Washington University
Law Review

VOLUME 95 NUMBER 2 2017

WHO SHOULD OWN POLICE BODY CAMERA VIDEOS?

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ABSTRACT

Numerous cities, states, and localities have adopted police body camera programs to enhance police accountability in the wake of repeated instances of police misconduct, as well as recent reports of more deep-seated police problems. These body camera programs hold great promise to achieve accountability, often backed by millions of dollars in federal grants.

But so far, this promise of accountability has gone largely unrealized, in part because police departments exercise near-total control over body camera programs and the videos themselves. In fact, the police view these programs chiefly as a tool of ordinary law enforcement rather than accountability—as helpful for gathering evidence against individuals in cases of resisting arrest, drug possession, vandalism, and so on.

This disturbing drift has undermined the promise of body camera programs in two ways: first, police control erodes accountability. Police control the videos themselves and resist disclosure, making it impossible for communities to hold them accountable for misconduct.

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Second—the chief focus of this article—using these videos in ordinary law enforcement exacerbates the pernicious discovery asymmetry in the criminal justice system, affording police and prosecutors early access to these videos, but depriving defendants and their counsel of the very same evidence. Defendants once again find themselves pleading guilty or preparing for trial without access to the evidence against them or worse, evidence that might be exculpatory.

We therefore propose a solution: shift ownership and control of police body camera videos from police departments to a neutral police accountability agency. This move would solve both problems: first, this new agency would disclose videos to the public and the media, especially in high-profile cases, according to neutral rules calibrated to enhance accountability. Second, this agency would disclose these videos in ordinary criminal cases to both sides equally—affording criminal defendants timely access to crucial evidence, which will promote a more just, accurate, and efficient criminal justice system.

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INTRODUCTION

Imagine if police departments across the nation sought funding for a new program described as follows: "We propose a video surveillance program targeted toward heavily patrolled low-income neighborhoods of color in order to gather evidence of crimes such as drug possession, vandalism, and resisting arrest. We will primarily use this evidence to prosecute criminal cases against civilians—not police officers—withholding it from defendants to encourage pleas, and allowing access only to those who take the risk of going to trial. The public and the media will rarely, if ever, gain access to these videos, and we will release them at our unilateral discretion; we will, of course, own and control all the footage." If this were the avowed purpose and description of a program, few would support it. Yet this is precisely how most police body camera programs are currently run.

Over the past few years, scores of major cities, regional hubs, and smaller towns have begun to deploy body cameras on their police officers to provide fuller evidence of the interactions between officers and civilians.[1] Nearly every large city plans eventually to use them—95% according to a recent survey.[2] Proponents argue that body cameras will keep officers accountable by deterring unlawful or abusive conduct[3] and reducing citizen complaints.[4] In 2014, then-President Obama promised $75 million for body camera programs,[5] and cities such as New York,[6] Baltimore, and Los Angeles have launched their own programs,[7] often in the face of allegations of police misconduct or abuse.

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1. *See infra* 0.

2. Mike Maciag, *Survey: Almost All Police Departments Plan to Use Body Cameras*, GOVERNING THE STATES AND LOCALITIES (Jan. 26, 2016), https://perma.cc/A57A-FTZZ.

3. *E.g.*, Floyd v. City of New York, 959 F. Supp. 2d 668, 685 n.66 (S.D.N.Y. 2013) (noting body cameras will deter police abuse such as offensive language, racial slurs, or excessive force). *See infra* 0.

4. Barak Ariel et al., *"Contagious Accountability:" A Global Multisite Randomized Controlled Trial on the Effect of Police Body-Worn Cameras on Citizens' Complaints Against the Police*, 44 CRIM. JUST. & BEHAV. 293 (2017) (93% drop in citizen complaints).

5. Justin Sink, *Obama to Provide Funding for 50,000 Police Body Cameras*, THE HILL (Dec. 1, 2014), https://perma.cc/GQL5-BM2K. Over the past two years, as part of the Body-Worn Camera (BWC) Policy and Implementation Program, the Bureau of Justice Assistance provided 179 awards to state, local, and tribal law enforcement organizations totaling over $41 million. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T. OF JUSTICE, UPDATE: FISCAL YEAR 2016, BODY-WORN CAMERA PROGRAM 1 (2016).

6. *See* Ashley Southall, *Do Body Cameras Help Policing? 1,200 New York Officers Aim to Find Out*, N.Y. TIMES, Apr. 27, 2017; *Floyd*, 959 F. Supp. 2d at 685 (ordering New York City to implement a pilot program to address widespread constitutional violations by the police).

7. *See infra* 0.

At the same time, body camera proponents separately pitched these programs to police departments as a tool of ordinary law enforcement, leading to their widespread adoption.

But in an often unremarked development, police have taken control of body camera programs and—most damaging—they have claimed sole ownership of the videos themselves.[8] They decide which system to buy; they determine how to configure those systems; they decide when and how to activate the cameras; they control who may have access to the videos and when; and they determine how long to keep the videos, and whether to destroy them.[9] Most policy makers assume such police control falls within the natural order of things. Why shouldn't police departments control the programs, own the videos, and control their disclosure?

We argue that police control threatens to undermine these body camera programs in their infancy.[10] First, police control erodes accountability, leaving body cameras to fulfill only their law enforcement function. Police control of body camera programs allows police to determine which interactions to record, which to reveal to the public, and which to destroy.[11] Police in cities such as Los Angeles, San Francisco, Washington D.C., Albuquerque, and Baton Rouge have turned off, blocked, failed to activate, or otherwise interfered with the recording of controversial and potentially unlawful police conduct.[12]

And where controversial, often fatal, encounters are recorded, time and again, police have resisted disclosing these videos, often in cases where

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8. For example, New York City's proposed body camera regulation expressly makes body camera videos the "property of the New York City Police Department." *See* New York City Police Department Operations Order, Body-Worn Cameras—Pilot Program II (June 26, 2016) (draft for public comment) [hereinafter NYC Draft Regulation] (outlining field use of body cameras for uniformed officers only), *available at* https://perma.cc/T53F-7YF3; AURORA POLICE DEP'T, DIRECTIVE MANUAL 16.04, BODY WORN CAMERAS (2016); *see also* BALT. CTY. POLICE DEP'T, BODY-WORN CAMERA USE POLICY (2016) ("System recordings are the property of the Department."), *available at* https://perma.cc/HTJ7-L4ES; CH. POLICE DEP'T, SPECIAL ORDER S03-14: BODY WORN CAMERAS (2016) ("All digitally recorded data created with the BWC are the property of the Chicago Police Department."), *available at* https://perma.cc/7HWX-3KFQ; Miami-Dade Cty. POLICE DEP'T, DIRECTIVE 16–18: REVISION TO THE DEPARTMENTAL MANUAL, NEW POLICY (2016), *available at* https://perma.cc/UPM9-CPNF; OAKLAND POLICE DEP'T, ORDER I-15.1: PORTABLE VIDEO MANAGEMENT SYSTEM 5 (2014), *available at* https://perma.cc/4B6B-678F.

9. *See infra* 0; Kate Mather, *Why Some of the Most Controversial Police Shootings Aren't on Video*, L.A. TIMES (Apr. 2, 2017), https://perma.cc/9AK4-T2U9.

10. It will not be the first time a federal funding program for local police has had the unfortunate effect of increasing the expanse and intrusiveness of local policing. Rachel Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 872 (2015) (noting that federally-funded programs "provide incentives to local police departments to conduct additional arrests, use force, intimidate citizens, take private property, and engage in electronic surveillance of individuals").

11. *Cf.* Melendres v. Arpaio, 784 F.3d 1254, 1266 (9th Cir. 2015) (requiring videotaping of traffic stops based in part on sheriff department's destruction of evidence.)

12. *See infra* 0.

doing so also helps them avoid accountability. They enjoy this power to conceal because in nearly every jurisdiction, laws, regulations, or police policy give them sole ownership and control of the videos.[13]

The shooting of teenager Laquan McDonald in Chicago in 2014 illustrates how police control of body camera video stymies accountability. When a Chicago police officer shot McDonald sixteen times, killing him, several dashboard cameras were rolling.[14] Police on the scene nevertheless claimed, falsely, that McDonald was lunging at them with a knife before he was killed,[15] apparently confident the videos would never be released. Indeed, the police department fought release until a court ordered their disclosure a year later.[16] Only then did the public learn the truth: McDonald was walking away from police when he was killed.[17] The day of the videos' release—but a year after prosecutors first viewed the videos—the authorities charged Officer Jason Van Dyke with first-degree murder, making him the first Chicago police officer in decades to be charged with murder for an on-duty incident.[18] Police videos, and body cameras in particular, can help officer-community relations by promoting accountability, but not when police have unilateral control of the videos.

At the same time, police control of body camera videos creates a second problem. Police are increasingly using police and surveillance video in prosecuting ordinary criminal cases,[19] including misdemeanors such as resisting arrest[20] and more serious drug offenses.[21] The numbers reveal an uncomfortable truth: body camera videos are used far more often

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13. *See infra* 0.

14. Jeremy Gorner & Jason Meisner, *FBI Investigating Death of Teen Shot 16 Times by Chicago Cop*, CHI. TRIB., Apr. 14, 2015.

15. Monica Davey, *Officers' Statements Differ from Video in Death of Laquan McDonald*, N.Y. TIMES, DEC. 5, 2015.

16. Nausheen Husain, *Data: Laquan McDonald Timeline: The Shooting, the Video and the Fallout*, CHI. TRIB., JAN. 13, 2017.

17. Monica Davey & Mitch Smith, *Video of Chicago Police Shooting a Teenager is Ordered Released*, N.Y. TIMES, Nov. 19, 2015.

18. Monica Davey & Mitch Smith, *Chicago Protests Mostly Peaceful After Video of Police Shooting is Released*, N.Y. TIMES, Nov. 24, 2015.

19. V. Noah Gimbel, *Body Cameras and Criminal Discovery*, 104 GEO. L. J. 1581, 1584 (2016) ("[B]eyond serving as an instrument of police accountability, BWCs are also capable of producing countless terabytes of video evidence for use in criminal prosecutions.").

20. State v. Herrin, No. 1 CA-CR 12-0141, 2012 WL 3233227, at *2 (Ariz. Ct. App. Aug. 9, 2012) (dash camera video admitted to show defendant resisted arrest); State v. Gibbons, No. 2012-UP-177, 2012 WL 10841329, at *1 (S.C. Ct. App. Mar. 14, 2012) (video played to show resisting and harassment); Sturgeon v. State, No. 01-94-00355-CR, 1995 WL 71430, at *6 (Tex. Ct. App. Feb. 23, 1995) (surveillance video admitted to show defendant resisted arrest).

21. United States v. Cejas, 761 F.3d 717, 722 (7th Cir. 2014) (hidden video mounted on pole); State v. Gibbs, 775 S.E.2d 925 (Table), 2015 WL 4094231, at *1 (N.C. Ct. App. July 7, 2015) (body camera video from undercover officer recording drug transaction).

against ordinary citizens than the police. According to a recent survey of lead prosecutors, 92.6% report their office has used them against private citizens and only 8.3% against police officers.[22]

Use of video for ordinary criminal law enforcement is not itself the main problem. But police control of these videos means that criminal defendants do not have equal or timely access to these videos, thus exacerbating the pernicious discovery asymmetry already infecting the criminal justice system.[23]

The primary focus of this Article, therefore, is this more hidden development—police control of body camera video exacerbates the unfairness already deeply entrenched in the criminal justice system. Police and prosecutors leverage their control of body camera footage to pursue ordinary criminal cases. In these prosecutions, the government may withhold these videos from defendants until after a plea, after a suppression motion, and perhaps up to the eve of trial. For the 94% of state-level criminal defendants whose cases end in plea bargains, not trials,[24] they may never see the video evidence in their own case. This asymmetry merely adds to the long list of evidence to which police and prosecutors enjoy unilateral access, evidence often central to a criminal case.[25]

We say prosecutors "leverage" the videos and "withhold" them, but in reality, they simply treat the videos as another type of discovery,[26] another relevant piece of evidence that they do not have to disclose until well after first appearance, arraignment, bail argument, and even guilty plea. With some noteworthy, recent exceptions, such as Texas,[27] defendants are not entitled to receive police reports, witness statements, 911 calls, radio runs, lab reports, and other relevant evidence in a timely fashion—they very often plead guilty without ever having seen them.[28]

This asymmetry unfairly deprives defendants of timely, relevant

22. LINDA MEROLA ET AL., CTR. FOR EVIDENCE-BASE CRIME POLICY, GEORGE MASON UNIV., BODY WORN CAMERAS AND THE COURTS: A NATIONAL SURVEY OF STATE PROSECUTORS 5 (2016), *available at* https://perma.cc/M32V-4DM8. The authors report this as a key finding but warn that far more total citizens are prosecuted than police—"so these percentages are not directly comparable." *Id.*

23. *See infra* Part IV(a).

24. Missouri v. Frye, 566 U.S. 133, 143 (2012) (noting that 94% of state defendants and 97% of federal defendants plead guilty).

25. *See infra* Part IV(a).

26. N.Y.C. POLICE DEP'T, NYPD RESPONSE TO PUBLIC AND OFFICER INPUT ON THE DEPARTMENT'S PROPOSED BODY-WORN CAMERA POLICY 24 (2017) (confirming that body camera video will not be released but subject to "the standard discovery process between the prosecution and the defense"), *available at* https://perma.cc/C5JE-DTSM.

27. TEX. CODE CRIM. PROC. ANN. art. 39.14(j) (West 2015) (providing for discovery before plea).

28. *See infra* Part IV(a).

evidence. Body camera videos can be relevant to ordinary criminal cases in numerous ways. The video may show the initial stop and search by the police, and whether that stop was supported by reasonable suspicion under the Fourth Amendment.[29] The video may support a charge of drug possession, or create doubt. Under most body camera policies, the video footage will likely capture the physical arrest itself, particularly relevant when evaluating a charge of resisting arrest, or the propriety of a search.

Police body camera programs have thus reached an ironic crossroads: programs designed chiefly to instill trust and reduce friction, excessive force, and other misconduct in neighborhoods facing pervasive and intrusive policing, have instead *aided* that same manner of law enforcement in those same neighborhoods—without contributing to officer accountability. We must decide, what are body cameras for?

We propose a solution to this disturbing trend: shift the ownership and control over videos from the police to a neutral, third-party government agency—a police accountability agency. This new agency would follow new disclosure rules. These rules would promote accountability by calibrating disclosure according to that value. Second, these rules would enhance fairness in the criminal justice system through early, symmetrical disclosure of footage to defendants and their counsel.

Many scholars have written about the promise of body camera videos to enhance accountability,[30] as well as their potential drawbacks.[31] But even these critics fail to question the premise that police will own and control the actual videos. Most focus on accountability, but practically no one has considered how these videos further exacerbate the information asymmetry that pervades our criminal justice system.[32] In a thoughtful piece, V. Noah Gimbel has argued that, pursuant to a defendant's discovery rights, prosecutors should not have a monopoly on the use of body camera footage as evidence—but even he assumes that police will own and control these body camera videos and that we must address the

29. Mary Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. 897, 954 (2017) (assessing likely future effect of body cameras on criminal procedure and the Fourth Amendment in particular); *infra* 0.

30. *See infra* 0.

31. Mary Fan, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 ALA L. REV. 395, 396 (2016) (highlighting how pervasive body cameras can intrude upon individual privacy); Bernard E. Harcourt, *Cover-Up in Chicago*, N.Y. TIMES, Nov. 30, 2015 (identifying how elected officials manipulate release of videos to ensure reelection); Howard M Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 833 (2015) (urging caution that body cameras will not solve police misconduct).

32. *But see*, Sarah Lustbader, *The Real Problem with Police Video*, N.Y. TIMES, Dec. 2, 2015; *Gimbel*, *supra* note 19.

issue in the context of a defendant's discovery rights.[33] But treating these videos as ordinary criminal discovery means that defendants will not obtain this crucial evidence in time for it to matter, just as with other discovery. We propose taking these videos out of the discovery regime entirely so that prosecutors and defense counsel alike will have equal and early access.

First, our proposal would enhance transparency and accountability by ensuring timely disclosure of body camera videos to the public, the media, watchdogs, and others in high-profile cases, with appropriate consideration of privacy and public safety. Such timely disclosure will itself act as a deterrent; if the police know that misconduct will become public quickly—and will not languish on a police server for years—they will take more care. This new agency would balance disclosure against genuine law enforcement needs—delaying disclosure temporarily only if disclosure would pose a tangible and significant threat to an individual or an investigation. It would also take into account the privacy of civilians and officers, blurring and redacting identifying features where appropriate. But since the chief goal is accountability, these delays should be rare and brief. In less prominent cases too, this agency would afford early access to potential civil litigants so that they, perhaps with counsel, can determine whether they have a case or whether the police acted appropriately.

Second, in the criminal justice sphere, our proposal would afford criminal defendants access to body camera videos that is *symmetrical* to the access currently afforded to criminal prosecutors. Defendants and their lawyers would have immediate access, via a web link, to view these videos in time for it to matter: at the defendant's first appearance before a judge. Especially in misdemeanor cases, such timely access will afford defendants a fair opportunity to attack probable cause—the main purpose of a first appearance[34]—as well as to make arguments concerning bail. Timely access will encourage prosecutors and judges to dismiss bad cases outright. It will allow defendants to negotiate plea bargains with far better information. Since approximately 94% of state cases plead out,[35] our proposal for symmetrical discovery access could have significant consequences for any case in which a body camera video is relevant evidence.

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33. Gimbel, *supra* note 19, at 1584–86.

34. *See generally* Gerstein v. Pugh, 420 U.S. 103 (1975) (many jurisdictions include a "Gerstein hearing" to determine probable cause in their first appearance for warrantless arrests. *See, e.g.*, Rothgery v. Gillespie County, Tex., 554 U.S. 191 (2008) (noting that Texas' intitial appearance before a magistrate "combines the Fourth Amendment's required probable-cause determination with the setting of bail") (citing *Gerstein*, 420 U.S. at 103).

35. *Frye*, 566 U.S. at 143.

0 of this article sketches the potential benefits of body cameras, including accountability. It shows that the chief premise and motivation of these programs lies in such police accountability.

0 shows how police department control shifts body camera programs from being a tool for police accountability to a tool of ordinary law enforcement. This Part does so primarily by discussing how such programs currently work, detailing the technological logistics.

0 proposes that we take body camera footage outside police control. It proposes that a new, neutral oversight agency (a police accountability agency) possess and control body camera videos and oversee their disclosure to prosecutors and defense lawyers, as well as to the media and public. It acknowledges the shortcomings of many existing police review boards, but suggests that our proposed agency will have greater power simply because it will control the videos.

0 presents the heart of our proposal: timely defendant access in criminal cases to body camera videos. This part situates our proposal within the larger literature of defendant discovery, plea bargaining, and the way in which the criminal justice system treats defendants unfairly. It proposes that police, prosecutors, and defense counsel have ready access via the internet to body camera videos taken at the time and place of the event or arrest.

Finally, 0 begins a rough sketch of how such a police accountability agency would disclose body camera videos to the media and public, balancing the needs of law enforcement and privacy against the public's right to keep the police accountable.

I. THE PROMISE OF ACCOUNTABILITY

Americans have increasingly called for both greater accountability and transparency in police conduct.[36] Perhaps ironically, the source of these demands arises from what promises to be the solution: video recording of police activity. Before turning in later parts to the potential drawbacks of police body camera videos, this part briefly sketches the need for accountability and the great promise body cameras hold as a solution. It highlights that the chief driving force behind body camera programs is accountability.

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36. *See infra* 0.

A. The Problem

The videos are as familiar as they are disturbing. In July 2014, police officer Daniel Pantaleo put Eric Garner in a chokehold; cell phone video from a bystander recorded Garner pleading and saying, "I can't breathe," before choking to death under the weight of numerous New York police officers.[37] In October 2014, Chicago police shot and killed a teenager named Laquan McDonald sixteen times. Dashboard camera video, released a year later, led to murder charges against officer Jason Van Dyke.[38] In April 2015 a South Carolina police officer shot Walter Scott in the back, killing him.[39] In July 2015, a police officer shot unarmed Samuel Debose during a traffic stop. Police body camera videos played a central role in publicizing the killing and prompting murder charges against the officer, Ray Tensing.[40]

In these cases, and many others,[41] video captured officers killing often unarmed, black civilians. In many of these cases, the officers made up an exculpatory story. Officer Michael Slager, for example, claimed Walter Scott had grabbed his taser and appeared to plant a weapon at Walter Scott's side.[42] And in these cases, the video appeared to many viewers to show black men and boys gunned down by police for no good reason.[43]

For those unfamiliar with law enforcement tactics in heavily policed communities, these videos were shocking. For residents of those communities, the videos affirmed what they had been seeing—and, for some, decrying—for decades.[44] Indeed, many statistics help to support these anecdotal incidents. Numerous studies show police stop, question, and frisk blacks and other minorities in far higher numbers than whites, and that racial bias plays a role in these disparities.[45] Some studies show

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37. Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES, July 18, 2014.

38. Jason Meisner et al., *Chicago Releases Dash-Cam Video of Fatal Shooting after Cop Charged with Murder*, CHI. TRIB., Nov. 24, 2015.

39. Michael S Schmidt & Matt Apuzzo, *South Carolina Officer is Charged with Murder of Walter Scott*, N.Y TIMES, Apr. 7, 2015.

40. Robinson Meyer, *Body-Camera Footage Gets an Officer Indicted for Murder*, THE ATLANTIC (July 29, 2015), https://perma.cc/7GE4-JTME.

41. *See, e.g.*, Richard Fausset, Richard Perez-Pena & Campbell Robertson, *Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Investigation*, N.Y. TIMES, July 6, 2016; Jeremy Gorner, *Report: Paul O'Neal Shot After Officer Said He Reached into Waistband*, CHI. TRIB., Aug. 13, 2016; Peter Holley & Katie Zezima, *White Tulsa Officer Charged in Death of Unarmed Black Man, Freed on Bond*, WASH. POST (Sept. 23, 2016), https://perma.cc/4MFD-WUJY.

42. Michael S. Schmidt & Matt Apuzzo, *supra* note 39.

43. *Id.*; Robinson Meyer, *supra* note 40.

44. *See generally* Tom R. Tyler et al., *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization,* 11 J. EMPIRICAL LEGAL STUD. 751 (2014).

45. *See, e.g.*, Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of*

that police kill blacks more often than whites,[46] but at least one recent study may draw these conclusions into doubt.[47]

B. The Body-Camera Solution

In response to the killings and other abuses caught on video, a broad coalition of voices, from the American Civil Liberties Union (ACLU) to law enforcement, has called for police to wear body cameras—both to help prevent and deter future misconduct and to document it when it does occur.[48] And many have praised the great potential to improve policing that these programs hold, though others have begun to question whether these body camera programs will reduce unlawful police use of force.[49] Even if the programs do not reduce unlawful use of force, many say they will at least hold police accountable after the fact.

Force (July 2016), *available at* https://perma.cc/KUC9-VPRC; Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N. 813, 821–22 (2007); LYNN LANGSTON & MATTHEW DUROSE, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STAT., SPECIAL REPORT: POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS 2011 (2013); S. F. DIST. ATT'Y, BLUE RIBBON PANEL ON TRANSPARENCY, ACCOUNTABILITY, AND FAIRNESS IN LAW ENFORCEMENT, REPORT 28 (2016) (finding "racial disparities regarding SFPD stops, searches, and arrests, particularly for Black people"), *available at* https://perma.cc/A9WC-AMWZ.

46. *See, e.*g., Cody T. Ross, *A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States*, *2011–2014*, PLoS ONE 10(11): e0141854 (2015) (finding that the probability of being black, unarmed, and shot by police is about 3.49 times the probability of being white, unarmed, and shot by police on average).

47. Fryer, *supra* note 45, at Abstract (for "officer-involved shootings – we find no racial differences in either the raw data or when contextual factors are taken into account.").

48. *See, e.g.*, Press Release, The Leadership Conference on Civil and Human Rights, Civil Rights, Privacy, and Media Rights Groups Release Principles for Law Enforcement Body Worn Cameras (May 15, 2015) (signed by thirty-four rights groups including the ACLU, NAACP, Data & Society, and Electronic Frontier Foundation), *available at* https://perma.cc/4GUN-PHP7?type=image; Brianna Keilar & Dan Merica, *Hillary Clinton Calls for Mandatory Police Body Cameras, End 'Era of Mass Incarceration'*, CNN (Apr. 29, 2015), *available at* https://perma.cc/8JSK-2DZJ; Carrie Dann & Andrew Rafferty, *Obama Requests $263 Million for Police Body Cameras, Training*, NBC NEWS (Dec. 1, 2014), https://perma.cc/U5B5-BD9Q; Press Release, U.S. Senator Brian Schatz of Hawaii, Sen. Schatz, Paul & Reps. Brown, Ellison, Cummings Introduce Bipartisan Legislation to Help Expand Responsible Use of Police Body Cameras (Mar. 26, 2015), *available at* https://perma.cc/PQH2-X5ZY; Paul Chambers, *Hayward Police Officers Push for City to Fund Body Cameras*, KTVU NEWS (July 5, 2015), https://perma.cc/AW5Y-34RB; Megan Cassidy, *Phoenix Officials Push to Buy Body Cameras for all Patrol Officers*, AZ CENTRAL (Feb. 8, 2016), https://perma.cc/88L3-22N3; Bailey Hicks, *Carolina Beach Police Push for 30 New Body Cameras*, WECT6, Apr. 7, 2016; Chad Marlow & Jay Stanley, ACLU, *We're Updating Our Police Body Camera Recommendations for Even Better Accountability and Civil Liberties Protections*, FREE FUTURE BLOG (Jan. 25, 2017), https://perma.cc/DDZ5-L569.

49. *See, e.g.*, CYNTHIA LUM ET AL., EXISTING AND ONGOING BODY WORN CAMERA RESEARCH: KNOWLEDGE GAPS AND OPPORTUNITIES 11 (2015) (Reviewing all empirical studies and concluding that it is too early to draw definitive conclusions; some studies, for example, show reduced use of force, whereas others show higher rates of arrest.), *available at* https://perma.cc/57PU-WGG6.

Then-Attorney General Loretta Lynch described her hopes for body camera programs as follows: "Body-worn cameras hold tremendous promise for enhancing transparency, promoting accountability, and advancing public safety for law enforcement officers and the communities they serve."[50] The ACLU has characterized body cameras as "a win for all," as long as privacy safeguards are implemented.[51] The Washington D.C. Police Complaints Board's report and recommendation on body cameras found "several" potential benefits to such a program, citing "the potential to enhance public safety and improve relations between police and members of the public by reducing misconduct, facilitating the resolution of incidents that arise, and improving officer training."[52] The report also noted that body cameras can enhance "public confidence in the criminal justice system."[53]

In New York, a federal court in 2013 found that the New York Police Department's stop and frisk program violated the federal constitution and ordered the police department to develop a pilot body camera program. In doing so, it found that body cameras are "uniquely suited to addressing the constitutional harms at issue in this case."[54] These cameras would accomplish this goal by allowing police supervisors to monitor the recordings, preserving them to verify complaints against the police, and evaluate the effectiveness of the body cameras. The court appointed a monitor to make sure this all happened.[55] The pilot program began in April 2017.[56]

With these high hopes, programs are proliferating, from large cities to smaller towns and even colleges.[57] On the federal side, in December of 2014, then-President Obama promised $75 million toward purchasing 50,000 body cameras, part of a larger program.[58] As part of this promise,

50. Mark Berman, *Justice Dept. Will Spend $20 Million on Police Body Cameras Nationwide*, WASH. POST (May 1, 2015), https://perma.cc/KAV3-288U.

51. JAY STANLEY, ACLU, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL, VERSION 2.0 1 (2013), *available at* https://perma.cc/4G4N-S2KE.

52. D.C. OFFICE OF POLICE COMPLAINTS, POLICE COMPLAINTS BD., ENHANCING POLICE ACCOUNTABILITY THROUGH AN EFFECTIVE ON-BODY CAMERA PROGRAM FOR MPD OFFICERS 2 (2014), *available at* https://perma.cc/LC9X-KFQP.

53. *Id.*

54. *Floyd v. City of New York*, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013).

55. *Id.* at 676.

56. Southall, *supra* note 8.

57. THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS & UPTURN, POLICE BODY WORN CAMERAS: A POLICY SCORECARD (2016), *available at* https://perma.cc/G4LB-NA7M; BRENNAN CENTER FOR JUSTICE, POLICE BODY-WORN CAMERA POLICIES (2016), *available at* https://perma.cc/G4P8-Y9FH; Nancy Doolittle, *Cornell Police Implements Body-Camera Program*, CORNELL CHRONICLE (Feb. 2, 2017), https://perma.cc/KU8U-4CCD.

58. Sink, *supra* note 5.

the Department of Justice allocated $20 million for pilot body camera programs.[59] The Bureau of Justice Assistance has awarded $41 million to law enforcement agencies over the past two years through its body-worn camera program.[60]

States and localities,[61] along with some private organizations, have also begun funding body camera programs. Nearly every large police department, 95%, report they have body cameras or plan to employ them.[62] The Police Executive Research Forum (PERF) body camera survey of 500 law enforcement agencies, conducted in August of 2013, found that among the 254 agencies that responded, approximately one-quarter reported that they already used body cameras.[63] More recent estimates by the Department of Justice (DOJ) say approximately 4000–6000 agencies currently use the technology.[64] More than thirty states now have legislation relating to body cameras.[65]

Body cameras represent only one response to police misconduct. Many departments have committed to better training, particularly in de-escalation techniques, better relations with the communities they patrol, and other more specific improvements. Beyond the police, private citizens have already sought to keep the police accountable by recording their actions with cell phone cameras. It is important to note that the vast majority of the abusive police conduct captured on video over the past few years has been the result of civilian bystander filming, not police video. Several communities have formed organized groups to regularly monitor the police through cell phone recording, with the hope of both deterring

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59. Press Release, Dep't of Justice, Office of Public Affairs, Justice Department Announces $20 Million in Funding to Support Body-Worn Camera Pilot Program (May 1, 2015), *available at* https://perma.cc/V6X4-DGWR.

60. BUREAU OF JUSTICE ASSISTANCE, *supra* note 5, at 1.

61. *See, e.g.*, Eric Markowitz, *Police Departments Face a Crucial Question: How To Pay For Body Cameras?*, INT'L BUS. TIMES, May 12, 2016; Press Release, State of Conn. Office of Policy & Mgmt., Body-Worn Recording Equipment (BWRE) Reimbursement Grant Program for Local and University Law Enforcement Agencies (Mar. 2, 2016) (The Connecticut Department of Policy and Management announced "the availability of grants-in-aid to municipal law enforcement agencies and state university police forces . . . for body-worn recording equipment and digital data storage devices or services."), *available at* https://perma.cc/Y34U-GBEU.

62. Maciag, *supra* note 2 (a survey by the Major Cities Chiefs Association and Major County Sheriffs' Association reported 95% plan to use body cameras).

63. U.S. DEP'T OF JUSTICE, COMMUNITY ORIENTED POLICING SERVICES, POLICE EXEC. RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM 2 (2014), *available at* https://perma.cc/23QS-LH4R.

64. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, BODY-WORN CAMERA TOOLKIT: NATIONAL LANDSCAPE, *available at* https://perma.cc/5SZ5-SA54.

65. National Conference of State Legislatures, *Body-Worn Cameras Interactive Graphic* (2016), *available at* https://perma.cc/DUA7-FXD6.

bad conduct and saying, symbolically, *we are watching*.[66]

Nevertheless, body cameras have become perhaps the most widespread organized response to communities' cries for accountability, reflecting the hope that they will bring about many improvements, including deterring police abuse, quickly resolving complaints against the police, and enhancing democracy and transparency more generally.

C. Accountability

Those promoting body camera programs primarily insist we must deploy them to keep the police accountable. They claim that the programs will do so by deterring police from using excessive force in the first place. If police know their conduct will appear on the nightly news, they are less likely to use excessive force. In cases where police do use excessive force, those promoting body camera progams hope that these videos will also provide evidence to hold individual officers, or police departments, accountable, whether through criminal prosecutions or civil remedies. Finally, proponents believe that these programs will reduce false accusations of police abuse,[67] and provide evidence of appropriate and even heroic police conduct.[68]

We accept the premise that body cameras have the potential to enhance accountability in these ways. Our chief point is that police ownership and control of body camera programs and videos will undermine each of these avenues of accountability. Shifting control over the programs and the videos to a trusted, neutral, police accountability agency, by contrast, will promote each of the methods, as further elaborated below.

The remainder of this Part and 0 will elaborate on how body cameras should promote accountability and how police control threatens to undermine each of those methods. In 0 we focus on the complementary problem: this same police control of body camera videos, ironically, exacerbates the unfairness in the ordinary criminal justice system.

1. Deterrence

Many have argued police and citizens will behave better when they know they are being watched and recorded by police body cameras.[69]

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66. Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. 391, 407 (2016).

67. Ariel*, supra* note 4.

68. Julie Bosman, *Hollywood-Style Heroism is Latest Trend in Police Videos*, N.Y. TIMES, MAY 28, 2017.

69. *Ariel, supra* note 4; 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

Preliminary evidence appears to support this theory,[70] although some studies find no positive effect.[71] In the now-famous study conducted in Rialto, California, researchers asked whether body cameras would lead to an increase in "socially-desirable behavior" on the part of police officers. They found that over the course of one year with body cameras, use-of-force incidents decreased by over 50% compared to control conditions. Not only did the police use less force, but citizen complaints against police decreased by 90%.

Another pilot study, conducted in Mesa, Arizona, found a 75% drop in use-of-force complaints and a 40% reduction in citizen complaints against officers.[72] A separate study on the impact of body cameras conducted with the Orlando Police Department concluded that over the course of one year with cameras, use-of-force incidents fell by 53% among officers using the cameras, while civilian complaints against those officers fell by 65%.[73]

On the other hand, no one has appeared to study whether body cameras or their videos have led to greater accountability of individual officers after misconduct.

2. Post-Hoc Evidence

One can imagine policy-makers, watchdogs, and others taking a more methodical approach to police departments overall, relying on scores or

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on Police Use-of-Force 8 (2013) (unpublished manuscript), *available at* http://perma.cc/74NX-AB74. "It seems that knowing with sufficient certainty that our behavior is being observed or judged affects various social cognitive processes: We experience public self-awareness, become more prone to socially-acceptable behavior and sense a heightened need to cooperate with rules." *Id.* at 2–3.

70. *See, e.g.*, Darren Henstock & Barak Ariel, *Testing the Effects of Police Body-Worn Cameras on Use of Force During Arrests: A Randomised Controlled Trial in a Large British Police Force*, EUROPEAN J. CRIMINOLOGY 1, 2 (Jan. 16, 2017) ("Overall, we found a 50 percent reduction in the odds of force used when BWCs are present compared with control conditions . . . . However, the effect concentrates in open-hand tactics (physical restraints and non-compliant handcuffing), with no discernible effect on categories of more aggressive force responses (for example, dogs, Tasers, batons, pepper spray)."); Justin T. Ready & Jacob T.N. Young, *The Impact of On-Officer Video Cameras on Police–Citizen Contacts: Findings from a Controlled Experiment in Mesa, AZ*, 11 J. EXPERIMENTAL CRIMINOLOGY 445, 445 (2015).

71. *See* Zusha Elinson, *Police Body Cameras Don't Reduce Use of Force: Study*, WALL ST. J., Nov. 23, 2016 (discussing preliminary results in Milwaukee, Spokane, and Tempe).

72. RYAN STOKES & LEE RANKIN, MESA POLICE DEP'T, PROGRAM EVALUATION & RECOMMENDATIONS: ON-OFFICER BODY CAMERA SYSTEM (2013), *available at* https://perma.cc/4GB3-NPNA.

73. *See* Wesley G. Jennings, Matthew D. Lynch & Lorie A. Fridell, *Evaluating the Impact of Police Officer Body-Worn Cameras (BWCs): The Orlando Police Department (OPD) Experience*, 43 J. CRIM. JUSTICE 480, 480 (2015). *See also* Nick Wing, *Study Shows Less Violence, Fewer Complaints When Cops Wear Body Cameras*, HUFFINGTON POST (Oct. 13, 2015), https://perma.cc/DM8N-3WNM; Mitch Perry, *USF/Orlando PD Study Finds Police Body Cameras Reduce Citizen Complaints*, FLA. POLITICS (Oct. 12, 2015), https://perma.cc/8E8D-8DTA.

hundreds of videos to recommend systemic improvements in training and policy. That is, the body camera videos would further accountability department-wide.

Of course, this type of accountability requires an independent agency—and one that *has control* of all body camera videos—and not simply those that might come into its hands on a sporadic basis. This is precisely what jurisdictions have failed to do, and what we propose: a dedicated agency collecting body camera videos to study and draw more generalized conclusions for improved police conduct.

Meanwhile, such an agency would also address individual cases. It would use videos to sanction individual officers, to decide complaints, and award money damages. It would also use them to establish larger policy goals to reduce injury and death through de-escalation techniques, for example.

3. Claims Against the Police

Body camera videos will provide evidence for those bringing claims against the police for excessive force or other unlawful conduct. These may be administrative actions or law suits under Section 1983[74] or state law. These claims can, of course, deter future police misconduct, if enforced, but their primary purpose will be to provide a remedy for those aggrieved by police misconduct.

In the ordinary case the remedy will be money damages for individuals. But in cases involving widespread abuse, plaintiffs could seek injunctive relief. Plaintiffs could bring class actions or the Department of Justice could bring its own law suits based upon body camera videos. Of course, in these instances plaintiffs or the DOJ would need to access a much broader selection of body camera videos. Our proposed police accountability agency would develop procedures for deciding how to address wide-spread problems in police departments vis-à-vis access to large numbers of videos.

4. Reducing False Claims

Proponents of body cameras also expect them to lead to quicker resolution of complaints against police officers: video might show which party was at fault, or leave less room for debate. Proponents also predict that body cameras will reduce the number of civilian complaints against

74. Newmaker v. City of Fortuna, 842 F.3d 1108, 1112 (9th Cir. 2016) (noting in Section 1983 lawsuit that dash camera video contradicted officer's claim he hit the victim only twice).

police in the first place, because civilians will refrain from filing meritless complaints.[75] Of course, the primary hope is to lower instances of police abuse overall. Body cameras might also reduce settlement payouts, which, in New York City, totaled nearly $1 billion over the decade ending in 2010.[76] Two European studies, one conducted in England and the other in Scotland, indicate that body cameras do contribute to the resolution of citizen complaints against police officers and may in fact reduce false complaints.[77] In addition to the Mesa, Arizona study finding drastic reductions in complaints against officers,[78] a separate study in Mesa found that officers wearing body cameras were more cautious and risk-averse than those who did not wear them.[79]

5. Enhancing Democracy

Body cameras promise not only to deter misconduct, but also to further reforms by revealing misconduct. Marc Jonathan Blitz notes that video is uniquely capable of engendering such reform movements: "Video footage is far more able than eyewitness testimony to shift the debate from questions about what occurred in a police encounter to questions about how a just and well-functioning society should prevent excessive use of police force."[80] Institutionalized video recording programs could help vindicate disenfranchised members of society whose claims of police abuse have long been met with skepticism, and also vindicate the many earnest police officers who are met with hostility among those they seek to serve.

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75. *See, e.g.*, *Developments in the Law—Policing: Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1802 (2015).

76. Mary Calvi, *NYPD Paid Nearly $1 Billion to Settle Lawsuits*, CBS N.Y. (Oct. 14, 2010), https://perma.cc/6KTW-K7M9.

77. ARIEL & FARRAR, *supra* note 69, at 8. For reviews of the existing evidence, see Henstock & Ariel, *supra* note 70; MICHAEL D. WHITE, U.S DEPT. OF JUSTICE, OFF. OF JUSTICE PROGRAMS, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 17, 20–22 (2014), *available at* https://perma.cc/ER9F-BCBE.

78. *See supra* note 48 and accompanying text.

79. READY & YOUNG, *supra* note 70, at 445–58.

80. *See* Marc Jonathan Blitz, *Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats,* AM. CONST. SOC'Y 7 (May 2015), https://perma.cc/J4AP-W32U. *See also* State v. Henderson, 27 A.3d 872, 877–78 (N.J. 2011) ("Study after study revealed a troubling lack of reliability in eyewitness identifications. From social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, the record proves that the possibility of mistaken identification is real. Indeed, it is now widely known that eyewitness misidentification is the leading cause of wrongful convictions across the country."); Jim Dwyer, *Witness Accounts in Midtown Hammer Attack Show the Power of False Memory*, N.Y. TIMES, May 14, 2015.

II. POLICE CONTROL OF BODY CAMERA PROGRAMS

Against this great potential, police department ownership and control of body camera programs threatens to undermine the very accountability promised by these programs. This section will survey how current body camera systems work, pointing out along the way the degree to which the police control procurement, use, disclosure, and destruction of these videos. We will present our proposed alternative in later parts.

A. Procurement

Police and law enforcement interests generally play a central role in procuring body camera systems. In New York City, for example, a federal court ordered the police department to create a body camera pilot program precisely to remedy constitutional violations and improve accountability.[81] But the New York City Police Department (NYPD) had sole discretion in choosing a vendor.[82]

Small police forces similarly have discretion when it comes to procurement. For example, small police forces often choose body camera systems that favor their interests rather than the public's interest in holding them accountable for their actions. The Sheriff's Office of Stanton County, Nebraska, for example, recently acquired body cameras for its ten officers last year.[83] Their chief expressed what is likely true for many jurisdictions: that they bought the system to "protect [them]selves" and "collect video evidence." The selected body camera company, Wolfcom, now uses that law enforcement-based rationale to promote its body camera systems to other law enforcement agencies.[84]

Other body camera vendors also market directly to the police and law enforcement interests. The websites for Axon,[85] Digital Alley,[86] and Wolfcom,[87] tout features beneficial to police, such as officer protection. They tend to avoid emphasizing less police-friendly features, such as

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

82. Mark Morales, *Taser Questions NYPD's Body-Camera Contract Award*, WALL ST. J., Oct. 13, 2016.

83. *Stanton County Sheriff's Office Chooses WOLFCOM Police Body Cameras*, WOLFCOMUSA, https://perma.cc/XD8V-YXDN.

84. *Id.*

85. *Axon Body 2*, AXON ("When you need to stay focused, count on Axon Body 2 to record the situation at hand . . . . Axon Body 2 has your back."), https://perma.cc/UKL6-8KTR.

86. *Body Worn Cameras: Most Versatile Body Camera on the Market*, DIGITAL ALLY, https://perma.cc/WB2N-KBMU ("Each unit comes with a variety of mounts and camera modules that help meet your agency's needs.").

87. *Wolfcom Police Body Cameras*, WOLFCOMUSA, https://perma.cc/TS8Q-43CA ("[B]ecause 'Cops Deserve The Best'").

enhanced police accountability.

Wolfcom's mission appears entirely police-focused, ending with their slogan: "because 'Cops Deserve the Best.'"[88] It explains its name by reminding us that, "a [w]olf is a natural born leader and survivor . . . . When a leader is killed, another takes his place." Other body camera vendors similarly highlight advantages to police and law enforcement, such as ease of use and help with authenticating videos for trial. Many highlight tools that allow police to view video in the field on their smart phones at the moment and make tags.

Axon takes a more moderate tone but similarly focuses on how its body cameras will help officers rather than hold them accountable. They assure officers that "Axon Body 2 has your back."[89]

These vendors often deemphasize features that might keep police officers accountable. They rarely if ever mention how civilians can use body camera videos to sue the police, or how the media can use footage to demonstrate persistent police abuse. They do not remind police that body camera or dash camera videos have led to investigations of police shootings in Chicago, Cleveland, and elsewhere. Such facts would make for poor marketing when police buy the product; they would make for far better marketing if those interested in accountability were the ones shopping for a system.

B. Use and Capture

Police control how and when body cameras operate and often face few sanctions when sidestepping department policies. For example, though many systems automatically trigger recording upon certain events, these same systems allow the officer discretion whether to activate the recording device, and, more important, whether to stop it.[90] Officers may, at times, need this discretion to avoid recording private matters, such as a domestic violence victim's identity or the interior of a victim's home.

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88. Id. ("Our nations [sic] Law Enforcement officers and first responders risk their lives every single day. Despite their honorable sacrifices, their integrity is under constant attack. To protect those that protect us all, our mission is to create the best body cameras in the world. A body camera that will see and remember what an officer may have forgotten under stressful conditions. A body camera that will be the truth behind false accusations when an officer needs it the most, and one that will put the viewer right in the shoes of the wearer. We push ourselves to make the best Police body cameras in the world because 'Cops Deserve The Best.'" [sic]).

89. *Axon Body 2*, AXON, https://perma.cc/LE9A-HPCV.

90. For a review of various policies with regard to officer discretion by jurisdiction, see THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS & UPTURN, *supra* note 57; BRENNAN CENTER FOR JUSTICE, *supra* note 57.

Nevertheless, such power to stop recording has led, in a great many cases, to abuse.[91] When white officers shot and killed Alton Sterling outside a grocery store in Baton Rouge, both officers's body cameras had been dislodged.[92] Intentionally and unintentionally, officers have been found to violate body camera policies at alarming rates, including a particularly damning 2014 Department of Justice report about use of force in Albuquerque.[93] Researchers at the ACLU have cited body camera policy compliance rates as low as 30%.[94]

When officers fail to record when they should, they often face few, if any, consequences.[95] In addition, some courts have refused to find that police supervisors have any legal obligation to ensure their officers's recording equipment works.[96]

D. Access

Vendors and police configure the access to body camera videos in a manner designed to build a case against a suspect, and to prosecute that suspect in court, rather than to keep police accountable. For example, in some instances police alone have direct access to the videos. This configuration runs entirely counter to accountability: the very party that the program aims to check currently has full control over its contents.[97]

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91. Barak Ariel et al., *The Deterrence Spectrum: Explaining Why Police Body-Worn Cameras 'Work' or 'Backfire' in Aggressive Police–Public Encounters*, POLICING (Jan. 31, 2017), https://perma.cc/QC5H-B58Z.

92. *ACLU Questions Lack of Police Body Cams in Alton Sterling Shooting*, CBS/AP (July 6, 2016), https://perma.cc/T7MQ-ZF9C.

93. Letter from Jocelyn Samuels, Acting Asst. Att'y Gen., U.S. Dep't of Justice & Damon P. Martinez, Acting U.S. Att'y, U.S. Dep't of Justice, to Richard J. Berry, Mayor, City of Albuquerque 26 (Apr. 10, 2014), *available at* https://perma.cc/N86R-6XCB ("We also reviewed numerous reports where officers and supervisors on the scene failed to turn on their lapel cameras or belt tapes. Officers failed to record some incidents even when it was the officers themselves who initiated the contact, making their failure to switch on their cameras or recorders before beginning the encounter especially troubling. For example, in an incident where officers fired Tasers at 'Mike' after stopping him for speeding, none of the officers present recorded the incident. Many of the reports include repetitive or standardized explanations for failing to record, such as 'the immediacy of the situation' and 'rapid and unexpected event.' These descriptions were provided where it was clear that the officer had a clear opportunity to record the event. We found very few examples of officers being reprimanded for failing to record force incidents.").

94. STANLEY, *supra* note 51, at 4.

95. Connie Fossi-Garcia & Dan Lieberman, *Investigation of 5 Cities Finds Body Cameras Usually Help Police*, FUSION TV (Dec. 7, 2014), https://perma.cc/JQ94-5792. An investigation that reviewed records from five police departments concluded that officers "have little to [no] fear when violating department policies about recording." *Id.*

96. *See, e.g.*, Reid v. Womack, No. 2:11–CV–788, 2014 WL 4094465, at *13 (D. Utah Aug. 18, 2014) ("Furthermore, no supervisor is required or expected to regularly review dash-cams or daily logs of all of its officer when there is no known or suspected problem.").

97. *See* Ashley Southall, *Civil Rights Lawyers Plan to Challenge New York's Body-Camera*

Similarly, many officers can review videos in the field via a smartphone app or otherwise. For example, the Axon system—formerly known as "TASER"—provides a mobile app that lets officers "stream, tag, and replay video right on your phone."[98] Digital Ally similarly provides a mobile app to stream directly from the camera in the field.[99] When officers use excessive force, or in any controversial case, officers can review any footage before filing an incident report stating what they saw and why they behaved as they did; such power allows them to ensure that whatever account they provide conforms to the video evidence. In numerous cases where officers did not have such an opportunity, their own account conflicted substantially with the video record.[100]

Finally, these systems, and their accompanying policies, drafted by the police departments themselves, leave to the discretion of law enforcement the question of whether to release video footage to the public or even to prosecutors. In Los Angeles, police initially refused to release any video footage unless ordered to do so by a court. The Los Angeles Police Department (LAPD) eventually stated that it might reconsider that policy.[101] Notwithstanding, it appears that the LAPD has only released footage primarily to support its own officers's narratives in high-profile use-of-force incidents to date.[102]

The New York Police Department has similarly used its discretion to impose rules that disfavor ready release of videos, particularly to criminal defendants but also to anyone caught on tape interacting with the police. At the same time, it has retained the policy of allowing police to view their own videos before filing a report or making a statement. The NYPD has maintained this position in the face of strong public and community

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Program, N.Y. TIMES, Apr. 16, 2017 (describing lawsuit to delay program in part because officers can view videos before writing their reports).

98. *Axon Body 2*, AXON, https://perma.cc/AB2Y-LDGU.

99. DIGITAL ALLY FIRSTVU HD SERIES, FLYER, DIGITAL ALLY, *available at* https://perma.cc/235F-LJ8Y.

100. Kevin Conion & Steve Visser, *Dashcam Video Appears to Show Fort Worth Cop Shooting Man in the Back*, CNN (Dec. 30, 2016), http://www.cnn.com/2016/12/30/us/fort-worth-texas-police-shooting/index.html; Associated Press, *Michael Slager's Account of Walter Scott Shooting Contradicted by Video, Officers Say*, N.Y. DAILY NEWS (Nov. 7, 2016, 3:03 PM), http://www.nydailynews.com/news/national/officer-account-shooting-contradicted-video-cops-article-1.2862974.

101. Miranda S. Spivack, *Cop Camera Footage: Public Record or Police Property?*, CENTER FOR INVESTIGATIVE REP. (Dec. 21, 2016), https://perma.cc/XDL2-XE6X; Kate Mather, *A Fight Over Access to LAPD Body Cameras is Shaping Up*, L.A. TIMES, Feb. 5, 2015.

102. *See, e.g.*, Kate Mather, James Queally & Joseph Serna, *Protests Continue After LAPD Releases Video Showing Moments Before Fatal Police Shooting*, L.A. TIMES, Oct. 4, 2016. Allyson Scher & Ariel Spierer, *Policing Project to Assist LA: When to Release Body Camera Footage*, POLICING PROJECT, NYU, https://perma.cc/YDP7-ZTFV.

opposition. Indeed, the NYPD itself co-sponsored a survey available to all New Yorkers—yielding a response of roughly 25,000 individuals and several local organizations.[103] This survey, carried out by the Policing Project—affiliated with NYU School of Law—very recently revealed a public far keener on openness in body camera programs than the police.

First, 76% of respondents said that the police should be required to show a person caught in an interaction with police the video "upon request."[104] In response, the NYPD said that it would continue to require individuals to pursue public records requests via New York's Freedom of Information Law[105]—a lengthy process that allows the police to decline to produce the videos for numerous reasons in its discretion.[106] Second, respondents also wanted body-worn camera footage of high-profile incidents released to the public either immediately, or after an internal investigation is complete.[107] The NYPD said it would continue to study the problem, but noted numerous instances in which it would not release videos in high-profile cases for several months, if at all.[108]

Third and most relevant here, the NYPD said that for those depicted in videos and subsequently arrested, it would not release the videos to the individual at all, even after a public records request. Instead, the video would be treated as ordinary criminal discovery[109]—meaning that the individual would likely not receive the video until late in the criminal process—as discussed in detail below.

As for officer access, more than two-thirds of respondents favored "some restrictions" on allowing officers to review their own body camera videos *before* writing a report on the incident. Respondents feared officers would tailor their reports to the video, and perhaps "explain away their conduct."[110] Organizations such as public defenders similarly urged a policy requiring police to write reports before viewing the videos. The NYPD rejected these views entirely, confirming that officers will be

103. POLICING PROJECT, NYU, REPORT TO THE NYPD SUMMARIZING PUBLIC FEEDBACK ON ITS PROPOSED BODY-WORN CAMERA POLICY 6 (2017), *available at* https://perma.cc/TQD3-LD2T.

104. *Id.* at 25. This includes those who strongly agree or agree with the statement: "If a person has an interaction with an officer wearing a body-worn camera, the NYPD should be required to show that person the footage upon request." *Id.*

105. N.Y.C. POLICE DEP'T, NYPD RESPONSE TO PUBLIC AND OFFICER INPUT ON THE DEPARTMENT'S PROPOSED BODY-WORN CAMERA POLICY 24 (2017), *available at* https://perma.cc/C5JE-DTSM.

106. POLICING PROJECT, *supra* note 103, at 26.

107. N.Y.C. POLICE DEP'T, *supra* note 105, at 25.

108. *Id.* at 25–26.

109. POLICING PROJECT, *supra* note 103, at 23.

110. *Id.* at 23.

permitted to view videos before writing their reports.[111]

In sum, police departments—and the vendors they choose—configure body camera systems with an eye toward prosecuting civilians rather than enhancing their own accountability.

E. Prosecution

Finally, this focus on ordinary law enforcement continues once the suspect becomes a defendant and the police hand the case over to prosecutors. Most systems allow prosecutors to access the videos directly, via the vendor's web portal, or indirectly by way of a DVD that the police can supply.[112]

Prosecutors therefore may view these videos in drawing up a complaint, in arguing at any first appearance or bail hearing, in determining a plea offer, and in preparing for trial.

By contrast, defense lawyers and defendants often do not enjoy access to this critical evidence until the eve of trial itself. This asymmetry exacerbates the inequities of the criminal justice system when it comes to access to information and discovery; it provides such a vivid example of our argument that we consider it as a case study of the problem in more detail below in 0. It may also help to explain why most prosecutors believe that body-worn camera evidence will help the prosecution more than the defense.[113]

III. BEYOND POLICE CONTROL

We argue that we must return body camera programs to their chief purpose: accountability. Sure, law enforcement may use these videos in ordinary prosecutions, but that purpose should remain secondary to police accountability and transparency. That dual function requires third-party control. Consequently, a neutral, third-party agency should maintain and control these videos: a police accountability agency.

This agency's main purpose must involve using these videos to deter police misconduct, exposing police misconduct when it occurs,

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111. *Id.* at 22.

112. The Axon system, for example, includes a platform that will share videos with prosecutors via a secure web link. *Evidence.com for Prosecutors*, AXON, https://perma.cc/6P2K-3ZAM.

113. LINDA MEROLA, *supra* note 22, at 34. Of the lead prosecutors surveyed, 62.7% believed that body camera evidence would assist the prosecution more than the defense. By contrast, 5.8% thought that the evidence would be of greater benefit to the defense. *Id.*

sanctioning police for any violations, and developing department-wide programs to reduce future violations. These videos would thus not primarily serve as evidence against suspects but as evidence in claims against the police.

As discussed above, studies suggest the videos will exonerate a great many officers. Indeed, police themselves have embraced body camera programs because they often vindicate officer accounts. But we will only further this goal of exoneration if we disclose videos evenhandedly. By contrast, if the police withhold or selectively disclose videos, the community will lose trust in these programs and discount those programs and discount those videos that truly show an officer acted appropriately.

But in many other instances the videos will show wrongdoing by the police, allowing this police accountability agency to take appropriate steps. These steps should be aimed not necessarily at criminal prosecution of officers but rather preventing future violations.

These videos *are* evidence useful for other purposes, and this neutral agency should develop guidelines—sketched below—for disclosing these videos. The emphasis is on neutrality. This agency would disclose the videos to those depicted at the same time as law enforcement, and as a result, the police and prosecutors would no longer enjoy a privileged position. Similarly, the agency would disclose videos to the media when it would be in the public interest to do so. At least in high profile cases, this public interest would have police accountability as its main criterion. This focus on accountability would contrast with current police policies. Sometimes departments withhold or selectively disclose to serve law enforcement interests. But at other times, law enforcement does so for illegitimate reasons, such as portraying victims of excessive police force negatively[114] or trying to maintain or enhance the reputation of the police department or elected officials.

Below we first sketch the logistics of this independent agency.

A. Independent Agency

This police accountability agency would focus on body camera videos in the first instance. Though it could operate as an indpendent agency, it could also be folded into any larger accountability agency, as long as that agency remained genuinely independent of the police and other law

114. The recent release—two and a half years after the fact—of an additional video that casts doubt on the Ferguson police portrayal of Michael Brown as an aggressive robber is an excellent example of this phenomenon. *See* Mitch Smith, *New Ferguson Video Adds Wrinkle to Michael Brown Case*, N.Y. TIMES, Mar. 11, 2017.

enforcement. We discuss in more detail below the pros and cons of these larger accountability agencies into which our proposed agency might fit.

Our proposed agency would promote police accountability in numerous ways. It would review body camera videos in particular cases where misconduct has been alleged. But it would also establish methods for reviewing and assessing broad samples of body camera videos so as to assess and improve police conduct on the department-level. These two tasks would necessarily involve monitoring the police.

Additionally, the agency would also make the videos accessible to others seeking accountability. It would disclose videos to the media, to individual plaintiffs seeking redress, and to other watchdogs such as the Department of Justice—weighing police accountability against, when relevant, individual privacy interests. And, most relevant for these purposes, in ordinary criminal cases, it would afford speedy and equal access to body camera videos for defense lawyers and prosecutors alike.

Our proposed agency would satisfy the recent calls of scholars, policy-makers, advocates, and others to bring police conduct under greater democratic control and, more specifically, closer regulatory scrutiny.[115] The police enjoy the greatest power of force and surveillance over the American people, and yet are subject to some of the weakest democratic checks and regulatory restraints.[116] We focus on how police have unilateral control over their use of body cameras, but many have noted how they enjoy similarly unregulated control over their use of almost every tactic and device they employ, including checkpoint stops,[117] crackdowns on particular types of crime,[118] Tasers, SWAT teams, undercover operations, drones, recorded interrogations, and so on.[119]

Numerous scholars[120] and government agencies have urged greater

115. *See, e.g.*, Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. Rev. 1827, 1831–35 (2015).

116. *Id.*

117. While the Supreme Court has regulated *how* police may carry out a checkpoint, they have imposed few restraints on when and where they may deploy such checkpoints. *See, e.g.*, *Michigan State Police v. Sitz*, 496 U.S. 444, 464 (1990) (Stevens, J., dissenting) (noting that under the program approved by the majority, "the police have extremely broad discretion in determining the exact timing and placement of the roadblock").

118. Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 36 (2017).

119. Friedman & Ponomarenko, *supra* note 115.

120. *Id.*; Sunita Patel, *Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793 (2016) (assessing community engagement plans and proposing a blueprint); Simonson, *supra* note 66 (describing citizens monitoring the police through cell phone recording groups); David Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1703–05 (2005) (supplying a theoretical background).

community involvement with policing generally[121] and with respect to body cameras in particular. For example, the Final Report of the President's Task Force on 21st Century Policing called for greater community engagement to help remedy distrust of the police.[122] The NYU School of Law Policing Project seeks to gather community views on policing, and otherwise enhance community participation.

In New York, the police department asked the Policing Project to gather community views on the court-ordered pilot body camera program. The NYPD committed to respond to the community, outlining how the "department adjusted its policy in response to the feedback it received, and why."[123] In the end, however, the NYPD chose not to cede control of videos or access to them, despite the public's support for such measures.[124]

Our proposed agency should be staffed with neutral officials and bureaucrats who will make the day-to-day decisions about the programs, the disclosures of video, and so on. But it will also include representatives from numerous stakeholders. In addition to the focus on community input sketched above,[125] the agency will take account of the views of city policy makers and executives, including city councils, mayors' offices, and relevant agencies.

This agency should also include representatives from the police, prosecutors' offices, the defense bar, and judges. The videos will play a growing, legitimate role in ordinary law enforcement; police should play a significant role in determining how they are procured, configured, and used. Lawyers and judges should likewise assist in making these videos available and useful at the earliest stages of the criminal process at first appearances, bail arguments, arraignments, and before guilty pleas.

The agency will cost money. Some cost will simply involve shifting the existing police funds that pay vendors to maintain the videos to this agency; that shift should be revenue-neutral. But the agency will require additional funding to implement a more robust, thoughtful, and liberal disclosure policy. We anticipate that the same motivation behind pushing

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121. *See, e.g.*, U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV. & U.S. ATTORNEY'S OFF. N. DIST. OF ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT (Jan. 13, 2017), *available at* https://perma.cc/3RYK-QNMA.

122. OFF. OF COMMUNITY ORIENTED POLICING SERVICES, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (May 2015), *available at* https://perma.cc/3A9D-N2B3.

123. Joe Joseph, *NYPD Asks Policing Project to Gather Public Input on Body Cameras*, POLICING PROJECT (June 29, 2016), https://perma.cc/D7YE-MTBC. The NYPD recently provided its response. N.Y.C. POLICE DEP'T, *supra* note 105.

124. *See supra* notes 103–107 and accompanying text.

125. *See also* Rachel Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129 (2016) (outlining how to design an oversight agency).

for the program funding in the first place, accountability, can be drawn upon to support the funding needed to actually achieve that goal.[126]

Outside major cities, however, states should likely create a state-wide agency so that each individual municipality need not shoulder the burden and cost of setting up such an agency. Such a state-wide approach would also set up the body camera programs themselves, so that each municipality need not individually source, buy, configure, and maintain the equipment and system.

B. Failures of Existing Police Review Boards

Many large cities already oversee their police departments with internal affairs units or civilian complaint review boards or similar agencies. Many commentators and courts[127] have criticized these units or agencies as failures. Summarizing the prevailing view, one scholar noted that "[police] departments' resistance to disciplining their own officers extends to even the most obvious misconduct."[128]

These existing oversight agencies have failed for many reasons, including small staffs and budgets, lack of enforcement power, and, in some cases, bias toward the very police departments they oversee. They often lack subpoena power, investigative resources, and the power to criminally charge or sanction police officers.[129]

The Department of Justice recently reviewed Chicago's police accountability bodies and found them deficient.[130] The DOJ also made similar findings in Baltimore.[131] These accountability agencies rarely sustained complaints, often failed even to investigate cases, conducted cursory investigations, were stymied by police codes of silence, and had inadequate staffing.[132] Both cities agreed to federal oversight of their police departments, and both have begun to revamp their accountability agencies. Chicago, for example, created a new Civilian Office of Police

126. Chicago has committed funds for a new Civilian Office of Police Accountability with enhanced staffing and resources. Dan Hinkel & Jeremy Gorner, *Chicago Police Vow to Continue Reforms but Few Details Offered*, CHIC. TRIB., Mar. 14, 2017.

127. *See, e.g.*, Beck v. City of Pittsburgh, 89 F.3d 966, 974 (3d Cir. 1996).

128. Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 866 (2016).

129. Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1494 (2016).

130. *See generally* U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 121.

131. U.S DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 140 (Aug. 10, 2016), *available at* https://perma.cc/76MR-2H76.

132. *Id. See also* POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE 15 (2016), *available at* https://perma.cc/B9TD-W5NB ("Chicago's police accountability system is broken.").

Accountability to replace IPRA.

A reader might wonder what makes us believe our proposed independent police accountability agency would fare any better. We suggest that our proposed police accountability agency might succeed where previous efforts have often failed because it will have a concrete role in controlling police videos, and this role will afford it greater ability to oversee police departments. In addition, this agency will hopefully enjoy the greater funding that many governments have willingly afforded to new body camera programs. In short, now is the time for new accountability agencies to ride the popular wave of body cameras in order to achieve a more trusting relationship between police and the communities they serve. And as cities such as Chicago begin to create and fund truly independent bodies, our proposal could dovetail nicely with those ongoing efforts.

Unfortunately, neither Chicago nor Baltimore's proposals for an independent accountability agency to review complaints against the police includes what we urge: that such an agency control police body camera videos.[133] Without that independent control, even these proposed new independent oversight agencies will lack control over the central new tool of police accountability: body camera videos.

C. Servers

Police face high costs and technical challenges storing videos on in-house servers;[134] some departments have chosen to store their videos with the camera vendors, which afford police and prosecutors remote access. These vendors are developing expertise in housing, indexing, and protecting these videos. Nevertheless, even third-party vendors come with potential drawbacks since they develop surveillance tools such as facial recognition software[135] without democratic control or authorization.

Our proposal would not necessarily change the existing physical control of videos by third-party commercial vendors or even police departments; it would simply shift from the police to the police accountability agency complete control over the videos, developing rules

133. United States v. Police Dep't of Baltimore, No. 1:17-cv-00099-JKB (D. Md. 2017); U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 121.

134. POLICE EXEC. RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM 27 (2014), *available at* https://perma.cc/U5HT-9YP8 (claiming that of forty departments consulted, all stored either in-house or on a cloud service managed by a third-party vendor); Josh Sanburn, *Storing Body Cam Data is the Next Big Challenge for Police*, TIME, Jan. 26, 2016.

135. Matt Stroud, *Taser Plans to Livestream Police Body Camera Footage to the Cloud by 2017*, MOTHERBOARD (Jul. 18, 2016), https://perma.cc/GVL2-M4NF.

for their maintenance, disclosure, and deletion, and effectuating those rules by actually deciding who gets what when.

Nevertheless, our proposal to remove control over videos from police departments makes it easier to shift, conceptually, to the notion that tens of thousands of police departments across the country, big and small, should not be attempting to develop and safely maintain massive amounts of video data. In the long run, expert commercial cloud vendors should likely maintain these videos both because they are likely to better guard against hacking and because they can probably maintain and index the material better and more cost effectively.

D. Procurement Decisions

Similarly, the police accountability agency will lead procurement. Law enforcement should certainly play a role in deciding which systems to adopt; they will, after all, be using them. In addition, civilian agencies such as state legislatures, city councils, attorney generals; offices, the comptrollers' offices, civilian complaint review boards, criminal defense offices, and inspector generals' offices should also play a role in the process, including giving input on which systems to procure and how to configure them, with an eye toward goals beyond simply aiding law enforcement. These other agencies, some of which both defend and prosecute police misconduct, will be a necessary voice in shaping a program that furthers accountability.

E. Configuration and Use

The police accountability agency will likewise configure the body cameras and systems to ensure accountability. Police often fail to activate recordings, stop them, or block the view, often in violation of their own departments' policies. The police accountability agency could require more forensic metadata to allow experts to determine whether the camera failed or the officer deliberately interfered with its proper functioning. The agency could require continuous recording while on duty, longer buffering periods (like a DVR, the camera always records but only saves the last 30 or 60 seconds upon activation), or real-time upload (especially as mobile connections become faster).

The police accountability agency could be empowered to impose sanctions on individual officers, supervisors, or entire departments for violations of any recording rules. Today, as already noted, officers rarely suffer discipline for recording violations.

IV. SYMMETRICAL ACCESS

This Part illustrates one of the biggest practical changes brought about by our proposal— access in the context of ordinary criminal cases.

Currently, police and prosecutors control body camera video, and defense counsel must seek those videos by subpoena[136] or other discovery device, and can expect to wait to receive them—sometimes until trial.[137] This asymmetry puts defense counsel at a disadvantage, whether preparing for trial or advising a client to consider a plea. Similarly, defendants themselves must approach a plea offer without potentially critical information concerning the case.

We have argued in general for removing from the police both the physical and legal control over body camera videos in favor of a police accountability agency. The chief corollary of our proposal relates to defense discovery: under our proposal, defense counsel will have near-symmetrical access to such video as prosecutors.

Indeed, these videos *will no longer be produced in discovery at all*. This is fitting, since body cameras have been championed and funded as tools to enhance police accountability and not merely as ordinary law enforcement tools. In our proposed system, prosecutors and defense counsel alike will seek the videos from the police accountability agency just as each would have to seek, for example, cell phone video from a civilian. True, the Agency will establish automatic access for each side as detailed below; but prosecutors, police, and other law enforcement will not have presumptively superior claims to these materials.

Our proposal fits into the larger debate concerning defense discovery, and the unfair asymmetry between defense and prosecution—whether before plea or even during trial. This section will briefly survey that debate in general. It will then sketch how defense counsel should be afforded access to the videos before turning to reasons to support such early, timely access.

This section will provide reasons rooted in policy, fairness, accuracy, and efficiency for providing defendants and their counsel timely access to body camera videos. We will therefore present our argument below focusing on misdemeanor and simple felony cases. These cases are the

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136. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 20.3(a) (4th ed. 2016) (noting most jurisdictions do not require prosecutors to produce anything not in their possession or control).

137. Housley v. Tanner, No. 09-4358, 2010 WL 4924776, at *6 (E.D. La. 2010) (defense counsel first saw incriminating undercover police body camera video at trial).

most likely to involve body camera video, whether documenting the charged crime itself such as resisting arrest or, in the case of a possession charge, supplying evidence concerning reasonable suspicion or probable cause for a stop or search. Misdemeanors themselves make up about 80% of criminal cases, involving roughly 10.5 million per year.[138] These cases almost always conclude with a plea, often at first appearance, and present the highest risk of innocent defendants pleading guilty.[139] This results from the desire to bring an end to what could be a long and torturous process, especially in cases where the offered penalty appears light compared to what the individual would face under most sentencing schemes.[140]

Admittedly, in some ways, by making body camera videos more accessible to defense counsel, and automatically available to both sides, we inject these videos even deeper into ordinary criminal cases, running at cross purposes with our premise: that the chief purpose of these videos lies in police accountability and not ordinary law enforcement cases. Nevertheless, as discussed more above, law enforcement has already retooled these videos from methods of accountability to methods of prosecution, and that development will be almost impossible to reverse. Plus, it is hard to justify categorically excluding a class of relevant evidence from prosecutors or defense counsel.

There is no reason that body cameras cannot serve both goals—accountability and law enforcement—simultaneously acting effectively as truth-seekers. In order for this to succeed, we argue that, at the very least, there should be a fair symmetry in their use; again, if body cameras *chief* purpose is police accountability, then when they are used for their secondary purpose (law enforcement) in ordinary criminal cases, they should not be treated as within the sole and unilateral dominion of the police and prosecutors. Even if these purposes are regarded as equal, symmetrical access would be crucial for body cameras to fulfill both.

A. Defense Discovery

In civil lawsuits, federal and state law affords liberal discovery; each side enjoys symmetrical access to information from the other side before trial,[141] including all non-privileged, relevant documents,[142] the right to

138. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320 (2012).
139. *Id.* at 1345.
140. Nancy Gertner, Bruce Brower & Paul Shechtman, Letters to the Editor, '*Why the Innocent Plead Guilty': An Exchange*, THE N.Y. REV. OF BOOKS (Jan. 8, 2015), https://perma.cc/GV98-7CQ4.
141. FED. R. CIV. P. 26.

conduct depositions of witnesses,[143] broad subpoena power of witnesses,[144] and other discovery devices.

By contrast, defendants in criminal cases have traditionally enjoyed almost no right to pre-trial discovery. They have had little right to access police reports, witness statements, depositions, prior testimony from grand jury proceedings, or other ordinary tools available on the civil side.[145] In the federal system and in many state systems, defendants do not have a right to view previous statements by the witnesses against them until those witnesses have testified.[146]

Those opposing defense discovery have relied on a few main rationales: first, they worry defendants will use the information to craft their testimony and commit perjury, or to persuade other witnesses to do so.[147] Second, they worry defendants will learn from the discovery the identity of witnesses or their likely testimony, and intimidate (or harm) those witnesses.[148] Third, they believe that it would be unfair to the prosecutors since the Fifth Amendment right against self-incrimination would not impose on the defendant a reciprocal duty to disclose his case.[149]

Despite these objections, many jurisdictions have recently liberalized their discovery rules in recognition of the unfair position in which they place criminal defendants. Florida allows defendants to depose witnesses before trial. Texas recently enacted a broad defense discovery act.[150] Despite these advances, the federal discovery rules remain very limited, as do those of most states. In all jurisdictions, the information flows to the prosecutor first and then, at some point in the process, to defense, but often only for those 6% of defendants who choose to forego plea deals in

142. FED R. CIV. P. 34.

143. FED. R. CIV. P. 30.

144. FED. R. CIV. P. 45.

145. Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771, 773 (2017) ("[D]efendants are entitled to little prosecutorial evidence."); Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 IND. L.J. 845, 845 (1995) ("Anyone who has practiced or studied both civil and criminal litigation in the United States is immediately struck by the relative lack of discovery devices available to the defendant in a criminal prosecution."); William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, WASH. U. L. Q. 1963, 279, 288–90; LAFAVE, supra note 136, at § 20.1(b).

146. 18 U.S.C. § 3500 (2015).

147. Edward J. Imwinkelried, *The Worst Surprise of All: No Right to Pretrial Discovery of the Prosecution's Uncharged Misconduct Evidence*, 56 FORDHAM L. REV. 247, 264 (1987); Brennan, *supra* note 145, at 289–92 (noting and rejecting argument).

148. Imwinkelried, *supra* note 147, at 269–73. He notes that the problem of witness intimidation is small but sufficiently possible in some cases to warrant courts to craft particularized limits to discovery.

149. LAFAVE, *supra* note 136, at § 20.1(b).

150. TEX. CODE OF CRIM. PROC. ANN. art. 39.14 (West 2014).

favor of trials. Often, the decision of when in the process to hand over discovery is almost entirely in the discretion of the individual prosecutor on the case. Judges do not control this process.

Moreover, discovery in misdemeanor cases at the first appearance, in time for a plea, remains virtually nonexistent.[151]

As detailed below, our proposal to make body camera videos available to defense counsel at the first appearance, in time to shed light on plea negotiations as well as bail arguments, will largely sidestep many of the objections normally leveled against affording the defense early discovery. Before turning to those reasons, however, we first sketch the typical procedure leading up to the first appearance in a misdemeanor case.

B. Processing a Criminal Case

In a typical misdemeanor or simple felony case, the police who have arrested a suspect forward information to prosecutors, sometimes in the form of an affidavit or police report. In large metropolitan areas, prosecutors often staff complaint rooms,[152] where they write criminal complaints setting forth the criminal statute charged and the facts showing the defendant violated that statute.[153] Prosecutors will rely on the written information supplied, but they will often speak directly with the arresting officer by phone, video, or in person.[154]

Prosecutors file the charging documents with the court clerk, who dockets a case, transforming the suspect into a defendant. Meanwhile, the police transport the defendant to central booking at the courthouse where clerks book him. The court system will usually hold the defendant in a courthouse holding cell, which can contain hundreds of other defendants in large cities, pending their appearance before a judge.[155]

In those jurisdictions that appoint counsel for indigent defendants at their first appearance, that defense counsel will often receive the criminal complaint for a defendant and be afforded time to speak with the defendant immediately before appearing before the judge.[156] During this

151. Grunwald, *supra* note 145, at 773 ("[D]efendants…must negotiate plea agreements and prepare for trial in the dark.").

152. New York City describes these as complaint rooms. Other jurisdictions use other terms.

153. People *ex rel*. Maxian v. Brown, 77 N.Y.2d 422, 425 (1991) (describing process in New York City); Williams v. Ward, 845 F.2d 374, 376–78 (2d Cir. 1988); People v. LaFontaine, 619 N.Y.S.2d 479, 480–81 (N.Y. Sup. Ct. 1994).

154. *Ward,* 845 F.2d at 377.

155. *Brown*, 77 N.Y.2d at 425; *Ward*, 845 F.2d at 374.

156. *Brown*, 77 N.Y.2d at 425.

initial interview, the defense lawyer will explain the charges and get basic information from the defendant.[157] Counsel will often focus on getting enough facts to make a persuasive argument that the defendant should be released pending trial.[158]

Counsel will also try to determine whether the defendant should consider pleading guilty now, at first appearance. This decision will depend upon factors including the strength of the government case, the defendant's willingness to plead guilty, the defendant's previous criminal record, and the likelihood of a defendant being held on high bail.[159]

Once defense counsel has met with her client, court officers will bring the defendant before the judge. The prosecutor and defense counsel will also be present. At this first appearance, the magistrate must find probable cause to believe the defendant committed the offense or release the defendant.[160] Most states' criminal procedure rules also require magistrates or judges, during this first appearance, to determine bail, orders of protection, and other conditions under which to release the defendant pending trial.[161]

In assessing probable cause and bail, the court will hear from both sides. The prosecutor will present the charges and often recommend a bail amount. The defense will then argue for release, and sometimes argue that the prosecution has not established probable cause. Many jurisdictions appoint counsel to represent indigent defendants at this first appearance;[162] in other jurisdictions, defendants are on their own.[163]

Finally, prosecutors or judges will at times offer defendants a plea agreement to dispose of the case then and there. These pleas are often quite attractive to defendants because they might result in immediate release, or release in a few days.[164] Defendants, especially those facing

157. AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Standard 4–3.2 (4th ed. 2015).

158. *Id.*

159. *Id.*

160. *Id.*

161. 18 U.S.C. § 3142 (2012); Rothgery v. Gillespie Cty., 554 U.S. 191, 196 (2008) (describing Texas' procedure); CONN. GEN. STAT. ANN. § 54-64a (West 2014); FLA. R. CRIM. P. 3.131.

162. Maxian v. Brown, 77 N.Y.2d 422, 425 (1991).

163. Lahny R. Silva, *Right to Counsel and Plea Bargaining:* Gideon*'s Legacy Continues*, 99 IOWA L. REV. 2219, 2232 (2014) ("From misdemeanors to felonies, judges conduct hearings and take pleas without defendants ever consulting with or being represented by a lawyer."); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance after Gideon v. Wainwright*, 122 YALE L. J. 2150, 2152 (2013) (poor people regularly appear before judges at hearings without lawyers and many "plead guilty without lawyers").

164. Josh Bowers, *Punishing the Innocent*, 156 U. Pa. L. Rev. 1117, 1133 (2008); Silva, *supra* note 163, at 2232; Bright & Sanneh, *supra* note 163, at 2152 ("Innocent people plead guilty to get out of jail."); Allison D. Redlich & Alicia Summers, *Voluntary, Knowing, and Intelligent Pleas:*

misdemeanor charges, who decline to plead guilty can wait weeks or months in jail for trial on charges that often result in sentences of only a few days or weeks.[165]

As for discovery, defendants will almost never receive any discovery from the prosecution during this first appearance. They will not receive police reports, 911 calls, radio runs, witness statements, their own statements to the police, a list of physical evidence, lab tests, video tapes, photographs, lineup identification information, or anything else. Usually, they simply receive the charging document such as a criminal complaint stating the statute and a bare recitation of facts alleged.[166]

Nevertheless, defendants often plead guilty ignorant of anything but the very rudiments of the state's case because they want to get out of jail more quickly.[167]

1. Body Camera Discovery

There are currently no jurisdictions of which we are aware have moved police body cameras outside discovery, with its inherent asymmpetry, to provide them immediately to defendants. As with other discovery, defendants and their counsel have no access to body camera videos at first appearance or before a plea agreement, even when that evidence could be useful or dispositive.[168] Among the body camera policies that have been made public, most police share footage with prosecutors only, and make no mention of criminal defendants. Those jurisdictions which do mention criminal defendants[169] only refer to them in order to clarify that defense attorneys must procure video footage from prosecutors in accordance with existing discovery rules.[170] No jurisdiction places ownership of the footage

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Understanding the Plea Inquiry, 18 PSYCHOL., PUB. POL'Y & L. 626, 628 (defendants "may be quite pleased" with a plea that allows them to avoid jail).

165. Bowers, *supra* note 164, at 1133; Jed S. Rakoff, *Why Innocent People Plead Guilty*, THE NEW YORK REVIEW OF BOOKS (Nov. 20, 2014), https://perma.cc/CB6S-56DM.

166. Bright & Sanneh, *supra* note 163, at 2157 ("Some prosecutors make plea offers conditioned upon the defendant's not filing any motions or seeking discovery.").

167. *Id.*; Silva, *supra* note 163, at 2232.

168. For an illustration of how this denial of access can negatively impact bail decisions, see Zina Makar, Op-Ed, *Bail Reform Begins with the Bench*, N.Y. TIMES, Nov. 17, 2016.

169. *See, e.g.*, CHARLOTTE-MECKLENBURG POLICE DEP'T, INTERACTIVE DETECTIVES' GUIDE, § 400–06 (June 8, 2016), https://perma.cc/9TK8-8RR3; FAYETTEVILLE POLICE DEPARTMENT WRITTEN DETECTIVES AND OPERATING PROCEDURES, § 3.24 (Feb. 25, 2015), *available at* https://perma .cc/4SRM-XUWJ; ROCHESTER POLICE DEPARTMENT BODY-WORN CAMERA MANUAL (June 15, 2016), *available at* https://perma.cc/45HN-9NE7; SAN ANTONIO POLICE DEPARTMENT GENERAL MANUAL, PROCEDURE 410–BODY WORN CAMERAS (Feb. 12, 2016), *available at* https://perma. cc/9NMX-5PNB.

170. N.Y.C. POLICE DEP'T, *supra* note 105, at 24.

in the hands of a neutral third party, and none gives direct access to criminal defendants or their attorneys.[171]

C. Timely Defense Access

We propose a straightforward solution that follows naturally from our larger proposal that an independent police accountability agency maintain body camera videos: defense counsel or defendants should have access to relevant body camera videos before the first appearance. We sketch here the logistics of this access before devoting the remainder of this section to supporting the proposal.

First, upload: in most cases the police will upload videos from the field or immediately upon ending their shift. In those cases in which they have not, police must upload body camera video early in the arrest and booking process and certainly in time for prosecutors and defense counsel to view before first appearance. They would upload the video with appropriate identifying tags such as the defendant's name and any state identification number used as part of booking or from his previous criminal record.

Second, we propose that both prosecutors and defense counsel have immediate access to these videos via a secure Internet connection or, more likely, a secure smartphone or tablet app. The security will follow federal and state guidelines for handling electronic data[172] and ensure that the prosecutor or defense counsel has authorization to view the video. Prosecutors or defense counsel would have to log in to the site, provide their own password, and enter a passkey for the particular case they seek to access. Probably the court system would provide dedicated computers or tablets for the lawyers and the judge to access these videos. Limiting access to recognized dedicated computers (along with passwords) will enhance security.

The FBI Criminal Justice Information Services has issued detailed guidelines for maintaining the secure collection, retention, and transmission of sensitive criminal justice information. Its 2015 Security Policy comprehensively describes guidelines for secure, authenticated computer login procedures limited to authorized personnel. It includes

171. *See* THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS & UPTURN, *supra* note 57.

172. FED. BUREAU OF INVESTIGATIONS CRIMINAL JUSTICE INFO. SERV. DIV., FBI CRIMINAL JUSTICE INFORMATION SERVICES (CJIS) SECURITY POLICY (2015); *see also* National Institute of Standards and Technology, *Framework for Improving Critical Infrastructure Cybersecurity* (Feb. 12, 2014), https://perma.cc/SU5Z-SXJV; Sci. Working Grp. on Dig. Evidence & International Org. on Dig. Evidence, *Digital Evidence: Standards and Principles*, FORENSIC SCI. COMMC'N, April 2000 (these guidelines largely govern how agencies should maintain digital evidence).

appendices governing local police departments.[173]

Prosecutors and defense counsel will likely stream the video rather than download it. The plug-in allowing the stream, such as QuickTime, or the applet, such as Flash, would discard the data as it streams it. The parties can stream the video as often as necessary, but the police accountability agency will bar them from downloads to avoid improper distribution.

Courts will need a fast Internet connection to allow relatively high quality streaming, though any system will compress the files in ways that lose some information and quality. This compression may already have occurred when the police upload and store the original videos to the cloud, or even when they record the videos in the first place. Depending on the technology, the parties may first wish to view the video at a lower quality merely to see if anything warrants further, higher quality viewing.

As for timing, prosecutors will have access to the videos in the complaint room. As they draw up the criminal complaint or other charging document, they will be able to view the videotape to assess the charges themselves or any other potential procedural issues, such as an illegal search, a suggestive identification at the scene, or other infirmities. This will allow prosecutors to dismiss cases early, or recommend more lenient plea agreements.

Defense counsel will have access in the courtroom before they appear before the judge with their client to be heard on bail and other matters. They may wish to view the tape before or after seeing their client. Ideally, they will be able to view the video *with* their client, who can explain what is going on. This will help the defense also evaluate the strength of the prosecution's case, discover any problems with their potential case, and to identify witnesses to interview in preparing for trial.

D. An Argument for Timely Access

1. Exculpatory Evidence

Most important, body camera video will sometimes show that the defendant is innocent of the charge.[174] It may show the defendant did not resist arrest, or attack the officer, or that the defendant was acting in self-defense against excessive force.[175] In drug cases, the video may show that

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173. FED. BUREAU OF INVESTIGATIONS CRIMINAL JUSTICE INFO. SERV. DIV., *supra* note 172.

174. United States v. Zaragoza-Moreira, 780 F.3d 971, 974 (9th Cir. 2015) (federal agents allowed potentially exculpatory video to be destroyed; court reversed conviction).

175. Burton v. State, 978 N.E. 2d 520, 526–27 (Ind. Ct. App. 2012) (reversing trial court's

the defendant did not possess drugs, that the stash of drugs was not really anywhere near him, or that other criteria for constructive possession were otherwise not met.[176]

Recent events in Baltimore illustrate the critical role defense counsel can and should play in reviewing police body camera videos in addition to prosecutors. In July 2017, Maryland's Office of the Public Defender released a body camera video that appears to show a Baltimore police officer planting drugs, prompting prosecutors to dismiss dozens of cases involving the officer depicted in the video.[177] The public defender's office said at least one other video, from November 2016, shows police manufacturing evidence.[178] Note that both prosecutors and the police in Baltimore have units devoted to reviewing such body camera footage, and neither caught these videos.[179]

In drunk driving cases, the video may show that the defendant was not driving in a drunken manner, or perhaps not driving at all.[180] It might show her passing the field sobriety tasks. In fact, several jurisdictions require that police videotape field sobriety tests, and their failure to produce the video in court can result in a dismissal or an adverse inference.[181]

As Alexandra Natapoff has written, states process roughly 10.5 million non-traffic misdemeanor cases per year; these cases make up 80% of criminal court dockets.[182] Many of these fall into categories to which video tape evidence might be relevant. She writes that many of these misdemeanor convictions are for "urban disorder offenses," such as disorderly conduct,[183] drunk driving, drug possession,[184] minor assault, vandalism,[185] drunkenness, vagrancy,[186] and curfew violation or

failure to allow self-defense instruction in light of dash camera video showing officers apparently attacking the defendant and using excessive force).

176. Jack Leonard, *Surprise Video Puts an End to Drug Trial*, L.A. TIMES (July 1, 2008), http://articles.latimes.com/2008/jul/01/local/me-video1 (video showed defendant did not throw box with drugs during chase as alleged).

177. Jacey Fortin, *Video Appears to Show Baltimore Police Offcer Planting Drugs*, N.Y. TIMES, July 19, 2017.

178. Jacey Fortin, *Baltimore Drops Dozens of Cases After Video Casts Doubt on Officers*, N.Y. TIMES, Aug. 3, 2017) at A10.

179. Eric Westervelt, *New Baltimore Police Scandal Threatens Criminal Cases*, ALL THINGS CONSIDERED, NPR Aug. 8, 2017.

180. State v. Merriman, 410 S.W.3d 779, 782 (Tenn. 2015) (dismissing drunk driving conviction because police failed to preserve video of traffic stop that could have shown defendant had not been driving in a drunken or reckless manner).

181. *See, e.g.*, S.C. CODE ANN. § 56-5-2953 (2009).

182. Natapoff, *supra* note 138, at 1320.

183. *Id.* at 1316. She estimates 665,000 disorderly conduct cases per year.

184. *Id.* She estimates 758,000 marijuana possession cases per year.

185. *Id.* She estimates 270,000 vandalism cases per year.

186. *Id.* She estimates 33,000 vagrancy cases per year.

loitering.[187] These are often the precise cases that body cameras might document, especially with the buffer capability that captures footage from before the officer hits the record button.

Charges of curfew violation, loitering, and vagrancy often depend on particular facts that an officer sees, and can easily result from an abuse of police discretion, often as retaliation for what the officer perceives to be rude behavior from a civilian.[188] Body camera videos will deter police from engaging in such abusive behavior and help limit arrests to those of individuals who genuinely pose a threat.

Cities often have specific targeted programs to arrest individuals for trespassing in public housing, or even private housing, and here too body camera videos can shed light on whether the defendant was properly stopped and questioned and whether he had authority to be there.[189]

In the end, Natapoff estimates that thousands of innocent defendants plead guilty to misdemeanors each year, often simply to get out of jail more quickly.[190] For many of these defendants, body camera videos will either show their innocence, which would result in a dismissal, or would at least tend to exonerate the individual, which may encourage a defendant to stick it out to trial.

2. Fourth Amendment and other Violations

Body cameras will also supply evidence of possible police violations[191] of the Fourth Amendment or other provisions, such as a violation of *Miranda*. They will often show whether police had reasonable suspicion to stop a person for questioning,[192] or to believe he is armed, justifying a search; they will show whether a person consented to a search free of coercion;[193] they will show whether police properly executed a search

187. *Id.* She estimates 112,000 curfew violation or loitering cases per year.

188. McCurdy v. Montgomery County, Ohio, 240 F.3d 512, 520 (6th Cir. 2001).

189. Ligon v. City of New York, 925 F.Supp.2d 478, 484–85 (S.D.N.Y. 2013) (holding New York City's "Trespass Affidavit Program" regularly violated the Fourth Amendment) .

190. *See id.*; *see also* Silva, *supra* note 163; Bright & Sanneh, *supra* note 163.

191. State v. Collins, 87 So. 3d 857, 859 (La. Ct. App. 2010) (suppressing evidence and reserving conviction since police video showed the defendant did not change lanes without signaling, rendering the stop unlawful); United States v. Jackson, No. EP-10-CR-1628-KC, 2010 WL 4023553, at *8–10 (W.D. Tex. Oct. 13, 2010) (suppressing evidence after video showed officer detaining motorist solely because of his refusal to consent to search).

192. State v. Stowe, 25 So. 3d 945, 951 (La. Ct. App. 2009) (dash camera established reasonable suspicion to continue detention of motorist); Albani v. United States, No. 09-4790, WL 2010 WL 4181816, at *8 (E.D. Pa. Oct. 25, 2010) (video established probable cause by showing security officer taking steps to steal wallet).

193. Caraway v. State, 255 S.W.3d 302, 310 (Tex. Ct. App. 2008) (police video showed

warrant or if there was some exigency justifying an exception to the warrant requirement.[194] Did they knock and announce before entering? Did they exceed the scope of the warrant? Did they use excessive force in making an arrest?[195]

Often, the absence of certain material on body camera videos will reveal violations. If the police claim a person consented to a search but they failed to record that consent, the absence may be evidence the person did not consent. If the police claim the defendant resisted arrest but the body camera was off at the time, the court might be entitled to infer the individual did not resist, assuming the defendant so claims.

These videos will not only show police violations, but, at other times, will also support the police in showing that they did have probable cause, reasonable suspicion, or consent. These videos will therefore facilitate and expedite suppression hearings by simply showing what happened.

One important category we must discuss involves stop-and-frisk, and whether the police have reasonable suspicion under *Terry* in a particular case to stop and detain a person for questioning. In *Floyd v. City of New York*, the court found that the NYPD regularly violated the Fourth Amendment rights of suspects as part of its vast stop and frisk program.[196] Between 2004 and 2012, the police conducted roughly 4.4 million stops and frisks—searches and seizures under the Fourth Amendment. The court found that the officers often lacked reasonable suspicion to effect these stops—and this finding was based on forms the police officers themselves were required to fill out.[197]

The court in *Floyd* therefore ordered the police to adopt a pilot body camera program to help guard against these Fourth Amendment violations.[198] In particular, the court found that body cameras are "uniquely suited to addressing the constitutional harms at issue in this case."[199] These cameras were to accomplish this goal by allowing police supervisors to monitor the recordings, preserve them to verify complaints against the police, and evaluate the effectiveness of the body cameras. The

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defendant's physical conduct amounted to voluntary consent to search of vehicle); State v. Prater, 984 N.E.2d 36, 39–40 (Ohio Ct. App. 2012).

194. Meeks v. City of Minneapolis, 822 F. Supp. 2d 919, 924 (D. Minn. 2011) (video showed no exigency justifying strip search in public).

195. Scott v. Harris, 550 U.S. 372 (2007) (police video showing high speed chase demonstrated that the police acted reasonably in seizing the fleeing defendant and therefore did not violate his Fourth Amendment rights).

196. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

197. *Id.*

198. *Id.* at 685.

199. *Id.*

court appointed a monitor to ensure compliance.[200]

On the other hand, body camera videos will also show instances when officers did not violate the Fourth Amendment. When the police seek consent for a search, individuals will often give consent with little apparent coercion.[201] Viewpoint bias may make the consent appear more voluntary than it is, but body cameras will at least identify the most clearly coercive situations.

Some might argue that if a person is guilty, it does not matter that his Fourth Amendment rights were violated. Or at least, it might matter at a hearing or a trial, but shouldn't at the plea bargain stage. Some courts have at least suggested *Brady*[202] applies to the plea bargaining process[203] and suppression motions[204] under the Fourth Amendment.

Body camera videos may also illustrate other constitutional violations, such as faulty identification proceedings. Police may have created an undue risk of suggestiveness by bringing a suspect directly to a victim for identification on site.[205] They may also have tainted an identification by giving the victim hints as to which member of a six-person line-up they hope she chooses.[206] Absent body camera videos, such interactions between police and victims during crucial stages of a case would otherwise likely go unchecked by defendants and their attorneys.

3. Plea Bargaining

Over all, 97% of federal cases and 94% of state cases end in guilty pleas.[207] As noted above, an even larger percentage of misdemeanor cases end in a guilty plea, and the vast majority of defendants enter this plea without ever seeing the evidence against them.

Scholars have argued that this state of ignorance renders the pleas

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200. *Id.*

201. *See, e.g.*, United States v. Sapp, No. 2:15-CR-00221-KJD-NJK, 2016 WL 155028 (D. Nev. Jan. 13, 2016).

202. Brady v. Maryland, 373 U.S. 83 (1963) (holding due process requires prosecutors to provide defense counsel material exculpatory material).

203. United States v. Dahl, 597 Fed.Appx. 489, 490 (10th Cir. 2015).

204. Biles v. United States, 101 A.3d 1012, 1015 (D.C. Ct. App. 2014) (citing Miller v. United States, 14 A.3d 1094 (D.C. 2011), Mackabee v. United States, 29 A.3d 952 (D.C. 2011), and collecting cases from other jurisdictions).

205. United States v. Sapp, No. 2:15-CR-00221-KJD-NJK, 2016 WL 155028 (D. Nev. Jan. 13, 2016).

206. *See* State v. Henderson, 27 A.3d 872, 896 (N.J. 2011) ("Research has shown that lineup administrators familiar with the suspect may leak that information 'by consciously or unconsciously communicating to witnesses which lineup member is the suspect.'") (citation omitted).

207. Missouri v. Frye, 566 U.S. 134, 135 (2012).

unconstitutional or at least unfair.[208] Putting aside constitutional arguments, allowing defendants and their counsel to view body camera footage before entering a plea would make pleas more accurate, more fair, and more efficient.

The pleas would be more accurate because defendants and counsel will be able to determine better whether the charges are valid. In the tumble of the street, defendants will often not know whether they started a fight or finished it, resisted arrest or merely asked to be left alone. Videos that reveal guilt[209] will encourage quick pleas; videos that tend to exonerate will reduce inaccurate pleas and, hopefully, simply result in a dismissal. And when defendants believe they were justified in their actions, they will know whether there is video evidence supporting their position or whether they would be in for an uphill climb at trial, thereby expediting the plea process.

Moreover, videos will reveal whether the prosecutor has charged the appropriate level of crime; the government may have charged second degree assault when the video makes out only third degree assault.

Pleas will be fairer if the defendant and counsel can see the state's evidence. Basic notions of justice suggest that a person pleading guilty to a crime should see the evidence concerning that crime when there is very little reason to keep it secret.

These videos will enhance efficiency. Prosecutors will dismiss cases, or not even bring them, when the video does not support the officer's account. Judges will dismiss weak cases when prosecutors refuse to do so. Video recordings will lead to plea offers more in line with the facts.[210] Guilty defendants will plead more readily when confronted with strong, recorded evidence of guilt.

Plea bargains often involve an agreed-upon or at least recommended sentence in addition to the charge. A video can help the defendant decide whether to accept a long sentence, or fight for a shorter one, based on the demonstrated strength of the government's case. Even if a defendant is shown on video committing the elements of assault, there may be background facts caught on camera that could provide some context and,

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208. Natapoff, *supra* note 138.

209. Solis-Morales v. State, 728 S.E.2d 253, 254 (Ga. Ct. App. 2012) (police video showed officer recovering keys stolen from victim from defendant's pocket).

210. Although a video can be subject to biased interpretation, "in the case of eyewitness testimony, the viewer's biases do not simply exert a powerful influence on how visual data is interpreted; they shape the visual data itself. Biases are built into the eyewitness record in a way they are not built into a video of the scene. Video, of course, is far from a comprehensive record of what occurred, but it is less likely . . . to be as skewed by emotions or personal loyalties as human memory." Blitz, *supra* note 80, at 7.

in some cases, a justification such as self-defense.

4. Defendant Access

We also argue that defendants—and not just their counsel—should be able to view body camera videos before plea or trial. This follows for a few reasons. First, many of the fairness and efficiency arguments above rest upon a defendant herself viewing the video. If the video shows strong evidence of guilt, for example, a defendant who can view it will be more likely to plead guilty.

Second, defendants will be able to better assist in their defense if they can view the video. They will usually know far more than the defense attorney, the prosecutor, or the judge about what is depicted in the video, and can provide context. They can assist by identifying witnesses, explaining to counsel what is going on in the video, and, where appropriate, how those events might justify his or her actions.

Third, defendants who view videos can supplement overworked counsel who may not even have the time to view the video, or to view it with a careful eye.

Fourth, many jurisdictions do not supply counsel to indigent defendants at the first appearance at all. In these jurisdictions, a defendant must represent himself and therefore must be entitled to view the video to carry out this function. He may not be able to raise carefully crafted legal arguments, but he should be able to identify at least more glaring problems with the case or the police conduct.

Similarly, some jurisdictions allow defendants to waive counsel and plead guilty;[211] in these cases defendants should also be permitted to view the video so as to determine whether to take a plea.

Some scholars have argued more generally that defendants should play a greater role in their own defense to enhance legitimacy in a system that often makes defendants feel sidelined even, at times, by their own counsel.[212]

5. Judges

Our proposal also envisions judges having immediate access to videos

211. Godinez v. Moran, 509 U.S. 389, 392–93 (1993) (defendant waived counsel and pleaded guilty); State v. Shafer, 969 S.W.2d 719, 727 (Mo. 1998). Court *must* permit defendants to waive counsel. Faretta v. California, 422 U.S. 806, 807 (1975).

212. Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1127–29 (2014).

on the bench. This access will allow judges to view the tapes *sua sponte* if they wish, or at the request of counsel. This access will allow judges to assess the strength of the government case in determining not only probable cause but, more practically, in assessing bail. It will also help judges to determine sentences when defendants choose to plead guilty early.

E. Objections

Scholars, courts, prosecutors, and others have often raised various objections to enhanced defendant discovery. This section shows why many of those objections do not apply to video recordings, or, if they do, how they can be addressed. This section then sketches objections from the other direction—that our proposal will harm defendants.

1. Objections from Prosecutors

First, some may argue that defendant discovery of body camera video would reveal undercover officers or confidential informants. True, such information may appear in police reports or other police documents, and for those documents the argument enjoys some force.[213] But body camera programs usually apply, if not entirely, to uniformed police officers.[214] These videos, therefore, will generally not reveal undercover officers and rarely, if ever, reveal police informants. Moreover, most policies afford officers discretion to turn off or not to activate the videos when talking to informants, or could otherwise disguise their identities so as not to place them in danger.[215]

Second, many argue discovery will reveal witnesses whom the defendant may intimidate, or worse.[216] Michael Graham describes witness intimidation, in general, as a "serious obstacle" to justice, particularly in mafia and domestic violence cases.[217] But videotapes are unlikely to reveal witnesses of whom the defendant is unaware. And for mob cases, or

213. Roviaro v. United States, 353 U.S. 53, 63 (1957) (recognizing privilege for informants); United States v. Smith, 780 F.2d 1102, 1107 (4th Cir. 1985) ("[T]he safety and security of the person supplying the information is best protected by nondisclosure of his identity to those who may cause him harm.").

214. NYC Draft Regulation, *supra* note 8 (outlining field use of body cameras for uniformed officers only).

215. *Id.* at 3–4 (prohibiting recording of interviews with "current or potential confidential informants").

216. Montoya, *supra* note 145 (noting that even if witness intimidation occurs, expanding discovery rights will rarely exacerbate this problem).

217. Michael H. Graham, *Witness Intimidation*, 12 FLA. ST. U. L. REV. 239, 240 (1984).

complex drug investigations, in particular body cameras on uniformed officers will play little role. In domestic violence cases, officers will deactivate recording, as they will if other sensitive witnesses are present such as victims of a sex crime. For ordinary interviews, effective technology exists to mask the individual's identity.[218]

But for the vast majority of cases that are misdemeanor cases disposed of at first appearance by a plea or shortly thereafter, it remains very speculative that the defendant will view the tape, identify a previously unknown person as a potential witness, locate that person, and then harass or intimidate that witness, all in a matter of hours. If the case does not plead out but proceeds to trial, the defendant is ultimately entitled to know who the witnesses against her are when they testify.

Some also argue defendant discovery will slow the process. Prosecutors must take the time to gather their own documents and scour police records and files for further evidence or to check for *Brady* material.[219] This time and expense undoes the very value of a plea bargain: to preserve government resources. But our proposal will impose no additional burden on the government in simply providing access to defense counsel. Once a secure system has been established, prosecutors will not have to do any additional work—simply for access at least. On the contrary, once defense counsel has access to these videos in *every* case, prosecutors will no longer have a duty to view the videos themselves, at least for discovery purposes, because the defense will already have it.

A bigger resource problem is the extra work that will be required of defense counsel. They will need to take time to view videos for their many cases involving body cameras, even though only a subset of these videos will likely contain relevant or useful information. To address this problem, public defenders could have paralegals or interns take a first pass viewing the videos. As discussed above, in some cases defendants themselves will view the tapes. Neither solution stands as a good substitute for defense counsel viewing the tapes, however, particularly because only lawyers can properly identify often complex legal issues. This therefore counts as a cost, but hopefully and probably one that public defenders will be happy to take on.

The Supreme Court noted another reason to resist providing defendants discovery before plea: it will discourage them from pleading guilty. This

218. *Id.*

219. Merola, *supra* note 22. Most prosecutors surveyed believed body cameras would increase case preparation time and "make the discovery process more burdensome or difficult for them." *Id.* at 5.

argument has little force as applied to body camera video tapes. First, in many cases the video will reveal the case to be quite strong and therefore enhance efficiency by encouraging pleas. Second, videos will show both parties what happened, resulting in plea *offers* that more accurately reflect what happened or what can be proven, again resulting in more efficiency and more accuracy.

In some cases, the videotape will encourage the defendant to stand trial where the prosecutor still believes she has a strong case. In this scenario the videotape will make the plea system less efficient. But if both sides feel vindicated by the video, that is precisely the type of case that should be taken to trial and adjudicated by a judge or jury. Further, it is not the actual viewing of the tape that causes the delay but its contents. Absent other reasons to deprive the defendant of the truth about his case, it goes too far to simply say we want to encourage pleas even in cases in which a videotape reveals weaknesses in the government's proof.

The Court in *United States v. Ruiz*[220] also hinted that not all discovery will contain relevant information. This is true, but why should prosecutors or police unilaterally decide whether a given videotape contains relevant information? Unlike a mountain of documents that the prosecutor might have to cull, a body camera video will typically involve a short interaction between the police and the defendant. Law enforcement is also not immune to cognitive biases that work to convince them that certain evidence is more favorable to the prosecution than it is.

A related argument presents more problems: how to determine which videos should be made available with respect to a given case. To some extent this represents a technological problem and to some extent a conceptual one. As for technical issues, in the first instance the videos tagged as relating to a particular defendant will of course count as relevant. In addition, any video of the arresting officer near the time and place of the arrest should possibly count. We must include these videos to avoid police simply refusing to tag videos in connection with an arrest at all, or tag only some subset.

Similarly, body camera videos of other officers on the scene should be produced. Again, all systems today can geotag and time stamp videos so that they can be quickly retrieved based on time and location. Of course, courts and the parties will need to develop common sense rules for how close in time and space will count. In cities, one can imagine videos within 100 feet and perhaps within one hour might be relevant, but this is a rule that can only be developed through experience.

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220. United States v. Ruiz, 536 U.S. 622, 630 (2002).

2. Objections from Defendants

Finally, one could argue that our proposal will harm defendants. As noted above, it will more thoroughly inject these videos into ordinary criminal cases, normalizing their use. Moreover, body camera videos themselves are inherently pro-law enforcement. Our proposal might encourage prosecutors to view videotapes more often than they otherwise would have, and to the extent those videotapes favor the government case, will build a stronger case even at first appearance than they otherwise would have.[221] After all, some research shows that both body camera videos and police interrogation videos tend to present defendants in a poor light, both literally and metaphorically. Perspective bias,[222] poor lighting, and other factors make the defendant or suspect look worse than they would if videotaped from a neutral angle under better lighting conditions.[223]

We take this objection seriously but it is not clear how to modify our proposal in light of it. We could, perhaps, prevent prosecutors and defense counsel from using body camera videos at all, or only in exceptional cases. That is, our proposed agency would refuse access to prosecutors or defense counsel except upon some special showing and would generally restrict use to cases of alleged police misconduct.

But walling off such videos from ordinary criminal cases would likely be infeasible. First, simply by virtue of ordinary rules of evidence they are highly likely to be relevant to a criminal case. If we allow defendants to use body camera footage in their own defense, it would be difficult to then turn around and bar prosecutors from using the videos in their case in chief. Second, such restricted access would run counter to the rights of the media and others to obtain these videos by public records laws. Third, law enforcement and prosecutors are unlikely to agree that they will lose not only control over these videos but access as well.

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221. Merola, *supra* note 22, at 5. Most prosecutors surveyed believe body cameras will make their cases stronger.

222. Timothy Williams, James Thomas, Samuel Jacoby & Damien Cave, *Police Body Cameras: What Do You See?*, N.Y. TIMES, Apr. 1, 2016.

223. Alexandra Mateescu, Alex Rosenblat & Danah Boyd, Police Body-Worn Cameras (February 2015) (Working Paper) ("[Video] footage sometimes fails to provide important context, and can be subject to biases and varying interpretations. In some cases, it may require special training to interpret the content of what is captured in recording."), *available at* https://perma.cc/UB3K-VX36.

F. Constitutional Constraints

Our argument rests in policy rather than constitutional constraints. Nevertheless, constitutional considerations lie in the background and provide helpful traction on this issue. We therefore sketch that background here.

Traditionally, the Supreme Court has been largely hostile to any kind of defendant discovery, whether pre-plea or even at trial. It has held that defendants have no general constitutional right to discovery.[224] As a consequence, defendants likely do not have a general constitutional right to receive body camera videos.

On the other hand, defendants do have a right to receive material, exculpatory evidence. Therefore, if a given video contains exculpatory evidence, and that evidence would be material in the context of the case overall, prosecutors have a duty to disclose it before trial. But the case law remains unclear regarding whether prosecutors must produce *Brady* material before a *plea*.[225]

Many scholars argue that *Lafler v. Cooper*[226] and *Missouri v. Frye*,[227] have recognized that the plea bargaining process is akin to trial, and that the Supreme Court will soon make other trial rights apply to the plea stage, including the right to receive *Brady* material before pleading guilty. If so, then we can begin to build an argument around a defendant's right to receive exculpatory material before a plea. (Remember, the court has held that defendants do not have a constitutional right to discovery even *at trial* if that discovery is not materially exculpatory.)

Thus, assuming a plea *Brady* right, where does that leave prosecutors who have access to body camera videos? If *Brady* applies full force, prosecutors will have an obligation to watch those videos. After all, *Brady* obligates prosecutors to take reasonable steps to find exculpatory material not only in their own files but also in police files. Under current regimes, body camera videos reside on police servers or in the cloud under police control. As a result, prosecutors will have to review all videos.

Or, prosecutors could simply make all body camera videos available to defense counsel, as we propose. After all, *Brady* does not require

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224. *Ruiz*, 536 U.S. at 622.

225. *See* United States v. Conroy, 567 F.3d 174 (5th Cir. 2009) (holding that a defendant who pleads guilty automatically waives *Brady*); *see also*, Smith v. United States, 876 F.2d 655, 657 (8th Cir. 1989). *But see* White v. United States, 858 F.2d 416, 422 (8th Cir. 1988) (*Brady* violation could be factor whether plea valid); Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995) (holding a *Brady* claim survives a plea); United States v. Wright, 43 F.3d 491, 496 (10th Cir. 1994).

226. 566 U.S. 156 (2012).

227. 566 U.S. 1 (2012).

prosecutors to discover all material, exculpatory evidence for the defense but merely to produce it. Our system of access for defense counsel will mean prosecutors do not have to review body camera videos in every case as they may otherwise have to do when reading *Brady* together with *Frye* and *Lafler*.

Again, we root our argument primarily in policy and ordinary notions of accuracy, fairness, and efficiency. We merely canvas these constitutional arguments as a foreshadowing of what might be coming soon as the courts further develop the implications of *Frye* and *Lafler*.

V. BALANCING TRANSPARENCY AGAINST OTHER INTERESTS

This section tackles the balance between transparency and accountability with other interests, including law enforcement goals and privacy of individuals. This section first sketches the current state of affairs: except where specific legislation dictates otherwise,[228] police departments generally have unilateral discretion on if and when to release videos to the media and the public.[229] This section then discusses how our proposal would alter the status quo, leading to a more open and even-handed system of disclosure to the public. Finally, this section considers the difficult balance between openness and individual privacy—the privacy of vulnerable victims. For example, it considers as well the privacy of individual officers as employees against unfair scrutiny or retaliation from supervisors.

A. Current Regime

Several jurisdictions have passed a law regarding body cameras, but in many of these places, no particular law governs the custody or rules for releasing body camera videos to the public[230]—though this landscape is changing quickly. Generally, police departments have taken control and exercise unilateral discretion in releasing these videos, limited only by

228. For an interactive map showing current state legislation and police department policy on public access to body camera footage, see *Access to Police Body-Worn Camera Video*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, https://perma.cc/84M7-XJR2.

229. *See* Kimberly Kindy & Julie Tate, *Police Withhold Videos Despite Vows of Transparency*, WASH. POST (Oct. 8, 2015), https://perma.cc/SL5Z-FXSF; Hari Sreenivasan & Wesley Lowery, *How Do Police Decide When to Release Video Footage?*, PBS NEWSHOUR (Sept. 24, 2016, 7:44 PM), https://perma.cc/FK4K-NQJZ. Almost every body camera policy specifies that the videos are the property of the police. *See* Spivack, *supra* note 101.

230. National Conference of State Legislatures, *Body-Worn Camera Law Database* (Apr. 1, 2017), https://perma.cc/6NFR-NGUC.

more general public records statutes; the press cannot get the material unless they sue.

Police departments often resist disclosure.[231] In other cases, police departments will disclose information or videos selectively, often in ways that appear to benefit the department and cast a shadow on any civilian victim.[232]

When the *Washington Post* examined the forty-nine fatal police shootings caught on body camera between January and October of 2015, it found that fewer than half of them had been publicly released, and in several of those cases, the videos were severely cut or edited.[233] Those videos that were publicly released almost uniformly depicted civilian victims who were armed, many of whom initially attacked the police[234]—suggesting, at least, selective disclosure. It is crucial to note that the vast majority of police abuse videos that have circulated over the past few years have been taken by bystanders; only a very small number were taken by police video cameras and willingly handed over to the public by those police departments.[235]

Police most often resist disclosure by arguing that police body camera videos should be exempt from disclosure under the law enforcement exemption.[236] Most states exempt law enforcement investigative records

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231. *See, e.g.*, Andy Vitalicio & David Cross, *Police Revise Body Camera Policy after Public's Reaction; NAACP Ponders Future of Lawsuit*, PASADENA NEWS NOW (Jan. 5, 2017, 6:53 AM), https://perma.cc/Z7U9-DAYF (reporting that Pasadena Police changed their policy to allow release of videos only after lawsuit by NAACP, among other negative reactions); David Hinkel, *City Delays Release of Police Shooting Video Despite 90-Day Period*, CHIC. TRIB., Apr. 10, 2017, 5:09 AM (prosecutors sought to delay release of video past new, hard ninety-day deadline for investigative reasons and to protect a defendant's right to a fair trial).

232. *See, e.g.*, Rob Elgas, *Police Release Video of Cop Beaten by Suspect She Feared Shooting*, ABC7 EYEWITNESS NEWS (Oct. 14, 2016), https://perma.cc/KW7L-WHL9; Charles E. Ramirez*, Police Release Video to ID Suspect in WSU Cop's Death*, THE DETROIT NEWS (Dec. 8, 2016, 1:32 PM), http://perma.cc/SX4F-RLY9; Katie Rogers, *Los Angeles Police Release Video of Fatal Shooting; Say Man Had Gun*, N.Y. TIMES, Oct. 4, 2016 (explaining that LAPD had released surveillance video purporting to show eighteen-year-old who was later shot by police holding handgun, but not showing shooting itself).

233. Kindy & Tate, *supra* note 232.

234. Phoebe Connelly, *Fatal Police Shootings Captured by Body Cameras, 2015*, WASH. POST (Oct. 8, 2015), https://perma.cc/9FU2-K5SV.

235. For a thorough discussion of the importance of civilian recording of police-community interactions, see Simonson, *supra* note 66.

236. *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). *See also* N.C. GEN. STAT. § 132-1.4 (2013). NC's law leaves criminal investigations records entirely in the hands of police: "[records made] in an effort to anticipate, prevent, or monitor possible violations of the law" can be released only at the discretion of

from disclosure under their state public records law, and police argue, often successfully, that body camera footage constitutes such an investigative record eligible for exemption.[237] This law enforcement exemption is often categorical, requiring no consideration of the public's interest in that information.[238] Thus, much body camera footage can remain out of reach of the public for years, and often indefinitely.

The San Diego Police Department, for instance, has used the exemption to reject requests for body camera footage of police use of deadly force: one, a high-speed chase that ended after multiple officers fired on the driver and another, of a standoff where police shot and killed an armed and mentally ill veteran.[239] The Los Angeles Police Department, which has equipped some, but not yet all, of its officers with body cameras,[240] considers the footage an investigatory record and will not release footage to the public unless required by a civil or criminal proceeding.[241]

1. Further Restrictions Particular to Body Cameras

Worse, some states have enacted laws protecting body camera videos from public disclosure, allowing police departments to withhold body camera footage *even after an investigation is closed.*[242] At least 21 states have passed laws that directly govern the disclosure of body camera videos, and another 13 states have legislation pending.[243] Many of these laws impose even more restrictions on disclosure than the ordinary law enforcement exemption, drawing these videos further and further from the public eye and away from a tool of accountability.[244]

South Carolina, for example, has adopted a body camera law that provides a blanket exemption against disclosure. It states, "[d]ata recorded by a body-worn camera is not a public record subject to disclosure under the Freedom of Information Act."[245] Instead, the statute puts law

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the police department. *Id.* § 132-1.4(b)(2).

237. *See, e.g.*, 5 U.S.C. § 552(b)(7).

238. ABRAMS INSTITUTE, POLICE BODY CAMERA FOOTAGE: JUST ANOTHER PUBLIC RECORD 11 (2015), *available at* https://perma.cc/68NE-XFXH.

239. *Id.* (citing Liam Dillon, *Police Body Camera Videos Will Stay Private—At Least for Now*, VOICE OF SAN DIEGO (Mar. 19, 2014), https://perma.cc/AZC9-4J7M.

240. Kate Mather & David Zahniser, *City Council Vote Resumes $57.6-Million Rollout of LAPD Body Cameras*, L.A. TIMES, June 22, 2016.

241. *See* Spivack, *supra* note 101; Kate Mather, *A Fight over Access to Video From LAPD Body Cameras is Shaping Up*, L.A. TIMES, Feb. 5, 2015.

242. *See, e.g.*, S.C. CODE ANN. § 23-1-240(G)(1)-(3).

243. *See* Comm. for Freedom of the Press, *supra* note 231.

244. NEB. REV. STAT. § 44-04-18.7(1) (2015); S.C. CODE ANN. § 23-1-240 (G)(1) (2015).

245. S.C. CODE ANN. § 23-1-240(G)(1)-(3) (public disclosure is left to the discretion of the

enforcement in charge of deciding whether to disclose in individual cases.

Similarly, North Carolina law expressly states that body camera footage is not a public record and therefore not subject to disclosure. The North Carolina law only allows for disclosure to individuals depicted in the recording or their representatives.[246] Others, such as the media, concerned citizens, or other government agencies, can obtain such recordings only upon petition showing a compelling interest or other good cause.[247] Oregon exempts body camera recordings from disclosure unless public interest requires such disclosure.[248]

On the other hand, a small handful of jurisdictions have very recently begun to craft more liberal disclosure rules for body camera videos, and have thereby created better accountability mechanisms. For instance, in response to public outcry over the Laquan MacDonald video, Chicago imposed a new policy that requires mandatory and automatic public release of video related to a critical incident within sixty days of the incident, or at an earlier date when possible.[249] But even Chicago envisions that police body camera video will remain under the ownership and control of the police.[250]

B. Transparency Versus Law Enforcement

Our proposal to entrust videos with a police accountability agency, and to ensure these videos fulfill their original promise of accountability, will significantly change the existing balance.

First, as to the substantive rule, we would urge one far more permissive of disclosure than the prevailing trend in many states—at least to those depicted on tape interacting with the police, or in high-profile cases. States ought *not* consider body camera videos to be exempt from disclosure as law enforcement records, even pending trial. Body camera programs are *primarily* funded as a tool to hold the police accountable, and not solely as a tool of ordinary law enforcement; police should therefore not be able to resist disclosure by substituting the secondary reason for the primary reason. Such a switch will erode, rather than build, trust between the community and the police.

State Law Enforcement Division, the Attorney General, or a circuit solicitor).

246. N.C. GEN. STAT. §§ 132-1.4A(b), (c) (West Supp. 2016).

247. *Id.* § 132-1.4A(f)(1).

248. H.B. 2517, 78th Leg. Assemb., Reg. Sess. (Or. 2015).

249. Hinkel, *supra* note 234 (noting the policy permits one thirty-day extension).

250. POLICE ACCOUNTABILITY TASK FORCE, *supra* note 132; Scher & Spierer, *supra* note 102. Before a video is made public, however, the individuals depicted or described in the footage (or the family or legal representative if the individual is deceased) must be given notice. *Id.*

In addition, we would urge repeal of those state statutes that impose restrictions on disclosure of body camera videos beyond the existing public records exceptions. These statutes undermine the purpose of accountability under the guise of law enforcement needs.

Our proposed substantive rule would mean that for most misdemeanor or minor felony cases, our proposed agency should release videos even in the unlikely case that release would somehow interfere with law enforcement prosecution of an individual defendant. Again, these videos play only a secondary role as law enforcement tools.

But in most cases, release of the videos will not interfere with prosecution of misdemeanors or minor felonies especially since video editing technology can effectively mask the identities of those depicted in the videos. In more serious or high-profile crimes, law enforcement will have the chance to show the agency why it should not release videos immediately. Police may argue they need a more days to interview witnesses, when the release of the video might taint their memory of events. Or police might show how releasing the video would identify vulnerable witnesses even after appropriate disguising measures have been taken.

But in the vast majority of videos from uniformed police body cameras, these situations will not arise.

C. Transparency versus Privacy

Privacy presents far greater challenges, but balancing privacy against transparency largely goes beyond the scope of this Article, which has focused on the balance between law enforcement and accountability. We will leave for others, or for another day, the best way to balance disclosure against the privacy interests of bystanders, vulnerable victims, suspects, defendants, or indeed individual police officers themselves, beyond noting the availability of and need for effective redaction of identifying markers.

We must similarly leave aside for now how best to consider how the privacy-accountability balance applies in minority neighborhoods that face the largest police presence. Even as we outfit officers with body cameras in these neighborhoods in particular to deter misconduct, we simultaneously subject these neighborhoods to greater electronic surveillance.[251]

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251. *See Developments in the Law*, *supra* note 75, at 1794–1817 (2015), ("[A]lthough 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

Finally, any accounting for privacy will have to ensure that body camera programs, and the thousands of videos they generate, will not become part of a mass surveillance program, cataloging videos in searchable databases, with facial recognition software, that will lead to evils identified elsewhere in the literature.[252]

CONCLUSION

Police body cameras programs hold great promise to enhance police accountability. They can deter police misconduct and expose abuses, especially in high-profile cases in which the community demands transparency and justice. They hold the most promise in highly patrolled neighborhoods, often low-income neighborhoods of color.

But this promise faces a new, hidden challenge that we have examined and exposed here: the police have taken control over these programs, along with sole ownership of the body camera videos themselves. This control threatens to undermine the goal of accountability and exacerbate the unfairness already present in the criminal justice process.

We have shown how police control determines how to configure and use body camera systems. Studies have shown that the more discretion police have to stop filming, or to never start filming, the less that program deters misconduct.[253] Similarly, police ownership of videos has led to countless, often infamous cases of the police refusing to release videos, or selectively releasing them in ways designed to protect their reputation rather than promote accountability and enhance community trust.

Even as police control erodes accountability, it magnifies the unfairness that already infects the criminal justice system. True, police body camera videos contain evidence of ordinary crimes, and therefore may play an appropriate role in prosecuting those crimes. But police ownership has meant that this evidence becomes available to police and prosecutors in preparing cases, bringing charges, and even preparing for trial, while defendants and defense counsel cannot get access to the same evidence in time to make bail arguments, consider plea deals, or even in some cases

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increasingly militarized . . . . Facial recognition software in particular may pose a threat to civilian privacy when coupled with body cameras."); *see also, e.g.*, Frederick Melo, *St. Paul City Council Gets an Earful on Police Body Camera Pilot Project*, PIONEER PRESS (Nov. 2, 2016, 9:11 PM), https://perma.cc/4XRQ-EL5G.

252. Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 330 (2015); Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1374–98 (2004).

253. Ariel, *supra* note 91.

prepare for suppression motions or trial.

These two related outgrowths of police control have led to an unsettling irony: over-policing, misconduct, and killings in low-income neighborhoods have largely motivated body camera programs in hopes of accountability and deterrence. Yet these programs have drifted to *aiding* in that same law enforcement of those same neighborhoods without helping to reduce incidents of police misconduct and increase accountability and mutual trust.

We have proposed a novel and perhaps radical solution that restores body camera programs to their chief purpose: accountability. We propose shifting ownership and control of all body camera videos from police departments to a neutral police accountability agency. This agency would grant access to police videos according to neutral rules that favor disclosure with a primary eye toward accountability.

Of course, even though the primary goal of body camera programs is accountability, the police videos, as a secondary matter, do become evidence relevant to ordinary law enforcement. As a consequence, our proposed police accountability agency will disclose these videos for ordinary criminal cases as well. But it will do so on a fair, symmetrical basis—affording defense counsel and defendants immediate access to these videos via a secure web link—early enough so that defendants can make an informed plea. In this way, and only in this way, body cameras can serve both goals: accountability and law enforcement.

Our proposal sketches the technical logistics of this early defense access, in time for first appearance or arraignment, and shows why such early access will lead to more just, accurate, and efficient criminal justice outcomes. Such timely access will impose little, if any, costs on police efficiency or safety to witnesses or the community. Our proposed regime will represent a sea-change in how defendants and defense counsel currently prepare for bail hearings, plea bargains and trial, while allowing body camera programs to fulfill their primary purpose: accountability.