

SEIGENTHALER REPORT

Uncovering the police

Converging trends threaten public accountability of local and state law enforcement across the United States

By Jack McElroy

Presented by the John Seigenthaler Chair of Excellence in First Amendment Studies

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About the Seigenthaler Reports Series

We are pleased to introduce the Seigenthaler Reports, a new series exploring current issues in journalism, with particular focus on press freedom, the ability of the press to adequately inform the public, and the changing nature of the press in a digital age. The reports are a project of the John Seigenthaler Chair of Excellence in First Amendment Studies, established in 1986 in the College of Media and Entertainment at Middle Tennessee State University. Mr. Seigenthaler (1927-2014) was the longtime president, editor and publisher of *The Tennessean* in Nashville and the first chairman of the Freedom Forum First Amendment Center at Vanderbilt University. During his tenure leading *The Tennessean*, he championed the cause of civil rights and fought for journalists to have access to public records and meetings. The chair's programs promote understanding of the First Amendment and support quality journalism in the state through deepening student experiences and community partnerships.

— *Deborah Fisher*, Director of the John Seigenthaler Chair of Excellence in First Amendment Studies

About the Author

Jack McElroy grew up in Tucson, Ariz., where he earned a bachelor's degree in English at the University of Arizona. He began his newspaper career at the *Douglas (Arizona) Daily Dispatch* in 1976, and a year later he joined *The Albuquerque (N.M.) Tribune*, where he eventually served as managing editor. He earned a master's degree in Management at the University of New Mexico. In 1991, he moved to the *Rocky Mountain News* in Denver and was managing editor there when the Columbine High School shootings occurred. The newspaper was awarded a Pulitzer Prize for its photo coverage of the event. McElroy was named editor of the *Knoxville News Sentinel* in 2001. During his 18-year editorship, the newspaper won several national awards for work on behalf of the First Amendment and open government. He was a founding board member of the Tennessee Coalition for Open Government and served as president of the Tennessee Press Association. McElroy retired on Feb. 1, 2019, but continues to serve on the TCOG board and as the TPA representative on the State of Tennessee's Advisory Committee on Open Government.



Summary

As the digital age matures, technology that makes government information widely available is triggering a backlash. And the institution most caught in the crosshairs is the local police department. Concerns about victim privacy, officer safety and even the reputations of those arrested have led to a series of decisions and movements to shield information that was once readily available and reported by local news outlets. At the same time, networked communications and heightened concern about terrorist activity has led to an expanding but largely secret use of surveillance techniques, including facial recognition and mobile phone tracking, that allow local police the unprecedented ability to know who is where and when. Just as law enforcement knows more about the activities of its citizenry, the citizenry is beginning to know increasingly less about their local and state police departments. And what they do know often is a carefully shaped message coming directly from police themselves. These trends raise important questions about the ability of the press to independently report on crime and law enforcement activities in their communities. *“Uncovering the Police: Converging trends threaten public accountability of local and state law enforcement across the United States”* documents the distinct forms of this new curtain of confidentiality and poses important questions for journalists and communities alike.

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Chapter 1: Introduction

The police scanner squawked, putting John Messner on alert. Trouble was brewing in Knoxville's Fort Sanders neighborhood near the University of Tennessee where hundreds of students lived.

“They were having a street party,” recalled the veteran news photographer of that April evening. “I could hear it was getting progressively worse.” When the call went out for “all available units, that’s when I got my equipment.”

Prowling the area a short while later, he came upon a frightening scene.

“It unfolded before me,” he said. “It scared me. I was just like: ‘Click, click, click, click.’ I couldn’t believe what I saw. I was waiting to hear the cop say, ‘Hey you!’”

In those few seconds in 2014, Messner’s camera froze in time images of a Knox County deputy sheriff with his hands wrapped around the neck of a handcuffed 22-year-old student, choking him into unconsciousness while he was restrained by other officers.

Messner emailed the pictures to London’s *Daily Mail*, and within hours the world was seeing what he’d witnessed.

“That was right in the middle of all the Black Lives Matters stuff,” Messner said. Until then, “I didn’t even realize what all that viral stuff was.”

Messner had worked hard for the once-in-a-lifetime shot, which led to the deputy’s forced retirement and a \$100,000 lawsuit settlement. He’d been monitoring police scanners since he was 16. After high school, the habit led him to the *York (Pennsylvania) Dispatch* and a 35-year journalism career, much of it as a freelance photographer.

“I made a lot of money chasing ambulances and firetrucks,” he said. “I would listen 24/7. Even at night, it was on my nightstand.”

In Tennessee, Messner built a “Knoxville Crime” Facebook page, which eventually had 98,000 followers who shared tips, discussed neighborhood incidents, admired Messner’s photos, and followed the site’s live feed of 911 emergency traffic.¹

But that feed died in mid-2018 when the Knox County Sheriff’s Office and the Knoxville Police Department began encrypting their radios, saying that apps and sites such as Messner’s made emergency calls too accessible.

Then-Chief David Rausch explained: “It’s a way to keep our officers safe, it’s a way to keep the public safe, and it’s a way to hold those who would be out here committing criminal acts accountable for their actions without giving them the advantage of knowing when we’re coming.”²

The change, however, crippled Messner’s nascent media outlet. No more live feed. No more chasing police calls. That type of watchdog journalism was done in East Tennessee.

“I filled a void,” he said. “You have no idea what’s going on in this city any more.

“I say we have the secret police here in Knoxville. Right after they encrypted radio, they shot three people. The shootings seemed to be justified, but there’s no outside scrutiny. They said, ‘We’ll update you.’ But they never did.”³

¹ Messner, John. Interview with Jack McElroy. Telephone interview. May 23, 2019.

² Dorman, Travis. “Knox authorities to encrypt radio communication.” May 9, 2018. *Knoxville News Sentinel*. <https://www.knoxnews.com/story/news/crime/2018/05/09/knoxville-tn-police-scanner-e-911-emergency-radio/595013002/> (Accessed September 9, 2019).

³ Messner, *op.cit.*

In information age, momentum to limit access to police records grows

The case is an example of a paradox that's emerging as the digital age matures. Technology that makes government information widely available is triggering a backlash. Concerns about individual privacy, national security, officer safety, and government efficiency are driving hundreds of new confidentiality initiatives across the United States.

A survey of freedom of information experts in 2017 found that about half thought access to state and local government records had gotten worse in the previous four years. Many noticed an increase in denials of public records, especially at the local level. State press associations and FOI organizations said they were scrambling to keep up with legislation making information confidential. Nine out of 10 of the experts predicted that the situation was going to get worse.

“Every year for the past five years we’ve had a massive onslaught of efforts to gut the law,” Michele Earl-Hubbard, a media law attorney in Washington state, commented on the survey. “It’s bad. It’s really, really bad.”⁴

Those results mirrored a survey of open government advocates and journalists done in 2016, in which 44 percent of respondents said transparency-law violations had gotten worse in the previous two years. Worst of all, according to more than half those surveyed, were local police departments.⁵

As the nation nears the end of the second decade of the 21st century, Messner’s vision of secret policing is taking distinct form as curtains of confidentiality are drawn over local and state police activities coast to coast. The justifications often make sense in isolation. Personal privacy faces digital exposure of unprecedented scale and longevity. A never-ending state of war against terrorism inclines even local law-enforcers to make homeland security a priority over transparency. As proliferating

⁴ Cuillier, David. “Forecasting Freedom of Information/Why it faces problems—and how experts say they could be solved”. March 2017. Study commissioned by the John S. and James L. Knight Foundation. <https://kf-site-production.s3.amazonaws.com/publications/pdfs/000/000/232/original/FOI-final-unlink.pdf> (Accessed August 7, 2019).

⁵ “Troubling Trends from Biennial Open Government Survey”. March 17, 2016. National Freedom of Information Coalition. <https://www.nfoic.org/biennial-open-government-survey-results-troubling> (Accessed August 7, 2019).

cameras and social media spot and spread the misdeeds of bad cops, local officials fear retaliation against good officers as well as damage to the credibility of their departments. At the same time, global positioning systems, facial recognition software and ubiquitous digital communications provide investigators with powerful new tools and tactics that police are loathe to disclose.

These good intentions are masking law enforcement at a time when the historical champions of open government -- newspapers -- are withering. Fewer fights for public records are being launched, and far fewer journalists are covering the police beat. Law enforcement, meanwhile, is expanding its own storytelling capabilities. Local cops are “cutting out the middleman,” using the latest social media methods to produce content and to shape their own message to the public. Traditional news reporting, already weakened, is further hobbled by police department public information officers bypassing newsrooms. Startup watchdog initiatives face competition from police agencies with their own exclusive content.

“Now we are in a state where we could have very secretive police agencies out there doing what they want and not being held accountable,” said David Cuillier, a professor at the University of Arizona and board president of the National Freedom of Information Coalition who has testified before Congress many times on open-government issues. “Everybody hopes there are checks and balances within the system, but the best oversight is public oversight, and that’s what we’re losing.”⁶

Press fought to open records, then lost ground

After World War II and with the outbreak of the Cold War, an attitude of “loose lips sink ships” prevailed in the country. Statutes and common law were a jumble, and access to government records depended on the enterprise of individual journalists. “We knew it was all wrong, but we didn’t know how to start the battle for reformation,” said James S. Pope, then managing editor of the *Louisville Courier-Journal* and chairman of the American Society of Newspaper Editor’s Freedom of Information Committee. To find a path, ASNE commissioned Harold L. Cross, a professor at the Columbia School

⁶ Cuillier, David, Interview with Jack McElroy. Telephone interview. May 20, 2019.

of Journalism and attorney for the *New York Herald-Tribune*, to study the legal landscape.⁷

The *People's Right to Know, Legal Access to Public Records and Proceedings*, was published in 1953. In 405 pages, Cross surveyed open-government law throughout the then-48 states and federal government. Transparency, he found, was stymied by an array of adverse trends including “habits of secrecy and censorship,” the “burgeoning effect of the doctrine of ‘right of privacy,’” lobbying by “proponents of secrecy,” and “loss of public faith in the deterrent effects of publicity.”⁸

Police records were an especially thorny problem, and Cross devoted an entire chapter to them. “The law,” he wrote, “is divergent, restrictive, obscure or nonexistent.” Even the term “police records” created problems because it implied information for the “use and convenience of the police.” He recommended new laws that specified “the particular records needed” but predicted that the press would continue to rely on informal channels to get news from law enforcement. “Sugar, plus judicious admixtures of strength and determination, catches more ‘police news’ than vinegar,” he concluded.

Still, *The People's Right to Know* sounded a clarion call for legislation guaranteeing open government. “The people have the right to know,” Cross declared in his preface. “Freedom of information is the very foundation for all those freedoms that the First Amendment of our Constitution was intended to guarantee.”⁹

Cross’s book laid the groundwork for the push for a national Freedom of Information Act, the first version of which President Lyndon Johnson signed into law on the Fourth of July 1966. Then in 1974, with the turmoil of Watergate, Vietnam, and the Civil Right Movement, Congress passed, over President Gerald Ford’s veto, amendments to the FOIA that remain the core of the law today.

⁷ Cuillier, David. “The people’s right to know: Comparing Harold L. Cross’ pre-FOIA world to post-FOIA today.” *Communication Law and Policy* 21(4) (October 2016): 433-463.

⁸ Cross, Harold L. *The People's Right to Know, Legal Access to Public Records and Proceedings*. Morningside Heights, NY: Columbia University Press, 1953.

⁹ Ibid.

The passion for transparency did not last, however. After Ronald Reagan's election in 1980 and his declaration of a "War on Drugs," Attorney General Edwin Meese pressed for expansion of police powers to address the perceived crisis. In 1986, amendments made it easier to close records under FOIA's law enforcement Exemption 7, and records involving surveillance and informants were removed from the FOIA process altogether, allowing agencies to issue "no records" responses even when records existed.

Before the amendments, Exemption 7 accounted for 38 percent of FOIA exemption claims. Afterward, the exemption accounted for 45 percent of all refusals, and the rate has been accelerating. From 2015-16, the exemption accounted for 57 percent of refusals. Within the law enforcement exemption, the "personal privacy" sub-exemption saw especially explosive growth, alone accounting for 28 percent of all FOIA exemptions in 2015-16. The full effect of the 1986 amendments can't be quantified, however, because truthful "no records" responses can't be distinguished from "no records" responses given when records really do exist. Before the amendments, 5 percent of requests got a "no records" response. Afterward, the rate doubled to 10 percent, and it also is accelerating. From 2008-2016, the "no records" response rate was 12 percent, and in 2016 it reached 15 percent of requests.¹⁰

"There is no knowing the degree of impact made by the amendment of exclusions," wrote A. Jay Wagner, the Marquette University professor who did the analysis, "and this is perhaps the most troublesome aspect of their use. It allows for no recourse and no understanding on the part of the requester. As First Amendment attorneys Christine Walz and Charles Tobin put it: "The Reagan-era addition to the FOIA, on its face, provides the government with a license to lie."¹¹

The federal Freedom of Information Act doesn't govern local records, but many state legislatures passed open-government laws during that same 1966-74 period of societal upheaval. Since then,

¹⁰ Wagner, A. Jay "A Secret Police: The Lasting Impact of the 1986 FOIA Amendments." *Communication Law and Policy* 23:4: (2018): 387-426.

¹¹ Ibid.

exemptions to those laws have steadily increased. In Florida, the number of exemptions grew from 250 in 1985 to more than 1,000 in 2014. In Vermont, 40 exemptions were spelled out when its law was passed in 1975; in 2007, a legislative study found 206 exemptions.¹² A more recent study in Tennessee found that exemptions to public records laws had grown from 89 in 1988 to 538 in 2018.¹³

Cuillier has examined how transparency laws have evolved since Cross's groundbreaking work. His finding: Access is better than in 1953 "because of more defined laws and rules." Some particular police records, such as automobile accident reports, had become easier to obtain. "A key improvement in access over the past sixty years has been the shift toward a presumption of openness," his 2016 study concluded.¹⁴

But over the past 20 to 30 years, the trend has been toward secrecy. "The general trajectory for secrecy has been up," Cuillier said. "The only thing that can change that is some catastrophic event that causes the people to wake up ... The press, in its heyday, had the clout to push back. Without the press to push back, we have a void."¹⁵

Chapter 2: The burgeoning privacy argument

Online mugshots spark public outcry, political reaction

The "burgeoning effect" of the right to privacy that Cross identified has become a juggernaut in the digital age. Citizen outcry over embarrassing information online has prompted police and politicians to act. Several states, for example, have banned the business model of the internet-shaming industry,

¹² Ginley, Caitlin. "The State of Open Records Laws: Access Denied". June 1, 2012, updated May 19, 2014. Center for Public Integrity. <https://publicintegrity.org/state-politics/the-state-of-open-records-laws-access-denied/> (Accessed August 8, 2019).

¹³ "Statutory Exceptions to the Tennessee Public Records Act". January 2018. Tennessee Comptroller of the Treasury. https://comptroller.tn.gov/content/dam/cot/orc/documents/oorc/2018-01-19_ExceptionstotheTennesseePublicRecordsActFinal.pdf (Accessed August 8, 2019).

¹⁴ Cuillier, David. "The people's right to know: Comparing Harold L. Cross' pre-FOIA world to post-FOIA today." *Communication Law and Policy* 21(4) (October 2016): 433-463.

¹⁵ Cuillier, David. Interview with Jack McElroy. Telephone interview. May 20, 2019.

which charges arrestees to have booking mugshots removed from websites. California has even brought extortion charges against one of the leading sites, Mugshots.com.¹⁶

But now states have begun to target the release of arrest records to the public, as well. In New Jersey, a bill introduced this year would close booking photos. In Illinois, a bill passed this year that stops police from posting mugshots on social networking sites, and another bill was introduced to block the release of mugshots entirely before conviction, except as needed for public safety. In New York, the budget bill included a provision making release of state police mugshots an “unwarranted invasion of personal privacy” unless done for a specific law enforcement purpose.¹⁷

The New York measure was pushed by Gov. Andrew Cuomo. His spokesman said the law was needed because the internet-shaming business had dodged other measures by claiming First Amendment protection. But the New York initiative originally proposed closing *all* identifying arrest information, and it was supported by the “Ban the Box” movement, which seeks to prevent criminal histories being used to discriminate in hiring. The final bill sealed only mugshots, a compromise that satisfied some privacy champions. Booking photos “never disappear,” JoAnne Page, president and CEO of the Fortune Society, a New York City nonprofit that helps people released from incarceration, told The Associated Press. “This can keep someone from getting a job, from getting housing. It can ruin peoples’ lives.”¹⁸

Some states move to seal more arrest records

In other states, though, a broader “Clean Slate” movement has succeeded in closing more criminal records. In 2018, Pennsylvania’s legislature voted 188-2 to seal a variety of arrest and misdemeanor conviction records after 10 years, and the law allows other misdemeanors to be sealed earlier by

¹⁶ “Open Government Guide”. Reporters Committee for Freedom of the Press. <https://www.rcfp.org/open-government-sections/11-mugshots/> (Accessed August 9, 2019).

¹⁷ NJ A1203, NJ A2835, IL SB1699, IL SB1345, NY S01505. LegisScan. <https://legiscan.com/gaits/search?state=ALL&keyword=mugshots>. (Accessed August 9, 2019).

¹⁸ Carola, Chris. “Mug shot proposal pits privacy versus the right to know”. The Associated Press. February 19, 2019. <https://apnews.com/5e48d07e739e4b198c0f45feb470f73d> (Accessed August 9, 2019).

petition. Gov. Tom Wolf touted the legislation as a national model,¹⁹ and this spring, the Colorado legislature followed suit, establishing a process for sealing records of drug crimes, misdemeanors and lesser felonies from one to five years after final disposition.²⁰ In Ohio, a bill was introduced to allow expungement after 10-20 years of records of all crimes except murder, voluntary manslaughter, child or patient abuse, kidnapping, human trafficking, terrorism, domestic violence or any sex crime.²¹

Sealing after the fact is not the ideal sought by some. Sarah E. Lageson, a professor at the Rutgers University School of Criminal Justice, has focused her research on online mugshots, crime data and criminal records, which her Rutgers bio describes as “new forms of ‘digital punishment.’” In a piece she wrote this year for Slate, she saluted the Clean Slate efforts but added, “For expungement to work, reforms have to target the dissemination of records ... Policies that regulate access to criminal-record data from its point of origin, routine in many European countries, would reduce the need for down-the-road remedies”.²² In an interview, she added, “If I could write perfect legislation, I would pass privacy protections of pre-conviction records.” But that’s not practical, she said, and would “open the door to a lot of Reporter Committee litigation,” which she believes would waste valuable journalistic resources. Instead, she wants states to exert control over how local law-enforcement agencies distribute information, especially the bulk release of mugshots and identifying data.²³

For a slightly different reason, last year two members of the Berkeley City Council and the mayor proposed a policy of withholding booking photos from the public and allowing police to keep secret the names of arrestees, as well. The purpose was to prevent “doxing,” or the publishing of personal information to harass or threaten people. The proposal came in reaction to the Berkeley Police

¹⁹ “Governor Wolf: ‘My Clean Slate’ Program Introduced to Help Navigate New Law.” Pennsylvania Governor Website. January 02, 2019 <https://www.governor.pa.gov/newsroom/governor-wolf-my-clean-slate-program-introduced-to-help-navigate-new-law/> (Accessed August 9, 2019).

²⁰ CO HB1275. LegiScan. <https://legiscan.com/CO/bill/HB1275/2019> (Accessed August 29, 2019).

²¹ OH SB160. LegiScan. <https://legiscan.com/OH/bill/SB160/2019> (Accessed August 29, 2019).

²² Lageson, Sarah Esther. “There’s No Such Thing as Expunging a Criminal Record Anymore.” Slate. January 7, 2019. <https://slate.com/technology/2019/01/criminal-record-expungement-internet-due-process.html> (Accessed August 9, 2019).

²³ Lageson, Sarah. Interview with Jack McElroy. Telephone interview. August 22, 2019.

Department releasing information and photos of protesters on Twitter.²⁴ Ultimately, the council only directed police not to post photos of people arrested during protests.

‘Victim-centered’ policies can leave public guessing

In some cases, annoyance, not threats or harassment, is prompting closure of police information. In 2019, the Tennessee legislature passed a bill making “personally identifying information” in accident reports secret. The law cites street addresses, telephone numbers, driver’s license numbers and insurance information.²⁵ One legislator said he helped sponsor the bill because constituents were pestered by calls from pain clinics after accidents. The new law might have little impact in Chattanooga, however. The police department there already had said it would stop releasing accident reports with names, addresses or driver’s license numbers as part of settlement with a personal injury lawyer who claimed a crash victim was solicited by another lawyer after the Police Department released an unredacted report.²⁶

In recent years, the Chattanooga Police Department has committed itself broadly to “victim-centered policing,” said Alison Gerber, editor of the *Chattanooga Times Free Press*. “As part of that,” she said, “they stopped putting victims' names in press releases. When we asked for incident reports, they said we couldn’t get one – in the last two years, they have stopped giving us incident reports.” Sometimes the police won't even name victims in the affidavits submitted to the courts.²⁷

The secrecy, however, is inconsistent, said Gerber. “They may say that's their official policy, but they don’t always comply with it.” She believes an underlying goal is to withhold the names of gang members in hopes of stopping retaliatory killings. But gangs, she said, already know who is involved –

²⁴ Francke, Terry. “Berkeley Council Mulls Suppressing the Names of the Arrested”. Californians Aware. September 14, 2018. <https://www.calaware.org/berkeley-council-mulls-suppressing-the-names-of-the-arrested/> (Accessed August 9, 2019).

²⁵ TN SB1346. LegiScan. <https://legiscan.com/TN/text/SB1346/id/1995636>. (Accessed August 29, 2019).

²⁶ Hughes, Rosana. “Some Tennessee legislators attempting to make even more official records off limits to the public”. *Chattanooga Times Free Press*. February 17, 2019. <https://www.timesfreepress.com/news/local/story/2019/feb/17/legislaticould-limit-publics-access-records/488816/> (Accessed August 10, 2019).

²⁷ Gerber, Alison. Interview with Jack McElroy. Telephone interview. August 26, 2019.

“they put it on Facebook” – and the policy is a disservice to law-abiding citizens.²⁸

“In Chattanooga, shootings aren’t really random, and we can show that better if we know who the victims are,” she said. “The people should know why shootings happen ... It creates more opportunity for misinformation when the government body in charge of suppressing crime is not up front about information involving crime.”²⁹

The same issue prompted the California legislature to take up a bill this year that would require police to notify victims or witnesses of gang-related offenses that their names might be disclosed and allow them to request that the information be withheld. After unanimous passage in two committees, the bill was awaiting further action.³⁰

Privacy advocates push to apply medical rules to death probes

Medical records have long been held to be private. But is examining a dead body a medical procedure? In 2015, the South Carolina Supreme Court ruled that autopsy reports “fit neatly with that general understanding of medical records” and are, therefore, exempt from disclosure. The case involved a 25-year-old man who was shot by police in Sumter County. Officers said the man fired first, but the autopsy -- leaked to *The Item* newspaper -- showed the victim was shot in the back and had no gunshot residue on his hands. Braden Bunch, then senior news editor for the paper, said it made no sense to treat autopsy reports as medical records: “There has never been an autopsy that has ever been performed that improved someone’s health.”³¹

Two years later, though, the South Carolina attorney general drew on the ruling in issuing an opinion

²⁸ Ibid.

²⁹ Ibid.

³⁰ CA AB941. California Legislative Information. https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB941 (Accessed September 7, 2019).

³¹ Flach, Tim. “SC’s high court: Autopsy reports are not public records”. *The State*. July 16, 2014. <https://www.thestate.com/news/local/crime/article13868843.html> (Accessed August 10, 2019).

that toxicology reports from autopsies are medical records, too, and closed to the public. But he also said coroners could discuss the results of the screenings for drugs and alcohol if they chose because they were not medical providers under the HIPPA health privacy law and an autopsy did not involve any of the medical procedures or health-care billing that the federal government requires be kept secret.³²

Privacy arguments have been made recently to close autopsies in other states, as well. In 2018, a Tennessee medical examiner cited the case of a baby who died of herpes contracted from its mother in testifying in favor of a bill to seal autopsy reports.³³ The bill was withdrawn by a sponsor, however, after open-government advocates cited multiple watchdog exposés that depended on medical-examiner documents.³⁴ Also last year, the Colorado legislature passed, with 96 votes out of 100, a bill to close juvenile autopsy reports. The president of the Colorado Coroners Association dismissed the objections of transparency supporters, saying coroners are held accountable by other government authorities and, “The families we answer to also are the ones we are accountable to.” Nonetheless, Gov. John Hickenlooper vetoed the bill. “Transparency and dialogue after a tragedy often bring about change,” he said. “Our heart goes out to any family who's gone through this. But that's part of the reason why you want to do everything you can to ensure that it happens as rarely as possible.”³⁵

‘Open data’ movement leads to efforts to restrict police records

The “open data” movement, which encourages the government to post information online, is also prompting efforts to close some records to the public. In 2016, The Police Foundation and the National

³² Collins, Jeffrey. “Toxicology reports medical records in S.C., but coroner can discuss.” The Associated Press. February 29, 2016. <https://www.heraldonline.com/news/state/south-carolina/article63263032.html> (Accessed August 10, 2019).

³³ Alund, Natalie Neysa. “Tennessee lawmakers seek to make autopsy results secret”. *The Tennessean*. March 5, 2018. <https://www.tennessean.com/story/news/politics/2018/03/05/tennessee-lawmakers-seek-make-autopsy-results-secret/394416002/> (Accessed August 10, 2019).

³⁴ McElroy, Jack. “Editorial | Bill to make autopsies secret protects government corruption, cover-ups and incompetence”. *Knoxville News Sentinel*. March 4, 2018. <https://www.knoxnews.com/story/opinion/editorials/2018/03/04/tennessee-autopsies-secret-government-corruption-opinion/383383002/> (Accessed August 10, 2019).

³⁵ Eason, Brian. “Colorado Governor Vetoes Bill to Make Autopsy Records Secret.” The Associated Press. June 1, 2018. <https://www.usnews.com/news/best-states/colorado/articles/2018-06-01/colorado-governor-vetoes-bill-to-make-autopsy-records-secret> (Accessed August 10, 2019).

Network to End Domestic Violence used a Justice Department grant to develop guidelines on how law enforcement agencies should respond to the “increased public interest in police data.” The report warned that data should be limited to aggregated information and not include facts about individual cases. “Granular, incident-specific data can make victims of crimes easily identifiable, which in turn can make them more vulnerable to further trauma, harassment, and discrimination in their personal or professional lives,” according to the recommendations. “As law enforcement agencies consider making more data open and available to the public, they have ethical and legal obligations to protect victim privacy.”³⁶

The report expresses particular concern for victims of sexual violence and recommends redaction of name, age, address and other details. Redaction should sometimes include the names of suspects, as well as victims, because “knowing the perpetrator’s identity could reveal the victim’s identity.” Likewise, location should be withheld because “the incident location could identify a victim ... even a block address could be identifying.” Narratives in police reports, too, “can contain details that could be potentially identifying, even if names are excluded.”³⁷

The report’s bottom line: “Jurisdictions may also want to consider updating the public records laws to reflect the significant changes due to the development and availability of online open data sets that were not even contemplated when public record laws were enacted.”³⁸

In June, Connecticut took some of the steps recommended by the report, amending its public records law to require police to redact a victim's name, address “or other identifying information” from records involving sexual assault, voyeurism, impairing the morals of children or family violence.³⁹ In

³⁶ “How Law Enforcement Agencies Releasing Open Data Can Protect Victim Privacy & Safety”. NNEDV Safety Net Project and The Police Foundation. 2016. <https://static1.squarespace.com/static/51dc541ce4b03ebab8c5c88c/t/5876a8322e69cf7c9ba1a215/1484171315884/PDI+for+Law+Enforcement+-+Final.pdf> (Accessed August 10, 2019).

³⁷ Ibid.

³⁸ Ibid.

³⁹ CT Public Act No. 19-43. LegiScan. <https://legiscan.com/CT/text/SB01105/id/2037074>.

Connecticut, as in many states, police often arrest both parties in domestic violence incidents. “This would make both their identities confidential,” said Mitchell Pearlman, former executive director of the Connecticut Freedom of Information Commission. “They both reportedly are victims and both reportedly are perpetrators. Then the actual perpetrator never goes to trial. So the whole incident will be swept away.” News organizations pointed out this problem, he said, “but legislators chose to trust the system.”⁴⁰

‘Marsy’s Law’ lets crime victims control release of information

The modern victims’ rights movement dates to the 1973 Supreme Court case of *Linda R.S. v. Richard D.*, in which a woman was denied standing in a failure-to-pay-child-support prosecution. The court’s decision, however, provided guidance for creating victims’ rights. Many states went on to pass laws or constitutional amendments,⁴¹ including Tennessee, which in 1998 overwhelmingly approved its Victims’ Bill of Rights Amendment granting crime victims the rights to confer with prosecutors, be informed of, present and heard at proceedings, get speedy resolution and restitution, and “be free from intimidation, harassment and abuse.”⁴² Other laws added privacy language. The federal Crime Victims’ Rights Act, passed in 2004, granted the right to “be treated with fairness and with respect for the victim’s dignity and privacy,”⁴³ and the California Victims’ Bill of Rights Act of 2008 made a nearly identical promise.⁴⁴

California’s constitutional amendment was known as Marsy’s Law, after Marsy Nicholas, a student at the University of California in Santa Barbara who was stalked and murdered in 1983 by an ex-

⁴⁰ Pearlman, Mitchell. Interview with Jack McElroy. Telephone interview. June 18, 2019.

⁴¹ “History of Victims’ Rights”. National Crime Victim Law Institute. 2011. https://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/history_of_victims_rights/. (Accessed August 11, 2019).

⁴² “Tennessee Victims’ Bill of Rights, Amendment 2 (1998)”. Ballotpedia. [https://ballotpedia.org/Tennessee_Victims%27_Bill_of_Rights_Amendment_2_\(1998\)](https://ballotpedia.org/Tennessee_Victims%27_Bill_of_Rights_Amendment_2_(1998)). (Accessed August 11, 2019).

⁴³ “Crime Victims’ Rights Act”. United States Department of Justice. <https://www.justice.gov/usao/resources/crime-victims-rights-ombudsman/victims-rights-act> (Accessed August 11, 2019).

⁴⁴ “Victims’ Bill of Rights”. State of California Department of Justice. https://oag.ca.gov/victimservices/content/bill_of_rights (Accessed August 11, 2019).

boyfriend. The man, eventually convicted of second-degree murder, was released on bail shortly after the killing, unbeknownst to the family, and Marsy's mother was shocked to meet him in a grocery store. Since then, Marsy's brother -- Henry Nicholas, a billionaire who founded the Broadcom semiconductor company -- has spent tens of millions of dollars on a "Marsy's Law for All" campaign to pass state constitutional amendments recognizing an array of victim's rights. After California, Marsy's Law passed in Illinois, Montana, North Dakota, Ohio and South Dakota, and in 2018 voters approved the amendment in Florida, Georgia, Kentucky, Nevada, North Carolina and Oklahoma, though the courts blocked the vote from being certified in Kentucky.⁴⁵

Versions differ, but many include broad rights to privacy, with major consequences. In South Dakota, the amendment grants victims the right to prevent disclosure of "information or records that could be used to locate or harass the victim or the victim's family." Some police agencies have interpreted that to mean they cannot share information about unsolved crimes.⁴⁶ In November 2018, a sheriff's deputy in South Dakota who killed a fleeing suspect invoked that right himself, saying he was a victim because the suspect had fired shots before being slain. The Pennington County Sheriff's Office refused to release the deputy's name, saying the law "affords him protections as it does any victim of crime."⁴⁷ In nearby North Dakota, at least eight law enforcement officers have invoked Marsy's Law to keep their identities secret after use-of-force incidents.⁴⁸

In Florida, the impact has been chaotic. Marsy's Law supporters produced a legal opinion that the amendment forbids the release of crime victims' names without their consent. A records custodian must "maintain confidentiality of any information that 'could be used' in the context to locate a victim or

⁴⁵ Quinton, Sophie. "'Marsy's Law' Protections for Crime Victims Sound Great, but Could Cause Problems". Pew Charitable Trusts Stateline Article. October 12, 2018. <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/12/marsys-law-protections-for-crime-victims-sound-great-but-could-cause-problems> (Accessed August 11, 2019).

⁴⁶ Ibid.

⁴⁷ Tupper, Seth. "Marsy's Law shields name of deputy who shot suspect". *Rapid City Journal*. December 7, 2018. https://rapidcityjournal.com/news/local/marsy-s-law-shields-name-of-deputy-who-shot-suspect/article_789f446f-c936-51fd-ad39-75f1e8d601a3.html (Accessed August 11, 2019).

⁴⁸ Baumgarten, April. "Marsy's Law often invoked to withhold officers' names". *Grand Forks Herald*. July 22, 2018. <https://www.grandforksherald.com/news/crime-and-courts/4475423-marsys-law-often-invoked-withhold-officers-names> (Accessed August 11, 2019).

victim's family," wrote Marsy's Law attorney Barry Richard.⁴⁹ But the Florida Sheriff's Association advised members that Marsy's Law is "ambiguous and subject to interpretation." Sheriffs should, however, withhold identifying information at a victim's request, though it's unclear how that request must be made.⁵⁰

"It's awful. It's vague," said Barbara Petersen, who this summer retired after 25 years directing Florida's First Amendment Foundation. "Law enforcement doesn't know how to interpret it." In one instance, she said, deputies responded to a domestic violence call and one of them fired into a moving car after a woman bumped him leaving the scene. The sheriff withheld the name of the officer, citing Marsy's Law.⁵¹

"In Tallahassee," she said, "people who live in a very quiet suburb found a car and body in the middle of the street, blood everywhere. When The Tallahassee Police Department responded, the only information they would provide was the time, date, crime (DUI manslaughter) and name of officer responding." A reporter from the *Tallahassee Democrat* learned the name of the victim because the family launched a GoFundMe campaign, but the police department still would not confirm the information. For months, the police made no arrest and were mum on the identity of a suspect, too, although the newspaper had interviewed the driver, a woman already on probation for running over a former boyfriend, and she admitted involvement in the latest crash.⁵²

"It makes the public go: 'What the hell? What are they trying to hide?'" said Peterson. She said Florida already had 36 laws protecting victims, but challenging Marsy's Law would be daunting. "The Marsy's Law for All people have lots and lots of money, buckets of money," she said. "They could just beat us

⁴⁹ Ogleson, Jacob. "Marsy's Law protects privacy for victims and families, legal opinion says". Florida Politics. March 14, 2019. <https://floridapolitics.com/archives/290944-legal-opinion-marsys-law> (Accessed August 11, 2019).

⁵⁰ Evans, Wayne. "Memo Re: Amendment 6 to the Florida Constitution - Victim's Rights." Florida Sheriff's Association. January 7, 2019.

⁵¹ Petersen, Barbara. Interview with Jack McElroy. Telephone interview. August 23, 2019.

⁵² Ibid.

to death with money.”⁵³

Many believe victims’ anguish shouldn’t live on online

Some victims' advocates want records closed not because they reveal private information but because they might cause anguish by continuing to exist in cyberspace. That issue raged after the 2012 shootings at Sandy Hook Elementary School in Newtown, Conn. In 2013, the governor and legislative leaders drafted a bill to seal crime scene photos and 911 records from the shooting, which killed 20 children and six adults⁵⁴ A Task Force on Victim Privacy and the Public’s Right to Know subsequently heard testimony from two dozen people, including Bill Sherlach, whose wife was killed. He shared his fear: "With the internet, bloggers, truthers and conspiracy advocates, any information available will be published ... over and over and over again."⁵⁵ The task force decided that images and recordings should be closed if disclosure constituted “an unwarranted invasion of personal privacy.” Open-government advocates had to fight to keep the word “unwarranted” in the language so that privacy interests would be balanced against the public’s need for information.⁵⁶

But some policymakers have a tough time seeing how intrusions into painful personal moments can be warranted. Tennessee Rep. Rick Tillis, a former firefighter and EMT, this year introduced legislation to close 911 recordings. "A lot of times at the fire hall when we'd be watching the news and watching a sensationalized news story and a victim screaming bloody murder on the call, we just didn't think it was appropriate," he said.⁵⁷ After open-government groups cited examples of watchdog reporting that

⁵³ Ibid.

⁵⁴ “Connecticut bill would limit public access to records of Sandy Hook shooting.” *The Register Citizen*. May 22, 2013. <https://www.denverpost.com/2013/05/22/connecticut-bill-would-limit-public-access-to-records-of-sandy-hook-shooting/> (Accessed August 11, 2019).

⁵⁵ “Sandy Hook shooting victims’ families ask to keep 911 call audio private”. The Associated Press. October 30, 2013. <https://www.theguardian.com/world/2013/oct/30/newtown-connecticut-sandy-hook-shooting-911-calls-public> (Accessed August 11, 2019).

⁵⁶ “Task Force on Victim Privacy and the Public’s Right to Know Final Report”. State of Connecticut. January 27, 2014. <https://www.cga.ct.gov/2014/rpt/pdf/2014-R-0009.pdf> (Accessed August 11, 2019).

⁵⁷ Hughes, Rosana. “Some Tennessee legislators attempting to make even more official records off limits to the public”. *Chattanooga Times Free Press*. February 17, 2019. <https://www.timesfreepress.com/news/local/story/2019/feb/17/legislaticould-limit-publics-access-records/488816/> (Accessed August 10, 2019).

relied on 911 recordings, Tillis took the bill off notice, saying he wanted work on it and bring it back in 2020.⁵⁸

Mitchell Pearlman was among the experts who testified before the Connecticut Task Force, and he wrote an oped for *The Hartford Courant* during the debate. “In the wake of the Sandy Hook tragedy,” he wrote, “it’s understandable that government officials may look for quick fixes, especially those that might relieve some of the victims’ anguish. But emotion-charged quick fixes and knee-jerk responses often bring devastating unintended consequences ... Without transparency, there is simply too much room to cover up mistakes, misconduct and even wrongful arrests, prosecutions and convictions.”⁵⁹ In an interview, he added, “We had a terrible situation with the Sandy Hook school shooting. It took several years and tens of thousands of dollars to get records about what went wrong.” While victim privacy was cited for the secrecy, “most thought it took that long because the police thought they would be criticized for the way they handled it.” But it was essential that the Sandy Hook calamity be fully examined for lessons that might help in future school shootings. “Look at what came out of Columbine,” he said. “We still are learning.”⁶⁰

Chapter 3: Confidential new tools, techniques

As intrusion becomes invisible, laws protect the stealth

As the networked world has heightened citizen concerns about privacy, it also has provided police with an array of investigative tools, especially for search and surveillance. This is an area of the law where electronic capabilities have long led to legal structures protecting the confidentiality of investigations. In the early days of the nation, when the Fourth Amendment protections were developed, searches and

⁵⁸ Fisher, Deborah. “2019 Legislative Report: New exemptions to Public Records Act, and bills that failed or were delayed.” Tennessee Coalition for Open Government. May 22, 2019. <http://tcog.info/2019-legislative-report-new-exemptions-to-public-records-act-and-bills-that-failed-or-were-delayed/> (Accessed September 10, 2019).

⁵⁹ Pearlman, Mitchell. “Victims’ Rights Don’t Trump Necessity Of Transparency”. *The Hartford Courant*. October 25, 2013. <https://www.courant.com/opinion/hc-op-pearlman-victims-right-limited-for-good-reas-20131025-story.html> (Accessed August 11, 2019).

⁶⁰ Pearlman, Mitchell. Interview with Jack McElroy. Telephone interview. June 18, 2019.

seizures happened in public, with neighbors watching as authorities entered and combed through private premises. That changed with wiretapping, which did not require a warrant until a Supreme Court ruling in 1967.⁶¹

Since then, new legal developments have assured that intrusion without physical trespass has remained a largely hidden activity. The Electronic Communications Privacy Act in 1986 required police to obtain court orders to capture routing data on phone lines. But the law -- later broadened to include internet communication -- also required that the orders be sealed. The same was true of the 1968 Wiretap Act, which let law enforcement intercept real-time communications. The Stored Communications Act of 1986, which regulates how investigators get data about a person's email and digital communications from internet service providers, requires court orders, as well, but allows a delay of disclosure to the individual whose communications are sought. In Fiscal Year 2015, courts turned down only 28 out of 14,801 applications to delay notice under the act.⁶²

Service providers can be ordered to keep secret the requests they receive for data, too. Microsoft, alone, said it received 3,250 secrecy orders in a recent 20-month period, and Facebook has said that about 57 percent of the tens of thousands of police requests it receives come with gag orders. In 2016, Verizon received more than 21,000 search warrants and many more requests for non-content information, for which no warrant is required. "Widespread sealing and secret docketing practices ... obscure key data about law enforcement's use of surveillance," wrote Hannah Bloch-Wehba, a law professor at Drexel University who did the analysis. "(A)dditional sunshine in this dimly lit area would not only have a salutary effect on surveillance and policing, but it is also consonant with historical practice ..."⁶³

Facial recognition scans expand with little scrutiny

Local police now are pioneering new electronic search and surveillance techniques, with little or no

⁶¹ Bloch-Wehba, Hannah. "Exposing Secret Searches: A First Amendment Right of Access to Electronic Surveillance Orders". *University of Washington Law Review*. Volume 93 No. 1 (2018). <https://www.law.uw.edu/wlr/print-edition/print-edition/vol-93/1/exposing-secret-searches-a-first-amendment-right-of-access-to-electronic-surveillance-orders> (Accessed August 11, 2019).

⁶² Ibid.

⁶³ Ibid.

public oversight. The sheriff's office of Washington County, Ore., in 2017 became the nation's first law enforcement agency to apply Amazon's Rekognition software to police work. Rekognition "provides highly accurate facial analysis and facial recognition" that can be used to "detect, analyze, and compare faces for a wide variety of use cases," according to Amazon.⁶⁴ After the company unveiled the application in 2016, Chris Adzima, a programmer who was working on a sheriff's department app, began experimenting with the technology. Within three weeks, he had set up a system to analyze the hundreds of thousands of jail mugshots the department already had online. Soon deputies were using the facial searches on their daily beats. In 2018, they logged more than 1,000 searches, which led to suspects' homes and social media sites, as well as to dozens of arrests. But a public records request by *The Washington Post* turned up only nine case reports that mentioned facial recognition.

"Just like any of our investigative techniques, we don't tell people how we catch them," Detective Robert Rookhuizen told the *Post*. "We want them to keep guessing." Cheap and easy to use, Rekognition makes face searching possible for every law-enforcement agency in the country. Washington County paid just \$700 for its initial upload of some 300,000 photos, and it now pays about \$7 a month for searches.⁶⁵ The technology has raised concerns about inaccurate matching, but in May, Amazon shareholders shot down proposals to stop sales to police agencies or to conduct an independent study of the technology's effects.⁶⁶

Many other police agencies, especially in large cities, have been using proprietary facial-recognition systems for years, often with little public awareness. In 2016, a team of researchers at Georgetown University sent public records requests to the 50 largest law-enforcement agencies in the country and other agencies that seemed to be using facial recognition. The requests asked for policies, audits,

⁶⁴ "What Is Amazon Rekognition?" Amazon Web Services documentation. <https://docs.aws.amazon.com/rekognition/latest/dg/what-is.html> (Accessed August 12, 2019).

⁶⁵ Harwell, Drew. "Oregon became a testing ground for Amazon's facial-recognition policing. But what if Rekognition gets it wrong?" *The Washington Post*. April 30, 2019. https://www.washingtonpost.com/technology/2019/04/30/amazons-facial-recognition-technology-is-supercharging-local-police/?utm_term=.f4621cc58607 (Accessed August 12, 2019).

⁶⁶ Kelly, Tyko. "Amazon shareholders reject banning sale of facial recognition software to law enforcement". *USA Today*. May 22, 2019. <https://www.usatoday.com/story/tech/2019/05/22/amazon-facial-recognition-shareholders-reject-banning-software-sales/3770927002/> (Accessed August 12, 2019).

training documents and financial records tied to the practice. Several agencies -- including the Baltimore, Cleveland, Indianapolis, Miami-Dade, and Salt Lake City police departments and the Massachusetts, Mississippi and New Mexico state police -- did not respond to the records requests at all. Others -- including the Dallas, Houston, Phoenix and St. Louis police departments and the New Jersey, Rhode Island and South Carolina state police -- responded but without indicating whether they were using facial recognition. The New York Police Department denied the records request completely saying any records fell under the “non-routine techniques and procedures” exemption in New York’s Freedom of Information Law.⁶⁷

“Police departments generally tell the public very little about their use of face recognition,” the Georgetown researchers concluded. “When the existence of these systems comes to light, it is often due to the work of investigative journalists and privacy organizations.” Ohio’s system, for example, remained unknown for five years until the *Cincinnati Enquirer* revealed that all of the state’s driver’s license photos had been loaded into the Bureau of Criminal Investigation’s database for examination. Documents showed the Chicago Police Department purchased a system in 2012, but the agency would provide no information on how it was used. The Pinellas County, Fla., Sheriff’s Office had been using a system for more than a decade, but the county’s public defender said he had never once gotten any facial recognition information in the disclosures that prosecutors are required to provide defense attorneys. “Face recognition is too powerful to be secret,” the researchers stated in their final recommendations. “Any law enforcement agency using face recognition should be required to annually and publicly disclose information ...”⁶⁸

Google data dragnets quietly round up cell phones

Facial recognition isn’t the only cutting edge surveillance technique that is evolving mostly in secret. One rapidly growing technique is geofence searching, which involves obtaining data from Google about which cell phones were near the scene of an incident. The method uses a phone’s Location

⁶⁷ “The Perpetual Line-up/Unregulated Police Face Recognition in America”. Georgetown Law Center on Technology and Privacy. October 18, 2016. www.perpetuallineup.org (Accessed August 12, 2019).

⁶⁸ Ibid.

History feature, which lets phone users see where they (or their children) have been by accessing data stored in Google's Sensorvault database. The use of the data for police dragnets was made public in 2018 by WRAL-TV in North Carolina, which discovered four search warrants seeking "anonymized" lists of all the phones that had entered particular areas. Police planned to use the phones' location histories to spot suspicious movements before issuing warrants for individual phones. Raleigh police would not be interviewed about the practice, but, answering questions via email, they said they got the idea from the North Carolina Bureau of Investigations, which would not comment.⁶⁹

The practice has spread rapidly. *The New York Times* reported this year that Google had received as many as 180 requests for geofence information in a single week. Although the Supreme Court has ruled that a search warrant is required to obtain historical data on a single person's cellphone, it has not ruled on anonymized geofenced lists. Google, however, is requiring warrants, though a single warrant may produce dozens, or even thousands, of results, and, the *Times* reported, the warrants often are sealed.⁷⁰

Nationwide cloak of confidentiality covers high-tech gear

Cell-site simulators, commonly known by the popular brand name "Stingray," are another surveillance tool that has been widely, and secretly, deployed in many communities. Originally developed for national-defense use, Stingrays emit signals that mimic cell phone towers, forcing nearby phones to transmit identifying information. The ACLU of Michigan revealed in 2015 that the Michigan State Police had been using cell-site simulators for almost a decade. The initial \$200,000 purchase, made with a Department of Homeland Security grant, and a later \$593,450 upgrade using asset-forfeiture money, were hidden with vague descriptions in State Administrative Board agendas. The State Police dodged transparency requirements by arguing that "educating the public . . . could have a severe detrimental effect on future investigative efforts." When the ACLU made records requests, the agency released documents only on appeal. They showed that the initial purchase was justified by saying it would "allow the State to track the physical location of a suspected terrorist who is using wireless

⁶⁹ Dukes, Tyler. "To find suspects, police quietly turn to Google." WRAL-TV. March 15, 2018. <https://www.wral.com/Raleigh-police-search-google-location-history/17377435/> (Accessed August 12, 2019).

⁷⁰ Valentino-DeVries, Jennifer. "Tracking Phones, Google Is a Dragnet for the Police." *The New York Times*. April 13, 2019. <https://www.nytimes.com/interactive/2019/04/13/us/google-location-tracking-police.html> (Accessed August 12, 2019).

communications as part of their operation.” But of the 128 investigations in which the equipment was used in 2014, none involved terrorism.⁷¹

Stingray secrecy is far broader than one agency’s attempts to keep the technology hidden. In 2010, Harris Corp., which manufactures the devices, entered into an agreement with the Federal Communications Commission requiring that all licensing of Stingrays to state and local law enforcement be coordinated through the FBI. The FBI, in turn, required police agencies to enter into nondisclosure agreements that prohibited them from revealing information in response to public-information requests, even about the nondisclosure agreements. In 2015, however, a New York court ordered disclosure of one of the NDAs. It showed that the secrecy requirement even extended to seeking dismissal of cases rather than revealing “any information concerning the Harris Corporation wireless collection equipment/technology ...”⁷²

Since then, public awareness has grown. As of November 2018, ACLU tracking showed that in five states, the state police were using cell-phone simulators; in eight states, local police were; and in 13 states, including Tennessee, both state and local police were using Stingrays. Use in other states remained unknown. “Law enforcement agencies all over the country possess Stingrays, though their use is often shrouded in secrecy,” the organization reported.. “We are continuing to push for transparency and reform.”⁷³

Agencies use national security language to evade info requests

Some local police departments have begun borrowing national-security language in withholding information about investigative tools and practices. In December 2014, some 70,000 people marched in

⁷¹ Wessler, Nathan Freed. “Police Citing “Terrorism” to Buy Stingrays Used Only For Ordinary Crimes.” ACLU. October 23, 2015. <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/police-citing-terrorism-buy-stingrays-used-only> (Accessed August 12, 2019).

⁷² Bates, Adam. “Stingray: A New Frontier in Police Surveillance. Cato Institute. January 25, 2017. <https://www.cato.org/publications/policy-analysis/stingray-new-frontier-police-surveillance#full> (Accessed August 12, 2019).

⁷³ “Stingray Tracking Devices: Who’s Got Them?” ACLU. <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/stingray-tracking-devices-whos-got-them?redirect=map/stingray-tracking-devices-whos-got-them> (Accessed August 12, 2019).

New York to protest the deaths of Eric Garner and Michael Brown at the hands of police officers. But organizers of Millions March NYC experienced unusual problems with their cell phones. The group requested records under New York's Freedom of Information Law to learn if police were using special equipment to disrupt phones. The New York Police Department responded that it could neither confirm nor deny the existence of records responsive to the request.⁷⁴

Such "Glomar" responses first came into use in 1975 when the *Los Angeles Times* was seeking information about a CIA effort to recover a sunken Soviet submarine using a salvage ship called the Hughes Glomar Explorer. The CIA responded: "We can neither confirm nor deny the existence of the information requested but, hypothetically, if such data were to exist, the subject matter would be classified, and could not be disclosed."⁷⁵ Federal courts have supported Glomar responses in cases of national security, and the New York Court of Appeals ruled that a Glomar response was a permissible answer to a state freedom of information request if a different response would reveal that a specific individual or organization were under investigation. In that case, the Reporters Committee for Freedom of the Press complained that Glomar responses had become "a staple of evasion" among federal agencies and predicted, "If New York courts open the door to the issuance of Glomar responses by state and local government agencies in this case, over time, use of the Glomar doctrine by such agencies may spread far beyond the facts presented here."⁷⁶

That prediction proved prescient. In the Millions March case, the NYPD was concerned about guarding the secrecy of investigative "tools," not the identities of targets. Supreme Court Judge Arlene Bluth shot down that argument early this year, writing: "FOIL is intended to shed sunlight on government actions. The very notion of a Glomar response ... contradicts the purpose of disclosure under FOIL." The department subsequently said it had no records of cell phone interference or surveillance. The judge also ruled against NYPD's redaction of the prices and product features of software and

⁷⁴ Millions March NYC v. New York Police Department. Supreme Court of State of New York Index No. 100690/2017

⁷⁵ "Neither Confirm Nor Deny." WNYC Studios. June 4, 2019. <https://www.wnycstudios.org/story/confirm-nor-deney> (Accessed August 13, 2019).

⁷⁶ Brief of Amici Curiae the Reporters Committee for Freedom of the Press and 20 media organizations in support of appellant. Talib W. Abdur-Rashid v New York City Police Department. Court of Appeals State of New York: APL-2016-00219.

technology it used to monitor protesters' social media accounts on the basis that the information was "trade secrets." "If the prices and the product features are trade secrets," the judge wrote, "then every single contract a governmental agency enters into would be exempt from FOIL."⁷⁷

Police argue cutting-edge tools are 'proprietary' or 'trade secrets'

Nonetheless, the trade secrets argument is being used to keep confidential cutting-edge police techniques. The question was the center of a 2016 ProPublica investigation into the reliability of DNA testing by New York's crime lab. The lab had developed an algorithm for testing samples that contained mixtures of people's DNA. The government would not make public the underlying programming, however, arguing it was a "proprietary and copyrighted" statistical tool. ProPublica went to court, won release of the code and highlighted flaws in it that could affect the odds of correctly identifying defendants. New York later abandoned the proprietary algorithm for different software for evaluating mixes of DNA.⁷⁸

Concern about secret government algorithms prompted the Connecticut Foundation for Open Government to produce a white paper on the issue in 2018. "Proprietary computer algorithms are considered intellectual property and deemed trade secrets by most private enterprises and many government agencies that create and use them," the paper noted, but, "if the algorithms themselves are based on flawed reasoning or processes, then government policies and decisions based on them will likewise be flawed (and) ... can lead to an enormous waste of public resources and even to a significant loss of life."⁷⁹

A few jurisdictions have begun to grapple with the issue. In late 2017, in response to the ProPublica investigation, The New York City Council created a task force to study how city agencies should use

⁷⁷ Millions March NYC *op.cit.*

⁷⁸ Kirchner, Lauren. "Machine Bias/Federal Judge Unseals New York Crime Lab's Software for Analyzing DNA Evidence". ProPublica. October 20, 2017. <https://www.propublica.org/article/federal-judge-unseals-new-york-crime-labs-software-for-analyzing-dna-evidence> (Accessed August 14, 2019).

⁷⁹ Kirchner, Lauren. "New York City Moves to Create Accountability for Algorithms." ProPublica. December 18, 2017. <https://www.propublica.org/article/new-york-city-moves-to-create-accountability-for-algorithms> (Accessed August 14, 2019).

algorithms, the first such effort nationally. But a year and a half later, after the task force had met 18 times behind closed doors, it was struggling to fulfill its mission. The reason: A lack of information about the artificial intelligence the city was using, much of which was run by outside tech companies and shrouded in proprietary secrecy.⁸⁰

Chapter 4: Erecting shields to protect officers

Push to encrypt scanner traffic follows 9/11 attacks

Technology is among the factors driving encryption of police radio traffic, too. In 2012, the Middle Class Tax Relief and Job Creation Act included a provision to build and operate a national radio access network (RAN) for public safety. The 9/11 attacks had exposed problems that emergency responders had with incompatible communications systems, so a major priority of the network was interoperability. FirstNet, as it was called, would cost \$7 billion to \$10 billion in national, state and local funds to build out and eventually could be used by some 5.4 million first responders.⁸¹ By 2017, all 50 states had opted into the network. In addition to interoperability, the availability of “end-to-end encryption” was a selling point.⁸² The argument for encryption was spelled out in a 2016 report developed by 28 national, state and federal agencies including FEMA, the FBI and three offices of the Department of Homeland Security. “Today we find many public safety communications channels streamed across the Internet or openly broadcast giving the public, media, criminals, and potential terrorists immediate access to crucial public safety information,” the report stated. It cited examples of open radio communication creating potential law-enforcement problems and recommended: “The best way to attempt to protect sensitive information and to ensure that public safety personnel and

⁸⁰ Ghaffary, Shirin. “New York City wants to make sure the AI and algorithms it uses aren’t biased. That’s harder than it sounds”. Vox. April 11, 2019. <https://www.vox.com/2019/4/11/18300541/new-york-city-algorithms-ai-automated-decision-making-systems-accountable-predictive-policing> (Accessed August 14, 2019).

⁸¹ Newcombe, Tod. “FirstNet Explained.” *Government Technology*. April 18, 2014. <https://www.govtech.com/em/safety/FirstNet-Explained-EM.html> (Accessed August 14, 2019).

⁸² “Early Benefits of FirstNet: Network Security”. First Responder Network Authority. September 19, 2018. <https://www.firstnet.gov/newsroom/blog/early-benefits-firstnet-network-security> (Accessed August 14, 2019).

operations are protected from unwanted disclosure is to encrypt part or all of the radio traffic.”⁸³

Now, more and more jurisdictions are turning to encryption. Departments in the Nashville metro area followed Knoxville's example in Tennessee, rolling out encryption in 2019.⁸⁴ Police agencies in the Richmond, Va., area went to encryption in July 2018.⁸⁵ Ten police departments in the Erie, Penn., area began encrypting in the first half of 2019. All cited mission security and officer safety as reasons the hidden transmissions were needed.⁸⁶

"I can't tell you how many times we've raided drug houses and found police scanners," Erie Bureau of Police Chief Dan Spizarny told the *Erie Times-News*. Erie County Executive Kathy Dahlkemper, said she was an advocate of police transparency, citing her support of body cameras. But, she added: "Public safety and the safety of our first responders trumps transparency."⁸⁷

Some agencies have taken steps to accommodate media when using encryption. The Las Vegas Metropolitan Police Department began encrypting a few months after the October 2017 concert shootings that left 58 people dead and 850 hurt. Police scanners were crucial to news coverage of the massacre, and the department has since allowed media outlets access to the radio system, but only if they sign agreements with terms that include not taking officers' names from the radio traffic.⁸⁸ The

⁸³ "Considerations for Encryption in Public Safety Radio Systems". Federal Partnership for Interoperable Communications. September 2016. https://www.dhs.gov/sites/default/files/publications/20160830%20Considerations%20for%20Encryption_Final%20Draft508_0.pdf (Accessed September 7, 2019).

⁸⁴ Sauber, Elaina. "Radio silence: Nashville police to block public from listening to communications." *The Tennessean*. February 15, 2019. <https://www.tennessean.com/story/news/local/2019/02/15/nashville-police-encrypt-radio-scanners/2838756002/> (Accessed August 14, 2019).

⁸⁵ Bowes, Mark. "Public's ability to monitor police radio traffic ends July 2; Richmond-area agencies to encrypt all channels". *Richmond Times-Dispatch*. June 22, 2018. https://www.richmond.com/news/local/central-virginia/public-s-ability-to-monitor-police-radio-traffic-ends-july/article_46efd2f7-a858-5533-82e8-a34a6979086f.html (Accessed August 14, 2019).

⁸⁶ Rink, Matthew. "Erie Cops Are Latest in Pennsylvania to Encrypt Radio". *Erie Times-News*. February 25, 2019. <https://www.govtech.com/dc/Erie-Cops-are-Latest-in-Pennsylvania-to-Encrypt-Radio.html> (Accessed August 14, 2019).

⁸⁷ Ibid.

⁸⁸ Rink, Matthew. "Scanner played key role in newspapers coverage of Las Vegas mass shooting". *Erie Times-News*. February 24, 2019. <https://www.goeerie.com/news/20190224/scanner-played-key-role-in-newspapers-coverage-of-las-vegas-mass-shooting> (Accessed August 14, 2019).

Denver Police Department moved to encryption this year, and it was developing a consent agreement to allow media outlets to listen to encrypted channels. “We’re not just flipping a switch and going dark and telling the media to follow us on social media,” DPD Chief Paul Pazen promised Channel 7. But in nearby Longmont, Colo., the editor of the *Longmont Times-Call* refused to sign a similar agreement because it was too restrictive, although eventually a verbal agreement was reached.⁸⁹

Body cameras often closed to guard ‘ongoing investigations’

The conflict between transparency and concern for the safety of police became the focus of national attention in 2014 when police in Ferguson, Mo., refused to release the name of the officer who killed an 18-year-old African American, Michael Brown. Demonstrations, violence and rumors swept the community as Police Chief Thomas Jackson withheld the information, saying the officer had received death threats in phone calls and on social media. Missouri’s open records law allows police to keep secret information that “is reasonably likely to pose a clear and present danger” and, Jackson said, “If we come out and say, ‘It was this officer,’ then he immediately becomes a target.”⁹⁰ Nearly a week after the shooting, police did identify the white officer involved as Darren Wilson, but only after Wilson and his family had been moved out of town. The Ferguson shooting lent momentum to the Black Lives Matter movement, which began a year earlier as a hashtag after the acquittal of a white neighborhood watch coordinator in the shooting death of Trayvon Martin, an unarmed African-American teenager in Florida. Then, in late 2014, a countermovement -- Blue Lives Matter -- was born after the killing of two New York police officers in apparent retaliation for the deaths of Brown and Eric Garner, an African American killed by New York police that same year. Blue Lives Matter advocates suggested that a “war on police” had erupted in the United States because the number of law-enforcement deaths rose from 2013 to 2014. But statistics showed that, though deaths were up in 2014 from a record low in

⁸⁹ Lopez, Meghan. “More police departments are encrypting their scanners, raising freedom of information concerns”. Denver Channel 7. March 23, 2019. <https://www.thedenverchannel.com/news/360/more-police-departments-are-encrypting-their-scanners-raising-freedom-of-information-concerns> (Accessed August 14, 2019).

⁹⁰ Peters, Jonathan. “Can Ferguson police legally withhold the officer’s name?” *Columbia Journalism Review*. August 14, 2014. https://archives.cjr.org/united_states_project/can_ferguson_police_legally_withhold_officers_name.php?page=all (Accessed August 15, 2019).

2013, a decades-long decline in violence against police was continuing.⁹¹

There was no video of the shooting of Michael Brown, and the accounts of witnesses varied. Some said he had his hands up when he was killed. Others said he was charging the officer. After a grand jury decided not to charge Wilson in the death, Brown's family issued a statement calling for a nationwide campaign "to ensure that every police officer working the streets in this country wears a body camera." By that time, many departments already had launched pilot programs. "Police realize that they're under greater levels of public scrutiny," Art Lurigio, a professor of psychology and criminal justice at Loyola University Chicago, told *Time* magazine in late 2014. "And the Michael Brown case is elevating this urgency. It's bringing this discussion of cameras to a more fevered pitch."⁹²

Three years later, a survey showed that 62 of the 69 "major city" police departments had body camera programs with policies in place, and three others had begun using body cams but had not made policies public yet. But the cameras have raised a plethora of questions about records storage, access, integrity and redaction. A "Policy Scorecard" developed by The Leadership Conference on Civil & Human Rights, a coalition of more than 200 organizations, showed that in November 2017, of 75 body-cam policies examined, only four had special provisions to make video available to the people who were recorded.⁹³ Public records laws governed access in other jurisdictions, and the laws varied greatly. In 2018, the National Conference of State Legislatures reported that 23 states and the District of Columbia had passed laws addressing access to police body-cam video. Some treated recordings as public records subject to exemptions that excluded particular types of content. Others excluded body cameras from public records laws but allowed access in special situations. Oregon permits release of video if it serves the public interest, and South Carolina lets local or state police release video at their own discretion.⁹⁴

⁹¹ Kaste, Martin. "Is There A 'War On Police'? The Statistics Say No". NPR. September 17, 2015. <https://www.npr.org/2015/09/17/441196546/is-there-a-war-on-police-the-statistics-say-no> (Accessed August 15, 2019).

⁹² Sanburn, Josh. "The One Battle Michael Brown's Family Will Win". November 12, 2014. *Time*. <https://time.com/3606376/police-cameras-ferguson-evidence/> (Accessed August 15, 2019).

⁹³ "Police Body Worn Cameras: A Policy Scorecard." The Leadership Conference and Upturn. November 2017. <https://www.bwcorecard.org/> (Accessed August 15, 2019).

⁹⁴ "Body-Worn Camera Laws Database". National Conference of State Legislatures. November 2017. <http://www.ncsl.org/research/civil-and-criminal-justice/body-worn-cameras-interactive-graphic.aspx#/> (Accessed August 15, 2019).

The law continues to evolve, with fresh legislation introduced in 2019 in 21 states addressing use of police body cameras or storage and access to their recordings.⁹⁵

Adam Marshall, attorney for the Reporters Committee for Freedom of the Press, has followed the issue closely since the Ferguson killing, even writing a paper on the topic while he was still in law school. When Washington, D.C., launched one of the nation's early body-cam pilots, "I had the pleasure to submit the first FOI for body-cam video, which led us down a whole rabbit hole," he said. That first request was met with a response that exempt information in the video could not be redacted. "That's like saying you can't have this police report because we can't find a Sharpie to redact it," Marshall said. Tools are available that make video redaction relatively simple now, but agencies, he said, continue to argue that redaction is prohibitively laborious. Yet preventing citizens from seeing video is "anathema to the purpose of body cameras," he said, "which is to assure accountability and build public trust."⁹⁶

Because laws and policies remain in flux, law enforcement agencies often are the ones deciding whether to reveal their videos to the public. This year The Associated Press conducted an audit, requesting recordings of 20 recent use-of-force incidents from agencies in 12 states. By the time the AP published the results of the test in conjunction with National Sunshine Week in March, not a single video had been released. Most often, the law-enforcement bodies said their denials were because of an "ongoing investigation," an exemption intended to prevent disclosure of sensitive details of a case. Use of this exemption "makes no sense and should have no place when it comes to police body camera footage," Chad Marlow, a counsel for the American Civil Liberties Union, told the AP after the audit. "The decisions about whether footage is being released or not is being dominated by the group that is supposed to be watched. When that happens, police body cameras go from being a tool for transparency and accountability into a propaganda tool."⁹⁷

⁹⁵ LegiScan. <https://legiscan.com/gaits/search?state=ALL&keyword=body+camera>. (Accessed August 15, 2019).

⁹⁶ Marshall, Adam. Interview with Jack McElroy. Telephone interview. August 30, 2019.

⁹⁷ Foley, Ryan J. "Public regularly denied access to police officer videos". The Associated Press. March 13, 2019. <https://www.apnews.com/67f22d5857f14413a4a9b34642c49ae3> (Accessed August 15, 2019).

Chapter 5: Changing relationship with reporters

Routine coverage gives way to focus on conduct

Just as the Ferguson shooting sparked momentum in the Black Lives Matter movement and prompted many police departments to adopt body cameras, that incident and other high-profile cases of African Americans dying during arrests have increased media attention on police conduct, which, in turn, has added strain to the always tenuous relationship between journalists and officers.

In St. Louis, Elizabeth Donald, president of the local chapter of the Society of Professional Journalists, said police have made it harder to cover protests since the Ferguson demonstrations. An example was the 2017 arrest of *St. Louis Post-Dispatch* reporter Mike Faulk, who was detained for half a day and charged with failure to disperse when he was covering a protest after the acquittal of a white officer who killed a black man in 2011.

In Chicago, where dash-cam video disproved police accounts of the 2014 killing of Laquan McDonald, an African American teenager, the Fraternal Order of Police in 2017 issued a “cease and desist” letter demanding that two reporters from the *Chicago Sun-Times* stop knocking on the doors of police officers. The journalists had been seeking comment for a story about officers abusing alcohol and drugs.⁹⁸

In New York, where Eric Garner’s fatal arrest was captured by a bystander’s video in 2014, freelance journalist Nick Pinto described in *Columbia Journalism Review* this year how police attitudes changed as his reporting focused on police conduct. When he tried to cover a departmental trial of an officer who had shot an unarmed 18-year-old, the officer at the door “asked me to wait as he escorted in other reporters and an entire school field-trip class, then turned to me and cheerfully apologized that the

⁹⁸ Borden, Jeremy. “‘Cease and desist’: Journalism’s strained relationship with police”. *Columbia Journalism Review*. October 18, 2017. https://www.cjr.org/united_states_project/chicago-police-union-reporters.php (Accessed August 16, 2019).

room was at capacity.”⁹⁹

In California, the 2018 killing of Stephon Clark, an unarmed African American, by a police officer near Sacramento, led to changes in transparency laws that recently opened police misconduct files to the public. Police unions reacted with legal action to keep files created before 2019 sealed. As many as 20 lawsuits involving police, journalists and civil rights groups are now in the courts.¹⁰⁰

Nonetheless, Stephen Handelman, director of the Center on Media, Crime and Justice at John Jay College in New York, believes day-to-day relationships between police and reporters are pretty much the same as they have always been – where they still exist. “If you go behind the headlines of the accusations, the back and forth, you find on a street level that cops and reporters get along with the same sort of wary suspicion they always have,” he told CJR in 2017. The problem he sees is the shrinking number of journalists covering the police beat full time. “They come in and parachute and ask a few questions and then move on to another story,” he said.¹⁰¹

Fewer journalists are covering the ‘cop beat’

There's no doubt that fewer reporters are covering police news. For years, most of those reporters worked for newspapers, and the growth of digital advertising has shattered that industry's business model. Newspaper advertising revenue plunged from just under \$50 billion in 2006 to an estimated \$14.3 billion in 2018. Newsroom employment during that time dropped from 74,410 to 37,900,¹⁰² and the trend is continuing. From January 2017 to April 2018, more than a third of the largest newspapers

⁹⁹ Pinto, Nick. “The impossible task of covering the NYPD”. May 23, 2019. *Columbia Journalism Review*. <https://www.cjr.org/watchdog/nypd-media-journalists.php> (Accessed August 16, 2019).

¹⁰⁰ Ma, Annie. “Cops Are Battling Journalists Over California’s New Police Transparency Law”. *Mother Jones*. February 5, 2019. <https://www.motherjones.com/crime-justice/2019/02/california-police-records-transparency-lw/>. (Accessed August 16, 2019).

¹⁰¹ Borden, Jeremy. “‘Cease and desist’: Journalism’s strained relationship with police”. *Columbia Journalism Review*. October 18, 2017. https://www.cjr.org/united_states_project/chicago-police-union-reporters.php (Accessed August 16, 2019).

¹⁰² “Newspapers Fact Sheet”. Pew Research Center. July 9, 2019 <https://www.journalism.org/fact-sheet/newspapers/> (Accessed August 16, 2019).

in the country laid off journalists.¹⁰³

Faced with choosing between jobs and legal bills, newspapers, once champions of transparency, have also been backing away from open-government fights. In the National Freedom of Information Coalition's 2016 Open Government Survey, 30 percent of respondents expected spending on transparency battles to decline, and 70 percent blamed lack of resources.¹⁰⁴ In a 2015 survey of 66 of the nation's top newspaper editors, more than half agreed with the statement: "News organizations are no longer prepared to go to court to preserve First Amendment freedoms." The biggest problem is in local communities, where, as one editor noted, "small papers don't have the resources to contest illegal denials or meeting closures (and) where, arguably, it matters most."¹⁰⁵

Police deliver their own news, control 'the narrative'

While newspaper reporting declines, police are increasing coverage of their own activities via social media. In 2013, the Boston Police Department's groundbreaking use of social media after the Boston Marathon bombing drew the attention of a Harvard University Executive Session on Policing. The BPD especially was praised for its use of Twitter "to keep the public informed about the status of the investigation, to calm nerves and request assistance, to correct mistaken information reported by the press, and to ask for public restraint in the tweeting of information from police scanners." A paper based on the Harvard session noted that police could learn "tips and tricks about social media from the corporate sector" but must remember they have "unique powers, unique responsibilities and a unique relationship to the public." They also "control much of the information." The authors warned police departments that successfully engaging with communities may require a shift in style because "many

¹⁰³ Grieco, Elizabeth; Sumida, Nami; Fedeli, Sophia. "About a third of large U.S. newspapers have suffered layoffs since 2017. Pew Research Center. July 23, 2018. <https://www.pewresearch.org/fact-tank/2018/07/23/about-a-third-of-large-u-s-newspapers-have-suffered-layoffs-since-2017/> (Accessed August 16, 2019).

¹⁰⁴ "Troubling Trends from Biennial Open Government Survey". National Freedom of Information Coalition. March 17, 2016. <https://www.nfoic.org/biennial-open-government-survey-results-troubling> (Accessed August 16, 2019).

¹⁰⁵ "In Defense of the First Amendment". Knight Foundation. April 21, 2016. <https://knightfoundation.org/reports/defense-first-amendment> (Accessed August 16, 2019).

law enforcement agencies have adopted a culture of silence and have overly guarded information.”¹⁰⁶

Since then, agencies across the nation have begun embracing social media, if not necessarily a philosophy of openness. Transparency advocates point to three separate incidences in Colorado in the winter of 2017-18 in which officers were killed. In one suburban Denver county, the sheriff’s office denied media requests for body camera footage, citing “ongoing investigation,” then released its own agency-produced video on Facebook and Twitter featuring some of the footage denied to the media. “If I went to the press, radio and television ... I’m not going to be able to tell the story in such a fashion that I thought was appropriate,” Douglas County Sheriff Tony Spurlock told The Associated Press. In two other counties, sheriffs used social media to update reporters but refused to answer questions during press conferences where statements were read. “We have to be proactive,” said El Paso County Sheriff Bill Elder, “Otherwise we’re following the story; we’re letting somebody else write the narrative.”¹⁰⁷

Lauri Stevens, a former TV news reporter who now teaches police how to promote themselves on social media, sees real value in law enforcement taking its message directly to the public. “I got into this business because first responders of all kinds didn’t get a chance to tell their story the way they wanted to,” she said. Now, “they have an opportunity to set the record straight.” Over the past decade, her training – including an annual SMILE conference, which stands for “social media, internet and law enforcement” – has helped “hundreds, if not thousands” of departments become more sophisticated in telling their stories. Some are even developing their own “quasi newsrooms,” she said.¹⁰⁸

“I read that the public trusts the information they get from the police more than the information they get from the media,” she said. “Police are using that to their advantage now.” She’s not worried that the law-enforcement message might become the only one the public hears. “If the cops do get out of hand,

¹⁰⁶ Davis, Edward F. III; Alves, Alejandro A.; Sklansky, David Alan Sklansky. “Social Media and Police Leadership: Lessons From Boston”. *New Perspectives in Policing*. March 2014. <https://www.ncjrs.gov/pdffiles1/nij/244760.pdf> (Accessed August 18, 2019).

¹⁰⁷ Foody, Kathleen. “Police improve social media skills, raising worries by media”. The Associated Press. March 14, 2018. <https://apnews.com/d8a82706779042679fd9a521a77f8f70> (Accessed August 18, 2019).

¹⁰⁸ Stevens, Lauri. Interview with Jack McElroy. Telephone interview. August 26, 2019.

someone is going to correct them, if not the media, someone in the public,” she said.¹⁰⁹

This year's SMILE conference in Houston opened with a talk by the local sheriff who uses Twitter “to give the news media and his 20,000-plus followers a first-hand look at the many investigation scenes he inspects as part of his regular routine,” according to the conference agenda. “Houston news reporters have grown accustomed to seeing Sheriff Gonzalez breaking the news at all hours of the day on major car crashes, homicide investigations, and other significant events.” Other sessions on the agenda promised to help officers to:

- Build audience. “Ainsley will show you how to capitalize on eye-catching content to GROW your following on each of your department’s social media pages. This session is perfect for representatives of small and mid-sized agencies and/or PIOs & social media managers who have been assigned to the role but don’t know where to start”
- Improve production values. “Melissa will show you how you can create quality videos and graphics on the go. You will learn about free/inexpensive mobile apps, accessories such as microphones and tripods, tips and tools.”
- Control the narrative and protect a department’s reputation. “As a Public Information Officer, you are tasked with releasing the right amount of details to keep the media happy and community informed all while protecting the integrity of the criminal case. This presentation will look at multiple high profile cases that could completely wipe out the credibility of your officers and administration if not handled well.”¹¹⁰

Stevens also has hosted a ConnectedCops blog, where conflicting perspectives on law enforcement’s swing to social media were apparent in a 2012 post. That year the Milwaukee Police Department ended a longstanding practice of holding morning briefings, replacing them with postings on an online site called “The Source.” The *Milwaukee Journal Sentinel*’s editorial board criticized the step as a reflection of a “bunker” mentality that earlier had led to encryption of radio traffic and a halt to phone calls to detectives when PIOs were not on duty. The newspaper likened The Source to “a similar house news

¹⁰⁹ Ibid.

¹¹⁰ Agenda of 2019 SMILE Conference. LawS Communications. <http://smileconference.com/agenda/> (Accessed August 18, 2019).

organ ... Pravda.”¹¹¹ A posting on the ConnectedCops blog headlined “You know it’s a good day when... the local paper calls you Pravda.” responded, saying: “Police departments are constantly struggling to get the local media to report on topics that, in spite of their best efforts, still go uncovered and they’re frustrated that when they do gain media attention, the story is often reported, well, not quite right. The latest department to up the ante using open source technology and move more towards providing its own news is the Milwaukee Police Department (MPD), and the local media are less than thrilled about it.” The post summed up the police perspective with a quote from the Milwaukee police chief: “To the Journal Sentinel I say, ‘Welcome to the 21st Century’.”¹¹²

The sentiment is widespread, as shown by an article in the December 2016 edition of *The Police Chief*, the journal of the International Association of Chiefs of Police, headlined: “Eliminate the Middleman: Telling the Agency’s Own Story with Social Media.” Written by the PIO of the Pinellas County, Fla., Sheriff’s Office, the article cites “the emergence of a band of citizen journalists” as well as mainstream “media skew” as reasons law enforcement should take its message directly to the public. “By eliminating the need for a media outlet to serve as a middleman in disseminating vital information -- be it for public or personal benefit,” the article concludes, “social media has effectively shifted public information officers’ voices from the background to the foreground.”¹¹³

Journalists question credibility of police PIOs

Journalists, though, have serious doubts about the credibility of those PIO voices. A study in 2012 showed a strong majority of reporters believed the public was being denied important information because of controls imposed by public information officers.¹¹⁴ In turn, 65 percent of PIOs said that

¹¹¹ Franzen, Ernst-Ulrich. “The bunker at the Milwaukee Police Department.” *Milwaukee Journal Sentinel*. May 3, 2012. <http://archive.jsonline.com/blogs/news/150023575.html> (Accessed August 18, 2019).

¹¹² “You know it’s a good day when... the local paper calls you Pravda.” ConnectedCops. May 11, 2012. <http://connectedcops.net/category/media/> (Accessed August 18, 2019).

¹¹³ Kehres, Karly. “Eliminate the Middleman: Telling the Agency’s Own Story with Social Media”. *The Police Chief*: December 2016. Vol. LXXXIII, No. 12. https://www.policechiefmagazine.org/wp-content/uploads/PoliceChief_December2016.pdf (Accessed August 18, 2019).

¹¹⁴ Carlson, Carolyn; Cuillier, David; Tulkoff, Lindsey. “Mediated Access: Journalists’ Perceptions of Federal Public Information Officer Media Control. March 12, 2012. Society of Professional Journalists. <http://spj.org/pdf/reporters-survey-on-federal-PAOs.pdf> (Accessed August 19, 2019).

“controlling media coverage of the agency is a very important part of protecting the agency’s reputation.”¹¹⁵ More recent research has focused specifically on police reporters and police PIOs. In a 2016 survey, police reporters said it was unusual for them to be able to interview officers without going through PIOs, and when reporters got news releases, less than half found the information usually sufficient. “The department actively seeks to prevent me ... from gaining access to both officers and public records,” commented one reporter.¹¹⁶ For their part, police PIOs said in another 2016 survey that their job was to make sure the public got accurate information from their agencies. To accomplish that, three-quarters believed it was necessary to supervise interviews with officers to “control the message” and make sure reporters “stayed on track.”¹¹⁷

Much of this research was done by Carolyn Carlson, professor emeritus at Kennesaw State University, and a former press secretary and reporter. She also served as national president of the Society of Professional Journalists and her studies were widely publicized in conjunction with National Sunshine Week. Police PIOs, she found, tended to be officers who’d been given desk jobs rather than trained PR professionals. “So they have an attitude that is different from other PIOs; they see themselves more as a police officer than as public relations.”¹¹⁸

One question included in Carlson’s surveys was: What’s your first priority? “These guys were not averse to saying, ‘My priority is to protect the reputation of the department.’ Their priority should be to get the public the information it needs to know. Their position was: ‘Screw that. We’re just trying to make us look good.’ We’re police officers first, and we’re here to present the police department in the best light possible. Their top priority is to get information out that is: one, accurate, and two, is not

¹¹⁵ Carlson, Carolyn S.; Jackson, Roberta. “Mediated Access: Public Information Officers’ Perceptions of Media Control.” Society of Professional Journalists. March 10, 2013. <https://www.spj.org/pdf/foi/mediatedaccessreport11mar2013.pdf> (Accessed August 19, 2019).

¹¹⁶ Carlson, Carolyn S.; Kashani, Paymon. “Mediated Access/Crime Reporters’ Perceptions of Public Information Officers’ Media Control Efforts, Use of Social Media, Handling of Body Camera Footage and Public Records”. Society of Professional Journalists. March 2016. <https://www.spj.org/pdf/sunshineweek/crime-reporters-survey-report.pdf> (Accessed August 19, 2019).

¹¹⁷ Carlson, Carolyn S.; Kashani, Paymon. “Mediated Access Police Public Information Officers’ Media Management Efforts, Use of Social Media, Handling of Body Camera Footage and Public Records.” Society of Professional Journalists. March 2016 <http://docplayer.net/42870279-Mediated-access-police-public-information-officers-media-management-efforts-use-of-social-media-handling-of-body-camera-footage-and-public-records.html> (Accessed August 19, 2019).

¹¹⁸ Carlson, Carolyn. Interview with Jack McElroy. Telephone interview. May 6, 2019.

going to make police look bad.”¹¹⁹

With the decline of the print media, Carlson sees a vicious spiral developing. Police PIOs don’t get as many inquiries from journalists as they used to, so they take control of distributing information themselves. Inexperienced reporters in shrunken newsrooms “see this as the way things are and ought to be” and don’t dig deeper. “That lazy reporting encourages the PIOs to give them the facts that make the police look good, and not necessarily all the facts,” she said. “If you are a real crime reporter, you go to the scene and talk to 27 people, and you’ll get a pretty well-rounded story.” That kind of reporting is rare, these days. That disturbs me.”¹²⁰

The decline in police reporting also worries Mitchell Pearlman, the former director of the Connecticut Freedom of Information Commission, who has helped launch a non-profit news organization called the Connecticut Mirror. “There are few, if any, major news organizations who cover cops as a beat any more,” he said. So a goal of the Mirror now is to hire a full-time reporter dedicated to covering law enforcement. “If we are able,” he said, “it will be one reporter for the state of Connecticut.”¹²¹

Chapter 6: Conclusion

FOI community fears public doesn’t understand concern

In late 2016, David Cuillier of the University of Arizona directed a study for the John S. and James L. Knight Foundation on what can be done to address the nation’s freedom of information woes. The 228 participants from across the country were “those most involved with and passionate about access to government information.” Many cited problems with laws, processes and enforcement. But Cuillier also found widespread worries about awareness of the issue. “(R)espondents expressed concern that the public did not understand the rights they have and how those rights are threatened,” he wrote.

“Citizens’ fear of privacy invasion can overshadow the public benefits of open records, and politicians

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Pearlman, Mitchell. Interview with Jack McElroy. Telephone interview. June 18, 2019.

have leveraged that fear to close records that would embarrass officials or expose inefficiency or corruption. Public approval of the press is low, and nonprofit efforts to promote freedom of information have waned in recent years.”¹²²

The experts who were surveyed suggested an array of tactics to address the situation, from better training of records custodians to toughening up transparency laws to infusing FOI into popular culture through music, books, games and apps.¹²³

Cuillier distilled the ideas into four recommended strategies:

- “Band together.” Break down walls between groups with interests in open government and find ways to work on concert.
- “Take the fight to the states.” Create a litigation network that can address problems as they crop up on the local level.
- “Bolster education and advocacy.” Expand Sunshine Week into a year-round effort to train and educate on the topic.
- “Develop digital technology.” Bring the FOI fight into the digital age with the latest tools to gather resources and to help guide government agencies in sharing information proactively.¹²⁴

Local police should be No. 1 open-government priority

Only Baby Boomers might remember “Almost Cut My Hair,” the Crosby, Stills, Nash & Young lament about feeling pressure to conform to the dictates of “The Establishment.” But just about everyone can relate to the lyrics: “(It) increases my paranoia/Like looking in my mirror and seeing a police car.”

Local cops are the most direct, and intimidating, manifestation of government authority that citizens encounter in their daily lives. The great majority of law men and women are dedicated public servants.

¹²² Cuillier, David. “Forecasting Freedom of Information/Why it faces problems -- and how experts say they could be solved.” John S. and James L. Knight Foundation. March 2017. <https://kf-site-production.s3.amazonaws.com/publications/pdfs/000/000/232/original/FOI-final-unlink.pdf> (Accessed August 20, 2019).

¹²³ Ibid.

¹²⁴ Ibid.

They are rightly lauded as heroes, and their exploits, imagined and real, make up a large bulk of our national storytelling -- in detective novels, TV shows, movies and news stories. In their central role of maintaining order in communities, though, police also wield extraordinary power: power to compel behavior, to deprive liberty, even to kill. Public scrutiny is essential to assuring that such power remains in check and aimed at serving the citizenry, not the agents of the government themselves.

But forces converging today are blocking access to the basic information that citizens have used to monitor their local police for decades. Privacy worries are prompting movements to hide not only the names of victims and perpetrators but also the basic “what,” “where,” and “why” of incidents. Fear of terrorism has made homeland security a watchword even among local police, encouraging a wartime attitude toward secrecy. Viral citizen campaigns have left law-enforcement agencies feeling embattled, and entrenched. Technology, often shrouded through trade secret laws, has spawned powerful, and intrusive, crime-solving tools that are most effective if kept confidential. At the same time, a broken business model has gutted newspapers -- the traditional watchdogs of local police -- and social media has handed law enforcement the tools to leverage its exclusive access to information and tell its own story to the public.

Adam Marshall of the Reporters Committee for Freedom of the Press sees “a growing culture of secrecy within law enforcement agencies that does not view transparency as a value that should be promoted. Most of the questions I get from reporters deal with law enforcement. It’s the No. 1 issue.” With help from the Knight Foundation, the RCFP has launched a Local Legal Initiative, which for the first time will hire attorneys outside Washington, D.C., to support the media. The organization hopes to have five lawyers deployed by the first of the year. “Access and transparency issues are going to be a large part of what they’ll be working on,” said Marshall. “We see an increased need for everyday support of local reporting. It’s a small step to start, for sure, but it’s something.”¹²⁵

The public may be preoccupied by high-profile tussles between the Washington media and a White House that taunts them as “fake news” and “enemies of the people.” But in cities and counties across

¹²⁵ Marshall, Adam. Interview with Jack McElroy. Telephone interview. August 30, 2019.

the country, a less visible but no less crucial fight for government accountability is being waged, and often lost, at police stations, sheriff's departments and state police offices every day. The struggle involves more than just the troubled traditional media. Like John Messner's Facebook group, many non-traditional outlets – digital startups, non-profits, citizen blogs, and social media watchdogs – are trying to fill gaps left by shrinking newsrooms. But these ultra-local initiatives don't have anything like the organized power the newspaper industry had in 1953, when Harold Cross wrote *The People's Right to Know* and the American Society of Newspaper Editors launched its successful assault on government secrecy in America.

Critical choices face American communities

As information technologies continue to grow more sophisticated, communities face critical choices about what the public should know and what should be known only by law-enforcement institutions. Questions include:

- To what extent should offenders have their criminal histories erased, and at what stage in the judicial process should a curtain of confidentiality be lowered? Should basic arrest information be withheld to prevent it from becoming lodged in cyberspace?
- When should the identities of victims be kept private: when publicity might put them at further risk, when it could raise painful memories, or when it exposes them to annoying sales calls? Should victims have the right to control entirely their exposure to the public, and if so, should police involved in use-of-force incidents be considered victims, too, of resisting-arrest crimes?
- If victim privacy is a priority, should protecting identities also limit the public's right to know other details of law-enforcement activities, such as where events happen and who is arrested?
- Should the dead have privacy rights even if that means less scrutiny into how they died?
- To what extent should law enforcement be allowed to keep investigations confidential? By denying the existence of records that do, in fact, exist? By refusing to confirm or deny that records exist? Or by declaring that records are part of an ongoing investigation and not subject to disclosure?
- What public accountability should there be when new investigative techniques and technology are developed and deployed? To what extent should high-tech tools be protected by

nondisclosure agreements and claims of trade secrets?

- When does officer safety trump transparency? Should the public be limited in its awareness of emergency calls to assure police security?
- Critically, what 21st century institutions will fill the watchdog role that the media, especially newspapers, filled during the 20th century? How can new information outlets achieve robust commercial success? Will non-profit and citizen initiatives take up much of the burden? Or will government structures have to be trusted to monitor their own law enforcement activities and report police news?

In the introduction to his groundbreaking book, Cross noted society's progressive "loss of faith ... in the deterrent effect of publicity in such matters as crime ..." Today, that danger is more urgent than ever, and Cross's ultimate warning is essential to recall:

Public business is the public's business. The people have the right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings. ... It is not enough merely to recognize philosophically or to pay lip service to the important political justification for freedom of information. It is not enough that by virtue of official grace and incentives some information, even in large aggregate volume, does somehow become available. It is not enough that, thanks to the industry and resourcefulness of newsmen, information of governmental activity becomes available to the people speedily, in volume and at low cost. Citizens of a self-governing society must have a legal right to examine and investigate the conduct of its affairs, subject only to those limitations imposed by the most urgent public necessity.¹²⁶

¹²⁶ Cross, Harold L. *The People's Right to Know, Legal Access to Public Records and Proceedings*. Morningside Heights, NY: Columbia University Press, 1953.

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