Fordham Law Review

Volume 87 | Issue 4 Article 2

2019

Policing the Admissibility of Body Camera Evidence

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ARTICLES

POLICING THE ADMISSIBILITY OF BODY CAMERA EVIDENCE

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Body cameras are sweeping the nation and becoming, along with the badge and gun, standard issue for police officers. These cameras are intended to ensure accountability for abusive police officers. But, if history is any guide, the videos they produce will more commonly be used to prosecute civilians than to document abuse. Further, knowing that the footage will be available as evidence, police officers have an incentive to narrate body camera videos with descriptive oral statements that support a later prosecution. Captured on an official record that exclusively documents the police officer's perspective, these statements—for example, "he just threw something into the bushes" or "your breath smells of alcohol"—have the potential to be convincing evidence. Their admissibility is complicated, however, by conflicting currents in evidence law.

Oral statements made by police officers during an arrest, chase, or other police-civilian interaction will typically constitute hearsay if offered as substantive evidence at a later proceeding. Yet the statements will readily qualify for admission under a variety of hearsay exceptions, including, most intriguingly, the little-used present sense impression exception. At the same time, a number of evidence doctrines generally prohibit the use of official out-of-court statements against criminal defendants. This Article unpacks the conflicting doctrines to highlight a complex, but elegant, pathway for courts to analyze the admissibility of police statements captured on body cameras. The result is that the most normatively problematic statements should be excluded under current doctrine, while many other statements will be admissible to aid fact finders in assessing disputed events.

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INTRODUCTION

After widespread protests of shootings of civilians by police officers in 2014, a broad consensus arose around the need to outfit police officers with body-worn video cameras.[1] Proposals to push police departments to purchase and use these so-called "body cameras" obtained "overwhelming support from every stakeholder in the controversy—the public, the White House, federal legislators, police officials, police unions, and the American Civil Liberties Union."[2] In New York City, the federal district court that found that city's infamous "Stop and Frisk" program unconstitutional ordered implementation of a body camera program as a remedy.[3] The judge explained that "body-worn cameras are uniquely suited to addressing the constitutional harms" of abusive policing.[4] The New York City Police Department responded with a plan to issue 18,000 body cameras by the end of 2018,[5] and New York's mayor "promised to expand the program to all

1. Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 831–32 (2015).

2. *Id.* at 832–33 (citations omitted); *see also* Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 396 (2016) (describing the use of police body cameras as "a practice hailed of late by scholars, politicians, and activists alike").

3. Floyd v. City of New York, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013).

4. *Id.*; *accord* Leadholm v. City of Commerce City, No. 16-cv-02786-MEH, 2017 WL 1862313, at *3 (D. Colo. May 9, 2017) (noting that the implementation of body cameras may assist victims of police civil rights violations).

5. Gina Cherelus, *New York City Says Accelerating Rollout of Police Body Cameras*, REUTERS (Jan. 30, 2018, 6:38 PM), https://www.reuters.com/article/us-new-york-

patrol officers by 2019."[6] Similar progress outfitting police officers with body cameras can be found across the nation.[7]

The consensus is that body cameras will have a positive impact on policing.[8] Yet, the speed with which proponents embraced and implemented the technology left a number of ancillary issues unresolved.[9] Key among these are the ways in which body camera evidence will be used outside the police-accountability context. While body cameras are generally conceptualized as a check on police power, they also present a rich opportunity for police officers to generate evidence in criminal prosecutions.[10] As body cameras become a routine part of a police officer's equipment, video from those cameras will become virtually ubiquitous at trial.[11] And as knowledgeable consumers of the criminal justice system, police officers may be tempted to shape that evidence as arrests and cases unfold. Early signs of this can already be seen in an episode in Baltimore where police officers were accused of staging drug discoveries for their body cameras.[12] Another way police officers can generate evidence is by narrating their activities and observations to highlight (or fabricate) incriminating events for a future audience. A cagey police officer with some knowledge of the evidence rules may seize the opportunity provided by a body camera to provide a contemporaneous narration of events leading to an arrest as a substitute for an inconvenient court appearance and generally unpleasant cross-examination. And, in fact, there are already reports that "officers have been trained to narrate events when they are being recorded."[13]

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bodycameras/new-york-city-says-accelerating-rollout-of-police-body-cameras-idUSKBN1FJ34X [https://perma.cc/P772-NP2L].

6. Ashley Southall, *Do Body Cameras Help Policing? 1,200 New York Officers Aim to Find Out*, N.Y. TIMES (Apr. 26, 2017), https://www.nytimes.com/2017/04/26/nyregion/do-body-cameras-help-policing-1200-new-york-officers-aim-to-find-out.html [https://perma.cc/6WJW-R86B].

7. *See* Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1565 (2016) (noting that at least thirty-six states have proposed some form of legislation involving "police-worn cameras").

8. *See, e.g.*, *supra* notes 2–4.

9. For a summary of the policy issues implicated by the sudden prominence of body cameras, see Richard E. Myers II, *Police-Generated Digital Video: Five Key Questions, Multiple Audiences, and a Range of Answers*, 96 N.C. L. REV. 1237, 1253–64 (2018).

10. *See, e.g.*, State v. Plevell, 889 N.W.2d 584, 587 (Minn. Ct. App. 2017) ("A compact disc containing body camera videos from the officers who responded to the 911 call and attempted to resuscitate the woman was played for the grand jury.").

11. For early examples, see United States v. Groah, No. C 17-00198 WHA, 2017 WL 6350283, at *1 n.1 (N.D. Cal. Dec. 13, 2017) (excluding a police officer's statements on body camera video on hearsay grounds); Greer v. City of Hayward, 229 F. Supp. 3d 1091, 1094 n.3 (N.D. Cal. 2017) (same); State v. Paoli, No. 44038, 2017 WL 361153, at *3 (Idaho Ct. App. Jan. 25, 2017) (rejecting a challenge to the admissibility of hearsay statements contained in police body camera video admitted as excited utterances in a domestic violence prosecution); People v. Albertson, No. 4-15-0873, 2018 WL 2392858, at *1–2 (Ill. App. Ct. May 24, 2018) (reviewing a similar objection).

12. *See* Evan Simko-Bednarski, *Bodycam Footage Raises Questions in Baltimore Case*, CNN (Aug. 25, 2017, 5:48 PM), https://www.cnn.com/2017/08/25/us/baltimore-police-body-camera-footage/index.html [https://perma.cc/PJ5L-8MNL].

13. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, POLICING BODY CAMERAS 22–23 (2017).

This leads to a thorny question that courts have yet to answer and that scholars have largely ignored: whether police officer statements captured on a body camera ("police body camera statements") are admissible in court.[14] Litigants focused on the events portrayed in body camera video can easily overlook the admissibility of accompanying statements. Yet a statement captured on a body camera that describes some relevant occurrence—for example, "he is reaching for his pocket" or "your breath smells like alcohol"—should draw a hearsay objection because it is an out-of-court statement introduced (presumably) to prove the asserted fact—that is, to prove the truth of the matter asserted.[15] To overcome the objection, the proponent of such statements will need to either identify a nonhearsay purpose or point to an applicable hearsay exception.[16] And since nonhearsay purposes for a police officer's statements about a suspect's incriminating activities are unlikely to materialize (outside of the police-accountability context),[17] the potential applicability of a hearsay exception becomes critical. This is especially true in scenarios where a police officer's statement—for example, "he just tossed a gun"—narrates an occurrence that is not captured on the video and thus constitutes a critical piece of evidence against the accused.

The admissibility of police body camera statements hinges on how courts unpack an unresolved tension in evidence law. Statements made contemporaneously with litigated events are generally admissible through a variety of hearsay exceptions.[18] For example, if a passerby sees a man

14. Apart from the benefits of such cameras, scholars focus on privacy concerns and the logistics of discovery. *See generally* Marc Jonathan Blitz, *Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats*, 9 ADVANCE 43 (2015); Mary D. Fan, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 ALA. L. REV. 395 (2016); Kelly Freund, Note, *When Cameras Are Rolling: Privacy Implications of Body-Mounted Cameras on Police*, 49 COLUM. J.L. & SOC. PROBS. 91 (2015); V. Noah Gimbel, Note, *Body Cameras and Criminal Discovery*, 104 GEO. L.J. 1581 (2016); Richard Lin, Note, *Police Body Worn Cameras and Privacy: Retaining Benefits While Reducing Public Concerns*, 14 DUKE L. & TECH. REV. 346 (2016); Ethan Thomas, Note, *The Privacy Case for Body Cameras: The Need for a Privacy-Centric Approach to Body Camera Policymaking*, 50 COLUM. J.L. & SOC. PROBS. 191 (2017). For further discussion, see also Myers, *supra* note 9, at 1254 ("Confrontation Clause requirements may limit the use of recordings. Hearsay limitations might require special instructions or redaction.").

15. Hearsay is defined as a statement offered "to prove the truth of the matter asserted in the statement." FED. R. EVID. 801(c)(2).

16. *See* 30B CHARLES ALAN WRIGHT & JEFFREY BELLIN, FEDERAL PRACTICE AND PROCEDURE § 6712 (2017).

17. This Article focuses on the use of video footage outside the police-accountability context. In cases against police officers, police statements about suspect activities may be relevant for the nonhearsay purpose of establishing the officer's state of mind. This will rarely be true in cases against civilians. *See id.* § 6720 (explaining the abuse of the nonhearsay purpose of showing the course of investigation); *id.* § 6833 (emphasizing the nonexistent relevance of most statements offered to show a speaker's state of mind). Another viable nonhearsay purpose in both contexts will be criminal defense use of police body camera statements to impeach contrary police officer testimony. When a speaker's own out-of-court statements are used to impeach a speaker, the statements are introduced for a nonhearsay purpose; they are relevant regardless of their truth. *Id.* § 7051.

18. *See infra* Part III.

walking into a bank with a rifle, the passerby's exclamation to a companion—such as, "he's got a gun!"—would be admissible at trial as an excited utterance or present sense impression.[19] Yet, an official narration of a crime or investigation, such as would be found in a police report, typically cannot be introduced against a defendant in a criminal case.[20] Thus, a police officer's report on the same event that contained similar language—for example, "the suspect walked into the bank with a gun"—would just as clearly be inadmissible hearsay. Body cameras present the courts with the dilemma of reconciling these two scenarios. Is "he's got a gun" admissible against a defendant even when the observer is a police officer who includes that narration in an official police record generated by the police officer's body camera?

To answer this question, courts must reconcile a series of inconsistent evidence rules, ambiguous congressional intent, and an overriding constitutional provision. The guidance that results is that police officers' out-of-court statements captured in body camera video can be introduced as substantive evidence against a criminal defendant if the statements qualify for admission under certain hearsay exceptions, such as the present sense impression, excited utterance, or recorded recollection exceptions; and either (1) the statements are "nontestimonial";[21] or (2) the police officer who made the out-of-court statement testifies. Although courts have so far stumbled in this context, this conclusion resolves the tensions described above. Specifically, it reconciles a series of conflicting evidence rules, untangles ambiguous congressional intent, enforces constitutional principles, and facilitates the admission of reliable evidence. Thus, this Article is not another dire warning about the incompatibility of aging evidence rules and new technology. Instead, this is a feel-good tale about how normative concerns about police-generated evidence map relatively well into an existing evidentiary framework. All that is required is for courts, litigants, and scholars to see through the evidentiary thicket to a refreshingly elegant resolution provided by existing evidentiary and constitutional doctrine.

I. BODY CAMERAS IN MODERN POLICING: THE IMPETUS AND THE IMPLICATIONS

"Police body cameras are compact devices that can create both audio and visual records of police officer actions, observations, and interactions with the public."[22] The cameras are small and versatile enough to be worn almost

19. *See* FED. R. EVID. 803(1)–(2).

20. *See id.* r. 803(8); Crawford v. Washington, 541 U.S. 36, 59 (2004) (explaining that the Confrontation Clause requires the opportunity for cross-examination of testimonial hearsay).

21. For purposes of Confrontation Clause analysis, the U.S. Supreme Court has defined "nontestimonial" as a statement "not made with the primary purpose of creating evidence for . . . prosecution." Ohio v. Clark, 135 S. Ct. 2173, 2181 (2015).

22. Dru S. Letourneau, Note, *Police Body Cameras: Implementation with Caution, Forethought, and Policy*, 50 U. RICH. L. REV. 439, 442 (2015); *see also* NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, A PRIMER ON BODY-WORN CAMERAS FOR LAW

anywhere on a police officer's person.[23] Like badges, firearms, or radios, these miniature devices are becoming an essential part of the modern police officer's gear.[24] Notably, the rise of body cameras is not without precedent. Another recording device, the dashboard camera ("dash cam"), provides a rough historical precursor. The history of dash cams in policing and the use of that video in criminal prosecutions can inform the likely treatment of body camera evidence.

Prior to 1980, there were few, if any, dash cams in police patrol cars.[25] Around that time, police departments began installing dash cams to help secure drunk-driving convictions.[26] A second, more powerful, impetus for dash cams came in the 1990s over concerns about racial bias and profiling.[27] At least in limited circumstances, dash cams could promote police accountability.[28] The U.S. Department of Justice (DOJ) Office of Community Oriented Policing Services (COPS), through its In-Car Camera Initiative Program, contributed the first funds for state agencies to acquire dash cams in 2000.[29] That year, only 11 percent of state police vehicles used the technology.[30] By 2003, 72 percent did.[31]

The "body camera revolution"[32] or "body camera bonanza"[33] seems to be following the dash cam trajectory. The Police Executive Research Forum, in conjunction with COPS, conducted a survey in July 2013 that revealed that

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ENFORCEMENT 5 (2012) (describing body cameras as "mobile audio and video capture devices that allow officers to record what they see and hear").

23. Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. 897, 901 (2017) (describing police body cameras as "[s]mall enough to be worn on the head, ear, or chest"); *see also* NAT'L INST. OF JUSTICE, *supra* note 22, at 5 (noting that body cameras "can be attached to various body areas, including the head, by helmet, glasses or other means, or to the body by pocket, badge or other means of attachment").

24. *See, e.g.*, Devin Coldewey, *Cop Watch: Who Benefits When Law Enforcement Gets Body Cams?*, NBC NEWS (Aug. 17, 2013, 11:08 AM), https://www.nbcnews.com/technology/cop-watch-who-benefits-when-law-enforcement-gets-body-cams-6C10911746 [https://perma.cc/Y7U7-M662]; 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 [https://perma.cc/793J-FJHY] (stating that body cameras will become "standard police equipment"); Dave Lucas, *NY AG Announces Program to Provide Funding for Police Body Cameras*, WAMC (July 30, 2018), http://www.wamc.org/post/ny-ag-announces-program-provide-funding-police-body-cameras [http://perma.cc/HQ62-HZN2] ("The devices have become standard issue in many police departments.").

25. INT'L ASS'N OF CHIEFS OF POLICE, THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING 5 (2004).

26. Mothers Against Drunk Driving (MADD) advocated for the use of video cameras to preserve evidence of police officer encounters with drunk drivers to improve the likelihood of convictions. *Id.*

27. *See id.*

28. *See id.*

29. *Id.* at 5–6.

30. *Id.* at 6.

31. *Id.*

32. Fan, *supra* note 23, at 898.

33. Caren Myers Morrison, *Body Camera Obscura: The Semiotics of Police Video*, 54 AM. CRIM. L. REV. 791, 791 (2017).

fewer than 25 percent of responding law enforcement agencies used body cameras.[34] That changed dramatically following the August 2014 shooting of Michael Brown in Ferguson, Missouri. The resulting public outcry, amplified by the rallying cry "Black Lives Matter," marked the starting point of the body camera revolution.[35] In 2014, President Barack Obama proposed a $263 million spending package to increase the use of body cameras, which included a $75 million package to aid local governments with implementation costs.[36] In 2015, the DOJ announced the $20 million Body-Worn Camera Pilot Partnership Program as part of a $75 million investment in law enforcement agencies.[37] Not to be left out, in April 2017, Axon (formerly TASER) offered all interested police agencies free cameras for a year.[38]

These actions are having an impact. A 2015 survey conducted by the Major Cities Chiefs' Association and the Major County Sheriffs' Association indicated that approximately 95 percent of law enforcement agencies surveyed already employed or were committed to employing body cameras in the near future.[39] By 2016, thirty-five of the seventy largest U.S. cities had begun using or had committed to using body cameras.[40] As of November 2017, thirty-four states have enacted laws regarding the use of body cameras.[41]

The critical difference between dash cams and body cameras is the scope of coverage. Dash cams cover only a limited area of view—directly in front of a police car—and typically only come into play in cases that arise out of

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34. POLICE EXEC. RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 2 (2014).

35. *See* Seth W. Stoughton, *Police Body-Worn Cameras*, 96 N.C. L. REV. 1363, 1364 (2018) (noting that the usefulness of body cameras "was popularized in the aftermath of . . . [the] fatal shooting of Michael Brown"); Wasserman, *supra* note 1, at 831–32 ("[O]ne significant policy suggestion has emerged from the [Michael Brown shooting]: equipping police officers with body cameras."); *Herstory*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/herstory [https://perma.cc/PHC8-6RF5] (last visited Feb. 12, 2019) (connecting the start of the Black Lives Matter movement to the shooting of Michael Brown).

36. Associated Press, *Police Need Body Cameras to Build Trust with Public, Obama Says*, NEW ORLEANS TIMES PICAYUNE (Dec. 1, 2014, 1:46 PM), http://www.nola.com/crime/index.ssf/2014/12/obama_police_body_cameras.html [https://perma.cc/Z7ND-KSQ7].

37. Press Release, U.S. Dep't of Justice, Justice Department Announces $20 Million in Funding to Support Body-Worn Camera Pilot Program (May 1, 2015), https://www.justice.gov/opa/pr/justice-department-announces-20-million-funding-support-body-worn-camera-pilot-program [https://perma.cc/N8YG-856S].

38. Josh Sanburn, *The Company That Makes Tasers Is Giving Free Body Cameras to Police*, TIME (Apr. 5, 2017), http://time.com/4726775/axon-taser-free-body-cameras-police [https://perma.cc/E7GE-7YCT].

39. MAJOR CITIES CHIEFS & MAJOR CTY. SHERIFFS, SURVEY OF TECHNOLOGY NEEDS—BODY WORN CAMERAS ii (2015). The survey population consisted of sixty-seven major cities and seventy-six major counties. *Id.* at 1.

40. Stoughton, *supra* note 35, at 1366.

41. Alison Lawrence, *What Does the Latest Research Say About Body-Worn Cameras?*, NAT'L CONF. ST. LEGISLATURES BLOG (Nov. 20, 2017), http://www.ncsl.org/blog/2017/11/20/what-does-the-latest-research-say-about-body-worn-cameras.aspx [https://perma.cc/SRV5-6EWT].

traffic stops. Further, only a subset of police vehicles are equipped with dash cams. This means that dash cams capture only a small percentage of citizen-police encounters. By contrast, body cameras are small and mobile, which allows them to go places dash cams cannot.[42] With saturation of the patrol force, body cameras will capture a substantial percentage of coercive citizen-police interactions.

Body cameras have been touted as the gold standard in ensuring police accountability and building public trust,[43] and they have garnered support at every level.[44] The focus of the effort is to ensure police accountability. At the same time, a prominent role for body camera video in criminal prosecutions outside the police-accountability context is inevitable. As one recent article warns: "Law enforcement has certainly become their main function, as they're used more and more to identify suspects and provide evidence for the prosecution."[45]

Understandably, scholars and the media have focused on the role of body camera video in holding police officers accountable for unlawful shootings and other uses of excessive force. Scholars have also highlighted privacy concerns generated by body camera video that is made publicly available[46] and the discovery obligations that are created when the government monopolizes access to the video.[47] Recognizing that there is no question that video evidence of relevant events will be admitted at trial, scholars interested in evidentiary implications have warned about the potential unreliability of seemingly unimpeachable video.[48] Largely ignored is the question of whether and to what extent the audio tracks that accompany body camera videos, and specifically police body camera statements, are admissible against a defendant in a criminal prosecution. Part II takes up that surprisingly complex question.

II. THE ADMISSIBILITY OF POLICE BODY CAMERA STATEMENTS

Police body camera statements will often constitute powerful evidence. For example, a police officer may state on the video that a person stopped for

42. *See* NAT'L INST. OF JUSTICE, *supra* note 22, at 5 (noting that body cameras "have the capability to record officer interactions that previously could only be captured by in-car or interrogation room camera systems").

43. *See, e.g.*, Fan, *supra* note 23, at 953 (noting that the focus of body cameras is "to rebuild public trust and demonstrate police accountability"); Stoughton, *supra* note 35, at 1366 (noting that body cameras are deemed to serve two ends: "greater police accountability and improvement[] in police-community relations"); Associated Press, *supra* note 36 (noting that the White House stated that body cameras "could help bridge deep mistrust between law enforcement and the public").

44. Wasserman, *supra* note 1, at 832–33.

45. Martin Kaste, *Should the Police Control Their Own Body Camera Footage?*, NPR (May 25, 2017, 5:00 AM), https://www.npr.org/2017/05/25/529905669/should-the-police-control-their-own-body-camera-footage [https://perma.cc/CZH4-YA9K].

46. Mark Tunick, *Regulating Public Access to Body Camera Footage: Response to Iesha S. Nunes, "Hands Up, Don't Shoot,"* 67 FLA. L. REV. F. 143, 146–50 (2016).

47. *See, e.g.*, Simonson, *supra* note 7, at 1567–68, 1574–75.

48. *See, e.g.*, Morrison, *supra* note 33, at 796; Stoughton, *supra* note 35, at 1378; Tunick, *supra* note 46, at 144–46.

drunk driving smells like alcohol or was swerving all over the road; a fleeing drug-crime suspect discarded something in the bushes; an arrestee reached for his pocket; a suspected conspirator signaled to an associate; or an arrestee just waived his *Miranda* rights. The possibilities are as varied as the factual scenarios that populate the criminal courts. In almost all such circumstances, however, these statements constitute hearsay because they are out-of-court statements offered at a later proceeding for the truth of the matter asserted in the statement.[49] Evidence rules generally bar hearsay, even if the statement's author (i.e., the declarant) testifies.[50] The theory behind the prohibition is that important disputes should be resolved through adversarial questioning of live witnesses recounting, in the presence of the fact finder, what occurred. Consequently, evidence rules discourage unsworn, out-of-court statements that can be introduced without "cross-examination, the 'greatest legal engine ever invented for the discovery of truth.'"[51]

The hearsay prohibition, however, is not absolute. A hearsay statement becomes admissible as substantive evidence if it falls within one of the many hearsay exceptions.[52] Statements captured on body camera videos, like those described above, will potentially be eligible for admission under a number of exceptions. Primarily, police body camera statements could be admitted under the recorded recollection,[53] excited utterance,[54] or present sense impression[55] exceptions.

A. Recorded Recollections

Recorded recollections are the most straightforward example of how police officer statements captured in body camera video may be admissible. The recorded recollection[56] hearsay exception permits out-of-court statements to be introduced as substantive evidence on the theory that a witness's recollection of events at an earlier time will be more reliable than the same witness's later testimony from a fading memory.[57] The exception, however, is narrow. It allows the introduction of "[a] record that: (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and (C) accurately reflects the witness's knowledge."[58] Importantly, the recorded recollection exception requires the declarant who made the recorded out-of-court statement to

49. *See* FED. R. EVID. 801(c)(2).
50. *Id.* r. 802.
51. California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940)).
52. *See* FED. R. EVID. 802.
53. *Id.* r. 803(5).
54. *Id.* r. 803(2).
55. *Id.* r. 803(1).
56. *See id.* r. 803(5).
57. *Id.* r. 803(5) advisory committee's notes on proposed rules (Exception (5)) ("The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them.").
58. *Id.* r. 803(5).

testify.[59] In the present context, this means that if a police officer testifies to memory failure regarding a detail that the police officer earlier referenced on video, the exception permits the introduction of the police officer's out-of-court body camera statement. For example, if a police officer relayed the reason he stopped a motorist (e.g., "you were swerving all over the road") on a video, but could not recall the reason for the stop at a later hearing, the prosecution could introduce the police officer's out-of-court statement as a recorded recollection. The exception's application is both clear and narrow: the recorded recollection exception only applies if the officer-declarant testifies,[60] vouches for the accuracy of the out-of-court statement during that testimony[61] (e.g., "I always inform suspects accurately about why I stopped them"), and testifies to a present memory failing.[62] In addition, the exception typically does not allow the statement itself to be introduced into evidence but only read into the record.[63] This caveat is intended to prevent the jury from giving recorded recollections greater weight than other testimony.[64] The requirement is easily accommodated for oral or written statements, which can be read to the jury but not physically provided to them. For videos, this requirement becomes somewhat unwieldy. The most faithful application would be playing the police body camera statement during the witness's testimony but not permitting the recording to be admitted into evidence as an exhibit.[65]

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59. *Id.* r. 803(5) advisory committee's notes on proposed rules (Exception (5)); 30B WRIGHT & BELLIN, *supra* note 16, § 6853.

60. FED. R. EVID. 803(5) advisory committee's notes on proposed rules (Exception (5)) (recognizing that because the declarant must testify for the exception to apply, "the unavailability requirement of the exception is of a limited and peculiar nature"); *see* United States v. Porter, 986 F.2d 1014, 1017 (6th Cir. 1993) ("While Rule 803(5) treats recorded recollection as an exception to the hearsay rule, the hearsay is not of a particularly unreliable genre. This is because the out-of-court declarant is actually on the witness stand and subject to evaluation by the finder of fact.").

61. *See* United States v. Mornan, 413 F.3d 372, 378 (3d Cir. 2005) (rejecting the admission of evidence under Rule 803(5) where the witness "could not attest to the accuracy of her statement during her current testimony"); Johnson v. State, 967 S.W.2d 410, 416 (Tex. Crim. App. 1998) ("[T]he witness may testify that she presently remembers recording the fact correctly or remembers recognizing the writing as accurate when she read it at an earlier time. But if her present memory is less effective, it is sufficient if the witness testifies that she knows the memorandum is correct because of a habit or practice to record matters accurately or to check them for accuracy. At the extreme, it is even sufficient if the individual testifies to recognizing her signature on the statement and believes the statement is correct because she would not have signed it if she had not believed it true at the time. However, the witness must acknowledge at trial the accuracy of the statement." (citations omitted)).

62. FED. R. EVID. 803(5)(A).

63. *Id.* r. 803(5) ("If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party."); *see also* 30B WRIGHT & BELLIN, *supra* note 16, § 6857.

64. 30B WRIGHT & BELLIN, *supra* note 16, § 6857.

65. This would mean that if the jury will actually receive the video as an exhibit for other purposes, such as to visually illustrate the incident, statements admitted only as recorded recollections would need to be redacted. *See id.* ("In such circumstances, the [requirement] should be taken to mean that the pertinent portions of the video or audio recording can be played for the jury during trial, but not taken back to the jury room. If the jury, thereafter requests to view the video or hear the audio, a court could rely on Rule 803(5) to refer the

B. Excited Utterances

Excited utterances provide another straightforward example of a mechanism for introducing police body camera statements at trial. The Federal Rules of Evidence (FRE), like their state analogues, define excited utterances as "statement[s] relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."[66] The exception "rests on the theory that the agitated mind is much less likely to engage in conscious fabrication than the reflective mind."[67] Or, as the Advisory Committee explains: "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."[68] As one of the authors of this Article has explained:

> The key identifying feature of excited utterances is the emotional mindset of the declarant. To qualify for admission under Federal Rule of Evidence 803(2), an out-of-court statement must be uttered "while the declarant was under the stress of excitement" generated by the described event or condition. This typically entails a foundational inquiry into the speaker's tone of voice and demeanor. Other factors include, "timing, age of the declarant, characteristics of the event, and the subject matter of the statements." These factors are designed to get at the critical underlying question of whether and to what degree the event spoken of by the declarant was, at that time, generating an emotional response.[69]

Given the nature of police-citizen interactions, statements of civilians captured on body camera videos will frequently qualify as excited utterances. An important limitation arises, however, with respect to statements by police officers. The excited utterance exception hinges on an assessment of the out-of-court speaker's excitement level.[70] This means that statements of trained, experienced police officers will be less likely to qualify for admission under the excited utterance exception than analogous statements made by civilians. For statements by police officers, only the most stressful events (e.g., an officer-involved shooting or grisly traffic accident) will likely generate a sufficient emotional reaction or, more precisely, foundational evidence of such a reaction to trigger the exception. Statements by police officers

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jurors to the court reporter's transcript (assuming it records the pertinent statements). This would ensure that, consistent with the intent of the rule, the recorded recollection is not prioritized in the jurors' minds over the live testimony of the same or other witnesses.").

66. FED. R. EVID. 803(2); *see also, e.g.*, ILL. R. EVID. 803(2); TEX. R. EVID. 803(2).

67. United States v. Ledford, 443 F.3d 702, 711 (10th Cir. 2005).

68. FED. R. EVID. 803(1) advisory committee's notes on proposed rules (Exceptions (1) and (2)).

69. 30B WRIGHT & BELLIN, *supra* note 16, § 6818 (footnote omitted) (first quoting FED. R. EVID. 803(2); then quoting Guam v. Cepeda, 69 F.3d 369, 372 (9th Cir. 1995)).

70. *Id.* (explaining that judicial analysis of admissibility depends on the "critical underlying question of whether and to what degree the event spoken of by the declarant was, at that time, generating an emotional response").

regarding routine police activities, like traffic stops or arrests, will rarely qualify for admission under the excited utterance exception.[71]

C. Present Sense Impressions

Given the narrowness of the recorded recollection and excited utterance hearsay exceptions in this context, the most feasible exception supporting admission of police officer statements captured in body camera video is the present sense impression exception. As explained below, the present sense impression exception, while nearly a century old, is tailor-made for the introduction of contemporaneous narration captured on body camera video. Its application, however, is also the most legally complex and normatively problematic. Thus, treatment of this exception's application to police body camera statements requires more extensive analysis.[72]

The modern present sense impression exception is illustrated by Rule 803(1). That rule, and analogous variations in most states, creates a hearsay exception for "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived [the event or condition]."[73] Qualifying statements are admissible even if the declarant does not testify, and they do not require any showing of the speaker's unavailability.[74]

Despite its broad sweep, the present sense impression exception has generated little controversy over the years. This is because it has been rarely used.[75] The primary reasons for the lack of use are practical limitations, not legal obstacles.

Before any litigant offers a present sense impression, such a statement must be "(1) uttered, (2) preserved, and (3) tactically significant to a litigated dispute."[76] These factors are not easy to satisfy.[77] One of the authors of this

71. *See* United States v. Hemsher, 893 F.3d 525, 533 (8th Cir. 2018) ("The execution of a search warrant in the normal course of employment by trained officers does not constitute a startling event."); *cf.* United States v. Campbell, 782 F. Supp. 1258, 1262 (N.D. Ill. 1991) ("Even for a police officer who presumably is trained to react in such potentially dangerous situations, involvement in a chase with an armed suspect would be an exciting and startling event."); United States v. Obayagbona, 627 F. Supp. 329, 339 (E.D.N.Y. 1985) ("The fact that the excited witness was a law enforcement agent does not preclude admissibility under the excited utterance exception.").

72. One of the authors of this Article has written extensively about the present sense impression exception, and the discussion that follows about the exception's origins is largely drawn from that work. *See* Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 367–50 (2012).

73. FED. R. EVID. 803(1).

74. *See, e.g.*, State v. Wright, 370 P.3d 1122, 1126 (Ariz. Ct. App. 2016) (rejecting an objection to police body camera statements narrating a drug deal in progress that were offered as present sense impressions).

75. *See* FED. R. EVID. 803(1) advisory committee's notes on proposed rules (Exceptions (1) and (2)) ("Since unexciting events are less likely to evoke comment, decisions involving Exception (1) are far less numerous.").

76. *See* Bellin, *supra* note 72, at 347 (alteration in original) (quoting FED. R. EVID. 803(2)).

77. *See id.*

Article has explained this in a general context by contrasting the present sense impression and excited utterance exceptions to illuminate the point:

> The excited utterance exception applies if a speaker makes a statement relating to a "startling" event while "under the stress of [the resulting] excitement." As a practical matter, startling events and excited utterances frequently coexist. If a witness (a bystander, participant, or victim) is present, a startling event will invariably trigger excited statements intended for a broad audience: "Stop, thief!"; "An assassin shot the Vice President!" Due to their association with an often significant event, excited utterances are also likely to be preserved in the memories of others or documented (for example, by police responding to a crime scene).[78]

Present sense impressions possess none of these advantages. Contemporaneous observations are less likely to be uttered about nonexciting events, and when they are, they are less likely to be remembered or preserved.[79] Thanks to social media and text messaging, this is changing. Social media posts and text messages often recount unexciting events (unfortunately for us all!) and do so in a manner that leaves consumers of the posts with little ability to corroborate the initial observation.[80] But social media and text messaging are relatively recent phenomena. As a result, until recent years, present sense impressions played little role in litigation due to the practical limitations described above.

Police body cameras demolish these practical limitations. Body camera video is, by its very nature, designed to be preserved. Thus, any statements made by police officers during a police-citizen encounter will be available for later use at trial. More importantly, police officers, aware of this fact, may be incentivized to narrate incriminating, even if mundane, events for a future audience. This means that the present sense impression exception provides a ready vehicle for the creation and introduction of police body camera statements at trial.

Police body camera statements fit neatly within the present sense impression exception's text. A police officer's running narration of an encounter, including comments like "the suspect is reaching for his waistband" or "the suspect threw a gun as he began to run away," at least on their face, "describ[e] or explain[] an event or condition, made while or immediately after the declarant perceived [the event or condition]."[81]

While certainly not contemplated by the drafters of the present sense impression exception, police body camera statements also fit within the exception's rationale. The present sense impression exception rests on an assumption "that contemporaneity ensures reliability."[82] Statements that qualify under the exception are assumed to be both accurate and sincere. The statements are accurate because the closeness in time between the perceived

78. *Id.* at 347–48.
79. *See id.* at 348–49.
80. *See id.* at 347.
81. FED. R. EVID. 803(1).
82. United States v. Green, 556 F.3d 151, 157 (3d Cir. 2009).

event and the declarant's verbal description eliminate dangers of faulty memory.[83] The statements are thought to be sincere because the absence of time for reflection "negative[s] the likelihood of deliberate or conscious misrepresentation."[84]

Police body camera statements also bring the added reliability benefit of corroboration, something touted by the earliest proponents of the present sense impression exception.[85] Commentary urging the American courts to adopt a hearsay exception for present sense impressions dates back to the nineteenth century.[86] An 1881 article by James Bradley Thayer, the "granddaddy of the modern present sense impression,"[87] explained that a present sense impression relates "what was then present or but just gone by, and so was open, either immediately or in the indications of it, to the observation of the witness who testifies to the declaration, and who can be cross-examined as to these indications."[88] Prominent scholars echoed these views, opining that because "the person who heard the declaration [would surely be] on hand to be cross-examined," the present sense impression exception constituted "an ideal exception to the hearsay rule."[89]

The drafters of the Federal Rules of Evidence cite these scholars in the Advisory Committee Notes ("Notes") that accompanied the adoption of the present sense impression exception and explicitly endorsed their rationales.[90] The Rule requires that a qualifying statement be made contemporaneously with the event described and assumes (like Thayer, Morgan, and the other commentators) that some measure of corroboration would typically follow from that requirement.[91] The Notes make this assumption explicit by highlighting the (presumed) inevitability of corroboration: "Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement."[92] This critical assumption that present sense

83. 30B WRIGHT & BELLIN, *supra* note 16, § 6812.

84. FED. R. EVID. 803(1) advisory committee's notes on proposed rules (Exceptions (1) and (2)).

85. For a related example of the added benefits provided by videos, see State v. Plevell, 889 N.W.2d 584, 589 (Minn. Ct. App. 2017) (relying on body camera video to determine that "the boyfriend does not appear to be under stress caused by the event" and that therefore his statements did not qualify for admission as excited utterances).

86. *See* Bellin, *supra* note 72, at 341.

87. Aviva Orenstein, *Sex, Threats, and Absent Victims: The Lessons of* Regina v. Bedingfield *for Modern Confrontation and Domestic Violence Cases*, 79 FORDHAM L. REV. 115, 133 (2010).

88. James B. Thayer, *Bedingfield's Case—Declarations as a Part of the Res Gesta*, 15 AM. L. REV. 71, 107 (1881); *see also* Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 236 (1922) (expressing the same sentiment).

89. Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 439 (1928).

90. *See* FED. R. EVID. 803(1) advisory committee's notes on proposed rules (Exceptions (1) and (2)).

91. *See* Bellin, *supra* note 72, at 348–49.

92. FED. R. EVID. 803(1) advisory committee's notes on proposed rules (Exceptions (1) and (2)).

impressions will be accompanied by some measure of corroboration holds for statements captured in body camera video.

Unlike modern present sense impressions found in text messages and social media posts, statements captured in body camera video bring some of the same corroboration guarantees that were originally thought to undergird the present sense impression exception. Police body camera statements can be admitted with the police officer's testimony—thus allowing "the declarant [to] be examined on the statement."[93] And more importantly, even if the police officer does not testify, the statements will be introduced through the video itself, which can "be examined as to the circumstances as an aid in evaluating the statement."[94] Thus, even if the officer-declarant does not testify, the fact finder will typically see a version of what the speaker observed (and could plausibly observe) when the statement was made. This will impart information about the police officer's ability to observe the described event, and the precise things described. To the extent the described event is not observable on the video, that fact will be ammunition for the evidence's opponent. In sum, the present sense impression exception will serve as a ready vehicle to admit statements narrated contemporaneously with body camera video. As a result, police body camera statements have powerful evidentiary implications both for and against criminal defendants. But this is not the end of the story. Part III explores the significant obstacles to admission of police body camera statements—even if those statements fit within a hearsay exception.

III. OBSTACLES TO THE ADMISSIBILITY OF POLICE BODY CAMERA STATEMENTS

This Article has thus far illustrated the ready pathway to admissibility for police body camera statements. The examples provided, however, raise normative concerns that counsel caution when admitting police body camera statements against a criminal defendant. Of course, if those concerns do not map onto the evidence rules, they can serve only as arguments to policymakers to change the rules. However, to the degree these concerns are captured in evidence rules and doctrine they can be given force to exclude problematic police body camera statements. This Part provides a brief summary of the normative concerns and then analyzes the evidentiary rules that give force to those concerns.

A. Concerns with Using Police Body Camera Statements in Trials

Consistent with the public clamor for rapid deployment of body cameras summarized in Part I, body camera video presents several benefits. For instance, body cameras capture and preserve evidence for trial that would otherwise be unavailable or left to the well-documented vagaries of human

93. *Id.*
94. *Id.*

recollection and live testimony.[95] Further, body camera video evidence is considered "accurate and objective."[96] But the danger that juries will be overly swayed by information and statements captured in body camera videos raises serious normative concerns. This is particularly important because the video produced by police body cameras will more commonly be used to prosecute citizens than to document their abuse at the hands of police.[97]

As Howard Wasserman notes, body cameras are described as a "panacea; they are spoken of as the singularly effective solution" to police abuses because "[v]ideo tells us exactly what happened, [and] entirely eliminates the . . . ambiguity that often characterizes police-citizen encounters."[98] However, video is not as accurate as its proponents believe. For one, the final product depicted in the video is different than what actually occurred.[99] Additionally, video is susceptible to subtle manipulation at the time of its creation.[100] These shortcomings are especially concerning in the context of police body cameras because the body cameras do not directly capture the police officer's actions and, instead, are suspect-focused.[101] This is important given a cognitive limitation known as "camera perspective bias," which results in something known as "illusory causation," or the tendency to overattribute cause based on camera focus.[102] And because the body cameras provide viewers with only the police officer's perspective, viewers of the video may subconsciously adopt not just the police officer's perspective but the commentary of the police officer as well.

Seth Stoughton highlights two cognitive biases that are relevant here: motivated reasoning and identity-confirmation bias.[103] These can lead

95. *See* Stoughton, *supra* note 35, at 1378 (quoting Floyd v. City of New York, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013)).

96. *Id.* at 1393.

97. Letourneau, *supra* note 22, at 461 (noting that unintended consequences arising from the assumed admissibility of body camera video evidence "could result in the degradation of a defendant's right to a fair trial by redefining the entire criminal trial process").

98. Wasserman, *supra* note 1, at 833; *see also* Morrison, *supra* note 33, at 792–94 (noting that the assumption that video depicts "objective truth" means, in part, that "we lack the ingrained, institutionalized skepticism we bring to text"); Jessica Silbey, *Cross-Examining Film*, 8 U. MD. L.J. RACE RELIGION GENDER & CLASS 17, 18 (2008) ("It is typical for courts and advocates to naïvely treat filmic evidence as . . . a presentation of unambiguous reality."); Tunick, *supra* note 46, at 144–45 (noting that supporters assume that body cameras are reliable and provide an objectively true account of reality or a "neutral third eye").

99. *See, e.g.*, Silbey, *supra* note 98, at 18 ("[F]ilm is a constructed medium. The camera always presents a certain point of view and a frame that includes some images and excludes others." (footnote omitted)); Stoughton, *supra* note 35, at 1405 (noting that body cameras "will record less, more, and differently than a human would see, all at the same time" through a process known as video compression).

100. *See* Tunick, *supra* note 46, at 145 (noting that the person who controls "where the camera points can manipulate their audience in subtle ways").

101. Stoughton, *supra* note 35, at 1409–10.

102. *Id.* at 1409.

103. *See id.* at 1406. Motivated reasoning is "defined as 'the tendency of people to conform [their] assessments of information to some goal or end [other than] accuracy.'" *Id.* (alterations in original) (quoting Dan M. Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection*, 8 JUDGMENT & DECISION MAKING 407, 408 (2013)).

viewers of the body camera video to interpret evidence in a way that conforms to their expectations.[104] The incomplete and acontextual nature of video evidence facilitates this gap-filling[105] because visual gaps can be readily filled with oral cues. Consequently, the fact that body camera video evidence is elevated among other forms of evidence as more neutral and objective becomes especially problematic.[106] This could lead juries to defer to the impression created by body camera video and any police officer statements it contains.[107]

Once police officers know that body camera video evidence can either hurt or help them, there may be an incentive to capitalize on their initial, unilateral control of the video to generate favorable evidence (or suppress unfavorable evidence). Police officers involved in shooting Stephon Clark muted their body camera audio shortly after the shooting, which drew suspicion to their actions.[108] Similarly, in the 2016 shooting of Alton Sterling, both police officers' body cameras were "dislodged."[109] Recently, allegations surfaced that Baltimore police officers reenacted the discovery of drug evidence for body cameras.[110] More broadly, researchers at the American Civil Liberties Union found that as many as 70 percent of police officers violate body camera policies.[111] None of this means that body camera video, or statements captured in that video, must be excluded from litigation. It does suggest, however, that police body camera statements can be manipulated to create a one-sided and potentially misleading account—an account that can be uniquely persuasive. This danger becomes particularly significant if police body camera statements are introduced at trial without the live testimony of the officer-declarant. Such statements will be admitted with a veneer of reliability despite never having been subjected to an oath or "the crucible of cross-examination."[112]

All of these dangers are familiar ones to the evidence rules. In particular, the rules governing hearsay are designed to restrict the admission of out-of-court statements to only those statements that are sufficiently reliable to be

104. *See id.*

105. Morrison, *supra* note 33, at 801.

106. *See* Stoughton, *supra* note 35, at 1408, 1413 (noting that whether or not video evidence is superior to other forms of evidence is debatable, but the danger is that people view it as such despite its flaws).

107. *See* Tunick, *supra* note 46, at 145 ("The assumption that the camera is objective and captures the most reliable evidence is likely to lead a jury or judge to have nearly absolute faith in the credibility of video evidence and be reluctant to challenge it.").

108. Alex Horton, *After Stephon Clark's Death, New Videos Show Police Muted Body Cameras at Least 16 Times*, WASH. POST (Apr. 17, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/04/17/after-stephon-clarks-death-new-videos-show-more-muted-police-body-cameras-delays-to-render-aid [https://perma.cc/Q4P4-URKB].

109. *ACLU Questions Lack of Police Body Cams in Alton Sterling Shooting*, CBS NEWS (July 6, 2016, 7:30 PM), https://www.cbsnews.com/news/alton-sterling-baton-rouge-police-shooting-aclu-questions-lack-of-body-cameras [https://perma.cc/4NVV-W2XR].

110. *See* Simko-Bednarski, *supra* note 12.

111. Laurent Sacharoff & Sarah Lustbader, *Who Should Own Police Body Camera Videos?*, 95 WASH. U. L. REV. 269, 290 (2017).

112. Crawford v. Washington, 541 U.S. 36, 61 (2004).

presented to the trier of fact. As the next sections discuss, for the most part, courts have the tools they need in this context. They need only navigate those rules correctly, a challenge that is admittedly complicated by the overgrown thicket of evidence doctrine implicated by police body cameras.

B. The Calculated Narration "Requirement"

The analysis of the obstacles to admission of police body camera statements begins with a court-created doctrine that will undoubtedly be applied in this context, even though it should be discarded completely. The Seventh Circuit, and to a lesser degree other courts, read an additional requirement into the present sense impression exception that has the potential to exclude virtually all police body camera statements whether offered by the prosecution or defense.[113] These courts require that a qualifying present sense impression be made without "calculated narration."[114] As explained below, however, calculated narration is an illegitimate ground of exclusion. Subsequent sections explain that other sources of evidence law, particularly the law enforcement exception to the public records hearsay exception and the Confrontation Clause, track similar considerations, which renders calculated narration redundant as well.[115]

The Texas Court of Appeals applied the "calculated narration" concept in *Fischer v. State*[116] to exclude police officer statements captured on a dash cam video. In *Fischer*, the court considered the admission of a police officer's running narration of a drunk-driving arrest, which was recorded by a dash cam mounted in the police officer's patrol car.[117] The court suspected that the police officer had consciously created statements for use in a later prosecution and concluded that this disqualified the resulting statements from admission as present sense impressions.[118] Because the police officer's statements fit neatly into the text of the present sense impression exception, the court had to invoke the exception's spirit (not its text) to support exclusion.[119] On appeal, the Texas Court of Criminal Appeals affirmed the intermediate court's decision.[120] The Court of Criminal Appeals held that

113. This discussion criticizing the calculated narration exception to the present sense impression hearsay exception in the body camera context tracks one of this Article's authors' analysis criticizing the exception generally. *See* 30B WRIGHT & BELLIN, *supra* note 16, § 6815.

114. *Id.*

115. *See infra* Parts III.C–D.

116. 207 S.W.3d 846 (Tex. App. 2006), *aff'd*, 252 S.W.3d 375 (Tex. Crim. App. 2008).

117. *Id.* at 848–49.

118. "It therefore appears that Martinez recorded his comments not as an objective observer, but as a law enforcement officer, as a lay witness, and as an expert witness cataloging evidence and opinions for use in Fischer's prosecution." *Id.* at 859.

119. *Id.* at 855–56 (applying the rationale underlying present sense impressions to recordings of police officer's observations on dash cam recordings).

120. Fischer v. State, 252 S.W.3d 375, 376 (Tex. Crim. App. 2008), *aff'g* 207 S.W.3d 846 (Tex. App. 2006).

the statements were "calculated statements"—a veritable "speaking offense report"—inadmissible under the hearsay rules.[121]

Predictably, other courts disagree. In *State v. Blubaugh*,[122] the Utah Court of Appeals held that police officer statements captured on a video of the defendant's home were admissible under the present sense impression exception because the police officer's narrative was contemporaneous with his perceptions.[123] Similarly, in *United States v. Rideout*,[124] the Fourth Circuit found narrations by a police officer on hours of video recorded for investigative purposes admissible under the present sense impression exception.[125] Neither case viewed the calculated nature of the statements as disqualifying.

The Seventh Circuit in *United States v. Woods*[126] applied the calculated narration gloss in a closely related context to separate out the portions of a confidential informant's narration of events on a recorded audio transmission which were admissible under the present sense impression exception.[127] The court explained that:

> Parts of Davis' narratives are simple descriptions of events as they occurred, which meet the requirements of the rule. However, some of the narrative statements are clearly addressed to the FBI agents listening in via the microphone. These statements were made for the benefit of the agents—*i.e.*, were calculated and provided for a reason—and are not admissible under the present sense impression exception.[128]

This analysis tracks *Fischer* in the sense that the court is attempting to distinguish between presumably reflexive statements that are admissible under the present sense impression exception and calculated statements made *for a reason* that are not admissible.

There are two problems with relying on the calculated narration concept to screen police body camera statements for admissibility.[129] First, the concept is without support in the evidence rules. The absence of "calculated narration" is not a requirement of the present sense impression exception, an interpretation of any language in that rule, or an attempt to implement the intent of its drafters. It is a judicial supplement to an otherwise clear rule. The Seventh Circuit candidly acknowledges this, stating: "In determining

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121. *Id.* at 376, 381; *see also* Eggert v. State, 395 S.W.3d 240, 243 (Tex. App. 2012) (describing the police officer's "calculated narrative" as a "speaking offense report").

122. 904 P.2d 688 (Utah Ct. App. 1995).

123. *Id.* at 700 (ruling that the police officer's narrative on a recorded videotape of the defendant's home "was made while perceiving defendant's home" and so "was admissible hearsay" under the present sense impression exception).

124. 80 F. App'x 836 (4th Cir. 2003), *vacated on other grounds*, 543 U.S. 1116 (2005).

125. *Id.* at 843 (rejecting the challenge to a police officer's contemporaneous narration of a videotape admitted as a present sense impression).

126. 301 F.3d 556 (7th Cir. 2002).

127. *Id.* at 559.

128. *Id.* at 562 (citation omitted).

129. One of the authors of this Article recently criticized "calculated narration" doctrine in a treatise volume. *See* 30B WRIGHT & BELLIN, *supra* note 16, § 6815. Some of the following discussion is drawn from that criticism.

whether a statement meets the conditions of Rule 803[(1)], we have sought to determine, in addition to the predicates listed in the rule, if the statement was made without 'calculated narration.'"[130] This candor is refreshing, but hints at the doctrine's fatal illegitimacy.

Concededly, the roots of the calculated narration requirement can be found in the present sense impression exception's common-law heritage. In *Houston Oxygen Co. v. Davis*,[131] cited in the Notes accompanying Rule 803(1),[132] a Texas court noted that the hearsay statement under consideration was reliable because it was "sufficiently spontaneous to save it from the suspicion of being manufactured evidence," and thus "[t]here was no time for a calculated statement."[133] But to the extent the Advisory Committee incorporated this amorphous sentiment into the present sense impression exception, it did so by including a strict timing requirement. The Committee explained that "substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation."[134] Full stop. As for *Houston Oxygen*, the Committee spent a grand total of two words on the case and never suggested it had incorporated all of its asides into the rule.[135] There is no suggestion in the text of the present sense impression exception or the Notes accompanying it that courts should, in addition to requiring contemporaneity, weigh the degree of the speaker's calculation. You need not be Justice Antonin Scalia to recognize that a string-type citation to a case in Notes does not provide courts with the authority to elevate every comment in the cited case to a position on par with the text of an evidence rule—particularly if the Committee was undoubtedly aware of the pertinent language and chose not to include or even comment on it.[136]

There is little more to say about the practice of adding requirements to a carefully codified hearsay exception. Federal courts, and most state courts, simply lack the authority to reconfigure their evidence rules.[137] The U.S. Supreme Court has made the point explicitly:

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130. *Woods*, 301 F.3d at 562 (quoting United States v. Ruiz, 249 F.3d 643, 646–47 (7th Cir. 2001)).

131. 161 S.W.2d 474 (Tex. 1942).

132. FED. R. EVID. 803(1)–(2) advisory committee's notes on proposed rules (Exceptions (1) and (2)).

133. *Houston Oxygen Co.*, 161 S.W.2d at 476.

134. FED. R. EVID. 803(1)–(2) advisory committee's notes on proposed rules (Exceptions (1) and (2)).

135. *Id.* ("Since unexciting events are less likely to evoke comment, decisions involving Exception (1) are far less numerous. Illustrative are Tampa Elec. Co. v. Getrost, 151 Fla. 558, 10 So.2d 83 (1942); Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942); and cases cited in McCormick § 273, p. 585, n. 4."). For those keeping score, the "two words" are: "Illustrative are." *Id.*

136. For a sense of Justice Scalia's views about reliance on even clear guidance in the Advisory Committee Notes to override or supplement the text of the Federal Rules of Evidence themselves, see Tome v. United States, 513 U.S. 150, 167–68 (1995) (Scalia, J., concurring in part and concurring in the judgment).

137. *See, e.g.*, United States v. DiMaria, 727 F.2d 265, 272 (2d Cir. 1984) (noting that the "scheme of the Rules" is "preferable to requiring preliminary determinations of the judge," which could result in "delay, prejudgment and encroachment on the province of the jury").

> When Congress enacted the prohibition against admission of hearsay in Rule 802, it placed 24 exceptions in Rule 803 and 5 additional exceptions in Rule 804. Congress thus presumably made a careful judgment as to what hearsay may come into evidence and what may not. To respect its determination, we must enforce the words that it enacted.[138]

This follows from the general principle that rules of evidence enacted through a legislative process must be respected in the same manner as statutes.[139] Courts do not boldly announce that they have improved statutes by adding a requirement not found in the text. Evidence rules are no different. Supplementing the textual requirements of discrete hearsay rules with vague, ill-defined requirements is particularly noxious as it defeats the very purpose of codified evidence rules.

This leads to the second problem with applying the calculated narration caveat to screen police body camera statements: the requirement is incoherent. This is illustrated by how the Seventh Circuit in *Woods* seemed to draw a line between the informant's musings to himself (admissible) and those communicated to police officers (inadmissible) because the latter were calculated and the former (apparently) just oozed out.[140] This would counterintuitively suggest, contrary to *Fischer*, that a police officer's monologue on a body camera video would be admissible. Of course, many courts would disagree—and there would be no way to declare a winner. This is because there is only an illusory line between calculated and uncalculated statements or, in the *Woods* court's words, between statements made with or without "a reason."

The present sense impression exception itself is specifically designed for statements that are not emotionally driven and instead represent calm narrations of observed events.[141] In each instance, the speaker must observe something, decide whether or not to describe the event, and then choose the words that best communicate the intended sentiment. Calculation is inevitable and happens in the blink of an eye.[142] After all, "[e]verything a person says is calculated to some degree."[143] Any distinction between calculated and spontaneous narration, then, is merely one of degree. This reveals the calculated narration requirement's "fatal flaw": "the difficulty of actually distinguishing 'calculated narration' from spontaneous description in proffered hearsay statements."[144] The courts actually recognize this problem, noting, for example, that "[o]ne can still make statements without calculated narration even if made in responses to questions."[145] But that concession gives away the game because "a response to a question is clearly

138. United States v. Salerno, 505 U.S. 317, 322 (1992).
139. *See, e.g.*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587 (1993) ("We interpret the legislatively enacted Federal Rules of Evidence as we would any statute.").
140. *See* United States v. Woods, 301 F.3d 556, 562 (7th Cir. 2002).
141. *See supra* notes 76–79 and accompanying text.
142. *See* 30B WRIGHT & BELLIN, *supra* note 16, § 6815.
143. *Id*.
144. *Id.*
145. United States v. Boyce, 742 F.3d 792, 797 (7th Cir. 2014).

calculated in the sense that the respondent must hear and understand the question, and then formulate a preferred response."[146] This means that the doctrine rests on an illusory distinction between statements made with and without calculation. This freedom allows courts "to reject otherwise qualifying hearsay statements based, consciously or unconsciously, on other considerations, including improper ones, such as their views of the relative merits of the parties' underlying positions."[147] The doctrine contains an unmistakable hint of the courts "assessing the credibility of the out-of-court declarant, an enterprise better suited to the jury"[148]—something the Committee condemns in another context as "altogether atypical."[149]

In light of the imprecise and atextual nature of the calculated narration requirement, courts should not rely on this judicially manufactured concept to exclude police body camera statements offered under the present sense impression exception. Importantly, many of the concerns that motivate the calculated narration requirement can be legitimately operationalized through other evidentiary rules and the Confrontation Clause, as discussed in the next sections.

C. The Law Enforcement Exception

Courts seeking to capture the normative concerns regarding the reliability and fairness of the introduction of police body camera statements can find more solid ground in the so-called "law enforcement exception" to the public records hearsay exception. The typical public records exception, illustrated by Rule 803(8), excepts from the hearsay prohibition records or statements of a public officer that set out matters observed while "under a legal duty to report,"[150] provided that the opponent of the evidence does not show that "the source of information [or] other circumstances indicate a lack of trustworthiness."[151] Critically, however, Congress amended the rule before it became effective to include a caveat that precludes the admission "in a criminal case [of] a matter observed by law-enforcement personnel."[152] This law enforcement exception, in concert with the Confrontation Clause, is the

146. 30B WRIGHT & BELLIN, *supra* note 16, § 6815.
147. *Id.*
148. *Id.*
149. FED. R. EVID. advisory committee's notes on proposed rules (Introductory Note: The Hearsay Problem) ("For a judge to exclude evidence because he does not believe it has been described as 'altogether atypical, extraordinary.'" (quoting James H. Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 HARV. L. REV. 932, 947 (1962))); *cf.* Chadbourn, *supra*, at 947 (criticizing the Uniform Rules' provision for exclusion of out-of-court statements not made in "good faith" as violating the "time-honored formula" that "credibility is a matter of fact for the jury, not a matter of law for the court"); Margaret Bull Kovera et al., *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703, 704 (1992) (concluding from results of empirical analysis of a mock juror study that "jurors are, in fact, skeptical of hearsay evidence and capable of differentiating between accurate and inaccurate hearsay testimony").
150. FED. R. EVID. 803(8)(A)(ii).
151. *Id.* r. 803(8)(B).
152. *Id.* r. 803(8)(A)(ii).

key evidentiary limitation on the admissibility of police officer statements captured in body camera video.[153]

Congress added the law enforcement exception to the originally proposed public records exception specifically to prevent prosecutors from relying on official records containing police officer hearsay.[154] The provision's author, Congressman David Dennis of Indiana, explained the rationale as follows:

> [You] should not be able to put in the police report to prove your case without calling the policeman. I think in a criminal case you ought to have to call the policeman on the beat and give the defendant the chance to cross examine him, rather than just reading the report into evidence. That is the purpose of this amendment.[155]

Other representatives spoke in support, all signaling the same intent: to prevent the introduction of a police report "without calling the policeman" to testify.[156] Congressman Jim Johnson of Colorado drew on his experience as a prosecutor in state court to emphasize that "good cross-examination was one of the principal elements in any criminal trial."[157] Johnson continued: "If the officer who made the investigation is not available for cross-examination, then you cannot have a fair trial. I cannot believe the gentleman would be saying that we should be able to convict people where the police officer's statement is not subject to cross-examination."[158] Congressman John Hunt of New Jersey added:

> The only time I can recall in my 34 years of law enforcement that a report of an investigator was admissible in court was to test the credibility of an officer. . . . We would never even think about bringing in a report in lieu of the officer being there to have that officer cross-examined; but reports were admitted as evidentiary fact for the purpose of testing the officer's credibility and perhaps to refresh his memory.[159]

Congresswoman Elizabeth Holtzman of New York expressed her understanding that the amendment "reaffirms the right of cross examination to the accused."[160]

As these excerpts from the Congressional Record indicate, Congress focused "on a prototypical potential abuse of the proposed [public records exception], the admission of police reports relating to the charged crime in lieu of live testimony from the involved officer."[161] Giving effect to this congressional intent, courts do not permit prosecutors to introduce police

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153. *See* 30B WRIGHT & BELLIN, *supra* note 16, § 6885.

154. FED. R. EVID. 803(8) advisory committee's notes to the Senate Judiciary Report No. 93-1277.

155. 120 CONG. REC. 2387 (1973) (statement of Rep. Dennis). For a helpful compendium of legislative history, see RICHARD D. FRIEDMAN & JOSHUA DEAHL, FEDERAL RULES OF EVIDENCE: TEXT AND HISTORY (2015).

156. 120 CONG. REC. 2387 (1973) (statement of Rep. Dennis).

157. *Id.* at 2388 (statement of Rep. Johnson).

158. *Id.*

159. *Id.* (statement of Rep. Hunt).

160. *Id.* (statement of Rep. Holtzman).

161. 30B WRIGHT & BELLIN, *supra* note 16, § 6885.

reports by simply switching to related hearsay exceptions, like the business records exception in Rule 803(6)—even though that exception does not include a law enforcement exception.[162]

The more general question of whether individual statements made by police officers can be admitted under other hearsay exceptions, like the excited utterance exception, is complicated by Congress's inattention to this detail. Generally, failure "to gain admission through one hearsay exception has no bearing on that evidence's admissibility under another hearsay exception."[163] For example, an "exclamation after a severe injury [would] not qualify for admission as a dying declaration [but that] does not preclude its admission as an excited utterance."[164] This follows from the general structure of the rules. Hearsay prohibitions, like the representative Rule 802, typically state that "[h]earsay is not admissible unless any of the following provides otherwise."[165] Rule 802 includes "these rules" as one of the sources of authority for the admission of hearsay.[166] Rules like Rule 803, then, provide a laundry list of discrete exceptions, preceded by the generic language: "The following are not excluded by the rule against hearsay."[167] From this structure, the everyday practice of courts, and common sense, it is clear that it is not disqualifying if an out-of-court statement that fits within one hearsay exception fails to qualify for admission under another exception. It is expected.

The argument that, in the case of police reports, the law enforcement exception trumps other rules of admissibility is based on Congress's apparent intent, excerpted above, "to restrict the introduction of police reports against criminal defendants generally."[168] Exactly how far this intent sweeps, however, is unclear. While the evidence rules typically enjoy a distinguished status as refreshingly clear and cohesive, there are inconsistencies and ambiguities. These blights are often, as here, a result of congressional intrusions into the more comprehensive and precise designs of the Advisory Committee. Congress sometimes acts without the evidentiary big picture in mind and without providing thorough written explanations that round up any interpretive loose ends. In this case, it appears that Congress simply did not consider how broadly the law enforcement exception should apply. As a result, the path forward requires divining Congress's intent in the face of an ambiguous textual command and a few generic comments on the House

162. *See, e.g.*, United States v. Weiland, 420 F.3d 1062, 1074 (9th Cir. 2005) ("[P]ublic records . . . must be admitted, if at all, under Rule 803(8) . . . ."); United States v. Versaint, 849 F.2d 827, 831 & n.9 (3d Cir. 1988) (concluding that a police report was properly analyzed under Rule 803(8) and citing cases suggesting the inapplicability of Rule 803(6) to police reports); United States v. Cain, 615 F.2d 380, 382 (5th Cir. 1980).

163. 30B WRIGHT & BELLIN, *supra* note 16, § 6885.

164. *Id.*

165. FED. R. EVID. 802.

166. *Id.*

167. *Id.* r. 803.

168. 30B WRIGHT & BELLIN, *supra* note 16, § 6885. "Debate exists over whether a public report inadmissible under Rule 803(8) is nonetheless admissible under one of the other hearsay exceptions." United States v. Nixon, 779 F.2d 126, 134 (2d Cir. 1985).

floor. And here, the congressional intent to preclude reliance on police reports does not seem to be all-encompassing. Congressman Hunt's remarks themselves suggest an area where police reports can be used—to aid a testifying officer to recollect specific facts.[169] The logic seems to extend to admission of police reports under the recorded recollection exception.[170] Further, a constant sentiment in the remarks of those who spoke in support of the law enforcement exception was the need to ensure *cross-examination* of any officer whose *official commentary* on an incident made its way into evidence.[171] This suggests that the law enforcement exception should bar any hearsay statement by a law enforcement officer offered through exceptions other than the public records exception, only if the following two criteria are met: (1) it is a statement authored pursuant to the police officer's law enforcement obligations (i.e., "while under a legal duty to report"); and (2) the officer does not testify.

Courts should apply this clear congressional intent any time prosecutors offer police officer statements through a hearsay exception. Congress undoubtedly intended the law enforcement exception to apply generally, not solely to official reports offered under the public record hearsay exception. The representatives who introduced and spoke in favor of the law enforcement exception to the public records exception would find no solace in the admission of a police report in lieu of police officer testimony simply because the prosecution cited another hearsay exception. The clearest illustration of this principle is that the prosecution cannot rely on the business records exception to admit a police report, since that exception is just the analogue of the public records exception for organizations that do not fall into the governmental category. At the same time, police officer statements that do not fit the public records paradigm, that is, are not uttered as part of the police officer's official duties ("while under a legal duty to report"),[172] should not be captured by the law enforcement exclusion. Thus, a true excited utterance by a police officer—such as "he's got my gun!"—does not

169. *See* FED. R. EVID. 803(8) advisory committee's notes to Senate Judiciary Report No. 93-1277. "State courts . . . allow law enforcement officers to 'read their reports into the record when they lack a sufficient present recollection to testify from memory.'" State v. Vigil, 336 P.3d 380, 387 (N.M. Ct. App. 2014) (quoting State v. Scally, 758 P.2d 365, 366 (Or. Ct. App. 1988)). In such circumstances, since the witness purports to be testifying from a refreshed memory, the hearsay prohibition has no application. 30B WRIGHT & BELLIN, *supra* note 16, § 6852 ("When the witness testifies based on a refreshed recollection, the witness is still testifying from memory, as in any other presentation of live witness testimony. . . . If this process is followed, there is no hearsay bar to testimony based on a refreshed memory, and a hearsay exception is not required.").

170. *See* United States v. Picciandra, 788 F.2d 39, 44 (1st Cir. 1986) (noting that the admission of a law enforcement report as a recorded recollection did not prejudice defendants); United States v. Sawyer, 607 F.2d 1190, 1193 (7th Cir. 1979) (finding an agent's memorandum admissible under the recorded recollection exception where the agent testified and was available for cross-examination); Goy v. Jones, 72 P.3d 351, 353–54 (Ariz. Ct. App. 2003) (finding a police report admissible under the recorded recollection exception); State v. Scally, 758 P.2d 365, 366 (Or. Ct. App. 1988) (noting that a police officer was permitted to read a report into the record as a recorded recollection).

171. *See supra* notes 155–62 and accompanying text.

172. FED. R. EVID. 803(8).

come within the prohibition contemplated by Congress. Such a statement is simply not the type of public record, or official law enforcement statement, referenced in the public records exception or the congressional remarks emphasizing the need for a limitation. Present sense impressions captured on police body camera videos fall somewhere between a public record and an excited utterance.

To the extent a police officer narrates a body camera video to memorialize and highlight information relevant to future proceedings, the statements fall within the first criterion set forth above: a statement or report authored pursuant to the officer's law enforcement obligations (i.e., "while under a legal duty to report").[173] These statements fit the mold of out-of-court statements by a law enforcement officer that Congress intended to exclude through the law enforcement exception. Thus, even if those statements fit within hearsay exceptions other than the public records exception, they must be excluded if the officer-declarant does not also testify.

There remains the question of whether the law enforcement exception should preclude admission of these statements even if the officer-declarant testifies. As the above discussion suggests, Congress's primary concern in this context was the admission of police reports in lieu of police officer testimony. In that scenario, the defendant is denied the ability to cross-examine the police officer. When the police officer testifies, this concern evaporates. The defense attorney can cross-examine the police officer about any disputed statement captured in the video evidence. The congressional focus on circumstances where a police report is introduced *instead of* police officer testimony suggests the absence of a congressional intent to override admissibility in these circumstances. Further, since the police officer can review video prior to testifying, and prosecutors can introduce recorded recollections of forgetful testifying witnesses, it is unlikely that important statements captured in body camera video will fail to make their way into the trial in some form during the recording officer's testimony. The police officer will likely testify directly as to the observations themselves. And to the extent the defense attacks the police officer's credibility, the recorded statements may become admissible as prior consistent statements.[174] This means that if a police officer's statements qualify for admission under a hearsay exception (like the present sense impression exception) and the police officer testifies, courts should not exclude those statements under the law enforcement exception. There is nothing in the text of the rules that would support that result, and the congressional intent to preclude such

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173. *Id.*

> [C]ourts do not interpret the "legal duty" provision to require that a statute or other legal rule explicitly impose a duty on the declarant or agency to report a particular observation. "Rather, it suffices if the nature of the responsibilities assigned to the public agency are such that the record is appropriate to the function of the agency."

30B WRIGHT & BELLIN, *supra* note 16, § 6884 (quoting United States v. Lopez, 762 F.3d 852, 862 (9th Cir. 2014)).

174. *See* FED. R. EVID. 801(d)(1)(B) (permitting out-of-court statements offered to rehabilitate a declarant's credibility to be introduced as substantive evidence).

evidence is limited to circumstances where the evidence is offered in lieu of police officer testimony.

Congress intended the law enforcement exception to prevent prosecutors from introducing official police statements in lieu of testimony from the police officer who authored those statements. This does not mean, however, that if the officer-declarant testifies, police body camera statements (and other police reports) can be introduced through the public records exception itself (as opposed to through other exceptions, like the present sense impression exception).[175] The distinction comes from the text of the public records exception, Rule 803(8)(A)(ii), which excludes law enforcement statements without reference to whether the officer-declarant testifies. This clear text trumps the above analysis in the narrow context of the admission of police body camera statements under the public records exception. As explained already, with respect to admission of hearsay under other exceptions, however, the law enforcement exception's application is (at best) ambiguous. In that circumstance, it is necessary to examine congressional intent more broadly, leading to the conclusion reached above that the officer-declarant's testimony is sufficient to overcome the law enforcement exception.

D. The Confrontation Clause

The above analysis parallels the second legal doctrine that legitimately captures the normative concerns about police body camera statements: the Confrontation Clause.[176] The Confrontation Clause trumps any hearsay exceptions with respect to the admissibility of police officer hearsay offered against a criminal defendant.[177] Under the pre-2004 *Ohio v. Roberts*[178] regime, courts swept aside Confrontation Clause objections by pointing to the applicability of any well-established hearsay exception or generic reliability guarantees.[179] After *Crawford v. Washington*[180] in 2004, that is no longer the case.[181]

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175. *Cf.* United States v. Hayes, 861 F.2d 1225, 1230 (10th Cir. 1988) (stating that the law enforcement exception does not apply to the files in question "because Vest, the I.R.S. employee who searched Hayes' files and obtained the computer documents, testified at trial").

176. U.S. CONST. amend. VI. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.*

177. It should be noted that the analysis under the Confrontation Clause applies equally in both state and federal contexts, as the U.S. Supreme Court has long made clear. *See* Pointer v. Texas, 380 U.S. 400, 406 (1965) (holding that the Sixth Amendment "is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment'" (quoting Malloy v. Hogan, 378 U.S. 1, 10 (1964)). Thus, the Confrontation Clause analysis in this Article applies equally to the states.

178. 448 U.S. 56 (1980).

179. *Id.* at 66. This explains Congress's concern, discussed in Part III.C, about the potential introduction of police reports without cross-examination.

180. 541 U.S. 36 (2004).

181. *Id.* at 68–69.

Under *Crawford* and its progeny, whether an out-of-court statement implicates the Confrontation Clause depends on how the statement came about, or its "primary purpose."[182] The inquiry is an objective one considering all the circumstances giving rise to the statement.[183] If a statement is made or elicited "with the primary purpose of creating evidence for . . . prosecution," it is testimonial.[184] If the statement is made or elicited with some other primary purpose, such as to evaluate and respond to an ongoing emergency or as part of a casual conversation among friends, the statement is "nontestimonial" and does not implicate the Confrontation Clause.[185] Thus, the reenergized post-2004 Confrontation Clause doctrine prohibits hearsay that is otherwise admissible under many hearsay exceptions, including the present sense impression exception. In fact, the U.S. Supreme Court has already applied this doctrine in an analogous context, ruling that a government lab report identifying a substance as an illicit narcotic could not be offered under the public records hearsay exception against a criminal defendant absent cross-examination of the analyst who authored it.[186] In language that is applicable to the instant context, the Court said:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.[187]

This same analysis should apply to hearsay statements of other public officials (e.g., police officers) offered under other hearsay exceptions (e.g., the present sense impression exception). To the extent those out-of-court statements were generated with an eye toward later proceedings, they would be testimonial. This revitalized corner of confrontation doctrine will prohibit the use of many police body camera statements, particularly those that constitute self-conscious narration of incriminating events (e.g., "suspect smells of alcohol").

Confrontation Clause doctrine also provides a helpful shortcut for courts attempting to divine the congressional intent in enacting the law enforcement exception to the public records hearsay exception. The Confrontation Clause's directives largely parallel the law enforcement exception and unequivocally override any inconsistent evidence rules. This is because the

182. *See, e.g.*, Davis v. Washington, 547 U.S. 813, 821–22 (2006). *See generally* Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865 (2012) (describing the shift in Confrontation Clause jurisprudence).

183. *See, e.g.*, Michigan v. Bryant, 562 U.S. 344, 360 (2011).

184. Ohio v. Clark, 135 S. Ct. 2173, 2181 (2015).

185. *Id.*

186. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009).

187. *Id.*

same concerns that motivated the representatives who championed the law enforcement exception in 1974 animate the current Confrontation Clause doctrine.[188] The key question in a typical fact scenario becomes whether a hearsay statement is testimonial and, if so, whether the police officer who made the statement testifies. As this analysis comfortably tracks the similar concerns that motivated Congress to enact the law enforcement exception, as well as that exception's text and application, admissibility questions will often be resolved solely through application of the Confrontation Clause.

The Confrontation Clause analysis will often be straightforward. Police body camera statements will not always be made "with the primary purpose of creating evidence for . . . prosecution,"[189] but they will often have that purpose. For example, the police officer's statements in *Fischer*, described above, seem clearly motivated to create a record for a later trial.[190] Importantly, the inquiry is objective—it looks at all of the circumstances surrounding the making of the statement.[191] Key factors for courts to consider are the purpose of body cameras themselves—to provide formal evidence of police-citizen interactions—and police officers' general knowledge of that purpose.[192] The absence of other purposes for most police body camera statements will also be critical. After all, why else apart from generating evidence would a police officer be narrating interactions captured on body camera video? In light of these considerations, most monologues by a police officer describing events of evidentiary significance will qualify as "testimonial." But there will certainly be exceptions. In extreme circumstances, such as those likely to generate excited utterances, the police officer's purpose in making statements may become nontestimonial.

A case that illustrates the hidden complexity of this analysis is *United States v. Polidore*.[193] There, the Fifth Circuit evaluated the admissibility of an anonymous caller's recorded statements to 911.[194] The caller described drug dealing going on outside his home.[195] The Fifth Circuit deemed the statements elicited by the 911 operator to be nontestimonial.[196] The court explained:

> [T]he primary purpose . . . was neither to "enable police assistance to meet an ongoing emergency" nor to "establish or prove past events potentially relevant to later criminal prosecution." Rather, the primary purpose of the interrogation was to gather information necessary for the police to respond

188. *See* Bellin, *supra* note 182, at 1877 (explaining the core of the new doctrine as capturing the intuition that "[t]he Clause must, above all, prohibit the admission of out-of-court statements procured as substitutes for live-witness testimony"); *see also supra* notes 155–62.

189. *Clark*, 135 S. Ct. at 2181.

190. *See supra* notes 116–21.

191. Michigan v. Bryant, 562 U.S. 344, 360 (2011).

192. Sacharoff & Lustbader, *supra* note 111, at 274 (noting that body cameras were pitched to police departments as a "tool of ordinary law enforcement").

193. 690 F.3d 705 (5th Cir. 2012).

194. *Id.* at 708.

195. *Id.* at 708–09.

196. *Id.* at 718.

> to a report of *ongoing* criminal activity. . . . [W]e conclude that the declarant's statements were not testimonial; under the totality of the circumstances, the primary purpose of the interrogation was not to create an out-of-court substitute for trial testimony.[197]

This type of analysis may blur the line somewhat when police officers *communicate to each other* and those statements are captured on a body camera video. In such circumstances, purposes other than creating a record for later proceedings become plausible. Because some other purposes may be official but not testimonial, the law enforcement exception may still play a role in excluding otherwise admissible police body camera statements. But for the paradigmatic—and most worrisome—statements discussed in this Article, where a police officer narrates events to no audience except the body camera, the testimonial nature of those utterances will be all but indisputable.

Even if a court finds that certain police body camera statements are testimonial, the inquiry does not end. The Confrontation Clause has no application to out-of-court statements if the declarant testifies at trial. As the Court explained in *Crawford*, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."[198] This means that even with respect to testimonial statements, the defendant's confrontation right is satisfied by the opportunity to cross-examine the declarant. As a result, if the police officer who made the proffered body camera statements appears at trial, the Confrontation Clause is satisfied. As noted earlier, this tracks the analysis of the law enforcement exception discussed in previous sections.[199] Police officer testimony also obviates Congress's primary concern in creating the law enforcement exception that the prosecution not present an official record "without calling the policeman" who authored that record to testify.[200]

The above analysis resolves the most normatively problematic instances of police body camera statements. Efforts to introduce police officer narrations of incriminating events without the police officer's live testimony will be blocked by both the law enforcement exception and the Confrontation Clause. If, however, the officer-declarant testifies, police body camera statements that fit within the present sense impression, excited utterance, or recorded recollection exceptions[201] should not be barred by these provisions.

E. Police Body Camera Statements Offered by the Defense

In some circumstances, the defense may seek to introduce police body camera statements as evidence at trial. Police officers will inevitably make

197. *Id.* at 712 (citations omitted).

198. Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004).

199. *See supra* notes 155–62.

200. *See supra* notes 155–62; *see also* 120 CONG. REC. 2387 (1973) (statement of Rep. Dennis).

201. The same analysis would apply for other, less frequently applicable exceptions like the state of mind exception. *See* FED. R. EVID. 803(3).

observations and assertions on body camera videos that undermine the prosecution. To the extent the defense offers such statements solely to impeach contrary testimony by the same police officer, no hearsay exception is needed. The statement can be offered for a purpose other than the truth of the matter asserted: specifically, to undermine the testifying police officer's credibility.[202] The defense may, however, also seek to introduce a testifying police officer's out-of-court statement as evidence of the truth of what the police officer (previously) asserted (i.e., as substantive evidence). Or the defense may seek to introduce a nontestifying police officer's out-of-court statement captured on a body camera video (e.g., a description of a suspect that does not match the defendant).[203] In these circumstances, the defense will need to navigate the hearsay rules, even though the normative concerns described at the outset of this Article largely fade away. The analysis will be similar to that described in the preceding three sections except, critically, the Confrontation Clause does not apply.[204]

Assuming a police body camera statement qualifies for admission under a hearsay exception (e.g., the present sense impression exception), the defense should have little trouble admitting the statement. Since the Confrontation Clause has no application to evidence offered by the defense,[205] the only plausible grounds for exclusion are (1) the calculated narration exception to the present sense impression exception, and (2) the law enforcement exception to the public records hearsay exception. As already discussed, the calculated narration exception applied by a few courts has no support in the Federal Rules of Evidence and so should not be applied in any circumstances, much less to prevent the introduction of police body camera statements by the defense.[206] The law enforcement exception, by contrast, arises from an evidence rule's text, and that text makes no distinction between statements offered by the prosecution or the defense.[207] As the rationale for the law enforcement exception is solely concerned with prosecution-sponsored evidence, however, courts are open to the argument that the law enforcement exception has no application to evidence offered by the defense.[208] Such efforts set up a classic text-versus-rationale fight with respect to evidence offered solely under the public records exception. The explicit text of the Rule would prohibit the statements even if offered by the defense, while the Rule's clear and documented rationale—preventing unfairness to

202. 30B WRIGHT & BELLIN, *supra* note 16, § 6728 ("The statement is relevant to the witness's credibility because it shows that the witness said something that is inconsistent with her present testimony. This theory of relevance does not depend on the truth of the out-of-court statement.").

203. In the alternative, the defense may seek to introduce evidence that impeaches a testifying police officer as substantive evidence.

204. U.S. CONST. amend. VI (limiting the right to confront witnesses to "the accused").

205. *Id.*

206. *See supra* Part III.B.

207. *See, e.g.*, FED. R. EVID. 803(8)(A)(ii).

208. *See* 30B WRIGHT & BELLIN, *supra* note 16, § 6885 (citing United States v. Versaint, 849 F.2d 827, 832 (3d Cir. 1988); United States v. DePeri, 778 F.2d 963, 976 (3d Cir. 1985); and United States v. Smith, 521 F.2d 957, 968 n.24 (D.C. Cir. 1975)).

defendants—counsels an opposite conclusion. But as already discussed, the fight will rarely be dispositive.

Most police body camera statements will qualify for admission under hearsay exceptions other than the public records exception, particularly the present sense impression exception.[209] In that circumstance, it makes little sense to apply the law enforcement caveat to the public records exception to exclude the evidence. A police body camera statement that meets the terms of the present sense impression hearsay exception, for example, should be readily admitted when offered by the defense. For the reasons already discussed in this Part, courts would be stretching congressional intent too far to enforce the law enforcement exception to bar evidence *offered by the defense* under another rule, that is, an exception other than the public records exception itself. And, again, the Confrontation Clause has no application, even if the police officer does not testify, because the prosecution cannot claim any right to confrontation under the Sixth Amendment. The only caveat is that in jurisdictions where courts disqualify statements offered under the present sense impression if deemed to be the result of calculated narration, this illegitimate barrier to evidence would apply even to defense evidence.

CONCLUSION

The widespread consensus that body cameras are necessary to restore public trust and ensure police accountability means that body cameras and their resulting video will become an integral component of everyday police work. As a result, body cameras will be used not just to protect citizens from unlawful uses of force, but also to establish citizens' guilt in criminal prosecutions. Yet, the scholarly conversation has included little discussion of this use of body cameras and largely ignored the admissibility of police officer statements captured in the videos. In light of police officers' unilateral control of body cameras, many of the scenarios courts encounter will raise important normative concerns about the reliability and fairness of the introduction of this evidence against criminal defendants. As explained above, these concerns are largely captured by the array of evidence rules implicated by police body camera statements.

Reconciling the various rules leads to the following guidance: police officer statements captured in body camera video can be introduced as substantive evidence against a criminal defendant if the statements qualify for admission under certain hearsay exceptions and are either (1) "nontestimonial" as that term is defined in the Supreme Court's post-2004 Confrontation Clause jurisprudence, or (2) the police officer who made the out-of-court statement testifies. Consistent application of this framework faithfully applies existing evidence doctrine to this new form of evidence and largely protects against the most normatively problematic scenarios of police body camera evidence. Against a backdrop of steady complaints of the

209. *See supra* Part II.C.

unsuitability of aging legal doctrine to new technology,[210] courts, scholars, and litigants should celebrate this instance where existing doctrine, while messy and complex, maps well onto new normative concerns. Courts need only recognize that framework and apply it consistently in this novel and important evidentiary context.

210. *See, e.g.*, Jeffrey Bellin, *eHearsay*, 98 MINN. L. REV. 7, 13 (2013) (contending that "changes in culture and technology have led to the creation of a vast, new subset of recorded out-of-court statements that, while excluded by current evidence doctrine, cannot justifiably be kept from juries").