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A DUE PROCESS RIGHT TO RECORD THE POLICE

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I. INTRODUCTION

Do citizens have 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.¹ The increase in litigation is driven by dramatic improvements in camera technology, which allow individuals to record and share images in ways that were previously available, if at all, only to members of large media organizations.²

Most of the discussion and litigation has revolved around the question of whether there is a First Amendment right to record police officers in public. In the recent First Circuit case of *Glik v. Cunniffe*,³ for example, passerby Simon Glik 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,⁴ and seized his camera and memory chip in the process as evidence. The First Circuit held that the right to record police officers in public is a "clearly established" part of the First Amendment's protections, and held the officers were not entitled to qualified immunity.⁵

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1. 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).

2. See 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> (describing growth of ubiquitous, low-cost photo and video technology and its impact on citizen newsgathering).

3. 655 F.3d 78 (1st Cir. 2011).

4. This is a common, if rarely successful, gambit used by law enforcement to halt or punish those recording them. See Reynolds, *supra* note 2.

5. *Glik*, 655 F.3d at 85–88.

Though the issue has not yet reached the Supreme Court, it seems safe to say that the case for First Amendment protection regarding photos and video of law enforcement officers in public is quite strong, and is in the process of being resolved. This Essay, however, argues that independent of any First Amendment right, there is also a due process right to record the actions of law enforcement, and that this right applies even when the interaction takes place in private, and not in public places. This question of a due process right to record the police has not yet produced the degree of attention and litigation that public recording has, but the growth of inexpensive recording equipment and its inclusion in smart phones ensures that such attention and litigation are sure to be forthcoming.

A. The Public-Private Distinction

It is not entirely clear that the First Amendment right to record police officers applies only in public. Just as the “plain view” exception to the Fourth Amendment empowers police officers to make arrests based on objects or behavior they see in the privacy of citizens’ homes, it is entirely possible that the First Amendment entitles citizens to record police officers’ actions whenever citizens are present. Most of the leading cases to date, however, have involved public places, and that has been stressed in the opinions and discussion. In *Glik*, for example, the First Circuit noted that the arrest took place in Boston Common, “the oldest city park in the United States and the apotheosis of a public forum. In such traditional spaces,” the court continued, “the rights of the state to limit the exercise of First Amendment activity are ‘sharply circumscribed.’”⁶

While citizen journalism may record misconduct—or the lack thereof—where police act in public parks and similar locations, the very public character of those places means that there will likely be other witnesses. But what of the interaction of citizens and police officers in places where there is no one else present?

Such interactions may well be newsworthy enough to justify First Amendment protection, but they may also raise due process concerns. When officers act improperly in the presence of witnesses, after all, they may still enjoy a testimonial advantage, as courts and juries are notoriously willing to believe even doubtful police testimony. But when there is no third party present, the question is presented more strongly. A recent case from Chicago serves to illustrate the point.

6. *Id.* at 84.

Tiawanda Moore made a sexual harassment complaint against a Chicago patrol officer. When visited by police Internal Affairs officers who tried to persuade her to drop the charge, she recorded the audio using her Blackberry. Though the audio reflected rather poorly on the Internal Affairs officers, the response of the Chicago state's attorney was to act not against the officers, but against Ms. Moore, charging her with "wiretapping."

Moore was acquitted after the jury heard the recording:

Her attorney, Robert W. Johnson, argued that Moore believed that the internal affairs investigators, Sgt. Richard Plotke and Officer Luis Alejo, were dragging their feet on her complaint, which could be construed as official misconduct, a criminal charge.

"The plan was to kill this complaint from the very beginning," Johnson told jurors Wednesday in his closing argument. "They were stalling, they were intimidating her and they were bullying her into not making that complaint."

In the recording, which the one juror said was replayed several times in the jury room, Alejo was heard explaining to Moore that she might be wasting her time because it was basically her word against that of the patrol officer. Alejo also said they could "almost guarantee" that the officer would never bother her again if she dropped the complaint.

"When we heard that, everyone (on the jury) just shook their head," juror Adams said in a telephone interview. "If what those two investigators were doing wasn't criminal, we felt it bordered on criminal, and she had the right to record it."

Moore alleged that the patrol officer who answered the domestic disturbance call at her home had fondled her and given her his personal phone number.⁷

7. Jason Meisner & Ryan Haggerty, *Woman Who Recorded Cops Acquitted of Felony Eavesdropping Charges*, CHI. TRIB., Aug. 25, 2011, http://articles.chicagotribune.com/2011-08-25/news/ct-met-eavesdropping-trial-0825-20110825_1_eavesdropping-law-police-officers-law-enforcement. For a more recent instance where private recording played a similar role in protecting an individual's rights, see Douglas Stanglin, *Cops In A Jam After Cell Tape Contradicts Arrest Report*, USA TODAY ONDEADLINE BLOG, Mar. 28, 2012, <http://content.usatoday.com/communities/ondeadline/post/2012/03/cops-in-a-jam-after-cell-tape-contradicts-arrest-report--/1> ("The audiotape depicts a starkly different scene from what officers Nicole Stasnek and Derek Fernandes declared in their official reports and told the court under oath.").

Moore, when the Internal Affairs officers spoke with her, was not under investigation—she was the complainant, whom investigators were trying to persuade to drop the complaint they were supposed to be investigating. But, there seems no good reason why she should have been prosecuted for recording this interaction, and it seems quite likely that a jury would not have believed her testimony about the Internal Affairs officers' behavior, which was indeed almost “incredible,” without such evidence.

B. Legal Self-Defense

Of course, for citizens speaking with federal investigators, a possible False Statements Act prosecution makes self-defensive recording even more important. Under the False Statements Act, codified at 18 U.S.C. § 1001,

...[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.⁸

In the absence of a recording, it is the citizen's word against the investigators' regarding precisely what is said, and although the due process clause might not extend so far as requiring that investigators make

8. 18 U.S.C. § 1001. In recent years, numerous high-profile defendants, though found innocent of the crimes of which they were initially accused, were nonetheless convicted of violating the False Statement Act. See Solomon Wisenberg, *How to Avoid Going to Jail under 18 U.S.C. Section 1001 for Lying to Government Agents*, FINDLAW.COM, <http://library.findlaw.com/2004/May/11/147945.html> (describing such cases and concluding that “[t]he potential for abuse of this statute is great”) (last visited Mar. 28, 2012).

a recording of their conversations, it certainly seems that it might extend so far as to permit citizens to do so.

So for citizens, recording interactions with police serves two important purposes regardless of whether those interactions take place in public or in private. First, it provides a record of potential police misbehavior. Second, it provides a potentially exculpatory record of the citizen's conduct, in circumstances where, otherwise, it would be the citizen's word against the officer's. These are the sort of interests implicated by the due process clauses of the Fifth and Fourteenth Amendment. Thus, although citizens' right to record the police is usually analyzed under the First Amendment, this Essay argues that there may be compelling reasons to analyze that right under the due process clause as well.

II. DUE PROCESS AND EVIDENCE

At present, perhaps because ubiquitous audio and video recording technology is a very recent development, there is little, if any, case law on point. However, a due process right to record the police would represent a logical step beyond existing law that deals with law enforcement's duty to preserve potentially exculpatory evidence for the benefit of criminal defendants. Such duties on the part of law enforcement are limited by the burden that such evidence preservation might pose, but that burden is not present where the evidence in question is gathered and preserved by individuals. In such cases, law enforcement officers need simply do nothing. Their only "burden" would consist of a duty not to interfere.

A. *The Duty to Preserve Evidence*

At present, police and prosecutors have a duty to turn over exculpatory evidence to defendants when such evidence exists and when they are aware of it.⁹ However, they are under no duty to preserve such evidence in general, and absent bad faith, the destruction of such evidence is not a violation of due process rights.¹⁰

This reading of due process has been criticized by commentators who note that such evidence may constitute an accused's only real hope for acquittal, and that the difficulties involved in proving bad faith on the part

9. *Brady v. Maryland*, 373 U.S. 83 (1963).

10. *Arizona v. Youngblood*, 488 U.S. 51 (1988). See also Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241 (2008).

of law enforcement are almost insuperable for most defendants, resulting in proceedings that are substantively unfair.¹¹ But notwithstanding such criticisms, federal courts—and many state courts—have generally been reluctant to impose a duty to preserve evidence, worrying that such a duty would be a tremendous burden on prosecutors and law enforcement agencies.¹² As the Supreme Court stated in *Arizona v. Youngblood*, “[The] ‘fundamental fairness’ requirement of the Due Process Clause [should not be read] . . . as imposing on the police an undifferentiated and absolute duty to retain and preserve all material that might be of conceivable evidentiary significance in a particular prosecution.”¹³ The Court thus settled on the “bad faith” test as a bright-line approach, one that would focus judicial attention on those cases where the police had misbehaved, and where that misbehavior itself served as an indication that the destroyed evidence had exculpatory significance.

Regardless of the merits of the bright-line approach, which has been rejected in some states as a matter of state constitutional law, it is easy to understand the *Youngblood* majority’s concern: police evidence rooms are not unlimited in size, and if the disposal of any item might at some later date wind up deep-sixing a case, the natural tendency to hang on to every item would soon lead to an overflow, and problems with storage and indexing of evidence that might themselves lead to additional problems and injustices, as well as expense. None of these concerns, however, applies in the context of a private citizen recording interactions with the police.

B. A Right to Record

Unlike a duty to preserve evidence, a right to record interactions with the police imposes no burdens on the police at all. Where someone else does the recording, the police are being asked not to act, but to refrain from acting. Given that photography and recording are activities to which a liberty interest attaches,¹⁴ this difference makes a due process right to record the police rather easy to analyze under the Supreme Court’s standard framework as presented in *Mathews v. Eldridge*.¹⁵

11. Bay, *supra* note 10.

12. *Id.* at 255.

13. *Youngblood*, 488 U.S. at 58, *quoted in* Bay, *supra* note 10.

14. *Glik*, 655 F.3d at 87–88.

15. 424 U.S. 319 (1976).

In *Eldridge*, the Court held:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used; and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁶

In the context of recording the police, the analysis is straightforward. First, the private interest here is considerable. For a citizen, every interaction with the police is significant. Statements they make may give rise to criminal liability, and the police may even use force—perhaps including deadly force—as part of that encounter. An arrest as the result of comments made (or of refusal to answer questions), even if charges are later dropped, may lead to a significant deprivation of liberty that is unlikely to be compensated.

Exacerbating this problem is that any conflict between the individual's recollection of events and the recollection of the police is likely to be resolved in favor of the police, and in many circumstances, there may not be independent witnesses who might resolve the question. Thus, in the absence of such a recording, the risk of an erroneous deprivation of liberty would seem quite high.

A recording of the interaction, meanwhile, would seem to reduce substantially the risk of error, both by providing a record and by encouraging better behavior on the part of the police. (It seems unlikely, for example, that Tiawanda Moore would have experienced the same treatment had the officers known, or even simply feared, that they were being recorded.)¹⁷ Likewise, the burden on the the government here is negligible, since it is being asked merely to refrain from interfering with citizens' activities.

Finally, the government's interest would seem to align with the right of individuals to record police behavior. Individual police officers, and their representative police unions, have obvious reasons for preferring that

16. *Id.* at 335.

17. Though it is beyond the scope of this brief Commentary, it is worth noting that such a right might also find penumbral support in the Sixth Amendment's right to have compulsory process for obtaining witnesses in a defendant's favor. (Thanks to Prof. Brannon Denning for this observation).

citizens not record their encounters with law enforcement. But, from the perspective of the government, which is concerned with justice and right outcomes, more information, and more reliable information, is surely a plus, rather than a minus. There might be concerns with the accuracy of recordings, or with selective editing, but the rules of evidence should provide adequate protections on this front, just as they do now with security camera footage or police dash-camera video.

III. CONCLUSION

In an age of ubiquitous recording, citizens have already learned to expect that virtually anything they do outside of their home may be recorded by someone. Yet those recordings are usually controlled by others who have no obligation to retain them in order to protect citizens' rights. Under these circumstances, a due process right of citizens to record their encounters with law enforcement (and, perhaps, other government officials) serves to level the playing field and to protect important liberty interests that may not always be fully protected by the First Amendment.¹⁸ At the same time, this due process right imposes no significant burdens on government officials or on the public fisc. This being the case, there seems no reason why courts should not find a due process right to record the police, and many reasons why such a right should exist.

18. There is a tendency on the part of some judges to construe First Amendment protections as involving protection for the "institutional press," rather than protection for all citizens engaged in publication or newsgathering. See generally Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From The Framing to Today*, 160 U. PENN. L. REV. 459 (2011) (criticizing this view); see also Glenn Harlan Reynolds, "Open Internet" Proposals and Internet Activities By Ordinary Americans, testimony delivered before the Federal Communications Commission, Dec. 15, 2009, available at <http://www.docstoc.com/docs/19398968/Reynolds-FCC-Statement-On-Open-Internet> (also criticizing this view).