

## MISSING POLICE BODY CAMERA VIDEOS: REMEDIES, EVIDENTIARY FAIRNESS, AND AUTOMATIC ACTIVATION

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*A movement toward police regulation by recording is sweeping the nation. Responding to calls for accountability, transparency and better evidence, departments have rapidly adopted body cameras. Recording policies require the police to record more law enforcement encounters than ever before. But what happens if officers do not record? This is an important, growing area of controversy. Based on the collection and coding of police department body camera policies, this Article reveals widespread detection and enforcement gaps regarding failures to record as required. More than half of the major-city departments in the sample have no provisions specifying consequences for not recording as required—and several have protections against discipline.*

*The Article discusses how the labor-management structure of departments and the individual-blame nature of disciplinary processes render internal departmental enforcement of recording rules challenging. As the central framers of conduct rules for police, and as gatekeepers of evidence, courts have an important role to play in addressing the missing video problem. The challenge is how to frame remedies that avoid judicial inquiry deterrence: a reluctance to address missing video issues because it would entail messy and costly collateral mini-trials on whether recordings are missing for legitimate reasons or due to*

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*officer malfeasance. This Article proposes three judicial pretrial remedies that proceed from a more administrable evidentiary fairness perspective: exclusion of partial recordings, favorable inferences, and pattern and practice detection harnessing systemic facts accumulated by courts in criminal cases.*

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## I. INTRODUCTION

Why did a Minneapolis police officer shoot Justine Damond after she called to report a possible sexual assault?<sup>1</sup> The officers at the scene were wearing body cameras, but they did not record the fatal encounter.<sup>2</sup> The officers in Baton Rouge who fatally shot Alton Sterling also were wearing body cameras—but both of the officers involved reported that their cameras fell off.<sup>3</sup> Officers also were wearing body cameras when Keith Scott died in Charlotte,<sup>4</sup> and when Paul O’Neal died in Chicago.<sup>5</sup> The officer wearing a body camera at the scene of Scott’s death did not activate the camera to capture both audio and video until after the shooting.<sup>6</sup> The officer who fired the fatal shot into O’Neal’s back during a foot pursuit also did not hit record until after the fatal shot.<sup>7</sup> The police departments involved in each shooting were among the hundreds nationwide that have adopted police-worn body cameras in recent years to rebuild public trust.<sup>8</sup> Each of the departments’

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<sup>1</sup> Andy Mannix, *911 Call Transcript: Before Being Shot by Officer, Justine Damond Called in Possible Rape*, MINN. STAR TRIB. (July 19, 2017, 9:24 PM), <http://www.startribune.com/911-call-before-being-shot-by-officer-justine-damond-called-in-possible-rape/435423423/>.

<sup>2</sup> Mark Berman, *What the Minneapolis Police Shooting Tells Us About the Limits of Body Cameras*, WASH. POST (July 19, 2017), <http://wapo.st/2uAnJ0I>.

<sup>3</sup> See Kimbriell Kelly et al., *Fatal Shootings by Police Remain Relatively Unchanged After Two Years*, WASH. POST (Dec. 30, 2016), <http://wapo.st/2hBOTix> (“[P]olice said body cameras ‘fell off’ the officers . . . as they responded to a call about a man with a gun outside of a convenience store.”); see also Aliyah Frumin, *After Baton Rouge Shooting, Questions Swirl Around Body Cam Failures*, NBC NEWS (July 7, 2016), [https://www.nbcnews.com/news/us-news/after-baton-rouge-shooting-questions-swirl-around-body-cam-failures-n605386?cid=m1\\_onsite](https://www.nbcnews.com/news/us-news/after-baton-rouge-shooting-questions-swirl-around-body-cam-failures-n605386?cid=m1_onsite).

<sup>4</sup> See Wesley Lowery, *Charlotte Officer Did Not Activate Body Camera Until After Keith Scott Had Been Shot*, WASH. POST (Sept. 26, 2016), <http://wapo.st/2cwPtXn>.

<sup>5</sup> See Annie Sweeney & Jeremy Gorner, *Chicago Police: Body Camera Didn’t Record Cop’s Fatal Shooting of Teen in Back*, CHI. TRIB. (Aug. 2, 2016, 7:04 AM), <http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-shooting-eddie-johnson-met-20160801-story.html>.

<sup>6</sup> See Lowery, *supra* note 4 (describing the Scott shooting).

<sup>7</sup> William Lee, *Autopsy: Paul O’Neal Fatally Shot by Police in Back*, CHI. TRIB. (Aug. 17, 2016, 8:13 PM), <http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-shooting-eddie-johnson-met-20160801-story.html>.

<sup>8</sup> See Mike Maciag, *Survey: Almost All Police Departments Plan to Use Body Cameras*, GOVERNING (Jan. 26, 2016), <http://www.governing.com/topics/public-justice-safety/gov-police-body-camera-survey.html> (reporting on the uptake of police-worn body cameras among departments across the nation); Brent McDonald & Hillary Bachelder, *With Rise of Body Cameras, New Tests of Transparency and Trust*, N.Y. TIMES (Jan. 6, 2017), <https://nyti.ms/2jaxwBF> (describing the challenges faced by police departments nationwide in rolling out a body-camera program).

policies mandated recording in the context where the shooting occurred, unless it was unsafe to do so.<sup>9</sup> The practice on the ground, however, did not follow the rules on the books. Numerous other such cases and controversies involving a failure to record have arisen across the nation.<sup>10</sup>

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<sup>9</sup> See CHARLOTTE-MECKLENBERG POLICE DEP'T, INTERACTIVE DIRECTIVES GUIDE, DIRECTIVE 400-005 (effective May 11, 2015), [https://www.rcfp.org/bodycam\\_policies/NC/Charlotte\\_BWC\\_Policy.pdf](https://www.rcfp.org/bodycam_policies/NC/Charlotte_BWC_Policy.pdf) ("Officers will ensure that DMVR equipment (both video and audio) is activated and operating properly and that the video recorder is positioned and adjusted to record events in the following circumstances: [traffic stops, pursuits, emergency response, and prisoner transport]."); CHICAGO POLICE DEP'T, BODY WORN CAMERAS, SPECIAL ORDER S03-14 (effective May 10, 2016) [hereinafter CHI. PD, ORDER S03-14], <https://www.bwccscorecard.org/static/policies/2016-05-10%20Chicago%20-%20BWC%20Policy.pdf> ("Department members assigned a [Body Worn Camera]: will activate the system to event mode to record the entire incident for all . . . traffic stops. . . . foot and vehicle pursuits; emergency driving situations; high-risk situations . . . any encounter with the public that becomes adversarial after the initial contact; and any other instance when enforcing the law."); BATON ROUGE POLICE DEP'T, BODY WORN CAMERAS, No. 502/15-1 (eff. Apr. 23, 2015) (on file with author) ("Body Worn Camera Recorders shall be utilized to record the following types of events when safe to activate: . . . All Calls of Service, including backup Officers [and] Other legitimate law enforcement contacts."); MINNEAPOLIS POLICE DEP'T, POLICY & PROCEDURE MANUAL § 4-223 (effective July 29, 2017), [http://www.ci.minneapolis.mn.us/police/policy/mp\\_dpolicy\\_4-200\\_4-200](http://www.ci.minneapolis.mn.us/police/policy/mp_dpolicy_4-200_4-200) ("Officers shall activate their BWC for the following circumstances. . . . Any contact involving allegations of criminal activity . . . . Any use of force situation. If a BWC is not activated prior to use of force, it shall be activated as soon as it is safe to do so.")

<sup>10</sup> See, e.g., *United States v. Daniel*, No. 1:16 CR 6 SNLJ (ACL), 2016 WL 4004578, at \*5 (E.D. Mo. July 7, 2016) ("[A]ccording to Perryville Police Department policy the body camera should be used during interactions with suspects. . . . Officer James testified that he believed his body camera was on throughout the traffic stop, however, it turned out the recorder either hadn't been turned on, it was not functioning, or he 'possibly didn't use it correctly.'"); Nashelly Chavez, *Rocklin Officers Who Shot Former Honor Student Didn't Turn on Body Cameras Until Later*, SACRAMENTO BEE (Mar. 3, 2017, 6:11 PM), <http://www.sacbee.com/news/local/crime/article136372438.html> (did not record until after fatal shooting); Lynh Bui & Peter Hermann, *Federal Officials Indict Seven Baltimore Police Officers on Racketeering*, WASH. POST (Mar. 1, 2017), <http://wapo.st/2lqLXSU> (detailing charges against officers who allegedly extorted money from civilians, used or threatened force, and turned off their body cameras during the encounters); Kym Klass, *Community Gathers to Remember Greg Gunn*, MONTGOMERY ADVERTISER (Ala.) (Feb. 26, 2017, 5:53 PM), <http://on.gmadv.com/2lHxDsq> (reporting that the officer failed to turn on his body camera during a stop and chase in which the officer beat, tased and then fatally shot Greg Gunn); Yihyun Jeong, *Completed Investigation into Flagstaff Officer Punching Woman Sent to Coconino County Attorney*, ARIZ. REPUBLIC, Jan. 3, 2017, 2:18 PM, <http://azc.cc/2LPrcl> (reporting that an officer turned off his body camera during an encounter that involved the officer punching a woman); Alex Holloway, *Ricky Ball Shooting: Officers Respond to Ball Lawsuit*, COMMERCIAL DISPATCH (Columbus, Miss.) (Nov. 2, 2016, 10:48 AM), <http://www.cdispatch.com/news/article.asp?aid=53932> (reporting that an officer did not activate his body camera during a traffic stop in which the officer shot and killed Ricky Ball, a passenger).

What happens when key video evidence is missing, contrary to the police department's own rules? This Article illuminates the murky or absent internal checks on the growing problem of missing or partial recordings and proposes judicial remedies to supplement internal enforcement challenges. This Article also explores the desirability of new technologies that automate the decision to record and reduce the risk of human error and noncompliance. Presenting findings from the collection and coding of available major-city body camera policies, this Article reveals widespread enforcement gaps in body camera policies.<sup>11</sup> More than half of body camera policies in this sample do not specify consequences for not recording as required.<sup>12</sup> Many also have express limits regarding the mechanisms for detecting whether officers follow the recording rules.<sup>13</sup> This Article discusses how police departments are constrained to address the challenges by labor laws and collective bargaining requirements.<sup>14</sup> The issue is important from both adjudicative justice and public safety perspectives. There is emerging evidence that wearing body cameras reduces the use of force among officers who follow the recording protocol, but increases among officers who wear body cameras and do not follow the rules.<sup>15</sup>

In the activist arena, the ACLU of Massachusetts has proposed a “no tape, no testimony” rule in which courts would instruct juries to discredit or ignore the testimony of officers if the body camera recording is missing.<sup>16</sup> Some state legislatures are also beginning

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<sup>11</sup> See *infra* Part II.B.

<sup>12</sup> See *infra* Part II.B, Table 2.

<sup>13</sup> See *infra* Part II.B, Tables 1, 3, 4.

<sup>14</sup> See *infra* Part III.A.

<sup>15</sup> See Barak Ariel et al., *Report: Increases in Police Use of Force in the Presence of Body-Worn Cameras Are Driven by Officer Discretion: A Protocol-Based Subgroup Analysis of Ten Randomized Experiments*, 12 J. EXPERIMENTAL CRIMINOLOGY 453 (2016). For a discussion of the findings, see *infra* text accompanying notes 84–86.

<sup>16</sup> See ACLU OF MASS. & SAMUELSON LAW, TECH. & PUB. POLICY CLINIC NO TAPE, NO TESTIMONY 2 (2016) [hereinafter ACLU, NO TAPE, NO TESTIMONY], [https://aclum.org/wp-content/uploads/2016/11/ACLU\\_BodyCameras\\_11.21\\_final.pdf](https://aclum.org/wp-content/uploads/2016/11/ACLU_BodyCameras_11.21_final.pdf) (proposing an instruction that “would tell the jury that, if it finds that the police unreasonably failed to create or preserve a video of a police-civilian encounter, it can devalue an officer’s testimony and infer that the video would have helped the civilian. If the jury finds that the case involves bad faith, such as the outright sabotage of body cameras, then it should be instructed to disregard officer testimony altogether.”).

to search for approaches to address the problem.<sup>17</sup> Reflecting the enduring focus on the criminal trial as the arena of primary contestation in criminal adjudication, early proposals focus on jury instructions regarding the testimony of officers who fail to record.<sup>18</sup>

While the attention is salutary, the focus on jury instructions does not address the vast majority of criminal cases, that is, those which never make it to trial. More than 90% of criminal convictions come from plea bargaining, never reaching the jury-instructions phase of trial.<sup>19</sup> According to the most recently available aggregated statistics, 97% of federal convictions,<sup>20</sup> and 94% of state felony convictions<sup>21</sup> arise from plea bargains. As the U.S. Supreme Court has recognized, “[b]ecause ours ‘is for the most part a system of pleas, not a system of trials,’ it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.”<sup>22</sup> Filling a gap, this Article focuses on pretrial remedies that can apply to the fuller swathe of criminal procedure cases. This Article also concludes that remedies for missing video are just a stop-gap measure. The optimal approach to the missing video problem is automatic activation to reduce the risk of human error and noncompliance.

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<sup>17</sup> See, e.g., H.B. 2737, 100th Gen. Assemb., Reg. Sess. (Ill. 2017) (making it a Class 3 felony and a firing offense for an officer to knowingly fail to turn on or turn off an officer-worn body camera contrary to departmental recording policy when there is a reasonable opportunity to comply); H.B. 1613, 2017 Sess. (Va. 2017) (providing that an officer who fails to record using the body camera as required may still testify about the events that should have been recorded, but the court should instruct the jury to consider the failure to record “in determining the weight given to [the officer’s] testimony,” or if there is no jury, then the court should consider the factor in weighing the testimony).

<sup>18</sup> E.g., H.B. 1613, 2017 Sess. (Va. 2017). See generally ACLU, NO TAPE, NO TESTIMONY, *supra* note 16 (proposing remedies focused on jury instructions and trial testimony).

<sup>19</sup> See DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.22.2009 (2009), <http://www.albany.edu/sourcebook/pdf/t522009.pdf>, cited in *Missouri v. Frye*, 566 U.S. 134, 143 (2012).

<sup>20</sup> Of the 89,741 criminal defendants convicted and sentenced in U.S. District Courts in 2010, 87,418 pled guilty or entered a plea of nolo contendere. See DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.22.2010 (2010), <http://www.albany.edu/sourcebook/pdf/t5222010.pdf>.

<sup>21</sup> See SEAN ROSENMERKEL ET AL., DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES, at 24 tbl.4.1 (2009), <https://www.bjs.gov/content/pub/pdf/fssc06st.pdf> (reporting data on the types of felony convictions in state courts in 2006).

<sup>22</sup> *Frye*, 566 U.S. at 144 (citation omitted) (quoting *Lafler v. Cooper*, 566 U.S. 156, 170 (2012)).

The import of the body camera issue will only increase as more police departments deploy the cameras in order to rebuild public trust and to fulfill promises of accountability after national turmoil and protests in the wake of tragic police shootings.<sup>23</sup> The strategy of surveilling the surveillers by using body cameras united an unusual coalition of civil rights and civil liberties groups and law enforcement leaders in support of the reforms.<sup>24</sup> Body camera policies now call for recording more law enforcement activities than ever before, such as stops, frisks, searches, uses of force, responses to calls, and even consensual encounters in some jurisdictions.<sup>25</sup> Controversial police activities that were formerly opaque, left to reconstruction in police-said, defendant-said credibility contests, are now supposed to be illuminated by a more objective record of what really happened.<sup>26</sup>

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<sup>23</sup> See, e.g., Adam A. Marshall & Katie Townsend, Opinion, *A Tool to Gain the Public's Trust*, WASH. POST (May 15, 2015), <http://wapo.st/1Fj1zyJ> (discussing the impetus for rapid department adoption of police-worn body cameras); Max Ehrenfreund, *Body Cameras for Cops Could Be the Biggest Change to Come Out of the Ferguson Protests*, WASH. POST: WONKBLOG (Dec. 2, 2014), <https://wapo.st/1tHTsl3> (reporting that, in response to incidents like the shooting of Michael Brown in Missouri, “body-worn cameras will be as ubiquitous in the world of policing as handcuffs” by 2019).

<sup>24</sup> See, e.g., Press Release, NAACP ET AL., Civil Rights Coalition Urges National Reforms and Recommendations to Address Police Abuse (Sept. 24, 2015), <http://www.naacp.org/latest/civil-rights-coalition-urges-national-reforms-and-recommendations-to-address/> (calling for police to wear body cameras); Lawyers’ Comm. for Civil Rights Under Law et al., A Unified Statement of Action to Promote Reform and Stop Police Abuse (Aug. 18, 2014), [https://www.aclu.org/sites/default/files/assets/black\\_leaders\\_joint\\_statement\\_-\\_final\\_-\\_8-18.pdf](https://www.aclu.org/sites/default/files/assets/black_leaders_joint_statement_-_final_-_8-18.pdf) (a joint statement of multiple civil rights and civil liberties groups urging the adoption of police-worn body cameras); Maciag, *supra* note 8 (reporting on the widespread adoption of police-worn body cameras by departments around the nation).

<sup>25</sup> See Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. 897, 932 (2017) [hereinafter Fan, *Justice Visualized*] (reporting findings on common contexts where body camera policies require recording).

<sup>26</sup> See, e.g., AUSTIN POLICE DEPT., POLICY MANUAL, POLICY 303, at 128 (issued Sept. 28, 2017), [https://www.austintexas.gov/sites/default/files/files/Police/APD\\_Policy\\_Manual.pdf](https://www.austintexas.gov/sites/default/files/files/Police/APD_Policy_Manual.pdf) (“The use of Body Worn Digital Recording (BWDR) system provides an unbiased audio/video recording of events that employees encounter.”); CHI. POLICE DEPT., BODY WORN CAMERAS, Special Order S03-14, § I (effective June 9, 2017), <https://directives.chicagopolice.org> (search in search bar for “S03-14”; then follow “Body Worn Cameras” hyperlink) (stating that body-worn cameras can “improve the quality and reliability of investigations and increase transparency”); PHILA. POLICE DEPT., BODY-WORN CAMERAS, DIRECTIVE 4.21, § 1 (issued Jan. 15, 2016, updated Jan. 27, 2017) [hereinafter PHILA. PD, BWC DIR.], <http://www.phillypolice.com/assets/directives/D4.21-BodyWornCameras.pdf> (explaining that body-worn cameras “provide an unbiased audio and video recording of events that officers encounter”); Fan, *Justice Visualized*, *supra* note 25, at 919–20 (discussing the imbalance of power and ability to speak in defendant-said, police-said credibility contests).



Yet, amid this revolution on paper, emerging reports from the field indicate that some body-worn cameras are disabled or turned off when they are supposed to be recording.<sup>27</sup> Even when it comes to the more established technology of patrol car dash cameras, findings by Chicago police officials indicate that 80% of recordings fail to capture audio due to officer error or “intentional destruction.”<sup>28</sup> Selective recording and non-recording poses the risk of subverting the promise that led communities across the nation to embrace more surveillance by police body cameras in exchange for improved accountability and transparency.<sup>29</sup> If the problem is left unchecked, rather than being a tool of police accountability, body camera recordings could amplify the problems of a gross imbalance in power. Video recordings can offer more powerful evidence to speed up a plea bargain or conviction or justify a search or seizure.<sup>30</sup> But recordings that might exonerate or implicate officers are missing.<sup>31</sup>

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<sup>27</sup> See *supra* notes 4–5 and accompanying text. See also, e.g., Justin Fenton & Kevin Rector, *7 Officers Charged with Racketeering: Members of City Gun Task Force Accused of Robbing Civilians*, BALTIMORE SUN, Mar. 2, 2017, 2017 WLNR 6558848 (reporting prosecutors’ allegations that seven Baltimore police officers who were indicted for racketeering turned off their body cameras before threatening civilians to extract payments); Tim Cushing, *ACLU Suggests Jury Instructions Might Be A Fix For ‘Missing’ Body Camera Recordings*, TECHDIRT, Dec. 3, 2016, 2016 WLNR 36979699 (“Body cameras are pretty much mainstream at this point, but when excessive force and/or misconduct are alleged, footage captured by police is often nonexistent. Officers disable recording equipment, delete footage, or simply claim the camera ‘malfunctioned.’ Some repeatedly ‘forget’ to activate their cameras ahead of controversial arrests and interactions.”).

<sup>28</sup> Radley Balko, *80 Percent of Chicago PD Dash-Cam Videos are Missing Audio Due to ‘Officer Error’ or ‘Intentional Destruction,’* WASH. POST (Jan. 29, 2016), <http://wapo.st/1nCW5d0>.

<sup>29</sup> See, e.g., POLICE EXEC. RESEARCH FORUM, DEP’T OF JUSTICE, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 5 (2014) [hereinafter JUSTICE DEP’T BWC RECS.], <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf> (discussing the accountability and transparency concerns that prompt police departments and communities to adopt police body cameras).

<sup>30</sup> See, e.g., *State v. Herrin*, No. 1 CA-CR 12-0141, 2012 WL 3233227, at \*2 (Ariz. Ct. App. Aug. 9, 2012) (dash camera recording used to secure a felony conviction for resisting arrest); *United States v. Bryant*, No. 1:15CR99-1, 2015 WL 2248177, at \*1, \*5 (M.D.N.C. May 13, 2015) (reviewing officer body camera footage and concluding that the defendant’s nervous demeanor helped justify the stop when the encounter was no longer consensual in nature), *rev’d*, 654 F. App’x 622 (4th Cir. 2016); *State v. Gibbons*, No. 2012-UP-177, 2012 WL 10841329, at \*1 (S.C. Ct. App. Mar. 14, 2012) (recording of defendant’s arrest used to secure convictions for first-degree harassment and resisting arrest).

<sup>31</sup> See, e.g., *Richardson v. Mahon*, No. 4:15-cv-3317-RBH-TSR, 2017 WL 430862 (S.D.S.C.), *vacated on other grounds*, 2017 WL 4262517 (4th Cir. Sept. 26, 2017) (alleging

Courts, as the central framers of criminal procedure rules and evidentiary gatekeepers, have an important role to play in deterring selective recording and non-recording and ensuring an accurate and fair evidentiary record.<sup>32</sup> The challenge is how to fashion remedies that do not altogether deter judicial inquiry because they require collateral mini-trials on whether officers had legitimate reasons for not recording or whether they acted in bad faith.<sup>33</sup> This Article proposes remedies flowing from a more administrable evidentiary fairness framework that spares courts from having to wade into the morass of individual blame before offering a remedy.<sup>34</sup> Remedies that reflect this approach include excluding partial recordings and drawing favorable inferences for the defense.<sup>35</sup> This Article also proposes drawing on the institutional capacity of courts as repositories of evidence and filings in order to detect patterns and practices of violations in need of redress.<sup>36</sup> Finally, this Article discusses the desirability of deploying new technologies that automate the decision to record, reducing both the risk of human error or resistance and the need for judicial intervention.

This Article proceeds in four parts. Part II frames the growing problem of the gap between the promise to record more police encounters than ever before and noncompliance on the ground. This part also discusses the widespread silence regarding sanctions in recording policies for failure to record. Part III discusses why departments face difficulties disciplining officers for

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that officer failed to record plaintiff's arrest via body camera or dash camera though other officers said the events should have been recorded); *United States v. Daniel*, No. 1:16 CR 6 SNLJ (ACC), 2016 WL 4004578, at \*5 (E.D. Mo. July 7, 2016) (noting absence of the recording of key contested events despite policy which required recording via body camera). *See also* Tim Cushing, *If Police Officials Won't Hold Officers Accountable, More Cameras Will Never Mean More Recordings*, TECHDIRT, Aug. 11, 2016, 2016 WLNR 24414477 (discussing examples of police failures to record); examples cited, *supra* note 2–5, and discussion, *infra* Part II.

<sup>32</sup> *See infra* Part IV.

<sup>33</sup> *See* discussion *infra* Part IV.A.

<sup>34</sup> *See* discussion *infra* Part IV.A.

<sup>35</sup> *See* discussion *infra* Part IV.B.1–2.

<sup>36</sup> *See infra* Part IV.B.3; *see also* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2051–54 (2016) (encouraging criminal courts to better utilize their specialized institutional knowledge of the criminal justice system in order to participate effectively in efforts “to reform the failed criminal justice state”).

failing to record as required or even specifying what, if any, sanctions apply. Part IV argues that courts have an important role to play in addressing the missing-video problem and the incapacity of departments to self-police. This part offers three pretrial remedies to incentivize compliance and ensure fair evidentiary use of the audiovisual record in criminal cases. Finally, Part V concludes by arguing that the optimal approach is to deploy new technologies that automate police-worn body camera recording, thus alleviating the missing video problem and the need for judicial intervention.

## II. AFTER THE RECORDING REVOLUTION: THE MISSING VIDEO PROBLEM

Revolutions offer grand promises of transformation that seize attention and tantalize the imagination.<sup>37</sup> But the real impact—if any—of a revolution is determined in the messy days after the revolution, during the implementation of the promises.<sup>38</sup> It is in implementation that promises come to fruition or go unrealized—or even invert, offering the opposite of what people hoped.<sup>39</sup> Now is the crucial time that will frame the real impact of the recording revolution in police regulation.

Shaken by protests over police use of force, and recurrent deaths of young minority men, departments across the nation have promised to adopt body cameras to rebuild trust, address accusations, and promote accountability.<sup>40</sup> The rapid shift since

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<sup>37</sup> See, e.g., Matt Viser & Annie Linsky, *Grand Promises Stir Voter Passions, But Are Hard to Keep*, BOS. GLOBE (Jan. 25, 2016), <https://www.bostonglobe.com/news/politics/2016/01/25/donald-trump-and-bernie-sanders-lead-pack-with-unrealistic-promises/CxkGiorOezl2d365xtQlqK/story.html> (discussing the “pie-in-the-sky” policies 2016 presidential candidates Donald J. Trump and Bernie Sanders espoused during their respective campaigns).

<sup>38</sup> See BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 27, 72, 96 (1992) (discussing the challenges of implementing promises made during a revolution once “normal politics” has resumed in a post-revolution society).

<sup>39</sup> See *id.*

<sup>40</sup> See, e.g., POLICE COMPLAINTS BD., *ENHANCING POLICE ACCOUNTABILITY THROUGH AN EFFECTIVE ON-BODY CAMERA PROGRAM FOR MPD OFFICERS* 3–4 (2014), <https://policecomplaints.dc.gov/publication/enhancing-police-accountability-through-effective-body-camera-program-mpd-officers> (follow “Attachment” hyperlink) (recommending that the District of Columbia Metropolitan Police Department utilize body-worn cameras to “reduce the incidence of complaint-generating events,” to foster a culture of respect between the police and the public, and to hold accountable those officers that have broken the law or department policy); JUSTICE

late 2014 has been remarkable. In 2013, few departments had body cameras.<sup>41</sup> Police officers had concerns over wearing the intrusive technology.<sup>42</sup> Since the national protests over police killings, and calls by civil rights and civil liberties groups for police to wear body cameras, the vast majority of departments have announced plans to deploy the technology.<sup>43</sup> Then-President Barack Obama's announcement in late 2014 of plans to offer millions of dollars in grant funding for body cameras further fueled the scramble to adopt programs.<sup>44</sup>

On the books, recording policies seem to present a major transparency paradigm shift, mandating recording of most law enforcement activities such as stops, searches, arrests, uses of force, responses to calls, and more.<sup>45</sup> On the ground, however, challenges involving the nonrecording or selective recording of police activities are emerging.<sup>46</sup> This part presents the growing challenge of missing video after the body camera revolution and how recording policies often do not specify what, if any, sanctions apply.

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DEPT BWC RECS., *supra* note 29, at 6–7 (discussing the positive feedback from police departments regarding the use of body cameras).

<sup>41</sup> See, e.g., JUSTICE DEP'T BWC RECS., *supra* note 29, art. 2 (reporting that, in 2013, less than a quarter of the 254 police departments surveyed used body cameras).

<sup>42</sup> See Tami Abdollah, *Officers' Body Cameras Raise Privacy Concerns*, ASSOCIATED PRESS, Mar. 15, 2014, WESTLAW (“[S]ome rank-and-file officers are worried [body cameras] might ultimately be used to derail their careers . . . .”); O’Ryan Johnson & Erin Smith, *Concern on Both Sides: BPD Brass, Union Fear Cameras on Cops*, BOS. HERALD, Dec. 4, 2014, 2014 WLNR 34249221 (discussing the concerns of top Boston police officials that people in “crime-battered neighborhoods” might not want to speak with the police if they knew they were being recorded).

<sup>43</sup> See Maciag, *supra* note 8 (reporting that 95% of seventy police departments surveyed had plans to adopt or had adopted body cameras).

<sup>44</sup> See DENVER OFFICE OF THE INDEP. MONITOR, 2014 ANNUAL REPORT 8 (2015) [hereinafter DENVER INDEP. MONITOR 2014 REPORT], [http://extras.denverpost.com/Denver\\_Monitor\\_2014\\_Annual\\_Report.pdf](http://extras.denverpost.com/Denver_Monitor_2014_Annual_Report.pdf) (“Many police chiefs . . . scrambled to announce BWC programs . . . after the President’s announcement.”); Carrie Dann & Andrew Rafferty, *Obama Requests \$263 Million for Police Body Cameras, Training*, NBC NEWS (Dec. 1, 2014, 7:15 PM), <http://www.nbcnews.com/politics/first-read/obama-requests-263-million-police-body-cameras-training-n259161> (reporting that, in the wake of tragic police shootings, the Obama White House requested “\$263 million in funding for police body cameras and training”).

<sup>45</sup> See Fan, *Justice Visualized*, *supra* note 25, at 932 (“Nearly all [police] departments mandate recording of *Terry* and traffic stops, searches, arrest, pursuits, and responses to calls for service.”).

<sup>46</sup> See discussion *supra* notes 3–10 and *infra* notes 47–77 and accompanying text.

## A. NEW CONTROVERSIES OVER RECURRING TRAGEDIES

On a San Francisco street, sheriff's deputies beat suspected auto thief Stanislav Petrov with metal batons, inflicting multiple head and arm injuries that required twelve days of hospitalization.<sup>47</sup> Ten out of the eleven responding officers did not activate their body cameras.<sup>48</sup> The eleventh officer's body camera did activate—by accident.<sup>49</sup> The incident came to light when residents, whose private security cameras captured the incident, gave the public defender's office their recordings.<sup>50</sup> At the time, the Alameda Sheriff's Department policy encouraged sheriffs to use their body cameras to record, but did not mandate it.<sup>51</sup> After the controversy over the case, the sheriff's department revised its policy to require recording.<sup>52</sup>

Requiring recording of law enforcement activities is an increasingly prevalent approach.<sup>53</sup> Is a policy mandate to record police encounters enough to address the failure to activate the body camera? Controversies and findings from other jurisdictions suggest the answer is no. Even in the growing number of jurisdictions where department policies require recording, some officers have not activated their body cameras or hit record only after the key event, such as a use of force or traffic stop.<sup>54</sup>

Consider, for example, the experience of early departmental pioneers that piloted body cameras before the rush. The Phoenix

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<sup>47</sup> See Dan Lawton, *Alameda County Deputy Beating Prompts Change in Body Camera Policy*, MERCURY NEWS (Mar. 29, 2016, 5:32 AM), <http://www.mercurynews.com/2016/03/29/alameda-county-deputy-beating-prompts-change-in-body-camera-policy/>; Melanie Woodrow, *Alameda County Deputy Beating Case Prompts Camera Policy Change*, ABC7 NEWS (Mar. 29, 2016), <http://abc7news.com/news/alameda-county-deputy-beating-case-prompts-policy-change/1267601/>.

<sup>48</sup> Gretel Kauffman, *How Police Departments Are Ensuring the Use of Body Cameras*, CHRISTIAN SCI. MONITOR, Aug. 7, 2016, 2016 WLNR 24034840.

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

<sup>50</sup> *California Deputies Charged in Beating Captured on Video*, CBS NEWS (May 10, 2016, 6:15 PM), <http://www.cbsnews.com/news/california-deputies-charged-in-beating-captured-on-video/>.

<sup>51</sup> See Lawton, *supra* note 47 (noting that, prior to the Petrov incident, it was “optional for deputies to turn on their cameras”).

<sup>52</sup> *Id.*

<sup>53</sup> See Fan, *Justice Visualized*, *supra* note 25, at 932 tbl.2 (listing enforcement events and the number of surveyed departments that require recording of the event—most had adopted the mandatory recording of the police activities included in the survey).

<sup>54</sup> See *infra* notes 55–77.

Police Department body camera policy instructed officers that the “camera must be activated during all investigative or enforcement contacts, which includes traffic stops.<sup>55</sup> Yet, a recent evaluation of the impact of body-worn cameras in the department found that a mere 6.5% of traffic stops were recorded.<sup>56</sup> Officers were most likely to use their body cameras to record domestic violence calls,<sup>57</sup> where the evidentiary value of recordings for prosecution are particularly crucial because victims frequently recant.<sup>58</sup> Even then, less than half (47.5%) of domestic-violence incidents were recorded.<sup>59</sup>

As another police department ahead of the curve in piloting body cameras, the Denver Police Department’s results are also instructive.<sup>60</sup> The department’s body camera policy required activation in numerous contexts, such as “[p]edestrian, citizen and/or vehicle contacts,” and “[a]ny encounter that becomes adversarial.”<sup>61</sup> Yet, the Independent Monitor overseeing the department found that, during the six-month pilot program, only twenty-one of eighty uses of force were recorded by body-worn cameras—just 26% of such critical incidents.<sup>62</sup> Unrecorded uses of force included incidents such as punching a suspect in the face, baton strikes, pushing, pepper-spraying, and tasing suspects.<sup>63</sup>

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<sup>55</sup> PHOENIX POLICE DEP’T, BODY WORN VIDEO TECHNOLOGY – PILOT, OPERATIONS ORDER 4.49, § 5 (effective Apr. 2013).

<sup>56</sup> CHARLES M. KATZ ET AL., ARIZ. STATE UNIV. CTR. FOR VIOLENCE PREVENTION AND CMTY. SAFETY, EVALUATING THE IMPACT OF OFFICER WORN BODY CAMERAS IN THE PHOENIX POLICE DEPARTMENT 22 (2014), [http://publicservice.asu.edu/sites/default/files/ppd\\_spi\\_feb\\_20\\_2015\\_final.pdf](http://publicservice.asu.edu/sites/default/files/ppd_spi_feb_20_2015_final.pdf).

<sup>57</sup> *Id.* at 22.

<sup>58</sup> See also SAN DIEGO POLICE DEP’T, AXON BODY WORN CAMERAS, PROCEDURE 1.49, § V (2015) [hereinafter SAN DIEGO PD, PROCEDURE 1.49], [https://rcfp.org/bodycam\\_policies/CA/SanDiegoBWCPolicy\\_update.pdf](https://rcfp.org/bodycam_policies/CA/SanDiegoBWCPolicy_update.pdf) (“Domestic violence victims often recant their statements as early as the following morning after a crime. Some victims go so far as to testify that the officer fabricated their statement. Victims may also make their children unavailable for investigators or court to avoid their providing statements.”); Deborah Tuerkheimer, Crawford’s *Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 14–16 (2006) (explaining that domestic violence victims frequently succumb to pressures from batterers and recant, refuse to testify, disappear, or refuse to press charges).

<sup>59</sup> KATZ ET AL., *supra* note 56, at 22.

<sup>60</sup> The Denver Police Department piloted body cameras beginning in June 2014. See DENVER OFFICE OF THE INDEP. MONITOR, *supra* note 44, at 8.

<sup>61</sup> DENVER POLICE DEP’T, BODY WORN CAMERA, POLICY 111.11, § 3 (finalized Sept. 1, 2015), [https://www.rcfp.org/bodycam\\_policies/CO/DenverCO\\_BWC\\_policy\\_update.pdf](https://www.rcfp.org/bodycam_policies/CO/DenverCO_BWC_policy_update.pdf).

<sup>62</sup> DENVER OFFICE OF THE INDEP. MONITOR, *supra* note 44, at 10.

<sup>63</sup> *Id.* at 13, 20, 24–25.

Some of the non-recording occurred because supervisors or off-duty officers were not required to wear body cameras at the time.<sup>64</sup> Yet, even among officers who were patrolling on-duty and required to use body cameras, only 47% of the forty-five uses of force were recorded despite the rules.<sup>65</sup>

While recording policy noncompliance rates are not available for many other departments, scandals and deaths are revealing problems.<sup>66</sup> In Baltimore, an investigation into officers who allegedly used traffic stops, home entries, and false warrants to rob civilians also revealed how the officers would regularly turn off their body cameras during such encounters.<sup>67</sup> Baltimore Police Department policy clearly and concisely mandates body camera activation during any “activity that is investigative or enforcement in nature” or “any encounter that becomes confrontational.”<sup>68</sup> The alleged behavior on the ground, if proven true, would be a mockery of the rules.

In Chicago, the national controversy over the shooting of seventeen-year-old Laquan McDonald—and the missing audio from the five patrol car dash cameras at the scene—led to a departmental investigation.<sup>69</sup> The investigation found that 80% of dash cameras had “no functioning audio.”<sup>70</sup> Intentional destruction and officer error have contributed to the widespread problem.<sup>71</sup> After a disciplinary crackdown that included random checks and punishment, the volume of video uploaded after each shift increased

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<sup>64</sup> *Id.* at 17–18.

<sup>65</sup> *Id.* at 17.

<sup>66</sup> See *supra* notes 3–10 and accompanying text.

<sup>67</sup> Press Release, Dep’t of Justice, Seven Baltimore City Police Officers Arrested for Abusing Power in Federal Racketeering Conspiracy (Mar. 1, 2017), <https://www.justice.gov/usao-md/pr/seven-baltimore-city-police-officers-arrested-abusing-power-federal-racketeering>.

<sup>68</sup> BALTIMORE POLICE DEP’T, BODY WORN CAMERAS PILOT PROGRAM POLICY 824 (effective Oct. 26, 2015), <https://www.bwcorescorecard.org/static/policies/2015-10-26%20Baltimore%20-%20BWC%20Policy.pdf>.

<sup>69</sup> See Jeremy Gerner, *Nearly 2 Dozen Chicago Cops Disciplined for Faulty Dashboard Cameras*, CHI. TRIB. (Jan. 7, 2016, 6:56 AM), <http://www.chicagotribune.com/news/opinion/editorials/ct-chicago-police-disciplined-met-20160106-story.html> (describing the discipline officers have received after the shooting as a result of investigations into officers’ use of dash-cams).

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

<sup>71</sup> See Balko, *supra* note 28 (reporting the various ways Chicago officers prevent dash-cam audio from being recorded, including “stash[ing] microphones in their squad car glove boxes” and “pull[ing] out batteries”).

by 75%.<sup>72</sup> But the national spotlight on missing video in Chicago did not end there.

Responding to calls for transparency, the Chicago Police had expanded its body camera program when officers fatally shot eighteen-year-old Paul O'Neal after he crashed a stolen Jaguar into police cars and then ran away on foot.<sup>73</sup> Chicago's body camera policy calls for officers to record all foot and vehicle pursuits, emergency driving situations and "any other instance while enforcing the law," among many enumerated contexts.<sup>74</sup> But the officer who shot O'Neal did not activate his body camera and catch the crucial moments.<sup>75</sup>

Chicago and Baltimore are hardly alone in the missing video controversy. The problem is underscored by the nonrecording of fatal shootings in numerous other jurisdictions that have adopted body cameras, such as Flagstaff, Arizona; Rocklin, California; Columbus, Missouri; Charlotte, North Carolina; and Montgomery, Alabama.<sup>76</sup> In San Diego, it was the unrecorded fatal shooting of police officers wearing body cameras that underscored the problem, and how the protection of police as well as civilian lives are at stake.<sup>77</sup>

Using technology to improve the behavior of the police and public seems like an elegant idea, drawing on the principles behind Jeremy Bentham's famous Panopticon.<sup>78</sup> The Panoptic ideal is that people behave better when they know they are being watched, deploying pervasive surveillance to induce self-policing of behavior.<sup>79</sup> The challenge is that the Panopticon was a plan for

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<sup>72</sup> See Gorner, *supra* note 69.

<sup>73</sup> See Sweeney & Gorner, *supra* note 5.

<sup>74</sup> CHI. PD, ORDER S03-14, *supra* note 9, § II.A.2.

<sup>75</sup> Police believe the officer did not intentionally disable the body camera. Rather, "the crash or the officer's lack of experience operating the camera" were likely causes of the nonrecording. See Sweeney & Gorner, *supra* note 5.

<sup>76</sup> See *supra* notes 3–10.

<sup>77</sup> Amanda Lee Myers, *Fatal Police Shooting Highlights Inconsistent Body Cam Usage*, ASSOCIATED PRESS (Aug. 6, 2016), <https://apnews.com/13112c126c9642bdbb21a1db47b2873f>.

<sup>78</sup> See Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93, 102 (2012) [hereinafter Fan, *Panopticism*] (discussing the extension of Panoptic principles to police regulation).

<sup>79</sup> See Miran Božović, *Introduction* to JEREMY BENTHAM, *THE PANOPTICON WRITINGS* 8, 11–18 (Miran Božović ed., 1995) (summarizing Bentham's idea for a Panopticon prison, where inmates would be situated around an opaque watchtower so they were constantly visible to guards).



controlling prisoners.<sup>80</sup> Police officers are not prisoners, and the police have more power to resist panoptic control, as illustrated by the controversial cases of unrecorded use of force by officers wearing body cameras surfacing around the nation.<sup>81</sup>

Failure to record perversely undermines the very public trust and safety goals that led communities across the nation to adopt body cameras.<sup>82</sup> Early studies suggesting that body cameras reduce the use of force and complaints by citizens are oft-cited by people hoping for a technological fix to one of the most challenging problems of our times.<sup>83</sup> Yet new findings suggest the situation is more complex.

The first findings from the largest set of randomized controlled trials of the effectiveness of body cameras revealed that uses of force jumped by 71% among officers who did not follow the recording protocol and instead recorded at their discretion.<sup>84</sup> In contrast, among officer who followed the protocol, the use of force decreased by 37% among body cameras wearers compared to controls.<sup>85</sup> Adherence matters—and nonadherence by officers equipped with body cameras may be associated with perversely heightened risk.<sup>86</sup> Addressing failure to record is thus important

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<sup>80</sup> See Fan, *Panopticism*, *supra* note 78, at 102 (“Bentham’s original conception envisioned facilitating more efficient and effective governance of prison inmates . . .”).

<sup>81</sup> See *supra* notes 3–10, 47–77.

<sup>82</sup> See MICHAEL D. WHITE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 19 (2014), <http://cvpcs.asu.edu/products/police-officer-body-worn-cameras-assessing-evidence> (follow “Documents” hyperlink) (noting that body cameras “can demonstrate to the community that officers aim to act in a fair and just manner”).

<sup>83</sup> See Barak Ariel et al., *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 (2015) (reporting results from a Rialto, California trial finding that officers who did not wear body cameras had twice the incidence of uses of force compared to officers randomly selected to wear body cameras); KATZ ET AL., *supra* note 56, at 33 (finding a 22.5% decline in complaints against officers in a precinct that tested body cameras during a time when complaints were rising in other precincts); WHITE, *supra* note 82, at 17–18 (finding a decline in complaints against Mesa, Arizona, police officers after the introduction of body cameras); Wesley G. Jennings et al., *Cops and Cameras: Officer Perceptions of the Use of Body-Worn Cameras in Law Enforcement*, 42 J. CRIM. JUST. 549, 550 (2014) (discussing a Mesa (Arizona) Police Department evaluation which found a 40% decline in complaints against officers and a 75% decrease in use of force incidents after the introduction of body cameras).

<sup>84</sup> Ariel et al., *supra* note 15, at 459–61.

<sup>85</sup> *Id.*

<sup>86</sup> See *id.* at 461 (suggesting that “the selective activation of cameras by police is a corollary to situations that are already escalating in aggression,” and that “activating a

to both public safety and public trust, and can help improve the accuracy of adjudicating contested events.

B. WHAT HAPPENS IF OFFICERS DON'T FOLLOW THE RECORDING RULES?

What happens to officers who refuse or otherwise fail to record pursuant to their department's body camera policy? How do we even know if officers have cameras off when they are supposed to be recording? These questions are important because, without the ability to assess and incentivize compliance, recording policies are fancy dress over the same recurring problem. This section reports findings regarding nonrecording detection mechanisms and sanctions from the collection and coding of body camera policies from police departments serving the 100 largest cities in the United States.

The author and a research team composed of research assistants and law librarians conducted online searches, supplemented by direct contact with police departments, to ascertain the body camera adoption status and availability of a policy.<sup>87</sup> The team focused on the primary police department serving each municipal area, rather than specialized agencies such as the Highway Patrol, because the primary department generally has the broadest portfolio of activities.<sup>88</sup> In the course of collecting the policies, the team found that as of late 2015—about a year after the call for body cameras by civil liberties and civil rights groups<sup>89</sup> and the President<sup>90</sup>—eighty-eight of the one hundred major-city departments had either piloted or deployed body cameras, or at least had plans to do so.<sup>91</sup> Through searches of public materials and requests to the departments, the team

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camera *during* a tense situation may serve to increase the aggression of the citizen/suspect (and thus the officer)").

<sup>87</sup> The author and research team have no external sources of funding or conflicts to report.

<sup>88</sup> See, e.g., David N. Falcone & L. Edward Wells, *The County Sheriff as a Distinctive Policing Modality*, 14 AM. J. POLICE 123, 123–26 (1995) (explaining distinctions between law enforcement agencies).

<sup>89</sup> See *supra* note 24 and accompanying text.

<sup>90</sup> See *supra* note 44 and accompanying text.

<sup>91</sup> See Fan, *Justice Visualized*, *supra* note 25, at 931 (reporting the findings).

collected and coded fifty-nine policies available as of December 2016.<sup>92</sup>

This sample yielded diversity of region and city size. The regions represented and city sizes ranged from more than 8.5 million people in New York City to less than 250,000 people in cities such as Fremont, California; Gilbert, Arizona; Chesapeake, Virginia; and Madison, Wisconsin.<sup>93</sup> Appendix A lists the fifty-nine cities for which we collected and coded departmental body camera policies. The fifty-nine-policy sample set is more than twice as large as the collection of twenty-three body camera policies mapped by the Brennan Center.<sup>94</sup> It includes thirty-eight major cities not covered in that set, such as Atlanta, Boston, Cleveland, Houston, Miami, Philadelphia, San Francisco, and St. Louis. The study also codes substantive positions beyond a simple yes or no—for example, the type of consequences for not activating one’s body camera, rather than just whether the policy has consequences. This project thus builds upon and advances prior important work.

The results reported here are based on the coding of variables addressing three clusters of key questions for the detection and enforcement of recording rule violations:

- (1) **Reporting and other detection mechanisms.** What, if anything, does an officer have to do upon a failure to record pursuant to policy? Are there other mechanisms for detecting failures to record as required?
- (2) **Sanctions or other consequences.** What, if any, consequences are specified for a failure to record?
- (3) **Officer protections against detection and discipline.** Do the policies contain provisions

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<sup>92</sup> Of the policies, seven were draft policies, while the vast majority were finalized to govern at least a pilot deployment in the field.

<sup>93</sup> For population size data, see U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR INCORPORATED PLACES OF 50,000 OR MORE, RANKED BY JULY 1, 2016 POPULATION: APRIL 1, 2010 to July 1, 2016, <https://factfinder.census.gov/faces/tableserVICES/jsf/pages/productview.xhtml>.

<sup>94</sup> *Police Body Camera Policies: Accountability*, BRENNAN CTR. FOR JUST. (Aug. 3, 2016), <https://www.brennancenter.org/analysis/police-body-camera-policies-accountability>.

limiting the ability to detect violations of the recording requirements and/or the ability to impose discipline for violations?

Codes for the main types of policy positions were generated through an iterative process, based on an evaluation of the provisions.<sup>95</sup> The distribution of policy positions are summarized in Tables 1–4 below.

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<sup>95</sup> For background on policy coding, see, e.g., Charles Tremper et al., *Measuring Law for Evaluation Research*, 34 EVALUATION REV. 242, 252–55 (2010).

*Table 1. Do Officers Have to Report Failures to Record?  
59 Major-City Police Department Policies\**

Policy Position	Number of Agencies	Proportion of Sample
Must explain in report, activity log, or other memorandum or database (“in writing”)	17	29%
Must explain on camera, in writing, or both, and notify supervisor	8	14%
Must explain on camera and in writing	4	7%
Must explain on camera only	1	2%
Must notify supervisor only	1	2%
Must be able to articulate reason for nonrecording but no reporting requirement	1	2%
Must explain early deactivation but no provision for failure to record altogether	14	24%
No provision on reporting failures to record	11	19%

*\* Because these policies are not mutually exclusive and some agencies are represented in more than one category, the numbers will not sum to 59/100%.*

*Table 2. Consequences for Failure to Record  
59 Major-City Police Department Policies\**

Policy Position	Number of Agencies	Proportion of Sample
Express provision that failure to record or noncompliance is subject to discipline	9	15%
Written reprimand on first violation, one fined day and officer usage audit on second, and formal disciplinary case on third with “severe” disciplinary action for “purposeful, flagrant or repeated violations”	1	2%
Failure to activate is deemed a violation if it is to commit a violation of law or policy	1	2%
Supervisors have discretion to use non-disciplinary sanctions	1	2%
Counseling or training rather than discipline	4	7%
Express provisions <i>against</i> disciplinary consequences (with or without exceptions for repeated patterns or intentional violations)	4	7%
No provision on consequences	35	59%

\* *Because these policies are not mutually exclusive, and some agencies are represented in more than one category, the numbers will not sum to 59/100%.*

*Table 3. Supervisorial Review or Compliance Audits  
59 Major-City Police Department Policies\**

Policy Position	Number of Agencies	Proportion of Sample
Supervisors are required to regularly view a sample of recordings for compliance	22	37%
Audits for policy compliance authorized	20	34%
Supervisor may view recordings generally	6	10%
Supervisors may not use recordings for evaluation unless there is an adverse event trigger (e.g., citizen complaint, good cause)	4	7%
An adverse event and higher authorization are required for supervisor evaluation	5	8%
No provision for supervisor review	6	10%

*\* Because these policies are not mutually exclusive, and some agencies are represented in more than one category, the numbers will not sum to 59/100%.*

*Table 4. Limits on Disciplinary Use of Recordings  
59 Major-City Police Department Policies\**

Policy Position	Number of Agencies	Proportion of Sample
May not use recordings to search for violations without cause and/or no random review for disciplinary purposes	11	19%
Minor violations found in recordings should not be subject to discipline	10	17%
Review of videos related to specific adverse event should focus only on that event and relevant recordings pertaining to it	6	10%
Internal Affairs or similar unit may not view recordings unless formal complaint, higher authorization or official investigation	2	3%

\* Because this table reports the prevalence of officer-protective positions, and not all policies have such provisions, the figures will not sum to 59/100%.

As *Table 1* reports, just over half of the sample of major-city policies (51%) have provisions on documenting failures to record via camera, in writing, or both. To further strengthen detection, a few departments combine the documentation with supervisor notification. Conversely, nearly half of the major-city departments do not require that officers document in some written or video record when and why they failed to record an event that required recording. One department requires officers to notify a supervisor about the failure to record, but there is no documentation requirement. Nearly a quarter of the departments (24%) require the officer to explain the reasons for early deactivation of the



recording, but do not address the complete failure to record an event.

Auditing or supervisory review of a sample of videos for compliance is an alternative method of detecting some forms of noncompliance with recording rules.<sup>96</sup> Of the sample, 37% require supervisors to regularly review a sample of their officers' recordings for policy compliance. This strategy puts the burden of detection on supervisors. It is more likely to catch issues with early termination of recording rather than nonrecording, because supervisors review what is recorded, rather than what is not recorded. The San Diego Police Department has an additional strategy to address the challenge of detecting failures to record altogether. Supervisors are required to see if "the number of enforcement contacts match up to the number of videos submitted."<sup>97</sup> Audits are another detection strategy. The study reveals that, among the major-city departments, 34% authorize audits for compliance.

A number of the major-city policies have protections *against* supervisor review of recordings for evaluation and discipline purposes. As *Table 3* summarizes, 15% of the major-city departments limit supervisor review of recordings absent an adverse-event trigger such as a citizen complaint or use of force. In addition, some of those departments require higher authorization as well as an adverse event before supervisors may review videos. As *Table 4* shows, 19% of the policies have express provisions against the use of recordings to actively search for violations and/or prohibit random review of recordings for disciplinary purposes. Ten percent of the policies specify that, even when an adverse event necessitates viewing the videos, the review should focus on the specific adverse event and recordings pertaining to it. Another more prevalent protection, found in 17% of the policies, provides that minor violations documented in recordings should not be subject to discipline.

The majority of the major-city policies (59%) lack any provisions regarding the consequences for failure to record. Ten percent

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<sup>96</sup> Cf. Goner, *supra* note 69 (describing the "random checks" by investigators to determine whether Chicago police officers were properly reporting issues with dashboard cameras to their supervisors).

<sup>97</sup> SAN DIEGO PD, PROCEDURE 1.49, *supra* note 57.

contain an express provision against disciplinary consequences. As for those policies that do address consequences, the most prevalent approach (15% of the sample) is a general warning that failure to record or noncompliance with the body-worn camera policy is subject to investigation and/or discipline. The Denver Police Department—whose Independent Monitor wrote extensively about noncompliance and the need to specify sanctions<sup>98</sup>—is a notable exception because of its detailed schedule of sanctions for failures to record.<sup>99</sup> Some departments (7%) even expressly tell officers that noncompliance with the body-worn camera recording policy will generally not result in disciplinary consequences.<sup>100</sup>

### III. INTERNAL DEPARTMENTAL ENFORCEMENT CHALLENGES

To satisfy calls for accountability, transparency, and better evidence, body camera policies are full of recording requirements.<sup>101</sup> On paper, a transformation seems to be underway. But recording rules that provide little incentive to comply is only a reform on paper.<sup>102</sup> As the results reported in Part II.B reveal, the majority of major-city body camera policies that are publicly available are silent about the consequences for refusing to record as required. Policies are somewhat stronger on strategies for reporting and detecting noncompliance, but, even then, omissions are widespread.<sup>103</sup> Moreover, several major-city police department policies contain protections against the review and use of recordings for evaluation and disciplinary purposes.<sup>104</sup>

This policy landscape, with its enforcement gaps, is shaped by the major challenges that police leaders face in introducing an

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<sup>98</sup> See discussion, *supra* notes 60–65.

<sup>99</sup> See DENVER POLICE DEPT., OPERATIONS MANUAL, BODY WORN CAMERA TECHNOLOGY, POLICY 119.04, § 12 (effective Sept. 15, 2017) [hereinafter DENVER PD MANUAL] (listing sanctions for violating the body-worn camera policy, ranging from oral reprimands for the first violation in twelve-month period to “more severe disciplinary action” for “[p]urposeful, flagrant, or repeat[ ] violations”).

<sup>100</sup> See *supra* Table 2.

<sup>101</sup> See Fan, *Justice Visualized*, *supra* note 25, at 928–34 (discussing the results of study into the recording requirements of police departments).

<sup>102</sup> See, e.g., DENVER OFFICE OF THE INDEP. MONITOR, *supra* note 44, at 30 (reporting that the failure to inform officers of possible sanctions for noncompliance with recording requirements may have contributed to the substantial number of failures to record).

<sup>103</sup> See *supra* Table 3.

<sup>104</sup> See *supra* Table 4.

intrusive change to how rank-and-file officers must operate.<sup>105</sup> The internal enforcement challenges are inherent in the structure of police departments. This section discusses two major challenges that render internal enforcement difficult and necessitate external intervention or “cover” to police leaders to effectuate change. First is the management-labor relationship between those who are introducing and enforcing recording requirements and those who must bear the burdens.<sup>106</sup> Labor laws and unions give line officers the power to resist or delay deployment of body cameras unless they have input on the recording rules.<sup>107</sup> Second is the individual fault-based nature of the discipline process.<sup>108</sup> Internal disciplinary processes entail navigating the blurry zone between important and legitimate reasons for omissions of recording and subversion or resistance.<sup>109</sup>

#### A. THE DISCIPLINE DILEMMA

Police leaders adopting body cameras to rebuild public trust and allay controversies face a dilemma. For cameras to produce the desired benefits of reducing uses of force and citizen complaints, officers must actually use the technology as directed.<sup>110</sup> Consequences for rule violations are the usual strategy to incentivize compliance.<sup>111</sup> The need to spell out consequences for noncompliance is no secret. Indeed, the Bureau of Justice Assistance provides the following advice to police departments:

A department’s policy should also clearly indicate what will happen to an officer who fails to activate a camera in circumstances where activation is required. Will

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<sup>105</sup> See discussion *infra* notes 113–29.

<sup>106</sup> See discussion *infra* notes 113–29.

<sup>107</sup> See discussion *infra* notes 113–29.

<sup>108</sup> See discussion *infra* notes 140–65.

<sup>109</sup> See discussion *infra* Sections III.B.1, III.B.2.

<sup>110</sup> See Ariel et al., *supra* note 15, at 459–62 (arguing that body cameras “should remain on throughout the [officer’s] entire shift,” and officers should not retain discretion to activate the devices).

<sup>111</sup> Compare Austin’s famous classical formulation of law as a command that a sovereign may enforce through the threat of a sanction. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 5 (Noonday Press 1954).

the officer be subject to discipline? If so, how will he or she be disciplined? The consequences for failure to activate as well as premature deactivation should be clearly stated.<sup>112</sup>

The problem is that spelling out sanctions is easier to recommend than to accomplish in practice. Introducing body cameras requires buy-in from the ranks—and potentially court battles with the police union over the change in working conditions and whether recording rules must be collectively bargained.<sup>113</sup> Under federal labor laws, collective bargaining with the workers' union is required when the conditions imposed by management constitute a material change to the applicable labor contract secured through collective bargaining.<sup>114</sup>

Through this leverage, or the specter of it, police labor unions have successfully secured limits on the use of recordings for officer monitoring, evaluation and discipline.<sup>115</sup> Sometimes, as in the

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<sup>112</sup> BUREAU OF JUSTICE ASSISTANCE, BODY-WORN CAMERA TOOLKIT: FREQUENTLY ASKED QUESTIONS 21 (2015), [https://www.bja.gov/bwc/pdfs/bwc\\_faqs.pdf](https://www.bja.gov/bwc/pdfs/bwc_faqs.pdf).

<sup>113</sup> See, e.g., Ben Conarck, *Jacksonville Sheriff, Police Union Clash Over Body Camera Rules*, FLA. TIMES UNION (Jacksonville), Feb. 8, 2017, 2017 WLNR 6684923 (reporting on a dispute between the local police union and the sheriff over whether body camera rules are subject to mandatory collective bargaining); Brian Bakst, *Maplewood Police Officers Challenge Body Camera Policy in Lawsuit*, MPR NEWS (Minn.) (Nov. 21, 2016), <http://www.mprnews.org/story/2016/11/21/maplewood-police-officers-challenge-body-camera-policy-lawsuit> (reporting on lawsuit by police officers who objected to random audits of body camera recordings and argued that such provisions must be subject to collective bargaining); Jan Ransom, *Boston Slow to Adopt Policing Innovations; Changes Stall as Unions Seek Role*, BOS. GLOBE, Sept. 5, 2016, 2016 WLNR 27007841 (reporting on a court battle between a Boston police union and Boston Police Department management over the introduction of body cameras and whether rules should be subject to collective bargaining); Harry Bruinius, *Why Police Are Pushing Back on Body Cameras*, CHRISTIAN SCI. MONITOR, Aug. 30, 2016, 2016 WLNR 26450977 (detailing lawsuits and debates involving police unions over the body camera issue); Brian Brus, *Police Union Complaint Halts Body-Cam Test Program*, J. REC. (Okla. City), June 15, 2016, 2016 WLNR 18940773 (discussing how a lawsuit by an Oklahoma City police union put the City's body camera program on hold); Andrew Blake, *Body Cameras Spark Lawsuit Between Denver Cops, City Officials*, WASH. TIMES, Nov. 6, 2015, 2015 WLNR 33002278 (discussing a lawsuit by a Denver police union seeking collective bargaining over body camera rules).

<sup>114</sup> See 29 U.S.C. § 158(d) (2012) (describing the obligation to bargain collectively).

<sup>115</sup> See, e.g., Editorial, *Draft Body-Camera Policy Places Police Union's Concerns Over Public's*, OREGONIAN, June 24, 2016, at A16, 2016 WLNR 19464570 (discussing controversy over the closed-door negotiations of a body camera policy between the mayor and the police union that allegedly resulted in a dilution of accountability and transparency measures); Max Schanzenbach, *Union Contracts Key to Reducing Police Misconduct*, CHI. TRIB., Nov. 24, 2015, at 17, 2015 WLNR 34864776 (discussing how unions have successfully used

case of the Seattle Police Department's policy regarding its body camera pilot program, the influence of the union in securing protections against discipline for not recording is transparently described on the face of the policy:

The Memorandum of Agreement between the City of Seattle and the Seattle Police Officers' Guild outlines the scope of the program. Pursuant to that agreement, there will be no discipline that follows from not recording a particular incident with BWV.<sup>116</sup>

When police department management designs a body camera program and policy without union input, the entire program can derail. For example, the Oklahoma City Department of Police had to halt its body-worn camera program after an arbitrator ruled that the rules regarding recording and review had to be negotiated with the police union as part of a collective bargaining agreement.<sup>117</sup> The union supported body cameras to protect against false accusations but wanted the power to help frame the rules of recording and protections regarding supervisor review and compliance audits.<sup>118</sup> A central concern raised by the union was the management's policy allowing supervisors to review recordings

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collective bargaining to resist body camera adoption by police departments and secure "binding arbitration for any significant disciplinary action taken against officers—a system stacked heavily in favor of police").

<sup>116</sup> SEATTLE POLICE DEP'T, SEATTLE POLICY MANUAL, BODY-WORN CAMERA PILOT PROGRAM, POLICY 16.091 (effective Apr. 1, 2016). The current version of the Seattle Police Department's manual no longer includes the quoted language. Instead, the manual provides for particular situations in which an officer will not be disciplined. For example, a failure to record particularly sensitive or private interactions, such as interviews with victims of sexual assault, will not subject the officer to discipline. See SEATTLE POLICE DEP'T, SEATTLE POLICE MANUAL, POLICY 16.090-POL 1 (effective July 19, 2017) [hereinafter SEATTLE PD MANUAL], <https://www.seattle.gov/policemanual/>. Furthermore, upon departmental review of body camera recordings, an officer will not be subject to discipline for "minor acts of misconduct unrelated to the original reason for viewing the video" including use of profanity or rudeness. See *id.* at POLICY 16.090-POL 2. Unlike the provision in the 2015 version of Seattle's manual, it is unclear from the policy itself whether the 2017 provisions were the result of collective bargaining.

<sup>117</sup> See *Agreement Reached to Restart Police Department's Body-Worn Camera Program*, US FED. NEWS, Nov. 29, 2016, WESTLAW.

<sup>118</sup> See *id.*

at any time.<sup>119</sup> The union wanted a limit to prevent supervisors from going on “a fishing expedition.”<sup>120</sup>

Concerns over supervisors using recordings to hunt for violations and nickel-and-dime officers for minor issues is reflected in the number of protections addressing those concerns.<sup>121</sup> Philadelphia’s body camera policy explains the underlying rationale:

To effectively perform their duties, Officers must have a level of comfort in which minor disciplinary offenses recorded while performing their duties that would not otherwise become known but for wearing a Body-Worn Camera, will not adversely affect an officer’s career. . . . Thus, the secondary purpose of this directive is to provide officers with the knowledge that “minor disciplinary code violations” that are captured on any Body Worn Camera will not result in an official Internal Affairs investigation . . . based solely upon their minor infraction.<sup>122</sup>

The proposed draft of the New York body camera policy offers examples of “nickel-and-dime” concerns, “such as chewing gum or taking off a hat that the supervisor wouldn’t have otherwise seen.”<sup>123</sup> Beyond sweating the small stuff, the larger concern is increased supervisor surveillance enabled by the availability of records. For example, Saint Paul’s policy explicitly addresses the

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<sup>119</sup> See Sheldra Brigham, *OKCPD Removes Body Cameras until Policy is in Place*, KFOR NEWS CHANNEL 4 (June 15, 2016, 7:14 PM), <http://kfor.com/2016/06/15/okcpd-removes-body-cameras-until-policy-is-in-place/>.

<sup>120</sup> See *id.* (quoting union president John George, “We didn’t want supervisors just to be able to go on a fishing expedition”).

<sup>121</sup> See *supra* Part II.B & Table 4 (finding that 17% of major-city police department policies involved limits on disciplinary use of recordings in cases of minor violations).

<sup>122</sup> PHILA. PD, BWC DIR., *supra* note 26, § 2.B.

<sup>123</sup> N.Y. POLICE DEPT., OPERATIONS ORDER DRAFT FOR PUBLIC COMMENT 10 (June 29, 2016) [hereinafter NYPD, DRAFT OPERATIONS ORDER], <https://policingproject.org/wp-consent/uploads/2016/06/NYPD-BWC-Draft-Policy.pdf>; see also SEATTLE PD MANUAL, *supra* note 116, at POLICY 16.090-POL 2 (discussing examples of minor infractions, such as uniform infractions).

issue, providing: “Supervisors may not access or review BWC Data for the purpose of surveillance of any employee.”<sup>124</sup>

The omissions, gaps, and limits on review and discipline must be viewed in the structural context of police departments and labor’s concerns regarding management. When a police department announces a plan to adopt body cameras, that does not mean that the officers who will actually be wearing the cameras support the endeavor. For example, when the Boston Police Department sought 100 volunteers to pilot the technology, not a single person on the force of more than 2,000 sworn officers volunteered.<sup>125</sup> The department had to conscript the 100 testers, whose union then sued, alleging labor law violations.<sup>126</sup> Management has a delicate task securing buy-in from officers.<sup>127</sup> Launching even a small pilot program is hard enough.<sup>128</sup> Specifying consequences for noncompliance risks rousing organized resistance that would altogether defeat the project.<sup>129</sup>

An external power may have more success in putting teeth into recording policies—or providing cover to police management to do so.<sup>130</sup> It is noteworthy that the department in the sample with a detailed scale of sanctions—and among the toughest sanctions—for non-recording was the Denver Police Department.<sup>131</sup> Since 2005, the Office of the Independent Monitor has served as a public

<sup>124</sup> ST. PAUL POLICE DEP’T, BODY WORN CAMERA PILOT POLICY, POLICY 442.18 (issued Oct. 25, 2016, revised Sept. 11, 2017), <https://www.stpaul.gov/books/44218-body-worn-camera-pilot-policy>.

<sup>125</sup> Editorial, *Patience on ‘Pilot’*, BOS. HERALD, Dec. 20, 2016, at 20, 2016 WLNR 38936566, [http://www.bostonherald.com/opinion/editorials/2016/12/editorial\\_patience\\_on\\_pilot](http://www.bostonherald.com/opinion/editorials/2016/12/editorial_patience_on_pilot).

<sup>126</sup> Michael Levenson & Evan Allen, *Boston Police Union Challenges Body Camera Program*, BOS. GLOBE, Aug. 26 2016, 2016 WLNR 26144946 (“[W]hen no officers volunteered to wear cameras, [the police commissioner] announced the department would effectively force 100 officers to wear the devices. . . . The [police] union [subsequently] filed a grievance . . .”).

<sup>127</sup> For numerous examples of the court battles with police unions over the introduction of body cameras, see *supra* note 113.

<sup>128</sup> See sources cited *supra* note 113.

<sup>129</sup> See, e.g., Liam Dillon, *Police Access Bills No Longer a Priority*, L.A. TIMES, Feb. 28, 2017, at 1, 2017 WLNR 6287355 (discussing “steadfast” union opposition on discipline issues and successful fights by police unions).

<sup>130</sup> Cf. Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. C.R.-C.L. L. REV. 289, 336–37 (2015) (noting that in the legislative context “[a]n external reviewer’s report might supply political cover for sympathetic but risk-averse lawmakers to press for reform”).

<sup>131</sup> See DENVER PD MANUAL, *supra* note 99, at POLICY 119.04, § 12.

watchdog over the Denver Police Department.<sup>132</sup> Created by ordinance passed by the City Council in 2004, the Independent Monitor has the power to monitor police conduct, investigate, and recommend changes in practices.<sup>133</sup> In 2014, following the Denver Police Department's pilot-test of police body cameras, the Independent Monitor released a report finding that many uses of force were not recorded on camera.<sup>134</sup> The Independent Monitor noted that the failure to inform officers of possible sanctions for noncompliance may have contributed to the failures to record despite policy mandates.<sup>135</sup>

Drafted subsequent to the Independent Monitor's report, Denver's current body camera policy is now among the most detailed and toughest on sanctions among all the available majority policies analyzed. Denver's policy provides for an oral reprimand, together with a mandated officer review of the body camera policy, a follow-up meeting with a supervisor, and a "[j]ournal entry" for a first violation in a 12-month period; a written reprimand for a second violation in a 12-month period; and "1 fined day" for the third violation in a 12-month period.<sup>136</sup> In addition, upon a second violation, the officer is subject to "an in-depth audit of the officer's data usage" and the resulting documentation goes to the Professional Standards Unit, which "will generate a formal Personal Assessment System (PAS) review."<sup>137</sup> In addition to this scale of penalties, the policy cautions that "[p]urposeful, flagrant or repeated violations will

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<sup>132</sup> See OFFICE OF THE INDEP. MONITOR, COMPLAINT MONITORING GUIDELINES: EXECUTIVE SUMMARY 1 (2010), [https://www.denvergov.org/content/dam/denvergov/Portals/374/documents/OIM\\_Case\\_Handling\\_Guidelines\\_Final\\_Executive\\_Summary\\_8\\_1\\_10.pdf](https://www.denvergov.org/content/dam/denvergov/Portals/374/documents/OIM_Case_Handling_Guidelines_Final_Executive_Summary_8_1_10.pdf) ("In 2005, in an effort to improve police accountability to the public, the City of Denver created the Office of the Independent Monitor (OIM) . . . to monitor and report on the handling of citizen complaints by the Denver Police and Sheriff Departments.")

<sup>133</sup> DENVER, COLO., REV. MUNICIPAL CODE ch. 2, art. XVII, § 2371. See also Noelle Phillips, *Move to Strengthen Denver's Independent Monitor Advances*, DENVER POST (Feb. 3, 2015, 9:57 AM), <http://www.denverpost.com/2015/02/03/move-to-strengthen-denvers-independent-monitor-advances/> (discussing a dispute between the Monitor and the Denver Police Department over whether the Department is obligated to grant full access to body camera footage for the Monitor).

<sup>134</sup> See discussion *supra* at notes 60–65.

<sup>135</sup> See DENVER INDEP. MONITOR 2014 REPORT, *supra* note 44, at 30.

<sup>136</sup> DENVER PD MANUAL, *supra* note 99, at POLICY 119.04, § 12.

<sup>137</sup> *Id.*



result in more severe disciplinary action.”<sup>138</sup> These tough and detailed provisions contrast sharply with the majority approach of simply not addressing the consequences for noncompliance with recording directives.<sup>139</sup>

#### B. PARSING BETWEEN LEGITIMATE CHALLENGES AND SUBVERSION

Another important reason for the widespread omissions regarding consequences for failures to record is the difficulty of distinguishing legitimate from culpable conduct. The commentary to the New York Police Department’s draft body camera policy openly acknowledges that sanctions are unspecified because of the difficulties: “Officer discipline is generally not mentioned in the proposed policy. It is difficult to specify a discipline system as there are many variables that determine whether or not an officer should face discipline in [a] specific instance.”<sup>140</sup> As the drafters of the New York policy frankly address, silence regarding whether sanctions will occur is no oversight. It is easier to leave things unspecified because there are good reasons not to record. Two of the major and commonly occurring justifications for failures to record are the need to respond to exigencies in the field and technological malfunction. As discussed below, parsing between these important and legitimate justifications and refusal, resistance, and subversion is a delicate and difficult task.

1. *Forgot in the Heat of the Moment, or Refused to Record?* In the cool and safe remove of hindsight, it is all too easy to question and condemn imperfect adherence, especially after a tragedy.<sup>141</sup> But in the heat and fray of the field there are legitimate reasons why recording fails.<sup>142</sup> Officers focused on the immediate need to respond to the exigencies of fast-unfolding and high-stress events

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<sup>138</sup> *Id.*

<sup>139</sup> See *supra* Table 4.

<sup>140</sup> NYPD, DRAFT OPERATIONS ORDER, *supra* note 123, at 10.

<sup>141</sup> Indeed, “we tend to be historical simplifiers, even reducers, who often skate over the relevant facts in order to lay the blame *somewhere* rather than everywhere or nowhere.” MARK FREEMAN, HINDSIGHT: THE PROMISE AND PERIL OF LOOKING BACKWARD 40 (2010).

<sup>142</sup> See discussion *infra* at notes 143–44, 152–57. Cf. *Atwater v. City of Lago Vista*, 532 U.S. 318, 346–47 (2001) (explaining that police officers frequently have to act “on the spur (and in the heat) of the moment”).

may forget to hit record, or lack the time to do so.<sup>143</sup> Among body camera policies, there is wide and express acceptance of the basic proposition that safety trumps the recording obligation in body camera policies.<sup>144</sup>

Inexperience with implementing new recording requirements can further lead to failures to record in stressful situations.<sup>145</sup> Mistakes happen. There is a learning curve with new technologies and procedures.<sup>146</sup> The lack of a clear and calibrated scale of sanctions can even potentially end up underprotecting officers who face high-stress circumstances and a new recording regime. For example, if a tragedy happens on an officer's watch, and the incident hits the headlines, there is a risk of swift and severe sanctions in response to the attention, since no specified scale is

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<sup>143</sup> See, e.g., *New York v. Quarles*, 467 U.S. 649, 656 (1984) (“In a kaleidoscopic situation[,] . . . spontaneity rather than adherence to a police manual is necessarily the order of the day . . .”).

<sup>144</sup> See, e.g., CORPUS CHRISTI POLICE DEP'T, MOBILE DIGITAL VIDEO RECORDING SYSTEMS AND BODY WORN CAMERAS, POLICY 303, at 7 (May 10, 2016) (on file with author) (“At no time is a member expected to jeopardize his/her safety in order to activate a BWC or change the recording media.”); MILWAUKEE POLICE DEP'T, STANDARD OPERATING PROCEDURE, POLICY 747.25 (effective July 15, 2016), <http://city.milwaukee.gov/ImageLibrary/Groups/mpdAuthors/SOP/747-BODYWORNCAMERABWC1.pdf> (“The department recognizes that officer safety is paramount. Members with BWC who arrive on a scene or engage in an enforcement contact must start recording as soon as it is safe and practical to do so.”); NYPD, DRAFT OPERATIONS ORDER, *supra* note 123, at 3 (“If the circumstances require a [ ] [uniform member of the service] to engage immediate safety measures first, the [uniformed member] should do so and then activate the BWC as soon as it is practical and safe. At no point should proper tactics be compromised to begin a recording.”); SAN DIEGO POLICE DEP'T, AXON BODY WORN CAMERAS, PROCEDURE, PROCEDURE 1.49, at 2 (effective July 20, 2016) [hereinafter SAN JOSE PD, BWC POLICY], <https://www.sandiego.gov/sites/default/files/149.pdf> (“Officer safety and public safety take precedence over recording events. . . . Officer safety and the safety of the public shall be the primary considerations when contacting citizens or conducting vehicle stops, not the ability to record an event.”); SAN JOSE POLICE DEP'T, BODY WORN CAMERA POLICY, at 2 (effective July 29, 2015), [http://www.sjpd.org/InsideSJPD/BodyCameras/SJPD\\_BWC\\_Policy\\_06-29-15\\_with\\_POA\\_approval.pdf](http://www.sjpd.org/InsideSJPD/BodyCameras/SJPD_BWC_Policy_06-29-15_with_POA_approval.pdf) (“The safety of officers and members of the public is the highest priority, and the Department acknowledges there may be situations in which operation of the device is impractical or may be an impediment to public and officer safety. Additionally, the Department recognizes human performance limitations during particularly stressful, critical situations.”).

<sup>145</sup> See Sweeney & Gerner, *supra* note 5 (reporting findings of a preliminary investigation that officers' inexperience with operating body cameras led to a failure to record the police shooting of Paul O'Neal).

<sup>146</sup> See, e.g., SAN DIEGO PD, BWC POLICY, *supra* note 144, at 1 (“There is also a learning curve that comes with using body-worn cameras.”).

set.<sup>147</sup> Under the hot scrutiny of public attention after a tragedy, as people search for a villain to blame, officers' claims about mistakes and exigencies may face withering skepticism.<sup>148</sup>

Yet the very import and power of the safety and high-stress justification creates the risk of it becoming a blanket and standard-form invocation. This is a particularly acute risk in the cases that do not make the national news—the tasings, the pepper sprays, and the baton strikes that go unrecorded and without a fatality to draw media attention.<sup>149</sup> For example, the Independent Monitor for the Denver Police Department observed that, in a number of unrecorded uses of force, the “officers asserted that the situations evolved too rapidly or were too volatile to permit BWC activation, even though it was the officers who initiated the contacts without first activating their BWCs, as required.”<sup>150</sup> Parsing between these legitimate realities and circumvention, or just outright refusal to activate the body camera, calls for expert judgment and inference when confronted with uncertainties.

2. *Technological Malfunction or Circumvention?* Technological solutions are alluring because they seem to free us from human fallibility.<sup>151</sup> Yet, as anyone who has pounded multiple keys of a frozen laptop or had a cell phone die knows, technology has its own

<sup>147</sup> Cf., e.g., Jeffrey Standen, *The End of the Era of Sentencing Guidelines: Apprendi v. New Jersey*, 87 IOWA L. REV. 775, 805 (2002) (discussing how penalties that are clearly articulated in advance protect against the risk of more severe penalties); Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. ILL. U. L.J. 485, 492–93 (1999) (discussing the role of media attention in raising the probability of punishment in the white-collar crime context).

<sup>148</sup> See Thomas E. Drabek & Enrico L. Quarantelli, *Scapegoats, Villains, and Disasters*, 4 TRANS-ACTION 12, 12–16 (1967) (discussing the phenomenon of public scapegoating and villain-seeking after tragedies).

<sup>149</sup> See discussion, *supra* notes 62–65.

<sup>150</sup> DENVER INDEP. MONITOR 2014 REPORT, *supra* note 44, at 20.

<sup>151</sup> The greater freedom from human fallibility that technology affords has spurred excitement and innovation in diverse quarters. See, e.g., Anita L. Allen, *Dredging Up the Past: Lifelogging, Memory, and Surveillance*, 75 U. CHI. L. REV. 47, 50–51 (2008) (discussing technological advances in response to fallible human memory which would “enable unprecedented accurate retention and recall”); Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 221–23 (2007) (discussing technological advances in automated law enforcement programs). This allure can be misleading, however, compelling courts to adopt safety measures to prevent misleading jurors. See, e.g., *Reese v. Stroh*, 874 P.2d 200, 205 (Wash. Ct. App. 1994) (discussing standards for the admission of evidence which were “adopted to prevent the use of . . . technologies that, because they are mechanical or mysterious, appear infallible to the average juror”).

particular and manifold fallibilities. Batteries die, devices freeze, fall, or otherwise fail.<sup>152</sup> In the early days of dash cameras, departments who adopted the then-new and enticing technology soon discovered the many ways cameras and technology can deliver glitches.<sup>153</sup>

Accounts of malfunctioning body cameras are already emerging.<sup>154</sup> Halfway into a six-month pilot program, the Boston Police Department experienced seventy-two recording failures with their body cameras.<sup>155</sup> The Department attributed those failures to “technical malfunctions includ[ing] insufficient battery life, cameras falling off their mounts, or shutting off without explanation.”<sup>156</sup> Clearly it would be unjust to punish officers for the fallibilities of technology, particularly when performing under high-stress, suboptimal field conditions. Yet parsing between the vulnerabilities of technology and the subversion of resistant officers can be tough.

Consider, for example, the claims by two Baton Rouge police officers that both their body cameras fell off during the tragic shooting of Alton Sterling.<sup>157</sup> Sterling was selling CDs outside a convenience store when a homeless man persistently sought

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<sup>152</sup> See discussion *infra* notes 154–56.

<sup>153</sup> See Tom Casady, *Hidden Cost of Body-Worn Cameras*, DIRECTOR'S DESK (Oct. 31, 2014, 6:12 AM), <http://lpd304.blogspot.com/2014/10/hidden-cost-of-body-worn-cameras.html> (discussing frequent technological malfunctions in the early days of dash camera adoption).

<sup>154</sup> See, e.g., Adam Randall, *Norman Gary Family Hoping for Indictment in Grand Jury's First Day*, GOSHEN NEWS (Goshen, Ind.), Feb. 28, 2017, 2017 WLNR 6249535 (discussing police department reports of widespread body camera malfunctions one of which resulted in a failure to record a fatal shooting); Bob Blake, *Family of Man Shot and Killed Files Civil Rights Lawsuit Against Elkhart Police Officers*, S. BEND TRIB. (Ind.), Jan. 25, 2017, 2017 WLNR 2549264 (chronicling controversies over body camera malfunctions and suspension of a body camera program, due to frequent technical problems); Samantha Vicent, *Tahlequah Police Release Video from Officer-Involved Fatal Shooting*, TULSA WORLD (Okla.), Aug. 20, 2016, 2016 WLNR 25518803 (discussing body camera malfunction and memory capacity problems); Greg Moran, *Officer's Statements Conflict on Weapon*, L.A. TIMES, Dec. 24, 2015, at 3, 2015 WLNR 38209020 (reporting on officer's claim that body camera was not working at the time of a shooting and “it had been malfunctioning for several weeks”).

<sup>155</sup> Brian Dowling & Owen Boss, *Critics Slam Cop Body Cams on the Link*, BOS. HERALD, Dec. 19, 2016, at 2, 2016 WLNR 38826283.

<sup>156</sup> *Id.*

<sup>157</sup> See Kelly et al., *supra* note 3.

money from him.<sup>158</sup> Finally, Sterling said, “I told you to leave me alone,” and showed the panhandler his gun.<sup>159</sup> The homeless man then called 911 on his cell phone, telling police there was a man with a gun at the store.<sup>160</sup> What happened next was captured on the cell phone camera of a bystander and a store camera but the officers’ body cameras failed to obtain usable footage of the incident.<sup>161</sup>

Experts disagree on the likelihood that both cameras were dislodged around the same time.<sup>162</sup> Some opined for the media that it would be highly unlikely for two cameras to both fall off at the same time-critical juncture.<sup>163</sup> Yet others said it could happen and, in fact, it has happened before.<sup>164</sup> Tod Burke, a professor of criminal justice and former police officer, argued that the highly unusual scenario would be for two officers to collude to prevent the recording of an incident whilst in the middle of a high-stress situation.<sup>165</sup> The battle of the experts that played out in the media demonstrates how potentially time- and resource-consuming it would be to parse between officer subversion and technological malfunction in determining whether discipline is justified or not.

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<sup>158</sup> See Joshua Berlinger et al., *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/>.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*; Richard Fausset et al., *Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Investigation*, N.Y. TIMES (July 6, 2016), <https://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html>.

<sup>162</sup> See Frumin, *supra* note 3 (“Critics say [the officers’] explanation is awfully convenient—and arguably untrue.”).

<sup>163</sup> See, e.g., *id.* (quoting Steve Tuttle, a spokesman for Taser, “[i]t’s not unheard of, but it’s very unusual in the overall industry and certainly isn’t a significant issue for us despite seven years of our cameras being worn by more than 3,500 law enforcement agencies”).

<sup>164</sup> See *id.* (quoting law enforcement officials as stating that “it is entirely possible that both cameras could have fallen off,” and reporting that the Salt Lake City Police Department had “seen it happen when two officers are engaged with a person”).

<sup>165</sup> See *id.* (“It would have been a very, very unusual circumstance where both officers would have to say let’s turn it off and throw our body cameras away. Everything seemed to happen relatively quickly.”).

#### IV. JUDICIAL PRETRIAL REMEDIES FROM AN EVIDENTIARY FAIRNESS PERSPECTIVE

Given the internal enforcement challenges and the reporting and incentives gaps in departmental recording policies, judicial remedies are especially important. Courts have long been the most critical external actor in regulating police power.<sup>166</sup> Courts are also the seasoned gatekeepers of evidence.<sup>167</sup> This dual judicial role and level of expertise are important for addressing the missing video problem. The challenge is how to frame administrable remedies that reduce the risk of perverse consequences posed by costly inquests into whether individual officers are to blame for missing video.<sup>168</sup> This section proposes adopting an evidentiary fairness approach that does not depend on messy and costly culpability assessments and offers three remedies designed from such a perspective.

##### A. THE ADVANTAGES OF MAKING CULPABILITY IRRELEVANT

Defendants do not fare well when they have to show bad faith on the part of the government for missing evidence.<sup>169</sup> This is an approach with a low probability of success for at least three main reasons. First, officers are unlikely to say they acted in bad faith and, in defendant-said, police-said credibility contests, officers are more likely to be believed.<sup>170</sup> Second, courts are reluctant to find

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<sup>166</sup> See Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 48–76 (2010) (chronicling the rise of courts' central role in regulating the police); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2471–2503 (1996) (discussing the central role of courts in framing conduct rules for the police).

<sup>167</sup> See, e.g., *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 147 (1999) (discussing the courts' central gatekeeper role on evidentiary issues); Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW & HUM. BEHAV. 433, 434 (2001) (“[J]udges are central and active figures in admissibility decision-making . . .”).

<sup>168</sup> See discussion *infra* Part IV.B.

<sup>169</sup> See, e.g., *United States v. Parker*, 72 F.3d 1444, 1452 (10th Cir. 1995) (holding the defendant failed to show bad faith on the part of the government in destroying video evidence); *United States v. Valentin*, 2016 WL 1296854, at \*2 (D. Conn. Mar. 30, 2016) (ruling the defendant failed to show that the missing video was as a result of bad faith on the part of the government); *Burks v. Howes*, No. 08-12825-BC, 2010 WL 2772432, at \*4 (E.D. Mich. July 13, 2010) (same).

<sup>170</sup> See discussion *infra* notes 173–79.

that officers are “testilying,” even when they suspect this may be the case.<sup>171</sup> Lastly, courts are reluctant to engage in costly mini-trials on collateral evidentiary issues.<sup>172</sup>

As a systemic matter in criminal justice, credibility contests between defense allegations and police testimony are highly uneven and messy.<sup>173</sup> Absent additional evidence beyond competing testimony, stories can diverge widely, with each side accusing the other of lying rather than merely mistaken.<sup>174</sup> Defendants often allege that the police abused their power and perjured themselves to hide their civil rights violations.<sup>175</sup> The police say the defendant is lying to avoid and subvert just punishment.<sup>176</sup>

The playing field in this ugly battle is highly imbalanced. To preserve their Fifth Amendment privilege to remain silent and reduce the risk of generating impeachment material, defendants have strong incentives to remain silent rather than testify, even at pretrial motion hearings.<sup>177</sup> This renders claims proffered in motions seem all the more unsubstantiated. Furthermore, defendants are viewed as having a severe credibility problem—

<sup>171</sup> See discussion *infra* notes 180–82.

<sup>172</sup> See discussion *infra* notes 183–86.

<sup>173</sup> See Fan, *Justice Visualized*, *supra* note 25, at 913–20 (discussing the one-sidedness and ugliness of credibility contests).

<sup>174</sup> See *id.*

<sup>175</sup> See, e.g., *Commonwealth v. Sparks*, 746 N.E.2d 133, 138 (Mass. 2001) (noting defendant’s allegations that police planted a knife in defendant’s bedroom during the execution of a search warrant); *State v. Pogue*, 17 P.3d 1272, 1273 (Wash. Ct. App. 2001) (noting “[defendant’s] insinuation that the police planted the drugs”); *People v. McGirt*, 603 N.Y.S.2d 164, 165 (N.Y. App. Div. 1993) (noting defendant’s allegations that “the police . . . planted evidence on him”); *cf.* Press Release, Dep’t of Justice, *Three Former Atlanta Police Officers Sentenced to Prison in Fatal Shooting of Elderly Atlanta Woman* (Feb. 24, 2009), <https://www.justice.gov/opa/pr/three-former-atlanta-police-officers-sentence-d-prison-fatal-shooting-elderly-atlanta-woman> (quoting U.S. Attorney David E. Nahmias, “As Atlanta police narcotics officers, these three defendants repeatedly failed to follow proper procedures and then lied under oath to obtain search warrants. Their routine violations of the Fourth Amendment led to the death of an innocent citizen.”).

<sup>176</sup> See Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CALIF. L. REV. 1665, 1695 (1987) (discussing the credibility deficit defendants face).

<sup>177</sup> See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1449–50 (2005) (explaining that defendants are “encouraged to be quiet” through the criminal process).

after all, they are charged with a crime.<sup>178</sup> Historically, defendants were not even deemed qualified to testify under oath.<sup>179</sup>

Moreover, judges are highly reluctant to openly discredit the testimony of law enforcement officers.<sup>180</sup> Even when judges find an officer's account questionable, the judge is keenly aware that an adverse finding suggesting that the officer is a liar can destroy the officer's career.<sup>181</sup> In a criminal justice system where judges are likely to see regularly officers from the jurisdiction's agency in court and in chambers—and perhaps even need law enforcement endorsements to get re-elected—there are powerful systemic pressures against discrediting officers.<sup>182</sup>

Finally, courts are also reluctant to engage in costly collateral mini-trials on evidentiary questions.<sup>183</sup> In the context of recording technology, when the proffered reason may be technological malfunction, such inquests would be even more costly, perhaps

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<sup>178</sup> See Dripps, *supra* note 176, at 1695 (asserting that a criminal charge imposes a powerful incentive to offer exculpatory (and often perjured) testimony and “[b]ecause of this incentive, the trier of fact is likely to discount any exculpatory testimony given by the accused”).

<sup>179</sup> See *Portuondo v. Agard*, 529 U.S. 61, 66 (2000) (citing 3 J. WIGMORE, EVIDENCE § 579 (3d ed. 1940)) (noting eighteenth-century courts did not consider a defendant's testimony at trial to be evidence, “since they were disqualified from testifying under oath”).

<sup>180</sup> See Morgan Cloud, *Judges, “Testilying,” and the Constitution*, 69 S. CAL. L. REV. 1341, 1352 (1996) (quoting THE N.Y.C. COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE CITY'S ANTI-CORRUPTION PROCEDURES, COMMISSION REPORT 36 (1994) (on file with the Georgia Law Review)) (“On the word of a police officer alone a grand jury may indict, a trial jury may convict, and a judge pass sentence.”); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1047–48 & n.51 (1996) (suggesting that some judges might ignore perjury to achieve what the judge considers to be justice under the given circumstances of the case).

<sup>181</sup> Slobogin, *supra* note 180, at 1045 (noting that, although “judges believe perjury is systematic,” they are rarely sure enough that it is occurring to expose a police officer to criminal charges).

<sup>182</sup> See Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L. REV. 1391, 1391 (2001) (discussing law enforcement endorsements in judicial elections).

<sup>183</sup> See, e.g., *United States v. Hurst*, 185 F. App'x 133, 136–37 (3d Cir. 2006) (discussing evidentiary rules that serve to avoid mini-trials on collateral matters); *United States v. Bullock*, 94 F.3d 896, 899 (4th Cir. 1996) (discussing courts' reluctance to engage in collateral mini-trials on an officer's past traffic stops, as “[f]ocusing on such collateral matters would unduly encumber the court's proceedings”); *United States v. Talamante*, 981 F.2d 1153, 1156 n.5 (10th Cir. 1992) (affirming district court's decision to avoid collateral mini-trials in which the defense and the government would offer different characterizations); *United States v. Waloke*, 962 F.2d 824, 830 (8th Cir. 1992) (discussing and affirming the lower court's refusal to engage in collateral mini-trials in which each side would compete to characterize the relevant events differently).



entailing a battle of the experts regarding the probability of the occurrence of such a malfunction.<sup>184</sup> Remedies for missing videos predicated on the blameworthiness of individual officers would open the door to such messy and costly inquiries.

If remedies for missing video hinge on culpable officer conduct, the risk of deterring a judicial inquiry is high. By judicial-inquiry deterrence, I mean the avoidance of finding a colorable claim of a violation, to avoid the mess and costs of wading into credibility contests, collateral mini-trials, and potentially finding an officer guilty of perjury or wrongdoing. Scholars have used the concept of remedial deterrence to refer to judicial avoidance of finding a violation to avoid the costs of offering a remedy.<sup>185</sup> Judicial-inquiry deterrence as framed here operates even earlier, leading to curt dismissals of defense claims without significant inquiry.<sup>186</sup>

Rather than individuating blame on officers for missing evidence, the focus of judicial remedies should be from a systemic perspective on evidentiary fairness. This perspective elevates courts out of the murky morass of individual blame—is this particular officer lying about the camera falling off or is the defendant lying? Instead, the evidentiary fairness approach from a systemic perspective frames the problem thus: Key contested aspects of this encounter were not recorded even though, pursuant to the department's policies, they are usually recorded. To address this, remedies would focus on system integrity, including the underlying imbalances in evidentiary advantages between the police and the defendant, rather than trying to assign blame and guess who is lying and who is not.

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<sup>184</sup> See discussion *supra* notes 162–65 and accompanying text.

<sup>185</sup> See, e.g., Sonja B. Starr, *Rethinking “Effective Remedies”: Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 759–60 (2008) (discussing remedial deterrence in the international criminal context).

<sup>186</sup> See, e.g., *United States v. Matthews*, 373 F. App'x 386, 390–91 (4th Cir. 2010) (per curiam) (rejecting the defendant's argument that the government's destruction of video evidence warranted the remedy of a dismissal); *United States v. Parker*, 72 F.3d 1444, 1452 (10th Cir. 1995) (upholding the district court's denial of defendants' motion to dismiss in a case where a state trooper erased a video recording which may have held exculpatory evidence).

## B. PRETRIAL REMEDIES BASED ON EVIDENTIARY FAIRNESS

An evidentiary fairness approach from a systemic perspective can inform the choice of remedies for missing video. This section proposes three potential remedies. To capture the bulk of criminal cases, which never make it to trial, the focus here is on pretrial remedies. The three proposals are: (1) exclusion of partial recordings; (2) positive inferences to counteract the tendency to discredit the defendant; and (3) using institutional awareness of systemic facts to detect patterns of missing recordings. Each proposed remedy is discussed below.

1. *Exclusion of Partial Recordings.* Regardless of whether the officer was at fault for the missing video, courts can offer the remedy of excluding partial video where recording rules require recording the entire encounter. This approach is not unprecedented.<sup>187</sup> In *United States v. Yevakpor*, a New York district court excluded portions of a surveillance tape that the government sought to introduce because other portions were automatically recorded over and not preserved.<sup>188</sup> The clips the government preserved showed the defendant carrying a suitcase with heroin at the New York Port of Entry and the search of the suitcase by officers.<sup>189</sup> The court construed the defendant's motion to exclude the clips as an invocation of Federal Rule of Evidence 106's partial codification of the Doctrine of Completeness.<sup>190</sup>

Rule 106 provides that where a party introduces a recorded statement, or a part of one, "an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be at the same time."<sup>191</sup> The problem with partial video, of course, is that there is no other portion the adverse party can introduce. In *Yevakpor*, the court creatively addressed this problem outside the four corners of

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<sup>187</sup> See *United States v. Yevakpor*, 419 F. Supp. 2d 242 (N.D.N.Y. 2006) (excluding partial government surveillance tape).

<sup>188</sup> The recording system recorded over stored images "every 6 to 7 days." *Id.* at 244, 247, 252.

<sup>189</sup> *Id.* at 243–45.

<sup>190</sup> *Id.* at 246–46.

<sup>191</sup> FED. R. EVID. 106. The 2006 version of Rule 106 used in *Yevakpor* was worded differently, but its meaning was essentially the same.

the classic Rule 106 situation.<sup>192</sup> The court noted that it did “not doubt the U.S. Attorney’s good faith” but that, regarding the routine destruction of the rest of the video, partial video recordings are akin to still photographs and thus pose a greater risk of scenes being taken out of context than the “continuous stream of information” that a complete video can provide.<sup>193</sup> The court agreed with the defense that interpretation of the clips would be skewed by the lack of presentation in full context.<sup>194</sup> Performing its own “pragmatic balancing test,” the court excluded the clips as “more prejudicial than probative.”<sup>195</sup>

Moreover, the court put the government on notice:

[I]f selected segments of a video or audio exhibit will be offered at trial, the entire video or audio exhibit had best be preserved . . . . Given the current state of affairs in our nation, when surveillance occurs both with and without our knowledge, a great danger to liberty would exist if Government could pick and choose segments of recordings for use in prosecution, destroy the remainder, and then argue that the defense must show that the destroyed evidence contained exculpatory or otherwise potentially useful and relevant information. Simply put, the Government cannot make use of video segments that have been “cherry-picked” when the remainder of the recording has been erased or recorded-over.<sup>196</sup>

From a seemingly mundane drug-smuggling case at a port of entry, the court discerned the larger values at stake and the need to fashion a remedy that applied regardless of proof by the defense that the missing video was exculpatory or that the government acted in bad faith. From an evidentiary fairness perspective, even if a recording is incomplete due to no fault of the officer, there are still important concerns about its admission. Video evidence has a

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<sup>192</sup> *Yevakpor*, 419 F. Supp. 2d at 246–47.

<sup>193</sup> *Id.* at 246.

<sup>194</sup> *Id.* at 250.

<sup>195</sup> *Id.* at 250–52.

<sup>196</sup> *Id.* at 252 (citation omitted).

dangerous power to seem to offer the viewer the ability to see for him or herself what really happened.<sup>197</sup> Yet the vantage point of the camera and what it catches and misses can tell a misleading story.<sup>198</sup>

We do not know whether something crucial that would put conduct in context is cut out. Seeing only part of the action without key context can lead viewers to draw the wrong inferences.<sup>199</sup> For example, is a suspect apparently behaving belligerently toward an officer on video doing so because he was aggressive from the beginning of the encounter, or because the officer was demeaning or threatening first? Was the suspect acting suspiciously from the start of a *Terry* stop, or does he only look suspicious once the camera turns on and displays the contraband which was found on the suspect during a stop and frisk? The partial recording might be a selective presentation—or it might be due to mistake, technological malfunction, or exigency. Rather than adjudicating officer fault, however, the court could exclude the partial video as a matter of evidentiary fairness so the prosecution does not have the advantage of a partial—and potentially misleading—video.

2. *Favorable Inferences.* What happens if video is missing altogether? The Supreme Court has held that it is a due process violation for the government to fail to preserve evidence that is exculpatory to the defendant.<sup>200</sup> If the defendant cannot show the destroyed evidence was exculpatory, and “no more can be said than that it . . . might have exonerated the defendant,” then the criminal defendant must show bad faith on the part of the police.<sup>201</sup> This body of law is unavailing in the failure to record

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<sup>197</sup> See NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT 8 (2009) (stating that videos can be “highly credible evidence of the reality they depict,” and that they are more readily believed than words); Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 692 & n.29 (2012) (arguing that images are often more persuasive than other forms of knowledge, even having the power to overcome personal memories of an event; but the meaning of those images always comes from interpretation).

<sup>198</sup> See Fan, *Justice Visualized*, *supra* note 25, at 947–52 (discussing the particular perspective of body-worn cameras and the point-of-view bias that can result).

<sup>199</sup> See, for example, *Yevakpor*, 419 F. Supp. 2d at 246, where the court was concerned that a partial recording presents an increased risk that scenes may be taken out of context.

<sup>200</sup> *Arizona v. Youngblood*, 488 U.S. 51, 55 (1988).

<sup>201</sup> *Id.* at 56–58.

context for three reasons. First, the evidence was not destroyed. Rather it was never created. Second, if the evidence was never created, it is hard for the defendant to prove that it might be exculpatory.<sup>202</sup> Third, bad faith is hard to prove because the officers will rarely say they were acting with bad intent and are likely to proffer alternative rationales, which courts are reluctant to suggest are false.<sup>203</sup>

It may be tempting to try to draw an analogy with spoliation doctrine, which also concerns remedies for missing evidence. Spoliation means the destruction of evidence or failure to preserve it for reasonably foreseeable litigation.<sup>204</sup> More fundamentally, the doctrine is about the “inherent power of the courts . . . to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth.”<sup>205</sup> To sanction spoliation, courts may infer that the information would have been adverse to the party.<sup>206</sup> Many courts require a showing of intentional destruction in bad faith before imposing an adverse-inference sanction.<sup>207</sup> Others hold that bad faith is not required

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<sup>202</sup> Cf. *Yevakpor*, 419 F. Supp. 2d at 246 (“This is a harsh standard to apply considering that the Defendant cannot know what missing portions would be relevant” since the video no longer exists).

<sup>203</sup> See discussion *supra* notes 180–82.

<sup>204</sup> *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).

<sup>205</sup> *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001).

<sup>206</sup> See *id.* at 592–93 (affirming the district court’s grant of a motion to dismiss, where the failure to preserve a motor vehicle in its “post-accident condition” “highly prejudiced” defendant).

<sup>207</sup> See, e.g., *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015) (“We permit an adverse inference against the spoliator or sanctions against the spoliator only upon a showing of ‘bad faith’ or ‘bad conduct’ . . . Bad faith, in the context of spoliation, generally means destruction for the purpose of hiding adverse evidence.”); *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 461 (8th Cir. 2013) (ruling that the district court must find bad faith and prejudice in order to give an adverse-inference instruction); *Bull v. United Parcel Service, Inc.*, 665 F.3d 68, 79 (3d Cir. 2012) (discussing the “pivotal” role of bad faith in sanctionable spoliation); *Norman-Nunnery v. Madison Area Tech. Coll.*, 625 F.3d 422, 428 (7th Cir. 2010) (requiring the party seeking an adverse inference to “demonstrate that the defendants intentionally destroyed the documents in bad faith,” explaining “[t]he crucial element in a spoliation claim is not the fact that documents were destroyed but that they were destroyed for the purpose of hiding adverse information”); *Turner v. Public Serv. Co.*, 563 F.3d 1136, 1149 (10th Cir. 2009) (“But if the aggrieved party seeks an adverse inference to remedy the spoliation, it must also prove bad faith.”); *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) (“In this circuit, an adverse inference is drawn from a party’s failure to preserve evidence only when the absence of that evidence is predicated on bad faith.”); see also 89 C.J.S. *Trial* § 671 (2017) (“The jury should be given an adverse-inference instruction on spoliation of evidence if the requesting party makes a threshold showing that the opposing

and instead use other criteria, such as willful conduct or notice that the evidence was potentially relevant to the litigation.<sup>208</sup>

Civil rights plaintiffs attempting to allege spoliation based on a recording omission or destruction have failed because of an inability to show bad faith and the availability of other explanations, such as officer inexperience.<sup>209</sup> Classic spoliation doctrine is even more difficult to apply in the context of an officer's decision not to record altogether. The failure to record is a particularly ambiguous context because evidence was not destroyed. Rather it never existed. Culpable bad faith—acting with the purpose of destroying evidence to hide adverse information<sup>210</sup>—is even harder to allege because of the legitimate reasons officers may proffer for not recording in the field.<sup>211</sup> The remedy would be merely theoretical rather than attainable because of the difficulty of demonstrating that a video that never existed would have contained adverse information.<sup>212</sup> While some

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party improperly caused the loss of the evidence.”); 29 AM. JUR. 2D *Evidence* § 256 (“[T]he intentional spoliation . . . of evidence relevant to a case raises . . . an inference[] that this evidence would have been unfavorable. . . . The inference does not arise where the destruction was a matter of routine with no fraudulent intent.”).

<sup>208</sup> See, e.g., *Grosdidier v. Broadcasting Bd. of Governors*, 709 F.3d 19, 28 (D.C. Cir. 2013) (ruling that a showing of bad faith is not required); *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (holding that bad faith is not always necessary for sanctionable spoliation and willful conduct suffices); *Byrnie v. Town of Cromwell*, 243 F.3d 93, 109 (2d Cir. 2001) (holding that a spoliation claim can be based on a violation of regulatory duty to keep records if the records “were destroyed with a culpable state of mind (i.e. where, for example, the records were destroyed knowingly, even if without intent to violate the regulation, or negligently)” and “the destroyed records were relevant to the party’s claim or defense”); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329–30 (9th Cir. 1993) (holding that bad faith is not required and notice that evidence is relevant to the litigation and failure to preserve suffice).

<sup>209</sup> See, e.g., *Victor v. Lawler*, 520 F. App’x 103, 105–06 (3d Cir. 2013) (per curiam) (holding that the officer failed to record due to inexperience and not bad faith). Cf., e.g., *Bracey v. Grondin*, 712 F.3d 1012, 1019 (7th Cir. 2013) (holding that the civil rights plaintiff failed to show bad faith on the part of prison guards who did not preserve video recordings of an incident).

<sup>210</sup> See *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998) (defining “bad faith” as “destruction for the purpose of hiding adverse information”).

<sup>211</sup> See discussion *supra* Part III.B (discussing the possible legitimate reasons for a failure to record an incident, including technical malfunctions and either forgetting or not having time to “hit record” during the heat of a particularly stressful encounter).

<sup>212</sup> See, e.g., *Missouri v. Seibert*, 542 U.S. 600, 616 n.6 (2004) (plurality opinion) (noting that officer intent is rarely openly revealed); *United States v. Martinez*, No. 11-10195-RWZ, 2013 WL 49767, at \*6–7 (D. Mass. 2013) (finding no bad faith when the government failed to preserve videos the defendant claimed might have contained exculpatory information).

courts do not require a showing of bad faith for an adverse inference, many do because of “the gravity of an adverse inference instruction, which ‘brands one party as a bad actor.’”<sup>213</sup>

To surmount this dilemma, this Article proposes a positive inference when video of a law enforcement encounter that should be recorded is missing. This positive rather than adverse inference could apply regardless of the culpability of the officer in the failure to record. The positive inference would be that the missing video could have information that supports the defense. This positive framing spares the culpability connotations of an adverse inference that video is missing because the officer knew he had something to hide. Rather than an adverse inference branding a party as a “bad actor” in destroying evidence, a favorable inference is a credibility-reinforcing move. It counteracts the systemic imbalance in credibility capital that defendants face in the criminal justice system.<sup>214</sup> It puts a thumb on the scale of inferences in favor of the defendant without necessitating a finding that recording was subverted to hide damaging evidence. A recording could be missing for wholly legitimate reasons and yet still contain information that could support the defense.

3. *Pattern and Practice Detection.* Finally, a systemic perspective also widens the horizon of remedies beyond the individual case level to a systemic level. This proposal draws on Andrew Crespo’s important call for courts to use their privileged access to systemic facts to advance beyond transactional myopia in criminal procedure.<sup>215</sup> Transactional myopia refers to the tendency to focus on the specific facts in a particular criminal procedure case before the court.<sup>216</sup> Systemic facts refers to the

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*Cf. Bracey*, 712 F.3d at 1019 (“Without having seen the video, no prison official could have known the tapes potentially contained adverse information and, without that knowledge, could have destroyed the tapes for the purpose of hiding adverse information.”).

<sup>213</sup> See, e.g., *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 461 (8th Cir. 2013) (quoting *Morris v. Union Pac. R.R.*, 373 F.3d 896, 900 (8th Cir. 2004)). See also *supra* note 207 for numerous examples of courts requiring a showing of bad faith before sanctioning a party with an adverse inference.

<sup>214</sup> See discussion *supra* notes 173–82 (discussing the “severe credibility problem” defendants face).

<sup>215</sup> Crespo, *supra* note 36.

<sup>216</sup> See *id.* at 2057 (explaining that “constitutional criminal adjudication . . . is largely transactional in nature, focusing on the ‘one-off interaction typified by the singular’ search,

larger pattern of data that courts can detect and interpret based on information acquired over time by processing many criminal procedure cases.<sup>217</sup>

Courts have amassed a valuable trove of systemic facts in their filing cabinets, online data systems, and transcripts.<sup>218</sup> This can help courts more accurately detect systemic problems and adjudicate between competing claims. For example, in justifying a search or seizure, do the police always use standard-form boilerplate language?<sup>219</sup> How likely is it for warrants issued based on such boilerplate recitations to yield the evidence sought?<sup>220</sup> A word search using high-speed software through digitized search warrant affidavits and inventories can detect such a pattern.<sup>221</sup>

A defendant in a particular case alleging that crucial video footage is missing may just seem to be an isolated case, or give the impression of grasping at straws to create a defense. But high-speed searches of motions filed over time can detect patterns in alleged missing evidence. Do the claims tend to involve the same law enforcement agency unit, or even the same officers? Do the claims cluster around particular kinds of cases or neighborhoods, potentially unveiling an off-the-books tactic in a particular kind of investigation or among a particular team? This form of judicial audit can supplement internal departmental enforcement mechanisms. Detection of problematic patterns can inform judges if they need to start stepping up scrutiny—and whether wading into the morass of fault for missing video is warranted.

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seizure or prosecution of ‘a particular suspect for a specific crime’” (emphasis omitted) (quoting Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1039 (2016)).

<sup>217</sup> See *id.* at 2066–68 (describing systemic facts as “information with respect to which a given decisionmaking institution enjoys deep institutional familiarity, privileged (or perhaps even exclusive) access, or both”).

<sup>218</sup> See, e.g., *id.* at 2072–75 (describing the Superior Court of the District of Columbia’s catalogued and digitized information on probable-cause documentation, including written affidavits and hearing transcripts).

<sup>219</sup> See *id.* at 2074–85 (providing examples of “routine factual representations,” such as “high-crime areas”).

<sup>220</sup> See *id.* at 2085 (reporting that searches sanctioned by warrants obtained through the use of “probable-cause scripts” more often than not fail to yield the evidence sought, using firearms (91% failure rate) and drugs (66% failure rate) as examples).

<sup>221</sup> See *id.* at 2074, 2082–85 (explaining how cumulative information can be used by courts to assess the descriptive and predictive accuracy of probable-cause scripts).



## V. CONCLUSION: AUTOMATIC CAMERA ACTIVATION

On paper, a revolution in police regulation by recording seems to be sweeping the world of law enforcement, as departments around the nation adopt body camera recording mandates in response to calls for reform. On the ground, however, problems with nonrecording or recording after the crucial moment are emerging. Controversies over missing video are raising important questions about how to enforce recording requirements and protect system integrity against partial or missing videos.

Internal departmental enforcement of recording rules is challenging because of the individual fault-based nature of disciplinary processes as well as the management-labor negotiations and protections. Courts are better institutionally situated to ensure a fair and accurate video evidentiary record. The challenge is determining what remedies to offer when video that should be available under departmental recording rules is missing. Remedies requiring a showing of bad faith on the part of the officers are illusory. The blame approach is predetermined to fail because of the reluctance of courts to find that officers are perjurers; to wade into costly mini-trials on collateral evidentiary issues; and to second-guess the judgment calls of officers in the heat and stress of the field. Remedies contingent on finding culpability are likely to lead to judicial-inquiry deterrence, in which courts dismiss claims regarding missing video with little or no inquiry because of the costs of parsing officer fault.

This Article proposes an evidentiary fairness approach that avoids wading into the messy morass of individual blame. Under this approach, partial recordings should be excluded because of the tendency to mislead rather than as a sanction based on a finding of officer wrongdoing. Where video is missing altogether, an inference that the video could contain information favorable to the defense should be drawn. This contrasts with spoliation doctrine, which often requires a showing of bad faith before imposing the adverse inference that a party destroyed or failed to preserve evidence because it was favorable to the other party. Furthermore, courts can use their repository of motions and other documents or information regarding missing video to detect

potentially problematic systemic patterns that warrant heightened scrutiny—and can perhaps even wade into the morass of fault.

Beyond any stop-gap remedies for missing video, the optimal approach ultimately is to prevent the problem from arising by automating recording.<sup>222</sup> Rather than expecting officers acting in the heat and stress of unfolding situations to remember to record, technology can activate recording upon pre-determined triggers such as motion, sounds, physiological indicators, or activation of sirens. Companies are beginning to offer automatic recording solutions that rely on triggers such as the boom of a gunshot; the drawing of a gun or Taser; exceeding a certain speed; the opening of a door; the activation of sirens; entering a geo-fenced area designated “high-crime”; or indicators of an officer’s physiological stress.<sup>223</sup> Currently available technology can even automatically activate the body cameras of other officers within a certain radius of the event so that more cameras are offering context from different angles.<sup>224</sup> These are important developments. The automation of recording can help avert the controversy, pain, and accusations over missing video after a tragedy. Technology also

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<sup>222</sup> I am exploring the technological dimension in a forthcoming book. MARY D. FAN, CAMERA POWER: PROOF, POLICING AND PRIVACY (forthcoming 2018).

<sup>223</sup> See Laura Diaz-Zuniga, *New Bodycams Start Recording with the Draw of A Gun*, CNN (July 21, 2017, 7:11 PM), <http://cnn.it/2vJNMQr> (discussing automatic activation technology triggered by the removal of a weapon from its holster); Robert Maxwell, *Lakeway Police First to Use Automatic Body Cameras*, KXAN (Austin, Tex.) (June 12, 2015, 4:57 PM), <http://kxan.com/2015/06/12/lakeway-police-first-to-use-automatic-body-cameras/> (discussing recording activation triggers linked to a patrol vehicle’s “lights, siren, brake system, airbag, dome light or doors”); Ryan Mason, *More than A Body Cam*, POLICE: THE LAW ENFORCEMENT MAGAZINE (Apr. 28, 2015), <http://www.policemag.com/channel/technology/articles/2015/04/more-than-a-body-cam.aspx> (describing Utility’s system, which “allows the camera to automatically activate based on policies set by the agency” and triggers such as the vehicle speeding over seventy-five miles per hour, entering into a geo-fenced area, or during certain types of interactions).

<sup>224</sup> See Nick Wing, *New Police Body Camera Device Starts Recording When Cops Draw Guns*, HUFFINGTON POST (Mar. 1, 2017, 6:11 PM), [http://www.huffingtonpost.com/entry/taser-signal-police-body-camera\\_us\\_58b72c32e4b0284854b385b2](http://www.huffingtonpost.com/entry/taser-signal-police-body-camera_us_58b72c32e4b0284854b385b2) (describing the Signal Sidearm product from Axon (Taser), which activates the officer’s body camera as well as other body cameras within thirty-feet, upon the drawing of the officer’s firearm from its holster); Michael Fleeman et al., *L.A. Police to Get Tasers that Activate Body Cameras When Used*, REUTERS (Jan. 6, 2015, 6:40 PM), <http://reut.rs/1xPDACa> (discussing Los Angeles Police Department’s purchase of the Taser X26P weapon, which is linked via Bluetooth to Taser’s body cameras, “turn[s] on the camera the second the Taser’s safety switch is thrown,” and “record[s] the date, time and duration of firing, and whether Taser wires actually strike suspects and how long the thousands of volts of electricity pulse through them.”).

can help address mistrust over police discretionary decisions, including the decision whether to record.<sup>225</sup> While framing effective remedies for errors and omissions is important, the optimal approach is to reduce the risk of such problems arising altogether, sparing police departments, the community, and the courts the controversy and costs of redressing the missing video problem.

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<sup>225</sup> See Joh, *supra* note 151, at 216–25 (discussing how technology can help address controversies over police discretion in contexts such as traffic stops).

## APPENDIX A

The following jurisdictions, organized by population size in descending order, are among the nation's 100 largest municipalities that had body camera policies available for collection and coding:

- |                       |                          |                        |
|-----------------------|--------------------------|------------------------|
| 1. New York, NY       | 21. Milwaukee, WI        | 41. Anaheim, CA        |
| 2. Los Angeles, CA    | 22. Las Vegas, NV        | 42. Aurora, CO         |
| 3. Chicago, IL        | 23. Albuquerque, NM      | 43. St. Louis, MO      |
| 4. Houston, TX        | 24. Tucson, AZ           | 44. Riverside, CA      |
| 5. Philadelphia, PA   | 25. Fresno, CA           | 45. Corpus Christi, TX |
| 6. San Antonio, TX    | 26. Sacramento, CA       | 46. Lexington, KY      |
| 7. San Diego, CA      | 27. Long Beach, CA       | 47. Stockton, CA       |
| 8. Dallas, TX         | 28. Mesa, AZ             | 48. Cincinnati, OH     |
| 9. San Jose, CA       | 29. Virginia Beach, VA   | 49. St. Paul, MN       |
| 10. Austin, TX        | 30. Atlanta, GA          | 50. Toledo, OH         |
| 11. San Francisco, CA | 31. Colorado Springs, CO | 51. Greensboro, NC     |
| 12. Fort Worth, TX    | 32. Raleigh, NC          | 52. Chula Vista, CA    |
| 13. Charlotte, NC     | 33. Omaha, NE            | 53. Durham, NC         |
| 14. Memphis, TN       | 34. Miami, FL            | 54. Winston-Salem, NC  |
| 15. Boston, MA        | 35. Oakland, CA          | 55. Chesapeake, VA     |
| 16. Seattle, WA       | 36. Minneapolis, MN      | 56. Scottsdale, AZ     |
| 17. Denver, CO        | 37. Cleveland, OH        | 57. Fremont, CA        |
| 18. Baltimore, MD     | 38. Wichita, KS          | 58. Gilbert, AZ        |
| 19. Portland, OR      | 39. New Orleans, LA      | 59. Boise, ID          |
| 20. Oklahoma City, OK | 40. Tampa, FL            |                        |