

First Amendment Audits

Eric Shytle

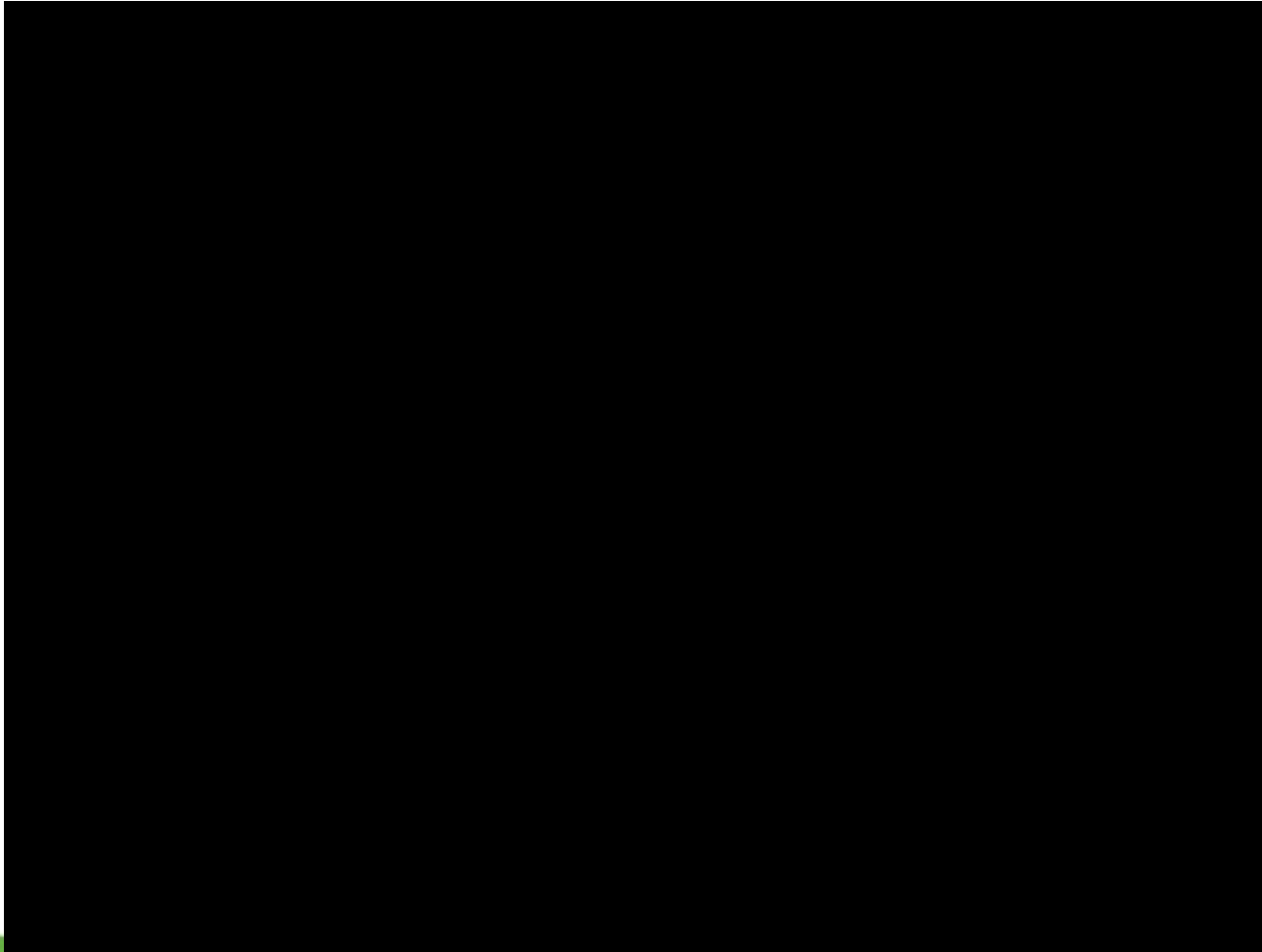
General Counsel, Municipal Association of SC



Sensitive Content Warning

The first three slides contain violent images that might disturb some viewers. Please feel free to leave the room or otherwise avoid these images. We should be in the presentation proper within 5 minutes.

Background; Origins



The Modern Context



Videos Captured on Cellphone Cameras



What Is the Legal Issue?

- First Amendment: Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
- Is recording speech?

Current Unanimous View: Recording Police Conduct is Speech

- “[R]ecording police activity in public falls squarely within the First Amendment right of access to information. As no doubt the press has this right, so does the public.... Bystander videos provide different perspectives than police and dashboard cameras, portraying circumstances and surroundings that police videos often do not capture. Civilian video also fills the gaps created when police choose not to record video or withhold their footage from the public.” *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017).
- This is the view of *every* federal court to consider the issue in the context of police-initiated encounters.

First Circuit (Including New Hampshire)

- “In summary, though not unqualified, a citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.” *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011).
- “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.” *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014).
- A Massachusetts wiretapping statute “violates the First Amendment in criminalizing the secret, nonconsensual audio recording of police officers discharging their official duties in public spaces.” *Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020).

Difficult Applications of the Rule

- What about intentional provocation of police officers while recording?
- What about interactions with government employees other than public safety officers?
- What about the rights of third parties, who merely happen to be interacting with government employees?
- What about filming security-sensitive government property?

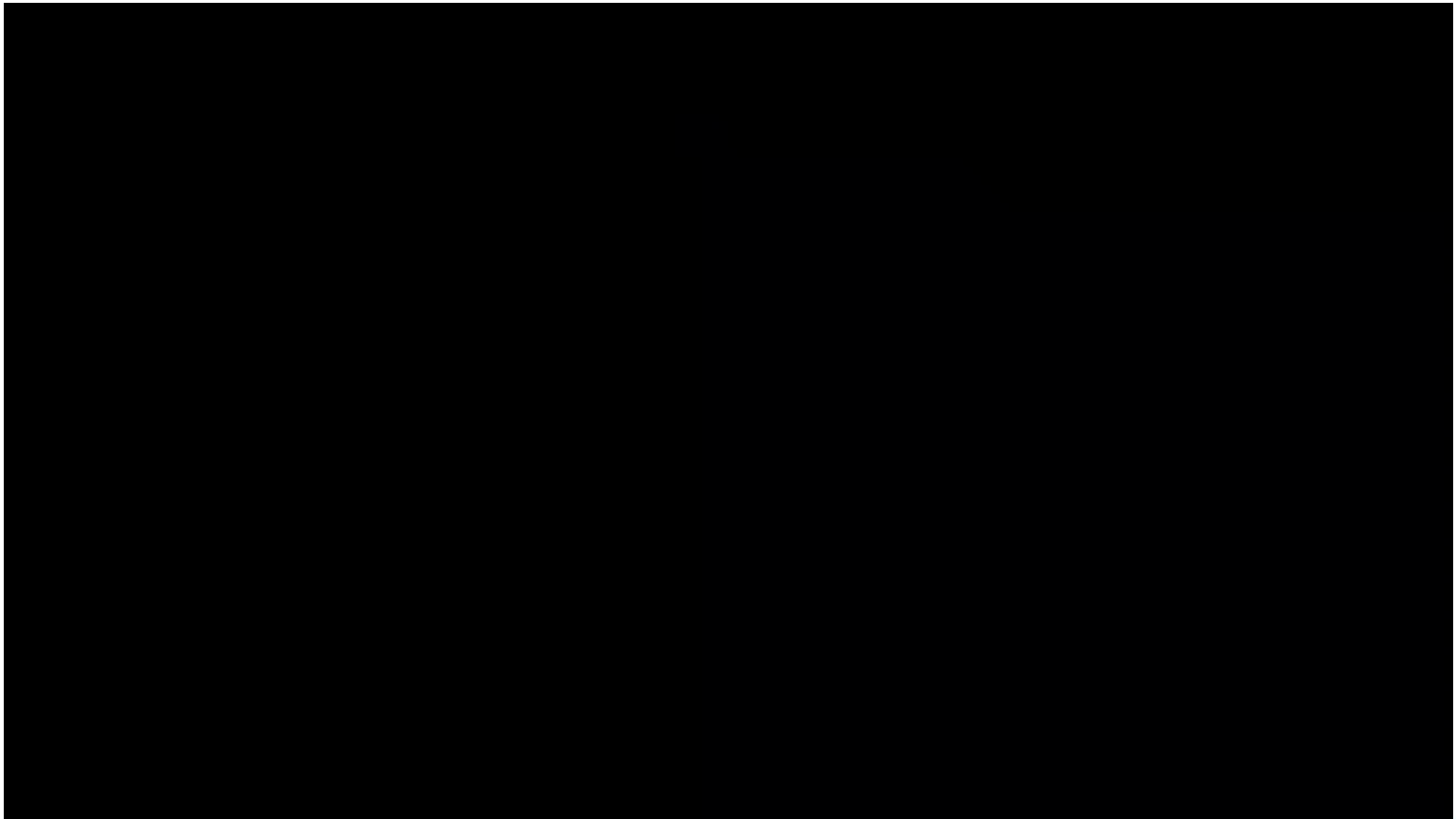
Thus: The So-Called “First Amendment Audit”

- An American social movement categorized by its practitioners as activism and citizen journalism that tests constitutional rights – in particular, the right to photograph and video record in a public space.
- Two main classes: (1) auditor-initiated contact with police; and (2) auditor-initiated intrusion into public buildings. Both are by design intended to provoke a response.
- Audits are often confrontational in nature.
- Auditors tend to film or photograph government buildings, equipment, access control points, and sensitive areas, as well as recording law enforcement or military personnel present.

Provocation Example



Facilities Audit Example



What Can Local Governments Do?

- Most important: Employee education.
- Create guidelines for the government's property to establish the nature of the public forum involved.
- Creates guidelines for conduct that regulate only “time, place, and manner” – not content.
- Make sure that the guidelines – both forum guidelines and conduct guidelines – are transparent to the public and known by employees.

Facilities Regulation

Forum Guidelines

- NOTE special situation in the First Circuit, which includes New Hampshire – more on this later.
- Public forums – streets, sidewalks, common areas inside and outside public buildings.
- Designated or limited public forums – courtrooms, council rooms.
- Nonpublic forums – private offices, secure locations, areas marked “authorized personnel only.”

Forum Guidelines, Cont.

- Essentially “private” work areas – personal offices, workstations, secure locations, and so on – can be marked and treated as nonpublic forums.
- Hybrid areas that are open to the public but only for certain purposes or at certain times – courtrooms, billing counters, council chambers – can be marked and treated as limited or designated forums.
- Useful rule of thumb: Would you be required to allow traditional speech in the location? For example, could protestors gather in an employee’s office to demonstrate?

Nonpublic Forums

It is “black-letter law that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum.” *Davenport v. Washington Educ. Ass’n*, 551 U.S. 177, 189 (2007).

Forum Rules, Cont.

Reasonable justifications for excluding or limiting First Amendment auditors with respect to limited public or nonpublic forums:

- Protecting the privacy rights of citizens
- Preventing disruption of government business
- Public safety

Note Special Rule in First Circuit: “Public Areas”

- The First Circuit may or may not explicitly recognize forum analysis in the context of video and audio recording, see *Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020).
- But it does recognize the expectation of privacy and the concept of “public areas.” See *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014).
- The First Circuit cases have explicitly recognized the following locations as being “public” for video recording purposes: the Boston Common (*Glik*); a traffic stop on the shoulder of a public right-of-way (*Gericke*); and a hallway outside of council chambers, immediately after a council meeting (*Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999).

Note Special Rule in First Circuit: “Public Areas”

- Therefore, the concepts and tools developed in for forum-specific rules in South Carolina *should* be applicable by analogy in New Hampshire, with reference to expectations of privacy and public areas.
- But, always consult your own attorney.

Forum Rule Example

- From Portland, Oregon: “No person shall enter, attempt to enter or remain in any areas of City Property for purposes other than to conduct legitimate business with City offices or tenants located at City Property, to enjoy the publicly accessible amenities at a City Property when the City Property is open to the public, or to lawfully assemble for social or public interaction at portions of City Property specifically designated for such assembly.”

Public Property vs. Public Forum



Conduct Regulation

Conduct Rules

- Governments may impose content-neutral regulations on “time, place, and manner” of speech, even in public forums.
- In public forums, these regulations cannot discriminate based on content or on viewpoint.
- But these regulations can require generally applicable standards.

Special Case: Third Parties

- Generally speaking, it is legal to video record a private citizen as long as they do not have a reasonable expectation of privacy.
- Note that audio recording is more limited than video recording – wiretapping laws, reasonable expectations of privacy, and so on. This is likely a product of more precedent.
- It seems likely that you could create “privacy zones,” comparable to the standing points in pharmacy lines.
- And recent Florida case – no recording of third parties without their consent.

Filming Customers



Special Case: Stalking

NH Rev. Stat. § 633:3-a Stalking.

I. A person commits the offense of stalking if such person:

(a) Purposely, knowingly, or recklessly engages in a course of conduct targeted at a specific person which would cause a reasonable person to fear for his or her personal safety or the safety of a member of that person's immediate family, and the person is actually placed in such fear;

(b) Purposely or knowingly engages in a course of conduct targeted at a specific individual, which the actor knows will place that individual in fear for his or her personal safety or the safety of a member of that individual's immediate family.

....

General Guidelines for ALL Employees

- Know your legal authority; EDUCATION
- Know the difference between public property and public forums
- If regulations apply (either to the forum or to the conduct), clearly articulate them – and then be willing to politely enforce those regulations
- Strive to remain calm and rational
- Deflect or defuse inflammatory statements
- Remember that you may end up on YouTube