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First Amendment Audits

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Background; Origins

- On March 3, 1991, Rodney King was beaten by LAPD officers after a high-speed chase.
- George Holliday, an uninvolved bystander, filmed the incident from a nearby balcony and sent the footage to a local news station.
- The footage was captured on a traditional, large, bulky camcorder – which would have been difficult to transport for regular usage.
- The incident was covered by news media around the world and caused a public furor.



The Modern Context



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What Is the Legal Issue?

- First Amendment: Congress shall make no law “abridging the freedom of speech, or of the press”
- Is recording speech?
- Remember that this question has been primarily considered in the context of “Bystander Videos” – footage captured by an uninvolved bystander of an encounter between the police and a suspect. The courts are highly protective of the right to film such videos.



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Initial / Minority View: Recording is Conduct

- "An argument can be made that the act of photographing, in the abstract, is not sufficiently expressive or communicative and therefore not within the scope of First Amendment protection—even when the subject of the photography is a public servant." Pomykacz v. Borough of W. Wildwood, 438 F. Supp. 2d 504, 513 (D.N.J. 2006).
- Recording "does not partake of the attributes of expression; *it is conduct*, pure and simple." D'Amario v. Providence Civic Ctr. Auth., 639 F. Supp. 1538, 1541 (D.R.I. 1986).



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Current / Majority 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.



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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?



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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.

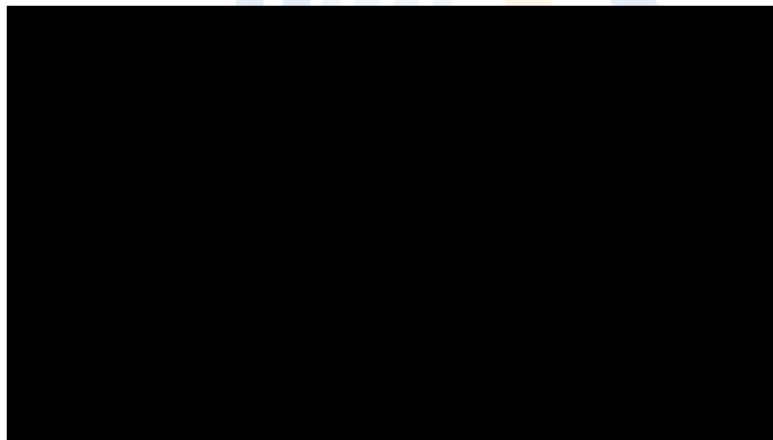


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Provocation Example



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.



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Facilities Regulation



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Forum Guidelines

- Traditional 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”



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Forum Guidelines

- "In a *traditional public forum* – parks, streets, sidewalks, and the like – the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited."
- "The same standards apply in *designated public forums* – spaces that have not traditionally been regarded as a public forum but which the government has intentionally opened up for that purpose."
- "In a *nonpublic forum*, on the other hand – a space that is not by tradition or designation a forum for public communication – the government has much more flexibility to craft rules limiting speech. The government may reserve such a forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."

Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 1885, 201 L. Ed. 2d 201 (2018)



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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).



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Forum Guidelines, Cont.

- Essentially “private” work areas – personal offices, workstations, courtrooms, waiting rooms, secure locations, and so on – can be marked and treated as nonpublic 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?



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Forum Rules, Cont.

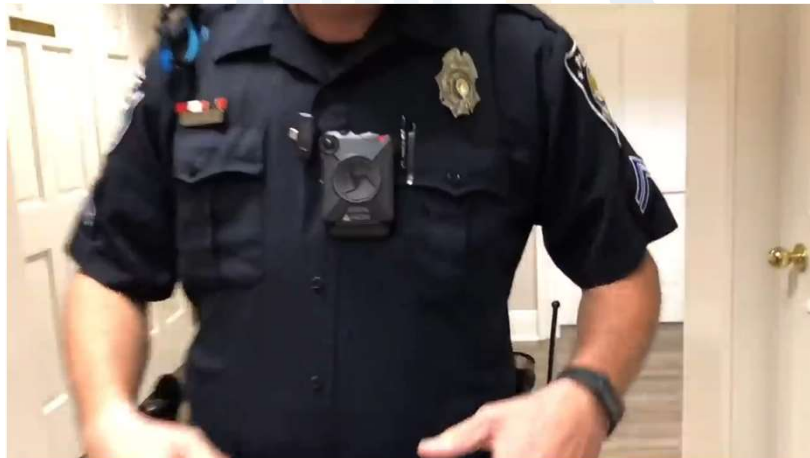
Reasonable justifications for excluding First Amendment auditors from designated government property:

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



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Public Property vs. Public Forum



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Conduct Regulation



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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.



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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.



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Filming Customers



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Special Case: Stalking & Harassment

S.C. Code Ann. § 16-3-1700. Definitions. As used in this article:

(A) "Harassment in the first degree" means a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose and causes the person and would cause a reasonable person in his position to suffer mental or emotional distress.

Harassment in the first degree may include, but is not limited to:

- (1) following the targeted person as he moves from location to location;
- (2) visual or physical contact that is initiated, maintained, or repeated after a person has been provided oral or written notice that the contact is unwanted or after the victim has filed an incident report with a law enforcement agency;
- (3) surveillance of or the maintenance of a presence near the targeted person's ... (b) place of work...



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Model Policy: Access

- No person shall enter Municipality Property for any purpose other than to conduct legitimate business with offices or tenants located at Municipality Property, to enjoy publicly accessible amenities in Public Areas, or to lawfully assemble for social or public interaction in Public Areas specifically designated for such assembly.



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Model Policy: Limited Access

- “Limited Access Area” means any designated area on Municipality Property that is not generally open to or occupied by the public; is open to or occupied by the public on only a limited, as-needed, or by-invitation basis; or is in an area generally open to or occupied by the public in close proximity to private third parties conducting business with Municipality employees. Limited Access Areas may be designated by doors, physical barriers, building design features, signage, reception desks or stations, stanchions, ropes, fencing, bollards, or other visible indications... The Municipality shall retain the right to verbally instruct third parties that an area is a Limited Access Area.



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Model Policy: Limited Access

- Limited Access Areas shall be accessible only to the following: (i) employees, elected officials, and appointed officials of the Municipality; and (ii) private parties but only on a limited, as-needed, or by-invitation basis, to include those private parties accessing a Limited Access Area for the express purpose of conducting business with Municipality employees.
- Photography, audio recording, and video recording is prohibited in Limited Access Areas, except as follows....



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Model Policy: Rules of Conduct

- No person shall engage in activity that disrupts or interferes with the normal operation or administration of business at Municipality Property, lawful use by employees and authorized users at Municipality Property, or Municipality-permitted activities.
- No person shall stalk, harass, threaten, intimidate, or otherwise compromise the wellbeing and safety of employees or private third parties lawfully using Municipality Property.



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Model Policy: Third Parties

- *Enforceable*: No person shall photograph, audio record, or video record in such a manner that would allow capture of, access to, or disclosure of private, personal, confidential, sensitive, or privileged information of private third parties.
- *Perhaps*: No person shall photograph, audio record, or video record any private third party lawfully entering into, using, or occupying Municipality Property, without the express consent of such third party.



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Model Policy: Employee Guidance

- Employees should refrain from engaging with auditors wherever possible. Municipality employees should monitor auditors on Municipality Property, but should refrain from engaging them unless they violate any Rule of Conduct. In the event that engagement is necessary, every effort should be made to respond calmly without escalating the encounter.
- An employee who does not wish to be photographed or recorded may retire to a Limited Access Area.
- Employees are not required to respond to questions or demands from an auditor, and should refrain from doing so if possible.
- Employees may invite a private third party conducting business with the Municipality and who do not wish to be filmed to retire to a more private Limited Access Area in order to complete any business or transaction.



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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
- Always remember that you may end up on Youtube!



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