

TO RECORD OR NOT TO RECORD: USE OF BODY-WORN CAMERAS DURING POLICE RESPONSE TO CRIMES OF VIOLENCE AGAINST WOMEN

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For a variety of reasons—officer safety, public accountability, evidence collection, and departmental transparency—an increasing number of police departments have adopted, or are considering adopting, the use of body-worn cameras (BWCs). In the rush to deploy these cameras, departments across the country are piecing together policies and protocols for camera use. While departments strive to implement policies that are both comprehensive and workable for real-world application, most departments have not considered the impact of camera usage in their response to crimes of violence against women. These unique crimes require a very different approach to investigation and trial if victims are to be protected and offenders held accountable. Domestic and sexual violence, stalking, and human trafficking are crimes that require investigation and trial strategies that respectfully acknowledge and accommodate the trauma that victims suffer as a result of these crimes and enable fact-finders to understand the impact of that trauma. The positive and negative implications of BWC usage in the law enforcement response to these crimes demand serious, collaborative contemplation in the drafting or review of departmental policy. The lack of existing research-based evidence to guide policy and practice in this area strongly suggests a multidisciplinary approach, considering the perspectives of police, prosecutors, advocates, medical professionals, and victims. Such an approach, incorporating the experience and perspectives of allied professionals, can help anticipate and address potential problem areas. This article will examine several issues that should be considered in creating or refining policy on BWC usage.

PROS AND CONS OF BWC USE

There are many advantages to the use of BWCs in criminal investigations of violence against women. The camera effectively captures and preserves victim demeanor, usually in close temporal proximity to the crime. The initial response to the scene in a domestic violence investigation, for example, comes when the victim typically is the most forthcoming with valuable information about the crime and the most receptive to the resources responders have to offer. Whether recording or not, officers should gather as much information as they can about the crime and the history of the relationship, while providing the victim with as many resources as possible during this critical time. Recording and documenting the suspect's statements and demeanor during such a call is also invaluable. Details of the scene, along with documentation of other persons present and audio recording of spontaneous statements, can be captured. In sexual violence and human trafficking cases, the victim's behavior and demeanor may support the theme and theory of the case. In stalking cases, capturing the victim's fearfulness on video may help to satisfy essential elements of the crime, depending on what the statute requires. These recordings can be compelling evidence in court, and therefore provide a powerful inducement for offenders to enter guilty pleas. Recordings may capture certain nontestimonial statements admissible under *Crawford v. Washington*² if the victim is unable to participate at trial, or corroborate details of the original statement if the victim later recants or testifies for the defense.

While recordings of statements, scene, and demeanor can provide advantages in cases involving violence against women, it is also important to consider the potential downside of BWC recordings in the absence of thoughtful policy provisions. Public release of a victim's recorded statement as a result of a public records request, for example, would be traumatic for the victim and have a chilling effect on future victims' ability to report. A mandatory advisory statement to

a victim that the camera is recording may not register in the mind of a victim in trauma or one who is intoxicated. A recording would undoubtedly provide useful evidence where the victim is incapacitated, but nevertheless have a negative impact on that victim's emotional well-being. And while many victims may not notice that an officer's BWC is recording, for some victims the camera's presence may compound their distress. These victims may shut down and refuse to speak at all to an officer who is recording. Additionally, a victim's personal safety strategy — to later deny or minimize to her abuser what was said to the police — may no longer work when everything said to police will be captured on video and turned over to the abuser in discovery. Detailed policy guidance and training on the use of BWCs can help address some of these issues. A good video does not obviate the need to engage, support, and listen to the victim; police and prosecutors should be careful not to allow the video to substitute for a carefully implemented victim-centered response.

POLICY CONSIDERATIONS

Many jurisdictions have deployed body-worn cameras and many more are investigating their use, but not all jurisdictions have detailed policy guidance on the use of this equipment. The departments that have put together policies on BWCs generally have not considered the unique situations faced by victims of violence against women. For example, some departments do not require that officers advise individuals that they are being recorded. Other departments require such an advisory at the time of any responsive police-citizen encounter or investigation. Some have exceptions for situations in which notice is not practicable or permit officers to use their discretion as to notification.³ And still others require affirmative consent from the victim to be recorded.⁴ Each jurisdiction should contemplate what level of notice or consent is appropriate for their BWC policy.

Many policies also do not address when BWCs can or should be deactivated. Some policies call for deactivation in any constitutionally-protected area, or where there might be an expectation of privacy, such as a private residence.⁵ Exceptions would include the execution of search warrants, exigent circumstances, where there are specific public safety concerns, or when the affected subject has affirmatively consented.⁶ As with the plain-view doctrine,⁷ when an officer has the right to be present, constitutional concerns should be alleviated. The BWC is essentially a technical tool for recording the officer's observations. But even where an officer has authority to be present there will be situations in which propriety and privacy would require deactivation. These would include response in certain sensitive areas such as bathrooms, locker rooms, or health-care facilities.⁸ Generally, recording in a hospital setting could implicate patient privacy laws such as the Health Insurance Portability and Accountability Act (HIPAA).⁹

Any time a recording is terminated, for even the best of reasons, there is a risk of allegation that the camera was deactivated to conceal police misconduct or impropriety. To forestall such allegations, an officer deactivating the BWC for any reason should announce, on camera, that the recording is being terminated and why. When the termination is in accordance with departmental policy, accusations of wrongdoing become less potent and more defensible in court. Additional safeguards by departments, such as ongoing random-sample review of BWC recordings, can assure factfinders—and the public—that the department does monitor recordings for indications of officer misconduct.

An examination of existing statutes and case law related to police dash-cam video and privacy issues may be helpful. Many states have laws governing when and how police may make such recordings, and how they may be used. Some states may already have laws related specifically to body-worn cameras as well. In 2016, Florida, Minnesota, and New Hampshire all enacted legislation related to the use and release of BWC video.¹⁰ Victims' rights laws and legislation related to privacy in general, as well as laws governing preservation of evidence¹¹ and public records requests, may be implicated by policy relating to BWCs. For example, jurisdictions with permissive public records law may want to exercise special caution in the use of BWCs during officer interaction with victims if there is a possibility that such recordings, or portions thereof, would be subject to disclosure in response to a public records request. In states without existing legislative or judicial guidance as to the release

of official recordings, legislation and protocols to protect victim safety and privacy may be a matter of some urgency.

It is also important to consider what the officer's response should be if a victim asks that the camera be turned off. Where the policy requires that the camera remain on during conversations with the victim, the officer's response might be that departmental policy requires that it remain on, just as it requires him or her to wear a gun or other pieces of police equipment. An alternative policy might be to promote victim autonomy by accommodating the victim's request not to be recorded in order to move the investigation forward.

Departmental policies should thoughtfully reflect the reality that many offenders in these cases are determined and creative, and thrive on terrorizing their victims. For example, a stalker might engage in relatively trivial harassment or property damage in hopes that police recordings, disclosed in discovery, will provide a view of the layout of the interior of the victim's home. It is important, therefore, that policies and protocols support victims and do no unintentional harm. Additionally, jurisdictions may want to consider mandatory training of first responders for their engagement with certain specialized victim populations, such as juveniles, people with disabilities, the elderly, immigrants, and the LGBT community. While the policy may be the same with respect to these populations, officer sensitivity to issues faced by some victims can be alleviated through skillful officer interaction and appropriate advocacy. Police departments that employ department-based advocates and work closely with confidential community-based advocates can strategize about the best ways to investigate crimes involving vulnerable populations. Seeking the input of specialized service providers such as adult protective services, child protective services, immigration rights groups, dedicated tribal advocates, LGBT community groups, and those providing services to persons with disabilities can dramatically improve our ability to collect valuable evidence in an informed way while allaying the fears many of these victims harbor about the criminal justice system.

Special consideration should be given to the advisability of recording any information related to safety. Discussions related to safety planning or to the administration of a lethality assessment instrument¹² should not be recorded, or at the very least should be redacted prior to discovery. Any conversation between the victim and an advocate should not be recorded, whether at the scene of the crime or at some other setting such as a hospital. Recording such conversations could compromise victim safety and confidentiality.¹³

PROSECUTION CONCERNS

Prosecutors in jurisdictions using BWCs should anticipate additional workload. Each recording in a case will need to be carefully reviewed and potentially redacted to eliminate certain personal identifying information of victims and witnesses that may have been captured. If multiple officers responded to a scene, each recording must be reviewed, redacted, and provided in discovery, though the original unredacted video must be preserved. This time-consuming, technical work may require an office to purchase appropriate video editing software or equipment. Additionally, video provided in discovery should be routinely governed by a protective order that prohibits its further dissemination by the defense and prohibits defense counsel from providing the defendant with a copy. *Pro se* defendants may be permitted to privately view, but not keep, a copy of the recording. Video provided in discovery should be copied to a physical disc, rather than emailed or shared via file sharing services, to maximize security and accountability should a video become public.

As BWC usage becomes commonplace, prosecutors should anticipate defense strategies related to failure to record an encounter or statement. There will obviously be cases where the camera malfunctions and fails to record, an officer inadvertently fails to activate the camera, or a recording is lost or mistakenly erased. These situations might raise suspicions or give rise to accusations of wrongdoing on the part of the police. Such errors are not a basis for dismissing a case; rather, they are akin to other errors resulting in failure to collect evidence or loss of evidence. The defense may, however, request that the jury receive an instruction that they may draw an adverse inference from the error. Such instructions should be vigorously opposed in the absence of court rule, statute, or case law mandating such an instruction. The de-

fense may, however, properly argue such an inference in summation, just as it could argue any other absence of evidence as a basis for finding reasonable doubt. Written policies on equipment malfunctions, activation or deactivation of cameras, and preservation of recordings, along with data collection of malfunctions or errors, can help to alleviate suspicions of wrongdoing. Prompt documentation of any malfunction, examination and repair of malfunctioning equipment, and data showing the number of times equipment has malfunctioned or was not activated, along with department-wide data for the incidence of equipment malfunction or non-activation, will promote confidence in officer and departmental integrity.

Additionally, defense attorneys may accuse victims of playing to the camera as BWC use becomes widespread. Is a victim really in an excited state as a result of the domestic or sexual assault or only because the victim knows they are being recorded? Generally, these videos speak for themselves, and any judges or juries will evaluate the victim's demeanor on video as they do with any other recorded evidence, or during trial testimony. And this defense argument could cut both ways, as a defendant captured on video would also be aware of the recording. Another potential problem may arise when BWCs capture victim behavior or demeanor that is a result of abuse or trauma but likely to be misunderstood by a judge or jury. In those situations, the presentation of expert testimony to explain victim behavior or response to trauma may be important to place the behavior in context.¹⁴

Prosecutor's offices may also have to respond to public records requests.¹⁵ Most states include police video recordings in their statutory definition of "public record" but provide for various exemptions to disclosure, as where an investigation could be adversely affected by disclosure or where disclosure could harm an individual.¹⁶ These exemptions are designed to protect case integrity, victim privacy, and the privacy of someone accused of a crime but not yet convicted. In some states, however, there is little legal protection against disclosure of videos. Jurisdictions without clear guidance governing release of police video in response to public records requests may want to consider legislation specifying which, if any, videos should be subject to release and under what circumstances. Retention requirements—based on state law or departmental or prosecutor's office policies—may affect whether a video remains available for disclosure.¹⁷ Typically, any evidence will need to be retained until the case is dismissed or until the defendant has exhausted all appeals. After that time, videos—like other evidence—generally can be safely and securely destroyed in accordance with office policy or state statute. Until evidence has been legally destroyed, it may remain subject to public records requests.

Because there is currently a lack of empirical evidence detailing the impact of BWCs on victims in privacy-sensitive investigations, it is important to monitor the effect these recordings have on victims and on the cases. Collecting and analyzing feedback from all the parties who intersect with victims or cases involving this kind of evidence will help to guide and refine policy. Victims and witnesses can be surveyed, along with allied professionals, including police, prosecutors, advocates, judges, jurors, defense attorneys, police department counsel, and medical professionals.

CONCLUSION

As technology advances and the use of body-worn cameras becomes increasingly prevalent, the effects on victims and on the criminal justice system should become more evident. While video recordings can be an advantage to police and prosecutors, indiscriminate use of BWCs may have unintended adverse effects on victims and witnesses, ranging from loss of privacy to emotional trauma and potentially, as in the case of the sophisticated stalker, physical harm. The safety of victims, witnesses, and officers should always be paramount in policy-making. By carefully considering all the ways body-worn cameras impact the system and those involved in a case, we can make effective use of this persuasive evidence while at the same time maximizing the safety of everyone involved. Development or refinement of departmental policy on this evolving technology must be a collaborative effort, involving all of the key stakeholders, to ensure that the policy is comprehensive and responsive to officer safety and accountability as well as victim safety and privacy.

ENDNOTES

- 1 John Wilkinson is an Attorney Advisor at AEQUITAS. The author wishes to acknowledge the contributions of participants at the International Association of Chiefs of Police Body-Worn Camera Forum in February 2016, as well as the contributions of AEQUITAS' Attorney Advisor Teri Garvey and Associate Attorney Advisor Mary Katherine Burke.
- 2 541 U.S. 36, 124 S.Ct. 1354 (2004), addresses the admissibility of out-of-court statements from a non-testifying witness based upon an accused's Sixth Amendment right to confrontation. For an in-depth discussion of *Crawford* issues, please refer to AEQUITAS, THE PROSECUTORS' RESOURCE ON CRAWFORD AND ITS PROGENY (2012), available at www.aequitasresource.org/library.cfm.
- 3 California, Florida, Georgia, Illinois, Massachusetts, Maryland, Michigan, Montana, Nevada, New Hampshire, Oregon, Pennsylvania, and Washington require all parties to consent to police body-worn camera recordings and police photography. See *Police Worn Cameras, Where Your State Stands, State by State Breakdown*, URBAN INSTITUTE (Jan. 1, 2017), <http://apps.urban.org/features/body-camera>. In regard to other recordings (i.e., those that do not involve police body-worn cameras), California, Florida, Illinois, Maryland, Massachusetts, Nevada, New Hampshire, Pennsylvania, and Washington require two parties to consent to recordings, whereas Georgia and Oregon require only one party's consent to conduct a recording.
- 4 In New Hampshire, an individual has the statutory right to not be recorded by police body-worn cameras, and "officers shall inform an individual of this option. If a citizen then declines to be recorded, the officer shall deactivate the audio and video functions[.]" and the officer must document the reason in the associated police report. Use of Body-Worn Cameras, N.H. REV. STAT. § 105-D:2.V.
- 5 Many states prohibit the audio or oral recording of individuals who have a justified expectation of privacy. See URBAN INSTITUTE, *supra* note 3. Some states have proposed legislation to require law enforcement officers to turn off their body-worn cameras in areas that raise privacy concerns (see Mississippi's proposed Police Safety Act of 2016, H.B. 669, Reg. Sess. (Miss. 2016), which includes provisions to exclude recordings in private residences without a warrant), but more local jurisdictions are addressing these issues in their police department's internal policies on body-worn cameras. See, e.g., *San Jose Police Department Body Worn Camera Policy*, SAN JOSE POLICE DEPARTMENT, http://www.sjpd.org/InsideSjpd/BodyCameras/BWC_Policy.html (last visited Jan. 26, 2017); MARYNELL REGAN, MILWAUKEE POLICE DEPARTMENT, MPD BODY WORN CAMERA FAQ (Oct. 15, 2015), https://city.milwaukee.gov/ImageLibrary/User/jkamme/FirePoliceComm/MPDBodyWornCameras_FAQ.pdf. For updates on states' pending body-worn camera legislation, see *State Law Enforcement Body Camera Policies*, ELECTRONIC PRIVACY INFORMATION CENTER, <https://epic.org/state-policy/police-cams/> (last visited Jan. 18, 2017).
- 6 URBAN INSTITUTE, *supra* note 3.
- 7 The "plain view doctrine" is an exception to the warrant requirement under the Fourth Amendment's protection from unreasonable searches and seizures. The plain view doctrine provides a justification for law enforcement officers to make a warrantless seizure of contraband items found in plain view that were not the objective of the initial lawful warrant. See 1 Wayne R. LaFare, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.2(a) (2d ed. 1987).
- 8 All but nine states have regulations requiring law enforcement officers to stop video recording in areas where there is a justifiable expectation of privacy. See URBAN INSTITUTE, *supra* note 3.
- 9 HIPAA protects access to patient records and information. 42 U.S.C.A. § 201. Body-worn camera recordings could potentially run afoul of Wrongful Disclosure of Individually Identifiable Health Information, 42 U.S.C.A. § 1320d-6 under HIPAA, which states no person may unlawfully divulge individually identifiable health information that: "(1) uses or causes to be used a unique health identifier; (2) obtains individually identifiable health information relating to an individual; or (3) discloses individually identifiable health information to another person."
- 10 See Florida's statute, General exemptions from inspection or copying of public records, FL. STAT. ANN. § 119. 071, which exempts body camera recordings from public records requests if the body camera recording "a. Is taken within the interior of a private residence; b. Is taken within the interior of a facility that offers health care, mental health care, or social services; or c. Is taken in a place that a reasonable person would expect to be private[.]" Minnesota's statute, Portable Recording Systems, MINN. STAT. ANN. § 13.825, which regulates specific circumstances under which portable recording systems are to be released to the public and how long recordings will be retained; and New Hampshire's statute, Use of Body Worn Cameras, N.H. REV. STAT. § 105-D:2, which limits the use of the recordings for "law enforcement purposes" only, and limits the release of video to the public if there was use of force by an officer, the discharge of a gun, or "an encounter that results in an arrest for a felony-level offense."
- 11 See the discussion on the retention of non-evidentiary recordings in *Police Body Camera Policies: Retention and Release*, THE BRENNAN CENTER (Aug. 3, 2016), <https://www.brennancenter.org/analysis/police-body-camera-policies-retention-and-release>.
- 12 For more information on the lethality assessment process (LAP), see DANGER ASSESSMENT, [HTTPS://WWW.DANGERASSESSMENT.ORG/ABOUT.ASPX](https://www.dangerassessment.org/about.aspx) (last visited Jan. 26, 2017).
- 13 Review your jurisdiction's statutes to determine whether advocates in your state are governed by statutory privilege or confidentiality. See AEQUITAS, VICTIM PRIVILEGE STATUTES BY PRACTITIONER available upon request at <http://www.aequitasresource.org/taRegister.cfm>.
- 14 See JENNIFER LONG, NAT'L DISTRICT ATTORNEYS ASSOC'N, INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR IN SEXUAL AND DOMESTIC VIOLENCE PROSECUTIONS (2007), http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf; AEQUITAS' CASE LAW DIGEST: EXPERT TESTIMONY ON VICTIM BEHAVIOR, available upon request at <http://www.aequitasresource.org/taRegister.cfm>. For guidance on introducing expert testimony on victim behavior, please contact AEQUITAS at 202-558-0040 or send an email to TA@aequitasresource.org.

15 Commonly referred to as “The Freedom of Information Act,” Public Information, agency rules, opinions, orders, records, and proceedings, 5 U.S.C.A. § 552, is a federal law that allows for the full or partial disclosure of previously unreleased information and documents controlled by the United States government. States have their own statutes and policies on the release of documents within the state’s control.

16 Sophie Merguia, *Most States Set Privacy Restrictions on Body Cam Video*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (June 29, 2016), <https://www.rcfp.org/browse-media-law-resources/news/more-states-set-privacy-restrictions-bodycam-video>. See, e.g., N.D. CENT. CODE § 44-04-18.7 (exempting any recording by a law enforcement officer or firefighter taken in “a private place” from public disclosure).

17 THE BRENNAN CENTER, *supra* note 12.

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