Rising From Ferguson: Body Cams to the Rescue?

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Introduction

On December 1, 2014, in the wake of widespread protests and racial unrest following the deaths of Michael Brown in Ferguson, Missouri, Tamir Rice in Cleveland, Ohio, and Eric Garner in Staten Island, New York, President Obama announced a $263 million effort to quiet simmering tensions between law enforcement and communities of color throughout the country.[1] A key component of the plan includes $75 million for the purchase and deployment of 50,000 police body cameras.

The President's announcement signifies that body cameras are here to stay. Well before recent events, several Minnesota police departments were testing and deploying body cameras. Burnsville was the first city to deploy cameras in 2010. Duluth now has 103 patrol officers equipped with mobile video recording devices or "MVRs," making it the single largest user of body cameras in the state. Now Minneapolis – with the largest police force in Minnesota – is field testing 40 cameras, and the city hopes to equip all officers with MVRs by the end of 2015.[2] Several other cities, from Rochester to the Iron Range, are currently testing or deploying body cameras.

Officers in Duluth, Minneapolis, Burnsville and other departments around the country report positive experiences using this new technology. For city attorneys and staff, however, body cameras generate a host of new legal, technical and financial challenges. The Minnesota Legislature has yet to consider amendments to the Minnesota Government Data Practices Act clarifying proper classification of body cam footage obtained by police in a variety of different public and private settings. Given the broader application and reach of body-worn cameras compared to dashboard cams, city attorneys must draft new policies that satisfy a variety of competing interests related to body cam use (evidence preservation, personnel privacy considerations, public access). City and court legal staff are also battling to adapt and stay on top of the tidal wave of new electronic data being created by round-the-clock police use of body cameras. This technology is proving quick to deploy with the assistance of large third-party vendors such as Taser, but city legal staff and courts generally have less funding and resources available to adapt at an equivalent rate of speed.

The purpose of this article is to introduce this significant and rapidly emerging trend, highlight the challenges city attorneys face in implementing body-worn camera programs, and steer readers toward useful resources and sample body cam policies for further study. The law related to body cam use will develop and grow rapidly in the coming years – state legislatures and courts are just beginning to consider the delicate balance between public safety needs and personal privacy rights as it relates to this issue. The only certainty is this: given reports indicating substantial reductions in use-of-force incidents and police complaints following deployment of body cameras, along with the federal government's increased support for their use, body cameras could well be arriving in your jurisdiction soon.

II. The Case For MVRs – Why Police Departments Throughout The Country Are Increasingly Turning To Body Cameras

"Whenever you do a thing, act as if all the world were watching."

–Thomas Jefferson

The import of Jefferson's famous advice is easily understood because it rests on a commonly noted attribute of human behavior – people act better on camera (in other words, they behave better when they think others are watching). Indeed, in one study, simply placing a picture of a pair of eyes on an "hon-

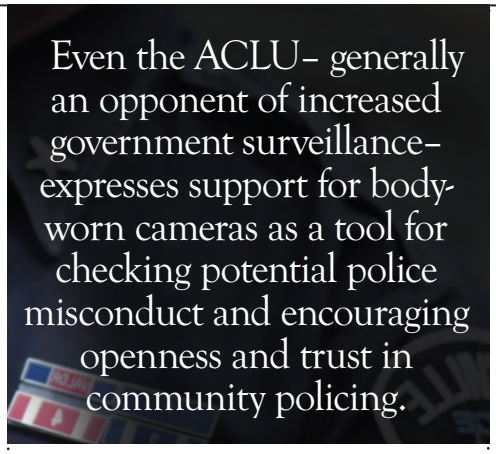
esty box" in a university break room resulted in people unwittingly contributing nearly three times as much for their coffee.[3] Lawyers are acutely aware of this phenomenon. What attorney has not seen another lawyer or witness transform from an ogre into the most charming person in the world upon entrance of the judge or jury?

It is perhaps this trait more than any other that is leading police departments across the country to rapidly test and equip officers with body cameras. The oft-cited 2012 study of the Rialto (California) Police Department found a 60 percent reduction in use-of-force incidents and an 88 percent reduction in citizen complaints following camera deployment.[4] A 2012 pilot program in Mesa, Arizona, reported similar results. Over the course of one year, 50 officers were assigned cameras and another 50 in a control group were not. The two groups were similar in age and race. During the first eight months of deployment, officers without cameras generated almost three times as many citizen complaints. By contrast, officers wearing cameras generated 40 percent fewer total complaints – and 75 percent less use-of-force complaints.[5]

Police chiefs overseeing MVR deployments across the country consistently report that citizen complaints drop significantly following body cam deployment. These chiefs encourage officers to notify citizens as soon as possible that their interactions are being recorded. As one chief put it, "everyone is on their best behavior when the cameras are running. The officers, the public – everyone."[6]

However not everyone is convinced of the efficacy of body cameras. One author concluded that "[t]here is little evidence regarding most of the perceived benefits and drawbacks of the technology . . . little is known about . . . whether the technology increases trust, legitimacy, and transparency of the police."[7] The author concluded that "the privacy implications of body-worn cameras, for both citizens and police officers, are not clearly understood; [d]epartments considering . . cameras should proceed cautiously."

Nevertheless, the bulk of the research and reports agree that body cameras improve police practices, accountability and transparency. Even the ACLU – generally an opponent of increased government surveillance – expresses support for body-worn cameras as a tool for checking potential police misconduct and encouraging openness and trust in community policing. The ACLU urges caution, however, regarding the potential for body cameras to infringe on privacy rights, particularly where officers gather footage following entry into private homes.[8] Such privacy concerns foreshadow the major battle on the horizon as body cam use grows.



III. Data Practices – A Privacy Firestorm Is Approaching

The most serious and pressing issue surrounding MVR deployment in Minnesota--and no doubt around the country--is the question of whether and to what extent state legislatures will craft protections limiting public access to body cam footage. In the wake of recent events in Duluth, the stage has been set for a data practices showdown during the current and next legislative sessions in Minnesota.

At around 4 a.m. on Monday, August 11, 2014, Duluth police officers responded to a report of a domestic disturbance. The city had recently deployed body cameras, and several of the officers were wearing their recorders. On arrival, they found a suicidal man threatening to kill himself. He had cut himself with a large knife and barricaded himself in a room in the home. Officers observed a substantial amount of blood seeping under the door and believed that, if the man did not receive medical attention quickly, he would die. They announced their intention to open the door. A veteran K-9 officer took the lead. As the officer and his K-9 partner entered, he repeatedly ordered the man to drop the knife and attempted to disarm him. The man slashed with the weapon. The officer fired his sidearm twice, then immediately began to render medical assistance. The knife-wielding man survived the incident.

Media immediately requested release of the videos. In light of a notice of potential civil litigation, the city declined to release the videos pursuant to Minnesota's Data Practices Act. The city further noted the unclear classification of the data under state law and the need for further direction from the Department of Administration, the agency responsible for overseeing the Data Practices Act.

On December 16, 2014, Duluth applied to the Department of Administration for temporary classification of body cam data as private or protected nonpublic information until further guidance could be issued by the Legislature. The Department quickly rejected the application and indicated that the Legislature would be the necessary forum to resolve the complex data practices and personal privacy questions presented.

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Police Body Cameras *Cont'd from page 13*

In the wake of the Department's refusal to consider Duluth's application, proper classification of body-camera footage under the Data Practices Act remains in limbo. Certain questions are easy to answer – for example, the identities of undercover officers or informants are always confidential, as are the identities of child victims of abuse. But officers are obtaining footage in a variety of potentially sensitive public and private settings – hospitals, treatment centers, private homes.

As if confusion and uncertainty did not already reign, Duluth and Minneapolis have now received data practices requests for *all* body camera footage in their possession. In Duluth's case, a requestor named "Jah Love" has requested via email "[a]ny and all Duluth Police Department body cam videos." Duluth has had over 100 cameras in the field gathering data around the clock for months. The enormous financial and staff costs and burdens of such broad-reaching requests threaten to sink body-cam programs in Minnesota and around the country before they start. If state legislatures do not act quickly to address classification of data created by this new technology, the debate over the potential benefits of body-worn cameras to improve community policing, transparency and trust will be a moot discussion. Few if any departments will have the resources to satisfy data practices requests, and other departments around the country have already terminated their programs as a result.[9]

It is too early to tell how Minnesota's legislature will address these questions. In the words of Twin Cities media attorney Mark Anfinson, however, it seems clear that the State is in for a "knockdown, drag-out battle at the Capitol." How the Legislature chooses to walk the line between public safety needs and personal privacy rights may well decide whether body cameras become a regular part of community policing throughout Minnesota, or whether MVR use will be limited to a handful of larger departments with the resources to handle the data practices burdens and costs associated with their use.

IV. Policies – Implementing A Body Cam Program

Another challenge facing city attorneys is the need to craft body cam policies that satisfy a variety of competing interests related to body cam use: the evidence preservation needs of prosecutors, defendants, and a city's civil defense team; the rights of the public to certain forms of data; police personnel and privacy needs; technical limitations of body cam systems, etc.

As just one example of the challenges of crafting an effective policy, many proponents of body cameras urge departments to keep cams on at all times to maximize transparency and build trust in community policing. City attorneys are also inclined to advise officers to err on the side of keeping cameras rolling to avoid later claims that key information or evidence is lost or missing (a gift to defense attorneys or plaintiffs in Section 1983 actions).

As a practical matter, however, officers need to retain discretion to start and stop cameras for a variety of reasons in a variety of different settings. Most understand that personnel privacy, department security, and general professional police needs require that cameras stay off inside headquarters, during meetings, bathroom breaks, etc. There are other times when officers, in their discretion or as a mandatory matter of state law, need to turn off cameras, such as when they meet with undercover officers or interview child victims of abuse or assault.

There are also innocent technical challenges associated with keeping cameras on at all times. Creating and storing video footage from department-wide, round-the-clock patrols creates an enormous amount of data that must be stored, categorized, and potentially retrieved at a later date – all of which costs a significant amount of money for data storage or the hiring and training of technical staff. Further, Duluth police are finding that new camera batteries last roughly 10 hours during regular use, meaning most officers need to step away from police work during long shifts to recharge cameras if they are constantly rolling. Accordingly, Duluth's policy – and many of the other policies developed around the country – go to great lengths to provide guidance regarding instances in which cameras should be turned on or off.[10]

Given the relative infancy of body cam use in the field, there is little state statutory or common law guidance regarding "best practices" for body cam policies. Fortunately, the Department of Justice, police advocacy groups, and an increasing number of large police departments around the country have created initial policies to help guide other cities as body-cam use grows. Links to several of these policies are provided at the end of this article.

V. From The Streets To The Stand - Body Cams Take Center Stage

Perhaps even more dramatic than the impact of body cameras on community policing is the potential for body cameras to radically change courtroom dynamics, case presentation, and bottom-line liability for cities.

In recent years, use of technology in the courtroom has increased at a rapid pace. These changes are being fueled by state and federal court efforts to achieve completely electronic case filing and management. Accompanying the push to go paperless, courtrooms are adding the tools necessary to facilitate electronic case presentation. These are not just "feel good" or environmentally friendly changes. Tech evolution in the courtroom is necessary to keep pace with the manner in which most Americans obtain their news and information every day. Fill a jury box in 2015, and it is a safe bet that most of the jurors – of all ages and from the lowest wage earner to the top – are familiar with using an iPhone, iPad or other electronic device to communicate with friends and family, watch their favorite legal drama, upload pictures and videos of grandkids, and so on.

When these jurors arrive at the courthouse to fulfill their civic duty, woe to the lawyer who fails to understand or satisfy their expectation for technically seamless presentation of evidence and exhibits. In February 2013, closing arguments proceeded in the *American Steamship v. Hallet Dock*[11] matter in Duluth – a complex, multi-week federal jury

trial involving the 2009 partial sinking of the 1,000-foot Walter J. McCarthy when it struck submerged debris in the Duluth-Superior Harbor. Lead defense counsel gave a solid closing, periodically using the easel or ELMO to highlight particular points or exhibits.

By contrast, plaintiff's legal team walked the jury through an hour-long, extraordinarily tech savvy and fast-moving PowerPoint presentation that highlighted the key evidence at trial. At first, it seemed as if the judge and jury were ignoring plaintiff's attorney completely, until it became clear that every one of them was glued to the video monitor directly in front of them – one monitor for every two jurors in the box. After a surprisingly short deliberation given the complexity of the case, the jury awarded $4.7 million to the plaintiff.

Like it or not, today's jurors have been groomed to expect electronic case presentation. They will have little patience for attorneys that do not satisfy that expectation, and they will almost certainly trust video they see with their own eyes more than any witness that takes the stand. Enter body cams: most prosecutors and civil attorneys defending Section 1983 or use-of-force claims will tell you that jurors have traditionally given officers the benefit of the doubt except in the most serious cases of police misconduct. Now – it's all about the video. Everyone just wants to see the video and decide for themselves whether a defendant is guilty or an officer crossed the line. The danger with this new evidence is that it is as persuasive and striking as it is incomplete. A video can never capture the totality of the circumstances leading up to or surrounding an event, much less an officer's emotions and perceptions in the heat of the moment.

Moving forward, city attorneys and officers will need to be ready to deal with both the good and the bad of body cam footage in the courtroom. Aside from the necessity of being proficient in presenting relevant video clips, counsel will need to consider the likely reactions and judgments of lay jurors to body cam footage, then be ready to explain or satisfy juror doubts or questions through officer

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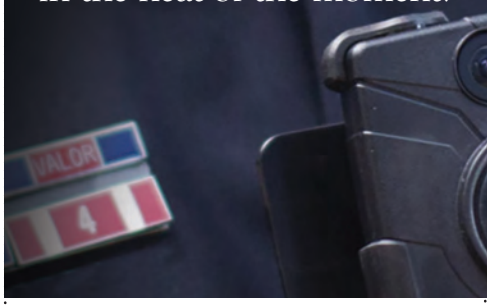

testimony or other supplemental evidence. Video of a police shooting may well come across as shocking, abrupt, excessive or unnecessary based solely on what jurors see in the video. Surrounding events and circumstances will need to be carefully presented to ensure that knee-jerk reactions to videos do not decide cases.

City attorneys and police will also need to be careful to preserve all potentially relevant video evidence – or risk dismissals or spoliation sanctions in civil actions. Certain circumstances may warrant turning off cameras to protect citizen privacy, the identities of undercover officers of internal operations, etc. Such gaps in video footage, however, could prove costly to cities, as opposing counsel may retool their entire strategies to focus solely on what evidence may be missing and why. No matter how innocent, judges or juries could well make cities pay dearly for video evidence they *want* to see, but cannot for whatever reason.

VI. CONCLUSION

Body-worn cameras appear to hold great potential for reducing use-of-force incidents and police complaints while building trust and transparency in community policing. MVR programs could well be buried early by data practices requests and privacy concerns, however, unless legislatures act quickly to classify body cam footage obtained in various public, private and investigative settings. The impact of body cameras on city police and attorney work will evolve quickly in the coming years. Stay tuned for legislative action and court decisions in the coming months. In the meantime, the below resources should prove helpful to city attorneys representing police departments considering body-cam deployment.

VII. ADDITIONAL LINKS & RESOURCES

(Editor's Note: Each of the additional resources referenced by the authors is annexed to the digital version of this article, available to IMLA members at the IMLA Archive www.imla.org/publications/magazine-archives.

Reports and Research

Miller, Lindsay, Jessica Toliver, and Police Executive Research Forum. 2014. *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned* at pp. 5-6, Washington, DC: Office of Community Oriented Policing Services, http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf.

White, Michael D. 2014. *Police Officer Body-Worn Cameras: Assessing the Evidence* at p. 35, Washington, D.C.: Office of Community Oriented Policing Services, https://ojpdiagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf.

Stanley, Jay. October, 2013. *Police Body-Mounted Cameras: With Right Policies in Place, A Win for All*, https://www.aclu.org/files/assets/police_body-mounted_cameras.pdf.

A Primer on Body-Worn Cameras for Law Enforcement, U.S. Dept. of Justice, Office of Justice Programs National Institute of Justice (Sept. 2012), https://www.justnet.org/pdf/00-Body-Worn-Cameras-508.pdf.

Sample Policies

See Duluth Police Department Mobile Video Recorder Policy http://www.duluthmn.gov/media/304979/_duluth_pd_policy_manual.pdf

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Listserv *Cont'd from page 25*

for deer, elk, moose and bear jumping out of the woods every minute. What used to be where I went for a change of scenery will be my home country. The new things and old things were about in even balance, it seemed, as I kept an eye peeled for wildlife, and there appeared to be many coincidences in them. It will be interesting to see what happens next.

I will miss you, my listserv friends. There's a lot we don't know about each other, I suppose, but what we do know we know very well. You have helped me at least as much as I have helped any of you. We have done some good work together.

We work at the place in the machinery of democracy that theories are theories and what works is what works. There is no 'supposed to be' or 'should be.' It is what it is and we either make civilization happen every day, or it doesn't happen. We work on the retail floor of our federal system of government, and we do a mighty fine job of keeping the store stocked, well lit, warm and safe, and keeping the boss out of trouble. We are one of the great bargains in government and we add value to what we touch.

It is an honor to have had the harness on with you. I look forward to walking through this big change – and my new home country – with you.

The job comes with a 4-bedroom parsonage. This is the prettiest corner of the most beautiful region of the grandest run of the Rocky Mountains, with Glacier Park to the north, the Bob Marshall Wilderness to the east and spectacular, freshwater Flathead Lake – 30 miles long, as the crow flies – ringed with cherry orchards, to the south and west. I would have trouble believing my luck – this is so much more wonderful than anything I had dreamed of – if it didn't hurt so much to leave.

I'll keep a light on for you and I will continue to hang out at the Water Cooler. Don't be a stranger. My personal email address, jickaddy@gmail.com, is stable, and the website for the church is http://www.bigforkumc.org/ (Watch for manuscripts and podcasts of sermons and a lot more photos there come this Canada Day).

Now that you know the place, all you have to find is the time. Onward and upward. ML

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See City of Minneapolis Body Camera Statement of Purpose http://www.minneapolismn.gov/www/groups/public/@mpd/documents/webcontent/wcms1p-133495.pdf

See also the website for the Spokane, Washington, Police Department Body Camera Pilot Program, https://beta.spokanecity.org/police/accountability/bodycamera/, which includes links to several additional body camera policies, including those adopted by Seattle, Denver, Phoenix, and Madison, Wisconsin, to name a few.

Notes

1. Trymaine Lee, Zachary Roth and Jane C. Timm, *Obama to announce $75 million for body cameras* (December 1, 2014) AM, updated December 1, 2014, 8:13 PM), http://www.msnbc.com/msnbc/obama-announce-75-million-body-cameras.
2. Trisha Volpe, *Minneapolis police see promise in pilot project to use body cameras* (December 10, 2014), http://www.mprnews.org/story/2014/12/10/mpls-police-body-camera-pilot.
3. Bateson et al., Cues of being watched enhance cooperation in real-world setting, *Biol. Lett.* (2006) 2, 412-414, http://rsbl.royalsocietypublishing.org/content/roybiolett/2/3/412.full.pdf.
4. Miller, Lindsay, Jessica Toliver, and Police Executive Research Forum. 2014. *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned* at pp. 5-6, Washington, DC: Office of Community Oriented Policing Services (available online at: http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf).
5. *Id.* at p. 6.
6. *Id.* at p. 5.
7. White, Michael D. 2014. *Police Officer Body-Worn Cameras: Assessing the Evidence* at p. 35, Washington, D.C.: Office of Community Oriented Policing Services (available online at: https://ojpdiagnostic-center.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf).
8. Stanley, Jay. October, 2013. *Police Body-Mounted Cameras: With Right Policies in Place, A Win for All* (available online at: https://www.aclu.org/files/assets/police_body-mounted_cameras.pdf).
9. *Washington State police overwhelmed by public requests for dash- and body-cam footage*, Homeland Security News Wire (November 27, 2014), http://www.homelandsecuritynewswire.com/dr20141127-washington-state-police-overwhelmed-by-public-requests-for-dash-and-bodycam-footage.
10. *See, e.g.,* DPD Mobile Video Recorder Policy at 419.5.1 - .3 (listing circumstances requiring activation of body cams, cessation of recording, and prohibited recording).
11. American Steamship Co. v. Hallett Dock Co., Civil File No. 09-2628 (MJD/LIB) (D. Minn. 2013). ML

Amicus *Cont'd from page 20*

jectively unreasonable. In other words, is there a subjective component (in this case the Seventh Circuit applied a recklessness test, which is similar to a deliberate indifference test) to excessive force claims under the Fourteenth Amendment or should these claims be analyzed like Fourth Amendment claims brought by arrestees?

This case is of particular importance to local governments given the fact that municipalities run the jail facilities that house pretrial detainees and an objective Fourth Amendment type standard will make it more difficult for correctional officers and local governments to win on summary judgment in Section 1983 cases brought by pre-trial detainees. IMLA has joined an amicus brief that is being filed by the State and Local Legal Center in this case. The brief argues that the Eighth Amendment standard should apply to pre-trial detainees given the practical realities of jails. Specifically, convicted inmates and pre-trial detainees are housed together in correctional facilities and officers often have no way of knowing whether an inmate is convicted or a pretrial detainee. Moreover, it is not feasible for officers to segregate pretrial detainees because of safety concerns and high turnover rates in jails housing pretrial detainees. Having one standard that applies to all inmates, whether convicted or pretrial detainees, provides the greatest level of protection for correctional officers and local governments while still ensuring inmates' constitutional rights are safeguarded. ML