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Video and Audio Taping Police Activity

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❖ Introduction

Three years ago, this journal published an article entitled [Officer Privacy and a Citizen's Right to Video-Record Police Activity](#), 2009 (5) AELE Mo. L.J. 201. It addressed topics which included privacy concerns of police officers, litigation issues, police policies and directives, audio-recordings, and activist groups which make an effort to record police activity.

While pointing out that no person has a right to impede law enforcement actions or to expose officers to danger, it stated that the First Amendment “generally protects the right to photograph or video-record the activities of law enforcement personnel while engaged in their duties.” It further concluded that officers lack a right to privacy while performing their duties. Those conclusions remain accurate and there is much of lasting value in that article, which it is recommended that readers review in conjunction with this one.

At the same time, that article was then able to accurately state that “Surprisingly, there are almost no officially reported decisions regarding a citizen’s right to video-record or photograph police activities.” The law has rapidly developed in this area in the few short intervening years. This article serves to update its predecessor by providing an overview of recent case law in which courts have increasingly acknowledged a First Amendment right to both videotape and audio tape police officers performing their duty.

It also discusses an important letter sent to a court by the U.S. Department of Justice which critiques a municipal police department’s policy on the subject of recording police activity

both in public and on private premises where an individual has a right to be, and makes a number of suggestions that it believes should be incorporated into such a policy.

At the end of this article, there is a list of useful and relevant resources and references.

❖ Update on taping and the First Amendment

Once upon a time, cameras, audio-recording devices, and filming equipment (later video cameras) were relatively bulky, cumbersome, expensive, and complicated to operate. It was then exceedingly rare for police activities to be recorded in any great detail by members of the general public.

Things have changed. Welcome to the modern world. Police officers increasingly know that everywhere they go in public, there are numerous individuals carrying tiny portable devices capable of instantly capturing still photos and audio/video recordings, as well as, in many instances, instantly streaming them for display to the public on a website or storing them off-site. This year, for the first time, the tens of millions carrying around smartphones with Internet connectivity [outnumbered](#) those bearing more conventional cell phones, constituting close to half of all U.S. adults.

In this environment of greatly reduced privacy for everyone, a federal appeals court held that a man was exercising clearly established [First Amendment](#) rights in standing ten feet away from City of Boston, Massachusetts police officers and using a cell phone's video recorder with an audio microphone to record their activities, based on his concern that they were using excessive force on an arrestee in a public place.

The officer was not entitled to qualified immunity on the man's false arrest lawsuit, despite his argument that the videotaping, by recording audio without consent of all parties to a conversation, violated a state wiretapping statute. The state wiretapping statute under which he was arrested aimed at clandestine recording, and the officers admitted that the arrestee was open about the fact that he was recording them.

The case stands for the precedent that there is clearly a right to audio and video record police "carrying out their duties in public." [Glik v. Cunniffe](#), #10-1764, 655 F.3d 78 (1st Cir. 2011). In April of 2012, the City of Boston reached a \$170,000 settlement with the plaintiff in [Glik](#). A decade earlier, a divided state Supreme Court had held that a motorist could be prosecuted for secretly recording police officers during a routine traffic stop. [Comm. v. Hyde](#), #SJC-08429, 750 N.E.2d 963 (Mass. 2001). See also [Gouin v. Gouin](#), #CIV. A.2001-10890-RBC, 249 F. Supp. 2d 62 (D. Mass. 2003), ruling that police

officers stated a claim against an arrestee for violating a Massachusetts state statute prohibiting unconsented-to interception of wire and oral communications in alleging that he surreptitiously made a tape recording of his arrest, transportation, and booking.

In 12 states, eavesdropping statutes require the consent of all parties to a conversation before it can be recorded. [A state-by-state [guide](#) to the details of eavesdropping and recording laws may be found online]. Those states are California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington. Since all parties to a conversation cannot give consent when they don't know a recording is being made, surreptitious audio taping can be prohibited under these laws.

In all of those states except Massachusetts and Illinois, the laws have been interpreted to imply a condition that there must be an "expectation of privacy," and do not apply to conversations in public made in a manner that anyone nearby or passing through can overhear it. Massachusetts and Illinois laws impose a requirement of consent by all parties before recording even for conversations carried out in public.

The strict application of the Massachusetts statute has been undermined in its application to conversations by officers in public by the *Glik* decision, and the strict application of the comparable law in Illinois was similarly challenged by a recent federal appeals court ruling.

The Illinois eavesdropping statute was held to violate the First Amendment to the extent that it could be applied to prohibit the open audio taping of police officers in public performing their official duties. Any supposed governmental interest in protecting conversational privacy was not implicated when officers performing their duties engage in communications audible to those witnessing the events.

In restricting more speech than is necessary to protect legitimate privacy interests, the statute was likely to violate the free speech and free press guarantees of the First Amendment. An injunction against enforcement of the statute was therefore ordered. [*ACLU of Illinois v. Alvarez*](#), #11-1286, 2012 U.S. App. Lexis 9303 (7th Cir.).

See also [*People v. Allison*](#), #2009-CF-50 (Cir. Ct. Crawford Co., Ill., 2011) , a trial court decision declaring unconstitutional the Illinois eavesdropping state as violating the First Amendment when applied to prosecute a man for using a concealed digital recorder to record his own conversations with police and other city and county employees. The court held that the defendant had a First Amendment right "to gather information by audio recording public officials involved in performing their public duties."

In [*Kelly v. Carlisle*](#), #09-2644, 622 F.3d 248 (3rd Cir. 2010), the court ruled that a police officer was not entitled to qualified immunity on Fourth Amendment claims arising out of his arrest of a man for filming his actions during a traffic stop. At the same time, as the right to videotape police officers during traffic stops was not then clearly established, the officer was entitled to qualified immunity on the arrestee's First Amendment claim.

The arrestee was a passenger in a vehicle stopped for speeding, and he used a video camera he had with him to record the officer, allegedly without the officer's knowledge or consent. The officer believed that this was a violation of a Pennsylvania wiretapping and electronic surveillance law. The officer called a prosecutor, and contended that he relied on the prosecutor's advice in placing the passenger under arrest.

The officer believed that the passenger was violating the statute, as it requires police officers to inform people when they record traffic stops. While the officer's reliance on the prosecutor's advice in placing the passenger under arrest might give rise to a presumption that he was entitled to qualified immunity, the appeals court ordered further proceedings to determine whether that reliance was objectively reasonable. [On remand, the trial judge denied summary judgment to the defendant officer. [*Kelly v. Carlisle*](#), #1:07-cv-1573, 815 F. Supp. 2d 810 (D. Pa. 2011).]

A motorist stopped by two Maryland state troopers recorded his interaction with the officers without informing them he was doing so. The recording included both video and audio. He later posted the recordings on the YouTube™ [website](#). He was subsequently arrested and then indicted on charges that included, among other things, making the recordings of an oral private conversation.

The trial judge ruled that the recorded audio exchange between the arrestee and the officers was not a private conversation as intended by the provisions of a state wiretap statute. "There is no expectation of privacy concerning a traffic stop on a public street. The law is clearly established that a traffic stop is not a private encounter."

Charges concerning making and disseminating the recording were dismissed, while charges concerning traffic violations arising from the same incident will go forward. "Those of us who are public officials and are entrusted with the power of the state are ultimately accountable to the public. When we exercise that power in public fora, we should not expect our actions to be shielded from public observation." [*State of Maryland v. Graber*](#), #12-K-10-647 #12-K-10-647, 2010 Md. Cir. Ct. Lexis 7.

❖ Justice Department Policy Recommendations

A man sued the Baltimore, Maryland police department for seizing, searching, and deleting the contents of his mobile phone after he utilized it to record officers who were arresting a friend of his. The department subsequently issued a [general order](#) instructing officers that the public has a right to record police activity in public.

The plaintiff and city are currently discussing a possible settlement of the lawsuit. On May 14, 2012 the Civil Rights Division of the U.S. Department of Justice sent a [letter](#) to the attorneys for the city in the case, *Sharp v. Baltimore City Police Department*, # 1:11-cv-02888, U.S. District Court (D. Md.).

In the letter, which it made public, the Justice Department, while taking no position on the plaintiff's claims for damages, recommended that any resolution to his claims for injunctive relief "should include policy and training requirements that are consistent with important First, Fourth and Fourteenth Amendment rights at stake when individuals record police officers in the public discharge of their duties."

Bearing these rights in mind, the Justice Department asserted, would "engender public confidence in our police departments, promote public access to information necessary to hold our governmental officers accountable, and ensure public and officer safety." Beyond any comments in the letter on the immediate case, the important thing is that the Justice Department used it to lay out the "basic elements of a constitutionally adequate policy on individuals' right to record police activity."

The letter, making detailed reference to existing case law and commentary, sets forth six general areas that an adequate policy should cover. There is undoubtedly room for disagreement over the nuance, details, and certainly the wording of policies to be written in line with these recommendations. But a close examination and discussion of each of these six topics should prove beneficial to anyone either writing or revising a policy. The six recommendations are:

1. "Policies should affirmatively set forth the First Amendment right to record police activity." Such recording, the letter asserts, constitutes speech through which individuals collect and distribute information on matters of public concern. Such rights can be limited by reasonable time, place and manner restrictions. Recording police activities helps uncover abuses. Policies should instruct officers as to these rights, including examples of where people can lawfully record police, as well as the types of activities which may properly be recorded.

The letter pointed out that recordings made on private property as well as on public property may be protected, citing [Jean v. Massachusetts State Police](#), #06-1775, 492 F.3d 24 (1st Cir. 2007), holding that the posting of a video taken during a warrantless search of a private resident was protected under the First Amendment. Recordings should be allowed to be made in those places where people have a legal right to be, whether on public or private property.

2. “Policies should describe the range of prohibited responses to individuals observing or recording the police.” These include bans on interference with lawful recording, threats against those doing so, or the search or seizure of a camera or recording device without a warrant or special circumstances. Under no circumstances should officers be allowed to destroy or delete photos or recordings. Doing so could violate due process by depriving a person or property rights without notice and an opportunity to be heard.

3. “Policies should clearly describe when an individual’s actions amount to interference with police duties.” The right to record does not include the right to do so in a manner that threatens the safety of others, violates other laws, or incites others to break the law. Criticizing police conduct does not constitute interference. Policies should also spell out under what circumstances an arrest of a person making a recording could occur.

4. “Policies should provide clear guidance on supervisory review.” When should an officer summon a supervisor to the scene and what should they do when they get there? Examples of when a supervisor’s guidance should be required might include making an arrest of an individual related to a recording or seizing or making a warrantless search of a camera or recording device.

5. “Policies should describe when it is permissible to seize recordings and recording devices.” Both First and Fourth Amendment principles should be covered, and there should be guidance on how to seek consent to review photos and recordings, as well as when exigent circumstances may justify a seizure, along with a prohibition of warrantless searches of a seized and secured device. Consent must not be improperly obtained by coercion. “A policy permitting officers, with supervisory approval, to seize a film for no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant if that film contains critical evidence of a felony crime would diminish the likelihood of constitutional violations.”

6. “Police departments should not place a higher burden on individuals to exercise their right to record police activity than they place on members of the press.” No one

needs to have pre-established official press credentials to record officers engaged in performing their duties in public.

On this last point, the letter quotes the court in *Glik*, which noted that:

“[M]any of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.”

In conclusion, it is clear that widespread video and audio taping of police activity is here to stay, and increasingly accepted and expected by the public and the courts. As a consequence, every law enforcement agency has an urgent need to make sure that it has comprehensive policies and effective training to cope with the reality of heightened scrutiny.

❖ **Police department posting of videotapes**

When members of the public post videotapes of police activities on Internet websites, officers and police management may be understandably upset. Such videos may record only fragmentary images of what occurred, showing, for example, an officer hitting an arrestee with a baton, but not what preceded, justified, and actually necessitated that action.

Further, videos may be edited to portray police in the worst possible light. A video of police making an arrest of trespassers, for example, may be edited to exclude the warnings by officers that those present must leave or be arrested.

Some police departments now routinely post videos of police activity on the Internet, with content they control, and which can show the whole incident. Such videos have shown a wide variety of activities, ranging from traffic stops and DUI arrests, to police actions during political demonstrations or rescue operations.

Some departments post videos of press conferences, announcements, or recorded interviews with media reporters that they feel media outlets did not fully or accurately report. Other departments have posted videos of crimes as part of a campaign to get members of the public to identify suspects.

A number of police departments, such as the city of [Minneapolis](#), have established their own video “channels” on the [YouTube™](#) website where their periodic videos can be

found, while others, such as [Oakland](#), use their own departmental website or some other location for this purpose.

Some videos come from cameras mounted in police vehicles or on other equipment, including some weapons. Others are recorded by members of the department assigned to record major public events, and are also part of evidence gathering.

There are bound to be legal issues that arise about such routine posting of videos by police departments, including privacy issues. There are only a few reported court decisions on the subject, there are a handful of cases worth looking at and drawing some lessons from. Most involve the propriety of videotaping, rather than the issues of posting or broadcasting the videos.

- A prior article in this journal, [Civil Liability from Media Activities During Law Enforcement Operations](#), 2008 (4) AELE Mo. L.J. 101, also contains material which may be helpful in researching this issue.

Police officers, like other members of the public, can lawfully make videotapes in areas where there is no reasonable expectation of privacy. In [U.S. v. Bucci](#), #07-2376, 582 F.3d 108 (1st Cir. 2009), officers lawfully placed a video camera on a utility pole across from a house, using it to conduct surveillance on the house for a period of eight months. No vegetation, gates or fences in front of the building obstructed the public's view of the garage or the driveway from the street. The residents, therefore, had no reasonable expectation of privacy in places exposed to public view.

Similarly, in [U.S. v. Vankesteren](#), #08-4110, 553 F.3d 286 (4th Cir. 2009), *cert. denied*, #08-1253, 556 U.S. 1269 (2009), the Virginia Dept. of Game and Inland Fisheries, in placing a hidden, motion-activated, video camera in a man's open fields, and using it to monitor his hawk trap, did not violate his Fourth Amendment rights. He had no legitimate expectation of privacy, as the video merely recorded what any member of the public would have been able to see while passing by.

See [Sprague v. Nally](#), #03-489, 882 A.2d 1164 (Vt. 2005), (police officer's videotaping of a traffic stop, and of a subsequent search of the motorist's home, did not violate any clearly established right of the motorist, who was stopped for speeding).

In [Caldarola v. County of Westchester](#), #01-7457, #01-7457, 343 F.3d 570 (2nd Cir. 2003), the county's action in videotaping a correctional officer when he was escorted to a car to be transported to a police station for booking in a "perp walk" manner was a "seizure" under the Fourth Amendment, but his privacy interest in not having the

videotape broadcast to the public is found to be outweighed by a legitimate governmental purpose in informing the public about efforts to stop abuse of disability benefits by its employees and to deter others from attempting similar crimes.

On the other hand, videotaping in private areas may be another matter. See [*Brannum v. Overton County School Board*](#), #06-5931, 516 F.3d 489 (6th Cir. 2008), finding that the Fourth Amendment privacy rights of middle school students were violated by the installation and operation of video surveillance cameras in athletic locker rooms at the school, which resulted in them being videotaped while dressing and undressing.

The court further found that the record did not show any concern for safety and security that would make the intrusion involved reasonable. Such privacy rights may also be implicated were a department to post a videotape of the execution of a search warrant inside a private residence, where individuals might be fully or partially unclothed.

❖ Resources

The following are some useful resources related to the subject of this article.

- [Audio & Video Taping](#). Case Summaries from AELE's Fire, Police & Corrections Personnel Reporter.
- Chevy Chase (Md.) Police Department Memo on [Video Recording and Photographing Police Officers](#) (2012).
- Baltimore (City) Police Department Policy on "[Video Recording of Police Activity](#)" (2011).
- "[Can We Tape? A State-by-State Guide](#)," Reporters Committee for Freedom of the Press.
- [Citizen Media Law Project](#) at Harvard University's Berkman Center for Internet & Society.
- Miami Beach Police Department Policy on "[Seizure & Search of Portable Video and Photo Recording Devices](#)" (2011).
- [First Amendment Handbook](#), Reporters Committee for Freedom of the Press (7th Edition, 2011).
- [Search and Seizure: Media Presence](#). Case Summaries from AELE's Liability Reporter.

- [U.S. Department of Justice Letter to the Baltimore Police Department](#) on the right to record police in public (May 14, 2012).
- [Wiretapping, Video Surveillance, & Internet Legal Issues](#). Case Summaries from AELE's Liability Reporter.

❖ **Prior Relevant Monthly Law Journal Articles**

- [Civil Liability from Media Activities During Law Enforcement Operations](#), 2008 (4) AELE Mo. L.J. 101.
- [Officer Privacy and a Citizen's Right to Video-Record Police Activity](#), 2009 (5) AELE Mo. L.J. 201.
- [The Use of Personally-Owned Mobile Phone Cameras and Pocket Video Cameras by Public Safety Personnel](#), 2012 (2) AELE Mo. L. J. 501.
- [Videotaping and Police Behavior](#), 2011 (6) AELE Mo. L. J. 501

❖ **References and images**

- "[A Due Process Right to Record the Police](#)," by Glenn Harlan Reynolds and John A. Steakley, 89 Washington University Law Review No. XXX (2012).
- "[Good Cop, Bad Citizen? As Cellphone Recording Increases, Officers Are Uneasy](#)," American Bar Journal (Mar. 2012).
- "[Policing the Police: Freedom of the Press, the Right to Privacy, and Civilian Recordings of Police Activity](#)," by Marianne F. Kies, 80 The George Washington Law Review 274 (November 2011).
- "[Confirmation of a Catch-22: *Glik v. Cunniffe* and the Paradox of Citizen Recording](#)," by Caycee Hampton, 63 Florida Law Review 1549 (2011).
- "[Less than Picture Perfect: The Legal Relationship between Photographers' Rights and Law Enforcement](#)," by Morgan Leigh Manning, 78 Tennessee Law Review 105 (2010).
- "[Orwell's Vision: Video and the Future of Civil Rights Enforcement](#)," by Howard M. Wasserman, 68 Maryland Law Review 600 (2009).

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