

NO CALLING CUT: THE POLITICAL RIGHT TO RECORD POLICE

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On February 15, 2014, Shawn Thomas witnessed and began recording New York Police Officer Efrain Rojas making an arrest at a subway station.¹ All indications show that Thomas was a safe distance away, approximately thirty feet, when Rojas retaliated by video recording Thomas.² Rojas approached Thomas, shoving his camera in Thomas's face, and the two began arguing.³ Thomas eventually accused Rojas of invading his personal space; Rojas accused Thomas of the same thing.⁴ A sudden skip in the video occurred.⁵ The next image was of Rojas and presumably Shawn Thomas outside.⁶ Rojas was pressing Thomas against the snow-covered ground.⁷ A third person had taken over the camera, recording Rojas as he arrested Thomas.⁸ Thomas was charged with resisting arrest, trespassing, disorderly conduct, and obstructing government.⁹

Thomas's story is not, at its core, unusual. A quick internet search can provide numerous videos of police officers aggressively approaching civilians who happen to record the officers in the course of their public duties.¹⁰ Officers' reactions range from the one seen in

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1 Andrea Park, *VIDEO: NYPD Officer Allegedly Assaults Man For Recording Arrest on Phone*, METRO (Feb. 19, 2014), <http://www.metro.us/newyork/news/local/2014/02/19/video-nypd-officer-allegedly-assaults-man-for-recording-arrest-on-phone/>; Thomas Tracy, *VIDEO: Cop Allegedly Assaults Man Recording Him in Brooklyn Subway Station*, N.Y. DAILY NEWS (Feb. 19, 2014, 3:23 PM), <http://www.nydailynews.com/new-york/brooklyn/allegedly-assaults-man-recording-article-1.1620037>.

2 Park, *supra* note 1.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *See, e.g.*, Copwatch News, *Kentucky Cops Detain Man for "Suspicion of Terrorist Activity" for Video Recording Police Station*, YOUTUBE (Aug. 13, 2012), http://www.youtube.com/watch?v=_

Thomas's case, ultimately leading to the recorder's arrest, to simply approaching the civilian recorder and inquiring as to what he or she was doing and why.

Arrests of civilian recorders are by no means unusual. Cases surrounding civilian recorders being arrested and charged with violations of privacy,¹¹ harassment,¹² or wiretapping¹³ statutes have begun peppering the district courts and even reaching the circuit courts. Over the past decade, four circuits have decided cases in which a civilian recorder was arrested or forced to cease recording. The recorders, believing this to be a violation of their First Amendment rights, filed claims pursuant to 42 U.S.C. § 1983.¹⁴ The decisions collectively indicate that there is a firmly established First Amendment right to record police officers, but that courts are only starting to address the Fourth Amendment concerns. While the recorder does have a First Amendment right to record, the right overlaps with Fourth Amendment jurisprudence dictating the reactions permissible by law enforcement officers. In addition, the right to record cannot be so limitless as to allow recorders to directly interfere with law enforcement.

This Comment will explore the First Amendment rights of the civilian recorder, taking into consideration reasonable limitations and police officer reactions. Part I considers the current circuit decisions

valioLMxFQ at 0:50–1:15, 4:15–4:50 (depicting an officer explain that taking photographs or pictures of a police building is a suspicious activity relating to terrorist activities and creates fear for an officer's safety); Jay Kelly, *Harassed by Boston Police for Taking Video*, YOUTUBE (Aug. 13, 2013), <http://www.youtube.com/watch?v=zaF2u9G-jXE> (showing Boston Police officers harassing a recorder for endangering a plainclothes police officer and interfering with an investigation despite other civilians being allowed to walk nearby); Digby Jones, *California Deputy Detains Man for Video Recording Arrest, Accusing Him of Possibly Plotting Murder*, YOUTUBE (June 13, 2013), <http://www.youtube.com/watch?v=pk0jjs-VUyQ> (showing an officer approaching a bystander, detaining him, and asking for ID for recording an arrest); stopthenewworldorder_now.com, *Police Harass Children for Filming Police*, YOUTUBE (May 22, 2013), <http://www.youtube.com/watch?v=H0KNRiliVDM> (seemingly depicting an officer forcibly removing a camera phone from an individual).

¹¹ See, e.g., *Johnson v. Hawe*, 388 F.3d 676, 679 (9th Cir. 2004) (refusing to grant an officer qualified immunity for arresting an individual under the State of Washington's Privacy Act).

¹² See, e.g., *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 538–40 (E.D. Pa. 2005) (reviewing the previous conviction of a man for harassment after he videorecorded Pennsylvania state troopers, whom the man believed were inspecting trucks in an unsafe manner).

¹³ See, e.g., *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011) (discussing a Massachusetts man's arrest for violating state wiretap statutes after videorecording Boston police officers making an arrest); *Commonwealth v. Hyde*, 750 N.E.2d 963, 964 (Mass. 2001) (discussing a citizen's arrest for video recording that occurred during a traffic stop).

¹⁴ 42 U.S.C. § 1983 provides for a civil right of action when an individual acting under the color of the law deprives a citizen or person within the jurisdiction of the United States of his Constitutional rights. 42 U.S.C. § 1983 (2006).

surrounding Right to Record cases and examines a balanced approach between viewpoints. Part II examines the First Amendment right to record as part of a right to gather public information. Part III examines realistic limitations and concerns surrounding the right to record, including the intersection with the Fourth Amendment.

I. CURRENT CIRCUIT DECISIONS

The following part examines the current circuit court decisions surrounding the right to record. As the public has become increasingly saturated by smart phones, and cameras record almost every aspect of our lives, courts have begun to address the First Amendment concerns posed by arrests and limitations on the civilian video recording of police officers in the course of their public duties. At the time of the drafting of this Comment, the First, Third, Ninth and Eleventh Circuits have all faced the issue, each taking a slightly different approach in interpretation.

A. *First Circuit – A Right to Record Matters of Public Interest*

The First Circuit addressed the issue of the citizen-recorder in the 2011 case of *Glik v. Cunniffe*.¹⁵ The court was faced with a 42 U.S.C. § 1983 suit for violation of civil rights after Simon Glik, a Massachusetts resident, was arrested and charged with wiretapping¹⁶ for video and audio recording three police officers arresting a young man.¹⁷ Glik recorded the interaction on his personal cell phone from about ten feet away, not otherwise interacting with the officers. While the wiretapping charges were eventually dismissed, Glik believed the arrest violated his First Amendment Rights.

The First Circuit found that “[t]he filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within” the protected First Amendment principles of gathering and disseminating information.¹⁸ In reaching its conclusion, the court looked to the

¹⁵ 655 F.3d 78 (1st Cir. 2011).

¹⁶ *Id.* at 80; *see also* MASS. GEN. LAWS ch. 272, § 99(C)(1) (2014) (“Except as otherwise specifically provided in this section any person who willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one half years, or both so fined and given one such imprisonment.”).

¹⁷ *Glik*, 655 F.3d at 79.

¹⁸ *Id.* at 82.

rights of a citizen recorder and equated them with the rights of the press.¹⁹ The First Circuit then looked to surrounding jurisdictions to reach the conclusion that there was a First Amendment right to record the actions of police officers in public spaces, drawing heavily on the importance of discourse pertaining to government affairs.²⁰

B. Third Circuit – Reasonable Time, Place, and Manner Restrictions

In *Kelly v. Borough of Carlisle*,²¹ the Third Circuit addressed a qualified immunity claim²² for officers who stopped Brian Kelly, a passenger in a vehicle, from recording the routine traffic stop.²³ Kelly habitually carried a hand-held video camera and began recording a Pennsylvania police officer,²⁴ who had stopped the driver for speeding and a bumper height violation.²⁵ The police officer asked Kelly to relinquish the camera, believing this to be a violation of wiretapping statutes. Kelly complied.²⁶ After consulting with a district attorney, the officer arrested Kelly for violating Pennsylvania's Wiretap Act.²⁷ The officer asked for bail and held Kelly in prison for 27 hours.²⁸ Charges were eventually dropped, but Kelly pursued a § 1983 suit alleging the police officers violated his First Amendment right to record and Fourth Amendment right to be free from arrest lacking in probable cause.²⁹

¹⁹ *Id.* at 83.

²⁰ *Id.* at 83–84.

²¹ 622 F.3d 248 (3d Cir. 2010).

²² An individual who is facing a § 1983 suit for violation of rights can claim qualified immunity as a defense. Qualified immunity protects government officials from liability when their conduct does not clearly violate a Constitutional right. If there was no constitutional right, or if the right was not clearly established at the time of the violation, the government official is freed from liability and any resulting damages. *See Anderson v. Creighton*, 438 U.S. 635, 638 (1987) (noting that the defense arose out of “conflicting concerns” for, on the one hand, a victim’s right to meaningful relief and for, on the other, the societal costs of allowing damage suits against public officials); *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982) (noting at the outset of its analysis that the Court’s “decisions consistently have held that government officials are entitled to some form of immunity from suits for damages”).

²³ *Kelly*, 622 F.3d at 251–52.

²⁴ There is some dispute about whether the camera was in plain sight the entire time. *Id.* at 251. This dispute is immaterial to the First Amendment question.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 251–52; *see also* 18 PA. CONS. STAT. §§ 5701–5782.

²⁸ *Kelly*, 622 F.3d at 252.

²⁹ *Id.*

The Third Circuit reviewed the district court's grant of summary judgment for the police officer based on qualified immunity.³⁰ In examining whether there was Fourth Amendment probable cause to arrest under the wiretapping statute, the court considered whether the officer had a reasonable expectation of privacy in his actions with Kelly, making it a private conversation.³¹ The court vacated the officer's summary judgment with respect to qualified immunity, remanding for additional fact-finding.³²

The Third Circuit also reviewed the First Amendment claim, which the district court dismissed as not clearly established.³³ Looking to the surrounding circuit court decisions, the Third Circuit noted the right to record matters of public concern is still subject to the limitations of reasonable time, place and manner.³⁴ In a previous Third Circuit decision, *Whiteland Woods, L.P. v. Township of West Whiteland*,³⁵ reasonable time, place, and manner restrictions led the court to allow the prohibition of video recording town hall meetings, because the act of gathering information in the context of the First Amendment allowed note-taking as a reasonable manner restriction as opposed to video recording.³⁶ Due to the *Whiteland Woods* decision,³⁷ amongst others, the Third Circuit found that the right to record was not clearly established, upholding the grant of qualified immunity on the First Amendment issue.³⁸

³⁰ *Id.*

³¹ *Id.* at 258. The Court considered the expectation of privacy not as a part of the First Amendment issue, but based on the language of the statute. The Wiretapping statute only prohibits the interception of oral communications possessing an expectation that the communication not be intercepted. *See id.* at 257; 18 PA. CONS. STAT. §§ 5702–03.

³² *Kelby*, 622 F.3d at 259.

³³ *Id.*

³⁴ *Id.* at 262. Time, place, and manner restrictions are common First Amendment limitations. Those engaged in conduct covered by the First Amendment can still be limited in reasonable, content-neutral ways that dictate the time frame, location, and manner of communication. This is discussed more in Part III, *infra*. *See also* *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“Our cases make clear . . . that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech . . .”).

³⁵ 193 F.3d 177 (3d Cir. 1999).

³⁶ *Kelby*, 622 F.3d at 262.

³⁷ *Whiteland Woods, L.P. v. Township of W. Whiteland*, 193 F.3d 177 (3rd. Cir. 1999)

³⁸ *Kelby*, 622 F.3d at 262–263.

C. *The Ninth Circuit – No Clearly Established Interpretation of the State Statute*

The Ninth Circuit in 1995 offered a much more limited approach when deciding *Fordyce v. City of Seattle*.³⁹ Jerry Edmond Fordyce was video recording a Seattle protest, including police officers and civilian bystanders, for local television.⁴⁰ After being arrested under Washington privacy statutes, which were later dismissed after a night in jail, Fordyce filed a § 1983 civil rights claim.⁴¹ The district court granted summary judgment based on qualified immunity.⁴² The Circuit Court rejected qualified immunity for the First Amendment claims, remanding them for trial.⁴³ It then upheld a grant of qualified immunity for the arrest, basing its decision on the state law that prohibited recording private conversations.⁴⁴ The court found that, at the time of arrest, it was not sufficiently clear if conversations in public constituted private conversations for the purpose of the statute.⁴⁵ The Ninth Circuit therefore upheld the grant of qualified immunity with respect to the arrest under the Fourth Amendment.

D. *Eleventh Circuit – Reasonable Time, Place, and Manner Restrictions*

The Eleventh Circuit's decision in *Smith v. City of Cumming* upheld a grant of summary judgment in favor of police officers who prevented James and Barbara Smith from video recording the officers in public.⁴⁶ The court stated:

As to the First Amendment claim under Section 1983, we agree with the Smiths that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct.⁴⁷

Yet, the court found the police officers' actions did not violate this right, despite an allegation of police officers preventing video recording.⁴⁸

³⁹ 55 F.3d 436 (9th Cir. 1995).

⁴⁰ *Id.* at 438.

⁴¹ *Id.*

⁴² *Id.* at 438–39.

⁴³ *Id.* at 439.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 212 F.3d 1332, 1332–33. (11th Cir. 2000).

⁴⁷ *Id.* at 1333.

⁴⁸ *Id.* at 1332–33. No additional factual information was provided to clarify how the officers prevented the Smiths from recording. The Court provided no information to reconcile the claim that the officers stopped the Smiths with the statement that the Smiths “have not shown that the [officers’] actions violated that right.” *Id.*

With the variations among courts, which approach should dominate, and what, if anything, can police officers do in response to civilian recording? The common theme amongst the courts is granting of the right to record in limited circumstances. The exception to this is the First Circuit, which used broad language and looked to the diminished privacy in public locations and the importance of the type of speech. None of the courts have been willing to throw open the police station doors to civilians with cameras in hand. Yet, the police actions that occur on public streets are readily available for all to see. Adding a video recorder only alters the calculus in that it creates an arguably objective record of the events.

This approach recognizes that the public has a legitimate interest in monitoring and observing the activities of police officers as government officials. It encompasses the First Circuit's belief that there is a right to record, but that the right extends only to public places, a reasonable place restriction.

There is, however, also a legitimate interest in protecting officers from violence and police investigations from intrusions stemming from recorders. While these are common concerns, the balance rests on allowing civilians to record officers performing their duties when officers are in public and can be personally observed. There also must be recognition that the legal activity of recording is not shielded from reactions or from arousing suspicions of illegal activity in some contexts. The act of video recording, although constitutionally protected, can be considered in the probable cause and reasonable suspicion analyses on behalf of the officers.

II. THE FIRST AMENDMENT PROTECTIONS OF POLITICAL SPEECH

The primary concern of the courts mentioned above in assessing these cases has been Freedom of Speech and the Press. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."⁴⁹ Despite the two separate phrases for speech and press and a contentious debate among academics,⁵⁰ it has been determined that both provisions encompass

⁴⁹ U.S. CONST. amend. I. The First Amendment was made applicable to the states through the Fourteenth Amendment in *Murdock v. Pennsylvania*, 318 U.S. 105, 108 (1943).

⁵⁰ Compare Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1027–28 (2011) (arguing that treating freedom of the press and freedom of speech equally creates an impermissible redundancy in phrasing), with Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 462–

the same general right to expression, with members of the press being awarded no greater rights than those of the public.⁵¹ The First Amendment focus is well-founded and the primary concern that should arise when discussing the suppression of video recording of police officers and dissemination of information surrounding government actors. This part will discuss (a) the appropriate level of scrutiny with this type of issue; (b) the right to gather information under the First Amendment, specifically in the context of an overly vague and often-ignored case; and (c) film as a specifically protected medium of First Amendment activity. In conclusion, this part will find that there is a right to record government officials as part of the First Amendment.

A. Judicial Scrutiny of Speech Regulations and Police as Government Actors

Exacting scrutiny should be applied when considering limitations to the right to record. It has been determined that the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”⁵² The very core of this amendment is political speech, receiving the strongest protections amongst the various categories of speech.⁵³ This rationale stems from the concept of a well-informed electorate

63 (2012) (arguing that the Framers considered the press to be a form of technology and were attempting to “secur[e] the right of every person to use communications technology, and not just securing a right belonging exclusively to members of the publishing industry”).

51 *Houchins v. KQED, Inc.*, 438 U.S. 1, 10–11 (1978); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974); *Pell v. Procnier*, 417 U.S. 817, 833–34 (1974); *Nixon v. Warner Commc’ns*, 435 U.S. 589, 608–09 (1978).

52 *Roth v. United States*, 354 U.S. 476, 484 (1957); *see also Thornhill v. Alabama*, 310 U.S. 88, 101–02 (“The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”).

53 *See Buckley v. Valeo*, 42 U.S. 1, 15–16 (1976) (finding that financial contributions are a form of political speech which is at the very core of the First Amendment); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (finding that a higher standard of intent is needed in libel cases when the plaintiff is a public official because the First Amendment was designed to facilitate the dissemination of information about public officials); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (Stevens, J., concurring) (“Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position . . .”).

creating political accountability for those that allegedly serve them.⁵⁴ While the formal law requires a strict scrutiny of content-based speech restrictions,⁵⁵ and intermediate scrutiny surrounding content-neutral restrictions,⁵⁶ the public interest in gauging government actions is so high and historically ingrained that even the review of content-neutral regulations of speech pertaining to government actors can begin to look more like strict scrutiny and is sometimes referred to as “exacting scrutiny.”⁵⁷ For example, the Supreme Court requires a higher standard of intent in libel suits brought for defamation of a public figure’s character so as to not chill the conversation surrounding government and politics.⁵⁸ While the law at issue in *Sullivan* was content-neutral, the concern over free speech and government officials required heightened sensitivity. The stakes are simply higher when pertaining to government actions and actors, those very people that are supposed to be acting on the citizen’s behalf and with their consent.

The restrictions on the right to record, like the libel statutes, are content neutral but also encompass the political speech that the First

54 This idea has been foreshadowed in Justice Powell’s dissent in *Saxbe*.

What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny. . . . “[The] First Amendment is one of the vital bulwarks of our national commitment to intelligent self-government.” It embodies our Nation’s commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression.

417 U.S. at 862–63 (Powell, J., dissenting) (internal citations omitted). See also *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”).

55 See *McCullen v. Coakley*, 134 S.Ct. 2518, 2530 (2014) (stating that restrictions that are not content neutral “must satisfy strict scrutiny—that is, it must be the least restrictive means of achieving a compelling state interest”); see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 653–55 (1994) (describing the level of scrutiny as “strict” for any conferred benefit or punishment based on the content of a message) (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974); *Pac. Gas & Elec. Co. v. Pub. Utilities Comm’n*, 475 U.S. 1 (1986)).

56 See *Turner Broad. Sys.*, 512 U.S. at 642 (“[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny.”).

57 See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (“When a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.”).

58 *Sullivan*, 376 U.S. at 268–69.

Amendment strives to keep unfettered. Police officers possess an immense amount of power and an immense potential for abuse.⁵⁹ They are the government actors we are most likely to encounter, and that proximity creates a desire for close monitoring and accountability worthy of the highest level of judicial scrutiny—exacting scrutiny under which the law can only stand when it is narrowly tailored for an important government interest.

B. The Right to Gather Information as Part of the First Amendment

The First Amendment Freedom of Speech and the Press, in the case of the civilian recorder and most other political communication, would be hollow if there was no implicit right to gather information. In recognition of this, the Supreme Court has found within the First Amendment a right to access, receive, and gather information. This “structural model”⁶⁰ protects the First Amendment by protecting those seeking out news, and ensuring that they are not arbitrarily cut off from normally accessible information.⁶¹ This right to gather is by no means absolute,⁶² yet “[t]here is an undoubted right to gather news ‘from any source by means within the law.’”⁶³

Within the context of the First Amendment right to record, this presents no unique problem to the citizen recorder. Surely the recorder has a right to use his or her sense of sight and to access public places.⁶⁴ While the recorder would not have the right to request en-

⁵⁹ See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 455–56 (2004) (explaining that the “distinctive and influential organizational culture” of police offices “bears significant responsibility for police misbehavior”).

⁶⁰ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (“But the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes, it has a *structural* role to play in securing and fostering our republican system of self-government.”).

⁶¹ See *id.* at 576–77 (finding a right to gather information at criminal trials should be protected from arbitrary foreclosure because they were historically open to the public); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (“We do not question the significance of free speech, press, or assembly to the country’s welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.”).

⁶² See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 8–9 (1978) (finding that there is no right to access all sources of information within government control, specifically within secure prison systems); *Zemel v. Rusk*, 381 U.S. 1 (1965) (upholding a ban on passports to Cuba, because national safety is of greater importance than the gathering of information firsthand).

⁶³ *Houchins*, 438 U.S. at 11 (citing *Branzburg*, 408 U.S. at 681–82).

⁶⁴ In fact, a whole range of Fourth Amendment jurisprudence exists on this assumption, allowing officers to make warrantless arrests in public, and seize evidence in plain view. Limiting the public access to see and document this information would then have to cre-

trance to police files and offices, the recorder would be allowed to gather the information projected to the public and readily accessible for all to see. Yet, problems exist in (1) the right to observe arrests and (2) the right to gather information through a specific type of medium: film.

1. *The Often-Ignored Problem of Colten: No Right to Observe Without Something More*

Particularly important within the Right to Record and gathering information context is a case seemingly forgotten by recent Circuit Court decisions: *Colten v. Kentucky*.⁶⁵ The case has thus far been ignored by the circuit courts, but explicitly rejected a First Amendment right to observe police actions.⁶⁶ If there is no right to visually observe an arrest as police activity, then there would likely be no right to video record either.

In *Colten*, one car amongst a procession of vehicles was pulled over for a legal traffic stop.⁶⁷ Drivers following, including Colten, pulled off the highway, many leaving their cars.⁶⁸ The large gathering of cars caused additional officers to stop, blocking one lane of the highway and causing traffic to back up.⁶⁹ Colten approached the initial officer several times to arrange for transportation of passengers and watch the officer; he was asked to return to his car and leave the scene.⁷⁰ When Colten remained, he was charged with disorderly conduct for “congregat[ing] with other persons in a public place and refus[ing] to comply with a lawful order of the police to disperse” while intending to cause a public inconvenience.⁷¹ In a challenge to his charges, Colten claimed that he was engaged in the First Amendment activities of disseminating and receiving information relating to the issuance of a traffic citation.⁷² The Supreme Court rejected this reasoning, finding that the officers had a legitimate interest in enforcing traffic laws and were reasonably worried that the procession of cars on the side

ate a limitation in the actions of police officers, who only derive their rights to act on and consider evidence based on a known lack of privacy.

⁶⁵ 407 U.S. 104 (1972).

⁶⁶ *Id.* at 109 (noting that the arrangement for transportation and observation of the issuance of a traffic citation was not disseminating or receiving information, and therefore was not under the protection of the First Amendment).

⁶⁷ *Id.* at 106.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 106–07.

⁷¹ *Id.* at 108.

⁷² *Id.* at 109.

would be a danger to those parked and to other motorists. Therefore, the argument was a “strained, near-frivolous contention” and the conduct “was not, without more, protected by the First Amendment.”⁷³

Colten, when read too narrowly, seems to create a limitation for the Right to Record advocates, but can easily be explained in the context of the prevailing Right to Record decisions. When examining the facts, *Colten* aligns most clearly with the reasonable time, place, and manner rationalization of the Eleventh Circuit. Impeding the flow of traffic and interfering with the officer’s issuing of a citation is not a reasonable manner of observing an arrest. Yet, it was the very act of observing that *Colten* did not have a right to “without more.”⁷⁴ *Colten* can fit within the prevailing Right to Record decisions if (a) it declares that the right to observe is not absolute and is subject to reasonable limitations; or (b) an individual has no right to observe, but the act of recording is the something “more” that the Court needed to find First Amendment protection.

*a. Colten Dealt with the Unique Situation of an Observer Actually
Obstructing an Officer From the Performance of His or Her Duties*

One possible explanation of *Colten* in the right to gather information and Right to Record context is that the court was less clear on this issue than we now wish they were or was engaged in some faulty reasoning. *Colten*’s observance of the arrest was not the issue. Instead, the issue was doing so on a public highway and with a sufficient number of people as to limit the use of the road. The courts have “consistently recognized the strong interest of state and local governments in regulating the use of their streets and other public places.”⁷⁵ Even in the infamous case of Martin Luther King Jr.’s civil rights marches in Birmingham, the Supreme Court recognized the need to monitor highways with reasonable regulations:

Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Walker v. City of Birmingham, 388 U.S. 307, 315 (1967).

of the means of safeguarding the good order upon which they ultimately depend.⁷⁶

Very similarly, Colten's valid interest in gathering information under the First Amendment did not create unbridled access at the cost of reasonable safety and transportation regulations. Colten had a right to be in a publicly accessible place, and he clearly had a right to use his senses and see what was occurring around him. However, Colten could not exercise his First Amendment rights in any way he so desired. His rights remained subject to a larger body of law governing time, place, and manner.

When understood as a case balancing First Amendment rights with public safety, *Colten* seems more reasonably adapted within the circuit court decisions. Civilians have a right to record, but no right is absolute and shielded from inconveniences. The Eleventh Circuit, although not abundantly clear in the acceptable limitations, correctly identified that speech is subject to reasonable time, place, and manner restrictions. For Colten, his manner was blocking the flow of traffic and creating a risk of an accident while engaging the officer in conversation, ultimately distracting the officer from his legal actions. It was not the observation that was the problem; it was the manner Colten chose to observe.

b. Observation Does Not Merit First Amendment Protection, but the Act of Recording is Additional Speech Activity Worthy of Protection

Colten can also be reconciled with current Right to Record decisions by claiming that the act of recording creates the higher level of protection under the First Amendment. The *Colten* court stated, "Colten's conduct in refusing to move on after being directed to do so was not, without more, protected by the First Amendment."⁷⁷ Colten's reasoning for not moving was based on a desire to arrange transportation and observe the issuance of a citation, seemingly insufficient under the first amendment "without more."

When attempting to reconcile this with current Right to Record decisions, it is possible that the act of recording constitutes the something "more" to which the court referred. This approach has received at least some support. Mario Cerame, in considering *Colten* in the context of recording officers in Connecticut, believes that the critical difference may be the presence of a device that can capture

⁷⁶ *Id.* at 316 (citing *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)).

⁷⁷ *Colten*, 407 U.S. at 109.

and publish the events.⁷⁸ Respectfully, the observation could have just as easily been written in a newspaper article or a book, presented at a defense hearing, or orally repeated to others at a later time, and it would have been equally protected under the First Amendment but only required visual observation like that in *Colten*. It is hard to imagine that the gathering of information for a book or newspaper, which may only require observation as opposed to video, would receive different levels of protection.

As discussed in the part immediately below, an individual's choice in how to gather information is an additional First Amendment issue of concern in Right to Record cases.

c. Choice of Information-Gathering Medium as a First Amendment Issue: The Right to Film over Simple Observation

Once it is accepted that individuals have a right to use their biological senses to gather information openly accessible to all through every day observation, the right to do so by means of video recording must be addressed. The act of recording is, in itself, expressive activity protected under the First Amendment. While the act of taking a video may be seen as non-expressive physical act of simply standing and holding a camera, the video being produced conveys a message.⁷⁹ In Right to Record cases, it is a political message.

Film, either moving or still, has previously been recognized as a protected First Amendment medium, even in the most unlikely of cases. In *Ashcroft v. Free Speech Coalition*,⁸⁰ the Supreme Court struck down a blanket ban on sexually explicit images that appeared to depict children, although they were generated without the use of and harm to children.⁸¹ In discussing the issue of depicting children in sexual scenarios, the court implicitly endorsed the movies "Traffic" and "American Beauty" as within the realm of First Amendment

⁷⁸ Mario Cerame, *The Right to Record Police in Connecticut*, 30 QUINNIPIAC L. REV. 385, 412 (2012).

⁷⁹ See Cerame, *supra* note 78, at 414–15 ("The subject, the frame, the angle, the lighting, the distance are all intrinsic to the value of the piece, and they are part of on-the-fly editorial control that the citizen-recorder exercises. Imperfections in this chosen medium—the blurriness, the rough audio, the shaky camera—add to the work's authenticity. The medium itself, often coarse and everyday, enhances the speaker's message criticizing the establishment. Inasmuch as any of these are incidental, they are part of the overall artistic choice of medium by the recorder, like Pollock's paint splashes or Banksy's street art stencils.")

⁸⁰ 535 U.S. 234 (2002).

⁸¹ *Ashcroft*, 535 U.S. at 234.

speech.⁸² The videos were considered to be artistically significant and worthy of First Amendment protection that a blanket ban did not consider.⁸³ Video therefore acts as a protected media of expression. That, naturally, does not mean that it can be produced in whatever way desirable, without regard for other laws; it simply means that what is being produced while recording has a First Amendment protection.

More specifically in Right to Record cases, there is a need to consider the choice between types of expressive mediums. When the Third Circuit decided to grant qualified immunity in *Kelly v. Borough of Carlisle*,⁸⁴ it noted that it would be a reasonable restriction to permit note-taking as opposed to video recording, seemingly implying that it may be permissible to ban video recording because some alternative in the form of written or oral communications exist. Yet, there is a fundamental difference in video as a medium as opposed to other alternatives. At the heart of most civilian-police interactions brought into court lie intense factual disputes.⁸⁵ Yet, video acts to resolve these disputes, providing an objective representation of events.⁸⁶ This objectivity that occurs with video has been noted as a value not only to the civilian recorder, but also to police officers and departments

⁸² *Id.* at 247–48.

⁸³ *Id.*

⁸⁴ *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010).

⁸⁵ *Cf. Scott v. Harris*, 550 U.S. 372 (2007) (considering the justification for use of deadly force in a video recorded high-speed car chase given two vastly differing versions of the same event); Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras As Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771, 808 (2005) (finding that an objective video record “eliminates the need for a ‘swearing contest’ in which officers and suspects present vastly different stories about what happened”).

⁸⁶ *See Scott*, 550 U.S. at 372 (finding no factual dispute when the video clearly contradicted one version of events); Thurlow, *supra* note 85, at 808 (finding that an objective video record “eliminates the need for a ‘swearing contest’ in which officers and suspects present vastly different stories about what happened”); Howard M. Wasserman, *Orwell’s Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 607 (2009) (claiming that videos alter the scope of Section 1983 suits and provide “truthful, unbiased, objective, and unambiguous reproduction[s] of reality, deserving of controlling and dispositive weight”); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 344 (2011) (“Images, unlike words, do not demand great literary ability, or even literacy, for persuasiveness; they provide apparently robust verification that does not depend on the reputation of the proponent.”).

that have adopted mandatory recording procedures⁸⁷ of interactions with civilians.⁸⁸

Videos possess a certain credibility because the viewer is seeing it as if it were the first time, rather than trusting an individual with his own viewpoints, biases, and interests, which might influence the viewer's interpretations. Writing and jotting down notes does not provide the same objective viewpoint. Notes are easily altered or phrased in a specific way to invoke an emotional response whereas video displays what was within the frame and allows for personal interpretations and conclusions.⁸⁹

Further problems can be seen with the Third Circuit's "manner" restrictions on recording by noting that simply because there is an alternative does not make a ban on one form reasonable. Requiring video to be forgone for less-reliable note taking requires the adoption of a less-credible method of documentation, particularly when there is a notable credibility variation between police officers and those they interact with,⁹⁰ and it is rarely a reasonable limitation. In many situations, those interacting with police might not be able to capture events that happen faster than one can write. Alternatively, if the proposed recorder is the one interacting with the police, it becomes increasingly difficult to comply with police orders, such as putting hands behind one's back, in the air, or producing a license while continuing to capture the events.

The availability of the alternative is influential, but not dispositive. Simply looking to alternative forms of expression would allow bans on whole categories of expressive, artistic mediums. It would be permissible to eliminate all movies, as books can tell stories just as well. Yet, we find variations between text and images, both with value but in different ways.

87 Thurlow, *supra* note 85, at 772–75 (discussing the expansion of court-ordered and legislatively mandated police recording between 2004 and 2005).

88 Wasserman, *supra* note 86, at 614 (noting that the recording of police officers protects against misrepresentations in civil rights suits against the police department and police misconduct more generally); Thurlow, *supra* note 85, at 810–12 (2005) (noting that police and prosecutors receive the greatest advantages from recording by allowing officers to refrain from taking notes, use the videos in training new recruits, and deter defendants from filing unmeritorious suppression claims).

89 Cf. Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838 (2009) (finding that various people will interpret an objective video in different ways based on their cultural background, and that these variations in interpretation would be reflected in the recounting of the events).

90 See Cerame, *supra* note 78, at 396 (noting that courts and juries are more likely to believe police officer testimony as credible).

For these reasons, video holds a unique value compared to other methods of gathering and disseminating information. Specific limitations allowing individuals to take notes on police actions in exchange for forgoing video recording cease to be reasonable time, place, and manner restrictions.

III. REASONABLE LIMITATIONS AND PERMISSIBLE RESPONSES: FOURTH AMENDMENT INTERSECTIONS AND CONSIDERATIONS

While the First Amendment allows video recording police officers as constitutionally protected activity, that does not mean that any government reactions to it are inherently unconstitutional. While the circuit court decisions involve police misconduct and claims of constitutional violations, they stem from the type of reaction as opposed to the mere existence of a reaction. While the act of recording exists on a spectrum of First Amendment activity, so do the permissible reactions of police officers.

While the First Amendment remains at the heart of the consideration of the courts' decisions, there are additional implications for Fourth Amendment jurisprudence. The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, provides that the people are "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, . . . and no warrants shall issue, but upon probable cause . . ." ⁹¹ This amendment has been interpreted to allow various levels of police intrusion, ranging from brief questioning and frisking to full-blown searches and arrests. Nearly every police interaction has the potential to scare civilian recorders, even in a way that has the potential to chill the valid speech occurring. However, the fear of chilling speech cannot eliminate a whole array of Fourth Amendment law, nor should it forbid officers from acting in reasonable ways.

The following parts examine the legality of reactions generally permitted within the Fourth Amendment and some potential issues that arise at the intersection of the First and Fourth Amendments.

A. *Approaching a Recorder with No Further Actions*

Police officers are granted the authority to randomly approach any individual in a public place, ask them questions, and request con-

91 U.S. CONST. amend. IV.

sent for further police conduct.⁹² As long as a reasonable person would understand that he or she is free to choose not to engage with the officer and refuse cooperation, there is no higher standard of specificity or suspicion.⁹³ The Fourth Amendment is not implicated when the activity is non-coercive and consensual.⁹⁴

This remains applicable with the civilian-recorder of the police officer. There is nothing to stop an officer from approaching the civilian recorder and engaging her in questioning, as long as the totality of the circumstances indicates to the recorder that he is in no way forced to answer. The Fourth Amendment is not implicated in these exchanges as they are considered to be consensual.⁹⁵

There is an argument that merely approaching an individual could create a certain chill to the act of recording. It is also possible that officers being recorded are more likely to approach and may even intend to intimidate recorders with the hope that they desist and that their speech is chilled. The same could be said for any activity the individual is engaged in when approached by an officer regardless of the legality of the actions. It therefore seems unlikely that police would be forced to not acknowledge the presence of a camera as opposed to approaching and inquiring without force or intimidation. If the recorder were to choose to not respond or state that they do not wish to answer the questions, the officer would not be permitted additional reaction or force.⁹⁶ Just because the activity is legal and constitutionally protected does not mean it must go unnoticed.

B. Probable Cause and Reasonable Suspicion: The Use of Protected Activity as a Basis for Greater Intrusion

In order to conduct a full search or arrest, there must be probable cause.⁹⁷ The Supreme Court found this to require “only a probability or substantial chance of criminal activity.”⁹⁸ Establishing a threshold

⁹² See *Florida v. Bostick*, 501 U.S. 429, 431, 434 (1991) (acknowledging that “the Fourth Amendment permits police officers in random airport lobbies and other public places to ask [individuals] questions.”).

⁹³ *Id.* at 431, 434.

⁹⁴ *Id.* at 434.

⁹⁵ *Id.*

⁹⁶ *Florida v. Royer*, 460 U.S. 491, 497–98 (1983) (stating that “[t]he person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds”) (internal citations omitted).

⁹⁷ U.S. CONST. amend. IV.

⁹⁸ *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983).

showing of probable cause allows the officer to arrest a person, conduct a search of that person incident to arrest, and occasionally permit for searches of areas such as cars where there is probable cause that evidence does exist.⁹⁹ In the alternative, officers are permitted to conduct a “*Terry*” stop if the officer has reasonable suspicion that a crime has occurred or is about to occur.¹⁰⁰ This gives the officer permission to briefly stop the individual to question him.¹⁰¹ If there were to be suspicion that the individual was armed and dangerous, it would allow the officer to conduct a brief frisk of the outside clothing for weapons.¹⁰² In both standards, reasonable suspicion and probable cause, innocent and completely legal behavior can and frequently does provide the basis for intrusion upon the individual’s privacy.¹⁰³ These same standards are applicable against the civilian recorder.

In every Circuit Court case discussed in Part I, the officers arguably had probable cause that wiretapping statutes or privacy statutes were violated through recording. In each case all of the charges were dismissed. An officer needs probable cause to arrest or reasonable suspicion to stop and frisk, but the question remains: “probable cause of what?” If the First Amendment protections of Freedom of Speech are to be taken seriously, then the mere act of recording a police officer while in a public place cannot constitute a crime, probable cause, or reasonable suspicion. A line must be drawn between those “crimes” where the act of recording *is the crime itself* and where the recording is indicative of some other behavior or plan, which is criminal outside of the recording. The former criminalizes political speech protected by the Constitution, whereas the latter falls within the permissible use of the legal activity of recording to establish probable cause or reasonable suspicion of some other non-video-recording crime. General and broad-reaching statutes such as the wiretapping and privacy statutes are not enforceable or applicable against the civilian recorder, and unnecessarily infringe on political speech by criminalizing it. The Supreme Court has already held that statutes that criminalize protected speech under the First Amend-

99 *Id.* at 243–46.

100 *See Terry v. Ohio*, 392 U.S. 1, 10 (1968) (“[T]he police should be allowed to ‘stop’ a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity.”).

101 *Id.*

102 *Id.*

103 *See Gates*, 462 U.S. at 244 n.13 (1983) (“[I]nnocent behavior frequently will provide the basis for a showing of probable cause.”); *Terry*, 392 U.S. at 1 (1968) (finding that an officer’s reasonable suspicion warranted an invasion of privacy).

ment cannot stand.¹⁰⁴ Narrowing the scope of the wiretapping and privacy laws to exclude the civilian recorder remains true to the Supreme Court's position that speech protected by the First Amendment cannot be criminalized.

There are, however, still narrow cases in which recording is not a criminal offense but can be seen as evidence of some other criminal activity. For example, when considering conspiracy and attempt charges, a civilian-recorder who was attempting or conspiring to commit an illegal act might, in his or her planning, video record the area or people targeted. In this particular scenario, the people being recorded would be on-duty police officers. While the act of video recording is not a crime, the purpose of the video and the use of it as part of a criminal plan can provide evidence of a separate crime. The act of recording when combined with other activities would be permissible evidence to provide support for probable cause and reasonable suspicion. The act of recording and the recorded image alone would be insufficient to establish probable cause or reasonable suspicion without additional circumstances. At this time, a case of this nature has yet to arise and seems unlikely to arise. Instead, cases so far have involved bypassers recording arrests.

While allowing the legal activity to be used as evidence of a crime may have a chilling effect on protected speech, one that the Court frequently seeks to avoid, the same can be said for all legal activity that is considered in establishing the requisite Fourth Amendment intrusions.

C. Reasonable Limitations: Time, Place, and Manner

As noted by the Eleventh Circuit, speech is generally capable of content-neutral limitations based on time, place, and manner. Such restrictions of protected speech are permissible if they are "narrowly tailored to serve a significant government interest," and leave open alternative channels for communication.¹⁰⁵ Impermissible government purposes, such as the suppression of particular content or disagreement with the message, make the restrictions content-specific

¹⁰⁴ See *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) ("[A]ny enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.").

¹⁰⁵ *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). See also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark* for the same).

and unconstitutional.¹⁰⁶ For civilian recorders, these limitations can be particularly important. Of special note in this situation is that the time, place, and manner restrictions must be neutral to the content of the speech, meaning that harsher restrictions cannot be imposed on the civilian recorder over the civilian observer, as the presence of a small recording device generally only makes the difference in creating a record.¹⁰⁷ The following Parts consider (i) time restrictions and (ii) place restrictions. Manner restrictions are not discussed in depth, as the manner in this particular Comment is video recording.¹⁰⁸

1. *Time Restrictions for the Civilian Recorder*

Time restrictions may take two forms: (1) limitations to the precise day, minute, and hour; and (2) limitations on duration of recording. The first is impractical, as it would require the civilian recorder to specifically know when events worthy of recording occur. The most common situation for a civilian recorder is one mentioned at the opening: an individual randomly observing a police interaction or arrest and deciding to capture it on video. Prior planning is not an option. Limitations on the amount of time spent recording are more likely, although also constitutionally disturbing.

Under the Fourth Amendment, police officers are permitted to not only follow every step an individual takes as long as it occurs in public, but also use digital tracking devices such as beepers, even if the officers lack probable cause. The Supreme Court readily dismissed these activities as intrusions of privacy because the public activities and travels were readily visible to anyone who wished to see them.¹⁰⁹ The court relied on the fact that travels were regularly observable to anyone as a basis for saying that there is no privacy interest in activities conducted in public. Limiting the amount of time a

¹⁰⁶ *Ward*, 491 U.S. at 791; *see also Clark*, 468 U.S. at 294 (“[E]xpression . . . may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech.”).

¹⁰⁷ Some will likely argue that the creation of a record is a significant variation. However, a video record is only a more verifiable form of what is visually seen. It is easier to convey to others, and limiting that speech is impermissible prior restraint, and based on the content of its message.

¹⁰⁸ For considerations on alternative manners, such as note taking or plain observation and their comparative inadequacies, *see supra* Part II(C).

¹⁰⁹ *United States v. Knotts*, 460 U.S. 276 (1983). *But see United States v. Jones*, 132 S. Ct. 945, 961–63 (2012) (Alito, J., concurring) (suggesting that the Fourth Amendment may limit police from following an individual for extended periods of time without reason).

civilian recorder can spend personally observing and documenting the actions of police officers flies in the face of this reasoning. Members of the public do not have to shield their eyes from the publicly accessible and readily viewable political actions of their government when the government is not forced to shield its eyes from its citizen's public actions.

2. *Place Restrictions for the Civilian Recorder*

Place restrictions are a realistic consideration for the civilian recorder. Police officers have an important government interest in maintaining the safety of those around them, including their own safety as officers. They further have an important interest in maintaining crime scenes. All of these can impact the physical place a civilian recorder may be.

As explained in the right to gather information part of this Comment, there is no absolute right to access specific, restricted areas in the interest of gathering information. Civilian recorders should be limited in the same way as any other observers should be. No additional access should be granted, but no additional limitations should be placed on the recorder. That is the best way to preserve speech with reasonable content-neutral limitations.

Notable in place restrictions is the Supreme Court's recent treatment of buffer zones against protesters at abortion clinics. The Supreme Court recently decided *McCullen v. Coakley*, a case questioning a 35-foot buffer zone around all reproductive health care clinics.¹¹⁰ *McCullen*, an anti-abortion protester, claimed the buffer zone violated her First Amendment rights, in part because she was too far displaced and unable to convey her messages to those entering the facilities.¹¹¹ The Court found the restrictions on location unconstitutional because they "burden[ed] substantially more speech than necessary to achieve the . . . asserted interests."¹¹² The Court recognized that moving protesters farther away was undoubtedly easier to protect public safety and prevent harassment and intimidation.¹¹³ Nevertheless, the buffer was not narrowly tailored enough to address the valid concerns; instead, the government "must demonstrate that alternative

¹¹⁰ *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

¹¹¹ *Id.* at 2535.

¹¹² *Id.* at 2537.

¹¹³ *Id.* at 2540.

measures that burden substantially less speech would fail to achieve the government's interests."¹¹⁴

For civilian recorders, the place restriction holds similar concerns. While some concerns for safety may exist, an outright ban or an overly large distance restriction inhibits more speech than is necessary to preserve safety. *McCullen* also suggests that removing a recorder so far from the scene that nothing could be captured could be an infringement of First Amendment Rights. The permissible distance varies based on the precise situation and government concerns. Thirty feet may be enough for observing and recording an arrest when the arrestee was not resisting. Additional distance would be needed if there were guns being waived. Individual evaluations on a case-by-case basis would be required.

D. Concerns for Officer Safety and Investigations

It is nearly impossible to consider the civilian recorder without considering officer safety. It is a concern many have, noting the need to protect our officers and preserve their investigative efforts. As a hypothetical, imagine a civilian recorder who, after spending significant time recording officers in publicly accessible and visible places, is able to discern the contents and strategy of an investigation. Revelation of the investigation to the public presents the possibility of ruining any potential results, and even causing physical harm to confidential informants. The initial reaction is to create such a limitation whereby the recorder would not be permitted to obtain such information or convey it to others.

Such a response, however, contradicts well-established First Amendment decisions and constitutes prior restraint. Indeed, "any prior restraint on expression [has] a heavy presumption against its constitutional validity."¹¹⁵ In a per curiam decision, the Supreme Court struck down an injunction prohibiting the *New York Times* from publishing classified information entitled "History of U.S. Decision-Making Process on Viet Nam Policy."¹¹⁶ The U.S. Government argued that publication of the information would endanger the United States, and publication should be halted to ensure safety.¹¹⁷ Yet, the court disagreed. Justice Hugo Black's concurrence stated, "[t]he

114 *Id.*

115 *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (citation omitted) (internal quotation marks omitted).

116 *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

117 *Id.* at 718 (Black, J., concurring).

word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.”¹¹⁸ Justice Potter Stewart, in his concurrence, noted the vast and occasionally unchecked powers of the executive before stating,

[i]n the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.¹¹⁹

He noted that some of the documents “should not, in the national interest, be published.”¹²⁰ Yet, it was still short of the necessary “direct, immediate, and irreparable damage” needed to restrain the protected activity. If the First Amendment can protect the *New York Times* and *Washington Post* in publishing the classified, strategic, executive decisions about the Vietnam War, because they were not considered dangerous enough, then there is no valid safety argument at play with the citizen recorder either.

The limitation based on abstract considerations of safety, which may or may not ever occur, is nothing more than prior restraint. In the average recording of an arrest, there is no evidence that the video recording will cause danger at the hands of the recorder or if the video is released. These concerns are unwarranted without a specific set of facts that would indicate otherwise to the officer. Video recording itself, the capturing of moving images, does not pose a safety concern. Acts done in conjunction with video recording or circumstances surrounding the video recording may, on a case- and fact-specific basis, indicate otherwise. However, a total ban because the mere possibility that someone watching too closely may cause harm at some point in time is not enough to justify a ban on First Amendment protected speech for every person in America.

CONCLUSION

Civilian recorders have a First Amendment right to engage in video recording of their public officials, including police officers, while they perform their duties in public. This right is not absolute, and no right ever is. It has fine contours and will likely raise future constitu-

118 *Id.* at 719 (Black, J., concurring).

119 *Id.* at 728 (Stewart, J., concurring).

120 *Id.* at 730 (Stewart, J., concurring).

tional questions. Yet, allowing recorders to be arrested for doing nothing more than monitoring the actions of their government is to penalize the public for remaining informed. A well-informed electorate is nothing but desirous, and recording assists in spreading that knowledge and information. In conclusion, consider the ever-elloquent words of James Madison: “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”¹²¹

¹²¹ Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).