POLICE TRANSPARENCY AND THE EXCLUSIONARY RULE

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I. INTRODUCTION

Our country has been marked this year by police brutality and ferocious public protest.[1] The reform of police departments is unquestionably vital business, bearing on life, liberty, dignity, security, and property, as well as principles like equal treatment under law. In order to fully and fairly assess reform proposals, we should, at the very minimum, reflect upon moral truths and political ideals, in conjunction with the empirical work of social scientists and the real-world experiences of a range of stakeholders.

Yet there are additional sources deserving of our consideration, such as works of literature or even popular culture, which in the right instance can serve as repositories of shared experience, tradition, and practical wisdom.[2] In fact, when it comes to matters of police reform, and specifically the assumptions we make about officer attitudes and perspectives, I find myself, at least on occasion, drawing from such sources, including those seemingly unrelated to policing, one in particular being a well-known story of an old man named Royal Tenenbaum, a disgraced father who angles to win back his estranged wife and adult children.[3]

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[1] The deaths of George Floyd and Breonna Taylor, both caused by police earlier this year, spurred several weeks of international public protest. Damian Cave et al., *Huge Crowds March Around the Globe to Protest Police Brutality*, N.Y. TIMES (June 6, 2020), https://www.nytimes.com/2020/06/06/world/george-floyd-global-protests.html.

[2] For a full discussion of the "moral imagination," see RUSSELL KIRK, ELIOT AND HIS AGE: T.S. ELIOT'S MORAL IMAGINATION IN THE TWENTIETH CENTURY (2d. ed. 2008). Kirk describes the concept as follows:

> The phrase is Edmund Burke's. By it, Burke meant that power of ethical perception which strides beyond the barriers of private experience and events of the moment – "especially," as the dictionary has it, "the higher form of this power exercised in poetry and art." The moral imagination aspires to the apprehending of right order in the soul and right order in the commonwealth. It was the gift and obsession of Plato and Virgil and Dante.

Id. at 4–5.

[3] THE ROYAL TENENBAUMS (American Empirical Pictures 2001).

At one point in the story we are cast back in time, to the father in middle age, playing a "war game" with his young kids. The father is perched on a roof with a BB gun, giving "cover fire" to Chas, his eldest son and "fellow soldier," who's crouched in the tall grass below, stalking "their enemy" across the lawn. Trusting in dad's protection, the son rises and begins his advance, at which point his father quickly turns his gun on him.

> *Royal:* Hold it Chazzie. Hold it right there.
>
> *Chas:* What are you doing?! You're on my team!
>
> *Royal:* Ha-ha! There are no teams!

The father takes the open shot, leaving his son with two scars, each for life. One is physical—a BB lodged between two knuckles.[4] The other is psychological—a deep-seated understanding that "there are no teams," rousing in Chas profound alienation, perennial distrust, and extreme caution, which as an adult comes barreling to the surface.[5] Later in life, we see Chas asked why he does not call his mother's boyfriend of ten years by his first name. He's puzzled: "I don't know him that well." Endlessly on guard, Chas leads precise middle-of-the-night fire drills for his two sons, whose bedroom is "perfectly neat and organized like a military barracks," featuring "two fire extinguishers and a large first-aid kit mounted on the wall," as well as "night lights in every socket."

With just a modest stretch of the imagination, the pathologies of the fictional Chas Tenenbaum can broaden our understanding of the dynamics of modern policing. Historically, police officers have gone about their business with bankable allies. Fellow cops flat-out lied when needed,[6] prosecutors

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[4] When, several decades later, the father asks the son if the BB is still lodged in his hand, the son confronts him, asking why he took the shot. The father responds softly, "It was the object of the game, wasn't it?," to which the son answers, "No, we were on the same team." "Were we?," counters the father.

[5] Chas's fear and caution as an adult can also be explained by additional factors, including but not limited to his father's embezzlement from his company and his wife's death in a fire.

[6] *See* Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1343 (1996) ("[W]e cannot avoid the unfortunate reality that police perjury exists, particularly in the context of search and seizure testimony."); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041 (1996) ("In one survey, defense attorneys, prosecutors, and judges estimated that police perjury at Fourth Amendment suppression hearings occurs in twenty to fifty percent of the cases."); Gabriel J. Chin & Scott C. Wells, *The Blue Wall of Silence as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 234 (1998) ("[T]he Mollen Commission indicated that in New York, 'the practice of police falsification . . . is so common in certain precincts that it has spawned its own word: 'testilying.'").

looked the other way,[7] and, when all else failed, judges and juries gave officers the benefit of the doubt.[8] To put it simply: with the badge came deep loyalties and wide deference. But officers today find themselves in a stricter, less forgiving environment, notable for its widespread video surveillance (from body-worn cameras, smart phones, and closed circuit televisions) and its democratized channels of distribution (through social media).[9] In this new paradigm of policing, officer misconduct (including lying to protect a colleague) brings a far more sizable risk of exposure and penalty.[10] There's also a well-documented ratchet effect at work: footage of misconduct regularly goes "viral," triggering structural reforms by a host of former allies, including internal affairs branches, prosecutors, city councils, and legislatures.[11] As one officer recently explained:

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[7] *See* Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016) (describing prosecutors' reliance on law enforcement in securing convictions as creating incentive to not prosecute police misconduct); Asit S. Panwala, *The Failure of Federal and Local Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L.J. 639 (2003) ("From 1980 to 1991, the Los Angeles District Attorney's Office only prosecuted forty-one officers out of 319 [police brutality] cases referred to them, a mere thirteen percent.").

[8] *See* Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970) (noting that fact finders generally find police testimony credible); Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J. L. & PUB. POL'Y 111, 114 (2003) ("[T]he jurors tend not to identify with the people searched. All too often, jurors think those people are the sort likely to be criminals even if they have not committed a crime in the case at hand.").

[9] *See* Michael Potere, Note, *Who Will Watch the Watchmen?: Citizens Recording Police Conduct*, 106 NW. L. REV. 273, 278 (2012); Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. 391, 408 (2016) (describing "copwatching" as a community-organized "tactic of police accountability" that involves "ask[ing] the police questions about their actions and engag[ing] in dialogue about constitutional principles" while filming the encounter).

[10] *See infra* Part II. The focus here is on *physical* searches and arrests, as illegal electronic searches will likely evade detection by video surveillance. *See generally* Jon Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L.J. 117 (2016) (testing "the hypothesis, based on chilling effects theory, that traffic to privacy-sensitive Wikipedia articles reduced after the mass surveillance revelations [of June 2013]").

[11] *See, e.g.*, Sarah Almukhtar et al., *Black Lives Upended By Policing: The Raw Videos Sparking Outrage*, N.Y. TIMES (Apr. 19, 2018), https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html?searchResultPosition=1 (compiling "footage that has sparked a national conversation about race and policing"); Dale Kasler et al., *Should Cops Always Chase Suspects? Sacramento Considers Reform After Stephon Clark Shooting*, SACRAMENTO BEE (Mar. 31, 2018), https://www.sacbee.com/news/local/crime/article207445464.html (reporting that in the wake of released helicopter footage of the shooting of Stephon Clark, "[e]lected officials, community leaders and the police chief himself say the Sacramento Police Department must find ways to defuse tense confrontations with suspects before they turn lethal"); Christine Byers, *St. Louis Clergy, Civic Leaders Calling for Police Reform Following Release of Shooting Video*, ST. LOUIS POST DISPATCH (Sept. 26, 2016), https://www.stltoday.com/news/local/crime-and-courts/st-louis-clergy-civic-leaders-calling-for-police-reform-following-release-of-shooting-video/article_38f9b9ce-af97-5098-8b63-9a4e78b9279c.html; UPTURN & LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, POLICE BODY WORN CAMERAS: A POLICY SCORECARD (2015), https://www.bwcscorecard.org ("In the wake of high-profile incidents in Ferguson, Staten Island, North Charleston, Baltimore, and elsewhere, law enforcement agencies across the country have rapidly

> My [body-worn camera] footage was subject to review by my supervisors, who could punish violations of our general orders, no matter how petty. Body cameras provided a piece of evidence shown to judges, juries, and, of course, defense attorneys, who could now pick apart both my recorded voice and my testimony at trial. And it was a public record the mayor sometimes released to local news outlets when there was a use-of-force incident. Seemingly overnight, keeping my job meant doing everything by the book.[12]

The growing realization that "there are no teams" (or if there are not *no* teams, then at least smaller and less cohesive ones) undoubtedly alters police attitudes, resulting in officers who are, on balance, more alienated and fearful, and thereby more cautious about breaking the rules.[13] In police departments across the country, officers are—one by one by one—beginning to think less like Dirty Harry and more like Chas Tenenbaum.[14]

This evolving behavioral profile of police officers in the United States raises compelling doctrinal questions for criminal and constitutional law. Take, for instance, the "exclusionary rule." A hallmark of the U.S. criminal justice system, the exclusionary rule provides generally (subject to various exceptions) that evidence gained in violation of the U.S. Constitution is inadmissible in criminal prosecutions.[15] This long-standing rule is likely to be affected by enhanced transparency in policing. In the immediate future, criminal defendants have much to gain, as video footage (and fewer instances of officer perjury) will make it easier to prove constitutional violations.[16] But

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adopted body-worn cameras for their officers."); Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF L. REV. 837, 847–48 (2016).

[12] Katie Miller, *A Surprising Downside to Bodycams*, SLATE (May 3, 2019).

[13] *See infra* Part II.

[14] *See* David A. Harris, *How Accountability-Based Policing Can Reinforce—or Replace—the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 154 (2009) [hereinafter *Accountability-Based Policing*] ("Commentators do not exaggerate when they say that these new ways of insuring police accountability can create a 'new world' of policing in the United States—policing that fights crime and also respects the Constitution, the rule of law, and the people police serve."); David A. Harris, *Picture This: Body Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH L. REV. 357, 359 (2010) [hereinafter *Picture This*] ("For police officers and the agencies in which they serve, this revolution represents a huge change as many may feel that the public has them 'under surveillance,' or at the very least, under observation."); Mary Erpenbach, *The Whole World Is Watching: Camera Phones Put Law Enforcement Under Surveillance*, L. ENFORCEMENT TECH., Feb. 2008, at 40, 41.

[15] *See* Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914). *See also infra* text accompanying notes 78–82 (discussing exceptions to the exclusionary rule).

[16] *See* Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. 897, 915–16 (2017); Andrew Ferguson, *The Exclusionary Rule in the Age of Big Data*, 72 VAND. L. REV. 561, 569–70 (2019) ("By quantifying police activities, litigants can begin to visualize patterns of systemic and recurring issues and introduce them in Fourth Amendment suppression hearings."). Of

in the long run, the government can be expected to reap the larger benefits. No one denies the exclusionary rule imposes high costs on society (the most prominent being that the guilty sometimes go free),[17] which according to the U.S. Supreme Court are only justified insomuch as the threat of suppressing evidence of criminal guilt is needed to sufficiently deter the police from violating our rights.[18] So what happens if police are, on balance, sufficiently deterred by factors beyond the fear of lost evidence? Is the exclusionary rule still justified? Because the marginal deterrent benefit of the exclusionary rule weakens as alternative deterrents gain strength, transparency in policing (and, more specifically, the alienation, fear, and caution it generates in police officers) may well lead the U.S. Supreme Court to further winnow (or perhaps altogether abandon) the rule. This Article describes the rising transparency in policing in greater detail and explores some of its ramifications for the exclusionary rule.

II. TRANSPARENCY IN POLICING

The beat has become riskier for bad cops. For starters, video cameras are just about everywhere.[19] In 2015, the largest police departments in the U.S. were surveyed about body-worn cameras (BWC). Of responding departments, nineteen percent had programs that were "fully operational,"

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course this is not a panacea. *See generally* Howard M. Wasserman, *Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement*, 96 N.C. L. REV. 1313, 1313 (2018) (analyzing "procedural problems surrounding the use of video recording and video evidence to counter police misconduct, hold individual officers and governments accountable, and reform departmental policies, regulations, and practices").

[17] *See* People v. Defore, 242 N.Y. 13, 21 (N.Y. Ct. App. 1926) ("There has been no blinking the consequences. The criminal is to go free because the constable has blundered."). In 1984, the Supreme Court observed that "the cumulative loss due to nonprosecution or nonconviction of individuals arrested on felony drug charges is probably in the range of 2.8% to 7.1%." United States v. Leon, 468 U.S. 897, 907 n.6 (1984) (citing Thomas Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NU Study and Other Studies of "Lost" Arrests*, 1983 A.B.F. RES. J. 611, 621). For a discussion of additional costs, see *infra* note 80.

[18] *See* United States v. Leon, 468 U.S. 897, 922 (1984) ("We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.").

[19] Fan, *supra* note 16, at 897 ("Now a revolution is coming. Across the nation, police departments are deploying body cameras."); Alexander J. Martin, *Complaints Against Cops Down 93% Thanks to Bodycams – Study*, REGISTER (Sep. 29, 2016), https://www.theregister.co.uk/2016/09/29/complaints_v_cops_bodycam_tech/ (quoting Professor David Birch that "[t]here can be no doubt that body-worn cameras increase the transparency of frontline policing. Anything that has been recorded can be subsequently reviewed, scrutinized and submitted as evidence").

and seventy-seven percent intended to start a program.[20] Only five percent of responding departments did not intend to assign BWCs.[21]

BWCs are not, of course, the only cameras on the streets. It is estimated that seventy-seven percent of American adults own a cell phone with video recording capability.[22] The percentage has more than doubled since 2011.[23] Moreover, the prevalence of close-circuit television (CCTV) continues to grow.[24] Take, for example, Chicago, with its more than 15,000 CCTV systems.[25] Or New York City, where over sixty percent of commercial and apartment buildings feature CCTV.[26] Or Washington, D.C., where 30,000 CCTV cameras are trained on the public schools.[27]

Just as importantly, the mass dissemination of video footage is now quick and cheap. Video recordings from smart phones can be uploaded by anyone, and viewed by anyone, in a matter of seconds.[28] New video footage of police misconduct is constantly being shared on social media, some of which is bound to go "viral." This in turn triggers further structural transparency reforms from historical allies such as internal affairs branches, city councils, and legislatures.[29]

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[20] LAFAYETTE GROUP, DEP'T OF HOMELAND SEC., MAJOR CITIES CHIEFS AND MAJOR COUNTY SHERIFFS: TECHNOLOGY NEEDS – BODY WORN CAMERAS ii (2015), https://www.bwctta.com/sites/default/files/Files/Resources/Handouts%20-%20BWC%20TTA%20Regional%20Conference%2C%20Charleston%20SC.pdf. Although the decision to use BWCs can come at the departmental or municipal level, thirty-four states and the District of Columbia have passed laws regarding body-worn cameras. Interactive Database of Body Worn Camera Laws, NAT'L CONF. OF STATE LEGIS., https://www.ncsl.org/research/civil-and-criminal-justice/body-worn-cameras-interactive-graphic.aspx (last updated Feb. 28, 2018).

[21] *See* LAFAYETTE GROUP, *supra* note 20; *see also* Michael Maciag, *Survey: Almost All Police Departments Plan to Use Body Cameras*, GOVERNING (Jan. 26, 2016), https://www.governing.com/topics/public-justice-safety/gov-police-body-camera-survey.html.

[22] *Mobile Fact Sheet*, PEW RES. CTR: INTERNET & TECH. (last visited May 20, 2020), https://www.pewresearch.org/internet/fact-sheet/mobile/ (A total of ninety-five percent of Americans have a cell phone of some kind).

[23] *Id. See generally* sources cited *supra* note 9 (discussing the prevalence of persons with smart phones who can, and do, record police activity).

[24] CCTV is a television system in which signals are not publicly distributed but are monitored, primarily for surveillance and security purposes.

[25] William M. Bulkeley, *Chicago's Camera Network is Everywhere*, WALL ST. J. (Nov. 17, 2009), https://www.wsj.com/articles/SB10001424052748704538404574539910412824756.

[26] Joanne Kaufman, *The Building has 1,000 Eyes*, N.Y. TIMES (Oct. 4, 2013), https://nyti.ms/176Qlc6.

[27] Bernard James & Fhanysha Clark, *Body Worn Cameras: Student Privacy Rights and Video Surveillance*, J. OF SCH. SAFETY, Fall 2015, at 14, 15, https://www.mydigitalpublication.com/publication/?m=9648&i=274369&p=14 ; Faiz Siddiqui, *A Look Inside Metro's New Video Surveillance Hub*, WASH. POST (Feb. 4, 2016), http://wapo.st/20uP5Qx?tid=ss_tw.

[28] *See generally* sources cited *supra* note 9.

[29] *See* sources cited *supra* note 11.

Transparency unquestionably affects behavior. Conventional wisdom holds that when people are recorded (or, at least, worry about being recorded) their behavior improves. Social scientists call this the "observer effect," or "panopticon effect."[30] The relationship between observation and compliance has been confirmed by studies concerning voting, recycling, and crime.[31] More recently, it has been confirmed in the context of policing. Take, for instance, a 2017 study out of Cambridge.[32] Officers in various departments were assigned "reveal body cameras." The officers were further required to verbally warn citizens they were being filmed.[33] The researchers found that the cameras created "an equilibrium" between civilians and police, with individual officers growing "more accountable, and modify[ing] their behavior accordingly."[34] Across all trial sites during the twelve months preceding the evaluation period, 1,539 complaints were brought against the police (1.2 per officer).[35] During a twelve-month evaluation period, complaints fell to 113 (.08 per officer), for a total reduction of ninety-three percent.[36]

The authors of the Cambridge study concluded that BWCs are causing a "profound sea change in modern policing."[37] The authors pointed to a phenomenon called "contagious accountability."[38] Interestingly, complaints against both the treatment group (officers assigned BWCs) and the control

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[30] *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 208 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (elaborating on Bentham's insights regarding the panopticon).

[31] *See* Melissa Bateson et al., *Cues of Being Watched Enhance Cooperation in a Real-world Setting*, 2 BIOLOGY LETTERS 412, 412–13 (2006) (higher public good contributions); Alan S. Gerber et al., *Social Pressure and Voter Turnout: Evidence from a Large-Scale Field Experiment*, 102 AM. POL. SCI. REV. 33, 33–42 (2008) (higher voter turnout); Jim McCambridge et al., *Systematic Review of the Hawthorne Effect: New Concepts Are Needed to Study Research Participation Effects*, 67 J. OF CLINICAL EPIDEMIOLOGY 267, 267–76 (2014) (effects of observation on research participation); Mathias Ekström, *Do Watching Eyes Affect Charitable Giving? Evidence from a Field Experiment*, 15 EXPERIMENTAL ECON. 530, 530–44 (2011) (higher charitable contributions); Kevin J. Haley et al., *Nobody's Watching? Subtle Cues Affect Generosity in an Anonymous Economic Game*, 26 EVOLUTION & HUM. BEHAV. 245, 245–54 (2005) (higher levels of generosity in economic games).

[32] *See* Barak Ariel et al., *Contagious Accountability*: *A Global Multisite Randomized Controlled Trial on the Effect of Police Body-Worn Cameras on Citizens*' *Complaints Against the Police*, 44 CRIM. JUST. & BEHAV. 293 (2017) (detailing an experiment that took place in 2014 and 2015 in seven locations in the United States and United Kingdom and encompassed nearly 1.5 million officer hours across over 4,000 shifts in jurisdictions with over 2 million people).

[33] *Id.* at 299.

[34] *Id.* at 304.

[35] *Id.* at 301.

[36] *Id.*

[37] Martin, *supra* note 19 ("Cooling down potentially volatile police-public interactions to the point where official grievances against the police have virtually vanished may well lead to the conclusion that the use of body-worn cameras represents a turning point in policing.").

[38] *See* Ariel, *supra* note 32, at 306.

group (officers without BWCs) dropped at roughly the same rate.[39] The authors saw this as evidence that "large scale behavioral change" had seeped into "almost all interactions, even during camera-less control shifts, once the experiment had introduced camera protocols to participating forces."[40] One of the co-authors, Alex Sutherland, observed that "[i]t may be that, by repeated exposure to the surveillance of the cameras, officers changed their reactive behavior on the streets—changes that proved more effective and so stuck."[41] Another co-author, Barak Ariel, concluded that "[w]ith a complaints reduction of nearly 100% across the board, we find it difficult to consider alternatives to be honest."[42]

Not all studies of BWCs are as conclusive. In 2016 and 2017, half of Washington, D.C. police officers were randomly assigned BWCs.[43] Midway through the evaluation period, the second half of the force was provided BWCs.[44] The authors of the study concluded that the analyses "consistently point to a null result."[45] They explained that "the average treatment effect on all of the measured outcomes was very small, and no estimate rose to statistical significance at conventional levels."[46] Their "best estimate" was that for every 1000 officers per year, "there would be about 75 *more* uses of force if the [department] had BWC than not."[47] The estimate was tentative,

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[39] *Id.* at 301, 306.

[40] University of Cambridge, *Use of Body-Worn Cameras Sees Complaints Against Police 'Virtually Vanish,' Study Finds*, SCIENCEDAILY (Sept. 29, 2016), https://www.sciencedaily.com/releases/2016/09/160929132458.htm (discussing Ariel, *supra* note 32).

[41] Damien Gayle, *Police With Body Cameras Receive 93% Fewer Complaints—Study*, THE GUARDIAN (Sept. 29, 2016), https://www.theguardian.com/uk-news/2016/sep/29/police-with-body-cameras-receive-93-fewer-complaints-study.

[42] *Id.* For other studies, see Timothy I. Cubitt et al., *Body-Worn Video: A Systematic Review of Literature*, 50 AUSTL. AND N.Z. J. OF CRIMINOLOGY 3379 (2017); LINDSAY MILLER & JESSICA TOLIVER, POLICE EXEC. RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED (2014), https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf; CYNTHIA LUM ET AL., GEO. MASON UNIV., EXISTING AND ONGOING BODY WORN CAMERA RESEARCH: KNOWLEDGE GAPS AND OPPORTUNITIES (2015), https://cebcp.org/wp-content/technology/BodyWornCameraResearch.pdf; TOM ELLIS ET AL., U. PORTSMOUTH INST. CRIM. JUST. STUD., EVALUATION OF THE INTRODUCTION OF PERSONAL ISSUE BODY WORN VIDEO CAMERAS (OPERATION HYPERION) ON THE ISLE OF WIGHT: FINAL REPORT TO HAMPSHIRE CONSTABULARY (2015), https://researchportal.port.ac.uk/portal/files/2197790/Operation_Hyperion_Final_Report_to_Hampshire_Constabulary.pdf; E.C. Hedberg et al., *Body-worn Cameras and Citizen Interactions with Police Officers: Estimating Plausible Effects Given Varying Compliance Levels*, 34 JUST. Q. 627 (2017).

[43] DAVID YOKUM ET AL., THE LAB @ DC, EVALUATING THE EFFECTS OF BODY-WORN CAMERAS: A RANDOMIZED CONTROLLED TRIAL 4 (2017), https://bwc.thelab.dc.gov/TheLabDC_MPD_BWC_Working_Paper_10.20.17.pdf.

[44] *Id.*

[45] *Id.* at 11.

[46] *Id.*

[47] *Id.* at 13 (emphasis added).

however, due to the study's failure to account for "contagious accountability."[48] The authors wrote that the department's institutional endorsement of BWC "may have caused a shift in the norms of the broader force even though devices were only deployed to a subset of the officers."[49] The authors also speculated the null finding could have been the result of "operating in an environment already saturated by cameras."[50] They explained that an "officer without a BWC may be affected by his or her awareness of a nearby colleague in the treatment group who is equipped with a BWC."[51]

III. TRANSPARENCY AND EXCLUSION

Social science seems to confirm what conventional wisdom suggests: that rising transparency in policing—marked by pervasive video surveillance and democratized channels of distribution—deters individual acts of police misconduct.[52] This new strain of deterrence will likely have ramifications for the U.S. legal system, particularly with regard to searches and seizures.

The Fourth Amendment of the U.S. Constitution provides in part that "[t]he right of the people to be *secure* in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated."[53] At the time of the framing, the word "secure" was defined as "protected" or "free from fear."[54] It is apparent from the framers' use of "secure" that they were not simply preserving a right to be spared unreasonable searches and

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[48] *Id.* at 20. The authors do not use the term "contagious accountability;" however, their findings allude to the concept.

[49] *Id.* This would not be surprising. *See also* CAROL A. ARCHBOLD & SAMUEL E. WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY 14 (2005) (explaining that the "rotten apple" theory is overly simplistic and that it does not incorporate the managerial and organizational causes of misconduct).

[50] *Id.*

[51] *Id. See also* Cynthia Lum et al., *Research on Body Worn Cameras: What We Know, What We Need to Know*, 18 CRIMINOLOGY AND PUB. POL'Y 93, 99 (2019) (reviewing thirty-two studies about how body cameras affect police behavior and finding that "researchers have mostly found that officers wearing BWCs receive fewer reported complaints than do those that are not wearing the cameras" while allowing for the possibility that overall complaints were reduced mostly due to reduction in frivolous complaints).

[52] This deterrence impact would seem largely confined to physical searches and seizures. Many forms of illegal electronic searches and seizures would not be deterred by video surveillance of policing.

[53] U.S. CONST. amend. IV (emphasis added).

[54] *See* OXFORD ENGLISH DICTIONARY 851 (2d ed. 1989) (defining "secure" as: "safe, free from danger;" "protected from or not exposed to danger;" or "being free from fear or anxiety"); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 1777 (1755) (defining "secure" as: "free from danger, that is safe;" "to protect;" "to insure;" "free from fear;" or "sure, not doubting").

seizures, but rather a right to something broader: to be *protected* (or *free from fear*) against such misconduct.[55]

A textual mandate, standing alone, offers little in the way of security. At best, it serves as a soaring declaration of what "should be"[56] and, at worst, a forgotten "ink blot."[57] As a result, discussions about *implementation* prove critical: how exactly do lawmakers (including, for better or worse, appellate courts) go about ensuring the people are in fact "secure" against unreasonable government searches and seizures? The answer, of course, depends on the times.[58] If every individual officer in every individual encounter were willing and able to follow "the rules," all that would be needed for us to be "secure" are lawful rules—the police would simply abide by the rules in good faith and the people would remain "secure" against unreasonable searches and seizures.[59] But police officers are not robots. They are humans. And like the rest of us, they can be malicious, sloppy, and inattentive.[60] As a result, the

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[55] *See* Luke M. Milligan, *The Forgotten Right to Be Secure*, 65 HASTINGS L.J. 713, 717–19 (2014); *see also* THOMAS CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION, § 3.4.4 n.218 (3d ed. 2017) ("My views are consistent with Professor Milligan's in that 'secure' includes freedom from fear. There is ample historical basis for that claim. However, I did not contemplate that usage to permit individuals to make pre-search or pre-seizure claims to prevent those intrusions or to prevent regulations that would permit them. I just never contemplated that application—but I agree that it can be so construed. . . . Professor Milligan's insights should not be overlooked: the framers valued security and that concept included freedom from fear. Otis, after all, in the Writs litigation sought to prevent certain procedures—suspicionless, general searches—not to litigate them after the fact."); DAVID GRAY, THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE 158 (2017) ("Americans who read the Fourth Amendment in 1791 would have understood that it sought to secure a basic set of protections against threats to them, their homes, their writings, and their property that would leave them as 'well-guarded as a prince in [their] castle[s].'").

[56] *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 468 (1897).

[57] *See Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearing Before the Sen. Comm. on the Judiciary*, 100th Cong. 249 (1987).

[58] This does not suggest a pragmatic approach to interpretation. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 140 (1997) ("I take many things to be embraced within 'the freedom of speech,' for example, that were not in fact protected, because they did not exist, in 1791—movies, radio, television, and computers, to mention only a few. The originalist must often seek to apply that earlier age's understanding of the various freedoms to new laws, and to new phenomena, that did not exist at the time."); District of Columbia v. Heller, 554 U.S. 570, 582 (2008) ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way."). For a more general discussion of reasoning from first principles, see generally JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); (explaining that "practical reasonableness" is a basic good); ARISTOTLE, NICOMACHEAN ETHICS (350 BC) (describing natural reasoning).

[59] *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961) (discussing the "internalization" of law by public officials).

[60] Using observational studies, researchers have shown that police violate the Constitution in roughly thirty percent of the searches or seizures they conduct. *See* Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 331 (2004).

Fourth Amendment's right "to be secure" can only be upheld by (1) inventorying the full set of deterrents (legal and non-legal) against unreasonable searches and seizures, and (2) establishing new deterrents when needed (and eliminating them when not). Only then can we certify that the people are sufficiently "secure" against unreasonable searches and seizures.[61]

To keep the people "secure" during most of the Nineteenth Century, little ingenuity was required of the U.S. Supreme Court. Officers were relatively constrained in their ability to commit illegal searches and seizures by a variety of strict, extra-constitutional factors.[62] These included the real possibility of tort suits (for trespass, assault, or false imprisonment), the prospect of triggering violent and justifiable self-help, limitations on investigatory powers under positive law, the absence of professional incentives for individual officers to search or seize, and the relatively meager amount of funding allocated to law enforcement.[63] These extra-constitutional limitations, coupled with the Fourth Amendment's textual ban on "general warrants,"[64] were more or less sufficient to keep the people "secure" against unreasonable searches and seizures.[65]

Yet these extra-constitutional checks on police misconduct softened over time, mostly due to the emergence of institutionalized policing in the middle of the Nineteenth Century.[66] For the first time, large-scale criminal

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[61] Weeks v. United States, 232 U.S. 383, 391–92 (1914) ("The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever *secure* the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of law." (emphasis added)); *see also* Milligan, *supra* note 55 (discussing the reliance of the early exclusionary rule cases—*Boyd* and *Weeks*—on the meaning of "secure" in the Fourth Amendment).

[62] *See generally* Milligan, *supra* note 55.

[63] *See, e.g.*, Entick v. Carrington, (1765) 95 Eng. Rep. 807 (K.B.) ("By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action."); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 69 (1998) ("A warrant issued by a judge or magistrate . . . had the effect of taking a later trespass action away from a jury of ordinary citizens."); Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085, 1102–1117 (2012) (discussing risks of warrantless searches and seizures for government agents at time of the founding); United States v. Jones, 132 S. Ct. 945, 963 (2012) (Alito, J., concurring) ("In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical."); Collins v. Virginia, 138 S. Ct. 1663, 1676 (2018) (Thomas, J., concurring) ("Historically, the only remedies for unconstitutional searches and seizures were 'tort suits' and 'self-help.'").

[64] The second clause of the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[65] *See* Milligan, *supra* note 55, at 259.

[66] *See generally* Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 RUTGERS L. REV. 447 (2010) (documenting the rise of police forces).

investigations were feasible,[67] and individual officers were incentivized to make arrests and execute searches.[68] Unsurprisingly, the newfound political influence of the police departments was wielded to loosen statutory and common law restrictions on investigatory powers.[69] As a result, many of the extra-constitutional deterrents in place from the time of the framing had been diminished to the point where the people were left insecure against unreasonable searches and seizures.[70]

Recognizing this increased insecurity, the U.S. Supreme Court made the monumental decision to attach evidentiary penalties to officer misconduct. In the 1886 decision *Boyd v. United States*, the Court declared inadmissible "allegations . . . taken as confessed" following an individual's refusal to consent to an unreasonable search or seizure.[71] The *Boyd* majority grounded this rule in the constitutional guarantee of "security."[72] Several decades later, in *United States v. Weeks*, the Court embraced the exclusionary rule in a more general fashion, drawing explicitly from the constitutional right "to be secure."[73] *Weeks* provides:

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever *secure* the people, their persons, houses, papers and effects,

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[67] *Id.*

[68] *Id.*

[69] *See id* at 461 ("By the 1880s, the [New York City] police department had developed a powerful lobby in the legislature which it used to modify the state's law on material witness detention."); *id.* at 462 ("The new officers also acquired the ability to seek warrants based on information they learned through their investigations. A search standard unmoored from the requirement of a victim's complaint."); *id.* at 459–60 ("The legal rules that had prevented aggressive policing were also eliminated between 1850 and 1920."); *id.* at 460 (noting that officers gained the authority to arrest without a warrant and began to seek warrants to search and arrest); *id.* at 460 (detailing that officers started interrogating suspects and detaining material witnesses and were given the authority to wiretap without seeking prior judicial authorization).

[70] *See* People v. Cahan, 282 P.2d 905 (Cal. 1955) ("We have been compelled to reach th[e] conclusion [that the exclusionary rule is necessary] because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers."); *see generally* Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1017 (1987); REMO FRANCESCHINI & PETER KNOBLER, A MATTER OF HONOR: ONE COP'S LIFELONG PURSUIT OF JOHN GOTTI AND THE MOB (1993) (explaining how police officers responded to Fourth Amendment rules in the course of their work).

[71] Boyd v. United States, 116 U.S. 616, 620 (1886). In this case, the "seizure" came in the form of a subpoena. *Id.*

[72] *Id.* at 635 (stating that the "constitutional provisions for the security of person and property should be liberally construed").

[73] 232 U.S. 383, 392 (1914).

against all unreasonable searches and seizures under the guise of law.[74]

The *Weeks* Court explained that if "letters and private documents can thus be [illegally] seized and held and used in evidence against a citizen accused of an offense," then "the protection of the Fourth Amendment, declaring his right to be *secure* against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution."[75] Close study of *Weeks* and *Boyd* suggests the exclusionary sanction is not, as many claim, grounded in an unbounded act of judicial pragmatism,[76] but rather a faithful application of the Fourth Amendment's right "to be secure."[77]

While there are divergent views about the foundational authority for the exclusionary rule, all of the justices are in accord that the rule's primary purpose is to deter police misconduct.[78] Working within this deterrence

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[74] *Id.* at 393 (emphasis added).

[75] *Id.* at 391–92 (emphasis added). *See also id.* at 393 ("The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever *secure* the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of law." (emphasis added)).

[76] *See* Herring v. United States, 555 U.S. 135, 141 (2009) ("[T]he exclusionary rule is not an individual right and applies only where it results in appreciable deterrence."); United States v. Leon, 468 U.S. 897, 906 (1984) ("[T]he exclusionary rule is neither intended nor able to cure the invasion of the defendant's rights which he has already suffered." (internal quotations and citations omitted); Collins v. Virginia, 138 S. Ct. 1663, 1677 (2018) (Thomas, J., concurring) (stating that the Court has "clarified that the exclusionary rule is not required by the Constitution").

[77] *See* Milligan, *supra* note 55, at 758 ("In sum, the creation of supplemental Fourth Amendment rules in *Boyd* and *Weeks* can be fairly understood as judicial efforts to generate deterrence sufficient to safeguard individual Fourth Amendment rights to be 'protected' and 'free from fear.'"); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974) (stating that the Fourth Amendment is a "regulatory canon requiring government to order its law enforcement procedures in a fashion that keeps us collectively secure in our persons, houses, papers and effects"); Donald L. Doernberg, *"The Right of the People": Reconciling Collective and Individual Interests under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 294 (1983) (concluding that "the Court should explicitly recognize the societal interest [motivating the exclusionary rule] for what it is—a collective constitutional right"); Lawrence Rosenthal, *Seven Theses in Grudging Defense of the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 523, 538 (2013) ("Absent a remedial scheme that offers reasonably effective deterrence, the right to be 'secure' against unreasonable search and seizure is breached.").

[78] The Supreme Court originally emphasized three policy considerations underlying the exclusionary rule: deterrence, fairness to the victim of the violation, and the integrity of the judicial process. *Weeks*, 232 U.S. 383. In the late 1960s, however, the Court made clear there was only one true justification: the deterrence of police misconduct. *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974) ("The rule is a remedy designed to safeguard Fourth Amendment rights through its deterrent effect, rather than a personal constitutional right of the party aggrieved."). With that said, four justices more recently wrote they believe the rule continues to be animated by fairness and integrity concerns. *See* Herring v. United States, 555 U.S. 135, 152 (2009) (Ginsburg, J., dissenting) ("But the rule also serves other important purposes: It 'enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,' and it 'assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit

framework, the Supreme Court has, on one hand, extended the sanction to encompass "fruits" of a violation[79] and, on the other, curbed it through the creation of various "categorical exceptions."[80] Categorical exceptions account for those situations where the exclusionary rule does not "pay its way"[81]—in other words, where the rule's marginal deterrent value does not outweigh its heavy societal costs.[82] Over the years the Court has recognized an extensive set of categorical exceptions, allowing ill-gotten gains to be used in civil actions, in grand jury proceedings, in sentencing hearings, for impeachment purposes, where there is an independent (or inevitably discovered) source for the evidence, where the evidence was attenuated from the violation, or where the criminal defendant was not a victim of the constitutional violation.[83] To certify the need for a categorical exception, the Supreme Court inventories the entire field of deterrents (legal and non-legal) against police misconduct, and then evaluates whether the exclusion of ill-gotten evidence under similar situations will provide sufficient marginal deterrence to justify its costs on society.[84]

The Court is rightly mindful that deterrents change with time. In the 2006 case of *Hudson v. Michigan*, the Court wrote that "[w]e cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago," as "[t]hat would be forcing the public today to pay for the sins and inadequacies of a

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from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.'").

[79] Silverthorne Lumber Co., Inc. v. United States, 251 U.S. 385, 392 (1920) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all.").

[80] Herring v. United States, 555 U.S. 135, 141 (2009)

[81] *Id.* at 147 (2009) ("[W]hen police mistakes are the result of negligence such as that described here . . . any marginal deterrence does not 'pay its way.'").

[82] *See* Hudson v. Michigan, 547 U.S. 586 (2006) (calling the cost of excluding evidence a "massive remedy," imposing "substantial social costs," and a "'costly toll'" on courts and police). For examples of the rule's costs, see People v. Defore, 242 N.Y. 13, 21 (N.Y. Ct. App. 1926) ("There has been no blinking the consequences. The criminal is to go free because the constable has blundered."); Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 115–16 (2003) (identifying as a cost of the exclusionary rule the judiciary's distortion of substantive Fourth Amendment law to avoid the application of the exclusionary rule).

[83] *See, e.g.*, Nix v. Williams, 467 U.S. 43 (1984) (inevitable discovery exception); United States v. Leon, 468 U.S. 897 (1984) (good-faith exception); Hudson v. Michigan, 547 U.S. 586 (2006) (knock and announce exception); Segura v. United States, 468 U.S. 796 (1984) (independent source exception); United States v. Janis, 428 U.S. 433 (1976) (civil litigation exception); Alderman v. United States, 394 U.S. 165 (1969) (standing exception); Utah v. Strieff, 136 S. Ct. 2056 (2016) (attenuation exception).

[84] *See Hudson*, 547 U.S. at 594–99; *Leon*, 468 U.S. at 922 ("We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.").

legal regime that existed almost half a century ago."[85] The *Hudson* majority went on to describe how certain deterrents had strengthened in the forty-five years since the federal exclusionary rule was incorporated to state and local governments.[86] The Court pointed to a rise in the availability of tort damages and the increased influence of citizen review panels.[87] It also took special notice of the "increasing professionalism" of police officers.

> [W]e now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. There have been 'wide-ranging reforms in the education, training, and supervision of police officers.' Numerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline. Failure to teach and enforce constitutional requirements exposes municipalities to financial liability. Moreover, modern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect.[88]

In conclusion, the *Hudson* Court found that the "extant deterrences" against police misconduct "are substantial—incomparably greater than the factors deterring warrantless entries [in 1961] when *Mapp* was decided."[89]

In the twelve years since *Hudson* was decided, the deterrents against police misconduct have only strengthened. Officers bent on misconduct in today's environment—featuring expansive video surveillance and social media—face risks of exposure barely conceivable just twelve years ago. Moreover, their allies are few: fellow officers are less likely to lie on their

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[85] *Id.* at 597.

[86] *Id.* (citing Mapp v. Ohio, 367 U.S. 643 (1961)).

[87] *Id.* at 597–98.

[88] *Id.* (quoting SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990, 51 (1993)) (internal citations omitted).

[89] *Id.* at 599 (citing Mapp v. Ohio, 367 U.S. 643 (1961)). The Court went on to create a "categorical exception" for violations of the knock-and-announce rule. *Id.*

behalf,[90] prosecutors face new pressures to bring criminal charges,[91] and jurors and judges are less likely to give officers the benefit of the doubt.[92] As a result, one act of flagrant misconduct could land an officer on administrative leave before his shift is up.[93] He could be "front-page material" for months on end—a notorious figure. Down the line, he could be demoted, fired, sued, and prosecuted for anything from assault, terroristic threatening, manslaughter, or murder.[94] All this raises the question: if rising transparency in policing deters officer misconduct (and the research suggests it does), how far does it diminish the marginal deterrence value of the exclusionary rule?[95]

This could play out in a variety of ways. Conceivably, rising transparency of policing could have no impact on the exclusionary rule, as the Supreme Court could either reject the claim that transparency deters misconduct (which is doubtful), or justify the exclusionary rule on grounds beyond deterrence (such as the integrity of the courts, or fairness to the victim of the misconduct).[96] On the other extreme, the Court might jettison the rule, taking

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[90] *See Picture This*, *supra* note 14, at 359 ("The possibility that videos of police-citizen incidents will surface after the fact, as well as the wide availability of the these videos on services such as YouTube, means that police must take seriously the possibility that irrefutable images of their actions on the job may contradict their own versions of what happened."); *Accountability-Based Policing*, *supra* note 14, at 213 (discussing how recordings "remove both the incentive and opportunity for 'testilying'"); Jim Dwyer, *When Official Truth Collides with Cheap Digital Technology*, N.Y. TIMES (July 30, 2008), https://www.nytimes.com/2008/07/30/nyregion/30about.html (discussing how cheap, widely available technology "has ended a monopoly on the history of public gatherings that was limited to the official narratives, like the sworn documents created by police officers and prosecutors").

[91] *See* Associated Press, *Prosecutors Seek Right Mix of Charges in George Floyd Case* (June 6, 2020), https://apnews.com/a6da876768487749632e42fa9eb5bb50; *Number of Cops Charged in Shootings Tripled in 2015*, CHI. TRIBUNE (Dec. 3, 2015), https://www.chicagotribune.com/nation-world/ct-police-officer-shootings-charges-20151203-story.html ("If you take the cases with the video away, you are left with what we would expect to see over the past 10 years — about five cases." (quoting Professor Philip Stinson)); Matt Furber & Rich Smith, *Minneapolis Officer Charged With Murder in Australian Woman's Death*, N.Y. TIMES (Mar. 20, 2018), https://www.nytimes.com/2018/03/20/us/minneapolis-police-shooting-justine-damond.html.

[92] *See* Mary D. Fan, *Hacking Qualified Immunity: Cameras and Civil Rights Settlements*, 8 ALA. C.R. & C.L. L. REV. 51, 61–62 (2017).

[93] *8 Officers Put on Paid Leave Following Fort Smith Shooting*, KATV (Jan. 4, 2018), http://katv.com/news/local/8-officers-put-on-paid-leave-following-fort-smith-shooting; Adrianne Kelly, *LMDC Officer Placed On Administrative Leave After Shooting Outside Denny's*, WLKY (Dec. 31, 2017), http://www.wlky.com/article/police-investigating-officer-involved-shooting-on-eastern-parkway/14523337.

[94] *See supra* notes 90–93.

[95] *See, e.g.*, *Picture This*, *supra* note 14 (discussing how BWC will likely deter misconduct); Martin, *supra* note 19 ("Cooling down potentially volatile police-public interactions to the point where official grievances against the police have virtually vanished may well lead to the conclusion that the use of body-worn cameras represents a turning point in policing.").

[96] *See* Herring v. United States, 555 U.S. 135, 148 (Ginsburg, J., dissenting).

the position that transparency deters misconduct to the point where fear of suppression no longer holds sufficient marginal deterrence value. More likely, the Court will settle somewhere in the middle, tailoring a new categorical exception relating to transparency.

Provisionally and for the sake of argument, I would suggest a categorical exception for illegal physical searches or seizures recorded by a violating officer's BWC.[97] There is a certain symmetry in this approach, insomuch as any BWC footage of misconduct will go a long way toward establishing alternative penalties, in the form of either public criticism, administrative sanctions, a civil rights lawsuit, or a criminal prosecution. With that said, the categorical exception could be cast in broader terms. For example, the availability of the exception might turn not on whether the officer's BWC recorded the misconduct, but whether she was part of a police department mandating the use of BWCs. While this more expansive exception would seem to invite exploitation by strategic officers who could obstruct or disable their BWC during high-stakes encounters, such risks would be mitigated by the likelihood that administrative sanctions would be imposed on officers failing to properly operate BWCs, and that in any related civil lawsuits, adverse inferences would be drawn against such officers. Of course these doctrinal suggestions are by no means exhaustive, as there are surely additional, reasonable ways to frame a "transparency" exception to the exclusionary rule.

IV. CONCLUSION

In this age of rising transparency, police officers bent on misconduct are more suspicious, alienated, and cautious than ever before. Sooner or later, this new strain of deterrence will be factored into the Supreme Court's analysis of the exclusionary rule. When that day comes, it's conceivable the Court will hold the rule is no longer needed to keep the people "secure" against unreasonable searches and seizures. Peering out decades, it is certainly possible the exclusionary rule will have faded out of legal practice and into legal history—an artifact remembered mostly for its critical role in keeping the people "secure" during a period of our nation's history, between the emergence of institutionalized policing in the Nineteenth Century, and the rise of total transparency in the Twenty-First.

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[97] For a variety of reasons, rising transparency has a far lesser deterrent effect on illegal electronic searches and seizures. As a result, it is unlikely these forms of misconduct would fall within any "transparency" categorical exception.