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## Privacy and Power: an Analysis of Police Body Cameras

The United States has a long history of police brutality and abuse of power. Incidents ranging from the Haymarket affair to marches during the civil rights movement have resulted in unnecessary violence and loss of life. This history is a result of many factors including racism, governmental crackdown and individual misconduct. While this history is not unknown there has been an increase in awareness of these issues in the last few years largely because of high profile instances of police killing unarmed black men such as Michael Brown and Tamir Rice in 2014. These incidents have prompted large protests and renewed discussions over race, use of force and police accountability in our society.

One potential explanation for why there has been a resurgence of public outcry over police violence is that new technology has allowed for individual citizens to record police interactions on their phones. This change has allowed for previously unnoticed or unprovable violence to be shown to a wide audience and thus has spurred controversy. One of the most talked about and now often implemented changes that have taken place as a response to public pressure is to equip police with body cameras (small cameras that can be attached to the front of a shirt or glasses) in order to ensure a record of events should there be dispute over how encounters with police unfolded. This solution while appealing is controversial because these cameras reduce the privacy of both the citizens and police. This is problem exacerbated because most departments have very few clear policies dictating how the recordings will be stored, used and disseminated. While there are many different angles that I could tackle these issues from I will be focusing on using the theories developed by Helen Nissenbaum, George Henrick Von Wright to guide policy making with the goal to both preserve privacy as much as possible and

yet still allow body cameras to increase police accountability. In this paper I will argue that police body cameras are appropriate and should be used even though they reduce privacy because they provide society with the great benefit of reducing police misconduct and because the privacy harms can be mitigated through strict policies which I will lay out.

Before I get into the main thrust of my argument I will clarify a few issues at play in the context of the use of body cameras by police. As I mentioned above the new practice of assigning police body cameras has faced resistance. Some people are worried that as technology has advanced in the last twenty to thirty years new and more effective means of surveillance have become available and this has resulted in an erosion of privacy rights. A reasonable person might be worried that police body cameras are just another tool that may have been developed with good intentions but that can be used to further monitor people in situations where they were previously unscrutinized. This is an important concern to address as there is a possibility that police will use data collected from body cameras to run analytics on all of the footage they record to compile a virtual library of faces or distinctive body features with which to identify people. Even if not taken to quite that extreme there are still possibilities for police to use the body cameras to capture who shows up to protests or other actions people would not want recorded<sup>1</sup>. This leads into another critique that has been leveled at body cameras which is that if we give police the discretion to turn them off or on whenever they want the cameras will be useless in achieving the intended goal of preventing police misconduct. However if they are forced to keep them on at all times then that means that things that are private will be captured such as when police respond to a burglary call and record the inside of people's houses. Not only

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<sup>1</sup> . unsurprisingly interactions that require a response from the police often come during some of the most stressful, personal and sometimes embarrassing moments people's their lives. While this possibility may be less impactful than profiling or monitoring protesters but I'm sure most people can sympathize with not wanting their dirty laundry recorded and possibly seen by others.

that but people may be less inclined to report sensitive crimes to the police if they know it will be recorded, for example cases of sexual assault or informants on organized crime.<sup>2</sup>

Having addressed these critical background issues, I shall now invoke recent work in the field of privacy to help work through the problems with police body cameras. Bringing in Nissenbaum's theory of contextual integrity will allow me to give an account of whether there is a violation of privacy in a given context. Helen Nissenbaum is a professor of media studies with a background in philosophy and is one of the leading thinkers on privacy. In the rest of my essay I will discuss Nissenbaum's theory of contextual integrity and how it helps us in working through the problems surrounding police body cameras. Then I will use Von Wright to add a notion of power to Nissenbaum's model. After this I will bring in Solove to describe what kind of justification for new privacy practices may be acceptable. From there I will use those frameworks to recommend policy implementations surrounding body cameras and defend them.

Nissenbaum conceptualizes privacy through a framework she calls “contextual integrity”. Rather than trying to find an essential account of what privacy is that is always the same in all situations she claims that privacy comes out of context specific norms. She claims that while there are many variations of privacy norms this does not mean that privacy is an arbitrary predilection but rather that “these expectations (of privacy) are systematically related to characteristics of the background social situation.” (Nissenbaum 129). So there is no single concept of privacy that is applicable to all situations but rather the right to privacy emerges in

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2 . On the flip side of the coin the police themselves have claimed that their privacy is also at risk, they worry that the footage the cameras collect will be used against them by their superiors to punish them if they criticize their bosses. This is a serious concern not only because it is understandable that the police do not want their every move watched but also because it increases the power of the heads of police departments to control officers through giving them a way to monitor them at all times (Vertesi). With access to the recordings of the cameras they would have the ability to go through them in order to find minor infractions to punish police officers at will which can easily be used for the employer's benefit (such as for reducing union membership or activity). This could reduce the likelihood of whistle blowing from within police departments because officers might not have the opportunity to raise concerns about their superiors or ongoing practices if they know they might face retaliation for their actions.

specific circumstances. The central claim that Nissenbaum makes is that privacy is not “a right to secrecy nor a right to control but a right to appropriate flow of personal information.”

(Nissenbaum 127). So it is the correct flow of information that is the goal of her framework and it is how certain privacy practices or policies are to be justified. Nissenbaum analyzes the justifiability of information flows in terms of what she calls *informational norms*. The four main elements of informational norms that will allow Nissenbaum to look at particular claims of privacy violations that essentialist conceptions of privacy often cannot account for are actors<sup>3</sup>, attributes<sup>4</sup>, transmission principles<sup>5</sup> and contexts.<sup>6</sup> These elements are meant to make clear the informational norms that are already in place in a given situation. The four elements she lists are helpful for that purpose but an idea of power needs to be added as part of her notion of context, because power reveals who creates norms and enforces the norms that are already present.

The problem with Nissenbaum's proposed framework of contextual integrity is that it assumes that the informational norms that are in place are appropriate ones. This is a trend towards conservatism that Nissenbaum sees in her own work that she tries to amend by putting the burden of proof on the party that wishes to change the current informational norm (Nissenbaum 166). This addition to her framework allows for the possibility of changing norms if one can argue that a new practice is superior or worthwhile enough. However even with this addition her model can only explicate the norms that are already there but not question how those norms came to be created or what purpose those norms serve. These are crucial aspects to be overlooked because by ignoring who has power in a given situation her framework obscures who

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3 . Actors are as the word implies the people who are involved in the norms

4 . Attribute is the type of information that is being transmitted. For example medical information, identifying information or information regarding school grades.

5 . Transmission principles are the restrictions on the flows of information. For example a law preventing doctors from sharing medical information is a transmission principle.

6 . Context is itself made up of four elements 1.roles 2.activities 3.values 4.norms. Norms also has four parts to it consisting of A. ought elements B. subjects of norms C. acts D. conditions of application. I will be adding E. power under norms when I expand Nissenbaum's theory.

benefits from the norm, it simply assumes that everyone benefits equally.

Including Von Wright's conception of power is extremely helpful in filling this gap. Nissenbaum actually cites him explicitly for giving her the 4 elements that make up norms but when I looked up Von Wright's theory of norms he actually has 5 elements to norms not 4. The fifth element was power and excluding this was a mistake on her part because an account of power is necessary in order to explain the relationship between who creates norms and who is bound by them. Von Wright defines power as “competence, by virtue of norm, to act as an authority of norms”(Von Wright 186). For Von Wright power emerges when one agent has the authority by virtue of norm<sup>7</sup> to compel another agent to be subject to a norm. That is somewhat abstract but a simple example is that of the Congress of the United States. Congress has the ability by virtue of the norms regarding representational democracy to create laws (a type of norm) that are binding on people within the United States. The key point for Von Wright is who has authority to create norms that bind subjects. This is an important inclusion in contextual integrity framework because it not only shows how norms are created but gives one grounds with which to question the validity of norms themselves. One way that this move can be motivated using Von Wright would be by looking at whether there are norms that govern the creation of other norms and whether they were followed. There would be grounds to question a law that congress created if the representatives voting on the law had not been democratically elected or if a law was passed without obtaining the required number of votes. With this addition to her theory I now turn to how to justify informational norms.

Now that an idea of power has been included in her theory it is able to both identify the

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<sup>7</sup> . For Von Wright authority always comes from higher orders of norms, that is to say that there are chains of norms and that an agent's authority rests on a higher order norm that gives them that authority. Eventually a chain has to end however, any norm that does not rely on a higher order norm he calls a sovereign norm. In the example of Congress the sovereign norm might be the Constitution or the will of the people. (Von Wright 185/6).

context specific informational norms present and evaluate them in terms of who enforces and creates those norms. For the purposes of making a normative claim about what should be done in the case of police body cameras we need a way to compare the importance of privacy norms to those of other values such as security. The framework of contextual integrity works by comparing each of the four elements of a new norm or practice (such as an introduction of body cameras on police) with the preexisting informational norms that governed informational flow before the new practice arose. In Nissenbaum's words "if the new practice generates changes in actors, attributes, or transmission principles, the practice is flagged as violating entrenched informational norms"(Nissenbaum 150). If it is the case that one of the elements has changed between the old practice and the new one then there is reason to believe that a violation of privacy has occurred. So giving police body cameras would be a prima facie red flag because the attributes of the information collected has changed. Before police officers only had information of an incident regarding what they themselves remembered about it or wrote down in a report. Now however they have a full video record of any encounter they are involved in. This is not enough to establish a normative claim however because while it is fine to have these changes pointed out and be made clear the changes themselves are not enough to say that the practice should be discontinued. As most new practices will involve one element regarding informational norms to change means that to merely say that any change at all is a violation to privacy would entail that our society would have no method with which to create better practices or norms. Clearly not all new practices or changes in privacy norms are harmful, so we need a way to decide whether a given change in informational norms is an appropriate one that does not rely on simply showing that a change has happened. Nissenbaum's answer to this is to claim that the person or people who are doing the action which is violating the previous norms need to offer

a justification as to why their new norm or practice should be acceptable. This is helpful but it doesn't answer the question of what kind of justification is a valid one for upholding privacy against competing values because there are potentially multiple ways in which a new practice could be justified.<sup>8</sup>

In order to figure out whether a given change in privacy norms is acceptable we need to look at what value privacy has and how this is affected by police body cameras. I believe that there are multiple ways in which privacy is valuable but the most important one for this essay is how in many contexts privacy serves as a check on governmental power. What I mean by this is that privacy serves as a way to demarcate zones that disallow the government or agents of the government from exerting their power in those zones. Remember that for Von Wright, power is the ability of an agent to create norms that bind a subject, but this does not mean that a norm authority can create any norm they wish. Von Wright describes the creation of norms as often being limited in that “The authority may issue norms of a certain kind, but must not issue norms of certain other kinds. It may be argued that norms, the issuing of which is not expressly permitted to the authority, are in fact forbidden to him.” (Von Wright 187). So while an authority can create and enforce norms, they are often limited to what norms they can create and have authority over. In the context of law enforcement as police officers are the enforcers of norms I claim that privacy's most important function *in this situation* is to limit governmental power by preventing the police from enforcing certain types of norms in certain contexts. For example

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<sup>8</sup> . It is important to have a criteria with which to judge new proposed privacy norms or activities because without such a justification the debate just shifts to a debate around how we ground our moral claims regarding privacy. Solove is useful for filling this gap. Often the debate around privacy issues takes the shape of privacy being an individual value that is in conflict with societal values such as security. For Solove this is a mischaracterization of the issue which often results in privacy losing out because of its seemingly selfish quality. He claims that “We should understand the value of privacy in terms of its practical consequences. Privacy should be weighed against contrasting values, and it should win when it produces the best outcome for society.” (Solove 87). This is helpful because it gives us a way to decide between different privacy practices, we choose the one that has the best benefit for society as a whole.

while it is appropriate for lawmakers to create laws concerning automobiles or traffic they are prevented at least implicitly from creating laws concerning what type of clothes one wears or sexual acts between consenting adults. Privacy serves to protect us from governmental bodies expanding their authority to norms that they aren't authorized to establish. This has a societal value and not just personal value. There are multiple reasons that people in power may want to expand their authority to more contexts but we as citizens have good reason for not allowing that<sup>9</sup>. Power is not always a bad thing but what privacy as a value does puts the burden of proof on authorities to provide a clear and convincing justification for why they should be allowed to create and enforce norms in a new context<sup>10</sup>.

So what does this all have to do with the implementation of police body cameras? They should be implemented because while they reduce privacy they actually accomplish what privacy is trying to protect in this situation, that is to prevent governmental overreach. Privacy is unarguably lessened when body cameras are introduced, even with strict control over the information collected the flow of information has been increased and expanded in a new way. What Nissenbaum's analytic with the inclusion of power defined by Von Wright shows is that the reduction of privacy created by the cameras is not necessarily a violation. Police are the ones who have power in most situations so a reduction of privacy for them is justified by the protection of the citizens. Body cameras for the police have the clear benefit of reducing (or at least the documentation of) police misconduct. Privacy's societal value is still preserved because with the right policies there is no expansion of governmental power. Even though police body cameras reduce privacy they are justified because they make sure police are not using their

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<sup>9</sup> . Most importantly such expansion of power is usually only beneficial to the one making the norm. Often it is the citizens who suffer such as in cases where the police try to crack down on peaceful protests or monitor citizen's communications

<sup>10</sup> . In Nissenbaum's language they have to provide a compelling reason or make the case that privacy is not actually violated or that such a violation is justified



power in ways they are not authorized to which was the goal of privacy in the first place<sup>11</sup>. This means that the privacy harm is not as severe than if the situation was changed so that it was the citizens themselves who were primarily under scrutiny. The reduction in privacy for citizens should not result in much concrete harm because the information collected on them can be controlled through effective policies as police body cameras are only aimed at checking police power. The inclusion of power brings to the fore how police are enforcers of norms and can expect weaker privacy rights because they are the ones in authority not the ones in need of protection from authority. Police body cameras are then justified because they provide a compelling benefit while the lesser harms involved can be mitigated.

This is where intelligent privacy policy informed by theory can be of value. While body cameras can be effective tools to prevent abuse we need to craft norms that regulate their use so that they do not become a tool to exercise arbitrary or intrusive power which privacy is supposed to protect against. To accomplish this I offer three main policy suggestions<sup>12</sup>. First none of the footage taken by the cameras should be accessible (without a warrant) or changeable by anyone within the police department. This is critical, officers or heads of departments simply have far too much vested interest in the outcomes of complaint cases against them to be allowed control of the footage they capture. To enforce this separation requires that all recordings from cameras are controlled by the judicial branch (probably the district court) and that no copies of the recordings are made without permission. Police should only be allowed access to these records if they can show a judge that they have reasonable belief that the recordings contain evidence of a crime and even then police should be allowed only read access not write access to the data.

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11 . The goal being to prevent arbitrary expansion of power. Body cameras are meant to be a concrete way to enforce this limitation by preventing police from hiding their activities.

12 . There are of course many more policies that could and should be implemented but for the sake of time I will focus on just three that I see as most relevant to the theories I have discussed and those that I believe will have the largest impact on preserving privacy and preventing misuse of the information collected.

This policy serves multiple functions. Most importantly it establishes strict control over access to the information which should prevent police departments from changing or destroying incriminating and embarrassing footage while still allowing for the footage to be shown as evidence in complaint disputes. This should also protect the officers themselves by eliminating the possibility for their superiors to use body cameras as a tool of control or punishment.

Secondly, citizens should be informed that they are being recorded and have the power to decide whether they want to be recorded or to waive that right. If they waive their right to have an encounter recorded that decision needs to be documented officially and have some kind of proof that the citizen choose that option such as a signature. This policy should mitigate many of the issues I brought up before such as when police enter a house or interview a witness. This will hopefully mitigate the problems of witnesses or survivors of violence not wanting to talk to police because they can choose not to be recorded and at the same time it should allow for people to not have their houses or private lives filmed if they are concerned about their privacy. A corollary to this is that the officers will not have the power to choose when they record or not. The rules should be that as soon as they interact with a citizen or respond to a call they must be recording.(Stanley). What this does is make sure that they must record everything and not exclude the things that show them in a bad light or are evidence of misconduct.

Finally, all data created by the body cameras should be deleted routinely after a set period of time. If there is a complaint, was use of force in the incident (even proportional force) or the encounter ended in an arrest then the recording should be flagged. The exact amount of time the information should be kept is hard to pin down but I suggest that after six months if none of the above condition are met the information should be erased. If the recordings were flagged they should be kept for some longer interval before being used or deleted.(Stanley). The main

purpose of having the data wiped is to prevent creation of a database or having it used to run identification analysis on the populace.

These policies should ensure that body cameras are used to provide our society with a way to prevent police abuse of power while making sure that the value of privacy is preserved as much as possible. The trade off is not a completely comfortable one because there is always the potential that new practices and informational norms may have unexpected consequences but the harms caused by the lack of accountability of police need to be addressed and body cameras provide the best benefit with the fewest downsides (and ones that can be mitigated). The creation of intelligent and effective policies is massively aided by paying close attention to the particulars within their given context while relying on theory to provide a framework which with to thematize particular contexts and values. For this purpose Nissenbaum and Von Wright were and are extremely useful. It is important to be willing to evaluate and criticize practices even when the problems surrounding them seem intractable or inevitable. Critical reflection is the only way improvements will be made and we can progress as a society.

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