

POLICE BODY WORN CAMERAS AND PRIVACY: RETAINING BENEFITS WHILE REDUCING PUBLIC CONCERNS

RICHARD LIN[†]

ABSTRACT

Recent high-profile incidents of police misconduct have led to calls for increased police accountability. One proposed reform is to equip police officers with body worn cameras, which provide more reliable evidence than eyewitness accounts. However, such cameras may pose privacy concerns for individuals who are recorded, as the footage may fall under open records statutes that would require the footage to be released upon request. Furthermore, storage of video data is costly, and redaction of video for release is time-consuming. While exempting all body camera video from release would take care of privacy issues, it would also prevent the public from using body camera footage to uncover misconduct. Agencies and lawmakers can address privacy problems successfully by using data management techniques to identify and preserve critical video evidence, and allowing non-critical video to be deleted under data-retention policies. Furthermore, software redaction may be used to produce releasable video that does not threaten the privacy of recorded individuals.

INTRODUCTION

In the aftermath of a controversial shooting of an unarmed man by a police officer in Ferguson, Missouri,¹ many police departments

[†] Duke University School of Law, J.D. 2016; Federal Law Enforcement Training Center, UPTP-017B 2010; Rutgers College, B.A. Physics, Political Science, and History 2010. This note is dedicated in the memory of Officer Christopher Matlosz, #317, Lakewood Police Department, New Jersey, End of Watch January 14, 2011. Special thanks to Professor Lisa Griffin, whose endless patience was crucial to the development of this note, and to Stacy Jen, whose endless patience was crucial to the completion of my *Juris Doctor*.

¹ See generally *Ferguson Unrest: From Shooting to Nationwide Protests*, BRITISH BROADCASTING CORPORATION (Aug. 10, 2015), <http://www.bbc.com/news/world-us-canada-30193354>.

prepared to deploy police body worn cameras to capture video and audio footage of interactions with the public. On November 18, 2014, the Seattle Police Department, which had plans to deploy such cameras, received an anonymous request for disclosure of public records, in accordance with Washington State law.² However, this request was staggering in scope: the requester sought records on every dispatched call, all police reports, and data on every records search conducted by Seattle P.D.³

Even more significantly, the requester sought all videos generated by both car-mounted dash cameras and body worn cameras since the program started.⁴ The requester, only known as “policevideorequests@gmail.com,” stated he “wanted to call attention to significant flaws in deploying body cameras without thought to privacy.” Through various social media outlets such as YouTube⁵ and Reddit,⁶ the requester uploaded the disclosed videos for public viewing and commentary.

Suddenly, Seattle Police officials found themselves in a bind. Washington State law does not allow agencies to refuse a disclosure request because the request is overbroad, and fees are only applicable for a limited portion of the costs.⁷ Yet, complying with the request would potentially “delay responses to prosecutors and defense attorneys seeking information for criminal trials,” and “violate the privacy rights of individual citizens, who will have their lives, their encounters with police and even their homes posted on the Internet.”⁸ Furthermore, “police videos are filled with sensitive information that is not disclosable under

² Steve Miletich & Jennifer Sullivan, *Costly Public-Records Requests May Threaten SPD Plan for Body Cameras*, THE SEATTLE TIMES (Nov. 20, 2014, 8:12 AM), <http://www.seattletimes.com/seattle-news/costly-public-records-requests-may-threaten-spd-plan-for-body-cameras>.

³ *Id.*

⁴ *Id.*

⁵ See *Police Video Requests*, Police Video Requests’ Channel Homepage, YOUTUBE, <https://www.youtube.com/user/policevideorequests/featured> (last visited Apr. 14, 2015).

⁶ See *policevideorequests*, Overview of policevideorequests’ Reddit Posts, REDDIT, <http://www.reddit.com/user/policevideorequests> (last visited Apr. 14, 2015).

⁷ Miletich & Sullivan, *supra* note 2.

⁸ *Id.*

law, so police faced the onerous task of go[ing] through video, frame by frame . . . to redact sensitive images.”⁹

Thankfully for Seattle Police, they were able to make a deal with the anonymous requester, where he would drop his massive request and help Seattle P.D. develop their technological capacities, in return for the department’s cooperation in providing him access to police records.¹⁰ In contrast, other departments were not quite so lucky, and some agencies, such as Bremerton Police (WA), were forced to abandon their body worn camera programs in light of broad and unmanageable public records requests.¹¹

Police body cameras have great potential to improve evidence collection and law enforcement accountability. But implementing them would be costly and difficult, because of the privacy concerns that must be accommodated. The privacy concerns of citizens who interact with law enforcement stem from state “open records” laws that may require disclosure of captured video and audio. While open records laws provide exceptions to disclosure, such as for keeping investigations confidential or for protecting the identity of informants, these will not be enough to address privacy concerns with respect to body worn cameras. Further policy refinements are therefore necessary to sufficiently protect privacy.

Although such refinements are necessary, agencies and lawmakers who wish to deploy police body worn cameras must ensure that privacy protection efforts do not limit camera use so much that they become useless. They must also ensure that such efforts are technologically feasible. One promising avenue for addressing these concerns while achieving privacy protection is the use of data management techniques. Data management would reduce the burdens associated with preparing public records for release, and would include stricter document retention policies, conditional retention, and “tagging.” Yet, despite their potential, these techniques come with possible side-effects that lawmakers must consider before deployment of a police body worn camera program. This note evaluates several proposed privacy solutions and describes how police departments and independent review boards may ensure that body worn camera programs work effectively.

⁹ Jennifer Sullivan, *Man Drops Massive Records Requests, Will Help Seattle Police with Video Technology*, THE SEATTLE TIMES (Nov. 20, 2014, 9:19 PM), <http://www.seattletimes.com/seattle-news/man-drops-massive-records-requests-will-help-seattle-police-with-video-technology>.

¹⁰ *Id.*

¹¹ See Miletich & Sullivan, *supra* note 2.

I. POLICE BODY WORN CAMERAS: A BRIEF OVERVIEW

In the post-Ferguson conversation on police reform, support for body worn cameras is often centered on their unique advantages of small size, mobility, and evidentiary accuracy. The use of these cameras could potentially answer the age-old question of “who will watch the watchmen?”¹² Whereas many previous police reforms focused on creating independent public bodies to review police activity,¹³ technological advances have created new opportunities to enhance the abilities of supervisors and independent bodies to monitor officers through recorded video. With cameras becoming smaller, cheaper, and more advanced, the use of video to monitor police brings a number of benefits. Such benefits include improvements in police accountability and public trust, decreases in use of force by police and against police, reductions in citizen complaints, and stronger evidence via officer-eye videos.¹⁴

However, the disadvantages of using such equipment temper these potential benefits. Body worn cameras are expensive to purchase and deploy, increase administrative burdens, require both rigorous review and supervisor action to reap accountability benefits, and their use may decrease the quality of public-police interaction.¹⁵

II. PRIVACY PROBLEMS OF POLICE BODY WORN CAMERAS: LAW, PRIVACY, AND ANALOGUES

While a considerable body of public debate has emerged around the benefits of police body worn cameras, the disadvantages are

¹² Juvenal, *Satire VI*, ll. 347–48 in JUVENAL: SATIRE 6, at 69 (Lindsay Watson & Patricia Watson eds., 2014).

¹³ See, e.g., *About CCRB*, NYC CITIZEN COMPLAINT REVIEW BOARD, <http://www.nyc.gov/html/ccrb/html/about/about.shtml> (last visited Apr. 14, 2015).

¹⁴ See generally MICHAEL D. WHITE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE (2014); LINDSAY MILLER & JESSICA TOLIVER, POLICE EXEC. RES. F., IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED (2014), <http://ric-zai-inc.com/Publications/cops-p296-pub.pdf>.

¹⁵ See *id.* (arguing citizens who wish to inform officers about a crime may decide against it due to video/sound recording and the increased likelihood of retaliation against “snitching,” and officers will also be discouraged from being flexible about smaller offenses such as minor instances of speeding, jaywalking, loud music, or public intoxication).

discussed less frequently.¹⁶ A problem that has received less consideration is the fact that body worn cameras present privacy issues relating to their ability to record video and audio anywhere police officers go, and the fact that videos may be public record subject to release upon request. Though similarities exist between body worn cameras and previously implemented technologies like police car dash cameras and closed circuit television (herein “CCTV”) monitoring, the nature of body worn cameras is sufficiently different that these previous analogues do not supply ready solutions to these problems.

A. Dealing with Sensitive Information: Open Government/Records Acts

State Open Government/Records Acts and their Federal analogue, the Freedom of Information Act, “are a product of the ‘open government’ climate brought about by distrust of government accountability and by misuse of government power during the civil rights and Vietnam protest era.”¹⁷ Often times, videos taken from police equipment are covered by such acts, and police agencies have the legal obligation to turn over such videos upon request.¹⁸ For example, the Public Disclosure Act in Chapter 42 of the Revised Code of Washington (herein “RCW Ch. 42”) applies to any record “relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”¹⁹ Furthermore, the term “records” includes film, tapes, and recordings.²⁰

However, many public disclosure statutes also provide disclosure exceptions that pertain to law enforcement records. For example, RCW Ch. 42 provides that records exempt from public disclosure requirements include specific investigative records “essential to effective law enforcement or for the protection of any person’s right to privacy,” information that could reveal the identity of crime witnesses or crime

¹⁶ See generally Harold M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831 (2015).

¹⁷ ERIC M. STAHL, MICHAEL J. KILLEEN & DAVIS WRIGHT TREMAINE, OPEN GOVERNMENT GUIDE: OPEN RECORDS AND MEETINGS LAWS IN WASHINGTON 1 (Gregg Leslie & Mark Caramanica eds., 6th ed. 2011).

¹⁸ WASH. REV. CODE § 42.56.070 (2005).

¹⁹ WASH. REV. CODE § 42.56.010 (2010).

²⁰ *Id.*

complainants, and investigative records pertaining to sexual assaults or the identity of child victims of sexual assault.²¹

The privacy exception against disclosure in RCW Ch. 42 specifies that “right to privacy” is “invaded or violated only if disclosure of information about the person [w]ould be highly offensive to a reasonable person, *and* . . . is not of legitimate concern to the public.”²² While what is “highly offensive to a reasonable person” is unclear in the narrow investigative record context,²³ both prongs of this test must be satisfied in order to prevent disclosure.²⁴ Furthermore, the exception only applies to ongoing investigations.²⁵

Therefore, a requester who can defeat the second prong by showing that the recordings are “of legitimate concern to the public,” will override the privacy concerns raised by disclosure, and can obtain and release the recordings.²⁶ Even if release of the video would be highly offensive to a reasonable person, the legitimate concerns of the public would justify the release.²⁷ Furthermore, closure of the ongoing investigation also turns the closed investigative record into an open record that must be disclosed.²⁸ Lastly, “[b]ecause the public policy . . . is to *favor disclosure*, all exemptions are to be narrowly construed.”²⁹ Under this scheme, it is frighteningly easy for police body camera video of private citizens to become releasable public records.

While RCW Ch. 42 includes the aforementioned disclosure exceptions, it also specifies that “exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, *can be deleted* from the specific records sought.”³⁰ Therefore, if the sensitive and

²¹ WASH. REV. CODE § 42.56.240 (2013).

²² WASH. REV. CODE § 42.56.050 (1987) (emphasis added).

²³ See generally MICHELE L. EARL-HUBBARD & GREG OVERSTREET, WASHINGTON ADMINISTRATIVE LAW PRACTICE MANUAL § 4.05 (Kristal K. Wiitala ed., 2012).

²⁴ See *id.* (citations omitted).

²⁵ See *id.* (citing *Ashley v. Washington State Pub. Disclosure Comm’n*, 560 P.2d 1156, 1159 (1977)).

²⁶ See *id.* (citation omitted).

²⁷ See *id.*

²⁸ See *id.* (citing *Ashley v. Washington State Pub. Disclosure Comm’n*, 560 P.2d 1156, 1159 (1977)).

²⁹ See *id.* (citing WASH. REV. CODE § 42.56.030) (emphasis added)).

³⁰ WASH. REV. CODE § 42.56.210 (2005) (emphasis added) (providing exceptions to this rule as well).

private information can be redacted, the agency must redact it and the records must be disclosed.³¹ Furthermore, there are very few bars to how the requester can use the records.³²

Because police videos are redactable and videos obtained can be used in almost any way the requester desires, police agencies are forced to bear the burden of redacting the videos they are required to disclose.³³ This is so that these disclosures do not “violate the privacy rights of individual citizens, who will have their lives, their encounters with police and even their homes posted on the Internet.”³⁴ With respect to preparing the videos for mandatory disclosure, the current limits of software and technology make redacting a herculean task. James McMahan, policy director at the Washington Association of Sheriffs and Police Chiefs, commented, “[t]he only way to identify people in a video or an audio file is by watching or listening to it in real time. You can’t do a word search in a video, you can’t do a voice search in an audio . . . We’ve got to put a real body in a chair in front of a screen.”³⁵ While the state of the technology is improving, it is not yet fully mature, and successful implementation in the present day must take into account the burdensome nature of redacting videos.³⁶

Additionally, while statutes may permit police to collect fees to offset the costs of producing documents, they do not cover all costs.³⁷ Even more significantly, the fees do not provide for the maintenance and storage costs for the records.³⁸ Furthermore, the costs of searching records are often not covered,³⁹ and there may be limits on whether or not agencies can collect fees upfront.⁴⁰ While many public agencies face budget constraints, for small law enforcement agencies with more limited

³¹ *See id.*

³² *See* WASH. REV. CODE § 42.56.070(9) (providing that agencies cannot sell or “provide access to lists of individuals requested for commercial purposes”).

³³ Miletich & Sullivan, *supra* note 2.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *See id.*

³⁷ *See* WASH. REV. CODE § 42.56.120 (forbidding fees for inspecting documents, locating documents, making documents available, but allowing reasonable charges for providing copies given that they do not exceed actual costs directly related to copying).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *See id.* (allowing agencies to require deposits, but limiting to no more than ten percent of estimated cost).

budgets and smaller personnel pools, these upfront and unreimbursed costs may prove to be fatal to the agency's effort to deploy body worn cameras, given their inability to comply with requests for videos under public document disclosure laws.

B. Privacy Implications of Police Body Worn Cameras

Though the highly mobile and up-close nature of police body worn cameras can yield great benefits, it is precisely their ability to record whatever the officer sees that poses privacy concerns. The problems stemming from their ability to record in private spaces are further compounded by their ability to capture close-up recordings of both voices and faces in an easily disseminated electronic format. Furthermore, even though members of the public might expect government "intrusion" when they actively call for police service, body worn cameras are not limited to recording only when responding to calls for service. If body worn cameras are set to record as a default, they can also take on a constant, pervasive monitoring role with repercussions for surveillance and tracking.

1. Right to Privacy

Legally, one's "right to privacy" can be formulated in many different ways. American constitutional law protects an individual from unreasonable search and seizure by government officers, based on that individual's "reasonable expectation of privacy," which requires "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"⁴¹ Additionally, tort law commonly covers unreasonable intrusion upon the seclusion of another and unreasonable publicity given to a person's private life as forms of "invasion of privacy."⁴²

2. Intrusion of Cameras into Private and Public Space

However one formulates "privacy," it is clear that the mobility of body worn cameras enables police to proactively carry them into private spaces that one may normally expect to be closed to the general public, such as private residences. Even if the police officers themselves have a warrant or some other exception to the individual's "expectation of privacy," the disclosable and easily distributable video from their cameras effectively turns the privileged entry of a number of officers into

⁴¹ *Katz v. United States*, 389 U.S. 347, 361 (1967) (J. Harlan, concurring).

⁴² 62A AM. JUR. 2D *Privacy* § 29 (1990).

a ride-along for thousands of watchers who may view the released videos in the future.⁴³

Furthermore, that same mobility allows video and audio to be captured in close enough proximity as to allow easy identification of faces and voices. Making matters even worse, police officers respond to intensely emotional and personally invasive crimes such as domestic violence and sexual assault, and the intrusion of a responding policeman or specially-trained detective into one's personal sphere may no longer be limited to the responding officers. Body worn cameras bring with them the explosive possibility that perfectly preserved video and audio of the intensely traumatizing experiences of vulnerable victims could be pushed into the public sphere and be exposed to millions of viewers.⁴⁴

Additionally, the passive "always-on" capabilities of body worn cameras may cause special privacy concerns in the public sphere. While those who call for police service may expect "intrusion" to a certain degree, police body cameras may be set to constantly record even the general public and persons who are not actively interacting with the police. The "always-on" deployment posture advocated by the ACLU⁴⁵ results in a virtual dragnet of footage, with individuals who do not call for police services caught on video along with those who requested the police services. While those who call for police service (or have the police called on them) can expect to have public records made of the encounter in the form of dispatcher logs, police reports, and body camera footage, one might not expect public records to be made about them simply because they walked down the street in view of a police officer.

Furthermore, facial recognition software, GPS tracking of cameras, and a database of body camera footage may eventually create a system like license plate reader databases, in which the monitoring and tracking of license plate images and the movement of individuals is now possible.⁴⁶ As noted by Harley Geiger, senior counsel with the Center for

⁴³ While lawmakers could simply categorize videos inside private property as part of the exception for privacy in disclosures, accusations of racist conduct by police inside a private residence (e.g. an arrest or use of force against a minority) would be made far worse by the refusal of prosecutors to disclose body camera evidence.

⁴⁴ See White, *supra* note 14, at 27–28.

⁴⁵ See MILLER & TOLIVER, *supra* note 14, at 12.

⁴⁶ Devlin Barrett, *U.S. Spies on Millions of Drivers*, THE WALL STREET J. (Jan. 26, 2015), <http://www.wsj.com/articles/u-s-spies-on-millions-of-cars-1422314779>.

Democracy and Technology, “[e]nough of those cameras make it possible for government and companies to map a person’s movements, like when they attend a political rally or discreetly visit someone.”⁴⁷

3. *Previous Analogues: Dash Cameras and CCTV*

This brave new world of police body cameras raises privacy concerns that are not entirely new, as analogues exist in other forms of law enforcement video monitoring, namely police car dash cameras and CCTV. However, the concerns of those technologies do not map squarely onto the issues raised by body worn cameras, mainly due to the mobility and proximity of cameras to recorded persons. Therefore, the questions raised by body worn cameras cannot be entirely answered with the lessons learned from CCTV and dash camera implementation.

Firstly, police car dash cameras can be considered to be the mother of body worn cameras. Mounted in law enforcement vehicles, these cameras go wherever police officers drive their cars, and commonly record the area in front of the patrol car.⁴⁸ Much like body worn cameras, dash cameras may also capture audio,⁴⁹ and the recordings are often subject to Open Government/Records Acts.⁵⁰

However, unlike dash cameras, body worn cameras present a greater voyeurism/privacy problem due to the mobility of body cameras, the larger amount of footage captured, and calls for “always on” recording parameters.⁵¹ The car-mounted nature of dash cameras necessarily restricts how close the dash cameras can get to individuals, due to the length of the hood of the car itself and the fact that the car will be stationary and cannot automatically follow highly mobile use of force incidents while the police officer is outside of the car. Therefore, the level of detail and video quality will likely be lower than that of a body-mounted camera, which approaches individuals as closely as the police officer does. This could make it easier to recognize individuals captured by body camera video, compared to more distant footage from dash cameras.

⁴⁷ Tom Risen, *DOJ Spying and the Business of Car Surveillance*, U.S. NEWS (Jan. 28, 2015), <http://www.usnews.com/news/articles/2015/01/28/doj-spying-and-the-business-of-car-surveillance>.

⁴⁸ Erika Aguilar, *LAPD Finds That Patrol Car Dash Cameras Are No Panacea*, SOUTHERN CAL. PUB. RADIO (Dec. 5, 2014), <http://www.scpr.org/news/2014/12/05/48504/lapd-finds-that-patrol-car-dash-cameras-are-no-pan>.

⁴⁹ *Id.*

⁵⁰ See WASH. REV. CODE § 42.56.010 (2010).

⁵¹ See MILLER & TOLIVER, *supra* note 14, at 12.

Furthermore, unlike police officers, police cars (generally) do not end up inside residences and other spaces where individuals could have a “reasonable expectation of privacy,” thus reducing the chances that a privacy interest could be violated by dash cameras. Police officers, however, are much more likely than cars to end up in such private spaces, and therefore, the video from body cameras presents a greater privacy issue than that of dash cameras.

Compounding the problems from increased mobility and proximity of police body camera recordings is the fact that while prominent advocates such as the ACLU are calling for police body cameras to be “always on,”⁵² dash camera videos are usually very limited because they are often activated only when emergency lights are activated.⁵³ Therefore, “[w]hen a [police officer] activates the emergency light bar on his or her cruiser, the dash camera begins capturing footage until the light bar is turned off. That means an officer could go an entire shift, or potentially days, without activating the dash cam.”⁵⁴

With a far higher degree of mobility, proximity, and more intrusive recordings, police body worn cameras create a stronger and more indiscriminate dragnet of video because they are more detailed and intrusive than their dash camera counterparts. Even though dash cameras are less intrusive than body cameras,

[v]ideo from dashboard cameras, a more widely used technology, has long been exploited for entertainment purposes. Internet users have posted dash-cam videos of arrests of naked women to YouTube, and TMZ sometimes obtains police videos of athletes and celebrities during minor or embarrassing traffic stops, turning officers into unwitting paparazzi.⁵⁵

⁵² See *id.* at 13 (The ACLU argues dash cams should record all encounters with the public. Officers would be required to activate cameras not only during calls for service or law-enforcement related encounters, but also during informal conversations with the public).

⁵³ See John Voket, *Newtown Police Weighing Pros, Cons of Body Cameras*, THE NEWTOWN BEE (Mar. 27, 2015, 9:53 AM), <http://newtownbee.com/newtown-police-weighing-pros-cons-of-body-cameras/>.

⁵⁴ *Id.*

⁵⁵ Matt Pearce, *Growing Use of Police Body Cameras Raises Privacy Concerns*, LOS ANGELES TIMES (Sept. 27, 2014, 6:00 AM), <http://www.latimes.com/nation/la-na-body-cameras-20140927-story.html#page=1>.

Therefore, body camera footage treated under the same disclosure regime as dash camera footage could potentially be used in the same way with even more egregious results, and “[o]fficers wearing body cameras could extend that public eye into living rooms or bedrooms, should a call require them to enter a private home.”⁵⁶

Furthermore, the explosion of constant and pervasive surveillance by police-run CCTV poses privacy problems as well, but not necessarily to the same degree of intrusiveness as body worn cameras. While police CCTV is generally set to constantly record, police CCTV cameras are mounted in public spaces, and are strategically placed to monitor general areas rather than specific individuals.⁵⁷ This is an important distinction from police body cameras, which do not necessarily remain in public space, and do follow specific individuals if police officers choose to do so.⁵⁸

Despite these differences, some of the problems inherent in police CCTV also carry over to police body cameras, and are even exacerbated by the mobility of the cameras. For example, police misuse of surveillance to monitor disfavored groups or individuals, and the ability to use facial recognition to track individuals via networks of CCTV cameras could easily carry over to police body cameras as well, given that body cameras are in essence mobile, close-up CCTV cameras.⁵⁹ Furthermore, both body cameras and CCTV cameras raise concerns about over-surveillance, recording of public space, and a “chilling effect” on public life.⁶⁰ Significantly, police body cameras bring those public problems to private spaces and activities, and introduce the possibility of an even stronger chilling effect against private expression, assembly, and activities by creating video recordings of private spaces and activities which may be releasable to the general public. While police officers may already enter private spaces under certain limited circumstances, there is a difference between a limited number of police officers entering one’s private space, and having videos from that entry available to the entire public for viewing.⁶¹

⁵⁶ *Id.*

⁵⁷ See MILLER & TOLIVER, *supra* note 14, at 11.

⁵⁸ *Id.*

⁵⁹ See *What's Wrong with Public Video Surveillance?*, AM. C.L. UNION, <https://www.aclu.org/whats-wrong-public-video-surveillance?redirect=technology-and-liberty/whats-wrong-public-video-surveillance>.

⁶⁰ See *id.*

⁶¹ See *supra* Section II.b.2.

III. POTENTIAL SOLUTIONS TO PRIVACY PROBLEMS: ADVANTAGES AND DISADVANTAGES

Many of the problems raised by police body worn cameras are related to their status as public record and the difficulties of reviewing, redacting, and maintaining video records in accordance with public interest and law. Despite these problems, body cameras still retain significant advantages that may outweigh these disadvantages. Especially at a time when public trust in police is low, law enforcement agencies should endeavor to put this technology to productive use. However, in light of the aforementioned problems, agencies and lawmakers must carefully tailor deployment plans in order to maintain the ability to comply with mandatory disclosure and provide a means of ensuring police accountability, without unnecessarily trampling over privacy concerns.

A. *Quick but Problematic Potential Solutions*

Some solutions to the mandatory disclosure and privacy problems of police body cameras may sound particularly appealing due to the perceived ease of implementation. Some of these solutions, however, come with hidden problems that seriously undermine the very reasons for implementing body worn camera programs in the first place.

One such solution is to restrict recording policies, either by tying recording to consent of individuals being recorded, or by giving police officers discretion to decide when recording is appropriate. While many police departments already require officers to inform individuals that they are being recorded when feasible,⁶² the ACLU's position is that police officers should ask members of the public for consent to record the conversation.⁶³ However, this approach is subject to administrability concerns. For example, it may be extremely difficult for departments to formulate clear, fast, and effective guidance on when officers are

⁶² See, e.g., *Department Directive: Digital Imaging, Digital Audio & Video, and Body Worn Camera Systems*, BURLINGTON POLICE DEPARTMENT (July 22, 2014), <https://www.burlingtonvt.gov/Police/Key-Department-Directives> (follow "DD14 - Digital Imaging, Digital Audio & Video, and Body Worn Camera Systems.pdf" hyperlink).

⁶³ Markeshia Ricks, *Chief: Cop Body Cams Coming*, NEW HAVEN INDEP. (Dec. 4, 2014, 9:21 AM), http://www.newhavenindependent.org/index.php/archives/entry/nhpd_body_cams_coming ("ACLU-CT spokeswoman Jeanne Leblanc said individual officers should not get to arbitrarily decide when their cameras should be off, but in routine matters that take them into peoples' homes, they should have to ask for permission to record.").

required to ask for consent, or can override refusal to consent. Furthermore, individuals who are forming the intent to flee or assault a police officer are unlikely to consent to recording, and by the time police officers are in a fight or chase, it may be difficult or physically impossible to reactivate a body camera. This would make it far more likely that the public will be deprived of the benefit of video evidence in use of force incidents.

Furthermore, giving police officers broad discretion on when to record would allow officers to take privacy and sensitivity concerns into consideration before recording. However, it is important to note that this would exacerbate the very problems with accountability and transparency that body worn cameras are designed to address. With wide discretion, it is likely that many officers who oppose the use of body cameras will be reluctant to turn them on.⁶⁴ In addition, selective recording would only exacerbate accountability problems by giving “bad cops” a way to hide abusive and illegal behavior. Even in a situation where force was used appropriately after cameras were turned off, the turning off of the camera could be seen by the public as a deliberate attempt to conceal police brutality.⁶⁵

More drastically, it is also possible that Open Government/Records Acts could be amended to exempt police body worn camera video from disclosure, thereby eliminating privacy issues stemming from the mandatory disclosure of video to the public and also eliminating the burden of complying with such requests.⁶⁶ For example, in February 2015, the Kansas State Senate passed an amendment to the Kansas Open Records Act that would keep mandatory disclosure of police audio and video recordings limited to the individuals recorded, their attorneys, and parents or guardians of those individuals.⁶⁷ At least

⁶⁴ See WHITE, *supra* note 14, at 31 (In a study by the Mesa Police Department, when police officers were permitted discretion to activate body cameras when they “deemed appropriate,” use of the cameras declined by 42% than when the standard was “every effort to activate . . . when responding to a call or hav[ing] any contact with the public”).

⁶⁵ See *id.* at 32.

⁶⁶ Ryan J. Foley, *State Lawmakers, Police Groups Seek to Restrict Public Access to Videos from Body Cameras*, U.S. NEWS (Mar. 20, 2015, 3:57 PM), <http://www.usnews.com/news/us/articles/2015/03/20/state-bills-would-limit-access-to-officer-body-camera-videos>.

⁶⁷ See *id.*

fifteen other states have seen similar measures proposed, with many only allowing those who are actually in the video to access those videos.⁶⁸

One such bill in Arizona goes even further and “declares that body camera recordings are not public records, and as such can be released only if the public interest ‘outweighs the interests of privacy or confidentiality or the best interests of the state.’”⁶⁹

However, the removal of police body worn camera video from the scope of Open Government/Records Acts is a deceptively simple solution that undermines the police accountability justification for body worn cameras in the first place. By creating exceptions from disclosure for the footage, legislators may alleviate burdens of production and some privacy concerns at the cost of fueling the distrust of police that led to the deployment of body worn cameras in the first place.⁷⁰ While individuals may be able to access the videos in which they were themselves recorded,⁷¹ expansive citizen review of police forces becomes much more difficult without giving individuals broad enough access to identify overarching patterns of misbehavior, such as profiling and discrimination. By undermining the ability of the public to monitor and hold law enforcement agencies accountable, statutory exemption of all police body camera videos from disclosure undoes the campaign to increase public confidence in police, and returns reform back to square one. Meanwhile, police departments would still incur the significant costs of purchase, maintenance, and storage, without providing the accountability benefits that made body cameras attractive to deploy in the first place.

B. Techniques for Limiting Video Retention and Protecting Privacy

While individual consent, officer discretion, and statutory exclusion are problematic at best, it is possible to employ systematic and technology-based solutions which may yield results that do not undermine the policies behind deploying police body worn cameras. A promising potential solution for reducing both administrative costs and privacy concerns is reducing the amount of video retained, by shortening

⁶⁸ *See id.*

⁶⁹ *See id.*

⁷⁰ *See Proposed Florida Body Camera Law Riddled With Exceptions At Behest Of Police Union*, TECHDIRT.COM (Feb. 19, 2015, 3:30 PM), <https://www.techdirt.com/articles/20150217/14490830061/proposed-florida-body-camera-law-riddled-with-exceptions-behest-police-union.shtml>.

⁷¹ Foley, *supra* note 66.

retention periods and narrowing long-term retention to videos showing use of force and other events of public interest, such as accidents, protests, and evidence cutting against false accusations by the police or against the police. Furthermore, improving the way videos are stored and deploying rapidly-improving software aids can reduce the administrative burden of complying with Open Government/Records Acts.

1. Data Management

a. Setting Document Retention Policies

One line of potential solutions to the privacy problems created by mandatory disclosure of police body camera video is simply to limit the amount of video retained as public record. A police agency that sets a shorter document retention period by policy could delete videos after a certain time period if the video has not been used in an investigation or otherwise been identified as potentially useful evidence.⁷² This would allow for automatic deletion of videos, except the significant ones, where force was used, race was potentially a factor, searches were conducted, or some situation of potential public interest took place.⁷³

Because the limitations of current technology require tedious manual review and redaction of videos, a blanket request for all videos retained as public record would be time consuming and costly for police agencies to fulfill.⁷⁴ A clear document retention policy, however, would reduce the amount of video held as public record, and therefore, would limit the total amount of potentially sensitive video that could be requested.⁷⁵ Simultaneously, such a policy would also limit the amount of time and funding that the agency would have to devote to searching for and redacting material prior to disclosure.⁷⁶ Furthermore, this would also lower the cost of video evidence storage, since there would be less to store.⁷⁷

b. Tagging Videos and Identifying Privacy Concerns

While identification of videos with evidentiary significance and potential for public interest is an important step in implementing a document retention policy and deciding what should be automatically

⁷² MILLER & TOLIVER, *supra* note 14, at 44.

⁷³ *See id.* at 43–44.

⁷⁴ *Id.* at 33–34.

⁷⁵ *Id.* at 33.

⁷⁶ *Id.*

⁷⁷ *Id.*

deleted, it also makes complying with disclosure requests easier and faster. Officers returning from patrol can label, or “tag,” videos as evidentiary or non-evidentiary, and can even refine those tags down to specific types of incidents, whether it be a traffic stop or an assault on a police officer.⁷⁸

Significantly, it may be possible to tag videos implicating privacy-sensitive contexts such as private residences, domestic violence, interaction with minors, or ongoing investigations. With the identification and tagging finished, complying with a specific records request would be much simpler.⁷⁹ For example, for a records request for videos of traffic stops, the search would require just a text search of a database for “traffic” rather than sifting through videos trying to figure out if the incident depicted is a traffic stop as opposed to the investigation of a suspicious vehicle. Furthermore, agencies could potentially save time when trying to identify videos for redaction because the officers already identified sensitive videos in advance.

2. Software-Based Privacy Protections and Redaction Technology

In addition to the aforementioned document retention policies, tagging, and statutory amendments, technological solutions to privacy concerns and redaction difficulties may be on the horizon. For example, the popular web-based video host, YouTube, already makes automatic face-blurring software available for those who upload videos to the website.⁸⁰ Furthermore, voice changing software is readily available,⁸¹ with more limited versions available for free.⁸² As technology improves, other automatic redaction tools may become available as well, all of which may alleviate the burden of complying with Open Government/Records Acts and make it easier for agencies to redact videos and protect the identity and privacy of individuals in the requested videos.

Such technology could also make it possible for agencies to automatically produce low-resolution, blurred-out video and modified

⁷⁸ *Id.* at 32.

⁷⁹ *See id.*

⁸⁰ *Face Blurring: When Footage Requires Anonymity*, YOUTUBE OFFICIAL BLOG (July 18, 2012), <http://youtube-global.blogspot.com/2012/07/face-blurring-when-footage-requires.html>.

⁸¹ *MorphVOX Pro*, SCREAMING BEE, <http://www.screamingbee.com/product/MorphVOX.aspx> (last visited Apr. 13, 2015).

⁸² *MorphVOX Jr (Free)*, SCREAMING BEE, <http://www.screamingbee.com/product/MorphVOXJunior.aspx> (last visited Apr. 13, 2015).

voices for widespread and immediate public release. This would allow agencies to immediately release video to counter media speculation and allow the public the opportunity to comb through video records, all without identifying the individuals involved or clearly depicting private spaces.

3. *Criticisms and Concerns of Proposed Solutions*

The use of police body worn cameras is fraught with hidden hazards, and the aforementioned solutions all have potential downsides that must be carefully considered before deployment. For example, reliance on tagging may be conceptually simple, but actually requires officers to perform a great deal of preemptive work to tag *all* videos as they are taken,⁸³ rather than only when disclosure requests are made. Additionally, the usefulness of tagging relies on the accuracy of labeling, and envisioning what purpose the video may serve in the future. What is a normal traffic stop to a police officer may become a point of data in a profiling case, or a run-of-the-mill conversation may become an unprofessional conduct allegation at a later date, at which point the video may have been deleted due to shorter retention policies for videos tagged as having no evidentiary significance or controversy attached. Additionally, it may be difficult for police officers to predict which videos may reveal information that impacts a future criminal investigation, which could lead to failure to tag the video as sensitive. Therefore, this approach is particularly weak in situations where police officers need to predict future controversies and tag videos based on that conjecture.

Even more significantly, tagging requires that officers self-report on what happened in the video.⁸⁴ Because body worn cameras are often implemented to increase police accountability and transparency, the potential for officers to “hide” bad conduct by tagging their own videos with incorrect tags or simply not tagging certain videos may undermine the benefits of body worn cameras by making it harder for supervisors and investigators to find and identify instances of unprofessional and illegal conduct.⁸⁵ Therefore, due to the potential for inaccuracy and intentional obfuscation, a prudent supervisor concerned about both police

⁸³ MILLER & TOLIVER, *supra* note 14, at 32.

⁸⁴ *See id.*

⁸⁵ Similar concerns animate writings about police deleting videos taken of them by citizens. *See generally* Conor M. Reardon, Note, *Cell Phones, Police Recording, and the Intersection of the First and Fourth Amendments*, 63 DUKE L.J. 735 (2014).

accountability and liability may reasonably choose to go through the same old painstaking manual redaction process rather than risk impaling his or her career upon inaccurate descriptions of videos and accidental disclosure of sensitive materials.

The use of software is still currently limited by the inability of software to identify and analyze the content of audio, and whether the audio discusses matters of an ongoing investigation or private matters. Similarly, software still does not yet distinguish between the interior of homes and of public buildings, or automatically redact tattoos, clothing choices, mannerisms, and patterns of location that may be used to identify and even stalk individuals. While such technology is actively being pursued with the cooperation of privacy activists,⁸⁶ the state of the art is still limited and public disclosure requests still entail heavy burdens and privacy concerns for police agencies. Furthermore, even after software is used to blur video and modify voices, the video may still allow the public to identify persons in the video by context, which would discourage individuals from reporting crimes, and may even place informants at significant risk.

Despite these problems, the suggested solutions of shortening data retention policies, tagging videos, and using redaction technology still retain considerable advantages by at least making sure that significant amounts of video are actually preserved, with less potential for “missing” important incidents. Additionally, closer supervision and auditing of video tagging may encourage a culture of accountability, and force officers to tag their videos accurately and report use of force incidents to the chain of command. Lastly, the inexorable march of software and technology may yield yet undeveloped techniques for automated context-based redaction, and may even allow automatic identification of intentionally mislabeled violent incidents.⁸⁷ In light of these retained advantages and the availability of methods to limit potential problems, strong data management policies and software-based privacy and redaction technologies are particularly attractive and robust methods of limiting the privacy problems of deploying police body worn cameras.

⁸⁶ Bill Schrier, *Inside the Seattle Police Hackathon: A Substantial First Step*, GEEKWIRE (Dec. 20, 2014, 7:24 AM), <http://www.geekwire.com/2014/seattle-police-hackathon-substantial-first-step>.

⁸⁷ See, e.g., *Customer Service Software Senses Angry Callers*, THE UNIV. OF TEX. AT DALLAS NEWS CTR. (July 9, 2009), <http://www.utdallas.edu/news/2009/07/09-002.php>.

CONCLUSION

In light of the pressing need to heal the widening rift between the people and the police, body worn cameras have great potential to improve law enforcement accountability and provide accurate evidence of use of force and behavior, for both the police and the public. Despite costs and privacy concerns due to intrusive video and public records disclosure requirements, workable solutions exist for protecting privacy and making it possible to comply with disclosure laws, all while retaining the evidentiary and accountability benefits of body worn cameras.

These solutions, namely shortening data retention policies, tagging videos, and using redaction technology, all pose problems of their own, but do not undermine the principal justifications for investing resources into police body worn cameras in the first place, and may even yield increasing returns as the technology improves. Though efforts to reform police practices are frequently fraught with hidden dangers, unforeseen consequences, and emotionally charged accusations from all sides, police body worn cameras may serve as the means to cut through the fog and provide the police accountability so desperately needed to uphold equal justice under law.