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What Is and What Should Never Be: Examining the Artificial Circuit "Split" on Citizens Recording Official Police Action

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— Comment —

WHAT IS AND WHAT SHOULD NEVER BE: EXAMINING THE ARTIFICIAL CIRCUIT “SPLIT” ON CITIZENS RECORDING OFFICIAL POLICE ACTION

*“Nearly all men can stand adversity, but if you want to test a man’s character, give him power.”**

ABSTRACT

The free flow of information concerning public officials’ performance of their duties, widely disseminated to the citizenry, is important to the proper functioning of a democratic republic. Courts have traditionally recognized the important role of robust citizen oversight in maintaining public official accountability in First Amendment jurisprudence. As new media for recording and distributing information have arisen, the First Amendment’s protective embrace has consistently shielded users from criminal punishment for their communicative activity, regardless of the controversial nature of their subject matter. The propagation of smartphones with ever-greater audiovisual capabilities represents simply the latest phase in the evolution of electronic media, but some wary police and overzealous prosecutors have attempted to suppress citizens’ recording of public police activity using state wiretapping laws. Wiretapping statutes typically ensure this privacy by requiring the consent of one or all of the participants to a conversation, but for the consent requirement to attach as a preliminary matter, such a conversation must typically be private in a Fourth Amendment sense. The typical arrest scenario, performed by public officers in a public place, seemingly fails to fulfill this requirement. Accordingly, it is highly dubious whether such criminal statutes could ever be considered reasonable time, place, or manner restrictions on First Amendment activity. With what appears to be a relatively straightforward constitutional analysis, doctrinal resolution on the

* Attributed to Abraham Lincoln, but one source states it is actually a quote *about* Lincoln by an author, so it is probably apocryphal. Robert G. Ingersoll, *True Greatness Exemplified in Abraham Lincoln*, UNITY, Mar. 1, 1883, no.1. At least one other source has attributed a similar quote to Lincoln: “If you want to discover just what there is in a man—give him power.” FRANCIS TREVELYAN MILLER, PORTRAIT LIFE OF LINCOLN: LIFE OF ABRAHAM LINCOLN, THE GREATEST AMERICAN 34 (1910).

issue of citizen recording should have been fairly swift in the federal courts.

Yet the opposite has proven true. Several district courts' applications of the discretion the Supreme Court granted them in *Pearson v. Callahan*—to decide whether a constitutional right is “clearly established” before addressing the substantive constitutional issues in § 1983 cases—have stagnated the development of First Amendment jurisprudence in this area. This Comment explores why the “sound discretion” granted by the *Pearson* Court may not be as broad as some district courts have assumed. Because the *Pearson* Court listed at some length what district courts should consider in utilizing their § 1983 discretion—and *Camreta v. Greene* established that those considerations were *factors*, not merely dicta to be disregarded—the “sound discretion” of *Pearson* is not equivalent to *carte blanche*. Therefore, this Comment proposes that the Court can and should ensure adherence to its § 1983 qualified immunity precedent by requiring district courts to make *Pearson* findings on the record. This would better facilitate adequate development of constitutional law on important contemporary issues like the First Amendment right to record police, ensuring that the district courts' administrative convenience is curtailed enough to avoid doctrinal stagnation.

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INTRODUCTION

Being hit over the head with a police baton is no picnic.¹ Neither is being tased.² In the decades since the Rodney King beating first threw excessive police force into the American limelight, groups such as the ACLU have worked hard to keep it there by encouraging citizens to record and report such misconduct.³ With the advent of cheap handheld recording devices and new public fora spurred by the digital revolution, alleged instances of police brutality are legion.⁴

Yet few would argue that the use of force is always inappropriate.⁵ Policing is undeniably dangerous work, sometimes

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1. In September 2013, a video surfaced on YouTube of police repeatedly striking an unarmed, mentally ill man who resisted arrest. After the man was tased, police administered at least six baton blows, resulting in broken bones to his arms and legs and a large gash on his head. Richard Winton, *Long Beach Police Video: Man's Arm, Leg Broken, Lawyer Says*, L.A. TIMES (Sept. 6, 2013), <http://articles.latimes.com/2013/sep/06/local/la-me-ln-long-beach-police-arrest-video-20130906> (last visited Mar. 1, 2014). See also VIDEO: *Man Beaten with Baton by Sacramento Police Officers Later Dies in Custody*, N.Y. DAILY NEWS (MAY 25, 2013, 3:49 PM), <http://www.nydailynews.com/news/national/video-man-beaten-baton-dies-article-1.1354655> (depicting a fatal encounter where another mentally ill man was restrained by one officer while another officer hit him ten times over the head with a metal baton).
 2. See Charles Rabin, *Two Men Die After Being Targeted by Miami-Dade Police Tasers*, MIAMI HERALD, Feb. 28, 2014, (describing the deaths of two men as the result of being tasered in two unrelated domestic dispute calls).
 3. See Andrew Rosado Shaw, Note, *Our Duty in Light of the Law's Irrelevance: Police Brutality and Civilian Recordings*, 20 GEO. J. ON POVERTY L. & POL'Y 161, 184–85 (2012) (describing CopWatch, “a network of individual organizations dedicated to monitoring the police,” and the ACLU’s phone app, Police Tape, which allows citizens to record video and audio of police encounters and send it directly to secure ACLU servers in the event that police attempt to seize the phone or delete its contents). Several grassroots blogs are also dedicated to educating the public about police monitoring. See PINAC: PHOTOGRAPHY IS NOT A CRIME, <http://photographyisnotacrime.com> (last visited Mar. 4, 2014); RIGHTTORECORD.ORG, <http://www.righttorecord.org> (last visited Mar. 4, 2014).
 4. See Shaw, *supra* note 3, at 171 (“[V]ideo[-]sharing websites like YouTube host tens of thousands of videos alleging police misconduct.”).
 5. See Shane Dixon Kavanaugh, *Alleged Masturbating Man in Salem Bar Arrested after Taser Proves Ineffective, Officials Say*, OREGONLIVE (Dec. 23, 2013, 9:03 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/12/alleged_masturbating_man_in_sa.html

requiring split-second decisions to ensure the safety of officers and bystanders. Discerning the justified use of force from the unjustified is often a difficult business. Some commentators, mainly police advocacy groups and prosecutors, have attempted to extend these rationales to justify suppression and confiscation of footage depicting police in action.⁶

This Comment will argue that public safety justifications are only vindicable in a narrow subset of police-conduct filming situations; courts have alluded to these reasonable time, place, and manner restrictions in passing.⁷ The remainder forms a baseline of First Amendment-protected activity warranting uniform judicial recognition. But as this Comment will demonstrate, achieving uniform recognition has proven surprisingly difficult because of the procedural posture of most cases—§ 1983 claims against individual officers for damages. Development of the law has been stymied by the effects of the qualified immunity doctrine, under which judges can decline to reach the underlying constitutional question and instead simply rule that the law is not clearly established. With the ever-increasing omnipresence and technological capabilities of personal recording devices, doctrinal clarification is in order. Part I of this Comment will explain the important role of citizen scrutiny over public official activity in a well-functioning republic, providing historical examples of the powerful effect violent imagery has had on the American people since the nation's inception. Part II will then analyze the recent case law involving citizen recording. It will briefly touch upon the misguided struggle to apply extant statutory schemes to criminalize filming situations facilitated by technological innovation. Primarily, however, it will examine the underlying procedural issues, observing

(detailing the bizarre escapades of a man high on crystal meth and the subsequent efforts of numerous police officers to subdue him).

6. See, e.g., David Murphy, Comment, “*V.I.P.*” *Videographer Intimidation Protection: How the Government Should Protect Citizens Who Videotape the Police*, 43 SETON HALL L. REV. 319, 328 (2013) (referencing an interview with the executive director of the Fraternal Order of Police in which he asserts that citizen recording has a “chilling effect on some officers who are now afraid to act for fear of retribution”).
7. Compare *Szymecki v. City of Norfolk*, No. 2:08-cv-00142-HCM-TEM, at 8 (E.D. Va. Sept. 11, 2008) (using time, place, and manner restrictions as evidence that the First Amendment right to record is not clearly established), and *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010) (same), with *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (implying that time, place, and manner restrictions are an exception to, and do not preclude, First Amendment protection), and *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (same), and *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 605–08 (7th Cir. 2012) (implying such restrictions must be very narrowly tailored).

that the Court's qualified immunity doctrine for § 1983 actions has greatly hindered resolution of an important constitutional question. It will ultimately posit that, in light of recent developments and other precedent, the circuit split concerning a First Amendment right to record police officers is unsustainable as a proper application of qualified immunity doctrine. Finally, assuming that constitutional protection should be afforded to the majority of situations involving citizen recording, Part III will assess the major obstacles to obtaining relief that need to be addressed before recording police activity can be considered a right with any teeth.

I. CITIZEN OVERSIGHT AS A CHECK ON POLICE POWER

Sometimes it is easy to forget the critical role speech plays in greasing the wheels of our democracy. As we collapse on the sofa at the end of another grueling workday, perhaps we flip on the news and catch a few snippets about an opposition leader in some far-flung region of the globe who has been jailed because those in power disdain or feel threatened by his or her message.⁸ The alleged crimes are

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8. See, e.g., Sebnem Arsu & Dan Bilefsky, *In Turkey, Twitter Roars After Effort to Block It*, N.Y. TIMES, Mar. 22, 2014, at A6 (“While Turkey, a predominantly Muslim country of 79 million people, has long sought to portray itself as a model of democracy in a restive region, critics both inside and outside the country denounced the government’s ban as a ‘digital coup’ more befitting China or North Korea.”); Olga Rudenko, *Police Storm Ukraine Opposition Office, Comes in Wake of Anti-Government Protest Sunday*, USA TODAY, Dec. 10, 2013, at 7A (describing a police raid on the opposition party’s headquarters in Ukraine), Oleg Shynkarenko, *Ukraine’s Bloody Crackdown Enters Its Third Day*, DAILY BEAST (Feb. 19, 2014), <http://www.thedailybeast.com/articles/2014/02/19/ukraine-s-bloody-crackdown-enters-its-third-day.html> (“More than 30 people have been killed and hundreds wounded in the latest bout of violence to engulf Ukraine. The authorities have called it an anti-terrorist operation, though of course none of those killed . . . was a real terrorist.”); Moises Naim, *Venezuela on the Brink*, HUFFINGTON POST (Feb. 28, 2014, last updated 5:59 PM), http://www.huffingtonpost.com/moises-naim/venezuela-unrest_b_4874523.html (describing popular frustration in Venezuela regarding the jailing of opposition leaders and the shutdown of television stations); Nancy A. Youssef, *Egyptians Use Muslim Brotherhood Crackdown to Settle Scores*, MIAMI HERALD, Feb. 28, 2014, (explaining politically motivated arrests in Egypt, ostensibly for party affiliation); Stanley Weiss, *What Thailand Needs Most Is a Bill of Rights*, HUFFINGTON POST (Feb. 28, 2014, last updated 9:59 PM), http://www.huffingtonpost.com/stanley-weiss/what-thailand-needs-most_b_4877124.html?utm_hp_ref=world&ir=WorldPost (alluding to Thailand’s vicious cycle of protests, coups, and government crackdowns); Reuters, *Is Gen. Franco Still Dead?*, THE CHRONICLE, Nov. 30, 2013, at 2 (“Spain’s conservative government agreed Friday to toughen penalties for unauthorized street protests up to a possible \$816,000 fine, a crackdown that belies the peaceful record of the anti-

sometimes laughably dubious;⁹ we shake our heads and change the channel, secure in the knowledge that the repression exercised by authoritarian regimes and fledgling democracies would not dare show its face in our own nation. Indeed, many of the mechanisms that accord us this sense of security operate so inconspicuously in the background of our constitutional fabric that perhaps most of us seldom take the time to stop and think about them. But this is not necessarily so. Legal thinkers in the Founding era carefully considered the ramifications of free speech, or lack thereof, to the problems of their day.¹⁰ As the decades passed, the problems changed, but the core principles remained the same. Interested citizens, commentators, and, most importantly, courts have adapted these timeless principles to contemporary media to ensure an “uninhibited, robust, and wide-open”¹¹ evaluation of our nation’s affairs. As previously inconceivable media make more information available to more people at faster rates than ever before, it is critical that courts continue their traditional role as guardians of this public discourse.

A. *Quis Custodiet Ipsos Custodes? The First Amendment
Case for Transparent Police Oversight*

One traditional principle that has shaped the present debate about citizen recording is embodied in the phrase “quis custodiet ipsos

austerity protests of recent years.”). See also Trudy Rubin, Op-Ed, *Squelching Dissenters Won't Work*, NEWPORT NEWS DAILY PRESS, Mar. 1, 2014, at A16 (“From Russia, to Ukraine, to Venezuela, to Egypt, and beyond, there are copycats: Arrest opposition leaders on absurd charges, hold show trials, beat—or sometimes shoot—protesters, and silence media that challenge the government’s message. Then blame a foreign conspiracy. This formula kept many dictators in power in the 20th century. It is outdated in this one.”).

9. See, e.g., Alastair Gale, *North Confirms It Has Purged Dictator’s Uncle*, WALL ST. J., Dec. 9, 2013, at A10 (“North Korea confirms purge of leader Kim Jong Un’s uncle and country’s second-highest leader Jang Song Thaek because of anti-state crimes, including selling off natural resources, taking drugs and squandering foreign currency at casinos.”); *Opposition Blasts Venezuela “Repression,” Nation’s Military to Deploy Troops into Restive Region*, TAMPA TRIBUNE, Feb. 21, 2014, at 1 (detailing the Venezuelan opposition leader’s arrest on charges of arson and criminal incitement as part of an “attempted coup sponsored by right-wing and ‘fascist’ opponents in Venezuela and abroad, particularly the United States”).
10. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 20–26, 231–45 (1998); ROBERT J. WAGMAN, *THE FIRST AMENDMENT BOOK* (1991).
11. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (“[I]t may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”).

custodes.”¹² Translated loosely, it asks, “Who will watch the watchmen?,” a question posed multiple times during the first wave of student-written works on cell-phone recording.¹³ Operating from the premise that unchecked police power is inherently undesirable, such pieces lauded “the role of police recordings in exposing police conduct to the public.”¹⁴

From a big-picture standpoint, such exposure encourages citizens to evaluate and discuss whether the disputed police conduct evinced by the footage “is or is not abusive behavior.”¹⁵ If a consensus is reached that the behavior crossed the acceptable line of reasonable force, then system-wide policy changes can be made, resulting in “strengthen[ed] public confidence in police.”¹⁶ Without the transparency that police recording fosters,¹⁷ human nature and internal departmental pressures might result in information about questionable police interactions never seeing the light of day,¹⁸ potentially increasing the amount of wrongful behavior as the accountability of officers decreases.

Exposure of police conduct via video recording can also have a major impact in the courtroom.¹⁹ For a long time, commentators have noted that juries often exhibit a significant bias in favoring a police officer’s version of events over a criminal defendant’s.²⁰ Video footage often goes a long way in narrowing or eliminating this built-in

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12. JUVENAL: THE SATIRES 6.346–348 (Niall Rudd trans., Oxford ed. 1991).
 13. See Michael Potere, Comment, *Who Will Watch the Watchmen?: Citizens Recording Police Conduct*, 106 NW. U. L. REV. 273 (2012); Travis S. Triano, Note, *Who Watches the Watchmen? Big Brother’s Use of Wiretap Statutes to Place Civilians in Timeout*, 34 CARDOZO L. REV. 389 (2012); Robert J. Tomei Jr., Note, *Watching the Watchmen: The People’s Attempt to Hold On-Duty Law Enforcement Officers Accountable for Misconduct and the Illinois Law That Stands in Their Way*, 32 N. ILL. U. L. REV. 385 (2012); Marianne F. Kies, *Policing the Police: Freedom of the Press, The Right to Privacy, and Civilian Recordings of Police Activity*, 80 GEO. WASH. L. REV. 274 (2011).
 14. Mark Brncik, Note, *A Case for Non-Enforcement of Anti-Recording Laws Against Citizen Recorders*, 62 CASE W. RES. L. REV. 485, 503 (2011).
 15. *Id.* at 502.
 16. *Id.* at 504.
 17. *Id.* at 518.
 18. *Id.* at 504–05 (explaining the “Blue Code of Silence” that permeates some police departments’ culture).
 19. Shaw, *supra* note 3, at 172.
 20. *Id.* (citing Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 764–66 (1993)).

credibility gap.²¹ Without it, civil actions for police brutality may often prove fruitless,²² and criminal defendants may be more likely to accept a plea bargain on terms more favorable than they would receive at trial in a “he said, she said”-type case.²³ The courtroom impact is not always limited to the trial stage of a proceeding. In recent years, the importance of video evidence to supplement the factual record has reared its head at the summary judgment stage as well.²⁴ If seeing is believing,²⁵ it is not difficult to understand why many police are uncomfortable with the prospect of losing the inherent advantages the system afforded them prior to the advent of handheld recording devices.

But history²⁶ and the Bill of Rights counsel toward lifting the veil. Legal commentators have attempted to locate the right to record in a variety of places, including three of the six clauses of the First Amendment²⁷ and the Due Process clauses of the Fifth and

21. *Id.* at 162 (citing Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers’ Power*, 117 Yale L.J. 1549, 1152–54 (2008)).

22. *Id.*

23. *Id.*

24. *Id.* at 172 n.118 (citing Howard M. Wasserman, *Video Evidence and Summary Judgment: The Procedure of Scott v. Harris*, 91 JUDICATURE 180, 180–84 (Jan.-Feb. 2008)). *See also* Scott v. Harris, 550 U.S. 372 (2007) (holding that a court was not required to accept the non-moving party’s version of the facts at the summary judgment stage when undisputed video evidence clearly contradicts it); Brncik, *supra* note 14, at 505 (summarizing the importance of *Scott v. Harris* and a Ninth Circuit companion case on citizen recording).

25. *See* Steven A. Lauth, Note, *Sunlight Is Still the Best Disinfectant: The Case for a First Amendment Right to Record the Police*, 51 WASHBURN L.J. 349, 349 (2012) (“To receive second-hand information, even from a trusted, reliable source, may still raise doubts about the authenticity of what has been reported. But to actually see something with our own eyes not only removes those lingering doubts but provides us with the joy, sadness, amazement, or outrage that can only come from seeing it for ourselves. Simply stated, images are compelling.”).

26. *See* ACLU of Ill. v. Alvarez, 679 F.3d 583, 599–600 (7th Cir. 2012) (quoting several preeminent historical treatises that discuss the First Amendment right to gather information in order to hold government accountable). *See also* Travis Gunn, Note, *Knowledge Is Power: The Fundamental Right to Record Present Observations in Public*, 54 WM. & MARY L. REV. 1409, 1431–44 (2013) (discussing the historical legal treatment of mechanical recording media).

27. *See* 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 (2004) (arguing that the Speech and Press Clauses converge to protect the process of gathering information, because it leads to expression); Howard M. Wasserman,

Fourteenth Amendments.²⁸ Conceivably, one could argue that this makes the right to record police a constitutional orphan, worthy of sympathy but without a home. Yet the lopsidedness of the available commentary probably indicates that the converse is true: perhaps the right to record police flows from all of these sources independently, and therefore is paramount enough to warrant redundant protection. For, as James Madison said, “[T]here are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations.”²⁹

B. Theory in Action: A Historical Perspective

America has a long history of demanding social change when confronted with visceral imagery of official misconduct. One of its earliest examples serves as an apt parallel to today’s filming debate. In early March 1770, tensions were running high in Boston. Two regiments of British soldiers, sent by the Crown to enforce the wildly unpopular Townshend Acts, had allegedly been heavy-handed in their interactions with the locals.³⁰

Orwell’s Vision: Video and the Future of Civil Rights Enforcement, 68 MD. L. REV. 600, 658–59 (2009) (arguing that allowing citizens to film police catalyzes the ability to petition the government for the redress of grievances and that civil litigation against the government is itself a form of petitioning for redress of grievances); Murphy, *supra* note 6, at 324–25 (demonstrating how the Speech, Press, and Petition clauses could all be invoked in a hypothetical police recording scenario). Conceivably, an argument could be made that a fourth First Amendment Clause right, the right to assemble, is at least indirectly implicated, because a free flow of information encourages people to organize and take action against government misconduct. Cf. Nicholas S. Brod, Note, *Rethinking a Reinvented Right to Assemble*, 63 DUKE L.J. 155, 159 (2013) (advocating for a renewed emphasis on a “speech-assembly nexus” in constitutional thinking).

28. See Glenn Harlan Reynolds & John A. Steakley, Commentary, *A Due Process Right to Record the Police*, 89 WASH. U. L. REV. 1203, 1209 (2012) (conceiving of the right to record police as a protected liberty interest, the “erroneous deprivation” of which constitutes a due process violation).
29. James Madison, *Speech in the Virginia Ratifying Convention on the Control of the Military* (June 16, 1788), in 1 THE HISTORY OF THE VIRGINIA FEDERAL CONVENTION OF 1788, WITH SOME ACCOUNT BY EMINENT VIRGINIANS OF THAT ERA WHO WERE MEMBERS OF THAT BODY 130 (Hugh Blair Grigsby et al. eds., 1890).
30. ROBERT J. ALLISON, NEW ENGLAND REMEMBERS: THE BOSTON MASSACRE 1–7 (2006). See generally ARMAND FRANCIS LUCIER & SAMUEL ADAMS, JOURNAL OF OCCURRENCES: PATRIOT PROPAGANDA ON THE BRITISH OCCUPATION OF BOSTON (Heritage Books 1996) (cataloging the events of the day from a decidedly pro-colonist viewpoint).

Early one evening, a young barber's apprentice spotted a redcoat whom he believed to be overdue in paying a bill to his master.³¹ When the apprentice called the soldier out on his alleged debt (which had actually been paid), another soldier, standing sentry in front of the Customs House, replied that the apprentice was out of line and should show the first soldier proper respect.³² The apprentice did not take kindly to the suggestion and a verbal spat ensued, culminating with the second soldier approaching the apprentice and striking him on the head with the butt of his musket.³³

All hell broke loose. As an increasingly unruly crowd surrounded the redcoats, a handful of reinforcements arrived with arms drawn.³⁴ "Snowballs, ice, and oyster shells rained down on the soldiers."³⁵ When one of them hit a soldier with enough force to knock him to the ground, he responded instinctively by rising and firing his musket without orders.³⁶ Others, panicking, followed suit. When the smoke cleared, eleven locals lay bleeding, with five eventually succumbing to their injuries.³⁷

The only way the colonial governor could quell the insurrection was to tepidly assure his citizenry of a thorough investigation.³⁸ Both regiments of troops and all customs officers were removed from the city proper.³⁹ On both sides of the Atlantic, people attempted to ascertain the true chain of events and proper assignation of culpability.⁴⁰ In addition to written accounts, Paul Revere's engraving of the shooting, printed in the *Boston Gazette*, greatly fueled the clamor for justice—and forever ingrained the Boston Massacre in the

31. ALLISON, *supra* note 30, at 11.

32. HILLER B. ZOBEL, *THE BOSTON MASSACRE*, 185–86 (1970).

33. *Id.*

34. ALLISON, *supra* note 30, at 11–13.

35. *Id.* at 13. British accounts often add stones to the list of projectiles that the crowd hurled at the soldiers. *Hardly a Massacre—British View*, THE BOSTON MASSACRE HISTORICAL SOCIETY, <http://www.bostonmassacre.net/british.htm>.

36. ZOBEL, *supra* note 32, at 197; ALLISON, *supra* note 30, at 14.

37. ALLISON, *supra* note 30, at 14.

38. *Id.* at 20–21.

39. *Id.* at 20.

40. Competing pamphlets containing witness depositions from each side, Loyalist and Patriot, each claimed to provide the "fair" version of events. Compare JAMES BOWDOIN ET AL., *A SHORT NARRATIVE OF THE HORRIBLE MASSACRE IN BOSTON* (John Doggett, Jr. ed., 1849) (Patriot account), with THOMAS HUTCHINSON, *A FAIR ACCOUNT OF THE LATE UNHAPPY DISTURBANCES IN BOSTON* (1770) (Loyalist account).

American psyche.⁴¹ Nine soldiers were indicted for murder by mid-March.⁴²

At trial in November, no less a man than Founder and future-President John Adams represented the soldiers to assure a fair trial.⁴³ Putting on his advocacy hat, Adams in colorful language urged the jury to put aside their preconceived notions and focus instead on in-court witness testimony, claiming self-defense:

We have entertained a great variety of phrases to avoid calling this sort of people a mob. . . . The plain English is, gentlemen, [it was] most probably a motley rabble of saucy boys, Negroes and mulattoes, Irish teagues and outlandish jacktars. And why should we scruple to call such a people a mob, I can't conceive, unless the name is too respectable for them.⁴⁴

Among the “mulattoes” comprising the “mob” was Crispus Attucks, a runaway slave working as a sailor who was the first victim to fall.⁴⁵ Adams sought to portray Attucks as a primary instigator who had exhibited “mad behavior” by striking a redcoat,⁴⁶ despite some witnesses characterizing him as more of a relatively passive bystander.⁴⁷ Apparently the narrative resonated, as six soldiers were acquitted and two were convicted of the lesser charge of manslaughter.⁴⁸

So if the outcome of the case was relatively unaffected by Revere's lithograph and the competing press accounts, and the jury instead focused on the in-court testimony, what is the point? Does not this historical example actually illustrate the relative unimportance of powerful imagery in combatting official misconduct? Perhaps it does, if one takes a narrow, micro view of cause and effect. Obviously an

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41. ALLISON, *supra* note 30, at 26–29. The author points out that Revere likely plagiarized Henry Pelham, another prominent engraver. *Id.* at 27. See also Conor M. Reardon, Note, *Cell Phones, Police Recording, and the Intersection of the First and Fourth Amendments*, 63 DUKE L.J. 735, 740 (2013) (noting the public outcry arising in part from Revere's work, which later made some question whether the British soldiers would receive a fair trial).
42. FREDERIC KIDDER, HISTORY OF THE BOSTON MASSACRE 123–25 (Joel Munsell ed., 1870) (providing a transcript of the soldiers' trial and a copy of their indictments for murder).
43. DAVID MCCULLOUGH, JOHN ADAMS 66 (2001).
44. *Id.* at 67.
45. ALLISON, *supra* note 30, at 12, 14.
46. KIDDER, *supra* note 42, at 257–58.
47. *Id.* at 6, 13, 16, 142, 164, 168.
48. MCCULLOUGH, *supra* note 43, at 68.

after-the-fact artist's rendering of a controversial event is not competent in-court evidence.⁴⁹ But the fact remains that thirteen years later there were no more redcoats in Boston.⁵⁰ And this is the macro view of cause and effect: even when an image has no perceptible or permissible effect in any single legal proceeding, it can shape the broader public discourse as people engage in "the free discussion of government affairs."⁵¹ Citizens use such images to spread messages to other citizens in the hopes of spurring collective action, thus allowing broader segments of society to simultaneously evaluate those messages and determine if government officers are truly acting in accordance with its best interests.

To illustrate, fast-forward two hundred years to the tumultuous decades in the middle of the last century. Not only had actual still images⁵² displaced mere artists' renderings, but *moving* images could also be recorded,⁵³ placing the viewer at the scene in a way previously unimaginable. From the comfort of a movie theater, and eventually their own living rooms,⁵⁴ millions of Americans could evaluate their nation's foreign policy actions abroad, good or bad, with far greater context than ever before.⁵⁵

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49. Although Revere did in fact render a detailed map of the fallen bodies' final location for use as an exhibit at trial, the lithograph illustrating the Massacre was highly inflammatory and prejudiced. ALLISON, *supra* note 30, at 15, 26–29; ZOBEL, *supra* note 32, at 268. Cf. FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury . . .").
 50. See Treaty of Paris, United States–Great Britain, Sept. 3, 1783, 8 Stat. 80, T.S. No. 104 (recognizing United States sovereignty).
 51. Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).
 52. Louis Daguerre is credited with inventing the daguerreotype, an early forerunner to the modern camera, in 1837. HELMUT GERNSEHEIM, A CONCISE HISTORY OF PHOTOGRAPHY 10–11 (3d ed. 1986).
 53. Not to be outdone by Daguerre, fellow Frenchman Louis Le Prince is credited with inventing the first motion picture camera in 1888. A TECHNOLOGICAL HISTORY OF MOTION PICTURES AND TELEVISION: AN ANTHOLOGY FROM THE PAGES OF THE JOURNAL OF THE SOCIETY OF MOTION PICTURE AND TELEVISION ENGINEERS 76–84 (Raymond Fielding ed., 1967).
 54. The first television broadcasts in the United States were in 1928, although widespread adoption in American households did not occur until the late 1940s. WRNY to Start Daily Television Broadcasts; Radio Audience Will See Studio Artists, N.Y. TIMES, Aug. 13, 1928, at 13; James L. Baughman, *Television Comes to America, 1947–57*, ILL. HIST., Mar. 1993, at 41.
 55. Just as the graphic images of the Nazis' mass executions reinforced the righteousness of American intervention in Europe during World War II, scenes like the My Lai massacre and self-immolation of Buddhist monks

Domestically, the consequences were even more powerful.⁵⁶ The Civil Rights movement blossomed as people in all regions of the country were exposed to the realities of Southern segregation on the nightly news. When the police chief of Birmingham callously turned attack dogs and fire hoses on peaceful protesters, the footage “tore at America’s conscience.”⁵⁷ No longer could official brutality hide in the shadows of regional parochialism; after a hundred years of suppressed, superficial freedom for a large segment of society, America suddenly demanded more. Civil rights shot to the top of the Kennedy administration’s agenda, culminating with passage of the Civil Rights Act of 1964.⁵⁸

When the long history of macro effects flowing from imagery of official misconduct is properly established, the real significance of the Rodney King beating⁵⁹ comes into focus. By 1991, the technology required to film was no longer cost-prohibitive to the masses.⁶⁰ Handheld camcorders in the hands of everyday citizens meant that footage of official misconduct no longer had to pass through the

initiated significant second-guessing. See Alan Taylor, *In-Focus with Alan Taylor: World War II: The Holocaust*, ATLANTIC (Oct. 16, 2011), <http://www.theatlantic.com/infocus/2011/10/world-war-ii-the-holocaust/100170/>; Joseph Eszterhas, *Cameraman Saw GIs Slay 100 Villagers*, PLAIN DEALER, Nov. 20, 1969, at A1; Jonathan Sanger, *Burning Monk Photo: How a Moment Became Breaking News in 15 Hours*, NBC NEWS (June 11, 2013, 6:00 AM), http://photoblog.nbcnews.com/_news/2013/06/11/18886161-burning-monk-photo-how-a-moment-became-breaking-news-in-15-hours?lite.

56. Consider Lawrence Beitler’s iconic photograph of the lynching of two African American men in Marion, Indiana, which later inspired the song “Strange Fruit” by Billie Holiday. Jack Doyle, “*Strange Fruit*” 1939, POPHISTORYDIG.COM (Mar. 7, 2011), <http://www.pophistorydig.com/?tag=strange-fruit-protest-song> (last visited Mar. 6, 2014); *Strange Fruit: Anniversary of a Lynching*, NPR RADIO DIARIES (Aug. 6, 2010, 4:30 PM), <http://www.npr.org/templates/story/story.php?storyId=129025516>.
57. Corky Siemaszko, *Birmingham Erupted into Chaos in 1963 As Battle for Civil Rights Exploded in South*, N.Y. DAILY NEWS (May 3, 2012, 9:26 AM), <http://www.nydailynews.com/news/national/birmingham-erupted-chaos-1963-battle-civil-rights-exploded-south-article-1.1071793>.
58. Pub. L. No. 88-352, 78 Stat. 241.
59. See Howard Rosenberg, *Minicamwitness News—Welcome to the Revolution*, L.A. TIMES, Mar. 8, 1991, at F1 (“Welcome to America’s ugliest home videos . . . Increasingly, no matter what happens or where it happens, an amateur with a minicam is there to record it, and subsequently TV is there to air it. In the case of the King incident, moreover, not only to air it but also, in repeatedly doing so, to indict symbolically Los Angeles Police Chief Daryl F. Gates and his entire department.”).
60. See *infra* note 141.

production process of mainstream reporting, which some commentators have argued had an acute sanitizing effect in prior decades.⁶¹ The unfiltered footage “turned what would otherwise have been a violent, but soon forgotten, encounter between Los Angeles police and Rodney King into one of the most widely watched and discussed incidents of its kind,”⁶² sparking both macro⁶³ and micro⁶⁴ consequences. Thus, what the Rodney King beating really represents is the advent of personal accountability flowing from imagery of police misconduct. Video has finally provided a reliable enough medium to rival in-court testimony in terms of evidentiary value, and its proliferation and contribution to the public discourse on a macro and micro level should be fortified, not repressed.

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61. See generally ANIKO BODROGHKOZY, *EQUAL TIME: TELEVISION AND THE CIVIL RIGHTS MOVEMENT* (2012).
 62. *The Holliday Videotape*, U. MO.-KANSAS CITY L. SCH., <http://law.umkc.edu/faculty/projects/ftrials/lapd/kingvideo.html> (last visited Mar. 6, 2014) (containing links to video of the King beating).
 63. Unfortunately, fifty-three people died in the resulting L.A. Riots. Kathleen Miles, *Rodney King L.A. Riots Told Through Shocking Videos, 20 Years Later*, HUFFINGTON POST (last updated Apr. 29, 2012, 12:05 AM), http://www.huffingtonpost.com/2012/04/24/rodney-king-la-riots-videos_n_1401337.html. However, the systemic focus on police brutality has paid major dividends. *Compare* Ted Rohrllich, *Majority Says Police Brutality Is Common*, L.A. TIMES, Mar. 10, 1991, at A1 (indicating widespread public disagreement with the then-L.A. police chief's assertion that the King beating was an “aberration”), *with* Joel Rubin et al., *LAPD's Change in Focus: The King Video Ushered Police into a YouTube World*, L.A. TIMES, Mar. 3, 2011, at A1 (“Compared to the cops who beat King, officers these days hit the streets with a new reality ingrained in their minds: Someone is always watching The ubiquitous use of cameras by the public has helped serve as a deterrent to police abuse, said Geoff Alpert, a leading expert on police misconduct.”).
 64. See Tracy Wood & Sheryl Stolberg, *Beating Case Considered by Grand Jury*, L.A. TIMES, Mar. 12, 1991, at B1 (reporting that law enforcement officials, including prosecutors and police, said that the officers who participated in the beating could face charges of assault with a deadly weapon, or assault “under color of authority”). All officers were acquitted of state charges, but two were later convicted of federal charges. Seth Mydans, *Storm of Anger Erupts – National Guard is Called into City: Jury Acquits Los Angeles Policemen in Taped Beating*, N.Y. TIMES, Apr. 30, 1992, at A1; Seth Mydans, *Tension Eases as Residents Hail the Verdict*, N.Y. TIMES, Apr. 18, 1993, at A1. King also won a civil suit for \$3.8 million. Seth Mydans, *Rodney King Is Awarded \$3.8 Million: City to Pay Victim in '91 Police Beating*, N.Y. TIMES, Apr. 20, 1994, at A14.

II. THE OBSTACLES TO ESTABLISHING A CONSTITUTIONAL RIGHT TO FILM POLICE

But enough history lessons. What have the federal courts said about a citizen's right to film police? Nominally, a split has emerged, with three circuits recognizing a First Amendment right to record public officers and two declining.⁶⁵ Yet this is not a split in the traditional sense; instead of actually answering the substantive constitutional question in the negative, the two holdouts have chosen not to even reach it.⁶⁶ Rather, the judges in those circuits relied on a discretionary feature in § 1983's qualified immunity doctrine to find such a right "not clearly established," leaving the law in a state of unsettled stasis.⁶⁷ To properly understand how this came to be, it is worth examining the existing criminal law under which police have argued authority to halt citizen filming. After demonstrating the questionable applicability of these laws as time, place, and manner restrictions on third-party video recording, this section will provide a brief synopsis of § 1983 qualified immunity doctrine, before taking a closer look at the key appellate court decisions that form the contours of the present legal landscape.

A. *The Dubious Applicability of Wiretapping Statutes and Other Existing Criminal Laws to Recording by Third-Party Observers*

The paradigm scenario for police interfering with citizen recording is as follows. Officer A arrests Citizen B on the street, pulls her over for a traffic offense, or detains her for some other brief period, such as a *Terry* stop.⁶⁸ Citizen C, who may be either a total stranger or close acquaintance of B, but is not himself a suspect in any crime, observes the encounter and objects to some aspect of it. As a result, C takes out his smart phone and begins filming the officer's actions. Officer A, or perhaps one of his colleagues, Officer D, notices the smart phone pointed in his direction and becomes agitated at being recorded. Officer D instructs C to stop filming Officer A and put the phone away. C declines. Officer D, now hot under the collar, again instructs

65. *Compare* *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (holding that there is a First Amendment right to film matters of public interest), *and* *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (same), *and* *Glik v. Cunniffe*, 655 F.3d 78, 82–84 (1st Cir. 2011) (same), *and* *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 605–08 (7th Cir. 2012) (same), *with* *Szzynecki v. Houck*, 353 F. App'x 852, 853 (4th Cir. 2009) (holding that a First Amendment right to record police is not clearly established), *and* *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010) (same).

66. *See Szzynecki*, 353 F. App'x at 853; *Kelly*, 622 F.3d at 262.

67. *See Szzynecki*, 353 F. App'x at 853; *Kelly*, 622 F.3d at 262.

68. *See infra* note 303.

C to stow the phone. Again C refuses. Changing tack, Officer D asks C if his phone is recording audio as well as video. When C replies in the affirmative, Officer D snatches the phone and informs C he is under arrest.

Sound far-fetched? In the two circuits declining to hold C's right to record protected by the First Amendment, C could in fact be charged with a felony. Because C's recording had an audio as well as a video component, C could potentially be guilty of violating a state wiretapping statute and face years in prison⁶⁹ for his misconceived attempt at do-goodery.

Modern state wiretapping statutes arose in the middle part of the last century as a response to calls to protect citizens' reasonable expectations of private conversation from unwarranted intrusion by the government or unauthorized third parties.⁷⁰ Essentially, these statutes make it a crime to surreptitiously record (and in some cases, eavesdrop on) private conversations without the participants' consent. There are two major categories that then form based on the notion of consent. The so-called "one-party" consent statutes, where the person recording the conversation need only obtain the consent of a single participant, form the majority of state statutes as well as the federal baseline.⁷¹ A smaller number of states utilize the stricter "two-party" or "all-party" regimes, where the person recording the conversation must obtain the consent of *every* participant.⁷² Further variations concerning scienter⁷³ and the secrecy or openness of the recording⁷⁴ exist, but the primary distinction in terms of legal relevance is precisely whose consent must be obtained before recording a conversation.

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69. Shaw, *supra* note 3, at 173 (referencing prison sentences in some states of over a decade).
70. HOWARD J. KAPLAN ET AL., ABA SEC. OF LITIG., *THE HISTORY AND LAW OF WIRETAPPING* 2–4 (2012); Michelle K. Wolf, Note, *Anti-Wiretapping Statutes: Disregarding Legislative Purpose and the Constitutional Pitfalls of Using Anti-Wiretapping Statutes to Prevent the Recording of On-Duty Police Officers*, 15 J. GENDER RACE & JUST. 165, 167–72 (2012); Brncik, *supra* note 14.
71. Brncik, *supra* note 14, at 489–90; Triano, *supra* note 13, at 391–94.
72. Brncik, *supra* note 14, at 490–91; Triano, *supra* note 13, at 394–96.
73. See Rebecca G. Van Tassell, Comment, *Walking a Thin Blue Line: Balancing the Citizen's Right to Record Police Officers Against Officer Privacy*, 2013 BYU L. REV. 183, 188 n.13 (2013) (referencing the all-party consent statute rejected in *ACLU of Ill. v. Alvarez*, which required the offender to "knowingly and intentionally use[] an eavesdropping device").
74. *Id.* at 187 n.11 (attempting to reconcile these variations with *Katz's* reasonable expectation of privacy test).

In an all-party-consent state, a person wishing to record police activity would first need to obtain the consent of the person being detained. In many cases where the detained citizen is likely to feel mistreated by the officer, the probability that such a citizen is likely to grant consent is not hard to conceive (although difficulties concerning exactly how to obtain that consent without obstructing the officer's administration of justice⁷⁵ lurk in the background). But it is similarly easy to conceive that, given the choice, most police officers would decline to grant such consent.⁷⁶ In a scenario where several police officers are called upon to respond to the scene, the prospects of all-party consent are virtually nil. Thus, the formality and practical difficulty associated with obtaining consent of a private citizen, coupled with the high improbability of officer consent, make recording police encounters without violating anti-wiretapping statutes prohibitively difficult in all-party consent states.

As might be imagined, the main evils with which these statutes historically concern themselves are the wiretapping of telephone lines and bugging of residences and other dwellings with hidden recording devices.⁷⁷ Accordingly, commentators have largely excoriated the statutes' application as time, place, and manner restrictions on the open filming of public officials performing their duties in public places.⁷⁸

First, the federal statute and many similar state statutes were enacted shortly after *Katz v. United States*⁷⁹ and its emphasis on reasonable expectations of privacy.⁸⁰ Some explicitly incorporated the reasonable expectation of privacy test into statutory language.⁸¹ Opponents of the expansion of anti-wiretapping statutes to police

75. See Potere, *supra* note 13, at 313 (“[A] videographer could potentially distract an officer, leading to an error that harms an investigation or results in injury.”).

76. See Murphy, *supra* note 6, at 326–37 (analyzing “Incentives for Police Officers to Intimidate Videographers”).

77. See Shaw, *supra* note 3, at 174 (comparing the dictionary definition of wiretapping to 18 U.S.C. § 2510 (2012)). See also Lopez v. United States, 373 U.S. 427, 467 (1963) (Brennan, J., dissenting) (“Electronic eavesdropping by means of concealed microphones and recording devices of various kinds has become as large a problem as wiretapping, and is pervasively employed by private detectives, police, labor spies, employers and others for a variety of purposes, some downright disreputable.”).

78. See *supra* notes 14, 15, 28.

79. 389 U.S. 347 (1967).

80. *Id.* at 360–61 (Harlan, J., concurring). See also Wolf, *supra* note 70, at 170–72 (explaining the domino effect *Katz* had on federal and state wiretapping legislation).

81. *E.g.*, GA. CODE ANN. § 16-11-62(2)(B) (2012); accord 18 U.S.C. § 2510(2), (21)(A) (2012).

filming point out that there can be “no reasonable expectation that that conversation was private because the arrest [or other police encounter] was on a public street, within the presence of third parties, and within earshot of passersby.”⁸² Without a reasonable expectation of privacy, so the argument goes, the interactions between police officer and citizen does not fall within the subset of conversations the statute was implemented to protect.⁸³

A second argument made by opponents is that even if anti-wiretapping laws are invoked, more important First Amendment interests outweigh them.⁸⁴ While anti-wiretapping laws are arguably derived from Fourth Amendment jurisprudence and its accompanying rationales,⁸⁵ the fact remains that they are strictly statutory. As such, they must fall to superior constitutional commands, lest the right to report on public officers’ performance of their official duties be infringed upon and removed from the public discourse.⁸⁶ A subset of this argument is that citizens forfeit their privacy rights when they assume the mantle of public office and are acting under color of that position.⁸⁷ The dichotomy would then entail that whatever conversation police officers participated in while acting in their private capacity as citizens would be protected, while the privacy of those that took place while they were wearing the badge would have to give way to “an expectation of public accountability in the scope of their duties.”⁸⁸

82. Van Tassell, *supra* note 73 (referencing *State v. Flora*, 845 P.2d 1355 (Wash. Ct. App. 1992)).

83. *E.g.*, Brncik, *supra* note 14, at 493–97.

84. *See, e.g.*, Justin Welply, Comment, *When, Where and Why the First Amendment Protects the Right to Record Police Communications: A Substantial Interference Guideline for Determining the Scope of the Right to Record and For Revamping Restrictive State Wiretapping Laws*, 57 ST. LOUIS U. L.J. 1085, 1106 (2013) (proposing, instead of officer privacy, a “substantial interference” test for assessing the reasonableness of time, place, and manner restrictions on First Amendment protection for police recording); Jake Tracer, *Public Officials, Public Duties, Public Fora: Crafting an Exception to the All-Party Consent Requirement*, 68 N.Y.U ANN. SURV. AM. L. 125, 151–63 (2012) (proposing a legislative amendment to all-party consent statutes to take into account overriding First Amendment interests); Triano, *supra* note 13, at 410 (“[A]ny diminished privacy interests of police must ‘give way’ when balanced against the First Amendment interests in recording and publishing matters of public importance, especially when seeking to uncover police misconduct—as balancing becomes futile when one side of the scale is empty.”).

85. *See supra* notes 79–82 and accompanying text.

86. *See supra* notes 12–18 and accompanying text.

87. Triano, *supra* note 13, at 410–11.

88. *Id.* at 410 (internal citation and quotation marks omitted).

The third major criticism of the anti-wiretapping statutes' application is the asymmetry with which they have been applied.⁸⁹ In many places around the country, dashboard cams have become increasingly prevalent in police cruisers, with little or no protest as to their propriety.⁹⁰ In some state statutes, such dash-cams are specifically exempted from the operation of the statute.⁹¹ The result is a disproportionate concern for officer privacy over citizen privacy, rendering the underlying privacy justifications watery thin by “the turning of the Acts on their heads—police officers would be able to record civilians at all times (even in situations when officer safety is not a concern) regardless of privacy expectations, where civilians would not be able to record the police officers in the same circumstance.”⁹²

While all three major arguments against misuse of anti-wiretapping statutes as time, place, and manner restrictions are compelling, the reasonable expectation of privacy and asymmetry rationales could also potentially be used by a court to resolve the issue of the legality of recording police on narrow statutory interpretation grounds. But only an argument with a First Amendment component can truly carry the day with regard to citizen filming. Purely statutory state-law arguments will have the disadvantage of being decided in a far more piecemeal manner,⁹³ but more importantly, they will leave open other “catchall” offenses as means to suppress citizens' filming of police work.⁹⁴ Broad crimes like obstruction of justice, disorderly conduct, harassment, loitering, and trespassing will become the new preferred tools for police who wish to shield themselves from being filmed.⁹⁵ The right to record must find

89. *Id.* at 412–13.

90. See Lee Williams, *Should All Officers Have Cameras in Patrol Cars?*, SARASOTA HERALD-TRIBUNE (Aug. 31, 2012, 3:16 PM), <http://www.heraldtribune.com/article/20120831/ARTICLE/120839914> (“Police officials say they believe that the benefits that the video camera provides to officers, the department and the public, far outweigh the costs.”); Potere, *supra* note 13, at 313–14; Brncik, *supra* note 14, at 508.

91. Triano, *supra* note 13, at 412 (citing 720 ILL. COMP. STAT. ANN. 5/14-3(h) (2012)).

92. *Id.* at 413.

93. This will also likely deprive them of redressability through any federal cause of action. See *infra* Part II.C.2.

94. Shaw, *supra* note 3, at 178.

95. *Id.*; Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 362–64, 371 n.122 (2011) (describing how a person recording a police officer might be charged with loitering); *Id.* at 386 n.179 (explaining how recording a police officer can be trespassing).

its home in the First Amendment, or forever be a vagabond subject to the whims of the laws of the respective states.

*B. The Current State of the “Clearly Established” Requirement:
Pay No Attention to the Man Behind the Curtain*

Sometimes before proceeding to the underlying question of whether the Constitution confers a specific right, one must ask how he or she would vindicate that right in the event that a government official violated it. For violations like those mentioned in the paradigm scenario above, the most obvious post hoc remedy is a § 1983 civil rights action against the offending official.⁹⁶ Suits against individual officials ensure that they are held accountable for transgressing on others’ rights in the exercise of discretionary functions, something that neither forward-looking injunctions⁹⁷ nor suits to establish municipal liability⁹⁸—other forms of § 1983 relief—can provide.

A plaintiff bringing a § 1983 constitutional claim against an individual officer must allege facts showing that the officer acted under color of state law in depriving him or her of constitutionally guaranteed rights.⁹⁹ If a defendant then asserts that he or she acted reasonably, within the confines of the law, a separate qualified immunity analysis is required.¹⁰⁰ Qualified immunity is a judicial doctrine designed to exercise fairness to the public-official defendant. In the citizen-recording context, this means recognizing that police officers are neither lawyers nor judges and should not be held personally responsible for exercising reasonable discretion in enforcing the gray, unsettled fringes of the law.¹⁰¹ When a public official raises a

96. 42 U.S.C. § 1983 (2012). *Cf.* Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242 (1979) (recounting the historical development of civil rights actions for damages).

97. *See* Geoffrey J. Derrick, *Qualified Immunity and the First Amendment Right to Record Police*, 22 B.U. PUB. INT. L.J. 243, 276–81 (2013) (explaining the difficulties with an individual obtaining injunctive relief in a First Amendment recording context). In any event, injunctive relief merely ensures that the government will not interfere with future constitutionally protected courses of action; they do not redress past wrongs.

98. *Id.* at 281–282 (exploring the practical difficulties of proving *Monell* liability against municipalities). Even if *Monell* liability can be established, the individual officer who committed the wrong may receive no negative repercussions from his or her corresponding constitutional violation of the plaintiff’s rights.

99. 42 U.S.C. § 1983 (2012).

100. *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982).

101. *Pearson v. Callahan*, 555 U.S. 223, 244–45 (2009).

qualified immunity defense, in addition to the substantive question of whether a constitutional right existed and was violated, the court must also make the slightly different inquiry whether such a right was “clearly established” at the time of the disputed official action.¹⁰² Thus, the qualified immunity inquiry typically unfolds into two additional but related steps. Courts examine how settled the area of law from which the violation arose was at the time of the disputed conduct¹⁰³ and whether a reasonably competent person in the defendant’s position would have been aware of that law and acted accordingly.¹⁰⁴

For nearly a decade, the Supreme Court in *Saucier v. Katz*¹⁰⁵ required that lower courts should first decide the substantive question of whether a right existed and was violated before moving on to the question of whether qualified immunity nonetheless applied.¹⁰⁶ Courts and commentators dubbed this the “rigid order of battle.”¹⁰⁷ While imposing a mandatory burden on courts hearing § 1983 claims to always decide the substantive issue on the merits,¹⁰⁸ it had the virtue ensuring the development of the underlying constitutional doctrines at issue.¹⁰⁹ However, the Court softened its stance in *Pearson v. Callahan*,¹¹⁰ declaring that the order in which deciding courts analyzed the issues in qualified immunity cases would henceforth be discretionary rather than mandatory.¹¹¹

Apparently motivating the about-face was mounting frustration with the judicial burden involved with deciding novel constitutional

102. *Harlow*, 457 U.S. at 818.

103. *E.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 81 (1st Cir. 2011).

104. *Id.*

105. 533 U.S. 194 (2001).

106. *Id.* at 200–01.

107. *E.g.*, *Derrick*, *supra* note 97, at 248. The phrase appears to have derived from Justice Breyer’s dissent in *Brosseau v. Haugen*, 543 U.S. 194, 201–02 (2004).

108. *Saucier*, 533 U.S. at 200.

109. *Id.* at 201.

110. 555 U.S. 223 (2009). Although not relevant to this Comment, *Pearson* was a Fourth Amendment case involving a circuit split over the “consent once removed” theory applied by some courts as an exception to the search warrant requirement. *Id.* at 229. Essentially, it provides that a suspect who unwittingly allows an undercover officer or informant into his house also effectively consents to additional officers entering without a warrant. *Id.* The officers argued that they were entitled to qualified immunity based on the circuit split. *Id.*

111. *Id.* at 236.

issues.¹¹² In such cases, judges confront the difficult task of comprehensively analyzing the legal arguments and analogous precedent, even though the average government officer could not possibly be expected to know the answer to the constitutional question.¹¹³ Yet the Court did not explicitly reject the *Saucier* sequence. Instead, the Court held that the procedure would presumably still be proper in a great many cases,¹¹⁴ but some commentators have argued that it did so without any meaningful guidance as to precisely what lower courts should consider when deciding to begin with the merits or proceed directly to whether the right was clearly established for qualified immunity purposes.¹¹⁵

Unsurprisingly, *Pearson* has resulted in a judicial mindset that ossifies the law,¹¹⁶ rather than simply affording lower courts sensible flexibility in determining which issues to hear. Instead of spending significant time—and risking being reversed—on vexing constitutional questions, many lower courts have instead applied *Pearson* as a de facto qualified-immunity-first rule.¹¹⁷ The detriment that such an overly rigid application of constitutional avoidance presents should not be understated.¹¹⁸ Ironically, once one district court judge decides, using his or her *Pearson* discretion, that a particular right is not clearly established, and a Court of Appeals affirms, nearly all future discretion for other judges within the circuit to decide factually related cases on the merits is effectively lost. Any discretion that does remain will eventually vanish, as more cases are decided within a respective circuit on “clearly established” rather than substantive constitutional grounds and judges in that circuit feel additional pressure to follow suit rather than undertake the more arduous *Saucier* sequence.¹¹⁹ The cumulative uncertainty that *Pearson* unleashed cannot have been what the Court intended, and yet it will remain the gremlin in § 1983’s machinery until the Court provides further guidance.

112. *Id.* at 235–40.

113. *Id.* at 237.

114. *Id.* at 232, 236, 242.

115. *E.g.*, Derrick, *supra* note 97, at 248; Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 Sup. Ct. Rev. 139, 171 (2009).

116. *See infra* Part II.C and III.A.

117. *See infra* Part III.A.

118. *See* *Camreta v. Greene*, 131 S. Ct. 2020 (2011) (“[I]f those officials are entitled to qualified immunity, a court can dismiss the damages claim without ever deciding its merits—and so the qualified immunity situation threatens to leave standards of official conduct permanently in limbo.”).

119. *See infra* note 172 and accompanying text.

C. *Glik-ety Split: Those Who Decide and Those Who Abstain*

In many ways, the unique combination of circumstances surrounding the proliferation of smart phones and its attendant First Amendment consequences provides an ideal illustration of *Pearson's* dysfunction. From a chronology standpoint, the case was decided in 2009,¹²⁰ just before smart phone ownership reached its tipping point among American adults.¹²¹ Therefore, unlike many criminally proscribed activities,¹²² most recording of police action involves using a tool widely possessed and routinely used¹²³ by a majority of the populace. When combined with the relatively benign nature of the activity itself, and a lack of demonstrable negative externalities to society,¹²⁴ this arguably increases the majority's ability to identify with those prosecuted under misapplied laws. But most importantly, the smart phone handily exemplifies a technology that the Framers could not possibly have envisioned,¹²⁵ highlighting the need for

120. *Pearson v. Callahan*, 555 U.S. 223, 223 (2009).

121. See Dara Kerr, *Smartphone Ownership Reaches Critical Mass in the U.S.*, CNET NEWS (June 5, 2013, 5:35 PM), http://news.cnet.com/8301-1035_3-57587932-94/smartphone-ownership-reaches-critical-mass-in-the-u.s/ (showing a steady rise in smartphone ownership among U.S. adults, from 35% in 2011 to 56% in 2013).

122. Consider, for example, that the U.S. Department of Health and Human Services reports that in 2012, only 7% of adults aged 26 or older engaged in illicit drug use. *Results from the 2012 National Survey on Drug Use and Health: Summary of National Findings*, U.S. DEP'T OF HEALTH AND HUMAN SERVS. 17, <http://www.samhsa.gov/data/NSDUH/2012SummNatFindDetTables/NationalFindings/NSDUHresults2012.htm> (last visited Mar. 2, 2014).

123. See Leslie Horn, *43 Percent of People Use Their Cell Phone as Their Primary Camera, Poll Finds*, PC MAG (June 27, 2011, 11:18 AM), <http://www.pcmag.com/article2/0,2817,2387677,00.asp> (reporting the results of a survey in which 43% of respondents used their cell phone as their primary camera, while an additional 21% use it in conjunction with a regular camera). No word yet on whether the continued rise of traditional camera use among hipsters has altered these results. See Amanda Golden, *Teen Hipsters Discover Joys of Analog Photography*, CNET (last updated May 16, 2011, 4:09 PM), http://news.cnet.com/8301-1023_3-20062810-93.html (kidding, of course).

124. *Compare* *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (noting how video recording “memorializes, without impairing, [police] work in public spaces”), *with* Joey Scarborough et al., *Alec Baldwin Gets Into Street Scuffle with NY Photographer, Pins Man Against Hood of Car*, NY DAILY NEWS (last updated Aug. 28, 2013, 1:46 AM), <http://www.nydailynews.com/entertainment/gossip/alec-baldwin-street-scuffle-new-york-photographer-article-1.1438362> (highlighting the virtues of photographers keeping a reasonable distance from their subjects).

125. *E.g.*, Dr. Saby Ghoshray, *Doctrinal Stress or In Need of a Face Lift: Examining the Difficulty in Warrantless Searches of Smartphones Under*

elasticity when ascertaining the boundaries of previously recognized categories of protected speech.¹²⁶ The four circuits to tackle the issue have recognized this, fitting the citizens' right to film police comfortably inside long-recognized categories of protected speech.¹²⁷ But such doctrinal flexibility is conspicuously absent from the terse decisions in the two circuits that chose to proceed solely under the "clearly established" prong of the § 1983 analysis while leaning heavily on *Pearson*.¹²⁸

1. Courts That Find a First Amendment Right to Record
on the Constitutional Merits

The first decision by a circuit concerning the constitutionality of recording police, *Fordyce v. City of Seattle*,¹²⁹ occurred in 1995 before the advent of the smartphone¹³⁰ or even the widespread popularity of cellular phones in general.¹³¹ *Fordyce* involved an activist who was

the Fourth Amendment's Original Intent, 33 WHITTIER L. REV. 571 (2012).

126. *Cf. Glik*, 655 F.3d at 82 (regarding the right to "gather and disseminate information") ("The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles.").
127. *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012).
128. *Szymecki v. Houck*, 353 F. App'x 852 (4th Cir. 2009); *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010).
129. 55 F.3d 436 (9th Cir. 1995).
130. Although IBM debuted a device known as Simon in 1993 that could technically lay claim to the title of "first smartphone," it was not until the debut of the BlackBerry a decade later that a smartphone achieved widespread adoption by the U.S. public. Compare Ira Sager, *Before iPhone and Android Came Simon, the First Smartphone*, BLOOMBERG BUSINESSWEEK (June 29, 2012), <http://www.businessweek.com/articles/2012-06-29/before-iphone-and-android-came-simon-the-first-smartphone>, with Felix Gillette et al., *The Rise and Fall of BlackBerry: An Oral History*, BLOOMBERG BUSINESSWEEK (Dec. 5, 2013), <http://www.businessweek.com/articles/2013-12-05/the-rise-and-fall-of-blackberry-an-oral-history#p3>.
131. According to the CTIA, a wireless industry association, there were slightly over 28.1 million cell phone subscribers in June 1995, a month after *Fordyce* was decided. CTIA, JUNE 2010 SEMI-ANNUAL WIRELESS INDUSTRY SURVEY 3 (2010), available at http://files.ctia.org/pdf/CTIA_Survey_Midyear_2010_Graphics.pdf. The Census Bureau estimated the 1995 U.S. population at 262.7 million people, placing the percentage of cell phone ownership around 10.7%. PAUL CAMPBELL, U.S. CENSUS BUREAU, POPULATION PROJECTIONS: STATES, 1995–2025, at 3 (1997), available at <https://www.census.gov/prod/2/pop/p25/p25-1131.pdf>.

arrested while “videotap[ing] [a] demonstration for local television production, presumably for broadcast on a public access channel,” on a camcorder.¹³² When the activist decided to film the police’s reaction to the crowd’s heated behavior, one officer “attempted physically to dissuade [the activist] from his mission.”¹³³ In reinstating the activist’s § 1983 suit, the Ninth Circuit recognized a “right to film matters of public interest.”¹³⁴ While little analysis was devoted to precisely where this right came from,¹³⁵ it can be comfortably assumed that it was derivative of either, or some combination, of two broader, previously recognized First Amendment categories referenced elsewhere in the opinion: “the right to gather news”¹³⁶ or the right to “publicly gathering information.”¹³⁷

The Eleventh Circuit was similarly succinct in its opinion five years later in *Smith v. City of Cumming*,¹³⁸ holding that “photograph[ing] or videotap[ing]” police was protected under “the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”¹³⁹ The court noted the right to record police was subject to reasonable time, place, and manner restrictions, but declined to provide further specificity.¹⁴⁰ At the time these early cases were decided, portable video cameras were readily available,¹⁴¹ but did not

132. 55 F.3d at 438.

133. *Id.* According to the activist, the officer smashed the camera in his face. *Id.* at 439. There was also a separate, but somewhat related, § 1983 violation in the initial complaint stemming from the activist’s arrest by a different officer for filming two private citizens later in the day. The activist spent a night in jail and eventually the charges were dropped. *Id.* at 438. The main issue in that § 1983 claim, which the Ninth Circuit held was properly dismissed under qualified immunity, was whether there was sufficient probable cause under the Fourth Amendment to justify the arrest for violating state privacy statutes. *Id.* at 439–40.

134. *Id.* at 439.

135. The First Circuit in *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011), actually attributed this “terseness [to] implicitly speak[] to the fundamental and virtually self-evident nature of the First Amendment’s protections in this area.”

136. *Fordyce*, 55 F.3d at 438.

137. *Id.* at 439.

138. 212 F.3d 1332 (11th Cir. 2000).

139. *Id.* at 1333. *Smith* was ultimately dismissed not on qualified immunity grounds but because the plaintiff failed to factually establish that his constitutional rights were violated. *Id.*

140. *Id.*

141. Sony launched the first consumer camcorder in 1983 with the release of the Beta Movie BMC-100. *History of the Video Camera*, SONY.NET,

yet provide the ability for most people to routinely carry around filming devices in their pocket on a daily basis. Nonetheless, both cases were decided well after the Rodney King beating exposed the powerful effect citizen filming could have.¹⁴² In this way, perhaps the relatively short length of the opinions from these circuits compared to those that emerged from later ones can be compared to a Newton's Cradle.¹⁴³ Past events involving video cameras had aptly demonstrated the virtues served by increased police-work transparency, but the limitations in the technology caused a loss of momentum over time (in this case, in terms of judicially perceived importance to society). Only by reintroducing momentum to the system, in terms of the virtual ubiquity of recording devices, would the importance of the issue force courts to sufficiently clarify the existence and source of the right to film police.

Indeed, when the First Circuit became the first to tackle the issue of police recording in the smartphone era in *Glik v. Cunniffe*,¹⁴⁴ its approach was considerably more systematic. The court began with the text of the First Amendment, noting that “the text’s proscription on laws ‘abridging the freedom of speech, or of the press’ . . . encompasses a range of conduct related to the gathering and dissemination of information,”¹⁴⁵ and “‘prohibit[s] government from limiting the stock of information from which members of the public may draw.’”¹⁴⁶ The First Circuit then explained how “filming government officials engaged in their duties in a public place . . . fits comfortably within these principles,”¹⁴⁷ drawing on several past Supreme Court precedent to highlight how public dissemination of

<http://www.sony.net/SonyInfo/CorporateInfo/History/sonyhistory-f.html> (last visited Mar. 28, 2014).

142. See *supra* notes 62–64 and accompanying text.

143. The popular office toy employs five equally sized spheres suspended from strings. When the user lifts and releases a sphere on either end, it strikes the others and demonstrates the physical transfer of momentum with a reciprocal action on the other end. Over time, however, the reciprocal movements become less pronounced as momentum leaves the system and the spheres gradually come to rest. See Gary Antonick, *Numberplay: How Does Newton’s Cradle Work?*, N.Y. TIMES, (Dec. 6, 2010, 11:58 AM), http://wordplay.blogs.nytimes.com/2010/12/06/numberplay-newtons-cradle/?_php=true&_type=blogs&_r=0. (last visited Mar. 23, 2014).

144. 655 F.3d 78 (1st Cir. 2011). *Glik* involved an attorney bystander who used his cell phone to record officers employing what he believed to be excessive force in arresting another man. *Id.* at 79–80.

145. *Id.* at 82 (quoting U.S. CONST. AMEND. I).

146. *Id.* (quoting *First Nat’l Bank of Boston v. Belotti*, 435 U.S. 765, 783 (1978)).

147. *Id.*

information concerning public officials' conduct uncovers abuse and results in higher standards of official behavior.¹⁴⁸ The court concluded its analysis with a practical observation in tribute to the times: “[N]ews stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.”¹⁴⁹

The First Circuit's analysis of the First Amendment right to record public officials in *Glik* was not completely unqualified; it too mentioned the necessity of “reasonable time, place, and manner restrictions.”¹⁵⁰ But the court emphasized how narrowly tailored such restrictions would have to be, holding them inapposite to a person “‘film[ing] [officers] from a comfortable remove’” without “‘[speaking] to nor molest[ing] them in any way’ (except in directly responding to the officers when they addressed him [or her]),”¹⁵¹ while present in a “‘traditional public space[.]’”¹⁵² Consequently, the First Circuit seemingly laid down a nearly unfettered right for nonthreatening third-party recorders in public places.

The ACLU sought to build upon this third-party right by its procedural posturing in *American Civil Liberties Union of Illinois v. Alvarez*.¹⁵³ Perhaps recognizing that third-party recorders present the most sympathetic plaintiffs, the ACLU sought to organize a “police accountability program,”¹⁵⁴ under which members would openly and systematically use their cell phones to record officers while they performed their duties in public.¹⁵⁵ Unlike *Fordyce, Smith, and Glik*, which were actions for damages, the *Alvarez* suit used § 1983 to seek declaratory and injunctive relief.¹⁵⁶ After overcoming initial standing hurdles,¹⁵⁷ the Seventh Circuit emphasized the importance of not allowing laws to foreclose “‘entire medium[s] of expression.’”¹⁵⁸ Regardless of when the speech restriction occurs,¹⁵⁹ said the court, it reduces the quality and quantity of the public's supply of

148. *Id.* at 82–84.

149. *Id.* at 84.

150. *Id.*

151. *Id.* (quoting *Iacobucci v. Boutler*, 193 F.3d 14, 25 (1st Cir. 1999)).

152. *Id.*

153. 679 F.3d 583 (7th Cir. 2012).

154. *Id.* at 588.

155. *Id.*

156. *Id.*

157. *Id.* at 590–94. *See also infra* notes 201–209 and accompanying text (discussing standing and other issues with alternative causes of action).

158. *Id.* at 595 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994)).

159. *Id.* at 596. *See also* McDonald, *supra* note 27 (developing this theory in more detail).

information,¹⁶⁰ which weakens crucial links in the chain of public official accountability.¹⁶¹ As such, it “burden[ed] First Amendment rights directly,”¹⁶² and the court granted the injunction.¹⁶³

The *Alvarez* decision was important in one other regard as well. It provided the most comprehensive “time, place, and manner”¹⁶⁴ discussion of any police recording case to date, taking the time to actually determine and apply the appropriate level of judicial scrutiny to the Illinois’ anti-eavesdropping statute. Because the statute was likely content-neutral,¹⁶⁵ the court examined it under intermediate scrutiny, which requires “an important public-interest justification . . . and . . . a reasonably close fit between the law’s means and its ends.”¹⁶⁶ From there, a simple syllogism demonstrated why the statute was unconstitutional. If the privacy of citizens’ conversations is the public-interest justification, and *Katz v. United States*¹⁶⁷ holds that what citizens expose to the public carries no reasonable expectation of privacy, then “by legislating [so] broadly—by making it a crime to record any conversation, even those that are not in fact private—the State has severed the link between the eavesdropping statute’s means and its ends.”¹⁶⁸ This simple yet elegant argument would seem to provide the template to strike down any similar misapplication of other eavesdropping or anti-wiretapping statutes, and yet the challenges in other circuits have not come. *Alvarez*, to which the Supreme Court denied certiorari,¹⁶⁹ remains the most recent Court of Appeals decision concerning citizens’ rights to film police.

What accounts for this slow-down? Is there simply a lack of quality plaintiffs? Perhaps. But there are a couple of other potential explanations, with very different respective implications. The first is simply that *Alvarez* and its slightly older brethren, with no real opposition on the substantive issue in other circuits, have been very influential on lower courts and among law enforcement, tilting the scales towards constitutional protection.¹⁷⁰ Another more alarming

160. *Alvarez*, 679 F.3d at 596.

161. *Id.* at 597.

162. *Id.* at 603.

163. *Id.* at 608.

164. *Id.* at 605.

165. *Id.*

166. *Id.*

167. 389 U.S. 347 (1967).

168. *Alvarez*, 679 F.3d at 606.

169. 133 S. Ct. 651 (2012).

170. There is some support for this argument in the opinions of lower courts in circuits that have yet to take a position on the First Amendment

possibility exists, though. Given that two circuits affirmed district court decisions that held the right to record police was not “clearly established” from a qualified immunity standpoint,¹⁷¹ lower courts may simply be opting for the path of least resistance under *Pearson* at a greater rate than before.¹⁷² Rather than tilting the scales for constitutional protection—or, more likely, against it—such cases leave their thumbs off of the scales entirely.

right to record police. *See, e.g.*, *Crawford v. Geiger*, No. 3:13CV1883, 2014 WL 554469, at *8 (N.D. Ohio Feb. 10, 2014) (case within the Sixth Circuit citing *Alvarez*, *Glik*, *Smith*, and *Fordyce* as representing “unanimity among the circuits having decided the precise issue in this case”). The Sixth Circuit had previously passed on the issue. *See* *Ross v. Burns*, 612 F.2d 271, 274 (6th Cir. 1980). *See also* *United States v. Wells*, 789 F. Supp. 2d 1270, 1277 n.4 (N.D. Okla. 2011) (case within the Tenth Circuit citing *Smith* approvingly for the proposition that police officers are reasonably subject to public scrutiny); *Barnes v. Timmons*, No. 12-cv-01042-WJM-KMT, 2013 WL 439069, at *5 (D. Colo. Feb. 5, 2013) (case within the Tenth Circuit assuming plaintiff had First Amendment right to photograph officer, but dismissing on plaintiff’s factual admissions); *Porat v. Lincoln Towers Cmty. Ass’n*, No. 04 Civ. 3199(LAP), 2005 WL 646093, at *5 (S.D.N.Y. Mar. 21, 2005) (case within the Second Circuit referring to *Fordyce* and *Smith* as dealing with protected expressive conduct under the First Amendment, but ultimately differentiating by asserting that not all photography is communicative). Two of the more publicized sets of internal police policies respecting the right to record police come from Baltimore and Washington D.C. *See* BALTIMORE POLICE DEP’T, GEN. ORDER J-16, VIDEO RECORDING OF POLICE ACTIVITY (2011); D.C. METRO. POLICE DEP’T, GENERAL ORDER OPS-304-19, VIDEO RECORDING, PHOTOGRAPHING, AND AUDIO RECORDING OF METROPOLITAN POLICE DEPARTMENT MEMBERS BY THE PUBLIC (2012).

171. *See infra* Part II.C.2.

172. *See, e.g.*, *Mesa v. City of New York*, No. 09 Civ. 10464(JPO), 2013 WL 31002, at *24–25 (S.D.N.Y. Jan. 3, 2013) (disposing of the case because the law was not “clearly established,” despite expressing agreement with the four circuits recognizing First Amendment protection); *Ortiz v. City of New York*, No. 11 Civ. 7919(JMF), 2013 WL 5339156, at *3–4 (S.D.N.Y. Sep. 24, 2013) (again disposing of the case on “clearly established” grounds, despite the existence of the *Mesa* decision and the Justice Department having taken an official stance on constitutional protection); *Williams v. Boggs*, No. 6:13-65-DCR, 2014 WL 585373, at *5–6 (E.D. Ky. Feb. 13, 2014) (citing *Kelly* and *Szyrncki*, after noting “there is no authority from the Sixth Circuit clearly establishing any right to film a police officer”). Other cases have seized upon the “time, place, and manner” language in the circuit opinions to dispose of the cases on narrow grounds, despite the fact that time, place, and manner restrictions are intensely fact-bound and often require substantive discussion as extensive as would be required to determine the underlying constitutional issue. *See, e.g.*, *Mocek v. City of Albuquerque*, No. CIV 11-1009 JB/KBM, 2013 WL 312881, at *51–58 (D.N.M. Jan. 14, 2013); *Magnan v. Doe*, No. 11-753 (JNE/SER), 2012 WL 5247325, at *10 (D. Minn. July 6, 2012).

2. Courts That Decline to Examine a First Amendment Right to Record by Disposing of Cases on the “Clearly Established” Prong of the Qualified Immunity Analysis

In *Kelly v. Borough of Carlisle*,¹⁷³ a passenger in a vehicle that was pulled over filmed the traffic stop using a hand-held camera.¹⁷⁴ The officer notified the passenger and driver that he was videotaping their encounter from a dashboard cam and recording audio from a microphone attached to his lapel, yet when he noticed immediately thereafter that the passenger was recording him, he confiscated the passenger’s camera.¹⁷⁵ After consulting with an assistant prosecutor and calling in an additional three officers for assistance, he then arrested the passenger.¹⁷⁶ As the officers escorted the passenger to the jail, one of them rhetorically remarked, “When are you guys going to learn you can’t record us?”¹⁷⁷ As might be predicted, the prosecutor eventually dropped all charges against the passenger, who subsequently brought a § 1983 action.¹⁷⁸

In holding that the officers were entitled to qualified immunity for any potential First Amendment violations, the Third Circuit conspicuously noted the propriety of the district court’s avoidance of the ultimate constitutional issue under *Pearson*, despite the fact that there already existed within the circuit at least one case suggesting that there “may” be a protected right to film police.¹⁷⁹ Turning to the “clearly established” question, the Third Circuit noted as a preliminary matter that even among courts that had found a First Amendment right to film the police there was considerable debate regarding whether such a right consisted of blanket protection or required sufficiently “expressive or communicative purpose.”¹⁸⁰ The court then proceeded to factually distinguish other cases where protected speech was found—for example, filming in connection with political activism,¹⁸¹ meetings of state officials,¹⁸² or as part of news

173. 622 F.3d 248 (3d Cir. 2010).

174. *Id.* at 251.

175. *Id.* at 251–52.

176. *Id.* at 252.

177. *Id.*

178. *Id.*

179. *Id.* at 254, 260. This professed exercise of judicial restraint is curious, given the court’s later willingness to adopt a new rule that “a police officer who relies in good faith on a prosecutor’s legal opinion that the arrest is warranted is presumptively entitled to legal immunity.” *Id.* at 255–56.

180. *Id.* at 259, 262.

181. *Id.* at 261. The Third Circuit either mistakenly or disingenuously characterized *Fordyce* as a case where the court recognized a First

gathering¹⁸³—on the basis of supposedly greater expressive purpose.¹⁸⁴ Finally, the court noted in passing that even if there was a right to film police, it could be qualified like other speech by “reasonable time, place, and manner restrictions” (although the court devoted no analysis as to how such restrictions would fare in a police-recording situation).¹⁸⁵

The Third Circuit’s approach in *Kelly* should be questioned for multiple reasons. As a substantive matter, it makes little sense to argue that recording police in such a case has no expressive or communicative purpose and content. Because any effect that such footage will have on the wider public discourse must necessarily come after it is filmed and disseminated, its expressive or communicative *content* is antecedent to those acts.¹⁸⁶ Similarly, its expressive or communicative *purpose* is often contingent upon what actually

Amendment right to film “but ultimately grant[ed] qualified immunity to police because it was not clearly established under what circumstances conversation in public could be protected under state privacy statute.” *Id.* However, qualified immunity was granted in *Fordyce* regarding whether it was “clearly established” that probable cause was not present under the Fourth Amendment when applying state privacy laws to private individuals, *not* for the plaintiff’s First Amendment claims against public officials, which were reinstated. *See supra* note 133 and accompanying text. The district court had also taken the impermissible procedural step of instituting declaratory relief *sua sponte* without notifying the parties. *Fordyce v. City of Seattle*, 55 F.3d 436, 441–42 (9th Cir. 1995). Even regarding filming *private* citizens in public places, however, the Ninth Circuit cautioned: “*Fordyce* was, and still is, uncertain and insecure regarding his right *vel non* to videotape and audiotape private persons on public streets. . . . [T]he circumstances culminating in his arrest. . . are a ‘brooding presence,’ which cast an adverse effect on his legitimate interests as a citizen of the United States.” *Id.* at 440 (quoting *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 893 F.2d 1012, 1015 (9th Cir. 1989)).

182. *Kelly*, 622 F.3d at 261.

183. *Id.* at 261–62.

184. *Id.* at 262.

185. *Id.*

186. *See ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595–96 (7th Cir. 2012) (“The act of making an . . . audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. . . . [T]here is no fixed First Amendment line between the act of creating the speech and the speech itself . . .”). *See also* Brncik, *supra* note 14, at 504 (“If a state prevents citizens from recording their interactions with police, it arguably deprives citizens of due process and their right to present a defense at trial by preventing this evidence from being created at the outset.”); Potere, *supra* note 13, at 302–12 (analyzing prohibitions on recording as prior restraints); McDonald, *supra* note 27 (arguing for greater doctrinal recognition of a right to *gather* information).

transpires between the policeman and the citizen. Videos of police officers performing their duties reasonably will seldom end up on YouTube.¹⁸⁷ In effect, the citizen is saying, “I’m not sure what is going to transpire, but if something objectionable happens, I may want to be able to show someone else in the future.” Accordingly, the Third Circuit’s apparent requirement that the expressive or communicative nature of both the activity’s content *and* purpose need be established before First Amendment protection attaches is overly restrictive,¹⁸⁸ if not completely illogical. The court’s run-down of the inherently fact-bound time, place, and manner restriction doctrine¹⁸⁹ also contributes little to the opinion without any actual analysis of how it would apply in the context of the case at hand.

More importantly, the *Kelly* opinion highlights another flaw in the way lower courts have approached *Pearson*. The preceding paragraph, and much of the Third Circuit’s opinion, grapples with the substantive constitutional question under the guise of answering the “clearly established” question.¹⁹⁰ Indeed, in many cases involving novel but plausible individual rights questions, a well-reasoned opinion that begins with the “clearly established” prong of the qualified immunity analysis will nevertheless have embedded within it a significant substantive constitutional discussion component.¹⁹¹

The alternative to doctrinal overlap between the two prongs of the qualified immunity analysis is not much more appealing, though. In *Szyrnacki v. Houck*,¹⁹² the Fourth Circuit’s opinion did not labor

187. Although the first page of search results on YouTube for “police officer performing his duties well” did turn up one notable exception—caught, of course, on a dashcam. YouTube, http://www.youtube.com/results?search_query=police%20officer%20performing%20his%20duties%20well&sm=3 (last visited Mar. 3, 2014).

188. See Kreimer, *supra* note 95, at 377–81 (quoting ALAN CLARK, *SUPERSIZING THE MIND: EMBODIMENT, ACTION, AND COGNITIVE EXTENSION* 58 (2008) (positing that expression to others is not a necessary condition for First Amendment protection, as people constantly record events using memory for later reflection, and “external storage” assists the “individuals’ freedom to reflect effectively on those experiences”).

189. *Kelly*, 622 F.3d at 262.

190. *Id.* at 260–63.

191. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (emphasis added) (internal quotation marks omitted) (“[T]here are cases in which there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the ‘clearly established’ prong. It *often* may be difficult to decide whether a right is clearly established without deciding precisely what the constitutional right happens to be.”).

192. 353 F. App’x 852 (4th Cir. 2009).

with such difficulties, choosing instead to worry almost exclusively about hedging its decision. After an obligatory blurb concerning *Pearson* discretion, the court began by noting that district courts “should identify the right at a high level of particularity,” and “need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose.”¹⁹³ Perhaps recognizing cases from other jurisdictions that had held that a First Amendment right to film police exists, the Fourth Circuit then stated that “[a]ccordingly, if the right is recognized in another circuit and not in this circuit, the official will ordinarily retain the immunity defense.”¹⁹⁴ With all of its bases thus covered, the court then concluded its one-page opinion with this perfunctory holding: “Here, the district court concluded *Szzynecki*’s asserted First Amendment right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct. We have thoroughly reviewed the record and the relevant legal authorities and we agree.”¹⁹⁵ In this way, *Szzynecki* provides a prime example of constitutional stagnation,¹⁹⁶ the other consequence that can arise from unconstrained exercises of *Pearson* discretion. Cases like *Szzynecki* officially make no “incremental advance in the law”¹⁹⁷—in this case, the First Amendment—but still cast a shadow over the shoulder of district court judges considering whether to address the underlying substantive issue in future cases.¹⁹⁸

193. *Id.* (internal quotation marks omitted).

194. *Id.* (internal quotation marks omitted).

195. *Id.* at 853.

196. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001) (emphasizing the necessity of considering the constitutional issue first in order to develop constitutional law); *Pearson*, 129 F.3d at 816 (citing the same concern with “constitutional stagnation” although ultimately making the two-step procedure optional).

197. *Camreta v. Greene*, 131 S. Ct. 2020, 2044 (2011).

198. Two cases from within the Third Circuit perfectly illustrate the less-desirable consequences of *Pearson* discretion. Once a circuit has spoken on the “clearly established” nature of an alleged right—as in *Kelly*—district courts, wary of being reversed, treat it as if the circuit rejected the constitutional right on the merits. Thus, by rejecting similar challenges with a simple citation to the circuit-level case, district courts never actually choose to answer the underlying constitutional question first. *Pearson* discretion becomes nothing more than cautious adherence. *See True Blue Auctions, LLC v. Foster*, Civil Action No. 11-242 Erie, 2012 WL 2149801, at *5 (W.D. Pa. Apr. 9, 2012) (citing *Kelly*) (“Given the uncertainty in the case law and the lack of authority from the Third Circuit, this Court is unable to rule as a matter of law that there was a clearly established right to videotape a police officer”); *Fleck v. Trs. of Univ. of Pennsylvania*, Civil Action No. 12-3765, 2014 WL 460652, at *13–14 (E.D. Pa. Feb. 5, 2014) (citing *Kelly*) (“The

Faced with such unsavory results on an increasingly important First Amendment issue—opinions with either minimal reasoning or reasoning that at least partially implicates the underlying substantive issue, with neither advancing the law—the current iteration of *Pearson* doctrine applied by some lower courts seems to have backfired in precisely the way Justice Alito assured it would not.¹⁹⁹ In place of a split comprised of “yeas” and “nays” lies an ambiguous field of “yeas” and doubtful “passes.”

III. ADDRESSING THE OBSTACLES: ANCHORING THE CORE AND FILLING IN THE BLANKS

It is clear that citizen plaintiffs whose recording activities have been wrongfully interfered with by police must overcome the stagnation presented by some district courts' application of *Pearson*. As this Comment will demonstrate, the text of *Pearson* and other precedent may indicate that such stagnation has resulted from a flawed interpretation of how much discretion is actually available under *Pearson*. But even if *Pearson* discretion is reined in, there will still be two considerable obstacles to obtaining effective relief. First, some courts have held up time, place, and manner exceptions to First Amendment protection as a potential hindrance to a right to record police activity. The practical importance of such allusions is probably overblown due to the scrutiny such exceptions would have to face. The second problem, difficulty recovering anything more than nominal damages, is more substantial and will likely require legislative action. Nonetheless, doctrinal clarification is an important first step on the path to vindication of the right to record police officers and merits closer examination.

circumstances here differ. The plaintiffs were on a public street, not in a car, and initially recorded only their own activity. But when they ignored repeated police requests to move from the mosque doorway and lower their voices, the landscape changed. [The citizen recorder] refused to shift the camera away from the [police] officer's face, a refusal she took as a threat. That disregard led to their arrest and the video camera's seizure. Under such circumstances we hold that there was then no clearly-established First Amendment right in our Circuit to film police activity where, as here, the plaintiffs actively impeded efforts to restore public order.”).

199. *Pearson*, 129 S. Ct. at 821–22 (“Any misgivings concerning our decision to withdraw from the mandate set forth in *Saucier* are unwarranted. . . . Moreover, the development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity.”)

A. *There's Still Hope: Why the Pearson Problem
Should Not Be Insurmountable*

If the way courts have exercised *Pearson* discretion when handling First Amendment right-to-record cases has proven dysfunctional, what precisely should be done to rectify courts' inaction? One commentator considers *Pearson* inevitably flawed, urging a readoption of *Saucier's* "rigid order of battle" for First Amendment-related §1983 claims.²⁰⁰ Ignoring the practical unlikelihood that the Court would take such a stance just a few years after rejecting it, *Saucier* sequencing does demonstrate certain appealing procedural advantages when applied in a First Amendment context.

Recently, members of the Court have repeatedly emphasized that because qualified immunity does not apply to suits against municipalities or for injunctive relief, such suits, along with criminal cases, will provide sufficient vehicles for vindicating individual rights and developing constitutional law.²⁰¹ In some cases and on some issues this will certainly be true. However, as Geoffrey Derrick pointed out, the civil suit alternatives have drawbacks in the context of individual citizens who record police officers.²⁰² Because injunctive relief is essentially forward-looking, rather than backward-looking as in damage suits, a plaintiff may have Article III standing issues stemming from the necessity of pleading facts sufficient enough to establish injury-in-fact and redressability.²⁰³ *Monell* suits against municipalities require demonstrating policies or practices that encourage the allegedly abusive action, a tall task that often requires prohibitively arduous amounts of discovery.²⁰⁴ For these reasons,

200. Derrick, *supra* note 97, at 283–90.

201. *Pearson*, 555 U.S. at 242–43 (Alito, J.); *Camreta*, 131 S. Ct. at 2043–44. (Kennedy, J., dissenting).

202. Derrick, *supra* note 97, at 276–81.

203. *Id.* at 278–79 (“The requirement that a plaintiff assert an ‘irreparable injury’ that ‘monetary damages’ cannot remedy stifles § 1983 actions for forward-looking injunctive relief as a tool for constitutional development. . . . [Further,] suits for injunctive relief will only secure injury-in-fact and therefore standing where the plaintiff can prove a credible threat of future prosecution.”) For example, a plaintiff would have to establish a concrete plan to systematically record police activity in the future, as the ACLU did in *Alvarez*. Such a bar—essentially requiring premeditated, coordinated action—seems unfairly high to an individual plaintiff seeking to vindicate an isolated violation of his or her rights.

204. *Id.* at 281–83. Given that it is unlikely a department will have a written policy discouraging citizens from recording police, a potential plaintiff would have to prove custom, which would not encompass a defendant officer who chose to go rogue.

Monell suits often result in settlement rather than decision on the constitutional merits.²⁰⁵

The probability of a criminal suit vindicating a right to record police presents its own difficulties. In a criminal case, the accused would invoke the First Amendment as part of a defense asserting that the statute he or she was prosecuted under was unconstitutional. But as the cases at the circuit level demonstrate, practical-minded prosecutors often opt to drop questionable charges²⁰⁶ rather than pursue them at the risk of having a court invalidate portions or particular applications of the law at issue. In this way such statutes remain a tool for overzealous police officers to immediately halt citizen-recording activity they find offensive. Seize the phone, take the citizen into custody temporarily, wait for the prosecutor to drop the charges, release the citizen, and return the phone—and perhaps delete some footage along the way.²⁰⁷ Obviously no constitutional law gets

205. *Id.* at 282-83.

206. *See* *Fordyce v. City of Seattle*, 55 F.3d 436, 438 (9th Cir. 1995); *Kelly v. Borough of Carlisle*, 622 F.3d 248, 252 (3d Cir. 2010); Jeremy Kohler, *Cameras, Cops, and the First Amendment*, CRIME REPORT (Nov. 2, 2011, 5:13 PM), <http://www.thecrimereport.org/news/inside-criminal-justice/2011-11--cameras-cops-and-the-first-amendment>; *Cf.* Jim Schaefer, *No Charges for Detroit Free Press Photographer or Police Officer After Cell-Phone Seizure and Arrest*, DETROIT FREE PRESS (Aug. 24, 2013, 4:08 PM), <http://www.freep.com/article/20130823/NEWS01/308230111/detroit-free-press-photographer-mandi-wright-officer-Lamar-Penn> (illustrating another evasion option: arrest an individual without ever charging him or her).

207. *See* Diana Marcum et al., *FBI Probes Death in Kern County: Federal Review Comes Amid Questions of Evidence Tampering in Deputies' Beating of a Man on Video*, L.A. TIMES, May 15, 2013, at A1 (reporting witnesses' statements that video recordings of police beating a man to death were missing when the police returned witnesses' confiscated phones). In one of the more extreme examples of destroying evidence, police, after shooting a man, demanded that a bystander turn over the phones he used to record the incident. When he refused, police swarmed the vehicle, ordered the recorder out, and then smashed the phone. Luckily, the recorder had the foresight to store the SD card under his tongue. Mike Masnick, *Miami Beach Police Tried to Destroy Video from Bystanders, Holding Them at Gunpoint*, TECHDIRT (June 7, 2011, 8:29 AM), <http://www.techdirt.com/articles/20110607/00012014582/miami-beach-police-tried-to-destroy-video-bystanders-holding-them-gunpoint.shtml>. A year later, the same police department seized a woman's cell phone from her after she recorded them shooting her stepfather in their apartment. *See* Gary Nelson, *Cops Seize Cell Phone Shooting Video After Police-Involved Shooting*, CBS MIAMI (Nov. 30, 2012, 6:56 PM), <http://miami.cbslocal.com/2012/11/30/cops-seize-cell-phone-shooting-video-after-police-involved-shooting/> (noting suspicion at the police's motives by the head of the local ACLU). *See also* Shaw, *supra* note 3, at 176 (describing an encounter where a man's confiscated cell phone was returned without its memory card).

developed in such a scenario. Of equal importance, while the citizen incurs no criminal liability, his or her rights remain thoroughly transgressed without prospect of relief absent the personal right of action against the officer provided by § 1983. Presumably, few would classify this as a good-faith exercise of public officials' discretionary functions.²⁰⁸

A § 1983 individual-damages claim where the court answers the constitutional question on the merits prior to moving on to the qualified immunity question is less likely to suffer from any of these risky procedural shortcomings.²⁰⁹

But despite its attraction, a return to *Saucier* mandatory sequencing, even just for First Amendment claims, does not solve the issue that the Court sought to address in the first place in *Pearson*. The Court in *Pearson* sought to allow district courts leeway to separate cases where hearing the underlying constitutional issue was “worthwhile”²¹⁰ for the “development of constitutional precedent”²¹¹ from “factbound”²¹² cases where the “substantial expenditure of scarce judicial resources”²¹³ is wasted on presumably farfetched constitutional arguments that are unlikely “to make a meaningful contribution to such development.”²¹⁴ While the Court clearly had the often-perplexing contours of the Fourth Amendment in mind²¹⁵ when it made this observation, its First Amendment jurisprudence has, at times, been similarly tortuous and fact dependent.²¹⁶ And, as alluded to earlier, the winds of judicial opinion among the Court's members

208. Although the Court rejected a subjective good faith component as part of the qualified immunity inquiry in *Harlow v. Fitzgerald*, 457 U.S. 800, 815–18 (1982), presumably it is still an acceptable aspirational standard for society when assessing public-official conduct.

209. Derrick, *supra* note 97, at 278, 291.

210. *Pearson v. Callahan*, 555 U.S.223, 242 (2009).

211. *Id.* at 236–37.

212. *Id.* at 237.

213. *Id.* at 236.

214. *Id.* at 237.

215. *See id.* (citing *Buchanan v. Maine*, 469 F.3d 158, 168 (1st Cir. 2006) (“We do not think the law elaboration purpose will well be served here, where the Fourth Amendment inquiry involves a reasonableness question which is highly idiosyncratic and heavily dependent on the facts.”)).

216. Consider the subtle doctrinal nuances present in Justice Stewart's classic take on obscenity in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964): “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”

are also blowing against such a radical turnaround. *Pearson* was a unanimous decision;²¹⁷ presumably the whole Court was concerned with the administrative burdens of mandatory *Saucier* sequencing.

It is also becoming increasingly clear that a significant contingent of the Court's members is willing to go even further. In *Camreta v. Greene*,²¹⁸ Justice Scalia's concurrence was blunt, noting that although "[t]he parties have not asked us to adopt [ending 'the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity'], . . . I would be willing to consider it in an appropriate case."²¹⁹ Justice Kennedy, joined in dissent by Justice Thomas, explained the rationale for doing so as elimination of what he saw as a constitutional aberration that contradicted the Article III case-or-controversy mode of adjudication.²²⁰ Justice Kennedy disapprovingly noted that the Court's grant of discretion in *Pearson* "make[s] dictum precedent, in order to hasten the gradual process of constitutional interpretation and alter the behavior of government defendants."²²¹ Instead, Justice Kennedy clearly expressed a desire for more "incremental advance[s] in the law"²²² through cases with alternative procedural settings²²³ more in line with the Court's doctrine of constitutional avoidance.²²⁴ While the practical efficacy of those alternative procedural settings has been criticized,²²⁵ it is quite evident that the Court is unwilling to force lower courts to answer the underlying constitutional question in every qualified immunity suit.

1. Reemphasizing District Court Consideration of the *Pearson* Factors by Requiring Findings on the Record

If wholesale reversion to *Saucier* is not a viable option, what might be a more reasonable "refinement [for the Court to make] to . . . qualified immunity jurisprudence?"²²⁶ This Comment suggests that actually requiring district courts to comply with *Pearson* may be a good starting point. What is truly frustrating about cases like *Kelly* and *Szymecki* is that the lower courts seemingly acted as if they had

217. *Pearson*, 555 U.S. at 226.

218. 131 S. Ct. 2020 (2011).

219. *Id.* at 2036.

220. *Id.* at 2037–45.

221. *Id.* at 2040.

222. *Id.* at 2044.

223. *Id.* at 2043–44.

224. *Id.* at 2045.

225. See *supra* notes 202–205 and accompanying text.

226. *Camreta*, 131 S. Ct. at 2044.

unbounded discretion, rather than the broad—although still limited—discretion actually announced in *Pearson*. For this reason, this Comment posits that requiring district courts to make findings on the record²²⁷ demonstrating their actual consideration of the factors²²⁸ announced in *Pearson* and related precedent will serve an important goal. Such a requirement will arguably better align lower-court reasoning with the language of and policies underlying *Pearson*. As this Comment will demonstrate, once such an alignment is achieved,

227. Perhaps most on-point to *Pearson* discretion is the requirement of “an express determination that there is no just reason for delay” in a FED. R. CIV. P. 54(b) determination allowing entry of partial final judgment, as it implicates a similar balancing of administrative considerations and fairness to the parties. *See* *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1 (1980). District court factor-consideration findings on the record are required in many other contexts. While some are legislatively mandated, others are judicially imposed in common law fashion, especially in criminal settings. *Compare* FED. R. CRIM. P. 32(c)(1)(A)(ii) (judicially promulgated rule under the Rules Enabling Act) (allowing a district court to waive the probation officer’s presentence investigation if “the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. §3553, and the court explains its finding on the record”), *and* *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589–95 (1993) (judicially imposed requirement of findings concerning admissibility of scientific expert testimony, based on interpretation of legislatively enacted FED. R. EVID. 702), *with* *Barker v. Wingo*, 407 U.S. 514, 522, 530–31 (1972) (judicially imposed requirement in cases raising the Sixth Amendment right to a speedy trial), *and* *Hakeem v. Beyer*, 990 F.2d 750, 755 (3d Cir. 1993) (“Resolution of the speedy trial issue also requires a balancing of the factors set forth in *Barker v. Wingo* . . . based on appropriate findings of fact and that balancing is a matter for the district court in the first instance.”). State courts utilize findings on the record in child custody and sentencing proceedings as well. *Reid v. Reid*, 213 P.3d 353, 356, 358 (Ariz. Ct. App. 2009) (internal citations and quotation marks omitted) (“The court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child. . . . The rationale for this requirement is not simply to aid appellate review . . . but also to provide the family court with a necessary ‘baseline’ against which to measure any future petitions by either party based on ‘changed circumstances.’”); (MICH. CT. R. PRAC. 6.425 (citing *People v. Oliver*, 427 N.W.2d 898 (Mich. Ct. App. 1988)) (“Requirement that court articulate on the record reasons for the sentence was not satisfied where court gave no reason for sentence imposed, even though sentence imposed was within sentence recommended by sentencing guidelines.”)).

228. *See* *Pearson v. Callahan*, 555 U.S. 223, 236–40 (2009). Although the significance of Justice Alito’s discussion of which cases should sensibly be analyzed constitutional issue-first is not immediately clear (i.e., whether it is simply dictum or more concrete guidance), the status of these considerations as factors was later confirmed in *Camreta*. *See infra* note 246 and accompanying text.

lower courts will be less prone to simply hide the ball on important constitutional issues like a First Amendment right to record police.

The argument that *Pearson* did not stand for unbounded discretion must begin with the language of the opinion itself. Critically, the Court held that “judges of the district courts and the courts of appeals should be permitted to exercise their *sound* discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.”²²⁹ The use of the modifier “sound” in the most critical sentence of the central holding of the case is important.

Two fair interpretations can arise from its use. The first should be thought of as the “weak” interpretation of the word’s importance. Under this interpretation, the Court was simply giving the lower courts a “pat on the back” by describing their judgment on discretionary matters as generally sound. The second should be thought of as the “strong” interpretation of the word’s importance. Under this interpretation, the Court was limiting the lower court’s discretion to that within reasonable—and reasoned²³⁰—bounds. This Comment posits that the strong interpretation of “sound” better accords with the context of *Pearson* and other precedent.

Merriam-Webster’s dictionary attributes the following definitions to the word sound (among others): “free from error, fallacy, or misapprehension,” “exhibiting or based on thorough knowledge and experience,” “legally valid” or “logically valid and having true premises,” and “showing good judgment or sense.”²³¹ If the Court were simply noting or assuming that the lower courts’ judgment on discretionary matters was “sound” within any of these definitions, its insertion into the opinion would at best be redundant, because

229. *Pearson*, 555 U.S. at 236 (emphasis added).

230. In an administrative law context, the Court has repeatedly expressed dissatisfaction with agency decisions rendered without adequate reasoning based on the administrative record. *See* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413, 419 (1971) (“Plainly, there is ‘law to apply’ [A]n administrative record that allows the full, prompt review of the Secretary’s action That administrative record is not, however, before us. The lower courts based their review on the litigation affidavits that were presented. These affidavits were merely ‘post hoc’ rationalizations, . . . which have traditionally been found to be an inadequate basis for review.”). *See also* *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1973) (applying “hard look” review to an agency decision); Matthew Warren, Note, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599 (2002) (exploring the origins and purposes of hard look doctrine).

231. *Sound(1) Definition*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1192 (11th ed. 2004).

exercises of unbounded discretion would already be correct and unreviewable as a matter of course.²³² Rather than attributing the “sound” modifier no meaning, the overall context of *Pearson* suggests that the better course is to apply a strong interpretation of the word.²³³

If *Pearson* discretion was thus meant to be nonabsolute, the next step must be to identify limiting principles within the opinion. Justice Alito’s majority identifies at least seven types of cases—potential underlying principles—that may tip the scales one way or another for district courts considering whether to proceed first with the constitutional question or the clearly established question. Briefly summarized, they are as follows:

- Is this the type of case “in which there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the ‘clearly established’ prong?”²³⁴
- Does this case “[p]romote[] the development of constitutional precedent”²³⁵ or is it “so factbound that [it] provides little guidance for future cases?”²³⁶
- Will hearing this case “result[] in a substantial expenditure of scarce judicial resources on difficult questions that have

232. Older cases in which the Court uses the phrase “sound discretion” do tend to evince the “weak” interpretation. However, the Court’s more recent decisions gravitate toward a stronger interpretation. *Compare* *Newcomb v. Wood*, 97 U.S. 581, 583–84 (1878) (“It has long been the established law in the courts of the United States that to grant or refuse a new trial rests in the sound discretion of the court to which the motion is addressed, and that the result cannot be made the subject of review upon a writ of error.”), *with* *Renico v. Loett*, 559 U.S. 766, 775 (2010) (This is not to say that we grant *absolute* deference to trial judges in this context. . . . [T]he judge’s exercise of discretion must be ‘sound,’ and we have made clear that [i]f the record reveals that the trial judge has failed to exercise the ‘sound discretion’ entrusted to him, the reason for such deference by an appellate court disappears. Thus if the trial judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling, close appellate scrutiny is appropriate. Similarly, if a trial judge acts irrationally or irresponsibly, . . . his action cannot be condoned.).

233. *See, e.g.*, *Ratzlaf v. United States*, 510 U.S. 135, (1994) (“The trial judge . . . treated §5322(a)’s ‘willfulness’ requirement essentially as surplusage—as words of no consequence. Judges should hesitate so to treat statutory terms in any setting . . .”). Presumably common-law terms of art should receive similar treatment in context.

234. *Pearson*, 555 U.S. at 236.

235. *Id.*

236. *Id.* at 237.

no effect on the outcome of the case?”²³⁷ Will it also substantially “waste[] the parties’ resources?”²³⁸

- Will the case “soon be decided by a higher court”²³⁹ or involve “a constitutional question on which [the Supreme Court has] just granted certiorari?”²⁴⁰
- Does the case “rest[] on an uncertain interpretation of state law”²⁴¹ or “require[] clarification of an ambiguous state statute?”²⁴²
- Does the case “depend on . . . facts not yet fully developed”²⁴³ or is “the precise factual basis for the plaintiff’s claim or claims . . . hard to identify?”²⁴⁴
- Is the parties’ “briefing of constitutional questions [in the case] . . . woefully inadequate?”²⁴⁵

Admittedly, the structure of this portion of the *Pearson* opinion makes interpreting its intended effect on subsequent lower court decisions difficult. In a void, it may be fair to argue that such discussion was pure dicta. But Justice Kagan’s majority opinion in *Camreta* clears up any ambiguity by very clearly referring to this section of the *Pearson* discussion as “*factors courts should consider in making this determination.*”²⁴⁶ This relatively strong, semi-mandatory language further solidifies the notion that lower courts are not unconstrained in making the *Pearson* decision. Simply put, there are things that they have to consider.²⁴⁷

237. *Id.* at 818.

238. *Id.*

239. *Id.* at 238.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 239.

244. *Id.* at 238–39.

245. *Id.* at 239.

246. *Camreta v. Greene*, 131 S. Ct. 2020, 2032 (2011) (citing *Pearson*, 555 U.S. at 236–42).

247. The late jurisprudence philosopher Ronald Dworkin analogized these discretionary considerations in tough cases to a referee making a difficult call in a game: “The referee is not free to give effect to his background convictions in deciding this hard case. . . . We have, then, in the case of the [] referee, an example of an official whose decisions about institutional rights are understood to be governed by institutional constraints even when the force of these constraints is not clear. We do

Like most such multifactor tests, no single factor need be given conclusive or decisive effect.²⁴⁸ It is probably also fair to assume that not every factor will apply or need be discussed in every case.²⁴⁹ Similarly, the *Pearson* factors are probably not intended to be exclusive.²⁵⁰ Indeed, based on past precedent and the functional concerns of the federal judiciary as a whole, this Comment suggests three additional factors that the Court should consider adding to the *Pearson* analysis to further help guide lower-court discretion.

In *Hope v. Pelzer*,²⁵¹ an Alabama prison inmate sued prison guards for tying him to a hitching post in the midday sun without a shirt, adequate water, or bathroom breaks, in violation of the Eighth Amendment's ban on cruel and unusual punishment.²⁵² The prison guards asserted a qualified-immunity defense, arguing under Eleventh Circuit precedent that there had to exist cases with "materially similar" facts to the one at bar to properly hold defendants responsible for violations of "clearly established" constitutional rights.²⁵³ The Court, in rejecting such a requirement, held that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."²⁵⁴ Noting "the danger of a rigid, overreliance on factual similarity,"²⁵⁵ the Court emphasized the fair-notice relevance of state regulations and a Department of Justice report that expressed the opinion that actions like those taken by the guards were indeed unconstitutional.²⁵⁶ In dissent, Justice Thomas stridently disagreed with the use of these sources when analyzing

not think that he is free to legislate interstitially within the 'open texture' of imprecise rules." RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 102 (1977).

248. *See, e.g.*, *League of Latin American Citizens v. Perry*, 548 U.S. 399, 501 n.* (2006) (Roberts, C.J., concurring in part and dissenting in part).
249. *See, e.g.*, *Arrow Fastener Co. v. Stanley Works*, 59 F.3d 384, 400 (2d Cir. 1995) ("No single factor is dispositive, and cases may certainly arise where a factor is irrelevant to the facts at hand.").
250. *See, e.g.*, *Hodge v. Police Officers*, 802 F.2d 58, 59–60 (2d Cir. 1986) (holding that factors announced in a previous case concerning judicial appointment of counsel for an indigent litigant in a civil right suit "were not intended as an exclusive list," but nonetheless reversing because "the district court did not properly exercise its discretion").
251. 536 U.S. 730 (2002). *Hope* was decided when *Saucier's* "rigid order of battle" was still governing law, but *Pearson* did not directly overrule *Hope's* central holding.
252. *Id.* at 733–35.
253. *Id.* at 739.
254. *Id.* at 741.
255. *Id.* at 742.
256. *Id.* at 743–45.

whether the guards had fair warning that their conduct was a constitutional violation.²⁵⁷ In his view, the only proper source of such fair warning for purpose of answering the “clearly established” inquiry was binding circuit precedent that was on point from a factual standpoint—stringently so.²⁵⁸

Hope contributes two insights to the *Pearson* analysis. First, executive branch pronouncements regarding the constitutional ramifications of certain law enforcement actions can be relevant to whether an asserted constitutional right is clearly established in the context of a particular case.²⁵⁹ Second, the bases of consideration for a court answering the “clearly established” question should not be artificially constrained; Justice Thomas’s approach was rejected in favor of a broader, more practical, totality-of-the-circumstances-type inquiry.²⁶⁰

Therefore, this Comment proposes the following two additions to the *Pearson* factors. First, has a coordinate branch of government officially expressed an opinion as to the constitutionality of the practice in the case at hand? If so, the benefits of doctrinal clarification, as well as proper judicial branch assertion of its role as supreme arbiter of the Constitution,²⁶¹ may militate in favor of proceeding constitutional-question-first in a qualified immunity case. Second, if no courts within the circuit have answered the substantive constitutional question, have courts in other federal circuits? If so, *Saucier*’s rigid order of battle may be advisable in order to advance constitutional clarity. Nothing in this factor should be interpreted as forcing or subliminally encouraging a district court to agree on the merits with the decisions of other circuits on a given constitutional issue. On the contrary, even a holding that no such constitutional right exists advances the law by creating a genuine circuit split instead of an artificial one, such as currently exists in the First Amendment right-to-record context.

The third proposed addition to the *Pearson* factors derives not from *Hope* but from the language and reasoning of *Pearson* and

257. *Id.* at 759–60.

258. *Id.* at 755–59.

259. *See supra* note 256 and accompanying text.

260. *See Hope*, 536 U.S. at 743 (“Although the facts of the case are not identical, [a past decision’s] premise . . . [can have] clear applicability in [a later] case.”).

261. *Cf. Baker v. Carr*, 369 U.S. 186, 211 (1962) (“Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.”)

Camreta. Do alternative causes of action actually exist for similarly situated parties to ensure adequate future development of the constitutional right at issue?²⁶² The modifiers “actually” and “adequate” would help to steer courts to recognize practical difficulties in alternative causes of action that seem facially adequate but in fact are not legally fungible.²⁶³ The “similarly situated parties” requirement recognizes the fact that while organizational plaintiffs may be able to overcome some of those problems in certain cases,²⁶⁴ it is probably unfair to deny all *individual* plaintiffs the opportunity to vindicate their rights or make meaningful doctrinal contributions on that basis. In this way, an “alternative cause of action” factor would simply add to the *Pearson* analysis a consideration that already clearly figures heavily into several Justices’ conceptions of the doctrine of qualified immunity.

To summarize, the present way that some lower federal courts apply *Pearson* discretion when deciding whether qualified immunity attaches is both objectionable and discordant with the language of the *Pearson* decision itself. However, a reversion to *Saucier*’s rigid order of battle—constitutional merits first, “clearly established” right second—is quite unlikely. Instead, a less extreme middle ground must be found. If the Supreme Court simply required district courts to specify the bases of their *Pearson* decision on the record, it would strike a more desirable balance between resolving ambiguity on broadly relevant constitutional questions and affording district courts the flexibility they need to dismiss questionable § 1983 claims. District courts would be prevented from dismissing qualified immunity cases based on wholly insufficient or overlapping reasoning, or on overly technical rules of decision that allow them to escape consideration of constitutional rulings from other circuits. At the same time, district courts could still dismiss cases that arguably flunked some or all of the *Pearson* factors and have the benefit of an abuse-of-discretion standard of review. In short, on-the-record *Pearson* findings would better focus courts on the business of doing what *Pearson* and *Hope* have already instructed them to do.

2. The Majority of the *Pearson* Factors Actually Favor Consideration of the First Amendment Right to Record

In *Kelly* and *Szyrnki*, the Third and Fourth Circuits declined to decide whether there was a right to record police, instead relying on *Pearson* discretion to dispose of the cases on the notion that any such

262. See *supra* notes 201, 223.

263. See *supra* notes 201–207 and accompanying text.

264. See *supra* notes 156, 202–203.

right was not “clearly established.”²⁶⁵ But a closer examination of the factors actually discussed by the *Pearson* majority, when compared to what the respective courts actually said in those two decisions, indicates that they arguably fell outside of the discretion granted in *Pearson*. If the cases were decided again today, in light of the added factors suggested by this Comment, that conclusion would be even further reinforced.

As a preliminary matter, the Court’s third *Pearson* factor, the cost of litigation to the parties and the court, will frequently, if not always, weigh against arguing or deciding the constitutional question. Litigation is expensive,²⁶⁶ and courts have limited resources;²⁶⁷ these two elements are unlikely to ever be completely absent in any given case. As a matter of logic, costs to the parties and the court are also likely to be highly correlated as litigation continues. Thus, for most *Pearson* analyses, the cost of litigation and burden on the court will be placed on the side of the ledger that counsels against hearing the case, although its force will certainly vary in the context of the other factors in a particular case. If a plaintiff has adopted a “shotgun-effect” complaint, consisting of a multitude of alleged violations of constitutional and statutory rights of varying levels of plausibility, then cost considerations may carry more force than they would in a scenario where a complaint contained one or two well-pleaded, well-reasoned violations. Given the presence of at least six other factors identified by the Court in *Pearson*, district courts should be hesitant to attach conclusive effect to cost without turning to mitigating considerations.

The *Kelly* court did not explicitly refer to cost as a justification for the district court’s decision, but it is probably fair to excuse that on the assumption that preventing an overburdened docket is omnipresent in the minds of most judges.²⁶⁸ But other *Pearson* factors arguably point in the opposite direction and outweigh cost considerations. *Kelly* is a textbook example of a case where “there

265. *Kelly v. Borough of Carlisle*, 622 F.3d 248, 263 (3d Cir. 2010); *Szymecki v. City of Norfolk*, No. 2:08-cv-00142-HCM-TEM, at 8 (E.D. Va. Sept. 11, 2008).

266. *E.g.*, Martha Neil, *Litigation Too Costly, E-Discovery a ‘Morass,’ Trial Lawyers Say*, ABA J. (Sep. 9, 2008, 10:00 AM), http://www.abajournal.com/news/article/litigation_too_costly_e_discovery_a_morass_trial_lawyers_say/ (noting, however, that most lawyers surveyed felt “the current system works well for some kinds of cases, such as individual tort claims”).

267. *See, e.g.*, Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 MISS. C. L. REV. 211 (1994) (exploring the ever-present tradeoff between quality and quantity of cases heard by federal courts).

268. *See id.* at 211–12.

would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the ‘clearly established’ prong,²⁶⁹ which completely undercuts any potential cost-savings rationale. The Third Circuit devoted nearly five pages of its *Kelly* opinion to analyzing and distinguishing cases from within the circuit and other jurisdictions that had considered the First Amendment recording issue,²⁷⁰ only to ultimately decline to contribute to the substantive discussion and instead use the relatively in-depth analysis to dispose of the case because the right was not “clearly established” within the circuit.²⁷¹ With the abundance of language indicating the court’s doubt that such a broad First Amendment right existed at all, it is questionable whether much additional analysis would have been required to instead hold that such a right simply did not exist, or, if it did, that it required the recorder to have an “expressive purpose.”²⁷² The outcome to the parties would have been the same, but the Third Circuit would have made a real contribution to a *genuine* circuit split—“promot[ing] the development of constitutional precedent”²⁷³—instead of simply muddying the waters with lengthy and ultimately inconclusive discussion.

The remaining *Pearson* factors also point towards deciding the constitutional issue. The factual basis for the plaintiff’s claims was well developed and fairly undisputed.²⁷⁴ There were no uncertain interpretations of state law which were material.²⁷⁵ There is nothing indicating that the parties’ briefing was inadequate.²⁷⁶ There were no

269. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

270. *Kelly*, 622 F.3d at 259–63.

271. *Id.* at 263.

272. *Id.* at 262.

273. *Pearson*, 555 U.S. at 236.

274. *Kelly*, 622 F.3d at 251–52.

275. *Id.* at 252. The official government position, as embodied by the assistant district attorney, was that it was appropriate for the police officer to arrest the plaintiff under the Pennsylvania wiretap statute. *Id.* In *Kelly*, any unsettled state law was significant mainly to the Fourth Amendment probable cause claim. *See id.* at 254–59. Moreover, in evaluating that claim, the court found the law to be “clearly established.” *Id.* at 258.

276. To the contrary, the plaintiff in *Kelly* appeared to address most of the relevant precedent available for his position at the time of the case. *See id.* at 261 (“*Kelly* also cites a number of cases for the proposition that a general right to record matters of public concern has been clearly established.”). The court simply rejected their applicability. *Id.* at 262. Presumably, the government supplied the case law concerning time, place, and manner restrictions and the requirement that speech have an expressive component. *See id.* at 262–63.

certiorari petitions pending before the Supreme Court from other circuits confronting the issue.²⁷⁷ The “balancing” therefore consisted of an unstated burden on court resources (and potentially cost to the parties)—undercut by the fact that the court nonetheless devoted considerable discussion to the substantive constitutional issues—trumping the other six *Pearson* factors. If the *Kelly* court’s consideration of the *Pearson* factors had been required to be on the record, it is doubtful it could have disposed of the case as it did without abusing its discretion.

As mentioned previously,²⁷⁸ *Szymecki* presents different problems. The district court’s reasoning in the case is particularly confusing, as is its precise effect on future right-to-record litigation within the Fourth Circuit. The district court, in ruling on the defendant police officer’s motion to dismiss, apparently found that a First Amendment right to film police *existed* “subject to reasonable time, place, and manner restrictions.”²⁷⁹ Yet the court declined to determine definitely whether that right was *violated* by the police officer’s actions, instead moving on to whether the right was “clearly established.”²⁸⁰ This is especially curious, since at the time the district court decided the case in December 2008,²⁸¹ the *Pearson* decision was still a month away, so *Saucier* still mandated deciding the constitutional-violation prong of

277. The Court has only considered one petition for certiorari in a case concerning the right to record police, which came two years after *Kelly*. *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012). Although the Court’s official doctrine has long held that nothing concerning the merits of an issue should be implied from a denial of certiorari, skeptical observers have continued to puzzle over its practical significance. *Compare* *Maryland v. Balt. Radio Show, Inc.*, 338 U.S. 912, 917–19 (1950) (internal citations omitted) (“[Denial of certiorari] simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. . . . [S]uch a denial carries with it no implication whatever regarding the Court’s views on the merits of a case which it has declined to review.”), *with* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1278 (1979) (“[Many people] take literally and seriously what Justice Harlan once said publicly to Learned Hand: ‘when you read in Monday morning’s New York Times ‘Certiorari denied’ to one of your cases, then despite the usual teachings, what the notation really means is ‘Judgment affirmed.’”).

278. *See supra* notes 192–99 and accompanying text.

279. *Szymecki v. Houck*, No. 2:08-cv-00142-HCM-TEM, at *6 (E.D. Va. Dec. 17, 2008), *aff’d*, 353 F. App’x 852 (4th Cir. 2009).

280. *Id.* at *7.

281. *Id.*

the qualified immunity inquiry before moving on to the “clearly established” prong.²⁸²

Even ignoring this separate legal error, the *Szymbekski* district court’s discussion of whether the right to record was “clearly established” was conspicuously narrow, although probably correct within Fourth Circuit rules of decision. While noting that the plaintiff had cited two decisions from other circuits establishing a right to record, it reasoned, using Fourth Circuit precedent,²⁸³ that the existence of those cases “does not mean that . . . this specific right was clearly established [in the Fourth Circuit].”²⁸⁴ The district court thus (1) seemingly recognized there was a First Amendment right to record police in its order concerning defendant’s motion to dismiss, (2) declined to decide whether the police officer’s actions were a violation of that right, in contradiction of *Saucier*, and (3) ruled that despite persuasive decisions in other circuits, Fourth Circuit rules of decision prevent it from according those decisions any effect when deciding whether the right was “clearly established.”

By the time the Fourth Circuit heard the *Szymbekski* appeal, the Supreme Court had decided *Pearson* in the interim.²⁸⁵ The error in the district court’s opinion, previously reversible under *Saucier*, was no longer fatal. Rather than go through the messy business of sorting out the implications of the district court’s earlier order holding that a First Amendment right to record police existed, the Fourth Circuit ignored that aspect of the district court’s decision, instead simply affirming—with minimal reasoning—the district court’s “clearly established” conclusion.²⁸⁶ Both the district court opinion and the Fourth Circuit opinion were initially unpublished,²⁸⁷ restricting their precedential value in some circuits.²⁸⁸ With all of its confusing

282. See *supra* notes 105–109 and accompanying text.

283. *Szymbekski*, No. 2:08cv-00142-HCM-TEM, at *7–8 (E.D. Va. Dec. 17, 2008) (internal citations and quotation marks omitted) (“While the nonexistence of a case holding the defendant’s identical conduct to be unlawful does not necessarily prevent the denial of qualified immunity, if a right is recognized in some other circuit, but not this one, an official will ordinarily retain the immunity defense. . . . Mrs. Szymbekski did not cite any decision by the Supreme Court, any decision by the Court of Appeals for the Fourth Circuit, any decision by any district court within the Fourth Circuit, or any decision by the Supreme Court of Virginia to support this proposition.”).

284. *Id.* at *8.

285. See *supra* notes 110–114.

286. See *supra* notes 192–96 and accompanying text.

287. *Crawford v. Geiger*, No. 3:13CV1883, 2014 WL 554469, at *9 (N.D. Ohio Feb. 10, 2014).

288. Federal Rule of Appellate Procedure requires the circuits to at least allow citation to cases disposed of after January 1, 2007, but the

procedural history, some courts have made the error of citing *Szymecki* as if it had created a genuine circuit split on the underlying constitutional issue of a First Amendment right to film police,²⁸⁹ instead of simply holding that there had been no Fourth Circuit precedent to rely on to declare the right clearly established prior to the decision in the *Szymecki* case itself.

From a big picture standpoint, because the district court decided *Szymecki* before the Supreme Court decided *Pearson*, it is difficult to analyze its decision under the *Pearson* factors. Nevertheless, imagining if such a case was to be decided in the same way today, it would arguably represent an abuse of *Pearson* discretion. The *Szymecki* district court proceeded to the “clearly established” prong based purely on the convenience that narrow Fourth Circuit rules of decision would provide in limiting the factors it had to consider.²⁹⁰ The Fourth Circuit affirmed on similarly narrow grounds.²⁹¹ Without referencing any sort of balancing of the other factors that *Pearson* mandates, such a decision today would be essentially arbitrary,²⁹² and thus reversible.

The three additional factors proposed by this Comment for addition to the *Pearson* analysis, which derive from previous decisions of the Court, would further highlight the discretionary shortcomings in a case like *Kelly* or *Szymecki* that arose today. First, the executive

particular weight attached to those citations varies among the circuits. FED. R. APP. P. 32.1; Colter Paulsen, *Case Management in the Sixth Circuit: Unpublished Opinions*, SQUIRE SANDERS SIXTH CIRCUIT APPELLATE BLOG (Oct. 17, 2011), <http://www.sixthcircuitappellateblog.com/news-and-analysis/case-management-in-the-sixth-circuit-unpublished-opinions/>. Cf. Sarah E. Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 WASH. L. REV. 217 (2006) (highlighting the danger non-precedential decisions can have within a circuit as well).

289. See, e.g., *Williams v. Boggs*, No. 6:13-65-DCR, 2014 WL 585373, at *6 (E.D. Ky. Feb. 13, 2014) (quoting *Miller v. Colson*, 694 F.3d 691, 698 (6th Cir. 2012)) (internal quotation marks omitted) (“[D]isagreement among the circuit courts is evidence that a certain matter of federal law is not clearly established.”). The disagreement referred to in *Miller* is the underlying constitutional right, *not* whether the right is clearly established. *Miller v. Colson* illustrated its circuit-split principle by referring to the Supreme Court’s denial of certiorari on a *substantive* issue—the scope of “an indigent criminal defendant’s constitutional right to psychiatric assistance in preparing an insanity defense.” *Miller*, 694 F.3d at 697–98 (citing *Granviel v. Texas*, 495 U.S. 963 (1990) (Marshall, J., dissenting from denial of certiorari)).

290. *Szymecki v. Houck*, No. 2:08-cv-00142-HCM-TEM, at *8 (E.D. Va. filed Dec. 17, 2008), *aff’d*, 353 F. App’x 852 (4th Cir. 2009).

291. *Szymecki v. Houck*, 353 F. App’x 852, 852–53 (4th Cir. 2009).

292. See *supra* note 248 and accompanying text.

branch of the federal government has quite clearly elucidated its take on the constitutionality of laws that unnecessarily restrict the First Amendment right to record police. In 2012, the Department of Justice issued a memo to the Baltimore Police Department that resoundingly encouraged police acknowledgement and protection of such a right through carefully crafted department-level policies, stating that it “reflects the United States’ position on the basic elements of a constitutionally adequate policy on individuals’ right to record police activity.”²⁹³ Second, in comparison to the two circuits that recognized a right to record police when *Kelly* and *Szymecki* were decided, today four circuits have affirmatively ruled that such a right exists,²⁹⁴ with a fifth circuit possible in the near future.²⁹⁵ As more courts around the nation encounter the issue of a First Amendment right to record police, it will become increasingly difficult to justify the decision to abstain from that dialogue on the grounds of *Pearson* discretion. Third, and finally, alternative causes of action would likely present different legal difficulties that prevented them from being effective vehicles for constitutional development.²⁹⁶

As demonstrated, the decisions by the courts in *Kelly* and *Szymecki* to proceed with the “clearly established” prong of the qualified-immunity inquiry arguably do not accord with the relevant considerations elaborated in *Pearson*. Requiring district courts to place their *Pearson* balancing on the record would hasten the development of constitutional law on important issues like the First Amendment right to record police by making it harder for district courts to simply brush aside the need to make difficult decisions at the risk of being reversed. Further, requiring district courts to consider whether coordinate branches of government or courts in other circuits have taken stances on a particular issue would help them to separate novel questions of law that have national, systemic

293. Letter from Jonathan M. Smith, Chief, Special Litig. Sec., Civil Rights Div., U.S. Dep’t of Justice, to Mark H. Grimes, Office of Legal Affairs, Balt. Police Dep’t (May 14, 2012) (explaining the legal basis for the right to record, prohibited police responses to being filmed, narrow circumstances constituting citizen interference with police duties, adequate supervisory review policies, and search and seizure guidelines).

294. *See supra* Part II.C.1.

295. Recent decisions by two district courts in Ohio and Kentucky reached different results on the right to record police, shifting the spotlight to the Sixth Circuit. *Compare Crawford v. Geiger*, No. 3:13CV1883, 2014 WL 554469, at *8–10 (N.D. Ohio Feb. 10, 2014) (holding the First Amendment right to record police exists and was clearly established), *with Williams v. Boggs*, No. 6:13-65-DCR, 2014 WL 585373, at *7 (E.D. Ky. Feb. 13, 2014) (holding that there is not a clearly established First Amendment right to record police).

296. *See supra* notes 201–209 and accompanying text.

importance from less plausible or more idiosyncratic claims. Such a compromise in qualified immunity doctrine would afford district courts the flexible discretion that the Court sought to grant them in *Pearson* while still prohibiting them from behaving arbitrarily in avoiding underlying constitutional questions. Rather than a mandatory return to *Saucier*'s "rigid order of battle," the Court should encourage a middle ground: a reasoned order of battle.

B. About Those Time, Place, and Manner Restrictions . . .

As several of the leading cases mention, and consistent with other First Amendment rights, presumably the right to film will be subject to reasonable time, place, and manner restrictions.²⁹⁷ As discussed in Part II.A, laws in the ilk of wiretapping statutes likely fail as valid restrictions, even under intermediate scrutiny. With a couple of notable exceptions, however, the cases have been rather silent on precisely what other types of laws permissible restrictions would likely encompass. On the one hand, this should hardly be surprising as a matter of judicial restraint. Courts, having no opportunity to decide such matters until a concrete controversy arises,²⁹⁸ must wait until plaintiffs bring them challenges to allegedly invalid restrictions and government defendants invoke a time, place, and manner defense.²⁹⁹ But it is becoming increasingly clear that once the dust settles on whether there is a First Amendment right to record police to begin with, time, place, and manner restrictions represent the next frontier for litigation.³⁰⁰ Therefore, this Comment will offer a few brief thoughts on the potential limits of such restrictions. The purpose of this section is to provide a rough outline, rather than a comprehensive analysis, of how First and Fourth Amendment doctrines will interact in this setting, because this is likely where the majority of foreseeable time, place, and manner restriction justifications will derive in a right-to-record-police setting.³⁰¹

297. *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Szymecki v. Houck*, Civil No. 2:08-cv-00142-HCM-TEM, at *8 (E.D. Va. filed Dec. 17, 2008), *aff'd*, 353 F. App'x 852 (4th Cir. 2009); *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010); *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 605–08 (7th Cir. 2012).

298. U.S. CONST. art. III, § 2, cl.1.

299. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (considering whether a restriction on the sound system in a rock concert was reasonable with regard to time, place and the manner of the restriction).

300. *See supra* note 297.

301. Judge Posner's dissent in *Alvarez* is an effective summary of justifications offered by those who oppose a First Amendment right to film police on the merits. It emphasizes "public safety" and "effective

There are three readily foreseeable situations where a citizen could be recording a police officer's actions, and each has potentially different ramifications. The first scenario is where the citizen doing the filming is the subject of police investigation for some crime or violation.³⁰² In this case, presumably the citizen recorder's rights would be at their lowest ebb due to the overriding concerns for police officer safety.³⁰³ Keeping objects that could be potential weapons out of the citizen's hands would be a paramount concern.³⁰⁴ Hands-free filming, such as that done by a camera mounted to a dashboard,³⁰⁵ a piece of clothing,³⁰⁶ or inside a motorcycle helmet,³⁰⁷ presumably would not carry a similar level of risk, and thus restricting its use would presumably not be sufficiently narrowly tailored to the goal of achieving police safety. While police would probably not be allowed to

law enforcement" rationales, while exhibiting a conception of privacy very different from *Katz*. *Alvarez*, 679 F.3d at 611–14 (Posner, J., dissenting).

302. *See, e.g.*, *Maryland v. Graber*, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7 (Md. Cir. Ct. Sept. 27, 2010). Anthony Graber was a National Guard staff sergeant who was pulled over on his motorcycle for driving recklessly on the highway. When the officer drew his gun on Graber before writing him a ticket, Graber posted a video of the encounter to YouTube, which he had recorded using a helmet camera. A month later, police officer raided Graber's parents' home, where he lived, and arrested him for violation of Maryland wiretap laws after seizing his recording equipment. Ray Sanchez, *Growing Number of Prosecutions for Videotaping the Police*, ABC NEWS (July 19, 2010), <http://abcnews.go.com/US/TheLaw/videotaping-cops-arrest/story?id=11179076>.
303. *See, e.g.*, *Knowles v. Iowa*, 525 U.S. 113, 117–18 (1998) (allowing police to order a suspect to remain in or step out of a vehicle during a traffic stop to preserve officer safety); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (allowing police to perform an open-handed pat down of the exterior of a suspect's clothing if they possess a reasonable suspicion the suspect may be armed); *Michigan v. Summers*, 452 U.S. 692, 705 (1981) (allowing police to detain persons leaving a home that they have a warrant to search); *United States v. Robinson*, 414 U.S. 218, 235 (1973) (allowing police to perform a full search of a suspect's person incident to arrest).
304. *Robinson*, 414 U.S. at 231 (citing *Closson v. Morrison*, 47 N.H. 482, 484 (1867) (internal citation omitted)).
305. *See supra* notes 90–92 and accompanying text.
306. *Cf.* Ian Lovett, *In California, a Champion for Police Cameras*, N.Y. TIMES, Aug. 22, 2013, at A12 (“In the first year after the cameras were introduced [in Rialto, California] in February 2012, the number of complaints filed against officers fell by 88 percent compared with the previous 12 months. Use of force by officers fell by almost 60 percent over the same period.”).
307. *See supra* note 302.

halt such recording, there would probably be a compelling argument in some cases for the need to seize such footage as evidence.³⁰⁸

The second scenario would involve a citizen who has an interest in or relationship to another citizen who is being investigated for commission of a crime or violation, but who is not himself or herself a subject of investigation.³⁰⁹ For example, the citizen may be a passenger in a car pulled over for a traffic violation, or a co-resident of a shared dwelling being searched. In such cases the same officer safety rationales would probably apply until it was determined that the citizen was not the subject of any official investigation. At that point, if the citizen began recording the encounter from a comfortable remove, there would appear to be a less compelling argument for any additional restrictions by officers.³¹⁰ The same evidence rationales as in the first scenario may still apply to collecting the resultant footage and audio, though.³¹¹

The third scenario would involve a citizen who is a disinterested third-party bystander in a public place.³¹² Here, the citizen's First Amendment right to record the police officers' actions would presumably be at its apex. As the First Circuit noted in *Glik*, recording police officer activity from a reasonable distance while not interrupting the exercise of their duties is "not reasonably subject to limitation."³¹³ It is important to note that verbally protesting what officers are doing while filming them is probably insufficient to be considered interference, as that itself would be protected speech.³¹⁴

308. See *Chimel v. California*, 395 U.S. 752, 763 (1969) ("[I]t is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person [or in the area within his immediate control] in order to prevent its concealment or destruction.").

309. *E.g.*, *Kelly v. Borough of Carlisle*, 622 F.3d 248, 251 (3d Cir. 2010).

310. *Cf.* *Arizona v. Gant*, 556 U.S. 332, 353 (2009) (Scalia, J., concurring) (referring to the "charade of officer safety" that the government offered to justify the search of a suspect's entire vehicle incident to arrest after the suspect was already in custody in the back of a police car).

311. See *supra* note 308.

312. *E.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 79–80 (1st Cir. 2011).

313. *Id.* at 84.

314. *Id.* (internal citations and quotation marks omitted) ("[T]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state. The same restraint demanded of law enforcement officers in the face of provocative and challenging speech must be expected when they are merely the subject of videotaping . . ."). See also Letter, *supra* note 293 ("Nor does an individual's conduct amount to interference if he or she expresses criticism of the police or the police activity being observed.").

Privacy interests asserted by officers in any of the three scenarios should be similarly unavailing as time, place, and manner restrictions. This is true under either—and often both—of two theories. First, as the Seventh Circuit noted in *Alvarez*, the *Katz* rationale that what one exposes to the public is not private will carry the day in many police-recording situations.³¹⁵ Second, in other conceivable situations—such as an arrest inside a building, for example—the idea that the public duties of public officials are de facto not private should govern.³¹⁶ Regardless of the precise theory, the allowable range of restrictions will likely be quite narrow.³¹⁷

C. *The Need for Statutory Damage Provisions with Teeth*

In order to recover more than nominal damages in a § 1983 action, *Carey v. Piphus*³¹⁸ holds that the plaintiff must be able to allege injuries apart from the violation of a constitutional right itself.³¹⁹ The § 1983 requirement of a cognizable injury will be thorny in the context of citizen recorders. Absent damage to or confiscation of the citizen's recording device, the only injury will be the lost opportunity to film the now-past encounter. This likely comes fatally close to being an injury solely to the exercise of the constitutional right, which is unrecoverable because “damages based on the ‘value’ or ‘importance’ of constitutional rights are not authorized.”³²⁰ While a request for punitive damages may also be an option, the plaintiff would have to prove the additional element of the offending officer's

315. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 605–06 (7th Cir. 2012).

316. *Wasserman*, *supra* note 27, at 650.

317. The *Alvarez* court noted that in addition to being closely tailored, any reasonable restriction might have to leave open adequate alternative channels of gathering information. “[A]udiovisual recording [sic] are uniquely reliable Their self-authenticating character makes it highly unlikely that other methods could be considered reasonably adequate substitutes.” *Alvarez*, 679 F.3d at 607. *Contra Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010) (internal citation omitted) (“[W]e held that the planning committee's prohibition on videotaping was not unconstitutional because other means of recording the meeting—for example, note-taking—were permitted, thus protecting the public's right of access.”).

318. 435 U.S. 247 (1978).

319. *Id.* at 266.

320. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 309 n.13 (1986). *See also Murphy*, *supra* note 6, at 349. This is often a problem with the denial of constitutional rights. A more conservative view of constitutional development might emphasize that eventually some plaintiffs will come forward with actual compensatory damages that make it sufficiently worthwhile to bring suit, and that those plaintiffs will be the ones to establish “clearly established” law.

“evil motive or intent” or “reckless or callous indifference to the federally protected rights of others.”³²¹

Accordingly, one commentator, operating on the premise that successful deterrence requires a remedy that simultaneously compensates the victim and punishes the violating officer,³²² has proposed a model state statute that includes a mandatory punitive damages provision.³²³ Such standalone statutes, including the one proposed by Connecticut Senate in 2012,³²⁴ are certainly laudable and represent one way to force officers to internalize the consequences of their First Amendment violations. Because the federal damages regime is relatively settled,³²⁵ state legislatures should take the opportunity to enact the respective regimes that they feel best balance rectifying First Amendment recording violations with other considerations.³²⁶

It is worth noting that a broad range of punishments could effectively vindicate a citizen recorder’s violated rights. The point of such provisions is to make them sting enough to discourage future violations; how much sting is appropriate is open for debate. For example, such a spectrum could range from mandating administrative punishments, such as suspensions without pay,³²⁷ on the one end, to amending state provisions equivalent to § 1983 to mandate the award of attorney’s fees,³²⁸ or statutorily allowing punitive damages at the

321. *Smith v. Wade*, 461 U.S. 30, 56 (1983).

322. *Murphy*, *supra* note 6, at 353.

323. *Id.* at 354–55.

324. *Id.* at 355 (referencing S.B. 245, 2012 Gen. Assemb., Feb. Sess. (Conn. 2012)). See Hugh McQuaid, *Senate Passes Watered-Down Police Recording Bill*, NEW HAVEN INDEPENDENT (June 3, 2011, 8:08 AM), http://www.newhavenindependent.org/index.php/archives/entry/senate_passes_watered-down_police_recording_bill/ (exploring the origins of and debate surrounding the new law).

325. See *supra* notes 318–320 and accompanying text.

326. For example, the cost of spurious litigation. Cf. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (“Unfortunately, there have also been a growing number of frivolous lawsuits, particularly actions for damages against law enforcement officers . . .”).

327. See *Police Discipline and Community Policing: New Models*, CMTY. POLICING DISPATCH (Cmty. Oriented Policing Servs. (COPS), U.S. Dep’t of Justice), (Aug. 2008), http://cops.usdoj.gov/html/dispatch/August_2008/new_model.htm (explaining community-service alternatives to traditional police discipline that may better develop public trust of police officers).

328. Technically, judges may currently award attorney’s fees to prevailing plaintiffs, although such awards are highly unlikely for those who only recover nominal damages. 42 U.S.C. § 1988(b) (2012); *Farrar v. Hobby*, 506 U.S. 103, 114–16 (1992) (internal citations and quotation marks

jury's discretion, on the other end. As long as some sort of substantial punitive action flows from the constitutional violation itself, states should get creative in formulating the solution that best fits their needs.

CONCLUSION

American attitudes towards the use of police force are complex. We praise it when it protects us,³²⁹ sometimes laugh at it in the abstract,³³⁰ and lament it when it goes a step too far.³³¹ The way we

omitted) (“[T]he most critical factor in determining the reasonableness of a fee award is the degree of success obtained. . . . This litigation accomplished little beyond giving petitioners the moral satisfaction of knowing that a federal court concluded that their rights had been violated. . . . In some circumstances, even a plaintiff who formally prevails under § 1988 should receive no attorney’s fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party.”). Making the award of attorney’s fees mandatory as a matter of state law would often be quite a significant punishment. *See* *Goetz v. Ricketts*, 632 F. Supp. 926, 932 (D. Colo. 1986) (awarding a prevailing plaintiff in a civil-rights suit \$42,318 in attorney fees). This accords with the average costs of litigation in other types of suits. *See* PAUL HANNAFORD-AGOR & NICOLE L. WATERS, COURT STATISTICS PROJECT, NAT’L CTR. FOR STATE COURTS, ESTIMATING THE COST OF CIVIL LITIGATION 6–7 (reporting that the average cost of an automobile tort case was around \$43,000, compared to \$54,000 for premises liability cases, \$88,000 for employment cases, \$91,000 for contract cases, and a whopping \$122,000 for malpractice cases).

329. *See, e.g.*, Katharine Q. Seelye et al., *2nd Bombing Suspect Is Captured, Wounded, After a Frenzied Manhunt Paralyzes Boston: Overnight Shooting Amid Dagnet Left Brother and Officer Dead*, N.Y. TIMES, Apr. 20, 2013, at A1 (detailing the prolonged, gunshot-filled manhunt for Boston Marathon bomber Dzhokhar Tsarnaev).

330. *See, e.g.*, ROBIN HOOD: MEN IN TIGHTS 00:13:12 (Twentieth Century Fox 1993) (As Prince John’s soldiers are beating Alchoo, played by Dave Chappelle, he exclaims, “Man, I hope someone’s getting a video of this thing!”). *See also* Kris Coronado, *Whatever Happened to . . . The Guy Who Got Tased by Police at a Kerry Forum?*, WASH. POST, May 22, 2011(Magazine), at 6 (“[A University of Florida student who was tased by police] trademarked the phrase “Don’t tase me, bro” in September 2007 and says he has sold quite a few T-shirts on his Web site.”).

331. *See, e.g.*, Ben Brumfield & Melanie Whitley, *Oklahoma Father Dies in Police Encounter After Mother Slaps Daughter*, CNN Justice (Feb. 26, 2014, 8:37 PM), <http://www.cnn.com/2014/02/26/justice/oklahoma-arrest-death-video/> (“It was supposed to be a fun family outing to the movies, but Nair Rodriguez’s 19-year-old daughter got under her skin. They fought, she said, and she slapped her daughter. Moments later, police arrived on a domestic dispute call at the Moore, Oklahoma, theater and did not confront Nair Rodriguez but rather her husband, Luis. They took him down, and after the encounter on February 15, he

feel about it is often if not always dependent on the context of its application. Video and audio recordings memorialize this context with an unmatched level of accuracy, allowing us to rapidly—and sometimes viscerally³³²—grasp the gist and propriety of a depicted police interaction. In many instances, video footage will be the next best thing to having been on the scene. Recordings are thus important tools in evaluating how police officers are serving us as public servants, and the right to make them should find its refuge in the First Amendment.

No federal circuit has disagreed with this proposition. Yet unanimous judicial recognition of the right to record police has proven elusive. Somehow, despite consideration by six Circuit Courts of Appeal, the right to record remains in limbo. Two circuits declined to definitively answer the issue, and in doing so exercised an unrestrained brand of discretion that ignored the relevant factors discussed by the Court in *Pearson v. Callahan*. What remains is an artificial split—not on the merits of the First Amendment right violated, but on technical qualified immunity grounds. It is a split that should never have arisen. In future qualified immunity cases, the Court should require district courts to make well-reasoned *Pearson* findings on the record, and take the opportunity to ensure the kind of “sound” discretion that does not stagnate judicial recognition of important individual rights.

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was dead.”); Michael Schwirtz & J. David Goodman, *Police Bullets Hit Bystanders, and Questions Rise Yet Again*, N.Y. Times, Sept. 16, 2013, at A1 (recounting an incident where two police officers accidentally shot two bystanders while trying to apprehend a mentally ill man in Times Square).

332. Shaw, *supra* note 3, at 171–72 (internal citations omitted) (“A thirty minute video emerged in 2011 showing the killing of Kelly Thomas, a homeless and mentally ill man suspected of breaking into cars. In the truly disturbing video, six officers threaten and then beat Thomas with fists, a baton, and the butt of a stun gun while he repeatedly apologizes, insists that he cannot breathe, and pleads for his absent father. Thomas subsequently died of a crushed windpipe. Spectators at trial left the courtroom in disgust and the judge paused the video to warn those who could not stomach its content to leave.”).

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