

Introduction

Dual Revolutions in Recording the Police

Lordy, I hope there are tapes.

– James Comey, Former Director of the Federal Bureau of Investigation (FBI)¹

We are keeping more data on ourselves than on the public now. That's our surveillance. We are doing a lot of internal surveillance.

– Brian Maxey, Chief Operating Officer, Seattle Police Department²

LIFE AND DEATH ON BODY CAMERA

It is a hot Friday night in Baltimore. People are outside to escape the brick oven heat of their homes. In the patchwork of neighborhoods that compose the city, residents talk, play, shop, visit, flirt – and sometimes call for help or scramble for cover because bullets break out.

Baltimore is one of the deadliest cities in America for the people who live in and love the city.³ As the heat of summer 2017 hit, Baltimore was on pace to reach

¹ *Full Transcript and Video: James Comey's Testimony on Capitol Hill*, N.Y. TIMES (June 8, 2017), www.nytimes.com/2017/06/08/us/politics/senate-hearing-transcript.html.

² Throughout this book, there will be quotations and information from the more than one hundred interviews conducted for this book with police leaders and officers, community members, cop-watchers, civil rights and civil liberties experts, and technologists. If a quotation is not derived from one of the interviews conducted for this book, the source is given in the footnote. As a convention, the reader can assume that quotes without secondary source attribution are from original interviews conducted for this book. This research was reviewed by the institutional review board of the Human Subjects Division (HSD) of the University of Washington (HSD study 50785).

³ In 2015, Baltimore had the second-highest murder rate of all major US cities – eleven times the national average. Michael B. Sauter, Samuel Stebbins, & Thomas C. Frohlich, *The Most Dangerous Cities in America*, USA TODAY (Oct. 1, 2016), www.usatoday.com/story/money/business/2016/10/01/most-dangerous-cities-america/91227778/ (based on Uniform Crime Reports data for 2015). For homicide trends by city, see MATTHEW FRIEDMAN, AMES GRAWERT,

the highest per capita homicide rate in its history.⁴ At the start of August 2017, community leaders and activists designated a cease-fire weekend, pleading “nobody kill anybody” for just a seventy-two-hour respite.⁵ By Saturday of that cease-fire weekend, two more homicides happened.⁶

Money and violence are not evenly distributed and Baltimore is no exception. West Baltimore has families with roots many generations deep in the city, dating to the Great Migration when sharecroppers moved more northerly, drawn by steel and other industry jobs.⁷ History is etched in each block, some still retaining the pride and beauty of the past and people trying to hold on. Other blocks are pocked with homes boarded, burned, and deteriorating like corpses with eyes blocked shut. Violence and the disappearance of good factory jobs have driven some people to give up homes and move from a place where even the graffiti pleads, “Stop Shooting.”

Out here in the Western and its bordering Central districts, the officers and I wear bulletproof vests. The officers also wear body cameras, a new technology deployed throughout the force just this year. Over the course of the ten-hour “Charlie” shift, from late afternoon deep into the night at 3:00 AM, those cameras will record the video equivalent of several feature-length films.

Someone will be shot. A bleeding victim’s friend will flag down the patrol car in an alleyway for help. Officers will search for a shooter and gun on the loose on the street where children play. Someone will be hiding in the dark as an boyfriend fresh out of prison tries to break down the door. Someone will be stabbed, bleed out, and die. Repeatedly, paramedics will bear fallen community members to the University of Maryland’s famous shock trauma unit, which the cops revere for its repeated miracles of reviving the dead and nearly gone.

JAMES CULLEN, *CRIME IN 2016: UPDATED ANALYSIS* (Brennan Center for Justice, Dec. 20, 2016), at 3 www.brennancenter.org/sites/default/files/analysis/Crime_in_2016_Updated_Analysis.pdf; AMES GRAWERT & JAMES CULLEN, *CRIME IN 2015: A FINAL ANALYSIS* (Brennan Center for Justice, Apr. 20, 2016), www.brennancenter.org/analysis/crime-2015-final-analysis.

⁴ Luke Broadwater & Justin Fenton, *With Murders Skyrocketing in Baltimore, Feds Begin Sending Help*, *BALT. SUN* (May 1, 2017), www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-atf-crime-20170501-story.html. By the end of 2017, Baltimore would report a per capita homicide rate record of 56 killings per 100,000 people for the city of 615,000 residents, a record high for the city. *2017 Sees Highest Murder Rate Ever in Shrinking Baltimore*, *CBS NEWS*, Jan. 2, 2018, www.cbsnews.com/news/baltimore-homicide-murder-rate-highest-2017-crime-increase-fred-die-gray-killing/.

⁵ Ray Sanchez, *Second Deadly Shooting in Baltimore’s “Nobody Kill Anybody” Weekend*, *CNN* (Aug. 6, 2017), www.cnn.com/2017/08/04/us/baltimore-ceasefire-weekend/index.html.

⁶ *Id.*

⁷ W. E. B. Du Bois chronicled the migration: “Negros come from country districts to small towns, then go to larger towns; eventually they drift to Norfolk, Va., or to Richmond. Next they come to Washington, and finally settle in Baltimore or Philadelphia.” W. E. B. DU BOIS, *ON SOCIOLOGY AND THE BLACK COMMUNITY* 128 (1978).

The cameras capture all this, and people in some of their most terrifying, painful, embarrassing moments. Dying moments, crying moments, scared silent and unresponsive moments. Mixed in with everyday travails. Warring neighbors, exes, family members; hit-and-runs; and the steady drumbeat of calls about someone dealing drugs, on a residential street, in the corner store, or at the park where children play ball.

Between calls, the officers use cell phones to tag all the video with relevant metadata, such as incident time, type, and individuals involved (Figures 0.1 and 0.2). At the end of the shift, the officers upload the amassed data documenting daily life and sometimes death. The night's videos will join the rapidly growing trove of audiovisual data stored in the cloud, generating new potential and power to regulate the police, prevent the eruption of violence, and change the balance of power when it comes to proof. The massive and rapidly growing volume of audiovisual data about policing practices and daily life on the streets and in private places like homes also raises important legal questions about proof, privacy, public disclosure, data preservation, and advanced data analytics to better protect civil liberties and prevent harm.

The questions are fast-breaking and new because of the rapid uptake of police-worn body cameras. A survey of 254 police departments across the United States conducted in July 2013 found that fewer than a quarter of the responding departments used body cameras.⁸ Then came the fires and protests over controversial killings in police encounters and fierce national debate over police power and use of force. West Baltimore is an emblem of the pain and national turmoil.

Just two years ago, West Baltimore burned during protests over the death of Freddie Gray, age twenty-five.⁹ On April 12, 2015, Gray was walking down the street in the West Baltimore neighborhood where he grew up, and where he would die.¹⁰ Officers said Gray spotted the police and ran, so they chased and seized him.¹¹

⁸ POLICE EXECUTIVE RESEARCH FORUM, US DEP'T OF JUSTICE, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 2 (2014), www.justice.gov/iso/opa/resources/472014912134715246869.pdf ("Although the use of body-worn cameras is undoubtedly a growing trend, over 75 percent of the respondents reported that they did not use body-worn cameras as of July 2013.")

⁹ Peter Hermann, *After Rioters Burned Baltimore, Killings Pile Up Largely under the Radar*, WASH. POST (May 17, 2015), www.washingtonpost.com/local/crime/violence-has-become-part-of-life-in-baltimore/2015/05/17/4909264a-f714-11e4-a13c-193b1241d51a_story.html?utm_term=.5fd20e45ee24.

¹⁰ Freddie Gray grew up in the Sandtown-Winchester neighborhood of West Baltimore, where his fatal encounter with police occurred. Scott Shane, Nikita Stewart, & Ron Nixon, *Hard but Hopeful Home to 'Lot of Freddie's'*, N.Y. TIMES (May 3, 2015), at A1.

¹¹ Kevin Rector, *The 45-Minute Mystery of Freddie Gray's Death*, BALT. SUN (Apr. 12, 2015), www.baltimoresun.com/news/maryland/freddie-gray/bs-md-gray-ticker-20150425-story.html.



FIGURE 0.1 An officer in West Baltimore tags police-worn body camera with metadata between handling calls for service.

A bystander recorded Gray calling in pain as officers pulled him into a van.¹² No citizen was along to record what happened during the ride to the police station, and officers did not have to wear body cameras back then. Somehow, during those mysterious forty-five minutes, Gray died. Today, his face is painted two stories high in a mural on the building across a street from the arrest, in remembrance and in pain. And Baltimore officers, like police officers across the nation, now are required to record most law enforcement encounters.¹³

By 2016, the Major Cities Chiefs Association and Major County Sheriffs' Association reported that 97 percent of the seventy law enforcement agencies

¹² The video can be viewed courtesy of the Baltimore Sun online at www.youtube.com/watch?v=mxbeuownxjQ

¹³ See Baltimore Police Dep't, Pol'y 824, Body Worn Cameras (Jan. 1, 2018).

Mandatory Recording

Unless unsafe, impossible, or impractical to do so, all members (not just the primary unit) present, dispatched, or otherwise participating in any of the below listed activities must activate their BWC:

- 1 At the initiation of a call for service or other activity or encounter that is investigative or enforcement-related in nature . . .
- 6 When transporting a detainee, regardless if the transport vehicle is equipped with a Transport Vehicle Camera (TVC) System . . .



FIGURE 0.2 In the Anacostia neighborhood of Washington, DC, officers link body camera video to police reports.

surveyed indicated they were going to adopt body cameras or had already done so.¹⁴ New body camera policies require officers to record more law enforcement activities than ever before, such as stop-and-frisks, searches, and responses to calls for service.¹⁵ The rapid proliferation of police-worn body cameras has important ramifications for police regulation and civil liberties protection – but it is only part of a larger recording revolution.

COPWATCHING, SPONTANEOUS AND ORGANIZED

To focus just on cop-worn cameras spreading across communities ranging from impoverished West Baltimore to wealthy places like the San Francisco Bay Area and New York would miss a major part of the story of police regulation by recording. Camera power radiates not just from police-worn

¹⁴ MAJOR CITIES CHIEFS & MAJOR COUNTY SHERIFFS, *SURVEY OF TECHNOLOGY NEEDS: BODY WORN CAMERAS 2* (DHS Office of Emergency Communications, Dec. 2015), <https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rvvt.EAJQwK4/v0>. See also Mike Maciag, *Survey: Almost All Police Departments Plan to Use Body Cameras*, GOVERNING (Jan. 26, 2016), www.governing.com/topics/public-justice-safety/gov-police-body-camera-survey.html (quoting a figure of 95 percent).

¹⁵ See Table 1.3 for a summary of the common contexts where the 213 body camera policies coded for this book require recording.

body cameras but also from the multitude of cell phones that community members carry, with the potential to record police encounters in public or in private.

People wield cameras as a form of self-protection, as protest, and as a way to address imbalances in power. You may not have the badge, the gun, the official imprimatur of the state. People may not believe you, or even bother to hear you when you cry or speak. But a video can go viral. It carries the authority of seeming documentary objectivity and the power to get the word out. And if someone dies, the camera offers an alternative viewpoint to the official story. The camera is a form of self-defense, particularly in communities of color where people live the reality behind the grim statistics that African Americans face a higher risk of stops, frisks, arrests, and death in police encounters.¹⁶

Like communities anywhere, people need to have someone they can call when tragedy or emergency strikes. When someone is bleeding out. When a gun and shooter is on the loose. When someone fears for her life. Even in communities with high mistrust of the police, people call the police in times of need, as evident from the stream of calls throughout the day and night. But people do not trust the officers that come.¹⁷ That mistrust is visible the moment officers pull up. Community members – even those who called the police – often have their cell phones at the ready to record (Figure 0.3). And when something goes down, like a frisk or an arrest, a crowd will quickly gather, mobilized by Facebook Live recording. Organized copwatchers also patrol in some communities, keeping an eye on the cops and encouraging people to record in a form of self-help regulation and community engagement in policing by protest and dissent.

So the people record the cops. And the cops are now directed by new body camera rules to record almost every encounter with the public. The body cameras go with officers into homes to respond to domestic calls; into the

¹⁶ The data on homicides by police are notoriously spotty, leading to efforts by major news organizations to conduct newspaper surveillance of deaths. See, e.g., *The Counted Database*, THE GUARDIAN (last updated Dec. 2016), www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database (presenting searchable data on killings by the police in 2015 and 2016). For graphs of Centers for Disease Control and Prevention data on the disparities in the risk of death people face in police encounter by race, see Figures 1.1–1.2.

¹⁷ For work on the crisis of trust in policing, particularly in disadvantaged minority communities, see, e.g., Rod K. Brunson, “Police Don’t Like Black People”: *African-American Young Men’s Accumulated Police Experiences*, 6 (1)CRIMINOLOGY & PUB. POL’Y 71–101 (2007); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L. J. 457–504 (2000); Tracey Meares, *The Legitimacy of Police among Young African-American Men*, 92 (4)MARQUETTE L. REV. 651–656 (2009); Tom R. Tyler, *Policing in Black and White: Ethnic Group Differences in Trust and Confidence in the Police*, 8 (3)POLICE QUARTERLY 322–342 (2005).



FIGURE 0.3 A West Baltimore resident records the police talking to witnesses and searching for bullets after a shooting.

middle of the night to halt an alleged home invader; into the blind alleys and stairwells; and into many other sites and moments when a bystander with a camera may not be around.

As a Western Baltimore resident with roots three generations deep explained to me, the cameras on cops – even the ones she called to her home to keep the peace as her daughter’s ex moves out – are reassuring. “Keeps from the he-said, she-said. It makes you feel better because you can see. You can see what really happened. Just go to the video.”

These everyday scenes on the streets reflect the dual recording revolutions that are transforming policing, proof, and privacy in the United States. Everyone has incentive to record to contest or control the narrative. With widespread access to small portable cell phone cameras any ordinary Chris,¹⁸ Feidin,¹⁹ or Ramsey²⁰ can film the police and release a viral video shot from his point of view. As mistrust grows, and protests and riots erupt over controversial uses of force, police departments also have incentive to deploy body cameras to offer evidence beyond the officer’s word, which is no longer as credited as it used to be.²¹

¹⁸ Air Reserve base worker Chris LeDay played an important role in disseminating the video of the shooting of Alton Sterling to the public. Peter Holley, “*Super-fishy*”: Man Who Posted Video of Alton Sterling Killing Claims Employer Still Refusing to Let Him Work, WASH. POST. (July 24, 2016), www.washingtonpost.com/news/post-nation/wp/2016/07/13/man-who-posted-video-of-alton-sterling-killing-claims-he-was-targeted-by-vengeful-police/?utm_term=.2c4e3f596bee.

¹⁹ Immigrant barber Feidin Santana recorded the shooting of Walter Scott in South Carolina. *Feidein Santana, Who Recorded Police Shooting of Walter Scott, Speaks Out*, NBC NEWS (Apr. 8, 2015), www.nbcnews.com/news/latino/feidin-santana-who-recorded-man-shot-police-officer-speaks-out-n338171.

²⁰ Deli worker Ramsey Orta filmed the death of Eric Garner. J. David Goodman, *Man Who Filmed Fatal Police Chokehold Is Arrested on Weapons Charges*, N.Y. TIMES (Aug. 4, 2014), at A19.

²¹ Concern over possible police “testilying” has been long-standing. See, e.g., Christopher Slobogin, *Testilying: Police Perjury and What to Do about It*, 67 U. COLO. L. REV. 1037–1060 (1996). But the concern is particularly salient today, with confidence in the police reaching its lowest point in

TOUTVEILLANCE

We live in an age of rapidly expanding toutveillance, where virtually everyone has the pocket-sized means to record. The French language gave us the word *surveillance*.²² The proposition *sur*, meaning “on” or “over,” implies a directionality of control where the people below are watched from overseers in power above.²³ In contrast, the French word *tout* is a more capacious concept, meaning “all,” “every,” or “whole.” Toutveillance is more than the top-down of surveillance. Toutveillance also is more than the bottom-up control suggested by *sousveillance*, from the French *sous*, meaning “below” or “underneath.” Steven Mann used the term *sousveillance* to refer to citizens exercising bottom-up control to monitor the watchmen.²⁴ I would go farther.

In our toutveillance society, people and the police are recording each other from all directions, making everyone at once surveilled and surveiller. I am recording you, you are recording me, and the police are recording us too, because the people demand it. The lines of power and control radiate from all directions as people seek to document their perceptions and thus shape the narrative. This is captured by the flexible French term *tout*. The phenomenon also is captured by the recordings by the police, community members, and private and public surveillance devices increasingly interspersed throughout the landscapes of our daily lives. The growing trove of police, public, and privately generated data has great power, potential – and perils – for protecting civil liberties, police regulation, and harm prevention.

This book is about the implications of pervasive police recording for proof, privacy, big data analytics, civil rights protection, and violence prevention. Emerging policies and laws are now laying the foundation for a future that will be shaped by the rise of audiovisual big data amassing from police-worn body

twenty-two years in 2015 according to Gallup Polls. Jeffrey M. Jones, *In US, Confidence in Police Lowest in 22 Years*, GALLUP POLLS (June 19, 2015), <http://news.gallup.com/poll/183704/confidence-police-lowest-years.aspx>. Even at the low point, 52 percent of Americans surveyed still express “a great deal” or “quite a lot” of confidence in police. *Id.* This is a mark of how much trust and credibility officers have historically enjoyed – and why there has previously been little incentive to record rather than ask the public to rely on the officer’s word.

²² For a concise and colorful history of the “very French word” surveillance, see The Vocabularist, *The Very French History of the Word “Surveillance,”* BBC MAGAZINE (July 14, 2015), www.bbc.com/news/blogs-magazine-monitor-33464368.

²³ KEVIN MACNISH, *THE ETHICS OF SURVEILLANCE* 1 (Routledge 2018).

²⁴ Steve Mann, *New Media and the Power Politics of Sousveillance in a Surveillance-Dominated World*, 11 (1/2) *SURVEILLANCE & SOC’Y* 18–34 (2013); Steve Mann, *Veillance and Reciprocal Transparency: Surveillance Versus Sousveillance, AR Glass, Lifelogging, and Wearable Computing*, 2013 *PROC. IEEE INT’L SYMP. ON TECH. & SOC’Y* 1, 1.

cameras, bystander cell phone recordings, and other surveillance systems. Audiovisual big data analytics already is being used in criminal investigations. Video integration systems in places like Atlanta and Los Angeles can amass video and other data feeds from multiple sources for crime-predictive analytics and to track persons of interest.²⁵

The next frontier is using audiovisual big data and predictive analytics for improved police regulation, civil rights and civil liberties protections, and violence prevention in law enforcement encounters. The audiovisual big data on policing practices coming from the dual revolutions in recording the police present opportunities to discover new ways to prevent harm to the public and officers using machine learning methods such as artificial neural networks. But there are major challenges, including the risk of severe privacy harms; refusals to disclose data; misleading or biased audiovisual data; and limits on the use and preservation of one of the major sources of data, body camera videos, for officer evaluation and discipline.

The book draws on more than 100 interviews with law enforcement rank-and-file officers, supervisors, community members, copwatchers, civil rights and civil liberties advocates, and technology executives and experts to explore the issues and how to address them. The book also presents the results of the coding and analyses of 213 body camera policies from jurisdictions across the nation to show the main policy approaches, splits, and coming challenges.²⁶ Recording by the public is a force as powerful, wild and unregulated as the will of a crowd. In contrast, the volume of police-worn body camera policies prescribing more standardized recording protocols is growing. While state legislatures are beginning to pass laws pertinent to police-worn body cameras, much of the early policy action is in the less visible realm of police department policies. Mapping the policy approaches is a foundation for debates about trade-offs between privacy, public disclosure, and regulation by transparency. The policy analyses also reveal potential obstacles to maximizing the harm prevention and police regulation power of aggregated audiovisual big data.

The goal is to provide a forward-looking account of the potential of widespread police recording and the resulting audiovisual big data to reshape criminal justice and the politics of privacy. The book focuses on the rise of police-worn body cameras and citizen recording to capture police encounters on the streets and inside homes and other private places. The pervasiveness

²⁵ For a discussion of big data analytics in police investigations, see, e.g., ANDREW FERGUSON, *THE RISE OF BIG DATA POLICING* (2017).

²⁶ See the appendix for a summary of the methods of policy collection and coding and a list of the 213 jurisdictions, ordered by state.

and ease of such recordings pose important questions regarding privacy, accountability, transparency, proof, and the balance of power between officers and citizens. Technology rapidly changes but the overarching issues this book explores will pose continuing challenges and questions for communities, legislatures, and police departments.

The issues also cross borders and have comparative import. The United Kingdom, followed by the United States, are the earliest movers in widely deploying police-worn body cameras. Other nations are likely to follow. From Rio de Janeiro, Brazil, to Kingston, Jamaica, to Cape Town, South Africa, to Manila, the Philippines, police forces are exploring police-worn body cameras and other recording strategies.²⁷ Because of the ubiquity of cell phone cameras across the world, citizen recording of authorities is growing as a strategy of protest, resistance, and accountability seeking. The rapid spread of police recording culture and the resulting market for technological advances in utilizing the audiovisual data has important implications for the future of criminal justice, privacy, safety, and security.

This book also is about the value choices and hard trade-offs communities face. Communities and police departments are investing limited budgetary dollars in body cameras in the hopes of saving lives, preventing escalation to violence, averting riots, providing better proof, and potentially exonerating community members – and officers – from false accusations.²⁸ Though people

²⁷ Gráinne Perkins, *Lights, Camera, Action! Body-Worn Cameras: Challenges and Opportunities in Police Research*, 11 *POLICING: A JOURNAL OF POLICY AND PRACTICE* 1–5 (2017); Kim Brunhuber, Police in Crime-Ridden Rio de Janeiro Try a Cheaper Body Camera: Their Phones, CBC, Apr. 11, 2016, www.cbc.ca/news/world/brazil-crime-police-cameras-1.3527618; Monique Grange, Bunting Announces That Police Are to Start Wearing Body Cameras, *JAMAICA GLEANER* (Jan. 23, 2014), <http://jamaica-gleaner.com/power/50696>.

²⁸ See, e.g., POLICE COMPLAINTS BD., *ENHANCING POLICE ACCOUNTABILITY THROUGH AN EFFECTIVE ON-BODY CAMERA PROGRAM FOR MPD OFFICERS* 3 (2014) (“The devices have the potential to enhance public safety and improve relations between police and members of the public by reducing misconduct, facilitating the resolution of incidents that arise, and improving officer training. Other potential advantages for the District government include enhancing public confidence in the criminal justice system and reducing the city’s exposure to civil liability.”); POLICE EXECUTIVE RESEARCH FORUM, US DEP’T OF JUSTICE, *IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED* 2 (2014) (“Among police executives . . . reported benefits include the following: Strengthening police accountability by documenting incidents and encounters between officers and the public[;] Preventing confrontational situations by improving officer professionalism and the behavior of people being recorded[;] Resolving officer-involved incidents and complaints by providing a more accurate record of events[;] Improving agency transparency by allowing the public to see video evidence of police activities and encounters[;] Identifying and correcting internal agency problems by revealing officers who engage in misconduct and agency-wide problems[;] Strengthening officer performance by using footage for officer training and monitoring[;] Improving evidence documentation for investigations