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Transparency for What End? Policing Politics in New York City

Marc Landy

Chefs do not routinely consult food chemists about how to improve their cuisine. But if their recipes go seriously awry, chefs may feel called upon to bolster their art with science. In such dire circumstances, an understanding of the underlying chemistry may be necessary to produce a better dish. Likewise, those involved in the practice of policing will not normally feel the need to consult a political scientist. But these are not normal times. As events over the past six months in Baltimore, Maryland; Ferguson, Missouri; Staten Island, New York; and Cleveland, Ohio, have dramatized, the relations between civilians and police have reached a level of political tension and mutual mistrust that, as in the cooking example, the practical arts now require the aid of science. Political science is not chemistry. But as this paper attempts to demonstrate, it does offer an array of conceptual tools that can help to place the debate about police and civilians on a sounder analytic footing.

In particular, the paper looks at the issue of transparency. It seeks to understand how the specific question of transparency informs the broader debate about the role of civilian oversight in promoting better policing. It focuses on one key issue in the transparency debate, the use of body cameras. It begins by placing the related issues of body cameras and transparency within the context of the broader debate about quality of life policing. It then describes the distinctive contribution that two concepts intrinsic to political science—deliberative capacity and latent consequences—can make to the consideration of these interrelated matters. It then examines how body cameras improve police work in general and

transparency in particular, and also how they produce negative latent consequences that undermine deliberative capacity. It concludes by suggesting how those negative latent consequences can be minimized.

I. QUALITY OF LIFE POLICING

Because this paper is New York centered, it confines itself to a consideration of the relationship between body cameras and the strategic principle that has come to govern New York policing and that lies at the heart of the current controversy there. That approach goes by a variety of names: quality of life policing, order maintenance policing, or by its nickname, “Broken Windows.”¹ For simplicity’s sake, and also because it comports best with my analysis, I will consistently refer to it as “quality of life” policing. Political science is particularly suited to analyze this particular version of policing because, as the term “quality of life” implies, it is not simply a method of crime fighting. It is an assertion about the common good. Politics is the activity by which the common good is sought, and political science is the discipline that tries to consider politics systematically.

Quality of life policing rests on two premises. The first is that the prevention of crime and the maintenance of order are the primary goals of policing.² Those two goals are more important and more achievable than solving crime. An emphasis on solving crime places police in a reactive mode, operating after the fact to apprehend criminals after the crime has been committed. Quality of life policing places prevention ahead of crime solving. The second premise is that there is a connection between what

¹ This term was first coined in an article by George L. Kelling and James Q. Wilson. See George L. Kelling & James Q. Wilson, *Broken Windows: The police and neighborhood safety*, THE ATLANTIC (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.

² See Vincent J. Webb, THE ENCYCLOPEDIA OF POLICE SCIENCE 1095, vol. 2 (Jack R. Green ed., 2007).

would have previously been considered trivial crimes and the prevention of serious crime.³ The nickname, “Broken Windows,” derives from the premium placed on preventing the physical degradation of neighborhoods that results from vandalism, graffiti, dumping of refuse, and the like.⁴

For example, consider a building with a few broken windows.

If a factory or office window is broken, passersby observing it will conclude that no one cares or no one is in charge. In time, a few will begin throwing rocks to break more windows. Soon all the windows will be broken, and now the passerby will think that, not only is no one in charge of the building, no one is charge of the street on which it faces. Only the young, the criminal, or the foolhardy have any business on an unprotected avenue, and so more and more citizens will abandon the street to those they assume prowl it. Small disorders lead to larger and larger ones, and perhaps even to crime.⁵

Or, consider a pavement. Litter accumulates on it and eventually people even start leaving bags of refuse from take-out restaurants or even break into cars.⁶ From such seemingly insignificant actions, a decent neighborhood turns into a slum.⁷ As buildings become vacant, their entryways become ambush hideouts for muggers, and streets that used to be safe to walk on become dangerous.⁸ Crime prevention sets in motion a crime-reducing dynamic.⁹ As an active police presence makes parks, streets, and subways feel safer, people come out to fill them, which then makes them even safer.¹⁰

³ See generally GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS* 11–37 (1996).

⁴ *Id.* at xv.

⁵ *Id.*

⁶ *Id.* at 20.

⁷ *Id.*

⁸ *Id.* at 236–59.

⁹ *Id.* at 21

¹⁰ *Id.*

In addition to its concern for physical decay, quality of life policing also addresses the fear created by menacing individuals. Perhaps the most storied example, in New York at least, involved the “squeegee men,” youths who would extort money from car drivers by washing car windows.¹¹ Not all squeegee men posed a problem but many would menace drivers who declined their services by “draping themselves on the car hood to prevent it from moving, even after the lights changed.”¹² Fearing that a refusal would result in damage to the car, many drivers would either agree to pay to have their windshield squeegeed or would simply pay a few dollars to make them go away.¹³ After decades of ignoring them, the New York Police Department (NYPD) worked with the Manhattan District Attorney’s Office to develop a procedure for facilitating the arrest of those who constituted a menace.¹⁴ Not only did these arrests reduce the sense of menace that the squeegee men’s presence had induced, many of them were found to have outstanding warrants for more serious crimes.¹⁵ The same spirit lay behind the “stop and frisk” policy the NYPD practiced until prevented from doing so by court order.¹⁶ The notion was to take weapons away from suspicious individuals *before* they had an opportunity to commit a crime.¹⁷

The dissent from the equation of quality of life policing and the common good stems from what many residents (of the very communities that it claims are most in need of this approach) find to be an effort to brutalize

¹¹ *Id.* at 3.

¹² *Id.* at 141

¹³ *Id.*

¹⁴ *Id.* at 143.

¹⁵ *Id.* at 141, 146.

¹⁶ Dylan Matthews, *Here’s What You Need to Know About Stop and Frisk—and Why the Courts Shut It Down*, WASH. POST (Aug. 13, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/13/heres-what-you-need-to-know-about-stop-and-frisk-and-why-the-courts-shut-it-down/>.

¹⁷ *Id.*

them.¹⁸ One aspect of this dissent has to do with the sheer aggressiveness the police display as they respond to what they claim to be suspicious behavior. Young men find themselves the subject of intrusive interrogation by the police simply because they are “hanging out.”¹⁹ For example, my friend, a white newspaper editor, told me about one of his talented young black reporters who found himself spread-eagled across the hood of his car because the police did not immediately believe that a young black man could legally own such a nice shiny new vehicle. Similarly, an African American student of mine described walking the shortest route to the subway and being stopped by the New York police, made to show ID, and rudely asked what he was doing walking around at that late hour. The seeming arbitrariness with which the NYPD stopped and frisked fed these resentments.

Another source of opposition involves the very definition of quality of life. Those who already doubt that the police are on their side see this aggressive prosecution of so-called minor offenses as a new excuse to prosecute them for no offense at all, as exemplified by the case of the squeegee men.²⁰ Squeegeeing is hardly a desirable or well-paid occupation.²¹ Those who squeegee are probably unemployed and lacking the skills needed to obtain more desirable employment.²² Their quality of life is enhanced by this chance to make some money on what they perceive

¹⁸ ANDREA MCARDLE & TANYA ERZEN, *Introduction*, in *ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY* 3 (Andrea McArdle & Tanya Erzen eds., 2001).

¹⁹ *Id.* at 1–19.

²⁰ Corey Kilgannon, *With a Squeegee and a Smile, a Relic of an Unruly Past Wipes On*, N.Y. TIMES (Oct. 3, 2010), http://www.nytimes.com/2010/10/04/nyregion/04squeegee.html?_r=0.

²¹ *Id.* This article provides a detailed portrait of a squeegee man and reveals that he has been engaged in this occupation since he was twelve and shows the amount of money he makes. The article implies that most squeegee men are similarly undereducated and lacking in skills that would earn them a better income. *See id.*

²² *Id.*

to be an honest basis. And what if they do not intend to menace the driver?²³ Is it enough that the driver *feels* menaced, whether or not that is the squeegee man's intention? And, if the driver ends up with a cleaner windshield, is that not a positive outcome for all concerned?

Or, take the example of Eric Garner.²⁴ He was apprehended by the police for selling untaxed cigarettes, so-called "loosies."²⁵ New York has an exorbitantly high cigarette tax.²⁶ The tax is highly regressive.²⁷ The Tax Foundation estimates that 57 percent of the cigarettes purchased in New York are purchased illegally.²⁸ Some see loosie sales not as a crime but as a response to extortionate government action.²⁹

²³ *Id.* The author of this article observed this squeegee man and reported that he did not menace drivers. The article implies that many in not most squeegee men are not menacing. *See id.*

²⁴ Nick Gillespie, *Eric Garner Was Choked to Death for Selling Loosies*, THE DAILY BEAST (Dec. 3, 2014), <http://www.thedailybeast.com/articles/2014/12/03/the-policies-behind-eric-garner-s-death.html>.

²⁵ Joseph Goldstein, *A Cigarette for 75 Cents, 2 for \$1: The Brisk, Shady Sale of 'Loosies'*, N.Y. TIMES (Apr. 4, 2011), <http://www.nytimes.com/2011/04/05/nyregion/05loosie.html>.

²⁶ *Id.*

²⁷ "Low-income earners also spend a greater portion of their money on cigarettes than high-income earners do. 'From 2010 to 2011, smokers earning less than \$30,000 per year spent 14.2 percent of their household income on cigarettes, compared to 4.3 percent for smokers earning between \$30,000 and \$59,999 and 2 percent for smokers earning more than \$60,000,' according to researchers. A \$1 increase in federal cigarette taxes would cost approximately \$450 a year for someone living on \$20,000 to \$25,000 a year." Jason Russell, *Regressive Cigarette Tax Hikes Hardly Improve Health*, WASH. EXAMINER (Dec. 26, 2014), <http://www.washingtonexaminer.com/regressive-cigarette-tax-hikes-hardly-improve-health/article/2557898>.

²⁸ Joseph Henchman & Scott Drenkard, *Cigarette Taxes and Cigarette Smuggling by State*, TAX FOUND. (Mar. 19, 2014), <http://taxfoundation.org/article/cigarette-taxes-and-cigarette-smuggling-state>.

²⁹ *See* John Kass, *N.Y. Action Dooms Seller of 'Loosies'*, CHICAGO TRIB. (Dec. 4, 2014), <http://www.chicagotribune.com/news/columnists/kass/ct-eric-garner-kass-met-1205-20141205-column.html>.

II. POLITICAL DELIBERATION

We have established that quality of life policing provokes a dispute about the common good. Perhaps the greatest achievement of American political science, practiced by the framers of the Constitution, was to develop political principles and institutions capable of substituting government by discussion for government by force. The Constitution establishes the two houses of Congress to serve as public forums in which alternative understandings of the common good are expressed and discussed.³⁰ Of course, discussion is not the whole story. Because differences of opinion will endure even after exhaustive discussion, those differences will need to be resolved by majority vote. And force still plays a role because recalcitrant minorities may balk at accepting the majoritarian conclusion and will have to be coerced into acquiescence. But, as the framers recognized, to maintain a republican political order, discussion must come first.³¹

Government by discussion is an aspiration for republican government, not a description of how any particular representative decision-making body is actually functioning at any moment in time. Often decisions are made that embody very little in the way of the reflection and mutual learning that characterizes true deliberation. Deals are cut. Or, worse, they are not cut and an impasse develops. Political deliberation is difficult. When people have strongly held commitments and beliefs, it is very hard for them to listen attentively to other points of view, to try to understand those other ways of looking at things, and to see the merits of those alternative positions.

³⁰ I refer in particular to the House of Representatives and the Senate. *See* U.S. CONST. art. 1, § 1–5.

³¹ *See* SAMUEL BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FREEDOM* 270–275 (1993) (describing the Framers’ understanding of and commitment to government).

My study of the formulation and passage of the federal law designed to clean up abandoned, hazardous waste sites, commonly known as Superfund, provides a stark example of deliberative failure.³² Despite extensive scrutiny by several congressional subcommittees and committees and a strong desire on the part of its principal proponents to solve a serious environmental problem, false initial premises went unquestioned and a policy format was adopted that delayed the actual cleanup of abandoned sites for many years.³³

But republican government fails if its aspirations are not realized at least some of the time, at critical times. A failure to reconcile serious, principled differences can lead to a breakdown of the trust and mutual respect necessary to keep republican government alive.³⁴ Deliberation about policing points to this broad problem in microcosm. In this time of crisis, a failure to inspire a serious and fair-minded deliberation about quality of life policing carries grave consequences.

Deliberation is by no means an activity reserved for formal representative bodies, legislatures, city councils, and the like. In a successful republic, it is to be nurtured wherever serious disputes about the common good arise. Serious deliberation about quality of life policing should involve community residents and police on the beat as well as those holding elective and high appointive offices. Residents and the police should be deliberating with one another as well as providing input to their elected representatives. Such informal deliberations can and should take place in church basements, precincts, and community centers, as well as at city hall.

Political scientists are trained to think about how best to nurture public deliberation. They think in terms of “deliberative capacity,” meaning the extent to which a particular decision-making process, institution, or

³² For a full description of Superfund, see *EPA's Superfund Program*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/superfund> (last updated Nov. 23, 2015).

³³ MARC LANDY & MARC ROBERTS ET. AL., *THE ENVIRONMENTAL PROTECTION AGENCY, ASKING THE WRONG QUESTIONS: FROM NIXON TO CLINTON* 133–171 (1994).

³⁴ See BEER, *supra* note 31, at 366.

congeries of political forces enhances or detracts from the practice of deliberation.³⁵ It is this simultaneous recognition of the difficulty and the necessity of deliberation that makes the phrase “politics is the art of the possible” more than a cliché.³⁶

III. LATENT CONSEQUENCES

Deliberative capacity therefore serves as the standard to be applied to any public problem and the efforts to redress it. The case at hand is the effort to increase civilian oversight of the policy by making police behavior more transparent. Perhaps the most useful analytic tool that political science brings to this task is the concept of latent consequences.³⁷ This idea forces one to focus not on what a particular reform effort seeks to accomplish but on what changes in behavior actually result from the effort. The actual consequences of an activity are not necessarily those being sought. Political science goes beneath the promise of any course of action to discover what incentives that course of action actually create for those it touches and whether or not those incentives promote the goal being sought or create perverse incentives that actually undermine that goal.³⁸ Thus, in relating transparency to deliberative capacity, one would want to know whether and to what extent efforts to improve transparency have latent consequences that undermine deliberative capacity.

³⁵ See generally *id.* at 3–21.

³⁶ This phrase is attributed to Otto von Bismarck and has since come into common usage. OTTO BISMARCK, FÜRST BISMARCK: NEUE TISCHGESPRÄCHE UND INTERVIEWS 248 (1895). I discuss the matter of deliberative capacity at greater length in my essay. See MARC LANDY, *Local Government and Environmental Policy*, in DILEMMAS OF SCALE IN AMERICA’S FEDERAL DEMOCRACY 229–231 (Martha Derthick, ed., 1999).

³⁷ Robert K. Merton, *The Unanticipated Consequences of Social Action*, 1 AM. SOC. REV. 894, 894–904 (1936).

³⁸ For a striking example of the principle of latent consequences at work to undermine the goals of public policy, see Marc Landy & Mary Hague, *Private Interests and Superfund*, 108 THE PUB. INTEREST 97, 97–115 (1992).

Here is an example from outside the world of policing that illustrates how an effort to promote transparency can actually serve to undermine deliberative capacity. Consider the state of Massachusetts' open meeting law.³⁹ The law is unclear as to whether those who serve on town committees may engage in private discussions among themselves about the matters that come before their committee or whether any discussion amongst them must be confined to the public meeting itself.⁴⁰ The goal is laudable—to encourage transparency. All citizens are able to hear everything that transpires. But this rule has debilitating latent consequences. In my town, it has severely hampered the recruitment of persons to serve on committees. In the minds of many desirable candidates, the pleasure of serving on a committee rests largely in informal discussions with their colleagues free of the glare of publicity. They cherish their discussion over coffee in the local luncheonette. They feel excessively constrained by the idea that they can no longer test speculative ideas and tentative conclusions on their colleagues. Everything they say is on the record. So rather than subject themselves to these constraints, they refuse to serve. Deliberative capacity is not enhanced when the most knowledgeable and best-equipped persons absent themselves from the deliberation. The very strictness of the transparency effort created perverse incentives that actually undermined the deliberative capacity it was designed to achieve.

³⁹ OFFICE OF THE ATTORNEY GENERAL, OPEN MEETING LAW GUIDE (2015), available at <http://www.mass.gov/ago/docs/government/oml/oml-guide.pdf>.

⁴⁰ Ray Hainer, *Local Officials Warned Against Chatting About Town Business Online*, COMMONWEALTH (Feb. 1, 2006), <http://commonwealthmagazine.org/politics/local-officials-warned-against-chatting-about-town-business-online/>.

IV. BODY CAMERAS, LATENT CONSEQUENCES, DELIBERATIVE CAPACITY

The added transparency that body cameras provide has the potential to greatly improve policing and public trust in policing. For example, a study conducted in Rialto, California, found that after officers began wearing cameras, use of force incidents were reduced by 60 percent, and citizen complaints were reduced by 88 percent.⁴¹ However, latent consequences resulting from the use of body cameras threaten to undermine the deliberative capacity needed to reconcile conflicting views of how quality of life policing affects the common good.

Restating the nature of the conflict over quality of life policing helps to explain how and why the attempt to increase transparency by deploying body cameras is likely to produce such negative latent consequences. Quality of life policing is controversial because what some view as the maintenance of order and decorum, others view as an excuse to harass and brutalize. Any serious deliberation about the matter must begin by recognizing that both these views have merit.

On the one hand, the essential insight of quality of life policing is correct. Prevention is more effective than cure. The police will never really succeed in reliably catching criminals after a crime had been committed, and, even if they could, the damage has already been done. Crime prevention geared towards quality of life improvement sets in motion a crime-reducing dynamic. An active police presence makes parks, streets, and subways look and feel safer so people come out and populate them making them even safer. On the other hand, as currently practiced, quality of life policing is excessively rude, intrusive, and often misguided. Neighborhood residents

⁴¹ LINDSAY MILLER ET AL., OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, U.S. DEP'T OF JUSTICE, IMPLEMENTING A BODY-WORN CAMERA PROGRAM RECOMMENDATIONS AND LESSONS LEARNED 5 (2014), *available at* <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

experience the police not as their guardians but as an invasion force. The problem is deep because police discretion regarding whom to approach and how best to approach them is inevitable. There is no rulebook for determining in advance who is a proper object of police scrutiny and who is not. Nor is there clear guidance regarding what level of politeness and aggressiveness a policeman should bring to any particular encounter with someone that policeman views as menacing and or potentially dangerous.

The indiscriminate use of body cameras will make it harder to realize the benefits of quality of life policing while at the same time minimizing the ill effects to which it is prone. As a major US Justice Department report on body cameras points out, both the police and those being filmed act differently when they know the camera is on.

“Body-worn cameras not only create concerns about the public’s privacy rights but also can affect how officers relate to people in the community, the community’s perception of the police, and expectations about how police agencies should share information with the public.”⁴²

Such heightened self-awareness may indeed lessen the use of force. But it is likely to also have the latent consequence of undermining the willingness of community members to share local knowledge with the police. It is one thing to talk privately and informally about whom in the neighborhood the patrol officer should watch more closely. It is far different to put such information on the record. Filming such interactions turns intimate conversation into theatre. Both the patrol officer and the community member come to see themselves as acting out a part rather than simply talking to one another. Of course, such problems can be minimized if the patrolman retains discretion about when to turn on and off the camera. Even so, those problems are not entirely eliminated because the informant to whom the patrolman is talking may not entirely trust his protestation that

⁴² *Id.* at vii.

the camera is off. But granting such discretion is exactly what the most ardent proponents of body cameras fear. The police officer becomes the film editor of his own film, determining what those who want to review his behavior see and what they don't. If such discretion is allowed, it will sometimes be abused. Some policemen, probably those whose behavior is most in need of scrutiny, will turn the camera off when they want to do things that would not stand up to either civilian oversight or review by their superiors.

Since such discretion cannot be eliminated, the key to improving quality of life policing is that it be used wisely. Proper training and discerning recruitment play a role in cultivating the requisite sensitivities.⁴³ But even more critical is the acquisition of local knowledge by the police. To end the perception of them as an invasion force, they have to not act like one. They should be assigned to specific neighborhoods for long periods of time and get to know those neighborhoods by walking the beat. In this manner they would come to a rich understanding of neighborhood life—one that would enable them to become more discerning about who and what constitutes danger and who can be enlisted in the cause of order maintenance. This emphasis on the acquisition of local knowledge was at the heart of the community policing movement. It has not disappeared from New York policing practice, but as other policing principles such as Compstat have become increasingly in vogue, it no longer occupies center stage.⁴⁴

Meaningful deliberation about quality of life policing would focus on the role that community policing needs to play. Although outside forces would

⁴³ RUSSELL W. GLENN ET AL., TRAINING THE 21ST CENTURY POLICE OFFICER: REDEFINING POLICE PROFESSIONALISM FOR THE LOS ANGELES POLICE DEPARTMENT 91–98 (2003), *available at* http://www.rand.org/pubs/monograph_reports/MR1745.

⁴⁴ Compstat is a data driven management model introduced in New York in 1994 see POLICE EXECUTIVE RESEARCH FORUM, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, COMPSTAT: ITS ORIGINS, EVOLUTION, AND FUTURE IN LAW ENFORCEMENT AGENCIES 9 (2013), *available at* <https://www.bja.gov/Publications/PERF-Compstat.pdf>.

undoubtedly play a part, the heart of the deliberation would be between the residents of the individual, high-crime neighborhoods; the precinct-level policemen whose discretion will ultimately determine the success or failure of the community policy effort; and the leadership of the police force who have the power to either facilitate or deter local policing efforts. The key issues for deliberation would be what changes in patrolling patterns, stationing of officers, and protocols for interaction between officers and the public would be necessary to obtain the trust of key members of the community who would then be willing to share their local knowledge with the police.

V. CONCLUSION

Body cameras are here to stay. As discussed above, they produce many beneficial effects, and they provide a powerful weapon for the police in the battle of the videos. The new reality is that any nasty incident is likely to be filmed by people hostile to the police, and the police now need to be able to present their visual side of the story. The most serious practical question body cameras raise is how much discretion to give to the wearer about turning it on and off. The benefits of a rigid policy are that the camera becomes much more dependable as a means for deterring and exposing police misbehavior. The cost of a rigid policy is that it will interfere with community policing which in turn is the key to good quality of life policing. Thus, the choice is between two valuable goals. There is no simple formula for choosing between them. The best solution is to accord different weights to each goal depending on the case at hand. In communities experiencing severe conflict between the community and the police, the level of trust necessary for the successful implementation of community policing does not yet exist. In that circumstance, insisting that the body cameras stay on virtually all the time may be a necessary precondition for establishing the level of trust that could then serve as the basis for instituting community

policing. The better behaved the police become, the greater the discretion to accord to them about how to use the camera.

In a community where successful deliberation has established the basis for trust between the residents and the police, the benefits of not recording many types of interactions outweigh the costs. In those circumstances, the police should be allowed to keep the cameras off except when they are actively engaged in an actual law enforcement episode. These are delicate distinctions to draw, and they will be opposed by those who have a generalized mistrust of and hostility towards the police. But the benefits of quality of life policing are real, and they require that the police perform a very complex and sensitive role in the communities they serve. Some of the key aspects of that role are best performed off camera.