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Breaking Down the Police Videotaping Decision

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In an opinion released on August 26, 2011, the U.S. Court of Appeals for the First Circuit ruled that a private citizen's right to videotape police officers performing their duties in a public space is "unambiguously" protected by the First Amendment. *Glik v. Cunniffe, et al.*, No. 10-1764 (1st Cir. Aug. 26, 2011).

In 2007, Simon Glik encountered three police officers making an arrest in the Boston Common and, concerned that the officers were using excessive force, began to record video footage of the arrest with his cell phone. One of the officers told Glik, "I think you have taken enough pictures," and Glik replied that he was videotaping the arrest. When Glik affirmed that his cell phone recorded audio, he was arrested and subsequently charged with violation of Massachusetts' wiretap statute, disturbing the peace and aiding in the escape of a prisoner. The latter charge was voluntarily dismissed for lack of probable cause and, in 2008, the Boston Municipal Court granted Glik's motion to dismiss the remaining two charges. Thereafter, Glik filed a civil rights action against the officers and the City of Boston in the U.S. District Court for the District of Massachusetts, alleging claims under 42 U.S.C. § 1983 for violations of his First and Fourth Amendment rights, in addition to various state law claims. The district court denied the police officers' motion to dismiss Glik's complaint on qualified immunity grounds, and the defendants immediately appealed the ruling to the First Circuit on interlocutory review.

To determine whether public officials are entitled to qualified immunity, the court considers whether the facts alleged by the

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plaintiff make out a violation of a constitutional right and, if so, whether the right was “clearly established” at the time of the defendant’s alleged violation. With regard to Glik’s First Amendment claim, the First Circuit unequivocally concluded that there is a constitutionally protected right to videotape police carrying out their duties in public, explaining that “[i]t is firmly established that the First Amendment’s aegis extends further than the text’s proscription on laws ‘abridging the freedom of speech, or of the press,’ and encompasses a range of conduct related to the gathering and dissemination of information.”

The court cited precedent firmly establishing that videotaping of public officials is an exercise of First Amendment liberties and observed that gathering information on government officials protects free discussion of government affairs, aids in the uncovering of abuses, and promotes effective functioning of government. Although the right to film is subject to reasonable time, place and manner restrictions, the court opined that the peaceful recording of an arrest in a public space that does not interfere with police duties is not reasonably subject to limitation.

The First Amendment right to gather news does not only inure to the benefit of the news media, but also to the benefit of private individuals, the court further noted. Recognizing that evolving technology has allowed private citizens to increasingly contribute to news gathering and dissemination, the First Circuit stated:

Moreover, changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. The proliferation of electronic devices with video-recording capability means that many 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. Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.

In addition, the First Circuit concluded that Glik’s Fourth Amendment rights were violated by his arrest without probable cause, relying on the fact that his recording in plain view was not “secret” within the meaning of the state wiretap statute. Even if the officers did not actually know that Glik was recording audio on his cell phone, the court found that the conspicuous use of a cell phone commonly known to record audio is sufficient evidence from which to infer actual knowledge of the recording.