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To Protect and Serve:

New Trends in State-Level Policing Reform, 2015-2016

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From the Director

National criminal justice discourse has centered heavily on policing over the past several years. Issues related to police use of force—frequently resulting in deaths—and its disproportionate application to people of color have entered into our lives and living rooms in virtual and viral ways that are unparalleled to any other time in recent history. These events have fueled longstanding concerns and outrage. Meanwhile, killings of officers in New York City, Dallas, and Baton Rouge increased fears for officer safety. In response, government stakeholders and communities have begun to seek ways to increase the public confidence in law enforcement that is critical to public safety.

There are more than 18,000 individual police departments nationwide that are governed by cities and counties, establishing local jurisdictions as the main engine of police reform efforts. Yet the landscape for reform has recently flourished well beyond local government, with President Trump's administration promising enhanced measures to support officer safety and "law and order," as well as a number of Congressional proposals that seek police reform in a variety of areas.

States, too, have begun to supplement and accelerate local action, as evidenced by the precipitous increase in the number of pieces of state legislation that were passed in 2015 and 2016. Overall, 34 states and the District of Columbia made at least 79 changes to their laws governing policing in the last two years, compared to at least 20 bills total in the prior three-year period.

The present report examines this legislative action. It documents a new direction for policing—one that is likely to build momentum as its successes become apparent. Most significantly, 31 laws establish provisions for police body-worn cameras and their related footage to protect both the public and police.

Other notable trends include laws that place limits on and improve reporting and training related to police use of force, improve crisis intervention responses and training, protect citizens who film police encounters, and improve policing practices surrounding racial profiling. Although not subject to this report, which focuses on enacted legislation, another notable trend may soon join this list: legislation was increasingly introduced to add law enforcement personnel into a state's hate crime statutes; although 13 of 14 proposed bills failed in 2016, 32 similar bills have since been introduced within the first two months of 2017.

The volume of laws enacted also represents a growing bipartisan trend toward criminal justice reform. Both traditionally "red" and "blue" states have spurred a wave of policing reform and are becoming laboratories of innovation in this arena.



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About this report

In 2015 and 2016, 34 states and the District of Columbia passed at least 79 bills, executive orders, or resolutions to change some aspect of policing policy or practice. This is significant, since policing reform is largely the province of local jurisdictions or specific police departments. In contrast, in the three years prior to the study period—between 2012 and 2014—there were few pieces of state legislation that dealt with policing.¹ In reviewing legislative activity over the last two years, the Vera Institute of Justice found that states focused reform efforts in the following three areas:

- > improving policing practices around use of force, racial profiling, and vulnerable populations;
- > documenting police operations through the increased use of body-worn cameras, enhanced protections for public recordings of police, and new requirements for maintaining and reporting data on police operations; and
- > improving accountability in instances of police use of force and misconduct cases, especially those incidents that result in death.

By providing concise summaries of representative legislation in each area, this report aims to inform policymakers and members of the public who are looking to understand state-level changes in policing policy and practice.

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Introduction

The work of law enforcement involves countless low-visibility duties that are often risky, challenging, and dangerous—including investigating alleged or suspected crimes, responding to service calls or civilian requests for assistance, or restoring and maintaining lawful order.² Over the last three years, however, members of the public have brought increased attention to incidents of police-community conflict, violence, and misconduct, sparked by several high-profile deaths of people of color, many of them unarmed, during seemingly routine police encounters.³ These incidents—many of which were captured unfiltered on video and widely disseminated—have resulted in scrutiny of police officer behavior and, in particular, have reignited a debate over the extent to which police may use deadly force against civilians.⁴ The ensuing public attention has also signaled a marked erosion in police-community relations and perceptions of police legitimacy and accountability. At the same time, killings of police officers in New York City, Dallas, and Baton Rouge increased concerns about officer safety.

Although police use of force is rare in practice, accounting for only 1.6 percent of all encounters between law enforcement and civilians, increased exposure of these incidents, as well as investigations into the practices of certain police departments, have served to highlight the disparate effect that certain incidents—especially the use of deadly force—have on racial and ethnic minorities.⁶ A number of Department of Justice reports reveal that some departments use unreasonable force during interactions with people from minority communities—as well as those who have, or are perceived to have, mental illness. The reports point to embedded structural and systemic deficiencies in these departments or their local governance, including issues with oversight, training, data collection, and organizational policies, as the main reasons why such practices have endured.⁷

Concerned that eroding public trust impedes relationship-building with the community—which is central to effective policing—localities, states, and the federal government have begun to examine ways to increase public confidence. This includes strategies to improve overall policing

While localities and police departments remain at the forefront of reform efforts, states have supplemented local action by developing a wide variety of policing legislation.

practices, particularly in relation to communities of color, and mechanisms to identify and swiftly correct unlawful, unprofessional, or unethical conduct. To this end, the House Judiciary Committee held a hearing on policing strategies on May 19, 2015, and various measures were introduced in the 114th Congress to address both use of force tactics and data collection by state and local police departments.⁸ This was on the heels of the final report of President Obama's Task Force on 21st Century Policing, which offered a set of policy recommendations focused on training, investigations, prosecutions, data collection, and information sharing.⁹ In a new administration and Congress, policing continues to garner federal attention, with President Trump's administration promising "law and order", and a number of Congressional proposals seeking reform through a variety of tacks, from ending racial profiling by federal law enforcement agencies, to deterring violence against police by requiring mandatory sentences.

With 18,000 individual police departments nationwide that are governed by cities and counties, localities and police departments themselves remain at the forefront of reform efforts. But states both red and blue have supplemented local action by developing a wide variety of policing legislation, much of which had the goal of improving police-community relations—including measures mandating enhanced police training requirements, regulating the tactics and techniques of physical force when restraining people, opening departments up to greater scrutiny, or abiding by new reporting rules when making stops or arrests. In 2015 and 2016, states enacted legislation to:

improve policing practices: States introduced enhanced use of force training, imposed certain restrictions on control and restraint tactics such as chokeholds, or convened working groups to investigate the use of

lethal force by law enforcement officers. Still other states passed laws that require mandatory or enhanced training for officers in their dealings with people suffering from mental illness or dementia. To better ensure that all groups are treated fairly and to minimize the risk of unconstitutional practices, states such as Oregon and Tennessee also enacted or enhanced racial profiling prohibitions, with some introducing requirements for increased training of law enforcement officers on implicit bias and its effect.

document police operations: To better track day-to-day patrol policies and practices, over half of states, both red and blue, either sought to explore, or mandated the use of, body-worn cameras—small video cameras that are typically attached to an officer’s clothing, helmet, or sunglasses—that can capture video and audio recordings of activities, including traffic stops, arrests, searches, interviews, interrogations, and critical incidents such as officer-involved shootings.¹⁰ Many police and other leaders believe that body cameras can potentially improve police interactions with people and communities; enhance police performance by identifying and correcting problems when they occur; and vindicate officers from false or unwarranted complaint. States also enacted laws protecting the rights of the public to digitally record law enforcement officers in the course of their duties, in some cases clarifying that it is neither a crime nor grounds for arrest or detention. To better track how and when officers use force, states such as Colorado and Texas also strengthened data and reporting requirements on officer use of force incidents, particularly those that result in injuries and fatalities.

A note about bill summaries

This report does not aim to provide an exhaustive listing or analysis of every police-related bill passed by the states in 2015 and 2016. Rather, the authors selected for inclusion here only those bills most representative of the three broad types or areas of police reform. The bill summaries in the report are for this reason organized by the type or area of reform rather than by state. (See Appendix A for a listing by state of all legislation covered in this report.) Finally, where a particular piece of legislation makes distinct changes in multiple areas (for example, Connecticut HB 7103 covers both enhancing police transparency and increasing accountability), a summary of the bill’s relevant provisions are included under each corresponding reform category.^a

^aFour bills concerning the acquisition of surplus military equipment by police departments (like Montana HB 330 (2015)) were not included in this report.

increase accountability in police use of force cases: To improve accountability in relation to police use of deadly force, several states, including Georgia, Nebraska and Utah, enacted laws to increase the independence of the investigation into these events. Common measures include protocols that require an external law enforcement agency, a special prosecutor, or an independent review board to conduct investigations into these events. Some states also required that any decision not to bring charges must be justified and publicly disclosed. Still other states undertook grand jury reform to counteract the perception by some that the grand jury process is too secretive and biased in favor of law enforcement.

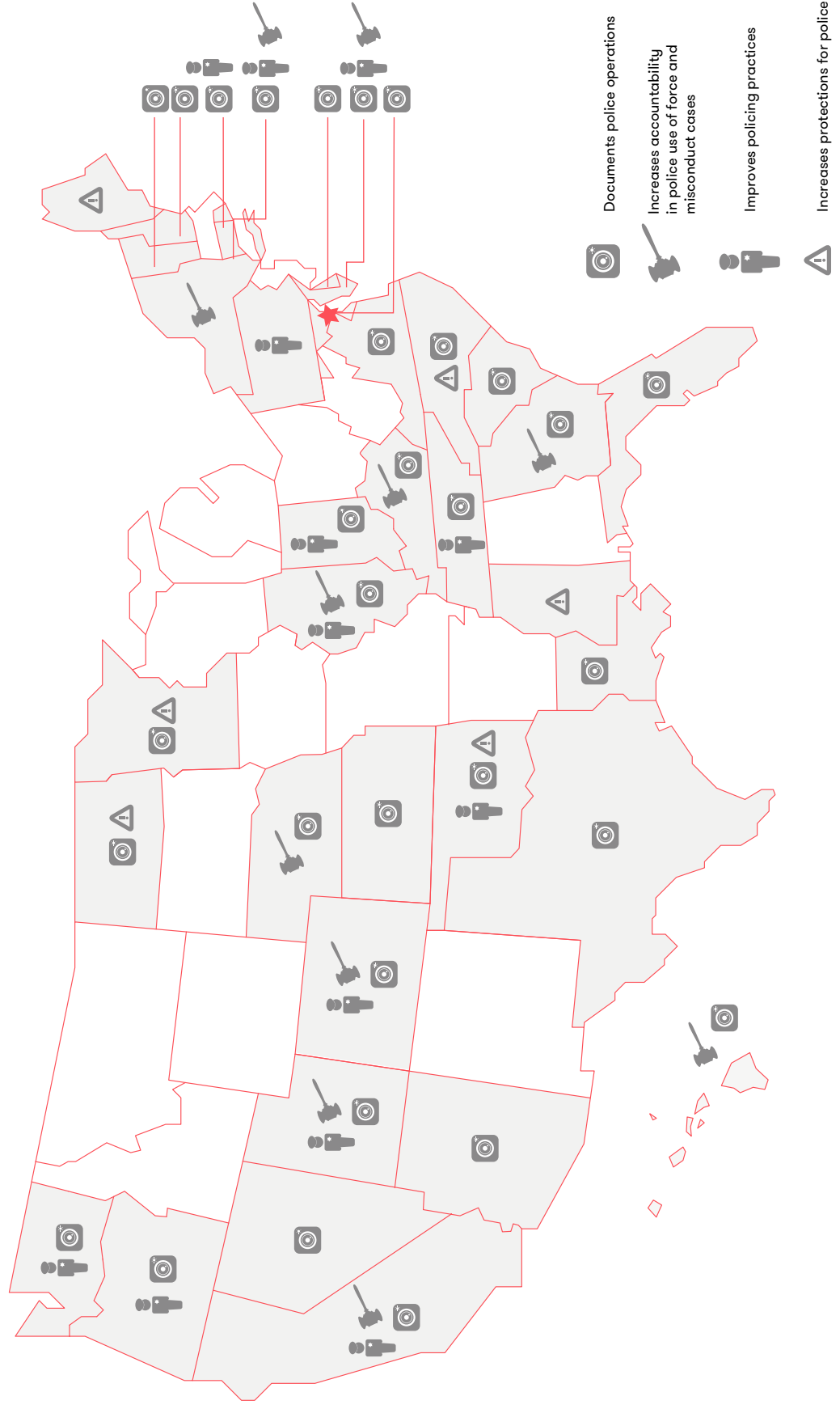
Local police reforms

Though state and federal laws have some effect on policing, police policy and practice is largely governed by municipalities and affected by local politics and the organizational culture, policies, and resources of individual law enforcement agencies. Indeed, because county sheriffs are part of, and local police departments fall under the control of, local government, local laws and departmental policies will typically have a greater effect on police practices than state laws.^o City police chiefs—or depending on jurisdiction, police commissioners, directors, or administrators—are usually appointed by mayors, whom voters often hold accountable for police performance and public safety. This decentralized control over policing leads to wide variation in on the ground practices, but also offers up certain municipalities and individual departments as laboratories of innovation in best practices. Although local measures are not the focus of this report, the following list provides a sampling of reforms in large localities.

- > In January 2015, the **Chicago** City Council passed an ordinance, SO2014-9752, expanding the city’s prohibition on profiling to include the categories of “national origin” and “gender identity.” The law also expands the definition of “peace officer” and “security personnel” who, along with police officers, are forbidden from using the listed characteristics as the sole factor in forming reasonable suspicion to stop or probable cause to arrest a person.
- > In September 2015, the **Oakland** City Council passed Ordinance 13327, which clarifies that taking a photograph or making a video or audio recording of a police officer or peace officer while in a place one has the right to be, or while the officer is in a public place, is not a violation of the law. Furthermore, the ordinance states that such activity, in and of itself, does not constitute reasonable suspicion to stop or probable cause to arrest a person.
- > In March 2015, **Philadelphia** Mayor Michael Nutter signed Executive Order 1-15, which established the Police Department Community Oversight Board. The mayor acted in response to the recommendations in the final report of the President’s Task Force on 21st Century Policing and the Justice Department’s report on deadly force policy and practice in the Philadelphia Police Department. The board, which is accountable to the mayor, was tasked with monitoring, assessing and, if necessary, assisting the police department’s progress in implementing the recommendations of the two federal reports.
- > In June 2016, more than 80 percent of **San Francisco** voters approved Proposition D, which expands the authority of the city’s Office of Citizen Complaints (OCC). Previously, the OCC was only required to investigate an incident involving a police officer if a complaint was made. With the passage of Proposition D, the OCC must investigate all incidents in which a member of the San Francisco Police Department discharges a firearm that results in death or injury.
- > In May 2015, **St. Louis** Mayor Francis Slay signed Board Bill 208CS into law establishing a Civilian Oversight Board to investigate allegations of police misconduct about the St. Louis Metropolitan Police Department from members of the public and to research and assess police policies, operations, and procedures and make findings and recommendations.

^oAs of 2008, there were 12,501 local police departments, 3,063 sheriff’s offices, 1,733 special jurisdiction agencies, and 638 other agencies, primarily county constable offices in Texas. See Brian Reeves, *Census of State and Local Law Enforcement Agencies, 2008* (Washington, DC: Bureau of Justice Statistics, 2011) 2, <https://perma.cc/TL5G-KJVR>.

Mapping police reform in the states by bill type



Improving policing practices

Law enforcement officials, elected leaders, and some members of the public have expressed concern about an atmosphere of mistrust between police and communities in the wake of high-profile fatalities stemming from police encounters.¹¹ This divide is particularly prevalent between police and many communities of color, especially in light of

In performing their duties, no decision by police officers is more consequential than the decision to use deadly or severe force.

media and government reports exposing racially targeted policing practices in certain departments.¹² Together with the prevalence of violent crime and the low rates at which officer shooting cases have resulted in arrest, members of the public have been increasingly concerned with the police practices of stopping, searching, arresting, and using force against racial minorities at rates disproportionate to their share of the population.¹³ In addition, police practices with respect to other vulnerable populations, such as people living with mental illness, have received greater attention, with calls for enhanced training in appropriate crisis intervention and de-escalation techniques to lessen the risk of harm when these people encounter law enforcement.

Use of force

In performing their duties, no decision by police officers is more consequential than the decision to use deadly or severe force—in some

cases, application of force appears to run contrary to law enforcement's primary duty to protect all civilians (and themselves) from physical and other harm. Although police actions that result in serious injury or death are rare, they are attention-getting: fatal shootings by police have made headlines with increasing frequency, amplified further by the fact that some of these incidents were captured on video.¹⁴ The proliferation of such videos and images has tarnished police-community relations and has in turn demoralized some police officers who feel misunderstood and undervalued by those they protect and/or underequipped by their own departments in terms of training and guidance.¹⁵

In an effort to counteract these negative effects, police officials have begun to explore and establish best practices regarding officer discretion on when and how to use force.¹⁶ In 2016, recognizing the need for clearer standards, the Police Executive Research Forum set forth 30 guiding principles regarding police use of force, aimed at providing officers with better tools for handling difficult situations.¹⁷ Departments and localities too have begun to implement reforms to use of force, but at the state level, at least five states—Colorado, Connecticut, Illinois, Utah and Washington—have enacted laws that either limit the use of certain types of force, such as chokeholds, or mandate or strengthen police training on the legal boundaries of justifiable force.¹⁸ Some states also require that such training include cultural sensitivity, bias-free policing, or procedural justice components. One state—Washington—convened a task force to study and recommend use of force best practices.

- > **Colorado HB 1264 (2016)** limits the use of chokeholds by police officers against civilians. Chokeholds are only allowable in extreme circumstances, such as if the officer is defending himself or herself or another person's life where there is believed to be an imminent use of deadly force or infliction of serious bodily injury, or when deadly force is otherwise authorized.
- > **Connecticut HB 7103 (2015)** requires police training programs to cover the use of physical force, cultural sensitivity, and bias-free policing.
- > **Illinois SB 1304 (2015)** prohibits the use of chokeholds. The act also requires that the Illinois Law Enforcement Training Standards Board expand its curriculum to cover courses on arrest and control tactics, constitutional and proper use of law enforcement authority, procedural justice, human rights, and implicit bias.

- > **Utah HB 355 (2016)** authorizes the attorney general (AG) to establish a training center and provide resources to law enforcement officers regarding lawful use of force. The AG must provide legal and practical training and must make available statewide training and other information on this issue.
- > **Washington HB 2908 (2016)** creates the joint legislative task force on use of deadly force by police officers. The law directs the task force to conduct a national scan of laws, practices, and training programs regarding the use of deadly force; review current policies, practices, and tools used by or available to law enforcement as an alternative to lethal uses of force, including Tasers and other nonlethal weapons; and recommend best practices to reduce the number of violent interactions between law enforcement officers and members of the public.

Profiling

A growing body of research shows that racial and ethnic minorities are disproportionately affected by certain police practices—including traffic and pedestrian stops, vehicle and person searches, and drug arrests.¹⁹ Although many of these studies strongly suggest that race is a consistent predictor of outcomes in certain police-civilian interactions, there remains some debate around how to interpret these data and whether they can be used to determine if a pattern of race discrimination exists.²⁰ Though the basis for such patterns in police practices merit further study, they have nevertheless caused concern among some in the public (and many police departments alike) that race-based decision-making among police is common and reflects racial prejudice motivated by implicit or explicit bias, whether by individual police officers or departments as a whole.²¹ The issue of racial profiling in policing has, in particular, provoked frustration among black, Latino, and Muslim communities, which feel that their members are often unfairly targeted or unjustly placed under suspicion. Years of excessive stops, citations, and arrests of black people in Ferguson, Missouri, for example, fueled the public's outcry after the police killing of Michael Brown.²²

Concerned that police and communities may be divided by police-initiated action that relies on race, ethnicity, national origin, religion, or gender identity, rather than a civilian's illegal actions, several state legislatures, including Colorado and Tennessee, passed laws aimed

Defining “use of force”

During 2002—the latest year for which these data were collected by the Bureau of Justice Statistics—the rate of complaints regarding use of force in departments with 100 or more sworn officers was 6.6 per 100 officers.^a Of those complaints, only 8 percent had enough evidence to prove that an officer committed any offense.^b Although most agencies keep local data on such complaints, there is no national database that demonstrates how frequently police officers engage in the use of force or how many of these incidents are deemed to be “excessive.”

Indeed, what justifies the use of force or determines its excessiveness is highly subjective and the definition of “use of force” is itself ambiguous. Although the International Association of Chiefs of Police describes the use of force as the “amount of effort required by police to compel compliance by an unwilling subject,” the National Institute of Justice (NIJ) contends that there is no universally accepted definition for the term.^c

In general, the use of force is recognized as an action that members of law enforcement take to protect themselves or others in response to harm or the threat of harm. Individual agencies set the standard for their officers on what is an appropriate use of force in various situations.

Because the necessity for use of force varies depending on the threat level, there is typically an accompanying “continuum” that officers may use—from merely using his or her presence, along with professional and nonthreatening behavior, as itself a deterrent; to a verbal request or warning; to physical intervention; and, finally, possibly lethal force. This continuum is meant to guide officers in the various levels of intervention they may use to resolve a situation, with steps taken in between to determine not only whether the use of force is justified, but also the type and extent of force required.^d

^a Mathew Hickman, *Citizen Complaints about Police Use of Force* (Washington, DC: Bureau of Justice Statistics, 2006) 1.

^b *Ibid.*

^c See International Association of Chiefs of Police, *Emerging Use of Force Issues: Balancing Public and Officer Safety, Report from the IACP/COPS Office Use of Force Symposium* (Washington, DC: IACP/COPS, 2012), <https://perma.cc/MN8P-5BUV>, and National Institute of Justice (NIJ), “Police Use of Force,” <https://perma.cc/L7XX-7EPP>.

^d For more information on what constitutes “use of force,” see endnote 45 on the legal standards governing police in making decisions to use deadly force, and NIJ, “Police Use of Force.”

at outlawing prejudicial profiling by law enforcement officers. In addition, California and Colorado expanded the range of personal characteristics, beyond race, that officers may not use as a basis for a stop or further action following a stop.

- > **California AB 953 (2015)** revises the definition of racial profiling to instead refer to racial *and identity* profiling, clarifying that profiling entails “the consideration of, or reliance on, to any degree, actual or perceived race, color, ethnicity, national origin, age, religion, gender identity or expression, sexual orientation, or mental or physical disability in deciding which persons to subject to a stop or in deciding upon the scope or substance of law enforcement activities following a stop.” The law also establishes the Racial and Identity Profiling Advisory Board, which is tasked with eliminating racial and identity profiling and improving diversity and racial and identity sensitivity in law enforcement. The board, among other duties, is required to investigate and analyze state and local law enforcement agencies’ racial and identity

profiling policies and practices, annually hold public meetings, and make publicly available its findings and policy recommendations. Finally, the act requires training on racial profiling and cultural sensitivity. Courses must stress understanding and respect for racial, identity, and cultural differences, and the development of effective, non-combative methods for carrying out law enforcement duties in a diverse racial, identity, and cultural environment.

- > **Colorado HB 1263 (2016)** prohibits law enforcement officers from profiling based solely on race, ethnicity, gender, national origin, language, religion, sexual orientation, gender identity, age, or disability when determining whether to subject someone to arrest, investigation, or other law enforcement activity.
- > **Connecticut HB 7103 (2015)** requires police training programs to include training on cultural competency, sensitivity, and bias-free policing. It also requires each law enforcement agency to implement guidelines for the recruitment, retention, and promotion of minority police officers in order to promote the goal of reaching racial, gender, and ethnic diversity within the unit.
- > **Maryland SB 413 (2015)** requires law enforcement agencies to have policies against race-based traffic stops based on model policies developed by the Police Training Commission.
- > **Oregon HB 2002 (2015)** directs all law enforcement agencies to adopt written policies and procedures prohibiting profiling, which must include, at minimum, certain elements outlined in the new law. The law also requires law enforcement agencies to provide copies of complaints that allege profiling to the Law Enforcement Contacts Policy and Data Review Committee. The committee may receive complaints directly from the public, as well. The new law established the Law Enforcement Profiling Work Group and directed the group to prepare a report concerning profiling, including recommendations for legislation, by December 2015. In 2016, **Oregon HB 4003 (2016)** extended the life of the work group, which is now tasked with producing a second report that will identify methods to address and correct patterns or practices of profiling and identify any statutory changes needed, including recommendations for legislation.

- > **Rhode Island H 5819 & S 669 (2015)** amend the *Racial Profiling Act* so that unless a reasonable suspicion of criminal activity exists, neither a driver nor pedestrian is required to consent to a search.
- > **Tennessee HB 57 & SB 6 (2015)** together enact the *Racial Profiling Prevention Act*, requiring law enforcement agencies to adopt written policies prohibiting racial profiling, defined as detention, interdiction, or other disparate treatment on the basis of a person's actual or perceived race, color, ethnicity, or national origin.

Vulnerable populations and crisis intervention

As mental and behavioral health problems within communities have increased over the last few decades, while community treatment services have decreased, police officers have concomitantly become first responders to situations involving people living with a mental or behavioral health disorder—such as substance abuse disorder, depression, bipolar disorder, anxiety, post-traumatic stress disorder, dementia, and schizophrenia.²³ By one estimate, one in 10 calls to police involves someone who is experiencing a mental health crisis or diminished mental capacity.²⁴ In many cases, officers are the only source of immediate service to people in urgent need.²⁵

Yet even as police officers are called upon to serve as *de facto* health providers in the course of duty, many lack specialized skills or training to help people living with these disorders and de-escalate tense situations involving them. Deficient community resources and services or the absence of alternative response options other than arrest compound this lack of expertise. Consequently, police encounters with people suffering mental or behavioral health crises can quickly escalate into violence and result in serious physical injury or death to the person, bystanders, and the responding officers.²⁶

To better meet the growing needs of people who experience behavioral or mental health emergencies locally, policymakers in states from California to Indiana to Oklahoma passed measures aimed at improving law enforcement responses by enhancing officer training on how to detect and respond to a range of behavioral, cognitive, developmental, and mental health disorders. This is especially important because the hiring process for officers typically does not screen or require expertise or capabilities in these areas.

One increasingly common strategy is the creation of Crisis Intervention Teams (CITs), in which officers are specially trained to help people who are experiencing a crisis or diminished mental or emotional capacity. These teams are founded on strong partnerships between law enforcement and community-based treatment providers. Aside from CITs, states, such as Pennsylvania, are also mandating that all officers receive training on de-escalation techniques or education on relevant referral resources and services available in the community.

- > **California AB 1227 (2015)** requires the Commission on Peace Officer Standards and Training to submit a report assessing whether existing training courses on peace officer interactions with persons with mental illnesses or developmental disabilities cover all appropriate topics—including identifying indicators of mental disability, conflict resolution techniques, and alternatives to lethal force—and identifying areas where additional training may be needed.
- > **California SB 11 (2015)** requires the Commission on Peace Officer Standards and Training to review its current training module in its basic training course relating to persons with a mental illness, intellectual disability, or substance abuse disorder, and to develop additional training, including a continuing education course, to better prepare law enforcement officers to recognize, de-escalate, and appropriately respond to persons with these conditions.
- > **California SB 29 (2015)** mandates that the Commission on Peace Officer Standards and Training require its field training officers to have at least eight hours of crisis intervention behavioral health training to better prepare new officers to effectively interact with persons who have a mental illness or intellectual disability.
- > **Illinois HB 4112 (2015)** mandates that the Illinois Law Enforcement Training and Standards Board create a standard curriculum for a certified CIT training program addressing specialized policing responses to people with mental illnesses. The program should train officers to identify signs and symptoms of mental illness, de-escalate situations involving people who appear to have a mental illness, and connect such people in crisis to treatment.

- > **Illinois SB 1304 (2015)** expands training requirements for probationary police officers, which includes courses on the disease of addiction, cultural perceptions and common myths of rape, and interview techniques that are trauma-informed, victim-centered, and sensitive.
- > **Indiana HB 1242 (2015)** requires police reserve officers to complete mandatory in-service training in interacting with persons with mental illness, addictive disorders, intellectual or developmental disabilities, autism, and Alzheimer's disease or related senile dementia.
- > **Indiana SB 380 (2015)** requires the law enforcement training academy to include an overview of the CIT training model in initial training. The new law also establishes the Indiana Technical Assistance Center for Crisis Intervention Teams to create and support a statewide CIT advisory committee and to assist rural and other counties in creating crisis intervention teams and training.
- > **Oklahoma SB 1202 (2016)** requires peace officers to complete additional certified training each year that includes training on mental health conditions.
- > **Pennsylvania HB 221 (2015)** requires police officers to be trained in the recognition of mental illness, intellectual disabilities, and autism, and techniques to interact with and de-escalate the behavior of people with these conditions. Officers must also be instructed about the services available to such people.
- > **Washington SB 5311 (2016)** requires the Criminal Justice Training Commission to provide crisis intervention training to all new full-time law enforcement officers employed after July 1, 2017. The training should provide tools and resources to officers in order to respond effectively to people who may be experiencing an emotional, mental, physical, behavioral, or chemical dependency crisis and to increase the safety of both law enforcement and civilians in crisis.

Documenting police operations

Media attention to incidents of use of force by police against unarmed civilians and, in particular, video recordings of these events, have enabled the public to witness when, and judge how, police officers exercise lethal force, and have exonerated officers from erroneous complaints. This new awareness has increased attention to law enforcement use of force and catalyzed community action in response to police practices.

In an effort to reduce violence and engender greater public trust, state legislators enacted numerous laws to improve the transparency of police operations, primarily by opening up everyday policies and practices to increased scrutiny. Policymakers focused on 1) the use of body-worn

Protections for police

Recent high-profile incidents resulting in the death or injury of police officers have highlighted ongoing concerns about officer safety. In 2015 and 2016, a number of states adopted laws aimed at improving responses to (and in one case, deterring) violence against law enforcement. While Louisiana adopted a law—HB 953 (2016)—that amends the definition of hate crime victims to include law enforcement personnel, six states in 2015 and 2016 joined 21 others in adopting laws establishing “Blue Alert” systems.^a Blue Alerts, similar to Amber alerts in the case of abducted children, deliver coordinated public notifications to aid in the timely identification, location, and apprehension of an individual suspected of killing or seriously wounding a law enforcement officer.^b A Blue Alert system is a cooperative effort between various local and state agencies, broadcasters, and the general public to provide critical information—such as a detailed description of an alleged perpetrator, that person’s vehicle, and license plate information—in order to

facilitate a speedy capture, and eliminate the threat posed on communities and law enforcement personnel. Examples include using media broadcasts and Department of Transportation messaging signs. The following six states enacted Blue Alert legislation during the study period:

- > Maine LD 375 (2015);
- > Mississippi SB 336 (2015);
- > Minnesota SF 878 (2016);
- > North Carolina H 1044 (2016);
- > North Dakota HB 1281 (2015); and
- > Oklahoma HB 2747 (2016).

^a These include: Florida and Texas (2008); Alabama, Georgia, and Maryland (2010); California, Delaware, Mississippi, Tennessee, Utah, and Virginia (2011); Colorado, Ohio, Kentucky, South Carolina, and Washington (2012); Connecticut and Indiana (2013); and Arizona, Illinois, and Kansas (2014).

^b For more information, see the National Blue Alert System, <http://bluealert.us/>.

cameras in certain police interactions with the public; 2) access to police body-worn camera footage; 3) the protection of the right of civilians to digitally record law enforcement officers in the course of their duties; and 4) the collection of data on certain types of police conduct, such as officer-involved deaths or traffic and pedestrian stops, to help identify potential agency problems—such as the exercise of excessive force—and to develop a plan for corrective action.

Body-worn cameras

Gaining an accurate version of police-civilian encounters under scrutiny can be extremely difficult because of competing accounts. Increasingly, police departments are beginning to view body-worn cameras, the majority of which are typically placed on the upper placket of an officer's uniform with a forward-facing viewable area, as an essential “third-eye” that can capture events and interactions between officers and the public, including traffic or street stops, arrests, searches, interrogations, and critical incidents such as officer-involved shootings.²⁷ Because body cameras provide a “contemporaneous, objective record” of a broader set of police-civilian encounters than the already widely used dashboard camera, or “dash-cam” (which records what occurs directly in front of or around a police vehicle), many police and other leaders believe they can be a key tool in further

- > improving police interactions with people and communities;
- > identifying and correcting problems when they occur, thus enhancing police performance;
- > vindicating officers from false or unwarranted complaints;
- > increasing public trust in law enforcement, by demonstrating a willingness to open itself up to outside scrutiny; and
- > strengthening police accountability.²⁸

In the run-up to a symposium in January 2016 that convened 150 law enforcement officials, along with legal professionals, security and privacy experts, and policy advisors to discuss critical issues related to body camera implementation, International Association of Chiefs of Police President Terrence M. Cunningham said, “Body-worn cameras have emerged as an important tool for law enforcement. . . .that. . . .need to be integrated with key principles and core values in police/community relations, agency wide training, policy development and enforcement, and efforts to enhance transparency.”²⁹ Jim Bueermann, president of the Police Foundation and former chief of police from Redlands, California, reasoned that it is critical that law enforcement “harness this opportunity to advance our profession

and to be more accountable as we serve and protect our communities.”³⁰

Although still in its infancy, emerging research examining the effect of body cameras seems to support their perceived benefits. Some studies suggest that body cameras can reduce the number and lifespan of citizen complaints—a significant benefit since police departments often expend millions of dollars annually to investigate and resolve these filings.³¹ There is also budding evidence to suggest that such cameras can prevent and deter unprofessional, illegal, and inappropriate behaviors by both the police and the public due to the “surveillance effect” that is thought to drive people to comply with accepted rules of conduct.³² Indeed, because video evidence provides the potential for greater scrutiny over criminal procedure and policy violations, a number of studies suggests that officers who use body cameras are more likely to think carefully when considering actions that could become a civil liability to the department (such as abuse

Body camera implementation considerations

In a mid-2015 survey, 19 percent of U.S. major city and county law enforcement agencies reported having fully operational body-worn camera programs, and an additional 77 percent either intended to implement a program or were in a pilot phase.^a Law enforcement agencies that are considering body-worn cameras face several challenges, with little precedent to guide them. Recognizing the importance of well thought-out implementation, the U.S. Department of Justice’s Bureau of Justice Assistance created an online body-worn camera toolkit.^b Concerns about body-worn cameras coalesce into three major areas:

Privacy: The vast majority of police departments that have deployed body-worn cameras have drawn up privacy policies, sometimes with a mandate from their state legislature, in an effort to protect the rights of both civilians and officers. Creating such a policy involves weighing various legitimate concerns and making difficult choices. Thirteen states have two-party or all-party consent laws, which require that a person consent to being recorded.^c In these states, legislators must carve out an exception for police body-worn cameras before agencies can deploy them. Even in the absence of consent laws, various privacy questions arise:

- > Should civilians be informed that they are being recorded? If so, when?
- > How can the identities of all people involved be protected? This not only includes officers and subjects of police action, but also victims and bystanders who may appear in the videos.

Should there be special rules to protect minors, confidential informants, or people who are recorded in private residences or in healthcare facilities?

- > How should officers handle recording inside homes?
- > How, if at all, do religious and cultural sensitivities affect the decision to record in a home?
- > Should police use facial recognition technology to identify people appearing in videos?

Video storage, retention, and disclosure: Guided by state law, police agencies have also put in place policies governing where, for how long, and by whom video should be stored. Video storage can be expensive. Indeed, some local police departments have been forced to shelve existing programs due to new laws which mandate longer storage retention.^d Agencies implementing body-worn cameras are confronting questions such as

- > Should police retain and redact video themselves or outsource these tasks to private contractors?
- > How long should video footage be retained?
- > In what circumstances is it appropriate to disclose video to the people involved and to the public? If disclosure is to occur, when and how?
- > Should subjects of recordings have an automatic right to view footage?
- > How can the security of footage be protected, especially when stored on cloud-based servers?

of authority) or that could become a personal liability to the officer (such as neglect of duty).³³ Significantly, studies found that body cameras can contribute to an overall reduction in the number of use of force incidents.³⁴

Guided in part by this research, at least 26 states and the District of Columbia passed laws or a resolution in 2015 and 2016 to explore, mandate, and inform use of and access to footage from body-worn cameras in certain situations. States also called on departments to develop or clarify policies and procedures surrounding body-camera use, including those related to data storage, retention, and public disclosure; privacy and consent; and when it is and is not required to record.

- > **Arizona SB 1300 (2015)** establishes the Law Enforcement Officer Body Camera Study Committee to investigate the use of body worn cameras and recommend policies regarding their use by law enforcement.

Discretionary versus mandatory camera use: Some police departments that were early adopters of body-worn cameras outlined periods when recording was mandatory and periods when officers were allowed to use their discretion about recording.⁶ Departmental policies and some state statutes are now further prescribing the situations in which recording must occur. In crafting such policies, officials confront questions that implicate cost and privacy concerns, for example:

- > In what situations should recording occur—only when officers are responding to calls for service, every time officers interact with the public, or something in between?

- > In situations where recording is mandatory, when should it begin and end?
- > If officers retain discretion not to record, how and when should they be required to explain their decisions?
- > Should police supervisors be allowed to monitor video in the course of their supervision responsibilities?
- > Should supervisors be allowed to use video footage to train other officers and cadets?

⁶Major Cities Chiefs and Major Counties Sheriffs, *Technology Needs—Body-Worn Cameras*, (Washington, DC: U.S. Department of Homeland Security, December 2015), <https://perma.cc/5M2S-S7VV>.

⁷U.S. Department of Justice, Bureau of Justice Assistance, “Body-Worn Camera Toolkit,” <https://perma.cc/DL58-XWAU>

⁸The Urban Institute, “Police Body-Worn Cameras: Where Your State Stands,” <http://apps.urban.org/features/body-camera/>.

⁹See for example, “Two US police departments drop body cameras over costs,” *Al Jazeera*, September 11, 2016; The White House, “Fact Sheet: Strengthening Community Policing,” [December 14, 2014] (proposing a three-year, \$263 million investment package to increase the use of body-worn cameras and provide a 50 percent match to states/localities who purchase body-worn cameras and requisite storage), <https://www.whitehouse.gov/the-press-office/2014/12/01/fact-sheet-strengthening-community-policing>; see also Peter Hermann and Rachel Weiner, “Issues over police shooting in Ferguson lead push for officers and body cameras,” *The Washington Post*, December 2, 2014, http://wpo.st/_HR72. As an example, in 2013 the New Orleans Police Department launched a plan to deploy 350 body-worn cameras at an anticipated cost of \$1.2 million over five years, with data storage accounting for the majority of that cost. Lindsay Miller, Jessica Toliver and Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Implications and Lessons Learned* (Washington, DC: Office of Community-Oriented Policing Services, 2014) 32, http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf.

¹⁰See, for example, discussion of the body-worn camera experiment by the Mesa, Arizona police department in Michael D. White, *Police Officer Body-Worn Cameras: Assessing the Evidence* (Washington, DC: Office of Community Oriented Policing Services, 2014) 8-9, <https://www.ojpdagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf>.

- > **California AB 69 (2015)** stipulates that certain body-worn camera recordings, including footage of officer-involved shootings or use of force incidents, must be kept for a minimum of two years. All other recordings must be kept for a minimum of 60 days.
- > **California SB 85 (2015)** requires that the California Highway Patrol establish a pilot program to explore the use of body-worn cameras, including when the cameras should be activated; where on the body they should be attached; how best to notify the public that they are being recorded; and mechanisms for reviewing camera policies.
- > **Colorado HB 1285 (2015)** establishes a year-long body-worn camera study group to examine the use of the cameras and make recommendations on best practices and policies. The legislation also provides funding provisions for the purchase of cameras, the training of officers using them, and the storage of recordings.
- > **Connecticut HB 7103 (2015)** mandates the use of body-worn cameras and requires that guidelines be developed regarding use of the cameras and the retention of data. The new law allows an officer to review the footage to assist with report writing or in a case where they are being investigated. However, footage from the cameras is not subject to public disclosure if it constitutes an unwarranted invasion of privacy.
- > **Delaware HCR 46 (2015)** encourages the Delaware Police Chief's Council, in consultation with other relevant agencies, to develop a uniform body-worn camera policy, which should address who is required to wear the cameras; when the cameras must be activated; storage, retention, access, and review of footage; how to provide notice of recording; and the consequences for violating the policy.
- > **District of Columbia B21-0530 (2015) and B21-0351 (2016)** aim to "promote accountability and transparency, foster improved police-community relations, and ensure the safety of both MPD [Metropolitan Police Department] officers and the public." While these acts allow for the chief of police to issue policy directives on body-worn cameras (which are required to be published on the police department's website), they also stipulate a range of policy requirements. For example, requests for body-worn camera footage must be determined within 25 days and the department must

publish the retention schedules for different types of recordings. People captured in a recording or their legal representatives may view the footage. The mayor is also permitted to release footage that would not normally be publicly accessible under freedom of information laws if the recordings are deemed to be of significant public interest, such as video of an officer-involved shooting. Officers must undergo training on the use of body-worn cameras and inform members of the public that they are being recorded, and are prohibited, in most instances, from recording at schools. Officers may view camera footage to assist them in report writing, except in cases of officer-involved shootings. Finally, the acts require the department to audit its body-worn camera program to examine its effect on privacy rights, citizen complaints, and use of force incidents.

- > **Florida SB 248 (2015)** requires footage from body-worn cameras to be retained for at least 90 days and sets limitations on the types of body-worn camera recordings that can be released to the public. Specifically, the act defines recordings made in a private residence, health care, or social service facility as confidential, but does require law enforcement agencies to disclose the footage to the subjects in the recording or their legal representatives. A court may also order disclosure of a recording.
- > **Florida HB 93 (2016)** requires law enforcement agencies that use body-worn cameras to develop specific procedures governing the use of cameras and the storage, retention, and release of footage. The act also requires that law enforcement officers undergo training on these policies and that agency practice be periodically reviewed to ensure conformity to the policies.
- > **Georgia HB 976 (2016)** mandates that certain body-worn or vehicle camera footage—including that which involves criminal investigations, a vehicle accident, an arrest, or an officer's use of force—must be kept for a minimum of 30 months. Recordings of other incidents must be retained for 180 days. Additionally, the legislation ensures that a law enforcement officer is not civilly liable for the depictions obtained through these recordings and they do not have a duty to redact or obscure people or information captured in the recording.

- > **Illinois SB 1304 (2015)** details protocols for the use of body-worn cameras, including the development of guidelines, policies, and training. Recordings must be kept for a minimum of 90 days and officers are able to review the recordings prior to filing a report, provided they stipulate that this was done. Generally the new law exempts recordings made by body-worn cameras from public disclosure unless they are related to a complaint or an incident involving the discharge of a firearm, use of force, arrest, detention, death, or bodily harm.
- > **Indiana HB 1019 (2016)** determines that a recording made by law enforcement is not considered an investigatory record and is available for public viewing unless it is likely to cause harm or is a threat to public safety, interferes with the fairness of a trial, affects an ongoing investigation, or is not in the public interest. Specific requestors or their legal representatives may access recordings in which they or their properties feature or which are relevant to a crime in which they were the victim. Some depictions must be obscured before the footage is supplied for review, including dead bodies, severe violence, minors, undercover operations, and confidential informants.
- > **Kansas SB 22 (2016)** defines all recordings made by law enforcement body-worn or vehicle cameras as criminal investigation records for the purposes of the Kansas Open Records Act, thereby applying the regime of that act to such recordings. The legislation also provides that people who are the subject of the recording or their legal representatives may view the footage.
- > **Kentucky HB 124 (2016)** permits funds from the sale of confiscated firearms to be used (in part) for the purchase of body-worn cameras for law enforcement. The law also requires law enforcement agencies applying for body-worn camera grants to develop and submit for review a policy governing body-worn camera use.
- > **Louisiana HCR 180 (2015)** creates a limited-duration, 22-member task force comprising judiciary committee chairpersons from the state House and Senate, state legal representatives, law enforcement and local municipality representatives, and members of leading social justice and media organizations to make recommendations on the use of body-worn cameras. The task force, which is required to meet at least twice, must present a final report examining the

use, guidelines, and possible legislative requirements for body-worn cameras.

- > **Louisiana SB 398 (2016)** prevents the disclosure of a body-worn camera video or audio recording if its law enforcement custodian finds that it violates a person's expectation of privacy, unless a court order is made to the contrary. Any recordings made by officers not performing their duties at the time of the recording are also prohibited from public release if disclosure would violate a reasonable expectation of privacy.
- > **Maryland HB 533 & SB 482 (2015)** require the Maryland Police Training Commission to develop, and publish online, guidelines governing the use of body-worn cameras, which must cover when to record, storage and access to footage, consequences for the violation of relevant policies, and privacy protections for people. The acts also created the Commission Regarding the Implementation and Use of Body Cameras by Law Enforcement Officers (effective until June 1, 2016) to study, report on, and make recommendations on this issue. When using the cameras, officers must be identifiable (through uniform or badge), be a part of the interaction, and notify the subject that they are being recorded.
- > **Minnesota SF 498 (2016)** classifies as public any portable audio or video recording that captures an on-duty officer discharging his or her weapon or using force that results in bodily harm and requires that such recordings, and those involving a complaint against an officer, be kept for at least one year. In all other instances recordings must be retained for 90 days. The new law requires law enforcement agencies to develop, with public input, policies prior to implementing the use of portable recording devices, which must cover a number of matters, including how data can be accessed and stored; when using the device is mandatory, prohibited, or discretionary; circumstances in which the subject must be informed that they are being recorded; and disciplinary procedures for failure to comply with the agency's policies.
- > **Nebraska LB 1000 (2016)** requires the Nebraska Commission on Law Enforcement and Criminal Justice to develop model policies governing the use of body-worn cameras that set the minimum standard for local law enforcement agencies' policies. These policies must include officer training that covers how the cameras are to be

used and minimum recording retention periods of 90 days, except when a recording has evidentiary value, in which case it must be retained until a final determination has been made.

- > **Nevada AB 162 (2015)** requires law enforcement agencies employing body-worn cameras to develop policies regarding their use and also mandates that cameras must be activated when an officer is responding to a call for service or when an investigative interaction occurs between a uniformed officer and a member of the public. Certain incidents, such as interactions with victims or people wanting to anonymously report a crime, are prohibited from being recorded. Recordings are considered public records and can be viewed if a request is made.
- > **Nevada SB 111 (2015)** requires uniformed officers of the Nevada Highway Patrol who routinely interact with the public to wear a body-worn camera while on duty and to activate it when responding to a call for service or when an investigative interaction occurs between a uniformed officer and a member of the public. Recording people in private residences, people wanting to anonymously report crimes, or victims of crime are prohibited. Footage must also be retained for a minimum of 15 days and disciplinary procedures must be developed for officers who either fail to operate a camera when required, or intentionally manipulate or permanently delete or destroy recordings, which are considered public records and can be viewed if a request is made.
- > **New Hampshire HB 1584 (2016)** requires law enforcement agencies that employ body-worn cameras to develop policies and procedures governing their use and the retention of data collected. The law also sets out circumstances in which body-worn cameras must be activated and the circumstances and areas in which their use is prohibited. The footage is accessible for law enforcement or training purposes only and may be further restricted if an officer is involved in a shooting or use of deadly force incident, or is suspected of wrongdoing. Except for special circumstances, such as when footage captures the use of deadly force or is related to an investigation, most recordings must be maintained for 30 days and must be deleted after 180 days.
- > **North Carolina HB 972 (2016)** requires law enforcement agencies to develop policies governing the use of body-worn and dashboard cameras, but delegates authority to determine retention periods for

footage to the government archival and record-keeping body. While the new law does not consider recordings made by body-worn and dashboard cameras to be public records, it does allow people who are the subject of a recording or their representatives to review the footage.

- > **North Dakota HB 1264 (2015)** amends the North Dakota Century Code so that an image taken in a private place by a law enforcement officer or firefighter using a body-worn camera or similar device is not considered a public record.
- > **Oklahoma HB 1037 (2015)** classifies body-worn camera recordings that capture incidents such as officer use of force or violence, pursuits, and traffic stops as public records. The law also allows law enforcement agencies to redact portions of a recording if it depicts footage such as a dead body, nudity, or a person under 16 years of age. Footage relevant to an internal investigation that reveals the identity of the law enforcement officer subject to investigation may be redacted, but the full video must be made available to the public once the investigation has concluded and any associated final disciplinary action has been rendered.
- > **Oregon HB 2571 (2015)** requires law enforcement agencies to create policies and procedures governing the use of body-worn cameras and the storage and retention of the recordings and provides that, generally, cameras must record continuously and be activated whenever an officer has reasonable suspicion that a crime or violation is occurring or has occurred. Recordings must be kept for at least 180 days, but no more than 30 months, unless related to a court proceeding or ongoing criminal investigation. Recordings are exempt from public disclosure unless the public interest requires disclosure in a particular instance. In such circumstances, the video must be edited so that the faces in the recording are not identifiable. The use of facial recognition or other biometric matching technology to analyze the footage taken by body-worn cameras is prohibited.
- > **South Carolina SB 47 (2015)** requires the Law Enforcement Training Council to conduct a study and to develop guidelines and statutory recommendations on the use and implementation of body-worn cameras, which must cover camera activation and recording restrictions and access to and release of footage. Law enforcement agencies are required to develop their own policies, based on the

guidelines, which the Law Enforcement Training Council will review and approve. Under the new legislation, recordings are not public records; however, subjects in the video, defendants or litigants whose cases relate to the recording, and certain government officials may request and must receive the footage.

- > **Texas SB 158 (2015)** requires the Texas Commission on Law Enforcement to provide a training curriculum on the use of body-worn cameras that officers who will use such cameras must complete. Law enforcement agencies are required to develop specific policies governing the use of cameras, including when cameras are to be activated and the minimum time data is to be retained. Policies should also cover public access to the recordings, handling of equipment and malfunctions, and procedures for internal review. All recordings involving the use of deadly force or an investigation of an officer must be kept until the matter is finalized and cannot be released to the public unless release of the footage furthers law enforcement purposes.
- > **Texas HB 3791 (2015)** permits a person stopped or arrested for intoxication offenses to be provided a copy of the video that depicts the interaction with the law enforcement officer.
- > **Utah SB 82 (2015)** requires a law enforcement officer executing a warrant to wear a body-worn camera, if available, and to follow the department's policies on body-worn camera use.
- > **Utah HB 300 (2016)** requires law enforcement agencies using body-worn cameras to have written policies governing their use. Cameras must be clearly visible to the person being recorded and should be activated as soon as possible prior to any law enforcement encounter. Recordings from body-worn cameras are generally private records except in specific circumstances, including where they feature an officer discharging his or her weapon, an officer-involved death, or a complaint or legal proceeding against a law enforcement officer or agency. Copying, retaining, duplicating, distributing, altering, or deleting body-worn camera footage by officers without authorization is also prohibited.
- > **Vermont S 174 (2016)** requires the Law Enforcement Advisory Board to report on model policies for the implementation of body-worn cameras. The report is required to examine the costs of using

cameras, any potential grants that can mitigate the cost, camera use and activation, rules governing camera malfunction, and stipulations for when the recordings should be exempt from public disclosure.

- > **Washington HB 2362 (2016)** requires law enforcement agencies to establish policies regarding the use of body-worn cameras, which must comply with minimum standards. The law also classifies recordings made by body-worn cameras as exempt from public disclosure, although those directly involved in a recorded incident have the right to request access to the footage. This right also extends to the executive director from either the state commissions on African American, Asian Pacific American, or Hispanic affairs, or an attorney representing a person claiming a denial of civil rights.

Recording the police

The near ubiquitous use of cell phones with video and audio recording capabilities means that almost anyone can readily capture incidents involving the police and disseminate recordings on social or other media—or even broadcast events in real-time.³⁵ Although several federal circuit courts have held that recording police in public is constitutionally protected so long as people do not interfere with legitimate police activities, federally the law actually remains unsettled, with some circuits determining that one's right to record police in public hinges on whether recordings display sufficient “expressive” content.³⁶ Because of this ambiguity, many people may be unaware or confused about their legal right to record. The unsettled nature of the law may also explain why some police officers order people to cease recording police activities, arrest and detain people for not ceasing, confiscate or destroy recording devices, demand to view audio or video without a warrant, or delete or destroy recordings.³⁷

With video recording increasingly accepted as an important mechanism for transparency and a tool to inform public trust, at least six states—California, Colorado, Connecticut, Hawaii, Illinois, and Oregon—enacted laws to ensure consistent protection of this right by clarifying and making explicit when, where, and under what circumstances it is legal for the public to record the police, and outlining collateral rights when this right is infringed upon. Indeed, many of the new laws make it clear that recording police officers who are undertaking their official duties is not a

crime and, thus, not grounds for arrest or detention; while other laws outline disciplinary or legal actions that people may take if police illegally interfere with, or retaliate against, their right to record. Still others assert specific rights, such as a person's right to maintain custody and control of a recording and the recording device.

- > **California SB 411 (2015)** establishes that it is not a crime to record police, provided that the officer is in a public space and the person recording is in a place where they have a right to be. The act also stipulates that taking a photograph or recording cannot be grounds for arrest or detention.
- > **Colorado HB 1290 (2015)** outlines that a person has a right to not only record a police officer, but also to maintain custody and control of the recording and recording device. This legislation also ensures that a person has a right to a civil liability claim against the law enforcement agency if they are retaliated against for making the recording or if their recording device is interfered with by officers.
- > **Connecticut HB 7103 (2015)** makes law enforcement agencies liable if their employees interfere with a person recording police.
- > **Hawaii SB 2439 (2016)** ensures that a person is not prohibited from taking a photograph or making an audio or video recording of a law enforcement officer, provided that the officer is in a public place and is undertaking official duties at the time. Officers are authorized, however, to take reasonable action to maintain safety and control.
- > **Illinois SB 1304 (2015)** prohibits officers from interfering with people recording police and requires law enforcement agencies to develop policies that outline the disciplinary actions that will result if an officer confiscates or destroys a recording or device.
- > **Oregon HB 2704 (2015)** creates an exemption to the law prohibiting the recording of non-willing participants in order to allow the recording of police. Specifically, the law defines a law enforcement officer as a participant if the person making the recording is in a place where they are lawfully allowed to be, if the officer is performing official duties, if the recording is in plain view, and if the conversation being recorded is generally audible.

Data collection and reporting

The increased attention to police officers fatally shooting civilians has surfaced a long-standing problem: the lack of reliable data measuring the prevalence of police use of force, particularly of violent encounters with civilians, both fatal and non-fatal. Indeed, there are no routine, national systems for collecting data on such incidents, and the federal government does not keep a comprehensive database or record of police shootings from the roughly 18,000 state and local law enforcement agencies nationwide.³⁸ What data does exist only counts “justifiable homicides” by police and relies on voluntary self-reporting by police departments, many of which neither currently collect such information or report it to the FBI.³⁹ While in 2014, the federal government had hoped to encourage better reporting of police-involved deaths by tying compliance to federal criminal justice funding assistance, numerous law enforcement agencies still do not report deaths in custody.⁴⁰

In response to this information gap, researchers, media outlets, advocacy organizations, and other interested stakeholders have sought to paint a more complete national picture by compiling all publicly available information about police use of force—using information garnered from news reports, Freedom of Information Act (FOIA) requests, independent research, civilian complaints, court rulings, and victimization surveys.⁴¹ The federal government too has begun new efforts to rectify the gaps in government data by expanding the FBI’s data collection efforts beyond police-involved deaths to include all forcible actions by police that result in serious bodily injury or involve the discharge of firearms, through a pilot program set to begin in early 2017.⁴² On the state level, these independent efforts have likewise spurred some jurisdictions to take steps to improve their data collection activities and to strengthen reporting mechanisms. Recognizing the necessity of consistent and accurate data, at least 11 states, including Maryland and Texas, enacted new laws that require police departments to collect and report information related to officer-involved shootings, deaths, or other incidents of force. Some of these laws also require departments to track information on all civilian or traffic stops, and the number of civilian complaints, including any outcomes of investigations.

- > **California AB 71 (2015)** requires the reporting of officer-involved shootings and use of force incidents that result in serious bodily injury, as well as those incidents perpetrated by civilians against peace officers. Certain details, such as race, gender, the types of weapons used, and the number of people involved, must be documented.

- > **California AB 953 (2015)** requires law enforcement agencies to collect and report on all stops, providing information such as the reason and result of the stop, the race, gender, and age of the person, whether the officer asked for consent to search, and whether the officer searched or seized property. Additionally, the new law requires the annual reporting of citizen complaints against peace officers and that reports regarding the outcomes of the investigation be made public, along with the collected stop data.
- > **Colorado SB 185 (2015)** establishes the *Community Law Enforcement Action Reporting (CLEAR) Act*, which requires the Colorado Commission on Criminal and Juvenile Justice to convene an advisory committee to study community policing practices and to create a report regarding best practices. Law enforcement agencies are required to report data on stops and arrests, including race, ethnicity, gender, and incident report number to the Division of Criminal Justice.
- > **Colorado SB 217 (2015)** requires the collection and reporting of information related to officer-involved shootings, including the race, gender, age, sexual orientation, and mental/physical health of the victim and officer, together with the reasons for the initial interaction. The final report collating this information is required to be published publicly on the legislative committee's website.
- > **Connecticut HB 7103 (2015)** requires law enforcement units to maintain records on all incidents where officers have used physical force that is likely to cause serious injury.
- > **Illinois SB 1304 (2015)** requires law enforcement agencies to submit monthly reports on arrest-related deaths and officer-involved shootings. Compliance with the reporting requirements can be considered a factor when awarding grant funds to agencies. This new law also amends *The Racial Profiling Prevention and Data Oversight Act*, expanding the definition to require reporting and analysis of data relating to pedestrian (in addition to traffic) stops. Lastly, the act creates an officer professional conduct database to track information on officers who are dismissed or who resign during an investigation.
- > **Maryland HB 771 (2015)** requires the police commissioner to publicly report on a range of information on the Baltimore City Police Department, including the number of black and/or female officers, civilian complaints against law enforcement, officers who were suspended, and use of force

incidents that caused injury. The new law also requires the commissioner to report on the department's community policing efforts.

- > **Maryland HB 954 (2015)** mandates that each local law enforcement agency collect and report information related to officer-involved deaths and deaths in the line of duty, including the age, gender, race, and ethnicity of the victim and officer and the circumstances surrounding the incident.
- > **Maryland SB 413 (2015)** requires the collection and reporting of information for every traffic stop. The information collected includes categories such as the alleged violation, whether a consensual search was conducted, resulting charges or arrests, and the demographic characteristics of the driver.
- > **Rhode Island H 5819 & S 669 (2015)** require the ongoing collection of traffic stop data that captures information such as the "reasonable suspicion" or "probable cause" leading to the search as well as race, gender, and age of people stopped by police. The new law also authorizes the department of transportation to conduct a study to determine whether there are racial disparities in traffic stops. After the completion of the study, law enforcement agencies must submit annual reports summarizing subsequent remedial action to address identified disparities, if any, in practice. The act also requires the number of civilian complaints against law enforcement agencies to be compiled and made publicly available.
- > **Tennessee HB 2122 & SB 2304 (2016)** require the annual reporting of all law-enforcement-related deaths, including people who die in custody or during transport or arrest.
- > **Texas HB 1036 (2015)** requires the collection of information on all officer-involved shootings that result in death or injury, as well as information on the shooting deaths or injuries of officers. Information collected includes the race, age, and gender of the civilian and officer, whether the civilian was brandishing a weapon, and whether the officer was on duty at the time of the incident. A report containing this information must be published publicly and, in the case of an officer-involved shooting, provided to the attorney general.
- > **Virginia HB 301 (2016)** expands the annual crime reporting requirements to include details of officer-involved shootings that result in injury or death.

Increasing accountability in police use of force and misconduct cases

Although the rise of video footage from bystanders' cell phones and police dashboard and body cameras has led to an uptick in the number of police officers arrested and charged after an on-duty fatal shooting, most cases of civilian deaths by police do not result in prosecutors bringing charges, grand juries indicting officers, or cases ending with guilty verdicts.⁴³ This is largely because most police-involved shootings are understood to be committed in self-defense or in the defense of others and are thus considered legally justified.⁴⁴ Indeed, because policing comes with serious risks that cannot be casually dismissed, the law gives wide discretion to law enforcement officers to use whatever force they believe to be necessary to make an arrest or to protect themselves or the public—a legal standard that hinges on what a police officer thinks was “reasonable” under the circumstances.⁴⁵ As a result, courts often give more weight to an officer’s stated perception of a given situation than to other types of evidence.⁴⁶ However, some members of the public, who are now often witnessing these incidents soon after they occur—and sometimes even in real-time—may consider such video footage as a “direct, unmediated” and evenhanded view of events that provides “credible representations” of reality.⁴⁷ Thus, when no one is held responsible in light of such recordings, they may express concern over a perceived lack of accountability.

For some, this contradiction has heightened scrutiny of the current systems and processes meant to protect against police impropriety and impunity, and has been interpreted as an indicator that current investigatory mechanisms lack sufficient independence or are not objective. Indeed, in many cases the police departments themselves investigate incidents before a case is provided to a prosecutor for review.⁴⁸ In turn, prosecutors—who work closely with law enforcement on a day-to-day basis—are then tasked to decide whether the case should move forward.

Depending on the jurisdiction, a prosecutor either directly decides whether to bring charges, holds a preliminary hearing if required by state or local law, or convenes a grand jury—a legal body of citizens that hears evidence exclusively presented by a prosecutor, in secret, and decides, based on that evidence, whether a criminal case has sufficient evidence to proceed.⁴⁹

State policymakers have enacted a number of new laws that alter the way that police-involved shootings or deaths are investigated. Many states have sought to strengthen the independence of investigations by requiring that they be carried out by outside agencies, special prosecutors, or an independent review board. Some states, meanwhile, sought to increase transparency by requiring prosecutors to publicly disclose decisions not to file charges; while three states—California, Colorado, and Georgia—sought to do so by enacting grand jury reform. (For more information about grand juries, see “What are grand juries?” on page 38). Connecticut and Kentucky both established new procedures and disciplinary measures following public-issued complaints, including allegations of police misconduct or criminal activity.

- > **California SB 227 (2015)** requires prosecutors rather than grand juries to inquire into cases of officer-involved shootings or the use of excessive force by an officer that results in the death of a suspect. The aim of the law is to rebuild public trust in judicial processes and counteract the public perception that prosecutor-run grand juries lack transparency and are biased.⁵⁰
- > **Colorado SB 219 (2015)** requires law enforcement agencies to develop protocols for investigating officer-involved shootings that result in injury or death. Protocols must provide for participation in a multi-agency critical incident team or partnership with the Colorado Bureau of Investigations or a neighboring law enforcement agency. The new law also requires a district attorney who declines to file criminal charges in such a case to publicly disclose the reasons for not doing so, and a district attorney who refers such a matter to a grand jury to release a statement regarding the general purpose of the grand jury’s investigation. A grand jury that does not return a bill of indictment may issue a report detailing its findings if it considers it in the public interest to do so.
- > **Connecticut HB 7103 (2015)** requires the Division of Criminal Justice to investigate officer use of physical force that results in the death of a person. To prevent the appearance of a conflict of

interest in such cases, the law also requires the chief state's attorney to appoint either a prosecutorial official from a district other than the one where the use of force incident occurred or a special state's attorney or deputy to investigate the case. The new law also prohibits law enforcement units from hiring any police officer who has been dismissed or resigned for malfeasance or other serious misconduct.

What are grand juries?

The grand jury system originated in 1166, when King Henry II of England enacted a series of ordinances (“The Assize of Clarendon”) that said that a person could not be tried as a criminal unless a certain number of local citizens—“the grand assize”—appeared in court to accuse him or her of specific crimes.^a To combat lawlessness and assert royal jurisdiction and authority over criminal matters, the grand assize was given the authority to provide certain information to the king’s itinerant judges, including identifying suspects, presenting evidence, and determining whether to make an accusation.^b By the early 1300s, however, it had become a system the monarchy abused, in which the king punished jurors who refused to convict. In response, grand juries began to shift their focus from accusation to determining whether the accused was being given a fair trial. Centuries later, grand juries evolved into a safeguard against baseless or politically-motivated prosecution.^c This evolution led to grand juries being incorporated into the U.S. Constitution.^d

In all states except for Connecticut and Pennsylvania, grand juries are used for criminal indictments—a formal criminal charge—in at least some cases. In fact, grand juries of between 12 and 23 people are required for certain serious crimes in the federal courts and in approximately half of state courts.^e Grand juries review the adequacy of evidence presented by a prosecutor and decide whether the evidence supports the indictment of the suspect(s).^f Prosecutors alone run grand jury proceedings—neither judges nor defense counsel are present.^g Grand jury proceedings are also conducted in secret, ostensibly to protect innocent people from disclosure of the fact that they are under investigation, as well as to prevent witnesses from being pressured or threatened by potential defendants.^h If a grand jury agrees that there is sufficient evidence to charge a suspect with a crime, it returns an indictment and the suspect is charged.ⁱ

^a “For the first time, grand juries were positively identified as something other than enforcement agencies of central government; they also existed for the protection of the accused.” See Mark Kadish, “Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy and Its Process,” *Florida State University Law Review* 24 (Fall 1996): 1, 5-7, <https://perma.cc/X7F3-ST5A>

^b *Ibid.*

^c *Ibid.*, 8-9.

^d The Fifth Amendment includes a Grand Jury Clause ensuring that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” See U.S. Constitution, amend. V. The Grand Jury Clause is designed to protect people against arbitrary and overzealous government by preventing “hasty, malicious and oppressive prosecution.” See *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

^e Connecticut and Pennsylvania still use grand juries for criminal investigations. See Daniel Taylor, “Which States Use Criminal Grand Juries,” *Findlaw Blotter*, November 26, 2014, <https://perma.cc/DB5Y-9VUZ>

^f See for example Administrative Office of the United States Courts, Handbook for Federal Grand Jurors, “Nature of the Grand Jury” 3, <https://perma.cc/DB5Y-9VUZ>

^g *Ibid.*

^h See for example *United States v. Providence Tribune Co.*, 241 F. 524 (D.R.I. 1917). Grand jury secrecy was later codified on the federal level. Federal Rules of Criminal Procedure, Rule 6(d)-(e).

ⁱ See Jeffrey Fagan and Bernard Harcourt, “Professors Fagan and Harcourt Provide Facts on Grand Jury Practice In Light of Ferguson Decision,” Columbia Law School, December 5, 2014, <https://perma.cc/2H24-TJA6>

- > **Georgia HB 941 (2016)** requires that, if deemed necessary by eight or more of its members, or at the request of the district attorney, a grand jury shall investigate officer-involved injuries or deaths. This law also removes provisions that had previously allowed accused officers and their counsel to be present during the presentation of evidence, permitted the officer to give a statement after the state finished presenting its evidence, and prevented an accused officer from being subject to examination.
- > **Hawaii SB 2196 (2016)** establishes the Law Enforcement Officer Independent Review Board within the attorney general's department to investigate deaths in law enforcement custody and officer-involved shootings. The act also requires all law enforcement agencies to have specific policies to govern the handling of these cases.
- > **Illinois SB 1304 (2015)** requires law enforcement agencies to have a written policy regarding the investigation of officer-involved deaths and that such investigations are to be conducted by at least two investigators. The law prohibits the appointment of investigators who are employed by the law enforcement agency that employs the officer involved in the incident, unless the investigator is employed by the Department of State Police and is not assigned to the same division or unit as the officer involved in the death. If no charges or indictments are brought as a result of the investigation, an investigatory report of findings must be publicly released.
- > **Kentucky HB 333 (2015)** establishes investigative procedures and disciplinary protocols for allegations of misconduct and criminal activity by police officers and peace officers.
- > **Maryland SB 882 (2015)** alters the definition of "law enforcement unit" in order to increase the number of law enforcement agencies that are subject to review by the Baltimore City Civilian Review Board. It also adds to the board representatives from the state ACLU and the city branch of the NAACP. In addition, the board must hold at least four meetings in locations rotated throughout different police districts in Baltimore City.
- > **Nebraska LB 1000 (2016)** requires that at least two investigators reviewing a fatal police encounter come from agencies other

than the agency involved in the encounter. It also provides that in cases of officer-involved deaths where no charges are brought, the transcripts and exhibits from the grand jury must be made available to the public.

- > **New York Executive Order 147 (2015)** appoints the attorney general as a special prosecutor to investigate and, if warranted, prosecute certain matters involving the deaths of unarmed civilians at the hands of law enforcement officers. The special prosecutor may also investigate and prosecute cases where there is a question regarding whether a civilian was armed and dangerous at the time of his or her death.

- > **Utah HB 361 (2015)** requires the chief executive of a law enforcement agency to work with the district or county attorney to designate an agency to investigate instances of officer use of force. To ensure impartiality and prevent the appearance of a conflict of interest, the investigative agency must not be one where any officer under investigation is employed. The law also directs all law enforcement agencies to adopt and make public their policies and procedures for selecting the investigating agency that is to oversee all officer-involved critical incidents.

Conclusion

The myriad statutes enacted in 2015 and 2016 represent a change in the course of policing reform, with a proliferation of legislation in nearly two-thirds of states that affect law enforcement practice and policy. Influenced by the media and public attention to several high-profile incidents in which police have shot or otherwise used deadly force on unarmed civilians, as well as the documented disparate effect of certain police practices on communities of color, the new reforms signal a state interest in mandating training and oversight of city and county agencies.

The dissemination of cell phone videos of police actions may continue to inspire public pressure to monitor police practices. Indeed, states—and individual local departments—remain the most likely agents of change in response to both civilian concerns and law enforcement’s desire to rebuild community trust and, ultimately, improve the safety and security of the people they serve.

Appendix A

All legislation, alphabetized by state, with categories (continued)

	Session Year	Legislation	Category
Arizona	2015	SB 1300	Body-worn cameras
California	2015	AB 953	Profiling, data collection and reporting
	2015	AB 1227	Vulnerable populations and crisis intervention
	2015	SB 11	Vulnerable populations and crisis intervention
	2015	SB 29	Vulnerable populations and crisis intervention
	2015	AB 69	Body-worn cameras
	2015	SB 85	Body-worn cameras
	2015	SB 411	Recording the police
	2015	AB 71	Data collection and reporting
	2015	SB 227	Increasing accountability
Colorado	2015	HB 1285	Body-worn cameras
	2015	HB 1290	Recording the police
	2015	SB 185	Data collection and reporting
	2015	SB 217	Data collection and reporting
	2015	SB 219	Increasing accountability
	2016	HB 1264	Use of force
	2016	HB 1263	Profiling
Connecticut	2015	HB 7103	Use of force, profiling, body-worn cameras, recording the police, data collection and reporting, and increasing accountability
Delaware	2015	HCR 46	Body-worn cameras
District of Columbia	2015	B 21-0530	Body-worn cameras
	2016	B 21-0351	Body-worn cameras
Florida	2015	SB 248	Body-worn cameras
	2016	HB 93	Body-worn cameras

	Session Year	Legislation	Category
Georgia	2016	HB 976	Body-worn cameras
	2016	HB 941	Increasing accountability
Hawaii	2016	SB 2196	Increasing accountability
	2016	SB 2439	Recording the police
Illinois	2015	SB 1304	Use of force, vulnerable populations and crisis intervention, body-worn cameras, recording the police, data collection and reporting, and increasing accountability
	2015	HB 4112	Vulnerable populations and crisis intervention
Indiana	2015	HB 1242	Vulnerable populations and crisis intervention
	2015	SB 380	Vulnerable populations and crisis intervention
	2016	HB 1019	Body-worn cameras
Kansas	2016	SB 22	Body-worn cameras
Kentucky	2015	HB 333	Increasing accountability
	2016	HB 124	Body-worn cameras
Louisiana	2015	HCR 180	Body-worn cameras
	2016	SB 398	Body-worn cameras
Maine	2015	LD 375	Protections for police
Maryland	2015	SB 413	Profiling, data collection and reporting
	2015	HB 533	Body-worn cameras
	2015	SB 482	Body-worn cameras
	2015	HB 771	Data collection and reporting
	2015	HB 954	Data collection and reporting
	2015	SB 882	Increasing accountability
Minnesota	2016	SF 498	Body-worn cameras
	2016	SF 878	Protections for police

Appendix A

All legislation, alphabetized by state, with categories (continued)

	Session Year	Legislation	Category
Mississippi	2015	SB 336	Protections for police
Nebraska	2016	LB 1000	Body-worn cameras, increasing accountability
Nevada	2015	AB 162	Body-worn cameras
	2015	SB 111	Body-worn cameras
New Hampshire	2016	HB 1584	Body-worn cameras
New York	2015	Exec. Order 147	Increasing accountability
North Carolina	2016	HB 972	Body-worn cameras
	2016	H 1044	Protections for police
North Dakota	2015	HB 1264	Body-worn cameras
	2015	HB 1281	Protections for police
Oklahoma	2015	HB 1037	Body-worn cameras
	2016	SB 1202	Vulnerable populations and crisis intervention
	2016	HB 2747	Protections for police
Oregon	2015	HB 2002	Profiling
	2015	HB 2571	Body-worn cameras
	2015	HB 2704	Recording the police
	2016	HB 4003	Profiling
Pennsylvania	2015	HB 221	Vulnerable populations and crisis intervention
Rhode Island	2015	H 5819	Profiling, data collection and reporting
	2015	S 669	Profiling, data collection and reporting

	Session Year	Legislation	Category
South Carolina	2015	SB 47	Body-worn cameras
Tennessee	2015	HB 57	Profiling
	2015	SB 6	Profiling
	2016	HB 2122	Data collection and reporting
	2016	SB 2304	Data collection and reporting
Texas	2015	SB 158	Body-worn cameras
	2015	HB 3791	Body-worn cameras
	2015	HB 1036	Data collection and reporting
Utah	2015	SB 82	Body-worn cameras
	2015	HB 361	Increasing accountability
	2016	HB 300	Body-worn cameras
	2016	HB 355	Use of force
Vermont	2016	S 174	Body-worn cameras
Virginia	2016	HB 301	Data collection and reporting
Washington	2016	HB 2908	Use of force
	2016	SB 5311	Vulnerable populations and crisis intervention
	2016	HB 2362	Body-worn cameras

Appendix B

All legislation by reform type

	Improves policing practices			Protections for police
	Use of force	Profiling	Vulnerable populations & crisis intervention	
Arizona				
California		AB 953 (2015)	AB 1227, SB 11, SB 29 (2015)	
Colorado	HB 1264 (2016)	HB 1263 (2016)		
Connecticut	HB 7103 (2015)	HB 7103 (2015)		
Delaware				
District of Columbia				
Florida				
Georgia				
Hawaii				
Illinois	SB 1304 (2015)		HB 4112, SB 1304 (2015)	
Indiana			HB 1242, SB 380 (2015)	
Kansas				
Kentucky				
Louisiana				
Maine				LD 375
Maryland		SB 413 (2015)		
Minnesota				SF 878 (2016)
Mississippi				SB 336 (2015)
Nebraska				
Nevada				
New Hampshire				
New York				
North Carolina				H 1044 (2016)
North Dakota				HB 1281 (2015)
Oklahoma			SB 1202 (2016)	HB 2747 (2016)
Oregon		HB 2002 (2015), HB 4003 (2016)		
Pennsylvania			HB 221 (2015)	
Rhode Island		H 5819, S 669 (2015)		
South Carolina				
Tennessee		HB 57, SB 6 (2015)		
Texas				
Utah	HB 355 (2016)			
Vermont				
Virginia				
Washington	HB 2908 (2016)		SB 5311 (2016)	

**Increases accountability
in use of force cases**

Documents police operations

		Body-worn cameras	Recording the police	Data collection and reporting
Arizona		SB 1300 (2015)		
California	SB 227 (2015)	AB 69, SB 85 (2015)	SB 411 (2015)	AB 71, AB 953 (2015)
Colorado	SB 219 (2015)	HB 1285 (2015)	HB 1290 (2015)	SB 217, SB 185 (2015)
Connecticut	HB 7103 (2015)	HB 7103 (2015)	HB 7103 (2015)	HB 7103 (2015)
Delaware		HCR 46 (2015)		
District of Columbia		B 21-0530 (2015), B 21-0351 (2016)		
Florida		SB 248 (2015), HB 93 (2016)		
Georgia	HB 941 (2016)	HB 976 (2016)		
Hawaii	SB 2196 (2016)		SB 2439 (2016)	
Illinois	SB 1304 (2015)	SB 1304 (2015)	SB 1304 (2015)	SB 1304 (2015)
Indiana		HB 1019 (2016)		
Kansas		SB 22 (2016)		
Kentucky	HB 333 (2015)	HB 124 (2016)		
Louisiana		HCR 180 (2015), SB 398 (2016)		
Maryland	SB 882 (2015)	HB 533, SB 482 (2015)		SB 413, HB 771, HB 954 (2015)
Minnesota		SF 498 (2016)		
Nebraska	LB 1000 (2016)	LB 1000 (2016)		
Nevada		AB 162, SB 111 (2015)		
New Hampshire		HB 1584 (2016)		
New York	Exec. Order 147 (2015)			
North Carolina		HB 972 (2016)		
North Dakota		HB 1264 (2015)		
Oklahoma		HB 1037 (2015)		
Oregon		HB 2571 (2015)	HB 2704 (2015)	
Pennsylvania				
Rhode Island				H 5819, S 669 (2015)
South Carolina		SB 47 (2015)		
Tennessee				HB 2122, SB 2304 (2016)
Texas		SB 158, HB 3791 (2015)		HB 1036 (2015)
Utah	HB 361 (2015)	SB 82 (2015), HB 300 (2016)		
Vermont		S 174 (2016)		
Virginia				HB 301 (2016)
Washington		HB 2362 (2016)		

Endnotes

- 1 Of at least 20 pieces of policing legislation enacted during these preceding years, six established the creation of Blue Alert systems designed to help speed the apprehension of suspects who kill or injure law enforcement officers. See <http://www.bluealert.us/>
- 2 Joseph Goldstein, "Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice," *Yale Law Journal* 69, no. 4 (1960): 543-594 ("Police decisions not to invoke the criminal process largely determine the outer limits of law enforcement ... [These decisions] are generally of extremely low visibility and consequently are seldom the subject of review.")
- 3 High profile deaths include Michael Brown (Ferguson), Jeremy Mardis (Marksville, LA), Akai Gurley (New York City), Tamir Rice (Cleveland), Eric Garner (New York City), Freddie Gray (Baltimore), Walter Scott (North Charleston, SC), Samuel DuBose (University of Cincinnati), Jamar Clark (Minneapolis), Alton Sterling (Baton Rouge), Philando Castile (Minneapolis), Keith Scott (Charlotte), Terence Crutcher (Tulsa), and Deborah Danner (New York City).
- 4 For example, see Police Executive Research Forum, *Guiding Principles on Use of Force* (Washington, DC: Police Executive Research Forum, 2016), <https://perma.cc/4RSB-KSWX>; David W. Brown, "Bad Laws Produce Bad Law Enforcement," *ACLU*, August 18, 2016, <https://perma.cc/G4UZ-L9YY>
- 5 For example, in 92 of 102 cases in 2015 in which an unarmed black person was killed by the police, charges were never brought against the officer involved; and in only two of 10 cases in which charges were brought was the officer eventually convicted, with one punished with a particularly lenient sentence: See Kimberly Kindy and Kimbriell Kelly, "Thousands Dead, Few Prosecuted," *The Washington Post*, April 11, 2015, <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/> That officer received a sentence of only one year in jail and was allowed to serve it exclusively on weekends. See Mapping Police Violence, "Unarmed Victims" (2015), <https://perma.cc/6HM5-VU8L>
- 6 From 2002 to 2011, an annual average of 44 million people ages 16 or older had one or more face-to-face encounters with police. Of those who had contact, 1.6 percent experienced the threat or use of nonfatal force by the police during their most recent contact. See Shelley Hyland, Lynn Langton, and Elizabeth Davis, *Police Use of Nonfatal Force, 2002-11* (Washington, DC: Bureau of Justice Statistics, 2015) 1, <https://perma.cc/22WT-A5ZN>. That race can and does play a factor in police practices is well established. Research has demonstrated that race can affect arrest decisions (see for example, Tammy Rinehart Kochel, David B. Wilson, and Stephen D. Mastrofski, "Effect of Suspect Race on Officers' Arrest Decisions," *Criminology* 49, no. 2 (2011): 473-512); vehicle and person searches (see, for example, Robin S. Engel and Richard Johnson, "Toward a better understanding of racial and ethnic disparities in search and seizure rates," *Journal of Criminal Justice* 34, no. 6 (2006): 605-617); traffic stops (see for example Patricia Warren, Donald Tomaskovic-Devey, William Smith, Matthew Zingraff, and Marcinda Mason, "Driving While Black: Bias Processes and Racial Disparity in Police Stops," *Criminology*, 44, no. 3 (2006): 709-738); pedestrian stops (see for example Andrew Gelman, Jeffrey Fagan, and Alex Kiss, "An Analysis of the New York City Police Department's 'Stop-and-Frisk' Policy in the Context of Claims of Racial Bias," *Journal of the American Statistical Association* 102, no. 479 (2007): 813-823); and drug arrests (see for example Katherine Beckett, Kris Nyrop, and Lori Pfingst, "Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests," *Criminology* 44, no. 1 (2006): 105-137). Regarding use of force, the U.S. Justice Department's Bureau of Justice Statistics also reports that black people are more likely than white people to experience threats, or use of force by police, including the type of force that is perceived to be excessive. See Hyland et al., *Police Use of Non-Fatal Force, 2002 - 11*, 4, 6. In addition, according to a research project mapping police violence, unarmed black Americans were killed by police at five times the rate of white Americans in 2015 and black Americans represented 41 percent of those killed by police in the nation's 60 largest cities in 2015, despite being only 20 percent of the population in these cities. See Mapping Police Violence, <http://mappingpoliceviolence.org>
- 7 For example, see U.S. Department of Justice, Civil Rights Division, *Investigation of the Baltimore City Police Department* (Washington, DC: DOJ, 2016); also see U.S. Department of Justice, Civil Rights Division, Letter from Acting Assistant Attorney General Jocelyn Samuels and Acting U.S. Attorney Damon P. Martinez (D., N.M.) to Mayor Richard Barry, City of Albuquerque (April 10, 2014) (reporting findings of Department of Justice's investigation into the Albuquerque Police Department), <https://perma.cc/FLZ4-BBED>
- 8 H.R. 2052, the Excessive Use of Force Prevention Act of 2015, introduced in April 2015 by Rep. Hakeem Jeffries (D-NY); H.R. 2875 and S. 2168, the Law Enforcement Trust and Integrity Act of 2015, introduced in June 2015 by Rep. John Conyers (D-MI) and in October 2015 by Sen. Benjamin Cardin (D-MD); H.R. 2302, the Police Training and Independent Review Act of 2015, introduced in May 2015 by Rep. Steve Cohen (D-TN); H.R. 5221, the Preventing Tragedies Between Police and Communities Act, introduced in May 2016 by Rep. Gwen Moore (D-WI); H.R. 3481 and S. 1476, the Police Reporting Information, Data, and Evidence Act of 2015 (the "PRIDE Act"), introduced in September 2015 by Rep. Joaquin Castro (D-TX) and in June 2015 by Senators Barbara Boxer (D-CA) and Cory Booker (D-NJ); H.R. 1810, the Collection and Analysis of Data to Educate and Train Law Enforcement Officers Act of 2015 (the "CADET Act"), introduced in April 2015 by Rep. Sheila Jackson Lee (D-TX); H.R. 306, the National Statistics on Deadly Force Transparency Act of 2015, introduced in January 2015 by Rep. Steve Cohen (D-TN).
- 9 President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing* (Washington, DC: Office of Community Oriented Policing Services, 2015), <https://perma.cc/4JLF-44N9>.

- 10 Definition of body-worn cameras from Miller, Lindsay, Jessica Toliver, and Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned* (Washington, DC: Office of Community Oriented Policing Services, 2014).
- 11 The Police Executive Research Forum stated in a March 2016 report that current conditions are “a combustible mixture that threatens to undermine police effectiveness, the trust between police and community, and ultimately, the safety of residents and police officers alike.” Police Executive Research Forum, *Guiding Principles on Use of Force*, <https://perma.cc/4DHT-EU5C>.
- 12 See Emily Ekins, *Policing in America: Understanding Public Attitudes Toward the Police. Results From a National Survey* (Washington DC: The Cato Institute, 2016). Also see, for example, Civil Rights Division, United States Department of Justice, *Investigation of the Ferguson Police Department* (Washington, DC: U.S. Department of Justice, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.
- 13 See endnote 4. See also Brad Heath, “Racial gap in U.S. arrest rates: ‘Staggering disparity’” *USA Today*, November 19, 2014, <http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/> (arrests); Sharon LaFraniere and Andrew W. Lehren, “The Disproportionate Risks of Driving While Black,” *The New York Times*, October 24, 2015, <http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html>.
- 14 The Police Foundation, using data from the Bureau of Justice Statistics and *The Washington Post*, calculated that one in 67,000 face-to-face encounters between police and civilians results in death from police use of force. Police Foundation, “Use-of-Force Infographic” (2016), <https://www.policefoundation.org/general-resources/use-of-force-infographic/>.
- 15 Seth Stoughton, “How Police Training Contributes to Avoidable Deaths,” *The Atlantic*, December 12, 2014, <http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/>.
- 16 Police Executive Research Forum, *Guiding Principles on Use of Force*. Also see, The International Association of Chiefs of Police, *Emerging Use of Force Issues: Balancing Public and Officer Safety* (Washington DC: IACP and the U.S. Department of Justice, Office of Community Oriented Policing Services, 2012).
- 17 Ibid.
- 18 An example of local reform are the steps that have been taken by the Asheville Police Department in North Carolina. The department invited Vera to help it reform its de-escalation and use of force policies after a high-profile police shooting there. Vera Institute of Justice, *Asheville Police Department De-escalation Policy Workshop Summary* (New York: Vera Institute of Justice, 2016), <https://perma.cc/93XN-RUGL>
- 19 See endnote 4.
- 20 Many studies use the “benchmarking” approach, which involves comparing search rates for people of different ethnicities. If one group accounts for more searches than their share of the local population, then this would be interpreted as evidence of discrimination. Detractors of benchmarking point to the fact that if a higher percentage of people in one group actually do carry, for example, illegal drugs or weapons—determined by using a second test that examines the “hit” rate or outcome of an encounter—a higher search rate may not reflect racial discrimination. See James Lange, Mark Johnson, and Robert Voas, “Testing the racial profiling hypothesis for seemingly disparate traffic stops on the New Jersey Turnpike,” *Justice Quarterly* 22, no. 2 (2005): 193-223. Also, researchers at Stanford University recently developed a new measurement test, called the “threshold test”—a statistically rigorous way to quantify how suspicious officers initiate searches. After analyzing data from 4.5 million traffic stops in 100 North Carolina cities, researchers found that black and Hispanic drivers are subjected to a lower search threshold than whites, suggestive of widespread discrimination against these groups. See Edmund Andrews, “Stanford researchers develop new statistical test that shows racial profiling in police traffic stops,” *Stanford News*, June 28, 2016, <https://perma.cc/QY5K-PDAZ>
- 21 Robin S. Engel and Richard Johnson, “Toward a better understanding of racial and ethnic disparities in search and seizure rates,” *Journal of Criminal Justice* 34, no. 6 (2006); Also see Ranjana Natarajan, “Racial profiling has destroyed public trust in police. Cops are exploiting our weak laws against it,” *The Washington Post*, December 15, 2014, <https://perma.cc/GW6Y-NQDZ>
- 22 See, for example, Civil Rights Division, U.S. Department of Justice, *Investigation of the Ferguson Police Department* (Washington, DC: U.S. Department of Justice, 2015), 4–6, <https://perma.cc/SK2X-J3BS>
- 23 For example, studies estimate that seven to 10 percent of all police interactions involve people with a mental illness, and officers working in larger police departments report an average of six monthly encounters involving a person in a state of psychiatric distress. See Randy Borum, “Police perspectives on responding to mentally ill people in crisis: Perceptions of program effectiveness,” *Mental Health Law & Policy Faculty Publications* (1998), http://scholarcommons.usf.edu/mhlp_facpub/568; and Martha Williams Deane, Henry J. Steadman, Randy Borum, Bonita M. Veysey, and Joseph P. Morrissey, “Emerging partnerships between mental health and law enforcement,” *Psychiatric Services* 50, no. 1(1999): 99-101. This has been in part because from the 1970s onwards—during the period of “deinstitutionalization”—the primary locus of psychiatric treatment shifted from long-term care in state hospitals to community-based settings, but without adequate public funding. This has led to a

- chronic shortage of outpatient mental health services, income assistance, and housing and employment support that many people with chronic psychiatric disabilities need to live successfully in their communities. See Gerald N. Grob, *From Asylum to Community: Mental Health Policy in Modern America* (Princeton, NJ: Princeton University Press, 1991). For history of the deinstitutionalization of the mentally ill generally, see Bernard E. Harcourt, “Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s,” *Ohio State Journal of Criminal Law* 9, no. 1 (2011): 53-88, <https://perma.cc/3DJH-3T4L>. Also see Richard G. Frank and Sherry A. Glied, *Better But Not Well: Mental Health Policy in the United States since 1950* (Baltimore, MD: The Johns Hopkins University Press, 2006).
- 24 Doris A. Fuller, H. Richard Lamb, Michael Biasotti, and John Snook, *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters* (Arlington, VA: Treatment Advocacy Center, Office of Research & Public Affairs, 2015) 1, <https://perma.cc/JB6S-JEUY>. Also see Randy Borum, “Police perspectives on responding to mentally ill people in crisis: Perceptions of program effectiveness,” *Mental Health Law & Policy Faculty Publications* (1998), http://scholarcommons.usf.edu/mhlp_facpub/568
- 25 E. Fuller Torrey, MD, *Out of the Shadows: Confronting America’s Mental Illness Crisis* (New York: John Wiley & Sons, 1998).
- 26 Studies indicate that between one-quarter and one-half of people killed by police are mentally ill. *The Washington Post*, “991 People Shot Dead by Police in 2015,” <https://www.washingtonpost.com/graphics/national/police-shootings/>; E. Fuller Torrey et al., *Justifiable Homicides by Law Enforcement Officers: What Is the Role of Mental Illness?* (Treatment Advocacy Center and the National Sheriffs’ Association, 2013), <https://perma.cc/LQ3B-7LA5> Richard Pérez-Pena, “When ‘Yelling Commands’ Is the Wrong Police Response,” *The New York Times*, September 29, 2016, http://www.nytimes.com/2016/09/30/us/when-yelling-commands-is-the-wrong-police-response.html?_r=0.
- 27 Video footage captured by police body-worn cameras has provided crucial evidence in a number of high-profile police encounters that resulted in civilian deaths. For example, in the case of Samuel DuBose—who was shot and killed by University of Cincinnati police officer Ray Tensing—body camera footage contradicted Tensing’s claim that the car dragged DuBose, causing Tensing to shoot him. In fact, the video showed that the car only rolled after DuBose was shot. Also, other body camera footage recorded statements by responding officers that were suggestive of a police cover up. See Jeremy Stahl, “New Body Cam Videos Show Cops Coalescing Around False Narrative of Sam DuBose Killing,” *Slate*, July 30, 2015, http://www.slate.com/blogs/the_slatest/2015/07/30/sam_dubose_murder_phillip_kidd_and_david_lindenschmidt_suspended_after_backing.html. Body camera footage also resulted in speedy arrests in the police shooting of Jeremy Mardis. See David A. Graham, “The Death of Jeremy Mardis and the Honesty of the Police,” *The Atlantic*, November 12, 2015, <http://www.theatlantic.com/national/archive/2015/11/the-death-of-jeremy-mardis-and-trustworthy-police/415437/>; and Christine Hauser, “Video of Fatal Police Shooting of Louisiana Boy, 6, is Released,” *The New York Times*, September 29, 2016, http://www.nytimes.com/2016/09/30/us/police-video-louisiana-shooting.html?_r=0.
- 28 District Court Judge Scheindlin, in her discussion of the “stop-and-frisk” policy in New York City, believed that such recordings could “either confirm or refute the belief of some minorities that they have been stopped simply as a result of their race, or based on the clothes they wore, such as baggy pants or a hoodie.” See *Floyd, et al. v. City of New York, et al.*, 959 F.Supp.2d 668, 685 (S.D.N.Y. 2013). For perceived benefits of body cameras, see Lindsay Miller, Jessica Toliver and Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned* (Washington, DC: Office of Community Oriented Policing Services, 2014) 5-11. For information about the genesis of widespread dashboard camera usage see Robinson Meyer, “Seen It All Before: 10 Predictions About Police Body Cameras,” *The Atlantic*, December 5, 2014, <http://www.theatlantic.com/technology/archive/2014/12/seen-it-all-before-10-predictions-about-police-body-cameras/383456/>. As of 2013, 68 percent of local police departments were using in-car video cameras, colloquially known as “dash cams,” an increase of 7 percent from 2007. See Brian Reaves, *Local Police Departments, 2013: Equipment and Technology* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, 2015, NCJ 248767), <https://perma.cc/SC9F-WBMT>
- 29 International Association of Chiefs of Police, “Law Enforcement – Industry Experts Convene Symposium on Critical Policy Issues: Body-Worn Cameras,” press release (Washington, DC: IACP, January 21, 2016), <https://perma.cc/67N4-ADQA>
- 30 *Ibid.*
- 31 See, for example, Barak Ariel, William A. Farrar, and Alex Sutherland, “The Effect of Police Body-Worn Cameras on Use of Force and Citizen’s Complaints Against Police: A Randomized Control Trial,” *Journal of Quantitative Criminology* 31, no. 3 (2015): 509-535 and Ryan Stokes, Lee Rankin and Tony Filler, *Program Evaluation & Recommendations: On-Officer Body Camera System* (Mesa, AZ: Mesa Police Department, 2013) 11-12; also see ODS Consulting, *Body Worn Video Projects in Paisley and Aberdeen, Self-Evaluation*, (Glasgow: ODS Consulting, 2011). For an estimate of the money departments spend resolving complaints, one study found that law enforcement agencies spent more than \$346 million in 2010 “on misconduct-related civil judgments and settlements excluding sealed settlements, court costs, and attorney fees.” See David Packman, *2010 National Police Misconduct Reporting Project Police Misconduct Statistical Report - Draft* (Washington DC: Cato Institute, 2011).
- 32 See Barak Ariel, William A. Farrar, and Alex Sutherland, “The Effect of Police Body-Worn Cameras on Use of Force and Citizen’s Complaints Against Police: A Randomized Control Trial,” *Journal of Quantitative Criminology* 31, no. 3 (2015) and Ryan Stokes, Lee Rankin and Tony Filler, *Program Evaluation & Recommendations: On-Officer Body Camera System* (Mesa, AZ: Mesa Police

- Department, 2013). Both studies saw a decrease in police use of force. A United Kingdom study saw civilian behavior improve. See ODS Consulting, *Body Worn Video Projects in Paisley and Aberdeen, Self-Evaluation* (Glasgow: ODS Consulting, 2011). This supports other research across many disciplines that suggest people alter their behavior once made aware that they are being observed. For a review of this research, see Barak Ariel et al., “The Effect of Police Body-Worn Cameras,” at 516. Also see Barak Ariel et al., “‘Contagious Accountability’: A Global Multisite Randomized Controlled Trial on the Effect of Policy Body-Worn Cameras on Citizens’ Complaints Against the Police,” *Criminal Justice and Behavior* 20, no. 10 (2016): 1-24, which suggests that the “surveillance effect” has more effect on police behavior, affecting entire departments and not just officers who used body cameras (“Whatever the precise mechanism of the deterrence effect of being watched and, by implication, accountability, all officers in the departments were acutely aware of being observed more closely, with an enhanced transparency apparatus that has never been seen before in day-to-day policing operations. Everyone was affected by it, even when the cameras were not in use, and collectively everyone in the department[s] attracted fewer complaints.”), <http://cjb.sagepub.com/content/early/2016/09/21/0093854816668218.full.pdf+html>.
- 33 Justin Ready and Jacob Young, “The Impact of On-Officer Video Cameras On Police Citizen Contacts: Findings From a Controlled Experiment,” *Journal of Experimental Criminology* 11, no. 3 (2015): 445-458.
- 34 See, for example, Ryan Stokes et al., *Program Evaluation & Recommendations: On-Officer Body Camera System* (finding that on-body camera users experienced a 75 percent reduction in use of force complaints when compared to the previous twelve months).
- 35 A high-profile example of this was the live-streamed death of Philando Castile. Castile was fatally shot in a car by Minnesota police officer Jeronimo Yanez. Castile’s girlfriend Diamond Reynolds recorded the moments following the shooting and live-streamed the footage through Facebook. See James Poniewozik, “A Killing. A Pointed Gun. And Two Black Lives, Witnessing,” *The New York Times*, July 7, 2016, <http://www.nytimes.com/2016/07/08/us/philando-castile-facebook-police-shooting-minnesota.html>.
- 36 See for example, *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) (holding that there is a First Amendment right to videotape police carrying out their duties in public places “subject to reasonable time, place, and manner restrictions”); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012), cert. denied, 133 S. Ct. 651 (2012) (ensuring that the ACLU can record police officers in the field); and *Gericke v. Begin*, 753 F.3d 1, 10 (1st Cir. 2014) (reaffirming the First Amendment right to film police officers, including during traffic stops, so long as it does not interfere with legitimate law enforcement activities). However, the Third Circuit in *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010), found that “there was insufficient case law establishing a right to videotape police officers during a traffic stop.” Noting this, Federal District Court Judge Kearney in *Fields v. City of Philadelphia*, No. 14-4424, 2016 [E.D. Pa. Feb. 19, 2016] stated, “[w]hile acknowledging activities observing and recording the police may be protected, our Court of Appeals has never held speech unaccompanied by an expressive component is always afforded First Amendment protection.” According to Judge Kearney, the recordings in question were not protected speech under the First Amendment because they were merely observational and conveyed no particular message, such as criticism of police conduct.
- 37 For example, a U.S. Marshal in South Gate, CA was caught in April 2015 grabbing a phone from a woman who was recording his actions and smashing it on the ground. See Joseph Serna, “With smartphones everywhere, police on notice, they may be caught on camera,” *Los Angeles Times*, April 21, 2015, <http://www.latimes.com/local/lanow/la-me-ln-feds-probe-video-phone-in-south-gate-20150421-story.html>. Also in December 2014, police arrested Kianga Mwamba after she began recording an arrest being made on the side of the road and deleted the cell phone recording. Mwamba successfully sued the Baltimore Police Department. See Yvonne Wenger, “Baltimore City to pay \$60,000 settlement to woman who recorded arrest,” *The Baltimore Sun*, January 19, 2016, <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-settlements-20160119-story.html>
- 38 Joseph Richardson, “Who Shot Ya? How Emergency Departments Can Collect Reliable Police Shooting Data,” *Journal of Urban Health* 93, no.1 (2016) 8, 10. The tally of law enforcement agencies, as of 2008, include 12,501 local police departments, 3,063 sheriff’s offices, 50 primary state law enforcement agencies, 1,733 special jurisdiction agencies, and 638 other agencies, primarily county constable offices in Texas. See Brian Reeves, *Census of State and Local Law Enforcement Agencies, 2008* (Washington, DC: Bureau of Justice Assistance, 2011) 2.
- 39 See Ryan Gabrielson, Ryann Grochowski Jones, and Eric Sagara, “Deadly Force, in Black and White,” *ProPublica*, October 10, 2014, <https://perma.cc/Q43C-BV34>, in which the authors state: “The data . . . is terribly incomplete. Vast numbers of the country’s 17,000 police departments don’t file fatal police shooting reports at all, and many have filed reports from some years but not others. Florida departments haven’t filed reports since 1997 and New York City last reported in 2007. Information contained in the individual reports can also be flawed.” In 2012, only 750 (4 percent) of the nation’s law enforcement agencies reported police-involved shooting data to the FBI. In addition, in an evaluation of its data collection of arrest-related deaths, the Bureau of Justice Statistics found methodological limitations due to voluntary reporting that were significant enough for it to temporarily suspend its program. See Duren Banks and Michael Planty, *Assessment of Coverage in the Arrest-Related Deaths Program* (Washington, DC: BJS, 2015) 1-2. On the state level, underreporting and classification errors are also prevalent—even in mandatory reporting states such as California and Texas. See Howard Williams, Scott Bowman, and Jordan Jung, “The Limitations of Government Databases for Analyzing Fatal Officer-Involved Shootings in the United States,”

- Criminal Justice Policy Review* (May 28, 2016). Also see Lise Olsen, “In Texas and California, police fail to report use-of-force fatalities from 2005-2015,” *Houston Chronicle*, October 9, 2016, <https://perma.cc/92UA-KGP8> and Rob Barry and Coulter Jones, “Hundreds of Police Killings Are Uncounted in Federal Stats,” *The Wall Street Journal*, December 3, 2014, <https://perma.cc/X9E3-LC87>
- 40 See Pub. Law No. 113-242, which mandates that states receiving federal criminal justice assistance report all deaths that occur in law enforcement custody, including while a person is being detained or arrested. According to the American Bar Association, however, states that are not reporting deaths in police custody are still receiving DOJ funds. See Stephanie Francis Ward, “States not reporting deaths in police custody are still getting DOJ funds,” *ABA Journal*, September 14, 2016, <https://perma.cc/KPS9-MT6E>. Congress has tried to enact similar laws before: In 1994, the Violent Crime Control and Law Enforcement Act mandated that the Department of Justice annually gather, report, and publish a summary of public data counting uses of “excessive” force, but nothing much came of the plan. At some point the task of collecting data fell to the International Association of Chiefs of Police, a professional organization that maintained a database until 2001. The *Death in Custody Reporting Act* was initially passed in 2000 to tally prison confinement deaths. Lawmakers inserted a provision requiring tallies of arrest-related deaths in 2003, but the law expired in 2006 without a single report having been released. Since then, the provision requiring state counts of arrest-related deaths has stayed on the books—but reporting has never been enforced. Many local law enforcement agencies provide incomplete data.
- 41 For example, “Killed by Police” and databases published by the *Washington Post* and the *Guardian* provide comprehensive information about those who have been killed and the circumstances of their deaths, see Killed By Police, <http://killedbypolice.net/>; “The Counted: People Killed by Police in the US,” *The Guardian* (reporting 1139 people killed by police in 2015), <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database>; see also “Investigation: Police Shootings,” *The Washington Post* (reporting 991 people fatally shot by police in 2015), <http://www.washingtonpost.com/graphics/national/police-shootings/>. These efforts have identified significant discrepancies between the number of police-involved killings recorded by law enforcement and those recorded by independent organizations—with some tallies that are roughly 2.5 times higher than those reported by the FBI’s Uniform Crime Reporting program, which only counts what are considered “justifiable” homicides by police.
- 42 U.S. Department of Justice, Office of Public Affairs, “Justice Department Outlines Plan to Enable Nationwide Collection of Use of Force Data,” October 13, 2016, <https://perma.cc/P6TA-4NUL>
- 43 For example, 18 officers were charged in 2015, compared to an average of five per year over the preceding decade. See Shaila Dewan and Timothy Williams, “More Police Officers Facing Charges, But Few See Jail,” *The New York Times*, December 29, 2015, <https://www.nytimes.com/2015/12/30/us/more-police-officers-facing-charges-but-few-see-jail.html>. Also see Kimberly Kindy and Kimbriell Kelly, “Thousands Dead, Few Prosecuted,” *The Washington Post*, April 11, 2015, <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/>; Kimberly Kindy, Marc Fisher, Julie Tate, and Jennifer Jenkins, “A Year of Reckoning: Police Fatally Shoot Nearly 1000,” *The Washington Post*, December 26, 2015, <http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/>; and Zusha Elinson and Joe Palazzolo, “Police Rarely Criminally Charged for On-Duty Shootings: Research Shows 41 Officers Were Charged With Murder or Manslaughter for On-Duty Shootings Over 7 Years,” *The Wall Street Journal*, November 24, 2014, <https://perma.cc/5EGQ-5D56>
- 44 Elinson and Palazzolo, *The Wall Street Journal*, 2014.
- 45 Police officers in all states are granted authority, either by statute or by common law, to use force to accomplish lawful objectives—such as arrest, entry to serve a warrant or make an arrest, and detention—but the exact contours of that authority vary from state to state. Most laws are modeled on the standard announced in *Tennessee v. Garner*, 471 U.S. 1 (1985): that deadly force can only be used “to prevent the escape” of a suspect and if “the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.” See Chad Flanders and Joseph Welling, “Police Use of Deadly Force: State Statutes 30 Years After *Garner*,” *St. Louis University Law Review* 35 (2016): 109, 120-4, <https://perma.cc/SW5N-AMGM>. Generally, the extent to which police can use deadly force is governed by the Fourth Amendment, which guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The use of force must be “objectively reasonable” based on the totality of the circumstances of the incident. This applies regardless of whether the use of force is deadly or not. See *Graham v. Connor*, 490 U.S. 386, 389 (1989) (“All claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard”). In *Graham*, the court held that “the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” *Ibid.* at 396-7. But in determining the “reasonableness” of use of force, there are no strict multi-factor tests. Indeed, determining the reasonableness of the use of deadly force in a police-civilian encounter is a complex and layered issue that depends on a host of underlying factual considerations—for example, determining whether facts support the conclusion that a suspect posed an immediate threat to police, persons, and property in the surrounding area, which in turn depends on a

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- series of prior factual conclusions about the real-world events on the ground. See *Scott v. Harris*, 550 U.S. 806 (1996). Note also that the law does not clearly require exhaustion of non-violent or less-than-lethal means before resorting to lethal force. See, for example, *Harris v. Serpas*, 745 F.3d 767, 772–73 (5th Cir.), cert. denied, 135 S. Ct. 137 (2014). Nor does the law consistently prohibit the use of force to maintain law and order, prevent escape, or apprehend a suspect, in absence of an imminent threat of death or serious injury. See, for example, *McKenney v. Harrison*, 635 F.3d 354 (8th Cir. 2011).
- 46 See for example a discussion of exemplary case law in John Gross, “Judge, Jury and Executioner: The Excessive Use of Deadly Force by Police Officers,” *Texas Journal on Civil Liberties & Civil Rights* 21, no. 2 (2016): 155, 170-6.
- 47 Howard Wasserman, “Orwell’s Vision: Video and the Future of Civil Rights Enforcement,” *Maryland Law Review* 68, no. 3 (2009) 600, 619-20 (“[Video] purports to be raw, unambiguous, and unbiased evidence incontrovertibly showing what happened in the real world”), <https://perma.cc/Y3XK-QPJW>.
- 48 See for example a discussion of the process in San Joaquin County in Amari L. Hammonds, Katherine Kaiser Moy, Rachel R. Suhr, and Cameron Vanderwall, *At Arm’s Length: Improving Criminal Investigations of Police Shootings* (Stanford, CA: Stanford Criminal Justice Center, 2016), <https://perma.cc/WDM5-PLUK>
- 49 See Daniel Richman, “Prosecutors and Their Agents, Agents and Their Prosecutors,” *Columbia Law Review* 103, no. 4 (2003): 749, 758. According to Richman “[p]rosecutors are the exclusive gatekeepers over [the] court, but they need agents to gather evidence.” For a discussion on the conflict of interest that exists when prosecutors investigate the police, see generally Kate Levine, “Who Shouldn’t Prosecute the Police?” *Iowa Law Review* 101, no. 4 (2016): 1447, <https://perma.cc/M4JZ-YJZQ> Levine also discusses the control prosecutors wield when presenting evidence before grand juries. *Ibid.* at 1472. In contrast, at a preliminary hearing, both prosecutor and defendant present arguments and evidence in a public venue as to why the case should or should not proceed to trial, with the judge making the ultimate decision based on the proceedings. For a look at the scope of the federal preliminary hearing, see Federal Rules of Criminal Procedure, Rule 5.1, <https://perma.cc/2JJT-EPUJ>
- 50 However, in January 2017, the Third District Court of Appeal in Sacramento said that the legislature had exceeded its powers because the law interferes with a county grand jury’s express state constitutional authority to issue a criminal indictment. In a unanimous decision, the court declared that under the separation of powers doctrine, the legislature “cannot act to defeat or materially impair the inherent constitutional power of another entity” and therefore “does not have the power to enact a statute that limits the constitutional power of a criminal grand jury to indict” a person on a criminal offense. The court said the legislature could seek a constitutional amendment banning grand juries from investigating deadly police force cases or revise the procedural rules that make grand jury investigations secret. See *People ex rel. Pierson v. Superior Court (South Lake Tahoe Police Officers’ Association)*, No. C081603 (Cal. App. 3d January 10, 2017), <https://perma.cc/Z6SD-PC5M>. At the time of publication, no appeal had yet been filed.

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