



(formerly the Citizen Media Law Project)

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Guide to Reporting at the 2012 Republican and Democratic National Conventions

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The Berkman Center for Internet & Society
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ABOUT THE DIGITAL MEDIA LAW PROJECT:

The Digital Media Law Project (“DMLP”) works to ensure that individuals and organizations involved in online journalism and digital media have access to the legal resources, education, tools, and representation that they need to thrive. The DMLP began operations as the “Citizen Media Law Project” in May 2007, focusing its work on providing legal resources for citizen journalism. The project changed its name in 2012 to reflect the broader range of independent digital media ventures that it has grown to serve, including citizen media as well as professional journalists and content creators operating outside of the traditional publishing industry.

The DMLP carries out its mission through its five core initiatives: (1) maintaining a detailed legal guide on media and business law topics for non-lawyers; (2) compiling a searchable database of complaints and other legal threats directed at online publishers; (3) engaging in research and responsive activity to address breaking issues in digital media law; (4) facilitating access for online publishers to legal representation through its nationwide attorney referral service, the Online Media Legal Network; and (5) publishing regular blog entries on current issues in media law, technology law and journalism.

The DMLP is based at the Berkman Center for Internet & Society at Harvard University.

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The Berkman Center for Internet & Society is a research center founded at Harvard Law School in 1997. Now a University-wide Center, it serves as the locus for a network of Harvard and other faculty, students, fellows, lawyers, entrepreneurs, and others working to identify and engage with the challenges and opportunities presented by the Internet. The Center is devoted to research and teaching on issues at the intersection of emerging technologies, law, public policy, industry, and education, and to the development of dynamic approaches and rigorous scholarship that can affect and support the public interest.

The Berkman Center has been at the forefront of efforts to study and facilitate online expression, including, among other initiatives: publishing Media Re:public, a series of papers exploring the potential and the challenges of the emerging networked digital media environment; launching Global Voices Online, a non-profit organization that aggregates and disseminates the views expressed in blogs throughout the world; and hosting the Blogging, Journalism, and Credibility Conference, which brought together professional journalists, bloggers, news executives, media scholars, and lawyers to study the emerging media environment on the Internet.

The Berkman Center also has been at the forefront of studying the Internet’s impact on democracy and how we can use Internet technologies to enhance economic and educational opportunities, to improve the way that we teach and learn, and to make information accessible to citizens around the world.

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Your Rights, In Summary.

What follows is a brief synopsis of the various legal issues addressed in this guide. For more on each point, see the accompanying page in the guide. A printable reference sheet is included at the end of this guide.

Freedom of the Press, Generally (page 3)

- The rights of the press are generally the same as the rest of the general public, unless statutes specifically say otherwise.
- The government may impose some restrictions on where, when, and how newsgathering activity is conducted, but may not discriminate based on the viewpoint of the reporter.
- During a “national special security event” (page 5) the Secret Service will be the lead federal agency in security coordination and implementation.
 - Any special relationships you have with the local police are not likely to be in effect.

Packing for the Conventions (page 7)

- Both cities have passed ordinances specifically prohibiting the possession of a number of items around the conventions.
 - *Tampa*, see page 7
 - *Charlotte*, see page 8
- Because it may be searched, consider leaving your usual cell phone at home if it contains sensitive information.
- Wear a press credential (page 10) while working, unless doing so will make you a target for harm.
 - Wearing a credential does not grant you a broader right of access, nor will wearing a credential guarantee special treatment.
 - Seek a credential from your employer or trade organization. If you do not have one, you can make your own credential, but do not attempt to forge or imitate another organization's credential.
- Be prepared for the conditions – be prepared especially for heat and extremely loud noises.
- To help facilitate your release if arrested, bring government ID, cash or a credit card, quarters, and a printed-out copy of the number for your attorney (see page 12).

Attending the Conventions (page 13)

- Access to inside the RNC and DNC requires a credential. If you do not have one already, it is unlikely that you will be able to obtain one.
- Attempting to access the conventions without an official RNC or DNC credential can lead to arrest under state and federal law.

Covering Activity Around the Conventions (page 15)

- Several streets around the convention centers will be closed. For specific areas, see page 16.
- Both cities have created “free speech zones” (page 16) to compensate for closure of streets.
 - It is unclear whether the police will attempt to force members of the press covering protests into these zones.
 - Legal challenges to “Free Speech Zones” will not be resolved in the moment. For how a court would approach the question, see page 18.
- Both cities control assemblies and parades through permits and parade routes (page 19)
 - *In Tampa* (page 19), assemblies of 50 or more persons requires a permit, with certain exceptions (see page 20).
 - Parades follow a designated route and require a permit.
 - Parades and assemblies may be terminated if there is a severe weather watch or warning.
 - *In Charlotte* (page 21), any assembly that obstructs the normal flow of traffic requires a permit.
 - Parades follow a designated route and require a permit.
 - A number of other regulations control public assemblies, including limitations on posting signs and a notice requirement for any “picket” of 50 or more persons.
 - Under municipal ordinances, the director of a city park may, at any time, close a park to the public.
- Privately owned land dedicated to public use (page 23) presents specific issues.
 - Generally, there is no right to be on private land. The owner can remove you for any reason.
 - May be of special concern in *Charlotte*, where much of the uptown “public” land is privately owned.

Laws Governing Public Assembly (page 24)

- Enforcement of these laws may use sweep arrests and capture nearby journalists, so be aware of how the law applies to demonstrators.
 - Press should not expect special treatment under public assembly laws.
- Both cities prohibit **disorderly conduct** (page 25), or conduct that is violent and disorderly (and more than pure speech).
 - Both cities prohibit conduct that interferes with pedestrian and vehicular traffic.
- Frequent cause of arrest at conventions is general crime of **unlawful assembly** (page 26).
 - Often enforced through sweep arrests that capture nearby journalists.
 - Usually enforced first by ordering a crowd to disperse. Refusing an order to disperse (even as a journalist) may lead to your arrest.
 - Unlawful assembly *in Tampa* (page 27)
 - Defined as 3 or more persons assembling with a common, unlawful purpose, in a way that would give those nearby a well-grounded fear of a breach of the peace.
 - Florida grants broad power to disperse an unlawfully-assembled crowd. Officers can command the assistance of nearby persons in dispersing the crowd, and arrest those who do not comply.
 - No apparent exception for journalists.
 - Unlawful assembly *in Charlotte* (page 28)
 - Defined as 3 or more people assembling with common intent to commit disorderly acts, in a way that would cause those nearby to apprehend a breach of the peace.
 - North Carolina gives officers the power to order a crowd to disperse, and anyone who remains is presumptively engaged in the crime of riot.
 - No apparent exception for journalists.
 - Police departments sometimes express a desire to arrest journalists under these laws, but note difficulty in determining “who is a journalist.” (Page 29)
 - The more you act like an independent observer, the more likely the police will treat you as one.

Recording in Public (page 30)

- Look first to see if a law prohibits the recording, and then see if you may have a First Amendment right that supersedes this law.
 - If an encounter is resolved based on a claim of First Amendment rights, it is likely to be in court, after actions have been taken against you.
- Best practices can avoid most public recording issues. (Page 31)
 - For interviews, inform the person you will be recording and seek oral consent on the recording.
 - When recording crowds, try not to intrude into or record conversations where it appears that the parties are trying to keep the conversation private.
 - When recording the police, do not interfere with police activity.
- Both states have **wiretapping laws** (page 31) that prohibit electronic interception of certain face-to-face and electronic communications.
 - For both states consent provides protection, but in *Tampa* consent must come from all parties to the communication.
 - Both states prohibit intercepting oral communications only when the parties have a reasonable expectation of privacy in the communication.
 - *In Tampa* (page 32), consent is only valid if obtained from all parties.
 - At least one court in Florida has suggested that some conversations in public places can be sufficiently private to be protected.
 - Law does not prohibit video-only recording, at least when the recording does not capture the substance of any communications.
 - *In Charlotte* (page 33), consent can be obtained from only party to the communication.
 - The law does not apply to video-only recordings.
- Beyond wiretapping, both states present other **privacy concerns** (page 34). Rests generally on a claim of “intrusion,” or a showing that there was an invasion into the private life of another, in a way that is highly offensive.
 - Be mindful of when you’re invading another person’s space, and seek consent in close cases.

- If in *Tampa*, see page 35; in *Charlotte*, see page 36.
- The law is emerging, but several federal courts now recognize a **constitutional right to record (page 36)**, at least when done openly and to document actions of public officials in public spaces.
 - The federal appeals court with jurisdiction over *Tampa* recognizes a right to record police conduct; case law governing *Charlotte* has yet to recognize this right.
 - Even so, past conventions show examples where law enforcement targeted those recording police conduct. Be prepared for a hostile response.

Interactions with the Police (page 39)

- (For definitions of “reasonable suspicion” and “probable cause,” see page 39.)
- In all encounters with police, try and remain professional and calm.
- Police may ask you to voluntarily surrender your rights (e.g., seeking consent for a voluntary search); try to ascertain whether an instruction is a request is a command.
- Aside from police, **private security details (page 40)** may be present to regulate behavior on private land.
 - Ignoring order from private security to leave may lead to a claim for trespass.
 - Both states allow for private parties to temporarily detain individuals, but only when the private party personally witnessed a serious crime or a breach of the peace.
 - It may be difficult in some situations to tell whether a person is acting as public law enforcement or private security.
- Police may **ask for your identification (page 41)**.
 - *In Tampa*, law authorizes police to do so if officer has reasonable suspicion that person has committed, is committing, or will commit a crime.
 - *In Charlotte*, there is no law providing officers that power, but police may nevertheless ask you to volunteer that information. You are not under a duty to respond.
- Police may ask you **to move or disperse (page 43)** from an area.
 - Authority to order people to move or disperse comes from several different statutes.
 - The police may not move you if they are doing so in order to prevent you from reporting, but they may have other, legal motivations for doing so.
- When confronting an order to move, consider asking if there is another location from which you can film.
- Failure to comply will likely result in your arrest.
- No matter how you respond, document the encounter carefully.
- The police may **order you to stop recording (page 45)**.
 - This order deserves special attention, as there are only a few specific grounds where such recording is unlawful.
 - There is a strong likelihood that an order to stop recording violates the reporter’s First Amendment rights. Document this encounter very carefully to preserve any subsequent claim.
 - That said, the ultimate constitutionality of the order will not be resolved in the field, and disobeying will likely lead to your arrest.

Searches, Seizures, and Arrests (page 46)

- Contact an attorney if you are searched, if your property is seized, or if you are arrested.
- Police may ask you to voluntarily consent to a search; you should politely decline.
- **Searches and seizures of property (page 47)** require a warrant or for the officer to show one of several specific warrant exceptions.
 - If searched under a warrant, save the warrant, do not interfere, and then contact an attorney.
 - Consent is an exception to the warrant requirement.
 - The police are permitted to search you as part of an arrest.
 - The police may search or seize property under certain “exigent circumstances,” where obtaining a warrant would be impossible (e.g., suspect is fleeing or evidence is likely to disappear).
 - Containers that are seized under “exigent circumstances” should only be searched after an officer obtains a warrant.
 - Officers are allowed to make a brief protective “frisk” of suspect for weapons, if officer has reasonable suspicion that person is armed and dangerous.

- **Searching digital devices (page 49)** presents special concerns.
 - Courts might uphold the warrantless search of a phone after its seizure, if the officer believes that data could be remotely deleted.
 - Both Florida and North Carolina courts allow officers to search digital devices after arresting the device's carrier.
 - A court may be able to compel you to reveal any passwords or decryption keys used to protect the phone.
 - An officer may order you to reveal such information, or face an independent charge for obstruction of justice.
 - Consider bringing a disposable phone if your usual phone contains sensitive information.
 - Historically, courts have strictly limited the seizure of expressive materials like photographs and videos.
 - Contact an attorney immediately if your material is seized.
 - Consider using a service which maintains a remote copy of this material.
 - There is no reason why police should delete photographs or video from a seized camera.
 - If you find that your data has been deleted, stop using the device and contact a data recovery expert.
- **Searching journalism work product (page 52)** is strictly limited under federal law.
 - The Privacy Protection Act limits the ability of police to seize journalism work product, unless they have probable cause to believe that the product relates to a crime committed by the journalist.
 - The law also limits the ability to seize other documentary materials, unless the officer has reason to believe that seeking material through other channels will result in destruction of evidence.
- **If you are placed under arrest (page 53)**, identify yourself as a journalist, invoke your right to speak to an attorney, expressly invoke your right to remain silent, and then remain silent.
 - Do not physically resist or obstruct the arrest as it is happening.
 - Police may arrest you when they have probable cause to believe you have committed or are committing a crime.
 - Generally, arrests do not require a warrant if crime is witnessed by officer or a felony.
- Courts have not addressed whether the police can arrest an entire crowd for the actions of some of the crowd's members.
- Arrest procedure *in Tampa* (page 57):
 - The police may issue a "Notice to Appear" in lieu of an arrest.
 - You will be searched, transported to a holding facility, fingerprinted, photographed, and then turned over to jail personnel.
 - Arrestees are given "first appearance" within 24 hours of arrest. Judge will inquire as to your ability to afford counsel, appoint or give you time to obtain counsel, and then inform you of the conditions of your pre-trial release.
- Arrest procedure *in Charlotte* (page 58):
 - The police may issue a citation in lieu of arrest.
 - You will be brought to a detention center, fingerprinted, photographed, and detained until your appearance before a judicial officer.
 - If you are arrested without a warrant, the police will bring you before a magistrate "without unnecessary delay," and no later than 48 hours after detention.
 - The magistrate will inform you of your right to counsel and set the conditions of your pre-trial release, most likely under bail or a written promise to appear.

Unlawful Police Conduct (page 60)

- If subject to unlawful police conduct, consider seeking a remedy under federal civil rights law.
- Consult with an attorney if you are considering bringing a claim.

Legal Hotlines:

Reporters Committee for Freedom of the Press:

General Hotline: **800-336-4243**

- RNC: **813-984-3076**
- DNC: **704-343-2063**

Student Press Law Center:

General Hotline: **703-807-1904**

National Lawyers Guild:

- RNC: **813-241-0101**
- DNC: **704-372-4200**

I. Introduction

This guide is intended to be a resource for journalists that will be covering the events surrounding the Republican and Democratic National Conventions (“RNC” and “DNC”). Traditionally, the RNC and DNC draw thousands of reporters¹ and countless more demonstrators into an intense week of political and protest activity around a major American city. While modern conventions are more ceremonial than deliberative, they remain a fundamental illustration of our self-governance through the party election process. Throughout the conventions, organizations of all beliefs gather to have their voices heard before the instruments of political power. Amidst this freedom and democracy, law enforcement will attempt to exercise extraordinary levels of restriction in order to mitigate public disruption, and the political parties will strive to manage coverage to portray their candidates in the most advantageous light.² Few other events so clearly demonstrate the tension between democratic liberty and organizational control.

Even when the police expend the effort to create low-visibility enforcement, such plans may be jettisoned if the police believe that a disruptive force may be present. Such was the case at the 2008 RNC, where the City of St. Paul quickly abandoned its low-profile approach to enforcement when a small contingent of demonstrators began to destroy public and private property, creating instead the overwhelming police presence for which that convention is now remembered.³

As a journalist, these events can be sources of considerable stress and danger. This is especially true for citizen or independent journalists. The most recent Democratic and Republican National Conventions stand as examples of the drastic and chilling measures taken to curtail expression in response to security concerns. Policing tactics have included large-scale sweep arrests, preemptive raids on private homes, and the imposition of ironically-named “free speech zones.”⁴ Journalists have often been interfered with and arrested, even when efforts had been made before the event to identify and protect members of the press.⁵ Reviews of the conventions reveal circumstances where law enforcement officers on the streets were hostile to journalists in attitude and

¹ The Republican National Convention Public Safety Planning and Implementation Review Commission, convened by the City of St. Paul following the 2008 RNC, indicates that 15,000 local, national, and international journalists covered the convention live in St. Paul. CITY OF ST. PAUL, REPORT OF THE REPUBLICAN NATIONAL CONVENTION PUBLIC SAFETY PLANNING AND IMPLEMENTATION REVIEW COMMISSION 18 (Jan. 14, 2009), <http://www.stpaul.gov/DocumentCenter/Home/View/7405> [hereinafter ST. PAUL REPORT].

² See Jay Zitter, *Validity of Restrictions Imposed During Political Nominating Conventions Impinging Upon Rights to Freedom of Speech and Assembly Under the First Amendment*, 46 A.L.R.6th 465 (2009).

³ See ST. PAUL REPORT, *supra* note 1, at 50-55.

⁴ See Joshua Rissman, *Put it on Ice: Chilling Free Speech at National Conventions*, 413 LAW & INEQUALITY J. 413, 413 (2009).

⁵ See, e.g., N.Y. CIVIL LIBERTIES UNION, RIGHTS AND WRONGS AT THE RNC 26 (2005), http://www.nyclu.org/pdfs/rnc_report_083005.pdf [hereinafter NYCLU REPORT] (noting a photographer’s arrest for unlawful assembly as part of a sweep at the 2004 RNC); ST. PAUL REPORT, *supra* note 1, at 18-23.

approach,⁶ and – far worse – instances where the police specifically targeted those documenting the conventions on cell phones and cameras.⁷

This guide contains an overview of municipal regulations, state and federal law, and case interpretation from state and federal courts with jurisdiction over Tampa, Florida, and Charlotte, North Carolina.⁸ It has been written for journalists engaged in reporting from the areas surrounding the conventions, including coverage of related protests. Those engaged in demonstrations themselves may find some of this material useful, but this guide is intended for a different audience and makes no attempt to be comprehensive with respect to demonstrator rights. Protesters seeking additional information about their substantive rights should consider contacting organizations such as the National Lawyers Guild and the American Civil Liberties Union.⁹

It is also important to note that this guide reflects the law as we expect it will be applied in Charlotte and Tampa for the 2012 conventions, based on information available as of mid-August, 2012. The law may change later, and we do not plan to keep this document current after its initial release. (We will try to provide up-to-date information during the 2012 conventions on our website, <http://www.dmlp.org>.) The DMLP takes no position here on whether the law as described below reflects the appropriate balance between the rights of the press to inform the public and the need for public safety and security.

More importantly, we cannot and do not guarantee that state or federal law enforcement will follow the law as set forth in this guide. Predicting law enforcement decisions in a mass gathering event is a task of probabilities, and one can only attempt to manage the risk of arrest.

This document is not a substitute for legal advice specific to your situation and does not create an attorney-client relationship between you and the Digital Media Law Project.

⁶ Kirsten Berg, *Looking to Policy*, in REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, POLICE, PROTESTERS AND THE PRESS 7 (2012), <http://www.rcfp.org/rcfp/orders/docs/PPTP.pdf> [hereinafter POLICE, PROTESTERS AND THE PRESS].

⁷ NYCLU REPORT, *supra* note 5, at 19.

⁸ While cases providing persuasive reasoning are drawn from throughout the country, emphasis has been placed on the courts that have jurisdiction over the cities of Tampa and Charlotte. Specifically, this guide focuses on rulings from the United States Supreme Court, the Florida Supreme Court, the Florida District Court of Appeal for the 2nd District, the Florida Circuit Court for the 13th Circuit, the Florida County Court for Hillsborough County, the United States Court of Appeals for the 11th Circuit, the United States District Court for the Middle District of Florida, the North Carolina Supreme Court, the North Carolina Court of Appeals, the North Carolina Superior Court for Mecklenburg County, the United States Court of Appeals for the 4th Circuit, and the United States District Court for the Western District of North Carolina.

⁹ See *Tampa 2012 Legal*, NAT'L LAWYERS GUILD, <http://tampa.nlg.org/> (last visited Aug. 21, 2012); *Charlotte 2012 Legal*, NAT'L LAWYERS GUILD, <http://charlotte.nlg.org/> (last visited Aug. 21, 2012); ACLU OF FLORIDA, <http://www.aclufl.org/> (last visited Aug. 21, 2012); ACLU OF NORTH CAROLINA, <https://www.acluofnorthcarolina.org/> (last visited Aug. 21, 2012).

1. Freedom of the Press in the Context of Convention Reporting

Before turning to particular laws, it is worth reviewing how constitutional free press issues are examined in United States courts, and the practical effect of approaching these issues in the context of an ongoing event. What follows are statements of general principles that will help ground the specific rights and limitations discussed in the sections below.

- The rights of the press are generally the same as the rest of the general public, unless statutes specifically say otherwise.

Despite the First Amendment's textual contemplation of distinct rights for "speech" and "the press," courts generally equate the constitutional rights of the media with those of the general public.¹⁰ Accordingly, when considering one's First Amendment right to engage in certain behavior, it is always best to start from the presumption that all are afforded the same rights. Where the general public has a right to be present and speak, a member of the press should expect to be allowed to engage in the same;¹¹ where no such right exists, the press should not expect an exception be made. Reporting on an event does not give you the right to violate generally applicable laws, including laws prohibiting trespassing, violence to others, obstruction of justice, or disturbing the peace.¹²

Statements made by law enforcement regarding mass gatherings and conventions routinely seek to reinforce that point, often in circular or conclusory statements about a right to report "so long as you do not break the law."¹³ At the same time members of the media frequently assert that they are unprepared or surprised to have law enforcement treat them the same way as the general public.¹⁴ This confusion has resulted in arrests at past conventions.

A possible source of this confusion may be the fact that other areas of law do, on occasion, provide special treatment for the press. State and federal laws may in certain circumstances favor the press over the general public. These types of laws are far more the exception than the rule, and the laws in Tampa and Charlotte rarely provide the press with greater protection than everyone else.

More often, special treatment in reporting comes not from the law at all, but through special relationships with law enforcement, based on years of beat

Summary:

- The rights of the press are generally the same as those of the public, unless statutes specifically say otherwise.
- Your First Amendment rights are only enforceable against the government.
- The government may impose some restrictions on where, when, and how newsgathering activity is conducted, but may not discriminate based on the viewpoint of the reporter.

¹⁰ There are a few specific exceptions, but these are unrelated to issues confronted while reporting in the field. For an exhaustive review on this topic, see *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 797-802 (1978) (Burger, C.J., concurring).

¹¹ And, indeed, any attempt to *disfavor* the press below the rights of the general public is consistently held unconstitutional. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

¹² See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991).

¹³ See ST. PAUL REPORT, *supra* note 1, at 19 ("Police officials believe that they communicated the message to journalists that they would have to obey police orders and that they enjoyed no special status, claiming – 'the rules are the same for everyone.'").

¹⁴ *Id.* at 67.

reporting and community engagement. While these sorts of relationships may already exist for some journalists in Tampa and Charlotte, they have no legal force, and might not apply in the context of extraordinary events (particularly where, as discussed below, local law enforcement is generally superseded by federal authorities). These understandings are painstakingly developed but easily broken; it is safe to presume that ordinary arrangements will give way to added security at the RNC and DNC.¹⁵

- Your First Amendment rights are only enforceable against the government.

Beyond a lack of specialized treatment, journalists should also be aware of other limitations on constitutional rights. Courts uniformly state that free speech and press rights emanating from the Constitution only protect against “state action.”¹⁶ State action is a term of art that generally refers to acts taken by a person on behalf of, or under the authority of, the government.

This means that actions taken by private individuals are not bound by the press and speech protections of the First Amendment. For example, a private landowner may remove a reporter from private land solely based on her expressive activity, and the reporter would usually have no recourse under the First Amendment. On the other hand, if a police officer removed the reporter off a public street based on the reporter’s newsgathering activity, this might present a violation of constitutional rights.

- The government may impose some restrictions on where, when, and how newsgathering activity is conducted, but may not discriminate based on the viewpoint of the reporter.

Finally, even when a right to speak exists,¹⁷ courts generally allow the government to impose certain restrictions on the time, place, and manner of speech, provided they are imposed without regard to the specific content in the expression, and the means chosen for regulation limit speech in a narrow way, in light of the legitimate state interest served by regulation.¹⁸ Many of the restrictions on speech that are described in this guide – such as permit and zoning requirements for demonstrators, noise limitations, and other crowd control measures – are enacted by governments as “time, place, or manner”

¹⁵ See section I.2, *infra*.

¹⁶ See, e.g., *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972).

¹⁷ It is worth mentioning in passing that certain categories of speech are not considered protected under the First Amendment, including, among others: obscene speech; child pornography; defamatory speech made with the requisite level of fault; true threats of violence; speech which encourages imminent lawless activity; and speech which would provoke a person of ordinary caution into a violent act. See generally *United States v. Stevens*, 130 S. Ct. 1577 (2010); *New York v. Ferber*, 458 U.S. 747 (1982); *Miller v. California*, 413 U.S. 15 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Watts v. United States*, 394 U.S. 705 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). It is unlikely that any reporting or publication made by the average journalist covering these events will run into these categorically unprotected arenas.

¹⁸ *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989).

restrictions on speech.

Legal challenges brought to those regulations require the challenger to show that they either were enacted in response to the expected content of the protests, or that they are not sufficiently tailored to address legitimate government interests (by, for example, suppressing far more speech than is necessary). Those challenges, while tremendously important, are rarely resolved outside of a courtroom.

In spite of this broad ability to regulate the means of expression, at no time may the government suppress speech or the press based upon the viewpoint of the speaker or reporter. For example, remedies are available if police disband only conservative protests while allowing liberal protests to assemble, or kick out members of the press perceived to be Democrats, while allowing Republicans to remain.¹⁹ Proving such a motivation, however, can be quite a challenge, and reporters should be aware that the police may have a legitimate, non-viewpoint-based reason for treating different members of the press differently.²⁰

When reading the rules that follow, bear in mind that unless you are specifically told otherwise, you are expected to follow all laws that govern public activity and behavior. Ignoring the law, especially laws concerning police orders to move and disperse pursuant to unlawful assembly statutes, may result in your arrest. (See [section IV.2.2](#) and [section V.3](#).)

2. What Changes During a National Special Security Event

The nominating conventions are events of national importance, and, for that reason, subject to concerns of national security. The United States Secret Service (the designated protective body for the President and major presidential candidates²¹) is tasked with the responsibility of protecting the two individuals around whom these events revolve, and thus takes on significant responsibilities in overseeing the security of these events.

- When an event is declared a “national special security event” the Secret Service becomes the lead federal agency in security coordination and implementation.

The implementation of Secret Service control is governed by federal law, which allows the President to declare an event to be a “special event[] of national significance.”²² When a “national special security event” is declared, the Secret Service is authorized to participate in the planning, coordination, and implementation of event security.²³ The nominating conventions usually are so

Summary:

- When an event is declared a “national special security event” the Secret Service becomes the lead federal agency in security coordination and implementation.
- Any special relationships you have with the police are not likely to be in effect.
- The Secret Service, like all governmental organizations, is required to honor your constitutional rights.

¹⁹ *Moss v. U.S. Secret Service*, 675 F.3d 1213, 1228 (9th Cir. 2012) (citing *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995)).

²⁰ See *Moss*, 675 F.3d at 1228-29 (noting the difference between moving a protest in order to suppress the protest’s viewpoint and moving a protest for legitimate security reasons).

²¹ 18 U.S.C. § 3056(a).

²² § 3056(e)(1).

²³ § 3056(e)(1).

designated,²⁴ and the Secret Service usually becomes the lead agency in implementing all security operations, including all operational plans related to security perimeters, barricades, and credentialing.²⁵

- Any special relationships you have with the police are not likely to be in effect.

This can be a source of difficulty for journalists accustomed to working with the standard municipal and state law enforcement that govern Charlotte and Tampa at other times. As noted above, special arrangements and understandings are frequently established between law enforcement and reporters over the course of time. Those understandings will almost certainly yield to the rules mandated by the Secret Service. This was a contributing factor to misunderstandings between journalists and law enforcement that resulted in journalist arrests during the 2008 RNC.²⁶

- The Secret Service, like all governmental organizations, is required to honor your constitutional rights.

Despite these increases in security and punishment for violations, the Secret Service is required to honor the First Amendment, as are all governmental entities.²⁷ So while expectations of special treatment may alter or give way altogether, acts taken by the Secret Service that violate the First Amendment are still subject to remedy and sanction by the courts.

²⁴ SHAWN REESE, CONG. RESEARCH SERV., RS 22754, NATIONAL SPECIAL SECURITY EVENTS 3 (2009), <http://www.fas.org/sgp/crs/natsec/RS22754.pdf>.

²⁵ *Id.* at 2; see also ST. PAUL REPORT, *supra* note 1, at 10 (noting that the Secret Service was the lead federal agency in security design, planning, and implementation at the 2008 RNC).

²⁶ ST. PAUL REPORT, *supra* note 1, at 19.

²⁷ See *Moss v. U.S. Secret Service*, 675 F.3d 1213, 1222-23 (9th Cir. 2012).

II. Packing for the Conventions

Your usual checklist of items to carry on assignment may need to be modified in light of municipal ordinances passed in both cities, and the reality that risk of arrest is heightened when covering events that involve mass gatherings. As you prepare for your trip, keep in mind the following restrictions and suggestions.

1. Prohibited Items

- Both cities have passed ordinances specifically prohibiting the possession of a number of items around the conventions.

Both Tampa and Charlotte have passed a number of ordinances regulating the possession of certain items that are perceived as tools of civic disruption at demonstrations. These items run the spectrum from obvious weaponry to relatively common items for those reporting in the field. Journalists should be careful to review these restrictions to avoid unnecessary disruption in reporting activity.

- Some items are only prohibited if you possess them with an intent to do harm; even if you don't harbor an intent to do harm, the police may stop you if they reasonably believe that you do.

Many of these items are only prohibited when the person possessing the item harbors the intent to cause some form harm or disruption. One might assume that a member of the press harbors no such ill will, but bear in mind that while reporting on the ground the issue will not be your own subjective intent, but whether a police officer reasonably believes based on your conduct that you have the desire to cause harm. Disputes over the reasonableness of an officer's belief will be resolved long after actions are taken based on the officer's beliefs. For more on police interactions, see [section V](#).

- Consider leaving your usual cell phone at home.

Beyond the items prohibited below, keep in mind that in the event you are arrested the police are likely to search all items you carry on your person. This includes digital devices such as cell phones. If there is sensitive information contained on your phone, such as source contact information, consider leaving these devices at home during the conventions and carry a pre-paid disposable phone instead. (For more, see [section V.4.1.1](#).)

In Tampa

In a special ordinance applicable to the RNC, the City of Tampa has prohibited the possession of a number of items on any city-owned property, when carried "with the intent to cause injury, harm or damage to any person or property." These include aerosol cans, a wide array of weapons, containers filled with "any liquid, solid or gas," projectile launchers, or lengths of wood or metal

Summary:

- Both cities have passed ordinances specifically prohibiting the possession of a number of items around the conventions.
- Some items are only prohibited if you possess them with an intent to do harm; even if you don't harbor an intent to do harm, the police may stop you if they reasonably believe that you do.
- Consider leaving your usual cell phone at home.

greater than 3/4" in diameter.²⁸

A further list of items prohibited within the few square miles²⁹ around the Convention Center includes: rope or wire (with a tensile strength greater than 30 pounds and longer than six feet), all glass bottles or other frangible containers, all locks (including bicycle locks), portable shielding materials other than umbrellas (so long as the umbrella doesn't have a metal tip), and gas masks. Exceptions are made for law enforcement and those licensed to do business in Tampa who carry such items in the course of their business.³⁰ Masks or other items that conceal one's identity are not allowed in the area surrounding the Convention Center, with the exception of masks worn in the "Public Viewing Areas" and those participating in a sanctioned parade.³¹

Even more restrictions are imposed in the "Public Viewing Areas" (detailed below in [section IV.1.2](#)). Of most concern to journalists is the total prohibition of **tripods, bipods, and monopods**. No indication is made in the ordinance as to whether a media exception will apply. Other prohibited items include camping gear, coolers, lasers, fireworks, and "any other item that law enforcement personnel determines [sic] to be a clear and present danger to the health, safety, welfare and good order of the persons in the Public Viewing Area."³²

In Charlotte

The City of Charlotte has similarly passed a number of ordinances in preparation for the DNC.³³ Most relevant is an amendment to Charlotte's municipal ordinances that allows the City Manager to declare a large-scale event "of national or international significance" to be an "extraordinary event." During such an event, the possession of a number of items is specifically prohibited, and it becomes a violation of the ordinance to throw "any item" with the area of the event.³⁴

The DNC has been declared an "extraordinary event," and thus all persons other than government employees are prohibited from possessing, carrying, controlling, or having immediate access to a variety of items within the area

²⁸ Tampa Ordinance 2012-56 § 7(A) (May 18, 2012), available at http://www.tampagov.net/dept_special_events_coordination/files/RNC/RNC_Temporary_Ordinance.pdf [hereinafter Tampa RNC Ordinance].

²⁹ The provisions apply to the RNC "Event Zone," defined as the area bordered by North and South Boulevard to the west, Routes I-275 and I-4 to the north, 22nd Street to the east, and Adamo Drive and the channels to the south, as well as South Harbor Island north of Knights Run Avenue. *RNC Event Zone Map*, CITY OF TAMPA, http://www.tampagov.net/dept_special_events_coordination/files/RNCEventZoneMap_1.pdf (last visited Aug. 21, 2012).

³⁰ Tampa RNC Ordinance, *supra* note 28, at § 7(B).

³¹ *Id.* § 8.

³² *Id.* § 7(C). Tripods are also prohibited if used "with the intent to obstruct the public's ability to freely move about on rights-of-way, sidewalks and other areas to which the public has access . . ." *Id.* § 9(A).

³³ Steve Harrison, *Charlotte City Council OKs Expanding Police Power During DNC*, CHARLOTTE OBSERVER (Jan. 24, 2012), <http://www.charlotteobserver.com/2012/01/24/2953565/police-powers-during-democratic.html>.

³⁴ CHARLOTTE CODE OF ORDINANCES §§ 15-310, 15-313(b).

Tampa, in brief:

- Rope, wire, glass bottles, all locks, and gas masks are prohibited within the area surrounding the Convention Center and Forum.
- Aerosol cans, containers, lengths of wood and metal, and projectile launchers are prohibited if carried with the intent to harm.
- Tripods, bipods, and monopods are not allowed within the "Public Viewing Area"

Charlotte, in brief:

- Police scanners are likely not allowed within the area surrounding the convention.
- Chains, cables, wires, aerosol containers, non-water-soluble paints, and most sharp objects are not allowed in the area surrounding the convention.
- Backpacks, duffel bags, satchels, and coolers are not allowed if carried with the intent to conceal weapons.
- Masks, scarves, pepper spray, and body armor are not allowed if worn or used in order to avoid identification or to resist arrest.

defined as the event's location.³⁵ Of greatest concern to journalists are **police scanners**, which by the terms of the ordinance are completely prohibited, although an exception exists for those that are engaged in an activity "in which he or she legitimately used the device or object" for a "legitimate use."³⁶ The law does not specify what a "legitimate use" for a restricted object is, and the language of the defense suggests that the ordinance is meant to target objects that can be used both as tools and as weapons (e.g., knives, heavy objects, hammers, and glass), and not items that can be used as informational tools. Given this inartful drafting, expect officers to interpret the term "legitimate" narrowly and inconsistently as it applies to police scanners.

Tripods, bipods, and poles are restricted only when the person harbors the intent "to obstruct pedestrian or vehicular movement on a public road, public sidewalk, public right of way, entrance or exit to private property, or any other area open to the public."³⁷ Those using such devices in Charlotte should be mindful of their location vis-à-vis pedestrian and vehicular traffic, and obey any order to move in order to ensure passage of traffic in a public area.

Other prohibited items within the "extraordinary event" area include all chains, cables, wires, or other objects capable of inflicting serious injury if thrown or struck; aerosol containers; non-water-soluble paints; sharp bladed objects; hammers or crowbars; and all animals except service animals (unless allowed by special permit).³⁸

Further items are prohibited when used in a particular way or possessed with the intent to do harm. Again, because it is ultimately up to an officer's reasonable observations as to whether an item is possessed with such intent, be especially cautious if you plan to bring these items into the square mile around the Time Warner Arena. Most disconcerting is the prohibition of **backpacks, duffel bags, satchels, or coolers**, when carried "with the intent to conceal weapons or other prohibited items."³⁹ Glass and other breakable containers are prohibited if capable of holding dangerous substances and carried "with the intent to inflict serious injury to a person or damage to property."⁴⁰ Several items – including gas masks, body armor, pepper spray or other irritants, and masks or scarves – are prohibited when worn or used with the intent to obstruct or delay the police or hide one's identity while committing a crime.⁴¹

³⁵ The area of the "extraordinary event" has been defined as approximately a square mile around the Time Warner Arena, specifically, the area encircled by South Cedar Street, East Morehead Street, South Kings Drive on to Charlottetowne Avenue, and East 7th Street, with an additional portion north of East 7th Street along North Caldwell Street, East 9th Street, North Church Street, down to West 5th Street back to Cedar Street. See *Supplement to Declaration of Extraordinary Event*, CITY OF CHARLOTTE (Aug. 7, 2012), <http://chameck.org/city/charlotte/dncinfo/Documents/Supplement%20to%20DNC%20Extraordinary%20Event%20Declaration.pdf> (last visited August 14, 2012).

³⁶ CHARLOTTE CODE OF ORDINANCES §§ 15-313(c)(12), (d).

³⁷ *Id.* §15-27(b).

³⁸ *Id.* §15-313(c).

³⁹ *Id.* §15-313(c)(5).

⁴⁰ *Id.* §15-313(c)(6).

⁴¹ *Id.* §§15-313(c)(9-11).

2. Suggested Items

There are some particular items that you should be sure you *do* bring. First and foremost are items that help identify you as a member of the press.

2.1 Press Credentials

- Wear a press credential while working, unless doing so will make you a target for harm. Always keep your credentials quickly accessible.

The Committee to Protect Journalists (“CPJ”) advises members of the working press to wear credentials while reporting on stories, unless operating in environments where identification as a member of the press might make the reporter a target for harm. Even when hidden, however, the CPJ advises that journalists keep credentials quickly accessible.⁴²

- Wearing a credential does not grant you a broader right of access, nor will wearing a credential guarantee special treatment. That said, police have used them in the past to quickly release detained journalists.

Unlike some other cities,⁴³ wearing a press credential in Charlotte and Tampa will not confer any broader right to access restricted places (aside from the official convention credentials, which will allow access to the convention itself). Credentials *will not* guarantee special treatment by the police, but they are nevertheless an important tool in self-identification. As noted more fully in [section V.4.2](#), police at conventions have previously allowed journalists to self-identify using press credentials in order to quickly release reporters caught up during sweep-arrests. At the very least, it will alert the police that you are there as an independent and observing entity.

That said, credentials do not immunize against arrest. In one famous incident in New York, six police-credentialed journalists covering the Occupy Wall Street movement were arrested while covering the Zuccotti Park eviction.⁴⁴ Credentials also did not stop the arrest of multiple journalists at the 2008 RNC.⁴⁵

Summary:

- Wear a press credential while working, unless doing so will make you a target for harm. Always keep your press credential easily accessible.
- Wearing a credential does not grant you a broader right of access, nor will wearing a credential guarantee special treatment. That said, police have used them in the past to quickly release detained journalists.
- Seek a credential from your employer or trade organization. If you do not have one, you can make your own credential, but do not attempt to forge or imitate another organization’s credential.

⁴² *Civil Matters and Disturbances*, COMMITTEE TO PROTECT JOURNALISTS, <http://www.cpj.org/reports/2012/04/civil-matters-and-disturbances.php> (last visited Aug. 21, 2012) [hereinafter CPJ], *Civil Matters and Disturbances*].

⁴³ PROTEST AND ASSEMBLY RIGHTS PROJECT, SUPPRESSING PROTEST: HUMAN RIGHTS VIOLATIONS IN THE U.S. RESPONSE TO OCCUPY WALL STREET 84 (2012), <http://www.chrgj.org/projects/suppressingprotest.pdf> (noting that NYPD press credentials allow members of the media to cross police lines in certain circumstances).

⁴⁴ See *id.* at 85-86; Kirsten Berg, *Who’s Impeding Whom?*, in POLICE, PROTESTERS AND THE PRESS, *supra* note 6, at 2.

⁴⁵ ST. PAUL REPORT, *supra* note 1, at 23.

- Seek a credential from your employer or trade organization. If you do not have one, you can make your own credential, but do not attempt to forge or imitate another organization's credential.

If you do not have a press credential issued from your contractor or employer you may be able to obtain one through a trade association.⁴⁶ A number of organizations provide press credentials for their members, including the National Press Photographers Association and the National Writers Union.⁴⁷ If you are working on assignment but are not issued press credentials, try to obtain a letter on the assigning organization's stationery to identify you as a working member of the press.⁴⁸

There is nothing inherently wrong with creating your own credential should you be unable to obtain one from an issuing organization, though be careful not to include any false information about your identification. To put it more directly, *do not forge another organization's credential*. Aside from the serious legal risks inherent in use of misinformation on a credential,⁴⁹ it undercuts your appearance as a independent professional. Any detected forgeries in a press credential will likely attract immediate and severe negative attention from law enforcement.

2.2 Other Items

Many journalism support organizations offer checklists of newsgathering supplies and gear. A good place to start when packing your gear is to consult one of these checklists, then cross-reference the list with the prohibited items above. Also, keep the climate in mind; the average high temperatures for the end of the summer in Tampa and Charlotte are in the high 80s to low 90s.⁵⁰ As always, safety first: bring bottled water and, if you are especially sensitive to

Note:

As the recent London Olympics demonstrated, mass gatherings typically place a tremendous strain on cellular and mobile data networks, and frequently result in service disruptions. Be prepared in the event that cell phone service is slow or inaccessible.

See Matthew Humphries, *Olympic Games Fans Asked Not to Use Their Phones at Events*, GEEK.COM (July 30, 2012), <http://www.geek.com/articles/news/olympic-games-fans-asked-not-to-use-their-phones-at-events-20120730/>.

⁴⁶ Credentials are traditionally obtained from local police departments, event organizers, or professional news organizations. As noted below in [section III](#), credentials to attend the RNC and DNC are no longer available. The Tampa and Charlotte police departments have not indicated that they will be issuing media credentials.

⁴⁷ *Basic Preparedness*, COMMITTEE TO PROTECT JOURNALISTS, <http://www.cpj.org/reports/2012/04/basic-preparedness.php> (last visited Aug. 21, 2012) [hereinafter CPJ], *Basic Preparedness*].

⁴⁸ *Id.*

⁴⁹ Among other chargeable offenses, imitating a credential issued by a governmental organization may result in a charge of forgery. See F.S.A. § 831.01; N.C. GEN. STAT. § 14-119. Use of another person's personal information to make a credential is a crime in both Tampa and Charlotte. See F.S.A. § 817.568(2)(a); N.C. GEN. STAT. § 13-113.20 (applies only to use of specific types of identifying information). Use of a fake press credential while in an encounter with law enforcement will likely bring a claim for obstruction of justice. See *Caines v. State*, 500 So.2d 728, 728 (Fla. D. Ct. App. 2d 1987) (providing a false identification to law enforcement is a crime); *State v. Dietze*, 660 S.E.2d 197, 200 (N.C. Ct. App. 2008) (making a false statement with the intent to hinder law enforcement is a crime). Use of a forged credential to gain special access could give rise to a claim for trespassing (see [section III](#), *infra*) and possibly "uttering a forged instrument." See F.S.A. § 831.02; N.C. GEN. STAT. § 14-120.

⁵⁰ *Average Weather for Tampa, FL*, THE WEATHER CHANNEL, <http://www.weather.com/weather/wxclimatology/monthly/graph/USFL0481> (last visited Aug. 21, 2012); *Average Weather for Charlotte, NC*, THE WEATHER CHANNEL, <http://www.weather.com/weather/wxclimatology/monthly/graph/USNC0121> (last visited Aug. 21, 2012).

heat, a sports drink or other rehydration solution.⁵¹

Also, there are reports that the police in Tampa have obtained a number of “Long Range Acoustic Devices” (LRADs) for possible use during the convention.⁵² These devices, which can produce sound at volumes and frequencies beyond the human pain threshold, are condemned by hearing experts, and are believed to have the capability to cause irreversible hearing damage.⁵³ Journalists may wish to consider bringing hearing protection. (It is not known whether the Charlotte police plan to obtain or use such devices.)

In the unfortunate event you are arrested, it is also a good idea to bring some items to help facilitate your release. Try to be sure to pack the following:

1. A **government-issued ID**, to help expedite the police’s positive identification of you
2. **Cash and/or a credit card**, in order to pay any bond that is required to ensure your later appearance in court. This can end up being a few hundred dollars, so be sure to have either cash or credit to cover that range.
3. **Quarters**, in case the jail only provides a payphone.
4. Any formal materials to demonstrate to the police the fact that you are a member of the press (e.g., a letter from your news organization or an additional copy of your press credential).
5. A printed-out copy of **the number of your attorney**, or the number for one of the legal assistance hotlines developed for the convention. You may want to consider writing this down on your person, in the event that your items are confiscated before you are allowed to make a phone call.⁵⁴

⁵¹ CPJ, *Basic Preparedness*, *supra* note 47.

⁵² Janelle Irwin, *Tampa Police Share Strategies of Devices and Tactics They’ll Use with Republican Convention Protesters*, WMNF (Aug. 17, 2012), http://www.wmnf.org/news_stories/tampa-police-share-strategies-of-devices-and-tactics-theyll-use-with-republican-convention-protesters.

⁵³ Press Release, Better Hearing Institute, *Better Hearing Institute Condemns Use of Sound Cannons (LRAD’s) for Crowd Control During Chicago’s May NATO Summit* (May 17, 2012), available at http://www.bizjournals.com/prnewswire/press_releases/2012/05/17/SF09605.

⁵⁴ *What to Expect if You Can’t Avoid Arrest*, in *POLICE, PROTESTERS AND THE PRESS*, *supra* note 6, at 8; see also *Checklists*, COMMITTEE TO PROTECT JOURNALISTS, <http://www.cpj.org/reports/2012/04/checklists.php> (last visited Aug. 21, 2012); *Dealing With the Police When Covering Protests*, STUDENT PRESS LAW CENTER, http://www.splc.org/pdf/covering_protests.pdf (last visited Aug. 21, 2012); *List of Handy Equipment*, INT’L NEWS SAFETY INSTITUTE, <http://www.newssafety.org/page.php?page=5931&Itemid=100505> (last visited Aug. 21, 2012).

III. Attending the Conventions

We expect the majority of readers to be interested in covering the events surrounding the conventions, but we recognize that some may be intending to cover the actual events from inside the convention halls. Unfortunately, your ability to do so is severely limited, unless you have already made arrangements with the Republican National Committee or Democratic National Convention Committee.

- Access to inside the RNC and DNC requires a credential. If you do not have one already, it is unlikely that you will be able to obtain one.

At this point, it is unlikely that you will be able to obtain access to the RNC or DNC if you have not requested such credentials already. The press credentials processes for the DNC and RNC have closed.⁵⁵ Individuals and organizations that have requested credentials, but have not heard whether their application has been accepted, should contact the committees organizing the RNC and DNC at the addresses provided at the time of their application.

- Attempting to access the conventions without an official RNC or DNC credential can lead to arrest under state and federal law.

Status as a member of the press will not give you a general right to enter the conventions themselves, nor will it grant you access to any of the private events held around the conventions. Anyone who chooses to enter the convention centers or other private areas without proper authorization should expect full civil and criminal sanction. Unauthorized entry into either arena would be ground for a civil claim for trespass,⁵⁶ and likely criminal prosecution for trespass as well.

Both Florida and North Carolina recognize a criminal action for trespass. In Florida, a person is guilty of criminal trespass when they either enter a structure without permission from the property owner (or his agent), or remain after being warned to depart.⁵⁷ In North Carolina, a person is guilty if the person enters or remains in an area secured or closed in a way that clearly demonstrates an intent to keep out intruders, or if a person enters or remains in an area where the lawful owner (or agent) gives clear instruction not to enter.⁵⁸

⁵⁵ See *Frequently Asked Questions*, REPUBLICAN NAT'L CONVENTION, <http://www.gopconvention2012.com/about/did-you-know/> (last visited July 12, 2012); *Media Logistics*, DEMOCRATIC NAT'L CONVENTION, <http://www.demconvention.com/press/medialogistics/> (last visited Aug. 21, 2012); *Convention Credentials*, U.S. SENATE SERGEANT AT ARMS, <https://ebbs.senate.gov/convention/periodical.cfm> (last visited July 12, 2012).

⁵⁶ See *Singleton v. Haywood Elec. Membership Corp.*, 588 S.E.2d 871, 874 (N.C. 2003) (trespass is the wrongful invasion into the property of another); *Keziah v. Seaboard Air Line Ry. Co.*, 158 S.E.2d 539, 548 (N.C. 1968) (no force or actual damage is required for trespass claim); *Coddington v. Staab*, 716 So.2d 850, 851 (Fla. D. Ct. App. 4th 1998) (trespass is any unauthorized entry into another's property).

⁵⁷ F.S.A. § 810.08.

⁵⁸ N.C. GEN. STAT. §§ 14-159.2, 14-159.3.

Summary:

- Access to inside the RNC and DNC requires a credential. If you do not have one already, it is unlikely that you will be able to obtain one.
- Attempting to access the conventions without an official RNC or DNC credential can lead to arrest under state and federal law.

Furthermore, a special federal trespassing crime applies to the grounds where the President or another person protected by the Secret Service (e.g., Governor Romney) are temporarily visiting, as well as a “building or grounds so restricted in conjunction with an event designated” as a national special security event (see [section I.2](#)). Anyone who knowingly enters or remains at such spaces “without lawful authority to do so” is subject to fines and/or imprisonment.⁵⁹

That several of these buildings are owned by the public⁶⁰ will make no difference. While the public is afforded certain rights of access to various forms of public land under the “public forum doctrine,”⁶¹ the few courts that have considered the question have found that municipal arenas either do not qualify as public fora or can be validly closed during particular events as a “time” restriction on the space.⁶² In any event, courts seem to have little difficulty finding closure of the nominating venue and immediate environs to be a valid and constitutional restriction on the general right to gather and speak.⁶³

⁵⁹ 18 U.S.C. § 1752.

⁶⁰ The City of Charlotte owns the Time Warner Cable Arena and the Tampa Sports Authority, a public agency, owns the Tampa Bay Times Forum. The Bank of America Stadium is privately owned. See *About Tampa Sports Authority*, TAMPA SPORTS AUTHORITY, <http://www.tampasportsauthority.com/About-TSA.html> (last visited Aug. 21, 2012); *Arena Information*, TIME WARNER CABLE ARENA, <http://timewarnercablearena.com/page/arenainfo/arenainfo> (last visited Aug. 6, 2012); *Bank of America Stadium*, CAROLINA PANTHERS, <http://www.panthers.com/stadium/index.html> (last visited Aug. 21, 2012).

⁶¹ The doctrine generally provides that traditional public fora, such as parks and sidewalks, are subject only to content-neutral time, place, and manner restrictions that are narrowly tailored to further a government interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). Non-traditional areas that are expressly designated by the government to be public fora are held to this same standard. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983). Areas that are opened to limited public communication (such as mailboxes in a public school) must be restricted only as is reasonable in light of the purpose for the forum, and may not discriminate on basis of speaker viewpoint. *Id.* at 46.

⁶² See, e.g., *Calash v. City of Bridgeport*, 788 F.2d 80, 83 (2d Cir. 1986) (holding a municipal arena to be a non-public forum); *Century Federal v. City of Palo Alto*, 710 F. Supp. 1559, 1571 n. 18 (N.D. Cal. 1988) (extensively criticizing *Calash*, but finding that the same result could be reached by treating the arena as a designated public forum).

⁶³ See, e.g., *ACLU v. City and County of Denver*, 569 F. Supp. 2d 1142, 1174 (D. Colo. 2008) (“[T]he Convention is a private event, being conducted on private property, with access only by invitation. It is the Convention Committee that issues credentials to whomever it sees fit.”); *City of Chicago v. Lynd*, 265 N.E.2d 116, 119 (Ill. 1970) (closure of street immediately adjacent to 1968 DNC valid, when done for safety and not with an intent to suppress free expression); Elizabeth Craig, *Protecting the President from Protest: Using the Secret Service’s Zone of Protection to Prosecute Protesters*, 9 J. OF GENDER, RACE, & JUSTICE 665, 667 (2006) (noting ease at which courts allow Secret Service to close public fora during presidential visits).

IV. Covering Activity Around the Conventions

Much of the attention and excitement around the conventions will occur on the streets and sidewalks surrounding the Tampa Bay Times Forum and Time Warner Cable Arena. Demonstrators will likely fill the spaces around the conventions and seek to have their voices heard by the delegates and the public at large. It is in this space that press coverage is most important, and, unfortunately, where members of the press may meet the most danger.

As noted above, the rights of the press do not generally extend beyond the rights of the general public. Therefore, it is important to ground a discussion of a journalist's risks with an examination of the general rights of citizens. What follows is some general information regarding the rights of individuals to gather and speak on the streets of Tampa and Charlotte. Notes from past conventions are included to illustrate how these general laws have been applied to the press at other political conventions. Information related to in-the-field newsgathering is also included.

1. Security Perimeters Around the Conventions

As noted above in [section I.1](#), the general right of the people to gather and speak in public spaces is subject to laws that govern the time, place, and manner of such speech. While in the abstract this seems like a superficial limitation, this carve-out has allowed cities and states to pass a wide array of laws and ordinances regulating speech and behavior. Violation these regulations may result in your arrest.

These regulations do not exist without some judicial scrutiny. In the past, parties have been marginally successful in challenging so-called “time, place, and manner” restrictions as improper limitations on First Amendment rights. We have included a discussion of court limitations and interpretations of analogous regulations from prior conventions. Bear in mind, however, that in the field it is highly unlikely that a person will be in a position to challenge any given regulation. For more on this point, see [section V.3](#), addressing interactions with the police.

1.1 Closed Streets

The United States Secret Service has issued press releases indicating which particular streets will be closed to pedestrian and/or vehicular traffic during the conventions. As discussed below in [section IV.1.2.1](#), any challenge to the validity of these restrictions must probably come in the form of a lawsuit. Courts have been extremely permissive in allowing for these closures, provided adequate avenues of public gathering and expression are available.⁶⁴

A quick overview on street closures for both cities follows.

⁶⁴ See, e.g., *Marcavage v. City of New York*, No. 10-4355-cv, 2012 WL 3125225 at *6 (Aug. 2, 2012); *City of Chicago v. Lynd*, 265 N.E.2d 116, 199 (Ill. 1970).

Note:

The political conventions always bear some risk of a serious accident or attack. The Committee to Protect Journalists advises all reporters to mind their own safety and self-protection above all else. If you find yourself first on the scene of an incident, be on the lookout for lingering safety hazards, including oncoming traffic, downed power lines, and hazardous chemical leaks. In the event of an attack, consider the chance of a follow-up incident, and avoid contact with any material that may be evidence related to the crime. Do not remove any material from the scene of an accident or attack. Authorities will establish a safety perimeter around such events, and crossing a police line without permission may lead to an arrest. If you do seek to report from behind such a line, ask for permission.

CPJ, *Civil Matters and Disturbances*, *supra* note 42.

In Tampa

Beginning Saturday evening on August 25th, most roads within a few blocks of the Tampa Bay Times Forum and Convention Center in Tampa and Tropicana Field in St. Petersburg will be closed to vehicular traffic. Roads will be closed to pedestrian traffic in a one-block radius around Tropicana Field and Campbell Park in St. Petersburg, and from the Convention Center and Tampa Bay Times Forum out to Brorein Street to the north, Bayshore Boulevard between Brorein and Platt Streets to the west, and Beneficial Drive from Channelside Drive to the Garrison Channel to the east. Both bridges over Garrison Channel will be closed except to local traffic, and the channel itself will be closed to maritime traffic.⁶⁵

In Charlotte

With the March on Wall Street South Coalition parade scheduled on Sunday, September 2nd,⁶⁶ “CarolinaFest” on Monday,⁶⁷ and the convention running for the rest of the week, many of the streets in uptown Charlotte in and around the Time Warner Arena will be closed from Sunday morning through Thursday night. Most of the area will be closed to vehicular traffic, and the Secret Service has indicated that the blocks immediately surrounding the Time Warner Cable Arena, as well as the streets immediately adjacent to Charlotte City Hall (all week) and the Bank of America Stadium (on Wednesday and Thursday), will be closed to pedestrian traffic.⁶⁸

1.2 “Free Speech Zones”

In light of the inevitable closure of nearby streets, cities typically create “free speech zones,” or special areas where protesters are allowed to assemble in order to both provide a forum of expression and control the streets in and around the convention center. These zones have been employed in mass gatherings since the 1960s,⁶⁹ but are best remembered from the 2004 DNC in Boston. There, the zones were located underneath an abandoned overpass and marked by rows of jersey barriers with eight-foot fences and mesh netting.⁷⁰ Such physical disrespect of First Amendment rights was later upheld in a legal challenge that reached the United States Court of Appeals for the First Circuit.⁷¹

Note:

For maps showing the areas that are closed to pedestrian and vehicular traffic, visit http://www.secretservice.gov/press/GPA11-12_TampaSecurityTransportationPlan.pdf and http://www.secretservice.gov/press/GPA12-12_CharlotteSecurityTransportationPlan.pdf

Summary:

- Tampa and Charlotte have created “free speech zones.”
- It is unclear whether the police will attempt to force members of the press covering protests into these zones.

⁶⁵ Press Release, U.S. Secret Service, Law Enforcement Safety Agencies Announce Security Restrictions and Transportation Plan for the 2012 Republican National Convention (July 23, 2012), http://www.secretservice.gov/press/GPA11-12_TampaSecurityTransportationPlan.pdf.

⁶⁶ See *March on Wall Street South Coalition Parade Route*, CITY OF CHARLOTTE, <http://charmeck.org/city/charlotte/dncinfo/Documents/March%20on%20Wall%20Street%20South%20Parade%20Route%209%202%2012.pdf> (last visited August 21, 2012).

⁶⁷ See *CarolinaFest 2012*, CHARLOTTE IN 2012 HOST COMMITTEE, <http://www.charlottein2012.com/carolinafest2012/> (last visited Aug. 21, 2012).

⁶⁸ Press Release, United States Secret Service, Law Enforcement Safety Agencies Announce Security Restrictions and Transportation Plan for the 2012 Democratic National Convention (Aug. 14, 2012), http://www.secretservice.gov/press/GPA12-12_CharlotteSecurityTransportationPlan.pdf.

⁶⁹ Joseph Herrold, *Capturing the Dialogue: Free Speech Zones and the “Caging” of First Amendment Rights*, 54 DRAKE L. REV. 949, 950 (2006).

⁷⁰ See, e.g., ST. PAUL REPORT, *supra* note 1, at 28; Zitter, *supra* note 2.

⁷¹ *Bl(a)ck Tea Society v. City of Boston*, 378 F.3d 8, 15 (1st Cir. 2004).

The volume of angry legal commentary following this decision could fill a small library.⁷²

- Tampa and Charlotte have created “free speech zones.”

The cities of Tampa and Charlotte have opted to adopt the terms “Public Viewing Area” and “Speakers’ Platform” as their euphemisms for such designated speech areas.

In Tampa, the “Public Viewing Area” consists of three sections of land extending north up South Nebraska Avenue from the Tampa Bay Times Forum, including a square section of land bordered by Eunice Street, South Caesar Street, and East Walton Street, and two sections underneath the Crosstown Expressway on either side of South Jefferson Street.⁷³

In Charlotte, the “Speakers’ Platform” will be located on a section of land bordered by South Boulevard, East Stonewall Street, Interstate-277, and Stonewall Station.⁷⁴ This is about half a mile from the Arena itself, considerably further than zones in prior conventions.⁷⁵ Charlotte has not indicated whether closer parks, including “The Green” off of Tryon Street (a private park managed by Childress Klein Properties⁷⁶ – see section IV.1.4 below) and Marshall Park off of East 3rd Street (owned by the City and planned for use as the dispersal point for parades⁷⁷), will be provided as alternative locations of assembly.

- It is unclear if the police will attempt to force members of the press covering protests into these zones.

It is not clear how the press will be treated when covering activities in and around such speech zones. The cities of Tampa and Charlotte have not suggested that the designated free speech zones will be the *sole* area where persons will be able to gather and speak. (Indeed, their extensive regulation of conduct outside of those zones certainly contemplates speech happening in other areas.) That said, the police may choose to enforce general congregation laws in a way that attempts to persuade the crowd to move into such zones. Reporters planning to cover the zones from *outside* of these spaces should

⁷² For some highlights, see Mary Cheh, *Demonstrations, Security Zones, and First Amendment Protection of Special Places*, 8 U.D.C. L. REV. 53 (2005); Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006); Herold, *supra* note 69; Nick Suplina, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395 (2005).

⁷³ RNC Event Zone Map, *supra* note 29.

⁷⁴ DNC Parade Route and Speakers Platform, CITY OF CHARLOTTE, <http://charmeck.org/city/charlotte/dncinfo/Documents/DNCParadeRoute.pdf> (last visited Aug. 21, 2012).

⁷⁵ Compare *ACLU v. City & Cty. of Denver*, 569 F. Supp. 2d 1142, 1181-82 (D. Colo. 2008) (zone 200 feet away from audience upheld); *The Coalition to March on the RNC and Stop the War v. City of St. Paul*, 557 F. Supp. 2d 1014, 1028 (D. Minn. 2008) (parade route that came within 84 feet of audience upheld); *with SEIU v. City of Los Angeles*, 114 F. Supp. 2d 966, 972 (C.D. Cal. 2000) (zone 260 yards away from audience struck).

⁷⁶ *The Green*, CHILDRESS KLEIN PROPERTIES, <http://www.childressklein.com/property-profile.aspx?id=87> (last visited Aug. 21, 2012).

⁷⁷ See *DNC Parade Route and Speakers Platform*, *supra* note 74.

expect all generally applicable laws concerning loitering and congregation to apply. See [section IV.2](#) below.

1.2.1 Legal Challenges to “Free Speech Zones”

- Challenges to the validity of zones will not be resolved in the moment.

While we are not aware of any pending legal challenges to the locations of these zones for these conventions as of the date this guide was published, lawsuits frequently arise challenging the location, size, and features of these zones and accompanying street closures. Such challenges rarely succeed,⁷⁸ and are highly unlikely to result in any change of enforcement, absent court intervention.

- Courts will uphold a restriction so long as it is narrowly tailored to serve a significant government interest, and leaves open sufficient alternative channels of communication.

Cases addressing the validity of “free speech zones” follow the general framework of the Supreme Court’s decision in *Ward v. Rock Against Racism*, which concerned volume controls imposed by New York City over a concert venue in Central Park.⁷⁹ Under the *Ward* analysis, a court will uphold a restriction so long as the restriction is justified “without reference to the content of the regulated speech,” is a narrowly tailored (though not necessarily the least restrictive) means of achieving a significant government interest, and “leave[s] open ample channels of communication of the information.”⁸⁰

- Historically, courts have easily found a significant government interest is being served, and base their decision on whether the specific zone in question still allows for the speaker to access their particular audience.

In general, courts find little trouble finding that zoning around a convention is done without reference to the content of the speech, and in furtherance of the significant government interest of public safety.⁸¹ Where courts split is on the means employed to serve that interest, and whether the speakers have adequate alternative means of communication. While courts routinely state that a naked claim of “security” will not save an action taken to limit free speech,⁸² courts tend to be deferential toward security concerns, allowing law enforcement to set the restrictions based on past experiences and reasoned prediction.⁸³ The

Summary:

- Challenges to free speech zones will not be resolved in the moment.
- Courts will uphold a restriction so long as it is tailored to serve a significant government interest, and leaves open sufficient alternative channels of communication.
- Historically, courts have easily found a significant government interest is being served, and base their decision on whether the specific zone in question still allows for the speaker to access their particular audience.

Note:

Even a viewpoint-neutral regulation concerning the time, place, and manner of speech can give rise to a claim for deprivation of civil rights, if you can show that enforcement of that law was done with intent to target persons based on their viewpoints. The United States Court of Appeals for the Ninth Circuit recently allowed a claim against the Secret Service to proceed when the plaintiff alleged that the Secret Service moved a group protesting then-President George W. Bush further away from where the President was located than a similarly-sized group supporting the President.

Moss v. U.S. Secret Service, 675 F.3d 1213, 1224-25 (9th Cir. 2012).

⁷⁸ Rissman, *supra* note 4, at 423.

⁷⁹ *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

⁸⁰ *Id.* at 791; see *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 12 (1st Cir. 2004).

⁸¹ See *Bl(a)ck Tea Soc’y*, 378 F.3d at 13; *ACLU v. City & Cty. of Denver*, 569 F. Supp. 2d 1142, 1162-63 (D. Colo. 2008); *City of Chicago v. Lynd*, 265 N.E.2d 116, 119 (Ill. 1970).

⁸² See *SEIU v. City of Los Angeles*, 114 F. Supp. 2d 966, 971 (C.D. Cal. 2000).

⁸³ See *Bl(a)ck Tea Soc’y*, 378 F.3d at 13-14; *ACLU*, 569 F. Supp. 2d at 1176.

heavier the restriction on speech, however, the more the government must show to justify the restriction.⁸⁴

Courts have also rejected these zones when the effect is to prevent the speaker from speaking to her intended audience.⁸⁵ When engaging in this analysis, courts are especially sensitive to the concern that the message of the protesters actually reach the convention delegates, upholding the zone when the court finds that they can and striking the zone when the court finds that they cannot.⁸⁶ (A very recent decision from the United States Court of Appeals for the Second Circuit, however, rejected a “sight and sound” requirement for such zones, in favor of a “close proximity” test.⁸⁷) Under this analysis, Charlotte’s location of a free speech zone half a mile from the Time Warner Arena would seem to be too distant to serve as an adequate channel of communication.

1.3 Permits and Parade Routes

Specific permitting schemes strictly regulate assembly and parading around the cities of Tampa and Charlotte. Both cities have enacted a number of specific regulations concerning public assemblies and parades conducted during the RNC and DNC. These regulations are important to keep in mind as a journalist, as a group that attempts to parade in violation of these ordinances will be ordered to disperse, and should they fail to do so a journalist may be caught up in any resultant sweep arrests. An overview of these regulations follows.

In Tampa

The City of Tampa has promulgated a series of temporary regulations in a municipal ordinance concerning the permitting and regulation of spaces that are “owned, leased, managed, or operated by the city, including but not limited to, sidewalks, rights-of-way and parks” during the RNC.⁸⁸ Failure to comply with these regulations, in the words of the city, “will . . . result in immediate enforcement including . . . arrest for violation of municipal ordinances”⁸⁹

⁸⁴ See *Bl(a)ck Tea Soc’y*, 378 F.3d at 14 (“[H]eavier burdens on speech must, in general, be justified by more cogent evidentiary predicates.”); *ACLU*, 569 F. Supp. 2d at 1176 (“[T]he more extensive the restrictions, the more precise the justifications for that restriction must be.”).

⁸⁵ *SEIU*, 114 F. Supp. 2d at 972; *Staubert v. City of New York*, No. 03-civ-9162, 2004 WL 1593870 at *27-28 (S.D.N.Y. July 16, 2004).

⁸⁶ Compare *ACLU*, 569 F. Supp. 2d at 1181-82 (restriction placing speakers between 8 and 200 feet from delegates sufficiently within sight and sound of delegates) with *SEIU*, 114 F. Supp. 2d at 972 (restriction placing speakers 260 yards away from delegates violated First Amendment); but see *Bl(a)ck Tea Soc’y*, 378 F.3d at 14 (placing less weight on the requirement that the speech reach the audience on the street, given that message was likely to be spread through television, radio, and the Internet).

⁸⁷ *Marcavage v. City of New York*, No. 10-4355, 2012 WL 3125225 at *8 (2d Cir. Aug. 2, 2012).

⁸⁸ Tampa RNC Ordinance, *supra* note 28, at § 3.

⁸⁹ *Id.* § 15(A).

Tampa, in Brief:

- Any assembly of 50 or more persons requires a public gathering permit, unless the assembly does not interfere with pedestrian and vehicle traffic.
- A permit exception applies to specific “spontaneous gatherings” at Joe Chillura Park, following a major news event.
- There is a designated parade route for all those planning to conduct a parade. A permit is required to parade.
- Parades and assemblies may be terminated if there is a severe weather watch or warning.

- Any assembly of 50 or more persons requires a public gathering permit, unless the assembly does not interfere with pedestrian and vehicle traffic.

Unless one of the exceptions below applies, organizers of all gatherings where 50 or more persons are anticipated to attend, held from August 27th through September 1st, are required to obtain a Public Gathering Permit from the City of Tampa.⁹⁰ A public gathering permit is not required for gatherings where the anticipated attendance is less than 50 persons, gatherings where the assembly will not interfere with or obstruct the usual flow of traffic on sidewalks or public ways (meaning that participants remain on sidewalks or crosswalks, walk two abreast, give way to those they encounter, and obey all traffic and crosswalk regulations), or assemblies taking place in the “Public Viewing Area.” (See section IV.1.2.)⁹¹

Specific rules apply to the consideration and granting of these permits,⁹² and a lottery was held for permits to gather at several parks located in the immediate vicinity of the Convention Center.⁹³

- A permit exception applies to “spontaneous gatherings” in Joe Chillura Park, following a major news event.

A special permit exception applies to “spontaneous” gatherings which are occasioned by news that breaks within 48 hours of the gathering, provided the gathering is held in Joe Chillura Park, a square block of land located between North Morgan Street, Madison Street, Pierce Street, and East Kennedy Boulevard. Tampa’s ordinance requires the event organizer to provide notice to the Tampa Police and Department of Parks and Recreation, if practicable, at least 24 hours before such a “spontaneous” gathering.⁹⁴

The City of Tampa also will be operating a “Speakers’ Platform” inside of the “Public Viewing Area,” including amplified sound, between 9am and 11pm on the days of the convention. Access to this is controlled by application, on a first-

Note:

With the exception of the “Public Viewing Area,” parks in Tampa will close at 3am.

Tampa RNC Ordinance, *supra* note 28, at § 16.

⁹⁰ *Id.* § 5(B).

⁹¹ *Id.* § 5(B)(2).

⁹² The city has indicated that they will not consider the viewpoint of the speakers or predicted amount of hostility when granting these permits, and will give preference to First Amendment activities when possible. Permits will be denied, however, if the application is not complete or contains misrepresentations or material falsehoods, or if the applicant has previously made material misrepresentations, previously violated gathering permit terms, or has an outstanding debt with the city in connection with prior events. Additionally, a permit will be denied if an earlier permit application has been received for the same location and the space cannot accommodate both, if the space will not accommodate the expected attendance, or if “[t]he proposed assembly would likely interfere with the movement of emergency vehicles or police protection in areas contiguous to the vicinity of the assembly.” *Id.* § 5(B)(6).

⁹³ Applicants seeking to apply for gatherings at these parks were encouraged to apply by June 11th, and a lottery to resolve conflicting applications was held on June 15th. Applications received after the lottery are issued on a first-come-first-served basis. See *Official Permit Application, 2012 Republican National Convention*, CITY OF TAMPA, http://www.tampagov.net/dept_special_events_coordination/files/RNC/RNCEvent_Application_Fillable.pdf (last visited July 30, 2012).

⁹⁴ Tampa RNC Ordinance, *supra* note 28, at § 5(B)(2)(c).

come-first-served basis.⁹⁵

- There is a designated parade route for all those planning to conduct a parade. A permit is required to parade.

For organizations planning to parade during the conventions, the city has established a designated parade route. The route will start at the intersection of North Brush Street and East Washington Street, run west along East Washington to Morgan Street, south on Morgan Street for one block, then east on East Whiting Street to South Nebraska Avenue, then south on South Nebraska for two blocks, ending at the intersection of South Nebraska Avenue and Walton Street.⁹⁶ This is the only route permitted between August 27th and September 2nd.⁹⁷ A permit is required to use this route; the same general rules for approval, denial and revocation of parade permits apply as with assembly permits.⁹⁸

- Parades and assemblies may be terminated if there is a severe weather watch or warning.

According to Tampa's regulations, any assembly or parade may be terminated immediately by the City of Tampa Parks and Recreation Director in the event of "severe weather," defined as a weather forecast or event that requires the National Weather Service to issue a severe weather watch or warning.⁹⁹

In Charlotte

Charlotte has created the following permitting scheme for the DNC under the "extraordinary event" ordinance.¹⁰⁰ (See [section II.1.](#))

- Any assembly that is likely to obstruct the normal flow of traffic must obtain a permit.

Any assembly or parade that is likely to obstruct the normal flow of traffic upon any public street must obtain a permit from the city.¹⁰¹ Charlotte regulations enumerate several specific ways in which a permit can be rejected based on

⁹⁵ *Official Permit Application, 2012 Republican National Convention, supra* note 93.

⁹⁶ See *RNC Parade Route and Viewing Area Map*, CITY OF TAMPA, http://www.tampagov.net/dept_special_events_coordination/files/RNC/ParadeRoutePublicViewingArea_Final.pdf (last visited Aug. 21, 2012).

⁹⁷ Tampa RNC Ordinance, *supra* note 28, at § 6(A)(3). Applicants seeking to hold a parade outside of the immediate area of the convention must follow the standard parade route permitting process through Chapter 28 of the Tampa code of ordinances. See *id.* § 6(A)(3)(b).

⁹⁸ See *id.* § 6(A)(6)(b).

⁹⁹ *Id.* at § 5.

¹⁰⁰ CHARLOTTE CODE OF ORDINANCES § 15-312.

¹⁰¹ *Id.* § 19-312(a). While the City Manager's order contemplates a firm deadline of July 2nd for such permits, see *Declaration of Extraordinary Event*, CITY OF CHARLOTTE (April 27, 2012), <http://charmeck.org/city/charlotte/dncinfo/Documents/Declaration%20DNC.pdf>, the city's website indicates that parade permits would be considered through August 24th, on a first-come-first-served basis, see *Parade Route and Speakers Platform: Application and Guidelines*, CITY OF CHARLOTTE, <http://charmeck.org/city/charlotte/dncinfo/Pages/FreeSpeech.aspx> (last visited August 14, 2012).

Charlotte, in Brief:

- Any assembly that is likely to obstruct the normal flow of traffic requires a permit.
- All parades must follow a designated parade route; at this time no time slots are available on the official parade route.
- A number of other regulations control the ability of people to gather and protest in the city, including limitations on posting signs in parks and a notice requirement for any "picket" of 50 or more persons.
- Under municipal ordinances the director of a city park may, at any time, close a park to the public.

incomplete or misleading applications.¹⁰² The city also allows permits to be rejected if the city determines that the parade would “present unreasonable danger to public health or safety,” would “unnecessarily interfere with traffic,” or if there will not be “sufficient law enforcement and traffic control officers to adequately protect participants and non-participants from traffic related hazards” in light of other demands at the time.¹⁰³

- All parades must follow a designated parade route; at this time no time slots are available on the official parade route.

Starting on Monday, September 3rd, the city has cabined all parades to a designated route, beginning at Pearle Street Park, running down Baxter Street to South McDowell Street, northeast up McDowell, turning left on East Stonewall Street to South Caldwell Street, northeast on South Caldwell to East 3rd Street, and then right on East 3rd Street to Marshall Park.¹⁰⁴ As of the time of this writing the city has indicated that all time slots for the official parade route have been filled.¹⁰⁵

- A number of other regulations control the ability of people to gather and protest in the city, including limitations on posting signs in parks and a notice requirement for any “picket” of 50 or more persons.

Beyond this parade regulation, the City has repeatedly stated that “[u]nder current City ordinances, individuals and groups may demonstrate on City sidewalks at any time anywhere within the City, without a permit.”¹⁰⁶ This is at best simplistic and at worst misleading. A number of local ordinances restrict the assembly of persons in ways that would implicate standard protest activity, including a prohibition against amplified sound without a permit on sidewalks and in parks (although this prohibition will be suspended on September 4-6th by a special declaration),¹⁰⁷ against attaching ropes or wires to trees on public

Note:

According to the Mecklenburg County Department of Parks and Recreation, public parks in Charlotte are open “from sunrise to sunset,” unless lit, in which case they will remain open “while in use,” but will close by 10:30pm. The city has not yet to indicate whether parks will hold extended hours during the DNC.

Park Hours, MECKLENBURG CTY. DEP’T OF PARKS & RECREATION, <http://charmeck.org/mecklenburg/county/ParkandRec/Pages/Hours.aspx> (last visited August 22, 2012).

¹⁰² Applications must contain the name, address, and phone number of the person in charge of the event, as well as the contact information for the on-site manager of the event and the anticipated number of participants. CHARLOTTE CODE OF ORDINANCES § 19-312(b). Applications may be denied if they are incomplete, missing the required fee, contain material falsehoods, or if the applicant has previously made material misrepresentations, violated the terms of an earlier-issued permit, or have previously damaged city property at a gathering and not paid for such damage. *Id.* § 19-312(c).

¹⁰³ *Id.* § 19-312(c). Such provisions regarding security demands run close to unconstitutionality, in light of the Supreme Court’s decision in *Forsyth Cty., Georgia v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) (rejecting permitting scheme with variable fee for anticipated security needs, noting that “[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob”).

¹⁰⁴ *DNC Parade Route and Speakers Platform*, *supra* note 74. A separate parade route will be in effect on the Sunday before the convention, for a parade held by the March on Wall Street South Coalition. See *March On Wall Street South Parade Route*, *supra* note 66.

¹⁰⁵ *Parade Route and Speakers Platform: Application and Guidelines*, *supra* note 101.

¹⁰⁶ See, e.g., Press Release, City of Charlotte, City and County Plan for Free Speech Activities During DNC (April 20, 2012), <http://charmeck.org/city/charlotte/Newsroom/newsarchive/Pages/CityandCountyPlanforFreeSpeechActivities.aspx>.

¹⁰⁷ CHARLOTTE CODE OF ORDINANCES § 15-64(a)(3); *Supplement to Declaration of Extraordinary Event*, *supra* note 35. Additional exceptions are made for commercial establishments and large-scale music venues. See *id.* §§ 15-65.1, 15-65.2.

land,¹⁰⁸ and against posting any “sign, placard, advertisement, or inscription whatsoever” in a public park.¹⁰⁹

Moreover, the City of Charlotte places special burdens on any “picket” (defined as any “public display or demonstration of sentiment for or against a person or cause”) expected to draw a group of 50 people or more.¹¹⁰ Organizers of such a picket are required to give notice to the police of their intent to picket, including date, time, location, estimated number of participants, and contact information for the organizer.¹¹¹ Pickets may not interfere with pedestrian or vehicular traffic into driveways or building entrances. Signs at pickets may not obstruct traffic and may not include metal poles or large wooden poles.¹¹²

- Under municipal ordinances the director of a city park may, at any time, close a park to the public.

Further, according to the City Code, the director of a park may, at any time, close a park to the public, “either temporarily or at regular and stated intervals,” for any reason that the director finds “reasonably necessary.”¹¹³ Unlike Tampa, the City of Charlotte does not contemplate this applying only in cases of weather emergencies.

1.4 The Special Case of Privately Owned Land Open to the Public

- All of the rules above govern public land.

All of the regulations above, and the constitutional limitations imposed on them, apply only to public land in and around Tampa and Charlotte. An open question – and one presented quite famously in the circumstances surrounding the Occupy Wall Street protest held in Zuccotti Park in New York City – is what rules may apply in a space that is owned by a private entity but managed by the government or kept accessible due to agreement with the government.¹¹⁴ The right to access these “quasi-public fora” is a fascinating constitutional question in the abstract, but courts in both Florida and North Carolina seem reluctant to find any constitutional right to access privately owned public spaces.

- Florida and North Carolina courts seem disinclined to extend free speech rights to privately owned land.

Federal constitutional rights provide no right to speak on privately owned land, and private landowners are free to eject gatherers on such land under

Summary

- All of the regulations above govern public land.
- Florida and North Carolina courts seem disinclined to extend free speech rights to privately-owned land.
- This may have special impact in Charlotte, where many of the parks uptown are privately owned.

¹⁰⁸ *Id.* § 15-132(b).

¹⁰⁹ *Id.* § 15-137(2).

¹¹⁰ *Id.* § 19-302(a).

¹¹¹ *Id.* § 19-302(a).

¹¹² *Id.* § 19-303.

¹¹³ *Id.* § 15-138(b).

¹¹⁴ See generally PROTEST AND ASSEMBLY RIGHTS PROJECT, *supra* note 43, at 98-99.

trespassing laws.¹¹⁵ States are empowered through their own constitutions to provide stronger free-speech rights of access,¹¹⁶ but it does not look as though Florida and North Carolina are inclined to do so. Two unreported Florida decisions split on whether Florida's constitution provides such a right,¹¹⁷ and North Carolina courts uniformly reject the suggestion.¹¹⁸

- This may have special impact in Charlotte, where many of the parks uptown are privately owned.

This may be of special significance to the DNC in Charlotte, as many of the streets and parks in uptown Charlotte are privately owned public spaces.¹¹⁹ This includes many open spaces along Tryon Street, including the public park known as "The Green."¹²⁰ Any attempt to assert a right of access in these spaces would have to overcome several court decisions to the contrary, and will only be resolved off the street in formal legal channels.

2. Laws Governing Public Assembly

Law enforcement agents frequently rely on laws governing public assembly when punishing demonstrators (and, in certain unfortunate situations, the press). Given their frequent use, journalists should be particularly mindful of how these laws are implemented in Tampa and Charlotte.

- The press should not expect specialized treatment under public assembly laws.

It has been said a few times already in this guide, but it bears repeating that the press should not expect to receive special treatment under these laws due to their status. Existing relationships and prior treatment often lead journalists to assume that they will receive special treatment at these events, but reporters who have broken generally-applicable laws in reliance on such an assumption have been arrested at prior conventions. Again, even if you have a good

¹¹⁵ See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567-68 (1972). See generally TIMOTHY ZICK, *SPEECH OUT OF DOORS* 160-67 (2009) (noting how increasing privatization of public spaces erodes speech protection under current doctrines).

¹¹⁶ See *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 80-81 (1980).

¹¹⁷ Compare *Wood v. State*, No. 00-644-MMM-A, 2003 WL 1955433 at *2 (Fla. Cir. Ct. 14th Feb. 26, 2003) ("[T]he Constitution of Florida prohibits a private owner of a 'quasi-public' place from using state trespass laws to exclude peaceful political activity.") with *Whole Foods Mkt. Grp. v. Sarasota Coalition for a Living Wage*, No. 2007-CA-2208, 2010 WL 2380390 (Fla. Cir. Ct. 12th March 31, 2010) (disputing *Wood's* finding, and declining to extend it where the landowner has not opened up land in a way functionally equivalent to a town center).

¹¹⁸ *State v. Felmet*, 273 S.E.2d 708, 712 (N.C. 1981) ("This Court could . . . interpret our State Constitution to protect [this] conduct . . . However, we are not so disposed."); *State v. Marcopolis*, 583 S.E.2d 726, 726 (N.C. Ct. App. 2003) (reaffirming *Felmet*).

¹¹⁹ Mickey Osterreicher, *Covering the Conventions and Protests*, NAT'L PRESS PHOTOGRAPHERS ASS'N, <http://blogs.nppa.org/advocacy/2012/08/07/cover-the-conventions-and-protests/> (last updated Aug. 20, 2012).

¹²⁰ See *Ratcliffe Condominiums*, BATSON COOK CO., http://www.batson-cook.com/projects/residential/project_detail/ratcliffe (last visited August 21, 2012) (noting that The Green is "dedicated for public use").

professional rapport with the police in Tampa or Charlotte, those relationships are likely to give way during the conventions.

These laws are usually enforced by police orders to move or disperse. In the field you may find yourself confronting an order to disperse that you believe to be improperly issued. Bear in mind that issues regarding the validity of an order are rarely resolved on the spot, and refusal to obey may result in your arrest. The best course of action may be to comply, document the encounter, and consider pursuing a remedy later for violation of civil rights. For more on remedies for unlawful police conduct, see [section V.5](#). For more on orders to disperse, see [section IV.2.2](#).

2.1 Disorderly Conduct and Traffic Regulations

States uniformly prohibit activity that causes a breach of the peace or actions that block vehicular or pedestrian traffic. These laws only need brief mention, as constitutional doctrines have limited their application against pure speech, and actions that cause a breach of the peace are typically easy to identify in the moment. This does not mean that you should dismiss these laws, however. Such claims may become the underlying charge in a claim of unlawful assembly, which carries with it a far greater risk of collateral journalist arrests.

- Both Tampa and Charlotte prohibit violent or disorderly behavior, but such regulation is generally limited to conduct, instead of pure speech.

Both Florida and North Carolina prohibit acts of public violence and other disorderly behavior.¹²¹ In both states, an act of pure expression would only violate this law if it qualifies as “fighting words” under Supreme Court doctrine – that is, words which by their very nature will lead to an immediate breach of the peace.¹²² On the other hand, courts have little difficulty applying the doctrine when a suspect engages in both speech and conduct that disrupts, especially when the conduct hinders an officer’s ability to carry out her duties.¹²³

Summary

- Both Tampa and Charlotte prohibit violent or disorderly behavior, but such regulation is generally limited to conduct, instead of pure speech.
- Both cities prohibit gathering in a way that disrupts normal pedestrian and vehicle traffic.

¹²¹ F.S.A. § 877.03; N.C. GEN. STAT. § 14-288.4.

¹²² *State v. Saunders*, 339 So.2d 641, 644 (Fla. 1976) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)); *State v. Summrell*, 192 S.E.2d 569, 576 (N.C. 1972), *overruled on other grounds by State v. Barnes*, 380 S.E.2d 118, 119-20 (N.C. 1989); see also *State v. Orange*, 206 S.E.2d 377, 379 (N.C. 1974) (upholding the North Carolina statute on a vagueness challenge by narrowing the statute in light of *Gooding v. Wilson*, 405 U.S. 518 (1972)).

¹²³ See generally *C.L.B. v. State*, 689 So.2d 1171, 1172 (Fla. Dist. Ct. App. 1986) (upholding conviction under 877.03 on basis of defendant’s acts, which included repeatedly approaching a police officer in combination with speech such as loud name calling and cursing); *Delaney v. State*, 489 So.2d 891, 892 (Fla. Dist. Ct. App. 1986) (upholding probable cause to arrest and conviction under § 877.03 where “appellant’s conduct consisted of more than his arguably ‘protected’ speech” and such conduct “precluded [the] [o]fficer. . . from investigating . . . by being loud and abusive, continually interrupting [the officer’s] investigation . . . , and ignoring [the officer’s] request to wait his turn”).

- Both cities prohibit gathering in a way that disrupts normal pedestrian and vehicle traffic.

Ordinances in both Tampa and Charlotte prohibit gathering and standing in a way that interferes with the free passage of persons or vehicles on a street or sidewalk.¹²⁴

2.2 Unlawful Assembly and Orders to Disperse

- Unlawful assembly is a very common charge at mass demonstrations, and frequently enforced through sweep arrests that can capture nearby journalists.

The crime of “unlawful assembly” is a very common charge behind many of the arrests made during mass-gathering events. It is also where journalists may see the greatest collateral risk: police in the 2008 RNC protest enforced the law in protective “sweeps” of unlawfully assembled persons, and media parties that were swept up were often arrested and not immediately released.¹²⁵ Similar records of indiscriminate mass arrests can be found with the 2004 RNC, where New York City police famously used mesh netting to ensnare those assembled, capturing many innocent individuals in the sweep.¹²⁶

- Unlawful assembly laws usually are enforced first by ordering a crowd to disperse. Refusing to disperse is a frequent cause of arrest.

Unlawful assembly laws are universally paired with a statutory requirement to honor a police officer's order to disperse an unlawfully-assembled crowd. Confronting this order in the field is inherently challenging. On the one hand, as the Supreme Court stated in *City of Chicago v. Morales* (in the context of an anti-loitering statute), if the activity “is in fact harmless and innocent, the dispersal order is an unjustified impairment of liberty.”¹²⁷ But it is often unclear under the circumstances whether a crowd is assembled unlawfully or whether an individual is part of that crowd. Refusing to adhere to such a request is a frequent cause of arrest. Once again, judgment calls as to the lawfulness of a given order to disperse are extremely unlikely to be resolved on the streets, so a journalist's best option may be to comply with the order while simultaneously documenting the order and the journalist's own compliance. A journalist may then consider seeking a legal remedy.

Summary

- Unlawful assembly is a very common charge at mass demonstrations, and frequently enforced through sweep arrests that can capture nearby journalists.
- Unlawful assembly laws usually are enforced first by ordering a crowd to disperse. Refusing to disperse is a frequent cause of arrest.
- While the law does not require them to, officers may choose to treat members of the press as not part of the unlawfully assembled, so where possible try to distinguish yourself as a journalist.

¹²⁴ TAMPA CODE OF ORDINANCES § 14-41; CHARLOTTE CODE OF ORDINANCES § 19-303(c).

¹²⁵ ST. PAUL REPORT, *supra* note 1, at 19.

¹²⁶ NYCLU REPORT, *supra* note 5, at 19.

¹²⁷ *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999).

- While the law does not require them to, officers may choose to treat members of the press as not part of the unlawfully assembled, so where possible try to distinguish yourself as a journalist.

A statutory presumption in both Tampa and Charlotte treats *all* who refuse an order to disperse from a given area as part of the unlawfully assembled, even if they were not part of the initial group that was unlawfully gathered.¹²⁸ That said, the police have in the past treated members of the press as separate from an unlawfully-assembled crowd, so to the extent possible it is important to distinguish your activity from that of the crowd. Wearing a press credential may help a journalist avoid being caught up in a sweep arrest, or may help catalyze the journalist's release.¹²⁹ For more on how to respond to an order to disperse, see [section V.3](#); for more on press credentials, see [section II.2.1](#).

In Tampa

- Law applies when three or more people assemble with a common unlawful purpose in a way that would give those nearby well-grounded fear of a breach of the peace.

Florida has a statute that prohibits affrays, riots, and unlawful assembly.¹³⁰ The law states in relevant part that “if three or more persons meet together to commit a breach of the peace, or to do any other unlawful act, each of them shall be guilty of a misdemeanor of the second degree”¹³¹ In a 1977 constitutional challenge to the unlawful assembly law, the Florida Supreme Court clarified that three elements must be met to be guilty of unlawful assembly: “(1) an assembly of three or more persons, who (2) having a common unlawful purpose, (3) assemble in such a manner as to give rational, firm, and courageous persons in the neighborhood of the assembly a well-grounded fear of a breach of the peace.”¹³²

- Florida law grants officers broad powers to disperse, allowing officers to command the assistance of nearby persons, and holding unlawful anyone who refuses to assist or ignores the dispersal order.

Like most state statutes on unlawful assembly, the statute also contains a predicate power of the police to order an assembled crowd to disperse.¹³³ The scope and power of this law, however, is unlike those found in other states, and is indeed quite remarkable. Various state agents are allowed to enter an unlawfully assembled crowd and order them to disperse. If the crowd does not disperse, the state agent can then “command the assistance of all [nearby] persons in seizing, arresting and securing such persons in custody.” Any person

Tampa, in Brief:

- Law applies when three or more people assemble with a common unlawful purpose in a way that would give those nearby well-grounded fear of a breach of the peace.
- Florida law grants officers broad powers to disperse, allowing officers to command the assistance of nearby persons, and holding unlawful anyone who refuses to assist or ignores the dispersal order.
- Special liability standards apply if people are killed or wounded during the disruption of a crowd.

¹²⁸ See F.S.A. § 870.04; N.C. GEN. STAT. § 14-288.5

¹²⁹ CPJ, *Civil Matters and Disturbances*, *supra* note 42.

¹³⁰ See F.S.A. § 870.01 *et seq.*

¹³¹ F.S.A. § 870.02.

¹³² *State v. Simpson*, 347 So.2d 414, 415 (Fla. 1977).

¹³³ F.S.A. § 870.04. Immaterial edits were made to the law earlier this year. See 2012 Fla. H.B. 1383 (effective July 1, 2012).

who neglects or refuses to assist “shall be deemed one of the rioters or persons unlawfully assembled, and may be prosecuted and punished accordingly.” The same applies to anyone who, “when required by such officers to depart from the place, refuses and neglects to do so.”¹³⁴

Notably, this law makes no apparent exception for members of the media reporting from an unlawful assembly, nor has any reported case to date imposed such a limitation or interpreted those “assembled” to exclude the press. Thus, despite obvious policy arguments against this occurrence, members of the press may be instructed to help in the dispersal of the crowd, and if they do not do so, they may be subsequently arrested as part of those unlawfully assembled.

- Special liability standards apply if people are killed or wounded during the disruption of a crowd.

Special liability standards apply should any individual be killed or wounded during the disruption of an unlawfully assembled crowd. Should force be required to disperse a group unlawfully assembled, the police “shall be held guiltless and fully justified in law” should any person be killed or wounded.¹³⁵ On the other hand, should a member of the police be killed or wounded, “all persons so assembled and all other persons present who when commanded refused to aid and assist said officer shall be held answerable therefor.”¹³⁶

In Charlotte

- Law applies when three or more people have the common intent to commit disorderly acts interfering with the rights of others, in a way that would cause those nearby to apprehend a breach of the peace.

North Carolina recognizes the criminal common law offenses of “unlawful assembly” and “riot.” The North Carolina Supreme Court has defined “unlawful assembly” as requiring three elements: (1) the participation of three or more persons; (2) a common intent to commit disorderly acts which will interfere with the rights of others; and (3) the intent to commit such acts in a manner that would cause “firm persons to apprehend a breach of peace.”¹³⁷ A “riot” is defined as the execution of such public violence, when done by three or more persons with the intent to mutually assist one another in its execution.¹³⁸

Overlapping with common law is North Carolina General Statutes § 14-288.2, which punishes anyone who willfully engages in a “riot,” defined as “a public

Charlotte, in Brief:

- Law applies when three or more people have the common intent to commit disorderly acts interfering with the rights of others, in a way that would cause those nearby to apprehend a breach of the peace.
- North Carolina law gives officers the power to order an unlawfully assembled crowd to disperse, and any person who remains is presumptively engaged in the crime of riot.

¹³⁴ F.S.A. § 870.04. A review of case history does not reveal any recent instances where Florida law enforcement used this broad deputizing power to command those present to aid in the arrest of the unlawfully assembled.

¹³⁵ F.S.A. § 870.05. The Florida Supreme Court has suggested that this provision will not bar a claim against a police officer if there is insufficient factual evidence to show that an unlawful assembly was occurring. *Cleveland v. City of Miami*, 263 So.2d 573, 576 (Fla. 1972).

¹³⁶ F.S.A. § 870.05.

¹³⁷ *State v. Brooks*, 215 S.E.2d 111, 116 (N.C. 1975).

¹³⁸ *Brooks*, 215 S.E.2d at 116.

disturbance involving an assemblage of three or more persons which by disorderly and violent conduct, or the imminent threat [thereof], results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property.” The language of the statute would seem to broaden the common law crime by not requiring a common intent between rioters. Both remain valid laws.¹³⁹

- North Carolina law gives officers the power to order an unlawfully assembled crowd to disperse, and any person who remains is presumptively engaged in the crime of riot.

North Carolina also has a statute governing orders to disperse, and like Florida’s statute the law makes no indication that any special exception applies to media defendants. The law provides that any law enforcement officer may issue a command to disperse “if he reasonably believes that a riot, or disorderly conduct by an assemblage of three or more persons, is occurring.”¹⁴⁰ Failure to comply with a command to disperse is a misdemeanor, and if “any person remains at the scene of a riot . . . following a command to disperse and after reasonable time for dispersal has elapsed,” it is presumed that the person was willfully engaging in the riot or disorderly conduct, placing the burden on the defendant to prove otherwise.¹⁴¹ Very few cases have addressed the substantive dimensions of North Carolina’s dispersal statute, though courts have generally supported its overall validity.¹⁴²

2.2.1 Special Note: Dealing with Unlawful Crowds as a Journalist – the “Who Is a Journalist” Problem.

The blending of roles between journalist and demonstrator has become a perennial issue at mass gathering events. The commissioned study following the 2008 RNC notes the lack of a clear definition among all parties as to who should be considered a “journalist,” and that perspectives varied as to whether independent bloggers and demonstrators with video cell-phones should be included in that definition.¹⁴³ Police departments, largely due to history and custom, tend to think of “journalists” as those affiliated with more formal institutions, and may be more lenient toward such “traditional” members of the press while not affording any special treatment to non-traditional press or citizen journalists. This perception, of course, does not square with the modern realities of our increasingly independent Fourth Estate, where news reporting is done both by major incumbents and through independent and citizen

Summary

- Police generally adopt traditional perspectives on who is a journalist.
- The more you act like an independent observer, the more likely the police will treat you as one.

¹³⁹ See N.C. GEN. STAT. § 14-288.3 (“[T]his Article shall not be deemed to abrogate, abolish, or supplant such common law offenses as unlawful assembly, rout, [and] conspiracy to commit riot or other criminal offenses . . .”).

¹⁴⁰ N.C. GEN. STAT. § 14-288.5(a).

¹⁴¹ N.C. GEN. STAT. §§ 14-288.5(b), (c) (emphasis added).

¹⁴² See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 108 n.7 (1999) (Thomas, J., dissenting) (approvingly citing the North Carolina statute in passing); *Brooks v. N.C. Dep’t of Correction*, 984 F. Supp. 940, 959 (E.D.N.C. 1997) (presuming in dicta that the statute is sufficiently tailored to withstand a constitutional challenge).

¹⁴³ ST. PAUL REPORT, *supra* note 1, at 21.

reporting.

A fear of the police is that members of the protests may seek to claim that they are members of the press once they are arrested for violating a particular law while acting as a protester.¹⁴⁴ It is dangerous for the entire press ecosystem for those not actually reporting on the event to cry “press” when subject to arrest; this will no doubt diminish the rapport of other members of the independent press with law enforcement, thus diminishing all reporting at events.

Given the lack of statutory protections for members of the press in Florida and North Carolina’s unlawful assembly laws, a journalist’s only hope for preferential treatment will arise from their behavior. Accordingly, journalists should be very cautious about not blending in with an assembled crowd. Police may not want to arrest members of the press covering a crowd that is becoming riotous, but they may not be able to identify journalists in the moment. The more you act like an independent observer the more likely the police are to treat you as one. The Committee to Protect Journalists phrases the issue this way: “One could think of a journalist as a referee on the playing field: The referee must be close enough to observe the game accurately, yet must take every precaution to avoid getting mixed up in the action.”¹⁴⁵ Although this view might seem outdated to some practitioners, this is the model of journalism that police are most likely to understand and respect in the field.

3. Public Recording

- Analysis of your right to record depends on first seeing if a particular law prohibits the recording, and then seeing whether you may have a First Amendment right that supersedes this law.

Individuals have the general ability to record (through images, audio, or film) the activities of protesters and the police in public spaces. Until very recently, this general ability to record was largely cast in the negative: the right to record rested only in the empty space left over after state laws (in particular privacy and wiretapping laws) prohibited recording in certain places and circumstances. Over the past several years, courts have increasingly recognized an affirmative First Amendment right to record police activity in public that trumps application of privacy and wiretapping laws, in some circumstances.¹⁴⁶ This requires individuals analyzing their ability to record in a certain situation to ask two questions: First, is there a law which limits or prohibits the type of recording at issue? Second, if there is a law which would prohibit the recording, is the recording of the sort which is nevertheless protected under the First Amendment? Resolving this inquiry in favor of recording based on the second

Note:

The material in this section addresses a few of the laws that apply during the course of newsgathering. Other, separate, concerns arise with the publication of material gathered that are substantively outside of the scope of this guide. For a review on some publication risks, visit <http://www.dmlp.org/legal-guide/risks-associated-publication>.

¹⁴⁴ ST. PAUL REPORT, *supra* note 1, at 21.

¹⁴⁵ CPJ, *Civil Matters and Disturbances*, *supra* note 42.

¹⁴⁶ See, e.g., *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995); see also *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010) (supposing that there is a constitutional right, but declining to find it clearly established for qualified immunity purposes).

question can be tremendously difficult, and almost certainly would need to be done before a judge after legal actions have been taken against the person recording.

- Certain best practices can avoid many of the issues presented by these laws.

Nevertheless, there are best practices you can apply to certain types of recording that are likely to take place in the context of convention coverage:

- For interviews, start the interview by informing the person that you will be recording, and asking on the recording for the person's consent.
- When recording in crowds and other public situations, do not intrude into or record a conversation when it appears that the parties are trying to keep the conversation private. Be especially careful when using sensitive microphones or telephoto lenses.
- When recording the police, be careful not to interfere with police activity.

More information on the law as it applies in these situations follows below.

3.1 Wiretapping Laws

- Both states prohibit the interception of face-to-face and electronic communications in certain circumstances.

Both North Carolina and Florida have statutes prohibiting the recording of certain forms of "wire, oral, or electronic communication."¹⁴⁷ This contemplates both electronic and face-to-face communication.

- In both states, consent of person(s) recorded provides protection (but in Florida consent must come from all parties to the communication).

In both states, consent of the person(s) recorded provides protection, though in Florida consent must be obtained from *all parties*.¹⁴⁸ If you find yourself in a position where consent can be given easily (such as an in-person interview), consider asking the interviewee to note their consent at the start of the recording to avoid the issue.

- Both laws apply to oral communication only when the speaker has a reasonable expectation of privacy in what is said. Be mindful not to record conversations where the subject is clearly trying to keep communications a secret.

Also, both states protect oral communications made when the party has a reasonable expectation of privacy. Many statements shouted at a protest will not

Summary

- Both states prohibit the interception of face-to-face and electronic communications in certain circumstances.
- In both states, consent of person(s) recorded provides protection (but in Florida consent must come from all parties to the communication).
- Both laws apply to oral communication only when the speaker has a reasonable expectation of privacy in what is said. Be mindful not to record conversations where the subject is clearly trying to keep communications a secret.

¹⁴⁷ See N.C. GEN. STAT. § 15A-287; F.S.A. § 934.03

¹⁴⁸ See F.S.A. § 934.03.

meet this definition,¹⁴⁹ but be mindful not to record a conversation where a person is clearly trying to keep the public from hearing its contents. Courts will look to both whether the subject of the recording demonstrated intent to keep the communication secret, as well as whether it was reasonable for the person to expect privacy in the communication.

In Tampa

- Recording a communication in Florida requires consent of all parties to the communication.

Florida's wiretapping statute prohibits the interception of "any wire, oral, or electronic communication," as well as the disclosure of unlawfully recorded communications in most circumstances, unless "all of the parties to the communication" have consented.¹⁵⁰ Unlike some states (such as North Carolina), seeking consent from one party will not provide a defense.¹⁵¹

- The law only applies to oral communications where the person recorded has a reasonable expectation of privacy over the communication. Some conversations in public places may meet this test.

An important limitation in the statute comes from the definition of "oral communication," which is defined "as any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation"¹⁵² (No such restriction to the statute applies with respect to wire or electronic communications.) This definition imparts an "expectation of privacy" requirement before a communication can be protected, and that expectation must be both subjectively harbored in the individual and objectively reasonable under the circumstances.¹⁵³

Courts in Florida have found no expectation of privacy when the subject is previously warned of a recording, when conducting a conversation at normal volumes in a high-crime public area, when conducting a formal business

Tampa, in Brief:

- Recording a communication in Florida requires consent of all parties to the communication.
- Only applies to oral communications where the person recorded has a reasonable expectation of privacy over the communication. Some conversations in public places may meet this test.
- The law does not prohibit video-only recording, at least when the recording does not capture the substance of any communications.

¹⁴⁹ Cf. *United States v. Llanes*, 398 F.2d 880, 884 (2d Cir. 1968) (no expectation of privacy in a conversation held so loud that those outside the house could hear it).

¹⁵⁰ F.S.A. §§ 934.03(1)(a), (c), (e), (2)(d).

¹⁵¹ As one might expect, this has significantly hampered the ability of the Florida press to engage in effective investigative reporting, and has led to calls by many for the statute's revision or repeal. See, e.g., *Shevin v. Sunbeam Television Corp.*, 351 So.2d 723, 725-28 (Fla. 1977) (rejecting a First Amendment argument brought by multiple news organizations); *Guilder v. State*, 899 So.2d 412, 419 (Fla. D. Ct. App. 4th 2005) (noting judicial disapproval of the statute as written).

¹⁵² F.S.A. § 934.02.

¹⁵³ See *Jackson v. State*, 18 So.3d 1016, 1030 (Fla. 2009).

conference call, or when making an extortionate threat.¹⁵⁴

That said, an intermediate state court in Florida (though not the court governing Tampa) rejected the blanket suggestion that all conversations held in public are lacking an expectation of privacy.¹⁵⁵ Therefore, you should consider all circumstances of the communication, and not merely where it is taking place.

- The law does not prohibit video-only recording, at least when the recording does not capture the substance of any communications.

The law does not prohibit video recording without audio, at least when such recording does not capture the substance of a conversation.¹⁵⁶

In Charlotte

- Recording a communication in North Carolina requires consent of at least one party to the communication.

North Carolina's wiretapping law prohibits the interception of any "wire, oral, or electronic communication," as well as the disclosure of contents of unlawfully-made recordings.¹⁵⁷ The only applies if the interception is done "without the consent of at least one party to the communication."¹⁵⁸ The North Carolina Court of Appeals has allowed consent to be implied from the circumstances, when (in the context of a telephone call made from prison) the party was advised that a recording was being made and the party remained on the line and began the conversation.¹⁵⁹

- The law applies to oral conversations only where the person recorded has a reasonable expectation of privacy over the communication.

North Carolina's statute is more than 20 years younger than Florida's, and case law interpreting the statute is comparatively scant. North Carolina does require that an "oral communication" subject to protection be made "by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation,"¹⁶⁰ but interpretation of what is a reasonable expectation of privacy for purposes of this

Charlotte, in Brief:

- Recording a communication in North Carolina requires consent of at least one party to the communication.
- The law applies to oral communications only where the person recorded has a reasonable expectation of privacy over the communication.
- The law does not prohibit video-only recording, at least when the recording does not capture the substance of any communications.

¹⁵⁴ Jackson v. State, 18 So.3d 1016, 1029-30 (Fla. 2009) (previously warned of telephone recording); Brandin v. State, 669 So.2d 280, 282 (Fla. D. Ct. App. 1st 1996) (conversation outside of parked car in high-crime area); Cohen Bros., LLC v. ME Corp., 872 So.2d 321, 324-25 (Fla. D. Ct. App. 3d 2004) (formal business call); Jatar v. Lamaletto, 758 So.2d 1167, 1169-70 (Fla. Dist. Ct. App. 3d 2000) (extortionate threat).

¹⁵⁵ Brandin, 669 So.2d at 282 ("Although we cannot accept the blanket proposition that under Chapter 934 the police are free to intercept communications made on public streets without obtaining judicial assent, we do not need to resolve that issue here.")

¹⁵⁶ See Minotty v. Baudo, 42 So.3d 824, 830-31 (Fla. D. Ct. App. 4th 2010).

¹⁵⁷ N.C. GEN. STAT. § 15A-287.

¹⁵⁸ N.C. GEN. STAT. § 15A-287(a).

¹⁵⁹ State v. Troy, 679 S.E.2d 498, 500 (N.C. Ct. App. 2009).

¹⁶⁰ N.C. GEN. STAT. § 15A-286(17).

law is largely unresolved by the courts.¹⁶¹ Absent further guidance, reporters are advised to use their judgment as to whether a person appears to be demonstrating an expectation of privacy over their communications.

- The law does not apply to video-only recordings.

The North Carolina Court of Appeals has held that the wiretapping law applies only to oral recordings, and not video recordings without audio.¹⁶²

3.2 Privacy Concerns

Of the various “privacy” rights recognized in this country, the right most at issue in the course of newsgathering is the right against “intrusion” or “intrusion upon seclusion.” Other privacy laws govern the publishing information after it is gathered. For publication risks, be sure to check our legal guide at <http://www.dmlp.org/legal-guide/risks-associated-publication>.

- Generally, a claim for “intrusion” rests upon showing that there was an invasion into the private life of another, in a way that is highly offensive.

Both Florida and North Carolina generally require that there be (1) an intrusion or prying, (2) into the private life of another, (3) in a manner that is highly offensive to a reasonable person.¹⁶³ What constitutes an “intrusion,” the “private life” or another, and what is “highly offensive” varies somewhat between the states.

- Be mindful of when you may be invading another person’s space, and seek consent in close cases.

Claims of intrusion are raised far less frequently than other privacy-based claims, and case law is comparatively sparse. As discussed below, the risk can generally be avoided by (1) being mindful of when your recording is invading the private space of another in a way that would offend the sensibilities of most people, and (2) seeking consent to record in close cases or when consent is easily obtained (such as in an interview).

Note:

As a testament to the world’s ever-developing technology, reporters at mass gathering events have started to use cheap aerial cameras to get sky-view shots of protest events. While regulation of these small craft is far from settled, use of such aircraft may be believed by law enforcement to violate the temporary flight restrictions (“TFRs”) in place for both Tampa and Charlotte by the Federal Aviation Administration, which prohibits, among other things, the use of model aircraft, model rockets, and “unmanned aircraft systems” in and around the convention airspace. Violation of TFRs can result in federal prosecution.

*Flight Advisory, National Special Security Event, Republican National Convention, FAA (July 30, 2012), https://www.faa.gov/files/notices/2012/Jul/120730_Published_RNC_Flight_Advisory.pdf; *Flight Advisory, National Special Security Event, FAA (July 30, 2012), https://www.faa.gov/files/notices/2012/Jul/120730_Published_DNC_Flight_Advisory.pdf.**

Summary:

- Generally, a claim for “intrusion” rests upon showing that there was an invasion into the private life of another, in a way that is highly offensive.
- Be mindful of when you may be invading another person’s space, and seek consent in close cases.

¹⁶¹ The only reported decision addressing the reasonableness of an expectation of privacy held that a person using a radio-wave cordless telephone does not have such an expectation. See *State v. McGriff*, 566 S.E.2d 776, 780 n.1 (N.C. Ct. App. 2002).

¹⁶² *Kroh v. Kroh*, 567 S.E.2d 760, 763 (N.C. Ct. App. 2002).

¹⁶³ See RESTATEMENT (SECOND) TORTS §652B; *Miller v. Brooks*, 472 S.E.2d 350 (N.C. Ct. App. 1996); *Forsberg v. Housing Auth. of Miami Beach*, 455 So.2d 373, 376 (Fla. 1984) (Overton, J., concurring) (indicating that Florida follows the Restatement formulations of privacy torts).

In Tampa

- “Intrusion” in Florida may require physical trespass into another’s private space, and recording of individuals in public is generally protected.

The decisions of Florida courts protect the ability to record in public in two critical ways. First, Florida courts have split as to whether the law requires that there be a physical trespass into one’s private space in order to sustain a claim, although the Florida Supreme Court has suggested that the intrusion can be either “physical or electronic.”¹⁶⁴ Second, the law has very limited application in public environments. As one federal court in Florida stated:

[T]here is no liability “for observing [a person] or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye. Even in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters.”¹⁶⁵

Thus, an intrusion claim may be brought for recording someone in public, but the plaintiff would have to show both that a non-physical intrusion can be the basis for a claim in Florida, and that the nature of the prying extended beyond the mere recording of an individual in public.

- Courts look to context, motives, and degree when considering whether an intrusion was “highly offensive.”

The intrusion must also be highly offensive, from the perspective of the average person. When considering this tort, a federal court interpreting Florida law stated that courts should consider the degree of the intrusion, the context and circumstances around the intrusion, as well as the motives and objectives of the intruder.¹⁶⁶

- Consent is a defense.

Consent is a defense to a claim of intrusion.¹⁶⁷

Tampa, in Brief:

- “Intrusion” in Florida may require physical trespass into another’s private space, and recording of individuals in public is generally protected.
- Courts look to context, motives, and degree when considering whether an intrusion was “highly offensive.”
- Consent is a defense.

¹⁶⁴ Compare *Heath v. Playboy Enters., Inc.*, 732 F. Supp. 1145, 1148 n.8 (S.D. Fla. 1990) (requiring physical trespass) with *Liberti v. Walt Disney World Co.*, 912 F. Supp. 1494, 1508 (M.D. Fla. 1995) (suggesting the existence of a claim for videotaping conducted on defendant’s property); see *Allstate Ins. Co. v. Ginsberg*, 863 So.2d 156, 162 (Fla. 2003) (defining intrusion as “physically or electronically intruding into one’s private quarters”).

¹⁶⁵ *Benn v. Fla. E. Coast Ry. Co.*, No. 97-cv-4403, 1999 WL 816811 at *8 (S.D. Fla. July 21, 1999) (quoting RESTATEMENT (SECOND) TORTS § 652B cmt. c).

¹⁶⁶ *Wolfson v. Lewis*, 924 F. Supp. 1413, 1420 (E.D. Pa. 1996) (interpreting Florida law).

¹⁶⁷ *Florida Publ’g Co. v. Fletcher*, 340 So.2d 914, 917 (Fla. 1977).

In Charlotte

- Interpretive history is limited, but suggests that there must be a “physical or sensory intrusion” in order to be a violation.

The North Carolina Court of Appeals has said that “[g]enerally, there must be a physical or sensory intrusion or an unauthorized prying into confidential personal records to support a claim for invasion of privacy by intrusion.”¹⁶⁸ In that same case, the court denied a claim for intrusion based upon evidence gathered from interviews and public records.¹⁶⁹ Beyond this, few cases have elaborated on the specific contours of this claim.

3.3 The Growing Trend: Recognition of a Constitutional Right to Record

- The law is emerging, but several federal courts now recognize some form of a constitutional right to record, at least when done openly and to document actions of public officials in public spaces.

While case history in Florida and North Carolina is limited, several federal Courts of Appeal in the United States – including the federal appeals court with jurisdiction in Florida – have begun to recognize some form of a First Amendment right to record, at least when the recording is done openly, in public, and of government agents executing their lawful duties.¹⁷⁰ This right has usually been asserted as a defense to charges of wiretapping, when the individual is recording the police during the course of an arrest or other formal activity. Several such cases are currently pending before state and federal courts.¹⁷¹

- The federal appeals court with jurisdiction over Florida indicates that there is a right to record police conduct; case law in North Carolina has yet to formally recognize this right.

Florida in particular has some case law indicating support for a constitutional right to record. The United States Court of Appeals for the Eleventh Circuit, in a brief opinion from 2000, stated that individuals “ha[ve] a First Amendment

Summary:

- The law is emerging, but several federal courts now recognize some form of a constitutional right to record, at least when done openly and to document actions of public officials in public spaces.
- The federal appeals court with jurisdiction over Florida indicates that there is a right to record police conduct; case law in North Carolina has yet to formally recognize this right.
- Past conventions show examples where law enforcement targeted those recording police conduct, and those recording the police should be prepared for a hostile response.

¹⁶⁸ Broughton v. McClatchy Newspapers, Inc., 588 S.E.2d 20, 27 (N.C. Ct. App. 2003).

¹⁶⁹ *Id.* at 30.

¹⁷⁰ See *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (“The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.”); *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) (“[A] citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.”); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”); *Fordyce v. City of Seattle*, 55 F.3d 436, 438 (9th Cir. 1995) (assuming a First Amendment right to record the police).

¹⁷¹ See, e.g., *Sharp v. Baltimore City Police Dep’t*, No. 11-cv-2888 (D. Md. Answer filed July 27, 2012); *Datz v. Milton*, No. 12-cv-1770 (E.D.N.Y. Answer filed May 2, 2012).

right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct,” at least on public property.¹⁷² The same court recently reaffirmed that decision in passing.¹⁷³

Courts governing Charlotte have been quieter on the topic. The United States Court of Appeals for the Fourth Circuit has addressed the constitutional right to record the police only once, in an unpublished and non-binding decision from 2009. In that case, the court held that even if such a right exists (and the court did not say if it does or does not), it was not “clearly established” at the time of the plaintiff’s arrest and so the plaintiff could not pursue damages against the police officer for violation of his rights.¹⁷⁴

There is increasing traction for this constitutional right from the Executive Branch of the federal government as well. In a highly unusual move, the Civil Rights Division of the United States Department of Justice filed a Statement of Interest in one ongoing federal case in Maryland.¹⁷⁵ The Department urged the court to recognize the rights of citizen to record the police in the public discharge of their duties, arguing that a citizen’s recording of a friend being arrested was “unquestionably protected by the First Amendment.”¹⁷⁶ In a subsequent letter to the parties during settlement negotiations, the Department of Justice suggested that any police policy on handling recording by citizens should include the following:

- Recognition of the First Amendment right to record police activity, particularly while on public spaces such as parks and sidewalks.
- That officers should not “threaten, intimidate, or otherwise discourage an individual from recording police officer enforcement activities or intentionally block or obstruct cameras or other recording devices.”
- A directive for officers to allow recording “unless the person engages in actions that jeopardize the safety of the officer, the suspect, or others in the vicinity, violate the law, or incite others to violate the law.”
- When such a risk is presented, encouragement for officers to provide “ways in which individuals can continue to exercise their First Amendment rights as officers perform their duties, rather than encourage officers to look for potential violations of the law in order to restrict an individual’s recording.”
- Clear policies on when film may be seized, and prohibition of seizure “for ... longer than reasonably necessary for the police, acting with diligence, to obtain the warrant if that film contains critical evidence of

¹⁷² *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

¹⁷³ See *Abella v. Simon*, No. 11-16124, 2012 WL 303447 at *1 (11th Cir. July 26, 2012).

¹⁷⁴ *Szymborski v. Houck*, 353 Fed. App’x 852, 852 (4th Cir. 2009) (per curiam); see *Glik*, 655 F.3d at 85 (noting, while discussing *Szymborski*, that “[s]uch unpublished opinions have no precedential force, . . . and the absence of substantive discussion deprives *Szymborski* of any marginal persuasive value it might otherwise have had” (internal citations omitted)).

¹⁷⁵ See Statement of Interest of the United States, *Sharp v. Baltimore City Police Dep’t*, No. 11-cv-2888 (filed Jan. 10, 2012) [hereinafter DOJ Statement of Interest].

¹⁷⁶ *Id.* at 5.

a felony crime.”¹⁷⁷

While these suggestions bear some considerable weight, they are, in the end, merely suggestions. To date, the police in Tampa and Charlotte have not indicated whether they will act in compliance with the Department of Justice’s standards.

- Past conventions show examples where law enforcement targeted those recording police conduct, and those recording the police should be prepared for a hostile response.

Past political conventions have included a tragic history of instances where the police allegedly *targeted* those recording the police, especially when the circumstances suggest that the individual will use the recording to shame or embarrass the police. A review of the 2004 RNC noted several instances where the police specifically targeted videographers recording the police and the protests.¹⁷⁸ This is clearly a battleground issue in the constant struggle between the police and the press, and those recording police activity at the DNC and RNC should be prepared to confront a hostile police response. As discussed further below, remain calm and professional to the extent possible, and carefully document the police encounter as best you can for use in any subsequent legal challenge. (Bear in mind that even if you make the decision to stop recording in response to a hostile police encounter, you can almost guarantee that others around you will begin recording should they observe your situation.¹⁷⁹ Ask if they will send you copies of what they record.)

¹⁷⁷ Letter from Jonathan M. Smith, Chief, Special Litigation Section, U.S. Dep’t of Justice Civil Rights Division, to Mark H. Grimes, Baltimore Police Dep’t Office of Legal Affairs, and Mary E. Borja, Wiley Rein LLP 3-4, 5, 6, 7 (May 14, 2012), available at http://www.justice.gov/crt/about/spl/documents/Sharp_ltr_5-14-12.pdf [hereinafter DOJ Letter].

¹⁷⁸ NYCLU REPORT, *supra* note 5, at 32.

¹⁷⁹ See generally *Police Fight Cellphone Recordings*, NEW ENGLAND CTR. FOR INVESTIGATIVE REPORTING, <http://necir-bu.org/investigations/police-fight-cellphone-recordings-2/police-fight-cellphone-recordings/> (last visited Aug. 21, 2012) (noting abundance of cellphone recordings of police encounters).

V. Interactions with the Police

Note: Terms of Art

Throughout this section, two different standards are used to describe what level of suspicion an officer must have before taking certain actions. These are terms of art with complicated legal histories, but can be generally summarized as follows:

- **Reasonable Suspicion:** Specific, articulable facts leading an officer to the reasonable belief that a temporary intervention into the privacy of another is warranted.¹⁸⁰ This is used when permitting temporary investigative “stops” and protective “frisks” of individuals for weapons.
- **Probable Cause:** Considering the facts and circumstances within the officer’s knowledge, and the trustworthiness of that information, information sufficient to lead a person “of reasonable caution” to believe that the subject has committed or is committing a crime. This is used in a variety of circumstances, including to justify search or arrest of a person.

Given the overwhelming police presence at the RNC and DNC, journalists reporting from these events can almost guarantee that at some point they will face an encounter with law enforcement. These encounters can run the spectrum from simple conversations, direct orders from police to move or disperse, stops and searches of personal property, up through arrest. To ensure your fair treatment, it is vitally important to be aware of your rights in encounters with police.

- In all encounters with police, try to remain professional and calm.

Specific types of encounters are classified and addressed below, but as a general comment the most important thing to keep in mind in any police encounter is to remain professional and as calm as the circumstance allows, even if you firmly disagree with an officer’s actions. Journalists always tend to fare better before the police (or, should a legal challenge to a police action be brought, before a judge) if they can show that they remained respectful, however outrageous the actions of law enforcement may have been.¹⁸⁰

- Police may ask for a voluntary surrender of your rights; try to ascertain whether an instruction is a request or a command.

Try also to determine whether a police instruction is a request or a command. Even when the legal justification for a police order does not exist, the police may ask for your voluntary consent to surrender some of your rights, such as a voluntary search of a bag, or an informal request for information. The police are free to do this, though members of the public are generally allowed to refuse such requests. Refusal to obey an order, however, can lead to further legal

Summary:

- In all encounters with police, try to remain professional and calm.
- Police may ask for a voluntary surrender of your rights; try to ascertain whether an instruction is a request or a command.

¹⁸⁰ See Kristen Rasmussen, *After an Arrest: A Journalist’s Guide to Civil Rights Claims and Other Remedies for Government Interference with Newsgathering Activities*, in POLICE, PROTESTERS AND THE PRESS, *supra* note 6, at 9.

trouble, as detailed in [section V.3](#). If you're not sure whether a police instruction was a request or a command, politely and respectfully ask the officer to clarify.

1. Distinguishing Police from Private Details

Whenever confronting an authority figure in the field, consider first whether the person issuing the order is a police officer (there to protect public safety) or private security (there to protect the rights of a nearby property owner). Your rights when encountering these figures vary. The general power to enforce and arrest, balanced by constitutional safeguards, is entrusted only to public law enforcement.¹⁸¹

- Private security may be present to regulate behavior on private land, and ignoring an order from private security may lead to a trespass claim.

This is not to suggest that you can wholly dismiss interactions with private security. As noted above, many of the spaces in and around the convention site are private land, and private security may be there to regulate behavior on that land. While on private land you will be subject to whatever rules the owner of the land decides to impose, and violation of those rules (including orders to leave) may subject you to claims of civil and criminal trespass. (See [section III](#).)

- Both states allow for private parties to temporarily detain individuals, but only when the private party personally witnessed a serious crime or a breach of the peace.

Additionally, both Florida and North Carolina empower individuals to detain other individuals in certain limited circumstances (the so-called “citizen’s arrest”). Florida recognizes a common law right of a person to detain another when that person is involved in an imminent breach of the peace such that immediate intervention is necessary¹⁸² or when that person is committing a felony.¹⁸³ Similarly, a North Carolina statute grants people the power to detain another person when they have probable cause to believe that the person committed a felony, breach of the peace, or a crime involving physical injury or destruction of property.¹⁸⁴ Both states require that the underlying crime be conducted in the presence of the person making the private arrest in order for the arrest to be lawful.¹⁸⁵ If a private citizen arrests you unlawfully you can bring a claim for false imprisonment.¹⁸⁶

Summary:

- Private security may be present to regulate behavior on private land, and ignoring an order from private security may lead to a trespass claim.
- Both states allow for private parties to temporarily detain individuals, but only when the private party personally witnessed a serious crime or a breach of the peace.
- It may be difficult in some situations to tell whether a person is acting as public law enforcement or private security.

¹⁸¹ See *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971).

¹⁸² *Johnson v. Barnes & Noble Booksellers, Inc.*, 437 F.3d 1112, 1116-17 (11th Cir. 2006).

¹⁸³ *Phoenix v. State*, 455 So.2d 1024, 1025 (Fla. 1984).

¹⁸⁴ The person is only allowed to detain the suspect long enough to immediately notify law enforcement and surrender the person to law enforcement once they arrive. N.C. GEN. STAT. § 15A-404.

¹⁸⁵ N.C. GEN. STAT. § 15A-404; *Steiner v. State*, 690 So.2d 706, 708 (Fla. Dist. Ct. App. 1997).

¹⁸⁶ See *Rousselo v. Starling*, 495 S.E.2d 725, 732 (N.C. Ct. App. 1998); *Johnson*, 437 F.3d at 1116.

- It may be difficult in some situations to tell whether a person is acting as public law enforcement or private security.

There may be particular situations where identifying whether a person is acting as a government figure or as a private party is a challenge. (For example, off-duty police officers may be hired as private security, or a reporter may have an encounter with a law enforcement agent commuting home from her shift.¹⁸⁷) States have adopted doctrines to help discern whether a particular person's actions should be treated as private or public, though the states vary slightly in how to resolve the question.

In Tampa

Courts in Florida look to (1) whether the government was aware of and acquiesced in the conduct; and (2) whether the individual in question intended to assist the police or further his or her own ends.¹⁸⁸ The Florida District Court of Appeal governing the Tampa region has indicated that relevant facts include whether the police department actively sought or endorsed the employment, whether the officers were in uniform or carrying sidearms at the time, and whether the police department advised or supervised the deployment of security.¹⁸⁹

In Charlotte

In an important First Amendment case concerning the conduct of off-duty sheriff's deputies, the federal appellate court with jurisdiction over North Carolina held that when the police officers were motivated to act based on criticism of their public duties, they were acting under the color of state law.¹⁹⁰ While holding this sufficient to find state action, the court also noted that sanction or support of the conduct by the sheriff himself provided independent grounds for finding state action in that case.¹⁹¹ In an earlier case, the same court also noted that a lack of outward indications of authority (such as wearing a uniform, being on duty, or driving a patrol car) does not automatically dispel the claim that the officer was acting as a government actor for purposes of a civil rights claim; one should instead look to the underlying actions taken to determine whether they were motivated by state interests.¹⁹²

2. If the Police Stop You and Ask for Your Identification

In some limited circumstances you may be required to provide your identification when asked. Several states – including Florida, but not North Carolina – have adopted “stop and identify” laws. These laws allow an officer

¹⁸⁷ See, e.g., *Kelly v. State*, 407 So.2d 1011, 1012-13 (Fla. App. 5th Dist. 1981) (off-duty police acting as skating rink security); *State v. Iaccarino*, 767 So.2d 470, 472-73 (Fla. App. 2d Dist. 2000) (sheriff's deputies serving on “extra-duty” as concert security).

¹⁸⁸ *Iccarino*, 767 So.2d at 475 (citing *United States v. Cleveland*, 38 F.3d 1092, 1093 (9th Cir. 1994)).

¹⁸⁹ *Iccarino*, 767 So.2d at 475-76.

¹⁹⁰ *Rossignol v. Voohaar*, 316 F.3d 516, 524 (4th Cir. 2003).

¹⁹¹ *Rossignol*, 316 F.3d at 525-26.

¹⁹² *Revene v. Charles Cty. Comm'rs*, 882 F.2d 870, 872-73 (4th Cir. 1989).

who has reasonable suspicion that a particular person has committed or is committing a crime to stop that person and demand the person provide her name and address, as well as an explanation of her conduct. These laws have been upheld by the Supreme Court, so long as they require the officer to have reasonable suspicion to believe the person committed a crime.¹⁹³

In Tampa

- Florida has a “stop and identify” law, which allows police to temporarily detain a person in order to identify that person, if the officer has reasonable suspicion that the person has committed, is committing, or will commit a crime.

Florida statutes allow the police to “temporarily detain [a] person for the purpose of ascertaining the identity of the person . . . and the circumstances surrounding the person's presence,” when the police reasonably believe that person to have committed, be committing, or be about to commit a crime.¹⁹⁴ This belief must be based on more than an apparent desire to avoid the police or presence in a high-crime area, though such facts may be relevant in a larger determination.¹⁹⁵ The stop must for no longer than is reasonably necessary to obtain that information, and must be conducted within the immediate vicinity of where the person was encountered.¹⁹⁶ During this stop, an officer may ask for proof of identification, including a driver's license.¹⁹⁷ Failure to comply may result in your arrest.¹⁹⁸

Even when the police do not have a well-founded belief that the person is involved in a crime, the police may nevertheless ask an individual for their identification, though that person is under no duty to answer such requests.¹⁹⁹ If you are uncertain whether a request for identification is voluntary or involuntary, politely ask the officer for clarification.

In Charlotte

- As of publication, North Carolina does not have a “stop and identify” law. Police may ask you to voluntarily provide them with identification, but you are not under a duty to respond.

As of the time of publication, North Carolina has not enacted a “stop and identify” law. The North Carolina Court of Appeals recently rejected an argument that a police officer could frisk a suspect in order to obtain a copy of

Summary:

- Florida has a “stop and identify” law, which allows police to temporarily detain a person in order to identify that person, if the officer has reasonable suspicion that the person has committed, is committing, or will commit a crime.
- As of publication, North Carolina does not have a “stop and identify” law. Police may ask you to voluntarily provide them with identification, but you are not under a duty to respond.

¹⁹³ *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 187-88 (2004).

¹⁹⁴ F.S.A. § 901.151(2).

¹⁹⁵ See, e.g., *J.D. v. State*, 568 So.2d 99, 100 (Fla. App. 3d Dist. 1990).

¹⁹⁶ F.S.A. § 901.151(3).

¹⁹⁷ See *State v. Ramos*, 598 So. 2d 267, 269 (Fla. App. 3d Dist. 1992).

¹⁹⁸ See F.S.A. § 856.021 (refusal to give identification relevant in determining whether person is guilty of crime of loitering or prowling); Op. of Fla. Att’y Gen., no. 072-256 (1972) (failure to comply with stop and identify law is grounds for arrest under loitering statute).

¹⁹⁹ *Hill v. State*, 561 So.2d 1245, 1247 (Fla. App. 2d Dist. 1990).

his identification as part of an investigatory detention (see [section V.4.2](#)).²⁰⁰

That said, the police may still ask you for a copy of your identification or pose other questions without offending the Fourth Amendment, though you are under no duty to respond.²⁰¹ You may wish to take that opportunity to identify yourself as a member of the press.

3. If the Police Ask You to Move or Disperse

A large part of the police's role during mass gatherings is to manage the location of the crowd in light of other safety risks (e.g., pedestrian and vehicle traffic, security deployments to protect governmental figures, access to areas by medical personnel, etc.). Public relations branches of the police routinely remind the press that they may be subject to arrest if they ignore an order to leave an area ordered to disperse, even if they are not part of the unlawfully assembled.²⁰² There is no reason to believe that the cities of Tampa and Charlotte will take a different position.

- Several different laws provide police with the authority to order a crowd to move or disperse, in certain circumstances.

The validity of an order to move can be found in a number of areas in the law, including the police's general ability to set up security perimeters around a crime scene,²⁰³ orders to disperse an unlawfully-assembled crowd,²⁰⁴ and enforcement of provisions regarding the blocking of pedestrian or vehicular traffic.²⁰⁵

- The police may not order you to move if they are doing so in order to prevent you from reporting on an event, but they may have other, legal, motivations for asking you to move.

That said, the police may not order you to move if they are doing so in order to prevent you from reporting on an event. Determining whether this is the case can be a tremendous challenge. It is entirely possible in the field for a reporter to wander accidentally into a protected area, unintentionally interfere with traffic, or be present in an area where a dispersal order was recently given. Be conscious of the fact that you may be violating a generally applicable law even if you do not realize it. Alarm flags should rise, however, if you find that you are being singled out amongst a group of individuals to be moved. This may be a sign that you are being targeted directly, which may be a violation of your constitutional rights. For example, several organizations have reported instances

Summary:

- Several different laws provide police with the authority to order a crowd to move or disperse, in certain circumstances.
- The police may not order you to move if they are doing so in order to prevent you from reporting on an event, but they may have other, legal, motivations for asking you to move.
- When confronting an order to move, consider asking if there is another location from which you can film. Failure to comply with an order to move will likely result in your arrest. Document the encounter carefully.

²⁰⁰ See *In re D.B.*, 714 S.E.2d 522, 525-27 (N.C. Ct. App. 2011).

²⁰¹ *State v. Yancey*, 727 S.E.2d 382, 387 (N.C. Ct. App. 2012).

²⁰² See, e.g., ST. PAUL REPORT, *supra* note 1, at 7.

²⁰³ TAMPA CODE OF ORDINANCES § 18-3 (allowing for the creation of police lines); CHARLOTTE CODE OF ORDINANCES § 15-29.

²⁰⁴ See [section IV.2.2](#), *supra*.

²⁰⁵ See [section IV.2.1](#), *supra*.

where the press were deliberately moved further away from an individual's arrest than other spectators.²⁰⁶ If this done in order to present the press from reporting on the arrest, this would be a violation of the First Amendment.²⁰⁷

- When confronting an order to move, consider asking if there is another location from which you can film. Failure to comply with an order to move will likely result in your arrest. Document the encounter carefully.

Confronting a potentially unlawful order presents a difficult balance in the moment. On the one hand, the police order may be an improper or even unconstitutional interference on your right to report on the event, and the public's right to receive the benefit of your reporting.²⁰⁸ On the other hand, refusal to comply with an order intended to maintain public safety and order will likely lead to the journalist's arrest (and thus, the end of her reporting), and may also limit the effectiveness of a subsequent challenge to the police activity in court.²⁰⁹

Rather than refusing an order to move or arguing with a police officer, you might consider asking the officer (politely) whether there is a location from which you can continue reporting. This may help you avoid inadvertently violating the law.

Either way, journalists that are seeking to avoid arrest are generally well-advised to follow police instructions to relocate, even if doing so limits one's reporting on an event. This will avoid what would be an almost certain arrest, and also presents a better set of facts for a subsequent challenge to that order.²¹⁰ Be sure to make all efforts to gather evidence of the police activity, including, if possible, the names and badge numbers of officers involved in any incident.²¹¹ History amply demonstrates the value in obtaining recordings of any police encounter, so try to also obtain videos from others who might have captured the particular encounter. This information will help you and your attorney to decide whether to pursue a remedy for violation of your rights.

²⁰⁶ See, e.g., PROTEST AND ASSEMBLY RIGHTS PROJECT, *supra* note 43, at 85.

²⁰⁷ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 583 (1980) (Stevens, J., concurring) (“[A]n arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.”); *Telemundo of Los Angeles v. City of Los Angeles*, 283 F. Supp. 2d 1095, 1102-03 (C.D. Cal. 2003) (citing cases where discriminatory access to public forums violated First Amendment); *Davis v. E. Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 929 (5th Cir. 1996) (recognizing a right of the press to gather and disseminate news).

²⁰⁸ See PROTEST AND ASSEMBLY RIGHTS PROJECT, *supra* note 43, at 85.

²⁰⁹ Kristen Rasmussen, *After an Arrest: A Journalist's Guide to Civil Rights Claims and Other Remedies for Government Interference with Newsgathering Activities*, in *POLICE, PROTESTERS AND THE PRESS*, *supra* note 6, at 7-9.

²¹⁰ *Id.*

²¹¹ *Id.* at 10.

Note:

Both Tampa and Charlotte make it a crime to intentionally cross a police line or barricade. The commission reviewing the actions at the 2008 RNC cited failure to stand behind a police line as the justification for the arrest of Amy Goodman from *Democracy Now!*, perhaps the most famous recent example of a journalist's arrest at a political nominating convention.

Charlotte City Code § 15-29; Tampa Municipal Code § 18-3 (allowing for the creation of police lines); ST. PAUL REPORT, *supra* note 1, at 24.

Note:

Laws in both Florida and North Carolina make it a separate crime to knowingly resist or obstruct law enforcement officers. In order for the law to apply the suspect must know that they are resisting or obstructing, and the underlying order must be lawful. Courts in both states have generally held that it is not a violation of these laws to ask a clarifying question regarding the order, or to ask for an officer's badge number.

See generally F.S.A. §§ 843.01-02; N.C. GEN. STAT. §14-233; see *Davis v. Williams*, 451 F.3d 759, 767 (11th Cir. 2006); *Hadnot v. State*, 956 So. 2d 1206, 1208 (Fla. Dist. Ct. App. 2007); *State v. Sinclair*, 663 S.E.2d 866, 870 (N.C. Ct. App. 2008); *State v. Hewson*, 362 S.E. 2d 574, 575 (N.C. Ct. App. 1987).

3.1 If the Police Ask You to Stop Recording

- Orders to stop recording deserve special attention, as there are only a few specific grounds where such recording is unlawful.

Police orders to stop recording are of special concern, as there are only a few specific grounds where public recording is unlawful. (Those are discussed above, in [section IV.3.](#)) Strong policy arguments suggest that recording an officer from a safe distance does not violate more general laws related to execution of law enforcement duties, such as obstruction of justice.²¹² If the recording is being done at a safe distance from law enforcement activity, and in a way that does not capture private situations or conversations, the police are highly unlikely to have a lawful reason to ask you to stop recording.

- There is a strong likelihood that an order to stop recording violates the reporter's First Amendment rights, especially if done to suppress a critical depiction of the police.

Moreover, in light of the growing recognition of a constitutional right to record the police while exercising their public functions (see [section IV.3.3](#)), there is a strong argument to be made that such an order violates the reporter's constitutional rights. The federal appellate court with jurisdiction over Charlotte has previously addressed the question of such collateral harms to the First Amendment in a case concerning a sheriff who directed his deputies to purchase and detain all copies of a newspaper highly critical of a candidate and friend of the sheriff.²¹³ The court, while noting that it was not a "traditional" form of speech suppression, nevertheless held that the wholesale purchasing of all copies of a local newspaper was done with the intent to suppress speech, and thus this limitation on the "liberty of circulation" violated the First Amendment.²¹⁴ An order to stop recording bears strong resemblance to these sorts of claims, in that it stops documentary evidence of police activity from being generated and subsequently circulated.

- The ultimate constitutionality of an order to stop recording will not be resolved in the field. Disobeying the order will likely result in the reporter's arrest.

As noted several times above, however, the ultimate constitutionality of an order is highly unlikely to be resolved in the field, and resistance to such an order will likely result in the reporter's arrest. To preserve any subsequent constitutional claim for violation of rights, preserve as much information about the encounter as you can from yourself and other witnesses, and contact an attorney.

²¹² See DOJ Letter, *supra* note 177, at 6 ("[A]n individual's recording of police activity from a safe distance without any attendant action intended to obstruct the activity or threaten the safety of others does not amount to interference."); *cf.* ACLU v. Alvarez, 679 F.3d 583, 607 (7th Cir. 2012).

²¹³ *Rossignol v. Voorhaar*, 316 F.3d 516, 519 (4th Cir. 2003).

²¹⁴ *Id.* at 522.

Summary:

- Orders to stop recording deserve special attention, as there are only a few specific grounds where such recording is unlawful.
- There is a strong likelihood that an order to stop recording violates the reporter's First Amendment rights, especially if done to suppress a critical depiction of the police.
- The ultimate constitutionality of an order to stop recording will not be resolved in the field. Disobeying the order will likely result in the reporter's arrest.

3.1.1 Special Note: May the Police Record Me?

Journalists and demonstrators often ask if the police are allowed to record them. As part of their normal function to preserve the peace and investigate crime, the police are generally allowed to record activity occurring in public in which you have no reasonable expectation of privacy. The police ordinarily may not record your activity on private property without either a warrant or the permission of the owner or tenants of the property, unless your activity is in plain view from a public location without the aid of electronic devices not generally available to the public.²¹⁵ Although the police are entitled to record activity in public, they are not entitled to intimidate you from the exercise of your rights in the guise of recording you or conducting other law enforcement activity.²¹⁶ You should seek legal assistance if you believe that the police are using cameras as a tool for harassment or intimidation (for example, if an officer follows you closely with a camera without any reason to believe that you are engaged in unlawful activity).

4. Searches, Seizures, and Arrests

- Contact an attorney if you are searched, if your property is seized, or if you are arrested.

The sections that follow discuss the particular rules and standards that govern police actions that deprive you of liberty or property. While other forms of interference are plausible, the police will generally impede your liberties while you are reporting by doing one of three things: by searching your person and possessions for evidence of a crime, by seizing your property as evidence, or by arresting you. In each of these situations, it is advisable to retain an attorney in order to represent you in the inevitable legal process that will follow, especially if the police maintain custody of you or your property.

- Police may ask for your voluntary consent to a search; you should politely refuse.

Specific standards emanating from the Fourth Amendment (which prohibits unreasonable searches and seizures) govern the level of suspicion required before you or your property can be searched or seized, but in all cases you can voluntarily surrender these rights by consenting to a search.²¹⁷ Consent cannot be coerced, but an officer does not have to inform you that you do not have to consent.²¹⁸ Officers frequently avoid the complicated process of establishing the requisite level of suspicion to justify a search by simply asking for permission to search an item. Civil rights lawyers largely agree that a polite and

Summary:

- Contact an attorney if you are searched, if your property is seized, or if you are arrested.
- Police may ask for your voluntary consent to a search; you should politely refuse.

²¹⁵ *Kyllo v. United States*, 533 U.S. 27, 34-35 (2001).

²¹⁶ See *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986).

²¹⁷ See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Wyche v. State*, 987 So.2d 23, 26 (Fla. 2008); *State v. Smith*, 488 S.E.2d 210, 213 (N.C. 1997).

²¹⁸ See *Schneckloth*, 412 U.S. at 227; *Bumper v. North Carolina*, 391 U.S. 543, 548-50 (1968).

respectful refusal to consent is the appropriate response.²¹⁹

4.1 If the Police Search You and Seize Your Property

- Searches require a warrant or a warrant exception. If searched pursuant to a warrant, save a copy of the warrant, do not interfere, and contact an attorney immediately.

The Fourth Amendment protects against “unreasonable” searches and seizures. Courts uniformly agree that a validly-issued warrant²²⁰ gives grounds for law enforcement to conduct a search.²²¹ It is highly unlikely that you will be searched pursuant to a warrant while on the street reporting, but if you are, the police are obligated in both states to provide you a copy of the search warrant.²²² Save this document, do not interfere with the search, and contact an attorney immediately.

A more likely occurrence during protests is that the police will search you based on an exception to the general requirement to obtain a warrant. There are only a few valid exceptions to the general warrant requirement,²²³ but a number of them apply to situations that might arise while reporting in the field.

- Consent is an exception to the warrant requirement.

Consent is a valid exception to the warrant requirement. If you do consent to a search, you will have waived your right to object to the search in a later criminal proceeding, unless you can show that consent was not freely given or the officer exceeded the reasonable scope of the consent.²²⁴

- The police are permitted to search you as part of a lawful arrest.

Also, the police are allowed to conduct a search of a person during the course of a lawful arrest of that person.²²⁵ For more on validity of grounds for arrest, see [section V.4.2](#) below. For information on how this doctrine applies to digital devices, see [section V.4.1.1](#).

²¹⁹ See generally Scott Morgan, *5 Reasons You Should Never Agree to a Police Search (Even if You Have Nothing to Hide)*, HUFFINGTON POST (Feb. 21, 2012, 10:52pm), http://www.huffingtonpost.com/scott-morgan/5-reasons-you-should-neve_b_1292554.html. On a more academic level, see DANIEL SOLOVE, *NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY* 21-32 (2011).

²²⁰ That is, a warrant (1) issued pursuant to a sworn statement by a law enforcement officer, (2) brought before a neutral judicial official, (3) showing probable cause that the subject of the warrant has evidence or instrumentalities related to a crime, and (4) issued only as to a particular place to be searched and thing to be seized. U.S. CONST. AMEND. IV; *Illinois v. Gates*, 462 U.S. 213, 239 (1983).

²²¹ *State v. Young*, 974 So.2d 601, 609 (Fla. D. Ct. App. 1st 2008); *State v. Steen*, 536 S.E.2d 1, 11 (N.C. 2000).

²²² F.S.A. § 933.11; N.C. GEN. STAT. § 15A-252.

²²³ *Jones v. State*, 648 So.2d 669, 674 (Fla. 1994); *State v. Yates*, 589 S.E.2d 902, 904 (N.C. Ct. App. 2004).

²²⁴ *Florida v. Jimeno*, 500 U.S. 248, 251-52 (1991).

²²⁵ *United States v. Robinson*, 414 U.S. 218, 235 (1973).

Summary:

- Searches require a warrant or a warrant exception. If searched pursuant to a warrant, save a copy of the warrant, do not interfere, and contact an attorney immediately.
- Consent is an exception to the warrant requirement.
- The police are permitted to search you as part of a lawful arrest.
- The police may search you without a warrant under certain “exigent circumstances,” where obtaining a warrant is impossible. Containers that are seized under this exception should only be searched after the officer obtains a warrant.
- An officer is allowed to make a brief protective “frisk” of a suspect when the officer has reasonable suspicion that the person is armed and dangerous.

- The police may search you without a warrant under certain “exigent circumstances,” where obtaining a warrant is impossible. Containers that are seized under this exception should only be searched after the officer obtains a warrant.

Courts also recognize an “exigent circumstances” exception to the general warrant requirement, which generally applies when the officer has probable cause to believe the person or object contains evidence of a crime, but the circumstances are such that it is impossible to wait for a validly-issued warrant.²²⁶ Some of the most common reasons why police assert that a warrantless search is appropriate are (1) that the suspect is fleeing officers, (2) that there is a strong likelihood that the evidence will be destroyed, or (3) that the police must intrude in a private area order to prevent an imminent and serious injury to a person – all possible scenarios in the context of field reporting at a mass demonstration.²²⁷

Under an “exigent circumstances” exception the police may seize closed containers that they have probable cause to believe contain evidence of a crime, but the Supreme Court has stated that the proper order of operations is to secure the container if the officer has the grounds to do so, and then hold on to the containers until a warrant is obtained for their search.²²⁸

- An officer is allowed to make a brief protective “frisk” of a suspect when the officer has reasonable suspicion that the person is armed and dangerous.

Finally, as a matter of officer safety, an officer is permitted to make a brief “frisk” of a suspect when the officer has reasonable suspicion that the suspect is armed and dangerous.²²⁹ The scope of the frisk may only be as long and thorough as is necessary to ascertain whether the person is, in fact, armed.²³⁰ Courts in Florida and North Carolina have allowed officers to also use this protective frisk to seize contraband items, but only when the criminality of the object can be immediately determined by its feel.²³¹ Prodding, transforming, or manipulating an item uncovered during a protective frisk transforms the frisk into a search, requiring police to provide a separate constitutional justification.²³²

With few other exceptions, searches are not permitted. If you are searched for any reason, you should attempt to record and remember as much of the

²²⁶ See *Riggs v. State*, 918 So.2d 274, 279 (Fla. 2005); *State v. Allison*, 257 S.E.2d 417, 421 (N.C. 1979).

²²⁷ See generally *Mincey v. Arizona*, 437 U.S. 385, 394 (1978).

²²⁸ *United States v. Place*, 462 U.S. 696, 701-02 (1983).

²²⁹ *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968); F.S.A. § 901.151; *State v. Streeter*, 195 S.E.2d 502, 506-07 (N.C. 1973).

²³⁰ See F.S.A. § 901.151(5); *State v. Benjamin*, 478 S.E.2d 651, 739-40 (N.C. Ct. App. 1996).

²³¹ See *State v. Crawford*, 577 S.E.2d 717 (N.C. Ct. App. 2003) (table decision); *Perkins v. State*, 979 So.2d 409, 411-12 (Fla. D. Ct. App. 1st 2008).

²³² *Minnesota v. Dickerson*, 508 U.S. 366, 377-78 (1993).

encounter as possible and contact an attorney, in case the search leads to a criminal charge against you. Be sure to document any items that are taken from you.²³³ In some, but not all, circumstances, an unlawful search will lead to the inability of use of any evidence found against you in subsequent prosecution.²³⁴ It may also lead to remedies for violation of your civil rights.

4.1.1 Searches and Seizures of Digital Devices

- Courts might uphold the constitutionality of a search if the officer believes that data may be remotely deleted.

Another forefront issue in the context of civil rights and newsgathering is how the police should treat search and seizure of digital devices, including digital cameras and cell phones. Case history is scant, but courts in both Florida and North Carolina seem to treat such digital devices by analogy to “closed containers” in the pre-digital space.²³⁵ Traditionally, this would mean that the warrantless seizure of the “container” itself would be justified under theories like exigent circumstances, but opening the container and searching inside would have to wait until a warrant is obtained.²³⁶

The analogy is an imperfect one, in light of the fact that some smartphones provide the ability to access and delete data stored on the phone from a remote location.²³⁷ Because the permanence of the evidence seized is far less certain, a court might uphold the validity of a warrantless search where an officer has grounds for belief that the contents on the device could be destroyed while the officer waits to obtain a warrant.²³⁸ This might in certain circumstances be a reasonable belief to hold with respect to a smartphone, but less of a reasonable belief to hold with respect to devices like a standard digital camera, where the device has no networked data capabilities.

- Both Florida and North Carolina courts allow officers to search digital devices after arresting the device’s carrier.

Additionally, courts in many states – including Florida and North Carolina – have allowed officers to search portable devices after arresting the device’s

²³³ See F.S.A. § 933.11 (requiring officers to provide a receipt for items seized); N.C. GEN. STAT. § 15A-254 (same).

²³⁴ *Hilton v. State*, 961 So.2d 284, 293 (Fla. 2007); N.C. GEN. STAT. § 15A-974.

²³⁵ See *Fawdry v. State*, 70 So.3d 626, 630 (Fla. D. Ct. App. 1st 2011) (analogizing a cell phone to a closed container); *State v. Wilkerson*, 683 S.E.2d 174, 205-06 (N.C. 2009) (treating a cell phone like a container in analysis).

²³⁶ *Horton v. California*, 496 U.S. 128, 136-37 (1990); see *United States v. David*, 756 F. Supp. 1385, 1392-93 (D. Nev. 1991) (applying this analogy to an early laptop).

²³⁷ See, e.g., *United States v. Murphy*, 552 F.3d 405, 411 (4th Cir. 2009) (allowing retrieval of text messages from phone due to chance of deletion).

²³⁸ See *iPhone 4S – Locate Your Missing iPhone with Find My iPhone*, APPLE, INC., <https://www.apple.com/iphone/built-in-apps/find-my-iphone.html> (last visited August 21, 2012) (mentioning the ability for an iPhone owner to remotely delete the phone’s contents).

Summary:

- Courts might uphold the constitutionality of a search if the officer believes that data may be remotely deleted.
- Both Florida and North Carolina courts allow officers to search digital devices after arresting the device’s carrier.
- A court may or may not be able to compel you to reveal any passwords or decryption keys. Officers may command you to reveal such information or face additional legal charges.
- Be prepared to expect the police to be able to search any digital device you carry with you on your arrest. Bring a disposable phone if your regular phone contains sensitive information.
- Courts have historically limited the ability of police to seize copies of expressive material such as photographs and videos. Contact an attorney if your material is seized and consider using a service which maintains a remote copy of the material.
- There is no reason that police should delete photographs or video from a seized camera. If you find that your data has been deleted, stop using the device and contact a forensics expert.

carrier, under the “search incident to arrest” doctrine.²³⁹ While this allows law enforcement access to a shocking amount of personal information, given the amount of personal data and communications stored on the average smartphone, courts as of yet have not placed any meaningful limitations on this doctrine in either state.

- A court may be able to compel you to reveal any passwords or decryption keys. Officers may command you to reveal such information or face additional legal charges.

Some may attempt to frustrate searches of digital devices by relying on passwords and file encryption technologies. While file encryption provides a valuable code-based way to protect your information from most people, you may be forced to decrypt the phone for an officer or provide a password pursuant to a court order.²⁴⁰ An officer may also command you on the spot to decrypt a device, and failure to do so may bring an additional charge against you for obstruction of justice. (See [section V.3.](#))

- Be prepared to expect the police to be able to search any digital device you carry with you on your arrest. Bring a disposable phone if your regular phone contains sensitive information.

Due to the current state of the law, you should be prepared to expect the police to search the entire contents of any digital device you carry with you, should you be arrested. For that reason, consider bringing a pre-paid disposable phone if your usual phone contains sensitive data, such as source contact information.

- Courts have historically limited the ability of police to seize copies of expressive material such as photographs and videos. Contact an attorney if your material is seized and consider using a service which maintains a remote copy of the material.

Beyond the search of a camera or cell phone, special sensitivities apply to the *seizure* of expressive material such as photographs or videos that are intended for release to the general public. Again, while there are few reported cases addressing how these questions apply in the modern context, courts addressing the seizure of allegedly obscene films in the 1960s and 70s imposed a number

²³⁹ See *Fawdry v. State*, 70 So.3d 626, 630 (Fla. D. Ct. App. 1st 2011); *State v. Wilkerson*, 683 S.E. 2d 174, 205-06 (N.C. 2009); *but see State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009) (rejecting application of the “search incident to arrest” doctrine to cell phones in Ohio).

²⁴⁰ Courts are split as to whether compelling disclosure of a password violates the Fifth Amendment’s protection against self-incrimination. In one case in the United States Court of Appeals for the Eleventh Circuit (which has jurisdiction over Florida), the court allowed a defendant to claim a Fifth Amendment privilege not to decrypt a number of hard drives, where the government had not shown that they knew whether any particular files at issue actually existed. *In re Grand Jury Subpoena*, 670 F.3d 1335, 1346 (11th Cir. 2012); *but see In re Boucher*, No. 2:06-mj-91, 2009 WL 424718 at *4 (D. Vt. Feb. 19, 2009) (requiring decryption of hard drive under the “foregone conclusion” doctrine). For more, see John Villasenor, *Can the Government Force Suspects to Decrypt Incriminating Files?*, SLATE (March 5, 2012 11:09am ET), http://www.slate.com/articles/technology/future_tense/2012/03/encrypted_files_child_pornography_and_the_fifth_amendment_.html.

of procedural safeguards to prevent seizures that have the effect of removing a particular expression from the public's view pending trial.²⁴¹ Courts are especially critical of searches and seizures of expressive material when the basis for the seizure is disapproval of the message contained within.²⁴²

In a recent case concerning the arrest of a person who was recording the Baltimore Police, the Civil Rights Division of the United States Department of Justice intervened and argued that the logic of these earlier cases should apply to the seizure of cell phones used to record police activity.²⁴³ In a subsequent letter to the parties, the Department suggested that the seizure should be for no longer than is necessary to obtain a warrant, and even then only when the recording has evidence of a serious crime.²⁴⁴ As noted above when discussing the right to record the police (see [section IV.3.3](#)), the Department's reasoning is well-founded and highly persuasive, but ultimately amounts to a non-binding suggestion. Courts in Florida and North Carolina have yet to meaningfully address the question.

A journalist facing a seizure of her camera or any of its contents (e.g., the camera's memory card) should immediately contact an attorney. If it is important for you to be able to use the material that you record without delay, or if you are concerned that your recordings may be held (or deleted) while in police custody, you should consider using a recording device or program that streams content to the Internet in real time. At the very least, you should regularly upload your recordings to another, preferably remote, device or service so that you have a copy available for your use. (And recall that the police may be able to access your phone if you are arrested; do not keep the login credentials for any streaming or uploading service on your phone.)

- There is no valid reason that police should delete photographs or video from a seized camera. If you find that your data has been deleted, stop using the device and contact a forensics expert.

There is no valid reason for the police to delete photos or video from a seized camera,²⁴⁵ but this fact did not stop police from doing exactly that at past conventions.²⁴⁶ This stands as a flagrant violation of First Amendment rights, especially when done with the intent to suppress expression critical of the police.²⁴⁷ Journalists who find that material has been deleted from their camera

²⁴¹ *Roaden v. Kentucky*, 413 U.S. 496, 503 (1973); *A Quantity of Books v. Kansas*, 378 U.S. 205, 210 (1964) (plurality opinion); *Marcus v. Search Warrants*, 367 U.S. 717, 731–33 (1961).

²⁴² See *Walter v. United States*, 447 U.S. 649, 655 (1980).

²⁴³ See DOJ Statement of Interest, *supra* note 175, at 12.

²⁴⁴ DOJ Letter, *supra* note 177, at 9-10.

²⁴⁵ *Osterreicher*, *supra* note 119; DOJ Letter, *supra* note 177, at 5 (“Under the First Amendment, there are no circumstances under which the contents of a camera or recording device should be deleted or destroyed.”); see *Sawicki v. City of Brunswick Police Dep’t*, No. 1:07-cv-803, 2008 WL 5378342 at *6 (N.D. Ohio Dec. 19, 2008) (assuming, though not deciding, that officer deletion of surveillance video showing infliction of excessive force was a § 1983 violation).

²⁴⁶ NYCLU REPORT, *supra* note 5, at 32-33.

²⁴⁷ See *Rossingol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) (Finding wholesale suppression of expressive material to be a prior restraint under the First Amendment).

should contact an attorney.

Also, be aware that data on a digital device is never fully deleted until the space in the memory of the device is actually overwritten with new data. Thus, if you discover that photos or video have been deleted off of a camera, it may be possible to restore the data. Immediately stop using the device (to avoid the data from being overwritten) and contact a data recovery specialist to begin the process of retrieving that data.²⁴⁸ You may want to consider bringing multiple memory cards so you can continue photographing while simultaneously preserving the deleted data.

4.1.2 Searches of Notebooks and Other Journalism Work Product

Though it is a rare occurrence, at some prior conventions members of the press reported that police had confiscated notebooks and other journalism work product.²⁴⁹ This is a potential violation of federal law.

- Federal law limits the ability of police to seize journalism work product, unless they have probable cause to believe that the product relates to a crime committed by the journalist.

A specific federal statute called the Privacy Protection Act limits the ability of police to seize journalism work product.²⁵⁰ Under this law, government officials may not search or seize work product materials possessed created by “a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.”²⁵¹ An exception to this is when the police have probable cause to believe that work product relates to a crime that the person possessing the materials has committed or is committing.²⁵² In other words, the police are prohibited from seizing *your* work product as evidence of *another person’s* crime, but this does not stop the police from seizure of your work product if the evidence relates to your own criminal activity. A broader exception also applies when the information gathered is necessary to prevent death or serious injury.²⁵³

Summary:

- Federal law limits the ability of police to seize journalism work product, unless they have probable cause to believe that the product relates to a crime committed by the journalist.
- Federal law also limits the ability to seize other documentary materials, unless the officer has reason to believe that seeking the material through other channels will result in destruction of evidence.

²⁴⁸ See Carlos Miller, *Here is the Full, Unedited, Uncensored And Uninterrupted Video Police Deleted From Me*, PHOTOGRAPHY IS NOT A CRIME (Feb. 9, 2012, 7:12am), <http://www.pixiq.com/article/i-recovered-the-full-uninterrupted-video-police-deleted> (demonstrating how a journalist was able to recover an exculpatory video from an arrest that was previously deleted by the Miami Police Department).

²⁴⁹ ST. PAUL REPORT, *supra* note 1, at 23

²⁵⁰ 42 U.S.C. § 2000aa.

²⁵¹ § 2000aa(a).

²⁵² § 2000aa(a)(1). There are further specific limitations to seizure when the crime of which a journalist is suspected is receipt, possession, communication or withholding of the same information sought by the police, except when the information relates to crimes of national security or child pornography. See *id.*

²⁵³ § 2000aa(a)(2).

- Federal law also limits the ability to seize other documentary materials, unless the officer has reason to believe that seeking the material through other channels will result in destruction of evidence.

In the case of documentary materials other than journalism work product, the same restrictions apply, with additional exceptions if an officer has reason to believe that giving notice pursuant to a subpoena for the information would result in destruction of the evidence at issue.²⁵⁴ Should you find yourself confronting a situation where this provision may apply, consider telling the police that you are a journalist and do not plan to delete any of the footage at issue. The police are not obliged to accept your statement that you will preserve the recordings, but they may choose to believe you, especially if you also provide press credentials or other indications of your press status.

Should you find yourself in a situation where your work product is seized, inform the police of your status as a member of the press and contact an attorney to help facilitate the release of your work product.

4.2 If You are Placed Under Arrest

- If you are facing imminent arrest, identify yourself as a member of the press, ask to speak to an attorney, expressly invoke your right to remain silent, and then remain silent.

In the event you are facing an imminent arrest, there is little that this guide can tell you other than to identify yourself as a member of the press, ask to speak to an attorney, expressly invoke your right to remain silent,²⁵⁵ and otherwise remain completely silent. (See [section V.4.2.1.](#))

- Do not physically resist or obstruct the arrest as it is happening.

Also, should you be arrested by an officer, do not attempt to physically resist by pulling away, striking the officer, or otherwise obstructing the arrest. In addition to the strong likelihood that the police will meet force with force, to do so may bring a claim for resisting arrest.²⁵⁶ This is especially true in Florida, where physical resistance to an unlawful arrest can nevertheless be grounds for an independent charge for resisting arrest.²⁵⁷

This remainder of the information in this section provides basic information regarding the grounds for an arrest and how those grounds have been applied at

²⁵⁴ § 2000aa(b)(3). There also is a broad exception for situations where seeking material via subpoena has been fruitless and delay in accessing the materials sought would “threaten the interests of justice.” § 2000aa(b)(4).

²⁵⁵ See *Berghulis v. Thompson*, 130 S. Ct. 2250, 2259-60 (2010).

²⁵⁶ F.S.A. § 776.051; N.C. GEN. STAT. § 14-233.

²⁵⁷ *State v. Roy*, 944 So.2d 403, 406 (Fla. Dist. Ct. App. 3d 2006); *but see Mayhue v. State*, 659 So.2d 417, 419 (Fla. Dist. Ct. App. 2d 1995) (resisting illegal arrest without violence is not unlawful); *State v. McGowan*, 90 S.E.2d 703, 705 (N.C. 1956) (allowing a defendant to resist an unlawful arrest under North Carolina law).

Summary:

- If you are facing imminent arrest, identify yourself as a member of the press, ask to speak to an attorney, expressly invoke your right to remain silent, and then remain silent.
- Do not physically resist an arrest as it is happening.
- Police may arrest you if they have probable cause to believe a crime is or has been committed. Generally, police do not require a warrant to arrest you for a felony, or for any crime that the officer witnesses.
- Courts in Florida and North Carolina have not addressed the question of whether police can arrest an entire crowd for the actions of some of the crowd’s members.

prior conventions, as well as specific advice as to how best protect your rights upon arrest and a brief description of post-arrest procedure in Florida and North Carolina.

- Police may arrest you if they have probable cause to believe a crime is or has been committed. Generally, police do not require a warrant to arrest you for a felony, or for any crime that the officer witnesses.

Under the Fourth Amendment, the police may arrest an individual if they have probable cause to believe that a crime is or has been committed.²⁵⁸ Arrests are considered a “seizure” of your person for Fourth Amendment purposes, and thus can only be done pursuant to a properly-issued warrant or a valid exception to the warrant requirement.²⁵⁹ The Supreme Court has recognized a tremendously large exception that essentially renders the warrant requirement meaningless in the context of public demonstrations: an officer may arrest an individual for any felony, or any misdemeanor committed in the officer’s presence, so long as the officer has probable cause to believe that the subject committed the relevant crime.²⁶⁰

- Courts in Florida and North Carolina have not addressed the question of whether police can arrest an entire crowd for the actions of some of the crowd’s members.

A large and fundamental question presents itself in the sweep arrests conducted at mass gathering events, that is, whether probable cause has to be present as to a particular person in order to detain that person, or whether probable cause as to a group can satisfy arrest of all those apparently in the group. The consequences in either direction are highly significant. In the event of an unlawful riot, should probable cause have to be demonstrated as to each individual person, police would need to evaluate the grounds for arresting each individual assembled. This would make sweep arrests virtually impossible, as the police would not be able to show that all of those caught up were lawfully detained.

U.S. Supreme Court decisions provide a somewhat contradictory history regarding the necessity of individualized suspicion. In *Ybarra v. Illinois*, the Supreme Court stated that search of tavern patrons under a warrant authorizing search of a tavern for drug activity was unconstitutional, because “a search or seizure of a person must be supported by probable cause particularized with respect to that person.”²⁶¹ On the other hand, the Supreme Court has relaxed the requirement of individualized suspicion in certain “special” contexts, holding that in certain rarified situations the “reasonableness” standard imposed by the Fourth Amendment is satisfied by something less than individualized

Note:

Not all police encounters which prohibit your movement are arrests. The police may approach you and ask you questions as an informal encounter. Police are permitted to do so, but you are free to refuse to answer such questions, and can freely walk away. As an intermediate step between informal encounters and arrests, police are empowered under the Fourth Amendment to briefly detain someone with whom the officer has reasonable suspicion that the person has committed or is committing a crime. Such a stop should only be for as long as necessary to resolve this suspicion, and the police cannot take the person into custody until they have grounds for arrest.

Florida v. Royer, 460 U.S. 491, 497-500 (1983); See Terry v. Ohio, 392 U.S. 1, 20-22 (1968); F.S.A. § 901.151; State v. Foreman, 527 S.E.2d 921, 923 (N.C. 2000).

²⁵⁸ Devenpeck v. Alford, 543 U.S. 146, 152 (2004).

²⁵⁹ See *id.*

²⁶⁰ Maryland v. Pringle, 540 U.S. 366, 369-70 (2003).

²⁶¹ Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

suspicion.²⁶²

Lower courts are split on the issue. Some, drawing from the general “reasonableness” requirement of seizures, have held that sweep arrests in the context of mass gatherings are reasonable under the circumstances, based on the theory that the “unit” of those assembled did so unlawfully. This included a major case addressing the arrests made at the 2008 RNC.²⁶³ Other courts have rejected the notion that the police can justify an arrest of a large number of people, based on the suspected unlawfulness of only some in the group.²⁶⁴

Critically, it does not appear as though Florida and North Carolina courts have addressed the issue, and any resolution to this issue will only come after a challenge to a sweep arrest has been made. Should you face a group arrest situation, a good place to start is to self-identify as a journalist the minute the police begin the arrest process. The 2008 RNC report shows that St. Paul Police did, in some circumstances, release members of the press upon self-identification.²⁶⁵ (Though, quite famously, they did not do so in other instances.²⁶⁶) If you do choose to speak up, try to maintain a calm and professional demeanor.²⁶⁷

Also, as stated in [section IV.2.2](#), an innocent bystander in an area where an order to disperse has been lawfully given (i.e., the order was based on others unlawfully assembled at the same area) that refuses to leave is presumptively guilty of unlawful assembly in Florida and North Carolina. That is to say, if you ignore a command to disperse you will not be arrested because of the unlawfulness of others around you; your own refusal will be a basis for officers to believe that you personally have committed a crime under Florida and North Carolina law.

4.2.1 Stay Calm, Ask for an Attorney, then Stay Silent

- Call a trusted person before arrest if you can, ask to speak to an attorney, invoke your right to remain silent, and then do not answer any questions.

If it appears as though an arrest is unavoidable, try to call a trusted colleague, friend, or family member to inform them of where you are and the fact that you

Note:

Josh Stearns at Free Press will be documenting all reports of journalist arrests on Twitter. If you can, report any journalism arrests you witness or experience by using the **#journalarrest** hashtag on Twitter.

²⁶² See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653-54 (1995) (school drug testing).

²⁶³ *Bernini v. City of St. Paul*, 665 F.3d 997, 1003 (8th Cir. 2012); *Carr v. District of Columbia*, 587 F.3d 401, 408 (D.C. Cir. 2009).

²⁶⁴ *Papinau v. Parmley*, 465 F.3d 46, 59 (2d Cir. 2006) (Sotomayor, J.) (denying summary judgment on qualified immunity for mass arrest of protestors based on alleged unlawfulness of some involved); see also *Garcia v. Bloomberg*, No. 11-cv-6957, 2012 WL 2045756 (S.D.N.Y. June 7, 2012) (requiring an imminent threat of violence before police may disperse an otherwise-lawfully-assembled crowd).

²⁶⁵ ST. PAUL REPORT, *supra* note 1, at 55.

²⁶⁶ *Id.* at 22.

²⁶⁷ CPJ, *Civil Matters and Disturbances*, *supra* note 42.

are likely to be arrested. It can take hours after an arrest before you will have access to a phone again, especially during a mass gathering event.²⁶⁸

Upon your arrest you will be advised of your right to remain silent and right to an attorney.²⁶⁹ Exercise both of those rights, by stating that you invoke your right to remain silent²⁷⁰ and right to counsel. Do not answer any other questions until you have had a chance to consult with an attorney.

4.2.2 Who to Call

If you do not already have an attorney, the following organizations have indicated that they will be establishing hotlines to help set up legal assistance during the RNC and DNC:

Reporters Committee for Freedom of the Press (for those reporting at the convention)

General Hotline: **800-336-4243**

- RNC: **Thomas & LoCicero PL: 813-984-3076** or **813-984-3078** (Aug. 24th – close of convention)
- DNC: **McGuire Woods LLP: 704-343-2063**; backup **704-904-5834** or **919-428-5883** (Aug. 31st – close of convention).

Student Press Law Center (for members of the student press)

General Hotline: **703-807-1904**.

National Lawyers Guild (for all engaged in First Amendment Activity)

- RNC: **813-241-0101**
- DNC: **704-372-4200**

Local chapters of the **American Civil Liberties Union** typically also release hotlines for members of the public arrested for exercising civil rights, but as of the time of writing this guide those hotlines were not yet available.

4.2.3 What to Expect After Being Arrested

What follows is an overview of post-arrest procedures in Tampa and Charlotte. The procedures are generally dictated by statute, though in the event of an arrest conducted without a warrant a suspect also has a constitutional right to have an “initial arraignment” before a judicial official to establish that there was probable cause for the arrest.²⁷¹

Despite the Fourth Amendment issues at stake, past conventions have included examples of arrestees being held for far longer than typical arrests, to the point

Note:

If you think it is likely that you will be arrested during your coverage of events in Tampa and Charlotte, consider taking time before you head to the conventions to establish a “check-in” system with an editor, colleague, family member, or friend outside of the convention area. Make sure that contact has a way to reach any contacts you have in Tampa or Charlotte, and vice versa, in order to coordinate your release in the event of an arrest.

CPJ, *Basic Preparedness*, *supra* note 47.

Note:

This guide also operates under the assumption that the arrestee is age 18 or over. Special procedures apply in both states when arresting and booking juveniles.

²⁶⁸ STUDENT PRESS LAW CENTER, *supra* note 54.

²⁶⁹ *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966).

²⁷⁰ Following recent Supreme Court decisions addressing one’s *Miranda* rights, it is generally best to affirmatively invoke the right to remain silent, and then remain silent after so invoking. See *Berghulis v. Thompkins*, 130 S. Ct. 2250, 2259-60 (2010) (police are not required to end an interrogation if the suspect “makes no statement”).

²⁷¹ *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

of unlawfulness in the 2004 RNC in New York.²⁷² Should you be arrested, your ultimate treatment depends entirely on how well equipped Tampa and Charlotte are to process arrestees. Discuss your treatment with your attorney, and document your experience as best you can.

In Tampa

- The police may issue a “Notice to Appear” in lieu of an arrest.

Florida’s Rules of Criminal Procedure allow for the issuance of a “Notice to Appear” instead in lieu of a physical arrest. Such a notice will include, among other things, your name and address, the date of the offense, the offenses charged, the time and place for you to appear in court, the name and address of the trial court, and the name of the arresting officer. The arresting officer cannot issue such a notice if you fail to identify yourself, refuse to sign the notice, or if you have previously failed to respond to a notice or summons. The officer also cannot issue the notice if the officer has reason to believe that you pose an unreasonable risk to yourself or others, pose a risk that you will not respond to the notice, or if the officer has suspicion that you are wanted in another jurisdiction.²⁷³ The booking officer for the police department also has the authority to issue a Notice to Appear, based on the officer’s belief that that you will appear as directed, taking into account any ties you have with the community, your character, employment record, and past record of convictions.²⁷⁴

- If you are arrested you will be searched, transported to a holding facility, fingerprinted, and photographed before being turned over to jail personnel.

According to the Tampa Police Department’s Standard Operating Procedures, should the officer opt instead to arrest and detain you, you will be searched and then transported to a booking facility.²⁷⁵ The officer will complete an arrest affidavit, and then transfer you over to booking officials.²⁷⁶ You may then be searched again by jail personnel, before a warrant check is made and processing paperwork (including your fingerprints and a photograph) is completed. You will then be turned over to jail personnel.²⁷⁷

Tampa, in Brief:

- The police may issue a “Notice to Appear” in lieu of an arrest.
- If you are arrested you will be searched, transported to a holding facility, fingerprinted, and photographed before being turned over to jail personnel.
- Arrestees are given a “first appearance” within 24 hours of arrest. The judge will inquire as to your ability to afford counsel, give you time to obtain counsel if possible, and then inform you of the conditions of your pre-trial release.

²⁷² NYCLU REPORT, *supra* note 5, at 6.

²⁷³ FLA. R. CRIM. P. 3.125.

²⁷⁴ *Id.* at 3.125(c).

²⁷⁵ TAMPA POLICE DEP’T, STANDARD OPERATING PROCEDURES §§ 371(III)(A), (C), available at http://www.tampagov.net/dept_police/Files/publications/TPD_SOP.pdf.

²⁷⁶ *Id.* § 371(III)(E).

²⁷⁷ *Id.* §§ 371(III)(E)(5-6).

- Arrestees are given a “first appearance” within 24 hours of arrest. The judge will inquire as to your ability to afford counsel, give you time to obtain counsel if possible, and then inform you of the conditions of your pre-trial release.

Under Florida rules, all arrestees must be brought before a court for a “first appearance” within 24 hours of arrest.²⁷⁸ Prior to this appearance, if possible, the judge will inquire as to your financial ability to afford counsel. Should the judge find that you qualify, counsel shall be appointed for you no later than the “first appearance” hearing.²⁷⁹ If you do not qualify, the judge shall postpone the hearing until such time that your own counsel can be present (if this will unduly delay the hearing, the judge may also appoint you counsel for purposes of that hearing).²⁸⁰ At the hearing the judge will inform you that you are not required to say anything, that you have the right to counsel, and that you have the right to communicate with counsel as necessary.²⁸¹

The judge will then set forth the conditions for your pre-trial release. Unless the judge determines that no condition of release can reasonably protect the community from risk of physical harm or ensure your presence at trial, you will be entitled to release.²⁸² The judge is empowered to look to a wide variety of factors to set the conditions of your release, and can impose any number of conditions, including release on personal recognizance, posting of a bond, restrictions on travel, and placement in custody of a designated person.²⁸³

There are a variety of options available to a defendant once bail has been set. At this point, it is best to consult with an attorney as to your options going forward.

In Charlotte

- The police may issue a citation in lieu of arrest.

If the crime the police believe you to have committed is a misdemeanor, the police are empowered to issue a citation instead of arresting you for the offense. The citation will include a brief description of the crime charged, noting where and when the crime allegedly occurred, identifying you and the issuing officer, and indicating where and when to appear in court.²⁸⁴ Should this occur, save this citation, gather any information you can from the scene as to potential witnesses or videos depicting the incident, and contact and attorney to begin preparation for your defense.

²⁷⁸ FLA. R. CRIM. P. 3.130(a).

²⁷⁹ *Id.* at 3.130(c)(1).

²⁸⁰ *Id.* at 3.130(c)(2).

²⁸¹ *Id.* at 3.130(b).

²⁸² *Id.* at 3.131(a).

²⁸³ *Id.* at 3.131(b)(1).

²⁸⁴ N.C. GEN. STAT. § 15A-302.

Charlotte, in Brief:

- The police may issue a citation in lieu of arrest.
- If you are arrested you will be brought to a detention center, fingerprinted, photographed, and detained until your appearance before a judicial officer.
- If you are arrested without a warrant, police will bring you before a magistrate “without unnecessary delay,” no later than 48 hours after detention.
- The judicial official will inform you of your right to counsel and set the conditions for your pre-trial release, most likely release under bail or a written promise to appear.

- If you are arrested you will be brought to a detention center, fingerprinted, photographed, and detained until your appearance before a judicial officer.

Should the police instead opt to arrest you, the you will most likely be brought to a detention intake center, where the arresting officer will present the intake officer with a paperwork detailing the circumstances leading to arrest.²⁸⁵ If necessary, the arresting officer may conduct a health screening to ensure your safety before turning you over to the booking officer.²⁸⁶ You will then be fingerprinted, photographed, and detained until you can appear before a judicial officer.²⁸⁷

- If you are arrested without a warrant, police will bring you before a magistrate “without unnecessary delay,” no later than 48 hours after detention.

If you are arrested without a warrant (as most on-the-street arrests are likely to be at the DNC) you will next be brought before a magistrate, who will determine whether the officer indeed had probable cause to arrest you for the relevant crime. While the relevant North Carolina statute requires that this be done “without unnecessary delay,”²⁸⁸ in reality this can take some time, but under the Fourth Amendment this can be no later than 48 hours after your initial detention.²⁸⁹ If the magistrate determines that there was not probable cause for your arrest, you will be released.²⁹⁰

- The judicial official will inform you of your right to counsel and set the conditions for your pre-trial release, most likely release under bail or a written promise to appear.

The magistrate will inform you of the charges, remind you of your right to communicate with counsel, and inform you of the general circumstances under which you can be released through bail.²⁹¹ For most offenses, magistrates will either release you with your written promise to appear at trial, release the you upon payment of a bond guaranteeing your appearance at trial, or release you to the custody of a designated person agreeing to supervise you.²⁹² In determining which condition to set, a magistrate is required to take into account a variety of factors, including the nature of the offense charged, the evidence against you, your employment and financial situation, any record of

²⁸⁵ CHARLOTTE-MECKLENBURG POLICE DEP'T DIRECTIVES no. 500-002 (effective May 26, 2006), available at <http://charmec.org/city/charlotte/CMPD/resources/DepartmentDirectives/Documents/CMPDDirectives.pdf>.

²⁸⁶ *Id.*

²⁸⁷ *Id.* no. 500-005.

²⁸⁸ N.C. GEN. STAT. § 15A-511.

²⁸⁹ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 358 (2001).

²⁹⁰ N.C. GEN. STAT. § 15A-511(c)(2).

²⁹¹ § 15A-511(b).

²⁹² §§ 15A-534(a)(1-3), (b) (requiring one of these three conditions, unless the judicial official determines that the defendant poses a danger to another person, is likely to suborn perjury or destroy evidence, or release will not reasonably assure later appearance at trial).

convictions or history of flight, and “any other evidence relevant to the issue of pretrial release.”²⁹³ The terms of pre-trial release will be recorded and a copy will be provided to you.²⁹⁴

There are a variety of options available to a defendant once bail has been set. At this point, it is best to consult with an attorney as to your options going forward.

5. Remedies for Unlawful Police Conduct

At numerous times in this guide we have mentioned that it will be impractical to challenge the constitutionality of a given police action in the moment. This is not to suggest, however, that you should not pursue a claim for violation of your civil rights as a result of improper police activity. What follows is a brief overview of how federal law provides a means for bringing such a claim.

- Federal law provides a remedy for those who violate your civil rights under the “color of law.”

Federal law provides for a monetary and injunctive remedy for violations of civil rights through 42 U.S.C. § 1983 (“Section 1983”), which provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]²⁹⁵

The purpose of this law is to deter those acting under the color of law from depriving individuals of their constitutional rights, and to provide a remedy in the event that such deterrence is not enough.²⁹⁶ The claim requires a plaintiff to show that a “person” (which has been interpreted to mean individuals and municipalities, when acting through established policy or custom, but not state or federal governments) acting “under the color of law” violated a right protected by the United States Constitution or federal statute.²⁹⁷ According to the U.S. Supreme Court, a person acts “under the color of law” when the

²⁹³ § 15A-534(c).

²⁹⁴ § 15A-534(d).

²⁹⁵ 42 U.S.C. § 1983. The language of Section 1983 expressly limits this remedy to those acting under the authority of a “State or Territory or the District of Columbia,” but analogous claims can be brought against those acting under the color of federal law, following the Supreme Court’s decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See also F.S.A. § 760.51 (Florida Attorney General can bring claim for violation of rights).

²⁹⁶ See *Wyatt v. Cole*, 504 U.S. 158, 161 (1992).

²⁹⁷ Jennifer Rich, *Section 1983 Outline*, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT OFFICE OF STAFF ATTORNEYS (2008), available at http://www.ca9.uscourts.gov/guides/Section_1983/Sec_1983_Outline.pdf.

Summary:

- Federal law provides a remedy for those who violate your civil rights under the “color of law.”
- Consult with an attorney if you are considering bringing a claim.

person “exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”²⁹⁸

Claims regarding reporters frequently fall into two general classes: First Amendment claims based on retaliatory actions taken in order to interfere with a journalist’s ability to report, and Fourth Amendment claims based on the unlawful search of a journalists or seizure of journalists and/or their work product.²⁹⁹ Recall that reporting does not immunize a member of the press from generally applicable laws, and to be successful a journalist must show that they were interfered with for covering events, and not just for being suspected of breaking a law.³⁰⁰

- Consult with an attorney if you are considering bringing a claim.

Given the law’s 140-year history, Section 1983 has been interpreted extensively by federal courts, and is subject to a wide array of exceptions and limitations. It is highly advisable to seek experienced counsel when considering bringing a Section 1983 claim.³⁰¹

The effect of these cases can be quite instrumental in catalyzing reform. In addition to providing monetary penalties for unlawful conduct and awarding attorneys fees,³⁰² prior Section 1983 settlements have helped establish new training protocols for police departments, guidelines to better ensure protection of First Amendment rights, and have moved the courts to recognize new constitutional protections for members of the press.³⁰³

²⁹⁸ West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). At least one court with jurisdiction in North Carolina has noted the intent of Congress to construe state action liberally, given that the law was originally enacted to combat “conspiracies between local law enforcement officers and private individuals – typically the Ku Klux Klan – to violate the rights of former slaves.” *Rossingol v. Voorhaar*, 316 F.3d 516, 527 (4th Cir. 2003).

²⁹⁹ See Kristen Rasmussen, *After an Arrest: a Journalist’s Guide to Civil Rights Claims and Other Remedies for Government Interference with Newsgathering Activities*, in POLICE, PROTESTERS AND THE PRESS, *supra* note 6, at 3.

³⁰⁰ Kirsten Berg, *Who’s Impeding Whom?*, in POLICE, PROTESTERS AND THE PRESS, *supra* note 6.

³⁰¹ A number of organizations can help you find a qualified attorney to handle such a case, including the Digital Media Law Project through its Online Media Legal Network. For more visit <http://www.omln.org/>.

³⁰² 42 U.S.C. §§ 1983, 1988(b).

³⁰³ See generally *Univ. of Calif. Pays to Settle Seized Photographer’s Lawsuit*, FIRST AMENDMENT CTR. (July 3, 2012), <http://www.firstamendmentcenter.org/univ-of-calif-pays-to-settle-in-seized-photographers-lawsuit> (noting new training for UC Berkeley police officers regarding treatment of photographers); Mickey Osterreicher, *NPPA Commends CCR in Settlement of a Federal Lawsuit Filed on Behalf of Arrested Journalists*, NAT’L PRESS PHOTOGRAPHERS ASS’N (Oct. 4, 2011), <http://blogs.nppa.org/advocacy/2011/10/04/nppa-commends-ccr-in-settlement-of-a-federal-lawsuit-filed-on-behalf-of-arrested-journalists/> (new guidelines in St. Paul following journalist arrests at 2008 RNC); DOJ Letter, *supra* note 177 (outlining a proposal for new policies for the Baltimore Police Department).

Appendix

DMLP Pocket Guide to Reporting at the RNC and DNC

Full Guide Available at <http://www.dmlp.org/conventions>

Note: *This guide provides general information about the law as it pertains to Tampa, FL, and Charlotte, NC, as of August 2012, and might not apply with respect to other times and jurisdictions. Specific facts and circumstances often alter outcomes in specific cases. This document is not a substitute for legal advice specific to your situation and does not create an attorney-client relationship between you and the Digital Media Law Project.*

I. General Principles

The rights of the press to speak and to gather news are in general the same as the rights of the general public. Status as a member of the press does not give you authority to violate generally applicable laws against trespassing, unlawful assembly, invasion of privacy, etc.

Be careful of relying on pre-existing relationships and understandings with police. Your expectations might not reflect the special security arrangements in place in Tampa or Charlotte, particularly given that the U.S. Secret Service will take the lead in law enforcement.

The government may impose some restrictions on where, when, and how newsgathering activity is conducted, but may not discriminate based on viewpoint of a reporter. That said, your First Amendment rights apply only against government officials. Owners of private property are permitted to eject you for any reason, including their dislike for your viewpoint or that of your employer. Entry onto private property without permission or refusal to leave when asked may give rise to trespassing and other criminal charges.

II. Packing for the Conventions

Restricted Items

Tampa

- Rope, wire, glass bottles, all locks, and gas masks within the area surrounding the Convention Center and Forum.
- Aerosol cans, containers, lengths of wood and metal, and projectile launchers carried with the intent to harm.
- Tripods, bipods, and monopods are not allowed within the "Public Viewing Area"

Charlotte

- Police scanners are likely not allowed within the area surrounding the convention.
- Chains, cables, wires, aerosol containers, non-water-soluble paints, and most sharp objects are not allowed in the area surrounding the convention.
- Backpacks, duffel bags, satchels, and coolers are not allowed if carried with the intent to conceal weapons.
- Masks, scarves, pepper spray, and body armor if worn or used in order to avoid identification or to resist arrest.

Items to Bring

- Press credentials or other press identification
 - Only official RNC/DNC credentials will allow you into the conventions; other credentials might help with police. Do NOT forge credentials from any organization for any purpose.
- Water
- Hearing protection (in the event of use of LRADs)
- Government-issued ID
- Sufficient cash or a credit card to cover bail
- Quarters (for a jail pay phone)
- Essential phone numbers (attorney or legal hotline)

Items to Leave Behind

- Consider leaving any smart device containing sensitive information at home, and bringing a disposable phone instead. If you are arrested, the police may attempt to search the contents of your device.
- Leave contact information for your attorney or a legal hotline with a trusted person at home, in case you need a friend to locate legal help for you.

III. Attending the Conventions Proper

The time for applying for credentials to enter the conventions themselves has already passed. If you do not already have credentials, it is unlikely you will be able to obtain them.

Inside the conventions, you will be subject to the rules and regulations imposed by the parties as to your behavior. As private organizations, the parties may exclude you for any reason.

IV. Restricted Areas Around the Conventions

Certain streets and other areas near the convention halls will be closed to vehicle and foot traffic. Check the Secret Service's press releases for current information on street closures, available at http://secretservice.gov/press_release.shtml.

Parades and demonstrations may be required to obtain a permit from the city in order to march or assemble. Journalists should be careful if a particular group appears to be marching outside of designated routes or assembling unlawfully, because of the risk of being caught up in a sweep arrest (see Section V, below).

Apart from specific street closures and restrictions on parades, neither Tampa nor Charlotte has indicated that demonstrators or journalists will be restricted to particular areas. Both Tampa and Charlotte have established "free speech zones" for protestors and demonstrators in the general area of the conventions:

Tampa: The zone consists of three sections of land extending north up South Nebraska Avenue from the Tampa Bay Times Forum, including a square section of land bordered by Eunice Street, South Caesar Street, and East Walton Street, and two

sections underneath the Crosstown Expressway on either side of South Jefferson Street.

Charlotte: The zone consists of a section of land bordered by South Boulevard, East Stonewall Street, Interstate-277, and Stonewall Station, about 1/2 mile from the Time Warner Cable Arena.

It is unclear whether other parks and public spaces will be available for assembly, or whether police will attempt to encourage journalists and demonstrators to move into the "free speech zones." Legal challenges to the sufficiency of the "free speech zones" are unlikely to be resolved in the field, as opposed to subsequent proceedings in court.

Be careful, particularly in Charlotte, of publicly accessible but privately owned spaces. Courts in Florida and North Carolina have been reluctant to limit a private owner's right to control access, even when a space is generally open to the public.

V. Laws Governing Public Assembly

Unlawful Assembly

Unlawful assembly is a very common criminal charge at mass demonstrations, and the law is enforced through sweep arrests that can capture nearby journalists. Unlawful assembly laws usually are enforced first by ordering a crowd to disperse; refusal to disperse is a frequent cause of arrest.

While the law does not require it, officers may choose to treat members of the press separately from an unlawful assembly, so try to distinguish yourself as a journalist as soon as you can. Police tend to think of "journalists" as those affiliated with formal institutions, and may be more lenient toward members of the "traditional" press or credentialed reporters, while not affording any special treatment to non-traditional press or citizen journalists. That said, the more you act like an independent observer, the more likely the police are to treat you as one.

Tampa: Florida's unlawful assembly law applies when three or more people assemble with a common unlawful purpose in a way that would give those nearby a well-grounded fear of a breach of the peace. Florida law grants officers broad powers to disperse an unlawful assembly, allowing officers to command the assistance of nearby persons and to arrest anyone who refuses to assist or ignores the dispersal order. Police are presumptively justified if members of an unlawful assembly are injured or killed, but if an officer is killed or wounded, all individuals unlawfully assembled may be held responsible.

Charlotte: North Carolina's unlawful assembly law applies when three or more people have the common intent to commit disorderly acts interfering with the rights of others, in a way that would cause those nearby to apprehend a breach of the peace. North Carolina law gives officers the power to order an unlawfully

assembled crowd to disperse, and any person who remains is presumptively engaged in the crime of riot.

Disorderly Conduct

Both Tampa and Charlotte prohibit violent or disorderly behavior, but such regulation is generally limited to conduct, instead of pure speech. Both cities prohibit gathering in a way that disrupts normal pedestrian and vehicle traffic. Again, be careful of situations where police cannot easily distinguish you from others acting unlawfully.

VI. Recording in Public

In general, you are permitted to record both audio and video of activity occurring in public, unless a specific law says otherwise.

The most common laws limiting recording are "wiretapping" statutes that prohibit electronic recording of oral conversations.

- You are allowed to record with the consent of the parties to a conversation; in Tampa, you must obtain the consent of all parties, while in Charlotte, the consent of one party is enough.
- In either city, you may freely record conversations without permission if the parties have no reasonable expectation of privacy. Even in public spaces, however, people may reasonably attempt to converse privately, so beware of recording if the parties are taking steps to keep their conversation to themselves.
- Wiretapping laws do not prohibit video-only recording, at least when the recording does not capture the substance of any communications.

If you are recording the actions of police or other government officials in public, you might have a First Amendment right to record that overrides state laws requiring consent. The federal appeals court with jurisdiction over Florida has held that there is a right to record police conduct; North Carolina has yet to formally recognize this right. This right is not unlimited, and does not permit you to interfere with an arrest or other police activity.

Certain best practices can avoid many issues with recording:

- When conducting interviews, start by informing the person that you will be recording, and asking for consent on the recording.
- Do not record a conversation when it appears that the parties are trying to keep the conversation private. Be especially careful when using sensitive microphones or telephoto lenses.
- When recording the police, be careful not to interfere with police activity.

VII. Interactions with the Police

In all encounters with police, try and remain as professional and calm as the circumstance allows. Police are allowed to ask you to surrender your rights voluntarily; you are permitted to ask whether an instruction is a request or a command. It is rarely if ever helpful to waive any rights voluntarily.

Private Security

It is important to distinguish police from private security details, if possible. Private security may regulate behavior on private land, and ignoring an order from private security may also temporarily detain individuals, but only when the private party personally witnessed a serious crime or a breach of the peace. Only the police have the general power to arrest you.

If You are Stopped by Police

Florida has a "stop and identify" law, which allows police to temporarily detain a person in order to identify that person, if the officer has reasonable suspicion that the person has committed, is committing, or will commit a crime. In contrast, North Carolina does not currently have such a law. Police may ask you to voluntarily provide them with identification, but you are not under a duty to respond.

If the Police Ask You to Move or Stop Recording

The police may not order you to move to prevent you from reporting on an event, but they may have legal reasons for asking you to move. When confronting an order to move, consider asking if there is another location from which you can report. Refusing an order to move will likely result in your arrest. Document the encounter as best you can and consult with an attorney.

An order to stop recording is likely a violation of your First Amendment rights, especially if done to suppress a critical depiction of the police. However, the ultimate constitutionality of an order to stop recording will not be resolved in the field. Again, disobeying such an order will likely result in your arrest.

If You or Your Property is Searched, or Your Property is Seized

Contact an attorney if you or your property is searched or seized by police. Police may ask for your voluntary consent to a search. You will waive your rights to object to the search later if you consent without being coerced; there is usually no benefit to you from agreeing to a voluntary search.

Involuntary searches require a warrant or a warrant exception:

- If searched pursuant to a warrant, save a copy of the warrant, do not interfere, and contact an attorney immediately.
- The police may search you as part of a lawful arrest.
- The police may search you without a warrant under certain "exigent circumstances," where obtaining a warrant is impossible. Containers that are seized under this exception should only be searched after the officer obtains a warrant.
- An officer is allowed to make a brief protective "frisk" if he/she has reasonable suspicion that you are armed and dangerous.

Police may search the contents of digital devices in your possession after arresting you, or if they have reason to believe that data on the device may be remotely deleted. A court may or may not be able to compel you to reveal any passwords or

decryption keys. However, officers may command you to reveal such information or face additional legal charges.

Identifying yourself as a journalist at the time of a search might help prevent the police seizing your property. The ability of police to seize copies of expressive material such as photographs and videos is limited. There is also a specific federal law limiting the ability of police to seize a journalist's work product or other documentary materials, unless the materials relate to a crime committed by the journalist (or, in the case of non-work product, that obtaining a warrant will result in destruction of evidence).

There is no valid reason that police should delete photographs or video from a seized device. If you find that your data has been deleted, stop using the device and contact a forensics expert to help recover your files. Also consider using a service which maintains a remote copy of the material.

If You are Arrested

If you are caught up in a crowd disturbance or other situation likely to lead to your arrest, attempt to contact a trusted person. Let them know where you are, that you are likely to be arrested, and that you need an attorney.

If you are arrested, identify yourself as a member of the press, ask to speak to an attorney, expressly invoke your right to remain silent, and then remain silent. Do not physically resist or obstruct the arrest as it is happening. At your earliest opportunity, call an attorney. The following organizations have provided hotlines for legal assistance:

Reporters Committee for Freedom of the Press:

- General Hotline: 800-336-4243
- RNC: Thomas & LoCicero PL: 813-984-3076 or 813-984-3078 (Aug. 24th - close of convention)
- DNC: McGuire Woods LLP: 704-343-2063; backup 704-904-5834 or 919-428-5883 (Aug. 31st - close of convention).

National Lawyers Guild:

- RNC: 813-241-0101
- DNC: 704-372-4200

Student Press Law Center (student press only):

- General Hotline: 703-807-1904



Legal Hotlines:

Reporters Committee for Freedom of the Press:

General Hotline: **800-336-4243**

- RNC: **813-984-3076**
- DNC: **704-343-2063**

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