

No Tape, No Testimony

*How Courts Can Ensure
the Responsible Use of Body Cameras*



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SUMMARY

In January 2015, the Chicago Police Department launched a pilot program requiring its officers to use body-worn cameras. The program began in the wake of public outcry over violence by Chicago police officers against civilians, and a police official explained that it sought to “rebuild[] trust with the residents we’re sworn to serve.”¹ In July 2016, an officer wearing one of these cameras killed Paul O’Neal, a Black teenager who allegedly stole a car and crashed it into a police cruiser. After Mr. O’Neal fled on foot, the officer fatally shot him in the back. In theory, Mr. O’Neal’s final moments should have been recorded by the officer’s body camera, and the recording should now be available to assist a court, a jury, or the public in deciding whether the shooting was justified. But no such video exists. The camera worn by the officer who killed Mr. O’Neal was reportedly not turned on until after the fatal shot had been fired.²

This incident, and others like it, have been cited as cautionary tales about how the value of body cameras can be undermined if the police cannot or will not ensure their consistent use.³ But police departments are not the only institutions capable of assuring the effective use of body-worn cameras. Courts can do it too.

For three reasons, courts can and should encourage the police to record, when practicable, their investigative encounters with civilians.

- 1. Videos of police-civilian encounters have shaken public confidence in the capacity of legal proceedings to separate fact from fiction.** Time and again, cases have been headed for an incorrect result—such as the wrongful prosecution of a civilian or the wrongful exoneration of a police officer—*until* videos surfaced that contradicted officers’ versions of events. Meanwhile, there is growing evidence that witness testimony, on which courts must often rely when video is absent, can be quite flawed when used as the exclusive means of resolving disputes between police officers and civilians. Thus, when video evidence of a police-civilian encounter does not exist, legal proceedings may be less likely to get the right answer or to be respected by the public.
- 2. Police body-worn cameras present a viable and valuable supplement to witness testimony.** These cameras are quickly becoming part of the 21st-century police uniform, with a recent survey of 70 law enforcement agencies finding that 95% of respondents had either implemented or had committed to implementing body camera programs.⁴ Body cameras can be critical to uncovering the truth when the facts of a police-civilian encounter are contested. There is also evidence that, when body cameras are consistently worn and activated, they can deter misconduct or violence from happening in the first place.
- 3. Courts have both a distinct interest in and a unique means of encouraging police officers to record their encounters with civilians.** Courts have an interest in conducting legal proceedings that are fair, that avoid wrongful convictions and other catastrophic outcomes, and that efficiently resolve disputes. Given those interests, and given that videos of police-civilian encounters can make the difference between just and unjust results, courts should

encourage, when practicable, the recording of police-civilian encounters. Rather than leave this task to police departments, whose disciplinary practices are necessarily inconsistent, courts should provide this encouragement by using tools uniquely at their disposal: jury instructions.⁵

This report proposes a model jury instruction that encourages the recording of police-civilian encounters by empowering juries to impose *evidentiary consequences* for unreasonable or bad faith failures to record.

This instruction would tell the jury that, if it finds that the police unreasonably failed to create or preserve a video of a police-civilian encounter, it can devalue an officer's testimony and infer that the video would have helped the civilian. If the jury finds that the case involves bad faith, such as the outright sabotage of body cameras, then it should be instructed to disregard officer testimony altogether.

The tools that courts can use to craft this instruction already exist. Several courts now use jury instructions to encourage the recording of custodial interrogations and drunk-driving field tests; they can and should craft similar rules for body cameras. These measures can help prevent wrongful convictions, accurately resolve allegations of police misconduct, and enhance public trust in the justice system's capacity to get it right when confronted with police-civilian violence.

DISCUSSION

1. Rising Awareness of Police Violence and the Dangers of Relying on Conflicting Witness Testimony Support the Need for Video Evidence.

In August 2014, Darren Wilson, a white police officer, fatally shot Michael Brown, an unarmed Black teenager, in Ferguson, Missouri. There is no video of the shooting, and there is conflicting witness testimony about what happened.⁶ In November 2014, a grand jury in Ferguson declined to indict Wilson for killing Brown,⁷ setting off a wave of protests across the country.⁸ Meanwhile, other instances of police violence—including the killings of Black men like Eric Garner,⁹ Walter Scott,¹⁰ Laquan McDonald,¹¹ Alton Sterling,¹² and Terence Crutcher¹³—have been caught on video and shared widely on social media. These videos have documented police misconduct, led to the prosecution of officers and the exoneration of civilians, and fueled the Black Lives Matter movement.¹⁴

All too often, justice is left up to chance when recordings of high-stakes encounters are absent.

But these videos also raise questions about whether, when recordings of high-stakes encounters are absent, it is really possible to determine what happened and who, if anyone, was at fault. In those circumstances, ascertaining whether police misconduct occurred may depend on whether all the witnesses to an encounter are still alive, whether these witnesses accurately remember and describe what happened, and whether juries, judges, and the public discern which witness's description (if any) is accurate. All too often, justice is left up to chance.

a. Widely shared videos documenting police violence have triggered a sustained public outcry against police misconduct.

Following Ferguson, police violence against civilians has repeatedly made national news, and videos of the encounters have played a crucial role in the police reform movement that has arisen from these incidents.¹⁵ These videos have focused public attention on police violence, raised questions about whether police actions were justified, and fueled protests seeking police accountability. And, in many instances, these videos have altered the course of legal proceedings, including those following the deaths of civilians:

- In June 2016, Atlanta Police Department Officer James Burns shot and killed **Deravis Caine Rogers** by firing a gun through the passenger side window of Rogers's car.¹⁶ Burns had been called to an apartment complex after a report that a pedestrian was behaving suspiciously. Burns appears to have claimed that, when he arrived, a vehicle quickly pulled out of a parking spot and moved toward his car. Burns reportedly said that he tried to block Rogers's car because "everyone in [the] area was of interest."¹⁷ But an internal police investigation, which included review of

Videos of police violence against civilians have altered the course of legal proceedings.

dashboard camera footage, found that there was “no provocation, no reason” for Burns to shoot Rogers.¹⁸ Burns was subsequently charged with murder.

- In July 2015, University of Cincinnati Police Officer Ray Tensing fatally shot **Samuel DuBose** in the head after stopping him for a minor traffic violation.¹⁹ Tensing claimed that he had reached into the car to prevent DuBose, a Black man, from driving away.²⁰ Tensing also insisted that he fired his weapon only after his arm became lodged in the steering wheel as DuBose attempted to drive away, supposedly causing Tensing to be “dragged” and requiring him to “hold[] on for dear life.”²¹ In fact, Tensing’s body camera footage revealed that DuBose’s car began to drive away only after Tensing had shot DuBose. And at no point did Tensing’s arm appear to be caught in the car’s interior. Tensing was subsequently indicted for murder.²²
- In April 2015, North Charleston (S.C.) Police Officer Michael Slager fatally shot **Walter Scott** following a traffic stop for a non-functioning brake light.²³ Slager claimed that he fired his weapon because Scott had taken his Taser and police reports indicated that Slager had attempted to revive Scott using CPR. But that account was refuted by a cell phone video later released by a civilian eyewitness. According to the eyewitness, Scott had not taken the Taser but was instead running to get away from Slager’s Taser.²⁴ The video shows that Scott was moving away from Slager when Slager shot him, and does not show any attempt by Slager to revive Scott using CPR.²⁵ Instead, it shows Slager dropping something—possibly the Taser—next to Scott’s body. After the civilian video came out, Slager was arrested and charged with murder. In May 2016, a federal grand jury returned an indictment charging Slager with violating Scott’s civil rights and obstructing justice.²⁶
- In October 2014, Chicago Police Department Officer Jason Van Dyke killed pedestrian **Laquan McDonald** by shooting him 16 times.²⁷ Police supervisors initially ruled McDonald’s death a justifiable homicide, following police reports describing him as “crazed” and alleging that he lunged at officers with a knife.²⁸ But that account was refuted by video from a police dashboard camera, which was not released to the public until November 2015.²⁹ The video showed that McDonald was walking away when Van Dyke shot him.³⁰ On the same day that the video was released to the public, Cook County State’s Attorney Anita Alvarez announced that Van Dyke had been charged with murder.³¹
- In June 2012, three New Jersey police officers beat **Marcus Jeter**, who is Black, and then attempted to frame him.³² The officers initially encountered Jeter while responding to another call. Later, two officers pulled Jeter over, and a responding backup officer swerved into oncoming traffic and struck Jeter’s car.³³ Fearing for his safety, Jeter stayed in the car with his hands up. Officers then smashed Jeter’s window with a baton, elbowed him in the face, dragged him out of the car, and threw him on the ground. Yet Jeter was arrested and charged with eluding police, resisting arrest, and aggravated assault on an officer. It was not until nearly two years later, during Jeter’s trial, that police dashboard camera footage surfaced and exonerated Jeter.³⁴ The footage also led to criminal convictions for three different officers.³⁵

Video footage can also help police departments respond to claims of police misconduct. For example, body camera footage recently showed that a civilian in Florida falsely accused Daytona Beach police officers of threatening him and using a racial epithet.³⁶ Body camera footage also proved that a civilian in Tennessee had falsely accused a Knox County deputy of fondling her during a sobriety check at a traffic stop.³⁷ And in Boston, after members of the community raised concerns about police misconduct in a March 2015 incident in which an officer shot and killed a civilian, the Suffolk County District Attorney assuaged many of these concerns by releasing a surveillance video showing that the civilian had shot a police officer before the police fired on him.³⁸

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These videos suggest that the needless killings of civilians, as well as the unjust resolution of violent encounters between police officers and civilians, may be frighteningly common. The videos have also raised the expectation that, when an encounter between an officer and a civilian results in violence, video evidence should be used to sort out what happened. The natural question in these circumstances becomes “Where’s the videotape?”

b. In the absence of video, courts rely on potentially flawed witness testimony.

Precisely because videos have so dramatically altered the known facts of several infamous police-civilian encounters, they highlight the challenges involved in ascertaining the truth when a violent encounter between a police officer and a civilian is not recorded. In those circumstances, courts and juries may be forced to rely more heavily on eyewitness accounts. But eyewitness accounts are notoriously unreliable.³⁹ They can be mistaken, fabricated, or simply nonexistent. Moreover, when there is conflicting testimony about an unrecorded police-civilian encounter,

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a court’s or jury’s decision to side with one witness over another can yield accusations that the decision was based on the witness’s status—for example, siding with a police officer rather than a civilian—instead of the facts. Thus, when video is absent, there is a risk that court decisions about police-civilian encounters will be viewed as unjust or illegitimate.

As a threshold matter, it is not always possible for everyone involved in a police-civilian encounter to say what happened. This is necessarily true when someone is killed. In 2015, an estimated 990 civilians were killed by police officers⁴⁰ and an estimated 41 police officers were killed by civilians.⁴¹

Even when all witnesses survive a police-civilian encounter, eyewitness perception and memory can be limited and unreliable. Initial perception of events may be incomplete,⁴² and stress⁴³ and later-acquired information⁴⁴ may impede eyewitness perception and memory.

And that is just what can go wrong when witnesses try to tell the truth. Sometimes witnesses lie, and the absence of video can make it difficult or impossible to figure out when they are doing so. The officers who killed Laquan McDonald, Walter Scott, Samuel DuBose, and Deravis Caine Rogers appear to have simply invented accounts of what happened. In each incident, as well as the incident involving Marcus Jeter, officers either brought cameras or confronted civilians in public areas where they might have reasonably anticipated that a civilian would record them. Yet the officers gave false accounts anyway. Police officers and civilian witnesses may be even more likely to misrepresent the facts when they can be reasonably certain that their conduct is not being recorded.

For example, according to the Department of Justice, the police departments in Ferguson, Missouri, and Baltimore, Maryland, engaged in systemic violations of people's rights.⁴⁵ With respect to Ferguson, the DOJ concluded that the police engaged in widespread "stops without reasonable suspicion," "arrests without probable cause," and "excessive force" in violation of the Fourth Amendment.⁴⁶ Moreover, the DOJ also highlighted the police department's failure to adequately punish police officers who lied on the job. Instead, the DOJ found that "untruthfulness appears not even to always result in a formal investigation, and even where sustained, has little effect."⁴⁷ This lax approach to untruthfulness, according to the DOJ, sent the message that police officers "can behave as they like, regardless of law or policy."⁴⁸

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The DOJ found similar violations in Baltimore. It calculated that between November 2010 and July 2015, police officers in Baltimore made 10,163 arrests that were immediately determined not to be worth prosecuting.⁴⁹ The DOJ concluded that when these officers make arrests in the field without a warrant, "they often do so without probable cause."⁵⁰

But without concrete evidence—which video can sometimes provide—these routine violations may be extremely difficult to prove. In fact, the DOJ found that when a Baltimore City patrol officer complained about being ordered to stop a group of young Black men without having a valid reason for doing so, a sergeant simply told him to "make something up."⁵¹ Presumably the sergeant believed there would be no consequences for doing so.⁵²

When police or other witnesses give false testimony, whether intentional or not, there is a risk that the truth will remain out of reach.

c. Relying on eyewitness testimony may unduly advantage police officers.

There is reason to doubt that conflicting eyewitness testimony about police-civilian encounters can be fairly resolved by asking juries or judges to decide which eyewitness, if any, is correct. Instead, evidence suggests that police officer testimony is given more weight within the legal system than testimony from

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civilians, and that the legal system more broadly grants preferential treatment to police in the wake of their use of lethal force.⁵³

Perhaps the best evidence of a built-in advantage for police officers are the examples of police violence in which a civilian was charged with or convicted of a crime *until* video evidence surfaced that contradicted the officer's account of what happened. While those cases are abundant, it is more difficult to find examples of the reverse: situations in which an incident was incorrectly resolved in the civilian's favor until video vindicated the officer.

For example, in March 2014, Mary Holmes was waiting for a bus in Roxbury, Massachusetts, when she saw a transit officer screaming at a Black woman and slamming her down on a bench. Holmes, who is also Black, tried to help the woman and asked the officer to stop. When the officer ignored her, Holmes called 9-1-1. After Holmes had connected to 9-1-1, the officer and her partner pepper-sprayed Holmes and knocked her phone out of her hand. The two officers then beat Holmes with a baton, threw her on the ground, and arrested her. Worse yet, Holmes was charged with assault and battery, resisting arrest, and disorderly conduct.⁵⁴ And Holmes might have been convicted, had there not been security footage that persuaded the prosecutor to drop the case.

The tendency for police officers to be believed, and for civilians to be disbelieved, has implications that go beyond individual cases. Violent encounters between police and civilians, like the one that befell Ms. Holmes, have long been a horrific reality in America, particularly for communities of

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color. The problem is old; what's new are the cameras confirming its existence.⁵⁵ These videos are forcing the American public to confront both substantive issues about police violence and the realization that, without the support of video evidence, victims of police violence are at a severe disadvantage.⁵⁶

Finally, although it might be impossible to quantify the chances that a jury or judge will be swayed in a particular case by someone's status as a police officer or civilian, the *possibility* that a case might be resolved in this fashion can undermine faith in the courts across all cases. When there is no video, any decision involving a police-civilian encounter can trigger suspicion that it was consciously or unconsciously influenced by status. Relying on witness testimony thus runs the risk that police will not be held accountable for their misconduct, that false accusations of police misconduct will prevail in court, and that the legitimacy of courts will be questioned.

2. Body Cameras Have Become a Primary Response to Concerns about Police Violence.

Body cameras have emerged as a leading national response to the difficulties of relying on witness testimony to establish what took place during contested police-civilian encounters. Police officers across the country are increasingly equipped with body cameras, and this trend has been supported by a broad range of stakeholders—including police officers,⁵⁷ the White House,⁵⁸ and the public.⁵⁹ It is also increasingly supported by data, with studies suggesting that body cameras can not only document violent encounters but also deter them.

a. Body cameras are proliferating rapidly due to widespread support from police officers, the federal government, and the public.

Body cameras are quickly becoming integral to 21st-century policing. Police departments across the country have rapidly begun to outfit their officers with body cameras, a trend that is overwhelmingly supported by the public⁶⁰ and welcomed by the federal government⁶¹ and many police officers and departments.⁶²

These developments are turning body cameras into a standard part of police uniforms. In late 2014, a survey found that 41 of the police departments in the 100 most populous U.S. cities had already begun using body cameras.⁶³ And a 2015 survey of 70 law enforcement agencies around the country found that 95% of respondents had either implemented or had committed to implementing body camera programs.⁶⁴ Evidence suggests that, while some police officers are resistant, many officers support the use of body cameras, based in part on a belief that the cameras can reduce false claims of police misconduct.⁶⁵ Moreover, public support for body cameras appears to be overwhelming. A recent survey concluded that 93% of Americans favor the use of body cameras by police so officers can record their interactions with citizens.⁶⁶ A second survey found that public support for body cameras cuts across political party, gender, age, race, income level, and geography.⁶⁷

The federal government has effectively ensured further adoption of body cameras by making money available to police departments that wish to acquire them. In May 2015, President Obama announced a Body-Worn Camera Pilot Implementation Program that made over \$23 million available to local law enforcement agencies.⁶⁸ The administration recently demonstrated that its support for body camera programs is ongoing: the President's 2017 budget plan requests an additional \$5 million to provide body cameras to U.S. Customs and Border protection agents.⁶⁹

b. Body cameras appear capable of reducing the number of violent police-civilian encounters and helping courts to justly resolve those that do occur.

Body cameras are popular at least partly because they have been effective. First, there is growing evidence that body cameras can deter violent police-civilian encounters from happening in the first place. Second, when these encounters do occur, they can produce valuable supplements to eyewitness accounts, thus improving the likelihood that disputes will be resolved fairly.

There is preliminary evidence that body cameras can help police officers and civilians avoid violent confrontations. Body cameras have been associated with declines in civilian complaints and uses of force from Florida (Orlando and Tampa Bay)⁷⁰ to Ohio (Cleveland)⁷¹ to California (Rialto).⁷² For example, the Rialto Police Department’s body camera program yielded a roughly 50% decrease in the use of force by police officers.⁷³ Similarly, a study of the Orlando Police Department’s one-year body camera program revealed a 53% reduction in “response-to-resistance” incidents.⁷⁴ Orlando’s program was so successful that the officers who participated chose to keep their cameras after the program was over, and police commanders eventually equipped the entire department with cameras.⁷⁵ True, this research is ongoing, and it may well take years for a clear picture to emerge. But the bulk of the studies so far—and common sense—suggest that body cameras can protect both sides of the badge.

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Even when cameras do not deter the use of force, the recordings they generate can improve the likelihood that disputes will be resolved fairly and that the public will have a meaningful opportunity to voice concerns. For example, if it had not been for police camera footage, it is unlikely that the officer who killed Laquan McDonald in Chicago would have been charged with murder. Likewise, it took security camera footage to absolve Mary Holmes of any wrongdoing. Of course, the mere existence of video does not ensure that everyone will see an encounter the same way.⁷⁶ Videos can be incomplete and unclear, and are themselves subject to interpretation.⁷⁷ And, depending on whether the video was taken by a police officer or a civilian, it will reflect either the officer’s perspective or the civilian’s. But when video exists, there will be at least some facts that cannot be reasonably contested.⁷⁸ These facts can shed light on what happened and even save innocent people—civilians and police officers—from going to jail.

3. Courts Should Encourage Police Officers to Collect Body Camera Footage by Imposing Consequences for Failures to Record.

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encounters with civilians. Police departments can encourage these practices by disciplining officers who violate them.⁷⁹ But police departments are not the only stakeholders that should have an interest in encouraging the use of body cameras to create objective records of police-civilian encounters. Nor are they the only stakeholders capable of such encouragement.

Courts, too, have both good reason and a clear capability to promote the use of body cameras. Courts around the country have already crafted jury instructions or similar instruments that encourage officers to record certain interactions between civilians and officers, such as custodial interrogations and field sobriety tests. They should fashion similar tools to incentivize officers to consistently record, where practicable, their investigative encounters with civilians.

a. Police-initiated discipline cannot vindicate the interest of courts in using video evidence to prevent wrongful convictions, promote police accountability, and enhance judicial efficiency.

The proliferation of body cameras means that consistent access to recordings of contested police-civilian encounters is within reach. These encounters can be fast-paced, confusing, and, unfortunately, hostile. In the absence of video evidence, these encounters must be resolved in court by a process that is often unsatisfactory. As Ninth Circuit Judge Alex Kozinski has explained: “Nobody likes a game of ‘he said, she said,’ but far worse is the game of ‘we said, he’s dead.’”⁸⁰ Yet, at present, it has been left up to police departments to ensure that police officers will capture key evidence with these cameras. There is a better way.

Although some police departments have internal policies governing the use of body cameras, these policies often fail to adequately ensure the availability of body camera evidence. Many police departments do not specify any clear consequences for violations of departmental policies on using body cameras.⁸¹ Moreover, these policies can be amended at will,⁸² tend to vary from department to department,⁸³ and require consistent enforcement from police supervisors.⁸⁴ Therefore, internal police policies cannot be relied upon to ensure the availability of video footage of police-civilian encounters.

Even if police disciplinary policies on body cameras were effectively and consistently enforced across jurisdictions—which they are not—they would still not vindicate the distinct interest of *courts* in encouraging the recording of encounters between police officers and civilians. When a video reveals that a police officer has nearly gotten away with murder, or that a civilian has been wrongfully subjected to criminal proceedings, that is not merely a revelation of police misconduct. It is a revelation that the court system may be reaching the wrong result in many cases in which video evidence is absent. Courts should step in to remedy this flaw. In America today, any discussion of a violent incident between a police officer and civilian will inevitably raise the question, “Where’s the video?”⁸⁵ It’s now time for courts to raise that same question, by demanding that, when practicable, the facts of police-civilian encounters be proved with video evidence.⁸⁶

It’s now time for courts to demand that, when practicable, the facts of police-civilian encounters be proved with video evidence.

Indeed, video evidence that fosters accuracy and legitimacy in legal proceedings should be especially valuable to courts. Separating the innocent from the guilty is the justice system’s most important function, and video evidence has an important role to play in combatting wrongful convictions. People like Marcus Jeter and Mary Holmes avoided criminal convictions only after

video footage revealed that they had not, as officers alleged, committed crimes.⁸⁷ But they were also lucky; their arrests occurred within view of cameras. Other people are arrested outside the view of any camera, or within range of a body camera that is not in operation, and presumably some of these people are convicted of crimes they did not commit.

Beyond protecting civilians from wrongful convictions, courts have an interest in ensuring that civilians are protected by the Fourth Amendment's prohibition against unreasonable searches

Courts have an interest in ensuring that civilians are protected by the Fourth Amendment's prohibition against unreasonable searches and seizures.

and seizures. Promoting the availability of video evidence serves that interest by improving police accountability for searches and seizures that are not reasonable. The DOJ has concluded that Baltimore Police officers often make arrests without probable cause. Presumably, increased use of body-worn cameras could both discourage this practice and assist those seeking a remedy for violations of their constitutional rights.

Encouraging the availability of body camera footage has the additional benefit of promoting judicial efficiency and consistency. The absence of recordings can "result[] in the expenditure of significant judicial resources" merely to "attempt to reconstruct what transpired."⁸⁸ Encouraging recording across the board will also avoid the scenario in which comparably situated defendants have unequal access to video evidence, depending on whether an officer, bystander, or nearby camera system happened to capture an incident on tape.

By providing a valuable supplemental source of evidence, body cameras can benefit the major stakeholders in our criminal justice system, including civilians, the police, and the courts themselves. These benefits can only be realized, however, when police officers consistently record investigatory encounters with civilians. By imposing consequences for failing to record, courts can encourage officers to do so.

By imposing consequences for failing to record, courts can encourage officers to consistently record investigatory encounters with civilians.

b. Courts already use tools to encourage police officers to consistently record police-civilian encounters in other contexts.

Just as police departments are not the only institutions with a potential interest in encouraging the recording of police-civilian encounters, they are not the only institutions capable of such encouragement. In three respects, courts have demonstrated that they can develop tools that encourage recording and, as a consequence, help to prevent wrongful convictions, enhance the truth-seeking function of the courts, and improve the efficiency of the court system.

First, courts have already crafted jury instructions that recognize weaknesses of eyewitness testimony. Through the supervisory power of their state supreme courts, some states have adopted model instructions telling jurors that memory fallibility can lead eyewitnesses to identify

the wrong person as the perpetrator of a crime.⁸⁹ These instructions recognize that eyewitness testimony is often not the best source of evidence. Yet such testimony is often the evidence that remains when a violent encounter between a civilian and a police officer is not recorded. Thus, courts are well placed to recognize that resolving police-civilian disputes using eyewitness testimony is sub-optimal at best.

Second, outside the context of body cameras, some courts have already begun to encourage officers to record key interactions with civilians. Specifically, courts in eight states—Alaska, Arkansas, Indiana, Massachusetts, Minnesota, New Jersey, Utah, and Wisconsin—have implemented consequences that encourage law enforcement officers to record custodial interrogations (*i.e.*, police questioning where the interviewee is not free to leave).⁹⁰ Courts in two of these states, Wisconsin and Massachusetts, have rules that normally entitle the defendant to a cautionary jury instruction if prosecutors introduce evidence at trial of a statement made during an unrecorded custodial interrogation.⁹¹ For example, the rule in Massachusetts is as follows:

Outside the context of body cameras, some courts have already begun to encourage officers to record key interactions with civilians.

[T]he defendant is entitled (on request) to a jury instruction advising that the State's highest court has expressed a preference that [custodial] interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care.⁹²

Courts in four of these eight states—Alaska, Arkansas, Indiana, and Minnesota—have implemented measures to allow for the outright suppression of evidence of unrecorded statements.⁹³ In Minnesota, for example: “If law enforcement officers fail to comply with th[e] recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial. . . . [S]uppression will be required of any statements obtained in violation of the recording requirement if the violation is deemed ‘substantial.’”⁹⁴

Courts in the remaining two states, New Jersey and Utah, make unrecorded custodial interrogations inadmissible in certain circumstances but, if an unrecorded statement *is* admitted, the defendant may be entitled to a cautionary jury instruction.⁹⁵ In Utah, for example, absent an applicable exception, “evidence of a statement made by the defendant during a custodial interrogation in a place of detention shall not be admitted against the defendant in a felony criminal prosecution unless an electronic recording of the statement was made and is available at trial.”⁹⁶ However, “if the court admits into evidence a statement made during a custodial interrogation that was not electronically recorded under an exception . . . the court, upon the request of the defendant, may give cautionary instructions to the jury concerning the unrecorded statement.”⁹⁷ These evidentiary rules send a clear message to law enforcement that the courts prefer recorded interrogations.

Third, the increasingly widespread use of body cameras provides a reason to look beyond custodial interrogations and to begin encouraging the recording of police-civilian encounters in the field. In at least one state, this has already happened; South Carolina has a legal framework that encourages the recording of field tests of civilians suspected of driving under the influence of alcohol (DUI). A South Carolina statute requires officers who stop a DUI suspect to record audio and video of the encounter.⁹⁸ The recording must begin as soon as the police car turns on its lights and continue through any field sobriety tests, arrests, and Miranda warnings.⁹⁹ If an officer fails to record a DUI stop and does not provide an adequate excuse in a sworn statement, the courts consistently dismiss the charge.¹⁰⁰ The South Carolina courts have noted that this statute helps “create direct evidence of a DUI arrest”¹⁰¹ and “protect important rights of the defendant.”¹⁰²

In sum, several courts have already taken an active role in encouraging recording. They are equally capable of doing so for public encounters between police officers and civilians.

c. Courts should fashion jury instructions that create consequences for failures to record that a jury deems unreasonable or in bad faith.

Court-imposed consequences are a sensible and feasible means to encourage officers to record encounters between police officers and civilians. The most straightforward way to provide this encouragement is through jury instructions that would authorize adverse inferences against police officers or police departments when a jury finds that there has been an unreasonable or bad faith failure to record or preserve a recording of a police-civilian encounter. Under this approach, jurors would decide whether such a failure is in fact attributable to unreasonableness or bad faith, as opposed to legitimate reasons like a police department’s limited resources or a community’s desire to protect civilian privacy.

One virtue of this proposal is that, in many states, supreme courts may already have at their disposal authorities that could be used to fashion jury instructions that encourage officers to record their investigatory encounters with civilians. In some states, the relevant authority might arise from the state supreme court’s power to promulgate rules of evidence.¹⁰³ In other states, the relevant authority might be the state supreme court’s prerogative to make rules governing court practice and procedure.¹⁰⁴ In still other states, some state supreme courts may be able to rely on their power to supervise the judiciary.¹⁰⁵

Courts can craft instructions empowering juries to draw inferences in favor of a civilian.

Using these authorities, courts can craft instructions empowering juries to draw inferences in favor of a civilian and against a police officer or department if, *in the jury’s view*, the failure of the police to record an encounter was unreasonable or the result of bad faith. This report proposes the following model instruction:

Jury Instruction on Unrecorded Police-Civilian Encounters

You have heard evidence about an encounter between a police officer and a civilian. You have also heard that [the police officer did not record the interaction OR the police officer recorded the encounter but the video recording was lost or altered].

[Name of State or Commonwealth] Courts have concluded that police departments should create and store recordings of their investigative interactions with civilians when it is reasonable for them to do so. The courts have expressed this preference because, when these video recordings are not made, it can be harder to learn what happened.

If you find that it was not reasonable for the police department to fail to record its encounter with [Name of Civilian], you should infer that the recording, if it had been made, would have been favorable to [Name of Civilian]. You should also consider whether the absence of the video tends to affect the quality, reliability or credibility of the evidence presented by the [State/Officer/Police Department] about what happened during the encounter. You may give that evidence whatever weight you think it deserves under the circumstances.

In considering whether the absence of a recording was reasonable in this case, you may consider:

- the resources available to the police department;
- whether the officer knew in advance that s/he was going to have an investigative encounter with a civilian;
- whether the investigative encounter was not recorded because the officer reasonably relied on a departmental policy that forbids recording in this situation in order to protect the privacy of civilians;
- the specific facts of this police-civilian encounter; and
- other circumstances you deem relevant.

If you believe that the failure to record or the destruction of a recording was done in bad faith, and not merely unreasonable, you must disregard the police officer's testimony about this encounter. Bad faith includes, but is not limited to, any attempt by a police officer or department to conceal the truth about this specific encounter or to prevent the recording of police-civilian encounters more generally.

This instruction expresses a judicial preference in favor of reasonable recording, while at the same time putting the jury firmly in charge of deciding which failures to record are unreasonable. For example, if the jury decides that a police officer did not record a violent encounter with a civilian because the encounter was sudden and unanticipated, because the officer turned off her body camera under a policy designed to protect the privacy of domestic violence victims, or even because the community has made a decision to reject body cameras altogether,¹⁰⁶ then the jury might well conclude that any failure to record was reasonable. But if the failure to record cannot be adequately explained, as may be true in the case of Paul O'Neal, then the jury might well conclude that a failure to record was unreasonable or even undertaken in bad faith.¹⁰⁷

This instruction puts the jury firmly in charge of deciding which failures to record are unreasonable.

In sum, in many states, courts have the power to create consequences for failures to record using body cameras and should do so in order to incentivize consistent recording of police-civilian encounters.

CONCLUSION

To prevent wrongful convictions and advance their truth-seeking mission, courts should encourage the reasonable recording of police-civilian encounters. Video evidence has been enormously valuable in resolving contested police-civilian encounters, and courts have the interest, means, and responsibility to address the injustices that can arise when video is absent. They can do so by instructing juries to draw inferences in favor of civilians and against police officers when, in the jury's view, there has been an unreasonable or bad faith failure to record. This approach would help prevent wrongful convictions, hold officers accountable for their actions, and promote judicial efficiency. Without consequences for failures to record, justice can too easily be left up to chance.

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68. *Justice Department Awards over \$23 Million in Funding for Body Worn Camera Pilot Program to Support Law Enforcement Agencies in 32 States*, U.S. DEP'T OF JUST. (Sept. 21, 2015), <https://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law>.
69. Esther Yu Hsi Lee, *The \$5 Million Proposal to Hold Border Patrol Agents Accountable for Shootings*, THINK PROGRESS (Feb. 11, 2016), <http://thinkprogress.org/immigration/2016/02/11/3747744/president-budget-body-worn-cameras>.
70. Dan Sullivan & Tony Marrero, *USF Study Suggests Tampa Police with Body Cameras Less Likely to Use Force*, TAMPA BAY TIMES (Aug. 24, 2016), <http://www.tampabay.com/news/publicsafety/usf-study-suggests-tampa-police-with-body-cameras-less-likely-to-use-force/2290851> (referencing a study showing Tampa police officers who wear body cameras are less likely to use force than their counterparts who do not wear them, and referencing a previous study showing a drop in complaints against police who wore body cameras in Orlando).
71. Atassi, *supra* note 65 (stating that Cleveland police officials reported that police use of force had been reduced as much as 60 percent after the introduction of body cameras).

72. Lyndsay Winkley, *SDPD Used More Force, Fewer Aggressive Options in 2015*, SAN DIEGO UNION-TRIBUNE (Mar. 22, 2016), <http://www.sandiegouniontribune.com/news/2016/mar/22/sdpd-body-camera-report-force-complaints/> (citing a report indicating that use of force by Rialto police fell after the introduction of body cameras). However, other sources indicate that the relationship between body cameras and use of force may be more nuanced. One study found that the use of “more aggressive types” of force by San Diego police fell after the introduction of a body-worn camera program, but the use of “less aggressive types” of force increased. *Id.*
73. Stav Ziv, *Study Finds Body Cameras Decrease Police’s Use of Force*, NEWSWEEK (Dec. 28, 2014), <http://www.newsweek.com/amidst-debate-study-finds-body-cameras-decrease-polices-use-force-295315>.
74. Sullivan & Marrero, *supra* note 70.
75. *Id.*
76. See, e.g., Timothy Williams, et al., *Police Body Cameras: What Do You See?*, N.Y. TIMES (Apr. 1, 2016), http://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html?_r=0 (demonstrating that readers who stated they have more trust in the police were more likely to believe, after watching a video of police interactions with civilians, that the officer faced a very threatening or somewhat threatening situation).
77. See Howard M. Wasserman, *Orwell’s Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 620 (2009) (explaining the problems of overreliance on video, including that “[c]ourts and advocates frequently assume that video is the event itself, when, in fact, it only is further evidence of the event,” and that “the viewer of a video must evaluate and interpret its message, as with any other form of evidence or testimony”); Williams, *supra* note 76.
78. For example, in *Scott v. Harris*, the Supreme Court reversed factual findings based on testimony because they were contradicted by video evidence. 550 U.S. 372, 380-81 (2007) (“Respondent’s version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.”). See also Stanley, *supra* note 64 (outlining the benefits of body camera use); Lindsay Miller et al., *supra* note 57, at 9 (citing police executives who tout the ways in which video has “significantly improved how officers capture evidence”).
79. See, e.g., Cyrus Farivar, *Oakland Cops Disciplined 24 Times for Failing to Turn On Body-Worn Cameras*, ARS TECHNICA (Dec. 15, 2014), <http://arstechnica.com/tech-policy/2014/12/oakland-cops-disciplined-24-times-for-failing-to-turn-on-body-worn-cameras/>; Philips, *supra* note 3; *Police Body Camera Policies: Accountability*, BRENNAN CTR. FOR JUSTICE (July 8, 2016), https://www.brennancenter.org/sites/default/files/Accountability_Chart.pdf (describing body camera enforcement policies for 23 city police departments); Claire Tragesar, *San Diego Cops Risk Being Fired for Not Pressing Record on Body Cameras*, KPBS SAN DIEGO (Oct. 14, 2014), <http://www.kpbs.org/news/2014/oct/14/san-diego-police-could-be-fired-not-pressing-recor/>.
80. *Cruz v. City of Anaheim*, 765 F.3d 1076, 1077 (9th Cir. 2014).
81. The Leadership Conference on Civil and Human Rights and Upturn maintain a policy scorecard to evaluate the body-worn camera policies currently in place at major police departments in the United States. Of the fifty-one body-worn camera policies they analyzed, twenty-four policies describe when officers must record but do not require officers to provide concrete justifications for failing to record required events. *Police Body Worn Cameras: A Policy Scorecard*, LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS & UPTURN, <https://www.bwcorescorecard.org/> (last updated Aug. 2016).
82. See Martina Kitzmueller, *Are You Recording This?: Enforcement of Police Videotaping*, 47 CONN. L. REV. 167, 191 (2014).
83. The Policy Scorecard maintained by the LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS AND UPTURN captures this variation. Leadership Conference on Civil and Human Rights & Upturn, *supra* note 81.
84. See Jay Stanley, *Police Body Cameras: The Lessons of Albuquerque*, AM. CIV. LIBERTIES UNION (Mar. 24, 2015) <https://www.aclu.org/blog/police-body-cameras-lessons-albuquerque>; see also Findings Letter from Jocelyn Samuels, Acting Assistant Att’y Gen., Civil Rights Div., to Richard J. Berry, Mayor of the City of Albuquerque 1 (Apr. 10, 2014), http://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf.
85. See Crump and Segal, *supra* note 5.

86. For example, from the perspective of typical rules of evidence, video evidence is not preferred to eyewitness testimony. *See, e.g.*, Fed. R. Evid. 602 (“A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony.”); Fed. R. Evid. 1002 (“An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.”).
87. First Amended Complaint, *Holmes v. Garvey*, *supra* note 56, at ¶ 44; Sasha Goldstein, *Police Dash Cam Exonerates New Jersey Man, Leads to Indictment of Cops*, N.Y. DAILY NEWS (Feb. 25, 2014), <http://www.nydailynews.com/news/crime/police-dash-cam-video-exonerates-nj-man-implicates-cops-article-1.1701763> (discussing Marcus Jeter case).
88. *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 529 (Mass. 2004).
89. *See, e.g.*, Travis Anderson & Martin Finucane, *Jury Instructions on Eyewitness Testimony Updated*, BOS. GLOBE (Jan. 12, 2015), <https://www.bostonglobe.com/metro/2015/01/12/high-court-changes-jury-instructions-eyewitness-testimony-reflect-latest-science/Qo8FfCTeMeGrkYpKRYPRbL/story.html> (describing Massachusetts jury instructions for eyewitness identification).
90. *Custodial Interrogation Recording Compendium by State*, NAT’L ASS’N OF CRIM. DEF. LAW. (Apr. 3, 2016), <https://www.nacdl.org/usmap/crim/30262/48121/d>.
91. *Id.*
92. *DiGiambattista*, 813 N.E.2d at 533-34.
93. *Custodial Interrogation Recording Compendium by State*, *supra* note 90.
94. *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994).
95. *Custodial Interrogation Recording Compendium by State*, *supra* note 90.
96. Utah R. Evid. 616(b).
97. *Id.* 616(d)(2).
98. S.C. Code Ann. § 56-5-2953 (2006 & Supp. 2013).
99. Kitzmueller, *supra* note 82, at 181; S.C. Code Ann. § 56-5-2953 (2006 & Supp. 2013); *see also* Patrick McLaughlin, *The Importance of South Carolina’s DUI Video Law*, SCNOW.COM (Dec. 5, 2014), http://www.scnow.com/opinion/article_2cef5676-7c00-11e4-99cf-5749717ab2b1.html.
100. Kitzmueller, *supra* note 82, at 182.
101. *State v. Taylor*, 411 S.C. 294, 305 (Ct. App. 2014) (quoting *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 347 (2011)).
102. *Id.* at 306.
103. For example, as discussed in more detail above, the Utah Supreme Court adopted Utah Rule of Evidence 616, which permits courts to give cautionary jury instructions when they admit unrecorded custodial interrogations. Utah R. Evid. 616(d)(2). Many other state supreme courts have the power to promulgate rules of evidence. *See e.g.*, Connecticut (*State v. DeJesus*, 288 Conn. 418, 439 (Conn. 2008)); Idaho (*see State v. Knee*, 101 Idaho 484, 485-86 (1980)); Georgia (Ga. Code Ann. § 24-1-2(e)); Illinois (Ill. R. Evid. Rule 101 (West 2016)); Iowa (Iowa Code § 602.4201 (West 2015)); Kentucky (KY R. Evid. Rule 1102); Maine (Me. Rev. Stat. Ann. tit. 4, § 9-A); Michigan (MI Const. Art. 6 § 5 (West 2014); James K. Robinson & Ronald S. Longhofer, 1 Mich. Ct. Rules Prac., Evid. § 101.1 (Thomson Reuters 3d ed. 2015) (stating that Michigan’s Supreme Court’s constitutional power to promulgate rules of practice and procedure includes evidence rules)); Mississippi (Miss. Const. Art. 6 § 144 (West 2016); Miss. Code Ann. § 9-3-61 (West 2016) (stating that “the Supreme Court has the power to prescribe from time to time by general rules the... rules of evidence and the practices and procedure for trials and appeals...”)); Montana (Mont. Const. Art. VII, § 2(3) (West 2015); Mt. R. Rev. Rule 101, Commission Comment (a) (West 2015) (stating that the Montana Supreme Court’s authority to promulgate the rules of evidence is Article VII of the Montana Constitution)); New Hampshire (N.H.R. Evid. 1102 (West 2016)); Oregon (Or. Rev. Stat. Ann. § 40.015); South Carolina (S.C. R. Evid. 1102 (2016)); Virginia (Va. Code Ann. § 8.01-3 (2016)); Washington (Wash. Rev. Code Ann. § 2.04.190 (West 2016)); West Virginia (*See W. Va. R. Evid. 101* (referencing “any other rules adopted by the Supreme Court of Appeals”; *Meadows v. Meadows*, 468 S.E. 2d 309, 312 (W.Va. 1996)).

104. In Arkansas, for example, the state supreme court first referred the question of the practicability of adopting a rule requiring custodial interrogation recording to the Arkansas Committee on Criminal Practice. *Clark v. State*, 374 Ark. 292, 304 (2008). In response to the committee's recommendations, the Arkansas Supreme Court subsequently adopted a rule of criminal procedure, which allows trial courts to consider the failure to record a statement in determining the admissibility of the statement, as recommended by the committee. Ark. R. Crim. P. 4.7; *see also Custodial Interrogation Recording Compendium by State, supra* note 90. Similarly, the New Jersey Supreme Court appointed a Special Committee on Recordation of Custodial Interrogation to issue recommendations related to recording custodial interrogations. In response to the Committee's recommendations, the New Jersey Supreme Court adopted a court rule imposing consequences for failure to record. N.J. Court R. 3:17; *Custodial Interrogation Recording Compendium by State, supra* note 90.
105. *See, e.g. Commonwealth v. DiGiambattista*, 442 Mass. 423, 444-45 (2004) (stating that "we retain as part of our superintendence power the authority to regulate the presentation of evidence in court proceedings" to support its authority to impose consequences for the failure to record custodial interrogations); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (stating that "in the exercise of our supervisory power to insure the fair administration of justice, we hold that all custodial interrogation [...] shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention"); *State v. Jerrell*, 283 Wis. 2d 145, 172 (2005) (exercising the court's "supervisory power to insure the fair administration of justice" to impose consequences for the failure to record custodial interrogation of juveniles).
106. For example, the Movement for Black Lives, a coalition group of more than 50 organizations representing the Black community, has argued that the use of body-worn cameras may assist the police with the mass surveillance of Black communities. *End the War on Black People*, THE MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/end-war-on-black-people/#end-to-the-mass-surveillance> (last visited Sept. 7, 2016).
107. *See A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement*, § 1.b and § 1.s, AM. CIV. LIBERTIES UNION (Mar. 2015), <http://www.aclu.org/model-act-regulating-use-wearable-body-cameras-law-enforcement>.