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Bluebook Citation

David L. Hudson, Jr., *First Amendment Right to Receive Information and Ideas Justifies Citizens' Videotaping of the Police*, 10 U. St. Thomas J.L. & Pub. Pol'y 89 (2016).

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FIRST AMENDMENT RIGHT TO RECEIVE INFORMATION AND IDEAS JUSTIFIES CITIZENS' VIDEOTAPING OF THE POLICE

BY DAVID L. HUDSON, JR.

Several courts have declared that members of the public have a First Amendment—protected right to film or videotape the police.¹ At least one legal commentator has posited that this right falls within three of the five textually-based freedoms of the First Amendment – the Speech, Press, and Petition Clauses.² This right to receive information and ideas is a “corollary” of the right to speak that triggers the First Amendment interests of not only speakers, but also audiences.³ This right to receive information and ideas applies in the context of citizens recording the police. The public has a right to know how law enforcement officials treat citizens in encounters.

In one highly publicized case of recording the police, attorney Simon Glik filmed the police on his cell phone arresting a young man in Boston Commons.⁴ Glik felt that the police were mistreating the young man.⁵ After the charges were dismissed, Glik filed a civil rights claim against the police for violation of his constitutional rights under the First and Fourth Amendments.⁶ The officers claimed qualified immunity, but the First U.S. Circuit Court of Appeals ruled that Glik established a First Amendment right to film the police.⁷ In its analysis, the First Circuit rested this finding in part on the public’s right to receive information and ideas.⁸ Glik later told *The Boston Herald* that the police were fighting a “losing battle” in trying to suppress and oppress those who recorded them doing their jobs.⁹

1. *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014); *Glik v. Cuniffe*, 655 F.3d 78 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000).

2. David Murphy, Comment, “V.I.P.” *Videographer Intimidation Protection: How the Government Should Protect Citizens Who Videotape the Police*, 43 SETON HALL L. REV. 319, 324 (2013).

3. Jamie Kennedy, Comment, *The Right to Receive Information: The Current State of the Doctrine and the Best Application for the Future*, 35 SETON HALL L. REV. 789, 818 (2005).

4. David L. Hudson, Jr., *Good Cop, Bad Citizen? As Cellphone Recording Increases, Officers Are Uneasy*, ABA JOURNAL, (Mar. 1, 2012), http://www.abajournal.com/magazine/article/good_cop_bad_citizen_as_cellphone_recording_increases_officers_are_uneasy; *Glik*, 655 F.3d at 1,78.

5. *Id.*

6. *Glik*, 655 F.3d at 80.

7. *Id.* at 82-84.

8. *Id.* at 82.

9. Matt Stout, *Lawyer in Key Case: Regulating Recording is ‘losing battle’*, THE BOS.

Glik's case is not an aberration. Numerous cases abound where individuals have been arrested for filming the police.¹⁰

This essay examines the history and dimension of the First Amendment right to receive information and ideas, a concept that has appeared in many different strands of First Amendment law. The essay also explains that the public should have a First Amendment right to receive information about the performance (or lack thereof) of law enforcement officials.

The Supreme Court on the Right to Receive Information and Ideas

The U.S. Supreme Court first recognized the right to receive information and ideas in a Jehovah Witness handbill distribution decision, *Martin v. City of Struthers*.¹¹ An Ohio woman named Thelma Martin sought to distribute leaflets advertising a religious event by knocking on people's doors.¹² Though she proceeded door-to-door, she apparently did so without disruption.¹³ A sharply divided U.S. Supreme Court ruled that Martin had a First Amendment right to distribute her literature.¹⁴ Justice Hugo Black wrote for the majority: "This freedom embraces the right to distribute literature, and necessarily protects the right to receive it."¹⁵

In a 1969 obscenity and privacy decision, Justice Thurgood Marshall cited Thelma Martin's case before the High Court and wrote: "It is now well established that the Constitution protects the right to receive information and ideas."¹⁶ Marshall, one of the Court's more passionate defenders of First Amendment freedoms,¹⁷ reasoned that this right to receive information and ideas extended to expression regardless of its "social worth."¹⁸ *Stanley v. Georgia* was the first decision in which the Court used the precise phrase: "right to receive information and ideas." *The Washington Post* lauded the decision with an editorial entitled, "The Right to Receive Ideas."¹⁹

The Court's most extensive discussion of the right to receive information and ideas came from Justice William Brennan's plurality opinion in a library

HERALD (Aug. 11, 2015)
http://www.bostonherald.com/news_opinion/local_coverage/2015/08/lawyer_in_key_case_regulating_recording_is_losing_battle.

10. Kristen Rasmussen, *Filming Police in Public is Protected by the First Amendment*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Aug. 29, 2011), <https://www.rcfp.org/browse-media-law-resources/news/filming-police-public-protected-first-amendment>.

11. *Martin v. City of Struthers*, 319 U.S. 141, 146-147 (1943).

12. *Id.*

13. *Id.* at 142.

14. *Id.*

15. *Id.* at 143.

16. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

17. David L. Hudson, Jr., *Justice Marshall: Eloquent First Amendment Defender*, FIRST AMENDMENT CENTER, (Feb. 4, 2013), <http://www.firstamendmentcenter.org/justice-marshall-eloquent-first-amendment-defender>.

18. *Stanley*, 394 U.S. at 564.

19. Editorial, *The Right to Receive Ideas*, THE WASHINGTON POST, Apr. 12, 1969, at A10.

book censorship case, *Board of Education v. Pico*.²⁰ The case involved the censorship of nine books from a middle school, including literary classics such as *Black Boy* by Richard Wright and *Slaughterhouse Five* by Kurt Vonnegut.²¹ Apparently, several board members felt the books were inappropriate or un-American. The Court ruled that public school officials could not remove books from library shelves simply because they disagreed with the ideas contained in those books.²²

In his opinion, Justice Brennan explained that the right to receive information and ideas is an “inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses.”²³ First, he said the right to receive ideas flows naturally from the right to send them.²⁴ Second, “the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.”²⁵ He added that “access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner.”²⁶

The Court has reiterated the right to receive information and ideas in several other First Amendment contexts, including access to advertising,²⁷ attending criminal trials,²⁸ and news media interviews of prisoners.²⁹ Concurring or dissenting justices have advanced the right to receive information and ideas in other contexts, including the censorship of school newspapers,³⁰ the use of filtering software on library computers,³¹ and a limitation on the number of books for pretrial detainees.³²

Some of these cases emphasize the rights of an individual to access information, such as the *Pico* library censorship decision. Other cases focus on the right of the public to hear particular information, such as the right of the public to learn about price advertising in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel*.³³ Whatever the labeling or exact contours of the right, the U.S. Supreme Court has established a body

20. Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

21. See David L. Hudson, Jr., *Participant in Famous Book-banning Case Looks Back*, FIRST AMENDMENT CENTER, (Sep. 30, 2010), <http://www.firstamendmentcenter.org/participant-in-famous-book-banning-case-looks-back>.

22. *Pico*, 457 U.S. at 875.

23. *Id.* at 867.

24. *Id.*

25. *Id.*

26. *Pico*, 457 U.S. at 868.

27. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 757 (1976).

28. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980).

29. Houchins v. KQED, Inc., 438 U.S. 1 (1978).

30. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 287 (1988) (Brennan, J., dissenting).

31. United States v. American Library Ass’n, 539 U.S. 194, 216 (2003) (Breyer, J., concurring).

32. Bell v. Wolfish, 441 U.S. 520, 573 (1979) (Marshall, J., dissenting).

33. Va. State Bd. of Pharmacy, *supra* note 27, at 757.

of law recognized over decades and decades that the right to receive information and ideas is a clearly established part of First Amendment jurisprudence.

Right to Receive Information: Vital in Context of Police-Citizen Interactions

This right to receive information and ideas should apply with full force in the context of individuals videotaping the police. It certainly should be a vital part of the constitutional equation when examining the videotaping or filming of police interactions with citizenry.

The value of at least some film recordings of the police cannot be overstated. Because of some disturbing videos of police overreactions, citizen awareness has been heightened. More members of the public are demanding accountability and action as a result of recordings of police-citizen encounters.

Instances of police-citizen interactions that resulted in death have led to violent public reactions.³⁴ The killing of a fifteen year-old high school student by a police officer in New York City led to nearly a week of demonstrations and protests in Harlem in 1964.³⁵ In 1991, George Holliday, a plumber from Argentina, managed to capture four Los Angeles police officers beating motorist Rodney King. More than that, his video shocked the collective conscience of the country.³⁶ Holliday's video paved the way for more recent examples of citizens using their cell phones, cameras, or other equipment to record police activity.³⁷

The videotaping of police in recent years has increased calls for fundamental change in how the police interact with citizens. After the death of several African-Americans at the hands of police officers, many people across ideological divides agreed that the public should have the right to videotape the police.³⁸ The New York Police Department even disseminated a memo to its officers explaining that members of the public have a right to record police.³⁹ Videos of police officers seemingly mistreating citizens have

34. See ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 55 (2016).

35. *Id.*

36. Eric Deggans, *How the Rodney King Video Paved the Way for Today's Citizen Journalism*, CNN, Mar. 7, 2011, <http://www.cnn.com/2011/OPINION/03/05/deggans.rodney.king.journalism/>; Shafiq Abdussabar, *Citizen Journalism Videos Reshaping Police Use of Deadly Force*, NEW HAVEN REGISTER, May 27, 2015, at A6.

37. Deggans, *supra* note 36.

38. Jay Michaelson, *Who's Against Videotaping Police?*, THE DAILY BEAST, Apr. 9, 2015, <http://www.thedailybeast.com/articles/2015/04/09/who-s-against-videotaping-police.html>.

39. Ben Yakas, *NYPD Internal Memo Stern Reminder Cops Can't Arrest You For Videotaping Them*, GOTHAMIST, (Aug. 30, 2014, 2:20 PM), http://gothamist.com/2014/08/30/nypd_internal_memo.php.

altered many people's views of law enforcement.⁴⁰ The use of recording devices has acted as a deterrent to police abuse.⁴¹ It has led to various reform measures, even a bill introduced in Congress to fund local studies regarding the use of body cameras for police officers.⁴² Controversies have caused some state lawmakers to push back, seeking to pass legislation that would criminalize the recording of police officers within a certain distance.⁴³ Public outcry caused an Arizona legislator to shelve his proposal.⁴⁴

However, individuals are routinely threatened with arrest or arrested for filming the police. Carlos Miller, a photographer and First Amendment advocate, has been arrested several times for filming the police.⁴⁵ He was arrested in Miami, Florida, after filming the police who were having a stand-off with an Occupy group.⁴⁶ This experience and others caused Miller to start a blog, *Photography is Not a Crime*.⁴⁷ Noted free-expression expert, Clay Calvert, has warned that the right to record the police as a "risky First Amendment proposition."⁴⁸

The right to receive information and ideas is an important First Amendment right. It protects the free-expression rights of recipients and informs the public about a most important public institution. This First Amendment right to receive information and ideas should apply when police officers attempt to thwart or silence a person who attempts to videotape or record them. The public has a right to know how its police perform.

40. Richard Perez-Pena and Timothy Williams, *Glare of Video is Shifting Public's View of the Police*, N.Y. TIMES, Jul. 30, 2015, http://www.nytimes.com/2015/07/31/us/through-lens-of-video-a-transformed-view-of-police.html?_r=0.

41. Joel Rubin, *After King Case, Video Reigns*, ORLANDO SENTINEL, Mar. 6, 2011, at A10.

42. Police CAMERA Act, S. 887, 114th Cong. (2015); See also Dan Roberts, *Congressional Bill Would Test the Effect of Body Cameras on Police Brutality*, THE GUARDIAN, Mar. 27, 2015, <https://www.theguardian.com/us-news/2015/mar/27/rand-paul-body-camera-bill-test>.

43. Alia Beard Rau, *Bill Would Make it a Crime to Videotape Police in Arizona*, ARIZONA REPUBLIC, Jan. 12, 2016, <http://www.azcentral.com/story/news/arizona/politics/2016/01/08/bill-would-make-crime-videotape-police-arizona/78521262/>.

44. Bob Christie, *Arizona Bill Banning Up-Close Videotaping of Police Shelved*, ASSOCIATED PRESS, Jan. 28, 2016.

45. Alysia Santo, *You Have a Right to Remain Recording: Carlos Miller's Crusade for Freedom of Photography*, COLUMBIA JOURNALISM REVIEW, May 18, 2012, http://www.cjr.org/the_news_frontier/you_have_a_right_to_remain_rec.php.

46. *Id.*

47. See PHOTOGRAPHY IS NOT A CRIME, <https://photographyisnotacrime.com> (last visited Oct. 13, 2016).

48. Clay Calvert, *Still Risky for Citizens to Record the Police- Even in Public*, FIRST AMENDMENT CENTER (Jun. 8, 2014), <http://www.firstamendmentcenter.org/still-risky-for-citizens-to-video-police-even-in-public-places>.