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Filming the police: what to focus on after 'Glik'

By David Milton

A year after the 1st U.S. Circuit Court of Appeals' landmark decision in *Glik v. Cunniffe,* 655 F.3d 78 (1st Cir. 2011), which held that the First Amendment protects the right to video and audio-record on-duty police officers in public spaces, the right to record has become further enshrined in the law and in the public mind.

In May, the 7th Circuit, citing *Glik*, ordered entry of a preliminary injunction prohibiting enforcement of the Illinois wiretap law against individuals who openly record police officers acting in public. *ACLU v. Alvarez,* 679 F.3d 583 (7th Cir. 2012).

Later in May, the U.S. Department of Justice, also citing *Glik*, sent an open letter to the Baltimore Police Department with detailed guidelines for a constitutionally adequate policy on the right of individuals to record police activity.

In July, the DOJ entered into a consent decree with the New Orleans Police Department that includes provisions to safeguard that right.

And throughout the past year, images of police misconduct caught on film continued to make headlines and to foster police accountability.

This article discusses two issues unresolved by *Glik*, one legal, one practical.

The legal issue is whether the Massachusetts wiretap law can be constitutionally enforced against individuals who *secretly* make sound recordings of on-duty police officers acting in public. Simon Glik's recording was done openly.

The practical issue is how to ensure that police officers do not infringe the First Amendment right to record that *Glik* so strongly affirmed.

What 'Glik' held

Simon Glik was arrested on Oct. 1, 2007, for using his cell phone to video and audio-record three Boston police officers on the Boston Common using what seemed to be excessive force in making an arrest.

Although Glik stood about 10 feet away, held his phone in plain sight, and did not interfere with the officers, they arrested him for violating the state wiretap law (which prohibits secret recording of audio), among other charges. The charges were all dismissed as baseless.

Glik brought suit in federal court alleging violations of his First and Fourth Amendment rights. The officers moved to dismiss on qualified immunity grounds, arguing that Glik's First Amendment right to record the officers, and his Fourth Amendment right to be free from arrest under the wiretap statute for recording the officers, were not well-settled.

U.S. District Court Judge William G. Young denied the motion and the officers appealed.

The 1st Circuit held that the officers did not have immunity from suit because the First Amendment "unambiguously" protected Glik's actions.

Recording public officials in a public place "fits comfortably" within longstanding First Amendment principles, the court stated, emphasizing that gathering and disseminating information about public officials promotes democracy by ensuring that abuses of power are exposed.

Public scrutiny of the police is particularly important because their misuse of authority carries great potential for harm, the court noted.

On the Fourth Amendment question, the court held that the officers lacked even arguable probable cause to arrest Glik under the wiretap statute, which prohibits only secret recordings. Glik held his cell phone in plain view. A straightforward reading of the statute and Massachusetts caselaw, the court held, "cannot support the suggestion that a recording made with a device known to record audio and held in plain view is 'secret.'"

Applying 'Glik' to secret recordings

Because the wiretap statute did not apply to Glik's actions, the 1st Circuit did not address its constitutionality.

The court's broad First Amendment ruling suggests that even if Glik had secretly recorded the officers, it would have been unconstitutional to arrest him under the wiretap statute.

As stated, the court found that filming government officials in public spaces serves the fundamental First Amendment purposes of exposing misconduct and promoting the free discussion of public affairs. Those interests do not depend on whether the recording is done overtly.

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Indeed, the 1st Circuit made no mention of openness in discussing the First Amendment right. (The 7th Circuit, by contrast, limited its holding to open recording, which is all that the plaintiffs in that case sought to do. The court stated that surreptitious recording brings stronger privacy interests into play. However, it also noted that the communications at issue in that case — police conversations held in public and audible to any passersby — do not carry privacy expectations. *Alvarez,* 679 F.3d at __ & n.13.)

Though *Glik* recognized that the right to record the police is subject to valid time, place and manner restrictions, nothing in the court's reasoning suggests that non-secrecy might be one such restriction.

On the contrary, the court remarked that "the 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."

In *Commonwealth v. Hyde*, 434 Mass. 594 (2001), a divided Supreme Judicial Court upheld the conviction of Michael Hyde for illegal wiretapping based on his having secretly audio-recorded his interaction with police officers during a traffic stop.

The majority found that Hyde's recording violated the plain language of the statute, which it held contained no exception for recordings of police officers or of communications in which the speaker lacks a reasonable expectation of privacy.

A sharp dissent written by Chief Justice Margaret H. Marshall and joined by Justice Robert J. Cordy noted that the statute was intended to protect private conversations, and that police officers have no privacy interest in things they say in public that can be overheard by anyone within earshot.

Hyde dealt with the First Amendment in a single paragraph, stating only that the conviction did not violate the defendant's right to petition the government for redress of grievances. The majority did not address the First Amendment's broader protections for freedom of speech and of the press.

The court thus failed to consider the wide body of law recognizing what *Glik* called "the cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs."

A First Amendment challenge to the statute would pit that fundamental interest against whatever expectation of privacy police have in things they say in public. It should not be a close fight.

Protecting the right to record in the real world

Judicial opinions affirming constitutional rights on paper mean little if people cannot exercise those rights in practice.

After Glik filed his lawsuit, the Boston Police Department developed a training video based on the facts of his case. The video explains that openly recording the police does not violate the wiretap law. The video does not mention that such recording is a First Amendment right or provide guidance on how officers can avoid infringing that right.

The DOJ criticized the Baltimore Police Department's recording policy for the same omissions, stating that "policies should affirmatively state that individuals have a First Amendment right to record police officers and include examples of the places where individuals can lawfully record police activity and the types of activity that can be recorded." (The DOJ's letter to the Baltimore police, as well as its consent decree with the New Orleans Police Department, are available at www.justice.gov/crt/about/spl/findsettle.php.)

The DOJ letter also decries the use of pretextual charges — like disturbing the peace and interfering with a police officer — to punish people for recording the police. Boston police did that in Glik's case, charging him with disturbing the peace and aiding the escape of a prisoner in addition to illegal wiretapping.

In an example cited by the DOJ, Baltimore police officers threatened to arrest a man for "loitering" because he was standing on the sidewalk recording them. The DOJ recommends policies that "encourage officers to provide ways in which individuals can continue to exercise their First Amendment rights as officers perform their duties, rather than encourage officers to look for potential violations of the law in order to restrict the individual's recording."

The root of the problem is the aversion of many police officers to the scrutiny that citizen recording provides — although some officers have no problem with being recorded since the footage may exonerate them when they are accused of misconduct.

Police officers are highly visible public servants entrusted with extraordinary powers, the lawful exercise of which is critical to a free society. Police should be trained to assume that their every action is being recorded. Efforts to stifle that recording are not only unconstitutional, but also futile given the ubiquity of cell phone cameras.

As a Boston Globe editorial stated earlier this year, "Police and cameras: get used to it." MLW

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