

TEXAS A&M LAW REVIEW



**Volume Three
2015–2016**

**TEXAS A&M UNIVERSITY SCHOOL OF LAW
1515 COMMERCE STREET
FORT WORTH, TEXAS 76102**

THE FIRST AMENDMENT RIGHT TO RECORD IMAGES OF POLICE IN PUBLIC PLACES: THE UNREASONABLE SLIPPERINESS OF REASONABLENESS & POSSIBLE PATHS FORWARD

*By: Clay Calvert**

ABSTRACT

Analyzing federal cases through May 2015, this Article examines the current, contested terrain of the emerging, yet qualified, First Amendment right to record police performing duties in public venues. The Article argues that multiple First Amendment interests, ranging from the watchdog role of the press to discovery of truth under the marketplace of ideas theory, mandate that the reasonable-restrictions standard, which is now deployed by most courts to decide if this nascent right may permissibly be abridged, be jettisoned in favor of a more rigorous, speech-friendly approach. Specifically, the Article advocates a form of judicial review akin to strict scrutiny. It also proposes a framework of analysis—a “Continuum of Necessity”—for adding consistency and teeth to this tack. The Article concludes by calling on the Supreme Court to quickly consider a right-to-record case to establish two key points: (1) the existence of a clearly established First Amendment right in 2015 to record police performing their duties in public places; and (2) any restrictions imposed on this right are permissible only if they are so narrowly tailored that no viable alternatives exist that would allow for greater ability to record police under the circumstances.

TABLE OF CONTENTS

I. INTRODUCTION.....	132
II. JUDICIAL PERSPECTIVES ON THE RIGHT TO RECORD POLICE: BUMPS AND DETOURS ON THE ROAD TO RECOGNIZING A QUALIFIED FIRST AMENDMENT RIGHT	139
A. <i>The State of the Law in 2015: Split of Authority or Emerging Robust Consensus?</i>	141
B. <i>Federal Circuit Courts Not Yet Recognizing the Right to Record and Some Rumblings Below from Their District Courts</i>	142
1. U.S. Court of Appeals for the Second Circuit ..	142

* Professor & Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The Author thanks Kéran Billaud of the University of Florida for his research and suggestions on early drafts of this Article.

2. U.S. Court of Appeals for the Third Circuit	148
3. U.S. Court of Appeals for the Fourth Circuit . . .	150
4. U.S. Court of Appeals for the Fifth Circuit	150
5. U.S. Court of Appeals for the Sixth Circuit	152
6. U.S. Court of Appeals for the Tenth Circuit	155
C. <i>Recognizing a First Amendment Right to Record Police Performing Duties in Public Places</i>	155
D. <i>Qualifying the First Amendment Right to Record Police: The Reasonableness Approach to Restrictions</i>	159
III. DISCOVERING THE TRUTH ABOUT POLICE CONDUCT AND THE NEED TO ACCOUNT FOR FIRST AMENDMENT INTERESTS: WHY REASONABLENESS FAILS AS THE LEGAL STANDARD	162
IV. TOWARD A STRICT SCRUTINY STANDARD OF REVIEW FOR CENSORING THE RIGHT TO RECORD POLICE IN PUBLIC VENUES: FROM REASONABLE RESTRICTIONS TO NECESSARY RESTRICTIONS AND THE CREATION OF A CONTINUUM OF NECESSITY	170
A. <i>Arrest, Camera Seizure, and Camera Destruction: The Least Narrowly Tailored Restrictions</i>	173
B. <i>An Order to Stand Five or Fewer Yards Back: Presumptively Narrowly Tailored & Least Restrictive</i>	174
C. <i>More Than Five Yards Back: Presumptively Unconstitutional</i>	175
V. CONCLUSION	176

I. INTRODUCTION

Feidin Santana is not, by either trade or training, a journalist. He is, in fact, a twenty-three-year-old barber.¹ Yet, in early April 2015, the native of the Dominican Republic² performed an unexpected but vital journalistic function³ while walking to work one morning in North

1. David Zurawik, *Nonjournalists Again Leading the Discussion*, BALT. SUN, Apr. 12, 2015, at 1E.

2. See Feidin Santana, *Who Recorded Police Shooting of Walter Scott, Speaks Out*, NBC NEWS (Apr. 8, 2015, 11:21 PM ET), <http://www.nbcnews.com/news/latino/feidin-santana-who-recorded-man-shot-police-officer-speaks-out-n338171> (noting that Santana “immigrated to the U.S. from the Dominican Republic”).

3. Santana’s recording of the Walter Scott shooting embodies performance of the watchdog function of journalism, as it directly exposed abuses of power by a government official—namely, a police officer. See generally W. Lance Bennett & William Serrin, *The Watchdog Role*, in THE PRESS 169, 169 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005) (asserting that “the watchdog role of journalism may involve simply documenting the activities of government, business, and other public institutions in ways that expose little-publicized or hidden activities to public scrutiny”).

Charleston, South Carolina.⁴ Using a smartphone, Santana captured a video that would repeatedly air on newscasts and impart “the kind of information that drives national conversations.”⁵

It depicts a white police officer named Michael T. Slager fatally shooting Walter L. Scott, an unarmed black man, multiple times in the back after Slager pulled Scott over for a broken taillight.⁶ Santana’s video, as the *Wall Street Journal* reported, led to murder charges against Slager “and became the latest flash point in the debate about race and policing in America.”⁷ Indeed, another newspaper pointed out that “[i]f not for a chilling cellphone video, the shooting of Walter Scott in North Charleston might have been written off as a justified police shooting, another case of an officer gunning down a man because he feared for his life.”⁸

Put more bluntly, the video spoke the truth for a dead man who could not. In doing so, it also provided a path for possible posthumous justice.

Critically, Feidin Santana took the video despite a second police officer telling him to stop.⁹ Furthermore, that officer ordered Santana to stay put, but, as Santana told MSNBC, he “realized that that would be something no good and so I just run to my job.”¹⁰ Whether that officer would have seized Santana’s phone and deleted the video, of course, is conjecture.

What is clear, however, is that both the public and criminal justice system benefited immensely from Santana’s video, which directly contradicted Slager’s official version of events.¹¹ In fact, the day before

4. See *Transcript: Morning Joe Exclusive with Feidin Santana*, MSNBC (Apr. 9, 2015, 9:10 AM), <http://www.msnbc.com/morning-joe/transcript-morning-joe-exclusive-feidin-santana> [<http://perma.cc/QK42-K2YJ>] [hereinafter *Morning Joe Exclusive with Feidin Santana*] (quoting Santana for the proposition that “I live close to the scene. I used to live close from there. And I was heading to my work, to my job. I’m a barber and I work in a barbershop near there, so it’s easy for me to just go and walk”).

5. Zurawik, *supra* note 1, at 1E.

6. Frances Robles & Alan Blinder, *A Stark Image of a Shooting Carries Impact*, N.Y. TIMES, Apr. 9, 2015, at A1; see also David Zucchino, *Anger Simmers at S.C. Funeral*, L.A. TIMES, Apr. 12, 2015, at A8 (noting that Scott “was driving a used Mercedes-Benz to buy auto parts when Slager pulled him over in the parking lot of an Advance Auto Store in North Charleston”).

7. Valerie Bauerlein, *How Shooting was Caught on Video*, WALL ST. J., Apr. 10, 2015, at A4; see also Ernie Suggs, *Police Shooting - ‘We Didn’t Want Another Ferguson’ - South Carolina City Straddles Delicate Line in Shooting’s Aftermath*, ATLANTA J.-CONST., Apr. 12, 2015, at A1 (noting that “Santana’s video directly led to Slager’s arrest”).

8. *S.C. Shooting Video Could Have Impact*, RICHMOND TIMES-DISPATCH (Va.), Apr. 9, 2015, at 1A.

9. Steve Almasy, *Feidin Santana on S.C. Shooting: I Told Them What They Did Was an Abuse*, CNN (Apr. 13, 2015), <http://www.cnn.com/2015/04/09/us/south-carolina-witness-video/> [<http://perma.cc/2FM4-WKX5>].

10. *Morning Joe Exclusive with Feidin Santana*, *supra* note 4.

11. See Michael S. Schmidt & Matt Apuzzo, *Once Again, a Shooting Brings Race to the Fore*, INT’L N.Y. TIMES, Apr. 9, 2015, at 6 (reporting that “Officer Slager had

Santana's video surfaced, Slager claimed he feared for his life when he fired at least eight shots at Scott.¹² Santana's video, however, "instantly demolished the official version."¹³ Indeed, its disclosure marked the pivotal turning point in the case, with Slager being immediately fired thereafter and now facing a possible life sentence or the death penalty if convicted.¹⁴ The video remains posted today on *The New York Times's* website.¹⁵

Unfortunately, many people like Santana and Ramsey Orta—the latter captured a video depicting a chokehold placed on Eric Garner by a New York City police officer in July 2014 that caused Garner's death¹⁶—are not so lucky today when they try to film police performing duties in public places. Consider, for example, the following disturbing incidents, all occurring in April 2015—the same month of the North Charleston shooting.

A police officer in New Jersey City, New Jersey, stopped and detained a man named Joe Feranti who was filming a traffic stop with his phone.¹⁷ Feranti was standing on a public sidewalk when the officer told him "if you are recording my stop then I have to seize your

said he feared for his life because Mr. Scott had taken his stun gun in the scuffle. But . . . the video . . . seemed to dispel ambiguity over what took place. After it surfaced, Officer Slager was charged with murder"); David Zucchini et al., *Video Set One Fatal Police Shooting Apart*, L.A. TIMES, Apr. 9, 2015, at A1, A10 (quoting Justin Bamberg, an attorney representing the family of the slain Walter Scott, for the proposition that "[t]he officer lied in his incident report and his lies were corroborated by the Police Department. . . . It wasn't until the video came out that all that changed completely").

12. James Queally & David Zucchini, *S. Carolina Officer Charged with Murder*, L.A. TIMES, Apr. 8, 2015, at A7.

13. Juan Gonzalez, *When Will the Killing Cease?*, N.Y. DAILY NEWS, Apr. 10, 2015, at 6.

14. Mark Berman et al., *S.C. Officer Charged in Black Man's Killing*, WASH. POST, Apr. 8, 2015, at A1, A10.

15. *Video Shows Fatal Police Shooting*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/video/us/100000003615939/video-shows-fatal-police-shooting.html>.

16. See Susan Page, *7 Stories That Matter for 2015*, USA TODAY, Dec. 31, 2014, at 1A, 5A (providing a brief description of the incident Ramsey caught on his cellphone camera); Jake Pearson, *NYPD Officer's Chokehold Blamed in Man's Death*, WASH. POST, Aug. 2, 2014, at A2 (reporting that the New York City medical examiner concluded "that a police officer's chokehold caused the death of a man whose videotaped arrest and alleged final pleas of 'I can't breathe!' sparked outrage and led to the announcement of an overhaul of use-of-force training for the nation's largest police force. The death was ruled a homicide"); Ashley Southall & Marc Santora, *At Funeral, Rallying Cry for a Symbol of a Divide*, N.Y. TIMES, July 24, 2014, at A23 (reporting that Ramsey's video shows Officer Daniel Pantaleo "wrapping his arm around the neck of Mr. Garner, who was on a Staten Island street corner, arguing with the police and objecting to being arrested. The department has banned the use of chokeholds since 1993").

17. Christie Duffy, *Man Claims He Was Illegally Detained for Filming Jersey City Police*, PIX 11 NEWS (Apr. 28, 2015), <http://pix11.com/2015/04/28/man-claims-he-was-illegally-detained-for-filming-jersey-city-police/> [<http://perma.cc/V236-WFKZ>]. Feranti's video of the incident is posted on YouTube. Joe Feranti, *Being Illegally Detained by Jersey City Police*, YOUTUBE (Apr. 25, 2015), <https://www.youtube.com/watch?v=c4yB04UdWX8> (last visited July 18, 2015).

phone.”¹⁸ Also in the Garden State, police in Paterson confiscated the camera of a newspaper photographer, who was lawfully standing behind crime-scene tape, “after he refused to delete several photographs taken at the scene of the city’s seventh homicide this year.”¹⁹

Across the country, a video from California appeared in April 2015 on YouTube that seems “to show a Santa Barbara police officer knocking a cell phone out of the hands of a bystander filming a downtown arrest.”²⁰ Also in the Golden State, and perhaps most egregiously of all the incidents from April 2015:

[A] deputy U.S. Marshal was caught on video snatching a woman’s phone and smashing it on the ground.

The woman was using the phone to film armed deputies in Los Angeles County when one of the men suddenly rushed her, the 53-second recording revealed.

The burly, bearded deputy tore the phone from the woman’s hands and slammed it on the ground as she tried to scramble away. “No! Don’t do that!” the woman screamed.

The unidentified deputy, dressed in a tactical vest and carrying a rifle, appeared to kick something across the ground before he and the others turned and walked off.

The shocking encounter was captured by a stunned witness who was filming from across the street.²¹

The bottom line is that while this may well be the era of “video democracy,”²² filming police officers in public places remains risky and sometimes leads to detention and/or arrest.²³ It is also an activity

18. Duffy, *supra* note 17.

19. Peter J. Sampson & Jim Norman, *Cops Seize Camera of Record Staffer*, HERALD NEWS (N.J.), Apr. 30, 2015, at B2.

20. Tyler Haden, *Video of Arrest Appears to Show Officer Knock Phone from Bystander’s Hands*, SANTA BARBARA INDEP. (Cal.) (Apr. 23, 2015), <http://www.independent.com/news/2015/apr/23/video-arrest-appears-show-officer-knock-phone-byst/> [<http://perma.cc/S3Q8-69RH>]. The video of the incident is posted on YouTube. *Man Assaulted by Santa Barbara Police Officer*, YOUTUBE (Apr. 22, 2015), <https://www.youtube.com/watch?v=MNdMQIcTzzw> (last visited July 18, 2015).

21. Doyle Murphy, *U.S. Marshals Investigate Deputy Filmed Smashing Woman’s Phone in California*, N.Y. DAILY NEWS (Apr. 21, 2015), <http://www.nydailynews.com/news/national/u-s-marshal-deputy-filmed-smashing-watcher-phone-article-1.2193664>. The video in question is posted on YouTube. *U.S. Marshals in South Gate Attack Cop Watcher. Destroys Her Cellphone*, YOUTUBE (Apr. 19, 2015), <https://www.youtube.com/watch?v=O-J-6SkuKJ0&app=desktop> (last visited June 18, 2015).

22. David Zurawik, *Catching up with Video Democracy*, BALTIMORE SUN, Dec. 7, 2014, at 1E.

23. See, e.g., Danny Jacobs, *Woman Charged After Taking Video of Arrest Sues Baltimore Police*, DAILY REC. (Balt., Md.), Mar. 12, 2015, LexisNexis Academic (reporting that “[a] Baltimore woman has sued police after she was allegedly assaulted and arrested for filming an officer drawing her gun and arresting people in a shopping center parking lot”); Eliot Kleinberg, *Video of City Cops May Lead to Lawsuit*, PALM BEACH POST (Fla.), Mar. 6, 2014, at 1B (reporting that William Avery Chatman was arrested and had his cellphone seized because he was “taking video of West Palm Beach police officers who’d detained a man”); Lou Michel, *Police Say Cop Made Threat to Take Phone; Effort Cited to Delete Video After Beating*, BUFFALO NEWS

likely to increase in the near future, as smartphone applications (or “apps”) such as “Cop Watch” facilitate and expedite the recording and posting of videos online.²⁴

Additionally, the issue carries fiscal significance. That is because, when police wrongfully arrest citizens for recording them, it sometimes proves expensive for taxpayers. A whopping \$250,000 settlement paid by the City of Baltimore in 2014 demonstrates this fact.²⁵ Ultimately then, as Mickey Osterreicher, general counsel for the Na-

(N.Y.), May 1, 2014, at B11 (reporting that “Buffalo Police Officer John A. Cirulli threatened to confiscate the cellphone of the man who made a video of the officer beating John T. Willet unless he deleted the recording,” and adding that “[t]he video is the key piece of evidence in an investigation by the Internal Affairs Division of the Police Department. The FBI also is looking into the incident because of concerns about possible civil rights violations”); Greg Sowinski, *Filming Police Causes Stir - Man Faces Charges After Refusing to Turn Over Video*, DAYTON DAILY NEWS (Ohio), May 12, 2014, at B8 (reporting that “[a] man using a smartphone to record video of a police traffic stop is facing criminal charges after he refused to turn over his phone”).

24. See Farhad Manjoo & Mike Isaac, *Right Time, Right Place, Right App for Capturing Interactions with Police*, N.Y. TIMES, Apr. 9, 2015, at A17 (describing Cop Watch as “an iPhone app that automatically begins recording when you tap its icon and automatically uploads the video to YouTube when the recording is stopped”). In addition to Cop Watch, the ACLU of Northern California in April 2015 introduced the “Mobile Justice CA” app, which allows one “to send video to the ACLU even if law enforcement officials try to confiscate or destroy your smartphone.” Press Release, Mitra Ebadolahi, Am. Civil Liberties Union of N. Cal., New ACLU Mobile Justice App Empowers Public to Safeguard Rights (Apr. 30, 2015), <https://www.aclunc.org/blog/new-aclu-mobile-justice-app-empowers-public-safeguard-rights>.

25. Settlement Agreement and Release, *Sharp v. Balt. City Police Dep’t*, No. 1:11-cv-02888-CCB (D. Md. Jan. 28, 2014), http://www.aclu-md.org/uploaded_files/0000/0486/sharp_v._bpd_final_signed_agreement.pdf [<http://perma.cc/3NUL-W2K8>]; see Danny Jacobs, *City of Baltimore to Pay \$250K in Preakness Arrest Video Suit*, DAILY REC. (Balt., Md.), Mar. 4, 2014, LexisNexis Academic (reporting that Baltimore was “set to approve a \$250,000 settlement with an Owings Mills man who alleged police seized his cellphone and deleted video he took of his friend being arrested during the 2010 Preakness Stakes. Christopher Sharp claimed police also deleted videos of his son and reset his phone”).

In 2014, the City of Orlando, Florida, paid \$15,000 to settle a lawsuit filed by Alberto Troche, who alleged he “was jailed and had a cell phone pulled from his hand by a police officer because he video-recorded officers arresting another man who was calling for help.” Rene Stutzman, *Orlando Pays \$15K to Man Jailed for Recording Cops*, ORLANDO SENTINEL, Dec. 27, 2014, at B1.

In March 2015, the American Civil Liberties Union of Maine reached a settlement for an undisclosed amount of attorney fees and cash on behalf of plaintiffs Jill Walker and Sabatino Scattoloni, who:

were visiting Portland [Maine] on May 25, 2014 when they observed an encounter between five police officers and one woman. Walker and Scattoloni decided to film the incident from across the street, and they subsequently moved closer to observe the police activities. Officer [Benjamin] Noyes ordered the two to get off the sidewalk or face arrest. When Walker and Scattoloni asked the reason they would be arrested, Officer Noyes immediately ordered two other officers to arrest the couple.

Press Release, Am. Civil Liberties Union of Me., ACLU, Portland Police Reach Settlement in Filming Case (Mar. 30, 2015), <http://www.aclumaine.org/aclu-portland-police-reach-settlement-filming-case>.

tional Press Photographers Association, puts it, “[i]t’s the perfect storm You’ve got everyone with phone technology capable of recording high-quality stills and videos, along with the capacity of uploading these images immediately on YouTube.”²⁶

This Article treads into the eye of that storm. It explores the emerging contours and contested terrain of the First Amendment²⁷ right of citizens to record images of law enforcement personnel carrying out their duties in public venues. It is an issue the Supreme Court, unfortunately, has not squarely addressed,²⁸ but that multiple lower courts considered in 2014 and 2015.²⁹

Part II of this Article comprehensively examines recent judicial decisions—through and including May 2015—affecting this nascent right.³⁰ In the process, it also critiques the reasonableness standard adopted by many courts today as the legal benchmark against which police restrictions on this qualified constitutional right are measured. Additionally, it explores how the reasonable-restrictions approach mirrors the standard embraced by the Supreme Court in evaluating police actions in Fourth Amendment³¹ cases.

Next, Part III argues that the reasonableness standard embraced by courts for restricting the right to record police is too lax, at least from a free-speech perspective, because it only accounts for Fourth Amendment interests in ensuring proper law enforcement encounters during

26. Billy Cox, *Recording Police, and Catching Some Flak*, SARASOTA HERALD TRIB. (Fla.), Mar. 11, 2014, at A1.

27. The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

28. *See* *Mocek v. City of Albuquerque*, 3 F. Supp. 3d 1002, 1057 (D.N.M. 2014) (writing that “[n]either the Tenth Circuit nor the Supreme Court has directly addressed a right—constitutional or otherwise—to record police or law enforcement activity in public” (emphasis added)).

29. *See* cases discussed *infra* Part II, Section B.

30. *See infra* notes 37–231 and accompanying text.

31. The Fourth Amendment to the U.S. Constitution provides:

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.

U.S. CONST. amend. IV. The Fourth Amendment has been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See* *Wolf v. Colorado*, 338 U.S. 25, 28 (1949) (observing that “we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourth Amendment”); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding, with regard to the exclusionary rule adopted in *Weeks v. United States*, 232 U.S. 383 (1924), that “all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court”).

stops and arrests.³² In doing so, it fails to give proper weight to competing First Amendment speech and press interests in newsgathering, the watchdog function of the press now often played by citizen-journalists, and, perhaps most importantly, the goal of truth discovery, which lies at the heart of the marketplace of ideas theory that underlies much of modern First Amendment jurisprudence.³³

Part IV then proposes that police must prove that any restrictions imposed on the qualified First Amendment right to record them performing duties in public places are not simply reasonable, but that they are, in fact, necessary and narrowly tailored to serve directly a compelling interest in officer, detainee/suspect, or public safety.³⁴ This is in accord with the strict scrutiny standard of judicial review³⁵ that typically must be satisfied by governmental entities to justify a content-based restriction on speech. Additionally, Part IV goes further to recommend—for future academic, law enforcement, and judicial discussion—eight variables for consideration in determining when a recording restriction is not simply reasonable, but narrowly tailored.

Finally, the Article concludes in Part V by urging the Supreme Court to grant certiorari in a right-to-record case in order to recognize a First Amendment right to capture images of police doing their jobs in public venues and, in turn, to impose a heightened standard—one greater than mere reasonableness and one that accounts for First Amendment concerns—for analyzing when this qualified right may permissibly be curtailed.³⁶

32. See *infra* notes 232–83 and accompanying text.

33. Justice Anthony Kennedy reaffirmed this maxim and the power of the marketplace metaphor in *United States v. Alvarez*, writing for the plurality that “[t]he theory of our Constitution is ‘that the best test of truth is the power of the thought to get itself accepted in the competition of the market.’” *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

34. See *infra* notes 285–307 and accompanying text.

35. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (asserting that because a California law limiting minors’ access to violent video games “imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest”); *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000) (asserting that a content-based speech restriction can only withstand judicial review “if it satisfies strict scrutiny,” opining that “[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest,” and adding that “[i]f a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative”).

36. See *infra* notes 308–11 and accompanying text.

II. JUDICIAL PERSPECTIVES ON THE RIGHT TO RECORD POLICE:
BUMPS AND DETOURS ON THE ROAD TO RECOGNIZING A
QUALIFIED FIRST AMENDMENT RIGHT

On initial glance, establishing a First Amendment right to record images of police officers doing their jobs in public places would seem to be a fairly easy constitutional task—one flowing naturally from a number of established principles and maxims. Specifically, the logic chain for recognizing the right goes something along the lines of what follows below.

First, the Supreme Court has long held that images and films, not merely spoken and written words,³⁷ are protected by the First Amendment.³⁸ Second, and more recently, the nation’s high court concluded that the act of creating such images—not merely the finished product—also is safeguarded by that amendment.³⁹ Third, courts are clear that a person generally does not possess a reasonable expectation of privacy when he or she is situated in a public place, such as a street or sidewalk.⁴⁰ Fourth, and in accord with the first three points, the Supreme Court has observed that public streets and sidewalks—places where police often carry out their work—“are areas that have historically been open to the public for speech activities.”⁴¹ Fifth and finally, the conduct of police, as government officials, is a matter of public concern, and speech regarding matters of public concern is, as the Su-

37. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995) (observing that “the Constitution looks beyond written or spoken words as mediums of expression”).

38. *See Kaplan v. California*, 413 U.S. 115, 119–20 (1973); *see also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (concluding that “expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments”).

39. *Brown*, 131 S. Ct. at 2734 n.1 (noting that, for First Amendment purposes, “[w]hether government regulation applies to creating, distributing, or consuming speech makes no difference”); *see also Ashutosh Bhagwat, Producing Speech*, 56 WM. & MARY L. REV. 1029, 1080 (2015) (concluding, after an exhaustive analysis, that the First Amendment “protects the creation of communicative materials—in other words, producing speech”).

40. *See, e.g., Katz v. United States*, 389 U.S. 347, 351 (1967) (reasoning that “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection”); *Vega-Rodriguez v. P.R. Tel. Co.*, 110 F.3d 174, 181 (1st Cir. 1997) (observing that “persons cannot reasonably maintain an expectation of privacy in that which they display openly”); *Wishart v. McDonald*, 500 F.2d 1110, 1113–14 (1st Cir. 1974) (asserting that “the right to privacy . . . may be surrendered by public display. The right to be left alone in the home extends only to the home and not to conduct displayed under the street lamp on the front lawn”); *Jackson v. Playboy Enters., Inc.*, 574 F. Supp. 10, 13 (S.D. Ohio 1983) (finding no expectation of privacy in a tort case where the plaintiffs “were on a city sidewalk in plain view of the public eye”); *Stern v. Doe*, 806 So. 2d 98, 102 (La. Ct. App. 2001) (observing that “no right to privacy attaches to material in the public view” and noting that “[t]he plaintiff was clearly in the public view when he was standing on the sidewalk across the street from the school”).

41. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014).

preme Court recently reiterated in *Snyder v. Phelps*,⁴² at the heart of the First Amendment.⁴³

It thus seems like a legal no-brainer, as it were, that citizens possess a First Amendment right to take pictures, videos, and audio recordings of police performing their jobs in public venues. Unfortunately, it is not nearly that simple or clear.

Despite the series of legal principles identified two paragraphs above, current case law regarding the right to film police working in public places provides a mixed bag of good and bad news for citizen-journalists⁴⁴ and, more broadly, for the public's unenumerated right to know and to receive information.⁴⁵ As described below, although four federal appellate circuits now recognize a First Amendment right to film police doing their jobs in public places, that right is qualified rather than absolute. In turn, the "reasonableness" standard for determining when the right may permissibly be abridged by police provides far too much discretion for a few nefarious members of law enforcement to misuse and abuse it. Furthermore, some federal circuits have rejected the very existence of a clearly established First Amendment right to record police, be it qualified or absolute. Still other federal

42. *Snyder v. Phelps*, 562 U.S. 443 (2011).

43. *Id.* at 451–52.

44. See D. Jasun Carr et al., *Cynics and Skeptics: Evaluating the Credibility of Mainstream and Citizen Journalism*, 91 JOURNALISM & MASS COMM. Q. 452, 453–54 (2014), <http://jmq.sagepub.com/content/early/2014/06/13/1077699014538828> (defining citizen journalism broadly as "amateur news reporting" and, conversely, narrowly as "the reporting of newsworthy events, usually disasters or crises (events that the mainstream media cannot predict), typically using new media technologies, and often before the mainstream media arrive on the scene"); Sue Robinson & Cathy Deshano, *Citizen Journalists and the Third Places: What Makes People Exchange Information Online (or Not)?*, 12 JOURNALISM STUD. 642, 643 (2011), <http://www.tandfonline.com/doi/abs/10.1080/1461670X.2011.557559> (asserting that the notion of citizen journalism "embodies the grassroots self-publishing of content that creates and extends conversation by citizens who were once part of the audience but are now 'producers' without institutional backing," and adding that "the label is used pervasively to describe everyone from bloggers to those who merely contribute to news forums").

45. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (finding that "[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read" (emphasis added)); see also LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 242 (1991) ("Although often tied specifically into demands for freedom of information statutes and open meeting laws, the right to know gained a momentum of its own and was, by the end of the 1960s, treated by the media as a synonym for freedom of the press."); Eric B. Easton, *Public Importance: Balancing Proprietary Interests and the Right to Know*, 21 CARDOZO ARTS & ENT. L.J. 139, 141–42 (2003) (observing that "[f]ew of the corollary principles that grow out of the First Amendment have inspired more thoughtful scholarship and impassioned debate than the notion that an implicit right to know accompanies the explicit right to speak"); Barbara H. Smith, *The First Amendment Right to Receive Online Information in Public Libraries*, 18 COMM. L. & POL'Y 63, 63–64 (2013), <http://www.tandfonline.com/doi/full/10.1080/10811680.2013.746139> (asserting that "[t]he First Amendment right of free speech has a corollary right," namely "the right to receive information and ideas").

circuits have yet to address the issue, though some district courts within those same circuits have recently considered it. The sum total is a maddening morass of murkiness that negatively affects the public's right to know while sometimes providing the cloak of qualified immunity for police to avoid monetary liability.

A. *The State of the Law in 2015: Split of Authority or Emerging Robust Consensus?*

In March 2015, U.S. District Judge Vanessa Bryant of Connecticut, which falls within the Second Circuit, found a split of authority among the federal circuits when it comes to recording police.⁴⁶ She observed in *Rivera v. Foley*⁴⁷ that “[t]he First Circuit, Seventh Circuit, Eleventh Circuit, and Ninth Circuit all recognize that the First Amendment protects the photography and recording of police officers engaged in their official duties. The Third Circuit and the Fourth Circuit take the contrary approach.”⁴⁸ Judge Bryant, in turn, concluded that as of February 2014—the date of the incident at issue in the case before her—“the right to photograph and record police officers who are engaged in an ongoing investigation was not clearly established as a matter of constitutional law in [the Second] Circuit.”⁴⁹

Yet, just one month prior, in February 2015, U.S. Magistrate Mark Lane of Texas, which is situated in the Fifth Circuit, recognized a “robust consensus among circuit courts of appeals”⁵⁰ that “the right to photograph and videotape police officers as they perform their official duties [is] clearly established.”⁵¹ Lane went on to opine that “[t]he First Amendment protects a private citizen’s right to assemble in a public forum, receive information on a matter of public concern—such as police officers performing their official duties—and to record that information for the purpose of conveying that information.”⁵²

The fact that two federal district courts, within the span of only one month, reached seemingly opposite conclusions on the same issue—split of authority versus robust consensus—illustrates judicial discord in 2015 regarding the right to record law enforcement personnel doing their jobs. To begin to unpack this muddle, Section B examines decisions by federal circuit courts that have yet to recognize a clearly established First Amendment right to record police, as well as recent decisions by district courts within those same appellate circuits that have addressed the issue. In contrast, Section C analyzes cases from

46. *Rivera v. Foley*, No. 3:14-cv-00196 (VLB), 2015 U.S. Dist. LEXIS 35639, at *24 (D. Conn. Mar. 23, 2015).

47. *Id.*

48. *Id.* (citation omitted).

49. *Id.* at *3, *23–24.

50. *Buehler v. City of Austin*, No. A-13-CV-1100-ML, 2015 U.S. Dist. LEXIS 20878, at *25 (W.D. Tex. Feb. 20, 2015).

51. *Id.*

52. *Id.* at *21.

federal circuits recognizing this right. Finally, Section D explores problems with the reasonable-restrictions standard adopted by courts that recognize a qualified First Amendment right to record police.

As a threshold matter, it is important to understand that the concept described below in some cases regarding whether a First Amendment right to record police in public places is *clearly established* relates to the doctrine of qualified immunity from monetary liability for government officials.⁵³ Specifically, as the Supreme Court observed in 2014, “[a] government official sued under § 1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was *clearly established* at the time of the challenged conduct.”⁵⁴ Put slightly differently, “courts may not award damages against a government official in his personal capacity unless” the constitutional right the official allegedly violated was clearly established when the violation occurred.⁵⁵ Qualified immunity questions thus arise, in cases relevant for this Article, when deciding if the First Amendment right to record police performing their duties in public places was clearly established at the time that right allegedly was violated, *not* at the time the case was heard.

B. *Federal Circuit Courts Not Yet Recognizing the Right to Record and Some Rumblings Below from Their District Courts*

This Section reviews cases by federal circuit courts—specifically, the U.S. Courts of Appeals for the Third and Fourth Circuit—that have rejected recognition of a clearly established First Amendment right to record police officers performing their duties in public places. In addition, it examines opinions regarding that same right rendered since January 1, 2013, by district courts within other circuits that have yet to address the issue. As becomes evident, several district courts within these latter circuits appear to be leaning favorably toward acknowledging the right to record.

1. U.S. Court of Appeals for the Second Circuit

The Second Circuit, as becomes clear in the discussion that follows, has not directly addressed whether there is a First Amendment right to record police performing their duties in public places. However, four opinions issued since January 1, 2013, by district courts within that circuit—three from the influential Southern District of New York and one from Connecticut—have tackled the question. Most notably and most recently, a May 2015 decision by a judge in the Southern

53. See *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (observing that “[q]ualified immunity is applicable unless the official’s conduct violated a clearly established constitutional right”).

54. *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (emphasis added) (discussing 42 U.S.C. § 1983 (2012)).

55. *Lane v. Franks*, 134 S. Ct. 2369, 2381 (2014).

District of New York lays the foundation for future recognition of such a right by the Second Circuit.

In that case, *Higginbotham v. City of New York*,⁵⁶ U.S. District Judge P. Kevin Castel considered whether the November 2011 arrest of freelance video-journalist Douglas Higginbotham while filming the Occupy Wall Street protest in lower Manhattan violated his First Amendment rights.⁵⁷ Higginbotham was filming the arrest from the top of a telephone booth in order to get a better view.⁵⁸ He argued that the police “retaliated against him for filming a violent arrest, in violation of his First Amendment rights.”⁵⁹

Judge Castel initially noted that neither the Supreme Court nor the Second Circuit had considered whether there was a First Amendment right to record public police activity.⁶⁰ The judge was positively persuaded to recognize the right, however, based on precedent from other federal circuits.⁶¹ Specifically, Castel wrote that all of the other circuit courts that have addressed the issue “have concluded that the First Amendment protects the right to record police officers performing their duties in a public space, subject to reasonable time, place and manner restrictions.”⁶² Here, he cited decisions by the First,⁶³ Seventh,⁶⁴ Ninth,⁶⁵ and Eleventh Circuits,⁶⁶ each of which is addressed later in Section C of this part of the Article.

Judge Castel agreed with the rulings from this quartet of circuits,⁶⁷ reasoning that “if one accepts that photographing and filming receive First Amendment protection as a general matter (at least when they are ‘expressive’), it is difficult to see why that protection should disappear simply because their subject is public police activity.”⁶⁸ If anything, Castel suggested, recording such activity deserves heightened protection because it relates to the actions of government officials (police officers) and their potential misconduct.⁶⁹

When considering the question of qualified immunity for the New York City officers involved in Higginbotham’s arrest in November 2011, Castel found “that the right to record police activity in public, at

56. *Higginbotham v. City of New York*, No. 14-cv-8549 (PKC)(RLE), 2015 U.S. Dist. LEXIS 62227 (S.D.N.Y. May 12, 2015).

57. *Id.* at *1–3.

58. *Id.* at *2.

59. *Id.* at *17.

60. *Id.* at *20.

61. *Id.*

62. *Id.*

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

64. *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012).

65. *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995).

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

67. *Higginbotham*, 2015 U.S. Dist. LEXIS 62227, at *20.

68. *Id.* at *20–21.

69. *See id.* at *21 (citing *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991)).

least in the case of a journalist who is otherwise unconnected to the events recorded, was in fact ‘clearly established’ at the time of the events alleged in the complaint.”⁷⁰ He pointed out that, by that date, “the First, Ninth and Eleventh Circuits had all concluded that the right exists.”⁷¹

Castel also rejected the notion that decisions from the Third and Fourth Circuits in *Kelly v. Borough of Carlisle*⁷² and *Szymborski v. Houck*,⁷³ respectively—decisions addressed later in this Section—created a split of authority with the First, Seventh, Ninth, and Eleventh Circuits. Judge Castel reasoned here that:

Kelly and *Szymborski* did not decide whether the right existed: they merely held that, even if it did exist, it was not clearly established for the purposes of qualified immunity in those cases’ factual contexts. They are thus not relevant to the question whether there is a consensus on the existence of a journalist’s right to record events in which he is otherwise a non-participant.⁷⁴

He further distinguished *Kelly* and *Szymborski* because the plaintiff in each case was affiliated with or related “to the person being stopped or arrested by the police.”⁷⁵ Douglas Higginbotham, conversely, “had no relation to the arrestees he was filming, and was at a remove from the arrest.”⁷⁶

Yet Castel also concluded that the First Amendment right to record police is not absolute.⁷⁷ Specifically, the right exists only when the recording is done “from a reasonable distance,”⁷⁸ and, in turn, it ceases to exist “when the recording would impede police officers in the performance of their duties.”⁷⁹ Judge Castel added that the right to record police activity in a public space “may not apply in particularly dangerous situations, if the recording interferes with the police activity, if it is surreptitious, if it is done by the subject of the police activity, or if the police activity is part of an undercover investigation.”⁸⁰

In the case before him, however, Judge Castel found that none of these five exceptions applied to Douglas Higginbotham.⁸¹ Judge Castel reasoned:

70. *Id.* at *22.

71. *Id.* at *23.

72. *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010).

73. *Szymborski v. Houck*, 353 Fed. App’x 852 (4th Cir. 2009) (per curiam).

74. *Higginbotham*, 2015 U.S. Dist. LEXIS 62227, at *24–25 (citations omitted).

75. *Id.* at *25.

76. *Id.*

77. *See id.* (observing that “the right to record police activity in a public space is not without limits, and some uncertainty may exist on its outer bounds”).

78. *Id.* at *21–22.

79. *Id.* at *22.

80. *Id.* at *25–26.

81. *Id.* at *26.

The complaint alleges that [Higginbotham] was a professional journalist present to record a public demonstration for broadcast and not a participant in the events leading up to the arrest he was filming. There is nothing in the complaint suggesting that his filming interfered with the arrest. Accordingly, and in light of the case law consensus described above, a reasonable police officer would have been on notice that retaliating against a non-participant, professional journalist for filming an arrest under the circumstances alleged would violate the First Amendment.⁸²

Judge Castel's *Higginbotham* opinion stands in direct contrast on the split-of-authority issue to the January 2013 ruling by Judge J. Paul Oetken, also of the Southern District of New York, in *Mesa v. City of New York*.⁸³ In *Mesa*, Judge Oetken determined that "the right to photograph and record police is not clearly established as a matter of constitutional law in this Circuit."⁸⁴ In reaching this result, he emphasized that "no Second Circuit case has directly addressed the constitutionality of the recording of officers engaged in official conduct."⁸⁵

Oetken also pointed to a split of authority among the other federal circuits, with the First, Seventh, Ninth, and Eleventh Circuits recognizing such a right, while the Third and Fourth Circuits "decided just the opposite, declining to extend First Amendment protections to the recording of police activity."⁸⁶ He pointed to *Kelly* and *Szymbek*—Third and Fourth Circuit opinions, respectively, which declined to recognize a constitutional right.⁸⁷ Judge Oetken's determination here thus diametrically opposes that of Judge Castel in *Higginbotham* who, just two years later, considered the exact same cases and refused to find a split of authority.⁸⁸ While Oetken found that *Kelly* and *Szymbek* created a split of authority, Castel deemed those cases irrelevant.

Oetken, however, did seem personally amenable to recognizing such a right. As he put it, "this Court is inclined to agree with the First, Seventh, Eleventh, and Ninth Circuits that the photography and recording of police officers engaged in their official duties 'fits comfortably' within First Amendment principles."⁸⁹ Thus, while both Judges Castel and Oetken personally support the recognition of a First Amendment right to record police, only Judge Castel was willing to formally recognize it as law.

82. *Id.*

83. *Mesa v. City of New York*, No. 09 Civ. 10464 (JPO), 2013 U.S. Dist. LEXIS 1097 (S.D.N.Y. Jan. 3, 2013).

84. *Id.* at *76.

85. *Id.*

86. *Id.* at *75.

87. *Id.*

88. See *supra* text accompanying notes 60–71.

89. *Mesa*, 2013 U.S. Dist. LEXIS 1097, at *75–76.

A third judge from the Southern District of New York also recently considered the right-to-record issue. In September 2013, U.S. District Judge Jesse Furman found that as of October 17, 2010 (the date of the recording incident at issue in the case), the right to video record police officers in the course of their official duties was not clearly established, for purposes of a qualified-immunity defense, in the Second Circuit.⁹⁰ He pointed out that “because neither the Supreme Court nor the Second Circuit has addressed the right in question . . . it follows that the right was not clearly established on October 17, 2010.”⁹¹

Importantly, Judge Furman made it clear in *Ortiz v. City of New York* that he was not addressing whether a constitutional right to record police *exists*, but rather whether it was *clearly established* for purposes of qualified immunity.⁹² As he wrote, even if plaintiff Anibal Ortiz “alleged a constitutional violation, Defendants are entitled to qualified immunity, and Plaintiff’s First Amendment claims are dismissed on that ground alone.”⁹³

The fourth district court decision within the Second Circuit since January 2013 to address the right-to-record issue is the March 2015 ruling by Judge Vanessa Bryant of Connecticut in *Rivera v. Foley*,⁹⁴ which was described earlier.⁹⁵ After noting that the Second Circuit had not addressed the question, she found that “other circuits are split on this issue.”⁹⁶ Specifically, she pointed to the Third and Fourth Circuits—the courts that issued the rulings in *Kelly* and *Szymbekski*, respectively, and that were cited by Judge Oetken in *Mesa* as establishing a split of authority⁹⁷—as not recognizing a First Amendment right to record police.⁹⁸ As noted earlier, Judge Castel would disagree with Judge Bryant’s split-of-authority determination just two months later in *Higginbotham*.⁹⁹

Rivera presents an interesting factual twist, however, on the right-to-record issue. That is because the camera in question was mounted on a drone, which plaintiff Pedro Rivera described “as a remote-controlled model aircraft outfitted for recording digital images.”¹⁰⁰ He used it to record images of a vehicular accident scene.¹⁰¹ Importantly, Rivera was standing outside of the crime-scene area but flew the

90. *Ortiz v. City of New York*, No. 11 Civ. 7919 (JMF), 2013 U.S. Dist. LEXIS 136897, at *10–11 (S.D.N.Y. Sept. 24, 2013).

91. *Id.* (citing *Mesa*, 2013 U.S. Dist. LEXIS 1097, at *25).

92. *Id.* at *10–11.

93. *Id.* at *11.

94. *Rivera v. Foley*, No. 3:14-cv-00196 (VLB), 2015 U.S. Dist. LEXIS 35639 (D. Conn. Mar. 23, 2015).

95. *See supra* notes 47–49 and accompanying text.

96. *Rivera*, 2015 U.S. Dist. LEXIS 35639, at *24.

97. *See supra* notes 83–87 and accompanying text.

98. *Rivera*, 2015 U.S. Dist. LEXIS 35639, at *24.

99. *See supra* notes 73–76 and accompanying text.

100. *Rivera*, 2015 U.S. Dist. LEXIS 35639, at *3.

101. *Id.*

drone about 150 feet directly above it.¹⁰² Judge Bryant was reticent to recognize any First Amendment right based on these facts, reasoning that:

plaintiff directed a flying object into a police-restricted area, where it proceeded to hover over the site of a major motor vehicle accident and the responding officers within it, effectively trespassing onto an active crime scene. Even if recording police activity were a clearly established right in the Second Circuit, Plaintiff's conduct is beyond the scope of that right as it has been articulated by other circuits.¹⁰³

The bottom line from *Higginbotham*, *Mesa*, *Ortiz*, and *Rivera* is that while the Second Circuit has yet to address the right to record, Judge Castel's May 2015 opinion in *Higginbotham* breaks new ground in that direction, clearing the way for future recognition by the Second Circuit. The recognition of such a right within the Second Circuit and now, per Judge Castel's *Higginbotham* ruling, within the Southern District of New York is crucial because New York City is a major metropolis where allegations of police misconduct are in the news spotlight¹⁰⁴ and where videos of police already have had a profound impact. As a July 2014 article in *The New York Times* explained:

Over the past several years, videos have sometimes resulted in prosecution of officers or disciplinary proceedings. Video from 2008 that showed a police officer named Patrick Pogan knocking over a bicyclist in Times Square, has received nearly three million views on YouTube [sic]. The officer was eventually convicted of making false statements about the episode in a criminal complaint.¹⁰⁵

New York City also is where, in December 2014, a grand jury chose not to indict a white police officer, Daniel Pantaleo, in the chokehold death of a black man, Eric Garner, that was captured on a citizen-taken video.¹⁰⁶ William J. Bratton, commissioner of New York City police, acknowledged in February 2015 that his force has "a problem with citizen satisfaction" in minority communities and that "[w]e're often abrupt, sometimes rude, and that's unacceptable."¹⁰⁷ In such a combustible atmosphere, it is paramount that New York City citizens possess a right to record officers performing their duties in public.

In contrast to the clear First Amendment victory in *Higginbotham*, Judge Bryant's *Rivera* decision suggests judicial reluctance to recog-

102. *Id.*

103. *Id.* at *25–26 (citation omitted).

104. See, e.g., J. David Goodman, *Bratton Spurned 25% of Board's Misconduct Findings in First Half of '14*, N.Y. TIMES, Aug. 27, 2014, at A19.

105. Colin Moynihan, *Suit Seeks to Establish Right to Record New York Police Officers*, N.Y. TIMES (July 15, 2014), <http://nyti.ms/1ynMPJq>.

106. J. David Goodman & Al Baker, *New York Officer Facing No Charges in Chokehold Case*, N.Y. TIMES, Dec. 4, 2014, at A1.

107. J. David Goodman, *Police Commissioner, Speaking on Racism in America, Says Officers Must Fight It*, N.Y. TIMES, Feb. 25, 2015, at A19.

nize a First Amendment right to record when the recording is made by drones flying directly above a crime scene. Whether other judges choose to carve out a drone-recording exception from a First Amendment right to record police in public remains to be seen.

2. U.S. Court of Appeals for the Third Circuit

In January 2015, U.S. District Judge William Yohn Jr. of Pennsylvania observed in *Montgomery v. Killingsworth*¹⁰⁸ that “[w]hether the Third Circuit will eventually decide to follow what appears to be a growing trend in other circuits to recognize a First Amendment right to observe and record police activity is, of course, not for this court to decide.”¹⁰⁹ In *Killingsworth*, Yohn had to consider, for purposes of qualified immunity, the state of the law within the Third Circuit in 2011—when the arrests at issue occurred.¹¹⁰ In doing so, he turned to the Third Circuit’s 2010 decision in *Kelly v. Borough of Carlisle*.¹¹¹

In *Kelly*, the Third Circuit addressed whether Brian Kelly’s First Amendment rights were violated when he was arrested in May 2007 for videotaping a police officer during a traffic stop.¹¹² Kelly was a passenger in a vehicle pulled over for speeding by Officer David Rogers, and Kelly proceeded to record the driver’s encounter with Rogers using a hand-held video camera.¹¹³ Rogers arrested Kelly for allegedly violating Pennsylvania’s wiretap law “[b]ecause Kelly had not informed Rogers that he was recording.”¹¹⁴

The Third Circuit concluded that, at the time Kelly recorded Rogers, “the right to videotape police officers during traffic stops was not clearly established.”¹¹⁵ The Third Circuit reasoned, in part, that the Supreme Court considers traffic stops “inherently dangerous situations.”¹¹⁶ The appellate court did suggest, however, that even if a more general “right to record matters of public concern”¹¹⁷ existed in May 2007, it “is not absolute; it is subject to reasonable time, place, and manner restrictions.”¹¹⁸ In other words, it would be a qualified constitutional right.

108. *Montgomery v. Killingsworth*, Nos. 13cv256; 13cv3081; 13cv3082, 2015 U.S. Dist. LEXIS 7152 (E.D. Pa. Jan. 21, 2015).

109. *Id.* at *41 n.7.

110. *See id.* at *36 (noting that “this inquiry focuses only on the state of the law at the time of the arrests: January 23, 2011, for *Montgomery*, and July 14, 2011, for *Loeb*”).

111. *Id.* at *39–40 (discussing *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010)).

112. *Kelly*, 622 F.3d at 251.

113. *Id.*

114. *Id.* at 251–52.

115. *Id.* at 263.

116. *Id.* at 262 (citing *Arizona v. Johnson*, 129 S. Ct. 781, 786 (2009)).

117. *Id.*

118. *Id.*

In its unpublished 2013 decision in *True Blue Auctions v. Foster*,¹¹⁹ the Third Circuit reiterated *Kelly*'s conclusion that "our case law does not clearly establish a right to videotape police officers performing their official duties."¹²⁰ *Foster* differed from *Kelly* in a seemingly important way—specifically, *Foster* did not involve a traffic stop, but rather the video recording of officers standing on a public sidewalk.¹²¹ Yet the Third Circuit in *Foster* refused to recognize a First Amendment right to record in such venues, pointing out that lower courts within the circuit are divided on the issue.¹²² "[O]ur case law does not clearly establish a right to videotape police officers performing their official duties,"¹²³ it concluded. *Foster* is the most recent Third Circuit case to address the issue.

In February 2014, Judge Stewart Dalzell of the Eastern District of Pennsylvania openly acknowledged in *Fleck v. Trustees of the University of Pennsylvania*¹²⁴ that the decisions described immediately above in both *Kelly* and *Foster* place the Third Circuit "in the minority among those circuits that have considered the free speech right to openly record police activity."¹²⁵ He wrote that, in light of recent decisions by other circuits recognizing such a right, as well as a brief filed by the U.S. Department of Justice acknowledging that right,¹²⁶ "the determination of a clearly established right to record police activity

119. *True Blue Auctions v. Foster*, 528 F. App'x 190 (3d Cir. 2013).

120. *Id.* at 193.

121. *Id.* at 192.

122. *Id.* at 193.

123. *Id.*

124. *Fleck v. Trs. of the Univ. of Pa.*, 995 F. Supp. 2d 390 (E.D. Pa. 2014).

125. *Id.* at 407 n.13.

126. See Statement of Interest of the United States at 1, *Sharp v. Balt. City Police Dep't*, No. 1:11-cv-02888-BEL (D. Md. Jan. 10, 2012), http://www.justice.gov/crt/about/spl/documents/Sharp_SOI_1-10-12.pdf [<http://perma.cc/83VB-FGH3>]. The brief provides, in relevant part:

This litigation presents constitutional questions of great moment in this digital age: whether private citizens have a First Amendment right to record police officers in the public discharge of their duties, and whether officers violate citizens' Fourth and Fourteenth Amendment rights when they seize and destroy such recordings without a warrant or due process. The United States urges this Court to answer both of those questions in the affirmative. The right to record police officers while performing duties in a public place, as well as the right to be protected from the warrantless seizure and destruction of those recordings, are not only required by the Constitution. They are consistent with our fundamental notions of liberty, promote the accountability of our governmental officers, and instill public confidence in the police officers who serve us daily.

Id. In addition to this brief, the Justice Department spelled out in a May 2012 memorandum its "position on the basic elements of a constitutionally adequate policy on individuals' right to record police activity." Letter from Jonathan M. Smith, Chief of the Special Litig. Section, U.S. Dep't of Justice, to Mark H. Grimes, Balt. Police Dep't at 1 (May 14, 2012), http://www.justice.gov/crt/about/spl/documents/Sharp_ltr_5-14-12.pdf [<http://perma.cc/3GHU-BBHM>].

may be ripe for reconsideration in our Circuit.”¹²⁷ For now, however, the Third Circuit remains in the minority of federal appellate court circuits that have directly considered the existence of a right to record police in public places.

3. U.S. Court of Appeals for the Fourth Circuit

In 2009, the Fourth Circuit issued a very short per curiam and unpublished opinion in *Szymecki v. Houck*.¹²⁸ There, the Fourth Circuit agreed with a lower court that a “First Amendment right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct.”¹²⁹ That conduct arose in 2007,¹³⁰ but the appellate court opinion fails to address any specific facts regarding the recording.

As discussed later, some courts have dismissed the importance of *Szymecki*, given both its unpublished status and the exceedingly cursory nature of its analysis.¹³¹ If *Szymecki* is, in fact, judicially jettisoned as unpublished and superficial, then the Third Circuit in *Kelly* is left standing as the lone federal appellate court to squarely reject the recognition of a clearly established First Amendment right to record police in public places.

Kelly, in turn, is now five years old, and the facts upon which it is based arose eight years ago. In brief, *Kelly*’s relevance may be fading fast in the legal rearview mirror.

4. U.S. Court of Appeals for the Fifth Circuit

Although the Fifth Circuit has not directly addressed whether there is a First Amendment right to record police doing their jobs in public venues, U.S. Magistrate Mark Lane of the Western District of Texas, which falls within that circuit, recognized such a right in February 2015 in *Buehler v. City of Austin*.¹³² As noted earlier,¹³³ Lane sweepingly held that “[t]he First Amendment protects a private citizen’s right to assemble in a public forum, receive information on a matter of public concern—such as police officers performing their official duties—and to record that information for the purpose of conveying that information.”¹³⁴

127. *Fleck*, 995 F. Supp. 2d at 408 n.13.

128. *Szymecki v. Houck*, 353 F. App’x 852 (4th Cir. 2009) (per curiam).

129. *Id.* at 853.

130. *Szymecki v. City of Norfolk*, No. 2:08cv142, 2008 U.S. Dist. LEXIS 86437, at *1 (E.D. Va. Sept. 8, 2008), *aff’d sub nom.* *Szymecki v. Houck*, 353 F. App’x 852 (4th Cir. 2009) (per curiam).

131. *See infra* notes 167–70 and accompanying text.

132. *Buehler v. City of Austin*, No. A-13-CV-1100-ML, 2015 U.S. Dist. LEXIS 20878 (W.D. Tex. Feb. 20, 2015).

133. *See supra* notes 50–52 and accompanying text.

134. *Buehler*, 2015 U.S. Dist. LEXIS 20878, at *21.

Lane next turned to the qualified immunity issue of whether such a right was clearly established during the initial recording by Plaintiff Antonio Buehler,¹³⁵ which took place on January 1, 2012, during a traffic stop of another individual, in front of a gas station, for driving while intoxicated.¹³⁶ Magistrate Lane found a “robust consensus among circuit courts of appeals” on the date of the stop that “the right to photograph and videotape police officers as they perform their official duties was clearly established.”¹³⁷

In recognizing this consensus, Lane failed to mention either the Third Circuit’s decision in *Kelly* or the Fourth Circuit’s ruling in *Szymecki*. Those are conspicuous omissions because they both were cited by both Judge Oetken of the Southern District of New York and Judge Bryant of Connecticut, as described above, to support the proposition that there is, in fact, a split of authority among the circuits.¹³⁸

Magistrate Lane acknowledged that the right to record police is qualified, rather than absolute. Specifically, he opined that it is subject to reasonable time, place, and manner restrictions.¹³⁹ In holding that the right is qualified, Lane identified competing interests that must be balanced:

An obvious tension exists between a police officer and an individual observing and recording that police officer. As previously stated in the Court’s order on the motion to dismiss, an individual has a constitutional right to assemble in a public place so as to observe and acquire information related to the police as they perform their official duties. At the same time, a police officer must be free to perform his official duties without undue interference so as to protect the officer and everyone in the vicinity.¹⁴⁰

Finally, Magistrate Lane drew support for a First Amendment right to record police in public places from a 1981 Fifth Circuit opinion, *Shillingford v. Holmes*,¹⁴¹ that did not squarely address the issue but involved analogous facts.¹⁴² That case involved Charles Shillingford, a tourist in New Orleans who photographed police “apprehending a boy on the street during a Mardi Gras parade.”¹⁴³ In response, a police officer “struck the camera and Shillingford with his nightstick, destroying the camera, smashing it into Shillingford’s face and lacerating

135. Buehler was arrested a second time—on August 26, 2012—for recording police. *Id.* at *14–15. Because this arrest occurred after the January 1, 2012, arrest described above in the text of the Article, it is not discussed here, as the earlier arrest is more relevant for determining when the right to record was first clearly established.

136. *Id.* at *5–6.

137. *Id.* at *25.

138. *See supra* notes 83–89, 94–103 and accompanying text.

139. *Buehler*, 2015 U.S. Dist. LEXIS 20878, at *23.

140. *Id.* at *24.

141. *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981), *abrogated on other grounds by Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir. 1993).

142. *Buehler*, 2015 U.S. Dist. LEXIS 20878, at *21–22.

143. *Shillingford*, 634 F.2d at 264.

his forehead. Mr. Shillingford was not involved in the arrest incident and did not interfere with the police in any fashion.”¹⁴⁴

Although Shillingford’s § 1983 action focused on the physical and personal injuries he sustained due to a government official’s alleged use of excessive force,¹⁴⁵ the Fifth Circuit noted that “the assault by the policeman was unprovoked and unjustified. It was patently taken because, as a bystander on the public streets, Shillingford was photographing what the policeman did not want to be memorialized.”¹⁴⁶ Magistrate Lane cited this language to suggest that *Shillingford*, in fact, recognized a First Amendment right to record police, although the Fifth Circuit never reached that conclusion.¹⁴⁷

No other federal court in the nation, be it trial or appellate, has cited *Shillingford* when considering whether there is a First Amendment right to record police performing duties in public places. Its relevance thus might be considered somewhat suspect, especially since the Fifth Circuit in *Shillingford* did not directly address the First Amendment issue.

5. U.S. Court of Appeals for the Sixth Circuit

Although the Sixth Circuit has not squarely addressed the First Amendment right to record police working in public venues, two district courts in two states within the circuit—one in Kentucky and one in Ohio—examined the question in 2014 and reached very different answers.

In February 2014, U.S. District Judge Danny Reeves of Kentucky observed in *Williams v. Boggs*¹⁴⁸ that “there is no authority from the Sixth Circuit clearly establishing any right to film a police officer, during a traffic stop or otherwise.”¹⁴⁹ Judge Reeves seemed particularly skeptical of recognizing such a right within the context of a traffic stop, noting that “[w]hile there is *some precedent* from other jurisdictions indicating a right exists under the First Amendment to videotape police *in certain contexts*, it is not uniform and not clearly-established, *especially in the context of traffic stops*.”¹⁵⁰ Each of the italicized phrases above indicates apparent judicial hedging of bets against acknowledging a First Amendment right to record traffic stops.

Judge Reeves further noted that the Third Circuit’s decision in *Kelly*¹⁵¹ was “the only out-of-circuit case involving the video-record-

144. *Id.*

145. *Id.* at 265.

146. *Id.* at 266.

147. *Buehler*, 2015 U.S. Dist. LEXIS 20878, at *21–22.

148. *Williams v. Boggs*, No. 6:13-65-DCR, 2014 U.S. Dist. LEXIS 18328 (E.D. Ky. Feb. 13, 2014).

149. *Id.* at *14.

150. *Id.* at *13 (emphasis added).

151. *See supra* Part II, Section B, Subsection 2 (discussing *Kelly*).

ing of a police officer during a traffic stop,”¹⁵² and that *Kelly* “held that such a right is not clearly established.”¹⁵³ Thus, while Magistrate Lane omitted any reference to *Kelly* in *Buehler*, and while Judge Castel in *Higginbotham* found *Kelly* completely irrelevant, Judge Reeves in *Williams* squarely relied upon *Kelly*.

In refusing to recognize a more general, clearly established right to record police, Judge Reeves pointed to a split of authority among the other federal appellate circuits. Specifically, he noted that “while three circuits have held that a right to film police officers *in some circumstances* is clearly established, two others have held that it is not.”¹⁵⁴ The “two others” Judge Reeves cited were the Third Circuit in *Kelly* and the Fourth Circuit in *Szymecki*,¹⁵⁵ both of which are described earlier in this part of the Article.¹⁵⁶ Finally, he added that “even if the alleged right were clearly established, it would not be absolute but subject to reasonable restrictions regarding time, manner and place.”¹⁵⁷ But Judge Reeves’s decision in *Williams* was not the only one by a district court within the Sixth Circuit in 2014 to address the right to record.

In *Crawford v. Geiger*,¹⁵⁸ which like *Williams* was decided in February 2014, Senior U.S. District Judge James Carr of Ohio found “there is a First Amendment right to *openly film* police officers carrying out their duties.”¹⁵⁹ Carr was clear, as the italicized part of the quotation above indicates, that he was not going to “rule one way or the other on the First Amendment right to record police officers surreptitiously. That is not at issue in this case.”¹⁶⁰

The notion of open-versus-surreptitious recording may be a point of future division among courts when it comes to limiting the right to record police. It will be recalled that Judge Castel in *Higginbotham* noted that the right to record may not apply “if it is surreptitious.”¹⁶¹ Whether other courts focus on this point remains to be seen.

152. *Williams*, 2014 U.S. Dist. LEXIS 18328, at *15.

153. *Id.*

154. *Id.* at *14. Specifically, Judge Reeves pointed to the decisions described earlier in this part of the Article by the Third and Fourth Circuits in *Kelly* and *Szymecki*, respectively, for failing to recognize a clearly established right to record police officers performing their duties in public places. *Id.* at *13–14. In contrast, he found that the First, Seventh, and Eleventh Circuits had recognized some variation of such a clearly established right. *Id.* at *11–12. The decisions referenced by Judge Reeves from these latter three circuits are described later in Part II, Section C of this Article.

155. *Id.* at *13.

156. *See supra* notes 112–18 (addressing *Kelly*) and 128–31 (addressing *Szymecki*) and accompanying text.

157. *Williams*, 2014 U.S. Dist. LEXIS 18328, at *15.

158. *Crawford v. Geiger*, 996 F. Supp. 2d 603 (N.D. Ohio 2014).

159. *Id.* at 615 (emphasis added).

160. *Id.* at 615 n.9.

161. *Higginbotham v. City of New York*, No. 14-cv-8549 (PKC)(RLE), 2015 U.S. Dist. LEXIS 62227, at *25–26 (S.D.N.Y. May 12, 2015).

A blanket surreptitious-recording exception to a general First Amendment right to record police in public places, however, would be particularly damaging to investigative journalists.¹⁶² Imagine, for instance, investigative journalists (or simply inquisitive and concerned neighborhood citizens) who, while sitting in a vehicle parked on a public street, use video cameras, pointed from behind dark-tinted windows, to record police confronting homeless individuals in a public park adjacent to the street. This certainly seems to be surreptitious recording of police in a public place; the police would not know they are being watched or recorded. Yet such recording also seems in no way to interfere with the actions of the police in the park. In brief, then, a blanket “no surreptitious recording” exception seems to make little sense; it simply goes too far.

Judge Carr concluded on the qualified immunity question in *Crawford* that “as of August 26, 2012, the right of a citizen to film police activity in a public setting where there was no present danger of harm to officers or others was clearly established.”¹⁶³ Although he noted that “[t]he Sixth Circuit has not ruled specifically on the right of the public openly to film police officers and their actions in a public setting,”¹⁶⁴ Carr stressed that the First, Seventh, Ninth, and Eleventh Circuits “have found the right unquestionably exists under the First Amendment.”¹⁶⁵ Carr wrote that at the time of the August 2012 encounter in the case before him, “the First, Seventh, Ninth, and Eleventh Circuits had issued clear and consistent opinions finding that the First Amendment right to openly record police activity existed. There was no indistinguishable circuit opinion to the contrary.”¹⁶⁶

Notably, on this last observation, Judge Carr denigrated the importance of the Fourth Circuit’s decision in *Szymecki*¹⁶⁷ in terms of it supposedly contradicting the views of the First, Seventh, Ninth, and Eleventh Circuits. Specifically, Carr pointed to “the complete absence of substantive analysis or discussion”¹⁶⁸ by the Fourth Circuit in *Szymecki* in suggesting why the right to record police in public places was not clearly established. He wrote that the Fourth Circuit reached its conclusion “without discussing facts or law.”¹⁶⁹ He also emphasized

162. See generally JAMES S. ETTEMA & THEODORE L. GLASSER, CUSTODIANS OF CONSCIENCE: INVESTIGATIVE JOURNALISM AND PUBLIC VIRTUE 3 (1998) (contending that the work of investigative journalists “calls us, as a society, to decide what is, and what is not, an outrage to our sense of moral order and to consider our expectations for our officials, our institutions, and ultimately ourselves,” and asserting that “their stories implicitly demand the response of public officials”).

163. *Crawford*, 996 F. Supp. 2d at 616.

164. *Id.* at 614.

165. *Id.* at 614–15.

166. *Id.* at 617.

167. See *supra* Part II, Section B, Subsection 3 (discussing *Szymecki*).

168. *Crawford*, 996 F. Supp. 2d at 616.

169. *Id.*

that *Szzynecki* lacks any precedential effect as an unreported decision.¹⁷⁰

Judge Carr also distinguished the Third Circuit's decision in *Kelly*.¹⁷¹ Specifically, he observed that while *Kelly* dealt with a traffic stop, the case before him centered on plaintiffs who "were outside on their own property"¹⁷² and used cellphones to record their own confrontation with police regarding a possible break-in on the property.¹⁷³

Crawford thus suggests that, in contrast to Judge Reeves's decision in *Williams*, there is some traction, at least within one sector of the Sixth Circuit, for that appellate court to recognize in the near future a First Amendment right to record police in public venues.

6. U.S. Court of Appeals for the Tenth Circuit

In February 2014, U.S. District Judge James Browning of New Mexico observed that the Tenth Circuit has not "directly addressed a right—constitutional or otherwise—to record police or law enforcement activity in public."¹⁷⁴ He noted that the circuits that have recognized such a right had qualified it, such that the right is subject to the imposition of reasonable time, place, and manner restrictions.¹⁷⁵ Unfortunately, Judge Browning's decision in *Mocek v. City of Albuquerque* represents the only judicial guidance on the right-to-record issue within the Tenth Circuit as of June 1, 2015.

C. *Recognizing a First Amendment Right to Record Police Performing Duties in Public Places*

Four federal circuits—the First, Seventh, Ninth, and Eleventh—now recognize, in some form, a qualified First Amendment right to record police performing their jobs in public venues. The most recent federal appellate court to address the right-to-record issue was the First Circuit in May 2014 in *Gericke v. Begin*.¹⁷⁶ There, the First Circuit squarely recognized a First Amendment right of citizens to film government officials, including police officers, performing their duties in public places.¹⁷⁷ Specifically, the appellate court concluded that, when Carla Gericke attempted to film an officer conducting a late-night traffic stop in Weare, Massachusetts, in March 2010, "she was exercis-

170. *Id.*

171. *Id.* at 615–16.

172. *Id.* at 615.

173. *Id.* at 608.

174. *Mocek v. City of Albuquerque*, 3 F. Supp. 3d 1002, 1057 (D.N.M. 2014).

175. *Id.* at 1057–58.

176. *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014).

177. *Id.* at 7–10.

ing a clearly established First Amendment right . . . in the absence of a police order to stop filming or leave the area.”¹⁷⁸

The First Circuit observed in *Gericke* that First Amendment principles regarding gathering information about government officials “apply equally to the filming of a traffic stop and the filming of an arrest in a public park.”¹⁷⁹ The court emphasized that “[a] traffic stop, no matter the additional circumstances, is inescapably a police duty carried out in public. Hence, a traffic stop does not extinguish an individual’s right to film.”¹⁸⁰ In June 2014, the town of Weare paid \$57,500 to settle Carla Gericke’s lawsuit.¹⁸¹

Gericke, in turn, sprang largely from the First Circuit’s decision only three years prior in *Glik v. Cunniffe*.¹⁸² That case arose after Simon Glik was arrested on October 1, 2007, for using his cellphone to capture video of three police officers arresting another individual in Boston Common.¹⁸³ In *Glik*, the First Circuit found that “a citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.”¹⁸⁴ *Glik*, in fact, went so far as to recognize a sweeping “First Amendment right to gather news”¹⁸⁵ that extends well beyond members of traditional, professional, and legacy news media to encompass “bystanders with a ready cell phone or digital camera.”¹⁸⁶

The First Circuit in *Glik* drew seemingly significant support for its finding from the following logic: if police officers, as the Supreme Court has held, must put up with “a significant amount of verbal criticism and challenge directed at”¹⁸⁷ them, then surely they must be expected to exercise similar restraint “when they are merely the subject

178. *Id.* at 3.

179. *Id.* at 7.

180. *Id.*

181. Doug Alden, *Weare Settles Police Lawsuit over Arrest for Video Recording*, N.H. UNION LEADER (Manchester) (June 6, 2014), <http://www.unionleader.com/apps/pbcs.dll/article?AID=/20140607/NEWS07/140609237/1022/newhampshire0301>.

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

183. *Id.* at 79–80.

184. *Id.* at 85.

185. *Id.* at 83.

186. *Id.* at 84. The First Circuit emphasized, regarding this point, that:

changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.

Id.

187. *City of Houston v. Hill*, 482 U.S. 451, 461 (1987).

of videotaping that memorializes, without impairing, their work in public spaces.”¹⁸⁸ Put more bluntly, if the First Amendment protects a good amount of yelling and name-calling directed at police, then it certainly must also protect a good amount of camera pointing. Simon Glik, who did no more than point a phone camera, ultimately received a \$170,000 settlement.¹⁸⁹

In summary, the First Amendment right to record police that *Glik* initially recognized in filming an arrest in a public park was later extended to the realm of traffic stops in *Gericke*. Recall that, in contrast to *Gericke*, the Third Circuit in *Kelly* refused to recognize a right to record in a traffic stop case, pointing out that the nation’s high court considers traffic stops to be inherently dangerous.¹⁹⁰

The First Circuit’s decisions in *Gericke* and *Glik* follow more than a full decade on the heels of those in two other federal circuits. In 2000, the Eleventh Circuit recognized in *Smith v. City of Cumming*¹⁹¹ “a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct. 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.”¹⁹² Five years prior to *Smith*, the Ninth Circuit acknowledged a general and broad “First Amendment right to film matters of public interest.”¹⁹³ That decision involved the use of a video camera to film police in the context of a public march in Seattle in 1990.¹⁹⁴ It was handed down in 1995, long before the advent of the smartphones now used to capture video like that in North Charleston, South Carolina. An unpublished 2013 ruling by the Ninth Circuit, however, involving the use of a cellphone to take pictures of police at an accident scene, suggests the existence of such a clearly established right in that circuit.¹⁹⁵

More recently, a federal district court in California, which falls within the Ninth Circuit, recognized in 2014 that “under the law of this circuit there is and was on December 7, 2012, a clearly established right to record police officers carrying out their official duties.”¹⁹⁶ In that case, a citizen recorded police officers using her laptop while they

188. *Glik*, 655 F.3d at 84.

189. Eric Ernst, *It’s Police Lights, Camera, Payout*, SARASOTA HERALD-TRIB. (Fla.), Apr. 13, 2012, at B1.

190. *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010).

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

192. *Id.* at 1333.

193. *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995).

194. *Id.* at 438.

195. *Adkins v. Limtiaco*, 537 Fed. App’x 721, 721–22 (9th Cir. 2013).

196. *Crago v. Leonard*, No. 2:13-cv-531-TLN-EFB PS, 2014 U.S. Dist. LEXIS 107578, at *12 (E.D. Cal. Aug. 5, 2014).

searched her private residence.¹⁹⁷ Magistrate Edmund Brennan concluded that:

[t]here simply is no principled basis upon which to find that although the right to record officers conducting their official duties only extends to duties performed in public, the right does not extend to those performed in a private residence. The public's interest in ensuring that police officers properly carry out their duties and do not abuse the authority bestowed on them by society does not cease once they enter the private residence of a citizen.¹⁹⁸

Another California federal district court in 2014 also concluded that “videotaping of police officers carrying out their duties in a public place is an exercise of First Amendment liberties.”¹⁹⁹

In 2012, the U.S. Court of Appeals for the Seventh Circuit in *American Civil Liberties Union of Illinois v. Alvarez*²⁰⁰ became the fourth circuit to recognize the right to record police in public. In doing so, it emphasized that both the right to *record* and the right to *disseminate* a recording are protected by the First Amendment. Writing for a two-judge majority, Judge Diane Sykes opined:

The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected²⁰¹

In *Alvarez*, the Seventh Circuit considered the constitutionality of a state eavesdropping statute²⁰² as applied “against people who openly record police officers performing their official duties in public.”²⁰³ The majority reasoned the statute “interferes with the gathering and dissemination of information about government officials performing their duties in public. Any way you look at it, the eavesdropping statute burdens speech and press rights and is subject to heightened First Amendment scrutiny.”²⁰⁴ In reaching this decision, the Seventh Circuit majority favorably cited the First Circuit's ruling in *Glik*.²⁰⁵ It also found that *Glik* aligned with the Eleventh Circuit's ruling in *Smith*.²⁰⁶

197. *Id.* at *2.

198. *Id.* at *13.

199. Rouzan v. Dorta, No. EDCV 12-1361-BRO (JPR), 2014 U.S. Dist. LEXIS 61012, at *34 (C.D. Cal. Mar. 12, 2014).

200. Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012).

201. *Id.* at 595.

202. 720 ILL. COMP. STAT. 5/14-2(a)(1) (2012).

203. *Alvarez*, 679 F.3d at 586.

204. *Id.* at 600.

205. *Id.* at 600–01.

206. *Id.* at 601 n.10.

D. *Qualifying the First Amendment Right to Record Police: The Reasonableness Approach to Restrictions*

The First Circuit in both *Gericke* and *Glik*, as well as the Eleventh Circuit in *Smith* and several of the district court decisions discussed above,²⁰⁷ each qualified the First Amendment right to record police in public places, making clear it is not absolute. The fact that it is a qualified right, however, is not, at least standing alone, what is troubling.

After all, the Supreme Court long has recognized that, despite the First Amendment's seemingly absolutist language of "no law,"²⁰⁸ there are multiple categories of speech that simply receive no constitutional protection.²⁰⁹ Furthermore, even content-based restrictions on speech are permissible if they satisfy the strict scrutiny standard of judicial review.²¹⁰ Additionally, the First Amendment right of access to certain criminal proceedings is qualified, not absolute.²¹¹ In brief, then, the mere fact that a nascent First Amendment right to film police officers carrying out their jobs in public places is not absolute comes as little surprise.

207. See *Buehler v. City of Austin*, No. A-13-CV-1100-ML, 2015 U.S. Dist. LEXIS 20878, at *23 (W.D. Tex. Feb. 20, 2015) (noting that the First Amendment right to record police is "subject to reasonable time, place and manner restrictions"); *Higginbotham v. City of New York*, No. 14-cv-8549 (PKC)(RLE), 2015 U.S. Dist. LEXIS 62227, at *25–26 (S.D.N.Y. May 12, 2015) (observing that "the right to record police activity in a public space is not without limits, and some uncertainty may exist on its outer bounds," and stating that "it may not apply in particularly dangerous situations, if the recording interferes with the police activity, if it is surreptitious, if it is done by the subject of the police activity, or if the police activity is part of an undercover investigation").

208. See *supra* note 27 (setting forth the relevant portion of the First Amendment, including the phrase "no law").

209. See *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (identifying true threats, incitement of imminent lawless action, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, and fraud as unprotected categories of expression); *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (identifying obscenity, defamation, fraud, incitement, and speech integral to criminal conduct as types of speech not protected by the First Amendment); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) (noting that the First Amendment does "not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children").

210. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (asserting that because a California law limiting minors' access to violent video games "imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest"); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000) (asserting that a content-based speech restriction can only stand judicial review "if it satisfies strict scrutiny," opining that "[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest," and adding that "if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative").

211. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 9 (1986) (asserting that "even when a right of access attaches, it is not absolute").

What is highly problematic, however, is the extremely flexible and malleable test adopted in *Gericke*, *Glik*, and *Smith* for determining when the right to record may permissibly be extinguished. “Reasonable restrictions on the exercise of the right to film may be imposed when the circumstances justify them,”²¹² the First Circuit wrote in *Gericke*. It added that “a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties.”²¹³ The appellate court pounded home its nebulous reasonableness standard in *Gericke*, opining that “an individual’s exercise of her First Amendment right to film police activity carried out in public, including a traffic stop, necessarily remains unfettered unless and until a reasonable restriction is imposed or in place.”²¹⁴

In *Glik*, the First Circuit wrote that the right to record “may be subject to reasonable time, place, and manner restrictions.”²¹⁵ Unfortunately, it also found “no occasion to explore those limitations here,”²¹⁶ thus leaving them in legal limbo. Similarly, the Eleventh Circuit in *Smith v. City of Cumming*²¹⁷ wrote that the First Amendment right to photograph or videotape police conduct was “subject to reasonable time, manner and place restrictions,”²¹⁸ but it failed to elaborate on that point.

The trouble, of course, is fathoming the reasonableness of a recording restriction in any given situation. Furthermore, the challenge, at least from a pro-First Amendment perspective, is compounded due to the judicial deference likely to be granted to law enforcement personnel.²¹⁹ As Professor L. Song Richardson observes, “courts repeatedly defer to the judgments of *all* officers, with no inquiry into the particular officer’s training, experience, and skill.”²²⁰

Ultimately, what a police officer claims constitutes a reasonable restriction on the right to be filmed is not likely to be the same as what a citizen-journalist or First Amendment advocate believes is reasonable.

212. *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) (emphasis added).

213. *Id.* at 8 (emphasis added).

214. *Id.* (emphasis added).

215. *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011).

216. *Id.*

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

218. *Id.* at 1333.

219. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 773 (2005) (Stevens, J., dissenting) (noting “the importance of according proper deference to law enforcement professionals”); *see also* Craig Hemmens & Daniel Levin, “Not a Law at All”: A Call for a Return to the Common Law Right to Resist Unlawful Arrest, 29 Sw. U. L. Rev. 1, 7 (1999) (contending there is “increased deference given to police authority by contemporary courts”).

220. L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1155 (2012).

The police officer and the citizen-journalist inevitably approach the same situation from very different perspectives and with very disparate objectives. While an officer speaking with a driver during a traffic stop is rightfully concerned about both her own safety and that of the public, as well as following Fourth Amendment-derived protocol, a citizen-journalist recording the same encounter is centered on documenting the officer-driver interaction with sufficient clarity and definition that it can accurately and impartially reveal to the public what transpires.

The use of reasonableness, however, as the key concept in *Gericke*, *Glik*, and *Smith* is not surprising. It squarely comports with what Professor Eric Miller describes as “the Supreme Court’s expansion of ‘reasonableness’ as a post hoc standard by which to evaluate police conduct.”²²¹ Indeed, the “reasonableness inquiry . . . lies at the heart of contemporary Fourth Amendment doctrine.”²²²

This is particularly true in the realm of Fourth Amendment searches and seizures since the Court’s ruling nearly fifty years ago in *Terry v. Ohio*.²²³ In *Terry*, the Court wrote that “the central inquiry under the Fourth Amendment [is] the *reasonableness* in all the circumstances of the particular governmental invasion of a citizen’s personal security.”²²⁴ Chief Justice Earl Warren wrote for the Court that:

[t]he scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate *the reasonableness* of a particular search or seizure in light of the particular circumstances.²²⁵

As Professors Jeffrey Fagan and Amanda Geller wrote in the *University of Chicago Law Review* in 2015, “*Terry*’s rules formed the reasonableness core of a new regime governing what police can do and when.”²²⁶ Professor Wayne Logan elaborates that a “principal area for police mistakes in the constitutional law realm concerns Fourth Amendment procedural doctrine. Here, the constitutional reasonableness of police behavior, and potential application of the good-faith exception to the exclusionary rule, is measured by how the behavior sizes up against court-made standards.”²²⁷

221. Eric J. Miller, *Role-Based Policing: Restraining Police Conduct “Outside the Legitimate Investigative Sphere,”* 94 CALIF. L. REV. 617, 622 (2006).

222. David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 130 (2013).

223. *Terry v. Ohio*, 392 U.S. 1 (1968).

224. *Id.* at 19 (emphasis added).

225. *Id.* at 21 (emphasis added).

226. Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 53 (2015).

227. Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 77 (2011).

The ultimate problem is, as Professor Daniel Solove asserts, that under the Fourth Amendment, “[t]he standard of ‘reasonableness’ is a rather toothless one.”²²⁸ Reasonableness simply provides too much discretion to police to censor the First Amendment rights of citizens to capture videos and photographs, especially because courts view discretion “as a desirable feature of law enforcement professionalism.”²²⁹ Reasonableness “is not a bright-line rule, but instead a flexible approach that the Court adopted because of its elasticity in the face of widely varying situations implicating the Fourth Amendment.”²³⁰ Although controlling police discretion is “a goal that lies at the very heart of Fourth Amendment reasonableness,”²³¹ something more rigorous is needed to cabin discretion when competing First Amendment interests are at stake.

Indeed, the next Part argues that multiple First Amendment interests mandate a more precise and heightened form of judicial review than mere reasonableness in right-to-record cases.

III. DISCOVERING THE TRUTH ABOUT POLICE CONDUCT AND THE NEED TO ACCOUNT FOR FIRST AMENDMENT INTERESTS: WHY REASONABLENESS FAILS AS THE LEGAL STANDARD

In *Branzburg v. Hayes*,²³² the Supreme Court observed that “without some protection for seeking out the news, freedom of the press could be eviscerated.”²³³ The case of Feidin Santana illustrates²³⁴ that newsgathering interests unabashedly are at stake when citizens play a press-like function and record police performing their official duties.

Indeed, if news is defined as “the material that people use to learn and think about the world beyond themselves,”²³⁵ then Santana definitely gathered news. As columnist Tony Norman of the *Pittsburgh Post-Gazette* contends, Santana’s video “opened the eyes of millions of Americans who previously doubted that a police officer would be capable of shooting anyone who didn’t truly deserve it. It takes away their certainty (until the next unrecorded shooting) that it is always

228. Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1302 (2004).

229. Hadar Aviram & Daniel L. Portman, *Inequitable Enforcement: Introducing the Concept of Equity into Constitutional Review of Law Enforcement*, 61 HASTINGS L.J. 413, 423 (2009).

230. *Id.* at 447.

231. Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 811 (2011).

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

233. *Id.* at 681.

234. *See supra* notes 1–15 and accompanying text.

235. BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM* 37–38 (2001).

the victim's fault."²³⁶ Parsed differently, citizen-recorded videos of police can serve as startling wake-up calls to an undesirable reality—a first step toward discovering the truth about the ways and means of policing among, perhaps, a few rogue officers.

Capturing images itself is a First Amendment-protected activity. As Texas's highest criminal court crisply reasoned in 2014:

The camera is essentially the photographer's pen or paintbrush. Using a camera to create a photograph or video is like applying pen to paper to create a writing or applying brush to canvas to create a painting. In all of these situations, the process of creating the end product cannot reasonably be separated from the end product for First Amendment purposes.²³⁷

In journalistic terms, as Professor Marc Jonathan Blitz observed in 2013, “using an iPhone to snap a photograph of one's surroundings is, in many respects, simply a modern form of note taking.”²³⁸ Those iPhone notes, as it were, can expose police abuses of authority. The Supreme Court, in turn, recognizes the role of the press “as a watchdog of government activity.”²³⁹ As the late First Amendment scholar C. Edwin Baker wrote, “the press receives constitutional protection to be a voice independent of the government (or, at least, independent of the other three ‘estates’) in order to perform the crucial democratic tasks of providing an independent source of vision and information, including performance of a watchdog role.”²⁴⁰

Today, citizen-journalists wielding smartphones may perform this same watchdog function. This is increasingly important because, as Professor Seth Kreimer asserts, “[s]erendipitous amateur image capture can fill some of the lacunae left by the decimation of salaried news staffs.”²⁴¹ Indeed, a September 2010 article in *American Journalism Review* contended that:

investigative reporters are a vanishing species in the forests of dead tree media and missing in action on Action News. I-Teams are shrinking or, more often, disappearing altogether. Assigned to cover multiple beats, multitasking backpacking reporters no longer have time to sniff out hidden stories, much less write them. In Washing-

236. Tony Norman, *Video for Once Allows Police No Excuses*, PITTSBURGH POST-GAZETTE, Apr. 10, 2015, at A-2.

237. *Ex parte* Thompson, 442 S.W.3d 325, 337 (Tex. Crim. App. 2014).

238. Marc Jonathan Blitz, *The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21, 76 (2013).

239. *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

240. C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 968 (2007).

241. Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 350 (2011).

ton, bureaus that once did probes have shrunk, closed and consolidated.²⁴²

In a 2010 article, Professor Stephen Lacy and his colleagues noted that “some academics and industry analysts have suggested that online citizen journalism might evolve and develop to the point of compensating for declining community coverage resulting from decreased newspaper reporting resources.”²⁴³ A year earlier, Professor Claire Serant witnessed “a growing trend that has citizen journalists working with non-profit organizations to become frontline communicators in towns that lost newspapers recently.”²⁴⁴ The bottom line is that citizen-journalists, in light of economic factors plaguing the institutional press and professional journalism today, are increasingly called upon to play the role of watchdog.

Efforts, in turn, to distinguish citizen-journalists from the institutional press are constitutionally flawed in this particular arena. Professor William Lee keenly observes that “[b]ecause the value of expression does not depend upon the identity of its source, efforts to separate the citizen journalists from the press are constitutionally flawed. Stated differently, the constitutional value and protection of expression does not depend upon whether it emanates from an institution recognized as the press.”²⁴⁵ In a similar vein, Professor Erik Ugland called on the Supreme Court in 2008 to “abandon any suggestion that ‘freedom of the press’ implies anything other than the *freedom of all citizens* to seek out the news and to communicate it through media.”²⁴⁶

Indeed, two years later the Supreme Court recognized in *Citizens United v. Federal Election Commission*²⁴⁷ that “[w]ith the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.”²⁴⁸ Justice Anthony Kennedy wrote for the majority that “restrictions distinguishing among different speakers”²⁴⁹ are prohibited by the First Amendment. Furthermore, the *Citizens United* majority quoted favorably Justice Antonin Scalia’s observation from an earlier case that the Court has

242. Mary Walton, *Investigative Shortfall*, AM. JOURNALISM REV. (Sept. 2010), <http://www.ajr.org/Article.asp?id=4904> [<http://perma.cc/2MZF-SLTT>].

243. Stephen Lacy et al., *Citizen Journalism Web Sites Complement Newspapers*, 31 NEWSPAPER RES. J. 34, 34–35 (2010).

244. Claire Serant, *Citizen Journalists Starting Newspapers in Towns That Have Lost Their Weeklies*, GRASSROOTS EDITOR, Fall 2009, at 13, 13.

245. William E. Lee, *Citizen-Critics, Citizen Journalists, and the Perils of Defining the Press*, 48 GA. L. REV. 757, 771 (2014) (footnote omitted).

246. Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL’Y 113, 189 (2008) (emphasis added).

247. *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010).

248. *Id.* at 352.

249. *Id.* at 340.

“consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.”²⁵⁰

Building from this logic, the U.S. Court of Appeals for the Ninth Circuit in 2014 concluded in a defamation case involving a defendant-blogger that:

[t]he protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others’ writings, or tried to get both sides of a story. As the Supreme Court has accurately warned, a First Amendment distinction between the institutional press and other speakers is unworkable²⁵¹

Finally, as Senior U.S. District Court Judge James Carr pointed out in the right-to-record case of *Crawford v. Geiger*,²⁵² which was addressed earlier in this Article,²⁵³ “[t]he First Amendment protects not just the right of the press to gather news—it affords that right to the general public as well.”²⁵⁴ Carr emphasized that:

[t]echnology has put the ability to gather and disseminate newsworthy information literally in the hands of anyone who has a cell phone. With increasingly frequency, events of local, regional, national, and even international significance first and frequently most vividly come to public attention because a bystander saw, recorded, and, often as those events were underway, transmitted what was happening.²⁵⁵

Ultimately, then, any argument that the watchdog role played by citizen-journalists when they take images of police performing duties should somehow be devalued in First Amendment jurisprudence, as compared to the mainstream or institutional press, simply does not hold water. Beyond the watchdog role played by citizens when they record police in action, a more fundamental benefit of capturing such images is the effort to determine the truth regarding what really transpires during interactions between police officers and suspects/detainees.

For instance, the truth about such encounters is often contested. A police officer, such as Officer Slager in the North Charleston shooting, may claim one version of events.²⁵⁶ The person he questions or arrests, however, may assert a very different account of the same interaction. More troubling, as in North Charleston, a citizen may be killed

250. *Id.* at 352 (quoting *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 691 (Scalia, J., dissenting)).

251. *Obsidian Fin. Grp. v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014).

252. *Crawford v. Geiger*, 996 F. Supp. 2d 603 (N.D. Ohio 2014).

253. *See supra* notes 158–73 and accompanying text.

254. *Crawford*, 996 F. Supp. 2d at 614.

255. *Id.*

256. *See supra* notes 11–12 and accompanying text.

by the officer and not even have the opportunity to provide his or her version of the truth. Thus, protecting a third-party citizen's right to record police-citizen interactions can help to shed light on the truth regarding what transpires.

Searching for the truth, of course, is at the core of First Amendment values. As scholar and theorist Thomas Emerson wrote, "freedom of expression is an essential process for advancing knowledge and discovering truth."²⁵⁷ Indeed, the marketplace of ideas theory, which Professor Matthew Bunker succinctly describes as "one of the most powerful images of free speech, both for legal thinkers and for laypersons,"²⁵⁸ pivots on the notion that free speech "contributes to the promotion of truth."²⁵⁹

The marketplace of ideas theory was initially incorporated into First Amendment jurisprudence²⁶⁰ nearly a century ago in *Abrams v. United States*.²⁶¹ That is when Justice Oliver Wendell Holmes, Jr. famously reasoned in dissent that:

the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.²⁶²

As Professor Robert Post encapsulates it, "in *Abrams* Holmes explicitly oriented his theory of the First Amendment toward the value of truth."²⁶³ The Supreme Court in *Hustler Magazine v. Falwell*²⁶⁴ reiterated decades later the importance of what it called "the truth-seeking function of the marketplace of ideas."²⁶⁵

Images, in turn, can be powerful in ferreting out the truth. Professor Barbie Zelizer, for example, asserts that in journalism "the image's capacity to be seen as true and accurate has come to uphold journalism's broader role in accounting for the real world."²⁶⁶ Similarly, Pro-

257. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970).

258. MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY* 2 (2001).

259. Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 *DUKE L.J.* 967, 998 (2003).

260. See Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 *DUKE L.J.* 1, 3 (asserting that Holmes first introduced the marketplace of ideas "concept into American jurisprudence in his 1919 dissent to *Abrams v. United States*").

261. *Abrams v. United States*, 250 U.S. 616 (1919).

262. *Id.* at 630 (Holmes, J., dissenting).

263. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 153, 158 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

264. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

265. *Id.* at 52.

266. Barbie Zelizer, *What's Untransportable About the Transport of Photographic Images?*, 4 *POPULAR COMM.* 3, 14 (2006).

fessor Peter Hamilton observes that journalistic photos are “assumed to have some ‘truth-value’ in the sense that they allow the viewer privileged insight into the events they depict.”²⁶⁷ This is relevant here as citizens, armed with smartphones, may play the role of journalists when they record images of police interacting in public spaces with other citizens. Ultimately, and in accord with Chief Justice John Roberts’ point in 2012, “[a]s every schoolchild knows, a picture is worth a thousand words.”²⁶⁸

Indeed, it is particularly useful to recall here how George Holliday’s video, taken from his apartment balcony more than two decades ago, “purported to capture the truth or reality of the beating, a reality subject to interpretation,”²⁶⁹ of African American Rodney King by several Los Angeles police officers. As columnist Jan Ransom of the *Philadelphia Daily News* astutely queries, “had it not been for the infamous video shot by George Holliday . . . would anyone have believed King’s story?”²⁷⁰ In the case of Rodney King, as perhaps today the shooting of Walter Scott in North Charleston, “the camera becomes perfect witness and transparent medium, empowering those who were not at the crime scene to become witnesses too.”²⁷¹

In summary, because of the unambiguous importance of the First Amendment and criminal justice interests involved in the recording and dissemination of videos such as that captured by Feidin Santana, the reasonable-restrictions standard adopted by courts for squelching the right to record simply is insufficient to safeguard the watchdog and truth-seeking functions performed today by citizen-journalists. A possible precedential hurdle, however, standing in the way of ramping up the reasonableness test to a more stringent one in the name of First Amendment interests is the Supreme Court’s 1978 decision in *Zurcher v. Stanford Daily*.²⁷²

In *Zurcher*, the Court rejected the free-press argument that innocent third-party searches of news organizations conducted under Fourth Amendment strictures required special consideration of the First Amendment interests at stake. As Justice Byron White wrote for the *Zurcher* Court:

[P]rior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amend-

267. Peter Hamilton, *Representing the Social: France and Frenchness in Post-War Humanist Photography*, in REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 75, 85 (Stuart Hall ed., 1997).

268. *FCC v. CBS Corp.*, 132 S. Ct. 2677, 2678 (2012).

269. CLAY CALVERT, *VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE* 5 (2000).

270. Jan Ransom, *Around the Country, Power of Video v. Power of Police*, PHILA. DAILY NEWS, Sept. 3, 2011, at 6.

271. Harley Erdman, *Caught in the “Eye of the Eternal”: Justice, Race, and the Camera, from The Octoroon to Rodney King*, 45 THEATRE J. 333, 347 (1993).

272. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

ment interests would be endangered by the search. As we see it, no more than this is required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper.²⁷³

Justice White added that “[t]here is no reason to believe . . . that magistrates cannot guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper.”²⁷⁴

A key difference, however, between *Zurcher* and the right-to-record cases at the heart of this Article is the involvement, prior to any law enforcement action, of a neutral judge or magistrate in the former, but not in the latter. To this point, Justice White reasoned in *Zurcher* that “[t]he hazards of such warrants can be avoided by a neutral magistrate carrying out his responsibilities under the Fourth Amendment, for he has ample tools at his disposal to confine warrants to search within reasonable limits.”²⁷⁵ In other words, a judge or magistrate stands as an intermediary between police and newsroom searches, attempting to cabin and confine the search scope of law enforcement personnel in advance of a search.

In the right-to-record cases, however, no judge or magistrate is consulted in advance of a police officer’s on-duty decision to halt a citizen’s filming of his or her actions. As Magistrate Mark Lane wrote in 2015, “the officer on the scene of an arrest or investigation will be the arbiter of what constitutes a reasonable time, place, and manner for the exercise of the individual’s First Amendment right to record.”²⁷⁶ The officer thus acts free of interference by a judge or magistrate. It is only after the officer thwarts a citizen’s recording that a judge or magistrate steps into the picture to determine, post hoc, if the quashing of recording was reasonable.

If, in turn, the judge or magistrate decides that stopping the filming was unreasonable, then there is no suitable remedy for the infringed upon First Amendment interests. That is because the recording was stopped, either before it could begin or before it was allowed to finish. This is tantamount to a prior restraint on protected expression, causing irreparable injury to the First Amendment and to the public’s right to know. As the Supreme Court has observed, “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”²⁷⁷ Just as restrictions on exit polling in public places prevent gathering information from voters and

273. *Id.* at 565.

274. *Id.* at 566.

275. *Id.* at 567.

276. *Buehler v. City of Austin*, A-13-CV-1100-ML, 2015 U.S. Dist. LEXIS 20878, at *24 (W.D. Tex. Feb. 20, 2015).

277. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

thereby cause irreparable injury to First Amendment interests,²⁷⁸ so too do restrictions on filming police in public venues.

Whatever images might have been captured on video, had not an officer stopped it, can never be recaptured. They are gone forever. That is highly problematic because, as investigative reporter Thomas Peele asserts, “the best chance here of learning about police abuse is for it to be captured live.”²⁷⁹

A second major difference between *Zurcher* and the right-to-record cases is that the *Zurcher* Court considered the alleged danger to First Amendment interests to be purely speculative. In contrast, the multiple examples of apparent abuse in the right-to-record disputes described in the Introduction²⁸⁰ suggest the harms are very real. Remarking on the unproven and abstract nature of the harm to the press in *Zurcher*, Justice White wrote that the *Stanford Daily* and its supporting friends of the court:

pointed to only a very few instances in the entire United States since 1971 involving the issuance of warrants for searching newspaper premises. This reality hardly suggests abuse; and if abuse occurs, there will be time enough to deal with it. Furthermore, the press is not only an important, critical, and valuable asset to society, but it is not easily intimidated—nor should it be.²⁸¹

Two facets of this logic do not hold up when applied to the right-to-record cases. First, examples of police abuse of power in right-to-record cases are numerous, as the instances from April 2015 alone that are described in the Introduction indicate.²⁸² And the troubles keep on coming: in May 2015, a Tempe, Arizona police officer was suspended “for seizing cellphones from a man who was recording an encounter with the officer.”²⁸³

Second, Justice White’s assumption in *Zurcher* that the press “is not easily intimidated”²⁸⁴ was directed at the institutional press, not average citizens who now use smartphones to capture news. One can easily imagine citizens being deterred from recording police if not assured of First Amendment protection. Although mainstream news organizations may have money and insurance to fight legal disputes in

278. *ABC v. Heller*, 2:06-CV-01268-PMP-RJJ, 2006 U.S. Dist. LEXIS 80030, at *38–39 (D. Nev. Nov. 1, 2006).

279. Thomas Peele, Opinion, *The Best Chance Here of Learning About Police Abuse is for It to be Captured Live*, *CONTRA COSTA TIMES* (Cal.) (May 2, 2015), http://www.contracostatimes.com/endorsements/ci_28026676/thomas-peeelerecording-police-action-is-often-only [<http://perma.cc/U7F6-UERX>].

280. See *supra* notes 17–21 and accompanying text.

281. *Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978).

282. See *supra* notes 17–21 and accompanying text.

283. Associated Press, *Tempe Officer Suspended for Seizing Man’s Cellphones*, *ALBUQUERQUE J.* (May 28, 2015), <http://www.abqjournal.com/591240/news-around-the-region/tempe-officer-suspended-for-seizing-mans-cellphones.html> [<http://perma.cc/N92J-JZEZ>].

284. *Zurcher*, 436 U.S. at 566.

court, the average citizen likely lacks that same financial power and might, in turn, censor his or her recording activities in order not to risk arrest at the hands of officers upset they are being recorded.

Ultimately, then, the First Amendment interests at stake in right-to-record police cases demand that any restrictions imposed on the right be subject to a much more stringent standard of judicial review than mere reasonableness. The next Part thus argues that the appropriate standard of review tracks that of strict scrutiny and, in particular, that any restriction on the right to record must be so narrowly tailored as to be necessary to serve a compelling law enforcement interest.

IV. TOWARD A STRICT SCRUTINY STANDARD OF REVIEW FOR CENSORING THE RIGHT TO RECORD POLICE IN PUBLIC VENUES: FROM REASONABLE RESTRICTIONS TO NECESSARY RESTRICTIONS AND THE CREATION OF A CONTINUUM OF NECESSITY

A fundamental dichotomy in First Amendment speech jurisprudence separates content-based restrictions from content-neutral regulations.²⁸⁵ The former typically are subject to the rigorous strict scrutiny standard of judicial review, while the latter are analyzed under a more lenient and government-friendly intermediate scrutiny test.²⁸⁶

Under strict scrutiny, a restriction on speech will be upheld only if it “is narrowly tailored to serve a compelling interest.”²⁸⁷ The Supreme Court observed in 2011 that this “is a demanding standard.”²⁸⁸ That is partly because the concept of narrow tailoring in strict scrutiny demands that the restriction on speech “be the least restrictive means”²⁸⁹ of serving the alleged compelling interest. This necessitates that “[i]f a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”²⁹⁰

In contrast, under intermediate scrutiny the means “need not be the least restrictive or least intrusive means.”²⁹¹ Instead, and in accord with the Fourth Amendment analysis described above in Section D of

285. Clay Calvert, *Content-Based Confusion and Panhandling: Muddling a Weathered First Amendment Doctrine Takes Its Toll on Society’s Less Fortunate*, 18 RICHMOND J. L. & PUB. INT. 249, 250 (2015).

286. *Id.* at 250–51; see also Patrick M. Garry, *A New First Amendment Model for Evaluating Content-Based Regulation of Internet Pornography: Revising the Strict Scrutiny Model to Better Reflect the Realities of the Modern Media Age*, 2007 BYU L. REV. 1595, 1600–01 (observing that “in order to sustain various speech restrictions under a more permissive review than strict scrutiny, an intermediate level of scrutiny has been used for time, place, and manner regulations found to be content-neutral”).

287. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1665 (2015).

288. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011).

289. *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014).

290. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

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

Part II, “reasonable restrictions on the time, place, or manner of engaging in protected speech”²⁹² are allowed. Additionally, the interest needed to support a speech restriction under intermediate scrutiny need only be significant or important, rather than compelling.²⁹³

The Supreme Court has observed that “[d]eciding whether a particular regulation is content based or content neutral is not always a simple task.”²⁹⁴ Despite this fact, several strong arguments exist that restrictions on the First Amendment right to record police in public places are content based and, thus, should be subject to strict scrutiny review.

First, the scope of the right to record police itself applies only to a particular type of content—namely, images and recordings depicting government officials and, specifically, police performing their official duties in public venues. If content-based restrictions are those that require examination of the content of a message to know if a violation occurs,²⁹⁵ then this right can only be violated if the images in question are those of specific people (law enforcement personnel) doing specific tasks (carrying out their jobs). For a violation to occur, then, a judge needs to examine the censored images to see if law enforcement personnel are portrayed in them or, if the recording was thwarted before it could even begin, needs to examine the testimony of the citizen-recorder to determine what she was attempting to record.

Second, such restrictions are content based because they are “concerned with undesirable effects that arise from ‘the direct impact of speech on its audience’ or ‘[l]isteners’ reactions to speech.’”²⁹⁶ Specifically, police officers are concerned about the direct impact—the undesirable effects, as it were—of citizens’ cameras pointed toward them when they squelch those citizens’ right to record them. It is the reaction of the officers to the act of recording that directly leads to censorship. Police fear the speech-recording process will somehow negatively impact either their actions or those of the suspects/detainees.

In summary, only a very particular, specific type of content or subject matter is being censored—images of police in action—in cases like *Glik*.²⁹⁷ Put differently, Simon Glik’s recording in Boston Common would not have been censored by police had the subject matter

292. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993) (emphasis added).

293. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (asserting that “[a] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests”); *Rock Against Racism*, 491 U.S. at 791 (noting that there must be “a significant governmental interest” under intermediate scrutiny).

294. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

295. *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014).

296. *Id.* at 2531–32 (alteration in original) (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

297. *See supra* notes 182–89 and accompanying text.

of his cellphone images been tourists strolling through the park, a couple holding hands, or people frolicking on a summer day in the Frog Pond Spray Pool.²⁹⁸ Glik was in a public space and could shoot any of those images without fear of arrest. It was only because the images were of police in action that he was arrested.

Because of the content-based nature of restrictions imposed on photographing police in public places, those restrictions should be required to comport with strict scrutiny review. Specifically, they must be justified by a compelling interest and be narrowly tailored in scope such that they cannot be served as effectively by “a less restrictive alternative.”²⁹⁹ In other words, a restriction must be more than just reasonable to serve the compelling interest; it must, in fact, be “carefully tailored”³⁰⁰ as “the least restrictive means”³⁰¹ of serving it.

It boils down to requiring a much tighter fit between law enforcement interests and the restrictions ostensibly designed to serve them. This is important because it requires police to more carefully and precisely craft restrictions on citizen-recorders than are permitted under the more relaxed standard of reasonableness. In blunt terms, citizen-recorders can only be made to stand back from police no more than is absolutely necessary to serve compelling law enforcement interests.

Assuming that the collective safety of officers, suspects/detainees, and the public, as well as preserving evidence at public crime and accident scenes, are compelling interests when police interact with people on the job, the focus necessarily becomes whether a restriction on the right to film in any given case is truly necessary to serve any of those interests. The danger here, of course, is that the difference between a *reasonable* restriction and a *necessary* restriction becomes little more than meaningless semantics and a futile exercise in verbal gymnastics.

To add rigor and consistency to the reasonable-versus-necessary difference, there must be standardized criteria and variables for both police and courts to consider and evaluate in any given citizen-recorder case. What follows, then, are some possibilities to begin the process of adding legal flesh to this difference. They hopefully will spark a conversation—one among stakeholders, including First Amendment advocates, law enforcement leaders, members of the judiciary, and concerned citizens—about factors to be weighed, in a totality-of-the-circumstances approach, by courts to decide if a restriction truly was the least restrictive possible on the First Amendment right to record.

298. See *Warm Weather Programs*, BOS. COMMON FROG POND, <http://boston-frogpond.com/warm-weather-programs> [<http://perma.cc/QXR5-WRDN>] (noting that “[t]he Frog Pond Spray Pool is a Boston family favorite for city dwellers and visitors alike. Sit back, relax, and enjoy the beauty and history of The Boston Common while your little tadpoles splash around and cool down on hot summer days”).

299. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

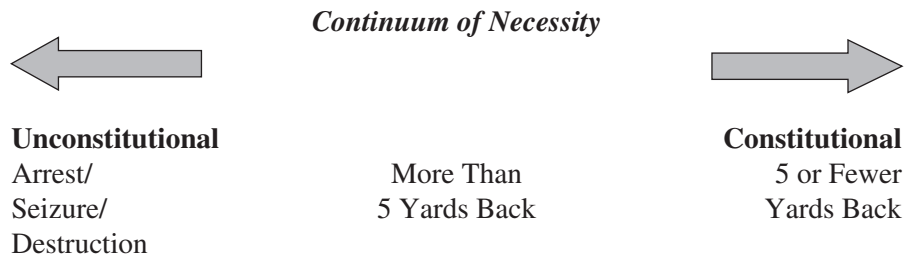
300. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

301. *Id.*

The approach proposed below involves a continuum, dubbed here a *Continuum of Necessity*. On one end (the unconstitutional end) are police remedies—citizen arrest, camera seizure, and camera destruction—that invariably are overly repressive of First Amendment interests and thus are unconstitutional as applied to citizens who do no more than record police in public places. Arrest, seizure, and destruction are the *least* narrowly tailored of possible restrictions on the First Amendment right to record, as described below in Section A.

On the opposite end of the continuum (the presumptively constitutional end) are police orders for citizens to stand no more than five yards back from police-suspect/detainee encounters. This fifteen-foot buffer zone, as described below in Section B, strikes a balance between safety concerns and First Amendment interests. A citizen-recorder who claims that an order to stand five or fewer yards back would need to demonstrate why such distances are excessive under the factual circumstances.

In between these extremes are orders for citizen-recorders to stand *more than* five yards back. In all such cases, police must demonstrate why the order is the least restrictive possible—impinging absolutely no more than is necessary on First Amendment interests—to serve compelling safety interests and/or preservation of evidence/crime scene values. In these more-than-five-yards scenarios, as described later in Section C, courts should consider a list of factors to help decide the necessity of the restriction.



A. *Arrest, Camera Seizure, and Camera Destruction: The Least Narrowly Tailored Restrictions*

As a starting point, the *least narrowly tailored restriction*—the most sweeping constraint that would never survive strict scrutiny—is to arrest and/or seize or destroy the recording device of a citizen who, while situated in a public place, is doing nothing more than recording police on the job. Arrest and equipment seizure are extreme reactions—ones tantamount to imposing a prior restraint on the production of speech—to such potential news-gathering conduct and thus are

presumptively unconstitutional.³⁰² In brief, the mere act of recording an officer performing duties in public should never, standing alone, justify an arrest or camera seizure. There must be some conduct *in addition* to the recording act to justify this drastic restriction. This might be considered a *recording-plus* criterion.

An officer who arrests a citizen-recorder or who seizes her recording device should be required to prove that the citizen-recorder's overall conduct—*conduct in addition to the act of recording*—was either: (a) directly creating an imminent danger to the safety of the officer, suspect/detainee, and/or other members of the public located in close physical proximity to the officer; or (b) interfering with the preservation of evidence at the scene of an accident or crime. Such additional conduct might include: (1) physically trying to obstruct the officer in performing duties; (2) repeatedly trying to engage the officer in disruptive conversation while the officer is talking with the suspect/detainee and after being told by the officer to remain quiet;³⁰³ or (3) verbally trying to incite others in the near vicinity to attack the officer.³⁰⁴ These are the only circumstances in which such extreme remedies might be justified.

B. *An Order to Stand Five or Fewer Yards Back: Presumptively Narrowly Tailored & Least Restrictive*

If the citizen-recorder is standing within the immediate physical reach of an officer performing his or her duties, the remedy should be one of distance to stand back, not one of arrest or camera seizure/destruction. The concept of “immediate physical reach,” for sake of consistency, is proposed here as standing within five yards of an officer who is interacting with a suspect/detainee or who is actively preserving/collecting evidence. An immediate physical reach buffer zone is necessary for officer safety, as well as the safety of the citizen-recorder, who might be injured if the officer-suspect/detainee interaction turns violent.

302. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556–59 (1976) (describing how prior restraints are presumptively unconstitutional and carry “an immediate and irreversible sanction”).

303. See *Colten v. Kentucky*, 407 U.S. 104 (1972) (upholding a disorderly conduct conviction of a man who repeatedly verbally interfered with police). As the Kentucky appellate court in this case described it, the defendant “was not seeking to express a thought to any listener or to disseminate any idea. He simply was trying to irritate the police by his presence and by efforts at interruption.” *Colten v. Kentucky*, 467 S.W.2d 374, 378 (Ky. Ct. App. 1971), *aff'd*, 407 U.S. 104 (1972).

304. Incitement of imminent violence that is likely to occur is not protected by the First Amendment. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

Of course, there will be quibbles by First Amendment purists over whether an order to stand five yards back—fifteen feet—is too far away and unnecessarily hinders the recording of clear images. For example, a 2015 Texas bill that would have created a twenty-five-foot buffer zone was later dropped after being severely criticized.³⁰⁵ But a five-yard-back approach, with the clarity of today's smartphone cameras, is designed to strike a balance between First Amendment interests and law enforcement objectives, including safety concerns. Compromise seems a matter of necessity if progress is to be made on this issue.

An order to stand no more than five yards back thus would be presumptively narrowly tailored and no greater than necessary to protect compelling interests in safety and evidence preservation. A citizen-recorder challenging a five-yards-back order would need to demonstrate how it interfered with his or her ability to record the officer in action.

C. *More Than Five Yards Back: Presumptively Unconstitutional*

A police order for a citizen-recorder to stand more than five yards back of a police-suspect/detainee encounter should be presumptively unconstitutional. Such orders may be permitted and upheld by courts, however, if police can demonstrate they are necessary to serve compelling interests in safety or evidence/crime scene preservation.

The overarching principle here is simple: *The further back the police order to stand, the more difficult the police burden of proving its necessity.* In other words, there is a positive correlation—*the greater the restriction, the greater the burden.* This rule is the backbone of analysis for all distance-based restrictions of more than five yards under the framework proposed here as a starting point for discussion among stakeholders.

Factors for courts to consider in the evaluation process of five-plus-yards pushbacks include, but are not limited to:

- (1) The number of police officers on the scene;
- (2) The number of suspects/detainees on the scene;
- (3) Whether the suspects/detainees are known to be armed and/or whether there is probable cause to believe they are armed;
- (4) The nature of the criminal record(s) of the suspect(s)/detainee(s) known to the officers at the scene and at the time when an order to push back a citizen-recorder more than five yards was made;
- (5) The lighting of the scene (daytime or nighttime, light or dark);

305. Allison Wisk, *Bill to Limit Filming of Police Activity is Dropped*, DALL. MORNING NEWS (Apr. 10, 2015), <http://www.dallasnews.com/news/politics/state-politics/20150410-bill-to-limit-filming-of-police-activity-is-dropped.ece> [<http://perma.cc/27A7-G4NQ>].

- (6) The potential public concern of any images and video that might be captured at the scene, given the specific facts surrounding the police encounter with suspects/detainees;³⁰⁶
- (7) The number, if any, of clearly (based on their words and/or conduct) police-hostile members of the public located within the immediate physical proximity (five or fewer yards) of the officer(s) at the scene; and
- (8) Whether the citizen-recorder was, beyond the mere act of recording, engaged in any police-hostile conduct such as yelling at the police, encouraging others to attack the police, or physically trying to disrupt the actions of the police.

These eight factors are to be weighed by courts, considering the precise distance of a police pushback order of more than five yards and in light of the guiding rule that the further back the police's order to stand, the more difficult the police's burden of proving it is necessary. No one factor controls. Importantly, the sixth factor—the potential public concern of any images that might have been (or that were) captured at the scene—directly takes into account First Amendment interests into this judicial analysis.³⁰⁷

The bottom line is that the analysis proposed here is merely a starting point to foster discussion and dialogue among academics and, more importantly, stakeholders in right-to-record cases in which police restrictions were imposed on citizen-recorders. The factors, of course, are ripe for commentary and suggestions by other scholars and stakeholders.

V. CONCLUSION

In 2015, the First Amendment right of citizens to record police performing their duties in public places is in an unsettled phase of judicial ferment. Constitutional calm and stasis have yet to settle in over this evolving, hot-button right; some courts recognize it, some courts do

306. The guiding principle on this factor is that the more potential for the public concern of the images, the less distance of pushback should be afforded to the police. This, in other words, is an inverse or negative relationship—the greater the images may have public concern, the less is the distance allowed for their restriction.

The concept of “public concern” may be evaluated here under the test adopted by the Supreme Court in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). In *Snyder*, the high court held that speech regarding matters of public concern is privileged and at the core of First Amendment protection. *Id.* at 1215. The Court broadly defined public concern, disjunctively, as expression that might “be fairly considered as relating to any matter of political, social, or other concern to the community” or that relates to “a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” *Id.* at 1216.

In defining public concern, the *Snyder* majority concentrated on a trio of variables—content, context, and form of the speech—and asserted that when evaluating them, “no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.” *Id.*

307. See *supra* Part III.

not, and those that do, qualify it with a slippery reasonable-restrictions standard.

This Article illustrated that the most recent federal appellate court to consider the issue—the First Circuit, with its 2014 opinion in *Gericke v. Begin*—solidly recognized the existence of such a right, even when the incident recorded is a traffic stop.³⁰⁸ On the other hand, district courts within other federal circuits fractured in 2015 on whether there is a consensus of appellate authority recognizing such a right or, instead, a split of authority.³⁰⁹

Significantly, a federal judge within the influential Southern District of New York, which includes New York City, acknowledged in May 2015 the existence of this right. That decision, in *Higginbotham v. City of New York*, paves the way for the Second Circuit to perhaps soon become the fifth federal circuit—along with the First, Seventh, Ninth, and Eleventh—to recognize a First Amendment right to record police performing their duties in public venues. Other federal circuits that have not squarely addressed the existence of such a First Amendment right might, in the meantime, offer their views in future cases.

As smartphone ownership now approaches nearly two-thirds of all American adults,³¹⁰ it seemingly increases the odds that cases will proliferate and percolate up through the judicial system in the near future. In fact, a 2014 study by Nielson found that among Millennials, which account for about 77 million people in the United States, 85% ranging in ages from eighteen through twenty-four years own smartphones, and 86% spanning ages twenty-five to thirty-four years own them.³¹¹

More troubling than the current split of authority, this Article argued, is the relaxed standard of reasonableness for restrictions that may be permissibly imposed on this nascent First Amendment right. A reasonable-restrictions standard, stemming from Fourth Amendment dictates, simply provides too much discretion and wiggle room for police to squelch First Amendment interests, including the unenumerated public's right to know about potential abuses of police power. The Article asserts that any restrictions on this emerging constitutional right, which can help lead directly to discovery of the truth

308. See *supra* notes 176–81 and accompanying text (addressing *Gericke*).

309. See *supra* Part II, Section B, Subsection 1 (addressing two seemingly diametrically opposed views on this issue by two different federal district courts in 2015).

310. See Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RES. CTR. (Apr. 1, 2015), <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015> [http://perma.cc/69LB-FKE2] (finding that “64% of American adults now own a smartphone of some kind, up from 35% in the spring of 2011. Smartphone ownership is especially high among younger Americans, as well as those with relatively high income and education levels”).

311. *Mobile Millennials: Over 85% of Generation Y Owns Smartphones*, NIELSON (Sept. 5, 2014), <http://www.nielson.com/us/en/insights/news/2014/mobile-millennials-over-85-percent-of-generation-y-owns-smartphones.html> [http://perma.cc/977R-MH79].

about police interactions with suspects/detainees, should be subject to judicial review akin to strict scrutiny.

Specifically, limitations imposed on the right must be narrowly tailored with such precision and tight fit that no other alternatives were available that could have allowed for enhanced citizen recording rights. The Article has offered up, as a starting point for collaborative discussion among First Amendment advocates and law enforcement leaders, as well as members of the judiciary, eight factors to lend rigor to determinations of whether restrictions are, in fact, narrowly tailored. The Article also proposed a *Continuum of Necessity* for evaluating such cases, as well as a fundamental principle—namely, the greater the distance pushback by police, the greater the police burden to justify it—at the heart of this analysis.

Ultimately, the Supreme Court must, posthaste, wade into the thicket to make clear two principles: (1) there is a clearly established First Amendment right to record police in 2015 performing their official duties in public places; and (2) any restrictions imposed on this constitutional right are only permissible if they are so narrowly tailored and carefully crafted that there are no other possible alternatives that would allow for greater ability of citizens and journalists to record police under the circumstances. The nation's high court should also establish clear factors and criteria for lower courts to deploy when fathoming whether any given police-imposed restriction was, in fact, no greater than necessary to serve compelling interests in safety (officer, suspect/detainee, or public) and evidence preservation.

Without judicial adoption of such criteria, the critical difference between reasonable restrictions and necessary restrictions surely risks becoming muddled and meaningless. And without leadership from the Supreme Court now, the split of authority that some courts currently recognize will allow rogue police officers to continue to escape, under the doctrine of qualified immunity, monetary liability when they wrongfully seize phones and arrest citizens for doing no more than recording public servants in the line of duty.