

The fine line between rights and privacy

Since the invention of cell phones, all of us carry our cameras everywhere. And we expect video cameras, both publicly and privately owned, to watch us. Very little isn't captured by a photograph or video.

Case law in this country has long recognized the concept that what happens on the street is not considered "private." While early decisions focused on whether someone seeking attention in a crowd setting forfeits a right to be paid for commercial use of their image, court doctrine in several instances spoke of being "part of the spectacle" and that photographs of such situations are not an invasion of one's right to privacy. Courts began to recognize a First Amendment right to communicate socially valuable ideas through photos taken in public places. One of the most famous cases involved a New York man walking on the street who happened to be holding the hand of a woman not his wife. Many states now recognize that photographing or videotaping in a public place is not an "intrusion" on one's privacy.

Take that long-standing case law principle and push it into the 21st century. What do we do with a U.S. Supreme Court decision that says a "time, place and manner" restriction on speech may be upheld if it "serves a substantial governmental interest and do[es] not unreasonably limit alternative avenues of communication"? It is true, granted, that this statement comes from a court decision involving a policy ban on photographing in a prison. However, that same policy was the basis of a federal appellate court holding in 2004 that "neither

the public nor the media has a First Amendment right to videotape, photograph or make audio recordings of governmental proceedings that are by law open to the public...."

Let's jump to 2016. We find that same quote shows up in a federal court case where the judge held a citizen cannot publish videos of police activities taken in public places. As it happened, the citizen making the videos was following law enforcement officers and filming their activities. The police officers claimed harassment. Is this true? Will

we find that courts step back from their long-standing position that the public has a right to film activity clearly visible in a public place?

And Missouri's Sunshine Law has contained language for a number of years providing "A public body SHALL (emphasis added) allow for the recording by audiotape, videotape, or other electronic means of any open meeting. A public body may establish guidelines regarding the manner in which such recording is conducted so as to minimize disruption to the meeting." (See 610.020.3.) Is it disruptive for a reporter to record the meeting

using his or her cellphone or other recording device? Is it more disruptive for a reporter to videotape a meeting than to audiotape a meeting? If a phone is partially stuck in a chest-pocket of a shirt or jacket, does it matter whether the phone is recording audio or video?

Last summer, the Western District Court of Appeals in Missouri told us that if a public body in the state chooses to make its own recording of a meeting which is then made available to the public, that may be sufficient to satisfy the

statutory mandate and that the words "allow for the recording" is not personal to the citizen attending the meeting, but only requires that such a recording be available, if a citizen desires it. Granted, this dispute took place within the Missouri State Capitol, a place that falls within that "gray" area of being a "public place" in that it is open to the public generally, but not open to the public for all purposes and in all places. Courts have acknowledged in other cases that some "public" places are not open for all – nobody expects to be able to walk into a legislator's office in the Capitol and make himself or herself at home.

Finally, while we are talking about privacy and public places, let's think for a minute about the issue that the Supreme Court is grappling with in terms of CaseNet, its online court record system. It is designed to make the court process more transparent. The public is now able to see what is happening in court cases, to some degree, no matter where you may be located. While in the past the public had to make the effort to go down to the courthouse to look at the file, now case information may be gleaned by just reading docket notes from your home computer. The Court is suddenly balancing privacy interests with this desire for transparency and struggling to find the proper balance.

All of this leads me to conclude that the right to privacy continues, now more than ever, to push against basic First Amendment rights. The Ninth Amendment and the First Amendment have long been carefully balanced. Now more than ever, journalism ethics and standards are critical as we must raise ourselves above the "citizen journalists" who seek to claim our mantle and the rights that go with our profession, even as we realize that those same citizens are an important asset to newspapers with smaller staffs.

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