

# POLICE BODY-MOUNTED CAMERAS: BALANCING THE INTERESTS OF CITIZENS AND THE STATE

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## ABSTRACT

There has been a significant push in the community at large to equip law enforcement officers with body-mounted cameras. This push has come as the result of several high profile cases in the media of officer involved shooting deaths. This note will address both the benefits and drawbacks of such technology, the proceeding social impact of the cameras' implementation, and the constitutional issues raised by that implementation. This note will then outline suggested regulations for body camera operation. Ultimately, the note will conclude in favor of the use of body cameras by law enforcement officers, as they will benefit both officers and the public.

## TABLE OF CONTENTS

I. INTRODUCTION .....	70
II. SOCIAL IMPACT .....	72
A. CASE STUDY: RIALTO, CA .....	72
B. EXPANDING THE PRESENCE OF BODY-MOUNTED CAMERAS .....	74
III. CONSTITUTIONAL ISSUES .....	76
A. FIRST AMENDMENT .....	76
B. FOURTH AMENDMENT .....	77

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\* J.D. Candidate, University of Southern California Gould School of Law, 2016. Special thanks to the editors of the Southern California Review of Law and Social Justice for their thoughtful review. I would also like to thank my family, particularly my parents, for making this possible.

70                    *REVIEW OF LAW AND SOCIAL JUSTICE*    [Vol. 25:1

IV. REGULATION.....	79
V. CONCLUSION.....	82
A. WHAT BODY CAMERAS MEAN FOR THE FUTURE .....	82
B. WHAT BODY CAMERAS CANNOT DO .....	83
C. CONCLUSIONS.....	85

## I. INTRODUCTION

On August 9, 2014, the United States was gripped by the media frenzy surrounding the death of Michael Brown, the unarmed black teenager who was fatally shot by a white police officer in Ferguson, Missouri.<sup>1</sup> In the coverage and discussion by the news media, facts were relatively scarce and only two things were abundantly clear: Michael Brown was dead, and Officer Darren Wilson had killed him.<sup>2</sup> What remained unclear in the days following Brown’s death, however, was an explanation of what really happened; several witnesses corroborated Officer Wilson’s story that Brown had charged him and thus forced the officer to shoot in self-defense, while others stated that Brown had surrendered and did not pose any threat (which led to the “hands up, don’t shoot” rallying cry used by Brown’s supporters).<sup>3</sup>

The outrage and allegations of racial bias behind Brown’s death led many to call for more police accountability.<sup>4</sup> The need for action appeared urgent in the midst of reignited racial tension reminiscent of the rift caused by the 1991 Rodney King riots.<sup>5</sup> Further, Brown’s death had come at a

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<sup>1</sup> See, e.g., Rachel Clarke & Christopher Lett, *What Happened When Michael Brown Met Officer Darren Wilson*, CNN (Nov. 11, 2014), <http://www.cnn.com/interactive/2014/08/us/ferguson-brown-timeline/>.

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*; Sandhya Somashekhar & Kimbriell Kelly, *Was Michael Brown Surrendering or Advancing to Attack Officer Darren Wilson?*, WASH. POST (Nov. 29, 2014), [http://www.washingtonpost.com/politics/2014/11/29/b99ef7a8-75d3-11e4-a755-e32227229e7b\\_story.html](http://www.washingtonpost.com/politics/2014/11/29/b99ef7a8-75d3-11e4-a755-e32227229e7b_story.html).

<sup>4</sup> See, e.g., Deborah Jacobs, *Police Accountability after Ferguson*, HUFFINGTON POST (Aug. 21, 2014), [http://www.huffingtonpost.com/deborah-jacobs/police-accountability-after-ferguson\\_b\\_5696806.html](http://www.huffingtonpost.com/deborah-jacobs/police-accountability-after-ferguson_b_5696806.html).

<sup>5</sup> See *id.* See also Jonathan Capehart, *Three Troubling Things Exposed by the Ferguson Police Shooting of Michael Brown*, WASH. POST (Sep. 5, 2014), <http://www.washingtonpost.com/blogs/post-partisan/wp/2014/09/05/three-troubling-things-exposed-by-the-ferguson-police-shooting-of-michael-brown/>; Emily Swanson, *Black Americans Much More Likely to See Race As Factor in Michael Brown Shooting*, HUFFINGTON POST, (Aug. 18, 2014, 2:55 PM), [http://www.huffingtonpost.com/2014/08/18/ferguson-shooting-poll\\_n\\_5688762.html](http://www.huffingtonpost.com/2014/08/18/ferguson-shooting-poll_n_5688762.html) (a recent HuffPost/YouGov poll showed that 76 percent of African American respondents viewed the Brown shooting as part of a broader pattern of police treatment of Black Americans, while only 35 percent of White Americans agreed).

time when the death of another unarmed black man, Eric Garner, at the hands of police officers was still fresh in the minds of many. Garner's death, who died after being placed in a chokehold, was another highly publicized and controversial instance involving the propriety of police response.<sup>6</sup>

Since these incidents, police body-mounted cameras have been viewed as a possible method of increasing police accountability while also protecting citizens and aiding grand juries assigned to these cases.<sup>7</sup> Police body-mounted cameras are small, pager-sized cameras that can be affixed onto an officer's uniform (or even worn as a headset), and allow for the recording of audio and video footage of items within the officer's line of sight.<sup>8</sup> In a 2013 survey of 254 police nationwide police departments, 75 percent of those departments indicated that they did not use police body-mounted cameras, while one-third of those that did use cameras did not have a written policy governing their usage.<sup>9</sup>

Police body-mounted cameras provide tangible benefits for both sides.<sup>10</sup> For example, the use of these cameras has reduced the use of force by officers and the number of complaints filed against officers.<sup>11</sup> Unsurprisingly, however, the prospect of cameras entering the daily work of police officers has prompted privacy concerns among officers and citizens alike.<sup>12</sup> Some also doubt whether body-mounted cameras would

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<sup>6</sup> Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>.

<sup>7</sup> See, e.g., Richard Serrano & Joel Rubin, *Amid Outcry over Police Shootings, Departments Weighing Cop Cameras*, L.A. TIMES (Aug. 27, 2014), <http://www.latimes.com/nation/la-na-cops-camera-20140828-story.html>; Reid Wilson, *States Consider Police Body Cameras After Civilian Deaths Bills Aim to Curb Excessive Force, Racial Profiling*, BOSTON GLOBE (Feb. 15, 2015), <http://www.bostonglobe.com/news/nation/2015/02/15/police-accountability-measures-flood-state-legislatures-after-ferguson-staten-island/8tC3efOX4WwDtGjepkIZVI/story.html>; *Ferguson Decision Underscores the Need for Police Body Cameras*, WASH. POST (Nov. 24, 2015), [https://www.washingtonpost.com/opinions/the-ferguson-decision-underscores-the-need-for-police-body-cameras/2014/11/25/828caca-74f4-11e4-9d9b-86d397daad27\\_story.html](https://www.washingtonpost.com/opinions/the-ferguson-decision-underscores-the-need-for-police-body-cameras/2014/11/25/828caca-74f4-11e4-9d9b-86d397daad27_story.html).

<sup>8</sup> Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All*, ACLU (Oct. 2013), <https://www.aclu.org/police-body-mounted-cameras-right-policies-place-win-all>.

<sup>9</sup> LINDSAY MILLER ET AL., IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 2 (POLICE EXEC. RESEARCH FORUM, 2014), available at <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

<sup>10</sup> See, e.g., Ian Lovett, *In California, A Champion for Police Cameras*, N.Y. TIMES (Aug. 21, 2013), <http://www.nytimes.com/2013/08/22/us/in-california-a-champion-for-police-cameras.html>.

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., *id.*

make any meaningful difference in police work.<sup>13</sup> Others, in contrast, hold a positive view on police body cameras, believing the cameras' success will depend entirely on the use of key camera regulations.<sup>14</sup>

This Note will examine the potential impact of police body cameras on a wide-scale. In Part II, this Note will go into detail regarding the benefits and drawbacks of police body cameras. Part III will then delve into the constitutional issues—namely, with the First and Fourth Amendment—presented by body cameras, and Part IV will propose suggested guidelines that balance the interests of the government and the public.

Incidents such as the aforementioned deaths and their impact on perceptions of public safety and racial bias demand a governmental response that will increase police accountability. Ultimately, this Note concludes that the regulated use of police body cameras is an important step in the right direction and should be adopted on a wide-scale.

## II. SOCIAL IMPACT

### A. CASE STUDY: RIALTO, CA

The city of Rialto, CA, has proven a noteworthy testing ground for the use of body-mounted cameras.<sup>15</sup> Since Rialto implemented the cameras, the city has seen an 88 percent decline in complaints against officers and a 65 percent decrease in officer use of force.<sup>16</sup> An independent review of the Rialto experiment led the Department of Justice to conclude that although the degree of correlation between the foregoing statistics and the use of body cameras is unknown, it seems likely that the results in part are linked to camera-conscious officers adjusting their behavior to some extent (whereas any analysis of the citizens' behavior must consider whether the citizen knew of the presence of the camera).<sup>17</sup>

Still, long-term studies how these cameras affect police officers still

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<sup>13</sup> Justin Hansford, *Body Cameras Won't Stop Police Brutality. Eric Garner is Only One of the Reasons Why*, WASH. POST (Dec. 4, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/12/04/body-cameras-wont-stop-police-brutality-eric-garner-is-only-one-of-several-reasons-why/>.

<sup>14</sup> See Stanley, *supra* note 8.

<sup>15</sup> See Randall Stross, *Wearing a Badge and a Video Camera*, N.Y. TIMES (April 6, 2014), <http://www.nytimes.com/2013/04/07/business/wearable-video-cameras-for-police-officers.html>.

<sup>16</sup> *Id.*

<sup>17</sup> See Margaret Talbot, *Why Cameras on Police Officers Won't Save Us*, THE NEW YORKER (Dec. 4, 2014), <http://www.newyorker.com/news/daily-comment/camera-police-officers-wont-save-us>.

is unknown.<sup>18</sup> For example, it is unclear whether any reduction in the use of force is necessarily a sign of favorable circumstance. Police body cameras may prompt officers to withdraw from particularly dangerous areas where they know that the likelihood that force will be used is high and, therefore, is more likely to be closely scrutinized when the incident is reviewed on video.<sup>19</sup> Furthermore, the nature of police work is unforgiving and any hesitation to use force, due to fear of how one's actions will be perceived, may potentially make the difference between life and death for an officer or a citizen.<sup>20</sup>

Nonetheless, Rialto's police officers and outside commentators believe the cameras are effective tools for protecting officers serving the ends of justice.<sup>21</sup> Police Chief Farrar, from Rialto, invested in these cameras for his entire police force because he expects that officers and citizens will both behave better.<sup>22</sup> Officers have stated that they like the cameras because, assuming that citizens knew they were being recorded, the cameras prevent them from forming the intention to lie about their story later on. Officers also like the cameras because recordings can clear up conflicting stories and thereby aid grand juries.<sup>23</sup> Furthermore, even if grand juries do not indict officers in those instances that prompt national outrage, the fact remains that body cameras may still be able to provide some positive changes in the initial decision of whether or not to use force (and how such force is manifested).<sup>24</sup> Ultimately, police body cameras may hold the potential to bring positive behavioral changes on both sides of the law as a result of the increased accountability they provide.<sup>25</sup>

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<sup>18</sup> See Taylor Gordon, *Police Departments Having Problems with Body Cameras Are Learning What the Black Community Knew All Along*, ATLANTA BLACK STAR (Jan. 24, 2015), <http://atlantablackstar.com/2015/01/24/police-departments-finding-issue-body-cameras-learning-black-community-knew-along/>.

<sup>19</sup> Michael E. Miller, *A Body Cam Caught a Cleveland Cop Acting Heroically. So Why Are Cops Afraid of Them?*, WASH. POST (Oct. 9, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/10/09/a-body-cam-caught-a-cleveland-cop-acting-heroically-so-why-are-cops-afraid-of-them/>.

<sup>20</sup> See *id.*

<sup>21</sup> Lovett, *supra* note 10.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Lovett, *supra* note 10; Josh Voorhees, *Darren Wilson Is Not an Outlier*, SLATE (Dec. 1, 2014), [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/12/darren\\_wilson\\_no\\_true\\_bill\\_why\\_cops\\_are\\_almost\\_never\\_indicted\\_for\\_shooting.html](http://www.slate.com/articles/news_and_politics/politics/2014/12/darren_wilson_no_true_bill_why_cops_are_almost_never_indicted_for_shooting.html).

<sup>25</sup> David Wright et al., *Police Departments Are Buying Body Cams, and Officers Don't Have to Tell You When They're Recording*, ABC NEWS (NOV. 18 2014), <http://abcnews.go.com/Technology/police-departments-buying-body-cams-officers-recording/story?id=27003287> (quoting LAPD Chief Charlie Beck as stating, "In a couple of decades every public safety

In addition to the positive behavioral changes that police body cameras may bring, it is also apparent that police body cameras are more favorable than using mass, indiscriminate surveillance such as street cameras and audio detectors in public places—an option which stands on the other end of the spectrum of tools to record police behavior.<sup>26</sup> The main overlapping concern of these two methods of recording public spaces is privacy—an area that police body-mounted cameras pose less of an issue (this will be explored in Part III).<sup>27</sup> However, police body-mounted cameras are not stationary like “regular” surveillance and do not monitor particular areas for prolonged periods of time. Although there will be inevitably some long-term surveillance that police body-mounted cameras will pick up, including when the camera is recording when an officer is on patrol, this issue can be mitigated through strict camera control regulations discussed in Part IV. Next, police body-mounted cameras by their very nature only monitor situations in which police are physically present. As a result, police body-mounted cameras balance the privacy interests with the public’s interest (by means of a transparent, accountable police force) in a manner that is favorable to mass, indiscriminate surveillance.

#### B. EXPANDING THE PRESENCE OF BODY-MOUNTED CAMERAS

Body-mounted cameras placed on police officers could provide evidence from the scene of a crime or police-civilian encounter in the form of witness interviews, sights from the crime scene, and footage of unfolding events caught on tape. However, exposing an even greater scope of the investigative process by keeping cameras on during interviews with parties of interest and during the creation of police line-ups could also

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employee, police officers, firefighters, paramedics, everybody will have them . . . I think it improves behavior on both sides of the camera, which is our goal.”).

<sup>26</sup> See, e.g., Quentin Burrows, *Scowl Because You’re on Candid Camera: Privacy and Video Surveillance*, 31 VAL. U.L. REV. 1079, 1125–29 (1997) (elaborating on the threat of creating a Big Brother state through the government’s use of video surveillance); Trevor Timm, *The Police Body-Cam Peep Show: Are You Ready to Give Up Your Privacy, Too?*, THE GUARDIAN (Sep. 6, 2014), <http://www.theguardian.com/commentisfree/2014/sep/06/police-body-cam-privacy-recorded-cops>; Christopher Slobogin, *Symposium: Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213 (2002) (examining the harmful effects that camera surveillance in public places has on the public’s willingness to engage in certain acts of free speech); Matt Taibbi, *Apocalypse, New Jersey: A Dispatch from America’s Most Desperate Town*, ROLLING STONE (2013), <http://www.rollingstone.com/culture/news/apocalypse-new-jersey-a-dispatch-from-americas-most-desperate-town-20131211> (providing a case study on a New Jersey city that has been equipped with mass surveillance to aid in policing).

<sup>27</sup> See Burrows, *supra* note 26, at 1126–30; Timm, *supra* note 26.

promote increased transparency and accountability.<sup>28</sup> This proposal has not garnered much interest or support because it would require body-mounted cameras to be placed on detectives (distinct from police officers), but it is one worth examination.

One reason why recordings of all witness encounters and the creation of police line-ups are important is that recordings may counteract the effect of any inappropriate interrogations which can lead to false confessions.<sup>29</sup> These interrogations often begin with interrogators convincing the suspect to waive his Miranda rights, making false promises of leniency, and being confrontational, and sometimes they assume guilt and force suspects to confess.<sup>30</sup> Recording these interactions could possibly enable a jury to better weigh the value of identifications and confessions through seeing these matters on video.<sup>31</sup> An appropriate and practical safeguard to protect detectives and not impede their work is to limit the recording to interrogations, suspect line-ups, and witness interviews.<sup>32</sup>

As explained in the previous section and the current section, the impact of police body cameras on citizens and police will be both positive and negative. In the end however, the positives—potentially reducing the use of force and the number of citizen complaints, and aiding jurors' deliberations—outweigh the negatives. Furthermore, the negative issues can be mitigated through means described in Part IV.

### III. CONSTITUTIONAL ISSUES

#### A. FIRST AMENDMENT

The First Amendment of the United States Constitution reads that Congress shall make no law “abridging the freedom of speech, or of the

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<sup>28</sup> DAN SIMON, *IN DOUBT*, 120–35 (1st ed. 2012).

<sup>29</sup> *See id.*

<sup>30</sup> *See id.* at 121–22.

<sup>31</sup> *See id.* (stating that if the jury knew more about how interrogations were conducted, then they would be more careful about the weight that they place on the confessions that they foster).

<sup>32</sup> *See generally*, *Police Fail to Record Interrogation in Notorious New York Murder Case*, THE INNOCENCE PROJECT (Oct. 24, 2013), <http://www.innocenceproject.org/news-events-exonerations/police-fail-to-record-interrogation-in-notorious-new-york-murder-case>. (examining the story of a young girl who was allegedly murdered by her cousin, who later recanted part of his confession. However, the interview was not recorded, which prompted NY police officers to record confessions from start to finish to rebut the presumption of a false confession); Carrie Johnson, *New DOJ Policy Urges Agents to Videotape Interrogations*, NPR (May 21, 2014), <http://www.npr.org/blogs/thetwo-way/2014/05/21/314616254/new-doj-policy-calls-for-videotaping-the-questioning-of-suspects>.

press; or the right of the people to peaceably assemble.”<sup>33</sup> When in public, individuals generally have a right to remain anonymous until they provide cause to be identified.<sup>34</sup> This is because the government aims to encourage public participation in the political process and to restrict laws that unjustifiably infringe on that right.<sup>35</sup> Still, as noted in Part I, implementing body cameras may come with the sort of negative outcomes that are associated with mass, indiscriminate surveillance—namely, the undermining of First Amendment values.<sup>36</sup> One scholar described the interaction of body cameras and free speech as follows:

People who engage in expressive conduct in public know they will be observed. But they may choose, like the pamphleteer or the petitioner, not to reveal their identity, for all sorts of reasons. Camera surveillance virtually nullifies that effort. Because the camera’s recorded images are far better than an informer’s memory, it vastly improves government efforts to link visages with names. Furthermore, as one commentator points out, “surveillance of a person’s movements could, over time, reveal associational tendencies as thoroughly as a membership list.”<sup>37</sup>

Professor Stephen Slobogin, whose writings have addressed this issue, believes that the government should have to justify the use of cameras in public places on legitimate law enforcement ground.<sup>38</sup> Unfortunately for those opposing the increase of government surveillance, cases challenging government surveillance on First Amendment grounds are rare, as they often do not reach the merits of the First Amendment claim.<sup>39</sup> The best claim that opponents of body-camera surveillance have may be that police body cameras would create a chilling effect on their “collective effort to foster beliefs through lawful advocacy.”<sup>40</sup> Establishing standing to sue, however, would likely be difficult.<sup>41</sup>

The *Lujan* Supreme Court case explained that standing requires: (1)

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<sup>33</sup> U.S. CONST. amend. I.

<sup>34</sup> *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 200 (1999) (holding that requiring individuals distributing pamphlets to wear identification badges was not constitutional because it discouraged participation in the political process and there was no legitimate cause for requiring identification).

<sup>35</sup> *See id.*

<sup>36</sup> *See, e.g., Burrows, supra* note 26, at 1125–29.

<sup>37</sup> Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 *MISS. L.J.* 213, 257–58 (2002).

<sup>38</sup> *Id.* at 286–96.

<sup>39</sup> Matthew Lynch, *Closing the Orwellian Loop Hole: The Present Constitutionality of Big Brother and the Potential for a First Amendment Cure*, 5 *FIRST AMEND. L. REV.* 234, 258 (2007).

<sup>40</sup> *Id.* at 263–64.

<sup>41</sup> *Id.*

2015]

*POLICE BODY-MOUNTED CAMERAS*

77

“injury in fact”—that is, a “concrete and particularized” legal harm that is “actual or imminent, not ‘conjectural’ or ‘hypothetical’”; (2) the injury arises from “the challenged action of the defendant” and (3) the injury is “likely” to be “redressed by a favorable decision.”<sup>42</sup>

This description shows why it is difficult to establish a First Amendment claim for police body cameras or any kind of surveillance, even though it would likely have an effect on freedom of association and consequently on freedom of speech.<sup>43</sup> For one, it would be nearly impossible to show any kind of concrete injury as the case would be purely speculative concerning how “society” generally, or the plaintiff specifically, was impacted.<sup>44</sup> The effect may also be a subjective feeling of fear, which is legally insufficient according to the foregoing case law.<sup>45</sup> Thus, any First Amendment claims against police body cameras, despite their social impact, are likely to fail.<sup>46</sup>

Despite the probable lack of standing to sue, it is nonetheless likely that police body cameras will indeed have some negative impact at rallies, protests, and anywhere else that police officers can be found; with enough review and resources, the government could study the general movements of people who have provided no reason for suspicion.<sup>47</sup> These First Amendment issues, while lacking a strong argument in court, can still be addressed through regulation addressed in Part IV.

#### B. FOURTH AMENDMENT

Claims against police body cameras may find greater viability under the Fourth Amendment’s guarantees against unreasonable search and seizure and the right to be secure in one’s person, houses, and effects. Police body-mounted cameras deviate the most from general surveillance in that body cameras are more readily capable of entering the homes of individuals. When analyzing the potential Fourth Amendment objections to police body cameras, the two viable options are that the cameras pose (1) a physical invasion of a constitutionally protected area, or (2) an actual expectation of privacy by the person being recorded exists.<sup>48</sup>

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<sup>42</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>43</sup> *See, e.g., Lynch, supra* note 39, at 263–64.

<sup>44</sup> *See id.*

<sup>45</sup> *Id.*

<sup>46</sup> *See id.* at 266–68 (explaining that standing needs to be an injury specific to a person and trying to represent others is not a way to fulfill that requirement).

<sup>47</sup> *See id.* at 241–43.

<sup>48</sup> *See Katz v. United States*, 389 U.S. 347, 360 (1967).

*Katz v. United States* is still the leading case on Fourth Amendment interpretation and put forth the idea of a “reasonable expectation of privacy.”<sup>49</sup> Since *Katz*, some Supreme Court justices have held that long-term surveillance in the form of GPS tracking of individuals in public spaces interferes with an individual’s expectations of privacy.<sup>50</sup> In *United States v. Jones*, the plurality stated, “[S]ociety’s expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual’s car for a very long period.”<sup>51</sup> Nearly all police camera footage shot in public would seemingly involve short-term surveillance of what the officer sees. But a constitutional problem may arise if all body camera footage is coalesced and reviewed, and police patrol particular positions for extended periods of time and thus approach the point of “long-term” surveillance that concerned the *Jones* plurality.<sup>52</sup> The massive amount of data collected by all of these police officers spread throughout the city could serve as a roadmap for tracing people’s daily activities.<sup>53</sup>

Interestingly enough, police body-mounted cameras can actually *increase* compliance with the Fourth Amendment if their usage is regulated.<sup>54</sup> Since police body cameras also film the officer’s actions, the cameras may pressure these officers to comply with Fourth Amendment protections since the officers know they are being recorded.<sup>55</sup> One study concluded that police violate the constitution in 30 percent of the searches and seizures that they conduct.<sup>56</sup> Introducing body cameras could decrease this number by creating a record of the search that can be watched and reviewed for accuracy—matters to be resolved include establishing that a search ever took place, tracking evidence seized, whether there was any property damage done by officers, and even aiding determinations of probable cause.

To ensure that police are held accountable to the Fourth Amendment, there must be protocols in place to ensure that recording all searches is

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<sup>49</sup> *Id.*

<sup>50</sup> *United States v. Jones*, 132 S. Ct. 945, 958 (2012) (Alito, J., concurring in plurality opinion).

<sup>51</sup> *Id.*

<sup>52</sup> *See id.*

<sup>53</sup> See Mark J. Blitz, *The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21, 65 (2013).

<sup>54</sup> David A. Harris, *Is the Exclusionary Rule a Good Way of Enforcing Fourth Amendment Values?: Picture This: Body Worn Video Devices (Head Cams) as Tools for Insuring Fourth Amendment Compliance by Police*, 43 TEX. TECH L. REV. 357, 363 (2010).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

routine.<sup>57</sup> David Harris, a University of Pittsburgh law professor, believes that providing a strong incentive for officers to record their encounters could be a suitable regulation; Professor Harris proposes a presumption in favor of the defendant's story unless there is a recording, which would create an effective motivation, stating,

[The] absence of a recording of the relevant search and seizure would give rise to a presumption that the defendant's version of events should be accepted, absent (1) a compelling reason explaining the failure to record, and (2) a finding that the defendant's version of events could not be believed by a reasonable person.<sup>58</sup>

With such a presumption in place, police body cameras actually help to make sure officers are honoring Fourth Amendment rights. Further, to push officers to make sure they record all searches, the definition of "compelling reason," in camera regulations would need to be narrowed.<sup>59</sup> When dealing with a camera that records continuously, there would be virtually no reason not to record besides being assaulted and having the camera ripped from your uniform.<sup>60</sup>

#### IV. REGULATION

Police body cameras will require significant regulations in order to ensure that their implementation will promote the interests of citizens.<sup>61</sup> To promote the social justice goals of police body-mounted cameras, (i) these cameras should run continuously, (ii) officers should provide notice to individuals being recorded, (iii) there should be broad public disclosure to the community, (iv) a recording should only be used when a dispute arises based on accuracy or use of force, and (v) a technological standard should be put in place.<sup>62</sup>

Although there is no constitutional protection afforded to what one voluntarily disclosed to another party, disclosure is a warranted regulation for police body-mounted cameras because it promotes good behavior by the public.<sup>63</sup> That is, knowledge that one is being recorded is more likely to result in the individual altering their behavior since they too know that

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *See id.*

<sup>61</sup> *See Stanley, supra note 8.*

<sup>62</sup> *See id.*

<sup>63</sup> *See United States v. White, 401 U.S. 745, 751 (1971).*

their actions will be scrutinized.<sup>64</sup> Furthermore, notice cannot be given to everyone the officer records in the peripherals of their camera; thus, broad public disclosure should be made for areas where police are wearing body-mounted cameras.

Meanwhile, in regards to whether to have the cameras running continuously or only at certain times, the former is preferred since selective recording allows too much room for tampering and error (such as an officer forgetting to turn on the camera). Although a presumption in favor of the defendant's story—as put forth by Professor Harris<sup>65</sup>—helps in this situation, the steady stream of footage would certainly be helpful as a safety net.

The American Civil Liberties Union (ACLU) has written in favor of continuously running body cameras, citing their distrust of governmental discretion and belief that continuous recording will best serve the interests of the public.<sup>66</sup> The ACLU model remedies privacy issues through two means: control of recordings and length of retention.<sup>67</sup> The ACLU believes that officers should have no control over recordings as there has been manipulation of dash cam footage in the past—an issue which can extend to body camera footage.<sup>68</sup> However, there is the issue of officers' general paperwork and speaking with coworkers at the station that the ACLU does believe need not be recorded, is unfairly harsh on police officers, and has a potential for abuse by supervisors in the police force.<sup>69</sup> To remedy this, the ACLU believes that much of the camera footage should be deleted in weeks unless it is flagged for potential misconduct or contradictory stories.<sup>70</sup> Another option is not having cameras record continuously but instead contain some technology that responds to heightened voices.<sup>71</sup>

Still, the ACLU's solutions leave something to be desired. The weekly deletion of footage seems extreme in that items may not be flagged in time and cases have not gone to trial so enough time has not passed for memory lapse and contradictory stories. Having cameras respond to heightened voices also leaves room for manipulation and an easy excuse. Many routine police activities such as traffic stops do not involve heightened voices, yet the need for a recording may arise even during

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<sup>64</sup> See, e.g., Lovett, *supra* note 10.

<sup>65</sup> See Harris, *supra* note 54 at 363.

<sup>66</sup> Stanley, *supra* note 8.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

“quiet” exchanges or the use of visual cues. For example, a driver may suddenly assault an officer, and the camera would allow no context for the officer’s response (which may involve the use of force).

Instead, a better solution would be having body cameras turn on automatically as soon as officers leave the police station. This would allow officers a place to interact freely with their coworkers while keeping them accountable outside. Next, a requirement for officers to confirm their cameras have turned on, and are recording continuously before they enter their cars, can also further ensure there is no tampering. Captured footage can also be kept on a large data drive, with access completely prohibited unless there is a factual or abuse of authority issue. These proposals pose safeguards to ensure that footage is not misused or leaked.

The ACLU guidelines for flagging also urges police to post guidelines for filing a complaint and inform those recorded of their right to do so.<sup>72</sup> The ACLU calls for deleting videos after a few weeks if a complaint has not been filed.<sup>73</sup> If force was used, the recording is automatically flagged.<sup>74</sup> However, while this could work, it ignores cases where stories begin to conflict at trial, and deleting the video forces the process to rely on personal knowledge testimony. Therefore, saving all of the recordings on a large drive for roughly two years and deleting any older videos can remedy this problem. Citizens should also have access to these recordings, but only if they are the subject of the video.<sup>75</sup> This will allow them to refresh their memory of what happened and may promote a clearer understanding of events.

Nonetheless, some opponents to the cameras have voiced concerns with the impact that the cameras would have on officers’ performance and safety. For example, one former officer interviewed by National Public Radio (NPR) stated that “the whole atmosphere tells you right at the outset that if there’s a bad ending, you’re going to be called a murderer, you’re going to get death threats in your home.”<sup>76</sup> There is also a related argument that cameras place officers in danger by hampering their ability to “act and react in dangerous situations.”<sup>77</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See, e.g., Gordon, *supra* note 18.

<sup>77</sup> See, e.g., David Feige, *Brutal Reality: When Police Wear Body Cameras, Citizens Are Much Safer*, SLATE (Apr. 2015), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/04/police\\_body\\_cameras\\_cops\\_commit\\_less\\_violence\\_and\\_complaints\\_are\\_real.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/04/police_body_cameras_cops_commit_less_violence_and_complaints_are_real.html) (citing an NPR interview).

In regards to the foregoing arguments, it is the author's contention that the footage itself can provide one of the most comprehensive views of an incident, so that every officer can walk confidently knowing that the reality of the situation has been captured and that their proper response will be recognized. There will always be individuals upset at the loss of life at the hands of a police officer even when the officer's action was justified (and this may even cause the death threats referenced in the NPR interview<sup>78</sup>), but this is an inevitable part of police work that exists even without the use of cameras. As for the allegations that officers' safety will be at risk, such an argument assumes that an officer's instincts and training will be trumped by mere concerns for liability. However, such an assumption does not seem warranted.

When regulated correctly, body-mounted cameras will be able to hold officers responsible for their actions and promote safety for all involved, all while protecting the privacy rights of citizens. Effective guidelines are required for proper integration of body-mounted cameras into a police force, as failure to do so can result in undesirable consequences.

## V. CONCLUSION

### A. WHAT BODY CAMERAS MEAN FOR THE FUTURE

Police body-mounted cameras tread a fine line between a massive public surveillance measure and a tool for citizens to keep their government accountable.<sup>79</sup> Still, when all the drawbacks and benefits are weighed, these body cameras provide a way for citizens to monitor the massive authority given to police officers in a way and on a scale never available before.<sup>80</sup>

Looking through the lens of the First and Fourth Amendments, the proposed regulations of this note will prevent them from impeding the freedom of association and they will actually benefit Fourth Amendment guarantees.<sup>81</sup> Because cameras will only be used for purposes of factual accuracy, flagged claims, and use of force, all extraneous information will be inaccessible and other access is limited. Therefore, citizens will be able to freely associate without any undue burden.<sup>82</sup> On Fourth Amendment issues, these cameras will allow even greater accountability, as officers

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<sup>78</sup> *Id.*

<sup>79</sup> *See supra* Part III.

<sup>80</sup> *See id.*

<sup>81</sup> *See id.*

<sup>82</sup> *See id.*

will be recorded doing searches and observing factors that they cite in their probable cause determinations.<sup>83</sup>

Body cameras will likely be a significant tool for law enforcement in the future. It is important that, as we approach this new era of police accountability, we do so with an eye towards preserving our freedoms and ensuring these cameras are implemented with these concerns in mind.

#### B. WHAT BODY CAMERAS CANNOT DO

With police body-mounted cameras gaining so much popularity in the news and even with the President, they may seem to be an absolute remedy to resolve perceived abuses of authority.<sup>84</sup> However, these cameras are definitely not a cure-all, and their limitations must be recognized.

An example is the recording of Eric Garner's fatal encounter with police, as mentioned in the introductory section of this note. Police body camera videos shown in courtrooms will likely look a lot like the Garner video.<sup>85</sup> The video depicts Garner, a heavysset man, choked to death as he continually states, "I can't breathe."<sup>86</sup> The incident was caught on video by a bystander who recorded it on their cell phone.<sup>87</sup> Still, the grand jury ultimately did not indict the officer involved.<sup>88</sup> The recording of John Crawford's lethal encounter with police is another potent example. Crawford was shot to death by police at a Wal-Mart for holding an air rifle that he had picked up inside of the store.<sup>89</sup> Video footage from ceiling cameras inside the store show that Crawford is shot almost immediately after police first encounter him even when it appears that he was not aiming the gun at anyone.<sup>90</sup> Nonetheless, a grand jury opted not to issue

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<sup>83</sup> *See id.*

<sup>84</sup> Nolan Feeney, *Obama Requests Funds for Police Body Cameras to Address 'Simmering Distrust' after Ferguson*, TIME (Dec 1, 2014), <http://time.com/3613058/obama-ferguson-police-body-cameras-funding/>.

<sup>85</sup> Gene Demby, *What We See in the Eric Garner Video, and What We Don't*, NAT'L PUB. RADIO (Jul. 29, 2014, 8:03 AM), <http://www.npr.org/blogs/codeswitch/2014/07/29/335847224/what-we-see-in-the-eric-garner-video-and-what-we-don't>.

<sup>86</sup> Al Baker et al., *supra* note 6.

<sup>87</sup> Demby, *supra* note 85.

<sup>88</sup> Andrew Siff et. al., *Grand Jury Declines to Indict NYPD Officer in Eric Garner Chokehold Death*, NBC N.Y. (Dec. 4, 2014, 1:59 PM), <http://www.nbcnewyork.com/news/local/Grand-Jury-Decision-Eric-Garner-Staten-Island-Chokehold-Death-NYPD-284595921.html>.

<sup>89</sup> Elahe Izadi, *Ohio Wal-Mart Surveillance Video Shows Police Shooting and Killing John Crawford III*, WASH. POST (Sept. 25, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/09/25/ohio-wal-mart-surveillance-video-shows-police-shooting-and-killing-john-crawford-iii/>.

<sup>90</sup> *Id.*

any indictments for Crawford's death.<sup>91</sup>

In light of the outcomes of those recorded deaths, it is not surprising that some are calling police body-mounted cameras a "Band-Aid solution" that ignores the deep-seated racial bias held by officers and even grand jury members.<sup>92</sup> As such, how would a video taken from a body camera be any different?

The trend here is that not only are officers very rarely convicted of any crimes, they are not even charged.<sup>93</sup> Despite recordings of these events, grand juries have decided that use of force was justified in both of these killings.<sup>94</sup> This preexisting bias against minority groups and in favor of police officers is deeply ingrained in the American psyche, and that is not a problem that body cameras can solve.<sup>95</sup> Society is willing to take officers at their word, and the Supreme Court has backed this up in *Graham v. Connor*, which states, "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."<sup>96</sup>

Thus, officer involved shootings are based on a subjective standard of reasonableness. As long as that officer was in fear for his life, his actions are justified.<sup>97</sup> In his article for Slate, Voorhees cites the research of Phillip Stinson, a professor at Bowling Green State University.<sup>98</sup> Stinson's research show that between 2005 and 2011 there were 2718 justified homicides by law enforcement, with only forty-one officers facing any charges, not convictions, for murder or manslaughter.<sup>99</sup> This gulf of disparity shows that officers are often given the benefit of the doubt in these cases. Finally, the conviction rate for officers charged with crimes is only one in three, half that of an average citizen.<sup>100</sup>

Police body cameras can provide evidence of police abuse of

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<sup>91</sup> Mark Berman, *No Indictments After Police Shoot and Kill Man at an Ohio Wal-Mart; Justice Dept. Launches Investigation*, WASH. POST (Sept. 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/09/24/no-indictments-after-police-shoot-and-kill-man-at-an-ohio-wal-mart-justice-dept-launches-investigation/>.

<sup>92</sup> Nia-Malika Henderson, *With Eric Garner, Obama's Body Camera Argument Just Took a Big Hit*, WASH. POST (Dec. 3, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/12/03/obamas-body-camera-argument-just-took-a-big-hit/>.

<sup>93</sup> Voorhees, *supra* note 24.

<sup>94</sup> *Id.*

<sup>95</sup> Henderson *supra* note 92.

<sup>96</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989); Voorhees, *supra* note 24.

<sup>97</sup> Voorhees, *supra* note 24.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

authority but cannot make juries and judges convict officers.<sup>101</sup> The implementation of police body cameras will reduce this use of force, but it does not seem that viewing a video of the shooting will change a jury's opinion of an officer.<sup>102</sup> To change this, we must change society's values, not a task directly solvable through law.<sup>103</sup> In the meantime, as cameras capture more of what officers are doing and police begin to police themselves more carefully, maybe we will see the rate of officer indictments go up if police related shootings become a relative rarity.

In order to truly create trust between officers and minority groups we must work to heal the wounds left by these recent cases. Police body cameras are no doubt a step in the right direction. But, in order to truly see a conducive relationship develop between these two groups, police officers must be held accountable for what they do on these recordings.<sup>104</sup>

### C. CONCLUSIONS

Police body cameras can be an effective tool to protect citizens, increase police accountability, and ensure accurate fact-finding.<sup>105</sup> As long as footage is carefully regulated and controlled, these cameras will serve the best interests of society and not become just another form of mass scale surveillance.<sup>106</sup> The rise in popularity of body cameras shows both a police willingness to change the culture of some of their work and the willingness of citizens to be recorded to influence their police department. These cameras represent change for the relationship between officers and citizens, and by keeping police accountable and providing citizens with an accurate record, they help to remove some of the fear that visits many when they interact with an officer.

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *See id.* (claiming that police officers are given more leeway to act if the officer was on duty and this outcome stems from the way that our society views officers and certain groups in society).

<sup>104</sup> *Id.*

<sup>105</sup> *See Stanley, supra note 8.*

<sup>106</sup> *See id.*