



# Recording the Police

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## Key Points

- Current laws provide protection for police officers' safety.
- Introduced in the 84th Legislature, HB 2918 violates the First Amendment and is bad policy.
- Recommend passing legislation protecting the rights of citizens to record the police without arbitrary distances and allowing officers to order such recording position to be changed when their safety or ability to perform their duties is interfered with.
- Recommend adopting an amendment to current statute governing interference with governmental operations to provide a defense for filming, recording, photographing, documenting, or observing a peace officer alone similar to the "speech alone" exemption in current statute.

## Introduction

Weighing the legitimate interests of government against the rights of individuals is always a difficult navigational maneuver that the Texas Legislature attempts to wrangle each legislative session. One of the legitimate interests of government, any government, is the protection of its population. The public safety function of the government is most clearly on display in its police functions and police officers attend to this most important task on a daily basis. During interactions between the police and the public, these two competing interests sometimes come into conflict. In no instance is this interaction more sensitive than in the application of force by the police when making an arrest. Capturing these interactions on video and audio recording can hold both sides accountable, and criminalizing such recordings is bad policy and an infringement on the rights of the individual.

## Use of Force and the Role of the Police in a Democratic Society

As keeper of the peace, the police officer is both a part of the community and a part of the government. It is the latter role that is aptly governed by the Constitution in restraining the actions a police officer can lawfully take. The Fourth Amendment to the Constitution prohibits unreasonable searches and seizures by the government and requires probable cause to obtain a warrant ([National Archives](#)). Unlike most legislation written today, it is quite short and much of how we apply it comes through case law via Supreme Court decisions.

Arrests, and any use of force by the police, constitute a seizure and are examined under the Fourth Amendment's require-

ment that searches and seizures not be unreasonable ([National Archives](#)). For a definition of what *is* reasonable under Fourth Amendment scrutiny, we must look to case law. The Supreme Court decision in *Graham v. Connor* provides the standards by which a court will look at cases involving force applied by the police. In doing so, the Court requires that claims of excessive use of force by the police be viewed under the reasonableness standard established in the Fourth Amendment, and that reasonableness would be viewed from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" (*Graham v. Connor*). Perhaps of greatest weight to this decision was the Court's wording in its opinion:

"The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." (*Graham v. Connor*)

As media coverage of police shootings continue to make daily news, it is this case and perhaps those two specific quotations that will take center stage in any meaningful reform in policing. The Court's decision in *Graham* is intended to allow police officers the ability to perform their vital role in arresting criminals through the sometimes necessary use of physical force. However, it also established a very low bar for law enforcement to meet in justifying the use of force and leaves the definition of a "reasonable officer on the scene" open to broad interpretation that cannot be uniformly applied. A standard that only examines what a similarly trained officer

*continued*

under similar circumstances would do allows for tremendous differences in the ability to use force based on the physical and psychological characteristics of the officer involved. Reasonable force under such examination becomes impossible to truly define as the term is a continuously moving target that changes with every individual officer and shows little regard for the competency of the officer to perform police duties. If, as would be preferable, future use of force case law or statutes move toward a proportionality consideration in evaluating force use by the police, video obtained of the event by any means would be invaluable in both the police and the public.

New studies have resulted in the release of the Police Executive Research Forum's Guiding Principles on Use of Force report in March of 2016. This report provides for thirty guidelines in establishing use of force policies. One of the guidelines recommends agencies adopt a higher standard than the one established in *Graham v. Connor* and move from the Court's reasonableness standard to a proportional standard in developing use of force policies ([PERF, 35, 36](#)). Such a move would ostensibly change the determination of whether or not the force used was appropriate from an evaluation of the officer's actions based strictly on the abilities and characteristics of the individual officer to an evaluation of the proportionality of the force given the situation presented. While the difference might not be immediately apparent to many, those who analyze such incidents can immediately appreciate the benefit of the recording of an incident in making such a determination.

The Court's ruling in *Graham* remains the basis for legal examinations of force, but more restrictive policies in the agency would allow police departments to discipline, train, exonerate, or terminate officers in the manner prescribed by their policy, which can be more restrictive than the requirements in *Graham*.

The ability of the police to use force is necessary for the safety of the community. There is no real authority without the ability to compel compliance with lawful orders from the police, by force if necessary. Despite its necessity, force is the area of government involvement that citizens are right to be skeptical of.

### The Legitimate Interests of the Police

The most compelling reason for law enforcement to oppose citizens recording their actions is the potential risk to their safety. When police officers are interacting with

a citizen, they also have to be mindful of their surroundings. This is especially true when there are other people at or near the scene of the encounter. The more volatile the interaction, the more danger officers may perceive from others gathering around them. Having to divide their attention between the citizen being contacted (or searched or arrested) and others around the officers can impede the performance of the officer's legitimate actions. Protecting officers who are vulnerable while making an arrest or handling a volatile situation is an understandably important purpose for certain statutes that seek to accomplish this.

Interfering with the performance of official duties by a police officer is already a criminal offense under Texas Penal Code Section 38.15 and includes when a person "interrupts, disrupts, impedes, or otherwise interferes with a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law" ([Texas Penal Code Chapter 38](#)). The existing statute already could potentially result in the arrest of someone recording the police, but the circumstances of such an arrest would need to be clearly articulated by the officer in order to explain how his or her duties were impeded or interfered with by the actions of the person arrested, a difficult case to make on mere proximity alone.

There is no shortage of hypothetical situations where the proximity of a person recording an officer would impede the officer's official duties, but under the current statute, the officer would need to articulate how and why the proximity of the arrestee did so. The burden is on the officer to articulate the interference with official duties under current law, and recording alone would not amount to interference.

### Previous Efforts to Address Citizen Recording

Introduced in the 84th Legislature, HB 2918 would have amended the current Penal Code Section 38.15 to criminalize *any* recording of the police within 25 feet of the officer if unarmed or 100 feet if the recording party is lawfully carrying a handgun ([HB 2918](#)).

The setting of arbitrary distances in HB 2918 defeats the balance achieved in [current law](#) criminalizing the interference with public duties between holding law enforcement accountable and allowing them to safely and effectively carry out their duty ([Texas Penal Code Chapter 38](#)). The requirement that an officer articulate why and how the defendant interfered with their official duties is

important because it protects citizens from attempts by law enforcement to stop legitimate efforts to hold them accountable in their use of force by documenting their activities.

HB 2918's basis for choosing the specified distances is unclear. Would a police officer be truly safe from someone with a handgun simply because that person is 100 feet away? Is the officer now made less safe because that same person is using a recording device to document the officer's actions? Is there some significance to 25 feet as a line of demarcation that truly increases the safety of a police officer? Again, encroaching on police officers in certain manners at various distances, with or without a recording device, may truly interfere with the officers' ability to safely perform their job. In those situations police officers can already articulate the interference and can arrest offenders.

Also problematic in justifying the arbitrary distance provisions of HB 2918 is a defense already present in the current statute, which states that the interference or interruption cannot consist of speech alone ([Texas Penal Code Chapter 38](#)). Exempting speech alone from penalization is a recognition of the First Amendment, which HB 2918 rejects. Additionally, the inexplicable implication of HB 2918 is that officers are somehow made less safe by a person standing an arbitrary distance away while filming them than they are from a person right next to them screaming obscenities at them. Attempting to reconcile HB 2918's amendments with [current statute](#) makes the bill's encroachment on First Amendment protections all the more apparent.

A defense to this charge as identified by HB 2918 is that the person doing the recording is a member of the media, and the bill defines what qualifies as a member of the media. This definition of the media is not likely to pass a constitutional review under the First Amendment's guarantee of freedom of the press and does not take into account modern media platforms ([Reddy, 1](#)). As mentioned, this rejection of the First Amendment is in direct contrast to the current wording of the statute which protects what might appear as much more volatile activity than what the new bill proposes to criminalize.

A second bill filed last session, HB 1035, provided a different approach to the same topic by proposing to amend the current statute and provide a defense similar to the "speech only" defense of the original statute and extend it to "filming, recording, photographing, documenting, or

observing a peace officer." It also amended Section 37.09 and made it a criminal offense for an officer to destroy a recording seized from a person ([HB 1035](#)).

HB 1035 provided clarity in two important ways: by codifying the officer's authority to tell someone to move away or to another area and specifically allowing for the citizen to document officer activity. In this way the bill both recognized the individual's right to document officer activity and provided a mechanism for an officer to minimize safety risks posed by proximity, when necessary, short of arrest. It further protected citizen rights by criminalizing the destruction of any recordings or documentation by an officer ([HB 1035](#)).

Police officers operate under significant hazardous conditions at times, and as representatives of the community and the government, their lawful actions need to be protected and their safety preserved. However, HB 2918 does little to actually protect the police officers from physical danger and much to deprive citizens of basic constitutional freedoms. A better balance of legitimate government interests and individual rights is not achieved by HB 2918. The current statute provides legitimate balance in allowing officers to arrest those who interfere with their duties but requiring them to articulate such interference; this balance would be completely lost if we were to criminalize a citizen exercising a fundamental right to record their government in action based on arbitrarily determined proximity to our public servants.

Beyond simply the First Amendment issues at stake in HB 2918 are the impacts on the necessary transparency in citizen and government interactions. Documentation of events serves as valuable evidence for both the citizens and the police, and even a citizen's recording might vindicate a wrongfully accused police officer. Documentation allows agencies to remove bad officers and celebrate good ones in the same manner that it helps convict guilty citizens and exonerate the innocent.

While the two proposed bills are not compatible, HB 1035 is equally well-intentioned in providing transparency to police operations and protections for those documenting such action while ensuring the safety of police officers by allowing them the ability to have individuals move when necessary. What is not as apparent is the necessity for the amendments this bill proposes or how the amended current statutes would change legally. In codifying an officer's ability to order a person to move from an area, a person's right to document police activity,

making that activity alone clearly lawful, and criminal penalties for officers who destroy such documentation, the proposed bill succeeds.

Where the bill might fall short is in its lack of requiring any articulation or reason for an officer to order someone documenting their activity to move. Under the current statute, an officer would need to articulate why the order to move was necessary if disobedience resulted in an arrest. Reading the plain language of the proposed amendments in HB 1035, it seems an officer could order a move in proximity or position for any reason, which could be abused in an attempt to defeat documentation by continuously ordering a change of proximity or position or ordering a position that does not allow the documentation to occur without any corresponding safety or other need.

## Recommendations

The public and the police are safer when they are each held accountable. Law enforcement recordings in the form of body cameras and dashboard-mounted cameras have long provided valuable evidence of wrong or right actions by both the citizens and the police. The same ability to document interactions between the police and the communities they serve rightfully is afforded to the citizens by the First Amendment. Defining the press as did HB 2918 in a manner inconsistent with society's new reliance on social media as a form of news is both unlikely to pass judicial review and poor public policy ([Reddy, 1](#)).

The 85th Legislature should not take up any bill that criminalizes the recording of police and should recognize both the constitutional right of citizens to document the

activities of their government while still protecting the ability of police officers to safely perform their duties, both of which are accomplished under existing law. The codification of an officer's ability to order a person to move from an area to another in order to keep recording police interactions with the community would require parameters surrounding the authority of officers to order a change of proximity in order to avoid abuse or other unintended obstruction to achieving greater transparency. The codification of "documentation only" as a defense to a charge of obstructing governmental operations, similar to the current "speech only" defense in the current statute is a worthy clarification.

With the intention of providing safety for police officers while ensuring the rights of individuals to document interactions with the police, the 85th Legislature could

- Pass legislation protecting the rights of citizens to record the police without arbitrary distances and allowing officers to order such recording position to be changed when their safety or ability to perform their duties is interfered with.
- Adopt an amendment to current statute governing interference with governmental operations to provide a defense for filming, recording, photographing, documenting, or observing a peace officer alone similar to the "speech alone" exemption in current statute.
- Oppose any bill containing language that would criminalize the recording or observing of police officers from within an arbitrary distance. ★

## References

[\*Graham v. Connor\*](#), 490 U.S. 386 (1989).

[HB 1035](#). 2015. Introduced. 84th Texas Legislature (R).

[HB 2918](#). 2015. Introduced. 84th Texas Legislature (R).

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Texas Penal Code. [Chapter 37. Perjury and Other Falsification](#).

Texas Penal Code. [Chapter 38. Obstructing Governmental Operation](#).





## About the Author



**Randy Petersen** is a senior researcher for Right on Crime and the Center for Effective Justice at the Texas Public Policy Foundation. Petersen spent 21 years in law enforcement in Bloomingdale, Illinois, working in patrol, investigations, administration, and management. After retiring from the Bloomingdale Police Department, Randy moved to Texas where he was an instructor and Director of the Tarrant County College District Criminal Justice Training Center, one of the largest police academies in the state. The academy was responsible for basic police training for over 40 different police agencies in the DFW Metroplex as well as in-service training for current law enforcement officers from all over the country.

Randy is passionate about law enforcement and criminal justice policy issues and is pursuing his Doctor of Management in Homeland Security. His research specialties include the militarization of law enforcement, police training, and police assisted diversion programs. Randy holds a B.S. in Legal Studies and a M.S. in Justice Administration and Crime Management from Bellevue University.

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