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Policing the Police: The Fight Between Transparency and Censorship

Mercades White

Technological advances have led to increased video surveillance of both citizens and public officials. One of those advances has been the use of body camera footage. Body cameras are typically worn on police officers' uniforms and record forward-facing video.¹ The cameras are manually controlled by officers and usually require an officer to press a button to begin recording.² Proponents have championed body cameras as a tool for increased transparency between the public and the police.³ Following numerous high-profile civilian deaths, such as the death of Michael Brown in 2014, the use of body cameras has been nationally expanded.⁴ However, across the nation police departments are debating how to control and release body camera footage.⁵ Many police unions and departments are attempting to withhold that footage, arguing the videos are personnel records, not public information.⁶ In opposition, civil rights groups often argue that withholding the footage negates the purpose of body cameras.⁷ Nationally, the struggle between transparency and privacy in regard to body camera footage remains largely unresolved. With increasing evidence that body cameras do not reduce police misconduct, the line between transparency and privacy has only become murkier.⁸

¹ *Body-Worn Camera Frequently Asked Questions*, U.S. DEPARTMENT OF JUSTICE, (2015), https://www.bja.gov/bwc/pdfs/bwc_faqs.pdf.

² *Id.*

³ Kimberly Kindy & Julie Tate, *Police Withhold Videos Despite Vows Of Transparency*, WASH. POST (Oct. 8, 2015), http://www.washingtonpost.com/sf/national/2015/10/08/police-withhold-videos-despite-vows-of-transparency/?utm_term=.acf84317abc3

⁴ Julie Bosman, *Hollywood-Style Heroism Is Latest Trend in Police Videos*, N.Y. TIMES (May 28, 2017), <https://www.nytimes.com/2017/05/28/us/body-cameras-police-video.html>.

⁵ *Id.*

⁶ Ashley Southhall, *New York Police Union Sues to Stop Release of Body Camera Videos*, N.Y. TIMES (Jan. 9, 2018), <https://nyti.ms/2ErKHIW>.

⁷ Kindy, *supra* note 3.

⁸ Nell Greenfieldboyce, *Body Cam Study Shows No Effect on Police Use of Force or Citizen Complaints*, NPR (Oct. 20, 2017), <https://www.npr.org/sections/thetwo-way/2017/10/20/558832090/body-cam-study-shows-no-effect-on-police-use-of-force-or-citizen-complaints>

EXPANDED BODY CAMERA USE

On August 9, 2014 Michael Brown, an unarmed black teenager, was shot by a white police officer in Ferguson, Missouri.⁹ Following the death of Michael Brown, organizations such as the National Association for the Advancement of Colored People (“NAACP”), American Civil Liberties Union (“ACLU”), and the National Bar Association (“NBA”) pressured the federal government to take action against police misconduct.¹⁰ Notably, on August 18, 2014, fourteen national and civil human rights organizations issued a statement urging the Department of Justice (“DOJ”) to investigate Michael Brown’s death and mandate body camera use by the Ferguson police department.¹¹ The NBA further demanded four initiatives: first to make it mandatory for police officers to wear body cameras, with any violation of that requirement resulting in suspension and/or termination; second, for Congress to develop and implement an “Early Warning System” to identify officers who are prone to emotional instability or behavior problems; third, to review the use of deadly force policies; and finally, to implement mandatory reporting of incidents by race.¹² In response, the Obama Administration announced that body-worn cameras would be tested on Border Patrol agents.¹³ Many organizations, including the NAACP, hailed this as a step in the right direction.¹⁴

Following public outcry surrounding officer shootings involving unarmed citizens, the DOJ granted \$23 million dollars in 2015 to expand body camera usage nationwide.¹⁵ The Obama Administration announced the goal was “enhanc[ed] transparency, accountability and credibility in police encounters with the public.”¹⁶ Jared Kosoglad, a civil rights attorney in Chicago, agrees with this sentiment. He argues that expanded use of body cameras has affected litigation in two ways.¹⁷ First, body cameras have complicated a police officer’s ability to lie, and secondly if the body camera is turned off during an encoun-

⁹ Julie Bosman & Monica Davey, *Protests Flare After Ferguson Police Officer is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <https://nyti.ms/1yNsywu>.

¹⁰ NAACP, *Civil Rights Coalition Urges National Reforms and Recommendations to Address Police Abuse*, (Sep. 24, 2014), <http://www.naacp.org/latest/civil-rights-coalition-urges-national-reforms-and-recommendations-to-address/>

¹¹ NAACP, *supra* note 9.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Bosman, *supra* note 4.

¹⁶ Kindy, *supra* note 3.

¹⁷ In Person Interview with Jared Kosoglad, Attorney, Jared S. Kosoglad P.C. (Apr. 5, 2018).

ter it raises the inference to the public, and potential jurors, that there is a reason for the lack of footage.¹⁸ As of May 2017, more than half of all medium to large police departments were using or testing body cameras.¹⁹ As of 2015, thirty-six states had introduced legislation to create rules governing the use of body cameras statewide.²⁰ Although these steps promoted progress in many portions of this country, it simultaneously sparked a debate about how best to regulate and release body camera footage.²¹

POLICE UNIONS

Police unions have been challenging the release of body camera footage in court, often arguing that the footage is released arbitrarily with little to no benefit.²² Chad Marlow, an attorney for the ACLU, argues that if police departments and law enforcement organizations are the “sole arbiters of what video the public gets to see,” then body camera footage will become less about transparency and accountability and instead be a “surveillance and propaganda tool.”²³ Mr. Kosoglad shares a similar sentiment. He argues, “police unions do not have the public interests [in mind.] They are trying to protect officers from misconduct. It’s about preserving the status quo not the police officers themselves.”²⁴ Further, Mr. Kosoglad contends that body camera footage is public information because it pertains to police conduct while officers are on duty.²⁵ However, police unions frequently push back on this notion and argue releasing the footage presents a multitude of risks, including tainted juror pools, potential lawsuits challenging an individual’s right to privacy, and assisting criminals.²⁶ Police unions in several cities, such as New York City, Boston, and Seattle, have resisted implementation of body cameras citing the aforementioned issues.²⁷

The New York City Police Department has been significantly slower in its implementation of body cameras than other police departments across the na-

¹⁸ *Id.*

¹⁹ Bosman, *supra* note 4.

²⁰ Kindy, *supra* note 3.

²¹ *Id.*

²² Southhall, *supra* note 6.

²³ Kindy, *supra* note 3.

²⁴ Kosoglad Interview, *supra* note 16.

²⁵ *Id.*

²⁶ Kindy, *supra* note 3.

²⁷ *Id.*

tion.²⁸ In particular, the New York City police union has argued that the footage is protected under a state civil rights law, known as Section 50-a.²⁹ The law, which was passed in 1976, aims to protect the privacy of officers and prevent any negative repercussions from the release of their personnel records.³⁰ Patrick J. Lynch, the New York City police union president, claimed that body camera footage “has serious implications not only for the safety and due process rights of police officers, but for the privacy and rights of members of the public, as well.”³¹ Further, the union claims that New York City Mayor Bill de Blasio and the New York City Police Department have shown “reckless disregard” for state law and privacy concerns by releasing body camera footage.³² The New York City Police Department illustrated their general distrust of releasing footage by explicitly stating that body camera footage should not be released to the public, “when it interferes with active law enforcement investigations [and/]or when it would constitute an unwarranted invasion of personal privacy.”³³ Ultimately a New York appellate court, the First Judicial Department, ruled that, “the remedy. . . must come not from this court, but from the legislature.”³⁴

HEROISM AND COUNTER PROGRAMMING

Although many police departments and unions have protested against implementing body cameras, other police departments are utilizing positive footage from body cameras in attempts to bolster their reputations.³⁵ For example, police departments in Ohio, Kansas, and Connecticut have released footage of heroic efforts on behalf of police officers.³⁶ These videos are released without the request of a journalist or civilian in order to “characterize cops positively when tales of bad apples over[take] the news cycle.”³⁷ Many civil rights advocates have expressed their concerns regarding this particular usage of body

²⁸ Southhall, *supra* note 6.

²⁹ *Id.*

³⁰ Alan Feuer, *Civil Rights Law Shields Police Personnel Files, Court Finds*, N.Y. TIMES (Mar. 30, 2017), <https://nyti.ms/2nF05fr>.

³¹ Southhall, *supra* note 6.

³² *Id.*

³³ Joseph Goldstein, *What Would New York Police Body Cameras Record?*, N.Y. TIMES (Oct. 17, 2016), <https://nyti.ms/2ebFk7l>.

³⁴ Feuer, *supra* note 30.

³⁵ Bosman, *supra* note 4.

³⁶ *Id.*

³⁷ Matt Stroud, *Police Body Camera Footage is Becoming a State Secret*, THE VERGE (Jun. 12, 2017), <https://www.theverge.com/2017/6/12/15768920/police-body-camera-state-secret>.

cameras, arguing that it is an effort to distract from police misconduct, therefore defeating the purpose of body cameras.³⁸ Numerous states have implemented laws which prohibit public access to body camera footage through a series of classification maneuvers.³⁹ However, these laws are not applicable to voluntarily released body camera footage.⁴⁰

For example, in May of 2017, the police chief of Topeka, Kansas decided to release body camera footage of a police officer jumping into a pond to save a child with autism who was separated from his father.⁴¹ However, Kansas classifies body camera footage as, “criminal investigation documents” meaning the footage is available when investigations are closed.⁴² This classification complicates a civilian’s ability to obtain body camera footage under the Kansas’ Open Records Act.⁴³ The police chief noted, “a little good news can also help with public confidence and morale. . .”⁴⁴ This public relations strategy arguably stretches the federal governments goals of “enhanc[ing] transparency, accountability and credibility in police encounters with the public.”⁴⁵

It is not a stretch to say the federal government intended for body camera footage to be widely available in order to shed light on officer involved shootings. Considering the cameras were implemented and funded by the federal government following the death of Michael Brown, the public relations strategy utilized by many police departments and unions does not appear to be in line with the original intentions. If body camera footage is being withheld via state legislative roadblocks, how can body cameras be classified as public information? There is a strong argument that the classification of body cameras is not entirely dictated by state legislation, but that this legislation is merely obscuring the original purpose of body cameras. Mr. Kosoglad made a striking observation, contending that, “we’re going to hit a point where we have to stop questioning the integrity of policing, and modern technology will permit that. Ultimately there will be a time when all footage is made available on line to go

³⁸ Bosman, *supra* note 4.

³⁹ Stroud, *supra* note 36.

⁴⁰ *Id.*

⁴¹ Bosman, *supra* note 4.

⁴² Stroud, *supra* note 36.

⁴³ *Id.*

⁴⁴ Bosman, *supra* note 4.

⁴⁵ Kindy, *supra* note 3.

look at and download.”⁴⁶ Surely, this scenario, legality aside, is closer to the idea of, “enhanc[ed] transparency, accountability and credibility in police encounters with the public.”⁴⁷

⁴⁶ Kosoglad Interview, *supra* note 16.

⁴⁷ Kindy, *supra* note 3.