

THE **CONSTITUTION PROJECT**



Safeguarding Liberty, Justice & the Rule of Law

THE USE OF BODY-WORN CAMERAS

BY LAW ENFORCEMENT

GUIDELINES FOR PUBLIC USE & INTERIM POLICY BRIEF

TESTIMONY OF

THE CONSTITUTION PROJECT

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BEFORE THE

COUNCIL OF THE DISTRICT OF COLUMBIA, COMMITTEE ON THE JUDICIARY

PUBLIC OVERSIGHT ROUNDTABLE

ON THE

METROPOLITAN POLICE DEPARTMENT'S BODY-WORN CAMERA PROGRAM

THURSDAY, MAY 07, 2015

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EXECUTIVE SUMMARY

Introduction

Thank you to Chairperson McDuffie and to the Council of the District of Columbia, Committee on the Judiciary, for holding a Public Oversight Roundtable on the Metropolitan Police Department's ("MPD") Body-Worn Camera Program. On behalf of The Constitution Project, I am grateful for the opportunity to participate in this roundtable. In light of the tragic deaths of Michael Brown, Eric Garner, John Crawford, Tamir Rice, Aiyanna Jones, Rekia Boyd, and of course, Freddie Gray and Walter Scott, the nation has been paying special attention to our criminal justice system and the relationship of communities with law enforcement.

The Constitution Project is well-known for issuing policy reports are guided by several bipartisan and diverse committee members¹ who push for practical reforms to protect constitutional rights. Recently, TCP convened a Committee on Policing Reforms² ("Committee"), comprised of law enforcement, legal scholars, community advocates, and judges, prosecutors and defense attorneys. In January 2015, the Committee submitted these recommendations on body-worn cameras and the attached interim policy brief³ to the President's Task Force on 21st Century Policing. I was also asked to testify before the Task Force in January. I also encourage the Council to review our earlier report: [*Guidelines for Public Video Surveillance: A Guide to Protecting Communities and Preserving Civil Liberties*](#), which raises some of the concerns we hear regarding body-worn cameras.⁴

Please note that the Committee's position on these issues and its recommendations may evolve over time, after further research, internal discussion, and analysis.⁵ Over the next few months, the Committee is working to revise the attached interim policy brief and will publish an official report and set of recommendations, which will be available on The Constitution Project's [website](#). Additionally, as more stakeholders weigh in, more agencies adopt this technology, and more empirical research is conducted, new questions are bound to arise which may require further evaluation of the use of body-worn cameras by law enforcement.

Background

Body-worn cameras have gained increased attention and use among law enforcement professionals. It's also important to note, as many others have, that body cameras are not the sole solution to the issues we see today on the ground. The use of technology for law enforcement surveillance and observation is not new. In the early 1990s, dashboard cameras emerged as a

¹ The list of TCP policy and issue committees is available at: <http://www.constitutionproject.org/about-us/policy-and-issue-committees/>.

² The full list of members serving on the Committee on Policing Reforms is available on The Constitution Project's website: www.constitutionproject.org.

³ The Constitution Project sincerely thanks the law firm of Morgan, Lewis & Bockius LLP, which provided a team of pro bono attorneys to guide the Committee on Policing Reforms in crafting its recommendations.

⁴ A copy of the video surveillance report is available at <http://www.constitutionproject.org/wp-content/uploads/2012/09/54.pdf>.

⁵ The Constitution Project encourages the DC City Council to review its report: *Guidelines for Public Video Surveillance: A Guide to Protecting Communities and Preserving Civil Liberties*, available at <http://www.constitutionproject.org/wp-content/uploads/2012/09/54.pdf>. The report addresses many of the concerns raised by experts in criminal justice, privacy rights, and civil liberties regarding the use of body-worn cameras by law enforcement.

means of capturing real-time encounters between the police and the public.⁶ Despite early resistance, dashboard cameras gained widespread acceptance as research demonstrated positive effects on officer safety, accountability, and a reduction in agency liability.⁷ Closed circuit surveillance systems have also become increasingly popular, prompting TCP to issue our video surveillance report.⁸ And of course, the use of smart phones has also dramatically increased citizens' ability to film police officers.⁹ Law enforcement agencies also increasingly recognize the potential for video footage to assist with prosecuting crimes and fostering accountability and professionalism.

The implementation of body-worn cameras has gained increased attention and use among law enforcement professionals, who use them for functions such as obtaining evidence during investigations, promoting officer safety, and improving law enforcement community relations, and accountability. Police body-worn cameras present novel legal and policy questions. Proponents of body-worn cameras suggest they will protect due process and equal protection values while promoting police accountability. However, any new surveillance technology and recording devices implicate privacy, First Amendment, and other constitutional concerns as well. MPD must carefully tailor its body-worn camera program to retain the benefits of such use while limiting any infringement on rights. The attached policy brief outlines the legal issues, potential benefits, and potential disadvantages of adopting police body-worn cameras. It then provides recommendations for implementing such programs in a manner that promotes transparency and accountability, improves relations between law enforcement and community members, and protects privacy.¹⁰

The attached background paper raises a host of constitutional, legal, and policy questions – detailed further in Appendix B – that have been raised with the implementation of body-worn cameras. The Committee believes that the recommendations below must be implemented to promote transparency, protect privacy rights, and improve relations between law enforcement and community members.

Recommendations

MPD's use of body-worn cameras presents a number of potential benefits as well as risks. As such, the recommendations below seek to maximize the potential advantages of body cameras while minimizing or eliminating the disadvantages. The Committee on Policing Reforms recommends that policymakers and law enforcement agencies adhere to the recommendations below when implementing body-worn camera programs. Finally, the role of community input cannot be understated. One of the core functions of body-worn cameras is to improve community trust; therefore, input from community members must be sought and considered by policymakers and law enforcement agencies on an on-going basis as policies are developed and implemented.

⁶ White, Michael D. *Police Officer Body-Worn Cameras: Assessing the Evidence* (Washington, DC: Office of Community Oriented Policing Services, 2014), 11.

⁷ White at 11; Hayes, Jonathan; Ericson, Lars. *A Primer on Body-Worn Cameras for Law Enforcement* (U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice, 2012), 3.

⁸ White at 12. *See also* Ramirez, Eugene. *A Report on Body Worn Cameras* (Manning & Kass, Ellrod, Ramirez, Trester LLP), 11.

⁹ White at 12.

¹⁰ The Constitution Project sincerely thanks the law firm of Morgan, Lewis & Bockius LLP, which provided a team of pro bono attorneys to guide the Committee on Policing Reforms in crafting this submission. The attorneys included Erik M. Kosa and Mark L. Krotoski, who provided significant time and tremendous guidance to this effort.

Written policies

1. Written policies should exist clearly laying out how the cameras are to be used and the footage maintained.
2. Written policies should describe, at a minimum, when recording is required; how officers should determine recording responsibilities if multiple officers are on the scene; whether or not (and how) officers are to announce that an encounter is being recorded; what events officers should *not* record during an encounter; when supervisors can review footage; selection of technology vendors for purchase and maintenance of cameras, as well as for retention and audits of footage; elements of officer training; data storage and management requirements; video download procedures; video redaction procedures; preparation of video for use in prosecution; maintenance and upkeep of equipment; and how long video is to be retained.

Implementation

1. **Law enforcement considerations:** Before implementing a body camera program, law enforcement agencies should identify the specific objectives behind the program, as well as the anticipated benefits, costs, uses, and privacy impact of body-worn cameras.
2. **Engaging law enforcement personnel:** Body-worn cameras should be introduced by agencies incrementally, starting with pilot programs and soliciting feedback from law enforcement personnel. Incremental implementation will allow for adjustments to department policies that better balance accountability, privacy, transparency, and community relationships as the program develops.
3. **Engaging the community:** The community should be consulted about how their local law enforcement agencies will use body-worn cameras prior to implementation and finalizing department policies as well as on an on-going basis. Policies should be posted online.

When to record

1. **When to begin recording:** Policies should set clear rules regarding the types of interactions that are to be recorded and when that recording must begin. The benefits of body cameras are undermined when recording is discretionary and such policies should be rejected. Recording should begin either (1) during every interaction with the public, or (2) when responding to law enforcement-related calls for service, meaning calls for service, traffic stops, arrests, searches, interrogations, and pursuits. There must be a clear written policy spelling out the requirements and defining what requires activation of the cameras. When in doubt about whether an encounter should be recorded, the default should be to record the encounter.
2. **Notification:** Officers should be required to clearly inform subjects they are being recorded unless doing so would be unsafe or impossible under the circumstances.
3. **Termination of recording:** If recording is limited to law enforcement-related activities, once activated, the camera should remain on until conclusion of the incident, the officer has left the scene, or a supervisor has authorized (on camera) that recording may cease.
4. **Consent:** Officers should be required to obtain consent before recording crime victims. Interviewing crime victims can be especially sensitive (particularly in rape and domestic violence cases). Agencies must have a written policy regarding consent and officer discretion. For

instance, agencies may give officers limited discretion to record in these situations or require officers to obtain victim consent to record these sensitive encounters. Citizen requests for cameras to be turned off should themselves be recorded to document – either in writing or by recording – such requests. If the officer denies the request to consent, such a denial should also be recorded.

5. **Mandatory exceptions to recording:** Agencies should prohibit recording of:
 - Conversations with confidential informants and undercover officers.
 - Places where a heightened expectation of privacy exists, e.g., restrooms and locker rooms.
 - Strip searches.
6. **Consequences for missing footage:** Policies should be written and clear about each officer's obligations to record and store footage and the potential administrative penalties for violating the recording policy.
7. **Documentation:** Officers should document – in writing or on camera – the reasons for not activating or deactivating a camera in situations that otherwise require it to be recorded. To prevent *ex post* explanations, officers should be required to document these reasons contemporaneously.
8. **Other exemptions:** In order to make the use of body-worn cameras as predictable as possible and to protect their legitimacy, additional exemptions should apply.
 - Recording should never be used to surreptitiously gather information based on First Amendment protected speech, associations, or religion.
 - Law enforcement agencies should be aware of the heightened right to privacy in a home and other private spaces; policies should be developed to take reasonable expectations of privacy into account.

How to maintain the data

1. **Flagging videos to be kept:** The following types of footage should be automatically flagged for retention: (1) those involving a use of force; (2) incidents leading to detention or arrest; or (3) where either a formal or informal complaint has been registered.
 - Any subject of a recording should be able to flag the recording for retention, even if not filing a complaint or initiating an investigation.
 - Police department personnel should also be able to flag a recording for retention if they have a basis to believe police misconduct has occurred or have reasonable suspicion that the video contains evidence of a crime.
 - If useful evidence is obtained during an authorized recording, the recording should be retained in the same manner as any other evidence gathered during an investigation.
2. **Chain of custody:** The chain of custody must be clearly preserved and recorded.
 - Policies should clearly describe the responsibility of the officer to turn in and download recorded footage, except for certain clearly-defined incidents – such as officer shootings or use of force – in which case the officer's supervisor should take physical custody of the camera.

- Data should be downloaded at the end of each shift. Data should be properly categorized according to type of event captured: if the camera recorded a law enforcement-related event, it should be tagged as “evidentiary”; if not, it should be tagged as “non-event.”
 - Safeguards should be designed to prevent deletion by individual officers.
 - Policies should clearly state where data is to be stored.
3. **Data security:** The method of storage must be safe from data tampering or unauthorized access, both before uploading and prior to downloading. Third party vendors must be carefully vetted.
4. **Auditing:** There must be effective audit systems in place and clear policies on who may access the data and when.
- An agency’s internal audit unit, not an officer’s direct chain of command, should conduct random review of footage to monitor compliance with the program.
 - Policies should specifically forbid personnel from accessing videos for any other use than those specifically authorized by the policy, such as personal use and/or uploading to social media websites. Policies should contain specific measures for preventing access for personal use (such as built-in audits to accurately trace who has accessed the system).
 - Agencies should collect statistical data concerning camera usage, including when video footage is used in criminal prosecutions and when it is used in internal affairs matters. Agencies should conduct studies evaluating the financial impact of camera programs, including the cost of purchasing equipment, cost savings (including legal fees in defending lawsuits), and complaints against officers.
 - Agencies should conduct periodic reviews to assess the efficacy of their body-worn camera programs.
5. **Deletion:** To protect privacy, videos should be deleted after the elapse of a specified period of time. Policies should clearly state the length of time data is to be retained.
- Non-evidentiary footage: The retention period of non-evidentiary footage should be measured in weeks, not years. Most existing policies retain such footage between 60-90 days.
 - Evidentiary footage: Videos which are part of an investigation should be maintained until the investigation and any ensuing litigation is concluded. In serious felony cases resulting in the conviction and sentence of a number of years or imposition of a death sentence, the footage should be retained indefinitely.

Data Access

Most state open records laws exempt records from disclosure if they are part of an ongoing investigation. But most state records laws were written before the use of body cameras and may not take into consideration the novel privacy issues presented by their use; such laws may need to be amended in jurisdictions where body cameras are used.

1. **When to disclose footage to the public:**

- Videos should be deleted after the conclusion of investigation/litigation to protect privacy interests.
- Policies should be in compliance with state open records laws and specifically outline who in the agency is responsible for complying with open records requests; where possible, policies should prescribe liberal disclosure.

- Redaction should be used in disclosed recordings when feasible.
- Unredacted or unflagged recordings should not be subject to public disclosure without the consent of the subject of the recording.

2. **Supervisor review:**

- Written policies should clearly state that supervisors must be allowed to review officer footage, e.g., to investigate a complaint against the officer or a specific incident in which the officer was involved, or to identify videos for training purposes.

3. **Litigation-related access**

- In litigation involving an incident that is recorded, there should be mandatory disclosure of the recording to defendants and/or plaintiffs.

4. **Filming of law enforcement**

- Legislation criminalizing citizen recording of the police should be eliminated.

Training

1. Training should be required for all law enforcement personnel who wear cameras or will have access to video footage, including supervisors, auditors, etc. Training should address all practices included in the agency's policy, an overview of relevant state laws and department policies governing consent, evidence, privacy, public disclosure, procedures for operating the equipment effectively, and scenario-based exercises that replicate situations officers may face in the field.

Ongoing research

1. There remains insufficient empirical research to fully support or refute many of the claims made about police body-worn cameras. Police departments implementing body-worn camera programs should be flexible in the development of their policies and willing to learn from other departments and make adjustments as needed.
2. Further empirical research on the effects of body-worn cameras is vital. Researchers should examine all aspects of the technology, including its perceived civilizing effects, evidentiary benefits, impact on citizen perceptions of law enforcement, and on privacy rights for both citizens and police officers. Research should include citizen surveys to capture perceptions of the technology and its effect on trust in law enforcement.

APPENDIX A

The following members of The Constitution Project Committee on Policing Reforms endorses this submission (please note that affiliations are listed for identification purposes only):

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APPENDIX B

THE **CONSTITUTION PROJECT**



Safeguarding Liberty, Justice & the Rule of Law

BACKGROUND PAPER

THE CONSTITUTIONAL IMPLICATIONS OF THE USE OF BODY-WORN CAMERAS BY LAW ENFORCEMENT

BY

THE CONSTITUTION PROJECT COMMITTEE ON POLICING REFORMS

I. Introduction

Police departments across the country are increasingly using body-worn cameras, and many of those who are not are considering implementing them. The availability of this new technology presents unique and novel issues, including: (1) whether to record; and (2) if so, when and how to record. On the first question, individual police departments can best weigh the benefits and costs of implementing police body-worn cameras given their local law enforcement needs, resources, and objectives. This policy brief focuses on the second question. As more departments consider implementing body-worn camera programs, it is clear the legal and policy issues presented by their use are here to stay. Given this trend, there should be a consensus among stakeholders about the best way to use them.

The implementation of body-worn cameras has gained increased attention and use among law enforcement professionals, who use them for functions such as obtaining evidence during investigations, promoting officer safety, and improving law enforcement accountability and professionalism. Body-worn cameras may also promote transparency and improve relations between police and communities. This memorandum outlines the legal issues, potential benefits, and potential disadvantages of adopting police body-worn cameras and includes potential recommendations for implementing such programs.

II. Background

The use of technology for law enforcement surveillance and observation is not new. In the early 1990s, dashboard cameras emerged as a method for capturing real-time encounters between the police and the public.¹¹ Despite early resistance, dashboard cameras gained widespread acceptance as research demonstrated positive effects on officer safety and accountability and a reduction in agency liability.¹² Closed circuit surveillance systems have also become increasingly popular as both a method of crime prevention and as a tool for criminal investigations (such as in the Boston Marathon bombing).¹³ Moreover, the proliferation of smart phones has dramatically increased citizens' ability to film police officers while performing their duties.¹⁴

Law enforcement officials increasingly recognize the potential for video footage to assist with prosecuting crimes and fostering accountability and professionalism. The U.S. Department of Justice recently implemented a policy creating a presumption that statements made by individuals in federal custody, following arrest, but prior to their appearance in court, will be electronically recorded.¹⁵ And body-worn camera programs are already in place in several

¹¹ White, Michael D. *Police Officer Body-Worn Cameras: Assessing the Evidence* (Washington, DC: Office of Community Oriented Policing Services, 2014), 11.

¹² White at 11; Hayes, Jonathan; Ericson, Lars. *A Primer on Body-Worn Cameras for Law Enforcement* (U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice, 2012), 3.

¹³ White at 12. See also Ramirez, Eugene. *A Report on Body Worn Cameras* (Manning & Kass, Ellrod, Ramirez, Trester LLP), 11.

¹⁴ White at 12.

¹⁵ See Press Release 14-548, Attorney General Holder Announces Significant Policy Shift Concerning Electronic Recording of Statements (May 22, 2014) available at: <http://www.justice.gov/opa/pr/attorney-general-holder->

smaller police departments across the country, including Rialto, California and Mesa, Arizona. Larger jurisdictions such as Los Angeles and New York City are also beginning to test body-worn cameras.

The technology itself is widely available and relatively easy to use. There are a number of body-worn camera manufacturers, including Panasonic, VIEVU, TASER International, WatchGuard, and Wolfcom Enterprises.¹⁶ The technology includes several components that vary across manufacturers.¹⁷ For example, TASER International's AXON system includes a small camera worn by the officer on a shirt lapel, hat, or sunglasses that captures what the officer sees, as well as a device that records the video, a battery pack that lasts typically from 12-14 hours, and an on/off switch for recording.¹⁸ The AXON system comes with a cloud-based data storage service allowing the officer to place the camera in a dock at the end of the shift after which the footage is uploaded to the cloud.¹⁹ The VIEVU system is a self-contained, pager-sized device that officers wear on their torso, and also includes a docking station for downloading video footage.²⁰

III. Constitutional Values and Legal Issues at Stake

Police body-worn cameras present novel legal questions. Proponents of body-worn cameras suggest they will protect due process and equal protection values while promoting police accountability. However, any new surveillance technology and recording devices implicates significant privacy concerns. Agencies must carefully tailor body-worn camera programs to retain the benefits while limiting any infringement on privacy rights.

a. Privacy and anonymity

The use of body-worn cameras by law enforcement has the potential to impact the privacy and anonymity of others. Victims may hope traumatic events can remain private due to the sensitive nature of their experiences. Video and sounds of bystanders may be captured in the recordings. These concerns implicate values long venerated by American society and modern concepts of privacy.²¹

[announces-significant-policy-shift-concerning-electronic-recording](#) (accessed Jan. 14, 2015) (Attorney General Holder stated that the new policy “creates a presumption that statements made by individuals in federal custody, after they have been arrested but before their initial appearance, will be electronically recorded” and “also encourages agents and prosecutors to consider electronic recording in investigative or other circumstances not covered by the presumption”).

¹⁶ See Hayes at 15 (depicting chart of available body-worn cameras).

¹⁷ See Ramirez at 10 (depicting one commonly-used body-worn camera).

¹⁸ White at 12. See also AXON flex on-officer video, TASER.COM, available at: <http://www.taser.com/products/on-officer-video/axon-flex-on-officer-video> (accessed Jan. 14, 2015).

¹⁹ White at 12. See also AXON flex on-officer video, TASER.COM, available at: <http://www.taser.com/products/on-officer-video/axon-flex-on-officer-video> (accessed Jan. 14, 2015).

²⁰ White at 12. See also VIEVU Products, Choose the VIEVU Camera for you!, VIEVU.COM, available at: <http://www.vievu.com/vievu-products/hardware/> (accessed Jan. 14, 2015).

²¹ See Solove, Daniel J. *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1101-02 (2002).

In addition to the broader privacy values at stake, some state laws also protect privacy in ways that could interfere with the use of body-worn cameras. Several state statutes require the consent of both parties before the recording of a conversation. These so-called “two-party consent” statutes could prevent the use of police body-worn cameras in many circumstances,²² unless stakeholders work with legislatures to add exceptions for their use. Moreover, while some two-party consent laws do recognize a law enforcement exception, body-worn cameras present novel issues and departments in these states must be careful to ensure regular use of body-worn cameras satisfies this type of exception.

As noted below, privacy concerns may be addressed in part by the manner in which the program is implemented. For example, recordings may be limited to identifiable law enforcement objectives. Safeguards can be used concerning the storage of the recordings. Access to the recordings can be limited to law enforcement purposes.

b. Government accountability and procedural safeguards

Citizens expect that they will be treated fairly by law enforcement and the criminal justice system. Citizens also have the right to know what their government is doing. Government accountability and public confidence in law enforcement remains essential.²³ Evidence gathered by police officers may become public through the criminal justice process.

c. Equal Protection and anti-discrimination

American society abhors discrimination because it degrades its victims and reinforces class structures. Some advocates of police body-worn cameras stress the benefit of a more complete record of police interaction with the public—particularly minority communities—both to deter allegations of abuse and to improve police relations.²⁴

IV. Potential Advantages of Body-Worn Cameras

Advocates of body-worn cameras tout several advantages of adopting them: (1) furthering law enforcement and community objectives by helping gather evidence for an investigation; (2) improving police accountability and professionalism; (3) improving citizen

²² See Section VI for further discussion of this issue.

²³ See Speech: *Assistant Attorney General Leslie R. Caldwell Speaks at Cybercrime 2020 Symposium* (Dec. 4, 2014) (observing “a growing public distrust of law enforcement surveillance and high-tech investigative techniques” that “can hamper investigations” which may be based on “misconceptions about the technical abilities of the law enforcement tools and the manners in which they are used”), *available at*: <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-cybercrime-2020-symposium> (accessed Jan. 16, 2015).

²⁴ See Press Release: *A Unified Statement of Action to Promote Reform and Stop Police Abuse*, LAWYERSCOMMITTEE.ORG, Aug. 18, 2014 (joint statement by Lawyers’ Committee for Civil Rights Under Law, A. Phillip Randolph Institute, Advancement Project, ACLU, Hip Hop Caucus, Leadership Conference on Civil and Human Rights, National Action Network, NAACP, NAACP Legal Defense Fund, National Coalition on Black Civic Participation, Black Women’s Roundtable, National Bar Association, National Urban League, and Rainbow Push Coalition), *available at*: http://www.lawyerscommittee.org/newsroom/press_releases?id=0494 (accessed Jan. 16, 2015).

behavior; (4) increasing opportunities for police training; (5) expediting resolution of complaints against police; and (6) promoting transparency and trust in police departments.

a. Furthering law enforcement and community objectives in gathering and preserving evidence for investigation

Body-worn cameras provide another method to obtain evidence and information during an investigation and may supplement other forms of evidence-gathering such as photographs, forensics, and written reports. Among other unique attributes, body-worn cameras may provide for the recording of information in real time and statements by individuals. Video footage of law enforcement activities could assist in ensuring more comprehensive evidence collection, preserving law enforcement and judicial resources, documenting uses of force, and reducing assaults on officers.

While there is scant empirical evidence from the United States regarding the impact of body-worn cameras on arrest and prosecution practices, it stands to reason that the use of body-worn cameras will result in obtaining more evidence during criminal prosecutions.²⁵ This is especially so where victims may feel sensitive about pressing charges, such as in domestic violence cases, which are difficult to prosecute. Body-worn cameras can record the victim's statement (with permission), showing injuries and providing more reliable evidence.²⁶ Some prosecutors have begun encouraging police departments to use body-worn cameras for these purposes.²⁷ For example, Daytona Beach's chief of police has stated that body-worn cameras have changed how domestic violence cases are handled: "Oftentimes we know that the suspect is repeatedly abusing the victim, but either the victim refuses to press charges, or there is simply not enough evidence to go to trial."²⁸ With the victim's consent, body-worn cameras can gather this evidence and officers may even capture the assault itself on video if they arrive while the incident is ongoing.

Body-worn cameras may also include access to material evidence that can aid the accused during a criminal prosecution. *Brady v. Maryland* requires turning over exculpatory material and prohibits the destruction of such material.²⁹ Thus, to ensure more comprehensive evidence collection for both parties and to ensure judicious use of law enforcement resources, law enforcement agencies should enforce a strong presumption in favor of preserving such material.

On the other hand, there are situations where the best course of action is not to record. If body-worn cameras are to advance law enforcement interests, policies must be broad enough to capture encounters most likely to be needed as evidence in prosecution, yet sufficiently narrow

²⁵ In-car camera systems have existed for years, and evidence on their use may be extrapolated to body-worn cameras. The International Association of Chiefs of Police collaborated with prosecutors across the country to assess the effects of video footage on prosecution. Hayes at 3. Prosecutors reported the presence of video evidence greatly enhanced the likelihood of convictions and increased guilty pleas. *Id.*

²⁹ 373 U.S. 83 (1963).

to allow for effective community policing, including sensitive interactions between police and public.³⁰ Discretion may sometimes be necessary in sensitive situations, such as involving interviews of victims or confidential informants who would not otherwise come forward if they are recorded.³¹ An overly-broad recording policy could also inhibit the ability of police officers to build relationships and effectively engage their communities. Reconciling these tensions must guide what serves as an appropriate definition of “law enforcement purpose.” In sum, a “law enforcement purpose” is essentially that which aims to address a potential threat to public safety of finite duration. The use of body-worn cameras must be connected to such an objective.

b. Improved accountability and officer behavior

Historically, there has been little evidence of encounters between police officers and the public aside from the testimony of the parties involved. Encounters between the police and public sometimes result in violence, complaints against police officers, or both. The ability to record these encounters holds great potential for the reduction of unnecessary uses of force, complaints against police, drains on agency resources, and strained relations between police departments and their communities.

There is some evidence that use of body-worn cameras may limit the unnecessary use of force.³² In 2012, the Rialto, California Police Department assigned cameras randomly to officers across 988 shifts. Rialto is a mid-sized police department with, at the time of the study, 115 sworn officers and 42 non-sworn personnel serving 100,000 residents.³³ The study demonstrated a 59 percent reduction in officer use of force incidents during the trial.³⁴ The control group (i.e. shifts without cameras) experienced twice as many use-of-force incidents compared to shifts with cameras.³⁵ The study also showed an 88 percent reduction in citizen complaints compared to the year before the camera program.³⁶

The Mesa, Arizona Police Department has also been studying the effects of body-worn cameras. Officer attitudes toward the use of such equipment are positive, with 77 percent of officers believing that cameras cause officers to behave more professionally.³⁷ The Mesa police force also evaluated officer behavior by examining trends in citizen complaints. The first part of the study compared 50 officers who wore cameras to 50 non-camera-wearing officers.³⁸ Those who wore cameras generated eight complaints; those without were the subject of 23

³⁰ See PERF Report at 40.

³¹ See PERF Report at 12.

³² See generally, Ariel, Barak; Farrar, William A.; Sutherland, Alex. *The Effect of Police Body-Worn Cameras on Use of Force and Citizens' Complaints Against the Police: A Randomized Controlled Trial* (New York: J. Quant. Criminal, 2014).

³³ Farrar, Tony. *Self-awareness to being watched and socially-desirable behavior: A field experiment on the effect of body-worn cameras on police use-of-force* (Police Foundation, 2013), at 5 (“Police Foundation Report”), available at: <http://www.policefoundation.org/content/body-worn-camera> (accessed Jan. 14, 2015).

³⁴ PERF Report at 5; Ramirez at 7.

³⁵ PERF Report at 5; Ramirez at 7.

³⁶ PERF Report at 5; Ramirez at 7.

³⁷ White at 21.

³⁸ White at 21.

complaints.³⁹ This study also tracked complaint trends before and after camera users began wearing cameras. In the year before the camera project began, these officers were subject to 30 complaints; during the study, the frequency of citizen complaints dropped by roughly half.⁴⁰ It is important to note that the causal factors of these trends are unclear. These studies do not answer whether cameras lead to improved citizen behavior, improved police behavior, or a mixture of both.⁴¹ Available research cannot distinguish between these effects; therefore, more research is needed.⁴²

c. Improved citizen behavior

The use of police body-worn cameras could conceivably reduce frivolous complaints against police. Unfortunately, there is insufficient evidence to assess this factor outside of anecdotal reports in the media and preliminary results from a few evaluations.⁴³ However, there is a rich body of evidence showing that people tend to embrace commonly-accepted social norms when they are aware they are being watched.⁴⁴

d. Increased opportunities for police training

Many agencies use cameras to identify and correct problems with police training, often using cameras as a tool to evaluate new officers and identify where training is needed.⁴⁵ They can also be useful in evaluating and taking action against officers with a history of complaints.⁴⁶ For example, the Miami Police Department has been using body-worn cameras as part of its training academy since 2012. Miami Police Major Ian Moffitt stated that “we can record a situation, a scenario in training, and then go back and look at it and show the student, the recruit, the officer what they did good, what they did bad, and [what they can] improve on[.]”⁴⁷ Cameras can help departments under consent decrees with the DOJ Civil Rights Division and other agencies demonstrate compliance.⁴⁸ But the effectiveness of cameras on police training remains mostly untested.⁴⁹

e. Expediting resolution of citizen complaints against police

There is evidence that body-worn cameras help resolve citizen complaints against police officers.⁵⁰ However, no research has tested the technology’s impact on lawsuits against police.⁵¹

³⁹ White at 21.

⁴⁰ White at 21.

⁴¹ White at 6; Ariel, Farrar, and Sutherland 2014 at 19 (“Just Another Hawthorne Effect?”).

⁴² See White at 6. See generally, Ariel, Farrar, and Sutherland 2014 at 21-23 (“Research Limitations”).

⁴³ White at 22.

⁴⁴ Police Foundation Report at 2.

⁴⁵ PERF Report at 7.

⁴⁶ PERF Report at 8; White at 7.

⁴⁷ White at 25.

⁴⁸ PERF Report at 8.

⁴⁹ White at 7.

⁵⁰ White at 7.

⁵¹ White at 7.

Police departments devote considerable resources to resolving citizen complaints and lawsuits.⁵² However, complaints against police officers are often stymied by the fact that there are not witnesses and the complaint simply pits the officer's word against the citizen's.⁵³ Video evidence changes this dynamic. Citizens may be less likely to file frivolous complaints knowing that video evidence may refute their claims. Likewise, in the case of wrongdoing by police, the officers in question may be less likely to challenge the case. Rialto's chief of police has noted in interviews that access to video has expedited the resolution of complaints.⁵⁴

f. Promotes transparency and legitimacy of police actions

Transparency is an important benefit of body-worn cameras. It can demonstrate to the community that officers act in a fair and just manner. In her recent ruling on New York's stop-and-frisk program, Judge Scheindlin wrote that "recordings should . . . alleviate some of the mistrust that has developed between the police and the black and Hispanic communities, based on the belief that stops and frisks are overwhelmingly and unjustifiably directed at members of these communities."⁵⁵ However, this claim has not been sufficiently tested. There have been virtually no studies on citizens' views of this new technology.⁵⁶ Thus the nature of citizen support for body-worn cameras remains untested, as do its effects on the perceived legitimacy of police actions.⁵⁷

V. Potential Disadvantages of Body-Worn Cameras

More widespread use of surveillance technology presents several concerns: (1) without proper safeguards, body-worn cameras could violate citizens' rights; (2) officers may feel they cannot do their job effectively if camera use is not confined appropriately; (3) implementing body-worn camera programs takes up agency resources; (4) body cameras will not solve all law enforcement problems.

a. Citizens' concerns

Without proper safeguards, some concerns have been raised that body-worn cameras could be used for broad government surveillance and monitoring. Moreover, body cameras face outward, monitoring anyone within an officer's field of vision, potentially without the individualized basis for suspicion. Expanded government surveillance, without appropriate safeguards, could chill free speech and infringe on privacy rights.⁵⁸ Videos could also be publicly released, potentially violating the privacy of the individuals recorded.⁵⁹ If implemented, the use

⁵² White at 23.

⁵³ White at 23.

⁵⁴ White at 24.

⁵⁵ *Floyd v. City of New York*, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013).

⁵⁶ White at 6.

⁵⁷ White at 20.

⁵⁸ Buttar, Shahid. *Police Violence? Body Cams Are No Solution*. TRUTH-OUT.ORG. Jan. 6, 2015, <http://truth-out.org/opinion/item/28357-police-violence-body-cams-are-no-solution>.

⁵⁹ Ramirez at 15.

of police body-worn cameras should be carefully regulated to avoid infringing on First and Fourth Amendment rights.

Moreover, body-worn cameras can capture in real time the traumatic experiences of crime victims, citizens experiencing medical trauma, and those being detained or arrested.⁶⁰ Recording these events may exacerbate citizens' trauma. The technology thus has the potential to undermine trust in casual encounters associated with community policing.⁶¹ Citizens, including witnesses, victims, and confidential informants, may be less likely to offer information to police knowing they are being recorded.⁶²

b. Officers' concerns

Law enforcement personnel would find it problematic to have every minute of an officer's day recorded, especially as officers build professional relationships with each other and with the communities they police.⁶³ The added requirement that cameras be turned on in certain situations also exposes police officers to additional liability if an incident occurs while the camera is turned off, raising questions about why the officer did not activate it. Some police unions even maintain that the use of cameras represent a change in working conditions that must be negotiated during contract talks.⁶⁴ In addition, there may even be situations where only a partial recording of an encounter exists—whether accidentally or purposefully—which will raise additional questions about evidentiary weight and the officer's conduct. It will therefore be critical to establish when cameras should be turned off and on, consistent with law enforcement objectives.

c. Logistical and resource requirements

Officers who wear cameras need to be trained in their use, including from when to record to proper maintenance and access. Departments should develop clear administrative policies. And of course cameras cost money: each camera costs between \$800 to \$1,000.⁶⁵ Relevant footage must also be stored. When footage is used in court, there will be expenses associated with reviewing and redacting footage. Additionally, in jurisdictions with broad public-disclosure laws – which are of course critical to promoting government and law enforcement transparency and accountability – an open records request could prove costly.⁶⁶ Such requirements may consume department resources.

⁶⁰ White at 7.

⁶¹ PERF Report at 1.

⁶² White at 27; PERF Report at 12.

⁶³ White at 8.

⁶⁴ White at 8.

⁶⁵ White at 9.

⁶⁶ See Jennifer Sullivan and Steve Miletich, *Costly public-records requests may threaten SPD plan for body cameras*, THE SEATTLE TIMES, Nov. 19, 2014, http://seattletimes.com/html/localnews/2025060346_spdcamerasxml.html.

VI. Implementation Questions

If body-worn camera programs are implemented, agencies must craft policies that further law enforcement objectives and capture the benefits of the technology without exposing the agency and the public to the potential harms. Lawmakers and agencies must decide numerous important questions, including when encounters should be recorded, how programs should be implemented in “two-party consent” states, when the public should be allowed access to the footage, how long footage will be stored, and what role written policies will play. Additionally, it will be critical to draw the line between what should be mandated at the federal and state level and to what extent police departments should be given the freedom to develop their own procedures.

a. When should encounters be recorded?

Possibilities range from requiring officers to record their entire shift, all interactions with the public, or only certain interactions relevant to law enforcement activities and investigations. Any decision on implementation should be clearly defined in a written policy. The Police Executive Research Forum (“PERF”) surveyed police departments across the country on the use of body-worn cameras. Most of the departments using body-worn cameras require officers to activate cameras when responding to law enforcement-related calls for service, meaning calls for service, traffic stops, arrests, searches, interrogations, and pursuits.⁶⁷

Officers may need to have some discretion to not record certain situations, such as when the citizen objects to a recording during a sensitive conversation. PERF advocates this approach to protect community privacy rights, such as when talking with crime victims, everyday interactions with community members, and witnesses concerned with retaliation if known to be cooperating with police.⁶⁸ If officers have discretion on when to record interviews with witnesses, it will give witnesses the incentive to come forward. Many departments, including in Rialto, California; Mesa, Arizona; and Fort Collins, Colorado give officers discretion whether to record in investigating sensitive crimes such as rape and abuse.⁶⁹ Many departments will also want exceptions for when activation is unsafe or impractical.⁷⁰

Finally, policymakers and agency leaders will also need to decide what happens if a use of force occurs when a camera should have been recording but the footage is missing. They will need to clearly define what penalties should be in place for such cases.

b. How should programs be implemented in “two-party consent” states?

⁶⁷ PERF Report at 13.

⁶⁸ PERF Report at 12.

⁶⁹ PERF Report at 13.

⁷⁰ PERF Report at 40.

In some states, the consent of both parties to a *private* conversation is required before a recording may take place.⁷¹ Police may need to work with their legislatures in “two-party consent” states that do not already have law enforcement exceptions to have police cameras waived from the law’s requirements. Otherwise, officers must obtain consent before recording if the other party has a reasonable expectation of privacy in the conversation. In Pennsylvania, for example, the state legislature enacted a law in February 2014 waiving the two-party consent requirement for police body cameras.⁷² Regardless, it may be sensible for police to inform citizens they are being recorded even if the law does not require it (as in the majority of states, which require only the consent of one party).⁷³

c. What access to footage should be permitted?

Records made and created during an investigation may become available to others during the course of the criminal justice process. Crime victims and ordinary citizens generally will not want their images broadcast in the media. Citizens may also be sensitive to recording when officers are inside their homes as such recordings could become subject to state open records laws.⁷⁴

Agencies must also consider how the release of videos interacts with state open records laws. Many law enforcement agencies take the position that so long as the officer has a right to be in the home, the encounter may be recorded.⁷⁵ But in many states, unless a record is part of an ongoing investigation, it will be subject to open records requests, subjecting many private recordings to public inspection.⁷⁶

Moreover, video footage will necessarily be used in investigations and criminal proceedings. Body-worn camera footage will be treated similarly to other analogous types of evidence, such as photographs. The public availability of evidence in criminal proceedings changes depending upon the stage of the proceeding. If evidence is collected during an investigation but no charges are filed, it may eventually be subject to disclosure through open records laws.⁷⁷ If evidence is collected during an investigation and charges are filed, the following guidelines generally apply: (a) during the discovery phase, evidence is available only to the government and the defendant. Constitutional and statutory standards govern such

⁷¹ See, e.g., Fla. Stat. § 934.03 (Florida law prohibits recording where reasonable expectation of privacy exists); Wash. Rev. Code § 9.73.030 (requiring consent of all parties but “consent” may be obtained by announcing the recording to all parties); see also Washington Attorney General Opinion 2014 No. 8 (Nov, 24, 2014) (reviewing privacy issues under Washington law), available at: <http://www.atg.wa.gov/AGOOpinions/Opinion.aspx?section=archive&id=32439#.VLgdiyXOWUk> (accessed Jan. 16, 2015).

⁷² Doyle, Michael. *A possible Ferguson solution: Cameras on cops*. MCCLATCHYDC.COM. Nov. 26, 2014, available at: <http://www.mcclatchydc.com/2014/11/26/248308/a-possible-ferguson-solution-cameras.html> (accessed Jan. 14, 2015),

⁷³ PERF Report at 14.

⁷⁴ PERF Report at 15.

⁷⁵ PERF Report at 15.

⁷⁶ PERF Report at 15.

⁷⁷ See Stanley, Jay. *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All* (ACLU, Oct. 2013) (“ACLU Report”), 5; PERF Report at 17.

availability;⁷⁸ (b) if evidence is used during court proceedings, the First and Sixth Amendments may provide the public a qualified right to access these records.⁷⁹

d. How long should videos be stored?

Departments spend significant resources responding to open records requests. Given the large amount of data body-worn cameras will produce, departments could be inundated with too many open records requests for their resources to handle, given the time necessary to review and redact information before release.⁸⁰ Because data storage incurs significant costs, the length of storage time dramatically affects personnel hours and direct costs associated with the storage device.⁸¹

e. What should be the role of written policies?

Body-worn camera programs will not be effective without clear written policies that are consistently enforced. Of the 63 agencies across the country that reported using body-worn cameras in one study, nearly one-third did not have written policies governing the practice.⁸² Many reported a lack of guidance on what the policies should include.⁸³ It is important for policymakers to answer the implementation questions in written policies to ensure the consequences of body-worn camera programs are predictable and perceived as legitimate by all stakeholders.

V. Conclusion

Advocates of police body-worn cameras emphasize potential to promote law enforcement functions. Cameras can create an instant record of information obtained during an investigation. Body-worn cameras can also promote due process and equal protection values by providing a record of police encounters with citizens.

On the other hand, more widespread adoption of video recording technology potentially threatens the privacy of others captured in the footage. Without proper safeguards, body-worn cameras could be used for broad government surveillance. Written policies are essential to the implementation and appropriate use of body-worn cameras consistent with law enforcement objectives. Implementing body-worn camera programs requires careful balancing of the costs and benefits, as well as continuous engagement with both law enforcement and the public.

In the coming months, the Committee on Policing Reforms will release a final report regarding the use of body-worn cameras and guidelines for preserving civil liberties while enhancing the relationship between communities and law enforcement.

⁷⁸ See, e.g., FED. R. CRIM. P. 16 (federal criminal discovery standards).

⁷⁹ See generally, Reagan, Robert T. *Sealing Court Records and Proceedings: A Pocket Guide* (Washington, DC: Federal Judicial Center, 2010), 2-5.

⁸⁰ White at 33-34.

⁸¹ White at 32-33.

⁸² PERF Report at 2.

⁸³ PERF Report at 2.