

Response of the Burlington, Vermont Police Department to a request by the Vermont ACLU for a body camera policy that precludes the ability of an officer to view her agency's body-worn camera footage prior to making official statements to the state in any range of instances.

As we presume the ACLU will agree, allowing police officers to review body camera footage of an incident before making a statement about the incident affords the Americans under our employment the same civil liberties that all Americans enjoy and that the ACLU normally champions. No opposing arguments offered to date persuade the Burlington Police Department that its police officers should not be allowed this basic right.

As a condition of employment with the city, the Burlington Police Department compels its officers to wear cameras, there to collect evidence for the state about the officers' conduct while on duty. The routine work of police officers, when performed as intended, puts them constantly on the edge of violating the criminal law or others' civil rights if the officers make mistakes. The lawfulness—indeed, the appropriateness—of many of the acts of police is evident only as a matter of the specific circumstances. These fact patterns are often captured by body camera footage, though sometimes incompletely, and the facts are in many cases vigorously disputed by various parties. The most sensitive disputes occur where there is an allegation that a person employed as a police officer has acted unlawfully and where the officer, by contrast, believes that she has acted reasonably and consistently with her training under the circumstances as they unfolded.

The ACLU has taken the position that police officers should be made to give, as a matter of agency policy, sworn statements about incidents captured on body-worn cameras without first viewing the footage. The Burlington Police Department cannot accept this approach, any conceivable benefits of which are outweighed by the impingement on the liberties of the people who serve the public under our employment. Like the ACLU, the Burlington Police Department takes the liberties of *all* Americans seriously. That includes police officers, who, being people, have the same suite of basic liberties afforded to all other

people.¹ We would never compel a person to mount a machine on her body that collects evidence for the state about what she does, and then compel her to make sworn statements to the government about what she has done without giving her an opportunity to review the evidence that the state has forced her to collect and then seized from her person. The very idea doesn't square with the most basic principles underlying the Fourth and Fifth Amendments.

This is a good opportunity to restate the fact that people who worry that their actions may have created exposure to criminal liability are never, under any circumstances, compelled to make a statement of any kind to the state. They may always first discover the evidence the state plans to introduce, including relevant recordings; seek to suppress any of it they feel was collected unlawfully; and confer with their counsel in light of the evidence presented about what to say or whether to say anything at all. Police officers are free to exercise their right to remain silent—sometimes out of typical nervousness or fear in the face of the mighty power of the state, whether they are actually guilty of anything. But when they do, it derails the due process and procedural justice rights of the other parties involved in the incident. To balance these concerns, the Burlington Police Department retains the right to impose extraordinary sanctions on a silent officer, thus destroying her ability to continue to work in her profession and marking her as having subverted the ends of justice. We will not be the adversary of an officer in this way during the first uncertain stages of an investigation or event, especially when she will be able to discuss the incident with other law enforcement witness and discover any video footage at a later date in any case.

The specific benefits proposed by the ACLU of precluding video review before statements are nowhere near substantial enough to alter our stance. The main line of the ACLU's argument is that barring video review, somewhat paradoxically, will *benefit* police officers and their agencies because it will make officers seem more credible and their recollections more accurate. From the letter we received, it is clear that the ACLU feels that not reviewing footage offers a person the best defense possible because it will allow her to seem sincere in her efforts to work from an imperfect memory clean of *mens rea*. In particular, the ACLU has asserted that “pre-statement review undermines the credibility of officer statements and the integrity of investigations of officer conduct—whether the officers actually lie or not.” Does this apply in all contexts, such as to non-police criminal defendants as well? If so, then the ACLU should issue a congruent statement on ACLU letterhead that generally advises all criminal defendants and suspects not to review evidence the government possesses about what they are alleged to have done because it will enhance the integrity of the defendant's account—whether the defendant actually lies or not.

Instead of circumscribing the rights of police officers alone, it seems like the best course of action would be to allow police officers to continue to enjoy their full panoply of

¹ For example, when cases against police officers are put before a grand jury, it is the person (i.e, the human being), not the uniform, who is being considered for indictment. This person reverts to the considerations accorded to all people in such a case. If grand jury proceedings remain secret for people generally, then they naturally would also remain secret for people employed as police officers.

rights as individuals but to counsel them to voluntarily waive those rights under the appropriate circumstances. The knowing waiver of rights is common in legal proceedings and investigations. Police, like all people, seek the best for themselves. If speaking before viewing will increase the accuracy and believability of a sworn statement or testimony, then convincing police officers to waive these rights—indeed, convincing all people in similar situations to waive them generally—should be an easy matter. We have noticed, however, that the ACLU doesn't urge criminal suspects generally to speak to the government unencumbered by the review of evidence, but rather exhorts the right to remain silent.

As a basis for denying video review, the ACLU also points to emerging science about the malleability of memory.² Much of it remains to be clarified, it is hardly accepted as convention, and its application here would appear to run headlong into other emerging research casting a measure of doubt on people's initial recollections of high-stress encounters. The Burlington Police Department will remain silent on the science of recollection until the courts or legislature specifically speak on the issue. *Lacking this articulation, when there is any tension between science and rights, it is our belief that rights should prevail.* Until the U.S. Constitution is amended or construed accordingly, police officers as people will never lose the right to remain silent to the state until they have had the opportunity to review the evidence the state possesses regarding their conduct. We thus identify no basis for imposing an administrative rule on police that runs counter to basic rights and fairness with no demonstrable countervailing benefit.

There is one final irony that we feel is important to bring to light. The proposed language of the ACLU's body camera policy imposes a Benthamite Panopticon on American people working in the role of police officer. When all of the people in a group are compelled to record their own actions, to turn this material over to the state without knowing what it contains, and then to act in this state of uncertainty, the state has effectively created a regime of universal surveillance for these Americans. Supporting mass and shadowy surveillance of a particular group runs quite counter to what we know about the values of the ACLU. It creates a situation in which its subjects presume that the state *may* have witnessed anything about what they have done, and could have construed it any manner of ways, *whether it was actually witnessed or not.* This is a Panopticon, one of the most insidious conceptual forms of surveillance of modern times:

The concept of the design is to allow all (*pan-*) inmates of an institution to be observed (*-opticon*) by a single watchman without the inmates being able to tell whether or not they are being watched. Although it is physically impossible for the single watchman to observe all cells at once, the fact that

² The instance of withholding body camera footage in the Winooski case until after the judicial proceedings were concluded was unfortunately mischaracterized by the ACLU. The worry was not about tainting the public's *recollection* of the incident, but about bias for or against a police officer *qua* defendant prior to trial due to what the footage revealed, *lacking other evidentiary context*, when paired with the implicit or explicit anti or pro-police biases of a potential juror.

the inmates cannot know when they are being watched means that all inmates must act as though they are watched at all times, effectively controlling their own behaviour constantly.³

It is one thing to tell a person she is being watched, and quite another to promise that the state will be watching and demand that she offer an official accounting of her actions at any time while contending with the government's deliberate opaqueness about what it has actually seen. This very concern was expressed by Foucault, the postmodern philosopher who called the Panopticon

an ideal architectural figure of modern disciplinary power. The Panopticon creates a consciousness of permanent visibility as a form of power, where no bars, chains, and heavy locks are necessary for domination any more. Foucault proposes that not only prisons but all hierarchical structures like the army, schools, hospitals and factories have evolved through history to resemble Bentham's Panopticon. The notoriety of the design today (although not its lasting influence in architectural realities) stems from Foucault's famous analysis of it.⁴

Here, in Vermont, it would not be the state creating this Panopticon over a group of Americans set apart from others only by a particular trait—in this case, profession—but rather the ACLU itself. When the ACLU is strenuously advocating for a system that is the very embodiment of oppressive power, it seems like the proposed language for Vermont's body camera policy was some sort of ironic inside joke on the police. Indeed, members of the ACLU have used panoptic metaphors to decry many things that they believe are wrong with modern society.⁵ One way out of this is to deny that cops contending with state power are less than ordinary people, on a level beneath the public that the officers are sworn to protect and serve, and even beneath those criminal suspects who have demonstrably broken the law. The simple way out of this disturbing quagmire is to allow officers to view their body camera footage, if they so choose, before they account to the state.

³ Wikipedia

⁴ *Ibid.*

⁵ See, for example, <https://www.aclu.org/blog/saturday-panel-nyc-life-panopticon>

Appendix:

In light of this position on the part of the Burlington Police Department, and in keeping with the extant law, the Burlington Police further recommend that the following concepts be part of the state's model policy:

Reviewing footage: When police officers wear body cameras on their persons and activate these cameras to document their activities and interactions, the video and audio file created shall be considered their initial statement and report of their activity and interactions. Any other reports, statements, etc., created afterward shall be considered follow-ups to this initial statement and report. Officers shall always be afforded the opportunity to review any previously-created statements and reports before creating subsequent reports, including those of other officers who have created reports related to the incident in question.

[An exception to this rule commences at the time that a state's attorney requests that an officer not have access to police statements or reports because she is the subject of a criminal investigation and such access would interfere with an enforcement proceeding. Upon this direction of a state's attorney, the officer will be relieved of police powers, placed on administrative duty, and will not be required as a matter of agency procedure to make any type of statement, in accordance with the officer's Fifth Amendment rights.]

Public places: A police officer may activate his or her body camera for any legitimate law enforcement purpose, without warning or declaration, and without seeking permission from persons who may be filmed, when the officer is in a public place or other location where the relevant courts have affirmatively ruled that there is no reasonable expectation of privacy and where any other person may likewise freely film events without warning, declaration or permission.

Overriding requests to stop filming victims or in private places: Police officers may collect body camera footage whenever and wherever they have reasonable cause to believe another person present, other than a police officer, is recording their activity or the incident they are involved in, regardless of any persons' request that the police officer stop filming. Should an officer who is filming come to reasonably believe that persons present other than police officers have ceased recording, and a victim or a custodian of a private place requests the officer to stop filming, the officer shall stop filming. "Reasonable cause to believe a person is recording" shall be construed as the observable presence of a device which is typically known to have the ability to capture video or audio, either possessed by a person or positioned in a way that it can capture the audio or video of the incident in question, to include cameras and devices held by persons, affixed to persons, placed in the vicinity of police activity, or affixed to walls, ceilings and other features of the landscape.

Analytics: Police agencies are encouraged to employ analytics that measure the tenor and content of police/person interactions in order to determine if officers have engaged in force encounters or used discourtesies, profanities or slurs that have gone undetected and unreported by other means. They are encouraged to employ analytics that offer insight into the deteriorating conduct of officers and provide an early warning thereof.