



A Cell Phone Camera is NOT a “Get Out of Jail Free” Card

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The proliferation of recording devices has resulted in a new reality for police officers: encountering civilians who are recording them as they do their job. While the Supreme Court has yet to give law enforcement officers a clear definition of the constitutional right to record (subject to reasonable time, place and manner restrictions), *the writing is on the wall*.

The overwhelming majority of courts that have taken up the question have concluded that the First Amendment prohibits officers from infringing upon a civilian’s right to record them in public while performing their official duties. **This is particularly true when there is no question as to whether or not *the civilian was lawfully present*—meaning that the civilian was not ducking below police tape or otherwise placing themselves into a position where they are putting officer safety and/or investigations into jeopardy.** Arrests motivated by the fact that a recording was taking place where a civilian was lawfully present have been tossed out by local prosecutors and have resulted in a multitude of lawsuits and settlements. Yet the YouTube® footage going viral often shows officers angrily asserting the act of recording is illegal.

Avoiding an Over-Correction

In response to this clear momentum, law enforcement agencies across the country are publicly acknowledging that recording officers is not an arrestable offense in and of itself, absent exigent circumstances. Many of these agencies are also instructing their personnel to respect the First Amendment right of civilians to record.

But how many of these agencies are actually training their people to recognize that a civilian’s right to record in many instances is *not* an affirmative defense to charges independent of the act of recording? **It is crucial that officers have a keen understanding of the difference between arresting someone *for* recording them in public versus arresting someone *while* they happen to be recording them in public.** This distinction is a crucial one.

It seems clear that agency leaders do not want officers stopping, questioning and even arresting an individual simply for recording. But it should be *equally* clear that agency leaders do not want officers refraining from utilizing their discretion to stop, question or arrest as a result of the mistaken belief that

individuals with camera phones in their hands present a heightened standard for reasonable suspicion or probable cause.

Situations in which officers approach a suspect and are confronted with a camera are now commonplace. **If officers “over-correct” in their interactions with the public and refrain from taking actions they would otherwise deem appropriate due to a misunderstanding of the limits of the First Amendment right to record, police operations and public safety could suffer.**

Understanding a Civilian’s Right to Record and the Limitations of that Right

The importance of striking this balance is illustrated by two cases from the First Circuit. In the *Glik v. Cunniffe* case, the plaintiff was walking past the Boston Common when he came upon three officers arresting an individual. The plaintiff pulled out his cell phone and began recording the arrest from “roughly ten feet away”.¹ The case facts do not indicate that he ever advanced closer to the officers or spoke to the officers until one of the officers approached and addressed him. When he refused to put his cell phone away, he was arrested on the charge of violating the Massachusetts wiretapping statute.

In finding for the plaintiff in *Glik*, the First Circuit stated that “[t]he filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within [First Amendment] principles. Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest.”²

The following year, the Federal District Court of New Hampshire, encountered another case of a civilian recorder being arrested but found in favor of the officers. In *Bleish v. Moriarty*, the plaintiff physically interfered with lawful police arrests at a protest demonstration.³ The plaintiff was within one foot of an officer, reaching into the squad car to interview an arrestee, constantly and loudly asking questions of the officers, and refusing to comply with repeated officer requests to back away and allow the officers to do their job.

In finding for the officers, the court stated that “[t]he video recordings do show that she was arrested while she was engaged in activities that are ordinarily protected by the First Amendment, but **being arrested while exercising constitutional rights is very different from being arrested for exercising those rights.**” (emphasis added)⁴

The Need for Practical Guidance

Beyond the First Circuit, courts have given guidance to law enforcement indicating that criminal offenses such as criminal obstruction can and have been engaged in while a recording is also taking place. But practical guidance for officers on the street is in somewhat short supply. So, it makes sense that agencies should be training officers to answer the following questions:

- Can I articulate to this individual—knowing that I am being recorded—why I have stopped them and/or what law I suspect they have violated?
- Can I justify my actions separate and apart from the fact that a recording was taking place?
- Can I affect the stop or arrest without continually discussing the recording device, keeping in mind that by focusing on the recording device I can create the appearance that the camera was a motivating factor in my decision-making?
- Can I write a report that treats the camera as a mere footnote?

Officers should be trained to recognize that these questions are crucial in an age of unprecedented transparency and to understand that if the answers to these questions are unequivocally “yes”, then the officer’s actions are likely well within the confines of the Constitution.

Officer interactions with individuals who are recording them is a frequent and foreseeable occurrence. **It should be made clear to officers and civilians that none of the emerging case law indicates that the activation of a recording device serves as a “get out of jail free” card for civilians engaging in unlawful activity. The challenge for law enforcement agencies is to confer with legal counsel and engage in pro-active training that prepares officers to utilize common sense discretion in the field when confronted by individuals seeking to shelter unlawful activities under the umbrella of the right to record officers.**

References

¹ *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011)

² *Id.*

³ *Bleish v. Moriarty*, 2012 DNH 118 (D.N.H. 2012)

⁴ *Id.*