

Body Cameras for Police:
When Should They Be Turned Off?

Table of Contents

Abstract..... 4

Introduction 4

Part I: Factors to Consider 6

 Serving the Intended Purpose 6

 Privacy Rights 7

 The Practicality of Obtaining Consent and/or Giving Notice 9

 The Role of Discretion 10

 Implications of Cracking Police Secrecy 12

 Cost and Efficiency 13

 Safety 14

 Enforcement..... 14

Part II: Current Scholarship and Policies 15

 Requiring That Cameras Always Be On..... 15

 Requiring that Cameras Be On for All Encounters with Citizens 16

 Allowing for Discretion Sufficient to Protect Individual Privacy Rights 18

 Allowing for Broader Discretion..... 20

 Instituting Complete Discretion..... 22

 Overview of Most Common Exceptions to Filming Recommended or Adopted..... 24

Part III: The Best Practice–Filming All Citizen Encounters 27

 Major Benefits 27

 Accountability 27

 Unambiguousness 28

 Practicality Advantages 28

 Addressing Concerns 29

 Practicality Concerns 29

 Privacy Infractions 29

 Cost and Efficiency 30

Conclusion..... 31

Abstract

The most important question to be answered when crafting a policy that governs the use of body cameras for police officers is when said cameras should be off. It seems to be a simple question, but there are a myriad of factors that need consideration. Some of those factors are: serving the intended purpose, privacy rights, the practicality of obtaining consent or giving notice, the role of discretion, the implications of cracking police secrecy, cost, efficiency, safety, and enforcement. Ultimately, the policy that best addresses all of these factors is requiring officers to leave their cameras on for all citizen encounters. It is the only way to ensure police compliance, and there are ways to mitigate its downsides.

Introduction

In the wake of the tragic deaths of Michael Brown, Eric Garner and so many others in recent news, the issue of police brutality has been heavily discussed by scholars, politicians, and laypeople alike.¹ As a result of those discussions, many reforms have been proposed to increase the accountability and visibility of police departments in the hope that unethical violence may be deterred, or at least brought to light. Perhaps the single reform that has drawn the most support

¹ See, e.g., Police Body Cameras, C-SPAN, (May 19, 2015), <http://www.c-span.org/video/?326097-1/hearing-police-body-cameras> (a recent Senate subcommittee hearing on the issue of body cameras).

is the institution of mandatory body cameras for police officers.² These body cameras would film the actions of the officers as they perform their official duties, and its recordings would then be available for viewing in cases where the reasonableness of a certain act of force is in question.

The idea has gained such support that President Obama requested \$75 million in funding over the course of three years for law enforcement agencies to purchase around 50,000 body cameras.³ The first \$20 million has already been announced.⁴ Many people rejoice at the funding, hoping that it heralds a new era wherein police activity will not be so secret and so untouchable. Even police officials, police unions, and the American Civil Liberties Union have shown support.⁵

But a fundamental question remains: What specifically should body cameras record? Put another way, what is the best policy for governing when they can, or perhaps even must, be turned off? The answer to this question is unexpectedly complex, and there are many things that must be considered. For example, if the cameras are on all the time, then anyone who wants to use the footage must sift through hours of silent driving, sitting, or even paperwork. That may not be the most efficient use of the technology. Then again, any time the cameras are off we run the risk of missing things we might sorely want to see. Additionally, there will be times when

² See, e.g., See, e.g., Tammy Payne, *Arrest of OKC Officer Highlights Benefits of Body Cameras*, NEWS 9, (Aug. 22, 2014), <http://www.news9.com/story/26345123/arrest-of-okc-officer-highlights-benefits-of-body-cameras> (discussing a recent survey finding that 77% of Americans would feel safer if officers were equipped with body cameras, and that 74% felt that officers “should be required to wear body cameras.”).

³ Jordan Fabian, *Obama’s difficult legacy on race*, 2015 WL 3961548 (2015)

⁴ *Id.*

⁵ Howard M. Wasserman, *Moral Panics and Body Cameras* (2015), 92 Wash. U. L. Rev. 831, 832-33 (2015).

victims, suspects, or other vulnerable people do not wish to be on film, and we need to decide whether their wishes should be honored. Officers have privacy concerns as well, both in their official capacity and as citizens themselves. Those concerns might matter, or they might completely disappear when officers are on the job.

The issues listed so far are barely even the tip of the iceberg, but they give a taste of the weighty questions to be considered throughout this paper. In essence, if the camera is only on during certain times, then we need to decide when those times should be and what specifically it is that we want to capture. Furthermore, if the camera can be turned off, we need to decide who has the power to turn it off, and whether they do so according to fixed rules or whether they are allowed some measure of discretion.

This paper will examine these issues and weigh the advantages and disadvantages of different systems, both actual and hypothetical. Part I will look at the main factors to consider in drafting a policy. Part II will look at the present state of scholarship and the prevailing theories on the issue, including what policies on body cameras police departments have already adopted. Part III will advocate for a best practice and address the issues it raises. Finally, the conclusion will tie the discussion together.

Part I: Factors to Consider

Serving the Intended Purpose

First and foremost, any policy enacted must ensure that it is adequately serving the purpose behind this reform. That purpose, of course, is holding officers accountable for the choices they make when interacting with citizens. To meet that purpose, we need sufficient footage of those encounters to be produced. For example, a policy that cameras be off all the time is completely useless because nothing we are interested in is recorded. Obviously, no one is advocating that cameras always be off, but every exception that we allow generates holes in the footage produced, and we need to be conscious of that. A good policy will ensure that the camera is left on enough to serve its intended purpose.

Privacy Rights

In the broad scope of a police officer's duties, there is a long list of privacy concerns that must be taken into consideration. This is perhaps the most discussed factor⁶, and with good reason.

First, there are the privacy interests of the police officers, both as citizens themselves and in their official capacity. A significant portion of an officer's life will be filmed, and it may be that in his official capacity, his individual rights disappear; the implications of such need to be considered. Additionally, there is the privacy of the police department as a whole to take into account. Allowing body cameras in the department is uncomfortable because even footage of mundane tasks like filling out forms may be reviewed.

⁶ See, e.g., Civil Rights, Privacy, and Media Rights Groups Release Principles for Law Enforcement Body Worn Cameras, The Leadership Conference, May 15, 2015, <http://www.civilrights.org/press/2015/body-camera-principles.html>

Second, targets of criminal investigations may not appreciate being filmed either. Being labeled a suspicious person is traumatizing enough, but to have that encounter filmed and perhaps even made public could be humiliating. For some, such footage may cost them their reputation in the community.

Third, witnesses and other citizens being interviewed who were not directly involved in the crime have privacy interests also. They may even be reluctant to help police officers by sharing what they know if the only way they can do so is on film. Therefore, denying them the right to refuse recording may result in lost testimony or less positive relationships between the police and the community.

Fourth, victims of crime have an interest in privacy as well, and theirs is perhaps the most universally compelling. One can easily imagine a situation in which a victim, who has already had to endure the trauma of a crime committed against them, would want cameras to be turned off. Consider, for example, a woman who has been the victim of rape and who is still in a state of undress when the police arrive on the scene. She may not want her nakedness to be recorded and stored in someplace unknown to her. Later, as she recounts the incident to an officer and breaks down into tears, the blinking red light of the camera may feel horribly intrusive to her, just one more witness to her humiliation. Similar incidents of child abuse or domestic disputes would raise similar concerns.

Fifth, there is the matter of the legal expectation of privacy⁷ in particular places the police may go. If they are entering onto private property, the owner of that property may not want such

⁷ See *Katz v. U.S.* 389 U.S. 347 (1967).

work to be recorded. For example, if officers enter a private home in order to interview a person about a crime, or for any other reason, that individual's personal living space will be put onto film, including incriminating material in the background. It is not just an issue of the person themselves but of their constitutionally-protected home as well. Many other places raise similar concerns, such as bathrooms, locker rooms, hospitals, jails, and mental institutions.

Lastly, there is a broader concern about the privacy interests of society in general, beyond any individual person. Body cameras on police represents one more step towards living in a surveillance state. Such a step must not be taken lightly. As the ACLU puts it, outfitting officers with cameras that record continuously, "in a place like New York City . . . would mean unleashing 30,000 camera-equipped officers on the public streets, where an officer on a busy sidewalk might encounter thousands of people an hour. That's a lot of surveillance."⁸ They also make the point that the places most vulnerable to this type of intrusive surveillance are the low-income or minority areas in major cities.⁹

The Practicality of Obtaining Consent and/or Giving Notice

If we agree that any of the privacy concerns above are valid, then one way to protect them is to ask for consent, or at least provide notice, prior to turning a camera on. But doing so is not always easy. There may not be time for officers to pause the action, announce the camera, and ask if anyone objects to filming. Alternately, officers may be in very public places with

⁸ Jay Stanley, *Police Officer Discretion in the Use of Body Worn Cameras*, ACLU, February (Feb. 2, 2015.), <https://www.aclu.org/blog/free-future/police-officer-discretion-use-body-worn-cameras?redirect=blog/criminal-law-reform-immigrants-rights-technology-and-liberty-free-speech-national-security/poli>

⁹ *Id.*

dozens of people walking in the background of a recording, making it nearly impossible to obtain consent from each and every person.

Other considerations include situations where there are multiple people present. For example: is it sufficient to ask one parent if an officer is filming a whole family? What if, unbeknownst to the officer, a friend is visiting the children, or there is a cousin present? Should the rule be *in loco parentis*?

Furthermore, if notice or consent is to be sought, we must decide what type of consent is sufficient. The ACLU, for example, has called for notice to citizens “wherever practicable,” potentially in the form of “an easily visible pin or sticker saying ‘lapel camera in operation’ or words to that effect.”¹⁰ However, there are many other options, ranging from a verbal announcement to a pamphlet of rights. Similarly, there are a myriad of reactions that may potentially be deemed consent, from silent lack of objection to a signed and dated form.

Finally, there is the issue of who merits notice. It is possible that everyone is entitled to know that they are being filmed. However, it may also be that while some may deserve notice, like victims of the crime, others, like the suspects themselves or citizens in the background, do not.

The Role of Discretion

If we are to come to the conclusion that there are any situations in which cameras should be turned off, the next question is how much discretion should be afforded to officers in deciding

¹⁰ Chapter Four Considering Police Body Cameras, 128 Harv. L. Rev. 1794, 1808 (2015)

when those times should be. On one end of the spectrum, there could be a set of hard and rigid rules that officers absolutely must follow. On the other hand, officers could be given free rein to assess the situation that they are in and make individual choices about whether filming would be appropriate or not. There are several weighty and important concerns driving the analysis of that question.

If police officers are given too much discretion, they may abuse it. This is not speculation; the examples of abuse are unfortunately myriad. In New Orleans, a police officer who shot an unarmed black man apparently shut off her camera prior to the encounter.¹¹ In Oakland, many officers made arrests during an Occupy protest with their cameras turned off, contrary to department policy.¹² In Albuquerque, an officer who fatally shot a 19-year-old girl never turned his camera on to record any part of the incident.¹³ In Denver, a city called into question for their questionable officer-citizen interactions, a six-month study found that only one in four police encounters involving force were actually recorded during that time, partially because officers were turning their cameras off.¹⁴ The list is extensive.

On the other hand, if officers are not given enough discretion, they may be forced to film in situations where it is inappropriate, uncomfortable, or even dangerous to do so. We would be tying the hands of those arguably in the best position to know whether an encounter should be

¹¹ *Id.* at 1806

¹² Ali Winston, [A New Way to Punish Oakland Cops?](#), East Bay Express, February 15, 2012.

¹³ Arijeta Lajka, [Reports Suggest Body Cameras Are Only Effective When Cops Can't Turn Them Off](#), Vice News, March 25, 2015, <https://news.vice.com/article/reports-suggest-body-cameras-are-only-effective-when-cops-cant-turn-them-off>

¹⁴ *Id.*

filmed or not, and we would be disregarding their experience and tactical skill. This could have a major cost for officers and citizens alike.

Implications of Cracking Police Secrecy

It is a well-known fact that many aspects of police work are not revealed to the public. Whether it is undercover work that necessitates entire secret lives or simply day-to-day operations, police are known to close ranks and keep the details of their work to themselves¹⁵. It is important to consider, therefore, what aspects of police work may be compromised if it is no longer afforded its current level of secrecy.

There is also the so-called “Blue Wall of Silence” to take into account¹⁶. The Blue Wall of Silence is the well-documented and pervasive tendency of officers to cover for each other in situations where one of their own is accused of wrongdoing. In one recent example, a 17-year-old boy in Chicago named Laquan MacDonald was shot sixteen times¹⁷. Two of the first three shots hit him in the back, and the next thirteen were fired once he was already lying on the ground, wounded.¹⁸ After the incident, police moved people away from the scene instead of taking eyewitness statements from them, then went to a nearby fast food restaurant and deleted

¹⁵ Bittner, Egon. 1972. Review: William A. Westley, *Violence and the Police: A Sociological Study of Law, Custom and Morality*. *American Journal of Sociology* 77(4): 779–81. .

¹⁶ Jerome Skolnick, Corruption and the Blue Code of Silence, *Police Practice and Research: An International Journal* § 3.1, (2002) 7-19.

¹⁷ Callie Crossley, Breaking the Blue Wall of Silence: A Quest for Police Transparency, WGBH News, December 7, 2015, <http://www.pri.org/stories/2015-12-07/breaking-blue-wall-silence-quest-police-transparency>

¹⁸ *Id.*

nearly an hour and a half of security camera footage that may have captured the killing.¹⁹ The story might never have come to light at all if journalists hadn't exposed an autopsy report and video footage that contradicted the official reports.²⁰

Of course, such incidents are extremely alarming . Uncovering police secrecy is arguably beneficial, if not necessary. The fact that the practice is so ingrained in police operations, however, merits caution and due consideration. Changing it may have extreme consequences.

Cost and Efficiency

Though less exciting to discuss, the reality is that there is an administrative cost attached to every policy that must be taken into consideration. The more police officers are obliged to film, the more storage is required, which means an increased burden of sifting through voluminous footage in search of relevant information. Furthermore, different policies have varying costs attached in terms of filming, storing, and making available different volumes of footage. This is not insignificant; the price of storing and maintaining such large collections of data can comprise around two thirds of the total cost of the whole body camera program²¹, as such it is a critical factor to consider.

¹⁹ Alan Pyke, [An Officer Has Been Charged With The Murder Of Laquan McDonald. But What About The Cover-Up?](http://thinkprogress.org/justice/2015/11/25/3725986/laquan-mcdonald-chicago-accountability/), Center For American Progress Action Fund, November 25, 2015, <http://thinkprogress.org/justice/2015/11/25/3725986/laquan-mcdonald-chicago-accountability/>

²⁰ *Id.*

²¹ Martin Kaste, [Stealth Mode? Built-In Monitor? Not All Body Cameras Are Created Equal](http://www.npr.org/sections/alltechconsidered/2015/10/30/453210272/stealth-mode-built-in-monitor-not-all-body-cameras-are-created-equal), NPR, updated November 2, 2015, <http://www.npr.org/sections/alltechconsidered/2015/10/30/453210272/stealth-mode-built-in-monitor-not-all-body-cameras-are-created-equal>.

Safety

Another concern is safety. There is a question of whether suspects will react negatively to filming, thus increasing the risk of retaliation against police officers. For officers, pausing what they are doing to turn on the camera may be dangerous in the heat of action. As deputy D.A. Ryan Lufkin put it, “if you are facing a knife-wielding criminal, your first instinct isn't going to be turning the camera on.”²² A good policy will dictate whether we allow officers to protect themselves in these situations, or whether other concerns override any risk to the physical safety of the force.

Enforcement

Finally, once a policy is selected there must also be an enforcement mechanism to ensure proper implementation with due regard to any discretionary allowances under the policy if it is to have a discernible effect. This opens up a whole new category of considerations. In crafting a policy that contains an enforcement mechanism, we must determine the consequences for failure to make a recording, who would administer such consequences, the role of discretion in enforcement, extra-agency consequences for agency refusal to enforce, and many other contingencies. If these questions are not answered prior to the institution of the policy, then we may end up with officers turning off their cameras without consequence as the department closes ranks around them, or a situation encountered in San Diego where tapes are made but are never

²² Melody Finnemore, High-Tech Revolution: Electronic Evidence from a Broadening Array of Sources Is Creating a Sea Change for Police, Prosecutors and Defense Attorneys, Or. St. B. Bull., October 2015, at 26, 28.

released to the public at all.²³ According to data collected by Campaign Zero, a policy platform that grew out of the Black Lives Matter movement, San Diego is not an anomaly for failing to use videos to keep their officers accountable. Of the seventeen major cities that currently have policies governing body-worn cameras for their police departments, only one included any language at all about enforcement²⁴.

Part II: Current Scholarship and Policies

Several of the major advocates in this debate have openly opined on the issue of what should be recorded. Additionally, the reform has already been put into place in many police departments across the country. There are five general categories that policies on this topic may fall into, and we will examine each of them in turn, as well as which departments and advocates back them.

Requiring That Cameras Always Be On

At one end of the spectrum, departments may be required to keep their cameras on all the time. Presumably, they would not even be capable of turning the camera off, but their supervisor or perhaps an automated system would activate it at the beginning of the shift.

²³ Sara Libby, [Even When Police Do Wear Cameras, Don't Count On Seeing The Footage](http://www.citylab.com/crime/2014/08/even-when-police-do-wear-cameras-you-cant-count-on-ever-seeing-the-footage/378690/), *The Atlantic*, August 18, 2014, <http://www.citylab.com/crime/2014/08/even-when-police-do-wear-cameras-you-cant-count-on-ever-seeing-the-footage/378690/>

²⁴ Nick Wing, [Police Make No Promises To Discipline Officers Who Violate Body Camera Policy](http://www.huffingtonpost.com/entry/police-body-camera-policy_563b8d81e4b0b24ace4938ab), *THE HUFFINGTON POST*, Nov. 6, 2015, http://www.huffingtonpost.com/entry/police-body-camera-policy_563b8d81e4b0b24ace4938ab

The biggest advantage of this policy is that it achieves the intended purpose of body cameras. Nothing will be missed. Furthermore, it is an easy and unambiguous policy. Enforcement is not an issue, and discretion cannot be abused. It will also make compliance and daily operations easy for officers. They do not need to remember any rules and they do not need to worry about obtaining consent in the field before switching on a camera because they have no control over it.

On the other hand, if officers are not allowed to switch off the camera, then they may record more than what is acceptable. This policy could lead to egregious violations of citizen privacy. Strip searches, vulnerable victims, and sensitive crime scenes would all be captured indiscriminately. Perhaps more significant as a practical matter, this policy is extremely costly and inefficient. Finally, this is the biggest breach of police privacy because any conversations between partners in the seclusion of their cars or offices would be recorded as well. Such conversations may by nature include secret police tactics or strategies that the officers have a strong interest in keeping from the public lest would-be criminals take advantage of the knowledge and use it against the officers in their criminal dealings. Invasion of personal privacy is also a concern, as under this policy officers would not even be able to visit the bathroom alone. The ever-watching eye of the camera upon them even there.

No police department that I have been able to find has adopted this policy, and no advocates are backing it either.

[Requiring that Cameras Be On for All Encounters with Citizens](#)

A second possible policy is requiring that officers keep their cameras turned on for any and all relevant encounters with citizens, but keep them turned off the rest of the time. There are different views on which citizen encounters are relevant and whether episodes such as casual conversations on the street or dead time waiting for a tow truck to arrive would qualify²⁵, but generally the purpose of this policy is to focus on aspects of an officer's job that we are most interested in observing whilst excluding ancillary components.

This policy shares numerous pros and cons with the previous scheme. It continues to serve the intended purpose of body cameras, as citizen encounters are what we are most concerned with. Furthermore, the policy is relatively unambiguous with clear guidelines, though it is still capable of serious privacy violations.

However, it differs in two major ways. First, it is significantly less expensive and more efficient because the sheer volume of footage is diminished by not requiring hours of sitting in the car, driving, walking, and other such mundane experiences to be recorded. That being said, footage produced under this approach is also not compendious.

Second, this policy gives officers the ability to turn the cameras on and off themselves. This means that enforcement is now an issue. Fortunately, because the policy is explicit, there should be no disagreement over compliance any time an officer is interacting with a citizen.

²⁵ See *infra* Table 1.

The ACLU originally supported this position without exception in 2013²⁶, arguing that officers should record every encounter in which an officer is interacting with a member of the public, because continuous recording eliminates “any possibility that an officer could evade the recording of abuses committed on duty”.²⁷ It has since modified its recommendation.²⁸

Even after the revisions, however, it still comes closest of all the policy advocates to backing this approach. They allow for very few exceptions to filming, only permitting cameras to be turned off during witness interviews where the witness does not consent to filming²⁹. Commenting on the reasons behind the original position, as well as the still-limited revision, ACLU representative Jay Stanley said, “The record-all-encounters policy leans heavily toward bolstering oversight; it was based on the assumption that we will see some police officers working to undermine camera oversight every way they can. We still think that.”³⁰ This policy does the most to limit potential abuses whilst limiting recordings to a manageable level.

Allowing for Discretion Sufficient to Protect Individual Privacy Rights

²⁶ Jay Stanley, *Police Body-Mounted Cameras: With Right Policies In Place, A Win For All*, AM. CIVIL LIBERTIES UNION 1, 1(2013), available at https://www.aclu.org/files/assets/police_body-mounted_cameras.pdf

²⁷ Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 842 (2015).

²⁸ Jay Stanley, *Police Officer Discretion In The Use Of Body Worn Cameras*, ACLU, February 2, 2015, <https://www.aclu.org/blog/free-future/police-officer-discretion-use-body-worn-cameras?redirect=blog/criminal-law-reform-immigrants-rights-technology-and-liberty-free-speech-national-security/poli>

²⁹ *A Model Act For Regulating The Use Of Wearable Body Cameras By Law Enforcement*, ACLU, <http://www.aclu.org/ACLUAct.pdf>

³⁰ Jay Stanley, *Police Officer Discretion In The Use Of Body Worn Cameras*, ACLU, February 2, 2015, <https://www.aclu.org/blog/free-future/police-officer-discretion-use-body-worn-cameras?redirect=blog/criminal-law-reform-immigrants-rights-technology-and-liberty-free-speech-national-security/poli>

A third policy would entail allowing police officers to exercise discretion, but to confine that discretion when they infringe the individual privacy rights of others. It should be noted that all departments or advocates endorse some minimal privacy protections, namely requiring that officers turn off their cameras when they are in areas with an expectation of privacy such as a bathroom, locker room, or hospital room, unless filming is part of an investigation or has some other relevance to police work.³¹ This means that if an officer is going to the bathroom out of personal necessity, his or her camera should be off. On the other hand, if that officer is chasing a suspect who ducks into a restroom stall to hide, then the camera should remain on during that pursuit. This category delineates measures that emphasize privacy protections beyond such minimal and common sense exceptions.

There are three main exceptions that have been advocated in the area of privacy protection. First, that officers turn off their cameras when they are filming sensitive situations like the aftermath of a rape. Second, that officers turn off cameras if a witness or victim does not consent to their testimony being filmed. Third, that cameras be turned off during private conversations such as officers speaking to other officers, officers speaking to attorneys, or any conversations involving undercover agents or confidential informants.

The most axiomatic benefit of this policy is that it protects something that many Americans value - privacy. A policy like this means that victims in sensitive situations do not have to subject themselves to filming in order to obtain help. It also allows officers to turn off cameras when they themselves are uncomfortable filming, and it eliminates the hassle of trying

³¹ See Table 1, below

to work with a victim, witness, or suspect who objects to filming and will not talk unless cameras are turned off. Under this policy, officers in any of those situations may lawfully comply with the individual's wishes, turn off the camera, and then proceed to gather information unhindered.

The primary defect of this policy is that it is much more ambiguous than the preceding initiatives. Because there is increased discretion and the governing rules are a little vague, officers have a higher potential to abuse the power granted them and can turn off cameras in situations where they should be on. Enforcement is therefore necessary and there will be circumstances which are difficult to adjudicate because it is often a subjective determination whether or not it is inappropriate to film.

Supporters of this type of policy include the International Association of Chiefs of Police³² and the Labor Relations Information System.³³ Many police departments have written policies that also seem to fall into this category, including Chicago, Denver, Fort Worth, and Washington D.C.³⁴ That being said, a written policy and the actual behavior of the force are two different things. Despite the fact that Chicago's body camera policy limits itself to only privacy exceptions, the story of Laquan MacDonald, discussed above, tells us that in at least one instance the policy was disregarded.

Allowing for Broader Discretion

³² See *Body Worn Cameras: Model Policy*, IACP, (April 2014) <http://www.aele.org/iacp-bwc-mp.pdf>.

³³ See *Body-Worn Cameras Policy*, LRIS, (2014) <http://www.lris.com/wp-content/uploads/2014/09/Model-Body-Camera-Policy.pdf>.

³⁴ See *infra* Table 1

A fourth possible policy is sanctioning discretion that is broader than the mere protection of individual privacy rights, but still not completely unlimited. These policies either include language referencing discretion or judgment, or at least imply that there are some situations where officers may choose not to film that are not covered by the situations outlined in the policy.

This policy is advantageous in that an officer has significant leeway to make decisions about whether filming is appropriate. It allows officers to look after their own safety and other imperative factors in addition to the privacy interests of others.

On the other hand, this policy is more equivocal than the last one, making it either incredibly difficult to enforce or, in the worst case scenario, rendering it functionally unenforceable because almost any situation may satisfy one of the factors. If a department desires credit for making reforms but is reluctant to hold its officers accountable, this is likely the type of policy it would enact. Additionally, obtaining consent in the field is still an issue, and more of the intended purpose of the cameras is compromised.

A predictably large number of law enforcement officials support this type of policy. They want officers to be afforded some discretion in whether to keep cameras off during certain encounters, and they want to waive the recording requirement entirely in situations where it would be “unsafe” or “impossible.”³⁵

³⁵ *Id.*

For example, in the Milwaukee police statement it states, “Police members have discretion in whether or not to record potentially sensitive events or circumstances”³⁶. The use of the word “potentially” and the fact that the statement is followed by an illustrative list of examples as opposed to an exhaustive list means that Milwaukee officers could likely argue that any situation they are in is “potentially” sensitive enough to qualify.

The Baltimore Police Department also falls into this category, giving officers the discretion to turn their cameras off “in certain situations”, but failing to fully articulate what those situations are.³⁷ Three suggested situations include: sensitive circumstances, lack of consent, and safety.³⁸

Instituting Complete Discretion

The last and final possible policy, falling all the way on the other end of the spectrum from leaving cameras on all the time, is allowing for complete and total discretion among officers.

On the plus side, this is once again an unambiguous and easy to follow policy. If an officer thinks that the camera should be off, then he or she is going to be correct. Enforcement is not an issue because the officer can never be wrong. This can be a good thing, as it allows

³⁶ *Milwaukee Police Department: Standard Operating Procedure 747 Body-Worn Cameras (BWC)*, MILWAUKEE POLICE DEPARTMENT, http://www.city.milwaukee.gov/ImageLibrary/Groups/cityFPC/agendas4/150903_VII_I.pdf (last visited Apr. 2, 2016).

³⁷ *Pilot Program*, BALTIMORE POLICE DEPARTMENT, <http://s3.documentcloud.org/documents/2488128/bpd-body-worn-camera-pilot-policy.pdf> (last visited Apr. 2, 2016).

³⁸ *Id.*

trained officers within the field to operate as they see fit without being encumbered by administrative rules. Obtaining consent is also not an issue.

On the other hand, the major downside is that there is no accountability at all for officers. The intended purpose is therefore completely unmet. Any officers that want to use unnecessary force or otherwise abuse their positions may simply switch their cameras off and carry on without any punishment at all for doing so.

No advocates have backed this position. No police departments have explicitly backed it either, although many policies that fall into the previous category may functionally act as though they fall into this one. This is especially true of policies that include catch-all language that leaves discretion open-ended.

The Los Angeles Police Department's policy is an example of this. LAPD officers are permitted to turn their cameras off in situations where "(i)n the officer's judgment, a recording would interfere with his or her ability to conduct an investigation, or would be inappropriate."³⁹ Similarly, Phoenix officers "may deviate from (the policies about when the camera should be on) if it is in the obvious best interests of the department to do so and they are able to justify such a deviation."⁴⁰ The San Jose policy simply says that "(o)fficers will use reasonable judgment in determining when to deactivate the body-worn camera".⁴¹

³⁹ *Id.*

⁴⁰ *Body Worn Video Technology – Pilot*, PHOENIX POLICE DEPARTMENT, <https://www.dropbox.com/s/3x4iy8tc9n208pn/Phoenix%20body%20cam%20policy.pdf?dl=0> (last visited Apr. 2, 2016).

⁴¹ *San Jose Police Body Worn Camera Policy*, SAN JOSE POLICE DEPARTMENT, http://www.sjpd.org/InsideSJPD/BodyCameras/BWC_Policy.html (last visited Apr. 2, 2016).

Language like this makes it easier for officers to justify their decisions to deactivate, and gives enforcers of the policies little ground to criticize them. In practice, therefore, it may act like complete discretion.

Overview of Most Common Exceptions to Filming Recommended or Adopted

The table below is meant to summarize the information above about the most common exceptions to recording as well as the policy advocates and police departments that back them. The policy advocates included are those that have been the most vocal and have drafted model policies on the topic. The cities included in the table reflect all the police departments in the 30 biggest cities in the U.S. that have a body-worn camera policy in place as of the time of this writing.⁴² Cities that have begun a body camera program but do not have a written policy governing it include Houston, Oklahoma City, Philadelphia, and Nashville.⁴³ The remaining cities, which have neither a body camera program nor a policy governing use, include Boston, Columbus, Detroit, El Paso, Indianapolis, Jacksonville, Portland, San Antonio, and San Francisco.⁴⁴

⁴² Nick Wing, *Police Make No Promises To Discipline Officers Who Violate Body Camera Policy*, THE HUFFINGTON POST, http://www.huffingtonpost.com/entry/police-body-camera-policy_563b8d81e4b0b24ace4938ab (last visited Apr. 2, 2016).

⁴³ *Id.*

⁴⁴ *Id.*

Table 1

When Camera May Be Turned Off During:	Parts of the job not involving interactions with citizens	Citizen Encounters That are Non- Investigative and Non-Confrontational	Parts of Citizen Encounters Where Filming Is Unnecessary Because Nothing is Happening	Presence In Areas With An Expectation of Privacy (Unless Deemed Necessary)	Sensitive Situations Where Citizen Privacy Must Be Protected	Witness Interviews In General	Witness Interviews Where An Individual Does Not Consent to Filming	Situations Where Police Privacy Must Be Protected	Situations Involving a Confidential Informant or Undercover Agent	Unsafe Situations	Situations Where Filming Is Impractical	Other (catch-all language)
Policy Advocates												
ACLU	X			X			X			X		
International Association of Chiefs of Police	X			X	X		X	X	X			
International Municipal Lawyers Association	X	X		X			X			X	X	
Labor Relations Information System	X			X	X		X	X	X			
Police Executive Research Forum	X	X		X	X	X	X	X	X	X	X	
Police Departments												
Austin	X		X	X				X		X	X	
Baltimore	X	X		X	X		X	X	X	X	X	X
Charlotte	X	X	X	X				X				

Chicago	x		x	x	x		x	x				
Dallas	x		x	x				x	x	x	x	
Denver	x		x	x	x		x	x		x		
Fort Worth	x	x	x	x	x		x	x			x	
Louisville	x	x		x	x			x	x			
Los Angeles	x	x	x	x	x		x	x	x	x	x	x
Memphis	x	x		x	x	x		x	x			
Milwaukee	x	x	x	x	x			x	x	x	x	x
New York City	x	x	x	x			x	x		x	x	
Phoenix	x	x		x				x	x	x	x	x
San Diego	x	x	x	x	x	x		x		x	x	x
San Jose	x	x	x	x	x		x	x	x	x	x	x
Seattle	x	x		x							x	
Washington DC	x	x		x	x			x	x			

Note: There were a few exceptions to filming that were only adopted by one department and so were not included on the table for space-saving reasons. Charlotte's policy included a prohibition of filming juveniles in non-criminal contexts. San Diego's policy included a statement that peaceful demonstrations should generally not be filmed. San Jose recognized "human performance limitations during particularly stressful, critical situations" and specified that an officer could not film in a private home as part of a consent search without consent for the filming as well. Seattle prohibits recording "(p)eople who are lawfully exercising their freedom of speech, press, association, assembly, religion, or the right to petition the government for redress of grievances" and non-criminal individuals in their homes who do not consent

Part III: The Best Practice—Filming All Citizen Encounters

In light of all the factors outlined above, the best policy is to require officers to keep the cameras on for the duration of all encounters with citizens.⁴⁵ If a camera is turned off, there should be a rebuttable presumption that the officer acted wrongly in switching it off. To look after the privacy interests of victims, children, suspects, and other vulnerable people, there should also be extremely strict rules about who may view the recordings that are made, when it is appropriate to make them available to the public, when and how it is appropriate to obtain consent, and how long they are stored. What those policies may be is beyond the scope of this paper. However, as a general rule, it is better to have a recording and be able to keep it protected than to not have a recording at all. This policy is the best balance of the factors above, and its benefits outweigh its costs. Furthermore, there are ways to address its costs that render them less costly. All in all, it is by far the best policy, for the reasons explained below.

Major Benefits

Accountability

This policy addresses the intended purpose of body cameras perfectly. Filming all citizen encounters will ensure that we record exactly what we have an interest in seeing and nothing else. Officers will not be able to hide their wrongdoing without raising a huge red flag, because any time the camera is off during a citizen encounter the presumption will be that an officer was acting wrongly, and the burden will be on the officers to prove that they were not by showing

⁴⁵ See Table 1 (exempting common sense situations like going to the bathroom, as discussed above).

evidence of malfunction. This means that officers will not be able to hide behind their discretion. Taking away discretion is the biggest strength of this policy because it ensures that discretion may not be abused. We as a society may effectively hold our police force accountable for the actions they take against citizens.

This policy also cracks the Blue Wall of Silence, and rightly so. No longer will officers be able to cover for one another when their indiscretions are on camera for all to see. This is important, and it is the only way to ensure justice.

Unambiguousness

Enforcement will be easier with bright line rules, and that is a strength of this policy. If an officer had his camera off while talking to or otherwise dealing with a citizen, then he should be disciplined for that. There is no need to evaluate whether consent was given, whether filming was appropriate, whether it was dangerous or unnecessary or anything else.

The unambiguousness will also make it easier for the enforcers to be held accountable. If a certain police department is not punishing officers for having their cameras off, that will be easy to see. There will be no need to read lengthy hearings and make judgment calls to decide if the police department is administering the policy fairly.

Practicality Advantages

Because consent is not needed in the moment, the practicality concerns of this policy are much easier to address than the practicality concerns of other policies. Officers may go about

their duties without interruption and then obtain consent later when there is time to do so if it is deemed necessary.

Addressing Concerns

Practicality Concerns

Despite the practical advantages, there are some other practicality concerns that are unique to this policy. Namely, locating filmed persons after the fact. Officers may not have taken down an address, or the relevant person may not have an address to give. Alternately, the relevant person may not want to be found at all.

On closer examination, this concern is not as significant as it first appears. The situations in which police would need to view a tape or make it publically available are largely situations in which the person can be found. The tapes should be used primarily for evidence either of criminal activity or of police misconduct. If the former, the defendant and the victim are already known persons who appear in court and can therefore be located for consent if need be. If the latter, someone has already filed a complaint and that person has a strong interest in giving consent. Furthermore, when it comes to people in the background of footage who cannot be located, their faces may easily be blurred.

Privacy Infractions

For those who oppose filming every citizen encounter without discretion, privacy rights are the most cited concern. Opponents argue that filming without obtaining consent is a violation of the constitutional right to privacy. However, those issues may be properly addressed

at a different point of the body camera program: storage and availability. Just as a police officer's ability to make observations in the course of his or her job is not a violation of privacy, neither is the eye of the camera. It is what is done with the recording afterwards that is of issue. Victims and suspects may not want to have their encounters with police made public or even to be viewed by anyone other than the police to whom they are speaking at the time that they are speaking to them. Perhaps there are situations in which it is appropriate for that to be the case, including the popular examples of children's testimony or victims of sex crimes. I would argue, though, that it is better to have a video that is never viewed than to not have a video at all. Victims may change their mind when evidence is needed in court or when they decide to file a complaint against an officer, and in those cases they may consent to have the protections around their videos lifted. If no tape has been made then there is no going back and victims may later regret denying consent.

We discussed the implications of cracking the Blue Wall of Silence above, but that is not the only type of police privacy that needs addressing. The second reason for police privacy is an understandable incentive to keep tactics confidential so that would-be criminals may not easily circumvent them. Once again, for those concerned about revealing police tactics, confidentiality may be maintained by limiting the availability of these recordings to the public.

Cost and Efficiency

There is an increased cost of storing so much video footage. However, that cost is somewhat offset by the savings against gathering evidence for court. Litigating citizen complaints is extremely costly for police departments. The Oakland Police Department alone

spent \$13,149,000 in the 2010-2011 fiscal year on legal costs in officer misconduct cases.⁴⁶ In theory, body cameras for police should cut down on these complaints by incentivizing officers to behave better, and resolving misconduct cases more efficiently by contributing to evidence gathering. These savings will counter-balance the costs of increased recordings and storage. Even where there is an efficiency cost when going through so much footage, it is less significant than the overall gain.

Conclusion

The simple question of when a body camera should be turned off is unexpectedly complex, touching on such important issues as privacy, consent, distribution of power, and safety, among others. There are so many considerations to be weighed that it is difficult to even calibrate a scale. Ultimately, however, the question comes down to what will best serve the interests of the public. For now, that question is best answered by eliminating discretion, recording as much as possible, and shifting the issues of privacy and consent to the ways in which those recordings are stored, viewed, and, if appropriate, made available to the public. Filming all citizen encounters is therefore the most appropriate policy to adopt.

⁴⁶ Winston, *supra* note 12.