CHANGING THE CULTURE OF UNCONSTITUTIONAL INTERFERENCE: A PROPOSAL FOR NATIONWIDE IMPLEMENTATION OF A MODEL POLICY AND TRAINING PROCEDURES PROTECTING THE RIGHT TO PHOTOGRAPH AND RECORD ON-DUTY POLICE

by
Kimberly McCullough[*]

In a world filled with cell phones and digital recording devices, documenting the activities of on-duty police has become increasingly common. Videos and photographs of police interactions have great value. They increase officer and public safety, provide evidence in judicial proceedings, expose police misconduct, and often provide a solid and effective foundation for demands for change. Although courts overwhelmingly agree that recording on-duty police is protected by the First Amendment, and despite the fact that police themselves increasingly record their interactions with the public, there exists a deep resistance in police culture to photography and recording by the public and press. Law enforcement officers across the nation use a variety of tactics—from intimidation and physical injury to criminal prosecution—to prevent the public from documenting them.

Changing the culture of unconstitutional interference with the right to photograph and record the police will be a difficult task. Litigation alone is not enough. This Comment calls for nationwide implementation of model police department training procedures and policies protecting the right of the public and press to document on-duty police. After providing a general overview of the relevant issues and explaining why policies and training are needed, the author sets out the necessary components of a model policy and training procedures and suggests tactics for promoting and requiring their implementation nationwide.

[*]Kimberly McCullough, J.D., Lewis & Clark Law School, Associate Attorney at Davis Wright Tremaine LLP. I would like to thank Professor Aliza Kaplan and Mickey H. Osterreicher, Esq., for their invaluable help and inspiration with the preparation of this Comment.

I. Introduction

Michael Allison thought he was having trouble with the police. He had no idea how bad things were about to get. Allison had been fixing up old cars in his front yard in Bridgeport, Illinois, in violation of a local abandoned property ordinance, also known as an "eyesore" ordinance.[1] For more than four years, police officers repeatedly seized Allison's cars, forcing him to pay hefty impound fees to retrieve them. Eventually, Allison filed a lawsuit against the City of Bridgeport, claiming the police were violating his rights. He continued to work on cars in his mother's driveway in nearby Robinson, Illinois, which also had an eyesore ordinance.[2] By Allison's account, Robinson police officers responded by threatening him with fines and arrest. He felt harassed and feared the officers were retaliating for his Bridgeport lawsuit, so he decided to record his conversations with the police. Allison believed he had a right to record. Then

[1] Radley Balko, *The War on Cameras*, Reason (Dec. 7, 2010), http://reason.com/archives/2010/12/07/the-war-on-cameras/singlepage. Eyesore ordinances prohibit the parking of inoperable or unregistered vehicles on private property, unless they are enclosed in a garage. *Id.*

[2] *Id.*

he was charged with five felony counts of eavesdropping under Illinois's wiretapping statute.[3] Allison faced up to 75 years in prison for recording the police.[4]

Sixteen-year-old Khaliah Fitchette was on the way home from school when her problems with the police began. Fitchette, an honors student and then-president of the junior class at her high school, was riding a Newark, New Jersey, public bus when a seemingly intoxicated man fell from his seat.[5] The driver called the police for help, and when they arrived, Fitchette took out her cell phone and started recording. Fitchette stood about 10 feet away and was not obstructing or interfering with the police officers, yet an officer ordered her to stop recording and to turn off her phone. Fitchette stopped recording. She declined, however, to turn off her phone, afraid she would miss a call from her mother. According to Fitchette's complaint, the officer grabbed Fitchette by the arm, forcibly pulled her off the bus, handcuffed her, seized her phone, deleted the video, took her to the police station, and threatened to charge her as an adult for obstruction of justice.[6] Terrified and despondent, Fitchette repeatedly pleaded with the police to let her call her mother. Finally, over an hour later, they dropped off the tearful teenager at her mother's workplace.[7]

Philip Datz was simply trying to do his job. As a professional, credentialed photojournalist in Suffolk County, New York, Datz covered breaking news events for local and national television networks.[8] On several different occasions, Suffolk County police prevented Datz from filming

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[3] *Id.*

[4] *Id.*; *see also* Kirsten Berg, *Strict Eavesdropping Law Ruled Unconstitutional in Illinois Case*, REPS. COMM. FOR FREEDOM OF THE PRESS (Sept. 16, 2011), http://www.rcfp.org/browse-media-law-resources/news/strict-eavesdropping-law-ruled-unconstitutional-illinois-case (discussing an Illinois judge's subsequent ruling that the law Allison was charged under was unconstitutional). A discussion of Allison's subsequent court case can be found *infra* at notes 157–159 and accompanying text.

[5] Complaint, Jury Demand and Designation of Trial Counsel at 2, Phillips v. City of Newark (N.J. Super. Ct. Law Div. Mar. 28, 2011), *available at* http://www.aclu-nj.org/download_file/view_inline/470/373; *see also* Press Release, ACLU, Newark Police Settles Lawsuit Over the Arrest of Teen with Cellphone Video (Nov. 19, 2012), http://www.aclu.org/criminal-law-reform-free-speech-technology-and-liberty/newark-police-settles-lawsuit-over-arrest.

[6] Complaint, *supra* note 5, at 2; Press Release, ACLU, *supra* note 5. Although charging a minor with obstruction of justice is prohibited under New Jersey law, the officers told Fitchette she would be charged as an adult because she could not prove her age. Fitchette's identification was in her backpack, which the police had left on the bus. Complaint *supra* note 5, at 2–3.

[7] Complaint *supra* note 5, at 9; *see also* Press Release, ACLU, *supra* note 5.

[8] Datz's video footage is regularly licensed to a variety of networks, including ABC, NBC, Fox, CBS, CNN, Newsday, and many more. He is also a member of the National Press Photographers Association (NPPA). Complaint at 2, 5, Datz v. Milton, No. CV12-1770 (E.D.N.Y. Apr. 11, 2012). Video footage of the encounter may be viewed online at http://www.newsday.com/long-island/suffolk/photographer-held-1.3067508.

police activity in public spaces open to public view.[9] On one such occasion, an officer roughly grabbed Datz by his press lanyard and ordered him to stop filming the aftermath of a police chase.[10] The sidewalk where Datz stood was open to the public and the officer allowed several bystanders to remain as he ordered Datz to walk away, telling Datz he would "get locked up" if he did not leave.[11] Datz complied, moving over 500 feet away to another public sidewalk before he resumed filming. In response, according to the complaint, the officer "sped his patrol car at high speed directly at [Datz], forcibly seized his camera and videotape, and arrested him."[12]

These stories are a mere sampling of a much wider phenomenon. Interference with recording and photography by the press and public is deeply embedded in police culture. For many officers and police departments, it is standard behavior. Law enforcement officers across the nation use a variety of tactics—from intimidation and physical injury to criminal prosecution—to prevent the public from documenting the actions of on-duty police. Although they have become increasingly comfortable with their own recording devices, police often view documentation by the public in an entirely different light: as something that needs to be stopped.

A call for change echoes across the nation. Concerned citizens, members of the press, legal scholars, litigators, and advocacy organizations are calling for the police to change their ways. Although the Supreme Court has not directly addressed the public's right to photograph and record on-duty police, the vast majority of lower courts to encounter the issue have held that the First Amendment guarantees such a right. Even the Department of Justice has weighed in, stating that members of the public "have a First Amendment right to record police officers in the public discharge of their duties, and . . . officers violate individuals' Fourth and Fourteenth Amendment rights when they seize and destroy such recordings without a warrant or due process."[13]

Changing the culture of unconstitutional interference with the right to photograph and record the police will be a difficult task. Litigation alone is not enough. Despite overwhelming agreement by the judiciary that the right to record on-duty police is constitutionally protected, and despite countless judgments imposing heavy penalties against police departments and officers for infringing said right, interference persists. Articles declaring injustice, complaints to police departments, and commu-

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[9] Complaint *supra* note 8, at 12–19.

[10] *Id.* at 1, 6.

[11] *Id.* at 1, 7.

[12] *Id.* at 2, 7–8.

[13] Letter from Jonathan M. Smith, Chief, Special Litig. Section, U.S. Dep't of Justice, Civil Rights Div., to Mark H. Grimes, Balt. Police Dep't, Office of Legal Affairs, and Mary E. Borja, Wiley Rein LLP at 2 (May 14, 2012), *available at* http://www.justice.gov/crt/about/spl/documents/Sharp_ltr_5-14-12.pdf.

nity groups calling for change have also been unable to create widespread and lasting change.

One possible method of change, however, is to transform the culture of interference from within. This Comment calls for nationwide implementation of model police department training procedures and policies protecting the right of the public and press to document on-duty police. Part I provides a general overview of the relevant issues, including the rise of digital documentation; tactics used by police to prevent documentation; the existence, importance, and contours of the constitutional right to document police; and current efforts to establish and protect the right. Part II explains why policies and training are necessary to change the culture of interference, including a discussion of the various benefits of model policies and training procedures, as well as the inadequacy of litigation and legislation to fully remedy this problem. Finally, Part III discusses the necessary components of model policy and training procedures and tactics for promoting and requiring their implementation nationwide.

II. Overview

A. The Rise of Digital Documentation

Over the last quarter of a century, the United States has seen a dramatic rise in photo, audio, and video journalism by ordinary citizens, as well as increased documentation and publication of interactions with law enforcement.[14] This is due in large part to advances in digital image technology, ubiquitous cell phone ownership, and widespread use of image sharing and social networking websites.[15] Concerned members of the public document and publish interactions with law enforcement to give voice to victims of police abuses and to deter future misconduct.[16] When these photos and videos go viral, they often provide a solid and effective foundation for demands for change where it is needed.[17]

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[14] Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 Minn. L. Rev. 515, 523, 526 (2007); Marianne F. Kies, Note, *Policing the Police: Freedom of the Press, the Right to Privacy, and Civilian Recordings of Police Activity*, 80 Geo. Wash. L. Rev. 274, 276–77 (2011); Lisa A. Skehill, Note, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 Suffolk U. L. Rev. 981, 985 (2009).

[15] Increased photo, audio, and video journalism is part of a larger societal change, as digital image capture has become a pervasive aspect of modern life. *See generally* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 339–51 (2011); *see also* Int'l Ass'n of Chiefs of Police, The Impact of Video Evidence on Modern Policing: Research and Best Practices from the IACP Study on In-Car Cameras 30, *available at* http://www.cops.usdoj.gov/Publications/video_evidence.pdf ("[T]he proliferation of affordable video technology has resulted in a rapid increase in the use of surveillance systems in businesses, schools, government offices, even churches and private homes.").

[16] Kreimer, *supra* note 15, at 347.

[17] *Id.* at 350–51.

In recent years, the law enforcement community has also increased its use of digital technology to document interactions with the public, including widespread use of in-car cameras and, more recently, small cameras mounted on police officers themselves.[18] Police officials praise the various benefits of their own digital documentation of the public—including crime deterrence and the creation of evidence for use in criminal trials—and have encouraged its use nationwide.[19] At the same time, police officers often view photographs and recordings made by the public and press as something they need to stop.

B. Tactics Used to Prevent Documentation of On-Duty Police

Along with the rise of digital documentation of police by the public, the United States has seen a simultaneous increase in interference with such documentation by police.[20] One need only perform a cursory YouTube or Google search to find a wide variety of examples of police officers interfering with individuals who wish to document the activities—

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[18] *Id.* at 346–47. For example, due in part to grants and encouragement from the Department of Justice's Office of Community Oriented Policing Services (COPS), the use of in-car camera technology in police vehicles has proliferated in recent years. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 15, at 1. By 2007, COPS had provided over $21 million in grants to help state police and highway patrol agencies purchase in-car cameras. *Id.* Body-mounted cameras raise privacy concerns, due to officers recording footage inside people's homes and without their knowledge. *See* Op-Ed., *If Police Encounters Were Filmed*, N.Y. TIMES (Oct. 22, 2013), *available at* http://www.nytimes.com/roomfordebate/2013/10/22/should-police-wear-cameras; Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All*, ACLU (Oct. 9, 2013), *available at* https://www.aclu.org/technology-and-liberty/police-body-mounted-cameras-right-policies-place-win-all.

[19] COPS first encouraged recording by police to ensure officer safety as well as to provide police departments with information about racial profiling, in anticipation that such information would be useful in investigating public challenges regarding profiling. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 15, at 1, 11. In 2002, the International Association of Chiefs of Police (IACP) launched a nationwide study into the use and value of in-car cameras on modern policing and found the following benefits: "increased officer safety; documentation of traffic violations, citizen behavior, and other events; reduced court time and prosecutor burden; video evidence for use in internal investigations; reduced frivolous lawsuits; and increased likelihood of successful prosecution." *Id.*; s*ee also* Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771, 810–12 (2005) (suggesting that police and prosecutors rather than criminal suspects are the greatest beneficiaries of mandatory video recordings of interrogations).

[20] *See generally* N. Stewart Hanley, Note, *A Dangerous Trend: Arresting Citizens for Recording Law Enforcement*, 34 AM. J. TRIAL ADVOC. 645, 647–50 (2011). This Comment provides a mere sampling of relevant cases, as there are far too many to compile in one comment. Professor Kreimer provides many more examples. *See* Kreimer, *supra* note 15, at 361–66. The website *Photography Is Not a Crime* also provides ongoing documentation of incidents around the country. PHOTOGRAPHY IS NOT A CRIME, http://www.photographyisnotacrime.com.

and frequently the misconduct—of on-duty police officers.[21] Police interference is not a new phenomenon for members of the press. In recent years, however, members of the press have reported an increase in targeting and harassment for photographing and filming police.[22] As tensions rise between journalists trying to do their jobs and officers more and more adamant about stopping them, police interference with people who openly identify as members of the press sometimes involves violence.[23]

At times, police merely issue warnings, telling observers they cannot photograph or record the police.[24] Other times, warnings turn to threats and intimidation, as officers force people out of otherwise public spaces, threaten to destroy recording equipment, block the views of phones and cameras, seize equipment, and delete photographs and recordings.[25] Increasingly, threats lead to arrests and prosecution. Although charges are

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[21] A January 17, 2014, YouTube search for "arrested for recording police" yielded 115,000 results, while "arrested for photographing police" yielded 6,830 results. Although there are no actual statistics on the prevalence of police interference with citizens who photograph and record them, the ease of finding specific examples from all over the country indicates a widespread problem. *E.g.*, Jesse Harlan Alderman, *Police Privacy in the iPhone Era?: The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian's Right to Record Public Police Activity*, 9 FIRST AMEND. L. REV. 487, 495–508 (2011).

[22] *See, e.g.*, James Estrin, *Criminalizing Photography*, LENS, N.Y. TIMES BLOGS (Aug. 14, 2012, 5:00 AM), http://lens.blogs.nytimes.com/2012/08/14/criminalizing-photography ("When you're identified as being a member of the press, you are often restricted from doing your job. What we're seeing is photographers being charged with disorderly conduct, trespass and obstruction of governmental administration for doing their job. I call it the catch and release program. Almost always the D.A. will drop the charges immediately. But in the meantime, the police have managed to stop the person from photographing."); *see also* REPS. COMM. FOR FREEDOM OF THE PRESS, POLICE, PROTESTERS & THE PRESS 2 (2012), *available at* http://www.rcfp.org/rcfp/orders/docs/PPTP.pdf ("If a reporter is lucky enough to avoid arrest, press passes, which once afforded journalist more access than the general public to incident scenes, are sometimes used to identify the folks who are corralled in press pens out of shot of the stories developing on the streets.").

[23] For an example of this type of violence, see *Times Photographer Is Arrested on Assignment*, N.Y. TIMES, Aug. 6, 2012, at A18. *New York Times* press photographer Robert Stolarik was taking photographs of the arrest of a teenage girl at about 10:30 p.m., when a police officer instructed him to stop. When Stolarik identified himself as a journalist for the *Times* and continued taking pictures, an officer grabbed Stolarik's camera and "slammed" it into his face, dragged him to the ground, and kicked him in the back. *Id.*

[24] Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction at 5–6, Bologna v. City of Escondido, No. 12-cv-1243-JAH-WVG (S.D. Cal. June 19, 2012) (plaintiffs arguing that the Escondido Police had violated their First Amendment rights by ordering them to cease recording officers at a traffic checkpoint).

[25] For example, when Christian Ramirez, who works for nonprofit social justice group Alliance San Diego, took photos of male U.S. Customs and Border Protection (CPB) agents whom he observed searching only women, his phone was confiscated and the photos deleted. Press Release, ACLU, Border Agents Harass Americans Taking Pictures, Threaten to Smash Cameras (Oct. 25, 2012), http://www.aclu.org/free-speech/border-agents-harass-americans-taking-pictures-threaten-smash-cameras. In another incident, CPB agents threatened to smash Ray Askins's camera if he did not delete photos he took at the border; the agents confiscated his camera and deleted all but one photo. *Id.*

often later dropped or prove unsuccessful, arrest and prosecution often results in financial costs, psychological trauma, and harm to dignity.[26] In some cases, arrests involve excessive force, physical harm, and permanent injury.[27] Most importantly, these actions chill, deter, and infringe the rights of the public and press to engage in protected First Amendment activities, and often violate Fourth and Fourteenth Amendment rights as well.[28]

Charges forming the basis of arrests and prosecutions for photography and recording of on-duty police officers vary widely, including "illegal photography,"[29] obstructing an investigation,[30] disturbing the peace,[31] aiding the escape of a prisoner,[32] disorderly conduct,[33] interfering with the police,[34] traffic code violations,[35] and suspicion of terrorism.[36] In recent years, scores of individuals have also been arrested under wiretapping statutes for recording police officers without consent, facing felony charges and sentences of up to 15 years in prison per violation.[37] While

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[26] For example, while using a camera to conduct research for a report about excessive pollution caused by the inspection system at the border, Ray Askins was threatened and then subjected to an invasive and embarrassing search by aggressive officers. *Id.*; *see also* Kies, *supra* note 14, at 284–85.

[27] Consider the injuries sustained by Mannie Garcia, discussed in Part II.E.

[28] *See* discussion *infra* Part I.D–E.

[29] Francisco Olvera was arrested in Sealy, Texas, after taking a photograph of a police officer who entered his home without consent or a warrant, and was then told he was being arrested for "illegal photography." Cameron Langford, *Illegal Photography, Hey?*, COURTHOUSE NEWS SERV. (June 21, 2010), http://www.courthousenews.com/2010/06/21/28235.htm.

[30] Kreimer, *supra* note 15, at 361.

[31] Glik v. Cunniffe, 655 F.3d 78, 80 (1st Cir. 2011).

[32] *Id.*

[33] Iacobucci v. Boulter, 193 F.3d 14, 18 (1st Cir. 1999); Christine Negroni, *Priest's Video Contradicts Police Report on Arrest*, N.Y. TIMES, Mar. 13, 2009, at A23 (priest in East Haven, Connecticut arrested for filming police search of immigrant-owned grocery store; police claimed they felt unsafe because of the unidentified object in his hands, even though the video showed they arrested him after recognizing the camera).

[34] Negroni, *supra* note 33.

[35] City of Escondido police cited California Vehicle Code § 22520.5, which prohibits vending merchandise within 500 feet of freeway ramps, as a reason for halting citizen protests and recordings of controversial vehicle checkpoints, despite the lack of any commercial speech or activity by those recording the police stops. Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction at 2, Bologna v. City of Escondido, No. 12-cv-1243-JAH-WVG (S.D. Cal. June 19, 2012).

[36] Individuals have been arrested for suspicion of terrorism because of government warnings that photography of public locations may indicate danger of a terrorist attack. Kreimer, *supra* note 15, at 364–65.

[37] *See* Justin Welply, Comment, *When, Where and Why the First Amendment Protects the Right to Record Police Communications: A Substantial Interference Guideline for Determining the Scope of the Right to Record and for Revamping Restrictive State Wiretapping Laws*, 57 ST. LOUIS U. L.J. 1085, 1085 (2013). Every state except for Vermont has a wiretapping statute. Kies, *supra* note 14, at 280. While recording on-duty police in public spaces generally does not violate most states' wiretapping laws, Maryland, Massachusetts, and Illinois are different, as explained in the following footnotes. For an extensive

most of the arrests and prosecutions under wiretapping statutes have occurred in Illinois,[38] Maryland,[39] and Massachusetts,[40] there are examples from other states as well.[41]

Police often seize cameras and recording devices[42] and then delete photographs and recordings from seized devices.[43] In circumstances where police are unable to prevent documentation from occurring, they sometimes seek suppression of the dissemination of resulting recordings and photographs.[44]

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discussion of wiretapping laws and a Table of State Authorities describing their characteristics, see Alderman, *supra* note 21, at 533–45.

[38] Illinois's wiretapping statute is the most restrictive in the country, requiring prior consent for all secret and open recordings. Kies, *supra* note 14, at 287. In *Alvarez,* discussed *infra* Part I.D.2, the Seventh Circuit invalidated the Illinois law as applied to individuals who record police carrying out their duties in public.

[39] Maryland's wiretapping statute requires prior consent of all parties to a communication, so long as the parties have a reasonable expectation of privacy. Kies, *supra* note 14, at 282–85. In Maryland in 2010, Anthony Graber, a Staff Sergeant for the Maryland Air National Guard, recorded a traffic stop with a camera mounted on top of his motorcycle helmet. After he uploaded the video to YouTube, his home was searched, and he was jailed for 26 hours, arraigned before a grand jury, and faced 16 years in prison for the alleged offense. *Id.* at 283–84; *see also* State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *4 (Md. Cir. Ct. Sept. 27, 2010). The charges were subsequently dismissed on the grounds that the conversation was not private. *Id.* at *7, *35–*36. Yvonne Shaw was charged with violation of Maryland's wiretapping law (though the charges were later dropped) for recording a police officer who was being aggressive toward her friend. Kies, *supra* note 14, at 284.

[40] Massachusetts distinguishes public and secret recordings, requiring consent for secret recordings even when there is no expectation of privacy. Commonwealth v. Hyde, 750 N.E.2d 963, 966–67 (Mass. 2001). In *Glik*, discussed *infra* Part I.D.3, the First Circuit held that an arrest under Massachusetts's wiretapping statute for openly recording the police violated both the First Amendment right to gather information and the Fourth Amendment guarantee against false arrests.

[41] In Washington State, James Flora surreptitiously recorded two officers who had allegedly called him a "nigger" in a previous encounter. During his arrest, the officers discovered the recorder and charged Flora for violation of Washington's wiretapping law. State v. Flora, 845 P.2d 1355, 1355–56 (Wash. Ct. App. 1992). The Washington Court of Appeals overturned the criminal conviction and held the police officer had no expectation of privacy because the conversation was in public and easy to overhear. *Id.* at 1358; *see also* Hornberger v. Am. Broad. Cos., 799 A.2d 566, 571 (N.J. Super. Ct. App. Div. 2002) (affirming dismissal of civil defamation and wiretapping claims brought by police officers who were secretly recorded during a traffic stop as part of a news segment). In addition, Skehill, *supra* note 14, at 986 n.40, notes examples from other states.

[42] Glik v. Cunniffe, 655 F.3d 78, 80 (1st Cir. 2011) (Glik's cell phone and computer flash drive were confiscated).

[43] Justin Fenton, *DOJ Urges Judges to Side with Plaintiff in Baltimore Police Taping Case*, BALT. SUN, Jan. 11, 2012, *available at* http://articles.baltimoresun.com/2012-01-11/news/bs-md-ci-aclu-doj-videotaping-20120111_1_police-officers-police-department-baltimore-police.

[44] Massachusetts police sought suppression of a recording of police captured on a "nanny cam" during a warrantless search of Paul Pechonis's home, which had been posted on the Internet along with criticism of the local district attorney by Mary Jean. Jean v. Mass. State Police, 492 F.3d 24, 25–26 (1st Cir. 2007).

C. Relevant Issues and Policy Considerations

Several issues and policy considerations are at the forefront of discussions about the right to record and photograph on-duty police: public and officer safety, the value of photos and recordings as evidence, concerns over the potential for inaccurate portrayals of police, fundamental fairness and balance of power, and privacy concerns. This section explores these issues to provide a backdrop for the rest of the discussion.

1. Public and Officer Safety

Safety is a primary concern of both proponents and critics of public documentation of on-duty police. A variety of sources and studies indicate that photography and recording of interactions between the public and police help keep everyone involved safe.[45] The presence of recording devices tends to deter criminal activity, consequently reducing the likelihood of violence associated with crime and potentially dangerous interactions between police and individuals committing crimes.[46] Police are often able to deescalate violent situations by informing aggressive individuals that they are on camera.[47] Officers who know they are being captured on film are more likely to treat the public with courtesy and professionalism, reducing incidences of excessive use of force.[48] Further, because police and citizen behavior are interdependent, reduced aggressiveness by officers is likely to result in less aggressive behavior by citizens, and vice versa.[49]

Some critics of the right to record on-duty police have expressed concern that police may be distracted by the knowledge that they are being recorded,[50] or that they may hesitate in dangerous circumstances due

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[45] INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 15, at 11, 13, 22; TONY FARRAR, POLICE FOUND., SELF-AWARENESS TO BEING WATCHED AND SOCIALLY-DESIRABLE BEHAVIOR: A FIELD EXPERIMENT ON THE EFFECT OF BODY-WORN CAMERAS ON POLICE USE-OF-FORCE 2, 8 (2013), *available at* http://www.policefoundation.org/content/body-worn-camera; *Police, Camera, Action . . . Head Cameras*, CITY OF PLYMOUTH (Aug. 2007), http://www.plymouth.gov.uk/storyboard_head_cameras.pdf.

[46] Hanley, *supra* note 20, at 657–58.

[47] *Id.*; INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 15, at 13–14. Forty-eight percent of the officers surveyed by IACP reported that citizens become less aggressive after being informed that they are being recorded. *Id.* at 14.

[48] Police studies show that officers are likely to act more professionally and courteously when being recorded. IACP found that use of in-car cameras was a proactive method of preventing officer misconduct. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 15, at 16, 22–23. IACP also voiced the opinion that proactive methods are preferable to reactive methods such as investigations and reviewing complaints. *Id.* at 22.

[49] INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 15, at 23.

[50] ACLU of Ill. v. Alvarez, 679 F.3d 583, 611 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012) (Posner, J., dissenting) ("An officer may freeze if he sees a journalist recording a conversation between the officer and a crime suspect, crime victim, or dissatisfied member of the public.").

to worries about potential future scrutiny based on recordings.[51] However, there is little actual evidence that observations or recordings of police cause hesitation in any circumstances. In fact, as officers grow more accustomed to being documented by increasingly prevalent recording, any initial distraction they experience subsides.[52]

The International Association of Chiefs of Police has hailed the use of video recordings for training and supervision as a valuable tool for improving police performance and increasing public and officer safety.[53] Training and supervision of officers improves their performance, helping them to ensure their own safety and the safety of the citizens with whom they interact. For example, videos of police interactions are frequently used by police for training and self-critique.[54] Recordings and photographs also provide valuable opportunities for police supervisors, who are often unable to interact with or observe individual officers on the street for long periods, to observe and discipline misconduct.[55]

This analysis of safety considerations assumes, of course, that individuals taking photographs or video do not physically interfere with the police. Certainly, individuals could endanger both the police and the public by harming an officer with camera or recording equipment. Similarly, standing in an officer's way or placing equipment between an officer and the subject of police activity would easily qualify as obstruction of justice.[56] However, if citizen observers peacefully stand at a safe distance from police activity, without physically interfering with police, the mere act of documenting police does not harm or prevent them from doing their jobs.

Some critics have raised the concern that images of police, particularly those that capture incidents of excessive use of force, could provoke viewers to anger and violence.[57] Considering the public outrage and mas-

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[51] Caycee Hampton, Comment, *Confirmation of a Catch-22:* Glik v. Cunniffe *and the Paradox of Citizen Recording*, 63 FLA. L. REV. 1549, 1557 (2011); Hanley, *supra* note 20, at 654–55. It is not uncommon for individuals to feel uncomfortable or vulnerable when being recorded. Kreimer, *supra* note 15, at 351.

[52] Research by IACP has shown that "[t]he use of in-car cameras does not hinder the officer from performing his or her duties." INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 15, at 16.

[53] *Id.* at 13, 18.

[54] Hanley, *supra* note 20, at 655. Officers who use in-car cameras overwhelmingly report use of such videos for self-critique, particularly as a tool for learning how to better ensure their own safety in encounters with citizens. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 15, at 13.

[55] INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 15, at 22.

[56] Colten v. Kentucky, 407 U.S. 104, 107–09 (1972) (finding that student bystanders did not have a First Amendment right to gather around an officer as he made an arrest along the side of a public road); *see also* ACLU of Ill. v. Alvarez, 679 F.3d 583, 607 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012) (recognizing that the First Amendment does not "immunize[] behavior that obstructs or interferes with effective law enforcement or the protection of public safety.").

[57] Kies, *supra* note 14, at 304.

sive riots sparked by widespread viewing of video of the infamous Rodney King beating, fear of this type of public reaction to videos of police violence is not entirely unfounded.

However, the creation of such images is likely the solution to, rather than the cause of, systemic police brutality and resulting violent reactions by the public.[58] As discussed above, incidents like the Rodney King beating are less likely to occur as photography and recordings of the police increase. In addition, widespread viewing of photos and video often provide the foundation of effective public challenges to systemic violence and police misconduct. For example, the Rodney King video brought major police violence problems to light and led to congressional enactment of 42 U.S.C. § 14141, which gives the "U.S. Attorney General the right to seek declaratory or injunctive relief against law enforcement agencies engaged in a pattern or practice of violating the Constitution or federal law."[59]

2. The Utility of Photo and Video Evidence in Judicial Proceedings

Photo and video evidence of police encounters is widely used in the judicial process. For example, photographs and videos of police interactions are regularly used in criminal trials.[60] In addition, evidence from citizen documentation of police encounters often proves useful in the vindication of civil rights through Section 1983 lawsuits.[61] The police also often benefit from documentation of their encounters with the public, as video footage is frequently used to exonerate wrongly-accused officers charged with misconduct.[62]

The use of photo and video evidence is pervasive in the judicial system because it is particularly useful in the courtroom. Cameras and recording equipment capture a portrait of events that witnesses may otherwise not notice, and they do so in an easily preserved format. Such evidence generally provides more accurate information than witness testimony, is not sus-

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[58] Hanley, *supra* note 20, at 657; Skehill, *supra* note 14, at 999–1000.

[59] Letter from Jonathan M. Smith to Mark H. Grimes & Mary E. Borja, *supra* note 13, at 4. Similarly, documentation by citizens at the 2004 Republican National Convention revealed systematic infiltration of political demonstrations by police. Kreimer, *supra* note 15, at 350–51. (discussing how "police abuse captured by the cameras of bystanding videographers, followed by public broadcast of the footage, has become a regular feature of our public life and the underpinning of effective demands for redress.").

[60] Alderman, *supra* note 21, at 526.

[61] *Id.* at 528–30. Although not an example of a successful civil rights suit, the Supreme Court held video evidence to be highly probative and valuable evidence when dismissing civil rights claim in *Scott v. Harris*, 550 U.S. 372, 380–81 (2007).

[62] *Talk of the Nation: The Rules and Your Rights for Recording Arrests*, NPR (July 8, 2010), *available at* http://www.npr.org/templates/story/story.php?storyId=128387108 (James Machado, the executive director of the Massachusetts Police Association, stating in a 2010 interview that "in my experience, in my own police department, and of course here in Massachusetts, videotape has more often than not exonerated the police rather than implicated them").

ceptible to the failings of memory, and relieves the jury of the difficult task of assessing the credibility of officers and private citizens.[63]

Video and photographic evidence is also valuable because it saves judicial resources. By clearly portraying events at issue in a lawsuit, photographs and recordings often promote quick settlements and reduce the length of trials. Video and photographic evidence also reduces the number of frivolous lawsuits by conclusively showing that claims are unfounded.[64]

Similarly, video and photographic evidence saves law enforcement resources. Due to the significant time-savings in investigations of citizen complaints and because video is likely to provide "conclusive evidence of guilt or innocence," digital documentation by police has proliferated.[65]

Although police recordings have dramatically increased, citizen and press photography and recording can prove valuable for filling gaps in evidence created by police.[66] Unfortunately, police recordings, for whatever reason, are frequently prone to technical difficulties.[67] Prosecutors also report that limitations in the field of vision and poor quality of police recordings often limit the usefulness of this valuable source of evidence in criminal trials.[68]

3. Concerns over Inaccurate Portrayals

Some members of law enforcement have voiced particular concern regarding the potential for recordings and photography to inaccurately portray the police.[69] Photography and recordings are dangerous, they say, because they may be digitally manipulated by altering images or cutting out sections of a recording.[70] It is problematic, however, to address this

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[63] Skehill, *supra* note 14, at 1008.

[64] *Id.*

[65] INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 15, at 16. Best police practices call for widespread recording of police encounters. Alderman, *supra* note 21, at 530–31.

[66] Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers' Power*, 117 YALE L.J. 1549, 1553–55 (2008).

[67] Hanley, *supra* note 20, at 660–62; Radley Balko, *When Police Videos Go Missing*, REASON (Aug. 12, 2010), http://reason.com/blog/2010/08/12/when-police-videos-go-missing. After conducting a nationwide study, IACP concluded that police often fell short on ensuring that "back end" components of recording (such as storing and filing recordings) were in place. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 15, at 2. IACP's Technology Technical Assistance Program (TTAP) has published information for police departments to help remedy the shortcomings. *See* INT'L ASS'N OF CHIEFS OF POLICE, *In-Car Cameras*, *in* TECHNOLOGY DESK REFERENCE: A PLANNING AND MANAGEMENT GUIDE 47, 67–68, *available at* http://www.theiacp.org/portals/0/pdfs/InCarCamera.pdf.

[68] INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 15, at 21.

[69] *Talk of the Nation: The Rules and Your Rights for Recording Arrests*, *supra* note 62 ("We have no problem with the videotaping if it is videotaped in its entirety. What we have problems with are snippets taken after an event has happened and, you know, only show a portion of the actual event.").

[70] Abdon M. Pallasch & Adeshina Emmanuel, *McCarthy: It's Good to Record Officers*, CHI. SUN-TIMES, Jan. 30, 2012, *available at* http://www.suntimes.com/news/politics/10289970-418/mccarthy-its-goodto-record-officers.html ("The Fraternal Order of Police,

concern by allowing police to selectively limit the use of digital documentation or to silence related speech out of fear of misleading or defamatory portrayals. Allowing officers the discretion to interfere with speech based on their perception of its content transforms officers into content-based gatekeepers of First Amendment rights. If an altered photograph, abbreviated recording, or associated statements falsely portray the police, defamation laws are an appropriate and available remedy. Additionally, an overall increase in the use of digital technology to document interactions with the police is likely to increase the availability of accurate representations, which may then be used to counter partial or misleading portrayals.

4. Fundamental Fairness and Balance of Power

Ensuring the right to record will engender the public with feelings of fairness, balance, and confidence in our justice system,[71] as opposed to the frustration and disempowerment that often follows from interference with the right to record.[72] When the public is continuously recorded by police, often without consent or notification,[73] and the public and press's own documentation is suppressed, negative views of the police, our justice system, and our democracy proliferate.[74] Because confidence in the police, along with the appearance and actual fairness in our legal system, is necessary to proper functioning of a democracy, this issue should be a cause for concern.[75]

5. Privacy Concerns

Privacy concerns are often at the forefront of discussions of the right to photograph and record on-duty police. Some commentators express concerns about the privacy rights of individuals interacting with police.[76] Police who interfere with observers often urge that they are protecting the privacy rights of third parties by interfering with citizen photography and

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which represents Chicago officers, has opposed changing the [Illinois wiretapping statute] out of fear citizens will selectively edit footage of officers to make them look bad.").

[71] Letter from Jonathan M. Smith to Mark H. Grimes & Mary E. Borja, *supra* note 13, at 1.

[72] Kies, *supra* note 14, at 301–02.

[73] Police can record in a variety of contexts without consent and without notifying citizens. *Id.* at 303. Citizens generally support open recording by police. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 15, at 20.

[74] *See* John W. Whitehead, *Lights, Camera, Arrested: Americans Are Being Thrown in Jail for Filming Police*, HUFFPOST BLOG (May 10, 2014, 5:59 AM), http://www.huffingtonpost.com/john-w-whitehead/filming-police_b_4935164.html?view=print&comm_ref=false.

[75] *See* Marc Krupanski, *Policing the Police: Civilian Video Monitoring of Police Activity*, GLOBAL (Mar. 7, 2012), http://theglobaljournal.net/article/view/643/.

[76] In *Alvarez*, discussed *infra* Part II.D.2, dissenting Judge Posner expressed concern over privacy rights of individuals talking with the police and the potential chilling of willingness to speak to police. ACLU of Ill. v. Alvarez, 679 F.3d 583, 609, 611 (7th Cir. 2012) (Posner, J., dissenting) (asserting that the invalidation of Illinois's wiretapping law "casts a shadow over electronic privacy statutes of other states as well"), *cert. denied*, 133 S. Ct. 651 (2012).

recordings.[77] Similarly, some members of the law enforcement community think police officers should be able to keep their on-duty conversations private, which raises the question of whether officers performing their duties in public spaces have a right to privacy.[78] In fact, officer privacy is one of the primary justifications for prosecutions under wiretapping statutes, despite the reality that wiretapping statutes were initially enacted to protect the public from government intrusion and not the converse.[79]

D. Constitutional Contours of the Right to Document On-Duty Police

Although the Supreme Court has not precisely addressed the legal question of whether there is a constitutionally protected right to photograph and record police officers carrying out their duties in public, lower courts directly addressing this issue have overwhelmingly held that the First and Fourteenth Amendments guarantee such a right. The two leading circuit court cases addressing the issue are *ACLU of Illinois v. Alvarez*[80] and *Glik v. Cunniffe*.[81] This section explores the relevant Supreme Court jurisprudence, the *Alvarez* and *Glik* cases, and the themes that emerge from the case law.

1. Relevant Supreme Court Jurisprudence

Although no Supreme Court case addresses the precise legal question of whether there exists a constitutionally protected right to photograph and record police officers carrying out their duties in public, a vast array of the Court's First Amendment jurisprudence is relevant to this discussion.[82] This section provides a sampling of some of the most applicable Supreme Court statements on the topic at hand.

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[77] Fordyce v. City of Seattle, 55 F.3d 436, 438 (9th Cir. 1995) (Plaintiff was arrested while videotaping a political demonstration by police officers after plaintiff allegedly recorded bystanders "against their wishes.").

[78] Kies, *supra* note 14, at 284.

[79] Privacy rights of citizens to be free from unreasonable governmental intrusions flow from the Fourth Amendment. Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965) (explaining that the right to be free from unreasonable governmental intrusions stems from the penumbra of privacy rights emanating from the Fourth and Fifth Amendments). The leading test on privacy rights is found in *Katz v. United States*, 389 U.S. 347, 361 (1967). The federal wiretapping law, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 801, 82 Stat. 197, 211 (codified at 18 U.S.C. §§ 2510–2511 (2006)), was passed one year after *Katz* and used Justice Harlan's two-pronged privacy test for search and seizure as the template for the privacy right against wiretapping in the law. Alderman, *supra* note 21, at 493; *see also* State v. Flora, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992) ("We decline the State's invitation to transform the privacy act into a sword available for use against individuals by public officers acting in their official capacity.").

[80] 679 F.3d 583 (7th Cir. 2012).

[81] 655 F.3d 78 (1st Cir. 2011).

[82] For a more extensive exploration of the constitutional issues at play herein, *see generally* Kreimer, *supra* note 15, at 366–410.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[83] Protection under the First Amendment expands beyond speech alone, establishing a right to both gather and receive information.[84] In connection with the right to gather information, the Supreme Court has stated that "[t]here is an undoubted right to gather news 'from any source by means within the law.'"[85] Further, the Court has stated that "without some protection for seeking out the news, freedom of the press could be eviscerated."[86]

Relating to the right to receive information, the Court has said that "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[87] Because photography and recording are methods of gathering information, and the resulting documentation contributes to the stock of information received by the public, the Court has indicated that both activities fall squarely within the protection of the First Amendment.[88]

A related but distinct issue is whether the protections of the First Amendment apply differently to photography, audio recording, and video recording. An odd result of the use of wiretapping statutes to arrest and prosecute people who record police is that in certain jurisdictions purely visual documentation is treated differently than documentation that includes audio.[89] The Supreme Court, on the other hand, has "voiced particular concern with laws that foreclose an entire medium of expression,"[90] and has indicated that different methods of gathering information should be equally protected.[91]

Given the rise of citizen journalists and bloggers, questions arise as to whether or not citizen journalists are members of the "press" and whether this should have some bearing on the right to photograph and record

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[83] U.S. CONST. amend. I.

[84] Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas."); *see also Glik*, 655 F.3d at 82.

[85] Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (plurality opinion) (quoting Branzburg v. Hayes, 408 U.S. 665, 681–82 (1972)); *see also Glik*, 655 F.3d at 82.

[86] *Branzburg*, 408 U.S. at 681. The Court's use of the qualifier "some" likely indicates the right is not without limitation.

[87] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978); *see also Glik*, 655 F.3d at 82.

[88] Burstyn v. Wilson, 343 U.S. 495, 502 (1952); *see also* ACLU of Ill. v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012) ("Audio and audiovisual recording are media of expression commonly used for the preservation and dissemination of information and ideas and thus are 'included within the free speech and free press guaranty of the First and Fourteenth Amendments."), *cert. denied*, 133 S. Ct. 651 (2012).

[89] J. Peter Bodri, Comment, *Tapping into Police Conduct: The Improper Use of Wiretapping Laws to Prosecute Citizens Who Record On-Duty Police*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1327, 1334–35 (2011).

[90] City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994).

[91] *Branzburg*, 408 U.S. at 681–82.

on-duty police.[92] Although the Court has not explicitly defined citizen journalists as members of the press, it has held that the rights of private individuals are coextensive with rights of reporters and press[93] and that the press is not entitled to special First Amendment privileges not also extended to ordinary citizens.[94] The Court has also held that the government may not engage in "discrimination among different users of the same medium for expression."[95]

Because the photographs and recordings at issue in this discussion often relate to police behavior and interactions, subjects of particular interest to the public, the Court's view of matters of public concern is also relevant. The Court has repeatedly indicated that the discussion of governmental affairs[96] and the "free flow of information to the people concerning public officials, their servants," is "the paramount public interest."[97] In addition, because the First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[98] the Court has imposed

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[92] This is particularly relevant as technology has progressed and "news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper." *Glik*, 655 F.3d at 84.

[93] Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978) (plurality opinion); *Branzburg*, 408 U.S. at 684. Note that the First Circuit has held that citizen journalists are members of the "press." *Glik*, 655 F.3d at 83. The Second Circuit, on the other hand, has applied a functional test that asks if citizens intend to distribute the information they have gathered. von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987). The Third Circuit has upheld this test as well. Titan Sports, Inc. v. Turner Broad. Sys. (*In re* Madden), 151 F.3d 125, 128–30 (3d Cir. 1998). The shared view of the Second and Third Circuits is explored in Papandrea, *supra* note 14, at 551, 561, 569–72. The First, Ninth, and Eleventh Circuits have applied a different test that looks to the value to the public of the information gathered. *See* Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000); Iacobucci v. Boulter, 193 F.3d 14, 24–25 (1st Cir. 1999); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995).

[94] *Branzburg*, 408 U.S. at 684 ("[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."). The Ninth Circuit recently held that Internet bloggers are entitled to the same First Amendment protections as the institutional press. Obsidian Fin. Grp., LLC v. Cox, 740 F.3d 1284 (9th Cir. 2014).

[95] Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

[96] *Glik*, 655 F.3d at 82 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)) ("Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'").

[97] Garrison v. Louisiana, 379 U.S. 64, 77 (1964). "The First and Fourteenth Amendments embody our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 75 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). Public officials cannot restrain publications discussing them. Near v. Minnesota *ex rel.* Olson, Cnty. Attorney, 283 U.S. 697, 718–19 (1931).

[98] *Sullivan*, 376 U.S. at 270.

serious limitations on subsequent punishment for reporting on matters of public concern.[99]

First Amendment protection is heightened further when reporting relates to government misconduct.[100] Speech related to misconduct is particularly guarded from infringement because of its special ability to deter and prevent the abuse of power.[101] Further, the Court has emphasized the importance of First Amendment protection as a check on abuses by law enforcement.[102] Free discussion regarding law enforcement is particularly important because police are "granted substantial discretion that may be misused to deprive individuals of their liberties."[103] The right to oppose and challenge police has been hailed by the Court as a characteristic of a free society, as distinguished from a police state.[104] For this reason, the Court has held that officers cannot punish citizens for "nonprovocatively" voicing their disapproval or criticism of the police,[105] and that officers must exhibit restraint in the face of challenging speech.[106]

The Court's view of political speech is also relevant to this discussion, as the recordings and photography at issue are often taken at political demonstrations, capture interactions between police and protesters, and are motivated by desire for political change as it relates to police misconduct.[107] Political speech is guaranteed the highest level of protection under the First Amendment.[108] When faced with a close call, the Supreme Court has directed courts "to err on the side of protecting political speech rather than suppressing it."[109]

Due to concerns that photographs and recordings of police could provoke a violent reaction by the public, the Court's rulings on this type of danger are also relevant. Although incitement to violence falls outside the ambit of the First Amendment, in order to qualify as incitement,

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[99] *Id.* at 279–80, 291–92; *Near*, 283 U.S. 697.

[100] *Cf.* Gentile v. State Bar of Nev., 501 U.S. 1030, 1034–35 (1991); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 797 n.11 (1978) (quoting THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 9 (1966)) ("[T]he state has a special incentive to repress opposition and often wields a more effective power of suppression.").

[101] The First Amendment "was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials . . . responsible to all the people whom they were selected to serve." *Mills*, 384 U.S. at 218–19. Freedom of speech related to government uncovers abuse and may improve operation and functioning of government. Press-Enterprise Co. v. Super. Ct. of Cal., Cnty. of Riverside, 478 U.S. 1, 12–13 (1986); s*ee also Glik*, 655 F.3d at 82–83.

[102] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 560 (1976) (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)) ("[E]xtensive public scrutiny and criticism" of police serves to "guard[] against the miscarriage of justice.").

[103] *Glik*, 655 F.3d at 82; *cf. Gentile*, 501 U.S. at 1035–36.

[104] City of Houston v. Hill, 482 U.S. 451, 462–63 (1987); *see also Glik*, 655 F.3d at 84.

[105] Norwell v. City of Cincinnati, 414 U.S. 14, 16 (1973).

[106] *Hill*, 482 U.S. at 462; *Glik*, 655 F.3d at 84.

[107] *See* Fordyce v. City of Seattle, 55 F.3d 436, 438 (9th Cir. 1995).

[108] Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 186–87 (1999).

[109] Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 457 (2007).

speech must be directed to and incite or produce an imminent lawless action and be likely to produce such action.[110] In contrast, when expressive activities are not directed toward inciting violence, expressive activities may not be restricted based on mere speculation or fear of a possible violent reaction by members of the public.[111]

The Court has also spoken extensively on privacy rights at issue with the right to record on-duty police. Most significantly, individuals do not have a constitutional right to privacy relating to the things they say and do in public spaces.[112] Individuals must have both a subjective expectation of privacy and an objective "reasonable expectation of privacy," which is not present for those things that "a person knowingly exposes to the public."[113]

Although this discussion of Supreme Court jurisprudence strongly suggests that a right to record on-duty police is protected by the First Amendment, the Supreme Court has repeatedly emphasized that the First Amendment right to gather information is not absolute.[114] As most of the recordings and photographs implicated by this discussion are taken in public spaces, the Court's treatment of restrictions on First Amendment rights exercised in traditional public fora is particularly relevant. Traditional public fora, which include traditional public spaces such as city parks and public sidewalks, are the most protected venue for speech and expression under the First Amendment.[115] Within traditional public fora, the government may impose only "reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'"[116] Further, First Amendment regulations within traditional public fora must be imposed "only with narrow specificity."[117] As a clue to the type of time, place, and manner restrictions that may withstand constitutional scrutiny, the Supreme Court has stated that the First Amendment does not protect expressive activities that actually obstruct a police officer's investigation.[118]

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[110] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[111] Speech may not be restricted on the grounds that "critics might react with disorder or violence." Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966).

[112] Katz v. United States, 389 U.S. 347, 351 (1967).

[113] *Id.*; *see also id.* at 360 (Harlan, J., concurring) (introducing the term "reasonable expectation of privacy").

[114] *See* Pell v. Procunier, 417 U.S. 817, 834–35 (1974); Branzburg v. Hayes, 408 U.S. 665, 684–85 (1972); Zemel v. Rusk, 381 U.S. 1, 17 (1965). But, restrictions on publication of "lawfully obtain[ed] truthful information" cannot be punished unless there is a state interest of the "highest order." Bartnicki v. Vopper, 532 U.S. 514, 527–28 (2001).

[115] Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939). Public sidewalks have been described by the Court as "the archetype of a traditional public forum." Snyder v. Phelps, 131 S. Ct. 1207, 1218 (2011).

[116] United States v. Grace, 461 U.S. 171, 177 (1983) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

[117] NAACP v. Button, 371 U.S. 415, 433 (1963).

[118] *See* Colten v. Kentucky, 407 U.S. 104 (1972) (individual's speech not protected by the First Amendment where individual persistently tried to engage an officer in

2. The Seventh Circuit: ACLU of Illinois v. Alvarez

The leading case affirming the right to record on-duty police, *ACLU of Illinois v. Alvarez*, was decided by the Seventh Circuit in 2012.[119] The ACLU of Illinois brought an action to stop the prosecution of individuals and organizations under Illinois's wiretapping statute for their use of recording devices in documenting police misconduct.[120] In order to challenge the Illinois wiretapping law, the ACLU sued on its own behalf based on its intention to institute a "police accountability program."[121] The program included a plan to "openly" record police officers performing public duties in public places and to post the recordings online.[122]

The ACLU's case was filed in order to challenge a pattern of interference under Illinois's wiretapping statute.[123] Michael Allison, whose story appears at the beginning of this Comment, was not the only person to face the harsh penalties of Illinois's wiretapping statute for recording police. When Christopher Drew was arrested—by officers "conducting a Homeland Security check"—for selling $1 patches without a peddler's license and subsequently searched, officers discovered a digital voice recorder in his pocket.[124] The recorder was on and recording. In response, Drew was charged with a Class 1 felony.[125]

Tiawanda Moore similarly faced 15 years in prison for recording her encounter with the police.[126] Moore claims that after she was sexually harassed and fondled by a police officer, she went to the police headquarters to report the incident. Moore brought a Blackberry to the station and recorded her conversation with two investigators from its internal affairs division as they gave her "the run-around" and attempted to

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conversation while the officer was issuing a summons to a third party on a congested roadside and refused to depart the scene after at least eight requests from officers).

[119] ACLU of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012).

[120] *ACLU v. Alvarez*, ACLU OF ILL., http://www.aclu-il.org/aclu-v-alvarez22/. Although the Illinois wiretapping statute carried a lesser sentence for non-consensual recording of citizens (as opposed to recordings of police, which carried the maximum sentence of 15 years per count), police officer recordings of citizens made for "law enforcement purposes" were expressly exempt from the law, allowing officers to record with impunity. *Alvarez*, 679 F.3d at 586–88.

[121] *Alvarez*, 679 F.3d at 586.

[122] *Id.* at 586. The plan involved recording police speaking at a volume "audible to the unassisted human ear," as opposed to enhanced recordings of whispered conversations. *Id.* at 588.

[123] *ACLU v. Alvarez*, *supra* note 120.

[124] Order Granting Defendant's Motion to Dismiss at 2, People v. Drew, No. 10CR0046 (Ill. Cir. Ct., Cook Cnty. Mar. 2, 2012), *available at* http://www.rcfp.org/sites/default/files/docs/20120322_135203_drew_decision.pdf.

[125] *Id.* Fortunately for Drew, the judge in his case found the Illinois wiretapping statute unconstitutional on its face, and as applied to Drew, as a violation of due process for subjecting innocent conduct to criminal penalties. *Id.* at 12.

[126] Don Terry, *Eavesdropping Laws Mean that Turning on an Audio Recorder Could Send You to Prison*, N.Y. TIMES, Jan. 23, 2011 (Nat'l ed.), at A29B.

discourage her from filing a complaint. When the investigators realized Moore was recording, they arrested her and charged her with two counts of eavesdropping.[127] Allison, Drew, and Moore are among at least 14 people who were prosecuted under Illinois's wiretapping statute for audio recording on-duty police in the eight years leading up to the ACLU's lawsuit, each facing the threat of imprisonment for 15 years or more.[128]

Addressing the constitutionality of the wiretapping law, the Seventh Circuit agreed with the ACLU and instructed the district court to enter a preliminary injunction "blocking enforcement of the eavesdropping statute as applied to audio recording of the kind alleged [by the ACLU]."[129] Following its own long-standing precedent,[130] the Seventh Circuit held that the making of audio and audiovisual recordings is a "corollary of the right to disseminate the resulting recording" within the protection of the First Amendment.[131] As applied to the ACLU's planned recording program, the statute was held unconstitutional because it restricted "an integral step in the speech process" and "interfere[d] with the gathering and dissemination of information about public officials performing their duties in public."[132]

Addressing the statute more broadly, the court stated that "the statute very likely flunks" when applied to situations similar to those proposed by the ACLU.[133] Although the ACLU urged the court to impose strict scrutiny, the court stated that intermediate scrutiny would likely

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[127] *Id.* Moore was subsequently acquitted on both charges. Rummana Hussain, *Woman Who Recorded Cops Acquitted of Felony Eavesdropping*, CHICAGO SUN-TIMES, Aug. 25, 2011, at 9, *available at* http://www.suntimes.com/news/metro/7259815-418/woman-who-recorded-cops-acquitted-of-felony-eavesdropping.html.

[128] *Court Issues Order Barring Controversial Enforcement of Illinois' Eavesdropping Law*, ACLU OF ILL. (July 9, 2012), http://www.aclu-il.org/court-issues-order-barring-controversial-enforcement-of-illinois-eavesdropping-law/. Twelve such prosecutions were identified by the ACLU in *Alvarez*. *See* ACLU of Ill. v. Alvarez, 679 F.3d 583, 592 & n.2 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012).

[129] *Alvarez*, 679 F.3d at 586.

[130] In 1969, the Seventh Circuit recognized the First Amendment right to gather and report news and photographic news events. Schnell v. City of Chicago, 407 F.2d 1084, 1085–86 (7th Cir. 1969), *overruled on other grounds by* City of Kenosha v. Bruno, 412 U.S. 507 (1973) (reversing dismissal for failure to state a claim for suit asserting violation of constitutional right to gather and report news and photograph news events under First Amendment).

[131] *Alvarez*, 679 F.3d at 595–96. "'The process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that we could value Beethoven without the benefit of strings and woodwinds. In other words, we have never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection.' This observation holds true when the expressive medium is mechanical rather than manual." *Id.* at 596 (quoting Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061–62 (9th Cir. 2010)).

[132] *Id.* at 600.

[133] *Id.* at 586.

apply because the statute was content-neutral on its face.[134] Intermediate scrutiny varies depending on context, but generally a law must be content-neutral, serve an important public interest, and have a "reasonably close fit" between the means and ends of the law.[135] Although the court found the law to be content-neutral and the proposed public interest of privacy to be important, the court held that the statute's means were overbroad because the statute restricted recordings that implicated no privacy interests at all.[136]

The Supreme Court denied a petition for certiorari in November of 2012,[137] leaving intact the Seventh Circuit's as-applied invalidation of the Illinois wiretapping law. The ACLU then sought and obtained a permanent injunction enjoining prosecution of the ACLU and its employees and agents under the wiretapping statute for audio recording on-duty police officers.[138] In March of 2014, the Illinois Supreme Court struck down Illinois' wiretapping statute as unconstitutional and facially overbroad under the First Amendment, relying on the Seventh Circuit's decision in *Alvarez*.[139]

3. The First Circuit: Glik v. Cunniffe

Not long before the *Alvarez* decision, in 2011, the First Circuit addressed the right to record on-duty police in *Glik v. Cunniffe*.[140] Similar to the situation in Illinois, numerous people in Massachusetts had been arrested, charged, and/or convicted under Massachusetts's wiretapping statutes for recording police.[141] For example, Jeffrey Manzelli and Peter Lowney were convicted for surreptitiously recording police officers at a protest.[142] Jon Surmacz was charged for recording Boston police officers breaking up a house party.[143] Emily Peyton was arrested for video recording the arrest of an anti-war protester, although charges were not filed.[144]

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[134] *Id.* at 603–04.

[135] *Id.* at 605.

[136] *Id.* at 605–06.

[137] Alvarez v. ACLU of Ill., 133 S. Ct. 651 (2012).

[138] ACLU of Ill. v. Alvarez, No. 10 C 5235, 2012 WL 6680341, at *1 (N.D. Ill. Dec. 18, 2012).

[139] The statute was analyzed and struck down by the Illinois Supreme Court in two similar cases, both involving surreptitious recordings of officials performing their public duties. People v. Clark, 6 N.E.3d 154 (Ill. 2014) (recording of conversation between defendant, opposing counsel, and a judge in a child support proceeding with no court reporter present); People v. Melongo, 6 N.E.3d 120 (Ill. 2014) (recording and publication of conversation with a court reporter).

[140] 655 F.3d 78 (1st Cir. 2011).

[141] *See, e.g.*, Alderman, *supra* note 21, at 507; Daniel Rowinski, *Police Fight Cellphone Recordings*; *Witnesses Taking Audio of Officers Arrested, Charged with Illegal Surveillance*, BOSTON GLOBE, Jan. 12, 2010, at 9.

[142] Commonwealth v. Manzelli, 864 N.E.2d 566, 568 (Mass. App. Ct. 2007); Rowinski, *supra* note 141.

[143] Rowinski, *supra* note 141.

[144] *Id.*

Michael Hyde secretly recorded a heated exchange with an aggressive Abington, Massachusetts, police officer during a traffic stop and later submitted the tape recording with a complaint to the police department's internal affairs division. Rather than the officers being disciplined, Hyde was prosecuted and sentenced to six months' probation under Massachusetts's wiretapping statute.[145]

Simon Glik, a Boston immigration and criminal defense attorney, was walking through Boston Common when he witnessed the arrest of a young homeless man. Concerned that the officers appeared to be hurting the man and using excessive force, Glik "publicly and openly" recorded the incident from approximately ten feet away.[146] Despite his lack of interference with the arrest, the officers arrested Glik and charged him with violation of Massachusetts's wiretapping statute, disturbing the peace, and aiding in the escape of a prisoner.[147] One charge was subsequently dropped by the prosecutor, and the other two charges were dismissed as baseless by the municipal court.[148]

Glik then filed a civil rights lawsuit to assert his First and Fourteenth Amendment right to record, along with his Fourth Amendment right to be free from unreasonable search and seizure.[149] On appeal, the First Circuit, ruling on the issue of qualified immunity, held that Glik's recording was protected by the First Amendment because it "encompasses a range of conduct related to the gathering and dissemination of information," and "Glik was exercising clearly-established First Amendment rights in filming the officers in a public space."[150] Therefore, his arrest was a violation of his Fourth Amendment right to be free from unreasonable search and seizure.[151]

The First Circuit emphasized the "fundamental and virtually self-evident nature of the First Amendment's protections" in connection with the right to record on-duty police, answering these constitutional questions "unambiguously."[152] While the court declined to explore the time,

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[145] Commonwealth v. Hyde, 750 N.E.2d 963, 965 (Mass. 2001); *see also* Kies, *supra* note 14, at 286.

[146] Glik v. Cunniffe, 655 F.3d 78, 79–80, 87 (1st Cir. 2011).

[147] *Id.* at 80.

[148] Hampton, *supra* note 51, at 1549.

[149] *Id.* at 1549–50.

[150] *Glik*, 655 F.3d at 79, 82.

[151] *Id.* at 88.

[152] *Id.* at 82, 84–85 (pointing to the brevity of First Amendment discussion in three cases as evidence of the obvious nature of the right: Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000); Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999); Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995)). *Iacobucci* involved a journalist who was arrested for filming officials in a hallway outside a public meeting. 193 F.3d at 17, 18. Although no First Amendment claim was asserted in the case, the First Circuit noted that filming was within the journalist's First Amendment rights. *Id.* at 25. *Glik* cited *Iacobucci* as "directly on point" and clearly establishing the right for qualified immunity purposes. 655 F.3d at 84.

place, and manner restrictions that may be applicable to individuals recording police, the court noted that the ability of the government to limit First Amendment rights is "sharply circumscribed" in traditional public spaces, like city parks.[153] The court did, however, distinguish Glik's recording from recordings occurring at a traffic stop[154] and stated that right to record is "not unqualified."[155] Following the First Circuit's ruling, Glik settled with the City of Boston for $170,000.[156]

4. Additional Lower Court Rulings

Both before and after *Alvarez* and *Glik*, an overwhelming number of courts across the nation have affirmed the right to photograph and record on-duty police. Michael Allison, whose story is discussed in the introduction to this Comment, successfully sought a ruling that the Illinois Eavesdropping Statute was unconstitutional as applied to his recording of police.[157] The Illinois Circuit Court ruled that Allison "possessed a First Amendment right to gather information by audio recording public officials involved in performing their public duties" and that the wiretapping law violated substantive due process by "subject[ing] wholly innocent conduct to prosecution."[158] Further, the court stated that laws intended to

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[153] *Glik*, 655 F.3d at 84 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). The court also used a conditional "may" when discussing whether the right to record is subject to time, place, and manner restrictions. *Id.*

[154] *Id.* at 85. The Third Circuit similarly indicated the right to record at a traffic stop was not clearly established for purposes of qualified immunity because it is an "inherently dangerous situation[]." Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010). *See generally* Hampton, *supra* note 51 (discussing the lack of "pronounced boundaries for First Amendment Protection" due to court in *Glik* distinguishing between Boston Common and a traffic stop, making it unclear exactly where the line is in regard to what is a public space).

[155] *Glik*, 655 F.3d at 85. Because Glik was recording "publicly and openly," the case did not resolve the issue of whether a surreptitious recording would have been protected. *Id.* at 87. Several years earlier, in 2007, when addressing the related question of whether the First Amendment protects the right to publish a surreptitious recording of police misconduct, the First Circuit held that because even an illegally obtained recording of police misconduct is related to a matter of public concern, First Amendment concerns outweigh any privacy rights of police officers. Jean v. Mass. State Police, 492 F.3d 24, 25, 33 (1st Cir. 2007).

[156] Press Release, ACLU of Mass., City of Boston Pays $170,000 to Settle Landmark Case Involving Man Arrested for Recording Police with Cell Phone (Mar. 27, 2012), http://www.aclum.org/news_3.27.12.

[157] People v. Allison, No. 2009-CF-50, at 12 (Ill. Cir. Ct., Crawford Cnty. Sept. 15, 2011), *available at* http://www.rcfp.org/sites/default/files/docs/20120322_125429_allison_trial_court_decision.pdf.

[158] *Id.* at 7, 11. Allison also attempted to record the court proceedings related to his violation of the ordinance, which is when he was charged with violation of the wiretapping statute. Circuit Court Judge David Frankland said that Allison had a First Amendment right to record the police officers and court employees. The judge also ruled that while it was reasonable to prohibit the defendant from recording in the courtroom, making what Allison did a felony offense was overreaching and irrational, in violation of due process. *Id.* at 6, 7, 11, 12.

protect citizen privacy "cannot be used as a shield for public officials who cannot assert a comparable right of privacy in their public duties."[159]

The Eleventh Circuit has also stated that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest,"[160] though such right is "subject to reasonable time, manner and place restrictions."[161] The Ninth Circuit has similarly recognized the "First Amendment right to film matters of public interest."[162] And the list goes on.[163]

5. Themes that Emerge from the Case Law

Several themes emerge from *Alvarez*, *Glik*, and the other court rulings. In regard to privacy issues, courts have consistently held that police, as public officials, have diminished or non-existent privacy expectations when it comes to public statements and interactions with citizens that occur in public.[164] Even assuming officers have a reasonable expectation of

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[159] *Id.* at 12. Although the State of Illinois initially appealed the court's ruling, the State subsequently dropped its appeal. Motion to Voluntarily Dismiss Appeal, People v. Allison, No. 2009-CF-50 (Ill. Mar. 20, 2011), *available at* http://www.rcfp.org/sites/default/files/docs/20120322_135605_allison_motion_to_dismiss_appeal.pdf.

[160] Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (noting a long line of cases recognizing right "to gather information about what public officials do on public property, and specifically, a right to record matters of public interest," many of which involve photographing or videotaping police).

[161] *Id.*

[162] Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (citizen-journalist arrested shortly after a confrontation with police over his recording police officers at a political demonstration).

[163] Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (individual filming troopers conducting truck inspections from private property protected by the First Amendment); Channel 10, Inc. v. Gunnarson, 337 F. Supp. 634, 638 (D. Minn. 1972) (police interference with filming of crime scene was unlawful prior restraint under First Amendment). *But see* Kelly v. Borough of Carlisle, 622 F.3d 248, 262–63 (3d Cir. 2010) (officer who arrested a passenger for recording a traffic stop entitled to qualified immunity because the court did not consider the right to record matters of public concern to be sufficiently established enough to put an officer on notice; however, the court did not address the issue of whether or not the right to record exists, only that it was not sufficiently established in the Third Circuit at the time of the arrest); Szymecki v. Houck, 353 F. App'x 852, 853 (4th Cir. 2009) (unpublished per curiam opinion summarily concluding that the "right to record police activities on public property was not clearly established in [the Fourth Circuit] at the time of the alleged conduct."). Note, however, that *Szymecki* was subsequently dismissed as unimportant in *Glik* as having no persuasive force because of a lack of substantial discussion of the relevant issues. *See* Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011). The Department of Justice also notes that *Szymecki* has no persuasive value because unpublished opinions have no precedential value in the Fourth Circuit. Letter from Jonathan M. Smith to Mark H. Grimes & Mary E. Borja, *supra* note 13, at 2 (citing United States v. Stewart, 595 F.3d 197, 199 n.1 (4th Cir. 2010)).

[164] Many state courts have held that police officers, as public officials, have a diminished expectation of privacy. Bodri, *supra* note 89, at 1332 (citing State v. Flora, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992); Rotkiewicz v. Sadowsky, 730 N.E.2d 282, 287 (Mass. 2000)). Several courts have applied an "open field" doctrine to officers regarding comments made in public. *Id.* (citing *Flora*, 845 P.2d at 1358). In most

some degree of privacy, courts have generally held that the First Amendment rights of citizens to record on-duty police as a matter of public concern outweighs any such privacy rights.[165]

Insofar as the right to record police may be circumscribed by time, place, and manner restrictions, courts tend to agree that content-neutral, narrowly tailored restrictions are likely to include requirements that citizens photograph and record in a peaceful manner,[166] observe police interactions from a reasonable distance,[167] and not directly interfere with police activities.[168]

Somewhat less clear is the issue of whether photographs and recordings must be openly taken in order to fall within the First Amendment's protection, or if surreptitiously captured photos and recordings are protected as well.[169] A number of courts and commentators agree that there should be no distinction between surreptitious and open documentation[170] due to concerns that a plain view requirement would provide officers with an incentive to falsely deny knowledge of recordings and pho-

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situations where police and the public interact, courts have held the situations to lack privacy protection. Alderman, *supra* note 21, at 515–18. It is possible, however, that recorded conversations would need to be audible to bystanders in order to fall under First Amendment protection. That was a fact of the protected recordings in *Alvarez*, discussed *supra* note 122.

[165] The First Circuit has held First Amendment rights related to matters of public concern outweigh any privacy rights of officers. Jean v. Mass. State Police, 492 F.3d 24, 33 (1st Cir. 2007). Washington and New Jersey courts have also rejected privacy claims of officers. Hornberger v. Am. Broad. Cos., 799 A.2d 566, 595 (N.J. Super. Ct. App. Div. 2002); *Flora*, 845 P.2d at 1358.

[166] *See* Iacobucci v. Boulter, 193 F.3d 14, 24 (1st Cir. 1999).

[167] Although *Glik*, discussed below, did not specify time, place, and manner restrictions, the court found that Glik's recording of police from 10 feet away was within his constitutional rights. *Glik*, 655 F.3d at 79–80. Similarly, a recent settlement with the City of Escondido specified 15 feet as a distance within which officers are allowed to prohibit filming (including on sidewalks), in order to ensure officer and citizen safety. Press Release, ACLU, Freedom of Speech Upheld in Escondido (Oct. 25, 2012), https://www.aclu.org/free-speech/freedom-speech-upheld-escondido.

[168] *Glik*, 655 F.3d at 84; Mishra, *supra* note 66, at 1550.

[169] For example, when the Supreme Court of Massachusetts upheld the conviction of a motorist under the Massachusetts wiretapping statute for secretly recording police, it indicated that he would not have been convicted if he had openly recorded. Commonwealth v. Hyde, 750 N.E.2d 963, 964, 969 (Mass. 2001). There was, however, a strongly worded dissent arguing against the application of the statute to secret recordings of police conducting official business. *See id.* at 971 (Marshall, C.J., dissenting).

[170] A number of courts have held secret recordings to be constitutional as long as the subject of recording has no expectation of privacy and, further, that officers do not have an expectation of privacy and may therefore be secretly recorded. *See, e.g.*, *Jean*, 492 F.3d at 29–30 (discussing Bartnicki v. Vopper, 532 U.S. 514 (2001)); People v. Clark, 6 N.E.3d 154 (Ill. 2014); People v. Melongo, 6 N.E.3d 120 (Ill. 2014). Several law review articles call for no distinction between secret and open recordings, as long as officers have no reasonable expectation of privacy. *See, e.g.*, Alderman, *supra* note 21, at 512. *See generally* Mishra, *supra* note 66; Skehill, *supra* note 14.

tographs when filing complaints against citizens.[171] In addition, the practical application of a plain view requirement may become problematic as rapid advancements in technology increase the ease of recording with less indication of its occurrence.[172] Requiring plain view recording and photography may also expose citizens and journalists to the danger of retaliation, particularly if they are observing officers who are already actively harming someone.

E. Current Efforts to Establish and Protect the Right to Document On-Duty Police

A variety of legal scholars, litigators, advocacy organizations, members of the press and public, and the Department of Justice are involved in ongoing efforts to protect the right to photograph and record the police. Increasingly, free speech advocates are engaging the public, the press, and law enforcement in discussions about how to protect First Amendment rights in this context.[173] Free speech advocates are also creating and promoting educational tools for members of the press and public explaining the law related to the right to record and photograph police.[174]

Legal advocates, including the National Press Photographers Association, ACLU affiliates, and passionate pro bono attorneys, have been active in litigation across the country. For example, Khaliah Fitchette, whose story appears at the beginning of this Comment, filed a civil rights action—with the help of the ACLU of New Jersey—against the City of Newark and four police officers.[175] Philip Datz, also discussed in the introduction to this Comment, filed a civil rights suit against the individual officer and the Suffolk County Police Department.[176] ACLU Border Affiliates, which includes affiliates in Southern California, Arizona, New Mexico, and Texas, recently filed a lawsuit against U.S. Customs and Border Protection related to its pattern, practice, and official policy of prohibit-

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[171] Skehill, *supra* note 14, at 985.

[172] *Id.* at 984.

[173] *See, e.g.*, *NPPA Hosts Free Speech Week Panel Discussion*, NAT'L PRESS PHOTOGRAPHERS ASS'N (Sept. 25, 2013), https://nppa.org/news/nppa-hosts-free-speech-week-panel-discussion.

[174] For example, the Reporters Committee for Freedom of the Press recently released a mobile phone app with information about the right to record. The app also instantly links users to the Reporters Committee website and its 24/7 media law hotline. Press Release, Reps. Comm. for Freedom of the Press, Reporters Committee Launches RCFP FirstAid Mobile App for Reporters (July 23, 2012), http://www.rcfp.org/reporters-committee-launches-rcfp-firstaid-mobile-app-reporters.

[175] Complaint, Jury Demand and Designation of Trial Counsel, Phillips v. City of Newark (N.J. Super. Ct. Law Div. Mar. 28, 2011), *available at* http://www.aclu-nj.org/download_file/view_inline/470/373. Fitchette's lawsuit led to changes in the Newark Police Department's policy related to the right to record police. Press Release, ACLU, *supra* note 5.

[176] Complaint at 34, Datz v. Milton, No. CV12-1770 (E.D.N.Y. Apr. 11, 2012). Mr. Datz is represented by the firm of Davis Wright Tremaine LLP, of which the author is an associate. Mr. Datz's case was referred to Davis Wright Tremaine by the New York Civil Liberties Union.

ing the use of cameras and video recorders at or near U.S. ports of entry without prior approval.[177] The ACLU of San Diego & Imperial Counties recently sued the City of Escondido and the California Highway Patrol for repeatedly interfering with a professional journalist's recording of controversial and heavily-protested traffic checkpoints.[178]

In connection with the use of wiretapping laws to prohibit recordings of police, many commentators have called for legislative solutions,[179] with some advocates attempting to pass such legislation.[180] Commentators

[177] Press Release, ACLU, *supra* note 25.

[178] Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction at 17, Bologna v. City of Escondido, No. 12-cv-1243-JAH-WVG (S.D. Cal. June 19, 2012); Complaint for Declaratory and Injunctive Relief and Damages, *Bologna* (May 22, 2012). In October 2012, a settlement was reached with the City of Escondido, which included attorney fees and an agreement by the City not to interfere with right to record traffic checkpoints, except within a narrowly defined "operational area" at each checkpoint, which may include portions of the road where vehicles are stopped and inspected, as well as limited portions of the sidewalk to ensure a safe distance of 15 feet between observers and officers and/or to allow placement of lights and cables on the sidewalk when conducting checkpoints after dark. Press Release, ACLU, *supra* note 167; Settlement Agreement Between Plaintiffs and Escondido Defendants at 2–4, *Bologna* (Oct. 24, 2012). The court reserved jurisdiction to oversee compliance with this agreement. *Id.*

[179] For example, a commentator recommends an amendment to the federal wiretapping law to limit liability for recording on-duty police officers' oral communication to when the "fact or method of recording creates or significantly exacerbates a substantial risk of imminent harm to the officer, other persons, or national security." Kies, *supra* note 14, at 278. This federal solution would standardize state laws to bring them into compliance with United States Constitution. *Id.* at 305–07. The commentator's preference is for a bright-line rule, over the potential for judicial muddiness, and is based on skepticism that courts will not resolve the issue. *Id.* at 305–06. Another commentator suggests passage of a federal law requiring state statutes to conform to the federal statute's reasonable expectation of privacy requirement. Bodri, *supra* note 89, at 1349. Another commentator suggests that Massachusetts's wiretapping statute should be modified to include a reasonable expectation of privacy exception. Skehill, *supra* note 14, at 1011. Another commentator suggests that state wiretapping statutes should expressly allow citizens to record officers performing their public duties, whether made secretly or openly, rather than relying on reasonable expectation of privacy provisions. Alderman, *supra* note 21, at 511–12.

[180] A bill was proposed in the Illinois General Assembly in 2012 to amend its state law to preclude criminal prosecution for recording police performing public duties in public places and speaking at audible volume. Dahlia Lithwick, *Recording Police Making Arrests: The Outrageous Illinois Law that Makes it a Felony*, SLATE (Jan. 31, 2012), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/01/recording_police_making_arrests_the_outrageous_illinois_law_that_makes_it_a_felony_.html. The bill failed to pass after facing opposition from the police, with some legislators voting against it in order to avoid angering law enforcement officials. Chris Healy, *Bill to Rescind Penalty for Taping Police Officers Fails, While State Seeks to Withdraw Appeal in Recording Case*, REPS. COMM. FOR FREEDOM OF THE PRESS (Mar. 22, 2012), http://www.rcfp.org/browse-media-law-resources/news/bill-rescind-penalty-taping-police-officers-fails-while-state-seeks-.

have also urged judges to narrowly construe wiretapping laws in the context of recordings of on-duty police.[181]

A growing number of law enforcement officials in supervisory positions and law enforcement organizations have also been calling for change. Commenting in 2012 on the Illinois wiretapping statute's implications on the right to record, Chicago Police Superintendent Garry McCarthy said he believed the law was "just as bad for the police as it [was] for citizens."[182] McCarthy had found recordings of police interactions to be particularly helpful in documenting his officers doing the right thing, helping the department and officers avoid frivolous lawsuits.[183] "There's no arguments when you can look at a videotape and see what happened," McCarthy said.[184]

A number of advocates have now turned their attention to police department policies and training.[185] Mickey Osterreicher, general counsel for the National Press Photographer's Association, an award-winning photojournalist, and a tireless defender of journalists' rights, has been advocating for change within police culture.[186] Working with free speech advocates, members of the press, law enforcement organizations, and police departments across the country, Osterreicher has been a leader in ongoing efforts to design and implement police department policies and training procedures regarding the right to record. Osterreicher regularly travels around the country helping police departments implement these new policies and training procedures.[187]

Similarly, ACLU affiliates and lawyers involved in civil rights suits against police have advocated, often successfully, for changes in police department policies and training procedures.[188] As part of Khaliah Fitch-

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[181] Hanley, *supra* note 20, at 666; *see also* Bodri, *supra* note 89, at 1336–37 (urging courts to find an implicit privacy requirement in unanimous consent wiretapping statutes when citizens are prosecuted for recording on-duty police).

[182] Pallasch & Emmanuel, *supra* note 70.

[183] *Id.*

[184] *Id.*

[185] Hanley, *supra* note 20, at 666 (suggesting training programs for police).

[186] MIKEY H. OSTERREICHER, ESQ.: ATTORNEY AT LAW, http://buffalo-law.com.

[187] *See* Press Release, NPPA, Ken Hackman, Mickey H. Osterreicher Honored with NPPA's Sprague Award (Jan. 17, 2014), https://nppa.org/news/ken-hackman-mickey-h-osterreicher-honored-nppa's-sprague-award. Osterreicher's views on the need for improved policies and training have also been published by the National Sheriff's Association. Mickey H. Osterreicher, *The Importance of the Right to Photograph and Record in Public*, SHERIFF MAG., May/June 2013, at 60 ("[W]idespread mistrust by police officers of the media (or anyone with a camera) and the misguided belief that photography and recording in public places may be restricted under color of law will continue unless proper guidelines and policies are adopted by law enforcement agencies throughout the country. Once those policies are implemented, police cultural change will only come about through continuous reinforcement, proper training and, where merited, disciplinary action against those officers who violate departmental guidelines.").

[188] *See, e.g.*, Marilyn Odendahl, *Settlement of Federal Case Requires Indianapolis Police to Revise Procedure*, THE IND. LAW. (Feb. 27, 2014), *available at* http://www.

ette's settlement, the Newark Police Department implemented a new policy on the right to record the police.[189] After Simon Glik filed his lawsuit, the City of Boston adopted a policy regarding the public's right to photograph and record police and developed a training video instructing police officers not to arrest people who openly record them in public spaces.[190] After the ACLU of Louisiana and the Tulane Civil Litigation Clinic received repeated calls for help from citizens who had been arrested and threatened for observing, photographing, and recording New Orleans police, they urged the NOPD to conduct First Amendment training.[191]

In 2012, the Department of Justice, Civil Rights Division, stated that its position is that improved policies and training procedures are a necessary component of solutions to the problem of interference with the right to record police.[192] The Department of Justice offered its support of

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theindianalawyer.com/settlement-of-federal-case-requires-indianapolis-police-to-revise-procedure/PARAMS/article/33569 (new policy required as part of settlement with Indianapolis Metropolitan Police Department regarding arrest and injury of man who refused to stop filming a nearby arrest).

[189] James Queally, *Newark Police Settle Case with Teen Illegally Detained for Filming Cops*, STAR-LEDGER (N.J.) (Nov. 28, 2012), *available at* http://www.nj.com/news/index.ssf/2012/11/newark_police_settle_case_with.html. A year earlier, while Fitchette's lawsuit was pending, Police Director Samuel A. DeMaio issued a training memorandum affirming the rights of citizens to record police officers performing their duties. The memorandum instructs officers not to confiscate, delete, or demand to view a citizen's photos or video without a warrant. Press Release, ACLU, *supra* note 5.

[190] Press Release, ACLU, *supra* note 156.

[191] Press Release, ACLU, ACLU Urges New Orleans Police Department to Conduct First Amendment Training (June 8, 2010), https://www.aclu.org/free-speech/aclu-urges-new-orleans-police-department-conduct-first-amendment-training. After reaching out to the New Orleans community for stories of police interference, the ACLU of Louisiana and the Clinic documented 15 incidents in a report intended to document the NOPD practice of threatening and arresting people who exercise their First Amendment right to observe and film the police, and to educate the New Orleans community about people's First Amendment right to observe and film the police. The NOPD did not have a policy or training procedures on the right to record police. The conclusion of the report included recommendations that the NOPD distribute a bulletin to its officers explaining the First Amendment right to observe, photograph, and film police officers when they are in public and clarifying that all officers must respect this right; that the NOPD include First Amendment training in its police academy training; and that the NOPD implement a system of discipline of officers who violate people's First Amendment right to observe, photograph, or film police officers in public. ACLU, OBSERVING, PHOTOGRAPHING & FILMING THE NEW ORLEANS POLICE DEPARTMENT 3, 19 (2010), *available at* http://www.laaclu.org/PDF_documents/Observing_photographing_filming_NOPD.pdf. The next year, it appeared that that training had not yet occurred, so the ACLU of Louisiana requested public records to determine if that was the case. Open Letter Seeking Public Records from Marjorie R. Esman, Exec. Dir., ACLU of La., to Ronal W. Serpas, Superintendent of NOPD (Mar. 15, 2011), *available at* http://www.laaclu.org/PDF_documents/Serpas_Re_1stAmendment_031511.pdf.

[192] Letter from Jonathan M. Smith to Mark H. Grimes & Mary E. Borja, *supra* note 13, at 1 ("[I]t is the United States' position that any resolution to Mr. Sharp's claims for injunctive relief should include policy and training requirements that are consistent with the important First, Fourth and Fourteenth Amendment rights at

the right to record on-duty police in connection with a civil rights lawsuit relating to the seizure of a cellphone as "evidence" by police.[193] When Christopher Sharp used his cell phone to record police arresting one of his friends, officers seized the phone and permanently deleted his videos, including unrelated and private recordings such as videos Sharp had taken of his young son.[194] In support of Sharp's subsequent civil rights suit, the Department of Justice sent a letter to the Baltimore Police Department and its attorneys stating its position that "private individuals have a First Amendment right to record police officers in the public discharge of their duties, and . . . officers violate individuals' Fourth and Fourteenth Amendment rights when they seize and destroy such recordings without a warrant or due process."[195]

The Department of Justice also filed a Statement of Interest in Sharp's case, further stating its view that the Baltimore Police Department "should develop a comprehensive policy that specifically addresses individual's First Amendment right to observe and record officer conduct," and that the policy "should be implemented through periodic training, and the effectiveness of the policy and training should be tested routinely through quality assurance mechanisms."[196] The Baltimore Police Department, Sharp, and the ACLU of Maryland settled Sharp's lawsuit in February, 2014. As part of the settlement, the Police Department has agreed to institute a new policy confirming citizens' rights to photograph and record police activities "in public or wherever citizens have a right to be." In addition, officers will be trained on the new policy and the Police Department will track complaints of misconduct in order to ensure that training is adequate.[197]

In 2013, the Department of Justice again expressed its views of the right to record and photograph on-duty police by filing a Statement of Interest in a civil rights lawsuit filed by Mannie Garcia, a U.S. Air Force veteran and award-winning photojournalist, against several police officers

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stake when individuals record police officers in the public discharge of their duties. These rights, subject to narrowly-defined restrictions, engender public confidence in our police departments, promote public access to information necessary to hold our governmental officers accountable, and ensure public and officer safety.").

[193] Fenton, *supra* note 43.

[194] *Id.*

[195] Letter from Jonathan M. Smith to Mark H. Grimes & Mary E. Borja, *supra* note 13, at 2.

[196] Statement of Interest of the United States, Sharp v. Baltimore City Police Department, No. 1:11-cv-02888-BEL (D. Md. Jan. 1, 2012), *available at* http://www.justice.gov/crt/about/spl/documents/Sharp_SOI_1-10-12.pdf ("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.").

[197] Settlement Agreement and Release, Sharp (Feb. 18, 2014), *available at* http://www.aclu-md.org/uploaded_files/0000/0486/sharp_v._bpd_final_signed_agreement.pdf.

and the Montgomery County Police Department in Maryland.[198] According to Garcia's complaint, he witnessed the arrest of two young men and "became concerned that the officers' actions might be inappropriate and that they might involve excessive force, so, as a journalist, he began to record the incident photographically."[199] Garcia initially stood at least 30 feet away from police, moving nearly 100 feet away after an officer flashed a spotlight at him. Although Garcia "clearly and audibly identified himself as a member of the press, and opened his hands to show that he was peaceful and had in his possession nothing but a camera," an officer declared that he was under arrest, "placed him in a choke hold and dragged him across the street."[200] While in the police car, Garcia observed the officer remove the battery and video card from his camera. Garcia was subsequently charged with disorderly conduct. His video card was never returned. Garcia's complaint alleges that he sustained "serious injuries to [his] neck, shoulder, and back," was "unable to work for an extended period of time and required medical care and extensive physical rehabilitation."[201]

In its Statement of Interest in Garcia's case, the Department of Justice stated that "[i]t is now settled law that the First Amendment protects individuals who photograph or otherwise record officers engaging in police activity in a public place."[202] Further the Department of Justice stated that "the United States is concerned that discretionary charges, such as disorderly conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights," and "the First Amendment right to record police officers performing public duties extends to both the public and members of the media, and the Court should not make a distinction between the public's and the media's rights to record here."[203]

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[198] Statement of Interest of the United States, Garcia v. Montgomery County, Maryland, No. 8:12-cv-03592-JFM (D. Md. Mar. 4, 2013), *available at* http://www.justice.gov/crt/about/spl/documents/garcia_SOI_3-14-13.pdf.

[199] Complaint for Declaratory Ruling, Injunctive Relief, Actual Damages, Punitive Damages and Attorney's Fees, Garcia v. Montgomery County, No. 8:12-cv-03592-JFM (D. Md. Dec. 7, 2012), *available at* https://nppa.org/sites/default/files/garcia_complaint.pdf.

[200] *Id.*

[201] *Id.*

[202] Statement of Interest of the United States, *Garcia*, No. 8:12-cv-03592-JFM, *available at* http://www.justice.gov/crt/about/spl/documents/garcia_SOI_3-14-13.pdf.

[203] *Id.* ("The derogation of these rights erodes public confidence in our police departments, decreases the accountability of our governmental officers, and conflicts with the liberties that the Constitution was designed to uphold.").

III. Why Policies and Training Are Essential to Changing the Culture of Interference

Implementation of policies and ongoing training related to the right to record on-duty police is necessary because other methods of preventing its infringement are, unfortunately, insufficient. Complaints to internal affairs departments are often unproductive. While litigation has led to increasingly common victories affirming the right to record police carrying out their duties in public, because of the wide variety and prevalence of tactics used by police to limit documentation, successful litigation remains an incomplete and piecemeal solution.[204] Further, the unfortunate reality is that after-the-fact litigation cannot adequately remedy successful interference and the destruction of photographs and recordings, as lost documentation can never be recovered.

Litigation against law enforcement can also be extremely costly and difficult to win.[205] In particular, the qualified immunity doctrine often shields public officials from personal liability for civil damages in 42 U.S.C. § 1983 actions,[206] even when an individual's constitutional rights have been violated,[207] and it also allows courts to avoid rulings that establish the existence of constitutional rights and develop constitutional precedent.[208]

In addition, an oddly negative result of the realities of the adversarial process is that litigation necessitates police departments taking positions against civil rights in order to reduce their liability.[209] Clarity regarding

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[204] *See* Kies, *supra* note 14, at 305–07 (expressing skepticism that courts will resolve the issue).

[205] Litigants can bring section 1983 suits for civil rights violations or criminal prosecutions in the case of egregious misconduct by police officers.

[206] Qualified immunity applies when actions taken by government officials are made in the exercise of discretionary functions. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). The qualified immunity doctrine seeks to balance "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[207] The two-step process of qualified immunity can be extremely difficult to overcome. The court must both determine that a constitutional right was violated and that the constitutional right in question was clearly established or well-settled at the time of the violation, thus giving officers fair warning that their conduct may subject them to liability. Hope v. Pelzer, 536 U.S. 730, 740 n.10 (2002). The second step does not "require a case directly on point, but existing precedent must have placed the . . . constitutional question beyond debate." Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011).

[208] Although the sequence set forth in *Saucier v. Katz*, 533 U.S. 194, 207 (2001), is "often appropriate" and "promotes the development of constitutional precedent," *Pearson*, 555 U.S. at 236, because the two prongs can be resolved in any order, a court can easily sidestep the constitutional issue, leaving constitutional rights unestablished for future cases.

[209] For example, in *Alvarez*, the State's Attorney argued the position that openly recording police in traditional public fora is "*wholly unprotected* by the First Amendment," an argument the Seventh Circuit characterized as "extreme" and

the right to record would be better for everyone involved because it would ensure that citizens' rights are upheld and that police have clear notice of how to protect those rights while performing their duties. In addition, litigation often wastes private and judicial resources when problems can be proactively solved in other more-efficient ways.

In the context of wiretapping law restrictions on recordings, both judicial and legislative solutions would only partially solve the problem of interference with the right to record on-duty police. Although legislative amendments to wiretapping laws could certainly impact the use of such laws as a justification for some arrests and prosecutions, such changes would not address or solve the problems related to the variety of other tactics used by police to curtail documentation. Legislative change is also dependent on the wills of legislators, who could just as easily pass restrictive wiretapping laws in other states, leading to more prosecutions. Such key constitutional protection should not be up for vote.

Were a judicial or legislative mandate that prosecutions under wiretapping laws conform to reasonable expectations of privacy established, officers and recorders would likely have difficulty assessing the legality of recording in different contexts, as the law would be sufficiently muddier than simply allowing peaceful recording from a safe distance. Rather than putting officers in the unfortunate position of having to think through complex legal issues in the field, a simple and straightforward solution would be preferable. In addition, because the standards for reasonable expectations of privacy are ever-changing, ongoing litigation would be required to keep the contours of the right up-to-date.

Unfortunately, even if the right to record were clearly established nationwide, the problem of police interference with documentation of police interactions would likely persist. Violations of the right to record continue to occur even in those jurisdictions where the right has been clearly established and where successful litigation has been brought against offending officers and police departments. Despite various efforts to curtail infringement of the right to photograph and record on-duty police, the culture of interference persists.[210] Although the culture may be difficult to change, widespread implementation of police department policies and officer training offers a promising avenue for significant progress.

Despite the increase in calls for changes to police department policies and training and a slow movement toward their adoption (often as a part of settlements with litigants and court orders), there is a still a dearth of relevant police department policies and training procedures around the nation.[211] In those police departments that have implemented

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"extraordinary." ACLU of Ill. v. Alvarez, 679 F.3d 583, 594 (7th Cir. 2012) (emphasis added), *cert. denied*, 133 S. Ct. 651 (2012).

[210] Kreimer, *supra* note 15, at 357.

[211] Fenton, *supra* note 43 (quoting Deputy Commissioner John P. Skinner of the Baltimore Police Department stating that only a "select few police departments in the

policies, the policies and procedures are often extremely brief and not accompanied or adequately reinforced with officer training.[212] On the other hand, in those rare instances when robust policies and training are actively implemented, incidences of police interference with observers with cameras and recording equipment have been greatly reduced.[213]

Widespread implementation of a uniform model policy and training procedures would offer a proactive and preventive solution to the problem of interference with documentation of on-duty police, as opposed to the expensive and piecemeal remedies obtained through litigation.[214] Further, even if policies and training procedures are unable to eliminate all instances of interference, standardized requirements for such policies and training will aid civil rights litigants in the courtroom and help to hold police departments accountable for failure to train.[215] Police departments and officers would also benefit from clear, nationwide guidelines related to constitutional rights which would eliminate the need for police to analyze and assess complex legal and constitutional issues in the field.

IV. Creating and Implementing a Model Policy and Training Procedures

A. The Department of Justice's Suggestions for a Model Policy: A Good Place to Start

The Department of Justice's position is that an adequate police department policy "must be designed to effectively guide officer conduct, accurately reflect the contours of individuals' rights under the First, Fourth and Fourteenth Amendments, and diminish the likelihood of future constitutional violations."[216] To accomplish this goal, the Depart-

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nation . . . have promulgated a general order regarding the issue of video recording police activity").

[212] For example, the central Pennsylvanian Manheim Township Police Department's policy simply states: "It is the policy of the Manheim Township Police Department to recognize the legal standing of members of the public to make video/audio recordings of police officers and civilian employees who are carrying out their official police duties in an area open to the public, and by citizens who have a legal right to be in an area where police are operating, such as a person's home or business." Lancaster, Pa., Manheim Twp. Police Dep't Policy 7.1.3, Persons Recording Police Employees (Dec. 11, 2007).

[213] Mickey Osterreicher, *Covering the Conventions and Protests*, NPAA Advocacy Comm. Blog (Aug. 7, 2012), http://blogs.nppa.org/advocacy/2012/08/07/cover-the-conventions-and-protests/.

[214] *See* Glik v. Cunniffe, 655 F.3d 78, 82–83 (1st Cir. 2011) (Affirmative steps by police departments to protect citizens' constitutional rights "not only aids in the uncovering of abuses . . . but also may have a salutary effect on the functioning of government more generally.").

[215] In some circumstances, failure to train regarding protection of constitutional rights gives rise to liability. *See* Connick v. Thompson, 131 S. Ct. 1350, 1359 (2011).

[216] Letter from Jonathan M. Smith to Mark H. Grimes & Mary E. Borja, *supra* note 13, at 2.

ment of Justice has suggested the following basic elements of a constitutionally adequate policy related to recordings of police, which serves as a useful starting point for designing a model policy relating to the right to document on-duty police.

First, the policy must "affirmatively set forth the First Amendment right to record police activity" and specifically recite and explain the right, rather than making vague references to constitutional rights more generally.[217] This must be accompanied by practical guidance, such as "examples of the places where individuals can lawfully record police activity and the types of activity that can be recorded," and it should include the right to record from a person's own home or other private property where the person has a right to be present.[218] Terminology used when providing practical guidance must also be specific and defined. For example, rather than indicating that people can record when they are in the "public domain," an adequate policy would clearly state that recordings may occur not only on streets and sidewalks, but also from any place a citizen has "a legal right to be present, including an individual's home or business, and common areas of public and private facilities and buildings."[219]

Next, the policy must "describe the range of prohibited responses to individuals observing or recording the police."[220] This must include a general rule prohibiting the search or seizure of a camera without a warrant, with "narrowly circumscribed" exceptions, and it must absolutely prohibit destruction or deletion of devices, cameras, or recordings.[221] Officers must also be directed not to "threaten, intimidate, or otherwise discourage an individual from recording police officer enforcement activities or intentionally block or obstruct cameras or recording devices."[222]

An adequate policy must also "clearly describe when an individual's actions amount to interference with police duties," so that officers do not end up misusing their discretion to look for ways to arrest observers.[223] This should include specific examples explaining what qualifies as interference and clarify that recording from a safe distance and even expressing criticism of police does not constitute interference.[224] Officers must be instructed to advise citizens of alternative locations to observe from, rather than immediately arresting observers without adequate warning and an opportunity to move.[225]

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[217] *Id.* at 2–4.
[218] *Id.* at 3–4 (citing cases where courts have found this specifically).
[219] *Id.* at 4.
[220] *Id.* at 5.
[221] *Id.* (pointing out that this implicates due process as well).
[222] *Id.*
[223] *Id.* at 5–7.
[224] *Id.* at 5–6.
[225] *Id.* at 6–7.

The policy must "provide clear guidance on supervisory review."[226] Such guidance should require a supervisor to be on the scene before any arrests or seizures are made, not after, and describe the limited circumstances when seizure of recordings and recording devices is permissible.[227] Finally, the policy must direct officers to "not place a higher burden on individuals to exercise their right to record police activity than they place on members of the press."[228]

B. Additional Requirements of a Model Policy

While the Department of Justice's suggestions provide a good foundation for an adequate policy, the following additional requirements would incorporate and address additional concerns and issues explored throughout this Comment.

A model policy should clearly state that the right to photograph, record, and capture audio is a single unitary right and does not vary depending upon the medium.[229] It should also specify that officers may require observers to stand a safe distance from police activity. The policy should specify a standard safe distance, such as 10 or 15 feet, so both officers and observers have clarity about where observers may stand, which would reduce confusion and limit officer discretion.[230] The policy should also clarify that police are allowed to close areas if there is an active investigation, pursuit, or other emergency or exigency, such as a crime scene or a disaster.[231] Activities that pose a genuine traffic or public safety hazard, which may be prohibited, should be clearly specified.[232] The policy should clarify that a mere claim of distraction is inadequate justification for interference.[233] Police should be clearly directed not to seize record-

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[226] *Id.* at 7–8.

[227] *Id.* at 7–10.

[228] *Id.* at 10–11.

[229] *See* Titan Sports, Inc. v. Turner Broad. Sys. (*In re* Madden), 151 F.3d 125, 128–30 (3d Cir. 1998).

[230] Settlement Agreement, *supra* note 178, at 2 (settlement specifying a distance of 15 feet between observers and officers as adequate to ensure safety).

[231] Branzburg v. Hayes, 408 U.S. 665, 684–85 (1972) ("Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded."); *see also* Settlement Agreement, *supra* note 178, at 3 (settlement specifying agreement that police could close off certain areas during a police investigation, pursuit, or other emergency or exigent circumstances that occur during the course of a traffic checkpoint).

[232] *See* Complaint for Declaratory and Injunctive Relief and Damages at 6, Bologna v. City of Escondido, No. 12-cv-1243-JAH-WVG (S.D. Cal. May 22, 2012) (outlining circumstances that could create a genuine traffic or public safety hazard, such as protesters stepping into the road or holding signs in the path of oncoming traffic, but explaining that "[a] general claim of driver safety or distraction is inadequate to protect First Amendment activities").

[233] Research by IACP has shown that the use of in-camera recordings "does not hinder the officer from performing his or her duties." INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 15, at 13, 16.

ings and photos to preserve evidence of a crime, unless a warrant is obtained.[234] The policy should also clarify that officers are entitled to privacy rights when they are off-duty, so they need only refrain from saying things they wish to keep private during on-duty hours.[235]

C. Adequacy of Training

For any policy to be effective, officers must receive adequate and regular training on its contents.[236] Because this problem is so widespread and prevalent, this should include more than just a cursory review of the policy during an officer's initial training. Further, special trainings should occur before events, such as large political demonstrations, where photography and recording of police are likely to occur. Experts in this area of law are more than willing to help educate police departments and officers, and were law enforcement to dedicate its own resources to the task, such trainings could be implemented across the nation. Finally, police departments should perform routine quality assurance checks and track complaints of violations of the right to record to determine if training is sufficient or needs to be supplemented and improved.

D. Tactics for Promoting or Requiring Implementation of Policies and Procedures

Although the benefits of police policies and training procedures related to the right to record on-duty police officers extend to the public, police departments, and even individual officers, the widespread adoption of policies and training procedures is easier said than done. Further development of alliances between advocacy groups and the public, cooperation with police departments, and ongoing litigation are all tactics that may, and likely must, be pursued on the national and local level in order to make this change.

Further development of alliances between advocacy groups and the public will enable a greater ability to influence police departments on a local and national level. Legal advocacy groups, like the ACLU and the

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[234] *See* Letter from Jonathan M. Smith to Mark H. Grimes & Mary E. Borja, *supra* note 13, at 5.

[235] *See id.* at 2 (characterizing the First Amendment right to record officers "in the public discharge of their duties").

[236] In order to be truly effective, it would also behoove police departments to help educate the public about the right to record, particularly as it relates to the requirement that observers not interfere with police activities and stand a reasonable distance away from the officers they are photographing or recording. This could be accomplished through police literature, but it may be most effective to communicate to community leaders and activists at community forums on the right to record. Such community forums could serve the additional purpose of developing cooperation and goodwill between members of the public and police. They could also provide an opportunity for members of the public to tell their stories of police interference with their documentation of police, so that officers are able to better understand why the issue is so important to the public.

National Press Photographers Association, police watch groups around the country, and those who have been collecting and compiling stories of violations of the right to record, as well as members of the public, will each be able to better advocate for the right to record if they join efforts and present a unified proposal for nation-wide implementation of a model policy and training procedures.[237]

As a unified whole, these allied groups should approach local police departments and national police associations and organizations in an attempt to seek cooperation on this issue. They should educate the police departments about the extent of the problem, the existence of the right, and the benefits to police departments of implementation of a model policy and training procedures. Community forums and the creation of videos and other educational media that include narratives from members of the public who have suffered as a result of police interference would likely aid this educational process. Model policies and training procedures should then be proposed to police departments and organizations, with a simultaneous call for input and feedback from the police, in order to foster cooperation.

Of course, if these efforts do not immediately succeed, the threat of ongoing litigation may help to move things along. And once litigation has been commenced, offers to settle and proposed remedies suggested to the court should always include the requirement that policies and training procedures be implemented.

V. Conclusion

The unconstitutional culture of interference with documentation of on-duty police that exists in the law enforcement community around the country is a serious and ongoing threat to First Amendment rights. This culture has persisted despite ongoing efforts by litigators, legislators, legal commentators, and judges across the nation. It is possible that this problem will never be completely remedied, but widespread implementation of a model policy and training procedures that clarify the right to record offer the potential for significant change. The author's hope is that this Comment will provide inspiration and lay some of the groundwork for changing the culture of unconstitutional interference.

[237] Legal advocates, along with experts from the ACLU and NPPA, will be able to fine-tune a model policy and training procedures, as well as provide advice in the event that case law in this area develops further. Police watch groups, who are already advocating for change in various areas, can add this issue to their priority lists and help to educate and reach out to the public and police departments. Those documenting violations will be able to provide source material for compelling narratives to both educate the public and present to police departments.