

# Recent Case Report

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## Glik v. Cunniffe

(1<sup>st</sup> Cir. 2011) \_\_ F.3d \_\_ [2011 WL 3769092]

### ISSUE

Does the First Amendment prohibit officers from arresting a person for recording them as they arrest someone else?

### Facts

As Glik was walking past the Boston Commons, he saw three Boston police officers arresting a man. Concerned that the officers were using excessive force, he stopped about ten feet away and recorded the incident on his cell phone's digital video camera. After the officers arrested the man, one of them told Glik, "I think you have taken enough pictures." Glik responded, "I am recording this. I saw you punch him." An officer then asked Glik if his cell phone also recorded sound. When Glik said yes, the officer arrested him for violating the Massachusetts wiretap statute. A court subsequently dismissed the charge on grounds the statute does not apply when, as here, the recording was not done secretly.

After the police department refused to investigate his internal affairs complaint into the matter, Glik sued the officers and the department for violating his rights under the First and Fourth Amendments. In a pretrial proceeding, the court rejected the officers' contention that they were entitled to qualified immunity, and they appealed to the First Circuit.

### Discussion

The main issue on appeal was whether the First Amendment prohibits officers from arresting a person for recording their actions in public places; and, if so, whether this prohibition was "clearly established" when Glik was arrested. To both questions, the court ruled yes—so long as the recording "does not interfere with the police officers' performance of their duties." Specifically, the court ruled that Glik was exercising "clearly-established First Amendment rights" in recording the arrest, and that "his clearly-established Fourth Amendment rights were violated by his arrest without probable cause."<sup>1</sup>

The court also rejected the officers' argument that this rule should be interpreted to cover news reporters, but not private citizens. As the court observed, "[C]hanges in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. 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."

For these reasons, and because it was apparent that Glik did not interfere with the officers, the court ruled they were not entitled to qualified immunity. POV

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<sup>1</sup> Also see *Fordyce v. City of Seattle* (9th Cir. 1995) 55 F.3d 436, 439; *Smith v. City of Cumming* (11th Cir. 2000) 212 F.3d 1332, 1333.