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Constitutional Law-First Circuit Court of Appeals Upholds a Citizen's Right to Film a Police Officer during a Traffic Stop Absent a Reasonable Restriction-Gericke v. Begin, 753 F.3D 1 (1st Cir. 2014)

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CONSTITUTIONAL LAW—FIRST CIRCUIT COURT OF APPEALS UPHOLDS A CITIZEN'S RIGHT TO FILM A POLICE OFFICER DURING A TRAFFIC STOP ABSENT A REASONABLE RESTRICTION—*GERICKE V. BEGIN*, 753 F.3D 1 (1ST CIR. 2014).

When a person acting under color of state law deprives a citizen of his federal constitutional rights, that citizen will have a remedy under Section 1983.[1] In recent years, there have been a growing number of citizens alleging a violation of their First Amendment rights and bringing actions under § 1983 after suffering prosecution seemingly in retaliation for filming or recording police officers.[2] In *Gericke v. Begin*,[3] the First Circuit Court of Appeals considered whether plaintiff, Carla Gericke, was exercising a clearly established constitutional right when she filmed a police officer during a traffic stop.[4] The First Circuit held an individual has a clearly established First Amendment right to record a police officer during a traffic stop, unless a reasonable restriction has been imposed on his right to record.[5]

At approximately 11:30 p.m. on March 24, 2010, Gericke was in her vehicle in Weare, New Hampshire following Tyler Hanslin to Hanslin's residence when Weare police Sergeant Joseph Kelley pulled behind Gericke's vehicle and activated his emergency lights.[6] In response, Hanslin and Gericke both pulled to the side of the road and Sergeant Kelley pulled between the vehicles; Kelley then informed Gericke that he was only

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[1] *See* 42 U.S.C. § 1983 (2012) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.").

[2] *See* Eric M. Larsson, *Criminal and Civil Liability of Civilians and Police Officers Concerning Recording of Police Actions*, 84 A.L.R.6th 89 (2013).

[3] 753 F.3d 1 (1st Cir. 2014).

[4] *See Gericke*, 753 F.3d at 5.

[5] *See id.* at 10 (concluding no police order to stop filming so filing wiretapping charge violated First Amendment rights).

[6] *See id.* at 3 (detailing events leading to case).

detaining Hanslin and she should move her vehicle.[7] While Gericke was moving her vehicle to the adjacent Weare Middle School parking lot, Kelley approached Hanslin's vehicle and inquired about the presence of weapons; Hanslin replied that he was in fact armed with a handgun.[8] After Gericke parked, she exited her vehicle and announced to Sergeant Kelley she was going to audio-video record him.[9] Gericke then proceeded to point a video camera at Sergeant Kelley in an attempt to film Kelley's interactions with Hanslin.[10] Under Gericke's version of the facts, Sergeant Kelley never asked Gericke to stop recording and he did not give her any type of order to leave the area.[11]

As the stop continued, Gericke eventually stopped holding up the camera and placed it in the center console of her vehicle.[12] At this point, Officer Brandon Montplaisir approached Gericke's vehicle and demanded the camera's location; however Gericke refused to respond to his requests.[13] Montplaisir then arrested Gericke for disobeying a police order and Gericke was subsequently transported to the Weare Police Station where she was charged with disobeying a police officer and unlawful interception of oral communications.[14]

In May 2011, Gericke brought an action against the officers and town under 42 U.S.C. § 1983, alleging that her First Amendment rights were violated when she was charged with illegal wiretapping for recording the traffic stop.[15] In the district court, the defendant officers asserted that they were entitled to qualified immunity, however the court ruled that further development of the facts was necessary in order to decide the qualified immunity question.[16] While the district court recognized that

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[7] *See id.*

[8] *Id.* Hanslin was properly licensed to carry the firearm and at no time during the encounter did Sergeant Kelley draw his own weapon. *Id.* at 3 n.1.

[9] *Gericke*, 753 F.3d at 3.

[10] *See id.* (noting Gericke attempted to record Sergeant Kelley but could not get camera to record). Notwithstanding, the parties did not feel that her camera's malfunction was relevant to the larger underlying issues in the case. *Id.* at 3 n.2. The court agreed and stated, "Gericke's First Amendment right does not depend on whether her attempt to videotape was frustrated by a technical malfunction." *Id.*

[11] *See id.* at 3. The defendant-officers agreed to accept Gericke's "best case" version of the facts in order to test the qualified immunity issue on appeal. *Id.* at 5.

[12] *See id.* at 3.

[13] *See id.* at 3-4. Gericke also refused to give the officer her license and registration. *Id.* at 4.

[14] *See Gericke*, 753 F.3d at 4. At a probable cause hearing the town prosecutor declined to proceed on any of Gericke's pending charges and upon referral the Hillsborough County Attorney similarly declined to prosecute. *See id.*

[15] *See id.* (discussing procedural history).

[16] *See id.* at 4-5. *See generally infra* notes 22-26 and accompanying text (discussing

there was a right to peacefully film a police officer performing her official duties in public, it concluded that there was no clearly established right to record an officer in a disruptive manner.[17] The district court held that there was a genuine factual dispute about whether Gericke was disruptive, the court accordingly denied the officers' motion for summary judgment.[18] In response, the officers filed a timely interlocutory appeal to test the qualified immunity issue.[19] Upon review, the First Circuit Court of Appeals held that the officers were not entitled to qualified immunity because at the time of the traffic stop it was clearly established that Gericke had a right to peaceably record the officers so long as no reasonable restriction was imposed or in place.[20]

State and local police officers who act under color of state law and deprive a citizen's federal statutory or constitutional rights can be sued under the Civil Rights Act of 1871 § 1983, which is a federal statutory remedy for the violation of constitutional rights.[21] However, liability under § 1983 is not absolute, and while different immunity defenses do exist, the defense of qualified immunity is the most frequently utilized and presents the most complicated problems for plaintiffs attempting to bring successful § 1983 actions.[22] Qualified immunity is a defense for officials who make reasonable, but mistaken, judgments that lead to constitutional deprivations.[23] When conducting a qualified immunity analysis a

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qualified immunity).

[17] *See Gericke*, 753 F.3d at 5 (summarizing district court's findings).

[18] *See id.*

[19] *See id.* at 5 (outlining basis for defendants' appeal). The First Circuit refused to hear the interlocutory appeal if there was a disputed factual question, e.g., Gericke being disruptive, so the officers agreed to accept Gericke's "best case" version of the facts in order to test the qualified immunity issue. *See id.*

[20] *See id.* at 10 (upholding citizen's right to peacefully record police officers).

[21] *See* 42 U.S.C. § 1983 (2012) (discussing actors under color of law found depriving rights are liable to injured party). Section 1983 actions are in a sense "constitutional torts" and require a deprivation of a citizen's federal rights by a person acting under color of state law. *See* James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 393 n.1 (2003) (characterizing 1983 actions against state and federal officials as constitutional torts).

[22] *See* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 12-13 (1997) (discussing absolute and qualified immunity doctrines). Chen notes that absolute immunity covers only a limited class of officials, such as legislators, judges, and prosecutors. *See id.* at 12. Qualified immunity covers the "vast remainder of officials, who compromise the most substantial segment of the public sector ...." *Id.* at 13; *see* MICHAEL AVERY, DAVID RUDOVSKY & KAREN M. BLUM, POLICE MISCONDUCT: LAW AND LITIGATION, § 3:4 (3d ed. 2014) (noting qualified immunity is significant and problematic defense to civil rights litigation).

[23] *See* Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2085 (2011) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open

reviewing court will ask the following two questions: (1) do the facts alleged by the plaintiff establish a violation of a constitutional right; and if so, (2) was that constitutional right clearly established at the time the alleged conduct occurred.[24] A constitutional right will be clearly established where, "[t]he contours of the right [are] sufficiently clear [such] that a reasonable official would understand that what he is doing violates that right."[25] When analyzing the clearly established prong, courts compare prior case law with the facts of the case at hand to determine whether a reasonable official would know he is a violating a right; it is therefore critical to determine the source of law that will put an official on notice and

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legal questions."); Brosseau v. Haugen, 543 U.S. 194, 198 (2004) ("Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted."); Malley v. Briggs, 475 U.S. 335, 341 (1986) ("[Q]ualified immunity … provides ample protection to all but the plainly incompetent or those who knowingly violate the law."); *see also* Chen, *supra* note 22, at 14 (discussing Supreme Court's policy rationales for qualified immunity doctrine). First, the Court has identified fairness as a rationale for qualified immunity doctrine because in some cases it may be unfair to subject government officials to liability for discretionary decisions that are often made in light of unclear constitutional law. *See* Chen, *supra* note 22, at 14. Second, public officials may fear committing constitutional violations and this may also interfere with the performance of public duties and decision-making; ideally the defense of qualified immunity would remove this impediment by reassuring public officials that even mistaken decisions will not often result in liability. *See id.* Lastly, Chen explains that the Court has advanced the "social costs" argument, which posits that many constitutional tort claims are frivolous, and qualified immunity saves public officials and society in general, from the time and expense of defending against such frivolity. *See id.*

[24] *See Al-Kidd*, 131 S.Ct. at 2080 (outlining qualified immunity analysis); Pearson v. Callahan, 555 U.S. 223, 232-33 (2009) (explaining flexible, two pronged approach to qualified immunity). In *Pearson*, the Court overruled prior case law and held that reviewing courts no longer have to engage in a mandatory two step qualified immunity analysis. *Pearson*, 555 U.S. at 236. Prior case law mandated a two-step approach to the analysis, whereby the first prong needed to be satisfied before moving to the second. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001) (requiring mandatory two-step approach). In the wake of *Pearson*, courts remain free to conduct the two-step inquiry, but courts may also jump directly to the second prong and thus avoid the larger constitutional question that is often presented at the first step. *See Pearson*, 555. U.S. at 236 (noting *Saucier* test no longer mandatory and courts can apply prongs in light of circumstances); *see also* Karen M. Blum, *Qualified Immunity: Further Developments in the Post-Pearson Era*, 27 TOURO L. REV. 243, 248 (2011) (explaining most courts move directly to second prong without deciding whether constitutional violation exists).

[25] Anderson v. Creighton, 483 U.S. 635, 640 (1987); *see* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions [are] generally shielded from liability for civil damages insofar as their conduct does not violate [a] clearly established statutory or constitutional rights of which a reasonable person would have known."). *But see Al-Kidd*, 131 S. Ct. at 2083 (adding law clearly established when *every* reasonable official understands his conduct violates constitutional right) (emphasis added); Karen Blum, Erwin Chemerinsky & Martin Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 655 (2013) (noting "*every reasonable official*" language of *Al-Kidd* creates more stringent "clearly established" law test) (emphasis added).

the level of generality with which the reviewing court will frame the underlying right.[26]

There are many types of § 1983 actions, particularly because technology has developed and electronic devices with recording capabilities have become increasingly ubiquitous forcing courts to deal with § 1983 actions brought by citizens who claim officers have been retaliating against citizens for recording officers in public areas.[27] Almost invariably, these cases present situations where a citizen is charged with a

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[26] *See* Blum, Chemerinsky & Schwartz, *supra* note 25, at 652-53 (highlighting sources of law courts look to). The authors state that Supreme Court decisions, controlling circuit authority, or a consensus of persuasive authority from other circuits are three sources of law that can make the law clearly established. *See id. But see* Pabon v. Wright, 459 F.3d 241, 255 (2d Cir. 2006) (reasoning law not clearly established when neither Second Circuit nor Supreme Court had recognized such); Thomas ex rel. Thomas v. Roberts, 323 F.3d 950, 955 (11th Cir. 2003) ("[O]nly Supreme Court cases, Eleventh Circuit caselaw, and Georgia Supreme Court caselaw can 'clearly establish' law in this circuit."). Although the Supreme Court has not provided definitive guidance on the clearly established standard, it has criticized and reversed lower courts for framing the right too narrowly and too broadly. *See* Blum, Chemerinsky & Schwartz, *supra* note 25, at 653-56 (highlighting difficulty determining what is sufficient to put officials on notice their conduct is unconstitutional). At one end of the spectrum, the Supreme Court has instructed reviewing courts to take notice of the particular facts at issue in the case and frame the right in a more particularized and narrow sense. *See id.* At the other end of the spectrum, the Supreme Court has suggested a more liberal approach by stating that fair notice about the unconstitutionality of the conduct is all that is required to make the law clearly established. *See id.* Indeed, the Court has rejected the proposition that fair notice requires a prior case that is directly on point with the official's challenged conduct. *See id. Compare Saucier*, 533 U.S. at 200 ("[T]he question [of] whether the right was clearly established must be considered on a more *specific* level than recognized by the Court of Appeals.") (emphasis added), *and Brosseau*, 543 U.S. at 199-200 ("We … ask whether, at the time of Brosseau's actions, it was 'clearly established' in this more 'particularized' sense that she was violating Haugen's Fourth Amendment right."), *with* Hope v. Pelzer, 536 U.S. 730, 740-41 (2002) (holding fair warning of unconstitutional conduct all that is necessary to make law clearly established).

[27] *See* Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) (deciding citizen had First Amendment right to film police officers in public park); Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010) (holding right to film officer during traffic stop was not clearly established); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing citizens have First Amendment right to "photograph or videotape police conduct"); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (finding officer could be liable for assaulting citizen videotaping protest march); Justin Welply, Comment, *When, Where and Why the First Amendment Protects the Right to Record Police Communications: A Substantial Interference Guideline for Determining the Scope of the Right to Record and for Revamping Restrictive State Wiretapping Laws*, 57 ST. LOUIS U. L.J. 1085, 1100-06 (2013) (outlining older and newer cases that involve citizens recording police officers). Additionally, courts have also held individuals have the right to record officers from private property. *See* Jean v. Mass. State Police, 492 F.3d 24, 33 (1st Cir. 2007) (holding activist had First Amendment protection after recording police conducting warrantless search of private residence); Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (holding citizen had First Amendment right to film officers from private property).

violation of a state wiretapping statute after recording some type of encounter with police.[28] In the face of significant criticism from academia and increasing disdain from courts, police officers have nevertheless used these statutes and other general laws with growing frequency to prosecute citizens who have recorded police activity.[29] However, many officers have faced liability because retaliation against a person who is exercising her First Amendment rights has long been recognized as a cognizable claim under § 1983.[30]

As with any nascent issue of law, the use of wiretapping statutes to prosecute individuals who record police officers has created some confusion in the courts over the scope of the right, as well as some division

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[28] *See Glik*, 655 F.3d at 80 (explaining Glik charged with violating wiretap statute after recording officers on Boston Common conducting arrest); *Fordyce*, 55 F.3d at 438 (describing plaintiff charged with violating Washington wiretap statute); Jesse Harlan Alderman, *Police Privacy in the iPhone Era?: The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian's Right to Record Public Police Activity*, 9 FIRST AMEND. L. REV. 487, 489-511 (2011) (collecting and analyzing federal and state wiretapping statutes); Marianne F. Kies, Note, *Policing the Police: Freedom of the Press, the Right to Privacy, and Civilian Recordings of Police Activity*, 80 GEO. WASH. L. REV. 274, 278-90 (2011) (explaining legal history behind wiretapping statutes and statutes' usage against citizens); Andrew Martinez Whitson, Note, *The Need for Additional Safeguards Against Racist Police Practices: A Call for Change to Massachusetts & Illinois Wiretapping Laws*, 34 B.C. J.L. & SOC. JUST. 195, 200 (2014) (discussing expanded use of wiretapping statutes against citizens who record police); *see also* David Murphy, Comment, *"V.I.P." Videographer Intimidation Protection: How the Government Should Protect Citizens Who Videotape the Police*, 43 SETON HALL L. REV. 319, 333-34 (2013) (noting that police may choose to charge citizens with violations of other general laws). In addition to wiretapping statutes, the author lists obstruction of justice and failure to disobey a police order as two examples of alternative charges that police could use against citizens who record police officers. *See* Murphy, *supra*.

[29] *See* ACLU v. Alvarez, 679 F.3d 583, 608 (7th Cir. 2012) (enjoining enforcement of Illinois eavesdropping statute on First Amendment grounds); Taylor Robertson, *Lights, Camera, Arrest: The Stage is Set for a Federal Resolution of a Citizen's Right to Record the Police in Public*, 23 B.U. PUB. INT. L.J. 117, 139 (2014) (criticizing wiretapping statutes against citizens who record police and calling for uniform federal rule); Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers' Power*, 117 YALE L.J. 1549, 1553 (2008) (urging states to amend wiretapping laws and allow citizens to record police under certain circumstances); Travis S. Triano, Note, *Who Watches the Watchmen? Big Brother's Use of Wiretap Statutes to Place Civilians in Timeout*, 34 CARDOZO L. REV. 389, 422 (2012) (proposing solutions for improper arrest of citizens who record police).

[30] *See* AVERY, RUDOVSKY & BLUM, *supra* note 22, at § 2:16 (explaining that § 1983 actions can serve as remedy for retaliatory prosecutions); *see also* Colin P. Watson, Note, *Limiting a Constitutional Tort Without Probable Cause: First Amendment Retaliatory Arrest After Hartman*, 107 MICH. L. REV. 111, 111 (2008) (explaining federal law remedy for citizens who face retaliation for exercise of First Amendment rights). The author explains that plaintiffs alleging a retaliation claim must plead and prove the following three elements: (1) the existence of a First Amendment right; (2) that the exercise of the right was a substantial motivating factor in the government official's decision to take adverse retaliatory action; and (3) that the adverse action chilled the exercise of the citizen's right. *See* Watson, *supra*, at 114.

over whether the right is clearly established when considered in the context of novel factual situations.[31] In the leading decision of *Glik v. Cunniffe*, the First Circuit Court of Appeals held that plaintiff Simon Glik had a clearly established right to film police officers who were making an arrest on the Boston Common.[32] However, the First Circuit qualified this right to record by stating the right is not absolute, and that it could be limited by reasonable time, place, and manner restrictions.[33] Importantly, the court noted the peaceful nature of Glik's recording, and reasoned that Glik's right to record remained unfettered because he recorded from a "comfortable remove", and did not interfere or molest the officers in any way.[34] The First Circuit also distinguished *Kelly v. Borough of Carlisle*, a

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[31] *See* Glik v. Cunniffe, 655 F.3d 78, 79 (1st Cir. 2011) (holding plaintiff had clearly established right to film officers on Boston Common); Kelly v. Borough of Carlisle, 622 F.3d 248, 259 (3d Cir. 2010) (holding right to film officer not clearly established in context of traffic stop); *see also* Bleish v. Moriarty, No. 11-cv-162-LM, 2012 U.S. Dist. WL 2752188, at *14 (D. N.H. July 9, 2012) (granting officers summary judgment because arrest was not related to suspect's First Amendment activities). The *Bleish* court noted officers in this case said nothing about Bleish's First Amendment rights while arresting her and the officers even passed her camera to other demonstrators for safekeeping. *Bleish*, 2012 U.S. Dist. WL 2752188, at *11. Additionally, the court highlighted the fact that Bleish was recording the officers from a distance of one or two feet and even stuck her camera in an officer's face and inside a police cruiser. *See id.* at *13. Bleish also spoke to officers in a loud tone from a short distance away while the officers were attempting to arrest another demonstrator, and the court seemed to disapprove of the distraction that this created. *See id.*; *see also* Matheny v. Cnty. of Allegheny Pa., No. 09-1070, 2010 U.S. Dist. WL 1007859, at *6 (W.D. Pa. Mar. 16, 2010) ("[I]n light of the existing law as of April 29, 2009 … the purported First Amendment right to record the police was not 'clearly established.'"). *But see* Jesse Harlan Alderman, *Before You Press Record: Unanswered Questions Surrounding The First Amendment Right To Film Public Police Activity*, 33 N. ILL. U. L. REV. 485, 533 (2013) (arguing robust consensus of persuasive authority makes right to record clearly established).

[32] *See Glik*, 655 F.3d at 79 ("We conclude, based on the facts alleged, that Glik was exercising clearly-established First Amendment rights in filming the officers in a public space, and that his clearly-established Fourth Amendment rights were violated by his arrest without probable cause. We therefore affirm."); *see also* Caycee Hampton, Case Comment, *Confirmation of a Catch-22: Glik v. Cunniffe and the Paradox of Citizen Recording*, 63 FLA. L. REV. 1549, 1552-1557 (2011) (discussing and analyzing implications of *Glik* decision); Jane T. Haviland, Case Comment, *Constituional Law—First Circuit Protects Right to Record Public Officials Discharging Duties in Public Space—Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011),* 45 SUFFOLK U. L. REV. 1329, 1329-32 (2012) (explaining facts of *Glik* case).

[33] *See Glik*, 655 F.3d at 84 ("[T]o be sure, the right to film is not without limitations. It may be subject to reasonable time, place, and manner restrictions.").

[34] *See id.* ("[T]he complaint indicates that Glik 'filmed [the officers] from a comfortable remove' and 'neither spoke to nor molested them in any way' (except in directly responding to the officers when they addressed him). Such peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation.") (citation omitted); *see also* City of Houston v. Hill, 482 U.S. 451, 462-63 (1987) (stressing importance of individual's right to criticize and challenge police action).

case in which the Third Circuit Court of Appeals held the right to film a police officer during a traffic stop was not clearly established.[35] Although *Glik* answered several important questions, its holding was limited by the court's own qualifications and the relatively non-controversial facts of that case.[36]

In *Gericke v. Begin*, the First Circuit again took up the issue of a citizen's right to record the police and ultimately reaffirmed that right in the context of a traffic stop.[37] Notably, the case came to the First Circuit through an interlocutory appeal and the officers agreed to accept Gericke's "best case" version of the facts in order to test the qualified immunity issue.[38] Turning to the first prong of the analysis, the court reasoned an individual has a constitutional right to film traffic stops because traffic stops are a police duty carried out in public, and a citizen's ability to film police in such a setting serves significant First Amendment objectives.[39] However, the court was quick to point out that the right to film a traffic stop is not absolute and can be limited by reasonable restrictions.[40] The

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[35] *See Glik*, 655 F.3d at 85 (distinguishing Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010)). The court proclaimed, "*Kelly* is clearly distinguishable on its facts; a traffic stop is worlds apart from an arrest on the Boston Common in the circumstances alleged." *Id.* Even the Supreme Court has taken notice and stressed the danger of traffic stops. *See* Arizona v. Johnson, 555 U.S. 323, 330 (2009) (recognizing uniquely dangerous nature of traffic stops).

[36] *See Glik*, 655 F.3d at 84 (cautioning right to film may be subject to reasonable time, place, and manner restrictions). However, the court went no further by stating, "[w]e have no occasion to explore those limits here …" *Id.* Indeed, the court went on to state that Glik's conduct fell "*well within* the bounds of the Constitution's protections." (emphasis added). *Id.*

[37] Gericke v. Begin, 753 F.3d 1, 5 (1st Cir. 2014) (stating issue before court).

[38] *See id.* The court explained "since the officers accept [Gericke's] version [of the facts] in order to test the immunity issue, we, in turn, accept interlocutory jurisdiction to decide the question on Gericke's 'best case,' which portrays compliance with all police orders." *Id.* (internal citations and quotation marks omitted). In a footnote at the end of the case, the court suggested that the officers could be entitled to qualified immunity if a fact-finder were to find that Sergeant Kelley had in fact ordered Gericke to leave the area or stop filming. *See id.* at 10 n.13. However, the defendants ultimately settled with Gericke for $57,500, so this potentially interesting issue never arose. *See* Danielle Keeton-Olsen, *Recent Settlement in Suit Over Arrest for Recording Police Follows Growing Trend*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (June 16, 2014), http://www.rcfp.org/browse-media-law-resources/news/recent-settlement-suit-over-arrest-recording-police-follows-growing- (reporting Gericke's settlement).

[39] *See Gericke*, 753 F.3d at 7. The court endorsed the idea that filming officers encourages free and open discussions of government affairs by citizens and reasoned it is an important First Amendment principle. *See id.* The right to record also aids in uncovering government abuse and may have a beneficial effect on government functioning. *See id.*

[40] *See id.* at 7-8 ("[R]easonable restrictions on the exercise of the right to film may be imposed when the circumstances justify them."). Essentially, the court reasoned that the right to film remains unfettered unless a restriction is imposed on that right. *See id.* at 8. In giving examples of restrictions, the court stated, "a restriction could take the form of a reasonable, contemporaneous order from a police officer, or a preexisting statute, ordinance, regulation, or

court explained certain traffic stops might present safety concerns to officers and bystanders, and in these instances a police order to cease recording could be justifiable even if it incidentally impacted a citizen's First Amendment rights.[41] However, the court also cautioned that if the police order was specifically and solely directed at the citizen's right to film, then the officer would be justified only if he could reasonably conclude that the citizen's recording was interfering, or about to interfere, with the performance of his duties.[42] The court reasoned under Gericke's version of the facts, Sergeant Kelley never issued an order to stop filming or leave the area; therefore Gericke's First Amendment right to film the stop remained unfettered.[43]

The court then proceeded to analyze whether the right to film the traffic stop was clearly established at the time the stop occurred.[44] Relying on *Glik*, which had been decided two years prior, the court decided that Gericke had a clearly established right to film the stop.[45] The court explained that under Gericke's account of the facts no order was given to leave the area or stop filming, and in the absence of such restrictions, Gericke's right to film was clearly established.[46] The court concluded by stating that every reasonable officer would understand that charging Gericke with illegal wiretapping in the absence of a reasonable restriction on her right to record would violate the First Amendment and accordingly, the officers were not entitled to qualified immunity on their interlocutory appeal.[47]

As recording devices of all types continue to spread throughout society, citizens will continue to record police with increasing frequency and the First Circuit should be commended for being on the forefront of

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other published restriction with a legitimate governmental purpose." *Id.*

[41] *See id.* at 8. The court explained, "[t]he circumstances of some traffic stops, particularly when the detained individual is armed, might justify a safety measure—for example, a command that bystanders disperse—that would incidentally impact an individual's exercise of the First Amendment right to film." *Id.* (suggesting ordering citizen to cease recording under circumstances might be proper due to safety concerns).

[42] *See id.* at 8. The court cautioned, "a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties." *Id.*

[43] *See id.* at 8-9.

[44] *Gericke*, 753 F.3d at 9.

[45] *See id.* at 9-10.

[46] *See id.* at 9.

[47] *See id.* at 9-10.

this complicated problem.[48] In this case, the court's decision was proper because Gericke was peacefully recording the officers from a safe distance, and the officer did not order her to stop.[49] Although traffic stops can be dangerous, there should not be a blanket prohibition on recording during stops, and in a case like this a citizen clearly should have a First Amendment right to record.[50] Recording during traffic stops can benefit citizens and police officers because it tends to discourage police misconduct and false accusations by complainants and for these reasons citizens should have a right to record in this context.[51]

The court was also correct in asserting that the right to record during traffic stops can be limited by reasonable restrictions.[52] Officers frequently confront dangerous situations and they should have the ability to order a citizen to stop recording for both personal and citizen safety.[53] Going forward, officers will likely be able to stop citizens from recording in situations where safety is at issue, and these orders could be properly given during traffic stops or during other dangerous service calls.[54] Additionally, an officer can likely give a valid order to stop recording when a citizen is interfering with the officer's duties.[55] While local practitioners

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[48] *See* Larsson, *supra* note 2, at 1 ("In recent years, the proliferation of miniature recording devices and free video-sharing websites has led to a dramatic increase in citizen journalism. The effect of this development is clearest in the context of civilian recordings of police activity, particularly in instances of police misconduct.").

[49] *See Gericke*, 753 F.3d at 3 ("[U]nder Gericke's account, Kelley never asked her to stop recording, and, once she pulled into the parking lot, he did not order her to leave the area.").

[50] *See id.* at 8 ("[An] individual's exercise of her First Amendment right to film police activity carried out in public, including a traffic stop, necessarily remains unfettered unless and until a reasonable restriction is imposed or in place.").

[51] *See id.* at 7 ("[G]athering information about government officials in a form that can be readily disseminated serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs") (internal quotation marks omitted); Mishra, *supra* note 29, at 1554-55 (explaining how citizen recording deters police misconduct).

[52] *See Gericke*, 753 F.3d at 7 ("[R]easonable restrictions on the exercise of the right to film may be imposed when the circumstances justify them.").

[53] *See* Arizona v. Johnson, 555 U.S. 323, 330 (2009) (acknowledging traffic stops may be "especially fraught with danger to police officers"). The Court further stressed the risk of harm during a stop is minimized if officers exercise complete authority over the situation. *See id.*; *see also* Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011) (remarking that "a traffic stop is worlds apart from an arrest on … Boston Common").

[54] *See Gericke*, 753 F.3d at 8 ("[T]he circumstances of some traffic stops, particularly when the detained individual is armed, might justify a safety measure—for example, a command that bystanders disperse—that would incidentally impact an individual's exercise of the First Amendment right to film."). The court continued, "[s]uch an order, even when directed at a person who is filming, may be appropriate for legitimate safety reasons." *Id.*

[55] *See id.* at 8 ("[A] police order that is *specifically directed at the First Amendment right to film police* performing their duties in public may be constitutionally imposed only if the officer

who represent officers should advise them of these two limitations on the First Amendment right to record, they should be particularly cautious about going too far because officers are still expected to exercise significant restraint when dealing with citizens who are recording.[56] These exceptions remain extremely narrow, and in many situations it appears courts will continue to side with citizens by holding there is a clearly established right to record public police actions.[57]

Qualified immunity remains an extremely important aspect of these types of cases for plaintiffs and defense attorneys, and practitioners should be prepared to craft arguments at both steps of the analysis.[58] At the first step, practitioners should highlight or downplay the dangerousness of the situation and level of interference with the officer because courts will likely be disinclined to rule a citizen has an absolute right to record in dangerous situations or in situations where they are belligerently interfering with the officer.[59] The clearly established prong cuts both ways for plaintiffs and defense counsel because for plaintiff's counsel there have now been two First Circuit decisions that have upheld a citizen's right to record, and this likely makes the right clearly established in a broad spectrum of different

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can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties.") (emphasis added). However, it should be noted this does not mean officers can order citizens to cease recording at the slightest sign of interference. *See* City of Houston v. Hill, 482 U.S. 451, 461 (1987) (stating First Amendment protects *significant amount* of verbal criticism and challenge of police officers) (emphasis added).

[56] *See Gericke*, 753 F.3d at 8 (agreeing police officers must tolerate substantial burdens caused by citizens' exercise of First Amendment rights).

[57] *See id.* ("[W]e have made clear that '[t]he same restraint demanded of police officers in the face of 'provocative and challenging' speech, must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.'"); *see also* cases cited *supra* note 27 (listing many cases where right to record police has been recognized).

[58] *See Gericke*, 753 F.3d at 5 (explaining that qualified immunity provides government official with breathing room to make reasonable but mistaken judgments); AVERY, RUDOVSKY & BLUM, *supra* note 22, at § 3:4 (remarking that qualified immunity "presents thorny problems in civil rights litigation"). The authors write that qualified immunity is "the most significant and problematic defense to claims of civil rights violations." AVERY, RUDOVSKY & BLUM, *supra* note 22, at, § 3:4.

[59] *See Gericke*, 753 F.3d at 8 (highlighting orders to stop recording are appropriate for safety reasons or if officer is interfered with); *see also* Bleish v. Moriarity, No. 11-cv-162-LM, U.S Dist. 2012 WL 2752188, at *14 (D. N.H. July 9, 2012) (granting summary judgment when no jury found defendant was arrested for exercising First Amendment rights). Although *Bleish* did not involve qualified immunity, the court drew a stark contrast between the facts of its case and *Glik*. *Bleish*, 2012 U.S. Dist. WL 2752188, at *13. In the court's analysis, they reasoned a demonstrator's actions in filming officers from one or two feet away and sticking her camera in a police cruiser were vastly different from Glik's recording from a comfortable remove. *See Bleish*, 2012 WL 2752188, at *14.

situations.[60] Conversely, practitioners representing officers should strive to be highly fact specific and contrast the facts of their case with the prior circuit precedents of *Gericke* and *Glik*.[61]

In *Gericke v. Begin*, the First Circuit faced the issue of a citizen's right to record a police officer during a traffic stop. Ultimately, the court arrived at a balanced holding that will benefit citizens and police, and practitioners should pay careful attention to the implications of this decision. Although the context of a traffic stop may be different from other situations, citizens should maintain the right to record unless and until a reasonable restriction has been put in place. Therefore, the First Circuit's holding in *Gericke v. Begin* was the correct one.

John J. Ryan

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[60] *See Gericke*, 753 F.3d at 9-10 (upholding right to film police officer during traffic stop); *Glik*, 655 F.3d at 79 (upholding right to record officers during arrest on Boston Common); Hope v. Pelzer, 536 U.S. 730, 740-41 (2002) (cautioning that officials can be on notice of clearly established law even in novel factual situations); *see also* Alderman, *supra* note 31, at 533 (expressing view that there is now "robust consensus" of persuasive authority from two circuit courts that make right to record police officers clearly established).

[61] *See* Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2085 (2011) (noting law will be clearly established only if *every* officer knows he is violating right) (emphasis added); Brosseau v. Haugen, 543 U.S. 194, 199-200 (2004) (explaining right must be clearly established in more *particularized* sense) (emphasis added). The court stated, "[w]e … ask whether, at the time of Brosseau's actions, it was 'clearly established' in this more 'particularized sense' that she was violating Haugen's Fourth Amendment right." *Brosseau*, 543 U.S. at 199.