

REGULATING PUBLIC ACCESS TO BODY CAMERA FOOTAGE:  
RESPONSE TO IESHA S. NUNES, “HANDS UP, DON’T SHOOT”

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INTRODUCTION

Iesha Nunes argues that police should be required to wear body cameras.<sup>1</sup> Use of body cameras would provide judges or juries proof of police abuses, or may even deter police misconduct from occurring in the first place. Nunes suggests that had police in Los Angeles worn body cameras they might not have beaten Rodney King and sparked riots;<sup>2</sup> and if the grand jury reviewing police use of force on Eric Garner had access to footage from a body camera, rather than amateur video, they might have been able to find probable cause to charge the officer involved.<sup>3</sup> For many criminal cases the only available evidence is eyewitness testimony, which can be unreliable.<sup>4</sup> “What better way,” asks Nunes, “is there to support or refute eyewitness testimony than to play a recording of an event from a body camera worn by a police officer . . . ?”<sup>5</sup> Nunes proposes that in order for states to receive certain federal funds, police use of body cameras should be required, and recommends that an unbiased group create uniform guidelines for their use.<sup>6</sup>

There is no denying that police use of body cameras could substantially strengthen our ability to protect civil rights and avoid abuses of police power. But as Nunes acknowledges, the widespread use of body cameras must be regulated. In developing policies regarding their use, not only must we keep in mind the obvious advantages they would have in the sorts of cases that have made the national news, but we must consider the implications of their widespread use to record the vast majority of police-citizen encounters. While at one point Nunes implies that we should adopt the use of body cameras regardless of the cost because there is no “monetary value for the protection of a citizen’s right to have a fair and accurate trial,”<sup>7</sup> she ultimately relies on the position that the benefits of using body cameras outweigh the costs.<sup>8</sup> This is a judgment shared by the authors of what I shall refer to as the ‘Rialto’ study—the first

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1. Iesha S. Nunes, Note, “*Hands Up, Don’t Shoot*”: *Police Misconduct and the Need for Body Cameras*, 67 FLA. L. REV. 1811 (2015).

2. *Id.* at 1815–16.

3. *Id.* at 1820–21.

4. *See id.* at 1814 (citing *United States v. Wade*, 388 U.S. 218, 228 (1967)).

5. *Id.* at 1824–25.

6. *Id.* at 1835–36.

7. *Id.* at 1841.

8. *Id.* at 1841–42.

controlled study of the effect of body-worn cameras, the results of which were published in 2015.<sup>9</sup> They estimate the dollar benefit-cost ratio of using these cameras to be 4:1.<sup>10</sup> The main benefit of requiring police to use body cameras is improved conduct on the part of police and citizens, because they will know they are being observed. Nunes refers to U.K. studies purporting to show that public order offenses decreased because the public knew that officers were wearing body cameras.<sup>11</sup> She also refers to a *New York Times* story that reports that the Rialto study found an 88% decline in complaints filed against officers after twelve months of a pilot program in which body cameras were worn.<sup>12</sup>

While I agree with Nunes that having police wear body cameras could do tremendous good, I will emphasize the potential limitations of body cameras and the threats they pose to privacy, particularly in the United States where courts have been reluctant to recognize reasonable expectations of privacy in public places. The concerns I raise are difficult to quantify as a cost that could be inputted into a cost-benefit analysis, but they still should be taken into account as governments develop policies for the use of body cameras.

### I. ARE BODY CAMERAS RELIABLE?

Advocates of police body cameras assume they are reliable and provide objectively true accounts of what took place in police-public encounters that will prove invaluable in protecting civil rights and thereby provide benefits that outweigh the cost to privacy. Nunes notes that advanced cameras have a wide-angle lens, implying that they will capture an entire scene and not just perspectives that support a police officer's version of what took place.<sup>13</sup> Nunes states, “[t]he camera only records

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9. Barak Ariel, William Farrar & Alex Sutherland, *The Effect of Police Body-Worn Cameras on Use of Force and Citizens' Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANTITATIVE CRIMINOLOGY 509 (2015).

10. Ariel, Farrar & Sutherland, *supra* note 9, at 528. The authors, one of whom was Chief of the Rialto police department, studied 988 shifts over one year involving fifty-four police officers in Rialto, California. Roughly half the shifts were required to wear body cameras and the other half—the control—did not wear cameras. The authors found that there were fewer citizen complaints during the year (three, as opposed to twenty-four in a prior year—although two of the three were lodged against officers wearing cameras) and fewer use of force incidents (twenty-five versus fifty-four in a prior year, seventeen of which involved ‘no-camera’ officers and eight of which involved ‘body camera’ officers). *See id.* at 524.

11. *See* Nunes, *supra* note 1, at 1830; *cf.* Paul Drover & Barak Ariel, *Leading an Experiment in Police Body-Worn Video Cameras*, 25 INT'L CRIM. JUST. REV. 80, 89 (2015) (noting a number of instances during a study of body-camera use by police in Wolverhampton, England in which members of the public became less aggressive and resistant when told they were being recorded).

12. Nunes, *supra* note 1, at 1832 & n.186; *see also supra* note 10.

13. *See* Nunes, *supra* note 1, at 1831 (citing TASER Int'l, *TASER AXON Body Camera Comparison*, YOUTUBE (Aug. 1, 2013), <https://www.youtube.com/watch?v=xBx09u2DqXo>).

and reports what happened.”<sup>14</sup> Others who are excited by the potentials of police use of body cameras similarly regard the camera as objective—“a neutral third eye.”<sup>15</sup> Students of film know that directors who control where the camera points can manipulate their audience in subtle ways, though this ability is reduced to a significant degree if the camera angle is wide enough.<sup>16</sup> Still, camera manipulation is a concern that contributed to two Miami-Dade city commissioners disapproving the adoption of body cameras by police on the basis that there might be disputes about ‘camera angles.’<sup>17</sup> A more obvious way a police officer can manipulate what is seen is by covering the lens or turning off the camera when approaching an encounter that the officer anticipates might escalate and lead to the use of force.<sup>18</sup> It would of course look suspicious if officers frequently turned off their cameras or obstructed the lenses. But use-of-force encounters—defined in the Rialto study as physical force greater than ‘compliance holds’, including use of OC spray, baton, Taser, or firearm, or a canine bite<sup>19</sup>—are relatively rare. In the three years prior to the Rialto experiment there were just sixty-five use of force encounters per year by the Rialto police, or a rate of 1.46 per 1000 contacts; during the one year experiment there were just twenty-five.<sup>20</sup> If Rialto’s experiences are typical, then given the relative rarity of these incidents, it might not be difficult for police to ensure the camera is off when they anticipate an incident, and explain it away as an oversight.

We could largely avoid this concern by ensuring that the cameras are not manipulated and are always on when police are ‘active’ (for example, responding to a call, investigating an incident, encountering a member of the public). The architecture of the surveillance system might be modified so that officers had no ability to turn the camera off when active. Or it may be that there would be other incentives to ensure that the cameras were not manipulated. The assumption that the camera is objective and captures the most reliable evidence is likely to lead a jury or judge to have nearly absolute faith in the credibility of video evidence and be reluctant to challenge it. This is a concern similar to one raised by use of DNA

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14. *Id.* at 1833.

15. Ariel, Farrar & Sutherland, *supra* note 9, at 517.

16. See Gabe Moura, *SHOT SIZES: Telling What They See*, ELEMENTS OF CINEMA (June 3, 2014), <http://www.elementsofcinema.com/cinematography/framing-shot-sizes/> (“[F]ilmmaker[s] direct[ ] what the public sees and how.”).

17. See Douglas Hanks, *Miami-Dade OKs Up to \$5 Million for Police Body Cameras*, MIAMI HERALD (June 2, 2015), <http://www.miamiherald.com/news/local/community/miami-dade/article22957272.html>.

18. *Cf.* Ariel, Farrar & Sutherland, *supra* note 9, at 517 (body cameras “can almost guarantee apprehension for socially undesirable behavior, if that behavior is recorded” (emphasis added)).

19. Ariel, Farrar & Sutherland, *supra* note 9, at 521.

20. *Id.* at 523.

evidence: the public has such faith in science that there may be an air of “mystic infallibility” to lab techniques, and juries will take for granted that DNA evidence is reliable even if it is not.<sup>21</sup> The appeal of objective video evidence may be so great that officers’ testimony might be discredited if they failed to record their encounter with the public;<sup>22</sup> and juries may be reluctant to convict if there is no video recording of an arrest and its surrounding circumstances. If police officers care about conviction rates, this would be a powerful incentive for them to ensure that the body camera is on. But this pressure to always record all police-public encounters would only exacerbate legitimate privacy concerns.

## II. PRIVACY AND THE NEED TO REGULATE PUBLIC ACCESS

Crime would certainly decrease if video cameras monitored every conceivable location where a crime might take place. But placing cameras everywhere, including inside peoples’ homes and workplaces, would be an unacceptable breach of privacy and not worth the potential benefit. Even if we accepted the highly questionable proposition that only criminals and not innocent people with nothing to hide can rationally object to having their activities exposed *to the police*, individuals who are not engaged in infamous criminal activity can have a legitimate interest in not having recordings of their activities potentially be in the public record and readily accessible *to everyone*. Even those who committed a minor offense in the past can have an interest in not having information about that offense archived and searchable for the rest of their lives.<sup>23</sup> In fact, the Court of Justice of the European Union ruled that individuals may have a right to have this information deleted from search engine results.<sup>24</sup> The costs to privacy of the police use of body cameras will depend crucially on the extent to which access to the footage is available to the public and news media, and in particular, whether it could be broadcast by a media outlet or uploaded to the Internet and indexed so that it became readily accessible by using a search engine.

Florida Statute § 119.071(2)(1)(2) exempts body camera recordings from public record status if taken in the interior of private residences or in health care and similar facilities or “in a place that a reasonable person

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21. Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CAL. L. REV. 721, 769 (2007).

22. Cf. Ariel, Farrar & Sutherland, *supra* note 9, at 529; Drover & Ariel, *supra* note 11, at 85 (noting the concern that body camera footage would “devalue the evidential weight of an officer’s statement”).

23. For discussion, see MARK TUNICK, BALANCING PRIVACY AND FREE SPEECH: UNWANTED ATTENTION IN THE AGE OF SOCIAL MEDIA 33–37, 195–97 (NY: Routledge, 2015); Mark Tunick, *Privacy and Punishment*, 39 SOC. THEORY & PRAC. 643–68 (2013).

24. Case C-131/12, *Google Inc. v. Agencia Española de Protección de Datos*, 2014 E.C.R. para. 100.

would expect to be private.”<sup>25</sup> If police record an individual in a public place, then the recording may not be exempt, and conceivably could be disclosed.<sup>26</sup> Not only is Nunes not concerned about this possibility; she is concerned that the exemptions to public record status that the statute does create are too restrictive: “[a] large number of police encounters probably occur within these locations, which makes a great many recordings unavailable to the public. This practice defeats the point of using the technology. The recordings must be accessible in order for the positive effects of body cameras to be seen.”<sup>27</sup> Nunes is also critical of the statute’s requirement that agencies retain recordings for just ninety days<sup>28</sup>: “three short months . . . is hardly enough time for the public to properly access and review recordings”;<sup>29</sup> “[i]t is hard to trust a system that makes it difficult for a party to view evidence that she has a right to view.”<sup>30</sup> While Nunes does add that courts should “carefully take the privacy rights of civilians into account,”<sup>31</sup> she dismisses concerns about the potential misuse of video recordings as “negligible.”<sup>32</sup> But given privacy law precedents in the United States, it is doubtful that courts will carefully take privacy into account, particularly when the police record an encounter that occurs in a public place.

Courts in the United States have generally held, both in search and seizure as well as privacy tort cases, that a reasonable person could *not* expect privacy in a public place.<sup>33</sup> In addition, information concerning an individual’s arrest—mistaken or not—is regarded as a public fact,

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25. FLA. STAT. § 119.071(2)(1)(2) (2015).

26. FLA. STAT. § 119.071(2)(1)(4) (2015) says a body camera recording “shall be disclosed . . . [t]o a person recorded by a body camera” or their “personal representative,” or to a person who resides in a place depicted in a recording (but only those portions that record the interior of that place), or pursuant to a court order. This might plausibly be interpreted not to bar other disclosures, but to stipulate only when law enforcement is required to disclose, or to apply only to footage deemed exempt from sunshine laws by § 119.071(2)(1)(2) so that it is inapplicable to all other footage. Moreover, FLA. STAT. § 119.071(2)(1)(4)(d)(I)(H) (2015) gives a judge discretion in deciding whether to order disclosure to consider whether “there is good cause to disclose.” If a judge believed dissemination of information about a public fact was a good reason, disclosure might be authorized.

27. Nunes, *supra* note 1, at 1838.

28. FLA. STAT. § 119.071(2)(1)(5) (2015).

29. Nunes, *supra* note 1, at 1838.

30. *Id.* at 1837.

31. *Id.* at 1838.

32. *Id.* at 1840.

33. *See, e.g.*, *United States v. Knotts*, 460 U.S. 276, 285 (1983); *United States v. Vazquez*, 31 F. Supp. 2d 85, 92 (D. Conn. 1998); *McNamara v. Freedom Newspapers, Inc.*, 802 S.W. 2d 901, 903 (Tex. App. 1991); *see also* Tunick, *BALANCING PRIVACY AND FREE SPEECH*, *supra* note 23, at 62–89 (discussing privacy tort law); Mark Tunick, *Privacy in Public Places: Do GPS and Video Surveillance Provide Plain Views?*, 35 *SOC. THEORY & PRAC.* 597 (2009) (discussing Fourth Amendment law).

dissemination of which cannot generally be restricted.<sup>34</sup> In one Ohio case, the police conducted a drug raid on a bar and mistakenly arrested an individual.<sup>35</sup> The arrest was broadcast multiple times by a local news station and the individual sued for invasion of privacy, but lost.<sup>36</sup> The court held that an arrest is a matter of legitimate public concern and no one can have a reasonable expectation of privacy in a public bar.<sup>37</sup> Another court ruled that broadcasting a “perp walk” does not violate a right to privacy because the broadcast serves to deter crime and educate the public.<sup>38</sup> Given the preference by courts in the United States to regard free speech interests as more weighty than privacy interests, then without policy restrictions that clearly limit access to recordings of police-public encounters there might be little protection against widespread dissemination of information that might unjustly harm reputations.

Reputational interests are not all that is at stake. Someone who records an accident victim in the midst of suffering a trauma saying to a paramedic “I just want to die” and, on the ground that this took place in a public place, shares this video with a local television station that then broadcasts it, sets back the accident victim’s interest in dignity.<sup>39</sup> Some individuals might be so fearful of unwanted attention that they are deterred from reporting a crime in the first place. In the Rialto study, body cameras would not be turned on only in cases where police encountered police informants or there was a case of a sexual assault on a minor.<sup>40</sup> But there are other contexts in which crime victims might want to avoid being put into the public spotlight.<sup>41</sup>

Unlike in the United States, in Canada and Europe one can reasonably expect not to have one’s image captured and shared even when one is in a public place and is visible to others. A distinction is recognized between my being seen by others in a public place, and my image being captured and widely shared and potentially archived on the Internet where it could be found by search engines and forever define me in the eyes of others. Canada’s Supreme Court required a magazine publisher to pay \$2000 in damages after it published a photograph of a seventeen-year-old girl sitting in front of a public building, without her consent, though there was

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34. *See Paul v. Davis*, 424 U.S. 693, 713 (1976).

35. *See Penwell v. Taft Broad. Co.*, 469 N.E. 2d 1025, 1027 (Ohio App. 1984)

36. *See id.* at 1027.

37. *See id.* at 1028.

38. *See Caldarola v. Cty. of Westchester*, 343 F.3d 570, 571, 572 (2d Cir. 2003).

39. *See Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 474, 475 (Cal. 1998) (involving a video filmed not by police but by a production company).

40. *See Ariel, Farrar & Sutherland supra* note 9, at 520. The authors recognize that use of body cameras may deter the reporting of some crimes, but do not pursue this further, while nevertheless concluding that the benefits of body-cameras outweigh the costs. *See id.* at 525.

41. FLA. STAT. § 119.071(2)(j) protects crime victims from having their identity and some personal information disclosed, but does not specifically pertain to footage from body cameras.

nothing defamatory or even uncomplimentary about the photo.<sup>42</sup> The Court reasoned that the photographer stripped the young woman of her human dignity, reducing her to the status of being “a ‘spectacle’ for others.”<sup>43</sup> In a famous case in England, the European Court of Human Rights ruled that while a man who was attempting suicide on a public road was visible to anyone nearby, this does not make it legitimate for the police to make CCTV surveillance footage of him available to the media for public broadcast: there is a zone of privacy even in public places.<sup>44</sup> So long as courts in the United States fail to recognize that while we cannot reasonably expect to be invisible to others when in a public place, we *can* reasonably expect that our image is not memorialized and made readily accessible to the entire world, clear guidelines for use of police body cameras are needed to protect reputational and dignity interests that might be frustrated by public access to the recordings of encounters with the police.

Another possible consequence of allowing body camera recordings into the public record, apart from the possible threat to a person’s reputation or dignity, is that ready access to these recordings might deter positive uses of police discretion. The ultimate objective of law enforcement is to promote public health and safety and not to punish all infractions. Sometimes police use their discretion and avoid conflict by *not* enforcing a law in a particular case. Police might decide not to give someone a traffic ticket or charge them for possession of a small amount of marijuana if in their judgment there would be greater social utility in giving a warning. But if police-public encounters are in the public record, those who do receive a ticket or are charged with possession might have access to records that would show that others similarly situated were treated more favorably. This might lead to equal protection and other challenges, and could deter police from using their discretion. In some contexts and in some jurisdictions that would be welcome as it could deter abuses of police discretion—as would be the case if a predominantly white police force uses racial profiling or strictly enforces the law only on members of historically underrepresented minority groups. A primary justification for using body cameras is precisely to end such abuses.<sup>45</sup> But there are contexts in which police discretion is beneficial, and positive instances of discretion may be hindered if forced into the sunshine by regulations that require body cameras to be on at all times when police are active.

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42. *Aubry v. Editions Vice-Versa, Inc.*, [1998] 1 S.C.R., paras. 40, 41, 74 (Can.).

43. *Id.* at para. 69 (quoting J. Ravnas, *La protection des personnes contre la réalisation et la publication de leur image*, No. 347 at 388–89 (1978)).

44. See Tunick, BALANCING PRIVACY AND FREE SPEECH, *supra* note 23, at 79–80 (discussing *Peck v. United Kingdom*, 36 Eur. Ct. H.R. 41 (2003)).

45. See Nunes, *supra* note 1, at 1811 (discussing the Michael Brown shooting in Ferguson, Missouri).

If police use of discretion is not uniform throughout the nation, we may want regional variations in regulations of the use of body cameras. However, the avoidance of unwanted attention that could lead to indignities and unjust reputational harm is an interest that any individual can reasonably have. Although people vary in their subjective desire for privacy, and so we should not expect everyone to care about this interest to the same degree, all jurisdictions in the nation that implement a police body-camera program should develop clear policies that are sensitive to this interest. We should not assume that incidents that take place in a public place are public facts that should be readily accessible always and to everyone.