Florida Law Review

Volume 63 | Issue 6 Article 7

2-8-2013

Confirmation of a Catch-22: Glik v. Cunniffe and the Paradox of Citizen Recording

Caycee Hampton
caycee@ufl.edu

CASE COMMENT

CONFIRMATION OF A CATCH-22: *GLIK V. CUNNIFFE* AND THE PARADOX OF CITIZEN RECORDING

Glik v. Cunniffe, No. 10-1764, 2011 WL 3769092
(1st Cir. Aug. 26, 2011)

Caycee Hampton[*]

On October 1, 2007, Simon Glik observed several police officers arresting a young man on the Boston Common.[1] Concerned that the officers were employing excessive force, Glik began to record the arrest with his cell phone. After successfully arresting the young man, an officer asked Glik whether the cell phone had recorded audio. When Glik replied in the affirmative, the officer arrested Glik for "unlawful audio recording in violation of Massachusetts's wiretap statute."[2] Glik was ultimately charged with three state law offenses: (1) violating the state wiretap statute,[3] (2) disturbing the peace,[4] and (3) aiding in the escape of a prisoner.[5]

The Commonwealth voluntarily dismissed the count of aiding in the escape of a prisoner, and a Boston municipal court disposed of the remaining two charges in response to Glik's motion to dismiss.[6] In particular, the court "found no probable cause supporting the wiretap charge, because the law requires a secret recording and the officers admitted that Glik had used his cell phone openly and in plain view to obtain the video and audio recording."[7] Following a fruitless filing of his complaint with the Boston Police Department,[8] Glik filed an action against the arresting officers and the City of Boston in the U.S. District Court for the District of Massachusetts. Glik's complaint included, in

* J.D. Candidate, 2012, University of Florida Levin College of Law; B.A. History, 2009, University of Florida. I dedicate this Comment to Kyle for his genuine interest in the rights of a citizen recorder. Special thanks to Allison Fischman, Kathryn Kimball, and Paul Pakidis for their encouragement and expertise.

1. The Boston Common is the oldest public park in the United States and is well known as "a stage for free speech and public assembly." *The Boston Common*, FREEDOM TRAIL, http://www.thefreedomtrail.org/visitor/boston-common.html (last visited Oct. 10, 2011).

2. Glik v. Cunniffe, No. 10-1764, 2011 WL 3769092, at *1 (1st Cir. Aug. 26, 2011).

3. *Id.* (citing MASS. GEN. LAWS ANN. ch. 272, § 99(C)(1) (West 2011)).

4. *Id.* (citing MASS. GEN. LAWS ANN. ch. 272, § 53(b)).

5. *Id.* (citing MASS. GEN. LAWS ANN. ch. 268, § 17).

6. *Id.*

7. *Id.*

8. Following Glik's filing of an internal affairs complaint with the Boston Police Department, the Department neither "investigate[d] his complaint [n]or initiate[d] disciplinary action against the arresting officers." *Id.* at *2.

relevant part, claims under 42 U.S.C. § 1983[9] for violation of Glik's First and Fourth Amendment rights.[10]

The officers moved to dismiss Glik's complaint based on qualified immunity,[11] but the district court concluded that "in the First Circuit . . . th[e] First Amendment right publicly to record the activities of police officers on public business is established."[12] The district court consequently denied the officers' motion to dismiss, and the officers appealed.[13]

The U.S. Court of Appeals for the First Circuit limited its review to the issue of qualified immunity, which is immediately appealable on interlocutory review.[14] The court ultimately ruled that, "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,"[15] and that, because Glik's recording was not "'secret' within the meaning of Massachusetts's wiretap statute . . . the officers lacked probable cause to arrest him."[16] Accordingly, upon determining that the officers had violated Glik's clearly established constitutional rights, the court of appeals held that the district court did not err in denying qualified immunity to the appellants on Glik's First and Fourth Amendment claims.[17]

---

9. Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (2006). This section states that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

10. Glik's complaint also included state law claims under the Massachusetts Civil Rights Act and a claim for malicious prosecution. *Glik*, 2011 WL 3769092, at *2.

11. *Id.* Qualified immunity is an affirmative defense available to a defendant–official accused of violating the constitutional rights of the plaintiff. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). In the U.S. Court of Appeals for the First Circuit, the test for qualified immunity inquires (1) whether the facts alleged by the plaintiff make out a violation of a constitutional right and, if so, (2) whether that right was clearly established at the time of the defendant's alleged violation. *See infra* text accompanying notes 23–25.

12. *Glik*, 2011 WL 3769092, at *2 (internal quotation marks omitted).

13. *Id.*

14. *Id.*

15. *Id.* at *7.

16. *Id.* at *9.

17. *Id.* at *9–10.

The essential holding of *Glik v. Cunniffe* establishes that the First Amendment of the U.S. Constitution protects a citizen's right to film[18] law enforcement officers in a public space, and it further conveys that arresting a citizen for disobeying a state wiretap statute by recording a law enforcement officer in a public space violates that citizen's Fourth Amendment right to be free from unreasonable seizure. This Comment argues that, in situations involving citizen recording of law enforcement official conduct, the court's holding merely identifies an incongruity in the practical application of the First and Fourth Amendments and fails to offer any constructive guidance to citizens unsure of their right to record.

Addressing *Glik*'s ironic outcome necessitates a brief explanation of the relevant historical treatment of (1) the law of qualified immunity, (2) a citizen's constitutional rights under the First and Fourth Amendments, and (3) the Massachusetts wiretap law. After providing the applicable background, this Comment will apply the law to the circumstances of *Glik* and explain the dilemma that emerges from the court's decision.

The U.S. Supreme Court has characterized qualified immunity as a principle that "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."[19] The Court established the standard for evaluating the affirmative defense of qualified immunity in *Harlow v. Fitzgerald*.[20] In that case, the Court explained that qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[21] This standard, the Court emphasized, contains no subjective component but instead evaluates the objective reasonableness of an official's conduct.[22]

The First Circuit announced the law of qualified immunity in *Maldonado v. Fontanes*.[23] *Maldonado* sets forth a two-part test that requires a court to decide "(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so,

18. Note that although the *Glik* court phrased its First Amendment holding in terms of the right to "film" government officials, the state wiretap statute at issue specifically criminalizes the interception of "wire or oral" communications. *See infra* note 41 and accompanying text. Thus, this Comment focuses on the legality of audio, as opposed to video, recording.

19. *Glik*, 2011 WL 3769092, at *2 (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)).

20. 457 U.S. 800 (1982).

21. *Id.* at 818; *see Glik*, 2011 WL 3769092, at *2 (citing *Harlow*, 457 U.S. at 800, 807).

22. *See Harlow*, 457 U.S. at 818–19.

23. 568 F.3d 263 (1st Cir. 2009).

whether the right was 'clearly established' at the time of the defendant's alleged violation."[24] The second inquiry may simply be phrased as "whether the state of the law at the time of the alleged violation gave the defendant fair warning that his particular conduct was unconstitutional."[25] This two-part test supplies the framework for the holding in *Glik*.

The constitutional rights evaluated in *Glik* through the perspective of this qualified immunity test include those guaranteed to citizens by the First and Fourth Amendments. The First Amendment of the U.S. Constitution guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[26] In *First National Bank of Boston v. Bellotti*,[27] the Supreme Court observed that "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."[28] The Court also acknowledged in *Houchins v. KQED, Inc.*[29] that an important part of protecting the stock of public information is the principle that "[t]here is an undoubted right to gather news 'from any source by means within the law.'"[30] Furthermore, in *Mills v. Alabama*,[31] the Court explained that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs," and that "the press . . . was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials . . . responsible to all the people whom they were selected to serve."[32]

In *Iacobucci v. Boulter*,[33] the First Circuit recognized that a peaceful citizen's act of recording a public official, without violating any law, constituted an exercise of that citizen's First Amendment rights.[34]

---

24. *Glik*, 2011 WL 3769092, at *2 (quoting *Maldonado*, 568 F.3d at 269).

25. *Id.* at *3 (quoting *Maldonado*, 568 F.3d at 269).

26. U.S. CONST. amend. I; *see Glik*, 2011 WL 3769092, at *3–7 (discussing whether the defendants were entitled to qualified immunity from Glik's First Amendment claim).

27. 435 U.S. 765 (1978).

28. *Glik*, 2011 WL 3769092, at *3 (quoting *Bellotti*, 435 U.S. at 783).

29. 438 U.S. 1 (1978).

30. *Glik*, 2011 WL 3769092, at *3 (quoting *Houchins*, 438 U.S. at 11 (quoting Branzburg v. Hayes, 408 U.S. 665, 681–82 (1972))).

31. 384 U.S. 214 (1966).

32. *Id.* at 218–19; *Glik*, 2011 WL 3769092, at *4 (quoting *Mills*, 384 U.S. at 218).

33. 193 F.3d 14 (1st Cir. 1999).

34. *See Glik*, 2011 WL 3769092, at *4. In *Iacobucci*, the plaintiff's claim under 42 U.S.C. § 1983 centered on a Fourth Amendment violation, as the plaintiff was not arrested under a state wiretap statute but rather charged with "disorderly conduct" and "disrupting a public assembly." 193 F.3d at 18, 21. However, the court reasoned that "because Iacobucci's activities were peaceful, not performed in derogation of any law, and done in the exercise of his First Amendment rights, [the defendant–law enforcement officer] lacked the authority to stop them."

Although the citizen in *Iacobucci* was a journalist, the opinions of other circuit courts indicate that the First Amendment similarly protects a citizen recorder who lacks affiliation with the "press." For instance, in *Smith v. City of Cumming*,[35] the U.S. Court of Appeals for the Eleventh Circuit held that a citizen recorder "had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct."[36]

The Fourth Amendment to the Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[37] Regarding the fundamental protection against unreasonable seizure, the U.S. Supreme Court has explained that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[38]

According to the First Circuit Court of Appeals' reasoning in *Holder v. Town of Sandown*,[39] the Fourth Amendment requires that "at the time of the arrest, the 'facts and circumstances within the officer's knowledge . . . [were] sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect [had] committed, [was] committing, or [was] about to commit an offense.'"[40] In the absence of such an objectively reasonable belief, an arrest would violate the Fourth Amendment's protection against unreasonable seizures.

The crux of Glik's police encounter—and Fourth Amendment violation—originates in the Massachusetts wiretap statute. The statute provides, in relevant part, that "any person who willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception . . . of any wire or oral communication shall be fined . . . or imprisoned . . . or both . . . ."[41] The term

35. 212 F.3d 1332 (11th Cir. 2000).

36. *Id.* at 1333; *Glik*, 2011 WL 3769092, at *4 (citing *Smith*, 212 F.3d at 1333). Although the *Smith* court decided that the First Amendment protected the citizen's recording of police conduct, the court also determined that the citizen failed to show that the defendant's actions violated that right. *Smith*, 212 F.3d at 1333.

37. U.S. CONST. amend. IV; *see Glik*, 2011 WL 3769092, at *7–9 (discussing whether the defendants were entitled to qualified immunity from Glik's Fourth Amendment claim).

38. *See* Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891).

39. 585 F.3d 500 (1st Cir. 2009).

40. *Glik*, 2011 WL 3769092, at *7 (quoting *Holder*, 585 F.3d at 504 (quoting Michigan v. DeFillippo, 443 U.S. 31, 37 (1979))).

41. MASS. GEN. LAWS ANN. ch. 272, § 99(C)(1) (West 2011); *see Glik*, 2011 WL 3760902, at *7 (citing ch. 272, § 99(C)(1)).

"interception" means "to secretly hear [or] secretly record . . . the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication,"[42] and an "oral communication" is defined as "speech, except such speech as is transmitted over the public air waves by radio or other similar device."[43]

The Supreme Judicial Court of Massachusetts provided extensive interpretation of this state law in *Commonwealth v. Hyde*.[44] In *Hyde*, a motorist was prosecuted for violating the Massachusetts wiretap statute by tape-recording the comments of on-duty police officers during a traffic stop.[45] The court rejected the defendant–motorist's argument that "the statute [was] not applicable because the police officers were performing their public duties, and, therefore, had no reasonable expectation of privacy in their words."[46] Instead, the court upheld the conviction, reasoning that the "defendant was not prosecuted for making the recording; he was prosecuted for doing so secretly."[47] The court further explained that the motorist could have avoided violating the wiretap statute if he had simply informed the officers that he intended to record their encounter or, alternatively, held the tape recorder in plain sight.[48] This "secrecy inquiry" played a significant role in the outcome of *Glik*.[49]

Glik's constitutional analysis followed the structure of the *Maldonado* test.[50] Accordingly, the court first addressed whether the facts alleged by the plaintiff constituted a violation of a constitutional right, and subsequently addressed whether that constitutional right was "clearly established" at the time of the defendant's alleged violation. Through this filter, the court provided a detailed explanation of the First and Fourth Amendment rights belonging to a citizen who records a law enforcement officer in a public space.

---

42. MASS. GEN. LAWS ANN. ch. 272, § 99(B)(4); *see Glik*, 2011 WL 3769092, at *7 (citing ch. 272, § 99(B)(4)).

43. MASS. GEN. LAWS ANN. ch. 272, § 99(B)(2).

44. 750 N.E.2d 963, 976 (Mass. 2001); *see Glik*, 2011 WL 3769092, at *7 (discussing *Hyde*).

45. *Hyde*, 750 N.E.2d at 964–65.

46. *Id.* at 967.

47. *Id.* at 969. Chief Justice Margaret H. Marshall dissented, opining that "[t]he purpose of [Massachusetts's wiretap statute] is not to shield public officials from exposure of their wrongdoings." *Id.* at 975 (Marshall, C.J., dissenting).

48. *Id.* at 971. Despite the reasoning in *Hyde*, the *Glik* court opted not to extend its First Amendment holding to situations like traffic stops. *See infra* notes 65–66 and accompanying text.

49. *See infra* text accompanying notes 60–61.

50. Glik v. Cunniffe, No. 10-1764, 2011 WL 3769092, at *2 (1st Cir. Aug. 26, 2011).

The court framed the First Amendment issue by considering whether there is a constitutionally protected right to videotape police carrying out their duties in public.[51] The Court resolutely answered this inquiry in the affirmative. The court reasoned that the First Amendment's protection extends beyond the textual guarantees of freedom of speech or of the press and explained that the protection encompasses "a range of conduct related to the gathering and dissemination of information."[52] Next, the court asked whether this right to record was clearly established. The court noted that several prior opinions recognizing a right to record government officials in a public space were marked by a characteristic brevity, which the court interpreted to be indicative of the "fundamental and virtually self-evident nature of the First Amendment's protections in this area."[53] Thus, *Glik* established that the right of the citizenry "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."[54]

Further adhering to the *Maldonado* test, the court next addressed the potential Fourth Amendment violation. The controversy over the existence of a Fourth Amendment violation originated in an interpretation of state law; that is, a Fourth Amendment violation is predicated upon the plaintiff's claim that the defendant lacked probable cause that the plaintiff was violating some law at the time of arrest.[55] In *Glik*, the appellant law enforcement officers argued that "the allegations of the complaint establish probable cause that Glik violated Massachusetts's wiretap statute."[56]

Accordingly, the court turned to an interpretation of the Massachusetts wiretap law.[57] The court found that the "critical limiting term in the statute is 'interception,' defined to mean 'to secretly hear [or] secretly record . . . .'"[58] Explaining that a recording is "secret" unless the subject has actual knowledge of the recording, and further noting that "actual knowledge" does not require explicit acknowledgement of the recording, the court found that "the secrecy inquiry turns on notice, i.e., whether, based on objective indicators, such as the presence of a recording device in plain view, one can infer that the subject was aware that she might be recorded."[59]

---

51. *Id.* at *3.
52. *Id.*
53. *Id.* at *6.
54. *Id.* at *7.
55. *Id.*
56. *Id.*
57. MASS. GEN. LAWS ANN. ch. 272, § 99 (West 2011).
58. *Glik*, 2011 WL 3769092, at *7 (quoting MASS. GEN. LAWS ANN. ch. 272, § 99(B)(4)).
59. *Id.*

Application of the *Glik* facts to this "secrecy inquiry"—namely the consideration that Glik's cell phone had been held in plain view—led the court to conclude that "Glik's recording was not 'secret' within the meaning of Massachusetts's wiretap statute, and therefore the officers lacked probable cause to arrest him."[60] The court further found that "[t]he presence of probable cause was not even arguable here," and thus that the lack of probable cause was "clearly established" for the purpose of denying the appellants qualified immunity.[61]

Glik effectively holds that the right of a citizen to record a law enforcement officer in a public space is so entrenched in First Amendment precedent that the defense of qualified immunity is conclusively inapplicable. Further, the case holds that an arrest based on a recording with a device in plain view lacks probable cause for purposes of enforcing the state wiretap law and consequently violates the Fourth Amendment—again without the defense of qualified immunity. While this explanation seems legally rational, it is inconsistent with the realistic application of the law; ironically, the case itself proves that citizens are still being arrested for what the court describes as a "well-established" and "fundamental" principle of law.[62] This holding presents an inconvenient paradox for citizens unsure of their right to record. Notably, because several states have enacted wiretap statutes similar to that of Massachusetts,[63] *Glik* represents a concern of many citizens beyond the jurisdiction of the First Circuit.

---

60. *Id.* at *9.

61. *Id.*

62. *Id.* at *6–7. The authority relied upon by the *Glik* court to illustrate the longstanding nature of the constitutionally protected right to record police officers in public included cases such as *Mills v. Alabama*, 384 U.S. 214 (1966); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); and *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999). Each was decided well before Glik's arrest in 2007.

63. California, Florida, Illinois, Maryland, Michigan, Montana, New Hampshire, Pennsylvania, and Washington each require the consent of all parties to a communication for lawful audio recording. *See* CAL. PENAL CODE § 632 (West 2010); FLA. STAT. § 934.03 (2010); 720 ILL. COMP. STAT. ANN. 5/14-1, -2 (West 2011); MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(3) (LexisNexis 2010); MICH. COMP. LAWS SERV. § 750.539(c)–(d) (LexisNexis 2011); MONT. CODE ANN. § 45-8-213(1)(c) (2010); N.H. REV. STAT. ANN. § 570-A:2(I) (LexisNexis 2010); 18 PA. CONS. STAT. ANN. § 5703 (West 2011); WASH. REV. CODE ANN. § 9.73.030(1) (West 2010). *But see* Sullivan v. Gray, 324 N.W.2d 58, 60 (Mich. Ct. App. 1982) (holding that a participant in a conversation may record that conversation without fear of penalty pursuant to the statute—because "eavesdropping" contemplates that the violator would record the conversations of others—and thus interpreting Michigan's wiretap statute to require consent of only one party to a communication). The requirement of all-party consent effectively permits law enforcement officers to arrest citizen recorders when the officers themselves withhold consent to the recording. *See, e.g.*, Press Release, ACLU, ACLU Sues After Mother Falsely Arrested by Boynton Beach Police Officers (June 25, 2010), http://www.aclu.org/free-speech/aclu-sues-after-mother-falsely-arrested-boynton-beach-police-officers.

Glik offers no definitive resolution to the question of whether a citizen may record a law enforcement officer in the officer's professional capacity. Rather, the case merely provides that each citizen retains the right to film law enforcement officers in the discharge of their duties "in a public space."[64] This explanation fails to clarify for the average American citizen whether the act of filming a law enforcement officer is protected by the First Amendment. The answer will depend on the factual circumstances of each filming.

To foreshadow the factual dependence of this First Amendment protection, the *Glik* court strongly distinguished between filming a law enforcement officer on the Boston Common and filming an officer during a traffic stop,[65] reasoning that a traffic stop can be characterized as an "inherently dangerous situation[]."[66] The court also carefully noted that a citizen's right to film government officials in a public space is "not unqualified."[67] Thus, the court's validation of Glik's recording offers little enduring guidance regarding what "spaces" are "public" enough to qualify for First Amendment protection. Practically speaking, law enforcement officers may continue to enforce the state wiretap statute in any situation less public than an oral communication on the Boston Common.

Of course, regardless of the "public" setting, a realistic concern countering the benefits of citizen recording is the police officer's purpose of ensuring public safety. One recent news article acknowledged that citizen-recorded videos subject police officer actions to new scrutiny and change the way accusations against officers play out in court.[68] The article claimed that some officers are afraid to use necessary force because of "fear of retribution by video" and blamed this new pressure on police officers for the recent trend toward police enforcement of wiretap laws to limit citizen recording of police activity.[69]

Interestingly, the *Glik* opinion referenced this same theme of ubiquitous public technology to extend First Amendment protection to citizen recorders in public spaces.[70] *Glik* emphatically explained that "the public's right of access to information is coextensive with that of

64. *Glik*, 2011 WL 3769092, at *7.

65. "[A] traffic stop is worlds apart from an arrest on the Boston Common in the circumstances alleged." *Id.* at *6.

66. *Id.* (quoting Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010)) (internal quotation marks omitted).

67. *Id.* at *7.

68. Kevin Johnson, *For Cops, Citizen Videos Bring Increased Scrutiny*, USA TODAY, Oct. 15, 2010, at 1A, *available at* http://www.usatoday.com/news/nation/2010-10-15-1Avideocops15_CV_N.htm (last visited Oct. 10, 2011).

69. *Id.*

70. *Glik*, 2011 WL 3769092, at *5.

the press," and that "[i]t is of no significance that the present case . . . involves a private individual, and not a reporter, gathering information about public officials."[71] To address the practical issue of police interaction with citizen recorders, the court reasoned:

> In our society police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights. . . . 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.[72]

Law enforcement discomfort with being recorded in public while on duty does not, without more, affect the First Amendment protection afforded the citizen recorder, nor does it excuse the Fourth Amendment violation of arresting a citizen for recording police activity in a public space.

To enforce a policy that intrudes upon an individual's ability to check potential governmental abuse, and to do so without express legislative support,[73] undermines public confidence in the government. The *Glik* court expressly acknowledged that "[g]athering 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.'"[74] The court further noted:

---

71. *Id.*

72. *Id.* at *6 (citations omitted) (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

73. The state of Florida provides a fitting example of ambiguous legislative endorsement of the state wiretap law as a vehicle to prosecute citizens for filming the police in their capacity as public officials. The Florida wiretap statute, FLA. STAT. § 934.03, like its Massachusetts counterpart, refers to an "interception" of oral communication. Some Florida judges have disagreed over whether the statute was intended to criminalize recordings in addition to interceptions. *See* State v. Tsavaris, 394 So. 2d 418, 420–31 (Fla. 1981) (Alderman, J., concurring in part and dissenting in part). For instance, in his dissent from the majority opinion in *Tsavaris*, Justice Alderman claimed that the legislature's choice of the term "interception" rather than "recording" was intentional and that "[o]ne does not intercept a conversation made directly to himself." *Id.* at 431–32. Justice Alderman additionally posited that "[i]f the legislature had intended to make it unlawful for any person to record an oral or wire communication, it could easily have done so in plain and simple language. It did not. Instead, it criminalized only the willful *interception* of wire or oral communication." *Id.* at 432. Justice Alderman concluded his dissent with a plea to the legislature to correct what he perceived to be a "judicial distortion" of § 934.03. *Id.* In Massachusetts, the ambiguity lives on regarding the extent to which the location of the recorder and the recorded communication influences the First Amendment protection of a recording; this ambiguity is fueled partially by disagreement over the intended function of the statute. *See supra* note 47 and accompanying text.

74. *Glik*, 2011 WL 3769092, at *4 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

> "Freedom 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.[75]

Citizen recording is a nonviolent and nonintrusive way for citizens to hold police officers accountable for their actions while carrying out their public service. Indeed, the court noted that, because Glik "'filmed [the officers] from a comfortable remove' and 'neither spoke to nor molested them in any way,'" Glik's peaceful recording was not subject to limitation.[76] Theoretically, the possibility of citizen surveillance should incentivize police officers to act in accordance with their professional duties at all times. If citizens believe—correctly or otherwise—that it is illegal to record unethical police behavior, the potential for vigilante filming diminishes, and an important check on governmental authority diminishes correspondingly.

In sum, the *Glik* court acknowledged that law enforcement officers must learn to coexist with the constitutional right of the citizenry to record in public spaces, but offered little explanation to clarify the instances in which a citizen may rightly assume that she is recording in a "public space." Without additional clarification, citizens will remain uncertain about their right to record and will inevitably fall victim to unconstitutional arrests due to the imprecise explanation of the "public" prerequisite for First Amendment protection.

In *Glik*, a citizen's exercise of a "clearly-established" First Amendment right resulted in a "clearly-established" Fourth Amendment violation. Although the court unambiguously arrived at this conclusion, it failed to provide a bright-line resolution to avoid this discrepancy in the future. Apart from recognizing that "a traffic stop is worlds apart from an arrest on the Boston Common,"[77] the court provided no guidance for determining what situations constitute a "public space" in which a citizen's right to film government officials is safeguarded by the First Amendment. Absent pronounced boundaries for First Amendment protection, citizens who choose to record law enforcement officials risk inviting the same Fourth Amendment violation confirmed in *Glik*.

---

75. *Id.* (citations omitted) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 n.11 (1978) (quoting THOMAS EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 9 (1966))).

76. *Id.* at *5 (quoting Iacobucci v. Boulter, 193 F.3d 14, 25 (1st Cir. 1999)).

77. *Id.* at *6.