AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech

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Glik v. Cunniffe, 65 F.3d 78 (1st Cir., 2011)

In 2007, Simon Glik saw three Boston police officers arresting someone in a public park. Concerned that the officers were using excessive force, Glik pulled out his cell phone and from several feet away began to make a video of the police. After the officers had subdued their suspect, one of them asked Glik whether his phone recorded audio. When Glik said that he was recording them, he was arrested for violating the state wiretapping statute, disturbing the peace, and aiding in the escape of a prisoner. The local prosecutor declined to press the last charge, and a municipal court dismissed the first two charges. The police department refused to pursue disciplinary charges against the officers for their arrest of Glik, and so he filed a civil suit in federal district court contending that the officers had violated his constitutional rights. The officers moved to have the suit dismissed on the grounds that they had qualified immunity from legal penalties when conducting their public duties, but the trial court denied the motion, concluding that "this First Amendment right publicly to record the activities of police officers on public business" is clearly established, and thus the officers could not have reasonably understood themselves as acting within their duties when arresting Glik. The officers appealed that ruling to the circuit court, which affirmed the trial court's decision and allowed the civil suit against the officers to proceed. The circuit court thought it was "virtually self-evident" that members of the public had the right to film police officers conducting their duties in a public place.

JUDGE LIPEZ

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Long-standing principles of constitutional litigation entitle public officials to qualified immunity from personal liability arising out of actions taken in the exercise of discretionary functions. *Harlow v. Fitzgerald* (1982). The qualified immunity doctrine "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." We apply a two-prong analysis in determining questions of qualified immunity. . . . require[ing] that we decide "(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was 'clearly established' at the time of the defendant's alleged violation." *Maldonado v. Fontanes* (1st Cir., 2009).

. . . At bottom, "the salient question is whether the state of the law at the time of the alleged violation gave the defendant fair warning that his particular conduct was unconstitutional."

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The First Amendment issue here is, as the parties frame it, fairly narrow: is there a constitutionally protected right to videotape police carrying out their duties in public? Basic First Amendment principles, along with case law from this and other circuits, answer that question unambiguously in the affirmative.

It 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. As the Supreme Court has observed, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." . . .

The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles. Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting "the free discussion of governmental affairs." *Mills v. Alabama* (1966). Moreover, as the Court has noted, "[f]reedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.'" This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties. . . .

In line with these principles, we have previously recognized that the videotaping of public officials is an exercise of First Amendment liberties. In *Iacubucci v. Boulter* (1st Cir., 1999), a local journalist brought a § 1983 claim arising from his arrest in the course of filming officials in the hallway outside a public meeting of a historic district commission. . . . [W]e explicitly noted, in rejecting the officer's appeal from a denial of qualified immunity, that because the plaintiff's journalistic activities "were peaceful, not performed in derogation of any law, and *done in the exercise of his First Amendment rights,* [the officer] lacked the authority to stop them."

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It is of no significance that the present case . . . involves a private individual, and not a reporter, gathering information about public officials. The First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public's right of access to information is coextensive with that of the press. . . . 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.

To be sure, the right to film is not without limitations. It may be subject to reasonable time, place, and manner restrictions. We have no occasion to explore those limitations here, however. On the facts alleged in the complaint, Glik's exercise of his First Amendment rights fell well within the bounds of the Constitution's protections. Glik filmed the defendant police officers in the Boston Common, the oldest city park in the United States and the apotheosis of a public forum. In such traditional public spaces, the rights of the state to limit the exercise of First Amendment activity are "sharply circumscribed." Moreover, as in *Iacobucci,* the complaint indicates that Glik "filmed [the officers] from a comfortable remove" and "neither spoke to nor molested them in any way" (except in directly responding to the officers when they addressed him). Such 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 our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights. Indeed, "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill* (1987). The same restraint demanded of law enforcement officers in the face of "provocative and challenging" speech must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.

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[A]ppellants cite is a Third Circuit opinion finding the right to film not clearly established in the context of a traffic stop, characterized as an "inherently dangerous situation[]." *Kelly v. Borough of Carlisle* (3rd Cir., 2010). *Kelly* is clearly distinguishable on its facts; a traffic stop is worlds apart from an arrest on the Boston Common in the circumstances alleged. . . .

In summary, though not unqualified, a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment. Accordingly, we hold that the district court did not err in denying qualified immunity to the appellants on Glik's First Amendment claim.

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Affirmed.