

Discover Policing Podcast Series

Title: Public Recording of Police: Considerations for Law Enforcement and Communities

Interviewees

- Mickey H. Osterreicher, General Counsel for the National Press Photographers Association
- Billy Grogan, Chief, City of Dunwoody, GA; Member, IACP Human and Civil Rights Committee

About

Chief Grogan and Mr. Osterreicher discuss the legalities of the public's right to record police based on the recent IACP/COPS Office publications on Public Recording of Police. Mickey and Chief Grogan touch on the current climate around recording police and how it has made an impact in police and community relations.

Audio Transcript

00:00 Joseph Marcus: From the International Association of Chiefs of Police, welcome to the Discover Policing podcast. I'm Joseph Marcus.

[music]

00:12 Chief Billy Grogan: When we start trying to stop people from doing, lawfully recording us, it ends up escalating situations rather than de-escalating situations. I think we've come a long way and people do this for a living. They're actually looking to have confrontations with police officers.

00:32 Mickey Osterreicher: When I was a journalist, the only way that the public might see photographs and recordings is if those pictures were published in the newspaper or a magazine or a broadcast by a television station.

00:47 JM: This episode is funded by the U.S. Department of Justice's COPS Office. And the department's full disclaimer notice is available at the end of the podcast and in the episode show notes. The views, information, or opinions expressed during this podcast are solely those of the individuals involved and do not necessarily represent those of the IACP or the COPS Office. My guests today, Mickey Osterreicher, and Chief Billy Grogan, discuss public recording of law enforcement. We discuss the rights of people to record police in public and how police should be trained in a way that protects people's constitutional rights. I hope you enjoy the conversation I had with the two of them. And now, here's my interview with Chief Billy Grogan and Mickey Osterreicher.

01:33 JM: Thank you both for being on the podcast.

01:35 MO: Thanks for having us.

01:37 CG: Glad to be here.

01:38 JM: This is going to be a little bit different for us. Most of my podcasts have been separate interviews, so I'm excited to try and experiment with this and see how it goes. You both have worked together. Can you talk a little bit about some of the work you've done together, Chief Grogan?

01:55 CG: Sure. Several years ago, the IACP received a COPS grant to do some research on the public recording of police, and so Mickey and I were on the Advisory Committee, that helped... We met several times and discussed a lot of the issues related to the public recording of police. And ultimately, the IACP put together some training documents and resources for local agencies to help guide departments across the country in public recording of police.

02:33 JM: Mickey, can you give us a little bit of background about some of the issues around civilian recording of police, just what are some of the major cases and what has sort of shaped the conversation around public recording of law enforcement?

02:48 MO: Sure. There have been a number of issues that have come up over the years. I think there was at least a general misbelief that when officers are out in public, that they have some

reasonable expectation of privacy, but pretty much, the rule of thumb is that when you are in a public place, that you don't. Now, if you get in a patrol car, or do something where you're not outside in a public forum, that's a different story. So case law has formed over the years, the seminal case is *Glik v. Cunniffe*, which took place in the First Circuit. There was a gentleman who was walking through the park and saw some Boston police officers trying to effectuate an arrest, took out his Blackberry and started to record them. When he was done, they kind of looked at him and asked him if he'd been re-recording them. He said "Yes" and then they arrested him and charged him with a violation of the Massachusetts wiretap statute.

04:00 MO: That case got thrown out at the... All the different charges that were lodged against him were dismissed, including that one. And then he filed a federal civil rights lawsuit under United States Code 42, USC, 1983. And, basically, the federal judge in that case said "No", that there was no qualified immunity and that the case would be able to proceed. The City of Boston appealed that up to the First Circuit and the First Circuit re-affirmed that. We've seen the same kind of thing now in all of the odd US circuit Courts of Appeal. So the First, the Third, the Fifth, the Seventh, the Ninth, and the Eleventh have all said the same thing. It's interesting that the even courts have not really weighed in on it. Go figure why.

05:02 JM: So has it not made it to the Supreme Court then? This is all just in Appellant Court?

05:05 MO: No. This matter has not been heard, but this issue has not been determined by the Supreme Court. It's really pretty much a Circuit Court by Circuit Court issue. And, what's important here is that once that right has been clearly established, it's very difficult for officers to then claim qualified immunity. That's why it's so important, both on the law enforcement side and for citizens and journalists.

05:38 JM: And Chief Grogan, can you talk a little bit about what the impact on law enforcement has been and how it may have changed with the ubiquity of camera phones and mobile recording devices, generally?

05:50 CG: Well sure. Well, I think when you look at the devices that everyone has on their hip now or in their pocket, certainly, it's become more prevalent. Just about any major incident, especially where there's a crowd around, many people have their phones out and they're easily able to record it, share it immediately on social media. And so, I think that it's just become commonplace now.

06:19 CG: Regardless of the legal perspective, I think, previously, if you go back and look and you see some of the videos that have been posted, where police officers have confronted people who are recording them, and they otherwise were not interfering with the police officer doing his or her job, it's really left law enforcement with a black eye, because we end up looking like the bad guys, like we have something to hide, even though, in most cases, the people who are doing a recording are not interfering with the officers, not causing any kind of issues. It's the simple fact that the officer sometimes don't like to be recorded. And in some cases, inappropriately, they think there's some legal restriction on people being able to record it.

07:15 CG: So I think when you move forward and you combine that was happening and then you add on what happened in Ferguson, when we start trying to stop people from recording, doing, lawfully recording us, it ends up escalating situations rather than de-escalating situations. I think we've come a long way in the knowledge and our actions in law enforcement toward the public

recording the police. But I think we still have a long ways to go.

07:50 MO: I think it's really important for officers to remember that pretty much every cell phone may be recording. So, I think keeping that in mind, keeping the fact in mind that if a person, whether they're a citizen, or a journalist, has a legal right to be present if they're in a traditionally public forum, standing on a sidewalk, or in a park that they can photograph and record the officer, as the chief said, as long as they don't materially interfere. If they don't have this absolute right to do whatever they want, so if there's some specific direction that the officer wants to give them, that's perfectly appropriate. But as we've seen far too many times where the officers tell them to turn off the damn camera and get the hell out of here, that's not an appropriate time, place, and manner restriction on their First Amendment rights.

08:42 JM: There's a couple of things I wanted to touch on in there. What is... How does recording civilian rights record, how does that connect with the First Amendment right a little bit more clearly? And then, what are some of those time, place, and manner restrictions? So Mickey, if you wouldn't mind taking sort of how does recording police connect to that First Amendment protection?

09:10 MO: Sure. There's a number of clauses in the First Amendment, but the ones we're going to deal with here are the freedom of speech and freedom of the press. And most people, when they go, "Well, freedom of speech, what does that have to do with photographing or recording?" But through case law, it's been determined that photography and recording is a form of an expression. And without expression, you can't have free speech. That's how it comes under the ambit of the First Amendment. And then the... Again, the other principle is because when you're out in public, there is no reasonable expectation of privacy.

09:49 JM: And then Chief Grogan, can you talk a little bit about the time, manner, and place restrictions? How should both law enforcement think through those, and how should community members who are recording think about those issues?

10:03 CG: Sure. Well, I think Mickey's touched on some of it in the fact that if it's a public space, a public area that they have access to, then certainly, they can record. But what happens sometimes is, in people's excitement, they get too close to the action. If an officer is using force of some kind trying to arrest someone and somebody is standing immediately behind the officer, the officer can't see them. The officer may think that they may be with the person, so the officer doesn't know their intention necessarily. It can put the officer unnecessarily at risk. And so, that's a situation where the person would probably need to step back. And so, you don't want to ever put yourself in the middle of the situation that you're recording.

10:51 CG: It's fine to stand back at a distance enough, or not stand in traffic, or not standing anywhere else that you would be interfering where the officer is trying to perform their duties, or putting yourself in danger. And it's really situation, based on situation to situation. It's not necessarily a blanket statement, but certainly, I think in a general sense, not interfering with the case of the action that the officer... And then not putting yourself in any type of risk, whether it's risk from traffic, or from approaching vehicles, or from any of the suspects. If it's a moving situation, a case of it's happening some type of incident, you just don't want to be in a situation that becomes dangerous for you or people that you're with.

11:39 JM: And then, how do you think... I guess it might be a question for both of you, but how should law enforcement officers appropriately establish restrictions? In that way, they grant the citizens the right or the people the right to record in an appropriate manner, but they're not putting such burdens or restrictions on those individuals who are recording?

12:07 MO: I think the best way for officers to do things is to not specifically address the camera. Assume that the person is there, and if they have a legal right to be present, if they're standing on a public street. Then if you need them, direct them with specific directions as to where you would like them to stand. "I need you to stand over here so I can see you." "You need to step back a couple of feet." An officer also is concerned about weapon retention. If somebody is close enough to reach for your weapon, that's a reasonable time place and manner restriction for you to ask them to step back. If they're shouting at whatever is going on and saying, "You don't have to answer his questions." I mean that, again, rises to a different level of material interference, whereas, if a person is just silently standing there as if they were also watching this, but they happened to have a cell phone in their hand and recording it, it really shouldn't make any difference whether they're watching or recording if they're able to be there.

13:14 MO: If they're doing something that is either endangering the officer, a third party, or themselves, then the officer, just as they would in any other situation, needs to give them clear direction as to where they want them to be, but telling them that they need to move back so far away that they can't see in here, unless there's a reason for it.

13:37 MO: Let's just say, for example, you've got a bomb threat. Now they're clearing the area. They're not clearing you out because you got a camera in your hand. They don't want anybody that's there because if the bomb goes off or explosive device goes off, they are responsible for that person's safety. So it really depends what is reasonable in terms of asking somebody to move back a few feet in one situation asking them to move back a block might not be unreasonable in another situation.

14:09 CG: Mickey makes a great point in that, act as though the camera is not there. So, your decision-making has to be related to whatever else is going on. The worst thing you can do as an officer is say, "Are you recording me?" Because then you can... You've given away, your intent, to whatever maybe follows with your directions. So if you keep it simply the fact... "Hey, I need you to move over here, where I can see you. Or can you just step back from this? You're too close. Or you know, some kind of direction, regardless of the camera.

14:48 CG: And then Mickey did mention... We do have a situations across the country where, and people do this for a living. They go out and they're, in some cases, they're actually looking to have confrontations with police officers. And so they're getting sometimes in the face of the officer, and being very aggressive, and at that particular point, the officer feels like they're being threatened or there's something else that he needs to get the situation under control, and he has to give appropriate direction to the person who's doing the recording.

15:24 JM: Before this, Chief and I talked a little bit about those constitutional checks and people posting things on YouTube just to check the cops. How have those two things shaped the law enforcement training and responds to civilians recording police?

15:57 CG: I think, certainly, most professional police departments are aware that this is happening and hopefully, they're giving their officers proper instructions. We've had a group coming around here in our area, not to my department, but they came to other local departments, and all they were doing was walking around the lobby of the police department and with a camera, and just recording everything. And they moved out into the parking lot and it was a public parking lot. There's not... They didn't go behind any barriers. And so, they were recording it, recording just the vehicles sitting there and all this, and it went south pretty quickly. And that wasn't that long ago. And all because the supervisor that ended up coming on the scene decided that he wasn't allowed to record and he was restricted from recording, he needed to turn the camera off or he was going to go to jail. Now, this is the after many of these court cases, and it's, I think, in professional law enforcement circles is pretty well-known now, like Mickey said, it's an established fact that people have a right to record when they're in these public places.

17:17 CG: And so I think these "constitutional checks" in quotes as you've said are happening more frequently, and police departments need to be aware and know how to act appropriately because this information is going to be shared on social media, posted on different platforms. And if it's handled incorrectly, not only does it make the department look bad, and the officer look bad, in some cases, you could open up your agency to some liability. And so, it's extremely important that it be handled appropriately.

17:51 MO: We've seen that a lot, where they're doing what a lot of them call First Amendment audits. For whatever reason, they've taken it upon themselves to go out and see how officers and departments react to being photographed and recorded. The thing that I deal with, most of the time, are either citizens or journalists who happen to come upon police officers performing their official duties and think that it's important to record that event because it's a matter of public concern. But you know the video cuts both ways, it can show that an officer.

18:31 MO: Absolutely perform professionally. They were polite and they acted with the courtesy and professionalism that officers are expected to do, so it's not always that somebody's trying to get a gotcha moment, getting officers to do something bad, but oftentimes, they are out there to see if they can goad officers into taking, taking the bait. The problem is, when I was a journalist, the only way that the public might see photographs and recordings is if those pictures were published in a newspaper or a magazine or broadcast by a television station.

19:10 MO: As the Chief said, now with social media, pretty much those images can be live-streamed. They can be seen around the world, and go viral, in a matter of moments. As we often say, we're trying to get officers to not be video stars, and to keep departments from being sued, to keep officers from being sued. And then also, it's kind of a win-win because the public then has the right not only to exercise their First Amendment rights, but also to be informed and see officers acting in the appropriate manner. It's not always that somebody is going to be acting inappropriately.

19:54 JM: Are there differences between the rights that credentialed journalists have versus rights that individual citizens who just happen to be on the corner recording might have?

20:11 MO: No. Again, in my training with both citizens, journalists, and police officers, the press doesn't have any greater right of access than the public. If the police set up a perimeter, and for either evidence collection or public safety, then everybody needs to be behind that perimeter if it's

clearly set up. Now oftentimes, if a PIO arrives, if a commanding officer arrives, and the situation warrants it, they may allow the press to get closer to the scene than the general public, but they certainly, as I said, they don't have any greater rights than the public, but they certainly also have no less right than the public. Far too often, we will see where the police will set up a perimeter and they'll allow the public like right up to the yellow tape, but when the media shows up, they'll direct them much further back saying, "Well, you have longer lenses and you can get closer. And that's just is inappropriate. So they can't get closer unless the police allow them, they don't have any kind of constitutional right, or First Amendment right to do that, but they certainly can't be kept further away or shouldn't be kept further away than the general public.

21:34 JM: In addition to some of the tools that you had mentioned earlier on, how do you train your officers in handling some of these situations, both with the public and with media present?

21:46 CG: Sure. One of the things I think that has helped with this topic is the prevalence of body-worn cameras. And so, we've had body-worn cameras, we had in-car cameras for the entire existence of our department, which is 10 years old, but we got body cameras, body worn cameras about four years ago, maybe going on five years, and officers are now really used to everything being recorded that they do ever call that they go on the camera's recording? And it's kept for the prescribed time that we're required by our retention laws here in Georgia. And so, officers now have become accustomed to being recorded, so I don't think today, it's as much of a, especially newer officers, younger officer who are very active on social media, who probably think nothing about doing a selfie or a video or whatever, they're just used to being recorded, unlike maybe some older officers from my generation and later...

23:00 CG: And so, we talk certainly about that through our annual training and the resources that are available with the IACP, the public recording the police resources, those are very helpful. Little short roll call video, there's a longer video as well, longer training. And both those resources are excellent to kind of give a broad overview of it. They have a few examples there, and I think it's really simple to deliver, but also simple to understand, and they make it really easy to get that information out there. And for us, we've had people record us all the time on calls and the press shows up at different times, and they're just used to being recorded and we even have people say, "I'm recording you." And usually, the officer responds, "Well, that's fine. I'm recording the situation also with my body camera." And usually, that's the end of that, so it works... That works for us.

24:07 MO: To add on to what the chief said, it's so important, I think, for departments, first of all, to have a policy and there are many model policies. The IACP has one that are available, so departments don't have to reinvent the wheel. And then, once you have that policy that whatever it is that you're comfortable with, then you need to have training. We can't talk about with everything else, how important training is and just having a policy with no training, then it's just a piece of paper. But if you have the proper policy, if you give the proper training, you give it on a regular basis. Not like once when you're coming through the academy and then forget about it. I think then, if there's a deviation, then it's much easier to possibly, if you have to provide remedial training, if you have to discipline an officer, you can't just expect officers to know this without having a policy and without having training, just as you wouldn't expect them to know other things without those general orders and training.

25:23 CG: Very, very true.

25:26 JM: Mickey, can you briefly touch on some of the consequences of... The legal consequences for departments if their officers aren't trained properly? What are some of the situations that you've seen in your legal career?

25:44 MO: Well, you certainly you can be faced with those federal civil rights lawsuits that I mentioned at the beginning that end up costing citizens and taxpayers hundreds of thousands of dollars unnecessarily. The extreme is having an officer disciplined, losing pay. We've had one case in New York City, where, because the officer swore on a misdemeanor complaint in the narrative to things that didn't actually happen, that officer ended up being prosecuted for that.

26:23 JM: Yeah. And I know when we were going over our podcast on body worn cameras, we were talking about those costs and benefits both. There's a cost of having a body-worn cameras, but they can also help protect departments from lawsuits, in addition to helping civilians, of course, as well. And we talked a little bit already about the proactive-ness of body worn cameras and helping camp down some of the issues around being recorded by civilians as well from the police officer's perspective.

26:57 CG: Yeah. Part of sometimes what happens with some of these public recordings of the police is, it's not the whole situation. So they caught the last 30 seconds of some incident that's been going on for a minute and a half, and so that proved to be a little problematic for officers, and therefore, one of the reasons that I think a lot of departments made the move for body-worn cameras. In that, hey, if these situations are happening, and we're getting part of what's going on being reported, we need to record what actually is going on the entire thing. And I think that's been helpful for law enforcement for sure.

27:42 MO: Absolutely. It's very rare that somebody's going to have been recording to whatever the interaction that led up to possibly some official action by the officer. Yes, that's a perfect reason. And it's the real reason, as the Chief said, why a lot of the officers that are using body cams understand the concept. If you know that you're out there doing what you're supposed to be doing, you would want to welcome all the recordings that you could have, which kind of... And I don't know how much you want to get into this, but I think it's an issue that we should mention at least is when people or the media are recording oftentimes we've seen officers say that they can seize that recording as evidence. And...

28:32 JM: And that was actually... That's a perfect segue, that was going to be my next question. If we can talk a little bit about that, please.

28:37 MO: Sure. So oftentimes, we've seen officers say to someone, "Well, if you've recorded me, I'm going to seize that as evidence." And there are exigent circumstances under which a recording can be seized. There has to be probable cause that a serious crime has been committed. And the act of somebody recording a police officer, in and of itself, is not a crime at all, let alone a serious crime. Serious crimes, normally are death or bodily injury. And then the officer has to have a good faith belief, which is a much lesser standard, legal standard, that there's evidence of that crime on the camera. And then the third prong, and all three prongs have to be met, is that they have to have a good faith belief that absent the seizure, that that recording will be lost or destroyed. And then most departments and maybe the Chief wants to talk more directly to this, have a policy that if you're going to do a seizure of somebody's recording device, whether it's a cellphone or a camera, that you normally have to call a supervisory officer and go through a certain set of procedures.

29:57 MO: Now, there's nothing wrong with an officer asking, "Hey, did you record this? Can I take a look at it?" And if a person wants to voluntarily show them that, that's one thing. If they want to voluntarily possibly email that file to an email that the departments have set up for the retention and collection of electronic evidence, that would be another thing, but coercing somebody into showing it, even if you have, meet the exigent circumstances, there's... You still need a warrant to actually take a look at what's on that device. Again, unless there's a higher exigent circumstance, where it's going to be the fact that, if you don't look at it, that somebody may be seriously injured, or killed, or there may be a serious incident.

30:53 CG: I think Mickey makes a great point. Two, you certainly want to make sure that before you do something like that, that you have a supervisor's permission to move forward, that there's been a supervisory review of the seizure. But I would also caution that this should be very rare and unusual. It should not be something that's commonplace, and you certainly shouldn't seize as some basically pretextual type of reason to just to get their recording, because then, you're going to end up in a lot of trouble as a result of that. And whatever was on there would not be able to be used in court as well.

31:37 JM: Chief Grogan, you've talked... You've been in this work and you've been talking to chiefs across the country on some of these issues. Now, what are some of the things that you are hearing from them on how to address some of those issues with their officers and supervisors to make sure that they are following the necessary legal protocols and standards for those?

32:01 CG: I think even just a few years ago, people were having a hard time in the law enforcement across the country. I remember there's some departments said they've got spanked by the courts, so to speak, but then they were still doing the same thing. They were still a seizing people's cameras and recording devices and... But I think I've seen some transition, or some better acceptance. I think it really starts from the leadership, and I think the Chiefs are more aware of this issue and have made a more concentrated effort to get out in front of it, and prevent problems before they happen. I think their most professional Chiefs recognized that this is an issue that needs to be addressed through policy, and through training. I think the IACP has done a great job partnering with the COPS office through a grant to actually give some deliverable materials that can be used to educate officers and to help put departments in a better place related to this topic. I think I've seen a lot of progress.

33:21 JM: Yeah. Mickey, you talked... Can you talk about some of the issues that you saw and some of those challenges that some departments are facing in terms of officer.

33:39 MO: Yeah. But before we get to that, because I don't want to forget, the one thing that we did, that we do see, and that's a problem is just as I talked about the exigent circumstances, we've seen officers that end up seizing the recording for the purpose of either deleting or destroying it. And there had been a number of those cases already. That basically turns exigent circumstances on its head. The whole idea is to seize that recording to preserve the evidence, certainly not to destroy it. The Department of Justice has come out very strongly in one of those cases that said, there are no circumstances under the First Amendment, whereby an officer should delete or destroy or order the person who owns that equipment or a third party to delete or destroy those images. And that has

implications not only for the First Amendment, but for the 14th Amendment, in terms of due process and also for Fourth Amendment seizures.

34:46 MO: I think those are some of the kinds of things that we see and it's unfortunate that there are still departments out there, as the Chief said, the IACP office, all this wonderful resources and material that we were able to put together. They've got the policy, they've got the training, they've got videos. They've got instructor guides. They've got everything you need, and it really isn't a heavy lift, so that every department should not ever run into this problem where their officers basically violate people's constitutional rights, violate the very rights that officers took an oath to uphold. It's really important and I just feel very honored to have been part of this and work with so many law enforcement officers like the Chief, that really want to make sure that that message gets heard loud and clear throughout the country.

35:58 JM: I mean, we're sort of wrapping up the podcast and I don't want to take too much more of your time, but Chief, what are some of the things, generally, or some of the challenges that you would want other chiefs, or other law enforcement officers to be cognizant of? What are two important takeaways that you think they should understand? Some of your key takeaways from your work in this field.

36:29 CG: Well, one, I guess, would be human nature. Sometimes when police officers are confronted with people and it's probably more so when it's somebody that's getting close to them or in their face or being loud or something as opposed to somebody standing over, but human nature sometimes takes over and we, the officers may act or react in a way that's not appropriate. And I think having a good policy and maybe talk about training on that policy so that it becomes kind of ingrained, it becomes second nature, they understand that. They will be less likely to overreact or react inappropriately to those types of situations. A little investment on the front end in that type of policy and training can pay dividends later on the back end so that somebody doesn't just have a knee jerk reaction to a situation.

37:39 JM: Great. That's everything that I have. Mickey, is there anything that you want to add before we wrap up the podcast?

37:48 MO: No, I think we've covered it. I think the chief said it before, but I'll say it again. The camera shouldn't be the issue. If a person has a legal right to be present, whether it's in a public place or on private property with permission of the owner, the officer shouldn't really be reacting to the fact that there's a camera there. If anything, they should welcome it.

38:09 JM: Well, on that note, we will leave it there. Thank you both for being on the podcast.

38:13 CG: You're welcome.

38:14 MO: It's a pleasure. It's a pleasure being on with you, Chief. Thank you.

38:18 CG: Good talking to you, Mickey.

[music]

38:25 JM: I want to thank Chief Grogan and Mickey Osterreicher again. I also want to thank you for

PROP

listening. To find resources and trainings on this topic, please visit theiacp.org/prop. And we'll also put a link in the show notes. Feel free to email us with any questions or comments at discoverpolicing@theiacp.org. For this episode, I had research and production help from Elynn Lee. Thank you to the U.S. Department of Justice's COPS Office for their support on this episode. Please see the show notes to learn more about the COPS office and follow their work. This project was supported in whole or in part by cooperative agreement number 2017CKWXXK004 awarded by the U.S. Department of Justice Office of Community Oriented Policing Services. And as always, the opinions contained herein are those of the speakers and do not represent the official position or policies of the U.S. Department of Justice. References to specific individuals, agencies, companies, products or services should not be considered an endorsement by the speakers, IACP, or the U.S. Department of Justice, rather the references are illustrations to supplement discussion of the issues.

PROP