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Fourth Amendment Implications of Police-Worn Body Cameras

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COMMENT

FOURTH AMENDMENT IMPLICATIONS OF POLICE-WORN BODY CAMERAS

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I. INTRODUCTION

What would it mean for society if every individual's actions were recorded from his or her point of view? Would this create clarity, or more confusion and worry? There is no easy answer to these questions. However, in terms of the accountability of law enforcement officers

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around the United States, it seems there is a popular solution to the growing concerns of police misconduct around the country.[1] The solution, championed by a wide variety of individuals, is to record the actions of law enforcement officials in the course of their duties.[2] To do this effectively likely requires the increased use of police-worn body cameras.[3] There are many active supporters of the use of body cameras in policing; this comes as no surprise in light of recent events around the nation.[4]

The recent events that spurred this call for reform in the use of body cameras are many and varied, but two have received a great amount of national attention: the police shooting of Michael Brown,[5] and the death of Eric Garner while in police custody.[6] The shooting of Michael Brown

1. *See Developments in the Law–Policing*, 128 HARV. L. REV. 1794, 1795–96 (2015) [hereinafter *Developments in the Law–Policing*] (commenting on the desire for objective evidence in police-civilian interactions following recent incidents of the use of police force as a way to increase the accountability of law enforcement and deter misconduct); Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 836 (2015) (addressing the moral panic which occurred following the shooting of Michael Brown in Ferguson, Missouri which led to far reaching support for the use of police-worn body cameras to prevent similar future incidents from occurring and discussing whether or not the cameras would provide the solution their proponents seek).

2. *See Developments in the Law–Policing*, *supra* note 1, at 1796 ("The American Civil Liberties Union (ACLU) also repeatedly voiced its support for widespread adoption of . . . new technology, heralding body cameras as 'a win-win' as long as civilian privacy remained properly protected."); Christopher Slobogin, *Community Control over Camera Surveillance: A Response to Bennett Caper's Crime, Surveillance, and Communities*, 40 FORDHAM URB. L.J. 993, 997 (2013) (proposing police-worn body cameras as a more reasonable solution than the use of wide-spread surveillance to "make sure that we know what the police are up to"); Wasserman, *supra* note 1, at 832 (providing a counter perspective to body cameras as a solution to the moral panic created by the shooting).

3. *See* Martina Kitzmueller, *Are You Recording This?: Enforcement of Police Videotaping*, 47 CONN. L. REV. 167, 178 (2014) ("[I]t is a safe assumption that a police department that makes its officers record all encounters and that uses videos to hold officers accountable would likely not have incited the same public rage as the Ferguson Police Department did in the wake of Michael Brown's shooting.").

4. *See Developments in the Law–Policing*, *supra* note 1, at 1794–95 (2015) (using the shooting of Michael Brown by a police officer, the death of Eric Garner while in police custody, and the public's response to those incidents as background information for discussion of the use of police-worn body cameras by specifically addressing the view point of the ACLU and the actions taken by the White House).

5. *See* Jack Healy, *Ferguson, Still Tense, Grows Calmer*, N.Y. TIMES (Nov. 26, 2014), http://www.nytimes.com/2014/11/27/us/michael-brown-darren-wilson-ferguson-protests.html (discussing the climate in Ferguson, Missouri following the grand jury decision not to prosecute the officer who shot and killed Michael Brown and providing information on the protests that followed along with the response of law enforcement).

6. *See* Radley Balko, *Some Thoughts on Eric Garner*, WASH. POST, (Dec. 4, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/12/04/some-thoughts-on-eric-garner (reporting on the decision of the grand jury not to charge the officer who put Eric Garner in a choke hold with Garner's death which occurred as the result of a subsequent heart attack while he was in

occurred on August 9th, 2014, and sparked outrage for several reasons.[7] Brown was young and unarmed at the time of the shooting, and many members of his community and commenters on the incident saw race as the primary factor in the shooting.[8] Understandably, there were different beliefs as to what happened leading up to the incident. The officer who shot Brown, and the grand jury that decided not to indict him for Brown's death, believed the shooting of Brown was justified.[9] On the other hand, others believed Brown did not act in a way that necessitated the use of deadly force.[10] Supporters of body camera use see this uncertainty, created by the differing accounts of the incident, as a problem which would be solved by wide-spread body camera use.[11]

Unlike the shooting of Michael Brown, the death of Eric Garner was captured on tape.[12] The video was not recorded from a police-worn body camera but by another citizen not involved in the arrest.[13] During Garner's arrest he was placed in a chokehold.[14] It was later found that this chokehold contributed to his death due to Garner's weight, asthma,

police custody and opining on the circumstances surrounding Garner's death).

7. *See* Mac Ehrenfreund, *What We Know About What Happened in Ferguson*, WASH. POST, (Nov. 25, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/11/25/get-completely-caught-up-on-whats-happened-in-ferguson (detailing the circumstances of the shooting of Michael Brown along with the grand jury decision and the aftermath in Ferguson, Missouri).

8. *See* Wesley Lowery, Carol D. Leonnig & Mark Berman, *Even Before Michael Brown's Slaying in Ferguson, Racial Questions Hung over Police*, WASH. POST (Aug. 13, 2014), https://www.washingtonpost.com/politics/even-before-teen-michael-browns-slaying-in-mo-racial-questions-have-hung-over-police/2014/08/13/78b3c5c6-2307-11e4-86ca-6f03cbd15c1a_story.html (reporting that racial tensions in Ferguson, Missouri may have played a part in the shooting of Michael Brown, and stating that tensions, already present for years, have grown drastically following the shooting).

9. *See* Ehrenfreund, *supra* note 7 (reporting on the results of the grand jury investigation and providing that the officer who shot Michael Brown claimed he was in danger because Brown attempted to grab his weapon).

10. *See id.* (describing the views of witnesses that gave contradicting statements—that the officer was the aggressor instead of Michael Brown and that Brown did not put the officer's life in danger by reaching for his weapon—on the incident alleged).

11. *See Developments in the Law–Policing, supra* note 1, at 1800 (casting doubt on the assertion that one of the reasons for the growing support of body cameras is their ability to capture truly objective evidence as a way to know what happened without bias affecting the evidence).

12. Balko, *supra* note 6 (pointing to the reaction to the footage of Eric Garner's arrest as evidence that the use of body cameras can be a vehicle to enact change).

13. *See* Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (Jun. 15, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html ("As [the officers] moved in, a cellphone camera held by a friend of Mr. Garner recorded the struggle that would soon be seen by millions.").

14. *Id. See* James Queally & Alana Semuels, *Eric Garner's Death in NYPD Chokehold Case Ruled a Homicide*, L.A. TIMES (Aug. 1, 2014), http://www.latimes.com/nation/nationnow/la-na-nn-garner-homicide-20140801-story.html (detailing the decision to rule Eric Garner's death a homicide).

and heart disease.[15] The video produced controversy over the methods the police used to arrest Garner. Many saw the use of a chokehold to be unnecessarily violent[16] or an abuse of force, while others saw the force used as reasonably necessary to enact the arrest.[17]

These incidents all demonstrate one thing: when high profile instances of police force are caught on tape, there a debate can be expected over whether their use of force was justified.[18] The argument for the use of body cameras is simple. In theory, the debate surrounding whether or not an officer's use of force is justified would be answered definitively by reference to the footage obtained during the incident by the body camera attached to the officer at the time.[19] The footage would provide objective evidence of the incident,[20] and importantly, would allow an individual—or group of individuals—to view the incident from the perspective of the officer who used the force.[21] This would allow them to step into the

15. *See id.* (listing several of health factors that may have caused the police chokehold to result in death).

16. *See* Balko, *supra* note 6 (proposing the video of Eric Garner's arrest showed a level of force used that many people would consider to be excessive). It has been posited that seemingly innocuous laws, such as selling untaxed cigarettes, are enforced with violence or the threat of violence, and that how a law is enforced should be established as well as the law itself to prevent similar uses of excessive force. *Id.*

17. *See* Evan Horowitz, *An Interpretation of the Grand Jury's Decision on Eric Garner's Death*, BOS. GLOBE (Dec. 4, 2014), https://www.bostonglobe.com/metro/2014/12/04/understanding-eric-garner-death-and-grand-jury-decision/s9uQPMvcKPD2mAmFy2ln9J/story.html (reporting the grand jury's decision not to indict the officers involved in the Eric Garner's arrest).

18. *See* Wasserman, *supra* note 1, at 832 (detailing the position of body camera supporters' argument that body camera use in the shooting of Michael Brown would have provided evidence on what really happened—either a justified use of force or an overreaction to an objectively peaceful situation).

19. *See Developments in the Law–Policing*, *supra* note 1, at 1800 ("Proponents of body cameras often herald these cameras' unique ability to provide an 'unambiguous' account of police-civilian encounters.").

20. *See id.* at 1803 (suggesting the use of body camera footage can be effective evidence for trials because cameras provide beneficial and objective evidence); Travis S. Triano, Note, *Who Watches the Watchmen? Big Brother's Use of Wiretap Statutes to Place Civilians in Timeout*, 34 CARDOZO L. REV. 389, 406 (2012) (viewing civilian recorded video of police encounters with civilians as objective and trustworthy evidence that is beneficial in establishing facts in a clearer manner than relying on witnesses and their credibility and advocating for the legality of such recordings). *But see Developments in the Law–Policing*, note 1, at 1812–13 (proposing overreliance on video footage as completely objective evidence may not be wise, as other possibilities may be excluded and the complete picture of the situation is not examined when only the narrow point of view of the camera is analyzed); Wasserman, *supra* note 1, at 840 (presenting an alternative view to the objectivity of video footage by acknowledging the way a video is shot may affect what is seen on video which is not always the same between people with different "cultur[es], deomographic[s], [and other] social, political, and ideological characteristics").

21. *See* David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH. L. REV. 357, 360–61 (2010) (providing a

shoes of the officer to determine if the officer's use of force was reasonable based on the circumstances the officer faced in that moment.[22] However, there are potential negative effects stemming from the use of body cameras.[23] A potential negative impact of the increased use of body cameras, as argued by their opponents, is the potential for the cameras to tie the hands of the officers wearing them, limiting their discretion and judgment in dangerous situations, and ultimately putting the public at risk of ineffective policing.[24]

Both sides of this divided issue miss something important. The focus of both points of view is entirely on the effect body camera use will have on police encounters with citizens. Specifically, the arguments are either based on the potential reduction of police misconduct and increased accountability to prevent the public from being harmed[25] or alternatively, the negative impact such cameras may have on the efforts of police to act

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comparison between the use of police-worn body cameras and the now wide-spread use of dash cams in police vehicles, and explaining different ways the body-worn cameras can be attached to a law enforcement officer).

22. *See id.* at 362 (explaining an experiment that compared a law enforcement officer with a body camera and an officer without a body camera done and stating that the experiment clearly showed what the officer wearing the body camera saw and heard "as she received a radio call and began to pursue a person reportedly carrying a gun into an apartment complex").

23. *See id.* at 367 (listing several potentially unexpected consequences from using body cameras in law enforcement including fewer people approaching officers and individuals interpreting footage in different ways).

24. *See* Bryce Clayton Newell, *Crossing Lenses: Policing's New Visibility and the Role of "Smartphone Journalism" as a Form of Freedom-Preserving Reciprocal Surveillance*, 2014 U. ILL. J.L. TECH. & POL'Y 59, 84 (2014) (suggesting the use of body cameras may serve to "exacerbate the compromised position of the patrol officer," who is constantly battling "dual pressure[s]" of both the need to be right and the need to take action).

25. *See Developments in the Law–Policing*, *supra* note 1, at 1803 (explaining part of the purpose of body cameras is to provide increased accountability and transparency thereby allowing citizens to feel more secure in the actions taken by police officers); Matthew R. Segal & Carol Rose, *Race, Technology, and Policing*, 59 BOS. BAR J. 27, 29 (2015) (supporting a "system of police-worn body cameras, with appropriate privacy protections [to] protect both law enforcement and the public"); Waleska Suero, Note, *Lessons from Floyd v. City of New York: Designing Race-Based Remedies for Equal Protection Violations in Stop & Frisk Cases*, 7 GEO. J. L. & MOD. CRITICAL RACE PERSP. 139, 143 (2015) ("The use of body cameras is an important race-based remedy for monitoring the allegations of racial discrimination that increasingly appear in complaints in stop and frisk cases."); Balko, *supra* note 6 (arguing the video footage obtained during the arrest preceding Eric Garner's death accomplished the goal of body cameras—increasing transparency of police action to identify problems in policing techniques that lead to police misconduct); *see also* Kami Chavis Simmons, *Body-Mounted Police Cameras: A Primer on Police Accountability v. Privacy*, 58 HOWARD L. J. 881, 887 (2015) (asserting another benefit to using police-worn body cameras—the "transparency also extend[s] to the internal structures within the police department . . . . [e]ven if officers display behavior that are not actionable or subject to disciplinary proceedings").

effectively in protecting the public.[26] The arguments often fail to acknowledge a different concern: What effect will the increased use of recording devices in policing have on the rights of individuals who are not the subject of police misconduct investigations? In an era of ever-advancing technology, the increased use of widespread video recording, although intended to prevent misconduct of police officers, creates concerns over the Fourth Amendment rights of individuals to be free from unreasonable searches.[27]

II. BACKGROUND

A. *The Fourth Amendment in General*

The Fourth Amendment[28] to the U.S. Constitution provides protection from unreasonable searches and seizures for citizens of the United States.[29] The amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[30]

This amendment has been shaped by the judiciary to evolve with the needs of an ever-changing society; as a result, it has been applied to a wide variety of circumstances.[31] Regardless of the circumstances, the Fourth

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26. *See* Newell, *supra* note 24, at 84 (suggesting the use of body cameras may serve to compromise the position of police officers "who [are] often under the 'dual preassure[s] to "be right" and to "do something,'" even in stressful or dangerous situations" by disrupting the nature of those situations).

27. *See id.* (suggesting increased measures to assure the public that information gathered from body cameras is not used arbitrarily or used to interfere with the lives of citizens "[i]n a modern society where surveillance has become a stable and accepted element of everyday life").

28. U.S. CONST. amend. IV.

29. *Id.*; *see also* Illinois v. Caballes, 543 U.S. 405, 408 (2005) (implying a search that compromises a legitimate privacy interest is subject to Fourth Amendment protections); Kyllo v. United States, 533 U.S. 27, 31 (2001) (recognizing, in most cases, a warrantless search of a citizens home will not be considered reasonable, and would be unconstitutional); Horton v. California, 496 U.S. 128, (1990) (addressing the perceived differences between a "search" and a "seizure" and the interests they protect (citing United States v. Jacobsen, 466 U.S. 109, 113 (1984))).

30. U.S. CONST. amend. IV.

31. *See* United States v. Jones, 132 S. Ct. 945, 949 (2012) (holding the use of a Global Positioning System (GPS) device to track the movement of a motor vehicle was a "search" within the meaning of the Fourth Amendment); *Kyllo*, 533 U.S. at 27 (stating government agents used a thermal imaging device to determine if an individual was growing marijuana inside his home and concluding the use of the thermal imaging device constituted a "search" under the Fourth Amendment); Bond v.

Amendment still stands to protect an individual from searches in instances where the individual maintains a "reasonable expectation of privacy."[32] However, as surveillance technology continues to progress, and is used more expansively in law enforcement, concerns arise over how new surveillance methods may affect these same individuals.[33]

United States, 529 U.S. 334, 338–39 (2000) (examining a situation in which a piece of luggage was handled in a manner intended to shift its contents and provide the person handling it an idea of what was inside and concluding such action violated a reasonable expectation of privacy because the individual may expect other bus passengers or employees to handle the luggage, but does not expect them to manipulate it with the purpose of discovering what it contains); New York v. Class, 475 U.S. 106, 114–15 (1985) (declaring that a police officer's discovery of a hand gun while reaching into an individual's motor vehicle in order to move papers obscuring the vehicle identification number (VIN) during a traffic stop was a search, but the search was not a violation of the Fourth Amendment); United States v. Karo, 468 U.S. 705, 711 (1984) (discussing the Fourth Amendment implications of the Drug Enforcement Administration's (DEA) placement of a beeper in a can of ether that was later acquired by the respondents); Katz v. United States, 389 U.S. 347, 353 (1967) (holding an electronic listening device, placed on the outside of a phone booth, was an unreasonable search in the absence of a warrant acquired through the judicial process); United States v. Taketa, 923 F.2d 665, 671 (9th Cir. 1991) (analyzing whether there can be a reasonable expectation of privacy, and, as a result, Fourth Amendment protection, in the use of a third party's office and application of a "conspirator exception"); United States v. Wymer, 40 F. Supp. 3d 933, 938 (N.D. Ohio 2014) (addressing the warrantless installation of a camera adjacent to a business for purposes of surveillance in relation to the reasonable expectation of privacy standard); United States v. Brooks, 911 F. Supp. 2d 836, 843 (D. Ariz. 2012) (evaluating the use of a pole camera in an apartment complex's parking lot to surveil an individual who resides in an adjacent apartment building).

32. *See Jones*, 132 S. Ct. at 951–52 (clarifying that the reasonable expectation of privacy test is an addition to—not a replacement for—"the common-law trespassory test."); *Karo*, 468 U.S. at 712 ("A 'search' occurs 'when an expectation of privacy that society is prepared to consider reasonable is infringed.'" (quoting *Jacobsen*, 466 U.S. at 113 (1984))); *Taketa*, 923 F.2d at 670–71 ("A valid [F]ourth [A]mendment claim requires a subjective expectation of privacy that is objectively reasonable."); *Wymer*, 40 F. Supp. 3d at 938 (explaining a search can occur in two ways: (1) a physical trespass done to gather information or (2) violation of an individual's reasonable expectation of privacy).

33. *See Kyllo*, 533 U.S. at 33–34 (stating "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology" in the Court's application of a reasonable expectation of privacy standard to law enforcement's use of a thermal imaging device); Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1374–75 (2004) (asserting technology used for surveillance has changed significantly from the creation of the reasonable expectation of privacy standard to a point where it has become far less costly, and yet has become endlessly more efficient in regard to the information able to be obtained); Jeremy Brown, *Pan, Tilt, Zoom: Regulating the Use of Video Surveillance of Public Places*, 23 BERKELEY TECH. L.J. 755, 757–58 (2008) (discussing the various ways in which camera technology is advancing and the need for increased regulation to match growing privacy concerns, including the linking of vast integrated camera networks, increasingly detailed images with high resolutions, inferred and motion capture imaging, the increasingly automated nature of these systems, drones, and others); Bennet Capers, *Crime, Surveillance, and Communities*, 40 FORDHAM URB. L.J. 959, 963 (2013) (acknowledging the increased presence and ability of surveillance cameras in major cities, and indicating those cameras are able to capture much more than in the past due to advances in

Regardless of the technology used, a reasonable expectation of privacy is still applied as the relevant standard in cases where no physical trespass is involved.[34] The Supreme Court articulated this standard in *Katz v. United States*.[35] Prior to the reasonable expectation of privacy, courts engaged in an analysis that required a physical trespass to property, as a prerequisite to falling under the protection of the Constitution.[36] *Katz* changed this in 1967. In *Katz*, the Court examined the FBI's use of an

technology and use of surveillance); Sean K. Driscoll, *"The Lady of the House" vs. a Man with a Gun: Applying* Kyllo *to Gun-Scanning Technology*, 62 CATH. U. L. REV. 601, 637 (2013) (analyzing the potential Fourth Amendment issues present with use of gun-scanning technology); Hillary B. Farber, *Eyes in the Sky: Constitutional and Regulatory Approaches to Domestic Drone Deployment*, 64 SYRACUSE L. REV. 1, 5–6 (2014) (addressing potential Fourth Amendment concerns in the context of increasing unmanned aerial drones and alluding to the fact that the law is often slow to keep up with changes in technology); Newell, *supra* note 24, at 60–61 (recognizing the increased use of more sophisticated forms of video surveillance by law enforcement as well as the increased use of smart phones and other recording devices by the general public). *But see* Ric Simmons, *Why 2007 Is Not like 1984: A Broader Perspective on Technology's Effect on Privacy and Fourth Amendment Jurisprudence*, 97 J. CRIM. L. & CRIMINOLOGY 531, 534–35 (2007) (suggesting technology advancements provides citizens with further methods of protecting their privacy in addition to allowing more advanced methods of gathering information for government agents).

34. *See Jones*, 132 S. Ct. at 953 (announcing when there is no trespass, and there is only the "transmission of electronic signals" the proper analysis involves the reasonable expectation of privacy standard); Illinois v. Caballes, 543 U.S. 405, 408–09 (2005) (holding there is no legitimate privacy interest in contraband a citizen hopes to conceal from the authorities, and thus any expectation of privacy in the concealment of contraband is unreasonable); *Kyllo*, 533 U.S. at 31 (explaining a search of one's home without a warrant is a violation of a reasonable expectation of privacy in one's home, where one expects to "be free from unreasonable governmental intrusion"); United States v. Alabi, 943 F. Supp. 2d 1201, 1273 (D. N.M. 2013) (addressing Fourth Amendment concerns of Secret Service agents accessing information contained in the magnetic strips of credit cards already in their possession and reasoning there was no violation of a reasonable expectation of privacy because the information obtained was clearly visible on the surface of the credit cards in question); United States v. Brooks, 911 F. Supp. 2d 836, 840 (D. Ariz. 2012) (employing the reasonable expectation of privacy analysis to the installation of a pole camera in an apartment building parking lot); Capers, *supra* note 33, at 965 (commenting on how the reasonable expectation of privacy standard, applied to government surveillance of public places, is still a prevailing view of Fourth Amendment doctrine, and questioning the apparent result of that view—that any exposure to a public area would relinquish a reasonable expectation of privacy and thus, Fourth Amendment protection).

35. *Katz*, 389 U.S. at 347.

36. *See id.* at 352–53 (conceding prior case law did support the Government's argument—where there is no penetration of tangible property, no Fourth Amendment inquiry is needed—and proceeding to explain how that premise has been discredited); Goldman v. United States, 316 U.S. 129 (1942) (holding there was no violation of the Fourth Amendment and no trespass when government agents placed a detectaphone, a discreet listening device, against a wall to overhear the conversations and telephone calls occurring on the other side), *overruled by* Katz v United States, 389 U.S. 347 (1967); Olmstead v. United States, 277 U.S. 438, 466 (1928) (holding a private telephone conversation intercepted through a wiretap did not invoke Fourth Amendment protection because there was no search or seizure of any "tangible material effects or an actual physical invasion of [a home] for the purpose of making a seizure"), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

electronic listening device attached to the outside of a telephone booth to record the conversations occurring within the booth.[37] Analyzing the Fourth Amendment in that context, the Court concluded there need not be a physical or technical trespass to constitute a search or seizure deserving of constitutional protection.[38] Instead, the Court in *Katz* created a standard that applies to the individuals themselves, as opposed to the location of the search.[39] Justice Harlan, in his concurrence, articulated the standard as a "constitutionally protected reasonable expectation of privacy . . . ."[40] Harlan's concurrence has become the basis for the reasonable expectation of privacy standard, and its application to Fourth Amendment issues involving search and seizure.[41] Justice Harlan explained:

> As the Court's opinion [in *Katz*] states, 'the Fourth Amendment protects people, not places'... My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'[42]

Justice Harlan's concurrence defined what was necessary to be protected by a reasonable expectation of privacy: (1) a subjective manifestation of an expectation of privacy; and (2) that the expectation of privacy be objectively reasonable based on societal expectations.[43] In subsequent cases, the Supreme Court has applied Justice Harlan's analysis to determine whether a reasonable expectation of privacy existed.[44] When a search is conducted, without a warrant, under circumstances in which an

37. *Katz*, 389 U.S. at 348.

38. *See id.* at 353 ("The fact that the electronic device employed to achieve [a recording] did not happen to penetrate the wall of the booth can have no constitutional significance.").

39. *Id.* at 351 ("The Fourth Amendment protects people, not places.").

40. *Id.* at 360–61 (Harlan, J., concurring).

41. *See* United States v. Jones, 132 S. Ct. 945, 950 (2012) ("Our [cases after *Katz*] have applied the analysis of Justice Harlan's concurrence in that case, which said that a violation occurs when government officers violate a person's 'reasonable expectation of privacy.'").

42. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

43. *See id.* ("[T]he rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"); *see also* Max Guirguis, *Electronic Visual Surveillance and the Reasonable Expectation of Privacy*, 9 TECH. L. & POL'Y 143, 174 (2004) ("The ultimate measure of constitutionality is not the location of the observer, but the reasonable expectation of the observed in the location under surveillance.").

44. *See Jones*, 132 S. Ct. at 950 (noting the Supreme Court has relied on Justice Harlan's analysis of the reasonable expectation of privacy standard); Smith v. Maryland, 442 U.S. 735, 740 (1979) (applying the reasonable expectation of privacy standard as articulated in Justice Harlan's concurrence in *Katz*).

individual maintains a reasonable expectation of privacy, that search is per se unreasonable.[45] Absent a showing that the search was reasonable under the circumstances, the search violates the Fourth Amendment.[46]

This standard was recently reiterated in *United States v. Jones*[47] as an addition to the common law trespass test that was relied upon prior to the Court's decision in *Katz*.[48] In *Jones*, the Court made it clear the reasonable expectation of privacy test is to remain the standard in cases where there is no physical trespass involved,[49] but allowed for the common law trespass standard to continue to apply in cases where the search involved a physical intrusion of the property in question.[50] Justice Scalia explained this in the majority's opinion, writing: "[W]e do not make [the common law] trespass [standard] the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to the *Katz* analysis."[51]

The common law trespass standard differs from the reasonable expectation of privacy standard; a court may apply both methods of analysis to determine if a search is reasonable under the meaning of the

45. *See Jones*, 132 S. Ct. at 951 (explaining the reasonable expectation of privacy standard put forth in *Katz* still applies and if a reasonable expectation of privacy is violated, a Fourth Amendment violation may occur); *Katz*, 389 U.S. at 353 ("The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.").

46. *See* Riley v. California, 134 S. Ct. 2473, 2477 (2014) (caveating there are specific exceptions allowing for warrantless searches to still be considered reasonable within the meaning of the Fourth Amendment).

47. *Jones*, 132 S. Ct. at 945.

48. *Id.* at 952 ("But as we have discussed, the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.").

49. *See id.* (disagreeing with the view expressed in the Justice Sotomayor's concurrence—the *Katz* analysis involving a reasonable expectation of privacy should be the exclusive standard used to examine whether a search is per se unreasonable—by arguing "[s]itutations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis").

50. *See id.* at 951 (explaining the *Katz* Court did not hold the property interests protected by the common law trespass standard would be weakened by the adoption of the new reasonable expectation standard); Soldal v. Cook County., Illinois, 506 U.S. 56, 62–64 (1992) (rejecting the respondent's argument—that *Katz* held "the Fourth Amendment is only marginally concerned with property rights"—by stating "our cases unmistakably hold that the Amendment protects property as well as privacy"); United States v. Knotts, 460 U.S. 276, 286 (1982) (Brennan, J., concurring) (clarifying that *Katz* held "that the Fourth Amendment protects against governmental invasions of a person's reasonable 'expectation[s] of privacy,' even when those invasions are not accompanied by physical intrusions," but when there is a physical intrusion to gather information there may still be a constitutional violation).

51. *Jones*, 132 S. Ct. at 953.

Fourth Amendment.[52] Under the reasonable expectation of privacy analysis, the Court will presume that a search conducted without a judicially authorized warrant is unreasonable per se if the analysis set forth in Justice Harlan's concurrence in *Katz* is satisfied, and assuming no warrant exception exists, regardless of whether or not there was a physical trespass.[53] However, where there is a physical trespass accompanied by an intention to gather information, the Court will presume a warrantless search is unreasonable in accordance with the common law trespass standard.[54]

The common law trespass standard developed around the historical interpretation of the Fourth Amendment which was intended to protect property interests.[55] With a search involving a physical intrusion of an individual's property, these historical property interests are affected, and the trespass standard applies.[56] The Court expanded this historical

52. *See id.* at 951–52 (clarifying the different circumstances in which the reasonable expectation of privacy test is applied and the common law trespass standard is applied and implying both tests are ways of determining the reasonableness of a search). *Compare* Katz v. United States, 389 U.S. 347, 353 (1967) (expanding the narrow view asserted in past cases—that only common law property interests are the basis of Fourth Amendment protections and as a result a physical invasion of such property is necessary to constitute a violation—to include violations of an individual's reliance on an expectation of privacy which includes conversations taking place within a phone booth), *with* Olmstead v. United States, 277 U.S. 438, 466 (1928) (rejecting the argument that evidence gathered by wiretapping a private phone conversation without a warrant was a violation of the Fourth Amendment because the amendment was created with the purpose of preventing warrantless searches of a person, his home, or his other tangible property and without a physical invasion of such property there can be no Fourth Amendment violation), *overruled by Katz*, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

53. *See Katz*, 389 U.S. at 360–61 (Harlan, J., concurring) (stating his interpretation of the majority's opinion is that where there is a reasonable expectation of privacy, that area is constitutionally protected and that an invasion of that constitutionally protected privacy is presumptively unreasonable without a search warrant); Marc Jonathan Blitz, *The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21, 25 (2013) (asserting the view of the Supreme Court and other legal scholars: the Fourth Amendment requires the government obtain a valid warrant when circumstances point to a reasonable expectation of privacy, but when there is no such expectation a warrantless search or visual inspection is generally not an unconstitutional search (citations ommitted)).

54. *See* Los Angeles v. Patel, 135 S. Ct. 2443, 2452 (2015) (stating a search, conducted without a judicial warrant, is presumptively unreasonable unless it meets a specific exception); *Jones*, 132 S. Ct. at 950–51 (reiterating that where there is a physical trespass in an constitutionally protected area accompanied by an intent to gather information, such action may be unconstitutional (citing *Knotts*, 460 U.S. at 286 (Brennan, J., concurring))).

55. *See Olmstead*, 277 U.S. at 463 ("The well-known historical purpose of the Fourth Amendment . . . was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects . . . ."), *overruled by Katz*, 389 U.S. 347 (1967), *and Berger*, 388 U.S. 41 (1967).

56. *See Jones*, 132 S. Ct. at 953 (recognizing the reasonable expectation of privacy test, established in *Katz*, extends Fourth Amendment protection outside of property rights, but also recognizing it does not eliminate previously protected property rights).

protection to apply to places and circumstances where an individual has a reasonable expectation of privacy.[57] Therefore, if there is a physical invasion of the property, a common law trespass standard will apply, and if there is no physical invasion, the reasonable expectation of privacy standard will apply.[58]

The Court has recognized specific circumstances that do not normally create a reasonable expectation of privacy and operate to allow warrantless searches without violating the Fourth Amendment.[59] Endorsed exceptions include: searches occurring incident to arrest,[60] searches in an

57. *See Katz*, 389 U.S. at 351 (explaining Fourth Amendment protections go further than protecting certain property, but may also protect "what he seeks to preserve as private, even in an area accessible to the public").

58. *See Jones*, 132 S. Ct. at 952–53 (reiterating the common law trespassory test is still recognized, in addition to the reasonable expectation of privacy test, but that it should not be applied in "[s]ituations involving merely the transmission of electronic signals without trespass").

59. *See* Riley v. California, 134 S. Ct. 2473, 2482 (2014) (restating the ultimate issue in Fourth Amendment cases is reasonableness, which is usually achieved by obtaining a judicial warrant, but in cases where there is no valid warrant, a search will only be considered reasonable "if it falls within a specific exception to the [Fourth Amendment's] warrant requirement" (citing Kentucky v. King 563 U.S. 452, 459–60 (2011))); Fernandez v. California, 134 S. Ct. 1126, 1132 (2014) ("[C]ertain categories of permissible warrantless searches have long been recognized."); Missouri v. McNeely, 133 S. Ct. 1552, 1558 (2013) ("Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception."); Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (following the principle that searches must be reasonable, and normally will require a warrant "subject to certain exceptions"); United States v. Davis, 785 F.3d 498, 516–17 (11th Cir. 2015) ("The Fourth Amendment prohibits unreasonable searches, not warrantless searches. As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'"); Ford v. State, No. PD-1396-14, 2015 WL 8957647, at *5 (Tex. Crim. App. Dec. 16, 2015) ("Searches conducted without a warrant are per se unreasonable, subject to certain 'jealously and carefully drawn' exceptions." (quoting Jones v. United States, 357 U.S. 493, 499 (1958))).

60. *See* Maryland v. King, 133 S. Ct. 1958, 1969–71 (2013) (examining the constitutionality of a DNA swab after the arrest of an individual and holding such action is a search, but such a search, when conducted under certain circumstances, can be reasonable because the right of the government to search an individual incident to a legal arrest has always been recognized); Maryland v. Buie, 494 U.S. 325, 334 (1990) (holding police officers may conduct a search without a warrant, probable cause, or even reasonable suspicion as part of the arrest of an individual, as long as that search is limited to areas "adjoining the place of arrest" from where the officer may be concerned a danger may be hidden, but "[b]eyond that . . . there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene"); Michigan v. Long, 463 U.S. 1032, 1049–50 (1983) (concluding the search of an automobile's compartments following a crash was justified as long as it was limited to places a weapon may be hidden and only when the officers reasonably believe "the suspect is dangerous and the suspect may gain immediate control of weapons[,]" and in this case the search did not turn up any weapons, but the marijuana that was discovered as a result was deemed to have not been obtained by means of an illegal search); Terry v. Ohio, 392 U.S. 1, 25–26 (1968) (addressing the issue of a police pat-down of a potential robbery suspect and stating "[a] search for weapons in the absence of probable cause to arrest,

"open field,"[61] searches necessitated by the exigencies of the situation,[62] searches where consent is given,[63] and searches involving evidence in plain view.[64] The case-by-case analysis of these exceptions is still based on an examination of the search's reasonableness in light of the circumstances; these exceptions simply help define whether or not the search was reasonable.[65] For example, the Court in *Kentucky v. King*[66]

however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation . . . . [and] must be limited to that which is necessary for the discovery of [dangerous nearby] weapons").

61. *See* Florida v. Jardines, 133 S. Ct. 1409, 1414–15 (2013) (defining "curtilage" as the area around a home, immediately associated with the home, so as to allow an objective belief that the privacy protected within a home extends to that area and, as a result, that area is protected by the Fourth Amendment, but the area beyond the curtilage of a home, or "open fields," is beyond this reasonable expectation of privacy and outside of the protection of the Fourth Amendment); Oliver v. United States, 466 U.S. 170, 177–80 (1984) (agreeing with Justice Harlan's concurrence in *Katz*—that the Fourth Amendment does not protect subjective expectations of privacy, but protects expectations of privacy the rest of society is willing to accept as reasonable—and stating an expectation beyond the curtilage of a home, extending into "open fields" is not objectively reasonable and not protected by the Fourth Amendment).

62. Kentucky v. King, 563 U.S. 452, 460 ("One well-recognized exception applies when "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" (quoting Mincey v. Arizona, 437 U.S. 385, 394 (1978))); *Stuart*, 547 U.S. at 406 (holding a police officer's entry was reasonable due to his objectively reasonable belief that there was an injured person inside and there may have been a risk of continuing violence which constituted the exigent circumstances necessary for action without a warrant). The exigent circumstances exception to the warrant requirement provides courts the opportunity to examine the reasonableness of a warrantless search on a case-by-case basis and allows for additional exigencies to qualify based on fact-specific inquires. *See McNeely*, 133 S. Ct. at 1559 (stating that in circumstances where there is no warrant establishing jurisdiction, the court may allow a fact-specific inquiry to determine if a particular emergency situation established the reasonableness of the search). However, there are several specifically defined exigencies: emergency assistance, "hot pursuit" of a suspect, entering a burning building, preventing the destruction of evidence, and others. *Id.* at 1558–59.

63. *See Fernandez*, 134 S. Ct. at 1137 (holding a warrantless search of a home is reasonable where consent was obtained even though a warrant was available because requiring a warrant, after consent is given, places an unnecessary burden on the police officer, the magistrate, and the party who gives consent); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (accepting the well-settled Fourth Amendment view that a warrantless search is presumptively unreasonable, unless a specific exception, such as consent, is implicated).

64. *See* Minnesota v. Dickerson, 508 U.S. 366, 375 (1993) (applying the plain view doctrine to legally-conducted pat downs). The plain view doctrine applies when law enforcement officials engaged in a legal search, come across evidence that is out in the open, or within "plain view." *Id.* As it is in plain view, there is no reasonable expectation of privacy, and such evidence may be seized without a violation of Fourth Amendment protections if it was viewed from a lawful position and officers have a lawful right to access the object. *See id.*

65. *See* Kentucky v. King, 563 U.S. at 459 (acknowledging that some warrantless searches are presumptively unreasonable, but such presumptions "may be overcome in some circumstances because '[t]he ultimate touchstone of the Fourth Amendment is "reasonableness"'" (citing Brigham City v. Stuart, 547 U.S. 398, 403 (2006))).

addressed the issue of police officers entering a residence without a warrant to prevent the destruction of evidence.[67] In *King*, the Court explained the general requirement that a search of a home must be conducted pursuant to a warrant to be reasonable.[68] However, "the warrant requirement is subject to certain reasonable exceptions."[69] The Court then examined whether the imminent destruction of evidence qualified under the well-recognized exigent circumstances exception.[70] Exigencies of the situation, such as where the destruction of evidence is likely, cause a search to be reasonable even if conducted without a warrant.[71]

Another rationale for denying Fourth Amendment protections, reflected in the recognized exceptions of "open field" searches and the "plain view" doctrine, is based on the public nature of the "search" in question.[72] The rationale is that the Fourth Amendment does not provide protection when there is a knowing exposure to the public; it is this reasoning that many video surveillance cases seem to rely on.[73]

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66. Kentucky v. King, 563 U.S. 452 (2011).

67. *Id.* at 456–57.

68. *See id.* at 459 ("[S]earches and seizures inside a home without a warrant are presumptively unreasonable." (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006))).

69. *Id.* (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

70. *Id.* at 460.

71. *See id.* ("[T]he need 'to prevent the imminent destruction of evidence' has long been recognized as a sufficient justification for a warrantless search." (quoting Brigham v. Stuart, 563 U.S. 452, 403 (2006))). Here, the Court mainly examined whether it is still reasonable to conduct a search to prevent the destruction of evidence, when such destruction is prompted by the police officers themselves. *See id.* at 461. The Court concluded such action may rise to the level of an unreasonable search, but an officer knocking on the front door is not unreasonable. *Id.* at 469.

72. *See* United States v. Knotts, 460 U.S. 276, 281–82 (1982) (concluding that when driving on public streets there can be no reasonable expectation of privacy due to the voluntary nature of such travel); Katz v. United States, 389 U.S. 347, 351 (1967) (expressing the view that if a person knowingly exposes something to the public, there is no expectation of privacy, and therefore, the Fourth Amendment is not applicable); Slobogin, *supra* note 2, at 267–69 (construing Supreme Court case law to reflect the view that what is exposed to the public is not something that can have a reasonable expectation of privacy, and that "police observation from a public vantage point is not a search, even if the area observed is the curtilage, traditionally considered part of the home").

73. *See* Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding the government's use of a thermal imaging device to observe the inside of a home was a violation of the Fourth Amendment because the device was not in use by the public and therefore violated a reasonable expectation of privacy); *Knotts*, 460 U.S. at 276 ("[N]o such expectation of privacy extended to the visual observation of [the defendant's] automobile arriving on his premises after leaving a public highway . . . ."); United States v. Taylor, 776 F.3d 513, 519 (7th Cir. 2015) (alluding to the lack of a reasonable expectation of privacy in a parking garage due to its public nature and likening parking in such a structure to being parked on a public street); Christensen v. Cty. of Boone, 483 F.3d 454, 459–60 (7th Cir. 2007) (analyzing a situation in which the plaintiffs claimed an illegal search had taken place in violation of the Fourth Amendment as a result of a deputy following them while they drove along public streets

B. *Video Surveillance and the Use of Pole Cameras*

At this time, there is little to no discussion of the Fourth Amendment as it realtes to police-worn body cameras, as they have only been implemented in a few jurisdictions,[74] and what little discussion there is focuses mainly on the ability or lack of ability of the body cameras to regulate police behavior.[75] To examine potential concerns created by police-worn body cameras in relation to a civilian's Fourth Amendment rights, it is necessary to begin by discussing Fourth Amendment concerns through the broader lens of video surveillance in general.

An issue currently being addressed in many courts is that of law enforcement officials mounting cameras on utility poles in public areas for purposes of surveillance.[76] These cases do not involve physical trespasses, as the cameras are installed in public areas (usually on public utility poles), and therefore do not invoke the common law trespass standard.[77] Rather,

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and patronized local businesses and holding that such actions did not constitute a search because there was no legitimate interest in privacy while driving in public or visiting local businesses, both of which are activities knowingly exposed to the public); United States v. Houston, 965 F. Supp. 2d 855, (E.D. Tenn. 2013) (noting there was no violation of the Fourth Amendment when a pole camera was set up in an area that was accessible to the public and law enforcement officials because "it did not provide law enforcement with a vantage point they could not have enjoyed from the ground," even though no warrant was obtained and the camera was directed toward the defendant's property; however, the court held the surveillance violated a reasonable expectation of privacy due to the ten-week duration of the surveillance); Blitz, *supra* note 33, at 1378 (distinguishing between video surveillance within a private home or office and video surveillance from a public vantage point, stating that in the latter "courts have almost always found the Fourth Amendment inapplicable").

74. *See* Wasserman, *supra* note 1, at 837 (asserting any attempt to state the effects of police-worn body cameras on police behavior would be mere speculation because "[t]he technology and its use by actual police are too new to know its true effects").

75. *See Developments in the Law–Policing, supra* note 1, at 1814 (concluding that using body cameras may present problems and "the presence of a camera is no guarantee that officers will temper their use of force"); Wasserman, *supra* note 1, at 836–37 (addressing the widespread call for increased use of police-worn body cameras as a means to increase police transparency and reduce violence and discussing why increased body camera use may not provide the benefits that its advocates hope for). *See generally* Harris, *supra* note 21, at 357 (proposing widespread use of police-worn body cameras would be effective in increasing police officers' professionalism, and would ensure their actions are in compliance with Fourth Amendment procedures).

76. *See* United States v. Garcia-Gonzalez, No. 14-10296, 2015 WL 5145537, at *1 (D. Mass. Sept. 1, 2015) (examining law enforcement's use of a pole camera employed by the FBI for surveillance of property adjacent to the defendant and the installation of a new pole camera following the defendant's move); United States v. Wymer, 40 F. Supp. 3d 933, 937 (N.D. Ohio 2014) (discussing Fourth Amendment concerns arising from a warrantless installation of a pole camera—at the request of local authorities—by the Ohio Bureau of Criminal Investigation for the sole purpose of surveying defendant's business operations); United States v. Houston, 965 F. Supp. 2d 855, 871–72 (E.D. Tenn. 2013) (addressing the installation of a pole camera adjacent to defendant's property, where a subsequent warrant for continued use was issued, and surveillance continued for ten weeks).

77. *See Wymer*, 40 F. Supp. 3d at 938 (accepting the common law trespass search was not

the issue addressed in these cases is whether, under the specific circumstances of the surveillance, the use of a camera mounted from a public vantage point violates an individual's reasonable expectation of privacy.[78] At least one of these courts explicitly applied the two-part analysis presented in Justice Harlan's concurrence in *Katz*,[79] but all courts that have addressed this issue base their analysis on whether there can be an objectively reasonable expectation of privacy in anything visible to the general public.[80]

By following the reasonable expectation of privacy standard, these federal courts have held, in large part, that surveillance from a public vantage point through the use of a pole camera does not violate a reasonable expectation of privacy.[81] This is because a pole camera placed in a public place, even if for the purpose of surveillance, exposes no more to law enforcement officers than what the individual being surveyed

implicated because law enforcement did not install a camera on the defendant's property, so there was no trespass and no claim of a trespass search can be made).

78. *See Garcia-Gonzalez*, 2015 WL 5145537, at *3 (indicating the reasonable expectation of privacy standard applies to pole camera surveillance by reiterating the two-part analysis set forth in Justice Harlan's concurrence in *Katz*); *Wymer*, 40 F. Supp. 3d at 938 ("The closer question is whether the government violated Wymer's reasonable expectation of privacy with its covert and continuous video surveillance of the premises for four months.").

79. *Garcia-Gonzalez*, 2015 WL 5145537, at *3 (stating the *Katz* analysis applies due to the use of an electric means without physical trespass and putting forth Justice Harlan's two-part analysis as a way "to establish a Fourth Amendment violation").

80. *See id.* (applying a reasonableness standard when there was no physical trespass); *Wymer*, 40 F. Supp. 3d at 939–40 (concluding that there was no reasonable expectation of privacy because the property was exposed to public view); *Houston*, 965 F. Supp. 2d at 871 (holding that use of a pole camera alone was not unreasonable, but may become unreasonable depending on the duration and the circumstances).

81. *See Garcia-Gonzalez*, 2015 WL 5145537, at *8–9 (holding, reluctantly, a pole camera's extended viewing of a residence did not violate any reasonable expectation of privacy because it did not attempt to see more than was possible from the public view and the length of time it was installed did not constitute a violation of a reasonable expectation based on binding precedent upholding the surveillance by a warrantless pole camera in place for eight months); *Wymer*, 40 F. Supp. 3d at 938–39 (concluding the reasonable expectation of privacy is not violated because the property in question was commercial in nature and there were no attempts to "shield the property from public view"); *Houston*, 965 F. Supp. 2d at 871–72 (implying the warrantless installation of a pole camera is not a violation of a reasonable expectation of privacy, but stating that if such surveillance is continued for an unreasonable period of time it would become a violation); Brown, *supra* note 33, at 760 (explaining there is little to no regulation regarding the use of surveillance cameras in public places and acknowledging the courts have not defined clear guidelines for what is and what is not reasonable, yet "[t]hey have held that individuals can expect to be videotaped in or on streets, sidewalks, taverns, front yards, hallways at self-storage facilities, mountaintops, open fields, and the common areas of public bathrooms"). The view these courts take—that anything videotaped from a public vantage point is not something in which a reasonable expectation of privacy can exist—is mirrored by almost every state and federal court that has addressed the issue of the surveillance from a public vantage point. *See* Blitz, *supra* note 33, at 1379.

displays to the public in general; therefore, the individual cannot have a reasonable expectation of privacy, and as a result the Fourth Amendment provides no protection and no warrant is required for the installation of such cameras.[82]

Although courts hold the use of these cameras to be reasonable, they allude to the possibility that the method and manner of the surveillance associated with pole cameras may be sufficient to violate a reasonable expectation of privacy, and therefore may implicate the Fourth Amendment and its protections.[83] The United States District Court in Massachusetts recently articulated this possibility with reference to *Jones*, *Katz*, and *United States v. Knotts*:[84]

> In *Jones*, the majority specifically noted that *Katz* did not withdraw any of the protection which the amendment extends to the home. The majority opinion also impliedly rejects as unsupported, by *Knotts* or otherwise, the suggestion that an unconstitutional search is permissible if it produces only public information. At the same time, the majority quoted *Knotts* as recognizing the "limited use which the government made of the signals from this particular beeper," and noted that *Knotts* "reserved the question whether 'different constitutional principles may be applicable' to 'dragnet-type law enforcement practices' of the type that GPS tracking made possible here." This suggests that the twenty-four-hour dragnet-type surveillance the Court in *Knotts* warned about may violate the Fourth Amendment even though all of the information gathered is public. For, in the face of advancing technology, "what a person knowingly exposes to the public," endangers profoundly different ramifications than it did in 1967, when *Katz* was

82. *See Wymer*, 40 F. Supp. 3d at 939 (relying on the reasoning in *Katz*, which stated: "what a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection"); *Houston*, 965 F. Supp. 2d at 870 (reasoning if the pole camera was not able to see more than what was already visible to the public in regard to activities occurring within a residence, then there is no "search" under the meaning of the Fourth Amendment); Brown, *supra* note 33, at 759–60 ("A public place is generally considered to be one in which individuals do not have reasonable expectations of privacy. The result is that, 'according to the law, everything that occurs in a public place cannot be held out to be a private activity.'").

83. *See Garcia-Gonzalez*, 2015 WL 5145537, at *7 ("[T]wenty-four-hour dragnet-type surveillance . . . may violate the Fourth Amendment even though all of the information gathered is public . . . in the face of advancing technology, 'what a person knowingly exposes to the public,' endangers profoundly different ramifications than it did in 1967 when *Katz* was decided."); *see also* Marc Jonathan Blitz et al., *Regulating Drones Under the First and Fourth Amendments*, 57 WM. & MARY L. REV. 49, 71 (2015) (discussing the Fourth Amendment implications of drone use and proposing that the manner in which the technology is used plays a significant role in determining its constitutional implications—for example, "just because other people are of course free to observe my public movements does not mean, without more, that the government may use technology that logs a significant portion of those movements").

84. United States v. Knotts, 460 U.S. 276 (1982).

decided.[85]

One factor frequently discussed involves the length of time the surveillance can continue before reaching the point of being unreasonable.[86] The Supreme Court hinted that this may be a relevant factor in determining if a reasonable expectation of privacy is violated in *Knotts*.[87] The majority opinion in *Jones* does not directly address a temporal issue,[88] but Justice Sotomayor points out in her concurrence that long-term surveillance may provide much greater detail about an individual.[89] District courts have applied this reasoning to acknowledge the possibility that prolonged surveillance from a pole camera may violate an individual's reasonable expectation of privacy.[90] Another factor which could give rise to a pole camera's use violating a reasonable expectation of privacy is the high-tech nature of the camera or the ability of the camera to adjust what it is able to see—meaning the camera has the ability to zoom,

85. *Garcia-Gonzalez*, 2015 WL 5145537, at *7.

86. *See id.* (commenting that continuous, fulltime surveillance may violate the Fourth Amendment (citing United States v. Knotts, 460 U.S. 276, 284 (1982))); *Houston*, 965 F. Supp. 2d at 871 (concluding the warrantless installation of a pole camera did not violate the Fourth Amendment, but the continuous ten-week operation of that camera, in spite of a lack of an established time considered to be reasonable, was unreasonable).

87. *See* United States v. Jones, 132 S. Ct. 945, 952 n. 6 (2012) (explaining that the holding in *Knotts* was limited in scope to government use of a particular beeper which left open the issue of whether continuous "dragnet-type" surveillance may require increased constitutional protection and stating that the extended use of a GPS tracker made such dragnet-type surveillance possible in that case); *Knotts*, 460 U.S. at 283–84 (relaying the respondent's claims that the government was engaged in what amounted to twenty-four hour continuous surveillance without a warrant due to their use of "scientific devices" (in this case a beeper), but ultimately rejecting that argument in these circumstances because the Court has "never equated police efficiency with unconstitutionality[,]" and waiting to consider such "dragnet" type surveillance for a case that properly presents it for consideration); *Houston*, 965 F. Supp. 2d at 873 (explaining that a pole camera used for over eight weeks after a two-week warrant expired was a violation of a reasonable expectation of privacy because "ten weeks crosses into the unreasonable, provoking 'an immediate negative visceral reaction' suggestive of the Orwellian state").

88. *See Jones*, 132 S. Ct. at 954 (responding to Justice Sotomayor's concurrence by commenting: "[I]t remains unexplained why a 4-week investigation is 'surely' too long and why a drug-trafficking conspiracy involving substantial amounts of cash and narcotics is not an 'extraordinary offens[e]' which may permit longer observation[,]" posing questions over what time period is reasonable and what time periods are unreasonable, and concluding the Court will have to wait and address these "vexing problems" in the future when a case that implicates the reasonable expectation of privacy test cannot be resolved, as it can here, through the application of the common law trespass test).

89. *See Jones*, 132 S. Ct. at 954–55 (Sotomayor, J., concurring) (arguing long-term GPS surveillance may violate an individual's reasonable expectation of privacy because law enforcement can gather large amounts of data in great detail and at low cost).

90. *See Garcia-Gonzalez*, No. 14-10296, WL 5145537, at *8 (discussing Justice Sotomayor's concurrence and acknowledging the merits of considering that long-term and detailed surveillance may violate an individual's reasonable expectation of privacy).

pan, or see at night.[91]

It seems that in most instances there will be no physical trespass in cases dealing with video surveillance.[92] As a result, the standard applied will likely be based on a reasonable expectation of privacy.[93] However, if surveillance is prolonged in an unreasonable manner, or if the capability of a recording device far surpasses what an individual reasonably believes they have exposed to the public, then warrantless video surveillance may violate the reasonable expectation of privacy.[94]

III. ANALYSIS

A. *Reasonable Expectation of Privacy and Body Camera Use*

There is no question more citizens will be recorded with widespread use of body cameras,[95] but do police-worn cameras maintain a reasonable

91. *See* United States v. Anderson-Bagshaw, 509 Fed. Appx. 396, 405 (6th Cir. 2012) (opining most citizens do not expect the government to put their yards under surveillance for long periods of time or do so with hidden cameras capable of zooming and panning); United States v. Nerber, 222 F.3d 597, 603 (9th Cir. 2000) (noting "the legitimacy of a person's expectation of privacy may depend on the nature of the intrusion[,]" and acknowledging that the nature of the video surveillance can, when highly focused, rise to a high level of intrusion which violates a reasonable expectation of privacy); Blitz, *supra* note 53, at 31 (stating surveillance in public spaces threatens Fourth Amendment rights even without permanent documentation of the surveillance obtained through recording and explains "[p]olice can use telescopes or extremely powerful zoom lenses to scrutinize details on a person's clothing, or on items or documents removed from a wallet or briefcase, that would be invisible to bystanders just a few yards away"); Guirguis, *supra* note 43, at 180 ("[B]ased on precedents in which the Court has consistently held that a person has no reasonable expectation of privacy in public, it can be inferred that 'traditional' camera surveillance will readily pass constitutional muster—unless additional technology is employed to augment the natural senses of sight and hearing.").

92. *See* United States v. Wymer, 40 F. Supp. 3d 933, 938 (N.D. Ohio 2014) (accepting the common law trespass search was not implicated because law enforcement did not install a camera on his property, so there was no trespass and therefore no claim of a trespass search).

93. *See Jones*, 132 S. Ct. at 953 (holding both the reasonable expectation of privacy standard and the common law trespass standard are applicable to potential Fourth Amendment violations; however, if there is not physical trespass onto the property but "merely the transmission of electronic signals without trespass" then the reasonable expectation of privacy standard applies in place of the common law trespass standard).

94. *See id.* at 954 (explaining the Court's decision was based on common law trespass and not based on the reasonable expectation of privacy standard, but conceding that a future case involving electronic surveillance may raise the issue of whether extended electronic surveillance crosses the line into unreasonableness under the reasonable expectation of privacy standard put forth in *Katz*); Blitz, *supra* note 53, at 26–27 (explaining that, although the Court in *Jones* alluded to the possibility that a term of surveillance in a public place may rise to a Fourth Amendment violation if the circumstances violate a reasonable expectation of privacy, the Court did not "clearly identify how long or how intense the public surveillance must be to cross the constitutional dividing line").

95. *See* Taylor Robertson, *Lights, Camera, Arrest: The Stage Is Set for a Federal Resolution of a Citizen's*

expectation of privacy when recording? If the footage obtained in the use of body cameras is that which may be visible to anyone from a public point of view, it seems likely that the reasonable expectation of privacy standard will be applied in the same manner in which it applies to the use of other police surveillance cameras filming from public locations—namely the use of pole cameras.[96] This would mean as long as the officer wearing the body camera is in a public location, the camera is incapable of recording anything that could be considered within an individual's reasonable expectation of privacy.[97]

At this time, the prevailing view with respect to pole cameras maintains there is usually no reasonable expectation of privacy when recording from a public vantage, though some scholars have commented on the view's lack of practical applicability for increasingly advanced surveillance technology. These critics argue the use of cameras must be further defined to apply the ideals of the Fourth Amendment to modern technology, especially when the camera has the capacity to record.[98] This

Right to Record the Police in Public, 23 B.U. PUB. INT. L.J. 117, 143–44 (2014) (advocating the rights of citizens to record law enforcement officers in the course of their duty and acknowledging the risk of more civilians who are not under arrest or suspicion being recorded due to their interactions with the police).

96. *See* United States v. Garcia-Gonzalez, No. 14-10296, 2015 WL 5145537, *1 (D. Mass. Sept. 1, 2015) (examining law enforcement's use of a pole camera already employed by the FBI for surveillance of property adjacent to the defendant and examining law enforcement's installation of a new pole camera following the defendant's move); *Wymer*, 40 F. Supp. 3d at 937 (discussing Fourth Amendment concerns arising from an warrantless installation of a pole camera, for the sole purpose of surveying defendant's business operations, by the Ohio Bureau of Criminal Investigation at the request of local authorities); United States v. Houston, 965 F. Supp. 2d 855, 865 (E.D. Tenn. 2013) (noting there was no violation of the Fourth Amendment when a pole camera was set up in an area that was accessible to the public and law enforcement officials because "it did not provide law enforcement with a vantage point they could not have enjoyed from the ground" even though no warrant was obtained and the camera was directed toward the defendant's property; however, the court held the surveillance violated a reasonable expectation of privacy due to the ten-week duration of the surveillance); United States v. Brooks, 911 F. Supp. 2d 836, 843 (D. Ariz. 2012) (evaluating the use of a pole camera in an apartment complex's parking lot to survey an individual who resides in an adjacent apartment building).

97. *See* Triano, *supra* note 20, at 409 (asserting that an individual's reasonable expectation of privacy is no longer enjoyed in many public settings, neither law enforcement nor private citizens, because "being subject to a video recording is an accepted fact of modern society").

98. *See* Blitz, *supra* note 53, at 30 (distinguishing the implications of mere observation as a form of surveillance and the implications of observation combined with recording that observation as part of the surveillance); *see also* Kitzmueller, *supra* note 3, at 177 (comparing old methods of recording which necessitated large equipment and access to and storage of physical film, with the modern small recording devices and the seemingly endless storage capabilities available through "compact discs, flash drives, hard drives, and now even in a 'cloud'"); Triano, *supra* note 20, at 409 (proposing the concept of a reasonable expectation of privacy, especially in a public setting, "must be adjusted to reflect the advancement of modern technology").

is because there is an inherent difference between viewing something as it happens and recording the occurrence.[99] These observations appear not only in the discussions of advancing camera ability and recording capacity, but also in new forms of surveillance such as unmanned aerial vehicles (drones).[100]

B. *Common Law Trespass Standard and Body Camera Use*

The Supreme Court has made it clear that the reasonable expectation of privacy is not the exclusive standard applied in all Fourth Amendment cases.[101] The common law trespass standard applies in cases involving physical trespass.[102] It follows that police use of a recording device, including a body camera, when on the property of another may be sufficient to implicate the common law trespass standard.[103] A situation where a body camera records images of an individual's property while the officer is on that individual's property may easily occur in the everyday actions of law enforcement officers performing their duties.[104] In these situations a common law trespass standard may be applied if the recording takes place on the property of another without a warrant.[105] Such

99. *See* Blitz, *supra* note 53, at 30 (arguing that recording is inherently more intrusive than simple observation because even if the camera does not create a privacy concern by simply viewing, the fact the video footage may later be re-watched and scrutinized compromises the privacy of the individual to a greater extent).

100. *See* Blitz et al., *supra* note 83, at 72 (acknowledging the revival of the common law trespass standard by the Supreme Court in *Jones*, and suggesting the standard may be applicable to the use of unmanned aerial vehicles depending on how the Court eventually defines the concepts of trespass in relation to the common law trespass standard); Farber, *supra* note 33, at 5–6 (addressing potential Fourth Amendment concerns in the context of increasing unmanned aerial drones, and alluding to the fact the law is often slow to keep up with changes in technology).

101. *See* United States v. Jones, 132 S. Ct. 945, 952 (2012) ("[A]s we have discussed, the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.").

102. *Id.* at 953 (clarifying the common law trespass standard may be applied in situations where there is physical trespass, but allowing for the reasonable expectation of privacy standard to continue to be applied in situations where there is "merely the transmission of electronic signals without trespass [and] would remain subject to the *Katz* analysis").

103. *See* Blitz et al., *supra* note 83, at 72 (acknowledging the revival of the common law trespass standard by the Supreme Court in *Jones* and suggesting the standard may be applicable to the use of unmanned aerial vehicles depending on how the Court eventually defines the concepts of trespass in relation to the common law trespass standard).

104. *See* Newell, *supra* note 24, at 85 (commenting on the discretionary nature of police work which permits a high degree of flexibility in many policing situations and stating the use of body cameras may create concerns in diminishing the ability of officers to use this discretion).

105. *See Jones*, 132 S. Ct. at 949 ("The Government physically occupied private property for the

recordings, taken without warrant or probable cause will likely violate the Fourth Amendment when analyzed according to either the common law trespass standard or the reasonable expectation of privacy test.[106]

Emergency situations, as discussed earlier, are cause for police officers to enter premises for purposes of conducting a "search."[107] But what if officers conduct such a search while wearing a body camera? The recording in that situation seems to exceed the search contemplated by the exception.[108] The exception exists to allow officers to enter premises, or otherwise conduct a search to prevent events that are time sensitive, as long as their actions are reasonable in light of the circumstances.[109] An example of this is to prevent the destruction of evidence.[110] However, recording such a warrantless entrance may cross the line to a trespass and search in violation of the Fourth Amendment. This is because the recording is not necessary to serve the purposes of the emergency search.[111] It would only serve to allow for warrantless documentation of

purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted.").

106. *See id.* at 951–53 (holding either the common law trespass standard or the reasonable expectation of privacy test may be applied to situations where a search is involved depending on whether or not there has been a physical trespass); *Developments in the Law–Policing, supra* note 1, at 1808 (acknowledging the use of police recording in a private home may create additional privacy concerns that would not be at issue in the course of unrecorded police activity while on the property of a private citizen).

107. *See* Riley v. California, 134 S. Ct. 2473, 2494 (2014) (discussing the exigencies of the situation as a recognized exception to the warrant requirement, allowing for officers to conduct a search under emergency circumstances, and giving examples of emergency circumstances which include "the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury").

108. *See* Blitz, *supra* note 53, at 30 (arguing that recording is inherently more intrusive than simple observation because even if the camera does not create a privacy concern by simply viewing, the fact the video footage later be may later re-watched and scrutinized compromises the privacy of the individual to a greater extent).

109. *See* Kentucky v. King, 563 U.S. 452, 459–60 (2011) (listing (1) providing necessary aide; (2) preventing imminent harm; (3) imminent destruction of evidence; or (4) when in active pursuit of a suspect as examples that fall under the exception). *But see* Claire R. O'Brien, Recent Development, *Reasonable Suspicion or a Good Hunch?* Dapolito *and a Return to the Objective Evidence Requirement*, 93 N.C. L. REV. 1165, 1182 (2015) (arguing courts should require more objective evidence be presented to justify an officer conducting a *Terry* search of an individual when applying a standard of reasonable suspicion as a way to further "justify the intrusion into the individual's life").

110. *See King*, 563 U.S. at 460 (identifying the prevention of the imminent destruction of evidence as a recognized emergency situation in which law enforcement officers may conduct a "search" that would otherwise violate the Fourth Amendment).

111. *See id.* (listing several examples of when exigent circumstances make the search objectively reasonable, all of which depend on imminent action and none of which necessitate recording of the officer's actions).

a search that is authorized only to prevent the occurrence of the emergency itself.[112]

C. *Legislative Response*

The climate that the recent events of police misconduct created in the United States is one of concern and anger directed towards law enforcement.[113] As a result of these incidents, and public outcry for increased accountability, many law-making bodies around the country have begun passing legislation in an effort to address the public criticism of policing techniques and the perceived ineffectiveness of current procedures intended to protect the public from police misconduct.[114] Legislatures around the United States have begun by setting forth requirements for law enforcement agencies to establish the rules associated with body camera use,[115] however such actions do not automatically alleviate all of the concerns associated with police misconduct or body camera use.[116] For example, in 2015 the Maryland Public Safety Code was amended, requiring the Maryland Police Training Commission to publish a policy online by the first of 2016 that includes: testing of body cameras; procedures to follow; when to record; when not to record; when consent is needed to record; who has access to the recordings; how the recordings are to be used; specific protections in situations that involve an expectation of privacy; and several others.[117] These requirements leave the police with a large amount of discretion, and it is unclear what standards will be employed moving forward. As a result of this

112. *See Developments in the Law–Policing*, *supra* note 1, at 1808 (addressing concerns over a recorded search of private homes or vehicles due to their intrusive nature and the officers ability to examine the recordings at a later point in time to see things that would have been unseen in real time).

113. *See id.* at 1794–95 (noting the growing concerns of many communities over methods of policing and referencing the wide-spread protests and demonstrations occurring after the deaths of Michael Brown, Eric Garner, and others across the country); O'Brien, *supra* note 109, at 1183 ("Recent events have cast doubt on the abilities of officers to self-regulate the constitutionality of their actions, and citizen-police tensions are high.").

114. MD. CODE ANN., PUB. SAFETY § 3-511 (West 2015); TEX. OCC. CODE ANN. §§ 1701.655, 1701.657 (West 2015).

115. PUB. SAFETY § 3-511; OCC. §§ 1701.655, 1701.657.

116. *See id.* (mandating "the Maryland Police Training Commission shall develop and publish online a policy for the issuance and use of a body-worn camera by a law enforcement officer[,]" listing what the policy must address, and providing the commission with a large amount of flexibility in determining how the cameras will be operated).

117. *See id.* (listing several requirements for the Maryland Police Training Commission to fulfill in their development of a policy to dictate the manner in which their officers should be instructed to use police-worn body cameras).

uncertainty in how body cameras will be employed, it remains unclear to what extent the use of body cameras will infringe on the Fourth Amendment rights of citizens. The issue will largely depend on how each jurisdiction sets their standards for body camera use.

Texas also passed an act in 2015 calling for a similar policy to be adopted by any "law enforcement agency that receives a grant to provide body cameras . . . ."[118] However, the Texas legislature took the additional step of providing that any policy promulgated by a law enforcement agency may not state that the officer is to record, using a body camera, for an entire shift.[119] This addresses the concern of individuals being recorded without cause, or for unnecessarily long periods of time. It also addresses concerns regarding recordings and the opportunity to review vast amounts of footage over time. Furthermore, Texas enacted another code provision in 2015 that allows an officer, at his own discretion, to discontinue recording or choose not to record at all while equipped with a body camera.[120] This option is available to the officer only in "nonconfrontational encounter[s] with a person, including an interview of a witness or victim."[121] The Act also allows for the officer to provide an indication of why the camera was not activated if he or she is responding to a call for assistance,[122] and provides an officer's justification for not recording "because it is unsafe, unrealistic, or impracticable is based on whether a reasonable officer under the same or similar circumstances would have made the same decision."[123]

Legislatures have begun enacting statutes requiring law enforcement agencies to define exactly when and how body cameras are to be used.[124] But does this ensure there will not be a Fourth Amendment violation? Not entirely. This may serve to limit unnecessary exposure to the recording of body cameras, however it is unlikely that police will use a high level of discretion due to the nature and purpose of body camera use in

118. *Compare id.* (requiring law enforcement agencies to fulfill specific requirements in setting their body camera policies and to make those policies public by the beginning of 2016), *with* OCC. § 1701.655 (requiring law enforcement agencies which receive a grant for body worn cameras to ensure that the agency's policy provide for the camera to be used only for law enforcement purposes and set a policy in line with several other guidelines including: data retention standards (minimum of ninety days), methods of storage, public access, officer access, internal review procedures, and documentation of equipment).

119. OCC. § 1701.655.

120. *Id.* § 1701.657.

121. *Id.*

122. *Id.*

123. *Id.*

124. *See* MD. CODE ANN., PUB. SAFETY § 3-511 (West 2015); OCC. §§ 1701.655, 1701.657.

the first place.[125] Law enforcement agencies, in response to the current climate, are trying to protect themselves by providing increased transparency and accountability.[126] This means that requirements the agencies put in place are more likely than not to require as much recording as possible, not merely recording when there is probable cause or an existing warrant.[127] Rather, there is an incentive to record all interactions with citizens, in accordance with the wishes of body camera advocates, to avoid unrecorded incidents occurring at unexpected moments.[128]

This creates an interesting paradox. The reason so many agencies and legislatures are requiring body camera use is to ensure police officers are conducting themselves in a professional manner in all situations[129] and to ensure there is objective evidence in cases where the use of force occurs.[130] However, there is no way to fully predict when these instances

125. *See* Harris, *supra* note 21, at 365 (arguing police body cameras may provide increased Fourth Amendment protections for individuals by forcing police conducting a search or seizure to regulate their behavior and remain within constitutional limits).

126. *See* Peter Hermann & Rachel Weiner, *Issues over Police Shooting in Ferguson Lead Push for Officers and Body Cameras*, WASH. POST (Dec. 2, 2014), https://www.washingtonpost.com/local/crime/issues-over-police-shooting-in-ferguson-lead-push-for-officers-and-body-cameras/2014/12/02/dedcb2d8-7a58-11e4-84d4-7c896b90abdc_story.html (reporting many law enforcement agencies in large cities are beginning to enact body camera programs after public outcry following allegations of police misconduct as a means to help resolve "the debate over accountability and trust," and asserting that such cameras will likely become standard equipment in policing).

127. *See* Newell, *supra* note 24, at 85 (claiming police-worn body cameras would only be effective in increasing police accountability if either the cameras are always activated and recording—giving law enforcement officers no discretion on deactivation—or law enforcement officers were given strict rules for the use of the cameras to ensure they are used for the effect intended and suggesting for this method to work the public would also need to be able to access the footage, which would also need to have strict rules on how it is stored and maintained).

128. *See id.* (suggesting to achieve the goals of law enforcement accountability through police-worn body cameras, the officer wearing the camera must have no discretion as to when the camera can be deactivated). *But see Developments in the Law–Policing, supra* note 1, at 1806 (suggesting by giving law enforcement agencies control over setting their policies for using police-worn body cameras "the very organization meant to be held accountable will be able to prevent these videos from being created in the first instance or shared after the fact"); Newell, *supra* note 24, at 83 ("[I]t would be naïve to believe officers (and departments) would: (1) record all encounters judiciously; (2) preserve all recordings properly; and (3) properly release all footage related to public requests under state disclosure laws (especially when the footage is damning), unless strict laws and regulations were in place . . . .").

129. *See Developments in the Law–Policing, supra* note 1, at 1799 (providing an example of police misconduct "which has long been an issue of public concern" and acknowledging "[g]rowing anxiety over police abuse has negatively impacted police departments' public relations, and such tensions have hampered the effectiveness of law enforcement in the communities they police").

130. *See* Harris, *supra* note 21, at 363 (relaying the view of a police chief who favors the use of body cameras due to their capability to solve issues concerning an officer's conduct); Triano, *supra* note 20, at 406 (viewing civilian recorded video of police encounters with civilians as objective and trustworthy evidence that is beneficial in establishing the facts in a clearer manner than relying on

will occur, and when they do occur, rarely will it be practical, or even wise, for officers to concern themselves with making sure their body camera is on and recording.[131] Due to the purported purposes of body cameras and the realities of law enforcement, for body cameras to do their job they must be recording often, not only when an incident is foreseeable.[132] As a result of continuous recording, more citizens will be exposed to the recording and more warrantless surveillance will occur.[133] As more surveillance occurs—and it must to achieve the goals purported by body camera supporters—there is greater potential for invading the reasonable expectation of privacy of citizens, and an increased likelihood that Fourth Amendment violations will result.[134]

IV. CONCLUSION

There are varying views on whether the use of police-worn body cameras is wise.[135] What remains clear regardless of the point of view

witnesses and their credibility and advocating the legality of such recordings).

131. *See* Newell, *supra* note 24, at 84 (suggesting the use of body cameras may serve to compromise the position of police officers "who [are] often under the 'dual pressure[s] to "be right" and to "do something,"' even in stressful or dangerous situations" by disrupting the nature of those situations).

132. *See* Harris, *supra* note 21, at 365 (arguing police body cameras may provide increased Fourth Amendment protections for individuals by forcing police conducting a search or seizure to regulate their behavior and remain within constitutional limits).

133. *See* Robertson, *supra* note 95, at 143–44 (acknowledging the risk of more civilians who are not under arrest or suspicion being recorded due to their interactions with the police).

134. Blitz, *supra* note 53, at 31 (stating surveillance in public spaces threatens Fourth Amendment rights even without permanent documentation of the surveillance obtained through recording and explaining "[p]olice can use telescopes or extremely powerful zoom lenses to scrutinize details on a person's clothing, or on items or documents removed from a wallet or briefcase, that would be invisible to bystanders just a few yards away."). Blitz continues to explain how courts have grappled with this issue by commenting on how such technology may constitute a violation of the Fourth Amendment in some circumstances, especially when such a powerful device is aimed at those areas explicitly protected by the Fourth Amendment —"namely, an individual's 'person, . . . papers, and effects[,]" and concluding the use of these high powered observation systems creates Fourth Amendment concerns analogous to recording *Id. But see* Guirguis, *supra* note 43, at 180 ("[B]ased on precedents in which the Court has consistently held that a person has no reasonable expectation of privacy in public, it can be inferred that 'traditional' camera surveillance will readily pass constitutional muster—unless additional technology is employed to augment the natural senses of sight and hearing.").

135. *Compare* Triano, *supra* note 20, at 406 (viewing citizen-recorded video of police encounters with citizens as objective and trustworthy evidence that is beneficial in establishing the facts in a more clear manner than relying on witnesses and their credibility and advocating the legality of such recordings), *with* Wasserman, *supra* note 1, at 849 (balancing the prevailing viewpoint in the wake of the Ferguson shooting—body cameras are a win–win solution for solving problems with policing—with a counterview which casts doubt on whether body cameras are really the best solution to more complex issues).

taken on the issue is body cameras are a reality that will likely, in the near future, become prevalent across the United States.[136] While their use may or may not solve problems arising from law enforcement misconduct, their increased use will inevitably raise concerns over the Fourth Amendment rights of citizens. This is unavoidable if the cameras are to achieve their intended effect—to record the interactions between law enforcement officers and the public.[137] As addressed in this Comment, the likely result will be the same as seen with other forms of video surveillance. This means a court reviewing the Fourth Amendment rights of a private citizen, arising from the use of a police-worn body camera, will be subject to the reasonable expectation of privacy standard.[138] If that standard is applied under the current framework, then there is no Fourth Amendment violation anytime the recording is made while the officer is in a public space.[139]

However, this is not the case if the officer is not in public or if the standard begins is applied differently in the future, as some commenters

136. *See Developments in the Law–Policing, supra* note 1, at 1799–1800 (stating body camera use is gaining quick support following recent incidents of alleged police misconduct and urging "it is worth examining the potential merits of this relatively untested technology before it becomes the 'new normal' in policing"); Wasserman, *supra* note 1, at 832 (addressing the growing support for the use of police-worn body cameras following the shooting in Ferguson, Missouri, and providing a counter perspective to body cameras as a solution to the moral panic created by the shooting); Kate Mather, *LAPD Gets $1 Million for Body Cameras from Department of Justice*, L.A. TIMES (Sept. 21, 2015), http://www.latimes.com/local/lanow/la-me-ln-lapd-body-cameras-20150921-story.html (reporting on the recent grant received by the LAPD to purchase and train officers on the use of body cameras in Los Angeles and stating the LAPD was one of more than two hundred law enforcement agencies to request such funding).

137. *See Developments in the Law–Policing, supra* note 1, at 1803 (establishing the main argument supporters of the increased use of body cameras often cite—the increased accountability and improved relations between law enforcement and members of the communities).

138. *See* United States v. Jones, 132 S. Ct. 945, 951–52 (2012) (clarifying that the reasonable expectation of privacy test is an addition to—not a replacement for—"the common-law trespassory test."); United States v. Karo, 468 U.S. 705, 712 (1984) ("A 'search' occurs 'when an expectation of privacy that society is prepared to consider reasonable is infringed.'"(quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984))); United States v. Taketa, 923 F.2d 665, 670–71 (9th Cir. 1991) ("A valid [F]ourth [A]mendment claim requires a subjective expectation of privacy that is objectively reasonable."); United States v. Wymer, 40 F. Supp. 3d 933, 938 (N.D. Ohio 2014) (explaining a search can occur in two ways: a physical trespass done to gather information; or violation of an individual's reasonable expectation of privacy (citing Katz v. United States, 389 U.S. 347, 367 (1967) (Harlan, J., concurring), and citing United States v. Mathias, 721 F.3d 952, 956 (8th Cir. 2013))).

139. *See* Stephen Rushin, *The Legislative Response to Mass Police Surveillance*, 79 BROOK. L. REV. 1, 4 (2014) (discussing the potential future of advancing police surveillance technology, but admitting "history dictates that any judicial regulation will be limited and likely rely on the often-ineffective exclusionary rule for enforcement. As a result, Congress and state legislators must play a significant role in any future regulation of police surveillance").

are already advocating.[140] There have been several proposed solutions to combat the Fourth Amendment dilemma and protect the privacy of individuals. These solutions revolve around the policies enacted, which dictate how the camera is to be used. For example, the American Civil Liberties Union (ACLU), while advocating the use of body cameras[141] and acknowledging their use may be helpful in providing evidence of police encounters with the public, also made suggestions to limit "the ability of the police to edit footage[,] . . . limit[] the use of recordings, and establish good technological controls."[142] The theory for these controls is to ensure the body cameras remain a tool for monitoring the actions of the police and not a tool for monitoring the public.[143]

How will these proposed solutions protect the Fourth Amendment rights of citizens? For now, it appears the reasonable expectation of privacy standard applies, and there is no violation of an individual's Fourth Amendment rights when these body cameras are used to film them from the officer's views—at least when that officer observes them from a public vantage point.[144] There is no clear answer for when these public recordings may rise to the level of a Fourth Amendment violation, and there will not be a clear answer until the issue of illegal search and seizure is more fully litigated with respect to the use of police-worn cameras and

140. *See* Blitz, *supra* note 53, at 27 (explaining the Supreme Court commented on how video surveillance may cross the line into becoming unconstitutional and setting forth a potential solution for the uncertainty left by the Supreme Court in not doing so); Triano, *supra* note 20, at 409 (proposing the concept of a reasonable expectation of privacy, especially in a public setting, "must be adjusted to reflect the advancement of modern technology").

141. *See* John Sexton, Justin Sommerkamp & Justin Martin, *Ineffable Intuition and Unreasonable Suspicion: Our Rule of Law Failure*, 67 SMU L. REV. 729, 743 (2014) (claiming "[the] idea of using police body cameras could be gaining traction[,]" and using the ACLU's support of body cameras as an example of the increase in favorability).

142. *See id.* (discussing the future of Fourth Amendment jurisprudence and in doing so mentioning the potential use of body cameras, while arguing for a more objective reasonable suspicion standard).

143. *Id.* ("In order to ensure that the [body] cameras do not become a tool for the government to monitor the public, instead of the other way around, the ACLU makes suggestions . . . .").

144. *See* Slobogin, *supra* note 2, at 267–69 (construing Supreme Court case law to reflect the view that what is exposed to the public is not something that can have a reasonable expectation of privacy, and that "police observation from a public vantage point is not a search, even if the area observed is the curtilage, traditionally considered part of the home"); *see also* United States v. Houston, 965 F. Supp. 2d 855, 865 (E.D. Tenn. 2013) (noting there was no violation of the Fourth Amendment when a pole camera was set up in an area that was accessible to the public and law enforcement officials because "it did not provide law enforcement with a vantage point they could not have enjoyed from the ground" even though no warrant was obtained and the camera was directed toward the defendant's property; however, the court held the surveillance violated a reasonable expectation of privacy due to the ten-week duration of the surveillance).

other public vantage point recordings. Only time will tell.