



DIGITAL FOURTH

The Massachusetts campaign to protect digital data
from unconstitutional government surveillance

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Joint Committee on Public Safety and Homeland Security
Hearing on Public Safety, February 4, 2016

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OVERVIEW

Digital Fourth is a Massachusetts-based civil liberties nonprofit founded in 2012. Our board consists mostly of academics. We meet weekly, and have an extensive network of volunteers across the state. We have worked on several issues in state legislation, including opposing an expansion of the state's wiretap statute. Our current bills before this Committee limit the acquisition of military equipment by police departments (H. 2169) and mandate police bodycams and data collection on police stops (H. 2170).

Our central concern is the **Fourth Amendment to the US Constitution**, which reads:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

We are also deeply concerned with **Article XIV of the Massachusetts Constitution**:

“Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.”

Presumptively, under Massachusetts and federal law, any bill that seeks to do these things is unconstitutional, and ought not to pass favorably out of committee. Conversely, any bill that reinforces that police officers should not stop, search or arrest people without, at a minimum, *individualized* reasonable suspicion of their involvement in a crime, should pass out favorably.

TESTIMONY RESPECTFULLY SUBMITTED BY

A handwritten signature in black ink that reads "Alex Marthews".

Alex Marthews, Chair, Digital Fourth

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SUPPORT S. 1257 / H. 2170, “An Act promoting the use of body-worn cameras by law enforcement”

We are the primary architects of this bill. We based it on model legislation developed by the Harvard Black Law Students Association, who consulted extensively with police departments and attorneys. It was generously filed for us by Sen. Eldridge and Rep. Provost, as a discussion draft that could spur adoption of bodycams in Massachusetts, with appropriate policies for the use and retention of the data generated. It was cosponsored by a variety of legislators in urban, suburban and rural districts across Massachusetts, reflecting the broad interest in this issue.

1. TESTIMONY OF MS. SHEKIA SCOTT, CO-ORGANIZER, BOSTON POLICE CAMERA ACTION TEAM

Good morning everyone and thank you Chairman Naughton, Chairman Timilty and all of the members of the committee, for allowing me to speak today.

I am here today to talk specifically about the popularity of body cameras and the efforts to pass bodycams on a city and state level.

Since early 2014, after the world witnessed countless videos of police misconduct mostly ending in murder, videos like Eric Garner, Sandra Bland, James Boyd, John Crawford, Tamir Rice, Jerame Reid - the list goes on and on - we've had a huge uptick in body camera popularity and the demand for body cameras has steadily increased not only within the public but also within police departments nationwide. There have been hundreds of studies/polls/surveys/think pieces on body cameras showing that the majority of Americans support body cameras for police officers but say there needs to be clear rules on how the cameras and the footage are used. In one study, Anzalone Liszt Grove Research and The Leadership Conference Education Fund found that nine out of 10, or 88 percent, of Americans want police to be required to wear body cameras. Super-majorities in every demographic group - white, black, Republican and Democrat - support body cameras on police officers. A nationwide survey — conducted in a partnership between PoliceOne and TASER International revealed that an overwhelming 94% of police officers, representing every region of the country, believe that there's a need for body cameras as well. This survey was conducted among 785 federal, state, and local law enforcement professionals.



Body-camera programs reportedly have been piloted, implemented, or will soon be implemented in major cities throughout the country, including Albuquerque (NM), Boise (ID), Charlotte (NC), Chicago (IL), Cleveland (OH), Columbus (OH), Dallas (TX), Detroit (MI), Indianapolis (IN), Jacksonville (FL), Kansas City (MO), Las Vegas (NV), Los Angeles (CA), Memphis (TN), New Orleans (LA), New York, (NY), Oakland (CA), Philadelphia (PA), Phoenix (AZ), San Antonio (TX), San Diego, (CA), San Jose (CA), and Seattle (WA).

Community efforts have risen up all over. Here in Boston, I along with a friend co-founded the Boston Police Camera Action Team. Our mission was to equip officers with body cameras including a sensible community inclusive policy. We spent months in our Boston communities educating and gathering opinions and concerns from residents, officers and government officials alike. We (with help from privacy and public organizations in our city and state, Digital Fourth, Boston Doorknockers and the ACLU) drafted a comprehensive policy both protective of citizens and their concerns as well as police officers and theirs. We introduced our policy to city hall as an ordinance and had a public hearing on the issue in August, swaying the commissioner and Mayor to introduce a pilot program.

On a state level, South Carolina introduced the first statewide bodycams mandate in 2015, in response to the appalling case of Walter Scott, who was shot in the back while fleeing after a traffic stop. A member of the public happened to film Officer Michael Slager, the shooter, planting a Taser on Scott's dead body to match his account in the police report that Scott grabbed his Taser.

Now, South Carolina is a poor Southern state with a state budget just over one-fourth the size of ours. It has a Republican Governor with ambitions for higher office. It has Republican supermajorities in both chambers of the legislature. It has the same number of police officers as Massachusetts, so a bodycams mandate will cost the same there as it will here. If they can pass a statewide bodycams mandate despite all these constraints on new expenditures, so can we.

To conclude: it's clear from the spread of bodycams that this is the time to move forward - now, not the next opportunity in 2018. If this bill went to its third impression, we would actually implement bodycams in 2021, by which time we might be the last in the nation to do so. Instead of following, and allowing years of abuses to fly under the radar, let's lead. Let's pass a bill this year that will be a model for other states to follow.



2. TESTIMONY OF MR. SAM TRACY, COMMISSIONER, SOMERVILLE HUMAN RIGHTS COMMISSION

Good morning, Chairman Naughton and Chairman Timilty. Thank you to you both and to all the members of committee, for allowing me to speak to you today.

I'd like to speak to you on two specific questions about the bodycams bill: *Is the problem significant?* And, *If adopted, will bodycams be effective at solving the problem?*

(a) Is There A Significant Problem That This Bill Could Solve?

As far as we can tell, there is a serious problem in Massachusetts when it comes to police interactions with members of the public. This is not a reflection on individual police officers, who are often courteous and disciplined. But the limited data we do have, mostly from Boston, shows that there are too many cases where interactions escalate into violence, and bodycams would help with these.

One good example of excessive force is the case of Anthony Ferrier. In summer 2014, Ferrier apparently tried to commit suicide in front of an MBTA train. Officer Sean Conway was on the scene and leapt to save Ferrier. Then, having rescued him, Officer Conway is shown on camera punching Ferrier repeatedly, fracturing his nose and injuring his eye. The MBTA noted that “Detective Conway’s use of force was justified and commensurate for the situation; Conway was in compliance with policy.” Litigation is underway, and a settlement will likely cost the taxpayers significant amounts; over the last ten years, such settlements have cost the City \$36 million. The only reason this incident is known is that it occurred within the sight-line of a camera. We simply don’t know how many incidents occur that are currently unfiled.

We know from the last systematic collection of police stop data across Massachusetts, between 2002 and 2003, that there are significant racial disparities in enforcement of the law. Evidence from Boston suggests that officers do disproportionately stop and arrest people of color, and that in general, when they make stops not resulting in arrest, they usually do not document any articulable reason for the stop.¹

Our bill would help to address this in two ways. First, it requires collection and analysis of data on police stops, by a new Law Enforcement Data Review Committee housed at

¹ “Black, Brown and Targeted: A Report on Boston Police Department Street Encounters from 2007-2010”, ACLU of Massachusetts, October 2014, available at <https://aclum.org/app/uploads/2015/06/reports-black-brown-and-targeted.pdf>, accessed August 4, 2015.



EOPS. Second, by mandating bodycams, our bill would ensure that there is some record wherever practicable of police-citizen interactions. Some behavior like Officer Conway's would be deterred; where practicable, the behavior not deterred would be captured on film; and that would be better for police-community relations.

(b) Have Bodycams Been Shown To Be Effective At Reducing Police Use Of Force?

The available academic evidence is that bodycams are highly effective. A good, controlled study was done in Rialto, CA, which resulted in a drop of 50% in use of force incidents and 87.5% in police complaints. This is encouraging evidence that bodycams could do more than almost any other intervention to reduce Fourth Amendment violations on the street; it's this study that attracted our interest in bodycams in the first place.² Since that study came out, the same effect has been observed in cities across the nation: in San Diego, and Detroit, and many other places. While some studies are better-constructed than others, they all point in the same direction: A substantial reduction in use of force that varies between 30% and 80%.

Some have suggested a pilot study for bodycams in Massachusetts. We view this as wholly unnecessary. Every study to date, in every place, shows the same direction of result. We have no reason to suppose that there are Massachusetts-specific factors that would mean that the declines in complaints and use of force seen elsewhere would not also happen here. To ask for more study in this context is to accept all the abuses that will happen because we delay, for no good reason, in adopting bodycams. It's time to move forward.

To sum up: Bodycams are likely to help significantly to rebuild police-community relations, drain the confrontation out of police-citizen interactions, and are the single most effective intervention identified in the literature and tested in the field at reducing both use of force incidents and complaints against the police.

² Barak Ariel , William A. Farrar, Alex, "The Effect of Police Body-Worn Cameras on Use of Force and Citizens' Complaints Against the Police: A Randomized Controlled Trial", *Journal of Quantitative Criminology* September 2015, Volume 31, Issue 3, pp 509-535.



3. TESTIMONY OF MR. ALEX MARTHEWS, PRESIDENT, CAMPAIGN FOR DIGITAL FOURTH AMENDMENT RIGHTS

Good morning, Chairman Naughton and Chairman Timilty. Thank you to you both and to all the members of committee, for allowing me to speak to you today.

First, I should say that as a society, we repose immense trust in the police. The State arms them, and sends them out into our neighborhoods in our name, and grants them functional immunity from prosecution under all but the most terrible of circumstances. It is reasonable to ask in return that we can see that they are doing their jobs fairly and ensuring that all members of the community receive the equal protection of the laws that is their Constitutional due.

I'd like to speak to you about a couple of necessary modifications to the bodycams bill.

When we filed the bodycams bill, and when we have spoken to legislators about it, we have consistently made clear that we expected the text to change as a result of committee work and expert testimony, and that it was submitted as a discussion draft. In the year that has passed since it was introduced, much work has been done nationally on crafting good-quality standards for bodycams policies. There are therefore a few amendments we would like to formally propose for our own bill, in order to prevent abuses that have arisen elsewhere:

(a) Bodycam Policies Should Be Public Records

Our bill offers broad discretion to police departments in devising their bodycam policies, but sets “minimum core standards” for those policies. One aspect missing from those minimum core standards is that the policies themselves should not only be public records, but should be posted to the websites of the police departments concerned.

(b) Bodycams Records Should Be Public Records

Our bill draft reads as follows (ll. 103-108 in the Senate version):

“(c) Applicability to Massachusetts’ public records statute (1) All audio-visual recordings that are captured during an interaction between a[n] individual or individuals and an officer or officers are exempt from public disclosure under 4 106 MGL 7(26)(a) and shall be kept confidential absent a court order. (2) This exception does not apply to individuals filmed in a police interaction, and their legal representatives shall have the right to inspect and copy such recordings.



We now believe, based on an array of cases such as the horrifying shooting of Laquan McDonald in Chicago and the political coverup that followed, that exempting bodycam footage from public disclosure without a court order has too great a potential for abuse. If disclosure is only up to the victims and their families, then it will be possible for prosecutable abuse to be covered up through a cash settlement with the family where the family agrees not to copy or redisclose such footage. In most states, dashcam records are presumptively public records, and it seems reasonable for bodycam records also to be presumptively public, even while cases arising from the footage are under investigation, subject to the constraints elsewhere in this bill that allow officers to turn off bodycams when they are in private contexts.

(c) Initial Written Report Should Be Required Before Officer Views Footage

There have been numerous cases across the country in the past year where the narratives of officers in their police reports were disproved by bodycam or dashcam footage when it became available.³ It is also possible for officers to “tailor” their narratives to what is shown and what is not shown in bodycam or dashcam footage before they are formally interviewed regarding an incident. For this reason, it is important for the bill to require, among the minimum core standards, that an initial written report of an incident should be required before the officer is able to view the dashcam or bodycam records relating to that incident.

³ See, in the case of the killing of Walter Scott, <http://www.alternet.org/media/media-had-already-bought-polices-fantasy-version-walter-scott-killing-video-surfaced>; in the case of the killing of Laquan McDonald, <http://www.usatoday.com/story/news/2015/12/05/chicago-police-officers-offer-narrative-at-odds-with-laquan-mcdonald-shooting-video/76827254/>.



SUPPORT H.3479, “An Act establishing a special commission to investigate and study methods to prevent the use of undue force by police officers”

Many people see the problem in citizen-police interactions as *insufficient police training*. Several admirable bills before the Committee today focus on this, but this misses part of the problem. When police shoot citizens, it is generally in circumstances falling *within* police rules of engagement and guidelines on use of force. The Supreme Court ruling in *Tennessee v. Garner* (1985) gives officers extraordinary latitude in deciding when to use force, in a way that systematically fails to respect people’s lives, and especially the lives of people of color. The result is that for citizens who kill police officers, the penalties are harsh, certain and immediate, but for police officers who kill citizens, there are typically no consequences; officers go on paid leave, and are almost never charged, let alone convicted. This is a gross imbalance of incentives, of accountability, and of power. In principle, the consequences should be the same for police and non-police; they should be able to claim self-defense, but should expect to be charged. We should not expect killing people to be a natural rather than extraordinary part of an officer’s job.

Providing more and better training, while advisable, is not going to solve this problem of unbalanced incentives. Here in Massachusetts, we can and should do better, and expect more of our officers. It is possible to reduce the rate of police shootings very significantly without putting officers at significant additional risk; in Germany, for example, their rate of police shootings of citizens is one-sixteenth of the rate in Massachusetts; one police officer was killed there in the line of duty in 2015, compared to none in Massachusetts.⁴ Therefore, there is a genuine need for a special commission of the kind outlined by Rep. Fox in this bill. The significant minority representation on the commission that she calls for is appropriate, given that both within Massachusetts and nationwide, people of color are overrepresented in police statistics.⁵ We all have an interest in making sure that the police are perceived as, and actually are, providing all people with the equal protection of the laws.

⁴ In Massachusetts, police shot ten people in 2015; in Germany, police shot eight people in 2015. Germany has twelve times the population of Massachusetts. Nationwide, police killed 1,138 members of the public in 2015, and around 50 officers were killed by members of the public.

⁵ Nationwide, 72% of the population is white, and 51% of the people shot by police in 2015 were white; in Massachusetts, 50% of the people shot by police in 2015 were white, and the population is 83% white.



SUPPORT H. 3480, “An Act relative to establishing an independent review board for police shootings”

Citizen police review boards exist in a few, mostly urban, settings in Massachusetts. They are typically gravely hamstrung by a lack of subpoena power; by being able only to advise that an officer be disciplined, rather than requiring it; and by requirements for an internal investigation to be completed before the citizen police review board can review an incident. Given these problems, it is time for a statewide review board of the kind envisioned in this bill: Independent, well-staffed, and able to recommend prosecution of officers where a shooting is ruled to have not been according to procedure.

(Note that this is connected to the issue previously described: If procedures are so permissive as to allow almost any kind of police shooting, it will be hard for citizen police review boards to find that any officer violated procedure).

Our only observation is that, unintentionally, this board may have too narrow a remit. Police may kill members of the public by means other than shooting, though shooting is the most common. There are also other issues of police discipline beyond killing members of the public, such as sexual exploitation and corruption, which could properly be placed under the remit of a statewide independent police review board.

Our bodycams bill proposes a commission that would also be housed at EOPS, and that would review law enforcement data on pedestrian stops, traffic stops, bodycams and other surveillance systems, such as databases of license plates. While we have no wish to multiply commissions, it seems to us that this independent review board has a fundamentally different purpose, being oriented around individual cases rather than data systems. If both bills were to become law as they stand, it would seem appropriate to us that this independent review board would be the entity responsible for determining whether the bodycam records in a particular case should be released to the public.



SUPPORT AND COMBINE:

S. 1244, “An Act relative to training for law enforcement in dealing with individuals suffering from mental illness”;

S. 1256, “An Act relative to training for law enforcement”;

S. 1264 / H. 2098, “An Act relative to criminal justice regarding autistic persons”;

H. 2106, “An Act relative to uniform use of deadly force guidelines”;

S. 1280 / S. 1311, “An Act relative to police training”; and

H. 2137, “An Act to establish a pilot grant program using ‘Emotional CPR’ to decrease hostilities between police and citizens”

Police shootings occur when officers fear for their lives, or their training suggests that there is a non-zero chance of their life being at risk. But people with mental illnesses or disabilities do not necessarily react to police intervention in expected ways, and the unexpected nature of their reactions increases the perceived risk they pose. The result is that about one-quarter of fatal police shootings are of mentally ill people.⁶ Only half of police departments receive any training on how to handle mentally ill people, so it is easy to interpret somebody who is confused or hearing voices as being noncompliant and therefore a threat. Being ill, disabled or autistic are not reasonable suspicion for being stopped, searched, arrested or killed. Most tragically, it sometimes happens that family members call to have trained professionals respond to deal with a mentally ill relative in crisis, and, instead of receiving help, the relative ends up dead.⁷ Better training in nonlethal de-escalation, emotional CPR, and other techniques, and publishing guidelines on use of deadly force, will surely help.

In Massachusetts, cases regularly arise where it is at least arguable that it was not necessary to shoot someone. The 2015 shootings of Santos Laboy⁸ and Douglas Buckley are examples.⁹

⁶ <http://www.npr.org/2015/07/04/420019849/paper-finds-one-quarter-of-those-killed-by-police-are-mentally-ill>

⁷ One such case is Jason Harrison, of Dallas, TX, killed in June 2014 at the doorstep of the home where he lived with his mother: <https://www.policeone.com/police-products/body-cameras/articles/8459038-Video-Dallas-cops-fatally-shoot-mentally-ill-man-wielding-screwdriver/>

⁸ <http://boston.cbslocal.com/2015/06/20/sister-says-man-fatally-shot-by-police-had-mental-issues-why-kill-him/>

⁹ <http://www.bostonglobe.com/metro/2015/07/02/brockton-man-fatally-shot-police/TFwHapR8aN1shu8KY67duM/story.html>



These bills promote the important objective of managing risk in citizen-police interactions. Without such bills, the default approach of police officers, and what their training will encourage them to do, is to minimize risk to their own lives, even at the cost of others'. That will inevitably result in cases like Mr. Laboy's, where he was carrying a small folding knife; Mr. Buckley's, where he was carrying a fake BB gun; and Mr. Harrison's, where he was carrying a screwdriver. It cannot simply be the case that it is OK to shoot someone if you could possibly believe that they are carrying something that may harm you; we do not apply that rule to members of the public, and should not apply it to police officers either. There must be more respect for life, and more care taken to avoid taking it, even at a minimally greater risk to the officer's life.

The bills listed above try to do similar things with respect to different categories of people: Those with mental illness (S. 1244); civilians in general (S. 1256); and those on the autism spectrum (S. 1264 / H. 2098). S. 1280 / S. 1311, with identical texts, present an interesting funding mechanism for this kind of training. These bills could easily be combined and made consistent in committee and then reported out favorably, as a more comprehensive police training bill; we urge you to do so. If this is not done, and if more than one of them passes, the bills risk creating multiple training regimes to deal with the same problem.



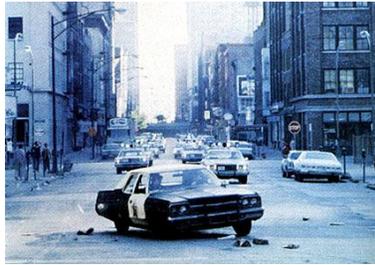
SUPPORT S. 1263, “An act relative to pedestrian stop data”, and H. 2118, “An Act relative to improving public safety and the public's right to know”

S. 1263 requires better documentation of pedestrian stops. In particular, it requires receipts to be produced contemporaneously for traffic stops that state the reason for the stop. An officer intent on abuse is unlikely to issue a receipt for that abusive interaction, but if the penalty for failing to give a receipt is certain and meaningful to the officer, this measure may deter abuse. Issuing receipts contemporaneously spreads information about an interaction outside the hands of law enforcement, allowing corroboration of what really happened and when. This will not only help defendants, but will also help officers demonstrate the truth in the face of public doubt.

In the same vein, H. 2118 suggests a log, held at the police station, related to complaints received, arrests made, and charges made. We believe this will be useful, provided the log and public record are digital, and include every incident of access to or modification the record after it is created and by whom.

S. 1263 is important because unconstitutional stops for no articulable reason – so-called “Investigate Person” stops – are endemic. A recent Boston study found that, of 200,000 stop reports studied which did not result in arrest, 75% listed the reason for the stop as “Investigate Person.” Two-thirds of the stops were conducted on people of color. Extra investment in “hotspot policing” and “data-driven policing” will likely target such stops even more intensely on high-minority neighborhoods. In NYC, from the 1980s until 2015, it was routine to target young men of color in particular for repeated, suspicionless stops. Enormous amounts of police time were invested in making these stops, but when policy changed away from this practice of “stop and frisk”, crime did not rise. For twenty years, all “stop and frisk” appears to have achieved was antagonizing young men of color, discouraging them from approaching law enforcement if they had information useful to the solving of a crime.

I live in a quiet suburb where the police do not routinely stop people going about their everyday activities. If I were treated in this way, without any reasonable suspicion of my involvement in a crime, I would hate it. So let’s collect this data, issue receipts, keep electronic logs, and thereby make sure that policing is being done fairly and constitutionally.



OPPOSE S. 1261, “An Act relative to police pursuits in the Commonwealth”

This bill seeks to establish a new criminal offense of failing to stop when a police car attempts to pull you over, with an astounding *minimum* prison sentence of two and a half years.

Our general approach is based on the Fourth Amendment, which argues that government should not be able to “seize” a person unless they have probable cause, demonstrated to a judge, of their involvement in an actual crime. Arrests must, to be constitutional, be based on at least “reasonable suspicion” of involvement in an actual crime.

This bill, because it creates a new offense, must by its nature be intended to deal with situations where there is *no* reasonable suspicion other than the fact that a person is fleeing from police. If someone has actual evidence of a major crime in the car – say, they are transporting heroin, or kidnapping a child – then that evidence will become clear as a result of the police pursuit, and they will be arrested on suspicion of having committed that crime. For such major crimes, a driver will not likely stop the car in order to avoid prosecution on a “failure to stop” charge; so this measure will be least effective against major crimes.

Prosecutors should bring charges against drivers for the actual crimes that a valid search of the car reveals. Let’s not invent new crimes so that prosecutors will have something to charge people with, or threaten people with as part of a plea process, merely for not complying with officers’ wishes. Contempt of an officer’s wishes, while often impolite, should not be criminal, and for many people, especially women alone in the car at night, they may be entirely justified in wanting to drive to a well-lit area with people around before stopping for a police car.

In general, so long as the police have no evidence that we have done anything wrong, we are not under a special obligation to comply with their instructions, any more than the instructions of another member of the public. To pass this bill would be to assume that there can only ever be valid reasons for conducting a traffic stop, an assumption not borne out by evidence.

We therefore urge you to not vote this bill out favorably.



OPPOSE H. 2130, “An Act requiring microphones and audio-recorders on tasers”

If the bodycams bill were to be reported out favorably, there would be no need for this bill, because police officers would be required to carry a form of audio-recording equipment at all times that it is reasonable to record. Their bill goes into less detail than ours about circumstances when it would not be appropriate to record, and does not provide at all for disciplining of officers who do not maintain their equipment appropriately, or damage it, or turn off the audio when they shouldn't. For these reasons, though the intent may be laudable, we would oppose this bill as it stands.