THE FIRST AMENDMENT AND THE POLICE IN THE DIGITAL AGE

Kermit V. Lipez*

I. INTRODUCTION

In almost thirty-two years as a judge, I have written over 1300 opinions. Each of these opinions was important to the parties involved, yet some have gained more prominence than others. This essay addresses one of those—a 2011 decision that involves the First Amendment, the complex relationship between the police and the communities that they serve, and the revolution in communications technology.

I emphasize two points as I begin. I have enormous respect for police officers and their work. They risk their lives on the job—a reality that we have seen far too often in recent years—and go to work every day despite that risk. But I also support the close scrutiny of police work. I believe that we can honor the work of the police while still acknowledging the need for independent review of their work. This essay describes the stakes in balancing those two values.

II. BACKGROUND

A. The Boston Common

The story begins on the Boston Common, the oldest public park in America.[1] The British began an eight-year encampment

*Senior Judge, United States Court of Appeals for the First Circuit. This essay is based on a Constitution Day lecture given at the University of Maine School of Law on September 20, 2016. I wish to thank my talented law clerks Claire Chung and Kathryn Schmidt for their research assistance in the preparation of this essay.

1. *Boston Common*, CITY OF BOSTON—PARKS & RECREATION, http://www.cityofboston.gov/parks/emerald/boston_common.asp (showing establishment date of 1634).

there in 1768.[2] The colonial militia mustered there on the eve of the American Revolution.[3] George Washington, John Adams and General Lafayette visited the Common to celebrate independence after the Revolution was won.[4] In the 1860s, anti-slavery meetings took place there.[5] Anti-Vietnam War and civil-rights rallies were held on the Common in the 1960s, including one led by Dr. Martin Luther King, Jr.[6] In 1979, Pope John Paul II celebrated Mass on the Common.[7] Protests of one kind or another continue to be held there. It is perhaps the quintessential American setting for the exercise of free speech and public assembly.[8]

B. Simon Glik

Simon Glik, who moved from Russia to the Boston area as a child, is a 2006 graduate of the New England School of Law, where he ranked first in his class.[9] He tells prospective clients of his solo practice that he "tr[ies] hard to achieve justice in every case for every client," because he "believe[s] the rule of law is designed to protect the weak against the powerful," and that he "personally" has "experienced what it is like to be unjustifiably accused by the government," and is "prepared to fight" for his clients.[10]

C. The Incident

Glik's self-description is legitimate. He was unjustifiably accused by the government of criminal offenses because of an

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2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *See id.*; *see also Boston Common*, FRIENDS OF THE PUBLIC GARDEN, http://friendsofthepublicgarden.org/our-parks/boston-common/history (noting that, "[f]rom Colonial times to the present day, the Common has been at the center stage of American history," and that the Common is still "the scene of sports, protests, and events large and small").
9. *About Simon Glik*, SIMON GLIK, ATTORNEY AT LAW, http://gliklaw.com/gliklaw/About_Me.html.
10. *Id.* at *Home*, http://gliklaw.com/gliklaw/Home.html.

incident that occurred on the Boston Common while he was walking nearby on the evening of October 1, 2007.[11]

On that night, he noticed three police officers arresting a young man on the Common.[12] Then he heard a bystander say something that sounded to him like "You are hurting him, stop."[13] Concerned that the officers were using excessive force to make the arrest, Glik stopped roughly ten feet away from the officers and began recording video footage of the arrest on his cell phone.[14]

After placing the suspect in handcuffs, one of the officers turned to Glik and said, "I think you have taken enough pictures."[15] Glik replied, "I am recording this. I saw you punch him."[16] An officer then approached Glik and asked if his cell phone recorded audio.[17] When Glik said yes, the officer arrested him for unlawful audio recording in violation of the Massachusetts wiretap statute.[18] Glik was taken in cuffs to the South Boston police station.[19] In the course of booking, the police confiscated his cell phone and a computer flash drive and held them as evidence.[20] Later, the police added charges for disturbing the peace and aiding in the escape of a prisoner to the wiretap offense.[21]

III. GLIK IN COURT

A. Proceedings Below

The prosecution did not go well for the Commonwealth. It immediately dismissed the charge of aiding in the escape of a prisoner, acknowledging lack of probable cause.[22] In February

11. Glik v. Cunniffe, 655 F.3d 78, 79 (1st Cir. 2011).
12. *Id.*
13. *Id.*
14. *Id.* at 79–80.
15. *Id.* at 80.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

2008, in response to Glik's motion to dismiss, a Boston municipal judge disposed of the disturbing-the-peace charges, ruling that "the fact that 'the officers were unhappy they were being recorded during an arrest . . . does not make a lawful exercise of a First Amendment right a crime.'"[23] He also dismissed the wiretap charge, finding no probable cause to support it. 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.[24]

Glik then filed an internal-affairs complaint with the Boston Police, but the Department declined to investigate his complaint or take any disciplinary action against the arresting officers.[25] That stonewalling prompted Glik to file a § 1983 action against the arresting officers and the City in February 2010, claiming violations of his First and Fourth Amendment rights.[26]

Asserting qualified immunity, the defendant officers moved to dismiss because, in their words, it was "not well-settled that [Glik] had a constitutional right to record the officers."[27] The trial judge denied their motion, concluding that "in the First Circuit . . . the First Amendment right to publicly record the activities of police officers on public business is established."[28]

The defendants appealed immediately, which brought the case to the First Circuit.[29] Glik's lawyer enlisted the help of the ACLU to protect the district court's ruling on appeal. Glik's First Amendment claim that he had a right to record the arrest had broad implications,[30] which prompted media and other

23. *Id.* (quoting the Boston Municipal Court).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* (quoting defendants' argument).

28. *Id.* (quoting district court's opinion).

29. As an exception to the final judgment rule, there is a right to appeal from the denial of a motion to dismiss on qualified immunity grounds, given that one purpose of the immunity is the protection of government officials from the burden of trial. *See* Mitchell v. Forsyth, 472 U.S. 511, 526–27 (1985) (explaining that qualified immunity "is an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial" (emphasis in original)).

30. Although Glik's Fourth Amendment claim was also important, it turned on the particulars of the Massachusetts wiretap statute and was consequently of less interest to those associated with the amicus briefs.

organizations from around the country to file amicus briefs on his behalf.[31]

B. At the First Circuit

1. Qualified Immunity

On appeal, the officers continued to rely on qualified immunity—a difficult doctrine. Indeed, if I had to identify one issue that has consumed more of my time than any other on the Court of Appeals, it would be qualified immunity. Its purpose can be stated in deceptively simple terms. The doctrine protects government officers from damages liability, and often from a trial itself, by

> balanc[ing] 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.[32]

Thus, in *Glik* as in every qualified-immunity case, the court faced two questions:

- whether the facts alleged by the plaintiff made out a violation of a constitutional right; and

- whether that right was clearly established at the time of the defendants' alleged violation, such that the

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31. Corrected Brief for Amici Curiae Berkeley Copwatch et al., in Support of Plaintiff-Appellee Simon Glik and Affirmance of the Ruling Below, *Glik v. Cunniffe*, 2011 WL 959479 (1st Cir. Feb. 8, 2011) (No. 10-1764) (indicating that Communities United against Police Brutality, Justice Committee, Milwaukee Police Accountability Coalition, Nodutdol for Korean Community Development, and Portland Copwatch joined brief); Brief for Citizen Media L. Project et al., as Amici Curiae in Support of Plaintiff-Appellee, *Glik v. Cunniffe*, 2011 WL 494310 (1st Cir. Jan. 27, 2011) (No. 10-1764) (indicating that Dow Jones & Company, Inc., Gatehouse Media, Inc., Globe Newspaper Company, Inc., the Massachusetts Newspaper Publishers Association, Metro Corp., NBC Universal, Inc., New England Newspaper and Press Association, Inc., the New York Times Company, Newspapers of New England, Inc., the Online News Association, and the Reporters Committee for Freedom of the Press joined brief).

32. *Glik*, 655 F.3d at 81 (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)).

> officers should have known that what they did was wrong.[33]

If the answer to either question was no, the officers prevailed. Thus, the "clearly established" inquiry adds a second layer of protection for government officials like the officers in *Glik*. If the law was not clear when they acted, we do not want to penalize them for taking actions that they reasonably could have believed were proper.

But this clearly established standard accounts for much of the difficulty in qualified-immunity cases. The analysis must be situation specific. In every case, the reviewing court must ask whether an officer confronted with the particular facts alleged by the plaintiff would have understood that the conduct at issue violated a constitutional right. Without that specificity, the theory goes, government officials will not have fair warning that they are behaving unlawfully. That fair warning comes from judicial precedents establishing constitutional rights. This requirement accounts for another challenge in qualified-immunity law: the temptation for judges to avoid answering a difficult constitutional question when it is easier simply to say that the constitutional right was not clearly established at the pertinent time. In other words, if the right being claimed by the plaintiff was not clearly established when the government officials acted, those officials are entitled to qualified immunity even if the judges conclude that their behavior violated the plaintiff's constitutional rights.[34]

Avoiding the constitutional question makes some sense if the judges on a panel disagree about whether a constitutional violation occurred, but do agree that the right was not clearly established at the relevant time. It is a prudent use of judicial resources to choose the consensus course. On the other hand, if judges constantly avoid the underlying constitutional question, no "clearly established" law will ever develop. Aware of the two-pronged qualified-immunity inquiry, the police officers in

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33. *Id*.

34. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009) (holding that courts need not decide the first and second prongs of the qualified-immunity inquiry in sequence, but should instead decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand").

Glik urged us to hold that any right to film police carrying out their duties in public, if it existed, was not clearly established when Glik was arrested. My colleagues and I rejected that approach. We understood the importance of first answering the constitutional question.

2. The Constitutional Question

By its terms, the First Amendment's proscription on laws "abridging the freedom of speech, or of the press," says nothing about the gathering or dissemination of information by the public.[35] But the Supreme Court long ago established 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," and that there is "an undoubted right to gather news from any source by means within the law."[36] With these principles in place, and citing cases from two other circuits supporting Glik's claim, we concluded that "[t]he filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles."[37] Noting the temptation of governmental authorities to repress or discourage opposition, we observed that this temptation is particularly problematic for "law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties."[38] The ability to collect information about their work could discourage such abuses.[39]

Then, again drawing on precedent, we made the important point that "the public's right of access to information is coextensive with that of the press."[40] Indeed, in an observation confirmed by current events, we said that changes in technology had blurred the lines between private citizen and journalist:

35. U.S. CONST. amend. I.

36. *Glik*, 655 F.3d at 82 (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978), and Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978)) (internal quotation marks omitted).

37. *Id.*

38. *Id.*

39. *Id.* at 82–83.

40. *Id.* at 83.

> 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.[41]

3. "Clearly Established" Law

Having decided that Glik had a First Amendment right to record the arrest, we then had to decide if the law supporting that right was clearly established in the First Circuit at the time of his arrest. As one might expect, there is an important connection between the constitutional question and the clearly established question. If there is abundant law supporting the conclusion that the conduct of government officials violated the Constitution, the clearly established question becomes much easier to answer in the affirmative.

I would not say that we found abundant law in *Glik* supporting the right to record. There were the general First Amendment principles about the right to gather information on the work of government officials, available both to journalists and private citizens. There were the two decisions—one by the Eleventh Circuit and the other by the Ninth—concluding, with scant analysis, that an individual has a First Amendment right to record police conduct in public places.[42] And, importantly, there was a First Circuit precedent that said, again with scant analysis, that a self-styled journalist, arrested for filming members of a local commission in the hallway outside a public meeting, had been exercising a First Amendment right to film.[43] Although the appellant officers had cited two other federal court of appeals decisions holding that the right to film the work of police officers in public was not clearly established, one was an unpublished per curiam with no precedential force, and the other involved a traffic stop, characterized by the court as an inherently dangerous situation in which police officers face

41. *Id.* at 84.

42. *See id.* at 83 (referring to Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000), and Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995)).

43. *See id.* (citing and discussing Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999)).

particular risk.[44] That description did not apply to the arrest on the Boston Common.[45]

The question, then, was whether these principles and cases would together have given fair warning to reasonable members of the Boston Police that Glik had a First Amendment right to film their conduct on the Common. If so, they would not be entitled to immunity for their unconstitutional conduct in arresting Glik.

In answering this fair-warning question, we found notable the brevity of the analysis in our hallway-filming case and in the two other cases agreeing that the First Amendment provides a right to film the public conduct of government officials. As we saw it, "[t]his terseness implicitly speaks to the fundamental and virtually self-evident nature of the First Amendment's protection in this area."[46] We also gave considerable weight to the clear language in our hallway-filming precedent, which stated 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."[47]

We therefore disagreed with the officers' assertion that, at the time of Glik's arrest, there was no clearly established First Amendment right in the First Circuit to record police officers carrying out their public duties. Rather, our own precedent and the self-evident nature of the First Amendment right at issue led us to conclude that "the state of the law at the time of [Glik's

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44. *Id.* at 85 (distinguishing Szymecki v. Houck, 353 F. App'x 852 (4th Cir. 2009), and Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010)).

45. *Id.* (pointing out that "a traffic stop is worlds apart from an arrest on the Boston Common in the circumstances alleged" in *Glik*). However, a panel of our court subsequently applied the First Amendment principles of *Glik* to a traffic stop on a New Hampshire highway:

> Those First Amendment principles apply equally to the filming of a traffic stop and the filming of an arrest in a public park. In both instances, the subject of filming is "police carrying out their duties in public" . . . . A traffic stop, no matter the additional circumstances, is inescapably a police duty carried out in public. Hence, a traffic stop does not extinguish an individual's right to film.

Gericke v. Begin, 753 F.3d 1, 8 (2014) (citation omitted).

46. *Glik*, 655 F.3d at 85.

47. *Id.* at 83 (quoting *Iacobucci*, 193 F.3d at 25).

arrest] gave the [police officers] fair warning that [their] particular conduct was unconstitutional."[48]

III. REACTION TO *GLIK*

A. Media Response

There was immediate recognition of the importance of the *Glik* decision. The New York Times editorial board described it as "a strong opinion" protecting the right to videotape the activities of police officers in public.[49] As the Times put it, "[t]he officers tried to turn Mr. Glik's exercise of his rights into a crime," but "[b]y turning his cell phone camera on them, he held them accountable for their conduct."[50]

Law journals and media bloggers took note of *Glik* too, emphasizing its importance in establishing that there was now a clear constitutional right to record the public activities of the police.[51] As one media commentator put it:

> The *Glik* case was sort of a turning point, because it was a very clear opinion. The First Circuit really grounded its recognition of this First Amendment right in a long tradition of First Amendment activity in public places: use of public parks, observing government officials. And so it was a very powerful statement that yes, we should be recognizing this right. And other courts started to pick up on that.[52]

Indeed, within months of *Glik*'s issuance, the Seventh Circuit, citing *Glik* in a lengthy decision, recognized the First Amendment right to record police conduct in public places.[53]

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48. *Id.* at 85 (quoting Maldonado v. Fontanes, 568 F.3d 263, 269 (1st Cir. 2009)).

49. Editorial, *A Vital Liberty*, NYTIMES.COM (Sept. 1, 2011), http://www.nytimes.com/2011/09/02/opinion/a-vital-liberty.html.

50. *Id.*

51. *See, e.g.*, Rebecca G. Van Tassell, Note, *Walking a Thin Blue Line: Balancing the Citizen's Right to Record Police Officers Against Officer Privacy*, 2013 B.Y.U. L. REV. 183, 192–93.

52. *The Right to Record Police*, WNYC—ON THE MEDIA (Apr. 17, 2015), http://www.wnyc.org/story/right-record-police/ (providing transcript of host Bob Garfield's on-air conversation with Jeff Hermes, deputy director of the Media Law Resource Center).

53. ACLU of Ill. v. Alvarez, 679 F.3d 583, 597–601 (7th Cir. 2012). Judge Posner dissented from the panel opinion, worried that "[a] fine line separates 'mere' recording of a

There was also recognition of *Glik's* implications for the role of the citizen journalist recording the work of the police, a phenomenon that began as early as two decades ago with the police beating of Rodney King in Los Angeles.[54] The video of that assault transfixed the country because of the brutality it recorded and its novelty. We saw the beating only because of the happenstance of a Sony Handycam—hardly a ubiquitous item at the time—in the hands of someone who witnessed the encounter, recorded it, and then, sensing the significance of what he had seen, sent his tape to a local television station.[55] *Glik*, as we noted in the panel opinion, was decided in the smart-phone era. It is no longer happenstance that someone like Simon Glik has the tools needed to become a citizen journalist exposing what he believes is police misconduct. The right to record articulated in *Glik*, and the technology that now makes it easier to exercise that right, have fundamentally changed the nature of policing in this country.

B. Police Response

1. Increased Public Recording Capacity: Cell Phone Cameras

Traditionally, the police have not welcomed challenges to their authority. A now-classic 1959 study of the exercise of police power in New York City showed that any criticism on the street of a police officer's conduct was invariably interpreted as "an offensive challenge to the officer personally, as well as to his authority."[56] If an agitated citizen visibly wrote down an

police-citizen encounter (whether friendly or hostile) from obstructing police operations by distracting the officers and upsetting the citizens they are speaking with." *Id.* at 611 (Posner, J., dissenting).

54. Daniel Victor & Mike McPhate, *Critics of Police Welcome Facebook Live and Other Tools to Stream Video*, NYTIMES.COM (July 7, 2016), https://www.nytimes.com/2016/07/08/us/critics-of-police-welcome-facebook-live-and-other-tools-to-stream-video.html (noting improvements in personal video-recording technology since the King recording and the recent development of web-based live-streaming services, but noting too that even a live video does not necessarily capture every nuance of the story behind a particular incident).

55. *Id.*

56. PAUL G. CHEVIGNY, POLICE POWER: POLICE ABUSES IN NEW YORK CITY 99 (1st ed. 1969) ("Criticism of a policeman's handling of a situation, for example, is interpreted as an extremely offensive challenge to the officer personally, as well as to his authority.").

officer's shield number, the result was often an arrest for interfering with a police officer or disorderly conduct.[57] What happened to Simon Glik on the Boston Common was a modern-day version of that phenomenon—the invocation of a wiretapping statute to deter the use of modern technology to record the work of the police.

We described in *Glik* the substantial discretion granted to police officers.[58] As one team of scholars has put it, "police work remains essentially reactive, essentially unsupervised at critical moments, and essentially dependent upon the judgment of the officer on the scene."[59] This discretion makes the work of police morally taxing, in the sense that the justification for the exercise of authority is often ambiguous.[60] Even the issuance or non-issuance of a parking citation can become a moral question for a police officer. "Is the officer being even handed? Should he recognize extenuating circumstances? Should she give someone a break if it is deserved?"[61] Moreover, police officers are the public officials most likely to interact with the public.[62] And our laws empower them to use force, sometimes even deadly force, in those interactions.

Yet we also expect police officers to use force in a manner that complies with the law and the Constitution. Put differently, we expect the police to "maintain order through coercive force,

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57. *Id.* at 99–102. Indeed "[t]he recording of his shield number is one of the most threatening of all actions to a policeman, because, apart from the fact that he interprets it as an act of defiance, it implies that, justifiable or not, his behavior is about to be called to the attention of his superiors." *Id.* at 103.

58. *Glik*, 655 F.3d at 82 (pointing out that "law-enforcement officials . . . are granted substantial discretion" while also noting that "it may be misused," and acknowledging that the Supreme Court had in another context recognized the public interest in the "responsible exercise" of police and prosecutorial discretion (citation omitted)).

59. HOWARD S. COHEN & MICHAEL FELDBERG, POWER AND RESTRAINT: THE MORAL DIMENSION OF POLICE WORK 4–5 (1991) (recognizing in addition that "police have a considerable range of discretion to carry out their work," that "[p]olicing can be a solitary job in which the officer makes decisions with little opportunity to discuss them with colleagues or supervisors before acting," and that "[i]n matters of morality, where written rules cannot provide guidance in decisionmaking, police officers stand pretty much on their own").

60. *Id.* at 11 (recognizing that "police are morally complex persons in morally taxing jobs," and suggesting that an understanding of this reality enables the public to appreciate works of fiction like the movie *Serpico*).

61. *Id.* at 13.

62. *See, e.g.*, *id.* at 6 (referring to the police as the "first line and most visible representation of government power").

on the one hand, and, on the other, to respect the rule of law, individual rights and the limits of government authority."[63] We understand that the police must often make judgments about the use of their authority under difficult circumstances. We understand the moral dilemmas that they sometimes face in making their decisions. But the stakes in their exercise of judgment are so high that we as citizens must insist that their work receive public scrutiny.

In *Glik*, we acknowledged both the burdens of this scrutiny for the police and its importance for our way of life. "[P]olice officers," we said, "are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights."[64] 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."[65] The same restraint demanded of police officers in the face of "provocative and challenging speech,"[66] we said in *Glik*, "must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces."[67]

I must acknowledge that I now read with some uneasiness this statement in *Glik* that officers will now be "*merely* the subject of videotaping that memorializes, without impairing, their work in public spaces."[68] The focus of that statement was videotaping that records without impairing the performance of the duties of the police officers in circumstances comparable to Glik's arrest. Any discomfort that the police feel at being recorded in such circumstances does not qualify as impairment.[69] In this limited sense, the reference to "mere"

63. *Id.*

64. *Glik*, 655 F.3d at 84.

65. *Id.* (quoting City of Houston v. Hill, 482 U.S. 451, 462–63 (1987)).

66. *Id.* (quoting *Hill*, 482 U.S. at 461).

67. *Id.*

68. *Id.* (emphasis added).

69. Judge Posner takes a different view in his dissent in *Alvarez*, believing that the act of recording itself does impair the work of the police. As he puts it,

> [a]n officer may freeze if he sees a journalist recording a conversation between the officer and a crime suspect, crime victim, or dissatisfied member of the public. He may be concerned when any stranger moves into earshot, or when he sees a recording device (even a cell phone, for modern cell phones are digital audio recorders) in the stranger's hand. To distract police during tense

videotaping was not problematic. But that reference understates the power of images, seen widely via television and social media, to magnify the consequences of one incident for the police and the public. Although this power of magnification does not affect the validity of the legal analysis in *Glik*, it has had a dramatic effect on the significance of the decision.

We see that significance in the intense debate over policing in black communities, where, as one reporter put it, children experience "the close-up views of violence, obviously traumatizing," that "are giving rise to a generation of young people who distrust authority, grow up well before their time and suffer nightmares that seem too real."[70] The filming of police conduct has brought a new urgency to that long-simmering issue and the wariness and suspicion it engenders. Congressman James Clyburn of South Carolina, one of the state's most prominent political figures, has urged young African-Americans to "keep your cell phones tuned up, keep the battery charged and don't hesitate to turn them on" if "that's what it's going to take for police officers to really think twice before pulling their weapons."[71] As of this writing, phone apps like "Cop Watch," "I'm Getting Arrested," and "Stop and Frisk Watch" are available, all with easy recording and upload capabilities so that, according to one commentator, "you don't have to fumble around with your device, which might provide probable cause for lethal force."[72] And with tools like Periscope and Facebook Live, "videos can be streamed even before an encounter is over, leaving no time for investigations or official statements."[73] The technology allowing citizens to record and publish events instantaneously has advanced markedly since the issuance of *Glik* six years ago.

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encounters with citizens endangers public safety and undermines effective law enforcement.

Alvarez, 679 F.3d at 611–12.

70. Yamiche Alcindor, *What Children Endure In the Violent Collisions of Policing and Race*, N.Y. TIMES, July 10, 2016, at A14.

71. Clarence Page, *Think Twice Before You Pull Out Your Camera*, CHI. TRIBUNE, Apr. 21, 2015, http://www.chicagotribune.com/news/opinion/page/ct-cellphone-videos-police-perspec-0422-jm-20150421-column.html.

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

73. Victor & McPhate, *supra* note 54, at A18.

This increased ability to film police conduct also has enormous courtroom implications. Traditionally, a trial has been the re-creation through courtroom testimony of an event that occurred in the outside world. Now, although testimony remains important, digital recording can bring that outside event directly into the courtroom to support or contradict the testimony. For a long time, commentators have noted that juries often exhibit a significant bias in favor of a police officer's version of events over that of a civil-rights plaintiff or a criminal defendant. But "[v]ideo footage often goes a long way in narrowing or eliminating this built-in credibility gap."[74] Put bluntly, in some cases, "[a] camera can mean that there is no ambiguity about what happened."[75]

Not surprisingly, many law-enforcement officers feel besieged by these capabilities. One officer in Los Angeles observed that

> [a]ny time there is a traffic stop made, the cell phones come out . . . . The people taking them out have nothing to do with the incident, but they feel the need to videotape it. It's like they think, "I am not going to stand across the street. I am going to become part of the problem."[76]

Police warn too that a video does not always tell the full story, so it "can't be viewed as [if it were as reliable as] D.N.A. . . . It doesn't have that level of conclusiveness."[77] Yet the power of a video made during a police-involved shooting is undeniable. Drawing on a wartime analogy, one officer observes, "I think a lot of what people see creates shock and awe."[78] For many of the nation's 800,000 state and local law-enforcement officers, there is presently a wartime feel to their work. Following up on

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74. Gregory T. Frohman, Note, *What Is and What Should Never Be: Examining the Artificial Circuit "Split" on Citizens Recording Official Police Action*, 64 CASE W. RES. L. REV. 1897, 1903–04 (2014).

75. Darryl Pinckney, *Black Lives and the Police*, N.Y. REV. OF BOOKS (Aug. 18, 2015), http://www.nybooks.com/articles/2016/08/18/black-lives-and-the-police/.

76. Michael Wilson & Michael Schwirtz, *In Week of Emotional Swings, Police Face a Dual Role: Villain and Victim*, NYTIMES.COM (July 9, 2016), www.nytimes.com/2016/07/10/nyregion/in-week-of-emotional-swings-police-face-a-dual-role-villain-and-victim.html?_r=0.

77. Victor & McPhate, *supra* note 54, at A18.

78. Gillian Graham, *How It Looks . . . Behind the Badge*, ME. SUNDAY TELEGRAM, July 24, 2016, at A5.

then-recent police deaths in Baton Rouge and Dallas, a team of reporters noted that "[e]ven the most hardened veterans call this one of the most charged moments of policing they have experienced."[79]

2. Updated Police Equipment: Body Cameras

Given the reality that video technology is both omnipresent among civilians and powerful, many police departments have moved from resisting the recording of their conduct by citizens to a growing inclination to place body cameras on themselves. One study indicates that body cameras or, in official jargon, "on-officer recording systems," are now used by about twenty-five percent of police agencies in the United States, and that eighty percent are at least evaluating their use.[80] Police unions have generally not opposed body cameras, believing that they might help the police defend against unfounded citizen complaints and may often exonerate police officers rather than implicate them in misconduct.[81] President Obama announced in December 2014 a $263 million program to purchase body cameras and improve the training of police officers who would use them.[82]

Despite this momentum, there remain thoughtful dissenting voices on the use of body cameras. They raise serious privacy concerns for people who, unwittingly, and perhaps with no involvement in the incident being investigated, are revealed on a widely distributed video.[83] Some police officers worry that cameras will inhibit victims and witnesses from speaking freely to the police, particularly in cases of sexual abuse or assault.[84] With body cameras in greater use, judges and juries will expect video footage of incidents and, when no footage is available, the

79. Timothy Williams & Alan Blinder, *Dread and Anguish for Police: "We've Seen Nothing Like This,"* N.Y. TIMES, July 18, 2016, at A1.

80. Michaelson, *supra* note 72.

81. *Id.*

82. *Obama Calls for $263M Federal Response to Ferguson*, NYPOST.COM (Dec. 1, 2014), http://nypost.com/2014/12/01/obama-calls-for-75m-for-police-body-cameras/ (A.P. story).

83. Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, A Win for All*, ACLU (Mar. 2015), https://www.aclu.org/police-body-mounted-cameras-right-policies-place-win-all.

84. Michaelson, *supra* note 72.

officer's integrity might be questioned.[85] Then there are the continuing concerns posed by the activation and operation of body cameras. As one police officer put it: "I pity the first officer with a body camera who forgets to turn it on or is shot because their decision to turn on the camera slowed their application of force."[86]

There have already been studies on the impact of the use of body cameras. Somewhat surprisingly, a recent RAND Corporation study seemed to indicate that reported rates of assaults against officers wearing cameras on their shifts were an average of fifteen percent higher, compared to reported assaults against officers working similar shifts without cameras.[87] The authors of the study suggest that this unexpected result may be due to officers feeling more comfortable reporting assaults once they are captured on camera.[88] Also, they suggest, monitoring by camera may make officers less assertive and more vulnerable to assault.[89]

Other studies suggest that these increased assaults against police officers could be avoided if the officers notified civilians that their conduct was being recorded by a body camera.[90] That notification may encourage compliance with the orders of

85. PoliceOne Staff, *Poll Results: Cops Speak Out About Body Cameras*, POLICEONE, (Nov. 12, 2014), https://www.policeone.com/police-products/body-cameras/articles/7790682-Poll-Results-Cops-speak-out-about-body-cameras/.

86. *Id.*

87. *Body-Worn Cameras Associated with Increased Assaults Against Police, and Increase in Use-of-Force if Officers Choose When to Turn on Body-Worn Cameras*, RAND CORP. (May 17, 2016), http://www.rand.org/news/press/2016/05/17.html [hereinafter RAND Study]. As the following discussion indicates, however, the RAND Study seemed to show that always-on (instead of officer-controlled) body cameras reduced the use of force by officers. *Id.*; *see also* text accompanying notes 88–92, *infra.*

88. *Id.*

89. *Id.*

90. MARK G. PETERS & PHILIP K. EURE, BODY-WORN CAMERAS IN NYC: AN ASSESSMENT OF NYPD'S PILOT PROGRAM AND RECOMMENDATIONS TO PROMOTE ACCOUNTABILITY at iii (2015) (taking the position that "providing citizens with a notification that they are being recorded may encourage compliance with officers' orders and calm potentially volatile encounters"); *see also* RAND Study, *supra* note 87 (indicating that, when officers follow the RAND protocol of constant recording and an announcement at the beginning of any encounter that it will be filmed, the "combination of the camera plus the early warning creates awareness that the encounter is being filmed, modifying the behaviour of all involved" (quoting RAND Study principal investigator)).

officers, even by highly agitated people, and promote more peaceful interactions with the public.[91]

As for the use of force by the police, the Rand study found that if officers turned cameras on and off during their shifts, use of force increased. If they kept the cameras running for their whole shifts, use of force decreased.[92]

Perhaps anticipating such a finding, the ACLU issued a report that calls for continuous recording throughout a police officer's shift, to eliminate any possibility that an officer could evade the recording of abuses committed on duty. Yet, the ACLU worries about the increasing use of surveillance video in our society, and specifically notes that continuous recording raises privacy issues for both police officers and the public.[93] On balance, though, weighing the importance of police accountability against the privacy interests of citizens generally, the ACLU has concluded that the balance tips heavily in favor of body-worn cameras. "Ideally," the ACLU says, "there would be a way to minimize data collection to only what was reasonably needed, but [there is] currently no technological way to do so."[94]

Given these technological and policy issues, the debate over the use of body cameras will continue for some time. More studies will and should be done on the effects of body cameras as the technology improves and law-enforcement officers have

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91. PETERS & EURE, *supra* note 90. *But see* RAND Study, *supra* note 87 (noting that RAND Study data suggest that turning the camera on before the interaction begins may be critical: If an officer "decides to announce mid-interaction they are beginning to film, for example, that could provoke a reaction that results in use-of-force").

92. The RAND Study "set out a protocol for officers allocated cameras during the trials: record all stages of every police-public interaction, and issue a warning of filming at the outset." RAND Study, *supra* note 87. But it turned out that "many officers preferred to use their discretion, activating cameras depending on the situation." *Id.* Officers' use of discretion apparently made a significant difference, because "during shifts with cameras in which officers stuck closer to the protocol, police use-of-force fell by 37% over camera-free shifts," while "[d]uring shifts in which officers tended to use their discretion [about whether to turn their cameras on], police use-of-force actually rose 71% over camera-free shifts." *Id.*

93. *See* Stanley, *supra* note 83.

94. *Id.* Also, with the accumulation of video recordings through the use of body cameras, there is another version of the accountability–privacy tension involving standards for retention of the videos and public access to them. *See generally* Kyle J. Maury, Note, *Police Body-Worn Camera Policy: Balancing the Tension Between Privacy and Public Access in State Laws*, 92 NOTRE DAME L. REV. 479 (2016).

more experience with their use. Although today's study results may seem preliminary and tentative, there can be little doubt that body cameras of some type will become an almost universal and routine part of police work. As one commentator put it:

> Body camera implementation is a tidal wave that cannot be stopped. Overwhelming political and judicial support has answered the question whether officers should (or will) be equipped with cameras. Now, the question is how *soon* can officers be equipped.[95]

That is a remarkable revolution in the nature of police work in the six years since *Glik* was published.

IV. THE CONTINUING SIGNIFICANCE OF *GLIK*

Interestingly, this revolution has occurred even though *Glik*, and the four companion cases decided by other federal courts of appeals,[96] are not the law of the land. The Supreme Court has not yet issued a decision applying the First Amendment to the filming of police conduct. So why has there been this wide acceptance of the right articulated in the *Glik* line of cases?

I think that the answer is twofold. First, there is the point that we made in *Glik* about "the fundamental and virtually self-evident nature of the First Amendment's protections" for the right to film the police carrying out their public responsibilities on the public's behalf.[97] In a free society it seems appropriate that we can invoke this potent tool of accountability. Second, perhaps reflecting the widely held approval for the First Amendment's protection of this right to film, there was the uniformly positive response to *Glik* in newspapers, blogs and

95. Maury, *supra* note 94, at 486 (emphasis in original).

96. See *Alvarez*, 679 F.3d at 608; *Smith*, 212 F.3d at 1333; *Fordyce*, 55 F.3d at 442; and, most recently, Turner v. Lieutenant Driver, 848 F.3d 678, 688 (5th Cir. 2017). The *Turner* court relied extensively on *Glik* in concluding that "First Amendment principles, controlling authority and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place and manner restrictions." *Turner*, 848 F.3d at 688. The court added: "As the First Circuit explained, 'the filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within [basic First Amendment] principles.'" *Id.* at 690 (citation omitted).

97. *Glik*, 655 F.3d at 85.

law journals. Although I cannot cite hard evidence for this proposition, I think that reaction contributed to a sense that the First Amendment principle articulated in *Glik* is now a durable part of the law, and that the public and the law-enforcement community may rely upon it and should adjust to it.

I acknowledge that I take some satisfaction in this belief in the importance of *Glik*. I also think about the case every time I see another story about a confrontation between the police and a member of the public memorialized on film, whether by a witness with a smart phone or the police with a body camera. But I also acknowledge an unanticipated consequence of the *Glik* line of cases. The recording of police conduct, whether by witnesses or the police themselves, has inflamed the debate over the racial divide in this country, sometimes with tragic consequences.

So we must face a hard truth about policing in the digital age. Although we must honor the vast majority of police officers who do their difficult work well, we must also recognize that black Americans experience the criminal justice system, including police interactions, differently from their white neighbors. Consider, for example, the Department of Justice's investigative report of the Baltimore Police in the aftermath of Freddie Gray's death, which revealed a significant racial disparity in arrests in Baltimore for highly discretionary offenses, such as "failure to obey" or "trespassing."[98] That finding reflects a presumption of criminal activity by black males that Bryan Stevenson, the head of the Equal Justice Initiative, an organization dedicated to saving the lives of death-row inmates, sees throughout our criminal justice system. As he puts it:

> Our society applies a presumption of dangerousness and guilt to young black men, and that's what leads to wrongful arrests and wrongful convictions and wrongful death sentences, not just wrongful shootings. . . . [W]e have a long history of seeing people through this lens of racial difference. It's a direct line from slavery to the treatment of

98. *See, e.g.*, Richard A. Oppel Jr., Sheryl Gay Stolberg & Matt Apuzzo, *Justice Department to Release Blistering Report of Racial Bias by Baltimore Police*, NYTIMES.COM (Aug. 10, 2016), https://www.nytimes.com/2016/08/10/us/justice-department-to-release-blistering-report-of-racial-bias-by-baltimore-police.html.

> black suspects today, and we need to acknowledge the shamefulness of that history.[99]

President Obama referred to this reality in his speech honoring the five Dallas police officers slain in the summer of 2016. The President acknowledged that, fifty years after passage of the Civil Rights Act, black parents, wary of interactions with the police, "still fear that something terrible may happen when their child walks out the door, still fear that kids being stupid and not quite doing things right might end in tragedy."[100] But he also warned that this fear does not justify irresponsible condemnation of the police. Hence he called on protesters to

> guard against reckless language going forward, look at the model set by the five officers we mourn today, acknowledge the progress brought about by the sincere efforts of police departments like this one in Dallas, and embark on the hard but necessary work of negotiation, the pursuit of reconciliation.[101]

Then he called on police departments to

> acknowledge that, just like the rest of us, they are not perfect; that insisting we do better to root out racial bias is not an attack on cops, but an effort to live up to our highest ideals.[102]

And then he called on all Americans to "decide to come together and make our country reflect the good inside us."[103]

President Obama has no illusions about the difficulty of this reconciliation. As he put it during an exit interview in November 2016:

> We know that when there is a conversation about the police and African-Americans, and conflict between those two,

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99. Jeffrey Toobin, *Justice Delayed*, NEW YORKER, August 22, 2016, at 40.

100. Barack H. Obama, President of the U.S., *Remarks by the President at Memorial Service for Fallen Dallas Police Officers,* THE WHITE HOUSE (July 12, 2016), https://www.whitehouse.gov/the-press-office/2016/07/12/remarks-president-memorial-service-fallen-dallas-police-officers.

101. *Id.*

102. *Id.* (also reminding listeners that police officers find reward in "knowing that our entire way of life in America depends on the rule of law; that the maintenance of that law is a hard and daily labor" and that "we don't have soldiers in the streets or militias setting the rules," but instead we "have public servants—police officers—like the men who were taken away from us . . . . upholding the constitutional rights of this country").

103. *Id.*

> everybody goes to their respective corners. That is an area that just triggers the deepest stereotypes and assumptions—on both sides. . . . If you don't stick your landing in talking about racial issues, particularly when it pertains to the criminal-justice system, then people just shut down. They don't listen.[104]

In my view, we can only get people to listen in conversations about the problems of policing in the black community if we both honor the work of the police and accept the legitimacy of grievances in the black community about the misdeeds of some police officers. With powerful digital images now sometimes confirming the substance of those grievances and at other times vindicating the work of the police, the right of individuals to record the public work of the police can help, in the long run, to bridge the differences between the police and the communities that they serve.[105]

V. AFTERMATH

Simon Glik's case never went to trial. Instead, the City settled for $170,000 in damages and legal fees. In the wake of that settlement, the Internal Affairs Division of the Boston Police Department, which initially refused to investigate Glik's complaint, disciplined two of the officers involved in his arrest for using "unreasonable judgment."[106] The City also developed a training video based on facts similar to the *Glik* case that instructs police officers not to arrest people who openly record police work in public.[107] Then-Commissioner Edward F. Davis said that the *Glik* case had changed the Department's training for

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104. David Remnick, *It Happened Here*, NEW YORKER, Nov. 28, 2016, at 54, 63.

105. There is some reason to be hopeful about this prospect. "Videos, once made public, have given authority to experiences of people of color with respect to the police, and have inserted into privileged lives the realities of those lived experiences." Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1565 (2016). And "national polls reveal that between December 2014 and May 2015 white Americans came to believe in larger numbers than ever that reports of police violence against African Americans are not isolated incidents and that there is a broader problem in American policing." *Id.* (citation omitted).

106. Matt Yas, *Lawyer Settles Cell Phone Suit Against City, Cops for $170K*, MASS LAWYERSWEEKLY.COM (Mar. 27, 2012), http://masslawyersweekly.com/2012/03/27/lawyer-settles-cell-phone-suit-against-city-cops-for-170k/.

107. *Id.*

its officers and "the way we advise officers to deal with the situation." But, as he noted, the case "still doesn't give someone the right to interfere with [a] lawful arrest"[108] while filming.

Subsequent to the development of the training video, new Commissioner William B. Evans announced in September 2015 that body cameras for police officers were coming to Boston.[109] The legal director of the ACLU in Massachusetts supported the Police Department's camera plan, explaining that, "[i]f combined with a policy that follows three core principles—accountability, privacy, and transparency—body cameras can deter misbehavior on both sides of the badge."[110] The promised body-camera program began in Boston with a pilot project that is still underway, having been extended for an additional six months because the initial pilot period has not generated enough data to support the planned analysis of body cameras' impact in use-of-force situations.[111] The project is now scheduled to end on September 11, 2017.[112]

For Simon Glik, all of these developments had to be gratifying. Prior to his arrest in October 2007, people who had tried to record the public conduct of police officers in Boston and elsewhere had been ordered to cease the recording or face arrest for the same sort of spurious charges invoked against

108. Monica Brady-Myerov, *Boston Settles Suit Over Recording of Police Officers*, WBUR.ORG (Mar. 28, 2012, 10:39 AM EDT), http://legacy.wbur.org/2012/03/27/recording-officers-settlement (indicating that "police could still arrest and charge someone with obstruction if their recording of the police action gets in the way").

109. Jacqueline Tempera, *Boston Police Will Test Body Cameras*, BOSTONGLOBE.COM (Sept. 16, 2015), https://www.bostonglobe.com/metro/2015/09/15/commissioner-evans-backs-test-program-for-body-cameras-boston-police/i48KxkB8ynLv723H1DjbPJ/story.html.

110. *Civil Rights Groups Applaud Boston Police Department Decision on Body Cameras and Announce Release of Model Policy*, ACLU.ORG (Sept. 17, 2015), https://www.aclu.org/news/civil-rights-groups-applaud-boston-police-department-decision-body-cameras-and-announce-release.

111. Yawu Miller, *Body Camera Advocate Pushing for Immediate Implementation in Boston*, BAYSTATEBANNER.COM (Feb. 23, 2017, 6:00 AM EST), http://baystatebanner.com/news/2017/feb/23/body-camera-advocate-pushing-immediate-implementat.

112. Jeremy C. Fox, *Boston Police Extend Body Camera Pilot Program*, BOSTONGLOBE.COM (Mar. 12, 2017), https://www.bostonglobe.com/metro/2017/03/12/boston-police-extend-body-camera-pilot-program/9AmEFOh4e4pYObWAXW9Z1M/story.html.

Glik.[113] This time, however, the police charged a defense attorney who knew how to respond. His challenge to those unjust accusations led to wide recognition of the First Amendment right to film the public conduct of police officers, an achievement with profound consequences for the nature of policing in the digital age.

113. *See, e.g.*, Jesse Harlan Alderman, *Before You Press Record: Unanswered Questions Surrounding the First Amendment Right to Film Public Police Activity*, 33 N. ILL. U. L. REV. 485, 489–90 (2013).