCs off and on, use-of-force rates were 37% lower; but when officers had discretion, use-of-force rates were 71% higher than they had been without the BWCs.<sup>103</sup> These results make it evident that policy choices can have a dramatic impact on BWC effectiveness. In general, these studies indicate that accountability, transparency, and objectivity are not guaranteed byproducts of documenting encounters through video evidence. Careful studies need to be implemented to outline the contours of what policy should look like.

## II. PRIVACY STANDARDS

### A. Fourth Amendment Protections

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .”<sup>104</sup> The Supreme Court has stated that “[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”<sup>105</sup> To this end, the Court’s decisions establish the low-water mark for privacy considerations, while state legislatures and constitutions can, and often do, provide for stricter considerations.<sup>106</sup> As will be explored in more depth in the following Section, the Arizona Constitution states that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”<sup>107</sup>

Fourth Amendment analysis focuses on whether there has been an intrusion into a constitutionally protected area (“persons, houses, papers, and effects”)<sup>108</sup> in order to obtain information or whether there has been a violation of a legitimate expectation of privacy.<sup>109</sup> However, there is no Fourth Amendment protection for “[w]hat a person knowingly exposes to the public, even in his own home or office.”<sup>110</sup> The Fourth Amendment does not protect, for example, information a person reveals to a wiretapped informant<sup>111</sup> or information that a person allows a

102. Ariel et al., *supra* note 61, at 459.

103. *Id.*

104. U.S. CONST. amend. IV.

105. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

106. *See United States v. Jones*, 565 U.S. 400, 429 (2012) (Alito, J., concurring) (“In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative.”).

107. ARIZ. CONST. art. II, § 8.

108. *Jones*, 565 U.S. at 406.

109. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Justice Harlan’s concurring opinion in *Katz v. United States* established a “twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable’” (objective). *Id.*

110. *Id.* at 351.

111. *United States v. White*, 401 U.S. 745, 754 (1971).



third party, such as a telephone company, to access.<sup>112</sup> The Fourth Amendment also does not extend to open fields on private property,<sup>113</sup> aerial views from a helicopter or airplane,<sup>114</sup> or tracking of movement on public roads with a beeper.<sup>115</sup> There is no reasonable expectation of privacy for items intentionally or inevitably exposed to the public, such as garbage left outside a house for trash collection.<sup>116</sup> Furthermore, police officers are allowed to augment their senses with technology so long as such a search does not make known “details that would previously have been unknowable without physical intrusion.”<sup>117</sup> For example, taking aerial photographs with a sophisticated camera was deemed appropriate,<sup>118</sup> while using thermal imaging to pick up heat signals from inside a house suspected of being used to grow marijuana was deemed not constitutional.<sup>119</sup>

BWCs raise privacy concerns. This Note focuses on intrusions into the home, plain-view searches, consent, and the potential development of Facial Recognition Technology (FRT). Fourth Amendment protection is especially acute regarding the privacy of the home: at the heart of the Fourth Amendment “stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”<sup>120</sup> Any intrusion into this sphere is met with the most rigorous Fourth Amendment protection.<sup>121</sup> However, if a police officer is legally present, in a home or elsewhere, the plain-view doctrine holds that the officer may use visible information or a visible object whose incriminating character is readily apparent as evidence.<sup>122</sup> “A truly cursory inspection—one that involves merely looking at what is already exposed to view, without disturbing it—is not a ‘search’ for Fourth Amendment purposes, and therefore does not even require reasonable

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112. *Katz*, 389 U.S. at 351–53. However, a recent Supreme Court case complicates this picture. *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018) (holding that the third-party doctrine did not apply, and therefore, the U.S. Government’s use of cell-site records to pinpoint the plaintiff’s location was a Fourth Amendment search).

113. *Katz*, 389 U.S. at 351 n. 8.

114. *E.g.*, *California v. Ciraolo*, 476 U.S. 207, 214 (1986) (holding that a warrantless flyover of the curtilage of a home was not unreasonable); *Florida v. Riley*, 488 U.S. 445, 451–52 (1989) (holding that a police flyover in a helicopter was not a search, despite its ability to come close to the ground).

115. *United States v. Knotts*, 460 U.S. 276, 285 (1983).

116. *California v. Greenwood*, 486 U.S. 35, 43–44 (1988).

117. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

118. *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986) (“It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise constitutional concerns.”)

119. *Kyllo*, 533 U.S. at 40.

120. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

121. *See, e.g.*, *Minnesota v. Olson*, 495 U.S. 91, 99 (1990); *United States v. Karo*, 468 U.S. 705, 719 (1984); *Chimel v. California*, 395 U.S. 752, 763 (1969).

122. *Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987); *Harris v. United States*, 390 U.S. 234, 236 (1968); *Ker v. State of California*, 374 U.S. 23, 42–43 (1963); *See, e.g.*, *United States v. Lee*, 274 U.S. 559, 563 (1927); *Hester v. United States*, 265 U.S. 57, 59 (1924).

suspicion.”<sup>123</sup> Furthermore, as long as the consent is voluntarily given, consent to a search immediately eviscerates any Fourth Amendment protection.<sup>124</sup>

In this regard, BWC usage in public places (such as streets or parks), or with consent, does not present a clear Fourth Amendment conflict. However, privacy concerns are more readily apparent when an officer legally enters a home while recording with a BWC.<sup>125</sup> The records produced can easily be viewed after the incident, with the possibility of enhancing the image and viewing it frame-by-frame. Though the plain-view doctrine arguably applies, the ability of a BWC to absorb such an unprecedented amount of information, and for the footage to be viewed later, with more time and for more detail, might raise heightened privacy concerns triggered by the intrusion into the sanctity of the home. BWCs offer, in this respect, a distinct shift from the policy and law that govern the use of dashcam footage from patrol vehicles, which are unable to enter a home and only capture (often at an awkward angle) a fixed vantage point.<sup>126</sup> Therefore, BWCs possibly transform a simple and cursory plain-view search into a far more invasive and thorough inventory search. Courts have come to mixed conclusions: some have held that taking pictures inside a defendant’s home constitutes a seizure, not a search;<sup>127</sup> others have found videotaping of a defendant’s home is a seizure if it was not expressly allowed by a warrant;<sup>128</sup> while others have found videotape searches permissible, either pursuant to a warrant exception<sup>129</sup> or as a permissible documentation of an officer’s observations.<sup>130</sup> The Supreme Court of Massachusetts

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123. *Hicks*, 480 U.S. at 325.

124. *Schneekloth v. Bustamonte*, 412 U.S. 218, 219, 225–26 (1973) (holding that the test for voluntariness is one of the totality of the circumstances).

125. Homes are at the heart of Fourth Amendment protections. *See, e.g., Olson*, 495 U.S. at 99; *Karo*, 468 U.S. at 719; *Chimel*, 395 U.S. at 763.

126. For more discussion on how the BWC “poses a major paradigm shift for courts in criminal cases” especially with regard to dashcam footage, see Fan, *supra* note 101, at 902–03.

127. *See, e.g., People v. Matteo*, 485 N.Y.S.2d 446, 448 (Sup. Ct. 1985) (photographing apartment was premeditated seizure of intangible, visual images).

128. *See Commonwealth v. Balicki*, 762 N.E.2d 290, 299 n.13 (Mass. 2002) (“Courts that have considered whether police officers can videotape searches without prior court authorization have reached a variety of conclusions. Some, like the judge in this case, have found that videotaping or photography constitutes a seizure.”).

129. *See, e.g., State v. Spears*, 560 So. 2d 1145, 1150–1151 (Ala. Crim. App. 1990) (permitting officers to photograph and videotape items in plain view); *People v. Reynolds*, 672 P.2d 529, 532 (Colo. 1983) (having no reason to require search warrant to photograph and measure as part of ongoing investigation; evidence lawfully seized under plain-view exception); *State v. Magnano*, 528 A.2d. 760, 764 (Conn. 1987) (photographing and measuring by detectives without a search warrant means evidence in plain view of initial responding officers may be permitted when police enter private premises in response to call for help).

130. *See, e.g., People v. Macioce*, 242 Cal. Rptr. 771, 780 (Cal. Ct. App. 1987), *cert. denied*, 488 U.S. 908 (1988) (“Photographs taken and diagrams made of the scene constituted no more than a memorialization of what the officers observed.”).

disapproved of video documentation, though it did not rule on the constitutionality of such documentation:

It is one thing to be present in a home carrying out the directives of a warrant, and of necessity being in a position cursorily to notice many of its contents. It is quite another to inspect the contents of a home and to create a permanent record of it for inspection by police, prosecutors, expert witnesses, and others at any time in the future. This record can be played and replayed as many times as necessary or desired, and the images can be focused or enlarged to show each detail of every item in that citizen's home.<sup>131</sup>

Another possible privacy issue is fast approaching: police departments and companies such as Axon (formerly Taser International) plan to incorporate FRT into BWCs,<sup>132</sup> thus triggering another Fourth Amendment privacy concern. In many respects, BWCs could potentially function like automated license-plate readers, quickly analyzing and cross-referencing facial identities with national and local police databases.<sup>133</sup> This would markedly push police departments further along the path toward a surveillance state, with increased impact on low-income, minority communities where police tend to spend a large amount of time.<sup>134</sup> This impact is well documented by the harms of stop-and-frisk policies because police departments typically concentrate their efforts on low-income, minority communities.<sup>135</sup> This impact “imposes large negative spillovers on disadvantaged neighborhoods,” increases stigma, and augments “social and racial stratification.”<sup>136</sup> In fact, in New York “the racial composition of a neighborhood was a better predictor of the density of stops than its lagged crime rate.”<sup>137</sup> And the stop-and-frisk policies were glaringly disparate: “at the height of New York’s [stop-and-frisk program], an African-American resident of New York City had a ninety-two percent chance of being

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131. *Balicki*, 762 N.E.2d at 299–300.

132. Alex Perala, *New Tech Brings Live Facial Recognition to Police Body Cameras*, FIND BIOMETRICS (July 18, 2017), <https://findbiometrics.com/facial-recognition-police-body-cameras-407183/>; Patrick Tucker, *Facial Recognition Coming to Police Body Cameras*, DEFENSE ONE (July 17, 2017), <http://www.defenseone.com/technology/2017/07/facial-recognition-coming-police-body-cameras/139472/> (“At least one Motorola competitor — Axon, formerly Taser — which also makes body cameras for cops, is also looking to integrate on-camera artificial intelligence into future products.”).

133. See, e.g., Jason J. Corso et al., *Video Analysis for Body-worn Cameras in Law Enforcement*, COMPUTING COMMUNITY CONSORTIUM (2015), <https://arxiv.org/pdf/1604.03130.pdf>; Alex Pasternack, *Police Body Cameras Will Do More Than Just Record You*, FAST COMPANY (Mar. 3, 2017), <https://www.fastcompany.com/3061935/police-body-cameras-livestreaming-face-recognition-and-ai>.

134. Ripley & Williams, *supra* note 4.

135. Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2402 (2017).

136. *Id.*

137. *Id.* at 2412 (citing *Floyd v. City of New York*, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013); *Floyd v. City of New York*, 813 F. Supp. 2d 417 (S.D.N.Y. 2011) (08 Civ. 01034 (SAS)) (expert's report)).

stopped in a single year period.”<sup>138</sup> New York is not atypical but merely a paragon of policing impacts on certain communities.<sup>139</sup>

Nevertheless, as long as FRT-equipped BWCs are used in public, they are unlikely to constitute a direct Fourth Amendment violation because people do not have an expectation of privacy that their faces will not be observed while walking down a public street.<sup>140</sup> Such a search occurs any time police officers walk down a street and scan the people around them. However, BWCs change the scale and memory capacity of such searches. No single police officer could do what a single camera equipped with FRT could possibly do, and it would take a sizable force to mimic such a camera’s behavior.<sup>141</sup> Yet, this type of information gathering achieved through technological enhancement is, according to the United States Supreme Court in *Kyllo v. United States*, not something “that would previously have been unknowable without physical intrusion,”<sup>142</sup> and is therefore likely valid.

Though surveillance through BWCs might not clearly trigger the Fourth Amendment, it raises broader political and policy concerns if police departments actually want to engage in this type of surveillance activity.<sup>143</sup> Furthermore, the “rapid expansion of police oversight may do less to empower civilians to watch their watchers, and more to enable the government to effectively track, detain, and arrest individuals.”<sup>144</sup> Justice Sotomayor reiterated this concern in *United States v. Jones* concerning the proliferation of GPS devices, but it is equally applicable to BWCs: “Awareness that the Government may be watching chills associational and expressive freedoms. And the Government’s unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse.”<sup>145</sup>

#### ***B. Federal and State Privacy Concerns Regarding BWCs***

The limits on BWCs from federal statutes and state laws do little to curb their use. Federal law prohibits, unless explicitly provided in the statute,

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138. Huq, *supra* note 135, at 2412 (citing AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* 41 (2014)).

139. *Id.* at 2398 (“The programmatic deployment of ‘stop and frisk’ or ‘stop, question, and frisk’ (SQF) in New York, Chicago, Philadelphia, and other major cities involved large numbers of street stops and frisks, often concentrated in a handful of minority neighborhoods.”).

140. “A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements.” *United States v. Knotts*, 460 U.S. 276, 280 (1983).

141. For instance, the Axon Body 2 BWC has 64GB storage capacity, 1080P resolution, and up to 70 hours battery life. *Axon Body 2*, AXON, <https://www.axon.com/products/body-2> (last visited Feb. 22, 2018).

142. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

143. *See United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring).

144. *Chapter Four Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1812 (2015).

145. *Jones*, 565 U.S. at 416.

“intentionally intercept[ing] . . . any wire, oral, or electronic communication.”<sup>146</sup> This does not appear to cover BWCs because BWCs do not intercept any communication,<sup>147</sup> and the statute carves out protections for any “person acting under color of law”<sup>148</sup> or “an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance.”<sup>149</sup> In conjunction with these specifications, the federal wiretapping statute also enshrines the constitutional idea that consent guts Fourth Amendment protections as long as one of the parties of the communication is privy to the communication.<sup>150</sup>

In Arizona, a reasonable expectation of privacy is largely limited to bathrooms, locker rooms, and the home.<sup>151</sup> The Arizona Constitution provides a more stringent privacy protection than the U.S. Constitution, stating that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”<sup>152</sup> The Supreme Court of Arizona has stated that while the Arizona “constitutional provisions were generally intended to incorporate federal protections, they are specific in preserving the sanctity of homes and in creating a right of privacy.”<sup>153</sup> In fact, “[t]he Arizona Constitution is even more explicit than its federal counterpart in safeguarding the fundamental liberty of Arizona citizens.”<sup>154</sup> Nonetheless, Arizona’s wiretapping laws adhere to the “one-party consent” doctrine, which allows a person privy to a conversation to record the

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146. 18 U.S.C. § 2511(1)(a) (2018).

147. Also, including oral communications, defined in *id.* § 2510(2), suggests this law only applies to conversations that the speaker does not know are being recorded: “[O]ral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication.” *Id.*

148. *Id.* § 2511(2)(c).

149. *Id.* § 2511(2)(e).

150. *See id.* § 2511(2)(c) (“It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.”); *id.* § 2511(2)(d) (“It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.”).

151. *See* ARIZ. CONST. art. II, § 8; ARIZ. REV. STAT. § 13-3019 (Westlaw through 1st Special Sess. of 53rd Leg.); *State v. Ault*, 724 P.2d 545, 549 (Ariz. 1986).

152. ARIZ. CONST. art. II, § 8.

153. *Ault*, 724 P.2d at 552 (holding that a warrantless entry into a defendant’s home was not justified by professed exigent circumstances, and therefore the evidence obtained could not be lawfully seized under plain-view doctrine); *see also* *State v. Bolt*, 689 P.2d 519, 524 (Ariz. 1984) (holding “that as a matter of state law officers may not make a warrantless entry of a home in the absence of exigent circumstances or other necessity. Such entries are ‘per se unlawful’ under our state constitution”).

154. *Ault*, 724 P.2d at 549.

conversation without the other knowing it or granting consent.<sup>155</sup> This reflects the minimum threshold set out in the federal wiretapping laws.<sup>156</sup> Furthermore, there must be a reasonable expectation of privacy for wiretapping laws to apply to oral communications.<sup>157</sup> This is also reflected in Arizona case law.<sup>158</sup> In *State v. Hauss*, the Arizona Court of Appeals held that no consent is required for the police to record a conversation absent a reasonable expectation of privacy in a conversation.<sup>159</sup> Additionally, some Arizona statutes do underscore the sensitivity in places with a heightened expectation of privacy, such as a home or a public bathroom.<sup>160</sup> Therefore, though some policy organizations recommend that officers ask for consent before using a BWC, this recommendation serves political goals, not legal necessities, of transparency and trustworthiness.<sup>161</sup>

So far, few bills and statutes explicitly address the use of BWCs in Arizona.<sup>162</sup> As indicated by 2015 Senate Bill 1300<sup>163</sup> and 2015 Arizona House Bill 5111,<sup>164</sup> the Arizona Legislature was interested in pursuing and ultimately encouraging the widespread usage of BWCs. Currently, only one Arizona statute directly addresses BWCs, and it carves out a protection for police officers during a

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155. ARIZ. REV. STAT. §§ 13-3005 to -3012 (making it a crime to intercept a “wire or electronic communication” or a “conversation or discussion” unless the person is a party to the communication, present during the conversation or discussion, or one party to the communication or conversation consents). *See generally Arizona Recording Law*, DIGITAL MEDIA L. PROJECT, <http://www.dmlp.org/legal-guide/arizona-recording-law> (last visited July 18, 2018).

156. *See* Perala, *supra* note 132.

157. *See* *Lanza v. New York*, 370 U.S. 139, 143 (1962) (rejecting reasonable expectation of privacy within a jail house); *State v. Hauss*, 688 P.2d 1051, 1056 (Ariz. Ct. App. 1984) (absent a reasonable expectation of privacy in a conversation, no consent is required). *See generally* § 13-3001 (defining “oral communications” and other eavesdropping terms). Therefore, recording in public places such as streets or parks is allowed absent any consent.

158. *See, e.g., Hauss*, 688 P.2d at 1056 (no reasonable expectation of privacy in a police interrogation room); *State v. Johnson*, 592 P.2d 379, 380 (Ariz. Ct. App. 1979) (consent of one party to a communication to recording nullifies statutory protections).

159. 688 P.2d at 1056.

160. ARIZ. REV. STAT. § 13-3019(A)(1) (“In a restroom, bathroom, locker room, bedroom or other location where the person has a reasonable expectation of privacy and the person is urinating, defecating, dressing, undressing, nude or involved in sexual intercourse or sexual contact.”); *see also* §§ 13-3005 to -3012; § 13-3019(C)(3); 18 U.S.C. § 2511(2)(c)-(e) (2018).

161. *See supra* notes 27–31.

162. *See* ARIZ. REV. STAT. § 38-1116 (following a use-of-force incident, prior to investigation the officer is required to be given notice that he or she can view BWC footage); S.B. 1300, 52nd Legis. 1st Reg. Sess. (Ariz. 2015) (establishing a law-enforcement-officer body-camera study committee).

163. Arizona Senate Bill 1300 established a temporary law-enforcement-officer body-camera study committee.

164. Arizona House Bill 2511 proposed that every peace officer in the State of Arizona shall wear a camera that electronically records both audio and video while the officer is performing official duties likely to result in a criminal investigation or arrest. H.B. 2511, 52nd Leg. 1st Reg. Sess. (Ariz. 2015).

use-of-force investigation for which BWC footage is available.<sup>165</sup> Arizona Revised Statutes § 38-1116 provides that “[t]he administrative investigation is not complete until after the officer has an opportunity to view the recorded video and provide any further information regarding the footage that the officer believes is relevant.” Also, officers are required to read a notice stating that the footage might contradict their memories of the incident.<sup>166</sup>

BWCs escape the purview of most Fourth Amendment privacy protections as well as federal and state wiretapping and privacy laws. This is largely due to lowered expectations of privacy during interactions with the police in public,<sup>167</sup> one-party consent laws (such as those in Arizona),<sup>168</sup> and the law-enforcement exceptions in most statutes.<sup>169</sup> However, some privacy concerns remain due to the novel nature of BWCs. These include the following: whether the expectation of privacy is so heightened in a home so as to require consent to be recorded by BWCs; whether BWCs qualify under the plain-view doctrine or a more invasive inventory search; and whether the use of FRT technology will alter how courts treat video footage and expectations of privacy.

### III. TRANSPARENCY

BWCs implicate another privacy concern: public access to BWC footage. Privacy concerns sit in tension with the desire for police departments to be transparent. BWCs received such extensive coverage in large part due to the perception that they can hold individual officers and police departments directly accountable for their actions, and thus “restore faith and confidence in law enforcement.”<sup>170</sup> BWCs are popular not only with the public, but also with police departments themselves as a legitimizing tool.<sup>171</sup> The main mechanisms for transparency are the Freedom of Information Act (FOIA)<sup>172</sup> and its state counterparts.<sup>173</sup> The FOIA represents the broad principle of government and agency accountability, enacted in part on the idea that “[a] democracy works best when the people have all the information that the security of the Nation permits.”<sup>174</sup> The FOIA not only allows requests for information, but also requires agencies to actively

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165. § 38-1116.

166. *Id.* § 38-1116(A)(2).

167. *See* Huq, *supra* note 135.

168. ARIZ. CONST. art. II, § 8.

169. ARIZ. REV. STAT. § 13-3019(C)(3).

170. Kyle J. Maury, *Police Body-Worn Camera Policy: Balancing the Tension Between Privacy and Public Access in State Laws*, 92 NOTRE DAME L. REV. 479, 491 (2016).

171. *See* Ramirez, *supra* note 70.

172. 5 U.S.C. § 552(a) (2016).

173. *See, e.g.*, ALA. CODE § 36-12-40 (Westlaw through Act 2018-579); ARIZ. REV. STAT. § 39-121.01; ORE. REV. STAT. § 192.410 (West, Westlaw through 2018 Reg. Sess.). For a list of all state freedom-of-information laws see *State Freedom of Information Laws*, NATIONAL FREEDOM OF INFORMATION COALITION, <https://www.nfoic.org/coalitions/state-foi-resources/state-freedom-of-information-laws> (last accessed Jan. 18, 2018).

174. H.R. REP. NO. 104-795, at 8 (1996) (quoting *Statement by the President Upon Signing the “Freedom of Information Act,”* 2 Pub. Papers 699 (July 4, 1966)).

publish records.<sup>175</sup> However, nine exemptions exist running counter to the FOIA's "presumption of disclosure for public records."<sup>176</sup> Three are particularly pertinent to BWCs: preventing the release of personnel information "which would constitute a clearly unwarranted invasion of personal privacy";<sup>177</sup> "records or information compiled for law-enforcement purposes";<sup>178</sup> and any statutory exemptions.<sup>179</sup> These exemptions are not categorical; the Supreme Court has held "that Congress did not design the FOIA exemptions to be mandatory bars to disclosure," so that "as a matter of policy some balancing and accommodation" between the public's interest in access to government information and privacy concerns must occur.<sup>180</sup>

In Arizona, public records are defined broadly, and there is a presumption of disclosure.<sup>181</sup> This policy operates to "open government activity to public scrutiny."<sup>182</sup> However broad, the definition of public records "is not unlimited."<sup>183</sup> First, "[o]nly documents with a 'substantial nexus' to government activities qualify as public records," and second, "[e]ven if a document qualifies as a public record, it is not subject to disclosure if privacy, confidentiality, or the best interests of the state outweigh the policy in favor of disclosure."<sup>184</sup> An agency can decline access to a public record as a discretionary choice; however, such a decision is subject to judicial review.<sup>185</sup>

Therefore, in Arizona, the first question is whether BWC footage constitutes a public record. Neither Arizona case law nor any statutes directly address whether BWC footage is a public record, but the broad definition should easily encompass such footage, and a few Arizona police departments list BWC footage as a public record in their internal guidelines.<sup>186</sup> This is in line with some

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175. 5 U.S.C. § 552(a).

176. Joseph Wenner, *Who Watches the Watchmen's Tape? FOIA's Categorical Exemptions and Police Body-Worn Cameras*, 2016 U. CHI. LEGAL F. 873, 879 (2016).

177. 5 U.S.C. § 552(b)(6).

178. *Id.* § 552(b)(7).

179. *Id.* § 552(b)(3).

180. *Chrysler Corp. v. Brown*, 441 U.S. 281, 292–93 (1979) ("This conclusion is further supported by the legislative history.").

181. *Griffis v. Pinal County*, 156 P.3d 418, 421 (Ariz. 2007). Arizona's public-records statute states: "Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours." ARIZ. REV. STAT. § 39-121 (Westlaw through 1st Special Sess. of 53d Legis. (2018)).

182. *Lake v. City of Phx.*, 218 P.3d 1004, 1006 (Ariz. 2009) (quoting *Griffis*, 156 P.3d at 421).

183. *Griffis*, 156 P.3d at 421.

184. *Lake*, 218 P.3d at 1006.

185. *Carlson v. Pima Cty.*, 687 P.2d 1242, 1246 (Ariz. 1984) (access to public records under the statute is "subject to the official's discretion to deny or restrict access where recognition of the interests of privacy, confidentiality, or the best interest of the state in carrying out its legitimate activities outweigh the general policy of open access"); ARIZ. REV. STAT. § 39-121.02 (stating that any person who is denied access to records under the statute may appeal the decision to the courts).

186. *See, e.g., Scottsdale Police Department Records Fee Schedule*, SCOTTSDALE POLICE DEPT RECORDS UNIT,



other states' policies<sup>187</sup> but is directly opposed to states, such as South Carolina, which by statute preclude public access to BWC footage.<sup>188</sup>

Next, Arizona police departments have discretion whether to release public records; they can decline if they believe these records raise privacy concerns. Phoenix, Mesa, and Tucson all rely on Arizona's public-record laws to make footage available; however, none of their internal policies provide a facilitated means of access. For instance, the Tucson Police Department states that "[m]embers of the public requesting to view a recording shall be directed to utilize the public records process to obtain video."<sup>189</sup> Because there is a presumption of disclosure in Arizona, the public will have to rely on internal guidelines for what qualifies as private; for instance, the Mesa Police Department will not release footage if it determines that there is a reasonable expectation of privacy such as in dressing rooms or restrooms.<sup>190</sup> Tucson's and Phoenix's policies are nearly identical.<sup>191</sup>

#### IV. RECOMMENDATIONS FOR POLICE DEPARTMENTS

Given BWCs' financial expense, unclear efficacy, and numerous privacy issues, police departments—particularly those in Arizona—would be well-advised to address the important concerns that have been flagged in their policies if they are serious about improving transparency. Because most of the departments' internal guidelines have been rolled out rapidly in response to the sudden interest in BWCs, this Part argues that they should be revised in order to address: (A) increasing ease of access and transparency; (B) turning BWCs off in places and during incidents where there is a heightened expectation of privacy; (C) preventing officers from viewing footage before making their incident reports; and (D) limiting the ability to use facial-recognition technology.

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<http://www.scottsdaleaz.gov/Assets/ScottsdaleAZ/Police/Records/Police+Records+Fee+Schedule.pdf> (last visited Jan. 24, 2018). See generally *Access to Police Body-Worn Camera Video*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/bodycams> (last visited Jan. 24, 2018).

187. See, e.g., TEX. OCCUPATIONS CODE § 1701.663 (Westlaw through end of 2017 Reg. and 1st Called Sess. of 85th Legis.).

188. S.C. Code § 23-1-240(G)(1) (Westlaw through 2018 Act No. 223 and Acts 225 to 226) ("Data recorded by a body-worn camera is not a public record subject to disclosure under the Freedom of Information Act.").

189. *Volume 3 General Operating Procedures*, supra note 18, § 3764.3; see also *Body Worn Video Technology – Pilot Operations Order 4.49*, PHOENIX POLICE DEPARTMENT (April 2013), <https://static.spokanecity.org/documents/police/accountability/bodycamera/phenix-policy.pdf>; *On-Officer Body Camera Program*, MESA POLICE 6 (June 7, 2016), <https://www.bwccscorecard.org/static/policies/2016-06-07%20Mesa%20-%20BWC%20Policy.pdf>.

190. *On-Officer Body Camera Program*, supra note 189, at 3 § 3.

191. *Body Worn Video Technology – Pilot Operations Order 4.49*, supra note 189; *Volume 3 General Operating Procedures*, supra note 18, § 3764.3

### A. Accessibility of BWC Footage

Police departments should facilitate public access to BWC footage.<sup>192</sup> Currently, Arizona police departments merely rely on public-records law; however, they can and should do more.<sup>193</sup> One method that police departments can implement is to make footage readily available to anyone who was recorded by a BWC.<sup>194</sup> Another solution is to provide public access if the person recorded by a BWC consents to disclose the recording. These small-scale efforts increase the transparency of police departments and make them appear more willing to directly engage with the public. The Washington, D.C. police department offers a workable model:

[T]he Metropolitan Police Department (MPD) shall schedule a time for any subject of a body-worn camera (BWC) recording to view that recording, provided no other individual is identifiable using information included in the footage. The subject, his or her legal representative, and the subjects' parent or legal guardian (if the subject is a minor), may view the BWC recording at the police station in the police district where the incident occurred. The video may only be viewed at an MPD location; copies of the video will not be provided to the requester.<sup>195</sup>

Public access to the recordings of large-scale events is a thornier issue: it requires balancing the department's transparency during critical moments against the privacy of many, sometimes hundreds, individuals. Prime examples where clamor for footage has reached national proportions are typically high-profile police killings, such as the killing of Philando Castile,<sup>196</sup> or mass-shooting events, such as the Las Vegas shooting in 2017 where 58 people were killed and more than 500 were injured.<sup>197</sup> Cell-phone-recorded footage of Eric Garner's treatment and death

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192. Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All Version 2.0*, AM. C.L. UNION, 7 (Oct. 2013), [https://www.aclu.org/sites/default/files/assets/police\\_body-mounted\\_cameras-v2.pdf](https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf); BWC SCORECARD, *supra* note 17; *Police Body Camera Policies: Recording Circumstances*, THE BRENNAN CENTER (Aug. 3, 2016), <https://www.brennancenter.org/analysis/police-body-camera-policies-recording-circumstances>.

193. *See supra* Part III.

194. Stanley, *supra* note 192. Redaction measures would need to be implemented to protect the privacy of bystanders. If multiple unrelated people are involved, similar measures might be needed as well.

195. *Body-Worn Camera Citizen Viewing Process*, METRO. POLICE DEP'T, <https://mpdc.dc.gov/bwcviewingprocess> (last visited Apr. 15, 2018) (additionally, "[i]f a request to review body-worn camera video footage is denied, an individual may submit a Freedom of Information Act (FOIA) request for additional information or a redacted version of the video").

196. Mitch Smith, *Video of Police Killing of Philando Castile Is Publicly Released*, NY TIMES (Jun. 20, 2017), <https://www.nytimes.com/2017/06/20/us/police-shooting-castile-trial-video.html>.

197. *See, e.g.*, Patrick Hilsman, *Las Vegas Refuses to Release Police Body Camera Footage from Mass Shooting*, NEWSWEEK (Nov. 20, 2017, 6:22 PM), <http://www.newsweek.com/las-vegas-police-body-camera-shooting-criticism-717494>; *see*

by NYPD officers sparked national protests and an outcry against police brutality.<sup>198</sup> Therefore, it is understandable that departments have been reluctant to disclose BWC footage.<sup>199</sup> In the case of the Las Vegas shooter, the police department only released three minutes of patchwork footage focusing on police efforts to protect the public, while resisting requests to provide a more complete record.<sup>200</sup> This limited footage, it was argued, “added little to the public’s understanding of the event that wasn’t already obvious from countless videos shot on concert-goer smartphones” and only served as an effort of self-promotion—the police department was not truly transparent.<sup>201</sup> Other situations have seen judicial intervention aiding police departments’ resistance to disclose: in Arizona, a judge prevented the media and public from viewing footage of a police shooting because “the video could anger the public and also ‘serve as turning a burning ember into a flame.’”<sup>202</sup>

A larger-scale solution would utilize redaction measures that protect personal privacy.<sup>203</sup> Such efforts would scrub the identification of victims and public bystanders or any other compromising information of any person appearing in video

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also, Nichole Manna, *Eagle Sues City for Access to Police Body-Camera Footage*, THE WICHITA EAGLE (Dec. 01, 2017, 11:46 AM), <http://www.kansas.com/news/local/crime/article187534548.html>. In the Las Vegas situation, as in other mass-shooting events, the public’s demand (and need) is for footage of the event itself. Therefore, public access to footage has less to do with police accountability and more to do with event factual accuracy.

198. *Choking of Eric Garner [WITH UNSEEN FOOTAGE] - Staten Island, New York - July 17th 2014*, YOUTUBE (Sept. 24, 2016), <https://www.youtube.com/watch?v=z0j-7L094d0>; *I Can’t Breathe’: Eric Garner Put In Chokehold By NYPD Officer – Video*, THE GUARDIAN (Dec. 4, 2014), <https://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video>; see also Oliver Laughland, Kayla Epstein, & Jessica Glenza, *Eric Garner Protests Continue In Cities Across America Through Second Night*, THE GUARDIAN (Dec. 5, 2014), <https://www.theguardian.com/us-news/2014/dec/05/eric-garner-case-new-york-protests-continue-through-second-night>; *Body-Camera Footage Shows Police Fatally Shooting Unarmed California Teen – Video*, THE GUARDIAN (July 13, 2016), <https://www.theguardian.com/global/video/2016/jul/13/body-camera-footage-dylan-noble-police-shooting-video>.

199. See, e.g., *Volume 3 General Operating Procedures*, supra note 18, § 3765.3 (Restrictions of the Tucson Police Department General Orders states that “Department members shall not allow citizens to review the recordings, unless approved by a supervisor. Members of the public requesting to view a recording shall be directed to utilize the public records process to obtain video”); see also supra Part III for more information. See generally *Access to Police Body-Worn Camera Video*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/bodycams> (last visited Apr. 15, 2018).

200. Hilsman, supra note 197.

201. Steve Friess, *Police Turn Body Cams into Tools for Public Relations, Not Accountability*, COLUMBIA JOURNALISM REVIEW (Oct. 23, 2017), <https://www.cjr.org/watchdog/body-cam-las-vegas-police.php>.

202. Amy Gajda, *When Public Records Aren’t Made Public*, SLATE (Nov. 16, 2017, 10:35 AM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2017/11/the\\_public\\_should\\_have\\_the\\_right\\_to\\_see\\_police\\_body\\_camera\\_footage.html](http://www.slate.com/articles/news_and_politics/politics/2017/11/the_public_should_have_the_right_to_see_police_body_camera_footage.html).

203. Here, empathy also plays a role. If footage without redaction ends up on YouTube, or some other public platform, it would be terrible for family members to learn about the shooting of their relatives without being first contacted by police.

footage. Though such measures can be expensive,<sup>204</sup> they might be a worthwhile investment for police departments to increase their levels of transparency and senses of accountability to the public.

The Tucson, Mesa, and Phoenix police departments implement none of these measures: they all rely solely on Arizona public-records laws without facilitating any ease of access for those recorded or the public at large.<sup>205</sup> One possible measure would be to allow individuals who have filed police-misconduct complaints to view all of the relevant footage associated with the event.<sup>206</sup> Though these laws are broad,<sup>207</sup> enabling ease of access and implementing redaction abilities are important steps to improving these policies.

### ***B. Heightened Expectations of Privacy***

In order to address the privacy concerns raised in Part III, police departments should implement a protocol that limits BWC usage in specific situations that involve a heightened expectation of privacy. The Tucson, Mesa, and Phoenix police departments all require that BWCs should not be activated in places where there is a reasonable expectation of privacy, but they delineate only public restrooms and dressing rooms.<sup>208</sup> Department policies should also be more sensitive to places such as healthcare, mental-health, or social-services facilities.<sup>209</sup> This concern is at its highest when recording within a person's home.<sup>210</sup> Both legally and socially, homes represent one of the places subject to the highest standard of privacy.<sup>211</sup>

Therefore, at a minimum, when entering a home without exigent circumstances, police should be required to give notice that a BWC is being used. This could be structured similarly to knock-and-announce procedures.<sup>212</sup> This method would pay respect to the sanctity of the home and address privacy concerns at a baseline level while bolstering police transparency. Better yet, when possible,

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204. See *supra* Part I.

205. See *supra* Part III.

206. Such released footage would need to protect the privacy of people unrelated to the incident through redaction. Of course, such a policy would entail more resources.

207. See *supra* Part III.

208. See BWC SCORECARD, *supra* note 17.

209. See, e.g., FLA. STAT. § 119.071(2)(1)(2) (West 2016) (exempting from disclosure BWC recordings made inside a private residence, healthcare, or mental-health or social-services facility, or any place where a person would have a reasonable expectation of privacy).

210. See *supra* Part III.

211. See *supra* Part III.

212. See *generally* *Hudson v. Michigan*, 547 U.S. 586, 590 (2006); *United States v. Banks*, 540 U.S. 31 (2003). For instance, officers could state: "Police, open up. We have a warrant and a body-worn camera." If safety concerns for the officers are raised, no notice would be required, similar to ARIZ. REV. STAT. § 13-3915(B) (Westlaw through 1<sup>st</sup> Special Sess. of 53rd Legis. (2018)) (no knock-and-announce needed for warrant if there is a reasonable showing of danger to officers).

consent to be recorded should be obtained. The American Civil Liberties Union provides a sample policy statement:

Prior to entering a private residence without a warrant or in non-exigent circumstances, a law enforcement officer shall ask the occupant if the occupant wants the officer to discontinue use of the officer's body camera. If the occupant responds affirmatively, the law enforcement officer shall immediately discontinue use of the body camera.<sup>213</sup>

This heightened deference to privacy concerns is necessary because of the unprecedented wealth of plain-view information a BWC is able to obtain.<sup>214</sup> The only major exception would occur in exigent circumstances: hot pursuit of a fleeing felon, imminent destruction of evidence, need to prevent a suspect's escape, and risk of harm to police or others inside the dwelling.<sup>215</sup> The International Association of Chiefs of Police (IACP) advocates for a somewhat-similar policy:

Whenever possible, officers should inform individuals that they are being recorded. In locations where individuals have a reasonable expectation of privacy, such as a residence, they may decline to be recorded unless the recording is being made . . . pursuant to an arrest or search of the residence or the individuals.<sup>216</sup>

Either policy is an improvement for Arizona police departments; such policies reflect the privacy of the home and the need for both notice and consent. However, IACP's broader scope—applicable where there is a reasonable expectation of privacy, not just in a home—is preferable.

### ***C. Police Officers' Abilities to Review BWC Footage***

Police officers should not be able to view BWC footage before writing a report. The ability to review footage compromises a police department's honesty and credibility, and raises concerns that officers will change what they would report to more closely model what appears in the footage. BWCs are popular in large part because they are supposed to act as a neutral observer, recording the incontestable facts of an event,<sup>217</sup> and therefore, they can expose officers who misreport incidents or abuse their discretion. Proponents of allowing officers to view footage before writing their reports, such as the Police Executive Research Forum, argue that BWC footage "often provides a more accurate record" than an officer's memory, which can be influenced by the stress of the situation, and therefore access should be

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213. *A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement*, ACLU 1 (June 2018), <https://www.aclu.org/other/model-act-regulating-use-wearable-body-cameras-law-enforcement>.

214. *See supra* Part II.

215. *See supra* Part II.

216. *Body-Worn Cameras Model Policy*, *supra* note 27.

217. *But see supra* Section I.C for a discussion of why BWC footage is contestable.

readily granted.<sup>218</sup> They argue that any “inconsistencies” between an officer’s memory and the footage “might damage a case or unfairly undermine” the perception of the officer’s reliability.<sup>219</sup> However, as discussed in Section I(C), video evidence is but one part of the picture and does not provide the full extent of what happened. Therefore, others argue that allowing officers to view footage before making a report “enables cross-contamination of evidence and impedes the search for truth.”<sup>220</sup>

Despite these issues, recent Arizona legislation does not adhere to these concerns. A new statute requires an officer to view the footage in case of a “use of force incident that resulted in a death or serious physical injury to another person.”<sup>221</sup> Though this requirement only applies in the limited circumstances of death or serious injury, the statute’s title, “Right to Review Recorded Video,” and its nature suggest that the Arizona Legislature is open to giving preferential treatment to police officers.<sup>222</sup> The Tucson Police Department policy has already established this general provision, but it only limits viewing footage in narrow circumstances: “officer-involved shootings, in-custody deaths, or significant injury situations.”<sup>223</sup> Phoenix allows officers to review footage to “refresh a user’s memory prior to completing required reports, preparing for court proceedings, etc.”<sup>224</sup> Mesa allows officers to “use media captured via the On-Officer Body Camera to assist with the investigation and completion of reports.”<sup>225</sup> This use is only limited by discretion of the “Chief of Police (COP) or designee,” or where “it hinders the internal investigation,” or if the officer has been involved in a shooting.<sup>226</sup> This parallels the national context: not a single BWC guideline surveyed in the BWC Scorecard report prevented officers from reviewing BWC footage.<sup>227</sup> This is unsurprising because

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218. *Implementing A Body-Worn Camera Program*, POLICE EXECUTIVE RES. F. 45 (2014), [http://www.policeforum.org/assets/docs/Free\\_Online\\_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf](http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf).

219. *Id.*

220. Jay Stanley & Peter Bibring, *Should Officers Be Permitted to View Body Camera Footage Before Writing Their Reports?*, AM. C.L. UNION (Jan. 13, 2015), <https://www.aclu.org/blog/free-future/should-officers-be-permitted-view-body-camera-footage-writing-their-reports>.

221. ARIZ. REV. STAT. § 38-1116(A) (Westlaw current through 1st Special Sess. of 53rd Legis. (2018)).

222. *Id.* See also *supra* Section I.C for a proposed amendment to the statute’s text.

223. *Volume 3 General Operating Procedures*, *supra* note 19, at 21–22 § 3736. The new statute will probably broaden Tucson’s policy. See *id.*

224. *Body Worn Video Technology – Pilot Operations Order 4.49*, *supra* note 189, at 2 § 5(B)(6).

225. *On-Officer Body Camera Program*, *supra* note 189, at 3.

226. *Id.*

227. Although such a requirement might incentivize officers to refrain from adding details to their reports in order to prevent cross-examination issues and misinterpretation, ultimately the combination of the events would present a more accurate description of the event in question. Furthermore, departments could stipulate to the level of detail required in a report.

police departments have a vested interest in protecting their officers and mitigating any potential public fervor resulting from the public catching inconsistent reporting.

Nevertheless, in the interest of legitimacy, departments should place restrictions on when footage can be viewed. For instance, officers should be required to write an incident report before viewing a recorded event in all situations, unless strictly necessary “while in the field, to address an immediate threat to life or safety.”<sup>228</sup> This caveat addresses officer-safety concerns while promoting department legitimacy.

#### ***D. Protecting Personal Biometric Data***

Lastly, police departments should implement protections of personal biometric data, such as preventing the use of facial-recognition technology (FRT). In *United States v. Jones*, Justice Sotomayor warned, with regards to the ubiquitous nature of GPS devices, an “[a]wareness that the Government may be watching chills associational and expressive freedoms. And the Government’s unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse.”<sup>229</sup> BWCs are poised to radically exacerbate this issue and intensify the controversial debate on capturing biometric data. Closed-circuit television (CCTV) cameras are already divisive; however, in Chicago, a city where they are prevalent, they only occur at a rate of 13 cameras per square mile, whereas Chicago police are present at 50 officers per square mile.<sup>230</sup> Because the density of police officers is not uniform, some communities will see heavy surveillance, possibly further decreasing trust in local police departments.<sup>231</sup>

Only a few departments surveyed by the BWC Scorecard had any language protecting against FRT.<sup>232</sup> Tucson, Mesa, and Phoenix police departments had no mention of FRT in their policies.<sup>233</sup> Instead, these departments should emulate guidelines that prevent BWCs from being used to create a database of mug shots; to create fillers in photo arrays;<sup>234</sup> or to search for people using facial-recognition software, both during live recording and subsequent to an incident. Furthermore, more oversight measures should be taken. Judicial oversight should be used to approve any efforts that attempt to scan recorded footage for a face, or to create a

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228. *A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement*, *supra* note 29, at 6 § 1(p).

229. 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring).

230. *Flash Talks*, CATO INST. (Dec. 14, 2016), <https://cdn.cato.org/archive-2016/cc-12-14-16-06.mp4>.

231. *Id.*

232. *Body Worn Camera Policy 824*, BALTIMORE POLICE DEP’T 9 (Sept. 13, 2017), [https://www.baltimorepolice.org/sites/default/files/Policies/824\\_Body\\_Worn\\_Cameras.pdf](https://www.baltimorepolice.org/sites/default/files/Policies/824_Body_Worn_Cameras.pdf) (“9.3. Be searched using facial recognition software.”).

233. BWC SCORECARD, *supra* note 17.

234. “Photo Array: A collection of photographs that are shown to a witness to determine if the witness can recognize a person involved with the crime . . . . Filler: A person whose photograph is included in a photo array, but is not a suspect in the crime.” *New York State Photo Identification Guidelines*, DIVISION CRIM. JUST. SERVS. 1 (Apr. 18, 2011), [http://www.criminaljustice.ny.gov/ops/training/other/story\\_content/external\\_files/photoarrayguidelines.pdf](http://www.criminaljustice.ny.gov/ops/training/other/story_content/external_files/photoarrayguidelines.pdf).

permanent facial print that can be saved for future use. The same probable-cause standard as is required for a warrant should be employed.<sup>235</sup> Internal oversight of any BWC equipped with FRT should be tightly regulated, requiring multi-step approval by department officials, and ideally FRT would only be deployed in situations involving a serious threat to officer or public safety. Taking preventative measures to ensure that BWC data is not misused for unlawful surveillance is paramount.

### CONCLUSION

The Tucson, Mesa, and Phoenix police departments should not only adopt these recommendations, but also continue to monitor the efficacy of their BWC programs. Departments, such as the Tucson Police Department, that have not conducted a control study to determine the actual need for expanding or maintaining their BWC programs, should implement one. The goal for these police departments should be to implement privacy-conscious policy prospectively, rather than expanding rapidly and having to deal with setbacks reactively. Hopefully, the results from the recent RCT in Washington, D.C., along with the growing awareness of the costs and potential evidentiary inadequacies, will slow the rapid deployment of BWCs. BWCs have the potential to be an effective policing tool—one that the public as well as police departments should be invested in. However, the policies that police departments adopt should keep the departments accountable. Otherwise, a BWC program can devolve into a tool of surveillance, ripe for abuse, undermining the very sources of its popularity—transparency and legitimacy.

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235. Therefore, if an officer has probable cause to believe that someone has committed a crime, the officer can scan recorded footage for that person's face. The main point here is to implement a legal barrier that prevents any and every face from being scanned and recorded and enables a standardized review of the decision.