

Police, Protestors and the Press

Winter 2012



How a wave of protests across the nation has tested police-press relations, and what it means for journalists who cover them.



“I’m with the press! I’m with the press!” a reporter yelled out as he was getting arrested. “I’ve got a press pass!”

The conventional wisdom was that yelling that identifying phrase above the din of a rallying crowd or amidst the confusion of police action could help a journalist avoid arrest.

But now, as documented in a series of videos that have surfaced across the Internet since the Occupy Wall Street protests have swept the nation, such shouts are likely to land journalists in handcuffs. Matthew Hamill, a host at Radio Free Nashville, yelled “I’m with the press” on Dec. 3 while covering Occupy Nashville. The officer replied “I don’t care who you are,” as he slapped on the handcuffs.

These days, credentials dangling around a reporter’s neck intended to provide special access to places are no guarantee that police will not lump the reporter in with protestors on charges, some of which are later dropped, such as disorderly conduct, trespassing or failure to comply with police orders.

continued inside



**REPORTERS
COMMITTEE**
FOR FREEDOM OF THE PRESS

If a reporter is lucky enough to avoid arrest, press passes, which once afforded journalist more access than the general public to incident scenes, are sometimes used to identify the folks who are corralled in press pens out of shot of the stories developing on the streets.

And, perhaps most telling, fewer reporters are shouting “I’m press!” for fear that it will make them clear targets for getting ordered back, harassed, roughed up or even arrested by authorities who would rather not have the press closely documenting their activities.

To be sure, these allegations of deteriorating police-press relations surrounding the coverage of the Occupy movement and similar incidents involving law enforcement officers do not necessarily represent a trend that has spread to police departments across the nation. In fact, many have maintained good ties with members of the media, and others have been responsive to concerns voiced by the press.

But with the dozens of reporters—members of the mainstream media, students, freelancers, bloggers and even cartoonists—that have been arrested or harassed in the months of covering the Occupy protests, the coverage has reignited an important debate about police-press relations. And at a time when it seems the protestor will continue to command the attention of the media with the sustained Occupy movement and what will likely be the most volatile national political conventions of the decade this summer, journalists are beginning to ask what kind of stage is being set as they continue to cover the chaos.

And if communications should break down and a journalist gets arrested, he or she needs to know what to do during and after that arrest. That includes knowing what to do to make

sure any future civil rights suit can be successful.

This guide is meant as an introduction for journalists to the general law that governs claims that the government somehow violated an individual’s civil rights and discusses the factual scenarios that often determine the results. It does not replace the legal advice from an attorney in one’s own state when confronted with a specific legal problem. Journalists who have additional questions or who need to find a lawyer with experience litigating these types of claims can contact the Reporters Committee at (800) 336-4243.

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Who’s impeding whom?

By Kirsten Berg

At events with huge crowds, rowdy protestors, and large law enforcement presence—high-intensity situations for cops and journalists—professions collide as adrenaline runs high.

Most of the journalism and law enforcement communities agree that reporters should be able to do their work covering these protests, so long as they are not breaking laws or interfering with police action.

But differing definitions of “interfering” and even “law-breaking” have enflamed debate between these groups over essentially who-is-impeding-who doing their job. In some situations, the argument is complicated by the somewhat chaotic crowd situations that surround them. (It should be worth noting, however, that some of the situations of reporter harassment and arrest also occurred during small, tame events, such as when visibly credentialed, equipment-laden *Milwaukee Journal-Sentinel* reporter Kristyna Wentz-Graff was one of three arrested during a street march of only 30 pro-

testors.)

Take for example New York City, where the birthplace of the Occupy Wall Street Movement has become a microcosm of these strained police-press relations. Faced with reports of 26 journalists (five of them credentialed by the New York City Police Department) arrested the night of the November Zuccotti Park eviction alone and allegations of roughing up journalists and blocking their newgathering, city officials staunchly defended police actions.

There was no media blackout, they claimed. The media was kept back in press pens for their own safety.

Many of the reporters did not hold up-to-date NYPD-press passes, the city alleged.

While some of the journalists had their arrests voided, the city said others were rightfully booked for trespassing or disorderly conduct.

“You don’t have a right as a press person, I don’t think, to stand in the way just in the interest of getting the story,” said New York Mayor, and media mogul, Michael Bloomberg during his weekly radio slot

on WOR-AM.

Although the press quickly dismissed some of these explanations and media advocates as unfounded (do reporters in dangerous war zones get held back for their own safety?, quipped a few journos), that question of interference and reporters rights again dominated debate.

Press and civil liberties advocates, however, seemed to signal that they thought the actions of press interference they had documented during the Nov. 15 eviction reflected a clear, department-wide policy to keep reporters away from the scene. This obstruction, a sternly-worded letter signed by media organizations including the Reporters Committee for Freedom of the Press said, amounted to actions “more hostile to the press than any other event in recent memory” and were “inappropriate, if not unconstitutional.” In short, these actions were not taken out of legitimate concerns about journalists interfering with police work.

“We have never argued, for example,
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“Democracy Now!” host Amy Goodman and two producers were among the more than 40 journalists arrested during the 2008 RNC convention while covering the protests in downtown St. Paul.

After an arrest

A journalist’s guide to civil rights claims and other remedies for government interference with newsgathering activities

By Kristen Rasmussen

More than 40 journalists were arrested while covering protests during the 2008 Republican National Convention in St. Paul. All charges were dropped, and a broadcast journalist and two producers, the latter of whom said they were bloodied during their encounters with police, sued the Minneapolis and St. Paul police departments. The agencies recently agreed to pay the journalists \$100,000 to settle the suit.

On the other hand, seven student journalists covering International Monetary Fund and World Bank demonstrations in Washington, D.C., were among the more than 650 people arrested during the chaotic event. Four of the students sued the D.C. police department, U.S. Attorney General and National Park Service. This October will mark the 10th anniversary of the filing of the lawsuit, which is still pending in federal court.

Scenarios like these raise an obvious question: How can such seemingly similar incidents give rise to such different outcomes? The answer centers on a number of legal doctrines, courts’ interpretation of which depends on the specific facts of a particular case.

Elements of a civil rights claim

When a journalist or member of the public believes that a government official purporting to be performing official duties deprived the individual of a right guaran-

teed under the U.S. Constitution, he or she may be able to sue the official in civil court. These civil rights claims, brought under federal law 42 U.S.C. § 1983 and thus often dubbed “Section 1983 claims,” allow a plaintiff to seek damages from the government and the official for the latter’s unlawful conduct. Generally, the purpose of a Section 1983 claim is to prevent civil rights violations by government officials.

Section 1983, adopted as part of the Civil Rights Act of 1871 and then informally known as the Ku Klux Klan Act, applies to state and local officials. The right to sue a *federal* official for such violations — called a *Bivens* action after the 1971 case in which the U.S. Supreme Court allowed such claims — is not explicitly authorized by the statute but springs from the Fourth Amendment right to be free from unreasonable searches and seizures.

Most civil rights claims brought by journalists allege violation of the reporters’ rights to freedom of the press and to gather news under the First Amendment. Actions that may constitute an infringement of this right include the detention and arrest of reporters as they do their jobs, interference with their ability to gather information and report on matters of public interest and concern by, for example, denying access to a place where a newsworthy event has occurred and harassment or retaliation for journalists’ publishing or newsgathering activities.

Journalists may also bring a civil rights

action for violation of their right to be free from unlawful searches and seizures under the Fourth Amendment. When officials confiscate journalists’ notes, film, video or other newsgathering equipment or arrest them without probable cause, a Section 1983 claim or *Bivens* action under this theory may be appropriate.

Potential defendants

Although a civil rights claim can be brought only against a government official acting “under color of” law, that does not mean an official must be on duty. For example, a newspaper publisher brought a successful Section 1983 action against off-duty sheriff deputies who attempted to buy and throw away all copies of an election-day newspaper criticizing their favorite candidates. This attempt to regulate or censor the news violated the speaker’s constitutional right to communicate, as well as the audience’s right to receive the information, the U.S. District Court in Baltimore ruled in *Rossignol v. Voorhaar* in 2004.

Although 42 U.S.C. § 1983 does not explicitly allow suits against federal officers for violations of constitutional rights, the U.S. Supreme Court in *Bivens v. Six Unknown Named Agents* held that a victim whose Fourth Amendment rights had been violated by Federal Bureau of Narcotics agents could sue for the violation of the amendment itself, despite the lack of any federal statute authorizing such a suit.

Bivens' creation in 1971 of a cause of action against federal officers has become particularly significant in recent years, said Alexis Agathocleous, a staff attorney at the Center for Constitutional Rights who represented "Democracy Now!" news hour host Amy Goodman and producers Sharif Abdel Kouddous and Nicole Salazar in their lawsuit stemming from their arrests while covering the 2008 Republican National Convention.

"There has been an increase in the policing [of newsworthy events] by federal law enforcement officers around the country, particularly at mass demonstrations," Agathocleous said. "They view these events as matters of national security."

In addition to the municipal police departments, Goodman, Kouddous and Salazar also named an unidentified U.S. Secret Service agent as a defendant. Unlike Section 1983 claims, *Bivens* actions

may only be brought against individual officers, not the government agencies that employ them.

Immunity issue

One of the most significant impediments to a successful civil rights claim is the government's invocation of qualified immunity. Under this doctrine, government officials are shielded from civil liability if their conduct did not violate clearly established rights of which a reasonable person would have known. Even if officials violated a well-established right, they may still be entitled to immunity if they can show that their actions were objectively reasonable in light of the law and the information they had at the time of the action. The Supreme Court has said that the doctrine provides ample room for mistaken judgments by protecting "all but the plainly incompetent or those who

knowingly violate the law."

The issue has risen recently in causes of actions stemming from arrests for recording the police in the performance of their public duties. Not surprisingly, the split in legal authority about whether a constitutional right to videotape the police in public exists is reflected in courts' qualified immunity decisions.

When Simon Glik recorded police officers arresting a suspect on the Boston Common, they arrested him for, among other charges, violation of the Massachusetts wiretap statute, which criminalizes secretly recording an in-person or telephone conversation without the consent of all parties to the conversation. A Boston Municipal Court judge dismissed the charge after the officers admitted that Glik publicly and openly recorded them, in contravention of the law's requirement that an unlawful recording be secret.

Who's impeding whom?

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that the press or news photographers should be able to trample all over a crime scene, get so close they are in the way of arresting people, or get in the way of police going after a suspected criminal, compromising the ability of the police to do their jobs," said David Diaz, vice president of the New York Press Club (NYPC) and spokesperson for the Coalition for the First Amendment, a newly formed association of New York-area media outlets that rose out of deteriorating police-press relations in that area.

"The Zuccotti situation is the quintessential scenario that justifies many of the freedoms of the press," he said, adding that if the press has any mandate at all under the First Amendment privileges, it is to report on government actions of controversial and potentially illegal nature. "Certainly going in and using police force to evict peaceful protesters from a park, even if they were there illegally, is something the press has every right to witness and report. It was in public.

But when there are organized efforts to prevent the press from reporting on these events, such as what he said happened during the eviction, it means the administration gets to control the narrative of the events, Diaz said.

At least part of the problem, media advocates and police agree, is the permeation of the everyone-has-a-camera, gotcha-moment, viral video culture of today. Whether it is the lens of a

citizen's camera-phone or a journalist's professional video equipment, some officers are reacting to being in the spotlight for actions that formerly occurred in the shadows.

In fact, some of the most damning portraits of police action during the Occupy movement, for example the cop pepper-spraying the line of peaceful protestors near Wall Street, came from an observer pointing a camera right at them. Most of this coverage was taken from a reasonable distance in public, but whether some of the attempts to get close to the action for the perfect shot are interfering with police work is still up for debate. But at least one police chief, Tim Dolan of Minneapolis, thinks it usually does not interfere.

"Cameras in your face are not going to impede officers anymore. Everyone who is out there has a camera or a cell phone, and you see scenes of a bunch of people charging a police line and 50 people recording him or her. Cameras are not an obstruction anymore," he said.

So in the disagreement about interference and law breaking, where is the line drawn?

Legally, the rights of reporters to gather the news in these types of situations are somewhat murky.

What is absolute is that reporters have the same rights as other citizens to observe, photograph, and record in public spaces. This means that authorities cannot, for example, keep journalists back for their own safety or stop them from photographing on a sidewalk if the public is allowed in those areas.

In terms of specific, guaranteed First

Amendment rights for newsgathering, however, it is more complicated.

Most courts have ruled that the same laws apply to the press and the public. So a journalist is not immune from charges such as unlawful assembly or disobeying a police order, even when they are doing so because they are covering the allegedly law-breaking protestors brought in on the same charges. An arresting official still has to prove probable cause for arrest, however, and cannot arrest a journalist simply out of irritation or frustration.

In a limited number of cases, reporters can successfully sue police officers under the First Amendment for unlawfully interfering with their newsgathering. To be successful, reporters must prove that they were detained specifically because they were covering the news, not just because they were suspected of breaking a law. But this is a difficult assertion to prove in court: Did police arrest the reporter because they were trying to control the scene, or was it to stop the journalist from reporting?

And journalists can sometimes turn to other defenses. For example, a law may not give the reporter the right to follow protestors as they trespass on private property, but he or she may be able to get their charges dismissed on more technical arguments about intent or lack of damages.

Ultimately, however, the choice about referring reporters for prosecution in these situations comes on a department-by-department basis. ♦



AP Photographer Matthew Rourke was arrested during the 2008 Republican National Convention in St. Paul.



AP PHOTOS

Glik sued in federal court, alleging that the officers violated his First and Fourth Amendment rights by arresting him for openly recording police officers carrying out their duties in public and confiscating his recording device, his cell phone.

The officers moved to dismiss, asserting qualified immunity from liability because Glik did not have a clearly established First Amendment right to document police conduct. A U.S. District Court in Boston last June denied the officers' motion to dismiss.

The court in *Glik v. Cunniffe* stated that "in the First Circuit, this First Amendment right publicly to record the activities of police officers on public business is clearly established."

The officers appealed the denial of the motion to the U.S. Court of Appeals in Boston (1st Cir.), which last August upheld the denial in an opinion that vigorously affirmed that the newsgathering protections of the First Amendment extend to "the filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities."

This right is a "basic, vital, and well-established liberty safeguarded by the First Amendment," the court said. "It is firmly established that the First Amendment's aegis extends further than the text's proscription on laws 'abridging the freedom of speech, or of the press,' and encompasses a range of conduct related to the gathering and dissemination of information. Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in pro-

tecting and promoting 'the free discussion of governmental affairs.'"

Because the officers allegedly violated a clearly established right, they are not entitled to immunity from liability, and Glik's lawsuit against them may proceed. Glik has said that he plans to pursue the claim.

But another man arrested for recording the police as they carried out their official duties does not have that opportunity.

Like Glik, Brian Kelly, the passenger in a truck pulled over by law enforcement in Carlisle, Pa., was arrested for violation of a state wiretapping law, in his case Pennsylvania's, which requires the consent of

all parties to record in situations where there is a reasonable expectation of privacy. Before the officer arrested Kelly, however, he confirmed his decision to do so with the assistant district attorney, who told the officer it was appropriate for him to arrest Kelly for violation of the statute.

Charges against Kelly were dropped, and he sued the officer, claiming that seizure of his camera and his arrest violated his Fourth and First Amendment rights.

A U.S. District Court in Harrisburg, Pa., granted the defense motion for summary judgment, holding that the officer was immune from liability because any

Convention/Event Hotlines

The Reporters Committee will be operating special hotlines for journalists during the G8 Summit in Chicago in May, as well as the two national political party conventions in late summer.

Democratic National Convention
Sept. 3-6, Charlotte, N.C.:
McGuireWoods LLP

Republican National Convention
Aug. 27-30, Tampa, Fla.
Thomas & LoCicero

G-8 Summit
May 15-22, Chicago
Mandell Menkes LLC

Local phone numbers will be established closer to the conventions and will be announced on the Reporters Committee website. As a backup, journalists can always call the Reporters Committee's main hotline, which operates 24 hours a day, year round.

REPORTERS COMMITTEE HOTLINE

800-336-4243

Looking to policy

By Kirsten Berg

As recent protests have proven, police-press relations are defined on a city-by-city basis, and sometimes even officer-by-officer basis.

Some departments have different policies towards reporters doing their jobs as a matter of attitude or training. For example, they may have a rule about not arresting credentialed or otherwise recognizable journalists or about dropping charges against them if they are detained.

Some of these regulations are spelled out, such as in New York where a police manual reads, "When incidents spill over or occur on private property, members of the media will not be arrested for criminal trespass, unless an owner or representative expressly indicates that the press is not to be permitted." Though, as the arrests during the Zuccotti Park eviction proved, these regulations were not always followed.

But if the police and the press could work together and form a mutually accepted policy about treatment of the press during these sometimes chaotic events, what would it look like?

One answer may come from the Minneapolis Police Department. In 2008, the cities of St. Paul and Minneapolis co-hosted the Republican National Convention, which became a source of tension for police-press relations when dozens of reporters were arrested while covering the demonstrations outside the convention center.

After the Twin Cities finished their hosting duties, Minneapolis Chief of Police Tim Dolan asked to work with the Police Executive Research Forum (PERF), an organization of law enforcement leadership from major cities that focuses on police policies of which he is a board member, to craft a report about the event and evaluate what would be the best policies to adopt in the future for policing large events. Dolan specifically requested that one focus had to be on drafting best practices for how to deal with members of the media. (Lawyers representing the Reporters Committee and its hotline during the convention met with Dolan and others before hand to discuss exactly these concerns, and how police would work with the media.)



JOURNAL SENTINEL PHOTO

Milwaukee *Journal Sentinel* photojournalist Kristyna Wentz-Graff was arrested in November while covering an Occupy Milwaukee protest. Police said it was not clear she was a journalist, though her *Journal Sentinel* ID badge is visible in the photo.

After a series of meetings that he conducted with members of the press, specifically reporters from local newspapers and television stations, the group came up with agreed upon recommendations. The result: an eight-page section of the report "Principles of Policing Mass Demonstrations" devoted to highlighting the importance of police-press relations in a democratic society, bulleted responsibilities for the police and the press to follow in these situations, and enumerated guidelines for police dealing with the media during such protests. (A full copy of these guidelines is available on the Reporters Committee Website.)

The document, for example, suggests creating a "cooperative" climate by having police meet with journalists before events when possible, setting up a process for easily and uniformly identifying journalists, clarifying rules about access and dispersal orders in writing, inviting journalists to observe police training, setting up media observation areas when they are necessary within a reasonable viewing and audible range of the event and providing ample numbers of public information officers to relay information or mediate conflicts. The guidelines also suggest excluding media from mass arrests of protesters when possible, for example by warning journalists when arrests are imminent, or, if media arrests occur, quickly releasing them.

The report also states that police should be able to expect that the press will do their part by carrying appropriate media credentials and understanding department policies and laws.

Chief Dolan admits that the topic of how to deal with members of the press can sometimes be controversial among his police colleagues in other cities, especially in matters where members of the media may be considered to be breaking the law.

Dolan said this even came up during the convention, noting that St. Paul had different policies than its twin city Minneapolis on this same topic. For example, unlike St. Paul, he said, Minneapolis would quickly "unarrest" reporters who had been caught up in massive sweep arrests, rather than detaining and charging them.

"In these cases we are not talking about participation in damaged property, we are talking about a failure to obey a command to disperse. In these types of situations, we recognize that a reporter covering a story will not obey that order," he said.

He said with future events, especially ones like the conventions that can be planned in advance, he would consider issuing separate credentials for reporters covering events outside the convention floor so that his force would not have the burden of determining who is a reporter and who is not on the spot. He said the

process should be open to all and that the requirements would be set so that new media, such as bloggers, could be accommodated.

He said he has shared his thoughts and experiences, though not necessarily these written guidelines, with other police departments though PERF, including with the future convention host cities Tampa and Charlotte. But, he reiterated, it is ultimately up to each department to choose what policies they think are best for them to adopt.

And police policies alone are not enough, as New York-area media advocates have had to reiterate in their struggle to get better treatment for reporters covering police action.

In New York, the police patrol guide actually states specific, favorable policies toward the press, thanks to a 1999 agreement between the force and the media. The guidelines include rules such as not interfering with videotaping or photographing in public places and that the media be given access within a clear sight of events—both of which press advocates say have been clearly violated by the department despite being on the books for over a decade.

To their credit, and as a direct result of a meeting between press representatives and the administration in response to the Zuccotti Park raid, Commissioner Raymond Kelly issued a department-wide “finest” message, an order read at 10 consecutive roll calls reiterating the non-interference clauses of the guide.

But just days after the Zuccotti Park incidents, more incidents of interfering with reporters popped up, including one videotaped encounter of an NYPD officer stepping back and forth to use his body to physically block a *New York Times* photographer from taking a picture of an ongoing arrest during an Occupy Wall Street demonstration in the World Financial Center. The near cartoonish actions of the officer using his body to stop seasoned photographer Robert Stolarik prompted a “Are you really doing this right now?” from the journalist.

This leads many media advocates to diagnose the problem, at least in New York, as an issue of attitude, not policy.

“The problem is not with the policies, they are good as written. I have been around long enough to see what this department has looked like under different administrations, and it has been as bad as it has been in a long time. It is a

matter of approach and attitude,” said Christopher Dunn, the associate legal director at the New York Civil Liberties Union, who has been monitoring incidents of police-press relations surrounding the Occupy protests in New York.

“The philosophy that seems to be coming from the top [of the NYPD] is to be aggressive with reporters, and until you see that change, you are not going to see changes on the street,” he said.

For one, they have been more receptive to complaints and concerns of reporter treatment since the eviction incidents, or at least quicker to respond, said *New York Times* vice president and counsel George Freeman.

Freeman was also present at a meeting between media organizations and the police department requested by advocates a few days after the raid. He explained that the finest message was an immediate and welcomed response to the concerns being voiced, but that it did not seem to produce immediate results as demonstrated by the other interference issues that happened in the days following. (He noted, however, that the NYPD responded quickly to a letter he sent about the incident with the *Times*’ Stolarik and said they were looking into the issue and would consider disciplinary action for that officer.)

He also said that officers at the meeting had informed him that there was ongoing police training about how to deal with members of the media, which itself was a response to a summer meeting about a separate press interference incident involving the NYPD. The department has since elaborated on the training, saying it includes rehashing NYPD directives about dealing with members of the press in lectures, handouts, slideshows and training.

But the NYPC’s Diaz said it again is an issue of in-writing, or rather in-training, versus in-practice

“You can say ‘yes, come do a class’ and instruct to the needs of the news media, what our rights actually are, but if the culture they are in and the messages they are getting are ‘well that is all well and good, but do as you see fit and if you think that the press is overstepping its boundaries, you make your own subjective judgments,’ it won’t do any good.” ♦

reasonable officer in his situation would have relied on advice given by the assistant district attorney.

Kelly appealed to the U.S. Court of Appeals in Philadelphia (3rd Cir.), which held last October in *Kelly v. Borough of Carlisle* that the officer was entitled to qualified immunity on Kelly’s First Amendment claim because, due to “insufficient case law,” there was no established right to videotape a police officer during a traffic stop. The finding, however, was limited to the particular, narrow context of traffic stops, which are often “inherently dangerous,” the court said.

Generally, qualified immunity will not be a significant issue in civil rights suits brought by journalists arrested for simply doing their job while not interfering with police duties — claims like those of the “Democracy Now!” journalists, according to Agathocleous, their lawyer. That’s because there is a strong body of law nationwide holding that the First Amendment protects newsgathering activities, particularly in public places. Such case law makes a claim that the right is not clearly established implausible and an arrest for the exercise of this right unreasonable.

“In our case, it was so clear,” he said. “There was powerful video footage of (Goodman) backing up from the police and saying, ‘Where should I go? Where should I go?’ and then her down on the ground” after an encounter with the police.

The issue is a closer call, however, when journalists do not comply with police instructions intended to maintain public safety and order, Agathocleous said. This scenario is often seen when reporters, asserting their First Amendment newsgathering rights, insist on crossing boundaries established by law enforcement to serve these public interests or otherwise refuse to observe regulations that apply to all members of the public, he added.

This was the situation in another Minnesota case in which two public access television show hosts arrested at a reception honoring three departing city council members. Their confrontation with police ensued after the pair was asked to leave the event because they refused to pay the \$15 entrance fee. Police officers escorted the men into a hallway, where a verbal and physical confrontation occurred. The parties disputed the details of the interaction, with one of the television hosts claiming that he peacefully cooperated with the police until they injured him and the police alleging that the man began to act unruly when asked to leave. The officers said force was necessary to subdue



A local NBC New York reporter was held back and threatened with arrest as New York police removed Occupy Wall Street protesters from Zuccotti Park in November 2011. Several journalists were detained during the event, although they were not charged.

this man, who was arrested and charged with disorderly conduct, obstructing legal process and obstructing legal process with force.

Throughout this confrontation, the television host who was arrested operated a video recorder, which he passed to his co-host when he was arrested. The co-host refused to voluntarily give the videotape inside the recorder to the officers when they asked him to do so. As a result, the police restrained the man and then confiscated the tape without a warrant.

The arrested man later sued, claiming, among other violations, that the officers infringed his Fourth Amendment right by seizing his tape without a warrant. The police argued that they were immune from liability, and a U.S. District Court in Minneapolis agreed. The officers' confiscation of the tape was proper, the judge held in *Berghund v. City of Maplewood, Minn.*, because they reasonably believed

What to expect if you can't avoid arrest

The Reporters Committee for Freedom of the Press offers some tips on how to avoid common problems experienced by reporters while covering demonstrations and other mass public events, and provides some insight about what to expect if you are arrested during one of them.

Journalists should be prepared for a large-scale disturbance by always carrying several essential items, including:

- a government-issued photo identification card. If you are detained without a government-issued I.D., the police will hold you until you can be fingerprinted and positively identified, a process that can take several hours and makes you ineligible for immediate release on bond.
- If you have a police-issued press pass, credential or other documentation of your function as someone who gathers and disseminates information to the public, be sure it is with you at all times as well.
- Carry cash and/or a credit card with you to post bond.
- Make it visually obvious you are a member of the press. It is advisable to always wear a hat and/or shirt that displays the word "PRESS" prominently.

If an event becomes the subject of law enforcement activity, the best way to avoid being arrested is to report on those activities in a manner that does not obstruct the law enforcement activity, and to follow all police orders. Do not walk through a police line without first showing your press pass or I.D. and obtaining permission. Keep in mind that press credentials issued by various government entities may be recognized in some places but not others.

Identifying yourself as a news reporter may reduce the likelihood of arrest, and may facilitate your release if you are caught up in a mass arrest. If you are covering the activities of a crowd that invites arrest and want to avoid being arrested along with them, move to the periphery of the activity so you can readily detach yourself should that prove necessary.

Be mindful, however, that following such a procedure does not guarantee your protection from arrest, as self-described adventure photographer Jerry Nelson, also an Occupy D.C. protester who camped out full-time, said he discovered while taking photographs of the police as they prepared to evict the demonstrators from a public park in early February.

"I was standing alone watching the activity when about five park police surrounded me and told me they wanted to speak with me," Nelson wrote in a column published on HuffPost DC, the Washington, D.C., edition of the online newspaper *The Huffington Post*. "When I asked what this was about one of them took the cigarette from my mouth while another slipped the plasti-cuffs over my wrists and pulled them so tight I could feel the skin tear beneath them."

In the event police detain you during a disturbance, remain calm and obey instructions. In addition:

- notify the arresting officer that you are a news reporter and show your credentials if you have any;
- ask that a supervising officer be notified that a reporter is being detained; and
- seek permission to call your organization's lawyer or the Reporters Committee legal defense hotline at your earliest opportunity, as the attorney can be of little, if any, assistance before speaking with you. If you are taken into custody and unable to place this call, try to inform a colleague, employer or somebody else to contact those individuals on your behalf. You may wish to keep an open phone line with an editor during the event if you expect trouble.

If you are arrested for disorderly conduct, disturbing the peace, failure to follow a police order or any other non-felony infraction, the quickest way to get back onto the streets to continue reporting is to cooperate and post bond.

Your arrest may be videotaped; if so, both you and the officer will be visible on the tape, and the officer will identify you and verbally state the probable cause for the arrest, although at least two journalists, including Nelson, have reported that police declined to provide details of why they were arrested. This

that the film contained evidence of a crime, the man's alleged disorderly conduct, that might be destroyed if they did not seize the tape — circumstances that allow the police to seize material without a warrant. Moreover, the officers acted reasonably when viewing and copying the tape, the original of which they held as evidence, and provided a copy to the host within a reasonable amount of time, the court said. The police also acted reasonably, according to the judge, in denying the hosts access to the event because they did not pay the entrance fee and used an acceptable amount of force to arrest the one host and remove the tape from the other.

Ashley Kissinger, the media lawyer who represented the Maryland publisher who successfully sued the local sheriff deputies for trying to buy and throw away all copies of a paper, said a journalist's full compliance with rules and orders restricting

newsgathering activities is often a critical element of a successful civil rights claim.

"The best-case (factual) scenario is that of a journalist who can show that he really went above and beyond in following instructions," Kissinger said. "If you can show that you objected (to the restriction) without violating rules or with minimum interference of the police duties and follow their rules as closely as you can, but your rights were still violated, the fact that you did not break the law is going to help you a lot."

Accordingly, journalists are well-served by adhering to the law, even if doing so means their coverage of a particular event is severely restricted, and challenging the restriction after the fact. This may mean, for example, leaving a cordoned-off area or accepting a citation and then appealing the actions later.

Along these lines, the language journalists and others use when communicating

objections to law enforcement officers at the scene and in the aftermath of the encounter may very well affect its outcome, Kissinger said. Beyond perhaps instigating the official discipline in the first place, "the fact that a journalist had been disrespectful might get in the way of a (subsequent) negotiation" between the parties, she said.

Remedies for harassing or retaliatory behavior

Journalists regularly call The Reporters Committee for Freedom of the Press' legal defense hotline complaining that local government officials who are displeased with their newsgathering or publishing activities engage in harassing or retaliatory conduct that makes the job nearly impossible. These acts range from asking the journalist's supervisor to bar the reporter from gathering or publishing information about the official, to

also was the case for Jacquie Kubin, online communities editor at *The Washington Times*, who was charged with assaulting a police officer and crossing police lines while she was covering the Conservative Political Action Conference in Washington, D.C., in mid-February.

After the arrest, you will then likely be taken to a facility being used by the police during the event for initial processing. Nelson, for example, said he was led to a processing tent the police had set up on site earlier in the day before being transported to a processing unit of a National Park Police substation.

Once at this facility, a routine booking procedure will be conducted in which you will be fingerprinted, your photograph will be taken, and your identity will be verified. Again, you should cooperate in giving your name, address and other basic identifying information, but remember that other statements you make can and will be used against you in later proceedings. Phones may be available for your use once your processing is complete, but you may not be permitted to meet in person with an attorney there.

Depending on the location of the event, there are a number of possibilities as to what will happen next:

- If you do not have proof of your identity or refuse to provide it, you may be transported to the local jail and detained until your identity is determined. This could substantially delay your release, so be sure to carry your government-issued I.D. card at all times.

- If you have provided proof of your identity and indicate you are able and willing to post the required bond to ensure your later appearance in court, after your identity is verified and you clear a criminal history check, you may be taken to the jail where you will post your bond, receive a date for future court appearance and be released. Again depending on the location, municipal offenses with which reporters likely would be charged could carry a bond ranging from about \$150 up to nearly \$600. You should therefore carry with you, at all times, a minimum of \$150 in cash as well as a credit card, or as much

cash as you are comfortable carrying. Posting bond is only a means whereby officials may release you from custody and still ensure your appearance at a future court proceeding and is not the equivalent of pleading guilty or taking any other action related to the pending charge or charges. However, be aware of whether what you are signing is such a bond arrangement, or contains language suggesting that you are admitting guilt.

- If you cannot or refuse to post bond, you will likely be taken to the local county courthouse for arraignment. The courthouse's operating hours may be extended during the event, although it is possible, if you are arrested over a weekend, for example, that you will not be arraigned until normal business hours.

Arrestees may receive video advisements in groups concerning the maximum penalties and bond setting procedures. Then each arrestee will appear before a judge individually. You have the right to have an attorney represent you at arraignment. If you are an independent journalist or your organization is unable to provide an attorney, you may call the Reporters Committee to request a referral to an attorney in your area who can provide assistance in connection with your arraignment.

At the arraignment, you will enter a plea. If you plead not guilty, it is in your best interest to file a written demand for jury trial, and pay any required fee for such, within 20 days after the plea is entered. (Indigent arrestees may be able to obtain a waiver of the fee). If you decide later that you wish to have a trial by the judge instead of a jury, you may do so and may receive a refund of the fee. Securing the right at the outset, however, is important from a negotiation standpoint, among other reasons.

After you enter your plea during arraignment, you likely will then be taken to the government holding facility to retrieve your property before you are transferred to the jail where you will either pay the required bond to secure your immediate release, or be held pending trial.

You can reach the Reporters Committee 24/7 legal defense hotline at 1-800-336-4243. ♦

refusing to grant interviews to this journalist only, to ordering staff members to decline to provide materials requested by the reporter, to, in the extreme example of the Maryland sheriff deputies, confiscating publications to prohibit community members from reading the material.

An assessment of whether these acts amount to an unconstitutional interference with the journalist's First Amendment rights is a difficult one that will likely turn on the ability, or lack thereof, to prove that the officials acted with retaliatory motives, Kissinger said. As such, journalists who suspect they are being targeted for their publishing or newsgathering activities should be able to identify specific examples indicating this ill will. These can include statements the official made directly to the reporter or others or a timeline establishing that the official's acts followed or somehow otherwise corresponded to particular newsgathering or reporting activities.

Amanda Martin, a North Carolina media attorney, likewise emphasized the importance of accurately documenting encounters with the police, noting that "minor, isolated incidents are not likely to trigger liability on behalf of the law enforcement agency, but repeated or egregious violations can."

Martin represented a freelance photographer in Durham, N.C., who in 2007 sued the city's police chief and a captain for allegedly violating his civil rights on several occasions dating back 15 years. The suit alleged that Julian Harrison, while working as a journalist, had been "harassed, assaulted, battered, unjustifiably arrested and falsely charged with crimes," detailing seven separate arrests. All charges against Harrison, which included trespassing and interference with investigation, were eventually dismissed. The defendants settled the case for \$11,500, according to court documents.

Martin advised that journalists who are arrested should do what they can to document events as they occur, including keeping detailed written notes and asking another reporter on the scene to record what transpires.

"Months later, your recollection may

differ from that of the arresting officer, but what is recorded by a camera is objective evidence of what took place," Martin wrote in a recent newsletter of the North Carolina Press Association, which she represents. "A partial recording that remained after law enforcement attempted to erase a recording was enough information to prompt the First



AP PHOTO

Police arrest a protester during an Occupy Chicago march and protest in Chicago in October 2011.

Circuit (in *Iacobucci v. Boulter*) to write, "A police officer is not a law unto himself; he cannot give an order that has no colorable legal basis and then arrest a person who defies it."

Agathocleous agreed, saying the case of the "Democracy Now!" journalists provides a compelling example of how important contemporaneous audio and video footage of an arrest can be in a lawsuit alleging that the detention was unlawful. Reporters involved in encounters with police should obtain as much documentary evidence as they can, including arrest, incident and other reports, he said. These journalists should also take great efforts to identify, preferably by name but at a minimum by badge number, the officers involved in the event. The more identifying information a reporter is able to ascertain, the easier it is to narrow the large field of officers assigned to work public events to those who may have acted unlawfully in doing so.

Other remedies

In addition to the Constitution, federal law prohibits the police from confiscating journalists' newsgathering materials. The

Privacy Protection Act of 1980 makes it "unlawful for a government officer or employee . . . to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast or other similar form of public communication." The statute applies to all searches and seizures of all types of journalists in any situation.

Contrary to many authorities' understanding, federal law requires officials (including police) to obtain a subpoena — not simply a search warrant — in order to gather evidence, including film, notebooks and recordings of all types, from a newsroom or from a journalist. When authorities fail to do so, journalists may file a civil lawsuit under the Privacy Protection Act, which mandates a minimum \$1,000 damages award to journalists who prevail on their claim.

There have been several cases nationwide where officials unlawfully searched newsrooms either because they were ignorant of the laws or because they chose to ignore them. In April 2010,

officials executed a search warrant on the newsroom of the student paper at James Madison University in Harrisonburg, Va., and confiscated hundreds of photographs of a campus event that the editor-in-chief refused to hand over. The students obtained a \$10,000 settlement award from the local prosecutor after filing a civil rights suit.

A 2011 Pennsylvania case indicates that the problem may extend to the judiciary as well. Senior District Judge Andrew Barilla in Wilkes-Barre authorized a search warrant on local TV station WNEP that authorities attempted to carry out in search of unedited, unaired video footage of a fatal house fire, according to *The (Wilkes-Barre) Times Leader*.

When WNEP employees turned officers away, Judge Tina Polachek Gartley ordered the station to hand over the video footage. However, WNEP challenged the order, arguing the footage was protected under the state's shield law, and the judge rescinded her order.

Despite the reversal, newspaper reports indicated that Polachek Gartley questioned WNEP's "authority" to refuse a search after a judge signed a valid war-

rant. There was no mention of authorities' need for a subpoena.

State statutes may also provide another remedy, Agathocleous said, noting that his clients, in addition to the constitutional violations, alleged that officers at the Republican National Convention also were liable for false arrest, assault, negligence, negligent supervision and training and battery under Minnesota law.

Agathocleous pointed out, however, that rights under many state laws are deemed waived when a plaintiff fails to bring suit for violation of the right within a certain amount of time after the occurrence of the event at issue. Depending on the particular law and state, these time limits are fairly generous and usually range from one to two years, but journalists consider-

ing suing under them should always keep track of the specific deadline, he added.

Finally, the Federal Tort Claims Act allows journalists and others to sue federal officers for damages for wrongs that resulted from an intentional act on the part of the defendant, such as an assault or battery, Agathocleous said. Before a plaintiff can bring such a cause of action, however, he or she must first file a claim with the federal agency responsible for the alleged misconduct. While this claim is being reviewed by the agency, it is referred to as an administrative claim. Although not required, the easiest way to prepare an administrative claim is to use the federal government's standard claim form, known as a Standard Form 95 or SF 95.

A potential plaintiff has two years from the time the claim arose to file the administrative claim with the appropriate federal agency. Once the claim is submitted, the agency has six months to rule on it. In some cases, the agency may acknowledge that the claim is valid and agree to pay the individual some or all of the money damages he or she demanded, obviating the need to go to court. If an agency rejects the claim or refuses to pay all the money damages demanded, however, the claimant has six months from the date on which the decision was mailed to file a lawsuit. A downloadable copy of an SF 95 is available on the U.S. Department of Justice's web site at http://www.justice.gov/civil/docs_forms/SF-95.pdf. ♦

A way forward

By Kirsten Berg

During the cold winter months, the issue of police-press relations while covering the Occupy protests quieted somewhat. Cities have quietly dropped charges against some journalists, though others still await trial for alleged offenses. In some incidents across the U.S., journalists have contemplated legal action, but thus far no concrete challenge has seen its day in court.

That is not to say that the issue is dormant for police departments and journalists. In New York, for example, the outcry of media condemnation of the treatment of reporters during the November raid led to some changes in the department, though it is yet to be seen if these are effective or simply artificial moves by the administration.

Organizations such as the NYCLU and New York Press Club are also contemplating taking legislative, legal or other action to remedy the problems that the media has faced, but representatives said they are waiting to see how the situation progresses and to gauge support for such moves.

And they are not completely without recent precedent.

Just this October, three *Democracy Now!* journalists arrested during the protests surrounding the 2008 Republican National Convention in Minneapolis-St. Paul announced a settlement over what they claimed were unlawful arrests as they were trying to cover a protest.

Although charges were eventually dropped, but the journalists eventually sued the police departments and Secret Service for violations of their first amendment rights to gather information, unlawful search and seizure, false arrest, assault and negligence of the officers and their supervisors.

The St. Paul police, in explaining theirs and many other reporter arrests made that day at a press conference while the convention was still going on, said that police officers were unable to make "fine distinctions" between reporters and other members of the public and that the fact that just because someone is a journalist did not "give them additional rights to commit any crimes."

Their suit was eventually settled after the evidence gathering in the case was completed, but before the case went before a judge at trial, with \$100,000 total in compensation

to the three journalists and a commitment from St. Paul police to undertake additional training and possibly new policies. The Reporters Committee has helped prepare materials for the training presentations, although many of the details of this have yet to be fleshed out, according to Azmy.

The case highlights that reporters have rights when covering police activities, and at a time when there seems to be a nationwide problem with police officers not distinguishing between members of the public and the press, it is an important message to law enforcement personnel who may have never been informed about these issues, he said.

"I think about an officer who in one of the depositions said that he arrested [one of the journalists] because she crossed the threshold of what they thought was okay. It was very revealing. Part of the democratic process is that police shouldn't think they can give orders when they feel like a journalist is simply being intrusive or annoying," he said.

It was no coincidence, he added, that the journalists and their lawyers first announced the Minnesota-based federal settlement at a press conference next to the Occupy Wall Street encampment in New York City in October: They wanted to send a clear message to the nation that the rights of dissenters and of the journalists who cover them are protected.

In the same way that the protestor seemed to define many news stories in 2011, the new year seems poised to be another year with public protest in full force. And with an enduring occupy movement and a level of public frustration that could channel into the massive demonstrations expected outside this summer's national political conventions, it is inevitable that police will have to continue to deal with the protestors and the press.

The question remains, however, if the peppered but tangible trend of strained police-press relations will continue into the new year.

Azmy says that for him, protecting the press in these situations means fighting on more than one front of the First Amendment.

"We've been interested in protecting First Amendment rights, and we know that you cannot meaningfully protect the rights of dissenters and advocates for social change, the protestors, if you don't also advocate for the rights of the journalists who cover these demonstrations," he said. "Whether or not law enforcement is on our side on this, it is critical for democracies for these protests to be heard and covered." ♦



NEWS MEDIA AND THE LAW FILE PHOTO

No fly zone

Unjustified temporary flight restrictions ground journalists

By *Andrea Papagianis*

Local and state police vehicles swarmed around a suburban apartment complex — 50 miles northwest of Boston — as authorities geared up for what was believed to be a standoff with a shooting suspect. Early that morning a 27-year-old man was found bleeding from a gunshot wound outside an apartment complex, triggering a heavily armed search for the gunman.

As authorities searched for the armed suspect Massachusetts State Police requested media outlets to voluntarily “refrain from filming live shots from the airspace above the Fitchburg scene.”

“The State Police are asking you to NOT FILM LIVE shot above the scene,” wrote police spokesman David Procopio in an email to members of the news media. “We are making this request in the interest of tactical, operational, and officer security reasons. Your compliance is appreciated.”

But news organizations had the right to film above the scene up until the point federal restrictions were handed down.

The Federal Aviation Administration issued flight restrictions — at the request of local law enforcement — curbing the aerial view of the events.

These restrictions, called Temporary Flight Restrictions (TFRs), are measures administered by the FAA to limit certain aircraft from operating within a designated area over a specified period of time. Technically, TFRs are issued to protect

people both on the ground and in the air from any harm.

Under the Code of Federal Regulations, each TFR must provide a hazard or condition as to why these restrictive measures are being implemented. But recent flight restriction approvals have raised the question as to whether the FAA is allowing local law enforcement to place overly restrictive measures limiting the scope of helicopter newsgathering without providing sufficient reason.

In the Fitchburg incident, the stated reason in the FAA-issued Notice to Airmen — commonly called a NOTAM — failed to specify any hazard or condition for limiting the airspace. The given reason was “temporary flight restrictions,” reaffirming what was already known, but not elaborating further.

In response to the TFR imposition, the Hearst Corporation, which owns WCVB-TV in Boston, sent a letter to FAA officials calling attention to what they considered to be “serious deficiencies in the FAA’s practices relating to TFRs.” According to the letter, “these deficiencies” led the FAA to execute “overly restrictive, baseless TFRs at the request of State Police.”

The letter cited other similar situations in which the media organization felt that TFRs were improperly approved.

“WCVB recognizes that there may be certain limited circumstances justifying a TFR, where the very presence of aircraft in the vicinity of law enforcement activity may pose a danger to others. In those rare

instances, it should not be difficult for the FAA to demand, and for law enforcement to provide, a clear explanation for why the restrictions are warranted,” Stephen Yuhan, legal counsel for Hearst, said in the letter.

According to the FAA, local law enforcement must establish a threat to aviation in the area covered by the flight restrictions or from aircraft operating in the area posing threats to people or situations on the ground. An example of a threat to people or situations on the ground might be a crime scene in which low-flying aircraft could scatter evidence or a fire that could be worsened by the helicopter rotors.

If no credible threat exists to people in the air or on the ground, TFR requests are denied, the FAA said. While they try to refrain from limiting airspace, an FAA spokesman said officials granting restrictions generally do not ask law enforcement elaborate details about their requests, but rather use personal judgment on individual cases as they arise.

Unjustified restrictions

On Oct. 18, the search for 11-year-old William McQuain came to an end.

After a six day search, authorities discovered the body of a young black male in a wooded area on the outskirts of Clarksburg, Md. — about 35 miles northwest of Washington D.C.

Regional media outlets flocked to the town as local authorities and volunteers, clinging to the hope of finding McQuain

alive, combed the area where he was last seen. But in the end, the young boy's remains were found with the baseball bat authorities believed was used in his attack. Almost a week before McQuain's body was found, the boy's mother was found brutally beaten and stabbed to death in the home she shared with her young son.

That morning the Montgomery County Police Department requested a temporary flight restriction for a five mile radius surrounding the area where the 11-year-old was found. The FAA granted the request and the specified airspace was closed.

Depending on the severity of an event or the security need, flight restrictions can be issued in as little as 20 minutes, according to the FAA. There is no standard timeline.

On the morning McQuain was found, the issued notice stated the reason for closing airspace around the crime scene was "to provide a safe environment for law enforcement activity." Pilots are expected to check the alert system before each flight.

But news organizations in the area did not believe law enforcement provided a valid reason for limiting access to news aircraft.

"The fear is that these law enforcement agencies — who taxpayers are paying for — simply do not want to be observed as opposed to offering any justifiable reasoning for cutting off access," said Kathleen Kirby, legal counsel for the Radio Television Digital News Association. "As a matter of public policy there's a right to gather the news and, absent any countervailing interests that law enforcement has, that right should be upheld," Kirby said.

Numerous entities can request TFRs, such as military commands, intelligence agencies, local law enforcement, governors, and major event organizers. Law enforcement officials making airspace closure inquiries can contact both local and national air traffic facilities to request a temporary flight restriction, which are then approved at the national level.

For the most part, safety and security reasons are cited when issuing flight restrictions. Circumstances under which airspace may be closed vary and may include a chemical plant explosion or a volcanic eruption, when toxic gases or fumes are on the ground or in the air. The FAA also approves such restrictions after natural disasters when rescue and relief efforts are being executed by other aircraft.

Widespread flight restrictions are implemented during presidential travel to

secure airspace over the areas visited and traveled by the president. These security measures extend to the vice president and other high profile public figures.

When events create a high level of public interest — such as the Super Bowl and World Series — airspace will be closed. Standard flight restrictions are also imple-



AP PHOTO BY LYNNE SLADKY

A spokesperson for Customs and Border Protection, left, holds a map showing a Temporary Flight Restriction.

mented in the area surrounding aerial performances and all space flight operations.

According to Kirby, the Radio Television Digital News Association plans to work with the FAA, local law enforcement and media organizations to ensure there is an appropriate issuing process in place, so the interests of law enforcement are equally weighed with media interests.

Gulf oil spill and TFRs

By land, sea and air, journalists struggle to gain access.

Ted Jackson gripped his camera as the tailgate of the U.S. Coast Guard plane opened over the oil streaked Gulf of Mexico. Shooting down the belly of the plane he glanced to see his photos, as luck would have it, Jackson said he got his shot — this time at least.

On April 20, 2010 — about 50 miles off the Louisiana coast — an explosion aboard the Deepwater Horizon offshore oil rig killed 11 workers. After burning for 36 hours the rig — registered to British Petroleum — sank into the ocean, spilling millions of gallons of oil into the Gulf of Mexico and quickly becoming one of the greatest environment disasters in United States history.

From the initial explosion to cleanup efforts, access to journalists was limited. Jackson, a photographer with *The Times-Picayune*, fought for access every step of the way.

"We were certainly the eyes for the

world to determine what was going on out there," Jackson said. "Nobody knew how bad it was going to be."

After hearing reports of tarballs — dark pieces of crude oil — washing ashore, Jackson made the two hour drive south from New Orleans to Grand Isle, La., where he met a posted guard securing access to the beach. As more journalists arrived that day, each was allowed access to the beach — but only in about 10 minute shifts. What should have been a simple photo shoot turned into an ordeal with authorities that only escalated as conditions of the spill worsened.

"It's hard enough sometimes to do journalism and to be held back at arm's length where you can't see; it had kind of a strangle hold effect on the journalism that we could do," Jackson said.

Because there was no way of knowing where or if the oil would reach land, Jackson took to the sky. When he chartered a plane to fly over the coast, the event became even more difficult to cover when it was not clear who was in charge.

Jackson thought BP might have been in charge since journalists were not only dealing with local and federal authorities, but with BP officials as well.

The day Jackson chartered a flight, the aircraft could not descend below 3,000 feet. Jackson said even with his longest lens you could not tell if there was a human being on a boat from that height. In hopes of getting closer to the disaster, Southern Seaplane owner Lyle Panepinto requested to fly at a lower altitude, but when authorities questioned who was on the plane, the request was immediately denied when he answered that he was with a photographer from *The Times-Picayune* in New Orleans.

"This was our coast, these were public beaches, Louisiana wetlands and we felt that we had a right to be able to see that," Jackson said. "We felt like, especially with a foreign company, that BP was calling all the shots."

After complaints emerged, the FAA revised flight restrictions over the gulf, allowing fly-overs on a case-by-case basis.

Eventually authorities coordinated boat and plane media tours operated by the Coast Guard.

As Jackson described it, the tours felt, "almost like a ride at Disney World where you get in and are assigned a seat and you are asked not to move around too much."

But Jackson said he didn't have much of a choice in the matter — while the situation wasn't ideal for reporting, "at least it was access," he said. ♦

The right to record in the wrong places

Documenting police arrests with smart phones increases — with consequences

By Chris Healy

At the 2010 Preakness Stakes horse race in Baltimore, a young woman in a yellow dress is held on the ground by uniformed Baltimore City police officers. She is bleeding profusely from her face. Several police officers push her into a prone position and place her arms behind her back. She is intoxicated, and apparently had gotten into an altercation with another man attending the race. Police intervened to break it up, but a large crowd is watching and some people are expressing alarm at what they believe to be an excessive use of force.

“Is that really fucking necessary?” a voice off camera asks a police officer.

The response: “Do me a favor and take a walk. Now. Do me a favor and turn that off. It’s illegal to videotape anybody’s voice or anything else. It’s against the law in the state of Maryland.”

The video ends abruptly.

A growing number of citizen activists, lawyers and journalists are questioning the constitutionality of laws and policies that prohibit people from recording the actions of police officers and public officials engaged in their public duties. Three high-profile cases involving this issue are pending before courts across the country.

The Preakness video was posted to YouTube by an individual believed to have been an off-duty Maryland State Trooper, according to attorney Deborah Jeon of the American Civil Liberties Union in Maryland. She says it depicts the same incident that her client Christopher Sharp recorded on his cell phone. The woman in the video was an acquaintance of Sharp’s, as was another man who is seen being arrested.

Sharp’s recording, however, no longer exists. Police officers seized the cell phone and deleted the videos, along with more than 20 others he had taken of his then-six-year-old son’s soccer and basketball games, according to a lawsuit Sharp filed against the Baltimore Police Department.

Sharp is well familiar with the Preakness Stakes, a major horse race that is part of the Triple Crown and is a notorious party event in Baltimore. He has attended the race many times, both as a spectator and as a former manager of the food and bev-



AP PHOTO BY GREG PAYAN

(Top) Partiers watch the race from inside the track of the 2010 Preakness horse race at Pimlico Race Course in Baltimore.

(Left) Chris Sharp and his son, Josh.



erage service at the track. He knows that it can get rowdy, and that there is always a large police presence at the race. In 2010, he was a spectator.

When the police intervened in the altercation, Sharp started to record it. He knew his friend was intoxicated, and that she was not dealing with the police in the best way possible. Nonetheless, he thought the situation might be getting out of hand. Without interfering or otherwise getting involved, Sharp decided to record the arrest. Passersby asked if he’d gotten it. “Yeah I got it. I got it all,” he replied.

Sharp says several officers ordered him to turn over his phone, and several times he nervously but respectfully refused, believing that he was under no obligation to do so. He was not arrested, nor directly threatened with arrest, but Sharp maintains that he felt extremely intimidated. When an officer who identified himself as a sergeant told him they would need to take the phone and download the videos to a laptop “for evidence,” and then return the phone, Sharp complied. While he waited for his phone to be returned, Sharp says another officer told him “they’ll probably just erase it and give it back.”

Indeed, all the videos on his phone — those of the arrest, and the videos of his son — were deleted, and his phone was set

to only be able to call 911.

“That was the last thing I was going to do at that point,” Sharp said.

The ongoing cases

Whether the First Amendment creates a right to take audio recordings of public officials, performing their public duties in public places, is a question front and center in three major pending cases. Two cases — *ACLU of Illinois v. Alvarez* and *Illinois v. Allison* — involve challenges to the state of Illinois’ eavesdropping law, one of the most limiting of recording in the country. The third, Sharp’s case, is a civil rights lawsuit asking for damages and policy changes at the Baltimore Police Department.

In all three cases, the extent to which the First Amendment creates a right to audio-record these public officials is a central question. And all three take place against the backdrop of *Glik v. Cunniffe*, a decision from August of last year in which the U.S. Court of Appeals in Boston (1st Cir.) recognized that the First Amendment protects the right to record.

In *Glik*, the court wrote that the First Amendment creates a broad prohibition on government attempting to restrict the “stock of public information.” This includes a right to gather information on how police officers perform their public

duties by recording them, the court held.

Indeed, prominent in the court's opinion was the recognition that the proliferation of recording equipment on portable devices like cell phones has changed the media landscape. "News stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper," the court wrote.

Robert Corn-Revere, a partner at Davis Wright Tremaine in Washington, D.C. who has worked extensively on First Amendment and media law issues, agrees that changing technology could influence how a court views these issues. "[Eavesdropping laws] risk the possibility of making all citizens criminals."

Jim Covington, Director of Legislative Affairs for the Illinois State Bar Association, believes that recording devices allow greater accuracy in settling disputes between police and citizens. "[Recordings provide] an instant replay of what really happened" in interactions with police, he said.

The three current cases share parallels with *Glik*. That case involved a young man who was walking on Boston Common when he saw police using excessive force in an arrest. He began to record the arrest on his phone. When confronted by the police and asked whether he was recording audio — which he was — Glik was arrested and charged with violating the Massachusetts wiretapping law. The charges were eventually dismissed as baseless because to violate the law, the recording had to have been made in secret, and all parties agreed that Glik recorded openly. Glik filed a civil rights lawsuit, and the First Circuit affirmed that his conduct was constitutionally protected.

Unlike Glik, Sharp was never arrested or charged with violating the Maryland wiretapping statute, and Jeon maintains that his actions were legal. But as in *Glik*, Sharp's case is a civil rights lawsuit against the department. He is seeking clarity of the law through a declaratory judgment that his actions were protected.

The Illinois cases, by contrast, are direct constitutional challenges to that state's eavesdropping law. The law makes it a crime to audio record any conversation without the consent of all parties recorded. There is no exception for recording police officers in public performing their public duties.

In fact, recording police officers is punished more severely than recording other parties. The statute makes it a class 1 felony to record a police officer, state's attorney, or judge, while any other violation is a less serious class 4 felony.

Alvarez, which was argued before the U.S. Court of Appeals in Chicago (7th Cir.) in September, is a pre-enforcement challenge brought by the ACLU. That means that nobody in the case was actually arrested for violating the law. Rather, the ACLU alleges that they have chosen



AP PHOTO BY PAUL BEATY

Chicago Police Superintendent Garry McCarthy opposes the Illinois eavesdropping law that bars recording police in public.

not to record certain public events out of fear that they *would* be arrested.

In *Allison*, by contrast, a man was arrested, and faces serious jail time.

Michael Allison is a hobbyist mechanic who had been cited under an Oblong, Ill., city ordinance for keeping an abandoned vehicle on his property. In the course of trying to sort out this citation, Allison allegedly violated the eavesdropping law by recording a police officer, the Oblong Chief of Police, the clerk of the court for Crawford County, two Oblong city attorneys, and Crawford County Judge Kimbara Harrell, according to a lower court opinion striking the law as unconstitutional.

Indeed, Allison had been told that no court reporter would be present to create a transcript at his citation hearing, and because of that had told the clerk of the court he would bring a recorder, according to William Sunderman, who represents Allison. Sunderman says that the judge asked Allison at the hearing whether he was recording. When Allison answered that he was, Judge Barney Harrell turned to a code book which was already open to

the eavesdropping law, read it aloud, and had him arrested on the spot. He faces five felony counts.

In September, Judge David Frankland found the law unconstitutional. Because of that, the case has skipped the intermediate appellate court and is now before the state Supreme Court.

Justice weighs in

Christopher Sharp may have friends in high places. On Jan. 10, the Department of Justice filed a statement of interest in his case, arguing that Sharp was protected by the First and Fourth Amendments. The right to record police officers, the department said, is "consistent with our fundamental notions of liberty, promote[s] the accountability of our governmental officers, and instill[s] public confidence in the police officers who serve us daily." The department declined to comment for this article.

For the United States to take such an unequivocally pro-speech position on this issue is unusual. Jeon said that Sharp's case is the first time that Justice has taken an official stance on the right to record. She believes that the department has been watching this issue percolate in various courts across the country for some time, and chose to become involved in Sharp's case partly because Sharp's case has just begun, and the department could get involved early.

The department's actions could have an impact on the Illinois cases. Sunderman called it the "cherry on top" of what he believes to be his strong legal position. "The Illinois Supreme Court could find the department's position interesting and persuasive."

And while such a clear statement of support for speech rights may be rare, it is welcome. "I have to applaud the government anytime it stands up for constitutional rights," Corn-Revere said.

Jim Covington concurs. "You want to be proud of your government from time to time."

Efforts at reform in the Illinois General Assembly

The battle in Illinois over the eavesdropping law has not been limited to the courts. Covington has worked extensively on getting the General Assembly to reform the law. He said that the cases pending in the Illinois courts have hastened the calls for reform. "But for the cases, the effort wouldn't have the legs that it does," he said.

House Bill 3944, whose chief sponsor is Rep. Elaine Nekritz, would create an

exemption to the law allowing citizens to record police officers performing public duties in a public place. Notably, the bill would not apply to all public officials, but solely to police officers, she said.

Support for reform has come from at least one unexpected place. At a panel discussion on police recording at the Loyola University Chicago, which included Reporters Committee for Freedom of the Press Executive Director Lucy Dalglish, Chicago Police Superintendent Garry McCarthy expressed his belief that recordings protect both police and citizens. “I actually am a person who endorses video and audio recording,” McCarthy was reported saying by the *Chicago Sun-Times*. “There’s no arguments when you can look at a videotape and see what happened.”

On Feb. 8, the Civil Law Committee of the House of Representatives Judiciary I Committee approved H.B. 3944 by a 9-2 vote. The Reporters Committee submitted written testimony in support of the bill. The bill will now proceed to the full House of Representatives.

The principal objections to the bill raised during debate related to individuals interfering with police investigations, Nekritz said, though doing so would remain a crime.

Covington said that their efforts should not be viewed as anti-police, but anti-bad law. He says that the bill would cure a double standard in the law allowing police to record citizens, but not vice versa.

The damage has been done

With the support of the United States government in his lawsuit, Chris Sharp and his legal team are optimistic.

At a hearing on Feb. 13, a federal judge denied the Baltimore Police Department’s motion to dismiss. Jean said that the department conceded at the hearing that the First Amendment creates a right to record. The case will not move forward to discovery, she said.

But for Sharp, some of the worst damage cannot be easily rectified by winning the suit. Despite his best efforts, Sharp has been unable to recover the lost videos of his son. “My son is my life,” Sharp says, and the videos represented 18 months of memories that he cannot get back.

Less tangible, but no less permanent, is the damage done to Sharp’s perception of law enforcement. “I was reared to trust the police,” Sharp says. “They have a difficult job.” His faith may not have been shaken had his experience reflected “one or two bad seeds,” but the fact that all of the officers on the scene seemed to collaborate together has damaged — perhaps irreparably so — Sharp’s view of the police. ♦

Woman faced 15 years for recording police

By Chris Healy

The two cases currently on appeal in the Illinois Supreme Court and the U.S. Court of Appeals (7th Cir.) are not the only ones involving the Illinois eavesdropping law. In January, Tiawanda Moore filed a lawsuit in federal court against the city of Chicago, alleging that officers violated her Fourth Amendment rights when they arrested her for recording two police officers who she said were interfering with her attempts to file a complaint.

“The law is designed to protect corruption and is not in the public interest,” said Robert Johnson, Moore’s attorney.

In July 2010, police officers responded to a call from Moore’s boyfriend regarding a domestic dispute at their house. One of the officers, in the course of interviewing Moore, groped her, according to Moore’s complaint.

Soon thereafter, Moore went to the police department to report her com-

plaint. She alleges that after she tried to report the misconduct and was rebuffed by two officers, she was told to go into a small interview room and that she could not leave. Believing that this detention was illegal, Moore began to record the conversation with the officers on her Blackberry.

When they realized that she was recording them, the officers arrested her. She faced 15 years in prison, but in August, a jury found her not guilty.

Johnson says that the pending bill to reform the law would likely not have influenced Moore’s case, as the recording she made was not in a public place but in a closed interview room in the police station. He also said that *Allison* and *Alvarez* likely would have little impact on her case because she is no longer facing prosecution.

The potential 15-year sentence for recording police officers is extreme, Johnson says. “You could sell crack cocaine on the streets of Chicago and not be looking at that kind of time.” ♦

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