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Video, a New Tool for the Police, Poses New Legal Issues, Too

By ERICA GOODE

When a man was fatally shot by a police officer on a street in Oakland, Calif., late last month, the shooting was captured by a video camera.

But the video was not taken by an alert pedestrian with an iPhone. It was recorded by a device clipped onto the police officer's chest.

The Oakland Police Department is one of hundreds of law enforcement agencies that are trying out the body-mounted video cameras, using them to document arrests, traffic stops and even more significant encounters, like officer-involved shootings.

The cameras, legal experts say, are the latest addition in a world where everyone is increasingly watching everyone else.

The police already record illegal left turns and ignored stop signs using cameras mounted on the dashboards of cruisers — evidence displayed vividly on video screens in courtrooms, sometimes to the chagrin of drivers who have just insisted they did no such thing.

Surveillance cameras watch for shoplifters and potential terrorists. And ever since a bystander recorded Los Angeles police officers beating Rodney King in 1991, video has been used by witnesses or suspects to record what they believe to be misconduct or inappropriate behavior by the police — a practice that has proliferated with the advent of smartphones.

The ubiquity of video in police encounters — some of it promptly uploaded onto YouTube — is creating new frontiers for judges and lawmakers, who must sort out the issues raised by the new technologies.

Courts in several states are considering cases where citizens who videotaped the police have been charged with violating wiretapping or eavesdropping statutes, prosecution that civil rights lawyers say violates First Amendment rights.

If body cameras are widely adopted by police departments — Viewu, the Seattle firm that sold Oakland its cameras, has supplied them to more than 1,100 police agencies across the country, according to Heidi Traverso, a company spokeswoman — privacy questions are likely to be added to the legal stew.

“If a police officer is taking a picture of every interaction, one of the things that he may find is me, naked as a jaybird, when my wife calls to complain,” said Franklin E. Zimring, a professor of law at the University of California, Berkeley. “Let's assume that it's either against the law or not, but I sure don't want it on YouTube. The

potential for a sort of permanent embarrassment is a looming presence when everything is filmed.”

Police officers argue that the pager-size devices, which are more versatile and cost far less than dashboard cameras, can provide objective evidence in situations that might otherwise depend on “he said, she said” accounts. Indeed, the videotape of the police shooting in Oakland is likely to play a critical role in the investigation by the department’s internal affairs division. The department has not released the names of the victim or the officers involved in the shooting.

Video from the cameras has also been used in Oakland to evaluate citizen complaints about police behavior, said Officer Johnna Watson, a spokeswoman for the department, adding that in one case — she declined to provide the details — an officer’s video proved that a complaint was unfounded.

Some legal experts also say that the more video evidence available, the better.

“With all its ambiguities and difficulties, the photographic brave new world is better than its predecessor,” Professor Zimring said. “The kinds of mistakes you can make with it are less often and less catastrophic” than with dueling verbal renditions of what occurred.

Howard Wasserman, a First Amendment scholar at Florida International University’s law school, noted that video recordings were not free from subjective interpretation.

“Film and literary theory show that it is a myth that video evidence is an unambiguous, objective, conclusive, singular and clear reproduction of reality,” Professor Wasserman wrote in a 2009 paper on the implications of video recordings for civil rights litigation.

But he, too, said that a world where “all encounters can be recorded by everybody” is “not necessarily a bad state of affairs.”

If nothing else, he and other legal scholars said, the adoption of the body cameras by police departments may help discourage attempts to prosecute citizens for making their own video records of police interactions, in most cases under wiretapping or eavesdropping laws that prohibit recording without consent from both parties.

In Maryland, for example, a speeding motorcyclist, Anthony Graber, was charged with illegal wiretapping last year when he used a helmet-mounted camera to record the state trooper who pulled him over, and then posted the resulting video on YouTube. A judge later threw out the charges, saying that Mr. Graber was within his rights in making the video.

In Illinois, Christopher Drew, an artist, may not be so lucky. He used a digital audio recorder to document his arrest for selling art without a permit in 2009 — a friend also videotaped the arrest and uploaded it on YouTube — and was promptly charged under the state’s unusually restrictive eavesdropping law, which makes recording a police officer without consent a Class 1 felony, punishable by up to 15 years in prison. The case has not yet come to trial.

The American Civil Liberties Union of Illinois, arguing that Illinois’s statute violates the First Amendment and would keep the organization’s members from monitoring citizen-police interactions, filed a lawsuit in 2010 challenging the law. A district court dismissed the case. The civil liberties group is now appealing the judgment.

Professor Wasserman noted that if the police are also videotaping their actions, “to say ‘we can have the cameras and nobody else can’ really becomes problematic.”

He pointed to a sweeping decision issued by a federal appeals court in Massachusetts in August in the case of Simon Glik, a recent law school graduate who was charged under the state’s wiretapping law in 2007 after he used his cellphone to videotape three uniformed police officers he believed were using excessive force. In ruling on a civil rights lawsuit brought by Mr. Glik after the wiretapping charges were dismissed, the appeals court judges said he “was exercising his clearly established First Amendment rights in filming the officers in a public space.”

David Milton, a lawyer who represented Mr. Glik, said he hoped that the federal court’s ruling would influence cases in other states, like the lawsuit brought by the American Civil Liberties Union of Illinois.

“It’s such a strong decision and it’s well reasoned and the first decision that really addresses this case,” Mr. Milton said. “It’s only fair and right that citizens should have the right to record the police.”