



TESTIMONY PREPARED FOR:

NEW YORK STATE
ASSEMBLY STANDING COMMITTEE ON CODES
ASSEMBLY STANDING COMMITTEE ON JUDICIARY
ASSEMBLY STANDING COMMITTEE
ON GOVERNMENT OPERATIONS

SUBJECT: Body Worn Camera Programs

PURPOSE: To examine the prospect of having police officers wear cameras, including privacy concerns, data retention and disclosure, and the effects of recording on community-police relations.

ALBANY
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Presented By:

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The Legal Aid Society, the nation's oldest and largest not-for-profit legal services organization, is an indispensable component of the legal, social and economic fabric of New York City – passionately advocating for low-income individuals and families across a variety of criminal, civil and juvenile rights matters, while also fighting for legal reform. The Society has performed this role in City, State and federal courts since 1876. With its annual caseload of more than 300,000 legal matters, the Society takes on more cases for more clients than any other legal services organization in the United States, and it brings a depth and breadth of perspective that is unmatched in the legal profession. The Society's law reform/social justice advocacy also benefits some two million low-income families and individuals in New York City, and the landmark rulings in many of these cases have a national impact. The Society accomplishes this with a full-time staff of nearly 1,900, including more than 1,100 lawyers working with over 700 social workers, investigators, paralegals and support and administrative staff through a network of borough, neighborhood, and courthouse offices in 26 locations in New York City. The Legal Aid Society operates three major practices — Criminal, Civil and Juvenile Rights — and receives volunteer help from law firms, corporate law departments and expert consultants that is coordinated by the Society's Pro Bono program.

The Society's Criminal Practice is the primary public defender in the City of New York. During the last year, our Criminal Practice represented over 200,000 indigent New Yorkers accused of unlawful or criminal conduct on trial, appellate, and post-conviction matters. In the context of this practice the Society represents people accused of crimes from their initial arrest through the post-conviction process.

The Society's Civil Practice provides comprehensive legal assistance in legal matters involving housing, foreclosure and homelessness; family law and domestic violence; income and economic security assistance (such as unemployment insurance benefits, federal disability benefits, food stamps, and public assistance); health law; immigration; HIV/AIDS and chronic diseases; elder law for senior citizens; low-wage worker problems; tax law; consumer law; education law; community development opportunities to help clients move out of poverty; prisoners' rights, and reentry and reintegration matters for clients returning to the community from correctional facilities.

The Legal Aid Society's Juvenile Rights Practice provides comprehensive representation as attorneys for children who appear before the New York City Family Court in abuse, neglect, juvenile delinquency, and other proceedings affecting children's rights and welfare. Last year, our staff represented some 34,000 children, including approximately 4,000 who were arrested by the NYPD

and charged in Family Court with juvenile delinquency. In addition to representing many thousands of children, youth, and adults each year in trial and appellate courts, The Legal Aid Society also pursues impact litigation and other law reform initiatives on behalf of our clients.

The breadth of The Legal Aid Society's representation places us in a unique position to address the issue before you today. We have spent many hours discussing the question with advocacy groups, community organizations, our Criminal Practice clients and as plaintiffs with the Joint Remedial Process required by the *Floyd/Davis/Ligon* stop and frisk litigation.¹ Evolving technology and recent events involving police tampering with body-camera footage have influenced this testimony.

¹Zimroth, Peter. "Recommendation Regarding Body-Worn Camera Program", December 7, 2015, Dkt No. 351, *Davis et al v. the City of New York et al*, 10-cv-00699.

TESTIMONY

Understandably, among many calls for policing reform, body-worn camera programs (BWC's) have been included as an enticing way for localities to have apparently neutral recordings of police encounters to review when allegations of police abuse are made. This Assembly is considering whether it is appropriate for legislation to require BWC programs across the State. Without also requiring localities to adopt specific policies to improve police accountability (such as independent community oversight agencies, public disciplinary hearings, etc.) and transparency (such as making substantiated on-duty misconduct accessible to the public), requiring BWC programs alone will not be effective.

The Assembly also asks whether an oversight agency, rather than a police department, should have custody of the footage. The lessons learned from the attempted cover-up in Chicago demonstrate that BWC programs will only improve police accountability systems when recordings are accessible by independent oversight agencies that can audit, prosecute and discipline officers. Used in conjunction with an external accountability system that delivers certain and swift discipline, BWC may assist in assessing alleged misconduct and deterring identified problems of abusive police conduct for particular precincts, units, shifts, and individual officers that have been identified in complaints.

BWC also has the potential to be used as mass surveillance on communities already heavily observed by police agencies. Of great concern is the fact that many jurisdictions have implemented BWC programs outside of the framework of police accountability systems.² Used in this way, BWC programs raise serious concerns of privacy and public expression and assembly. The State should consider, as the jurisdictions that initiate BWC across NYS proliferate, regulating how jurisdictions use BWC programs as surveillance, law enforcement and workforce management tools to ensure that existing privacy protections, public disclosure laws, criminal procedure and labor laws are updated to reflect this new technology.

Below, we discuss in more detail how the State may advance legislation regarding BWC programs that may improve community trust of law enforcement, rather than weaken it.

²Kate Mather, LAPD officers are on patrol with body cameras starting today, Los Angeles Times, August 31, 2015, available at <http://www.latimes.com/local/lanow/la-me-ln-lapd-body-cameras-rollout-20150831-story.html>; Courtney Gross, NYPD Ready to Hit Record on Body Camera Pilot Program, Times Warner Cable News NY 1, August 27, 2015, available at <http://www.ny1.com/nyc/all-boroughs/news/2015/08/27/nypd-ready-to-hit-record-on-body-camera-pilot.html><http://www.ny1.com/nyc/all-boroughs/news/2015/08/27/nypd-ready-to-hit-record-on-body-camera-pilot.html>.

Community & Stakeholder Involvement

Community buy-in has been recognized as an essential piece of BWC program implementation. It is not enough “to deploy these cameras widely and presume that the system is working without any problems.”³ Instead, they must be used to “foster strong, collaborative relationships between local law enforcement and the communities they protect.”⁴ Towards this end, The Department of Justice announced its new \$20 million BWC Pilot Partnership Program that included a National Body-Worn Camera Toolkit (Toolkit), an online resource designed to help plan and implement the BWC programs through direct input from all affected stakeholders, including law enforcement, prosecution, information technology, labor organizations, civic leaders, and community members.⁵ Police departments also acknowledge that involvement of the community is an essential aspect of introducing BWC programs.⁶

³ American Civil Liberties Union of Illinois, Suggested Guidelines on Use of Body Cameras by Police, September 8, 2014, available at <http://www.aclu-il.org/statement-regarding-use-of-body-cameras-by-police/>.

⁴ Office of Community Oriented Policing Services, Interim Report of the President’s Task Force on 21st Century Policing, p. 13 (March 2015), available at http://www.cops.usdoj.gov/pdf/taskforce/interim_tf_report.pdf.

⁵ The White House, Office of the Press Secretary, FACT SHEET: Creating Opportunity for All Through Stronger, Safer Communities, May 18, 2015, available at <https://www.whitehouse.gov/the-press-office/2015/05/18/fact-sheet-creating-opportunity-all-through-stronger-safer-communities>.

⁶ Lindsay Miller and Jessica Toliver, Police Executive Research Forum, Office of Community Oriented Policing Services, Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned, 2014, pgs 21-24, available at www.justice.gov/iso/opa/resources/472014912134715246869.pdf (hereinafter ‘PERF’).

Each community in which BWC programs are being considered, piloted, investigated or implemented needs to be involved and engaged with their local police department in determining the purpose and values that the BWC program should serve in its jurisdiction. Rural localities will have different concerns than urban localities – and each community should be involved in deciding what it wants from the incredibly powerful and expensive investment of BWC programs before they’re introduced.

Clearly Defined Purpose of BWC Program

BWC programs spiked in popularity in response to instances of police violence caught on video by witnesses’ handheld devices. For NYC, the purpose of the BWC program should be police accountability and not mass surveillance. BWC programs that, for example, assign random officers body cameras, give officers discretion about recording, have exclusive control over the digital recordings and exclusively decide disclosure, as many programs do, are implemented for the purpose of mass surveillance but won’t be effective at improving police accountability or community trust.

Independent Oversight Agencies Should Control Recordings If the Purpose is Improving Community-Police Trust and Police Accountability

The problem that has named BWC as the solution – abusive and arbitrary police practices – will continue to persist unless independent investigative agencies, and not police departments, control access to the digital records for review of complaints and audits. We recently learned from the Chicago killing of Laquan McDonald that there is a 86-minute gap in the surveillance video, as attested to by the manager of the fast-food chain that owned the surveillance tape. While forensic testing failed to prove tampering, a police superintendent reported: "There were apparently technical difficulties...", even though equipment had been in perfect working order for weeks before the shooting.⁷

Who has control over the recordings determines our view of all other questions about officer discretion to record, retention periods, editing footage, public access, discovery and privacy concerns because, again, it reflects whether the purpose of the BWC program is seen as police accountability versus mass surveillance. Once a locality determines that the BWC program is primarily for the purpose of police accountability, it should also conclude that its recordings should

⁷ "Burger King Manager Told Grand Jury of Gap in Laquan McDonald Video," *The Chicago Tribune*, November 27, 2015, available at: <http://www.chicagotribune.com/news/local/breaking/ct-chicago-cop-shooting-laquan-mcdonald-met-20151127-story.html>. See also, Townes, Carimah, "Texas Police May Have Edited Dash Cam Footage of Sandra Bland Arrest," *Think Progress*, July 22, 2015, available at: <http://thinkprogress.org/justice/2015/07/22/3683280/texas-police-may-edited-dash-cam-footage-sandra-bland-arrest/>

not be in the sole possession of the police department, but rather some watchdog agency that will actually regularly audit, critically examine and use recordings to improve police conduct. If a prosecutor determines that a recording is also essential to proving a criminal case, they should have to subpoena that video as they would subpoena an investigation file from the Civilian Complaint Review Board.

Recording discretion

If an independent oversight agency were to be collecting the BWC recordings and not leaving the recordings in the sole possession of police departments, then recording discretion should be minimal. Officers with BWC's should be required to record all police encounters, without exceptions for officer discretion other than when the officer goes on break.⁸ Concerns about mass surveillance are assuaged by the presence of a watchdog group only concerned with police misconduct and not the police.

If the recordings were controlled by NYPD, then the recording discretion should be limited to police-initiated encounters (starting from, for example, a pre-

⁸ The first ACLU recommendation (2013) was for continuous recording without police officer discretion to turn off cameras and their second recommendation (2014) was for police officer discretion in listed circumstances. See Jay Stanley, American Civil Liberties Union, [POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL](https://www.aclu.org/police-body-mounted-cameras-right-policies-place-win-all), March 2015, available at <https://www.aclu.org/police-body-mounted-cameras-right-policies-place-win-all>; Jay Stanley, American Civil Liberties Union, [Police Officer Discretion in the Use of Body Worn Cameras](https://www.aclu.org/blog/free-future/police-officer-discretion-use-body-worn-cameras), February 2, 2015, available at [available at: https://www.aclu.org/blog/free-future/police-officer-discretion-use-body-worn-cameras](https://www.aclu.org/blog/free-future/police-officer-discretion-use-body-worn-cameras).

level 1 DeBour initial encounter with a person). The rule should be to record everything with few exceptions: for encounters when an individual refuses consent to record (see below); encounters inside a private residence (possibly with exceptions for raids)⁹; during VICE operations¹⁰; during strip searches or anytime a subject is nude; at hospitals, medical facilities; during conversations with confidential informants or undercover officers¹¹; any other law enforcement interaction that involves a reasonable expectation of privacy like in bathrooms and locker rooms.¹²

Recording should also be shut off if the subject individual does not consent to the recording unless an officer fears for her or his safety. However in all circumstances an officer must inform someone they are recording that the device is on and recording.¹³

Once the encounter has ended, the officer must announce that recording will cease because the incident has ended. If the recording must cease prior to the incident ending, the officer must indicate the reason for ending the recording as he

⁹ PERF, supra at 15. PERF allows recording when there is a warrant, call for service or consent, noting privacy concerns inside a home. ACLU recommends using recording during planned uses of force, like SWAT raids.

¹⁰ Tracy Clark-Flory, Fast Company, THE PROBLEM WITH SEX WORKERS AND LAW ENFORCEMENT BODY CAMERAS, February 20, 2015, available at www.fastcompany.com/3042625/the-problem-with-sex-workers-and-law-enforcement-body-cameras.

¹¹ PERF, supra at 23, 42.

¹² Id. at 42.

¹³ Id. at 13-14, 18 (“unless doing so would be unsafe, impractical or impossible”).

turns it off. There must be concrete disciplinary consequences for officers who terminate a recording prior to the end of an incident without explanation. Termination should be an option.¹⁴

Selection of Units Subject to BWC

Rather than solely assigning BWC to random officers, units, shifts or precincts, BWC should be targeted to problem units, times or officers named by community complaints. The PERF report describes this approach, as used by a Daytona Beach Chief who found that an officer with a history of misconduct repeatedly turned the camera off mid-encounter, claiming malfunction. When the department was able to prove that it had not malfunctioned, it was able to force resignation of an officer whose building history of complaints would likely cost the city in lawsuits later.¹⁵

Retention of data

Again, assuming an independent agency has control over the data and not police departments, retention of data should be at least for the period of time that

¹⁴ PERF at 8, see discussion of Daytona Beach’s policy on terminating an officer for ending a video prematurely below. Officers turning off the camera during an incident has been already documented as a nationwide problem with BWCs. See also Gardner, Justin, “Cops Turn Off Body Cameras Before Killing Man”, *AlterNet*, December 5, 2015, available at: <http://www.alternet.org/civil-liberties/cops-turn-body-cams-killing-man-witnesses-watch-them-plant-gun-and-drugs?akid=13740.2275380.7VtbCF&rd=1&src=newsletter1046797&t=18>

¹⁵ PERF at 8.

one can file a complaint. However, regardless of who retains custody of the data, policies must be in place to explicitly state who has authorization to access data, when and for what purpose, and there should be mechanisms for auditing when footage has been accessed and by whom.¹⁶ Officers should categorize and tag footage as it is being downloaded so that it is identifiable in case of complaint and all footage should have an un-editable timestamp.

The camera data should be automatically stored and equipment needs to be turned in after shifts so that individual officers cannot alter or view footage. The strictest security measures must be taken to prevent hacking or unauthorized access to recordings. Of course, not allowing police departments to retain control over footage is the easiest way to ensure it is accurately preserved and disclosed.

Access to Recordings – for the subject of the recording, for the public and in court

On the fortieth anniversary of the Freedom of Information Law in December 2014, following six months of calls for police reforms following the police killings of Eric Garner and Michael Brown, the New York State Committee on Open Government issued a warning:

“[So] long as §50-a¹⁷ remains on the books, other efforts to increase police accountability that have been proposed are less likely to be effective. For

¹⁶ PERF, *supra* at 43.

¹⁷ Civil Rights Law §50-a is an exemption from the Freedom of Information Law for police and other uniformed officers.

example, the mandatory use of “bodycams” ... These video cameras capture the events in which law enforcement officers are involved ... but they are unlikely to provide greater transparency and accountability if the videotape recordings can be kept from the public under §50-a in cases where no privacy or safety concerns would otherwise justify withholding them. ... If the video can only be seen by the internal affairs unit within a police department, and there is no public disclosure, a primary purpose of the bodycam would be defeated.”¹⁸

Laws like Civil Rights Law 50-a, which exempt police records from public disclosure, exist across the country, the City of New York argues it even protects disclosure of on-duty substantiated misconduct.¹⁹ Responding to Commissioner Bratton’s statement that BWC footage would “likely never” become public, the New York City Public Advocate explained in October 2015, “[it] defies logic to keep the footage from these cameras hidden from the press and the public.”²⁰ Yet the current interpretation of Civil Rights Law 50-a, as discussed by the Committee on Open Government’s 2014 report, would likely be interpreted to exclude body

¹⁸State of New York Department of State, Committee on Open Government, “Annual Report to the Governor and State Legislature”, December 2014, at 5. Available at <http://www.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf>

¹⁹Bedell, Ben, “Board to Appeal Cop Records in Fatal Garner Encounter”, *New York Law Journal*, August 28, 2015, <http://www.newyorklawjournal.com/id=1202735886020/Board-to-Appeal-Cop-Records-in-Fatal-Garner-Encounter?slreturn=20151107144515>

²⁰Whitford, Emma. Gothamist. “Officials Push NYPD to Make Cops’ Body Cam Footage Public,” October 22, 2015. Available at http://gothamist.com/2015/10/22/cop_body_cameras.php

camera footage. Two bills introduced in the New York legislature would prevent this.²¹

For the subject of a recording, access should come easily as long as the person can produce a waiver proving that they are the subject of the video along with enough identifiers to locate the video. Any privacy protections already anticipated under FOIL should be considered waived by a properly notarized form.

All other public access should adhere to privacy protections already in the FOIL statute to prevent wide-release of a person's image (like their address, phone number or other private information already protected in the statute), accounting for new technological versions of redactions, such as digital facial distortion.²² At least ten others states have taken on public access legislation in response to BWC programs (to different ends).²³

²¹Legislation that would exempt records unless they're used *solely* as personnel records has been introduced S4808 as well as legislation that would exempt body cameras from 50-a protection. S6030/A8368.

²²Facial distortion as a redaction method has been proposed by NYS Democrats in pending legislation to make BWC footage accessible through FOIL. Bredderman, Will, "Democrats to Push Bill to Make Cop Body Camera Footage Available to the Public," The Observer, August 6, 2015, available at: <http://observer.com/2015/08/democrats-push-bill-to-make-cop-body-camera-footage-available-to-public/>

²³ Breitenbach, Sarah, "States Grapple with Public Disclosure of Police Body Camera Footage," September 22, 2015, available at: <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/09/22/states-grapple-with-public-disclosure-of-police-body-camera-footage>

Discovery in Criminal Court

In criminal cases where there is a recording underlying the prosecuted offense, it should be immediately shared with the defense attorney. The Legal Aid Society has previously testified about how desperately New York State needs to overhaul the criminal discovery statute. We have issued comprehensive proposals that Article 240 be repealed and a new discovery statute that we call “Article 245” enacted. This new discovery statute should be in line with those used in nearly all other States by requiring early discovery from both the prosecution and the defense, including disclosure of police reports and witness statements. Without overhauling discovery, defense attorneys may not be able to view BWC footage. This is because currently prosecutors need only disclose recordings that they intend to introduce at trial, or those that are exculpatory under *Brady*. This means that many BWC recordings would not be turned over at all. Furthermore, even those BWC recordings that would be discoverable would not have to be disclosed for several weeks after arraignment on the indictment or information. A body camera recording may be so completely conclusive of a criminal action as well as being so easy to identify, package and export that it should be shared immediately without delay.

In cases where a recording should have been made but wasn't, there should be evidentiary consequences. If the recording wasn't made because the officer

didn't press record, that officer's testimony should also be precluded and/or the defense can ask for an adverse inference. If police allege technical malfunction, they must carry the burden of proving that the malfunction caused the recording failure, and not discretion.

Community Recording Needs Protection

Finally, as BWC programs are being implemented, they should not be considered a substitute for recording by community members.²⁴ Community recording of police conduct should be protected, not criminalized. Yet in many places (including those where BWC programs have been adopted), there have been attempts to criminalize community recording of police, as was discussed by Professor Jocelyn Simonson this past November at Georgetown's Symposium on policing.²⁵ In her article, she discusses almost a dozen examples of recently introduced legislation that would make it a crime to, as a Texas bill has, "film, record, photograph or document" police while on duty within 25 feet.²⁶

²⁴While the Second Circuit has not held whether copwatching is protected by the First Amendment, it has been held by *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011); *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir.2012); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *Adkins v. Limtiaco*, 537 F. App'x 721, 722 (9th Cir. 2013) (per curiam) (unpublished opinion); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

²⁵"Beyond Body Cameras: Defending a Robust Right to Record the Police", 104 *Georgetown Law Journal* (pending publication in 2016).

²⁶ *Id.*, citing H.B. 291B, introduced March 2015 in the Texas State Legislature:
<http://www.legis.state.tx.us/tlodocs/84R/billtext/pdf/HB02918I.pdf#navpanes=0>
<http://www.chron.com/news/politics/texas/article/Bill-restricting-rights-of-citizens-to-videotape-6130903.php>

Criminalizing community recording of police would undermine trust and be antithetical to the purpose of improving police accountability and transparency. If anything, state legislatures should act to reinforce constitutional protection of recording police, as long as it's done without physical obstruction.

CONCLUSION

The Legal Aid Society thanks the State Assembly for inviting us to this hearing and we're very available to answer questions as needed. As technology rapidly evolves, we anticipate that our positions on many aspects of the BWC issue may change and we are committed to continuing to work with government to figure out the best way to optimize this technology for all members of the community.