

Spring 2017

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Recommended Citation

Alberto R. Gonzales and Donald Q. Cochran, *Police-Worn Body Cameras: An Antidote to the “Ferguson Effect”?*, 82 MO. L. REV. (2017)
Available at: <http://scholarship.law.missouri.edu/mlr/vol82/iss2/5>

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MISSOURI LAW REVIEW

VOLUME 82

SPRING 2017

NUMBER 2

Police-Worn Body Cameras: An Antidote to the “Ferguson Effect”?

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I. INTRODUCTION

You are a police officer working the night shift in a major U.S. city. In the dark hours of the early morning, you come across a group of young males in a part of the city known for criminal activity. When they see your patrol car, the young men stop what they are doing and look away quickly. All of your training, as well as the instincts that you have developed over years patrolling these same streets, tells you to stop and at least attempt to start a conversation with the group to determine whether criminal activity is afoot and perhaps prevent it. There is, however, a nagging thought in the back of your head. Isn't it possible – or perhaps likely – that someone in the group or nearby will have a video device and record the encounter? What if the crowd attempts to provoke a confrontation and then records it? What if the recording is posted to the Internet or sent to the media? Should such thoughts temper your judgment in this situation? Would they make you hesitate to get out of the car? Would it make a difference to you if you knew that you were wearing a body camera – one that you controlled, that would record your view of the situation, with images that could not be disposed of or edited after the fact by someone intending to deprive viewers of necessary context?

This Article explores the questions raised by this scenario, focusing on police-worn body cameras, the role these cameras may play in officer-citizen encounters, and the resolution of legal disputes that arise from such encounters. Part II discusses what role, if any, citizen-recorded videos and the effect

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they have on society play in the prevalence of crime – what has sometimes been called the “Ferguson effect.” Part III explores the role police-worn body cameras could play in counteracting any such effect, addressing arguments in favor of body cameras and exploring their potential to encourage positive police and citizen behavior. Part IV then considers potential concerns about the use of body cameras, exploring arguments against their use and their potential to hinder police behavior. Finally, Part V offers conclusions and recommendations on the issue of police-worn body cameras.

II. THE “FERGUSON EFFECT”

Police officer Darren Wilson shot and killed Michael Brown on August 9, 2014, in Ferguson, Missouri.¹ Although an investigation by the U.S. Department of Justice (“DOJ”) later cleared Officer Wilson of federal wrongdoing in the shooting,² a parallel investigation by the Civil Rights Division of the DOJ concluded that the City of Ferguson’s law enforcement practices revealed a “pattern or practice of unlawful conduct.”³ Regardless, widespread rioting and looting occurred in Ferguson in the aftermath of the Brown shooting and again after a state grand jury’s decision not to indict Officer Wilson.⁴

In November 2014, three months after the shooting, St. Louis Police Chief Sam Dotson was interviewed regarding preparations for the upcoming announcement of the grand jury’s decision. During the interview, Chief Dotson was apparently the first to use the phrase “Ferguson effect,”⁵ noting that “[i]t’s the Ferguson effect. . . . I see it not only on the law enforcement side, but the criminal element is feeling empowered by the environment.”⁶ Chief

1. U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 4 (2015), <https://www.justice.gov/sites/default/files/usao-mdpa/legacy/2015/03/18/DOJ%20Report%20on%20Shooting%20of%20Michael%20Brown.pdf>.

2. *Id.* at 5 (“[T]he Department has concluded that Darren Wilson’s actions do not constitute prosecutable violations under the applicable federal criminal civil rights statute, 18 U.S.C. § 242, which prohibits uses of deadly force that are ‘objectively unreasonable[]’ . . .”).

3. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (internal quotations omitted).

4. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html?_r=0.

5. Richard Rosenfeld, *Documenting and Explaining the 2015 Homicide Rise: Research Directions*, NAT’L INST. JUST. 18 (June 2016), <https://www.ncjrs.gov/pdffiles1/nij/249895.pdf>.

6. Christine Byers, *Crime up After Ferguson and More Police Needed, Top St. Louis Area Chiefs Say*, ST. LOUIS POST-DISPATCH (Nov. 15, 2014), <http://www.stlouispostdispatch.com/news/ferguson-police-chiefs-say-crime-up-after-ferguson-and-more-police-needed-top-st-louis-area-chiefs-say>.

Dotson did not clarify what he meant by “the environment.” The comment, however, occurred during a discussion of a rise in assaults and robberies since the shooting, coupled with a drop in arrests, due at least in part to the fact that officers had been pulled away from their normal duties for specialized training in civil unrest.⁷

The phrase “Ferguson effect” has subsequently evolved to have two distinct meanings.⁸ One meaning – apparently the dominant one – is the “de-policing” interpretation.⁹ Under this view, the “Ferguson effect” occurs when “highly publicized incidents of police use of deadly force against minority citizens, including but not limited to the Ferguson incident, cause[] police officers to disengage from their duties, particularly proactive tactics that prevent crime.”¹⁰ The second meaning, however, shifts the focus from police inaction to “chronic discontent” in the African-American community.¹¹ This explanation postulates that the effect occurs when longstanding grievances with policing in African-American communities are activated by controversial incidents.¹² When such incidents involve the use of force by police, they cause this chronic discontent to explode into violence.¹³

The next significant use of the phrase occurred in May 2015, when columnist Heather Mac Donald used it in a *Wall Street Journal* op-ed entitled *The New Nationwide Crime Wave*.¹⁴ Mac Donald clearly adopted a “de-policing” interpretation of the term, reporting that when Chief Dotson used the phrase to describe the criminal element’s empowerment, it was the result of cops “disengaging from discretionary enforcement activity.”¹⁵ Mac Donald noted that the first half of 2014, prior to the Ferguson incident, had continued a twenty-year pattern of declining crime.¹⁶ After the Ferguson incident, however, the trend appeared to be reversing due to a demonization of law enforcement that was causing police to abandon the type of proactive policing that had been their most powerful weapon in reducing crime.¹⁷ Mac Donald ended on this ominous note: “[U]nless the demonization of law en-

www.stltoday.com/news/local/crime-and-courts/crime-up-after-ferguson-and-more-police-needed-top-st/article_04d9f99f-9a9a-51be-a231-1707a57b50d6.html.

7. *Id.*

8. Rosenfeld, *supra* note 5, at 2.

9. *Id.*

10. *Id.* at 18.

11. *Id.* at 2.

12. *Id.*

13. *Id.*; see also Heather Mac Donald, Opinion, *The New Nationwide Crime Wave*, WALL STREET J. (May 29, 2015, 6:27 PM), <https://www.wsj.com/articles/the-new-nationwide-crime-wave-1432938425>.

14. See generally Mac Donald, *supra* note 13.

15. *Id.*

16. *Id.*

17. *Id.*

forcement ends, the liberating gains in urban safety over the past 20 years will be lost.”¹⁸

The first evidence that Mac Donald’s dire predictions might be coming true on a national scale came in September 2015. A front-page article in the *New York Times* entitled *Murder Rates Rising Sharply in Many U.S. Cities* began: “Cities across the nation are seeing a startling rise in murders after years of declines”¹⁹ The article noted that more than thirty cities had reported increases in violence from the preceding year.²⁰ Although mentioning the phrase “Ferguson effect,” the article did not attempt to tie the rise to any one cause, merely noting that “[s]ome officials say intense national scrutiny of the use of force by the police has made officers less aggressive and emboldened criminals, though many experts dispute that theory.”²¹

Not long after the *Times* story appeared, U.S. Attorney General Loretta Lynch called a meeting of big city mayors and police chiefs in Washington, D.C. to discuss the issue.²² It was at this meeting that FBI Director James Comey first publicly speculated that the rise in crime might be due to a reduction in police activity.²³ Director Comey expounded on this theory several days later in a speech at the University of Chicago Law School by attributing the rise to a “chill wind that has blown through American law enforcement over the last year.”²⁴ Although acknowledging that his view was anecdotal and lacked data, Director Comey observed that lives are saved by “actual, honest-to-goodness, up-close ‘What are you guys doing on this corner at 1 o’clock in the morning’ policing” and that there will be consequences if this type of policing “drift[s] away from us in the age of viral videos.”²⁵

Director Comey continued his assertion that de-policing was behind the rise in crime into 2016. In May of that year, after a private briefing on rising crime rates for the first quarter of the year, Director Comey observed that “a whole lot more people are dying this year than last year, and last year than the

18. *Id.*

19. Monica Davey & Mitch Smith, *Murder Rates Rising Sharply in Many U.S. Cities*, N.Y. TIMES, Sept. 1, 2015, at A1.

20. *Id.*

21. *Id.*

22. John Byrne, *Emanuel Blames Chicago Crime Uptick on Officers Second-Guessing Themselves*, CHI. TRIB. (Oct. 13, 2015), <http://www.chicagotribune.com/news/local/politics/ct-emanuel-fetal-police-met-20151012-story.html>; see also Rosenfeld, *supra* note 5, at 4.

23. Rosenfeld, *supra* note 5, at 4.

24. Michael S. Schmidt & Matt Apuzzo, *F.B.I. Chief Links Scrutiny of Police with Rise in Violent Crime*, N.Y. TIMES (Oct. 23, 2015), <http://www.nytimes.com/2015/10/24/us/politics/fbi-chief-links-scrutiny-of-police-with-rise-in-violent-crime.html> (internal quotations omitted).

25. *Id.*

year before and I don't know why for sure."²⁶ Although rejecting the term "Ferguson effect," Director Comey said that he is continuing to hear that many police are pulling back from aggressive confrontations with the public due to viral videos and that this phenomenon could be an important factor in the rising crime rates.²⁷

Not everyone agreed with the FBI Director. President Obama countered Director Comey's speech, saying he saw no evidence that police officers were policing less aggressively, and Director Comey was cherry picking the data.²⁸ In response to Director Comey's later comments, White House Press Secretary Josh Earnest said, "[T]here's not evidence at this point to link that surge in violent crime to the so-called viral video effect, or the Ferguson effect."²⁹ The Brennan Center for Justice at NYU Law School took exception to both aspects of Director Comey's argument. First, in its analysis of the 2015 crime numbers, the Center took exception to the assertion that crime was rising.³⁰ Noting that "[t]here is no evidence of a deviation from the historically low levels of violence the country has been experiencing," the report's authors concluded that "murder rates vary widely from year to year, and there is little evidence of a national coming wave in violent crime."³¹ Moreover, to the extent that homicides had increased nationally, the report's authors observed that more than half the increase occurred in three cities: Baltimore, Chicago, and Washington, D.C.³² All three cities had falling populations, higher poverty rates, and higher unemployment than the national average, which the authors opined could contribute to the increase in homicides.³³

Richard Rosenfeld, a professor at the University of Missouri at St. Louis, was an early critic of the idea that the "Ferguson effect" exists. His belief was grounded in his research conducted on crime in the St. Louis area.³⁴

26. Eric Lichtblau, *F.B.I. Director Says "Viral Video Effect" Blunts Police Work*, N.Y. TIMES (May 11, 2016), <http://www.nytimes.com/2016/05/12/us/comey-ferguson-effect-police-videos-fbi.html> (internal quotations omitted).

27. *Id.*

28. Heather Mac Donald, Opinion, *The Nationwide Crime Wave Is Building*, WALL STREET J. (May 23, 2016, 7:17 PM), <http://www.wsj.com/articles/the-nationwide-crime-wave-is-building-1464045462>.

29. Mark Berman, "We Have a Problem." *Homicides Are up Again This Year in More Than Two Dozen Major U.S. Cities.*, WASH. POST (May 14, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/05/14/we-have-a-problem-homicides-are-up-again-this-year-in-more-than-two-dozen-major-u-s-cities/?utm_term=.27c549f3e7f2 (internal quotations omitted).

30. See MATTHEW FRIEDMAN, NICOLE FORTIER & JAMES CULLEN, BRENNAN CTR. FOR JUSTICE, CRIME IN 2015: A PRELIMINARY ANALYSIS 15 (2015), https://www.brennancenter.org/sites/default/files/publications/Crime_In_2015.pdf.

31. AMES GRAWERT & JAMES CULLEN, BRENNAN CTR. FOR JUSTICE, CRIME IN 2015: A FINAL ANALYSIS 1 (2015), https://www.brennancenter.org/sites/default/files/analysis/Crime_in_2015_A_Final_Analysis.pdf.

32. *Id.*

33. *Id.*

34. See Davey & Smith, *supra* note 19.

Because homicides began rising in St. Louis prior to the Michael Brown killing, Rosenfeld noted, “[O]ther factors may be in play.”³⁵

Rosenfeld decided, however, to expand his research from just St. Louis to a national study. Funded by a grant from the DOJ’s National Institute of Justice, Professor Rosenfeld studied nationwide data in an attempt to answer two questions: (1) did homicide rates increase nationally, and, if so, how significant and widespread was the increase; and (2) was the rise caused by hesitancy on the part of police to do their jobs?³⁶

To answer the first question, Professor Rosenfeld looked at crime statistics provided by the police departments of fifty-six large U.S. cities.³⁷ Based on this data, he found that the homicide rate in these fifty-six cities rose collectively by 16.8% over the previous year – a rise that Rosenfeld found to be “real” and “comparatively large.”³⁸ Rosenfeld found these results worrisome, noting that “these aren’t flukes or blips, this is a real increase.”³⁹ Professor Rosenfeld responded to the Brennan Center’s interpretation of the 2015 data⁴⁰ by stating, “The conclusion one draws from the Brennan Center’s report is, ‘Not much changed,’ and that is simply not true. In the case of homicide, a lot did change, in a very short period of time.”⁴¹

Rosenfeld’s conclusion appears to be confirmed by the FBI’s recently released 2015 Uniform Crime Report (“UCR”).⁴² For cities with populations over 250,000, the UCR shows that homicides increased by 14.5% during 2015.⁴³ Thus, the murder rate rose nationally more in a single year than it

35. *Id.*; see also Lois Beckett, *Is the “Ferguson Effect” Real? Researcher Has Second Thoughts*, GUARDIAN (May 13, 2016, 4:23 PM), <https://www.theguardian.com/us-news/2016/may/13/ferguson-effect-real-researcher-richard-rosenfeld-second-thoughts> (“For nearly a year, Richard Rosenfeld’s research on crime trends has been used to debunk the existence of a ‘Ferguson effect’ . . .”).

36. Rosenfeld, *supra* note 5, at 4.

37. All but one of the cities – Salt Lake City – had populations over 250,000. *Id.* at 5. Thus, Professor Rosenfeld found the fifty-six-city sample to be a “reasonable proxy” for the seventy to eighty cities with populations over 250,000 that constitute “Group I” cities in the FBI’s Uniform Crime Report. *Id.* at 6.

38. *Id.* at 6, 10. See also Haeyoun Park & Josh Katz, *Murder Rates Rose in a Quarter of the Nation’s 100 Largest Cities*, N.Y. TIMES (Sept. 9, 2016), <http://www.nytimes.com/interactive/2016/09/08/us/us-murder-rates.html>.

39. Beckett, *supra* note 35 (internal quotations omitted).

40. FRIEDMAN, FORTIER & CULLEN, *supra* note 30.

41. Beckett, *supra* note 35 (internal quotations omitted). Another interesting finding of Rosenfeld was that of the fifty-six cities, ten accounted for two-thirds of the increase, experiencing a 33% rise in homicide. Rosenfeld, *supra* note 5, at 10. Taking a closer look at what differentiated these ten cities, Rosenfeld noted the key difference was that they had African-American populations that were twice as large as the other cities (40.8% compared to 19.9%). *Id.*

42. See FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: 2015 CRIME IN THE UNITED STATES tbl.12 (2016), <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-12>.

43. See *id.*

had in nearly half a century.⁴⁴ Moreover, despite the Brennan Center's initial skepticism that there was an increase in the murder rate at all, it now projects that the murder rate in 2016 will rise by 14% and the two-year increase in the murder rate from 2014 to 2016 will be 31.5%.⁴⁵

After finding a significant increase in homicides in 2015, Rosenfeld moved to his second question: why the rise? He began by noting the nature of this inquiry – that he was not looking to explain a long-term trend but instead for a short-term trend reversal.⁴⁶ Put simply, he asked “why homicide rates would suddenly increase after falling for over two decades.”⁴⁷ In conducting his analysis, he made what he opined was a reasonable assumption: “[W]hatever factors lay behind the 2015 homicide rise should themselves have exhibited comparably abrupt changes at the same time or shortly before.”⁴⁸ Looking at recent societal changes that could possibly explain a sudden and dramatic rise in murders, Rosenfeld saw only three possibilities: (1) an expansion in urban drug markets coinciding with the recent rise in heroin and opioid abuse, (2) recent reductions in prison population, or (3) some version of the “Ferguson effect.”⁴⁹

On its face, the drug market explanation seemed plausible. After all, there has been an undisputable increase in drug overdose deaths due to an increase in heroin and other opioid use.⁵⁰ Moreover, there is historical precedent for a correlation between a rise in drug use and crime rate, as a rise in the use of crack cocaine in the 1980s and early 1990s did in fact lead to a rise in the urban homicide rate.⁵¹ Rosenfeld, however, expressed skepticism that the “urban drug market” theory explains the rise.⁵² The primary reason for his skepticism was that the sharp rise in heroin overdose deaths began in 2011,

44. Timothy Williams & Monica Davey, *U.S. Murders Surged in 2015*, *F.B.I. Finds*, N.Y. TIMES (Sept. 26, 2016), <http://www.nytimes.com/2016/09/27/us/murder-crime-fbi.html>.

45. MATTHEW FRIEDMAN, AMES C. GRAWERT & JAMES CULLEN, BRENNAN CTR. FOR JUSTICE, *CRIME IN 2016: A PRELIMINARY ANALYSIS 1* (2016), https://www.brennancenter.org/sites/default/files/publications/Crime_2016_Preliminary_Analysis.pdf. See also MATTHEW FRIEDMAN, AMES GRAWERT & JAMES CULLEN, BRENNAN CTR. FOR JUSTICE, *CRIME IN 2016: UPDATED ANALYSIS 1* (2016), https://www.brennancenter.org/sites/default/files/analysis/Crime_in_2016_Updated_Analysis.pdf.

46. Rosenfeld, *supra* note 5, at 10.

47. *Id.* at 11.

48. *Id.* at 12.

49. *Id.*

50. The overdose death rate more than doubled from 1999 to 2014, and in 2014, heroin and opioids caused over 40,000 overdose deaths in the United States. *Id.* at 13. See also Lenny Bernstein, *Deaths from Opioid Overdoses Set a Record in 2014*, WASH. POST (Dec. 18, 2015), <https://www.washingtonpost.com/news/to-your-health/wp/2015/12/11/deaths-from-heroin-overdoses-surged-in-2014/>.

51. Rosenfeld, *supra* note 5, at 13; see also Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10, 11–13 (1995).

52. Rosenfeld, *supra* note 5, at 14.

and there was no reasonable explanation as to why a corresponding rise in the homicide rate should lag almost five years behind if drug markets were the cause.⁵³

Likewise, the recent reduction in the prison population fails to explain the sudden and dramatic increase in homicides.⁵⁴ Although there has clearly been a falling imprisonment rate in the United States, and it is undisputed that released prisoners are arrested at a rate much greater than the general population,⁵⁵ timing also makes this explanation problematic. The number of state and federal inmates peaked in 2009 and has been falling ever since.⁵⁶ Thus, Rosenfeld found this explanation, like the urban drug market theory, simply unable to account for the “sheer abruptness” of the 2015 increase.⁵⁷

“The only explanation that gets the timing right,” according to Rosenfeld, “is a version of the Ferguson effect.”⁵⁸ While the causes of violence and the reasons for crime trends remain complex and only partially understood,⁵⁹ Rosenfeld asserts that the most probable explanation for this spike in homicide rates is some version of the “Ferguson effect.”⁶⁰ Rosenfeld acknowledges that “[w]e don’t yet have the data to understand the mechanism for the Ferguson effect.”⁶¹ However, Rosenfeld leans toward the lost trust in policing mechanisms rather than the de-policing version of the effect advocated by Director Comey and Heather Mac Donald.⁶²

While it cannot be stated with absolute certainty that the “Ferguson effect” is the direct cause of the large spike in homicide rates, especially considering the multifactorial nature of cause and effect, it does appear to be the most plausible explanation. Moreover, it is apparent that many aspects of what is called the “Ferguson effect” – such as citizen-recorded videos, posts of videos on the Internet, and aggressive confrontations with police officers – are now simply a reality of modern policing that police officers must come to terms with.

53. *Id.* at 15.

54. *Id.* at 16.

55. *Id.*

56. See BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, <https://www.bjs.gov/index.cfm?ty=nps> (navigate to the “Yearend custody population” table); see also Rosenfeld, *supra* note 5, at 16.

57. Rosenfeld, *supra* note 5, at 20.

58. Beckett, *supra* note 35 (internal quotations omitted).

59. For example, even the causes of the dramatic drop in crime since the early 1990s are still in dispute and not fully understood. *Id.*

60. *Id.*

61. *Id.* (internal quotations omitted).

62. *Id.* See generally Heather Mac Donald, Opinion, *More on the “Ferguson Effect,” and Responses to Critics*, WASH. POST (July 21, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/21/more-on-the-ferguson-effect-and-responses-to-critics/?utm_term=.1e6c8b582e94.

III. CAN POLICE-WORN BODY CAMERAS COUNTERACT ANY EXISTING FERGUSON EFFECT?

If the “Ferguson effect” is a reality, it either takes the de-policing form advocated by Director Comey and Heather Mac Donald, the “lost legitimacy” of the police in African-American communities form as suspected by Professor Rosenfeld, or surfaces from some combination of these forces. A question then arises about whether anything can be done to counteract such an effect. Specifically, could the police use of body-worn cameras impact either or both versions of the effect? Part A of this section discusses the effect of police body cameras on police actions in light of the fact that de-policing is the driving force behind the “Ferguson effect.” Part B then discusses the potential effect police body cameras may have if the driving force is actually the lost legitimacy of the police in African-American communities rather than de-policing.

A. *Police-Worn Body Cameras and De-Policing*

Return to the scenario presented in the introduction – a classic example of what Director Comey calls “what are you guys doing on this corner at 1 o’clock in the morning?” policing.⁶³ De-policing occurs whenever a police officer decides not to get out of a patrol car for fear that the encounter will be recorded for public release, and the recording may portray the officer in a negative light.⁶⁴

Most, if not all, police departments have standard procedures in place to cover many situations that officers encounter. There is, however, no question that standard procedures only cover a fraction of the myriad of possible situations that police officers may face. As a result, many situations arise in which the decision to take action is largely or entirely a matter of discretionary policy decisions by individual officers, possibly in conjunction with partners or other officers at the scene. In light of the decentralized nature of these decisions, it seems reasonable to assume that the risk of confrontation and highly visible exposure might cause at least a fair number of police officers to hesitate to take actions that they might have taken in the past.⁶⁵

63. Schmidt & Apuzzo, *supra* note 24.

64. *Id.*

65. The 2015 UCR statistics provide support for the argument that some measure of de-policing is occurring, as they show that arrests of juveniles for all offenses decreased by 8.4% in 2015, and adult arrests decreased by 3%. FEDERAL BUREAU OF INVESTIGATION, *Persons Arrested*, UNIFORM CRIME REPORT: 2015 CRIME IN THE UNITED STATES (Sept. 2016), <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/persons-arrested/persons-arrested>. See also Heather Mac Donald, Opinion, *Ferguson Effect Detractors Are Wrong*, MANHATTAN INST. (Mar. 21, 2016), <https://www.manhattan-institute.org/html/ferguson-effect-detractors-are-wrong-8667.html> (arrests in St. Louis City and County down by one-third after the Brown shoot-

Can police officers wearing body cameras have an impact on such conduct, effectively serving as something of an *antidote* to any “de-policing” that is occurring and, thus, to the “Ferguson effect”? Return again for a moment to the role of our hypothetical police officer, and consider the effect of adding a police-worn body camera to the equation. Would this tip the balance in favor of a decision to get out of the car and talk to the young men? A body-worn camera, unlike one held by a citizen, will show events from the perspective of the police officer, giving viewers a sense of what the officer sees and hears (or does not see or hear). This could be helpful to the officer and thus encourage the officer to take action for two reasons: (1) the officer’s perspective is the legally relevant perspective, and (2) it gives context to the final frames often recorded by citizens.

First, legally, the officer’s perspective is the one that matters if an allegation of excessive force is made. In determining whether an officer used excessive force, the courts will look to whether the action was reasonable, and “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”⁶⁶ Accordingly, a police body camera video will provide a court with the view that legally matters. Moreover, in the court of public opinion, the public’s ability to see what the officer saw is critical to understanding the officer’s actions. It is the view most capable of putting the public in the officer’s position and giving them the context needed to determine whether or not the actions taken were reasonable. Additionally, the presence of a body camera that the officer controls can ensure that the public does not see only the provocative piece of the encounter.⁶⁷ If operated properly, such cameras will guarantee that the entire interaction is recorded and preserved so that the focus is not solely on the final frame of the incident, and a reviewing court or the public will be able to see the events leading up to the final part of the encounter.⁶⁸

ing and misdemeanor drug arrests in Baltimore down one-third through November 2015).

66. *Graham v. Connor*, 490 U.S. 386, 396 (1989). See also Karson Kampfe, *Police-Worn Body Cameras: Balancing Privacy and Accountability Through State and Police Department Action*, 76 OHIO ST. L.J. 1153, 1167 (2015) (noting that police-worn body cameras “create an objective record of an interaction from the officer’s point of view”).

67. Kampfe, *supra* note 66, at 1168.

68. *Id.* Of course, critics counter that police may fail to record certain encounters or delete them once recorded. *Chapter Four Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1806 (2015) (“[O]nce the locus of control shifts to the officers, the very organization meant to be held accountable will be able to prevent these videos from being created in the first instance or shared after the fact.”). However, given the prevalence of recording devices in the general public today and likelihood that the number will only increase, an officer’s failure to record an encounter will likely not prevent the encounter from being recorded but merely ensure that it is only documented by someone else, resulting in a lost opportunity to have the public see the officer’s view of events. Kampfe, *supra* note 66, at 1166 (noting that it was

Body cameras also may encourage police action (and thus counteract de-policing) due to their potential to have a civilizing effect on citizens in such encounters.⁶⁹ Such an effect is explained by the theory of self-awareness, which holds that people are less likely to engage in socially undesirable behavior if they know they are being watched.⁷⁰ This civilizing effect also operates on the other party in the encounter – the police officer.⁷¹ In a one-year study in which officers were randomly assigned to wear body cameras, researchers found that those wearing cameras used force half as often as those who did not and had only one-tenth as many citizen complaints filed against them.⁷² Although it is not entirely clear whether this result is due to improved police behavior, improved citizen behavior, or some combination of the two,⁷³ what is clear is that police-worn body cameras improved officer-citizen encounters. In addition, the cameras also appear to produce a measureable decrease in de-policing, as the department had 3000 more officer-citizen contacts during the year of the experiment.⁷⁴

In another study of 2000 police officers across seven different departments, researchers found a 93% reduction in complaints against officers when

estimated, by the end of 2014, 80% of the public would have cellphones capable of video recording).

69. Kampfe, *supra* note 66, at 1162.

70. *Id.* For the camera to have this effect on citizens who interact with police, they must know that they are being filmed by the camera, which can be accomplished with an announcement by the officer or a visual signal like a light on the camera. See Barak Ariel, William A. Farrar & Alex Sutherland, *The Effect of Police Body-Worn Cameras on Use of Force and Citizens' Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANTITATIVE CRIMINOLOGY 509, 516 (2015) (“[C]ameras . . . drive us to compliance. If we become aware that a video-camera is recording our actions, we may also become more conscious that unacceptable behaviors will be captured on film, and that detection is perceived as certain.”).

71. LINDSAY MILLER ET AL., OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 2 (2014), <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>; see also Lee Rankin, *On-Officer Body Camera System: End of Program Evaluation & Recommendation*, AXON FLEX (Sept. 27, 2014), https://issuu.com/leerankin6/docs/final_axon_flex_evaluation_12-3-13-; SPI: Phoenix Police Department Body-Worn Camera Project, ARIZ. ST. U. SCH. CRIMINOLOGY & CRIM. JUST., <http://coppfs3.asu.edu/news-events/news/spi-phoenix-police-department-body-worn-camera-project> (last visited Mar. 12, 2017).

72. Ariel, Farrar & Sutherland, *supra* note 70, at 523; see also MICHAEL D. WHITE, DIAGNOSTIC CTR., OFFICE OF JUSTICE PROGRAMS, DEP'T OF JUSTICE, GS23F-9755H, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 6 (2014), <https://www.ojpdiaagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf>; *Chapter Four Considering Police Body Cameras*, *supra* note 68, at 1801.

73. WHITE, *supra* note 72, at 6.

74. *Id.* at 21 n.11.

they were wearing body cameras.⁷⁵ The cameras apparently reduced both unfounded complaints and police aggression and actually improved the behavior of officers more than citizens.⁷⁶ Therefore, it appears that police-worn body cameras have the potential to counteract, and may already be counteracting, any de-policing occurring due to the “Ferguson effect.” However, it is possible that de-policing is not the driving force behind the “Ferguson effect.”

B. Police-Worn Body Cameras and Lost Legitimacy

What if the driving force behind the “Ferguson effect” and the rise in crime is not de-policing, but rather a lost trust in police in African-American communities that surfaces each time a controversial police use of force incident becomes public, particularly if it is documented in a citizen-recorded video? Can police-worn body cameras have an impact on this version of the effect, again serving as an antidote? A diverse collection of groups appears to believe that they can.

In a recent survey of more than sixty police departments, the DOJ concluded that cameras had the potential to promote “perceived legitimacy and sense of procedural justice” in officer-citizen encounters.⁷⁷ Support for body cameras appears to be bipartisan⁷⁸ and cross-racial.⁷⁹ In 2014, President Obama announced that he would seek to provide \$263 million to buy body cameras for police departments and provide training in their use.⁸⁰ In addition, at least thirty-six state legislatures and Congress have taken legislative action to purchase police-worn body cameras.⁸¹ In her groundbreaking order in the NYPD “stop and frisk” case, Judge Scheindlin wrote that police-worn body cameras “should . . . alleviate some of the mistrust that has developed

75. 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, 301 (2017).

76. *Id.* at 307.

77. Kirk Johnson, *Today’s Police Put on a Gun and a Camera*, N.Y. TIMES (Sept. 27, 2014), http://www.nytimes.com/2014/09/28/us/todays-police-put-on-a-gun-and-a-camera.html?_r=0 (internal quotations omitted); see also *Chapter Four Considering Police Body Cameras*, *supra* note 68, at 1803 (“That so many Americans feel they would be safer if all police officers wore body cameras speaks to this technology’s potential to increase accountability and transparency.”).

78. Roseanna Sommers, *Will Putting Cameras on Police Reduce Polarization?*, 125 YALE L.J. 1304, 1309 (2016) (noting that a Pew Research Center poll in December 2014 showed 79% of Republicans, 90% of Democrats, and 88% of Independents thought body cameras were a good idea).

79. *Id.* (the same poll shows support for body cameras by African-Americans (90%), Hispanics (89%), and Caucasians (85%)).

80. *Chapter Four Considering Police Body Cameras*, *supra* note 68, at 1795–96.

81. Kampf, *supra* note 66, at 1160.

between the police and the black and Hispanic communities.”⁸² Moreover, even the American Civil Liberties Union (“ACLU”), which initially opposed police-worn body cameras and scarcely agrees with the DOJ and police departments on most issues, reversed itself and now supports their use.⁸³

This near unanimity of opinion appears to derive from what all these groups perceive as the most important benefits that body cameras can provide to a public distrustful of the police – transparency and accountability.⁸⁴ Research shows that as public perception of the police becomes more positive, citizens are more compliant, and thus the crime rate decreases.⁸⁵ Increased transparency is central to the public’s perception of police legitimacy because it demonstrates fairness and justice.⁸⁶ Police-worn body cameras contribute to a sense of fairness and justice when they assist in resolving what would otherwise be suspect officer-citizen encounters by creating an “objective and reviewable record.”⁸⁷

This is not to say, however, that police body cameras will serve as a magic bullet that will solve all disputes.⁸⁸ In fact, a number of commentators have stressed that video evidence is not a panacea.⁸⁹ To illustrate this point, Professor Dan Kahan conducted an empirical study using the dash cam video in the case of *Scott v. Harris* that eight members of the U.S. Supreme Court

82. *Floyd v. City of New York*, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013); see also Allyson Roy, *Examining the Effects of Police Department Policy and Assignment on Camera Use and Activation* (May 2014) (unpublished Masters thesis, Arizona State University) (on file with author).

83. *Chapter Four Considering Police Body Cameras*, *supra* note 68, at 1796; Sommers, *supra* note 78, at 1310.

84. See Kampfe, *supra* note 66, at 1163.

85. See generally Roy, *supra* note 82.

86. WHITE, *supra* note 72, at 19.

87. Kampfe, *supra* note 66, at 1163.

88. One example of how police body cameras will not serve as a magic bullet because not everyone perceives a video recording the same way is the 1991 videotape showing the police beating of Rodney King. Geoffrey Taylor Gibbs, *Opinion, L.A. Cops, Taped in the Act*, N.Y. TIMES (Mar. 12, 1991), <http://www.nytimes.com/1991/03/12/opinion/l-a-cops-taped-in-the-act.html>. The stark differences in the way in which the King video was viewed were illustrated most clearly by the riots that occurred after a state criminal prosecution of the officers involved in the beating resulted in an acquittal by a largely white jury of three of the four officers and a mistrial as to the fourth. *Id.*

89. Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 833 (2015). See also Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 840 (2009); Sommers, *supra* note 78, at 1353–54; Alexandra Mateescu et al., *Police Body-Worn Cameras* 24 (Feb. 2015) (unpublished manuscript) (on file with Data & Society Research Institute) (“[T]he idea that cameras are able to capture the full story should be taken with caution.”).

found to be unambiguous.⁹⁰ Kahan’s researchers found that when they allowed the video to “speak for itself” – as the Court encouraged readers of its opinion to do – they found that “what it says depends on to whom it is speaking.”⁹¹ As Kahan observed:

Whites and African Americans, high-wage earners and low-wage earners, Northeasterners and Southerners and Westerners, liberals and conservatives, Republicans and Democrats – all varied significantly in their perceptions of the risk that Harris posed, of the risk the police created by deciding to pursue him, and of the need to use deadly force against Harris in the interest of reducing public risk.⁹²

These significant differences suggested to Kahan the presence of value-motivated cognition or the tendency of people to resolve factual ambiguities in a way that is consistent with their existing values.⁹³ Such differences are no doubt a reality of American society. If, as one commentator has noted, Officer Darren Wilson had been wearing a body camera when he shot Michael Brown, “opinions about what the video ‘showed’ almost certainly would split along political divisions about race, racial justice, police practices, and concepts of law and order.”⁹⁴ Such differences of opinion surface after events like a Staten Island grand jury’s recent decision not to indict Officer Daniel Pantaleo after the death of Eric Garner, despite a video recording of the encounter.⁹⁵ The failure to indict led Garner’s father to tell reporters that the President’s body camera initiative was “[t]hrowing money away. Video didn’t matter here.”⁹⁶

The correct question, however, is not whether police body camera video will resolve all ambiguity, but whether having video from a police body camera in a greater percentage of officer-citizen encounters is better than the status quo. Put simply, is having recorded video that is inherently less biased and more reliable than an eyewitness better in a system in which ambiguity is resolved largely by resorting to eyewitness testimony? In some cases, what the video *shows* may be clear enough to all viewers that it is dispositive. For instance, in a case where it directly exposes outright dishonesty, it will likely

90. Kahan et al., *supra* note 89, at 864; *Scott v. Harris*, 550 U.S. 372, 380–81 (2007) (civil suit against a deputy sheriff brought by a motorist who was left paralyzed when the car he was driving was rammed during a high-speed chase).

91. Kahan et al., *supra* note 89, at 838, 903 (Kahan’s researchers showed the dash cam video to a diverse sample of 1350 Americans).

92. *Id.* at 903.

93. *Id.* at 842–43.

94. Wasserman, *supra* note 89, at 841.

95. Sommers, *supra* note 78, at 1309.

96. *Id.* at 1309–10 (alteration in original) (quoting Elliott C. McLaughlin, *After Eric Garner: What’s Point of Police Body Cameras?*, CNN (Dec. 8, 2014, 7:41 PM), <http://www.cnn.com/2014/12/04/us/eric-garner-ferguson-body-cameras-debate>).

carry the day.⁹⁷ To the extent that such use of body camera video exposes *bad cops* and leads to their departure from the ranks of the police, it is unquestionably a good thing.⁹⁸ In other cases, although all viewers may not always see it in the same way, it nonetheless provides the opportunity for people not physically present at the event to learn more about what happened than they would have without the video.

IV. ARGUMENTS AGAINST BODY CAMERAS

While there may be strong arguments in favor of police body cameras, critics remain fairly consistent in their reasons to question, if not directly oppose, this policy. Part A of this section discusses general concerns relating to potential violations of privacy rights associated with recording individuals without their consent. This Part will discuss the competing interests between privacy rights and the public's right to information, while offering potential suggestions for administering body cameras to find a proper balance. Part B then delves into the specific federal and state laws that exist to protect our privacy, which include protection against video recordings. This Part will further discuss issues regarding images and sounds from innocent bystanders and family members who are more likely to be captured with a police body camera than with dashboard cameras or street surveillance cameras. Part C examines another common concern regarding prohibitive costs to police departments by examining the expense for the equipment, storage, and training – as they are substantial – and whether this cost is justified by the potential benefits. Part D discusses the potential over-deterrence that body cameras may cause. This Part analyzes the effect constant recording can have on a police officer's decisions, due to the possibility of later criticism and scrutiny. Part E then discusses the concern of over-reliance on technology in judging how an officer exercises discretion in the performance of his or her duties, exploring the idea that a picture is worth a thousand words, yet sometimes the narrative captured by an image is incomplete or false. Part F explores the possibility that recorded images will be used for reasons unrelated to law enforcement. This Part dives into whether releasing images to the public allows the police to lose control of the narrative, opening the door to an entirely new set of concerns. Finally, Part G considers the potential for police opposition to the use of body cameras by comparing the pushback for record-

97. *Id.* at 1350 (even a commentator who is generally skeptical of video's ability to outperform non-video evidence acknowledges that "video evidence may turn out to be decisive in cases where one party has blatantly lied about what happened").

98. *See, e.g., id.* at 1313 (noting the video showed the police officer picking up the taser and placing it near the shooting victim's body, and "once the video surfaced, 'there was hardly the typical closing of ranks around [the officer]' by other police and he was quickly charged with murder" (quoting Adam Chandler, *The Total Rejection of Michael Slager*, ATLANTIC (Apr. 9, 2015), <http://www.theatlantic.com/national/archive/2015/04/the-otherworldly-rejection-of-michael-slager/390165>)).

ed interrogations to the introduction of body cameras to the law enforcement arsenal.

A. *Protection of Privacy Rights Generally*

A major point of contention involving police body cameras relates to the privacy rights of innocent bystanders captured on the video, such as family members.⁹⁹ If a police video becomes public domain, incidents caught on tape could be accessible to anyone, without the consent of those videotaped. While bystanders on the street or in a public square may not have a reasonable expectation of privacy, someone in a private home likely does not expect to be filmed. Family members caught on film would be connected to the filmed incident by association to the video. This connection could affect reputations, relationships, and present or future employment. What are the rights of the innocent with this new technology under these privacy laws? Should the video that includes innocent bystanders and family members eventually be made available to the public? Releasing a police video into the public domain also raises the question of whether or not a person gives up his or her reasonable expectation of privacy simply because he or she is suspected of committing a crime.

The line between the public's right to know and an individual's reasonable expectation of privacy has been difficult to define. Some courts have ruled on the side of greater transparency, while others have been more deferential to law enforcement's posture toward privacy.¹⁰⁰ The divide over privacy has been most pronounced between groups such as the ACLU and state lawmakers.¹⁰¹ However, several ideas have been proposed to accommodate the interests of both sides. One straightforward approach is to simply require officers who wear body cameras to notify, whenever practicable, the public that they are being recorded, or require officers to wear easily visible signage that the officer is wearing a body camera and recording conversations and activities.¹⁰²

The alternative is to require officers to operate their body cameras only when interacting with the public in an official capacity. Not surprisingly, critics of the police are uncomfortable giving officers the power to turn a camera on and off and essentially decide what should or should not be cap-

99. *Chapter Four Considering Body Cameras*, *supra* note 68, at 1808–09.

100. Eileen Sullivan, *Police Body Cameras Show More Than Just the Facts*, SAN DIEGO UNION-TRIB. (Sept. 11, 2015, 12:14 AM), <http://www.sandiegouniontribune.com/sdut-police-body-cameras-may-solve-one-problem-but-2015sep11-story.html>.

101. Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All*, ACLU (Oct. 2013), <https://www.aclu.org/police-body-mounted-cameras-right-policies-place-win-all> (last updated Mar. 2015); Ryan J. Foley, *Bills Nationwide Aim to Seal Police Body Camera Videos*, DES MOINES REGISTER (Mar. 20, 2015, 11:10 PM), <http://www.desmoinesregister.com/story/news/crime-and-courts/2015/03/21/body-cameras-access-nationwide/25108067/>.

102. *See* Stanley, *supra* note 101.

tered by a body camera.¹⁰³ Even officers are wary of this approach, as they worry that the discretion to turn a body camera on and off will be used against them when there is a questionable incident that is not properly recorded because of a technical malfunction, an honest mistake on the part of the officer, or the circumstances did not give the officer the time to do so.

Obviously, a policy that allows selective recording will have to include clear rules about when and how such recordings are to occur, as well as impose serious punishment, in order to deter violations of the policy.¹⁰⁴ At this time, it is hard to imagine a selective recording policy that will fully satisfy law enforcement, proponents of privacy, and critics suspicious of law enforcement.

One challenge of having the body camera turned on during an entire shift and recording everything is that this would, of course, capture far more information than is relevant to police work – including private conversations and activities during breaks. Police departments would need the resources and capacity to store, maintain, and protect this information, which could place a strain on already-tight budgets, as discussed later.¹⁰⁵

Additionally, departments in possession of such information would undoubtedly be burdened by numerous requests from the media and public for such information. While much of the private or unofficial conversations and activities could be quickly deleted, this may run afoul of open records laws and be unpopular among those who rely on open records laws to obtain tantalizing and embarrassing images. Further, as there are websites dedicated to nothing but posting videos from police body cameras, quick deletion of such information may not even be sufficient to protect privacy rights against those wishing to publish tantalizing and embarrassing images on the Internet.¹⁰⁶

Under this proposal, departments would need the resources, technical capacity, and trained personnel to redact sensitive law enforcement and private information when responding to an open records request. By some estimates, the costs of editing videos to protect privacy interests would overwhelm some police departments. Because of the privacy interests implicated by this type of policy, legislators and regulators may want to consider limiting the amount of time the non-public or non-law enforcement related information must be preserved and turned over in an open records request. Some state lawmakers believe this approach is unworkable and are considering an outright ban to public release, except to those individuals whose images are captured on video.¹⁰⁷

103. Fox8Live.com Staff, *Officer Involved in Monday Shooting Had Body Cam Turned Off*, FOX 8 LIVE (2014), <http://www.fox8live.com/story/26283883/officer-involved-in-monday-shooting-had-bpdy-cam-turned-off>.

104. Stanley, *supra* note 101.

105. *See id.*

106. *See Police Body Cameras: Pros and Cons*, NEW ENG. C., <http://www.newenglandcollegeonline.com/resources/criminal-justice/police-body-cameras-pros-and-cons/#:WBPCOJMrJp8> (last visited Mar. 12, 2017).

107. *See Stanley, supra* note 101.

Any responsible policy regarding the release of a police video should reflect an appropriate balance between respecting the public's right to know the actions of its public servants, preserving legitimate privacy rights, and protecting the integrity of law enforcement investigations and prosecutions. Once justice under the law has been served and appropriate steps taken to protect legitimate privacy concerns, then an underlying police video should be released. The only exception to this policy might be those extraordinary circumstances where releasing the video incites mass violence, where images of graphic nudity cannot be blurred, or where the images of a body are so disturbing that a family has asked that it be withheld out of respect for a deceased.

However, these should be extraordinary exceptions. We live in an open society where access to information – no matter how graphic, distasteful, or unsavory – is valued, and in most cases, citizens have a right to know how their tax dollars are spent and how public servants perform their jobs. Furthermore, subject to legitimate law enforcement needs, the media enjoys the greatest protection under the First Amendment of our Constitution to report on the actions of our government.¹⁰⁸ If the media chooses to air those violent, distasteful, or unsavory videos, citizens who do not wish to be subjected to those images have the ability to avert their eyes, while those wishing to watch may also do so. Airing these videos may be the most effective way to educate the public and to hold accountable those responsible for wrongdoing and errors in judgment.

We must accept that releasing the video of a police shooting may result in condemnation, calls for resignations, and protests. That is the legitimate right – some would argue the responsibility – of every citizen, provided such protests are peaceful. No video gives a person a license to riot, destroy property, loot stores, burn police cars, or to otherwise break the law.

B. Statutory Protection of Privacy Rights

Our concern over the possible invasion of privacy is reflected in existing laws at the federal and state levels governing police recordings. The first Part of this section will discuss the protections created by federal statutes – the majority of which stem from Title III of the Electronic Communications Privacy Act. The second Part will turn to the state statutory protections, while discussing the difference in protections depending on the particular state.

1. Privacy Protection at the Federal Level

As the technology of recording devices has progressed, Congress has continuously enacted and modified statutory privacy protections. The statutory provisions that encompass the vast majority of federal privacy protec-

108. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

tions in regards to electronic recordings can be found in Title III of the Electronic Communications Privacy Act.¹⁰⁹

Title III prohibits wiretapping and other forms of electronic eavesdropping, possession of wiretapping or electronic eavesdropping equipment, use or disclosure of information obtained through illegal wiretapping or electronic eavesdropping, and disclosure of information secured through court-ordered wiretapping or electronic eavesdropping.¹¹⁰ Title III's prohibition against illegal wiretapping applies to any employee or agent of the United States¹¹¹ and prohibits any person from intentionally intercepting or endeavoring to intercept wire, oral, or electronic communications by using an electronic, mechanical, or other device.¹¹² However, the federal privacy protections created by Title III are far from absolute.

Under Title III, there are numerous exemptions from the general prohibition on illegal wiretapping and electronic eavesdropping. Some of these exemptions include consent interceptions, publicly accessible radio communications, government officials, communication service providers, and certain domestic situations.¹¹³ One carve-out of the federal privacy protection – perhaps the largest – is found in the consent interceptions exemption.¹¹⁴ Under this exemption, wiretapping and electronic eavesdropping are lawful if at least one party to the conversation has given explicit or implicit consent to the recording.¹¹⁵ This exemption extends to the use of police body cameras, provided that one party to the conversation consents to the recording.¹¹⁶ A police officer wearing a body camera has obviously consented to the recording of the encounter. Thus, any recordings made involving that officer will be covered under the consent exemption. It is important to note, however, that satisfying the one-party consent exemption of federal law will not be sufficient to make a recording lawful in states that require all parties involved to consent. Federal statutory privacy protections are often considered the bare minimum required by the Constitution, causing many to look to individual state privacy protections for greater protections.

2. Privacy Protection at the State Level

Virtually all states have laws making it unlawful to record the private conversations of others without consent.¹¹⁷ In most states, recording is al-

109. *See* Electronic Communications Privacy Act, 18 U.S.C.A. §§ 2510–21, 2701–10, 3121–26 (West 2017).

110. *Id.* § 2701.

111. *Id.* § 2510(6).

112. *Id.* § 2511(1).

113. *Id.* §§ 2511(2)(b)–(g).

114. *Id.* § 2511(2)(c).

115. *Id.*

116. *Id.* §§ 2511(2)(c)–(d).

117. *See infra* APPENDIX A.

lowed if a party to the communication gives prior consent.¹¹⁸ However, California, Florida, Georgia, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Oregon, Pennsylvania, and Washington make it unlawful to record without first obtaining the consent of all persons engaged in the recorded conversation.¹¹⁹ Some states, such as Florida and Montana, carve out an exception for law enforcement recordings in the line of duty.¹²⁰

The right of privacy is important, but it must be balanced against legitimate law enforcement needs. This can be accomplished by creating an exception in the law for recordings by law enforcement in the line of duty. For example, under Florida law, all parties to a communication must give prior consent for the interception of any oral communications to be lawful.¹²¹ However, an exception exists specifically for law enforcement.¹²² This exception still requires the prior consent of at least one party to the communication but only applies when the purpose of the interception is to obtain evidence of a criminal act.¹²³ Thus, the exception protects general privacy rights while allowing for law enforcement to better do their job.

C. Costs

Technology such as body cameras costs money, and many smaller or rural jurisdictions simply do not have the resources to equip their police departments with body cameras.¹²⁴ The costs of deploying police body cameras will likely include not only the costs of the cameras, but also ancillary equipment, training in the use of the equipment, protection and storage of the video, administrative and legal costs – including responding to open records requests – and other costs related to data storage, management, and disclosure to the public, as discussed below. There are several million dollars in grants for body cameras available from the Office of Community Oriented Policing Services within the DOJ.¹²⁵ Additionally, the DOJ recently announced that it has allocated \$20 million to police departments wishing to introduce body cameras to their officers as part of its Body-Worn Camera Program.¹²⁶ Advances in technology are likely to result in greater acceptance of body camer-

118. See *infra* APPENDIX A.

119. See *infra* APPENDIX A.

120. See *infra* APPENDIX A; see also FLA. STAT. ANN. § 934.03(3)(c) (West 2017); MONT. CODE ANN. § 45-5-223(3) (West 2017).

121. FLA. STAT. ANN. § 934.03(2)(d).

122. *Id.* § 934.03(2)(c).

123. *Id.*

124. *Chapter Four Considering Police Body Cameras*, *supra* note 68, at 1809–10.

125. Ryan J. Reilly, *Obama Administration Gives Police Departments Millions for Body Cams*, HUFFINGTON POST (Sept. 27, 2015, 12:23 PM), http://www.huffingtonpost.com/entry/police-body-camera-grants_us_56001b4be4b08820d919532b.

126. Christina Beck, *Justice Department Allocates \$20 million for Body Cameras*, CHRISTIAN SCI. MONITOR (Sept. 27, 2016), <http://www.csmonitor.com/USA/Justice/2016/0927/Justice-Department-allocates-20-million-for-body-cameras>.

as, make them simpler to use, and cause training and protocol to become streamlined. However, even if advances in this technology result in lower costs, substantially more resources are needed if body cameras are to be required for entire law enforcement departments.

While the overall costs of body cameras are not insubstantial, particularly to small, rural police departments, advocates of body cameras insist that over time much of the additional expense will be offset by fewer civil suits against police for misconduct, less administrative time for a department investigating a police shooting, and fewer man-hours taken off the streets and dedicated to desk duty or participating in a trial following accusations of a bad shooting.¹²⁷ In theory, this sounds reasonable, but critics argue that any lost savings from body cameras are likely to be casualties in the annual difficult decision-making over choices for a shrinking law enforcement budget. Although such savings may be difficult to quantify, supporters counter they are nevertheless real and should not be ignored.¹²⁸

D. Over-Deterrence

Studies show that people act differently when they know they are being recorded.¹²⁹ This is even true for public officials, such as judges and prosecutors, and it explains why some oppose allowing cameras in the courtroom.¹³⁰ While body cameras do not record every activity of an officer, they do record statements and commands made by the officer, the reactions of others to the officer, and the view from the officer's line of sight.

A police officer on patrol has great discretion in enforcing the law. Depending on the circumstances, an officer may issue a ticket, make an arrest, or give a warning and decline to issue a citation when an infraction or crime has occurred. Good police work is often a function of information provided by people in the community. Relationships will develop based on how the law is enforced and discretion is exercised. Because police body cameras record the movements and decisions of police officers, law enforcement will be understandably concerned with how they will be judged by their superiors. An officer under constant scrutiny is more likely to insist on strict adherence to the law for fear of being second-guessed by superiors. This may adversely affect relationships with locals, which, in turn, makes fighting crime more challenging.

127. *Chapter Four Considering Police Body Cameras*, *supra* note 68, at 1809.

128. *Id.* at 1809–10.

129. This is referred to in behavioral science as the Hawthorne effect and became a term following an experiment at the Hawthorne plant of Western Electric Company in the 1920s. *See generally* RICHARD GILLESPIE, *MANUFACTURING KNOWLEDGE: A HISTORY OF THE HAWTHORNE EXPERIMENTS* (1991). While the original experiment was discredited, the general premise has been accepted. Jeffrey A. Sonnenfeld, *Shedding Light on the Hawthorne Studies*, 6 J. ORGANIZATIONAL BEH. 111, 125 (1985).

130. Bill Delmore, *Cameras in the Courtroom: Limited Access Only*, 67 TEX. B.J. 782, 784–85 (2004).

Thus, some critics argue body cameras may actually hinder good police work by making it more difficult to promote trust and good will in the community and to establish community partners.¹³¹ A confidential informant may be unwilling to cooperate and speak with law enforcement officials on camera, no matter what assurances the department gives that the video of the interview and the identity of the informant will be protected. Similarly, a victim of domestic violence may be too frightened to talk on camera about the victim's abuser for fear that the abuser may gain access to, or learn about, the interview and harm the victim again. Thus, while body cameras may help police officers, overreliance on this technology, as discussed below, may actually harm police performance.

E. Overreliance on Technology

When being evaluated for improper conduct, few police officers are willing to rely solely on a video recording. First, while a body camera may indeed capture people, events, and surroundings, there is no guarantee the officer actually absorbed everything captured on film.¹³² The officer may have been focused on one particular movement or been distracted and turned his eyes from the scene captured by the body camera. Second, a recording can never truly be comprehensive – it may fail to show relevant events or conditions outside the coverage of the lens that may have influenced an officer's decision. For example, a video cannot accurately capture the tension or energy of a situation and is incapable of showing tiny changes of facial expressions or body shifts that a trained officer recognizes as a precursor to violence.¹³³ Third, enhancing the images of an incident and reviewing them in slow motion – all after the fact – may not reflect the officer's experience or apprehensions in real time.¹³⁴

Context is critical. As previously discussed, court determinations made involving allegations of excessive force are judged from the perspective of a reasonable officer on the scene, causing the intent and mindset of the officer and his or her subjective understanding of the threat to remain very important in assessing responsibility.¹³⁵ Nevertheless, even critics of body cameras must concede that the circumstances of a situation are less likely to be the subject of debate and second-guessing if there is video of the incident captured by a police body camera.

131. Kami Chavis Simmons, *Body-Mounted Police Cameras: A Primer on Police Accountability vs. Privacy*, 58 HOW. L.J. 881, 888–89 (2015).

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

133. *Id.*

134. *Chapter Four Considering Police Body Cameras*, *supra* note 68, at 1812–13.

135. *Graham v. Connor*, 490 U.S. 386, 396 (1989). See also *Kampfe*, *supra* note 66, at 1153 n.77.

F. Loss of Control

Another challenge to the growing popularity of body cameras is the loss of control over the video of a police shooting. A video released by a bystander may actually hurt the future prosecution of a police officer for unlawful conduct, or it may present a picture at odds with the total facts. One source of the bitter controversy in Chicago over the shooting of Laquan McDonald was whether a video from a police-worn body camera should be released to the public and if so, when.¹³⁶ Those in favor of doing so argued that body cameras are purchased with taxpayer dollars, and therefore, as taxpayers, the public is entitled to know how this technology is being used.¹³⁷

Unless the police are aware in advance of the existence of a private video, they have no control over whether and when such a video is released to the public. For this reason, if a video of an incident is to be made available to the public, the police would prefer that it be a video recorded by law enforcement, released at a time that does not frustrate law enforcement objectives, and that gives the police an opportunity to be prepared to answer questions from the media and the public about the events captured on the video.

On one hand, releasing a police video to the public immediately shifts the judgment of wrongdoing – at least initially – out of the hands of officials, such as prosecutors and judges, sworn to discharge a public duty, and into the hands of a potentially angry public.¹³⁸ The power to judge incriminating images is transferred from established judicial systems with constitutional protections to an emotional public whose judgment may be affected by inflammatory images and preexisting bias. Additionally, public outrage and mob mentality in response to a publicly available video can potentially influence the decisions of senior officials in subsequent disciplinary actions against officers and sway jury opinion in subsequent litigation. In summary, there is serious concern over releasing a video of a controversial police shooting be-

136. *Lingering Questions in the Shooting of Laquan McDonald by Chicago Police*, N.Y. TIMES (Dec. 6, 2015), <http://www.nytimes.com/interactive/2015/12/04/us/questions-in-laquan-mcdonald-shooting.html>.

137. For example, Indiana legislators are considering the expense to taxpayers, as well as privacy concerns, in drafting legislation regarding the release of police video. Matt Smith, *Indiana Lawmakers Debate Whether to Restrict Access to Police Body Camera Video*, FOX59 (Aug. 26, 2015, 4:38 PM), <http://fox59.com/2015/08/26/indiana-lawmakers-debate-whether-to-restrict-access-to-police-body-camera-video/> (last updated Aug. 26, 2015, 5:11 PM).

138. The City of Chicago delayed the release of the video showing Ronald Johnson's death for over a year, arguing that release of the video "could inflame the public and jeopardize the officer's right to a fair trial if he was charged later." Jason Meisner & Matthew Walberg, *City Wavering on Keeping Video Secret in Another Fatal Chicago Police Shooting*, CHI. TRIB. (Dec. 2, 2015, 7:15 AM), <http://www.chicagotribune.com/news/local/breaking/ct-ronald-johnson-chicago-police-shooting-met-20151201-story.html>.

fore there has been an official government determination that the shooting is or is not justified.

On the other hand, not making a body camera video publicly available – at least within a reasonable period of time following an incident – could lead to accusations of a cover-up of police brutality and misconduct by law enforcement and other public officials. Critics alleged this occurred in Chicago after a year-long delay by officials in releasing the police videos showing the killing of Laquan McDonald and the actions just prior to the killing of Ronald Johnson.¹³⁹ Claims of cover-up may also be raised if the public believes the video has been tampered with or altered. This complication can be seen in the situation that infuriated the Chicago community, where some of the public believed that the videos had been edited to shed a more favorable light on the officers involved.¹⁴⁰

In line with the concerns of police cover-ups, there are also concerns regarding whether an officer should be permitted to review the video prior to making a statement. Memories can often be clouded from the stress and pressure that accompany any shooting. Being able to see a video may jog the officer's memory about the officer's assessment of the situation and the reasons for the officer's actions. By viewing the video first, it is more likely that the officer's formal statement of the incident will be accurate and complete. However, there appears to be no consensus at this time among legal scholars, prosecutors, law enforcement, or civil libertarians on whether officers should view an existing video before giving a formal statement.¹⁴¹

In addition to public concerns of police cover-ups, choosing not to release the video immediately after the incident can create a one-sided story of the events that took place. Especially in situations where there is one or more citizen-recorded videos, the public will make snap judgments about the officer's guilt or innocence based solely on videos that are likely only the final frame of the incident – rather than the entire incident – that fail to show the officer's perspective. While a court of law ultimately decides the officer's fate, the court of public opinion can be extremely persuasive and lead to dire

139. Aamer Madhani, *Hundreds Protest as Chicago Releases Video of Cop Shooting Teen 16 Times*, USA TODAY (Nov. 24, 2015, 11:12 AM), <http://www.usatoday.com/story/news/2015/11/24/chicago-cop-charged-shooting-black-teen-16-times/76303768/> (last updated Nov. 25, 2015, 7:24 AM).

140. Associated Press, *Burger King Manager Says Chicago Police Erased Surveillance Video of Deadly Shooting*, Q13 FOX (Nov. 28, 2015, 11:35 AM), <http://q13fox.com/2015/11/28/burger-king-manager-says-chicago-police-erased-surveillance-video-of-deadly-shooting/>.

141. The Police Executive Research Forum suggests that police officers view video before giving a statement. MILLER ET AL., *supra* note 71, at 29. In contrast, the ACLU argues that this practice “enables lying” and is a “poor investigative practice.” Jay Stanley & Peter Bibring, *Should Officers Be Permitted to View Body Camera Footage Before Writing Their Reports?*, ACLU (Jan. 13, 2015, 12:15 PM), <https://www.aclu.org/blog/free-future/should-officers-be-permitted-view-body-camera-footage-writing-their-reports>.

consequences for the officer and the police department. For example, in the 2016 shooting of Alton Sterling in Baton Rouge, Louisiana, citizen bystanders used their cell phones to record video footage of the final frames of the incident.¹⁴² This video footage spread like wildfire on social media and reached extensive amounts of viewers, allowing each of them to make a decision on whether the officers on the scene were justified in shooting Sterling.¹⁴³ While Sterling was only one of a number of people shot by police in 2016, his death and the court of public opinion's guilty verdict of the officers have led to numerous protests in cities nationwide.¹⁴⁴ Regardless of whether the court of public opinion has the final word on an officer's guilt, perception is an extremely important aspect of policing. Releasing body camera video soon after an incident – especially incidents with citizen-recorded videos – could potentially help even the scales and present the public with a more neutral view of the events leading to the incident, preventing public outcry and protests.

There may, of course, be legitimate federal and state law enforcement reasons to deny or delay public access to a video. Because the video may serve as the central piece of evidence in prosecuting a crime, allowing investigators and prosecutors sufficient time to study a video for investigative purposes and to methodically develop a case without the intense public pressure to indict and pursue a conviction can help facilitate justice.

However, there are measures that can be taken to reassure the public that the decision not to release a video shortly after an incident is based on legitimate law enforcement reasons. For example, the participation and support of a neutral party or group from outside the law enforcement community could reassure the public there is no attempted cover-up when there is a decision not to release a video to the public.

G. Police Opposition?

As a general rule, the police – both individual officers and police organizations – tend to resist any new technology.¹⁴⁵ As video technology advanced in the 1980s and 1990s, such that the recording of suspect interviews became feasible, some departments began recording interviews, but many resisted. The most notable resistance to recording interrogations came from the FBI, which did not allow its agents to video or audio record such inter-

142. Joshua Berlinger, Nick Valencia & Steve Almasy, *Alton Sterling Shooting: Homeless Man Made 911 Call, Source Says*, CNN (July 8, 2016, 7:24 AM), <http://www.cnn.com/2016/07/07/us/baton-rouge-alton-sterling-shooting/>.

143. *Id.*

144. Victor Morton, *Dallas: Snipers Kill 5 Officers in Deadliest Day for Law Enforcement Since 9/11*, WASH. TIMES (July 7, 2016), <http://www.washingtontimes.com/news/2016/jul/7/black-lives-matter-protests-alton-sterling-philand/>.

145. Roy, *supra* note 82, at 40.

views absent the permission of a high-ranking supervisor.¹⁴⁶ Among the reasons that the FBI cited to justify its policy were concerns that recording might inhibit cooperation, that the video might show methods that could appear unfair to some observers, and that logistical costs were significant.¹⁴⁷

Over time, however, the prevailing opinion among police officers and departments on this particular use of technology changed. A telephone survey of more than 600 police departments conducted between 2003 and 2008 found that “[n]one of the officers who had experience with electronic recordings would voluntarily return to reliance on handwritten notes . . . and efforts at reconstructing through later testimony what occurred during the interviews. Many expressed surprise that there are departments not making use of modern recording technology.”¹⁴⁸ The benefits cited by departments that recorded included protection against baseless charges of improper conduct, fewer motions to suppress statements, more guilty pleas and guilty verdicts, deterrence of police misconduct, and increased public trust due to police transparency.¹⁴⁹ As final evidence of the seismic shift on this particular use of technology, the FBI announced in May of 2014 that it would reverse its policy and not only allow, but require, the videotaping of interviews in most instances.¹⁵⁰ According to Attorney General Eric Holder, the change was made because creating an electronic record of the interrogation ensures that there is an objective account of the interview and a “clear and indisputable record[]” of what was said.¹⁵¹

Similarly, in the current debate over police-worn body cameras, there is considerable resistance among some police organizations and officers. In a study of camera use in the Mesa Arizona Police Department, a survey of individual officers found that only 23% thought that the department should adopt the system, and fewer than half believed that other officers would wel-

146. FEDERAL BUREAU OF INVESTIGATION, ELECTRONIC RECORDING OF CONFESSIONS AND WITNESS INTERVIEWS (Mar. 23, 2006) [hereinafter ELECTRONIC RECORDING OF CONFESSIONS AND WITNESS INTERVIEWS], http://www.nytimes.com/packages/pdf/national/20070402_FBI_Memo.pdf. The FBI policy of not recording interviews was widely criticized by federal prosecutors. See Donald Q. Cochran, *Ghosts of Alabama: The Prosecution of Bobby Frank Cherry for the Bombing of the Sixteenth Street Baptist Church*, 12 MICH. J. RACE & L. 1, 18 n.118 (2006) (“FBI agents normally do not record, whether via audiotape, videotape, or signed statement, the statements of witnesses or suspects, instead relying (often to the dismay of generations of prosecutors) on an agent’s paraphrasing of what the witness said on a[n] FBI Form ‘FD-302.’”).

147. See Cochran, *supra* note 146, at 1, 3.

148. Thomas P. Sullivan, Andrew W. Vail & Howard W. Anderson III, *The Case for Recording Police Interrogations*, 34 LITIG. 1, 4 (2008).

149. *Id.* at 34–35.

150. Michael S. Schmidt, *In Policy Change, Justice Dept. to Require Recording of Interrogations*, N.Y. TIMES (May 22, 2014), <http://www.nytimes.com/2014/05/23/us/politics/justice-dept-to-reverse-ban-on-recording-interrogations.html>.

151. *Id.*

come the presence of a camera at a scene.¹⁵² In a study of the Phoenix Police Department, most officers' attitudes were either ambivalent or negative regarding cameras.¹⁵³ In an initial survey of more than 200 LAPD officers conducted in August of 2015, approximately two-thirds thought the cameras would be a distraction, half thought they would be an invasion of their privacy, and fewer than 10% thought they would reduce the amount of time spent on paperwork.¹⁵⁴ Finally, in the NYPD "stop and frisk" case, both the NYPD leadership and the police union voiced opposition to a judge's order requiring officers to wear body cameras.¹⁵⁵

However, there is reason to believe that police attitudes – both individual and departmental – toward body cameras will evolve over time and become more positive. Many of the arguments made in opposition to the use of body cameras – that they might inhibit cooperation, show police actions that could appear unfair to some observers, and increase logistical costs – are the same ones that were made against recording interrogations.¹⁵⁶ Only after officers began videotaping interrogations were they able to see and appreciate that the benefits of a video record – such as protection against baseless improper conduct charges, more guilty pleas and verdicts, less police misconduct, and increased public trust due to more transparency – outweighed any costs to such a degree that most officers cannot imagine going back to the old method.

In fact, we are already starting to see that officers appreciate body cameras more as they use them. For instance, in the Phoenix study mentioned above, officers' attitudes toward the cameras improved significantly after wearing them for three months.¹⁵⁷ Both individual officers and departments have begun to embrace cameras because they offer "an exceptional layer of protection to the majority of officers who perform their duties in an appropriate manner."¹⁵⁸ Police officers come to think of their camera as "another level of protection, a kind of flak jacket of evidence about what happened."¹⁵⁹ As one officer explained: "I get nervous when I think it's not on . . . I know it's going to document what the truth is, and I want the truth out there."¹⁶⁰

152. WHITE, *supra* note 72, at 21 n.10.

153. *Id.* at 21.

154. Craig Uchida, President, Justice & Security Strategies, Inc., Body-Worn Cameras Statewide Symposium (June 23, 2016).

155. Larry Celona, *NYPD in a "Snap" Judgment: PBA and Brass Resist Order to Carry Cameras*, N.Y. POST (Aug. 14, 2013, 4:00 AM), <http://nypost.com/2013/08/14/nypd-in-a-snap-judgment-pba-and-brass-resist-order-to-carry-cameras/>.

156. See ELECTRONIC RECORDING OF CONFESSIONS AND WITNESS INTERVIEWS, *supra* note 146.

157. WHITE, *supra* note 72, at 21.

158. Kampfe, *supra* note 66, at 1164–65.

159. Johnson, *supra* note 77.

160. *Id.* (internal quotations omitted).

V. CONCLUSION

A fair-minded look at the data relating to the incidence of violent crime since the events of August 2014 in Ferguson, Missouri, and other similar incidents – perhaps most significantly the Brennan Center’s recent projection that there is likely to be a post-Ferguson increase of greater than 30% in the national murder rate by the end of 2016 – leads to the conclusion that something is going on here. An increase in the murder rate of this magnitude happens for a reason, and it appears that the most likely reason for this increase is some type of “Ferguson effect.” Whether as a result of de-policing or the lost legitimacy of police in African-American communities, an increase of this magnitude threatens to undo much of the hard work done in the past twenty years by law enforcement and the American people to reduce crime.

The increased use of police-worn body cameras undoubtedly creates issues that need to be resolved. There are legitimate privacy concerns, both in terms of the initial recording, as well as questions relating to the storage and release of the recordings, concerns about the cost of widespread use of body cameras, and questions relating to how such recordings will affect police/citizen interactions. None of these concerns, however, appear to be insurmountable. Moreover, none appear to eclipse the benefits that the increased use of body cameras by police on the street could have. Whatever the reasons for the current rise in crime, increased use of body cameras worn by police officers appears to have the potential to reverse this disturbing trend by providing police officers with an incentive to get out of their patrol cars and restoring legitimacy to police in their interactions with citizens.

APPENDIX A: STATE LAWS REGARDING RECORDING PRIVATE
CONVERSATIONS OF OTHERS

	Consent	Brief Summary
Federal ¹⁶¹	One Party	Unlawful to intentionally intercept wire, oral, or electronic communications by using an electronic, mechanical, or other device without the consent of at least one person engaged in the conversation.
Alabama ¹⁶²	One Party	Unlawful to record any part of the private communication of others without the consent of at least one person engaged in the conversation.
Alaska ¹⁶³	One Party	A person may not use an eavesdropping device to hear or record any part of an oral conversation without the consent of one party to the conversation. “Eavesdropping device” means any device capable of being used to hear or record oral conversation, whether the conversation is conducted in person or by other means.
Arizona ¹⁶⁴	One Party	Unlawful to intentionally intercept a conversation at which a person is not present without the consent of a party to such conversation or discussion.
Arkansas ¹⁶⁵	One Party	It is unlawful for a person to intercept an oral communication and to record or possess a recording of the communication unless the person is a party to the communication or one of the parties to the communication has given prior consent to the interception and recording.

161. 18 U.S.C.A. §§ 2510–21 (West 2017).

162. ALA. CODE §§ 13A-11-30(1), 13A-11-31 (2017).

163. ALASKA STAT. ANN. § 42.20.310(a)(1) (West 2017).

164. ARIZ. REV. STAT. ANN. §§ 13-3001(7), (8), 13-3005(A)(2), 13-3012(9) (2017).

165. ARK. CODE ANN. § 5-60-120(a) (West 2017).

California ¹⁶⁶	All Parties	Unlawful for any person to intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrop upon or record the confidential communication.
Colorado ¹⁶⁷	One Party	Any person not visibly present during a conversation or discussion commits eavesdropping if he knowingly overhears or records such conversation or discussion without the consent of at least one of the principal parties thereto, or attempts to do so.
Connecticut ¹⁶⁸	One Party	Unlawful to eavesdrop. "Eavesdropping" is intentionally overhearing or recording a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device, or equipment.
Delaware ¹⁶⁹	One Party	Lawful for a person to intercept an oral communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception, unless the interception is for criminal or tortious acts.
District of Columbia ¹⁷⁰	One Party	Unlawful for a person not acting under color of law, not a party to the conversation, or without prior consent from a party to the conversation to willfully intercept or endeavor to intercept any oral communication.

166. CAL. PENAL CODE § 632(a) (West 2017).

167. COLO. REV. STAT. ANN. § 18-9-304 (West 2017).

168. CONN. GEN. STAT. ANN. §§ 53a-187, 53a-189 (West 2017).

169. DEL. CODE ANN. tit. 11, §§ 1335(a)(4), 2402(c)(4) (West 2017).

170. D.C. CODE ANN. § 23-542(b)(3) (West 2017).

Florida ¹⁷¹	All Parties (different rules for police in certain situations, see § 934.03(3)(c))	Unlawful to intentionally intercept or endeavor to intercept any oral communications, except when all parties to the communication have given prior consent to the interception.
Georgia ¹⁷²	All Persons Observed	Unlawful for any person, through the use of any device, without the consent of all persons observed, to observe or record the activities of another that occur in any private place and out of public view.
Hawaii ¹⁷³	One Person	Unlawful to intentionally intercept or attempt to intercept any oral communication. Not unlawful for person not acting under color of law to intercept an oral communication when the person is a party to the communication or when one of the parties to the communication has given prior consent.
Idaho ¹⁷⁴	One Person	Unlawful to intercept any oral communication unless prior consent has been given by one of the parties to the communication.
Illinois ¹⁷⁵	All Parties	Unlawful to knowingly or intentionally use an eavesdropping device in a surreptitious manner for the purpose of recording all or any part of any private conversation without consent of all parties.
Indiana ¹⁷⁶	One Party	Only deals with electronic communications; oral communications are not covered.
Iowa ¹⁷⁷	One Party	Unlawful to willfully intercept or endeavor to intercept an oral communication without consent from one of the parties to the communication.

171. FLA. STAT. ANN. § 934.03(3)(d) (West 2017).

172. GA. CODE ANN. § 16-11-62(2) (West 2017).

173. HAW. REV. STAT. ANN. § 803-42 (West 2017).

174. IDAHO CODE ANN. § 18-6702(2)(d) (West 2017).

175. 720 ILL. COMP. STAT. ANN. 5/14-2(a) (West 2017).

176. IND. CODE ANN. § 35-31.5-2-176 (West 2017).

177. IOWA CODE ANN. § 808B.2(2)(c) (West 2017).

Kansas ¹⁷⁸	One Party	Breach of privacy in Kansas deals with private communications (phone, telegraph, etc.) or installing recording devices in private locations. Both require consent of one of the parties involved.
Kentucky ¹⁷⁹	One Party	A person is guilty of eavesdropping when he intentionally uses any device to eavesdrop, whether or not he is present at the time. "Eavesdrop" means to overhear or record any part of an oral communication of others without the consent of at least one of the parties.
Louisiana ¹⁸⁰	One Party	Unlawful to willfully intercept or endeavor to intercept any oral communication. It is not unlawful if a person intercepting a communication is a party to the communication or if one of the parties to the communication gives prior consent, unless interception is for a criminal or tortious act.
Maine ¹⁸¹	One Party	Unlawful for any person to intentionally or knowingly intercept or attempt to intercept any oral communication (but see law officer exception). "Intercept" is defined as hearing or recording the contents of any oral communication by any person other than the sender or receiver or a person who has given prior consent.

178. KAN. STAT. ANN. §§ 21-6101(a)(1), (a)(4) (2016).

179. KY. REV. STAT. ANN. §§ 526.010, 526.020 (West 2017).

180. LA. STAT. ANN. §§ 15:1303(a)(1), (c)(4) (2017).

181. ME. STAT. tit. 15, §§ 709(4), 710(1) (2017).

Maryland ¹⁸²	All Parties	Unlawful for any person to willfully intercept or endeavor to intercept any oral communication. Lawful for a person to intercept an oral communication where the person is a party to the communication and where all of the parties to the communication have given prior consent to the interception, except in the case of tortious or criminal activities.
Massachusetts ¹⁸³	All Parties	Unlawful to willfully commit or attempt to commit an interception of any oral communication. "Interception" refers to secretly hearing or recording the contents of any oral communication through the use of an intercepting device by a person who does not have prior authorization from all parties.
Michigan ¹⁸⁴	All Parties	Unlawful for any person who is present or who is not present during a private conversation to willfully use any device to eavesdrop upon the private conversation without the consent of all parties thereto.
Minnesota ¹⁸⁵	One Party	Unlawful for any person to intentionally intercept or attempt to intercept any oral communication. Not unlawful for a person not acting under color of law to intercept an oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent.

182. MD. CODE ANN. CTS. & JUD. PROC. § 10-402 (West 2017).

183. MASS. GEN. LAWS ANN. ch. 272, §§ 99(b)(4), (c)(1) (West 2017).

184. MICH. COMP. LAWS ANN. § 750.539c (West 2017).

185. MINN. STAT. ANN. § 626.02a(d) (West 2017).

Mississippi ¹⁸⁶	One Party	Not unlawful for a person not acting under color of law to intercept a wire, oral, or other communication if the person is a party to the communication or if one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious acts.
Missouri ¹⁸⁷	One Party	Not unlawful for a person acting under law to intercept an oral communication, where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception.
Montana ¹⁸⁸	All Parties	Only deals with electronic communications; oral communications are not covered. Guilty if purposely intercepts an electronic communication, unless done by a public official or employee in performance of official duties.
Nebraska ¹⁸⁹	One Party	Not unlawful for a person not acting under color of law to intercept an oral communication when such person is a party to the communication or has prior permission from one of the parties. Excludes interception for tortious or criminal acts.
Nevada ¹⁹⁰	One Party	Cannot surreptitiously record or attempt to record any private conversation engaged in by another person or disclose contents of communication unless authorized to do so by one of the persons engaging in the conversation.

186. MISS. CODE ANN. § 41-29-531 (West 2017).

187. MO. ANN. STAT. § 542.402.1(2) (West 2017).

188. MONT. CODE ANN. § 45-8-213(2) (West 2017).

189. NEB. REV. STAT. ANN. § 86-290(2)(c) (West 2017).

190. NEV. REV. STAT. ANN. § 200.650 (West 2017).

New Hampshire ¹⁹¹	All Parties	Unlawful to willfully intercept any oral communication without consent of all parties.
New Jersey ¹⁹²	One Party	Unlawful to purposefully intercept or attempt to intercept any oral communication unless they are a party to the conversation or have prior consent from one of the parties to the conversation.
New Mexico ¹⁹³	One Party	The reading, interrupting, taking, or copying of any message, communication, or report by telegraph or telephone is unlawful without the consent of one of the parties.
New York ¹⁹⁴	One Party	Eavesdropping consists of unlawfully engaging in mechanical overhearing of a conversation. "Mechanical overhearing" means the intentional overhearing or recording of a conversation without the consent of at least one party by means of any instrument, device, or equipment.
North Carolina ¹⁹⁵	One Party	Unlawful to willfully intercept or attempt to intercept any oral communication without consent of at least one party to the communication.
North Dakota ¹⁹⁶	One Party	Unlawful to intentionally intercept any wire or oral communication by use of any electronic, mechanical, or other device, unless the individual was a party to the communication or one of the parties to the communication gave prior consent to such interception.

191. N.H. REV. STAT. ANN. § 570-A:2 (2017).

192. N.J. REV. STAT. ANN. §§ 2A:156A-3, 2A:156A-4 (West 2017).

193. N.M. STAT. ANN. § 30-12-1(C) (West 2017).

194. N.Y. PENAL LAW §§ 250.00(2), 250.05 (McKinney 2017).

195. N.C. GEN. STAT. ANN. § 15A-287(a) (West 2017).

196. N.D. CENT. CODE ANN. § 12.1-15-02 (West 2017).

Ohio ¹⁹⁷	One Party	Unlawful to intercept or attempt to intercept an oral communication. Does not apply to a person who is a party to the communication or if one of the parties to the communication has given prior consent to the interception, although this exception is invalid if for tortious or criminal conduct.
Oklahoma ¹⁹⁸	One Party	Not unlawful for a person not acting under color of law to intercept an oral communication when such person is a party to the communication or when one of the parties to the communication has given prior consent to interception, unless for the purpose of committing any criminal act.
Oregon ¹⁹⁹	All parties must be informed; consent not necessarily required	A person may not obtain or attempt to obtain the whole or any part of a conversation by means of any device, contrivance, machine, or apparatus, whether electrical, mechanical, manual, or otherwise, if not all participants in the conversation are specifically informed that their conversation is being obtained.
Pennsylvania ²⁰⁰	All Parties	Unlawful to intentionally intercept or attempt to intercept any oral communication. Exception applies when a person receives prior consent to intercept oral communications.
Rhode Island ²⁰¹	One Party	Unlawful for any person to willfully intercept or attempt to intercept any oral communication, except in situations where the person, not acting under color of law, is a party to the communication, or where one of the parties to the communication has given prior consent.

197. OHIO REV. CODE ANN. § 2933.52 (West 2017).

198. OKLA. STAT. ANN. tit. 13, § 176.4 (West 2017).

199. OR. REV. STAT. ANN. § 165.540(1)(c) (West 2017).

200. 18 PA. STAT. AND CONS. STAT. ANN. §§ 5704(4), 5703 (West 2017).

201. 11 R.I. GEN. LAWS ANN. § 11-35-21 (West 2017).

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South Carolina ²⁰²	One Party	It is lawful under this chapter for a person not acting under color of law to intercept an oral communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception.
South Dakota ²⁰³	One Party	Unlawful for a person to intentionally and by means of an eavesdropping device to overhear or record a conversation or discussion if he or she is not present during the conversation or has not received consent from a party to that conversation.
Tennessee ²⁰⁴	One Party	Lawful for a person not acting under color of law to intercept an oral communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception, except for tortious or criminal offenses.
Texas ²⁰⁵	One Party	Person commits an offense if the person intentionally endeavors to intercept an oral communication. It is an affirmative defense if a person not acting under color of law intercepts an oral communication if the person is a party to the communication, or one of the parties to the communication has given prior consent to the interception, unless intercepted for the purpose of committing an unlawful act.

202. S.C. CODE ANN. §§ 17-30-10, 17-30-30 (2017).

203. S.D. CODIFIED LAWS §§ 23A-35A-1, 23A-35A-20 (2017).

204. TENN. CODE ANN. § 39-13-601 (West 2017).

205. TEX. PENAL CODE ANN. § 16.02 (West 2017).

Utah ²⁰⁶	One Party	A person commits a violation if he or she intentionally or knowingly intercepts or endeavors to intercept any oral communication. A person not acting under color of law does not commit an offense if he or she is a party to the communication or a party gives prior consent, unless the intercepting is for tortious or criminal acts.
Vermont ²⁰⁷	Consent from person being surveilled	No person shall be recorded in any format without that person's consent while in a place where he or she would have a reasonable expectation of privacy in a home or residence. Security guards and private investigators within scope of their employment are exempted.
Virginia ²⁰⁸	One Party	Unlawful to intentionally intercept or attempt to intercept any oral communication, except where the person is a party to the communication or a party to the communication has given prior consent.
Washington ²⁰⁹	All Parties	Unlawful for any individual or the State of Washington to intercept or record any private conversation, by any device electronic or otherwise, designed to record or transmit such conversation, regardless of how the device is powered or actuated, without first obtaining the consent of all the persons engaged in the conversation.

206. UTAH CODE ANN. § 77-23a-4 (West 2017).

207. VT. STAT. ANN. tit. 13, § 2605(d) (2017).

208. VA. CODE ANN. § 19.2-62 (West 2017).

209. WASH. REV. CODE ANN. § 9.73.030 (2017).

West Virginia ²¹⁰	One Party	Unlawful for any person to intentionally intercept or attempt to intercept any oral communication. It is lawful under this article for a person to intercept an oral communication where the person is a party to the communication or where one of the parties to the communication has given prior consent, except for criminal or tortious purposes.
Wisconsin ²¹¹	One Party	Unlawful to intentionally intercept or attempt to intercept any oral communication. Lawful if the person is a party to the communication or where one of the parties has given prior consent, unless for tortious or criminal activities.
Wyoming ²¹²	One Party	No person shall intentionally intercept or attempt to intercept any oral communication, except where the person is a party to the communication or where one of the parties to the communication has given prior consent, unless for criminal or tortious acts.

210. W. VA. CODE ANN. § 62-1D-3 (2017).

211. WIS. STAT. § 968.31 (2017).

212. WYO. STAT. ANN. § 7-3-702 (West 2017).

