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Notes and Comments

WHO WILL WATCH THE WATCHMEN?: CITIZENS RECORDING POLICE CONDUCT

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ABSTRACT—Ordinary citizens are being arrested and prosecuted for recording police conduct in several states. These arrests are being made pursuant to state wiretapping statutes that prohibit the recording of any communication without the consent of all parties. Some of those arrested have filed lawsuits under 42 U.S.C. § 1983, claiming the arrests violate the First Amendment. However, courts have tended to dismiss these suits, arguing that the right to record the police is not “clearly established.” This Comment argues that the right to monitor the police and report misconduct is a clearly established, if not fundamental, element of American policing. It also maintains that arresting and prosecuting individuals who record police conduct constitutes an unconstitutional prior restraint on speech. It concludes by arguing that judicial decisions rendering the recording of police unquestionably legal would not undermine police efforts.

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Advice to a Young Policeman[:] . . . Your acts will at all times be subject to the observation and the animadversion of the public, and on the stand-point where you commence, and on the course which you pursue, depends not only much of the welfare of the community in which you move, but the credit of the department to which you belong, and your own success as an officer and a man.[†]

INTRODUCTION

“Get off the motorcycle! Get off the motorcycle! Get off the motorcycle! State Police . . . put your hands up!”¹ off-duty Maryland State Trooper J.D. Uhler yelled as he jumped out of his car, pulled out his gun, and ran towards motorcyclist Anthony Graber.² Trooper Uhler exited his

[†] EDWARD H. SAVAGE, *POLICE RECORDS AND RECOLLECTIONS; OR, BOSTON BY DAYLIGHT AND GASLIGHT FOR TWO HUNDRED AND FORTY YEARS* 341 (Boston, John P. Dale & Co. 1873).

¹ Anthony Graber, *Motorcycle Traffic Violation—Cop Pulls Out Gun*, YOUTUBE (Mar. 10, 2010), <http://www.youtube.com/watch?v=BHjjF55M8JQ> [hereinafter *Graber Video I*].

² Peter Hermann, *Judge Says Man Within Rights to Record Police Traffic Stop—Charges Alleging Wire Tap Violation Thrown Out*, BALT. SUN (Sept. 27, 2010), http://articles.baltimoresun.com/2010-09-27/news/bs-md-recorded-traffic-stop-20100927_1_police-officers-plitt-cell-phones; see also *Graber Video I*, *supra* note 1 (Graber’s footage of his initial interaction with Trooper Uhler); Anthony Graber,

personal vehicle wearing street clothes and, without displaying his badge, lunged towards Graber with his .40 caliber semiautomatic pistol readied.³ Graber, a twenty-four-year-old sergeant in the Maryland Air National Guard,⁴ was not without a weapon of his own⁵: he was recording the entire interaction using a helmet-mounted video camera.⁶

Graber admits—and his camera proves—that he was speeding and driving his motorcycle in a reckless manner,⁷ posing a serious risk both to himself and to other motorists. Trooper Uhler’s reaction to the situation was therefore not necessarily unreasonable, although his interaction with Graber may have initially been more aggressive than was necessary.⁸ Either way, Graber’s story does not end with a mere moving violation.

On March 10, 2010, five days after being pulled over by Trooper Uhler, Graber uploaded the footage he recorded of the incident to YouTube.⁹ The Maryland State Police discovered the video on March 15, 2010¹⁰ and charged Graber with violating Maryland’s wiretapping laws.¹¹ Had Graber been charged only with motor vehicle violations, he would

Motorcycle Traffic Violation—Cop Pulls Out Gun (Extended No Sound), YOUTUBE (Mar. 10, 2010), <http://www.youtube.com/watch?v=G7PC9cZEWcQ&NR=1> [hereinafter *Graber Video II*] (Graber’s footage of riding his motorcycle and his initial interaction with Trooper Uhler with no sound). These are the actual videos posted by Graber on March 10, 2010 that caused him to be arrested and face sixteen years in prison.

³ See *Graber Video I*, *supra* note 1. Maryland state troopers carry the Beretta Px4 Storm, “a .40 caliber semi-automatic pistol.” Press Release, Md. State Police, State Police Choosing New Model Beretta Pistol to Replace Sidearm That Is More Than 10 Years Old (May 8, 2008), available at http://icac.mdsp.org/media/press_release_details.asp?identifier=614.

⁴ Hermann, *supra* note 2.

⁵ See 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, 1005–06 (2009) (“Lacking the right to . . . record [police], citizens are left without a major weapon in combating police misconduct.”).

⁶ Hermann, *supra* note 2; see also *Graber Video I*, *supra* note 1 (posting of recorded video); *Graber Video II*, *supra* note 2 (same).

⁷ P.J. Orvetti, *Time to Cut the Wiretap Law: 1970s Law Doesn’t Fit Modern Times*, NBC 4 WASH. D.C. (June 16, 2010, 11:30 AM), <http://www.nbcwashington.com/news/local/Time-to-Cut-the-Wiretap-Law-96470009.html>.

⁸ See Annys Shin, *From YouTube to Your Local Court: Video of Traffic Stop Sparks Debate on Whether Police Are Twisting Md. Wiretap Laws*, WASH. POST, June 16, 2010, at A1 (stating that when Trooper Uhler realized that Graber did not pose a threat of fight or flight, he lowered and secured his firearm); *id.* (reporting that state police spokesman believed Uhler “acted appropriately”).

⁹ See *id.*; Carlos Miller, *Motorcyclist Jailed for 26 Hours for Videotaping Gun-Wielding Cop*, PIXIQ (Apr. 16, 2010, 2:46 AM), <http://www.pixiq.com/article/maryland-motorcyclist-spends-26-hours-in-jail-on-wiretapping-charge-for-filming-cop-with-gun>.

¹⁰ Miller, *supra* note 9 (providing image of “Application for Statement of Charges”).

¹¹ *State v. Graber*, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *1, *4 (Md. Cir. Ct. Sept. 27, 2010) (citing MD. CODE ANN., CTS. & JUD. PROC. §§ 10-402(a)(1)–(2), 10-403(a) (LexisNexis 2010)); Miller, *supra* note 9.

have faced a maximum fine of \$2090;¹² but adding the wiretapping violations meant he faced those fines *and* up to sixteen years in prison.¹³

A warrant was issued and six police officers raided Graber's home at 6:45 AM¹⁴ on April 15, 2010.¹⁵ The search lasted ninety minutes, during which the police did not allow Graber's mother to leave for work or his sister to go to school.¹⁶ The officers seized four computers, several external hard drives and USB drives, and the camera Graber used to film his interaction with Trooper Uhler.¹⁷ The search would have concluded with an arrest of Graber had he not been physically unable to leave his home due to recent gall bladder surgery.¹⁸ Graber turned himself in to police a week later and, after spending twenty-six hours in jail, was released by a judge who was skeptical that Graber actually violated Maryland's wiretapping statutes.¹⁹

The applicable Maryland wiretapping statute makes it illegal to "[w]illfully intercept, [or] endeavor to intercept . . . any wire, oral, or electronic communication"²⁰ and to "[w]illfully disclose, or endeavor to disclose, to any other person the contents of any wire, oral, or electronic communication . . ."²¹ The police applied the statute to Graber's case because Maryland's wiretapping statute prohibits interception unless *all*

¹² MD. CODE ANN., TRANSP. § 27-101(g)(3) (providing a maximum fine of \$1000 for a conviction of reckless driving under TRANSP. § 21-901.1(a)); *Schedule of Pre-Set Fines and/or Penalty Deposits*, MD. JUDICIARY 46, <http://www.courts.state.md.us/district/selfhelp/dccr090chargeonly.pdf> (last visited Mar. 18, 2012) (stating that violations of TRANSP. § 21-801(a) are subject to a \$90 fine). Graber was charged with two counts of violating TRANSP. § 21-901.1 and one count of violating TRANSP. § 21-801(a). *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *1.

¹³ See Adam Cohen, *Should Videotaping the Police Really Be a Crime?*, TIME (Aug. 4, 2010), <http://www.time.com/time/nation/article/0,8599,2008566,00.html>. Graber was charged with two counts of violating CTS. & JUD. PROC. § 10-402(a), each punishable by up to five years in prison, one count of violating CTS. & JUD. PROC. § 10-403(a), also punishable by up to five years in prison, and one count of violating TRANSP. § 21-1126, punishable by up to one year in prison. See CTS. & JUD. PROC. § 10-402(b); TRANSP. § 27-101(z); *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *1.

¹⁴ David Rittgers, *Wiretap Law Needs Update*, BALT. SUN, June 1, 2010, at A13.

¹⁵ *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *5.

¹⁶ Rittgers, *supra* note 14.

¹⁷ *Id.*; Shin, *supra* note 8.

¹⁸ Shin, *supra* note 8.

¹⁹ See Rittgers, *supra* note 14 ("The penalty [for violating Maryland wiretapping laws] can be up to five years in prison and up to a \$10,000 fine. When the prosecutor asked for a \$15,000 bond for a \$10,000 crime, the judge questioned both this maneuver and the use of the law against Mr. Graber."); Shin, *supra* note 8.

²⁰ MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a)(1) (LexisNexis 2010).

²¹ *Id.* § 10-402(a)(2). The Maryland wiretapping provisions only apply to audio recordings, not to the video itself. *State v. Graber*, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *6 (Md. Cir. Ct. Sept. 27, 2010) (citing *Ricks v. State*, 520 A.2d 1136, 1139 (Md. Ct. Spec. App. 1987)). A video recording without sound would therefore not be subject to prosecution under Maryland law.

parties consent to it.²² This application is questionable for two reasons. First, the same statute provides an exception to the all-party consent rule for police officers if, among other things, the officer is a party to the conversation.²³ Allowing the police a right expressly denied to the public in the absence of a compelling governmental interest is *prima facie* discrimination. Second, the Maryland provision defines “oral communication” as “any conversation or words spoken to or by any person in *private* conversation,”²⁴ and an interaction with a public servant in a public space can hardly be considered “private.” In fact, Judge Emory Plitt explicitly stated this in dismissing Graber’s charges: “Those of us who are public officials and are entrusted with the power of the state are ultimately accountable to the public. When we exercise that power in public fora, we should not expect our actions to be shielded from public observation.”²⁵

Anthony Graber’s case presents an extreme example of how far police and prosecutors are willing to go to prevent the recording and dissemination of police conduct; however, all-party consent wiretapping statutes are similarly, albeit less dramatically, misused elsewhere in the United States.²⁶ In Massachusetts, Simon Glik used his cell phone to record police making an arrest, only to find himself in handcuffs for allegedly violating the state’s wiretapping statutes.²⁷ In Pennsylvania, police arrested eighteen-year-old

²² § 10-402(c)(3) (“It is *lawful* under this subtitle for a person to intercept a wire, oral, or electronic communication where the person is a party to the communication and where *all of the parties* to the communication have given prior consent to the interception” (emphasis added)).

In a shockingly public admission of abuse of prosecutorial discretion, prosecutor Joseph Cassilly stated that he refused to dismiss the charges against Graber to highlight the undesirability of an all-party consent requirement in the hopes that the Maryland Legislature would repeal the provision. *See Recording the Police: Is Citizen Journalism Against the Law?*, CATO INST. at 23:27 (Sept. 22, 2010), <http://www.cato.org/event.php?eventid=7427> [hereinafter *CATO Video*] (statement of Joseph I. Cassilly, State’s Attorney, Harford County, Maryland).

²³ § 10-402(c)(4)(i) (listing the requirements for the law enforcement officer exception). The statute does not provide an exception for law enforcement officials to disseminate the recording as Graber did by posting the videos on the Internet. *See id.* § 10-401(2)(i). However, the recorded conversation should still fall outside the statute because interactions between members of the public and police officers are not private. *See infra* note 25 and accompanying text.

²⁴ § 10-401(2)(i) (emphasis added).

²⁵ *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *35; *see also id.* at *17–20 (elaborating on this conclusion).

²⁶ *See, e.g., Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010); *Banks v. Gallagher*, No. 3:08-1110, 2010 U.S. Dist. LEXIS 55308 (M.D. Pa. Mar. 18, 2010); *Matheny v. Cnty. of Allegheny*, No. 09-1070, 2010 U.S. Dist. LEXIS 24189 (W.D. Pa. Mar. 16, 2010); *Robinson v. Fetterman*, 378 F. Supp. 2d 534 (E.D. Pa. 2005); *Commonwealth v. Hyde*, 750 N.E.2d 963 (Mass. 2001); *Commonwealth v. Glik*, No. 0701-CR-6687, (Bos. Mun. Ct. Jan. 31, 2008), *available at* <http://www.volokh.com/files/glik.pdf>. Thirteen states require both parties to consent to the recording. Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 358 & n.76 (2011).

²⁷ John M. Guilfoil, *ACLU Files Suit over Cellphone Video of Police*, BOS. GLOBE (Feb. 1, 2010, 6:51 PM), http://www.boston.com/news/local/breaking_news/2010/02/_wwwbostoncomne.html.

Brian Kelly under the state's felony wiretapping statute for recording a routine traffic stop.²⁸ In New Hampshire, a disorderly conduct allegation turned into a Class B felony wiretapping charge with a potential seven-year prison sentence²⁹ when police discovered a video recording of their arrival at a house party on twenty-year-old partygoer Adam Whitman's cell phone.³⁰

Why are the police³¹ pursuing citizen videographers so aggressively? The most likely reason is that police officers fear the potentially damaging³² effect video footage can have on their reputation,³³ efficacy,³⁴ and safety.³⁵ This fear is exacerbated by the increasing prevalence of technology³⁶ that makes it possible to simultaneously capture and edit high-quality videos and then subsequently disseminate them on the Internet.³⁷ As a result, "[p]ervasive new camera and video technologies and social networking practices are creating a new generation of media producers [and]

²⁸ Matt Miller, *He's Cleared in Police Taping—DA Drops Charge Stemming from Carlisle Traffic Stop, Declares New County Policy*, PATRIOT-NEWS (Pa.), June 21, 2007, at A1. Kelly sat in jail for twenty-six hours and was only released when his mother posted her home as security for his \$2500 bail. *Id.* This case and the Third Circuit's reasoning in his appeal are discussed in detail *infra* Part II.B.

²⁹ In New Hampshire, Class B felonies are subject to a punishment of up to seven years in prison. N.H. REV. STAT. ANN. § 651:2(II)(a) (LexisNexis 2011).

³⁰ Editorial, *No Police Scrutiny; Drop the Camera and Back Away*, UNION LEADER (N.H.), July 13, 2010, at A8.

³¹ The terms "police," "law enforcement officials," "government actors," and "government agents" are used interchangeably to reflect general usage and because the analysis herein applies to any individual acting under federal, state, or local law.

³² *But see infra* Parts IV.C–D (arguing that the potential damage police officers perceive is either exaggerated or mitigable).

³³ *E.g.*, Andrew John Goldsmith, *Policing's New Visibility*, 50 BRIT. J. CRIMINOLOGY 914, 930 (2010) ("New citizen-controlled media technologies and their associated social uses have meant the seeds of scandal-mongering and reputational damage have been cast much more widely, posing a huge reputational threat to contemporary police organizations.").

³⁴ *See, e.g.*, Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1163 (2000) ("Personal experiences and popular images of police brutality or prejudice only confirm widely held suspicions, solidifying distrust on both an individual and group level. In turn, community distrust of the police imposes two very real costs on the criminal justice system. First, members of distrusting communities will shy away from cooperation with law enforcement, withholding valuable information or creative solutions to social ills. Second, distrusting individuals are less likely to obey legal commands.").

³⁵ *E.g.*, Brief of Appellees at 7, *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000) (No. 99-8199-J), 1999 WL 33618059, at *7 (arguing that police officers fear for their physical safety if they "constantly hav[e] to look over their shoulder[s] to see where" a videographer is standing and what he is doing); Kreimer, *supra* note 26, at 357 & n.74 ("Officers dislike being recorded in embarrassing situations and may be concerned that dissemination of their images may put them at risk of retaliation.").

³⁶ *See, e.g.*, Goldsmith, *supra* note 33, at 915–16. This technology is predominantly sophisticated mobile phones. *See, e.g.*, David Pogue, *New iPhone Conceals Sheer Magic*, N.Y. TIMES, Oct. 12, 2011, at B1 (describing the ability of the iPhone 4S to take high-definition video clips and subsequently upload them to the Internet).

³⁷ Pogue, *supra* note 36.

consumers, contributing to a ‘disappearance of disappearances’ and thus to a ‘new visibility’ in policing.”³⁸

While this concern is understandable, preventing citizens from recording and publishing police conduct is an unconstitutional “prior restraint” on speech.³⁹ And, although restraining the speech of those wishing to record police conduct has been litigated, courts have failed to reach a consensus regarding its constitutionality.⁴⁰ Existing scholarship argues that the First Amendment prohibits the police from restricting a person’s right to record them.⁴¹ However, the First Amendment doctrine of prior restraint, a cousin of freedom of the press,⁴² has yet to be explored. This Comment argues that the doctrine of prior restraint can and should be employed to protect the right of citizens to record police conduct.⁴³

Part I provides basic background on state and federal wiretapping statutes and discusses the ways police conduct can be recorded. Part II outlines how courts currently analyze the right and why they should hold

³⁸ Goldsmith, *supra* note 33, at 915 (citation omitted).

³⁹ “Prior restraint” refers to a “governmental restriction on speech or publication before its actual expression.” BLACK’S LAW DICTIONARY 1314 (9th ed. 2009). A prior restraint arises in this context by publicly and repeatedly punishing speech after it is shared, leading to a reluctance by members of the public to engage in it, and, ultimately, in its suppression. *See infra* Part III.D.

⁴⁰ *See infra* Parts II.A–B. This is largely because courts are able to avoid constitutional analysis in light of recent Supreme Court decisions regarding qualified immunity. *See infra* Parts II.A–B.

⁴¹ *See infra* Part II.C.3 (listing scholarship that cites the rights to free speech, a free press, expressive conduct, and redress grievances as reasons the police should not stop citizens from recording them).

⁴² Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 650–51 (1955) (“In England—the immediate source of our doctrine of prior restraint—printing first developed under royal sponsorship and soon became a monopoly to be granted by the Crown.”).

⁴³ Although the relationship between a citizen recorder, his audience, and police officers is complex, differences in the form of the recorded conversation (e.g., whether the recording was first party or third party, stored or disseminated, or on a smartphone or a camcorder) do not change the underlying constitutional permissibility of citizens recording police conduct. Nor does the timing of a police officer’s interference (i.e., before, during, or after the recording, or even after the recording has been publicly disseminated), *see also infra* Part III, or the form it takes (e.g., verbal request, request accompanied by threats of imprisonment or violence, or actual imprisonment or violence) change the analysis. Situations that would change the analysis include those involving legitimate interference in the officer’s duties (i.e., those that place either the officer or the recorder in danger of physical harm); and situations that occur in locations where the officer has a reasonable expectation of privacy (e.g., a police station). *See Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (“[P]eaceful recording of an arrest in a public space that does not interfere with the police officers’ performance of their duties is not reasonably subject to [First Amendment time, place, and manner] limitation[s].”); *id.* (“In such traditional public spaces [as Boston Common], the rights of the state to limit the exercise of First Amendment activity are ‘sharply circumscribed.’” (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983))); *see also McKenna v. City of Philadelphia*, No. 07-CV-110, 2008 U.S. Dist. LEXIS 76766, at *33–34 (E.D. Pa. Sept. 30, 2008) (finding that a police sergeant did not violate a plaintiff’s First Amendment rights when, as a rule, he allowed filming in a police station’s “public area” but not the “operations room” that housed “civilians, juveniles[,] . . . undercover police officers[,] . . . paperwork, equipment[,] and assignments”).

that it is “clearly established.” Part II also summarizes current academic literature on the subject. Part III defines the doctrine of prior restraint, traces its relevant development through the American court system, and applies it to police officers preventing citizens from recording their actions. Finally, Part IV examines the policy justifications for allowing the public to record and disseminate footage of police conduct.

I. BACKGROUND

“Wiretapping” is a modern form of eavesdropping⁴⁴ whereby a third party intercepts and records a communication between two or more parties.⁴⁵ The practice is so named because the communications recorded originally took place via electric telephone wires that needed to be “tapped” for the recording to take place.⁴⁶ The statutory definition of “wiretapping” has expanded with advances in technology to include intercepting wireless and oral communications.⁴⁷ This Part presents an overview of wiretapping jurisprudence to demonstrate why using all-party consent wiretapping statutes to prosecute individuals for recording police conduct constitutes their fundamental misuse.

A. Federal Wiretapping Jurisprudence

Wiretapping has long been outlawed in many states,⁴⁸ largely due to concerns that it violates individuals’ right to privacy and their right to be left alone.⁴⁹ These concerns gave rise to pivotal Fourth and Fifth

⁴⁴ “Eavesdropping” is the “act of secretly listening to the private conversation of others without their consent.” BLACK’S LAW DICTIONARY 588 (9th ed. 2009); *see also* *Berger v. New York*, 388 U.S. 41, 45 (1967) (“Eavesdropping is an ancient practice At one time the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse.”).

⁴⁵ *See* Robert F. Scoular, *Wiretapping and Eavesdropping Constitutional Development from Olmstead to Katz*, 12 ST. LOUIS U. L.J. 513, 513 (1968).

⁴⁶ *See Berger*, 388 U.S. at 46 (“The telephone brought on a new and more modern eavesdropper known as the ‘wiretapper.’ Interception was made by a connection with a telephone line.”); Margaret Lybolt Rosenzweig, *The Law of Wire Tapping*, 33 CORNELL L.Q. 73, 73 (1947) (“Wire tapping involves first a physical interference with wires before the act of listening or interception of messages occurs.”).

⁴⁷ The modern definition of “electronic communication” is “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce,” 18 U.S.C. § 2510(12) (2006); an “oral communication” is “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” *Id.* § 2510(2).

⁴⁸ For example, wiretapping has been prohibited in the state of Washington since 1893. WASH. REV. CODE § 6559 (1893), *reprinted in* E. D. McLAUGHLIN ET AL., *THE REVISED STATUTES AND CODES OF THE STATE OF WASHINGTON* 1070 (1896).

⁴⁹ *See* Scoular, *supra* note 45, at 515–16 (discussing the arguments presented in the “first wiretapping case before the United States Supreme Court”); *see also* *Olmstead v. United States*, 277

Amendment questions in the early twentieth century when law enforcement officials began eavesdropping and using wiretaps without warrants to gather evidence for criminal investigations.⁵⁰ In 1928, the Supreme Court confronted the Fourth Amendment questions in *Olmstead v. United States* but declined to interpret the Fourth Amendment in such a way as to limit law enforcement's use of warrantless wiretapping.⁵¹

In the wake of *Olmstead*, wiretapping by law enforcement officials continued unimpeded until the 1960s.⁵² By then, technological advancements such as smaller microphones and the ability to remotely activate recording devices had greatly expanded the depth and breadth of observation capabilities,⁵³ increasing instances of wiretapping by members of the public⁵⁴ and law enforcement officials alike.⁵⁵ This dilution of privacy—in particular, the growing use of wiretapping by law enforcement officials—troubled the Warren Court and was likely the impetus behind its 1967 decision in *Katz v. United States*, which overruled *Olmstead* and held that wiretapping constituted a search or seizure under the Fourth Amendment.⁵⁶ In *Katz*, law enforcement officials observed Charles Katz making calls from a specific public telephone booth at regular intervals and, suspecting illegal activity, taped microphones to the outside of the booth to record his conversations.⁵⁷ The recorded conversations revealed that Katz was calling a known gambler in Massachusetts⁵⁸ and were subsequently

U.S. 438, 478 (1928) (Brandeis, J., dissenting) (“The makers of our Constitution . . . conferred, as against the Government, *the right to be let alone* . . .” (emphasis added)).

⁵⁰ See *Olmstead*, 277 U.S. at 456–57 (majority opinion).

⁵¹ *Id.* at 463–64, 466 (holding that listening to the suspect's telephone calls was not an unconstitutional search or seizure under the Fourth Amendment because listening to a telephone conversation does not constitute a physical trespass). The Court may have reached this decision, at least in part, because the case involved a suspected bootlegger and arose in the context of Prohibition enforcement, *id.* at 455–56, thus placing political pressure on the Court to avoid removing tools from law enforcement. See RICHARD F. HAMM, *OLMSTEAD V. UNITED STATES: THE CONSTITUTIONAL CHALLENGES OF PROHIBITION ENFORCEMENT* 1–2 (Fed. Jud. Ctr. ed. 2010), [http://www.fjc.gov/public/pdf.nsf/lookup/olmstead.pdf/\\$file/olmstead.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/olmstead.pdf/$file/olmstead.pdf).

⁵² Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 840 (1998) (“Private individuals and law enforcement officers, at both the federal and the state levels, made extensive use of wiretapping and electronic surveillance during the 1920s, 1930s, 1940s, 1950s, and most of the 1960s until Congress passed legislation curtailing the practices in 1968.”).

⁵³ See Scoular, *supra* note 45.

⁵⁴ See, e.g., Stacy L. Mills, Note, *He Wouldn't Listen to Me Before, But Now . . . : Interspousal Wiretapping and an Analysis of State Wiretapping Statutes*, 37 BRANDEIS L.J. 415, 415 & n.4 (1999) (discussing the “alarming number” of instances of spousal wiretapping).

⁵⁵ Bast, *supra* note 52, at 840–41.

⁵⁶ See *Katz v. United States*, 389 U.S. 347, 353 (1967); Bast, *supra* note 52, at 841.

⁵⁷ *Katz v. United States*, 369 F.2d 130, 131 (9th Cir. 1966).

⁵⁸ Brief for the Respondent, *Katz*, 389 U.S. 347 (No. 35), 1967 WL 113606, at *3.

entered into evidence at trial, where the judge convicted⁵⁹ him of “transmitting wagering information by telephone.”⁶⁰ The Supreme Court overturned Katz’s conviction⁶¹ and held that recording his conversations violated the Fourth Amendment because Katz intended to keep them private and had the constitutional right to do so.⁶² Justice Harlan’s concurrence outlined what would become the two-part requirement guiding constitutional protection of private conversations: (1) “a person [must] have exhibited an actual (subjective) expectation of privacy” and (2) “the expectation [must] be one that society is prepared to recognize as ‘reasonable.’”⁶³

Congress codified Justice Harlan’s manifestation of protected private conversations in Title III of the Omnibus Crime Control and Safe Streets Act of 1968,⁶⁴ which requires law enforcement officials to either be a party to a conversation or obtain the consent of either party before intercepting private communications without a warrant.⁶⁵ If neither consent nor a valid warrant is obtained, any evidence extracted may be inadmissible in court,⁶⁶ and the interception may subject the eavesdropper to criminal penalties and civil damages.⁶⁷ For “person[s] *not* acting under color of law,”⁶⁸ however, the Act permits recording with the consent of just one party to the communication.⁶⁹ These regulations were meant to “protect the ‘cherished

⁵⁹ *Katz*, 369 F.2d at 131–32, 136. The district court conviction was rendered by a judge in a nonjury trial. Brief for the Respondent, *supra* note 58, at *2.

⁶⁰ *Katz*, 389 U.S. at 348.

⁶¹ *Id.* at 359.

⁶² *Id.* at 351–53.

⁶³ *Id.* at 361 (Harlan, J., concurring).

⁶⁴ See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 801, 82 Stat. 197, 211–14 (codified at 18 U.S.C. § 2511 (2006)); see also Stephen Linzer, *Federal Procedure for Court Ordered Electronic Surveillance: Does It Meet the Standards of Berger and Katz?*, 60 J. CRIM. L. CRIMINOLOGY & POL. SCI. 203, 207 (1969) (“[The 1968 Act] represents a permissive scheme of court ordered electronic surveillance while complying with the Supreme Court decisions in *Berger* and *Katz*. It has two fundamental purposes: protecting the privacy of wire and oral communications and delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized.” (footnotes omitted)).

⁶⁵ § 2511(2)(c) (“It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.”).

⁶⁶ See *id.* § 2518(9)–(10).

⁶⁷ *Id.* § 2511(4)(a).

⁶⁸ *Id.* § 2511(2)(d) (emphasis added). “The term [color of law] usu[ally] implies a misuse of power made possible because the wrongdoer is clothed with the authority of the state.” BLACK’S LAW DICTIONARY 302 (9th ed. 2009); see also § 2510(7) (“‘Investigative or law enforcement officer’ means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses . . .”).

⁶⁹ *Id.* § 2511(2)(d) (“It shall not be unlawful . . . for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception . . .”).

privacy of law-abiding citizens,⁷⁰ and Congress felt this responsibility was best left to the states.⁷¹ Therefore, the Act itself created a baseline of privacy protection, leaving states to fill in the details and craft wiretapping laws to suit their needs, provided those laws guarantee at least as much protection as the federal statute⁷² and do not violate the Constitution.⁷³

B. State Wiretapping Jurisprudence

Following the enactment of the Omnibus Crime Control and Safe Streets Act of 1968, most states passed statutes that permitted recording under the consent of one party to the communication.⁷⁴ In addition to Maryland,⁷⁵ where Anthony Graber was arrested, twelve states attempted to expand this protection by requiring the consent of *all* parties to a communication.⁷⁶ Factors that help determine whether a party “consented” to a recording include whether the recording is in “plain view” or surreptitious,⁷⁷ and whether the recorder is a party to the communication⁷⁸ or

⁷⁰ Skehill, *supra* note 5, at 990 n.73 (citing *Dalia v. United States*, 441 U.S. 238, 250 n.9 (1979)).

⁷¹ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 197 (1968) (“[C]rime is essentially a local problem that must be dealt with by State and local governments if it is to be controlled effectively.”).

⁷² Bast, *supra* note 52, at 845.

⁷³ U.S. CONST. art. VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .”).

⁷⁴ Jesse Harlan Alderman, *Police Privacy in the iPhone Era? The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian’s Right to Record Public Police Activity*, 9 FIRST AMEND. L. REV. 487 app. at 535–39 (2011) (listing the thirty-four one-party-consent states).

⁷⁵ MD. CODE ANN., CTS. & JUD. PROC. § 10-401 to -403 (LexisNexis 2010).

⁷⁶ See Alderman, *supra* note 74, at 496–510 (listing state statutes); Bast, *supra* note 52, at 927–30 (same). For the specific language of the statutes, see CAL. PENAL CODE §§ 631–632 (Deering 2010) (California); CONN. GEN. STAT. § 53a-187 to -189 (2010) (Connecticut); DEL. CODE ANN. tit. 11, §§ 1335, 2401, 2402 (2010) (Delaware); FLA. STAT. ANN. §§ 934.02 to .03 (LexisNexis 2010) (Florida); 720 ILL. COMP. STAT. ANN. §§ 5/14-1 to -2 (LexisNexis 2010) (Illinois); MASS. ANN. LAWS ch. 272, § 99 (LexisNexis 2010) (Massachusetts); MICH. COMP. LAWS SERV. §§ 750.539, 750.539a to .539e (LexisNexis 2010) (Michigan); MONT. CODE ANN. § 45-8-213 (2010) (Montana); NEV. REV. STAT. ANN. §§ 200.610, 200.650 (LexisNexis 2010) (Nevada); N.H. REV. STAT. ANN. § 570-A:2 (LexisNexis 2010) (New Hampshire); OR. REV. STAT. §§ 133.721, 133.726, 165.540, 165.542 to .543 (2010) (Oregon); 18 PA. CONS. STAT. §§ 5701–5704 (2010) (Pennsylvania); WASH. REV. CODE ANN. § 9.73.030 (LexisNexis 2010) (Washington).

⁷⁷ See, e.g., *Glik v. Cunniffe*, 655 F.3d 78, 86–88 (2d Cir. 2011); *Kelly v. Borough of Carlisle*, 622 F.3d 248, 256, 259 n.7 (3d Cir. 2010); Skehill, *supra* 5, at 983–84 & n.23; Howard M. Wasserman, *Orwell’s Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 649–51 (2009). In Massachusetts, for example, consent is implied if the other party can see the recording device. See, e.g., *Commonwealth v. Hyde*, 750 N.E.2d 963, 969 (Mass. 2001) (“The defendant was not prosecuted for making the recording; he was prosecuted for doing so secretly.”); *id.* at 971; *Commonwealth v. Glik*, No. 0701-CR-6687, at 2 (Bos. Mun. Ct. Jan. 31, 2008), available at <http://www.volokh.com/files/glik.pdf>.

⁷⁸ See *infra* text accompanying note 89.

a third-party observer.⁷⁹ All-party consent statutes can be further broken down into two categories: (1) statutes that require a reasonable expectation of privacy in the communication to prohibit recording⁸⁰ and (2) statutes that prohibit recording regardless of whether the parties had a reasonable expectation of privacy.⁸¹

All-party consent statutes permit—but do not require⁸²—arrest and prosecution even if unconsented recording is an individual’s only offense.⁸³ However, the purpose of all-party consent statutes is to prevent “unwarranted spying and intrusions on people’s privacy,”⁸⁴ not give the police an avenue to suppress protected speech; using these statutes to arrest and prosecute citizens recording police conduct represents their fundamental misuse. All-party consent statutes have also led to other unintended consequences.⁸⁵ For example, for a citizen to protect himself from a would-be blackmailer, he would first need to obtain the would-be blackmailer’s consent before recording proof of her crime, otherwise the citizen would also be guilty of a felony.⁸⁶

These all-party consent statutes also contain a logical flaw because both parties to a communication always consent to its capture and storage:

⁷⁹ *CATO Video*, *supra* note 22 (statement of Joseph I. Cassilly, State’s Attorney, Harford County, Maryland).

⁸⁰ *E.g.*, MD. CODE ANN., CTS. & JUD. PROC. §§ 10-401 to -403 (LexisNexis 2010); 18 PA. CONS. STAT. §§ 5701–5704 (2010); *see also* Alderman, *supra* note 74, at 496–500.

⁸¹ *E.g.*, 720 ILL. COMP. STAT. ANN. §§ 5/14-1 to -2 (LexisNexis 2010); *see also* Alderman, *supra* note 74, at 496, 500–06.

⁸² Police and prosecutors have nearly limitless, unreviewable discretion in choosing whether to arrest or charge someone with a crime. *See, e.g.*, AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT 130 (2009) (“By law and custom, a prosecutor has broad authority in prosecuting criminal cases, including the option to “screen out” or decide against pursuing a case at any stage. . . . For the most part, th[is] exercise of ‘prosecutorial discretion’ requires no formal process or oversight.”); Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 543 (1960) (stating that police officers may choose not to invoke the criminal process against an individual); Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 645 (2002) (same).

⁸³ MD. CODE ANN., CTS. & JUD. PROC. § 10-402(b) (LexisNexis 2010) (“Any person who violates [§ 10-402(a), the wiretapping prohibition] is guilty of a felony and is subject to imprisonment for not more than 5 years or a fine of not more than \$ 10,000, or both.”).

⁸⁴ Marianne B. Davis & Laurie R. Bortz, *Legislation, The 1977 Maryland Wiretapping and Electronic Surveillance Act*, 7 U. BALT. L. REV. 374, 384 (1978) (quoting 1973 Md. Laws 1924–25 (statement of Governor Marvin Mandel)).

⁸⁵ Many well-intentioned laws create unintended consequences. *See, e.g.*, Karen Turnage Boyd, *The Tale of Two Systems: How Integrated Divorce Laws Can Remedy the Unintended Effects of Pure No-Fault Divorce*, 12 CARDOZO J. L. & GENDER 609, 622–24 (2006) (discussing the unintended consequences of no-fault divorce laws); Christopher Dinkel, Note, *Welfare Family Caps and the Zero-Grant Situation*, 96 CORNELL L. REV. 365, 367–68 (2011) (arguing that welfare laws in California have unintentionally prevented otherwise deserving families from receiving much-needed financial assistance).

⁸⁶ *See CATO Video*, *supra* note 22, at 22:34 (statement of Joseph I. Cassilly, State’s Attorney, Harford County, Maryland).

when a person chooses to communicate with someone else, they are implicitly consenting to the other party receiving the information to reference and share at a later point.⁸⁷ Any time a person communicates information to someone else, he risks having that information repeated;⁸⁸ that risk of disclosure is not necessarily greater when the person is using a recording device. Thus, “sousveillance,” which is “the recording of an activity by a participant in the activity,”⁸⁹ always has the implicit consent of all parties.⁹⁰

In some states, all-party consent is required only if the parties have a reasonable expectation of privacy.⁹¹ The rationale for this requirement is that harm is less likely to occur if the conduct or communication captured was never intended to be private.⁹² Police officers acting within their official capacity are generally afforded a diminished expectation of privacy.⁹³ This is especially true when the underlying actions involve depriving citizens of their freedom. As then-Associate Justice Rehnquist put it:

An arrest is not a “private” event. An encounter between law enforcement authorities and a citizen is ordinarily a matter of public record, and by the very

⁸⁷ See *id.* at 1:06:40 (statement of Joseph I. Cassilly, State’s Attorney, Harford County, Maryland).

⁸⁸ In the immortal words of Benjamin Franklin: “Three may keep a secret, if two of them are dead.” TRYON EDWARDS, A DICTIONARY OF THOUGHTS 508 (N.Y., Cassell Publ’g Co. 1891).

⁸⁹ Goldsmith, *supra* note 33, at 922 (internal quotation marks omitted).

⁹⁰ This remains true even if the sharing party does not know she is being recorded because she is still communicating something to another person at the risk of having that person disclose that communication. Logically, this risk does not decrease just because the communicator does not know if the receiver is actively “remembering” the encounter.

⁹¹ For example, Pennsylvania requires the consent of both parties for a person not affiliated with law enforcement to record a communication. 18 PA. CONS. STAT. § 5704(4) (2010) (providing an exception to the all-party consent rule by permitting “[a] person, to intercept a wire, electronic or oral communication, where all parties to the communication have given prior consent to such interception”). The statute defines “oral communication” as “[a]ny oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation.” *Id.* § 5702. However, not all Pennsylvania legislators agree with these definitions, and on April 21, 2009, House Bill 1308 was introduced in the Pennsylvania House of Representatives, suggesting the following changes to section 5704(4):

A person, to intercept a wire, electronic or oral communication, where . . . *the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act.*

H.R. 1308, 193d Gen. Assemb., Reg. Sess. (Pa. 2009) (emphasis in original indicates the proposed language change). If passed, this bill would have made Pennsylvania a one-party consent state; instead, it died after being introduced to the judiciary committee. *Bill Information, Regular Session 2009–2010, House Bill 1308*, PA. GEN. ASSEMBLY, http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2009&sind=0&body=H&type=B&bn=1308 (last visited Mar. 18, 2012).

⁹² See *State v. Forrester*, 587 P.2d 179, 184 (Wash. Ct. App. 1978) (“To determine whether or not a . . . conversation is private [for the purposes of Washington’s all-party consent wiretapping prohibition that requires a reasonable expectation of privacy], the court must consider the intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case.”).

⁹³ See Wasserman, *supra* note 77, at 650.

definition of the term it involves an intrusion into a person's bodily integrity. To speak of an arrest as a private occurrence seems to me to stretch even the broadest definitions of the idea of privacy beyond the breaking point.⁹⁴

This is not to say that police officers never have an expectation for privacy when engaging with the public, but rather that privacy is the exception, not the rule.⁹⁵

II. THE RIGHT TO RECORD THE POLICE IS "CLEARLY ESTABLISHED"

A. 42 U.S.C. § 1983 and the Qualified Immunity Defense

A lawsuit brought against a police officer or municipality under 42 U.S.C. § 1983 is the forum in which the First Amendment right to record the police is most likely to be considered by courts.⁹⁶ Section 1983 provides a civil remedy for individuals whose constitutional rights have been violated by a person acting under color of law:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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 redress⁹⁷

The individuals being sued—usually government officials such as police officers—are entitled to an affirmative defense under the doctrine of qualified immunity.⁹⁸ Immunity will only be granted if properly invoked

⁹⁴ William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, 23 U. KAN. L. REV. 1, 8 (1974).

⁹⁵ Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers' Power*, 117 YALE L.J. 1549, 1555 (2008). Police officers can create an expectation of privacy that rightfully should protect the contents of their communications by "exercis[ing] some control to protect sensitive investigative or personal information against citizen recording by ensuring that they communicate about such information only in their own private spaces, or at least out of citizens' apparent earshot." *Id.* at 1556. However, these steps should not be able to shield an officer who wishes to verbally or physically assault a suspect because this might encourage more active efforts to conceal misconduct.

⁹⁶ 42 U.S.C. § 1983 (2006). First Amendment claims can, of course, arise in other contexts. *See, e.g.,* Jean v. Mass. State Police, 492 F.3d 24, 30 (1st Cir. 2007) (permitting dissemination of an Internet posting of police conduct after a plaintiff successfully challenged police interference under the Massachusetts interception statute); ACLU v. Alvarez, No. 10-C-5235, 2011 U.S. Dist. LEXIS 2088 (N.D. Ill. Jan. 10, 2011) (seeking injunctive relief against Illinois's eavesdropping statute); Commonwealth v. Hyde, 750 N.E.2d 963 (Mass. 2001) (challenging the use of a Massachusetts wiretapping statute to prosecute a criminal defendant for recording the police).

⁹⁷ § 1983.

⁹⁸ Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) ("Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official."); *see also* BLACK'S LAW DICTIONARY 818 (9th ed. 2009) (defining "qualified immunity" as "[i]mmunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights"). Qualified immunity is justified because it mitigates the

and if the actor's "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁹⁹ Thus, courts can dismiss a case on qualified immunity grounds if: (1) a constitutional right was not violated or (2) the right was not clearly established.¹⁰⁰

In 2001, the Supreme Court's decision in *Saucier v. Katz* required courts to first consider the constitutional element, and only if a party establishes that a constitutional right was violated were courts to consider "whether the right was clearly established."¹⁰¹ However, the Court quickly became convinced that the *Saucier* sequence was an unworkable and unwise approach.¹⁰² In *Pearson v. Callahan*, the Court dramatically shifted the way in which courts may analyze the qualified immunity defense.¹⁰³ *Pearson* allows courts to use their "sound discretion" when choosing the order in which the qualified immunity factors are considered.¹⁰⁴ For citizen recorders of police conduct, the outcome was not good. After *Pearson*, federal courts became more likely to declare that the right to record police conduct has not been clearly established than they were to engage in a constitutional analysis.¹⁰⁵

The precise meaning of "clearly established" is hazy.¹⁰⁶ The Court has stated that a clearly established right must be "sufficiently clear" and

fear of lawsuits that might otherwise chill or inhibit lawful and necessary actions by state officials. See JAMES E. PFANDER, PRINCIPLES OF FEDERAL JURISDICTION 227 (2d ed. 2011).

⁹⁹ *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow*, 457 U.S. at 818) (internal quotation marks omitted).

¹⁰⁰ See *Harlow*, 457 U.S. at 818.

¹⁰¹ 533 U.S. 194, 201 (2001). This ordering was important because questions of qualified immunity under § 1983 claims may be the only avenue in which a constitutional question could be brought before a court. See Sarah Lynn Lochner, Note, *Qualified Immunity, Constitutional Stagnation, and the Global War on Terror*, 105 NW. U. L. REV. 829, 832 (2011) (arguing that constitutional rights for individuals being prosecuted or detained as part of the "Global War on Terror" are most readily developed by courts under the qualified immunity analysis that follows the *Saucier* sequence).

¹⁰² John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 115–16 & nn.4–5 (citing cases that discuss the burden that "unnecessary merits adjudications" can place on courts).

¹⁰³ 555 U.S. at 223.

¹⁰⁴ *Id.* at 236.

¹⁰⁵ See, e.g., *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010); *Szymecki v. Houck*, 353 F. App'x 852, 853 (4th Cir. 2009); *Adkins v. Guam Police Dep't*, No. 09-00029, 2010 U.S. Dist. LEXIS 87353, at *28–36 (D. Guam Aug. 24, 2010); *Banks v. Gallagher*, No. 3:08-1110, 2010 U.S. Dist. LEXIS 55308, at *35–36 (M.D. Pa. Mar. 18, 2010); *Matheny v. Cnty. of Allegheny*, No. 09-1070, 2010 U.S. Dist. LEXIS 24189, at *12 (W.D. Pa. Mar. 16, 2010); *Gravolet v. Tassin*, No. 08-3646, 2009 U.S. Dist. LEXIS 45876, at *12–13 (E.D. La. June 2, 2009). The recently decided exception is *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

¹⁰⁶ *Eastwood v. Dep't of Corr.*, 846 F.2d 627, 630 (10th Cir. 1988) ("Definitions of what constitutes a clearly established right have been hazy."); Charles R. Wilson, "Location, Location, Location": *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447–48 (2000) ("Determining exactly when a right is 'clearly established' for qualified immunity purposes is

“apparent” such that a reasonable official would know that his actions violated a protected right.¹⁰⁷ This knowledge can be inferred if the official had “fair warning” that his actions violated a person’s constitutional rights.¹⁰⁸ One way to demonstrate fair warning is to show that a “robust consensus of cases of persuasive authority”¹⁰⁹ delineates the right “beyond debate.”¹¹⁰ Although the Court has failed to suggest a metric for determining what constitutes a “robust consensus,”¹¹¹ it has stated that the absence of “materially similar” precedent does not preclude a finding that a right was clearly established.¹¹² Therefore courts may look outside intracircuit and Supreme Court caselaw to make that finding, just as the Supreme Court itself has done.¹¹³ Despite the latitude that courts enjoy in deciding whether a right is clearly established, nearly every federal court that has decided the issue since *Pearson* has foregone constitutional analysis in favor of holding that the right to record police has not been clearly established.¹¹⁴ This is unsurprising given that weighing the rights and needs of citizens against those of the police is an unenviable task that anyone would justifiably want to avoid.¹¹⁵

philosophically complex. . . [And,] there is remarkably little consensus among the United States circuit courts concerning how to interpret the term . . .”).

¹⁰⁷ *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

¹⁰⁸ *Hope v. Pelzer*, 536 U.S. 730, 739–41 (2002).

¹⁰⁹ *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)) (internal quotation marks omitted).

¹¹⁰ *Id.* at 2083. Justice Scalia’s phrase “beyond debate” is a disappointingly unhelpful contribution to the development of the definition of “clearly established.” Failing to provide a metric for making such a determination changes the actual words that courts will use in their rulings without affecting the outcomes they will ultimately reach or the means by which they arrive at these decisions. More helpful would have been examples of what, if anything, places critical constitutional issues beyond debate.

¹¹¹ The First Circuit has suggested that “two closely related” cases may be sufficient to find that a right is clearly established. *Wilson v. City of Boston*, 421 F.3d 45, 57 (1st Cir. 2005).

¹¹² *Hope*, 536 U.S. at 739.

¹¹³ *Id.* at 741–42 (looking to an Alabama Department of Corrections regulation and a Department of Justice report, in addition to binding precedent, to determine that conduct violated a “clearly established” constitutional right); *see also* *Willingham v. Loughnan*, 321 F.3d 1299, 1301 (11th Cir. 2003) (“General statements of the law contained within the Constitution, statute, or caselaw may sometimes provide ‘fair warning’ of unlawful conduct.” (quoting *Hope*, 536 U.S. at 741)). *But see* *Adkins v. Guam Police Dep’t*, No. 09-00029, 2010 U.S. Dist. LEXIS 87353, at *36 (D. Guam Aug. 24, 2010) (“If the only way to find there is a clearly established right is to look to other circuits for guidance then it is likely that the right is not, in fact, clearly established in this circuit.”).

¹¹⁴ *See supra* note 105 (citing opinions by federal courts that have decided the issue). The recent First Circuit case *Glik v. Cunniffe* is an encouraging exception. *See* 655 F.3d 78, 84–85 (1st Cir. 2011).

¹¹⁵ *See* *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011) (“In this category of qualified immunity cases, a court can enter judgment without ever ruling on the (perhaps difficult) constitutional claim the plaintiff has raised. Small wonder, then, that a court might leave that issue for another day.”); *Wilson, supra* note 106, at 447 (“Judges in qualified immunity matters frequently face a series of unappealing moral choices, ranging from subjecting a public servant to personal liability for conduct undertaken in good faith, to eliminating a potential remedy for a plaintiff who has been subjected to embarrassing and degrading conduct.”).

Unfortunately, courts that use their *Pearson* discretion to avoid determining whether a constitutional right exists and then declare that a right is not clearly established can do so *ad infinitum*. This leads to the undesirable consequence that a right might never be “established”:

Officer A contends that the right to videotape police is not clearly established and the judge, without deciding if there is such a right, agrees that the law in that regard is not clearly established and that Officer A is entitled to qualified immunity. Case dismissed. A year later, when you sue Officer B, the judge looks at her earlier opinion and sees that the law is no clearer now than it was a year ago. Case dismissed. And when you sue Officer C the law is no clearer than it was in the previous two cases. Case dismissed. And so on.¹¹⁶

No standard is articulated and individuals seeking to record police conduct are consequently deprived of a framework for determining the limits, if any, of their right to do so.¹¹⁷ However, indefinite lack of clarity is not a foregone conclusion¹¹⁸ because considerable evidence supports the notion that the right to record police conduct—a derivative of the right to observe and report on police conduct and misconduct—has been clearly established.

B. Current Circuit Split

Both the First and Third Circuits have recently ruled on whether the right to record the police is clearly established, each reaching a different conclusion: in *Glik v. Cunniffe*, the First Circuit found the right clearly established;¹¹⁹ in *Kelly v. Borough of Carlisle*, the Third Circuit found that it was not.¹²⁰

I. *The First Circuit: Glik v. Cunniffe*.—On October 1, 2007, Simon Glik noticed three Boston Police officers arresting a man near Boston Common.¹²¹ When he overheard another bystander say, “You are hurting

¹¹⁶ Mary Catherine Roper, *3rd Circuit Police Videotaping Case Leaves Uncertainty in Its Wake*, LEGAL INTELLIGENCER, Oct. 25, 2010, at 7, 7–8.

¹¹⁷ *E.g.*, *Camreta*, 131 S. Ct. at 2030–31 (explaining that, by failing to address novel issues and claims, courts fail to encourage law-abiding behavior in public officials); Jeffries, *supra* note 102, at 120 (“Without merits adjudication, the legal rule would remain unclear, and development of the law would be forestalled by repeated applications of qualified immunity.”); Roper, *supra* note 116, at 8 (“If the judge never addresses the first step in the *Saucier* analysis, then the law remains ambiguous and your clients remain without protection.”).

¹¹⁸ The recent Supreme Court ruling in *Camreta v. Greene* supports this claim. In *Camreta*, the Court held that the party that wins a qualified immunity defense may still appeal a victory to clarify the constitutionality of the challenged actions. 131 S. Ct. at 2030–32. This will have the effect of “establishing controlling law” and “promot[ing] clarity—and observance—of constitutional rules.” *Id.* at 2030. If lower courts know that a ruling on the constitutionality of a government actor’s conduct can be appealed, they might be more likely to engage in at least a minimal explication of constitutional standards, thereby making courts more likely to decide, rather than avoid, constitutional issues.

¹¹⁹ 655 F.3d 78, 82 (1st Cir. 2011).

¹²⁰ 622 F.3d 248, 262 (3d Cir. 2010).

¹²¹ *Glik*, 655 F.3d at 79.

him, stop,” he realized the officers might be using excessive force and began recording the arrest with his cell phone.¹²² As Glik recorded the arrest from a distance of approximately ten feet, one of the officers said, “I think you have taken enough pictures,” to which Glik replied, “I am recording this. I saw you punch him.”¹²³ After this exchange, one of the officers asked Glik if his cell phone was recording audio, and when Glik confirmed that it was, he was placed under arrest for violating Massachusetts’s all-party consent wiretapping statute.¹²⁴ Glik’s criminal charges for violating the wiretapping statute were dismissed by the Boston Municipal Court because he made no effort to conceal the fact that he was recording the police and therefore did not meet the element of the offense requiring that the recording be intentionally secretive.¹²⁵

As is its prerogative in qualified immunity analysis, the First Circuit chose first to determine whether a First Amendment right to record the police exists. Drawing on longstanding Supreme Court precedent, the First Circuit held that the First Amendment proscribes laws that abridge an individual’s rights to free speech, a free press, and a “range of conduct related to the gathering and dissemination of information.”¹²⁶ The court specifically noted that the right to gather and disseminate information applies to the media and nearby citizens with cell phone and video cameras alike, particularly when that information is of public importance or relates to the duties of public officials.¹²⁷ This right is not unlimited, however, and is subject to content-neutral time, place, and manner restrictions.¹²⁸

Upon finding that the right exists, the First Circuit then found that it was clearly established because its ruling in *Iacobucci v. Boulter*, decided nearly a decade before Glik’s arrest,¹²⁹ “recognized a right to film government officials or matters of public interest in public space.”¹³⁰ The First Circuit concluded that *Iacobucci*, in conjunction with several extracircuit cases, led squarely to the conclusion that “a citizen’s right to

¹²² *Id.* at 79–80. Glik is now a practicing attorney in Boston, Massachusetts, having graduated from New England Law School in 2006. Simon Glik, *About Me*, GLIKLAW, http://gliklaw.com/gliklaw/About_Me.html (last visited Mar. 18, 2012).

¹²³ *Glik*, 655 F.3d at 80 (internal quotation marks omitted).

¹²⁴ *Id.* (citing MASS. GEN. LAWS ch. 272, § 99(C)(1) (2011) (prohibiting secretly recording another’s conversation)); *see also* § 99(B)(4) (“The term ‘interception’ means 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.*” (emphases added)).

¹²⁵ *Glik*, 655 F.3d at 80.

¹²⁶ *Id.* at 82.

¹²⁷ *Id.* at 84 (citing *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999)).

¹²⁸ *Id.* (citing *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000)). *Smith* is discussed in more detail *infra* Part II.C.1.

¹²⁹ 193 F.3d at 14.

¹³⁰ *Glik*, 655 F.3d at 84–85.

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.”¹³¹ The court reached this conclusion despite noting that the Third Circuit came to the opposite one in *Kelly v. Borough of Carlisle*.¹³² The First Circuit supported its holding by distinguishing the facts and context of Simon Glik’s case.¹³³ But even in the absence of these slightly divergent facts, *Kelly* is unpersuasive because of internal inconsistencies and analytical shortcomings.

2. *The Third Circuit: Kelly v. Borough of Carlisle.*—In *Kelly*, Officer David Rogers stopped Tyler Shopp for speeding and a bumper-height violation.¹³⁴ The plaintiff, Brian Kelly, was Shopp’s passenger and had with him a small video camera that he used to record the incident.¹³⁵ Toward the end of the encounter, Officer Rogers informed the boys that he was recording their conversation, at which point he discovered that Kelly was also recording their interaction.¹³⁶ Believing this to be a violation of Pennsylvania’s wiretapping law, Officer Rogers ordered Kelly to turn over the camera,¹³⁷ evidently failing to appreciate the “do as I say, not as I do” double standard of the command. After Kelly complied, Officer Rogers returned to his patrol car, called an Assistant District Attorney to confirm that Kelly’s behavior had violated the wiretapping statute, and arrested and detained the teenager for twenty-seven hours.¹³⁸

When the charges against him were eventually dropped,¹³⁹ Kelly filed a claim against Officer Rogers and the Borough of Carlisle under § 1983 for violating his First Amendment right to record the police.¹⁴⁰ Officer Rogers and the Borough of Carlisle successfully invoked a qualified immunity defense at trial, where the judge held that the right to record the police had not been clearly established.¹⁴¹ In affirming the lower court’s ruling, the

¹³¹ *Id.* at 85 (citing *Smith*, 212 F.3d at 1333; *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995)).

¹³² 622 F.3d 248, 262 (3d Cir. 2010).

¹³³ *Glik*, 655 F.3d at 85.

¹³⁴ 622 F.3d at 251.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* (citing Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 PA. CONS. STAT. §§ 5701–5782 (2010)).

¹³⁸ *Id.* at 251–52.

¹³⁹ *Id.* at 252; *see also* Miller, *supra* note 28 (“[Cumberland County District Attorney David] Freed said he withdrew the charge after reviewing evidence in the case and state court rulings regarding application of the wiretap law.”).

¹⁴⁰ *Kelly*, 622 F.3d at 252 (citing 42 U.S.C. § 1983 (2006)). Kelly also sued for violation of his Fourth Amendment rights. *Id.* at 252, 254.

¹⁴¹ *Id.* at 252–53 (“The [district] [c]ourt reasoned that . . . it was unclear whether Kelly had a right to videotape the police stop . . .”).

Third Circuit reasoned that: (1) the right to record the police had only been “hypothesized” by courts in the past,¹⁴² (2) cases that support a “general right to record matters of public concern” were “insufficiently analogous”¹⁴³ to Kelly’s case, and (3) the three on-point cases it cited were numerically insufficient to clearly establish the right.¹⁴⁴

Although the *Kelly* court’s analysis of the “clearly established” prong of the qualified immunity defense appears doctrinally plausible, it is incomplete for two reasons. First, it cited and then overlooked both Third Circuit precedent that calls for a low threshold for concluding that a right is clearly established, as well as Supreme Court precedent that allows the “clearly established” prong to be satisfied in cases lacking the “exact” same set of facts. Second, it largely ignored the context of the issue given the facts of Brian Kelly’s case, such as evidence that Officer Rogers actually did know of a citizen’s right to record police conduct.

The *Kelly* court cited the low threshold for finding a right clearly established in the Third Circuit’s opinion in *Kopec v. Tate*,¹⁴⁵ and concluded that such a finding could be based solely on the “case law of other circuits.”¹⁴⁶ It added that, “[alt]hough we have not [yet] had occasion to decide this [specific] issue, several other courts have addressed the right to record police while they perform their duties.”¹⁴⁷ The court then cited three cases—one from the Third Circuit,¹⁴⁸ one from a district court in Pennsylvania,¹⁴⁹ and another from the Eleventh Circuit¹⁵⁰—that support a citizen’s right to record police conduct.¹⁵¹ However, and without adequate

¹⁴² *Id.* at 260 (quoting *Gilles v. Davis*, 427 F.3d 197, 212 n.14 (3rd Cir. 2005)).

¹⁴³ *Id.* at 261–62.

¹⁴⁴ *See id.* at 262.

¹⁴⁵ 361 F.3d 772, 778 (3d Cir. 2004) (“[I]t cannot be said as a matter of law that a reasonable officer would not have known that his conduct was in violation of [a constitutional right] even though it appears that neither the Supreme Court nor [the Third Circuit] has ruled [on the issue].”).

¹⁴⁶ *Kelly*, 622 F.3d at 260; *see also* RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 376 (1996) (“The tendency in the courts of appeals is to treat Supreme Court decisions and decisions of the same circuit as authoritative and to interpret them broadly, but to treat decisions of other circuits as no more than persuasive and to interpret them narrowly. I am not sure how sensible this pattern is.”).

¹⁴⁷ *Kelly*, 622 F.3d at 260.

¹⁴⁸ *Id.* (“[V]ideotaping or photographing the police in the performance of their duties on public property may be a protected activity.” (emphasis omitted) (quoting *Gilles v. Davis*, 427 F.3d 197, 212 n.14 (3d Cir. 2005)) (internal quotation marks omitted)).

¹⁴⁹ *Id.* at 260–61 (“[T]here is a free speech right to film police officers in the performance of their public duties.” (citing *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005))).

¹⁵⁰ *Id.* at 260 (“[There is] a ‘First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct’ . . . ‘[T]he 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.’” (quoting *Smith v. City of Cumming*, 212 F.3d 1332, 1332–33 (11th Cir. 2000))).

¹⁵¹ *Id.* at 260–61.

explanation, the court then concluded that these three cases were “insufficient” to “put a reasonably competent officer on ‘fair notice’ that seizing a camera or arresting an individual for videotaping police during [a traffic] stop would violate the First Amendment.”¹⁵²

Kelly also favorably cited the Supreme Court’s decision in *Hope v. Pelzer* for the proposition that it is “not necessary” for the “exact set” of factual circumstances at issue to have been previously analyzed to find that a right is clearly established.¹⁵³ However, *Kelly* ultimately refused to follow the aforementioned caselaw that supports the “proposition that a general right to record matters of public concern has been clearly established”¹⁵⁴ precisely because it was factually distinct from Brian Kelly’s case.¹⁵⁵ All told, the *Kelly* court referenced a total of eight cases¹⁵⁶ that supported the right to record public officials, three of which expressly supported that right

¹⁵² *Id.* at 262. *But see infra* note 159 and accompanying text (discussing a case from the District of New Jersey cited in *Kelly* as an example of doctrinal ambiguity).

¹⁵³ *Kelly*, 622 F.3d at 259 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)).

¹⁵⁴ *Id.* at 261.

¹⁵⁵ *Id.* at 262 (“We find these cases insufficiently analogous to the facts of this case to have put Officer Rogers on notice of a clearly established right to videotape police officers during a traffic stop.”). To emphasize the uniqueness of the facts, the court emphasized that “none of the precedents upon which *Kelly* relies involved traffic stops.” *Id.* at 262. This statement adds little to the analysis and is also factually incorrect. In *Smith v. City of Cumming*, the Eleventh Circuit explicitly held that citizens have a First Amendment right to record the police. 212 F.3d at 1332–33. Although not mentioned in the text of the opinion, a cursory examination of the briefs indicates the issue actually did arise in the context of traffic stops. Brief of Appellant at 2, 11–12, *Smith*, 212 F.3d at 1332 (No. 99-8199-J); *see also infra* Part II.C.1 (discussing *Smith* in greater detail). In an effort to diminish *Smith*’s persuasive value, the *Kelly* court noted that, “[i]n the decade since [*Smith*] was decided, our decision in *Gilles* is the only federal appeals court case to cite it.” *Kelly*, 622 F.3d at 260 (citing *Gilles v. Davis*, 427 F.3d 197, 212 n.14 (3d Cir. 2005)). This assertion, while correct, more likely reflects the fact that no court, circuit court of appeals or otherwise, considered whether individuals have a First Amendment right to record the police from 2000 until 2005. On July 19, 2005, a district court in the Third Circuit unequivocally held that the right exists. *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 542 (E.D. Pa. 2005). Just three months later, in *Gilles v. Davis*, the Third Circuit stated that the right “may” exist. 427 F.3d at 212 n.14. Both cases cited *Smith. Id.; Robinson*, 378 F. Supp. 2d at 541. The only other circuit courts to discuss citizens recording police conduct before *Gilles* did not analyze whether the right to do so exists under the First Amendment or whether that right was clearly established. *See Johnson v. Hawe*, 388 F.3d 676, 679 (9th Cir. 2004) (determining whether recording a police officer in the conduct of his official duties violated Washington’s Privacy Act); *cf. Walker v. City of Pine Bluff*, 414 F.3d 989, 991–93 (8th Cir. 2005) (analyzing a citizen’s right to observe the police performing their duties and considering whether an officer has “arguable probable cause to arrest [an individual] for obstructing governmental operations because [that individual] distracted officers who were conducting a traffic stop by silently watching the encounter from across the street with his arms folded in a disapproving manner.”).

¹⁵⁶ In order of reference by the *Kelly* court, the cases are: (1) *Gilles*, 427 F.3d at 212 n.14; (2) *Smith*, 212 F.3d at 1332–33; (3) *Robinson*, 378 F. Supp. 2d at 541; (4) *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); (5) *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994); (6) *Demarest v. Athol/Orange Community Television, Inc.*, 188 F. Supp. 2d 82, 94 (D. Mass. 2002); (7) *Thompson v. City of Clio*, 765 F. Supp. 1066, 1070 (M.D. Ala. 1991); and (8) *Lambert v. Polk County*, 723 F. Supp. 128, 133–35 (S.D. Iowa 1989). *See* 622 F.3d at 260–63.

with regard to police officers.¹⁵⁷ This is twice as many cases as the Third Circuit needed to find a right clearly established in *Kopec*.¹⁵⁸ In fact, the *Kelly* court did not identify a single case that denied the existence of the right to record the police or other public officials,¹⁵⁹ even though denying citizens the right to record police conduct is the practical outcome of its ruling.¹⁶⁰ Nor could the *Kelly* court draw on any additional post-*Pearson*¹⁶¹ cases from the Third Circuit that analyzed the constitutional merits of the right because those cases uniformly held that the right was not “clearly established.”¹⁶² Therefore, *Kelly*, the third court in the Third Circuit to conclude that the right to record the police was not “clearly established,” appears to bear out *Saucier*’s unsettling prediction that “[t]he law might be deprived of [an] explanation were a court simply to skip ahead to the

¹⁵⁷ See *id.* at 260–61.

¹⁵⁸ The court in *Kopec* cites Third Circuit precedent to establish the principle that “[t]his court has adopted a broad view of what constitutes an established right of which a reasonable person would have known.” 361 F.3d 772, 778 (3d Cir. 2004) (alteration in original) (quoting *Burns v. Cnty. of Cambria*, 971 F.2d 1015, 1024 (3d Cir. 1992)) (internal quotation marks omitted). The *Kopec* court then used this principle to declare a right clearly established by using three factually distinct cases, all from courts outside the Third Circuit. *Id.* (citing *Martin v. Heideman*, 106 F.3d 1308, 1312 (6th Cir. 1997); *Alexander v. Cnty. of Los Angeles*, 64 F.3d 1315, 1322–23 (9th Cir. 1995); *Palmer v. Sanderson*, 9 F.3d 1433, 1436 (9th Cir. 1993)). In fact, *Kopec* only cites to the Third Circuit to justify its use of persuasive precedent from other circuits. *Id.* This makes it peculiar that *Kelly* fails to do the same with precedent that is more factually and geographically analogous.

¹⁵⁹ The court cited *Pomykacz v. West Wildwood* as an example of a court that “declined to adopt [the] blanket assertion that ‘the observation and monitoring of public officials is protected by the [F]irst [A]mendment.’” *Kelly*, 622 F.3d at 261 (alterations in original) (emphasis added) (quoting *Pomykacz v. W. Wildwood*, 438 F. Supp. 2d 504, 512–13 & n.14 (D.N.J. 2006)). However, stating that an alternative argument can be made without adopting one side or the other is not an affirmative denial of that argument. Moreover, the *Kelly* court ignored a case from a Pennsylvania district court that supports the conclusion that the public has a right to record the police in a public place. See *McKenna v. City of Philadelphia*, No. 07-CV-110, 2008 U.S. Dist. LEXIS 76766, at *11, 32–34 (E.D. Pa. Sept. 30, 2008), *aff’d*, 582 F.3d 447 (3d Cir. 2009) (“At the plaintiffs’ request (and over the objection of the City), I gave [a jury] instruction in this case that videotaping [the police] in a public place was a protected activity, but I declined to extend that right to the secured area of the police district.”). It also failed to mention extra-district cases that reach the opposite conclusion of *Pomykacz*. See *Am. Steel Erectors, Inc. v. Local Union No. 7, Int’l Ass’n of Bridge Workers*, No. 04-12536, 2006 WL 300422, at *4 n.6 (D. Mass. 2006), *aff’d*, 536 F.3d 68 (1st Cir. 2008) (“Videotaping of public activity for the purposes of petitioning governmental authorities would seem to be activity protected by the First Amendment.”).

¹⁶⁰ See *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011) (arguing that the absence of constitutional decisions will likely cause officials to “persist[] in [the] challenged practice” because the official “knows that he can avoid liability” in the future by means of granted qualified immunity because the law “still” remains not clearly established).

¹⁶¹ In *Robinson v. Fetterman*, the district court concluded that the right to record the police exists, 378 F. Supp. 2d at 534, but the case was decided before *Pearson* gave courts discretion to choose the order in which they engage in qualified immunity analysis, 555 U.S. 223 (2009).

¹⁶² *Banks v. Gallagher*, No. 3:08-1110, 2010 U.S. Dist. LEXIS 55308, at *35–36 (M.D. Pa. Mar. 18, 2010); *Matheny v. Cnty. of Allegheny*, No. 09-1070, 2010 U.S. Dist. LEXIS 24189, at *12 (W.D. Pa. Mar. 16, 2010).

question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."¹⁶³

The *Kelly* court should have also considered the above precedent¹⁶⁴ in light of the specific context of Brian Kelly's case. The Supreme Court has stated that the "specific context" of a case's facts is relevant in determining whether a right was clearly established at the time the government official acted,¹⁶⁵ and that the police officers "can still be on notice that their conduct violates established law even in novel factual circumstances" as long as the defendant had "'fair warning' that his conduct was unconstitutional."¹⁶⁶ In *Kelly*, Officer Rogers almost certainly had "fair warning" of these court decisions at the time of Kelly's arrest. This is because the Borough of Carlisle's police department has a "very vigorous training program"¹⁶⁷ that, in 2007, included a required "Legal Updates"¹⁶⁸ course that covered "legal issues affecting municipal police officers," such as "United States Supreme Court opinions and Pennsylvania court decisions regarding Search and Seizure as well as other pertinent case law."¹⁶⁹ Decisions establishing the right to record police conduct had been on the books in Pennsylvania for two years prior to the incident in *Kelly*.¹⁷⁰ Moreover, the Manheim Township Police Department in nearby Lancaster, Pennsylvania had an official policy of "recogniz[ing] the legal standing of members of the public to make video/audio recordings of police officers" since December 2007 at the latest.¹⁷¹ Although published after Kelly's arrest, it is unreasonable to

¹⁶³ *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

¹⁶⁴ See *supra* notes 148–50 and accompanying text.

¹⁶⁵ *Id.* (stating that the inquiry into whether a right was clearly established for the purposes of a qualified immunity defense "must be undertaken in light of the specific context of the case, *not* as a broad general proposition" (emphasis added)).

¹⁶⁶ *Kelly v. Borough of Carlisle*, 622 F.3d 248, 259–60 (3d Cir. 2010) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

¹⁶⁷ CARLISLE POLICE DEP'T, ANNUAL REPORT 9 (2008), available at <http://www.carlislepa.org/vertical/Sites/%7BD4E19CE2-0C18-44BC-A364-9960FD11CF6F%7D/uploads/%7B26769A02-E19D-4FDD-8EEC-73FF6BA00E02%7D.pdf>.

¹⁶⁸ *Id.* at 9–10. The Municipal Police Officers' Education and Training Program was created by statute and provides for a commission that can "establish and administer the minimum courses of study for basic and in-service training for police officers and to revoke an officer's certification when an officer fails to comply with the basic and in-service training requirements," 53 PA. CONS. STAT. § 2164(1) (2010), and "require[s] every police officer to attend a minimum number of hours of in-service training," *id.* § 2164(6).

¹⁶⁹ 2007 *MIST Topics*, COMMONWEALTH OF PA. MUN. POLICE OFFICERS' EDUC. & TRAINING COMM'N, <http://www.portal.state.pa.us/portal/server.pt/community/mpoetc/7545/training/595035> (last visited Mar. 18, 2012). Although this source was easily retrieved through a Google search, Brian Kelly's attorneys failed to cite to these documents as strong evidence that Officer Rogers actually knew of these cases. See Brief of Appellant at 25–32, *Kelly*, 622 F.3d at 248 (No. 09-2644), 2009 WL 6358608 at *25–31.

¹⁷⁰ See, e.g., *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 542 (E.D. Pa. 2005).

¹⁷¹ MANHEIM TOWNSHIP POLICE DEP'T, POLICY MANUAL 1 (2007), available at <http://www.aele.org/law/2009all05/manheim.pdf>.

assume that a township within an hour of the Borough of Carlisle would possess exclusive knowledge of such a right.

Given the facts of the case, the relevant caselaw, and the *Kelly* court's failure to definitively establish that Officer Rogers lacked actual knowledge of the right, the Third Circuit should have concluded that the right to record the police was clearly established and conducted a merits analysis of Kelly's constitutional claims. Doing so would have brought the Third Circuit's opinion in line with the First Circuit's more recent holding in *Glik v. Cunniffe*,¹⁷² at least in terms of analytical procedure. The next sections further support this conclusion with a more detailed examination of evidence from outside the Third Circuit,¹⁷³ background information on the historical and traditional practice of the public monitoring of police conduct, and a review of contemporary legal scholarship.

C. *The Right to Record Police Is "Clearly Established"*

Although the "clearly established" standard is generally considered within the "specific context of the case" and not as a "broad general proposition,"¹⁷⁴ numerous sources—in addition to First Circuit's decision in *Glik v. Cunniffe*—support the idea that the right to record the police is clearly established at the national level.¹⁷⁵ A "right" is "[s]omething that is due to a person by just claim, legal guarantee, or moral principle."¹⁷⁶ As such, intracircuit caselaw (an example of a right established by "legal guarantee") is only one piece of the puzzle, and therefore additional sources should be considered persuasive when determining whether a right is clearly established. Subsection C.1 examines established caselaw in circuit courts of appeal, subsection C.2 outlines the historical and traditional practice of the public monitoring police conduct, and subsection C.3 briefly presents contemporary legal scholarship. These sources are useful not only because a circuit's own precedent may not necessarily capture the overriding "moral principle" of the right, but also because these numerous sources necessarily interact to "establish" rights and communicate them to the general public.

I. *Smith v. City of Cumming*.—The right to record police conduct was first promulgated by the Eleventh Circuit in its 2000 opinion *Smith v. City of Cumming*.¹⁷⁷ In *Smith*, plaintiffs James and Barbara Smith filed a suit

¹⁷² 655 F.3d 78 (1st Cir. 2011); see also *supra* Part II.B.1 (discussing the First Circuit's opinion).

¹⁷³ See, e.g., *Bergeron v. Cabral*, 560 F.3d 1, 11 (2009) ("The court should search the relevant authorities both in circuit and out of circuit.")

¹⁷⁴ *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

¹⁷⁵ The Fourteenth Amendment renders the First Amendment applicable to the states. *E.g.*, *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (citing Supreme Court cases).

¹⁷⁶ BLACK'S LAW DICTIONARY 1436 (9th ed. 2009).

¹⁷⁷ 212 F.3d 1332, 1333 (11th Cir. 2000).

alleging harassment against the City of Cumming Police Department (CCPD) under § 1983.¹⁷⁸ Although not binding outside the Eleventh Circuit,¹⁷⁹ the facts of the case make the ruling particularly persuasive.

In response to what the couple thought to be an improper traffic stop conducted on Mrs. Smith, Mr. Smith used a police scanner¹⁸⁰ and a video camera to randomly track and videotape police officers making traffic stops to try to obtain evidence of the police improperly stopping other vehicles.¹⁸¹ Mr. Smith never interfered with the police activity and always recorded their conduct from public property.¹⁸² Nevertheless, the CCPD obtained an arrest warrant for Mr. Smith for “videotaping of . . . police officers.”¹⁸³

After continued harassment,¹⁸⁴ the Smiths filed suit under § 1983 for damages.¹⁸⁵ The district court dismissed the Smiths’s claim and they appealed to the Eleventh Circuit.¹⁸⁶ The court held that the Smiths “had a First Amendment right, subject to reasonable time, place, and manner restrictions, to photograph or videotape police conduct,” adding 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.”¹⁸⁷

When applied to the facts, this holding means that Mr. Smith was within his First Amendment rights to use a police scanner and video camera to follow and record police officers making traffic stops.¹⁸⁸ That Mr. Smith

¹⁷⁸ Brief of Appellant, *supra* note 155, at 3–10.

¹⁷⁹ See POSNER, *supra* note 146, at 380 (“[T]he thirteen courts of appeals constitute at best a loose confederacy, brought under some semblance of unity only by their common subjection to the ultimate authority of the Supreme Court.”).

¹⁸⁰ In Florida, use of police scanners is legal as long as it is not done in furtherance of a crime. FLA. STAT. ANN. § 843.167(1)(a) (West Supp. 2012) (“A person may not [i]ntercept any police radio communication by use of a scanner or any other means for the purpose of using that communication to assist in committing a crime or to escape from or avoid detection, arrest, trial, conviction, or punishment in connection with the commission of such crime.”).

¹⁸¹ Brief of Appellant, *supra* note 155, at 11.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ CCPD officers obtained an arrest warrant against Mr. Smith for videotaping the police and allegedly “intimidate[d]” and “embarrass[ed]” the Smiths with it at their place of business. *Id.*

¹⁸⁵ *Smith v. City of Cumming*, 212 F.3d 1332, 1332 (11th Cir. 2000).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1333. However, the court also found that the Smiths failed to demonstrate that the CCPD violated this right. *Id.* (“Although the Smiths have a right to videotape police activities, they have not shown that the Defendants’ actions violated that right.”).

¹⁸⁸ See Brief of Appellant, *supra* note 155, at 11 (“If the [the police] performed a stop, [Mr. Smith] would videotape the *traffic stop*.” (emphasis added)). Of course, this fact completely undermines the Third Circuit’s claim that its “decision [in *Kelly v. Borough of Carlisle*] on the First Amendment question is further supported by the fact that none of the precedents [including *Smith v. City of Cumming*] . . . involve[] traffic stops,” *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010), rendering its holding even less persuasive. See discussion *supra* note 155.

actively followed the police to record their conduct strengthens the argument that this right exists and is clearly established because his actions are much more invasive than what many others are currently trying to do. Rather than follow the police looking for improper conduct, most police recorders are more likely to observe the police interacting with members of the public by happenstance, take out their cell phones, and press “record.”¹⁸⁹ Therefore, *Smith* supports the First Amendment rights of individuals to take spontaneous recordings, as well as those of third-party watchdog groups who are as active as Mr. Smith in tracking and monitoring police conduct.¹⁹⁰ Although *Smith* speaks to more modern means of making audio and video recordings to report police conduct, the act of observing the police and publicly disseminating complaints is a practice that dates back hundreds of years.

2. *Historical Public Monitoring of the Police.*—The police enjoy a unique grant of state power: “they are the only representatives of governmental authority who are legally permitted to use force against the citizen.”¹⁹¹ As such, their actions must be subject to public observation and reporting in a democratic society. The purpose of police in the American democratic experiment¹⁹² has always been to protect the “common good.”¹⁹³ America’s earliest police force, the “citizen Watchmen” of Boston,¹⁹⁴ was established in 1636 because of a general sentiment that communities should have watchers.¹⁹⁵ Modern policing is a function of these colonial

¹⁸⁹ See, e.g., Hillary Federico, *Quinnipiac Students Claim Police Brutality, 1 Arrested After Taping Cops*, MIDDLETOWN PRESS (Sept. 29, 2010, 12:41 PM), <http://www.middletownpress.com/articles/2010/09/29/news/doc4ca29f3b65426189342936.txt>; Alan Zarembo, *Confrontation Between Sheriff’s Deputies, Bus Rider Caught on Tape*, L.A. TIMES BLOG (Jan. 11, 2012, 10:37 AM), <http://latimesblogs.latimes.com/lanow/2012/01/confrontation-between-deputies-bus-rider-caught-on-tape.html>.

¹⁹⁰ Paul Crawley, *Overzealous Cops Cost Atlanta \$40,000 for Seizing Video*, 11ALIVE ATLANTA WXIA TV (Feb. 11, 2011, 8:24 PM), <http://www.11alive.com/news/local/story.aspx?storyid=177508> (“If you stand back away from the officers and you’re in a public place, you have an absolute right under 11th Circuit [Court of Appeals] law to photograph or video [tape] those officers,” said Dan Grossman . . .” (alterations in original)). Attorney Dan Grossman represented a member of a watchdog group who was allegedly assaulted by the police for recording their conduct. *Id.*

¹⁹¹ ZENITH GROSS & ALAN REITMAN, ACLU, POLICE POWER AND CITIZENS’ RIGHTS: THE CASE FOR AN INDEPENDENT POLICE REVIEW BOARD 4 (1966).

¹⁹² See Wilbur R. Miller, *Police Authority in London and New York City 1830–1870*, J. SOC. HIST., Winter 1975, at 81, 83 (arguing that American “representative democracy” caused police in mid-nineteenth century New York City to view their authority in a much different way than their contemporaries in London).

¹⁹³ See SAVAGE, *supra* note †, at 13.

¹⁹⁴ *Id.*

¹⁹⁵ See RAYMOND B. FOSDICK, AMERICAN POLICE SYSTEMS 59 (1920) (“As early as 1636 a night watch was established in Boston, and thereafter hardly an important settlement existed in New England that did not have, in addition to its military guard, a few ununiformed watchmen.” (footnote omitted)).

community ideals,¹⁹⁶ making the police “representatives or agents of society” and rendering their actions a proxy for citizen actions.¹⁹⁷ Moreover, police officers are themselves members of the community,¹⁹⁸ making them aware of their responsibility to the public as its representatives¹⁹⁹ and the public’s corresponding democratic right to monitor their actions.²⁰⁰

The democratic right to monitor and report on police conduct has been documented for more than a century. For example, in response to an assault and battery conviction against a police officer, the *Chicago Tribune* published an editorial in 1857 arguing that police officers who exceed their authority should “suffer the consequences” of the punishment they “deserve,” lamenting that violating officers often escape punishment because “those whom they oppress are too poor or too ignorant to enforce their rights.”²⁰¹ In 1892, the *New York Times* ran an even clearer and more direct report of police misconduct: a sixty-one-year-old man that was allegedly beaten and critically injured by police after being arrested for refusing to pay his streetcar fare.²⁰² The *Chicago Tribune* reported a factually similar altercation in 1893 between a policeman and a “negro porter,” where the porter alleged that the officer “peremptorily ordered” him into a basement and “appended to his order a kick and a stroke from his billy, which left an ugly scar on the negro’s forehead.”²⁰³ About two weeks later, the *Chicago Tribune* published an editorial that chastised a police officer for physically striking and arresting a citizen when he threatened to report the officer for failing to clear a crowded street.²⁰⁴ The author then approvingly described the offending officer’s dismissal from the police

¹⁹⁶ MARY JEANETTE HAGEMAN, POLICE–COMMUNITY RELATIONS 14–16 (James A. Inciardi ed., 1985).

¹⁹⁷ See Deborah Johnson, *Morality and Police Harm*, in ETHICS, PUBLIC POLICY, AND CRIMINAL JUSTICE 79, 86 (Frederick Elliston & Norman Bowie eds., 1982); see also DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 86 (2008) (“[C]ommunities exist, . . . have coherent views and interests, and . . . law enforcement, and the criminal justice system more generally, can and should reflect those interests.”); VICTOR G. STRECHER, THE ENVIRONMENT OF LAW ENFORCEMENT 15 (1971) (“The conclusion is inescapable that in this country, perhaps for the first time recorded in history, *policemen are proxies for other citizens.*”).

¹⁹⁸ W. H. Parker, *The Police Role in Community Relations*, 47 J. CRIM. L. CRIMINOLOGY & POL. SCI. 368, 371 (1956) (“A police department is . . . merely a group of citizens employed to exercise certain functions. It is created by the public, shaped by the public, and operated by the public.”).

¹⁹⁹ See HAGEMAN, *supra* note 196, at 22.

²⁰⁰ E.g., G. Richards, *Effective Police-Community Relations Are the Cornerstone of the Prevention and Detection of Crime*, 65 POLICE J. 10, 13 (1992) (“The police . . . recognize the citizen’s democratic right to monitor and criticize police actions which affect public welfare.”).

²⁰¹ Editorial, *Policemen and Their Duties*, CHI. DAILY TRIB., Sept. 3, 1857, at 1.

²⁰² See *Says Policemen Beat Him*, N.Y. TIMES, May 3, 1892, at 5.

²⁰³ *Says a Policeman Assaulted Him*, CHI. DAILY TRIB., Mar. 18, 1893, at 1.

²⁰⁴ See Editorial, *Remonstrating with Policemen*, CHI. DAILY TRIB., Apr. 6, 1893, at 4.

force following an unsuccessful defense of his actions in “police court.”²⁰⁵ The pages of nineteenth-century newspapers swelled with reports of police officers being arrested,²⁰⁶ charged,²⁰⁷ and subsequently convicted²⁰⁸ or acquitted²⁰⁹ of misconduct and brutality.

Over time, the complaint process has become more formalized with the creation of police oversight committees staffed by civilians and funded by state and local governments.²¹⁰ These boards exist all over the United States and have been around in some form for more than sixty years.²¹¹ Generally, these oversight boards investigate and recommend punishment for police misconduct.²¹² Of course, concrete evidence of misconduct in the form of a video on a cell phone would make these bodies more effective because they would generally have stronger evidence to help determine which claims have merit and which do not.²¹³

²⁰⁵ *Id.*; see also *Fighting the Police Is Timewell’s Life Work*, BOS. GLOBE, Apr. 4, 1909, at SM5 (praising a tailor in London, England, who made reporting, challenging, and “[f]ighting” police abuse his “life[’s] work”).

²⁰⁶ *E.g.*, *Arrest of a Lieutenant of Police on a Charge of Assault and Battery*, N.Y. DAILY TIMES, Nov. 14, 1856, at 6 (reporting that the Lieutenant of the Thirteenth Ward Police was “in trouble again” for “assault[ing a] deponent”); *Arrest of Police Officers Charged with Burglary*, N.Y. DAILY, Jan. 13, 1853, at 8 (describing police officers who were arrested for an alleged burglary at a “wholesale grocery store”).

²⁰⁷ *E.g.*, *A Strange Case*, ATLANTA CONST., Oct. 22, 1884, at 3D (reporting that three police officers were charged with a “very serious assault”); *Patrolman Hogan on Trial*, N.Y. TIMES, Aug. 22, 1889, at 8 (reporting charges that “[p]atrolman Peter Hogan . . . assaulted . . . a baker, . . . striking him with a heavy cane and fracturing his skull”); *Proceedings of the Courts*, SUN (Balt.), Sept. 2, 1861, at 1 (reporting that a police officer was charged with assault); *Several Police Officers Dismissed and Others Reprimanded*, CHI. TRIB., Feb. 22, 1870, at 3 (“Patrolman Thomas Flynn . . . was charged ‘with neglecting to treat persons civilly and respectfully on all occasions, and intoxication.’ He was discharged from the force.”); *The Rights of Colored Persons*, THE LIBERATOR (Bos.), May 13, 1853, at 75 (reporting that a police officer was charged for pushing a woman down stairs); *Two Police Officers Charged with Brutality to Citizens*, CHI. DAILY TRIB., Aug. 26, 1882, at 12 (reporting that police officers were charged with “brutally assault[ing]” a woman “during a fracas over the building of a fence” and “str[iking] in the face” a witness who “protested against such brutality”).

²⁰⁸ *E.g.*, *A New M.P. Convicted of Assault and Battery*, N.Y. DAILY TIMES, July 20, 1857, at 3.

²⁰⁹ In 1858, *The Sun* reported that a police officer was tried for assault when he allegedly “seized [a woman] by the throat” and then “choked her and pushed her violently against a door.” *Proceedings of the Courts*, SUN (Balt.), Mar. 2, 1858, at 1. The next day, the same paper reported that the jury “rendered a verdict of ‘not guilty.’” *Proceedings of the Courts*, SUN (Balt.), Mar. 3, 1858, at 1.

²¹⁰ See, e.g., Cheryl Beattie & Ronald Weitzer, *Race, Democracy and Law: Civilian Review of Police in Washington, DC*, in CIVILIAN OVERSIGHT OF POLICING 41, 51–52 (Andrew Goldsmith & Colleen Lewis eds., 2000) (discussing the establishment of Washington, D.C.’s publicly funded “Civilian Complaint Review Board” to adjudicate “all non-frivolous complaints” against the police).

²¹¹ See James R. Hudson, *Police Review Boards and Police Accountability*, 36 LAW & CONTEMP. PROBS. 515, 520, 523, 526 (1971) (explaining that the “Civilian Complaint Review Board” was established in New York City in 1953 and that the “Philadelphia Police Review Board” was established in 1958).

²¹² *Id.* at 520.

²¹³ See Deborah Jian Lee, *NYPD Calls On Citizens for Amateur Video Evidence*, REUTERS (July 31, 2008, 6:02 PM), <http://www.reuters.com/article/2008/07/31/us-newyork-crime-video>

It is becoming easier than ever for citizens to monitor the police given the ubiquity of cell phones able to record, edit, and instantly publish videos to the Internet.²¹⁴ Using a cell phone to record and disseminate police conduct is functionally identical to the traditional democratic right to observe and report police conduct. The only difference is that a camera is used instead of eyewitness testimony and hearsay—a change that actually benefits the accuracy of reporting misconduct.²¹⁵

3. *First Amendment Doctrine.*—This section summarizes the work of four authors who have addressed the First Amendment right to record police conduct, covering a number of ways in which the First Amendment protects the right of individuals to record police. They have not, however, discussed the doctrine of prior restraint. Professor Seth Kreimer argues that videotaping the police conveys a message and is inherently expressive, and that these “captured images” therefore constitute speech protected by the First Amendment,²¹⁶ even if they are not outwardly shared with another person.²¹⁷ He also argues that the right to record the police is protected by the right to gather information under the First Amendment.²¹⁸

Professor Howard Wasserman argues that the First Amendment’s Free Press and Petition Clauses also protect the right to record police conduct.²¹⁹ For the former, he suggests that modern technology has created a low-cost means to capture and disseminate video, making virtually anyone a member of the press because they can share information as easily as media outlets.²²⁰ For the latter, he writes that recording the police facilitates petitioning the

idUSN3136650420080731 (“Soon citizen sleuths can transmit evidence of criminal activity directly to the police and 911, including evidence of police misconduct . . .”).

²¹⁴ See Cohen, *supra* note 13.

²¹⁵ See Parker, *supra* note 198, at 375 (complaining that negative newspaper articles about police misconduct “were written solely from the unsubstantiated account given by the arrestee”); see also Gary L. Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440, 440 (1979) (“[S]taged-crime research indicates that eyewitness identifications are often unreliable.”).

²¹⁶ Kreimer, *supra* note 26, at 372–74. This was published in 2011, after the Third Circuit decided *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010). See discussion *supra* Part II.B.2. Professor Kreimer also argues that recording the police is speech, not conduct, because image capture with modern technology facilitates the subsequent transfer and dissemination of the footage. Kreimer, *supra* note 26, at 375–76.

²¹⁷ Kreimer, *supra* note 26, at 377–78.

²¹⁸ *Id.* at 387, 390–91. Professor Kreimer notes, however, that the right to gather information has been rejected by the Supreme Court as an “an unadorned First Amendment [right] that supersedes other legal obligations.” *Id.* at 387.

²¹⁹ Wasserman, *supra* note 77, at 656–58. Professor Wasserman’s article was published and available before the Third Circuit decided *Kelly*. See discussion *supra* Part II.B.2.

²²⁰ See *id.* at 657; see also *About CNN iReport*, CNN iREPORT, <http://ireport.cnn.com/about.jspa> (last visited Mar. 18, 2012) (inviting the average citizen to partake in news reporting).

government to redress grievances because video footage provides a reliable, “unambiguous,” and “conclusive” source of information.²²¹

Finally, two student pieces discuss the right to record police conduct under the First Amendment: Lisa Skehill argues that it falls within the right to gather information;²²² Jesse Alderman argues that the public has the right to receive information about police conduct.²²³ Prior restraint is the only area of First Amendment doctrine that has not been applied to recording police conduct.

III. PRIOR RESTRAINT

The doctrine of prior restraint refers to the suppression of speech before it reaches the public. Prior restraints traditionally took the form of requirements that individuals submit their speech to a government official for approval before sharing it with the public.²²⁴ The prohibition against prior restraint has its roots in seventeenth-century England. Before 1688, nothing could be published without approval from the Office of the Imprimeur.²²⁵ When that office was abolished, censorship disappeared and the press was “said to be free.”²²⁶ This idea of a free press was imported to the United States and immortalized in the Free Press Clause of the First Amendment to the Constitution.²²⁷

This Part applies the doctrine of prior restraint to recording and sharing depictions of police conduct. First, it outlines the rule established in *Near v. Minnesota*²²⁸ that prior restraints on speech are presumptively invalid and applies that rule to citizens recording the police; it continues by discussing the exceptions to this rule articulated in *Near* and shows that recording the police falls outside them. Second, it presents the post-*Near* expansion of what actions the Court considers prior restraint, showing them to

²²¹ Wasserman, *supra* note 77, at 658–59.

²²² Skehill, *supra* note 5, at 1000–02. *But see* *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“The right to speak and publish does not carry with it the unrestrained right to gather information.”); Kreimer, *supra* note 26, at 387 (quoting *Zemel*, 381 U.S. at 17).

²²³ Alderman, *supra* note 74, at 521–25.

²²⁴ Emerson, *supra* note 42, at 648; *see also id.* at 650 (“As early as 1501, Pope Alexander VI, in a bull which prohibited unlicensed printing, applied the technique of prior restraint as a means of control. In England . . . printing first developed under royal sponsorship and soon became a monopoly to be granted by the Crown. . . . The Licensing Act of 1662 illustrates the scope of the system. Not only were seditious and heretical books and pamphlets prohibited, but no person was allowed to print any material unless it was first [approved by agencies of the Crown].”); 2 THOMAS PAINE, *Liberty of the Press*, in THE POLITICAL WRITINGS OF THOMAS PAINE 463, 464 (George H. Evans ed., G.H. Evans 1839) (1824) (describing early systems of prior restraint in England and France).

²²⁵ PAINE, *supra* note 224, at 434.

²²⁶ *Id.* (explaining that, “in consequence of [the] abolition,” work could “be published without first obtaining the permission of the government officer”).

²²⁷ U.S. CONST. amend. I.

²²⁸ 283 U.S. 697 (1931).

encompass restrictions on citizens recording the police. Finally, it demonstrates that, contrary to the beliefs of some, “subsequent punishment” is a form of prior restraint, and argues that situations like Anthony Graber’s fit within the subsequent-punishment-as-prior-restraint framework.

A. *Near v. Minnesota*

The landmark Supreme Court case that wrestled with the issue of prior restraint was *Near v. Minnesota*.²²⁹ There, the Court considered a Minnesota statute declaring a nuisance any publication that state officials—including the police—considered “obscene, lewd and lascivious” or “malicious, scandalous and defamatory.”²³⁰ The statute granted courts the authority to permanently prevent such speech and punish the speaker with a fine, imprisonment, or both.²³¹

The issue in *Near* arose when a county attorney successfully brought an action to enjoin publication of *The Saturday Press* for printing articles that alleged, among other things, that “law enforcing officers” were not “energetically performing their duties.”²³² Of particular relevance to the topic of this Comment is that “[m]ost of the [publication’s] charges were directed against the Chief of Police; he was charged with gross neglect of duty, illicit relations with gangsters, and with participation in graft.”²³³ Writing for a 5–4 majority,²³⁴ Chief Justice Hughes protected the publication’s right to criticize police officers by invalidating the statute as an unconstitutional “previous restraint[.]” on speech, comfortably couching his reasoning in the First Amendment’s Free Press Clause.²³⁵ Chief Justice Hughes noted that this right was “especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct.”²³⁶

The right to record the police and the way it is being prevented in states with all-party consent wiretapping statutes is eerily analogous to *Near*. Where the police in *Near* found that a publication criticizing police officers violated a statute that prohibited “scandalous” speech, so too are the police in all-party consent states finding that citizens who record their conduct violate state wiretapping statutes. In so doing, the police are using state wiretapping statutes to prevent communication of a message that may

²²⁹ *Id.*

²³⁰ MINN. STAT. § 10123-1 to -2 (Mason’s 1927) (superseded by *Near*, 283 U.S. at 697).

²³¹ *See id.* § 10123-3.

²³² *Near*, 283 U.S. at 703–04.

²³³ *Id.* at 704.

²³⁴ *Id.* at 701, 738.

²³⁵ *Id.* at 716 (“The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.”).

²³⁶ *Id.* at 717.

be (but is not necessarily) critical of them. And, just as the Minnesota authorities attempted to punish the publishers in order to prevent speech, police are attempting the same prior restraint today by threatening recorders at the scene,²³⁷ confiscating their cameras,²³⁸ arresting them,²³⁹ or, as with Anthony Graber, punishing them after the video has been disseminated.²⁴⁰ Because these efforts are geared towards preventing the public from receiving messages critical of the police,²⁴¹ this is essentially the same form of prior restraint Chief Justice Hughes ruled unconstitutional in *Near*, albeit with slightly sleeker technology.

B. *Exceptions to the Presumptive Invalidity of Prior Restraint*

The Court's decision in *Near v. Minnesota*²⁴² effectively created a presumption that prior restraints on speech are unconstitutional.²⁴³ However, Chief Justice Hughes also suggested that the government may successfully rebut this presumption and suppress speech in the "exceptional cases" when: (1) it would "obstruct[] . . . [military] recruiting . . . or [disclose] sailing dates of transports or the number and location of troops," (2) "the primary requirements of decency [need to] be enforced against obscene publications," or (3) "[t]he security of the community life [needs to] be protected against incitements to acts of violence and the overthrow by force of orderly government."²⁴⁴ Even if one of these three standards is met, a restraint is only properly imposed when the "evil that would result . . . is both great and certain and cannot be mitigated by less intrusive measures."²⁴⁵

The only *Near* exception that recording police conduct could conceivably fall under is the third, a standard the Court elaborated on in *New York Times Co. v. United States (The Pentagon Papers Case)*.²⁴⁶ There, the federal government sought a temporary restraining order and

²³⁷ *E.g.*, *Ickes v. Borough of Bedford*, 271 F.R.D. 458, 459 (W.D. Pa. 2010); *Connell v. Town of Hudson*, 733 F. Supp. 465, 466–67 (D.N.H. 1990).

²³⁸ *E.g.*, *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 636–37 (D. Minn. 1972).

²³⁹ *E.g.*, *Adkins v. Guam Police Dep't*, No. 09-00029, 2010 U.S. Dist. LEXIS 87353, at *6–7 (D. Guam Aug. 24, 2010).

²⁴⁰ *E.g.*, *State v. Graber*, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *1, *5 (Md. Cir. Ct. Sept. 27, 2010). If this subsequent punishment is frequent and public, then it will strongly discourage this speech in the future. *See infra* Part III.D.

²⁴¹ *See* RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL SECURITY* 107 (2006) (arguing the government should not be able to classify information, and thereby prevent the public from obtaining it, just because it would "embarrass the agency by revealing its mistakes").

²⁴² 283 U.S. 697 (1931).

²⁴³ JEROME A. BARRON & C. THOMAS DIENES, *FIRST AMENDMENT LAW* 57 (4th ed. 2008).

²⁴⁴ *Near*, 283 U.S. at 716.

²⁴⁵ *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994).

²⁴⁶ 403 U.S. 713 (1971).

preliminary injunction against the *New York Times* to prevent it from publishing classified documents about the Vietnam War.²⁴⁷ The Court permitted publication of the documents and held that the court-ordered injunction preventing publication was an unconstitutional prior restraint.²⁴⁸ The guiding standard emerged from the concurrences of Justices Stewart and Brennan²⁴⁹: the government must show that allowing publication will “surely result in direct, immediate, and irreparable damage to our Nation or its people.”²⁵⁰ Thus, the *Near* presumption against prior restraints is rebuttable in the face of “*extreme* danger to national security.”²⁵¹

Recording police conduct does not pose a direct, immediate, irreparable threat to any community or its people. Although footage of police misconduct might cause some initial tumult,²⁵² this is not irreparable and does not necessarily pose immediate danger to national security. In fact, the Transportation Security Administration does not even prohibit filming at airport security checkpoints,²⁵³ and if anything could rise to the level of threatening national security such that recording law enforcement officials is justifiably prohibited under a *Near* exception, surely it would be a

²⁴⁷ *Id.* at 714.

²⁴⁸ *Id.*

²⁴⁹ See Thomas R. Litwak, *The Doctrine of Prior Restraint*, 12 HARV. C.R.-C.L. L. REV. 519, 544–45 (1977). Compare *The Pentagon Papers Case*, 403 U.S. at 730 (Stewart, J., concurring) (concluding that an attempted restriction on newspaper publication requires a showing that the underlying content will “surely result in direct, immediate, and irreparable damage to our Nation or its people”), with *id.* at 726–27 (Brennan, J., concurring) (“[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the concurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. . . . Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.”).

²⁵⁰ *The Pentagon Papers Case*, 403 U.S. at 730 (Stewart, J., concurring).

²⁵¹ BARRON & DIENES, *supra* note 243, at 63 (emphasis added); see also *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (“Even where questions of allegedly urgent national security . . . are concerned, we have imposed this ‘most extraordinary remed[y]’ only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures” (alteration in original) (quoting *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 562 (1976))); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”).

²⁵² For example, this was the case in the wake of the Rodney King video and trial in 1991 and 1992. Associated Press, *Bush Directs Federal Forces to Riot Area*, ST. PETERSBURG TIMES (Fla.), May 2, 1992, at 6A.

²⁵³ *Can I Take Photos at the Checkpoint and Airport?*, TSA BLOG (Mar. 31, 2009), <http://blog.tsa.gov/2009/03/can-i-take-photos-at-checkpoint-and.html> (“[The Transportation Security Administration of the United States Department of Homeland Security doesn’t] prohibit public, passengers or press from photographing, videotaping, or filming at [airport] screening locations. You can take pictures at our checkpoints as long as you’re not interfering with the screening process or slowing things down. We also ask that you do not film or take pictures of our monitors.”).

potential threat to airport security.²⁵⁴ Finally, exposing police misconduct is equally likely to produce increased oversight over police, leading to reform and eventually more stability, not less.²⁵⁵

C. *Post-Near Expansion of What Constitutes Prior Restraint*

Although prior restraint doctrine has changed little in the wake of *Near*, the Court's conception of what constitutes an unconstitutional prior restraint on speech has broadened over the years. Prior restraint in the United States has historically been thought of in terms of a judicial injunction or a statutory licensing requirement,²⁵⁶ but it has expanded to include other forms of governmental speech suppression, such as taxes on newspaper publication processes²⁵⁷ or city ordinances allowing a mayor to approve permits for newspaper vending machines placed on public property.²⁵⁸

The prohibition on prior restraints as originally expressed in *Near* applies to any government actor, including a police officer.²⁵⁹ The Supreme Court made this application explicit eight years after *Near* in *Schneider v. State*.²⁶⁰ In *Schneider*, the Court struck down four city ordinances as unconstitutional prior restraints on speech.²⁶¹ These city ordinances required a government official, usually a police officer or the city's police chief, to approve a citizen's flyers or handbills before the citizen could distribute them.²⁶² The Court held that, "a municipality cannot . . . require all who wish to disseminate ideas to present them first to police authorities for their

²⁵⁴ See Sally B. Donnelly, *Behind the Airport Shutdowns*, TIME, Mar. 18, 2002, at 26 (stating that security fears and "suspicious" items like a food processor or a pair of scissors found in a trash can cause an airport to be completely shutdown).

²⁵⁵ See Goldsmith, *supra* note 33, at 922–23 (stating that footage of police misconduct at the 2009 G20 conference in London, England, "led to various investigations relating not just to this incident, but also to the policing of the G20 protests more generally" and "triggered and shaped the involvement of the oversight agency in a significant way").

²⁵⁶ BARRON & DIENES, *supra* note 243, at 56–57.

²⁵⁷ See *Minn. Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 586 n.9, 592–93 (1983); Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 7 (1989).

²⁵⁸ See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 772 (1988).

²⁵⁹ See *Near v. Minnesota*, 283 U.S. 697, 713 (1931) ("[T]he operation and effect of the statute in substance is that *public authorities* may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt." (emphasis added)).

²⁶⁰ 308 U.S. 147 (1939).

²⁶¹ *Id.* at 165.

²⁶² *Id.* at 163–64.

consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens.”²⁶³

The Court again invoked prior restraint to declare the same type of police preapproval of speech unconstitutional in *Cox v. Louisiana*.²⁶⁴ In *Cox*, the appellant led a group of protestors in an antisegregation speech outside the State Capitol building, the local courthouse, and various businesses in Baton Rouge, Louisiana.²⁶⁵ Although the content of the speech and the demeanor of the crowd were peaceful,²⁶⁶ the Sheriff deemed the gathering “inflammatory” and instructed the demonstrators to disperse.²⁶⁷ In doing so, he invoked his power under Louisiana state law to arrest and charge individuals who were disobeying his command with disturbing the peace.²⁶⁸ The Court invalidated as unconstitutional the appellant’s conviction under the Louisiana statute.²⁶⁹ Although the Court did not use the words “prior restraint,” its explanation of the discretionary application of a broad state statute that gives law enforcement officials the power to choose which speech may occur embodies the same definition.²⁷⁰

Schneider and *Cox* are readily applied to police officers and prosecutors who use all-party consent wiretapping laws to justify arresting and prosecuting citizens who record police conduct. The wiretapping statutes, though not necessarily overbroad, are being given extensive interpretation by police and prosecutors.²⁷¹ This interpretation gives them

²⁶³ *Id.* at 164.

²⁶⁴ 379 U.S. 536 (1965).

²⁶⁵ *Id.* at 539–42.

²⁶⁶ *Id.* at 542.

²⁶⁷ *Id.* at 543.

²⁶⁸ *Id.* at 544.

²⁶⁹ *Id.* at 558.

²⁷⁰ Compare *id.* at 557 (giving “broad discretion [to] a public official allows him to determine which expressions of view will be permitted and which will not[, and] . . . thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor”), and *id.* at 557–58 (“It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.”), *with* *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (“[L]iberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.”), and Emerson, *supra* note 42, at 648 (“The concept of prior restraint, roughly speaking, deals with official restriction imposed upon speech or other forms of expression in advance of actual publication.”).

²⁷¹ See, e.g., *Talk of the Nation: The Rules and Your Rights for Recording Arrests* (NPR radio broadcast July 8, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=128387108> (“[T]he way that Maryland law enforcement officials have interpreted this law, when a police officer pulls you over, he has an expectation of privacy with respect to what transpires during the interaction.”). “Extensive interpretation” is “[a] liberal interpretation that applies a statutory provision to a case not falling within its literal words.” BLACK’S LAW DICTIONARY 894 (9th ed. 2009).

considerable discretion in restricting “expressions of view,”²⁷² namely unfavorable views of the police. That discretion runs counter to the dictates of *Near*, which clearly established the right to be free from censure for publicly criticizing public officials.²⁷³ Therefore, the discretionary enforcement of state wiretapping statutes against individuals recording police conduct is an unconstitutional prior restraint on speech. The First Amendment violation is further illuminated by the fact that the police—the very public officials who run the risk of being criticized—are tasked with determining whether to restrain an individual’s speech as a violation of a statute.

Some courts have also ruled that physically preventing a person from capturing images is a form of prior restraint.²⁷⁴ In these instances, the “physical” prohibition was seizing the video equipment²⁷⁵ or arresting the videographer.²⁷⁶ Thus, one court stated that police seizing a news crew’s cameras and film as they filmed a burglary was “at least as effective a prior restraint—if not more so—as [the government’s actions] in *New York Times v. United States*.”²⁷⁷ And if seizing a videographer’s camera and film is a form of prior restraint, then detaining or arresting him surely is as well.²⁷⁸ In *Robinson v. Fetterman*, the plaintiff was arrested for filming the police making stops on the highway from private property onto which he had permission to enter.²⁷⁹ The police detained the plaintiff at the police station for several hours and confiscated his camera.²⁸⁰ In finding that the plaintiff “established his claim that the [police officers] retaliated against him for exercising his First Amendment right to videotape police conduct,”²⁸¹ the court asserted that, “to the extent that the troopers were restraining [the plaintiff] from making any future videotapes and from publicizing or publishing what he had filmed, [their] conduct clearly amounted to an *unlawful prior restraint* upon his protected speech.”²⁸²

²⁷² *Cox*, 379 U.S. at 557–58.

²⁷³ *See Near*, 283 U.S. at 717.

²⁷⁴ *See, e.g., Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 636–37 (D. Minn. 1972).

²⁷⁵ *See, e.g., Jones v. City of Minneapolis*, No. 07-3577, 2009 U.S. Dist. LEXIS 84330, at *4 (D. Minn. Sept. 15, 2009); *Channel 10*, 337 F. Supp. at 636.

²⁷⁶ *See McCormick v. City of Lawrence*, 271 F. Supp. 2d 1292, 1303 (D. Kan. 2003).

²⁷⁷ *Channel 10*, 337 F. Supp. at 637 (citing *The Pentagon Papers Case*, 403 U.S. 713 (1971)).

²⁷⁸ *See McCormick*, 271 F. Supp. 2d at 1303 (“[A]n arrest may constitute a ‘prior restraint’ in some circumstances.”)

²⁷⁹ 378 F. Supp. 2d 534, 539 (E.D. Pa. 2005).

²⁸⁰ *Id.* at 539–40.

²⁸¹ *Id.* at 542.

²⁸² *Id.* at 541 (emphasis added). Not all courts agree on this point. *Compare McCormick*, 271 F. Supp. 2d at 1303 (“[A]n arrest may constitute a ‘prior restraint’ in some circumstances.”), with *McCormick v. City of Lawrence*, 325 F. Supp. 2d 1191, 1202 (D. Kan. 2004) (“Although it appears that an arrest may constitute a ‘prior restraint’ in some circumstances, the law is not clearly established.”) (citations omitted).

D. Subsequent Punishment Is Prior Restraint

Whereas prior restraint is a suppression of speech *before* it reaches the public, subsequent punishment threatens²⁸³ or issues punishment *after* the speech has been disseminated, indicating the government's disapproval of the speech's content and its desire to prevent similar speech in the future.²⁸⁴ Although there is an argument that subsequent punishments are more justifiable than—and therefore somehow different from—prior restraint,²⁸⁵ it is clear that repeatedly punishing the same speech will inevitably cause potential speakers to either censor their messages or refrain from sharing them entirely.²⁸⁶ Although the prior restraint and subsequent punishment encompass different actions, the government's desired outcome is the same: to exclude what it deems are undesirable ideas from reaching the marketplace²⁸⁷ by continuously enforcing laws that punish certain speech. Therefore, subsequent punishment is a form of prior restraint.²⁸⁸

The artificial dichotomy between “prior restraint” and “subsequent punishment” is problematic because it theoretically enables courts to permit prior restraints on speech if the punishment occurs after the speech takes place.²⁸⁹ The distinction first arose in American law in *Near v. Minnesota*,

²⁸³ See *NAACP v. Button*, 371 U.S. 415, 433 (1963) (“The threat of sanctions may deter their exercise [of First Amendment freedoms] almost as potently as the actual application of sanctions.”).

²⁸⁴ See Emerson, *supra* note 42, at 648; William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 263 (1982).

²⁸⁵ *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558–59 (1975) (“The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.”).

²⁸⁶ James Madison discussed the impropriety of the distinction between prior restraint and subsequent punishment while castigating the Sedition Act in his Report on the Virginia Resolutions:

The freedom of the press, under the common law, is . . . made to consist in an exemption from all previous restraint on printed publications, by persons authorized to inspect or prohibit them. It appears to the committee that this idea of the freedom of the press can never be admitted to be the American idea of it; since a law inflicting penalties on printed publications would have a similar effect with a law authorizing a previous restraint on them. It would seem a mockery to say that no laws should be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made.

James Madison, *Madison's Reports on the Virginia Resolutions*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 546, 569 (Jonathan Elliot ed., J. B. Lippincott & Co. 2d. ed. 1876) (1863); see also *Thornhill v. Alabama*, 310 U.S. 88, 98 n.12 (1940) (citing same).

²⁸⁷ John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 430 (1983).

²⁸⁸ But see 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 20.16(c) (4th ed. 2008) (arguing that the difference between prior restraint and subsequent punishment is that the former prevents speech from ever reaching the public but the latter does not).

²⁸⁹ See, e.g., *Alexander v. United States*, 509 U.S. 544, 550, 553 (1993).

where Chief Justice Hughes approvingly cited to William Blackstone.²⁹⁰ However, both Blackstone and Chief Justice Hughes discussed the dichotomy in the context of unprotected speech, neither anticipating that subsequent punishment would be used to punish and therefore suppress protected speech.²⁹¹

The Court made clear its desire to prohibit subsequent punishment for protected speech in *Thornhill v. Alabama*.²⁹² There the Court held unconstitutional an Alabama antilabor union statute that forbade “nearly every practicable, effective means” of publicly communicating “the nature and causes of a labor dispute.”²⁹³ In reaching that conclusion, it noted that the statute “readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, [and] results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.”²⁹⁴ The Court found that subsequent punishment was a form of prior restraint in *Thornhill* because the statute was being selectively enforced to punish a certain type of speech, thereby discouraging that speech from occurring in the first place.²⁹⁵

The distinction between prior restraint and subsequent punishment is particularly problematic with the advent of mobile phone technology that allows any member of the public to share content with a large audience at a

²⁹⁰ 283 U.S. 697, 713–14 (1931) (“The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.” (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *151) (internal quotation mark omitted)).

²⁹¹ “Protected activity” is “[c]onduct that is permitted or encouraged by a statute or constitutional provision, and for which the actor may not be legally retaliated against.” BLACK’S LAW DICTIONARY 1343 (9th ed. 2009). In the First Amendment context, “protected speech” cannot be constitutionally suppressed by the Government. Blackstone argues that punishing speech after it occurs is sometimes “necessary for the preservation of peace and good order,” 4 WILLIAM BLACKSTONE, COMMENTARIES *152, which is analogous to the modern unprotected status of speech that would constitute “incitement to imminent lawless action,” see *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969). In *Near*, Chief Justice Hughes also appeared to limit permissible subsequent punishment of speech to unprotected communication and not “harmless publications.” *Near*, 283 U.S. at 715. Thus, Chief Justice Hughes was stating that a subsequent punishment for *unprotected* speech is *not* a form of prior restraint, while the same is not true if the speech is protected. Moreover, Chief Justice Hughes specifically noted that “publication of censure of public officers and charges of official misconduct” is a form of “cherished” protected speech. *Id.* at 717. Given the harm that Blackstone’s definition of prior restraint can cause to free expression, it is no wonder Thomas Jefferson believed “Blackstone had done more towards the suppression of liberties of man than all the millions of men in arms of Bonaparte.” GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 42–43 (2004) (internal quotation marks omitted).

²⁹² 310 U.S. 88 (1940).

²⁹³ *Id.* at 104.

²⁹⁴ *Id.* at 97–98 (emphasis added).

²⁹⁵ See *id.* at 101–02 (“The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.”).

relatively low cost.²⁹⁶ The unpredictability and sheer volume of potential speakers significantly weakens the government's ability to prevent undesired speech from reaching the public. This is where the threat of subsequent punishment becomes useful as a form of prior restraint: while the government cannot realistically prevent every video or photo from being posted to the Internet, it can suppress speech by means of a policy of punishment.²⁹⁷ Consistent enforcement of such a policy will eventually make the public wary of engaging in that type of speech, ultimately ending it altogether.²⁹⁸ In addition, the quantity of information people can receive on a daily basis is staggering, making it harder for a single story or piece of information to reach its target audience.²⁹⁹ Thus, a message is more likely to be received the more frequently it is sent; if the government can enforce a statute that by subsequent punishment impedes receipt of those messages, they might never reach their intended audience.

Furthermore, when the messages are important to police officers and prosecutors—as videos depicting police misconduct certainly are—efforts to suppress them become much more direct. For example, “[s]pecific warnings of prosecution from law enforcement officials create . . . [a] focused threat, and indeed, such threats have been a favored mode of suppression.”³⁰⁰ Or, threats might be abandoned in favor of openly and actively prosecuting individuals that record the police.³⁰¹ This sends a clear message to the public that any form of resistance to or documentation of police wrongdoing could subject that person to criminal sanctions.³⁰² Thus,

²⁹⁶ See Kreimer, *supra* note 26, at 344 (“In the emerging digital environment, broadly available and marginally costless image capture provides potential access to public dialogue for individuals and groups without firm economic or political bases or established public credibility.”).

²⁹⁷ The police have a strong incentive to prevent negative speech about their conduct because even one negative video can harm their reputation with the public, Eric S. Jefferis et al., *The Effect of a Videotaped Arrest on Public Perceptions of Police Use of Force*, 25 J. CRIM. JUST. 381, 391 (1997), and the absence of public trust can significantly hinder their ability to police the community, see FOSDICK, *supra* note 195, at 365 (“Without the cooperation of the public, the police themselves cannot successfully attack the problem of crime.”).

²⁹⁸ Mayton, *supra* note 284, at 263 (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 63–64 (1963)).

²⁹⁹ See, e.g., Goldsmith, *supra* note 33, at 921 (explaining one problem with “communicative abundance” is “[t]he proliferation of accessible, but also often competing and conflicting accounts” of events); Nicholas Carr, *Is Google Making Us Stupid?*, THE ATLANTIC, July/Aug. 2008, at 57 (“Even when I’m not working, I’m as likely as not to be foraging in the Web’s info-thickets—reading and writing e-mails, scanning headlines and blog posts, watching videos and listening to podcasts, or just tripping from link to link to link.”).

³⁰⁰ Mayton, *supra* note 284, at 265 (footnote omitted).

³⁰¹ See Shin, *supra* note 8.

³⁰² *Commonwealth v. Hyde*, 750 N.E.2d 963, 976 (Mass. 2001) (Marshall, C.J., dissenting) (“[The public’s role as watchdog] cannot be performed if citizens must fear criminal reprisals when they seek to hold government officials responsible by recording—secretly recording on occasion—an interaction between a citizen and a police officer.”).

citizens who would otherwise want to record police conduct might decline to do so rather than risk prosecution.³⁰³

Recording the police is precisely the type of activity that American prior restraint doctrine—and the First Amendment generally—seeks to protect. Although criticism (or praise) of the police by means of video footage is protected speech,³⁰⁴ some argue that it should still be prohibited because allowing it will have negative policy consequences that outweigh the benefits of improved oversight. The next section rebuts some of those policy arguments.

IV. POLICY

This Part presents four policy arguments that support allowing citizens to record police officers' conduct: (1) the inherently public nature of police work undermines the argument that more widespread recording of the police would “overdeter” their actions, (2) the potential dangers associated with recording the police can be mitigated and do not outweigh the public benefit of a monitored police force, (3) allowing citizens to record the police could actually increase, rather than decrease, public trust in law enforcement, and (4) the risk that some videos can be inaccurate or even falsified could be minimized with police “counter-recording” and libel lawsuits.

A. “Overdeterrence”

The inherently public nature of policing and its well-established exposure to the public for observation and criticism make overdeterrence resulting from citizens recording police conduct unlikely. The term *overdeterrence* is used because videotaping the police should deter improper actions but not prevent officers from addressing situations that require attention. However, recording the police with the aim of achieving safe streets and genteel officers may put officers in a quandary, with the constant fear of reprisal driving them to inaction.³⁰⁵ This could make their jobs more dangerous because criminals might detect an arresting officer showing intentional restraint or being “over-cautious,”³⁰⁶ and therefore become more likely to use violence.

Although widespread citizen recording might occasionally make an officer hesitate, proper training could mitigate this response.³⁰⁷ Even in the

³⁰³ See MD. CODE ANN., CTS. & JUD. PROC. § 10-402(b) (LexisNexis 2010).

³⁰⁴ See Kreimer, *supra* note 26, at 370–74.

³⁰⁵ See CLAUDE L. VINCENT, POLICE OFFICER 66 (1990).

³⁰⁶ See Benjamin J. Goold, *Public Area Surveillance and Police Work: The Impact of CCTV on Police Behaviour and Autonomy*, 1 SURVEILLANCE & SOC'Y 191, 197 (2003) (arguing that deterrence might make the police overly cautious and more vulnerable).

³⁰⁷ *CATO Video*, *supra* note 22, at 43:40 (statement of Maj. Neal Franklin, former Maryland State Police and Baltimore City Police Officer). The actual video footage captured by citizens can also be

absence of such training, it is more likely that “most officers will [not] shirk their clear duty to enforce the law and fight crime simply because there is a channel through which citizens can be assured of a fair hearing of grievances.”³⁰⁸ The risk of overdeterrence decreases even more if the police also do their own recording because it enables them to defend their actions if they are improperly accused of misconduct.

B. Recording Can Be Dangerous

Citizen-recording of the police could—but need not—subject the recorder or the officer to danger. For example, a citizen could be exposed to considerable risk if a police officer mistakes a camera or cellular phone for a gun and shoots the recorder as a result of a split-second decision.³⁰⁹ Or, a videographer could potentially distract an officer, leading to an error that harms an investigation or results in injury.³¹⁰ However, the police are frequently called upon to make split-second decisions in potentially dangerous and distracting circumstances. Allowing citizens to record police conduct noninvasively is not necessarily more distracting or dangerous than anything else the police might encounter.³¹¹

In addition, many police are already consistently recorded. Not only do some police departments record officers using car-mounted cameras,³¹² but some also even permit television shows like *COPS* to videotape them for

used to help train officers and prevent misconduct. Skehill, *supra* note 55, at 1004. In addition, the citizens themselves can be trained to safely and effectively record police conduct without interfering with police work. See Will Connaghan, Commentary, *ACLU Will Help Citizens Be ‘Vigilant,’* DAILY RECORD (St. Louis, Mo.), June 20, 2007, at 1.

³⁰⁸ See GROSS & REITMAN, *supra* note 191, at 28 (arguing in favor of creating independent civilian review boards for police). The arguments made by police unions against civilian review boards, *id.*, were remarkably similar to current public policy arguments against allowing citizens to freely record police conduct.

³⁰⁹ See, e.g., Bootie Cosgrove-Mather, *Cops: Phone Looked Like A Gun*, CBS NEWS (June 11, 2003), <http://www.cbsnews.com/stories/2003/06/11/eveningnews/main558226.shtml> (“Police videotape showed the suspect finally getting out of his car and pointing a shiny chrome object in what police took to be a shooter’s stance. Shots were fired, and 25-year-old Marquise Hudspeth was killed; shot eight times in the back.”); Nicole Tsong & Warren Cornwall, *Boy, 13, Shot After Officer Mistakes Cell For Weapon*, SEATTLE TIMES, Oct. 15, 2007, at A1 (“A Seattle police officer shot a 13-year-old twice in the leg early Sunday, and police said he had mistaken the boy’s cellphone for a weapon.”).

³¹⁰ Jane Musgrave, *Mom Who Videotaped Boynton Cops Sues over Arrest*, PALM BEACH POST (July 30, 2010, 9:59 PM), <http://www.palmbeachpost.com/news/mom-who-videotaped-boynton-cops-sues-over-arrest-833123.html>; see also Brief of Appellees, *supra* note 35 (recognizing the possibility that recording the police may be distracting); Goold, *supra* note 306, at 194–95 (same).

³¹¹ If it is, then modified training procedures can teach the police to adjust to the observation. See, e.g., ROB C. MAWBY, POLICING IMAGES 160 (2002); Goldsmith, *supra* note 33, at 926; Skehill, *supra* note 55, at 1004.

³¹² See, e.g., Lisa Halverstadt, *Glendale Police Cars Will Get Dash-Mounted Cameras*, AZCENTRAL.COM (Oct. 18, 2010, 8:25 AM), <http://www.azcentral.com/community/glendale/articles/2010/10/18/20101018glendale-police-car-cameras.html>.

the purposes of entertainment.³¹³ Surely police officers would not expose themselves (and by extension their families and friends) to unnecessary danger for the sake of entertainment. Nor can one argue that these two examples share the element of awareness and are therefore safer than citizens recording the police with cell phones because an awareness of ubiquitous citizen recording can be instilled in young officers during training.³¹⁴

C. Institutionalization of Distrust

The police depend on the public's cooperation to conduct their police work effectively,³¹⁵ and as such, they fear an "institutionalization of distrust."³¹⁶ Evidence suggests that the public reacts negatively to footage of police misconduct,³¹⁷ making people less likely to cooperate with police when called upon to do so. This problem is exacerbated when a large number of people view the footage in a short time period,³¹⁸ in a "viral" YouTube video, for example. Some argue that once the public develops negative feelings towards the police it is nearly impossible to reverse those feelings³¹⁹ because these videos, once posted, do not simply disappear from the Internet.³²⁰

However, if the police footage reinforces the desired belief that the police generally keep the public safe and protected, then recording and sharing footage of police conduct may actually improve the public's perception of them.³²¹ This, in turn, may increase the public's willingness to cooperate in police investigations. In fact, actively suppressing video recording of the police might also silence positive messages of police heroism and bravery,³²² which does not help the reputation the police are

³¹³ See *State v. Graber*, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *17 (Md. Cir. Ct. Sept. 27, 2010).

³¹⁴ See Skehill, *supra* note 5, at 1004.

³¹⁵ See, e.g., VICTOR E. KAPPELER & LARRY K. GAINES, *COMMUNITY POLICING* 171 (Shirley Decker-Lucke & Gregory Chalson eds., 6th ed. 2011) ("Citizens who do not trust the police are less likely to report crime and to participate in developing solutions to problems."); James Hawdon & John Ryan, *Police-Resident Interactions and Satisfaction With Police: An Empirical Test of Community Policing Assertions*, 14 CRIM. JUST. POL'Y REV. 55, 55-56 (2003) ("Effective policing depends on resident support.").

³¹⁶ Goldsmith, *supra* note 33, at 931 (internal quotation marks omitted).

³¹⁷ Jefferis et al., *supra* note 297, at 391.

³¹⁸ Skehill, *supra* note 5, at 999 n.141; *Graber Video II*, *supra* note 2.

³¹⁹ See Wasserman, *supra* note 77, at 647.

³²⁰ See Goldsmith, *supra* note 33, at 925 ("Video capture of images for mass dissemination, repeat viewing and popular debate enables mass mobilization of affect and discussion of particular events, as the Rodney King example and many subsequent cases have shown. . . . The video record typically remains accessible for later review.").

³²¹ See Luna, *supra* note 34, at 1120.

³²² See, e.g., Gregg Burrage, *Tampa Police Officers Rescue Kitten from Sewer*, ABC ACTION NEWS (Sept. 22, 2010), http://www.abccactionnews.com/dpp/news/region_tampa/tampa-police-officers-rescue-

justifiably trying to cultivate and sustain. Even if some of the videos are negative, arresting the recorder makes the police look even worse, further undermining their efforts to curry favor with the public. Allowing citizens to record the police is more likely to decrease the potential for “negative” videos because the act of recording will itself serve to decrease instances of police misconduct³²³—more transparency creates additional means for recourse in the (increasingly unlikely) event that misconduct does occur.³²⁴

D. Video Is Inaccurate

Finally, some argue that the accuracy of the video footage captured is a concern. Admittedly, the camera is a technologically limited instrument for capturing an event or series of events.³²⁵ Some also argue that the accuracy of the footage may be limited by the intentional or unintentional bias of the videographer:³²⁶ the camera operator may start the filming too late, focus on a particular element of the scene, or stop the filming too early,³²⁷ ultimately creating an incomplete but highly persuasive depiction of what occurred.³²⁸

One remedy for the police officers’ fear that false footage will spread and harm their reputations is that police officers, as citizens, can file lawsuits against other citizens who publish intentionally inaccurate footage.³²⁹ This serves two useful purposes without infringing First Amendment rights. First, the threat of being sued for publishing distorting footage might discourage wanton recording of police officers. Second, it would encourage the police to record their interactions with the public to create positive counterevidence.

Actively encouraging the police to record their interactions with the public benefits all parties involved because it increases the likelihood that

kitten-from-sewer (“In a scene that might be reminiscent of an episode of *MacGyver*, Tampa Police made a daring rescue of a stranded kitten trapped inside a storm drain.”).

³²³ Skehill, *supra* note 5, at 1003–04, 1008. *But see* Goold, *supra* note 306, at 198–200 (noting that CCTV encourages police to find ways around surveillance).

³²⁴ For example, having reliable footage of the police can “creat[e] pressure to trigger political and administrative responses.” Goldsmith, *supra* note 33, at 927.

³²⁵ Goold, *supra* note 306, at 195–96; Jessica Silbey, *Cross-Examining Film*, 8 U. MD. L.J. RACE RELIGION GENDER & CLASS 17, 29, 38 (2008); Wasserman, *supra* note 77, at 607, 620, 640.

³²⁶ Wasserman, *supra* note 77, at 640.

³²⁷ Goold, *supra* note 306, at 195–96.

³²⁸ See Howard Friedman, *Evaluating Police Misconduct Cases*, TRIAL, Dec. 1997, at 44, 49.

³²⁹ See HAGEMAN, *supra* note 196, at 139; *see also* Ildefonso Ortiz, *Former Weslaco Police Officer Files Defamation Lawsuit*, THE MONITOR (Tex.), Apr. 15, 2011, at 1B (“The former assistant police chief of Weslaco has filed a defamation lawsuit against a number of defendants, including . . . KRGV-TV—the station that produces Channel 5 News. . . . Baudeilo Castillo, a 21-year veteran of the Weslaco police department claims to have been falsely accused of having ties to criminal organizations in Mexico and other acts of corruption by members of a rival police union. He further claims those accusations were later broadcasted in a newscast, the lawsuit states.”).

the “entire” scene is captured.³³⁰ This evidence would be useful not only to police in their efforts to disclaim improper conduct, but also to the citizens who experienced the conduct. There are a number of ways the police could record these interactions to obtain counterevidence, some of which are already being implemented: car-mounted cameras,³³¹ cameras on Tasers³³² and guns,³³³ and even cameras mounted on the officers’ bodies.³³⁴ This additional footage can mitigate accuracy issues because it will paint a far more complete picture than footage from any single source.³³⁵

In sum, “no matter how well the police do their job . . . many people . . . will view them with animosity.”³³⁶ It is therefore better to have more information than less, because more members of the public will view the police positively when there is greater evidence showing that most police officers are properly and justly doing their jobs. And, when evidence shows that the police cannot be trusted, the police will have every incentive to improve their performance.

CONCLUSION

The police protect and serve, but in the rare cases in which they do not, they are not entitled to violate the Constitution by cloaking their misconduct in secrecy. Individuals have a constitutionally protected right to record and disseminate video footage of their police officers. This right is encapsulated in the First Amendment’s protection of free speech and a free press, and the rights to gather information, redress grievances, expressive conduct, and be free from prior restraint. Court rulings (and legislative activity) should affirm this right³³⁷ and, ideally, set standards under which the police may justifiably and constitutionally prevent citizens from capturing and transmitting video footage. Although there are facially valid reasons to suppress this type of speech, those arguments are outweighed by arguments in favor of expanding speech and the public’s access to safe, socially responsible policing.

³³⁰ See Silbey, *supra* note 325, at 18.

³³¹ Jordan Carleo-Evangelist, *Now, The Law Never Blinks*, TIMES UNION (Albany, N.Y.), Jan. 6, 2010, at A1.

³³² Brendan McLaughlin, *Taser Mounted Cameras Produce Painful Videos: Nobody’s Smiling on “Taser TV,”* ABC ACTION NEWS (Nov. 12, 2010), <http://www.abcactionnews.com/dpp/news/taser-mounted-cameras-produce-painful-videos>.

³³³ John Doherty, *Newburgh Police Consider PistolCam*, TIMES HERALD-RECORD (Oct. 30, 2007, 2:00 AM), <http://www.recordonline.com/apps/pbcs.dll/article?AID=/20071030/NEWS/710300304>.

³³⁴ *Police to Wear Body Cameras*, YELLOW ADVERTISER (U.K.) (Oct. 7, 2010), [http://www.yellowad.co.uk/news.cfm?id=35112&y=2010&searchword=police to wear body cameras](http://www.yellowad.co.uk/news.cfm?id=35112&y=2010&searchword=police%20to%20wear%20body%20cameras).

³³⁵ Silbey, *supra* note 325, at 30.

³³⁶ JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 240 (1993).

³³⁷ See *supra* Part II.