

BY

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Critical Incidents in Context

The Importance of Explaining the Totality of the Circumstances
When Publicly Releasing Video Evidence of Critical Incidents



Photo courtesy of Watch Guard Video

AS POLICE AGENCIES THROUGHOUT THE UNITED STATES CONTINUE TO DEPLOY BODY-WORN CAMERAS AND IN-CAR VIDEO TO RECORD PUBLIC-POLICE ENCOUNTERS, LEGISLATURES INCREASINGLY ARE PASSING LAWS THAT MANDATE AGENCIES TO PUBLICLY RELEASE VIDEO RECORDINGS OF CRITICAL INCIDENTS SUCH AS OFFICER-INVOLVED SHOOTINGS AND OTHER SERIOUS USES OF FORCE.

Proponents of such laws contend that the release of video recordings promotes transparency, increases accountability, and builds public trust by allowing community members to see what occurred and assess, on their own, whether an officer's actions were appropriate.

According to the Brennan Center for Justice, as of 2019, more than 15 U.S. states and the District of Columbia require law enforcement agencies to release video of critical incidents when requested, subject to various exceptions.¹ California instituted a law in 2019 requiring

police agencies to disclose video and audio recordings related to a critical incident within 45 days.² Additionally, many local jurisdictions and individual agencies have adopted policies requiring the disclosure of body-worn and other video evidence to demonstrate transparency to the community.

While these statutes and policies require agencies to release video and sometimes audio recordings of a critical incident, they often do not require the disclosure of other critical evidence regarding the surrounding facts and

circumstances of the encounter. In addition, agencies typically release the video evidence in a format that does not enable a viewer to understand the full context of the incident.³ This is an approach that is problematic for both constitutional and practical reasons.

THE CONSTITUTIONAL PROBLEM

The Fourth Amendment mandates that all searches and seizures be reasonable, and the U.S. Supreme Court has long held that this determination requires consideration of the totality of the circumstances. This is a standard that applies to all searches and seizures, including the use of deadly and other types of physical force.⁴

The court first applied this standard to police uses of force in the 1985 case of *Tennessee v. Garner*.⁵ There, the court examined the nature and quality of the intrusion and the importance of the governmental interests when asking whether the totality of the circumstances justified a search or seizure.⁶

The court reaffirmed that standard four years later in *Graham v. Connor*, holding that the Fourth Amendment inquiry set forth in *Garner* provided the exclusive framework for assessing the constitutionality of a police officer's use of force. The court emphasized that the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application and restated that the question is "whether the totality of the circumstances justify[es] a particular sort of search or seizure."⁷ Moreover, in *Scott v. Harris*, the court reaffirmed that a Fourth Amendment analysis of a use of force must consider all of the factual circumstances and rejected the argument that *Garner* had created a bright-line rule on when the use of deadly force was prohibited.⁸

THE PRACTICAL PROBLEM

The practical problem with releasing only video evidence without additional information is that a person viewing the footage will have difficulty understanding what is being depicted and why actions were taken absent objective facts and circumstances about the context of the incident.

Viewing a video of a police encounter with a member of the public is analogous to watching a baseball game through a straw.⁹ The viewer is trying to understand not only what happened, but also why those depicted took certain actions. If the video footage is focused on the pitcher throwing a fastball from the mound, it is impossible to determine whether that was the correct pitch under the circumstances because there is an absence of important contextual information. For example, was anyone batting at home plate or was the pitcher simply warming up? How many balls and strikes were there against a batter? How many outs were there and what inning was it? Was there a runner on base? What was the score?

For those familiar with the strategies and tactics of baseball, whether the pitcher's decision to throw a fastball was

the correct decision is dependent on the answers to these factual questions. The same holds true in policing where much more consequential decisions are made, under typically chaotic conditions. Without knowing and understanding the objective facts and circumstances surrounding the encounter, it is difficult, if not impossible, to make a well-informed opinion or judgment whether the officer's actions were lawful or otherwise appropriate.

In Los Angeles, California, the Los Angeles Police Department (LAPD) addressed these issues when it developed its video release policy in 2018.¹⁰ After extensive community input and research, the department approved a policy to release relevant video within 45 days "accompanied by additional information to provide context based on the evidence available at the time of release." (emphasis added)¹¹ The policy makes clear that the public is entitled to video and other evidence that is typically considered by the department and criminal prosecutors to determine the propriety of officers' conduct.

In accordance with this policy, the LAPD developed a system to inform the public about what occurred and why, with the evidence and information depicting the totality of the circumstances. After conducting extensive research and testing various methods, the LAPD began producing video segments called Critical Incident Community Briefings that include pertinent body-worn, in-car, or third-party video accompanied with a narrated introduction, 911 recordings, photographs, documents, radio transmissions, overhead maps, transcripts, reports, and other information. In addition, the video briefings include transcriptions of radio broadcasts, explanations of codes and acronyms used, and short segments of video or diagrams explaining how police equipment, such as body-worn cameras or less-lethal weapons, function.¹²

The narrator also explains the process involved in investigating, reviewing, and adjudicating a use-of-force incident, the extensive oversight involved in the process, and where the public can view the department's applicable policies and procedures.

Some have criticized LAPD's approach and the many agencies who have replicated its format, alleging that an edited video with narration is inherently biased and designed to mislead the viewers and defend the officer's actions. They argue that agencies should simply release all of the evidence, without edits or comments, and let the public decide whether the officer's actions were appropriate.

Bias, while a reasonable concern, can easily be addressed by ensuring that the briefings are factual, objective, and based on reliable evidence—just as officers are required to present evidence in police reports, search warrant affidavits, and testimony in a court of law. It is unrealistic, however, to expect the public to watch individual videos without any contextual information

and have an accurate or complete understanding of the totality of the circumstances. In fact, requiring the public to go through the laborious process of watching individual video streams, decipher what is visible, and speculate about the surrounding circumstances, is much more likely to mislead members of the public than inform them.

If the goal of disclosure is to promote transparency and inform the public about what occurred during a critical incident and why, it is incumbent on the agency to provide, to the extent reasonably possible, more than simply the raw video footage. It must also provide the evidence and information regarding the totality of the circumstances and use a format that a viewer can understand to evaluate whether the officer's actions were appropriate. Failing to do so undermines an agency's obligation to fully inform the public and is contrary to the underlying intent of both disclosure laws and the constitutional basis for assessing whether a use of force is lawful under the Fourth Amendment. ♡

NOTES:

¹Brennan Center for Justice, *Police Body Camera Policies: Retention and Release*, 2019.

²Cal. Govt. Code § 6254(f)(4)(A)(i) (stating that an agency may delay the disclosure of a video or audio recording related to a critical incident no longer than 45 days after the date the agency knew or should have known of the incident). A video or audio recording is considered "related to a critical incident" if it depicts an officer discharging a firearm at a person or shows an

officer using force that resulted in death or great bodily injury. See Cal. Govt. Code § 6254(f)(4)(C)(i) & (ii).

³Agencies also release the video in its unredacted and unedited form to avoid criticism that any editing or statement about the video will bias the public in an effort to defend the officers. Agencies, however, can both release the raw footage and produce a release that helps viewers understand what occurred and why, based on the objective facts and circumstances.

⁴See *Graham v. Connor*, 490 U.S. 386, 396 (1989).

⁵*Tennessee v. Garner*, 471 U.S. 1, 9 (1985).

⁶*Garner*, 471 U.S. at 8-9.

⁷*Graham*, 490 U.S. at 396, citing *Garner*, 471 U.S. at 8-9.

⁸*Scott v. Harris*, 550 U.S. 372, 383 (2007).

⁹See Geoffrey P. Alpert and Kyle McLean, "Where Is the Goal Line? A Critical Look at Police Body-Worn Camera Programs," *Criminology and Public Policy* 17, no. 3 (2018): 679, 682 (quoting LAPD official's characterization that watching body-worn camera footage is often "like watching a baseball game through a straw").

¹⁰Los Angeles Police Department (LAPD), "Volume 1: Policy," §420.55 Critical Incident Video Release Policy, 2020 3rd Quarter Manual.

¹¹The LAPD policy specifies that the release "shall consist of relevant video imagery that depicts the actions and events leading up to and including the [c]ritical [i]ncident" and defines relevant video imagery as "footage that is typically considered by the [Chief of Police], [Police] Commission, and criminal prosecutors to determine the propriety of an officer's conduct" during the incident. Most significantly, the policy, adopted by a civilian Board of Police Commissioners, states that "[t]he release of video shall be accompanied by additional information to provide context based on the evidence available at the time of release." LAPD, Critical Incident Video Release Policy.

¹²As of January 2021, the LAPD has produced 79 Critical Incident Community Briefings, which are available at <https://www.youtube.com/c/LAPDONLINE1/playlists>.

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