

# OPEN DATA POLICING

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## ABSTRACT

*More than any other promised police reform, the public would benefit from the government adopting an “open data” philosophy towards police accountability data. “Open data” in the context of public policy is the philosophy that when the government “provides people access to its process, decision-making, and data,” a “more effective ecosystem for innovation and development” results.<sup>1</sup> Body cameras have been introduced across the country as the manifestation of transparent policing meant to restore the public’s trust in police following multiple murders of unarmed young men and women of color nationwide. However, as Professor Simonson writes in her essay, “Beyond the Body Camera: Defending a Robust Right to Record the Police,” the body camera footage is created, stored, organized, and distributed by governmental agencies that continue controlling the narrative about police conduct.<sup>2</sup> In this article, I elaborate on Professor Simonson’s observation about governmental control over the narrative. I also discuss diverging approaches to public access to body camera footage from Seattle, which has embraced an “open data” model,<sup>3</sup> to Minnesota, where restrictions on public access to police data are being introduced for the first time through legislative regulations. On a more optimistic note, I will also discuss non-governmental efforts to subvert that control by cataloging and reporting on police accountability data. The seriousness and wealth of the information collected and shared through these efforts stands in sharp contrast to the dearth of police accountability data being disseminated by the government.*

## INTRODUCTION

“Open data” in the context of public policy is the philosophy that when the government “provides people access to its process, decision-making,

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1. Jason Tashea, *Emerging Justice Technologies and the Need for Evaluation*, JOHN JAY COLL. CRIM. JUST. RES. & EVALUATION CTR. 2 (Jan. 20, 2016), <https://perma.cc/LN8E-3XWD>.

2. See Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L. J. 1559, 1567 (2016).

3. See *SPD Launches YouTube Channel for Bodyworn Video*, SPD BLOTTER (Feb. 25, 2015), <https://perma.cc/U2RM-NAV7>.

and data” a “more effective ecosystem for innovation and development” results.<sup>4</sup> “Open data” or the “open source way”<sup>5</sup> promotes transparency by pushing politicians “to view government as a ‘platform’ that can be used to build collaborative solutions that can make communities better and serve citizens more efficiently.”<sup>6</sup> Applied to the current police reform movement, an “open data” philosophy would require some level of public access to the information police officials use to supervise, discipline, and retain officers. Such public access is essential for communities to make informed decisions about what systemic reforms to make.

Body camera footage is one type of information used by police officials to make decisions about accountability. Indeed, the Executive Director of the Police Executive Research Forum (“PERF”) introduced its body camera implementation report by stating: “A police department that deploys body-worn cameras is making a statement that it believes the actions of its officers are a matter of public record.”<sup>7</sup> Yet, to the detriment of public trust in policing, this is not what is happening.<sup>8</sup> Problematically, as Professor Simonson discusses in her essay “Beyond the Body Camera: Defending a Robust Right to Record the Police,” police departments are not seizing the potential for transparency and are instead continuing to construct obstacles to public access of recordings.<sup>9</sup> Professor Simonson discusses many ways police departments have continued “controlling the narrative” with body cameras: from “camera perspective bias,” to deciding when recording starts and stops, to custodial retention of the recordings.<sup>10</sup> This paper focuses on the last aspect of how police departments control

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4. Tashea, *supra* note 1.

5. “Open source way” is a software development principle promoted by Jim Whitehurst as a public policy and business organization strategy. *See* JIM WHITEHURST, *THE OPEN ORGANIZATION: IGNITING PASSION AND PERFORMANCE* (2015); *see also* *The Open Source Way*, OPENSOURCE.COM, <https://perma.cc/R9DP-FBQL>.

6. Jason Hibbets, *Can the Promise of Open Data be Fully Realized?*, OPENSOURCE.COM (Sept. 7, 2015), <https://perma.cc/H75X-TAE8>. Countries like Croatia, India, and the EU nations have adopted “open source” policies. *See* Josip Almasi, *Croatian Policy Encourages Open Source Adoption*, OPENSOURCE.COM (Aug. 28, 2015), <https://perma.cc/D97Y-2NHB>; Mark Bohannon, *India Adopts a Comprehensive Open Source Policy*, OPENSOURCE.COM (Aug. 6, 2015), <https://perma.cc/ZL4V-HRN6>; Paul Brownell, *European Union’s 5-Year Roadmap for IT and Open Source*, OPENSOURCE.COM (June 11, 2015), <https://perma.cc/5BNY-T4VA>.

7. POLICE EXECUTIVE RES. FORUM, *IMPLEMENTING A BODY-WORN CAMERA PROGRAM, RECOMMENDATIONS AND LESSONS LEARNED* v (2014), <https://perma.cc/NE6E-ZH8K> (hereinafter PERF).

8. *See* Eric T. Schneiderman, *Ending the Crisis of Confidence in Our Criminal Justice System*, HUFFINGTON POST (July 19, 2015, 3:30 PM), <https://perma.cc/S54Z-BJVK>; Graham Kates, *The ‘Crisis of Confidence’ in Police-Community Relations*, JUSTICE NOT JAILS (Sept. 7, 2014), <https://perma.cc/JP45-WQDB>.

9. Simonson, *supra* note 2, at 1568.

10. Simonson, *supra* note 2, at 1566–67.

the narrative by retaining custodial control of (and denying public access to) body camera recordings and other types of police accountability data.

On the fortieth anniversary of the Freedom of Information Law (“FOIL”), and following six months of calls for police reforms after the police killings of Eric Garner and Michael Brown, the New York State Committee on Open Government issued this warning about police departments retaining control over police accountability data:

“[S]o long as §50-a<sup>11</sup> remains on the books, other efforts to increase police accountability that have been proposed are less likely to be effective. For example, the mandatory use of ‘bodycams’ . . . These video cameras capture the events in which law enforcement officers are involved . . . but they are unlikely to provide greater transparency and accountability if the videotape recordings can be kept from the public under §50-a in cases where no privacy or safety concerns would otherwise justify withholding them . . . . If the video can only be seen by the internal affairs unit within a police department, and there is no public disclosure, a primary purpose of the bodycam would be defeated.”<sup>12</sup>

Laws like New York’s Civil Rights Law §50-a, which exempts police records from public disclosure, exist across the country, even for on-duty substantiated misconduct.<sup>13</sup> As body cameras multiply on officers’ lapels and sunglasses across the country, laws exempting the footage from public

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11. Civil Rights Law §50-a is an exemption from the Freedom of Information Law for police and other uniformed officers. *See* N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2016).

12. COMM. ON OPEN GOV’T, STATE OF N.Y. DEP’T OF STATE, ANNUAL REPORT TO THE GOVERNOR AND STATE LEGISLATURE 5 (2014), <https://perma.cc/DP9U-WKPN>.

13. *See id.* at 3–5. Police internal affairs records and citizen complaints are “mostly unavailable” from FOIL disclosure in twenty-three states, but only considered “confidential” by statute in two other states (California and Delaware). *See* Robert Lewis et al., *Is Police Misconduct a Secret in Your State?*, WNYC (Oct. 15, 2015), <https://perma.cc/7GA9-A9NZ>. Records are more readily available in fifteen states depending on whether severe discipline resulted from the misconduct. *See id.*; *see also* ME. REV. STAT. ANN. tit. 30-A § 503(1)(B)(5) (2013); OKLA. STAT. tit. 51, § 24A.7(B)(4) (West 2014); UTAH CODE ANN. § 63G-2-301(3)(o) (West 2014) (exempting formal charges of misconduct until and unless the charges are sustained and the action is complete). Texas’ statute makes internal affairs documents relating to deadly force public. It exempts internal affairs documents that determine the officer did not engage in misconduct, and it makes public the documents where disciplinary action is decided. *See* TEX. LOC. GOV’T CODE ANN. §§ 143.1214, 143.089 (West 1989). In twelve states, these documents are public record in most circumstances, although many state statutes are vague. *See* Lewis et al., *supra* note 13; *see also* Jenny Rachel Macht, *Should Police Misconduct Files be Public Record? Why Internal Affairs Investigations and Citizen Complaints Should be Open to Public Scrutiny*, 45 CRIM. L. BULL. 1, 3 (2009).

disclosure multiply as well, undermining the push for greater accountability and transparency. As New York City Public Advocate Leticia James said in October 2015, "It defies logic to keep the footage from these cameras hidden from the press and the public."<sup>14</sup>

For the purposes of this Article, "police accountability data" refers to any information about police misconduct, whether a recording from a civilian or body camera, an internal complaint, or a complaint made in a lawsuit. The secrecy of police accountability data compromises the information available to the public when judging police encounters and accountability systems. How can the public fairly judge a police interaction or a disciplinary system's functionality if the available information relies exclusively on reports screened by the government? For example, how can the public fairly judge the interaction between Eric Garner and police officer Daniel Pantaleo when Eric Garner's arrest (not conviction, *arrest*) history was unlawfully leaked to the media,<sup>15</sup> but the public still has no idea whether the officer who used a prohibited chokehold on Mr. Garner had ever before been the subject of a substantiated complaint of force?<sup>16</sup> If a police body camera—rather than civilian Ramsey Orta's camera—had captured Eric Garner's death, would it have been made public? If so, how long would it have taken?<sup>17</sup> If Ramsey Orta had given the recording to the police rather than to the Daily News, would it have been made public? If so, how long would it have taken?<sup>18</sup> We lament police departments' control over the narrative at both the macro- and micro-level. When the government retains custody over all evidence of discord between police and communities, it deprives the public of a narrative about general police conduct in a community. It also controls the individual narratives about police encounters such that the only story reported is the one that justifies, for example, state violence.

In Part I of this essay, I survey diverging governmental approaches to disclosing body camera footage. Specifically, I investigate how recently passed or introduced legislation treats police encounters, how it balances privacy concerns, and on what it predicates disclosure, if it allows for

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14. Emma Whitford, *Officials Push NYPD to Make Cops' Body Cam Footage Public*, GOTHAMIST (Oct. 22, 2015, 12:34 PM), <https://perma.cc/A6K7-UBQK>.

15. See Eric Mitchell, *Eric Garner Criminal Past Emerges: 30 Arrests in 34 Years, Including Assault*, INQUISITR (Dec. 6, 2014), <https://perma.cc/ZFC7-93GX>.

16. See *In re Luongo v. Records Access Officer, Civilian Complaint Review Bd.*, 15 N.Y.S.3d 636, 638–39 (N.Y. Sup. Ct. 2015) (No. 100250/2015).

17. See Chelsia Rose Marcus & Larry McShane, *Ramsey Orta, Who Recorded the Infamous Eric Garner Video and Now Says He's Harassed by Cops, Wishes He had 'Not Put My Name Out There'*, N.Y. DAILY NEWS (July 12, 2015, 8:00 PM), <https://perma.cc/NMF2-Q2AY>.

18. See Ken Murray, *How the Daily News Acquired the Eric Garner Video*, N.Y. DAILY NEWS (July 11, 2015, 11:00 PM), <https://perma.cc/2M37-TZTK>.

disclosure at all. In Part II, I analyze how this legislation has complicated and further restricted public access laws as it applies to police accountability data.<sup>19</sup> Finally, in Part III of this essay, I explore the potential benefits of applying “open data” principles to police accountability data. Although recent legislation is trending toward less rather than more public access, non-governmental initiatives encourage a more complete accounting of police conduct. Several non-governmental entities—including activists, community groups, law school clinics, public defender agencies, “news nerds,”<sup>20</sup> non-profits, and coding fellows—have created technology that empowers police-encounter witnesses through handheld filming devices.<sup>21</sup> Others have created portals that allow the public to record, organize, interpret, and disclose data about police encounters.<sup>22</sup> I survey how these non-governmental organizations are using the principles of open data to shift the narrative about police encounters in the courtroom, media, and policy reform, even when state governments continue to prevent access to police accountability data.

#### I. SURVEY OF NEW PUBLIC ACCESS LAWS REGARDING BODY CAMERAS

In addition to endorsing body cameras “to enhance agency transparency,” the President’s Task Force on 21<sup>st</sup> Century Policing, a task force created to “strengthen community policing and trust among law enforcement officers and the communities they serve,”<sup>23</sup> calls on police departments to “embrace a culture of transparency” and to “regularly post on the department’s website information about stops, summonses, arrests, reported crime, and other law enforcement data aggregated by demographics.”<sup>24</sup> Regarding the dissemination of body camera footage, the Task Force recommends that the Department of Justice develop best practices that can be adopted by state governments.<sup>25</sup> Existing “best practices”—based on the Police Executive Research Forum (“PERF”) for

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19. See *Access to Police Body-Worn Camera Video*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://perma.cc/C9CF-NVJN> (presenting a map showing current regulations and policies regarding access to bodycam footage); Lewis et al., *supra* note 13.

20. “News nerds” refers to journalists around the country who collaborate in using data and statistics to report trends in criminal justice. See David Krajicek, *The Rise of the Crime Beat ‘News Nerds’*, CBS NEWS (Feb. 9, 2016, 5:03 PM), <https://perma.cc/7LHY-L8E7>.

21. Civic tech is “any technology that is used to empower citizens or help make government more accessible, efficient and effective.” Stacy Donohue, *Civic Tech Is Ready For Investment*, TECH CRUNCH (Apr. 29, 2015), <https://perma.cc/FL8J-AKRL>.

22. See Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 396 (2016).

23. U.S. DEP’T OF JUSTICE, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING iii (2015), <https://perma.cc/66A9-V4F5>.

24. *Id.* at 13; see also *id.* at 31 (discussing BWC programs).

25. *Id.* at 35 (“3.3 Recommendation”).

the Office of Community Policing Services’ report—caution that law enforcement agencies should apply “exceptions to releasing video ‘judiciously to avoid any suspicion by community members that police are withholding video footage to hide officer misconduct or mistakes.’”<sup>26</sup>

Despite the PERF’s caution, in 2015, twelve states passed legislation that mostly restricts public access to body camera footage and other police accountability data. Nineteen states introduced similar legislation.<sup>27</sup> That is a total of thirty-one states that have proposed new restrictions on public access laws—mostly contrary to increasing transparency in police departments. Alternatively, some local police departments have rejected the use of body cameras altogether for fear that they will yield matters of public record.<sup>28</sup>

A commonly stated justification for these restrictions is “privacy” for the citizen-subjects of the body camera recordings. Whether the new restrictions, such as the blanket exemptions for all recordings, are necessary to protect privacy is, however, disputed.<sup>29</sup> Obviously, body cameras raise legitimate privacy concerns, but those concerns are not new to public access policies.<sup>30</sup> Most states’ public access laws already contain exemptions for invasions of privacy, and the newly introduced restrictions for footage are “duplicative or unwarranted.”<sup>31</sup> Existing privacy exemptions already cover foreseeable concerns for invasions of privacy, such as recordings from inside homes.<sup>32</sup> Other concerns can be addressed in less restrictive ways. For example, the ACLU’s Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement only exempts footage when it has expired and when the citizen-subject of the video requests that the footage not be made public.<sup>33</sup>

In Sections A through C, I survey diverging approaches to body camera footage and other police accountability data from (A) cities like

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26. BUREAU OF JUST. ASSISTANCE, BODY-WORN CAMERA TOOLKIT: BODY WORN CAMERA FREQUENTLY ASKED QUESTIONS 32, <https://perma.cc/YVD6-L8JC> (quoting PERF, *supra* note 7, at 18).

27. *See Access to Police Body-Worn Camera Video*, *supra* note 19; Sarah Breitenbach, *States Grapple with Public Disclosure of Police Body-Camera Footage*, PEW CHARITABLE TR. (Sept. 22, 2015), <https://perma.cc/NTY8-DAZY>.

28. *See* Timothy Williams, *Downside of Police Body Cameras: Your Arrest Hits YouTube*, N.Y. TIMES (Apr. 26, 2015), <https://perma.cc/8HS8-TCXF>.

29. *See infra* Part II.

30. Public access officers are the agency designees deputized with responding to Freedom of Information requests and deciding whether redactions or exemptions apply.

31. Breitenbach, *supra* note 28 (quoting Adam Marshall).

32. *See Access to Police Body-Worn Camera Video*, *supra* note 19 (citing H.B. 1264, 2015 N.D. Laws Ch. 311. (codified at N.D. CENT. CODE ANN. § 44-04-18.7 (West 2015))).

33. *A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement*, ACLU, Section 1(d) <https://perma.cc/DR9K-HM7T>.

Seattle, who have embraced transparency with a YouTube channel playing uninterrupted requested video with blurring, and with some exceptions that are unblurred, to (B) traditionally secretive states like New York, where years of tight restrictions on police accountability data are being revealed as police departments run body camera pilots, and to (C) states in transition that have become either more secretive like Minnesota—where historically open public access laws are being challenged by barriers to body camera footage—or more open like Illinois, where recent litigation finally won public access to police accountability data. The significance of each jurisdiction’s treatment of body camera footage is analyzed in Part II.

#### A. TRANSPARENCY STATES – SEATTLE

The fullest embrace of new technology’s twin ability to improve surveillance and transparency has been Seattle’s launch of the “SPD BodyWorn Video” YouTube channel. This development occurred at least partially because of the efforts of 24-year-old computer programmer Tim Clemans, whose request forced the police department to articulate a policy.<sup>34</sup> On the YouTube channel, launched after “[p]olice in Seattle received so many requests for body-camera footage under the state’s open records law that the department decided proactively to release videos,” there is a steady stream of body camera recordings uploaded with blurring to protect the privacy of people’s faces.<sup>35</sup> Yet Washington’s open records law, like many other states, contains exceptions that require redactions to protect privacy.<sup>36</sup> To grapple with this new technology’s challenge to existing public access laws that contained redaction requirements for privacy, Seattle’s police department enlisted the help of the technology community in Seattle and held a “hackathon” to brainstorm solutions.<sup>37</sup> “More than 80 people filled the room from 10 a.m. to 3 p.m. About one-

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34. See *SPD Launches YouTube Channel for Bodyworn Video*, *supra* note 3; Matthew Feeney, *Watching the Watchmen: Best Practices for Police Body Cameras* 11 (2015), <https://perma.cc/Q4KU-BSPF>; see also SEATTLE POLICE DEPARTMENT MANUAL, 16.091—BODY-WORN VIDEO PILOT PROGRAM, SEATTLE POLICE DEP’T (2015), <https://perma.cc/77A9-UFFZ>.

35. Eileen Sullivan, *Police Body Cameras Show More Than Just the Facts*, SEATTLE TIMES (Sept. 11, 2015, 5:15 PM), <https://perma.cc/V7HY-C3H4>.

36. WASH. REV. CODE ANN. § 42.56.240(14) (West 2016). The Washington State Open Records Law was amended on March 10, 2016, to clarify that “privacy” includes “highly offensive” recordings. 2016 WASH. SESS. LAWS 163 (West 2016).

37. See *SPD Launches YouTube Channel for Bodyworn Video*, *supra* note 3. A hackathon is “an event in which computer programmers and others involved in software development and hardware development, including graphic designers, interface designers and project managers, collaborate intensively on software projects.” *Hackathon*, WIKIPEDIA, <https://perma.cc/8LHP-PYW7>.

third were technology professionals or part-timers . . . [t]he remainder were Seattle police and other public officials.”<sup>38</sup>

Although the hackathon did not immediately result in a solution to the challenges of making body camera footage public, it started a conversation between the police department, tech community, and police reform and privacy advocates about how to simultaneously comply with public access laws while protecting people’s privacy. Unfortunately, Seattle is the exception rather than the rule.

#### B. SECRECY STATES – NEW YORK

New York has very restricted public access laws for police records that include broadly interpreted exemptions to “[a]ll personnel records used to evaluate performance toward continued employment or promotion.”<sup>39</sup> The courts have interpreted this to include disciplinary records of off-duty misconduct and parties have even argued to include all disciplinary records, even paltry summaries of an officer’s on-duty misconduct.<sup>40</sup> Assuming courts will apply these broad rules to body camera footage, New York City Police Commissioner Bill Bratton stated it would “likely never be made public.”<sup>41</sup> However, the NYPD did not outright deny a request by NY1 News to access body camera footage for five weeks between 2014–2015, it just charged the local news organization \$36,000.<sup>42</sup> An official NYPD policy regarding disclosure of body camera footage still has not been released.

Unlike other state legislatures, like Minnesota, that are creating restrictions to public access to police accountability data in response to the introduction of body cameras, New York’s legislature has introduced a law that might narrowly chip away at New York’s uniquely strict public access laws. Prompted by the December 2014 Committee on Open Government report, State Senator Daniel Squadron and State Assemblyman Daniel Quart introduced legislation that would restore body camera footage to the default rule of allowing public access, with limited

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38. Bill Schrier, *Inside the Seattle Police Hackathon: A Substantial First Step*, GEEKWIRE (Dec. 20, 2014, 7:24 AM), <https://perma.cc/U65G-EP49>.

39. N.Y. CIV. RIGHTS LAW §50-a (McKinney 2016); *see also* Cynthia H. Conti-Cook, *Defending the Public: Police Accountability in the Courtroom*, 46 SETON HALL L. REV. 1063, 1067–78 (2016) (discussing N.Y. Civ. Rights Law §50-a).

40. *See In re Luongo v. Records Access Officer, Civilian Complaint Review Bd.*, 15 N.Y.S.3d 636, 642–43 (N.Y. Sup. Ct. 2015) (appeal pending); *In re Daily Gazette Co. v. City of Schenectady*, 710 N.E.2d 1072, 1077 (N.Y. 1999).

41. Joseph Stepansky, *NYPD Body Camera Footage Unlikely to be Made Public: Bratton*, N.Y. DAILY NEWS (Sept. 3, 2015, 6:21 AM), <https://perma.cc/T6J2-QVV8>.

42. Julia Marsh, *Network Sues NYPD Over Charging \$36K for Body Cam Footage*, N.Y. POST (Jan. 14, 2016, 1:43 AM), <https://perma.cc/Q5WQ-YGPY>.



restrictions for citizen-subject privacy.<sup>43</sup> This legislation will not change the incredibly strict nature of New York's laws; however, its introduction has raised public awareness of how unusually restrictive New York's law is.<sup>44</sup>

Although it is unlikely that this bill, or perhaps any of the introduced body camera bills, will pass, it is telling that a majority of state legislatures have, despite resounding public outcry for more transparency through body cameras, tended toward greater protection for police accountability data instead of greater public access. In Part III, I will analyze this trend within the larger context of police secrecy and lying that has sparked the call for body cameras in the first place.

### C. STATE SECRECY IN TRANSITION – MINNESOTA, ILLINOIS, AND MORE

The debate over the body camera law has been especially contentious in Minnesota, a state that has historically allowed public access to police accountability data. The Minneapolis Police Department's withholding of surveillance recordings of the 2015 shooting of an unarmed black man, Jamar Clark, escalated the debate. The police department's justification for withholding the surveillance videos is that they were collected for "an active criminal investigation."<sup>45</sup> But advocates, doubting whether releasing the video would impinge any investigation, clamored for officials to release the footage.<sup>46</sup> After several months passed and the city still refused to release the footage, the NAACP and ACLU sued the police department, demanding public access to the footage.<sup>47</sup>

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43. Daniel L. Squadron, *Quart, Squadron, Advocates Announce Bill Allowing Public Access to Police Body Camera Footage*, N.Y. STATE SENATE (Aug. 6, 2015), <https://perma.cc/C4XM-HS3T>.

44. See The Editorial Board, *Stop Hiding Police Misconduct in New York*, N.Y. TIMES (July 29, 2015), <https://perma.cc/8XHC-EPKU>; The Editorial Board, *Eric Garner Case Shows Why Police Secrecy Law is Wrong*, AM N.Y. (Sept. 9, 2015), <https://perma.cc/RE2U-8CZG>; The Editorial Board, *Cop Misconduct Shouldn't be Kept Secret*, NEWSDAY (Sept. 9, 2015, 8:08 PM), <https://perma.cc/7WP5-WF9K>; The Editorial Board, *A Law that Hides Police Misconduct from the Public*, N.Y. TIMES (Oct. 12, 2015), <https://perma.cc/48S6-S4HV>;

Robert Lewis & Noah Veltman, *The Hard Truth About Cops Who Lie*, WNYC (Oct. 13, 2015), <https://perma.cc/56FE-KUPX>; Robert Lewis, *When a Cop's Right to Privacy Undermines Our Right to a Fair Trial*, WNYC (Oct. 14, 2015), <https://perma.cc/RQ3A-HXSQ>; Robert Lewis et. al., *New York Leads in Shielding Police Misconduct*, WNYC (Oct. 15, 2015), <https://perma.cc/SE5A-U43G>.

45. Jon Collins, *Why Video of Jamar Clark's Death May Not be Released Soon*, MPR NEWS (Nov. 19, 2015), <https://perma.cc/2LBY-FBWU>.

46. Advocates doubt that the "ongoing investigation" explanation is plausible: "[M]ost witness interviews should be done in the first couple days after an incident anyway." *Id.* (quoting ACLU-Minnesota Legal Director Teresa Nelson).

47. Mark Berman, *ACLU and NAACP Sue for Video of Minneapolis Police Shooting Jamar Clark*, WASH. POST (Feb. 9, 2016), <https://perma.cc/V6YY-LPYJ>.

Although the murder of Jamar Clark in Minnesota was not captured on body camera, his case illustrates the tension between the police and the public, especially in states where public access laws have traditionally been strong. While legislation about body-worn camera footage in Minnesota has been pending, “[m]ore than a dozen [Minnesota] cities had petitioned the Minnesota Department of Administration to let their police departments limit the public disclosure of video footage collected by police officers.”<sup>48</sup> That petition was denied.<sup>49</sup> Similar petitioning by police departments and unions nationwide to restrict public access to body cameras is causing the proliferation of bills introducing complete exemptions.

In states with historically unrestricted public access laws where police disciplinary records have generally been accessible to the public—such as Washington, North Dakota, Minnesota, Connecticut, Utah, Georgia, and Florida—legislation has either been introduced and/or passed generally restricting public access to police body cameras.<sup>50</sup> Although some states’ laws are restricting, specifically regarding privacy concerns,<sup>51</sup> Kansas,<sup>52</sup> Louisiana,<sup>53</sup> Minnesota,<sup>54</sup> Georgia,<sup>55</sup> Florida, and Utah<sup>56</sup> have all

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48. *MN Officials Reject Call to Limit Police Body Camera Data*, MPRNEWS (Sept. 28, 2015), <https://perma.cc/R55P-875F>.

49. *Id.*

50. See Lewis et al., *supra* note 13.

51. In 2015, the state of Washington introduced legislation that limits who can request body camera footage. See *Access to Police Body-Worn Camera Video*, *supra* note 19 (citing H.B. 1917, 64th Leg., 2015 Reg. Sess. (Wash. 2015)). Georgia introduced similar legislation limiting who can request body camera videos. Breitenbach, *supra* note 27 (citing S.B. 94, 2015 Gen. Assemb., Reg. Sess. (Ga. 2015)). North Dakota, Connecticut, and Florida have exempt categories of footage. See *Access to Police Body-Worn Camera Video*, *supra* note 19 (citing H.B. 1264, 64th Leg. Assemb., Reg. Sess. (N.D. 2015); S.B. 673, 2015 Leg., Reg. Sess. (Conn. 2015); S.B. 248, 2015 Leg., Reg. Sess. (Fla. 2015) (codified at FLA. STAT. § 119.07)).

52. Police personnel records are already exempt from disclosure. Lewis et al., *supra* note 13 (citing KAN. STAT. ANN. § 45-221); Kelly Swanson, *Advocates Push Back Against FOIA Exemptions for Bodycam Footage*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (June 9, 2015) (citing S.B. 18, 2015 Leg., Reg. Sess. (Kan. 2015), which proposed to exempt body camera recordings by labeling them as already exempt under “all criminal investigation records”), <https://perma.cc/7V8M-7RMD>.

53. Louisiana’s Public Records Act does not exclude police disciplinary records for on-duty misconduct. See Lewis et al., *supra* note 13 (citing LA. STAT. ANN. § 44:31; *City of Baton Rouge v. Capital City Press, L.L.C.*, 4 So. 3d 807, 822 (La. Ct. App. 2008)) (holding that police disciplinary records regarding on-duty conduct are not private). Regarding the newly introduced body camera law, see Swanson, *supra* note 53.

54. See *Access to Police Body-Worn Camera Video*, *supra* note 19 (citing H.F. 999, 89th Leg., Reg. Sess. (Minn. 2015)).

55. See Breitenbach, *supra* note 27 (citing H.B. 32, 2015 Gen. Assemb., Reg. Sess. (Ga. 2015) (introduced but not passed)).

introduced broad legislation that would completely exempt body camera footage from disclosure. These bills not only negate the transparency that body cameras promised, they also introduce restrictions on public access to police accountability data (the body camera footage) in states where there previously were none. As Kansas activists said in response to the introduction of a blanket exemption, it takes “a practice in transparency and turns it into a ‘travesty’ that allows publicly funded police departments to decide when footage should be released.”<sup>57</sup>

The Illinois Appellate Court’s 2014 holding in *Kalven v. City of Chicago* allowed for unprecedented access to records of police misconduct.<sup>58</sup> However, shortly after *Kalven*, the Illinois legislature introduced legislation that would restrict public access to body camera footage. In *Kalven*, a reporter, Jamie Kalven, met a resident of a housing development who had been beaten by “The Skullcap Crew,” police who were known for brutality.<sup>59</sup> When a law school clinic later tried to verify this fact by requesting a list of the Chicago police officers who have accumulated the most complaints, they received a protective order that barred them from making the information public.<sup>60</sup> The original reporter, Jamie Kalven, intervened in that action on the public’s behalf, arguing that police misconduct files were public information. After seven years, he finally prevailed in August 2014.

Professor Craig Futterman at the University of Chicago Law School, who led the law clinic that initially requested the records, has published an online resource, “The Citizen’s Police Data Project” with the Invisible Institute, documenting 200 police officers’ records of misconduct.<sup>61</sup> The Citizen’s Police Data Project was launched days before the shooting of Laquan McDonald hit national headlines.<sup>62</sup> Chicago became the epicenter of police accountability protests for several weeks.<sup>63</sup> In December 2015, despite all of this public attention, the City of Chicago nevertheless

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56. See *Access to Police Body-Worn Camera Video*, *supra* note 19 (citing S.B. 94, 2016 Gen. Sess. (Utah 2016), which “substantially expands the category of private records”).

57. Andy Campbell, *How a Police Body Camera Law Gets Chewed Up and Spit Out*, HUFFINGTON POST (Feb. 16, 2016, 11:28 AM), <https://perma.cc/8D67-C64A>.

58. 7 N.E.3d 741 (Ill. App. Ct. 2014); see also *Stateway Gardens Litigation*, CITIZENS POLICE DATA PROJECT, <https://perma.cc/6DTL-HZ97>.

59. *Stateway Gardens Litigation*, *supra* note 58.

60. *Id.*

61. See Part III, *infra*, for a discussion of this project.

62. Mr. Futterman also led the lawsuit calling for the public release of the video showing Mr. McDonald’s shooting. *Craig Futterman on the Laquan McDonald Shooting Video*, UNIV. CHI. L. SCH., (Nov. 24, 2015), <https://perma.cc/5WHV-EMKL>.

63. See Justin Madden, *Chicago ‘Black Christmas’ Protesters March Against Police Violence*, REUTERS (Dec. 24, 2015, 4:35 PM), <https://perma.cc/HJ6N-KQM9>.

opposed releasing the video of Cedrick Chapman's fatal shooting.<sup>64</sup> Less than one month later, the same city lawyers reversed their position, citing the "mayor's new efforts at transparency," and "a new policy on how to handle videos of police shootings."<sup>65</sup> Yet the new body camera disclosure law in Illinois does not provide wide public access to body camera footage even though the legislature's preamble to the restrictions recognized that body cameras "may provide impartial evidence and documentation to settle disputes and allegations of officer misconduct. Ultimately, the uses of officer-worn body cameras will help collect evidence while improving transparency and accountability, and strengthening public trust."<sup>66</sup>

Yet "settling disputes" and "improving transparency" seem to be designed to only inform the internal investigative and criminal agencies and not the general public. Illinois' body camera law also introduced restrictions on public access, exempting body camera footage from open records laws with specific exceptions.<sup>67</sup> Only use of force incidents, the discharge of a weapon, or deaths captured on camera will be subject to open records laws. The "quotidian targeting [and] harassment" that consists of the routine "violence of policing,"<sup>68</sup> will not be subject to disclosure or public scrutiny.

## II. ANALYSIS OF LEGISLATION RESTRICTING ACCESS TO BODY CAMERA FOOTAGE IN AN ERA OF POLICE REFORM

Although body cameras were sold to the public from inside the Trojan Horse of transparency and accountability<sup>69</sup> following the killings of unarmed black men in Ferguson, Baltimore, and New York City, implementation of body camera policies, specifically in regards to public access, suggests that they serve other purposes. For example, the exception for disclosure invoked by the Minneapolis Police Department in the Jamar Clark shooting, that an ongoing investigation prohibits disclosure, is not an isolated incident. It was actually an exception highlighted by PERF in describing how police departments should navigate public disclosure laws in states that may otherwise require public

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64. See Wayne Drash, *Video Released of Deadly Chicago Police Shooting*, CNN (Jan. 14, 2016, 9:12 PM), <https://perma.cc/M7Q8-QPUM>.

65. *Id.*

66. *Access to Police Body-Worn Camera Video*, *supra* note 19 (citing S.B. 1304, 99th Gen. Assemb., Reg. Sess. (Ill. 2015)).

67. *Id.*

68. "I say this all the time. The violence of policing is NOT mainly in the shootings & deaths but in quotidian targeting, harassment, etc[.]" Mariame Kaba (@prisonculture), TWITTER (Dec. 30, 2015, 12:20 PM), <https://perma.cc/7MWV-NNG7>.

69. PERF recommends: "In launching body-worn camera programs, law enforcement agencies should convey that their goal is to foster transparency and accountability while protecting civil liberties and privacy interests." PERF, *supra* note 7, at 18.

disclosure (like Minnesota). Pointing departments to existing exceptions to disclosure, the PERF report notes that “even the broadest disclosure laws typically contain an exception for video that contains evidence or is part of an ongoing investigation.”<sup>70</sup> This is from the same report where PERF proclaims that body cameras make “a statement that . . . the actions of its officers are a matter of public record.”<sup>71</sup>

How should we reconcile this bipolarity? Do police departments want to give the impression that their officers’ actions are a matter of public record without ever having to disclose anything? After touring an “International Association of Chiefs of Police” convention and speaking with body camera vendors, reporter Jacqui Shine doubted that body cameras were ever created as tools for transparency and accountability.<sup>72</sup> She discovered that none of the body camera vendors could explain how its products “might address the crisis of police brutality and the urgent need for greater law enforcement accountability.”<sup>73</sup> She concluded that “body cameras only work (or work best) for the clients the developers have in mind—the police, who don’t always want what the public wants.”<sup>74</sup> Police concerns include careful considerations of how the on/off switch works and whether the camera fits the lapel versus the hat. But they also include how the technology works, or doesn’t work, for data storage, maintenance, and identification:

“One company that provides records management systems to law enforcement, Public Engines, enters into contracts in which it attempts to claim proprietary rights to the data. Public Engines has gone so far as to help police deny records requests and sue people who scrape the public data off their sites in order to protect their millions of dollars of investment in the platform. And more than one salesperson for other data vendors has told me of meetings in which government officials have asked how they can use technology to give the illusion of transparency without making the data as useful as possible.”<sup>75</sup>

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70. *Id.* at 17.

71. *Id.* at v.

72. See Jacqui Shine, *Inside the Police-Industrial Complex*, PAC. STANDARD (Jan. 12, 2016), <https://perma.cc/AD57-MJ6D>.

73. *Id.*

74. *Id.*

75. Ryan Thornburg, *Why Aren’t Governments as Transparent as They Could Be?*, OPENSOURCE.COM (Mar. 16, 2015), <https://perma.cc/7KC6-FJDU>.

It is not privacy concerns of citizens driving the blanket exemptions for body camera footage in Kansas, Minnesota, and other states described in Part II. Rather, it is the concerns of police departments and unions, which include liability, protecting its members from discipline, and retaining power over the narrative of policing to avoid police reform measures from being introduced.<sup>76</sup>

As long as police departments control the technology, they control the narrative. An analysis of dozens of contracts between municipalities and Fraternal Order of the Police (“FOP”) revealed by a hacker “found that more than a third featured clauses allowing—and often mandating—the destruction of records of civilian complaints, departmental investigations, or disciplinary actions after a negotiated period of time.”<sup>77</sup> The same report also found that “30% of the 67 leaked police contracts . . . included provisions barring public access to records of past civilian complaints, departmental investigations, and disciplinary actions.”<sup>78</sup> The more police control the narrative, the more communities—like the Chicago housing development where reporter Jamie Kalven first heard about “The Skullcap Crew”—will continue to suffer alone under police violence, corruption, and terror. The less the public knows about an officer’s disciplinary history, the less they can judge that specific officer and his or her department’s disciplinary system. Contrast the response in Chicago to Officer Van Dyke’s lengthy documented disciplinary history (with the corresponding indictment and resignation from the Commissioner) with New York’s yet-unanswered demand for Officer Pantaleo’s substantiated misconduct summary. Officer Pantaleo was not indicted for the murder of Eric Garner, despite widely-viewed recording of Pantaleo using a prohibited chokehold on Mr. Garner, while he screamed “I can’t breathe” eleven times.<sup>79</sup> The cycle of community distrust, police violence, and the public impetus to change anything continues to spiral.

Individual members of the public may not be able to control the fact that police do not want them to access camera footage or police disciplinary data, or that companies that cater to police create the technology. But legislators, as representatives of the public interest, should

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76. See Eduardo Munoz, *NYPD Union Slams Police Reform Bills, Calls City Council Unqualified*, RT NEWS (June 29, 2015, 4:29 PM), <https://perma.cc/W6PJ-GUFG>. Some unions have gone so far as to lobby for secret police departments where officers’ names are not disclosed. See Tom Jackman, *Secret Police? Virginia Considers Bill to Withhold All Officers’ Names*, WASH. POST (Feb. 24, 2016), <https://perma.cc/K78B-PDYE>.

77. George Joseph, *Leaked Police Files Contain Guarantees Disciplinary Records Will Be Kept Secret*, GUARDIAN (Feb. 7, 2016, 7:00 AM), <https://perma.cc/4STM-686Y>.

78. *Id.*

79. Ken Murray, *Staten Island Man Dies After NYPD Cop Puts Him in Chokehold*, N.Y. DAILY NEWS (Dec. 3, 2014, 3:50 PM), <https://perma.cc/R483-RUGD>. See Part III(A) for a more detailed discussion.

be demanding greater public access to body camera footage and other police accountability data. More policies and legislation (like those in Seattle and Oklahoma) should be passed that require body camera footage to be categorized as information requiring disclosure.<sup>80</sup> Any permitted redactions should be allowed only as necessary to protect citizens' privacy and even then, only in limited circumstances.<sup>81</sup> Body cameras present a challenge, but also an opportunity, for government, the tech community, and the police reform community to collaborate on solutions to the dire crisis of public confidence in systems of police accountability and transparency without reverting to a state of police secrecy. Under no circumstances should there be a blanket exemption for all footage.

International human rights activists have observed how “[accountability can] mean, simply, learning what really happened.”<sup>82</sup> Simply learning what happened during a police encounter is similarly still a struggle for police accountability advocates in the United States.<sup>83</sup> Professor Simonson's warning that “[w]hen police departments become their own gatekeepers, deciding what to release, when, and to whom, they remain in control of the narrative surrounding videos—solidifying, rather than dismantling, the traditional monopoly that police departments possess over the evidence of and narratives structuring their behavior on the street” should be heeded.<sup>84</sup> The public should demand that legislators pass laws permitting greater open access to police records, including body camera footage. In the meantime, the public should look beyond the government's official narrative of police conduct when considering the need for reform. In the next Part, I survey exciting new projects by non-governmental actors that move to fully “[dismantle] the traditional monopoly” police departments usually have over the “narratives structuring their behavior on the street.”<sup>85</sup>

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80. *Access to Police Body-Worn Camera Video*, *supra* note 19 (citing H.B. 1037, 2015 Leg., Reg. Sess. (Okla. 2015)).

81. *See A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement*, *supra* note 33.

82. *About HRDAG*, HUM. RTS. DATA ANALYSIS GRP., <https://perma.cc/NJ6Q-6PUJ>.

83. Another way these efforts overlap is in the lack of transparency about police capability globally. A new project at Columbia Law School, the “Security Monitor Force,” seeks to document “police, military and other security forces around the world. The goal of the Monitor is to help make security forces more transparent and accountable.” SECURITY FORCE MONITOR, <https://perma.cc/C2RV-XVFT>; *Security Force Monitor: Trustees of Columbia University in the City of New York*, KNIGHT FOUND., <https://perma.cc/A4EL-LVGG>.

84. Simonson, *supra* note 2, at 1567.

85. *Id.*

### III. THE FUTURE OF “OPEN DATA” POLICING

The principles of open data as applied to government are “achieved when it provides people access to its process, decision-making, and data.”<sup>86</sup> From the above survey, it is clear that the government is resisting these principles, at least as they apply to police accountability data. When it comes to police reform, “[w]ithout having good timely data, we are governing in the dark.”<sup>87</sup> The current state-by-state legislative quagmire, however, has spawned an inventive movement to circumvent governmental control of police accountability data with creative “open source” data projects led by activists, community groups, law school clinics, public defender agencies, “news nerds,” non-profits, and coding fellows.

New technology now allows various stakeholders, rather than just the government, to create, collect, organize, interpret, and distribute data about police conduct.<sup>88</sup> “The trend is being driven by cheaper, more accessible data-sorting software and a growing cohort of journalists comfortable with computer science (and vice versa), as well as persistent frustration by reporters over immutable data-release paradigms in the justice world.”<sup>89</sup> These efforts have shifted the narrative about police encounters in the courtroom, in media, and in policy reform with burgeoning success. I split these efforts into two categories: (A) collecting, organizing and visualizing data, and (B) reporting data. Together they represent the various ways that open data is developing with respect to police reform activism, regardless of the government’s support or opposition.

#### A. COLLECTING, ORGANIZING, AND VISUALIZING POLICE ACCOUNTABILITY DATA

Copwatching, whether casual or organized, is the practice of filming police street encounters and is one of the most popular ways that communities have begun creating their own police accountability data to empower themselves by proving their narrative of police violence and corruption. “Local residents become the subjects, rather than the objects, of policing: civilians set the terms of engagement by deciding when and where to record, which recordings to save, who can have access to the

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86. Tashea, *supra* note 1, at 2.

87. Krajicek, *supra* note 20 (quoting Peter Wagner, Executive Director of the Prison Policy Initiative).

88. *See id.*

89. *Id.*



footage, and how to frame the narratives surrounding the release of any recordings.”<sup>90</sup>

Several smartphone apps, including the New York Civil Liberties Union’s “Stop Frisk Watch App”<sup>91</sup> and Georgia teenagers’ “Five-O App,”<sup>92</sup> have been developed to help people capture, organize, and store their own recordings. Rather than upload footage to government organizations that may withhold recordings, NYCLU, for example, holds the footage until the subject requests it. The apps are designed to withstand police attempts at obstructing footage—when the device is shaken, the recording ceases and automatically uploads to the Cloud. It is kept there until the subject requests it.<sup>93</sup>

In the past few years alone, we have witnessed the huge impact that this organically developing reaction to police brutality is having on the narrative of police street encounters, especially in low-income communities of color. Communities that historically have endured police brutality but lacked the political capital to capture the mainstream’s attention are gaining unprecedented traction and validation from civilian recordings.<sup>94</sup>

Other efforts, including the NYC Legal Aid Society’s Cop Accountability Database, seek to expand the definition of police accountability data beyond government files to include civil rights lawsuits, criminal court decisions, and other public sources.<sup>95</sup> Expanding the definition of police accountability data from official disciplinary complaints to other sources that similarly document misconduct events has changed who controls the definition of misconduct and therefore who controls the narrative of what is happening between police and the communities they serve. Lawyers have used information about an officer’s history of unlawfully searching people to argue at arraignments that evidence, also likely found illegally in the instant case, will ultimately be suppressed.<sup>96</sup> At bail hearings, in plea negotiations, discovery motions, hearings, and trials, Legal Aid Society lawyers are using police

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90. Simonson, *supra* note 22, at 396.

91. *Stop and Frisk Watch App*, NYCLU, <https://perma.cc/CN75-HFKC>.

92. Ryan Grenoble, *Teens Create ‘Five-O’ App to Help Document Police Brutality*, HUFFINGTON POST TEEN (Aug. 8, 2014, 12:50 PM), <https://perma.cc/X4FZ-DW2K>; FIVE-O, <https://perma.cc/ZFK9-AZEX>.

93. *Stop and Frisk Watch App*, *supra* note 91.

94. Madeleine Bair, *Caught on Camera: Police Abuse in the U.S.*, WITNESS MEDIA LAB (Sept. 2015), <https://perma.cc/YUY3-NNP2>.

95. Jason Tashea, *Databases Create Access to Police Misconduct Cases and Offer a Handy Tool for Defense Lawyers*, ABA J. (Feb. 1, 2016, 3:00 AM), <https://perma.cc/L63J-V8YN>.

96. Case on file with author.

accountability data to change the narrative in the courtroom about what happened during a specific encounter between a client and an officer.

The database has also allowed reporters to change the narrative in the media. For example, Al-Jazeera wrote an investigative report about sexual misconduct by police. The Cop Accountability Database was able to produce a report about lawsuits and newspaper articles detailing complaints that included sexual assault by police officers.<sup>97</sup> Most critically, in response to the Cop Accountability Database, the NYPD itself has begun a new system of risk management for its police force that includes defining misconduct more broadly. Rather than solely basing risk evaluations on government agencies' assessments (both the Internal Affairs Bureau and the Civilian Complaint Review Board), the NYPD includes allegations described in lawsuits as well.<sup>98</sup>

Open Police Complaints<sup>99</sup> is another form of creating data. It is a website (pending launch) designed like TurboTax for police complaints. Unlike the governmental complaint intake processes, the subject submits the complaint to oversight agencies, but can also circumvent the usual corresponding secrecy by publishing the complaint as the subject decides, with non-governmental actors, the press, or local civil rights attorneys. The Open Police Complaints portal will allow the individuals, not the government entity accepting the complaints, to decide how public to make their complaints.

The ability to create our own police accountability data means the community that makes it controls it. It decides how to create it, how to store and organize it, and how to report it. It completely changes the nature of the power dynamic between the state as official reporter and the public as consumer of the official report. The public's burgeoning role in this dynamic was already demonstrated by the power of Ramsey Orta's recording of the killing of Eric Garner. The introduction of body cameras should not persuade copwatchers to put down their cameras and rely on official footage.

Other efforts show the potential of applying the "open data" principles to policing by capitalizing on publicly available data to demonstrate a more accurate accounting of police encounters. The Citizens Police Data Project ("CPDP") has been a compelling example of these efforts.<sup>100</sup> The CPDP is from the same Chicago Invisibility Institute project that initiated

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97. See Steven Yoder, *Officers Who Rape: The Police Brutality Chiefs Ignore*, AL-JAZEERA (Jan. 19, 2016, 5:30 AM), <https://perma.cc/WM8L-WFE9>.

98. Lewis & Veltman, *supra* note 44.

99. OPEN POLICE COMPLAINTS, <https://perma.cc/H4QV-FGLP>.

100. CITIZENS POLICE DATA PROJECT, <https://perma.cc/NYZ9-3AMZ>.

*Kalven v. City of Chicago*.<sup>101</sup> The CPDP recently won the Sidney Award for Journalism for its visualization of over 56,000 complaints of police misconduct that it obtained from the *Kalven* case.<sup>102</sup> In the few months since its launch, the CPDP database has already shifted the narrative about policing: “The CPDP database revealed that the shooter [of Laquan McDonald], officer Jason Van Dyke, had been accused of misconduct 17 times before, and that none of the complaints against him—for excessive force and racial slurs—resulted in a penalty.”<sup>103</sup> On December 16, 2015, Van Dyke was indicted for six counts of murder.<sup>104</sup> Knowing Van Dyke’s documented prior misconduct history is vital to determine the extent to which systemic reform is required. Consider how differently Chicago reacted to its systemic disciplinary problems following the murder of Laquan McDonald, culminating in a six-count indictment against the offending officer and the resignation of its Commissioner, with New York City’s response to the murder of Eric Garner, which ended without an indictment and without any information about the offending officer’s prior misconduct.<sup>105</sup>

Open Data Policing NC is a very different, but equally effective, example of how governments and developers can collaborate on solutions to police misconduct.<sup>106</sup> Open Data Policing NC “aggregates, visualizes, and publishes public records related to all known traffic stops to have occurred in North Carolina since 2002, in Maryland since 2013, and in Illinois since 2005 . . . Where data sets are incomplete or missing, it is because they have not been reported to the state agency from which the site derives its records.”<sup>107</sup> This project has revealed patterns of racial profiling in traffic stops. At the press conference for the project’s launch, the developers were joined by a local police chief, who “has begun integrating the site into his management protocols. The Fayetteville Police

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101. 7 N.E.3d 741 (Ill. App. Ct. 2014); see Lewis Page, *Seeing the Invisible*, SOUTH SIDE WKLY. (Oct. 27, 2015), <https://perma.cc/57MT-F3JS>.

102. *The Invisible Institute Wins December Sidney for Exposing Trove of Troubling Police Data*, THE SIDNEY HILLMAN FOUND. (Dec. 2015), <https://perma.cc/H6YQ-W62G>.

103. *Id.*

104. *Officer Jason Van Dyke Indicted on 6 Murder Counts in Laquan McDonald Shooting*, ABC 7 EYEWITNESS NEWS (Dec. 16, 2015), <https://perma.cc/W7WT-C3XR>.

105. Compare *id.* and Bill Ruthhart & David Heinzmann, *Emanuel Dismisses Top Cop Garry McCarthy Amid Pressure for Change*, CHI. TRIB. (Dec. 2, 2015, 6:35 AM), <https://perma.cc/B2S6-54KE>, with Josh Voorhees, *Of Course It Happened Again: Why No One Should be Surprised NYPD Officer Daniel Pantaleo Wasn’t Indicted in the Chokehold Death of Eric Garner*, SLATE, (Dec. 3, 2014, 8:24 PM), <https://perma.cc/MW8Q-URG9>, and Ben Bedell, *Board to Appeal Cop Records in Fatal Garner Encounter*, N.Y. L. J. (Aug. 28, 2015), <https://perma.cc/84UU-2VVN>.

106. OPEN DATA POLICING NC, SOUTHERN COALITION FOR SOC. JUST., <https://perma.cc/L6E9-33PU>.

107. *Id.*

Department has seen a decrease in the number of searches and in the use of force at stops” since it began regularly reviewing the database.<sup>108</sup> When law enforcement embraces rather than protests transparency, everyone benefits.

Other projects have simply gathered information about data policies of police departments nationwide. In 2015, Code for America Fellows helped the City of Indianapolis open its police data and developed Project Comport, a tool to help cities open their police data.<sup>109</sup> They hope that Project Comport will function as a “Police Open Data Census.”<sup>110</sup> Black Lives Matter activists have created a research collaborative that has already produced two incredible police accountability portals. Mapping Police Violence does exactly that: the site opens with a graphic map of the United States sprayed by bullets in every location where a police killing of an unarmed person has occurred in 2015.<sup>111</sup> The same collaborative collected and organized nationwide police department policies regarding use of force in a way that facilitates comparative analysis in a report-card format.<sup>112</sup>

It is fairly obvious how these projects improve the public debate about police accountability and transparency. Without knowing the number of deaths in police custody or how one city’s use of force policies compare to another’s, there is little for the public to educate itself with and form positions around. Although the public typically forms opinions around media reporting, the media, just like the public, has similarly been kept in the dark about police accountability data.

#### B. REPORTING ON DATA

As the public outcry against police shootings gained momentum following the deaths of Eric Garner and Michael Brown in 2014, the government’s failure to collect official data about police accountability was revealed. “Attention fell on the police-shooting information gap as an evolving news industry was moving toward more quantitative

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108. See David Hudnall, *A New Tool to Track Police-Stop Data Across North Carolina*, INDY WK. (Dec. 17, 2015, 2:50 PM), <https://perma.cc/9QQV-MZVE>.

109. See *Indianapolis Metropolitan Police Department*, PROJECT COMPORT, <https://perma.cc/FD6W-ABSE>; see also Laura Ellena, *Contribute to the Police Open Data Census*, CODE FOR AMERICA (May 28, 2015), <https://perma.cc/UK4N-CHX7>.

110. See *Police Open Data Census Database*, CODE FOR AMERICA, <https://perma.cc/8KYP-6ZL2>.

111. MAPPING POLICE VIOLENCE, <https://perma.cc/NP33-BHXT>.

112. POLICE USE OF FORCE PROJECT, <https://perma.cc/WR89-Q8LN>. To view the report card, see *Use of Force Policy Review*, POLICE USE OF FORCE PROJECT, <https://perma.cc/47BC-3SWZ>.

journalism.”<sup>113</sup> In response to the converging ability to take on quantitative journalism and the opportunity to report about the gap of official information about police shootings nationwide, *The Washington Post* and *The Guardian* both created their own databases to assess how many police shootings happen nationwide, a statistic previously not calculated.<sup>114</sup>

Other news websites, like the Cato Institute’s National Police Misconduct Reporting Project<sup>115</sup> and the Marshall Project,<sup>116</sup> have created warehouses of news from across the country on police misconduct (and other criminal justice related matters) to give a more complete picture of the state of law enforcement in America. MuckRock has also contributed to recording record requests and has spearheaded efforts like “Blank Check: How local police fund themselves with fines and fees” through a “collaborative” journalism project that combines open records requests and reporting.<sup>117</sup>

These data “projects around the country . . . are making earnest attempts to improve oversight and understanding of the police.”<sup>118</sup> Combined with the official data on police encounters, the public’s data, whether created by a Copwatcher, a client’s story reported by a public defender, a visualization project built on a Freedom of Information request, or an investigative report based on previously unavailable data, will provide a more accurate, and long overdue, accounting of police encounters.

## CONCLUSION

Police accountability depends on the “eyes of an alert public opinion” and consistent enforcement.<sup>119</sup> But an alert public’s eyes must have

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113. Krajicek, *supra* note 20 (discussing what “Seth Lewis calls ‘the FiveThirtyEight effect.’ Nate Silver’s FiveThirtyEight.com, founded in 2007 as a polling aggregation website, now features deep data digs in politics, economics, science and health, sports, and culture”).

114. *Id.* (referencing *Police Shootings Database*, WASH. POST, <https://perma.cc/96JF-TWT5>); *see also id.* (referencing *The Counted: People Killed by Police in the U.S.*, GUARDIAN, <https://perma.cc/USV3-UMJ4>).

115. *See* NATIONAL POLICE MISCONDUCT REPORTING PROJECT, CATO INST., <https://perma.cc/6STE-V66U>; *see also* Feeney, *supra* note 34, at 11.

116. *See* THE MARSHALL PROJECT, <https://perma.cc/A7JJ-YAVN>.

117. *See* *Blank Check: How Local Police Fund Themselves with Fines and Fees*, MUCKROCK, <https://perma.cc/27PZ-F2MY>.

118. Jason Tashea, *7 Social Justice Projects Tapping the Power of Police Data*, TECHNICAL.LY (Jan. 6, 2016, 10:15 AM), <https://perma.cc/J6TG-JZWK>.

119. *Wolf v. Colorado*, 338 U.S. 25, 31 (1949); *see also* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010) (explaining that police officials do not have sufficient access to information about police misconduct described in lawsuits to

consistent and open access to the information required to hold police accountable.<sup>120</sup> Our legislatures should be serving the public's interest, not the police departments' interest, in deciding to what information the public should have a right of access.

“Impunity for human rights abuses thrives where there is a lack of transparency and information.”<sup>121</sup> Noting the parallel difficulties of reporting on human rights abuses internationally and reporting on police-involved deaths in the United States, Patrick Ball notes how “[t]he lack of systematic data poses a challenge both for those who wish to hold police accountable for their actions and for those who want to propose reform measures to reduce police violence.”<sup>122</sup> Although body cameras have the potential to improve police accountability and transparency, blanket exemptions from public access records are a direct threat to their potential. Even partially limiting laws being introduced across the country, usually packaged as privacy protections, complicate and further restrict the public's right to access police accountability data generally. As Professor Simonson's article urges, just because the police are picking body cameras up does not mean that we can put our Copwatching cameras down. Similarly, as the government slowly improves its police accountability data collection and reporting, neither should we put our data portals or our pens down.

The Human Rights Data Analysis Group's goal in collecting data of human rights abuses is to ensure “that the ‘truth’ is the most accurate truth possible.”<sup>123</sup> The most accurate truth is not limited to the official truth, nor is it exclusively defined by a crowd-sourced truth; rather, it is something in between the official truth brought down from above and the documentation of the public's lived experience, as reported from below.<sup>124</sup> Body camera recordings, viewed alongside Copwatchers' recordings and

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respond usefully); Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 847 (2012) (“Most police departments ignore lawsuits.”).

120. Wolf, 338 U.S. at 31–32. For a more detailed discussion of how police privacy laws undermine democracy and the accused's constitutional rights, see Conti-Cook, *supra* note 39.

121. *Human Rights Institute's New Project on Security Forces Wins Knight Foundation Award*, COLUM. L. SCH. (Jan. 26, 2016), <https://perma.cc/SM93-SZZS> (quoting Sarah Knuckey, Director of the Columbia Law School Human Rights Clinic and Co-Director of the Human Rights Institute) (discussing the need for Security Force Monitor, a Columbia Law School project that documents international police and military forces to improve accountability and transparency).

122. Patrick Ball, *Violence in Blue*, GRANTA (Mar. 4, 2016), <https://perma.cc/PM9Z-LRTN>.

123. *About HRDAG*, *supra* note 82.

124. This is accomplished using both surveillance and “sousveillance,” which is when the police are “watched from below, rather than on high.” Simonson, *supra* note 2, at 1568; *see also* Simonson, *supra* note 22, at 396.

witness reports have the potential of piercing a *more* “accurate truth” about policing to the public than we have ever had access to before. Restricting public access to these recordings undermines the “statement” body cameras are supposed to affirm: that “the actions of its officers are a matter of public record.”<sup>125</sup>

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125. PERF, *supra* note 7.