



(/)

HOME (/)
ABOUT
BLOG (/BLOG)
ONLINE ORIGINALS (/ONLINE-ORIGINALS)
SYMPOSIUM
SUBMISSIONS

The Right to Record: Public Officials, Public Spaces, and Public Interest

JANUARY 17, 2022

Blog Post | 110 KY. L. J. ONLINE | January 17, 2022

The Right to Record: Public Officials, Public Spaces, and Public Interest

By: David Emerson, Staff Editor, Vol. 110



The ubiquity of smartphones has brought about numerous changes. While some of these changes are bad (e.g., disengagement from society and the facilitation of narcissism), one particular and positive change must be noted: the ability to quickly capture quality footage. The proliferation of smartphones, most notably the iPhone, has equipped the average person with tech capabilities fit for cinema[1] and video journalism.[2] With respect to the latter, everyday citizens can place themselves at the vanguard of controversies they happen to witness. This access has led to a type of vigilante journalism, with one sect of the practice attracting significant controversy—those who film the police.

Interpretation of the Law

Hurt feelings notwithstanding, if an event is “plainly visible in public spaces,” capturing footage of that event is constitutionally protected.[3] However, this fact has not kept citizens from facing arrest when filming police, and there are additional implications regarding qualified immunity to which officers may be entitled. Overall, there have been notable cases where a citizen’s First Amendment right to film the police was upheld.

Glik v. Cunniffe, an interlocutory appeal, involved a § 1983 suit brought in the wake of Plaintiff Glik’s arrest after Glik used his cell phone to record “several police officers arresting a young man on the Boston Common.”[4] Glik faced three charges: “violation of the [Massachusetts] wiretap statute,” “disturbing the peace,” and “aiding in the escape of a prisoner. . . .”[5] All charges were eventually dropped, and Glik followed with a federal suit against the individual officers and the city of Boston itself on grounds of constitutional violations, state civil rights violations, and “malicious prosecution.”[6] The police officers cited qualified immunity, which, as “public officials,” would shield them “from personal liability arising out of actions taken in the exercise of discretionary functions.”[7]

With *Glik*, the Court held that there is a “cardinal First Amendment interest” in protecting the rights of citizens in practices like recording the police in the course of their duties.[8] Interestingly, the Court cited case law where *journalists* had been victorious in controversies involving the filming or photographing of public officials engaged in public conduct, noting that there is no need to distinguish between the interests of private citizens and the interests of the media, averring that “the public’s right of access to information is coextensive with that of the press.”[9] Thus, the right to capture such content is not exclusive to those employed by news organizations, and Glik had the constitutional right to record the police as they carried out the arrest.

The Boston Police officers' qualified immunity claim hinged on probable cause, and the officers' claim of probable cause hinged on the interpretation of the relevant wiretap statute.[10] The Court, looking to legislative purpose, found that the statute only criminalized content that was captured secretly.[11] In this respect, Glik had two factors in his favor: his conspicuous filming and the fact that the police knew that he was filming conspicuously.[12] Therefore, the needed "secret" requirement was not fulfilled, the officers resultingly had no probable cause (thus invalidating their claims of qualified immunity), and Glik was victorious.[13]

The conflict with the wiretap statute itself, however, demonstrated the outcome-determinative nature of statutory language. Had Glik kept his phone hidden during the confrontation, this case would have been even more convoluted. Shortly after the *Glik* opinion was handed down, a case out of Illinois combatted the constitutional shortcomings of wiretap statutes from the outset.

American Civil Liberties Union of Illinois v. Alvarez scrutinized Illinois's "eavesdropping statute" and sought a decision as to whether it applied to those "who openly record police officers performing their official duties in public."^[14] Here, the ACLU was attempting to form a "Chicago-area 'police accountability program'" which would involve the blatant recording of officers as they acted in the course of their public responsibilities.[15] What the ACLU feared was the application of the "eavesdropping statute" in the prosecution of its camera crews.[16] The resulting measure was a "preenforcement action" filed against Cook County State's Attorney, Anita Alvarez.[17]

The Seventh Circuit Court of Appeals found for the ACLU, writing that the statute imposed strictures that went well beyond what was needed "to protect legitimate privacy interests. . . ."^[18] Additionally, the *Alvarez* Court applied the Fourth Amendment to the conflict, putting to rest claims of invasions of privacy that might be put forth by the police.[19] Because the ACLU would be capturing content that was already, in-person, viewable to the public, any argument promoting an officer's "reasonable expectation of privacy" would be invalidated from the beginning.[20] Ultimately, the Court directed that *Alvarez* be restricted from using the statute as a means of silencing the ACLU's law enforcement watchdog program.[21]

Necessary Boundaries

Citizens do have a First Amendment right to film the police. As with all rights, however, there are limits. A person can film an arrest, but they cannot interrupt the process.[22] If the act of recording does, in fact, impede police procedure, the right to film ceases to apply.[23] In situations where citizens are ordered to stop filming, it is advised that they "perform strictly legal compliance with the officer's actions while still asserting the right to film."^[24] In this respect, every situation is different, and it is imperative for anyone who finds themselves in this situation to exercise good judgment.[25]

It stands to reason that the right to film the police can protect both the arrestor and the arrestee. If there happens to be an instance of police brutality, the scene can be captured, and the guilty party can be held accountable. Conversely, in cases of false allegations of police brutality, bystander video can serve as corroborating evidence.

As the old saying goes: If you're not breaking the law, you have no reason to worry.

[1] Ben Lindbergh, *The Rise of the iPhone Auteur*, Ringer (Feb. 7, 2019, 6:10 AM), <https://www.theringer.com/movies/2019/2/7/18214924/steven-soderbergh-high-flying-bird-iphone-tangerine-unsane-netflix>.

[2] Jacob Granger, *What iPhone do you need for your mobile reporting?*, Journalism.co.uk (Oct. 21, 2019), <https://www.journalism.co.uk/news/what-iphone-do-you-need-for-your-mobile-reporting-/s2/a746263/>.

[3] *Filming and Photographing the Police*, ACLU, <https://www.aclu.org/issues/free-speech/photographers-rights/filming-and-photographing-police> (<https://www.aclu.org/issues/free-speech/photographers-rights/filming-and-photographing-police>) (last visited Jan. 10, 2022).

[4] 655 F.3d 78, 79 (1st Cir. 2011).

[5] *Id.* at 80.

[6] *Id.* at 81.

[7] *Id.*

[8] *Id.* at 82.

[9] *Id.* at 83.

[10] *Id.* at 88.

[11] *Id.* at 87.

[12] *Id.* at 88.

[13] *Id.* at 89.

[14] 679 F.3d 583, 586 (7th Cir. 2012).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 605.

[20] *Id.* at 606.

[21] *Id.* at 608.

[22] Robinson Meyer, *What to Say When the Police Tell You to Stop Filming Them*, Atlantic (Apr. 28, 2015), <https://www.theatlantic.com/technology/archive/2015/04/what-to-say-when-the-police-tell-you-to-stop-filming-them/391610/>.

[23] *Id.*

[24] *Id.*

[25] *Id.*

 (<https://www.facebook.com/sharer/sharer.php?u=https%3A%2F%2Fwww.kentuckylawjournal.org%2Fblog%2Fthe-right-to-record-public-officials-public-spaces-and-public-inter>

 (<https://twitter.com/intent/tweet?url=https%3A%2F%2Fwww.kentuckylawjournal.org%2Fblog%2Fthe-right-to-record-public-officials-public-spaces-and-public-interest&text=the>



PREVIOUS

Moving in the Shadows: Creating New Legal Precedent While Avoiding Transparency
(</blog/moving-in-the-shadows-creating-new-legal-precedent-while-avoiding-transparency>)

NEXT

Mos Maiorum: The Filibuster, Political Question Doctrine, and Judicial Enforcement of Norms
(</blog/mos-maiorum-the-filibuster-political-question-doctrine-and-judicial-enforcement-of-norms>)



(859) 257-1678 | kentuckylawjournal112@gmail.com | 620 Limestone Lexington, KY 40508

(<https://kentuckylawjournal.org>)