

WRITE BEFORE YOU WATCH: POLICIES FOR POLICE BODY-WORN CAMERAS THAT ADVANCE ACCOUNTABILITY AND ACCURACY

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ABSTRACT

In the wake of high-profile killings and abuse by police officers over the past few years, the public has come to expect that officers will be equipped with body-worn cameras (BWCs). These cameras capture and preserve encounters between police and civilians, and the footage they record often becomes critical evidence in criminal, civil, or administrative proceedings. Reformers believe BWCs can improve police accountability, build public trust in police, and potentially reform police behavior.

Considering the reliance on BWCs, a key question has emerged: should officers be allowed to review BWC footage before preparing a report or giving a statement, or only after doing so? The question comes as policymakers across the country, from the White House to local municipalities, are attempting to reform criminal justice policy. Given that police departments design their internal policies, it is perhaps unsurprising that most of the nation's largest police departments using BWCs permit their officers, in most instances, to view the footage before writing an incident report. But this policy has profound negative consequences, both for the accuracy of police reports and the potential for police accountability. As cognitive science recognizes, an officer's memory of an incident is susceptible to being altered by details in BWC footage that the officer may not have noticed or remembered. These differences could be legally and factually significant. Moreover, permitting officers to view BWC footage before writing their reports undermines public confidence that officers will be truthful in memorializing their own perception of events. Access and exposure to the footage creates the appearance, if not the likelihood, that an officer will conform their report to match the recording.

Police departments should instead adopt a "write first, then watch" policy. This approach fulfills two objectives: first, it memorializes the officer's unaltered recollection, preserving the officer's state of mind at the time of the event; second, it assures transparency by denying a percipient witness to an event access to other evidence in a case before they have memorialized their own recollection of events. Under this policy, officers would be permitted to write supplemental reports only after viewing BWC footage, for the purpose of providing additional details or explain why their recollections differed from the footage. Each report

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would be distinguishable, eliminating any concern that the footage would affect the officer's initial report. This procedure ensures accuracy and accountability in an adversarial system.

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INTRODUCTION

In 2022, there were 1,096 deadly police shootings across the United States, the highest number on record.¹ Across the country, such fatal encounters—often ending in the deaths of Black citizens—have led to widespread distrust of official police reports and demands for quicker dissemination of information by authorities. In response to those demands, law enforcement's deployment of body-worn cameras (BWCs) has increased significantly.

The availability of video footage has played a crucial role in holding police accountable for high-profile killings over the last decade. In 2014, for example, Chicago police officer Jason Van Dyke shot LaQuan McDonald, a Black teenager, sixteen times on a public roadway.² After more than a year of public pressure and a

1. *Fatal Force*, WASH. POST (Aug. 28, 2023), <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>.

2. Kori Rumore & Chad Yoder, *Minute by Minute: How Jason Van Dyke Shot Laquan McDonald*, CHI. TRIB. (Jan. 18, 2019, 7:32 PM), <https://www.chicagotribune.com/news/laquan-mcdonald/ct-jason-vandyke-laquan-mcdonald-timeline-htmlstory.html>.

court order, authorities released the video, which conflicted with Van Dyke's version of the incident.³ Shortly before the release, prosecutors filed murder charges against Van Dyke,⁴ who was eventually convicted of second-degree murder.⁵ In the case of McDonald, and in many others—Tamir Rice, Freddie Gray, Breonna Taylor, George Floyd, and Tyre Nichols—both authorities and the public rely upon video evidence to know what transpired during an encounter between police and a civilian.⁶

Thus, many citizens, policymakers, and reformers believe that widespread adoption of BWCs will advance police accountability, build public trust in law enforcement actions, and potentially help reform police behavior.⁷ In 2022, President Biden signed an executive order on police reform that required federal law enforcement agencies to develop strategies on implementing BWCs.⁸ Similarly, some state legislatures have mandated the use of BWCs;⁹ others, while not requir

3. See Monica Davey, *Officers' Statements Differ from Video in Death of Laquan McDonald*, N.Y. TIMES (Dec. 5, 2015), <https://www.nytimes.com/2015/12/06/us/officers-statements-differ-from-video-in-death-of-laquan-mcdonald.html>; *City Releases Laquan McDonald Shooting Video*, WTTW NEWS (Nov. 24, 2015, 6:58 PM), <https://news.wttw.com/2015/11/24/city-releases-laquan-mcdonald-shooting-video>.

4. *Chicago Cop Who Allegedly Shot Teen Laquan McDonald 16 Times Charged With Murder*, ABC NEWS (Nov. 24, 2015), <https://abcnews.go.com/US/chicago-cop-allegedly-shot-teen-laquan-mcdonald-16/story?id=35391346>.

5. Megan Crepeau, Christy Gutowski, Jason Meisner & Stacy St. Clair, *Van Dyke Taken into Custody After Jury Convicts Him of 2nd-Degree Murder, Aggravated Battery for Each of 16 Shots*, CHI. TRIB. (Oct. 5, 2018, 9:00 PM), <https://www.chicagotribune.com/news/breaking/ct-met-laquan-mcdonald-jason-van-dyke-verdict-20181005-story.html>. Mayor Quinton Lucas, mayor of Kansas City, Missouri, stated, "If you don't share information, public imagination will take on its own element and you'll be dealing with the wrath of that." *Quotation of the Day: For Police, Body Cameras Break Old Code of Silence*, N.Y. TIMES (Jan. 29, 2023), <https://www.nytimes.com/2023/01/29/pageoneplus/quotation-of-the-day-for-police-body-cameras-break-old-code-of-silence.html?smid=url-share>.

6. While it used to be commonplace for authorities to issue a vague, sometimes inaccurate initial statement followed by refusal to release other evidence for months, such stonewalling is less effective with increased use of police BWCs and members of the public recording interactions with the police. See, e.g., Rachel Treisman, *Darnella Frazier, Teen Who Filmed Floyd's Murder, Praised for Making Verdict Possible*, NPR (Apr. 21, 2021, 11:15 AM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/21/989480867/darnella-frazier-teen-who-filmed-floyds-murder-praised-for-making-verdict-possib>.

7. See Seth W. Stoughton, *Police Body-Worn Cameras*, 96 N.C.L. REV. 1363, 1370 (2018); Kami N. Chavis, *Body-Worn Cameras: Exploring the Unintentional Consequences of Technological Advances and Ensuring a Role for Community Consultation*, 51 WAKE FOREST L. REV. 985, 986–91 (2016); Kristyn A. Jones, Pre-Report Review of Body-Worn Camera Footage: An Examination of Stakeholder Beliefs, Laypeople's Judgments of Officer Credibility, and the Consequences for Memory (June 2020) (Ph.D. dissertation, The Graduate Center, City University of New York) (on file with CUNY Academic Works); Anthony A. Braga, James R. Coldren, Jr., William H. Sousa, Denise Rodriguez & Omer Alper, *The Las Vegas Body-Worn Camera Experiment: Research Summary*, UNLV CTR. FOR CRIME & JUST. POL'Y 1, 6 (Nov. 2017), https://www.cna.org/archive/CNA_Files/pdf/lv-bwc-rib-2017.pdf (Explaining, amongst other things, that officers who wore BWCs had fewer uses of force, and fewer complaints against them. This study was funded by the U.S. Department of Justice.).

8. Exec. Order No. 14074, 87 Fed. Reg. 32945 (May 25, 2022).

9. Between 2020–2021, several states mandated police departments deploy BWC technology. See, e.g., *Body-Worn Camera Laws Database*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 30, 2021), <https://www.ncsl.org/civil-and-criminal-justice/body-worn-camera-laws-database>; Press Release, State of Rhode Island General Assembly, New Law Establishes Statewide Police Body Cameras Program (July 12, 2021), https://www.rilegisature.gov/pressrelease/_layouts/RIL.PressRelease.ListStructure/Forms/DisplayForm.aspx?List=c8baae31-3c10-431c-8dcd-9dbbe21ce3e9&ID=371908.

ing them, have developed policies to govern their use.¹⁰

Implementing BWCs raises numerous operational questions, such as when cameras should be activated or paused, where they are best placed on the officer's body, and when the public should be notified that the officer is recording. Questions about how BWC footage is stored and maintained are also of paramount importance. One such question is the subject of this Article: should officers be allowed to review BWC footage *before* preparing a report or giving a statement, or only *after* doing so?¹¹

This issue has generated intense scrutiny and debate among reformers and law enforcement agencies. Police officers and their unions have pushed for “pre-review” policies, which allow officers to check their memories against BWC footage before writing incident reports.¹² Given that police departments design their own internal policies, it is perhaps unsurprising that the majority of the nation's largest police departments that use BWCs permit pre-review.¹³ In fact, some departments *encourage* it.¹⁴ But pre-review policies erode both accuracy and accountability rather than enhancing them.

For one, allowing officers to watch footage before writing reports degrades the original memories they have of the events they perceived. Cognitive science recognizes that memory is malleable and can be significantly affected by post-event information.¹⁵ A witness' purest account is most assured when they are shielded

10. See *infra* Section I.B.3.

11. Social science research has found that officer review of BWC footage can affect the officer's memory of the event, as it serves as post-event information. See Rebecca Hofstein Grady, Brendon J. Butler & Elizabeth F. Loftus, *What Should Happen After an Officer-Involved Shooting? Memory Concerns in Police Reporting Procedures*, 5 J. APPLIED RSCH. MEMORY & COGNITION 246, 247 (2016). After reviewing the footage, the officer may (1) incorporate details provided in the footage that they did not actually perceive at the time of the incident or (2) forget details they experienced that were not captured by the footage. See Paula M. Di Nota, Bryce E. Stoliker, Adam D. Vaughan, Judith P. Andersen & Gregory S. Anderson, *Stress and Memory: A Systematic State-of-the-Art Review with Evidence-Gathering Recommendations for Police*, 44 POLICING: INT'L J. 1, 3, 10 (2020) (describing retrieval-induced forgetting). Thus, BWC footage may be compared to the officer's statement or testimony to account for discrepancies. See *infra* Section II (providing a comprehensive look at memory and reviewing BWC footage); Annelies Vredeveldt, Linda Kesteloo & Alieke Hildebrandt, *To Watch or Not to Watch: When Reviewing Body-Worn Camera Footage Improves Police Reports*, 45 L. & HUM. BEHAV. 427, 436 (2021).

12. See *infra* Section I.C.

13. See *infra* Section I.C. (discussing how a vast majority of police departments allow unrestricted review of footage before making any statement, written or otherwise, about an incident the officer witnessed).

14. See *infra* Section I.C.

15. Post-event information can be *any* external information shared with the subject after the event has occurred. There is a vast body of research examining how a subject's memory can be altered after being exposed to post-event information that is either inconsistent from one's initial account of events or adds facts the subject did not initially recount. See Elizabeth F. Loftus, David G. Miller & Helen J. Burns, *Semantic Integration of Verbal Information into a Visual Memory*, 4 J. EXPERIMENTAL PSYCH.: HUM. LEARNING & MEMORY 19, 29–31 (1978). While BWC footage is not false information, it will affect the officer's original memory of the event if it contradicts the original memory. Kathy Pezdek, Tyler Shapland & Jessica Barragan, *Memory Outcomes of Police Officers Viewing Their Body-Worn Camera Video*, 11 J. APPLIED RSCH. MEMORY & COGNITION 392, 393, 401 (2022) [hereinafter *Memory Outcomes*]; see also Kathy Pezdek, *Cross-Modality Semantic Integration of Sentence and Picture Memory*, 3 J. EXPERIMENTAL PSYCH.: HUM. LEARNING & MEMORY 515, 515, 523 (1977)

from such information.¹⁶ Exposure to external accounts, whether other witnesses' retellings or physical evidence, contaminates one's original memory.¹⁷ This is why police officers are trained not to reveal other witness accounts or information when obtaining statements from percipient witnesses.¹⁸ For the same reasons, officers should not be allowed to review BWC footage before writing accounts of what they experienced.

BWC recordings themselves may become important evidence in criminal, civil, or administrative proceedings.¹⁹ It may be used to establish probable cause for a warrant, help determine whether a warrant was validly executed, assess the validity of a consent search, or inform resolution of other factual questions with legal significance for raising constitutional claims.²⁰ The footage and the officer's recollection of events may differ in significant ways. An officer's memory of an incident is susceptible to being altered by details in the footage that the officer may not have noticed or remembered.

From a legal standpoint, an individual's perception of an event can legally justify one's actions, even if the reality was significantly different. An officer's use of force is measured in terms of its "reasonableness" given the situation.²¹

[hereinafter *Cross-Modality Semantic Integration*] (finding that memories can be altered by exposure to post-event information despite differences in how the information is communicated (e.g., pictorially as opposed to verbally)).

16. See *Memory Outcomes*, *supra* note 15; *Cross-Modality Semantic Integration*, *supra* note 15; Loftus et al., *supra* note 15.

17. See *Memory Outcomes*, *supra* note 15; Siobhan M. Hoscheidt, Kevin S. LaBar, Lee Ryan, W. Jake Jacobs & Lynn Nadel, *Encoding Negative Events Under Stress: High Subjective Arousal Is Related to Accurate Emotional Memory Despite Misinformation Exposure*, 112 *NEUROBIOLOGY LEARNING & MEMORY* 237, 238 (2014); see also Elizabeth F. Loftus, *Searching for the Neurobiology of the Misinformation Effect*, 12 *LEARNING & MEMORY* 1, 1–2 (2005) (describing the misinformation effect). Loftus' and others' research on suggestibility examines the danger of distorting the truth when witnesses are supplied with misinformation or information they did not generate themselves because they are likely to incorporate that information into their recollection. This relates to BWC footage pre-review even though it can be argued this is not supplying the witness with "misinformation" because if the officer does not know or generate this information on their own, supplying the officer with external information will distort independent recollection of events.

18. See, e.g., OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT* 15, 27, 34–37 (1999), <https://www.ojp.gov/pdffiles1/nij/178240.pdf>. Because some components of information (such as written statements or reports) are based on a participant or witness' memory of events, the order in which information is presented to a participant or witness can significantly affect the information itself. So, for example, it's important to obtain a description from a witness of a perpetrator or suspect before exposing the witness to information about the suspect, such as a through photo array or lineup. See *id.* at 33. It's important not to reuse suspects or fillers in multiple identification procedures with the same witness, see *id.* at 34, 37, because witnesses' memories are reconstructed and refashioned with each procedure, both changing their memory and adding other potential sources of substantiation.

19. "Proceedings" may be criminal, civil, or administrative, and they may involve law enforcement officers as witnesses, civil or criminal defendants, or as employees. Cf. *Proceeding*, BLACK'S LAW DICTIONARY (11th ed. 2019). While the evidentiary rules and factfinders may differ between these settings, similar evidentiary concerns apply in all of them.

20. See *Floyd v. City of New York*, 959 F. Supp. 2d 668, 687 (S.D.N.Y. 2013) (finding that BWC footage will help adjudicate the constitutionality of stop and frisks by the police).

21. See *Graham v. Connor*, 490 U.S. 386, 396 (1989) (establishing that police use-of-force cases are evaluated under a reasonableness standard, considering the totality of the circumstances).

Specifically, a determination of “reasonableness” under the Fourteenth Amendment involves an evaluation of the facts and circumstances, including the nature of the threat posed by the suspect, from the perspective of the officer present at the scene.²² As the Supreme Court stated in *Graham v. Connor*, a 1989 case assessing the use of force by police officers, it is important to know “the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”²³ The Court noted that police officers typically experience fast, unclear, tense situations in which they must make “split-second judgments” regarding how much force is necessary.²⁴ All the more reason why it is crucial to memorialize the officer’s recollection of events before allowing them to view BWC footage.

This is likely why many police departments prohibit officers from reviewing BWC footage before writing an incident report in use-of-force cases.²⁵ In a situation such as an officer-involved shooting, these police departments recognize the importance of preserving the officer’s independent recollection of the events.²⁶ The same rationale that prohibits watching the footage prior to writing an incident report (“pre-review”) should apply to *all* incidents.²⁷ The best practice to ensure the officer’s memory of an event is preserved is to have the officer memorialize their memory of the event before they watch the BWC footage.

Additionally, the position of the officer in an adversarial proceeding means that pre-review can work against accountability. If the officer is part of the prosecution team, the prosecutor will expect a report focused on recollections that support the prosecution. The prosecutor may thus have an incentive for the officer to review the BWC recording prior to writing a report to minimize discrepancies between the BWC recording and any official reports or statements. This dynamic deprives the accused of a fuller accounting of the officer’s memory prior to viewing the recording. Moreover, if the officer becomes the subject of an internal investigation, civil suit, or criminal prosecution, then the officer’s perception at the time of the event will become decidedly self-interested, increasing the risk that they will align their report with the BWC footage or otherwise account for each inconsistency before

22. *Id.*

23. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20–22 (1968)); see also Kathy Pezdek, *Psychological Research on the Use of Body-Worn Cameras*, ADVANCES IN PSYCH. & L., 2022, at 39, 49, 56 [hereinafter *Psychological Research on the Use of Body-Worn Cameras*] (stating that BWCs are an important tool to understand the reasonableness of an officer’s actions, but that it is also critical to understand the officer’s memory of the event by their recollection before they watch BWC footage).

24. *Graham*, 490 U.S. at 397. In fact, discrepancies between the officer’s perception and the BWC footage are not unexpected according to research on perception in high stress situations. See *infra* Section II.B.1.

25. See THE LEADERSHIP CONF. & UPTURN, POLICE BODY WORN CAMERAS: A POLICY SCORECARD (2017), <https://www.bwccscorecard.org/>.

26. See *id.* This exception is used by many departments, partially as a concession to challenges to proprietary department protocols. See Julian Mark, *New Body-Worn Camera Measures Pass – After 2.5 Years of Negotiation with SF Police Union*, MISSION LOC. (Oct. 8, 2020), <https://missionlocal.org/2020/10/new-body-worn-camera-measures-pass-after-the-police-union-held-onto-them-for-2%C2%BD-years/> (explaining that it took several years of negotiating before the San Francisco Police Union adopted the exception).

27. See *infra* Section III.

providing their own recollection of the incident. In this scenario, an officer's review of the recording prior to making a report or giving a statement deprives investigators, civil plaintiffs, or prosecutors of critical information concerning the officer's perception.²⁸ Beyond the case itself, such scenarios erode public trust in police officers and the criminal justice system overall.²⁹

For evidentiary purposes, BWC footage should be governed by a "write first, then watch" policy. This approach fulfills two important objectives: it memorializes the officer's unaltered recollection, and it keeps intact the officer's state of mind at the time of the event.³⁰ Under such a policy, officers could still be allowed, after viewing BWC footage, to issue supplemental reports addressing facts depicted in the video that the officer may not have accounted for in their initial report.³¹ For accountability purposes, the "write first, then watch" approach serves both truth and fairness in the adversarial process and the advancement of police reform goals.³²

In sum, the adoption of BWCs raised hopes that the cameras would increase transparency and accountability in policing. But without good policies to govern their use, BWCs may achieve little of either.³³ This Article explains why a "write first, then watch" policy is crucial to fulfilling these goals. Part I traces recent developments in police use of recording technologies, beginning with dashboard cameras, then custodial recordings, and culminating with BWCs. This history includes how policies around these emerging technologies were written, the growing pains they endured, and how they evolved into standard practices based on input from the public, governments, and police unions. It also reviews how police officers have resisted efforts to field these technologies. Part II explains the cognitive science of how memories are formed and influenced by exposure to external information, stress, and racial bias. Understanding this science is key to explaining why pre-review of BWC footage is inconsistent with rendering reliable and accurate incident reports. Finally, Part III advances the argument that prohibiting officer review of BWC footage prior to writing an incident report is consistent with enhancing public trust and accountability.

28. See *infra* Section III.

29. See *infra* Section III.

30. See *Psychological Research on the Use of Body-Worn Cameras*, *supra* note 23, at 49, 56.

31. Post-review reports may also be appropriate to identify anything the BWC record failed to capture due to technological malfunctions, limitations of the camera's field of view, inaudible sound, or anything else that prevented capturing the event in its entirety.

32. See, e.g., *Memory Outcomes*, *supra* note 15, at 401 ("If an officer's event memory and memory for their state of mind at the time of the event are used to determine whether their use of force was justified, then it is important to ensure that these memories are preserved and not altered by viewing their BWC footage . . ."). See generally Jay Stanley & Peter Bibring, *Should Officers Be Permitted to View Body Camera Footage Before Writing Their Reports?*, ACLU (Jan. 13, 2015), <https://www.aclu.org/blog/free-future/should-officers-be-permitted-view-body-camera-footage-writing-their-reports>.

33. Eric Umansky, *The Failed Promise of Police Body Cameras*, N.Y. TIMES MAG. (Dec. 13, 2023), <https://www.nytimes.com/2023/12/13/magazine/police-body-cameras-miguel-richards.html>.

I. RECORDING TECHNOLOGY IN POLICING: MONITORING AND EVIDENCE COLLECTION

A. *Background*

Over the past several decades, law enforcement agencies have increasingly adopted recording technologies for two broad purposes: monitoring and evidence collection. These technologies include dashboard cameras, video recording of custodial interrogations, and BWCs. To some, recordings may have more evidentiary weight because they purportedly show an objective view of what happened. But cameras are limited by numerous technical factors, including their positioning, the quality of their sound recordings, and even the need to activate them. Apart from any reform agenda, the reduced cost and proliferation of recording technology has meant that recording specific police practices—especially those that will have evidentiary significance—has become a common practice.³⁴ When the recordings themselves enter the adversarial system, they can also advance truth-seeking and affect other forms of evidence. For these technologies to advance both police reform and truth-seeking, the policies governing them must account for both purposes.

Recording technologies create information that is itself evidence. For example, dashboard camera videos and closed-circuit booking-area video recordings of suspected impaired drivers can be important evidence in operating-under-the-influence (OUI) prosecutions.³⁵ Electronic recordings of interrogations can be vital evidence concerning the voluntariness of a defendant's statement or the validity of a waiver. They may also show that law enforcement provided the information in a defendant's purported confession.³⁶ Video recordings of eyewitness-identification procedures can be important evidence of how an identification was conducted and whether improper suggestive techniques were employed. Video evidence may also be material to questions involving the use of force, the validity of consent, and the bases for law enforcement officers' suspicion and to the investigation or prosecution of actions by third parties.

Despite the utility of recording technologies in the investigation or prosecution of a legal matter, police often respond to being recorded with suspicion and

34. See L. ENF'T POL'Y CTR., BODY-WORN CAMERAS 1 (2019), <https://www.theiacp.org/resources/policy-center-resource/body-worn-cameras>.

35. See, e.g., *State v. Lopez*, 173 A.3d 485, 503 (Conn. App. Ct. 2017) (“A DVD of dashboard camera video is ‘subject to the same foundational requirements for admission as any other demonstrative evidence. Such evidence should be admitted only if it is a fair and accurate representation of that which it attempts to portray.’”) (quoting *State v. Melendez*, 970 A.2d 64, 75 (Conn. 2009)).

36. It is well-documented that common police interrogation technique is to posit facts to the suspect and simply seek confirmation rather than use open-ended questions. See Shaila K. Dewan, *Police Resist Fully Taping Interrogations*, N.Y. TIMES (Sept. 2, 2003), <https://www.nytimes.com/2003/09/02/nyregion/police-resist-fully-taping-interrogations.html>; see also Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. REV. 891, 911 (2004) (explaining that police interrogation techniques can be “confrontational, manipulative, and suggestive” and lead to false confessions).

substantial resistance.³⁷ Police unions have argued that surveillance footage could be used to invade the personal privacy of officers and that administrators would have unbridled internal review to the detriment of the officer.³⁸ Police unions are among the most influential lobbies in the United States.³⁹ In the aftermath of police killings that have spurred demand for criminal justice reform, the leaders of some police associations have only become more vocal in their support of the rank and file.⁴⁰ These leaders are advancing the narrative that police officers are under attack by the public, and they have doubled down on their opposition to proposed reforms.⁴¹

B. The Evolution of Police Recording Technologies

1. Dashboard Cameras

Dashboard cameras, commonly referred to as “dash cams,” date back to the 1930s, but their use took off in the 1980s as a tool for prosecuting drunk-driving arrests.⁴² Mothers Against Drunk Driving (MADD) advocated for dash cams as a

37. See Jason Law, *Slow to Adapt: Why So Few Mass. Police Departments Use Dash, Body Cameras*, BOS. 25 NEWS (July 12, 2019, 12:22 PM), <https://www.boston25news.com/news/many-local-police-departments-resistant-to-body-dash-cameras/961728400/> (suggesting that police oppose dash cameras because they do not want to be constantly monitored); Bruce Goldfarb, *Police Dash Cams Not in Picture for Many Counties*, PATCH (Apr. 17, 2012, 1:29 PM), <https://patch.com/maryland/westminster/police-dash-cams-not-in-picture-for-baltimore-metro-a485264a277> (stating that police and unions initially opposed dash cameras because they did not want to be recorded).

38. See Sean Smoot, *In View Commentary: Body-Worn Cameras – Understanding the Union Perspective*, BODY-WORN CAMERA TRAINING & TECH. ASSISTANCE, <https://bwctta.com/resources/commentary/view-commentary-body-worn-cameras-understanding-union-perspective#> (last visited Jan. 18, 2023) (a police union attorney expressing that officers are concerned the BWCs could be maliciously abused by supervisors and others intent on unfairly analyzing the officer’s conduct).

39. At a time in our nation when labor union membership is declining, police unions have continued to have high rates of membership and considerable access to money and political capital. See Noam Scheiber, Farah Stockman, & J. David Goodman, *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (Apr. 2, 2021), <https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html>; see also Benjamin Levin, *What’s Wrong with Police Unions*, 120 COLUM. L. REV. 1333, 1341–42, 1347–48 (2020) (examining police unions as one of the most influential lobbies in the United States and examining the similarities and differences between police unions and other public-sector unions); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1207 (2017).

40. Scheiber et al., *supra* note 39. In Minneapolis in 2015, a union president was elected under the message, “We are the only ones that support you. Your community doesn’t support you. Your police chief is trying to get you fired.” *Id.*

41. *E.g., id.* (“The greater the political pressure for reform, the more defiant the unions often are in resisting it — with few city officials, including liberal leaders, able to overcome their opposition.”); Kyle Lawson, *NYPD Unions Rail Against Police Reform Laws, Say Cops at Risk*, SILIVE.COM (June 9, 2020, 4:22 PM), <https://www.silive.com/news/2020/06/nypd-unions-rail-against-police-reform-laws-say-cops-at-risk.html> (quoting police union head saying “[w]e, as professionals, are under assault”).

42. *Caught on Camera: The History of the Police Dashcam*, NBC NEWS (Oct. 22, 2015), <https://www.nbcnews.com/long-story-short/video/caught-on-camera-the-history-of-the-police-dashcam-548708419951> (describing how dash cameras were used to provide evidence of drunk driving, as well as racial profiling by police officers); INT’L ASS’N OF CHIEFS OF POLICE, THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING: RESEARCH AND BEST PRACTICES FROM THE IACP STUDY ON IN-CAR CAMERAS 5 (2003), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/bwc/pdfs/iacpin-carcamerareport.pdf>.

way to create evidence that suspected drunk drivers were intoxicated.⁴³ In the 1990s, dash cam footage was largely used as evidence of racial profiling in traffic stops.⁴⁴ But dash cam penetration was limited because the devices remained too expensive for many law enforcement agencies.⁴⁵ As a result of this lack of access, the DOJ's Office of Community Oriented Policing Services created the "In-Car Camera Initiative Program," which provided funding to state police agencies beginning in 2000.⁴⁶ By 2007, sixty-one percent of police cars had dash cams.⁴⁷

Dash cams displayed the benefits of recording police-civilian interactions and helped spur law enforcement's ever-increasing use of recording.⁴⁸ And, as a result of this widespread adoption, police departments developed dash cam policies covering everything from when cameras should be activated to the storage of and access to the recordings.⁴⁹ These policies treat dash cam footage as independent evidence to be preserved and potentially used in adjudicative proceedings alongside officers' reports.⁵⁰

2. Recording of Custodial Interrogations

Reform is often an impetus for adoption of a recording technology, but evidentiary uses of the recordings can demand different policies. For example, coercive interrogations have led many states to require the electronic recording of some or all custodial interrogations.⁵¹ Beyond providing accountability in the interrogation

43. *Caught on Camera: The History of the Police Dashcam*, *supra* note 42.

44. *Id.* During the 1990s, video footage captured by dash cameras was also used to document searches of cars that were transporting drugs. See THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING: RESEARCH AND BEST PRACTICES FROM THE IACP STUDY ON IN-CAR CAMERAS, *supra* note 42.

45. See THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING: RESEARCH AND BEST PRACTICES FROM THE IACP STUDY ON IN-CAR CAMERAS, *supra* note 42.

46. *Id.*

47. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., LOCAL POLICE DEPARTMENTS, 2007, at 21 (2011), <https://bjs.ojp.gov/content/pub/pdf/lpd07.pdf>.

48. See THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING: RESEARCH AND BEST PRACTICES FROM THE IACP STUDY ON IN-CAR CAMERAS, *supra* note 42, at 5–6.

49. For example, see *Police Body-Worn Camera and Dashboard Camera Footage and Release Policy*, N.Y. STATE ATT'Y GEN., <https://ag.ny.gov/office-special-investigation/footage#release> (last visited Aug. 6, 2023), for the New York State's Attorney General's Office policy for dash cameras, and see *Vehicle Mounted Cameras: Impact and Use Policy*, NYC (Apr. 11, 2021), https://www.nyc.gov/assets/nypd/downloads/pdf/public_information/post-final/vehicle-mounted-cameras-nypd-impact-and-use-policy_4.9.21_final.pdf, for the New York City Police Department's policy on dash camera activation and data storage and access.

50. *E.g.*, REDMOND POLICE DEP'T, POLICY 423: BODY-WORN AND IN-CAR CAMERA SYSTEMS 1, 8–9 (2022), <https://www.redmond.gov/DocumentCenter/View/20077/RPD-Body-Worn-Camera-Policy?bidId=>.

51. Only four states—Alaska, Minnesota, Montana, and Arkansas—require police to record all custodial interrogations. See *Stephan v. State*, 711 P.2d 1156, 1159, 1162 (Alaska 1985); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994); MONT. CODE ANN. § 46-4-408 (2009); ARK. R. CRIM. P. 4.7 (requiring recording “whenever practical”). Many other states require police to record interrogations only in certain situations. See, *e.g.*, CAL. PENAL CODE § 859.5 (West 2017) (when interviewing murder suspects); IND. R. EVID. 617 (in felony cases); D.C. CODE § 5-116.01 (2005) (for “crimes of violence”). Some states with no requirements to record interrogations have taken other steps to encourage police to do so. See, *e.g.*, *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 518 (Mass. 2004) (holding if a defendant's interrogation was unrecorded, they have the right to

room, the recordings had obvious evidentiary value to litigants and courts. But it was only when DNA exonerations undermined police claims of voluntary and reliable confessions that electronic recording became more widespread.⁵² As the technology's use increased, so did its evidentiary and truth-seeking value.

Empirical studies revealed that coercion or threats preceding the recording were not deterred when only the admission itself was recorded, so policies evolved to require that the entire encounter between police and suspect be recorded.⁵³ When written or recorded confessions were refuted through DNA exonerations, further research showed how false confessions could be obtained, who was most susceptible to confessing falsely, and how interrogation practices could avoid these risks.⁵⁴

Despite the many benefits of electronically recording custodial interrogations, many in law enforcement initially opposed the use of such technology in the interrogation room.⁵⁵ One major concern was that the recording would deter suspects from confessing or answering questions entirely.⁵⁶ Other concerns included the practicality of recording every single interview, the cost of the equipment and the storage of footage, and the potential for malfunctions.⁵⁷ Many officers also worried about how jurors would perceive aggressive questioning by police when viewing recordings.⁵⁸ Questions also arose about when recording should begin, whether suspects should know they are being taped, and whether interrogations should

request “a jury instruction concerning the need to evaluate that alleged statement or confession with particular caution”).

52. Solomon Moore, *Exoneration Using DNA Brings Change in Legal System*, N.Y. TIMES (Oct. 1, 2007), <https://www.nytimes.com/2007/10/01/us/01exonerate.html> (“More than 500 local and state jurisdictions, including Alaska, Illinois, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, Wisconsin and the District of Columbia have adopted policies [sic] that require the recording of interrogations to help prevent false confessions, according to the Innocence Project.”); *The First 250 DNA Exonerations: Transforming the Criminal Justice System*, INNOCENCE PROJECT (Feb. 4, 2010), <https://innocenceproject.org/the-first-250-dna-exonerations-transforming-the-criminal-justice-system/>.

53. See THE JUST. PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW 2 (2007), <https://www.congress.gov/116/meeting/house/110815/documents/HMKP-116-JU00-20200617-SD004.pdf>.

54. AM. PSYCH. ASS'N, RESOLUTION ON INTERROGATIONS OF CRIMINAL SUSPECTS 1, 2 (2022), <https://www.apa.org/about/policy/resolution-interrogations-criminal-suspects.pdf> (“[T]he American Psychological Association recommends that all custodial interviews and interrogations of felony suspects be video recorded in their entirety and with a ‘neutral’ camera angle that focuses equally on the suspect and interrogator[.]”).

55. Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1140 (2005); Kristian Bryant Rose, *Of Principle and Prudence: Analyzing the F.B.I.'s Reluctance to Electronically Record Interrogations*, OKLA. J.L. & TECH., Jan. 2013, at 1, 2, 13–14; see, e.g., Dewan, *supra* note 36 (discussing the New York Police Department's resistance to the technology).

56. Alan M. Gershel, *A Review of The Law in Jurisdictions Requiring Electronic Recording of Custodial Interrogations*, RICH. J.L. & TECH., Spring 2010, at 1, 1.

57. See *id.* at 1–2; Dewan, *supra* note 36.

58. Gershel, *supra* note 56. For example, a common interrogation strategy that police officers utilize, but that jurors may not view as fair, is the police officer falsely telling the suspect that the police have found evidence implicating them in the crime. See Dewan, *supra* note 36. One way to circumvent this issue is to have officers testify as to the commonality of this practice in interrogating suspects. See *id.* The act of recording has also been found to reduce aggressive and abusive tactics in interrogations by police officers. See Brandon L. Bang, Duane Stanton, Craig Hemmens & Mary K. Stohr, *Police Recording of Custodial Interrogations: A State-by-State Legal Inquiry*, 20 INT'L J. OF POLICE SCI. & MGMT. 3, 5 (2018).

proceed while recording equipment was malfunctioning⁵⁹ — questions that have recently arisen again concerning BWCs.

However, as the technology proliferated, the hesitancy among law enforcement to record interrogations dissipated.⁶⁰ Just as recordings can reveal police misconduct, they can equally serve as powerful evidence of a defendant's culpability.⁶¹ Recordings can protect officers against lawsuits and claims of false confessions or inadequate *Miranda* warnings.⁶² Overall, recording custodial interrogations improves public trust and confidence in law enforcement and the criminal justice system.⁶³ The practice of recording custodial interrogations has thus increased significantly over the last three decades, and law enforcement officers have come to realize the benefits the technology provides. At the federal level, law enforcement agencies now mandate the recording of all custodial interrogations of suspects in any federal crime.⁶⁴ Even in states that do not require electronic recording of custodial interrogations by law, more than 450 police departments have independently adopted policies that require it.⁶⁵ For example, Idaho does not mandate recording interrogations, but twenty-two percent of the state's police departments have reported recording interrogations.⁶⁶

3. Body-Worn Camera Technology

Body-worn cameras are the latest recording technology to proliferate among police forces nationwide. BWCs enable an independent, contemporaneous recording of an interaction with a police officer. The camera captures and records both audio and visual images, which can be easily downloaded for access, storage, and review. Most BWCs are mounted to the middle of an officer's chest. Because the

59. Dewan, *supra* note 36.

60. Gershel, *supra* note 56, at 1–2.

61. Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297, 1308 (2008). Not only can jurors hear the defendant speak, they can observe the suspect's body language and demeanor and weigh the credibility of the statements for themselves.

62. Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1129–30, 1133–34 (2005).

63. *Id.* at 1130; see also LINDSAY MILLER & JESSICA TOLLIVER, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 9 (2014) (discussing the benefits of BWC, including improving accountability, transparency, and agency issues); Bang et al., *supra* note 58, at 3–18 (2018) (detailing how recording custodial interrogations increases trust in police officers and the integrity of investigations); Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297, 1308–10 (2008) (describing how recordings of custodial interrogations serve as strong pieces of evidence and improve trust in law enforcement); *Caught on Camera: The History of the Police Dashcam*, *supra* note 42 (describing how dash cameras were used to provide evidence of drunk driving, as well as racial profiling by police officers).

64. *FBI and Other Federal Agencies to Record Custodial Interrogations*, INNOCENCE PROJECT (May 22, 2014), <https://innocenceproject.org/news/fbi-and-other-federal-agencies-to-record-custodial-interrogations/>.

65. THE JUST. PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW 2 (2007), <https://www.congress.gov/116/meeting/house/110815/documents/HMKP-116-JU00-20200617-SD004.pdf>.

66. Bang et al., *supra* note 58, at 13; cf. Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297, 1338 (2008) (listing twenty-five Idaho police departments that record a majority of custodial interrogations).

camera is not fixed to an inanimate object, the camera captures whatever images and audio are within the officer's field of view. The cameras have limitations in light of their position and the nature of the technology.⁶⁷ The field of view, lighting, and background noise can affect the scope and quality of the recordings.⁶⁸

BWCs were first adopted by law enforcement in the United Kingdom in 2005.⁶⁹ Initially, some officers opposed the technology, expressing fears that recording would reduce their ability to assert independence and discretion during incidents.⁷⁰ However, soon after the adoption of BWCs, a study found that their use better enabled police officers to gather evidence and led to more successful prosecutions.⁷¹ At the same time, the Association of Chief Police Officers, an independent coalition of police from England, Wales, and Northern Ireland, warned that the use of BWCs could create expectations that every detail a police officer provides about an interaction will be supported by video evidence.⁷² The United Kingdom's roll-out of BWCs was slow but gained traction due to public outrage at use-of-force deaths.⁷³ Today, more than seventy percent of British police use the devices.⁷⁴

Police departments in the United States also took a gradual approach to the implementation of BWCs. By 2013, one-third of police departments across the

67. Vredevelde et al., *supra* note 11, at 428; Chuck Remsberg, *10 Limitations of Body Cams You Need to Know for Your Protection*, FORCE SCI. (Oct. 1, 2014), <https://www.forcescience.com/2014/10/10-limitations-of-body-cams-you-need-to-know-for-your-protection/>.

68. See Rémi Boivin, Camille Faubert, Annie Gendron & Bruno Poulin, *Explaining the Body-Worn Camera Perspective Bias*, J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY, Nov. 17, 2020, at 2, 8–10; see also Broderick L. Turner, Eugene M. Caruso, Mike A. Dilich & Neal J. Roese, *Body Camera Footage Leads to Lower Judgments of Intent than Dash Camera Footage*, 116 PROC. NAT'L ACAD. SCI. U.S. 1071, 1204 (2019) (showing difference in observers' perceptions of officer's intentionality based on whether they watched dash cam or BWC, with lower judgments of intent for BWC than dash cam video).

69. Keiran Wilson, Jessica Eaton, Una Foye, Madeleine Ellis, Ellen Thomas & Alan Simpson, *What Evidence Supports the Use of Body Worn Cameras in Mental Health Inpatient Wards? A Systematic Review and Narrative Synthesis of the Effects of Body Worn Cameras in Public Sector Services*, 31 INT'L J. MENTAL HEALTH NURSING 260, 260 (2022). One study conducted in California found that the use of body worn cameras reduced use-of-force incidents by 59% and citizen complaints by 87.5%. EUGENE P. RAMIREZ, A REPORT ON BODY WORN CAMERAS 7 (2014), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/14-005_report_body_worn_cameras.pdf.

70. See LEILA JAMEEL & SARAH BUNN, HOUSES OF PARLIAMENT: PARLIAMENTARY OFF. OF SCI. AND TECH., BODY-WORN VIDEO IN U.K. POLICING 9 (2015), <https://researchbriefings.files.parliament.uk/documents/POST-PB-0014/POST-PB-0014.pdf> (evaluating the impact of the new technology on various parts of the U.K. and its police programs).

71. Cameron Barr, *Body-Worn Cameras for Police? Britain Started Long Ago*, WASH. POST (Dec. 2, 2014, 3:42 PM), <https://www.washingtonpost.com/news/post-nation/wp/2014/12/02/body-worn-cameras-for-police-britain-started-long-ago/>. For example, those who had gotten in trouble with the law due to their intoxication found it difficult to challenge the charges against them, as, thanks to the use of the BWC, police could present video evidence. See Anthony Devlin, *Britain Straps Video Cameras to Police Helmets*, NBC NEWS (July 13, 2007, 5:32 PM), https://www.nbcnews.com/id/wbna19750278#_VN-wl_nF8y4.

72. Devlin, *supra* note 71. Privacy concerns also surrounded the implementation of body-worn cameras. *Id.*

73. See, e.g., *Metropolitan Police Officers Start Wearing Body Cameras*, BBC NEWS (May 8, 2014), <https://www.bbc.com/news/uk-england-london-27313500>. The public demanded police accountability following the death of Mark Duggan in England in 2011. *Id.*

74. Diana Miranda, *Body-Worn Cameras 'On the Move': Exploring the Contextual, Technical and Ethical Challenges in Policing Practice*, 32 POLICING AND SOC'Y 18, 18 (2022).

country were making use of BWCs.⁷⁵ Adoption of BWCs began to rise after several high-profile killings by police officers of mostly unarmed Black men; these incidents spurred demands for accountability and a mounting desire to independently document law enforcement behavior.⁷⁶ One of the early inflection points in the proliferation of BWCs among police was the killing of Michael Brown in 2014.⁷⁷ After Brown's death, many asserted that had the officer worn a BWC during the incident, the objective facts would have been revealed and the killing itself may have been prevented by the officer's realization that his actions were being filmed.⁷⁸ In the aftermath of Brown's death, lawmakers and the public increased their demands for the implementation of BWCs in all law enforcement agencies throughout the United States.⁷⁹ In 2015, the Department of Justice awarded more than twenty-three million dollars to be used toward BWCs across thirty-two states.⁸⁰ That same year, a coalition of reform-minded groups issued the Civil Rights Principles on Body Worn Cameras, which focused on ensuring that BWCs were being used to protect civil rights and liberties rather than to promote injustice.⁸¹ By 2016, forty-seven percent of police departments across the country had acquired BWCs, and ninety-five percent of those departments had at least one camera in service.⁸²

75. Candice Norwood, *Body Cameras Are Seen as Key to Police Reform. But Do They Increase Accountability?*, PBS NEWSHOUR (June 25, 2020, 4:41 PM), <https://www.pbs.org/newshour/politics/body-cameras-are-seen-as-key-to-police-reform-but-do-they-increase-accountability> (citing BRIAN A. REAVES, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., LOCAL POLICE DEPARTMENTS, 2013: EQUIPMENT AND TECHNOLOGY 4 (2015), <https://www.bjs.gov/content/pub/pdf/lpd13et.pdf>).

76. See, e.g., Sean Keenan, *Body Cameras Can Be a Powerful Tool. But Not All Police Forces Wear Them.*, N.Y. TIMES (May 19, 2023), <https://www.nytimes.com/2023/05/19/us/police-body-cameras-atlanta-cop-city.html>; Jay Stanley, *Body Cameras and the George Floyd Protests*, ACLU (June 25, 2020), <https://www.aclu.org/news/privacy-technology/body-cameras-and-the-george-floyd-protests> (calling for members of the public to advocate for policy changes on body cameras after the killing of George Floyd).

77. See Iesha S. Nunes, *Hands Up, Don't Shoot: Police Misconduct and the Need for Body Cameras*, 67 FLA. L. REV. 1811, 1813–14, 1834 (2016).

78. See, e.g., *id.* at 1814.

79. Cf. Stanley, *supra* note 76.

80. Press Release, U.S. Dep't of Just., Justice Department Awards over \$23 Million in Funding for Body Worn Camera Pilot Program to Support Law Enforcement Agencies in 32 States (Sept. 21, 2015), <https://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law>.

81. See Vanita Gupta, *Foreword to HARLAN YU & MIRANDA BOGEN, UPTURN, THE ILLUSION OF ACCURACY: HOW BODY WORN CAMERA FOOTAGE CAN DISTORT EVIDENCE* (2017), <https://www.upturn.org/static/reports/2017/the-illusion-of-accuracy/files/Upturn%20and%20LCCHR%20-%20The%20Illusion%20of%20Accuracy%20v.1.0.pdf>.

82. SHELLY S. HYLAND, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., BODY-WORN CAMERAS IN LAW ENFORCEMENT AGENCIES, 2016, at 1 (2018), <https://bjs.ojp.gov/content/pub/pdf/bwclea16.pdf>. A 2016 report by Upturn and the Leadership Conference on Civil and Human Rights found that policies across forty major police departments in the United States differed drastically. HARLAN YU & MIRANDA BOGEN, UPTURN, THE ILLUSION OF ACCURACY: HOW BODY WORN CAMERA FOOTAGE CAN DISTORT EVIDENCE (2017), <https://www.upturn.org/static/reports/2017/the-illusion-of-accuracy/files/Upturn%20and%20LCCHR%20-%20The%20Illusion%20of%20Accuracy%20v.1.0.pdf>.

In May of 2020, Minneapolis police officer Derek Chauvin killed George Floyd when he placed his knee on Floyd's neck for nearly ten minutes.⁸³ Floyd's death was captured on video by a teenager filming with her cellphone.⁸⁴ As the video spread throughout the United States and across the world, Americans reacted by protesting police brutality and racism.⁸⁵ Legislators introduced police-reform measures at the state and federal levels with the intention of increasing police transparency and accountability.⁸⁶ Once again, as with the public reaction following the death of Michael Brown, many demanded the widespread adoption of BWCs to stem police violence.⁸⁷

Soon after Floyd's death, congressional Republicans introduced the "Justice Act," and Democrats introduced the "George Floyd Justice in Policing Act of 2020."⁸⁸ The Justice Act proposed federal grants for BWCs that included funding for the development of policies on the use of the devices and the review of their footage.⁸⁹ But Senate Democrats rejected the Republican-backed bill and instead advanced their own police-reform bill.⁹⁰ The George Floyd Justice in Policing Act of 2020 focused on improving police oversight and training by limiting an officer's ability to review BWC footage.⁹¹ Specifically, the bill proposed that

No Federal law enforcement officer shall review or receive an accounting of any body camera video footage that is subject to a minimum 3-year retention period pursuant to subsection (j)(1) prior to completing any required initial reports, statements, and interviews regarding the recorded event, unless doing so is necessary, while in the field, to address an immediate threat to life or safety.⁹²

83. Lateshia Beachum, *Two Years After Floyd's Death, Protesters Reflect on What Changed*, WASH. POST (May 24, 2022, 11:35 AM), <https://www.washingtonpost.com/nation/2022/05/24/george-floyd-protesters/>.

84. *Id.*

85. *See id.*

86. *See* Steve Eder, Michael H. Keller & Blacki Migliozi, *As New Police Reform Laws Sweep Across the U.S., Some Ask: Are They Enough?*, N.Y. TIMES (Apr. 18, 2021), <https://www.nytimes.com/2021/04/18/us/police-reform-bills.html>; Catie Edmondson, *Bipartisan Police Overhaul Talks Are Officially Dead on Capitol Hill*, N.Y. TIMES (Sept. 22, 2021), <https://www.nytimes.com/2021/09/22/us/politics/police-reform-booker-scott.html>.

87. *See* Stanley, *supra* note 76; Akela Lacy, *Two Companies Fight to Corner the Police Body Camera Market*, INTERCEPT (Dec. 8, 2021, 1:26 PM), <https://theintercept.com/2021/12/08/police-reform-body-cameras-axon-motorola/>; *cf.* Justin T. Ready & Jacob T.N. Young, *The Unfulfilled Potential of Police Body Cameras in the Era of Black Lives Matter*, SLATE (Oct. 1, 2020, 9:00 AM), <https://slate.com/technology/2020/10/black-lives-matter-police-body-cameras.html> (referencing the killings of Floyd, Prude and Brooks).

88. Kiara Alfonseca, *More than a Year After George Floyd's Killing, Congress Can't Agree on Police Reform*, ABC NEWS (Sept. 23, 2021, 3:59 PM), <https://abcnews.go.com/Politics/year-george-floyds-killing-congress-agree-police-reform/story?id=80188065>; *see* Madeline Halpert, *2 Years After George Floyd's Murder, Congress Still Hasn't Passed Major Federal Police Reforms—Here's What States and Cities Have Done Instead*, FORBES (May 25, 2022, 2:21 PM), <https://www.forbes.com/sites/madelinehalpert/2022/05/25/2-years-after-george-floyds-murder-congress-still-hasnt-passed-major-federal-police-reforms-heres-what-states-and-cities-have-done-instead/?sh=5cc4b88c1869>.

89. Justice Act, S. 3985, 116th Cong. § 509(b)(3), (5) (2020).

90. Li Zhou, *Why Senate Democrats Just Tanked the Republican Police Reform Bill*, VOX (June 24, 2020, 1:40 PM), <https://www.vox.com/2020/6/24/21301746/senate-police-reform-vote>.

91. *See* George Floyd Justice in Policing Act of 2020, H.R. 116-434, 116th Cong. § 372(p) (2020).

92. *Id.*

After passing in the House, the Democrats' bill failed to pass in the Senate.⁹³

Implementation found its footing at the federal level on May 25, 2022, two years after Floyd's death, when President Biden signed an executive order on police reform.⁹⁴ The order required all federal law enforcement agencies to develop strategies for implementing BWCs.⁹⁵ Similarly, between 2020 and 2021, at least thirty states enacted police reforms,⁹⁶ and six states mandated the use of BWCs.⁹⁷ New York and Vermont, though they did not enact statewide body camera mandates, required that state law enforcement agencies use BWCs.⁹⁸ Meanwhile, Kentucky and Maryland enacted laws requiring police to activate BWCs when executing warrants.⁹⁹ In 2021, Rhode Island established a statewide program for BWCs.¹⁰⁰ Before any funding was distributed as part of this program, the state, with its Department of Public Safety and Police Chiefs' Association, was required to create regulations for the use of the devices as well as the footage they produce.¹⁰¹ In Massachusetts, the legislature addressed BWCs in their police reform bill by establishing a task force to make recommendations for BWC policies and procedures.¹⁰² Similarly, less than a month following Floyd's death, the state of New Hampshire created the Commission on Law Enforcement Accountability, Community and Transparency.¹⁰³ After the Commission's recommendations to expand the use of BWCs, New Hampshire equipped nearly all of its state police with them.¹⁰⁴ Some state law reform bills included the formation of commissions comprised of civil rights organization leaders, police chiefs, police association leaders, and attorneys.¹⁰⁵ The task for many of these commissions was to recommend best practices

93. Alfonseca, *supra* note 88 (specifying that one point of contention was over the potential elimination of qualified immunity).

94. See Exec. Order No. 14074, 87 Fed. Reg. 32,945 (May 25, 2022).

95. *Id.*

96. Ram Subramian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder>.

97. *Body-Worn Camera Laws Database*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 30, 2021), <https://www.ncsl.org/civil-and-criminal-justice/body-worn-camera-laws-database>. Before May 2020, only one state, South Carolina, mandated the use of BWCs. *Id.*

98. Amber Widgery, *One Year After George Floyd's Death, Work Continues on Policing Policy*, NAT'L CONF. OF STATE LEGISLATURES (May 20, 2021), <https://perma.cc/2J8H-HUPS>.

99. *Id.*

100. Press Release, State of Rhode Island General Assembly, *New Law Establishes Statewide Police Body Cameras Program* (July 12, 2021), https://www.rilegislature.gov/pressrelease/_layouts/RIL.PressRelease.ListStructure/Forms/DisplayForm.aspx?List=c8baae31-3c10-431c-8dcd-9dbbe21ce3e9&ID=371908.

101. *Id.*

102. S. 2963, 191st Gen. Ct., Reg. Sess. (Mass. 2020).

103. *New Hampshire Launches Commission on Law Enforcement*, FOSTER'S DAILY DEMOCRAT (June 22, 2020, 4:04 PM), <https://www.fosters.com/story/news/2020/06/22/new-hampshire-launches-commission-on-law-enforcement/113747370/>.

104. *New Hampshire Expands Use of Police Dashboard, Body Cameras*, ASSOCIATED PRESS (June 1, 2022, 2:17 PM), <https://apnews.com/article/politics-police-new-hampshire-reform-d79aa25783d381972261505ad850c57d>.

105. See, e.g., L. ENF'T BODY CAMERA TASK FORCE, *RECOMMENDED REGULATIONS FOR THE PROCUREMENT AND USE OF BODY WORN CAMERAS BY LAW ENFORCEMENT* 1, 4–5 (2022), <https://www.mass.gov/doc/law-enforcement-body-camera-final-report/download>.

for the operation of BWCs and the retention and dissemination of camera footage.¹⁰⁶ Cities across the country have made this technology a priority as well.¹⁰⁷

C. Current Policies and Practices for Review of BWC Footage

As the use of BWCs gains greater acceptance, the new grounds of contention are the policies by which police officers and departments control and use the recorded data.¹⁰⁸ In particular, law enforcement and reformers differ on whether officers should be allowed to view BWC footage before writing an incident report, a practice called “pre-review.”¹⁰⁹ Some lawmakers, civil rights organizations, and members of the public maintain that police officers should not be allowed to view their own BWC footage prior to memorializing their account of an event.¹¹⁰

In contrast, police unions have fought hard for policies that allow pre-review.¹¹¹ Pre-review has been, and continues to be, a major topic in contract negotiations between police unions and their municipalities.¹¹² In New Jersey, for example,

106. See, e.g., *id.* at 1–2. The Massachusetts Law Enforcement Body Camera Task Force issued its report to the legislature in August 2022. *Id.* at 1. Among the many issues considered was when BWC footage should be released to the public, how long BWC footage should be retained, and circumstances in which cameras should not be activated to protect the privacy of individuals. See *id.* at 1–2, 24–25. Although the pre-review approach generated a lot of discussion, this issue was not within the scope of the task force to decide because the legislature had previously decided that officers should not review BWC footage until after an initial report was written. *Id.* at 3.

107. See *Boston Police Conclude 1-Year Test of Body Cameras*, CBS NEWS (Sept. 14, 2017, 8:38 AM), <https://www.cbsnews.com/boston/news/boston-police-body-cameras/> (describing Boston Police Department’s testing of body worn cameras); SCH. OF CRIMINOLOGY & CRIM. JUST., NE. UNIV., THE IMPACTS OF BODY WORN CAMERAS ON POLICE-CITIZEN ENCOUNTERS, POLICE PROACTIVITY, AND POLICE – COMMUNITY RELATIONS IN BOSTON: A RANDOMIZED CONTROLLED TRIAL 2 (2018), <https://news.northeastern.edu/wp-content/uploads/2018/08/BPD-BWC-RCT-Full-Report-07272018.pdf> (reporting the results of Northeastern University’s trial of body worn cameras to the Boston Police Department); Darcy Costello, *Hundreds of Baltimore County Officers Don’t Have Body Cameras Years After Program’s Start; Goal Is to Reach All ‘Well Before’ Deadline*, BALT. SUN (Aug. 26, 2022), <https://www.baltimoresun.com/news/crime/bs-md-co-cr-body-cameras-20220825-kjk4edtsrvejhlhgmftzae364-story.html>; Josh Sanburn, *Los Angeles Plans to Outfit Every Cop With a Camera*, TIME (Dec. 16, 2014, 3:23 PM), <https://time.com/3636478/body-cameras-lapd-ferguson/>; HYLAND, *supra* note 82, at 1; see also Press Release, City of Somerville, City of Somerville & Police Union Reach Agreement to Deploy Patrol Officer Body Cameras (Mar. 23, 2021), <https://www.somervillema.gov/policebodycameras> (stating that, in June of 2020, the City of Somerville, Massachusetts, listed the implementation of body worn cameras as one of its top ten priorities for police reform). City of Worcester is the latest municipality in Massachusetts to equip officers with BWCs. See Dave Faneuf & Vanessa Ochavillo, *Worcester Police Department Body Camera Program Is Live. Here’s What You Need to Know*, WBUR (Feb. 27, 2023) <https://www.wbur.org/news/2023/02/27/worcester-body-camera-police-officer-massachusetts>.

108. See, e.g., Jonathan Levinson, *With Unanimous City Council Approval, New Portland Police Union Contract Takes Effect*, OPB (Feb. 24, 2022, 7:11 PM), <https://www.opb.org/article/2022/02/24/portland-city-council-approves-police-union-contract/>.

109. *Id.*

110. See, e.g., Stanley & Bibring, *supra* note 32; L. ENF’T BODY CAMERA TASK FORCE, *supra* note 105, at 3.

111. See, e.g., Levinson, *supra* note 106; Stanley & Bibring, *supra* note 32. For examples of such policies, see N.Y.C. POLICE DEP’T, PATROL GUIDE: USE OF BODY-WORN CAMERAS 6 (2020), and L.A. CNTY. SHERIFF’S DEP’T, MANUAL OF POLICY AND PROCEDURES: 3-06/200.00 - BODY WORN CAMERAS (2020).

112. See, e.g., Levinson, *supra* note 108; Tess Riski, *Should Portland Police Officers Be Allowed to Review Body Camera Footage Before Writing Reports?*, WILLAMETTE WEEK (Feb. 2, 2022, 6:20 AM), <https://www.willamette.com/news/2022/02/02/should-portland-police-officers-be-allowed-to-review-body-camera-footage->

following the killing of George Floyd, the legislature passed a law prohibiting police officers from viewing BWC footage before writing their initial reports.¹¹³ The bill was signed into law in November 2020, but the state legislature reversed direction less than two years later, passing a new law allowing officers to review BWC footage prior to writing police reports in the vast majority of incidents.¹¹⁴

The grip of police unions over policies and procedures governing BWCs is evident in other states as well. In early 2022, Oregon ended a two-year negotiation with the Portland police union over a new contract.¹¹⁵ Though the contract was focused on implementing various police reforms, the union opposed a provision that banned pre-review.¹¹⁶ The parties could not agree on a policy.¹¹⁷ A similar situation arose when Oklahoma City's police union filed a grievance against its department for implementing BWCs without setting procedural standards for how footage could be used.¹¹⁸ The grievance forced the city to cease negotiating over the terms of the footage policy.¹¹⁹

In disputes over BWC policies, police unions have largely won. Police departments, who write their internal policies and procedures, have overwhelmingly allowed for pre-review. A 2019 study performed jointly by Arizona State

before-writing-reports/; cf. Kathy Pezdek, *Should Cops Get to Review the Video Before They Report?*, MARSHALL PROJECT (Aug. 13, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/08/13/should-cops-get-to-review-the-video-before-they-report>.

113. Dana Difilippo & Sophie Nieto-Munoz, *Gov. Murphy Signs Flurry of Bills Just Before Second Term Begins*, N.J. MONITOR (Jan. 19, 2022, 6:55 AM), <https://newjerseymonitor.com/2022/01/19/gov-murphy-signs-flurry-of-bills-just-before-second-term-begins/>.

114. *Id.*; see N.J. STAT. ANN. § 40A:14-118.5 (West 2022). According to Senior Staff Attorney for the ACLU-NJ, Karen Thompson, “This legislation, backed by police lobbyists, fails to provide any measure of increased transparency around law enforcement officer conduct. In fact, it only serves to undermine the single morsel of accountability gained since George Floyd’s murder.” *Legislation Unfairly Allowing Police to View Camera Footage to Write Reports Is Signed Into Law*, ACLU (Jan. 18, 2022), <https://www.aclu-nj.org/en/press-releases/legislation-unfairly-allowing-police-view-camera-footage-write-reports-signed-law>. Similarly in Portland, Oregon, one of the main sticking points for the city’s approval of police body worn cameras was the issue of whether police should be allowed to view their BWC footage before writing their report. Tess Riski, *The Federal Government Is Going to Do What Portland Wouldn’t: Strap Cameras on Cops*, WILLAMETTE WEEK (Oct. 13, 2021), <https://www.wweek.com/news/city/2021/10/13/the-federal-government-is-going-to-do-what-portland-wouldnt-strap-cameras-on-cops/>. Those opposed to allowing officers to “pre-review” argue that it will allow the officer the hindsight to justify their actions. *See id.*

115. Levinson, *supra* note 108.

116. *See id.*

117. *Id.* A survey found that 52.33% of Portland community members believe that in instances where officers have used force, they should not be allowed to view body camera footage before writing their report. Maxine Bernstein, *Majority of Community Members Surveyed Don’t Want Portland Police Watching Body Camera Videos Before Writing Reports*, OREGONIAN (Mar. 2, 2022, 9:15 PM), <https://www.oregonlive.com/crime/2022/03/majority-of-community-members-surveyed-dont-want-portland-police-watching-body-camera-videos-before-writing-reports.html>. The same survey found that 34.10% preferred officers to watch the video before writing their report, and 13.57% did not have a preference. *Id.*

118. *See* Jana Hayes, *Union Files Grievance Against OKC Police Department amid Disagreements on Proposed Body-Cam Changes*, OKLAHOMAN (Dec. 21, 2021, 5:03 AM), <https://www.oklahoman.com/story/news/2021/12/21/oklahoma-city-police-union-files-grievance-over-proposed-body-cam-changes/6450045001/>.

119. *Id.*

University, the CNA Corporation, and Justice and Security Strategies, Inc., and funded by the DOJ's Bureau of Justice Assistance found that from 2015 through 2018 more than eighty-nine percent of police departments using BWCs had policies allowing for officer pre-review.¹²⁰ Today, nine of the ten largest police departments in the United States have policies that allow, and sometimes encourage, officers to view footage before writing incident reports.¹²¹ The most common protocol is that officers "may" view their own BWC footage before completing an incident report.¹²² Los Angeles takes this a step further, stating that "[d]epartment members are *encouraged* to review BWC recordings on their assigned smartphone device or Department computer prior to documenting an enforcement or investigative activity to ensure their reports, statements, and documentation are as accurate and complete as possible."¹²³ San Jose's policy includes even stronger language:

An officer should review body-worn camera files, including those of other officers, in the following instances:

1. For the purposes of completing criminal investigations and preparing official reports with the exception of Officer-Involved Incidents. . . .
2. Prior to courtroom testimony or for courtroom presentations, or as part of preparation by the San Jose City Attorney's Office for litigation in which a police officer is a party or a witness and the City Attorney's Office is representing the City and/or officers who are parties to the litigation.¹²⁴

This particular protocol—that officers should view not only their own footage but also the footage of other officers to both complete reports and to prepare courtroom testimony—appears to be the most expansive pre-review policy of any major police department. Comprehensive analysis of the pre-review policies of seventy-

120. MICHAEL D. WHITE, MICHAELA FLIPPIN & AILI MALM, KEY TRENDS IN BODY-WORN CAMERA POLICY AND PRACTICE: A FOUR-YEAR POLICY ANALYSIS OF US DEPARTMENT OF JUSTICE-FUNDED LAW ENFORCEMENT AGENCIES 12 (2019), https://bwcta.com/sites/default/files/inline-files/BWC%20Policy%20Analysis%20-%204th%20edition%20FINAL.Dec._2019.pdf (reporting results for law enforcement agencies that received funding for BWCs through the DOJ).

121. See POLICE BODY WORN CAMERAS: A POLICY SCORECARD, *supra* note 25; Ellen Kershner, *The Largest Police Departments in the US*, WORLDATLAS (Aug. 3, 2020), <https://www.worldatlas.com/articles/the-largest-police-departments-in-the-us.html>. The Metropolitan Police Department of the District of Columbia is the sole exception. See POLICE BODY WORN CAMERAS: A POLICY SCORECARD, *supra* note 25; Kershner, *supra*. Their policy prohibits pre-review in police shooting cases, but it allows pre-review in all other cases. POLICE BODY WORN CAMERAS: A POLICY SCORECARD, *supra* note 25.

122. See, e.g., N.Y.C. POLICE DEP'T, *supra* note 111 ("In the performance of their duties, uniformed members of the service may view . . . [t]heir own BWC recordings . . ."); Law Enforcement Officer-Worn Body Camera Act, 50 ILL. COMP. STAT. ANN. 706/10-20(a)(6)(A) (West 2022) ("[T]he recording officer and his or her supervisor may access and review recordings prior to completing incident reports . . ."); HOUS. POLICE DEP'T, GENERAL ORDER NO. 400-28, 11 (2021) ("Officers may, but are not required to, review BWC videos before completing an incident report."); PHILA. POLICE DEP'T, DIRECTIVE 4.21, 10 (2019) ("[O]fficers may review their own BWC recordings for the purpose of . . . [c]ompleting a thorough investigation [or] [p]reparing official incident reports and related documentation.").

123. L.A. CNTY. SHERIFF'S DEP'T, *supra* note 111 (emphasis added).

124. *Body Worn Camera Policy*, SAN JOSE POLICE DEP'T, <https://www.sjpd.org/about-us/inside-sjpd/body-camera-information/san-jose-police-body-worn-camera-policy> (last visited Oct. 15, 2023) (emphasis added).

five police departments, including the ten largest in the country, did not reveal any policies as broad as San Jose's.¹²⁵

Police officers' fervent commitment to pre-review can best be explained by concern over inconsistencies between officer incident reports and BWC footage. Both pieces of information have evidentiary significance should they become part of an adversarial proceeding. Officers fear their credibility will be challenged due to inconsistencies between the incident report and the camera footage.¹²⁶ Nonetheless, it is short-sighted for police to deprive stakeholders of an officer's firsthand account of what they recall happening, which can have important legal implications. It is wiser to let investigators, judges, and jurors determine the reasons for inconsistencies and make their own credibility assessment of a particular piece of evidence.

Police may counter by insisting that, if they are forced to write reports before watching BWC footage, they will simply submit reports that refer to the recordings and offer no substantive information. This, of course, would deprive fact-finders of the officer's unblemished recollection of events. It is noteworthy that many police departments prohibit officers involved in a police shooting or other deadly-force incident from viewing BWC footage prior to completing an incident report.¹²⁷ So when critical incidents occur that could lead to discipline or criminal charges against an officer, BWC policies prioritize the importance of preserving the officer's independent recollection. Put another way, when an officer and the department are on *opposing* sides of an adversarial proceeding, the department recognizes the evidentiary need to prohibit pre-review. That same recognition should apply in *all* instances involving BWC footage to ensure accuracy, maintain accountability and public trust, and safeguard fairness in the adversarial system.

II. REVIEWING BWC FOOTAGE AND ITS EFFECT ON MEMORY

The benefits of a "write first, then watch" policy can be found in the cognitive science research about the suggestibility of memory. Human memory does not

125. See POLICE BODY WORN CAMERAS: A POLICY SCORECARD, *supra* note 25.

126. Topeka police chief Ron Miller expressed this sentiment when he said that "[a]n officer should be given the chance to make a statement using all of the evidence available; otherwise, it looks like we are just trying to catch an officer in a lie." See *Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1808 (2015).

127. See, e.g., Law Enforcement Officer-Worn Body Camera Act, 50 ILL. COMP. STAT. ANN. 706/10-20(a)(6) (A) (West 2022) ("A law enforcement officer shall not have access to or review his or her body-worn camera recordings or the body-worn camera recordings of another officer prior to completing incident reports or other documentation when the officer . . . has been involved in or is a witness to an officer-involved shooting, use of deadly force incident, or use of force incidents resulting in great bodily harm"); S.F. POLICE DEP'T, GENERAL ORDER 10.11: BODY WORN CAMERAS 4 (2020), https://www.sanfranciscopolice.org/sites/default/files/2020-11/DGO10.11.BWC_20201110.pdf ("Following any (1) officer-involved shooting; or (2) in-custody death; any subject officer shall be required to provide an initial statement before the member reviews their own BWC recording(s). Officers may not view any other member's BWC recording(s) or any other video(s) that may capture an officer-involved shooting or in-custody death.").

function like a video recorder that objectively collects and stores events.¹²⁸ Much to the contrary, cognitive scientists widely agree that memory is imperfect and highly susceptible to distortion.¹²⁹ This Part is divided into three sections. The first section describes how memories are formed by outlining the three major steps of memory creation. The second section discusses the ways in which the quality and accuracy of memories are shaped by external influences. The final section connects the imperfect nature of memory with the imperative that police officers write their statements prior to any review of BWC footage.

A. *How Memory Works*

Memory functions as a dual process in which the unconscious interacts with the conscious.¹³⁰ The brain takes in information through both effortful processing, which leads to declarative, or explicit memory, and automatic processing, which leads to nondeclarative, or implicit memory.¹³¹

Within this process, there are three major steps in creating and maintaining memories.¹³² First, people receive information through “encoding,” the process by which the brain takes in information.¹³³ Second, they “store” the information.¹³⁴ Finally, in the third stage, they “retrieve” or “recall” the memory.¹³⁵

The quality and content of the memories are subject to external influences throughout these three stages. Even at the very first stage of creating a memory, the encoding stage, several factors may impact the accuracy of the memory.¹³⁶ These factors include, but are not limited to, a person’s “perception, attention, focus,

128. Despite voluminous studies on memory and brain science dating back one hundred years, lay people are under the mistaken belief that memories act like video recordings and what we recall of an event is truly the most accurate and detailed account. See Kristyn A. Jones, Pre-Report Review of Body-Worn Camera Footage: An Examination of Stakeholder Beliefs, Laypeople’s Judgments of Officer Credibility, and the Consequences for Memory 26 (June 2020) (Ph.D. dissertation, City University of New York) (on file with CUNY Academic Works).

129. See generally Joyce W. Lacy & Craig E. L. Stark, *The Neuroscience of Memory: Implications for the Courtroom*, 14 NATURE REVS. NEUROSCIENCE 649 (2013). In fact, the imperfect nature of memory was first found in 1885, when a researcher found that people were unable to retrieve about 50% of the information they had learned just one hour after learning and encoding that information. See *id.* at 649 (citing HERMANN EBBINGHAUS, *MEMORY: A CONTRIBUTION TO EXPERIMENTAL PSYCHOLOGY* (1885)). Ebbinghaus is most known for his “retention curve,” which states that as time rehearsing increases, the time it takes to re-learn decreases. See ELIZABETH YOST HAMMER, DAVID G. MYERS & C. NATHAN DEWALL, *MYERS’ PSYCHOLOGY FOR THE AP COURSE 328* (3d ed. 2018).

130. See generally Larry R. Squire & Adam J.O. Dede, *Conscious and Unconscious Memory Systems*, COLD SPRING HARBOR PERSPS. BIOLOGY, Mar. 2015, at 1.

131. HAMMER, MYERS & DEWALL, *supra* note 129, at 330–31. For example, automatic processing occurs when humans unconsciously keep track of how many times they have run into the same person that day. *Id.* at 331. In contrast, an example of effortful processing is driving or speaking a new language. *Id.*

132. *Id.* at 329 (displaying a graphic which demonstrates the stages of processing a memory).

133. *Id.*

134. *Id.*

135. *Id.*

136. See Ralph Norman Haber & Lyn Haber, *Experiencing, Remembering and Reporting Events*, 6 PSYCH., PUB. POL’Y, & L. 1057, 1059 (2000).

expertise, and understanding.”¹³⁷ Moreover, the way in which a brain encodes information will heavily affect the brain’s ability to accurately retrieve that memory later on.¹³⁸ For instance, if a person takes in information but pays little attention to it, the information becomes harder to eventually remember.¹³⁹ A person’s level of attention, prior experience with the situation, and general understanding of their experience will also impact how their brain takes in that information.¹⁴⁰ For example, an officer’s memory of an incident may consist of details of what the officer saw, smelled, and touched, and that memory will be impacted by the officer’s level of attention to those details during the incident.

In the second stage of memory processing, the storage stage, memory is stored in the brain, either as short-term or long-term memory.¹⁴¹ Storage occurs in the frontal lobe and hippocampus for explicit memories.¹⁴² Meanwhile, implicit memories are formed in the basal ganglia and cerebellum and stored in the cerebellum.¹⁴³

In the third stage, the retrieval stage, a person accesses and recalls their stored memory.¹⁴⁴ Retrieval cues, which are associations with the memory (e.g. certain smells, tastes, and sights), invoke the retrieval of the memory.¹⁴⁵ The more cues, the more likely the memory will be retrieved.¹⁴⁶ For instance, the smell of burning may trigger an officer’s memory of a house fire they responded to. During retrieval, the memory may be altered because details may be lost or misconstrued during the recall.¹⁴⁷ As a result, the next time a person retrieves that same memory, it will likely be different, incorporating the changes that occurred the last time the memory was recalled.¹⁴⁸ Given the malleability of memory, there are strong reasons to

137. *Id.* at 1064.

138. *Id.* at 1065.

139. See HAMMER, MYERS & DEWALL, *supra* note 129, at 330.

140. Haber & Haber, *supra* note 136, at 1059–62 (detailing how observational point of view and allocation of attention affect memory processing).

141. See Saul Mcleod, *Memory Stages: Encoding Storage and Retrieval*, SIMPLYPSYCH. (June 16, 2023), www.simplypsychology.org/memory.html.

142. HAMMER, MYERS & DEWALL, *supra* note 129, at 340.

143. *Id.* at 341.

144. John Appel, *A Tale of Woe: A Comment on Impeaching a Depressed Person’s Memory*, 58 HOUS. L. REV. 937, 943 (2021).

145. HAMMER, MYERS & DEWALL, *supra* note 129, at 345.

146. *Id.*

147. See Kaitlyn Hair, *Malleable Memory*, GIST: GLASGOW INSIGHT INTO SCI. & TECH. (Sept. 5, 2016), <https://the-gist.org/2016/09/malleable-memory>.

148. Marla Paul, *Your Memory Is Like the Telephone Game*, NW. NOW (Sept. 19, 2012), <https://news.northwestern.edu/stories/2012/09/your-memory-is-like-the-telephone-game#:~:text=Every%20time%20you%20remember%20an,the%20first%20to%20show%20this> (discussing how this distortion can be especially relevant in eyewitness testimony). This effect is sometimes referred to as “interference,” which occurs when new information blocks the recall of the older information, causing the brain to forget that information. See Avi J.H. Chanales, Nicole M. Dudukovic, Franziska R. Richter & Brice A. Kuhl, *Interference Between Overlapping Memories Is Predicted by Neural States During Learning*, NATURE COMMUN. 2 (Nov. 25, 2019), <https://www.nature.com/articles/s41467-019-13377-x>.

encourage memorializing events in writing immediately after they occur and before exposure to external stimuli.

B. *Factors and Impacts on the Accuracy of Memories*

It is widely known that memory fades over time.¹⁴⁹ This is due in part to the fact that the passage of time causes memories to become generalized as the memory is continuously retrieved and re-encoded.¹⁵⁰ The more a memory is similar to another memory, the stronger the level of generalization; the brain's hippocampus struggles to differentiate the similar memories.¹⁵¹ There are also a number of external factors that impact the accuracy of a person's memory, including stress, memory bias, familiarity and experience, racial bias, and post-event information.

1. Stress

The impact of stress on memory depends on the level of stress and an individual's level of physiological arousal.¹⁵² A moderate amount of stress enhances memory, while highly stressful situations can impair memory.¹⁵³ Moderately stressful situations have been found to impact memories in various ways.¹⁵⁴ When stress is induced immediately before a person encodes the information, memory may be preserved.¹⁵⁵ This is because stress releases hormones like noradrenaline and cortisol that enhance the consolidation of memory.¹⁵⁶ Additionally, during a stressful situation, the brain tends to focus on central aspects of the situation and, as a result, encode those details most clearly and accurately.¹⁵⁷ This is often referred to as a "filtering process," in which a person filters out less important details to focus their attention on crucial parts of the situation that are then encoded into memory.¹⁵⁸ Therefore, a moderate amount of stress during a situation may actually work to improve the memory of key aspects of the situation.¹⁵⁹

149. Am. Psych. Ass'n, *The Seven Sins of Memory*, with Daniel Schacter, PhD, YOUTUBE (Sept. 15, 2021), <https://www.youtube.com/watch?v=zXk9NngouYkY>.

150. Lacy & Stark, *supra* note 129, at 653.

151. *See id.*

152. *See* Kimberley A. McClure, Katherine L. McGuire & Elizabeth F. Loftus, *Officers' Memory and Stress in Virtual Lethal Force Scenarios: Implications for Policy and Training*, 26 PSYCH., CRIME & L., 248, 250–53 (2019).

153. *Id.* at 250 (explaining that facilitation of memories also depends on individual perceptions of moderate stress).

154. *Cf.* Hoscheidt et al., *supra* note 17, at 237.

155. *Id.*

156. *See* Marloes J. A. G. Henckens, Erno J. Hermans, Zhenwei Pu, Marian Joëls & Guillén Fernández, *Stressed Memories: How Acute Stress Affects Memory Formation in Humans*, 29 J. NEUROSCIENCE 10111, 10111, 10114 (2009); Anne Bierbrauer, Marie-Christin Fellner, Rebekka Heinen, Oliver T. Wolf & Nikolai Axmacher, *The Memory Trace of a Stressful Episode*, 31 CURRENT BIOLOGY 5204, 5204, 5206 (2021). Stress also activates the basolateral amygdala (BLA), which causes memories to be more firmly encoded. Lacy & Stark, *supra* note 129, at 655.

157. *See* Bierbrauer et al., *supra* note 156.

158. Di Nota et al., *supra* note 11, at 9.

159. *Id.*

At the same time, individuals react to highly stressful situations differently, and some people may experience memory and encoding impairment.¹⁶⁰ For instance, physical stress has been found to reduce the accuracy of a person's recall of an incident's specific details, such as facial recognition of the individuals involved.¹⁶¹ Furthermore, highly stressful situations can reduce memory quality and accuracy.¹⁶² One study found that both officers and bystanders were unable to recall as many details of a use-of-lethal-force situation in which a shooting occurred as compared to a lower-stress situation in which no shooting occurred.¹⁶³ To be sure, police officers routinely experience high stress in use-of-force incidents.¹⁶⁴ Therefore, the quality of an officer's memory of a situation may depend on the level of stress experienced and the individual's physiological stress response.¹⁶⁵ Further, researchers in one study noted that police officers are prone to "offloading," the brain's process of discarding unnecessary information to save space for more important memories, because of the high-stress situations they often confront.¹⁶⁶ Applying this phenomenon to an officer's memory, it is fair to say the memory will be more precise and accurate if the officer knows they will be required to give a first-hand account of the event prior to reviewing the BWC footage.¹⁶⁷ Pre-review may inhibit the officer's retrieval of certain details, which could be of legal significance.

Police officers may use these phenomena to argue that pre-review is needed to counter stress-induced memory issues. In that respect, however, pre-review would have no added benefits over a "write first, then watch" policy that allows officers to supplement their reports after viewing BWC footage. There is dual benefit to having both the footage and an accurate pre-viewing report from the officer. These

160. Lacy & Stark, *supra* note 129, at 655.

161. Di Nota et al., *supra* note 11, at 5.

162. *Id.* at 9. High stress increases production of guanine-cytosine, which negatively impacts the encoding stage. *Id.*

163. *Id.* (citing Claudia J. Stanny & Thomas C. Johnson, *Effects of Stress Induced by a Simulated Shooting on Recall by Police and Citizen Witnesses*, 113 AM. J. PSYCH. 359, 378–79 (2000)). These findings have also been supported by Hulse and Memon. *Id.* (citing Lynn M. Hulse & Amina Memon, *Fatal Impact? The Effects of Emotional Arousal and Weapon Presence on Police Officers' Memories for a Simulated Crime*, 11 L. & CRIMINOLOGICAL PSYCH. 313, 321 (2006)).

164. See *Psychological Research on the Use of Body-Worn Cameras*, *supra* note 23, at 41.

165. See *id.* at 55 ("An extensive research literature has generally supported the detrimental effect of stress on memory.") (citation omitted).

166. Brittany Blaskovits & Craig Bennell, *Exploring the Potential Impact of Body Worn Cameras on Memory in Officer-Involved Critical Incidents: A Literature Review*, 35 J. POLICE & CRIM. PSYCH. 251, 257 (2020). As one supporter of police use of BWCs noted, "[t]his offloading frees officers to use their attention on cognitive processes like communication, de-escalation, problem-solving, and decision-making. It also provides the needed mental resources to engage in motor tasks like unholstering, aiming, moving to cover, or deploying intermediate use of force options." Von Kliem, *Body-Worn Cameras and Memory*, FORCE SCI. (Sept. 17, 2020), <https://www.forcescience.com/2020/09/body-worn-cameras-and-memory/>.

167. Cf. Vredeveltd et al., *supra* note 11, at 437. ("[T]his procedure makes it more difficult to strategically restrict reports to on-camera details since the officer does not know exactly what has been recorded.") (citation omitted).

pieces of evidence work together, not only to provide the full story but also to account for any discrepancies in the officer's perspective, which may explain why the officer decided to act in the way that they did.

2. Impacts on Perception – Schemas & Bias

The way people perceive events is also affected by their internal biases.¹⁶⁸ We cannot separate one's perception of a stimulus from one's motivations, beliefs, and general knowledge, which together are referred to as "schemas."¹⁶⁹ Schemas are "abstract mental representations that influence perceptual and memory processes."¹⁷⁰ Research on implicit bias suggests that people's perceptions of situations can be at odds with reality due to their knowledge and perspectives.¹⁷¹ Therefore, "[w]hen we experience an event, we access the relevant schema to comprehend the event. Hence, our memory is not a mere record of the experienced event, but the product of an interpretation under a schema."¹⁷²

For instance, a person's racial prejudices may impact the way they remember a situation.¹⁷³ Racial bias is especially relevant for police officers and their perceptions. Numerous studies have shown that people of color are more likely to be targeted by police than are white people.¹⁷⁴ While explicit racism undoubtedly accounts for some of these results, implicit biases play a large role as well.¹⁷⁵ Police officers, just like civilians, use schemas about race that influence their actions.¹⁷⁶ One common schema involves associating Black people with criminal activity.¹⁷⁷ For example, a study found that police tend to react more quickly to armed Black suspects and unarmed white suspects, as these suspects align with racial stereotypes.¹⁷⁸ Due to these biases, police may recall a person as more

168. See Haber & Haber, *supra* note 136, at 1063.

169. See Joseph W. Alba & Lynn Hasher, *Is Memory Schematic?*, 93 PSYCH. BULL. 203, 203 (1983) (suggesting that memory is influenced by each person's schemas); Haber & Haber, *supra* note 136, at 1063 (discussing how a person's beliefs impact their encoding of memories); Rolando Masís-Obando, Kenneth A. Norman & Christopher Baldassano, *Schema Representations in Distinct Brain Networks Support Narrative Memory During Encoding and Retrieval*, eLIFE 1, 11–12 (Apr. 8, 2022), <https://elifesciences.org/articles/70445> (discussing how schemas impact the encoding and retrieval stages of memory processing).

170. Christina E. Webb & Nancy A. Dennis, *Memory for the Usual: The Influence of Schemas on Memory for Non-Schematic Information in Younger and Older Adults*, 37 COGNITIVE NEUROPSYCHOLOGY 58, 58 (2020).

171. See Haber & Haber, *supra* note 136, at 1063.

172. Ryoma Yamada & Yukio Itsukushima, *The Effects of Schema on Recognition Memories and Subjective Experiences for Actions and Objects*, 55 JAPANESE PSYCH. RSCH. 366, 366 (2013) (citation omitted).

173. Haber & Haber, *supra* note 136, at 1063.

174. See Kirsten Weir, *Policing in Black & White*, MONITOR ON PSYCH., Dec. 2016, at 36, <https://www.apa.org/monitor/2016/12/cover-policing>.

175. See *id.*

176. See *id.*

177. See *id.*

178. *Id.* (citing Joshua Correll, Bernadette Park, Charles M. Judd, Bernd Wittenbrink, Melody S. Sadler & Tracie Keese, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006, 1020 (2007)); see also Kimberly Barsamian Kahn & Paul G. Davies, *What Influences Shooter Bias? The Effects of Suspect Race, Neighborhood, and Clothing on Decisions to Shoot*, 73 J.

suspicious or threatening than they actually were on video. Officers may also experience an “own-race bias,” a phenomenon in which a person is better able to identify people of their own race than those of a different race.¹⁷⁹ This phenomenon has been observed in controlled studies and reveals that when there are several parties of various races involved in a scenario, one’s own-race bias will affect their identification of actors and proper understanding of the scenario.¹⁸⁰

Racial bias, of course, affects policing in ways that go far beyond officers’ memories of certain events.¹⁸¹ A database of killings by police compiled by The Washington Post offers a snapshot: In 2016, for example, of the 958 people reportedly killed by police, 437 of them (forty-six percent) were people of color.¹⁸² In the wake of George Floyd’s death, The New York Times reported that fifty-nine percent of use-of-force incidents in Minneapolis involved Black citizens, even though Black citizens make up only twenty percent of the Minneapolis population.¹⁸³ Further, a review of more than four million traffic stops in California produced similar results, demonstrating that Black people are overwhelmingly more likely to be stopped and searched.¹⁸⁴ This review also showed that a vehicle stopped with Black individuals inside is much more likely to lead to an officer engaging their weapon than a stop involving a white individual.¹⁸⁵ These statistics all lead to the same end result: a criminal-justice system that disproportionately investigates, prosecutes, and punishes people of color.¹⁸⁶

Soc. Issues 723, 737 (2017) (finding participants displayed racial bias in their shooting decisions, which was more pronounced if targets wore “stereotypically threatening criminal attire”).

179. See generally Hoo Keat Wong, Ian D. Stephen & David R. T. Keeble, *The Own-Race Bias for Face Recognition in a Multiracial Society*, FRONTIERS PSYCH., Mar. 2020, at 1, <https://doi.org/10.3389/fpsyg.2020.00208> (explaining own-race bias).

180. See Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821, 1840–41 (2003) (discussing the high rate of error in cross-racial identifications as compared to same-race identifications and the implications for due process).

181. See generally Phillip Atiba Goff & Kimberly Barsamian Khan, *Racial Bias in Policing: Why We Know Less than We Should*, 6 SOC. ISSUES & POL’Y REV. 177 (2012).

182. *Fatal Force*, *supra* note 1. “People of color” refers to victims identified in the database as Black, Hispanic, Asian, or Native American.

183. Richard A. Opper Jr. & Lazaro Gamio, *Minneapolis Police Use Force Against Black People at 7 Times the Rate of Whites*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/interactive/2020/06/03/us/minneapolis-police-use-of-force.html>.

184. Magnus Lofstrom, Joseph Hayes, Brandon Martin & Deepak Premkumar, *Racial Disparities in Law Enforcement Stops*, PUB. POL’Y INST. OF CAL., <https://www.ppic.org/publication/racial-disparities-in-law-enforcement-stops/> (last visited Aug. 19, 2023); see also, Joseph Goldstein, *Judge Rejects New York’s Stop-and-Frisk Policy*, N.Y. TIMES (Dec. 12, 2013) (Judge Shira Scheindlin finds NYC’s stop-and-frisk policy unconstitutional based on a pattern and practice of racially profiling Black and Latino men).

185. *Id.*

186. See Colleen Walsh, *Solving Racial Disparities in Policing*, HARV. GAZETTE (Feb. 23, 2021), <https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing/> (explaining that black men are 5.9 times more likely to be imprisoned than white men); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 8 (2012) (“[N]o other country in the world incarcerates such an astonishing percentage of its racial or ethnic minorities.”).

3. Expectations & Familiarity

Schemas also involve expectations about how a certain situation or event is “supposed to” occur.¹⁸⁷ For example, witnesses’ ideas of how a robbery occurs may be impacted by robberies they have heard about or seen on the news or in movies.¹⁸⁸ In turn, their memories of an actual robbery may be affected by these expectations.¹⁸⁹ This distorting impact on memory was seen in a study where participants in a mock trial setting were found to remember details of a robbery consistent with a typical “script” of a robbery.¹⁹⁰ As a result, participants included details of the robbery in their memories that never actually occurred.¹⁹¹ This effect may also affect police officers’ perceptions of situations.¹⁹² Specifically, studies have found that officers often rely on “event schemas,” which are described as scripts that are stored in officers’ brains, regarding the typical sequence of a certain type of event.¹⁹³ These scripts provide officers with certain expectations as to how the event will play out and how to react.¹⁹⁴ Importantly, schemas change over time based upon experience, so younger, less experienced officers may ascribe different schemas to different events, as compared to older, more experienced officers.¹⁹⁵ One study found that police officers use cognitive schemas to evaluate unusual and unclear behavior as suspicious.¹⁹⁶ In other words, when compared to the average person, police officers are more likely to interpret behavior that seems out of the ordinary as suspicious or threatening.¹⁹⁷ This schema may guide officers to react to these situations, perhaps by confronting the unusual behavior or investigating further.¹⁹⁸ Thus, what may appear to be simply strange behavior on BWC footage may be perceived by police officers as threatening and may motivate them to react.¹⁹⁹

187. See *Psychological Research on the Use of Body-Worn Cameras*, *supra* note 23, at 54.

188. *See id.*

189. *See id.*

190. *Id.* (citing Valerie Fisher Holst & Kathy Pezdek, *Scripts for Typical Crimes and Their Effects on Memory for Eyewitness Testimony*, 6 APPLIED COGNITIVE PSYCH. 573 (1992)).

191. *Id.* (citing Valerie Fisher Holst & Kathy Pezdek, *Scripts for Typical Crimes and Their Effects on Memory for Eyewitness Testimony*, 6 APPLIED COGNITIVE PSYCH. 573 (1992)).

192. *See id.* (citing Lorraine Hope, David Blocksidge, Fiona Gabbert, James D. Sauer, William Lewinski, Arta Mirashi & Emel Atuk, *Memory and the Operational Witness: Police Officer Recall of Firearms Encounters as a Function of Active Response Role*, 40 L. & HUM. BEHAV. 23 (2016)).

193. *See* Amy C. Watson, James Swartz, Casey Bohrman, Liat S. Kriegal & Jeffrey Draine, *Understanding How Police Officers Think About Mental/Emotional Disturbance Calls*, 37 INT’L J. L. & PSYCHIATRY 351, 353, 355 (2014).

194. People also develop “person schemas,” which guide thoughts on how certain types of people behave and ascribe certain attributes to those people. *Id.* at 353.

195. *Id.*

196. GEOFFREY P. ALPERT, ROGER G. DUNHAM, MEGHAN STROSHINE, KATHERINE BENNETT & JOHN MACDONALD, *POLICE OFFICERS’ DECISION MAKING AND DISCRETION: FORMING SUSPICION AND MAKING A STOP* 1–8 (2004) (citing C.L. Ruby & John C. Bringham, *A Criminal Schema: The Role of Chronicity, Race and Socioeconomic Status in Law Enforcement Officials’ Perceptions of Others*, 26 J. APPLIED SOC. PSYCH. 95 (1996)).

197. *Id.*

198. *Id.*

199. *See id.*

Additionally, a person's familiarity with a thing or situation, or lack thereof, will impact the number of accurate details they encode and, in turn, the number of inaccurate details the brain creates.²⁰⁰ For example, one study found that when witnesses to a hit-and-run vehicle collision were asked about the make and model of a car, those unfamiliar with types and features of cars were more likely to add details they did not actually remember and were less able to provide detailed descriptions of the car.²⁰¹ Meanwhile, car-savvy witnesses were better able to provide accurate descriptions of the car.²⁰² Thus, while a video recording provides an objective view of a situation, a person's memory of that situation will be more subjective because memory is influenced by their perception of that situation.²⁰³

4. Post-Event External Influences

Studies have also found that there are many ways an officer's memory can be affected after the event. In one study, researchers found that officers speaking with one another about the situation improved their *confidence* in the memory but not the *accuracy* of the memory.²⁰⁴ These discussions may even create false memories, especially when officers do not first record their own memories.²⁰⁵ Therefore, it is best if an officer first records their own memory so that external factors do not influence their account.²⁰⁶ In addition, review of any kind of external information before memorializing one's memory of the event could suppress memory consolidation and cause a person to have trouble recalling information that deviates from the external information.²⁰⁷ This phenomenon is known as "retrieval-induced forgetting," which occurs when retrieval of parts of a memory reduces access to other pieces of the memory that are not being retrieved.²⁰⁸ Retrieval-induced forgetting can also occur when an officer reviews a recording of an incident they were

200. See Haber & Haber, *supra* note 136, at 1062–63.

201. *Id.* at 1062 (citing Graham Davis, Anetta Kurvink, Rebecca Mitchell & Noelle Robertson, *Memory for Cars and Their Drivers: A Test of the Interest Hypothesis*, in DOUGLAS J. HERRMANN, CATHY MCEVOY, CHRIS HERTZOG, PAULA HERTEL & MARCIA K. JOHNSON, BASIC AND APPLIED MEMORY RESEARCH: PRACTICAL APPLICATIONS (1996)).

202. *Id.* (citing Graham Davis, Anetta Kurvink, Rebecca Mitchell & Noelle Robertson, *Memory for Cars and Their Drivers: A Test of the Interest Hypothesis*, in DOUGLAS J. HERRMANN, CATHY MCEVOY, CHRIS HERTZOG, PAULA HERTEL & MARCIA K. JOHNSON, BASIC AND APPLIED MEMORY RESEARCH: PRACTICAL APPLICATIONS (1996)). This concept of familiarity affecting memory has also been seen in cross-racial identification. *Id.* at 1063 (citation omitted). When the race of the suspect was different from that of the witness, and the witness had very few associations with people of that race, the witness was unable to observe as many distinct features of the suspect, decreasing the likelihood that their identifications were accurate. *Id.*

203. See Grady et al., *supra* note 11, at 247.

204. Di Nota et al., *supra* note 11, at 10 (citing Lorraine Hope, Fiona Gabbert & Joanne Fraser, *Postincident Conferring by Law Enforcement Officers: Determining the Impact Of Team Discussions on Statement Content, Accuracy, and Officer Beliefs*, 37 L. & HUM. BEHAV. 117 (2013)).

205. *Id.*

206. See *id.* at 12.

207. See *id.*

208. Grady et al., *supra* note 11, at 246; Vredeveltdt et al., *supra* note 11, at 429.

involved in and the footage only captures a limited perspective of the situation.²⁰⁹ The officer who experienced the situation will undoubtedly observe details the camera did not capture.²¹⁰ If an officer reviews the footage prior to writing their report, they may forget these “out of frame” details.²¹¹

Researchers have also studied how memory can be influenced by post-event information in the interview context, in which officers or witnesses might be exposed to misleading details.²¹² One early study of this effect asked participants to review photos of a car running a stop sign and hitting a pedestrian.²¹³ One group of participants was asked how fast the car was going “when it ran through the yield sign,” providing the misleading detail that the sign was a yield sign rather than a stop sign.²¹⁴ When asked what traffic sign was involved in the accident, this group was more likely to report that the car ran through the yield sign as compared to the control group, who was not exposed to the misleading detail.²¹⁵ Thus, the leading question itself had the ability to affect some participants’ memories.²¹⁶

C. Pre-Review of BWC Footage and Its Effect on Memory

The way in which memory works and how memory can be influenced is highly relevant to whether officers should be allowed to review body worn camera footage before recording their own recollection of the relevant event. Police officers often serve as percipient witnesses.²¹⁷ In fact, police officers are in many cases the only witnesses to testify for the prosecution. The criminal justice system is an adversarial system, meaning that an officer’s account of events will be scrutinized by lawyers, judges, and juries. Officer testimony is consequential on issues of the legality of a stop, search, and arrest as well as ultimate questions of guilt or innocence. For as long as policies and procedures have existed for police officer report writing, the standard practice has been to memorialize events as close in time to the event as possible.²¹⁸ For instance, officers generally do not end their shifts

209. See Grady et al., *supra* note 11, at 247.

210. See *id.*

211. *Id.*

212. See *Psychological Research on the Use of Body-Worn Cameras*, *supra* note 23, at 54 (discussing studies on post-event information).

213. Hoscheidt et al., *supra* note 17 (citing Elizabeth F. Loftus, David G. Miller & Helen J. Burns, *Semantic Integration of Verbal Information into a Visual Memory*, 4 J. EXPERIMENTAL PSYCH.: HUM. LEARNING AND MEMORY 19 (1978)).

214. *Id.*

215. *Id.*

216. *Id.*

217. Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1341 (2018); see also Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 245 (1998) (“Police are professional witnesses, perhaps the most experienced witnesses of any occupational group.”).

218. See, e.g., ALBUQUERQUE POLICE DEP’T, SOP 2-16: REPORTS 6-7 (2023), <https://public.powerdms.com/COA/tree/documents/19>; ATLANTA POLICE DEP’T, SOP 3060: REPORTS & REPORT WRITING 2 (2021), <https://public.powerdms.com/APD13/list/documents/488600>; CINCINNATI POLICE DEP’T, 12.400:

without writing reports of events that have evidentiary significance.²¹⁹ This standard procedure developed because details are fresher the closer in time to the event.²²⁰ Moreover, lapses in time allow for the opportunity for memory to be influenced by post-event information.²²¹

Showing an officer BWC footage naturally causes the officer to incorporate into their memory those new details they may not have remembered or even seen in the first place.²²² This was confirmed by a study in which a group of police officers completed two training scenarios and then answered questions about what had happened during those exercises.²²³ All of the officers first answered the questions without reviewing footage from the BWCs they had worn; they then answered the questions again a few minutes later, but some of the officers did so after reviewing the BWC recording.²²⁴ The group that reviewed the footage displayed more variability in their responses over time than the control group.²²⁵ The group that reviewed the footage also displayed more omissions—that is, they left out details that were not captured by the footage.²²⁶ Finally, these officers input more details that were present in the footage but were omitted from their initial reports.²²⁷ Even if the officer’s answer to the question was more accurate after watching the BWC footage, it reflected the “20/20 vision of hindsight” the Supreme Court warned against in *Graham*.²²⁸ The officer’s original memory of the events as they perceived them in real-time is a critical piece of evidence, and the write-first approach solidifies that evidence before it can be affected by external forces.²²⁹ This

INCIDENT AND MISCELLANEOUS REPORTING 2 (2019), <https://public.powerdms.com/Cin3647/tree/documents/2142610>. Overall, “the best way to preserve an accurate, complete, and informative memory from an officer’s report . . . [is] . . . interviewing the officer sooner rather than later, before any other new information, evidence, BWC footage, or time has contaminated or decayed an officer’s memory and perception of an event.” Grady et al., *supra* note 11, at 250.

219. *See, e.g.*, BALT. POLICE DEP’T, POLICY 104: INCIDENT REPORTING (2016) (“Submit all reports without undue delay, but in any case before completion of the tour of duty.”); CHI. POLICE DEP’T, SPECIAL ORDER S09-05-01: DEPARTMENT REPORTS AND LETTERS OF CLEARANCE (2003) (“Members will complete and submit all preliminary case reports within their tour of duty.”); S.F. POLICE DEP’T, GENERAL ORDER 1.03: DUTIES OF PATROL OFFICERS (1996) (“Submit every arrest and non-arrest report to a superior officer prior to reporting off duty.”).

220. *See* Am. Psych. Ass’n, *The Seven Sins of Memory, with Daniel Schacter, PhD*, YOUTUBE (Sept. 15, 2021), <https://www.youtube.com/watch?v=zXk9NgoUYkY> (detailing how memories fade as time passes).

221. Grady et al., *supra* note 11, at 247–49.

222. *See id.* at 247. *See generally* Henry L. Roediger III & Kathleen B. McDermott, *Creating False Memories: Remembering Words Not Presented in Lists*, 21 J. EXPERIMENTAL PSYCH. 803 (1995) (discussing false memories).

223. *Memory Outcomes, supra* note 15, at 395–96, 401.

224. *Id.* at 396.

225. *Id.* at 401.

226. *Id.* at 399, 401.

227. *Id.*

228. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Terry v. Ohio*, 392 U.S. 1, 20–22 (1968)).

229. *See Vredveldt et al., supra* note 11, at 437. This is also assuming that accuracy is defined as what the body camera footage captured.

phenomenon demonstrates how vulnerable memory is to new information, whether correct or not.²³⁰

Writing a report immediately after an event occurs preserves the officer's memory and decreases the opportunity for it to be influenced by external factors. Therefore, law enforcement and society more generally are best served by the "write first, then watch" approach, which prevents those original memories from being exposed to external information and influences.²³¹ Footage from an officer's BWC is a critical source of those external influences.²³²

Whether to write first or watch first is often framed as a question of which approach will provide the "most accurate" account of events for the truth-finding process.²³³ Framing the issue in such a narrow way is flawed in several ways. First, the written and oral accounts of events depicted in BWC recordings are memories of the events, and framing the question as one of accuracy ignores the science of how memory is formed, processed, and influenced.²³⁴ Witnesses to events mentally process those events differently, and it is rare to encode and report a memory in the precise way that a video recording does.²³⁵ Second, notwithstanding the objective nature of video recordings, different viewers see and respond to different features of a recording, rendering the notion that the recording speaks for itself misguided.²³⁶ Third, framing the question as one of accuracy positions BWC footage as the most significant evidence in an investigation, when it is often simply one among many sources of information. Because the legal system deals with both questions of the underlying ground truth in a police-civilian encounter (e.g., what did a suspect do or say?) *and* the officer's perception at the time (i.e., what did the officer think the suspect was doing or saying?), a police officer's account should strive to capture *both* ground truth and the officer's perception.²³⁷ There is an important synergy in the way these pieces of evidence work together, not only to

230. See generally Vredeveldt et al., *supra* note 11.

231. See Grady et al., *supra* note 11, at 247, 250.

232. See *Psychological Research on the Use of Body-Worn Cameras*, *supra* note 23, at 54 (discussing how BWC footage can serve as post-event information, which may impact an officer's memory of an event).

233. As the New York City Police Department put it, "It is a police officer's duty to accurately report the events he or she observes. The Department and prosecutors expect that an arresting officer will review the documentation and available evidence associated with a case *before* preparing reports or swearing out a criminal complaint. Body-worn camera footage is simply another form of documentation, and possibly an additional piece of evidence, just like an officer's notes or a transcript of a 9-1-1 call." N.Y.C. POLICE DEP'T, NYPD RESPONSE TO PUBLIC AND OFFICER INPUT ON THE DEPARTMENT'S PROPOSED BODY-WORN CAMERA POLICY 15-16 (2017), https://www.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf.

234. See *supra* Section II.A.

235. See Haber & Haber, *supra* note 136, at 1059.

236. See generally Yael Granot, Emily Balcetis, Neal Feigenson & Tom Tyler, *In the Eyes of the Law: Perception Versus Reality in Appraisals of Video Evidence*, 24 PSYCH., PUB. POL'Y, & L. 93 (2018).

237. For instance, suppose the officer's recollection of the event is that the suspect appeared to be yelling that he had a weapon and was reaching toward his waistband. The body camera footage, however, reveals the suspect saying he was unarmed and raising his hands above his head at the time the officer unholsters his firearm and shoots. In such a case, the officer's perception of what was happening in the moments leading up to the discharge of the firearm is crucial. See *Graham v. Connor*, 490 U.S. 386, 396 (1989). See generally

provide the full story but also to account for any discrepancies in the officer's perspective.

III. REFORMING THE PRE-REVIEW APPROACH ENHANCES PUBLIC TRUST AND ACCOUNTABILITY

Demands for accountability and greater transparency in police interactions with civilians have spurred momentum toward using BWCs in more police departments across the country. The 2014 killing of Michael Brown sparked a nationwide wave of BWC adoption and new funding for law enforcement agencies to purchase the cameras.²³⁸ The killing of George Floyd by Officer Derek Chauvin in May 2020 added to the public pressure for police reform and accountability, which reformers and the public believed BWCs might improve.²³⁹

There are several ways in which the “watch first, then write” procedure undermines public trust and accountability. First, if an officer has access to BWC footage prior to writing an initial police report, the footage will likely influence their independent recollection of events. Independent of the ways memory can be affected by BWC footage, access and exposure to the footage creates the appearance, if not the likelihood, that an officer will conform their report to match the video. One objection to this practice is based on the premise that the officer will be deliberately untruthful to avoid inconsistencies between their report and the footage.²⁴⁰ If there are details in the BWC footage that are inconsistent with the officer's recollection, they may be tempted to adjust their account to conform to the video footage because of the belief that the footage will be considered more reliable than the officer's own recollection of events.²⁴¹ A less nefarious contention is that an officer's recollection will be unconsciously affected by the video.²⁴² Cognitive-science research shows that one's memory will be unconsciously affected by watching the video first.²⁴³ In either scenario, an officer watching footage of events before writing their account of the interaction may be viewed by the public as eroding the transparency of a criminal investigation.²⁴⁴ Reports written by officers are critically important in the investigative process. They reveal the details of an incident according to the officer's perception, which may differ from other evidence in a case. Some people, including lawyers, investigators, and jurors, may view the

Bryan E. MacDonald, *Graham v. Connor: A Reasonable Approach to Excessive Force Claims Against Police Officers*, 22 MCGEORGE L. REV. 157 (1991) (discussing the standard set out in *Graham* and its implications).

238. See Keenan, *supra* note 76; see also *supra* notes 77–82.

239. See, e.g., Stanley, *supra* note 76.

240. Stanley & Bibring, *supra* note 32.

241. Cf. Albert Samaha, *How Video Finally Proved That Cops Lie*, BUZZFEED NEWS (Jan. 17, 2017, 4:17 PM), <https://www.buzzfeednews.com/article/albertsamaha/blue-lies-matter> (quoting a police officer's concern that “a seemingly inconsequential instance of misremembering . . . could irreversibly poison the arrest, undermining the credibility of all his words”).

242. See *supra* Section II.C.

243. See *Memory Outcomes*, *supra* note 15, at 401.

244. See *supra* note 114.

footage as the omniscient truth by virtue of the fact that it is a supposedly objective, contemporaneous account of the events. But a process that allows officers to view the footage before writing their report *undermines* the integrity of the investigative process.

A second way a “watch first, then write” policy undermines any gains in public trust from BWCs is the biased practice of letting a percipient witness to an event have access to other evidence in a case before they have memorialized their recollection of events. Police officers are often fact witnesses in adversarial proceedings. A fundamental principle of law enforcement investigations is to obtain from a witness their account of an event as close in time to the event as possible.²⁴⁵ This allows for minimization of bias and external influence. The Federal Rules of Evidence embody this notion of accuracy by declaring that statements made contemporaneously to an event, including those made immediately after the event while still excited or under stress, are excepted from the hearsay rule.²⁴⁶ Police departments typically have policies and procedures designed to ensure an accurate and unbiased method of obtaining witness statements.²⁴⁷ Those policies would prohibit a witness from being exposed to any evidence in the investigation until a statement is obtained.²⁴⁸ Why should we treat police officers any differently? According to police, pre-review makes police reports more accurate.²⁴⁹ If so, then why do we not allow witnesses to be exposed to all the facts available in an investigation before making a statement? It is patently obvious why: it is because we want to know what the witness recalls about the event without influence from others or exposure to physical evidence that may be consistent or inconsistent with the witness’ account.²⁵⁰ The public’s expectation of BWCs is that they keep police accountable for their behavior.²⁵¹ One easy way to erode public trust in police is to permit them to review BWC footage prior to providing their own account of events. The preservation of an independent and timely recollection of events for all witnesses is key in the truth-seeking function of an investigation.

The collection of witness statements and other evidence in an investigation should be kept separate. Teasing out the inconsistencies among evidence to assess the accuracy of a witness account is the role of investigators, not fact witnesses.

245. See NAT’L INST. OF JUST., U.S. DEP’T OF JUST., EYEWITNESS EVIDENCE: A TRAINER’S MANUAL FOR LAW ENFORCEMENT 13 (2003).

246. FED. R. EVID. 803(1)–(2).

247. See, e.g., BALT. POLICE DEP’T, POLICY 1002: Securing and Interviewing Witnesses (2021).

248. See NAT’L INST. OF JUST., *supra* note 245, at 23.

249. See, e.g., MILLER & TOLLIVER, *supra* note 63.

250. Throughout the criminal justice process, precautions are taken to avoid influencing a witness’ independent recollection. For example, police lineups are conducted one witness at a time to ensure no witness influences another; witnesses who give courtroom testimony are often sequestered from listening to one another’s testimony to preserve their own independent recollection and not be influenced by other witness accounts.

251. See William H. Sousa, Terance D. Miethe & Mari Sakiyama, *Inconsistencies in Public Opinion of Body-Worn Cameras on Police: Transparency, Trust, and Improved Police–Citizen Relationships*, 12 POLICING 100, 107 (2017).

Policies and procedures exist to ensure that fact witnesses' accounts are not contaminated by one another but remain independent.²⁵² Allowing an officer to review footage before writing their report creates an improper entanglement of two independent sources of information and thereby erodes the reliability of the officer's first-hand account. As has been stated throughout this Article, only after an officer has written an initial report documenting their account of events is it suitable for the officer to view the BWC footage. If viewing the footage causes the officer to want to provide additional details or explain why their recollection may differ from the footage, a supplemental report should be written. Each report would therefore be distinguishable from the other, and it would be clear when additional information was gleaned from watching BWC footage. By following this sequence, there is no concern that the footage will affect the officer's initial statement pertaining to the event.

Some policies attempt to carve out easy cases in which an officer's conduct is not at issue, but these cases can never truly be identified in advance. For example, police organizations, including the Police Executive Research Forum (PERF) and the International Association of Chiefs of Police (IACP), distinguish between incidents in which officers' actions will routinely be the object of internal and possibly external scrutiny ("critical incidents") and those that will be "routine incidents."²⁵³ This distinction ignores the fact that BWC recordings may be critical to identifying significant legal issues even in "routine" police interactions. Factual disputes over events that precipitated a "seizure," consent for a search, and execution of a search warrant form the basis of constitutional challenges that have an equally significant effect on the outcome of a case. Put simply, it is impossible to determine in advance which facts that may have been captured in a BWC recording will ultimately be significant.

In either case, whether the officer is on the prosecution team or being investigated, it is impossible to know the evidentiary significance of the BWC recording in advance. The best practice to ensure the officer's memory of an event is preserved is to have the officer, in *all* cases, memorialize their memory of the event before they watch BWC footage.

252. See NAT'L INST. OF JUST., *supra* note 245, at 10.

253. See MILLER & TOLLIVER, *supra* note 63, at 12; IACP, CONSIDERATIONS DOCUMENT: BODY-WORN CAMERAS 3 (2019), <https://www.theiacp.org/sites/default/files/2019-04/BWC%20Considerations%20-%202019.pdf>. In 2019, the IACP outlined items agencies should address when developing their own policies on the topic of BWCs, including "[v]iewing of recordings," saying, "Agency policy should address whether the viewing of BWC recordings is permitted by officers during the investigation of a critical incident, prior to writing a routine report, prior to an administrative investigation, and of other officers' BWC recordings." IACP, *supra*. The International Municipal Lawyers Association's Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement similarly guarantees officers the ability to "review or receive an accounting of" any BWC recording "prior to completing any required initial reports, statements and interviews regarding the recorded event" for incidents involving any use of force, events leading up to and including a felony arrest, or an encounter about which a participant has registered a complaint. A MODEL ACT FOR REGULATING THE USE OF WEARABLE BODY WORN CAMERAS BY L. ENF'T § 2(10)(a), (14) (INT'L MUN. LAWS. ASS'N).

Community trust is vital to successful policing.²⁵⁴ One key ingredient in developing trust is the sense that the public is being treated fairly and transparently by police officers. Research shows that public trust in police depends largely on whether police are acting in procedurally just ways.²⁵⁵ Tactics that obscure transparency delegitimize public confidence in the police.²⁵⁶ A policy that permits officers the opportunity to align their written report with the video footage subverts the goals of increasing community trust.

In many high-profile use-of-force cases involving police officers, video footage has proven to be vital evidence in investigations and prosecutions.²⁵⁷ Whether that evidence comes from officers' own BWCs or recordings made by citizens, the public has demanded immediate release of the footage.²⁵⁸ This urgency to make publicly available the simultaneous recording of the incident is another way in which the public expects transparency.²⁵⁹ To date, the majority of policies concerning retention and dissemination of BWC footage allow public access to the footage only through the Freedom of Information Act.²⁶⁰ This process can be onerous and deter people from seeking quick, no-cost access to footage. Denying the general public immediate access to the footage, particularly in cases involving officer use of force, only intensifies the public's mistrust of police in the days and weeks leading up to the release of the footage.²⁶¹ When footage is withheld from public view, tensions mount because the perception is that police are concealing detrimental evidence from the public. This produces extraordinary tension and anxiety within communities and greater animosity between the public and the police.²⁶² Some

254. See *Building Trust*, DEP'T OF JUST., CMTY. ORIENTED POLICING SERVS., <https://cops.usdoj.gov/buildingtrust> (last visited Aug. 11, 2023).

255. See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST., 283, 286 (2003); see also HARLAN YU & MIRANDA BOGEN, *THE ILLUSION OF ACCURACY: HOW BODY WORN CAMERAS CAN DISTORT EVIDENCE* 13 (2017), <https://www.upturn.org/static/reports/2017/the-illusion-of-accuracy/files/Upturn%20and%20LCCHR%20-%20The%20Illusion%20of%20Accuracy%20v.1.0.pdf> (“[A]llowing police officers to view body-worn camera footage before writing their reports violates community confidence, undermining two pillars of procedural justice: fairness in the process and transparency in actions.”) (emphasis omitted).

256. LAURA KUNARD & CHARLENE MOE, DEP'T OF JUST., *PROCEDURAL JUSTICE FOR LAW ENFORCEMENT: AN OVERVIEW* 7 (2015), <https://portal.cops.usdoj.gov/resourcecenter/RIC/Publications/cops-p333-pub.pdf>.

257. See, e.g., *City Releases Laquan McDonald Shooting Video*, *supra* note 3; Treisman, *supra* note 6.

258. *Quotation of the Day: For Police, Body Cameras Break Old Code of Silence*, *supra* note 5.

259. Brett Chapman, *Body-Worn Cameras: What the Evidence Tells Us*, 280 NAT'L INST. JUST. J. 49, 49 (2010).

260. See *Access to Police Body-Worn Camera Video*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/resources/bodycams/> (last visited Aug. 7, 2023) (showing a map of the United States with current state legislation status and police department policies regarding public access to BWC footage).

261. See, e.g., Rick Rojas, *Video of Memphis Officers Beating Tyre Nichols Elicits Widespread Horror*, N.Y. TIMES (Jan. 28, 2023), <https://www.nytimes.com/2023/01/28/us/tyre-nichols-video-reaction-protests.html>.

262. In Uvalde, Texas, controversy swarmed over the release of police records pertaining to the mass shooting at an elementary school. See Emma Bowman, *Uvalde Officials Are Using a Legal Loophole to Block the Release of Shooting Records*, NPR (June 18, 2022, 10:14 AM), <https://www.npr.org/2022/06/18/1106017340/uvalde-legal-loophole-mass-shooting-records>; Uriel J. García & Lexi Churchill, *Uvalde District Attorney Fights Release of Public Records Against Wishes of Most Families*, PROPUBLICA (Mar. 8, 2022, 12:50 PM), <https://www.propublica.org/article/uvalde-district-attorney-fights-release-public-records-despite-family-wishes>.

departments have released video footage shortly following police shootings of civilians. Doing so quelled community mistrust of police.²⁶³ The more transparent approach is to allow the public to view footage as quickly as possible so that communities are given more information rather than less information and can be less reliant on police accounts of events.

CONCLUSION

The use of BWCs has become the norm in twenty-first-century policing. They were widely adopted in the hope of holding police accountable and avoiding killings like those of Michael Brown and George Floyd, whose deaths galvanized the police reform movement. But, as this Article has discussed, BWCs likely will not deliver the benefits the public expects without sound policies to guide their use.

The “write first, then watch” approach is among the most important BWC policy law enforcement agencies should adopt. Pre-review policies, which most police departments have adopted, have numerous negative effects on accuracy and accountability in police-civilian encounters. Allowing police officers to view BWC footage before writing reports robs the accused and the judicial system of the officers’ original memories. And giving officers access to recordings undermines public confidence that officers will be truthful in memorializing their own perception of events. “Write first, then watch” policies not only avoid these pitfalls but also conform to the standards supported by cognitive science.

As policymakers across the country, from the White House to local municipalities, are attempting to reform criminal justice policy, this policy choice should be at the top of their agenda. “Write first, then watch” is a simple way to enhance the fairness and accuracy of the criminal justice system and ensure the public’s desire for police accountability is satisfied.

263. Chapman, *supra* note 259, at 49; see *Quotation of the Day: For Police, Body Cameras Break Old Code of Silence*, *supra* note 5.