

COMMENTS

“BODY CAMERAS WON’T BRING JUSTICE”: WHY PENNSYLVANIA’S CHAPTER 67A DOES NOT PROMISE POLICE ACCOUNTABILITY*¹

I. INTRODUCTION

On August 9, 2014, Ferguson, Missouri, police officer Darren Wilson shot and killed Michael Brown, an unarmed, black eighteen-year-old.² The killing sparked immediate and prolonged protests in Ferguson and elsewhere, with demonstrators taking to the streets to challenge what they viewed as yet another instance of police brutality against people of color.³ Three months later, a grand jury failed to indict Wilson for the killing, resulting in even more unrest.⁴

Consumed by the death of Brown and other high-profile police killings of people of color,⁵ the public and the media began to focus on police-involved

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1. The title of this Comment comes from Nicole Hemmer, Opinion, *Body Cameras Won't Bring Justice*, U.S. NEWS (Dec. 6, 2016, 12:00 PM), <http://www.usnews.com/opinion/thomas-jefferson-street/articles/2016-12-06/walter-scott-mistrial-shows-body-cameras-wont-solve-police-racial-bias> [http://perma.cc/YED2-U8SH].

2. Betsy Bruce, *Teenager Shot, Killed in Ferguson Apartment Complex*, FOX2NOW ST. LOUIS (Aug. 9, 2014, 3:50 PM), <http://fox2now.com/2014/08/09/man-shot-killed-in-ferguson-apartment-complex/> [http://perma.cc/7BMW-B8MZ]; German Lopez, *The 2014 Ferguson Protests over the Michael Brown Shooting, Explained*, VOX (Jan. 27, 2016, 6:19 PM), <http://www.vox.com/cards/mike-brown-protests-ferguson-missouri/mike-brown-ferguson-mo-protests> [http://perma.cc/LZN6-6R73].

3. Lopez, *supra* note 2; see also *Ferguson Unrest: From Shooting to Nationwide Protests*, BBC NEWS (Aug. 10, 2015), <http://www.bbc.com/news/world-us-canada-30193354> [http://perma.cc/Y9R5-4CQQ] (explaining that protesters called for more action to be taken after the release of a federal report that alleged overwhelming racial bias in Ferguson's policing).

4. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://nyti.ms/2jD6h5O> [http://perma.cc/KYE2-HS2G].

5. See Lauren Gambino et al., *Thousands March To Protest Against Police Brutality in Major US Cities*, GUARDIAN (London) (Dec. 14, 2014, 10:58 AM), <http://www.theguardian.com/us-news/2014/dec/13/marchers-protest-police-brutality-new-york-washington-boston> [http://perma.cc/FCG9-SDU8] (noting that the police killings of Tamir Rice, Akai Gurley, Trayvon Martin, Eric Garner, and

shootings, police use of force, police accountability, and police legitimacy.⁶ This created a tension between police and the civilians they swore to protect and serve, and an increase in public confrontation with police authority was met with “police withdrawal from proactive engagement with the public.”⁷ One approach to alleviating this tension that both the public and the police support is the implementation of police body-worn cameras (BWCs).⁸ Some groups who are concerned with police power abuses view BWCs as a means to hold officers accountable to the public.⁹ Many police think BWCs will improve community relations—particularly in communities of color—and give them more reliable evidence of their interactions.¹⁰ Therefore, public demand for BWCs has skyrocketed.¹¹ In December 2014, the Obama White House released a report that promoted the increased use of BWCs and requested \$75 million in federal funding for them.¹² The White House claimed that BWCs “help strengthen accountability and transparency, and that officers and civilians both act in a more positive manner when they’re aware that a camera is present,”¹³ and its report “signaled a major vote of confidence” for the use and future success of BWCs.¹⁴ Furthermore, the Obama administration’s Department of Justice identified six aspects of policing that BWCs could improve: (1) trust and legitimacy, (2) policy

Amadou Diallo were addressed at protests).

6. See Alex Sutherland et al., *Post-Experimental Follow-Ups—Fade-Out Versus Persistence Effects: The Rialto Police Body-Worn Camera Experiment Four Years On*, 53 J. CRIM. JUST. 110, 110 (2017). Many people and communities have been concerned with these issues since long before Michael Brown was killed. See, e.g., Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN.COM (July 27, 2017), <http://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/> [<http://perma.cc/R888-68MR>]. Nevertheless, the summer of 2014 proved to be a catalyst for much broader public concern about police brutality. See Lincoln Anthony Blades, *How Michael Brown’s Death Awakened a Nation to Police Brutality*, TEEN VOGUE (Aug. 9, 2018, 10:17 AM), <http://www.teenvogue.com/story/michael-brown-death-anniversary-police-brutality-black-lives-matter> [<http://perma.cc/f4fa-HPEL>] (describing the impact of Michael Brown’s death four years later).

7. See Sutherland et al., *supra* note 6, at 110 (citing various sources).

8. *Id.*

9. See, e.g., JAY STANLEY, ACLU, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL 2 (2d ed. 2015), http://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf [<http://perma.cc/SGZ5-PQX8>].

10. Barak Ariel et al., *The Effect of Police Body-Worn Cameras on Use of Force and Citizens’ Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANTITATIVE CRIMINOLOGY 509, 529 (2014); see also Sutherland et al., *supra* note 6, at 110.

11. See Matthew S. Crow et al., *Community Perceptions of Police Body-Worn Cameras: The Impact of Views on Fairness, Fear, Performance, and Privacy*, 44 CRIM. JUST. & BEHAV. 589, 589–90 (2017).

12. David Hudson, *Building Trust Between Communities and Local Police*, WHITE HOUSE (Dec. 1, 2014, 8:25 PM), <http://obamawhitehouse.archives.gov/blog/2014/12/01/building-trust-between-communities-and-local-police> [<http://perma.cc/9ZXC-CX5D>]; see also Crow et al., *supra* note 11, at 589; Uri Friedman, *Do Police Body Cameras Actually Work?*, ATLANTIC (Dec. 3, 2014), <http://www.theatlantic.com/international/archive/2014/12/do-police-body-cameras-work-ferguson/383323/> [<http://perma.cc/X2MH-PWKC>].

13. Hudson, *supra* note 12.

14. Crow et al., *supra* note 11, at 590.

and oversight, (3) technology and social media, (4) community policing and crime reduction, (5) training and education, and (6) officer wellness and safety.¹⁵

In Pennsylvania, the growing demand for BWCs culminated in the passage of Pennsylvania Senate Bill 560 (S.B. 560)¹⁶ on July 7, 2017.¹⁷ The bill added Chapter 67A to Title 42 of the Pennsylvania Consolidated Statutes,¹⁸ "clearing the way for the use of police body-worn cameras."¹⁹ Although Chapter 67A does not require police departments to implement BWCs, supporters of the law believe that it will encourage more departments to begin using them.²⁰ But much to the chagrin of civil rights activists and organizations like the ACLU, the law also provides sweeping restrictions on public access to the resulting BWC recordings.²¹ Chapter 67A both exempts all audio and video recordings made by law enforcement from Pennsylvania's Right-to-Know Law²² and further limits public access by implementing a "heavily restrictive process for members of the public to obtain" such recordings.²³

Nevertheless, supporters of Chapter 67A claim that the law will hold police accountable for their actions, precisely because it creates a process for public release of BWC footage.²⁴ This Comment discusses Chapter 67A and concludes that it will not lead to increased police accountability and transparency in Pennsylvania for two reasons. First, it will heavily restrict public access to the resulting BWC footage, undermining its accessibility. Second, even if the footage were accessible, the law would have little impact on police accountability because police accountability is a *structural* problem, not an *evidentiary* one.

This Comment proceeds in several sections. Section II lays out the current social, political, and legal landscape surrounding BWCs, both nationally and in Pennsylvania. Next, Section III uses a recent Pennsylvania Supreme Court decision as a framework for arguing that Chapter 67A makes public disclosure of BWC footage more difficult than the Right-to-Know Law. Section IV contends

15. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, OFFICE OF CMTY. ORIENTED POLICING SERVS., DEP'T OF JUSTICE, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1-4 (2015), <http://elearning-courses.net/iacp/html/webinarResources/170926/FinalReport21stCenturyPolicing.pdf> [<http://perma.cc/U8M5-TGAX>].

16. S.B. 560, 2017-2018 Gen. Assemb., Reg. Sess. (Pa. 2017).

17. Act of July 7, 2017, Act No. 2017-22, 2017 Pa. Legis. Serv. (West) (codified as amended in scattered sections of PA. STAT. AND CONS. STAT. ANN.).

18. *Id.*

19. *Police Worn Body Camera Legislation Clears Senate*, SENATOR GREENLEAF (May 10, 2017), <http://www.senatorgreenleaf.com/2017/05/10/police-worn-body-camera-legislation-clears-senate/> [<http://perma.cc/KHP2-5LZR>] [hereinafter SENATOR GREENLEAF].

20. Wallace McKelvey, *Pa. Senate Approves Police Body Camera Bill the ACLU Says Restricts Public Access*, PENNLIVE (May 10, 2017, 3:53 PM), http://www.pennlive.com/politics/index.ssf/2017/05/police_body_cameras.html [<http://perma.cc/3MTS-LLJS>].

21. *See id.* (noting that an ACLU of Pennsylvania representative believes that the law undermines the purpose of BWCs).

22. 42 PA. STAT. AND CONS. STAT. ANN. § 67A02(a) (West 2019).

23. McKelvey, *supra* note 20. *See infra* Part III.B for a discussion of these restrictions.

24. *See, e.g.*, SENATOR GREENLEAF, *supra* note 19 ("[Chapter 67A] . . . allows public access to [BWC] recordings.").

that even if the public had easy access to BWC footage, it would not lead to increased police accountability.

II. PUBLIC DEMAND FOR BWCs AND PENNSYLVANIA'S RESPONSE

Chapter 67A was a product of new public demands and existing Pennsylvania law. Part II.A discusses the recently increased public demand for BWCs by looking at the various justifications for them. Part II.A also looks at how the conversation about police BWCs has progressed over the past several years. Next, Part II.B discusses Chapter 67A, Pennsylvania's response to that increased public demand. Finally, Part II.C summarizes Pennsylvania's Right-to-Know Law,²⁵ which would apply to BWC footage if not for Chapter 67A.²⁶

A. *The Rising Demand and Various Justifications for Police Body-Worn Cameras*

In light of Michael Brown's death and other police killings, public demand for BWCs increased dramatically.²⁷ Given the novelty of BWCs, a lot of the advocacy for their adoption is based on "limited research of varying levels of quality and anecdotal evidence."²⁸ The world's first BWC study involving a police department (the Rialto Experiment)²⁹ was published in 2014 and involved the Rialto Police Department in California.³⁰ Results from the Rialto Experiment quickly became prominent among law enforcement leaders.³¹ In that study, researchers observed 988 officer shifts and analyzed the impact that BWCs had on police use of force and the number of citizen complaints lodged against the police.³² Researchers compared shifts in which police wore BWCs with those in which they did not and ultimately found that force was about twice as likely to be used by officers who were not wearing BWCs.³³

Despite the Rialto Experiment's promising results, there were debates about the transferability of its findings to other jurisdictions³⁴—after all, the Rialto Police Department had only fifty-four frontline officers at the time of the

25. 65 PA. STAT. AND CONS. STAT. ANN. §§ 67.101–.3104 (West 2019).

26. Tit. 42, § 67A02(a).

27. See Crow et al., *supra* note 11, at 590.

28. *Id.* at 590–91; see also CYNTHIA LUM ET AL., EXISTING AND ONGOING BODY WORN CAMERA RESEARCH: KNOWLEDGE GAPS AND OPPORTUNITIES 3 (2015), <http://cebcp.org/wp-content/technology/BodyWornCameraResearch.pdf> [<http://perma.cc/BYG8-4C47>] (“[R]esearchers are only beginning to develop knowledge about the effects, both intentional and unintentional, of [BWCs].”).

29. Ariel et al., *supra* note 10, at 510.

30. *Id.*; Sutherland et al., *supra* note 6, at 110.

31. See Sutherland et al., *supra* note 6, at 110.

32. Ariel et al., *supra* note 10, at 518–23.

33. *Id.* at 523–24.

34. Darren Henstock & Barak Ariel, *Testing the Effects of Police Body-Worn Cameras on Use of Force During Arrests: A Randomised Controlled Trial in a Large British Police Force*, 14 EUR. J. CRIMINOLOGY 720, 727 (2017).

study.³⁵ Major metropolitan cities have much larger law enforcement agencies whose operations are categorically different from small- or medium-sized forces like Rialto's.³⁶ Further, the peculiar role that Rialto Chief of Police Tony Farrar had as a coauthor of the study concerned some: "His position was hardly that of a neutral observer."³⁷

In fact, studies about BWCs that occurred soon after the Rialto Experiment have raised questions about the impacts of implementing BWCs.³⁸ A 2015 systematic review of all existing and ongoing BWC studies cautioned against "making definitive conclusions from the existing literature."³⁹ BWCs might reduce the number of civilian complaints against police or might lead to complaints being resolved more quickly, but the current evidence base does not definitively support that they do.⁴⁰ Importantly, however, that review also stated that the existing studies presented insufficient data to conclude whether BWCs impact accountability.⁴¹ Furthermore, it is "unclear, perhaps because of low incident rates, whether BWCs significantly reduce incidents of use of force."⁴²

The most recent example of uncertainty about the impact of BWC implementation on police use of force came out of a working paper released in 2017.⁴³ Considered "the most important empirical study on the impact of police body-worn cameras to date,"⁴⁴ the study included 2,224 officers from the

35. Ariel et al., *supra* note 10, at 518–19.

36. See Henstock & Ariel, *supra* note 34, at 727 (citing Laure Weber Brooks & Nicole Leeper Piquero, *Police Stress: Does Department Size Matter?*, 21 *POLICING* 600 (1998)).

37. Ben Brucato, *Cameras on Cops and Junk Science in Rialto*, BENBRUCATO.COM (Dec. 3, 2014), <http://www.benbrucato.com/?p=633#more-633> [<http://perma.cc/WC22-PY86>] ("Farrar's study was conducted as part of his criminology Masters research at Cambridge University. He was, importantly, simultaneously . . . the head of the agency and managed both complaint review processes and those officers involved in the study."); see also Christopher J. Schneider, *Body Worn Cameras and Police Image Work: News Media Coverage of the Rialto Police Department's Body Worn Camera Experiment*, 14 *CRIME MEDIA CULTURE* 449, 457–58 (2018) (noting that the study was overseen by Farrar as part of his master's dissertation).

38. See LUM ET AL., *supra* note 28, at 11 ("It is . . . unclear, perhaps because of low incident rates, whether BWCs significantly reduce incidents of use of force (either excessive or non-excessive)."). For instance, a 2015 report found that officers in Phoenix, Arizona, who wore BWCs were 42.6% more likely to engage in "arrest activity" than their peers who did not wear BWCs. CHARLES M. KATZ ET AL., SMART POLICING INITIATIVE, DEP'T OF JUSTICE, PHOENIX, ARIZONA, SMART POLICING INITIATIVE: EVALUATING THE IMPACT OF POLICE OFFICER BODY-WORN CAMERAS 7 (2015). Another study found that implementation of BWCs had no impact on officer use of force. EDMONTON POLICE SERV., BODY WORN VIDEO: CONSIDERING THE EVIDENCE 61–65 (2015).

39. LUM ET AL., *supra* note 28, at 11.

40. *Id.*

41. *Id.*

42. *Id.*; see also *supra* note 38.

43. DAVID YOKUM ET AL., EVALUATING THE EFFECTS OF POLICE BODY-WORN CAMERAS: A RANDOMIZED CONTROLLED TRIAL 22 (2017), http://bwc.thelab.dc.gov/TheLabDC_MPD_BWC_Working_Paper_10.20.17.pdf [<http://perma.cc/C3ZW-U9PT>] (concluding that "we should recalibrate our expectations of BWCs" and that departments "that are considering adopting BWCs should not expect dramatic reductions in use of force or complaints" by implementing them).

44. Nell Greenfieldboyce, *Body Cam Study Shows No Effect on Police Use of Force or Citizen Complaints*, NPR (Oct. 20, 2017, 10:30 AM), <http://www.npr.org/sections/I-way/2017/10/20/558832090/>

Metropolitan Police Department of the District of Columbia (MPD), which is among the largest police departments in the United States.⁴⁵ The results of the extensive study were simple: BWCs had virtually no impact on the frequency of citizen complaints or officers' use of force.⁴⁶ The study considered multiple explanations for that finding⁴⁷ but ultimately concluded that "we should [all] recalibrate our expectations of BWCs."⁴⁸

Regardless of the dearth of evidence on the positive effects of BWCs, the public and law enforcement officials view BWCs as an important tool for holding police accountable for abuses and brutality.⁴⁹ In addition to support from lawmakers and executive officeholders, BWCs received a judicial stamp of approval in a 2013 case about the NYPD's use of stop and frisk.⁵⁰ In that case, a federal judge endorsed the use of BWCs by ordering the NYPD to use BWCs on a trial basis.⁵¹

Moreover, proponents argue not only that BWC footage will create evidentiary trails, which could aid in investigations of police misconduct and other criminal matters,⁵² but also that it will help prevent police misconduct in the first place because people tend to behave better when they are being watched.⁵³ Numerous scientific studies support this argument and suggest that people change their behavior to conform with social norms precisely *because* they think someone is watching.⁵⁴ An important factor in those studies is the

body-cam-study-shows-no-effect-on-police-use-of-force-or-citizen-complaints [http://perma.cc/J6ZM-9KU2] (quoting Harlan Yu, a social science researcher for an organization that tracks how technology impacts social justice and civil rights issues).

45. YOKUM ET AL., *supra* note 43, at 5–6.

46. *Id.* at 11–17, 22 ("We are unable to detect any statistically significant effects [of wearing BWCs]."); *see also* Greenfieldboyce, *supra* note 44 ("We found essentially that we could not detect any statistically significant effect of the [BWCs]" (quoting Anita Ravishankar, one of the authors of the working paper)).

47. YOKUM ET AL., *supra* note 43, at 18–21 (offering potential explanations like (1) BWCs do not, in fact, have any effect on use of force or citizen complaints; (2) MPD officers might already be trained well enough to avoid use of force absent BWCs; (3) the effects of BWCs might have been masked by other factors in this study; (4) MPD officers did not use the cameras properly; and (5) BWCs might decrease use of force or citizen complaints, but administrative data do not adequately capture those decreases because some instances of use of force go unreported both by police and civilians).

48. *Id.* at 22.

49. *See* LINDSAY MILLER & JESSICA TOLIVER, POLICE EXEC. RESEARCH FORUM, OFFICE OF CMTY. ORIENTED POLICING SERVS., DEP'T OF JUSTICE, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 5–9 (2017), <http://ric-zai-inc.com/Publications/cops-p296-pub.pdf> [http://perma.cc/JJT6-E6B2]; Shira A. Scheindlin & Peter K. Manning, *Will the Widespread Use of Police Body Cameras Improve Police Accountability?*, AMERICAS Q., Spring 2015, at 24, 24, 26; Anthony Davies & James R. Harrigan, Opinion, *Pa. Law Tries To Avoid Police Accountability*, PHILA. INQUIRER, July 6, 2017, at A14.

50. *See* *Floyd v. City of New York*, 959 F. Supp. 2d 540, 563 (S.D.N.Y. 2013).

51. *Id.*

52. *See* MILLER & TOLIVER, *supra* note 49, at 9.

53. *See* Scheindlin & Manning, *supra* note 49, at 26.

54. Ariel et al., *supra* note 10, at 511; *see also, e.g.*, Siegfried K. Berninghaus et al., *Risk Attitude, Beliefs, and Information in a Corruption Game—An Experimental Analysis*, 34 J. ECON. PSYCHOL. 46,

likelihood of being caught: “When certainty of apprehension for wrongdoing is ‘high’, socially and morally unacceptable acts are less likely to occur.”⁵⁵ But the inconsistent results from various BWC studies do not indicate a clear translation from those sociological theories to the effectiveness of BWCs.⁵⁶ In other words, it is unclear if the use of BWCs—and the corresponding omnipresent threat of being watched—affects police behavior.⁵⁷ Still, many people continue to believe that the use of police BWCs increases police accountability and transparency.⁵⁸

In turn, a second supposed benefit of BWCs is that their implementation will cause civilians to perceive the police to be more legitimate, thereby increasing public trust.⁵⁹ Community relations are critical to effective policing and can only occur when the police have gained the trust of the civilians they serve.⁶⁰ An important aspect of enhancing police legitimacy and community relations is called “police image work”—efforts by police to “maintain control over their public image in media as the legitimate authority.”⁶¹ Police image work depends on overt support in the news and on social media platforms.⁶² Even the current, ambiguous evidence on the efficacy of BWCs could accomplish this goal.⁶³ Put another way, the media praise that police departments receive for implementing BWCs might be sufficient to portray police as legitimate, even though the evidence that BWCs improve policing is limited and anecdotal.⁶⁴

But even supporters of BWCs recognize the potential challenges and

51, 54–55 (2013) (finding that participants were more likely to engage in risky behaviors when they believed that they would not be caught).

55. Ariel et al., *supra* note 10, at 511.

56. See LUM ET AL., *supra* note 28, at 11 (cautioning against concluding that BWCs have any impact on police behaviors).

57. See *id.*

58. See MILLER & TOLIVER, *supra* note 49, at 5–9; Scheindlin & Manning, *supra* note 49, at 24, 26; Davies & Harrigan, *supra* note 49, at A14.

59. See Schneider, *supra* note 37, at 453, 461.

60. MILLER & TOLIVER, *supra* note 49, at 19.

61. Schneider, *supra* note 37, at 453 (citing RICHARD V. ERICSON, *REPRODUCING ORDER: A STUDY OF POLICE PATROL WORK* (2nd ed. 1982)).

62. *Id.* (citing various sources).

63. See *id.* at 461.

64. See Crow et al., *supra* note 11, at 590–91 (“[M]uch of the advocacy for widespread implementation of BWCs is based on limited research of varying levels of quality and anecdotal evidence.”); Schneider, *supra* note 37, at 461 (“[P]artnerships in news media can help augment police legitimacy even in spite of concerns over limited and/or anecdotal evidence. For instance, we may consider the manner in which police are able to provide claims in news media in support of the effectiveness of BWCs in terms of their own accountability, based largely on anecdotal evidence, speculation, and extrapolating the findings of a single study that, taken together, serve as the basis for the implementation of BWCs across jurisdictions.”). A great example of this comes out of the D.C. working paper discussed above, the results of which “point to a null result” in terms of the impact that BWCs had on the frequency of police use of force and citizen complaints. YOKUM ET AL., *supra* note 43, at 11. Responding to the working paper, the MPD Chief of Police said, “I am a little concerned that people might misconstrue the information and suggest that [BWCs] have no value. I don’t think that this study suggests that at all. . . . *I think it’s really important for legitimacy for the police department.*” Greenfieldboyce, *supra* note 44 (emphasis added).

concerns surrounding their widespread use, like invasion of privacy, high costs, difficulties in implementation, and storage limitations.⁶⁵ Moreover, some people disagree that implementing BWCs will increase police legitimacy and public trust because, they argue, the notion that introducing BWCs inherently enhances police legitimacy and professionalism is unfounded.⁶⁶ That is to say that it is hard to know whether the use of police BWCs alone actually increases the public's perception of police.⁶⁷ For instance, transparency is a crucial aspect of police legitimacy, but due to a lack of research on the subject there is little evidence to support the claim that BWCs increase police departments' transparency.⁶⁸ Therefore, the impact that BWCs have on the public's trust of the police is unclear.⁶⁹

In addition to the possibility that the police will garner unwarranted support from the public simply by using BWCs, focusing on the benefits of BWCs⁷⁰ risks overlooking potential negative effects. One such ramification is how BWCs portray certain groups of people.⁷¹ BWCs seldom actually record the *police*—they are almost always pointed at civilians.⁷² They are likely to film people in some of their most distressing moments, whether “emotionally, physically[, or] psychologically.”⁷³ Moreover, they are likely to film individuals who are among the most underrepresented in our society—people who are poor, people of color, people with mental illnesses, and people experiencing homelessness, for instance.⁷⁴ The proliferation of videos showing underrepresented individuals in a negative light creates a legitimate concern that the use of BWCs will perpetuate certain stereotypes.⁷⁵ That proliferation could also lead to another unfortunate, unintended consequence of BWCs: public release of BWCs might discourage individuals from certain populations from calling the police when they need assistance, for fear of being filmed.⁷⁶ Furthermore, recording individuals who are experiencing traumatic situations might, in fact, worsen the trauma.⁷⁷

Another significant risk of the use of BWCs is the potential trauma that can

65. See, e.g., MILLER & TOLIVER, *supra* note 49, at 11–34.

66. See Schneider, *supra* note 37, at 453–54.

67. See MICHAEL D. WHITE, OFFICE OF CMTY. ORIENTED POLICING SERVS., DEP'T OF JUSTICE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 19–20 (2014), <http://ric-zai-inc.com/Publications/cops-p289-pub.pdf> [<http://perma.cc/2PZT-7T6C>].

68. See *id.*

69. *Id.*

70. See, e.g., MILLER & TOLIVER, *supra* note 49, at 5–9 (discussing “the perceived benefits of” BWCs).

71. See Jamaal Abdul-Alim, *Scholar Warns Body Cams Used To Show Underrepresented in Worst Light*, 33 DIVERSE ISSUES HIGHER EDUC. 8, 8 (2016) (interviewing Cynthia Lum, associate professor of criminology at George Mason University and coauthor of EXISTING AND ONGOING BODY WORN CAMERA RESEARCH: KNOWLEDGE GAPS AND OPPORTUNITIES, *supra* note 28).

72. *Id.*

73. *Id.*

74. See *id.*

75. See *id.*

76. *Id.*

77. WHITE, *supra* note 67, at 27–28.

result from watching BWC footage.⁷⁸ This could be especially severe for members of the stigmatized, underrepresented communities mentioned above.⁷⁹ For many, knowing that the police are seldom held accountable for their actions "can transform that trauma into terror."⁸⁰ The trauma and terror surrounding images of police brutality can lead to withdrawal from action to eradicate such injustices, thereby undercutting the BWC goal of police accountability.⁸¹ While BWC footage can make certain previously uninformed segments of the population aware of the reality of police brutality,⁸² for some people, the long-term trauma related to watching the footage might outweigh the benefits of its accessibility.⁸³

78. See Jacob Bor et al., *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, 392 LANCET 302, 307–08 (2018) (finding a correlation between exposure to police killings of unarmed black people and poorer mental health); Liz Adetiba & Anna Almendrala, *Watching Videos of Police Brutality Can Traumatize You, Especially if You're Black*, HUFFINGTON POST (Sept. 20, 2016), http://www.huffingtonpost.com/entry/watching-police-brutality-videos_us_577ee9b3e4b0344d514eaa5d [<http://perma.cc/5J6J-76BX>]; Kia Gregory, *How Videos of Police Brutality Traumatize African Americans and Undermine the Search for Justice*, NEW REPUBLIC (Feb. 13, 2019), <http://newrepublic.com/article/153103/videos-police-brutality-traumatize-african-americans-undermine-search-justice> [<http://perma.cc/DM4Q-GML6>] (noting that viewing images of police violence can lead to various emotional and physical problems).

79. Adetiba & Almendrala, *supra* note 78 ("When you're part of a stigmatized community, so much of your identity is tied up in that community," explained Monnica Williams, a clinical psychologist and director of the Center for Mental Health Disparities at the University of Louisville. "And when you see other people like you who are being victimized, it makes you feel that the world's not a safe place for people like you."); Gregory, *supra* note 78 ("[B]ecause images of police violence are so pervasive, they inflict a unique harm on viewers, particularly African Americans, who see themselves and those they love in these fatal encounters.")

80. Adetiba & Almendrala, *supra* note 78 ("If you're conditioned to a trauma, and that trauma occurs and recurs in a context where it feels you have no control over it, and it's being done by powerful people for whom there are no consequences—that's why I'm saying we move from trauma to terror." (quoting Phillip Atiba Goff, "a social psychology expert and president of the Center for Policing Equity")); see Gregory, *supra* note 78 ("This trauma is compounded when videos reveal what seems to be a clear case of excessive or unnecessary police force, only for the officers involved to not face charges or be acquitted, routinely by a mostly white jury."). See *infra* Part IV.B for a discussion of the lack of accountability for perpetrators of police brutality.

81. See Adetiba & Almendrala, *supra* note 78 ("Because the videos are so horrifying, . . . some people try to shut them out and turn away—which makes those individuals less likely to pursue political action aimed at reform."); Gregory, *supra* note 78 ("There is also concern that viewers might eventually become inured to these images, indelible as they are, which might dampen efforts to hold accountable the police officers and the criminal justice system.")

82. See Adetiba & Almendrala, *supra* note 78 ("[T]he existence of police violence videos has forced many people, especially white Americans, to confront the reality that black people face. . . . Newt Gingrich, former House Speaker . . . , acknowledged that[, saying,] 'If you're a normal Caucasian, . . . you don't see that, because it's not part of your experience.'"); Gregory, *supra* note 78 ("The racial justice movement against state violence would not have accelerated at the quick pace that it did without these videos," said Khalil Gibran Muhammad, a professor of history, race, and public policy at Harvard Kennedy School.)

83. Gregory, *supra* note 78 ("The advent of new technologies has allowed us to chronicle and testify to a horribly entrenched truth: The American justice system continually, daily devalues black bodies. It has only been forced to reckon with the reality of its own bias when a flash of video shows, in soul-wrenching detail, the ease with which a life can be extinguished. This revelation comes at a cost to the well-being of African Americans across the country who are exposed to these images at the swipe

In sum, many civil rights activists and police departments support the use of BWCs. Viewing BWCs as a solution for lack of police accountability and transparency has gained prominence over the past several years in response to the results of the Rialto Experiment and repeated instances of police brutality caught on camera. But critics of BWCs do not believe that they are an evidence-based intervention and have concerns about their implementation, including risks like providing unwarranted legitimacy for police departments and further traumatizing members of oppressed communities, as well as logistical issues like costs and storage.

B. *Pennsylvania S.B. 560 Clears the Way for Police Body-Worn Cameras*

In March 2017, the Pennsylvania State Senate began its consideration of Senator Stewart J. Greenleaf's proposed S.B. 560, which sought to codify the use of BWCs in Pennsylvania.⁸⁴ By June, the bill passed in both the Senate and the House by votes of 49 to 1 and 185 to 9, respectively.⁸⁵ On July 7, 2017, Governor Tom Wolf signed the bill into law, and on September 5, 2017, it went into effect.⁸⁶ Given its broad bipartisan support, S.B. 560 was not subject to much debate or amending.⁸⁷ A handful of documents, however, illustrates the goals of the bill. S.B. 560, both as originally proposed and in its final form, intended to address two major issues concerning BWCs: (1) legally "clearing the way" for their use and (2) ensuring public access to the footage resulting from their use.⁸⁸

To "clear the way" for the use of BWCs, the law first exempted all police recordings from Pennsylvania's Wiretapping and Electronic Surveillance Control Act (Wiretap Act).⁸⁹ It then created a process by which the public can access

of a finger or the click of a mouse. And so far, with precious little to show by way of significant and lasting reform, *the cost has been too high.*" (emphasis added)).

84. *Bill Information - History*, PA. GEN. ASSEMBLY, http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2017&sind=0&body=S&type=B&bn=560 [<http://perma.cc/4BHR-MLSH>] (last visited Feb. 15, 2019) [hereinafter PA. GEN. ASSEMBLY].

85. *Id.*

86. *See* Act of July 7, 2017, Act No. 2017-22, § 4, 2017 Pa. Legis. Serv. (West) (noting that the act would take effect sixty days from July 7, 2017).

87. *See* PA. GEN. ASSEMBLY, *supra* note 84.

88. SENATOR GREENLEAF, *supra* note 19.

89. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 5704(13)–(14) (West 2019) (originally enacted as Act of July 7, 2017, § 2). Under the Wiretap Act, police can record video, but not audio, inside a person's home. *See id.* § 5704(2)(iv). Furthermore, the Wiretap Act requires police, in public spaces, to announce that a recording is taking place, which "would be nearly impossible on a busy street," according to Senator Greenleaf. SENATOR GREENLEAF, *supra* note 19. S.B. 560 amended sections 5704(13) and 5704(14) to exempt police BWC footage—as well as other means of surveillance—from the Wiretap Act. *See* Act of July 7, 2017, § 2. Specifically, S.B. 560 amended

Titles 18 (Crimes and Offenses) and 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, in wiretapping and electronic surveillance, further providing for definitions, for exceptions to prohibition of interception and disclosure of communications, for exceptions to prohibitions in possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices and for expiration of chapter; and providing for recordings by law enforcement officers.

Id. (full title of the act).

BWC footage.⁹⁰ Senator Greenleaf praised the law for improving “conviction integrity,” believing that it would ensure that both the police and the public be held accountable for their actions.⁹¹ He contended that the law would allow for the police to collect evidence in real time and for the public to access the recordings.⁹² Senator Greenleaf said that police departments would be required to produce requested recordings that do not relate to pending criminal matters.⁹³ The law purportedly encourages increased transparency⁹⁴ by exempting BWC footage from Pennsylvania’s Right-to-Know Law, which otherwise would govern how and when police must make BWC footage public.⁹⁵ Instead, the law creates a unique process for providing public access to the footage.⁹⁶

Specifically, S.B. 560 added Chapter 67A to Title 42 of the Pennsylvania Consolidated Statutes.⁹⁷ Chapter 67A provides that it—not the Right-to-Know Law—governs public access to recordings made by law enforcement.⁹⁸ It specifies the requirements for a request for any BWC recording, which are that the request must (1) be made in writing, within sixty days of when the recording was created, to the open-records officer of the relevant law enforcement agency; (2) be delivered by hand or certified mail; (3) “specify with particularity” the event that the recording captured, including its time, date, and location; and (4) describe how the requestor is related to the event that the recording captured.⁹⁹

The law enforcement agency must respond to a valid request within thirty days, either by providing the requested recording or by issuing a written denial to the requestor.¹⁰⁰ Alternatively, if the law enforcement agency does not provide the requested recording or issue a written denial to the requestor, then the request will be deemed denied.¹⁰¹

90. SENATOR GREENLEAF, *supra* note 19; *see also* 42 PA. STAT. AND CONS. STAT. ANN. §§ 67A03–67A07 (West 2019).

91. SENATOR GREENLEAF, *supra* note 19.

92. *Id.*

93. *Id.*

94. *See id.*

95. *See* tit. 42, § 67A02 (exempting “any audio recording or video recording made by a law enforcement agency” from the Right-to-Know Law). *See infra* Part ILC for a discussion of how the Right-to-Know Law governs public access to government records.

96. *See* tit. 42, §§ 67A03–67A06. The Right-to-Know Law defers to other laws in terms of determining if a record is exempt from disclosure. *See* 65 PA. STAT. AND CONS. STAT. ANN. §§ 67.301(b), .302(b), .305(a)(3), .305(b)(3), .306 (West 2019) (requiring disclosure from government agencies unless doing so would violate another law).

97. Act of July 7, 2017, Act No. 2017-22, § 3, 2017 Pa. Legis. Serv. (West) (codified as amended at tit. 42, §§ 67A01–67A09).

98. Tit. 42, § 67A02(a).

99. *Id.* § 67A03(1)–(3); *see also id.* § 67A03(4) (“If the incident or event that is the subject of the audio recording or video recording occurred inside a residence, the request shall identify each individual who was present at the time of the audio recording or video recording unless not known and not reasonably ascertainable.”).

100. *Id.* § 67A05(a).

101. *See id.* § 67A05(b) (“The request under 67A03 shall be deemed denied by operation of law if the law enforcement agency does not provide the audio recording or video recording to the requestor or explain why the request is denied within the time period specified or agreed to under

Next, Chapter 67A creates a two-step test for determining if a recording is exempt from public disclosure.¹⁰² First, a law enforcement agency must determine whether the requested recording contains at least one of the following types of content: (1) potential criminal evidence, (2) “information pertaining to an investigation,” (3) confidential information, or (4) victim information.¹⁰³ Second, if it does contain such content, then the law enforcement agency must determine whether the recording could be reasonably edited to redact and protect that content.¹⁰⁴ If that is not possible, then the recording must not be disclosed to the requestor.¹⁰⁵ The law does not, however, *affirmatively require* disclosure of recordings that do not contain prohibited content or that could be reasonably edited to redact and protect such content.¹⁰⁶

For the first step, Chapter 67A provides definitions for three of the four exempt types of content—“[i]nformation pertaining to an investigation,” confidential information, and victim information.¹⁰⁷ The law defines “[i]nformation pertaining to an investigation” as any recording that contains “[c]omplaints or depictions of criminal conduct” as well as any recording whose disclosure would (1) reveal information about an ongoing or concluded criminal or agency investigation; (2) “deprive an individual of the right to a fair trial or an impartial adjudication” or “administrative adjudication;” (3) “impair the ability of [a prosecutor] . . . or a law enforcement officer to locate a defendant or codefendant” or to arrest, prosecute, convict, or sanction an individual; (4) unreasonably invade an individual’s privacy; or (5) “endanger the life or physical safety of an individual.”¹⁰⁸

Confidential information includes (1) a confidential source’s identity, (2) the identity of somebody to whom confidentiality has been promised, and (3) legally confidential information.¹⁰⁹ Victim information is that which would identify a victim or put a victim’s safety in jeopardy.¹¹⁰

Upon either actual or constructive denial,¹¹¹ the requestor has thirty days to

subsection (a).”). Under certain circumstances, the law enforcement agency cannot unilaterally agree to disclose the requested recording. *See id.* § 67A08(3). That is, if (1) the recording in question “contains potential evidence in a criminal matter, information pertaining to an investigation, confidential information or victim information” and (2) “reasonable redaction of the [recording] will not safeguard the potential evidence, information pertaining to an investigation, confidential information or victim information,” then the jurisdiction’s prosecuting attorney must provide to the law enforcement agency written approval of the disclosure of the recording. *Id.*

102. *Id.* § 67A04(a).

103. *Id.*

104. *Id.*

105. *Id.*

106. *See id.* See also *infra* notes 120–22 and accompanying text for a brief explanation of the appeals process, which similarly indicates that agencies can deny requests for recordings that are not explicitly exempt from disclosure by Chapter 67A.

107. Tit. 42, § 67A01.

108. *See id.*

109. *Id.*

110. *Id.*

111. Constructive denial exists when the agency does not respond to a request for a recording

file a petition for review in the court of common pleas with jurisdiction.¹¹² The requestor’s petition will be summarily dismissed if (1) the original request was untimely;¹¹³ (2) the original request did not describe the event that the recording captured with “sufficient particularity,” including the time, date, and location of the event;¹¹⁴ (3) the requestor failed to pay a filing fee of \$125;¹¹⁵ (4) the requestor did not meet requirements for recordings made inside a residence;¹¹⁶ (5) the requestor failed to include a copy of the original written request and copies of any subsequent communications received from the law enforcement agency;¹¹⁷ or (6) the requestor failed to serve the agency’s open-records officer within five days of filing the petition with the court of common pleas.¹¹⁸

If the petition is not summarily dismissed, the requestor bears the burden of proving, by a preponderance of the evidence, that the law enforcement agency that denied the initial request either (1) did not base its denial on the two-part test outlined above¹¹⁹ or (2) denied the request on “arbitrary and capricious” grounds.¹²⁰ Additionally, the requestor must establish that either the public’s or the requestor’s interest in disclosure outweighs competing interests in nondisclosure.¹²¹ To make that determination, the court can consider (1) the public’s desire to understand how law enforcement officers interact with civilians; (2) the safety and privacy interests of victims, law enforcement officers, and others; and (3) the available resources for review and disclosure of the requested recording.¹²²

Ultimately, the court will reverse the initial denial by law enforcement only if it finds both that the denial did not comply with section 67A04(a) and that public disclosure serves the public interest. This effectively adds another manner for a law enforcement agency to deny a request: the agency could determine that a recording did not include prohibited content, or that the content could be protected through redaction, and still decide not to disclose the recording on the basis that the public’s or the requestor’s interest in disclosure is outweighed by interests in nondisclosure. Although the reviewing court would still have to affirm that analysis, the initial determination could be a means by which a law enforcement agency could withhold recordings, at least at first, in accordance

within thirty days. *See supra* note 101 and accompanying text.

112. Tit. 42, § 67A06(a)(1).

113. *Id.* § 67A06(d)(1).

114. *Id.* § 67A06(d)(2).

115. *Id.* § 67A06(b)(1), (d)(3).

116. *Id.* § 67A06(b)(2), (d)(3) (providing for summary dismissal of a petition if the recorded event took place in a residence and the requestor failed to “certify that notice of the petition has been served or that service was attempted on each individual who was present at the time of the audio recording or video recording and on the owner and occupant of the residence” to the extent that “the identity of an individual present or the location is . . . reasonably ascertainable by the petitioner”).

117. *Id.* § 67A06(b)(3), (d)(3).

118. *Id.* § 67A06(b)(4), (d)(3).

119. *See supra* notes 102–06.

120. Tit. 42, § 67A06(e)(1).

121. *Id.* § 67A06(e)(2).

122. *Id.*

with the law.

C. Pennsylvania's Right-to-Know Law

If not for Chapter 67A, Pennsylvania's Right-to-Know Law would govern the accessibility of BWC footage.¹²³ Understanding the Right-to-Know Law highlights the differences between it and Chapter 67A, which lends insight into why the legislature decided to exempt BWC footage from the Right-to-Know Law. In particular, the legislative history of the Right-to-Know Law demonstrates the legislature's clear desire to make government agencies more transparent in Pennsylvania.

On February 14, 2008, Governor Ed Rendell enacted the Right-to-Know Law.¹²⁴ The law "fundamentally change[d] the structure of Pennsylvania's open records law in favor of public access."¹²⁵ Aside from the thirty categories of records that it exempted from disclosure,¹²⁶ the law established a presumption of public access to all state and local agencies' records, to all legislative records, and to all of the financial records of the Commonwealth's court system.¹²⁷ The presumption of public access represents a liberal shift from Pennsylvania's previous open-records law, which presumed all records not to be public and placed the burden on a requestor to prove that a record should be made public.¹²⁸

The Right-to-Know Law applies to any Commonwealth agency, local agency, judicial agency, or legislative agency.¹²⁹ The Pennsylvania State Police is a Commonwealth agency.¹³⁰ Similarly, a local police department is a local agency.¹³¹ Therefore, Pennsylvania law enforcement agencies are subject to the Right-to-Know Law.¹³²

123. See *id.* § 67A02(a).

124. Right-to-Know Law, No. 2008-3, 2008 Pa. Laws 6 (codified as amended at 65 PA. STAT. AND CONS. STAT. ANN. §§ 67.101–.3104).

125. See Teri Henning, *Pennsylvania's Right to Know Law: Guide to the New Open Records Law: Act 3 of 2008*, PA. NEWSPAPER ASS'N (2008), <http://panewsmedia.org/docs/default-source/legal-and-legislative-documents/GuideToRTKL.pdf> [<http://perma.cc/49S2-JNPT>].

126. 65 PA. STAT. AND CONS. STAT. ANN. § 67.708 (West 2019). See *infra* notes 143–52 and accompanying text for a discussion of the relevant exceptions.

127. Tit. 65, § 67.305; see Henning, *supra* note 125.

128. See Act of June 21, 1957, No. 212, § 4, 1957 Pa. Laws 390, 391–92 (repealed 2008); *About the Right-To-Know Law*, OFFICE OF OPEN RECORDS, <http://www.openrecords.pa.gov/RTKL/About.cfm> [<http://perma.cc/V6GR-ETEQ>] (follow "What's the biggest change under the current law compared to the old law?" hyperlink) (last visited Feb. 15, 2019).

129. Tit. 65, §§ 67.301–.304.

130. See *id.* § 67.102 (defining Commonwealth agencies as any state offices, departments, authorities, and boards, as well as commissions, state-affiliated entities, independent agencies, multistate agencies, and any state organization that is meant to perform an essential government function); see also *Pennsylvania State Police v. Grove (Grove II)*, 161 A.3d 877, 892 (Pa. 2017) (applying the Right-to-Know Law to the Pennsylvania State Police).

131. See tit. 65, § 67.102 (defining local agencies as including political subdivisions and intermediate units, as well as all local or municipal government entities).

132. See *id.* §§ 67.301–.304. This is also made clear by the fact that Chapter 67A, which applies

To obtain a record from an agency under the Right-to-Know Law, an individual must request it from the relevant agency's open-records officer, which every agency must establish in accordance with the Right-to-Know Law.¹³³ The officer then has five business days to determine in good faith whether the record requested is a public record.¹³⁴ If the agency does not respond within five days, then the request is deemed denied.¹³⁵ If the request was in writing, the receiving agency must accompany its denial with an explanation that details the decision, includes legal authorities, and describes the appeals process.¹³⁶

If an individual's request is denied, the requestor may file a written appeal with the Office of Open Records, which must make its final determination within thirty days.¹³⁷ The requestor may request a hearing concerning this appeal.¹³⁸ If the Office of Open Records denies the appeal, the requestor can appeal to the appropriate court.¹³⁹

In the request and appeals processes, presumptions of and exemptions from the Right-to-Know Law apply.¹⁴⁰ The Right-to-Know Law establishes a presumption that records held by a Commonwealth or local agency are public, which means that the relevant agency must release the requested records.¹⁴¹ However, there are three exceptions to this presumption: (1) when the record in question is subject to a legally recognized privilege (such as attorney-client privilege or doctor-patient privilege), (2) when another law exempts a type of record from disclosure, and (3) when the record is specifically exempt by section 708 of the Right-to-Know Law.¹⁴²

Section 708 lists thirty different types of records that are exempt from disclosure.¹⁴³ Several of these exemptions are relevant to BWC footage. Any record that relates to official complaints made against individuals¹⁴⁴ or that reveals confidential information is exempt from disclosure.¹⁴⁵ Records relating to a criminal or noncriminal investigation are also exempt from public disclosure if

exclusively to law enforcement agencies, exempts BWC footage from the Right-to-Know Law, which would be unnecessary if those agencies were not subject to the Right-to-Know Law. *See* tit. 42, § 67A02(a).

133. Tit. 65, § 67.502(a)(1).

134. *See id.* § 67.901.

135. *Id.*

136. *See id.* § 67.903(2), (5).

137. *Id.* § 67.1101(a)(1), (b)(1).

138. *Id.* § 67.1101(b)(3).

139. *Id.* §§ 67.1301(a), .1302(a). The party must file with the Pennsylvania Commonwealth Court if the agency that denied the initial request is "a Commonwealth agency, a legislative agency or a judicial agency." *Id.* § 67.1301(a). Conversely, the party must file "with the court of common pleas for the county where the local agency is located" if the agency that denied the initial request is a "local agency." *Id.* § 67.1302(a).

140. *See id.* §§ 67.901, .1101.

141. *Id.* § 67.305(a).

142. *Id.* § 67.305(a)(1)–(3).

143. *Id.* § 67.708(b)(1)–(30).

144. *See id.* § 67.708(b)(16)(i), (17)(i).

145. *See id.* § 67.708(b)(16)(iii)–(iv), (17)(iii)–(iv).

such disclosure would (1) publicize the current status of an investigation,¹⁴⁶ (2) negatively affect an individual's right to impartial adjudication or a fair trial,¹⁴⁷ (3) diminish an agency's ability to hold an individual accountable,¹⁴⁸ or (4) risk the physical safety of an individual.¹⁴⁹

Additionally, section 708 exempts any record related to a criminal investigation from disclosure if such disclosure would make it more difficult to locate a defendant¹⁵⁰ or if the record includes information about the victim of a crime.¹⁵¹ Finally, section 708 exempts from disclosure records related to noncriminal investigations if such disclosure would result in an "unwarranted invasion of privacy."¹⁵²

The Commonwealth or local agency that receives a record request has the burden of proving, by a preponderance of the evidence, that the record is exempt from public access.¹⁵³ But, even if an agency deems a record to be exempt from public access, it may still choose to release the record if (1) the disclosure is not prohibited by another law or judicial order, (2) the record does not contain privileged information, and (3) the public interest in disclosure outweighs other interests in nondisclosure.¹⁵⁴

In sum, the Right-to-Know Law was intended to improve transparency of government agencies in Pennsylvania. It would apply to BWC footage, but Pennsylvania lawmakers opted to create a new process for public disclosure of BWC footage, contending that doing so would increase transparency.¹⁵⁵ A discussion of the differences between the Right-to-Know Law and Chapter 67A and what those differences could mean in practice follows in Section III.

III. *PENNSYLVANIA STATE POLICE V. GROVE*: A MODEL FOR THE DISTINCTIONS BETWEEN CHAPTER 67A AND THE RIGHT-TO-KNOW LAW

Chapter 67A seeks to improve conviction integrity, evidentiary collection, police accountability, and public access to BWC footage, among other things.¹⁵⁶ Whether it achieves some of those goals is beyond the scope of this Comment,¹⁵⁷ but the abandonment of the Right-to-Know Law as the law that controls the

146. *See id.* § 67.708(b)(16)(vi)(A), (17)(vi)(A).

147. *Id.*

148. *See id.* § 67.708(b)(16)(vi)(D), (17)(vi)(D).

149. *Id.* § 67.708(b)(16)(vi)(E), (17)(vi)(E).

150. *Id.* § 67.708(b)(16)(vi)(C).

151. *Id.* § 67.708(b)(16)(v).

152. *Id.* § 67.708(b)(17)(vi)(C).

153. *Id.* § 67.708(a)(1).

154. *Id.* § 67.506(c).

155. *See* SENATOR GREENLEAF, *supra* note 19.

156. SENATOR GREENLEAF, *supra* note 19.

157. For a discussion of how BWC policies can actually undermine goals like conviction integrity and improved evidentiary collection, see generally HARLAN YU & MIRANDA BOGEN, UPTURN, THE ILLUSION OF ACCURACY: HOW BODY-WORN CAMERA FOOTAGE CAN DISTORT EVIDENCE (2017), <http://www.teamupturn.org/reports/2017/the-illusion-of-accuracy> [<http://perma.cc/JX8U-3GFC>].

disclosure of BWC footage undermines the goals of police accountability and public access. This Section demonstrates that by considering *Pennsylvania State Police v. Grove (Grove II)*,¹⁵⁸ a Pennsylvania Supreme Court case that was decided less than a month before Chapter 67A was enacted.¹⁵⁹ Part III.A gives an overview of the case. Part III.B hypothesizes how the court’s analysis would have been different if Chapter 67A had applied. Finally, Part III.C asserts that disclosure in *Grove II* would have been less likely if Chapter 67A had applied instead of the Right-to-Know Law.

A. *How the Court Applied the Right-to-Know Law in Grove II*

On March 24, 2014, Michelle Grove requested records from the Pennsylvania State Police relating to a March 22, 2014, car accident to which two state troopers had responded.¹⁶⁰ Grove was neither involved in the accident nor a witness to it; she arrived at the scene of the accident before the state troopers did and remained there until after they left.¹⁶¹ The records that she requested included two motor vehicle recordings (MVRs)—dashboard camera footage of the aftermath of the accident.¹⁶² Pursuant to the Right-to-Know Law,¹⁶³ the State Police denied Grove’s request on the grounds that the recordings were “criminal investigative records.”¹⁶⁴

Grove appealed to the Office of Open Records,¹⁶⁵ as required by section 1101 of the Right-to-Know Law.¹⁶⁶ In its decision, the Office ruled that the State Police would have to provide Grove with the MVRs in their entirety.¹⁶⁷ The Office deemed the State Police’s explanation for withholding the recordings too conclusory to exempt them from disclosure.¹⁶⁸

The State Police appealed to the Commonwealth Court,¹⁶⁹ in accordance with the Right-to-Know Law.¹⁷⁰ The Commonwealth Court, which reviews decisions made by the Office of Open Records de novo,¹⁷¹ allowed the State Police to supplement the record to justify its classification of the MVRs as

158. 161 A.3d 877 (Pa. 2017).

159. See Act of July 7, 2017, Act No. 2017-22, § 4, 2017 Pa. Legis. Serv. (West); *Grove II*, 161 A.3d at 877.

160. *Grove II*, 161 A.3d at 880, 883.

161. See *id.* at 882.

162. See *id.* at 880–81.

163. See 65 PA. STAT. AND CONS. STAT. ANN. § 67.708(b)(16), (18)(i) (West 2019).

164. *Grove II*, 161 A.3d at 881–82.

165. *Id.* at 881.

166. Tit. 65, § 67.1101(a)(1).

167. See *Grove v. Pa. State Police*, No. AP 2014-0828, 2014 WL 2801575, at *3 (Pa. Office of Open Records June 17, 2014).

168. See *id.* (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

169. *Grove II*, 161 A.3d at 882.

170. Tit. 65, § 67.1301(a).

171. *Bowling v. Office of Open Records*, 75 A.3d 453, 477 (Pa. 2013).

exempt from the Right-to-Know Law.¹⁷² This new evidence, a sworn affidavit of the State Police's open-records officer,¹⁷³ asserted that MVR footage is used to document investigative work.¹⁷⁴ The State Police argued that this was sufficient to classify the recordings as investigative materials,¹⁷⁵ which are exempt from disclosure.¹⁷⁶

The court was not convinced by this argument.¹⁷⁷ It noted that an agency can withhold a record from public access only if the agency can establish by a preponderance of the evidence that the record is exempt from disclosure under the Right-to-Know Law.¹⁷⁸ This burden exists, the court explained, because exemptions from disclosure are meant to be construed narrowly.¹⁷⁹ The court pointed out that "investigative materials" is not defined by the Right-to-Know Law and held that the "mere fact that a record has some connection to a criminal proceeding does not automatically exempt it" from public disclosure.¹⁸⁰ Instead, to be considered an investigative material, a record must either (1) have been "created to report on a criminal investigation," (2) "document evidence in a criminal investigation," or (3) set forward "steps carried out in a criminal investigation."¹⁸¹ MVRs, the court concluded, are not typically investigative materials because they are used to track troopers' performance and interactions with the public, not to create evidentiary trails.¹⁸² However, if MVRs contain investigative work such as interviews, interrogations, and intoxication testing, then they can be exempt from disclosure as investigative materials.¹⁸³

One of the MVRs in this case contained no such investigative work, so the court held that the State Police had to disclose the video in its entirety.¹⁸⁴ The second MVR, on the other hand, included audio evidence of witness interviews, making it facially exempt from disclosure.¹⁸⁵ The court noted, however, the redaction mechanisms and requirements of the Right-to-Know Law, which preclude an agency from withholding a record if the nondisclosable information

172. Pa. State Police v. Grove (*Grove I*), 119 A.3d 1102, 1106 (Pa. Commw. Ct. 2015) (noting, however, that under normal circumstances the State Police would not have been allowed to supplement the record, because it had no apparent reason for failing to submit the evidence to the Office of Open Records in the first appeal), *aff'd in part, rev'd in part*, 161 A.3d 877 (Pa. 2017).

173. *Grove II*, 161 A.3d at 883.

174. *Grove I*, 119 A.3d at 1106.

175. *See id.* at 1108.

176. 65 PA. STAT. AND CONS. STAT. ANN. § 67.708(b)(16) (West 2019).

177. *Grove I*, 119 A.3d at 1108.

178. *Id.* at 1107.

179. *Id.*

180. *Id.* at 1108 (citing *Coley v. Phila. Dist. Attorney's Office*, 77 A.3d 694, 697–98 (Pa. Commw. Ct. 2013) (holding that, while a witness's statements were exempt from disclosure as investigative materials, an immunity agreement with the witness was not exempt unless its contents were shown to be investigative information)).

181. *See id.* (citing multiple cases).

182. *Id.*

183. *Id.* at 1109.

184. *Id.*

185. *See id.* at 1109–10.

that it contains can be redacted.¹⁸⁶ The court thus held that the State Police could redact the audio portions of the MVRs that contained witness interviews, but could not withhold the entire MVR.¹⁸⁷

The State Police then appealed to the Supreme Court of Pennsylvania.¹⁸⁸ The court started by reiterating that the goals of the Right-to-Know Law were to empower the public to learn more about the government and to increase government transparency.¹⁸⁹ Those goals require that permissible reasons for preventing public records from being disclosed must be construed narrowly.¹⁹⁰ Furthermore, the court defined criminal investigation as “an official inquiry into a possible crime” and gave a list of examples of information relating to a criminal investigation.¹⁹¹ Consequently, the court overruled the lower court’s determination that MVRs per se are not criminal investigative materials and instead held that courts must make that decision on a case-by-case basis.¹⁹² However, with regard to the MVRs at issue in the case, the supreme court affirmed the commonwealth court’s decision that neither MVR was wholly exempt from disclosure as investigative materials.¹⁹³

B. *How Chapter 67A Would Have Changed Grove*

While MVRs and police BWC footage are not necessarily interchangeable, *Grove II* offers an interesting insight into how Chapter 67A compares to the Right-to-Know Law. Although Senator Greenleaf touted Chapter 67A as providing a means for the public to gain access to BWC recordings,¹⁹⁴ Grove’s efforts likely would have been more difficult if the MVRs had been subject to Chapter 67A instead of the Right-to-Know Law. Generally speaking, the bases for denying a request are the same under the two laws.¹⁹⁵ There are, however, several procedural differences between the laws. Some of the differences are

186. *See id.* at 1109 (citing *Advancement Project v. Pa. Dep’t of Transp.*, 60 A.3d 891, 894 (Pa. Commw. Ct. 2013)).

187. *Id.*

188. *Grove II*, 161 A.3d 877, 886 (Pa. 2017).

189. *Id.* at 892 (first quoting *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012); then quoting *Levy v. Senate of Pa.*, 65 A.3d 361, 368 (Pa. 2013)).

190. *Id.* (quoting *Office of the Governor v. Davis*, 122 A.3d 1185, 1191 (Pa. Commw. Ct. 2015)).

191. *Id.* at 892–93 (listing “statements compiled by district attorneys, forensic reports, and reports of police, including notes of interviews with victims, suspects and witnesses assembled for the specific purpose of investigation” as examples of information relating to a criminal investigation (citing various cases)).

192. *See id.* at 894.

193. *Id.* at 895.

194. SENATOR GREENLEAF, *supra* note 19.

195. *Compare* 42 PA. STAT. AND CONS. STAT. ANN. § 67A04 (West 2019), *with* 65 PA. STAT. AND CONS. STAT. ANN. § 67.708 (West 2019). There are four types of content that are exempt from disclosure under Chapter 67A: (1) potential criminal evidence, (2) “information pertaining to an investigation,” (3) confidential information, and (4) victim information. Tit. 42, § 67A04(a). Those categories are also protected by the Right-to-Know Law, tit. 65, § 67.708(b), and the definitions of those categories under the two laws are substantially the same, *compare* tit. 42, §§ 67A01, 67A04, *with* tit. 65, § 67.708(b).

somewhat speculative, since it is impossible to know exactly how a court or an open-records officer will interpret Chapter 67A's language. Other differences are more obvious and difficult to dispute. Regardless, all of the differences—speculative or otherwise—demonstrate how Chapter 67A differs from the Right-to-Know Law and actually makes public access to recordings more difficult.

1. Initial Request

Two main aspects of how Grove filed her initial request—her relationship to the incident and the timing of her filing—could have led to a different analysis under Chapter 67A. Under the Right-to-Know Law, Grove had no obligation to explain why she was requesting the MVR footage.¹⁹⁶ Under Chapter 67A, however, Grove would have had to describe her relationship to the event that the recording captured.¹⁹⁷ Here, her relationship to the event was merely that she had walked onto the scene of an accident and was a curious bystander.¹⁹⁸ While Chapter 67A does not explicitly state whether a request can be rejected on the basis of there being an inadequate relationship,¹⁹⁹ the fact that it is a requirement suggests that it could be considered by the open-records officer in deciding whether to provide access to the recording.²⁰⁰ Moreover, the fact that there is no explicit standard for how officers should weigh the requestor's relationship to the incident grants broad authority to the officer, which could easily be exploited to prevent otherwise valid requests from being granted.²⁰¹ Conversely, in *Grove II*, where no such explanation was required, the requestor's relationship to the car accident played no role in the State Police's decision to not grant her request.²⁰²

196. Tit. 65, §§ 67.702–.703.

197. Tit. 42, § 67A03(3).

198. See *Grove II*, 161 A.3d at 882.

199. See tit. 42, § 67A03(3).

200. See *Surplusage Canon*, BLACK'S LAW DICTIONARY (10th ed. 2014). The surplusage canon is the doctrine of statutory interpretation that states that “every word and every provision in a legal instrument is to be given effect.” *Id.*

201. This requirement could be especially problematic in instances of police killings. If a BWC captured a police killing and there were no surviving witnesses to the killing (besides the officer(s)), would *anybody* be able to successfully request that BWC footage? Cf. Mensah M. Dean, *Fired Philly Cop Who Shot 3 Men Is Back on the Beat*, PHILA. INQUIRER (Aug. 25, 2017, 5:56 PM), <http://www.philly.com/philly/news/crime/philly-cop-shot-3-men-was-fired-is-back-on-the-beat-20170825.html> [<http://perma.cc/QLF4-AU59>] [hereinafter Dean, *Fired Philly Cop*] (describing a police killing in which the “only witness to the fatal shooting was the man [the officer] killed”). That may seem like an extreme example, but the reality is that the lack of clarity surrounding this requirement could lead to that very ruling by the police department's open-records officer.

202. See *Grove II*, 161 A.3d at 880–81. Another way in which Chapter 67A has a more stringent standard than the Right-to-Know Law has to do with the laws' requirements for the specificity of the request. The Right-to-Know Law requires that the request describe the requested records with “sufficient specificity” so that the agency can ascertain which records are being sought. 65 PA. STAT. AND CONS. STAT. ANN. § 67.703 (West 2019). Meanwhile, Chapter 67A requires that the request “specify with particularity” the event that the recording captured, including its time, date, and location. Tit. 42, § 67A03(2). While a seemingly minor difference, Chapter 67A objectively requires more specificity than the Right-to-Know Law, which objectively makes filing a proper request more

Another distinction between the two laws’ procedures for requesting a record is the timing of that request. The Right-to-Know Law has no timing requirement,²⁰³ whereas Chapter 67A requires that the request be made within sixty days of when the recording was made.²⁰⁴ While this distinction would not have mattered if *Grove II* had been decided under Chapter 67A (because Grove filed her request within two days of the car accident),²⁰⁵ it could easily affect future cases. There could be many barriers that would affect an individual’s ability to request the release of BWC footage within sixty days of an incident. Those barriers could be exacerbated, too, depending on the above discussion of how closely related an individual must be to the incident in question.

2. Standard of Judicial Review

The standard and scope of judicial review would have been different if Chapter 67A had applied to *Grove I* and *Grove II*. In *Grove I*, the Commonwealth Court noted that it could exercise de novo review of the Office of Open Records’ decision.²⁰⁶ This standard allows a reviewing court to decide the case without any deference to the ruling of the lower court or agency.²⁰⁷

Conversely, if the Commonwealth Court decided *Grove I* pursuant to Chapter 67A, the court would not have had such broad discretion. Rather than being allowed to make its ruling without any deference to the agency’s decision, it instead would have been required to review the decision by applying a two-part test.²⁰⁸ First, the court would have been required to decide that a preponderance of the evidence showed that the State Police’s initial decision was arbitrary and capricious.²⁰⁹ Second, it would have been required to determine by a preponderance of the evidence that either the general public’s interest in disclosure or Grove’s interest in disclosure outweighed the State Police’s interests in nondisclosure.²¹⁰ In making the second determination, the court could have considered (1) the public’s desire to understand how law enforcement officers interact with civilians; (2) the safety and privacy interests of victims, law enforcement officers, and others; and (3) the available resources for review and disclosure of the requested recording.²¹¹ Only after both parts of this test were satisfied would the court have been permitted to overrule the State Police’s

demanding.

203. See tit. 65, §§ 67.702–703.

204. Tit. 42, § 67A03(1).

205. *Grove II*, 161 A.3d at 880, 883.

206. *Grove I*, 119 A.3d 1102, 1105 (Pa. Commw. Ct. 2015) (citing *Bowling v. Office of Open Records*, 75 A.3d 453, 477 (Pa. 2013)), *aff’d in part, rev’d in part*, 161 A.3d 877 (Pa. 2017).

207. See *De Novo Judicial Review*, BLACK’S LAW DICTIONARY (10th ed. 2014). De novo judicial review is defined as a “court’s nondeferential review of an administrative decision, usu[ally] through a review of the administrative record plus any additional evidence the parties present.” *Id.*

208. See tit. 42, § 67A06(e).

209. *Id.* § 67A06(e)(1).

210. *Id.* § 67A06(e).

211. *Id.* § 67A06(e)(2).

initial denial of Grove's petition.²¹² This two-part test is considerably more stringent than the analysis that was applied in *Grove*, pursuant to the Right-to-Know Law.

3. Legislative History

The courts in *Grove I* and *Grove II* relied on the purpose of the Right-to-Know Law to inform their decisions.²¹³ The Right-to-Know Law's main purpose is to increase government transparency.²¹⁴ It contains an explicit, rebuttable presumption that records will be disclosed.²¹⁵ As a result, courts are careful to narrowly construe the statutory exemptions, thereby serving the goals of the Right-to-Know Law.²¹⁶ Moreover, an agency can only rebut the presumption if it proves by a preponderance of the evidence that the records in question are exempt.²¹⁷

In contrast, Chapter 67A has no such stated purpose, nor does it create an explicit presumption that law enforcement recordings will be disclosed.²¹⁸ As a result, there is no impetus for a court to narrowly construe the valid reasons for withholding a recording under Chapter 67A like the *Grove* courts did under the Right-to-Know Law.²¹⁹ While in *Grove*, the courts were able to use the legislative intent of the Right-to-Know Law to support their decisions, the courts would have found much more limited support for such conclusions in the legislative history and intent of Chapter 67A.²²⁰

4. Redaction

A fourth distinction between Chapter 67A and the Right-to-Know Law has to do with their requirements for redaction.²²¹ The MVRs that Grove requested contained both exempt and nonexempt information.²²² The court recognized that the Right-to-Know Law *requires* that the agency redact the exempt information and release the nonexempt information if such redaction is *possible*.²²³ In this case, redaction was possible—the State Police could eliminate the audio portion

212. *Id.* § 67A06(e).

213. *See Grove II*, 161 A.3d 877, 892–93 (Pa. 2017) (citing various sources); *Grove I*, 119 A.3d 1102, 1107 (Pa. Commw. Ct. 2015), *aff'd in part, rev'd in part*, 161 A.3d 877 (Pa. 2017).

214. *See, e.g.*, *Office of the Governor v. Davis*, 122 A.3d 1185, 1191 (Pa. Commw. Ct. 2015).

215. 65 PA. STAT. AND CONS. STAT. ANN. § 67.305(a) (West 2019).

216. *See Grove II*, 161 A.3d at 892 (quoting *Davis*, 122 A.3d at 1191); *Grove I*, 119 A.3d at 1107.

217. Tit. 65, § 67.305(a)(1)–(3) (establishing that the presumption is defeated if a preponderance of the evidence shows that the record (1) is exempt under section 708, (2) contains privileged information, or (3) is exempt from disclosure by some other law).

218. 42 PA. STAT. AND CONS. STAT. ANN. § 67A04(a) (West 2019).

219. *Grove II*, 161 A.3d at 892 (quoting *Davis*, 122 A.3d at 1191).

220. *See supra* notes 87–88 and accompanying text.

221. *Compare* tit. 42, § 67A04(a), *with* tit. 65, § 67.706.

222. *Grove I*, 119 A.3d 1102, 1109 (Pa. Commw. Ct. 2015), *aff'd in part, rev'd in part*, 161 A.3d 877 (Pa. 2017).

223. *See* tit. 65, § 67.706; *Grove I*, 119 A.3d at 1109 (citing *Advancement Project v. Pa. Dep't of Transp.*, 60 A.3d 891, 894 (Pa. Commw. Ct. 2013)).

of one of the MVRs.²²⁴ But if Chapter 67A had applied, the State Police would have been required to redact the exempt information and release the nonexempt information only if such redaction could be accomplished *through reasonable efforts*.²²⁵ While it seems likely that the redaction that was ordered in this case required only reasonable efforts, a different set of facts could have required something more than a reasonable effort, thereby preventing the release of one of the MVRs entirely. This establishes yet another way in which Chapter 67A makes public access and, as a result, police accountability and transparency less likely than the Right-to-Know Law.

C. Chapter 67A Makes BWC Footage Less Accessible

It is impossible to ascertain whether the courts’ decisions in *Grove I* and *Grove II* would have differed if Chapter 67A had applied instead of the Right-to-Know Law. But the above comparison demonstrates that successfully rejecting requests for recordings is significantly easier for agencies under Chapter 67A. The most drastic differences are present in the procedural aspects of the two laws. Chapter 67A has stricter requirements in terms of the timing of requests, specificity of requests, and reasons for requests. Additionally, by requiring courts to apply the aforementioned two-part test as opposed to allowing for de novo review, Chapter 67A makes it more difficult for a higher body to overrule an agency’s decision than the Right-to-Know Law. Chapter 67A also lacks the clear legislative intent for government transparency, which could make it harder for a court to justify narrow construction of its exemptions. Finally, Chapter 67A’s requirements for redaction could result in an extra basis for not disclosing BWC footage. So, while it is true that Chapter 67A provides a mechanism for public access to police BWC footage, praise for the bill as a method of improving transparency is misguided since Chapter 67A actually makes public access more difficult than the Right-to-Know Law did.

IV. DISCLOSURE DOES NOT LEAD TO ACCOUNTABILITY

As a result of the differences between the Right-to-Know Law and Chapter 67A, public disclosure of BWC footage is now more difficult to achieve in Pennsylvania. However, even if that were not the case or in the event that specific BWC footage were released to the public, increased police accountability would likely not result from Chapter 67A. Section IV explores the rationale behind that argument. In particular, Part IV.A tells the story of Daniel Pantaleo, the New York Police Department (NYPD) officer who killed Eric Garner in 2014. That killing was recorded and the recording was made public immediately, causing public uproar, yet Pantaleo was not indicted.²²⁶ Part IV.B discusses more generally the unlikelihood of police being held accountable for

224. *Grove I*, 119 A.3d at 1109.

225. *See* tit. 42, § 67A04(a).

226. *See* J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn’t Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <http://nyti.ms/1CFYn0i> [<http://perma.cc/3T9T-D3U3>].

instances of brutality and violence and argues that Pantaleo's case is far from an anomaly. Finally, Part IV.C explores the factors that make police accountability so rare and concludes that it is not an evidentiary problem, which could be resolved by BWCs, but rather a structural one.

A. *Daniel Pantaleo: A Case Study in Police Impunity*

Even if Chapter 67A made BWC footage more easily accessible,²²⁷ disclosure does little to increase police accountability. As mentioned in the Introduction, Michael Brown's killing and a grand jury's failure to indict his killer, Darren Wilson, served as a catalyst for the public demand for police BWCs.²²⁸ A month later, however, the premise that BWC footage of Michael Brown's death might have made a difference in Wilson's prosecution was undermined when a grand jury in New York failed to indict NYPD officer Daniel Pantaleo.²²⁹ Pantaleo killed Eric Garner, who was unarmed and accused only of selling untaxed cigarettes,²³⁰ with a chokehold on July 17, 2014.²³¹ In 1993, the NYPD banned chokeholds because they were known to be "potentially lethal and unnecessary" and had led to several civilian deaths in police custody in the 1990s.²³² The killing of Garner was filmed by a witness and the footage quickly became publicly accessible.²³³ A group of officers who witnessed Pantaleo choking Garner to death later filed "a dishonest incident report that didn't mention the chokehold."²³⁴ Yet, four months later, a grand jury failed to indict Pantaleo for his role in the homicide.²³⁵

Garner's story turns one argument for BWCs—that people behave better when they know they are being watched—on its head. Pantaleo was fully aware

227. But see *supra* Parts III.B–C for an argument that Chapter 67A makes BWC footage less accessible.

228. See Crow et al., *supra* note 11, at 589; Bruce, *supra* note 2; Friedman, *supra* note 12.

229. See Andy Cush, *Killer Cop Who Choked Eric Garner Walks Free*, GAWKER (Dec. 3, 2014, 2:30 PM), <http://gawker.com/killer-cop-who-choked-eric-garner-walks-free-1666276406> [<http://perma.cc/UJ4C-979Z>]; Friedman, *supra* note 12.

230. See Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <http://nyti.ms/1QVk0LK> [<http://perma.cc/W2RR-RR3Q>]. New York City "has never demonstrated that Garner was actually doing anything illegal at the time" of his death. Matt Taibbi, *Civilian Review Board Substantiates Charges Against Policeman in Eric Garner Case*, ROLLING STONE (Sept. 8, 2017, 2:47 PM), <http://www.rollingstone.com/politics/features/ccrb-substantiates-charges-against-policeman-in-eric-garner-case-w501745> [<http://perma.cc/4RS7-GF86>] [hereinafter Taibbi, *Civilian Review Board*].

231. Josh Sanburn, *Behind the Video of Eric Garner's Deadly Confrontation with New York Police*, TIME (July 23, 2014), <http://time.com/3016326/eric-garner-video-police-chokehold-death/> [<http://perma.cc/CK2D-RX5H>].

232. See Conor Friedersdorf, *Eric Garner and the NYPD's History of Deadly Chokeholds: The Context for Another Officer-Involved Homicide*, ATLANTIC (Dec. 4, 2014), <http://www.theatlantic.com/national/archive/2014/12/context-for-the-punishment-free-killing-of-eric-garner/383413/> [<http://perma.cc/C2A3-S3MR>].

233. See Friedman, *supra* note 12.

234. Friedersdorf, *supra* note 232.

235. Friedman, *supra* note 12.

that he was being recorded,²³⁶ but that did not prevent him from using an illegal chokehold on his victim.²³⁷ Looking at evidence about the repercussions of police misconduct—both generally and in Pantaleo’s personal history—sheds a light on why a camera did not discourage his behavior.²³⁸ As a general rule, law enforcement officers in the United States enjoy impunity—exemption from punishment for even their most egregious actions.²³⁹ Pantaleo learned this firsthand, even before he killed Garner.²⁴⁰

In the eight years that Pantaleo had been an NYPD officer before he killed Garner, “he had seven disciplinary complaints and 14 individual allegations lodged against him,” making his history of discipline “among the worst on the force.”²⁴¹ The New York City Civilian Complaint Review Board (CCRB), which is the all-civilian agency responsible for receiving and investigating complaints and allegations against NYPD officers, sought the harshest penalties against Pantaleo for four of those allegations.²⁴² The CCRB, which is not empowered to recommend criminal charges,²⁴³ recommended that the NYPD seek administrative prosecution of Pantaleo, which can result in suspension, loss of

236. Schneider, *supra* note 37, at 456.

237. See Taibbi, *Civilian Review Board*, *supra* note 230.

238. See, e.g., Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/> [<http://perma.cc/85CQ-3XDM>]; Taibbi, *Civilian Review Board*, *supra* note 230.

239. See, e.g., ROBERT F. KENNEDY HUMAN RIGHTS, IMPUNITY FOR KILLINGS BY POLICE IN THE UNITED STATES 1 (2017), http://www.aclu.org/sites/default/files/field_document/rfk_iachr_hearing_written_submission_rfkhr_final.pdf [<http://perma.cc/D7UT-NN9E>] (stating, in a submission to the Inter-American Commission on Human Rights, that “police are regularly shielded from accountability for excessive use of force within the United States”); Janelle Bouie, *The Walter Scott Case Was a Test*, SLATE (Dec. 7, 2016, 5:47 PM), http://www.slate.com/articles/news_and_politics/politics/2016/12/the_walter_scott_case_can_cops_kill_with_impunity.html [<http://perma.cc/V94D-S8B2>] (discussing examples of police impunity); Jeffery Robinson, *‘You’re Fucked’: The Acquittal of Officer Brailsford and the Crisis of Police Impunity*, ACLU (Dec. 12, 2017, 2:45 PM), <http://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/youre-fucked-acquittal-officer-brailsford-and> [<http://perma.cc/E6TT-DKL9>] (describing the “Crisis of Police Impunity”).

240. See Carimah Townes & Jack Jenkins, *Exclusive Documents: The Disturbing Secret History of the NYPD Officer Who Killed Eric Garner*, THINK PROGRESS (Mar. 21, 2017, 2:09 PM), <http://thinkprogress.org/daniel-pantaleo-records-75833e6168f3/> [<http://perma.cc/SX4M-HY9S>]. *Think Progress* obtained these documents from an anonymous source who had access to them. *Id.* Without that source, *Think Progress* would not have obtained the documents, since New York City does not release disciplinary records of police officers. Editorial, *To Honor Eric Garner’s Life, Reform the Police*, N.Y. TIMES (May 15, 2018), <http://nyti.ms/2L4c1Bt> [<http://perma.cc/X82F-3HSR>]. This is at least in part because the police union (the Patrolmen’s Benevolent Association of the City of New York) has sued Mayor Bill de Blasio and Police Commissioner James P. O’Neill to prevent them from releasing such information. *Patrolmen’s Benevolent Ass’n v. de Blasio*, No. 153231/2018, 2018 WL 3036350 (N.Y. Sup. Ct. June 19, 2018) (denying defendants’ motion to dismiss the suit).

241. See Townes & Jenkins, *supra* note 240. These complaints included multiple allegations of excessive use of force as well as other abuses of authority like unauthorized stops and searches. *Id.*

242. See N.Y.C. CHARTER § 440 (West 2019); Townes & Jenkins, *supra* note 240.

243. See N.Y.C. CHARTER § 440(c); *Frequently Asked Questions*, N.Y.C. CIVILIAN COMPLAINT REV. BD., <http://www1.nyc.gov/site/ccrb/about/frequently-asked-questions-faq.page> [<http://perma.cc/K4LK-4H8V>] (last visited Feb. 15, 2019) (follow “6. Does the CCRB discipline officers?” hyperlink).

vacation time, or termination.²⁴⁴ Nevertheless, the NYPD is not bound by the CCRB's recommendations,²⁴⁵ and it decided instead to merely punish Pantaleo with additional training, the weakest disciplinary option available.²⁴⁶

In a 2012 administrative proceeding, "the NYPD found Pantaleo guilty of unauthorized frisking," the same behavior that preceded Garner's death.²⁴⁷ In the 2012 case, the CCRB recommended that Pantaleo forfeit eight vacation days as punishment, but the NYPD ultimately decided on two.²⁴⁸

Per NYPD policy, the Performance Monitoring Unit (PMU) should place an officer who receives three complaints in a year under stricter monitoring, regardless of whether the complaints are ultimately substantiated.²⁴⁹ In 2012, Pantaleo received three complaints over the span of two months, which "should have raised red flags."²⁵⁰ Moreover, he had received many more complaints than most of his 36,000 NYPD peers.²⁵¹ In fact, only 2% of current NYPD officers have records comparable to Pantaleo's record *before* killing Garner.²⁵² Yet the ramifications of his behavior ahead of killing Garner were slight and in no way prevented him from remaining on the streets.²⁵³ That Pantaleo ultimately killed Garner is tragically predictable, as one analysis of police misconduct data shows that officers who are the subject of multiple complaints and officers who work closely with them are more likely to use excessive force and participate in shootings.²⁵⁴

After he killed Garner, Pantaleo was placed on desk duty by the NYPD.²⁵⁵ In December 2015, the NYPD Commissioner confirmed that an internal investigation of Garner's death was complete, but he stated that the Department would not take any disciplinary actions until the United States Department of

244. Townes & Jenkins, *supra* note 240.

245. See N.Y.C. CHARTER § 440(e); Townes & Jenkins, *supra* note 240.

246. Townes & Jenkins, *supra* note 240.

247. Townes & Jenkins, *supra* note 240.

248. *Id.*

249. See MICHAEL F. ARMSTRONG ET AL., N.Y.C. COMM'N TO COMBAT POLICE CORRUPTION, A FOLLOW-UP REVIEW OF THE NEW YORK CITY POLICE DEPARTMENT'S PERFORMANCE MONITORING UNIT 1-3 (2006), <http://www1.nyc.gov/assets/ccpc/downloads/pdf/A-Follow-up-Review-of-the-NYPDs-Performance-Monitoring-Unit-April-2006.pdf> [<http://perma.cc/KVG9-MJT2>]; Townes & Jenkins, *supra* note 240. Only 8% of the 36,000 NYPD officers have "ever had a single complaint against them substantiated by the" CCRB. Editorial, *supra* note 240.

250. Townes & Jenkins, *supra* note 240.

251. *Id.*

252. See *id.*

253. See *id.*

254. See Rob Arthur, *Bad Chicago Cops Spread Their Misconduct like a Disease*, INTERCEPT (Aug. 16, 2018, 9:03 AM), <http://theintercept.com/2018/08/16/chicago-police-misconduct-social-network/> [<http://perma.cc/2G3T-FHPG>] ("The same cops who are exposed to other high complaint officers go on to be listed on four times as many uses of force per year in the next few years. They also commit shootings at rates more than five times higher than their colleagues who weren't exposed to misbehaving officers.").

255. See Sally Goldenberg, *Records Show Increased Earnings for Officer Involved in Garner Death*, POLITICO (Sept. 12, 2016, 2:17 PM), <http://www.politico.com/states/new-york/city-hall/story/2016/09/officer-in-eric-garner-death-boosts-overtime-pay-105359> [<http://perma.cc/J4PW-3XN9>].

Justice completed its own investigation into the incident.²⁵⁶ Between when he killed Garner and September 2016, Pantaleo’s earnings as a police officer increased by nearly 15%.²⁵⁷ Finally, in September 2017, the CCRB substantiated two complaints against Pantaleo stemming from his killing Garner.²⁵⁸ It determined that Pantaleo used a banned procedure (an illegal chokehold) and improper force (restriction of Garner’s breathing).²⁵⁹ As it had before, the CCRB recommended administrative prosecution against Pantaleo—the “first real step toward discipline” since Garner was killed.²⁶⁰ But whether that will actually result in any ramifications for Pantaleo seems doubtful, especially given the NYPD’s history of not following the CCRB’s recommendations in cases involving illegal chokeholds.²⁶¹

A second step toward discipline was taken on July 19, 2018, when the NYPD announced “that it would immediately begin preparing for an internal administrative trial” against Pantaleo.²⁶² The Department had refrained from such action for over four years, ostensibly because it could not move forward with internal charges while a federal civil rights investigation into Garner’s death was ongoing.²⁶³ But on July 18, 2018, federal prosecutors informed local police that they would not object to the NYPD taking action against Pantaleo.²⁶⁴ Still, Pantaleo’s disciplinary trial is not set to begin until May 2019.²⁶⁵ More importantly, while the administrative prosecution could result in Pantaleo’s dismissal from the NYPD, it cannot change the grand jury’s 2014 decision not to indict him on criminal homicide charges.²⁶⁶

256. Townes & Jenkins, *supra* note 240.

257. See Goldenberg, *supra* note 255 (“Pantaleo earned \$119,996 in . . . 2016 His base pay was \$78,026 and he earned \$23,220 in overtime, according to a review of payroll records. He received an additional \$12,853 in unspecified pay, which could include retroactive pay or bonuses.”).

258. Taibbi, *Civilian Review Board*, *supra* note 230. When the CCRB substantiates a claim, it “means there is sufficient credible evidence to believe that the subject officer committed the alleged act without legal justification. Substantiated cases are sent to the police department with a disciplinary recommendation.” *Case Outcomes*, N.Y.C. CIVILIAN COMPLAINT REV. BD., <http://www1.nyc.gov/site/ccrb/investigations/case-outcomes.page> [<http://perma.cc/7LSQ-TPZJ>] (last visited Feb. 15, 2019).

259. *Id.*

260. *Id.*

261. See N.Y.C. DEP’T OF INVESTIGATION & THE OFFICE OF THE INSPECTOR GEN. FOR THE N.Y. POLICE DEP’T, OBSERVATIONS ON ACCOUNTABILITY AND TRANSPARENCY IN TEN NYPD CHOKEHOLD CASES 4–6, 17 (2015), http://www1.nyc.gov/assets/doi/oignypd/response/chokehold_report_1-2015.pdf [<http://perma.cc/T8N8-AWMY>]; Matt Taibbi, *In Police Violence Cases, Time Works Against Justice*, ROLLING STONE (July 13, 2016, 6:13 PM), <http://www.rollingstone.com/politics/news/in-police-violence-cases-time-works-against-justice-20160713> [<http://perma.cc/P3HN-22XZ>] [hereinafter Taibbi, *Police Violence*].

262. Benjamin Mueller, *Police Move To Discipline Officer Involved in Eric Garner’s Death*, N.Y. TIMES (July 19, 2018), <http://nyti.ms/2O44IAH> [<http://perma.cc/M4T3-GV79>].

263. *Id.*

264. *Id.*

265. Mark Morales, *Four Years After Eric Garner’s Death, Officer Faces NYPD Trial To See if He Will Keep His Job*, CNN (Dec. 6, 2018, 7:44 PM), <http://www.cnn.com/2018/12/06/us/eric-garner-nypd-daniel-pantaleo/index.html> [<http://perma.cc/HM5H-VWX9>].

266. See Townes & Jenkins, *supra* note 240.

Daniel Pantaleo killed Eric Garner using an illegal chokehold.²⁶⁷ A medical examiner ruled the death a homicide, caused by Pantaleo's actions.²⁶⁸ The killing was caught on camera and was immediately publicly accessible.²⁶⁹ Yet Pantaleo has faced virtually no repercussions for his actions. This account undermines the theory that access to police BWC footage will immediately lead to more accountability, and it is far from an outlier.

*B. Police Discipline: "Unusual—To the Point of Extraordinary"*²⁷⁰

The ramifications—or lack thereof—for Pantaleo should not come as a surprise. Criminal convictions of police charged with excessive force are incredibly rare.²⁷¹ Although there is no federal database that accurately tracks how many civilians are killed by police each year,²⁷² multiple independent databases have begun to collect that information in recent years.²⁷³ Those efforts show that police have killed approximately 1,000 civilians each year since 2015.²⁷⁴ Looking back further, Fatal Encounters, an online database that tracks police killings, has identified 24,447 police killings in the United States between 2000 and July 2018 (averaging more than 1,300 people killed per year) and considers its research incomplete.²⁷⁵ Fatal Encounters has recorded more than 15,500 police killings between January 2005 and April 2017.²⁷⁶ According to a multiyear examination of news articles by criminal justice scholar Philip Stinson, only 80 police officers were charged with murder or manslaughter between in

267. Sanburn, *supra* note 231.

268. Massimo Calabresi, *Why a Medical Examiner Called Eric Garner's Death a 'Homicide,'* TIME (Dec. 4, 2014), <http://time.com/3618279/eric-garner-chokehold-crime-staten-island-daniel-pantaleo/> [<http://perma.cc/964D-E5GM>].

269. See Friedman, *supra* note 12.

270. Bouie, *supra* note 239 (alterations omitted).

271. See, e.g., Reuben Fischer-Baum, *Allegations of Police Misconduct Rarely Result in Charges,* FIVETHIRTYEIGHT (Nov. 25, 2014, 9:45 AM), <http://fivethirtyeight.com/features/allegations-of-police-misconduct-rarely-result-in-charges/> [<http://perma.cc/6TFM-C34Z>]; Kindy & Kelly, *supra* note 238.

272. In 2016, the Department of Justice announced that it would begin to collect information about "arrest-related deaths" from all 19,450 local law enforcement agencies in the United States and from approximately 685 medical examiners' or coroners' offices. See Agency Information Collection Activities; Proposed Collection Comments Requested; New Collection: Arrest-Related Deaths Program, 81 Fed. Reg. 51489, 51489 (Aug. 4, 2016). However, participation in that program is voluntary. *Id.*

273. See, e.g., FATAL ENCOUNTERS, <http://www.fatalencounters.org/> [<http://perma.cc/D4BF-CBDX>] (last updated July 22, 2018); *Fatal Force*, WASH. POST, <http://www.washingtonpost.com/graphics/national/police-shootings-2017/> [<http://perma.cc/S5US-QT3M>] (last visited Feb. 15, 2019); *The Counted: People Killed by Police in the US*, GUARDIAN (London), <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> [<http://perma.cc/ZT84-TUEC>] (last visited Feb. 15, 2019).

274. See, e.g., *Fatal Force*, *supra* note 273 (cataloging 995 police killings in 2015, 963 in 2016, 987 in 2017, and 998 in 2018); *The Counted*, *supra* note 273 (tallying 1,146 police killings in 2015 and 1,093 in 2016).

275. See FATAL ENCOUNTERS, *supra* note 273.

276. See *id.* (follow "Search Database" hyperlink; then select "Year" from the drop-down list on the left; then search each year from 2005 to 2017).

that same time period.²⁷⁷ Based on those estimations and Stinson's admittedly incomplete research, only 0.52% of police killings resulted in a police officer being *charged* with murder or manslaughter. Of the 80 cases, 21 were still pending at the time of the study and 59 had been adjudicated.²⁷⁸ Of those, 28 resulted in convictions for murder or manslaughter.²⁷⁹ Assuming that the remaining 21 cases result in convictions (quite a bold assumption given the data), 49 officers would be convicted for police killings that occurred between January 2005 and April 2017.²⁸⁰ In other words, in that time frame, a *maximum* of 0.32% of police killings could result in a criminal conviction. Therefore, the lack of repercussions suffered by Daniel Pantaleo for killing Eric Garner is anything but unique. Rather, what happened to Pantaleo is what happens to over 99% of police officers who kill.

While some number of police killings might not result in arrests, indictments, or convictions due to valid reasons like self-defense, it is indefensible that the United States criminal justice system considers over 99% of police killings to be permissible. First of all, in countries that have similar economic markers as the United States, police kill nowhere near the number of people per capita as in the United States.²⁸¹ For instance, police in the United States shot more people to death in the first 24 days of 2015 (59) than police in England and Wales had shot and killed in the previous 24 years (55).²⁸² U.S. police had fatally shot at least as many people each week of the first five months of 2015 (at least 13 every week) as German police did in 2011 and 2012 combined (13).²⁸³ And they shot and killed more people in March 2015 (97) than Australian police did between 1992 and 2011 (94).²⁸⁴

Furthermore, one database that tracks whether victims were armed shows that more than 40% of victims were not carrying firearms when they were killed, more than 15% of victims were unarmed, more than 5% had a toy weapon, and more than 10% were "armed" with a vehicle.²⁸⁵ Assuming similar percentages

277. Philip M. Stinson, *Police Shootings Data: What We Know and What We Don't Know*, BOWLING GREEN ST. U. CRIM. JUST. FAC. PUBLICATIONS (Apr. 20, 2017), http://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1077&context=crim_just_pub [<http://perma.cc/G6WX-WJHF>]. Stinson admits that his reliance on news media limits the reliability of his findings and likely resulted in an underestimation of how many police officers were charged. *See id.* Unfortunately, "no official data" is available for police crimes. *Id.*

278. *See id.*

279. *Id.*

280. *Id.*

281. *See, e.g.,* Jamiles Lartey, *By the Numbers: US Police Kill More in Days than Other Countries Do in Years*, GUARDIAN (London) (June 9, 2015, 6:00 AM), <http://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries> [<http://perma.cc/LC8Y-3GGK>].

282. *Id.*

283. *Id.*

284. *Id.*

285. *The Counted*, *supra* note 273. Reference to these data points should not be understood to suggest that individuals who possessed firearms should be subject to summary execution by police officers. Many police killings of victims who possessed firearms when they were killed should not be considered justified either.

between January 2005 and April 2017, more than 6,000 victims of police killings were not carrying firearms at the time of their deaths, more than 2,300 victims were not armed at all, more than 700 victims were “armed” with a toy weapon, and more than 1,500 were “armed” with a vehicle. For only 80 officers to be arrested during the same time period is an inadequate level of accountability.²⁸⁶

The statistics are similar for nonfatal instances of police misconduct. In Chicago, for instance, civilian complaints against police officers seldom result in reprimands by the police department.²⁸⁷ From 1988 to 2018, the Chicago Police Department (CPD) sustained 7% of 247,150 complaints lodged against its officers by civilians.²⁸⁸ When black Chicagoans formally make allegations of misconduct against police officers, the statistics are even more staggering.²⁸⁹ Between 2011 and 2015, only 166 of 10,500 complaints (about 1.6%) filed by black people “were sustained or led to discipline after an internal investigation” by the CPD.²⁹⁰ In spite of this low rate of substantiated complaints, Chicago paid out more than \$520 million in settlements due to police misconduct between 2004 and 2014,²⁹¹ and many of those settlements came from complaints that had previously been dismissed as unsubstantiated by the CPD.²⁹²

Even when complaints are substantiated, they seldom result in serious punishment: “[N]early three-fourths of the officers found to have committed some kind of wrongdoing weren’t docked any time off or received suspensions of five days or less.”²⁹³ That means that, between 1988 and 2018, about 1.75% of civilian complaints resulted in a more serious repercussion than a five-day suspension. Statistics such as these are not unique to Chicago: in 2002, only 8% of complaints made against officers from “large State and local law enforcement

286. See, e.g., INT’L HUMAN RIGHTS CLINIC AT SANTA CLARA UNIV., LACK OF ACCOUNTABILITY FOR POLICE KILLINGS OF MINORITIES AND OTHER VULNERABLE POPULATIONS IN THE UNITED STATES 9 (2017) (urging, in a written submission to the Inter-American Commission on Human Rights, that the Commission “highlight the problem of impunity for police killings” in the United States in its upcoming report on the “extrajudicial killings of Black Americans by” police in the United States); RICH MORIN ET AL., PEW RESEARCH CTR., BEHIND THE BADGE: AMID PROTESTS AND CALLS FOR REFORM, HOW POLICE VIEW THEIR JOBS, KEY ISSUES AND RECENT FATAL ENCOUNTERS BETWEEN BLACKS AND POLICE 5, 75–76 (2017) (noting that 72% of police officers agree that their “poorly performing” peers “are not held accountable” and that 57% of black police officers and 60% of all civilians view police killings of black people as “signs of a broader problem”).

287. See CITIZENS POLICE DATA PROJECT, <http://cpdp.co/> [<http://perma.cc/8G2D-L3HY>] (last visited Feb. 15, 2019).

288. *Id.*

289. See Shane Shifflett et al., *Police Abuse Complaints by Black Chicagoans Dismissed Nearly 99 Percent of the Time*, HUFFINGTON POST (Dec. 7, 2015, 4:00 PM), <http://data.huffingtonpost.com/2015/12/chicago-officer-misconduct-allegations> [<http://perma.cc/8K2L-CLPU>].

290. *Id.*

291. Andrew Schroedter, *Beyond Burge*, BETTER GOV’T ASS’N (Apr. 3, 2014, 7:05 PM), <http://www.bettergov.org/news/beyond-burge> [<http://perma.cc/X89X-BXV6>].

292. See Jeremy Gerner & Geoffrey Hing, *Tribune Analysis: Cops Who Pile Up Complaints Routinely Escape Discipline*, CHI. TRIB. (June 13, 2015, 6:45 AM), <http://www.chicagotribune.com/news/ct-chicago-police-citizen-complaints-met-20150613-story.html> [<http://perma.cc/5LM9-SKKW>].

293. *Id.*

agencies" ("representing . . . 59% of officers" nationwide) were sustained.²⁹⁴

Philadelphia offers more examples of these statistics, which provide insight into *why* officers are so seldom held accountable. Since 2000, Philadelphia police officers have fatally shot at least 222 people, or about twelve people per year.²⁹⁵ Between 2007 and 2018, they shot at least 459 people.²⁹⁶ Yet officers have been charged in only two killings since 1999.²⁹⁷ Among those officers who shot victims during that time period is Cyrus Mann.²⁹⁸ On June 17, 2011, Mann shot into Jeremy May's moving vehicle, striking him in the arm.²⁹⁹ On August 9, 2012, Mann shot Hassan Pratt in the chest three times, killing him.³⁰⁰ On June 25, 2014, Mann shot Gregory Porterfield eight times in "his chest, back, leg, shoulder, wrist, buttocks, and an index finger, nearly killing him."³⁰¹ Like Pantaleo, Mann's behavior put him in rare company at the Philadelphia Police Department (PPD): he is one of only twelve Philadelphia police officers who were involved in at least three shootings between 2007 and 2014.³⁰² It is "exceedingly rare" that Mann was

294. MATTHEW J. HICKMAN, U.S. DEP'T OF JUSTICE, CITIZEN COMPLAINTS ABOUT POLICE USE OF FORCE 1 (2006), <http://www.bjs.gov/content/pub/pdf/ccpuf.pdf> [<http://perma.cc/4YHJ-ZB4S>]; see also Ryan J. Reilly, *Here's What Happens When You Complain to Cops About Cops*, HUFFINGTON POST (Oct. 9, 2015, 1:43 PM), http://www.huffingtonpost.com/entry/internal-affairs-police-misconduct_us_5613ea2fe4b022a4ce5f87ce [<http://perma.cc/89Z7-C3TF>] (noting that, when one accuses an officer of misconduct, the "internal affairs division usually decides the officer did nothing wrong" and discussing internal review procedures of police departments in St. Louis, Missouri; Ferguson, Missouri; Cleveland, Ohio; New Orleans, Louisiana; Newark, New Jersey; Albuquerque, New Mexico; New York City, New York; and other cities across the United States).

295. See FATAL ENCOUNTERS, *supra* note 273 (follow "Search Database" hyperlink; then select "City" from the drop-down menu on the left; then search "Philadelphia") (tallying 217 victims of police killings in Philadelphia between January 1, 2000, and November 3, 2017); *Officer Involved Shootings*, PHILA. POLICE DEP'T, <http://www.phillypolice.com/ois/> [<http://perma.cc/VFF7-RBFP>] (last visited Feb. 15, 2019) (stating that six people have been killed by police gunfire in Philadelphia since November 3, 2017).

296. See *Officer Involved Shootings*, *supra* note 295; see also GEORGE FACHNER & STEVEN CARTER, U.S. DEP'T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., COLLABORATIVE REFORM INITIATIVE: AN ASSESSMENT OF DEADLY FORCE IN THE PHILADELPHIA POLICE DEPARTMENT 18 (2015) (tallying 394 officer-involved shootings in Philadelphia between 2007 and 2014).

297. See Mensah M. Dean, *DA Krasner on Lack of Charges in Police Shootings: 'This Ain't Fair, This Is Biased.'* PHILA. INQUIRER (Jan. 12, 2018, 5:31 PM), <http://www.philly.com/philly/news/crime/da-krasner-on-lack-of-charges-in-police-shootings-this-aint-fair-this-is-a-bias-20180112.html> [<http://perma.cc/U8S3-W24L>] [hereinafter Dean, *This Ain't Fair*] (noting that, as of January 2018, the last Philadelphia police officer charged in an on-duty killing was Christopher DiPasquale in 1999); Victor Fiorillo, *Krasner Announces Homicide Charges Against Ex-Cop Who Shot Fleeing Black Suspect*, PHILA. MAG. (Sept. 4, 2018, 12:34 PM), <http://www.phillymag.com/news/2018/09/04/larry-krasner-ryan-pownall-indictment/> [<http://perma.cc/J5VS-GQ3D>] [hereinafter Fiorillo, *Homicide Charges*] (reporting that former Philadelphia police officer Ryan Pownall had been charged on September 4, 2018, in the killing of David Jones).

298. Dean, *Fired Philly Cop*, *supra* note 201.

299. *Id.*

300. *Id.*

301. *Id.*

302. FACHNER & CARTER, *supra* note 296, at 25.

involved in three shootings in three years,³⁰³ just as it was unique for Pantaleo to have twenty-one complaints of excessive force and other misconduct made against him in eight years.³⁰⁴

Mann received a four-day suspension for shooting May because he violated the PPD's policy against shooting into moving vehicles.³⁰⁵ For killing Pratt, who was unarmed and fleeing, he was fired after a three-year internal investigation determined that the shooting was "unwarranted."³⁰⁶ But Mann won his job back after going through an arbitration process in which the arbitrator "accepted as fact" Mann's testimony that he shot Pratt because he "posed a threat because he had reached for his waistband, where criminals often carry guns, . . . and [had] lunged for [Mann's] Taser and gun."³⁰⁷

Encouragingly, the arbitrator who ruled that Mann had to be reinstated noted that his "hands were pretty much tied" because there was insufficient evidence of any wrongdoing.³⁰⁸ At first blush, this is an issue that BWC implementation could resolve.³⁰⁹ That hope is undercut, however, by the story of Lieutenant Jonathan Josey, who was filmed punching Aida Guzman in the face in 2012.³¹⁰ The PPD fired him for his actions³¹¹ and charged with simple assault by the Philadelphia District Attorney's Office.³¹² At his bench trial, "Josey testified that he had been trying to knock a beer bottle from [Guzman's] hand and was surprised that he had instead punched her, causing her mouth to bleed."³¹³ The judge was "shocked" by the video, but found Josey not guilty after determining "that Josey had acted within reason" when he punched Guzman.³¹⁴ Then-Mayor Michael Nutter stated, "[I]t is beyond my comprehension as to how that's not at least an assault, simple assault."³¹⁵ "It is disturbing, it is certainly disappointing, and I don't understand it," he added.³¹⁶ The judge also happened to be married to a Philadelphia police officer, a fact that he failed to disclose to

303. Dean, *Fired Philly Cop*, *supra* note 201.

304. See *supra* note 241 and accompanying text, which explain that Pantaleo's disciplinary record was "among the worst on the force."

305. Dean, *Fired Philly Cop*, *supra* note 201.

306. *Id.*

307. *Id.*

308. *Id.*

309. See *id.* (quoting the arbitrator as implying that a camera, as well as officer or civilian witnesses, would have helped in the case against Mann—though by no means guaranteeing that video evidence would have changed his ruling).

310. Mensah M. Dean, *Judge Tosses Video Evidence, Acquits Ex-Cop Josey*, PHILA. INQUIRER (Feb. 28, 2013), <http://www.lawreport.org/ViewStory.aspx?StoryID=11099> [<http://perma.cc/DMF5-JWGA>] [hereinafter Dean, *Video Evidence*].

311. Victor Fiorillo, *Cop Who Hit Woman at Puerto Rican Parade Sues over Denied Promotion*, PHILA. MAG. (June 7, 2018, 5:06 PM), <http://www.phillymag.com/news/2018/06/07/jonathan-josey-lawsuit/> [<http://perma.cc/JKP3-CVHP>] [hereinafter Fiorillo, *Cop Who Hit Woman*].

312. Dean, *Video Evidence*, *supra* note 310.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

the District Attorney’s Office and that experts believe should have required him to recuse himself.³¹⁷

Several months later, though, an arbitration panel ruled in Josey’s favor, reinstating him as a police officer and requiring the PPD to give him back pay.³¹⁸ The panel also required that the PPD scrub Josey’s personnel file of any record of his firing,³¹⁹ which is also true for Mann and other Philadelphia officers who were reinstated by arbitrators after being fired by the Department.³²⁰ These anecdotes are far from unique to Philadelphia: A recent investigation by the *Washington Post* found that 37 of the 55 largest police forces in the United States fired a combined 1,881 officers between 2006 and 2017.³²¹ Nearly a quarter of those officers—more than 450—won their jobs back via an appeals process.³²²

The most recent example of police impunity in Philadelphia came on August 20, 2018, when Philadelphia police officer Richard Nicoletti killed Jeffrey Dennis by shooting him in the arm and head.³²³ Nicoletti, who had shot and injured another man in 2012,³²⁴ was among a group of officers who “were preparing to raid [Dennis’s] home” when they saw Dennis driving nearby.³²⁵ The officers maneuvered their cars to block Dennis’s.³²⁶ As he attempted to drive away, his car rammed into one of the unmarked police cars.³²⁷ Five officers surrounded Dennis’s car with their guns drawn while one ran to the driver’s side of the car and smashed in the window with a hammer.³²⁸ As Dennis continued to attempt to turn his car around, Nicoletti approached the vehicle “and sho[t] at

317. Mensah M. Dean, *Legal Experts: Judge in Josey Case, Married to Cop, Should Have Recused Himself*, PHILA. INQUIRER (Mar. 1, 2013), <http://www.lawreport.org/ViewStory.aspx?StoryID=11101> [<http://perma.cc/LR7Q-62HY>].

318. Fiorillo, *Cop Who Hit Woman*, *supra* note 311.

319. *Id.* Josey is now in the process of suing the PPD for refusing to promote him to captain, because, the PPD reasoned, doing so would “have a detrimental long-term impact on the relationship between the Department and the community we serve.” *Id.* (quoting a member of the PPD Promotional Review Board who did not recommend Josey for the promotion).

320. Dean, *Fired Philly Cop*, *supra* note 201.

321. Kimbriell Kelly et al., *Fired/Rehired*, WASH. POST (Aug. 3, 2017), <http://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/> [<http://perma.cc/3NZF-W4CM>]. The researchers requested data from each of the 55 largest police forces, but only 37 provided data. *Id.*

322. *Id.*

323. See John N. Mitchell, *Police To Release Video of Jeffery Dennis’ Fatal Shooting*, PHILA. TRIB. (Aug. 23, 2018), http://www.phillytrib.com/news/police-to-release-video-of-jeffery-dennis-fatal-shooting/article_a0c95d38-946f-5180-9a26-d56845c3e31d.html [<http://perma.cc/JLW4-W439>]; Sam Wood, *Philly Cop Will Not Be Charged by AG in Fatal August Shooting*, PHILA. INQUIRER (Dec. 4, 2018), <http://www.philly.com/philly/news/richard-nicoletti-police-shooting-jeffrey-dennis-krasner-mcnesby-20181204.html> [<http://perma.cc/S8ZK-NPMR>].

324. Chris Palmer, *Philly Cop, Cleared in Fatal August Shooting, Shot Someone Else in 2012, Records Show*, PHILA. INQUIRER (Dec. 19, 2018), <http://www.philly.com/news/philadelphia-police-shooting-nicoletti-jeffrey-dennis-tacony-20181220.html> [<http://perma.cc/23LR-M2AL>].

325. Wood, *supra* note 323.

326. *Id.*

327. *Id.*

328. *Id.*

near-point-blank range.”³²⁹ This act violated the PPD’s own policies, which “forbid[] the discharge of shots into a moving vehicle” and “prohibit shooting ‘to subdue a fleeing individual who presents no immediate threat of death or serious physical injury to [police officers] or another person.’”³³⁰ A nearby surveillance camera captured the killing.³³¹ Yet, after a four-month review, Pennsylvania Attorney General Josh Shapiro declined to press charges against Nicoletti.³³²

A seemingly promising development occurred recently in Chicago, when a jury convicted former Chicago police officer Jason Van Dyke³³³—who killed seventeen-year-old Laquan McDonald by shooting him sixteen times in 2014³³⁴—of murder in the second degree and sixteen counts of aggravated battery with a firearm.³³⁵ A police dashboard camera captured the murder, and the jurors elected to believe the video rather than Van Dyke’s “contradictory, overly rehearsed and simply not believable” testimony.³³⁶ Further, the footage worked to combat the “Blue Wall of Silence”—an unspoken code that discourages police officers from cooperating with investigations into alleged misconduct³³⁷—by contradicting three officers’ false paperwork that claimed that McDonald was assaulting police and that Van Dyke only shot him once.³³⁸ Those officers were eventually charged with official misconduct, obstruction of justice, and conspiracy for their actions.³³⁹

329. *Id.*

330. *Id.* (quoting PHILA. POLICE DEP’T, DIRECTIVE 10.1 § 4(F) (2017), <http://www.phillypolice.com/assets/directives/D10.1.pdf> [<http://perma.cc/WD5S-UX7E>]).

331. *Id.*

332. *Id.* Typically, Philadelphia District Attorney Larry Krasner would have handled the case. *See id.* However, Krasner had to recuse himself due to a potential conflict of interest—he had previously represented Dennis as his defense attorney. *Id.* Therefore, Krasner ceded the case to Shapiro. *Id.* For a discussion of the role prosecutors can play in ensuring—and preventing—police accountability, see *infra* note 398.

333. Similar to NYPD officer Daniel Pantaleo, *see supra* notes 241–54, Van Dyke was the subject of twenty complaints lodged by Chicagoans in his first thirteen years on the force. *See Jason Van Dyke*, CITIZENS POLICE DATA PROJECT, <http://cpdb.co/officer/jason-van-dyke/7655> [<http://perma.cc/W5J5-3C84>] (last visited Feb. 15, 2019). None of those complaints were substantiated, meaning Van Dyke was not disciplined for them. *See id.* Like with Pantaleo, the fact that Van Dyke ultimately murdered a civilian might not come as a surprise, given his history of complaints. *See infra* note 254 and accompanying text.

334. *See* Merrit Kennedy, *3 Chicago Police Officers Accused of Cover-Up in Killing of Laquan McDonald*, NPR (June 27, 2017, 5:31 PM), <http://www.npr.org/sections/thetwo-way/2017/06/27/534596557/3-chicago-police-officers-accused-of-cover-up-in-killing-of-laquan-mcdonald> [<http://perma.cc/LV5P-APUH>]; *see also* VIC MENSA, *16 Shots, on THERE’S ALOT GOING ON* (Roc Nation 2016).

335. Mitch Smith, *‘We Just Didn’t Buy It’: Jury Was Unswayed by Officer’s Story in Laquan McDonald Case*, N.Y. TIMES (Oct. 6, 2018), <http://nyti.ms/2QA0tI6> [<http://perma.cc/YD2N-QW2H>].

336. *Id.*

337. *See* ENCYCLOPEDIA OF CRIMINAL JUSTICE ETHICS 63–66 (Bruce A. Arrigo ed., vol. 1 2014).

338. Curtis Black, *How Chicago Tried To Cover Up a Police Execution*, CHI. REP. (Nov. 24, 2015), <http://chicagoreporter.com/how-chicago-tried-to-cover-up-a-police-execution/> [<http://perma.cc/J5Z4-D7WX>]; Kennedy, *supra* note 334.

339. Michael Harriot, *Judge Acquits Officers for Covering Up Laquan McDonald Murder*,

Since the footage shined light on the falsified paperwork³⁴⁰ and the jury in Van Dyke's trial "relied on the video" in coming to its verdicts,³⁴¹ the case could provide hope that BWCs will lead to increased accountability.³⁴² But there are several reasons to view it less optimistically. First, Laquan McDonald's murder was extreme in its flagrancy, as Van Dyke shot him sixteen times despite the fact that McDonald was "as far as the width of two car lanes away" and armed only with a knife.³⁴³ The details of the case match up with Philip Stinson's findings that "to secure a murder conviction against an officer, the facts of a case have to be 'so over the top and bizarre' that the officer's actions cannot be rationally explained."³⁴⁴

Another reason to temper expectations for BWCs after Van Dyke's conviction is that it was an anomaly.³⁴⁵ Police in the United States have killed more than 17,000 people since 2005.³⁴⁶ Some of those killings were captured on video.³⁴⁷ Yet Van Dyke marked just the seventh police officer to be convicted of murder in that time,³⁴⁸ and four of the other six convictions have been overturned.³⁴⁹

Van Dyke's sentence provides more cause for a subdued reaction. Though prosecutors sought a sentence of no fewer than eighteen years in prison, the

ROOT (Jan. 17, 2019, 4:29 PM), <http://www.theroot.com/judge-acquits-officers-for-covering-up-laquan-mcdonald-1831849268> [<http://perma.cc/JW3U-NBEF>].

340. See Black, *supra* note 338; Kennedy, *supra* note 334.

341. Smith, *supra* note 335.

342. See *Van Dyke Verdict Raises Hope of Greater Police Accountability*, NBC CHI. (Oct. 6, 2018, 8:58 PM), <http://www.nbcchicago.com/news/local/van-dyke-verdict-raises-hope-of-greater-police-accountability-495366311.html> [<http://perma.cc/U4RH-JX3G>].

343. See Justin Glawe, *The Cop Shooting So Horrific It Cost \$5 Million To Hide*, DAILY BEAST (Nov. 19, 2015, 3:48 PM), <http://www.thedailybeast.com/the-cop-shooting-so-horrific-it-cost-dollar5-million-to-hide> [<http://perma.cc/LWX3-GNPS>].

344. Ryan Tarinelli, *Ex-Texas Cop Guilty of Murder for Killing Unarmed Black Teen*, U.S. NEWS (Aug. 28, 2018, 10:00 PM), <http://www.usnews.com/news/us/articles/2018-08-28/ex-texas-cop-guilty-of-murder-for-killing-unarmed-black-teen> [<http://perma.cc/3DKR-QMST>] (quoting Philip Stinson, the Bowling Green State University professor whose research on police shootings is cited *supra*).

345. See *supra* notes 271–80 and accompanying text for an analysis of how rare it is for police officers to be convicted of killing civilians.

346. FATAL ENCOUNTERS, *supra* note 273 (follow "Search Database" hyperlink; then select "Year" from the drop-down list on the left; then search each year from 2005 to 2018).

347. See, e.g., Marcus Gilmer & Tim Chester, *Before Alton and Philando: 12 Other Police Killings Caught on Video*, MASHABLE (July 7, 2016), <http://mashable.com/2016/07/07/police-shootings-on-video/> [<http://perma.cc/XKG7-ARL9>] (showing that the majority of officers involved did not face charges); Jaeah Lee & AJ Vicens, *Here Are 13 Killings by Police Captured on Video in the Past Year*, MOTHER JONES (May 20, 2015, 10:15 AM), <http://www.motherjones.com/politics/2015/05/police-shootings-caught-on-tape-video/> [<http://perma.cc/6U7U-R55X>] ("To date, three officers have been charged."); Dana Liebelson & Daniel Marans, *14 Times Cops Walked in 2015 After Shooting People to Death*, HUFFINGTON POST (Dec. 29, 2015, 2:34 PM), http://www.huffingtonpost.com/entry/police-killings-no-indictment_us_5682b893e4b0b958f65a7702 [<http://perma.cc/3AWP-HC2U>].

348. See Tarinelli, *supra* note 344 (citing Stinson, *supra* note 277) (noting, in an article written before Van Dyke's conviction, that only six officers had been convicted of murder since 2005).

349. Stinson, *supra* note 277.

judge sentenced Van Dyke to fewer than seven.³⁵⁰ He will be eligible for release after serving half of that sentence.³⁵¹ This “[r]elatively [l]enient [s]entence”³⁵² disappointed community members and McDonald’s family, who were “heartbroken” and called the sentence “a slap in the face to us and a slap on the wrist to [Van Dyke].”³⁵³

Finally, the aftermath of McDonald’s murder shows the limited effect that BWCs have on judicial deference to police officers.³⁵⁴ Despite convicting him of murder, the jury still found Van Dyke not guilty of official misconduct.³⁵⁵ And a judge found not guilty on all counts the three officers who falsified paperwork in an effort to cover up the murder.³⁵⁶

Even though Van Dyke is experiencing criminal repercussions for murdering Laquan McDonald, aspects of his case illustrate why BWCs do not promise accountability. Additionally, what happened to Van Dyke was an anomaly. The stories of Pantaleo, Mann, Josey, and Nicoletti are much more representative of what happens when police officers commit acts of violence against civilians: they suffer minimal consequences and are not held accountable.

350. See Mitch Smith & Julie Bosman, *Jason Van Dyke Sentenced to Nearly 7 Years for Murdering Laquan McDonald*, N.Y. TIMES (Jan. 18, 2019), <http://nyti.ms/2ROAfG3> [<http://perma.cc/435F-N7V5>].

351. See Megan Crepeau, *Attorney General, Special Prosecutor Challenge Jason Van Dyke’s Sentence in Petition to State Supreme Court*, CHI. TRIB. (Feb. 12, 2019, 6:00 AM), <http://www.chicagotribune.com/news/ct-met-jason-van-dyke-laquan-mcdonald-sentence-challenge-20190205-story.html> [<http://perma.cc/EB5F-K62F>].

352. Megan Crepeau et al., *Jason Van Dyke Given Relatively Lenient Sentence of Under 7 Years in Prison for Laquan McDonald Shooting*, CHI. TRIB. (Jan. 18, 2019, 8:50 PM), <http://www.chicagotribune.com/news/local/breaking/ct-met-jason-van-dyke-laquan-mcdonald-sentence-d-20190118-story.html> [<http://perma.cc/9MXH-ZDCX>].

353. See Smith & Bosman, *supra* note 350 (quoting activist William Calloway); see also Monique Judge, *This Is Not Justice: Former Chicago Police Officer Sentenced to 6 Years, 9 Months for the Murder of Laquan McDonald*, ROOT (Jan. 18, 2019, 8:08 PM), <http://www.theroot.com/this-is-not-justice-former-chicago-police-officer-sent-1831885053> [<http://perma.cc/AAU9-AWJ5>]. Several weeks after Van Dyke was sentenced, the prosecutors “filed a petition in the Illinois Supreme Court asking the court to vacate [his] second-degree murder sentence and instead impose a sentence on each of the 16 counts of aggravated battery with a firearm.” Bill Kirkos et al., *Illinois Prosecutors Seek Stiffer Sentence for Jason Van Dyke in Laquan McDonald Killing*, CNN (Feb. 11, 2019, 4:45 PM), <http://www.cnn.com/2019/02/11/us/jason-van-dyke-sentence/index.html> [<http://perma.cc/MBW2-LK7Z>]. If resentenced, Van Dyke might face more prison time, in part because he would not be eligible for release until he served at least 85% of the aggravated battery sentence. Crepeau, *supra* note 351. Joe McMahon, who was specially assigned to prosecute the case, explained the decision to appeal by saying, “It is important that a police officer [be] held accountable for criminal conduct.” Kirkos et al., *supra*. There is no time frame for the court to rule on the appeal. Crepeau, *supra* note 351.

354. See *infra* notes 383–88 for a discussion of how courts and juries tend to give deference to police officers’ decisions.

355. Smith, *supra* note 335; see also 720 ILL. COMP. STAT. ANN. 5/33-3(b) (West 2019) (“An employee of a law enforcement agency commits misconduct when he or she knowingly uses or communicates, directly or indirectly, information acquired in the course of employment, with the intent to obstruct, impede, or prevent the investigation, apprehension, or prosecution of any criminal offense or person.”).

356. Harriot, *supra* note 339.

C. *Police Accountability Is a Structural Problem, Not an Evidentiary One*

Police are seldom punished for their misconduct.³⁵⁷ Even when video evidence showing police misconduct—and especially police killings—exists, police are often excused for their behavior.³⁵⁸ For instance, while the arbitrator in Mann’s case suggested that video footage of him killing Pratt might have changed his decision, Josey’s and Nicoletti’s cases indicate that resolution of evidentiary issues is insufficient for ensuring accountability. Despite being the product of the judicial system, the public generally views these acquittals, nonindictments, and rehiring as miscarriages of justice and as representative of a lack of accountability.³⁵⁹ The reality is that there are simply too many other barriers to achieving accountability. Lack of police accountability is not an evidentiary issue—it is a structural one.³⁶⁰

One structural issue that came up in Mann’s and Josey’s cases is the arbitration process that many police union contracts mandate.³⁶¹ This results in “enormous frustration” for police departments,³⁶² which are forced to rehire many of the officers whom they attempt to terminate.³⁶³

But it is exceptionally rare that police departments try to fire officers in the first place.³⁶⁴ Perhaps the most important reason that accountability is so difficult to achieve in cases of police misconduct is because of who investigates the allegations.³⁶⁵ Typically, officers accused of misconduct are either investigated by

357. See, e.g., Kindy & Kelly, *supra* note 238 (exploring the low frequency at which police officers are convicted of killing unarmed victims through a study of the few officers who have been charged with murder).

358. See, e.g., *supra* note 347.

359. See, e.g., MORIN ET AL., *supra* note 286, at 82–83 (noting that 65% of the public views accountability as a factor for protests after police killings); Zoé Samudzi, Opinion, *Why Police Officers Aren’t Held Accountable When They Kill People*, TEEN VOGUE (June 16, 2017, 8:12 PM), <http://www.teenvogue.com/story/why-police-officers-arent-held-accountable-when-they-kill-people> [<http://perma.cc/KL5J-8ALB>].

360. See, e.g., Rachel Moran, *In Police We Trust*, 62 VILL. L. REV. 953, 984–91 (2017) (discussing the systemic deference enjoyed by police in the criminal justice system); Samudzi, *supra* note 359 (same).

361. See Kelly et al., *supra* note 321 (“The 37 departments that reported rehiring officers have one commonality: a police union contract that guarantees an appeal of disciplinary measures.”).

362. Dean, *Fired Philly Cop*, *supra* note 201 (quoting Chuck Wexler of the Police Executive Research Forum).

363. Kelly et al., *supra* note 321.

364. See *id.* (“The 37 departments that complied with The Post’s request for records employ nearly 91,000 officers. The nearly 1,900 firings and the 451 rehiring show both how rare it is for departments to fire officers and how difficult it is to keep many of those from returning.”).

365. See Amanda Taub & Dara Lind, *Baltimore Police Will Face Criminal Charges for Killing Freddie Gray. That’s Incredibly Rare.*, VOX (May 1, 2015, 11:48 AM), <http://www.vox.com/2014/11/25/7173695/ferguson-police-officer-prosecution> [<http://perma.cc/FW3F-PGFN>] (“[T]he first inherent conflict is that the police are investigating their own.”). None of the police involved in Freddie Gray’s killing were ultimately convicted. Kevin Rector, *Charges Dropped, Freddie Gray Case Concludes with Zero Convictions Against Officers*, BALT. SUN (July 27, 2016, 8:57 PM), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-miller-pretrial-motions-20160727-story.html> [<http://perma.cc/V9YB-4242>].

their peers or by a local prosecutor.³⁶⁶ This can create a conflict of interest that makes just adjudication extremely unlikely.³⁶⁷ Also, in many cases prosecutors simply refuse to bring charges.³⁶⁸ And even in those exceptional instances when police officers are fired from one police department as a result of some alleged misconduct, the repercussions are decidedly slight, since they can often find employment at a new department within days.³⁶⁹ Even when officers are

366. See, e.g., HARRY W. MORE, CURRENT ISSUES IN AMERICAN LAW ENFORCEMENT: CONTROVERSIES AND SOLUTIONS 65–68, 92–95 (2008); Peter A. Joy & Kevin C. McMunigal, *Prosecutorial Conflicts of Interest and Excessive Use of Force by Police*, CRIM. JUST., Summer 2015, at 47, 47–48; Taub & Lind, *supra* note 365.

367. See, e.g., Joy & McMunigal, *supra* note 366; Taub & Lind, *supra* note 365.

368. See, e.g., Jerry Iannelli, *Prosecutors Haven't Charged Miami-Dade Cops Despite Footage Showing Them Beating Man, Lying About It*, MIAMI NEW TIMES (June 26, 2018, 8:30 AM), <http://www.miamiherald.com/news/miami-dade-cops-beat-man-and-lied-but-faced-no-discipline-10471151> [<http://perma.cc/JA89-WTXL>] (noting that Miami-Dade County police officers who were recorded by their own BWCs repeatedly punching Ephraim Casado in the face, grinding his body into the pavement, and lifting him into the air by his arms, and who then lied about the circumstances surrounding the incident, were neither fired by the police department nor charged by the prosecutor's office); Jon Swaine & Ciara McCarthy, *Dozens of Killings by US Police Ruled Justified Without Public Being Notified*, GUARDIAN (London) (Apr. 13, 2016, 12:17 PM), <http://www.theguardian.com/us-news/2016/apr/13/the-counted-us-police-killings-officers-cleared> [<http://perma.cc/XFG8-UWEX>] (finding that more than 16% of police killings are ruled justified without any public involvement).

369. See, e.g., Christopher Buchanan, *Officer Fired for Hitting Suspect with Car Hired by Nearby Police Department Days Later*, USA TODAY NETWORK (June 6, 2018, 12:08 PM), <http://www.usatoday.com/story/news/nation-now/2018/06/06/cop-fired-hitting-man-car-hired-days-later/677076002/> [<http://perma.cc/6Z4R-XAD6>]; P.R. Lockhart, *Officer Who Shot Antwon Rose Is Accused of Past Civil Rights Violations*, VOX (July 5, 2018, 3:50 PM), <http://www.vox.com/identities/2018/7/5/17537150/antwon-rose-police-shooting-pittsburgh-michael-rosfeld-civil-rights-lawsuit> [<http://perma.cc/7XEH-66NW>]; Samantha Vincent, *Betty Shelby Sworn in at Rogers County Sheriff's Office as Reserve Deputy*, TULSA WORLD (Aug. 10, 2017), http://www.tulsaworld.com/news/bettyshelby/betty-shelby-sworn-in-at-rogers-county-sheriff-s-office/article_6170de13-acae-524d-ac43-872fc92a6026.html [<http://perma.cc/T3FX-CS8B>]. Police officer Michael Rosfeld was accused of using excessive force while he worked for the University of Pittsburgh Police Department. Lockhart, *supra*. He eventually left that job, potentially because of those allegations. *Id.* Months later, he was hired by the East Pittsburgh Police Department. *Id.* On June 19, 2018, Rosfeld was sworn in as a police officer. German Lopez, *East Pittsburgh Police Officer Charged for Shooting of 17-Year-Old Antwon Rose*, VOX (June 27, 2018, 12:05 PM), <http://www.vox.com/identities/2018/6/20/17484480/antwon-rose-east-pittsburgh-police-shooting-video> [<http://perma.cc/E8BM-FJSR>]. That same day, he shot and killed unarmed seventeen-year-old Antwon Rose as Rose ran away. *Id.* A bystander recorded the killing and Rosfeld was eventually charged with criminal homicide. *Id.* Similarly, Taylor Saulters was fired from his job with the Athens Police Department in Georgia after he was recorded running into Timmy Patmon with his patrol car. Buchanan, *supra*. Three days later, Saulters was hired by the Oglethorpe County Sheriff's Office. *Id.* On September 16, 2016, Tulsa police officer Betty Shelby was recorded shooting and killing Terence Crutcher. Vincent, *supra*. She was relegated to administrative duties before ultimately being acquitted of manslaughter. *Id.* After her acquittal, she resigned from the Tulsa Police Department and accepted a job with the Creek County Sheriff's Office. *Id.* There she would resume patrolling the streets—just as soon as she completed “other obligations including ‘nationwide’ speaking engagements” about killing Crutcher and the resulting “events” over the following year. *Id.* As of August 2018, she had begun teaching a class called “Surviving the Aftermath of a Critical Incident” to law enforcement agencies around the country. Bill Hutchinson & Sabina Ghebremedhin, *Officer Who Killed Unarmed Black Man Responds to Critics of Her ‘Critical Incident’ Course*, ABC NEWS (Aug. 29, 2018, 1:51 PM), <http://abcnews.go.com/US/protest-erupts-critical-incident-class-taught-oklahoma-officer/story?id=57448147> [<http://perma.cc/CZ8K-BSPX>]. She does this in addition

investigated by an independent CCRB, the Board’s authority is limited and can be ignored by the police department to which it makes disciplinary recommendations.³⁷⁰

Additionally, for a variety of reasons, investigations into police misconduct are often delayed to a greater extent than other criminal charges.³⁷¹ One such technique, utilized especially in high-profile cases, is to prolong the internal investigation, which makes it much easier for departments to end investigations quietly in a manner that could be unsatisfactory to the public.³⁷² Furthermore, officers are infamous for subscribing to the “Blue Wall of Silence,” as Van Dyke’s peers did after he murdered Laquan McDonald.³⁷³ Conversely, officers who themselves report various forms of misconduct by their peers are often subject to both official and unofficial punishments.³⁷⁴

Police are also granted special protections when they are being investigated for official misconduct.³⁷⁵ These policies, often called Law Enforcement Officers’ Bills of Rights, shield officers from the type of investigation techniques that other accused criminals face.³⁷⁶ These policies can require that officers, before being questioned, be made aware of both the identity of the individual who lodged the complaint and the contents of that complainant’s testimony.³⁷⁷ Officers can often be interrogated only by other police officers (as opposed to CCRB investigators); questioning cannot occur for at least ten days after the incident, but in some jurisdictions, officers cannot be disciplined if more than one hundred days have passed since the incident; and officers can only be questioned for reasonable amounts of time at reasonable hours, with the

to her regular duties as a sheriff’s deputy. *Id.*

370. *See, e.g.*, N.Y.C. CHARTER § 440(e) (West 2019); Townes & Jenkins, *supra* note 240. *See also supra* notes 242–48 for a discussion of the role that the CCRB had in disciplining Daniel Pantaleo for complaints made against him.

371. *See, e.g.*, Taibbi, *Police Violence*, *supra* note 261; Taub & Lind, *supra* note 365.

372. *See, e.g.*, Black, *supra* note 338; Taibbi, *Police Violence*, *supra* note 261; Taub & Lind, *supra* note 365.

373. *See supra* notes 337–40, 356.

374. *See, e.g.*, Kendall Taggart, *This NYPD Officer Reported Sexual Harassment. Then She Was Forced into Rehab.*, BUZZFEED NEWS (July 8, 2018, 10:31 AM), <http://www.buzzfeednews.com/article/kendalltaggart/this-nypd-officer-reported-sexual-harassment-then-she-was> [<http://perma.cc/W5U3-ND9B>]. Police officer Jazmia Inserillo was the victim of sexual harassment by one of her superior officers for five years. *Id.* She reported him to her precinct’s commanding officer and her union delegate, and they ignored her. *Id.* She then made a complaint to the NYPD’s Office of Equal Employment Opportunity and, within months, she herself became the target of an investigation and the victim of further harassment from her colleagues and supervisors. *Id.* She was ordered to complete a ninety-day alcohol treatment program despite there being no indication of her abusing alcohol. *Id.* She refused to go to the program, and she was suspended before eventually quitting. *Id.* “Inserillo’s story . . . underscores” a well-known fact in police departments: “Those who speak up about misconduct sometimes say they are punished most severely of all.” *Id.*

375. Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 185 (2005).

376. *See id.*

377. Eli Hager, *Blue Shield*, MARSHALL PROJECT (Apr. 27, 2015, 12:06 PM), <http://www.themarshallproject.org/2015/04/27/blue-shield> [<http://perma.cc/2EQZ-N57D>].

guarantee of bathroom breaks.³⁷⁸ Some laws that codify the use of BWCs, similar to Chapter 67A, have clauses that help police avoid accountability³⁷⁹—even by allowing officers “who shoot people [to] review footage taken from *every officer* on the scene before they give a statement.”³⁸⁰ Granting officers access to the footage is particularly troubling because of how easily the footage can be edited and hacked “[w]ithout [a]nybody [n]oticing.”³⁸¹ Predictably, these policies obstruct accountability for officers accused of misconduct.³⁸²

Finally, in the rare event that police officers are tried for their misconduct, courts and jurors tend to be deferential to the officers’ decisions,³⁸³ like in Jonathan Josey’s case.³⁸⁴ In addition to the fact that police officers are entitled to

378. *Id.*; see also Bill Torpy, *Torpy at Large: When a Murderous Cop Has Law-and-Order Enablers*, ATLANTA J.-CONST. (July 5, 2018), <http://www.ajc.com/news/local/torpy-large-when-murderous-cop-has-law-and-order-enablers/kpMWaAMGrYq6qiQTNf4aFK/> [<http://perma.cc/F9OQ-2KTS>] (noting that, in what an independent investigator called “the worst police shooting” they had ever reviewed, the district attorney gave the involved officers “the evidence in the case weeks before it was presented to the grand jury and then let the [police department] . . . show jurors a faulty animation of the case”).

379. See, e.g., TEX. OCCUPATIONS CODE ANN. § 1701.655(b)(5) (West 2019) (requiring that law enforcement agencies that receive state grants to implement BWC programs create policies “entitling an officer to access any recording of an incident involving the officer before the officer is required to make a statement about the incident”).

380. Michael Barajas, *Body Cam Policies in Texas Exacerbate a System Designed To Protect Police, Critics Say*, TEX. OBSERVER (Sept. 22, 2017, 2:28 PM), <http://www.texasobserver.org/critics-dallas-body-cam-policy-exacerbates-a-system-designed-to-protect-police/> [<http://perma.cc/43GT-SZGU>] (“[This policy] highlights an unexpected downside for police reformers championing [BWCs], which, depending on how departments use them, could actually help cops avoid accountability.”). *But see, e.g.*, PHILA. POLICE DEP’T, DIRECTIVE 4.21 § 7(J) (2018), <http://www.phillypolice.com/assets/directives/D4.21-BodyWornCameras.pdf> [<http://perma.cc/FD49-67W6>] (limiting access to BWC footage that captures “a police discharge, a seriously injured officer, a motor vehicle accident involving serious bodily injury, any death, or any use of force resulting in serious bodily injury or death,” unless access is “necessary”—an undefined term).

381. See Daniel Oberhaus, *Hackers Can Edit Police Body Cam Footage Without Anybody Noticing*, VICE: MOTHERBOARD (Aug. 13, 2018, 1:53 PM), http://motherboard.vice.com/en_us/article/594q5d/hackers-can-edit-police-body-cam-footage-without-anybody-noticing [<http://perma.cc/CA9H-NUVB>] (discussing an experiment conducted by Josh Mitchell, a cybersecurity consultant, in which he “demonstrated security vulnerabilities in five different police body cameras . . . and showed how a hacker could manipulate or delete footage and associated metadata (such as the location, time, and date where the video was shot)”).

382. Keenan & Walker, *supra* note 375, at 186; see also Glenn Smith et al., *Benefit of the Doubt*, POST & COURIER (Charleston, S.C.) (2015), <http://data.postandcourier.com/shots-fired/page/4> [<http://perma.cc/6QSC-4YAB>] (“Review shows police-involved shooting investigations are stacked in favor of cops, with no indication SLED [South Carolina’s State Law Enforcement Division] digs into officers’ backgrounds, and with solicitors usually finding criminal charges not warranted.”); Glenn Smith et al., *Shots Fired*, POST & COURIER (Charleston, S.C.) (2015), <http://data.postandcourier.com/shots-fired/page/1> [<http://perma.cc/D7ME-3FCS>] (discussing the ways in which SLED’s investigations favor police, despite it being an independent agency). See generally Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1243–52 (2017) (proposing ways to limit the amount that police union contracts shield officers from accountability).

383. See Moran, *supra* note 360, at 958.

384. See *supra* notes 310–17 for a brief discussion of Josey’s criminal trial.

qualified immunity in civil cases,³⁸⁵ decades of United States Supreme Court decisions have resulted in a “knee-jerk deference to police conduct” in the criminal system.³⁸⁶ This blind deference allows law enforcement agents to act with impunity.³⁸⁷ As a result, it remains rare for police to be punished for their misconduct, which means that many potential jurors believe specific instances of police abuse and brutality are isolated, justifiable incidents.³⁸⁸

All of these factors combine to make accountability for police misconduct difficult to achieve. In the rare instances that police are prosecuted for abusing their power, they are often found not guilty because of both public and judicial deference to police decisions.³⁸⁹ Some people may argue that merely subjecting police officers to these investigations and trials is a form of accountability, even when the officers are not indicted or convicted. But many members of the public seem to disagree. In spite of the fact that police are often found to have been legally blameless—more likely *because* of that fact—countless people have been moved to protest police brutality.³⁹⁰ Many of those protests occur after a police officer is deemed, either by not being indicted or by not being convicted, to have acted justifiably when killing a civilian.³⁹¹ The lack of repercussions has a way of validating the officers’ actions, in that they are deemed to have done nothing wrong.³⁹² Members of the public tend to believe that the lack of indictments or convictions in such cases is a reflection of a lack of accountability for police officers.³⁹³ Evidently, this is not a controversial view, as 72% of police officers themselves feel that their poorly performing peers are not held accountable through current disciplinary systems.³⁹⁴

385. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (“[G]overnment officials . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

386. See Moran, *supra* note 360, at 970.

387. *Id.* at 984.

388. See *id.* (“[M]any people—far more likely to be white than people of color—choose to view these tragedies as isolated incidents, rather than the natural manifestations of systemic deference to those in power.”).

389. See Chase Madar, *Why It’s Impossible To Indict a Cop*, NATION (Nov. 25, 2014), <http://www.thenation.com/article/why-its-impossible-indict-cop/> [<http://perma.cc/363J-LAXC>].

390. See, e.g., MORIN ET AL., *supra* note 286, at 83; Mark Berman et al., *Police and Protestors Clash in St. Louis After Former Officer Who Shot Black Driver Acquitted on Murder Charges*, WASH. POST (Sept. 16, 2017), <http://www.washingtonpost.com/news/post-nation/wp/2017/09/15/st-louis-tenses-for-verdict-in-murder-trial-of-former-police-officer/> [<http://perma.cc/D27S-9BA5>]; Davey & Bosman, *supra* note 4; Maya Rhodan & Charlotte Alter, *No Charges for Officer Who Put Eric Garner in Deadly Chokehold*, TIME (Dec. 3, 2014), <http://time.com/3616780/eric-garner-chokehold-new-york-staten-island/> [<http://perma.cc/HX6K-H2YX>] (updated Dec. 4, 2014, 1:41 PM).

391. See, e.g., Berman et al., *supra* note 390; Davey & Bosman, *supra* note 4; Rhodan & Alter, *supra* note 390.

392. See Kindy & Kelly, *supra* note 238 (“Most jurors, experts say, view officers as those who enforce laws, not break them. And unlike civilians, police officers are allowed, even expected, to use force.”).

393. See MORIN ET AL., *supra* note 286, at 82–83 (noting that 65% of the public views accountability as a factor for protests after police killings).

394. *Id.* at 5.

Realistically, the only way to eradicate police brutality is through police abolition.³⁹⁵ As long as the police exist—even if all other appropriate steps are taken—there will always be “bad apples” who abuse their authority.³⁹⁶ The movement for police abolition is unlikely, however, to gain the political support required for its success in the short term.³⁹⁷ In the alternative, there are several other approaches that might produce police accountability.³⁹⁸ But implementing police BWCs is not the silver bullet.³⁹⁹ Any proposal to improve police accountability must focus on the structural nature of police impunity as opposed to the purported lack of evidence required to hold police accountable. Police abolition and certain other approaches to reform appropriately address this structural problem. BWCs do not.

395. See ALEX S. VITALE, *THE END OF POLICING* 1–30 (2017) (discussing the limitations of police reform).

396. For discussions of police abolition, see, for example, Maya Dukmasova, *Abolish the Police? Organizers Say It's Less Crazy Than It Sounds*, CHI. READER (Aug. 25, 2016), <http://www.chicagoreader.com/chicago/police-abolitionist-movement-alternatives-cops-chicago/Content?oid=23289710> [<http://perma.cc/XYL8-CRF6>]; José Martín, *Policing Is a Dirty Job, but Nobody's Gotta Do It: 6 Ideas for a Cop-Free World*, ROLLING STONE (Dec. 16, 2014), <http://www.rollingstone.com/politics/news/policing-is-a-dirty-job-but-nobodys-gotta-do-it-6-ideas-for-a-cop-free-world-20141216> [<http://perma.cc/DEL3-NGKB>]; Hari Ziyad, *How Growing Up in What Some Called a Religious “Cult” Helped Me Make Sense of Police Abolition*, BLACK YOUTH PROJECT (Dec. 6, 2017), <http://blackyouthproject.com/growing-called-religious-cult-helped-make-sense-police-abolition/> [<http://perma.cc/VC9F-YM9K>]; Philly for REAL Justice, *Rally and March for Police Abolition*, FACEBOOK (June 27, 2017, 4:17 PM), <http://www.facebook.com/events/1190779894400581/permalink/1194726467339257/> [<http://perma.cc/C7BG-SGGM>]. Also, recall the full context of the phrase often used to excuse police brutality: “One bad apple spoils the whole barrel.”

397. See, e.g., VITALE, *supra* note 395, at 197–220 (discussing the political power of the police).

398. See, e.g., Moran, *supra* note 360, at 993–1003; David A. Graham, *What Can the U.S. Do To Improve Police Accountability?*, ATLANTIC (Mar. 8, 2016), <http://www.theatlantic.com/politics/archive/2016/03/police-accountability/472524/> [<http://perma.cc/4R4W-WZ77>] (critiquing BWC implementation as well as other proposed solutions including better data collection, stricter prosecution, intervention by the Justice Department, increasing civil suits, eliminating police immunity laws, increasing civilian oversight, and implementing community policing as potential solutions); Samudzi, *supra* note 359. It is beyond the scope of this Comment to extensively discuss alternative approaches to achieving police accountability, but one somewhat encouraging development that bears mentioning has been the movement to elect prosecutors who are willing to take crimes committed by police more seriously. See Taylor Pendergrass, *How Bad Prosecutors Cause Bad Policing*, SLATE (Aug. 16, 2016, 2:09 PM), http://www.slate.com/articles/news_and_politics/crime/2016/08/how_bad_prosecutors_cause_bad_policing.html [<http://perma.cc/Z844-52JH>] (discussing the need for elected prosecutors to be willing to prosecute the police). For instance, Philadelphia elected Larry Krasner as its district attorney in 2017. Holly Otterbein, “Completely Unelectable” Progressive Larry Krasner Wins DA’s Race, PHILA. MAG. (Nov. 7, 2017, 9:25 PM), <http://www.phillymag.com/news/2017/11/07/larry-krasner-wins-district-attorney-general-election/> [<http://perma.cc/UY3Y-SKRD>]. He expressed “skepticism over the lack of prosecutions against city police for shooting suspects” both as a candidate and after taking office in January 2018. Dean, *This Ain’t Fair*, *supra* note 297. He pledged that he would prosecute police when they shoot people. *Id.* Within nine months of taking office, Krasner had charged former Philadelphia police officer Ryan Pownall for the June 8, 2017, killing of David Jones, a thirty-year-old black Philadelphian who was fleeing when Pownall shot him to death. Fiorillo, *Homicide Charges*, *supra* note 297.

399. See, e.g., Hemmer, *supra* note 1.

V. CONCLUSION

Among the purported accomplishments of Chapter 67A was increased police accountability. That assertion relied on two presuppositions. First, its proponents allege that Chapter 67A created a procedure that made it easier for the public to access BWC footage. Second, and more fundamentally, the law's supporters believe that the mere presence of publicly accessible BWC footage would lead to increased police accountability.

Both of those presuppositions prove to be inaccurate. First, while Chapter 67A does create a procedure by which the public can gain access to BWC footage, that procedure is more restrictive than Pennsylvania's Right-to-Know Law, which would otherwise apply to BWC footage. Second, the idea that BWCs will increase accountability relies on the behavioral science concept that people act better when they are being watched.⁴⁰⁰ But in the conversation around police BWCs, an important aspect of that analysis is lost: the risk of being punished is a crucial factor in self-policing.⁴⁰¹ Given the extensive history of police officers going unpunished for abuses like excessive force and even homicide, the accountability-based argument for BWCs is without merit. Police officers have virtually no reason to believe that they will be punished for the most egregious instances of abuse even when caught on camera.

Chapter 67A attempts to address a structural problem with an evidentiary fix. Such an approach to achieving police accountability is inadequate. Therefore, neither Chapter 67A specifically nor the availability of BWC footage generally will lead to improved police accountability.

400. See *supra* notes 52–56 and accompanying text.

401. See Ariel et al., *supra* note 10, at 509, 511 (“[W]hen certainty of apprehension for wrongdoing is ‘high,’ socially and morally unacceptable acts are less likely to occur.”).