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HOW PERVASIVE VIDEO AFFECTS LAW ENFORCEMENT AND CITIZEN RIGHTS

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A. *Photojournalists and the Right to Record Police*

The past two years saw a number of cases involving the hotly debated issue of journalists' and citizens' right to record police activity. In August of 2014, Ferguson, Missouri police officer Darren Wilson shot and killed Michael Brown, who was unarmed, resulting in a series of protests and demonstrations that involved violent clashes with police and garnered national attention. From these protests emerged numerous reports of police interference with the media, including allegations of obstruction of access, arrests, criminal charges, threats, and even physical assaults.[1]

One incident that gained notoriety was the arrest of *Washington Post* reporter Wesley Lowery and *Huffington Post* reporter Ryan Reilly. The reporters had been working out of a McDonald's restaurant during the protests when officers ordered them to leave. Lowery recorded the interaction and refused to stop when instructed to do so by an officer. The two were arrested and processed, but after being identified as members of the media, they were released.

In August of 2015, almost a year later and just before the statute of limitations would expire, Lowery and Reilly were charged with trespassing and interfering with a police officer.[2] A trespassing conviction carries a sentence of up to a year in jail and a fine of up to $1,000. The reporters' respective news organizations have condemned the charges. Around the same time that Lowery and Reilly were charged, two other journalists arrested while recording police in Ferguson. Bilgin Şaşmaz and Trey Yingst saw their charges dropped as part of a settlement in civil rights lawsuits filed on their behalf by the ACLU.[3]

Continuing through 2015, news reporting on the Black Lives Matter protests also brought arrests, including in Minneapolis.

Meanwhile, in Austin, Texas, another case involving the right to record police continues to make its way through the courts. In 2012, Antonio Buehler was arrested for resisting arrest after he filmed two police officers making a traffic stop.[4] Buehler claims that he was assaulted for asserting his right to film. He was later arrested twice more for filming police stops.

Buehler filed suit in Austin federal court, alleging under 42 U.S.C. § 1983, that five officers and unnamed John Does violated his First and Fourteenth Amendment rights when they interfered

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[1] *See* PEN AMERICA, PRESS FREEDOM UNDER FIRE IN FERGUSON: A PEN AMERICAN CENTER REPORT (Oct. 27, 2014), *available at* http://www.pen.org/sites/default/files/PEN_Press-Freedom-Under-Fire-In-Ferguson.pdf; AMNESTY INTERNATIONAL, ON THE STREETS OF AMERICA: HUMAN RIGHTS ABUSES IN FERGUSON (Oct. 2014), *available at* http://www.amnestyusa.org/sites/default/files/onthestreetsofamericaamnestyinternational.pdf.

[2] Ravi Somaiya & Ashley Southall, *Arrested in Ferguson Last Year, 2 Reporters Are Charged*, N.Y. TIMES, Aug. 10, 2015, http://www.nytimes.com/2015/08/11/us/arrested-in-ferguson-2014-washington-post-reporter-wesley-lowery-is-charged.html?_r=0.

[3] *See* Press Release, American Civil Liberties Union of Missouri, Two Journalists Recording Ferguson Protests Will Not Face Charges (Aug. 3, 2015), *available at* http://www.aclu-mo.org/newsviews/2015/08/03/two-journalists-recording-ferguson-protests-will-not-face-ch.

[4] *Buehler v. City of Austin/Austin Police Dep't*, A-13-CV-1100 ML (W.D. Tex. July 24, 2014).

with his efforts to film and to publish their public conduct. He also alleged additional Constitutional violations and various state-law claims.

In 2014, in an order largely denying the defendants' motion to dismiss, a federal magistrate judge upheld Buehler's right to photograph and film police officers carrying out their official duties in public.[5] The magistrate judge further held that this right was clearly established at the time of Buehler's arrests based on widespread recognition of the right by United States Courts of Appeals, including the Fifth Circuit, and many federal district courts.

However, Buehler's victory was short-lived. After Buehler was indicted by a grand jury on several misdemeanor counts of disobeying lawful orders, the magistrate judge granted summary judgment for the defendants, holding that the grand jury indictments established probable cause for each of Buehler's arrests and precluded his constitutional claims.[6] In making this ruling, the magistrate judge relied on Fifth Circuit precedent, which holds that "[i]f [probable cause for arrest] exists, any argument that the arrestee's speech as opposed to [his] criminal conduct was the motivation for [his] arrest must fail, no matter how clearly that speech may be protected by the First Amendment."[7] Thus, there was no constitutional violation and the officers were entitled to qualified immunity. Buehler appealed his case to the Fifth Circuit, and it has been tentatively calendared for argument during the week of February 29, 2016.[8]

Finally, a few states have recently attempted to limit the right to record through legislation. A bill in Arkansas that would have required photographers to obtain explicit written consent from subjects for most purposes, was passed by the legislature, but vetoed by Governor Asa Hutchinson. In a press release, Governor Hutchinson said he vetoed the bill "because in its current form it is overbroad, vague and will have the effect of restricting free speech." He added, "I believe the absence of a clear exemption for . . . expressive works will result in unnecessary litigation in Arkansas courts and will suppress Arkansans who engage in artistic expression from photography to art work."[9] And in Texas, a bill attempting to establish a minimum 25-foot distance between the photographer and the police was withdrawn by its proponent after receiving widespread criticism from citizens' groups and some law enforcement agencies.[10] Most recently, an Arizona legislator has introduced a bill criminalizing videotaping of law enforcement officers from a distance of less than 20 feet.

In a piece of California legislation specifically aimed at paparazzi, a photographer who allegedly pursued Justin Bieber in a high speed chase was charged under a statute that creates additional

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[5] Memorandum Opinion and Order, *Buehler*, A-13-CV-1100 ML, at 11-12 (W.D. Tex. July 24, 2014).

[6] *Buehler v. City of Austin/Austin Police Dep't*, No. 1:13-CV-1100-ML, 2015 U.S. Dist. LEXIS 20878, at *38 (W.D. Tex. Feb. 20, 2015).

[7] *Mesa v. Prejean*, 543 F.3d 264, 273 (5th Cir. 2008).

[8] *Buehler v. City of Austin/Austin Police Dep't*, No. 15-50155 (5th Cir. filed Feb. 24, 2015).

[9] Press Release, Ark. Governor, Governor Hutchinson's Veto Letter to Senate Concerning SB79 (Mar. 31, 2015), *available at* http://governor.arkansas.gov/press-releases/detail/governor-hutchinsons-veto-letter-to-senate-concerning-sb79.

[10] Annabelle Bamforth, *TX Rep. Jason Villalba Scraps Bill That Would Limit Filming Of Police*, TRUTH IN MEDIA, April 13, 2013, http://truthinmedia.com/tx-rep-jason-villalba-scraps-bill-that-would-limit-filming-of-police/.

penalties for certain driving violations committed with "intent to capture any type of visual image, sound recording, or other physical impression of another person for a commercial purpose." Cal. Vehicle Code § 40008(a). The trial court dismissed the charges holding the statute unconstitutional. The California Court of Appeals reversed, holding the law is constitutional on its face.[11]

B. *Invasion of Privacy/Intentional Infliction of Emotional Distress/Video Voyeurism*

The following cases illustrate other potential civil and criminal claims that can arise out of exercising the right to photograph and record in public:

- *Foster v. Svenson,* 7 N.Y.S.3d 96 (N.Y. App. Div. 2015).

  Beginning in February of 2012, Arne Svenson, a critically acclaimed photographer, began photographing people that lived in the building across the street from his New York City apartment. After approximately one year of photography, Svenson assembled a series of photographs called "The Neighbors," which he exhibited in galleries in Los Angeles and New York. During the New York exhibition, Plaintiffs and other residents of the building learned that they had been the subjects of Svenson's project. Despite Svenson's efforts to obscure his subjects' identities, Plaintiffs' two young children were identifiable in the photographs. Svenson eventually removed the photographs of the children from the exhibition; however, one of the photographs of Plaintiffs' daughter was shown on a New York City television broadcast, as well as on NBC's "Today Show."

  In May of 2013, Plaintiffs commenced an action seeking injunctive relief and damages for invasion of privacy and intentional infliction of emotional distress. Plaintiffs simultaneously moved for a preliminary injunction and a temporary restraining order ("TRO"). The TRO was granted. Svenson opposed the motion for a preliminary injunction and cross-moved to dismiss the complaint, claiming that, because the photographs were art, they were protected by the First Amendment and their publication, sale, and use could not be restrained. The trial court denied Plaintiffs' motion for a preliminary injunction and granted Svenson's motion to dismiss. The Appellate Division, however, granted a preliminary injunction pending the outcome of the appeal.

  The court found that the alleged conduct constituting the invasion of privacy was not actionable under the statutory tort of invasion of privacy. New York's statutory right to privacy prohibits the use of a person's "name, portrait, or picture" for "advertising purposes" or "for the purposes of trade." N.Y. CIV. RIGHTS LAW § 50. The New York courts have adopted a narrow construction of these terms, consistently holding that the privacy statute should not be interpreted to apply to publications of newsworthy events and matters of public concern. The exemption for newsworthy events and matters

[11] *Raef v. Superior Court of Los Angeles County*, 240 Cal. App. 4th 1112 (2015), review denied.

of public concern has also been extended to other forms of First Amendment speech, such as literary and artistic expression.

The court found that because the newsworthy and public concern exemption had been applied to many types of artistic expressions, it should be equally applied to works of art. The court noted that "artistic expression in the form of art work must therefore be given the same leeway extended to the press under the newsworthy and public concern exemption to the statutory tort of invasion of privacy." *Foster*, 7 N.Y.S.3d at 102. The court recognized, however, that the newsworthy and public concern exemption is not without limits. The exemption would not apply where the newsworthy or public interest aspect of an image is "merely incidental to its commercial purpose." *Id*. at 102-03.

The court found that Plaintiffs' allegations did not sufficiently allege that Svenson used the photographs for the purposes of advertising or trade within the meaning of the privacy statute. Additionally, the court held that since the images themselves were works of art protected by the First Amendment, any advertising undertaken in connection with the promotion of the artwork was permitted. The court also found that the method Svenson used to obtain the photographs, though intrusive, could not be deemed so outrageous as to go beyond the protections of existing state privacy laws. Finally, the court recommended that Plaintiffs' complaints would be best addressed to the Legislature. Because of heightened threats to privacy posed by new invasive technologies, the court "call[ed] upon the Legislature to revisit this important issue." *Id*. at 106.

- *Ex* parte *Thompson*, 442 S.W.3d 325 (Tex. Crim. App. 2014).

  On July 6, 2011, Ronald Thompson was arrested after he was caught recording women in bikinis without their consent. Thompson was charged with twenty-six counts of improper photography or visual recording in violation of section 21.15(b)(1) of the Texas Penal Code, commonly known as the "improper photography" statute. The statute provides:

  A person commits an offense if the person: (1) photographs or by videotape or other electronic means records, broadcasts, or transmits a visual image of another at a location that is not a bathroom or private dressing room: (A) without the other person's consent; and (B) with intent to arouse or gratify the sexual desire of any person.

  Tex. PENAL CODE § 21.15(b)(1).

  Thompson filed a pre-trial writ of habeas corpus seeking relief from a facially unconstitutional statute, arguing that the improper photography statute impermissibly regulated the content of speech and was both overbroad and vague, in violation of the First Amendment and Article I, Section 8 of the

Texas Constitution. The Bexar County District Court denied his petition on the merits. Thompson appealed the decision, and the San Antonio Court of Appeals reversed, holding that the statute was facially unconstitutional.

The Court of Appeals stated that the improper photography statute regulated the ability to take photographs, a constitutionally protected right, as well as an individual's thoughts. *Ex parte Thompson*, 414 S.W.3d 872, 877 (Tex. App.—San Antonio 2013), *aff'd*, 442 S.W.3d 325 (Tex. Crim. App. 2014) (by referencing a perpetrator's "intent to arouse or gratify . . . sexual desires" the statute "also restricts a person's thoughts, which the U.S. Supreme Court has held is wholly inconsistent with the philosophy of the First Amendment") (internal quotation marks and citations omitted). The court held that the improper photography statute regulated photography in a content-neutral manner, "not favor[ing] one type of photograph over another," and was subject to intermediate scrutiny. *Id*. at 878 (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994)). The court then held the statute to be impermissibly overbroad, as it seems to criminalize photographing people where they have no reasonable expectation of privacy—for example, in public. The court concluded that § 21.15(b)(1) was void on its face and remanded to the trial court to enter an order dismissing all charges against Thompson on alleged violations of the statute. *Id*. at 881.

The Texas Court of Criminal Appeals granted discretionary review of the Court of Appeals' decision on November 27, 2013. Briefing was complete in early 2014 and the court heard oral argument on May 7, 2014, with Thompson giving some of his argument time to Eugene Volokh, law professor and author of the legal blog The Volokh Conspiracy, representing amicus Reporters Committee for Freedom of the Press.

The Texas Court of Criminal Appeals affirmed the decision of the Court of Appeals, but its analysis differed from the lower court's. It agreed that the law constituted an impermissible regulation of an expressive activity (photography) and thought, both of which are protected by the First Amendment. *Thompson*, 442 S.W.3d at 337, 339. But it held that because the law penalized "only a subset" of non-consensual image-producing activity—"that which is done with the intent to arouse or gratify sexual desire"—it constituted a content-based restriction on speech and thus was subject to strict scrutiny. *Id*. at 347-48. Strict scrutiny requires that a law be the "least restrictive means" available to achieve a "compelling government interest." *Id*. at 348.

The court acknowledged a compelling government interest in preventing people from being photographed without their consent in private places, such as homes, or "with respect to an area of the person that is not exposed to the general public, such as up a skirt." *Id*. But it found that the improper photography statute was not the least restrictive means of preventing such photography, because it prevented all non-consensual photography for the

purpose of sexual gratification, including photography in public places. *Id*. at 349. For this reason, the statute failed strict scrutiny and constituted an invalid and unconstitutional content-based restriction on speech. *Id*. at 349, 351.

C. *Body-Worn Cameras*

The advent of body-worn cameras has raised a host of questions and a number of legislative initiatives. The Media Law Resource Center's thoughtful Model Policy on Police Body-Worn Camera Footage is attached to this paper with permission.

There is already at least one lawsuit on the issue of cost for copies of body-worn camera footage. Time Warner's news network NY1 is challenging the New York City Police Department's $36,000 charge for roughly 190 hours of footage NY1 requested under the state's FOI law.

D. *Drones*

Drones have continued to be a hot topic in newsgathering. Although the FAA missed the deadline set by Congress for the safe integration of drones into the national airspace, the FAA has made some progress in enabling unmanned aircraft systems ("UAS") operations, through (1) issuing a notice of proposed rulemaking, Operation and Certification of Small Unmanned Aircraft Systems; (2) issuing Section 333 exemptions to permit commercial operations; and (3) most recently, clarifying the applicability of the statutory requirements regarding aircraft registration to UAS, including those operating as model aircraft.

1. Operation and Certification of Small Unmanned Aircraft Systems

In February 2015, the FAA published its Notice of Proposed Rulemaking, addressing regulations on the operation of small unmanned aircraft systems ("sUAS").[12] These sUAS include drones that are under 55 pounds and used for non-recreational purposes. Under the Proposed Rule, sUAS operators, who must be seventeen or older, would be required to pass an initial test, be vetted by the Transportation Security Administration, obtain an sUAS operator certificate, and pass a recurrent test every twenty-four (24) months. The FAA also proposes that sUAS cannot fly at more than 500 feet above ground level, can only fly during daylight, cannot operate over people, and cannot be operated beyond the operator's visual-line-of-sight, unaided by anything except standard glasses and contact lenses.

The News Media Coalition (the "Coalition"), which is composed of various organizations, such as publishing companies and media networks, filed comments on the Proposed Rule on April 24, 2015. The Coalition was largely supportive of the Proposed Rule, but urged the FAA to relax certain restrictions. For example, the Coalition urged the FAA to allow for sUAS operations at night with certain safeguards, and to allow flights beyond the operator's visual-line-of-sight with the use of technology.

[12] Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544 (proposed Feb. 23, 2015) (to be codified at 14 C.F.R. pt. 21, 43, 45, 47, 61, 91, 101, 107 & 183).

In the February 2015 Proposed Rule, the FAA also sought comment on the creation of a "micro UAS" category for UAS under 4.4 pounds. To qualify, the device would have to be made of materials that would break apart or yield if there were a collision, and would be limited to 400 feet above ground level. The DJI Phantom, which is a popular UAS among journalists, would likely qualify as a micro UAS. The Coalition supported the creation of a micro UAS category, and urged the FAA to implement the category by final direct rule now, rather than waiting for the final rulemaking process to be completed.

2. Section 333 Exemptions

Until the FAA issues a final rule, individuals or entities wanting to operate a drone for commercial purposes, which include newsgathering activities, must apply for a Section 333 exemption.[13] The FAA has recently begun issuing significantly more exemptions under its "summary grant" process. Under this "summary grant" process, which was announced on April 9, 2015, the FAA continues to review each individual exemption application, but issues a summary grant if it finds that it has already granted a previous exemption that is similar to the new request.

In early 2015, the FAA also relaxed some of the conditions placed on Section 333 holders by loosening the certification requirements for UAS operators and creating a streamlined process for airspace authorizations. Section 333 exemption holders now only need to hold a sport or recreational pilot certificate, as opposed to previously being required to hold a commercial or private pilot certificate. Additionally, Section 333 exemption holders are now granted a blanket Certificate of Waiver or Authorization (COA), which allows them to operate within the parameters of the exemption as long as the UAS is flown at or below 200 feet, and stays a certain distance from airports. Previously, the Section 333 exemption holder was required to file for a COA prior to each operation.

In May 2015, the FAA issued a memorandum titled Media Use of UAS, which explains that citizen journalists can use drones to photograph newsworthy events and may later sell these photographs to the media; however, professional news photographers cannot do so. According to the memorandum, there are two ways in which a media entity may use drone footage:

(1) The media entity may apply for and receive FAA authorization for the operation of a drone for commercial purposes under the Section 333 exemption.

(2) The media entity may obtain information captured by a drone that is operated by an unaffiliated third-party person or entity. That unaffiliated third-party must be authorized by the FAA to operate the drone or must qualify under the "hobby or recreation exemption."

The operator's intention ultimately defines whether flights fall under "hobby or recreation." If the operator has a history of frequently reselling material captured via drone, the FAA is not likely to deem the flights "recreational." A media entity that does not have operational control

[13] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 333, 126 Stat. 11 (codified as amended in scattered sections of 49 U.S.C.).

over a drone, and is otherwise not involved in its operation, falls outside of FAA oversight. FAA regulations define "operational control" as "the exercise of authority over initiating, conducting, or terminating a flight." The FAA's definition of "operational control" is, of course, open to interpretation by the courts and administrators. There are two distinct ways in which a court or federal agency might interpret a media entity as having operational control or being otherwise involved in operation:

(1) The media agency physically operates the drone by holding and manipulating the remote control.

(2) The media agency directs or suggests to the freelance drone operator the time, place, or manner of the operation of the drone.

The operator of the drone may be held responsible for not obtaining FAA approval for any use not considered part of "a hobby or recreational activity." Unauthorized operation of a drone may result in fines.

3. Registration and FAA Task Force

In October 2015, the FAA reconsidered its past practice of exercising discretion with respect to requiring UAS to be registered and announced that registration will be required for all UAS, including those used for recreation or hobby purposes.[14] Federal law requires that a person may only operate an "aircraft" when it is registered with the FAA.[15] Congress has confirmed that UAS, including those used for recreation or hobby purposes, are "aircraft" under federal law.[16] Because UAS are aircraft, they are subject to FAA regulation, including the statutory requirements regarding registration, set forth in 49 U.S.C. § 44101(a), and further prescribed in regulation at 44 C.F.R. § 47.

The FAA issued interim final rules that became immediately effective in December 2015.[17] The rules created a streamlined, online registration system for sUAS that are operated for recreation or hobby purposes.[18] Registration is required for all sUAS that weigh between .55 and 55.00 pounds.[19] The individual registering the sUAS must be over 13 years old and must provide personal information such as address and email in order to register.[20] After registration, any sUAS must display its registration somewhere on the sUAS.[21] .

[14] Clarification of the Applicability of Aircraft Registration Requirements for Unmanned Aircraft Systems (UAS) and Request for Information Regarding Electronic Registration for UAS, 80 Fed. Reg. 63912 (Oct. 22, 2015).

[15] 49 U.S.C. § 44101(a).

[16] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, §§ 331(8), 336.

[17] Registration and Marking Requirements for Small Unmanned Aircraft, 80 Fed. Reg. 78,594 (Dec. 21, 2015) (to be codified at 40 C.F.R. pts. 1, 45, 47, et al.)

[18] *Id.* at 78,595-96.

[19] *Id.*

[20] *Id.*

[21] *Id.*

The new regulations have already been challenged in the D.C. Circuit by hobbyists.[22] The outcome of the case hinges on whether a provision of the FAA Modernization and Reform Act—stating that the FAA "may not promulgate any rule or regulation regarding a model aircraft" when it is, among other things, "flown strictly for hobby or recreational use"[23]—bars the regulations.

In another interesting lawsuit, a Kentucky drone owner has sued a property owner who shot down his drone for a declaratory judgment and damages.[24] Criminal charges of felony wanton endangerment and criminal mischief against the property owner had previously been dismissed.

4. State Regulations

In addition to the federal drone regulations, 45 states and some cities have passed or at least considered drone regulations. In a fact sheet issued on December 17, 2015, the FAA asserted its preemptive authority over drone regulation and urged other governmental bodies to consult with or to defer to the FAA in this area.[25]

Texas's law regulating drone use is the harshest law yet passed for newsgathering activities. TEX. GOV'T CODE ANN. § 423.001-.008. While most states that regulate drones are focused solely on improper use by law enforcement and leave other uses of drones largely unregulated (for now), Texas's law makes drone use by the public generally impermissible, leaving exceptions, including for police; military; state agencies; professional or scholarly research and development by a person acting on behalf of an institution of higher education; and certain commercial interests, like real-estate and oil-and-gas pipeline owners. *Id.* § 423.002. The law provides that, outside of these excepted areas, a person commits a Class C misdemeanor if she uses a drone to capture an image of an individual or privately owned real property with the intent to conduct surveillance on that individual or property. *Id.* § 423.003. It is another Class C misdemeanor to use the image so captured. *Id.* § 423.004. The statute also provides for a civil cause of action for these violations, imposing a civil penalty of $5,000 for each image captured and $10,000 for use of such an image, as well as costs and fees. *Id.* § 423.006.

E. *Ag-Gag Laws*

"Ag-gag" laws are those designed to prohibit filming or photographing the operations of an agricultural facility without the effective consent of the owner, imposing civil or criminal liability on violators. Several states have such laws on the books, but a recent federal court ruling may call into question the constitutionality of many of them.

Some ag-gag laws directly prohibit unauthorized filming or photography at an animal facility.[26] Others known as "quick–reporting" statutes, like the one enacted in Missouri in 2012, do not

[22] *See Taylor v. Huerta*, No. 15-1495 (D.C. Cir. Dec. 23, 2015).

[23] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 339.

[24] *Boggs v. Merideth*, No. 3:16-cv-00006 (W.D. Ky. filed Jan. 4, 2016).

[25] FAA Office of Chief Counsel, State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet (Dec. 17, 2015).

[26] *E.g.*, UTAH CODE ANN. § 76-6-112.

criminalize the activity itself, but do require that any video or photographic evidence of abuse or neglect be turned over to law enforcement immediately.[27] Animal rights groups oppose both types of ag-gag laws, claiming that quick-reporting statutes hamper their ability to compile enough evidence to mount effective civil or criminal cases against abusive agricultural operations.

Since the first ag-gag law was passed in Kansas in 1990, several other states have attempted to pass such legislation with varying degrees of success. In 2015, in particular, Wyoming and North Carolina successfully passed new ag-gag legislation,[28] while Montana, Colorado, and New Mexico saw ag-gag legislation efforts fail.[29]

However, the ultimate fate of ag-gag laws remains to be seen following a federal court decision striking down Idaho's ag-gag law as unconstitutional. In February 2014, Governor C. L. "Butch" Otter signed into law Idaho Code § 18-7042, entitled "Interference with Agricultural Production," which penalized the surreptitious filming of "agricultural production" with up to a year in prison, up to a $5,000 fine, or both.[30] In August of 2015, a federal court declared the law unconstitutional.[31]

In granting summary judgment for the plaintiffs,[32] the court ruled that the law was a content-and viewpoint-based restriction on speech in violation of the First Amendment. The court also ruled that the law violated the Equal Protection Clause of the Fourteenth Amendment "because it was motivated in substantial part by animus towards animal welfare groups, and because it impinges on free speech, a fundamental right."[33]

In describing the law, the court wrote:

> [Section] 18-7042 seeks to limit and punish those who speak out on topics relating to the agricultural industry, striking at the heart of important First Amendment values. The effect of the statute will be to suppress speech by undercover investigators and whistleblowers concerning topics of great public importance: the safety of the public food supply, the safety of agricultural

[27] MO. REV. STAT. § 578.013.

[28] WYO. STAT. § 6-3-414 (2015); N.C. GEN. STAT. § 99A-2. North Carolina's law allows property owners to sue employees who record non-public areas without authorization. While not specific to agriculture, the law has been criticized as a new type of ag-gag law. The fact that it is not specific to agriculture also raises implications for whistleblowers in other industries and environments.

[29] Montana already has an ag-gag law on the books prohibiting recording, but an attempt to pass a quick-reporting statute in 2015 failed.

[30] IDAHO CODE § 18-7042(3).

[31] *Animal Legal Defense Fund v. Otter*, No. 1:14-cv-00104-BLW, 2015 WL 4623943 (D. Idaho Aug. 3, 2015), appeal filed (9th Cir. Dec. 14, 2015).

[32] The plaintiffs included the Animal Legal Defense Fund, PETA, the ACLU of Idaho, the Center for Food Safety, and several other organizations and individuals.

[33] *Id.* at *4.

> workers, the treatment and health of farm animals, and the impact of business activities on the environment.[34]

As such, the law did not survive strict scrutiny review. The court also pointed out that other laws exist to protect the interests the state purports to be protecting with this law without violating free speech, such as laws against trespass, defamation, fraud, and theft.[35]

A similar challenge to Utah's ag-gag law is pending in federal court and is expected to go to trial in 2016, after the court denied defendants' motion to dismiss as to most plaintiffs and as to plaintiffs' equal protection and due process claims.[36] In a challenge to Wyoming's law brought by the National Press Photographers Association and a variety of environmental and animal rights groups, the district court denied defendants' motion to dismiss plaintiffs' First and Fourteenth Amendment claims.[37] North Carolina's ag-gag law is also being challenged in federal court.[38]

[34] *Id.* at *3.

[35] *Id.* at *4.

[36] *See Animal Legal Def. Fund v. Herbert*, No. 2:13-cv-00679-RJS (D. Utah) (Dkt. Nos. 54 and 59).

[37] *Western Watersheds Project v. Michael*, No. 2:15-cv-00169-SWS (D. Wyo. Dec. 28, 2015) (Dkt. No. 40).

[38] *People for the Ethical Treatment of Animals, Inc. v. Cooper*, No. 16-cv-25 (M.D.N.C. filed Jan. 13, 2016).

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[1] *See* PEN AMERICA, PRESS FREEDOM UNDER FIRE IN FERGUSON: A PEN AMERICAN CENTER REPORT (Oct. 27, 2014), *available at* http://www.pen.org/sites/default/files/PEN_Press-Freedom-Under-Fire-In-Ferguson.pdf; AMNESTY INTERNATIONAL, ON THE STREETS OF AMERICA: HUMAN RIGHTS ABUSES IN FERGUSON (Oct. 2014), *available at* http://www.amnestyusa.org/sites/default/files/onthestreetsofamericaamnestyinternational.pdf.

[2] Ravi Somaiya & Ashley Southall, *Arrested in Ferguson Last Year, 2 Reporters Are Charged*, N.Y. TIMES, Aug. 10, 2015, http://www.nytimes.com/2015/08/11/us/arrested-in-ferguson-2014-washington-post-reporter-wesley-lowery-is-charged.html?_r=0.

[3] *See* Press Release, American Civil Liberties Union of Missouri, Two Journalists Recording Ferguson Protests Will Not Face Charges (Aug. 3, 2015), *available at* http://www.aclu-mo.org/newsviews/2015/08/03/two-journalists-recording-ferguson-protests-will-not-face-ch.

[4] *Buehler v. City of Austin/Austin Police Dep't*, A-13-CV-1100 ML (W.D. Tex. July 24, 2014).

with his efforts to film and to publish their public conduct. He also alleged additional Constitutional violations and various state-law claims.

In 2014, in an order largely denying the defendants' motion to dismiss, a federal magistrate judge upheld Buehler's right to photograph and film police officers carrying out their official duties in public.[5] The magistrate judge further held that this right was clearly established at the time of Buehler's arrests based on widespread recognition of the right by United States Courts of Appeals, including the Fifth Circuit, and many federal district courts.

However, Buehler's victory was short-lived. After Buehler was indicted by a grand jury on several misdemeanor counts of disobeying lawful orders, the magistrate judge granted summary judgment for the defendants, holding that the grand jury indictments established probable cause for each of Buehler's arrests and precluded his constitutional claims.[6] In making this ruling, the magistrate judge relied on Fifth Circuit precedent, which holds that "[i]f [probable cause for arrest] exists, any argument that the arrestee's speech as opposed to [his] criminal conduct was the motivation for [his] arrest must fail, no matter how clearly that speech may be protected by the First Amendment."[7] Thus, there was no constitutional violation and the officers were entitled to qualified immunity. Buehler appealed his case to the Fifth Circuit, and it has been tentatively calendared for argument during the week of February 29, 2016.[8]

Finally, a few states have recently attempted to limit the right to record through legislation. A bill in Arkansas that would have required photographers to obtain explicit written consent from subjects for most purposes, was passed by the legislature, but vetoed by Governor Asa Hutchinson. In a press release, Governor Hutchinson said he vetoed the bill "because in its current form it is overbroad, vague and will have the effect of restricting free speech." He added, "I believe the absence of a clear exemption for . . . expressive works will result in unnecessary litigation in Arkansas courts and will suppress Arkansans who engage in artistic expression from photography to art work."[9] And in Texas, a bill attempting to establish a minimum 25-foot distance between the photographer and the police was withdrawn by its proponent after receiving widespread criticism from citizens' groups and some law enforcement agencies.[10] Most recently, an Arizona legislator has introduced a bill criminalizing videotaping of law enforcement officers from a distance of less than 20 feet.

In a piece of California legislation specifically aimed at paparazzi, a photographer who allegedly pursued Justin Bieber in a high speed chase was charged under a statute that creates additional

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[5] Memorandum Opinion and Order, *Buehler*, A-13-CV-1100 ML, at 11-12 (W.D. Tex. July 24, 2014).

[6] *Buehler v. City of Austin/Austin Police Dep't*, No. 1:13-CV-1100-ML, 2015 U.S. Dist. LEXIS 20878, at *38 (W.D. Tex. Feb. 20, 2015).

[7] *Mesa v. Prejean*, 543 F.3d 264, 273 (5th Cir. 2008).

[8] *Buehler v. City of Austin/Austin Police Dep't*, No. 15-50155 (5th Cir. filed Feb. 24, 2015).

[9] Press Release, Ark. Governor, Governor Hutchinson's Veto Letter to Senate Concerning SB79 (Mar. 31, 2015), *available at* http://governor.arkansas.gov/press-releases/detail/governor-hutchinsons-veto-letter-to-senate-concerning-sb79.

[10] Annabelle Bamforth, *TX Rep. Jason Villalba Scraps Bill That Would Limit Filming Of Police*, TRUTH IN MEDIA, April 13, 2013, http://truthinmedia.com/tx-rep-jason-villalba-scraps-bill-that-would-limit-filming-of-police/.

penalties for certain driving violations committed with "intent to capture any type of visual image, sound recording, or other physical impression of another person for a commercial purpose." Cal. Vehicle Code § 40008(a). The trial court dismissed the charges holding the statute unconstitutional. The California Court of Appeals reversed, holding the law is constitutional on its face.[11]

B. *Invasion of Privacy/Intentional Infliction of Emotional Distress/Video Voyeurism*

The following cases illustrate other potential civil and criminal claims that can arise out of exercising the right to photograph and record in public:

- *Foster v. Svenson,* 7 N.Y.S.3d 96 (N.Y. App. Div. 2015).

  Beginning in February of 2012, Arne Svenson, a critically acclaimed photographer, began photographing people that lived in the building across the street from his New York City apartment. After approximately one year of photography, Svenson assembled a series of photographs called "The Neighbors," which he exhibited in galleries in Los Angeles and New York. During the New York exhibition, Plaintiffs and other residents of the building learned that they had been the subjects of Svenson's project. Despite Svenson's efforts to obscure his subjects' identities, Plaintiffs' two young children were identifiable in the photographs. Svenson eventually removed the photographs of the children from the exhibition; however, one of the photographs of Plaintiffs' daughter was shown on a New York City television broadcast, as well as on NBC's "Today Show."

  In May of 2013, Plaintiffs commenced an action seeking injunctive relief and damages for invasion of privacy and intentional infliction of emotional distress. Plaintiffs simultaneously moved for a preliminary injunction and a temporary restraining order ("TRO"). The TRO was granted. Svenson opposed the motion for a preliminary injunction and cross-moved to dismiss the complaint, claiming that, because the photographs were art, they were protected by the First Amendment and their publication, sale, and use could not be restrained. The trial court denied Plaintiffs' motion for a preliminary injunction and granted Svenson's motion to dismiss. The Appellate Division, however, granted a preliminary injunction pending the outcome of the appeal.

  The court found that the alleged conduct constituting the invasion of privacy was not actionable under the statutory tort of invasion of privacy. New York's statutory right to privacy prohibits the use of a person's "name, portrait, or picture" for "advertising purposes" or "for the purposes of trade." N.Y. CIV. RIGHTS LAW § 50. The New York courts have adopted a narrow construction of these terms, consistently holding that the privacy statute should not be interpreted to apply to publications of newsworthy events and matters of public concern. The exemption for newsworthy events and matters

[11] *Raef v. Superior Court of Los Angeles County*, 240 Cal. App. 4th 1112 (2015), review denied.

of public concern has also been extended to other forms of First Amendment speech, such as literary and artistic expression.

The court found that because the newsworthy and public concern exemption had been applied to many types of artistic expressions, it should be equally applied to works of art. The court noted that "artistic expression in the form of art work must therefore be given the same leeway extended to the press under the newsworthy and public concern exemption to the statutory tort of invasion of privacy." *Foster*, 7 N.Y.S.3d at 102. The court recognized, however, that the newsworthy and public concern exemption is not without limits. The exemption would not apply where the newsworthy or public interest aspect of an image is "merely incidental to its commercial purpose." *Id*. at 102-03.

The court found that Plaintiffs' allegations did not sufficiently allege that Svenson used the photographs for the purposes of advertising or trade within the meaning of the privacy statute. Additionally, the court held that since the images themselves were works of art protected by the First Amendment, any advertising undertaken in connection with the promotion of the artwork was permitted. The court also found that the method Svenson used to obtain the photographs, though intrusive, could not be deemed so outrageous as to go beyond the protections of existing state privacy laws. Finally, the court recommended that Plaintiffs' complaints would be best addressed to the Legislature. Because of heightened threats to privacy posed by new invasive technologies, the court "call[ed] upon the Legislature to revisit this important issue." *Id*. at 106.

- *Ex* parte *Thompson*, 442 S.W.3d 325 (Tex. Crim. App. 2014).

  On July 6, 2011, Ronald Thompson was arrested after he was caught recording women in bikinis without their consent. Thompson was charged with twenty-six counts of improper photography or visual recording in violation of section 21.15(b)(1) of the Texas Penal Code, commonly known as the "improper photography" statute. The statute provides:

  A person commits an offense if the person: (1) photographs or by videotape or other electronic means records, broadcasts, or transmits a visual image of another at a location that is not a bathroom or private dressing room: (A) without the other person's consent; and (B) with intent to arouse or gratify the sexual desire of any person.

  Tex. PENAL CODE § 21.15(b)(1).

  Thompson filed a pre-trial writ of habeas corpus seeking relief from a facially unconstitutional statute, arguing that the improper photography statute impermissibly regulated the content of speech and was both overbroad and vague, in violation of the First Amendment and Article I, Section 8 of the

Texas Constitution. The Bexar County District Court denied his petition on the merits. Thompson appealed the decision, and the San Antonio Court of Appeals reversed, holding that the statute was facially unconstitutional.

The Court of Appeals stated that the improper photography statute regulated the ability to take photographs, a constitutionally protected right, as well as an individual's thoughts. *Ex parte Thompson*, 414 S.W.3d 872, 877 (Tex. App.—San Antonio 2013), *aff'd*, 442 S.W.3d 325 (Tex. Crim. App. 2014) (by referencing a perpetrator's "intent to arouse or gratify . . . sexual desires" the statute "also restricts a person's thoughts, which the U.S. Supreme Court has held is wholly inconsistent with the philosophy of the First Amendment") (internal quotation marks and citations omitted). The court held that the improper photography statute regulated photography in a content-neutral manner, "not favor[ing] one type of photograph over another," and was subject to intermediate scrutiny. *Id*. at 878 (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994)). The court then held the statute to be impermissibly overbroad, as it seems to criminalize photographing people where they have no reasonable expectation of privacy—for example, in public. The court concluded that § 21.15(b)(1) was void on its face and remanded to the trial court to enter an order dismissing all charges against Thompson on alleged violations of the statute. *Id*. at 881.

The Texas Court of Criminal Appeals granted discretionary review of the Court of Appeals' decision on November 27, 2013. Briefing was complete in early 2014 and the court heard oral argument on May 7, 2014, with Thompson giving some of his argument time to Eugene Volokh, law professor and author of the legal blog The Volokh Conspiracy, representing amicus Reporters Committee for Freedom of the Press.

The Texas Court of Criminal Appeals affirmed the decision of the Court of Appeals, but its analysis differed from the lower court's. It agreed that the law constituted an impermissible regulation of an expressive activity (photography) and thought, both of which are protected by the First Amendment. *Thompson*, 442 S.W.3d at 337, 339. But it held that because the law penalized "only a subset" of non-consensual image-producing activity—"that which is done with the intent to arouse or gratify sexual desire"—it constituted a content-based restriction on speech and thus was subject to strict scrutiny. *Id*. at 347-48. Strict scrutiny requires that a law be the "least restrictive means" available to achieve a "compelling government interest." *Id*. at 348.

The court acknowledged a compelling government interest in preventing people from being photographed without their consent in private places, such as homes, or "with respect to an area of the person that is not exposed to the general public, such as up a skirt." *Id*. But it found that the improper photography statute was not the least restrictive means of preventing such photography, because it prevented all non-consensual photography for the

purpose of sexual gratification, including photography in public places. *Id*. at 349. For this reason, the statute failed strict scrutiny and constituted an invalid and unconstitutional content-based restriction on speech. *Id*. at 349, 351.

C. *Body-Worn Cameras*

The advent of body-worn cameras has raised a host of questions and a number of legislative initiatives. The Media Law Resource Center's thoughtful Model Policy on Police Body-Worn Camera Footage is attached to this paper with permission.

There is already at least one lawsuit on the issue of cost for copies of body-worn camera footage. Time Warner's news network NY1 is challenging the New York City Police Department's $36,000 charge for roughly 190 hours of footage NY1 requested under the state's FOI law.

D. *Drones*

Drones have continued to be a hot topic in newsgathering. Although the FAA missed the deadline set by Congress for the safe integration of drones into the national airspace, the FAA has made some progress in enabling unmanned aircraft systems ("UAS") operations, through (1) issuing a notice of proposed rulemaking, Operation and Certification of Small Unmanned Aircraft Systems; (2) issuing Section 333 exemptions to permit commercial operations; and (3) most recently, clarifying the applicability of the statutory requirements regarding aircraft registration to UAS, including those operating as model aircraft.

1. Operation and Certification of Small Unmanned Aircraft Systems

In February 2015, the FAA published its Notice of Proposed Rulemaking, addressing regulations on the operation of small unmanned aircraft systems ("sUAS").[12] These sUAS include drones that are under 55 pounds and used for non-recreational purposes. Under the Proposed Rule, sUAS operators, who must be seventeen or older, would be required to pass an initial test, be vetted by the Transportation Security Administration, obtain an sUAS operator certificate, and pass a recurrent test every twenty-four (24) months. The FAA also proposes that sUAS cannot fly at more than 500 feet above ground level, can only fly during daylight, cannot operate over people, and cannot be operated beyond the operator's visual-line-of-sight, unaided by anything except standard glasses and contact lenses.

The News Media Coalition (the "Coalition"), which is composed of various organizations, such as publishing companies and media networks, filed comments on the Proposed Rule on April 24, 2015. The Coalition was largely supportive of the Proposed Rule, but urged the FAA to relax certain restrictions. For example, the Coalition urged the FAA to allow for sUAS operations at night with certain safeguards, and to allow flights beyond the operator's visual-line-of-sight with the use of technology.

[12] Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544 (proposed Feb. 23, 2015) (to be codified at 14 C.F.R. pt. 21, 43, 45, 47, 61, 91, 101, 107 & 183).

In the February 2015 Proposed Rule, the FAA also sought comment on the creation of a "micro UAS" category for UAS under 4.4 pounds. To qualify, the device would have to be made of materials that would break apart or yield if there were a collision, and would be limited to 400 feet above ground level. The DJI Phantom, which is a popular UAS among journalists, would likely qualify as a micro UAS. The Coalition supported the creation of a micro UAS category, and urged the FAA to implement the category by final direct rule now, rather than waiting for the final rulemaking process to be completed.

2. Section 333 Exemptions

Until the FAA issues a final rule, individuals or entities wanting to operate a drone for commercial purposes, which include newsgathering activities, must apply for a Section 333 exemption.[13] The FAA has recently begun issuing significantly more exemptions under its "summary grant" process. Under this "summary grant" process, which was announced on April 9, 2015, the FAA continues to review each individual exemption application, but issues a summary grant if it finds that it has already granted a previous exemption that is similar to the new request.

In early 2015, the FAA also relaxed some of the conditions placed on Section 333 holders by loosening the certification requirements for UAS operators and creating a streamlined process for airspace authorizations. Section 333 exemption holders now only need to hold a sport or recreational pilot certificate, as opposed to previously being required to hold a commercial or private pilot certificate. Additionally, Section 333 exemption holders are now granted a blanket Certificate of Waiver or Authorization (COA), which allows them to operate within the parameters of the exemption as long as the UAS is flown at or below 200 feet, and stays a certain distance from airports. Previously, the Section 333 exemption holder was required to file for a COA prior to each operation.

In May 2015, the FAA issued a memorandum titled Media Use of UAS, which explains that citizen journalists can use drones to photograph newsworthy events and may later sell these photographs to the media; however, professional news photographers cannot do so. According to the memorandum, there are two ways in which a media entity may use drone footage:

(1) The media entity may apply for and receive FAA authorization for the operation of a drone for commercial purposes under the Section 333 exemption.

(2) The media entity may obtain information captured by a drone that is operated by an unaffiliated third-party person or entity. That unaffiliated third-party must be authorized by the FAA to operate the drone or must qualify under the "hobby or recreation exemption."

The operator's intention ultimately defines whether flights fall under "hobby or recreation." If the operator has a history of frequently reselling material captured via drone, the FAA is not likely to deem the flights "recreational." A media entity that does not have operational control

[13] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 333, 126 Stat. 11 (codified as amended in scattered sections of 49 U.S.C.).

over a drone, and is otherwise not involved in its operation, falls outside of FAA oversight. FAA regulations define "operational control" as "the exercise of authority over initiating, conducting, or terminating a flight." The FAA's definition of "operational control" is, of course, open to interpretation by the courts and administrators. There are two distinct ways in which a court or federal agency might interpret a media entity as having operational control or being otherwise involved in operation:

(1) The media agency physically operates the drone by holding and manipulating the remote control.

(2) The media agency directs or suggests to the freelance drone operator the time, place, or manner of the operation of the drone.

The operator of the drone may be held responsible for not obtaining FAA approval for any use not considered part of "a hobby or recreational activity." Unauthorized operation of a drone may result in fines.

3. Registration and FAA Task Force

In October 2015, the FAA reconsidered its past practice of exercising discretion with respect to requiring UAS to be registered and announced that registration will be required for all UAS, including those used for recreation or hobby purposes.[14] Federal law requires that a person may only operate an "aircraft" when it is registered with the FAA.[15] Congress has confirmed that UAS, including those used for recreation or hobby purposes, are "aircraft" under federal law.[16] Because UAS are aircraft, they are subject to FAA regulation, including the statutory requirements regarding registration, set forth in 49 U.S.C. § 44101(a), and further prescribed in regulation at 44 C.F.R. § 47.

The FAA issued interim final rules that became immediately effective in December 2015.[17] The rules created a streamlined, online registration system for sUAS that are operated for recreation or hobby purposes.[18] Registration is required for all sUAS that weigh between .55 and 55.00 pounds.[19] The individual registering the sUAS must be over 13 years old and must provide personal information such as address and email in order to register.[20] After registration, any sUAS must display its registration somewhere on the sUAS.[21] .

[14] Clarification of the Applicability of Aircraft Registration Requirements for Unmanned Aircraft Systems (UAS) and Request for Information Regarding Electronic Registration for UAS, 80 Fed. Reg. 63912 (Oct. 22, 2015).

[15] 49 U.S.C. § 44101(a).

[16] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, §§ 331(8), 336.

[17] Registration and Marking Requirements for Small Unmanned Aircraft, 80 Fed. Reg. 78,594 (Dec. 21, 2015) (to be codified at 40 C.F.R. pts. 1, 45, 47, et al.)

[18] *Id.* at 78,595-96.

[19] *Id.*

[20] *Id.*

[21] *Id.*

The new regulations have already been challenged in the D.C. Circuit by hobbyists.[22] The outcome of the case hinges on whether a provision of the FAA Modernization and Reform Act—stating that the FAA "may not promulgate any rule or regulation regarding a model aircraft" when it is, among other things, "flown strictly for hobby or recreational use"[23]—bars the regulations.

In another interesting lawsuit, a Kentucky drone owner has sued a property owner who shot down his drone for a declaratory judgment and damages.[24] Criminal charges of felony wanton endangerment and criminal mischief against the property owner had previously been dismissed.

4. State Regulations

In addition to the federal drone regulations, 45 states and some cities have passed or at least considered drone regulations. In a fact sheet issued on December 17, 2015, the FAA asserted its preemptive authority over drone regulation and urged other governmental bodies to consult with or to defer to the FAA in this area.[25]

Texas's law regulating drone use is the harshest law yet passed for newsgathering activities. TEX. GOV'T CODE ANN. § 423.001-.008. While most states that regulate drones are focused solely on improper use by law enforcement and leave other uses of drones largely unregulated (for now), Texas's law makes drone use by the public generally impermissible, leaving exceptions, including for police; military; state agencies; professional or scholarly research and development by a person acting on behalf of an institution of higher education; and certain commercial interests, like real-estate and oil-and-gas pipeline owners. *Id.* § 423.002. The law provides that, outside of these excepted areas, a person commits a Class C misdemeanor if she uses a drone to capture an image of an individual or privately owned real property with the intent to conduct surveillance on that individual or property. *Id.* § 423.003. It is another Class C misdemeanor to use the image so captured. *Id.* § 423.004. The statute also provides for a civil cause of action for these violations, imposing a civil penalty of $5,000 for each image captured and $10,000 for use of such an image, as well as costs and fees. *Id.* § 423.006.

E. *Ag-Gag Laws*

"Ag-gag" laws are those designed to prohibit filming or photographing the operations of an agricultural facility without the effective consent of the owner, imposing civil or criminal liability on violators. Several states have such laws on the books, but a recent federal court ruling may call into question the constitutionality of many of them.

Some ag-gag laws directly prohibit unauthorized filming or photography at an animal facility.[26] Others known as "quick–reporting" statutes, like the one enacted in Missouri in 2012, do not

[22] *See Taylor v. Huerta*, No. 15-1495 (D.C. Cir. Dec. 23, 2015).

[23] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 339.

[24] *Boggs v. Merideth*, No. 3:16-cv-00006 (W.D. Ky. filed Jan. 4, 2016).

[25] FAA Office of Chief Counsel, State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet (Dec. 17, 2015).

[26] *E.g.*, UTAH CODE ANN. § 76-6-112.

criminalize the activity itself, but do require that any video or photographic evidence of abuse or neglect be turned over to law enforcement immediately.[27] Animal rights groups oppose both types of ag-gag laws, claiming that quick-reporting statutes hamper their ability to compile enough evidence to mount effective civil or criminal cases against abusive agricultural operations.

Since the first ag-gag law was passed in Kansas in 1990, several other states have attempted to pass such legislation with varying degrees of success. In 2015, in particular, Wyoming and North Carolina successfully passed new ag-gag legislation,[28] while Montana, Colorado, and New Mexico saw ag-gag legislation efforts fail.[29]

However, the ultimate fate of ag-gag laws remains to be seen following a federal court decision striking down Idaho's ag-gag law as unconstitutional. In February 2014, Governor C. L. "Butch" Otter signed into law Idaho Code § 18-7042, entitled "Interference with Agricultural Production," which penalized the surreptitious filming of "agricultural production" with up to a year in prison, up to a $5,000 fine, or both.[30] In August of 2015, a federal court declared the law unconstitutional.[31]

In granting summary judgment for the plaintiffs,[32] the court ruled that the law was a content-and viewpoint-based restriction on speech in violation of the First Amendment. The court also ruled that the law violated the Equal Protection Clause of the Fourteenth Amendment "because it was motivated in substantial part by animus towards animal welfare groups, and because it impinges on free speech, a fundamental right."[33]

In describing the law, the court wrote:

> [Section] 18-7042 seeks to limit and punish those who speak out on topics relating to the agricultural industry, striking at the heart of important First Amendment values. The effect of the statute will be to suppress speech by undercover investigators and whistleblowers concerning topics of great public importance: the safety of the public food supply, the safety of agricultural

[27] MO. REV. STAT. § 578.013.

[28] WYO. STAT. § 6-3-414 (2015); N.C. GEN. STAT. § 99A-2. North Carolina's law allows property owners to sue employees who record non-public areas without authorization. While not specific to agriculture, the law has been criticized as a new type of ag-gag law. The fact that it is not specific to agriculture also raises implications for whistleblowers in other industries and environments.

[29] Montana already has an ag-gag law on the books prohibiting recording, but an attempt to pass a quick-reporting statute in 2015 failed.

[30] IDAHO CODE § 18-7042(3).

[31] *Animal Legal Defense Fund v. Otter*, No. 1:14-cv-00104-BLW, 2015 WL 4623943 (D. Idaho Aug. 3, 2015), appeal filed (9th Cir. Dec. 14, 2015).

[32] The plaintiffs included the Animal Legal Defense Fund, PETA, the ACLU of Idaho, the Center for Food Safety, and several other organizations and individuals.

[33] *Id.* at *4.

> workers, the treatment and health of farm animals, and the impact of business activities on the environment.[34]

As such, the law did not survive strict scrutiny review. The court also pointed out that other laws exist to protect the interests the state purports to be protecting with this law without violating free speech, such as laws against trespass, defamation, fraud, and theft.[35]

A similar challenge to Utah's ag-gag law is pending in federal court and is expected to go to trial in 2016, after the court denied defendants' motion to dismiss as to most plaintiffs and as to plaintiffs' equal protection and due process claims.[36] In a challenge to Wyoming's law brought by the National Press Photographers Association and a variety of environmental and animal rights groups, the district court denied defendants' motion to dismiss plaintiffs' First and Fourteenth Amendment claims.[37] North Carolina's ag-gag law is also being challenged in federal court.[38]

[34] *Id.* at *3.

[35] *Id.* at *4.

[36] *See Animal Legal Def. Fund v. Herbert*, No. 2:13-cv-00679-RJS (D. Utah) (Dkt. Nos. 54 and 59).

[37] *Western Watersheds Project v. Michael*, No. 2:15-cv-00169-SWS (D. Wyo. Dec. 28, 2015) (Dkt. No. 40).

[38] *People for the Ethical Treatment of Animals, Inc. v. Cooper*, No. 16-cv-25 (M.D.N.C. filed Jan. 13, 2016).

Media Law Resource Center's Model Policy on Police Body-Worn Camera Footage

Model Policy on Police Body-Worn Camera Footage

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Memo Explaining the MLRC's Model Policy on Police Body-Worn Camera Footage

Across the nation, police departments and other law enforcement agencies have increasingly embraced the technology of body-worn video cameras (BWCs). Several organizations, both within the law enforcement community and various public interest and advocacy groups, have studied when and where law enforcement agents should deploy such technology, and have promulgated "best practices" recommendations regarding the retention of, and right of public access to, recordings made by police BWCs.[1]

In 2014 and 2015, a number of state legislatures[2] and other governmental bodies have considered amendments to their open records statutes to address specifically the recordings made by police BWCs.[3] Not surprisingly, the various "stakeholder" groups and public interest organizations have not agreed, and do not, necessarily agree on a single policy for retention of and access to such police BWC recordings. Each organization applies its own mission, function, values and unique perspective in weighing the competing interests of governmental transparency, concerns over individuals' privacy interests, logistical and financial burdens to be borne by police departments, interference with prosecutions and other law enforcement functions, etc. For example, the American Civil Liberties Union, devoted to protecting civil liberties in the Bill of Rights, has balanced its commitment to the "public's right to know" what its government is up to, against private citizens' rights of privacy and freedom from a governmental surveillance state, and has issued a policy statement (revised once)[4] in accordance with its commitment to promoting those competing values. In contrast, the Radio and Television Digital News Association has recently issued its own position statement with regard to public access to police BWC videos[5], that places a decidedly greater emphasis on the public's right to know than the ACLU policy reflects.

Given the multitude of legitimate positions on these issues, the Media Law Resource Center, on behalf of its members (who include the nation's leading newsgathering and reporting entities), hereby lends its voice and perspective to this ongoing public discussion via the attached "Model Policy on the Retention of, and Public Access to, Police Body-Worn Camera Recordings." First, we offer a few caveats and explanations for what is not included in this Model Policy. Then, we offer some explanation and justification for the positions set forth in the Model Policy.

What the Model Policy Does Not Address

Unlike some of the previous studies and reports mentioned above, the MLRC's Model Policy takes no position on when BWCs should be utilized by police and other law enforcement agencies (nor how the deployment of such cameras and recording devices should be funded, etc.). Recognizing that these issues present significant public policy matters for state legislatures, local governments, and individual law enforcement agencies, the MLRC has never advised law enforcement agencies on which technology to deploy in performing their law enforcement functions, nor on which records to generate or in what format. Nevertheless, MLRC recognizes that some of the personal privacy and other concerns about the disclosure of highly personal and intimate matters can and should be addressed at the "front end," by adopting policies about when BWCs should not be used.

Nor does the Model Policy take a position on the logistical details (e g , storage medium, costs) of maintaining the recordings made by BWCs Again, the MLRC recognizes that issues concerning costs, logistical and technological challenges, etc , posed by the massive amounts of data that BWCs will inevitably generate, pose significant public policy issues as well Once again, however, the MLRC respectfully leaves such matters to legislators, and local policymakers to resolve in accordance with multiple competing budgetary and human resources demands [6] In contrast, the issue of how long such records should be maintained is of interest and concern to the MLRC The MLRC Model Policy states that, as a general rule, the issues of retention and access are best resolved in accordance with states' and local jurisdictions' existing statutory and legal framework for such matters It is the MLRC's view that these official public records are not, in any qualitative way, fundamentally different from any other public records, generated by law enforcement agencies

Justifications for the MLRC Model Policy on Retention of, and Public Access to, Police Body-Worn Camera Recordings

Turning then to what is included in the Model Policy the MLRC Model Policy addresses only issues of retention of, and public access to, the recordings made by police BWCs Like the RTDNA's Position Statement, the MLRC believes that recordings made in the course of official conduct, by governmental agents (whether they be police officers, schoolteachers, city council members, mayors, or governors) are, fundamentally, "public records" which the public has a presumptive right to inspect, pursuant to not only the First Amendment, but various states' and political subdivisions' statutes that provide for access to "public records," including those made, maintained, or kept by law enforcement agencies [7]

Like the RTDNA's Position Statement, the MLRC's Model Policy is premised on the foundational assumption that all recordings made by police BWCs, in accordance with departmental policies, are subject to states' and local jurisdictions' statutes governing public access to public records And, like the RTDNA, the MLRC Model Policy presumes that without further amendments to such state and local statutes, existing exemptions for confidential informants, personal privacy interests, trade secrets, etc , adequately protect the persons and businesses whose activities are captured in such recordings from the harms attendant with disclosure of such material

To the extent that legislators consider revising or amending existing statutes providing access to public records, the Model Policy sets forth a series of principles to guide any such legislative reform Once again, these principles begin with the foundational principle that all records generated by any governmental entity that document, capture, and/or memorialize the discharge of public functions, are entitled to a strong presumption of public access for purposes of inspection and copying See, e g , Republican Party of N M v N M Taxation & Revenue Dep't, 283 P 3d 853, 870 (N M 2012) ("Transparency is an essential feature of the relationship between the people and their government "), Press-Enterprise Co v Superior Ct , 464 U S 501, 518 (1984) ("Without some protection for the acquisition of information about the operation of public institutions by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance " (Stevens, J , concurring) (internal marks and citation omitted)), see also Cox Broad Corp v Cohn, 420 U S 469, 491-92 (1975) ("[O]fficial records and documents open to the public are the basic data of government[] ")

Despite this strong presumption of public access to BWC recordings, existing statutes and sound public policy recognize that in particular circumstances, countervailing interests (including ongoing law enforcement investigations, confidential informants, gang-related threats of retaliation, and highly personal and intimate private facts) may, on occasion, appropriately -- and consistent with Supreme Court guidelines suggesting limiting access as narrowly as possible to serve the appropriate privacy interest -- outweigh the right of public access to portions of, or, in some cases the entirety of, those recordings

Unlike the ACLU's Policy Statement, which presumes a legitimate expectation of privacy on the part of non-law enforcement agents when they encounter such peace officers on a public street or other public location, the MLRC

Model Policy is grounded on a well-recognized body of law holding that individuals do not have a reasonable expectation of privacy with respect to their being photographed, videotaped, or recorded without their consent, when they are visible to the human eye and audible to the human ear, in any public place Indeed, the Restatement (Second) of Torts declares that for all but the most intimate and personal aspects of one's life, there is no legal liability for intrusion when an individual is photographed in public

The defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs Thus there is no liability for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye

§ 652B cmt c (1977) (emphasis added) [8] In order to recover for an intrusion upon seclusion, "the plaintiffs must show that some aspect of their private affairs has been intruded upon," and, therefore, the tort "does not apply to matters *which occur in a public place or a place otherwise open to the public eye* " *Fogel v Forbes, Inc* , 500 F Supp 1081, 1087 (E D Pa 1980) (emphasis added),[9] Mark v Seattle Times, 635 P 2d 1081, 1094 (Wash 1981) ("On the public street, or in any other public place, the plaintiff has no legal right to be alone, and it is no invasion of his privacy to do no more than follow him about and watch him there Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see " (emphasis added) (internal marks and citation omitted)), Dempsey v Nat'l Enquirer, 702 F Supp 927, 931 (D Me 1988) ("taking a photograph of the plaintiff in a public place cannot constitute an invasion of privacy based on intrusion upon the seclusion of another"), Salazar v Golden State Warriors, No C-99-4825, 2000 WL 246586, at *2 (N D Cal Feb 29, 2000) ("There is no intrusion into a private place when the plaintiff has merely been observed, or even photographed or recorded, in a public place The plaintiff must show he had an objectively reasonable expectation of privacy " (emphasis added) (internal marks and citation omitted)), Jackson v Playboy Enters , Inc , 574 F Supp 10, 13-14 (S D Ohio 1983) (dismissing claim based on photographs taken of plaintiff on public sidewalk), Mulligan v United Parcel Serv , Inc , No 95-1922, 1995 WL 695097, at *2 (E D Pa Nov 16, 1995) (holding that "party has no claim for invasion of privacy because of surveillance where he or she is not in a private place or in seclusion," and that plaintiff had no expectation of privacy when he was repairing a walkway in front of his home)

While individuals unquestionably enjoy a reasonable expectation of privacy within their homes or other private quarters, see, e g , Wilson v Layne, 526 U S 603 (1999),[10] the same is not true for the expectations of those in business settings and other private property locations that are generally open to the public See, e g , Med Lab Mgmt Consultants v ABC, 306 F 3d 806, 812-15 (9th Cir 2002), Desnick v ABC, 44 F 3d 1345, 1352 (7th Cir 1995)

Therefore, in recognition of the case law set forth above, the MLRC's Model Policy extends a presumption of public access to all police BWC footage of individuals filmed on a public street, park, sidewalk, or private business location that is readily accessible to the public BWC recordings of individuals inside their homes, apartments, places of residence or other private property, in contrast, are not subject to that same presumption of public access, unless the conduct recorded is itself a legitimate matter of public concern [11] And even in the case of ordinary, routine executions of warrants or other authorized home entries or entries onto private property, particular circumstances may warrant public disclosure of such recordings, law enforcement officials should be given discretion, in those circumstances, to make such BWC recordings available to the public, particularly with any private or sensitive information redacted (see below) In addition, the public should be permitted the right to petition a court for an order granting access to such recordings on the same basis, and to challenge the extent of any redactions

As to the privacy expectations of the peace officers whose actions are captured on the BWC recordings, it is well established that "a public officer has no cause of action [for invasion of privacy] when his activities in that capacity are recorded, pictured, or commented on in the press " Restatement (Second) of Torts § 652D cmt e (emphasis added), see also Johnson v Hawe, 388 F 3d 676, 683 (9th Cir 2004) (police officer has no legitimate expectation of privacy in his conduct "while he was on duty performing an official function in a public place"), Hornberger v ABC, 799 A 2d 566

594 (N J Super Ct App Div 2002) (holding that police officers have no legitimate expectation of privacy in their interactions with members of the public in discharging their official duties) [12]

With respect to certain BWC recordings in which private individuals are captured in private settings or in ways that implicate other legitimate public interests warranting withholding that information from public inspection, the Model Policy – consistent with both the federal FOIA and most states' Open Records Act – calls upon release of such records in redacted form, to eliminate such legitimate privacy concerns while allowing the public the maximum amount of access to information concerning the operation s of government [13] The records requester should have the right to challenge the extent of redactions in a court of law The Seattle Police Department is reported to be developing a technological means to facilitate such redaction, and will share that technology with other law enforcement agencies [14]

The MLRC's Model Policy on the Retention of and Public Access to Police Body-Worn Camera Recordings

Recordings made by police body-worn cameras (BWCs) should generally be made available for public inspection and copying in accordance with each jurisdiction's existing statutes governing public access to "public records," including those of law enforcement agencies

Such existing statutes have a host of exemptions from disclosure of "public records" that adequately protect individuals' privacy and other societal interests, that may be implicated by public release of BWC recordings, on a case-by-case basis

To the extent that any jurisdiction considers adopting statutes, rules, or regulations that are specifically directed to police BWC recordings, such laws should include the following

- There should be a strong presumption of public access to all such recordings made in public places and other non-private areas (areas in private property open to the public) Neither citizens nor law enforcement agents generally have a "reasonable expectation of privacy" in the recordings of their interactions in non-private venues
- Recordings of home searches or other lawful entries into private property are not subject to the same presumption of public access, but should nonetheless be available as public records if the requester demonstrates a legitimate public interest in the subject matter of the events that occurred inside the home or other private property
- Even in cases of ordinary, routine and lawful home entries (where the event is not of unusual public interest), particular unique circumstances may warrant public disclosure of such recordings, law enforcement officials should be given discretion, in those circumstances, to make such BWC recordings available to the public, particularly with any private or sensitive information redacted In addition, the public should be permitted the right to petition a court for an order granting access to such recordings on the same basis
- Highly personal and intimate details recorded by police BWCs during interactions with civilians in a private place may be redacted or blurred prior to those recordings being made available for public inspection and copying The public should be permitted the right to petition a court for an order granting access to any redacted material on a showing that such material is subject to legitimate public interest
- Police, sheriffs, etc should retain all BWC recordings for a period of several weeks (not days), unless a citizen complaint or a request to inspect the tape has been filed, in which case the recording should be retained until the matter is fully resolved, including exhaustion of all appeals § The cost to the public of accessing the non-confidential and/or redacted recordings made by police BWCs should not be so high as to discourage or prohibit citizens from accessing these public records

Notes

[1] See, e g , Leadership Conference on Civil and Human Rights, Civil Rights Principles on Body Worn Cameras (May 2015), http //www civilrights org/press/2015/body-camera-principles html, Marc Jonathan Blitz, Police Body-Worn Cameras Evidentiary Benefits and Privacy Threats, (Am Const Society May 13, 2015),https //www acslaw org/sites/default/files/Blitz_-_On-Body_Cameras_-_Issue_Brief pdf , Jay Stanley, Police Body-Mounted Cameras With Right Policies in Place, a Win for All, ACLU (2d ed Mar 2015), https //www aclu org/police-body-mounted-cameras-right-policies-place-win-all, Alexandra Mateescu et al , Police Body-Warn Cameras Data & Soc'y Res Inst (Feb 2015), http //www datasociety net/pubs/dcr/PoliceBodyWornCameras pdf , The Constitution Project Committee on Policing Reforms, The Use Of Body-Worn Cameras By Law Enforcement Guidelines For Use & Background Paper (January 28, 2015), http //www constitutionproject org/wp-content/uploads/2015/02/TCP-The-Use-of-Police-Body-Worn-Cameras pdf, Police Executive Research Forum, Implementing a Body-Worn Camera Program Recommendations and Lessons Learned, U S Dep't of Justice Office of Community Oriented Policing Programs (2014), http //www justice gov/iso/opa/resources/472014912134715246869 pdf, Eugene P Ramirez, A Report on Body Worn Cameras, (2014) http //www parsac org/parsac-www/pdf/Bulletins/14-005_Report_BODY_WORN_CAMERAS pdf, Antonia Merzon, Police Body-Worn Cameras A Report for Law Enforcement (Colo Best Practices Comm for Prosecutors 2013), A Primer on Body-worn Cameras for Law Enforcement, U S Dept of Justice, Nat'l Inst of Justice (Sept 2012), https //www justnet org/pdf/00-Body-Worn-Cameras-508 pdf, see also Considering Police Body Cameras, 128 Harv L Rev 1794 (Apr 10, 2015), http //harvardlawreview org/2015/04/considering-police-body-cameras/

[2] Ryan J Foley, State bills would limit access to police body cam videos Associated Press (Mar 24, 2015), http //www policeone com/police-products/body-cameras/articles/8481000-State-bills-would-limit-access-to-police-body-cam-videos/, (reporting that "[l]awmakers in at least 15 states have introduced bills to exempt video recordings of police encounters with citizens from state public records laws, or to limit what can be made public "), Mike Cavender, Police body cams The new FOIA fight, Radio Television Digital News Ass'n (Apr 22, 2015), http //www rtdna org/article/police_body_cams_the_new_foia_fight# VT25mLLnYZ4 ("There are at least 18 state legislatures considering bills to regulate (or deny) release of body cam video And there are many more municipalities which are setting their own rules Few, if any, are expected to be favorable to open public disclosure "), Susannah Nesmith, With more police wearing cameras, the fight over footage has begun in Florida, Columbia Journalism Review (March 9, 2015), http //www cjr org/united_states_project/florida_police_body_cameras php, Peter Hermann & Aaron C Davis, As police body cameras catch on, a debate surfaces Who gets to watch?, Wash Post (Apr 17, 2015), http //www washingtonpost com/local/crime/as-police-body-cameras-catch-on-a-debate-surfaces-who-gets-to-watch/2015/04/17/c4ef64f8-e360-11e4-81ea-0649268f729e_story html

[3] The MLRC's State Legislative Developments Committee has compiled state statutes addressing police BWCs at http //www medialaw org/committees/state-legislative-affairs-committee/item/2778 (restricted to MLRC members, password required)

[4] See Stanley, supra n 1

[5] See Cavender, supra n 2

[6] It is worth noting, however, that the Seattle Police Department has adopted an extremely cost-effective means of storing and providing access to its BWC videos, by posting them on a YouTube channel, at no cost to the Department for storage fees https //www youtube com/channel/UCcdSPRNt1HmzkTL9aSDfKuA

[7] See Reporters Committee for Freedom of the Press, Open Government Guide at Section IV N 4 "Police Records – Investigatory Records," http //www rcfp org/open-government-guide (searchable by outline topic headings)

[8] The Restatement does note that "[e]ven in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze, and there may still be invasion of privacy when there is intrusion upon these matters " Id

[9] The Restatement further recognizes that

Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed The same is true as to those who are the victims of crime or are so unfortunate as to be present when it is committed

Restatement (Second) of Torts § 652D cmt f (emphasis added)

[10] In Wilson, the Supreme Court held that the police had violated the Fourth Amendment when they brought reporters from the Washington Post to accompany them in their execution of a search warrant inside a private residence Notably, however, the court observed, "it might be reasonable for police officers to themselves videotape home entries as part of a 'quality control' effort to ensure that the rights of homeowners are being respected, or even to preserve evidence " Wilson, 526 U S at 613 (citation omitted)

[11] The Restatement also makes clear that when information is contained in a public record (one generated by a government agent documenting the governmental actions and open to the public), its subsequent publication by the media cannot give rise to a claim for "publicity given to private facts " Restatement (Second) of Torts § 652D cmt b (1977) ("there is no liability to giving publicity to facts about the plaintiff's life that are matters of public record" provided the record is open to inspection) Accordingly, publishing information captured by police BWC in documenting their discharge of official duties, if publicly available, cannot give rise to a claim for "publication of private facts " See, e g, Fry v Iona Sentinel-Standard, 300 N W 2d 687, 731 (Mich Ct App 1981) (holding, inter alia, that information about plaintiff recorded in police incident report could not form basis for invasion of privacy claim) Lindemuth v Jefferson Cnty Sch Dist R-1, 765 P 2d 1057 1059 (Colo App 1988) (holding that information in a public record can never be considered "private" for purposes of an invasion of privacy claim)

In addition, there is no cognizable claim for invasion of privacy by "publication of private facts" if the publication at issue addresses a matter of legitimate public concern See, e g Cape Publ'ns, Inc v Hitchner, 549 So 2d 1374, 1377-79 (Fla 1989) (child abuse report provided to a member of the press in violation of state statute addressed a matter of public concern), Bowley v City of Uniontown Police Dep't, 404 F 3d 783, 788-89 (3d Cir 2005) (same with respect to police report that was provided to the press in violation of state statute declaring such records confidential)

[12] This is true because "a public official has no right of privacy as to the manner in which he conducts himself in office " Rawlins v Hutchinson Publ'g Co , 543 P 2d 988, 993 (Kan 1975) (emphasis added), see also Nixon v Adm'r of Gen Servs , 433 U S 425, 457 (1977) (holding that public official enjoys a right of privacy only with respect to government-held information concerning "matters of personal life unrelated to any acts done by them in their public capacity" (emphasis added))

[13] See, e g , Freeom Colo Info , Inc v El Paso Cnty Sheriff's Dep't, 196 P 3d 892, 900 n 3 (Colo 2008) ("By providing the custodian of records with the power to redact names, addresses, social security numbers, and other personal information, disclosure of which may be outweighed by the need for privacy, the legislature has given the custodian an effective tool to provide the public with as much information as possible, while still protecting privacy interests when deemed necessary ")

[14] Lizzie Plaugic, Seattle's police department has a Youtube channel for its body camera footage The Verge (Feb 28, 2015), http //www theverge com/2015/2/28/8125671/seattle-police-body-cameras-youtube-channel