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VIDEO/AUDIO RECORDING IN PUBLIC SPACES

This month's Melissa Talks will cover a topic that has sparked a lot of conversation as well as led to many viral videos online. Today, we are talking about audio and video recording in public and private places. This is a really meaty topic so I will try to capture as much as I can in this short call.

First, let's start with a scenario. You are sitting at the front desk in the enrollment office on a regular Monday morning. A few minutes into reading and responding to emails, you see someone holding their cell phone up to their face, the camera light is on, and you realize they are filming you. As soon as you catch their eye, they start into a monologue about the neoliberal education being taught at the college and how students are being indoctrinated. They continue to record you and your colleagues as you sit at your desks. You are paralyzed with fear because you don't know how to react. Situations like this are becoming more and more common, so today we are going to talk about video and audio recording in public and private spaces.

What is the definition of a public space?

A public place is generally defined as an indoor or outdoor area, whether privately or publicly owned, to which the public have access by right or by invitation, expressed or implied, whether by payment of money or not.

Outdoor Public Spaces

When someone is in an outdoor public space on your colleges (where they are legally present), they have the right to capture any image that is in plain view, which includes pictures and videos of the outside of buildings and even when police officers are engaged in their regular activities. This right exists for non-commercial purposes. If the police approach the person taking the video/photos they cannot demand they stop or that the person delete the pictures/video.

Police officers may order those who are video recording to stop doing so if they truly believe that the person is interfering with legitimate law enforcement operations. In general, a court will trust an officer's judgment about what is "interfering" more than yours. Police officers may not generally confiscate or demand to view your photographs/video or search the contents your cell phone without a warrant. In addition, it is possible that courts may approve the seizure of a camera in some circumstances if police have a reasonable, good-

faith belief that it contains evidence of a crime by someone other than the police themselves but they would still need a warrant to view the evidence.

Indoor Public Spaces

The law distinguishes between a traditional public forum, or public square, and facilities opened to the public for a particular use or purpose, like a library or a courthouse. Facilities like libraries and courthouses are considered to be limited public forums or non-public forums for purposes of the First Amendment. In limited or non-public forums, the government agency administering the space is only obligated to allow those First Amendment activities that are consistent with the nature of the forum, even if the facility is open to the public. Non-public spaces in public buildings are those areas that are not open to the public or where users have an expectation of privacy, such as washrooms, reservable private study spaces, offices, break rooms, classrooms, and work areas. In these areas, recording should not be permitted.

Private Property

When you are on private property, the property owner sets the rules about the taking of photographs or videos. If you disobey property owners' rules, they can order you off their property (and have you arrested for trespassing if you do not comply).

Public Meetings

Arizona's open meetings law provides that "[a]ll or any part of a public meeting of a public body may be recorded by any person in attendance by means of a tape recorder or camera or any other means of sonic reproduction, provided that there is no active interference with the conduct of the meeting. (See, ARS 38-431.01(F)).

Indoor Private Spaces

When you are on private property, the property owner sets the rules about the taking of photographs or videos. If you disobey property owners' rules, they can order you off their property (and have you arrested for trespassing if you do not comply). The fact that the District is a political sub-division does not mean that all buildings are open to the public. Depending on the location a person wishes to enter, their right to record, let alone access, may be constrained by reasonable time, place, or manner restrictions, or by the District or college's interest in managing its property.

Audio Recording

You have a right to capture images in public places, but you don't always have a right to record what people say. Conversations with police in the course of their duties are not private conversations, but many other things you may record on a public street are. Arizona makes it a crime to intercept a "wire or electronic communication" or a "conversation or discussion" unless you are a party to the communication, present during the conversation or discussion, or one party to the communication or conversation consents. (ARS 13-3005-2012(9)). This means a person may record a conversation or phone call if they are a party to the

conversation or you get permission from one party to the conversation in advance—otherwise known as a one-party state.

The wiretapping law covers oral communications when the speakers have "an expectation that the communication is not subject to interception under circumstances justifying the expectation," (ARS 13-3001). Therefore, someone may be able to record in-person conversations occurring in a public place, such as a street or restaurant, without consent but a person should seek the consent of one or all of the parties before recording any conversation that an ordinary person would deem private.

Violating this law is punishable by imprisonment and a fine. In addition to this, there is also the possibility of a civil lawsuit for damages by the injured party.

First Amendment “Audits”

It is a fairly recent phenomenon and looking at these audits on a surface level, a first amendment audit may appear to be a both innocuous and even pointless, but there is much more happening beneath the surface. These audits are a form of activism where an individual ‘armed’ with a camera will simply walk into a public space and start recording. The crux of the audits focuses on the “auditors” right to openly film law enforcement personnel and other public officials. Once those audits are completed, the resulting video is posted to social media and to websites, such as YouTube. These audits have taken place in such public spaces as a college library, a police station/sheriff’s office, the post office, DMV, and the entrance of a military base or other government facility or publicly owned space.

Frequently the simple act of walking into a space and filming causes people to act up and typically these audits will involve an interaction with police, security, or other public employees or officials—and those interactions can get very heated. The goals of a first amendment audit truly depend on the “auditor’s” themselves. Some auditors see this as an opportunity to teach people about their rights and to protect those rights—which includes enforcing what is in the Constitution. Other auditors see this as an opportunity to be as abrasive as possible—sometimes in order to sell merchandise or to create “shock” videos to post on YouTube and other platforms. First Amendment audits are not always a bad thing. In fact, there have been reforms made with respect to police conduct as well as examples of where an audit has led to holding government officials accountable for violating people’s rights. Many courts ruled, and the U.S. Department of Justice has taken the position, that citizens have the First Amendment right to film police performing their duties in public.¹

If you encounter a First Amendment audit, always maintain courtesy, respect, and be tactful and above all else, please pay attention to behavior and conduct – not necessarily the recording itself. You can address the behavior through our policies. Also remember, these audits can only be performed in public spaces and not in offices, breakrooms, bathrooms, or any place where there is a reasonable expectation of privacy.

¹ See e.g. Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011); ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012); Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000); Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995); Turner v. Driver, No. [1] 16-10312 (5th Cir. 2017); Fields v. City of Philadelphia, 862 F.3d 353 (2017); Sharp v. Baltimore City Police Department, No. 1:11-cv-02888-BEL (D. Md. Statement of Interest filed January 10, 2012)

If someone is conducting an audit or otherwise recording for commercial purposes, you do have the ability to ask them what the purpose of the recording is and if the recording or photos are being made for commercial purposes (such as shooting a short film), you can instruct them to follow the existing policy. Please see Administrative Regulation [1.5 Use of College Facilities](#).

Arizona HB 2319

This proposed law would make it a crime to film any police activity within 8 feet, unless law enforcement gives permission to be closer. If the law enforcement activity is occurring in an enclosed structure on private property, a person who is authorized to be on the private property may make a video recording of the activity from an adjacent room or area that is less than 8 feet away from where the activity is occurring, unless a law enforcement officer determines that the person is interfering in the law enforcement activity or that it is not safe to be in the area and orders the person to stop recording or to leave the area. The penalty for breaking this new law would be a Class 3 misdemeanor if the person filming does not comply with an order to immediately cease recording. There are concerns that this law would violate the First Amendment, which means we would have to see what the court decides, if a constitutional challenge is brought.

If you have any questions, please contact Melissa Flores at Melissa.Flores@domail.maricopa.edu.

References:

[First Amendment "Audits" and the Civilian Right to Film Law Enforcement \(Part 1\) \(dgllearningcenter.com\)](#)

[Arizona Recording Law | Digital Media Law Project \(dmlp.org\)](#)

[Recording Police Officers and Public Officials | Digital Media Law Project \(dmlp.org\)](#)

[Microsoft Word - HB2319P.docx \(azleg.gov\)](#)

[Arizona Revised Statutes § 38-431.01 \(2021\) - Meetings shall be open to the public :: 2021 Arizona Revised Statutes :: US Codes and Statutes :: US Law :: Justia](#)



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