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"V.I.P." Videographer Intimidation Protection: How the Government Should Protect Citizens Who Videotape the Police

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"V.I.P." VIDEOGRAPHER INTIMIDATION PROTECTION: HOW THE GOVERNMENT SHOULD PROTECT CITIZENS WHO VIDEOTAPE THE POLICE

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I. INTRODUCTION

With each passing day, more incidents involving police officers, private citizens, and video cameras are emerging on the Internet, making the news, and sometimes appearing on civil and criminal dockets.[1] When individuals bring these incidents to public attention, more people seek to record police activity, which creates more opportunities for police officers to intimidate videographers.[2] On YouTube, an Internet user can watch hours of uploaded footage showing police officers aggressively confronting videographers.[3] These encounters raise questions about police conduct and private

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[1] *See, e.g.*, Hinhin2, *Good Cops, Doing Their Job, Professionally*, YOUTUBE (Feb. 28, 2011), http://www.youtube.com/watch?v=sylrpLhG4w0&NR=1; DanceRooster, *How To Invoke Your Rights With the Police*, YOUTUBE (Jan. 23, 2010), http://www.youtube.com/watch?v=0En_sdsyh1M&feature=related; RidleyReport, *NH: What to Do When Cops Order Camera Shutoff?*, YOUTUBE (Dec. 13, 2008), http://www.youtube.com/watch?v=vLSptMe3yw0&feature=related; Acumensch, *Film Is Not A Crime*, YOUTUBE (Mar. 7, 2007), http://www.youtube.com/watch?v=DMDW4Fszj2U.

[2] *See* sources cited *supra* note 1. The titles of these videos and related posts on the internet indicate that at least some private citizens are actively filling the role of providing public oversight of police conduct. As "how to" and other oversight videos continue to be uploaded and accumulate views, the number of videos being produced will likely rise, thus increasing the likelihood of confrontations with police over the use of the video camera.

[3] *See, e.g.*, Ccpafl, *Cop Watcher Arrested While Filming Police*, YOUTUBE (May 9, 2011), http://www.youtube.com/watch?v=F_8Bv0wNgCY&feature=related; RTAmerica, *Woman Arrested for Filming Police*, YOUTUBE (June 22, 2011), http://www.youtube.com/watch?v=OtJpL2ZdWVI; HellandKeller, *Police vs. Civilians w/ Video Camera*, YOUTUBE (Aug. 31, 2010), http://www.youtube.com/watch?v=A_U1oFcCAZo&feature=related. By using keywords like "police," "intimidation," and "camera" in the search query, users can endlessly watch videos of confrontations between private citizens and police officers regarding the use of video cameras.

citizens' rights to film police. Several courts, police departments, and legal scholars have addressed these questions, but have failed to reach a consensus as to the legality and practicality of protecting videographers from police intimidation.[4] So, the power to protect individuals and their rights to film police officers lies in the hands of state legislatures.

The United States Court of Appeals for the First Circuit recently addressed some of these questions in *Glik v. Cunniffe*.[5] In *Glik*, Boston police officers arrested Simon Glik for using his cellular phone's digital video camera to film several police officers arresting a young man.[6] Glik was subsequently charged with violations of Massachusetts's Anti-Wiretapping Statute[7] and two other state-law offenses, which the Court ultimately deemed baseless and thereby dismissed.[8] In doing so, the First Circuit held that the defendant police officers were not entitled to qualified immunity from Glik's constitutional claims because Glik had "clearly established First Amendment rights in filming the officers in public space."[9]

Glik demonstrates that the First Circuit is willing to defend a First Amendment right to videotape police officers. But not all courts extend a public right to film police officers, and the precise source of the right to film police within the First Amendment is somewhat elusive.[10] Arguably, the law is leaning in the direction of "protecting" individuals who film police officers in public, but police officers may be actively suppressing the use of video cameras to record police conduct.[11] If a First Amendment right to film police officers exists, or at least ought to exist, then state legislatures must protect videographers from overreaching police intimidation.

This Comment discusses police intimidation of videographers and provides a legislative model that protects videographers who film police conduct. Part II discusses how filming police in public is protected First Amendment activity. Part III exposes how the current legal environment incentivizes police officers to intimidate videographers who attempt to film police conduct. Part IV

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4 *See* discussion *infra* Parts III–IV.

5 Glik v. Cunniffe, 655 F.3d 78, 79 (1st Cir. 2011).

6 *Id.*

7 MASS. GEN. LAWS ANN. ch. 272, § 99 (West 2000).

8 *Glik*, 655 F.3d at 79.

9 *Id.* at 85.

10 *See infra* Part II.

11 *See* infra Part II.

scrutinizes the current framework of deterrents designed to prevent police misconduct and discusses why these safeguards fail to protect videographers. Part V recommends a bright-line rule that imposes harsh punishments to effectively deter police officers from intimidating law-abiding videographers who capture police conduct on camera. Lastly, Part VI will conclude this discussion.

II. FILMING POLICE OFFICERS IN PUBLIC AND FIRST AMENDMENT PROTECTION

This section provides an overview of the ambiguous First Amendment right to film police in public and discusses how legal and academic consensus is trending towards enhancing protection for videographers. Some courts have already held that the First Amendment protects filming police officers, but these courts have failed to precisely explain this right's origins and limitations.[12] Other courts, however, have not recognized a broad right to film police within the First Amendment.[13] Despite this dissonance, a First Amendment right to film police officers in public will likely be recognized in the future based on recent court decisions and legal scholarship.[14]

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[12] *See, e.g.*, ACLU of Ill. v. Alvarez, 679 F.3d 583, 586–87 (7th Cir. 2012) (holding that an Illinois eavesdropping statute "likely violates the First Amendment's free-speech and free-press guarantees"); Smith v. City of Cummings, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding that the plaintiffs "had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct," and that the First Amendment "protects the right to gather information about what public officials do on public property," but failing to clearly elaborate where in the First Amendment such a powerful right exists); State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *33–34 (Md. Cir. Sept. 27, 2010) ("[S]tatutes which implicate the free speech protections of the First Amendment must be narrowly construed."); *but see* Ramos v. Flowers, No. A-4910-10T3, 2012 WL 4208699, at *6 (N.J. Super. Ct. App. Div. Sept. 21, 2012) ("A documentary about a subject of public interest, such as urban gangs, is a form of investigative journalism, and the process of preparing such a documentary is a form of news gathering. For that reason, those activities are protected by the First Amendment to the United States Constitution . . . .").

[13] *See, e.g.*, Pomykacz v. Borough of W. Wildwood, 438 F. Supp. 2d 504, 512–13 n.14 (D.N.J. 2006) (explaining that the act of photographing, by itself, is not sufficiently communicative and therefore not subject to First Amendment protection, regardless of whether or not the subject is a public servant).

[14] *Cf. Alvarez*, 679 F.3d at 586–87; Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011). *See generally* Caycee Hampton, *Case Comment: Confirmation of a Catch-22:* Glik v. Cunniffe *and the Paradox of Citizen Recording*, 63 FLA. L. REV. 1549 (2011); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 392–403 (2011); Lisa A. Skehill, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow For the*

In relevant part, the First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[15] Although *Glik* lacked direct reference to the language of the First Amendment, it recognized an "unambiguous" right to gather and disseminate information related to matters of public interest, especially police conduct.[16] Likewise, the Supreme Court has indicated that First Amendment protection extends beyond the press, and defends individuals like Glik in regard to gathering public information.[17]

But precisely how the First Amendment affords such protection is not clearly established.[18] In *Glik*, First Circuit Judge Lipez remarked that "the First Amendment's aegis extends further than the text's proscription on laws 'abridging the freedom of speech, or of the press,' and encompasses a range of conduct" related to information gathering and dissemination.[19] To connect these principles to the filming of police officers in public, the court declared that "[t]he filming of . . . police officers performing their responsibilities" is a "cardinal First Amendment interest in protecting and promoting" information gathering, dissemination, and "free discussion of government affairs."[20] The court easily categorized Glik's activity as

Surreptitious Recording of Police Officers, 42 SUFFOLK U. L. REV. 981 (2009); Howard W. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600 (2009).

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

[16] *Glik*, 655 F.3d at 85 ("[T]hough not unqualified, a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.").

[17] *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978); Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978); Branzburg v. Hayes, 408 U.S. 665, 681–82 (1972).

[18] *See Glik*, 655 F.3d at 82. In opinions such as *Fordyce*, the court merely glanced over "the First Amendment right to film matters of public interest" without sufficiently explaining from where the right is derived. Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995).

[19] *Glik*, 655 F.3d at 82 (quoting *Belotti*, 435 U.S. at 783) (extending the First Amendment's reach in *Glik* by attributing that it "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").

[20] *Id.* (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)); s*ee also* Smith v. City of Cummings, 212 F.3d 1332, 1333 (11th Cir. 2000) (citing Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994)) ("The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."); *Fordyce*, 55 F.3d at 439.

information gathering and dissemination, but it failed to clearly indicate why that activity was actually protected by the First Amendment.[21] Circuit Judge Lipez vigorously supported his position with case law like *Smith v. City of Cumming* and *Fordyce v. City of Seattle*.[22] Upon closer inspection, however, those Supreme Court opinions merely addressed a videographer's First Amendment rights in passing, and failed to precisely derive the source of protection from the language of the First Amendment.[23] The majority of the sources used in *Glik* are somewhat ambiguous as to how the right to film matters of public concern is actually protected First Amendment activity.[24]

One source, however, provides more specific insight as to how the filming of police officers is protected First Amendment activity. *Glik* cited *Robinson v. Fetterman*, which held that individuals have a *free-speech* right to film police officers in the course of their public activities.[25] By at least referencing the Speech Clause,[26] the court in *Robinson* modestly provided some legitimate constitutional support for what *Glik* would ultimately declare to be a "clearly-established" First Amendment right to film police officers in public.[27]

Branching off from the Speech Clause, some legal scholars have more thoroughly examined the existence of a First Amendment right

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[21] *See Glik*, 655 F.3d at 82.

[22] *Id.* at 83 (citing *Smith*, 212 F.3d at 1333; *Fordyce*, 55 F.3d at 439). Amongst others cited to support the proposition that "the First Amendment protects the filming of government officials in public spaces" are Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969), and Connell v. Town of Hudson, 733 F. Supp. 465 (D.N.H. 1990).

[23] *Smith*, 212 F.3d at 1333 (where the plaintiffs allege that police harassed them for filming police activity, the court merely stated that it "agreed" that the plaintiffs had a First Amendment right and provided no further First Amendment analysis). *See generally Fordyce*, 55 F.3d 436 (this opinion does not discuss the merits of a First Amendment right to film but merely rejects the defendants' motion for summary judgment since a genuine issue of material fact existed in regard to whether the plaintiff's rights were violated when police seized and smashed his camera).

[24] *See Glik*, 655 F.3d at 82 (citing *Bellotti*, 435 U.S. at 777 n.11); Gentile v. State Bar of Nev., 501 U.S. 1030, 1035–36 (1991); *Mills*, 384 U.S. at 218).

[25] Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) ("Videotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence . . . . [T]here can be no doubt that the free speech clause of the Constitution protected Robinson as he videotaped the [police officers].").

[26] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech").

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

to film police officers.[28] The right to gather and disseminate information may be derived from three elements within the First Amendment: the Speech Clause ("Congress shall make no law . . . abridging the freedom of speech"); the Press Clause ("or of the press"); and the Petition Clause ("the right of the people . . . to petition the Government for a redress of grievances").[29] The Speech Clause protects the direct dissemination of speech—"dissemination" may be the speech itself or conduct that necessarily facilitates the speech.[30] Similarly, the Press Clause is interpreted to protect reasonable conduct antecedent to expression, such as legitimate means of news gathering.[31] Lastly, the Petition Clause protects information gathering for private citizens seeking the resolution of legal disputes and for the general purposes of self-governance.[32]

Conceivably, filming police officers could satisfy all three First Amendment clauses that form the right to gather and disseminate information. Hypothetically, a videographer could decide to make a documentary about the state of law enforcement in his community by video-recording the local police on duty. The videographer's commentary about law enforcement would be the "speech" itself in satisfaction of the Speech Clause and, absent additional conduct warranting police intervention, would be facially reasonable.[33] The Press Clause would protect the actual act of filming the police officers in public because it is a necessary and common means of news gathering.[34] Lastly, since a documentary could comment on law

[28] Wasserman, *supra* note 14, at 665.

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

[30] ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 797–99 (9th Cir. 2006).

[31] *See* Branzburg v. Hayes, 408 U.S. 665, 681 (1972) ("We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."); Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 354 (2004) (noting that the Speech Clause and Press Clause may not even be separate sources of the right to disseminate information, but the traditional press's news gathering conduct receives extensive First Amendment protection).

[32] *See* Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2494 (2011); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 896–97 (1984); s*ee also* McDonald v. Smith, 472 U.S. 479, 483 (1985) ("The values in the right of petition as an important aspect of self-government are beyond question.").

[33] *See* Williamson v. Mills, 65 F.3d 155, 158 (11th Cir. 1995) ("Taking photographs at a public event is a facially innocent act.").

[34] *See* ACLU of Ill. v. Alvarez, 679 F.3d 583, 595 (7th Cir. 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

enforcement, the film would have a general purpose for self-governance, thus satisfying the Petition Clause.[35] Albeit somewhat simplistic, this model illustrates how filming police is activity protected directly by the language of the First Amendment itself.

Alternatively, instead of focusing on a right to gather and disseminate information, some scholars argue that a right to film police officers can be derived from "freedom of expression."[36] For instance, captured images from photography or video-recording can be "like words inscribed on parchment" and therefore fall within the realm of First Amendment protection.[37] The analogy is that a videographer is to his recording as a writer is to his writings.[38] Since the government cannot interfere with a writer chronicling his thoughts and beliefs, likewise the government cannot disrupt a videographer recording in public.[39] Courts, however, have rejected this view, stating that because no idea is communicated through mere recordings, images and videos are not necessarily forms or means of

disseminate the resulting recording) (emphasis in original); Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005). Filming or videotaping is an essential part of reporting information and without the right to video-record, information gathering could not possibly be as effective as it is. *Id.* ("Videotaping is a legitimate means of gathering information for public dissemination . . . ."); Ramos v. Flowers, No. A-4910-10T3, 2012 WL 4208699, at *6 (N.J. Super. Ct. App. Div. Sept. 21, 2012) ("A documentary about a subject of public interest, such as urban gangs, is a form of investigative journalism, and the process of preparing such a documentary is a form of news gathering. For that reason, those activities are protected by the First Amendment to the United States Constitution . . . .").

[35] *Alvarez*, 679 F.3d at 597 ("'[T]here is practically universal agreement that a major purpose of' the First Amendment 'was to protect the free discussion of government affairs' . . . .") (quoting Ariz. Free Enter. Club's Freedom Club PAC v. Bennet, 131 S. Ct. 2806, 2828 (2011) (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976))); *Ramos*, 2012 WL 4208699, at *9 ("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 'free discussion of government affairs.'" (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966))). Debate on public issues should be uninhibited even if they include unpleasant attacks and scrutiny on the government and public officials. *See* Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government. . . . [D]ebate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

[36] *See* Kreimer, *supra* note 14, at 379.

[37] *Id.*

[38] *See id.*

[39] *Id.* ("The government is barred from intermeddling . . . in both speech and thought . . . [which] undergird the constitutional commitments to personal autonomy and popular sovereignty.").

expression that warrant protection.[40] In determining whether an isolated expression was protectable as "symbolic speech," courts have weighed the presence or absence of a "message conveyed" in the act that could constitute expression.[41] Compared to the right to gather and disseminate information, the freedom of expression argument is somewhat weaker.

Overall, although courts have failed to sufficiently discern a First Amendment right to film police officers in public, a solid argument exists for such a right. The right to gather and disseminate information derived from the Speech Clause, the Press Clause, and the Petition Clause fairly applies to situations like *Glik*, where a concerned citizen publicly seeks to document the activity of law enforcement officers with his video camera.[42] Thus, the right to film police officers in public has at least some identifiable roots in the plain language of the First Amendment.

III. INCENTIVES FOR POLICE OFFICERS TO INTIMIDATE VIDEOGRAPHERS

Despite "sweeping" decisions like *Glik* that strongly protect videographers' rights,[43] police engage in arrests and intimidation tactics to suppress videographers from filming police conduct in public.[44] This Part focuses on three aspects of the legal environment which compel some police officers to actively confront, intimidate, and even arrest individuals for filming police conduct in a public space: first, how police are often threatened by videographers;

[40] Montefusco v. Nassau Cnty., 39 F. Supp. 2d 231, 241–42 (E.D.N.Y. 1999) (stating that to warrant protection, "there must still be (1) a message to be communicated and (2) an audience to receive that message regardless of the medium in which the message is sought to be expressed. . . . [I]f either is lacking, there is absolutely nothing to transmit from 'mind to mind'"); *see also* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 568 (1995); Texas v. Johnson, 491 U.S. 397, 404 (1989); Spence v. Washington, 418 U.S. 405, 409 (1974); Bery v. City of New York, 97 F.3d 689, 695 (2d Cir. 1996). *But see Alvarez*, 679 F,3d at 596 ("[W]e have never seriously questioned that the process of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection.").

[41] *See Montefusco*, 39 F. Supp. 2d at 241–42; Kreimer, *supra* note 14, at 371.

[42] *See* Glik v. Cunniffe, 655 F.3d 78, 79 (1st Cir. 2011).

[43] Erica Goode, *New Tool for Police, the Video Camera, and New Legal Issues to Go With It*, GOUPSTATE.COM (Oct. 11, 2011) http://www.goupstate.com/article/20111011/ZNYT02/110113009/1088/sports?p=4&tc=pg&tc=ar.

[44] ReasonTV, *The Government's War on Cameras!*, YOUTUBE (May 26, 2011), http://www.youtube.com/watch?feature=player_embedded&v=LY0MUARqisM#! (interviewing Professor Eugene Volokh, who remarks "as it happens, the unfortunate reality is that often officers can intimidate people into not doing things they otherwise legally could").

second, the advantages police wish to maintain in courtrooms; and, lastly, the confusing state of anti-wiretapping statutes and laws of general applicability which often falsely justify arrests. Because of these three conditions, police officers will likely continue to suppress individuals who attempt to capture police conduct on video unless state legislatures enact changes that protect videographers' First Amendment rights.

Police are often uncomfortable and threatened by civilians with video cameras.[45] The basic reality is that some police officers do not appreciate being videotaped, which results in aggressive reactions from police officers toward videographers.[46] Generally, "[p]olice, like many civilians, are often camera-shy" and "dislike being recorded in embarrassing situations and may be concerned that dissemination of their images may put them at risk of retaliation."[47] Additionally, police officers often view videography as a challenge to their authority.[48] Considering those challenges to authority and the fear of retaliation, the problem for police is how to respond when every citizen is a potential threat of surveillance and scrutiny.[49] Police face potential bombardment from videographers because recording devices are cheaper and handier than ever.[50] Due to the proliferation of inexpensive recording technology, police encounters in public are more commonly captured on portable media that can be disseminated almost instantly, allowing the public to constantly scrutinize and form opinions about the police.[51]

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[45] *See, e.g.*, HellandKeller, *supra* note 3 (where the filmed police officer admitted, in apologizing to the videographers after they had a discussion with his superior, that he "was trying to intimidate" the videographers).

[46] *See id.*

[47] Kreimer, *supra* note 14, at 357.

[48] *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/?page=full (quoting David Ardia, Director of the Citizen Media Law Project at Harvard's Berman Center for Internet and Society, "[p]olice are not used to ceding power, and [video cameras] are forcing them to cede power").

[49] Kevin Johnson, *For Cops, Citizen Videos Bring Increased Scrutiny*, USA TODAY, Oct. 18, 2010, http://www.usatoday.com/news/nation/2010-10-15-1Avideocops15_CV_N.htm (quoting San Jose Police Chief Rob Davis, "[t]here is no city not at risk of a video showing an officer doing something wrong . . . [t]he question, when one of these videos do surface, is what we do about it").

[50] Wasserman, *supra* note 14, at 617–18 ("Technological improvement means that recorded evidence of police-public encounters, good and bad, will be the norm, more frequent and more widely disseminated, within and without the news media.").

[51] *See* Ray Sanchez, *Growing Number of Prosecutions for Videotaping the Police*, ABC NEWS, July 19, 2010, http://abcnews.go.com/US/TheLaw/videotaping-cops-

Police assert that this trend threatens certain societal interests.[52] Jim Pasco, the executive director of the Fraternal Order of Police,[53] remarked that the proliferation of cheap video equipment has "a chilling effect on some officers who are now afraid to act for fear of retribution by video."[54] Pasco's statement implies that video causes police officers to second-guess themselves before they act.[55] Additionally, Pasco's statement indicates that police officers either act differently or less deliberately when they know their conduct is not being recorded. If a police officer knew that his conduct was lawful, justified, and otherwise correct, he probably would not hesitate from acting regardless of whether a videographer was digitally capturing his conduct. A police officer's hesitation while a videographer records his conduct reinforces the argument that filming police officers in public causes police officers to lawfully and thoughtfully conduct police business. Pasco and the police seem to consider recorded observation of police conduct as a defect of society's new power to digitally record in public, but perhaps it is actually a positive feature that reduces occurrences of police misconduct.[56]

As the voice of the world's largest organization of law enforcement officers,[57] Pasco established that some police feel threatened by the concept that they are under surveillance.[58] In an interview with Reason Magazine's Radley Balko, Pasco supported the

arrest/story?id=11179076#.TrW-BXKwXf8; Keith B. Richburg, *New York's Video Vigilante, Scourge of Parking Enforcers*, WASH. POST, Aug. 3, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/08/02/AR2008080201503.html (describing the increasing trend of amateur videos of police conduct on YouTube).

[52] Johnson, *supra* note 49 (reporting that some police organizations believe "videotaping officers poses broad risks that reach beyond Internet embarrassments: It could cause officers to hesitate in life-threatening situations").

[53] FRATERNAL ORDER OF POLICE, http://www.fop.net (last visited Aug. 25, 2012) ("The Fraternal Order of Police is the world's largest organization of sworn law enforcement officers, with more than 325,000 members in more than 2,100 lodges. We are the voice of those who dedicate their lives to protecting and serving our communities. . . . [N]o one knows police officers better than the FOP.").

[54] Johnson, *supra* note 49.

[55] *See id.*

[56] Radley Balko, *Police Officers Don't Check Their Civil Rights at the Station House Door*, REASON (Aug. 9, 2010), http://reason.com/archives/2010/08/09/police-officers-dont-check-the (referencing how the Washington Post, USA Today, the Washington Examiner, the Washington Times, and other commentators have "all weighed in on the side that citizen photography and videography can be an important check to keep police officers accountable and transparent").

[57] FRATERNAL ORDER OF POLICE, *supra* note 53.

[58] *See* Johnson, *supra* note 49.

arrests of individuals like Anthony Graber,[59] who faced over fifteen years in prison for filming his own traffic stop, because the video could be manipulated to negatively portray police officers.[60] Pasco elaborated that civilian video could be edited or taken out of context, and when the video is not in the custody or control of law enforcement, it is rightly inadmissible as evidence.[61] Further, Pasco asserted that "[l]etting people record police officers is an extreme and intrusive response to a problem that's so rare it might as well not exist. It would be like saying we should do away with DNA evidence because there's a one in a billion chance that it could be wrong."[62] The "problem" that Pasco is referring to is police misconduct that is uncovered by civilian videography.[63] Overall, if Pasco truly represents the largest law enforcement organization in the world, then his statements suggest that the law-enforcement community views the act of filming a police officer as "extreme and intrusive."[64] This anxiety explains why police officers may act particularly aggressively toward videographers.

One reason why video threatens police officers is that civilian recordings have revealed serious inconvenient truths and exposed horrible incidents of police misconduct—most notably, the Rodney King incident.[65] Arguably, prohibitions on video recording and

[59] Balko, *supra* note 56; *see* State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *4–5 (Md. Cir. Sept. 27, 2010). Maryland state police officers raided Anthony Graber's home, confiscated his camera, computers, and hard drive, and arrested him for violating state wiretap laws when he posted the video of himself being pulled over by a gun-wielding undercover police officer on YouTube. Sanchez, *supra* note 51. Maryland Circuit Court Judge Emory A. Pitt, Jr. dismissed the case reasoning that law enforcement officers enjoy a very narrow expectation of privacy in the performance of their duties. *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *7–8; *see also* Peter Hermann, *Judge Says Man Within Rights to Record Police Traffic Stop*, 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; Anthony Graber, *Cop Pulls Out Gun On Motorcyclist*, YOUTUBE (June 5, 2010), http://www.youtube.com/watch?v=RK5bMSyJCsg.

[60] Balko, *supra* note 56.

[61] *Id.*

[62] *Id.*

[63] *See id.*

[64] *Id.* Pasco is not referring to conduct surrounding recording of police officers, just the act of recording alone. *Id.* (Pasco remarks "[y]ou have 960,000 police officers in this country, and millions of contacts between those officers and citizens. I'll bet you can't name 10 incidents [sic] where a citizen video has shown a police officer to have lied on a police report. . . . Letting people record police officers is an extreme and intrusive response to a problem that's so rare it might as well not exist.").

[65] *See* Jim Kavanagh, *Rodney King, 20 Years* Later, CNN (Mar. 3, 2011),

image capture "are deployed to suppress inconvenient truths."[66] The police's desire to censor videographers suggests that police officers are interested in controlling public perception of their conduct, and not just interferences with police business. Because police record their own conduct at nearly all times they are on duty, justifications for censoring videographers from recording the exact same conduct seem unreasonable.[67] Police previously enjoyed a monopoly over the ability to record public confrontations using cameras in cruisers and recording equipment attached to officers.[68] The power to record, however, is no longer unilaterally in police possession because private citizens can cheaply record police actions with minimal effort.[69] The potential First Amendment rights in filming police, the broad availability of recording devices, and the cultural obsession with posting personal videos on the internet eliminate any shroud of secrecy that police could maintain in publicly discharging their duties.[70] This threatening environment encourages police officers to either act appropriately at all times because they are under surveillance, or intimidate videographers to reduce any incentives to film police conduct.[71] Thus, some police officers seek to deter the public from filming their conduct because that conduct may be illegal, while others, like Pasco, find the act of recording police to be inherently intrusive.[72] It is for these reasons that police officers are incentivized to confront, intimidate, and arrest videographers.

When the biggest threats to police credibility were merely

http://articles.cnn.com/2011-03-03/us/rodney.king.20.years.later_1_laurence-powell-theodore-briseno-king-attorney-milton-grimes?_s=PM:US; *see also* Commonwealth v. Hyde, 750 N.E.2d 963, 971–72 (Mass. 2001) (Marshall, C.J., dissenting) (commenting on the importance of George Holliday's infamous recording of the Rodney King incident).

[66] Kreimer, *supra* note 14, at 383.

[67] Wasserman, *supra* note 14, at 651 ("[T]he basic act of recording officers in the performance of their official duties does not burden the officers or interfere with their ability to execute their offices."); Goode, *supra* note 43.

[68] INT'L. ASSOC. OF CHIEFS OF POLICE, THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING 13–26 (2004), *available at* http://cops.usdoj.gov/publications/video_evidence.pdf ("Attorneys representing [police] agencies categorically support the use of the in-car camera. They pointed out that video evidence allows them to save time in case disposition. On rare occasions, after reviewing the video evidence, they decided to settle the case in lieu of proceeding to trial. . . . The presence of video evidence allow[s] the agency to defend the officer with great success.").

[69] *See* Rowinski, *supra* note 48 ("[T]he proliferation of cellphone and other technology has equipped people to record actions in public.").

[70] *Id.*

[71] *See* Balko, *supra* note 56.

[72] *Id.*

eyewitness accounts of an incident, police could at least attempt to plausibly deny embarrassing or illegal conduct.[73] Once the availability of portable recordable media exploded, however, police officers lost the advantages of plausibility, deniability, and controlled documentation of the incident.[74] In "he said, she said" factual disputes, police officers are usually given the benefit of the doubt during proceedings.[75] In forming the record, police are accustomed to receiving substantial deference, and many prefer to be in a position where they can shape the perception of their actions without competing against a digital record.[76] In cases of police misconduct, the facts are often reduced to a citizen's word against the police officer's word.[77] Juries are more inclined to believe police officers over ordinary citizens.[78] Therefore, prior to the proliferation of recording devices, police officers maintained a strategic advantage in creating the record.

As portable videography spreads, police lose this strategic courtroom advantage. For instance, after the Prince George's County riot police beat Jack McKenna, police officers provided sworn statements that McKenna "struck [the] officers and their horses, causing minor injuries."[79] These sworn statements were directly contradicted by amateur video footage of the incident, which indisputably demonstrated that McKenna never touched the police

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[73] *See* INT'L ASSOC. OF CHIEFS OF POLICE, *supra* note 68, at 5–6 (discussing the history of video recording in police cruisers, effectively beginning in the 1980s).

[74] *See* Rowinski, *supra* note 48.

[75] *See* Sanchez, *supra* note 51 (quoting James Green, an attorney for the ACLU of Florida, who remarked that "[j]udges and juries want to believe law enforcement[;] . . . they want to believe police officers and unless you have credible evidence to contradict police officers, it's often very difficult to believe the word of a citizen over a police officer." The ACLU filed a First Amendment lawsuit on behalf of Sharron Tasha Ford after she was arrested for videotaping an encounter between police and her teenage son at a movie theater).

[76] Kreimer, *supra* note 14, at 357.

[77] *See, e.g.*, Youa Vang Lee v. Anderson, Civ. No. 07-1205, 2009 WL 1287832, at *9 (D. Minn. May 6, 2009) (concluding, despite heavily disputed facts, that both the police officer who shot the plaintiff's son and the city were entitled to summary judgment because the plaintiff failed to produce any evidence of a policy or custom as the cause of the police officer's alleged misconduct).

[78] *See* Skehill, *supra* note 14, at 998; 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, 764–65 (1993); Wasserman, *supra* note 14, at 618.

[79] Bradley Blackburn, *University of Maryland Student Brutally Beaten By Police After Basketball Game*, ABC NEWS (Apr. 13, 2010), http://abcnews.go.com/WN/video-shows-university-maryland-student-beaten-county-police/story?id=10362033#.TrYI7HKwXf8.

officers or their horses, and was instead calmly retreating when multiple riot police battered him against a wall and beat him with batons as he lay on the ground.[80] Ultimately, the state dropped all charges against McKenna, and the Prince George's County Police Chief, Roberto Hylton, suspended one police officer.[81]

As the McKenna case illustrates, police officers can lose their credibility very quickly if outside recordings are brought to the attention of the public and the court. Video evidence is so effective because the images provide a "direct, unmediated view of the reality they depict," and viewers, such as jury members, are more likely to accept those images as "credible representations" of how events actually transpired.[82] Compared to verbal descriptions of events, images are often more powerful for the viewer because the character of the medium is self-authenticating.[83] When officers are caught "blatantly contradict[ing]" video evidence, the result is fierce public criticism and sometimes suspension, firing, embarrassment, and/or civil damages.[84] Thus, expanding the availability of video reduces the likelihood that a police officer can successfully make a false statement.

Additionally, video evidence is particularly important in resolving civil rights claims that follow allegations of police misconduct. For example, video evidence can drastically change the outcomes of § 1983 civil rights actions[85] because courts understand video evidence as "singularly powerful" and "an unambiguous source

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[80] *Id.*; Roberts and Wood Law, *Beating and Arrest of Jack McKenna - April 3, 2011*, YOUTUBE (Dec. 10, 2010), http://www.youtube.com/watch?v=Zcrnnmt8cg8.

[81] Blackburn, *supra* note 79.

[82] *See* Wasserman, *supra* note 14, at 619 (quoting RICHARD K. SHERWIN, POPULAR CULTURE AND LAW xiv (Richard K. Sherwin ed., 2006)).

[83] ACLU of Ill. v. Alvarez, 679 F.3d 583, 607 (7th Cir. 2012) ("[A]udio and audiovisual recording are uniquely reliable and powerful methods of preserving and disseminating news and information about events that occur in public. Their self-authenticating character makes it highly unlikely that other methods could be considered reasonably adequate substitutes."); Kreimer, *supra* note 14, at 386.

[84] *See* Wasserman, *supra* note 14, at 651–52 (internal citations and quotation marks omitted); s*ee also* Trymaine Lee, *Police Officer Who Shoved a Bicyclist Is Off the Job*, N.Y. TIMES, Feb. 20, 2009, at A24. *But see* Briscoe v. LaHue, 460 U.S. 325, 343 (1983) (establishing that police officers who commit perjury have an absolute immunity against suits for money damages because allowing officers to be sued for their testimony as witnesses "might undermine not only their contribution to the judicial process but also the effective performance of their other public duties").

[85] *See, e.g.*, Scott v. Harris, 550 U.S. 372, 378 (2007) (discussing how the "existence in the record of a videotape capturing the events in question" is an "added wrinkle" to the resolution of the case).

of proof."[86] Fundamentally, video is perceived as truthful, objective, and generally clear, which often gives the video evidence dispositive weight in determining the outcome of the civil rights claim.[87] Because videography has this power, police are tempted to preserve their advantage in recording by preventing outside videographers from ever capturing police conduct in the first place.[88] Since a videographer may capture police misconduct that the officer cannot plausibly deny, police have to choose between acting appropriately and preventing the creation of evidence of misconduct. Consequently, some police officers have chosen the latter option, which can result in intimidation, harassment, and sometimes the arrest of otherwise law-abiding videographers.[89]

When police officers arrest videographers, the videographers often demand justification for their arrest.[90] Police officers commonly cite either the local jurisdiction's anti-wiretapping statute[91]

[86] Wasserman, *supra* note 14, at 607; *see also Alvarez*, 679 F.3d at 607; Marvin v. City of Taylor, 509 F.3d 234, 239–40 (6th Cir. 2007); Beshers v. Harrison, 495 F.3d 1260, 1262 n.1 (11th Cir. 2007).

[87] Wasserman, *supra* note 14, at 607.

[88] *See* Rowinski, *supra* note 48.

[89] *See* sources cited *supra* note 3.

[90] *See supra* note 3.

[91] *See, e.g.*, 47 U.S.C. § 605 (2006); ALA. CODE § 13A-11-31 (1975); ALASKA STAT. ANN. § 42.20.310 (West 2007); ARIZ. REV. STAT. ANN. § 13-3005 (2010); ARK. CODE ANN. § 5-60-120 (West 2008); CAL. PENAL CODE § 631 (West 2011); COLO. REV. STAT. § 18-9-304 (West 2004); CONN. GEN. STAT. ANN. § 53a-189 (West 2007); DEL. CODE ANN. tit. 11, § 1335 (West 2010); FLA. STAT. ANN. § 934.03 (West 2001); GA. CODE ANN. § 16-11-62 (West 2009); HAW. REV. STAT. ANN. § 711-1111 (West 2008); IDAHO CODE ANN. § 18-6702 (West 2006); 720 ILL. COMP. STAT. 5/14-2 (West 2006); IND. CODE § 35-33.5-1 (2004); IOWA CODE ANN. § 727.8 (West 2003); KAN. STAT. ANN. § 21-6101 (West 2008); KY. REV. STAT. ANN. § 526.020 (West 2006); LA. REV. STAT. ANN. § 15:1303 (West 2005); ME. REV. STAT. ANN. tit. 15, § 710 (2003); MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (West 2002); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 2000); MICH. COMP. LAWS ANN. § 750.539 (West 2004); MINN. STAT. ANN. § 626A.02 (West 2009); MO. ANN. STAT. § 542.402 (West 2002); MONT. CODE ANN. § 45-8-213 (2009); NEV. REV. STAT. ANN. § 200.650 (West 2000); N.H. REV. STAT. ANN. § 570-A:2 (2007); N.J. STAT. ANN. § 2A:156A-3 (West 2011); N.Y. PENAL LAW § 250.05 (McKinney 2008); N.C. GEN. STAT. ANN. § 15A-287 (West 2009); N.D. CENT. CODE ANN. § 12.1-15-02 (West 2008); OHIO REV. CODE ANN. § 29533.52 (West 2006); OKLA. STAT. ANN. tit. 13, § 176.3 (West 2002); OR. REV. STAT. ANN. § 165.540 (West 2003); 18 PA. STAT. ANN. § 5703 (West 2000); R.I. GEN. LAWS ANN. § 11-35-21 (West 2006); S.C. CODE ANN. § 17-29-20 (2003); S.D. CODIFIED LAWS § 23A-35A-20 (2004); TENN. CODE ANN. § 39-13-601 (West 2011); TEX. PENAL CODE ANN. § 16.02 (West 2011); UTAH CODE ANN. § 76-9-402 (West 2004); VA. CODE ANN. § 19.2-62 (West 2007); WASH. REV. CODE ANN. § 9.73.030 (West 2010); W. VA. CODE ANN. § 62-1D-3 (West 2002); WIS. STAT. ANN. § 968.31 (West 2007). States missing from this list are Mississippi, Nebraska, New Mexico, and Wyoming. Vermont does not have an anti-wiretapping statute in effect. For a discussion on the problems with state wiretap laws, *see* Marianne F. Kies, *Policing the Police: Freedom of the*

or general laws, such as obstruction of justice or failure to obey a police order.[92] Because of the confusing state of these laws, especially the anti-wiretapping statutes, citizens are often unaware of precisely how the law applies to their conduct, thereby allowing police officers to use this ignorance to intimidate videographers.[93] Although police may argue otherwise, no law directly prohibits a videographer from filming or photographing things in public.[94] Nevertheless, some police still attempt to combat the spread of public surveillance of police conduct through other existing statutes and "creative prosecutorial discretion."[95]

Police often rely on anti-wiretapping statutes[96] to arrest civilians who insist on recording police officers without their consent.[97] In most states and under federal jurisdiction, the anti-wiretapping statutes only require one party to consent for legal recording or eavesdropping of a communication.[98] In these "one-party-consent" jurisdictions, if one person involved in the communication consents to the recording—including the person recording the

Press, the Right to Privacy, and Civilian Recordings of Police Activity, 80 GEO. WASH. L. REV. 274 (2011). For a discussion on whether state wiretap laws violate the First Amendment, *see* ACLU of Ill. v. Alvarez, 679 F.3d 583, 586–87, 595–608 (7th Cir. 2012) (concluding that the Illinois eavesdropping statute "restricts a medium of expression commonly used for the preservation and communication of information and ideas, thus triggering [heightened] First Amendment scrutiny.").

[92] Stossel, *The War On Cameras*, YOUTUBE (Apr. 23, 2011), http://www.youtube.com/watch?v=2Eu0E1znMZM&feature=related (interviewing Radley Balko, Senior Editor of Reason Magazine).

[93] *See* State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *6 (Md. Cir. Sept. 27, 2010) (where Judge Pitt remarked that Maryland's anti-wiretap statute "on its face is unconstitutional; that it is unconstitutional and violative of the First Amendment to the United States Constitution"); *The Government's War on Cameras!*, *supra* note 44 (interviewing Professor Eugene Volokh, who adds that "not everybody knows what the law is, and sometimes not even all the police officers know what the law is").

[94] *See The Government's War on Cameras!*, *supra* note 44 (quoting Professor Eugene Volokh: "[I]n the jurisdictions of which I am aware, there is no prohibition on video-recording or photographing things when you are standing in a public place and you're looking at another public place").

[95] *See* Kreimer, *supra* note 14, at 357.

[96] For examples of such statutes, *see supra* note 91.

[97] *See* Kreimer, *supra* note 14, at 378.

[98] *See supra* note 91. Only twelve jurisdictions in the United States have "all-party consent" requirements in their wiretap statute. These jurisdictions are: California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington. *See The Government's War on Cameras!*, *supra* note 44; *see also* Stossel, *supra* note 92.

communication—the conduct is legal.[99] Assuming the videographer is consenting to his own action, police cannot reasonably expect to prosecute or arrest a videographer in "one-party-consent" jurisdictions for anti-wiretapping reasons. Massachusetts and eleven other jurisdictions (hereinafter, the "all-party-consent" jurisdictions), however, criminalize recording unless every party in the communication consents to the recording.[100]

Among "all-party-consent" jurisdictions, the issue of whether or not police officers are protected by anti-wiretapping laws is hotly debated.[101] Some jurisdictions require that parties have a "reasonable expectation of privacy" in their communication in order to receive protection from anti-wiretapping statutes.[102] A strong argument that is used in these jurisdictions is that police officers do not have a "reasonable expectation of privacy" when conducting police business in public.[103] Police officers ought not to expect privacy in public communication because of the public interest in police oversight, along with the fact that police communications in the line of public duty are generally less intimate than communications in other contexts.[104] In addressing this issue, some courts have found that police cannot enjoy a "reasonable expectation of privacy" in the

[99] *See Indiana Recording Law*, CITIZEN MEDIA LAW PROJECT, http://www.citmedialaw.org/legal-guide/indiana/indiana-recording-law (last visited Sept. 21, 2012) (explaining that "you may record a telephone conversation if you are a party to the conversation or you get permission from one party to the conversation"). The purpose of the anti-wiretapping statutes in "one-party-consent" jurisdictions is to prevent a third party from recording a private conversation between two individuals without their consent. *See id.*

[100] *See* sources cited *supra* note 91.

[101] *Compare* Commonwealth v. Hyde, 750 N.E.2d 963, 966 (Mass. 2001) (rejecting the argument that police are exempt from anti-wiretapping laws because they lack reasonable expectations of privacy in public communications), *with* Hornberger v. Am. Broad. Cos., Inc., 799 A.2d 566, 595 (N.J. Super. Ct. App. Div. 2002) (discussing how the New Jersey statute allows for members of the public to secretly record conversations when the speakers have no reasonable expectation of privacy).

[102] *See, e.g.*, 18 U.S.C. § 2510 (2006); *Hornberger*, 799 A.2d at 595.

[103] *See Hyde*, 750 N.E.2d at 965 (where the defendant validly, but unsuccessfully, argued that police officers do not have a reasonable expectation of privacy in their words during a traffic stop).

[104] *See* ACLU of Ill. v. Alvarez, 679 F.3d 583, 605–06 (7th Cir. 2012) (discussing how the privacy interests protected by the Illinois anti-wiretapping statute are "not at issue" because "[t]he ACLU want[ed] to openly audio record police officers performing their duties in public places and speaking at a volume audible to bystanders. Communications of this sort lack any 'reasonable expectation of privacy' for purposes of the Fourth Amendment."); Dina Mishra, *Undermining Excessive Privacy For Police: Citizen Tape Recording To Check Police Officers' Power*, 117 YALE L.J. 1549, 1555 (2008).

public discharge of their duties, while other courts have found that an expectation of privacy is not necessary for a violation of an anti-wiretapping statute to occur.[105] In jurisdictions which require a reasonable or legitimate expectation of privacy, most courts have found that police officers are public officials, and as such, are not afforded a reasonable expectation of privacy in the public discharge of their duties.[106]

Another element of confusion is the differentiation between video and audio recording.[107] Many jurisdictions that do not require "all-party-consent" may still require that all parties to the communication be put on notice that the conversation is being recorded.[108] A party may provide notice by showing a video camera in plain sight.[109] Furthermore, for conduct to be covered by an anti-wiretapping statute, it may also need to be an "oral communication," which may exclude video from the scope of the anti-wiretapping statute.[110] In *Glik*, the police officer, assuming Massachusetts's anti-wiretapping statute only applied to audio, asked Glik if his cellular phone recorded audio.[111] It was only after Glik answered in the affirmative that police officers arrested him under the color of the anti-wiretapping statute.[112] In resolving *Glik*, the First Circuit failed to differentiate between the audio and video aspects of Glik's

[105] *See Hyde*, 750 N.E.2d at 965 (upholding Michael Hyde's conviction because the legislature expressly established a ban on surreptitious recording to protect privacy, even for police officers). *But see* State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *35 (Md. Cir. Sept. 27, 2010) ("Those of us who are public officials and are entrusted with the power of the state . . . should not expect our actions to be shielded from public observation. 'Seq duis custodiet ipsos custodies?' (Who watches the watchmen?)").

[106] *See Alvarez*, 679 F.3d at 606–07; Kelly v. Borough of Carlisle, 622 F.3d 248, 258 (3d Cir. 2010); Johnson v. Hawe, 388 F.3d 676, 685 (9th Cir. 2004); O'Brien v. DiGrazia, 544 F.2d 543, 546 (1st Cir. 1976); *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *17; *Hornberger*, 799 A.2d at 595; Agnew v. Dupler, 717 A.2d 519, 523–24 (Pa. 1998); State v. Flora, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992). *Cf.* Katz v. United States, 389 U.S. 347, 351 (1967) (establishing that individuals do not have a reasonable expectations of privacy in what they "knowingly expose[] to the public").

[107] *See* Glik v. Cunniffe, 655 F.3d 78, 80 (1st Cir. 2011) (describing how the police officer only arrested Glik for illegal recording after he acknowledged that his cellular phone recorded audio).

[108] *See* OR. REV. STAT. ANN. § 165.540 (West 2003); State v. Neff, 265 P.3d 62, 63–64 (Or. Ct. App. 2011).

[109] *Glik*, 655 F.3d at 87.

[110] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 272, § 99 (West 2000).

[111] MASS. GEN. LAWS ANN. ch. 272, § 99 (West 2000); *Glik*, 655 F.3d at 79.

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

recording.[113] Instead, the court simply declared that Glik had a "well established" right to *film* police officers in public without indicating precisely which aspect of Glik's conduct was protected First Amendment activity.[114]

Overall, anti-wiretapping statutes are valuable tools for police officers seeking to suppress videographers. Since the laws lack clarity and well-defined scope, police can creatively and effectively cite anti-wiretapping statutes to intimidate even savvy videographers. Yet, if police do not assert charges from these anti-wiretapping statutes, they still have laws of general applicability at their disposal.[115]

Laws of general applicability include charges like obstruction of justice, disobeying an officer, obstructing an investigation, interfering with an officer, failure to obey an officer, disorderly conduct, resisting arrest, obstructing a street, and harassment.[116] While many of these charges may be dismissed, videographers are still arrested, placed into squad cars, and carted away from the scene.[117] Videographers may be fully within their rights to videotape the police, but after one confrontation they may expect intimidation, harassment, or arrest because in most cases "nothing" happens to the police officers who make false arrests.[118] Police are increasingly using laws of general applicability to suppress videographers from filming police conduct because citizens often do not know or understand the laws, thereby allowing police to think they can get away with applying the charges.[119] Overall, the inconvenience and embarrassment of being arrested creates a chilling effect for videographers, which makes laws of general applicability another valuable tool for police officers seeking to suppress videographers from filming police conduct.[120]

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[113] *Id.*

[114] *Id.* at 85.

[115] *See* Stossel, *supra* note 92; Kreimer, *supra* note 14, at 361 ("Where wiretap prohibitions do not apply, officers faced with defiant videographers frequently turn to broader criminal statutes that provide substantial enforcement discretion.").

[116] Stossel, *supra* note 92.

[117] *Id.*

[118] *Id.* (quoting Radley Balko from the interview).

[119] Kreimer, *supra* note 14, at 394 ("[O]ne growing source of litigation is the tendency of police officers to arrest photographers on trumped-up charges both as a way of preventing the spread of inconvenient truths and as a response to free-floating anxiety about individuals who remind officials of terrorists."); *The Government's War on Cameras!*, *supra* note 44.

[120] *See* Wasserman, *supra* note 14, at 648–49 ("Government might stop people from recording public encounters . . . through enactment and enforcement of express prohibitions on secret or unconsented-to recordings of persons and conversations . . . [or] through officers' efforts to move filmers away from the scene,

IV. SAFEGUARDS TO POLICE MISCONDUCT ARE INEFFECTIVELY PROTECTING VIDEOGRAPHERS

When Radley Balko said that "nothing" happens to police officers who unlawfully intimidate videographers, he did not comprehensively describe how police officers have to answer for their actions.[121] Balko did not literally mean that nothing happens following an incident between police and videographers.[122] Rather, he meant that police officers do not face serious consequences for their actions.[123] This Part discusses how the present framework of safeguards designed to deter police officers from harassing citizens fails to adequately protect videographers who are unlawfully intimidated by police. Specifically, this Part will cover the failure of three safeguards: first, the external check provided by the public at large; second, self-policing mechanisms such as internal affairs; and third, the civil remedy available to citizens who believe a public official has violated their constitutional rights. This Part will demonstrate how each of these deterrents is ineffective at curbing potential police misconduct toward videographers.

A. Safeguard #1: Public Oversight and How Police Can Defeat Its Purpose by Eliminating Public Recording of Their Conduct

Some scholars argue that allowing citizens to freely videotape police in public incentivizes police officers to properly fulfill their duties.[124] Leaders at some police departments have adopted this view as well.[125] For instance, Lieutenant Robin Larson of the Broward County, Florida, Sheriff's Office, takes the position that "[a]ll of our people should be conducting themselves like they are being recorded all the time."[126] With the persistent threat of surveillance, rational police officers would want to avoid committing any misconduct in public because video documentation of that misconduct could be widely disseminated very rapidly.[127] In that event, the general public,

to confiscate equipment, and, perhaps, to arrest filmers for violating non-speech laws of general applicability.").

[121] *See* Stossel, *supra* note 92.

[122] *See id.*

[123] *See id.*

[124] Mishra, *supra* note 104, at 1553.

[125] Johnson, *supra* note 49 (quoting Lieutenant Robin Larson of the Broward County, Florida Sheriff's Office).

[126] *Id.* (internal quotation marks omitted).

[127] *See* Rowinski, *supra* note 48 ("[W]ith the advent of media-sharing websites like Facebook and YouTube, the practice of openly recording policy activity has become

aware of the misconduct, could utilize the political process to pressure law enforcement officers to respect the limits of their authority.[128] Thus, mindful of potential public scrutiny and scorn, police officers would generally avoid performing illegal activities to protect themselves.[129]

The existence of some press coverage and public scrutiny of police misconduct indicates that this deterrent is somewhat effective, but the evidence of police-videographer confrontations in the news and on the Internet suggests that police are undermining the effectiveness of video by attempting to eliminate it.[130] By intimidating and arresting videographers, police are creating more footage of police-videographer confrontations, but may also be preventing footage of more alarming misconduct, such as the beatings of Jack McKenna or Rodney King, from being created in the first place.[131] An example is the case of Emily Good, a Rochester woman whose video-confrontation with police garnered national attention.[132] Rochester police officers arrested Good for obstructing governmental administration when she filmed a traffic stop directly outside her home.[133] Good was somewhat of a social activist, and filmed the traffic stop because she believed it involved racial profiling.[134] Police commanded Good to stop recording the incident, but when she

commonplace.").

[128] Wasserman, *supra* note 14, at 645 ("Public attention and outrage produces government action . . . . [A]ttention and outrage are more likely when video has gone "viral" and is being devoured and dissected on YouTube, blogs, and the mainstream news media, and where visceral public reaction to the video reflects a wide popular interpretation of the video as showing governmental misconduct. A viral video puts government on its heels, forcing it to publicly defend its officers (at least initially), while also recognizing that, because of the video, the people have developed informed perceptions and conclusions about the incident—perceptions that officials must respect (or at least consider) in making administrative decisions.").

[129] *See id.*

[130] *See* Rowinski, *supra* note 48 ("There are no hard statistics for video recording arrests. But the experiences of Surmacz and Glik highlight what civil libertarians call a troubling misuse of the state's wiretapping law to stifle the kind of street-level oversight that cellphone and video technology make possible.").

[131] *Cf.* Adam Cohen, *Should Videotaping the Police Really Be a Crime?*, TIME, Aug. 4, 2010, http://www.time.com/time/nation/article/0,8599,2008566,00.html; Blackburn, *supra* note 79.

[132] Ray Levato, *Emily Good to Sue Rochester Police Department*, WHEC ROCHESTER (June 28, 2011), http://www.whec.com/news/stories/s2176499.shtml.

[133] *Id.*

[134] *Id.* (the traffic stop in front of Good's home involved three white police officers arresting a lone black man and searching his car).

continued one of the officers arrested her.[135] Although a highly publicized discussion about Good's rights sprouted from the incident, police successfully frustrated Good's original purpose for filming—to monitor racial profiling by police officers.[136] By arresting Good, the Rochester police officers succeeded in preventing her from documenting anything related to racial profiling.[137]

The Good case highlights why the public-oversight deterrent fails to protect videographers from harassment and intimidation.[138] Instead of incentivizing officers to conduct their police business properly, the presence of a video camera may actually encourage a police officer to prevent the creation of footage of his conduct.[139] To do so, the police officer may harass, intimidate, and arrest the videographer, thereby shielding himself from liability for other potentially serious acts of misconduct.[140] While some videographers may be defiant and willing to resist police pressures, many individuals may simply seek to avoid confrontation and move on with their lives.[141] The ultimate result is a chilling effect on the filming of police in public.

Concededly, if the footage of the police officer attacking the videographer is as offensive as the Rodney King beating, the public would probably demand accountability in a similar manner.[142] Still, this deterrent may only be effective when videographers are successful in capturing police misconduct that warrants unified public outcry. Police harassment of videographers certainly warrants public scrutiny, but because the act of intimidating a videographer is not nearly as offensive as police beatings, shootings, or corruption

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[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *See* Levato, *supra* note 132.

[139] *See id.*; *see also* Rowinski, *supra* note 48 (quoting Sarah Wunsch of the American Civil Liberties Union of Massachusetts, stating that "[t]he police apparently do not want witnesses to what they do in public").

[140] *See* Rowinski, *supra* note 48 ("Ever since the police beating of Rodney King in Los Angeles in 1991 was videotaped. . . . the arrests of street videographers, whether they use cellphones or other video technology, offers a dramatic illustration of the collision between new technology and policing practices.").

[141] ACLU of Ill. v. Alvarez, 679 F.3d 583, 588 (7th Cir. 2012) (where the ACLU did not follow through on its planned audiovisual recording of police in public "because of a credible fear of prosecution"); Cohen, *supra* note 131 ("Most people are not so game for a fight with the police. They just stop filming. These are the cases no one finds out about, in which there is no arrest or prosecution, but the public's freedoms have nevertheless been eroded.").

[142] *See id.*

scandals, it is not as likely to stir an equally strong public reaction.[143] Ideally, the issues surrounding police confrontations with videographers ought to be resolved before more incidents similar to Rodney King's occur.

Another solution is needed because public awareness is not enough to prevent police officers from intimidating and arresting videographers. By aggressively engaging videographers, police effectively deter videographers from monitoring police conduct, which simultaneously shields other types of misconduct from exposure.[144] Since the public is not as offended as it would be if other types of misconduct were captured on camera, society is not as motivated to remedy the situation.

B. Safeguard #2: Internal Affairs: Why Law Enforcement Self-Policing is Insufficient

Law enforcement leadership is in a position to self-correct police misconduct through internal investigations and disciplining police officers.[145] In the past, police leadership has sternly held violating officers accountable for their actions.[146] Also, some police departments claim that the increase in public video-recording of police conduct has positively affected change in department training and staffing.[147] Broadly speaking, internal affairs departments have sometimes been effective in combating forms of police misconduct.[148]

While police departments should be able to self-regulate, this established deterrent has several limitations. Most notably, in the context of police officers harassing and intimidating videographers, it is unlikely that any substantial consequences will result from a videographer complaining to the police department.[149] For instance,

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[143] *See id.*

[144] *See* Levato, *supra* note 132; *see also* discussion *supra* Part IV.A.

[145] *See* Cohen, *supra* note 131.

[146] *See id.* (discussing the New York City police officer who was laid off after amateur video footage revealed he lied in his sworn statement about how he shoved a bicyclist to the ground); Johnson, *supra* note 49 (discussing the case of Jack McKenna and the ensuing suspensions of three officers involved in the beating of the University of Maryland student).

[147] *See* Cohen, *supra* note 131 (Broward County Sheriff's Officer Larson discusses how recorded incidents have "sparked" activity from the department to better train its officers).

[148] *See* Skehill, *supra* note 14, at 996 ("[M]any police departments have implemented internal affairs departments and citizen investigatory commissions to investigate and discipline police misconduct.").

[149] *See* Stossel, *supra* note 92 (Radley Balko commenting how "nothing" happens

in Emily Good's case, Rochester Chief of Police James M. Sheppard conducted an investigation that resulted in no announced disciplinary action, and the Chief merely mandated additional training and awareness for officers on the force.[150] Because the internal investigations are not transparent, the public cannot actually know if the investigations effectively resolve the problem.[151]

Another problem with the internal affairs model for reporting police misconduct is that in the context of video records, citizens may be afraid to report.[152] In Massachusetts, Michael Hyde was arrested for violating wiretapping statutes while trying to report police abuse.[153] Six days after Hyde recorded an incident with police, he filed a formal complaint at the Abington police station.[154] After the Abington police department performed an internal investigation, which absolved five of its officers, it sought a criminal complaint against Hyde for the recording he used to complain about the officers.[155] Since Hyde's conviction was upheld, videographers can be fearful, especially in all-party-consent states,[156] that reporting incidents to the local police station could result in their own arrest.

Another example that demonstrates the failings of internal

to police officers who falsely arrest videographers for filming their conduct).

[150] *See* Press Release, Rochester Police Dep't., Chief Sheppard Announces Outcome of Internal Administrative Reviews on Emily Good Arrest, Traffic Enforcement Operation (Sept. 2, 2011), *available at* http://www.rochestercitynewspaper.com/uploads/articles/12343-9.2.11-Press-Conference-Media-Packet.pdf. In a letter attached to the report, Sheppard stated that although police officers deal with high amounts of stress and danger, they must act professionally and with "appropriate respect for the rights of those involved." *Id.* Sheppard discussed how videographers generally have First Amendment rights to film police officers in public spaces, and that police officers "should assume that someone is watching and recording [their] actions at all times." *Id.* But police officers are to use "good judgment" to determine when those individuals recording them cross the line into obstructing justice. *Id.*

[151] *See generally* THE CITY OF N.Y. COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, ANATOMY OF FAILURE: A PATH FOR SUCCESS (1994), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCIQFjAA&url=http%3A%2F%2Fwww.parc.info%2Fclient_files%2FSpecial%2520Reports%2F4%2520-%2520Mollen%2520Commission%2520-%2520NYPD.pdf&ei=ZiVpULmHH6nC0QH1p4HwAw&usg=AFQjCNF9N3sXOxbKQoBJVLzpZk5jrB833w&sig2=dJjggMgRkD9GBQ9I9P9fKQ&cad=rja.

[152] *See* Commonwealth v. Hyde, 750 N.E.2d 963, 965 (Mass. 2001).

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *See supra* Part II.

investigations is the case of Anthony Graber in Maryland.[157] Maryland State Police raided Graber's home and seized his camera and computer equipment after he posted a YouTube video of a plain-clothed police officer stopping Graber on a highway.[158] Graber was facing more than fifteen years in prison if he was convicted of violating Maryland's anti-wiretapping statute.[159] Fortunately for Graber, Circuit Judge Emory Pitt threw out the four-count indictment against Graber.[160] Although Graber was ultimately vindicated, the prospect of spending over fifteen years in prison for what may have been First Amendment protected activity is quite disturbing.[161] If a different Judge presided over his case, it is very possible that Graber would be sitting in prison until approximately 2026.[162] Although Graber was not reporting police misconduct to the police, the effort by police to arrest Graber long after the traffic stop indicates that if Graber had tried to report police conduct like Hyde did, he may have been arrested in the same manner.[163] Any videographer with footage of police misconduct might be hesitant to bring such footage to the attention of police if it may jeopardize his freedom.

Overall, law enforcement self-policing is unreliable in safeguarding against police aggression toward videographers. Police officers are typically not harshly punished for violating the rights of videographers and the reporting mechanism for concerned citizens poses too great of a risk of arrest.[164] If a citizen wishes to complain to the police about an officer's conduct, he may hesitate to bring his video evidence of the alleged misconduct. With no reason to take internal investigations seriously and the substantial risks involved in bringing video evidence to the police's attention, it is unlikely that

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[157] *See generally* State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7 (Md. Cir. Sept. 27, 2010).

[158] *See* Sanchez, *supra* note 51.

[159] *See generally supra* note 59.

[160] *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *6, 34–35 (remarking that Graber's arguments are correct—that Maryland's wiretap statute "on its face is unconstitutional; that it is unconstitutional and violative of the First Amendment to the United States Constitution.").

[161] *Id.* The fact that Graber's violation was punishable up to fifteen years in prison is disturbing because Graber would be subject to the same sentence if he committed robbery, and a shorter sentence if he committed sexual assault in the third degree. MD. CODE ANN. CRIM. LAW §§ 3-307, 402 (West 2006).

[162] *See id.*

[163] *Compare* Commonwealth v. Hyde, 750 N.E.2d 963, 965 (Mass. 2001), *with Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *3–4.

[164] *See* discussion *supra* Part IV.B.

internal affairs can properly deter police officers from violating videographers' rights to film police in public.

C. Safeguard #3: The Shortcomings of 42 U.S.C. § 1983 Civil Remedies

As part of the Civil Rights Act of 1871,[165] Congress enacted 42 U.S.C. § 1983 to provide civil remedies for citizens whose rights have been abused "under the color" of state law.[166] The statute allows a private citizen to sue for damages and prospective relief against municipalities and local governments[167] when officials violate his or her civil rights.[168] Section 1983 is not itself a source of substantive rights; rather, it is merely a remedy or method for citizens to vindicate their rights as guaranteed by the Constitution.[169] In defining the remedy, the Supreme Court has noted that § 1983 is intended to financially compensate victims of official misconduct.[170]

When a lawsuit is filed against a police officer in his official capacity, the suit is known as an "official-capacity suit" and is treated as a suit against the government itself.[171] To prevail in a § 1983 official-capacity suit, a plaintiff must show that "the entity's policy or custom played a part in the violation of federal law."[172] Thus, for the government to be liable, the Supreme Court requires that the agent directly harm the plaintiff on behalf of the government and that the "moving force" behind the agent's action be a government implemented policy, statement, regulation, or custom.[173] Besides a

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[165] Civil Rights Act, ch. 22, 17 Stat. 13 (1871) (codified as amended at 18 U.S.C. § 241, 42 U.S.C. §§ 1983, 1985, 1988 (2006)). The Civil Rights Act of 1871 is also known as the "Ku Klux Klan Act." Wilson v. Garcia, 471 U.S. 261, 276 (1985).

[166] 42 U.S.C. § 1983; Ian D. Forsythe, *A Guide to Civil Rights Liability Under 42 U.S.C. § 1983: An Overview of Supreme Court and Eleventh Circuit Precedent*, THE CONSTITUTION SOCIETY, http://www.constitution.org/brief/forsythe_42-1983.htm (last visited Nov. 7, 2011).

[167] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 668 (1978).

[168] Monroe v. Pape, 365 U.S. 167, 179–80 (1961).

[169] Baker v. McCollan, 443 U.S. 137, 144–45 & n.3 (1979).

[170] Carey v. Piphus, 435 U.S. 247, 254–55 (1978). Notably, the Court has held that punitive damages may not be awarded against a municipality. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259–60 (1981). Fortunately for plaintiffs, the Civil Rights Attorney's Fees Awards Act of 1976 allows a citizen to receive attorney's fees if he prevails, meaning receives more than nominal damages. *See* 42 U.S.C. § 1988(b); Farrar v. Hobby, 506 U.S. 103, 114 (1992).

[171] Hafer v. Melo, 502 U.S. 21, 25 (1991); Kentucky v. Graham, 473 U.S. 159, 165 (1985).

[172] *Graham*, 473 U.S. at 166 (quoting *Monell*, 436 U.S. at 694).

[173] *Monell*, 436 U.S at 690–94.

direct policy endorsing unlawful conduct, a failure to properly train agents and employees can be a "moving force" behind the agent's wrongful conduct.[174] The failure to train must amount to "deliberate indifference," however, meaning that the government entity made a deliberate choice to not train police officers with respect to the violated right in question.[175] But, § 1983 plaintiffs will not succeed in showing "deliberate indifference" where a police officer's conduct is "obvious to all without training or supervision."[176]

Scholars doubt whether § 1983 is an effective remedy.[177] Absent a discoverable pattern of violations, in order to claim that the government was "deliberately indifferent," the plaintiff would have to show that the failure to train officers made violations of federal rights "highly predictable."[178] This requirement is farcical because the existence of a pattern does not change the fact that an individual's rights have been violated in one specific instance. A pattern, by definition, requires multiple occurrences of linkable events, but the plaintiff in any given § 1983 suit should not need to worry about anyone else's violated rights. Whether others have had their rights similarly violated is irrelevant with regard to compensating an individual for his injuries. Attempting to prove that a failure to train made the commission of violations "highly predictable" further deteriorates protection of individual constitutional rights.[179] Similarly, to determine if a violation is "highly predictable," the court

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[174] City of Canton v. Harris, 489 U.S. 378, 388–89 (1989).

[175] *Id.*; Sewell v. Town of Lake Hamilton, 117 F.3d 488, 489–90 (11th Cir. 1997). Since the Supreme Court rejected respondeat superior liability for municipalities, the aggrieved plaintiff must prove that the municipality somehow trained or was "deliberately indifferent" toward training police officers. *Monell*, 436 U.S. at 694.

[176] *Sewell*, 117 F.3d at 490 (quoting Walker v. City of New York, 974 F.2d 293, 299–300 (2d Cir. 1992). For instance, a police officer molesting young women at traffic stops and in the police station qualified as obviously wrongful conduct "without training or supervision." *Id.*

[177] *See* Laurie. L. Levenson, *Police Corruption and New Models for Reform,* 35 SUFFOLK U. L. REV. 1, 3–4 (2001); Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX,* 7 WM. & MARY BILL RTS. J. 755, 773–777 (1998-1999).

[178] Kelly v. Borough of Carlisle, 622 F.3d 248, 265 (3d Cir. 2010) (citing Berg v. Cnty. of Allegheny, 219 F.3d 261, 276 (3d. Cir. 2000)).

[179] *See* Bd. of Cnty. Com'rs. v. Brown, 520 U.S. 397, 405 (1997) ("Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee."); s*ee also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 519 (5th ed. 2007) (stating that "*Brown* articulate[d] a heightened requirement for causation, but [did] not define it with any precision").

will determine if the propensity to arrest videographers is a "plainly obvious consequence" of the government entity's decision-making procedures.[180] This attenuated process ultimately circles back to searching for a pattern of violations in the past, which, as discussed, seems unrelated to the fact that the plaintiff's rights were violated.[181]

Although municipalities may be held liable under some circumstances, individual officers may be shielded from liability by the doctrine of qualified immunity.[182] The qualified-immunity doctrine is intended to shield public officials from harassment, distraction, and liability when they are legitimately performing their duties.[183] Public officials are entitled to qualified immunity from personal liability when their actions arise out of discretionary functions.[184] To circumvent a police officer's qualified-immunity defense, the plaintiff must show or allege a violation of a "clearly established" constitutional right at the time of the police officer's alleged violation.[185] Determining if a constitutional right was "clearly established" requires two separate inquiries: whether the law was clear at the time of the alleged civil rights violation; and whether a reasonable police officer would have understood that his conduct violated the plaintiff's constitutional rights.[186]

In examining the "clearly established" requirement, the clarity of the law at the time of the alleged violation must be narrowly determined with respect to the specific facts of the case.[187] A broad and generalized conceptualization of the law is not sufficient to deny an officer qualified immunity.[188] This standard, however, does not

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[180] *See Brown*, 520 U.S. at 398–99; City of Canton v. Harris, 489 U.S. 378, 390 n.10 (1989).

[181] *See Brown*, 520 U.S. at 413–14 (explicating that attempting to determine whether the hiring of a particular police officer involved a highly predictable consequence, the Court discussed the relevance of the hiree's background and pattern of violence in relation to violating constitutional rights).

[182] *See* Pierson v. Ray, 386 U.S. 547, 557 (1967) (using the term "good faith immunity" which is synonymous with "qualified immunity"). A police officer is entitled to qualified immunity unless he acted "so obviously wrong, in light of preexisting law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing." Lassiter v. Ala. A & M Univ. Bd. of Trs., 28 F.3d 1146, 1149 (11th Cir. 1994).

[183] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[184] *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

[185] *See* Maldonado v. Fontanes, 568 F.3d 263, 269 (1st Cir. 2009); s*ee also* Barton v. Clancy, 632 F.3d 9, 21 (1st Cir. 2011).

[186] *Maldonado*, 568 F.3d at 269.

[187] Saucier v. Katz, 533 U.S. 194, 206 (2001).

[188] *Id.*

require that a prior court decision be on point.[189] The Supreme Court's decision in *Hope v. Pelzer* established that firm precedent is not necessary for a plaintiff to recover against an official.[190] The reasonableness of a police officer's actions depends on "whether the state of the law at the time of the alleged violation gave the [officer] fair warning that his particular conduct was unconstitutional."[191]

Despite the plaintiff-friendly standard developed in *Hope*, the absence of cases on point is still a basis for dismissal on qualified immunity grounds.[192] In dismissing the claim because of qualified immunity in *Brosseau v. Haugen*, the Supreme Court stressed the lack of similar cases where a police officer shot and wounded the plaintiff, who alleged that this violated his Fourth Amendment rights.[193] The Court's dissension with its own decision in *Hope* has created confusion in lower courts and clouded the "clearly established" standard for qualified immunity.[194] Often, police officers will have qualified immunity, which creates a nearly absolute bar against receiving damages from an individual police officer.[195] In practice, "[t]he qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law."[196] Essentially, if the law is confusing, police officers may be able to invoke qualified immunity.[197]

Regarding incidents involving recording police, some courts have allowed arresting officers to invoke qualified immunity after wrongful conduct.[198] An example is *Kelly v. Borough of Carlisle*, where a police officer arrested a passenger and seized his camera for filming

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[189] Hope v. Pelzer, 536 U.S. 730, 741 (2002).

[190] *Id.* (declaring that "[a]lthough earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding"). In *Hope*, the Supreme Court found an Eighth Amendment violation where the plaintiff prisoner was tied to a hitching post and taunted by police. *Id.*

[191] *Id.*

[192] Brosseau v. Haugen, 543 U.S. 194, 199 (2004).

[193] *Id.* at 199–201.

[194] *See* CHEMERINSKY, *supra* note 179, at 555.

[195] *See* Gilles v. Davis, 427 F.3d 197, 203 (3d Cir. 2005).

[196] *Id.* (internal quotations omitted).

[197] *See* Kelly v. Borough of Carlisle, 622 F.3d 248, 255 (3d Cir. 2010) ("Considering the proliferation of laws and their relative complexity in the context of a rapidly changing world, we cannot fairly require police officers in the field to be as conversant in the law as lawyers and judges.").

[198] *See id.* at 252; Skoog v. Cnty. of Clackamas, 469 F.3d 1221, 1225 (9th Cir. 2006).

the officer during a traffic stop.[199] Maintaining the officer's qualified immunity, the Third Circuit recognized a broad right to videotape police but not a "clearly established" right due to the confusing state of the law.[200] Because the case law was murky, a reasonably competent officer could not be put on "fair notice" that seizing a camera and arresting the videographer would violate the First Amendment.[201] Additionally, after the police officer initially seized the passenger's camera, he called the Assistant District Attorney to inquire whether the passenger actually violated Pennsylvania's anti-wiretap statute.[202] Unfortunately, the Assistant District Attorney misunderstood the law and recommended that the police officer arrest the passenger.[203] Although this fact supports the officer's reasonableness in making the final arrest, the officer still seized the camera *before* contacting the local prosecutor.[204] If the police officer inquired before confiscating the videographer's camera, it would be difficult to argue that his conduct was unreasonable.[205] That was not the case, but, nevertheless, the police officer was vindicated.[206]

In circumstances where a § 1983 litigant is successful, the statute permits courts to fashion a range of both legal and equitable remedies, but severely limits injunctive relief.[207] Specifically, federal courts are not in a position to enjoin municipal police departments.[208]

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[199] *Kelly*, 622 F.3d at 251–52 (exemplifying a case where the police officer believed the passenger's conduct violated Pennsylvania's anti-wiretap statute).

[200] *Id.* at 262.

[201] *Id.* at 251–52.

[202] *Id.*

[203] *Id.* The assistant district attorney who misunderstood the law would probably be shielded from § 1983 liability under the doctrine of absolute immunity for officials with prosecutorial functions. Imbler v. Pachtman, 424 U.S. 409, 423 (1976).

[204] *Kelly*, 622 F.3d at 252.

[205] The Third Circuit held that "a police officer who relies in good faith on a prosecutor's legal opinion that the arrest is warranted under the law is presumptively entitled to qualified immunity." *Id.* at 255–56. However, the holding applies specifically to Fourth Amendment claims premised on lack of probable cause. *Id.* at 256. Still, the police officer's reliance on a prosecutor's advice must be objectively reasonable. *Id.*

[206] *Id. Kelly* was remanded to allow the plaintiff to rebut the presumption that the police officer's contact with the local prosecutor reasonably justified his conduct. *Id.* at 266.

[207] 42 U.S.C. § 1983 (2006).

[208] *See* Rizzo v. Goode, 423 U.S. 362, 378–79 (1976) (holding that where the district court "injected itself by injunctive decree into the internal disciplinary affairs of [the] state agency," it departed from the principles of federalism "which play such an important part in governing the relationship between federal courts" and state governments). *But see* ACLU of Ill. v. Alvarez, 679 F.3d 583, 586 (7th Cir. 2012)

Without injunctive relief, successful plaintiffs could seek compensatory damages for injuries, but in order for the court to award damages, the plaintiff must suffer actual harm.[209] Additionally, the Supreme Court has permitted plaintiffs to recover punitive damages from individual police officers, but not from municipalities.[210] However, punitive damages are only available from an individual officer where his "conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."[211]

For videographers whose rights to film have been violated, § 1983 remedies are not very helpful. First, losing the ability to film does not constitute what is typically considered an "actual injury" deserving of compensation.[212] In *Carey v. Piphus*, despite finding that the plaintiffs were denied due process when they were wrongly suspended from school, the Supreme Court granted only nominal damages because the plaintiffs lacked evidence of actual injury.[213] Subsequently, the Court interpreted *Carey* as denying any concept of presumed damages.[214] Comparably, in *Memphis Community School District v. Stachura*, the Supreme Court solidified the *Carey* principle when it concluded that damages under § 1983 exist only to compensate plaintiffs who are actually injured, noting that "damages based on the 'value' or 'importance' of constitutional rights are not authorized . . . because they are not truly compensatory."[215]

Punitive damages are similarly unattainable because of the ambiguous "evil motive or intent" standard, the limitation on collecting damages from municipalities, and the likelihood that qualified immunity will shield an offending officer.[216] Therefore, because First Amendment rights such as free speech and news-gathering cannot be monetized, § 1983 fails to adequately protect aggrieved videographers.[217]

Although § 1983 initially appears to provide the means for an

(reversing and remanding to the district court with instructions to enjoin law enforcement from enforcing the Illinois eavesdropping statute against the ACLU).

[209] *See* Carey v. Piphus, 435 U.S. 247, 254 (1978).

[210] City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 265 (1981).

[211] Smith v. Wade, 461 U.S. 30, 56 (1983).

[212] *See Carey*, 435 U.S. at 258.

[213] *Id.* at 258.

[214] Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 309 (1986).

[215] *Id.* at 309 n.13 (citation omitted).

[216] *See supra* text accompanying notes 194–95, 208–09.

[217] *See* CHEMERINSKY, *supra* note 179, at 599.

appropriate remedy, it is unworkable for videographers because the burden for establishing a municipality's liability is too heavy, qualified immunity shields offending officers, and courts do not provide adequate damages when officers violate constitutional rights. Since the likelihood of a plaintiff receiving compensation for his injury is rather diminished, it follows that the rules of § 1983 seem to favor protecting police officers who did not know or care that a right existed over preservation of the right itself. Absent a prescribed remedy for violations, § 1983 fails to safeguard against unreasonable law enforcement intrusions.[218] Although § 1983 was promulgated to address citizens' grievances for violations of their constitutional rights, in the context of citizens filming police, it fails to remedy anything, which results in no deterrence for police officers and no protection for videographers.

V. BRIGHT-LINE RULE: EXPLICITLY STATED REMEDIES AND PERSONAL LIABILITY

The purpose of this Part is to provide a model legislative framework for protecting videographers against police harassment. First, this Part will discuss the rationale behind the model and how the legislation should meet the shortcomings of § 1983 civil rights actions. Then, this Part will present the model legislation itself, which state governments could consider, amend, and enact to protect videographers from police intimidation.

A. Considerations in Constructing a Videographer Protection Law

Police should be deterred from intimidating and harassing videographers who film their conduct in public.[219] To effectively deter police officers, the choice of whether or not to violate an individual's rights must be eliminated from a reasonable police officer's mind. In deciding whether or not to act in a certain situation, a police officer likely balances interests of privacy, safety, and self-preservation. Accordingly, a police officer is effectively deterred if in the interest of self-preservation he chooses not to violate a videographer's First Amendment rights.

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[218] *See* Skehill, *supra* note 14, at 994.

[219] *See* Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011) (quoting City of Houston v. Hill, 482 U.S. 451, 461 (1987)) (alluding to society's expectation that police are to endure significant burdens caused by citizens exercising their First Amendment rights, Judge Lipez discusses how police are expected to endure criticism and public scrutiny while exercising a higher level of restraint than normal citizens).

The Framers of the Constitution recognized that police power could potentially be abused, and in turn, harm free society.[220] Communities entrust police officers with powers that are sometimes abused.[221] Permitting individuals to record interactions with police without fear of prosecution is essential to balancing the government's need to enforce laws with a citizen's right to be free from government abuse.[222] When abuses occur, police officers ought to be fully accountable for their actions.[223] Protecting certain police interests, such as privacy when performing official public functions, is "inconsistent with democracy and democratic political accountability" when it results in a violation of a private citizen's guaranteed First Amendment rights.[224] Police should not be insulated from consequences when their conduct is unlawful.[225] Instead, police officers' discretionary power should be reduced so that they have less of an opportunity to harm citizens' First Amendment rights without a challenge.[226]

In the narrow context of protecting citizens who are filming police officers in the public discharge of their duties, an effective means of deterring police misconduct would be a strict law that punishes police officers who harass, intimidate, oppress, or arrest an individual because the individual is video-recording police conduct. Legislatures, in constructing their respective laws, should weigh interests such as police safety, the lawfulness of the videographer's overall conduct, and the general context of the incident. But to be

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[220] *See* Cox v. New Hampshire, 312 U.S. 569, 574 (1941) ("Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.").

[221] *See* Chapman v. United States, 365 U.S. 610, 612–14 (1961) (discussing how the Fourth Amendment is a constitutional guarantee against overreaching actions on behalf of law enforcement); Morris v. Super. Ct., 129 Cal. Rptr. 238, 243 (Cal. Ct. App. 1976) (noting how the framers of the Constitution recognized a need for a safeguard to protect citizens from "unfettered and unreasonable" police conduct).

[222] *See* Skehill, *supra* note 14, at 993–94.

[223] *Id.* at 1011.

[224] Wasserman, *supra* note 14, at 650.

[225] *Id.*

[226] *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1051 (1991) (citing Kolender v. Lawson, 461 U.S. 352, 357–58, 361 (1983)) ("[H]istory shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law."); s*ee also* King v. Ambs, 519 F.3d 607 (6th Cir. 2008) (where plaintiff's outrageous conduct while he was filming, but not the filming itself, rendered his speech unprotected); McCormick v. City of Lawrence, No. 02-2135, 2008 WL 2795134 (D. Kan. July 18, 2008) (same).

effective, the primary objective of the law must be to protect a videographer's right to be free from police abuse.

A categorical prohibition on police conduct would be problematic because police action against a videographer is sometimes appropriate.[227] But such circumstances must be narrowly construed. A broad exception based on soft standards like "reasonableness" could render the entire law useless.[228] To help prevent this from happening, legislatures should define possible exceptions to the rule as affirmative defenses.[229] These exceptions could include instances where the videographer was simultaneously breaking some other criminal statute or situations where the police officer or videographer would be in direct, impending danger without the officer's intervention.[230] Under this model, defendant police officers carry the burden of proving that their conduct did in fact fall within the exception for what otherwise is an unlawful violation of a citizen's First Amendment rights.[231]

Since First Amendment limitations—such as time, place, and manner restrictions, and murky wiretapping statutes—tend to obfuscate the First Amendment, a presumption should exist that protects openly filming the police officer's public conduct.[232] This presumption would provide the law with a "tie-goes-to-the-runner" judgment mechanism which leans toward protecting videographers.[233] "Tie goes to the runner" would mean that where the First Amendment right's existence is subject to close dispute, the conduct should go undisturbed by police. Of course, other conduct unrelated to the act of filming may open a videographer to police interference. Possible exceptions that allow a police officer to interfere with a

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[227] *See generally* Mishra, *supra* note 104.

[228] *See* S.B. 245, 2012 Gen. Assemb., Feb. Sess. (Conn. 2012), *available at* http://www.cga.ct.gov/2012/FC/2012SB-00245-R000271-FC.htm; Timothy B. Lee, *Hold Cops Personally Liable for Camera Arrests? Connecticut Bills Says Yes*, ARS TECHNICA (Apr. 25, 2012), http://arstechnica.com/tech-policy/2012/04/hold-cops-personally-liable-for-camera-arrests-connecticut-bill-says-yes/.

[229] *See* Conn. S.B. 245; Lee, *supra* note 228.

[230] *See* Conn. S.B. 245; Lee, *supra* note 228.

[231] *But see* Conn. S.B. 245 (Connecticut's bill does not indicate whether the burden of proof rests on the party bringing a claim or the defending peace officer).

[232] *See supra* Part II.

[233] "Tie goes to the runner" refers to an unwritten rule in baseball where if a play is so close that an umpire cannot determine whether the base runner was safe before a fielder made a tag, the umpire rules in favor of the base runner. David Wade, *Inside the Rules: Tie Goes to the Runner*, HARDBALL TIMES, Nov. 4, 2010, http://www.hardballtimes.com/main/blog_article/inside-the-rules-tie-goes-to-the-runner/.

videographer's filming of his conduct, however, should revolve around actual, not theoretical, threats to the safety of the videographer, the police officer, or other citizens as well as enforcement of other citizens' privacy rights.

Additionally, for the law to be effective as a deterrent, the remedy must be appropriate. Although the remedy must aim, in part, to offer some compensation to the aggrieved videographer, the remedy should primarily punish the violating police officer who offended the videographer's First Amendment rights.[234] Unless the harm to the videographer can actually be categorized under other forms of misconduct, such as brutality, the mere intimidation and arrest of the videographer should result in direct damages against the violating police officers and a short suspension from field duty. This degree of punitive treatment would create a greater deterrent effect than internal investigations, which, at times, merely lead to additional training without any actual discipline.[235]

Besides adequate deterrence, the state laws should also seek to fill in the holes left by § 1983 and the federal courts. Since § 1983 fails to adequately provide damages for those who suffer no injury besides a violated constitutional right, legislatures should incorporate liquidated or presumed damages into the statute.[236] In terms of avoiding problems that qualified immunity causes, automatic liability eliminates the shield and simultaneously bypasses the entire debate about "clearly established" laws.[237] If a state passes the model legislation below, the state would essentially remove the narrow issue of filming police officers from the complicated and cloudy realms of federalism and constitutional law. Lastly, considering how state legislatures may be cautious to micro-manage executive-operated agencies, liability for the municipalities is not part of the legislation. The rationale for this omission centers around law enforcement's inability to effectively self-police[238] and combats individual police officers' temptations to violate videographers' rights.[239]

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[234] *See supra* Part II.

[235] *See* Press Release, *supra* note 150 (despite national attention drawn from the Good incident, Rochester Police Chief James Sheppard merely indicated that police officers would receive additional training and procedural guidance on how to resolve similar future incidents but did not state that the offending officers would receive any discipline for their misconduct).

[236] *See supra* Part IV.C.

[237] *See supra* Part IV.C.

[238] *See supra* Part IV.B.

[239] *See supra* Part III.

B. Model "Videographer Intimidation Protection Act"

Below is the "Videographer Intimidation Protection Act" or the "V.I.P. Act." The following is a hypothetical construction of legislation that could effectively deter police from violating videographers' First Amendment right to openly film police conduct in public:

> Section 1: [Violation] No law enforcement officer, in the scope of his or her official duties, shall:
>
> (a) abridge the right of an individual to video-record (including audio) his or her conduct, or the conduct of other police officers in a public place;
>
> (b) harass, intimidate, abuse, question, or arrest any private citizen for the purposes of stopping, inhibiting, or preventing an individual from recording any law-enforcement officer's conduct in a public place; or
>
> (c) demand or require an individual to turn off his or her camera or otherwise stop filming for the purpose of stopping, inhibiting, or preventing an individual from recording any law enforcement officer's conduct in a public place;
>
> Section 2: [Defenses] A law enforcement officer may present any of the following affirmative defenses:
>
> (a) The existence of an actual, not theoretical, threat of impending harm to the police officer that is materially related to the videographer's act of filming;
>
> (b) The existence of an actual, not theoretical, threat of impending harm to the videographer that is materially related to the videographer's act of filming;
>
> (c) The existence of an actual, not theoretical, threat of impending harm to a nearby third party that is materially related to the videographer's act of filming;
>
> (d) A valid reason exists to confront the videographer, outside of his act of filming, including but not limited to a violation of a criminal statute that is unrelated to recording a law-enforcement officer's conduct; or
>
> (e) Enforcing the privacy rights of private citizens, or a criminal anti-wiretapping statute as it pertains to private citizens, but not of any public official acting in his or her official capacity.
>
> Section 3: [Evidence] In the event that the law-enforcement officer destroys the recording and cannot meritoriously assert an affirmative defense, liability is automatically attached to the violating law enforcement officer.
>
> Section 4: [Penalty] Where a law-enforcement officer is

> found to have violated this statute, the law-enforcement officer is to be:
>
> (a) held personally liable, in an action at law, or suit in equity, for no less than $1,000 but no more than $2,500,[240] and
>
> (b) suspended from public duty for at least three days but no more than twenty-one days.

For inspiration in constructing a "V.I.P. Act," state legislatures could refer to the model act described above,[241] or to Connecticut's recently passed "Act Concerning the Recording of Police Activity By the Public," (the "Connecticut Act").[242] The newly passed law, effective as of October 1, 2012, provides:

> A peace officer who interferes with any person taking a photographic or digital still or video image of such peace officer or another peace officer acting in the performance of such peace officer's duties shall . . . be liable to such person in an action at law, suit in equity or other proper proceeding for redress.[243]

Additionally, the text of the law provides five broad exceptions to liability.[244] A police officer, if he or she has "reasonable grounds," may interfere with a videographer in order to:

> (1) [L]awfully enforce a criminal law of [the] state or a municipal ordinance, (2) protect the public safety, (3) preserve the integrity of a crime scene or criminal investigation, (4) safeguard the privacy interests of any person, including a victim of a crime, or (5) lawfully enforce court rules and policies of the Judicial Branch with respect to taking a photograph, videotaping or otherwise recording an image in facilities of the Judicial Branch.[245]

Many similarities between the Model "V.I.P. Act" and the Connecticut Act are plainly visible. Each is intended to allow

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[240] These figures were determined based on median pay for patrol officers in the United States. With the median salary at approximately $50,000 per year, a discretionary penalty between two and five percent of annual pay is appropriate for deterrence purposes but not devastating to the officer's well-being. *See* Police Patrol Officer—U.S. National Averages, SALARY.COM, http://www.salary.com/police-officer-Salary.html (last visited Feb. 14, 2012).

[241] *See supra* Part V.B.

[242] S.B. 245, 2012 Gen. Assemb., Feb. Sess. (Conn. 2012), *available at* http://www.cga.ct.gov/2012/FC/2012SB-00245-R000271-FC.htm.

[243] *Id.*

[244] *Id.*

[245] *Id.*

"individuals to bring civil suits against peace officers who interfere with the . . . recording of their actions in the course of their duties," and each creates sensible exceptions for officers who act lawfully.[246] The inspiration and reasoning behind the texts are similar as well. Connecticut State Senator Eric Coleman, who sponsored the Connecticut Act, cited the Rodney King beatings, as well as another incident in which a Catholic priest was arrested for filming officers, as motivation for developing the legislation.[247] Additionally, the Connecticut Senate rejected an amendment that would have created an exception for police officers arresting an individual whose actions caused "inconvenience or alarm."[248] Concerned that the legislation would be rendered "toothless," critics argued that such an exception was too broad, and perhaps resembled laws of general applicability.[249] Overall, the Connecticut Act's inspiration seems aligned with many of the concerns that underlie the construction of the "V.I.P. Act."

Although the "V.I.P. Act" and the Connecticut Act share many elements, one major difference is notable—the Connecticut Act embraces indemnification of individual officers whereas the "V.I.P. Act" rejects indemnification.[250] Connecticut's legislature acknowledges that public servants are generally indemnified from civil action and provides, in its explanation, that the Connecticut Act potentially creates civil actions where the "law enforcement agency is liable for damages and legal costs."[251] In effect, the Connecticut Act permits a state form of qualified immunity to persist because it provides that "[o]fficers found liable . . . are entitled . . . to indemnification (repayment) . . . if they were acting within their scope of authority and the conduct was not willful, wanton, or reckless."[252] While the Connecticut Act's construction is subject to the Connecticut legislature's discretion, state-acknowledged indemnification and repayment to violating officers may render the Connecticut Act less potent than it otherwise could be.[253]

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[246] *Id.*

[247] *See* Lee, *supra* note 228; *see also supra* Part IV.A.

[248] Lee, *supra* note 228; *see supra* Part III.

[249] Lee, *supra* note 228; *see supra* Part III.

[250] S.B. 245, 2012 Gen. Assemb., Feb. Sess. (Conn. 2012), *available at* http://www.cga.ct.gov/2012/FC/2012SB-00245-R000271-FC.htm; *see supra* Part IV.C, V.A–B.

[251] Conn. S.B. 245.

[252] *Id.*

[253] *See supra* Part IV.C.

VI. CONCLUSION

A First Amendment right to film police officers in public exists and should be universally protected.[254] From case law and scholarly legal commentary, it is more than reasonable to conclude that the right exists and, subject to some narrow limitations, should not be abridged.[255] However, individuals' First Amendment rights are sometimes violated.[256] This occurs because police officers have interests in resisting the legal trend that private citizens have a right to film police officers in public.[257]

Police frequently escape liability when they abuse their power because the legal landscape is proving to be an enabling environment.[258] That environment, combined with the growing widespread availability of video-recording devices, has resulted in police officers abusing their power in an effort to chill videographers' actions.[259] The current framework of deterrence fails to address this chilling effect adequately.[260] Since the deterrents are too weak, or too avoidable, officers can often abuse their power without punishment.[261]

To resolve this problem, legislatures should pass a stricter law which directly targets and prevents police officers from interfering with videographers filming police conduct.[262] Had a safeguard been enacted, perhaps citizens like Emily Good would not have been falsely arrested for openly and unobtrusively monitoring police in the public discharge of their duties.[263]

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254 *See supra* Part II.
255 *See supra* Part II.
256 *See supra* Parts II–IV.
257 *See supra* Part III.
258 *See supra* Part IV.
259 *See supra* Parts II–IV.
260 *See supra* Part IV.
261 *See supra* Part IV.
262 *See supra* Part V.
263 *See supra* Part V.