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Beyond Body Cameras: Defending a Robust Right to Record the Police

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This symposium Article articulates and defends a robust First Amendment right to record the police up to the point that the act of filming presents a concrete, physical impediment to a police officer or public safety. To the extent that courts have identified the constitutional values behind the right to record, they have, for the most part, relied on the idea that filming the police promotes public discourse by facilitating the free discussion of governmental affairs. Like limiting the gathering of news, limiting the filming of the police constricts the information in the public sphere from which the public can draw and debate. I contend that this account of the constitutional values behind the right to record is correct but incomplete, for it sets aside the ways in which the act of recording an officer in the open is a form of expression in the moment, a gesture of resistance to the power of the police over the community. In order to flesh out this function of civilian recording as resistance, this Article contrasts civilian filming of the police with the use of police-worn body cameras: while both forms of film are useful to deter misconduct and document police activity, only civilian filming allows civilians to express ownership over their streets and neighborhoods. Ultimately, I argue that a jurisprudence of the right to record should account for both the benefits to public discourse and the in-the-moment communication to officers that can be found when civilians record the police.

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* Assistant Professor, Brooklyn Law School. I am grateful to the editors of *The Georgetown Law Journal* for organizing this symposium. For thoughtful comments on this piece, thank you to symposium participants Dante Berry, Delroy Burton, David Cole, Cynthia Conti-Cook, and G. Scott Hulsey. For helpful comments on earlier drafts, thank you to Alan Chen, Margot Kaminski, Anna Roberts, Laurent Sacharoff, and Timothy Zick.

INTRODUCTION

Too often, American police officers are taught that their job is to control the streets and the roads that they police—to "own" the neighborhood.[1] For example, in 2009 a New York Police Department (NYPD) Lieutenant instructed his officers during the "roll call" at the beginning of a shift at the 81st Precinct in Bedford Stuyvesant, Brooklyn:

> [W]e've got to keep the corner clear. . . . Because if you get too big of a crowd there, you know, . . . they're going to think that they own the block. We own the block. They don't own the block, all right? They might live there but we own the block. All right? We own the streets here. You tell them what to do.[2]

These words were secretly recorded by one of the gathered officers, who later testified in the successful class action litigation challenging the NYPD's stop-and-frisk practices as unconstitutional.[3] As the District Judge noted when she quoted the above words, "[b]ecause Bedford Stuyvesant is a historically black neighborhood and continues to have a majority black population, [the] Lieutenant[]'s comment carries troubling racial overtones."[4] Indeed, the history of local police officers in poor neighborhoods of color is one of domination, of playing the role, in James Baldwin's words, of "occupying solider[s]."[5]

It is in this context—the deliberate and longstanding power differential between police officers and the communities that they police—that, in this Article, I discuss the importance of civilian recording of the police and defend a robust interpretation of a First Amendment right to record the police. The act of filming itself entails a transfer of power from the police to the community. A resident of Bedford Stuyvesant who takes out her cell phone, stands near a police officer, and records that police officer on duty not only records a video of that officer's conduct for possible future use, but also expresses to the officer in that moment: I am watching you; I have ownership over this block too.

This expression of ownership is one that makes police officers bristle. Federal Bureau of Investigation (FBI) Director James Comey, for example, has argued that police officers are "under siege" by civilians holding cameras, contending that the filming of police officers has led to a slowdown in proactive and

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1. *See* Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. F. 225, 229 (2015) (describing how "[e]ither through formal training or informal example, officers learn to both verbally and physically control the space they operate in").

2. Floyd v. City of New York, 959 F. Supp. 2d 540, 597 (S.D.N.Y. 2013) (remedial opinion).

3. *See id.* at 561–63.

4. *Id.* at 597.

5. JAMES BALDWIN, NOBODY KNOWS MY NAME: MORE NOTES OF A NATIVE SON 66 (Vintage Int'l 1993) (1961) ("[The policeman] moves through Harlem, therefore, like an occupying soldier in a bitterly hostile country; which is precisely what, and where, he is, and is the reason he walks in twos and threes.").

effective police work.[6] If we recognize that the value of filming police as speech lies not only in its future contributions to public discourse and democratic dialogue, but also to that in-the-moment communication to police officers, then we can understand the feeling of intrusion experienced by police officers and why, despite that feeling, the expressive act of filming is still constitutionally valuable speech.[7] For civilian filming of the police is not only a tool of police accountability, but also a method of power transfer from police officers to the populations that they police.

As videos of police officers taken by civilians become a regular part of the national conversation surrounding policing,[8] it has become routine to hear experts and laypeople alike declare that there is a First Amendment "right to record" the police.[9] That right, however, is not yet settled law. Although four circuit courts—the First, Seventh, Ninth, and Eleventh Circuits—have found such a First Amendment right to record the police,[10] in many other federal jurisdictions, courts have yet to clearly articulate a right to record, and some courts have even expressed doubt as to whether the right should exist at all.[11] Indeed, in 2015, district courts within at least five different circuits held that

6. *See* James B. Comey, Dir., Fed. Bureau of Investigation, Remarks at the University of Chicago School of Law (Oct. 23, 2015), https://www.fbi.gov/news/speeches/law-enforcement-and-the-communities-we-serve-bending-the-lines-toward-safety-and-justice [perma.cc/PKQ3-7NDH]. These comments from Director Comey followed a *Washington Post* report that the consensus at a meeting of 100 police leaders from around the country was that the police in America are "under siege" by the onslaught of civilian bystanders filming their every move. *See* Aaron C. Davis, *'YouTube Effect' Has Left Police Officers Under Siege, Law Enforcement Leaders Say*, WASH. POST (Oct. 8, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/10/08/youtube-effect-has-left-police-officers-under-siege-law-enforcement-leaders-say/ [perma.cc/9M6E-3CD2]. However, social scientists have debunked the contention that there has been a so-called "Ferguson Effect," in which crime has increased as a result of protests against police violence. *See, e.g.*, David Pyrooz et al., *Was There a Ferguson Effect on Crime Rates in Large U.S. Cities?*, 46 J. CRIM. JUST. (forthcoming Sept. 2016); RICHARD ROSENFELD, THE SENTENCING PROJECT, WAS THERE A "FERGUSON EFFECT" ON CRIME IN ST. LOUIS? (2015), http://sentencingproject.org/doc/publications/inc_Ferguson_Effect.pdf [https://perma.cc/L7WF-UJ7B].

7. *See* City of Houston v. Hill, 482 U.S. 451, 462–63 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.").

8. *See generally* Richard Pérez-Peña & Timothy Williams, *Glare of Video is Shifting Public's View of Police,* N.Y. TIMES (July 30, 2015), http://www.nytimes.com/2015/07/31/us/through-lens-of-video-a-transformed-view-of-police.html?_r=0 [https://perma.cc/NQ6Z-2JMG].

9. *See, e.g.*, Robert Greenwald & Vanessa Baden Kelly, *Keeping Truth Legal: It is Our Right to Film Police*, HUFFINGTON POST (May 21, 2015), http://www.huffingtonpost.com/robert-greenwald/keeping-truth-legal-it-is_b_7347746.html [perma.cc/6NZR-HUMD]; Alessandra Ram, *It's Your Right to Film the Police. These Apps Can Help*, WIRED (May 3, 2015, 7:00 AM), http://www.wired.com/2015/05/right-film-police-apps-can-help/ [https://perma.cc/3K2E-6PA5]; *cf.* ACLU, *Know Your Rights: Photographers*, https://www.aclu.org/know-your-rights-photographers [perma.cc/SN7U-96A3] (last updated July 2014) (describing filming police officers in public as a constitutional right).

10. *See* ACLU of Ill. v. Alvarez, 679 F.3d 583, 608 (7th Cir. 2012); Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995); *see also* Adkins v. Limtiaco, 537 F. App'x 721, 722 (9th Cir. 2013) (per curiam) (First Amendment right to take photos of police).

11. *See* Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010) (finding no clearly established right to record traffic stops and expressing doubt as to whether right exists at all given dangerousness

there is not yet a "clearly established" First Amendment right to record police activity in public,[12] a finding that results in qualified immunity for police officers accused of violating the right.[13] Judges who sit in the same courthouses are coming to different conclusions, within weeks of each other, about whether the right is clearly established.[14] Since the gathering of the symposium in October 2015, one district court has even taken the unprecedented step of holding that there is no First Amendment right to record the police at all.[15] And when courts have explicitly found a right to record, they have varied widely in defining its limits.[16]

It is more likely than not that we are heading toward a national recognition of a First Amendment right to record on-duty police officers in public.[17] The real challenge for courts will not be whether there is a First Amendment right to record the police, but rather where its limits lie. For despite a common understanding that there is constitutional freedom to record the police in public, there has been strong resistance to civilian recording of police officers from police departments around the country, based in large part on accusations that civilian

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presented by traffic stops); *cf. Alvarez*, 679 F.3d at 611 (Posner, J., dissenting) (arguing that there should be no First Amendment right to record the police in public).

12. *See* Lawson v. Hilderbrand, 88 F. Supp. 3d 84, 100 (D. Conn. 2015); Garcia v. Montgomery County, No. TDC-12-3592, 2015 WL 6773715, at *7 (D. Md. Nov. 5, 2015); Pluma v. City of New York, No. 13CIV.2017(LAP), 2015 WL 1623828, at *7 (S.D.N.Y. Mar. 31, 2015); Montgomery v. Killingsworth, No. 13CV256, 2015 WL 289934, at *1 (E.D. Pa. Jan. 22, 2015); Williams v. Boggs, No. 6:13-65-DCR, 2014 WL 585373, at *1 (E.D. Ky. Feb. 13, 2014); Mocek v. City of Albuquerque, 3 F. Supp. 3d 1002, 1074 (D.N.M. 2014), *aff'd on other grounds*, No. 14-2063, 2015 WL 9298662, at *11–12 (10th Cir. Dec. 22, 2015); Ortiz v. City of New York, No. 11CIV.7919(JMF), 2013 WL 5339156, at *4 (S.D.N.Y. Sept. 24, 2013); *see also* True Blue Auctions v. Foster, 528 F. App'x 190, 193 (3d Cir. 2013) (no clearly established right to record police on a public sidewalk); Szymecki v. Houck, 353 F. App'x 852, 853 (4th Cir. 2009) (per curiam) (same).

13. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 231 (2009) (holding that the doctrine of qualified immunity protects police officers from liability if their conduct does not violate clearly established rights that a reasonable person would have known).

14. *Compare* Higginbotham v. City of New York, 105 F. Supp. 3d 369, 380 (S.D.N.Y. 2015) (finding clearly established right for a non-participant in a police encounter to film the police), *with Pluma*, 2015 WL 1623828, at *7 (noting there is no clearly established right to record police activity), *and Ortiz*, 2013 WL 5339156, at *4 (same).

15. *See* Fields v. City of Philadelphia, No. 14-4424, 2016 U.S. Dist. LEXIS 20840, at *3 (E.D. Pa. Feb. 19, 2016) (holding there is no First Amendment right "based solely on 'observing and recording' without expressive conduct"). This case is currently on appeal before the Third Circuit. *See ACLU-PA Appeals Judge's Ruling Against First Amendment Right to Record Police*, ACLU OF PA. (Mar. 21, 2016), http://www.aclupa.org/news/2016/03/21/aclu-pa-appeals-judges-ruling-against-first-amendment-right [https://perma.cc/QA72-W55P].

16. *Compare* Gericke v. Begin, 753 F.3d 1, 8 (1st Cir. 2014) (stating that filming police can only be constitutionally prohibited after a lawful order from a police officer when filming has interfered with police work), *with Higginbotham*, 105 F. Supp. 3d at 380 (holding that the right to record the police was clearly established as to journalists that are filming at a distance and "unconnected to the events recorded").

17. *See* Glenn Harlan Reynolds & John A. Steakley, *A Due Process Right to Record the Police*, 89 WASH. U. L. REV. 1203, 1204 (2013) ("Though the issue has not yet reached the Supreme Court, it seems safe to say that the case for First Amendment protection regarding photos and video of law enforcement officers in public is quite strong, and is in the process of being resolved.").

filming "interfere[s]" with police work,[18] places officers in danger,[19] or makes officers hesitant to engage in meaningful police work for fear of being filmed.[20] This resistance sometimes happens formally, for example, when police leaders have asked legislatures to criminalize the act of recording when the recording is done physically close to officers.[21] One bill proposed in the Texas legislature in March 2015, for instance, would have criminalized "filming, recording, photographing, or documenting the officer within 25 feet" while that officer is performing his official duties.[22] Resistance by police officers to civilian filming also happens on an ad hoc basis, ranging from ubiquitous requests that bystanders stop filming to arrests of individuals for interfering with police work through filming or failing to obey a command to stop recording.[23] To be sure, an individual filming a police officer may actually be physically interfering with that officer's ability to do her job. The First Amendment challenge in the context of police resistance to being filmed, then, is figuring out where constitutionally protected activity ends and interference begins.

This Article lays out and defends a robust First Amendment right to record the police up to the point that the act of filming presents a concrete, physical impediment to a police officer or to public safety. To figure out when the expressive activity of recording a police officer is worthy of constitutional protection, we need to know why that expression is valuable. I begin, in Part I, by contrasting civilian filming of the police with the use of police-worn body cameras—an accountability mechanism that has received broad national support

18. *See* Robinson Meyer, *What to Say When the Police Tell You to Stop Filming Them*, THE ATLANTIC (Apr. 28, 2015), http://www.theatlantic.com/technology/archive/2015/04/what-to-say-when-the-police-tellyou-to-stop-filming-them/391610/ [perma.cc/7WKM-JHD9].

19. *See, e.g.*, Anthony DeStefano, *NYPD Commissioner Bratton: Interfering with Arrests Makes it Harder for Cops to Nab Suspects,* NEWSDAY (July 28, 2014), http://www.newsday.com/news/new-york/nypd-commissioner-bratton-interfering-with-arrests-makes-it-harder-for-cops-to-nab-suspects-1.8910655 [perma.cc/C6F8-JQWF] (quoting NYPD Commissioner William Bratton as stating that civilian filming of officers interferes with their duties and puts officer safety in jeopardy).

20. *See* Comey, *supra* note 6.

21. *See, e.g.*, Matt Stout, *Boston Police Commissioner Wants Law to Push Back on Camera-Toting Cop Watchers*, BOS. HERALD (Aug. 10, 2015), http://www.bostonherald.com/news_opinion/local_coverage/2015/08/boston_police_commissioner_wants_law_to_push_back_on_camera [https://perma.cc/YCJ4-CDLJ] (describing call from Boston Police Commissioner William B. Evans for a law restricting the ability of citizens to film the police in public).

22. H.B. 2918, 84th Leg., Reg. Sess. (Tex. 2015).

23. According to one expert, Jay Stanley of the ACLU, "[t]here is a widespread, continuing pattern of law enforcement officers ordering people to stop taking photographs or video in public places and harassing, detaining and arresting those who fail to comply." Sam Adler-Bell, *That's What You Get for Filming the Police*, TRUTHOUT (May 7, 2015), http://www.truth-out.org/news/item/30628-that-s-what-you-get-for-filming-the-police [https://perma.cc/F59F-Y2TG]; *see also* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 357–64 (2011) (collecting cases); Daniel Denvir, *The Legal Right to Videotape Police Isn't Actually All That Clear*, CITYLAB (Apr. 10, 2015), http://www.citylab.com/crime/2015/04/the-legal-right-to-videotape-police-isnt-actually-all-that-clear/390285/ [perma.cc/9YCC-76BJ].

in the last two years.[24] I begin with this comparison for two reasons—first, because the national consensus that body cameras are an important tool of police accountability risks obscuring the importance of civilian recording of the police; and, second, because the contrast between the two forms of filming the police brings out benefits of civilian recording that go beyond the recording itself. When civilians film the police, local residents become the ones ensuring police accountability, resulting in a palpable power shift. Local residents remain in control of the footage and the information. And they are able to shape and define the public spaces that they occupy—filming becomes both a form of participation in public life and an expression of dissent.

Part II shifts to First Amendment theory, spelling out the First Amendment values behind the right to record the police. Some courts have begun to articulate these values. But when courts have done so, they emphasize one set of First Amendment values—the contribution of videos to public discourse and self-government—and discount the equally important value of promoting the ability of civilians to challenge government authority and contest government practices—to dissent. A jurisprudence of the right to record should account for both the benefits to public discourse *and* the in-the-moment communication to officers that can be found when civilians record the police. By recognizing the multifaceted constitutional values entailed in the right to record the police, the constitutional importance of the First Amendment right becomes more concrete and its protections broader.

Part III parses through the limits of a robust First Amendment right to record the police in public, identifying the boundary between protected filming of the police and unprotected interference with police work. I contend that two central tenets must guide determinations of when recording the police is constitutionally protected conduct: first, the act of recording on its own can never be enough to constitute interference; and second, any prohibited conduct must constitute *physical* interference with, or obstruction of, police work. These guidelines allow civilians not only to capture police conduct on camera, but also to express to officers in the moment—close-up and angrily, if they so choose—that they are watching them, that they own their block.

I. BEYOND BODY CAMERAS

We live in a world where civilian videos of police officers are ubiquitous. Indeed, a number of films recorded by civilians—of the choking of Eric Garner,

24. *See generally Bipartisan Support for More Body Cameras on Police Officers*, PEW RES. CTR. (Dec. 8, 2014), http://www.people-press.org/2014/12/08/sharp-racial-divisions-in-reactions-to-brown-garner-decisions/bipartisan/ [https://perma.cc/3ZZW-JMK5] (providing data showing broad support across racial and political lines for increasing the number of police-worn body cameras); Clare Sestanovich, *Our Body-Cams, Ourselves*, THE MARSHALL PROJECT (Feb. 10, 2015), https://www.themarshallproject.org/2015/02/10/our-body-cams-ourselves [perma.cc/3M6A-3VS3] (describing "broad (and rare) consensus . . . in support of [body-cameras among] advocates, legislators, and even many officers themselves").

the shooting of Walter Scott, the beating of a teenager at a public pool in McKinney, Texas—have become national artifacts revealing to the world police conduct that otherwise would have remained unknown.[25] Videos, once made public, have given authority to experiences of people of color with respect to the police, and have inserted into privileged lives the realities of those lived experiences. They have also changed the nature of formal proceedings to deal with complaints of police violence—as videos of police actions in public have proliferated, official findings of police misconduct and false statements by courts and police review boards have increased as well.[26] And the public, in turn, has shifted its view of policing; national polls reveal that between December 2014 and May 2015 white Americans came to believe in larger numbers than ever that reports of police violence against African-Americans are not isolated incidents and that there is a broader problem in American policing.[27]

Despite the growing importance of civilian video, however, recent calls to protect civilian filming have for the most part taken a back seat to calls for another form of filming the police: body cameras worn and operated by police officers themselves.[28] Since mid-2014, at least thirty-six states have proposed some form of legislation involving police-worn cameras, and President Obama has announced a three-year, $263 million investment in body cameras.[29] To be sure, body cameras are an important tool of deterrence and documentation; when used correctly they can aid law enforcement in their investigations and ensure reliable footage of use of force by the police.[30] But accompanying the

25. *See generally* Pérez-Peña & Williams, *supra* note 8 (discussing each of these videos).

26. *See, e.g.*, NYC CIVILIAN COMPLAINT REVIEW BOARD, SEMI-ANNUAL REPORT, at vii (2015), http://www.nyc.gov/html/ccrb/downloads/pdf/2015-Semi-Annual-Report-Web.pdf [https://perma.cc/B82P-PP6N] (stating that the review board has increased the rate at which it substantiates claims of misconduct "due, at least in some part, to the increasing availability of video").

27. *See* Mark Berman, *White Americans Are Changing Their Minds About Recent Deaths at the Hands of Police*, WASH. POST (May 8, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/05/08/the-very-different-way-white-and-black-americans-view-recent-deaths-at-the-hands-of-police-officers/ [https://perma.cc/R3EK-KX2D] (describing a May 2015 survey "show[ing] that 45 percent of white Americans said the deaths [of unarmed blacks] were isolated, down from 60 percent in The Post's poll last December; the number of white Americans who say there is a broader problem in policing has moved to 43 percent from 35 percent over the same span"); Pérez-Peña & Williams, *supra* note 8 (attributing this change to the "glare of video").

28. *See, e.g.*, Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 832–33 (2014) (describing the widespread support for police-worn body cameras expressed in 2014 by scholars, public officials, journalists, activists, and police departments); Sestanovich, *supra* note 24.

29. *See* Brian Heaton, *Body-Worn Camera Legislation Spikes in State Legislatures*, GOV. TECH. (June 1, 2015), http://www.govtech.com/dc/Body-Worn-Camera-Legislation-Spikes-in-State-Legislatures.html [perma.cc/F6VB-Y7AG]; Reid Wilson, *Police Accountability Measures Flood State Legislatures After Fergusion, Staten Island*, WASH. POST (Feb. 4, 2015), http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/04/police-accountability-measures-flood-state-legislatures-after-ferguson-staten-island/ [perma.cc/T2QU-64EJ]. However, most major American cities still do not have body cameras on their officers. *See* Dana Liebelson & Nick Wing, *Most Major Cities Still Don't Have Body Cameras for Cops*, HUFFINGTON POST (Aug. 13, 2015), http://www.huffingtonpost.com/entry/police-body-cameras_55cbaac7e4b0f1cbf1e740f9?kv [perma.cc/7BT5-RYHR].

30. *See, e.g.*, Rory Carroll, *California Police Use of Body Cameras Cuts Violence and Complaints*, THE GUARDIAN (Nov. 4, 2013), http://www.theguardian.com/world/2013/nov/04/california-police-body-

rise of police-worn body cameras is a misguided sense that the presence of body cameras negates the benefits of civilian recording.[31] Civilian recording is different in kind than the recording captured by police-worn cameras. This Part, therefore, contrasts the two forms of filming the police—filming by civilians in public and filming through police-worn body cameras—in order to flesh out the independent importance of civilian recordings and connect that importance to First Amendment protections.

To change who holds the camera, records the footage, and controls access to the footage is to change both the nature and the results of the act of filming an on-duty police officer. To begin with, the perspective literally matters: people perceive videos differently based on the angle from which they are shot and who has done the shooting.[32] With videotaped interrogations, for instance, individuals viewing a video of a confession are more likely to believe the police are being coercive if the video is shot from the point of view of the person being interrogated, pointing at a police officer. When the video is pointed at the suspect, in contrast, viewers are more likely to judge the confession voluntary.[33] Something similar occurs with videos of police conduct: when shot from the point of view of the police officer, as a body camera will do, the "camera perspective bias" will cause the viewer to sympathize with the officer's actions more than they would with a video taken from a neutral angle or from the perspective of the person engaging with the police officer.[34] To be sure, a video recorded by a civilian observer may have its own "camera perspective bias," making the viewer sympathize less with police officers and more with civilians interacting with those officers.[35] But to add a civilian perspective to the existing footage from a body camera is to enhance the viewer's ability to think through a situation from different viewpoints.

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cameras-cuts-violence-complaints-rialto [https://perma.cc/F4DE-9Z2F]; INT'L ASS'N OF CHIEFS OF POLICE, THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING: RESEARCH AND BEST PRACTICES FROM THE IACP STUDY ON IN-CAR CAMERAS 2 (2004), http://www.cops.usdoj.gov/ric/ResourceDetail.aspx?RID=404 [https://perma.cc/XJ4W-FM2X].

31. For example, a number of police leaders have both criticized civilian filming and announced new initiatives to equip officers with body cameras. *See, e.g.*, DeStefano, *supra* note 19; Stout, *supra* note 21.

32. *See* Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1347–60 (2010) (discussing the social science of camera perspective bias and its impact on video evidence in court).

33. *See* G. Daniel Lassiter & Audrey A. Irvine, *Videotaped Confessions: The Impact of Camera Point of View on Judgments of Coercion*, 3 J. APPLIED SOC. PSYCHOL. 268, 268 (1986) (discussed in Benforado, *supra* note 32, at 1350).

34. *See* Benforado, *supra* note 32, at 1353–56 (discussing perspective bias in the context of the video in Scott v. Harris, 550 U.S. 372 (2007)).

35. This camera perspective bias, though, is less clear than that of a police-worn camera. If a third party observer takes a video from a neutral distance, studies show that their assessment of the situation will be somewhere in the middle between the perspective of either of the two actors interacting with one another. *See* Lassiter & Irvine, *supra* note 33, at 268 (finding that a third-party perspective of a confession will lead to an intermediate assessment of whether a confession was coerced).

Civilian control over the recording device itself is also critical to the capture of the video. When civilians are operating the smartphone or the camera, police officers cannot turn off the camera[36] or "forget" to turn it on when they do not want to be filmed.[37] Such interference with body-worn cameras may be commonplace in some police departments. In 2014, for example, a U.S. Department of Justice (DOJ) report alleging excessive force at the Albuquerque Police Department found that police officers were inconsistent in turning on their cameras, often failed to record incidents even when they initiated the contact, and then gave what the DOJ concluded were unconvincing explanations as to why they did not turn on their cameras.[38] Similarly, in New Orleans, a report on the use of lapel cameras found that in two-thirds of cases, police officers did not activate their cameras during "use of force" events.[39] Civilian recorders of police officers do not film all instances of use of force, either—often, they are not there at all. Nor do civilians make neutral decisions about what conduct is worthy of recording. But when a civilian records a police officer, it transfers the decision of when to press "record" away from the officer and into the hands of an outside spectator.

Similarly, civilian control over access to the footage changes the function of the video in the public sphere. When police departments become their own gatekeepers, deciding what to release, when, and to whom, they remain in control of the narrative surrounding videos—solidifying, rather than dismantling, the traditional monopoly that police departments possess over the evidence of and narratives structuring their behavior on the street.[40] In many states, police departments are the sole gatekeepers of the release of body camera footage. Police departments often require complicated discovery requests before the footage is released or refuse to turn over any footage at all.[41] State

36. Or, at least they cannot turn it off without seizing the property or the person.

37. *See, e.g.*, Robert Gammon, *OPD Needs to Start Using Its Lapel Cameras*, E. BAY EXPRESS (Nov. 6, 2013), http://www.eastbayexpress.com/oakland/opd-needs-to-start-using-its-lapel-cameras/Content?oid=3756595 [http://perma.cc/NX5Z-NFT7]. In Los Angeles, one internal inspection found that about half of the estimated eighty cars in one patrol division had cameras or microphones that had been tampered with or removed by officers. *See* Joel Rubin, *LAPD Officers Tampered with In-car Recording Equipment, Records Show*, L.A. TIMES (Apr. 7, 2014), http://articles.latimes.com/2014/apr/07/local/la-me-lapd-tamper-20140408 [http://perma.cc/MYE3-EPVX].

38. *See* U.S. DEP'T OF JUSTICE CIV. RIGHTS DIV., ALBUQUERQUE POLICE DEPARTMENT (2014), http://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf [https://perma.cc/9R54-M4EP].

39. *See* Ken Daley, *Cameras Not On Most of the Time When NOPD Uses Force, Monitor Finds*, NOLA (Sept. 4, 2014), http://www.nola.com/crime/index.ssf/2014/09/cameras_not_on_most_of_the_tim.html [https://perma.cc/DA6Y-GCVL].

40. *See* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 18 (1966) (describing police officers' control over the structures surrounding their actions); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 417–18 (2016) (describing how police officers have long controlled official narratives of officers' behavior).

41. *See, e.g.*, Sara Libby, *Even When Police Do Wear Body Cameras, Don't Count on Seeing the Footage*, CITY LAB (Aug. 18, 2014), http://www.citylab.com/crime/2014/08/even-when-police-do-wear-cameras-you-cant-count-on-ever-seeing-the-footage/378690/ [https://perma.cc/K683-PC3H]; Sestanov-

legislatures around the country are moving to restrict access to body camera footage by exempting it from public records laws.[42] By maintaining control over their body camera operation and footage, police departments are able to craft official narratives before handing over information to the public or to independent investigators. In August 2015, for example, the Oakland Police Department held an invitation-only screening of a video of a fatal incident, but refused to release that same video to the public or provide a full, unedited version.[43] And the Chicago Police Department famously resisted releasing the footage of the police shooting of civilian Laquan McDonald, doing so only after losing a court battle in November 2015 and then carefully orchestrating the release of the video.[44] When police departments control access to the footage and the narratives surrounding any release of the footage, they strengthen their own power over the people who interact with the police on those videos.

In contrast, when civilians film the police, local residents hold the police accountable, resulting in a palpable power shift. Civilians record footage from their own perspective and control the release of that footage to the public or the authorities. They also do more than that: they communicate to police officers in the moment that someone is watching them. The transfer of power inherent in the act of observation turns the filming of a police officer in public into a form of resistance—into a challenge to their authority. Indeed, filming by disempowered populations has its own term and meaning in social theory: sousveillance is a special term for when cameras are turned on those in power.[45] Sousveillance—being watched from below, rather than from on high—facilitates the transfer of power from authorities to the less powerful.[46] Many civilians recognize the importance of this power shift. Organized copwatching groups, for example,

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ich, *supra* note 24 ("The urgent question now is not who will use the cameras, but who will be allowed to see the footage.").

42. *See* Ryan J. Foley, *Bills Nationwide Aim to Seal Police Body Camera Videos*, DES MOINES REG. (Mar. 20, 2015), http://www.desmoinesregister.com/story/news/crime-and-courts/2015/03/21/body-cameras-access-nationwide/25108067/ [https://perma.cc/K392-CQV2].

43. *See* Darwin BondGraham, *Oakland Police Let Media Watch Body-Cam Footage of Fatal Incidents, But Refuse to Publicly Release Videos*, E. BAY EXPRESS (Aug. 19, 2015), http://www.eastbayexpress.com/SevenDays/archives/2015/08/19/oakland-police-let-media-watch-body-cam-footage-of-fatal-incidents-but-refuse-to-publicly-release-videos [https://perma.cc/3UDQ-FCDE].

44. *See* Bernard E. Harcourt, *Cover-Up in Chicago,* N.Y. TIMES (Nov. 30, 2015), http://www.nytimes.com/2015/11/30/opinion/cover-up-in-chicago.html [https://perma.cc/NLC2-ASY6].

45. Professor Steven Mann, who coined the term, describes sousveillance as a technique for "uncovering the panopticon and undercutting its primary purpose and privilege." Steve Mann et al., *Sousveillance: Inventing and Using Wearable Computing Devices for Data Collection in Surveillance Environments*, 1 SURVEILLANCE & SOC. 331, 333 (2003); *see also* Steve Mann & Joseph Ferenbok, *New Media and the Power Politics of Sousveillance in a Surveillance-Dominated World*, 11 SURVEILLANCE & SOC. 18, 26 (2013) ("The practice of viewing from below when coupled with political action becomes a balancing force that helps—in democratic societies—move the overall 'state' towards a kind of veillance (monitoring) equilibrium . . . ."); Timothy Zick, *Clouds, Cameras, and Computers: The First Amendment and Networked Public Places*, 59 FLA. L. REV. 1, 66–67 (2007) (describing how sousveillance can be an empowering activity in the context of public protests).

46. For an extended discussion of this phenomenon, see Simonson, *supra* note 40.

have proliferated around the United States, in part because they link the power transfer involved in filming the police to efforts at larger social change.[47] One organized copwatching group describes its main purpose as "organiz[ing] and empower[ing] community residents to work collectively to change the relationships of power that affect our community."[48] In this way, filming police in public can become a form of civic engagement, a public gesture in which a civilian says through the pointing of a cell phone at an officer that they are holding that officer accountable in the moment.

The most open-sourced police-worn body cameras in the world could not substitute for the expressive functions of filming the police in public. So that to protect civilian recording is not just to say that we need to protect the documentation of police conduct should disputes arise in the future over the content of that conduct. It is also to say that we should protect the contestation of local police practices through observation and dissent. Part of allowing residents to participate in the public life of their neighborhoods means allowing them to shape and define the public spaces that they occupy through the expressive activity of filming the police at work.[49] The question is not, then, whether civilian video is valuable—it is—but how and why civilian video is *constitutionally* valuable. In the next Part, I connect the values of civilian recording of the police—democratic engagement, police accountability, and the expression of dissent—to parallel values found in First Amendment jurisprudence.

II. FIRST AMENDMENT VALUES AND CIVILIAN RECORDING

Police officers resist civilian recording in public when the act of recording disrupts their police work or undermines their authority. But disruptive, annoying, and offensive speech may be protected from government interference by the First Amendment when that protection serves larger First Amendment values, most famously the central tenets of promoting truth, self-government, and personal autonomy.[50] These values help identify which expressive acts are protected by the First Amendment and under what circumstances. Courts that recognize a right to record have relied almost exclusively on one First Amendment value: promoting self-government through the free discussion of governmental affairs.[51] This leading account of the First Amendment values behind the right to record is correct but incomplete, for it sets aside the ways in which the act of filming an officer in the open is a form of autonomous expression in the moment—an expression that would lose its full meaning if the expresser

47. *Id.*

48. *Id.* at 413–14.

49. *Cf.* TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 7–8 (2009) (describing the participatory benefits of allowing individuals to define their own spaces through speech out of doors).

50. *See generally* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 3–14 (1982).

51. *See, e.g.*, ACLU of Ill. v. Alvarez, 679 F.3d 583, 596–97 (7th Cir. 2012); Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011).

were not also visibly holding a recording device. So that for a complete account of the value to society behind the conduct that the First Amendment seeks to protect, a jurisprudence of the right to record should account for both the benefits to public discourse and the in-the-moment communication to officers that can be found when civilians record the police.

This Article assumes for the moment—although I return to it later—the baseline concept that video or audio recording of police officers in public is protected activity under the First Amendment. Many federal courts to address the matter have assumed this to be true, some without much discussion at all about if or how filming is a form of speech.[52] Although there is some disagreement among academics about whether recording is itself a form of expression, there is a general consensus that to record an official in public implicates the First Amendment because it is either expressive conduct itself or conduct that is essentially preparatory to speech—akin to gathering news or spending money to support a political candidate.[53] Setting aside this debate for a moment, I turn to focus instead on the First Amendment values underlying the protection of filming the police in public.

According to the leading cases finding a right to record—most prominently, recent decisions by the Seventh Circuit in *Alvarez* and the First Circuit in *Glik*—the central value served by recording police officials in public is the potential of the captured video to contribute to public discourse, and especially to the public discussion of issues related to politics and government.[54] As the First Circuit put it: "Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'"[55] Both the First and Seventh Circuits also rely on the related idea, drawn from campaign finance cases, that the First Amendment "prohibit[s] government from limiting the stock of information from which members of the

52. *See, e.g.*, *Alvarez*, 679 F.3d at 596–97; *Glik*, 655 F.3d at 83–84; Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995); *see also* Adkins v. Limtiaco, 537 F. App'x 721, 722 (9th Cir. 2013) (per curiam) (discussing First Amendment right to take photos of police). *But see* Fields v. City of Philadelphia, No. 14-4424, 2016 U.S. Dist. LEXIS 20840, at *3 (E.D. Pa. Feb. 19, 2016) (finding that recording the police on its own is not activity protected by the First Amendment).

53. For thorough discussions of this issue, see Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 84–85 (2014) (arguing that data collection is speech and, in particular, that filming is a type of expressive conduct); Kreimer, *supra* note 23, at 385 ("A prohibition on image capture is effectively a prohibition on the practice of sharing spontaneous images from life."); Margot Kaminski, *Privacy and the Right to Record*, 96 B. U. L. REV. (forthcoming 2016); Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991 (2016). For an argument that recording is not itself a form of speech, see Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1042 (2015) ("The act of recording is not itself expressive in the way that burning a flag is expressive because it does not communicate a message; it creates a message to be communicated later.").

54. *Alvarez*, 679 F.3d at 597; *Glik*, 655 F.3d at 83.

55. *Glik*, 655 F.3d at 82 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

public may draw."[56] Just as limiting the flow of money to political candidates or causes can restrict the amount of information that people have at their disposal when making political decisions, limiting the capture of audio and video of police conduct restricts the public's repository of information from which to draw when discussing and evaluating police practices.[57] Protecting the recording of the police thus enhances the key First Amendment value of promoting democratic discussion and engagement.[58]

Although courts are right to identify the contributions of recording the police to public discourse and to self-government, that should not be the end of the story. To be sure, because the police have traditionally been the ones with control over official narratives about police conduct in court and in the news, the ability to counter those narratives with stories backed up by video has transformed the nature of both public opinion and court testimony.[59] But the comparisons to campaign finance and the gathering of news miss out on the connection of open recording of the police to First Amendment values related to the ability of civilians to challenge government authority in the moment—to contest, resist, and dissent from local government practices through the expressive act of holding a visible recording device.[60] Recognizing the contemporaneous power of such an act implicates a range of First Amendment values—self-government, yes, but also promoting dissent,[61] and protecting autonomy and "individual self-realization."[62] While a focus on discourse and self-government

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56. *Id.* (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978)); *see also Alvarez*, 679 F.3d at 596 (money spent on politics "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached" (quoting Buckley v. Valeo, 424 U.S. 1, 19 (1976))).

57. *See Alvarez*, 679 F.3d at 596.

58. *See generally Alvarez*, 679 F.3d at 600 (stating that speech and press liberty are meant "to secure the[] right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct . . . ." (emphasis in original) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 421–22 (Boston, Little, Brown, and Co. 1868))); JOHN HART ELY, DEMOCRACY AND DISTRUST 93–94 (1980) ("The expression-related provisions of the First Amendment . . . were certainly intended to help make our governmental processes work, to ensure open and informed discussion of political issues, and to check our government when it gets out of bounds."); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 119 (1965) ("[T]he First Amendment . . . is concerned with the authority of the hearers to meet together, to discuss, and to hear discussed by speakers of their own choice, whatever they may deem worthy of their consideration.").

59. *See supra* notes 40–44 and accompanying text; *see also* Kreimer, *supra* note 23, at 385 ("Image capture is a precondition for effective participation in the contemporary visual ecology of communication."); Marceau & Chen, *supra* note 53, at 16 (describing the "unique contributions of recording to enhancing truth and promoting public discourse").

60. *See generally* Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 527–42 (1977) (describing the purpose of free speech as preserving the "checking value" of ordinary citizens against government overreaching).

61. *See* STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 93 (1999) (arguing that a central value of the First Amendment is to promote dissent).

62. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982); *see also* David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123

alone has generated only a forward-looking analysis (how can this act of recording affect public discourse or the workings of government in the future?),[63] a focus that also incorporates dissent, autonomy, and self-realization would investigate the presence of contemporaneous communication (how is this act of recording communicating a "proposition or attitude" towards a public official at the time of the recording?).[64] Asking this second, multifaceted question reveals the ways in which holding up a recording device in the visible presence of an officer communicates something important in the moment to that officer and to the larger public.

Observation of governmental actors can be a form of in-the-moment expression itself. When people observe government officials in action, the observers impact the decision making of those officials and help shape the public meanings of those official acts.[65] And recording backs up the power of observation—indeed, for some traditionally disempowered populations, the activity of close observation would not be safe or possible without the "weapon" of the camera to provide safety.[66] First Amendment jurisprudence has recognized this in-the-moment function of observation in the context of the right to observe courtroom proceedings. There, the Supreme Court has found the value of an open courtroom in the ability of the observer not just to publicize their observations in the future, but also to hold public officials accountable through observation in the moment. As the Court has said, "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of

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U. PA. L. REV. 45, 62 (1974) (describing First Amendment value of "autonomous self-determination"); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 221 (1972) (discussing personal autonomy as the central value protected by the First Amendment). Note that Redish's conception of "individual self-realization" encompasses the values of both autonomy and self-government, among others. *See* Redish, *supra*, at 594.

63. *See, e.g.*, Glik v. Cunniffe, 655 F.3d 78, 82–83 (1st Cir. 2011) (describing the benefits of recording the police as uncovering abuse, disseminating information to the public, and improving the functioning of government).

64. *See* Scanlon, *supra* note 62, at 206 ("[By] 'acts of expression,' . . . I mean to include any act that is intended by its agent to communicate to one or more persons some proposition or attitude."). This is echoed in Supreme Court jurisprudence, which holds that to constitute protected expression, there must be "intent to convey a particularized message . . . and in the surrounding circumstances the likelihood [i]s great that the message w[ill] be understood by those who view[] it." Spence v. Washington, 418 U.S. 405, 410–11 (1974).

65. *See* JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 302 (2011) (describing one of the central purposes of observers in adjudication as "denying the government and disputants unchecked authority to determine the social meanings of conflicts and their resolutions"). The idea that observers have an effect on individuals' actions simply through observation—sometimes referred to as the observer effect or the Hawthorne effect—is born out in social psychology as well. *See generally* PHILIP G. ZIMBARDO & ANN L. WEBER, PSYCHOLOGY 445 (1994) (discussing studies that measure the effects of observers on an individual performing a task).

66. *See* Kyle VanHemert, *Are Cameras the New Guns?*, GIZMODO (June 2, 2010, 5:00 PM), http://gizmodo.com/5553765/are-cameras-the-new-guns [https://perma.cc/XYR7-TC2R] ("When the police act as though cameras were the equivalent of guns pointed at them, there is a sense in which they are correct. Cameras have become the most effective weapon that ordinary people have to protect against and to expose police abuse.").

fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known."[67] The physical presence of citizen observers matters just as much as the later contributions of those observers to public discourse.

Moreover, by visibly challenging authority, the action of filming police officers in public is an expression of dissent. Pointing a smartphone at a police officer in public is a statement to that officer; it can serve as a symbol of quiet defiance. This visible challenge feels disruptive to police officers: they report that they feel tense[68] and threatened[69] by the presence of civilian recorders. The fact that the act of visible recording feels disruptive to police officers, even from afar, supports its inclusion as the kind of speech that must be protected precisely because it "invite[s] dispute" and causes "public inconvenience" and "unrest."[70] It is in this respect that filming in public is different from observing a public trial: while courtrooms demand decorum and solemnity, the public street is a forum traditionally open to dissent by the public, especially in the presence of armed police officers.[71]

A closer analog in First Amendment jurisprudence than the right to a public trial is the right to curse at police officers in public. The Supreme Court articulated this right most fully in *City of Houston v. Hill*, in which the Court found a Texas statute overbroad when that statute made it a crime to "oppose, molest, abuse or interrupt a police officer in the execution of his duty."[72] As the Court stated: "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."[73] The Court made clear that police officers must have a higher tolerance than a member of the general public for words that are challenging or provocative, for "a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'"[74] Significantly, in *Hill*, this led the Court to draw the constitutional line between protected and unprotected conduct at physical interference or obstruction.[75] The constitutional value served by protecting this

67. Press-Enter. Co. v. Superior Court of California, 464 U.S. 501, 508 (1984); *see also* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World,* 127 HARV. L. REV. 2173, 2197–200 (2014) (discussing the First Amendment values behind the Supreme Court's public trial cases).

68. *See* DeStefano, *supra* note 19.

69. *See* Davis, *supra* note 6.

70. Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (emphasis added). In *Terminiello*, the Court continued: "[Free speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.*

71. *See generally* ZICK, *supra* note 49, at 7–8 (describing public spaces as traditional cites of dissent and discussing the tendency of public officials to favor order and decorum over the expression of dissent).

72. City of Houston v. Hill, 482 U.S. 451, 461 (1987).

73. *Id.* at 462–63.

74. *Id.* at 462 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

75. *See id.* at 462 n.11.

conduct is not reasoned deliberation about government affairs, but rather the peaceful opposition to the authority of state actors.[76]

Like loud cursing, open recording is irritating to police officers, who may feel inhibited or distracted by the presence of the recorder. But, like cursing, the protection of open recording is supported by First Amendment values in part because it is a provocative form of expression—it allows civilians to challenge government authority on their own terms. Professor Timothy Zick, in his theorizing of First Amendment rights in public places, argues that sometimes protecting democratic values requires that we allow dissenters not just into social space, but also into the personal and even intimate space of public officials—what Zick terms "embodied places."[77] First Amendment protection of speech within embodied places facilitates forms of individual expression whose power is derived precisely from the proximity and immediacy of the act.[78] This is often true of the recording of police officers: while filming at a distance may sufficiently capture video for future use, it is the visible, in-your-face nature of holding up a cell phone in the immediate proximity of an officer at work that can solidify an individual statement of dissent and contestation.

The First Amendment values of self-government, self-realization, and protecting dissent thus combine to protect the ability of civilians to challenge authority in the moment and in person.[79] If we resolve to abide by these values, the clear implication is that to record a police officer is a protected form of expression in itself—not just because it is preparatory to the eventual speech involved in disseminating a video, but also because it expresses a "particularized message" in the moment.[80] The First Amendment must allow civilians to intrude into the sphere of police work with their cameras and smartphones up until the point that they physically interfere with that work. Our constitutional jurisprudence can only reach this conclusion if it recognizes that the constitutional purpose of protecting civilian recording is not just to protect the videos and audio captured by that recording, but also to protect the expressive act of recording itself.

III. "INTERFERENCE" AND THE LIMITS OF THE RIGHT TO RECORD

Where, then, do the constitutional limits of the right to record lie? Police officers and legislators may have very good reasons for wanting to restrict the

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76. *See id.* at 463 n.12 ("[T]he strongest case for allowing challenge [to the police] is simply the imponderable risk of abuse—to what extent realized it would never be possible to ascertain—that lies in the state in which no challenge is allowed." (quoting Note, *Types of Activity Encompassed by the Offense of Obstructing a Public Officer*, 108 U. PA. L. REV. 388, 407 (1960))).

77. ZICK, *supra* note 49, at 65–67.

78. *Id.* at 71. Zick invokes the idea of "embodied places" to explain that intrusion into someone's personal "buffer zone" is essential to certain forms of expression. *Id.* at 71–74.

79. *See* SHIFFRIN, *supra* note 61, at 76–80 (arguing that the protection of dissent implicates the First Amendment values of self-government, autonomy, and political identity).

80. Spence v. Washington, 418 U.S. 405, 410–11 (1974). I would therefore disagree with, or expand upon, the contention of previous scholars who have situated the right to record within its value as conduct essentially preparatory to speech. *See supra* note 53 and accompanying text.

act of filming, most centrally an interest in promoting public and officer safety. But in drawing the boundaries of the right to record, courts must keep in mind the multifaceted values underlying the right. Because the right to record values both the contributions of recording to future public discourse and the in-the-moment communication of visibly recording an officer, reasonable restrictions on the right cannot interfere too much with the ability of civilians either to capture footage for future use in the public sphere or to express dissent through the act of recording.

For the most part, courts have not adequately separated out these constitutional concerns when assessing the right to record. As a result, their rulings on the limits of the right have been wildly inconsistent. One recent district court decision, for instance, goes to great pains to limit First Amendment protection for recording officers to journalists who are unaffiliated with any of the people interacting with the police and who remain at a significant distance from the police they are filming.[81] The First Circuit, in contrast, has stated that recording of the police by anyone[82] can only be constitutionally prohibited when that person has interfered with police work through physical contact and when they have refused to stop their recording after a lawful warning.[83] A court assessing the constitutionality of a restriction on recording police officer conduct in public should be required to assess whether the restriction unnecessarily interferes with either the contemporaneous or future benefits of protecting the expressive conduct of recording. The right should not just be about silent filming from a distance, although that is often a good strategy for filming, but also about filming that involves disruptive and provocative behavior. Such demonstrative recording is invariably "irritating" to police officers,[84] but is nevertheless constitutionally protected.

Recognizing the contemporaneous expressive power of the act of recording police officers leads to a number of important doctrinal conclusions. First, it demonstrates that many restrictions of the ability of civilians to record officers are content-based restrictions, making them subject to strict scrutiny.[85] The content of the message of a bystander who is visibly pointing a recording device in the direction of the police is different than a bystander who has their hands at their sides. The recording bystander is telling the officer: I am watching you, and I care about how you speak and act when you are on duty. The camera is

81. Higginbotham v. City of New York, 105 F. Supp. 3d 369, 379–80 (S.D.N.Y. 2015).

82. *See* Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011) ("[T]he news-gathering protections of the First Amendment cannot turn on professional credentials or status.").

83. Gericke v. Begin, 753 F.3d 1, 8 (1st Cir. 2014).

84. Stout, *supra* note 21 (video interview with Commissioner Evans of Boston describing irritation of being filmed by civilians when on duty).

85. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000) (describing how content-based restrictions must pass strict scrutiny such that the restriction must be the least restrictive means of achieving a compelling state interest); Boos v. Barry, 485 U.S. 312, 321 (1988) ("Our cases indicate that . . . a *content-based* restriction on *political speech* in a *public forum* . . . must be subjected to the most exacting scrutiny." (emphasis in original)).

part of the content of the speech.[86] So that when a legislature bans recording within a certain distance of a police officer on duty or when a police officer arrests someone solely because of the presence of a recording device, those actions are being taken based in part on the expressive content of visibly holding the recording device.[87] Indeed, in Texas, the state representative sponsoring the bill that would ban nonreporters from filming within twenty-five feet of an officer repeatedly emphasized that the bill's intention was not to inhibit filming or police accountability (the future results of recording police officers), but rather to prevent interference with police work (the in-the-moment results of holding up a recording device near an officer).[88] If you do not recognize the value of protecting the contemporaneous expression of recording a police officer, however, it is not obvious that these restrictions are content-based.[89]

One implication of the content-based nature of restrictions on recording is that the act of recording a police officer in public can never on its own constitute interference or a crime. This should be the first tenet of any jurisprudence of the right to record. However, this is not currently the state of the law in many places. A woman in Pittsburgh, for example, was recently convicted after a bench trial of police interference for filming police officers from fifty feet away and refusing to obey six orders to turn off her phone and leave the area.[90] Although police officers require discretion in deciding when and how to investigate cases or secure crime scenes, such a conviction cannot pass constitutional muster—recording officers from fifty-feet away in public must be constitutionally protected conduct. And an arrest for failing to obey an unconstitutional command cannot stand. Similarly, a statute that criminalizes the recording of a police officer within a certain distance—for instance, twenty-five feet, as the proposed bill in Texas would have done[91]—is unconstitutional because it criminalizes the expressive conduct of holding up a phone within a visible distance of an officer.

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86. *Cf.* Kaminski, *supra* note 53 (arguing that "recording . . . does not communicate a message that is readily separable from the regulable aspects of the act.").

87. *See Boos*, 485 U.S. at 319 (finding a law prohibiting certain signs content-based because "the government has determined that an entire category of speech—signs or displays critical of foreign governments—is not to be permitted").

88. *See* Sarah Rumpf, *Texas Rep. Villalba Files Bill That Criminalizes Bloggers, Citizens Filming Cops*, BREITBART (Mar. 13, 2015), http://www.breitbart.com/texas/2015/03/13/texas-rep-villalba-files-bill-that-criminalizes-bloggers-citizens-filming-cops/ [https://perma.cc/RQP5-FKKS] (describing Texas State Representative Jason Villalba's repeated defense of the proposed bill and quoting Representative Villalba's tweet saying that "HB 2918 is meant to protect officers, NOT restrict the ability to keep them accountable. It DOES NOT prohibit filming").

89. *See* ACLU of Ill. v. Alvarez, 679 F.3d 583, 604 (7th Cir. 2012) ("In the end, we think it unlikely that strict scrutiny will apply.").

90. Lexi Belculfine, *North Side Woman Found Guilty of Interfering with Police Duties*, PITTSBURGH POST-GAZETTE (Aug. 27, 2015), http://www.post-gazette.com/local/city/2015/08/27/North-Side-woman-found-guilty-of-interfering-with-police-duties/stories/201508270204 [http://perma.cc/KMU6-HHSB].

91. *See* H.B. 2918, 84th Leg., Reg. Sess. (Tex. 2015).

Even if a court does not believe that state action restricting recording is content-based, recognizing the in-the-moment expression of recording the police also has implications for restrictions on either content-based or content-neutral state actions. Although a state can place reasonable "time, place, or manner" restrictions on public speech, those restrictions must be "narrowly tailored to serve a significant governmental interest."[92] For police officers, public safety is paramount—and certainly a significant governmental interest. But public safety is not the same as efficiency—an officer cannot intrude on free speech in order to do police work in the best way possible; she can only limit free speech in order to protect public safety. As the Court explained in *Hill*, the First Amendment requires "some sacrifice of [government] efficiency . . . to the forces of private opposition."[93] As a result, to group the act of recording into the bundle of possible actions that can potentially inhibit public safety is to cast the net too widely.

The second tenet of drawing the boundaries of permissible state actions restricting the recording of officers—including reasonable time, place, and manner restrictions—should thus be that government officials cannot claim that recording interferes with police work unless that interference constitutes a physical obstruction to that police work.[94] A hypothetical from *Hill* provides a useful example. There, the Court analyzed the conduct of a hypothetical person who runs alongside an officer and shouts at him while he is in the line of duty. The majority in *Hill* says that such conduct may sometimes constitute interference, but only because of a physical interference: "what is of concern in that example is not simply contentious speech, but rather the possibility that by shouting and running beside the officer the person may physically obstruct the officer's investigation."[95] It is the running, not the shouting. If you bring the *Hill* hypothetical into the present day and place a smartphone in the hypothetical runner's hand, the only point at which that runner can lawfully be asked to stop what she is doing is if she is physically in the way of the officer's investigation. Any other form of interference—screaming, recording, asking questions—is protected First Amendment activity, even if it does "interfere" with what an officer is trying to do in the lay meaning of the term.[96] A physical

92. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

93. City of Houston v. Hill, 482 U.S. 451, 463 n.12 (quoting Note, *Types of Activity Encompassed by the Offense of Obstructing a Public Officer*, 108 U. PA. L. REV. 388, 407 (1960)).

94. *See* Gericke v. Begin, 753 F.3d 1, 8 (1st Cir. 2014) ("[A] police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties."); Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011) ("[P]eaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation.").

95. *Hill*, 482 U.S. at 462 n.11.

96. *See Gericke*, 753 F.3d at 8.

impediment to public safety would not have to involve touching a police officer per se. One can imagine, for instance, someone jumping between an officer and an individual that officer is attempting to handcuff or someone physically obstructing the work of firefighters or emergency medical technicians. But here, as in the prior example, holding a camera in hand adds nothing to this public safety risk.

This is why it is necessary to remember the values underlying the First Amendment right to record. If the central purpose served by the right is to protect the ability of civilians to capture moving images and disseminate those images in the future, then it is not especially problematic to ban the filming of police officers within less than twenty-five feet—surely a spectator can film police conduct well enough from thirty feet away. But because the right is also about the ability of civilians to contest police practices in the moment—to convey with their smartphones that they have their eye on the officer—bystanders must be allowed to interfere to some degree with the peace, quiet, and distance that all police officers surely wish that they had from the public. For, in the end, police officers are public servants, sworn to protect the block rather than to own it. And when the people the police are sworn to protect choose to make the powerful gesture of recording the police in public, our Constitution requires that we let them make that statement.

CONCLUSION

Police leaders report that officers around the country feel "under siege."[97] Although recording police officers in public may not present quite the threat to effective law enforcement that these leaders contend—FBI Director Comey, for example, admitted that he had no evidence to support his proposition[98]—the feeling of being under siege is in some ways understandable. Recording police on the job *is* a threat to police power writ large. The ubiquity of smartphones has meant a shift in power dynamics between the police and the residents of the neighborhoods that they police. As courts around the country continue to grapple with the meaning and the limits of the First Amendment right to record, they should remember that observation is a form of power, especially when backed up by the record button, and that the populations who most frequently

97. *See supra* note 6 and accompanying text.

98. *See* Ciara McCarthy & Sabrina Siddiqui, *FBI Director Concedes he has Little Evidence to Support 'Ferguson Effect,'* THE GUARDIAN (Oct. 26, 2015), http://www.theguardian.com/us-news/2015/oct/26/fbi-director-ferguson-effect-crime-policing-james-comey [perma.cc/7NNH-Q6E2].

interact with the police—poor people of color—are also the populations with relatively little political power.[99] Unless we want to continue to allow the police to "own" the block, we need to protect methods of expression that give some ownership of public space back to the people who call it home.

99. *See generally* TRACI BURCH, TRADING DEMOCRACY FOR JUSTICE: CRIMINAL CONVICTIONS AND THE DECLINE OF NEIGHBORHOOD POLITICAL PARTICIPATION 75–104 (2013) (describing lack of political power of poor populations of color from which the majority of prison populations come); AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 199–231 (2014) (describing alienation and withdrawal from political life of individuals who had contact with the criminal justice system via stops, arrests, or confinement); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 63–120 (2011) (describing a historical trajectory in which democratic participation dies out for African American communities affected by both crime and the criminal justice system); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African-American Communities*, 56 STAN. L. REV. 1271, 1291–98 (2004) (describing how mass incarceration in African-American communities erodes those communities' ability to cultivate political power and affect the system).