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Right to Record: Recent local events lead to declaration of right, calls for reform



The Rev. Al Sharpton speaks at Eric Garner's Brooklyn funeral. AP photo

By Charisma L. Miller, Esq.
Brooklyn Daily Eagle

On July 17, a cell phone video surfaced showing a number of police officers surrounding Eric Garner on a sidewalk in Staten Island. The officers are seen and heard questioning Garner about selling illegal cigarettes. Tensions begin to flare and the video shows an officer apparently placing Garner in a choke-hold, subduing him to the ground and arresting him. Garner, an asthmatic with a heart condition, is heard repeatedly stating that he could not breathe. Garner died shortly after this altercation and his death was pronounced a homicide by the New York City Office of Chief

Medical Examiner.

In the last month, approximately three bystander videos have surfaced showing suspected acts of police brutality, including a video of a police officer apparently stomping on the head of an arrestee in Bedford-Stuyvesant, Brooklyn. Most recently the *New York Daily News* released a video of police officers attempting to arrest a partially naked woman outside of her Brownsville apartment.

Right to Record and the law

Videotaping police officers has long been a controversial topic but still a right afforded New Yorkers. The central push for the right to record arose in 2010 when a Baltimore resident sued that city's police department asserting that officers took his cellphone and wiped it clean while he was recording the police arrest and beat his friend. The suit gained national attention causing the U.S. Department of Justice (DOJ) to submit a letter in the case clarifying a citizen's right to record police interactions.

"[The] First Amendment [provides a] right to observe and record police officers engaged in the public discharge of their duties," the DOJ's letter states.

New York's police department specifically spells out that right in its policy manual. The NYPD Patrol Guide section 212-49 mandates, "Members of the service will not interfere with the videotaping or the photographing of incidents in public places," and puts a prohibition on an officer's "[i]ntentional interference such as blocking or obstructing cameras or harassing the photographer [which would] constitutes censorship."

The right to record is not open-ended, however. The recorded activity must take place in a public setting and be of police officers carrying out their official duties.

"If the action is happening in a public place, every New Yorker has the right to record," Brooklyn civil rights attorney Alena Shautsova told the Brooklyn Daily Eagle. "If the action occurs in a private or confined place, the city can impose rules. For example, you generally cannot video record in a courtroom."

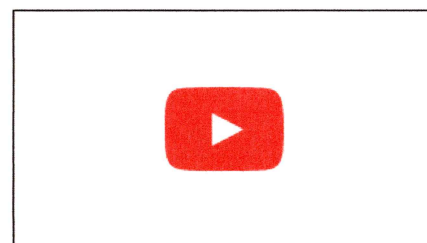
As NYPD policy lays out an individual's right to record, it also prohibits its officers from harassing or intimidating those attempting to exercise this right. Section 208-03 of the Patrol Guide dictates that an individual "taking photographs, videotapes or tape recording [and] remaining in the vicinity of a [police] stop or arrest" does not constitute probable cause

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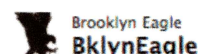
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for the detention of a bystander unless the officers or others are directly endangered.

And while a right to record has been identified as NYPD policy for at least 10 years, it is alleged that the police department is infringing on that right and engaging in practices that impede New Yorkers' ability to observe and record its police officers.

In a recent lawsuit filed in Manhattan's federal court, plaintiff Debra Goodman asserts that "[t]he NYPD maintains a policy, practice and custom in which officers interfere with the rights of individuals who, without interfering with police activity, are recording or attempting to record officers performing their official duties in public."

This is not the first of such lawsuits in New York and a number of similar suits have been filed in Brooklyn's federal court.

In 2012, Brooklyn resident Hadiyah Charles was arrested for disorderly conduct while filming police officers stop and search three unnamed individuals. According to the suit filed by the New York Civil Liberties Union, Charles was arrested, and her phone was confiscated and searched because she was exercising her right to record.

"The bottom line is that this plaintiff interfered with the officers' abilities to do their jobs, and her subsequent arrest was valid," Mark Zuckerman, counsel for the city's Law Department, said at the time.

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Bystander videos in the courtroom

Attorneys throughout Brooklyn advocate for bystander videos as an effective evidentiary tool.

"As a civil rights attorney, the right to record is a very important right for proof of police conduct," Shautsova noted.

The use of videos, attorneys assert, help tilt the balance of power in the courtroom that shows deference to the word of law enforcement officers over civilians.

"There's a general prejudice towards the truthfulness of a police officer as they are there to enforce the law, but that is not always the case," Shautsova said.

"Bystander videos give testimony more credibility and clarity," Marty Needleman, executive director of Brooklyn Legal Services Corp A, advised the Eagle. "They help enhance verbal testimony."

Concern that bystander videos interfere with justice by not containing a full account of police interactions are resolved through the judicial process, Brooklyn attorneys assure. Footage obtained through the right to record and held for trials are subject to evidentiary rules.

"There are mechanisms in place, such as the rules of evidence and a judge's determination as to admissibility," Shautsova noted.

Prosecutors always have the opportunity to counter the video footage during cross-examination, Needleman stated.

"Demonizing the Demon"?

In or out of the courtroom, it is clear that the right to record and bystander videos have impacted the way New Yorkers view police interactions. Critics of bystander footage claim that the recordings unfairly stigmatize police officers or misconstrue legal police actions as acts of police brutality.

In the case of the Garner video, NYPD union leader Patrick Lynch stated that "sometimes the use of force is necessary, but it is never pretty to watch."

Commenting on the man behind the camera at Garner's arrest, Lynch said that the bystander was "demonizing the good work of police officers."

Needleman, however, noted that the videos speak for themselves.

"The videos speak for themselves," Needleman said. "The footage is demonizing demons and demonic behavior."

"Ugliness is in the eye of the beholder." When questioned whether the videos can show legal but unsavory police conduct, Needleman said, "If it's ugly it's ugly. Someone can see to what extent an individual resisted or not resisted or to what extent the NYPD rules were violated. It all comes out in a clearer fashion in these videos."

New York politicians have been pushing for a more rounded approach to bystander videos. "Given the disturbing circumstances surrounding Eric Garner's death and countless complaints of police misconduct, I support outfitting NYPD officers with video cameras, beginning with a pilot program," New York City Public Advocate Letitia James said in a released statement.

It appears as though the NYPD agrees.

"In December of 2013, the department obtained two pairs of Google Glass and has been evaluating these devices in an attempt to determine any possible useful applications," Deputy Commissioner Stephen Davis said. "The devices have not been deployed in any actual field or patrol operations, but rather are being assessed as to how they may be appropriately utilized or incorporated into any existing technology-based functions."