



Capitol Police dressed in riot gear watch as activists react to the Supreme Court's ruling in the *Dobbs v Jackson Women's Health Organization* case in front of the U.S. Supreme Court, Nathan Howard/Getty Images via AFP.

GUIDE TO LEGAL RIGHTS IN THE U.S.

The following advice and recommendations are intended to give the reader a high-level understanding of the rights of a journalist when confronted by law enforcement officers while covering a protest or other political event. Given that these incidents often quickly escalate and that some—both protestors and police—do not always conform to legal strictures, it is generally prudent to comply with an officer's commands, even if they are not lawful, and to protect one's safety.

Quick Tips and Recommendations

- Carry your press credentials at all times and ensure credentials are visible to law enforcement.
- When covering demonstrations, protests, and campaign or political events, make sure you know in advance what restrictions are in place regarding the public's right to access, and whether there are any curfew or other restrictions in place.
- Do not trespass on private property to gather news; do not cross police lines at crime scenes; comply with location restrictions and barriers, absent exigent circumstances.
- You may record video or audio of public events, including of law enforcement activities at such events, as long as you are not interfering with or obstructing law enforcement activity.
- Maintain neutrality when covering events. For example, do not join crowd chants or wear clothing with slogans related to the events you are covering.
- Comply with dispersal orders or other directives issued by law enforcement. If engaged in an encounter with law enforcement, explain that you are a journalist covering the event and show your credentials. You may continue to record interactions with law enforcement.
- If law enforcement requests your audio or video recordings, camera, recording devices, equipment or notes, you may refuse and request that the official contact your media outlet or its lawyers.
- During a stop-and-frisk or arrest make it clear to law enforcement that any equipment, memory cards, notebooks, etc. contain journalistic materials or notes.



Police break up pro-Palestinian encampment at DePaul university Chicago. REUTERS/ Jim Vondruska.

FIRST AMENDMENT RIGHTS OF JOURNALISTS

RIGHT TO GATHER NEWS

The First Amendment protects both the freedom of speech and the freedom of the press. Journalists have a right to access public places to gather and disseminate news. Public places include sidewalks and public parks, but not private property. In addition, for government owned property, even those that allow for limited access to the public, members of the public, protestors, and reporters may be barred if the location is not itself public (for instance, private areas of a courthouse or jail) and hours of access for journalists are generally limited to those when the general public is permitted access.

Private property, such as convention centers or stadiums, may be used by public entities and public property may be used for private political party conventions. In either case, journalists may be provided access similar to the general public. For example, a judge ruled that a state Democratic organization holding a convention in the city's civic center could not discriminate among journalists by admitting some and not others. The judge said that a private body leasing a government facility had the same constitutional obligations as the government. This will vary by jurisdiction. If you expect to be covering a convention or political party gathering, the journalist should attempt to get access/credentials in advance to allow for an opportunity for resolution of any disagreements in advance.

TIME, PLACE, AND MANNER RESTRICTIONS ON DEMONSTRATIONS

The government is permitted to impose time, place and manner restrictions on speech as long as those requirements:

- are content neutral (e.g., justified without reference to the content of the regulated speech);
- are narrowly tailored to serve a significant governmental interest; and
- leave open ample alternative channels for communication of the information.

These restrictions could include noise restriction ordinances, as well as a zone system in anticipation of a demonstration, such as demonstration zones, no demonstration zones, journalist-only zones, and areas for pedestrian traffic. In addition, restrictions may prohibit protestors from bringing camping material or staying overnight in public spaces. Localities typically have rules requiring protestors to obtain a permit for a protest, or for specific kinds of protesting (for instance marching in the street or using a loudspeaker). As long as the standards for granting a permit and the scope of the permit satisfy the time, place and manner restrictions, such processes are constitutionally permitted. Where those permit-related restrictions are not followed by a member of the public or a journalist, public officials may lawfully deny access.

DISPERSAL ORDERS AND CURFEWS

Even where protestors have a valid permit, or where no permit is required under local rules, police may order protestors and reporters to disperse from an area if the time, place and manner restrictions test is met. This may occur where protestors are on a sidewalk blocking access to a building, or on a street blocking traffic. Similarly, if a reporter is in an unsafe area, for instance, stopped on a highway to record an accident, or standing on a phone booth to record a protest, police could order the reporter to leave the highway or come down from the phone booth. Police are generally required to issue warnings ordering protestors and reporters to disperse before making arrests, and courts may consider whether protestors and reporters could in fact hear the warnings in determining whether the arrests were proper.

In recent years, in response to various political protests, a number of municipalities issued curfew orders. Many of these curfew orders have exemptions for journalists, either explicitly or by permitting essential workers. Journalists should get as much information as possible about any applicable curfew order before reporting in an area, and should wear large, visible media credentials so that they are clearly identifiable as members of the press.

RIGHT TO RECORD

Most courts have determined that the First Amendment protects the right to make video recordings of police officers when they are in public, although this right can be subject to the time, place and manner restrictions described above and recording or covering the demonstrations or law enforcement activity should be conducted in a manner that is not obstructing or threatening the safety of others or physically interfering with law enforcement. This right has been recognized by over half of the nation's Courts of Appeals, including those in the First, Third, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits. The Supreme Court and all other appellate courts have not affirmatively ruled for or against the right. Some states have recently passed legislation prohibiting recording or approaching within a short distance of a police officer regardless of whether such conduct actually interferes with the officer's law enforcement activities. For example, Indiana passed a law in 2023 prohibiting individuals from approaching within 25 feet of an officer after being ordered not to approach. A journalist challenged the constitutionality of the law because of its potential to limit his right to record, but a federal district court held that the law is constitutional—as of spring 2024, the ruling is under appeal in the Seventh Circuit Court of Appeals. In Arizona, a 2022 law prohibiting recording within 8 feet of a police officer was held to be unconstitutional. Journalists should be cognizant of local legislation that may impact the manner in which they may record the police.

The right to record also exists at the U.S. border, and in 2020, the U.S. government entered into a binding settlement that prohibits customs and border patrol agents from infringing on the right to record law enforcement activity from publicly accessible outdoor areas as long as the recording does not interfere with the lawful law enforcement activity.

Many states have eavesdropping or wiretapping statutes that prohibit recording private conversations without the consent of one or both parties to the conversation, and some states have statutes that also apply to public conversations. In certain circumstances, courts have held that the application of these statutes infringes on the recorder's First Amendment rights. Nonetheless, reporters should review applicable law and guidance in the states in which they are working.

RETALIATION

Government officials cannot retaliate against reporters for their reporting or selectively grant access, for example, by denying a press credential. Reporters who have been unfairly denied press credentials should review the applicable law in the jurisdiction to learn how to challenge or appeal the decision.

JOURNALIST PRIVILEGE

Most courts have recognized that journalists have a qualified privilege under the First Amendment against compelled disclosure of materials gathered in the course of their work. Journalists can be required to hand over their work materials, but only in limited circumstances - for instance, if the government demonstrates a compelling need and shows that the information is not obtainable from another source. Many states also have so-called "shield laws" which generally provide journalists with protection against disclosing their materials. These protections are not absolute: for example, in a 2020 case, a court upheld a subpoena requiring a number of news organizations to turn over unpublished photos and videos of a protest because "the photos and video were critical for an investigation into the alleged arson of [police] vehicles and theft of police guns."

More recently, police in Kansas executed a search warrant and raided the office of the newspaper, the Marion County Record and the personal home of its publisher. The warrant was subsequently found to be improper, but only after many records and devices were seized. If a journalist's audio or video recordings or notes are requested by a government official, including a police officer, the journalist may refuse. But when confronted with a warrant for search and/or seizure, the journalist should ask to review the warrant and confirm it is signed by a judge and accurately identifies the address of the place to be searched, describes the items to be seized, and identifies the legal basis for the warrant. He or she should also seek legal counsel as soon as practicable.

In 2021, the U.S. Justice Department updated internal policies to prohibit the seizure of reporters' communications data for purposes of identifying confidential sources. However, this policy is not applicable to state and local law enforcement officers. In any event, such officers are bound by the Constitutional protections regarding seizure discussed below.

FOURTH AMENDMENT PROTECTIONS OF JOURNALISTS

SEARCH

The Fourth Amendment protects journalists from unreasonable search and seizure. As a general matter, this means that police cannot search one's body or belongings without a warrant. But there are exceptions, including to prevent or avoid serious injury, to prevent the imminent destruction of evidence, and with the consent of the person to be searched.

In addition, police may briefly detain and search a person—a “stop and frisk”—for *investigative purposes* based on a *reasonable* suspicion that an individual is armed or about to commit a crime. There must be at least some objective justification for a stop and frisk, but the officer need not even believe that it is more likely than not that a crime is or is about to be underway. Therefore, this type of stop is generally limited to a pat down, bag search, or vehicle search to search for weapons. Law enforcement officers generally are not permitted to search the digital contents of a journalist’s cell phone or camera based on *reasonable suspicion* alone.

SEIZURE

In addition to protection against an unreasonable search, the Fourth Amendment also protects against an unreasonable seizure. A seizure of property occurs when there is some meaningful interference with an individual’s possession of that property. A seizure can also be of a person, such as when an individual is stopped and then frisked (as discussed above).

Prior to an arrest, and during a temporary seizure of a person (i.e., during a stop and frisk), police may also temporarily seize property, such as journalistic equipment. Therefore, it is particularly important for a journalist to prominently display press credentials and to identify himself or herself as press when confronted by police, to assuage any concerns police may have regarding suspected criminal activity. This will also be favorable in any subsequent analysis of whether *reasonable suspicion* existed at the time of the search/seizure.

To preserve the added protections this law affords to such journalistic materials, a journalist—in addition to prominently displaying his or her press credentials—should let the officers know as soon as possible that certain materials that are or may be searched (whether notes, memory cards, etc.) are press materials related to media intended to be disseminated to the public. The Privacy Protection Act of 1980 (the PPA) provides for heightened standards to protect against unreasonable searches and seizures of certain materials reasonably believed to be related to media intended for dissemination to the public—including “work product materials” (e.g., notes or voice memos containing mental impressions, conclusions, opinions, etc. of the person who prepared such materials) and “documentary materials” (e.g., video tapes, audio tapes, photographs, and anything else physically documenting an event).

These materials generally cannot be searched or seized unless they are reasonably believed to relate to a crime committed by the person possessing the materials. They may, however, be held for custodial storage incident to an arrest of the journalist possessing the materials, so long as the material is not searched and is returned to the arrestee intact.

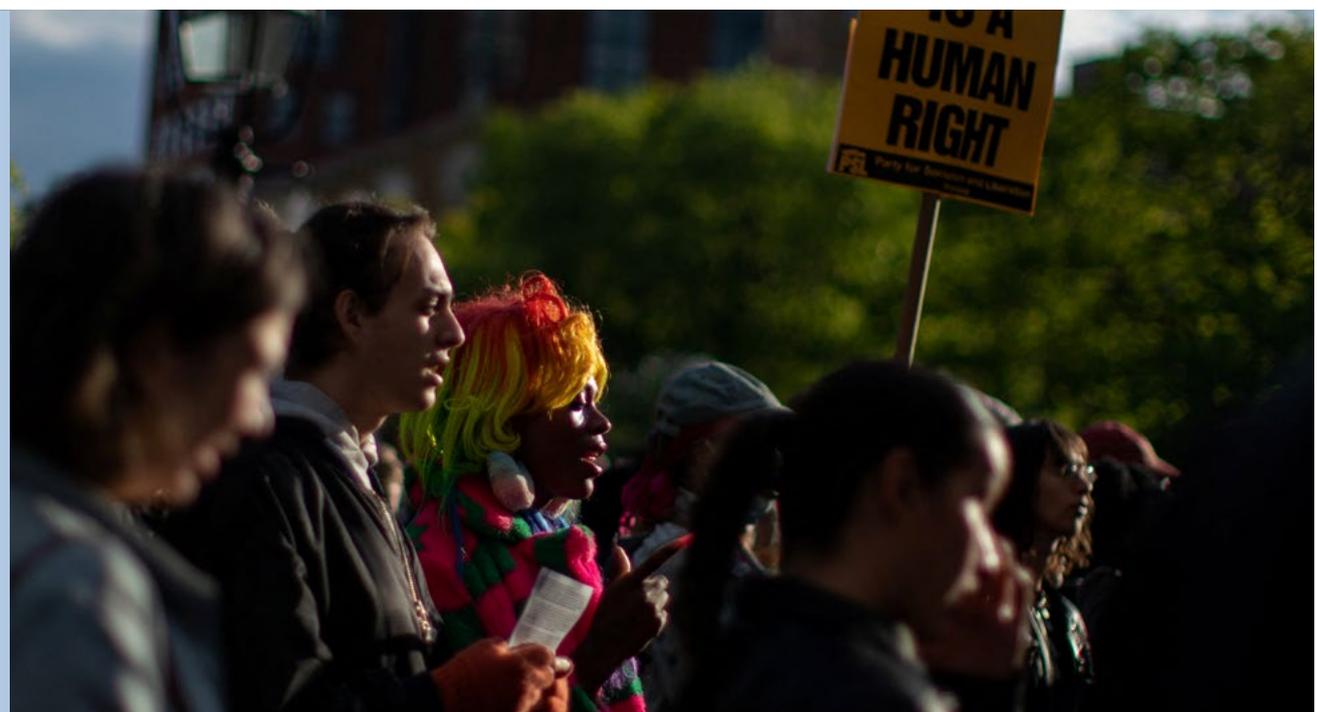
ARREST

An arrest is essentially a seizure of the person and so also implicates the Fourth Amendment. An officer must have probable cause to make an arrest. Probable cause requires more than a mere suspicion but less than absolute certainty that a crime has been or is being committed. The standard is intended to be practical and nontechnical and as a result, is “a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully reduced to a neat set of legal rules.” It is well-established that mere proximity to criminal activity does not establish probable cause to arrest, so a law-abiding journalist should not be arrested for covering a protest or demonstration even if that demonstration becomes unruly or violent.

When an officer makes a lawful arrest, the arrest impacts what qualifies as a reasonable search and seizure under the Fourth Amendment. It is considered reasonable for an officer to search an individual for weapons and evidence when making an arrest, even if the officer has no objective concern for safety or evidence preservation. This means that an officer with probable cause to arrest a journalist (for, e.g., disobeying a lawful order of dispersal, violating a curfew, trespassing, or participating in other unlawful conduct) may have legal justification to search through the belongings of the journalist. However, a search or seizure incident to arrest is limited to the area within the immediate control or vicinity of the arrestee—i.e., anything which would be easily reachable as a potential weapon (such as, arguably, a large piece of camera equipment) or easily destroyed evidence (such as camera film or memory cards).

Often during protests, officers choose to issue citations as opposed to making arrests. The law is unsettled as to whether officers may conduct searches incident to the issuance of these citations. Some courts, including the federal courts in New York, have held that a law enforcement officer need not intend to make an arrest to conduct a search incident to arrest, so long as the officer has probable cause to make an arrest and conducts the search prior to giving a citation. Federal courts in the western states, including California, Oregon, and Washington, have taken a different approach. There, search incident to arrest is only permissible when an arrest is actually made. Thus, if an officer seeks to conduct a search of a journalist, the journalist may want to ask whether they are being arrested, as this may affect what rights the journalist has to refuse the search. On the other hand, this may escalate the encounter and cause the officer to place the journalist under arrest when perhaps this was not the officer's intention.

Importantly, a search incident to arrest likely does not extend to a search of the contents of mobile phones or cameras. The Supreme Court has held that a search of digital data on a cell phone does not implicate the risk of harm to an officer or evidence preservation, and is therefore outside the scope of a lawful search incident to arrest. This holding would likely apply to digital cameras as well, as cameras contain data similar to that stored on cell phones. Seizure of these items likely is permissible, though.



People Protest the death of Jordan Neely in New York. REUTERS/Eduardo Munoz.

COVERING THE 2024 NATIONAL POLITICAL CONVENTIONS

In 2024, the Democratic National Committee and the Republican National Committee will hold their conventions to nominate Presidential candidates in Chicago and Milwaukee, respectively. The protections above are based on the U.S. Constitution and so will apply. In addition, states and cities may have additional protections available, which are addressed below.

CHICAGO, ILLINOIS

Section 4 of the Illinois Constitution provides that “all persons may speak, write, and publish freely.” And Illinois state and local law generally mirrors that of federal First Amendment jurisprudence when it comes to the right to gather news. Illinois law also mirrors federal law with respect to Fourth Amendment matters concerning search, seizure, and arrest. Below is a discussion of key aspects of Illinois law relevant to journalists covering demonstrations.

Arrest. Under the Fourth Amendment, police can only make arrests with probable cause. Two common justifications for arrests at protests in Illinois are (a) failing to comply with a dispersal order, and (b) disorderly conduct.

Federal courts in Illinois have held that probable cause may exist for arrest when a dispersal order is given and not followed. However, if permission to march is revoked without notice, arrests for marching without permission are not justified. Importantly, the message of the protest cannot be a justification for a dispersal order and the police are expected to protect protestors, even if their message provokes a hostile response from others. Further, under Illinois law, individuals on foot in public cannot be arrested simply for refusing to identify themselves. However, providing false information to police can lead to arrest. Journalists should comply with dispersal orders.

Illinois law prohibits disorderly conduct, which is defined as making an “unreasonable or offensive act, utterance, gesture or display which, under the circumstances, creates a clear and present danger of a breach of peace or imminent threat of violence.” Failing to obey law enforcement, and “using force or violence to disturb the public peace” are also considered disorderly conduct. Also, failure to disperse in the immediate vicinity of three or more people who are committing disorderly conduct is prohibited by this law.

Journalists should keep this in mind when covering demonstrations, as police officers may use this law as justification for detaining demonstrators and anyone in their vicinity. Journalists should avoid participating in any activities that may cause or provoke a disturbance and clearly distinguish themselves from individuals who may be doing so by wearing conspicuous press credentials.

Illinois Right to Record. The state of Illinois requires all parties to a conversation to give consent before one can record “all or any part of any” private oral conversation. Chicago ordinance also prohibits video recording in “areas where a person should reasonably expect to have privacy.” The Court of Appeals for the Seventh Circuit, which includes Illinois, has held that there is a First Amendment right to record government

officials performing their duties in public, except when the journalist is the subject of the arrest. As a result, journalists may record police officers covering demonstrations or protests as they will be occurring in public spaces and where the officers are on duty but such journalists must accede to an order to stop recording if the officers seek to lawfully arrest the journalist.

Illinois Shield Law. Under Illinois law, journalists enjoy qualified privilege with regard to maintaining confidential sources and news gathering material. A party that wishes to remove the protection can force a journalist to comply with a subpoena for material by showing that the interest in obtaining the material outweighs the journalist's interest in not revealing their sources. The journalist loses the privilege if the information sought is: (1) highly relevant and material, (2) necessary to the claim or defense, (3) not obtainable from a non-journalistic source, and (4) the party has exhausted all alternative sources. Further, a court will only grant such a subpoena if "(1) the information sought does not concern matters, or details in any proceeding, required to be kept secret under the laws of [Illinois] or of the Federal government; and (2) all other available sources of information have been exhausted, and disclosure of the information sought is essential to the protection of the public interest involved." Whether or not alternative sources have been exhausted is a fact-sensitive inquiry; however, parties seeking to remove the privilege must show that obtaining the information from other sources would be more than inconvenient, and that further efforts to obtain the information would likely be unsuccessful.

MILWAUKEE, WISCONSIN

Freedom of the press under Wisconsin state law mirrors federal law. The Wisconsin Constitution provides that "no laws shall be passed to restrain or abridge the liberty of speech or of the press." And Wisconsin law likewise affords the protections of the First and Fourth Amendment concerning news gathering, search, seizure, and arrest in a manner that mirrors that of federal law.

Arrest. Police officers in Wisconsin may arrest individuals at protests or demonstrations for disorderly conduct, which under Wisconsin law is defined as "violent, abusive, indecent, profane, boisterous, unreasonably loud, or similarly disorderly conduct." The Wisconsin Supreme Court reads this statute quite broadly such that any conduct that has the *tendency* to cause or provoke a disturbance is sufficient to give police officers probable cause to make an arrest, even if no actual disturbance is created. That said, federal courts in Wisconsin have held that an individual cannot be guilty of disorderly conduct simply by being in the vicinity of others being disorderly.

Wisconsin law permits police officers to call for the dispersal of an unlawful assembly, including protests that unlawfully block public travel on the street or entrances to buildings. Failure to accede to a lawful dispersal order is grounds for arrest. Journalists should comply with dispersal orders and wear clear press credentials to separate themselves from any unlawful demonstrations.

Wisconsin Right to Record. Wisconsin is a "one-party consent" state, meaning that at least one person involved in a recorded communication must give consent to record a conversation by participants who exhibit a justifiable expectation that the communication is not subject to interception. Thus, consent is not required to record conversations in public where there is no reasonable expectation of privacy. Moreover, as discussed above, the Court of Appeals for the Seventh Circuit, which also includes Wisconsin, has held that there is a First Amendment right to record government officials performing their duties in public. Federal courts in Wisconsin have held that a journalist has the right to record a police officer making an arrest, but not if they are themselves being arrested. As such, in the event a police officer seeks to lawfully arrest a member of the press who is recording, that officer may order the journalist to stop recording.

Wisconsin Shield Law. Wisconsin law provides qualified journalistic privilege with regard to maintaining confidential sources and news gathering material. A party that wishes to override the protection may obtain a subpoena through court order only if all of the following conditions are met: (1) the news, information, or identity of the source is highly relevant to a particular investigation, prosecution, action, or proceeding; (2) the news, information, or identity of the source is necessary to the maintenance of a party's claim, defense, or to the proof of an issue material to the investigation, prosecution, action, or proceeding; (3) the news, information, or identity of the source is not obtainable from any alternative source for the investigation, prosecution, action, or proceeding; and (4) there is an overriding public interest in the disclosure of the news, information, or identity of the source.

ABOUT US

Committee to Protect Journalists

The Committee to Protect Journalists (CPJ) is an independent, non-profit organization that promotes press freedom worldwide. We defend the right of journalists to report the news safely and without fear of reprisal. Every year, hundreds of journalists are attacked, imprisoned, or killed. For more than 40 years, CPJ has been there to defend them and fight for press freedom. With a team of more than 50 experts based around the world, CPJ documents and denounces press freedom violations, meets with heads of state and high-ranking officials, spearheads or advises on diplomatic efforts, and works with other organizations to ensure that justice prevails when journalists are jailed or murdered. CPJ also provides comprehensive, life-saving support to journalists around the world through up-to-date safety information and rapid response assistance. For more information about CPJ and the support available to journalists, please visit www.cpj.org

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