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First Amendment Right to Record Police: When Clearly Established is Not Clear Enough, 49 J. Marshall L. Rev. 101 (2015)

Matthew Slaughter

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FIRST AMENDMENT RIGHT TO RECORD POLICE: WHEN CLEARLY ESTABLISHED IS NOT CLEAR ENOUGH

MATTHEW SLAUGHTER*

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First Amendment jurisprudence supports the recognized right to film police activity as articulated by the circuits. Some commenting circuits have held the right is clearly established, while others have declined to extend their holdings so far. Practically, citizens are restrained from freely exercising their right to film police activity in public even in circuits that have found the right clearly established. Because reasonable restrictions have not yet been clearly articulated, such uncertainty will inevitably lead to a chilling effect on the otherwise protected activity. A national standard should affirmatively memorialize such a right, as well as articulate objective reasonable restrictions to prevent a chilling of a citizen’s exercise of valid First Amendment conduct.

I. INTRODUCTION

On a late night street in Maryland, several groups of people crowded around an area where officers were arresting students.¹ Sergio Gutierrez, a 21-year-old college student, began recording the interaction because he believed the officers were being too aggressive with the students.² The first officer approached Guterrez during his filming and stated, “[g]et out of my face!”³ Another officer then approached Guterrez and demanded that he leave.⁴ When Guterrez informed the police that he had a right to film the encounter, the officer responded with, “[y]ou diverted my attention!”⁵ After the police threatened him with arrest, Guterrez asked the officer, “[w]hat have I done wrong?”⁶ The officer replied, “[y]ou see us out here? . . . We aren’t fucking around, do not disrespect us . . . Now walk away and shut your fucking mouth or you’re going to jail. Do you understand?”⁷

Guterrez began to walk away, but (as any young adult would do) he had to get the last word in, “[h]ave I done anything wrong?”⁸ The officer responded by turning around and physically restraining Guterrez.⁹ The student tried to explain, “I thought I had freedom of speech here” to which the officer very quickly responded, “[y]ou don’t, you just lost it.”¹⁰ It only takes a cursory Google search to be inundated with hundreds of similar instances of citizens being arrested for filming police activity in public.¹¹

* Law clerk to the Honorable Karen L. Hayes of the United States District Court for the Western District of Louisiana. J.D. 2015, University of Alabama School of Law; B.A. 2011, University of Alabama. Many thanks to Professor Bryan Fair and the editors of the John Marshall Law Review for their assistance and contribution. Dedicated to the memory of Mason DiChiara and Taylor “Fro” Powell.

¹ Saliqa Khan, *Baltimore County Police Chief: Officer’s Actions Incorrect, Inappropriate*, WBAL-TV BALTIMORE (Feb. 27, 2014, 9:24 AM), www.wbaltv.com/news/maryland/baltimore-county/baltimore-county-police-chief-officers-actions-incorrect-inappropriate/24695916 [hereinafter Khan]; *Raw Video: Fight Between Officer, Man in Towson*, WBAL-TV BALTIMORE (Feb. 25, 2014, 1:09 PM), www.wbaltv.com/news/maryland/baltimore-county/police-probe-video-of-fight-between-officer-man/24660718 [hereinafter *Raw Video*].

² *Raw Video*, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Radley Balko, *Supreme Court Inaction Boosts Right to Record Police Officers*, HUFFINGTON POST (Nov. 29, 2012, 6:55 PM), www.huffingtonpost.com/2012/11/27/supreme-court-recording-police_n_2201016.html; *see also* Carlos Miller, PHOTOGRAPHY IS NOT A CRIME, <http://photographyisnotacrime.com/>.

Part II of this paper outlines the relevant Supreme Court First Amendment jurisprudence supporting the right to film police in public. Part III reviews the leading commenting circuits on the right to film police in public and summarizes the differences in their outcomes. Part IV outlines what national standard should be imposed and what future drafters should be mindful of while articulating such a fact-specific guideline. Part V examines the policy goals achieved by establishing the right to record police activity in public and why the right is essential to our justice system.

II. FIRST AMENDMENT JURISPRUDENCE

Whether an individual has a First Amendment right to film police officers in public while an officer is operating in his/her official capacity has not been decided on a national level.¹² Nonetheless, several circuits have commented on the issue and recognized a First Amendment right to record police in public places.¹³ If the Supreme Court were to adjudicate this issue, the First Amendment jurisprudence and underlying principles would strongly support the right to record police.¹⁴

A. *Right to Receive Information and Gather News*

The Supreme Court has stated that gathering and receiving information is implicitly part of the First Amendment.¹⁵ In *Stanley v. Georgia* the defendant was suspected of bookmaking activities, but upon the execution of a warrant only obscene material was

¹² See *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595-96 (7th Cir. 2012) cert. denied, 133 S. Ct. 651 (2012) (discussing federal jurisprudence in this area).

¹³ *Id.*; See *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); see also *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014); *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3rd Cir. 2010).

¹⁴ Many times the right to record police conduct in public infringes on other valid state interests, such as privacy. This article does not seek to investigate how far the right to record police extends in a private setting, but rather in an open public forum (which is not afforded any reasonable expectation of privacy). Thus, this article excludes all situations where a private entity may reasonably restrict filming in their residence, business, or other private place. It also excludes all instances of filming police secretly, which is a common element of state wiretapping statutes.

¹⁵ *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (holding that gathering of information is protected by First Amendment: “[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (First Amendment protects information and ideas); *Martin v. City of Sanders*, 319 U.S. 141, 143 (1943) (First Amendment protections extend to right to receive information); see also *Glik*, 655 F.3d at 82-83.

found, violating a Georgia statute.¹⁶ The Supreme Court held that individuals have a First Amendment right to possess obscene materials in the privacy of their homes.¹⁷ The Court found that the “right to receive information and ideas, regardless of their social worth, is fundamental to our free society.”¹⁸

Not only do citizens have the right to receive information and ideas, but the Supreme Court has also recognized the right to gather news from any source.¹⁹ Nor is the right to gather news limited to members of the professional press.²⁰ The general public equally shares the right with members of the press.²¹ The Court has also acknowledged that video recordings are a protected medium of speech under the First Amendment.²²

B. *Freedom of Speech and Press Promotes Ideas of Popular Sovereignty*

The specific expansions of the First Amendment guarantees by the Supreme Court are also consistent with historical legal principles.²³ An essential function of the First Amendment is to protect the free and open discussion of information to prevent potential abuses of governmental power.²⁴ The First Amendment requires courts to err on the side of allowing speech rather than restricting it to prevent any potential chilling effect.²⁵

¹⁶ *Stanley*, 394 U.S. at 558.

¹⁷ *Id.* at 568.

¹⁸ *Id.* at 564 (internal citations omitted).

¹⁹ *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (“There is an undoubted right to gather news from any source by means within the law.”) (citation omitted) (internal quotation marks omitted).

²⁰ See *Branzburg*, 408 U.S. at 684 (stating that the press is not afforded any special right or “access to information not available to the public generally.”).

²¹ *Id.*; see also *Glik*, 655 F.3d at 82-85.

²² First Amendment protections of speech encapsulate video and audio recordings as speech. *Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (holding that movies are a protected form of speech); see also *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595-96 (7th Cir. 2012) cert. denied, 133 S. Ct. 651 (2012) (holding that freedom of press and freedom of speech necessitate the protection of making audio or audiovisual recordings).

²³ See *Alvarez*, 679 F.3d at 599 (“To the founding generation, the liberties of speech and press were intimately connected with popular sovereignty and the right of the people to see, examine, and be informed of their government.”).

²⁴ See *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (noting the press as a deterrent for abuses of governmental power); see also *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (finding speech concerning public officials afforded significant First Amendment protection because of the “paramount public interest in a free flow of information to the people concerning public officials, their servants”).

²⁵ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-72 (1964) (noting that even factually incorrect statements deserve First Amendment protection to prevent fear of mistakes from suppressing public debate); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 686-87 (1978).

The Supreme Court has recognized the importance of preventing the government from limiting the stock of information available to the public.²⁶ This is especially true when the information is about what public officials do on public property and is a “matter of public interest.”²⁷ As the Court has noted, “[f]reedom of expression has particular significance with respect to government because ‘[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.’”²⁸ Moreover, the right to disseminate information about public officials is instrumental to a free working democracy.²⁹ Political speech is often afforded the highest First Amendment protection and the Supreme Court has instructed courts “to err on the side of protecting political speech rather than suppressing it.”³⁰

C. Supreme Court Jurisprudence on Police Conduct

Additionally, the Court has emphasized First Amendment protections for speech concerning law enforcement.³¹ Law enforcement is “granted substantial discretion that may be misused to deprive individuals of their liberties.”³² Thus, “[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”³³

²⁶ *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) (“[T]he 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.”); *Sullivan* 376 U.S. at 270 (“[D]ebate on public issues should be uninhibited, robust, and wide open.”).

²⁷ *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940); *see also*, *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (“At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”).

²⁸ *First Nat’l Bank*, 435 U.S. at 777 n. 11 (alteration in original) (quoting THOMAS EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 9 (1966)).

²⁹ *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (suggesting that speech is instrumental to free democratic governance).

³⁰ *Fed. Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 457 (2007); *see also* *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186-87 (1999).

³¹ *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 560 (1976); *see also*, *Lewis v. City of New Orleans*, 415 U.S. 130 (1974).

³² *Glik*, 655 F.3d at 82; *see also* *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035-36 (1991) (noting that “[t]he public has an interest in [the] responsible exercise” of the discretion granted police and prosecutors).

³³ *City of Houston, v. Hill*, 482 U.S. 451, 462-63 (1987); *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973) (“Surely, one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer.”).

In *City of Houston, Tex. v. Hill*,³⁴ the most analogous Supreme Court case to the issue presented here, the Court found that a city ordinance could not constitutionally prohibit speech that merely interrupted a police officer.³⁵ The Defendant's arrest was sparked by an incident in which he shouted at police officers, "in an attempt to divert [the officers'] attention" away from his friend who the officers had approached.³⁶ Additionally the Defendant challenged the officer to "pick on somebody your own size."³⁷ After being charged and acquitted, Hill contested his arrest on constitutional grounds.³⁸

The Supreme Court held that a statute may not criminalize protected speech, and that "[t]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."³⁹ The Court stated that its decision "reflects the constitutional requirement that, in the face of verbal challenges to police action, officers and municipalities must respond with restraint."⁴⁰ The Court also emphasized, "the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive."⁴¹

The First Amendment should likewise protect individuals who are arrested for recording police activity in public. Like the defendant in *Hill*, an individual recording police would be engaged in similar conduct, observing the arrest of another citizen.⁴² The individual recording the police would be merely using a camera instead of shouting at the police.⁴³ As noted above, video is considered speech in the context of the First Amendment.⁴⁴ Here, a defendant should not be prevented from an otherwise valid exercise of a First Amendment right, merely because it interferes with police activity.

III. COMMENTING CIRCUITS

The commenting circuits have found a First Amendment right to record police activities in public.⁴⁵ However, only some of the

³⁴ 482 U.S. 451 (1987).

³⁵ *Id.* at 466.

³⁶ *Id.* at 451.

³⁷ *Id.* at 454.

³⁸ *Id.* at 455.

³⁹ *Id.* at 461.

⁴⁰ *Id.* at 471.

⁴¹ *Id.* at 472.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See *supra* text accompanying note 22.

⁴⁵ See *supra* text accompanying note 13.

circuit courts recognize the right as clearly established in their circuit.⁴⁶ Additionally, as with many areas of First Amendment rights, the right to record police is not absolute and is subject to reasonable restrictions.⁴⁷ Generally the circumstance of each individual situation dictates if a right exists. With each circuit conducting a fact-sensitive analysis of each police confrontation, average citizens are left with little notice of whether their filming is a valid exercise of the First Amendment. The First, Third and Seventh Circuits have adjudicated cases that specifically address the right to film police activity in public. The Eleventh and Fourth Circuits have commented on the subject, but did so “only in passing.”⁴⁸

If a citizen believes his/her First Amendment right has been violated, the most common course for redress is to file a civil rights violation under 42 U.S.C § 1983. Section 1983 provides a civil remedy for individuals whose constitutional rights have been violated by a person acting under color of law.⁴⁹ In the context presented here, an officer may be awarded an affirmative defense of “qualified immunity” if the officer’s “conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁵⁰ As the circuit opinions below demonstrate, the ambiguity in this area without a clearly established right will cause a chilling effect on conduct under the First Amendment.⁵¹

A. *Third Circuit*

In *Kelly v. Borough of Carlise*,⁵² the Third Circuit held that a First Amendment right to videotape police officers in a public place had not been clearly established.⁵³ On May 24, 2007 Officer David

⁴⁶ See *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); see also *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000).

⁴⁷ *Id.*

⁴⁸ *Kelly v. Borough of Carlisle*, 622 F.3d 248, 261 (3rd Cir. 2010); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Szymbicki v. Houck*, 353 Fed.Appx. 852 (4th Cir. 2009).

⁴⁹ 42 U.S.C. § 1983.

⁵⁰ See *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); see also *Saucier v. Katz*, 533 U.S. 194 (2001); *Glik*, 655 F.3d at 81 (quoting *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009)) (The qualified immunity analysis is determined by “(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was ‘clearly established’ at the time of the defendant’s alleged violation.”); see also Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U. L.J. 135, 139 (2012).

⁵¹ See *supra* text accompanying note 25.

⁵² 622 F.3d 248 (3d Cir. 2010).

⁵³ *Id.* at 266.

Rogers stopped Tyler Shopp's vehicle for speeding.⁵⁴ Brian Kelly, the plaintiff, was Shopp's passenger and towards the end of the encounter he began recording Officer Rogers with a handheld video camera in his lap.⁵⁵ Once Officer Rogers became aware of the recording he confiscated Kelly's camera and called the District Attorney's Office to get approval to charge Kelly under the Wiretapping and Electronic Surveillance Control Act of Pennsylvania.⁵⁶ After the local district attorney eventually dropped the charges, Kelly filed a § 1983 action against the individual officers and the town, alleging that the officers violated his First and Fourth Amendment rights when they arrested him.⁵⁷ The officers filed a motion for summary judgment on qualified immunity grounds, and the district court granted their motion, holding that the right had not been "clearly established."⁵⁸

The Third Circuit Court of Appeals affirmed the district court's decision.⁵⁹ When analyzing whether Kelly had a clearly established First Amendment right to record the officer, the Third Circuit looked to several previous decisions and concluded that there was insufficient case law to support a clearly established right to record.⁶⁰ The Third Circuit noted some courts had recognized a general right to record matters of public concern, but stated that they did so "only in passing."⁶¹ The court held that such a general right was "insufficiently analogous" to a right to videotape a police officer in the performance of his duties such that the officer would be on notice of a clearly established right.⁶²

The Third Circuit emphasized that this situation involved a traffic stop, which the court characterized as an "inherently dangerous situation[]." ⁶³ The court mentioned another possible restriction, "videotaping without an expressive purpose may not be protected . . ." ⁶⁴ The court reasoned that an expressive purpose is akin to "speech," and distinguished an "expressive purpose" from

⁵⁴ *Id.* at 251.

⁵⁵ *Id.*

⁵⁶ *Id.* at 251-52 ("Because Kelly had not informed Rogers that he was recording, Rogers believed Kelly violated the Wiretap Act.")

⁵⁷ *Id.* at 252 (Kelly, a teenager, was detained for twenty-seven hours after his arrest).

⁵⁸ *Id.* at 252-53; *see supra* text accompanying note 50 (according to qualified immunity law, a state actor must violate a clearly established right in order to lose qualified immunity protection).

⁵⁹ *Id.* at 266.

⁶⁰ *Id.* at 260-62 (although it cited a lower court opinion and Eleventh Circuit which both found a free speech right to record police in the performance of their official duties); *see Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *see also Robinson v. Fetterman*, 378 F.Supp.2d 534, 541 (E.D. Pa. 2005).

⁶¹ *Kelly*, 622 F.3d at 261.

⁶² *Id.* at 262.

⁶³ *Id.*

⁶⁴ *Id.*

information gathering.⁶⁵ With all these possible exceptions, the court determined that the right to record police activity was not clearly established under the circumstances.⁶⁶

B. First Circuit

The U.S. Court of Appeals for the First Circuit was the first court to establish an affirmative First Amendment right to record police in their official capacity in public.⁶⁷

1. *Glik v. Cunniffe*

In August 2011, the First Circuit Court handed down the decision in *Glik v. Cunniffe*, after many people in Massachusetts had been arrested or charged for recording police under Massachusetts's wiretapping statute.⁶⁸ On the evening of October 1, 2007,⁶⁹ Simon Glik observed three Boston Police officers arresting a man near Boston Common.⁷⁰ Glik, a young defense attorney, heard another bystander yell, "[y]ou are hurting him, stop."⁷¹ Concerned that the police might be using excessive force, Glik took out his cell phone and began recording the police about ten feet away.⁷² After the suspect had been placed in handcuffs, one of the officers said, "I think you have taken enough pictures."⁷³ Glik replied, "I am recording this. I saw you punch him."⁷⁴ An officer then asked Glik if the recording had audio capabilities.⁷⁵ When Glik stated that he was recording audio, he was then himself arrested

⁶⁵ *Id.*

⁶⁶ *Id.* at 263.

⁶⁷ *Glik*, 655 F.3d at 83; Jesse Harlan Alderman, *Before You Press Record: Unanswered Questions Surrounding the First Amendment Right to Film Public Police Activity*, 33 N. ILL. U. L. REV. 485, 489 (2013) [hereinafter *Before You Press*].

⁶⁸ *Commonwealth v. Manzelli*, 864 N.E.2d 566, 568 (Mass. App. Ct. 2007) (Jeffrey Manzelli convicted of illegal wiretapping and disorderly conduct for recording police during a protest on Boston Commons); Daniel Rowinski, *Police Fight Cellphone Recordings: Witnesses Taking Audio of Officers Arrested, Charged with Illegal Surveillance*, BOSTON GLOBE (Jan. 12, 2010) at 9 available at www.boston.com/news/local/massachusetts/articles/2010/01/12/police_fight_cellphone_recordings/?page=3 (Jon Surmacz charged for recording police breaking up a party); *Commonwealth v. Hyde*, 750 N.E.2d 963, 965 (Mass. 2001) (Michael Hyde prosecuted under Massachusetts's wiretapping statute for recording police during a traffic stop).

⁶⁹ Four months after Kelly was arrested.

⁷⁰ *Glik*, 655 F.3d at 79.

⁷¹ *Id.*

⁷² *Id.* at 80.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

for unlawful interception of an oral communication in violation of Massachusetts's wiretapping statute.⁷⁶

The Boston Municipal Court dismissed the criminal charge of violating the wiretapping statute, because the court reasoned Glik made no effort to conceal the recording.⁷⁷ Although all charges had been dropped or dismissed against Glik, he filed a civil rights action in federal court against the City of Boston and the individual officers that arrested him.⁷⁸ Specifically, the complaint included claims under 42 U.S.C § 1983 for violating Glik's First and Fourth amendment rights.⁷⁹ The defendants filed a motion to dismiss the action on the grounds that the First Amendment did not protect Glik's audio recording.⁸⁰ Additionally, the defendants claimed that the officer was entitled to qualified immunity because if the right did exist, it was not yet "clearly established."⁸¹

As part of the qualified immunity analysis, the First Circuit held that there was a First Amendment right to record police.⁸² The court stated that First Amendment protections extend past the text's enumerated rights to "encompass[] a range of conduct related to the gathering and dissemination of information."⁸³ The court noted several Supreme Court decisions which suggest that the right to gather and disseminate information applies to the professional press and an individual citizen holding a cell phone camera equally.⁸⁴ The court also observed that the First Circuit had previously recognized that videotaping public officials was a valid exercise of a First Amendment right.⁸⁵ In *Iacobucci*, a private citizen successfully filed a § 1983 claim after he was arrested for filming officials in the hallway outside of a public meeting after refusing an officer's demand to stop filming.⁸⁶ The *Iacobucci* opinion was decided primarily on Fourth Amendment grounds, however the First Circuit in *Glik* relied heavily on dicta in *Iacobucci* that suggested there was First Amendment protection for recording of public officials.⁸⁷

⁷⁶ *Id.*; MASS. GEN. LAWS ch. 272, § 99(C)(1).

⁷⁷ *Glik*, 655 F.3d at 80 (the Commonwealth was unable to satisfy the required element that the recording was made secretly).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 82.

⁸⁴ *Id.* at 83-84; see also *Branzburg*, 408 U.S. at 684 (press and public have equal rights under the First Amendment); *Houchins*, 438 U.S. at 16; *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999).

⁸⁵ *Glik*, 655 F.3d at 83-84; *Iacobucci*, 193 F.3d at 25.

⁸⁶ *Glik*, 655 F.3d at 83; *Iacobucci*, 193 F.3d at 25.

⁸⁷ *Glik*, 655 F.3d at 83-84; *Iacobucci*, 193 F.3d at 25.

The *Glik* opinion did mention, however, that the right to film police officers is not without limitation.⁸⁸ The right may be subject to content-neutral “reasonable time, place, and manner restrictions.”⁸⁹ While the court did not elaborate on what those restrictions might look like, they recognized that *Glik*’s actions fell “well within the bounds of the Constitution’s protections.”⁹⁰ Even more illuminating is the fact that the First Circuit did not award the officer qualified immunity.⁹¹ Unlike the Third Circuit, the First Circuit held that the right to record the police in public was “clearly established.”⁹²

2. *Gericke v. Begin*

On May 23, 2014, three years after *Glik* was decided, the First Circuit again addressed the right to record police in public.⁹³ In *Gericke v. Begin*,⁹⁴ Carla Gericke was charged under New Hampshire’s wiretapping statute⁹⁵ after she attempted to record a late-night traffic stop of her friend in another vehicle.⁹⁶ Officer Kelley attempted to pull over the vehicle of Gericke’s friend.⁹⁷ Gericke believed she was being pulled over so she, along with the caravanning friend, pulled over to the shoulder.⁹⁸ At that point, Officer Kelley instructed Gericke that he was detaining the other vehicle, at which time Gericke explained they were together and she would park in an adjacent parking lot to wait.⁹⁹ The officer then approached the other vehicle and removed the occupant after he stated he was carrying a concealed firearm.¹⁰⁰ At this time, Gericke walked to a fence that separated her from the other vehicle and announced to Officer Kelley that she was recording him.¹⁰¹ Officer Kelley then ordered Gericke back to her car and she complied.¹⁰²

According to Gericke she was never told to stop recording and continued to point the camera at the officer from her vehicle.¹⁰³

⁸⁸ *Glik*, 655 F.3d at 84.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 88.

⁹² *Id.* at 85 (“*Kelly* is clearly distinguishable on its facts; a traffic stop is worlds apart from an arrest on the Boston Common in the circumstances alleged.”).

⁹³ *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014).

⁹⁴ *Id.*

⁹⁵ See N.H. REV. STAT. ANN. § 570–A:2.

⁹⁶ *Gericke*, 753 F.3d at 3.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* At this time, unbeknownst to Officer Kelley, the recording device malfunctioned and was no longer working. *Id.*

¹⁰³ *Id.*

Officer Brandon Montplaisir then arrived at the scene and demanded that Gericke hand over the camera.¹⁰⁴ After Gericke refused, she was arrested for disobeying a police officer and violating the State's wiretapping statute.¹⁰⁵ Eventually Gericke's charges were dropped and she initiated a § 1983 action.¹⁰⁶ The District Court, following the precedent set in *Glik*, held that the right was clearly established as long as Gericke was not being disruptive.¹⁰⁷

The officers appealed and argued that the circumstances of a late night stop differed from the facts of *Glik*.¹⁰⁸ The Court of Appeals for the First Circuit once again held that there was a clearly established right to record police in a public area.¹⁰⁹ In doing so, the court reiterated *Glik*, "it is clearly established in this circuit that police officers cannot, consistently with the Constitution, prosecute citizens for violating wiretapping laws when they peacefully record a police officer performing his or her official duties in a public area."¹¹⁰ The court stated that they believed the First Amendment principles discussed in *Glik* were just as relevant in the context of a traffic stop as in a public square.¹¹¹ However, the court elaborated on what might be considered a reasonable restriction:

The circumstances of some traffic stops, particularly when the detained individual is armed, might justify a safety measure—for example, a command that bystanders disperse—that would incidentally impact an individual's exercise of the First Amendment right to film. Such an order, even when directed at a person who is filming, may be appropriate for legitimate safety reasons. However, a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties.¹¹²

The court noted here that there was never an order given to stop recording or any other restriction while Gericke was filming.¹¹³ Further, the court stated that the right was clearly established in

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 3-4.

¹⁰⁶ *Id.* at 4.

¹⁰⁷ *Id.* at 5.

¹⁰⁸ *Id.* at 6.

¹⁰⁹ *Id.* at 10.

¹¹⁰ *Id.* at 5.

¹¹¹ *Id.* at 7 ("Those First Amendment principles apply equally to the filming of a traffic stop and the filming of an arrest in a public park.")

¹¹² *Id.* at 8.

¹¹³ *Id.* at 9 ("Under Gericke's account, no order to leave the area or stop filming was given. Hence, we need not analyze whether a reasonable officer could have believed that the circumstances surrounding this traffic stop allowed him to give such an order.")

this case and the officers were not entitled to qualified immunity.¹¹⁴ The case was remanded to determine if Gericke's rights were in fact violated or if the officers were justified under the circumstances.¹¹⁵

C. Seventh Circuit

In a 2–1 decision, the Seventh Circuit, in *ACLU v. Alvarez*,¹¹⁶ affirmed the right to record police in public.¹¹⁷ Prior to initiation of the suit, several citizens had been arrested and prosecuted under the Illinois Eavesdropping Act for recording audio of police officers performing their official duties in public.¹¹⁸ The Illinois Eavesdropping statute was described by the majority of the court as “the broadest of its kind,” and made it illegal to record oral conversations without consent of all parties involved.¹¹⁹ The statute (unlike other states) punished not only secret, but also open recordings.¹²⁰

In 2010, the ACLU, in an attempt to detect and deter police misconduct, instituted a “police accountability program.”¹²¹ The ACLU's program set out to make audio and video recordings of police officers during a public protest when they spoke at a volume loud enough for bystanders to hear it.¹²² Concerned that the police accountability program would cause their members to be arrested, the ACLU decided not to implement the program.¹²³ In contrast to other circuit opinions involving the right to record police, the ACLU challenged the eavesdropping statute's application, seeking an injunction through a pre-enforcement action against Anita Alvarez, the State's Attorney for Cook County.¹²⁴

1. Majority Decision

The Seventh Circuit agreed with the ACLU on the constitutionality of the statute and instructed the district court to enter a preliminary injunction “blocking enforcement of the

¹¹⁴ *Id.* at 9-10.

¹¹⁵ *Id.* at 10.

¹¹⁶ 679 F.3d 583 (7th Cir. 2012), cert. denied, 133 S. Ct. 651 (2012).

¹¹⁷ *Id.* at 608.

¹¹⁸ *See id.* at 592 n.2; *see, e.g.*, *People v. Drew*, No. 10-CR-4601 (Cook Cnty. Cir. Ct. Ill. 2010); <http://www.aclu-il.org/aclu-v-alvarez22/>.

¹¹⁹ *Alvarez*, 679 F.3d at 595 n.4; *see also* 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, 533-45 (2011); Jesse Harlan Alderman, *Before You Press*, *supra* note 67 at 489.

¹²⁰ *Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012).

¹²¹ *Id.* at 588.

¹²² *Id.* at 588.

¹²³ *Id.* at 586.

¹²⁴ *Id.* at 586 (Cook County includes Chicago, Illinois).

eavesdropping statute as applied to audio recording of the kind [in the ACLU's police accountability program]."¹²⁵ The court held that the "act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording."¹²⁶ As applied to the ACLU's attempted police recording program, the statute restricted "an integral step in the speech process" and "interfere[d] with the gathering and dissemination of information about government officials performing their duties in public."¹²⁷

The court reasoned that the statute did not sufficiently advance the State's interest in protecting conversational privacy.¹²⁸ The ACLU had lobbied the court to impose strict scrutiny, however the court stated that intermediate scrutiny would likely be more appropriate because the statute was content-neutral on its face.¹²⁹ The court explained that generally, intermediate scrutiny applies when a law is content-neutral, serves an important public interest, and has a "reasonably close fit" between the means and ends of the law.¹³⁰ The court conceded that the statute protected an important privacy interest right, but still held that the statute's means were overbroad and not narrowly tailored.¹³¹ The statute criminalized activity that did not implicate any privacy interest, such as the ACLU's proposed program.¹³²

Additionally, the court was not persuaded by the State's Attorney's argument that the Eavesdropping statute "reduce[d] the likelihood of provoking persons during officers' mercurial encounters."¹³³ The court dismissed this argument by stating that the invalidation of the eavesdropping statute does not "immunize[] behavior that obstructs or interferes with effective law enforcement or the protection of public safety."¹³⁴ The court noted that the "police may order bystanders to disperse for reasons related to public

¹²⁵ *Id.* at 586.

¹²⁶ *Id.* at 595-96.

¹²⁷ *Id.* at 600.

¹²⁸ *Id.* at 604-608.

¹²⁹ *Id.* at 603-04; *see Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (Content based restrictions are subject to strict scrutiny, as opposed to content neutral regulations which receive the more deferential intermediate scrutiny standard); *see also U.S. v. O'Brien*, 391 U.S. 367, 376-77.

¹³⁰ *Alvarez*, 679 F.3d at 605.

¹³¹ *Id.* ("Under the Court's speech-forum doctrine, a regulatory measure may be permissible as a 'time, place, or manner' restriction if it is . . . narrowly tailored to serve a significant governmental interest . . .") (internal citations omitted).

¹³² *Id.* at 605-06.

¹³³ *Id.* at 607.

¹³⁴ *Id.*

safety,” however police “cannot issue a ‘move on’ order to a person *because* he is recording [the police].”¹³⁵

2. Judge Posner’s Dissent

Judge Posner, author of the dissenting opinion, sharply disagreed with his colleagues, stating that the majority had allowed “‘civil liberties people’ [to tell] police officers how to do their jobs.”¹³⁶ Judge Posner highlighted the privacy interests involved in invalidating the statute, although he conceded that police officers did not receive any expectation of privacy in public performance of their duties.¹³⁷ However, Judge Posner pointed to the privacy interest of the civilians¹³⁸ interacting with police officers that would have their privacy interests violated.¹³⁹ Judge Posner reasoned that privacy of citizens who communicate with the police is enough to afford police officers a reasonable expectation of privacy.¹⁴⁰ He provided the example of a police informant’s expectation of privacy as a basis for a police officer’s privacy.¹⁴¹

Judge Posner also expressed concern that invalidating the statute would raise safety concerns, “the ubiquity of recording devices will increase security concerns by distracting the police.”¹⁴² The judge stated that recording police would likely impair the ability of officers “both to extract information relevant to police duties and to communicate effectively with persons whom they speak with in the line of duty.”¹⁴³ Police could freeze if a recording distracted them during intense encounters with citizens, compromising public safety.¹⁴⁴ Judge Posner additionally felt that the majority had “cast[] a shadow” on electronic privacy statutes of other states and did not restrict the *qualified* right afforded by the First Amendment.¹⁴⁵

The majority addressed some of Judge Posner’s criticisms, arguing that their opinion did not cast a shadow on other electronic privacy statutes; instead the court pointed to the extremely broad

¹³⁵ *Id.*

¹³⁶ Steven A. Lutt, Note, *Sunlight Is Still the Best Disinfectant: The Case for a First Amendment Right to Record the Police*, 51 WASHBURN L.J. 349, 367 (2012) (citing the transcript from oral arguments).

¹³⁷ *Alvarez*, 679 F.3d at 611, 613 (Posner J., dissenting).

¹³⁸ *Id.* at 611 (these include suspects, bystanders, bloggers, professional media, crime victims, citizens looking for directions and citizen witnesses).

¹³⁹ *Id.* at 613.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 611.

¹⁴⁴ *Id.* at 611-612.

¹⁴⁵ *Id.* at 609, 611 (Judge Posner made specific mention to the fact that rights protected by the First Amendment are not unqualified and can be reasonably restricted).

nature of the Illinois statute, which was clearly an outlier.¹⁴⁶ The court also pointed out that the as-applied challenge consisted of only the ACLU's planned application, which would only pick up recordings audible to bystanders (not private recordings).¹⁴⁷ Judge Posner's restraint in recognizing a First Amendment right to record police underscores the incongruences among the circuits in this area.

3. *Alvarez Aftermath*

The Supreme Court denied a petition for certiorari in November of 2012.¹⁴⁸ Recently, the Illinois Supreme Court relied on the decision in *Alvarez* and struck down Illinois' eavesdropping statute as unconstitutional.¹⁴⁹

D. *Making Sense of the Circuit Opinions*

A survey of federal jurisprudence in this area demonstrates that citizens in the commenting circuits have some sort of First Amendment right to record police officers.¹⁵⁰ Some circuits are more willing to immediately recognize such a right, while others allude to such a right, but are hesitant to label it as "clearly established."¹⁵¹ However, no district or circuit court has stated that there is no First Amendment protection to record police.¹⁵² The Courts also universally agree that the right to record police in public is not unlimited.¹⁵³ Some courts have elaborated on what those reasonable restrictions might look like, while others have merely mentioned it could be limited by reasonable restrictions.¹⁵⁴ Possible reasonable restrictions mentioned by the circuits include: in the context of a

¹⁴⁶ *Id.* at 609 (Judge Posner criticism); *Alvarez*, 679 F.3d at 607-08 (noting the broad nature of the statute which is contrary to most state and federal electronic privacy statutes); *iPhone Era*, *supra* note 119, at 533-45 (survey of state electronic privacy statutes).

¹⁴⁷ *Id.*

¹⁴⁸ *Alvarez v. Am. Civil Liberties Union of Ill.*, 133 S. Ct. 651 (2012).

¹⁴⁹ *See People v. Clark*, 6 N.E.3d 154 (Ill. 2014); *see also People v. Melongo*, 6 N.E.3d 120 (Ill. 2014).

¹⁵⁰ *See supra* Part II.

¹⁵¹ *Id.*

¹⁵² *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir.) cert. denied, 133 S. Ct. 651 (2012) (discusses prior jurisprudence on the right to film police).

¹⁵³ *See supra* Part II.

¹⁵⁴ *See supra* Part II.

traffic stop,¹⁵⁵ non-expressive conduct,¹⁵⁶ and “move on” orders issued by police officers in the interest of safety.¹⁵⁷

The Third Circuit found a right to record, however it stated it was not yet “clearly established” in the circumstances of the decision in *Kelly*.¹⁵⁸ In contrast, the First Circuit shortly thereafter in *Glik* departed from this reasoning and found a “clearly established” right to record police in public.¹⁵⁹ Qualified immunity protects police when the right has not been clearly established and “gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects ‘all but the plainly incompetent or those who knowingly violate the law.’”¹⁶⁰ Thus the First Circuit determined, in their qualified immunity analysis, that the offending officer was either plainly incompetent or knew he was violating Glik’s and Gericke’s First Amendment rights.

With such a stark contrast in outcomes, it is hard to believe that the First Circuit determined that the right became clearly established after only four months between the arrests.¹⁶¹ Instead, the differences in the factual circumstances of the cases might account for the differences in outcomes.¹⁶² Kelly was arrested for filming during a traffic stop, while Glik was arrested for filming in a public square.¹⁶³ Although in *Gericke*, the First Circuit later extended the holding in *Glik* to the context of a traffic stop.¹⁶⁴ Gericke filmed the actual traffic stop from behind a fence outside of the vehicle.¹⁶⁵ The Third Circuit decision in *Kelly* involved a passenger in the vehicle the officer had detained.¹⁶⁶ Because the holding of *Kelly* was restricted to just the facts of the case, the circuits (read together) appear to draw a line at persons filming

¹⁵⁵ *Kelly*, 622 F.3d at 262.

¹⁵⁶ *Id.* The Seventh Circuit addresses this concern in *Alvarez*, stating:

‘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)).

¹⁵⁷ *Alvarez*, 679 F.3d at 607.

¹⁵⁸ *Kelly*, 622 F.3d at 266.

¹⁵⁹ *Glik*, 655 F.3d at 85.

¹⁶⁰ *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

¹⁶¹ Glik’s arrest was made four months after the arrest in *Kelly*.

¹⁶² *Glik*, 655 F.3d at 83-84; *Kelly*, 622 F.3d at 266.

¹⁶³ *Id.*

¹⁶⁴ *Gericke*, 753 F.3d at 9.

¹⁶⁵ *Id.*

¹⁶⁶ *Kelly*, 622 F.3d at 266.

from inside the vehicle. The safety concerns were weighed superior to First Amendment rights in the context of persons detained under a traffic stop, but not when the individual recording was outside of the detained vehicle. This is an interesting distinction that could be elaborated on more in future circuit decisions or in a future national standard.

IV. FUTURE NATIONAL STANDARD

A. *Reasonable Time, Place, or Manner Restrictions*

As the traffic stop restriction highlights, the circumstances of each case determines if the First Amendment protects filming the police. The fact-sensitive inquiries the circuits have engaged in makes it difficult for a citizen to determine when they would have a right to film the police. The discrepancy necessitates a national standard to put both citizens and police on notice what activities are afforded First Amendment protection.

Without a national comprehensive standard or guideline for what is protected conduct, the effect will be an overall chill on protected speech.¹⁶⁷ For instance, if a citizen travels into a different circuit, is it reasonable or prudent to expect that citizen to know what First Amendment protections are available to record police abuse? If a citizen feels apprehension on what they can and cannot record, it will in effect cause a citizen to refrain from recording (and thus limit the stock of publicly available information), even if a citizen has a First Amendment right to do so.

In structuring a national standard, a drafter will inevitably have to consider different problems that could arise in implementing bright line reasonable restrictions on the right to record police activity. The Supreme Court has stated that the government may impose reasonable restrictions on the “time, place, or manner” of exercising First Amendment rights, “provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”¹⁶⁸ The problem with the circuit decisions is that they allude to the fact that police officers may use *their discretion* to interject time, place, and manner restrictions.¹⁶⁹ The Supreme Court has held reasonable time, place, and manner restrictions cannot be used to justify overly broad police restrictions.¹⁷⁰ For example, in *City of Houston v. Hill*,

¹⁶⁷ See *supra* text accompanying note 25.

¹⁶⁸ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotations omitted); see also *Kelly*, 622 F.3d at 262.

¹⁶⁹ *Alvarez*, 679 F.3d at 607.

¹⁷⁰ *City of Houston v. Hill*, 482 U.S. 451, 462 (1987).

the court struck down an ordinance that restricted speech that would “interfere” with a police officer.¹⁷¹

As the Seventh Circuit majority mentions, police can order citizens to disperse if they are concerned with issues involving safety.¹⁷² They may not, however, issue a move on order for the sole reason the citizen was filming their activities.¹⁷³ Although, the First Circuit in *Gericke* noted that police may restrict the right to film police activity if an officer can determine that the “filming itself is interfering, or is about to interfere, with [an officer’s] duties.”¹⁷⁴

It appears the Seventh Circuit recognizes that police may order citizens to disperse, but not for the sole reason of filming. While the First Circuit adopts an approach that police may restrict for the sole reason of filming if the filming itself is interfering. After review of the relevant Supreme Court jurisprudence,¹⁷⁵ the Seventh Circuit’s view of reasonable restrictions should be adopted. The First Circuit’s articulated reasonable standard is ineffective because police will inevitably find that the filming itself is interfering for the same reasons Judge Posner outlined. Judge Posner believed that filming itself would freeze officers into inaction and distract them while dealing with potential dangerous citizen detentions. However the majority addressed and dismissed these arguments in *Alvarez* and fashioned a more ideal standard that filming itself is not *per se* a dangerous activity that can be regulated above First Amendment interests.

Additionally, the Court has already invalidated a statute that restricted conduct because it *interfered with* police activity in *Hill*.¹⁷⁶ Otherwise, police would use these “move on” orders under the guise of safety for every single instance they were filmed in public.¹⁷⁷ Under the First Circuit restriction, as Guitierrez’s incident illustrates, a police officer could claim that “[y]ou diverted my attention” because you are filming and thus lose First Amendment protection.

¹⁷¹ *Id.* at 471-72 (“[W]e are mindful that the preservation of liberty depends in part upon the maintenance of social order. But the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.”).

¹⁷² *Alvarez*, 679 F.3d at 607.

¹⁷³ *Id.*

¹⁷⁴ *Gericke*, 753 F.3d at 8.

¹⁷⁵ *See supra* Part I; *Hill*, 482 U.S. at 471-72.

¹⁷⁶ *Hill*, 482 U.S. at 471-72.

¹⁷⁷ The police would arbitrarily use the “move on” orders as they did the wiretapping and eavesdropping laws.

B. Proposed Standards

At least one author suggests imposing a standard for uniformed police in public.¹⁷⁸ The only restriction on the right to film police would be if the officer believes that the filming would “substantially interfere with the performance of the officer’s duties.”¹⁷⁹ The officer must articulate how the otherwise protected activity “substantially interfered” with the officer’s duties rather than just claiming the activity as a “distraction.” The standard arguably balances police safety concerns with a citizen’s right to record public information. Also, the Supreme Court has already endorsed a case-by-case standard for substantial interference in restricting First Amendment rights in *Tinker*.¹⁸⁰ However, the “substantial interference” standard does not address the problems inherent in *Tinker* and here, which is that the standard is not uniform enough and lacks objective criteria.¹⁸¹ Otherwise the model will have the same effect that Justice Thomas articulated in the school context: “students have a right to speak in schools except when they do not.”¹⁸²

The Department of Justice, in a letter to the Baltimore Police Department, suggested some basic elements for future police policy on the right to film police.¹⁸³ First, the policy must “affirmatively set forth the First Amendment right to record police activity,” accompanied by examples of places and situations where the right exists and does not exist.¹⁸⁴ The policy must also include a range of prohibited responses to citizens recording the police.¹⁸⁵ The policy should “clearly describe when an individual’s actions amount to

¹⁷⁸ Justin Welply, *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, 1106 (2013).

¹⁷⁹ *Id.* at 1106.

¹⁸⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

¹⁸¹ The *Tinker* “reasonable disruption standard” and the proposed “substantial interference standard” are both practically insufficient. If the right to film police standard were to be subject to a case-by-case analysis it would chill the conduct of uncertain citizen photographers. Also drawing a standard out of the school speech context of First Amendment jurisprudence is not a wise decision in light of how confusing the standard has become. See Melinda Cupps Dickler, *The Morse Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 363-64 (2007).

¹⁸² *Morse v. Frederick*, 551 U.S. 393, 418 (2007) (Thomas, J., concurring).

¹⁸³ 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 (May 14, 2012), available at www.justice.gov/crt/about/spl/documents/Sharp_ltr_5-14-12.pdf.

¹⁸⁴ *Id.* at 2-3.

¹⁸⁵ *Id.* at 5 (“Officers should be advised not to threaten, intimidate, or otherwise discourage an individual from recording police officer enforcement activities or intentionally block or obstruct cameras or recording devices.”).

interference with police duties” and that criticizing police does not constitute interference.¹⁸⁶ Additionally, officers should advise citizens of alternative “less-intrusive” locations to observe or record from.¹⁸⁷ The most notable suggestion is to have a supervisor on the scene before any arrests are made.¹⁸⁸

In drafting a uniform national standard, there must be some objective criteria in place to inform both police and citizens what rights can be exercised and what interests trump those rights in the situation. Imposing this “objective criteria” is continually frustrated by the fast paced nature of police interactions, such as Guitierrez’s encounter. When citizens are unsure if they have a right to record police interactions, their otherwise valid conduct will be chilled, hampering the free flow of information protected by the First Amendment. This is why it is imperative for a future national drafter to limit the infringement on other valid interests such as safety, while promoting the First Amendment principles enumerated in *Hill*.

V. ESTABLISHING RIGHT TO RECORD POLICE IS A PRUDENT POLICY DECISION

A prevailing argument against a citizen’s right to record police activity in public is that the police and the public’s privacy interests are violated by such conduct.¹⁸⁹ However, law enforcement agencies around the country have equipped individual police officers with recording technology to film the public while conducting their official duties.¹⁹⁰ Since most police departments have instituted some form of recording device on police officers and

¹⁸⁶ *Id.* at 5-7.

¹⁸⁷ *Id.* at 7.

¹⁸⁸ *Id.* at 7-8. This would most certainly deter arbitrary arrests.

¹⁸⁹ *Alvarez*, 679 F.3d at 611, 613 (Posner J., dissenting) (Judge Posner also suggests that private citizens who interact with police may have their privacy interests violated).

¹⁹⁰ Howard M. Wasserman, *Orwell’s Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 600-01; TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 318 (2009). Agencies institute these recording procedures to deter police misconduct and to establish an objective evidentiary record in such contexts as interrogations and traffic stops. See Ric Simmons, *Why 2007 Is Not Like 1984: A Broader Perspective on Technology’s Effect on Privacy and Fourth Amendment Jurisprudence*, 97 J. CRIM. L. & CRIMINOLOGY 531, 532 (2007); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 494 (1998); Jessica M. Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 COLUM. J. L. & ARTS 107, 116 (1995).

police cars, it displays the inherent double standard the State wishes to employ.¹⁹¹

Studies have shown that these programs do work and police departments with officer-worn recording devices have seen a drastic decrease in officer-related incidents and formal complaints filed with police departments.¹⁹² The only reason for police departments to suppress citizen recordings is to have just one perspective, the officer's perspective. The State would prefer to have its side of alleged incidents on the evidentiary record without any opposing viewpoints.¹⁹³ As Jesse Alderman argues, the probative value of these recordings makes them essential to trials and hearings.¹⁹⁴

Many legal scholars have noted filming police conduct has helped to change police practices in the past, one example being the Rodney King beating.¹⁹⁵ In response to the citizen video, a commission investigated and determined that the officer's report of the incident was falsified, and that it had prevented any subsequent complaint filed from receiving the due diligence it should have otherwise received.¹⁹⁶ Likewise, if a citizen had recorded the incident involving Michael Brown's death in Ferguson, MO, it would allow the public a more accurate depiction of the events that day.¹⁹⁷

¹⁹¹ The "do as I say, not as I do" methodology with respect to privacy concerns in this context is contradictory. If these police filming programs can increase safety, then why would additional recording devices not also increase safety as well?

¹⁹² Rory Carroll, *California Police Use of Body Cameras Cuts Violence and Complaints*, THE GUARDIAN, available at <http://www.theguardian.com/world/2013/nov/04/california-police-body-cameras-cuts-violence-complaints> (after cameras were introduced in February 2012, public complaints against officers plunged 88 percent compared with the previous 12 months. Officers' use of force fell by 60 percent.) There is no reason to think that a second perspective from a private citizen would not additionally increase safety and professionalism in police interactions.

¹⁹³ This does not promote any of the First Amendment principles and encourages vigilante police to continue to trample civil rights. See RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* (2013) (a fantastic resource on the battlefield mentality of police officers which encourages abuses of discretion).

¹⁹⁴ *iPhone Era*, *supra* note 119, at 526-31 (many agencies have instituted a policy of recording during several phases of criminal investigations to preserve the evidentiary record).

¹⁹⁵ Mark Brncik, Note, *A Case for Non-Enforcement of Anti-Recording Laws Against Citizen Recorders*, 62 CASE W. RES. L. REV. 485, 503 (2011).

¹⁹⁶ *Id.*; INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT ii (1991) [hereinafter LAPD Report], available at www.parc.info/client_files/Special%20Reports/1%20-%20Christopher%20Commision.pdf. (videotape was key factor that lead to the investigation of the incident and brought the police abuse to the attention of the public, thus increasing the stock of public information).

¹⁹⁷ James Nye, *Conversation recorded by bystander just moments after Michael Brown shooting casts doubt on claims the teen surrendered to Officer Darren Wilson*, DAILY MAIL (August 17, 2014), available at

Instead, citizens and police alike are left to speculate what actually happened in Mr. Brown's final moments. With the increase of technology available for citizen recordings, the criminal justice system as a whole would benefit from the established right.¹⁹⁸ The right to record police in public is a prudent policy decision because it promotes practical evidentiary interests, as well as deterring police misconduct.

VI. CONCLUSION

All courts have held there is a right to record police activity in public, and that a reasonable restriction on this right exists. First Amendment jurisprudence supports the recognized right to film police activity as articulated by the circuits. Some commenting circuits have held the right is clearly established, while others have declined to extend their holdings so far. Practically, citizens are restrained from freely exercising their right to film police activity in public even in circuits that have found the right clearly established. Because reasonable restrictions have not yet been clearly articulated, citizens have the recourse to film the police and merely hope that their unique situation is afforded First Amendment protections. Such uncertainty will inevitably lead to a chilling effect on the protected activity and encourage police officers to continue to limit the right to film police in public. The police could also potentially be liable for civil rights violations and a citizen may have to deal with the unflattering prospect of being detained or even arrested for this activity. A national standard could alleviate the confusion and issues for both citizens and police alike. The standard should affirmatively memorialize such a right, as well as articulate objective reasonable restrictions to prevent a chilling of a citizen's exercise of valid First Amendment conduct.

www.dailymail.co.uk/news/article-2727321/Conversation-recorded-bystander-just-moments-Michael-Brown-shooting-casts-doubt-claims-teen-surrendered-Officer-Darren-Wilson.html

¹⁹⁸ Alexis Madrigal, *Policing the Police: The Apps That Let You Spy on the Cops*, THE ATLANTIC (June 23, 2011), available at www.theatlantic.com/technology/archive/2011/06/policing-the-police-the-apps-that-let-you-spy-on-the-cops/240916.

