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Filming the Watchmen: Why the First Amendment Protects Your Right to Film the Police in Public Places

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Abstract

Police are relying on state wiretapping statutes to arrest citizens who film police in public. The federal circuit courts that recognize a First Amendment right to film police in public places where the citizen-recorder has a right to be present are in line with Supreme Court precedent. While the exercise of the right to film police is subject to reasonable time, place, and manner restrictions, police cannot be allowed to suppress speech at the core of the First Amendment's protections. State wiretapping statutes that prevent citizens from filming police officers in such places without any further justification violate citizens' First Amendment rights.

Brandy Berning spent the night in a Florida jail because she used a cell phone to film a traffic stop on I-95.[1] George Thompson of Fall River, Massachusetts, claimed that he was verbally abused, arrested, and locked up overnight for filming a profane police officer with a cell phone from his front porch. The officer was across the street in full view and within earshot of anyone who happened to be passing by his home.[2] Most recently, Florida police arrested and charged Lazaro Estrada with obstruction of justice for peacefully filming an arrest with his cell phone on a public street.[3]

Why is this happening? Police are unhappy that people are using their cell phones—which often have video capabilities—to film police conduct. Some state statutes generally prohibit the recording or interception of oral communications unless all parties to the conversation consent.[4] To prevent citizens from gathering and disseminating information about police conduct, police are relying on these

Key Points

- Police are relying on state wiretapping statutes to arrest citizens who use their cell phones to film police in public.
- Federal circuits that recognize a First Amendment right to film police in public where the citizen-recorder has a right to be present are in line with the Supreme Court's free speech jurisprudence.
- While the exercise of the right to film is subject to reasonable time, place, and manner restrictions, the police should never be able to suppress filming activities simply because the film may portray the police in an unfavorable light.
- State laws that authorize officers to prevent filming without any further justification are unconstitutional.
- Even where state wiretapping laws contain exceptions for in-person communications where there is no reasonable expectation of privacy, drafting exceptions that specifically except the filming of police officers in public may help to deter police from suppressing speech.

This paper, in its entirety, can be found at **http://report.heritage.org/lm127**

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statutes to arrest citizens who film police in public, even if those citizens have a right to be present in the locations from which they film.

The question arises: Are such filming and any subsequent publication protected by the First Amendment? If so, what can we do to better secure our rights?

This paper summarizes how federal courts of appeal have treated the filming of police officers in public. It then contends that there exists a First Amendment right not only to film police in such places, subject to reasonable time, place, and manner restrictions, but also to publish the content of those films.

State wiretapping statutes that prevent citizens from filming police officers in public places where those citizens have a right to be present violate citizens' First Amendment rights. While the exercise of the right to film police is subject to reasonable restrictions as to time, place, and manner, police cannot be allowed to suppress speech that is at the core of the First Amendment's protections.

Circuit Courts Split over the Right to Film Police in Public

Four federal circuits recognize a First Amendment right to film the police in public. The two earliest cases contain little substantive analysis. In *Fordyce v. City of Seattle*, the Ninth Circuit Court of Appeals recognized "a First Amendment right to film matters of public interest."[5] The case concerned the filming, for later broadcast, of a protest on a public street, including police activities. The court, however, did not explain why the First Amendment protects a right to film police activities.

In *Smith v. City of Cumming*, the Eleventh Circuit took up a civil claim under 42 U.S.C. § 1983 in which a citizen-recorder alleged that the police had prevented him from exercising his First Amendment right to videotape police actions.[6] The court cited *Fordyce* for the proposition that 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."[7] On this basis, the court held that citizens have a First Amendment right, subject to reasonable time, place, and manner restrictions, "to photograph or videotape police conduct."[8]

Two other circuits have also recognized the right to film the police in public. In *Glik v. Cunniffe*, the First Circuit decided the case of a man arrested for openly filming an arrest in Boston Common in violation of a Massachusetts wiretapping law that criminalizes nonconsensual recording.[9] The court held that a right to videotape police was "clearly established."[10] The court cited *Smith* with several Supreme Court cases that it found established the right to gather and disseminate information about government: "Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'"[11]

1. Evan Bernick, *I Know My Rights: Woman Jailed After Filming Traffic Stop*, The Foundry (Feb. 22, 2014), http://blog.heritage.org/2014/02/22/know-rights-woman-jailed-filming-traffic-stop/.
2. Evan Bernick, *"Shut Up and Mind Your Business": Man Verbally Abused, Arrested for Filming Police*, The Foundry (March 14, 2014), http://blog.heritage.org/2014/03/14/shut-mind-business-man-verbally-abused-arrested-filming-police/.
3. Evan Bernick, *"What Did I Do Wrong?": (Another) Floridian Arrested for Exercising First Amendment Right to Film Police in Public*, The Foundry (May 5, 2014), http://blog.heritage.org/2014/05/05/wrong-another-floridian-arrested-exercising-first-amendment-right-film-police-public/.
4. *See* Cal. Penal Code § 632 (1994) (making it a crime to record "confidential communications" in which one of the parties has an objectively reasonable expectation that no one is listening in or overhearing the conversation without the consent of all parties to the conversation); Fla. Stat. Ann. § 934.03 (2013) (making it a crime to intercept or record a "wire, oral, or electronic communication" unless all parties to the communication consent); 720 Ill. Comp. Stat. 5/14 (2008) (making it a crime to use an "eavesdropping device" to overhear or record a phone call or conversation without the consent of all parties to the conversation).
5. 55 F.3d 436, 439 (9th Cir. 1995).
6. 212 F.3d 1332 (11th Cir. 2000).
7. *Id.* at 1333.
8. *Id.*
9. 655 F.3d 78 (1st Cir. 2011).
10. *Id.* at 85.
11. *Id.* at 82.

The First Circuit recently reaffirmed its *Glik* decision in *Gericke v. Begin*,[12] ruling that the First Amendment right to videotape a police officer performing a law enforcement action in public includes not only when the police make an arrest in a public park, as in *Glik*, but also when the police stop a vehicle to question the driver.[13]

The Seventh Circuit, in *American Civil Liberties Union of Illinois v. Alvarez*,[14] reached the same conclusion. In *Alvarez*, the ACLU sued Illinois State's Attorney Anita Alvarez in her official capacity under Section 1983.[15] The ACLU sought to bar Alvarez from enforcing an eavesdropping prohibition against recording activities that the ACLU planned to carry out in connection with its "police accountability program."[16] The ACLU intended to promote police accountability by openly audio recording police without their consent when (1) the officers were performing their public duties, (2) the officers were in public places, (3) the officers were speaking at a volume audible to the unassisted human ear, and (4) the manner of recording was otherwise lawful.[17]

The Seventh Circuit granted relief. Rejecting the State's Attorney's argument that recording is not speech protected by the First Amendment, the court asserted that "restricting the use of an audio or audiovisual recording device suppresses speech just as effectively as restricting the dissemination of the resulting recording."[18] The court analogized the facts of the case to those of *Citizens United v. Federal Elections Comm'n*, in which the U.S. Supreme Court held that "campaign-finance regulations implicate core First Amendment interests because raising and spending money facilitates the resulting political speech."[19] Just as raising and spending money facilitates political speech, the Seventh Circuit reasoned that "audio and audiovisual recording are communication technologies, and as such, they enable speech."[20] To hold that the First Amendment was not implicated would, in a similar fashion, allow the state to "effectively control or suppress speech by the simple expedient of restricting an early step in the speech process rather than the end result."[21]

By contrast, the Third Circuit does not recognize a First Amendment right to film the police in public. In *Gilles v. Davis* (2005), the Third Circuit suggested that videotaping or photographing the police in the performance of their duties on public property "may be a protected activity," citing the Eleventh Circuit's decision in *Smith*.[22] Subsequently, however, in *Kelly v. Borough of Carlisle*, a case that involved the filming of a traffic stop, the Third Circuit did not hold that filming police is protected speech.[23] While the court allowed that a "general right to record matters of public concern" might exist, it concluded that the cases addressing that issue were "insufficiently analogous" to the facts in question to put officers on notice of any such right.[24] It emphasized that no prior case law concerned the filming of a traffic stop

12. Gericke v. Begin, No. 12-2326 (1st Cir. May 23, 2014).
13. *Id.* slip op. 13–21.
14. 679 F.3d 583 (7th Cir. 2012).
15. *Id.* at 588.
16. *Id.* The Illinois eavesdropping statute made it a felony to audio record "all or any part of any conversation" unless all parties to the conversation give their consent. 720 Ill. Comp. Stat.. 5/14-2(a)(1) (2006).
17. 679 F.3d at 588.
18. *Id.* at 596.
19. 558 U.S. 310, 339 (2010).
20. *Alvarez*, 679 F.3d at 597.
21. *Id.*
22. 427 F.3d 197, 212 n.14 (3d Cir. 2005). In *Gilles*, two members of a campus ministry, James Gilles and Timothy Petit, brought claims under § 1983 against state university officials, alleging constitutional violations in connection with their arrest following a confrontation with campus police. When a riot broke out following Gilles's invectives against sex, booze, and homosexuality (delivered in front of a crowd in an area open to the public), police arrested Gilles, together with Petit, who filmed the events. Petit claimed that his First Amendment rights were violated because his videotaping was a protected activity.
23. 622 F.3d 248, 262 (3d Cir. 2010).
24. *Id.*

and that the Supreme Court treats traffic stops as "inherently dangerous."[25]

The circuit-level decisions recognizing a First Amendment right to film police in public are in line with the Supreme Court's free speech jurisprudence. In all of the above cases, citizens lawfully acquired publicly available information. The locations where filming took place—streets and parks—were traditional public fora and open to all.[26] In each case, the people filming the police activity had a right to be where they stood when they recorded police conduct.

The Supreme Court has consistently held that the First Amendment protects the right to gather publicly available information and to publish that information in any medium of a person's choosing.

- In *Cox Broadcasting Corp. v. Cohn*, the Court held that a rape victim could not sue a newspaper for damages for publishing the name of a rape victim because the newspaper learned her name through official court records.[27]

- In *Smith v. Daily Mail Pub. Co.*, the Court held that newspapers could lawfully publish the name of a juvenile arrested for homicide.[28] The newspapers had lawfully obtained the name by interviewing witnesses, the police, and an assistant prosecuting attorney.[29] Although a West Virginia statute made it a crime for a newspaper to publish without prior judicial approval the name of any youth charged as a juvenile offender,[30] the Supreme Court ruled the statute unconstitutional because it punished the publication of "lawfully obtained truthful information," and the government could not point to a countervailing "state interest of the highest order."[31]

- Finally, in *Bartnicki v. Vopper*, the Court held that a radio commentator possessed a First Amendment right to play a tape of an unlawfully intercepted conversation because he had not played a role in the unlawful interception and had acquired the tape legally.[32]

The right to publish lawfully obtained information does not depend upon the medium of expression. *Cox* and *Smith* both involved newspapers—a medium with which the Framers were familiar and that they would have expected to be the platform for discourse—but the First Amendment protects far more than black-and-white words on newsprint.

In *Burstyn v. Wilson*, the Court held that audio and audiovisual recordings are media of expression that are commonly used for the preservation and dissemination of information and ideas and thus are "included within the free speech and free press guaranty of the First and Fourteenth Amendments."[33] The right of publication extends also to the Internet. The Court in *Reno v. American Civil Liberties Union* struck down a congressional statute regulating the transmission of obscene or indecent materials on the Internet, finding no precedent for "qualifying the level of First Amendment scrutiny that should be applied to this medium."[34]

25. *Id.*
26. *See* Hague v. CIO, 307 U. S. 496, 515 (1939) (streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"). The government must carry a heavy burden in order to restrict speech in traditional public fora. *See* United States v. Kokinda, 497 U.S. 720, 726–27 ("Regulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny.").
27. 420 U.S. 469 (1975).
28. 443 U.S. 97 (1979).
29. *Id.* at 99.
30. *Id.* at 100.
31. *Id.* at 103.
32. 532 U.S. 514, 530–1 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.... But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.").
33. 43 U.S. 495, 502 (1952).
34. 521 U.S. 844, 870 (1997).

Today, citizen-recorders can "stream" police conduct to the Internet as they film that conduct with yet another novel device, smartphones.[35] But while technology has changed, free speech principles remain the same. Filming an event adds only two features to seeing it: The film preserves what the eye saw and corroborates a witness's account of what he or she viewed. Neither feature should somehow reduce the First Amendment protection that a videographer would be entitled to claim if he or she used binoculars or a camera lens to better observe an event without recording what transpired. The contrary rule would perversely transform a person's right to observe and report what he or she has seen into the government's right to demand that someone forget and remain silent about what takes place in a public forum.

The policies that the First Amendment seeks to advance hardly justify any such absurd result. There is a strong public interest in making police officers' public conduct transparent. Filming the police can yield evidence of government misconduct—among the core concerns of the First Amendment.[36]

Filming and publishing police conduct better informs the public about how officials are conducting their public duties and promotes accountability. Evidence also indicates that it influences law enforcement practice: Police are less likely to engage in misconduct when they know they are being recorded.[37]

Finally, police officers have no privacy interests that outweigh the strong public interest in transparency. Police officers conducting their duties in public places cannot reasonably expect that their conduct will be deemed private.[38] Thus, citizen-recorders should be presumptively free to film police in public places where they have the right to be present and to publish their recordings.

The Right to Film the Police in Public

The First Circuit in *Glik* properly held that the right to film police has limitations. The exercise of First Amendment rights is subject to reasonable time, place, and manner restrictions. In order to protect the First Amendment right to film police officers, it is necessary to define that right and work to ensure that it is respected.

Time, Place, and Manner Restrictions on Filming. The First Amendment does not confer a general right to demand access to a location from which citizens can gather information. In *Houchins v. KQED*, a media broadcasting company and members of the NAACP sued a sheriff who denied the media access to a portion of a county jail that had been the site of a recent inmate suicide and allegedly abusive conditions. The Court rejected the claim, stating that there is "no basis for the claim that the First Amendment compels others—private persons or governments—to supply information."[39]

Nor does it give news gatherers free rein to gather news by any means they think necessary. In *Branzburg v. Hayes*, a case involving journalists who claimed that compelling them to testify about confidential sources would violate their First Amendment right to gather news, the Court held that the First Amendment "does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[40]

The Court did subsequently recognize a limited right of access in the context of criminal proceedings. In *Richmond Newspapers v. Virginia*, the Court held that the First Amendment provides the public with a constitutional right of access to criminal trials because they historically had been open to the public and because "it would be difficult to single

35. *See* Ustream, http://www.ustream.tv/ (last visited April 11, 2014).

36. Steven A. Lautt, *Sunlight Is Still the Best Disinfectant: The Case for a First Amendment Right to Record the Police*, 51 Washburn L.J. 349, 372 (2012) ("[T]hose who record police activity perform much the same service as the pamphleteers who brought to light abuses of power during the years preceding the founding of the United States.").

37. Lisa A. Skehill, Note, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 Suffolk U. L. Rev. 981, 1006 (2009).

38. *See* Washington v. Flora, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992) (holding that police officers performing their official and public duties in a public street "could not reasonably have considered their words private.").

39. 438 U.S. 1, 11 (1978). *See also* Cornelius v. NAACP Leg. Def. Fund, 473 U.S. 788, 799–800 (1985) ("Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.").

40. 408 U.S. 665, 682 (1972). .

out any aspect of government of higher concern and importance to the people."[41]

More recently, however, the Court declined to extend the right of access beyond the courtroom. In *Los Angeles Police Dept. v. United Reporting Pub. Co.*, the Court upheld a California law denying access to arrestees' addresses if the request is made for commercial purposes, stating that the law represented "nothing more than a governmental denial of access to information in its possession."[42]

Further, the exercise of the right to film police, even where the citizen has a right to be present, cannot be unbounded. The Supreme Court has recognized that the government has a significant interest in protecting safety and has upheld speech restrictions grounded in safety concerns against First Amendment challenges.[43] While cameras are not themselves dangerous, their use can create safety hazards. Citizen-recorders may come too close or approach police from behind or oblique angles, posing a risk to officers looking to minimize their own vulnerabilities as well as those of members of the public.[44] Police must be able to protect their own safety and that of the public.

Yet two caveats are important to remember. First, the police cannot justify the refusal to allow someone to film what is in plain sight on the basis of a time, place, and manner restriction if the purpose of the restriction is to censor what is being seen and recorded. That would be a content-based restriction; Police do not interfere with parents filming their children's baseball games in public parks.[45] Second, there may be limited circumstances in which the police can justify a content-based restriction. The police can cordon off the area in which offenders have taken a hostage in order to prevent someone from broadcasting police efforts to free the hostage or to preserve the hostage's privacy. In each case, the government may have a compelling interest in preventing someone from undermining police efforts to free the hostage or in preserving the dignity of a victim who did not volunteer to be on the nightly news.

At the same time, however, the police generally should not be able to blind someone to seeing and reporting what occurs in the open, and they should *never* be able to do so simply because the film may portray the police in an unfavorable light. The scope of the publication right is one that can and should be filled out using the standard case-by-case approach that the courts have taken in resolving other First Amendment disputes.

Protecting the Right to Film. It is critical to prevent the police from invoking the electronic interception laws as a means of choking off constitutionally protected speech when no safety or privacy interests are in play. Certain laws that generally prohibit nonconsensual recording contain exceptions that protect citizens who record what is said in public. For instance, Florida's wiretapping law provides an exception for in-person communications when the parties do not have a reasonable expectation of

41. 448 U.S. 555, 575 (1980). *See also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (holding that a state law mandating closure of the court during the testimony of minor victims in sex offense trials violated the right of access to criminal trials established in *Richmond Newspapers*); Press-Enterprise v. Superior Court, 464 U.S. 501 (1984) (extending the right to cover juror *voir dire* proceedings); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (extending it to probable cause hearings)

42. 528 U.S. 32, 40 (1999). *See also* Estes v. Texas, 381 U.S. 532 (1965) (holding that a defendant was deprived of his right under the Fourteenth Amendment to due process by the televising and broadcasting of his trial, even though the court was open to the public and people could observe and report upon the proceedings). Federal courts have long prohibited the broadcasting of their proceedings. *See* Fed. R. Crim. P. 53 ("Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."). The Supreme Court prohibits cameras as well. *See, e.g.*, Public Information Office of the Supreme Court of the United States, A Reporter's Guide to Applications Pending Before the Supreme Court of the United States 15, *at* http://www.supremecourtus.gov/publicinfo/reportersguide.pdf; Public Information Office of the Supreme Court of the United States, Visitor's Guide to Oral Argument at the Supreme Court of the United States 3 (reminding visitors that no electronic devices are allowed in the courtroom at any time), *at* http:// www.supremecourtus.gov/visiting/visitorsguidetooralargument.pdf.

43. *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569, 574 (1941) (upholding a content-neutral ban on all unlicensed demonstrations "to assure the safety and convenience of the people in the use of public highways"); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 769 (1994) (upholding a content-neutral 36-foot buffer zone to protect access to a clinic and ensure that traffic was not blocked).

44. Michael Cerame, Note, *The Right to Record Police in Connecticut*, 30 Quinnipiac Law Rev. 385, 392 (2012).

45. *See* Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 97 (1972) ("Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.").

privacy in the conversation.[46] As noted, the public has a powerful interest in ensuring transparency in law enforcement, and on-duty police officers cannot reasonably expect their public conduct in public places to be private.

Other states, however, do not expressly make such exceptions in their wiretapping statutes.[47] Massachusetts' wiretap statute makes it a crime to "willfully commit[] an interception ... of any wire or oral communication."[48] The statute defines interception to mean "to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication."[49] In *Glik*, the First Circuit, interpreting that language, concluded that Glik's conduct fell outside the type of clandestine recording targeted by the statute because he openly filmed the officers.[50]

It may be possible to construe those laws as containing an implied exception for instances in which there is no reasonable expectation of privacy. After all, the state legislatures likely did not intend to make it a crime for a local news van to photograph people walking on a municipal sidewalk during the daytime as part of a news story about a beautiful spring afternoon or to photograph spectators at a Yankees game as part of an ESPN roundup. But reading a state law in a manner that excludes such conduct may not always be possible. If that turns out to be true, then the courts will be forced to judge whether the state law violates the First Amendment.

As noted, it would appear that any such law would be unconstitutional. There is no material difference between a case in which someone broadcasts to the officer that he is being filmed and a case in which the filming is entirely secretive. In both cases, the officer has no privacy interest at stake, and the government lacks a compelling interest in preventing citizens from observing the conduct of its agents, either secretly or openly, simply to justify suppressing speech that lies at the core of the First Amendment's protections.

Of course, the government can always charge an erstwhile Steven Spielberg with obstruction of justice or disorderly conduct if he or she physically interferes with police business, but merely filming police business by itself cannot be deemed an obstruction of justice or disorderly conduct. The First Amendment does not allow state law to reach that far.

Conclusion

The First Amendment generally protects the right to film police officers in public places and to publish the information acquired. At the same time, the exercise of the right to film, like all First Amendment rights, is subject to limitations. But speech about how public officials are conducting their duties lies at the core of the First Amendment's protections, and filming should therefore be given a wide berth.

Citizen-recorders should be presumptively free to film officers in public places when they have a license to be present, and state laws that authorize officers to prevent them from filming without any further justification are unconstitutional. Even where state wiretapping laws contain exceptions for in-person communications where there is no reasonable expectation of privacy, drafting exceptions that specifically except the filming of police officers in public may help to deter police from suppressing speech. At a minimum, the issue deserves further exploration.

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46. *See* Fla. Stat. Ann. § 934.02 (2) (2010) (requiring that an oral communication be "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.").
47. Even in jurisdictions where such exceptions exist, police are using wiretapping laws to suppress speech. One alternative worth exploring is creating specific exceptions for filming on-duty police officers in public. Those exceptions would apply so long as the citizen-recorders violate no other law. The presumption in favor of allowing recording could be overcome in narrow circumstances. Obstruction of justice or disorderly conduct charges could still be brought against citizen-recorders, just as they can be brought against others. Such exemptions for citizen-recorders could help to ensure that they are not treated differently from other citizens. *See* Cerame, *supra* note 44, at 449 (arguing that the government should be required to show that "the officer both subjectively believed his or her actions advanced safety, and that a reasonable officer would have objectively believed that those actions advanced safety").
48. Mass. Gen. Laws. Ch. 272, § 99 (C)(1)(1998).
49. Mass. Gen. Laws. Ch. 272, § 99 (B)(4)(1998).
50. *Glik*, 655 F.3d at 86.