

The Impact of Police Body-Worn Cameras on the Plea-Bargaining Process

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*Criminal justice today is for the most part a system of pleas, not a system of trials... To a large extent . . . horse trading determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.*²

Introduction

In recent years, law enforcement's use of body-worn cameras (BWCs) has been swiftly prioritized and funded by the United States government.³ In particular, through grants called Smart Policing Initiatives, the U.S. Department of Justice has dedicated over \$20 million to fund the purchase of BWCs and technical assistance for local police departments. When announcing the project, Attorney General Loretta Lynch emphasized the many possibilities of the technology, including the hope they would "enhance transparency, accountability, and credibility" that police departments were severely lacking following repeated instances of police brutality against unarmed black men in particular.⁴ In 2016, a nationwide survey estimated that about half of all enforcement agencies had already adopted BWCs, and this percentage has exponentially increased in the past years.⁵

Given that 90 to 95% of all criminal convictions, misdemeanor and felony, are a result of a plea bargain, it's important to scrutinize the effect of BWCs, positive and negative, on the plea-bargaining process.⁶ Although not many studies have undertaken this specific task, surveys of prosecutors have noted the propensity of the technology to increase the number of pleas accepted, and studies of law enforcement agencies have, thus far, echoed this finding in practice. It is likely that

¹ Katelyn N. Ringrose received her J.D. from Notre Dame Law School in 2019.

² *Missouri v. Frye*, 566 U.S. 134, 132 (2012).

³ Young, J. & Ariel, B. *The Effect of Wearing Police Body Cameras on Criminal Justice Outcomes, Plea Bargains and Speed of Prosecution: The Role of Prospect Theory*. Ventura Police Department & Cambridge University.

⁴ Noah Gimbel, *Body Cameras and Criminal Discovery*, 104 GEO. L. REV. 1581 (2016); See also Josh Sanburn, *Why Cops in Ferguson Don't Have Body Cameras*, TIME (Aug. 15, 2014) (reflecting the hope that BWC use will help mitigate police use-of-force against black victims), <http://time.com/3114329/ferguson-michael-brown-police-body-cameras>.

⁵ SHELLEY S. HYLAND, *Body-Worn Cameras in Law Enforcement Agencies*. (Nov. 2018) <https://www.bjs.gov/content/pub/pdf/bwclea16.pdf>.

⁶ CENTER FOR EVIDENCE-BASED CRIME POLICY, GEORGE MASON UNIVERSITY, *BODY-WORN CAMERAS AND THE COURTS: A NATIONAL SURVEY OF STATE PROSECUTORS* (2016).

the widespread use of BWCs will contribute to a rise in plea bargains as their use becomes more prevalent; and this rise in plea bargains holds numerous consequences for the United States' criminal adjudication system. Those consequences include the risk of incarcerating innocent individuals, further contributing to disparate sentences and conviction rates for persons of color from communities that police are more likely to monitor with their BWCs on, and inequitable access prior to trial to the very footage that can serve to aid or even exonerate a defendant prior to trial. It is important to critically analyze these negative effects before the very tool adopted to limit police brutality becomes a weapon against those citizens subject to the criminal justice system.

This note, in Part I, looks to the history of law enforcement's adoption of BWCs and their contemporary use. In Part II, I analyze the likely impact of BWCs on the plea-bargaining process, including both positive and negative implications. In Part III, I catalog efforts to mitigate potential ill-effects of BWC use on the plea bargaining process, including intra-office administrative mandates, with an eye toward the general trajectory of real-time data collection.⁷ In conclusion, this paper warns courts and administrative bodies to undertake research looking into the implications of BWC use on the plea-bargaining process before allowing the technology to influence pleas. Furthermore, agencies, both state and federal, should look into creating an impartial agency to hold BWC footage, and grant the defense access to that footage prior to trial and prior to acceptance of a plea.

Part I

Recent reports of police violence across the country have led law enforcement agencies, citizens, civil rights groups, city councils, and even courts to push for the rapid adoption of BWC technology.⁸ BWCs hold incredible promise; however these effects have gone largely unrealized, at least in part due to police departments exerting sole control over the footage accrued by the technology. In addition to rarely capturing a direct view of the commission of a crime, recent evidence suggests that police officers equipped with BWCs are as likely to use force as those without them.⁹ The very reason that BWCs were adopted in the first place has been negated as law enforcement officers occupy the role of the watchers, with community members as the watched.¹⁰ As Justice Brandeis said in his scathing

⁷ *Carpenter v. United States*, 138 S. Ct. 2206, 2267 (2018).

⁸ *See funding*, BUREAU OF JUSTICE ASSISTANCE, UNITED STATES DEPARTMENT OF JUSTICE. (2018), <https://www.bja.gov/bwc/topics-funding.html> (providing resources, options, guidance for agencies seeking to implement body-worn cameras).

⁹ *Id.*

¹⁰ This is the quintessential example of the "fox guarding the henhouse." *See* Sarah Lustbaker, *The Real Problem With Police Video*, THE NEW YORK TIMES. (Dec. 2, 2015), <https://www.nytimes.com/2015/12/02/opinion/the-real-problem-with-police-video.html>.

dissent in a 1928 Supreme Court case regarding electronic surveillance, “The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”¹¹

BWCs were adopted, in large part, to decrease costly investigations into citizen complaints by both lowering acts of violence perpetrated by law enforcement officers and shedding light on disputes between citizens and law enforcement.¹² However, BWCs have been proven to not lower the frequency of police use-of-force. This is likely because BWCs are directly controlled by law enforcement officers who can choose to turn the cameras off at will and are in the position to choose which data to retain or destroy.¹³ Police departments may not see the use of BWCs as a way to increase accountability, but rather as a mechanism of policing. As such, police may simply view BWCs as tools to gain more evidentiary support against perpetrators of crimes.¹⁴ Law enforcement officers are in charge of retaining BWC footage, and they hold the power to choose to not film certain community interactions. Because police control over BWCs and their footage discounts their viability as a method of providing accountability, and because police are able to resist disclosure of footage, communities are unable to use BWCs to achieve their initial aim of holding police accountable for their misconduct.¹⁵

Thus far, the impacts of BWCs have been far reaching, and tend to benefit law enforcement and prosecutor offices rather than the defendants and communities affected by police violence. The U.S. Department of Justice has noted that “[p]rosecutors, in particular, will heavily impact the BWC program as they will view and evaluate digital evidence as part of their decision-making process.”¹⁶ Prosecutors are offered unfiltered access to BWC footage via the same login mechanisms offered to law enforcement officers, and can use that footage to influence their decision on whether to offer a plea. A majority of lead prosecutors, when asked about who would most likely benefit from the use of BWCs, see themselves as the true beneficiaries of the technology.

¹¹ *Olmstead v. United States*, 277 U.S. 438, 573 (1928).

¹² DAVID A. HARRIS, *Picture This: Body-Worn Video Devices (“Head Cams”) as Tools for Ensuring Fourth Amendment Compliance by Police*, TEXAS TECH. L. REV. 43, 357- 71 (2010).

¹³ *Id.*

¹⁴ Laurent Sacharoff and Sarah Lustbader, *Who Should Own Police Body Camera Videos?*, 95 WASH. LAW REV. 269, 286 (2017).

¹⁵ W.A. FARRAR & B. ARIEL, *Self-Awareness to Being Watched and Socially-Desirable Behavior: A Field Experiment on the Effect of Body-worn Cameras on Police Use of Force*, POLICE FOUNDATION (2013).

¹⁶ See *Body-Worn Camera Policy and Implementation Program FY 2018 Competitive Grant Announcement*, DEPARTMENT OF JUSTICE, (2018), <https://www.bja.gov/funding/BWC18.pdf>.

To the public, BWC footage is seen as fairly irrefutable, whereby footage of a crime can be leaned upon to make or break a case.¹⁷ As a criminal defendant, it might feel hopeless to pursue a trial and introduce mitigating circumstances when it is known that BWC footage will be revealed by the prosecutor, particularly when the defendant is not privy to what the footage will reveal prior to being asked to accept or decline a plea bargain. While a guilty defendant fearful of being revealed on BWC footage may not be a sympathetic figure to some, countless innocent defendants plead guilty to crimes they did not commit. While the individual guilty defendant admitting his or her guilt due to the threat of BWC footage being revealed at trial is not incredibly worrisome, it is worrying that police may be monitoring some interactions over others, leading to race and class discrepancies. In addition to widespread issue of BWCs being used for discriminatory¹⁸ purposes when turned on in certain neighborhoods, for certain protests, or for certain defendants¹⁹ there is also the concern of innocence. When police departments hold footage that can exonerate a defendant, that footage should be turned over to defense attorneys. However, even if BWC footage is treated as traditional evidence, law enforcement and the prosecution will not necessarily turn it over. There is a long history of prosecutors hiding or refusing to turn over exculpatory evidence.²⁰ Because of a lack of trust between law enforcement and criminal defendants, as well as communities disproportionately impacted by police use-of-force, there may be defendants who feel, rightfully or not, that the footage accrued via BWCs could be doctored. Doctoring could entail an officer turning on his or her BWC to accrue footage after an altercation has already begun, painting him or herself in a good light, or physically intruding upon the footage. Many of the BWCs utilized by law enforcement are vulnerable to being intruded upon by hackers, law enforcement or not, due to their lack of a cryptographic mechanism that would confirm the validity

¹⁷ See Seth Stoughton, *Understanding the Practical Aspects of Interpreting Video Footage, Body-Worn Camera Training and Technical Assistance* (Apr. 24, 2019) <https://www.bwctta.com/resources/commentary/view-interpreting-bwc-video-footage> (“We tend to think of video footage as more comprehensive, accurate, and precise than other forms of evidence.”).

¹⁸ CHINELO NKECHI IKEM AND MATTHEW OGBEIFUN. *Body Cameras Aren’t Working. So What’s Next?* HUFFPOST, (Nov. 28, 2017), https://www.huffingtonpost.com/entry/body-cameras-arent-working-so-whats-next_us_5a1dbd2ee4b04abdc61464aa. (“When there is no video, black victims are thought to have done something wrong. When there is video, black victims are thought to have done something wrong off camera or before the incident, such as having a criminal record.”).

¹⁹ EMILY HONG, *Hands Up, Don't Film: Body Worn Cameras and Protests*, NEW AMERICA, (Oct. 9, 2015), <https://www.newamerica.org/oti/blog/hands-up-dont-film-body-worn-cameras-and-protests/>

²⁰ See All Things Considered, *Guilt By Omission: When Prosecutors Withhold Evidence Of Innocence*, NPR, (August 4, 2017), <https://www.npr.org/2017/08/04/541675150/guilt-by-omission-when-prosecutors-withhold-evidence-of-innocence> (journalist Emily Bazelon notes that, “in close cases where prosecutors might be more likely to lose if they turn over the evidence, it may be more likely that they don't disclose it.”)

of the stored video files. Due to the lack of such a mechanism, physically altered footage may be difficult to detect, and even more difficult for defendants to deny.²¹ Given historical distrust between police and criminal defendants, disproportionate policing of impoverished individuals of color, a distrust of the viability of the footage itself, and a lack of prosecutorial oversight when it comes to turning over exculpatory evidence, defendants may feel particularly pressured to accept a plea agreement when they are not granted pre-trial access to BWC footage.

Prosecutors can use BWC footage to influence their decision on whether to offer a plea agreement. In particular, “where footage is not purely inculpatory, prosecutors have a dual interest in keeping the videos to themselves and blocking defendants’ pretrial access . . . out of concern for the safety of victims and witnesses appearing on the tapes [and] to use BWC footage to their strategic advantage.”²² BWC use has already begun to increase the number of plea bargains accepted by defendants, with a majority of prosecutors forecasting an even greater increase as BWCs are adopted in more locales. Because law enforcement officers hold some power over the plea-bargaining process, this power is likely to increase given an officer’s ability to decide which footage to accrue and when.²³

A majority of lead prosecutors, when asked about who would most likely benefit from the use of BWCs, see themselves as the true beneficiaries of the technology. In a recent George Mason University study on BWCs, when asked about the impacts of BWCs on courts, a majority of prosecutors believed that BWC evidence would increase both rates of conviction and rates of plea agreements accepted.²⁴ In fact, fewer than 10% of lead prosecutors disagreed that BWCs would produce at least one of these results.²⁵ We should trust experienced prosecutors when they say that BWCs will help them secure more convictions. Although prosecutors may conflate positive benefits for them, via more accepted plea agreements, with a positive effect on society, these two effects are very different. An increase in plea agreements accepted may mean that more petty crimes are

²¹ Lily Hay Newman, *Police Body Cams Can Be Hacked to Doctor Footage*, WIRED, (Aug. 11, 2018), <https://www.wired.com/story/police-body-camera-vulnerabilities/>. (“The fact that some law enforcement evidence-collecting devices can be hacked evokes some true nightmare scenarios,” says Jay Stanley, senior policy analyst at the American Civil Liberties Union. “If there aren’t reliable ways of ensuring that such equipment meets strong security standards, then something is deeply broken. No police equipment should be deployed that doesn’t meet such standards.”).

²² NOAH GIMBEL, *Body Cameras and Criminal Discovery*, 104 GEOR. L. REV. 1581, 1584-85 (2016).

²³ See JONATHAN ABEL, *Cops and Pleas: Police Officers’ Influence on Plea Bargaining*, 126 YALE 1730, 1734 (2017).

²⁴ CENTER FOR EVIDENCE-BASED CRIME POLICY, GEORGE MASON UNIVERSITY, *BODY-WORN CAMERAS AND THE COURTS: A NATIONAL SURVEY OF STATE PROSECUTORS* (2016).

²⁵ *Id.*

charged, simply because police have accrued a great deal of evidence that is seen as irrefutable.

A majority of prosecutors have already used BWC footage as evidence in a trial, and nearly all prosecutors' offices in jurisdictions with BWCs, which make up 92.6% of all offices, have used BWC footage to prosecute private citizens.²⁶ In contrast, only 8.3% of offices located in jurisdictions with BWCs indicated that they have used BWC evidence to prosecute a police officer. Prosecutors benefit from BWC footage a great deal more than defense counsel.²⁷ A majority of prosecutors, 62.7%, believe that BWC evidence will help the prosecution more than it will assist the defense.²⁸ As it stands, however, the evidence accrued by BWCs will not be granted to the defense, whether it is helpful to the prosecution's case or not, until the decision as to whether to pursue a trial is made. Granting defense attorneys access to BWC footage, as part of the pretrial process, is an incredibly important step in ensuring that these estimates by prosecutors reflect more equity between defense and prosecution when it comes to the plea-bargaining process.

The theoretical basis for BWC adoption is seated in the deterrence theory. However, this theory supposes that individuals are rational actors who are choosing to act violently for measured reasons. Therefore, deterrence is effective only in controlled circumstances whereby police officers and civilians are acting rationally. This has proven to not be the case in many high-pressured circumstances, such as when individuals feel cornered, harassed, fearful, etc. The irony of BWC adoption is readily apparent in recent surveys that have pointed to the lack of an effect on recorded incidents of police use-of-force.²⁹ In an effort to understand these counterintuitive findings, researchers concluded that BWCs only reduce police use-of-force when officers' discretion to turn cameras on or off is minimized. The first findings from the largest set of randomized controlled trials of the effectiveness of body cameras revealed that use-of-force jumped by 71% among officers who did not follow the recording protocol and instead recorded at their discretion. In contrast, use-of-force decreased by 37% among officers who followed the protocol.³⁰ Despite this finding, there have been no legislative actions toward creating accountability mechanisms for officers who either disengage or choose to not wear their BWCs. Although many departments cite policies regarding

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ BARAK ARIEL, *Report: Increases in Police Use of Force in the Presence of Body-Worn Cameras are Driven by Officer Discretion: A Protocol-Based Subgroup Analysis of Ten Randomized Experiments*, J. Experimental Criminology (2016)

³⁰ MARY FAN, *Missing Police Body Camera Videos: Remedies, Evidentiary Fairness, and Automatic Activation*, 52 Ga. L. Rev. 57, 73 (2017).

mandatory recording, the majority do not impose consequences on officers who fail to comply.³¹

Because the rapid adoption of BWCs is occurring within a low information environment, researchers are only beginning to develop knowledge about the effects, both intentional and unintentional, of the technology.³² Rapid adoption of technologies in the absence of high-quality information about potential impacts can lead to unanticipated and unintended consequences that may work against both police and citizen interests. Some of the mixed implications of BWC adoption are already evident in literature issued by the Department of Justice urging law enforcement agencies to apply for grants to cover the cost of adoption: “BWCs can have a moderating effect on citizens and can help strengthen accountability and transparency in citizen-police interactions.”³³ This moderating effect can also be thought of as a chilling effect, hampering free speech and expression.³⁴

The need for more research in this area is paramount, as the adoption of BWCs will likely have important implications for police-citizen interactions, police management and budgets, safety and security, citizen privacy, citizen reporting and cooperation with police, and practices in the courts, both before and during trial.³⁵ It is crucial that when we look into the effect of BWC usage on the court system, that the plea-bargaining system is not overlooked in favor of analyzing the evidentiary effect of such footage on trials. Despite their relative newness, BWCs have already affected the plea-bargaining process and are likely to continue to escalate existing concerns with plea bargaining.

Part II

The criminal-justice system has become a weighty machine, industriously issuing punitive measures against transgressors and unable to afford criminal defendants a fair trial even if they opted to exercise their constitutional right.³⁶ In

³¹ See ARIEL *supra*, note 29. (Arguing for codified rules and regulations in regards to BWCs in order to decrease incidences of use of force.)

³² CENTER FOR EVIDENCE-BASED CRIME POLICY, GEORGE MASON UNIVERSITY, EXISTING AND ONGOING BODY-WORN CAMERA RESEARCH: KNOWLEDGE GAPS AND OPPORTUNITIES (2016).

³³ U.S DEP’T OF JUSTICE, OMB No. 1121-0329, INFORMATION REGARDING A CHANGE TO THE BODY-WORD CAMERA POLICY AND IMPLEMENTATION PROGRAM FY 2018 COMPETITIVE GRANT ANNOUNCEMENT (2018).

³⁴ NANCY LA VIGNE, *Evaluating the Impact of Police Body Cameras*, URBAN INSTITUTE (2015) (Aug. 5, 2015), <https://www.urban.org/debates/evaluating-impact-police-body-cameras>.

³⁵ *Body-Worn Cameras Information*, BUREAU OF JUSTICE ASSISTANCE UNITED STATES DEPARTMENT OF JUSTICE (2018) (Mar. 29, 2019), https://www.bja.gov/ProgramDetails.aspx?Program_ID=115#horizontalTab2.

³⁶ EMILY YOFFEE, *Innocence is Irrelevant*, THE ATLANTIC (2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/> (“According to Stephanos Bibas, a professor of law and criminology at the University of Pennsylvania Law School, the criminal-

addition to the 90 to 95% of all criminal convictions, misdemeanor and felony, that arise as a result of a plea bargain, approximately 97% of federal convictions and 94% of state felony convictions arise from plea bargains.³⁷ In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always a critical point for a defendant. Whether plea bargaining is a contract,³⁸ compromise,³⁹ or a disaster,⁴⁰ the fact stands that there are both positive and negative implications to the practice. These implications affect judges, prosecutors, defense attorneys, prosecutors, victims, defendants and the community at large. As adoption of BWCs rises, so too does the likelihood that the footage accrued will impact the plea-bargaining process.

Until the Supreme Court of the United States, acting under its rule-making power, promulgated Rule 11 of the Federal Rules of Criminal Procedure, procedures for accepting guilty pleas were lacking.⁴¹ Rule 11 is designed to eliminate any need to resort to a subsequent fact-finding proceeding after a plea of guilty is accepted. Judicially, plea bargains allow for a conservation of time judges have to spend overseeing trials. This, of course, is a function of the sheer amount of acts legislatures have criminalized. More defendants exist than there is time to allow them to undergo a proper trial. Effectively, if politicians chose to decriminalize rather than create new charges, criminal dockets would be less clogged and the justice system would not face the threat of incredible backlogging should plea bargains be barred. Plea bargaining also arguably allows judges more power in criminal proceedings than when a case proceeds to a jury trial.⁴²

In his 1970 dissent in *Parker v. North Carolina*, Justice Brennan, when looking at the issue of capital punishment, notes that the discussion there is, "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power."⁴³ Through charge selection and influence over possible sentencing ranges,

justice system has become a 'capacious, onerous machinery that sweeps everyone in,' and plea bargains, with their swift finality, are what keep that machinery running smoothly.").

³⁷ FAN *supra*, note 30 at 63. (Of the 89,741 criminal defendants convicted and sentenced in U.S. District Courts in 2010, 87,418 pled guilty or entered a plea of nolo contendere.); *See also* Dep't of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online tbl.5.22.2010 (2010), <http://www.albany.edu/sourcebook/pdf/t5222010.pdf>. (Showing U.S. District Court convictions from 1945 to 2010).

³⁸ ROBERT SCOTT and WILLIAM STUNZ, *Plea Bargaining as a Contract*, 101 YALE L.J. 1909, 1910 (1991).

³⁹ FRANK EASTERBROOK, *Plea Bargaining as a Compromise*, 101 YALE L.J. 1969, 1975 (1992).

⁴⁰ STEPHEN J. SCHULHOFER, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2009 (1992).

⁴¹ FED. R. Crim. P. 11

⁴² TIM LYNCH, *The Devil's Bargain: How Plea Agreements, Never Contemplated by the Framers, Undermine Justice*. CATO INSTITUTE, (2011), <https://www.cato.org/publications/commentary/devils-bargain-how-plea-agreements-never-contemplated-framers-undermine-justice>.

⁴³ 397 U.S. 790, 809 (1970).

prosecutors currently hold incredible power over defendants and it would be incorrect to say that defense attorneys and prosecutors hold equal bargaining power. Prosecutors also hold sway over the difference between the sentence a defendant faces if he or she pleads guilty and the sentence possible if he or she proceeds to trial and is convicted. The incredible leeway given to prosecutors in charging and sentencing pleas creates an inequality between the role of the criminal defense attorney and the criminal prosecutor. Prosecutors may use plea bargaining in order to secure convictions for certain members of criminal enterprises. This creates unequal sentences amongst similarly culpable defendants.

According to Justice Kennedy in *Missouri v. Frye*, “it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.”⁴⁴ Indigent defendants have the positive ability to accept guilt and avoid potentially costly and time-consuming trials. However, they also may face negative incentives in the form of feeling forced to accept a plea bargain under fear of losing their job due to trial time and time spent in jail. Furthermore, indigent defendants may simply lack the funds to engage in a thorough defense. Public defenders do not make worse lawyers than other defense attorneys, however, a “lack of funding, limited staffing, insufficient time to review cases all create a public defense system that provides suboptimal legal advice to those who need it, and the poor are the ones who need public defenders most.”⁴⁵ Although granted access to a defense attorney, clients may perceive more pressure to accept a plea agreement than to “roll the dice” and go to trial where they may receive a much harsher punishment than the one they pleaded for. BWCs may increase the number of charges brought forward, particularly against defendants accused of relatively low-level crimes, given the low evidentiary standard required for crimes like petty misdemeanors.⁴⁶

These problems are likely to plague plea bargains that are accepted due to the existence of BWC footage, and it is important that these core issues do not fade out of the foreground while examining the implications of the technology. For example, some theorize that court processes “end with a quick guilty plea because the footage will constitute overwhelming evidence.”⁴⁷ This fairly one-sided analysis of the use of BWC footage fails to take into account that the unique nature

⁴⁴ *Missouri v. Frye*, 566 U.S. 134, 143-44 (2012).

⁴⁵ JAY RAPPAPORT, *Plea Bargaining: An Unfair Deal*, EQUAL JUST., (Mar. 29, 2019), https://static1.squarespace.com/static/57689b0e197aeab794b8f733/t/57b3ec1d20099ef548475114/1471409182081/Equal+Justice_Jay+Rappaport.pdf.

⁴⁶ ELENA BURGER, *Thousands of Low-Profile Cases Could Turn on Police Body Camera Footage*. GOTHAM GAZZETTE, (Apr. 19, 2017), <http://www.gothamgazette.com/city/6879-thousands-of-low-profile-cases-could-turn-on-police-body-camera-footage>.

⁴⁷ CHRIS ROBERTS, *Court System would Benefit from more Police Body Cameras*. STAR TELEGRAM., (June 8, 2016), <https://www.star-telegram.com/opinion/opn-columns-blogs/other-voices/article82607082.html>.

of BWC footage is bound to raise more questions concerning coercion, unequal access to the footage, and a perception on the part of defendants that they will receive harsher sentences at trial.

When asked about the impacts of BWCs on courts, lead prosecutors stated the possibility of several differences occurring with the adoption of the technology.⁴⁸ A majority, 53%, believed that BWC evidence would increase rates of conviction.⁴⁹ This belief may rest in the assumption that BWC footage will provide irrefutable, or at least solid, evidence for the prosecution. An even greater majority, 62.3%, believed that BWC footage will increase the frequency and likelihood of plea bargains being accepted.⁵⁰ This belief is an incredibly interesting one, and may hinge on a multitude of factors. Because prosecutors are largely given unlimited access to BWC footage, and defense attorneys are not, prosecutors may place stock in their ability to describe the evidence they have on video as a technique to apply pressure on defendants contemplating a plea deal. They may also believe that defense attorneys are more likely to encourage their clients to accept a deal if the prosecution has video footage of the offense. In fact, fewer than 10% of lead prosecutors disagreed that BWCs would produce either an increase in convictions or pleas.⁵¹ Comparatively, few prosecutors believed that BWC evidence would increase either the number of appeals or case dismissals. However, a large number of prosecutors, 42.5%, indicated neutrality with respect to the question about case dismissals, showing that views on this point may not yet be well developed due to a lack of experience with BWC use.⁵²

When respondents were asked to assess the likelihood of what they would consider negative or burdensome impacts on the criminal justice system, few believed that BWCs would lead to what would be positive outcomes for defendants. For example, when asked whether BWCs would increase dismissals of criminal charges due to missing recordings, failure to record, or technical problems with the videos, comparatively few prosecutors thought this would occur. Few, 19.2%, strongly agreed that problems with BWC footage would lead to a decrease in charges, with 6.7% simply agreeing.⁵³ Sometimes silence speaks louder than words, and a high number of prosecutors, 42.5%, chose to remain neutral on this issue, suggesting that prosecutors are not yet sure of the impact that BWC evidence will have on case dismissals in their jurisdictions, and possibly hinting that

⁴⁸ See generally CENTER FOR EVIDENCE-BASED CRIME POLICY, GEORGE MASON UNIVERSITY, BODY-WORN CAMERAS AND THE COURTS: A NATIONAL SURVEY OF STATE PROSECUTORS (2016).

⁴⁹ *Id.* at 36.

⁵⁰ *Id.* at 6.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 31.

prosecutors may be unsure of whether BWC footage would work in defendants' favor.⁵⁴

Despite a relative lack of information at this early stage, anecdotal evidence offered by police departments shows a predicted rise in plea bargains accepted. In the approximate year and a half that the Atlanta City Police Department began using BWCs, citizen complaints went down, but the number of plea bargains accepted by defendants has been on the rise.⁵⁵ Police officers and prosecutors have counted this as a win because it allows them to spend less time in court testifying.⁵⁶ However, this means that the already alarmingly high number of cases that result in a plea conviction are on the rise.⁵⁷ Prosecutors have been found to use threats that coerce defendants into accepting plea agreements to secure a conviction when the evidence in a case is insubstantial.⁵⁸ Less than 6% of prosecutors be

lieve that BWC evidence will be of more help to the defense than the prosecution.⁵⁹ This result provides another indication of the belief among prosecutors that BWC evidence represents a powerful prosecutorial tool.⁶⁰ Allowing defense, and in some cases the public, access to BWC footage may allow for democratic accountability.⁶¹ Evidence-based policing, according to the U.S. Department of Justice, represents a massive shift in criminal law; however, this shift has not reciprocally affected the defense.⁶²

For this vast majority of defendants whose cases end in with a plea bargain, a video of their altercation with a police officer may never surface. Police and prosecutors hold unilateral control over the footage, and this asymmetry further exacerbates the inequity present during the plea-bargaining process. In addition to racial disparities, prosecutors exercise power in both the charging and sentencing variants present in a plea. Prosecutors and law enforcement officers also typically

⁵⁴ *See Id.* at 31.

⁵⁵ *See* Dept. of Research & Collective Bargaining Services, *Body-Worn Cameras Fact Sheet* AFL-CIO (Dec., 2014), https://www.bja.gov/bwc/pdfs/AFSCME_FACT-SHEET-Body-Worn-Cameras-1.pdf.

⁵⁶ *See Id.*

⁵⁷ *Id.*

⁵⁸ LINDSEY DEVERS, *Plea and Charge Bargaining Research Summary*, BUREAU OF JUSTICE ASSISTANCE UNITED STATES DEPARTMENT OF JUSTICE, (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.

⁵⁹ CHOPARD COHEN, *The Impact of Body-Worn Cameras on a Prosecutor*. NATIONAL DISTRICT ATTORNEYS ASSOCIATION, (2015), <https://cebcp.org/wp-content/technology/BWCProsecutors.pdf>.

⁶⁰ CENTER FOR EVIDENCE-BASED CRIME POLICY, GEORGE MASON UNIVERSITY, *BODY-WORN CAMERAS AND THE COURTS: A NATIONAL SURVEY OF STATE PROSECUTORS* (2016)

⁶¹ M.J. BLITZ, *Issue Brief: Police Body-worn Cameras: Evidentiary Benefits and Privacy Threats*, AM. CONST. SOC'Y FOR L. AND POL'Y 1, 7 (2015).

⁶² Cynthia Lum, *Body-Worn Cameras—Rapid Adoption in a Low Information Environment?*, CENTER FOR EVIDENCE-BASED CRIME POLICY, GEORGE MASON UNIVERSITY (2015), <https://cebcp.org/wp-content/TCmagazine/TC8-Spring2015>

hold leverage in the form of evidence. Historically, evidence has not been made available to defense until the defendant makes the decision to pursue trial. However, BWC footage is unlike traditional evidence as it is relatively low-cost to transfer to the defense and has a high probability of being able to bring transparency to an accounting of events. Videos may show why police officers opted to engage with certain individuals, whether that engagement was conducted in accordance with the Fourth and Fifth Amendments, and any results of that engagement. The video may support law enforcement's accounting of events, or shed doubt on those tendered statements.

Best practices over the taking and retention of BWC footage would indicate that strict state and federal legislation should govern who is in control over data, whether that right should rest with local law enforcement or with a neutral third party, as well as who should be party to viewing that footage. BWCs do not always need to be on, and arguably should not be given their privacy implications. However, the power to turn them on and off in tense situations should not rest with the very officers they were originally designed to hold accountable. At the moment, prosecutors and police have inarguable power in the ownership and control over footage. Shifting ownership of videos over to a third-party agency, and creating rules dictating who has access to the footage prior to the acceptance of a plea would allow for more symmetry in the court process and may help stymie the rise of plea bargains we are currently seeing.

Part III

Despite court and administrative decisions, there has been little positive change or effort in mitigating the effect of BWCs during the plea-bargaining process. For example, intra-office mandates that law enforcement officers always keep their BWC on have failed to solve the problem of law enforcement officers selectively turning off and on their own equipment.⁶³ Arguably, the most important facet of BWC footage, namely who can access it, has not yet been critically analyzed. At the moment, only prosecutors' offices are given access to the footage accrued via BWC.

Departments employing cloud-based storage platforms often create accounts for their local prosecutor's office through which prosecuting attorneys can electronically retrieve footage on their own without the need to create hard copies. The same can be done for any party authorized by the police department, including

⁶³ MARY FAN, *Missing Police Body Camera Videos: Remedies, Evidentiary Fairness, and Automatic Activation*, 52 GA. L. REV. 57, 70 (2017) (Only 6.5% of all traffic stops made by the Phoenix Police Department were recorded, despite a mandate issued by the department that all interactions with civilians be recorded).

defense attorneys. The sharing of electronic materials would entail minimal costs.⁶⁴ According to the Bureau of Justice Assistance to the U.S. Department of Justice, “Body-worn recordings are not simply another type of evidence that law enforcement collects and prosecutors use to prosecute offenders; their novelty, the volume of data generated, and the public’s recent spotlight on BWCs make this type of evidence unique.”⁶⁵ Because BWC footage is unique, it should be treated as such.

If footage is withheld prior to the offer of a plea, and then introduced during trial, the state bears the burden of paying for the storage of the footage, tagging and marking of the video, and the proper placement of the video within the correct case file. In addition to these costs, anytime a video is misplaced or not properly tagged, the state bears the financial and time burden of recouping the footage. At the moment, these costs are unknown as there is no overarching oversight of prosecutor and police budgets.⁶⁶ If a neutral agency were established, with the express purpose of retaining and identifying footage pre-plea, and then releasing that footage to defense and prosecution alike, the time burden would be shifted away from the police and prosecutors’ offices; although there would be cost involved. The Department of Justice, in its capacity as grantor for over twenty-million dollars of federal funds, could contemplate the creation of such a government agency as part of the expense of providing BWCs.⁶⁷

If funds cannot be sourced to cover an impartial agency, at the very least, prosecutors and police should undertake the work of revealing footage to defense without the aid of an external agency. Smaller groups including defense attorneys,

⁶⁴ NEW YORK CITY DEP’T OF INVESTIGATION, OFFICE OF THE INSPECTOR GENERAL FOR THE NEW YORK CITY POLICE DEPARTMENT, *BODY-WORN CAMERAS IN NYC: AN ASSESSMENT OF NYPD’S PILOT PROGRAM AND RECOMMENDATIONS TO PROMOTE ACCOUNTABILITY* (2015).

⁶⁵ DAMON MOSLER, *Policy Considerations for Body-Worn Cameras in Prosecutor Offices*, (2015) <http://bwctta.com/sites/default/files/Files/Resources/Policy%20Considerations%20for%20BodyWorn%20Cameras%20%28BWCs%29%20in%20Prosecutors%20Offices.pdf>.

⁶⁶ Though the costs of establishing a single agency are unknown, they are not inestimable. The Combined DNA Index System (“CODIS”) cost \$27.2 million in 2018; and the FBI’s Next Generation Identification (NGI) cost a cool \$107.4 million. Both systems allow for unprecedented information sharing between state, local and federal agencies, and there is no telling why an agency overseeing BWC footage would need to cost as much as either agency. It is worth noting that the federal government may want to keep BWC footage for nefarious purposes, like feeding in their biometric databank whereby citizens can be logged. It’s important that proponents of privacy keep such concerns front and foremost if such an agency were to be created. *See* Joseph Klimavicz, *Investment Summaries*, DEPARTMENT OF JUSTICE. (2018), <https://itdashboard.gov/drupal/summary/011/011-000003457>.

⁶⁷ There is nothing to say that a federal agency is the best or only way forward. State agencies would be equally equipped with providing regulation and oversight. In fact, six states (Arizona, Colorado, Connecticut, Louisiana, Maryland and South Carolina) have already created task groups to research and regulate BWC footage, but none require turning over the footage to defense pre-trial. *See* *Body Worn Camera Studies*. NATIONAL CONFERENCE OF STATE LEGISLATURES, (Feb. 28, 2018), <http://www.ncsl.org/research/civil-and-criminal-justice/body-worn-cameras-interactive-graphic.aspx#/>.

prosecutors, and police could develop a formal process for the transfer of videos from police to prosecutors and from prosecutors to defense attorneys.⁶⁸ This would entail minimal costs and allow for more symmetry in the plea-bargaining process. Symmetry in the pretrial process would allow for some concerns arising out of the use of BWC footage to be addressed. Those concerns include the capacity of the prosecution to inflate the culpability of a criminal defendant. It also increases public trust by disallowing, or at least hampering, the adulteration of footage prior to trial. Furthermore, the footage can elucidate what happened to a criminal defendant who is confused over the nature of the criminal act, one who acted in the heat of the moment, or one in denial or unwilling to accept guilt. Furthermore, the footage can serve to contradict an individual convinced of his or her own guilt due to their own naivete or inexperience in the criminal justice system. The footage can reveal acts committed by law enforcement officers that cross the line,⁶⁹ and can also empower innocent criminal defendants who may have wanted to forgo trial due to the cost. This buoying of innocent clients could increase public trust in the criminal justice system. Such an increase in transparency has incredible promise, and it would be a shame to continue to allow BWC footage to rest only in the hands of those most likely to conceal things like police brutality and corruption.

Prosecutors have expressed concerns about revealing unaltered and unscreened digital footage prior to trial, specifically with regard to certain cases, such as those arising out of domestic violence and/or sex crimes where particularly vulnerable victims may refuse to engage with police if they are frightened of retaliation on the part of their aggressor. Prosecutors may fear a chilling effect on sex-crime victims' willingness to report crimes, talk to officers, or cooperate with prosecutors if it becomes known that their features and voice will be turned over to the defense. Prosecutors also point to the prospect of witness intimidation, if witness statements are revealed prior to a trial, as well as the exposure of undercover officers and informants who may be at risk if their voices and images are disclosed. Finally, prosecutors are disturbed by the possibility that witnesses to a crime may be at loathe to approach officers if they believe that footage of them doing so will be revealed to the perpetrator prior to trial.

⁶⁸ *The Impacts of Body-Worn Cameras on Police-Citizen Encounters, Police Proactivity, and Police-Community Relations in Boston: A Randomized Controlled Trial*. SCHOOL OF CRIMINOLOGY AND CRIMINAL JUSTICE NORTHEASTERN UNIVERSITY. (2018). <https://news.northeastern.edu/wp-content/uploads/2018/08/BPD-BWC-RCT-Full-Report-07272018.pdf>.

⁶⁹ CHRISTIAN SHECKLER And KEN ARMSTRONG, *Talk of Police Misconduct Dominates Elkhart Public Meetings* SOUTH BEND TRIBUNE, (Nov. 23, 2018), https://www.southbendtribune.com/news/publicsafety/elkhartjustice/talk-of-police-misconduct-dominates-elkhart-public-meetings/article_886cf124-250b-5914-8011-42422fceb901.html. (Video footage surfaced in Elkhart, Indiana showing two police officers repeatedly punching a suspect in the face during detainment).

These fears are not unfounded and should be taken into account prior to the disclosure of BWC footage. However, the nondisclosure and inequity of allowing all footage to rest with prosecution and law enforcement until the unlikely chance that a trial is pursued is an incredible burden to place on defense, particularly when a defendant is being asked to weigh a plea bargain that will change the course of his or her life. If an impartial agency cannot be formed, and funds to cover tagging and marking footage cannot be sourced, the cheapest and easiest option would be to simply allow defense counsel, rather than the defendant him or herself, access to the doctored footage. This may strike an appropriate middle ground, whereby defense and prosecution are given similar access to footage that may serve to exonerate or shed light on law enforcement's possible mitigating actions, for example violations of the Fourth and Fifth amendment, prior to making the decision to pursue trial.

There are various interests that need to be balanced between prosecution and defense, and perhaps an impartial agency can help engage in that calculus by looking into the safety needs of victims and witnesses, the discovery rights of the defense, the confidentiality of ongoing investigations, and the right of the media to request information.⁷⁰ If such an agency cannot be formed, ad hoc state or local agencies can also handle the disbursement of information. At the very least, turning over footage to defense counsel, and not the defendant himself, can alleviate concerns prosecutors have about witness safety while also allowing equality between defense and prosecution. Disallowing anyone to view footage besides prosecutors and police inevitably throws shade on the possibility of BWC footage being used to help root out unwarranted use-of-force by law enforcement, which is, ironically, one of the main reasons that BCWs were adopted in the first place.

Conclusion

BWCs are not themselves inherently good or evil. The implementation of such technologies has numerous positive implications for the trial process; however, the implementation of such technology across the country also has negative implications for defendants in the plea-bargaining stage. Before we rush to adopt and see these implications play out in real-time, it is important to preemptively propose solutions. Therefore, introducing a system of accountability, whereby footage is kept by impartial groups, and disallowing self-regulation on the part of law enforcement is incredibly important. A system of transparency is likewise of import, where defendants are given access to the footage prior to

⁷⁰ *The Use of Body-Worn Cameras by Law Enforcement Officials: Hearing Before Assembly Committee on Codes, Judiciary of Governmental Operations, (2015 Assembly) (NY, 2015)* (Testimony of District Attorney Ass'n. of the State of NY).

entering a plea, thereby reducing the coercive risk posed by footage they have not seen, cannot remember, or is possibly doctored. This system is unlikely to completely stymie the rapid increase in plea bargains that is likely to result in the adoption of BWCs, but it can level the playing field for defendants and law enforcement alike.