

COMMENTARY

Transparency of Police Conduct Consistent with Public's Right to Know

By Samuel J. Samaro

In March of 1991, a Los Angeles resident by the name of George Holliday noticed some commotion outside his apartment. He grabbed a camcorder, went out onto his balcony and shot the now iconic footage of Rodney King being beaten by the police. The resulting prosecution of the officers involved occurred because, and only because, the incident happened to take place within eyeshot of a citizen with a video camera. At the time, videotaped evidence of police misconduct was extremely rare.

Today, it is not so rare. It has been estimated that as many as two-thirds of all American adults own smart phones. That means that most people walking the streets these days are carrying high-quality video equipment in their pockets or purses, and ever more frequently they are using those devices to record what they see in their daily lives, including altercations involving the police. On top of that, state and local



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governments have come under increasing pressure to add camera equipment to patrol cars and even patrol officer uniforms. As a consequence, police departments in many communities are now required to make their own video recordings of traffic stops, arrests and other interactions with citizens. We can anticipate a time when most things police do in public will be recorded by someone.

It is fair to say that law enforcement agencies are less than enthusiastic about this development. They argue, not without merit, that the videos only tell part of the story and often contain important evidence which, if released too soon, could compromise ongoing criminal investigations of suspects or

internal affairs investigations of officers. They worry that the repeated showing of such videos in the media and their availability online creates unjustified cynicism about the police and may actually subject officers to retribution attacks.

What such agencies frequently underestimate, however, is how intensely interested citizens are in such occurrences, especially when an individual is killed or physically harmed at the hands of the police, and how important it is to the public at large that the pertinent details be released as soon as possible, including, of course, any depictions recorded on video.

Experience since the conflagration in Ferguson, Missouri, in 2014 teaches that the difference between peaceful and incendiary outcomes often depends on the public's perception that the authorities have been forthcoming about what happened and have addressed any wrongdoing expeditiously. In Ferguson, information was not shared, and public dissatisfaction spilled out onto the streets. In one of the most chilling episodes of police misconduct ever recorded—the shooting death of Walter Scott last April

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as he ran away from Officer Michael Slager—the video told the story. As a result, the authorities acted swiftly to charge the officers involved, and the public reaction was muted.

Unfortunately, the reaction of the acting New Jersey attorney general to events such as these has been to circle the wagons and impose radio silence when there is a police use-of-force incident. To the great surprise of those in New Jersey who advocate on behalf of access to public records and transparency in state and local government, the Office of the Attorney General convinced the Appellate Division last April to rule that things like videos of police shootings are “criminal investigatory records” and can be withheld under an exception to the Open Public Records Act. That case, *North Jersey Media Group v. Lyndhurst*, drastically changes prior law and sets limits on public dissemination of information that could prove dangerous under the wrong (and, sadly, not least bit rare) conditions.

In the aftermath of *Lyndhurst*, on July 28, 2015, the attorney general published new guidelines that require most police use-of-force cases involving the death or serious bodily injury of a citizen to be presented to the grand jury. If the grand jury decides not to indict the officers involved, the guidelines require the prosecutor to prepare a report summarizing the incident, explaining why it is not being

prosecuted as a criminal offense. That sounds like a good development, until one learns that the guidelines also permit the authorities to withhold the names of the officers involved unless they are charged with a crime. In other words, the case will be presented to the grand jury in a proceeding to which the public will not be invited, presenting evidence that the public will not, thanks to *Lyndhurst*, be permitted to evaluate, and then assuming the officers are found not to have committed a crime, a report will be disseminated that will fail to disclose the identities of those who have been “exonerated.”

Last September, in what was described as a case of mistaken identity, an African-American tennis player, James Blake, was brutally tackled by a New York City police officer in front of the Grand Hyatt Hotel. Like so many others in recent months, the incident was captured on videotape. Because the press obtained the officer’s name, it quickly determined that he had a number of prior complaints lodged against him for using excessive force, and that story—along with the video—received extensive coverage by local and national news outlets. The officer was quickly stripped of his badge and gun, pending a hearing, and was recently found guilty of misconduct by the Civilian Complaint Board.

Would it have gone differently if the officer’s identity had not been



disclosed and the entire incident not depicted on video? Who knows? The important point is that transparency makes the wrong thing harder to do and satisfies the public’s very deep need to know that the right thing has happened.

Agree with the principle of transparency or disagree, the genie will not be stuffed back into the bottle. The fortuity of a man standing on his balcony with a camcorder is no longer the sole probable means by which police misconduct will be documented. Law enforcement will have to adjust to a world where most people carry video recorders. The way to adjust to that world is not to find new and better ways to withhold information, which leads to cynicism and unrest. It is to train officers to treat the public as if the camera is always rolling. ■