



IDEAS

Deleting the Right to Record the Police

An Arizona law seeks to solve the problem of police misconduct by preventing anyone from documenting it.

By Adam Serwer



Matt York / AP

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Sometimes cops lie. Sometimes they shoot a man in the back and leave him facedown on the ground but tell the public something else. Sometimes they say a man was responsible for his own death because he “physically resisted,” even though he had been restrained and begging for his life. Sometimes they gun down a 12-year-old without giving him time to drop his toy firearm, yet insist otherwise. And sometimes there’s video proving that they lied.

Video, even if it does not ultimately tell the entire story, can provide uniquely compelling evidence in a way testimony or physical evidence from the scene of a crime cannot. The spread of cellphone cameras has provided grim confirmation that police can be as dishonest as any other human being. That in itself raises certain dilemmas, such as how much weight to grant police statements and uncorroborated witness testimony.

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Yet there are those who think the problem is not the abuse of authority by law enforcement, but the existence of video documenting such abuses. Arizona lawmakers recently came up with a solution aimed at ensuring that fewer of these embarrassing videos contradicting police falsehoods get made. In July, the state's Republican governor, Doug Ducey, signed into law a measure making it illegal to record video within eight feet of where "law enforcement activity is occurring." In other words, the law allows police to arrest you for taking video of them, even if you're videoing them as they break the law. Although there has been prior litigation over the First Amendment right to record police, this appears to be the first time a state has sought to directly criminalize the act.

In an op-ed in *The Arizona Republic*, State Senator John Kavanagh acknowledged that he had proposed the bill at the request of "Tucson police officers" because of "groups hostile to the police that follow them around to videotape police incidents." Although insisting that he respects "the constitutional right of people to videotape police officers performing their duties," Kavanagh defended his bill as necessary. "Police officers have no way of knowing whether the person approaching is an innocent bystander or an accomplice of the person they're arresting who might assault them," he wrote. That rationale for the bill echoed the most common falsehood invoked by police attempting to cover up misconduct: that they feared for their safety. The same general theme has been advanced by many police-advocacy organizations and their supporters, who argue, in essence, that the Constitution ceases to exist the moment a police officer feels unsafe.

Media organizations—perhaps one of the very "groups hostile to the police" Kavanagh was referring to—sued over the law, and a federal judge blocked it from being enforced in September. The lawsuit, which was filed by attorneys from the

Arizona ACLU, argued that by “criminalizing the recording of police officers from a certain distance,” the law “creates a new risk of arrest and prosecution for activity that is protected by the First Amendment to the U.S. Constitution.”

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Mukund Rathi, an attorney with the Electronic Frontier Foundation, which filed a brief in support of the ACLU's position on behalf of local activists, notes that the infamous video depicting the murder of George Floyd in 2020 might not have been taken if a law like the one in Arizona had been in force.

“If this law was in place, those officers at the perimeter may have been justified in arresting people recording, because they would have been recording within eight feet of that perimeter, which might be unlawful under this law,” Rathi told me. “On paper or in practice, the police would have ended up prohibiting recording within more than just eight feet of what they were doing if this law was in effect.”

Courts are often reluctant to second-guess law enforcement after the fact. An officer who arrests someone standing more than eight feet away, and insists that they thought the person was closer, is unlikely to face consequences. (If you have any doubts about the deference of federal courts toward police, an appellate court recently affirmed that Ohio officers “reasonably believed” they were acting within the law when they arrested a man who made an internet page mocking them.)

The lawsuit also notes that compliance with the measure “will be particularly difficult in fluid and crowded situations, such as protests, where the eight-foot requirement may be uniquely cumbersome.” Indeed, the way the law is written, an officer could simply approach the person recording and then, if that person did not stop recording or could not move away fast enough, arrest them for violating the eight-foot barrier.

Moving rapidly away from an approaching officer, however, carries its own risks. The brief filed by the Electronic Frontier Foundation noted that in some cases, video taken by protesters before arrests had actually been used to disprove the basis of those arrests, by showing that the police account of the preceding events was false. In one example, Arizona police officers accused a protester of trying to impale them with an umbrella; multiple videos taken at the scene showed that she had been running past them when she was tackled. That incident, the local ABC News affiliate reported, was one of 39 cases brought against protesters that were ultimately dismissed.

“People have been charged with felonies and faced many, many years in prison for their legitimate and protected conduct at protests, but they were charged with things like felony rioting or rioting, assaulting a police officer,” Rathi said. “And in many cases, the fact that the protester had done nothing wrong was revealed by a video of the activity.”

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Arizona already has laws on the books that prevent physical interference with an arrest, as do other states. What makes this law unique is that it seeks to chill and restrict documenting abuses of state power by law enforcement, by giving officers the authority to arrest those who do so.

Police already have ample leeway to interfere with anyone recording them—a Seventh Circuit decision upholding the right to record police nevertheless concluded that although “an officer surely cannot issue a ‘move on’ order to a person *because* he is recording, the police may order bystanders to disperse for reasons related to public safety and order and other legitimate law-enforcement needs.” That distinction offers a loophole large enough that people get arrested attempting to record police even if they’re doing nothing wrong.

The Supreme Court has never ruled that there is a First Amendment right to record police, although several federal courts have. The First Amendment argument in favor of such a right seems clear and overwhelming. Yet court deference to law enforcement, combined with the growing tendency of conservative judges to conform their legal analysis to whatever the prevailing right-wing position is on a given culture-war controversy, means that the outcome of what should be a slam-dunk case is impossible to predict.

The fact that some police officers lie does not mean that every one of them is dishonest. But in any institution, the protection of bad actors who abuse their authority will ensure that such abuses continue and spread, making those who actually follow the rules targets of suspicion within their own organizations. When

the authority in question is the power to deprive people of their life or liberty, the right to expose such abuses becomes existential. Those who would uphold or pass laws like these don't want police misconduct to end—they simply want you to stop hearing about it.
