

## YOUR CONSTITUTIONAL RIGHT TO VIDEOTAPE POLICE



It is tough being a criminal defense lawyer these days. So tough that some lawyers have taken second jobs to pay the bills. For instance, here is a [Youtube](#) video of a lawyer who also works as a Uber driver. While driving his Ubermobile, he was pulled over by the cops. Like any attorney is taught, he started to make a record of the encounter by videotaping the police. This clearly made the cops uncomfortable if not pissed. They told him a new law had been passed making it illegal to videotape the police. He is threatened with arrest for videotaping the cops. Unfortunately, we never see the end of the encounter on this Youtube video. Last you hear is the cops threatening to get a canine unit

Given federal police about to be [imported](#) into Milwaukee over Gov. Evers objection and the upcoming [Democratic Convention](#) in Milwaukee starting Aug. 17th, you may be wondering if there is a right to record the actions of law enforcement officers? This topic has been the subject of considerable discussion, and no small degree of litigation, in recent years. See, Morgan Leigh Manning, Less than Picture Perfect: The Legal Relationship between Photographers' Rights and Law Enforcement, 78 Tenn. L. Rev. 105 (2010) (surveying case law regarding the arrest and prosecution of photographers for taking photos and recording video of law enforcement officers in public places).

Carlos Miller, Carlos Miller, a Miami journalist who runs the blog "[Photography Is Not a Crime](#)," said he has documented about 10 arrests since he started keeping track in 2007. Miller himself has been arrested twice for photographing the police. He won one case on appeal, he said, while the other was thrown out after the officer twice failed to appear in court. "They're just regular citizens with a cell-phone camera who happen to come upon a situation," [Miller said](#) . "If cops are doing their jobs, they shouldn't worry."

Typical of the situation is Simon Glik. *Glik v. Cunniff*, 655 F.3d 78 (1st Cir. 2011). He caught sight of three police officers arresting a young man. Hearing a passerby shout that the officers were hurting the man, Glik turned on his cell phone and began capturing video. The police officers objected to being recorded, arrested Glik and charged him with violating the state's "wiretap" law by recording them without their consent. This is a common, if rarely successful, gambit used by

law enforcement to halt or punish those recording them. See e.g., *American Civil Liberties Union of Ill. v. Alvarez*, 679 F. 3d 583 (7th Cir. 2012) (The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing the “First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct.”); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (the First Amendment protects the right “to film matters of public interest,” including police activity at a political rally); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 542 (E.D. Pa. 2005) (finding “no doubt that the free speech clause of the Constitution protected” plaintiff who videotaped officers because “[v]ideotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence”). Citing decisions of numerous circuit and district courts, the *Glik* court found that a private individual, like the press, had a “clearly established” First Amendment right to film of government officials, like the police, in public spaces. *Glik*, at 83-84. Incidentally, municipalities should know that Boston agreed to pay Glik \$170,000 in damages and legal fees for infringing on his right to record the police. Boston Settles Suit Over Recording Of Police Officers, WBUR, March 28, 2012, <https://www.wbur.org/news/2012/03/27/recording-officers-settlement> This settlement is similar to the result in *Phillips v. City of Newark* where a High school student taken into police custody for filming a police incident on a public bus with her cellphone. <https://www.aclu-nj.org/cases/phillipsvcityofnewark#:~:text=The%20American%20Civil%20Liberties%20Union,she%20used%20to%20record%20video>

*Glik* also held that the officers violated the Fourth Amendment, because they lacked probable cause to believe that the bystander violated the unusual Massachusetts ban on secret (but not open) audio recording of private and non-private conversations. 655 F.3d at 86-88.

As the *Alvarez* court emphasized, however, *the right to record the police is not a right to interfere with police operations*. The court said, “Nothing we have said here immunizes behavior that obstructs or interferes with effective law enforcement or the protection of public safety.” *Alvarez*. at 607. Thus, “While an officer surely cannot issue a ‘move on’ order to a person because he is recording, the police may order bystanders to disperse for reasons related to public safety and order and other legitimate law enforcement needs.” *Id.*

The United States Department of Justice has stated without qualification that “The First Amendment protects the rights of private citizens to record police officers during the public discharge of their duties.” *Sharp v. Baltimore City Police Department et al*, Civil No. 1:11-cv-02888-BEL, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND (2012) at p. 4 of 18, [https://www.justice.gov/sites/default/files/crt/legacy/2012/04/12/Sharp\\_SOI\\_1-10-12.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/04/12/Sharp_SOI_1-10-12.pdf) “As a basic principle, we can’t tell you to stop recording,” says Delroy Burton, chairman of D.C.’s metropolitan police union and a 21-year veteran on the force. “If you’re standing across the street videotaping, and I’m in a public place, carrying out my public functions, [then] I’m subject to recording, and there’s nothing legally the police officer can do to stop you from recording.... “What you don’t have a right to do is interfere ....Record from a distance, stay out of the scene,

and the officer doesn't have the right to come over and take your camera, confiscate it." Officers do have a right to tell you to stop interfering with their work, Burton told me, but they still aren't allowed to destroy film. ROBINSON MEYER, What to Say When the Police Tell You to Stop Filming Them The Atlantic (APRIL 28, 2015), <https://www.theatlantic.com/technology/archive/2015/04/what-to-say-when-the-police-tell-you-to-stop-filming-them/391610/>

"There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991). The reach of the First Amendment's protection extends beyond the right to gather such information – it also prohibits government officials from "punish[ing] the dissemination of information relating to alleged governmental misconduct." *Id.* at 1035; see *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (speech relating to alleged governmental misconduct "has traditionally been recognized as lying at the core of the First Amendment").

Another typical example is detailed in Glenn Harlan Reynolds, Watching The Watchers: Why Surveillance Is A Two-Way Street, *Popular Mechanics* (Oct. 1, 2009), <http://www.popularmechanics.com/technology/military/4237005>. Brian Kelly of Carlisle, Pa., was a passenger in his friend's car when the police pulled the vehicle over for speeding. When Kelly began videotaping, he was arrested and charged with violating a state wiretap statute and thrown in jail overnight. Charges were dropped when the district attorney recognized that recording police in public isn't much like wiretapping. In addition, the DA said that the police had no expectation of privacy when they themselves were recording the incident. Michael Gannon, of Nashua, N.H., faced similar charges when he used a front-door security camera to record what he considered to be overly aggressive behavior by a detective. The charges against Gannon were dropped.

It is curious that law enforcement for years has used the line, "If you have nothing to hide, what are you afraid of?" to justify their actions. Suddenly, with the advent of technology, the show is on the other foot and the government does not like it. If you are interested to see the state by state response to the government being recorded, see Spy files – spying on First Amendment activity-state by state. <https://www.aclu.org/other/spy-files-spying-first-amendment-activity-state-state>