

Setting the Record Straight:

Citizens' First Amendment Right to Video Police in Public

## Abstract

There is an alarming trend in the United States of citizens being arrested for videotaping police officers in public. Cell phones with video capabilities are ubiquitous and people are using their phones to document the behavior of police officers in a public place. The goal of this paper is to study the trend of citizen arrests currently in the news and recommend solutions to the problem of encroachment upon First Amendment rights through case law.

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances .<sup>1</sup>*

– *The First Amendment*

## **Introduction**

One of the five guarantees stated in the First Amendment is that citizens have a right to monitor their government. Currently there is a trend in the United States of police officers arresting citizens who are monitoring their actions using video in a public place.

With the evolution of technology, citizens have become amateur reporters. If a person owns a smart phone, he has the capacity to videotape what happens in front of him. If he has a YouTube account, blog, or Facebook page, he can upload a video in a matter of seconds, therefore broadcasting his content on a public platform.

Videos have proven to be beneficial to the justice system. An historic case of police brutality may have never seen the light of day if it were not for one of the nation's first so-called citizen journalists. Los Angeles police officers did not know their repeated beating of Rodney King was captured on video by a bystander, George Holliday in 1991.<sup>2</sup> Holliday videotaped the incident from a distance and began sharing it with news agencies. The video gained attention from around the

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<sup>1</sup> Bill of Rights *The Charters of Freedom*, National Archives and Records Administration. Bill of Rights text, at [http://www.archives.gov/exhibits/charters/bill\\_of\\_rights\\_transcript.html](http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html).

<sup>2</sup> LEONARD PITTS, *Violence, videotapes and police*, Miami Herald August 3, 2011.

world. Three of the Los Angeles police officers involved were tried and acquitted which sparked outrage among many of the area residents.<sup>3</sup>

More recently, in another police brutality case, a student from Maryland was slammed to the ground and beaten by several officers in April 2010.<sup>4</sup> A security camera captured the incident on camera. Video directly contradicted the officers' statements that 21-year-old Jack McKenna first attacked police. He was skipping on the sidewalk after a victory at a college basketball game with a friend when he was stopped and approached by officers on horses. McKenna stood next to a wall and suddenly two officers on foot appeared to slam the student into a wall. He put his hands up and fell to the ground. Officers used their batons to hit him repeatedly. The incident is still under investigation.

In another incident, passengers on a Bay Area Rapid Transit commuter train captured a killing on cell phone video in 2009. A police officer shot and killed Oscar Grant after being summoned to the platform because of reports of a fight.<sup>5</sup> Video of the incident showed a police officer attempting to arrest Grant. He was handcuffed when the officer drew his gun and shot Grant. The defense argued he was trying to reach for his Taser but instead drew his gun. The jury, who was able to see the video and hear audio of the officer saying, "Step back. I'm going to tase him" before the shooting didn't convict him of murder, but instead involuntary manslaughter. In this

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<sup>3</sup> FORREST STUART, *Constructing Police Abuse after Rodney King: How Skid Row Residents and the Los Angeles Police Department Contest Video Evidence*, 36 *Journal of the American Bar Foundation* (2011).

<sup>4</sup> ABC News *ABC News*, at <http://abcnews.go.com/GMA/video/student-beaten-cops-fights-back-10369656>.

<sup>5</sup> USA Today KEVIN JOHNSON, *For cops, citizen videos bring increased scrutiny*, USA Today November 4, 2011. 2010, at 1A.

case, the video also may have helped the officer. It certainly helped show the truth of what happened.

Police officers are aware of this but many seem to have a negative attitude toward citizens videotaping them. Why would an officer mind if someone videotaped them performing their job in public unless there is something they do not wish to be shown to others? Let's consider this as we look at cases of consequence when citizens have videotaped police officers in public during the years of 2009, 2010 and 2011.

In many recent cases, so-called citizen journalists have been arrested for videotaping what police do in a public space. This is troublesome when considering First Amendment rights. This study will show, through case law dealing with the First Amendment, public forum doctrine and privacy laws, that citizens have a right to engage in photography and videography in public spaces.<sup>6</sup> This paper seeks to apply old law to new technology.

### **Theoretical Perspective**

This research will contribute knowledge to Democratic Theory, First Amendment Theory, Public Forum Doctrine and Privacy Doctrine. The scholarly study will be beneficial because it informs the public about First Amendment rights and how, if at all, it protects free expression as we witness advances in technology.

Democratic Theory pertains to the idea of protection of the voter. Citizens have the right to be informed voters and the First Amendment is the channel through which diverse ideas are protected. If information is not available to the

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<sup>6</sup> Know Your Rights Photographers (ACLU ed., 2010).

masses, they cannot effectively vote. Some scholars would argue that no matter the platform or technology used to gather important information, the expression of information is protected by the First Amendment. Supreme Court Justice Hugo Black in a dissenting opinion stated that, "All present instruments of communication, as well as others that inventive genius may bring into being, shall be free from government censorship or prohibition. Laws which hamper the free use of some instruments of communication thereby favor competing channels."<sup>7</sup> Video provides a form of proof of an incident, almost like an eyewitness. Should citizens have a right to witness something that happens in public especially when or if it involves a police officer? Democratic Theory holds that democracy is defined as "rule by the people" with the premise dating back to government in Athens.<sup>8</sup> When police officers have the right to videotape citizens in public but may arrest a citizen for doing the same, government seems to hold the balance of power.

With regard to the First Amendment, we must examine its purpose. Legal scholar C. Edwin Baker explains it as protection of the pursuit of truth. "If free expression is valued, steps should be taken to encourage the greatest opportunity for that expression to take place."<sup>9</sup> Some circuit courts are beginning to give opinions that protect citizens who videotape police in public when they have a reason to communicate a message that is truthful. First Amendment Theory presents a necessity for knowledge about aspects in communities that can bring

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<sup>7</sup> *Kovacks v. Cooper/Dissent Black*, (US Supreme Court January 31, 1949).

<sup>8</sup> H. B. MAYO, *An Introduction to Democratic Theory* 58 (Oxford University Press . 1960).

<sup>9</sup> STEVEN J. HEYMAN DAVID AMAR, C. EDWIN BAKER, *The First Amendment Freedom of Speech, Its Constitutional History and the Contemporary Debate 2* (Vi Kram ed., Prometheus Books. 2009).

about social change. Speech can also bring to light instances where social change is needed.<sup>10</sup>

Supreme Court justices have interpreted the First Amendment in different ways, which has helped to shape theory. Some justices believe the best way to view the First Amendment is in the context the framers of the Constitution intended. However, others have determined the intent isn't clear and the idea of free speech cannot be based on historical perspective.<sup>11</sup> Overall, First Amendment Theory, whether in a classic or modern sense, proposes that an array of ideas, truths and perspectives must be communicated in order for citizens to encounter knowledge.

Emerson presents four important values regarding the First Amendment. These include: a way to insure self-fulfillment, a way to find truth, a means of encouraging participation in decisions and a way to find balance in society. His fourth point seems especially pertinent in this discussion: free expression should be protected by the amendment because it is necessary for community and culture to support stability and positive development. When this freedom is protected, it facilitates a more advanced society. When a citizen has the freedom to videotape a police office in public and shares the video in order to inform a community, the First Amendment serves its purpose. Furthermore, Emerson argued that when people are able to express their views, peace is upheld and anger is dissipated.

Courts have recognized the concept of a public forum. Historically, this includes locations such as streets, parks and other public places where citizens

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<sup>10</sup> Id.

<sup>11</sup> DOM CARISITI, *Expanding Free Expression In the Marketplace, Broadcasting and the Public Forum* 4 (Quorum Books. 1992).

gather and share ideas.<sup>12</sup> In *Hague v. CIO* Justice Owen Roberts stated in the opinion, “Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.”<sup>13</sup> In *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, the Supreme Court established that if the government is going to regulate speech in a public place that isn’t usually established as a place of expression, it has to be reasonable. Basically saying that just because someone in a public position doesn’t like a viewpoint, it doesn’t mean the citizen does not have a right to express it.<sup>14</sup>

If people have the right to express themselves in public places, it logically follows that a citizen has the right to videotape others in a public place. This promotes expression in public forum, the location where it is most welcome. Perhaps technology is advancing too quickly for courts to give opinion but platforms and tools of communication are developing and they are being used in our streets, parks and public places.

When considering public places and freedom of speech, it is useful to examine privacy doctrine and discuss who has an expectation of privacy in a public space. The idea of privacy was established in case law in the 1920s by the Supreme

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<sup>12</sup> DAVID AMAR, 31.

<sup>13</sup> *Hague v. CIO*, 496 651, (U.S. June 5, 1939).

<sup>14</sup> See generally. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 37, (U.S. February 23, 1983).

Court, in giving a broad scope to the Fourth Amendment.<sup>15</sup> Privacy evolved through court cases over time with justices establishing that government should have limited power over what a person does in his or her own home. To contrast that is the test of whether something someone does is in “plain view” of law enforcement.<sup>16</sup> If it is, a case for violation of Fourth Amendment does not hold up in court. This is where the idea of expectation of privacy takes shape. If a citizen does not have privacy protection when doing something in public that can be used against them in a court of law or simply observed by others, a law enforcement officer does not either. Neither a citizen nor a police officer can expect something revealed in public, including behavior or speech is protected as private.

Many of the videotape arrest cases, while the citizen was not charged with a crime, hinged on wiretap laws. Courts repeatedly found that police officers do not have a reasonable expectation of privacy in public therefore their privacy is not violated.

### **Justification for Arrests**

To gather data, a Google search and a LexisNexis search was performed in 2011 using the keywords "videotaping police arrest." A list of reported arrests that occurred in North America between 2009 and 2011, specifically involving a citizen videotaping police in a public space, was created. Many articles discussed the same

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<sup>15</sup> DOUG LINDER, *Exploring Constitutional Conflicts*, University of Missouri-Kansas City Law School(2012), at <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/rightofprivacy.html>.

<sup>16</sup> JIM HARPER, *Reforming Fourth Amendment Privacy Doctrine*, 57 American University Law Review, 1389 (2008).

arrests and any duplication was disregarded. This paper will discuss the narratives including the outcome of the encounter between the “suspect” and the police officer.

There is a strong indication that an exhaustive search was performed, however, there are limitations. Cases where people complied with a police officer's request to stop videotaping are unknown. It is also difficult to identify situations where an officer gave a potential threat to a citizen but did not arrest them. It is also likely that citizens have started to videotape an officer involved in an altercation and stopped when the officer took notice.

Using the list of articles found on Google and LexisNexis cases that were documented on network news websites as well as established local and national newspapers were viewed. The cases described here are representative of activity that occurred in this realm between 2009 and 2011.

### ***Wiretapping***

Many of the cases reviewed were based on state wiretapping laws. This follows logic because 49 states have anti-wiretapping law. Most states require that at least one person know an audio recording is occurring however, 13 states have a wiretap law that says both parties must give consent.<sup>17</sup> There is also a federal wiretap act. It was amended by the Electronic Communications Privacy Act and it protects three types of privacy: wire, oral and electronic communications.<sup>18</sup>

“Electronic communication is defined as ‘any transfer of signs, signals, writing,

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<sup>17</sup> J. PETER BODRI, *Tapping Into Police Conduct: The Improper Use of Wiretapping Laws to Prosecute Citizens Who Record On-Duty Police*, 19 *American University Journal of Gender, Social Policy & the Law*, 1334 (2011).

<sup>18</sup> Justice Information Sharing *Justice Information Sharing*, U.S. Department of Justice, at <http://it.ojp.gov/default.aspx?area=privacy&page=1285>.

images, sounds, data or intelligence of any nature transmitted in whole or in part.’” Wiretap laws were created, in part to protect the privacy of individuals while they were making phone calls.<sup>19</sup> The setting was private, perhaps in someone’s home or business. The law was also important historically as it allowed law enforcement a venue to fight organized crime.<sup>20</sup> How does this translate today to modern technology and audio recording in public? Should officers have an expectation of privacy while performing their duty in public?

Sharron Tasha Ford was standing on a public sidewalk in 2009 when she was arrested.<sup>21</sup> Ford was videotaping police officers interact with her teenage son outside a movie theater. Boynton Beach Police asked Ford to stop videotaping. When she refused, they threatened to arrest her but she kept filming, believing that it was her right to document the encounter.

Ford told her attorney that police grabbed her, confiscated her video camera and took her directly to the police station for booking. Even though charges of illegal wiretapping and resisting arrest were dropped by prosecutors Ford is suing the city of Boynton Beach. She says she was falsely arrested and that her First Amendment rights were violated.

The ACLU distributed a press release about the incident stating, “The ACLU is asking the court to affirm the right of citizens to record interactions with public

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<sup>19</sup> JIM DEMPSEY, *An Overview of the Federal Wiretap Act, Electronic Communications Privacy Act, and State Two-Party Consent Laws of Relevance to the NebuAd System and Other Uses of Internet Traffic Content from ISPs for Behavioral Advertising* at <https://www.cdt.org/privacy/20080708ISPtraffic.pdf>.

<sup>20</sup> BODRI, 1329.

<sup>21</sup> Cohen ADAM COHEN, *Should Videotaping the Police Really Be a Crime*(2010), at <http://www.time.com/time/printout/0,8816,2008566,00.html>.

officials performing official duties in public places, notwithstanding a state law that makes interceptions of certain oral communications a criminal offense if done without the consent of all parties to the communication.” Police alleged she didn’t receive permission to record audio of their interaction with her son, which is a requirement of state law when it refers to “wiretapping.”

Wiretapping charges were dropped against 20-year-old Adam Whitman in July 2010 in Portsmouth, N.H.<sup>22</sup> He was initially charged with disorderly conduct and felony wiretapping for videotaping police with his cell phone from a sidewalk. He was at a Fourth of July party when the police arrived. They began arresting people for underage drinking and that’s when Whitman recorded the encounters.

Anthony Graber was also arrested for videotaping a police officer in a public place and charged with illegal wiretapping.<sup>23</sup> Graber is a Maryland Air National Guard staff sergeant and was riding his motorcycle on a Maryland highway in 2010 when he decided to drive at excessive speeds. A state trooper who was not wearing his uniform and was in an unmarked vehicle observed Graber driving fast and attempted to pull him over. Once Graber stopped, he videotaped the encounter with the trooper on his helmet camera. The officer did not realize he was being videotaped and is shown aggressively approaching Graber without identifying who he is and with his gun drawn.

Later, Graber uploaded the video to YouTube, making it possible for millions of people to see how the Maryland state trooper handled the traffic stop that day. It

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<sup>22</sup> Sanchez RAY SANCHEZ, *Growing Number of Prosecutions for Videotaping the Police*(2010), at <http://abcnews.go.com/US/TheLaw/videotaping-cops-arrest/story?id=11179076#.T0RNnlH3A4Y>.

<sup>23</sup> COHEN.

did not show the officer in a favorable light. Rather than just taking his helmet camera during the public videotaping, officers raided Graber's parents' home the next month. They took his camera, his computer and hard drives. Graber spent 26 hours in jail that night and could face up to 16 years in prison if he is convicted under the state's wiretapping law because he did not ask the trooper permission before videotaping him, even though the encounter occurred on the interstate in plain view of other motorists.

Many in the legal field find this especially troublesome when most officers routinely record citizens during traffic stops through a dashboard camera. David Rocah, an attorney for the American Civil Liberties Union of Maryland, who is part of Graber's defense team said in an interview with ABC News, "Police and governmental recording of citizens is becoming more pervasive and to say that government can record you but you can't record it, speaks volumes about the mentality of people in governments. It's supposed to be the other way around. They work for us, we don't work for them."<sup>24</sup>

### ***Obstruction***

"Obstruction of justice is a broad concept that extends to any effort to prevent the execution of lawful process or the administration of justice in either a criminal or civil matter."<sup>25</sup> The point of obstruction laws is to protect legal proceedings and officers of the court. While there are many variations to the statute,

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<sup>24</sup> SANCHEZ.

<sup>25</sup> Richman DANIEL C. RICHMAN, *Obstruction of Justice* (2002), at <http://www.encyclopedia.com/doc/1G2-3403000178.html>.

there is a general provision that seems to be used to charge subjects more often. This has the inclusion of officials as potential victims rather than just witnesses.<sup>26</sup>

Several people have been arrested in the last few years after videotaping police and charged with obstruction of justice. Journalists are also not immune. Phil Datz, a credentialed and experienced news photographer in the state of New York was arrested in 2011 for videotaping police in a public place.<sup>27</sup> Datz was covering a news story when an officer told him to go away. He moved down the street, away from the officer as instructed and resumed videotaping. Shortly after that, the officer arrested him and charged him with obstruction.

The general counsel for the National Press Photographers Association got involved and protested Datz' arrest. Mickey Osterreicher sent a letter to the Suffolk County Police Department saying, "While in some situations the press may have no greater rights than those of the general public, they certainly have no less rights of access on a public street, especially where a crime scene perimeter has not been clearly established." In the situation, members of the public were not asked to step away from the crime scene however the journalist was. He complied, to an extent. Datz chose to listen to what the officer was saying even though under First Amendment rights, it seemed he was within protected speech actions while videoing the crime scene from the sidewalk.

Once Datz was detained and arrested, he arrived at the police station. Another officer apologized for the situation but said there was nothing he could do

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<sup>26</sup> Id.

<sup>27</sup> See generally. RAY LEVATO, *Case dismissed against woman arrested while videotaping police*, WHEC June 27, 2011. 2011.

to help because Datz had already been charged, booked and fingerprinted. He was released but at the time this paper was written, charges had not been dropped against Datz. How was Datz obstructing government duties by standing on a sidewalk away from the crime scene videoing the aftermath of a police chase? A court may have to decide that.

Emily Good was also arrested in New York in 2011 for videotaping a traffic stop from her front lawn.<sup>28</sup> When she arrived home, she noticed officers had pulled over a young black man in front of her house. She thought the interaction seemed to be escalating so she used her cell phone to video what was happening. When one of the officers noticed she was videotaping, he approached her and ordered her to go inside her house. On the videotape, he is heard saying he didn't "feel safe" with her behind him videoing his actions. When Good refused to go into her home, he said, "You seem very anti-police." She was quickly arrested and booked on obstructing governmental administration charges. After many people rallied to protest her arrest, the charges were thrown out by the District Attorney's office and a judge dismissed the case.

A spokeswoman for the New York Civil Liberties Union, KaeLyn Rich, interviewed with WHEC regarding the case saying Good's arrest was "A disgusting disregard for an individual's First Amendment rights to videotape in public spaces." She went on to say, "I hope we can... hold police accountable and make sure police officers are getting the training they need to respect people's constitutional rights." In this case, even the police chief of Rochester, James Sheppard, gave a statement

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<sup>28</sup> Id.

about the situation and First Amendment rights. He said, "Whatever the outcome of the internal review, we want to make clear that it is not the practice of the Rochester Police Department to prevent citizens from observing its activities – including photographing or videotaping – as long as it does not interfere with the safe conduct of those activities."<sup>29</sup> In the cases studied for this paper, obviously not every police department or city adopts this same attitude.

Wiretap Acts were established to protect citizens from the illegal tapping of phones. Laws clearly needs to be updated to deal with new technology. As the Supreme Court has shown in many rulings, there needs to be an understanding that in a public place there isn't always an expectation of privacy especially for public figures.<sup>30</sup>

### ***Police, Intimidation and Threats***

In Illinois, in October 2011, Brad Williams filed a federal suit against the Chicago Police Department. He claims a police officer beat him because he photographed an officer who dragged a citizen down the street outside his police car. Williams was in his own front lawn when he says he witnessed a police officer grab a man on a sidewalk and pull him down the street. Williams captured some of the incident through photography while standing in front of his house.

The officer's partner allegedly exited the squad car, approached Williams and said he was not allowed to photograph police. The lawsuit claims an officer handcuffed him and grabbed his throat after he did not stop videotaping the incident. There are eight counts on the suit including violation of Fourth

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<sup>29</sup> Id.

<sup>30</sup> See generally. *DEMPSEY;Garcetti v. Ceballos*, 410, (U.S. May 30, 2006).

Amendment rights. Williams says the officer had no grounds on which to arrest him. Whether the officers thought they might be violating the man's rights didn't seem to matter. The suit claims police kept Williams in the squad car for 30 minutes, giving him a lecture about respecting police and then released him. He was not formally charged or booked.

In March 2011, Mark Ashford was walking his dog in Denver, Colo., when he witnessed police pull over a driver for failing to stop at a stop sign. Ashford said he told the driver that he saw him stop at the stop sign. Police officers overheard Ashford and approached him, asking for his identification. While presenting his identification, Ashford says he also got out his cell phone to document the officers' actions. Soon after that, he claims officers wrestled him to the ground, twisting his arm to take his camera from him. Ashford was transported from the scene by ambulance suffering cuts above his eye and a concussion. The case is still under review.

In literature regarding First Amendment rights and how they protect new media and the involvement of citizen journalists, concerns are growing about intimidation from police. This is specifically in regard to whether police officers threaten or intimidate citizens who video an officer in a public place. Several of the cases studied for this paper included instances of an officer telling the defendant that he was not allowed to video their actions without permission. Since the information is coming from an officer, a person who is not familiar with First Amendment rights may immediately put his cell phone away and cease

documenting a situation. What are the implications in a new media world with evolving citizen journalism and citizens somewhat serving in a watchdog roll?

A Miami news photographer and journalist made this point on his blog, "Photography is not a Crime." He wrote about news photographers and citizens who were arrested for videotaping the police in public. He said if someone wants to use their cell phone to video police, it is their right to do so. "If cops are doing their jobs, they shouldn't worry."

An attorney for Ford, the woman arrested for videotaping police interaction with her son on a sidewalk, believes judges and juries should want more information in crime cases and therefore videotaped evidence would be helpful. He said this type of documentation is "probably the most effective way to protect citizens against police officers who exaggerate or lie." What does the United States Constitution protect about one's right regarding video and a public forum? A review of scholarly and legal literature will establish framework.

### **Case Law**

It is common for people to have a cell phone that provides options for videography and photography. The ubiquitous nature of cellphone cameras is relatively new and coincidentally the scholarly realm has a dearth of literature that studies the public use of new technology in traditional public forums. While there isn't much scholarly literature on the subject, the courts have provided options for a decade at least on cases presented regarding the First Amendment and the Fourth Amendment.

When considering freedom of speech and First Amendment philosophy, some scholars turn to Meiklejohn 's ideals.<sup>31</sup> He said citizen journalists should know that Congress cannot abridge freedom of speech. He also presents the idea that when someone faces a government that attempts to limit the freedom of speech, the person has "the right and duty of disobedience." But how should a person pursue such freedom in modern times?

That's the question Brian Kelly asked the courts after an incident in 2009. He was a passenger in a truck in Pennsylvania during a traffic stop and began videotaping the officer that was conducting the stop. Kelly claims the officer's behavior led him to put his camera in his lap and record video of the exchange. (There are conflicting accounts of whether the camera was fully visible to the officer.)

When the officer realized Kelly was videotaping him, he confiscated the camera and went to his squad car to seek legal direction via a phone call. Court documents show that he called the local prosecutor to seek permission to arrest Kelly for breaking the Pennsylvania Wiretap Act. The prosecutor indicated that he thought that the act had been broken so the officer arrested Kelly. Kelly then sued, saying that his First and Fourth Amendments had been violated. The Fourth Amendment relates to arrest without cause.

The case went to the United States Court of Appeals for the Third Circuit on appeal from the United States District Court for the Middle District of Pennsylvania.

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<sup>31</sup> ALEXANDER MEIKLEJOHN, *Free Speech and Its Relation to Self-Government* 83 (Harper & Bros. 1948).

The court upheld the District Court's decision. Several judges gave their opinions on the lower court's decision.

Circuit Judge Hardiman pointed to the case, *Agnew v. Dupler* to support his opinion. In that case, police officers sued their chief for eavesdropping on their conversation in the squadron room.<sup>32</sup> They said that their privacy had been invaded. Hardiman said, "The court held the chief did not violate the Wiretap Act because the officers did not have a reasonable expectation of privacy in statements made in the squadron room. ...this holding squelched the distinction developing in some lower court cases between a reasonable expectation of non-interception and an expectation of privacy." The judge inferred police officers shouldn't expect privacy while they are on duty in public.

A reasonable expectation of non-interception is a crucial element in several modern cases of the Wiretap Act. If an officer cannot expect non-interception of communication (videotaping by a citizen) in public, can he arrest someone for breaking a Wiretap Act if he or she videos him? While the courts have not yet established a resounding "NO" to that question, the paper will present evidence that shows recent legal decisions are setting groundwork to support such a conclusion.

Since the *Agnew* case, many other courts have added the layer of expectation of privacy when considering Wiretap Act allegations. That's not the only example in the state of Pennsylvania of case law and decisions regarding videotaping police. Ten years before *Agnew vs. Dupler*, the Pennsylvania Supreme Court held that

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<sup>32</sup> *Agnew v. Dupler*, 33, (Pa. August 25, 1998); JON CAMPISI, *Arrests over cell phone videotaping of police lead to increasing number of lawsuits*, Court of Common Pleas, Features, Federal Court, Issues, News, Pennsylvania Supreme Court (2011).

"secretly recording a police officer in the performance of his duties did not violate the Wiretap Act." (Hardiman opinion). Seemingly more important was the *Smith v. City of Cumming* decision.<sup>33</sup> The Eleventh Circuit recognized a "First Amendment right subject to reasonable time, manner and place restrictions to photography or videotape police conduct." The court declared: "[t]he First Amendment protects the right to gather information about what public officials do on public property and specifically a right to record matters of public interest."

The United States District Court for the Eastern District of Pennsylvania relied on the *Smith v. City of Cumming* to also hold that people have a free speech right to videotape police officers when they are in public working.

It is accurate that in the *Kelly v. Carlisle* case, the courts decided that case law did not specifically show whether citizens have a right to record police.<sup>34</sup> However, the Third Circuit found a difference between a citizen in public recording police for a reason and a citizen who was recording police for no reason. Would this stand to say that Kelly's right to record the officer conducting the traffic stop was protected since he claimed he was recording the officer because of his behavior? This relates to Section 1983 of Title 42 of the U.S. code that is part of the Civil Rights Act of 1871 regarding free speech rights. Specifically, the court tends to protect expression [videotaping] with a purpose. In another case of a Section 1983 lawsuit, *Fordyce v. City of Seattle*, the court suggested there is "a First Amendment right to 'film matters

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<sup>33</sup> *Smith v. City of Cumming*, 1332, (F.3d May 31, 2000).

<sup>34</sup> *Kelly v. Borough of Carlisle*, 248, (F.3d October 4, 2010).

of public interest.’ Police conduct in the course of carrying out their public duties would, presumably, qualify as a matter of public interest.”<sup>35</sup>

A similar and often cited case involving Section 1983 is *Robinson v. Fetterman* where the U.S. District Court for the Eastern District of Pennsylvania decided a man that videotaped state troopers conducting what he thought were unsafe traffic stops in 2002 should not be charged with a crime.<sup>36</sup> The troopers arrested the man but charges of harassment were later dismissed by a judge. The district court stated: “Robinson’s right to free speech encompasses the right to receive information and ideas. He also has a First Amendment right to express his concern about the safety of the truck inspections to the appropriate government agency or officials, whether his expression takes the form of speech or conduct. Videotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence, as it did in this case. In sum, there can be no doubt that the free speech clause of the Constitution protected Robinson as he videotaped the defendants on Oct. 23, 2002.” This is just one of many examples where courts uphold the right of a citizen to videotape a police officer in the public for a specific reason.

The Third Circuit in *Kelly* sought information from another case, *Fordyce v. City of Seattle* where an activist was arrested for violation of wiretap laws for videotaping a public march and videotaping police in the process. The person was arrested but the Ninth Circuit Court of Appeals suggested a citizen’s First

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<sup>35</sup> *Fordyce v. City of Seattle*, 1446, (F. Supp.); PIERCE BROOKS, MCLENDON, HUMPHREY & LEONARD, *Section 1983 and the Right to Record the Police* § 2012 (Elizabeth Spainhour ed., 2011).

<sup>36</sup> See generally. *Robinson v. Fetterman*, 534, (F.Supp.2d July 19, 2005).

Amendment rights included a right to videotape events occurring in public that are of public interest. Is, then, a police officer conducting duties during a public event part of the public interest? Precedents in the courts seem to say yes.

Another case regarding public place and recording of video and audio is the case *Shulman v. Group W Productions*.<sup>37</sup> In the case, a television news crew was performing a “ride-along” with a helicopter ambulance to document the daily activities of the crew. During the shoot, the helicopter happened to be dispatched to an automobile accident. When the crew landed on site, there were injuries to attend to and a patient was ultimately paralyzed from her injuries. The woman sued the production company that owns the TV station, saying that her right to privacy was invaded after the news reporter and editor aired footage that included the woman being treated and discussing her injuries in a distressed way. Eventually it was found that her privacy was intruded upon.

While this case does not necessarily pertain to citizen journalism, it encounters the premise of one’s right to videotape an event in a public place and in a sense “broadcast” the video. The higher courts confronted a few issues with this case. They decided that certain questions should be answered when considering an “invasion of privacy.” These include: Was the invasion considered “offensive and objectionable to the reasonable person” and was the video “of legitimate public interest?” Why include this case in our analysis of current decisions regarding a citizen’s First Amendment right to videotape police in a public place? This is important when considering why a citizen would videotape an officer while

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<sup>37</sup> *Shulman v. Group W Productions, Inc.*, 843, (Cal.Rptr.2d June 1, 1998).

conducting duty. Certainly in some of the incidents mentioned in the introduction of this paper, one might argue that an officer's conduct or lack of professionalism in an instance would be important to the interest of the public.

Justice Kathryn Wedegar gave her opinion on the case by writing, "a reporter's motive to discover socially important information may reduce the offensiveness of the intrusion." This is relevant to cases where a police officer may say privacy was violated by a citizen's act of videotaping the person during public duty. However Wedegar goes on to state "The First Amendment does not guarantee the press a constitutional right of special access to the information not available to the public generally." If a citizen is videotaping an officer, for example, on private property, the courts do not recognize that as a protected right.

Justice Ming William Chin concurred and went on to mention the importance of the videotaping occurring on public property (a state highway). Chin stated, "We should bear in mind we are not dealing here with a true 'interception' -e.g., a surreptitious wiretap by a third party-of words spoken in a truly private place-e.g., in a psychiatrist's examining room, an attorney's office, or a priest's confessional. Rather, here the broadcast showed [the plaintiff] speaking in settings where others could hear her, and the fact that she did not realize she was being recorded does not *ipso facto* transform defendants' newsgathering procedures into highly offensive conduct within the meaning of the law of intrusion." This opinion points, again, to the importance of the idea of privacy. If an officer is performing a duty on public property, in front of citizens, does he have a reasonable expectation of privacy?

Court decisions and justice opinions show that should not be the case. Some police departments across the United States have recognized these recent decisions and reacted by sending out departmental memos to educate officers. That this should be commonplace and perhaps, essential, for enforcers of the law to receive in order to fully recognize the span of First Amendment rights in modern days, as technology advances.

For instance, legal council Siana, Bellwoar & McAndrew, LLP sent a bulletin to the Pennsylvania Municipal Police Department on March 12, 2011 discussing legal decisions and implications regarding First Amendment rights. In the memo they wrote, "This decision should arguably lead to an improvement of communications between police officers and prosecutors, which could likely result in more informed decisions by police officers and a decrease in the number of allegations by individuals claiming that police officers lacked the requisite probable cause to make an arrest."<sup>38</sup> The memo goes on to specifically discuss the case of *Kelly v. Borough of Carlisle* stating, "the Third Circuit acknowledged that police officers are not expected to have an in-depth understanding of complex statutes such as the Pennsylvania Wiretap Act."<sup>39</sup> The Court also found it desirable that police officers seek the advice of prosecutors when they are uncertain as to whether requisite probable cause exists for an arrest." What does this mean to police officers? The memo answers that question, at least in some regard by acknowledging officers do not have complete protection in arresting a citizen for

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<sup>38</sup> MICHAEL E. TRUNCELLITO CHRISTOPHER P. GERBER, A Legal Bulletin for Pennsylvania Municipal Police Departments (Bellwoar & McAndrew Siana, LLP Attorneys at Law ed., 2011).

<sup>39</sup> Id.

videotaping an officer in public. “The Court stopped short of granting blanket immunity to police officers, holding that a call to a prosecutor is not a magic wand and that a plaintiff may still rebut this presumption by showing that a reasonable officer, in that specific situation, would not have relied on the prosecutor’s advice.”

This, perhaps, speaks to the crux of this research. The memo does not indicate that the prosecutor gave good advice in the arrest. In fact, it is important to note that the charges against Kelly were dropped completely and he pursued violation of his First and Fourth Amendment rights through several courts.

An even more recent memo in Pennsylvania to officers across the state, dated Sept. 8, 2011, goes into more depth regarding “THE LAW ON VIDEO/AUDIO TAPING LAW ENFORCEMENT OFFICERS ENGAGED IN THEIR PUBLIC DUTIES.” It is written by Glen S. Downey, Esq., Healey & Hornack, P.C. & Witold Walczak, ACLU of PA Legal Director. The memo begins with, “The law is clear that Pennsylvania’s Wiretap Statute 1 and its prohibition against the interception of oral communications turns on whether the speaker had a specific expectation of privacy that the contents of the communication in question would not be intercepted and whether such an expectation was justifiable under the circumstances.” Furthermore, and most importantly, the update to officers states, “In the case of somebody charged under the Wiretap Statute for intercepting the oral communications of a police officer during the course of the officer’s public duties, the proper inquiry would be whether the officer in those circumstances had a reasonable expectation of privacy. Countless state and federal courts have held that an officer discharging his or her duties in public does NOT have a reasonable expectation of privacy in those duties.”

As recently as February 2012, The New York Times Company Assistant General Counsel George Freeman sent a letter to the New York Police Department regarding press-police relations. Freeman wrote, "There have been other reports of police officers using a variety of tactics ranging from inappropriate orders directed at some journalists to physical interference with others who were covering newsworthy sites and events." The letter was written as a follow up to a meeting between media managers in New York City and NYPD Commissioner Raymond Kelly. During that meeting, both sides discussed more training and education for officers specifically "to instill in [officers] the importance of recognizing and protecting access, and not tolerating attempts to undermine it."<sup>40</sup> It should be noted that even after such a meeting, the counsel felt the need to follow up with another request to the police department for improvement in protecting freedom of speech.

### **Competing Legal Doctrines**

There are two perspectives in the face of legal doctrine. As noted above, police officers may argue that citizens have violated state wiretapping laws, are harassing police when they do not comply with an order or even engage in obstruction of justice when they continue to videotape an officer when he or she is arresting someone who has committed an illegal act. In most states across the United States, videotaping others in public is not necessarily protected and police

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<sup>40</sup> THE NEW YORK TIMES GEORGE FREEMAN, Letter to NYPD (New York Police Department ed., Letter to Deputy Commissioner Browne asking for improved media access in public spaces ed. 2012).

departments may recognize this. In 2010, courts found that “The First Amendment... does not protect purely private, recreational, non-communicative photography.”<sup>41</sup>

Another, more recent argument from police officers about the dangers of videotaping them in public has to do with safety. Jim Pasco, executive director of the Fraternal Order of Police, a national police union, has been quoted talking about the risks. “The proliferation of cheap video equipment is presenting a whole new dynamic for law enforcement. It has a chilling effect on some officers who are now afraid to act for fear of retribution by video. This has become a serious safety issue. I’m afraid something terrible will happen.”

Truly, terrible things have already happened to victims such as Rodney King and Oscar Grant. Video is useful to show the truth in situations such as these that lead us to the citizen’s perspective. Citizens subscribe to the idea that freedom of speech should not be limited and therefore, they have a right to document and publish an incident that occurs in public, especially when police abuse is documented.

In 1995 the Supreme Court gave this opinion: “To achieve First Amendment protection, a plaintiff must show that he possessed: (1) a message to be communicated; and (2) an audience to receive that message, regardless of the medium in which the message is to be expressed.” With this information from the Supreme Court, one would gather that a citizen who witnesses an officer behaving in an unprofessional way in a public space would have the freedom to videotape the

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<sup>41</sup> Larsen v. Fort Wayne Police Department

incident and share it with the public. Obviously both elements above must be met in a given situation.<sup>42</sup>

### **Discussion**

In every instance found in this research, the citizen was documenting a public official performing his or her duty in a public forum with exclusion of the case of Good where she was videotaping an officer while standing in her own front lawn. Of the cases we examined, only one led to charges against the citizen and that case is still moving through the court. In the other cases, charges were thrown out.

Some of those involved in these cases have brought civil suit against the city, county or police department claiming violation of First and Fourth Amendment rights. This trend is also increasing. As more citizens are arrested for videotaping an officer in public, more civil suits regarding civil right violations are coming through the courts. Perhaps this is part of the solution to the problem.

Case law supports the argument that the public has a right to gather and share information that they glean from a public space and this practice is protected by the First Amendment. When it comes to the opinion of police departments, however, there is an attitude by some officers that this type of action interferes with an officer's duties or violates state wiretap laws because the officer does not give "permission" for the citizen to record an event.

If it is established that First Amendment rights protect a citizen's right to videotape a police officer conducting duties in a public space, is there a consequence for officers that continue to arrest or threaten those who do so? It is unclear

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<sup>42</sup> COHEN.

whether the officers in the instances studied are aware of the First Amendment rights or whether the officers ignored them. That is part of the issue.

This paper proposes three solutions: updated training for police officers, education for citizens regarding First Amendment rights and careful consideration of current legislation.<sup>43</sup>

### ***Updated Training for Officers***

After reviewing cases of arrest, detainment and intimidation for videotaping officers in public, this research suggests that more needs to be done to protect a citizen's First Amendment rights especially as media changes and information can be disseminated quickly and widely. Police officers, young and old can benefit from modern First Amendment training and should, in the least, be aware of recent rulings in Circuit, District and Supreme Courts that give opinions on videotaping public figures in a public place for a purpose.

Just as has already occurred in states such as Maryland and Pennsylvania, police departments need to establish and discuss policy regarding citizens videotaping in public. What do the courts say in specific states? As has been shown with case law and recent cases where charges are dropped, the First Amendment protects the videotaping of officers in public and more United States courts are recognizing this.

In New Orleans, for instance, officers are educated that citizens can videotape in public but police routinely violated policy. Therefore training and policy is not enough to protect citizens from First and Fourth Amendment violations. Police

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<sup>43</sup> Know Your Rights Photographers.

departments should establish penalties for officers who have completed training and repeatedly order citizens to stop videotaping or confiscate and delete material that has been recorded. More research needs to be conducted to study effective penalties for breaking the law but just as an officer is not allowed to deliberately assault a citizen in public, he should not be allowed to detain, threaten or intimidate a citizen because he doesn't want to be videotaped. In a videotaping arrest listed above, an officer is shown in court records to have said to a detained citizen, "When are you people going to learn that you cannot videotape the police?" Perhaps officers should learn what the law establishes and if they do not follow the law, they should face consequences. This is what the ACLU continues to present to anyone who will listen. Legal representatives say there must be more of a check and balance of police power specifically in this problem area. "It creates an independent record of what took place in a particular incident, free from accusations of bias, lying or faulty memory. It is no accident that some of the most high-profile cases of police misconduct have involved video and audio records."<sup>44</sup>

In *Robinson v. Fetterman*, the United States District Court for the Eastern District of Pennsylvania held fast to a finding in the *City of Cumming* case stating, "Police cannot 'ignore or unreasonably apply a valid law in order to arrest someone who annoys or offends them.'"<sup>45</sup>

Mickey H. Osterreicher is a former news photographer, now an attorney, who has battled for First Amendment rights for journalists for years. He believes those

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<sup>44</sup> JAY STANLEY, *You Have Every Right to Photograph That Cop* at <http://www.aclu.org/free-speech/you-have-every-right-photograph-cop>.

<sup>45</sup> *Robinson v. Fetterman*.

who enforce the law are simply ignorant of the truth when it comes to videotaping police in public. He said, "This infringement upon protected First Amendment activities is often based on erroneous beliefs by those in authority that photography of certain public areas, buildings landmarks or police officers may be prohibited."<sup>46</sup> He goes on to say that journalists, scholars and those in the legal field should continue to talk about citizens getting arrested or being threatened for videotaping police. He believes that publicizing these instances will help ultimately protect free speech rights.

### ***Citizen Education***

Where does this information leave a citizen on a public sidewalk witnessing a police officer in public duty behaving in a way that could seem unprofessional or partly illegal? A person who has no legal background or is ignorant of his or her freedom of speech rights would likely immediately comply with an officer's demands to stop videotaping in public. He might also quickly delete any video or images without considering the implications if under pressure from law enforcement to do so.

Let us again consider one of the cases from the beginning of this paper. When Rodney King was beaten by officers it was in plain view of citizen bystanders. The police did not realize their conduct was being captured on videotape. The evidence was presented to a court of law as an almost eye witness to police brutality. While the evidence did not convince a jury to convict the officers, the video was still entered as essential evidence. Holliday, the citizen journalist, was luckily too far

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<sup>46</sup> MICKEY H. OSTERREICHER, *Photography & The Law* (2012), at <http://jpgmag.com/news/2012/01/photography-the-law-1.html>.

away for officers to demand he turn over evidence and stop videotaping the incident, which happened in public.

How can citizens help prevent potential police misconduct and stand up for First Amendment rights? This paper suggests that the media, higher education institutions and those in the legal field need to continue public education regarding this issue. Legal scholars who have studied photography and public forum agree. “The first way photographers can prevent abuse is to know their rights. When confronted by law enforcement officers, photographers who do not know and understand their rights are more likely to apologize for their conduct and comply with authority, whether or not this authority is legitimate.”<sup>47</sup> While this research does not encourage disrespect toward police officers or physical resistance to law enforcement, it does suggest that it is necessary and proper for citizens to know their rights and ask politely about why an officer is insisting on a cease of videotaping or detainment. Media should make the public aware of events where citizens are arrested, detained or harassed for these questions or noncompliance.

Citizens have one other course of action when they feel their civil rights are violated. It is increasingly common for people arrested for videotaping police in public to bring civil suit against the police department, city, county and perhaps even the state. While this option is costly in time, resources and funds, the pursuit of justice and precedence outweighs the impracticalities.<sup>48</sup>

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<sup>47</sup> MORGAN LEE MANNING, *Less Than Picture Perfect: The Legal Relationship Between Photographers' Rights and Law Enforcement*, 78 Tennessee Law Review, 130 (2010).

<sup>48</sup> *Id.*

Courts should also consider the implications of police immunity in cases regarding violation of civil rights. Federal and state officials have protection in their duties against being prosecuted for enforcing a law they believe to exist.<sup>49</sup> If an officer arrests an individual under the Wiretap Act and later charges are dropped, the officer cannot face penalties for the arrest. However, if a citizen presents a civil suit it is up to the courts to decide whether there was a misinterpretation of a law or abuse of power.

### ***Consider Current Legislation***

With more scholarly study and reasonable recommendations to our legal community, perhaps the field of communication and information science will assist in expanding upon and defining First Amendment regarding technological advances. Legal scholars have made the argument that the First Amendment doesn't need to be updated to evolve with changing technology. Evolution of legislature may not be necessary since protection was clear from the beginning but recognition of this is important. "How can one reconcile the fact of technological and media convergence with the legal presumption of distinct treatments?"<sup>50</sup> To this end, our legal community and communication industry should continue to argue for the strengths of current legislation in protection of free speech in public forum. In the least, dialogue must continue in this realm so that freedom is recognized and protected for citizens and police officers. This will also make courts aware of use of some statutes to intimidate citizens and free speech methods in public forum.

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<sup>49</sup> TREVOR W. MORRISON SETH P. WAXMAN, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 *The Yale Law Journal*, 2209 (2003).

<sup>50</sup> L.A. POWE THOMAS KRATTENMAKER, *Converging First Amendment Principles for Converging Communications Media*, 104 *see id. at*, 1719 (1995).

## Conclusion

This research is useful because it presents court decisions in one space that support a person's First Amendment right to capture newsworthy events on camera and established that police officers should not have an expectation of privacy while performing public duties.

Citizens have First Amendment rights and the right to practice them in a public forum. Those who do so, especially with a specific purpose to share such information, are not breaking any laws. This idea supports the First Amendment theory of governance, self-identity and the marketplace of ideas.

As more recent cases make their way through the courts, more decisions should be and will be made in favor of citizens videotaping public officials in a public forum. To that end, more research is needed to follow developments in courts that are facing these issues.

There is also a vast amount of information which should be explored and presented in this realm which would further our understanding of a court's reaction to First Amendment rights when it comes to videotaping officers in public as they perform their public duty.

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