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## Policing the Police: Analyzing the Legal Implications of the Sequestration of Cellphone Video Footage

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**POLICING THE POLICE: ANALYZING THE LEGAL  
IMPLICATIONS OF THE SEQUESTRATION OF CELLPHONE  
VIDEO FOOTAGE**

*Tristan Montaque\**

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**INTRODUCTION**

On Tuesday, August 5, 2014, police officers in Antioch, California beat and tased a mentally ill homeless man while attempting to take him into custody.<sup>1</sup> Prior to police arrival, the man was reportedly dancing in

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1. Carlos Miller, *Northern California Cops Beat Mentally Ill Man, Seize Phones, Claim it's their Right*, PHOTOGRAPHY IS NOT A CRIME (Aug. 9, 2014), <https://photographyisnotacrime.com/2014/08/northern-california-cops-beat-mentally-ill-man-seize-phones-claim-right/> (providing the perspective of a private citizen); Michael Burkholder, *Opinion: TV Media Does Antioch*

the street and dodging cars.<sup>2</sup> According to Antioch Police, upon police arrival, they found another officer wrestling with the man, who had a magazine clip in his hands.<sup>3</sup> Several witnesses to the incident assert that the man was handcuffed by police while being tased and beaten with a baton.<sup>4</sup> Witnesses then observed as an officer released a K9 police dog that began to bite the man until he was bleeding and unrecognizable.<sup>5</sup> After finally detaining the subject, police officers then turned their attention onto the witnesses who had recorded the incident.<sup>6</sup>

Witnesses say that the officers began confiscating cellphones from anyone who had shot video of the incident using a cellular device.<sup>7</sup> One witness observed as police pulled one woman out of her car and threatened to arrest her before she finally gave up her cellphone.<sup>8</sup> Another witness says that he was actually ordered by police to erase the video footage from his cellphone, and described the police interactions with witnesses who initially refused to comply with police requests as “controlling” and “demanding.”<sup>9</sup> Despite attempts by police, one video of the incident survived, and in it one can hear an officer of the Antioch Police Department saying he wants cameras confiscated before the video abruptly stops.<sup>10</sup>

Tablets, iPads, and other forms of mobile video-recording devices have become increasingly important in modern society, and arguably none more so than cellphones.<sup>11</sup> In addition to providing vital services and human connections, cellphones allow individuals to quickly share important news that often fails to make it into the daily paper or evening news broadcast.<sup>12</sup> It is little wonder, then, that cellular phones continue

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*Police a Disservice by Going for Ratings Versus Truths*, EAST COUNTY TODAY (Aug. 10, 2014), <http://eastcountytoday.net/opinion-tv-media-does-antioch-police-a-disservice-by-going-for-ratings-versus-truths/>.

2. See Michael Burkholder, *supra* note 1.

3. *Id.*

4. Alan Wang, *Witnesses Upset Over Antioch Arrest, Police Confiscating Cellphones*, ABC 7 NEWS (Aug. 8, 2014), <http://abc7news.com/news/witnesses-upset-over-antioch-arrest-police-taking-cellphones/249975/> (presenting the testimony of several witnesses).

5. *Id.* (citing one witness who described the incident as “overkill”).

6. See Miller, *supra* note 1 (noting that of all the witnesses, only one was able to retain the video).

7. See Wang, *supra* note 4 (“Then he took my phone anyway because I didn’t want no problems.”).

8. *Id.* (providing a quote from an observer).

9. *Id.*

10. See Miller, *supra* note 1.

11. See *Why Mobile Recording Devices are Important to Police in New Mexico*, L3 MOBILE-VISION, <http://www.mobile-vision.com/resources/new-mexico-police-realizing-importance-mobile-recording-devices/> (last visited Dec. 13, 2016) (associating the increased mobile device recordings with the shooting of a man in Las Cruces, New Mexico).

12. Amy Gahrn, *How Cell Phones Have Changed Our Lives*, CNN (Oct. 22, 2010, 1:11

to play an increasingly significant role in news production and creation, particularly at the local level.<sup>13</sup> With the advent, rise, and current ubiquity of cellphones and other forms of mobile recording devices, instances of police brutality, particularly among minority groups, are more frequently being recorded by private citizens and broadcasted for the entire world to see.<sup>14</sup>

Many of these mobile videos have illustrated instances of police and other law enforcement officials severely beating, brutalizing, and in many cases, shooting and killing American citizens, most of whom are either African-American or Latino and are unarmed.<sup>15</sup> On July 5, 2016, a video was uploaded of Alton Sterling, a black male, being fatally shot after an encounter with two police officers exerting excessive force against him.<sup>16</sup> On July 6, 2016, another video surfaced, this time of Philando Castile, also a black male, being fatally shot by police in the presence of his girlfriend and young daughter while sitting in the front seat of their car.<sup>17</sup> These are only two instances in a long and constantly growing list of black and other minority individuals who have been brutalized and often killed by law enforcement officials. Such unfortunate and untimely deaths have only gained national attention as a direct result of witnesses recording their encounters and uploading the videos onto the internet.<sup>18</sup>

In response to this growing trend, law enforcement officials have begun to fight this new-age vigilante news reporting by seizing and deleting cellphone video footage by these witnesses.<sup>19</sup> But what legal authority do police officials have to seize or delete cellphone footage from private citizens? And what implications might this authority have

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PM), <http://www.cnn.com/2010/TECH/mobile/10/22/gahran.mobile.phone.lives/index.html>.

13. *Id.*

14. Elliott C. McLaughlin, *We're Not Seeing More Police Shootings, Just More News Coverage*, CNN (Apr. 21, 2015, 7:26 AM), <http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/>.

15. AJ Vicens & Jaeah Lee, *Here Are 13 Killings by Police Captured on Video in the Past Year*, MOTHER JONES (May 20, 2015, 5:15 AM), <http://www.motherjones.com/politics/2015/05/police-shootings-caught-on-tape-video> (adding that in three of the thirteen shootings, the victims had serious mental health problems).

16. Joshua Berlinger et al., *Alton Sterling Shooting: Homeless Man Made 911 Call, Source Says*, CNN (July 8, 2016, 7:24 AM), <http://www.cnn.com/2016/07/07/us/baton-rouge-alton-sterling-shooting/> (containing a video of the events).

17. *Timeline: The Shooting Death of Philando Castile*, MPR NEWS (July 10, 2016), <http://www.mprnews.org/story/2016/07/07/timeline-philando-castile-shooting> (listing events related to the shooting and concluding with the outcome of the officer's trial).

18. Peter Dreier, *Caught on Camera: Police Racism*, THE AMERICAN PROSPECT (July 11, 2016), <http://prospect.org/article/caught-camera-police-racism> ("A recent wave of police violence against African American isn't anything new. It's just been caught on video.").

19. *Cell Phone Footage of Police Brutality*, CAL. POLICE BRUTALITY LAWYERS, <http://californiapolicebrutalitylawyers.com/brutality-video-footage.html> (last visited Dec. 13, 2016).

on evolving privacy interests? These are some of the questions that this paper will analyze and answer.

Part I of this Article examines cases that help illustrate the importance and need for mobile recording device footage to aid in the administration of justice. Part II discusses those constitutionally protected rights that are violated through the unlawful sequestering of a mobile video device and its footage. Finally, Part III outlines future considerations regarding the evolution of technology as it relates to the privacy interest of citizens and offers predictions as to how courts might address these issues in the future.

## I. THE IMPORTANCE OF MOBILE VIDEO FOOTAGE

Part I of this Article discusses the importance of cellphone videos on society and on judicial proceedings while also highlighting the more sobering realities of the continued incorporation of this relatively new form of technology. Furthermore, Part I identifies and examines some cases where video footage displaying instances of police brutality against citizens, taken by witnesses from mobile recording devices, assisted in achieving an indictment or a conviction against those police officers responsible for the brutality.

Mobile video technology is an important tool that can be used to effectuate the true purpose and processes of the justice system. Praised by private citizens for its powerful, convenient, reliable, and indiscriminate nature; the use of mobile video technology, such as cellphones, body cameras, dash cameras, and other forms of video surveillance technology; are increasingly being used to help change the nature of policing.<sup>20</sup> Improvements in technology have led to new body cameras that officers can mount onto a shirt pocket, zipper shirt, button-down shirt, or even a utility belt.<sup>21</sup> By using these body cameras in tandem with the camera systems already present inside police patrol cars, police departments can improve both officer accountability and relations with the general public, whose trust in officers is currently lacking.<sup>22</sup> Additionally, recent advances in cell phone technology have given civilians the power to capture their own footage by allowing them to

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20. Harvard Law Review Ass'n, *Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1796 n.6 (2015).

21. Iesha S. Nunes, "*Hands Up, Don't Shoot*": *Police Misconduct and the Need for Body Cameras*, 67 FLA. L. REV. 1811, 1830 (2015) (citing *AXON Body On-Officer Video*, TASER INT'L, INC., <http://au.taser.com/products/onofficer-video/axon-body-on-officer-video> (last visited Aug. 2, 2015)) (discussing the improvements and effects of body and dash cam technology used in law enforcement).

22. *Id.* at 1830, 1833 (citing David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH L. REV. 357, 360–61 (2010)).

record events—namely, police-civilian encounters—in real time.<sup>23</sup> However, despite the benefits of broadcasting the proliferation of police misconduct against minorities and raising global awareness to the racial conflagration endemic in American society, this mobile technology often has little to no impact on the actual administration of justice.

Time and again, police officers who have been clearly recorded engaging in police misconduct still ultimately evade indictment and conviction.<sup>24</sup> Perhaps the most infamous of such police evasion cases involves Officer Darren Wilson, a white police officer who was not indicted after he was caught on video shooting and killing Michael Brown, an unarmed black teenager in Ferguson, Missouri.<sup>25</sup> Even still, should the grave reality that despite even the clearest and most veracious video evidence, most police officers escape indictment and subsequent conviction for their crimes detract from those few instances where mobile video footage was successfully used to indict and potentially convict police officers who have engaged in similar acts of brutality?

#### A. *People v. Mehserle*

Oscar Grant was only twenty-two years old when he was shot in the back at point-blank range by then-Bay Area Rapid Transit police officer Johannes Mehserle.<sup>26</sup> Grant died later that day on January 1, 2009.<sup>27</sup> This was after Grant and his friends, who were returning from New Year's Eve celebrations in San Francisco, were verbally harassed with racial epithets by Mehserle and other BART police officers, who threatened to taser and kill Grant and his friends.<sup>28</sup> Grant was also physically assaulted when Mehserle's then partner, Anthony Pirone, held Grant down with both hands, and a knee on Grant's head and neck, before Mehserle shot Grant at point-blank range in the back.<sup>29</sup> Mehserle and the other officers fled the scene, then the state shortly thereafter.<sup>30</sup> However, Mehserle was forced to return to California and stand trial after videos of Grant's murder, which sparked national protests and global community outrage, went viral.<sup>31</sup>

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23. *Id.* at 1821.

24. *Id.*

25. Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), [http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?\\_r=1](http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=1).

26. Malaika Kambon, *Centuries of Rage: The Murder of Oscar Grant III*, S.F. BAY VIEW (Feb. 5, 2015), <http://sfbayview.com/2015/02/centuries-of-rage-the-murder-of-oscar-grant-iii/>.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

According to the case file, which included witness testimony, a BART platform surveillance video, and cellphone videos taken from five BART passengers, Grant, accompanied by several friends, including his then-fiancée Sophina Mesa, boarded a train in San Francisco heading to the Fruitvale BART station.<sup>32</sup> While en route, Grant became involved in a physical altercation with another passenger which quickly escalated into an all-out brawl involving at least ten men.<sup>33</sup> Passengers used the train intercom to report a fight in the train's lead car involving a large group of black males with no weapons wearing black clothing to the operator who, in turn, contacted BART central control who then contacted BART police.<sup>34</sup>

Upon arrival at the Fruitvale station, the fight stopped and BART police officer Anthony Pirone spotted five African-American men, including Grant and Michael Greer, talking on the platform by the lead car.<sup>35</sup> As Pirone approached, Grant and Greer got back on the train.<sup>36</sup> Pirone, whom a bystander described as appearing agitated, first ordered the three men who were still standing on the platform to stand against the platform wall and keep their hands visible.<sup>37</sup> Pirone then instructed his partner, Marysol Domenici, to watch the detained men against the wall.<sup>38</sup>

Pirone next ordered Grant off the train and shoved him against the platform wall with the other detained men.<sup>39</sup> Pirone returned to the train and ordered Greer out as well.<sup>40</sup> There is conflicting testimony as to whether Greer and Grant resisted custody or failed to comply with police orders, as well as whether Pirone used offensive language or tone in his efforts to subdue them. Testimony from passengers on the train illustrate Pirone as an aggressive, hostile, and abusive, both physically and verbally.<sup>41</sup> They also said Pirone used excessive or unnecessary force in his attempt to remove both Grant and Greer from the train.<sup>42</sup> While Pirone used excessive force on Greer to handcuff him, Grant and the other detainees "yell[ed] at Pirone to stop what he was doing."<sup>43</sup> A passenger's cellphone video shows Pirone hitting Grant with his fist, and witness testimony stated that Pirone shoved Grant against a wall and forced him

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32. Transcript of Record at 2, *People v. Mehserle*, 206 Cal. App. 4th 1125 (2012) (No. A130654), <http://www.lovenotbloodcampaign.com/case-file/>.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 2–3.

37. *Id.* at 3.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

to his knees, after which Pirone pulled out his Taser and pointed it at the detainees, with the “taser’s red laser sight trained on Grant’s groin and chest.”<sup>44</sup>

Pirone gave the order to arrest both Grant and Greer.<sup>45</sup> After hearing that he was going to be arrested for resisting a police officer, Grant stood up and asked, “Who can we talk to?!”<sup>46</sup> Pirone then grabbed Grant and forced him back down, with Officer Johannes Mehserle assisting by putting his hand on Grant’s head to help force him back down.<sup>47</sup> Officers Domenici and Woofinden helped keep the bystanders at bay while Mehserle, Pirone, and Guerra dealt with the five detainees.<sup>48</sup> Grant was kneeling on the ground while Pirone yelled racial slurs in his face.<sup>49</sup> Grant fell forward onto the ground as Grant grabbed his hands from behind, and Pirone pinned Grant’s neck to the ground with his knees.<sup>50</sup> Over Grant’s protestations that he surrendered, that he could not breathe, and that he was unable to move, Mehserle ordered Grant to give up his arms so he could be handcuffed and began to repeatedly pull at Grant’s right arm which was pinned underneath his body.<sup>51</sup> Mehserle was heard to exclaim that he was unable to get Grant’s hands and that he was going to tase Grant.<sup>52</sup>

Notably, cell phone video coverage of the melee shows Mehserle struggling to remove his handgun. When he finally retrieves it, Mehserle, holding the gun in both hands, stands and shoots Grant once in the back.<sup>53</sup> Mehserle, appearing surprised and dumbfounded according to several witnesses, “holstered his handgun and put his hands on his head, then bent over and put his hands on his knees.”<sup>54</sup> Grant, still conscious, shouted, “Oh, you shot me, you shot me.”<sup>55</sup> Mehserle then handcuffed Grant, searched him for weapons, and discovered that Grant was not armed.<sup>56</sup> Grant was taken to Highland Hospital with a single gunshot wound that penetrated his right lung, causing excessive blood loss.<sup>57</sup> Grant died approximately three to four hours after his surgery.<sup>58</sup>

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44. *Id.* at 4.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 5.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 5–6.

55. *Id.* at 6.

56. *Id.*

57. *Id.*

58. *Id.*



On the platform, shortly after the shooting, Mehserle told Pirone that he thought Grant was reaching for a gun.<sup>59</sup> Additionally, Mehserle talked to other officers in the minutes following the shooting and did not disclose that he had mistaken his handgun for his Taser.<sup>60</sup> A still emotional Mehserle confessed later at the station to Officer Foreman that he thought Grant was going for a gun.<sup>61</sup> Mehserle did not inform Officer Foreman that he thought he drew his taser instead of his handgun.<sup>62</sup>

Facing a second-degree murder charge and a maximum of fourteen years in prison, Mehserle testified at his trial that he meant to draw his stun gun instead of his .40-caliber pistol.<sup>63</sup> The videos taken by BART passengers were subsequently used as evidence during Mehserle's murder trial and were also posted online, further stoking the racial tensions brought on by the shooting.<sup>64</sup> Mehserle was found not guilty of murder or voluntary manslaughter, however, the jury convicted Defendant Mehserle of the lesser crime of involuntary manslaughter.<sup>65</sup> Mehserle was denied probation and sentenced to two years in prison for involuntary manslaughter.<sup>66</sup> Mehserle served only eleven months of his two-year sentence before he was released.<sup>67</sup>

Although the outcome of Mehserle's trial sparked nationwide outrage and protests, the spectators' cellphone and other video footage of the struggle and Grant's shooting was ultimately admitted as key pieces of evidence during Mehserle's trial, which undoubtedly had a significant impact in the case.<sup>68</sup> The video footage also inspired the Hollywood film, "Fruitvale Station," which recounts the tragedy of Oscar Grant's untimely death. This film not only helped bring awareness to Grant's story and the experiences of minorities with law enforcement, but it also illustrated the importance of cell phone video footage and how it can be used to aid in a criminal investigation.

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59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Ex-BART Officer Johannes Mehserle Released After 11 Months in Prison*, NBC NEWS (June 13, 2011, 4:55 PM), [http://www.nbcnews.com/id/43376251/ns/us\\_news-crime\\_and\\_courts/t/ex-bart-officer-johannes-mehserle-released-after-months-prison/#.WFDcqPkrLIV](http://www.nbcnews.com/id/43376251/ns/us_news-crime_and_courts/t/ex-bart-officer-johannes-mehserle-released-after-months-prison/#.WFDcqPkrLIV).

65. Transcript of Record at 9, *People v. Mehserle*, 206 Cal. App. 4th 1125 (2012) (No. A130654), <http://www.lovenotbloodcampaign.com/case-file/>.

66. *Id.*

67. Malaika Fraley, *Oscar Grant Case: Civil Jury Rules in Favor of Johannes Mehserle, Denies Award to Slain Man's Father*, MERCURY NEWS (July 1, 2014, 7:20 AM), <http://www.mercurynews.com/2014/07/01/oscar-grant-case-civil-jury-rules-in-favor-of-johanne-s-mehserle-denies-award-to-slain-mans-father/>.

68. *See Gahrn, supra* note 12.

## B. State v. Van Dyke

On Monday, October 20, 2014, officer Jason Van Dyke of the Chicago Police Department shot and killed 17-year-old African-American Laquan McDonald.<sup>69</sup> The next day, mere hours after video of him shooting McDonald was made available to the public, Van Dyke turned himself in to authorities.<sup>70</sup> According to dashcam video footage and a criminal complaint filed in Cook County Circuit Court, the circumstances surrounding McDonald's death began at 9:47 p.m. when Van Dyke was alerted from Cook County Police dispatch that an individual, later identified as McDonald, was being held under citizen's arrest for allegedly breaking into trucks and stealing radio equipment.<sup>71</sup> Minutes later, dispatch revealed that the suspect was walking away from the scene with a knife in hand.<sup>72</sup>

The dashcam video of one of the units that arrived on scene depicts McDonald as he was walking past the parked squad unit 822 patrol car.<sup>73</sup> The video shows McDonald holding a knife as he raised his right arm.<sup>74</sup> Van Dyke and his partner arrived on the scene and Van Dyke exited the police vehicle with his gun drawn.<sup>75</sup> As McDonald continued to walk away from police, Van Dyke took a step towards McDonald.<sup>76</sup> McDonald was ten feet away when he was struck by Van Dyke's first bullets.<sup>77</sup> McDonald fell to the floor on his side when Van Dyke fired another bullet into McDonald.<sup>78</sup> Clouds of smoke, which were actually clouds of debris caused by the fired bullets, slowly rose from McDonald's body.<sup>79</sup> McDonald was still lying in the street when Van Dyke fired his last shot.<sup>80</sup> Three more clouds of debris became visible where bullets struck the pavement close to McDonald's body.<sup>81</sup> As Van Dyke prepared to reload, Van Dyke's partner could hear McDonald struggling to breathe

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69. Elliott C. McLaughlin, *Chicago Officer Had History of Complaints Before Laquan McDonald Shooting*, CNN (Nov. 26, 2015, 5:45 PM), <http://www.cnn.com/2015/11/25/us/jason-van-dyke-previous-complaints-lawsuits/index.html>.

70. *Id.*

71. People's Factual Proffer in Support of Setting Bond at 2, *State v. Van Dyke*, No. 15-127823 (Ill. Cir. Ct., Nov. 24, 2015).

72. *Id.*

73. *Id.*

74. *Id.* at 3.

75. *Id.*

76. *Id.*

77. *Id.*

78. *See id.*

79. *Id.*

80. *Id.*

81. *Id.*

and told Van Dyke to hold his fire so that he could approach and kick the 3-inch blade away from McDonald's body.<sup>82</sup>

Van Dyke was armed with a 9mm semi-automatic pistol with a 16-round capacity.<sup>83</sup> Sixteen cartridge casings were later recovered from the scene, all fired from Van Dyke's gun.<sup>84</sup> Analysis of video from the scene shows that McDonald was lying on the ground for thirteen of the fourteen to fifteen seconds that passed from the time Van Dyke fired his first shot to the time he fired his last shot.<sup>85</sup> Van Dyke was also the only officer of eight on the scene that day that fired his handgun.<sup>86</sup> After having been shot sixteen times, McDonald was pronounced dead later that evening at Mt. Sinai Hospital.<sup>87</sup> According to the Cook County Medical Examiner, it was these multiple gunshot wounds that caused his death, making this a homicide.<sup>88</sup>

The dashcam video of the incident does not show McDonald advancing on Van Dyke, attempting to throw his knife at Van Dyke, jumping or lunging towards Van Dyke, raising his knife as if to stab Van Dyke, or doing anything that was threatening to Van Dyke other than not responding to police commands while holding a knife, and none of the officers on scene at the time reported anything substantially different from what the video showed.<sup>89</sup> The criminal complaint requests that "Van Dyke be held mandatory No Bail in that he personally discharged a firearm that proximately caused the death of Laquan McDonald and that a possible sentence of life imprisonment could be imposed as a consequence of his conviction."<sup>90</sup>

Although Van Dyke's attorney posits a version of events where Van Dyke was actually acting in fear for his life, numbers from The Citizens Police Data Project suggest otherwise.<sup>91</sup> The Citizens Police Data Project is a database of over 8,500 Chicago police officers that keeps record of misconduct complaints filed against each officer.<sup>92</sup> Reports from this database revealed that Van Dyke had been the subject of a misconduct complaint on at least twenty different occasions in his fourteen-year career.<sup>93</sup> And of those twenty, none have resulted in disciplinary action

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82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 4.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 5.

91. See McLaughlin, *supra* note 69.

92. *Id.*

93. *Id.*

against Van Dyke.<sup>94</sup> Van Dyke is not alone, however, as 402 other officers in the Chicago Police Department have twenty or more complaints on file.<sup>95</sup> Van Dyke, who has since been released on \$1.5 million bail, is currently awaiting trial for the first-degree murder of McDonald.<sup>96</sup> Additionally, at the direction of Chicago's police superintendent, seven of Van Dyke's colleagues were fired for making false reports to back up Van Dyke's story with McDonald painted as the aggressor—a story the video of the shooting proved false.<sup>97</sup> Although the fate of Van Dyke is still not certain, what remains certain is that the video footage of McDonald and Van Dyke played a significant role in helping to ensure that Van Dyke faces first-degree murder charges and that Van Dyke's former colleagues pay for their role in Van Dyke's crime.<sup>98</sup>

## II. THE RIGHTS OF CITIZENS

All people within the United States are promised and granted certain rights, as well as the protection of those rights, under both state and federal law. Part II of this Article discusses what rights, if any, are granted to private citizens as they pertain to cellphones, mobile video devices, and footage. Part II.A features some current lawsuits involving situations where private citizens have initiated federal legal proceedings against police officers and other state actors who unlawfully, and through use of coercion and intimidation, deprived them of their property and violated their constitutional rights. Section B of Part II discusses due process of law and examines how individuals, whose constitutional rights have been violated as a result of an unlawful police seizure, may bring a federal claim against their perpetrator(s). Part II.C outlines and analyzes the rights and protections granted by the First Amendment, as well as its limitations. Finally, Part II.D discusses the rights and protections granted by the Fourth Amendment, as well as its limitations.

### *A. How Mobile Video Footage is Unlawfully Sequestered by Police*

The ability of police and law enforcement officials to seize mobile video devices and footage evinces a direct implication of the protections

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94. *Id.*

95. *Id.*

96. Steve Schmadeke, *Prosecutors Oppose Van Dyke Skipping Routine Hearings in McDonald Case*, CHI. TRIB. (Apr. 14, 2016, 5:57 PM), <http://www.chicagotribune.com/news/laquanmcdonald/ct-laquan-mcdonald-jason-van-dyke-met-20160414-story.html>.

97. Mitch Smith & Richard A. Oppel, Jr., *7 Chicago Officers Face Firing Over Laquan McDonald Cover-Up*, N.Y. TIMES (Aug. 18, 2016), <http://www.nytimes.com/2016/08/19/us/laquan-mcdonald-chicago-police.html>.

98. Curtis Black, *How Chicago tried to cover up a police execution*, CHI. REPORTER (Nov. 24, 2015), <http://chicagoreporter.com/how-chicago-tried-to-cover-up-a-police-execution/>.

granted to private citizens by the First and Fourth Amendments of the U.S. Constitution. The First Amendment protects an individual's right of free speech,<sup>99</sup> while the Fourth Amendment protects an individual against unreasonable searches and seizures.<sup>100</sup> These implications are further rooted in the constitutional right of due process of law granted by both the Fifth and Fourteenth Amendments.<sup>101</sup> Consider the lawsuits below and note how each claim for redress is alleged under the First, Fourth, and Fourteenth Amendments, couched within a claim of a statutory violation of due process.

### 1. The Curious Case of Jessica Benn

On April 29, 2015, Jessica Benn attended a peaceful, anti-police brutality demonstration in Denver, Colorado with her husband.<sup>102</sup> While at the demonstration, Mrs. Benn noticed as the Denver police officers at the demonstration began to arrest scores of peaceful demonstrators for no apparent reason.<sup>103</sup> Mrs. Benn took out her cellphone and began to record the events occurring around her; notably, that of her husband's face being smashed into the ground by a Denver Police officer<sup>104</sup> Police District Commander Antonio Lopez yanked Mrs. Benn's phone away and used his baton to push her up against a bus.<sup>105</sup> Commander Lopez finally released Mrs. Benn, but only after she told him that she was pregnant.<sup>106</sup> Mrs. Benn never got her phone back.<sup>107</sup>

Mrs. Benn filed a federal civil rights suit on March 28, 2016 against the Denver Police Commander Antonio Lopez, and the City and County of Denver, Colorado.<sup>108</sup> The complaint asserts four counts against the named Defendants.<sup>109</sup> Count I asserts that Plaintiff's act of recording the police officers' actions in public constituted protected speech, expression, and news-gathering under the First Amendment, and that Lopez—acting within the scope of his employment—violated Mrs.

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99. U.S. CONST. amend. I.

100. U.S. CONST. amend. IV.

101. James W. Ely, Jr., *Due Process Clause*, in HERITAGE GUIDE TO THE CONSTITUTION (David F. Forte & Matthew Spalding eds., 2d ed. 2014), <https://www.heritage.org/constitution/#!/amendments/14/essays/170/due-process-clause>.

102. Andy Thayer, *Demonstrator Who Recorded Arrest Sues for Unlawful Seizure of Cell Phone*, LOEVY & LOEVY (Mar. 28, 2016), [http://www.loevy.com/blog/demonstrator\\_arrest\\_cell\\_phone/](http://www.loevy.com/blog/demonstrator_arrest_cell_phone/).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Complaint and Jury Demand at 14–20, *Benn v. Lopez*, No. 16-CV-715 (D. Colo. Mar. 28, 2016).

109. *Id.* at 14–15.

Benn's First Amendment rights in direct retaliation to her exercise of those rights.<sup>110</sup>

Count II of the lawsuit makes a claim under 42 U.S.C. § 1983 as it pertains to the Fourth Amendment, alleging a violation of Mrs. Benn's right against unreasonable searches and seizures. Count III of the complaint asserts a claim under 42 U.S.C. § 1983 as it pertains to the Fourteenth Amendment, and alleges a violation of Mrs. Benn's due process of law when Lopez permanently deprived her of her cell phone. Finally, Count IV of the complaint makes a claim of indemnification under Colorado state law, and asserts that the City of Denver is responsible for paying any compensatory damages, as Lopez was an employee of the City and County of Denver and was acting within the scope of his employment when he accosted Mrs. Benn.<sup>111</sup>

## 2. The Lengthy Lawsuit of Levi Frasier

On August 14, 2014, Levi Frasier witnessed two men pull another young man out of his vehicle.<sup>112</sup> Frasier immediately took out his tablet and began recording.<sup>113</sup> The "two men" Frasier initially identified happened to have been two Denver police officers.<sup>114</sup> The officers continued trying to restrain the suspect, who was already on the ground, as they attempted to get the suspect to give up the plastic bag he had just placed in his mouth.<sup>115</sup> After yelling to the suspect to spit out the drugs, one of the officers became enraged by the suspect's lack of compliance and began to punch the suspect repeatedly in the face, as the suspect lay there on the ground.<sup>116</sup> As the suspect's pregnant girlfriend approached the officers, one of the officers reached out and grabbed her leg. There were screams, and the pregnant woman fell to the ground.<sup>117</sup>

Still recording on his tablet, one of the officers finally noticed Frasier and yelled, "Camera!"<sup>118</sup> An officer later asked Frasier for the video.<sup>119</sup> Frasier, unwilling to give up the video, first told the officer that he had

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110. *Id.*

111. *Id.*

112. Lance Hernandez, *Man Who Recorded Alleged Denver Police Beating Sues DPD, Saying Tablet Was Seized, Video Disappeared*, 7 NEWS DENVER (Aug. 15, 2015, 12:38 AM), <http://www.thedenverchannel.com/news/local-news/man-who-recorded-alleged-police-beating-files-suit-saying-tablet-was-siezed-partially-erased>.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

only taken a picture.<sup>120</sup> He then told the officer that he had taken the video with his cell phone and not the tablet.<sup>121</sup> By this time, several officers had begun to surround Frasier, who was beginning to feel intimidated and coerced.<sup>122</sup> The officers asked Frasier again whether he was going to give them the video; he responded that he would not do so without a warrant.<sup>123</sup> At this time, one of the officers simply took Frasier's tablet.<sup>124</sup> After about four minutes, the officer returned the tablet to Frasier.<sup>125</sup> However, the video recording Frasier had just taken only moments earlier was now gone.<sup>126</sup>

The next day, Frasier filed a federal civil lawsuit against Officers Christopher Evans, Charles C. Jones, John H. Bauer, Russell Bothwell, as yet unidentified Denver police officers, and the City and County of Denver, Colorado.<sup>127</sup> The complaint outlines eight counts against the named Defendants, including a violation of the Plaintiff's First, Fourth, and Fourteenth Amendment rights.<sup>128</sup>

### B. 42 U.S.C. § 1983 and Due Process of Law

The Fifth Amendment and the Fourteenth Amendment of the U.S. Constitution prohibit governmental deprivations of "life, liberty, or property, without due process of law."<sup>129</sup> However, an analysis of the Fourteenth Amendment must begin with an analysis of the Fifth Amendment, as much of the language of the Fourteenth Amendment is drawn directly from the Fifth.<sup>130</sup>

#### 1. The Due Process Clause of the Fifth Amendment

Similar to the Fourteenth Amendment, the Fifth Amendment of the United States Constitution provides, in relevant part<sup>131</sup>: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

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120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Complaint and Jury Demand, *Frasier v. Evans*, No. 15-CV-1759, 2015 WL 6751136 (D. Colo. Aug. 14, 2015).

128. *Id.* at 11–21.

129. U.S. CONST. amend. V.

130. See Ely, *supra* note 101.

131. U.S. CONST. amend. V.

The court in *Hurtado v. California* established a test to determine what constitutes “due process of law” under the Fifth Amendment<sup>132</sup>: “that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law.” The court further acknowledges:

A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process according to the law of the land. This process in the States is regulated by the law of State.<sup>133</sup>

Ultimately, the court held that “any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.”<sup>134</sup>

The core meaning of “law of the land” provisions, dating back to the Magna Carta, is to secure the principle of legality by ensuring that executive and judicial deprivations are grounded in valid legal authority.<sup>135</sup> In this respect, the Fifth Amendment’s Due Process Clause limits the substance of executive or judicial action by requiring it to be grounded in law.<sup>136</sup>

## 2. The Due Process Clause of the Fourteenth Amendment

As a constitutional doctrine, the Due Process Clause of the Fourteenth Amendment serves three separate functions.<sup>137</sup> The Fourteenth Amendment provides, in relevant part<sup>138</sup>:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

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132. *Hurtado v. California*, 110 U.S. 516, 528 (1884).

133. *Id.* at 533.

134. *Id.* at 537.

135. *See Hurtado*, 110 U.S. at 537.

136. *See id.*

137. Ely, *supra* note 101.

138. U.S. CONST. amend. XIV, § 1.



due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The U.S. Supreme Court explains in *Daniels v. Williams* the three different types of constitutional protections that are granted by the Fourteenth Amendment, ultimately broadening the scope of due process law. As outlined by the court in *Daniels*:

First, it incorporates specific protections defined in the Bill of Rights. Thus, the State, as well as the Federal Government, must comply with the commands in the First and Eighth Amendments; so too, the State must respect the guarantees in the Fourth, Fifth, and Sixth Amendments. Second, it contains a substantive component, sometimes referred to as “substantive due process,” which bars certain arbitrary government actions “regardless of the fairness of the procedures used to implement them.” Third, it is a guarantee of fair procedure, sometimes referred to as “procedural due process”: The State may not execute, imprison, or fine a defendant without giving him a fair trial, nor may it take property without providing appropriate procedural safeguards.<sup>139</sup>

Under the modern law interpretation, both the federal and state governments are subject to the same substantive and procedural due process rights under the Fifth and Fourteenth Amendments.<sup>140</sup> Thus, an individual may make a Fourteenth Amendment due process claim under either of these three categories.

However, a claim under the first or second category (a direct violation of the Bill of Rights or a substantive due process claim) first requires a violation of 42 U.S.C. § 1983, which provides civil action for the deprivation of rights.<sup>141</sup> 42 U.S.C. § 1983 reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a

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139. *Id.*

140. Ely, *supra* note 101.

141. *See Daniels*, 474 U.S. at 338.

declaratory decree was violated or declaratory relief was unavailable.<sup>142</sup>

The court in *Daniels* analyzes each of the three categories of a Fourteenth Amendment due process claim. Under both the first and second categories, a plaintiff may invoke § 1983 regardless of the availability of a state remedy.<sup>143</sup> However, claims under the third category are described as follows:

A claim in the third category—procedural due process claim—is fundamentally different. In such a case, the deprivation may be entirely legitimate—a State may have every right to discharge a teacher or punish a student—but the State may nevertheless violate the Constitution by failing to provide appropriate procedural safeguards . . . In a procedural due process claim, it is not the deprivation of property or liberty that is unconstitutional; it is the deprivation of property or liberty *without due process of law*—without adequate procedures.<sup>144</sup>

Most provisions of the Bill of Rights are applicable to both the state and federal governments in the exact same manner. Thus, the fundamental difference between a substantive due process claim and a procedural due process claim is that a substantive due process claim requires an illegitimate deprivation of rights or property, whereas a procedural due process claim goes two steps further. In a procedural due process claim, not only can the deprivation be either legitimate or illegitimate, but the deprivation must also be one that deprives the individual of fair and adequate procedure—a trial, legal proceeding, tribunal, or other State remedy. Specifically, unless there is some legitimacy in the seizure, a person's personal property cannot be taken away from that person by any individual or by the State without that person being granted the opportunity to be heard before a tribunal (*e.g.*, court, trial, legal proceeding).

### 3. Applying the Fourteenth Amendment to Cellphones

A personal cellphone constitutes one's personal property in which, under the Fourteenth Amendment, that individual has protection through property rights. However, the law also provides exceptions to this blanket protection of rights. The law denies individuals' property rights in illegal drugs and other contraband, which could also be classified as one's

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142. 42 U.S.C. § 1983 (2012).

143. *Daniels*, 474 U.S. at 337–38.

144. *Id.*

“property.”<sup>145</sup> The law also denies individual rights in commonplace items that are used in illegal ways.<sup>146</sup> Applying this to cellphones, it is arguable that one’s property rights in his or her cellphone may be stripped if it is determined that the he or she has used the phone to further illegal conduct, such as using the phone to aid in the trafficking of illegal drugs or videotaping child pornography. However, the mere act of using one’s cellphone to record police officers engaging in brutal behavior against citizens is not, in and of itself, unlawful or considered a prohibited use as to strip away one’s property rights in their cellphone or its footage.

### C. Freedom of Speech and the First Amendment

The First Amendment of the U.S. Constitution provides that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”<sup>147</sup> The relevant portion of this clause as it pertains to the issue raised in this paper is the prohibition on the freedom of speech, a freedom granted to all people of the United States. The freedom of speech is, in fact, quite broad and rather generous, as it allows individuals the right to engage in a myriad of activities, including: the right of symbolic speech,<sup>148</sup> the right to advertise commercial products and professional services,<sup>149</sup> the right to contribute money to political campaigns,<sup>150</sup> the right to use offensive words and phrases to convey a political message,<sup>151</sup> and it also allows all people, even Colin Kaepernick, the right not to speak, not to salute the flag, and not to stand and place their hands over their hearts during the national anthem.<sup>152</sup>

This right also extends to recording video and audio of police using a cellphone, tablet, iPad, camcorder, or any other type of mobile video recording device. Under the First Amendment, all people of the United States have the right to record the police because public servants

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145. 21 U.S.C. § 881(a)(1) (2012); Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2448 (2016) (discussing the forfeiture of property rights in illegal substances and other contraband).

146. 21 U.S.C. § 881(a)(4), (h) (2012); see Nelson, *supra* note 145.

147. U.S. CONST. amend. I.

148. See *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

149. See *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

150. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *Buckley v. Valeo*, 424 U.S. 1 (1976).

151. See *Cohen v. California*, 403 U.S. 15 (1971).

152. See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

performing their public duties in a public place have no right to privacy regarding a citizen's right to record their actions.<sup>153</sup> Courts have ruled that “[r]ecording governmental officers engaged in public duties is a form of speech through which private individuals may gather and disseminate information of public concern, including the conduct of law enforcement officers.”<sup>154</sup>

Although broad, the freedom of speech granted under the First Amendment is not to be construed as a “blanket” protection, as it is accompanied by some limitations. There exists “time, place and manner” restrictions on filming.<sup>155</sup> Individuals are not granted the right to demand access to a location from which citizens can gather information.<sup>156</sup> The court in *Houchins v. KQED* denied a broadcasting company access to a particular location of a county jail that had alleged abusive conditions and that had also been the site of a recent inmate suicide, holding that, “there is no basis for the claim that the First Amendment compels others—private persons or governments—to supply information.”<sup>157</sup> Individuals are also not granted the right to gather news by any means they think necessary.<sup>158</sup> In *Branzburg v. Hayes*, a group of journalists claimed that compelling them to testify about confidential sources would violate their First Amendment right to gather news, and the court held that the First Amendment “does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.”<sup>159</sup> Although individuals are granted the right to access criminal trials under *Richmond Newspapers v. Virginia* (which held that the First Amendment provides the public with a constitutional right of access to criminal trials because they historically had been open to the public and because “it would be difficult to single out any aspect of government of higher concern and importance to the people . . .”),<sup>160</sup> recent case law has declined to extend the right of this access beyond the courtroom.<sup>161</sup> In *Los Angeles Police Department v. United Reporting Publishing Co.*, the court upheld a California law denying access to arrestees’ addresses if the request was made for commercial purposes,

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153. Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011).

154. *Id.*

155. *Id.* at 84.

156. *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978); see *Cornelius v. NAACP*, 473 U.S. 788, 799–800 (1985).

157. *Houchins*, 438 U.S. at 11.

158. *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972).

159. *Id.*

160. *Richmond Newspapers v. Va.*, 448 U.S. 555, 575 (1980); see *Globe Newspaper Co. v. Superior Court of Norfolk*, 457 U.S. 596 (1982).

161. *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 40 (1999); see also *Estes v. Texas*, 381 U.S. 532 (1965) (holding that excessive televising and broadcasting of criminal trial was a violation of due process).

stating that the law represented “nothing more than a governmental denial of access to information in its possession.”<sup>162</sup>

As it specifically concerns the filming of police officers by private citizens, a person’s right to record police is limited only by the usual “reasonable time, place, and manner restrictions” which can be placed on acts protected by the First Amendment.<sup>163</sup> The Supreme Court has recognized that the government has a significant interest in protecting safety and has upheld speech restrictions grounded in safety concerns against First Amendment challenges.<sup>164</sup> While cellphones and cellphone cameras are not inherently dangerous, their use can undoubtedly create safety hazards. Such restrictions on ones right to record might include<sup>165</sup>: citizen-recorders coming too close or approaching police from behind or oblique angles, posing a risk to officers looking to minimize their own vulnerabilities as well as those of members of the public;<sup>166</sup> recording police officers while knowingly trespassing in order to obtain footage; ordering a person to step back or to record from a distance where a suspect might have a gun or dangerous weapon; or creating a situation where a person’s actions are clearly causing serious interference with the police investigation. Given these examples, the issue of safety remains the cornerstone of such restrictions on police recording, as police officers must be able to protect and maintain their own safety as well as that of the public.

However, police are prohibited from using a “time, place and manner” restriction to justify a refusal to allow an individual to film what is in plain sight if the police officer’s purpose is to impose a “content-based restriction,” that is, to censor what is being recorded.<sup>167</sup> For example, police are not permitted to interfere with parents filming their children’s piano recital at a school or filming their children’s football game at a public park.<sup>168</sup>

There are some circumstances exist where police can justify a content-based restriction.<sup>169</sup> The police may block off the area in which offenders

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162. *United Reporting Publ’g*, 528 U.S. at 40.

163. Lauren Regan, *Policing the Police: Your Right to Record Law Enforcement*, CIVIL LIBERTIES DEFENSE CENTER (Apr. 21, 2015), <https://cldc.org/2015/04/21/policing-the-police/>.

164. *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); see *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 769 (1994).

165. Regan, *supra* note 163.

166. Michael Cerame, Note, *The Right to Record Police in Connecticut*, 30 QUINNIPIAC L. REV. 385, 392 (2012).

167. Evan Bernick & Paul Larkin, *Filming the Watchmen: Why the First Amendment Protects Your Right to Film the Police in Public Places*, HERITAGE FOUNDATION (June 12, 2014), <https://www.heritage.org/the-constitution/report/filming-the-watchmen-why-the-first-amendment-protects-your-right-film-the>.

168. *Id.*

169. *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

have taken a hostage in order to prevent someone from broadcasting police efforts to free the hostage or to preserve the hostage's privacy.<sup>170</sup> However, in each of these cases, there is a compelling government interest—usually to prevent ordinary citizens from unwittingly interfering with police efforts.<sup>171</sup> However, this compelling interest should not be used to prevent the free flow of accurate and credible news, and it should never be used to protect officers who, after having been caught on video engaging in misconduct, may not be viewed in the most favorable light.<sup>172</sup>

#### D. Privacy Interests and the Fourth Amendment

The Fourth Amendment grants protection against unreasonable searches or seizures by state actors, such as police. The Amendment reads<sup>173</sup>:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Cellphones are considered “effects” which fall under the protection of the Fourth Amendment.<sup>174</sup> Also, as previously discussed, the data stored within a person's cellphone, including audio and video footage, must be held distinct and separate from the actual phone itself, as a digital video or audio recording is not a tangible device.

##### 1. The *Riley* Court and the Development of Privacy Interests

The Supreme Court of the United States examined two separate cases in *Riley v. California*, using both to outline what interest, if any, an individual has in the digital contents of their cellphone.<sup>175</sup> In the first case, petitioner David Riley was convicted and given a higher sentence after police searched his phone and found evidence that Riley may have been involved in gang-related activity.<sup>176</sup> In the second case, respondent Brima

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170. *Id.*

171. Bernick Larkin, *supra* note 167.

172. *Id.*

173. U.S. CONST. amend. IV.

174. See Maureen E. Brady, *The Lost “Effects” of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 1003 (2016).

175. *Riley v. California*, 134 S. Ct. 2473, 2480 (2014).

176. *Id.* at 2481.

Wurie was charged with drug and firearm offenses when, after being arrested in an apparent drug sale, police officers seized a cellphone from Wurie's person and searched through the recent call logs.<sup>177</sup> From the call logs, they were to trace a frequently-appearing number to Wurie's apartment where they found drugs, a firearm, and ammunition.<sup>178</sup>

Three related precedents govern the extent to which officers may search property found on or near an arrestee.<sup>179</sup> The court in *Chimel v. California* required that a search incident to arrest be limited to weapons and evidence within the arrestee's immediate control, where it is justified by the interests in officer safety and in preventing evidence destruction.<sup>180</sup> Applying the *Chimel* analysis in *United States v. Robinson*, the court held that the risks identified in *Chimel* are present in all custodial arrests, even when there is no specific concern about the loss of evidence or the threat to officers in a particular case.<sup>181</sup> Finally, *Arizona v. Gant* permits searches of a car where "the arrestee is unsecured and within reaching distance of the passenger compartment," or where "it is reasonable to believe that evidence of the crime of arrest might be found in the vehicle."<sup>182</sup>

The court in *Riley* refused to extend the categorical rule from *Robinson* to searches of data stored on cellphones.<sup>183</sup> The *Riley* court further refused to import the *Gant* standard from the vehicle context to allow a warrantless search of an arrestee's cellphone whenever it is reasonable to believe that the phone contains evidence of the crime giving rise to arrest.<sup>184</sup> In reaching its decision, the court in *Riley* ultimately looked to *Chimel*, which arguably laid the groundwork for modern-day privacy interest analyses.<sup>185</sup> *Chimel* opined that there are two overarching interests that must be served when dealing with searches of private property by police officers: (1) seizure of items that could be used to harm an officer or escape; and (2) destruction of evidence.<sup>186</sup>

Using *Chimel* as a baseline, *Riley* addressed each issue raised by the *Chimel* court and determined that, as to the first issue, the digital data stored on a person's cell phone is not a 'weapon' in the traditional sense, in that it cannot cause physical harm to an arresting officer or assist an arrestee in escaping.<sup>187</sup> Police officers are allowed to examine the

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177. *Id.*

178. *Id.*

179. *Id.* at 2483.

180. *Chimel v. California*, 395 U.S. 752, 764 (1969).

181. *Riley*, 134 S. Ct. at 2483.

182. *Id.* at 2484 (citing *Arizona v. Gant*, 556 U.S. 332, 343 (2009)).

183. *Id.* at 2485.

184. *Id.* at 2492.

185. *Id.* at 2488–89.

186. *Chimel*, 395 U.S. at 764.

187. *See Riley*, 134 S. Ct. at 2485.

physical aspects of the phone to identify whether there is anything hidden within it that might be used as a weapon, like a razor blade, but the data on the phone does not pose a danger to anyone.<sup>188</sup> In addressing the second issue raised in *Chimel*, the *Riley* court observed that there was a legitimate concern regarding the issues of remote wiping and data encryption of the digital data stored on phones.<sup>189</sup> However, the court concluded that not only is neither issue truly prevalent, but that there are also other avenues by which an officer can address the unlikely problems of remote wiping, data encryption, and the untimely destruction of relevant digital information stored within a cellphone.<sup>190</sup> In short, the court ultimately held that, due to the proliferation of cellphone use as well as the sheer volume of data and storage capacity that cellphones contain, there exists a legitimate and extensive privacy interest in the digital contents of cellphones.<sup>191</sup> As such, police generally may not, without a warrant, search digital information on a cellphone seized from an individual who has been arrested.<sup>192</sup>

## 2. Reasonable Expectations of Privacy

In determining whether a Fourth Amendment constitutional violation has occurred, most courts also apply the standard Fourth Amendment test: whether the government has violated the claimant's "reasonable expectation of privacy."<sup>193</sup> Inspired by the Fourth Amendment, case law has further developed this idea by dividing this concept into two similar yet distinct entities: the subjective reasonable expectation of privacy and the objective reasonable expectations of privacy, both approaches requiring a two-fold inquiry.<sup>194</sup>

*Katz v. United States* discusses what constitutes a subjective expectation of privacy.<sup>195</sup> The court in *Katz* states:

My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities,

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188. *Id.*

189. *Id.* at 2486.

190. *Id.* at 2486–87.

191. *Id.* at 2494–95.

192. *Id.* at 2495.

193. See Brady, *supra* note 174 at 947.

194. Dow Chem. Co. v. United States, 476 U.S. 227 (1986); *Katz v. United States*, 389 U.S. 347 (1967).

195. *Katz*, 389 U.S. at 361.



or statements that he exposes to the “plain view” of outsiders are not “protected” because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.<sup>196</sup>

Thus, a subjective expectation of privacy would be one where the individual who is seeking protection has a legitimate, personal expectation of privacy; that is, an expectation of privacy that the individual himself would reasonably expect to have.<sup>197</sup>

Similarly, the court in *Dow Chem. Co. v. United States* argues as to what an objective expectation of privacy standard is.<sup>198</sup> Although the two-pronged analysis is generally the same for both standards, an objective expectation of privacy analysis requires there to be an actual (objective) expectation of privacy.<sup>199</sup> The court in *Dow* reasoned, “Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe.”<sup>200</sup> Thus, an objective expectation of privacy standard requires an individual to have a reasonable and legitimate expectation of privacy that society would also view as being a reasonable and legitimate expectation.<sup>201</sup> For example, as it relates to expectations of privacy regarding information, an expectation of privacy in information that is concealed would be more objectively reasonable than a subjective expectation of privacy in information that is exposed. Also, a person engaging in activity within the confines of her home with the doors closed and the blinds drawn would have a more objectively reasonable expectation of privacy than someone engaging in activity in a public place, where even a subjective expectation of privacy is only arguable, at best.

### III. FUTURE CONSIDERATIONS AND PREDICTIONS

Looking forward, it is important to note that an individual’s privacy interest is not a fixed and immutable section of law. Rather, it is a concept that continues to be affected and shaped by changing ideas, values, and perceptions. The right of protection of one’s privacy will continue to be extended so long as individuals assert their claims over what they deem to be private. As technology advances and society continues to change,

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196. *Id.*

197. *See id.*

198. *Dow Chem. Co.*, 476 U.S. at 235–36.

199. *See id.* at 238–39.

200. *Id.* at 236.

201. *Id.* at 235–36.

those protections will likely become increasingly restrictive. Part III.A discusses the role and potential impacts of advances in technology on future Fourth Amendment analyses and individuals, particularly police officers. Part III.B addresses the potential impact that continued widespread dissemination of mobile video footage and other personal information may have on people and future court decisions surrounding the issue of privacy rights and reasonable expectations of privacy.

### A. *Implications of Technological Advances*

Technology continues to develop and advance at a breathtaking pace. Undoubtedly, the effects of such high-speed technological development have been majorly positive. Not only do advances in technology allow people to live longer, healthier lives,<sup>202</sup> but these advancements have also sparked waves of innovation, creativity, and ingenuity; challenging each consecutive generation to go further, to do more, and to be better than their predecessors.<sup>203</sup> Most recently, at the Davos World Economic Forum, world leaders and innovators were surveyed in regards to what upcoming technological advances and futuristic capabilities may be in the works.<sup>204</sup> One such technological advance that was mentioned was the capability of implanting a phone inside a person's head.<sup>205</sup>

Although creative and socially relevant in its own right, talk of this new technological capability begs the question as to whether anyone has taken pause to seriously analyze the legal implications of such an endeavor. As discussed earlier, there are exceptions to when an officer may request and seize an individual's cellphone footage. If taking and storing mobile videos became as easy as blinking an eye, how would police go about lawfully seizing that person's footage? If phones were to be implanted inside a person's head, where would the data go? And how would such data be transferred from person to person? More importantly, how would that data be erased? Remote wiping, which was previously held to not be prevalent or a legitimate concern for police officers,<sup>206</sup> would soon undoubtedly become increasingly legitimate and highly prevalent. The continued development of technological advances would

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202. Florence P. Haseltine, *Technology Can Help Us Live Longer*, HUFFINGTON POST (Mar. 31, 2013), [http://www.huffingtonpost.com/florence-p-haseltine-phd-md/health-care-technology\\_b\\_2545273.html](http://www.huffingtonpost.com/florence-p-haseltine-phd-md/health-care-technology_b_2545273.html).

203. Tomas Chamorro-Premuzic, *Is Technology Making Us More Creative?*, GUARDIAN (June 18, 2015, 5:00 AM), <https://www.theguardian.com/media-network/2015/jun/18/technology-creative-creativity-web-content>.

204. Marguerite Reardon, *The Mobile Phone of the Future Will Be Implanted in Your Head*, CNET (Jan. 19, 2016, 4:00 PM), <https://www.cnet.com/news/the-mobile-phone-of-the-future-will-be-implanted-in-your-head/>.

205. *Id.*

206. *Riley*, 134 S. Ct. at 2487.

ultimately create a significant concern more so for police than for private citizens, as acts once deemed too difficult or impossible to ever truly be a legitimate cause for concern might soon become very possible.

### *B. Implications of Widespread Dissemination*

Privacy rights will also play a large role in shaping future legislation surrounding this and similar issues. One major source of concern in this area involves the expectation of privacy. A person has certain expectations of privacy in various kinds of property. As to cellphone video footage and data stored within a cellphone, it has been established that there exists an objectively reasonable expectation of privacy.<sup>207</sup> But how far will future courts go in protecting a person's privacy interests when they are freely given away?

In today's society, simply taking and storing a video is no longer enough; it must be shared with the entire world. When a video is recorded using someone's cellphone and then disseminated on the internet, it becomes global information. What objective, or even subjective, reasonable expectation of privacy does one have in a video that has been broadcasted over the internet for the entire world to see? Similarly, what expectation of privacy does a person have in a video of police engaging in misconduct after that video has been posted to Facebook? Would it then be unreasonable or unlawful for the officer to then seize the phone for its "content"? In the interest of fairness, some courts would likely begin deciding that people no longer have any reasonable expectation of privacy in any data stored on their phones, as it is already given away so freely.

## CONCLUSION

Absent a validly-served warrant, the sequestering of cellphone video footage by police officers is, in most cases, unlawful, illegal, and wrong. The U.S. Constitution grants the People protection from unwarranted government intrusion, which includes unreasonable searches and seizures. Aside from a few limitations, a person is well within her legal right under the First Amendment to record any police officer engaging in misconduct in a public place. Any efforts to prevent a person from doing so is a clear violation of that person's First Amendment rights. People should also not be mistreated, coerced, or intimidated by police to relinquish their personal property or delete its contents. Any such coercion is a violation of that person's Fourth Amendment right.

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207. *Id.* at 2494–95.

Unfortunately, due to institutional racism and failures of the judicial system, video recordings of police engaging in misconduct many times have little to no impact on the offending officer. More weight and attention must be given to video-recorded footage, as it is one of the most indiscriminate and reliable forms of evidence available today. There will be no change to the status quo if officers, emboldened by a false sense of invincibility, continue to escape conviction or judicial discipline for their blatant misconduct. Nevertheless, regardless of what little impact a video recording may have on the actual adjudication of justice against an offending officer, the benefits of recording still outweigh the courts' failure to take recordings into consideration.

Courts must have a clear and accurate account of events as they occurred in order to properly process excessive force claims under 42 U.S.C. § 1983.<sup>208</sup> Not surprisingly, one of the best ways for courts to do this is through civilian footage of police-civilian encounters.<sup>209</sup> This type of footage also serves to disincentivize officers who may be otherwise tempted to lie under oath, either to protect themselves or their colleagues.<sup>210</sup> Knowing that there is tangible, verifiable proof of what actually occurred during an event is sure to deter many officers from blatantly lying in any statement or tribunal.<sup>211</sup> Footage of police brutality and misconduct, especially recordings involving minority victims, should continue to be filmed and broadcasted to incite people to action and to galvanize grassroots coalitions that will advocate for judicial reform as well as a dismantling and rebuilding of the current broken system.

As quickly as society continues to develop, courts too should develop. The momentum of the rise of new technological advances will likely overtake the slow, inconsistent march of the courts, and legislation will soon fall below the curve. Future generations of attorneys and lawmakers, born and bred in this age of technological revolution and wonder, are perfectly primed to assist the courts in picking up the pace. As the intersectionality of law and creative technology continues to become more readily apparent, institutions of higher learning and legal education should also begin to refocus and restructure their ancient, decrepit curriculums and stale practices in order to adapt to the increasingly changing legal landscape. Law, like technology, should constantly be looking forward, and seldom backwards. As with all things, the law, its teaching, and its application must continue to advance and adapt or it will eventually decay and die.

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208. See Nunes, *supra* note 21, at 1842.

209. *Id.*

210. *Id.*

211. *Id.*