OUT OF FOCUS: ZOOMING IN ON BODY CAMERAS, PRIVACY, AND MEDICAL EMERGENCIES

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Abstract

As the use of body-worn cameras by police and law enforcement agencies becomes more widespread in the United States, local and state governments are beginning to grapple with how to regulate their use. This regulation requires local and state governments to consider a number of factors, not the least of which are the privacy concerns involved in deciding when police ought to record civilian encounters. In 2014, the California legislature began to consider a bill that, among other things, attempted to address such privacy concerns by barring officers from recording while responding to medical emergencies in public. Though that bill ultimately died in committee, other states are beginning to think seriously about how best to regulate body-worn camera usage. This Note will explore the privacy concerns involved in recording medical emergencies in public and will argue against such a prohibition. Instead, this note will ultimately argue that body camera policies should be tailored to meet the concerns and exigencies of each locale, and that, therefore, state should not over-regulate body camera use. Moreover, this Note will argue that such prohibitions are wholly duplicative, as such privacy concerns, to the extent that they exist, are generally mitigated by state and federal sunshine law exceptions.

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I. INTRODUCTION

In many corners, the United States is currently facing a crisis of confidence in law enforcement that is manifested in, among other things, a widespread demand for greater transparency and accountability in local policing.[1] Indeed, lack of police transparency is often cited as a major obstacle to "police reform and to building trust in police in communities."[2] Senator Elizabeth Warren has recently noted that "it is a tragedy when any American cannot trust those who have sworn to protect and serve."[3]

1. *See Ending Secrecy on Police Misconduct*, N.Y. TIMES (Feb. 13, 2015), http://www.nytimes.com/2015/02/14/opinion/ending-secrecy-on-police-misconduct.html; *U.S. Should Respond to Public Demands for Greater Police Accountability – Ban*, UN NEWS CENTRE (Dec. 4, 2014), http://www.un.org/apps/news/story.asp?NewsID=49516#.VhFguBNViko [hereinafter *U.S. Should Respond to Public Demands*] ("'It is clear that, at least among some sectors of the population, there is a deep and festering lack of confidence in the fairness of the [American] justice and law enforcement systems,' said UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein.").

2. Jason Henry, *ACLU Poll: California Voters Support More Access to Police Records*, WHITTIER DAILY NEWS (Aug. 27, 2015, 6:27 PM), http://www.whittierdailynews.com/government-and-politics/20150827/aclu-poll-california-voters-support-more-access-to-police-records.

3. Press Release, Senator Elizabeth Warren, Senator Warren Remarks at the Edward M. Kennedy Institute for the United States Senate (Sept. 27, 2015),

In response to this unease, there is burgeoning pressure on the law enforcement community to introduce policies and protocols ensuring public access to policing data and information in order to substantially increase the accountability of local law enforcement agencies (LEAs).[4] As noted by the United Nations, any effective system of police accountability requires, as a necessary condition, "[a] system involving monitoring before, during and after police operations."[5]

Hearing the hue and cry from the public, LEAs across the nation are beginning to respond.[6] Most prominent among recent developments in LEA transparency policies is the burgeoning use of police body-worn cameras (BWCs), in which interest has "exploded" since 2013.[7] This explosion is exemplified by President Barack Obama's proposed $75,000,000 competitive matching grant program to help fund LEA purchases of BWCs.[8] Although "there is no comprehensive nationwide list of police agencies that are using body cameras,"[9] recent surveys suggest that at least a quarter of the 17,000 LEAs in the United States have implemented the use of BWCs.[10] Moreover, it is thought that roughly eighty percent of LEAs in the United States are evaluating the efficacy of BWCs, if not outright using them.[11] Of particular note, the New York Police Department (NYPD) began a BWC pilot program in December 2014.[12] Though a report by the NYPD Inspector General's

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http://www.warren.senate.gov/?p=press_release&id=967.

4. *See, e.g.*, *U.S. Should Respond to Public Demands*, *supra* note 1.

5. UNITED NATIONS OFFICE ON DRUGS AND CRIME, HANDBOOK ON POLICE ACCOUNTABILITY, OVERSIGHT AND INTEGRITY 111 (2011).

6. *See, e.g.*, Ciara McCarthy, *NYPD to Require Officers to Report Every Time They Use Force*, GUARDIAN (Oct. 1, 2015, 4:15 PM), http://www.theguardian.com/us-news/2015/oct/01/nypd-excessive-force-new-york-police-report.

7. JAY STANLEY, ACLU, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL 1 (2015), https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf.

8. Press Release, The White House, FACT SHEET: Strengthening Community Policing (Dec. 1, 2014), https://www.whitehouse.gov/the-press-office/2014/12/01/fact-sheet-strengthening-community-policing.

9. Kari Paul, *It's Still Not Clear How Many Police Departments Actually Use Body Cameras*, VICE: MOTHERBOARD (July 30, 2015, 11:26 AM), http://motherboard.vice.com/read/its-still-not-clear-how-many-police-departments-actually-use-body-cameras.

10. *See* STANLEY, *supra* note 7, at 1. *But see* Matthew Feeney, *Watching the Watchmen: Best Practices for Police Body Cameras*, POL'Y ANALYSIS (CATO INST., Washington, D.C.), Oct. 27, 2015, at 1, 2, http://object.cato.org/sites/cato.org/files/pubs/pdf/pa782.pdf (suggesting that the number is closer to 18,000).

11. *See* STANLEY, *supra* note 7, at 1.

12. Rocco Parascandola, *SEE IT: NYPD Demonstrates Body Camera Pilot Program Slated to Start Friday*, DAILY NEWS: N.Y., http://www.nydailynews.com/new-york/nypd-

Office outlines a variety of potential problems with the NYPD BWC policy,[13] the NYPD is nonetheless slated to expand its BWC program to include 5000 total cameras, one of the largest usages in the country.[14] Moreover, the cities of Jersey City, Newark, and Paterson—all in New Jersey—recently partnered to purchase 1100 BWCs, which will be split among the municipalities.[15] Nationwide, numerous big cities and small towns have taken up the torch,[16] demonstrating the mushrooming popularity of BWC usage.

While BWCs provide a potentially exciting and effective tool for police oversight,[17] their implementation is not without problems.[18] Among the myriad concerns involved with implementing BWC policies are the economic costs associated with purchasing the necessary hardware;[19] the mechanics of how, where, and for how long to store

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body-camera-pilot-program-start-friday-article-1.2031875 (last updated Dec. 3, 2014, 6:05 PM).

13. *See* Jennifer Fermino et al., *NYPD Body Camera Pilot Program Needs Stricter Guidelines, Better Enforcement: Report*, N.Y. DAILY NEWS (July 30, 2015, 10:30 AM), http://www.nydailynews.com/new-york/nyc-crime/nypd-body-camera-program-stricter-guidelines-report-article-1.2309142 (reporting that the Inspector General recommends broader discretion to record placed in officers' hands).

14. Courtney Gross, *NYPD Ready to Hit Record on Body Camera Pilot Program*, NY1 (Aug. 27, 2015, 7:00 PM), http://www.ny1.com/nyc/all-boroughs/news/2015/08/27/nypd-ready-to-hit-record-on-body-camera-pilot.html.

15. *New Jersey's 3 Largest Cities Team Up to Buy Body Cameras for Police Officers*, CBS N.Y. (Apr. 24, 2015, 1:46 PM), http://newyork.cbslocal.com/2015/04/24/new-jerseys-3-largest-cities-team-up-to-buy-body-cameras-for-police-officers/.

16. *See, e.g.*, POLICY MP-26: BODY WORN CAMERAS (BWC) (effective Jan. 20, 2015), https://rcfp.org/bodycam_policies/WY/Mills_BWC_Policy.pdf; Jeremy Gorner, *Chicago Police Test Body Cameras in Shakespeare Patrol District*, CHI. TRIB. (Feb. 13, 2015, 9:48 PM), http://www.chicagotribune.com/news/ct-chicago-police-body-cameras-met-20150213-story.html; Kate Mather, *LAPD Begins Using Body Cameras as Concerns Linger*, L.A. TIMES (Aug. 31, 2015, 9:38 PM), http://www.latimes.com/local/crime/la-me-body-cameras-20150901-story.html; Diana Samuels, *Body Cameras Won't Be Required for Police in Baton Rouge, Metro Council Decides*, TIMES-PICAYUNE (June 10, 2015, 6:06 PM), http://www.nola.com/crime/baton-rouge/index.ssf/2015/06/body_cameras_police_baton_roug.html; *SLCPD Body-Cams 101*, SALT LAKE CITY POLICE DEP'T, http://slcpd.com/slcpd-body-cams-101 (last updated Dec. 4, 2014).

17. *See* STANLEY, *supra* note 7, at 2.

18. *See generally* COMMUNITY ORIENTED POLICING SERVICES, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED (2014) [hereinafter COPS].

19. *See id.* at 32; KEVIN TREADWAY & DAN MUSSELMAN, AXON BODY CAMERA PROGRAM AT THE FLAGSTAFF POLICE DEPARTMENT 2 (2015), http://www.flagstaff.az.gov/documentcenter/view/45614 (estimating cost of $2500 per camera per sworn officer, including cost of data storage, to run pilot BWC program).

recorded information;[20] and who will have control over and access to data once it is stored.[21]

Most current model BWC policies, as well as many BWC policies currently in use, do not directly address police recording with BWCs during ambulance calls.[22] Though many active and model BWC policies seem to either require or allow recording under such circumstances, they do so implicitly by giving the officer wide discretion in choosing when to record.[23] Indeed, "[s]ome of the agencies seem[] to have a policy of 'Record Everything, All The Time.'"[24] As of this writing, several states had begun to consider and pass legislation providing for certain minimal standards of practice, some of which address the issue above.[25]

In Section II.A, this Note will begin by briefly surveying California's Assembly Bill 66 ("AB 66"),[26] which recently died in committee. Next, in Section II.B, we will survey a series of model and active BWC policies from across the United States. Specifically, this Note will assess each policy to determine the extent to which it authorizes, requires, or permits recording by police via BWCs of medical emergencies in public. From there, Section II.C moves on to a broad-strokes overview of privacy doctrine in the United States, with particular attention paid to the genesis and foundations of modern doctrine, for purposes of introducing the concept of privacy and some of the issues that abound therein. Section II.D continues with an assessment of the extent to which individuals have an expectation of privacy in public places (here is a hint: they generally do not). Finally, Section II.E presents an assessment of expectations of privacy with respect to medical treatment and information in the United States.

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20. COPS, *supra* note 18, at 15–17.

21. *See* STANLEY, *supra* note 7, at 2–5.

22. *See, e.g.*, BOS. POLICE CAMERA ACTION TEAM, BODY CAMERA POLICY AND PROCEDURES FOR THE BOSTON POLICE DEPARTMENT 9 (2015), http://issuu.com/ccyancey/docs/bpd_body_camera_policy/13?e=11811396/10792306 (requiring police to record while "[r]esponding to a call," among other times). A complete list of all the policies referenced herein may be found in Appendix A.

23. *See id.* at 9–10. Some empirical studies on the matter have questioned the necessity of giving law enforcement officers broad discretion in choosing when to activate their BWCs. *See, e.g.*, EDMONTON POLICE SERV., BODY WORN VIDEO: CONSIDERING THE EVIDENCE 83 (2016), http://issuu.com/edmontonpolice/docs/bwv_final_report.

24. EUGENE P. RAMIREZ, A REPORT ON BODY WORN CAMERAS 13 (2014), http://issuu.com/ccyancey/docs/la_bodycam_report/1?e=11811396/10626847.

25. *See e.g.*, H.B. 617, 2015, Reg. Sess. (N.H. 2015); H.B. 1917, 64th Leg., Reg. Sess. (Wash. 2015).

26. Assemb. B. 66, 2015–2016, Reg. Sess. (Cal. 2015) [hereinafter A.B. 66].

Lastly, Part III of this Note will argue that a prohibition on the use of police BWCs during ambulance calls where the victim of the medical emergency is not involved in criminal activity is inadvisable nationwide because the various states' Freedom of Information Acts already proscribe the distribution of such records. Therefore, the type of proscription that was found in California's AB 66 is unnecessarily duplicative and overbroad in the face of the underlying policy purposes of BWC use. This Note will not argue, either empirically or normatively, for or against the use of BWCs but rather will simply assume their use as a fait accompli.[27]

II. BACKGROUND

A. *The Deceased Bill: In Memoriam*

On December 17, 2014, California Assemblymember Shirley Weber of San Diego introduced AB 66 to the California Assembly.[28] The stated purpose of the overall bill was to "develop[] policies based on best practices for [the use of BWCs] by law enforcement."[29] In that spirit, Assemblymember Weber noted, "We see the use of body cameras as an important step toward accountability and reestablishing trust between law enforcement and communities of color . . . . We need to ensure that they are used effectively and responsibly."[30] To that end, Assemblymember Weber's bill included numerous requirements[31] for the use of BWCs that range from activation, deactivation, privacy, access, and storage standards.[32]

Members of the California Assembly and members of the public at large met the bill's various provisions with mixed reactions.[33] The bill

27. For a particularly interesting study on the quantitative effects of BWC use, see generally Barak Ariel et al., *The Effect of Police Body-Worn Cameras on Use of Force and Citizens' Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANTITATIVE CRIMINOLOGY 509 (2015).

28. A.B. 66, *supra* note 26; Press Release, Assembly Member Shirley Weber, Weber Introduces Body Camera Bill (Dec. 19, 2014), https://a79.asmdc.org/press-release/weber-introduces-body-camera-bill.

29. Press Release, Assembly Member Shirley Weber, *supra* note 28.

30. *Id.*

31. Only one such requirement, discussed *infra*, is relevant here. As such, the others are outside the scope of this Note and will not be discussed in any detail.

32. *See* Editorial, *Rewrite Body Camera Bill or Put It Aside*, L.A. TIMES (May 22, 2015, 5:00 AM), http://www.latimes.com/opinion/editorials/la-ed-body-cameras-bill-ab66-20150522-story.html; A.B. 66, *supra* note 26.

33. *See, e.g.*, *Bill Analysis for Hearing on AB 66 Before Assemb. Comm. on Public Safety*, 2015–2016 Reg. Sess. 5–6 (Cal. 2015), http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0051-0100/ab_66_cfa_20150413_092540_asm_comm.html (summarizing several arguments for and against passage of the bill based on its possible effects on privacy and

sparked "intense negotiation" upon introduction to the Assembly on how to regulate the use of BWCs statewide.[34] Former California Attorney General Kamala Harris, moreover, refused to endorse the bill, "caution[ing] against using a 'one-size-fits-all' approach" to regulating BWCs.[35] Other commentators were more explicit in their concerns over the contents of AB 66. The Los Angeles Times editorial board noted that while the bill was a "noble attempt" not without its positive points, it failed to adequately address issues in police transparency and police accountability.[36] The Peace Officers Research Association of California (PORAC) also decried the substance of the bill, noting that it was, among other things, too vague and too inconsiderate of both police procedure and officers' opinions on the kinds of workplace changes intrinsically involved in such a law.[37] Specifically, PORAC and other such lobbying groups took issue with the fact that AB 66 forbade officers from reviewing BWC video after having recorded it.[38]

Ultimately, the bill was last sent to committee on May 7, 2015, and died there on January 31, 2016.[39] Under California's Constitution, "[a]ny bill introduced during the first year of the biennium of the legislative session that has not been passed by the house of origin by January 31 of the second calendar year of the biennium may no longer be acted on by the house."[40] Because the Bill was introduced in the first month of the 2015–2016 legislative session (December 2014),[41] AB 66

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public safety).

34. Melanie Mason, *Kamala Harris Cautions Against 'One-size-fits-all' Approach on Body Cameras*, L.A. TIMES (May 27, 2015, 1:43 PM), http://www.latimes.com/local/political/la-me-pc-harris-body-cameras-20150527-story.html.

35. *Id.*

36. *See Rewrite Body Camera Bill*, *supra* note 32.

37. *See* Letter from Michael Durant et al., President, Peace Officers Research Ass'n, to Hon. Shirley Weber, Cal. State Assembly (Apr. 8, 2015), http://porac.org/wp-content/uploads/PORAC_Opposition_Letter_AB_66_Weber.pdf?PHPSESSID=d0eed4f1dda4f6f0d955340b065b22f7&afe5d6.

38. *See id.*; Letter from Robert Masson et al., President, Riverside Sheriffs' Ass'n, to Hon. Shirley Weber, Cal. State Assembly (Mar. 31, 2015), http://www.rcdsa.org/info/Legislation/2015%20Legislation/2015%20Assembly%20Bills/AB%2066%20Oppose%20Weber%203-31-15.pdf; Chris Nichols, *Contested Body Camera Bill Advances*, SAN DIEGO UNION-TRIBUNE (April 14, 2015 3:44 PM), http://www.sandiegouniontribune.com/news/politics/sdut-sacramento-police-body-camera-AB-66-2015apr14-story.html.

39. *AB-66 Peace Officers: Body-Worn Cameras*, CAL. LEG. INFO., https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB66 (last visited Mar. 1, 2017).

40. CAL. CONST. art. IV, § 10(c).

41. *See AB-66 Peace Officers: Body-Worn Cameras*, *supra* note 40 (indicating AB 66 was introduced on December 17, 2014); OFFICE OF THE CHIEF CLERK, CALIFORNIA STATE

was required to become inactive by virtue of having not been acted upon within the prescribed time period.[42]

In terms of the substance of AB 66, only section 4(a)(2)(B) of the bill is relevant for purposes of this Note. Seemingly rather uncontroversial in the grand scheme—it received no discussion among commentators—this provision was added, apparently, as an attempt to "address[] privacy in sensitive social situations."[43] The section read, in relevant part:

> A peace officer employed by a law-enforcement agency that requires a [BWC] to be used by its peace officers shall not . . . [o]perate a [BWC], except in an emergency or other exigent circumstance . . . [d]uring an ambulance response to an accident or illness where the victim is not involved in any criminal activity.[44]

Because many states are currently grappling with whether and to what extent to regulate LEAs' use of BWCs,[45] it is entirely possible that in the near future similar provisions will be considered for enactment. As indicated above, this Note will argue against such action. However, before that argument can commence, a substantial amount of background is necessary in order to lay the argument's foundation.

B. *Model, Draft, and Active BWC Policies Across the United States*

From the outset, it is important to note that many of the LEAs currently using BWCs do not have written policies or procedures directing how the programs are to be implemented;[46] this, of itself, has the potential to give rise to certain problems.[47] The United States

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ASSEMBLY 7, 10 (2016), http://assembly.ca.gov/sites/assembly.ca.gov/files/Publications/2202_csa_2016_r5_web.pdf (indicating that the legislature convenes on the first Monday of December of even numbered years; thus, the 2015-16 session convened on December 8, 2014).

42. *Compare AB-66 Peace Officers: Body-Worn Cameras*, *supra* note 41, *with* CAL. CONST. art. IV, § 10(c).

43. *Bill Analysis for Hearing on AB 66 Before Assemb. Comm. on Privacy and Consumer Prot.*, 2015-2016 Reg. Sess., at 10 (Cal. 2015), http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0051-0100/ab_66_cfa_20150429_134440_asm_comm.html.

44. A.B. 66, *supra* note 26, § 4(a)(2)(B).

45. Niraj Chokshi, *These Are the States That Want to Regulate Police Body Camera Videos*, WASH. POST (Feb. 25, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/02/25/these-are-the-states-that-want-to-regulate-police-body-camera-videos/?utm_term=.775b8a70cf15.

46. *See* COPS, *supra* note 18, at 2.

47. *Cf.* MANTECH ADVANCED SYS. INT'L, INC., A PRIMER ON BODY WORN CAMERAS FOR LAW ENFORCEMENT 11 (2012) (report prepared for the National Institute of Justice under

Department of Justice (DOJ) suggests that this is, at least in part, caused by a feeling among LEA executives that there is not sufficiently clear guidance or standards on how to frame such written policies.[48]

Notwithstanding the fact that most LEAs have not implemented written policies, there are plenty available for review[49]—enough to inform analyses of how BWC policies and practices should evolve over time.[50] There are several model BWC policies and procedures available, written by law enforcement associations[51] and municipalities alike,[52] as well as policy/procedure recommendations by the DOJ and American Civil Liberties Union (ACLU).[53] Moreover, numerous counties and municipalities across the country have made available draft and active policies and procedures that they have developed over the past few years.[54] The following explication is based upon a review of forty of these individual model, draft, and active law enforcement association BWC policies and procedures from counties and municipalities across the nation, as well as some provided by law enforcement associations. The policies and procedures discussed herein were selected with the intention of providing a fairly representative cross sample of policies throughout differing communities across the nation. As such, every major region of the nation is represented by at least one selected policy. Furthermore, counties, major and minor cities, and smaller

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a grant).

48. *See* COPS, *supra* note 18, at 2.

49. For an interactive map providing access to several written policies and procedures, see Paul, *supra* note 9.

50. Alexandra Claudia Mateescu et al., Data & Soc'y Research Insti., Police Body-Worn Cameras 2 (Feb. 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2569481.

51. Distinct from LEAs, law enforcement associations are professional membership organizations that provide, among other things, policy and lobbying on behalf of LEA members.

52. *See generally* FRATERNAL ORDER OF POLICE, BODY-WORN CAMERA RECOMMENDED BEST PRACTICES, http://www.fop.net/programs/education/webinar/BestPracticesBWC.pdf.

53. JAY STANLEY, AM. CIVIL LIBERTIES UNION, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL 1 (Oct. 2013), https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf.

54. *See, e.g.*, LOUISVILLE METRO POLICE DEP'T, STANDARD OPERATING PROCEDURES FOR THE LOUISVILLE METRO POLICE DEP'T § 4.31.5 (2015) [hereinafter LOUISVILLE POLICY], https://rcfp.org/bodycam_policies/KY/Louisville_BWC_policy.pdf; N.Y.C. POLICE DEP'T, OPERATIONS ORDER NO. 48: PILOT PROGRAM - USE OF BODY-WORN CAMERAS 1 (2014) [hereinafter N.Y.C. POLICY], https://rcfp.org/bodycam_policies/NY/NYPD_BWC_Policy.pdf; TAOS CTY. SHERIFF'S OFFICE, POLICY NO. 025: IN-CAMERAS/BODY CAMERAS (2015) [hereinafter TAOS CTY. POLICY], https://rcfp.org/bodycam_policies/NM/Taos_BWC_Policy.pdf.

municipalities are also exemplified in the sample. The selected policies and procedures do not comprise an exhaustive list but are merely a fair representation of what these policies and procedures tend to look like, to the extent that they exist.

1. BWC Use and Functionality: A Brief Introduction

From the outset, it should be noted that "[n]ot all cameras are created equal."[55] Variations in functionality and features abound across models and brands, and these variations change the nature of how the cameras can be used.[56] While an in-depth analysis of these variations is outside the scope of this Note,[57] they bear mentioning to illustrate the point that the following explication is not representative of how *all* BWCs operate but is, rather, merely a fair representation of how BWCs *typically* operate.[58]

Normally, BWCs are worn on the officer's chest in a holster attached to the officer's shirt,[59] though there are models available that can be attached to the officer's sunglasses in order to provide an officer's "point-of-view" angle.[60] Much like any other personal equipment, the cameras are assigned to individual officers, meaning that each officer participating in a BWC program will have his or her own BWC.[61] Normally, once a BWC is assigned to a particular officer, it becomes that officer's responsibility to ensure that the BWC remains properly charged and in a state of good repair.[62] As such, at the beginning of each shift, an officer must prepare his or her BWC for service and don it

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55. Martin Kaste, *Stealth Mode? Built-In Monitor? Not All Body Cameras Are Created Equal*, NPR: ALL TECH CONSIDERED (Oct. 30, 2015, 5:48 PM), http://www.npr.org/sections/alltechconsidered/2015/10/30/453210272/stealth-mode-built-in-monitor-not-all-body-cameras-are-created-equal.

56. *See id.*

57. For an in-depth view of the differences in functionality and cost between commonly available BWCs, see NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, BODY-WORN CAMERAS FOR CRIMINAL JUSTICE: MARKET SURVEY (Mar. 2014).

58. *See* Keith Wagstaff, *Digital Partner: Here's How Police Body Cameras Work*, NBC NEWS (Dec. 1, 2014, 3:07 PM), http://www.nbcnews.com/tech/innovation/digital-partner-heres-how-police-body-cameras-work-n259211 (noting that roughly 20,000 TASER BWCs are currently being used by LEAs across the nation—a number that has likely grown since the article was published).

59. *See, e.g.*, AXON, TASER: AXON BODY CAMERA USER MANUAL 1, 5 (2014) [hereinafter TASER MANUAL].

60. *See, e.g.*, *Axon Flex*, AXON, https://www.axon.io/products/flex (last visited Mar. 1, 2017).

61. *See* TASER MANUAL, *supra* note 59, at 9. *But see id.* at 16 ("Your agency *may* have officers share . . . cameras." (emphasis added)).

62. *See, e.g.*, N.Y.C. POLICY, *supra* note 54, at 1–2.

as part of his or her uniform in a position that provides an optimal recording view.[63]

Once properly set up and donned, BWCs normally have two standard operating modes: Buffering and Event.[64] When powered on, the BWC immediately enters Buffering mode.[65] In this state, the camera is continuously recording video (but not audio).[66] However, this video is not saved to the BWC's permanent memory until the officer double-presses the Event button at the top of the unit.[67] Once an officer has done so, the thirty seconds of soundless video that the BWC recorded prior to entering Event mode is saved to the camera's memory.[68] The purpose of this is to allow for video to be later viewed in the context in which the officer saw events unfold.[69] Thus, if an officer witnesses a crime take place and immediately double-presses the Event button, the camera's memory will (ideally) include video of whatever it was the officer saw that caused him to enter Event mode to begin with. When the BWC is operating in Event mode, it is recording audio and video and saving it to the BWC's permanent memory.[70] The BWC will continue to do so until the officer presses and holds the Event button to terminate Event mode and return to Buffering.[71] Notably, BWCs typically provide visual and auditory cues to the officer alerting them as to what operating mode the BWC is in and how much battery life remains.[72]

At the end of an officer's shift, the video must be transferred from the BWC to the LEA's video repository.[73] The exact form that such repositories take will differ depending on the LEA,[74] though it appears

63. *See id.* at 4; RIALTO POLICE DEP'T, POLICY MANUAL: POLICY NO. 451: BODY WORN VIDEO SYSTEMS 451.4.B (2013) [hereinafter RIALTO POLICY], https://rcfp.org/bodycam_policies/CA/Rialto_BWC_Policy.pdf ("Officers shall position the camera on their uniform to facilitate optimum recording field of view.").

64. *See* TASER MANUAL, *supra* note 59, at 12.

65. *See id.*

66. *See id.*; Wagstaff, *supra* note 58.

67. *See* TASER MANUAL, *supra* note 59, at 12–13.

68. *See id.* at 12.

69. *See id.*; Wagstaff, *supra* note 58.

70. *See* TASER MANUAL, *supra* note 59, at 13.

71. *See id.*

72. *See id.*

73. *See, e.g.*, CHI. POLICE DEP'T, DEPARTMENT NOTICE 15-01: BODY WARN CAMERA PILOT PROGRAM – PHASE 1 (2015), https://rcfp.org/bodycam_policies/IL/Chicago_BWC_Policy.pdf.

74. *Compare id.* (noting that BWC video is uploaded to Evidence.com, which is TASER's proprietary BWC footage storage medium), *with* N.Y.C. POLICY, *supra* note 54,

that most LEAs use the BWC vendor's proprietary storage medium.[75] Once the officer has successfully uploaded the video from the BWC to the storage medium, the video is automatically deleted from the BWC's permanent memory.[76]

With a basic understanding of how BWCs typically function, it is now time to turn to the specifics of BWC operation procedures and policies. Most relevant for purposes of this Note are the appropriate times for an officer to enter Event mode and whether and to what extent the public has access to BWC video. Each of these points will be discussed in turn.

2. When to Record

As of October 2015, several states were beginning to tackle BWC regulation through the legislative process.[77] There are, of course, numerous issues that these policies and procedures must address. Among the concerns that any legislation, policy, or set of procedures for using BWCs are likely to address is determining when it is either required, permissible, or impermissible for an officer to enter Event mode. Indeed, the decision of whether and when to record an officer's interaction with the public is key not only to the success or failure of a BWC program[78] but also in determining whether and to what extent such recording can violate an individual's expectations of privacy.[79] To this end, there is debate within the law enforcement community as to the extent of discretion that should be given to police officers with

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at 3 (noting that officers are required to use unspecified software for archiving BWC footage captured during a shift and make a hard copy of footage that includes an arrest).

75. *See, e.g.*, TAMPA POLICE DEP'T, POLICY NO. 60.9.9: BODY WORN RECORDING EQUIPMENT 3–4 (2015) [hereinafter TAMPA POLICY], https://rcfp.org/bodycam_policies/FL/Tampa_BWC_Policy.pdf.

76. *See* TASER MANUAL, *supra* note 59, at 17.

77. Kimberly Kindy et al., *Of 138 Bills, Only Eight Provide a Pathway to Police Body Cameras*, WASH. POST (Oct. 8, 2015), https://www.washingtonpost.com/graphics/national/body-cam-legislation/.

78. *See* Connie Fossi-Garcia & Dan Lieberman, *Investigation of 5 Cities Finds Body Cameras Usually Help Police*, FUSION (Dec. 7, 2014, 2:56 PM), http://fusion.net/story/31986/investigation-of-5-cities-finds-body-cameras-usually-help-police/.

79. Erica Goode, *Video, a New Tool for the Police, Poses New Legal Issues, Too*, N.Y. TIMES (Oct. 11, 2011), http://www.nytimes.com/2011/10/12/us/police-using-body-mounted-video-cameras.html?_r=0 ("If a police officer is taking a picture of every interaction, one of the things that he may find is me, naked as a jaybird . . . . Let's assume that it's either against the law or not, but I sure don't want it on YouTube. The potential for a sort of permanent embarrassment is a looming presence when everything is filmed." (quoting Franklin E. Zimring, law professor at the University of California, Berkeley)).

regard to activating Event mode and what specific kinds of encounters should require activation.[80]

Though the available formal procedures and policies do vary with respect to when officers should or must record,[81] and at times they do so significantly,[82] the typical written BWC policies and procedures have a non-exhaustive list of public interactions that require an officer to activate his or her BWC's Event mode, followed by a rather broad provision for officer discretion.[83] For example, the City of Tampa, Florida's BWC policy provides the following:

> The body worn recording system SHALL be utilized to gather and record the following types of events, whenever possible, by all officers involved:
>
> a. Traffic stops
> b. Pursuits- vehicle or foot
> c. Potentially confrontational citizen contacts
> d. Physical arrests
> e. Use of force situations
> f. Suspicious vehicle/person calls
> g. In-custody *Miranda* rights advisement and interviews (unless recording by other means inside police facilities)
> h. Alarm responses and building checks
> i. Any other law enforcement activity which the officer feels could benefit from use of the body worn recording system.[84]

This kind of non-exhaustive list, which outlines particular instances wherein the camera must be recording along with a grant of discretion "against a baseline presumption that outside of such circumstances, the

80. *See* CITY OF MINNEAPOLIS, POLICE CONDUCT OVERSIGHT COMM'N, BODY CAMERA IMPLEMENTATION RESEARCH AND STUDY 5–6, 10–11 (Sept. 2015), https://chicagopatf.org/wp-content/uploads/2016/02/minneapolis-body-camera.pdf.

81. *See* Mateescu et al., *supra* note 50, at 12.

82. *Compare* RICHMOND CTY. SHERIFF'S OFFICE, GENERAL ORDER NO. 15-004: BODY WORN CAMERA (BWC) POLICY 3–4 (2015) [hereinafter RICHMOND CTY. POLICY], https://rcfp.org/bodycam_policies/GA/Richmond_BWC_Policy.pdf (enumerating a well-defined but non-exhaustive list of scenarios in which an officer *must* activate his or her camera's Event mode), *with* ORO VALLEY POLICE DEP'T, POLICY MANUAL: POLICY NO. 702: PORTABLE AUDIO/VIDEO RECORDERS 2 (2015) [hereinafter ORO VALLEY POLICY], https://rcfp.org/bodycam_policies/AZ/Oro_Valley_BWC_Policy.pdf (allowing for total discretion by an officer with respect to when to activate the BWC's Event mode).

83. *See* CITY OF MINNEAPOLIS, *supra* note 80, at 5–6.

84. TAMPA POLICY, *supra* note 75, at 2.

camera will not be recording,"[85] is generally in line with model policies and recommendations by the International Association of Chiefs of Police (IACP), the Police Executive Research Forum (PERF), and the Fraternal Order of Police.[86] Additionally, many BWC policies, including model policies and recommendations, provide that even in the specifically enumerated situations in which Event mode activation is required, the officer still has the discretion not to record when doing so would impede the performance of his or her duties or hinder his or her own safety.[87] Though civil liberties groups contend that a failure to record should carry a presumption against an officer, which would raise the specter of sanctions if not rebutted,[88] formal policies currently in place are generally much more lenient, typically requiring only that the officer be able to articulate a reason for failing to activate Event mode.[89]

Ultimately, formal BWC policies and procedures have thus far tended to err toward granting discretion, and at times *substantial* discretion, to officers.[90] An example of such substantial discretion can be found in the BWC procedures emanating from the City of Rialto, California, which notes that "[i]n addition to the [two] required conditions, officers may activate the system any time they feel its use

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85. Mateescu et al., *supra* note 50, at 12.

86. *See id.*; COPS, *supra* note 18, at 40; FRATERNAL ORDER OF POLICE, *supra* note 52, at 2–3.

87. *See* ANAHEIM POLICE DEP'T, POLICY MANUAL: POLICY 451: BODY WORN CAMERAS (BWC) § 451.4(a) (2015) [hereinafter ANAHEIM POLICY], https://rcfp.org/bodycam_policies/CA/AnaheimCA_BWC_policy.pdf; BOS. POLICE CAMERA ACTION TEAM, *supra* note 22, at 10; COPS, *supra* note 18, at 40; FRATERNAL ORDER OF POLICE, *supra* note 52, at 2–3; ORO VALLEY POLICY, *supra* note 82, at 702.4; Mateescu et al., *supra* note 50, at 12. *But see* WAXAHACHIE POLICE DEP'T, PROCEDURE NO. 4.026: ON-OFFICER VIDEO RECORDING SYSTEM 1–3 (2014), https://rcfp.org/bodycam_policies/TX/Waxahachie_BWC_policy.pdf (providing no apparent safety or effectiveness exception for entering Event mode during the specifically enumerated encounters).

88. *See* Johanna E. Miller, *Testimony Regarding the Risks of Police Body-Worn Cameras*, NYCLU (Jan. 31, 2015), http://www.nyclu.org/content/testimony-regarding-risks-of-police-body-worn-cameras.

89. *See, e.g.*, MYRTLE BEACH POLICE DEP'T, ADMINISTRATIVE REGULATIONS AND OPERATING PROCEDURES, NO. 271-B (2015) [hereinafter MYRTLE BEACH POLICY] ("If an officer fails to activate the BWC . . . the officer shall document why.").

90. *See* MARIANNA POLICE DEP'T, POLICY NO. 55.0: MOBILE VIDEO / AUDIO RECORDING EQUIPMENT III.B [hereinafter MARIANNA POLICY], https://rcfp.org/bodycam_policies/FL/Marianna_BWC_policy.pdf; MINNEAPOLIS POLICE DEP'T, MPD BODY CAMERA SOP 3, 7 (2014) [hereinafter MINNEAPOLIS POLICY], https://rcfp.org/bodycam_policies/MN/Minneapolis_BWC_Policy.pdf (requiring Event mode activation during a specific set of circumstances but also noting that Event mode should be activated during any "Significant Incident," the definition of which provides the officer with substantial discretion); RIALTO POLICY, *supra* note 63, at 451.2.G; SURPRISE POLICE DEP'T, OPS-50: PORTABLE VIDEO MANAGEMENT SYSTEM III.E.12 (2013) [hereinafter SURPRISE POLICY], https://rcfp.org/bodycam_policies/AZ/Suprise_BWC_Policy.pdf .

would be appropriate and/or valuable to document an incident."[91] Indeed, even policies that require recording encounters during all calls for service—such as those from the City of Marianna, Florida—still provide that officers have broad discretion in determining whether or not entering Event mode in a particular set of circumstances is appropriate.[92]

Though formal and model policies tend toward placing more, as opposed to less, discretion in the hands of officers, this does not necessarily represent agreement within the law enforcement and legal communities as to when police should record and how much discretion they should have. Some advocates warn that allowing for officers to have *any* discretion, vis-à-vis not requiring Event mode activation during *all* encounters with civilians, lends itself to the possibility of abuse by officers.[93] With that in mind, the IACP recommends that officers be required to enter Event mode during *all* encounters with the public.[94] Further, the Leadership Conference on Civil and Human Rights agrees that, except during a "specific and well defined exception," police should be recording "all interactions with members of the public . . . while on duty."[95]

In spite of the trend toward placing discretion to record in the hands of officers in the field, there are still rigorous constraints on permissible recording that pervade model, draft, and active policies and procedures, as well as civil rights advocates' recommendations. One of the few things on which advocates, academics, and individual LEAs

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91. RIALTO POLICY, *supra* note 63, at 451.2.G. As written, the Rialto Policy only requires Event mode activation during "[e]nforcement encounters where there is a reasonable suspicion the person is involved in criminal activity [and a]ny other contact that becomes adversarial after the initial contact." *Id.* at 451.2.G.1–2.

92. MARIANNA POLICY, *supra* note 90, at III.B ("[BWCs] can have implications in terms of privacy when it comes to recording nudity . . . and other sensitive matters. Officers should be aware of privacy concerns and should use their discretion whether to record . . . . Officers should use their discretion in cases in which persons are unwilling to share information about a crime if they are being recorded. Consideration should be given to whether obtaining the information outweighs the potential evidentiary value of capturing the statement . . . .").

93. *See* STANLEY, *supra* note 7, at 2 (documenting instances of improper manipulation of BWCs by police officers).

94. *See* IACP NAT'L LAW ENF'T POLICY CTR., BODY-WORN CAMERAS: MODEL POLICY 1 (Apr. 2014), http://www.aele.org/iacp-bwc-mp.pdf.

95. Letter from Wade Henderson and Nancy Zirkin to the President's Task Force on 21st Century Policing, Leadership Conference on Civil and Human Rights (Jan. 30, 2015), http://civilrightsdocs.info/pdf/policy/letters/2015/2015-01-30-letter-to-task-force-on-21st-century-policing.pdf.

seem to agree is that the privacy of the officers wearing the camera is a serious concern,[96] as is the privacy of those individuals who will be filmed.[97] With respect to officer privacy, BWC policies and procedures typically ban entering Event mode during SWAT operations;[98] while interacting with confidential informants;[99] while engaged in non-work related activities;[100] while speaking solely with departmental personnel;[101] or while in any location where the officer-cum-employee has a reasonable expectation of privacy, such as departmental locker rooms.[102]

Among the prohibitions aimed at protecting the privacy rights of the individuals being recorded are prohibitions on recording in areas where the individual has a reasonable expectation of privacy under Fourth Amendment jurisprudence, absent consent;[103] regulations on when and how an officer may record while in patient care areas of health care facilities;[104] and, absent an "obvious violation of criminal or municipal law," prohibitions on recording individuals in the midst of First Amendment activity, such as picketing.[105] As such, while officers are afforded a wide breadth in choosing when to record their encounters with civilians, that breadth is not unlimited.

Where permissive versus compulsory recording has created a veritable *terra damnata*, at least for purposes of this Note, is when an officer, responding to a medical emergency in public, must consider

96. *See* Mateescu et al., *supra* note 50, at 13.

97. *See id.* at 10–11.

98. *See, e.g.*, MINNEAPOLIS POLICY, *supra* note 90, at 2.

99. *See, e.g.*, DAVIDSON POLICE DEP'T, 500 PATROL OPERATIONS: AUTHORIZED PERSONAL EQUIPMENT: BODY WORN CAMERAS pt. V (2014) [hereinafter DAVIDSON POLICY], https://rcfp.org/bodycam_policies/NC/Davidson_BWC_policy.pdf.

100. *See, e.g.*, SPOKANE POLICE DEP'T, DRAFT, POLICY NO. 703: BODY CAMERAS § 703.2.5.C (2014), https://rcfp.org/bodycam_policies/WA/Spokane_BWC_Policy.pdf.

101. *See, e.g.*, MINNEAPOLIS POLICY, *supra* note 90, at 2.

102. *See, e.g.*, NEW ORLEANS POLICE DEP'T, POLICY MANUAL: POLICY NO. 447: BODY-WORN CAMERA ("*BWC*") § 447.6 (2014) [hereinafter NEW ORLEANS POLICY], https://rcfp.org/bodycam_policies/LA/NewOrleansLA_BWC_policy_update.pdf.

103. *See, e.g.*, N.Y.C. POLICY, *supra* note 54, at 3; ORO VALLEY POLICY, *supra* note 82, at 702.4 ("Members should remain sensitive to the dignity of all individuals being recorded and exercise sound discretion to respect privacy . . . .").

104. *See* GREENSBORO POLICE DEP'T, POLICY NO. 15.11: BODY WORN CAMERAS (BWC) § 15.11.5 (2014) [hereinafter GREENSBORO POLICY], https://rcfp.org/bodycam_policies/NC/Greensboro_BWC_Policy.pdf.

105. BURLINGTON POLICE DEP'T, DEP'T DIRECTIVE NO. 14, DIGITAL IMAGING, DIGITAL AUDIO & VIDEO, AND BODY WORN CAMERA SYS'S. § II(D)(2) (2014) [hereinafter BURLINGTON POLICY], https://rcfp.org/bodycam_policies/VT/Burlington_BWC_Policy.pdf; *see also* SEATTLE POLICE DEP'T, SEATTLE POLICE DEPARTMENT MANUAL: POLICY NO. 16.091: BODY-WORN VIDEO PILOT PROGRAM 2 (2015) [hereinafter SEATTLE POLICY], https://rcfp.org/bodycam_policies/WA/SeattleWA_BWC_policy_update.pdf.

whether or not to activate Event mode. Privacy issues related to this question notwithstanding,[106] the model, draft, and active BWC policies and procedures sampled for this Note are split on the question of whether to allow for recording in such situations. Indeed, of the policies and procedures sampled, twenty-eight take an affirmative or neutral stance, either expressly or implicitly, on this issue, with twelve prohibiting recording in such circumstances.[107]

To begin with policies that apparently require or allow recording when an officer responds to a medical emergency in public, the language of the IACP's model BWC policy states in no uncertain terms that police should record "all contacts with citizens in the performance of official duties," though there should be some level of discretion with respect to sexual assault victims.[108] Such implicit obligation on part of an officer to enter Event mode under these circumstances is also demonstrated by, for example, Seattle's BWC policy, which requires officers to record "[r]esponse[s] to 911 calls."[109] Similarly, New Orleans requires Event mode activation during "[e]mergency responses" and "[o]n all calls for service."[110]

Interestingly, Taos County, New Mexico, which has a combined policy for its radio car dashboard cameras and officer BWCs, requires that cameras be activated on all emergency responses during which the

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106. See *infra* Part II and Part III for a later discussion on the topic.

107. *See infra* Appendix for a complete list of policies and procedures sampled.

108. IACP NAT'L LAW ENF'T POLICY CTR., *supra* note 94, at 1; *see also* Mateescu et al., *supra* note 50, at 10.

109. SEATTLE POLICY, *supra* note 105, at 2.

110. NEW ORLEANS POLICY, *supra* note 102, § 447.3(1)(b); *see also* BURLINGTON POLICY, *supra* note 105, § II(C)(2)(c) (permitting recording under such circumstances by providing that "BWCs may be used to record . . . [a]ny other incident at the officer's discretion"); MENLO PARK POLICE DEP'T, POLICY MANUAL: POLICY NO. 450: USE OF AUDIO/VIDEO RECORDERS § 450.5 (2014), https://rcfp.org/bodycam_policies/CA/New_Menlo_Park_BWC_Policy.pdf ("Members shall activate the recorder during *all on duty contacts* with citizens . . . ." (emphasis added)); MISSOULA POLICE DEP'T, POLICY MANUAL: POLICY NO. 9.60: MOBILE VIDEO EQUIPMENT § IV.C.1.b (2014), https://rcfp.org/bodycam_policies/MT/Missoula_BWC_policy.pdf (permitting recording during incidents wherein the BWC may provide additional information that could not be provided by the dashboard camera, which, per section (B)(1)(a), would be running under such circumstances); SURPRISE POLICY, *supra* note 90, § III.E.4–5 (requiring Event mode activation while at accident scenes and during all calls for service); TUCSON POLICE DEP'T, 3 GENERAL OPERATING PROCEDURES 3700: SPECIALIZED DEPARTMENT EQUIPMENT § 3764.1 (2015), https://rcfp.org/bodycam_policies/AZ/TucsonAZ_BWC_policy_update.pdf (requiring Event mode activation while "[o]n calls for service" and providing for *when* such activation must occur).

radio car's emergency light bar is activated.[111] Though a reading of that language in isolation would seem to imply that the provision is applicable only to the dashboard cameras, it must be noted that the stated purpose of the procedures are to "reduce liability against the [Taos County Sheriff's Office], capture evidence and to be used as a training tool."[112] In light of that context, as well as the fact that the procedures are expressly directed at BWCs,[113] it is reasonable to conclude that this policy would require an officer to enter Event mode on their BWC when responding to an ambulance call.[114]

Clearly implicit—and perhaps explicit—in these aforementioned policies is that officers in the field should record not only while on calls for law enforcement purposes, but also when responding to ambulance calls. However, the discussion does not end there. There are numerous policies from across the country that apparently forbid recording when responding to medical emergencies in public. Before plunging into these policies, it is first necessary to distinguish between enforcement and non-enforcement activities, such that we might, with greater ease, understand the restrictions that these policies place on BWC activation under circumstances with which this Note is concerned. Rationally, any police function that includes "all activities surrounding the enforcement of criminal, traffic, narcotics, alcohol, and other laws" in a given municipality is considered an enforcement function.[115] By contrast, logically, activities outside of the ambit of the enforcement function are non-enforcement activities.[116]

With that distinction in mind, it is now possible to delve into the apparent prohibition on BWC Event mode activation while responding to medical emergencies in public that many procedures nationwide have in place. While, as noted above, there is certainly a trend toward providing officers with broad discretion in when to record civilian interactions, often times that discretion is permitted only with respect to law enforcement functions.[117] For example, the New York City Police Department's BWC policy orders that officers "not activate the BWC to record . . . [p]erformance of non-enforcement functions or administrative

111. TAOS CTY. POLICY, *supra* note 54, at 129.

112. *Id.* at 128.

113. *See id.*

114. *See* LOUISVILLE POLICY, *supra* note 54, § 4.31.5, at 321–22 (providing that officers must enter Event mode when, among other times, responding to vehicle accidents, domestic abuse calls, and calls relating to physical violence).

115. *See* Darryl S. Wood & Lawrence C. Trostle, *The Nonenforcement Role of Police in Western Alaska and the Eastern Canadian Arctic: An Analysis of Police Tasks in Remote Arctic Communities*, 25 J. CRIM. JUST. 367, 373 (1997).

116. *See id.*

117. *See, e.g.*, N.Y.C. POLICY, *supra* note 54, at 2–3.

duties within a Department facility."[118] On its own, this provision would already be proscriptive of recording under the circumstances with which we are concerned. However, that proscription comes into much sharper focus when read in light of the scenarios that do require recording under the NYPD's policy. Two of the seven listed scenarios requiring Event mode activation are explicitly referred to as "enforcement encounters."[119] Further, the rest of the listed scenarios are all *clearly* within the ambit of enforcement activities.[120] As such, it appears quite clear that the NYPD does not intend for its officers to record while responding to medical emergencies in public, in spite of a fairly wide breadth of discretion placed in the officers' hands.[121]

Certainly, the NYPD is not alone in this regard, nor does it appear to be an aberration or outlier. For instance, San Jose, California's BWC policy shares essentially identical language with the NYPD with respect to filming these events. To wit, the policy states that "[BWCs] shall not be used to record . . . [p]erformance of non-enforcement functions or administrative duties within a Department facility."[122] This language appears in spite of the policy's explicit requirement that Event mode be activated during "[r]esponse to . . . calls for service."[123] Some other police departments have taken a slightly different approach to banning Event mode activation in such circumstances. For example, the BWC policy of the City of Anaheim, California proscribes recording while "[a] health care provider is discussing medical issues with a patient."[124] For purposes of this policy, it is reasonable to assume that an Emergency

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118. *Id.* at 3.

119. *Id.* at 2.

120. *See id.* The rest of the listed scenarios in which entering Event mode is required are during vehicle stops, scenarios involving custodial arrest or an analogue thereof, use of force incidents, all adversarial incidents not specifically prohibited (such prohibitions include the aforementioned non-enforcement rule), and interior patrols of "non-Housing Authority buildings." *Id.*

121. *See id.* at 2–3 (instructing police officers to "[c]onsider activating the BWC during any activities where, in the uniformed member's judgment, it would be beneficial to record" as long as it is not a prohibited activity).

122. SAN JOSE POLICE DEP'T, SAN JOSE POLICE BODY WORN CAMERA POLICY § 10.B [hereinafter SAN JOSE POLICY], http://www.sjpd.org/InsideSJPD/BodyCameras/BWC_Policy.html.

123. *Id.* § 5(J). Other jurisdictions have similar policies. *See* DAVIDSON POLICY, *supra* note 99, pt. V; GREENSBORO POLICY, *supra* note 104, § 15.11.5 (providing that BWCs may only be used for "legitimate law enforcement purposes" and further providing that they may only be used in patient care areas when recording parties involved in an on-going investigation).

124. ANAHEIM POLICY, *supra* note 87, § 451.4.

Medical Technician ("EMT") is considered a health care provider.[125] As such, under Anaheim's policy, an officer would not be permitted to record while an EMT is assisting a victim of a health care emergency in public.

In summation, BWC policies provide some assistance in determining whether or not officers are, in fact, permitted to record during response to medical emergencies in public. However, this merely provides an overview of where, empirically, the typical BWC policy is on the issue. To determine whether, normatively, an officer should be permitted under state law to enter Event mode while responding to medical emergencies in public, we must dive deeper into the various policy issues that bear on this determination.

3. Civilian Access to Video

Of particular importance is whether and to what extent BWC policies and state laws allow public access to these videos.[126] As Lindsay Miller of PERF noted in her testimony before the Senate Judiciary Committee, "One of the most important questions that an agency will face is when to release body-worn camera footage externally to the public and news media."[127] While some state legislators have argued that the public should have no, or barely any, access to the BWC footage,[128] many commentators contend that there needs to be structures put in place that allow broad public access to the video while simultaneously considering the myriad privacy concerns of the videos' subjects.[129] Indeed, one such commentator notes:

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125. *See* Canister v. Emergency Ambulance Serv., 72 Cal. Rptr. 3d 792, 795 (Ct. App. 2008) (holding that EMT's are health care providers for purposes of determining whether professional negligence was present under California's Medical Injury Compensation Reform Act); *Occupational Outlook Handbook: EMTs and Paramedics*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/ooh/healthcare/emts-and-paramedics.htm#tab-1 (last visited May 1, 2017) (explaining that EMTs "care for the sick or injured in emergency medical settings").

126. *See* Joan Quigley, *Smile, You're on the Cop's Body Camera*, NJ.COM (last updated Feb. 1, 2016, 6:00 AM), http://www.nj.com/opinion/index.ssf/2016/02/smile_youre_on_camera_says_the_cop.html.

127. *Hearing on Police Body Cameras*, C-SPAN (May 19, 2015), https://www.c-span.org/video/?326097-1/hearing-police-body-cameras (statement of Lindsay Miller, Senior Research Assoc., PERF); *see also id.* (statement of Peter Weir, Dist. Attorney, 1st Dist., Colo.) ("Where is the right line between collecting this important evidence, and what, in fact, we will be distributing to the public at large.").

128. *See* Quigley, *supra* note 126 (noting that New Jersey State Senator Paul Sarlo recently introduced legislation to make it illegal for the public to have access to BWC footage outside of certain situations).

129. *See Hearing on Police Body Cameras*, *supra* note 127, at 3–4 (statement of Lindsay Miller, Senior Research Assoc., PERF); Feeney, *supra* note 10, at 10–14.

> Legislation preventing the public from requesting [BWC] footage does not improve law enforcement accountability and transparency. The public has an interest in knowing how police officers behave, and body cameras can offer key insights into how officers conduct arrests, traffic stops, and searches. Laws that exempt [BWC] footage from public-record requests put potentially revealing information behind a veil of secrecy.[130]

There is little question that simply redacting the relevant footage in order to alleviate potential privacy concerns is very expensive and not always feasible.[131] In spite of this, some jurisdictions have proposed, through their BWC policies, to do just this.[132] By contrast, the ACLU has noted, as an alternative to mere redaction, that requiring subjects to consent to releasing sensitive BWC footage strikes a balance between the public's interests in open, accountable policing and privacy.[133] Ultimately, BWC policies tend to be mixed not only in regards to whether or not they permit, by their terms or by reference to state law, distribution of BWC video but also with regard to whether they mention the issue at all. Thus, for example, policies from Orlando, Florida; Rialto, California; Richmond County, Georgia; and Louisville, Kentucky all adopt either by reference or inference the laws of their respective states.[134] Other policies, however, either only seem by their terms to allow BWC access to police officials[135] or simply do not mention public access to BWC video.[136]

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130. Feeney, *supra* note 10, at 12.

131. *See id.* at 13; STANLEY, *supra* note 7, at 7–8.

132. *E.g.*, LOUISVILLE POLICY, *supra* note 54, § 4.31.14, at 326 (providing that where distributing video in response to an Open Public Record request would violate the subject's right to privacy, relevant sections of the recording will be redacted before distribution).

133. *See* STANLEY, *supra* note 7, at 7–8 (arguing also that for videos in which there is "the highest likelihood of misconduct," footage should be released irrespective of redaction or subject consent).

134. ORLANDO POLICE DEP'T, POLICY AND PROCEDURE NO. 1140.0: MOBILE VIDEO RECORDING SYSTEMS 2–3 (2014) [hereinafter ORLANDO POLICY], https://rcfp.org/bodycam_policies/FL/Orlando_BWC_Policy.pdf (adopting, by reference, the State's Open Public Records laws with regard to releasing BWC footage to the public); RIALTO POLICY, *supra* note 63, § 451.6.B (same); *see also* LOUISVILLE POLICY, *supra* note 54, § 4.31.14, at 326 (referring Open Public Records requests to the appropriate government authority for review and disposition); RICHMOND CTY. POLICY, *supra* note 82, at 5 (same).

135. *See, e.g.*, N.Y.C. POLICY, *supra* note 54, at 7; SAN JOSE POLICY, *supra* note 122, § 4.

136. *See, e.g.*, PHOENIX POLICE DEP'T, OPERATIONS ORDER NO. 4.49: BODY WORN VIDEO TECHNOLOGY – PILOT (2013), http://rcfp.org/bodycam_policies/AZ/Phoenix_BWC_Policy.pdf.

With or without enumerated provisions within BWC policies regarding public access to BWC footage, the federal government and every state has statutory mechanisms in place that govern the release of public records ("sunshine laws"),[137] under which category of records BWC footage certainly falls.[138] However, these laws are complex in form and operation, as they provide many exemptions to the general rule of transparency, as well as rules for the deletion, truncation, and redaction of specified information, at specified times, and through specified means.[139] An understanding of how sunshine laws view BWC cameras, and in what ways these laws affect the release thereof, is instructive in determining whether, normatively, police should be permitted under state law to enter Event Mode during medical emergencies in public. This is so because strict sunshine laws that might prevent the dissemination of such videos would weigh heavily in favor of permitting such recording as the videos would not be subject to release at all, absent some mitigating efforts on behalf of the individual's privacy interests, thereby creating no hazard to individual privacy. Contrarily, highly permissive sunshine laws would provide significant weight against such a normative position. As a general principal, state sunshine laws would likely forbid subjecting BWC footage containing a medical emergency to disclosure. A brief survey of the field will demonstrate this.

As a starting point, it should be noted that though these statutes are intended as a vehicle by which persons within a particular jurisdiction can inform themselves fully and completely on the operation of their government, they are not intended to "cause . . . unwarranted invasion[s] of personal privacy"[140] but rather they reserve as one of their underlying policy objectives the ability to create transparent government without compromising personal privacy.[141] Additionally, the trend among the states is to construe the terms of their sunshine laws liberally in light of their underlying policy objectives.[142]

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137. *See generally* THOMSON REUTERS, *Freedom of Information Acts*, *in* 50 STATE STATUTORY SURVEYS: GOVERNMENT: PRIVACY (2016), Westlaw 0095 Surveys 8.

138. *See* Rutgers Inst. for Info. Pol'y & L., *NJ Police Bodycams*, RUTGERS L. SCH., http://newslawproject.rutgers.edu/nj-police-bodycams (last visited May 1, 2017).

139. *See* LEXISNEXIS, *Protection of Personal Information in Government Records*, *in* 50-STATE SURVEYS, STATUTES & REGULATIONS: CIVIL RIGHTS LAW – PROTECTION OF RIGHTS (2015).

140. *See, e.g.*, 5 ILL. COMP. STAT. 140/1 (2016).

141. *Id.*; *see also* CAL. GOV'T. CODE § 6250 (West 2016); HAW. REV. STAT. § 92F-2 (2016); N.J. STAT. ANN. § 47:1A-1 (West 2016).

142. *E.g.*, IND. CODE § 5-14-3-1 (2016); ME. REV. STAT. ANN. tit. 1, § 401 (2016).

Typically, sunshine laws—both in what they cover and in what they exempt—tend to contemplate the privacy interests of the subjects of the records. The Freedom of Information Act (FOIA) as currently enacted under federal law provides an exemption for the release of files that would "constitute a clearly unwarranted invasion of personal privacy."[143] More, the states have, "with few exceptions," tended to formulate their sunshine law exemptions similarly.[144] Thus, for example, California exempts from its public records disclosure of all medical records or similar records that the release of which would constitute an invasion of personal privacy.[145] Indeed, California is by no means alone in including this type of exemption in its sunshine law.[146] Alaska,[147] Colorado,[148] Connecticut,[149] Florida,[150] Georgia,[151] Kansas,[152] and Illinois,[153] all have statutory or common law protections in place to prevent the respective state's sunshine laws from causing intimate, private information from being subjected to public scrutiny. However, it must be noted that there is a small minority of states that provide no

143. Freedom of Information Act, 5 U.S.C. § 552(b)(6) (2012).

144. Andrea G. Nadel, Annotation, *What Constitutes Personal Matters Exempt from Disclosure by Invasion of Privacy Exemption Under State Freedom of Information Act*, 26 A.L.R. 4th 666, § 2(a) (2016).

145. CAL. GOV'T. CODE § 6254(c) (West 2016). Interestingly, a bill was recently introduced before the California Assembly that would, in effect, exempt BWC footage from the state's sunshine law. *See* Assemb. B. 2611, 2015-2016 Reg. Sess. (Cal. 2016).

146. Rather, most states have some form of privacy exception or exemption to their sunshine laws. *See* Nadel, *supra* note 144, § 2(a).

147. ALASKA STAT. § 40.25.120(a)(6)(C) (2016) (exempting records that "could reasonably be expected to constitute an unwarranted invasion of . . . personal privacy").

148. COLO. REV. STAT. § 24-72-204(6)(a) (2016); *see also* Todd v. Hause, 371 P.3d 705, 711–13 (Colo. App. 2015) (noting that though the state's sunshine laws do not expressly provide an exception to its general requirement of disclosure of public records for protection of personal privacy, Colorado courts have recognized that the "substantial injury to the public interest" exception in section 24-72-204(6)(a) is broad enough to encompass such an exception).

149. CONN. GEN. STAT. § 1-210(b)(2) (2016) (excepting medical files and *similar* records that the disclosure of which would bring about an invasion of personal privacy).

150. *See* FLA. STAT. § 119.071(2)(l)(2)-(4) (2016) (excepting BWC footage under various circumstances, including where disclosure "would reveal information regarding a person that is of a highly sensitive personal nature").

151. *See* GA. CODE ANN. § 50-18-72(a)(2) (2016); Fincher v. State, 497 S.E.2d 632, 636 (Ga. Ct. App. 1998) (noting that the state's sunshine laws determine whether disclosure of a record violates an individual's right to personal privacy under the state's prevailing privacy tort common law).

152. *See* Data Tree, LLC v. Meek, 109 P.3d 1226, 1234–35 (Kan. 2005) (discussing a personal privacy exemption to the state's sunshine law).

153. *See* 5 ILL. COMP. STAT. 140/1 (2016) (noting that the sunshine law is not intended to cause unwarranted breaches of personal privacy).

such protection in their statutory framework and, at least thus far, their courts have refused to read such a protection into the legislative intent or enactment.[154]

In order to determine what disclosures actually constitute an unwarranted invasion of privacy, courts have more or less coalesced around a single test:

> In construing the privacy exemption provisions in state freedom of information laws, the courts will usually first examine the specific statutory provision involved to see if the statute delineates exactly what types of records or other information are considered private and thus subject to the public disclosure exemption. If, however, the particular record, report, or other information sought to be disclosed is not specifically listed in the personal privacy provision as a personal matter, or if the provision does not define those matters, the disclosure of which would constitute an invasion of personal privacy, the courts most often will apply general privacy principles, which examination involves a balancing of conflicting interests—the interest of the individual in privacy on the one hand against the interest of the public's need to know on the other. It has been stated that the right of privacy is relative to the customs of the time and place, and is to be determined by the norm of the ordinary man.[155]

Thus, where an ambiguity exists as to whether a particular record is subject to the sunshine law's privacy exemption, courts apply a simple (in form) balancing test. In such circumstances the agency challenging disclosure bears the burden of demonstrating that the individual's privacy interest prevails over the public's need to know.[156] Though, even where the challenging agency prevails, public inspection of the document is not *per se* precluded; rather, other measures may be taken, such as redacting sensitive information before ultimately

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154. *E.g.*, Magic Valley Newspapers, Inc. v. Magic Valley Reg'l Med. Ctr., 59 P.3d 314, 317 (Idaho 2002). That court noted,

> When enacting laws governing the disclosure of public records, the Idaho legislature certainly could have included a provision . . . that exempts from disclosure records that would constitute a clearly unwarranted invasion of personal privacy. The legislature did not choose to do so, however, and we do not have the authority to rewrite the statute to include such a provision.

Id. (citing Idaho State Tax Comm'n v. Stang, 25 P.3d 113 (2001)).

155. Nadel, *supra* note 144, § 2(a).

156. *Id.* § 2(b).

allowing disclosure.[157] Notably, courts applying this balancing test typically wind up finding in favor of disclosure.[158]

Given that the use of BWCs has only recently emerged as a legal consideration, there is a paucity of case law directly on point. To date, courts have not had the opportunity to consider whether BWC footage involving medical emergencies in public is exempt under this rubric. However, that does not mean there is a total dearth of authority to inform such considerations. There are several cases from across that nation from which we can synthesize an appropriate legal theory, even though they are not on all fours with the precise issues involved.

Courts have rather consistently found that records pertaining to public health and safety can be exempted based upon the weightiness of the subjects' privacy concerns. For example, the court in *Marine Shale Processers, Inc. v. State* held that records created by a public health body investigating a potential link between extant environmental conditions and neuroblastoma were exempt from disclosure under this balancing test.[159] The court reasoned that the subjects would be easily identifiable in the records, which would further allow public access to highly specific and sensitive health information, family health histories, and other personal information.[160] As such, sensitive medical information, even when volunteered to a third party, can be found sufficiently private to warrant exemption from disclosure, even in the face of a high public interest.[161] Indeed, courts have even concluded that information regarding an individual's involvement in an automobile accident—which clearly would occur in public view—and their injuries or mortality as a result thereof, is information of a personal nature.[162] In *Larry S. Baker, P.C. v. City of Westland*, the plaintiff sought release of the names, addresses, and nature of injuries of persons injured or

157. *See* 66 AM. JUR. 2D *Records and Recording Laws* § 26, Westlaw (database updated May 2017) (citing Carlson v. Pima Cty., 687 P.2d 1242, 1246 (Ariz. 1984)).

158. Nadel, *supra* note 144, § 2(a).

159. 572 So. 2d 280, 283–84 (La. Ct. App. 1990).

160. *Id.*; *see also* S. Illinoisan v. Dep't of Pub. Health, 747 N.E.2d 401, 409 (Ill. App. Ct. 2001) (remanding a denial of a request for public health records to determine whether there were neuroblastoma hotspots by stating, "Therefore, we remand this cause to the trial court for further proceedings to determine the answer to the question of fact: Will the information sought reasonably tend to lead to the identity of any person whose condition or treatment is submitted to the Cancer Registry?").

161. *See, e.g.*, Larry S. Baker, P.C. v. City of Westland, 627 N.W.2d 27, 30 (Mich. Ct. App. 2001).

162. *See, e.g.*, *id.*

killed in automobile accidents.[163] The court reasoned that this kind of information regarding such incidents, though clearly having happened in public, was an embarrassing fact and was implicitly "an intimate detail of a person's private life."[164]

These cases essentially add up as follows. When courts are considering whether a sufficiently weighty privacy concern exists, they look to three factors: (1) "whether disclosure would 'result in personal embarrassment to an individual of normal sensibilities'";[165] (2) "whether the materials sought contain 'intimate details' of a 'highly personal nature'";[166] and (3) "whether 'the same information is available from other sources.'"[167] These factors, when considered together, seem to make out a common law tort of publication of private facts,[168] which is significant because courts tend to find *per se* privacy interests exist when the dissemination of the particular record at issue would amount to an invasion of privacy at tort.[169] More specifically, courts have found a sufficient privacy interest where dissemination would amount to the dissemination of embarrassing private facts tort.[170] It should be noted,

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163. *Id.* at 28.

164. *Id.* at 30. It should be noted that the plaintiff sought this information for reasons other than governmental oversight. *Id.* at 32. It is unclear whether the privacy interest here would have prevailed over a plaintiff's purpose more in line with the goals of the Michigan sunshine law. *Compare* MICH. COMP. LAWS § 15.243(1)(a) (2016) (exempting disclosure of "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy"), *and* Larry S. Baker, P.C., 627 N.W.2d at 30–32, *with* MICH. COMP. LAWS § 15.231(2) (2016) ("It is the public policy of this state that all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process."), *and* MICH. COMP. LAWS § 15.233(1) (2016) ("[U]pon providing a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body."). By contrast, some states refuse to consider the plaintiff's purpose in light of the privacy considerations. *See, e.g.*, State *ex rel.* Fant v. Enright, 610 N.E.2d 997, 998–99 (Ohio 1993).

165. Globe Newspaper Co. v. Police Comm'r, 648 N.E.2d 419, 425 (Mass. 1995) (quoting Attorney Gen. v. Collector of Lynn, 385 N.E.2d 505, 508 (1995)).

166. *Id.* (quoting Hastings & Sons Publ'g Co. v. City Treasurer of Lynn, 375 N.E.2d 299, 303 (1978)).

167. *Id.* (quoting *Collector of Lynn*, 385 N.E.2d at 509).

168. *Cf.* RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW. INST. 1977). Though the element requiring that the information not be of legitimate concern to the public is not present in these factors, that element is *de facto* part of the total analysis nonetheless, as the analysis requires a balancing of privacy interests against the public's right to know. *See* Nadel, *supra* note 144, § 2b.

169. *See, e.g.*, Perkins v. Freedom of Info. Comm'n, 635 A.2d 783, 788–89 (Conn. 1993); Athens Observer, Inc. v. Anderson, 263 S.E.2d 128, 130 (Ga. 1980).

170. *See* Hearst Corp. v. Hoppe, 580 P.2d 246, 253 (Wash. 1978).

however, that even where no privacy tort would be invoked, a court might still find a sufficient privacy interest in a given record where there is a substantial privacy interest, that is, "anything greater than a *de minimis* privacy interest."[171] Where *no* privacy interest can be shown, the records must be disclosed.[172]

It is possible that any BWC video captured by an LEA and containing footage of a medical emergency in public, the subject of which video is not involved in a crime, would already be exempted from sunshine laws, thereby making the likes of AB 66 section 4(a)(2)(B) unnecessary and duplicative. In such circumstances, absent an explicit proscription on releasing BWC footage,[173] LEAs would need to demonstrate that there is a sufficiently weighty privacy interest that prevails over the public's interest in obtaining footage of police responses to medical emergencies in public in order to resist a civilian records request. For purposes of this discussion, therefore, an analysis of the privacy torts is necessary to determine whether these records would likely be exempted under either a *per se* theory or under the more expansive "more than *de minimus*" theory, if at all.

C. *Privacy in the United States*

The right to privacy in the United States has developed over a long period of time[174] and "all but begins with Samuel Warren and Louis Brandeis's legendary 1890 law review article."[175] In this first authoritative gloss on an American right to privacy, Samuel Warren

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171. *See* Multi AG Media LLC v. Dep't of Agric., 515 F.3d 1224, 1229–30 (D.C. Cir. 2008). Though *Multi AG Media LLC* is a federal case adjudicated under the federal FOIA, "state courts called upon to construe state freedom of information exemptions are likely to refer to federal court decisions construing similarly phrased exemptions in the [f]ederal [FOIA]." *See* Nadel, *supra* note 144, § 2b.

172. *See, e.g.*, *Multi AG Media LLC*, 515 F.3d at 1229.

173. Numerous states have already begun to explicitly exempt BWC footage from their sunshine laws. *See* Sarah Breitenbach, *States Grapple with Public Disclosure of Police Body-Camera Footage*, PEW CHARITABLE TRUSTS (Sept. 22, 2015), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/09/22/states-grapple-with-public-disclosure-of-police-body-camera-footage. Some accounts indicate that nearly half of states in the United States have already or are considering explicitly barring BWC video from public records disclosure. *See, e.g.*, Chokshi, *supra* note 45.

174. Connie Davis Powell, *"You Already Have Zero Privacy. Get Over It!" Would Warren and Brandeis Argue for Privacy for Social Networking?*, 31 PACE L. REV. 146, 156 (2011).

175. John H. Fuson, Comment, *Protecting the Press From Privacy*, 148 U. PA. L. REV. 629, 634 n.26 (1999).

and Louis Brandeis argued for a "right to be left alone,"[176] which they based off of existing common law doctrines.[177] Notably, Warren and Brandeis were not establishing a new area of substantive law but were rather synthesizing the contemporary state of the law in order to adapt to changing societal needs spurred by emerging technologies—namely, photography.[178] By synthesizing case law in the areas of "defamation, property, implied contract, and copyright law," Warren and Brandeis touched off a period of doctrinal growth in the realm of American privacy rights when they unambiguously declared that the law must rise to meet the needs of changing circumstances and technological advancement.[179] To wit:

> T[hat] the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extend of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.[180]

By 1905, courts had slowly begun to recognize a right to privacy.[181] For example, in *Pavesich v. New England Life Insurance Co.*, the court found a violation of plaintiff's privacy where the defendant published a photograph of plaintiff as an advertisement and did so without plaintiff's permission.[182] Indeed, the court was so confident in its holding—perhaps bordering on haughty—that it proclaimed,

> So thoroughly satisfied are we that the law recognizes, within proper limits, as a legal right, the right of privacy . . . that we venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability, just as in the present day we stand amazed that . . . Lord Hale, with perfect composure of manner

176. Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888)).

177. Powell, *supra* note 174, at 151–54; Warren & Brandeis, *supra* note 176, at 206.

178. *See* Powell, *supra* note 174, at 152; Warren & Brandeis, *supra* note 176, at 206.

179. Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 997 (1995).

180. Warren & Brandeis, *supra* note 176, at 193.

181. *See, e.g.*, Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 70 (Ga. 1905).

182. *Id.* at 81.

and complete satisfaction of soul, imposed the death penalty for witchcraft upon ignorant and harmless women.[183]

The slow acceptance of a right to privacy has, by the time of this writing, become all but ubiquitous in the United States.[184]

Moreover, the right to privacy in the United States bears several doctrinal meanings.[185] Indeed, the sheer breadth of privacy doctrine in state and federal precedent is breathtaking, especially when one considers that the U.S. Constitution does not explicitly provide for such a right.[186] Currently, privacy doctrine includes an expectation of privacy under the Fourth Amendment, vis-à-vis police investigations,[187] and a right to privacy that provides an individual the right to self-determination in their personal affairs.[188] Lastly, and most relevant to this Note, there is a right to privacy in tort law,[189] which arguably boils down to "policing the[] 'limits of decency'" in order to redress a plaintiff's mental distress.[190]

In 1960, Dean Prosser's influential article, *Privacy*, surveyed the landscape of privacy actions in the tort arena and concluded that the "invasion of privacy" tort tends to fall into four categories: (1) intrusion upon the individual's seclusion or private affairs; (2) "[p]ublic disclosure of embarrassing private facts"; (3) false-light publicity; and (4) appropriation of name or likeness.[191] Subsequently, the American Law Institute adopted Dean Prosser's four-in-one theory in the Restatement (Second) of Torts,[192] as have a majority of states.[193] Notably, there is a

183. *Id.* at 80–81.

184. *See* RESTATEMENT (SECOND) OF TORTS § 652A cmt. (AM. LAW. INST. 1977).

185. *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 740–41 (1989).

186. *See id.*; U.S. CONST. amends. I, III, IV, V, IX, XIV.

187. *See* Katz v. United States, 389 U.S. 347, 350–51 (1967) ("[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion . . . .").

188. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2597–98 (2015). This substantive due process is rooted in privacy, which is said to include rights to human dignity and self-determination. *Id.*

189. *See, e.g.*, Rubenfeld, *supra* note 185, at 740.

190. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 961 (1989); *cf.* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 46 cmt. (AM. LAW. INST. 2012) ("[A] claim for intentional infliction of emotional harm . . . can readily be added when the gravamen of the case is a different tort, such as invasion of privacy . . . ."). *But see* McClurg, *supra* note 179, at 1027 n.212 (noting that there is a high bar for a plaintiff to surmount in making such a claim).

191. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

192. *See* RESTATEMENT (SECOND) OF TORTS § 652A(2); *see also* McClurg, *supra* note

strong interrelation between the four torts.[194] As such, most invasion of privacy claims at tort tend to allege violations of more than one of Dean Prosser's four torts simultaneously.[195] Conceptually, the interrelation is easy to imagine. Consider, for example, a scenario in which an accident victim is filmed without her permission and the film is subsequently broadcast without her permission.[196] In such circumstances, a plaintiff might be able to plead sufficient facts to establish a claim for intrusion into private facts and public disclosure.[197]

The thin line of distinction between these torts is further demonstrated by Mark Fall's article, *Privacy Protections of Computerized Information*.[198] In this article, Fall explains that "[m]ost privacy theorists agree" that an invasion of privacy occurs when information about an individual is disseminated, though the *mere* collection of that information can be an invasion as long as it is possible to be disseminated,[199] thereby implying that the distinctions between intrusion and disclosure are merely a matter of degree. Such is the thinly distinguished nature of the four torts.[200] Though, notably, regardless of the thin distinctions between these four torts, invasion of privacy doctrine has evolved in a complex and important area of American common law, "offer[ing] a rich . . . apprehension of the texture of social life in America."[201]

However, in spite of this apparent importance in American jurisprudence, and in spite of the fact that privacy doctrine has purportedly deep roots in Western civilization,[202] it is evident that courts very narrowly construe the privacy torts.[203] As such, privacy

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179, at 998.

193. *See* McClurg, *supra* note 179, at 998.

194. *Id.* at 1008.

195. *See id.*

196. *See* Shulman v. Group W Prods., Inc., 955 P.2d 469, 476 (Cal. 1998).

197. *See id.* at 477 (affirming the lower court's finding that triable issues exist as to plaintiff's intrusion claim but granting summary judgment on the disclosure of private facts claim where the facts disclosed were newsworthy).

198. Mark Fall, *Privacy Protections of Computerized Information*, 2 S. CAL. INTERDISC. L.J. 165, 169 (1993) (differentiating between information collection with the potential for disclosure and "pure collection," for which disclosure is theoretically impossible).

199. *See id.* Fall theorizes that if it was possible to collect information on an individual that could not possibly be linked back to the individual, it is then impossible to disclose information about that individual and no invasion can take place. *Id.*

200. *See* McClurg, *supra* note 179, at 1007; RESTATEMENT (SECOND) OF TORTS § 652A cmt. (AM. LAW INST. 1977).

201. Post, *supra* note 190, at 959.

202. *See* Hsiao-Ying Huang & Masooda Bashir, *Is Privacy a Human Right? An Empirical Examination in a Global Context*, THIRTEENTH ANN. CONF. ON PRIVACY, SECURITY AND TRUST, 77 (2015).

203. *See* Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV.

doctrine in American tort has evolved into a defendant-friendly doctrine.[204] Consider, for example, *The Florida Star v. B.J.F.*, in which the U.S. Supreme Court found that punishment for disclosure of private facts (such as disclosure of a sexual abuse victim's identity) might only be constitutionally imposed where doing so is narrowly tailored to achieving "a state interest of the highest order."[205] As such, courts have gradually watered down protections at tort for invasions of privacy in the United States, in some cases arguably to the extent that there is very little left of the doctrine's teeth.[206]

A tidy summation of the overarching development of privacy law in the United States can be found in Maureen Ohlhausen and Alexander Okuliar's recent article in the American Bar Association's Antitrust Law Journal:

> Personal privacy laws in the United States have evolved in three phases during the modern era. The first period began with Warren and Brandeis and lasted until about the Second World War. This period exhibited a growing recognition of personal privacy and the attempt to protect privacy by extending existing doctrines of law . . . . Next came the post-War era and the early computer age, in which federal laws developed to augment state and common laws and help reconcile the growing commercialization of personal data and the need to protect the individual; and finally, the modern era that began with commercial use of the Internet in the 1990s and in which we now find ourselves.[207]

Having thus established that the American common law provides at least some quantum of protections for individual privacy at tort, it simply must be mentioned that only one of the four commonly recognized privacy torts is relevant to this inquiry. To begin with, suits

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1283, 1291 (2000).

204. *See, e.g.*, Bisbee v. John C. Conover Agency, Inc., 452 A.2d 689, 693 (N.J. Super. Ct. App. Div. 1982) (holding that an appropriation claim may only succeed where the defendant acted with a commercial purpose). *See also* McClurg, *supra* note 179, at 1002.

205. 491 U.S. 524, 541 (1989); *see also* Sorrell v. IMS Health Inc., 564 U.S. 552, 574 (2011) (reasoning that a state law banning the sale of indefinable medical information by health providers burdens the First Amendment as it is a content-based restriction on free expression).

206. *See* McClurg, *supra* note 179, at 1002.

207. Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right [Approach] to Privacy*, 80 ANTITRUST L.J. 121, 125 (2015).

levied against government for intrusion on the individual's seclusion are normally predicated upon an allegation of unreasonable search and seizure, which errs more to the criminal procedure aspects of BWC usage and thus outside the scope of this inquiry.[208] Further, false-light and appropriate torts are irrelevant to the issues involved herein. Therefore, it remains to be seen whether an individual has an expectation of privacy in their medical emergencies in public, such that the dissemination of that information would constitute a disclosure of embarrassing private facts tort and thus *per se* provide the necessary privacy expectation to exempt such information from public records requests.

D. *Privacy in Public*

Author Jonathan Franzen, whether intentionally or otherwise, provided possibly the best summation of the state of the law regarding individual privacy rights in public in his short story *Imperial Bedroom*:

> If privacy depends on an expectation of invisibility, the expectation of *visibility* is what defines a public space. My "sense of privacy" functions to keep the public out of the private *and* to keep the private out of the public. A kind of mental Border collie yelps in distress when I feel that the line between the two has been breached.[209]

The above excerpt highlights a very important distinction in the privacy torts: "[o]n the public street, or in any other public place, the [individual] has no right to be alone."[210] Indeed, it has become an all but ubiquitous rule in American tort law that while an individual does not automatically make information public by presenting it in a public place,[211] that individual does lose their right of action with respect to that information by so presenting it.[212] Interestingly, courts have applied this general rule even in circumstances wherein the information involved was, in spite of its public display, highly intimate in nature.[213]

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208. *See* Phillip E. Hassman, Annotation, *State or Municipal Liability for Invasion of Privacy*, 87 A.L.R.3d 145, § 2[a] (2016).

209. JONATHAN FRANZEN, *How to Be Alone*, *in* IMPERIAL BEDROOM 48–49 (Picador ed., 2003).

210. Prosser, *supra* note 191, at 391.

211. *See, e.g.*, Nader v. Gen. Motors Corp., 255 N.E.2d 765, 771 (N.Y. 1970).

212. RESTATEMENT (SECOND) OF TORTS § 652D cmt. (AM. LAW INST. 1977).

213. *See, e.g.*, Tagouma v. Investigative Consultant Servs., Inc., 4 A.3d 170, 176-77 (Pa. Super. Ct. 2010) (finding that a defendant who prays in public has no legitimate expectation of privacy in public).

Though courts have tended to adhere to this restrictive definition of privacy, modern academics tend to argue for a much more expansive definition of privacy that would tend to protect against intrusion into—and giving publicity to—information presented, whether intentionally or not, in public spaces.[214] Professor Andrew J. McClurg, for instance, argues that by making a right of privacy contingent upon whether or not one is in a public place, courts lend a certain primacy to the geographical location of the individual in order to define the scope of his or her rights at tort.[215] This geographical primacy, McClurg argues, seems to fly in the face of the actual subjective expectations of individuals, who, in fact, *do* expect to have some measure of privacy in public.[216] By contrast, other commentators have noted that, among the justifications for not recognizing the right of privacy in public places, such an expansion of privacy rights actually protects the rights of all others.[217]

In spite of the myriad academic arguments in favor of expanding tort liability for invasion of privacy into public spaces, courts have, thus far, been disinclined to acquiesce. As such, a *per se* theory of privacy interest is unlikely to provide a LEA with the weighty interest needed to counter the public's right to know under state sunshine laws. However, the exploration is by no means at an end.

E. *Privacy in Medical Treatment*

The medical community defines privacy very differently than the legal community.[218] However, in spite of this difference in

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214. *See* ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967) ("Privacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated . . . ."); McClurg, *supra* note 179, at 1029 (arguing that the definition of privacy traditionally accepted by courts "is too restrictive"); Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 280–81 (1974) ("[T]he proposed definition is expressed as 'control over who can sense us.'"). *But see* Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 426–28 (1980) (rejecting a control-based definition of privacy in favor of a negative—as opposed to positive—freedom from intrusion).

215. *See* McClurg, *supra* note 179, at 1028–29.

216. *Id.* at 1026.

217. Helen Nissenbaum, *Protecting Privacy in an Information Age: The Problem of Privacy in Public*, 17 LAW & PHIL. 559, 572 (1998). It should be noted that Nissenbaum suggests this point, among others, merely to demonstrate possible reasons why, thus far, the right to privacy has not been extended into public places. *Id.* at 578–79. Nissenbaum is among the commentators who argue *in favor* of a right to privacy in public. *Id.* at 596.

218. *Compare Glossary: Emergency Medicine*, AMA J. ETHICS, http://journalofethics.

lexicographical opinion, the two fields do converge on at least one very important point: individual privacy is a crucial consideration.[219] This concern with privacy in medicine is, perhaps, meted out in the American public at large, fifty-five percent of whom are "very sensitive" about their health information, with only five percent saying they are not sensitive at all about it.[220] The emphatic concern with privacy in personally identifiable medical information stems from the notion that patients, knowing that their information will be private, safe, and secure, will be more open with their physicians.[221] "This in turn facilitates efficient and effective diagnosis, prognosis, and treatment of illness and disease."[222] Indeed, aside from such practical considerations, a care for patient privacy is a long-held tradition in the medical community, even earning a cameo in the Hippocratic oath.[223] At the federal level, the United States Department of Health and Human Services promulgated what is colloquially known as the HIPAA Privacy Rule[224] under the authority of the Health Insurance Portability and

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ama-assn.org/2003/02/glos1-0302.html (last visited May 1, 2017) (defining privacy as "a patient's right to have present during the clinical encounter only those involved in his or her medical care"), *and* Susannah Fox, *Informatics for Consumer Health: Privacy, Security and Confidentiality*, PEW RES. CTR. (Nov. 6, 2009), http://www.pewinternet.org/2009/11/06/informatics-for-consumer-health-privacy-security-and-confidentiality/ (defining privacy as "an individual's interest in protecting his or her individually identifiable health information and the corresponding obligation of those persons and entities accessing, using, or disclosing that information to respect those interests through fair information practices"), *with* RESTATEMENT (SECOND) OF TORTS § 652A cmt. (AM. LAW INST. 1977) ("The right of privacy has been defined as the right to be let alone.").

219. *See, e.g.*, Faith Lagay, *Resuscitating Privacy in Emergency Settings: AMA Policy Requires Patients' Consent Before Filming*, AMA J. ETHICS, http://journalofethics.ama-assn.org/2003/02/pfor1-0302.html (last visited May 1, 2017).

220. Elise Hu, *The Data You're OK Sharing and What You Don't Want Others to See*, NPR: ALL TECH CONSIDERED (Nov. 12, 2014, 10:13 AM), http://www.npr.org/blogs/alltechconsidered/2014/11/12/ 363320931/the-data-youre-ok-sharing-and-what-you-dont-want-others-to-see; Mary Madden, *Public Perceptions of Privacy and Security in the Post-Snowden Era*, PEW RES. CTR. (Nov. 12, 2014), http://www.pewinternet.org/2014/11/12/public-privacy-perceptions/. *But see* Scott Hensley, *A Worry in Theory, Medical Data Privacy Draws a Yawn in Practice*, NPR (Nov. 20, 2014, 11:25 AM), http://www.npr.org/sections/health-shots/2014/11/20/364059879/a-worry-in-theory-medical-data-privacy-draws-a-yawn.

221. Angus H. Ferguson, *The Evolution of Confidentiality in the United Kingdom and the West*, AMA J. ETHICS, http://journalofethics.ama-assn.org/2012/09/mhst1-1209.html (last visited May 1, 2017); *see also The Importance of Medical Privacy*, PRIVACILLA.ORG (Feb. 18, 2001), http://www.privacilla.org/business/medical/medicalimportance.html.

222. Ferguson, *supra* note 221.

223. Nat'l Lib. of Med., *Greek Medicine*, NAT'L INSTS. OF HEALTH (Sept. 16, 2002) https://www.nlm.nih.gov/hmd/greek/greek_oath.html ("Whatever I see or hear in the lives of my patients . . . I will keep secret, as considering all such things to be private.").

224. *See generally* 45 C.F.R. §§ 164.500–164.534 (2016).

Accountability Act of 1996 (HIPAA).[225] The HIPAA Privacy Rule, which is applicable only to health care providers, health insurers, and health care clearinghouses (collectively, "covered entities"),[226] regulates how, when, why, and to whom the covered entities may disseminate patients' "individually identifiable health information."[227] Notably, "the provisions of HIPAA are *only* applicable to covered entities," thus excluding LEAs from HIPAA's ambit.[228] Further, regardless of the extent the reach of the various state analogues to the HIPAA privacy doctrine, each state has its own, albeit often differing, variant on the basic general rule: "a person's medical records are personal and private."[229]

Indeed, "[s]tates have traditionally been the primary regulators of health care information."[230] While only ten state constitutions provide explicit protections for an individual's health data,[231] most states recognize a common law tort for invasion of privacy where health care providers disseminate such data absent consent, though, it must be noted that plaintiff successes are difficult as courts hold plaintiffs in these cases to a high standard.[232] Therefore, to the extent that each state has undertaken to protect personally identifiable health information, they have thereby intrinsically (and often expressly) made

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225. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

226. 45 C.F.R. § 164.500; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH & HUMAN SERVS., SUMMARY OF THE HIPAA PRIVACY RULE 2–3 (2003), https://www.hhs.gov/sites/default/files/privacysummary.pdf.

227. OFFICE FOR CIVIL RIGHTS, *supra* note 226, at 3–10. The rule defines "individually identifiable health information" as:

> information, including demographic data, that relates to: the individual's past, present or future physical or mental health or condition, the provision of health care to the individual, or the past, present, or future payment for the provision of health care to the individual, and that identifies the individual or for which there is a reasonable basis to believe can be used to identify the individual.

Id. at 4.

228. Hill v. E. Baton Rouge Par. Dep't of Emergency Med. Servs., 925 So. 2d 17, 25 (La. Ct. App. 2005) (Guidry, J., dissenting) (emphasis added).

229. THOMSON REUTERS, *Medical Records*, *in* 50 STATE STATUTORY SURVEYS: CIVIL LAWS: PRIVACY (2016), Westlaw 0020 Surveys 24.

230. Joy L. Pritts, *Altered States: State Health Privacy Laws and the Impact of the Federal Health Privacy Rule*, 2 YALE J. HEALTH POL'Y L. & ETHICS 327, 347 (2002).

231. *Privacy Protections in State Constitutions*, NAT'L CONF. OF ST. LEGISLATURES (May 5, 2015), http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx.

232. *See* Pritts, *supra* note 230, at 330–31.

a determination that individuals have a vested, significant interest in patient privacy.

III. ANALYSIS

To the extent that AB 66 would have proscribed LEAs and their agents from using BWCs during ambulance calls where the subject of the video is not involved in criminal activity, it would have been unnecessarily duplicative because, under the traditional balancing test set forth for determining whether public records are subject to release to the public, such videos are already likely to be exempt. Furthermore, in light of the overarching policy goals of using BWCs, generally, such a rule would be overly broad and potentially contrary to the purpose of BWC usage. Therefore, the multitude of states currently considering whether and to what extent to regulate BWC usage by LEAs should not consider adding such a provision.

A. *The Likes of Section 4(a)(2)(B) are Unnecessarily Duplicative*

While the over-arching purpose of AB 66 was to establish a standardized set of rules regarding the use of BWCs, which would "prevent these cameras from becoming abused in a way that undermines their original intent – reestablishing trust between law enforcement and communities of color,"[233] section 4(a)(2)(B), with which we are concerned, was meant to protect individual privacy.[234] To be sure, protecting the individual privacy of persons subject to BWC recordings is an important consideration, as numerous commentators have posited.[235] However, such a provision is entirely unnecessary to protect the privacy of those recorded as extant state laws *already* do so.

As discussed at length earlier,[236] the states have mostly molded their sunshine laws similarly to the federal FOIA.[237] Given this, state sunshine laws tend to offer significant protections to individuals whose personal information is contained within an otherwise mandatorily disclosed record where disclosure of the record would constitute an unwarranted invasion of personal privacy. Only a very small number of states have thus far refused to offer such protections.[238] Where

233. Press Release, Assemb. Shirley Weber, Public Safety Committee Passes Weber Body-Camera Bill (Apr. 15, 2015), https://a79.asmdc.org/press-release/public-safety-committee-passes-weber-body-camera-bill.
234. *Cf. Rewrite Body Camera Bill*, *supra* note 32.
235. *E.g.*, STANLEY, *supra* note 7, at 5.
236. *See supra* Section I.B.3.
237. Nadel, *supra* note 144, § 2a.
238. *E.g.*, Magic Valley Newspapers, Inc. v. Magic Valley Reg'l Med. Ctr., 59 P.3d 314,

disclosing a particular record may result in an invasion of personal privacy, courts tend to balance the individual's interest against the public interest in access to the information to determine whether the record should be released.[239]

To begin the balancing test analysis, it should be noted that under what this Note has termed the *per se* theory, articulated earlier,[240] LEA BWC footage is unlikely to be exempted from disclosure. Under the *per se* theory, courts find a privacy interest where disclosing the relevant record would constitute the "disclosure of private facts" tort at the state's common law.[241] However, in this context, the *per se* rule is likely unavailing. Here, the proscription is one involving ambulance calls where the subject of the recording is not involved in a crime. This necessarily would have proscribed BWC recording activity in public, as the bill would already have proscribed recording in homes absent a warrant or some exigent circumstance.[242] However, courts are at best reluctant to recognize a "disclosure of private facts" tort where the facts themselves are in a public—as opposed to private—space.[243] As such, because the BWC video would necessarily involve incidents *in public*, it is unlikely that the release thereof would, in itself, make out the necessary elements of a "disclosure of private facts" claim.[244] Because the *per se* theory does not present a cognizable privacy interest to balance against the public's interest in access to the footage, the footage would likely be disclosed under this theory.[245] As such, if looked at *only through this lens*, a provision such as what is found in section 4(a)(2)(B) may seem appealing to privacy advocates.

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316 (Idaho 2002).

239. Nadel, *supra* note 144, § 2a.

240. *See supra* note 169 and accompanying text.

241. *See* Perkins v. Freedom of Info. Comm'n, 635 A.2d 783, 788–89 (Conn. 1993).

242. Assemb. B. No. 66, Reg. Sess. § 4(a)(6) (Cal. 2015); *see also* LARRY M. EIG, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPALS AND RECENT TRENDS 13–14 n.77 (2011), https://fas.org/sgp/crs/misc/97-589.pdf (noting that statutory provisions should be read so that each provision bears its own meaning, thus not rendering any provision superfluous).

243. *See, e.g.*, Green v. Chi. Tribune Co., 675 N.E.2d 249, 252 (Ill. App. Ct. 1996) (distinguishing between conversation in a public versus private space in a "disclosure of private facts" claim).

244. This does not even consider the ramifications of issues such as qualified immunity, which in itself might make a private right of action as against a disclosing LEA near impossible. This merely considers whether the elements of the tort itself are met for purposes of determining whether the *per se* theory might successfully present the privacy interest necessary for a balancing test.

245. *See* Multi AG Media LLC v. Dep't of Agric., 515 F.3d 1224, 1229 (D.C. Cir. 2008).

The analysis, however, does not end there. The three factors to which courts look—and which seem, in their aggregate, to constitute the *per se* theory—are, as noted earlier, (1) "whether disclosure would 'result in personal embarrassment to an individual of normal sensibilities'"; (2) "whether the materials sought contain 'intimate details' of a 'highly personal nature'"; and (3) "whether 'the same information is available from other sources.'"[246] When considering each factor in turn, it becomes clear that BWC footage of medical emergencies in public *does* constitute a cognizable privacy interest for purposes of this balancing test.

As to the first and second factors, such information plainly constitutes the kind of intimate details of a highly personal nature that, if disclosed to the public, would result in embarrassment to a person of normal sensibilities. As noted earlier, the majority of Americans are "very sensitive" about their personally identifiable health care information, and nearly all Americans are *at least* concerned with it.[247] Furthermore, courts have reasoned that even where medical emergencies occur in public, information about them is of such a nature that is it intrinsically embarrassing to the subject, and thus the subject has some privacy interest therein.[248] One court further noted that such information was implicitly "an intimate detail of a person's private life."[249] Further, the states and the federal government have recognized a privacy interest with respect to medically indefinable health information—which BWC footage of a medical emergency in public would almost certainly constitute—because, in part, of the highly intimate and sensitive nature of the information.

Finally, with respect to the third element, the information sought is conceivably available from myriad other sources, thus weighing in favor of finding a sufficient privacy interest. First, the information is, ostensibly, in full view of the public. As such, there is nothing to stop members of the public from making their own audio or visual record of the incident and disseminating it as they see fit. Further, word of mouth dissemination by eyewitnesses will inform the local public of the goings on with greater rapidity—if not in such accurate detail—than the BWC footage. Finally, a video record taken by an officer using a BWC does not differ so greatly in this context from the officer's written report, at least to the extent that it records the identity of the subjects

246. Globe Newspaper Co. v. Police Comm'r, 648 N.E.2d 419, 425 (Mass. 1995) (citations omitted).
247. Madden, *supra* note 220.
248. *See* Larry S. Baker, P.C. v. City of Westland, 627 N.W.2d 27, 30 (Mich. Ct. App. 2001).
249. *Id.* at 30.

and the underlying facts of the incident.[250] Thus, to the extent that an officer's written report may or may not be disclosed through a sunshine law request, the information is available to the public through that route.

Moreover, it seems a firmly established general rule, with regard to this balancing test, that "the right of privacy . . . is to be determined by the norm of the ordinary man."[251] Given that, as Professor McClurg argues, the actual subjective expectation of the normal individual is that they *will* in fact have some extent of privacy in public;[252] and given that the vast majority of Americans are concerned with the privacy of personally identifiable health information,[253] there is certainly a more than *de minimis* expectation of privacy involved here.[254]

Thus, it is firmly established that there is a cognizable privacy interest for purposes of the balancing test. But what of the public's interest in disclosure? Broadly speaking, BWCs are being put into service by LEAs nationwide to enhance transparency in policing, hold officers accountable for engaging in unnecessary use of force (or other impropriety), and to protect those same officers from false allegations of unnecessary use of force (or other impropriety), thereby reducing the officers' and LEAs' liability.[255] Indeed, these goals are specifically enumerated in active BWC policies[256] and in attempts to legislatively regulate BWC usage.[257] While these are certainly substantial public interests, they do not rise to the level necessary to defeat the aforementioned privacy interests. As in *Marine Shale Processors* and *Southern Illinoisian*, where the courts found that the privacy interests involved in personally identifiable health information outweighed such

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250. *See* McClurg, *supra* note 179, at 1025.
251. Nadel, *supra* note 144, § 2[a].
252. *See* McClurg, *supra* note 179, at 1026.
253. Madden, *supra* note 220.
254. *See* Multi AG Media LLC v. Dep't of Agric., 515 F.3d 1224, 1229–30 (D.C. Cir. 2008).
255. Feeney, *supra* note 10, at 1; Mateescu et al., *supra* note 50, at 1–2; Gene King, *Thoughts About Body Worn Cameras*, LAW ENF'T ACTION F. NEWSLETTER, Dec. 2014, at 1–2; Pernell Witherspoon, *Police Body Cameras in Missouri: Good or Bad Policy? An Academic Viewpoint Seen Through the Lens of a Former Law Enforcement Official*, MO. POL'Y J., Summer/Fall 2014, at 35, 40; Jonathan M. Smith, Opinion, *Police Unions Must Not Block Reform*, N.Y. TIMES (May 29, 2015), http://www.nytimes.com/2015/05/30/opinion/police-unions-must-not-block-reform.html?_r=0.
256. *See e.g.*, ANAHEIM POLICY, *supra* note 87, § 451.1; ORLANDO POLICY, *supra* note 134, at 1; RICHMOND CTY. POLICY, *supra* note 82, at 1.
257. *See, e.g.*, Assemb. B. 66, 2015-2016 Reg. Sess. § 1(a)–(b) (Cal. 2015).

a significant public interest as a possible cancer hotspot,[258] it is likely that courts would find that such information should be protected even in light of an interest in LEA accountability.

Furthermore, it should be noted that any asserted public interest here would necessarily be circular logic. To wit, a party requesting disclosure must argue that the public's interest in disclosure is police accountability, which—given that LEAs are, in function, the coercive branch of government[259]—translates to governmental transparency. While this is an incredibly important interest, the argument against individual privacy essentially reduces to "the public's interest in disclosure is that the public has an interest in disclosure." Such circular reasoning is unlikely to prevail.[260]

Because there is a substantial privacy interest involved in recording medical emergencies in public, and because the public's interest in disclosure of such footage is comparatively small, courts are unlikely to allow such footage to be disclosed—either at all or unedited—via sunshine law requests. Therefore, provisions like section 4(a)(2)(B) are rendered unnecessary and thereby wholly duplicative, providing no extra protections to personal privacy. Moreover, states should not consider enacting similar provisions in their own BWC legislation.

Notably, this discussion may eventually prove, in large part, to be merely academic. Many states are currently considering laws that would explicitly exempt BWC footage from public disclosure.[261] As such, *any* footage, let alone medical emergencies in public, would not be subject to release. Thus, such laws, if passed, would render the likes of section 4(a)(2)(B) all the more useless.

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258. Marine Shale Processers, Inc. v. State, 572 So. 2d 280, 284 (La. Ct. App. 1990); S. Illinoisian v. Dep't of Pub. Health, 747 N.E.3d 401, 409 (Ill. Ct. App. 2001).

259. *See* Markus Jachtenfuchs, *The Monopoly of Legitimate Force: Denationalization, or Business as Usual*, 13 EURO. REV. 37, 38 (2005) ("The monopoly of force has developed into two distinct organizational forms: the military and the police."). *But see* Duane Rudolph, *How Violence Killed an American Labor Union*, 67 RUTGERS UNIV. L. REV. 1407, 1410–13 (2015) (discussing the judicial branch as inherently employing some type of violence in enforcing the law).

260. *See* 1 MORRIS R. COHEN & FELIX S. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 435 (1951) ("The realistic judge . . . will not fool himself or anyone else by basing decisions upon circular reasoning . . . Rather, he will frankly assess the conflicting human values that are opposed in every controversy, . . . and consign to Von Jhering's heaven of legal concepts all attorneys whose only skill is that of the conceptual acrobat.").

261. *See* Assemb. B. 2611, 2015-2016 Reg. Sess. (Cal. 2016); Breitenbach, *supra* note 173; Chokshi, *supra* note 45.

B. *The Likes of Section 4(a)(2)(B) are Overbroad in Light of the Overarching Purposes of BWC Use*

The same public interest that was insufficient to outweigh the risk of unwarranted invasions of individual privacy with respect to public records requests weighs heavily against states considering and adopting provisions such as section 4(a)(2)(B).[262] Since the year 2005, thousands of people—mostly unarmed—have been fatally shot by police in the United States.[263] In 2015 alone, just fewer than 1000 Americans were fatally shot by police, with 963 in 2016 and 421 in 2017 as of June.[264] As of 2015, fifty-four of the officers involved in these shootings were, rightly or wrongly, prosecuted.[265] As Kindy and Kelly's article points out, one of the common threads in the prosecution of police involved in fatal shootings was the presence of video footage.[266] While this explication may seem like panegyric on the use of BWCs and a condemnation of police, that is not the intent. Rather, it exemplifies the real-world context in which BWC policies exist; they do not exist in a vacuum, and nor should the legislation that regulates them.

If legislators are serious about using BWCs for purposes of increasing LEA accountability, protecting citizens from wrongful use of force, and protecting police from false allegations of wrongful use of force, then they must tailor any legislation on the issue to that purpose. As has been argued by several commentators, there must be a balance between recording as much as possible and placing *reasonable* limits on potential invasions of privacy.[267] It is, perhaps, understandable that legislators might think that proscribing Event mode activation during police responses to medical emergencies strikes such a balance, but does it truly?

To answer this question, consider the City of New Orleans. In 2014, there were 447,467 calls for service to the police.[268] Of those calls, 6050

262. *See, e.g.*, *Marine Shale Processers, Inc.*, 572 So. 2d at 284.
263. Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/.
264. *Database: Police Shootings*, WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings-2017/ (last visited May 1, 2017).
265. Kindy & Kelly, *supra* note 263.
266. *Id.*
267. *See, e.g.*, STANLEY, *supra* note 7, at 3.
268. *Calls for Service 2014*, CITY OF NEW ORLEANS OPEN DATA, https://data.nola.gov/Public-Safety-and-Preparedness/Calls-for-Service-2014/jsyu-nz5r (last updated June 1, 2017).

were classified as "Medical," with a further 700 hit-and-run incidents involving injuries and/or fatalities and 4150 automobile accidents involving injuries and/or fatalities.[269] All told, these responses account for nearly 2.5% of all calls for service in the City during 2014.[270] Even excluding the hit and run tally, which would have ostensibly involved the injured parties in some criminal activity (as a victim), that is still more than 2% of all calls for service.[271] And, lest it be overlooked, use of force incidents *do* happen during these calls. Take, for example, the fatal shooting of Georgia's Jack Lamar Roberson by police in 2013.[272] Roberson's fiancée phoned 9-1-1 for an ambulance, believing that Roberson was acting erratically do to an accidental medication overdose.[273] The officers involved claim that Roberson became combative and lunged at them with a weapon, thus they shot him.[274] In another incident, Kenneth Chamberlain Sr. was shot twice in his chest inside of his own home.[275] For reasons not known, Mr. Chamberlain had activated his medical alert pendant and when he was unresponsive to the call center technician, police and an ambulance were dispatched.[276] An hour later, Chamberlain lie dead and much of the incident was caught on film.[277]

In light of the public's interest in ensuring the legitimacy of use of force incidents—or claims of illegitimate uses of force—state legislatures should not bar LEAs from entering Event mode during medical emergency responses. Other, less broad, mechanisms can be employed to protect individual privacy, such as exempting such footage from public records disclosure, whether by judicial interpretation of sunshine laws or by explicit exemption through legislative action;[278] redacting personally identifiable information from BWC video involving medical emergencies in public; or simply requiring that, prior to

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269. *Id.*
270. *See id.*
271. *See id.*
272. Aviva Shen, *Man's Family Says They Called 911 for Paramedics, But Police Showed Up and Shot Him Instead*, THINKPROGRESS (Oct. 8, 2013), http://thinkprogress.org/justice/2013/10/08/2748561/police-kill-man-after-ambulance-call/.
273. *Id.*
274. *Id.*
275. Michael Powell, *'Officers, Why Do You Have Your Guns Out?'*, N.Y. TIMES (Mar. 5, 2012), http://www.nytimes.com/2012/03/06/nyregion/fatal-shooting-of-ex-marine-by-white-plains-police-raises-questions.html?_r=0.
276. *Id.*
277. *Id.* A grand jury, having considered the video, eventually cleared the officers involved of criminal wrong doing. *See* Rose Arce & Soledad O'Brien, *Police Officer Cleared in Shooting Death of Ailing Veteran in New York*, CNN (May 4, 2012, 6:11 AM), http://www.cnn.com/2012/05/03/justice/new-york-chamberlain-death/.
278. *See* discussion *supra* Section III.A.

disclosure, the subjects of such videos *consent* to the disclosure of such portions of the footage that potentially constitute an invasion of their privacy.[279]

Moreover, it must be up to the LEAs themselves, who are more qualified and experienced with *local* law enforcement necessities, to determine the outer reaches of required and permissive BWC use. Though statewide minimum standards of conduct and operation are, indeed, helpful and necessary, in order for the overarching goals of BWC use to be most effectively and efficiently met, policies and procedures need to be informed by the particular exigencies and circumstances of the LEA and the area it patrols.[280] Indeed, as demonstrated above, many LEAs have already decided that such BWC use is not appropriate and have, therefore, barred it in their individual BWC policies and procedures.[281] Such localized means are currently being employed in the State of New Jersey, for example, where former Acting Attorney General John Hoffman has ordered that all law enforcement officers using BWCs must cease recording when a person seeking emergency medical aid requests, barring a policy to the contrary adopted by the agency itself.[282]

As an ancillary note, it should be considered that there has been significant discussion inside the medical community about the pros and cons of BWC use by physicians during patient treatment.[283] Some commentators argue that using BWCs could simultaneously decrease—or at least make more efficient the adjudication of—claims for medical malpractice and increase the quality of care for patients.[284] If such is the case, the same could, potentially, be true of emergency medical service provision during response to 9-1-1 calls. While this argument is truly one for medical professionals to have, it should still be considered, if only marginally, by state legislatures considering whether to proscribe BWC use during medical emergency responses in public.

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279. *See supra* Section II.B.3.

280. *See* Feeney, *supra* note 10, at 7–8.

281. *See supra* Section II.B.2.

282. Directive from John J. Hoffman, Acting N.J Att'y Gen., Attorney General Law Enforcement Directive No. 2015-1, at 13 (July 28, 2015), http://www.nj.gov/oag/dcj/agguide/directives/2015-1_BWC.pdf.

283. *See, e.g.*, Jeremy Brown, *The Case for Body Cameras: Good for Doctors—and Their Patients*, MEDPAGE TODAY: EMERGENCY PHYSICIANS MONTHLY (Mar. 16, 2015), http://www.medpagetoday.com/Blogs/EPMonthly/50492; William B. Millard, *Body Cameras in the Emergency Department*, ANNALS OF EMERGENCY MED., Oct. 2015, at 17A, http://www.annemergmed.com/article/S0196-0644(15)00582-X/pdf.

284. *See* Brown, *supra* note 283.

IV. CONCLUSION

The current climate in the United States, which involves a crisis of confidence in local law enforcement, demands that states and LEAs take responsible measures to protect the quality and legitimacy of law enforcement. The use of BWCs by police has arisen as the seemingly most favored prospect for the type of reform needed to accomplish this task. Whether or not it is true that BWCs will, in fact, improve relations between LEAs, officers, and the communities they serve will, surely, become clear over time. However, if BWCs are to be the solution, then it is imperative that LEAs have the right policies and procedures in place to ensure maximal efficacy.

In recognition of this principle, many states, including California, have begun to consider how best to regulate the use of BWCs in order to strike a balance between governmental accountability and individual privacy.[285] However, the desire to protect individual privacy can go too far, such to the extent that it can begin to encroach upon the intended purpose of BWCs, thereby rendering their use toothless. A blanket proscription on the use of BWCs by police while responding to medical emergencies could be just such an encroachment. Such a proscription is a wholly unnecessary and duplicative action where extant laws *already* exist to protect the privacy of the subjects of the recordings and where less restrictive means can be employed to augment those laws. Further, such a proscription is overly broad in light of the goals of BWC use, precluding police from recording during substantial portions of their calls for service—times during which use of force incidents *do* commonly occur.

This Note has argued against a blanket proscription on BWC use during police responses to medical emergencies and in favor allowing such recording to continue to be permissible under state law. However, it must be understood that this Note *has not* made a normative judgment as to whether police, in fact, *should* enter Event mode during such responses. This Note merely argues that such a decision should be left to the LEAs and the officers involved in light the particular circumstances of the community they serve.

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285. *See supra* Part II.

APPENDIX

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