Recording a New Frontier in Evidence-Gathering: Police Body-Worn Cameras and Privacy Doctrines in Washington State

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INTRODUCTION

"Cams on cops." The terse three-word slogan, painted in green lettering on a homemade poster, held by a protester on a Seattle, Washington, street corner, deftly encapsulated a tidal shift in policing well underway in cities near and far.[1] In fact, across the state in Airway Heights, a town in Spokane County with a population one-hundredth the size of Seattle's,[2] patrol officers had been filming with body-worn cameras since 2009.[3] The cameras, Airway Heights Police Chief Lee Bennett had said, "were on sale."[4] And the cameras' footage proved to be unbiased and useful, he told an Eastern Washington media outlet.[5] His department, staffed with twenty-some officers, refers to video footage as "the third witness."[6]

By 2014, a "third witness" for overseeing police and civilian interactions—not only in Washington State, but in states across the nation—was in popular demand.[7] The year spawned massive citizen protests; people started to organize in record numbers on streets, in community centers, in churches, and in virtual spaces like Tumblr, Facebook, and Twitter[8] to thrust into the national spotlight a widespread disquiet over police shootings of unarmed racial minorities.[9] The name at the forefront of the movement belonged to Michael Brown, a black eighteen-year-old who was shot and killed in 2014 by Darren Wilson, a

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1. Ansel Herz, *Why the ACLU of Washington Opposes the State Proposal on Body Cameras*, STRANGER: SLOG (Apr. 14, 2015, 11:51 AM), http://www.thestranger.com/blogs/slog/2015/04/14/22050526/why-the-aclu-of-washington-opposes-the-state-proposal-on-body-cameras [https://perma.cc/W3X3-FDXG].

2. Recent estimates put Seattle's population at 684,451 residents and Airway Heights's at 6,639 residents. *QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/53/5300905.html?cssp=SERP [https://perma.cc/K64P-UJUC].

3. *See* Erik Loney, *Spokane Law Enforcement Want Third Eye*, KXLY (Feb. 25, 2011, 4:17 AM), http://www.kxly.com/news/Spokane-Law-Enforcement-Want-Third-Eye/682376 [https://perma.cc/UY3T-QYC3].

4. *Id.*

5. *Id.*

6. *Id.*

7. JAY STANLEY, ACLU, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL, VERSION 2.0 1–2 (2015), https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf [https://perma.cc/W64R-EEDG] (finding that police body-worn cameras arose to address the "growing recognition that the United States has a real problem with police violence").

8. Rubina Madan Fillion, *How Ferguson Protestors Use Social Media to Organize*, WALL STREET J.: DISPATCH (Nov. 24, 2014), http://blogs.wsj.com/dispatch/2014/11/24/how-ferguson-protesters-use-social-media-to-.organize/.

9. *See* Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES, http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0 (last updated Aug. 10, 2015).

white police officer.[10] A grand jury's decision not to indict Wilson for Brown's death ignited civilian clashes with police in Brown's home city of Ferguson, Missouri, so severe that windows shattered, buildings blazed, tear gas sprayed, and rubber bullets flew.[11] County officials declared a state of emergency.[12]

The problem: a perception of officers using force—sometimes deadly force—in unreasonable contexts and in racially motivated ways.[13] The solution: more oversight of the police by civilians.[14] The means: body-worn cameras—clip-on devices, usually smaller than a deck of cards, attached to an officer's eyewear or uniform lapel[15]—that would allow officers to capture their encounters with the public on video.

Cameras on cops: it was the pragmatic solution that many cities chose.[16] Body-worn camera programs were designed to encourage officers to follow department policies, to deter excessive use of force, to exonerate officers from unsupported claims of misconduct and groundless citizen complaints, to gather better evidence at crime scenes and, perhaps most importantly, to make everyday policing practices transparent in the wake of soured relationships between the force and the community.[17]

The idea took hold across the country.[18] From Damascus, Virginia, a town with a population hovering at about 800 residents[19] and four full-time police officers,[20] to New York City,[21] cities moved swiftly to adopt body-worn camera pilot programs.

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10. *Id.*

11. *Id.*

12. *Id.*

13. *See* The Harvard Law Review Ass'n, *Development in the Law Policing: Chapter Four Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1794–95 (2015) [hereinafter *Considering Police Body Cameras*].

14. *See id.*

15. STANLEY, *supra* note 7, at 1.

16. *See infra* text accompanying notes 18–21.

17. Bryce Clayton Newell, Collateral Visibility: Police Body Cameras, Public Discourse, and Privacy 61 (2016–17) (unpublished manuscript) (on file with Indiana Law Journal).

18. LINDSAY MILLER, JESSICA TOLIVER & POLICE EXECUTIVE RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 1–2 (2014) [hereinafter MILLER].

19. *See Damascus, VA Profile: Facts, Map & Data*, VA HOMETOWNLOCATOR (July 1, 2015), http://virginia.hometownlocator.com/va/washington/damascus.cfm [https://perma.cc/8FDY-UVR7].

20. Kevin Johnson, *Lack of Training, Standards Mean Big Problems for Small Police Departments*, USA TODAY (June 23, 2015, 4:39 PM), http://www.usatoday.com/story/news/nation/2015/06/23/small-police-departments-standards-training/28823849/ [https://perma.cc/B6JN-BA5U].

21. MARC JONATHAN BLITZ, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, POLICE BODY-WORN CAMERAS: EVIDENTIARY BENEFITS AND PRIVACY THREATS 3–4 (May 2015).

Cameras on cops: whether the policy was a solution, a preventative measure, or a new trend already underway in policing, it was the move that 25% of the nation's 17,000 police agencies chose in the last few years and an option that 80% are currently considering or testing.[22] The Department of Justice loudly endorsed the programs by supplying more than $23.2 million in funding to seventy-three local and tribal agencies in thirty-two states with the aim of "expand[ing] the use of body-worn cameras and explor[ing] their impact."[23] Some lawmakers even favored body-worn cameras enough to make them mandatory; in June 2015, South Carolina became the first state to require all law enforcement departments to implement body-worn camera programs.[24]

But, does privacy shrink as accountability grows? Some experts worry that body-worn cameras will infringe on the unique safeguards that states, including Washington, have built into their legal frameworks to protect privacy.[25] Take, for example, Technology and Liberty Director for the ACLU of Washington, Jared Friend, who voiced the fear that body-worn cameras could "ultimately amount to thousands of roaming surveillance cameras that will . . . capture all kinds of sensitive interactions."[26]

As departments pilot and implement body-worn cameras programs, researchers and scholars have raised concerns over protecting both the privacy of people who find themselves subjects of body-worn camera footage and the rights of citizens to obtain videos under state public record acts.[27] A spike of state legislation[28] has begun to respond to these

22. STANLEY, *supra* note 7, at 1.

23. Press Release, U.S. Dept. of Justice Office of Public Affairs, *Justice Department Awards over $23 Million in Funding for Body Worn Camera Pilot Program to Support Law Enforcement Agencies in 32 States*, U.S. DEPT. OF JUSTICE (Sept. 21, 2015), https://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law [https://perma.cc/9KKZ-6692].

24. Rich Williams, *South Carolina First State to Require Body-Worn Police Cameras*, NAT'L CONF. OF ST. LEGISLATURES (June 10, 2015), http://www.ncsl.org/blog/2015/06/10/south-carolina-first-state-to-require-body-worn-police-cameras.aspx [https://perma.cc/8E9G-F9H3].

25. In Washington, these privacy safeguards rest on Article I, Section 7 of the state constitution. *See* WASH. CONST. art. I, § 7.

26. Herz, *supra* note 1.

27. Police departments are hardly deaf to these concerns. Interestingly, Timothy Clemans, the civilian who brought this issue to the forefront in Seattle by making a public records request for every video the police had recorded with a body camera, was hired by the police department to help it deal with the massive amount of video data they had begun to accumulate. *See* Mark Harris, *The Body Cam Hacker Who Schooled the Police*, BACKCHANNEL (May 22, 2015), https://medium.com/backchannel/the-body-cam-hacker-who-schooled-the-policec046ff7f6f13#.t38q9fei8 [https://perma.cc/95LU-ARGD].

28. Thirty-four states, as of May 2015, are considering new laws regulating body-worn cameras. *Law Enforcement Overview*, NAT'L CONF. OF ST. LEGISLATURES (May 29, 2015),

concerns. Bills, including one signed into law on April 1, 2016, in Washington State, set guidelines limiting the disclosure of some sensitive or offensive footage to protect the identities of civilians filmed in homes, hospitals, and other intimate settings.[29]

However other questions linger. Should officers review videos—perhaps stopping, slowing, or zooming in on images—when preparing to testify for the State at criminal proceedings? Can police departments use images from body-worn cameras to create criminal profiles?[30] Friend's question—"Are [police] allowed to use the data they've collected for other purposes?"—crystalizes this general uneasiness.[31]

This Note contributes to a growing body of work that weighs the gains that communities stand to make from police body-worn cameras against the tangle of concerns about how cameras may infringe on individual liberties and tread on existing privacy laws. While police departments have quickly implemented cameras over the past few years, laws governing the use of the footage body-worn cameras capture still trail behind.[32] Notably, admissibility rules for footage from an officer's camera, and evidence obtained with the help of that footage, remain on the horizon.[33]

This Note focuses exclusively on Washington State's laws.[34] It takes a clinical approach by addressing two areas in which body-worn cameras as a government evidence-gathering tool may clash with privacy laws in Washington: the state's plain view doctrine and the Washington State Privacy Act.

This Note argues that courts should restrict evidence from body-worn cameras when that evidence defies the boundaries of the plain view doctrine or when it captures a protected conversation under the Privacy Act. Part I discusses the background in which body-worn

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http://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx [https://perma.cc/T8DM-TFWM].

29. H.B. 2362, 64th Leg., Reg. Sess. (Wash. 2016).

30. *See* Rachel La Corte, *Washington Senate Passes Bill on Police Body Cameras*, SEATTLE TIMES (Mar. 4, 2016, 8:02 PM), http://www.seattletimes.com/seattle-news/crime/washington-senate-passes-bill-on-police-body-cameras/ [https://perma.cc/J4WX-VRK6].

31. Sydney Brownstone, *The Seattle Police Department is Pondering What to Do with Body Cam Data*, STRANGER: SLOG (June 24, 2015, 1:53 PM), http://www.thestranger.com/blogs/slog/2015/06/24/22445782/seattle-police-department-is-considering-predictive-policing [https://perma.cc/7857-N59F].

32. MILLER, *supra* note 18, at 2.

33. BUREAU OF JUSTICE ASSISTANCE, LEGAL ISSUES SURROUNDING THE USE OF BODY CAMERAS, 1, 8 (2015) [hereinafter LEGAL ISSUES].

34. The use of body-worn cameras has the potential to brush up against the privacy laws of a number of states. However, the scope of this Note is limited to Washington' laws to provide a focused example of how evidence-gathering with body cameras might come into conflict with one state's legal framework.

cameras gained popularity, specifically unpacking their role in the community policing model; it then outlines Washington's hesitancy to embrace law enforcement's strides to enhance its evidence-gathering abilities through technology. Part II discusses the problems in determining whether footage obtained in the course of an officer's duties is admissible under the plain view doctrine. Part III examines the potential for cameras to capture the audio of conversations that the Privacy Act protects. Part IV argues that trial courts should be cognizant of the strong potential for body-worn camera footage and audio to influence juries; it advocates for courts to play a gatekeeping role and suppress evidence derived from body-worn cameras (1) when such evidence fails to meet the requirements of a plain view seizure or (2) when it contains a conversation recorded in violation of the Privacy Act.

I. POLICE BODY-WORN CAMERAS AS BOTH A REMEDY AND A LOGICAL NEXT STEP; WASHINGTON AS A PROTECTOR OF PRIVACY

The use of police body-worn cameras arose both in response to civilian misgivings of police displays of force and as a logical step to further the goals of information gathering in community policing. However, Washington's laws—both state supreme court decisions and legislative mandates underscoring the state's commitment to safeguarding privacy—erect a resistance to law enforcement drawing from new technology to augment its evidence-gathering capabilities.

A. Body-Worn Cameras: Information-Gathering Instruments to Further Community Policing Goals

Some have observed that police departments' body-worn camera programs unveil a new era of police oversight.[35] This era, some scholars suggest, is marked by a growing schism between the police and the citizenry.[36] The narrative is one that a textbook written years into the future might recount as follows, police shootings and inordinate displays of force demanded increased transparency from police officers; cities and police departments responded by self-monitoring with body-worn cameras.[37] Yet, the story is hardly so simple.

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35. Elise Hu, *Using Technology to Counter Police Mistrust is Complicated*, NPR (Sept. 2, 2014, 12:10 PM), http://www.npr.org/sections/alltechconsidered/2014/09/02/345208359/using-technology-to-counter-police-mistrust-is-complicated [https://perma.cc/38RZ-EZMZ].

36. STANLEY, *supra* note 7, at 2. *See generally* Barak Ariel, Tony Farrar & Alex Sutherland, *The Effect of Police Body-Worn Cameras on Use of Force and Citizens' Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANTITATIVE CRIMINOLOGY 509, 509 (2015).

37. *See Considering Police Body Cameras*, *supra* note 13, at 1794.

Some police departments, including Seattle's, point out that they started to consider cameras *before* the protests following the death of Michael Brown in Ferguson, Missouri.[38] Moreover, police officers and their supervisors largely welcomed body-worn camera programs.[39] And for good cause—one of the first comprehensive studies unpacking the effects of body-worn cameras, conducted in Rialto, California, found that civilian complaints against officers dropped by 88% after officers started wearing cameras.[40] Police department supervisors and officers cite other benefits of the cameras, namely that they preserve evidence that could—and often does—evaporate before trial.[41] Carlos Ramirez, a California police officer, highlighted that "[b]y the time [domestic violence] cases get to court often things have cooled down and the victim retracts. But with the video you see her with the bloody lip. There's nothing lost in translation."[42]

Body-worn cameras might have been a natural and predictable next step to improve upon the model of community policing that started to take hold in the second half of the twentieth century.[43] A 1998 newsletter, cosponsored by Harvard Law School and the Department of Justice, describes some of the key features of community policing:

> [These features include] information gathering, victim counseling and services, community organizing and consultation, education, walk-and-ride and knock-on-door programs, as well as regular patrol, specialized forms of patrol, and rapid response to emergency calls for service. Emphasis is placed on information sharing between patrol and detectives to increase the possibility of crime solution and clearance.[44]

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38. *SPD Answers Your Questions on Body Cameras*, SPD BLOTTER (Dec. 12, 2014, 6:33 PM), http://spdblotter.seattle.gov/2014/12/12/spd-answers-your-questions-on-body-cameras/ [https://perma.cc/CET9-5QYB] [hereinafter *SPD Answers Your Questions*]. Arguably, for a number of years independent pressures had weighed on Seattle to adopt a comprehensive police oversight program because the department had entered into a consent decree with the Department of Justice in December 2011. *See The Seattle Consent Decree: How It Came About, What It Is, and What the Monitor Does*, SEATTLE POLICE MONITOR, http://www.seattlemonitor.com/overview/ [https://perma.cc/8V3E-S3TR].

39. Rory Carroll, *California Police Use of Body Cameras Cuts Violence and Complaints*, GUARDIAN (Nov. 4, 2013 12:00 AM), http://www.theguardian.com/world/2013/nov/04/california-police-body-cameras-cuts-violence-complaints-rialto [https://perma.cc/M4HB-VJB9].

40. Ariel, Farrar & Sutherland, *supra* note 36, at 524.

41. Carroll, *supra* note 39.

42. *Id.*

43. *See* BUREAU OF JUSTICE ASSISTANCE, UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION 1, 5–7 (Aug. 1994).

44. George L. Kelling & Mark H. Moore, *The Evolving Strategy of Policing*, 4 PERSP. ON POLICING 1, 12–13 (Nov. 1998), https://www.ncjrs.gov/pdffiles1/nij/114213.pdf [https://perma.cc/28TM-A7Y6].

This characterization of community policing focuses on information gathering.[45] Successful community policing—even nearly twenty years ago as it was understood then by the newsletter's authors—hinged, in large part, on the police obtaining information from the people who resided in the areas they served. To do so, officers were to talk to citizens and create partnerships with business, church, and community leaders.[46] They were to spend time on the city blocks that made up their beat, to have their eyes and ears on the street, and to have a more continuous presence in the community than they ever had before.[47] Police departments started to recognize that more local information from the community—including information from informants about the identities of criminals and hotspots for crime—served them well in locating criminal activity.[48]

When police record a crime, the film often captures evidence. The film preserves a record from which prosecutors and defense attorneys can craft arguments in court. Video from a body-worn camera furnishes more life and color than even a carefully detailed, written police report.[49] It provides a better record than an officer trying to recall at trial what evidence he uncovered at a crime scene weeks or months before.[50] Thus, body-worn cameras not only rose in popularity to ensure police and citizens both remained on their best behavior,[51] but also because filming is a way to gather information and to collect useful evidence.

B. Washington's Restrictions on New Evidence-Gathering Tools

Washington, however, has not always welcomed technological advances in evidence-gathering. . In the face of wiretapping,[52] the global positioning system,[53] and thermal imaging,[54] Washington's legislature and courts have announced limitations on new technology-based tools, sometimes years ahead of federal rules. This trend aligns with the robust

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45. *Id.*

46. *See generally id.*

47. BUREAU OF JUSTICE ASSISTANCE, *supra* note 43, at 21–22.

48. *Id.* at 9–10.

49. Newell, *supra* note 17, at 12–13 (citing TONY MCNULTY & PATRICIA SCOTLAND, POLICE AND CRIME STANDARDS DIRECTORATE, *Foreword* to MARTIN GOODALL, POLICE & CRIME STANDARDS DIRECTORATE, GUIDANCE FOR THE POLICE USE OF BODY-WORN VIDEO DEVICES 5 (2007)).

50. *Id.*

51. *See* Carroll, *supra* note 39.

52. WASH. REV. CODE § 9.73.030 (1986); 1986 Wash. Sess. Laws 160–61.

53. State v. Jackson, 76 P.3d 217, 224 (Wash. 2003) (holding that the installation of a GPS tracker on a vehicle is a search and typically requires a warrant).

54. State v. Young, 867 P.2d 593, 598 (Wash. 1994) (holding that thermal imaging of a home was a search and that this warrantless use of technology violated Washington's state constitution).

privacy protections engendered in Article I, Section 7 of the constitution of the State of Washington, which extend beyond those contained in the federal Constitution.[55] Section 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."[56] Washington courts have held this language, unlike the Fourth Amendment, provides sweeping privacy protections and "no express limitations" on a Washington State resident's privacy interest.[57] Other state courts agree that Washington's constitution engenders a broader recognition of individual privacy rights than most state constitutions.[58] Washington, therefore, provides a particularly interesting context in which to examine the intersection of police body-worn cameras as evidence-gathering tools with privacy protections in state law.

II. A PLAIN *VIEW* OF EVIDENCE OR A PLAIN *RECORD* OF EVIDENCE?

Washington, like all states,[59] follows the plain view doctrine.[60] Generally, police officers cannot search constitutionally protected areas, or areas in which people enjoy a reasonable expectation of privacy, without a search warrant.[61] Warrants do not authorize a general search of an area; rather, they must be specific.[62] Warrants must describe with particularity the location to be searched and the items officers intend to discover[63] in order to "eliminate[] the danger of unlimited discretion in the executing officer's determination of what to seize."[64]

The plain view doctrine, however, is an exception to the warrant requirement that gives some discretion back to officers. It authorizes police to lawfully seize evidence they plainly perceive[65] without a warrant in a constitutionally protected area so long as two requirements are satisfied. First, officers must have a prior justification for an intrusion

55. State v. Valdez, 224 P.3d 751, 756–57 (Wash. 2009); *see also* State v. Arreola, 290 P.3d 983, 988 (Wash. 2012) (noting that Article I, Section 7 of Washington's constitution is "grounded in a broad right to privacy and the need for legal authorization in order to disturb that right").

56. WASH. CONST. art. I, § 7.

57. State v. Ferrier, 960 P.2d 927, 930 (Wash. 1998).

58. *See* Hageman v. Goshen Cnty. Sch. Dist. No. 1, 256 P.3d 487, 494 (Wyo. 2011) (discussing how Washington, unlike other states, elected to make the requirement of a warrant essential to determining the constitutionality of the search).

59. Horton v. California, 496 U.S. 128, 136 (1990) (holding that evidence obtained under the plain view doctrine does not violate the Fourth Amendment).

60. State v. Ruem, 313 P.3d 1156, 1160 (Wash. 2013).

61. *Id.*

62. State v. Perrone, 834 P.2d 611, 614 (Wash. 1992).

63. *Id.*

64. *Id.* at 615.

65. The plain view doctrine is not limited in application to evidence officers see; it also applies to evidence that officers touch. *See* State v. Hudson, 874 P.2d 160, 166 (Wash. 1994).

into the protected area.[66] Second, the evidence's incriminating nature must be immediately apparent.[67] If the government fails to establish that both of these requirements were met, the evidence is tainted and courts will exclude it in a subsequent criminal proceeding.[68]

Footage from an officer's body-worn camera is problematic in light of both of the plain view doctrine's requirements. First, body-worn cameras can record images of evidence in a protected location where an officer lacks a prior justification for being. Second, body-worn cameras may record images of evidence which officers do not perceive as incriminating at the time, but later, upon reviewing a segment of footage, identify as evidence of a crime.

A. *Filming Without a Lawful Presence? Footage Captured in Constitutionally Protected Contexts*

Evidence derived from body-worn police cameras becomes problematic upon considering the doctrine's initial requirement that an officer have a prior justification, or lawful reason, for being in the area in which the officer uncovers evidence in plain view.[69] Washington, like most states, requires that police meet this "lawful presence" requirement as a threshold condition before determining whether evidence was properly seized.[70] If an officer collects physical evidence from a protected area *without* prior authorization—for example, if the officer gathers the plain view evidence in the course of an illegal search—the evidence is the fruit of an unlawful seizure and will not be admissible at a subsequent criminal trial.[71]

Generally, a search warrant provides an officer with a prior justification to enter and search a protected area.[72] An officer may also have a prior justification for being in a protected area when exigent circumstances require the officer to enter, when the officer has consent to

66. *See Horton* v. California, 496 U.S. 128, 128 (1990) (explaining that the federal plain view doctrine no longer requires that officers who seize evidence in plain view also meet a third requirement, that the evidence be discovered inadvertently). While Washington cases before *Horton* recognized the inadvertency requirement, Washington's supreme court and appellate courts now consistently follow *Horton* and recognize only the two elements of the plain view doctrine *Horton* sets out—that officers have a prior justification and the evidence holds immediately incriminating nature. *See Ruem*, 313 P.3d at 1160; State v. O'Neill, 62 P.3d 489, 500 (Wash. 2003); State v. Ring, 364 P.3d 853, 857 (Wash. Ct. App. 2015).

67. *See Horton*, 496 U.S. at 128.

68. *Ruem*, 313 P.3d at 1164.

69. State v. Hatchie, 166 P.3d 698, 702 (Wash. 2007).

70. *Id.*; *see also Ruem*, 313 P.3d at 1160.

71. *Ruem*, 313 P.3d at 1165 (holding that information gathered in plain view will not support a subsequent search warrant based on that information if it was obtained while an officer was unlawfully present at a home).

72. *See* State v. Garvin, 207 P.3d 1266, 1270 (Wash. 2009).

enter, or when the officer is performing a search incident to a valid arrest.[73] When officers lack search warrants to enter a protected area, the rules surrounding the lawfulness of their presence also often hinge on the reasonable expectation of privacy a person enjoys in the protected space—the justifications for an inspection of a vehicle for suspected illicit materials is distinct from those authorizing an officer to enter a bedroom to look for concealed contraband.[74]

The home is one locale where Washington residents enjoy a substantial expectation of privacy.[75] Thus, a home search offers an illustration of how an officer might gather "plain view" evidence without a prior justification.[76] Unlike the majority of states, Washington requires that officers conducting a "knock and talk"[77] at a residence inform the occupants that they have the right to deny the officer's request to search the home.[78] Further, officers must inform the occupants that they "can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home."[79] This stringent informed consent standard prevents officers from seizing evidence in plain view at a residence after consent to search the home is withdrawn.[80]

In *State v. Ruem*, for example, the court held officers unlawfully continued a search when, despite smelling burnt marijuana and seeing marijuana starter plants in plain view, they continued to remain in a mobile home after the resident of the home revoked consent for the officers to be present.[81] Although the court found the initial entry into

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73. *Id.*

74. *Compare* State v. Tyler, 302 P.3d 165, 174 (Wash. 2013) (holding that consent is not a requirement for an inventory search of an impounded vehicle after a driver has been taken into custody), *with* State v. Kull, 118 P.3d 307, 311 (Wash. 2005) (holding that the government's failure to show consent or a concern for officer safety rendered a warrantless search of a woman's bedroom unlawful and that evidence in plain view seized in the course of the search should have been suppressed).

75. *See* State v. Ross, 4 P.3d 130, 135 (Wash. 2000).

76. *Id.*

77. A "knock and talk" occurs when police approach a home without probable cause of criminal activity and request consent to search the home. MARK L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: THE POLICE 218 (5th ed. 2015) (discussing a majority of states' rule that officers do not always need to inform residents they can refrain from consenting to a police officer's request to search their homes).

78. *See* State v. Ferrier, 960 P.2d 927, 934 (Wash. 1998).

79. *Id.*

80. *See, e.g.*, State v. Ruem, 313 P.3d 1156, 1165 (Wash. 2013).

81. *Id.* at 1164. *Ruem* was decided prior to the approval of Washington's Initiative 502, which removed criminal penalties for recreational use of marijuana by people twenty-one years old or older. *Fact Sheet: Initiative 502's Impact on the Washington State Liquor and Cannabis Board*, WASH. ST. LIQUOR & CANNABIS BOARD, http://www.liq.wa.gov/mj2015/fact-sheet [https://perma.cc/3F9P-GHSL].

defendant Ruem's home lawful,[82] the officers exceeded the scope of their consent when they continued to search the premises once Ruem told them, "This is not a good time."[83] Thus, the evidence officers uncovered in plain view was compromised because their prior justification for being at Ruem's residence vanished when he withdrew consent.[84]

The plain view doctrine's "prior justification" requirement and body-worn cameras also clash outside the context of a "knock and talk" at a home. In *State v. Ring*, a Washington appellate court held that an officer's plain view discovery of a an aluminum can with white powdered residue, which he immediately recognized as methamphetamine, was unlawful because a portion of the search warrant was overbroad and, therefore, invalid.[85] The appellate court reversed the defendant's conviction of possession of a controlled substance[86] because the trial court committed prejudicial error in admitting evidence of the trash can under the plain view doctrine.[87]

The use of body-worn cameras in situations underlying cases such as *Ruem* and *Ring* blurs the line between evidence that officers obtain legally and that which they may collect without the authority of law. In the context of a "knock and talk," body-worn cameras will assist in documenting an indisputable record of an officer issuing—or failing to issue—a warning to home residents of their rights to refuse consent to a search. But at the doorway and inside, the cameras can also record a wide range of other objects, people, and activities in the home. Furthermore, during a search, cameras will capture images of any space an officer moves through, regardless of whether a court later determines the officer should not have entered that location. Because cameras are generally mounted on an officer's glasses, hat, or lapel,[88] officers lack complete control of everything the camera catches. While an officer might record images of evidence listed in a warrant, her camera is likely to capture more.

This becomes particularly problematic in cases like *Ring*, in which the court noticed the officer who searched the shipping container was

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82. In this case, while officers did not give *Ferrier* warnings, the court determined their entry was still lawful because Ruem voluntarily consented, and the officer's purpose in entering the mobile home was to look for another suspect, not to search the home. *Ruem*, 313 P.3d at 1163.

83. *Id.* at 1164.

84. *Id.* at 1163–64.

85. State v. Ring, 364 P.3d 853, 857 (Wash. Ct. App. 2015) (explaining that although portions of the officers' warrant were valid, the overbroad, invalid portions could not be severed from the valid portions, thus the entire search was rendered unlawful).

86. *Id.*

87. *Id.*

88. GREG HURLEY, NAT'L CTR. FOR STATE COURTS, BODY WORN CAMERAS AND THE COURTS 1, 3 (2016).

"not aware of the purpose of the warrant, and could not remember exactly what the deputies were searching for."[89] Not only will an officer with a body-worn camera in this context leave with the memory of evidence he saw, he will leave with footage corroborating it.

A recording from the scene of a search—or another lawful intrusion—may match the officer's memory of objects or contraband the officer noticed. Yet, it may also offer a broader, clearer, or more convincing picture of what lay beyond an area the law authorized an officer to enter. Notably, in *Ruem*, the court made it clear that it was improper for the officers to base a warrant request on their plain view observation of the marijuana plants in the home because they made this observation in an unjustified context—after Ruem had revoked consent by telling officers it was not a good time for them to be in his mobile home.[90] Yet will officers be able to base warrant requests on video footage they obtain in constitutionally protected areas they lacked a justification for entering? This question, as well as the question of whether video footage may properly be admitted as stand-alone evidence, however, has yet to be addressed by the Washington Supreme Court.[91]

B. Immediately Incriminating or Immediately Incriminating Upon a Second Look?

The plain view doctrine's second requirement appears, at first blush, less entangled with privacy concerns than its first: evidence must hold an immediately incriminating nature at the time it is seized.[92] The second requirement serves a straightforward normative idea: police should generally only gather evidence specific that their search warrants predicts.[93] They should not enjoy free reign in executing a warrant[94] to gather evidence of other crimes or "extend a general exploratory search from one object to another until something incriminating at last

89. *Ring*, 364 P.3d at 857.

90. State v. Ruem, 313 P.3d 1156, 1164 (Wash. 2013).

91. LEGAL ISSUES, *supra* note 33, at 8.

92. State v. Hatchie, 166 P.3d 698, 702 (Wash. 2007).

93. *See, e.g.*, State v. Perrone, 834 P.2d 611, 614–15 (Wash. 1992) ("[T]he purposes of the search warrant particularity requirement are the prevention of general searches, prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate's authorization, and prevention of the issuance of warrants on loose, vague, or doubtful bases of fact.").

94. Officers can lawfully make privacy intrusions into protected areas without warrants under exigent circumstances. *See, e.g.*, State v. Moore, 120 P.3d 635, 640–41 (Wash. Ct. App. 2005) (holding that an officer could lawfully pull over a vehicle registered to a person listed as "missing/endangered" in a government database for the sole purpose of determining whether the missing person was in the car).

emerges."[95] When officers unpredictably encounter evidence that blatantly suggests criminal activity, however, it contravenes common sense that they ought to ignore it.[96] Evidence that falls into this category is limited to objects that will lead to an arrest or display a "sufficient nexus with the crime under investigation."[97] Washington's plain view doctrine also encompasses "plain touch," "plain smell," and "plain hearing."[98]

Generally, Washington courts have held the "immediately apparent" requirement means officers must *instantly* recognize that what they see (or touch or smell or hear) is contraband or evidence of a crime.[99] If officers make this determination, they may seize the evidence.[100] Washington law does not demand officers know with unflinching certainty that an object or substance before them bears a relation to a crime but does require that, "considering the surrounding facts and circumstances, the police can reasonably conclude they have evidence before them."[101] An officer's experience also matters: knowledge an officer gains though prior narcotics investigations, for example, is relevant in determining whether it was reasonable for the officer to assume a substance is an illegal drug.[102]

The "immediately apparent requirement" prevents officers in the field from gathering objects they encounter in the course of a lawful search if they need to further investigate them before deciphering their incriminating characteristics. In *State v. Murray*, for example, officers seized evidence unrelated to the theft they were investigating—in this case, a television set that police observed in plain view during an otherwise lawful search of an apartment.[103] The court held this evidence was tainted.[104] Even though the police had a warrant to search the apartment for evidence, they "did not know the television set was incriminating until *after* the serial numbers had been checked with police headquarters."[105] Put simply, the law does not vest in police the

95. State v. Murray, 527 P.2d 1303, 1307 (Wash. 1974) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971)).

96. *Id.*

97. State v. Terrovona, 716 P.2d 295, 303 (Wash. 1986).

98. State v. Lair, 630 P.2d 427, 433 (Wash. 1981).

99. *Id.*

100. *Id.*

101. *Id.*

102. *See* State v. Kennedy, 726 P.2d 445, 449 (Wash. 1986) (holding that, based on knowledge the officer had gained through officer's prior narcotics investigations, he could have reasonably concluded that a baggie he seized contained drugs).

103. State v. Murray, 527 P.2d 1303, 1307 (Wash. 1974).

104. *Id.*

105. *Id.* (emphasis added).

discretion to seize first and decipher a piece of evidence's incriminating nature later.

Law enforcement filming with body-worn cameras in Washington will likely encounter plain view evidence that is unequivocally incriminating in the course of many lawful searches or other situations in which they have a lawful prior justification for being in a given area.[106] Evidence of this class might include illegal guns or knives, drugs in powder or pill form and relevant paraphernalia, or child pornography. Other objects captured on film, however, might not readily display an overt, incriminating nature.

Take, for example, a package concealed in, but bulging underneath, a suspect's pants or jacket pocket. Upon squeezing the pocket in the course of a lawful pat-down for weapons,[107] suppose the officer feels what he determines to be a small baggie containing a powder or crystalline substance—something that he does not know for sure, but suspects to be contraband given his experience.[108] Do these circumstances furnish enough of an indication that the bulge holds an incriminating character? Can the officer seize the contents in the suspect's pocket based on his plain-feel discovery?

In *State v. Garvin*, the Washington Supreme Court was faced with a situation akin to the one described above but decided the case on other grounds.[109] The facts in *Garvin*, however, reveal how footage from a body-worn camera could augment what otherwise might be only marginal suspicion of an object's incriminating nature from an officer's touch, which would not be enough to seize the object.[110]

Similarly, the sight of an object that looks suspicious is not always enough for the officer to seize the item under the plain view doctrine.[111] For example, in *State v. Cotten*, FBI agents discovered a shotgun protruding from the defendant's bedcovers while they searched his room

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106. Given the number of cities currently implementing or piloting police body-worn camera programs in Washington, many officers have likely already made records of such evidence. *See supra* Part I.

107. A pat-down, or "*Terry* search," refers to a constitutionally permissible limited search of a suspect's outer clothing which an officer is justified in conducting when he has a reasonable articulable suspicion the suspect has weapons on his person that could harm the officer or others. *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968).

108. The facts of this hypothetical are closely based on the facts of State v. Garvin, 207 P.3d 1266, 1268–69 (Wash. 2009).

109. *Garvin*, 207 P.3d at 1272–73 (reversing the defendant's conviction on the grounds that the scope of the officer's pat-down was unreasonable and holding that the evidence should have been suppressed once the officer determined the bulge he felt in the pocket was not a weapon).

110. State v. Hudson, 874 P.2d 160, 166 (Wash. 1994) (holding that an officer must immediately recognize the incriminating nature of evidence he touches).

111. State v. Cotten, 879 P.2d 971, 979 (Wash. Ct. App. 1994).

for evidence in a bombing investigation.[112] The court held the plain view doctrine did not justify the FBI's seizure of the gun because the agents lacked knowledge of the suspect's involvement in a shooting.[113] The gun, therefore, lacked an "immediately apparent" incriminating nature.[114]

Police department manuals, including Seattle's, however, provide that officers may review footage previously recorded by body-worn cameras in a limited number of situations.[115] One of these situations is in preparation for criminal investigations.[116] Most of the state's police departments, including Seattle's, have not yet specified the amount of time or the level of thoroughness an officer may or should allot for reviewing a previously recorded incident that led to an arrest.[117] Similarly, policies lack answers regarding whether police officers can or ought to watch previously filmed footage in slow motion, enhance the images on the film, rewind and watch a particular scene unfold again, or stop the film at points to take notes or examine a particular shot in detail.

To be sure, footage from body-worn cameras serves the interest of justice in a significant way; it preserves a clear record of images and sounds that an officer can use in preparation for a subsequent fact-finding proceeding. Allowing officers to return to a film before testifying at trial provides officers an avenue to refresh their memories of an incident and proffer more accurate testimony at a criminal proceeding.[118]

However, could video that does arrive at the courtroom confer on testifying officers a disproportionate advantage? Recent scholarship on body-worn cameras unveils the concern that the officer—not the individual subject to a stop, search, seizure, or arrest—influences how a

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112. *Id.*

113. *Id.* The court in *Cotten* explained that, because the officers were conducting a search of a suspect's bedroom (in his mother's home with his mother's consent), the officers had authority to briefly seize dangerous weapons they encountered, so removing bullets from the gun or "otherwise rendering the weapon temporarily unusable," as well as keeping the gun with the officers was lawful. *Id.* at 980. The seizure, however, could not be justified under the plain view doctrine. *Id.*

114. *Id.*

115. SEATTLE POLICE DEP'T, SEATTLE POLICE MANUAL DIRECTIVE NO. 14-00062, NEW MANUAL SECTION: 16.091 – BODY-WORN VIDEO PILOT PROGRAM, Pt. 16.091-POL-2, ¶ 2 (Dec. 20, 2015), http://spdblotter.seattle.gov/wp-content/uploads/2014/12/12_17_14-Policy.pdf [https://perma.cc/N4JD-YZHJ].

116. *Id.*

117. *See id.*

118. In fact, some reports underscore the concern that given the volume of body-worn camera videos, footage favorable to defendants might slip through the cracks. HURLEY, *supra* note 88, at 7. Given the amount of video that will amass, as well as the uploading, sorting, and cataloguing police departments must undertake, "there will inevitably be cases in which video that was taken and classified by an officer will be lost or destroyed before being examined by the defendant or presented in the case." *Id.*

video is created.[119] An officer cannot alter film after recording it,[120] yet the officer still determines, at least to a notable degree, what ends up in a video and what gets left out. The officer does not control *every* image he captures with his camera, but still has more control than the subject of the film to make a record of incriminating evidence against that subject. The camera is not pointed on the officer, nor does it capture all of his relevant demeanor and body language. Similarly, officers will not point their cameras at unimportant, collateral scenes, people, or objects. In the course of a search, officers are likely to make a record—likely in good faith—of that which looked suspect to them, not that which looked innocent and benign.

As Washington courts have noted in evaluating the reasonableness of police making observations in the course of their work, an officer "is trained to observe to a higher degree than the average citizen."[121] The preparation that law enforcement agents undergo to effectively investigate crimes, including training to perceive what ordinary civilians might miss, situates police officers in a position to return from a search with video footage that strongly aligns with their suspicions of a given area or person.

An officer reviewing a film in preparation for trial will likely be able to uncover more factual support for the conclusion that an object or substance holds a set of characteristics that rendered it "immediately incriminating"—especially if further independent investigation or a suspect's confession confirms that the object was indeed related to criminal activity. Returning to the facts of *Garvin*, had the officers used cameras to record the encounter, the video could have easily captured an image defining the contours of the bulge in the defendant's pocket and corroborated the officer's suspicion that the pocket held a baggie containing contraband. The video could have also captured the way the defendant might have been trying to conceal the contents of his pocket with his hand movements, clothing, or stance.[122] Similarly, body-worn camera footage of the shotgun seized in *Cotton* could have augmented the State's argument that the weapon displayed an immediately incriminating character.

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119. *Considering Police Body Cameras*, *supra* note 13, at 1805–07.

120. To prevent deletion or editing of a video, Seattle has used a system of "hash tags" to encrypt a video so it cannot be altered after it is uploaded to the department's cloud storage system. *SPD Answers Your Questions*, *supra* note 38.

121. State v. Graffius, 871 P.2d 1115, 1119 (Wash. Ct. App. 1994).

122. It is important to note here that cameras can also surely provide a record that is exculpatory to suspects who are the subject of the film. The aim of this Note is to explore how police officer body-worn cameras might reify or make more convincing evidence in the record already obtained by law enforcement.

Revisiting a film allows the government to retroactively justify a prior determination that a seized object held an immediately incriminating character. This erodes the limits on the plain view doctrine. As the court explained more than forty years ago in *State v. Murray*, the first Washington case to chart the doctrine's boundaries, the plain view exception to the warrant requirement was not intended to give officers broad evidence-gathering privileges.[123] Rather, the plain view exception grew out of the common sense notion that law enforcement agents should not turn a blind eye to dangerous or significant evidence of criminal activity in front of them while they lawfully execute their duties.[124] The problem with footage from body-worn cameras is that the evidence returns to being, for all relevant purposes, "in front of" the officer again if he later examines it—it furnishes another opportunity for an object's incriminating nature to readily appear.

III. PICKING UP PRIVATE CONVERSATIONS: AUDIO RECORDINGS FROM BODY-WORN CAMERAS THAT VIOLATE WASHINGTON'S PRIVACY ACT

A. Officer–Civilian Conversations: Is a Fair Warning Required?

A second problem surrounding evidence-gathering capacities of police body-worn cameras arises upon examining Washington's Privacy Act.[125] The Washington Supreme Court resolved some questions about the legality of officers recording audio of their conversations with civilians in *Lewis v. State Department of Licensing*.[126] In *Lewis*, the court held that conversations between a civilian and a police officer executing his official duties at a traffic stop are not private.[127] However, the court in *Lewis* interpreted the Privacy Act to "tip[] the balance in favor of individual privacy at the expense of law enforcement's ability to gather evidence without a warrant."[128] The court specifically examined RCW 9.73.090(1)(c), the portion of the Privacy Act that governs sound recordings that correspond to video images recorded by cameras mounted on dashboards of law enforcement patrol vehicles, or "dash-cams." RCW 9.73.090(1)(c) provides in relevant part,

> [a] law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in

123. *See* State v. Murray, 527 P.2d 1303, 1307 (Wash. 1974).
124. *Id.*
125. *See* State v. Kipp, 317 P.3d 1029, 1032 (Wash. 2014).
126. *See generally* Lewis v. Washington, 139 P.3d 1078 (Wash. 2006).
127. *Id.* at 1083.
128. *Id.* at 1082.

> the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances. A law enforcement officer is not required to inform a person being recorded by video under this subsection (1)(c) that the person is being recorded by video.[129]

The court held the statute's plain language mandated the officers, who recorded audio of their conversations with the defendants from their dash-cams, to inform drivers that they were recording and make a record of the warning on the recording.[130] Because the officers failed to issue this warning, the court concluded that the trial court should have suppressed the evidence of the conversations at the traffic stop.[131]

Lewis suggests officers filming with body-worn cameras, like officers filming with dash-cams, should also be required to inform civilians they encounter that their camera's microphones are turned on—otherwise, the capture will be unlawful. Notably, the Seattle Police Department took no risks in its pilot program with twelve officers from the city's East Precinct; the department required the officers to give a verbal warning to anyone they filmed.[132] The Washington State Legislature, however, has yet to extend the requirements for dashboard cameras contained in RCW 9.73.090(1)(c) to police body-worn cameras.[133]

B. Conversations Between Civilians: Picking up Private Conversations

The Privacy Act's "all-party consent rule" is a distinctive privacy safeguard; only eleven states codify it in their laws.[134] Generally, the rule shelters private conversations from law enforcement's reach; it provides that unless *all* parties to a private conversation give consent, the state[135] may not record their conversation.[136] The Act first distinguishes between private and public conversations; it armors the former with full-bodied safeguards and confers none on the latter.[137]

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129. WASH REV. CODE § 9.73.090(1)(c) (2011).

130. *Lewis*, 139 P.3d at 1086 (holding that an officer recording a driver at a traffic stop does not require consent of the driver, but does require that the officer inform the driver he is recording).

131. *Id.*

132. *SPD Answers Your Questions*, *supra* note 38.

133. LEGAL ISSUES, *supra* note 33, at 3.

134. *Recording Phone Calls and Conversations*, DIGITAL MEDIA L. PROJECT (May 14, 2014), http://www.dmlp.org/legal-guide/recording-phone-calls-and-conversations [https://perma.cc/JKP2-BSUQ].

135. WASH. REV. CODE § 9.73.030(1)(b) (1986). Not only the state, but any "individual, partnership, corporation, association, or . . . political subdivision" is prohibited from recording a private conversation absent the consent of all parties to that conversation. *Id* at § 9.73.030(1).

136. *Id.*

137. Lewis v. Washington, 139 P.3d 1078, 1082 (Wash. 2006).

Because courts have not concluded an officer's conversation with a civilian is "public" under the Act,[138] an officer is not required to obtain the consent of a civilian before recording their exchange with a body-worn camera. In turn, the Act does not require a civilian to obtain consent of an officer prior to recording an oral exchange with that officer with a cellular phone or any other electronic device.[139] It is of no consequence who holds the camera or tape recorder, who presses record, and who halts the recording. In neither case is the recording of audio during a pure civilian-to-officer encounter unlawful so long as at least one party consents.[140]

Private conversations are different.[141] Washington courts prefer a plain definition of the word and employ a two-step test to determine whether a conversation is private: First, the participants in the conversation must manifest a subjective intent that the conversation be private.[142] Second, that expectation of privacy must be reasonable.[143] To make these two determinations, Washington courts consider several factors, including the "(1) duration and subject matter of the conversation, (2) location of conversation and presence or potential presence of a third party, and (3) role of the nonconsenting party and his or her relationship to the consenting party."[144] When a conversation is private, the Act prohibits recording it by any electronic device unless all parties to the conversation first give consent to be recorded.[145]

The all-party consent rule presents problems for officers recording with body-worn cameras in the field. A 2014 Washington Attorney General Opinion explained that while an officer recording audio with a body-worn camera as he talks to a person on the street does not trigger any requirement that the officer obtain that person's consent, "a court could conclude that some intercepted conversations in a person's home involving *parties other than police officers* might be private and not subject to lawful recording."[146]

Accordingly, if an officer lawfully enters a home where only one person is present—because, for example, he has a search warrant or valid consent for the entry—recording a conversation between the officer and that person without the individual's consent does *not* present a problem

138. *Id.* at 1084.
139. WASH. REV. CODE § 9.73.090(1) (1986).
140. 2014 Op. Wash Att'y Gen. No. 8 (Nov 21, 2014).
141. WASH. REV. CODE § 9.73.030 (1986).
142. *Lewis*, 139 P.3d at 1083.
143. State v. Kipp, 317 P.3d 1029, 1034 (Wash. 2014).
144. *Lewis*, 139 P.3d at 1083.
145. WASH. REV. CODE § 9.73.030(1)(b) (1986).
146. *Supra* note 140 (emphasis added).

because a pure officer-to-civilian conversation is public and not protected.[147] However, an officer who lawfully enters a home where more than one person is present and records a conversation between two or more people with his body-worn camera might violate the Act.

Problems involving parties "other than police officers" mushroom in cohousing units with multiple residents; apartment buildings with communal and frequented lobbies, hallways, and rooftops; and college dormitories with a number of shared rooms and common study spaces. It would be both burdensome and inefficient to require officers in the field to turn off their body-worn camera's microphones every time they encountered two or more people engaging in a conversation that appeared to be private.[148] Equally unreasonable would be for officers to always approach two or more individuals speaking to each other, ask them if they intended to keep their conversation private, and then request their consent to record the remainder of their conversation if they responded in the affirmative.

A near inevitability exists that officers will inadvertently record some private conversations with body-worn cameras. For this reason, some police departments—cognizant of the all-party consent rule—tread carefully. In Seattle, for example, the department's manual governing the city's body-worn camera program provides:

> For residences or other private areas not open to the public, officers will ask for consent to record with B[ody] W[orn] V[ideo]. The request and any response will be recorded. If the request is denied, officers will stop recording with BWV during the time that they are in the private area.[149]

The question remains though, does the consent of one person answering the door function as a valid authorization for an officer to record the communications of others inside? Some police department policies[150] and draft policies[151] on body-worn cameras require officers to inform civilians they are being recorded, but do not contain express

147. *Lewis*, 139 P.3d at 1084.

148. WASH. REV. CODE § 9.73.030(1)(b) (1986). The statute requires that the party recording "first obtaining the consent of *all* the persons engaged in the conversation." *Id.* (emphasis added).

149. SEATTLE POLICE DEP'T, *supra* note 115, at ¶ 5; *see also SPD Answers Your Questions*, *supra* note 38 (explaining that this provision of the policy was intended to comply with the state's all-party consent rule).

150. *E.g.*, AIRWAY HEIGHTS POLICE DEP'T, POLICIES AND PROCEDURES, Ch. 51, at 2 (Feb. 2009), https://static.spokanecity.org/documents/police/accountability/bodycamera/airway-heights-body-camera-policy.pdf [https://perma.cc/4RFG-K3CY].

151. *E.g.*, SPOKANE POLICE DEP'T, DRAFT POLICY 703: BODY CAMERAS 1 (Nov. 2014), https://static.spokanecity.org/documents/police/accountability/bodycamera/body-camera-policy-revised-draft-11-01-14.pdf [https://perma.cc/HMC8-KEHT].

language regarding consent. Situations in which a private area holds many occupants will present challenges for officers to adequately obtain valid consent from every speaker.

Recent court decisions hint that police body-worn cameras' recordings of private civilian-to-civilian conversations will be suppressed in criminal proceedings, but provide no definitive answer. In *State v. Kipp*, for example, the court held the *secret* recording of a conversation between a defendant and his brother-in-law violated the Privacy Act.[152] Reversing the trial court, the Washington Supreme Court held that the conversation, which centered on the accusation that Kipp had molested two of his nieces, was private under the Act because (1) the defendant, speaking to his brother-in-law in an upstairs kitchen, a room occupied by only one other person who was exiting, manifested his intent to keep his conversation confidential, and (2) this expectation of privacy was reasonable given the conversation occurred in a home, lasted over ten minutes, and broached grave topics.[153]

The court concluded that because the brother-in-law recorded the conversation in violation of the Privacy Act,[154] the trial court should have suppressed the audio recording of the conversation at the subsequent criminal proceeding.[155] *Kipp* provides a foundation for an argument that audio recordings made of private conversations through a police officer's body-worn camera are equally tainted evidence and should also be suppressed. If the subjects of the recording, like the defendant in *Kipp*, freely speak to one another, unaware that a body-worn camera is recording their voices, it is unlikely that the recording of this conversation could be used against them in court, particularly if they are speaking in a context where the circumstances point to a reasonable expectation of privacy. They might, for example, be conversing behind a closed bedroom door or out of sight, but not earshot, of an officer filming elsewhere in the home.

Questions about how to apply *Kipp*, however, still linger. What if two or more people *know* their private conversation might have been recorded—because, for example, they see an officer wearing a camera—but do not realize they ever had a right to withhold consent to an audio recording of their voices? Should courts also suppress these conversations?[156]

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152. State v. Kipp, 317 P.3d 1029, 1034 (Wash. 2014).

153. *Id.*

154. The brother-in-law turned the recording over to law enforcement to be used in investigation and for protection. *Id.* at 1031.

155. *Id.* at 1037.

156. In the context of the home, Washington case law suggests the answer may be yes. *See* State v. Ferrier, 960 P.2d 927, 934 (Wash. 1998) (holding that, in the context of the home, the

Furthermore, an officer might unintentionally record a private conversation. Both the officer and the civilian parties might be unaware that the conversation has been captured until after the officer is dispatched to another call, returns to the station, or ends a shift. Washington courts note that overhearing incriminating conversations or other auditory evidence of a crime in a place where the officer has a legal right to be does not require the officer to plug his ears.[157] In these situations, the inadvertent recording of the communication—either because the officer did not realize the conversation was private or realize his camera was recording—might also be suppressed. Assuming the officer acted in good faith and did not, like the law enforcement agents in *Kipp*, attempt to *secretly* harvest confidential information, however, the State might have a strong argument that the conversations should be admitted in a criminal proceeding.

Still, concerns regarding random and widespread "oversurveilling"[158] remain. Notably, the Privacy Act does not require that a recording be made knowingly for it to violate the all-party consent rule.[159] Good faith might not be enough.

IV. THE COURT AS REFEREE OF EVIDENCE AND PROTECTOR OF THE JURY'S FUNCTION

Trial courts and juries will be the first to the wrestle with evidence from body-worn cameras in criminal trials. Accordingly, Washington trial court judges should assume the responsibility of gatekeepers and exclude evidence derived from body-worn cameras when it arises in a context that unreasonably stretches the boundaries of the plain view doctrine or when it defies the Privacy Act's all-party consent rule.

A. Perspective Matters: The Jury's Role as Fact Finder in the Wake of Body-Worn Camera Footage

In considering the potential for body-worn cameras to generate a large body of evidence, it is important to recognize that the cameras benefit not only the government—using this evidence to investigate and prosecute crimes—but to criminal defendants as well. Videos create a

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waiver of a defendant's rights must be the product of an informed decision). Because *Ferrier* addressed a constitutional right—to require production of a warrant—courts may not extend *Ferrier*'s rule to a violation of a statutory right under the Privacy Act.

157. State v. Ruem, 313 P.3d 1156, 1168 (Wash. 2013) (Johnson, J., concurring in part, dissenting in part) (using the illustrative hypothetical of an officer unexpectedly hearing the crying of a kidnapped infant).

158. La Corte, *supra* note 30.

159. WASH. REV. CODE § 9.73.030(1)(b) (1986).

clear record of events for juries.[160] They deliver more verifiable evidence than eyewitness testimony, which is often presented months after an arrest.[161]

Video evidence has the potential to both exonerate defendants who are factually innocent and incriminate guilty actors who otherwise would go free. These benefits should not be ignored. The ironic problem that arises from videos capturing arrests, or events leading up to arrests, however, is that they might be too trustworthy. The "third witness" that Airway Heights Police Chief Lee Bennett describes could win an inordinate amount of favor with juries.[162] A video in the courtroom—whether it be body-worn camera footage, a civilian's cell phone video of a street corner arrest, surveillance footage, or an officer's in-car video recording of a traffic stop—holds sway with jurors.[163]

Seth W. Stoughton, a former police officer and a professor at the University of South Carolina School of Law, produced a series of videos that highlight how the position and angle of a camera informs the way people interpret video of police–civilian interactions.[164] One video, filmed from an officer's camera mounted on his chest, depicts a foot pursuit ending with both the civilian and the officer on the ground. The picture is jerky, the frame bounces frantically, and the images cut left and right.[165] The officer yells, "He is reaching for my gun!"[166] A second video shows the same foot pursuit, this time without the officer's shouting; it is filmed by a bystander with a cellular phone, standing a few yards away.[167] In the first video, 85% of viewers concluded the civilian never reached for the officer's gun.[168] In the second video, however 10% more viewers reported they did not see the suspect reach for the officer's gun.[169]

Another video shows an officer's body-worn camera capture an interaction with a civilian at close range—again, the video bounces rapidly and the viewer only catches shaky glimpses of the civilian's

160. *See* MILLER, *supra* note 18, at 9.

161. Not forgotten are the original reasons cities wanted body-worn cameras on officers in the first place: to contribute to a body of documentation to either prove or disprove claims of police misconduct. Courts often rely on videos from vehicle-mounted cameras of police encounters with civilians in evaluating excessive force claims. *See supra* INTRODUCTION.

162. *See* Loney, *supra* note 3.

163. *See Considering Police Body Cameras*, *supra* note 13, at 1812–14.

164. Timothy Williams, James Thomas, Samuel Jacoby & Damien Cave, *Police Body Cameras: What Do You See?*, N.Y. TIMES (Apr. 1, 2016), http://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html?_r=0.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

arms, torso, and face.[170] No weapon is visible. In this video, 32% of 80,000 viewers thought the officer faced a "very threatening" situation.[171] A following video, filmed from a distance, reveals the officer and the civilian were dancing to fast-paced music, not fighting.[172] Jurors are tasked with assessing the weight and credibility of all evidence presented in court, including videos. Different videos of the same event, however, like the ones Stoughton produced can provide variable narratives. Given the ability of a video and its audio to inform ideas about an encounter between a police officer and a suspect, courts should scrutinize evidence arising from body-worn video with special care in pretrial proceedings.

The Washington legislature will likely ultimately craft the rules surrounding permissible investigative use and the admissibility of film and audio from body-worn cameras. Washington recently passed a bill aimed at protecting privacy and preventing "voyeurism or exploitation" of footage from body-worn cameras by limiting disclosure of footage under the Public Records Act.[173] This bill does not, however, reconcile the problems that arise considering body-worn camera evidence in light of the plain view doctrine and the Privacy Act.[174] Legislative action takes time.[175] In the interim, judges ought to safeguard the jury's fact-finding province. Trial court judges hold great discretion to admit or suppress evidence,[176] and appellate courts hesitate to overturn their decisions when they act within this discretion.[177] Trial courts are, therefore, particularly well-positioned to preserve a jurisprudence that distinguishes Washington as protector of its residents' privacy[178] in the face of massive amounts of new evidence from police body-worn cameras.

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170. *Id.*

171. *Id.* The largest number of viewers (45%) reported they were "somewhat confident" in their answers. *Id.* Notably, most of the viewers who did not perceive a "very threating" situation still thought the encounter posed at least some threat to the officer in the video; they responded that the situation was either "somewhat," or "a little" threatening. *Id.* Only 7% of viewers responded that the situation was "not threatening." *Id.*

172. *Id.*

173. H.B. 2362, 64th Leg., Reg. Sess. (Wash. 2016).

174. *See id.*

175. At least three bills before House Bill 2362 died in the Washington State legislature. *See* Derrick Nunnally, *Police Body-Camera Bill Stirs Debate Over Privacy, Power*, SEATTLE TIMES (Feb. 25, 2015, 7:23 PM), http://www.seattletimes.com/seattle-news/politics/police-body-camera-bill-stirs-debate-over-privacy-power/ [https://perma.cc/LP86-WFRK]. Although House Bill 2362 provides a comprehensive framework for departments to craft policies regarding the retention and release of videos, it does not address any specific rules for reconciling audio from body-worn cameras with the Privacy Act's all-party consent rule. *See* H.B. 2362.

176. State v. Brown, 940 P.2d 546, 569 (Wash. 1997).

177. *Id.*

178. State v. Kipp, 317 P.3d 1029, 1032 (Wash. 2014) (noting that the Privacy Act's all-party consent rule, for example, provides more protection than either the federal or the state constitution).

B. Judges as Umpires: Excluding Evidence that Exceeds the Bounds of the Plain View Doctrine and the Privacy Act

Courts can resolve, or at least mitigate, the first problem with body-worn cameras and the plain view doctrine—the potential for officers to record evidence in a location in which they (intentionally or not) unlawfully intrude—by continuing to apply the plain view doctrine as they have for roughly the past forty years.[179] Courts should suppress footage obtained in plain view when the officer was unlawfully present in the location where the officer seized it. This means that in a case like *Ruem*, had there been a video depicting marijuana plants in the defendant's home, the video should have been excluded. Because Ruem revoked his consent to officers being on his property, their presence became unlawful before they viewed the plants.[180] Accordingly, any video from a body-worn camera depicting the plants would have also been filmed in an unlawful context.

Second, courts should not permit a video to substitute for an officer's personal account that she knew the evidence seized in plain view held an incriminating nature at the time she seized it. If a court admits video evidence depicting a plain view seizure made in the course of a lawful search, the video should be accompanied by testimony from the police officer whose body-worn camera recorded it or from another officer qualified to authenticate the video.[181] Film and audio that meets other evidentiary requirements for admissibility[182] should still be admitted under the plain view doctrine. In this case, the defendant should be able to cross-examine the officer regarding the content of the video and the officer's recollection of whether the evidence held immediately incriminating characteristics at the time of the seizure.

Furthermore, rules from *Lewis* and *Kipp* should extend to audio recordings that officers make with body-worn cameras. The protections that apply to dashboard cameras, which require an officer to inform a motorist that she is being recorded, should also apply to body-worn

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179. *See generally* State v. Murray, 527 P.2d 1303, 1307 (Wash. 1974) (recognizing the plain view doctrine for the first time in the Washington Supreme Court).

180. State v. Ruem, 313 P.3d 1156, 1164 (Wash. 2013).

181. LEGAL ISSUES, *supra* note 33, at 8. If footage is admitted at trial, the government should also demonstrate that the chain of custody from the original video to the video presented at trial has remained uncompromised. The state, or the defendant (if the proponent of the video), should offer foundation testimony from technicians to describe the functionality of a given camera and the processes through which the film is uploaded, stored, and retrieved. *Id.*

182. Footage will also be subject to ordinary state rules of evidence and constitutional provisions—which means it may be suppressed on other grounds. For example, audio footage may contain testimonial hearsay that courts should exclude if the defendant lacks an opportunity to confront the speaker in the video through cross-examination. *See* Davis v. Washington, 547 U.S. 813, 822 (2006).

cameras. More troublesome are audio recordings of the defendant's private conversations, like the conversation in *Kipp*, which officers illegally obtained in violation of the all-party consent rule. These private conversations could be stand-alone evidence[183] or they might lead officers to evidence of further criminal activity.[184] Private conversations captured on a body-worn camera's audio recording should not be harvested for use in prosecution. Courts should suppress recordings of private conversations.

Finally, courts should not condone law enforcement using evidence recorded on a body-worn camera to further their investigations when it defies the limits of the plain view doctrine or contravenes the Privacy Act's protections. This requires judges to deny requests for search warrants when probable cause rests only on (1) an unlawfully recorded private conversation, (2) visual recordings made in a location where an officer lacked a prior justification for being, (3) or a recording that captures evidence an officer did not immediately recognize as incriminating. This does not mean that if an officer has inadvertently recorded evidence illegally, that law enforcement cannot obtain probable cause through independent sources of evidence.[185] It only means courts should not permit law enforcement to base warrant applications on film or audio evidence created in impermissible contexts.

The aim here is not necessarily to reduce the number of videos that juries view. Nor is it to eliminate body-worn camera videos as materials an officer may review so that they can offer the most accurate testimony possible at trial. Neither is it meant to entirely thwart the potential for body-worn cameras' recordings to be useful tools in investigation. Rather, the goal of these recommendations centers on protecting against footage and audio that blurs the common sense boundaries of the plain view doctrine and chips away at the buffer of privacy the legislature constructed with the Privacy Act's all-party consent rule.

CONCLUSION

Whether law enforcement's body-worn camera programs mark a novel reshaping of policing practices in the United States or merely

183. As in *Kipp*, it could be an admission of a defendant's criminal activities. State v. Kipp, 317 P.3d 1029, 1031 (Wash. 2014).

184. A private conversation of this nature could, for example, contain statements regarding the location of the fruits of a crime or name other witnesses or victims.

185. State v. Gaines, 116 P.3d 993, 996 (Wash. 2005) (recognizing the "independent source doctrine" in Washington, which provides "evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action").

signal a revamping of community policing with the help of new technology, they will certainly have an impact on the evidence-gathering abilities of officers. They have and will continue to act as independent, but perhaps not entirely unbiased, "third witnesses." In turn, they have the potential to collide with some of Washington's existing privacy protections.

This Note has catalogued the difficulty in situating evidence obtained through the use of police body cameras in the framework of Washington State's plain view doctrine and the Privacy Act's all-party consent rule. First, under the plain view doctrine, questions will likely arise regarding whether footage was obtained while an officer enjoyed a prior justification for an intrusion of privacy or whether the intrusion lacked the authority of law. Courts will also likely encounter challenging questions of whether evidence catalogued on videotape had a nature so incriminating that it was "immediately apparent" at the time it was seized or whether it merely held a suspicious character that was later rationalized as incriminating. Second, officers with body-worn cameras—intentionally or unwittingly—may record a private conversation under the Privacy Act without the consent of all participants. This Note argues that in certain situations, this audio and video evidence should be excluded.

The legislature may craft admissibility rules and a more comprehensive framework in which to place footage from body-worn cameras, but uncertainty remains. This Note urges trial courts to act as gatekeepers in the interim. Courts should strictly apply the requirements of the plain view doctrine and the Privacy Act. In doing so, trial courts should reconcile the quickly emerging technological advances growing increasingly common in our society with the underlying robust principals of privacy that have distinguished Washington in its restriction of new technology-based law enforcement tools. While the law often lags behind technological advances, we should not dismiss our criminal justice system as incapable of fairly situating new evidence-gathering tools within its existing privacy framework.