



**Police Body Cameras in Domestic and Sexual Assault Investigations:
Considerations and Unanswered Questions**

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INTRODUCTION

Over the last several years, as the public demand for law enforcement's use of body cameras has increased dramatically, much has been written about body cameras as a law enforcement tool, including constitutional analyses, recommended protocols and procedures and even assessments of differing body camera models. Communities in the United Kingdom and United States have initiated pilot programs to determine the appropriate and most effective use of body cameras by policing agencies.¹ Research regarding how body cameras are used, in what situations and their effect, if any, on law enforcement response and citizen behavior, however, remains very limited.² "There remains insufficient empirical research to fully support or refute many of the claims made about the police body-worn cameras."³

If research on body camera programs in general is limited, the use of body cameras when responding to and investigating cases of domestic violence and sexual assault is almost non-existent. In the few articles and studies that even mention body cameras in the context of law

¹ Such communities have included Ft. Worth, TX, Milwaukee, WI, Phoenix, AZ, and Rialto, CA, as well as Essex, United Kingdom; Isle of Wight, Hampshire, United Kingdom; Paisley and Aberdeen, Scotland, United Kingdom; and Renfrewshire, Northfield and Mastarck, Scotland, United Kingdom. However, only a limited number of these communities included a research or assessment component as part of their body camera program.

² Drover, P. and Arial, B., "Leading an Experiment in Policy Body-Worn Video Cameras," 25 Int'l Crim. Justice Rev. 80, Georgia State University, 2015; Ellis *et al.*, "Operation Hyperion Body Worn Video: Evaluation of the Introduction of Personal Issue Body Worn Video Cameras on the Isle of Wight, Final Report to Hampshire Constabulary," University of Portsmouth Institute of Criminal Justice Studies (UK), Feb. 2015; Jennings *et al.*, "Cops and Cameras: Officer Perceptions of the Use of Body-Worn Cameras in Law Enforcement," 42 J. Crim. Justice 549, 2014; Katz *et al.*, "Evaluating the Impact of Officer Worn Body Cameras in the Phoenix Police Department," Center for Violence Prevention and Community Safety, Arizona State University, Dec. 2014; Laing, J. and Topping, N., "Strathclyde Police and Grampian Police Body Worn Video," HM Inspectorate of Constabulary for Scotland, May 2012; ODS Consulting, "Body Worn Video Projects in Paisley and Aberdeen: Self-Evaluation," July, 2011 (hereinafter, "Paisley and Aberdeen"); Owens *et al.*, "The Essex Body Worn Video Trial: The Impact of Body Worn Video on Criminal Justice Outcomes of Domestic Abuse Incidents," College of Policing (UK), Oct. 2014 (hereinafter, "The Essex Trial") (this study, however, did not include any information about use of the video at trial, impact on final case resolution or victim assessment of the use of such video). The vast majority of these studies focus on and survey law enforcement officers involved in pilot programs regarding their use/nonuse of body cameras, as well as assessing the various models available and the financial costs of such programs.

³ The Constitution Project Committee on Policing Reforms, "The Use of Body-Worn Cameras by Law Enforcement: Guidelines for Use and Background Paper," The Constitution Project, p. 5, Jan. 2015 (hereinafter, TCP Guidelines).

enforcement response to domestic violence and sexual assault, such references carry the connotation of being afterthoughts, tagged on to a larger argument or recommendation as a means of further support.⁴ This paper identifies and addresses the various issues – those known and unresolved – that may arise when law enforcement equipped with body cameras respond to victims of domestic violence and sexual assault, including issues of privacy and confidentiality, witness intimidation, possible evidentiary challenges when using body camera footage in trial, and unintended consequences such access and use may create for victims.

ISSUES OF PRIVACY AND CONFIDENTIALITY

It is a long-recognized constitutional principle that individuals in their own homes have greater privacy rights than when such individuals are on the public streets.⁵ Unlike dashboard cameras, which have been utilized for years by law enforcement, body cameras capture visual footage from inside an individual's home, rather than what occurs in front of a squad car in a public location. Furthermore, unlike the body microphones which many law enforcement agencies use, body cameras capture both visual and audio documentation. The ability to capture those visual images, inside an individual's home, is inherently more intrusive than other police investigative techniques. While body camera proponents laud the technology's ability to capture those visual and audio images of suspects and victims at the scene at the time of the crime, such cameras also present the significant likelihood of recording others at the scene, such as children or bystanders. Under currently recommended policies and practices, it is unclear how such

⁴ In the rare studies that have looked at the use of body cameras in domestic violence cases, the case numbers have been too few to allow any real conclusions to be made. In addition, the timing of these studies has been too short to follow and assess the outcomes of such cases and measure the effect, quantitatively or qualitatively, that the availability of body camera footage had. See, "The Essex Trial," *supra* n. 4 @1; "Paisley and Aberdeen," *supra* n. 4 @7; White, M., "Police Officer Body-Worn Cameras: Assessing the Evidence," Office of Community Oriented Policing Services, Washington, D.C., p. 7, 2014 (hereinafter, White Assessing the Evidence).

⁵ See *e.g.*, *Katz v. U.S.*, 389 U.S. 347 (1967).

individuals and their privacy rights will be protected, or if they even have the right or opportunity to dictate what is recorded or shared with the public.⁶ It is also important to note that, when police respond to a home on a domestic violence or sexual assault call, the circumstances are – at the very least – possibly embarrassing for the individuals involved and potentially chaotic and life-threatening.⁷ Officers may encounter victims, suspects and others who are belligerent and defiant, inebriated or otherwise incapacitated, and even individuals lacking basic clothing. When seeking police help, a victim will certainly know and expect that responding officers may witness such things, but that victim will have little expectation that their current appearance and behavior will eventually be available for public consumption when those officers utilize body cameras.

Law enforcement’s use of body cameras when responding to calls in domestic violence and sexual assault cases, however, has the potential to implicate more than general privacy rights of victims and other witnesses. Many communities across the country have developed partnerships between law enforcement and advocacy programs⁸ to connect victims of domestic and sexual assault to advocates in the aftermath of an incident. This contact includes phone calls to a local hotline after a domestic assault,⁹ advocates meeting victims at hospitals,¹⁰ as well as

⁶ Many policies suggest procedures for departments to follow when seeking permission to continue recording at the scene or regarding public access to such recordings later; however, these contemplate only a suspect and/or victim having the option of recording or of denying release of footage later. See *e.g.*, Stanley, J., “Police Body-Mounted Cameras: With Right Policies in Place, A Win for All,” Am. Civil Liberties Union, Oct. 2013 (hereinafter, Stanley, Right Policies); TCP Guidelines, *supra* n. 5; Ill. Laws, Art. 10, §10-20(b)(1)(2014).

⁷ Certainly for victims of sexual assault, these concerns are likely to be even more acute and urgent. See, <http://www.theatlantic.com/national/archive/2015/02/who-should-get-to-see-the-video-from-police-bodycams>.

⁸ Best practices for such a program highly encourage that advocacy programs involved in such “on-scene” partnerships be community-based programs, rather than advocates from law enforcement or prosecution offices, to ensure the provision and protection of confidentiality to victims.

⁹ See *e.g.*, Maryland Lethality Assessment Program (LAP), www.mnadv.org/lethality; Jeanne Geiger Domestic Violence High Risk Team Model, www.jeannegeigercrisiscenter.org/domestic-violence-high-risk-team-model.

advocates meeting the victim at her home once police have secured the scene.¹¹ The vast majority of states have granted these communications between victims and such advocates the protection of confidentiality – absent the victim’s permission, an advocate cannot share any information learned during a communication with that victim.¹² The use of body cameras in these contexts, however, runs the very real risk of inadvertently capturing portions of those communications as well as the specific identities of responding advocates if the officer is physically close enough for the camera to capture audio and video. Victims of domestic and sexual assaults often share more information with these confidential advocates than with law enforcement, at least initially.¹³ If such protected conversations are recorded by the body cameras, there is a real danger that the confidentiality provisions will no longer apply with the presence, albeit unintentional, of a third party. It is vital, therefore, that law enforcement and advocates establish protocols that comply with recording requirements, while still providing as much protection to these confidential communications as possible.

Law enforcement also needs to recognize other privileged or confidential communications can be compromised by the use of body cameras during investigations.

¹⁰ For many years, rape crisis advocates and volunteers have accompanied or met rape victims at hospitals and police departments to provide support, information and other resources during interviews and forensic examinations. For more information, see National Sexual Violence Resource Center (NSVRC), www.nsvrc.org/projects/sexual-assault-response-teams-sart-0.

¹¹ In several communities across the country, local community-based advocacy agencies have developed on-call advocate programs, in which an advocate is called to meet with a victim at the scene of an incident or other safe place immediately after the incident. See *e.g.*, Crisis Intervention Service, Mason City, IA, and Community Alliance Against Family Abuse, Apache Junction, AZ. (Contact information on file with author.)

¹² National Center on Protection Orders and Full Faith and Credit (NCPOFFC), “Advocate Confidentiality Statutes,” Jan. 2014 (www.bwjp.org/resource-center/resource-results/advocate-confidentiality-statutes).

¹³ The reasons for this are varied and numerous, but can include a mistrust of law enforcement or a fear that the responding officer will not believe their descriptions of the incident. See *e.g.*, Logan, TK and Valente, R., “Who Will Help Me? Domestic Violence Survivors Speak Out About Law Enforcement Responses,” National Domestic Violence Hotline (NDVH), Washington, D.C., 2015 (<http://www.thehotline.org/resources/law-enforcement-responses>).

Domestic and sexual assault incidents often involve the need for medical attention, for one or more of the individuals involved. This medical response may include paramedics responding to the scene or law enforcement taking or meeting a victim at a hospital or other medical facility. Each of these situations presents the risk of a police body camera capturing information that would be considered protected by a medical privilege.¹⁴ In addition, if body cameras remain in record mode while law enforcement are in a medical setting, there is the risk of capturing images and private medical information on anyone seeking their own assistance at an emergency room or hospital. As with advocates, it is important that any law enforcement body camera protocol make provisions to prevent even the inadvertent recording of medical information of victims and others that is protected as privileged.

ACCESS TO BODY CAMERA FOOTAGE

Access to recorded body camera footage has been one of the main rallying cries for proponents of their use, arguing that public access to recorded police action is vital to maintaining accountability.¹⁵ Certainly, the increasing prevalence of cameras and recording technology – and the publication of such footage – has generated vital public awareness and discourse on issues of police use and misuse of force, however this has mostly relied upon random citizen recording and distribution to news agencies or online. In communities that are currently using or experimenting with body cameras, the policies on access vary considerably. Recordings deemed “investigative” or “personnel” matters are rarely released, or only released

¹⁴ States afford varying degrees of protection to doctor-patient communications that can limit or prohibit the sharing of information without the patient’s consent. See e.g., CA Code §912; IA Code §622.10; MN Stat. §595.02; TX R.Evid. 509.

¹⁵ See e.g., No author, “Developments in the Law – Policing, Chapter 4: Considering Policy Body Cameras,” 128 Harv.L.Rev. 1794 (2015) (hereinafter Harvard, Body Cameras); Miller, L., Toliver, J. and Police Executive Research Forum (PERF), “Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned,” Office of Community Oriented Policing Services, 2014; Stanley, Right Policies, *supra* n. 8; TCP Guidelines, *supra* n. 5.

upon completion of a criminal case.¹⁶ In cases with officer-involved use of force or discharge of service weapons, departments may release such footage on their own or in response to media and public requests.¹⁷ In fact, the Seattle Police Department has opted to create its own online channel where all body camera footage is posted, with certain images blurred and/or information redacted.¹⁸

Concerns about the release of body camera footage are also varied. Many police and prosecutors fear compromising their cases or tainting potential jurors if such video is publicly released.¹⁹ Very often, individuals who are recorded by body cameras do not want their images or information made available to the general public. Public release of such footage also imposes a tremendous resource burden on law enforcement agencies, especially in large jurisdictions with hundreds of officers utilizing body cameras.²⁰ Particular footage must be located in safe storage and reviewed, legal determinations as to the appropriateness of release may be needed, notices to some or all individuals recorded may be required, redactions and other privacy protections applied to the specific footage before it is provided to the requesting individual.

For victims of domestic and sexual assault, this question of who can have access to – and to how much of – a recorded incident presents heightened and even unique concerns, specifically how offenders and other state agencies may use or misuse information obtained from such

¹⁶ See *e.g.*, Harvard, *Body Cameras*, *supra* n. 17; TCP Guidelines, *supra* n. 5 @ 10. Such disclosures will also be subject to a state's open records laws, regulations and legal interpretations.

¹⁷ This has been seen most recently in the Chicago case of the young black man, Laquan McDonald, fired upon by officers in 2014, and the later release of recorded footage in November 2015 after a protracted FOIA request.

¹⁸ <http://www.spokesman.com/stories/2014/dec/07/body-camera-use-abuts-privacy-issues>.

¹⁹ See *e.g.*, www.latimes.com/local/lanow/la-me-ln-garcetti-lapd-body-camera-policy-aclu-20150904-story (article discussing the policy of the Los Angeles Police Department not to release any body camera footage to the public and reasons for their position).

²⁰ See *e.g.*, TCP Guidelines, *supra* n. 5 @ 8; The Urban Institute, "Evaluating the Impact of Police Body Cameras," online moderated discussion, Aug. 5, 2015; White, *Assessing the Evidence*, *supra* n. 6 @ 30-34.

footage. Upon arrest, studies and anecdotal evidence have shown the increased risk that domestic violence victims face of intimidation and coercion from offenders.²¹ As part of the criminal case process, offenders will at least be able to view body camera footage that prosecutors intend to use to prove the charges. Unfortunately, that allows the offender to see and hear exactly what a victim has told police, making victims more vulnerable to retaliation.²² Offenders will also have the chance to see and identify any other witnesses and what they said to police, potentially increasing their risk of coercion or intimidation as well. It can be hoped that defense attorneys and courts will seek to limit these dangers by allowing offenders to view such footage, but not have their own copies. This, however, raises the additional risks posed when a defendant represents himself and thus has physical possession of such footage. Absent any restrictions imposed as part of a criminal case, there is nothing that would prevent an offender from posting body camera footage online or emailing it to others in an attempt to embarrass or frighten a victim. One can envision many scenarios involving the potentially devastating use of such recordings:

- Sharing video with child protection services or a custody evaluator in an effort to discredit the victim or to argue against child custody with victim;

²¹ See, Bonomi A. *et al.*, "'Meet me at the hill where we used to park:' Interpersonal Processes Associated with Victim Recantation," 73 Soc.Sci. & Med. 1054 (2011); Dedel, K., "Witness Intimidation," Office of Community Oriented Policing Services, July 2006; Garvey, T., "Witness Intimidation: Meeting the Challenge," AEquitas: The Prosecutors' Resource on Violence Against Women, 2013; Martinson, R. and Barnes, G., "Improving the Justice System Response to Witness Intimidation, Pilot Project Report: Duluth, MN," AEquitas: The Prosecutors' Resource on Violence Against Women, 2011; Martinson, R. and Belgum-Gabbert, M., "Improving the Justice System Response to Witness Intimidation, Pilot Project Report: Knoxville, TN." AEquitas: The Prosecutors' Resource on Violence Against Women, 2011; Martinson, R. *et al.*, "Improving the Justice System Response to Witness Intimidation, Pilot Project Report: San Diego, CA," AEquitas: The Prosecutors' Resource on Violence Against Women, 2012; Murphy Healey, K., "Victim and Witness Intimidation: New Developments and Emerging Responses," Nat'l Inst. of Justice, Research and Action, Oct. 1995.

²² *Id.*

- Sharing video with a victim's employer, especially if it depicts embarrassing images or information that may endanger her employment;
- Sharing video online or on social media in an attempt to embarrass the victim and alienate her further from friends or family; or
- Sharing the video with a victim's probation officer in an effort to implicate her in possible probation violations.

Once released outside of or after a criminal case is concluded or dismissed, there is little control that the victim or anyone can have on what an offender chooses to do with such footage in his possession. Thus, the body camera video, intended to help law enforcement and prosecution improve their ability to hold an offender accountable for his abuse, may likely become an additional tool of that abuse.

EVIDENTIARY CHALLENGES

The challenges and questions presented by the use of body cameras do not stop with law enforcement agencies. Clearly, footage from body cameras can provide prosecutors with powerful evidence of the actions and statements of both offenders and victims and the scene of the incident, in ways that written descriptions or still photographs cannot equate. There are several issues that present implications for prosecutors and courts when addressing the evidentiary use of body camera footage. First, as with other physical evidence, like photographs, prosecutors will need to lay the proper foundation in order for body camera video to be admitted. While potentially similar to the standards and arguments presented when entering dash-cam video into evidence, the body camera footage creates additional questions regarding chain of

custody; recordings are kept on agency servers or cloud servers and an administrator will be required to testify as to the technology and process of collecting, identifying and copying such video footage, and specifically to protections from even inadvertent changes or destruction.

In addition, courts and prosecutors will have to determine other evidentiary standards to utilize when video from body cameras is to be introduced at trial. This will include inferences that a jury can make about certain evidence and needed jury instructions. For example:

- What if there is no recording or only a partial recording due to a malfunction in the camera or the capture and copying of the incident's video? Will this weigh against the prosecution's case? Will there be a presumption of bad faith on the part of the responding officer?
- What if a victim requests that an officer cease recording in the midst of an incident? What inferences, if any, will juries be allowed to make about the investigation or the victim's credibility?
- What if there are multiple responding officers all with their own body cameras recording the incident? Will the prosecution be required to produce all of those recordings? What instructions will be provided to a jury if only one or several of such recordings are introduced as evidence?
- What weight will the jury be permitted to give body camera footage as compared to other evidence, such as witness testimony, photographs or a defendant's later statements?

These questions demonstrate that such video evidence may be seen as “objective,” but it clearly may not be comprehensive.²³ Cameras may fail, human error is always possible, and there is a limited field of vision available in recordings. As with current methods and tools of investigation, the context surrounding a recorded incident is critical. It is vital that neither law enforcement, prosecutors, courts nor juries view the presence of body camera footage as the penultimate evidence of what happened during a domestic or sexual assault incident. Such recordings cannot replace a thorough and comprehensive investigation that includes full officer reports, written statements of victims and witnesses, physical evidence including photographs, torn clothing or damaged property, along with ongoing monitoring of offenders’ actions to identify any intimidation or coercion tactics pending trial.

Furthermore, the use of body cameras by first responders, but most importantly by follow-up investigators, might also conflict with the growing body of research and knowledge of the effects that trauma – specifically the trauma of interpersonal violence and sexual assault – has on victims. While a full discussion on this issue is beyond the scope of this paper, it is essential to know that research has clearly shown that a traumatic event itself impacts the brain, effectively shutting down cognition and leaving the more primitive mid-brain and brainstem to experience and record the event. As explained by Russell Strand, current chief of the Family Advocacy Law Enforcement Training Division at the U.S. Army Military Police School, “While the more primitive portions of the brain are generally very good at recording experiential and sensory information, they do not do very well at recording the type of information law enforcement professionals have been trained to obtain i.e., the ‘who, what, when, where, why,

²³ Harvard, *Body Cameras*, *supra* n. 17, fn 119.

and how.’”²⁴ Law enforcement and prosecution have seen this numerous times when dealing with victims of trauma; many trauma victims are unable to accurately provide the factual, cognitive information, and, when asked to do so, often inadvertently provide inaccurate information. This situation creates a difficult balancing for law enforcement, prosecutors and victims.

- How far into an investigation should an officer record a victim’s descriptions on the body camera?²⁵ Should follow-up investigators use body cameras when interviewing victims of domestic and sexual assault? Should such investigators have different protocols about the use or stopping of any recording at this later stage?
- How will prosecutors be prepared to response to the readily available defense challenges to a victim’s credibility, when a body camera video demonstrates incomplete or inaccurate information in the victim’s descriptions?
- If law enforcement and prosecutors are to acknowledge the importance of being trauma-informed in their work with victims, how will a policy that requires recording of a domestic or sexual assault victim’s every word help or hurt that victim?
- What policies will prosecutors implement so that such footage, again intended to promote offender accountability, does not get used as a weapon against a victim who recants her original descriptions on the witness stand?²⁶

²⁴ BWJP, “Shifting the Paradigm for Investigating Trauma Victimization,” Battered Women’s Justice Project, March 2014 (www.bwjp.org/resource-center/resource-results/shifting-the-paradigm-for-investigating-trauma-victimization).

²⁵ Police and Crime Standards Directorate, Guidance for the Police Use of Body-Worn Video Devices, Home Office (UK), 2007 (citing ACPO Guidance on Investigating Serious Sexual Assault Offenses, Checklist 4).

²⁶ During trainings, community site visits and safety assessments, BWJP staff often learn of prosecutor offices that choose to charge victims with contempt for failing to appear for trial as well as charging victims with perjury when they testify in trial and recant their original statements to law enforcement. Information on file with the author.

Finally, the challenges that have continued to hamper domestic and sexual assault investigations and prosecutions still remain, despite the availability of body camera recordings of the incidents. Delayed reporting, incomplete or inadvertently inaccurate descriptions of events, fears of retaliation, and the inability of the criminal system to create long-term windows of safety will limit the willingness of victims to participate at trial. The evidentiary requirements post-*Crawford*²⁷ will still require victim testimony or sufficient investigation and facts to proceed with forfeiture by wrongdoing hearing.²⁸ Clearly, body camera programs cannot and should not replace comprehensive victim engagement practices, by law enforcement and prosecutors. Ongoing contact with victims pending trial and after ensures that victims are informed about the case, have a chance to share their concerns and perhaps be guided to resources to assist them, and can help counteract the coercion and intimidation tactics so often utilized by offenders. While body camera recordings have potential to be a powerful evidentiary tool, there remains much about the criminal system's response to domestic and sexual assault victims that it does, and perhaps cannot, remedy.

CONCLUSION

There is certainly a vital role that body cameras can have in promoting greater police accountability to the communities they seek to protect and serve, especially in communities of

²⁷ See, *Crawford v. Washington*, 541 U.S. 36 (2004)(6th Amendment Confrontation Clause prohibits the use of testimonial hearsay statements at trial unless the declarant is unavailable and defendant has had an opportunity for cross-examination, overturning prior rule of "adequate indicia of reliability" established in *Ohio v. Roberts*, 448 U.S. 56 (1980)); *Davis v. Washington*, *Hammon v. Indiana*, 547 U.S. 813 (2006)(created the primary purpose test to determine whether out-of-court statements are testimonial or nontestimonial); *Michigan v. Bryant*, 131 S.Ct. 1143 (2011)(primary purpose of interrogation or questioning is determined by the circumstances under which the encounter with law enforcement and declarant occurred and the statements and actions of both the declarant and the interrogators).

²⁸ *Giles v. California*, 128 S.Ct. 2678 (2008) (if defendant causes the declarant to be unavailable to testify, with the intention of preventing such testimony at a future hearing, the defendant has forfeited the right to confrontation and testimonial hearsay may be admissible at trial).

color. As policies for body camera use are created and implemented throughout the country, it is vital that practitioners give significant consideration to the role of such cameras in domestic and sexual assault investigations, including the potential for increased risk to victims. There is such limited research on body camera use by law enforcement, and almost nothing regarding their use in domestic and sexual assault cases. It will be imperative that agencies implementing such programs seek input from such victims – and especially victims from marginalized communities – to identify how this new investigative tool can be beneficial for practitioners AND victims.