
CHAPTER FOUR

CONSIDERING POLICE BODY CAMERAS

A.

One evening in early December 2014, thousands of people gathered on the historic Boston Common, not to view the annual Christmas-tree lighting, but to add their voices to a growing movement.¹ They carried with them signs inscribed with the mantras of that movement — phrases like “Hands Up, Don’t Shoot” and “Black Lives Matter” — and they joined together to call for justice, for police accountability, and for the nation to address the structural forces that permit white police officers to kill a black person at least every eighty-four hours.² These displays of solidarity, inspired by earlier protests in Ferguson, Missouri,³ spread across the country: from Oakland⁴ to Chicago⁵ to New York City,⁶ citizens took to the streets to demand reform from their government.

This widespread initiative — said to evoke the civil rights movement⁷ — began largely in response to a Missouri grand jury’s decision

¹ Travis Andersen et al., *Thousands Protest Eric Garner Case in Downtown Boston*, BOS. GLOBE (Dec. 4, 2014), <http://www.bostonglobe.com/metro/2014/12/04/protest-planned-christmas-tree-lighting-common/875sx4ZA1JcHliKte9UyCJ/story.html> [<http://perma.cc/T6QF-D4AX>]. While the tree lighting proceeded as planned, the ceremony’s speakers (none of whom acknowledged the demonstration) were forced to “shout[] over protesters.” *Id.*

² See Kevin Johnson et al., *Local Police Involved in 400 Killings per Year*, USA TODAY (Aug. 15, 2014, 9:41 AM), <http://www.usatoday.com/story/news/nation/2014/08/14/police-killings-data/14060357> [<http://perma.cc/N8PM-P2S8>] (finding that white police officers killed black people an average of two times per week based on self-reported statistics).

³ See *supra* Introduction, pp. 1707–08.

⁴ See, e.g., Jessica Guynn, *Berkeley Protesters March for Fourth Night, Briefly Block Freeway*, USA TODAY (Dec. 11, 2014, 8:28 AM), <http://www.usatoday.com/story/news/2014/12/09/berkeley-protests-michael-brown-eric-garner-fourth-night/20162279> [<http://perma.cc/VD32-MP7R>] (detailing protests of over 1500 individuals and noting that 223 protestors had already been arrested).

⁵ See, e.g., Associated Press, *Ferguson Decision Brings Protests to Lake Shore Drive*, CRAIN’S CHI. BUS. (Nov. 24, 2014), <http://www.chicagobusiness.com/article/20141124/NEWS04/141129890/ferguson-decision-brings-protests-to-lake-shore-drive> [<http://perma.cc/N855-WBKN>].

⁶ See, e.g., Rocco Parascandola, *Eric Garner Case Protesters Block Traffic in Staten Island Near Verrazano-Narrows Bridge*, N.Y. DAILY NEWS (Dec. 8, 2014, 10:37 AM), <http://www.nydailynews.com/new-york/eric-garner-protesters-block-traffic-staten-island-article-1.2037642> [<http://perma.cc/BS5R-AXWA>].

⁷ See Randy Kennedy & Jennifer Schuessler, *Ferguson Images Evoke Civil Rights Era and Changing Visual Perceptions*, N.Y. TIMES, Aug. 15, 2014, <http://www.nytimes.com/2014/08/15/us/ferguson-images-evoke-civil-rights-era-and-changing-visual-perceptions.html> (noting that, despite “formal similarities” between images, depictions of the police “could not have been more different,” as “[t]oday’s riot police officers [are] wearing military-style camouflage and carrying

not to indict police officer Darren Wilson for any crime related to his fatal shooting of Michael Brown, a black teenager who was unarmed when shot.⁸ A little over a week later, the failure of a Staten Island grand jury to indict NYPD Officer Daniel Pantaleo for his fatal use of a chokehold on Eric Garner, yet another unarmed black man, further catalyzed the movement — particularly because this deadly encounter was captured on film by nearby onlookers.⁹

The outrage over Officer Pantaleo's nonindictment presents an interesting challenge for reformers. Prior to the grand jury's decision, both protestors and politicians were calling for police departments across the country to outfit their officers with body cameras.¹⁰ The hope was that video recordings of police-civilian interactions would deter officer misconduct and eliminate the ambiguity present in cases like Michael Brown's, making it easier to punish officers' use of excessive force.¹¹ This initiative gained "overwhelming support from every stakeholder in the controversy — the public, the White House, federal legislators, police officials, [and] police unions."¹² Indeed, on December 1, 2014 — two days prior to the grand jury decision in Garner's case — President Obama announced \$263 million in federal funding to allow law enforcement agencies "to purchase body-worn cameras and

military-style rifles, their heads and faces obscured by black helmets and gas masks as they [stand] in front of an armored vehicle"); Dani McClain, *The Civil Rights Movement Came Out of a Moment Like This One*, THE NATION (Dec. 4, 2014, 5:47 PM), <http://www.thenation.com/blog/19196/civil-rights-movement-came-out-moment-one> [<http://perma.cc/3PLH-SN5X>].

⁸ See Eyder Peralta & Bill Chappell, *Ferguson Jury: No Charges for Officer in Michael Brown's Death*, NPR: THE TWO-WAY (Nov. 24, 2014, 3:37 PM), <http://www.npr.org/blogs/thetwo-way/2014/11/24/366370100/grand-jury-reaches-decision-in-michael-brown-case> [<http://perma.cc/2BZN-ZKW4>]; see also *supra* Introduction, p. 1708; *supra* ch. I, p. 1723.

⁹ See Aaron Blake, *Why Eric Garner Is the Turning Point Ferguson Never Was*, WASH. POST: THE FIX (Dec. 8, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/12/08/why-eric-garner-is-the-turning-point-ferguson-never-was> [<http://perma.cc/3XKR-XXWP>]; J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html>.

¹⁰ See, e.g., *Michael Brown's Family in Atlanta to Begin Campaign for Police Body Cameras*, WSB-TV (Sept. 21, 2014, 9:38 PM), <http://www.wsbtv.com/news/news/michael-browns-family-atlanta-begin-campaign-polic/nhRhk> [<http://perma.cc/X5SQ-YKH7>]; Justin Sink, *Obama to Provide Funding for 50,000 Police Body Cameras*, THE HILL (Dec. 1, 2014, 1:00 PM), <http://thehill.com/homenews/administration/225583-obama-to-provide-funding-for-50000-police-body-cameras> [<http://perma.cc/98ED-G4QF>].

¹¹ See Michael McAuliff, *Police Body Cameras Seen as a Fix for Ferguson-Style Killings*, HUFFINGTON POST (Nov. 25, 2014, 7:59 PM), http://www.huffingtonpost.com/2014/11/25/ferguson-body-cameras_n_6221558.html [<http://perma.cc/TUS2-NTY2>] ("Civil liberties advocates argue that video records prevent cops from abusing their authority, while law enforcement groups note that a person cannot falsely accuse an officer if their encounter is recorded.")

¹² Howard M. Wasserman, *Moral Panics and Body Cameras*, WASH. U. L. REV. COMMENTARIES, Nov. 18, 2014, at 2, http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1025&context=law_lawreview_commentaries [<http://perma.cc/P2QH-XGRC>] (footnotes omitted).

improve training.”¹³ The American Civil Liberties Union (ACLU) also repeatedly voiced its support for widespread adoption of this new technology, heralding body cameras as “a win-win” as long as civilian privacy remained properly protected.¹⁴

This widespread galvanization over body cameras¹⁵ exemplifies the human tendency, in times of tragedy, to latch on to the most readily available solution to a complex problem. But as the outcome of Garner’s case demonstrates, even when high-quality, graphic footage is available, officers may still not be indicted, let alone convicted.¹⁶ Moreover, body cameras are a powerful — and indiscriminate — technology. Their proliferation over the next decade will inevitably change the nature of policing in unexpected ways, quite possibly to the detriment of the citizens the cameras are intended to protect.¹⁷ So although

¹³ Sink, *supra* note 10. This money “would be used by the federal government to match up to 50 percent spending by state and local police departments on body-worn cameras and storage for the equipment. The White House estimate[d] that aspect of the program, which would cost \$75 million, would help fund the purchase of 50,000 body-worn cameras.” *Id.*

¹⁴ Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All*, ACLU (Oct. 9, 2013), <https://www.aclu.org/technology-and-liberty/police-body-mounted-cameras-right-policies-place-win-all> [hereinafter Stanley, *Police Body-Mounted Cameras*] [<https://perma.cc/B22V-LMQ3>]; see also Jay Stanley, *Accountability vs. Privacy: The ACLU’s Recommendations on Police Body Cameras*, ACLU (Oct. 9, 2013, 11:00 AM), <https://www.aclu.org/blog/free-speech-national-security-technology-and-liberty/accountability-vs-privacy-aclus> [<https://perma.cc/8KYZ-96U9>].

¹⁵ A recent survey revealed that 77% of Americans would feel safer if officers were equipped with body cameras, and 74% felt that officers “should be required to wear body cameras.” Tammy Payne, *Arrest of OKC Officer Highlights Benefits of Body Cameras*, NEWS 9 (Aug. 22, 2014, 8:14 AM), <http://www.news9.com/story/26345123/arrest-of-okc-officer-highlights-benefits-of-body-cameras> [<http://perma.cc/5QL7-G9Q5>].

¹⁶ For footage of Garner’s death, see *‘I Can’t Breathe’: Eric Garner Put in Chokehold by NYPD Officer – Video*, THE GUARDIAN (Dec. 4, 2014, 2:46 PM), <http://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video> [<http://perma.cc/K22V-4MHQ>]. This lack of accountability occurred despite the deadly use of a chokehold, Goodman & Baker, *supra* note 9, a maneuver banned by the NYPD since 1993. Tierney Sneed, *Tale of the Tape: When Police Brutality Is Caught on Camera*, U.S. NEWS & WORLD REP. (Aug. 7, 2014, 2:30 PM), <http://www.usnews.com/news/articles/2014/08/07/tale-of-the-tape-when-police-brutality-is-caught-on-camera> [<http://perma.cc/LJ5Q-BX3C>] (discussing the chokehold ban, but adding that the department has still received over 1000 allegations of chokeholds between 2009 and 2013). The ban “specifically [does] not distinguish between various types of holds, but rather ban[s] them categorically.” Ian Fisher, *Kelly Bans Choke Holds by Officers*, N.Y. TIMES, Nov. 24, 1993, <http://www.nytimes.com/1993/11/24/nyregion/kelly-bans-choke-holds-by-officers.html> (“‘Basically, stay the hell away from the neck,’ [then-NYPD Police Chief John Timoney] said.”).

¹⁷ Historically, many reforms undertaken for the professed purpose of “protecting” civilians have ultimately ended up empowering police officers. For example, the stop-and-frisk programs, ostensibly implemented to deter violence in high-crime neighborhoods, have enabled officers to stop and search a grossly disproportionate number of minorities without any proven efficacy. See, e.g., Ray Rivera, *Pockets of City See Higher Use of Force During Police Stops*, N.Y. TIMES (Aug. 15, 2012), <http://www.nytimes.com/2012/08/16/nyregion/in-police-stop-data-pockets-where-force-is-used-more-often.html> (reporting that NYPD officers made 680,000 stops in 2011, over 80% of which involved stopping a black or Latino individual, and finding that “police used some level of physical force in more than one in five stops across the city . . . [y]et the high level of force seldom

video footage has the potential to move citizens as it did in the Garner case,¹⁸ proper implementation of this new policing tool requires careful consideration of current policy proposals, rather than the rapid, reactionary adoptions currently taking place nationwide.¹⁹ Their adoption should also not be used as an excuse to stifle continued conversation about the root causes of police violence and fractured community relations, as body cameras alone will never be the hoped-for cure-all.

To that end, this Chapter explores the contours of the body-camera debate. Section B lays out the purported benefits of body cameras, particularly their potential for increasing public trust and police accountability. Section C catalogs several downsides of the cameras, all of which should be critically explored prior to their widespread adoption. Section D then discusses recommendations for other legal reforms necessary to ensure that body cameras do in fact increase transparency and improve relations between police and the communities they are supposed to serve. Section E briefly concludes.

B.

1. Marcus Jeter was arrested by New Jersey police officers during the summer of 2012 and subsequently charged with “eluding police, resisting arrest and aggravated assault on an officer.”²⁰ Parts of this encounter were caught on tape by the dashboard camera in the officers’ cruiser.²¹ Jeter maintained from the beginning that the officers had used excessive force while arresting him, and that he had not act-

translated into arrests”); Donald Braman, *Stop-and-Frisk Didn't Make New York Safer*, THE ATLANTIC (Mar. 26, 2014, 3:26 PM), <http://www.theatlantic.com/national/archive/2014/03/stop-and-frisk-didnt-make-new-york-safer/359666> [<http://perma.cc/4VS7-E4AT>] (“There’s no good evidence that the invasive policing strategy brought down crime.”).

¹⁸ Indeed, it is unlikely that the grassroots movement formed in response to Brown’s and Garner’s deaths would have become nearly as widespread or bipartisan without such footage. See Blake, *supra* note 9 (citing a study finding that 60% of Americans disagree with the grand jury outcome in Garner’s case, as compared to 36% of Americans disagreeing with the outcome in Brown’s case, and arguing that the disparity is due to the existence of video footage of the Garner incident, which significantly lessened the “debate about the particulars of precisely what happened”).

¹⁹ As Professor José Gabilondo has observed, times of “moral panic” often arise out of “an incident or pattern [that] catalyzes preexisting social anxiety [from which] an ad hoc issues movement is born. The media fans the flames through sensationalist and reductionist news stories. . . . Usually, a hasty legal reform results from the panic. Driven as it is by irrationality, the reforms usually miss the point of the original problem and suffer from disproportionality.” José Gabilondo, *Financial Moral Panic! Sarbanes-Oxley, Financier Folk Devils, and Off-Balance-Sheet Arrangements*, 36 SETON HALL L. REV. 781, 792 (2006); see also Wasserman, *supra* note 12, at 4.

²⁰ Sasha Goldstein, *Police Dash Cam Video Exonerates New Jersey Man, Leads to Indictment of Cops*, N.Y. DAILY NEWS (Feb. 25, 2014, 8:14 PM), <http://www.nydailynews.com/news/crime/police-dash-cam-video-exonerates-nj-man-implicates-cops-article-1.1701763> [<http://perma.cc/C72T-GRHN>].

²¹ *Id.*

ed violently.²² The Bloomfield Police Department conducted an internal investigation and found “the officers did nothing wrong.”²³ Jeter’s criminal case thus moved forward, and he considered accepting a plea deal that would have required him to serve five years in prison.²⁴ But then, nearly a year after Jeter’s arrest, his attorney uncovered evidence that a second police cruiser had been on the scene that night — “a fact that was left out of the police report.”²⁵ After filing an open-records request with the township, his attorney obtained video footage taken by the dashcam in the second car.²⁶ This footage was allegedly never seen by the prosecutor’s office, though it had been in the possession of the police department since 2012.²⁷

In the recovered video, the second police car is seen “swerv[ing] across oncoming traffic and running into the front of Jeter’s SUV, causing him to hit his head on the steering wheel.”²⁸ The footage also clearly shows Jeter with his hands in the air, sitting passively in the driver’s seat as officers approach the car — one pointing a pistol at the window, the other armed with a shotgun.²⁹ An officer then “uses a baton to smash the driver’s side window[,] . . . rip[s] the innocent man from his car[,] and throw[s] him on the ground.”³⁰ While beating Jeter, the officer yells “stop resisting” and “stop trying to take my f----- gun” — although the camera footage indicates that Jeter was neither resisting nor capable of reaching for the officer’s gun.³¹ After Jeter is dragged out of his car, “his face is smashed into the cement . . . [and] another officer takes a swing at his head.”³² In light of this footage, the prosecutors dropped all charges against Jeter.³³ The officers involved with the incident have since been indicted: one retired after pleading guilty to tampering, and two were arraigned “on charges of official misconduct, tampering with public records, and false documents and false swearing.”³⁴ If not for the dashcam video, Jeter would almost certainly have spent several years of his life in a prison cell while the officers answered to no one for their actions.

²² *See id.*

²³ *Id.*

²⁴ *See id.*

²⁵ *Dashcam Clears Bloomfield Man of Resisting Arrest; 2 Officers Charged*, CBS N.Y. (Feb. 25, 2014, 8:51 PM), <http://newyork.cbslocal.com/2014/02/25/dashcam-clears-bloomfield-man-of-resisting-arrest-2-officers-charged> [http://perma.cc/29BZ-UCNA].

²⁶ *Id.*

²⁷ *Id.*

²⁸ Goldstein, *supra* note 20.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

Jeter's story is just one example of the endemic problem of police misconduct, which has long been an issue of public concern, particularly with respect to interactions between police and people of color.³⁵ Of the almost five thousand misconduct reports filed each year against the police, excessive force complaints make up nearly one-quarter,³⁶ with close to ten percent of those cases having resulted in a civilian fatality.³⁷ Growing anxiety over police abuse has negatively impacted police departments' public relations, and such tensions have hampered the effectiveness of law enforcement in the communities they police.³⁸ Police departments are also forced to expend hundreds of millions of dollars each year to resolve these complaints.³⁹

At first glance, then, body cameras may appear to be a panacea for police departments struggling to provide transparency to their communities and resolve civilian complaints efficiently. As Jeter's story illustrates, video footage has the potential to expose officer misconduct and exonerate civilians whose actions have been falsely characterized by the police. These motivations spurred the adoption of body cameras by police departments in the United Kingdom several years ago,⁴⁰ and seem to be the driving force behind the current expansion of their use in the United States.⁴¹ Given the rapid adoption of body cameras,

³⁵ See, e.g., Kenneth Adams, *Measuring the Prevalence of Police Abuse of Force*, in POLICE VIOLENCE 52, 64 (William A. Geller & Hans Toch eds., 1996) (discussing a Gallup poll in 1991 that found that "20 percent of respondents, and 30 percent of nonwhite respondents, said that they knew someone who had been physically abused by police").

³⁶ David Packman, *2010 NPMSRP Police Misconduct Statistical Report -Draft-*, NAT'L POLICE MISCONDUCT REPORTING PROJECT (Apr. 5, 2011, 12:55 AM), http://www.policemisconduct.net/2010-npmsrp-police-misconduct-statistical-report/#_Excessive_Force [<http://perma.cc/GGY2-YE8S>] (finding that 23.8% of all misconduct allegations involved excessive force, with sexual misconduct complaints the next most common at 9.3%).

³⁷ *Id.* ("There have been 127 fatalities associated with credible excessive force allegations within 2010, which means approximately 8.1% of reported excessive force cases involved fatalities. Of these excessive force fatalities, 91 were caused by firearms, 19 were caused by physical force, 11 by taser, and 6 by other causes.")

³⁸ U.S. DEP'T OF JUSTICE, POLICE USE OF EXCESSIVE FORCE: A CONCILIATION HANDBOOK FOR THE POLICE AND THE COMMUNITY 3 (2002), <http://www.justice.gov/archive/crs/pubs/pdexcess.pdf> [<http://perma.cc/D94U-V27Q>] ("[O]ne thing we have learned[] is that good policing practices are essential to developing community support. . . . Moreover, a healthy relationship between the police and the community diminishes the prospect of the police using excessive force at all."); see also *supra* ch. III, p. 1784.

³⁹ Packman, *supra* note 36 (finding that over \$346 million was spent in 2010 "on misconduct-related civil judgments and settlements excluding sealed settlements, court costs, and attorney fees").

⁴⁰ Bracken Stockley, *First Police Force to Make Body Cameras Compulsory for Frontline Officers*, JUSTICE GAP (Feb. 14, 2014), <http://thejusticegap.com/2014/02/britain-moves-towards-fully-digitalised-criminal-justice-system> [<http://perma.cc/5H2N-CFJ8>] (highlighting an initiative by Hampshire police to "kit out all frontline officers with body worn video cameras").

⁴¹ See, e.g., Michelle Griego, *Body Cameras New Normal for Police in Bay Area*, NATION, CBS SF BAY AREA (Nov. 7, 2014), <http://sanfrancisco.cbslocal.com/video/10826623-body-cameras-new-normal-for-police-in-bay-area-nation> [<http://perma.cc/KRX8-AA3P>] (discussing the adoption of

it is worth examining the potential merits of this relatively untested technology before it becomes the “new normal” in policing. This section will thus lay out the anticipated benefits of body cameras while also questioning whether these advantages are, in fact, likely to be realized.

2. Proponents of body cameras often herald these cameras’ unique ability to provide an “unambiguous” account of police-civilian encounters.⁴² For example, they claim that, had Officer Wilson been wearing a camera, its footage would have captured the interaction between him and Michael Brown prior to Brown’s death. This footage would have provided the jury with a more objective account to use in resolving the discrepancies between Wilson’s account and the accounts of eyewitnesses.⁴³ This technology has also been praised as likely to reveal instances of police misconduct, reform police (and civilian) behavior, and build trust between the police and the community, all of which provide strong justifications for adoption.

(a) *Lowering Rates of Police Misconduct.* — Perhaps the most commonly cited indicator of body cameras’ potential to reduce instances of officer-civilian conflict is the “Rialto study.” In this study, which ran from February 2012 through July 2013, half of Rialto, California’s fifty-four patrol officers were “randomly assigned to wear the TASER AXON body-camera system.”⁴⁴ The results of the study appeared conclusive: “[s]hifts without cameras experienced twice as many incidents of use of force as shifts with cameras,” and “the rate of use of force incidents per 1,000 contacts was reduced by 2.5 times” overall as compared to the previous twelve-month period.⁴⁵

body cameras by over 4000 police departments nationwide, and their likely adoption by all emergency workers in the near future).

⁴² Cf. *Cruz v. City of Anaheim*, 765 F.3d 1076, 1077 (9th Cir. 2014) (Kozinski, C.J.) (“Nobody likes a game of ‘he said, she said,’ but far worse is the game of ‘we said, he’s dead.’ Sadly, this is too often what we face in police shooting cases like this one.”).

⁴³ See Marty Knollenberg, Op-Ed., *On-Body Cameras Will Protect Citizens and Police*, DETROIT FREE PRESS (Dec. 11, 2014, 10:42 AM), <http://www.freep.com/story/opinion/contributors/2014/12/11/police-body-cameras/20214223> [<http://perma.cc/3XAC-L5LM>].

⁴⁴ MICHAEL D. WHITE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 17 (2014) <https://ojpdiagnosticcenter.org/sites/default/files/spotlight/download/Police%20OFFICER%20BODY-Worn%20CAMERAS.pdf> [<https://perma.cc/ER9F-BCBE>]. Other studies include an evaluation at the Mesa Police Department in Arizona, in which fifty officers were outfitted with body cameras for one year and were compared to officers who did not wear such cameras, *id.* at 17–18, and an ongoing study at the Phoenix Police Department that is testing “whether the cameras deter unprofessional behavior from officers, lower citizen complaints, reduce citizen resistance, and disprove allegations against officers,” *id.* at 18.

⁴⁵ BARAK ARIEL & TONY FARRAR, POLICE FOUND., SELF-AWARENESS TO BEING WATCHED AND SOCIALLY-DESIRABLE BEHAVIOR: A FIELD EXPERIMENT ON THE EFFECT OF BODY-WORN CAMERAS ON POLICE USE-OF-FORCE 8 (2013), <http://www.policefoundation.org/sites/g/files/g798246f/201303/The%20Effect%20of%20Body-Worn%20Cameras%20on%20Police%20Use-of-Force.pdf> [<http://perma.cc/74NX-AB74>].

This dramatic reduction in the use of force indicates that body-worn cameras may have had a “civilizing” effect on officers, as the presence of a camera appeared to drastically lower the frequency with which officers “resorted to the use of physical force — including the use of OC spray (‘pepper spray’), batons, Tasers, firearms, or canine bites.”⁴⁶ This civilizing effect may also extend to (or stem from) civilians who know they are being filmed, as some police officials believe “the visible presence of a camera [can] . . . compel highly agitated people to calm down more quickly.”⁴⁷ Studies conducted in other locales have also found that body cameras reduce officers’ use of force in the field.⁴⁸

But “[q]uestions remain regarding the behavior dynamics that led to the decline in use of force,” which may be attributable to changes in officer behavior, in citizen behavior, a combination of the two, or changes in civilian reporting patterns (discussed below).⁴⁹ It may also be that lower rates of police misconduct are due to an increased culture of accountability on the force as opposed to the cameras themselves, an outcome that could arguably be achieved through other types of departmental changes.

(b) *Improved Resolution of Civilian Complaints.* — Another benefit, intimately related to reducing instances of officer misconduct, is the ability of camera footage to facilitate efficient resolution of citizen complaints and lower the overall number of complaints filed in the first place.⁵⁰ Rather than having to resolve a complaint based solely on “a credibility determination as between the complainant and one or more of the officers involved,” the supposed objectivity of the camera

⁴⁶ POLICE COMPLAINTS BD., ENHANCING POLICE ACCOUNTABILITY THROUGH AN EFFECTIVE ON-BODY CAMERA PROGRAM FOR MPD OFFICERS 3 (2014).

⁴⁷ David O’Reilly, *Evesham Police Chief Calls Cameras a ‘Game Changer,’* PHILA. INQUIRER (Aug. 7, 2014), http://articles.philly.com/2014-08-07/news/52519341_1_body-cameras-security-cameras-evesham-police-chief [<http://perma.cc/HB54-RKXG>]. As one example, Lt. Joseph Friel pointed to footage of an officer attempting to subdue a tall, muscular man who had been kicked out of a movie theater. In the video, the officer is seen repeatedly asking the man to calm down and inquiring why he is so upset; ultimately, his mood improved, and he even began joking with the officers. *Id.* As the mayor of one New Jersey township, now entirely outfitted with police dashboard and body cameras, put it: “Some people are going to say, ‘Oh it’s Big Brother watching us,’ but look at what this does. People act better. It reduces altercations. This changes the game.” *Id.* The Rialto study also found that once members of the public were notified that they were being filmed, even agitated individuals tended to calm down. *See* POLICE COMPLAINTS BD., *supra* note 46, at 3.

⁴⁸ WHITE, *supra* note 44, at 6 (“Several of the empirical studies have documented substantial decreases in citizen complaints (Rialto, Mesa, Plymouth, and Renfrewshire/Aberdeen studies) as well as in use of force by police (Rialto) and assaults on officers (Aberdeen). There is also anecdotal support for a civilizing effect reported elsewhere . . .”).

⁴⁹ *Id.* at 20; *see also id.* at 20–21.

⁵⁰ *See id.* at 23–24.

will ideally lead investigators to “more accurate findings.”⁵¹ Greater accuracy buttresses efficiency, since officers who did not engage in misconduct can be rapidly exonerated.⁵² The number of frivolous civilian complaints will likely also be reduced, as people become aware that their actions are on film, making it more difficult for them to prevail on questionable claims.

But a reduction in citizen complaints cannot necessarily be attributed to fewer instances of officer misconduct (the purported benefit discussed in section (a) above). Because this reduction in complaints could be due to individuals consciously choosing not to bring frivolous claims, as opposed to an actual reduction in misconduct by officers, it will be important to avoid conflating these two benefits when evaluating the efficacy of the cameras. Moreover, even if body cameras truly improve officer conduct *and* reduce civilian complaints, “[w]hether these reduced outcomes are persistent over time or just an initial change in the dynamic remains unclear”; thus, more sustained research is necessary to determine the ultimate effects of this technology.⁵³

(c) *Improved Officer Training.* — Police departments also perceive these cameras as helpful in the context of officer training, because “recordings [can] be used for remedial training or correcting the behavior of individual officers against whom misconduct allegations have been filed.”⁵⁴ Footage can be incorporated into training programs to demonstrate what actual, on-the-ground civilian encounters should (and should not) look like, and review of body-camera footage may be particularly useful in monitoring new officers. But this benefit does not necessarily require that *all* officers be outfitted with cameras, as videos taken on certain patrols could be used for training both within and between departments. Still, body cameras may prove most effective as training devices if supervisors are actually able to pull and review officers’ individual footage.⁵⁵

⁵¹ POLICE COMPLAINTS BD., *supra* note 46, at 3. Video footage may be particularly helpful in resolving the most common types of citizen complaints: excessive use of force, failure of an officer to provide identification upon request, and stop and frisks. *Id.* at 4.

⁵² *See id.* at 3–4.

⁵³ Jessica Glenza, *Body Cameras for Police Officers? Not So Fast, Say Researchers*, THE GUARDIAN (Dec. 4, 2014, 2:25 PM), <http://www.theguardian.com/us-news/2014/dec/04/body-cameras-police-eric-garner> [<http://perma.cc/N5AV-FHLX>] (quoting Professor Michael D. White, an Arizona State University criminology professor and author of the Department of Justice handbook on police body cameras).

⁵⁴ POLICE COMPLAINTS BD., *supra* note 46, at 4.

⁵⁵ *Id.* at 5. But this benefit is contingent on departmental review policies, as some police departments only allow supervisors to access footage if a civilian complaint has been made — prohibiting random screenings of officer conduct in the field. *See* POLICE EXEC. RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM 25 (2014) [hereinafter PERF REPORT].

(d) *Providing Effective Evidence for Trials.* — Footage from body cameras may help both prosecutors and defense attorneys by providing “objective evidence relating to whether a confession was voluntary, a search was consented to or justified, or a physical description matched a ‘lookout.’”⁵⁶ A recent survey of prosecutors confirms this: ninety-six percent of prosecutors said that video evidence improved their ability to prosecute cases.⁵⁷ In particular, video evidence has the advantage of “refresh[ing] the officer’s memory” and “verify[ing] the accuracy of written reports and statements surrounding [an] incident.”⁵⁸ Still, overreliance on video evidence raises several concerns: For one, as discussed below, film is not inherently objective.⁵⁹ It is also inevitable that video footage will not be available in every case, so creating such an expectation may be dangerous as juries could come to discount “other types of evidence, such as statements from police officers or other eyewitnesses.”⁶⁰

(e) *Increasing Accountability and Transparency.* — Taken all together, the preceding benefits may lead to improved relations between the police and the communities they serve, assuming body cameras do in fact result in more respectful officer behavior and the disciplining of those officers who abuse their power. Especially if citizens are able to request footage of their encounters with the police, or if departments willingly release footage of disputed incidents, the current climate of distrust may improve. That so many Americans feel they would be safer if all police officers wore body cameras speaks to this technology’s potential to increase accountability and transparency. But, as will be discussed below, if increased accountability ultimately leads mostly to increased government surveillance, the public’s trust may instead be undermined.⁶¹

C.

1. “It’s not real.”⁶² On August 5, five days before Michael Brown’s death, John Crawford III entered the local Walmart with his

⁵⁶ POLICE COMPLAINTS BD., *supra* note 46, at 5.

⁵⁷ INT’L ASS’N OF CHIEFS OF POLICE, THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING, at app. ii at 4 (2004).

⁵⁸ *Id.* at app. ii at 5.

⁵⁹ See *infra* section C.2(e).

⁶⁰ HOME OFFICE, GUIDANCE FOR THE POLICE USE OF BODY-WORN VIDEO DEVICES 7 (2007); cf. *Old Chief v. United States*, 519 U.S. 172, 188 & n.9 (1997).

⁶¹ See *infra* section C.2(d).

⁶² Last words of John Crawford III before being shot and killed by police officers in an Ohio Walmart for carrying an unloaded toy gun. Nisha Chittal, *Cops Shoot and Kill Man Holding Toy Gun in Wal-Mart*, MSNBC (Aug. 13, 2014, 8:06 PM), <http://www.msnbc.com/msnbc/cops-shoot-and-kill-man-holding-toy-gun-walmart> [<http://perma.cc/4K2Z-U426>].

girlfriend.⁶³ He was there to buy ingredients to make s'mores at a cookout with his family later that day.⁶⁴ But instead of leaving with graham crackers, he was taken from the store in an ambulance — fatally shot by police officers in an aisle.⁶⁵ Crawford was twenty-two years old.⁶⁶

The Beavercreek Walmart in Ohio, the site of Crawford's shooting, has over two hundred video cameras.⁶⁷ These cameras show Crawford on his cell phone, walking through the store. He then picks up an unloaded pellet gun, a product stocked on the Walmart shelves.⁶⁸ At the same time, Ronald Ritchie — another patron — dials the police, reporting a black man walking around with a gun in the store.⁶⁹ (Ritchie relayed this observation even though Ohio is an open-carry state.⁷⁰) Ritchie originally claimed that Crawford was pointing the toy gun at people, though he later recanted that statement.⁷¹ Officers responded to the scene with their guns drawn. The surveillance footage then shows them confronting Crawford and firing shots at him as he scrambles to retreat.⁷² Despite the fact that Crawford was holding a toy gun, that Ritchie recanted his earlier statement, and that the surveillance footage documented the entire police encounter (including officers firing while the toy gun was on the ground), a grand jury de-

⁶³ Jon Swaine, *Doubts Cast on Witness's Account of Black Man Killed by Police in Walmart*, THE GUARDIAN (Sept. 7, 2014, 10:37 AM), <http://www.theguardian.com/world/2014/sep/07/ohio-black-man-killed-by-police-walmart-doubts-cast-witness-account> [<http://perma.cc/MRR8-ABVQ>].

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* Crawford was not the only casualty that day: “[F]ellow shopper Angela Williams, a 37-year-old nursing home worker reported to have suffered from a heart condition, was in cardiac arrest after collapsing trying to flee the melee. She died later that evening in hospital.” *Id.* She and Crawford left behind four and two children, respectively. *Id.*; Jill Drury, *Mom Died at Walmart, Trying to Save Kids After Shooting*, WDTN.COM (Aug. 21, 2014, 3:20 PM), <http://wdtn.com/2014/08/06/mother-of-four-collapsed-at-walmart-trying-to-save-her-kids> [<http://perma.cc/YP8Z-XRKW>].

⁶⁷ Bearshelle Edmé & Jill Drury, *Police Release Dispatch Audio, Video of Walmart Shooting*, WDTN.COM (Aug. 21, 2014, 6:57 PM), <http://wdtn.com/2014/08/21/police-release-dispatch-audio-video-of-walmart-shooting> [<http://perma.cc/LJ6B-EFPT>].

⁶⁸ Swaine, *supra* note 63.

⁶⁹ *Id.*

⁷⁰ See Charles C.W. Cooke, Op-Ed., *Do Black People Have Equal Gun Rights?*, N.Y. TIMES, Oct. 26, 2014, <http://www.nytimes.com/2014/10/26/opinion/sunday/do-black-people-have-equal-gun-rights.html> [<http://perma.cc/5JGU-9VSS>].

⁷¹ See Swaine, *supra* note 63. To view a video synching Ritchie's 911 call to the video footage of Crawford, which makes evident the discrepancies between the two, see Jon Swaine, *'It Was a Crank Call': Family Seeks Action Against 911 Caller in Walmart Shooting*, THE GUARDIAN (Sept. 26, 2014, 4:02 PM), <http://www.theguardian.com/world/2014/sep/26/walmart-ohio-shooting-charges-911-caller-john-crawford> [<http://perma.cc/Z3EW-2YMF>].

⁷² To view this footage, see Elahe Izadi, *Ohio Wal-Mart Surveillance Video Shows Police Shooting and Killing John Crawford III*, WASH. POST (Sept. 25, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/09/25/ohio-wal-mart-surveillance-video-shows-police-shooting-and-killing-john-crawford-iii> [<http://perma.cc/YSG9-DBTU>].

clined to indict either officer involved.⁷³ Crawford's case thus became the third case in five years in which a Greene County, Ohio, grand jury failed to indict officers who had fatally shot civilians.⁷⁴

2. Notwithstanding the potential benefits of body cameras discussed in section B, Crawford's death provides one reason to be skeptical that video footage will necessarily lead to more just outcomes in excessive-force cases. And as several critics have cautioned, the adoption of such a pervasive, indiscriminate technology may have unintended negative consequences.⁷⁵ Because questions remain about whether body cameras will in fact increase police transparency and accountability, this section examines several potential drawbacks to body-camera proposals. These drawbacks should be given careful consideration to ensure that camera policies accomplish their intended objectives.

(a) *Locus of Control*. — So far, this Chapter has primarily included examples of police-civilian interactions that were filmed by citizens rather than by the police. The widespread circulation of these videos has been instrumental in shedding light on issues of police misconduct.⁷⁶ In theory, body cameras offer this benefit on an unprecedented scale: unlike citizens, who will not always be present or who may choose not to record, a police force outfitted with body cameras could

⁷³ Joe Coscarelli, *No Charges Against Ohio Police in John Crawford III Walmart Shooting, Despite Damning Security Video*, N.Y. MAG. (Sept. 24, 2014, 2:57 PM), <http://nymag.com/daily/intelligencer/2014/09/no-charges-john-crawford-iii-walmart-shooting-video.html> [<http://perma.cc/W6Z3-AL87>].

⁷⁴ See *id.* Another recent Ohio case involved Tamir Rice — a twelve-year-old African American boy — who was shot to death by Ohio police after someone called the police to report that Rice was “waving what looked like a gun in a park near [Rice’s] home. Within seconds of arriving, a police officer shot [Rice], but [Rice’s] gun turned out to be a toy used to fire plastic pellets.” Richard A. Oppel, Jr., *Police Shooting of Tamir Rice Is Ruled a Homicide*, N.Y. TIMES (Dec. 12, 2014), <http://www.nytimes.com/2014/12/13/us/police-shooting-of-tamir-rice-is-ruled-a-homicide.html>. Rice’s death, like King’s beating and Crawford’s shooting, was caught on camera. See Jordan Lebeau, *Cameras Didn’t Save Tamir Rice, Eric Garner*, BOSTON.COM (Dec. 5, 2014, 6:41 PM), <http://www.boston.com/news/opinion/2014/12/05/cameras-didn-save-tamir-rice-eric-garner/rInClocLy7c6bw1caequKK/story.html> [<http://perma.cc/2QDL-4S2S>] (discussing how Rice’s death was captured on surveillance video). Rice’s death has been ruled a homicide, and the officers are currently under investigation. See Oppel, *supra*.

⁷⁵ See, e.g., AJ Vicens, *Putting Body Cameras on Cops Is Hardly a Cure-All for Abuses*, MOTHER JONES (Aug. 21, 2014, 12:03 PM), <http://www.motherjones.com/politics/2014/08/chest-and-dash-cams-ferguson-police-abuse> [<http://perma.cc/PC7D-YH82>] (“[P]utting aside the fact that footage from a dashboard or chest-worn camera may not have negated what we’re seeing in Ferguson — where racial tension has been brewing for years, the result of a variety of factors — deploying such cameras isn’t necessarily the straightforward fix some observers make it out to be.”).

⁷⁶ Perhaps the most famous example of citizen surveillance was George Holliday’s filming of the brutal beating of Rodney King by several Los Angeles police officers in the early 1990s. See John Carman, *The Story Behind the King Videotape*, ST. PETERSBURG TIMES, May 10, 1992, at 3A. After Holliday shared his tape with the local news, the story was picked up — playing nationwide on repeat, *id.*, and sparking one of the most significant controversies in modern American race relations.

potentially document every officer-citizen encounter. But once the locus of control shifts to the officers, the very organization meant to be held accountable will be able to prevent these videos from being created in the first instance or shared after the fact.⁷⁷

For instance, only two days after Michael Brown was killed, a New Orleans police officer shot “[an] unarmed black man while trying to take him into custody.”⁷⁸ The victim, Armand Bennet, spent four days in the intensive care unit and needed staples to treat the wound on his forehead.⁷⁹ The officer had been wearing a body camera, but she had “apparently shut off her camera prior to the encounter.”⁸⁰ Though the officer claimed she had turned the camera off just prior to the end of her shift, the shooting took place at 1:15 a.m., and her shift ended at 2:00 a.m.⁸¹ Although New Orleans police recently adopted body cameras in an effort to build trust between law enforcement and the public,⁸² this sort of incident demonstrates how officers can still circumvent the technology to insulate themselves from oversight.⁸³ Even an officer’s *willful* refusal to record is not a fireable offense in New Orle-

⁷⁷ Marcus Jeter’s case, discussed in section B.1, *supra*, captures this phenomenon: the police department failed to turn over the dashboard-camera footage from the second car until forced to do so nearly a year after Jeter’s arrest, even though officers knew of its existence (and exonerating nature) that entire time. For an in-depth examination of how body cameras usually help police, as opposed to citizens, see Connie Fossi-Garcia & Dan Lieberman, *Investigation of 5 Cities Finds Body Cameras Usually Help Police*, FUSION (Dec. 7, 2014), <http://fusion.net/story/31986/investigation-of-5-cities-finds-body-cameras-usually-help-police> [<http://perma.cc/R79W-NL4Z>] (discussing a three-month investigation that “reviewed hundreds of pages of records from five police departments with body camera programs” and found “that the way body cameras are used usually [ensures that they] serve police more than citizens charging misconduct” and noting, in particular, “[i]n many use of force incidents, camera footage doesn’t exist, is only partially available, or can’t be found,” and when it is available, “the footage usually favors the officer’s account”).

⁷⁸ Vicens, *supra* note 75.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See Martin Kaste, *Can Cop-Worn Cameras Restore Faith in New Orleans Police?*, NPR (May 22, 2014, 5:38 PM), <http://www.npr.org/blogs/alltechconsidered/2014/05/22/314912840/can-cop-worn-cameras-restore-faith-in-new-orleans-police> [<http://perma.cc/F6KR-SZJW>].

⁸³ This would not be the first time that technology has been oversold as a panacea for policing problems: after the Rodney King beating in Los Angeles, the LAPD required officers to wear voice recorders that would “switch on automatically when their cruiser sirens [were] activated.” Elise Hu, *Using Technology to Counter Police Mistrust Is Complicated*, NPR (Sept. 2, 2014, 12:10 PM), <http://www.npr.org/blogs/alltechconsidered/2014/09/02/345208359/using-technology-to-counter-police-mistrust-is-complicated> [<http://perma.cc/9S8P-YMTL>] (quoting Sean Bonner, *Body Cameras and Law Enforcement*, SBDC (Aug. 31, 2014, 11:02 AM), <http://blog.seanbonner.com/2014/08/31/body-cameras-and-law-enforcement> [<http://perma.cc/Q7YK-SQAW>]). But it soon became clear that these recorders had “mysteriously” stopped working, and the department was eventually “forced to admit that their internal investigations showed that officers were purposefully breaking off the antennas on their recorders to disable them. Perhaps unsurprisingly the majority of the sabotaged recorders were in the Southeast division — a low income, high minority area with a long history of excessive force complaints.” *Id.* (quoting Bonner, *supra*).

ans.⁸⁴ And if the treatment of dashboard-camera footage is any indication, some officers will also erase footage prior to its review — an action likely to go unnoticed or unpunished by supervisors.⁸⁵

Even for properly recorded and stored footage, pressing concerns about public access remain. Many police departments currently do not allow private individuals or the media to access footage,⁸⁶ and the open-records laws in most states make it possible for departments to deny access indefinitely. While body-camera footage should constitute a public record under disclosure laws, most states have disclosure exemptions for records involved in a law enforcement investigation.⁸⁷ The definition of an “investigation” is malleable, and courts may be particularly inclined to defer to officers when it comes to matters of public safety. Some courts have ruled that law enforcement video footage does not fall under the exemption for criminal investigatory records;⁸⁸ however, this type of litigation is in its early stages, and in

⁸⁴ Martin Kaste, *Even Police Body Cameras Can Lose Sight of the Truth*, NPR (Aug. 23, 2014, 11:41 AM), <http://www.npr.org/2014/08/23/342623830/even-police-body-cameras-can-lose-sight-of-the-truth> [<http://perma.cc/Z6UQ-4XZ2>]. This lack of accountability is deeply problematic: a recent report found that “[w]hen New Orleans police officers exert force in the field, most of those interactions still are not being recorded despite new department protocols to activate body-worn cameras” Ken Daley, *Cameras Not on Most of the Time When NOPD Uses Force, Monitor Finds*, TIMES-PICAYUNE (Sept. 4, 2014, 10:05 PM), http://www.nola.com/crime/index.ssf/2014/09/cameras_not_on_most_of_the_tim.html [<http://perma.cc/QS5U-CS46>].

⁸⁵ See Robinson Meyer, *Seen It All Before: 10 Predictions About Police Body Cameras*, THE ATLANTIC (Dec. 5, 2014, 7:15 AM), <http://www.theatlantic.com/technology/archive/2014/12/seen-it-all-before-10-predictions-about-police-body-cameras/383456> [<http://perma.cc/9NW4-VJ7A>]. One researcher found that twenty-three percent of dashboard-camera tapes in a police department’s archive were either “blank or staticky.” Moreover, he discovered a practice whereby many departments left their video-evidence rooms — where degaussing machines are usually stored — unlocked. *Id.* He concluded that “[supervisors] don’t want to know” about improper use, *id.* (internal quotation marks omitted), and that they had cultivated a “studied inattentiveness” to the improper use of these machines to erase recorded footage, *id.* (internal quotation mark omitted).

⁸⁶ See, e.g., Liam Dillon, *Police Body Camera Videos Will Stay Private — At Least for Now*, VOICE SAN DIEGO (Mar. 19, 2014), <http://voiceofsandiego.org/2014/03/19/police-body-camera-videos-will-stay-private-at-least-for-now> [<http://perma.cc/VZ5Y-SFJN>] (discussing the San Diego Police Department’s decision not to release body-camera footage of two shootings that occurred while officers were wearing cameras — despite public-records requests).

⁸⁷ See, e.g., IND. CODE § 5-14-3-4(b)(1) (2014) (exempting “[i]nvestigatory records of law enforcement agencies”); MASS. GEN. LAWS ch. 4, § 7, cl.26(f) (2014) (exempting “investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest”); W. VA. CODE § 29B-1-4(a)(4) (2014) (same for law enforcement records).

⁸⁸ See, e.g., *Paff v. Ocean Cnty. Prosecutor’s Office*, No. OCN-L-1645-14, 2014 WL 5139407 (N.J. Super. Ct. Law Div. Oct. 2, 2014) (dashboard cameras); *Paff v. Ocean Cnty. Prosecutor’s Office*, No. OCN-L-1645-14, 2014 WL 3886839 (N.J. Super. Ct. Law Div. July 31, 2014) (same). In the *Paff* cases, a New Jersey Superior Court judge ruled (over the government’s objection) both that dashboard-camera footage is a public record, and that such footage is not covered by the public records laws’ exemption for criminal investigatory records. The judge reasoned that “OPRA’s criminal investigatory records exception does not render otherwise public government

many states the public (including individuals featured on the tapes) may remain unable to access the footage.⁸⁹ Although wholesale public access would likely prove undesirable, efforts by officers to thwart the goals of a body-camera regime do raise the question of *who* stands to benefit most from this technology.⁹⁰ Some departments, for example, allow officers to review video footage before making a statement on the record about an incident. As one police chief explained:

If you make a statement that you used force because you thought a suspect had a gun but the video later shows that it was actually a cell phone, it looks like you were lying. . . . An officer should be given the chance to make a statement using all of the evidence available; otherwise, it looks like we are just trying to catch an officer in a lie.⁹¹

This asymmetric access to the footage is therefore problematic as it allows officers to adapt their testimony in order to bolster their credibility while civilian witnesses cannot do the same.

(b) *Privacy*. — Privacy is a counterpoint to access: increasing transparency necessarily means more people will view body-camera footage, which will frequently feature civilians who may not want the recordings of themselves shared. This type of access raises the issue of whether officers must affirmatively warn all citizens that they are being recorded. The ACLU, for one, has called for notice to citizens “wherever practicable,” potentially in the form of “an easily visible pin or sticker saying ‘lapel camera in operation’ or words to that effect.”⁹² But questions remain, especially about the appropriateness of “police recordings made inside private homes” given the footage’s “uniquely intrusive nature.”⁹³ Officers’ ability to review tapes, slow them down, and enhance images means that a recorded search of a home or a vehicle can lead to the discovery of evidence that would otherwise have gone unnoticed.

Beyond initial police-citizen encounters, the long-term digital storage of those interactions, especially intimate interactions (such as recordings of domestic disputes⁹⁴), also raises privacy concerns. It is un-

records confidential because they document some aspect of a crime.” *Paff*, 2014 WL 3886839, at *4.

⁸⁹ See, e.g., Dillon, *supra* note 86.

⁹⁰ Given that police and prosecutors can use the footage in court to prosecute individuals caught committing crimes on camera, see INT’L ASS’N CHIEFS POLICE, *supra* note 57, at 21, those most likely to be disadvantaged by the footage are low-income, minority individuals because of the heavy police presence in their neighborhoods.

⁹¹ PERF REPORT, *supra* note 55, at 29 (quoting Topeka Police Chief Ron Miller).

⁹² Stanley, *Police Body-Mounted Cameras*, *supra* note 14.

⁹³ *Id.*

⁹⁴ Despite the highly personal nature of these encounters, police departments are in fact eager to use body cameras to resolve domestic violence cases: some commentators believe that the cameras will allow courts to see “just how bad it was that night” and will allow battered women to avoid facing their partners in court after a violent incident. See *Push for Body Cameras in Do-*

clear whether filmed individuals will have a right to request that the footage be deleted or not be shared with the public.⁹⁵ Footage taken inside the home could, for instance, be requested by other citizens (like neighbors), even though the privacy implications of these sorts of requests remain largely unexplored. Contextual policies thus need to be developed about when cameras should stop rolling — for example, during interviews of sexual assault victims — and when footage should cease to be stored. Without further guidance on these issues, civilians' privacy may be violated or, equally problematic, police may raise privacy concerns as an excuse to curtail public oversight.

(c) *Costs and Storage.* — As more departments acquire body cameras, and as officers' cameras roll each day, police departments will inevitably amass a colossal amount of footage, much of it likely irrelevant to any disputes over police-civilian interactions. While the start-up cost of outfitting a force with body cameras is not trivial for cash-strapped departments, the costs of storing and transmitting this data can be particularly staggering: some departments have already spent hundreds of thousands or even millions of dollars managing their data.⁹⁶ However, these costs may be offset by savings on litigation, if cameras do in fact lead to fewer complaints and more efficient resolution of police misconduct cases.⁹⁷

Still, this price tag leaves open the question of who exactly will bear the costs of this new technology — especially when politicians are wary of raising taxes while the country recovers from the Great Reces-

mestic Violence Cases, ABC NEWS 4 (Sept. 18, 2014, 6:57 PM), <http://www.abcnews4.com/story/26571784/push-for-body-cameras-in-domestic-violence-cases> [<http://perma.cc/3UMU-L4B3>].

⁹⁵ For example, under the court's rulings in *Paff*, any member of the public likely can request access to footage from an officer's body camera, which may intrude upon the privacy of the taped individual. See *supra* note 88; see also *Video: Washington Agencies Overwhelmed by Records Requests May Drop Body Cams*, POLICE (Nov. 11, 2014), <http://www.policemag.com/channel/technology/news/2014/11/11/washington-agencies-overwhelmed-by-records-requests-may-drop-body-cams.aspx> [<http://perma.cc/6UED-LJ5F>] (discussing a request by an unidentified citizen — the owner of a YouTube account, "Police Video Requests," dedicated to body and dash cam videos — for "every second of body cam video" ever recorded by the department).

⁹⁶ PERF REPORT, *supra* note 55, at 32 (describing the data storage costs as "crippling" for some departments and noting that the New Orleans Police Department expects to spend \$1.2 million over five years on its body-camera program, with most expenditures going toward data storage).

⁹⁷ Litigating citizen complaints has proven immensely expensive: for instance, the Oakland Police Department spent a total of \$13,149,000 in fiscal year 2010–2011 on legal costs for officer misconduct, Ali Winston, *Police-Related Legal Costs Spike in Oakland*, E. BAY EXPRESS (June 27, 2012), <http://www.eastbayexpress.com/oakland/police-related-legal-costs-spike-in-oakland/Content?oid=3260236> [<http://perma.cc/4HNQ-JYFD>], and the Chicago Police Department spent \$84.6 million in 2013 for misconduct settlements, judgments, and legal fees, Andy Shaw, *City Pays Heavy Price for Police Brutality*, CHI. SUN TIMES (Apr. 14, 2014, 2:23 AM), <http://politics.suntimes.com/article/chicago/city-pays-heavy-price-police-brutality/fri-04112014-1002pm> [<http://perma.cc/LLA2-URDF>].

sion.⁹⁸ In New Jersey, one proposed legislative answer has been to increase fines on certain defendants to finance the state's body-camera program: in particular, individuals convicted of DUIs and sex offenses would pay higher penalties.⁹⁹ This type of defendant-funded policing initiative raises concerns about profit motives in the criminal justice system.¹⁰⁰ It also demonstrates that even though a broad coalition of support has formed around body cameras, it will likely be the most vulnerable populations (and those most likely to be negatively affected by this technology, given the disproportionate police presence in low-income, minority neighborhoods) that are forced to foot the bill. If that is the case, it may fairly be asked whether body cameras are indeed a necessity or whether politicians are committed to such reform efforts only when it doesn't cost them political capital. Reformers should be cognizant of the regressive effects this type of funding scheme would have, and should search for other means of financing the body-camera initiative.

(d) *Surveillance State*. — In a post-9/11 world, the addition of yet another form of government surveillance should not go unexamined: recent technological advances have allowed the state to move beyond the use of traditional electronic surveillance devices — like wiretaps and bugs — toward more pervasive surveillance techniques.¹⁰¹ From the Snowden leaks¹⁰² to reports of police drone use,¹⁰³ citizens are

⁹⁸ See U.S. DEP'T OF JUSTICE, THE IMPACT OF THE ECONOMIC DOWNTURN ON AMERICAN POLICE AGENCIES 13 (2011) (estimating that between 12,000 and 15,000 police officers were laid off as a result of recent budget cuts).

⁹⁹ S. 2518, 216th Leg., Reg. Sess. (N.J. 2014), http://www.njleg.state.nj.us/2014/Bills/S3000/2518_I1.PDF [<http://perma.cc/9MG3-TC7F>].

¹⁰⁰ See *supra* ch. I.

¹⁰¹ See CHRISTOPHER SLOBOGIN, PRIVACY AT RISK, at ii (2007) (discussing “the [government’s] use of sophisticated technology to observe our daily activities,” as “[o]ur wanderings, our work, and our play can now be monitored not only through binoculars and other types of telescopic lenses but also with night scopes, tracking mechanisms, satellite cameras, and devices that detect heat and images through walls,” and our transactional data can be accessed “via snoopware, commercial data brokers, and ordinary Internet searches”).

¹⁰² In June 2013, Edward Snowden, a former CIA technician, leaked classified documents detailing the National Security Agency’s (NSA) daily collection of phone records from millions of cell phone customers. See Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN (Jun. 6, 2013, 6:05 AM), <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order> [<http://perma.cc/9CT7-HQ4U>]. The NSA and the Obama Administration have both faced rampant criticism for these infringements on civilian privacy, since further leaks revealed the NSA’s attempts to “circumvent widely used web encryption technologies,” frequent requests for data from large tech companies such as Google and Facebook, and daily collection of millions of text messages from around the world. Lorenzo Franceschi-Bicchierai, *The 10 Biggest Revelations from Edward Snowden’s Leaks*, MASHABLE (Jun. 5, 2014, 2:47 PM), <http://mashable.com/2014/06/05/edward-snowden-revelations> [<http://perma.cc/96F8-Y38H>].

¹⁰³ See, e.g., Phil Willon & Melanie Mason, *Governor Vetoes Bill that Would Have Limited Police Use of Drones*, L.A. TIMES (Sept. 28, 2014, 7:09 PM), <http://www.latimes.com/local/political>

more conscious than ever of being watched by their government.¹⁰⁴ Moreover, “mission creep” on the part of camera manufacturers has already begun: at least one city has made plans to outfit its parking attendants with body cameras,¹⁰⁵ and some advocates have called for expanding cameras into other arenas, like the classroom.¹⁰⁶

So although police body cameras have the potential to benefit citizens and officers alike, they nevertheless represent another substantial step toward a surveillance state. Police departments in recent decades have become increasingly militarized,¹⁰⁷ complete with intelligence departments,¹⁰⁸ devices that mimic cell phone towers,¹⁰⁹ and facial

[/la-me-ln-governor-vetoes-bill-to-limit-police-use-of-drones-20140928-story.html](http://perma.cc/87NA-CD4M) [http://perma.cc/87NA-CD4M] (discussing California Governor Jerry Brown’s veto of a bill that would have required law enforcement agencies to obtain warrants before using drones for surveillance of citizens); see also Jennifer O’Brien, Comment, *Warrantless Government Drone Surveillance: A Challenge to the Fourth Amendment*, 30 J. MARSHALL J. INFO. TECH. & PRIVACY L. 155, 165–66 (2013) (noting that President Obama signed into law the FAA Modernization and Reform Act of 2012, which “expressly directs the FAA to permit law enforcement operation of unmanned aircraft that weigh less than 4.4 pounds under specified restrictions”).

¹⁰⁴ Indeed, the media, the public, and even some politicians have vocalized ardent criticisms of the government’s ever-expanding surveillance apparatus. See, e.g., Spencer Ackerman & Paul Lewis, *NSA Surveillance Challenged in Court as Criticism Grows over US Data Program*, THE GUARDIAN (Jun. 11, 2013, 5:44 PM), <http://www.theguardian.com/world/2013/jun/11/nsa-surveillance-challenged-court-data> [http://perma.cc/H77A-CLJ3] (describing, first, a lawsuit filed by the ACLU in response to the Snowden leaks and, second, Senate legislative proposals to increase government transparency); Al Gore, TWITTER (June 5, 2013, 6:39 PM), <https://twitter.com/algore/status/342455655057211393> [https://perma.cc/J8YS-AZPJ] (“Is it just me, or is secret blanket surveillance obscenely outrageous?”).

¹⁰⁵ Jessica Glenza, *Miami Beach Plans for Body-Worn Cameras on Meter Maids and Police*, THE GUARDIAN (Aug. 21, 2014, 9:58 AM), <http://www.theguardian.com/world/2014/aug/21/police-body-cameras-miami-beach-city-workers> [http://perma.cc/QD6A-5VBN]; see also Jay Stanley, *Body-Worn Cameras Should Not Expand Beyond Law Enforcement*, ACLU (Aug. 29, 2014, 12:34 PM), <https://www.aclu.org/blog/criminal-law-reform-immigrants-rights-technology-and-liberty-free-speech-national-security/body> [https://perma.cc/F5PW-57AM] (cautioning against this sort of expansion because it brings the downsides of privacy invasion without the benefits of police oversight).

¹⁰⁶ See, e.g., Reihan Salam, *Tape Everything*, SLATE (Aug. 15, 2014, 11:34 AM), http://www.slate.com/articles/news_and_politics/politics/2014/08/ferguson_police_officers_should_be_forced_to_videotape_themselves_for_our.html [http://perma.cc/4N43-A96C] (“But why stop at video recording the police? . . . [T]here are many public servants who have considerable power over others and who are shielded from scrutiny in the absence of video recording. Public school teachers and administrators are the most obvious example.”). This expansion might make it easier for police to arrest students for school infractions, an issue highlighted and problematized in Chapter II. See *supra* ch. II.

¹⁰⁷ See generally RADLEY BALKO, *RISE OF THE WARRIOR COP* (2013).

¹⁰⁸ See, e.g., *Criminal Intelligence Division*, VA. ST. POLICE, http://www.vsp.state.va.us/BCI_CID.shtm (last visited Mar. 1, 2015) [http://perma.cc/4RTP-YL7S] (noting that the primary purpose of this *state* police division is to “identify, document, and disseminate criminal intelligence concerning persons involved in organized crime, terrorist groups, and those crimes involving multi-jurisdictional or serial crimes”).

¹⁰⁹ See, e.g., Cory Bennett, *Judge Unseals Info on Secret Cellphone Spying*, THE HILL (Nov. 21, 2014, 5:29 PM), <http://thehill.com/policy/cybersecurity/225074-judge-unseals-secret-cell-spying-details> [http://perma.cc/ZY5H-BLS5].

recognition software.¹¹⁰ Facial recognition software in particular may pose a threat to civilian privacy when coupled with body cameras:

[T]he increasing effectiveness of facial recognition software, even in consumer products like Facebook, means that simply recording an image of a person (in a private or public space) can lead to further identification. . . . Officer-mounted wearable cameras, paired with facial recognition, could easily become much like the current crop of automated license readers, constantly reading thousands of faces (license plates), interpreting identity (plate number), and cross-checking this information against national and local crime databases in real-time.¹¹¹

While not necessarily “inimical to individual liberty,” this 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.¹¹² Indeed, many policing initiatives that have been adopted in the name of “protecting” civilians have later been used against them.¹¹³ Past experiences should inform present debates over national adoption of body cameras, and proponents should be particularly careful to consider the long-term ramifications of normalizing this technology.

(e) *The “Objectivity” of Video Evidence.* — A final, fundamental concern regarding body cameras goes to the heart of their functionality: the reliability of the video footage they produce. This footage is, undoubtedly, the main advantage of the cameras in that it allows for ex post review of officer conduct in the field. But the perceived “ob-

¹¹⁰ See, e.g., Sebastian Anthony, *UK, the World's Most Surveilled State, Begins Using Automated Face Recognition to Catch Criminals*, EXTREMETECH (July 17, 2014, 8:03 AM), <http://www.extremetech.com/extreme/186435-uk-the-worlds-most-surveilled-state-begins-using-automated-face-recognition-to-catch-criminals> [http://perma.cc/C9NT-NCRK] (“The British police will be using NEC’s NeoFace technology, which can match faces from crime scene photos or videos against a database of images in just a few seconds. Combined with the highest density of CCTV cameras of any country in the world, police body-worn cameras that are constantly recording, and a CSI-like smartphone and tablet app that allows for face and fingerprint matching in the field, it is rather hard to be a criminal in the UK nowadays.”).

¹¹¹ Bryce Clayton Newell, *Crossing Lenses: Policing’s New Visibility and the Role of “Smartphone Journalism” as a Form of Freedom-Preserving Reciprocal Surveillance*, 2014 U. ILL. J.L. TECH. & POL’Y 59, 90. With the advancement of technology, it may also become possible to review years of stored body-camera footage using facial recognition software, looking for “cold” hits.

¹¹² See *id.* Given the number of primarily low-income, minority individuals who have outstanding warrants for unpaid fines or other minor offenses, see *supra* ch. I, pp. 1727–29, this combination of body cameras and facial recognition software may prove especially insidious.

¹¹³ For example, wiretapping laws were originally written to ensure that law enforcement respected “the privacy rights of individuals.” Travis S. Triano, Note, *Who Watches the Watchmen? Big Brother’s Use of Wiretap Statutes to Place Citizens in Timeout*, 34 CARDOZO L. REV. 389, 391–96 (2012). But since their inception, these statutes have instead been used to arrest and prosecute citizens for alleged violations of their states’ wiretapping statutes, including for filming the police. See *id.* at 396; see also *infra* section D.

jectivity” of video evidence also creates a danger of overreliance.¹¹⁴ “Video purports to be an objective, unbiased, transparent observer of events that evenhandedly reproduces reality for the viewer,” and “[f]rom an evidentiary standpoint, video evidence often will be overwhelming proof at trial.”¹¹⁵ Even with body cameras rolling at all times, though, the picture may not capture either “what happened outside the camera’s view or the causation for actions shown . . . depend[ing] on ‘the camera’s perspective (angles) and breadth of view (wide shots and focus).’”¹¹⁶ Perspective may have an outsized influence on a factfinder’s impression of the video: for instance, mock juries shown a first-person interrogation tape without the officer on screen are “significantly less likely to find an interrogation coercive, and more likely to believe in the truth and accuracy of the confession,” than are jurors who are shown the identical interrogation but from a wider angle that includes the officer.¹¹⁷ This sort of distortion is especially concerning given that body-camera footage will always be filmed from the perspective of the officer, making it easier for a jury to credit this perspective.

Beyond the technological limitations of these cameras, an empirical study conducted by Professor Dan Kahan illustrates that even video footage thought to be unambiguous¹¹⁸ is susceptible to multiple interpretations depending on the “cultural outlook[]” of the individual viewing the tape.¹¹⁹ These sorts of implicit biases may subtly affect how viewers — in their living room or in the courtroom — process the story told by body-camera footage. This phenomenon may also allow for the unconscious incorporation of implicit biases when determining

¹¹⁴ See Howard M. Wasserman, *Orwell’s Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 620 (2009) (“The certainty that video purports to provide . . . is more myth than reality.”); cf. SUSAN SONTAG, ON PHOTOGRAPHY 5–6 (1977) (“A photograph passes for incontrovertible proof that a given thing happened. . . . Whatever the limitations (through amateurism) or pretensions (through artistry) of the individual photographer, a photograph — any photograph — seems to have a more innocent, and therefore more accurate, relation to visible reality than do other mimetic objects.”).

¹¹⁵ Wasserman, *supra* note 114, at 619.

¹¹⁶ *Id.* at 620 (quoting Jessica Silbey, *Cross-Examining Film*, 8 U. MD. L.J. RACE RELIGION GENDER & CLASS 17, 29 (2008)). It is likely that the “source of a recording also might affect viewer perception,” as more or less legitimacy may be given to footage provided by the police, as opposed to the press, bystanders, or the civilian involved in the encounter. *Id.* at 640.

¹¹⁷ Jennifer L. Mnookin, *Can a Jury Believe What It Sees?*, N.Y. TIMES, July 14, 2014, <http://www.nytimes.com/2014/07/14/opinion/videotaped-confessions-can-be-misleading.html>.

¹¹⁸ In particular, the Supreme Court relied on the video of a purportedly high-speed chase in *Scott v. Harris*, 550 U.S. 372 (2007), to find that a police officer was justified in using potentially deadly force in response.

¹¹⁹ Dan Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 903 (2009). Identity-defining factors such as race, age, socioeconomic status, education, cultural orientation, and party affiliation all affected the viewer’s interpretation of the video. *Id.* at 867–70.

whether an officer's actions were "reasonable" under the circumstances for purposes of an indictment or conviction.¹²⁰

Given that body-camera footage (with all its fallibilities) will inevitably be used as an effective tool for the state in prosecuting defendants caught on film,¹²¹ it again must be asked *who* in fact benefits most from the adoption of this technology if officers are not also held accountable even when captured on tape. Because video evidence will likely prove singularly powerful in these sorts of excessive force cases, careful consideration must be given to how this type of evidence can be manipulated or distorted — both intentionally and unintentionally — in a manner that systematically favors the officers.¹²²

D.

As the foregoing sections demonstrate, the effective adoption of police body cameras presents many challenges for lawyers and policy-makers who must balance the positive goals of this initiative with deep and legitimate concerns about misuse of this powerful technology. Eric Garner's case is also a tragic reminder of the need to pursue other policing reforms in conjunction with body-camera initiatives because the presence of a camera is no guarantee that officers will temper their use of force or that meaningful justice will be served. Many promising legal proposals have already been offered; for example, some scholars have called for a reevaluation of the capacious "reasonableness" standard¹²³ currently used to evaluate the conduct of officers who have allegedly used excessive force.¹²⁴ Others have questioned the Court's existing doctrine on standing, which prevents a "victim[] of police violence from [prospectively] asking [a] federal court[] to help stop deadly practices," unless she is able to show that she is *personally* like-

¹²⁰ See *infra* section D, discussing the "reasonableness" standard used in excessive force cases.

¹²¹ For example, officers are being trained to film interviews with domestic violence victims on the scene (with the victim's consent) and to try to capture the assault itself on video, as this provides "enough evidence to move forward with the case, even if the victim ultimately declines to prosecute." PERF REPORT, *supra* note 55, at 9.

¹²² The lack of an indictment in Garner's case, despite readily available footage from a bystander that graphically depicts the officer placing Garner in the deadly chokehold, makes this concern all the more profound: how likely then will an indictment be in cases that feature such interactions solely from the perspective of the officer's body camera?

¹²³ *Graham v. Connor*, 490 U.S. 386, 395 (1989) ("[A]ll claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . .").

¹²⁴ See, e.g., Nancy Gertner, Op-Ed., *There Will Be More Fergusons*, BOS. GLOBE (Nov. 25, 2014), <http://www.bostonglobe.com/opinion/2014/11/24/surprise-ferguson-grand-jury-didn-indict-police-officer/zf9UnrZTqrEKKzTgOOJBOL/story.html> [<http://perma.cc/8ALD-SG7M>] (cautioning that the "reasonableness" standard may be too deferential to officers, sending the message to "[s]hoot first, think later, and . . . count on being exonerated.").

ly to suffer the same abuse in the future.¹²⁵ Advocates are also pushing for more responsible police training¹²⁶ and greater community engagement.¹²⁷

The grand jury process has come under particular scrutiny given how exceptionally difficult it has proven to indict police officers in excessive-force cases like Garner's.¹²⁸ The addition of "special prosecutors" who do not work with local police on a daily basis may be especially effective, because these special prosecutors would be more likely to prosecute such cases impartially, without an undue sense of loyalty or pressure.¹²⁹

One equally important but often overlooked legal priority is the need to safeguard the role of individuals who document and disseminate video footage of police-civilian encounters. This sort of "sousveillance"¹³⁰ is worth protecting, body cameras or no, because it has often been the powerful scenes captured by vigilant citizens (like the recording of Garner's death) that have spurred the country to confront latent issues of police brutality, long suspected but too often ignored.¹³¹ Recent cases such as *Glik v. Cunniffe*,¹³² *ACLU of Illinois v.*

¹²⁵ See, e.g., Shakeer Rahman & Sam Barr, Op-Ed., *Eric Garner and the Legal Rules that Enable Police Violence*, N.Y. TIMES (Dec. 5, 2014), <http://www.nytimes.com/2014/12/06/opinion/eric-garner-and-the-legal-rules-that-enable-police-violence.html>.

¹²⁶ See, e.g., Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, THE ATLANTIC (Dec. 12, 2014, 8:00 AM), <http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681> [<http://perma.cc/G89Y-XP9D>] ("In most police shootings, officers don't shoot out of anger or frustration or hatred. They shoot because they are afraid. And they are afraid because they are constantly barraged with the message that they should be afraid, that their survival depends on it.")

¹²⁷ See, e.g., Andrew Steele, *Gary Residents Tout Citizen Review Board to Curb Police Confrontations*, TIMES NW. IND. (Dec. 13, 2014, 8:00 PM), http://www.nwitimes.com/news/local/lake-gary-residents-tout-citizen-review-board-to-curb-police-confrontations/article_10c1b9b5-c427-54c2-a2a8-c90945d48145.html [<http://perma.cc/R7VG-37Y8>].

¹²⁸ The high frequency of nonindictments in cases involving police officers stands in stark contrast to the ease of obtaining an indictment in regular cases. See Ben Casselman, *It's Incredibly Rare for a Grand Jury to Do What Ferguson's Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014, 9:30 PM), <http://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson> [<http://perma.cc/2998-8K4L>]; see also *id.* ("U.S. attorneys prosecuted 162,000 federal cases in 2010 . . . Grand juries declined to return an indictment in 11 of them.")

¹²⁹ See, e.g., Paul Butler, *The System Must Counteract Prosecutors' Natural Sympathies for Cops*, N.Y. TIMES: ROOM FOR DEBATE (Dec. 4, 2014, 3:05 PM), <http://www.nytimes.com/roomfordebate/2014/12/04/do-cases-like-eric-garners-require-a-special-prosecutor/the-system-must-counteract-prosecutors-natural-sympathies-for-cops>.

¹³⁰ This term, coined by Steve Mann, refers to the mounting of cameras "on people in low places, rather than upon buildings and establishments in high places" to allow the marginalized to use technology to "mirror and confront bureaucracies and authoritative organizations such as police agencies." Laura Huey et al., *Cop Watching in the Downtown Eastside: Exploring the Use of (Counter)Surveillance as a Tool of Resistance*, in SURVEILLANCE AND SECURITY 149, 158 (Torin Monahan ed., 2006) (quoting Steve Mann, *Sousveillance*, WEARCAM.ORG (2002), <http://www.wearcam.org/sousveillance.htm> [<http://perma.cc/QTZ7-GNE8>]).

¹³¹ See *supra* Introduction, pp. 1708–09.

Alvarez,¹³³ and *Gericke v. Begin*¹³⁴ indicate a willingness on the part of courts to protect this vital First Amendment right, but the proliferation of body cameras may make civilians feel as if they no longer need to record officers in the field. Moreover, police may feel more justified in telling citizens to cease recording,¹³⁵ and the courts may be more willing to accept this as “reasonable” if body-camera footage is expected to exist in every case.¹³⁶ But civilian recordings can provide an additional (perhaps crucial) perspective,¹³⁷ adding further context to an encounter. And because this type of footage is ultimately controlled by civilians themselves, rather than curated by the police, it has the unique ability to empower traditionally powerless individuals to document and expose police abuses within their communities.¹³⁸ Courts and legislators discussing the proper administration of body cameras should therefore be mindful of simultaneously promoting the continued vitality of citizen-initiated surveillance of the police.¹³⁹

¹³² 655 F.3d 78 (1st Cir. 2011) (holding that citizens have a First Amendment right to film and record officers in public places).

¹³³ 679 F.3d 583 (7th Cir. 2012) (granting a preliminary injunction against enforcement of Illinois’s wiretapping law, ensuring that the ACLU could continue to record police officers in the field).

¹³⁴ 753 F.3d 1 (1st Cir. 2014) (reaffirming the First Amendment right to film police officers, including during traffic stops).

¹³⁵ Cf. Wasserman, *supra* note 114, at 600; *see also id.* at 602–07.

¹³⁶ Cf. Scott H. Greenfield, *A Small Right with a Huge Loophole*, SIMPLE JUSTICE (May 27, 2014), <http://blog.simplejustice.us/2014/05/27/a-small-right-with-a-huge-loophole> [<http://perma.cc/J6N6-XK2F>] (noting that *Gericke* sanctioned “[r]easonable restrictions on the exercise of the right to film [to] be imposed when the circumstances justify them,” *id.* (quoting *Gericke*, 753 F.3d at 7) (internal quotation mark omitted), and arguing that the “reasonableness” standard means “you have the constitutional First Amendment right to record police until they tell you to stop, because reasons, at which point you don’t,” *id.*).

¹³⁷ *See supra* section C.2(e) (critiquing the “objectivity” of video).

¹³⁸ Cf. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (“In our democracy, based on checks and balances, neither the Bill of Rights nor the judiciary can second-guess government’s choices. The only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardians of their liberty.”).

¹³⁹ Wasserman, *supra* note 114, at 648 (“We maintain the balance of power over availability of video and audio recording of public encounters only by recognizing a liberty to record — that is, recognizing that Big Brother cannot interfere with the public’s ability to watch him.”).

E.

“What’s the future for me? . . . [F]or my child, for my son? What is his future?”

— Unknown protestor to Benjamin Carr, Garner’s stepfather¹⁴⁰

Balancing the benefits and drawbacks of this powerful new technology is not an easy task, and the decision to equip police departments with cameras should not be made lightly. Once such a program is deployed, it is “increasingly difficult to have second thoughts or to scale back.”¹⁴¹ Expedient adoption therefore should not be prioritized over reasoned policymaking: the use of body cameras raises several significant legal questions, including what the default presumption should be when footage has gone missing or is unusable;¹⁴² the proper source of funding; whether parties who are filmed by the police, particularly in intimate exchanges, have a right to view (or delete) that footage; and what the contours of public access to body-camera footage should be. Policymakers, citizens, and police departments must think carefully about these and other drawbacks to a body-camera regime to make sure that, if this technology is to be adopted, it is used effectively and ultimately improves the quality of police services. Citizens should also remain vigilant — observing and recording the conduct of police within their communities rather than complacently allowing themselves to be surveilled by the state. And finally, wider systemic changes must be undertaken in conjunction with the deployment of body cameras to ensure that our legal process truly provides justice for all, rather than simply justice for some.

¹⁴⁰ These pleading words were spoken immediately after the grand jury declined to indict Officer Pantaleo for his deadly use of a chokehold. Eyder Peralta, *The Sentiment in New York Captured in a 25-Second Audio Clip*, NPR: THE TWO-WAY (Dec. 4, 2014, 7:56 AM), <http://www.npr.org/blogs/thetwo-way/2014/12/04/368422790/the-sentiment-in-new-york-captured-in-a-25-second-audio-clip> [<http://perma.cc/TB5F-WELW>] (describing the exchange as capturing “the anger, the desperation and the resolve to keep things peaceful in New York”).

¹⁴¹ Kevin Johnson, *Police Body Cameras Offer Benefits, Require Training*, USA TODAY (Sept. 12, 2014, 6:21 PM), <http://www.usatoday.com/story/news/nation/2014/09/12/police-body-cameras/15522059> [<http://perma.cc/BB6J-9X2K>] (quoting Chuck Wexler, Executive Director of the Police Executive Research Forum).

¹⁴² See Scott H. Greenfield, *The Missing Video Presumption*, SIMPLE JUSTICE (Mar. 30, 2014), <http://blog.simplejustice.us/2014/03/30/the-missing-video-presumption> [<http://perma.cc/B99T-6HG4>]. Scott Greenfield has proposed four possible presumptions for missing or unusable footage: (i) reversion to the traditional “he said/she said” analysis, (ii) a presumption that favors the police, (iii) a presumption that favors the defendant, or (iv) litigation over fault for video failure, and a negative presumption that is applied against the police only if they are responsible. See *id.*