Caught on Tape: The First Amendment Right to Record, Retaliatory Arrests & Unqualified Impunity

KYLIE RONNOW*

* Staff Member, Volume 52, and Senior Staff Member, Volume 53, The University of Memphis Law Review; Juris Doctor Candidate, University of Memphis Cecil C. Humphreys School of Law, 2023. Thank you to Professor Ronnie Gipson, who served as my faculty advisor and shared valuable insight about the Note-writing process and how to survive law school. Thank you to Denise Lee, Sarah Claxton, and Paden Hemphill for their incredible insight, reassurance, and patience throughout the editorial process. Thank you to my cat, Alfredo, who persisted on being by my side each time I opened my laptop—I appreciated his support and willingness to understand a complex legal landscape. Thank you to my sister, Miranda, who never lets me lose sight of why I went to law school—to try and make this world a better place. You are an endless wealth of knowledge, and I would not be here without you. Last, but certainly not least, thank you to my husband, Logan, for providing endless and unconditional love. Thank you for never letting me give up on myself and always cooking dinner.

I. INTRODUCTION

"I felt like I was going to die."[1] Those are the words of Khalah Sabbakhan describing her encounter with Richmond police on October 4, 2021.[2] Sabbakhan took a walk to the local Whole Foods that Monday morning when she noticed two police officers speaking to a woman on a bench.[3] After approaching the officers, Sabbakhan began advocating on behalf of the unknown woman asking officers if they were acting under the authority of a warrant as she began recording the interaction.[4] *Maybe* Sabbakhan asked too many questions of the officers. *Maybe* her camera interrupted the officer's attempt to communicate with the other woman. As Sabbakhan and fellow onlookers began to gather around the developing scene, no one anticipated what the officers were about to do. One officer tracked down the property manager to ask that Sabbakhan be permanently banned from the premises.[5] The property manager complied. When the officer returned to the scene, he

1. Chris Suarez, *Woman Who Filmed Arrest of Person Near Whole Foods Says Richmond Police Assaulted Her. Police Say She Injured Herself.*, RICH. TIMES-DISPATCH (Nov. 21, 2021), https://richmond.com/news/local/crime-and-courts/woman-who-filmed-arrest-of-person-near-whole-foods-says-richmond-police-assaulted-her-police/article_cce3a15d-0a26-597c-911a-5cd5cd84338c.html.

2. *Id.* The video interview depicts a visibly shaken Sabbakhan describing her experience with the Richmond Police Department. *See id.* Sabbakhan can also be seen wearing an arm brace and a large bandage on her head. *Id.*

3. *Id.*; *see also* Kaya Sky, *Horrifying Assaults on Homeless RVA Police Brutality*, YOUTUBE (Oct. 9, 2021), https://www.youtube.com/watch?v=sR1JR3Qj8lo. Sabbakhan posted the video to her YouTube channel where she described the woman on the bench as speaking limited English and appearing "to have mental challenges." *Id.*

4. Suarez, *supra* note 1. Sabbakhan spoke about her history volunteering with various community nonprofit organizations that assist homeless individuals during a recent interview. *Id*. This background shaped Sabbakhan's decision that day and led her to believe the encounter unfolding before her required intervention. *See id*.

5. *Id.*

ordered Sabbakhan, who was standing alone in an empty street, to stop recording.[6] The officer snatched the phone Sabbakhan used to previously record the incident away from her control.[7] The two officers slammed Sabbakhan to the ground, placing her under arrest for obstruction of justice and trespassing.[8] Sabbakhan was left with various cuts and bruises and an injured elbow.[9] She also spent two days in police custody and alleges prison officials denied her repeated requests for medical assistance.[10] However, the Richmond Police Department maintained throughout the investigation that Sabbakhan somehow injured herself.[11]

Sabbakhan's encounter with Richmond police is not unique and illustrates the many problems stemming from retaliatory arrests of civilian recordings.[12] A citizen who is a victim of a retaliatory arrest may face numerous charges including wiretap fraud, disturbing the peace, or interfering with an investigation.[13] Even though these frivolous

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* The Richmond Police Department later dropped the trespassing charges against Sabbahkan. *See* Chris Suarez, *Authorities Drop Charges Against Woman Who Filmed Richmond Police Arrest of Woman Near Whole Foods Last Month*, RICH. TIMES-DISPATCH (Nov. 22, 2021) [hereinafter Suarez, *Authorities Drop Charges*], https://richmond.com/news/authorities-drop-charges-against-woman-who-filmed-richmond-police-arrest-of-woman-near-whole-foods/article_56bd1c62-cfb0-53eb-add7-a3ebd2eadbf2.html#tncms-source=signup. The article contains conflicting information concerning why authorities decided to drop the charges. *See id.* The Department did not respond to *Richmond Times-Dispatch's* Freedom of Information Act request for the body camera footage of the incident. *Id.*

11. Suarez, *Authorities Drop Charges*, *supra* note 10.

12. Ricardo G. Fernández Martinez, *The Spontaneous Video and Its Impact on the Digital Press*, 32 COMMC'N. & SOC'Y 213, 213 (2019) ("Current mobile technology has resulted in a boom in citizen journalism and video activism as, thanks to online communications and web 2.0 applications, a video can now be shared within seconds . . . ."). The development of new technology certainly contributes to a more interactive society. This newly found and rapidly changing interaction is bound to spearhead political and societal change.

13. *See generally* J. Peter Bodri, Comment, *Tapping into Police Conduct: The Improper Use of Wiretapping Law to Prosecute Citizens Who Record On-Duty Police*, 19 AM. U.J. GENDER SOC. POL'Y & L. 1327 (2011). There is a genuine issue with police officers relying on all-party consent statutes to prevent citizens from recording

charges are often dropped once tempers have settled, arrestees often retain a valid claim under 42 U.S.C. § 1983 against the arresting officer.[14] However, police officers may mount a successful defense to this claim if a court permits the affirmative defense of qualified immunity.[15] Generally, qualified immunity shields public officials from civil liability, but it will not insulate a private individual who violates a citizen's constitutional rights.[16] This affirmative defense may defeat a § 1983 claim if the infringed-upon right was not "clearly established" in the jurisdiction where the violation occurred, leaving citizens with no remedy.[17] Courts often award qualified immunity to police officers in right-to-record claims,[18] reasoning that the right is not clearly established as constitutionally protected—yet courts in other jurisdictions assert that the right to record is protected by the First Amendment.[19] This inconsistency must be remedied. As this Note will demonstrate,

actions undertaken during the scope of the officer's employment. Bodri's comment asserts that wire-tapping statutes unjustifiably punishes civilians engaging in a protected First Amendment exchange.

14. 42 U.S.C. § 1983 (2012); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 429 (1971) (Black, J., dissenting) ("Should the time come when Congress desires such lawsuits, it has before it a model of valid legislation, 42 U.S.C. § 1983, to create a damage remedy against federal officers."). A plaintiff may file a retaliatory arrest claim under the authority of *Bivens* if the suit is filed against a federal entity or its agent. This Note will not discuss a *Bivens* claim as an arresting officer is likely to be an agent of the state rather than the federal government.

15. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) ("Qualified or 'good faith' immunity is an affirmative defense that must be plead by a defendant official.").

16. *See id.*

17. Pearson v. Callahan, 555 U.S. 223, 244 (2009) (holding that the officers were entitled to the defense of qualified immunity where "clearly established law [did] not show that the search violated the Fourth Amendment").

18. Courts find the right-to-record within different First Amendment freedoms. Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (asserting citizens maintain a First Amendment right to record matters of public concern); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) ("The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."); Connell v. Town of Hudson, 733 F. Supp 465, 471–72 (D.N.H. 1990) (denying qualified immunity to a police officer interfering with a journalist taking pictures of a car accident).

19. Bartinicki v. Vopper, 523 U.S. 514, 528 (2001).

lower courts should adopt a uniform standard to ameliorate the confusion created by the right to record.

Retaliatory arrests, such as the one experienced by Sabbakhan, violate the First Amendment because government officials are prohibited from arresting citizens in retaliation for protected speech.[20] First Amendment protection of speech extends beyond spoken or written word to conduct containing sufficient elements of communication.[21] Thus, the right to record is clearly established through previous Supreme Court precedent, and courts should not dismiss a civilian freelancer's[22] retaliatory arrest claim by improperly granting an officer qualified immunity.

If the government maintains a significant interest in regulating a particular type of speech, then courts are more likely to validate incidental limitations on an individual's First Amendment freedoms where that government interest is furthered by the restriction.[23] Civilian recordings of police officers interacting with the public have revealed abuses of authority and sparked social reform throughout the country. These recordings play a vital role in increasing public awareness and scrutiny regarding police practices. A recording from May of 2020 is a prime indication of the significant government interest associated with vigilant civilians recording police officers. The murder of George Floyd was initially characterized as a "medical incident during police interaction" by the Minneapolis Police Department.[24] However, after the video footage of the incident was uncovered, public outcry led to

20. Hartman v. Moore, 547 U.S. 250, 256 (2006) (citing Crawford-El v. Britton, 523 U.S. 574, 592 (1998)).

21. United States v. O'Brien, 391 U.S. 367, 376 (1968).

22. There is not an official term for a civilian who records a police officer discharging their official duties. The implication that the civilian is a "freelancer" does not mean they are somehow connected with a publication or news outlet.

23. *O'Brien*, 391 U.S. at 376.

24. Douglas O. Linder, *Original MPD Statement on Floyd: "A Medical Incident,"* FAMOUS TRIALS, https://www.famous-trials.com/george-floyd/2720-original-mpd-statement-on-floyd-a-medical-incident (last visited Dec. 29, 2021). The original statement cannot be found on the Minneapolis Police Department's website. It is not clear when the statement was removed, but it was originally posted the day of Floyd's murder. The following day is when the civilian captured video of the police officer's actions began to spread around the world.

immense social reform concerning the toxicity of municipal police departments in the United States and abroad.[25]

The purpose of this Note is to demonstrate the "clearly established" nature of the right to record under current First Amendment jurisprudence. This Note proposes that courts presented with this issue analyze it under the previous expressive conduct framework provided by the Supreme Court rather than viewing the claim as one of first impression. This approach looks to the totality of the circumstances to determine whose interest should be protected—that of the government or private individuals. The First Amendment protects not only the act of speech, but also the creation, distribution, and retention of speech.[26] The principles that uphold disseminating publications,[27] criticize the government,[28] and protect the free flow of information[29] are also operative when civilians record officers discharging their public duties. The right to record is merely an avenue for citizens to gain information about their public officials and then disseminate that information to the public. The advent of new technology which has made this practice

25. Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST., (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder ("Throughout the past year, at least 30 states and Washington, DC, enacted one or more statewide legislative policing reforms, ensuring greater policy uniformity within each jurisdiction.").

26. *See* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 762–67 (1976) (asserting that the protection of a "free flow of commercial information" enforces both societal and individual interests).

27. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 799–800 (1979) (Burger, C.J., concurring) (citing Lovell v. Griffin, 303 U.S. 444, 452 (1938)) (noting that the Speech and Press Clause work in unison to provide citizens with needed information and that the two cannot operate independently of the other).

28. Houston v. Hill, 482 U.S. 451, 461 (1987). The Court found that a city ordinance stating that an individual cannot "in any manner oppose . . . or interrupt any policeman in the execution of his duty" was overbroad and would "criminalizes[] a substantial amount of constitutionally protected speech." *Id.* at 461; *id.* at 466 (quoting HOUS., TEX., ORDINANCES § 34-11(a)(1984)).

29. Huslter Mag. v. Falwell, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matter of public interests and concern."); Associated Press v. United States, 326 U.S. 1, 20 (1945) (recognizing that the First Amendment prevented the government from "imped[ing] the free flow of ideas").

more common should not erode the freedom of expression prescribed by the First Amendment and the Supreme Court.

Employing the expressive conduct framework prevents police officers from hiding under the cloak of qualified immunity after conducting a retaliatory arrest against a civilian freelancer. By utilizing the Court's precedent from *United States v. O'Brien* and *Spence v. State of Washington*, courts can inquire into (1) the nature of the activity; (2) its factual context; and (3) the environment in which the conduct was performed to determine if the individual engaged in a form of protected expression.[30] Further, the Court's holding in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, which does not require a narrow articulable message for First Amendment protection, supports the inclusion of the right to record as a constitutional right.[31] While the expressive conduct analysis articulated in *Hurley* is not typically applied in the newsgathering context, it is the proper standard to evaluate civilian recordings because of the inherent expression involved in the conduct.[32]

Section II of this Note explains the development of First Amendment jurisprudence concerning expressive conduct and its relevancy to civilians recording police officers. Section III of this Note highlights the significant interest the government has in protecting civilian audio and visual recordings of police officers interacting with the public. Section IV of this Note demonstrates the need for a uniform standard when courts are presented with a right to record claim. This Note provides a suggested framework courts should employ when presented with a retaliatory arrest claim by a civilian freelancer. Further, this Note proposes that 42 U.S.C. § 1983 should be amended to prevent municipal police officers from utilizing a qualified immunity defense

30. Spence v. Washington, 418 U.S. 405, 409–10 (1974) (citing United States v. O'Brien, 391 U.S. 367, 376 (1968)).

31. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

32. When a civilian freelancer presses record, it is rarely because the civilian seeks to praise the officer's actions. Usually, there is some sort of tension between the individuals involved in the dispute and the (often third-party) civilian freelancer who begins recording because she feels the need to retain and then disseminate that recording. Both activities are protected under the First Amendment. *See* Jocelyn Simonson, Article, *Beyond Body Cameras: Defending a Robust Right to Record Police*, 104 GEO. L.J. 1559, 1556–69 (2011).

against a claim of retaliatory arrest of a freelancer exercising her right to record.

II. HISTORY & BACKGROUND

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[33] Taken literally, the Speech and Press Clauses to the First Amendment protect basic activities such as speech and publication. However, interpreting the plain language of the Constitution would not accurately reflect the sweeping range of protections afforded to citizens under the First Amendment.[34] The Supreme Court has broadened its First Amendment jurisprudence to focus on the freedom of expression rather than strictly limiting the amendment's application to speech and publication.[35] This continuous expansion of the Amendment's meaning indicates that the government maintains a significant interest in protecting the marketplace of ideas—including the right to record. Thus, retaliatory arrests of civilian freelancers violate the First Amendment because the citizen's conduct in recording officers is merely facilitating the exchange of thought. The right to record is a natural extension of the First Amendment, yet lower courts created unnecessary confusion by following varying interpretations of Supreme Court precedent.

A. Protecting Expressive Conduct

Protected First Amendment speech extends beyond spoken or written word and includes conduct containing sufficient elements of

33. U.S. CONST. amend. I.

34. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); Kaplan v. California, 413 U.S. 115, 119–20 (1973) ("[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection.").

35. *See* Martin v. Struthers, 319 U.S. 141, 143 (1943) (recognizing that the First Amendment freedoms of the press and speech "embraces the right to distribute literature . . . and necessarily protects the right to receive it") (citation omitted); *see also* Stanley v. Georgia, 394 U.S. 557, 564 (1969) (noting that "[i]t is now well established that the [First Amendment] protects the right to receive information and ideas").

communication.[36] In *United States v. O'Brien*, the Supreme Court considered whether burning a draft card on the steps of a courthouse was protected First Amendment conduct.[37] O'Brien unsuccessfully argued that the protection included all communicative actions, and that his act of burning the draft card was communicating protest of war.[38] The Court rejected this argument because suppression of the symbolic speech "is sufficiently justified if it is within the constitutional power of the Government."[39] Through the Necessary and Proper Clause, Congress has the power to raise armies and enact laws to effectuate goals within the scope of its enumerated powers.[40] O'Brien's conviction was affirmed because the government had a substantial interest in upholding the integrity of draft cards.[41] The Court reasoned that an intent to express an idea is required for a plaintiff to prevail; however, the First Amendment does not protect a limitless variety of conduct.[42] The *O'Brien* Court did not provide a test for when expressive conduct is sufficiently communicative to receive First Amendment protection. Even so, it made clear that the First Amendment does not protect all communications.[43]

The Supreme Court clarified the standard to analyze expressive conduct for First Amendment protection in *Spence v. Washington*. There, the Court held that the First Amendment protected the conduct of an individual who affixed a peace symbol to an American flag.[44] Establishing a new standard, the Court considered: (1) the nature of the activity; (2) its factual context; and (3) the environment in which it was undertaken to determine if the act constituted protected

36. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968); Spence v. Washington, 418 U.S. 405, 409 (1974).

37. *O'Brien*, 391 U.S. at 376.

38. *Id.*

39. *Id.* at 377.

40. *Id.* (citing Lichter v. United States, 334 U.S. 742, 755–58 (1948)).

41. *Id.* at 382. The Court reasoned that the government only needed to produce a sufficient governmental interest to uphold O'Brien's convictions "because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates." *Id.*

42. *Id.* at 376.

43. *O'Brien*, 391 U.S. at 376.

44. Spence v. Washington, 418 U.S. 405, 406 (1974).

expression.[45] After considering the political climate and the particularized message the defendant was attempting to convey, the Court found that there was a great likelihood that people who viewed the message would understand its meaning.[46] Thus, the Court held that the First Amendment protected the defendant's expressive conduct.[47]

The notion that expressive conduct requires a particularized message eventually became the standard for protecting an individual's expressive conduct. The Court in *Texas v. Johnson* cemented the particularized message requirement of the *Spence* Court when the expressive conduct directly scrutinizes government action.[48] The test then protects expressive conduct if there was (1) an intent to convey a "particularized message" and (2) a great likelihood that the message would be understood by its viewers.[49] The Court applied this standard to hold that First Amendment protection extended to burning the American flag in political protest.[50] The overtly political nature of the defendant's conduct led the Court to reason that the act was sufficiently communicative to implicate constitutional protection.[51] While the Court's holdings in *Spence* and *Johnson* are identical, it made clear that varying degrees of government scrutiny are protected under the First Amendment.

The "particularized message" standard announced in *Johnson* was the accepted analysis for expressive conduct until *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*. The *Hurley* Court considered whether the state of Massachusetts could impose an inclusionary mandate on organized expressive conduct.[52] Specifically, it questioned whether private citizens organizing a parade were

45. *Id.* at 409–10.

46. *Id.* at 410–11. The act of affixing a peace sign to an American flag in the context of the Cambodian incursion and the Kent State tragedy demonstrated the requisite intent to convey a particularized message. *Id.*

47. *Id.* at 415.

48. Texas v. Johnson, 491 U.S. 397, 404 (1989) (citing *Spence*, 418 U.S. at 410–11).

49. *Id.*

50. *Id.* at 419–20.

51. *Id.* at 406 ("The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent.").

52. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 559 (1995).

required to include a group who intended to convey a message the organizers disliked.[53] The Court's analysis hinged on the determination that the parade constituted First Amendment activity.[54] Whether the organizers sought to convey a "narrow, succinctly articulable" message was not relevant to the Court's analysis because this is not a prerequisite to constitutional protection.[55] The Court found that most marches and parades, including the one at issue, were within the realm of expressive conduct sufficient to impose First Amendment protection.[56] The *Hurley* Court's decision was abundantly clear: narrow, succinctly articulable messages are not required for First Amendment protection because that would limit individual civil liberties.[57] Under this framework, the Court has not hesitated to extend First Amendment protection to other modes of interaction—including social media.[58]

The *Hurley* decision led to confusion in the lower courts. For example, the Third Circuit found that *Hurley* completely eliminated the particularized message requirement for protected First Amendment speech and replaced the standard with the previous *Spence* test.[59] While the lower courts are split concerning the precise formula for an expressive conduct analysis, *Hurley* certainly altered the holding from *Texas v. Johnson*. By not recognizing that *Hurley* controls expressive conduct claims, courts often require the plaintiff to convey a particularized message in right-to-record claims.[60] However, at the very least,

53. *Id.*

54. *Id.* at 567–70.

55. *Id.* at 569 (reasoning that a restrictive expressive conduct analysis limiting expressions to a particularized message would exclude "the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll" from protection).

56. *Id.* at 569–70.

57. *Id.* at 569.

58. The Court has long recognized that online speech receives the same protections as ordinary speech. *See* Reno v. ACLU, 521 U.S. 844, 850–53 (1997); s*ee also* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2047–48 (2021) (holding that the First Amendment protected a high school student's Snapchat pictures which had vulgar captions that criticized the school).

59. Troster v. Pa. State Dep't of Corr., 65 F.3d 1086, 1090 (3d Cir. 1995). Under this analysis, the court found that passively wearing an American flag on a school uniform did not infringe upon First Amendment rights. *Id.* at 1092.

60. *See infra* note 86.

the *Hurley* decision loosened the particularized message requirement of the expressive conduct analysis.[61]

B. Newsgathering: Public Officials & Public Concern

To properly evaluate a right to record claim, it is important to set it against the backdrop of the Supreme Court's freedom of expression jurisprudence concerning public officials and newsgathering activities. When considering whether a citizen has the right to gather information about public officials, it is important to consider the right to privacy. Public officials, including police officers, do not have the same expectation of privacy that private citizens enjoy because of the relationship between these officials' work and public service.[62] Certain courts find that the privacy interests of police officers acting in their official capacity diminish if the act occurs in public where it is easily observable.[63] Other courts consider factors such as a police officer's broad discretionary authority, the high potential for abuse of power, and the officer's influence in the community to determine if the officer's expectation of privacy is lower than a reasonable citizen's expectation.[64]

The Supreme Court extended First Amendment protection to include collecting and receiving information, especially when it relates

61. Sandy Tomasik, Note, *Can You Understand This Message? An Examination of* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*'s Impact on* Spence v. Washington, 89 ST. JOHN'S L. REV. 265, 286–87 (2015) ("*Hurley* did not simply clarify what 'particularized' means; instead, *Hurley* lowered the threshold.").

62. J. Peter Bodri, Comment, *Tapping into Police Conduct: The Improper Use of Wiretapping Laws to Prosecute Citizens Who Record On-Duty Police*, 19 AM. U.J. GENDER SOC. POL'Y & L. 1327, 1332 (2011).

63. *See* State v. Flora, 845 P.2d 1355, 1357–58 (Wash. Ct. App. 1992). The court denied the extension of privacy protection to comments made by an officer during a traffic stop. *Id.* The court analyzed the question with the framework of *Katz v. United States* which found that an individual manifests a reasonable expectation of privacy when they (1) subjectively assert their privacy interests and (2) society is prepared to recognize the privacy interest as reasonable. 389 U.S. 347, 361 (1967); *see also* Bodri, *supra* note 61, at 1332 ("[C]ertain courts have ruled that comments police officers make in the course of their public duties are comments that have been knowingly exposed to the public.").

64. *Cf.* Rotkiewicz v. Sadowsky, 730 N.E.2d 282, 287 (Mass. 2000). Police officers acting within their official capacity are public officials for the purpose of defamation claims. *Id.* at 288–89.

to government operations that are a matter of public concern.[65] While the right certainly has limitations, the Court has sought to protect the collection and dissemination of information to the public.[66] For example, if a person has a uniquely original concept and then relays that information to another, it would be difficult to qualify this activity as newsgathering. It follows that newsgathering in the context of the First Amendment is linked to an individual's capacity to acquire and then communicate information to another.

In addition to protecting other forms of communication aside from speech, the First Amendment also protects the right to gather information concerning the activities of public officials.[67] The Supreme Court in *Garcetti v. Ceballos* held that public employees who make a statement acting within their official capacity do not receive the same First Amendment protections as private citizens.[68] To reach its holding, the Court first considered whether the employee speech concerned a matter of public or private concern.[69] If the speech relates to a matter of public concern, the burden then shifts to the public employer to determine that the suppression of the public employee's speech was justified to promote efficient and effective government operations.[70] The Court explained that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance"[71] and public employees should be "receptive to constructive criticism offered by their

65. *See supra* notes 27–29 and accompanying text.

66. *See supra* notes 27–29 and accompanying text.

67. Eugene Volokh, Opinion, *Court: No First Amendment Right to Videorecord Police Unless You are Challenging the Police at the Time*, WASH. POST: VOLOKH CONSPIRACY (Feb. 23, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/23/no-first-amendment-right-to-videorecord-police-unless-you-are-challenging-the-police-at-the-time/ ("[T]he First Amendment protects silent gathering of information (at least by recording in public) for possible future publication as much as it protects loud gathering of information.").

68. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006). The Court also noted that managerial discipline of a public employee for engaging in protected speech does not equate to First Amendment protected speech. *Id.* at 421–22.

69. *Id.* at 415–16 (citing Connick v. Myers, 461 U.S. 138, 146–47 (1983)).

70. *See id.* at 417. While this case was decided in the government employer-employee context, the analysis is applicable to any public employee acting within the scope of their employment.

71. *Id.* at 425 (quoting *Connick*, 461 U.S. at 149 (1983)).

employees."[72] However, the Court was hesitant to shield the public employee's speech because it related to workplace responsibilities.[73]

The First Amendment rights of public officials diminish when they act within the scope of their employment. This is especially true when the actions of the employer could produce a chilling effect on an individual citizen's protected speech. In *Bartnicki v. Vopper*, a union representative for the Pennsylvania State Education Association recorded a telephone conversation with the union's president concerning ongoing negotiations with the local school board.[74] An unknown individual intercepted the tape and Vopper, a radio commentator, played the recording on his talk show in conjunction with related news reporting on the issue.[75] After discovery, the plaintiffs learned that Vopper obtained the tape from a representative of a taxpayers' organization who opposed the union's position.[76] The Court held that the right to gather information concerning the activities of a public official outweighs any potential wiretapping violation if it relates to a matter of public concern.[77] The Court reasoned that legally recorded conversations do not violate the First Amendment—even if illegally obtained by a third-party.[78] If the information is illegally transmitted but it relates to a matter of public concern, the Court is hesitant to restrict citizen speech.[79] Minimal privacy intrusions are justified if the balance does not weigh in favor of "preserving the secrecy of information . . . ."[80] The *Bartnicki* Court's reasoning applies to a wide range of government actions, including routine or incidental communications.[81]

72. *Id.* at 425.

73. *Id.* at 424.

74. Bartnicki v. Vopper, 532 U.S. 514, 518 (2001).

75. *Id.*

76. *Id.* at 519.

77. *See id.* at 529–535. The respondents were found not guilty under a wiretapping statute because the information at issue was lawfully obtained and related to a matter of public concern, although it was illegally intercepted by a third party. *Id.* at 514–16.

78. *Id.*

79. *Id.* at 526–28.

80. *Id.* at 528.

81. For example, the Court found that police officers do not have a reasonable expectation of privacy when conducting traffic stops because of the inherent public exposure. Berkemer v. McCarty, 468 U.S. 420, 438 (1984) (recognizing that the average traffic stop is somewhat public because individuals on the street witness the

The Court recognized the right to record and disseminate information within the First Amendment because of the newsworthy content.[82] Thus, it necessarily follows that a retaliatory arrest of a citizen recording officers violates the First Amendment.

C. First Amendment Retaliation Claims

Police officers violate the First Amendment when arresting a citizen based on protected speech.[83] Retaliation against protected speech can deter the exercise of First Amendment rights, thus the Supreme Court has long recognized the right to be free from government retaliation when an individual is engaged in protected speech.[84] Because the right to be free from retaliatory arrests is clearly established, police officers cannot employ a qualified immunity defense stemming from a retaliatory arrest claim.[85] Engaging in retaliation offends the Constitution because it produces a chilling effect on the exercise of speech.[86] Even though retaliation is often difficult to correctly identify, the analysis requires a proper balance between shielding public officials from lawsuits and protecting an individual's First Amendment rights.

When an officer arrests a citizen based on protected speech, that citizen may seek recourse under 42 U.S.C. § 1983. Section 1983 of the Civil Rights Act states:

> Every person who, under color of [state law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights,

interaction to some degree); *see also* William J. Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J.L. REFORM 551, 564 (1984) ("[A] police officer's decision to stop a particular car for a license and registration 'spot-check' because the officer disapproves of the political message of a sticker on the car's bumper surely offends the value that we attach to freedom of expression.").

82. *See Bartnicki*, 532 U.S. at 515.

83. Hartman v. Moore, 547 U.S. 250, 256 (2006) (citing Crawford-El v. Britton, 523 U.S. 574, 592 (1998)).

84. Crawford-El v. Britton, 523 U.S. 574, 592 (1998) ("[T]he general rule has long been clearly established . . . the First Amendment bars retaliation for protected speech . . . .").

85. *Id.* at 591–92.

86. *Id.* at 588 n.10.

> privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[87]

For a plaintiff to establish a First Amendment retaliation claim, three elements must be satisfied: (1) the plaintiff was engaged in constitutionally protected speech; (2) the injury "would chill a person of ordinary firmness from continuing to engage in that activity";[88] and (3) the adverse actions of the defendant were motivated by the constitutionally protected speech.[89] However, a right-to-record claim can be easily defeated if the right was not "clearly established" law in the jurisdiction where the claim arose.[90]

D. Qualified Immunity Determinations

Police officers are often able to hide under the cloak of qualified immunity after engaging in a retaliatory arrest. The doctrine of qualified immunity is designed to protect government officials from assuming personal liability in civil rights claims.[91] The affirmative defense of qualified immunity protects a government official from personal liability "unless the official violated a statutory or constitutional right, and that right was 'clearly established.'"[92] Qualified immunity

87. 42 U.S.C. § 1983 (2012).

88. Worrell v. Henry, 219 F.3d 1197, 1212 (10th Cir. 2000).

89. *Compare* Frasier v. Evan 992 F.3d 1003, 1015 (10th Cir. 2021) (acknowledging that the right to record was not clearly established at the time of the alleged retaliatory arrest), *and* Fields v. Philadelphia 862 F.3d 353, 360–62 (3d Cir. 2017) (holding that officers were entitled to a qualified immunity defense as the right to record was not clearly established), *with* Glik v. Cunniffe, 655 F.3d 78, 83–84 (1st Cir. 2001) (holding that as the plaintiff was exercising their First Amendment journalistic liberties, the officer in question did not have the right to interfere), *and* Fordyce v. Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (noting that there is a First Amendment "right to film matters of public interest").

90. Reichle v. Howards, 566 U.S. 658, 663 (2012).

91. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

92. Marshall v. San Diego, 238 Cal. App. 4th 1095, 1108 (2015) (citing Carroll v. Carman, 574 U.S. 13, 16 (2014)). Other circuits have different tests for a First Amendment retaliatory arrest claim, but there is no significant distinction. *See also* Bennett v. Hendrix, 423 F.3d 1247, 1250–51 (11th Cir. 2005). The court reasoned

jurisprudence offered by the Supreme Court provides minimal guidance regarding one aspect of the liability dissolving doctrine: what does it mean for law to be "clearly established"? In the qualified immunity context, "clearly established" means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[93] As there is limited guidance regarding the proper source of clearly established law, lower courts often resort to a restrictive and unworkable definition when presented with the issue. Many lower courts require a controlling precedent in the jurisdiction where the claim arose for the plaintiff to prevail.[94] This leads to the overly broad application of the principle of qualified immunity, and the undue restriction of citizens' § 1983 claims.

Assessing whether an officer may raise a qualified immunity defense shifted dramatically with the Supreme Court's decision in *Pearson v. Callahan*. The Court abandoned its previous decision mandating courts in qualified immunity cases to assess whether the plaintiff established a constitutional violation before considering if the right was "clearly established."[95] This concept of mandatory sequencing instructed courts to consider the plaintiff's conduct and determine whether the public official's actions violated a constitutional right.[96] The *Pearson* Court granted deference to lower courts when deciding the constitutional merits of a claim.[97] This deference culminated in conflicting standards and a general theme of constitutional avoidance in areas of First Amendment jurisprudence that previous Courts did not

that a plaintiff must show a "defendant's retaliatory conduct adversely affected the protected speech" and "there is a causal connection between the retaliatory actions and the adverse effect on speech." *Id.* at 1250.

93. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

94. *Reichle*, 566 U.S. at 665–66 ("Assuming arguendo, that controlling Court of Appeals' authority could be a dispositive source of clearly established law . . . the Tenth Circuit's cases do not satisfy the 'clearly established' standard here."); *see also* Szymecki v. Houck, 353 F. App'x 852, 852–53 (4th Cir. 2009). The court declined to go beyond the controlling precedent in its particular jurisdiction. *Id.* at 852. The court then recognized that if the right were clearly established in another jurisdiction would not defeat a qualified immunity defense. *Id.* at 852–53. However, the court did not analyze the question under the framework for expressive conduct. *See id.*

95. Saucier v. Katz, 533 U.S. 194, 201 (2001).

96. *Id.*

97. *Pearson*, 555 U.S. at 241.

hesitate to expand.[98] The general principle of constitutional avoidance stalls the development of constitutional claims unless the right is already "clearly established" in the jurisdiction.[99] With mandatory sequencing dismantled under *Pearson*, lower courts often opt to address the second prong of the analysis which avoids addressing the merits of many civil rights lawsuits.[100] This created an uneven recognition of the right to record in the federal circuit, spurring a recurring constitutional question that has yet to be resolved.

A plaintiff's inability to establish a prima facie retaliatory arrest claim effectively chills protected First Amendment speech. The Supreme Court's decision in *Hartman v. Moore* addressed the question of whether probable cause could overcome a retaliatory arrest claim.[101] In *Hartman*, the Court held that if the officer satisfied the requisite level of probable cause, then a plaintiff is precluded from recovering under § 1983 of the Civil Rights Act.[102] The plaintiff alleged the government's prosecution amounted to retaliation after he scrutinized the U.S. Postal Service mail sorting system.[103] The scope of the *Hartman* holding was carefully limited to retaliatory arrest prosecutions, leaving

98. *See supra* Sections II.A, B. The Court steadily developed First Amendment jurisprudence by making connections to protected communication and other various mediums such as music and art. Under the constitutional avoidance scheme, the Court threatens to restrict development of protected speech that is sufficiently related to a matter of public concern.

99. *Pearson*, 555 U.S. at 239–41.

100. *See, e.g.*, Kelly v. Borough of Carlisle, 622 F.3d 248, 263 (3d Cir. 2010) (First Amendment right to record); Chaklos v. Stevens, 560 F.3d 705, 711, 716 (7th Cir. 2009) (First Amendment retaliation); Rasul v. Myers, 563 F.3d 527, 529–30 (D.C. Cir. 2009) (Eighth Amendment rights and procedural due process).

101. Hartman v. Moore, 547 U.S. 250, 256–57 (2006).

102. *Id.* at 265–66. After *Hartman*, plaintiffs seeking recourse for retaliatory prosecutions "cannot succeed in the retaliation claim without showing that the Assistant United States Attorney was worse than just an unabashed careerist, and if he can show that the prosecutor had no probable cause, the claim of retaliation will have some vitality." *Id.* at 265.

103. *Id.* at 252–54. Plaintiff worked for a manufacturer of multi-line optical readers and attempted to persuade the U.S. Postal Service to replace its single-line optical readers with the plaintiff's product. *Id.* at 252–53. The plaintiff criticized the government's use of single-line optical readers to members of Congress while lobbying for his company's multi-line readers. *Id.*

lower courts open to interpret whether or not to extend the standard to retaliatory arrest claims.[104]

Courts continuously expanded the reach of qualified immunity and bloated the doctrine to shield nearly any impropriety committed by a municipal police officer.[105] Recent legislation introduced in the United States House of Representatives seeks to end the judicially created doctrine by eliminating the defense for § 1983 claims.[106] Congress promulgated § 1983 to override discriminatory state laws, to supplement laws unenforced by the state, and to provide a federal remedy in federal court.[107] Qualified immunity detracts from the purpose of § 1983 by limiting a plaintiff's opportunity to a day in court. Congressional action is necessary to ameliorate the impact of the lower court's unequal recognition of the right to record.

E. The Artificial Circuit Split

While the First Amendment prohibits Congress from passing laws that would infringe upon an individual's protected speech,[108] this has not prevented police officers from interfering with citizens who attempt to record them in the discharge of their official duties. This intentional interference has resulted in retaliatory arrests against vigilant citizens, constitutional infringements, and a circuit split. At the heart of the circuit split is one central question: Whether the First Amendment right to record is "clearly established" in the jurisdiction where

104. *See* John Koerner, Note, *Between Healthy and* Hartman: *Probable Cause in Retaliatory Arrest Cases*, 109 COLUM. L. REV. 755, 775 ("[T]he Supreme Court's signal has evoked mixed interpretations among lower courts faced with retaliatory arrest cases. Retaliatory arrest case law is a mess, with some courts siding entirely with Hartman, others rejecting Hartman outright, and still others having yet to take a position.").

105. Marcus R. Nemeth, Note, *How Was That Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C. L. REV. 989, 999 (2019) ("[T]he Supreme Court expanded the qualified immunity doctrine with subsequent decisions . . . all affording government officials more protections.").

106. *See infra* note 177.

107. See Monroe v. Pape, 365 U.S. 167, 172–77 (1961), for an in-depth discussion concerning the three aims of § 1983.

108. U.S. CONST. amend. I.

the dispute arose.[109] If the right to record is not "clearly established," courts are hesitant to hold an officer liable for the infringement because a reasonable officer would not be aware of the right. In these cases, officers may advance a qualified immunity affirmative defense to negate the claims brought by the plaintiff.

These arrests have created much concern relating to a citizen's First Amendment right to record police encounters. The Tenth Circuit's decision in *Frasier v. Evan* aligned with the Third Circuit asserting that the right to record is not clearly established and a qualified immunity defense can defeat a right to record claim with ease.[110] However, the First and Eleventh Circuits have recognized that the right to record *is* clearly established under current First Amendment jurisprudence.[111] In these jurisdictions, plaintiffs are able to hold police officers liable for interfering with their constitutional rights by bringing a claim of retaliatory arrest against an officer interfering with their right to record.

1. Denials of the Right to Record

Levi Frasier began recording police officers in Denver, Colorado when he observed officers using force to arrest an uncooperative suspect in public.[112] Frasier began to record the interaction with his tablet.[113] After the unidentified person's arrest, one officer followed Frasier to his car and demanded the footage of the arrest.[114] When Frasier declined to voluntarily forfeit the footage, he showed it to officers who surrounded his car and pressured him to turn over the recording.[115]

109. *See supra* note 89.

110. *See* Frasier v. Evan 992 F.3d 1003, 1015 (10th Cir. 2021) (acknowledging that the right to record was not clearly established at the time of the alleged retaliatory arrest); Fields v. Philadelphia 862 F.3d 353, 360–62 (3d Cir. 2017) (holding that officers were entitled to a qualified immunity defense as the right to record was not clearly established).

111. Glik v. Cunniffe, 655 F.3d 78, 83–84 (1st Cir. 2001) (holding that as the plaintiff was exercising their First Amendment journalistic liberties the officer in question did not have the right to interfere); Smith v. Cumming, 212 F.3d 1332, 1332 (11th Cir. 2000).

112. *Frasier*, 992 F.3d at 1008.

113. *Id.*

114. *Id.*

115. *Id.*

Members of the Denver Police Department then snatched the tablet away without consent.[116] Frasier sought relief under 42 U.S.C. § 1983, claiming the officers violated his First and Fourth Amendment rights.[117]

The Tenth Circuit held in favor of the officers because the "right to record [the officers] in the performance of their official duties in public spaces was not clearly established at the time of their alleged conduct in August 2014."[118] The court did not agree with Frasier's argument that the Denver Police Department should be liable for failing to properly train its officers regarding a citizen's First Amendment right to record officers.[119] The Tenth Circuit reasoned that determining whether an area of law is "clearly established" is an objective test and what the officers knew at the time of the alleged violation is irrelevant to the analysis.[120] As the right to record was not "clearly established" at the time of the incident, the court permitted officers to advance a qualified immunity defense which trumped Frasier's First Amendment right-to-record claim.[121] By holding that training is "irrelevant"[122] to determine if a right is "clearly established," the court permitted officers to consciously disregard an individual's freedom of expression.

The Third Circuit faced a similar issue when Richard Fields and Amanda Geraci attempted to record police officers.[123] There, the court asserted that "recording police activity in public falls squarely within the First Amendment right of access to information."[124] Despite the Philadelphia Police Department adopting policies that recognize the First Amendment right to record, the court still held that officers were entitled to a qualified immunity defense.[125] The court reasoned that while there *presently is* a right to record, it was *not* clearly established

116. *Id.*
117. *Id.*
118. *Id.* at 1011–12.
119. *Id.* at 1015.
120. *Id.*
121. *Id.* at 1020–24.
122. *Id.* at 1019.
123. Fields v. City of Philadelphia, 862 F.3d 353, 356 (3d Cir. 2017).
124. *Id.* at 359.
125. *Id.* at 360–62.

at the time of the alleged retaliatory arrest in 2012.[126] The court ultimately held that the right to record was established at the time the opinion was issued, but it did not detail when the right became active.[127] This is particularly interesting considering the Philadelphia Police Department issued policies in 2011 "advising officers not to interfere with a private citizen's recording of police activity because it was protected by the First Amendment."[128] This holding added unnecessary confusion to right-to-record precedent because it essentially foreclosed any civilian freelancer's claim before 2017.[129]

2. Right to Record Jurisdictions

The First Circuit considered whether a citizen has a right to record the discharge of a police officer's official public duties in *Glik v. Cunniffe*.[130] In that case, Simon Glik was arrested for violating a wiretap statute after he recorded an arrest with his cell phone's camera.[131] Glik was concerned that excessive force was being used to arrest the individual and several bystanders gathered to observe the arrest.[132] When presented with the issue, the First Circuit adamantly proclaimed that the First Amendment protects the right of civilians to record the police acting in their official capacity.[133] To determine if the right was

126. *Id.* The Third Circuit used a series of analogous cases to determine the right to record was not established at the time of the incident. *Id*. The court relied upon cases where it was previously held that the right to record officers was not "clearly established" during routine traffic stops. *See id.* at 361 (first citing Kelly v. Borough of Carlisle, 622 F.3d 246, 262 (3d Cir. 2010); and then citing True Blue Auctions v. Foster, 528 Fed. Appx. 190, 192–93 (3d Cir. 2013)).

127. *Id.*

128. *Id.* at 362.

129. *Id.* at 365. The Third Circuit's decision in *Fields* added confusion to its already existing right to record precedent. In *Gilles v. Davis*, the court stated in a footnote that there "may" exist a right to record police officers performing their duties on public property, but it failed to answer the question. Gilles v. Davis, 427 F.3d 197, 212 n.14 (3d. Cir. 2005). However, the court also said that "photography or videography that has a communicative or expressive purpose enjoys some First Amendment protection." *Id.* The court's incomplete analysis regarding a civilian's right to record certainly spurred confusion within the circuit.

130. Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011).

131. *Id.* at 79.

132. *Id.* at 79–80.

133. *Id.* at 83.

clearly established, the court considered "(1) 'the clarity of the law at the time of the alleged civil rights violation,' and (2) whether, given the facts of the particular case, 'a reasonable defendant would have understood that his conduct violated the plaintiff['s] constitutional rights.'"[134] The court reasoned that "the First Amendment goes beyond protection of the press and self-expression of individuals . . . from which members of the public may draw."[135] The court rejected the officer's grant of qualified immunity, asserting that the plaintiff's activities "were peaceful, not performed in derogation of any law, and *done in the exercise of his First Amendment rights* . . . ."[136] In its reasoning, the court noted that recording an officer performing an arrest "is a basic, vital, and well-established liberty safeguarded by the First Amendment."[137]

The Eleventh Circuit similarly faced a right-to-record claim that arose when officers prevented Mr. Smith from recording an incident and subsequently harassed both him and his wife.[138] After summary judgment was awarded to the officers, the Smiths appealed.[139] The court affirmed summary judgment but found that the district court erred when it concluded that private citizens do not have a First Amendment right to record.[140] The court reasoned that the appellants did not produce enough evidence to survive a motion for summary judgment that defendant police officers violated their constitutional rights.[141] While the Smiths could not prevail, the court noted that there is a "right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."[142]

The aforementioned cases illustrate that the circuits disagree not only about whether the right to record is clearly established, but also

134. *Id.* at 81 (quoting Barton v. Clancy, 632 F.3d 9, 22 (1st Cir. 2011)) (alterations in original).

135. *Glik*, 655 F.3d at 82 (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978)).

136. *Id.* at 85.

137. *Id.* at 83 (quoting Iacobucci v. Boulter, 193 F.3d 14, 25 (1st Cir. 1999)).

138. Smith v. Cumming, 212 F.3d 1332, 1332 (11th Cir. 2000).

139. *Id.*

140. *Id.* at 1333.

141. *Id.*

142. *Id.*

the proper analysis to resolve the dispute. This unequal application of the law demonstrates the need for a clear standard.

III. ABSENCE OF A CLEAR STANDARD

The circuit split exacerbates the problem behind qualified immunity and the right to record—a failure to define an articulable standard that protects citizens seeking to exercise their First Amendment rights. Claims concerning citizens using cell phones to make audio and visual recordings of police officers in public have increased nationally.[143] These recordings often seek to uncover police misconduct or to document a noteworthy event. Some officers have responded to these recordings by arresting citizens for violating state wiretapping statutes that prohibit audio recordings if every recorded party does not consent.[144] In states where officers cannot rely on all-party consent statutes, the charge is often substituted for interfering with a police investigation,[145] refusing to comply with a police order,[146] disorderly

143. *See* Jim Dwyer, *Videos Challenge Accounts of Convention Unrest*, N.Y. TIMES (Apr. 12, 2005), https://www.nytimes.com/2005/04/12/nyregion/videos-challenge-accounts-of-convention-unrest.html. Videos showing police officer misconduct have frequented the news over the last decade.

144. *See* 18 U.S.C. § 2511(1)(a) (criminalizing the interception of "wire, oral . . . communication"). "All-party" consent statutes require every party to the communication give affirmative consent for the dissemination of the recording to be lawful. *See, e.g.*, Carol M. Bast, Article, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837 (discussing "all-party" consent statutes across jurisdictions).

145. *See* Iacobucci v. Boulter, 193 F.3d 14, 18 (1st Cir. 1999). Here, the court considered whether the officer had the requisite probable cause to arrest the plaintiff. *Id.* at 21–23. Because the plaintiff was lawfully present when he filmed a scheduled meeting of the Historic District Commission, and did not interfere with any of its business, "Iacobucci was doing nothing wrong: he was in a public area . . . he had a right to be there; he filmed the group from a comfortable remove; and he [did not speak] to [them]." *Id.* at 25.

146. *See* Adkins v. Guam Police Dep't, No. 09-00029, 2010 U.S. Dist. LEXIS 87353, at *7 (D. Guam Aug. 24, 2010).

conduct,[147] or stalking.[148] This is certainly an issue as two plaintiffs performing the same action in different jurisdictions may be effectively afforded different rights under the same Constitution.

This new age of journalistic and expressive media captured by civilians directly coincides with the development of First Amendment jurisprudence. The First Amendment has long sought to protect "the free flow of ideas and opinions on matters of public interest and concern."[149] Further, the government cannot place a prohibition on the distribution of ideas or information "that it disfavors, or compel the endorsement of ideas that it disproves."[150] Yet, officers may advance a qualified immunity defense which forecloses a plaintiff's chance for recovery. The Supreme Court has held that retaliatory arrests of citizens who speak out against the government directly violates the First Amendment.[151] These values are inherently present when a civilian records a police officer and the First Amendment is designed to protect such actions. The government has a significant interest in protecting the free exchange of information, especially when it involves the discharge of public duties by its agents. Thus, courts should not permit a police officer to advance a qualified immunity defense to a claim of retaliatory arrest when a civilian freelancer was attempting to record the officer's actions.

A. Constitutional Avoidance

The "clearly established" nature of the First Amendment right to record is in constitutional limbo, and the Supreme Court remains relatively silent on the issue. By declining to hear Levi Frasier's claim in *Frasier v. Evans*, the Court failed to take the opportunity to resolve the recurring constitutional question—whether recording police officers falls within protected First Amendment conduct. The federal

147. *See* Bryant v. Crowe, 697 F. Supp. 2d 482, 484–85 (S.D.N.Y. 2010) (discussing the arrest of a civilian who used vulgar language while recording officers making another arrest).

148. *See* Gravolet v. Tassin, No. 08-3646, 2009 U.S. Dist. LEXIS 45876, at *2–4 (E.D. La. June 2, 2009) (discussing the plaintiff's charge of stalking after videotaping on-duty police officers).

149. Hustler Mag. v. Falwell, 485 U.S. 46, 50 (1988).

150. *See supra* Section II.E.

151. Hartman v. Moore, 547 U.S. 250, 256 (2006).

circuits apply varying principles when presented with the issue, which creates uncertainty regarding an individual's rights. Moreover, police officers are held to different standards purely depending on the jurisdiction in which they work. These inconsistencies produce a chilling effect on protected First Amendment speech, and a failure to recognize a right to record will spur further litigation.

Circuit courts have rationalized the right to record police officers under the principal of gathering information concerning government affairs.[152] Information gathering and its vital role in self-governance is an inherent First Amendment value that is required to complete the analysis. For example, the First Circuit reasoned in *Glik v. Cunniffe* that protecting civilians who record police officers is a logical extension of newsgathering.[153] There, as in *Fields v. City of Philadelphia*, the court noted that "the right to film is not without limitations" and "may be subject to reasonable time, place, and manner restrictions."[154] However, under the facts which involved an officer arresting another individual, the court did not provide an example of when the government interest could justify restrictions on the right to record.[155] Wholly denouncing the right to record contradicts existing precedent and stalls the development of vital constitutional guarantees.

B. The Chilling Effect of Inconsistent Approaches

Courts that determine the First Amendment right to record is not "clearly established" and decide cases by applying qualified immunity risk chilling citizens' protected speech. The Chilling Effect doctrine considers whether government action will result in individuals unnecessarily self-censoring to stay within the realm of protected speech.[156]

152. *See, e.g.*, Fields v. Philadelphia, 862 F.3d 353, 359 (3d Cir. 2017) ("To record what there is the right for the eye to see or the ear to hear corroborates and lays aside subjective impressions for objective facts . . . . [R]ecording policy activity in public falls squarely within the First Amendment right of access to information. As no doubt the press has this right, so do the public.").

153. *See* Glik v. Cunniffe, 655 F.3d 78, 82–84 (1st Cir. 2011).

154. *Id.* at 84.

155. *Id.* at 79, 84.

156. *See* Smith v. People of the State of California, 361 U.S. 147, 154 (1959) ("The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public . . . .").

Without the Supreme Court's protection, citizens are less likely to record public interactions with police officers, especially if the interaction appears worthy of intervention. Claims such as Sabbakhan's have no merit in those jurisdictions, and plaintiffs in her exact place are left without a remedy. If First Amendment jurisprudence concerning the right to record cannot sufficiently develop in a particular jurisdiction, those citizens cannot perform the vital task of public oversight. The danger of criminal charges deters citizens from recording police officers and effectively chills protected First Amendment speech.

The chilling effect of awarding qualified immunity is realized through claims such as Sabbakhan's. Richmond, Virginia lies within the Fourth Circuit, which routinely awards qualified immunity to police officers.[157] The uncertainty of Sabbakhan's claim in the Fourth Circuit highlights the disparity amongst the lower courts in qualified immunity determinations. Whether it be in Richmond, any other city in the Fourth Circuit, or an entirely different jurisdiction altogether, Sabbakhan's story will certainly make civilian freelancers think twice before pressing record.

Following the Supreme Court's guidance in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, a court should likely find that Sabbakhan's claim against the Richmond Police Department is protected First Amendment expressive conduct. First, the court would have considered the nature of Sabbakhan's activity. She recorded police officers after repeatedly asking the officers why they were interested in the woman.[158] Second, the court must evaluate the activity's factual context. Sabbakhan began to record officers after realizing the woman's condition made her vulnerable and the abrasive manner in which police officers conducted their questioning.[159] Third,

157. Szymecki v. Houck, 353 Fed. Appx. 852, 852–53 (4th Cir. 2009); *see also* Garcia v. Montgomery Cnty., 145 F. Supp. 3d 492, 506 (D. Md. 2015) ("Although the Court finds that there is a constitutional right to video record public police activity, it concludes that the right was not clearly established in this jurisdiction at the time of the incident, and so grants qualified immunity to the officers on the First Amendment damages claim."). While the court did not deny the existence of the right to record, it did not declare it a right worth protecting. *Garcia*, 145 F. Supp. at 509.

158. *See supra* notes 1–3 and accompanying text. The actions and words of Sabbakhan clearly indicates that she was displeased with the government's actions and desired to document the interaction.

159. *See supra* notes 1–3 and accompanying text.

the court would have looked to the environment in which the plaintiff's conduct occurred. Sabbakhan recorded officers interacting with another civilian who was not detained, under arrest, or accused of violating any law.[160] She did not physically intrude into the officer's physical space nor interfere with any sort of official investigation.[161] Sabbakhan merely witnessed an interaction she felt warranted intervention. Having satisfied all three prongs of the Hurley framework, the outcome of Sabbakhan's claim would have come to a different outcome—a better outcome where her conduct fell under the protections of the First Amendment. And most importantly, Sabbakhan would not have been denied recovery on the basis of qualified immunity.

C. The Substantial Governmental Interest in Consistency

Civilians who record police officers serve an important democratic function—creating a record that renders the government action subject to scrutiny and ensures accountability of public officials.[162] Heightened social awareness coupled with the ability to capture audio and video footage of these public officials has sparked public debate regarding the practices and protocols of municipal police departments.[163] The role that recordings play in spurring progressive social protests and movements indicates the power that these recordings have to create concrete political change.[164] Beyond a mere accountability function, civilian recordings also act as a form of expressive resistance to police officers by influencing the behavior of those being recorded.[165] It is not a novel idea that individuals tend to act orderly if they are aware their actions are being recorded.[166] Even further, many

160. *See supra* notes 1–3 and accompanying text.

161. *See supra* notes 1–3 and accompanying text.

162. Sarah Almukhtar et al., *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, N.Y. TIMES (Apr. 19, 2018), https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html.

163. Subramanian & Arzy, *supra* note 25.

164. *See* ZEYNEP TUFECKI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST 6–7 (2017) (discussing the correlation between the cell-phone camera popularity and social movements across the country).

165. *Id.*

166. Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 196–97 (2008) ("[B]eing in public entails a degree of exposure, and

jurisdictions require police officers to wear a body camera while on-duty.[167] Applying a uniform standard to right-to-record claims promotes active citizen engagement because civilian freelancers know the First Amendment protects their conduct. The current inconsistencies in the law only work to chill a citizen's protected conduct.

IV. SOLUTION

A citizen who fears a police officer is using excessive force or acting unfaithfully should not be punished for their vigilance. Recording the actions of police officers performing their official duties is a form of speech that allows individuals to gather information and then disseminate that information for public scrutiny. To develop protected speech jurisprudence, courts presented with a right-to-record claim should read the First Amendment with the background of general First Amendment jurisprudence from the Supreme Court. This Section proposes a departure from the sequencing formula in *Pearson v. Callahan* because, as the right to record is clearly established, police officers cannot retain qualified immunity. Instead, courts should employ the expressive conduct test from *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, which does not require a "narrow, succinctly articulable message" for First Amendment protection, to find that the right to record is "clearly established."[168] The Supreme Court's precedent in *United States v. O'Brien* and *Spence v. State of Washington*, provides these factors to aid the analysis: (1) nature of the activity; (2) its factual context; and (3) the environment in which the conduct occurred.[169]

This Section further argues that Congress should amend § 1983 to eliminate qualified immunity as a possible defense for police

that . . . sometimes exposure can have beneficial consequences . . . . [I]f the potential for exposure reduces the incidence of those behaviors, so much the better.").

167. *Research on Body-Worn Cameras and Law Enforcement*, NAT'L INST. OF JUST. (Jan. 7, 2022), https://nij.ojp.gov/topics/articles/research-body-worn-cameras-and-law-enforcement ("This report showed that: 47% of general-purpose law enforcement agencies had acquired body-worn cameras; for large police departments, that number is 80%.").

168. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

169. Spence v. Washington, 418 U.S. 405, 409–10 (1974) (citing United States v. O'Brien, 391 U.S. 367, 376 (1968)).

officers. The amendment should prohibit advancement of the affirmative defense when officers, intentionally or otherwise, interfere with an individual's constitutional rights irrespective of the right's clearly established nature.

A. Applying the Expressive Conduct Test

While information gathering typically consists of predominately non-expressive conduct, the act can be protected under the First Amendment if there is a sufficient link to expressive activity.[170] Under the current expressive conduct framework provided by the Court, the right to record is clearly established in each jurisdiction of the United States. The Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* removed the "particularized message" requirement, and reinstated the *Spence* test, leaving courts to consider three elements: (1) the nature of the conduct; (2) its factual context; and (3) the environment in which the conduct occurred.[171]

The quintessential question for the court to determine, if the First Amendment applies to citizens who record police, is whether the expressive conduct test applies. Rather than following the strict "particularized message" language in *Texas v. Johnson*,[172] courts should look to the totality of the circumstances surrounding the interaction. If a court applies the *Johnson* standard, and the plaintiff fails to demonstrate an intent to convey a particularized message, then there can be no protection.[173] This approach leaves many civilian freelancers at the mercy of the courts—which could lead to an uneven recognition of a "clearly established" First Amendment right.

Rather than focusing the analysis on the conduct of the individual, the court should look to the information gathering value of civilian freelancer recordings. The *Hurley* and *Spence* framework consider the totality of circumstances surrounding the civilian freelancer which helps foster the development of First Amendment jurisprudence

170. *See supra* Section II.A.

171. Texas v. Johnson, 491 U.S. 397, 404 (1989) (citing *Spence*, 418 U.S. at 410–11).

172. *See supra* Section II.A (discussing the evolution of expressive conduct jurisprudence).

173. *See* Fields v. City of Philadelphia, 166 F. Supp. 3d 528, 534–37 (E.D. Pa. 2016), *rev'd*, 862 F.3d 353 (3d Cir. 2017).

regardless of technological advances. This would sufficiently balance the government interest with the protection of an individual's civil liberties. Under this approach, claimants such as Sabbakhan are able to express their reasoning for recording police officers and benefit from the First Amendment protection of the right to record.

B. An Amendment to End Impunity

Municipal police officers should be statutorily prohibited from advancing qualified immunity defenses when a court is considering the clearly established nature of a constitutional right. While federal legislation was previously proposed in the United States Senate to remove qualified immunity as a possible defense, it is unlikely to resurface from the Committee on the Judiciary.[174] Without federal guidance, states have taken action to address the liability assigned to police officers for uses of excessive force and other unlawful actions.[175] A few state legislatures have enacted new laws or amended existing statutes to limit an officer's reliance on qualified immunity.[176]

Congress should address a police officer's impunity and reliance on qualified immunity through an amendment to § 1983. While independent legislation to address the defense has seemingly perished in subcommittee,[177] an amendment to the provision could spark sufficient support. The proposed amendment must include language that directly eliminates the defense of qualified immunity, especially when the court

174. Ending Qualified Immunity Act, S. 492, 117th Cong. (2021). The proposed bill was sent to subcommittee where it is unlikely to leave. It has received little support from Republicans and moderates.

175. Ronnie R. Gipson Jr., *How Qualified Immunity Protects Police Officers Accused of Wrongdoing*, CONVERSATION (May 4, 2021), https://theconversation.com/how-qualified-immunity-protects-police-officers-accused-of-wrongdoing-159617.

176. *See, e.g.*, SB20-217, 73rd Gen. Assemb., 2d Reg. Sess. (Colo. 2010) (creating a civil cause of action for individuals whose rights were deprived by police officers); No. 6004, Gen. Asssemb., July Spec. Sess. (Conn. 2020). In both statutes, if the officer cannot pay the amount awarded to the plaintiff, then the jurisdiction is required to indemnify the officer. Colo. SB0-217; Conn. No. 6004. Extending liability beyond the individual officers ensures that municipalities will take the constitutional rights of its civilians into consideration.

177. *See supra* note 176 and accompanying text.

is determining if the right is clearly established in that particular jurisdiction. The amended language should read as follows:

> It is impermissible for a defendant to an action under this section to rely on a defense that he or she reasonably believed that his or her conduct was lawful at the time it was committed. It shall not be a defense that the rights, privileges, or immunities secured by the Constitution and laws were not clearly established at the time of the alleged deprivation.

This proposed statutory language abolishes qualified immunity on two fronts—the objective test as articulated by the Supreme Court in *Harlow* and the officer's subjective belief that the right was not clearly established. The amendment eliminates police officers' widespread reliance on qualified immunity to defeat claims of alleged constitutional violations.

Under this proposed amendment to § 1983, litigation would not be disposed of merely because a court believes the constitutionally protected right is not clearly established. As monetary damages are often the only remedy available to a plaintiff after a constitutional violation, the road to assigning liability should not be littered with obstacles barring recovery. This proposed framework embraces civilian suits lodged against municipal police officers by ensuring that plaintiffs have an opportunity for their case to be heard. Rather than awarding summary judgment to officers and their respective departments for infringing on a quasi-clearly established constitutional right, courts should be statutorily prohibited from permitting qualified immunity defenses.

This proposed language ensures the development of First Amendment jurisprudence while continuing to give the courts discretion to determine if a right is clearly established. Under the current framework, courts may permit a qualified immunity defense before considering if the right is clearly established.[178] Civilians maintain a significant interest in expanding the First Amendment to include expressive conduct that serves as an oversight on police officers. Additionally, this language prevents a defendant police officer from relying

178. *See supra* Section II.D.

on ignorance as a defense to a civil rights claim. Even when a specific police department's protocol is designed to protect a civilian's right to record, officers who violate the right are permitted to advance a qualified immunity defense in flagrant disregard of the policy.[179] This allowance directly infringes upon protections guaranteed by the Constitution and restricts citizens who seek to engage in protected First Amendment expressive conduct. Abolishing qualified immunity would bring us a step closer to holding officers accountable for their conduct.

V. CONCLUSION

Unfortunately, Sabbakhan's claim arose under the jurisdiction of the Fourth Circuit, which has been silent regarding a civilian's right to record police officers. If Sabbakhan were to move forward with litigation against the Richmond Police Department, it is unclear which analysis the court would follow. The First Amendment rights of citizens should not be determined by the plaintiff's geographical location. Without guidance from the Supreme Court, the retaliatory arrests of police officers continue to effectively chill protected speech. This Note proposes a method that strikes the correct balance between government and private interests.[180] By focusing the right to record analysis on the (1) nature of the activity; (2) its factual context; and (3) the environment in which the recording occurred, courts can accurately resolve the conflicting standards. Applying the expressive conduct formula provided by the Court in *Spence* and *Hurley* to civilian recordings ensures that officers cannot hide under the guise of qualified immunity to justify retaliatory arrests. However, without a congressional amendment to § 1983, the right to record is left for courts to interpret and unequally apply.

179. *See supra* note 125 for an example from the Third Circuit.

180. *See supra* Section IV.A.