

# No Tape, No Testimony

*How Courts Can Ensure  
the Responsible Use of Body Cameras*



## Executive Summary



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## SUMMARY

In January 2015, the Chicago Police Department launched a pilot program requiring its officers to use body-worn cameras. The program began in the wake of public outcry over violence by Chicago police officers against civilians, and a police official explained that it sought to “rebuild[] trust with the residents we’re sworn to serve.” In July 2016, an officer wearing one of these cameras killed Paul O’Neal, a Black teenager who allegedly stole a car and crashed it into a police cruiser. After Mr. O’Neal fled on foot, the officer fatally shot him in the back. In theory, Mr. O’Neal’s final moments should have been recorded by the officer’s body camera, and the recording should now be available to assist a court, a jury, or the public in deciding whether the shooting was justified. But no such video exists. The camera worn by the officer who killed Mr. O’Neal was reportedly not turned on until after the fatal shot had been fired.

This incident, and others like it, have been cited as cautionary tales about how the value of body cameras can be undermined if the police cannot or will not ensure their consistent use. But police departments are not the only institutions capable of assuring the effective use of body-worn cameras. Courts can do it too.

For three reasons, courts can and should encourage the police to record, when practicable, their investigative encounters with civilians.

- 1. Videos of police-civilian encounters have shaken public confidence in the capacity of legal proceedings to separate fact from fiction.** Time and again, cases have been headed for an incorrect result—such as the wrongful prosecution of a civilian or the wrongful exoneration of a police officer—*until* videos surfaced that contradicted officers’ versions of events. Meanwhile, there is growing evidence that witness testimony, on which courts must often rely when video is absent, can be quite flawed when used as the exclusive means of resolving disputes between police officers and civilians. Thus, when video evidence of a police-civilian encounter does not exist, legal proceedings may be less likely to get the right answer or to be respected by the public.
- 2. Police body-worn cameras present a viable and valuable supplement to witness testimony.** These cameras are quickly becoming part of the 21<sup>st</sup>-century police uniform, with a recent survey of 70 law enforcement agencies finding that 95% of respondents had either implemented or had committed to implementing body camera programs. Body cameras can be critical to uncovering the truth when the facts of a police-civilian encounter are contested. There is also evidence that, when body cameras are consistently worn and activated, they can deter misconduct or violence from happening in the first place.
- 3. Courts have both a distinct interest in and a unique means of encouraging police officers to record their encounters with civilians.** Courts have an interest in conducting legal proceedings that are fair, that avoid wrongful convictions and other catastrophic outcomes, and that efficiently resolve disputes. Given those interests, and given that videos of police-civilian encounters can make the difference between just and unjust results, courts should

encourage, when practicable, the recording of police-civilian encounters. Rather than leave this task to police departments, whose disciplinary practices are necessarily inconsistent, courts should provide this encouragement by using tools uniquely at their disposal: jury instructions.

This report proposes a model jury instruction that encourages the recording of police-civilian encounters by empowering juries to impose *evidentiary consequences* for unreasonable or bad faith failures to record.

***This instruction would tell the jury that, if it finds that the police unreasonably failed to create or preserve a video of a police-civilian encounter, it can devalue an officer's testimony and infer that the video would have helped the civilian. If the jury finds that the case involves bad faith, such as the outright sabotage of body cameras, then it should be instructed to disregard officer testimony altogether.***

The tools that courts can use to craft this instruction already exist. Several courts now use jury instructions to encourage the recording of custodial interrogations and drunk-driving field tests; they can and should craft similar rules for body cameras. These measures can help prevent wrongful convictions, accurately resolve allegations of police misconduct, and enhance public trust in the justice system's capacity to get it right when confronted with police-civilian violence.

**For the full report with citations, go to:**

**<https://aclum.org/our-work/aclum-issues/police-accountability/no-tape-no-testimony/>**

## Jury Instruction on Unrecorded Police-Civilian Encounters

You have heard evidence about an encounter between a police officer and a civilian. You have also heard that [the police officer did not record the interaction OR the police officer recorded the encounter but the video recording was lost or altered].

[Name of State or Commonwealth] Courts have concluded that police departments should create and store recordings of their investigative interactions with civilians when it is reasonable for them to do so. The courts have expressed this preference because, when these video recordings are not made, it can be harder to learn what happened.

If you find that it was not reasonable for the police department to fail to record its encounter with [Name of Civilian], you should infer that the recording, if it had been made, would have been favorable to [Name of Civilian]. You should also consider whether the absence of the video tends to affect the quality, reliability or credibility of the evidence presented by the [State/Officer/Police Department] about what happened during the encounter. You may give that evidence whatever weight you think it deserves under the circumstances.

In considering whether the absence of a recording was reasonable in this case, you may consider:

- the resources available to the police department;
- whether the officer knew in advance that s/he was going to have an investigative encounter with a civilian;
- whether the investigative encounter was not recorded because the officer reasonably relied on a departmental policy that forbids recording in this situation in order to protect the privacy of civilians;
- the specific facts of this police-civilian encounter; and
- other circumstances you deem relevant.

If you believe that the failure to record or the destruction of a recording was done in bad faith, and not merely unreasonable, you must disregard the police officer's testimony about this encounter. Bad faith includes, but is not limited to, any attempt by a police officer or department to conceal the truth about this specific encounter or to prevent the recording of police-civilian encounters more generally.