HEINONLINE

DATE DOWNLOADED: Sat Apr 6 19:17:40 2024
SOURCE: Content Downloaded from HeinOnline

Citations:
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.
Geoffrey J. Derrick, Qualified Immunity and the First Amendment Right to Record Police, 22 B.U. PUB. INT. L.J. 243 (2013).

ALWD 7th ed.
Geoffrey J. Derrick, Qualified Immunity and the First Amendment Right to Record Police, 22 B.U. Pub. Int. L.J. 243 (2013).

APA 7th ed.
Derrick, G. J. (2013). Qualified immunity and the first amendment right to record police. Boston University Public Interest Law Journal, 22(2), 243-292.

Chicago 17th ed.
Geoffrey J. Derrick, "Qualified Immunity and the First Amendment Right to Record Police," Boston University Public Interest Law Journal 22, no. 2 (Summer 2013): 243-292

McGill Guide 9th ed.
Geoffrey J. Derrick, "Qualified Immunity and the First Amendment Right to Record Police" (2013) 22:2 BU Pub Int LJ 243.

AGLC 4th ed.
Geoffrey J. Derrick, 'Qualified Immunity and the First Amendment Right to Record Police' (2013) 22(2) Boston University Public Interest Law Journal 243

MLA 9th ed.
Derrick, Geoffrey J. "Qualified Immunity and the First Amendment Right to Record Police." Boston University Public Interest Law Journal, vol. 22, no. 2, Summer 2013, pp. 243-292. HeinOnline.

OSCOLA 4th ed.
Geoffrey J. Derrick, 'Qualified Immunity and the First Amendment Right to Record Police' (2013) 22 BU Pub Int LJ 243 Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Provided by:
Fineman & Pappas Law Libraries

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at https://heinonline.org/HOL/License
-- The search text of this PDF is generated from uncorrected OCR text.
-- To obtain permission to use this article beyond the scope of your license, please use: Copyright Information

ARTICLES

QUALIFIED IMMUNITY AND THE FIRST AMENDMENT RIGHT TO RECORD POLICE

GEOFFREY J. DERRICK*

ABSTRACT 244
I. INTRODUCTION 244
II. THE RESPONSE OF POLICE OFFICERS NATIONWIDE TO CITIZEN RECORDING 252
III. THE FIRST AMENDMENT RIGHT TO RECORD POLICE OFFICERS IN PUBLIC 256
A. *The Free and Open Discussion of Government Affairs* 258
B. *The Freedom of the Press* 261
C. *Expressive Conduct and Prior Restraint Doctrine* 264
D. *Intermediate Scrutiny: Balancing Privacy and Speech Rights* 267
IV. CONSTITUTIONAL TORTS AS THE VEHICLE FOR DEVELOPMENT OF THE FIRST AMENDMENT RIGHT TO RECORD 276
V. THE NEED FOR *SAUCIER V. KATZ*'S MANDATORY SEQUENCING IN FIRST AMENDMENT CONSTITUTIONAL TORTS 283
VI. CONCLUSION 290

* Fellow, Center for Appellate Litigation, New York, NY. J.D., *magna cum laude*, 2012, Boston University School of Law; B.S., 2007, Northwestern University. Thank you to Professor Jack M. Beermann for sparking my interest in qualified immunity issues and for editing numerous drafts of this article. Thank you to Professor Karen Blum for first exposing me to policing issues, and Brigitt Keller and Sarah Wunsch for showing me how civil rights attorneys advocate for police accountability. Thank you to Howard Friedman and David Milton for staffing me on the *Glik* case as a summer law clerk in 2010 and for teaching me about federal civil rights litigation. Thank you to Joshua Matz and Nicholas J. Giles for thoughtful feedback on drafts of this article. Thank you to my father, Dennis P. Derrick, for teaching me about the law at an early age and cultivating my desire to fight for justice in my career as an attorney. Thank you to the editors of the *Public Interest Law Journal* for their diligent work to make this a better piece. Thank you to my family for their consistent encouragement and most of all to Lauren M. Weinstein, my wife, for her unwavering love and support that made this article possible. All remaining errors are my own.

ABSTRACT

Two Circuits have recently affirmed the First Amendment right to record police officers in public.[1] *These decisions arose in the context of a civil rights lawsuit brought by citizens arrested or threatened with arrest for recording the police where the defendant government officials raised a qualified immunity defense.* Pearson v. Callahan *gives judges considering such a defense the discretion to never reach the merits of the plaintiff's claim, deciding only that the right a plaintiff asserts that a government actor violated was not "clearly established" in their Circuit at the time of the alleged violation.*[2] *The Court's opinion in* Pearson *uprooted* Saucier v. Katz,[3] *which required courts to address the merits before deciding whether a defendant is entitled to qualified immunity because the right was not "clearly established" in their Circuit.*

While two Circuits laudably addressed the merits of whether the First Amendment right to record police officers exists, judges in all other Circuits have avoided the merits and held that the right was not "clearly established" in their Circuit. This article recommends a return to Saucier*'s mandatory sequencing of the qualified immunity analysis in First Amendment cases because immunity findings in those cases, without a consideration of the merits, chill protected speech by leaving the First Amendment right in permanent limbo.*

I. INTRODUCTION

Citizens nationwide have begun using cell phones to make audio and audiovisual recordings of police officers in public in order to document police misconduct and police heroism alike.[4] Officers in some states have responded to these recordings by arresting citizens for violating state wiretapping statutes that prohibit audio recordings absent the consent of every recorded party[5] (so-

---

[1] Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012); Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011).

[2] 129 S. Ct. 808 (2009).

[3] 533 U.S. 194 (2001).

[4] *See, e.g.*, Demian Bulwa, *Student's Video Given to Police Considered Best Look at Killing*, S.F. CHRON., May 18, 2009, at A5; Jim Dwyer, *Videos Challenge Hundreds of Convention Arrests*, N.Y. TIMES (Apr. 12, 2005), http://www.nytimes.com/2005/04/12/nyregion/12video.html; John Eligon & Colin Moynihan, *Police Officer Seen on Tape Shoving a Bicyclist Is Indicted*, N.Y. TIMES, Dec. 16, 2008, at A33; Jeffrey P. Hermes, *Another Go-Round with Recording the Police in Massachusetts*, CITIZEN MEDIA LAW PROJECT (Nov. 19, 2012), http://www.citmedialaw.org/blog/2012/another-go-round-recording-police-massachusetts.

[5] Only audio or audiovisual recordings implicate state and federal wiretapping laws, not the video accompanying the audio. *See, e.g.*, 18 U.S.C. § 2511(1)(a) (criminalizing the interception of "wire, oral . . . communication"); MASS. GEN. LAWS ch. 272 § 99(C)(1) (2008) (criminalizing "interception of any wire or oral communication"); 720 ILL. COMP STAT. § 5/

called "two-party consent" or "all party consent"[6] statutes).[7] In states without two-party consent statutes where police officers cannot substantiate wiretapping charges, police officers have arrested citizens who record them under catchall criminal statutes, such as statutes that prohibit interfering with a police investigation,[8] disorderly conduct,[9] refusing to comply with a police order,[10] or stalking.[11]

These nationwide arrests have triggered civil litigation concerning the First Amendment right to record public citizen-police encounters. Several individuals arrested or threatened with arrest under state wiretapping statutes have brought constitutional tort[12] lawsuits under 42 U.S.C. § 1983 alleging viola-

---

14-2(a)(1) (2006) (making it a felony to audio record "all or any part of any conversation"). Video recordings that contain no audio component are not subject to criminal penalties for wiretapping.

[6] "Two-party" or "all party" consent language in state wiretapping statutes means that every party to the communication must give affirmative consent to a recording for it to be lawful.

[7] *See, e.g.*, John M. Guilfoil, *ACLU Files Suit Over Cellphone Video of Police*, BOS. GLOBE (Feb. 1, 2010, 6:51 PM), http://www.boston.com/news/local/breaking_news/2010/02/_wwwbostoncomne.html; Peter Hermann, *Judge Says Man Within Rights to Record Police Traffic Stop, Charges Alleging Wire Tap Violation Thrown Out*, BALT. SUN (Sept. 27, 2010), http://articles.baltimoresun.com/2010-09-27/news/bs-md-recorded-traffic-stop-20100927_1_police-officers-plitt-cell-phones; Tal Kopan, *Judge Enters Permanent Order Allowing Recording of Police*, POLITICO.COM (Dec. 21, 2012, 5:12 PM), http://www.politico.com/blogs/under-the-radar/2012/12/judge-enters-permanent-order-allowing-recording-of-152651.html; Amanda Raus, *Wallingford Man Arrested for Filming New Haven Police*, NBC CONNECTICUT (Nov. 12, 2010, 11:30 PM), http://www.nbcconnecticut.com/news/local-beat/Wallingford-Man-Arrested-for-Filming-New-Haven-Police-107617839.html.

[8] *See, e.g.*, Iacobucci v. Boulter, 193 F.3d 14, 25 (1st Cir. 1999) (finding that plaintiff did not interfere with any police activities because he had a right to be at the public place where he filmed public officials).

[9] *See, e.g.*, Bryant v. Crowe, 697 F. Supp. 2d 482, 483-85 (S.D.N.Y. 2010) (describing the arrest of a citizen recorder for "disorderly conduct, resisting arrest and harassment" who used an obscenity while recording police officers who were making an arrest).

[10] *See, e.g.*, Adkins v. Guam Police Dep't, No. 09-00029, 2010 WL 3385180, at *8-10 (D. Guam Apr. 22, 2010), *report and recommendation adopted in part, rejected in part*, No. 09-00029, 2010 WL 3385176 (D. Guam Aug. 24, 2010) (discussing an arrest for a citizen photographer's refusal to comply with an officer's order to forfeit his cellular phone after he photographed police).

[11] *See, e.g.*, Gravolet v. Tassin, No. 08-3646, 2009 WL 1565864, at *3-4 (E.D. La. June 2, 2009) (discussing plaintiff charged with stalking a police officer for his videotaping of the officer while on duty).

[12] The term "constitutional torts" refers to civil rights lawsuits against state/local officials as well as federal officials brought by individuals to remedy violations of their personal rights under the federal Constitution. The "Ku Klux Klan Act," or the Civil Rights Act of 1871, sec. 1, 42 U.S.C. § 1983 (2006), provides the right of action to sue persons acting under the color of state law for such violations in federal court while federal common law,

tions of the First Amendment.[13] The police officers named as defendants in their individual capacities[14] in these lawsuits have uniformly raised a qualified immunity defense, alleging that the asserted First Amendment right was not "clearly established" in the Circuit at the time of the citizen's arrest.[15]

Qualified immunity is a common law doctrine that shields government officials from liability for civil damages in constitutional tort cases.[16] A plaintiff can overcome an official's qualified immunity defense only if (1) the complaint's allegations state a federal constitutional violation, and (2) the constitutional right in question was clearly established at the time of the alleged violation.[17] The "constitutional violation" prong of the qualified immunity inquiry requires the plaintiff to allege facts that, if proven at trial, would constitute a violation of a right guaranteed by the federal Constitution. The "clearly established" prong of the qualified immunity inquiry requires that the right be one about which a reasonable government official in the defendant's position should have known.[18] A right is "clearly established" if the government offi-

---

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), provides the right of action to sue federal officials for such violations in federal court. For the purposes of this note, the terms "police officer," "law enforcement officer," "officer," and "police" refer interchangeably to a government official acting under the color of state law, thus satisfying a necessary condition for the § 1983 right of action.

[13] *See, e.g.*, Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012); Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011); Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010); Szymecki v. Houck, 353 F. App'x 852 (4th Cir. 2009) (per curiam); Mesa v. City of New York, No. 09 CIV. 10464 (JPO), 2013 WL 31002 (S.D.N.Y. Jan. 3, 2013).

[14] The act of naming officers in their individual capacities signals to the Court that the plaintiff is advancing an officer suit that evades the state's sovereign immunity under *Ex Parte Young*, 209 U.S. 123 (1908).

[15] *See supra* note 13.

[16] Qualified immunity is a form of official immunity that affords government officials immunity from lawsuits by plaintiffs alleging that the government officials violated their constitutional rights. The Supreme Court created qualified immunity doctrine to decrease the social costs that would flow from a scheme where government officials were strictly liable for the damages of constitutional rights violations. It explained this rationale for qualified immunity doctrine in *Harlow v. Fitzgerald* as follows:

> [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."

457 U.S. 800, 814 (1982) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

[17] *See* Saucier v. Katz, 533 U.S. 194, 194 (2001), *overruled in part by* Pearson v. Callahan, 129 S. Ct. 808, 817 (2009).

[18] Qualified immunity protects a government official from constitutional tort liability on-

cial had "fair warning" that his or her actions violated a right protected by the federal Constitution.[19]

The Supreme Court's 2001 decision in *Saucier v. Katz* required that courts in qualified immunity cases assess whether the plaintiff had established a constitutional violation before addressing whether the right the plaintiff claims the government official violated was clearly established.[20] *Saucier* followed several qualified immunity cases in which the Court held that the law stagnates when

---

ly when a reasonable government official would not have known that her actions would violate a constitutional right that was "clearly established" at the time of the alleged violation. Courts will only grant immunity when the state actor's "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *See Pearson*, 129 S. Ct. at 815 (quoting *Harlow*, 457 U.S. at 818). Alongside the equilibrium rationale for qualified immunity findings, see *supra* note 16, the rationale for overcoming a qualified immunity defense is that while officers cannot be expected to know every small change in legal doctrine affecting citizens' rights, they should be expected to know about rights that are "clearly established."

[19] *See* Hope v. Pelzer, 536 U.S. 730, 739 (2002). The Supreme Court has most recently defined "clearly established" as a "robust consensus of cases of persuasive authority" that renders the right "beyond debate." Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2083, 2084 (2011) (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999)) (internal quotation marks omitted). Other post-*Hope* cases indicate confusion over how to determine whether a law is clearly established because there is inevitably an unclear relationship between officer conduct in the field and the qualified immunity precedent. For example, the Eleventh Circuit in *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002), held that courts look to "precedent that is tied to the facts" and whether the instant facts are "fairly distinguishable." *Id.* at 1351-52. Several scholars have endorsed the Eleventh Circuit's approach to the "fair warning" language in *Hope*. *See, e.g.*, Erwin Chemerinsky & Karen M. Blum, *Fourth Amendment Stops, Arrests and Searches in the Context of Qualified Immunity*, 25 TOURO L. REV. 781, 789-91 (2009); John C. Jeffries, *What's Wrong With Qualified Immunity?*, 62 FLA. L. REV. 851, 853-54 (2010).

However, the way courts have defined whether a right is "clearly established" is far from uniform. *Compare* Sorrels v. McKee, 290 F.3d 965, 971 (9th Cir. 2002) ("[U]npublished decisions of district courts may inform our qualified immunity analysis."), *with* Walton v. City of Southfield, 995 F.2d 1331, 1336 (6th Cir. 1993) ("[I]t is only in extraordinary cases that we can look beyond Supreme Court and Sixth Circuit precedent to find clearly established law."); Marsh v. Butler Cnty., 268 F.3d 1014, 1032 n.10 (11th Cir. 2001)) ("[W]hen case law is needed to 'clearly establish' the law applicable to pertinent circumstances, we look to decisions of the U.S. Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state.").

[20] *See Saucier*, 533 U.S. at 201 ("If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established."). *Saucier* thus mandated a sequential inquiry where courts are required to consider the merits of constitutional claims before determining whether the defendant officer is entitled to qualified immunity.

courts only address whether the right was "clearly established" at the time of the alleged violation.[21] In 2009, however, *Pearson v. Callahan* abandoned *Saucier*'s mandatory sequencing, known as the "rigid order of battle," in favor of judicial discretion to assess either the merits or the "clearly established" prong first.[22] *Pearson* identified numerous problems with *Saucier*'s rigid order of battle, but gave lower courts discretion to assess the constitutional merits of an alleged constitutional violation where doing so would "promote[ ] the development of constitutional precedent."[23]

Pearson did not provide lower courts any guidance concerning the types of constitutional cases in which they ought to reach the merits.[24] In fact, *Pearson*'s reliance on the "general rule of constitutional avoidance" counsels lower federal courts not to reach the merits of a right unless that right is already "clearly established" in the Circuit.[25] Since *Pearson*, the Courts of Appeals have opted to address the second prong of the *Saucier* qualified immunity analysis and avoid the merits in a wide variety of civil rights lawsuits.[26]

The doctrinal shift from *Saucier* to *Pearson* coincides with the increase in civil rights litigation nationwide concerning the First Amendment right to record police officers in public.[27] Two recent cases, *American Civil Liberties*

---

[21] *See, e.g.*, City of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998) (finding the merits determination necessary "to escape from uncertainty" in the clearly established prong); Siegert v. Gilley, 500 U.S. 226, 232 (1991) (describing the merits determination as a "necessary concomitant" to the clearly established prong).

[22] *See Pearson*, 129 S. Ct. at 817 (holding "that a mandatory, two-step rule for resolving all qualified immunity claims should not be retained").

[23] *Id.* at 818 (noting that the *Saucier* two-step procedure "is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable").

[24] *See, e.g.*, Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 142 167-68 (2009) ("By leaving the decision whether to reach the constitutional merits to the apparently standardless and unreviewable discretion of the lower courts, what *Pearson* put in place is deeply problematic.").

[25] *See Pearson*, 129 S. Ct. at 821.

[26] *See, e.g.*, Kovacic v. Villarreal, 628 F.3d 209, 213-14 (5th Cir. 2010) (substantive due process); Melendez-Garcia v. Sanchez, 629 F.3d 25, 35-36 (1st Cir. 2010) (substantive due process); Redd v. Wright, 597 F.3d 532, 536 (2d Cir. 2010) (First Amendment religion clauses); *Kelly*, 622 F.3d at 263 (First Amendment right to videotape police); Doe *ex rel.* Johnson v. S.C. Dep't of Soc. Servs., 597 F.3d 163, 175-77 (4th Cir. 2010) (substantive due process); Rasul v. Myers, 563 F.3d 529, 529-30 (D.C. Cir. 2009) (procedural due process and Eighth Amendment rights of Guantanamo Bay detainees); Chaklos v. Stevens, 560 F.3d 705, 711, 716 (7th Cir. 2009) (First Amendment retaliation); Norman v. Schuetzle, 585 F.3d 1097, 1111 (8th Cir. 2009) (substantive due process); Ewing v. City of Stockton, 588 F.3d 1218, 1231 (9th Cir. 2009) (Fourth Amendment and substantive due process).

[27] This article uses the terms "First Amendment right to record," "First Amendment right to record police officers in public," "citizen recordings of the police in public," "citizen recordings," and "right-to-record" interchangeably to refer to recordings that do not interfere

Union of Illinois v. Alvarez, 679 F.3d 583 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012), and *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), have affirmed a First Amendment right to record police in public. Most other lower federal courts to address the issue since *Pearson* have avoided the merits of whether arresting or threatening to arrest citizens for recording the police violates the First Amendment, instead finding a qualified immunity defense because the First Amendment right to record was not clearly established in their respective Circuits.[28] Indeed, the Circuits are split over whether the First Amendment right to record police is clearly established in their case law.[29] The uneven

---

with police activity and do not fall within a constitutionally accepted privacy limitation on recording. For example, simply holding a camera, without taking further action, would not constitute interference in most circumstances. Also, an accepted limitation on citizen recording of police in public already exists when police talk to a sexual assault victim or when the police uncover a dead body. Note, however, that in those situations it is another citizen's privacy interest that counterbalances a citizen recorder's First Amendment interest, not the police officer's privacy interest while performing his or her public duties.

[28] *See, e.g.*, *Kelly*, 622 F.3d at 259 n.3 (stating, "[s]hould the Supreme Court decide that *Saucier* sequencing is necessary in First Amendment cases or any other type of case, it may establish such a rule. It is not our place to do so in light of *Pearson*, and, consequently, the District Court did not abuse its discretion when it bypassed the constitutional question and proceeded to the clearly established prong."); Szymecki v. Houck, 353 F. App'x 852, 853 (4th Cir. 2009) (per curiam); Adkins v. Guam Police Dep't, No. 09-00029, 2010 WL 3385180, at *8-10 (D. Guam Apr. 22, 2010), *report and recommendation adopted in part, rejected in part*, No. 09-00029, 2010 WL 3385176 (D. Guam Aug. 24, 2010); Banks v. Gallagher, No. 3:08-1110, 2010 WL 1903597, at *11-12 (M.D. Pa. Mar. 18, 2010), *report and recommendation adopted*, No. 3:08-1110, 2010 WL 1903596 (M.D. Pa. May 10, 2010); Matheny v. Cnty. of Allegheny Pa., No. 09-1070, 2010 WL 1007859, at *5-6 (W.D. Pa. Mar. 16, 2010); Gravolet v. Tassin, No. 08-3646, 2009 WL 1565864, at *3-4 (E.D. La. June 2, 2009).

[29] The First, Seventh, Ninth and Eleventh Circuit Courts of Appeals have upheld a First Amendment right to openly record. *See* Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 600 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012) ("In short, the eavesdropping statute restricts a medium of expression—the use of a common instrument of communication—and thus an integral step in the speech process. As applied here, it interferes with the gathering and dissemination of information about government officials performing their duties in public. Any way you look at it, the eavesdropping statute burdens speech and press rights and is subject to heightened First Amendment scrutiny."); Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) ("The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within [First Amendment] principles. 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.' ") (citations omitted); Fordyce v. City of Seattle, 55 F.3d 436, 439-40 (9th Cir. 1995) (upholding a "First Amendment right to film matters of public interest"); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing a "First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct"). *See also*

recognition of this federal right is likely to generate further litigation in the federal courts and make it a recurring constitutional question that has important consequences for both First Amendment doctrine and the traditional role of citizens to monitor the conduct of government officials.

Pearson's flexible qualified immunity analysis impedes the resolution of this open issue because the unguided discretion of lower courts may never result in adjudication on the merits. The common law development of this and other federal constitutional rights ossifies when courts repeatedly reach the question of immunity but not the merits.[30] The current nationwide civil rights litigation concerning the First Amendment right to record police officers in public illustrates the pressing need for standards to guide judicial discretion over whether to reach the merits in First Amendment cases.[31]

Judges that choose to decide these cases on immunity grounds—that the First Amendment is not "clearly established" in their Circuit—risk chilling protected speech by leaving the right in limbo. Citizens are less likely to record police in two-party consent states if First Amendment doctrine is not sufficient-

---

Iacobucci v. Boulter, 193 F.3d 14, 25 (1st Cir. 1999) (stating that it was an "exercise of . . . First Amendment rights" to record public officials conversing in the lobby of a public building).

On the other hand, the Third and Fourth Circuit Courts of Appeals have found no such "clearly established" First Amendment right. *See Kelly*, 622 F.3d at 263; *Szymecki*, 353 F. App'x at 853-54.

[30] *See, e.g.*, Beermann, *supra* note 24, at 141. *See also* John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 408-11 (1999) (arguing that "merits-bypass" has a "law-freezing" effect); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 49 (2002) (offering the following syllogism on immunity rulings that leave the merits undecided: "To say that a case is close is to say that the law is not well established; to say that the law is not well-established is to say that the defendant is entitled to qualified immunity; to say that the defendant is entitled to qualified immunity is to say that the Court need not resolve the merits of the close case. This nearly circular analysis could serve to stagnate the substance of constitutional law almost indefinitely."); Mary Catherine Roper, *3rd Circuit Police Videotaping Case Leaves Uncertainty in Its Wake*, LEGAL INTELLIGENCER ONLINE (Oct. 25, 2010), http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202473842293 (explaining ossification of the right to record succinctly in this way: "Officer A contends that the right to videotape police is not clearly established and the judge, without deciding if there is such a right, agrees that the law in that regard is not clearly established and that Officer A is entitled to qualified immunity. Case dismissed. A year later, when you sue Officer B, the judge looks at her earlier opinion and sees that the law is no clearer now than it was a year ago. Case dismissed. And when you sue Officer C the law is no clearer than it was in the previous two cases. Case dismissed. And so on.").

[31] The First Amendment right to openly record police activity in public spaces arises almost exclusively in constitutional tort proceedings because police often drop wiretapping charges brought against citizen recorders, eliminating the development of the right as a First Amendment defense to criminal charges.

ly developed in their Circuit to provide a defense to wiretapping charges or to sustain a later civil lawsuit.

The thesis of this article is that the unique consequence of chilling protected speech that flows from immunity findings in First Amendment qualified immunity cases demands *Saucier*'s merits-first adjudication. *Saucier*'s mandatory sequencing would counteract the ossification of the First Amendment right to record because a determination of whether the right actually exists is the strongest evidence for future courts in assessing whether such a right was "clearly established" in the Circuit.[32] At the very least, courts deciding civil rights lawsuits alleging a violation of the First Amendment should use their discretion under *Pearson* to consider whether an immunity finding might have a chilling effect.

Qualified immunity doctrine is a trans-substantive barrier to suits against government officials insofar as it applies equally to all underlying federal rights.[33] But the chilling consideration arises only in qualified immunity cases concerning First Amendment rights, suggesting an analysis tailored to the First Amendment. A rights-specific analysis does not mean that an officer's immunity is more or less strong depending on the right involved.[34] Rather, mandating *Saucier*'s merits-first procedure in First Amendment cases would harness *Pearson*'s unguided discretion and better notify citizens about the extent of their recording rights.

This article proceeds as follows. Part II explores what police officers have done in reaction to citizen recording, particularly arrests for wiretapping and catchall crimes. Part III describes several bases in First Amendment doctrine for the right to record police officers in public. Part IV examines municipal liability and injunctive remedies as alternative routes under § 1983 for adjudicating the merits of the First Amendment right to record.[35] Part V discusses ramifications of *Pearson* for qualified immunity in First Amendment right-to-

---

[32] For an example of the *Saucier* procedure in a case concerning the First Amendment right to record police officers, see *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing a "First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct").

[33] *See, e.g.*, Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 490 (2011).

[34] Some scholars suggest that the trans-substantive character of qualified immunity is unbreakable. *See id.* ("In theory, it would be possible for the Supreme Court (or Congress) to make immunity—or the degree of immunity that an official can claim—depend on the right that the official allegedly violated. The Court, however, has never taken this approach. At the very least, trans-substantivity is a feature of official immunity doctrine as we have always known it."). This article merely calls for a return to *Saucier*'s procedure in First Amendment cases, not a change to the merits of the qualified immunity analysis.

[35] Municipalities are liable for constitutional torts where a plaintiff proves the existence of a "policy" or "custom" of the municipality that caused the constitutional violation at issue. Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658 (1978).

record cases and responds to the concerns about the mandatory *Saucier* procedure raised in *Pearson*. Part VI concludes by recommending a return to *Saucier*'s mandatory sequencing of the qualified immunity analysis in First Amendment cases because immunity findings in those cases, without a consideration of the merits, chill protected speech by leaving the First Amendment right in permanent limbo.

II. THE RESPONSE OF POLICE OFFICERS NATIONWIDE TO CITIZEN RECORDING

Current constitutional tort litigation centers on whether the First Amendment permits two-party consent state wiretapping statutes to criminalize citizen recordings of police in public. State legislatures enacted these restrictive laws on audio recordings following the initial recognition of citizen privacy rights against government eavesdropping by the Warren Court in the 1960s.[36] Justice Harlan's dissent in *Katz v. United States*[37] created a two-pronged test for determining when a private conversation is protected from eavesdropping by the Fourth Amendment: (1) if "a person ha[s] exhibited an actual (subjective) expectation of privacy" and (2) "the expectation [is] . . . one that society is prepared to recognize as 'reasonable.'"[38] Congress affirmed *Katz*'s personal privacy right by passing the federal wiretapping statute that requires the government to obtain either consent or a warrant prior to recording.[39] Interestingly, the federal wiretapping statute allows "person[s] not acting under the color of state law" to record so long as just one or more parties consent, suggesting heightened protection for citizen recording vis-à-vis government recording.[40]

---

[36] *See* 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, 491-92 (2011) (describing the linear path from Warren Court decisions, through the enactment of federal legislation on consent, and ultimately to varying state statutes on consent).

[37] 389 U.S. 347, 353 (1967) (finding that a telephone booth user had a Fourth Amendment right to be free from the government bugging his conversation). *Katz* overruled the "physical trespass rule" first created in *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (finding that the government did not violate the Fourth Amendment when it listened in on a private citizen's phone call because the Fourth Amendment required a physical trespass for its violation).

[38] *Id.* at 361 (Harlan, J., concurring).

[39] *See* Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197 (1968), *codified at* 18 U.S.C. §§ 2511(2)(a)(ii)(B), 2511(2)(c) (2006) (delineating the predicate requirements for governmental eavesdropping). *See also* 18 U.S.C. § 2511(4) (2006) (setting forth the penalties for violations of eavesdropping predicate requirements as exclusion of evidence, civil damages, or criminal liability).

[40] *See* 18 U.S.C. § 2511(2)(d).

The citizen privacy interest underlying the federal wiretapping statute[41] motivated some states to adopt protective two-party consent wiretapping statutes.[42] For example, the Massachusetts Electronic Surveillance Statute criminalizes "interception of any wire or oral communication" and defines "interception" as "secretly record[ing without] . . . prior authority by all parties to such communication."[43] In Massachusetts, "the legislative focus was on the protection of privacy rights and the deterrence of interference therewith by law enforcement officers' surreptitious eavesdropping as an investigative tool."[44] At least twelve other states have similar wiretapping statutes that require two-party or all-party consent.[45] However, unlike the federal wiretapping statute[46] and more than three-dozen state wiretapping statutes,[47] several outliers like Massachu-

---

[41] *See* Dalia v. United States, 441 U.S. 238, 250 n.9 (1979) (framing the purpose of the 1968 act as "protect[ing] the cherished privacy of law-abiding citizens").

[42] *See* Omnibus, *supra* note 39, at 197 (explaining that "crime is essentially a local problem that must be dealt with by State and local governments if it is to be controlled effectively").

[43] MASS. GEN. LAWS ch. 272 § 99(C)(1), § 99(B)(4) (2008).

[44] *See* Commonwealth v. Gordon, 666 N.E.2d 122, 134 (Mass. 1996). *See also* Jean v. Mass. State Police, 492 F.3d 24, 29-30 (1st Cir. 2007) (finding that the state interest advanced by the statute is in "protecting the privacy of its citizens").

[45] *See* CAL. PENAL CODE § 632 (2010); DEL. CODE tit. 11, § 1335(a) (2010); FLA. STAT. § 934.03(2)(d) (2010); HAW. REV. STAT. § 711-1111(1)(d)-(e) (2010); 720 ILL. COMP. STAT. § 5/14-2(a)(1) (2010); KAN. STAT. § 21-4001(a) (Supp. 2006); MD. CODE, CTS. & JUD. PROC. § 10-402(c)(3) (2010); MASS. GEN. LAWS ch. 272 § 99(B)(4) (2008); MICH. COMP. LAWS. § 750.539c-d (2010); MONT. CODE ANN. § 45-8-213(1)(c) (2010); N.H. REV. STAT. § 570-A:2(I) (2010); 18 PA. CONS. STAT. § 5704(4) (2010); WASH. REV. CODE § 9.73.030(1) (2010).

[46] 18 U.S.C. § 2510(2) (2006).

[47] At least thirty-six states include a reasonable expectation of privacy requirement. *See, e.g.*, ALA. CODE § 13A-11-30(1) (2010); ARIZ. REV. STAT. § 13-3001(8) (2010); CAL. PENAL CODE § 632(a) & (c) (2010); COLO. REV. STAT. § 18-9-301(8) (2010); DEL. CODE tit. 11 § 2401(13) (2010); D.C. CODE § 23-541(2) (2010); FLA. STAT. § 934.02(2) (2010); GA. CODE § 16-11-62(1) (2010); HAW. REV. STAT. § 803-41 (2010); IDAHO CODE § 18-6701(2) (2010); IOWA CODE § 808B.1(8) (2010); KAN. STAT. § 22-2514(2) (2010); KY. REV. STAT. § 526.010, (2010); LA. REV. STAT. § 15:1302(14) (2010); ME. REV. STAT. tit. 15, § 709(4)(B), 709(5) (2010); MD. CODE., CTS. & JUD. PROC. §10-401(2)(i) (2010); MICH. COMP. LAWS § 750.539a (2010); MINN. STAT. § 626A.01(4) (2010); MISS. CODE § 41-29-501(j) (2010); MO. REV. STAT. § 542.400(8) (2010); NEB. REV. STAT. § 86-283 (2010); NEV. REV. STAT. § 179.440 (2010); N.H. REV. STAT. § 570-A:1 (2010); N.J. STAT. § 2A:156A-2(b) (2010); N.C. GEN. STAT. § 15A-286(17) (2010); N.D. CENT. CODE § 12.1-15-04(5) (2010); OHIO REV. CODE § 2933.51(B) (2010); OKLA. STAT. tit. 13, § 176.2(12) (2010); 18 PA. CONS. STAT. § 5702 (2010); R.I. GEN. LAWS § 12-5.1-1(10) (2010); S.C. CODE § 17-30-15(2) (2010); S.D. CODIFIED LAWS § 23A-35A-1(10) (2010); TENN. CODE § 40-6-303(14) (2010); TEX. CODE CRIM. PROC. art. 18.20(2) (2010); UTAH CODE § 77-23a-3(13) (2010); VA. CODE § 19.2-61 (2010); WASH. REV. CODE § 9.73.030(1)(b) (2010); W.

setts[48] and Illinois[49] do not require the parties intercepted to have a reasonable expectation of privacy in order for the interception to be a criminal act.

As a result, officers in two-party consent states are enforcing wiretapping statutes to shield themselves from audio and audiovisual recordings in public even when it is unreasonable to think that their words and actions are private.[50] This application has allowed state wiretapping statutes to become unhinged from the citizen privacy interests they serve. The sweeping breadth of the wiretapping statutes in Massachusetts and Illinois deters citizens from engaging in socially valuable newsgathering and citizen oversight activities that traditionally have been recognized as protected First Amendment activities.[51] Such deterrence raises the First Amendment concern of chilling protected speech.

Some judges argue that there are legitimate privacy concerns that arise in the course of a police officer's public work, such as meeting with a confidential informant[52] or conducting a traffic stop.[53] But even in such situations, the police officer is no less doing the public's business than in a public park and therefore the First Amendment should apply just as strongly. These situations demand balancing a police officer's privacy rights against citizens' First Amendment recording rights.[54] However, most often citizen recording occurs in situations where the police officer is not meeting in secret with an informant

---

VA. CODE § 62-1D-2(h) (2010); WIS. STAT. § 968.27(12) (2010); WYO. STAT. § 7-3-701(a)(xi) (2010).

[48] *See* MASS. GEN. LAWS ch. 272 § 99(C)(1). *See also* Lisa A. Skehill, *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, 991 (2009) (concluding that there is no basis for interpreting the Massachusetts two-party consent wiretapping statute to require a reasonable expectation of privacy for recordings to be criminal).

[49] *See* 720 ILL. COMP. STAT. § 5/14-1, 14-2 (banning recording regardless of whether the subject of the recording enjoys a reasonable expectation of privacy).

[50] *See infra* Section III.D (discussing whether officers enjoy a reasonable expectation of privacy in light of countervailing First Amendment concerns).

[51] *See* Dina Mishra, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers' Power*, 117 YALE L.J. 1549, 1551-55 (2008); *see also infra* Section III.A-III.C (discussing the First Amendment bases for the right to record police activities).

[52] *See* Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 613 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012) (Posner, J., dissenting) ("[P]ublic places are [paradoxically] often more private than private places [imagine if detectives could meet with their informants only in police stations]. . . . And as in our informant example, many of the persons whom police want to talk to do not want to be seen visiting police stations.").

[53] Even after the holding in *Glik v. Cunniffe*, 655 F.3d 78, 79-81 (1st Cir. 2011), Massachusetts police have continued to arrest citizens recording police during traffic stops. *See, e.g.*, Jeff Swinconeck & Jeff Nowak, *Man Charged with Wiretapping Shrewsbury Police*, SHREWSBUTY DAILY VOICE (Nov. 16, 2012), http://shrewsbury.dailyvoice.com/police-fire/man-charged-wiretapping-shrewsbury-police.

[54] *See infra* Section III.D.

or in a precarious situation where citizen recording could conceivably create a safety threat to the officer.

Two-party consent state wiretapping statutes reject the federal wiretapping statute's differential treatment of citizen and governmental recording.[55] To satisfy the federal wiretapping law, a third-party citizen recorder needs only to obtain consent from one party they are recording, for example, either from the officer being recorded or the citizen interacting with that officer. To satisfy a two-party consent state statute, a third-party citizen recorder needs to obtain consent from both parties they are recording. For example, Illinois District Attorneys charged Tiawanda Moore with wiretapping for using her phone to record a police officer that prevented her from filing an Internal Affairs complaint about another officer who sexually harassed her.[56] In Massachusetts, Suffolk County District Attorneys charged Simon Glik with wiretapping for using his phone to record what he believed to be excessive force by police officers making an arrest on the Boston Common, a public park.[57] Neither citizen obtained consent from the officers, but the District Attorney dropped the charges against Mr. Glik,[58] and Ms. Moore was acquitted.[59]

The arrest of Mr. Glik on the Boston Common and the fourteen days of jail time for Ms. Moore, however, were likely sufficient to deter other citizens from recording. The Massachusetts and Illinois wiretapping statutes are emblematic of an uneven statutory framework nationwide in which citizens may record police officers in certain states but not others.[60] Such a system is likely to have a nationwide chilling effect on citizen recordings. It is entirely rational and

---

[55] *See, e.g.*, Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 868-81 (1998) (detailing state and federal statutory schemes); Diane Leenheer Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 U. RICH. L. REV. 1185, 1215-17 (2000) (collecting state statutory schemes).

[56] *See* Don Terry, *Eavesdropping Laws Mean That Turning on an Audio Recorder Could Send You to Prison*, N.Y. TIMES (Jan. 22, 2011), http://www.nytimes.com/2011/01/23/us/23cnceavesdropping.html.

[57] *See* Daniel Rowinski, *Police Fight Cellphone Recordings*, BOS. GLOBE (Jan. 12, 2010), http://www.boston.com/news/local/massachusetts/articles/2010/01/12/police_fight_cellphone_recordings/.

[58] *Id.*

[59] *See Illinois Eavesdropping Act: Tiawanda Moore Sues City Amid Multiple Challenges of Law*, HUFFINGTONPOST.COM (Jan. 16, 2012, 11:39 AM), http://www.huffingtonpost.com/2012/01/16/illinois-eavesdropping-la_n_1208770.html.

[60] *See supra* note 47 (listing thirty-six states where the ability to record a conversation turns on whether the parties to that conversation enjoy a "reasonable expectation of privacy"). In those thirty-six states that condition recording rights on privacy, a citizen who records a police officer would be able to defend him or herself against wiretapping charges by arguing that the police officer did not have a reasonable expectation of privacy at the time of the recording. That argument would not provide a defense to criminal wiretapping charges under the Massachusetts or Illinois statutes that require the consent of all parties regardless of whether their expectation of privacy was reasonable.

risk-averse for citizens without knowledge of each state's laws on consent to turn off their recorders. The unsettled application of state wiretapping laws means "[t]he threat of sanctions may deter . . . almost as potently as the application of sanctions."[61]

Even in one-party consent states where wiretapping charges cannot attach to citizen recording, police officers can charge citizens under catchall criminal provisions like interfering with a police investigation, disorderly conduct, refusing to comply with an officer's order, or stalking.[62] The breadth of these catchall criminal statutes and the fact that the trier of fact may be more likely to believe a police officer than a citizen[63] make it extremely difficult to refute catchall charges.[64] This difficulty for defendants charged with catchall criminal offenses is compounded by plea-bargaining and release-dismissal agreements[65] whereby defendants may contract away their right to file a civil rights lawsuit for the dismissal of their criminal charge.[66] Release-dismissal agreements allow police to wash their hands of overreaching and the excessive use of catchall charges, insulating such conduct from judicial review. While catchall charges may not invoke the same severity of incarceration associated with wiretapping, they can similarly deter citizens from recording and work the same chilling effect on citizen oversight of law enforcement.

III. THE FIRST AMENDMENT RIGHT TO RECORD POLICE OFFICERS IN PUBLIC

"Image capture" devices like cameras, video recorders, and cell phones have become pervasive in our society only in the last two decades.[67] Specifically,

---

[61] *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 604 (1967) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)) (internal quotation marks omitted).

[62] *See supra* notes 8-11.

[63] *See, e.g.*, David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 471-73 (1999) (describing how jurors and judges often give police officers the benefit of the doubt in evaluating the credibility and truthfulness of their testimony, while not providing nearly the same respect to lay witness testimony).

[64] Catchall charges often become a case of "he said, she said" between the officer and the citizen in which the adjudication turns heavily on the relative truthfulness of the parties. Any additional degree of credibility that the trier of fact accords to police officers is thus of heightened importance in criminal cases concerning catchall charges.

[65] A release-dismissal agreement is an agreement between a prosecutor and a potential criminal defendant in which the prosecutor agrees to dismiss or reduce criminal charges in return for the defendant releasing a civil rights claim against the police or other government officials. *See, e.g.*, Andrew B. Coan, *The Legal Ethics of Release-Dismissal Agreements: Theory and Practice*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 371, 372 (2005).

[66] *See* Town of Newton v. Rumery, 480 U.S. 386, 393 (1987) (finding that "[p]lea bargaining does not violate the Constitution even though a guilty plea waives constitutional rights" because the plea was voluntary).

[67] *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 339-40 (2011) (noting the

recordings have supplied critical proof in § 1983 actions brought against police officers and are accepted by the Supreme Court as incontrovertible evidence.[68] Videos containing audio are also the currency of Copwatch organizations, citizens concerned about police misconduct, and laypersons who wish to engage in political and social oversight activities on the Internet.[69] But the necessity of audio and audiovisual evidence in modern society does not alone place citizen recording within the realm of protected speech.[70]

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . or the right of the people . . . to petition the government for a redress of grievances."[71] Courts have relied primarily on the free and open discussion of governmental affairs[72] and the freedom of the press[73] in order to uphold a First Amendment right to record police in public. Several other colorable bases for First Amendment protection exist, such as

---

small cost of image capture as the driving force for its modern ubiquity); Howard M. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 656-59 (2009) (arguing that the low marginal cost of video recording makes it a particularly effective way to hold government accountable and redress grievances).

[68] *See, e.g.*, Scott v. Harris, 550 U.S. 372, 374-76 (2007) (relying heavily on a dashboard videotape of a police chase to determine the reasonableness of police action for the purposes of § 1983 liability); *see also* Andrew John Goldsmith, *Policing's New Visibility*, 50 BRIT. J. CRIMINOLOGY 914, 930 (2010) ("New citizen controlled media technologies and their associated social uses have meant the seeds of scandal-mongering and reputational damage have been cast much more widely, posing a huge reputational threat to contemporary police organizations."); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1161 (2000); Wasserman, *supra* note 67, at 649-50.

[69] *See* Edward T. Walker, *Contingent Pathways from Joiner to Activist: The Indirect Effect of Participation in Voluntary Associations on Civic Engagement*, 23 SOC. F. 116, 118 (2008) (explaining that the interaction of disparate citizens in community oversight is a forum of "group life [that] acts as a bulwark against tyranny and the dominance of a limited number of specialized interests"). An example of this type of oversight is the Witness Project, founded by Peter Gabriel in 1992, which seeks to document human rights abuses worldwide using videotape. *See* WITNESS, http://witness.org/ (last visited Jan. 14, 2013). The Witness Project partners with human rights organizations and was motivated by the public outcry in response to the Rodney King videotape. *See* WITNESS: ABOUT US, http://www.witness.org/about-us/how-we-started (last visited Jan. 14, 2013) ("With the momentum generated by reactions to the King video, Peter was able to realize his visionary idea of putting film at the forefront of human rights campaigns.").

[70] *See* Kreimer, *supra* note 67, at 367-68 (contending that, as of 2010, the existing cases "assert[ed], rather than argue[d] for, First Amendment protection" of image capture).

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

[72] *See* Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

[73] *See* Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012) ("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.").

expressive conduct[74] and the prohibition on prior restraints.[75] Assuming that citizen recording is deserving of some First Amendment protection, such a right can be circumscribed to the extent that a public official has a countervailing reasonable expectation of privacy.[76]

A. *The Free and Open Discussion of Government Affairs*

The First Amendment enshrines the right of citizens to petition the government for a redress of grievances without the fear of retaliation. This right would be hollow absent the ability for citizens to legally document and disseminate the basis for their grievances. The Supreme Court has affirmed that the public's access to truthful information about its own government is fundamental to the First Amendment right to petition for a redress of grievances.[77]

Similarly, the Supreme Court has held that the ability of citizens to verbally criticize police officers is fundamental to this oversight function.[78] Since the arrest of Henry Louis Gates, Jr., by the Cambridge Police Department in July 2009, arrests based purely on what one says to a police officer have received much scholarly attention.[79] Officers do not have authority to arrest individuals who speak their minds unless the words "inflict injury or tend to incite an immediate breach of the peace," thereby removing the speech from First Amendment protection.[80]

While not entirely akin to the right to verbally oppose police officers recog-

---

[74] *See* Kreimer, *supra* note 67, at 372-76 (arguing that recording the police is speech because recording is a precondition to later transferring and disseminating the footage online).

[75] *See* Michael Potere, Note, *Who Will Watch the Watchmen?: Citizens Recording Police Conduct*, 106 NW. U. L. REV. 273, 302-10 (2012).

[76] *See infra* Section III.D.

[77] *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (citing "the paramount public interest in a free flow of information to the people concerning public officials, their servants"). *See generally* Hustler Magazine v. Falwell, 485 U.S. 45, 50 (1988) (affirming the "fundamental importance of the free flow of ideas and opinions on matters of public interest and concern").

[78] *See* City of Houston v. Hill, 482 U.S. 451, 461-63 (1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. . . . The 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.").

[79] *See, e.g.*, CHARLES OGLETREE, THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES JR. AND RACE, CLASS AND CRIME IN AMERICA (2010); Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435 (2009); Christy E. Lopez, *Disorderly (mis)Conduct: The Problem with "Contempt of Cop" Arrests*, AM. CONST. SOC'Y FOR LAW & POL'Y (June 2010), *available at* http://www.nlg-npap.org/reports/disorderly-misconduct-problem-contempt-cop-arrests.

[80] *See* Gooding v. Wilson, 405 U.S. 518, 522-23 (1972) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

nized in *City of Houston v. Hill*,[81] the right to record police officers in public serves the same fundamental First Amendment value of governmental accountability.[82] Accountability requires the free flow of accurate information about those implementing the government's laws and exercising its powers. The ubiquity of modern image capture technology makes audio and audiovisual recordings extremely useful methods of monitoring and disseminating such information.[83] Citizen recording is perhaps the most effective form of police oversight because so many citizens possess recording devices and the marginal cost of recording is close to zero.[84]

Video recordings provide a direct check on police misconduct while other forms of oversight are more attenuated in their effect.[85] Internal checks in police departments such as internal affairs investigations and disciplinary measures are often toothless due to a combination of bureaucratic delay, lack of public knowledge, and an institutional bias against disciplining officers.[86] Judicial checks like the exclusionary rule in criminal cases,[87] civil sanctions,[88] mu-

---

[81] *Hill*, 482 U.S. at 461-63.

[82] *See, e.g.*, Kreimer, *supra* note 67, at 350 ("[P]olice 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 for effective demands for redress.").

[83] *See id.* at 347-51 (documenting numerous examples of when video recordings have provided the means for redress of grievances against governments); *see also* Mishra, *supra* note 51, at 1552-55 (detailing why video recording of police officers is a necessary check on police misconduct).

[84] *See* Kreimer, *supra* note 67, at 386 (noting the low cost of recording as the driving force behind its pervasiveness).

[85] *See* Mishra, *supra* note 51, at 1554 (explaining the scope and deficiencies of traditional oversight tools).

[86] *See* Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 237 (1998); David Weisburd et al., *Police Attitudes Toward Abuse of Authority: Findings from a National Study*, NATIONAL INSTITUTE OF JUSTICE RESEARCH IN BRIEF, May 2000, at 3-5 (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/181312.pdf (finding that 22% of officers use excessive force and 61% do not always report police misconduct).

[87] *See* Mapp v. Ohio, 367 U.S. 643, 656 (1961) (holding that evidence obtained in violation of a suspect's Fourth Amendment rights is excluded). *But see* Terry v. Ohio, 392 U.S. 1, 13-14 (1968) (noting that the exclusionary rule is "ineffective as a deterrent" when police are performing tasks unrelated to criminal prosecution such as evidence gathering or day-to-day crime prevention on the street).

[88] *See, e.g.*, 42 U.S.C. § 1983 (2006). Section 1983 litigation is largely ineffective as a deterrent to police misconduct. Section 1983 suits often result only in nominal damages upon which counsel cannot recover attorneys' fees because nominal fees reflect the fact that the defendant's conduct resulted in a technical rather than an injurious violation of the plaintiff's rights. *See* Farrar v. Hobby, 506 U.S. 103, 115 (1992) ("Whatever the constitutional basis for substantive liability, damages awarded in a § 1983 action must always be designed to compensate injuries caused by the constitutional deprivation."); *see also* Jack M. Beer-

nicipal liability,[89] and criminal prosecution of officers[90] only redress individual incidents of police misconduct and have empirically failed to address systemic problems.[91] External checks such as civilian and community police oversight boards suffer from political appointments, a lack of regulatory power, and police union backlash.[92]

The ever-present possibility of citizen recording encourages police officers to behave in a professional manner when exercising their authority in public.[93] Recordings also have collateral benefits to citizens such as "powerfully rebut[ting] jury bias favoring police credibility"[94] and sparking the interest of persons who are not otherwise involved in police oversight.[95] These benefits make citizen recording a powerful, democratic tool for governmental monitoring and transparency that is usable by everyone. The ease of dissemination of

---

mann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1010 (2002); Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 78 (1989) (describing the near impossibility of obtaining punitive damages in § 1983 cases).

While this article calls for a more robust discussion of the First Amendment right to record police officers in civil § 1983 actions, it does not do so because civil damages are a sufficient deterrent to police misconduct. Rather, by addressing the merits in civil § 1983 actions and over time making it such that the First Amendment right to record police officers is "clearly established" nationwide, citizens will be free to exercise their traditional oversight of government officials using cell phone cameras without the fear of criminal sanctions.

[89] *See* Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658, 691-92 (1978) (finding that plaintiffs may hold a municipality liable under § 1983); *see also infra* Section IV (discussing suits against municipalities as an alternative avenue to suits against individual officers for developing the First Amendment right to record police).

[90] *See* 18 U.S.C. § 242 (2006) (creating a federal criminal remedy for police misconduct).

[91] *See, e.g.*, Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 465 (2004) (recognizing that the "individual-specific and incident-specific nature of civil rights litigation" precluded the installation of broader accountability measures); Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 390-92 (2010) (documenting expert criticism of traditional remedial measures that arise in the litigation setting).

[92] *See, e.g.*, JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE & THE EXCESSIVE USE OF FORCE 33 (1993) (recounting the New York Police Department's backlash and successful opposition to the creation of a civilian review board); Reenah L. Kim, Note, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.-C.L. L. REV. 461, 464-65 (2001) (describing the undemocratic process of civilian review appointments).

[93] *See* Mishra, *supra* note 51, at 1554-55.

[94] *Id.* at 1554.

[95] *Id.* (arguing that "[w]hen the media publicizes citizens' recordings, it enables the general public to use the political process to pressure law enforcement officers to respect the limits of their authority").

recordings and their ability to capture community attention are factors that motivate everyday citizens to record police officers in public and thereby participate in a new form of twenty-first-century police accountability.

Both *Glik* and *Alvarez* referenced the First Amendment's commitment to the free and open discussion of governmental affairs to justify the First Amendment right to record police officers in public. The Seventh Circuit *Alvarez* majority cited several original sources from the time of the Constitution's founding to support the following conclusion:

> In short, the [Illinois] eavesdropping statute restricts a medium of expression—the use of a common instrument of communication—and thus an integral step in the speech process. As applied here, it interferes with the gathering and dissemination of information about government officials performing their duties in public. Any way you look at it, the eavesdropping statute burdens speech and press rights and is subject to heightened First Amendment scrutiny.[96]

The First Circuit in *Glik* also based its conclusion on the free and open discussion of governmental affairs: "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]

B. *The Freedom of the Press*

The First Amendment's protection for newsgathering and reporting can independently ground the right to record police officers in public.[98] The central purpose of the First Amendment is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[99] A vibrant marketplace requires both the gathering and dissemination of all relevant information in order to fully inform the public.[100]

The Supreme Court has found that the First Amendment undoubtedly pro-

---

[96] *See* Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 600 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012).

[97] Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

[98] *See, e.g.*, Burstyn v. Wilson, 343 U.S. 495, 502 (1952) (holding that video recordings such as movies are "included within the 'free speech' and 'free press' guaranties of the First and Fourteenth Amendments").

[99] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969); *see also* Mills, 384 U.S. at 218 ("[A] major purpose of [the First Amendment] was to protect the free discussion of governmental affairs.").

[100] *See, e.g.*, 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.").

tects the disclosure, dissemination, and receipt of information that touches on matters of public concern.[101] Information gathering, however, is antecedent to information disclosure and the Court has found it to be just as vital to a free press, holding that "without some protection for seeking out the news, freedom of the press could be eviscerated."[102]

The Court recognized recently in *Citizens United v. Federal Election Commission* that the government may not "repress speech by silencing certain voices at any of the various points in the speech process."[103] Here, two-party consent statutes operate to restrict the medium of expression and thereby impinge upon the dissemination of constitutionally protected speech.[104] Similarly, with a free press, the ability to record video and audio is critical to effective newsgathering expression and communication.[105] Professional journalists and citizens alike enjoy the freedom of the press.[106] The First Circuit in *Glik* explained that "[t]he First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather,

---

[101] *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 534 (2001) (recognizing a First Amendment right to disclose "truthful information of public concern"); Gentile v. State Bar of Nev., 501 U.S. 1030, 1034-35 (1991) (protecting the "dissemination of information relating to alleged governmental misconduct"); Hustler Magazine v. Falwell, 485 U.S. 45, 50 (1988) (citing the "fundamental importance of the free flow of ideas and opinions on matters of public interest and concern"); *First Nat'l Bank*, 435 U.S. at 777 n.12 ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) ("[T]he protection afforded is to the communication, to its source and to its recipients both."); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 257 (1964).

[102] *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 681 (1972); *see also* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 251-52 (2003) (Scalia, J., concurring in part and dissenting in part) ("The right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise."), *overruled by* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

[103] 130 S. Ct. at 898. *Citizens United* recognized that "[a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech." *Id.* at 905.

[104] *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994) (finding unconstitutional an ordinance that restricted residential signage); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 582 (1983) (holding that a tax on ink and paper "burdens rights protected by the First Amendment").

[105] *See* Kreimer, *supra* note 67, at 339; *see also* Demarest v. Athol/Orange Cmty. Television, Inc., 188 F. Supp. 2d 82, 94-95 (D. Mass. 2002) (upholding "a constitutionally protected right to record matters of public interest" for videographers); Cirelli v. Town of Johnston Sch. Dist., 897 F. Supp. 663, 669 (D.R.I. 1995) (finding a public school teacher's video recording of governmental health code violations protected speech).

[106] *See* Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (plurality opinion).

the public's right of access to information is coextensive with that of the press."[107]

Citizen recordings serve as an unfiltered record of the conduct of government officials and are an essential part of the information-gathering process that undergirds a free and open marketplace of ideas. Some scholars have argued that the right to record and gather the content of speech is a prerequisite to fully exercising one's free speech rights because speech devoid of justification would be impotent in the marketplace of ideas.[108] One scholar also contends that the modern right to report would be handicapped in the absence of a right to record.[109]

However, "generally applicable laws" prohibiting criminal conduct that have only "incidental effects on [the press's] ability to gather and report the news" can circumscribe the freedom to gather information.[110] Such laws prevent com-

---

[107] Glik v. Cunniffe, 655 F.3d 78, 83 (1st Cir. 2011); *see also* Lambert v. Polk Cnty., 723 F. Supp. 128, 133 (S.D. Iowa 1989) (opining that "[i]t is not just news organizations" that "have First Amendment rights to make and display videotapes of events—all of us . . . have that right"). The First Circuit in *Glik* further explained:

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

655 F.3d at 84.

[108] *See* Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297, 325-29 (2004) (describing the right to photograph as central to the right to generate the content that forms the substance of freedom of speech); Eugene Volokh, *First Amendment Right to Openly Record Police Officers in Public*, VOLOKH CONSPIRACY (Aug. 29, 2011, 6:49 PM), http://www.volokh.com/2011/08/29/first-amendment-right-to-openly-record-police-officers-in-public ("Just as the right to speak can be unconstitutionally burdened by restrictions on spending money to speak, or associating in order to speak, it can also be unconstitutionally burdened by restrictions on the gathering of information that is needed to credibly speak.").

[109] *See* Radley Balko, *The War on Cameras*, REASON MAGAZINE, Jan. 2011, *available at* http://reason.com/archives/2010/12/07/the-war-on-cameras (quoting University of California Los Angeles Law Professor Eugene Volokh as stating, "[y]ou can make a good argument that the right to record police is a necessary adjunct of the First Amendment right to report information").

[110] *See* Cohen v. Cowles Media Co., 501 U.S. 663, 669-70 (1991) ("[G]enerally applicable laws do not offend the First Amendment simply because their enforcement . . . has incidental effects on [the] ability to gather and report the news."); Arcara v. Cloud Books, Inc., 478 U.S. 697, 707 (1986) ("[T]he First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books."); Zemel v. Rusk, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information.").

pelling persons to supply information against their will,[111] but do not restrain the press from recording images and audio that have already been exposed for public consumption.[112] Audio or audiovisual recordings of police officers in public places do not compel the officers to reveal private information; they preserve information that the officer has already decided to make public.

Cases decided before video recording was ubiquitous cited taking pictures and photographs of the police as core First Amendment activity.[113] The Seventh Circuit in *Alvarez* used the freedom of the press to support a First Amendment right to record police in public.[114] *Alvarez* concluded that Illinois's two-party consent statute directly targets videotaping as a medium of expression and undercuts the press freedom to gather and disseminate information.[115]

C. *Expressive Conduct and Prior Restraint Doctrine*

While courts have not yet recognized the proposition, there is a colorable argument that the act of recording may deserve First Amendment protection by

---

See also Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1287-90 (2005) (explaining that seminal First Amendment cases during World War I involved the application generally applicable criminal statutes to speech).

[111] *See* Kreimer, *supra* note 67, at 390-92 (citing Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (plurality opinion)) (denying a right "to compel[ ] others . . . to supply information").

[112] *Id.* at 391-92.

[113] *See, e.g.*, Alliance to End Repression v. City of Chicago, 74 C 3268, 2000 WL 562480, at *21 (N.D. Ill. May 8, 2000) (holding that "taking photographs of the police" is protected by the First Amendment); Connell v. Hudson, 733 F. Supp. 465, 470-71 (D.N.H. 1990) ("According to principles of jurisprudence long respected in this nation, [the police officer] could not lawfully interfere with [the plaintiff's] picture-taking activities unless [the plaintiff] unreasonably interfered with police and emergency functions.").

[114] *See, e.g.*, Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 595-96 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (U.S. 2012). The Seventh Circuit in *Alvarez* explained:

> The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is wholly unprotected, as the State's Attorney insists. By way of a simple analogy, banning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes. The same is true of a ban on audio and audiovisual recording.

Id.

[115] *See id.* at 602-03 ("To the contrary, the statute specifically targets a communication technology; the use of an audio recorder—a medium of expression—triggers criminal liability. The law's legal sanction is directly leveled against the expressive element of an expressive activity. As such, the statute burdens First Amendment rights directly, not incidentally.").

virtue of its expressive content.[116] On this view, the act of recording the police in public by, for example, holding up a cell phone camera expresses the idea that citizens should be monitoring the police. The First Amendment protects "an apparently limitless variety of conduct [ ] labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[117]

Conduct is expressive if it is "inherently expressive" or objectively conveys a message.[118] The Supreme Court has recognized certain media as inherently expressive without undertaking a separate inquiry into the particular message or idea expressed through that medium.[119] For example, music,[120] parades,[121] and monuments[122] are media so intertwined with protected expression that any message communicated within those media is inherently expressive. Motion pictures and similar media are expressive by virtue of their status as outward expression, regardless of how much creative effort went into their creation.[123] In contrast, nude dancing is not speech because it does not "communicat[e] an idea or emotion" and is not "conventionally expressive."[124]

Inherently expressive "speech" receives First Amendment protection without

---

[116] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376 (1968).

[117] *Id.*

[118] *See, e.g.*, Rumsfeld v. Forum for Academic & Inst. Rights, Inc., 547 U.S. 47, 49 (2006) (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)) ("But we rejected the view that 'conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.' Instead, we have extended First Amendment protection only to conduct that is inherently expressive.") (internal citations omitted). *Compare* Boy Scouts of Am. v. Dale, 530 U.S. 640, 655-56 (2000) (finding that participating in the Boy Scouts of America was an expressive association because the scout oath, religious training, and other objective values associated with the conduct of being a boy scout), *with* Barnes v. Glen Theatre, 501 U.S. 560, 577 n.4 (1991) (Scalia, J., concurring) (arguing that nude dancing does not "communicat[e] an idea or emotion" and is not "conventionally expressive").

[119] *See* Kreimer, *supra* note 67, at 372 (citing Robert Post, Essay, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1253 (1995)) (arguing that certain protected media shift the inquiry from whether the speech objectively conveys a message to whether the speech is part of the medium).

[120] *See* Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment.").

[121] *See* Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995) (protecting all of the conduct associated with a parade, not just the "banners and songs").

[122] *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1136 (2009) (recognizing that a monument is expressive activity and then denying a secular group's request to erect the monument for reasons of forum analysis).

[123] *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 827 (2000); Burstyn v. Wilson, 343 U.S. 495, 501 (1952).

[124] *See* Barnes v. Glen Theatre, 501 U.S. 560, 577 n.4 (1991) (Scalia, J., concurring).

inquiry into the particular message or idea expressed.[125] In *Alvarez*, the American Civil Liberties Union ("ACLU") won a permanent injunction against enforcement of the Illinois eavesdropping statute that prohibited the ACLU's program of openly audio recording police officers without their consent when the officers are performing their duties in public.[126] ACLU members hold up cell phones in public as a part of the program, a signal to others that they are engaged in a collective effort to monitor police conduct.[127] Like nude dancing, this conduct is not "conventionally expressive," but it is "symbolic," like burning a draft card, because citizen recording communicates the idea that citizens ought to be monitoring the police.[128]

The enforcement of two-party consent state wiretapping statutes against citizen recorders may also be a prior restraint on First Amendment speech. A prior restraint on speech or the press limits the speaker's right to speak *ex ante*, rather than imposing penalties after the speech act occurs.[129] For example, the government may suppress speech by erecting an administrative process through which speakers submit their statements for prior approval. Like censorship *ex post*, a prior restraint of speech is presumptively unconstitutional.[130] Justice Anthony Kennedy opined in a 2005 denial of a stay application in *Multimedia Holdings Corp. v. Circuit Court of Florida, St. John's County*, that the "informal procedures undertaken by officials and designed to chill expression can constitute a prior restraint."[131] This opinion was the first time that the Supreme Court recognized that the entirely informal actions of government officials, taken together, could collectively constitute a prior restraint.[132]

Classifying those police actions that deter citizens from recording as informal prior restraints may provide an additional First Amendment mooring for

---

[125] *See* Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 390 (4th Cir. 1993) (citing *Ward*, 491 U.S. at 790).

[126] *See* Memorandum Opinion and Order at 2, Am. Civil Liberties Union of Ill. v. Alvarez, No. 10-C-5235 (N.D. Ill. Dec. 18, 2012).

[127] *Cf. id.* (describing the ACLU of Illinois's program for recording on-duty police officers).

[128] However, the First Amendment may not protect "symbolic conduct" as strongly as it protects expressive speech. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984). Conduct combined with speech may merit less protection than pure speech. *See* Rumsfeld v. Forum for Academic & Inst. Rights, Inc., 547 U.S. 47, 66 (2006) ("If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it."). *See also* Volokh, *supra* note 110, at 1282-83.

[129] *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 (1963).

[130] *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 702 (1931).

[131] *See* Multimedia Holdings Corp. v. Circuit Court of Fla., St. John's Cnty., 544 U.S. 1301, 1305 (2005) (Kennedy, J., denying application for stay).

[132] *Id.*

the right to record police in public.[133] Justice Kennedy's opinion in *Multimedia Holdings* states, "[a] threat of prosecution or criminal contempt against a specific publication raises special First Amendment concerns, for it may chill protected speech much like an injunction against speech by putting that party at an added risk of liability."[134] The informal actions taken by police officers to deter citizens who have already recorded them ought to invoke such special concern because the citizen is in possession of a specific recording that is ready for instant publication.

An officer who threatens citizen recorders, arrests them, or confiscates their cameras is engaging in exactly the type of informal activity contemplated by Justice Kennedy.[135] In *Multimedia Holdings*, a state court judge's animus toward a local newspaper in its order not to publish certain portions of a grand jury proceeding did not constitute a prior restraint because the orders "appear to have been isolated phenomena, not a regular or customary practice."[136] The animus of government officials toward citizen recordings is not isolated, especially when police officers arrest citizen recorders as part of the regular practice of enforcing their state's two-party consent wiretapping statute.

Discriminatory enforcement of two-party consent statutes by enforcing the statute against citizen recorders but not against police eavesdropping or citizen recordings of police heroism may also constitute a prior restraint.[137] It is inconsistent for the government to enforce two-party consent statutes to punish those who document police misconduct, while selectively absolving those who record police heroism. These inconsistent applications of two-party consent statutes stifle citizen recording by signaling punishment for those who disagree with the government. However, a court has yet to use this rationale in defense of the First Amendment right to record police officers in public.

D. *Intermediate Scrutiny: Balancing Privacy and Speech Rights*

The Seventh Circuit in *Alvarez* held that the Illinois Eavesdropping Statute[138] was subject to intermediate First Amendment scrutiny.[139] To survive interme-

---

[133] *See* Potere, *supra* note 75, at 302-11.

[134] *See Multimedia Holdings*, 544 U.S. at 1306.

[135] *See* Potere, *supra* note 75, at 310 (comparing the conduct at issue in *Near v. Minnesota*, 283 U.S. 697, 702 (1931), to conduct of police officers who deter citizen recorders).

[136] 544 U.S. at 1306.

[137] *See* Potere, *supra* note 75, at 310 (citing Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)) (finding unconstitutional a labor statute that "readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure" and "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview").

[138] 720 ILL. COMP STAT. § 5/14-2(a)(1) (2006) (making it a felony to audio record "all or any part of any conversation").

[139] *See* Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 602-03 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012).

diate scrutiny, "the burden on First Amendment rights must not be greater than necessary to further the important governmental interest at stake."[140] Statutes must also be content-neutral to survive intermediate scrutiny.[141] The Seventh Circuit found that the Illinois Eavesdropping Statute was content-neutral because "it does not target any particular message, idea, or subject matter."[142] With respect to the importance of the government's interest in the wiretapping statute and the tailoring of the statute to meet those ends, the Seventh Circuit balanced police officers' privacy rights with citizens' First Amendment rights.[143]

While two-party consent statutes are content-neutral on their face, it is important to recognize that the First Amendment does not permit two tiers of privacy protection, one for police officers and one for private citizens speaking to police officers.[144] A private citizen's statement to an on-duty police officer can be admitted into evidence in either a civil or criminal proceeding as a matter of course.[145] Both the private citizen and the officer derive their privacy interest from the same sources, privacy torts at state common law or state wiretapping statutes, which do not distinguish between police officers and private citizens.[146] In fact, police officers routinely employ audio or audiovisual recording devices on the dashboards of their squad cars in order to record their interactions with citizens.[147] These recordings can serve to exculpate police officers from liability and to provide evidence in criminal cases brought against the citizens in the recording. The reasonable expectations of privacy for both

---

140 *Id.* at 605 (citing Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989); Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989); and United States v. O'Brien, 391 U.S. 367, 376 (1968)).

141 *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) (noting that content neutrality is a "bedrock principle" of the First Amendment); United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) (remarking that laws restricting content are "presumptively invalid").

142 *See Alvarez*, 679 F.3d at 603.

143 *See id.* at 604-08.

144 *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 534 (2001) (stating that "[o]ne of the costs associated with participation in public affairs is an attendant loss of privacy," without regard to whether the participant is a government official or citizen).

145 *See, e.g.*, United States v. White, 401 U.S. 745, 752 (1971) (finding no search where an undercover informant recorded conversations with Mr. White); Hoffa v. United States, 385 U.S. 293, 301 (1966) (finding no Fourth Amendment protection for "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it"). *White* and *Hoffa* considered a citizen's privacy during private encounters with undercover officers, illustrating that Fourth Amendment law is concerned with scenarios much further down the slippery slope of citizen privacy than a public conversation with an on-duty officer.

146 *See infra* notes 161-162 (discussing the Massachusetts privacy tort as an example) and *supra* notes 45-49 (surveying state wiretapping statutes and their relationship to a "reasonable expectation of privacy").

147 *See, e.g.*, Stephen T. Watson, *Use of Dashboard Cameras in Police Cars Is on the Rise*, BUFFALO NEWS (Apr. 6, 2009).

police officers and private citizens in citizen-police encounters must rise or fall together in order for two-party consent statutes to be content-neutral.

The Seventh Circuit in *Alvarez* analyzed the Illinois Eavesdropping Statute as a time, place, or manner regulation on speech.[148] Under First Amendment speech-forum doctrine, the government may put time, place, or manner restrictions on inherently expressive media only if those restrictions are content-neutral, narrowly tailored, and leave open ample alternative channels for the communication.[149] For example, some Circuits have restricted the medium of recording in the context of a criminal trial,[150] a civil trial,[151] an execution,[152] and a city commission meeting[153] because the government can make a plausible content-neutral argument that video recordings of these events would undermine its ability to ensure fair trials, safety, or effective government.[154] The level of First Amendment protection for citizen recording thus changes depending on whether the forum in which the citizen finds herself recording is a traditional public forum, a limited public forum, or a nonpublic forum.[155]

Assuming the regulation is content-neutral, the intermediate scrutiny analysis in right-to-record cases like *Alvarez* turns on (1) the privacy interests of police officers and the (2) the tailoring of states' two-party consent wiretapping statutes. A "reasonable expectation of privacy" is the predominant public policy concern that animates state wiretapping statutes and state privacy torts.[156] The

---

[148] *See* Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 604-05 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012).

[149] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[150] *See* United States v. Kerley, 735 F.2d 617, 621-22 (7th Cir. 1985).

[151] *See* Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984).

[152] *See* Rice v. Kempker, 374 F.3d 675, 678 (8th Cir. 2004).

[153] *See* Whiteland Woods, L.P., v. Twp. of West Whiteland, 193 F.3d 177, 184 (3d Cir. 1999).

[154] *See* Frisby v. Shultz, 487 U.S. 474, 482 (1988).

[155] *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678-79 (1992) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)) (internal quotation marks omitted); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983). Traditional public forums are "places which by long tradition or by government fiat have been devoted to assembly and debate," and in order to restrict speech therein the government bears the burden of proof by a preponderance of the evidence "that [any content-based] regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *See Perry*, 460 U.S. at 45. The same test applies to limited public forums, i.e. those that the government has specifically designated for expressive activity, but the government may choose to close the forum altogether. *See id.* at 45-46. In nonpublic forums, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

[156] *See supra* notes 41-42 (discussing how the "reasonable expectation of privacy" for-

term "reasonable expectation of privacy" derives from *Katz v. United States*, in which the Court suppressed evidence obtained from an FBI microphone placed outside a public telephone,[157] and *Berger v. New York*, in which the Court suppressed evidence because an ex parte eavesdropping order provided too broad a basis for government "bugging."[158] In response to these rulings, Congress enacted the federal wiretapping statute through Title III of the Omnibus Crime Control and Safe Streets Act of 1968[159] as a means of conferring more investigatory authority upon law enforcement officers.

Katz, *Berger*, and their progeny are Fourth Amendment standards that provide the legal framework in which state law criminal wiretapping statutes and state law civil privacy torts operate. While citizen recordings of police are beyond the reach of the Fourth Amendment because they involve no state action, Fourth Amendment rules are relevant to define when a person's expectation of privacy is objectively reasonable. Restrictive two-party consent state wiretapping statutes enshrine citizens' reasonable expectations of privacy far beyond what is conferred by the federal wiretapping statute.[160]

Similarly, liability for civil privacy torts at state law incorporates the "reasonable expectation of privacy" formulation from *Katz*.[161] Both the doctrinal and academic histories of state law privacy torts[162] indicate that liability has always been tied to a social judgment about whether a citizen's expectation of

---

mulation in *Katz v. United States*, 389 U.S. 347 (1967), led to state efforts to secure citizen privacy). An antecedent question surrounding privacy rights here is whether there is a First Amendment right to ever record anyone in public in light of privacy concerns. For example, a private citizen may object to an audio recording on the street as a violation of her personal privacy. Such an objection likely only serves to curb recording in two-party consent states. In one-party consent states, the objection of a single person can be overcome by the consent of another party to the conversation. In two-party consent states, the objection of any party makes the recording illegal under the wiretapping statute.

[157] 389 U.S. at 351.

[158] 388 U.S. 41 (1967).

[159] Pub. L. No. 90-351, 82 Stat. 197 (*codified as amended at* 18 U.S.C. §§ 2510 *et seq.* (1998)). The 1968 Act was amended twice by the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 101(f), 100 Stat. 1852.

[160] *See id.* at 197 (giving states wide latitude with the language, "crime is essentially a local problem that must be dealt with by State and local governments if it is to be controlled effectively"). *See also supra* notes 41-42.

[161] *See, e.g.*, MASS. GEN. LAWS ch. 214, § 1B (2010) ("A person shall have a right against unreasonable . . . interference with his privacy."). *See also* Gauthier v. Police Comm'r of Bos., 557 N.E.2d 1374, 1376 (Mass. 1990) (dismissing a tort claim under § 1B because the plaintiff lacked a "reasonable expectation of privacy").

[162] A privacy tort is a cause of action to bring a damages action in state court against a party who violates one's privacy. *See, e.g.*, MASS. GEN. LAWS ch. 214, § 1B (created a statutory cause of action "against unreasonable, substantial or serious interference with . . . privacy").

privacy was objectively reasonable at the time.[163] Citizens, including police officers, can use privacy tort statutes to hold other private parties liable for damages flowing from the invasion of privacy.[164]

Police officers' privacy interests are limited, however, because police work involves matters of public concern that are already exposed to public consumption.[165] It is beyond dispute that citizens can lawfully take notes and testify about what they see or hear in public.[166] In the Fourth Amendment context, the Supreme Court has crafted a rule that police officers can use surveillance technology so long as it only augments their preexisting physical faculties such as vision or hearing.[167] Technology that gives police officers the ability to see through walls, for example, would go beyond mere augmentation of pre-ex-

---

[163] *See* Pavesich v. New England Life Ins. Co., 122 Ga. 190, 201 (1905) (holding that the right of privacy "must be made to accord with . . . the rights of any person who may be properly interested in the matters which are claimed to be of purely private concern"); RESTATEMENT (FIRST) OF TORTS § 867 cmt. c (1939) ("One who is not a recluse must expect the ordinary incidents of community life of which he is a part"); William Prosser, *Privacy*, 48 CALIF. L. REV. 383, 391 (1960) ("It is clear also that the thing into which there is prying or intrusion must be, and be entitled to be, private."); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193, 215 (1890) ("The general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private . . . to that extent the protection is to be withdrawn.").

[164] *See, e.g.*, MASS. GEN. LAWS ch. 214, § 1B (2008).

[165] *See* Bartnicki v. Vopper, 532 U.S. 514, 534 (2001) ("One of the costs associated with participation in public affairs is an attendant loss of privacy."); Jean v. Massachusetts, 492 F.3d 24, 30 (1st Cir. 2007) (finding police officers' privacy interests "virtually irrelevant" compared with First Amendment rights). *See also* Jesse H. 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, 517 (2011).

[166] See Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 595-96 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651, 184 L. Ed. 2d 459 (U.S. 2012). The Seventh Circuit explained note-taking within the context of the First Amendment's free press guarantee in this way:

> The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is wholly unprotected, as the State's Attorney insists. By way of a simple analogy, banning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes. The same is true of a ban on audio and audiovisual recording.

Id.

[167] *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 34 (2001) (excluding evidence of a marijuana growing operation inside a home obtained using a thermal imaging device because such "information regarding the home's interior [ ] could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search") (internal citations omitted).

isting faculties because it allows officers to see the inside of a home, something their own vision otherwise would not allow.[168] The Fourth Amendment rule flowing from *Kyllo v. United States* is that whatever a police officer can lawfully do with her physical faculties, she also can do with the aid of electronic or digital sense-enhancing technology without offending a citizen's reasonable expectation of privacy.[169]

The Court's justifications for the *Kyllo* rule support a citizen's right to record, even accepting the proposition that a police officer enjoys a reasonable expectation of privacy while executing his or her official duties in public. While the Constitution may not specify an explicit right to record, it does not preclude a citizen's right to testify about what one remembers seeing or hearing in public.[170] Similarly, a citizen has the right to write down, with a pen and paper, what is transpiring between a police officer and other citizens in public.[171] Given that the physical faculties of memory and handwriting are permissible forms of recording, *Kyllo*'s logic leads to the conclusion that a citizen may augment those physical faculties with electronic audio and audiovisual recording technology without abridging an officer's reasonable expectation of privacy.

This article argues that under the Fourth Amendment police officers do not enjoy a reasonable expectation of privacy in their conduct or speech when executing official duties in public. However, Judge Richard Posner argued in his *Alvarez* dissent that the privacy of citizens who communicate with the police is enough to afford police officers a reasonable expectation of privacy.[172] Judge Posner provided the example of a police informant's expectation of privacy as a basis for a police officer's privacy.[173] The *Alvarez* majority rebutted this contention by stating, "some conversations in public places implicate privacy and others do not," which justified invalidating Illinois's two-party consent statute that banned recording all conversations.[174] Judge Posner also forwards law enforcement policy goals as a reason to afford police officers privacy,[175] but this

[168] *See id.*

[169] *See id.* at 36.

[170] *See supra* note 166.

[171] *Id.*

[172] *See* Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 613 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012) (Posner, J., dissenting) (arguing that citizens speaking to the police "say things in public that they don't expect others around them to be listening to, let alone recording for later broadcasting").

[173] *See id.* at 614 ("Suppose a police detective meets an informant in a park and they sit down on a park bench to talk. A crime reporter sidles up, sits down next to them, takes out his iPhone, and turns on the recorder. The detective and the informant move to the next park bench to continue their conversation in private. The reporter follows them. Is this what the Constitution privileges?").

[174] *Id.* at 608 (citing Katz v. United States, 389 U.S. 347, 351 (1967)).

[175] *See id.* at 613-14.

argument proves too much because it would enact a blanket ban on recording, not one that is tailored to achieve that policy goal.[176]

Courts have not yet considered several additional justifications for police privacy. First, the mere existence of two-party consent statutes in an officer's state may give rise to an objectively reasonable expectation of privacy. If an officer knows that her state's two-party consent statute has been applied to citizen recordings of the police, she may justifiably rely on the longstanding interpretation of the state statute and expect privacy when conducting public police business. Second, in the context of Freedom of Information Act requests, the Supreme Court has recognized that citizens continue to enjoy a "reasonable expectation of privacy" in information that is not "wholly private."[177] In *U.S. Department of Justice v. Reporters Committee for Freedom of the Press* the Court found that citizens enjoy a reasonable expectation of privacy in how their criminal record information is compiled and presented, even if that record was previously made public.[178] The Court specifically noted that a person's reasonable expectation "is affected by the fact that, in today's society, the computer can accumulate and store information that would otherwise have surely been forgotten."[179] In the same way that the FBI's computer database compiles criminal record information in a more comprehensive manner than the earlier public criminal records, audio and audiovisual recordings compile evidence of police behavior in more detail than is possible with other forms of recording. Following the logic of *Reporters*, police officers may reasonably expect that their conduct, while already public, will not appear on YouTube, Facebook, or Twitter in vivid audio or audiovisual detail.

In addition to furthering officer privacy as an important government interest, state wiretapping statutes also must be narrowly tailored in order to survive intermediate scrutiny. To be narrowly tailored, a statutory restriction on speech cannot be "greater than necessary to further the important governmental interest at stake."[180] The Eleventh Circuit held in 2000 that citizens "had a First

[176] *See infra* notes 180-202 (discussing whether two-party consent statutes are narrowly tailored).

[177] *See* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 770-71 (1989) ("[T]he fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information.") (internal citations omitted).

[178] *See id.* at 771.

[179] *Id.*

[180] *See* Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 605 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (U.S. 2012). A content-neutral regulation passes intermediate scrutiny if "'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

Amendment right, subject to reasonable time, manner, and place restrictions, to photograph or videotape police conduct."[181] Generally applicable criminal laws such as two-party consent state wiretapping statutes and catchall criminal statutes are properly viewed as a time, place, or manner restriction that can defeat First Amendment rights.[182]

Narrowly tailored statutes "do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[183] For example, the First Amendment does not supersede generally applicable laws preventing the press from unlawfully obtaining truthful information it seeks to publish.[184] The First Amendment also does not "relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source."[185]

The *Kyllo* analogy suggests a poor fit between the means and ends of two-party consent state wiretapping statutes, a consideration on which the Seventh Circuit relied in *Alvarez* to find the Illinois Eavesdropping Act unconstitutional under intermediate scrutiny analysis.[186] While police officers certainly have a legitimate interest in doing their job free from citizen interference, they cannot reasonably expect that their words or actions on the street will remain private even after the words or actions have been exposed for public consumption.[187] The late Chief Justice William H. Rehnquist wrote in 1974 that the First Amendment value of governmental accountability outweighs the privacy of police officers carrying out their government duties in public.[188] Later in *Bart-*

---

[181] *See* Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000).

[182] *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (stating that First Amendment protections may not extend to "speech or writing used as an integral part of conduct in violation of a valid criminal statute").

[183] Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991).

[184] *See* Zemel v. Rusk, 381 U.S. 1, 16 (1965).

[185] *See Cohen*, 501 U.S. at 669 (citing Branzburg v. Hayes, 408 U.S. 665, 682-83 (1972)).

[186] *See* Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 605-06 (7th Cir. 2012), *cert. denied,* 133 S. Ct. 651 (2012).

[187] *See, e.g.*, State v. Graber, No. 12-K-10-0647, *35 (Md. Cir. Ct. Harford Cnty., Sept. 27, 2010) ("Those of us who are public officials and are entrusted with the power of the state are ultimately accountable to the public. When we exercise that power in public fora, we should not expect our actions to be shielded from public observation.").

[188] *See, e.g.*, William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, 23 KAN. L. REV. 1, 8 (1974) (finding the idea of privacy during public police-citizen interactions absurd by writing: "An arrest is not a 'private' event. An encounter between law enforcement authorities and a citizen is ordinarily a matter of public record, and by the very definition of the term it involved an intrusion into a person's bodily integrity. To speak of an arrest as a private occurrence seems to me to stretch even the broadest definitions of the idea of privacy beyond the breaking point.").

nicki v. Vopper, the Supreme Court reversed federal wiretapping charges against a citizen who recorded a private phone call about union labor negotiations because "privacy concerns give way when balanced against the interest in publishing matters of public importance."[189] In light of this history, the Seventh Circuit concluded that "by legislating this broadly—by making it a crime to audio record any conversation, even those that are not in fact private—the State has severed the link between the eavesdropping statute's means and its end."[190]

To the extent that two-party consent state wiretapping statutes suppress citizen recording in situations where there is no countervailing officer privacy interest, those statutes are likely overbroad under the First Amendment.[191] Invalidation for overbreadth requires that a statute chill a "substantial" amount of protected speech relative to its plainly legitimate sweep.[192] A two-party consent statute may meet the overbreadth test because citizens publish audio or audiovisual recordings of police online more and more while the government is using traditional wiretapping tools less and less.[193] The Supreme Court, however, has held that invalidating a statute for overbreadth is "strong medicine" that should only be applied "sparingly" and "as a last resort."[194] Therefore, courts are much more likely to engage in traditional intermediate scrutiny analysis than overbreadth analysis in right-to-record cases.

The Seventh Circuit's intermediate scrutiny analysis in *Alvarez* found that the Illinois Eavesdropping Statute failed to protect officer privacy because it criminalizes audio recording any conversation, even those that are not in fact private, thus forfeiting any privacy justification for the statute.[195] Without a privacy rationale on which to ground the statute, the Court found no public interest justification for the statute as it applied to the ACLU's recording program.[196] In ordering a permanent injunction following the Seventh Circuit's decision, the Northern District of Illinois noted, "[n]ot only are the conversa-

---

[189] Bartnicki v. Vopper, 532 U.S. 514, 516 (2001).

[190] *See Alvarez*, 679 F.3d at 606.

[191] First Amendment overbreadth challenges allow for facial invalidation of statutes that suppress a "substantial" amount of speech relative to their "plainly legitimate sweep." *See* Virginia v. Hicks, 539 U.S. 113, 118-21 (2003) ("To ensure that these costs do not swallow the social benefits of declaring a law 'overbroad,' [this Court has] . . . insisted that a law's application to protected speech be 'substantial' . . . relative to the scope of the law's plainly legitimate applications.") (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

[192] *See id.* at 119-20.

[193] *See* Letter from Ronald Weich, Assistant Att'y Gen., to Joseph R. Biden, Jr., President of the United States Senate (Apr. 30, 2010), *available at* http://www.scribd.com/doc/31033627/Executive-Communication#archive (showing a 34% decline of wiretapping applications at the federal level from 2009 to 2010).

[194] *See Broadrick*, 413 U.S. at 613.

[195] *See Alvarez*, 679 F.3d at 605.

[196] *See id.* at 605-06.

tions that the ACLU intends to record as part of its program not intended to be private, the recordings are open so that police and others have notice that they are being recorded. Thus, there is no privacy interest at stake here."[197]

The First Circuit in *Glik* did not apply intermediate scrutiny because the posture of the case was the defendant's interlocutory appeal from a denial of qualified immunity at the motion to dismiss stage.[198] At the motion to dismiss stage, the District Court needed to decide only whether Mr. Glik's complaint met the plausibility-pleading standard.[199] When the District Court denied qualified immunity to the individual officer defendants because it believed the complaint stated a violation of a clearly established First Amendment right,[200] the defendants took an immediate appeal to the First Circuit on that question.[201] The First Circuit thus held, on the narrow issue of whether "there [is] a constitutionally protected right to videotape police carrying out their duties in public," that "[b]asic First Amendment principles, along with case law from this and other Circuits, answer that question unambiguously in the affirmative."[202]

IV. CONSTITUTIONAL TORTS AS THE VEHICLE FOR DEVELOPMENT OF THE FIRST AMENDMENT RIGHT TO RECORD

Constitutional torts, i.e. suits under 42 U.S.C. § 1983 for backward-looking relief such as money damages, are the best vehicle for courts to develop First Amendment doctrine relating to the First Amendment right to record police. Qualified immunity analysis is confined to suits under § 1983 for money damages and offers a defense only to individual officer defendants, not municipalities or police departments.[203]

Dean John C. Jeffries, Jr., argues that money damages liability for constitu-

[197] *See* Memorandum Opinion and Order at 5, Am. Civil Liberties Union of Ill. v. Alvarez, No. 10-C-5235 (N.D. Ill. Dec. 18, 2012).

[198] *See* Glik v. Cunniffe, 655 F.3d 78, 80-81 (1st Cir. 2011).

[199] *See, e.g.*, Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545, 555, 579 (2007); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 23-24 (2010) ("First, district court judges are to distinguish factual allegations from legal conclusions, since only the former need be accepted as true. Then, they must decide on the basis of the factual allegations and their 'judicial experience and common sense' whether a plausible claim for relief has been shown.").

[200] *See also Glik v. Cunniffe et al.*, No. 1:01-cv-10150-WGY, Electronic Clerk's Notes From Motion Hearing (D. Mass. June 8, 2010) ("[I]n the First Circuit, this First Amendment right publicly to record the activities of police officers on public business is established.").

[201] *See Glik*, 655 F.3d at 80-81.

[202] *Id.* at 82.

[203] *See, e.g.*, RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 841, 1007-11 (6th ed. 2009) (explaining how qualified immunity operates differently depending on the remedy and does not bar injunctive remedies).

tional torts is not the appropriate remedial structure to encourage the development of constitutional rights.[204] He contends that forward-looking or prospective relief under § 1983 such as an injunction best serves the goal of constitutional development because it "continually shifts societal resources from the past to the future," while backward-looking or retrospective relief, such as money damages, does not.[205] Under Dean Jeffries' view, damages liability under § 1983 suffers from two main problems: (1) it creates the externality of draining government budgets,[206] and (2) qualified immunity may preclude money damages if "a reasonable officer could have believed" her actions to be lawful "in light of clearly established law."[207] With regard to the second problem, damages liability requires the "fault" of a government official in order to avoid qualified immunity while injunctions can provide a remedy even without proving that the government official was at fault.[208] Taken together, these criticisms suggest that § 1983 actions for money damages are reactive rather than proactive, thereby "risk[ing] the ossification of constitutional law by raising the cost of innovation."[209]

In addition to injunctive relief under § 1983, suits against municipalities under *Monell v. Department of Social Services of New York* are an alternative to individual suits against police officers for money damages.[210] *Monell* holds that local governments can be liable for constitutional violations committed pursuant to official policy or custom.[211] *Monell* liability is an additional route to adjudication on the First Amendment right to record police officers on the merits that has the added benefit of precluding a qualified immunity defense.[212] However, despite the arguments that Dean Jefferies and others put forward, both injunctive relief and *Monell* liability have disadvantages that make them

---

[204] *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999) ("Put simply, limiting money damages for constitutional violations fosters the development of constitutional law. Most obviously, the right-remedy gap in constitutional torts facilitates constitutional change by reducing the costs of innovation. The growth and development of American constitutionalism are thereby enhanced. More importantly, the fault-based regime for damages liability biases constitutional remedies in favor of the future. Limitations on damages, together with modern expansions in injunctive relief, shift constitutional adjudication from reparation toward reform.").

[205] *See id.* at 105-06.

[206] *Id.* at 113-15.

[207] Anderson v. Creighton, 483 U.S. 635, 641 (1987).

[208] *See* Jeffries, *supra* note 204, at 110-11.

[209] *Id.* at 90.

[210] 436 U.S. 658, 690-91 (1978).

[211] *See id.* ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

[212] Owen v. City of Independence, 445 U.S. 622, 637-38 (1980).

inappropriate to remedy the chilling effect created by two-party consent wiretapping statutes and catchall criminal charges.

Section 1983 suits for injunctive relief are less likely than suits for money damages to develop the First Amendment right to record because permanent injunctions require the plaintiff to prove an "irreparable injury," i.e., one that a court cannot remedy with "monetary damages."[213] In addition to this difficulty in proving injury, citizen recorder plaintiffs in suits for injunctive relief may lack the redressability sufficient for Article III standing.[214] In right-to-record suits for injunctive relief, a plaintiff would seek an injunction against the enforcement of two-party consent statutes or a declaration that state wiretapping statutes do not apply to recordings of police officers made in public. A declaration or injunction would provide a citizen plaintiff forward-looking relief by removing the threat of future prosecution and the chilling effect on protected speech.

The requirement that a plaintiff assert an "irreparable injury" that "monetary damages" cannot remedy stifles § 1983 actions for forward-looking injunctive relief as a tool for constitutional development.[215] Injury-in-fact analysis is grounded in the harm-based model created in *FCC v. Sanders Bros. Radio Station*[216] and *Data Processing Services Organizations v. Camp*[217] that explicitly disavowed the prior personal rights model.[218] After *Sanders Bros.* and *Camp*, a plaintiff need not assert the violation of a legal right to demonstrate injury-in-

[213] *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) ("[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."). In the Seventh Circuit, the test also requires "success, as opposed to a likelihood of success, on the merits." *See, e.g.*, Memorandum Opinion and Order at 3, Am. Civil Liberties Union of Ill. v. Alvarez, No. 10-C-5235 (N.D. Ill. Dec. 18, 2012) (citing ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Prot. Dist., 672 F.3d 492, 498 (7th Cir. 2012)) (describing the test for permanent injunctions in the Seventh Circuit).

[214] *See, e.g.*, FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 472 (1940) (finding that an injury to an interest is enough for Article III standing whether or not there is a violation of a personal right). Three decades after *Sanders Bros.*, the Court imported its harm-based model of Article III standing into the Administrative Procedure Act, effectively deputizing private attorneys general to litigate against agencies. *See* Data Processing Servs. Orgs. v. Camp, 397 U.S. 150, 154 (1970). Most recently, the Court has defined injury-in-fact sufficient for Article III standing as non-trivial factual harm that is concrete and particularized, i.e. affecting the plaintiff in a personal and individual way. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-78 (1992).

[215] *See eBay*, 547 U.S. at 391.

[216] 309 U.S. at 472.

[217] 397 U.S. at 154.

[218] *See, e.g.*, Ala. Power v. Ickes, 302 U.S. 464, 479-80 (1938) (setting forth the personal

fact sufficient for Article III standing. As applied to right-to-record cases, citizen recorders who the police arrest suffer factual harm to their interest in videotaping even if the Constitution does not clearly enshrine that interest in a personal right. Thus, § 1983 plaintiffs seeking backward-looking relief to compensate them for a prior arrest can easily allege factual harm sufficient for injury-in-fact and Article III standing.

However, injury-in-fact is more difficult to prove for § 1983 plaintiffs seeking forward-looking injunctive relief because it is less clear that they have suffered factual injury to an interest in videotaping. *Alvarez* demonstrates the upside of a § 1983 action for forward-looking injunctive relief, but the unique fact that the Cook County District Attorney threatened the ACLU with prosecution under the Illinois Eavesdropping Act is what injured the ACLU's interest in videotaping and therefore provided it standing to bring a pre-enforcement challenge to the statute.[219] The District Court described the injury on remand, stating, "[i]n the last two years, the Cook County State's Attorney's Office has prosecuted at least three civilians under the Illinois Eavesdropping Act . . . who recorded on-duty police officers."[220] While police officers are arresting citizen recorders nationwide, suits for injunctive relief will only secure injury-in-fact and therefore standing where the plaintiff can prove a credible threat of future prosecution.[221] The ACLU of Illinois was fortunate insofar as its defendant in *Alvarez* has brought prior wiretapping prosecutions.[222]

A novel theory of informational injury-in-fact under *Federal Election Commission v. Akins*[223] would similarly fail to secure Article III standing to seek injunctive relief against two-party consent statutes. In *Akins*, the Court held that Congress could give plaintiffs a right of action arising from a widely

---

rights model requiring the violation of a legal right in order for a plaintiff to secure Article III injury-in-fact).

219 Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 603-06 (7th Cir. 2012), *cert. denied,* 133 S. Ct. 651 (2012).

220 *See* Memorandum Opinion and Order at 2, Am. Civil Liberties Union of Ill. v. Alvarez, No. 10-C-5235 (N.D. Ill. Dec. 18, 2012).

221 *See* Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (describing how, in order for a plaintiff to sustain a pre-enforcement challenge to a statute, she must plead "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder").

222 *See Alvarez*, 679 F.3d at 592 (opining that: "The eavesdropping statute plainly prohibits the ACLU's proposed audio recording; Alvarez acknowledges as much. The recording will be directed at police officers, obviously increasing the likelihood of arrest and prosecution. The statute has not fallen into disuse. To the contrary, the ACLU has identified many recent prosecutions against individuals who recorded encounters with on-duty police officers; three of these were filed by Alvarez's office. Finally, Alvarez has not foresworn the possibility of prosecuting the ACLU or its employees and agents if they audio record police officers without consent.").

223 524 U.S. 11 (1998).

shared injury, such as the informational injury stemming from nondisclosure of donor information under the Freedom of Information Act.[224] In so holding, the Court recognized that the rule against standing for widely shared injuries was a prudential one that Congress could override with a statutory right of action.[225] The inability of citizens to access audio or audiovisual recordings of police in public may constitute a similar informational injury. However, *Akins*'s holding is narrow because the Court referred only to information "directly related to voting."[226] The limited application of *Akins* beyond information related to intelligent political activity and other fundamental political rights curtails its use as a basis for injury-in-fact sufficient to seek forward-looking relief.

Furthermore, suits for injunctive relief brought in jurisdictions where citizens are arrested for catchall charges cannot allege a credible threat of future prosecution. In such a suit, a citizen recorder plaintiff would seek a permanent injunction against police harassment and intimidation. However, monetary relief is likely a sufficient remedy for a citizen who is wrongly arrested under an isolated application of a catchall criminal statute.[227] In addition, a suit seeking injunctive relief against catchall criminal charges may fail Article III's bar on generalized, hypothetical grievances.[228] By seeking forward-looking injunctive relief, these citizen recorder plaintiffs are not complaining about a specific prior application of the state wiretapping statute; they are seeking to avoid hypothetical future arrests and intimidation for catchall offenses.[229] The facts alleging such future threats are common to all citizen recorders, rendering suits seeking injunctive relief against catchall charges mere generalized grievances. As such,

---

[224] *Id.* at 22-24.

[225] *See id.*

[226] *See id.* at 24-25 ("We conclude that similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts."). *See also* Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 645-46 (1998) (describing the "especially narrow reading of *Akins*").

[227] *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (finding that a plaintiff cannot secure the remedy of a permanent injunction unless she can prove an "irreparable injury," i.e., one that a court cannot remedy with "monetary damages").

[228] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 575 (1992) (quoting United States v. Richardson, 418 U.S. 166, 171, 176-77 (1974)) (finding "generalized grievances . . . impermissible" and "inconsistent with the framework of Article III" because "the impact on [the plaintiff] is plainly undifferentiated and common to all members of the public"); Warth v. Seldin, 422 U. S. 490, 499 (1975) (holding that it is not enough that a plaintiff is in the class of individuals harmed, the plaintiff needs to prove factual harm to herself or the complaint merely alleges a "generalized grievance" that is insufficient for Article III standing).

[229] *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (setting forward a requirement of a "real and immediate threat" of future injury in order for plaintiffs to have standing to seek forward-looking injunctive relief).

suits for money damages provide an easier route to adjudication on the merits of the First Amendment right to record.

Citizen recorders suing for forward-looking relief may also face redressability problems.[230] Redressability links the plaintiff's injury to the remedy sought.[231] A forward-looking remedy such as an injunction can only redress injuries that the plaintiff will suffer in the future.[232] In *City of Los Angeles v. Lyons*, the Court held that a plaintiff injured by a police chokehold had no standing to seek an injunction against the police department's policy allowing chokeholds because he could not credibly allege that the police would arrest him again and, even if arrested again, that the police would use the chokehold technique in the course of the future arrest.[233] In order to overcome the redressability bar to forward-looking relief, citizen recorder plaintiffs will need to plead a specific threat from law enforcement.[234] While the ACLU in *Alvarez* was able to do this due to the Cook County District Attorney's public threat of prosecution,[235] such a threat is unlikely to present itself in the vast majority of cases arising from citizen recording, thus limiting the ability of injunctive relief to serve as an appropriate vehicle for constitutional development. Given the problems of injury-in-fact and redressability, constitutional torts for injunctive relief are not as viable an avenue for the development of the First Amendment right to record as constitutional torts for money damages.

Furthermore, constitutional torts brought against municipalities under *Monell* cannot develop the First Amendment as well as those brought against individual officers because the difficulty of discovery in *Monell* cases profoundly limits its scope. *Monell* claims that allege policy and practice liability—such as a claim that a municipality had a policy of arresting citizens who recorded the police in public—are difficult to prove[236] and often complicate the parallel

---

[230] *See, e.g.*, *Lujan*, 504 U.S. at 595-601 (Kennedy, J., concurring) (plaintiff must show "a likelihood that a court ruling in their favor would remedy their injury"); Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 74-75 & n.20 (1978) (plaintiff must show "substantial likelihood" that the relief requested will redress the injury).

[231] *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 106-09 (1998).

[232] *See id.* (finding that an informational injury was not redressable where declaration of past lapses were too late to remedy past injuries and future declaration assumed, without justification, that further violations will occur).

[233] 461 U.S. 95, 102-03 (1983).

[234] *See, e.g.*, Steffel v. Thompson, 415 U.S. 452 (1974) (finding a chilling effect and thus an injury sufficient for Article III standing where a police officer warned a citizen that he would be arrested and prosecuted if he continued to distribute leaflets against the Vietnam War).

[235] *See supra* notes 219-222.

[236] *See* Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658, 690-91 (1978) (holding that local governments may be sued for damages, as well as declaratory or injunctive relief, whenever: "[T]he action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by

§ 1983 claim against individual government officials because the municipality will vehemently object to discovery.[237] Discovery of municipal documents is critical to proving *Monell* liability[238] where a municipal governing body, department, or agency formally adopted or promulgated a policy statement, regulation, ordinance, or decision.[239] Municipalities almost always attempt to bifurcate the *Monell* claim from the claim against government officials brought pursuant to a § 1983 right of action,[240] thereby delaying and frustrating the plaintiff's ability to compile evidence in support of policy or practice liability.[241] Judges regularly grant motions to bifurcate because they recognize the extremely high burden of proof for *Monell* plaintiffs and do not want to confuse the § 1983 claim.[242] Absent discovery, a plaintiff most often has no route to adjudication on the merits of the *Monell* claim.

The municipality's obstructionism results in the settlement of many *Monell* claims whereby the municipality stipulates to some limited wrongdoing or,

---

that body's officers. Moreover . . . local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's decisionmaking channels.").

[237] *See* G. Flint Taylor, *A Litigator's View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DePaul L. Rev. 747, 749 (1999).

[238] *Monell* liability for local governments has been based on many things, for example, policy statements, ordinances, regulations, decisions formally adopted and promulgated by government rulemakers, custom or usage, policy or custom of inadequate training, policy or custom of inadequate discipline, or the conduct of policymaking officials.

[239] For example, in *Monell*, the Department of Social Services and the Board of Education officially adopted a policy requiring pregnant employees to take unpaid maternity leaves before medically necessary. 436 U.S. at 658.

[240] *See, e.g.*, Cruz v. City of Chicago, No. 08-2087, 2008 WL 5244616, at *2-3 (N.D. Ill. Dec. 16, 2008) (opining that: "The spate of bifurcation motions and the willingness of many judges to grant them stems in large part from the recognition that, in many (perhaps most) instances, claims of municipal liability require an extensive amount of work on the part of plaintiff's attorneys and experts, and an extraordinary amount of money must be spent in order to prepare and prove them. . . . In addition, because of state law and the City's frequent practice of offering to stipulate to judgment being entered against it and to pay compensatory damages and reasonable attorneys' fees in the event of a judgment against the individual defendant officer(s) on the plaintiff's constitutional claims, . . . judges in this district have questioned why Section 1983 plaintiffs would want or need to proceed any further after resolution of their claims against the individual officer defendants."); Wilson v. City of Chicago, No. 07-1682, 2008 WL 4874148, at *1-3 (N.D. Ill. July 24, 2008) ("This stipulation—coupled with the motion to bifurcate—will short circuit any discovery into the City's training procedures.").

[241] *See* Taylor, *supra* note 237, at 749 ("*Monell* claims can greatly increase the costs of litigation, the attorney time expended, the effort of the opposition, and the length and complexity of the trial.").

[242] *See, e.g.*, *Cruz*, 2008 WL 5244616, at *2-3; *Wilson*, 2008 WL 4874148, at *1-3.

most often, none at all.[243] Settlements and stipulations stunt the development of constitutional rights in *Monell* suits because they do not develop any new constitutional law.[244] Settlement is antithetical to the development of the First Amendment right to record because it is a purely private outcome of civil litigation, one that serves the narrow goal of resolving disputes and does not serve a strong deterrent purpose.[245] On the contrary, suits against individual officers rarely settle because the defendants are professionally and personally motivated to contest the charges.[246] The tendency of *Monell* claims to settle thus makes § 1983 suits for damages against individual officers the best route to the development of the First Amendment right to record police officers in public.

Monell liability also does not provide citizen recorders a remedy for arrests based on catchall charges because such arrests are made in an *ad hoc*, fact-bound manner. A city may be able to immunize itself from *Monell* liability by simply creating a monitoring system for catchall arrests, but officers can nonetheless intimidate citizens by enforcing unspoken rules and enacting their own subjective form of street justice. Even a large number of such arrests by individual officers will likely be untraceable to the municipality.

V. THE NEED FOR *SAUCIER V. KATZ*'S MANDATORY SEQUENCING IN FIRST AMENDMENT CONSTITUTIONAL TORTS

While the First and Seventh Circuits laudably addressed the merits of whether the First Amendment right to record police officers exists, judges in all other Circuits have avoided the merits and held that the right was not "clearly established" in their Circuit.[247] This qualified immunity analysis would not have

---

[243] *See* Taylor, *supra* note 237, at 749.

[244] *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089-90 (1984).

[245] *Id.* at 1085-86. While *Monell* liability drains funds from government pocketbooks, that impact is far removed from the day-to-day practices of police officers who determine whether to arrest and/or intimidate citizen recorders. Section 1983 suits against individual officers in which those officers are personally motivated to respond and defend themselves provide a more direct affront to the practice of arresting citizen recorders.

[246] *See, e.g.*, Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 754 (1993) (compiling interviews with police departments nationwide and concluding that § 1983 plaintiffs face "a long and arduous litigation process, because police departments rarely settle section 1983 suits").

[247] *See* Kelly v. Borough of Carlisle, 622 F.3d 248, 259, 262 (3d Cir. 2010) ("We find these cases insufficiently analogous to the facts of this case to have put Officer Rogers on notice of a clearly established right to videotape police officers' during a traffic stop."); Szymecki v. Houck, 353 F. App'x. 852, 853 (4th Cir. 2009) (per curiam) ("[T]he district court concluded that Szymecki's asserted First Amendment right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct. We have thoroughly reviewed the record and the relevant legal authorities and we agree."); Mesa v. City of New York, 09 CIV. 10464 JPO, 2013 WL 31002, *25 (S.D.N.Y. Jan. 3, 2013) ("While district court decisions in this Circuit have dealt with similar cases

been possible before *Pearson*'s 2009 ruling because *Saucier*'s rigid order of battle imposed a mandatory sequencing of the merits prong first and the clearly established prong second.[248] The *Pearson* majority recognized that *Saucier*'s "two-step procedure" is valuable when it "promotes the development of constitutional precedent" but offered no further guidance on when to consider the merits prong before the clearly established prong.[249] Therefore, it remains entirely at the discretion of lower federal courts whether or not to reach the merits in qualified immunity cases after *Pearson*.[250]

Pearson discretion threatens to eliminate qualified immunity jurisprudence as a mechanism for the development of constitutional law so long as courts address only the "clearly established" prong of the analysis.[251] *Saucier* previously mandated that courts deviate from the usual principle of constitutional avoidance because the merits determination facilitates the development of constitutional law.[252] Justice Kennedy, writing for the *Saucier* majority, concluded that the explanation of the law would suffer "were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."[253]

Even though courts have most often exercised their *Pearson* discretion in favor of immunity-first adjudication,[254] the Supreme Court recently championed the *Saucier* merits-first model in *Camreta v. Greene*, holding that "our regular policy of avoidance . . . threatens to leave standards of official conduct permanently in limbo."[255] *Camreta* held that in qualified immunity cases

---

involving both recordation and disorderly conduct prosecution . . . no Second Circuit case has directly addressed the constitutionality of the recording of officers engaged in official conduct.").

[248] *See* Saucier v. Katz, 533 U.S. 194, 201 (2001), *overruled in part by* Pearson v. Callahan, 129 S. Ct. 808, 817 (2009).

[249] *Pearson*, 129 S. Ct. at 818.

[250] *See* Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 174-75 (2010).

[251] *See, e.g.*, Michael T. Kirkpatrick & Joshua Matz, *Avoiding Permanent Limbo: Qualified Immunity and the Elaboration of Constitutional Rights from* Saucier *to* Camreta *(and Beyond)*, 80 FORDHAM L. REV. 643, 679 (2011) ("[T]he survival of *Pearson* discretion—which is of vital importance to the development of constitutional law that protects individual rights and defines the limits of official power—may be in jeopardy unless the Court reaffirms its commitment to robust mechanisms of constitutional elaboration and refines the rules governing judicial discretion."). *See also* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 961 (2005) (noting that the rule against advisory opinions and dicta is not absolute where the law demands explanation).

[252] 533 U.S. at 207-08 ("Our instruction to the district courts and courts of appeals to concentrate at the outset on the definition of the constitutional right and to determine whether, on the facts alleged, a constitutional violation could be found is important.").

[253] *Id.* at 201.

[254] *See supra* note 17.

[255] *See* 131 S. Ct. 2020, 2024 (2011).

where the government prevails on the immunity prong but loses on the constitutional merits, the government may appeal the adverse constitutional merits ruling.[256] The majority further explained, "[I]t remains true that following the two-step sequence—defining constitutional rights and only then conferring immunity—is sometimes beneficial in clarifying the legal standards governing public officials."[257] However, Justice Scalia's concurrence[258] and Justice Kennedy's dissent, joined by Justice Thomas,[259] in *Camreta* display a palpable disdain for lower courts' discretion to address the merits before immunity.

The disagreement in *Camreta* may signal that the Supreme Court is losing faith in current qualified immunity doctrine.[260] While *Pearson* noted that "the two-step *Saucier* procedure is often, but not always, advantageous,"[261] *Camreta* cautions that "courts should think hard, and then think hard again, before turning small cases into large ones."[262] In one way, these passages suggest that *Camreta* is in favor of discretion and affirm *Pearson*'s presumption against *Saucier*'s rigid order of battle. However, Justice Kennedy's argument in his *Camreta* dissent that municipal liability, suppression hearings, and declaratory judgments are more preferable vehicles than *Pearson* discretion for developing constitutional law suggests doctrinal instability in post-*Pearson* qualified immunity analysis.[263]

Such instability creates an opening for a qualified immunity doctrine that is tailored to the First Amendment. Requiring *Saucier*'s merits-first adjudication in First Amendment cases would address the concern that repeated immunity findings might leave citizens in the "limbo" contemplated by *Camreta*. Without clear notice about their First Amendment rights, citizen recorders will stop recording due to fear of harassment, arrest, wiretapping charges, or catchall charges. Since wiretapping is a felony in certain states, some two-party consent state wiretapping statutes give prosecutors the tools to seek up to five years in

---

[256] *Id.* at 2028-29.

[257] *Id.* at 2032.

[258] *See id.* at 2036 (Scalia, J., concurring) (explaining that in an "appropriate case," he would be willing to "end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity").

[259] *See id.* at 2043 (Kennedy, J., dissenting) (stating that qualified immunity doctrine stands "in tension with conventional principles of case-or-controversy adjudication" and pejoratively labeling the majority's endorsement of a merits-first approach as "special permission" to issue "unnecessary merits determinations"). Justice Kennedy's *Camreta* dissent reflects a major shift in his thinking about qualified immunity since his *Saucier* majority.

[260] *See* Kirkpatrick & Matz, *supra* note 251, at 669 (observing that "Justices Scalia and Kennedy authored opinions suggesting deep unease with the direction of recent jurisprudence").

[261] Pearson v. Callahan 129 S. Ct. 808, 812 (2009).

[262] 131 S. Ct. at 2031-32.

[263] *See id.* at 2041-44 (Kennedy, J., dissenting).

prison for citizens who record police officers in public.[264] Even if prosecutors ultimately drop the charges, public arrests for recording embarrass citizens in the full view of their community members and thereby deter citizen recording. Because the specter of criminal charges presently deters citizens from recording the police, it is possible that citizens are chilled from engaging in conduct that is protected by the First Amendment.

In addition to chilling protected speech, judges that continue to practice constitutional avoidance risk ossifying First Amendment doctrine in their respective Circuits. The Third Circuit police recording case, *Kelly v. Borough of Carlisle*, explained that "it would be unfaithful to *Pearson* if we were to require district courts to engage in 'an essentially academic exercise' by first analyzing the purported constitutional violation in a certain category of cases."[265] Ironically, the Third Circuit here viewed *Pearson* as a rigid rule and not an invitation for it to exercise its own discretion. This preference for constitutional avoidance allows the First Amendment to stagnate and become essentially backward-looking. *Saucier*'s merits-first adjudication is preferable in First Amendment cases precisely because courts must extrapolate enduring First Amendment principles to the new medium of citizen recording.

First Amendment claims concerning the chilling of protected speech are a *sui generis* form of § 1983 litigation where the lower federal courts ought to have less discretion to entirely avoid reaching the merits. *Pearson*'s conclusion, affirmed in *Camreta*, that a merits-first approach can develop constitutional precedent is manifestly applicable to cases where the direct impact of unclear precedent is the chilling of protected speech. A chilling effect is such a strong constitutional concern under the First Amendment that it ought to rebut the presumption of *Pearson* discretion in favor of *Saucier*'s mandatory sequencing.

Pearson recited nine arguments against *Saucier*'s mandatory sequencing, six of which counsel against courts ever deciding the merits before the "clearly established" prong.[266] For example, *Pearson* cited the avoidance canon and the concern over advisory opinions.[267] The current chilling effect wrought by two-

---

[264] *See, e.g.*, MASS. GEN. LAWS ch. 272 § 99(C)(1) (2008).

[265] *See* Kelly v. Borough of Carlisle, 622 F.3d 248, 259 n.6 (3d Cir. 2010) (internal citations omitted).

[266] *See Pearson*, 129 S. Ct. at 817-21 (arguing that the mandatory *Saucier* sequencing (1) is inefficient for courts to adjudicate "questions that have no effect on the outcome of the case," (2) is inefficient for lawyers to litigate these questions, (3) produces constitutional decisions that are likely to be reversed on appeal, (4) forces constitutional rulings based on an insufficient factual record, (5) makes it difficult to obtain appellate review where the defendant loses on the merits but prevails on the "clearly established" prong, and (6) forces unnecessary determinations of constitutional law that "depart[ ] from the general rule of constitutional avoidance").

[267] *See id.* For a discussion of the concern regarding advisory opinions, see *Scott v. Harris*, 550 U.S. 372, 388 (2007) (Breyer, J., concurring) (quoting Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944)) (finding that courts ought not to decide constitu-

party consent wiretapping statutes powerfully rebuts the avoidance rationale. It is impossible to avoid the merits because the First Amendment right to record police in public is likely to continue developing via common law adjudication in which merits rulings will be the primary vehicle for the right to become "clearly established" in the Circuits nationwide.

Even assuming that the principles of constitutional avoidance and judicial economy should guide a court's discretion under *Pearson*, addressing the merits would resolve a recurrent constitutional question and avoid much future constitutional litigation. Continued immunity-first sequencing is likely to spawn myriad suits seeking injunctive and declaratory relief against two-party consent statutes.[268] Answering the merits question would foster the development of the First Amendment right to record police officers in public and thereby create governing standards that will resolve numerous future cases.

Lower federal courts hearing First Amendment constitutional torts should also relax the norm against advisory merits rulings in right-to-record cases. The norm is already flexible, as evidenced by "such well-established practices as the inclusion in opinions of alternative holdings, the resolution of the merits in harmless error cases, and the flexible mootness doctrine which allows courts to decide moot cases that are 'capable of repetition yet evading review.'"[269] Judge Pierre Leval distinguishes these necessary advisory circumstances from unnecessary merits rulings in qualified immunity cases, arguing that the latter cases confuse dicta and precedent.[270] *Camreta* addressed just such confusion, holding that the Supreme Court may review an advisory merits ruling when petitioned by the government defendant that won the lawsuit below because the merits were not "clearly established" in the Circuit.[271] *Camreta* thus recognizes that there is some doctrinal force and prejudice to a party facing an adverse, advisory merits ruling.[272] The functionally precedential character of such advisory rulings on the merits countenances judges to relax the norm against dicta in order to promote constitutional development.

---

tional questions "unless such adjudication is unavoidable"). *See also* Kirkpatrick & Matz, *supra* note 251, at 651-53 (reviewing the literature on these three criticisms of *Saucier*).

[268] *See e.g.*, Memorandum Opinion and Order at 2, Am. Civil Liberties Union of Ill. v. Alvarez, No. 10-C-5235 (N.D. Ill. Dec. 18, 2012) (describing the ACLU's recording program of officers in Chicago that is replicable nationwide).

[269] *See* Beermann, *supra* note 24, at 154.

[270] *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1268 (2006).

[271] Camreta v. Greene, 131 S. Ct. 2020, 2028 (2011).

[272] *See id.* at 2030 ("They are rulings that have a significant future effect on the conduct of public officials—both the prevailing parties and their co-workers—and the policies of the government units to which they belong. And more: they are rulings self-consciously designed to produce this effect, by establishing controlling law and preventing invocations of immunity in later cases. And still more: they are rulings designed this way with this Court's permission, to promote clarity—and observance—of constitutional rules.").

Pearson also criticized *Saucier*'s mandatory sequencing in cases where the merits determination is tied to an uncertain issue of state law.[273] In such cases, federal courts often abstain from resolving federal constitutional questions that might turn on state law grounds under the doctrine of *Pullman* abstention.[274] *Pullman* abstention is one way in which courts avoid constitutional issues outside of a straightforward avoidance canon. There are a number of uncertain issues of state law in right-to-record cases, such as: (1) whether two-party consent state wiretapping statutes apply to citizen recordings of the police in public, (2) whether the statutes apply only to secret recordings, and (3) whether a party can give constructive consent to the recordings.

Resolving these uncertain state law issues, albeit important, likely will not assist courts in determining the federal constitutional question. Even if state courts clarified the application of state wiretapping statutes, police officers could continue to arrest citizen recorders for catchall criminal charges such as disturbing the peace, disorderly conduct, etc. *Pullman* abstention in cases where a citizen recorder was arrested for a catchall offense is similarly fruitless because the state criminal statutes governing catchall charges likely have well-settled interpretations under state law that are entirely independent of state wiretapping statutes. In general, constitutional tort litigation brought in response to arrests for catchall charges is likely to be fruitless for developing the First Amendment right to record police because a plaintiff will have difficulty pleading a First Amendment violation. Unlike arrests for wiretapping, police can point to citizen conduct outside the scope of protected speech as the basis for catchall criminal offense arrests. Until circuit courts give the federal constitutional question more clarity, § 1983 actions challenging catchall arrests will have little traction.

Furthermore, constitutional tort plaintiffs in right-to-record cases are unlikely to plead the pendant state law claim that is a requirement for federal courts to abstain under *Pullman*.[275] For example, a constitutional tort plaintiff could plead simple assault or false arrest but would not do so because these claims do not accrue additional damages beyond those available in § 1983 actions.[276]

---

[273] *See* Pearson v. Callahan 129 S. Ct. 808, 819 (2009) (rejecting *Saucier*'s sequencing where the "resolution of the constitutional question requires clarification of an ambiguous state statute").

[274] *See* Railroad Comm'n of Tex. v. Pullman, 312 U.S. 496 (1941).

[275] *See id.* at 498 ("The Pullman Company and the railroads assailed the order as unauthorized by Texas law, as well as violative of the Equal Protection, the Due Process, and the Commerce Clauses of the Constitution."). *Pullman* abstention requires that the plaintiff plead both a federal constitutional claim and a state law claim so that the court may abstain on the federal constitutional claim in favor of prior adjudication of the state law claim.

[276] There is often no difference between state tort damages and constitutional tort damages because 42 U.S.C. § 1988 requires courts to look to the state law on damages where the federal law is deficient. *See* Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L.J. 559, 613-14 (1985); *see also* Robertson v. Wegmann, 436 U.S. 584, 590-

Plaintiffs are thus strategically incentivized to plead only their federal civil rights claim. It is also clear that two-party consent states have already settled on an interpretation of those statutes that criminalizes citizen recording of officers absent express consent by the officer, thereby rendering abstention unnecessary.[277]

Pullman abstention is also inappropriate in First Amendment constitutional torts because, "to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect."[278] Protracted state court litigation surrounding the applicability of two-party consent statutes would fail to remove the threat of prosecution that deters citizen recorders. Only a full articulation of the merits of the First Amendment right to record under *Saucier*'s mandatory sequencing can provide such clarity.

Pearson also argues that *Saucier* improvidently required courts to reach the merits in fact-bound cases that would be of little precedential value.[279] All of the current constitutional tort cases in the right-to-record area involve similar facts: citizens arrested for wiretapping or catchall criminal offenses based on their act of recording police officers while located in a public place where they had a right to be and where they did not physically or verbally interfere with a police investigation. These facts are likely to repeat themselves and generate continuing constitutional controversy because "copwatch" groups nationwide currently record police actions as a means of community police oversight.[280]

At least thirty-five major American cities or counties have created civilian review boards that allow community members to directly oversee, monitor, and account for the conduct of police officers.[281] While not all of these groups will record police, they represent the growing portion of private citizens who have recently become involved in police oversight. Modern recording technology like cell phone cameras are ubiquitous and provide citizens with an oversight tool that they can reasonably and practicably use to hold governmental actors accountable. It is inevitable that citizens involved in police oversight will con-

---

91 (1978) (explaining two purposes of § 1983: (1) compensating persons deprived of federal rights and (2) deterring abuses of federal rights by those acting under the color of state law).

[277] *See* Commonwealth v. Ennis, 785 N.E.2d 677, 680-81 (Mass. 2003) (examining application of the Massachusetts wiretapping statute to a cell phone recording made on the Boston Common, a public park). *See also* Commonwealth v. Hyde, 750 N.E.2d 963, 971 (Mass. 2001) (upholding a conviction under the Massachusetts wiretapping statute for citizen recording during a public traffic stop).

[278] *See* Zwickler v. Koota, 389 U.S. 241, 252 (1967). *See also* Dombrowski v. Pfister, 380 U.S. 479, 489-90 (1965) ("[A]bstention . . . is inappropriate for cases [where] . . . statutes are justifiably attacked on their face as abridging free expression.").

[279] *See* Pearson v. Callahan, 129 S. Ct. 808, 819 (2009).

[280] *See* Brief for Berkeley Copwatch, et al. as Amicus Curiae Supporting Plaintiff-Appellee, Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011) (No. 10-1764).

[281] *Id.* at 17-18.

tinue to record officers in two-party consent states and thus generate factually similar cases. Any concrete discussion of the First Amendment merits would provide notice and guidance to oversight groups about their rights during their encounters with the police in public. Even a discussion of the First Amendment interests in dicta would begin to develop a common law consensus around the presence or absence of a First Amendment right to record police officers in Circuits other than the First and Seventh.

Pearson lastly criticized the *Saucier* mandatory sequencing because the motion to dismiss stage involves a cursory factual record on which to reach the merits.[282] This concern is not present in most constitutional torts regarding the right to record police officers in public because they involve simple factual allegations, not less common situations such as where a citizen recorder is interfering with a police officer. The factual record need not be fully developed to decide whether citizens in two-party consent states ever, under any circumstances, have the right to openly make an audio or audiovisual recording of the police in public. Right-to-record cases therefore offer a relatively pure question of First Amendment law that courts should be equipped to resolve on the basis of the bare factual allegations contained in a complaint.

Furthermore, a specific qualified immunity analysis for First Amendment cases where chilling is a concern cannot eschew the traditional trans-substantive character of qualified immunity doctrine.[283] Trans-substantivity, as Professor Richard Fallon observes, makes qualified immunity doctrine "a poor tool for attempting to achieve an equilibration of the values underlying particular rights and the social costs of enforcing them."[284] However, "[d]espite its trans-substantivity, official immunity doctrine is not, of course, wholly inflexible."[285] A rights-specific qualified immunity analysis that puts the First Amendment merits first is simply a procedural return to *Saucier*; it does not make it more or less difficult for officers to win a qualified immunity defense when their conduct allegedly violates the First Amendment as opposed to other federal rights.

VI. CONCLUSION

Mandating *Saucier*'s merits-first adjudicatory model in First Amendment cases where chilling is a concern would appropriately constrain the unguided discretion that lower federal courts currently enjoy under *Pearson*. Such a modest return to *Saucier* would not alter the trans-substantive character of qualified immunity doctrine, as it would only change the order of the qualified immunity analysis when the underlying constitutional right is the First Amendment. This idea builds upon Dean Jeffries' view that "*Pearson* reminds us that different constitutional rights require different remedies . . . depend[ing] on the

[282] *See* 129 S. Ct. at 819-20.
[283] *See* Fallon, *supra* note 33, at 490-91.
[284] *Id.* at 490.
[285] *Id.* at 480.

alternatives."[286]

As I explain in Section IV, there are no viable alternative remedies to § 1983 actions for money damages that would allow the development of the First Amendment right to record police in public. Qualified immunity findings in § 1983 actions alleging a violation of the First Amendment are *sui generis* because a finding that First Amendment law is not "clearly established" leaves the doctrine in limbo with the unique consequence of potentially chilling constitutionally protected speech. Remedial money damages offer the best hope for avoiding *Saucier*'s worrying prediction that the "[t]he law might be deprived of [an] explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."[287]

Repeated immunity findings since *Pearson* in several Circuits have led to the ossification of the First Amendment's application to citizens recording police officers in public.[288] The First Amendment law as applied to citizen recording of police and two-party consent state wiretapping statutes is, at present, only "clearly established" in the First and Seventh Circuits. Against this backdrop of nationwide legal uncertainty and potential criminal penalties, private citizens are indirectly deterred from using their cell phones to record the police. Those private citizens who attempt to hold police officers accountable in their own communities are without one of their best and easiest-to-use tools for oversight.

Constitutional torts against individual officers are necessary because the alternatives of injunctive relief and *Monell* liability are much less likely to create adjudication on merits of the First Amendment right to record. Therefore, the alternatives of injunctive relief and *Monell* liability cannot effectively promote the development of constitutional law that is necessary to provide citizens certainty about their rights and prevent the chilling of citizen oversight of the police. In adjudicating First Amendment constitutional torts for damages, *Saucier*'s mandatory sequencing would force the common law of the First Amendment to adapt to new media and provide citizens with firm notice regarding the

---

[286] *See* John C. Jeffries, *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 117 (2010). In fact, *Pearson* explicitly assumed that its holding would not be trans-substantive by contemplating different remedies for different constitutional tort claims. *See* 129 S. Ct. at 821-22 ("Moreover, the development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity. Most of the constitutional issues that are presented in § 1983 damages actions and *Bivens* cases also arise in cases in which that defense is not available, such as criminal cases and § 1983 cases against a municipality, as well as § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages."). Jeffries calls this "[t]he least satisfying passage in *Pearson*" because it assumes that *Monell* and injunctive remedies are viable when in fact they are often "largely illusory." *See* Jeffries at 131-32.

[287] *See* Saucier v. Katz, 533 U.S. 194, 201 (2001).

[288] *See supra* notes 28 and 247 (collecting post-*Pearson* right-to-record cases decided only on immunity grounds).

legality of recording citizen-police interactions. This merits-first approach to qualified immunity offers the best route for developing the First Amendment right to record, thereby clarifying the legal landscape and removing the chilling effect created by the uncertainty surrounding two-party consent statutes.