Journal of Public Law and Policy

Volume 37 | Issue 1 Article 3

2017

Cop-Watch: An Analysis of the Right to Record Police Activity and Its Limits

Raoul Shah

Mitchell Hamline Law Journal of Public Policy and Practice

Volume 37 | Issue 1 Article 3

2016

Cop-Watch: An Analysis of the Right to Record Police Activity and Its Limits

Raoul Shah
Mitchell Hamline School of Law

COP-WATCH: AN ANALYSIS OF THE RIGHT TO RECORD POLICE ACTIVITY AND ITS LIMITS

Raoul Shah

I. INTRODUCTION

Over the last year, the news headlines blaring that a police officer's potentially inappropriate actions were recorded have become almost too familiar. The social climate has shifted to one where much of the historic trust that was placed in police officers has become questioned following the events in Ferguson, Missouri, and Staten Island, New York. The timing of this social climate shift has lined up perfectly with the prominence of smart-phones that are capable of recording high definition videos and sound recording. However, police have also historically cited to wiretap laws, which were intended to protect citizens from being recorded without consent, as a basis to arrest citizens for videotaping police activity.[1]

The issue of whether or not there is an established constitutional right to record police activity has arisen on various occasions without a definitive answer.[2] In *Rivera v. Foley*, Pedro Rivera heard that there had been a serious car accident and went out to the scene with his own drone.[3] The drone had been set up to "record visual images of the accident scene."[4] Rivera was standing outside of the scene of the accident and observing the officers responding to the call, and

[1] Michael Potere, *Who Will Watch the Watchmen? Citizens Recording Police Conduct*, 106 NW. U. L. Rev. 273 (2012).
[2] *Rivera v. Foley*, 2015 U.S. Dist. LEXIS 35639, at *24 (2d Cir. Mar. 23, 2015).
[3] *Id.* at *3.
[4] *Id.*

flew his drone about one hundred and fifty feet over the accident scene.[5] Some of the uniformed officers came over and asked Rivera to identify himself and what he was doing.[6] Rivera informed them that he was a photographer for a television station, but that he was not acting in that capacity at the time although he on occasion would forward video footage from the drone to the television station.[7] The officers demanded that Rivera quit operating the drone and leave, even though he was not violating any laws.[8] The officers also called Rivera's supervisors at work to complain that Rivera was interfering with a police investigation, and as a result, Rivera was suspended from work for one week.[9] Rivera then sued, alleging that the officers' actions violated his First and Fourth Amendment rights.[10]

The police officers claimed, among other things, that their conduct was protected by qualified immunity.[11] Qualified immunity protects municipal officers from being liable as individuals under a 42 U.S.C. § 1983 civil rights claim when they were engaged in "discretionary functions."[12] Qualified immunity exists "to protect officials when they must make difficult 'on-the-job' decisions."[13] The threshold inquiry to determine if qualified immunity is applicable is whether the officer's conduct violated a constitutional right given the specific context of that

[5] *Id.*
[6] *Id.* at *3-*4.
[7] *Id.* at *4.
[8] *Id.* at *4-*5.
[9] *Id.* at *5-*6.
[10] *Id.* at *6.
[11] *Id.* at *13.
[12] *Id.* (quoting *Williams v. Lopes*, 64 F. Supp. 2d 37, 41 (D. Conn. 1999)).
[13] *Rivera*, 2015 U.S. Dist. LEXIS 35639 at *13-*14 (quoting *Alto v. Anthony*, 782 F. Supp. 2d 4, 8 (D. Conn. 2011)).

case.[14] If it appears that the official conduct did violate a constitutional right, the second prong of the test is to determine if that right is one that has been clearly established, such that the unlawfulness of the conduct would be apparent "in light of the pre-existing law."[15] Only if the conduct is found to have violated a clearly established constitutional right will a claim under § 1983 not be barred by qualified immunity.

The discussion in *Rivera v. Foley* included an analysis of whether "the right to photograph and record police officers who are engaged in an ongoing investigation was clearly established as a matter of constitutional law" at the time of the incident in question.[16] The District Court for Connecticut held that because there had been a split between the other circuit courts as to whether or not such a right was clearly established, Rivera's recording of the police officers' activity was not protected and the officers were entitled to qualified immunity.[17] The court went one step further and said that even if the right had been clearly established, Rivera's use of a drone surpassed other cases where recording was all done from a handheld device and thus would not have been protected anyway.[18]

This article will advance the argument that the courts should find in future cases that the right to record police activity has been clearly established as a constitutional right, but that use of a drone to record police activity should not be recognized as a constitutional right. In Part II, this article will discuss the current split between the circuit courts as to whether recording police activity is a clearly

---

[14] *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)).
[15] *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)).
[16] 2015 U.S. Dist. LEXIS 35639 at *24.
[17] *Id.*
[18] *Id.* at *25-*26.

established constitutional right. Part III of this article will discuss the extent of the First Amendment as established by the United States Supreme Court's jurisprudence over time. Part IV of this article will discuss the right to record police activity in light of the case law regarding the First Amendment. The article will conclude that the right to record police activity is a clearly established constitutional right when a handheld device is used but use of a drone may be beyond the scope of that right.

II. CONFLICT BETWEEN CIRCUITS

The District Court for the District of Connecticut identified that the Circuit Courts of Appeals have been split as to whether or not the right to record police activity is a constitutional right that is clearly established such that it can defeat a claim of qualified immunity when an officer inhibits those actions.[19] The First, Seventh, Eleventh, and Ninth Circuits have all held that the right to photograph and record police officers in the performance of their duties is protected under the First Amendment.[20] The Third Circuit and the Fourth Circuit, however, have all denied the existence of such a right.[21]

a. Circuits that Recognize the Right to Record Police Activity

The First Circuit Court of Appeals addressed the issue in a case arising out of actions that took place in October of 2007.[22] Glik saw three police officers arresting a young man and, out of concern that the officers were using excessive

[19] *Id.* at *24.
[20] *Id.*
[21] *Id.*
[22] *Glik v. Cunniffe*, , 655 F.3d 78, 79 (1st Cir. 2011).

force, started to take video on his cell phone from approximately ten feet away.[23] One of the officers asked if Glik was also recording audio and when Glik stated that he was, the officer arrested Glik for a violation of the wiretap law and confiscated the cell phone.[24] The charges against him were later dismissed, and Glik filed a civil rights action against the officers under 42 U.S.C. § 1983 alleging that his First and Fourth Amendment rights were violated.[25] The officers claimed that they were entitled to qualified immunity on the grounds that there was no established constitutional right to record police officers.[26]

The district court denied the motion to dismiss.[27] On appeal, the First Circuit Court of Appeals held that based on principles from United States Supreme Court case law, they had already recognized a prior case that "the videotaping of public officials is an exercise of First Amendment liberties."[28] The court also stated that it did not matter that this was a private individual rather than a reporter recording the events because the First Amendment extends to the public, not just the press.[29]

In *ACLU v. Alvarez*, the Seventh Circuit Court of Appeals was asked to consider whether an eavesdropping statute was unconstitutional for impinging on citizens' First Amendment rights.[30] The court reasoned that courts have not "seriously questioned that the processes of writing words down on paper, painting

---

[23] *Id.* at 79-80.
[24] *Id.* at 80.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 83; *see Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999) (holding that when a journalist films public officials in a peaceful, law abiding manner, in an exercise of his First Amendment rights, police officers do not have the authority to stop him).
[29] *Glik*, 655 F.3d. at 83-84; *see also* Part III(b)(i), *infra.*
[30] 679 F.3d 583, 586 (7th Cir. 2011).

a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection."[31] Although those acts can be broken down into specific acts that would not be considered speech under the common definition, such as forming each line of a letter or an individual stroke of the paintbrush, the court has "not attempted to disconnect the end product from the act of creation."[32] Thus, "the act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording."[33] The Seventh Circuit easily extended these arguments to audio and visual recordings because they, like painting and writing, are methods of enabling speech.[34] The court held that these principles were universally accepted, and thus established under the First Amendment rights.[35]

The Eleventh Circuit in *Smith v. City of Cumming* reviewed a case where summary judgment had been granted to the City and police chief on a 42 U.S.C. § 1983 claim.[36] The court held that there was no doubt that the Smiths had a right to record police activity that was subject to "reasonable time, manner, and place restrictions."[37] However, the court denied review in a *per curiam* decision because the Smiths failed to show that the conduct by the police or City deprived

[31] *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010).
[32] *Id.*
[33] *ACLU*, 679 F.3d at 595.
[34] *Id.* at 597.
[35] *Id.*
[36] 212 F.3d 1332 (11th Cir. 2000).
[37] *Id.*

them of that right in their complaint.[38] Nonetheless, the Eleventh Circuit held that whether the right to record police activity was not at issue in that case.

The case from the Ninth Circuit referred to by the *Rivera* court did not explicitly say that there was a right to record police activity specifically, but could be interpreted as such. In that case, Jerry Fordyce had volunteered to videotape a demonstration for broadcast on a public television channel.[39] The police officers present at the demonstration, who were also subjected to being recorded, were not pleased by the recording and tried to physically prevent him from recording.[40] Specifically, Fordyce alleged that he was assaulted when a police officer grabbed his camera and smashed it into his face.[41] This incident was recorded by the video camera.[42] Fordyce was ultimately arrested for videotaping two boys after the adult who was with them asked him to stop, pursuant to a Washington statute that forbade recording private conversations without consent.[43] The Ninth Circuit Court of Appeals held that the officers were protected by qualified immunity as to the arrest, since they had a reasonable belief that Fordyce had committed a misdemeanor by recording the boys.[44] However, the court remanded because there were still genuine issues of fact as to whether Fordyce was assaulted by the officers prior to that in an attempt to dissuade him from exercising his First Amendment rights.[45] This holding could be taken to mean that there is a First

[38] *Id.* at 1333.
[39] *Fordyce v. City of Seattle*, 55 F.3d 436, 438 (9th Cir. 1995).
[40] *Id.*
[41] *Id.* at 439.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 439-40.
[45] *Id.* at 439.

Amendment right to record police activity in public that officers may not try to dissuade citizens from exercising.

b. Circuits that Deny the Right to Record Police Activity

The Third Circuit Court of Appeals denied that the right to record police activity during a traffic stop was well established as a constitutional right under the First Amendment.[46] In *Kelly*, the court found that the case law was insufficient to support a conclusion that competent officers would have fair notice that arresting someone for recording police activity would be a violation of their First Amendment rights.[47] Although some of the court's jurisprudence declared that there was a right to record police activity, other cases decided by the court held that there may need to be an express purpose in order to have a video recording be protected under the First Amendment.[48] Further, the court had denied that recording a public meeting was protected under the First Amendment.[49] Therefore, the court held that there was not a clearly established constitutional right to record all police activity such that police officers would be aware that impeding a citizen from recording would infringe upon constitutional protections.[50]

In *Szymecki v. Houck*, the Fourth Circuit Court of Appeals similarly ruled that there was not a clearly established right to record police activity in that

[46] *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010).
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*

circuit.[51] The court stated that when determining if a right is clearly established, it need only look at decisions made by the Supreme Court, the Circuit Court of Appeals, and the highest court from the state where the case was originally from.[52] It went on to hold in a *per curiam* decision that after reviewing the record and legal authorities, it seemed clear to them that police officers were protected by qualified immunity for stopping citizens from recording their activities because in that circuit the right to record police activity was not clearly established.[53]

III. CONSTITUTIONAL RIGHTS

a. The First Amendment and its Purpose

The Founding Fathers of the United States of America established that "Congress shall make no law […] abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[54] The United States Supreme Court has interpreted the First Amendment as a means to allow citizens to collect and distribute information and prohibiting the government from limiting the information that is available to the public.[55] This right is to collect and distribute information is particularly important when it relates to government actions.[56] The government would potentially have a great incentive in and motive to repressing opposition, and carries the power to suppress what information is available.[57]

[51] 353 Fed. Appx. 852 (4th Cir. 2009).
[52] *Id.*
[53] *Id.* at 853.
[54] U.S. const., Amend I.
[55] *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978).
[56] *Id.* at 777.
[57] *Id.*

Thus, the prohibition against the government exercising that power to suppress certain information that it finds unfavorable is crucial.[58]

The First Amendment specifically mentions that the freedom of the press should not be abridged.[59] This allows the press to gather news from any source, as long as it is done in a lawful manner.[60] The amendment was included in the Bill of Rights with the intent that it would protect free discussion about the government's affairs and allow debate over public issues to be uninhibited.[61] Allowing the press to gather information on government officials in a way that can be made public is protected because it promotes that "free discussion of governmental affairs" and allows for information regarding public issues to be distributed more widely.[62]

A public interest in governmental affairs includes an interest in law enforcement action.[63] Free discussion regarding law enforcement's use of discretion, and whether it was used appropriately, is of great significance to the public interest since law enforcement officials could use that discretion to inhibit liberties of the citizens.[64] Since issues regarding law enforcement's use of discretion is important to the public interest, access to information about it

[58] *Id.*
[59] U.S. const., Amend. I.
[60] *Houchins v. KOED, Inc.*, 438 U.S. 1, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978).
[61] *Ariz. Free. Enter. Club's Freedom Fund PAC v. Bennett*, 131 S. Ct. 2806, 2828-29, 180 L. Ed. 2d 664 (2011).
[62] *Mills v. Alabama*, 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966).
[63] *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035-36, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991).
[64] *Id.*

through the press was intended to be protected by the First Amendment as part of the "free discussion of governmental affairs."[65]

b. Evolution of the First Amendment Doctrines

i. Extension from the Press to the Public

While the First Amendment explicitly mentions a freedom of the press, it also includes language about freedom of speech generally and how other rights of the people, such as the right to petition the government for redress, are not to be inhibited.[66] The Supreme Court has interpreted this to mean that the public has a right regarding access to information, including collection and distribution, which exists concurrently with the right of the press.[67] The rights of the press are not special or exclusive for information that is not generally available to the public.[68] States have very "sharply circumscribed" limits that may be placed on First Amendment rights to collect and distribute information in public spaces.[69] Since the public has a right that exists simultaneously with the right of the press, the public is also entitled to gather information that advances the free and open discussion of government affairs so long as it is done by lawful means.[70] It would naturally follow that the public's right to gather information about government affairs also includes a right to gather information about law enforcement's use of discretion for the same reasons that the press is entitled to.[71]

ii. Use of Recording Devices

---

[65] *Ariz. Free Enter. Club's Freedom Fund PAC*, 131 S. Ct. at 2828-29.
[66] U.S. const., Amend. I.
[67] *Houchins*, 438 U.S. at 16, 98 S. Ct. 2588.
[68] *Branzburg v. Hayes*, 408 U.S. 665, 684, 92 S. Ct. 2646, 44 L. Ed. 2d 626 (1972).
[69] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983).
[70] *Houchins*, 438 U.S. at 1, 98 S. Ct. 2588.
[71] *Gentile*, 501 U.S. at 1035-36, 111 S. Ct. 2720.

The issue that appeared in *Rivera* is whether or not the right to use a recording device is a constitutional one that has been clearly established; not just whether the public has a right to gather information about law enforcement activity.[72] Recording, whether by video, photograph, or audio, is considered a type of expression that is commonly used to preserve and distribute information and ideas.[73] When regulations are placed on a mode of expression that ultimately will affect the quality of the communication itself down the line.[74] Using recording to preserve and later distribute information and ideas is a type of expression that is "included within the free speech and free press guaranty of the First" Amendment that has been made binding on the states by means of the Fourteenth Amendment.[75]

iii. The Right to Criticize Law Enforcement Officials

Included in the First Amendment protections granted to the people of the United States is the right to peacefully criticize law enforcement in the performance of their duties.[76] This guarantee is a "principal characteristic by which we distinguish a free nation from a police state."[77] The Supreme Court has explained that peaceful criticism has a high value in a free society and provides a check on state power, and thus is deserving of protection.[78]

This right, however, is not one without conditions. Criticism of law enforcement's performance of their duties loses its protection when it forms "no

---

[72] 2015 U.S. Dist. LEXIS 35639 at *24.
[73] *Burstyn v. Wilson*, 343 U.S. 495, 502, 77 S. Ct. 777, 96 L. Ed. 1098 (1952).
[74] *City of Lague v. Gilleo*, 512 U.S. 43, 48, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994).
[75] *Burstyn*, 343 U.S. at 502.
[76] *City of Houston, Texas v. Hill*, 482 U.S. 451, 461, 107 S. Ct. 2502, 96 L. Ed. 2d 398.
[77] *Id.* at 462-63.
[78] *Colten v. Kentucky*, 407 U.S. 104, 109, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972).

essential part of any exposition of ideas and [is] of such slight social value as a step to truth that any benefit that may be derived from [the criticism] is clearly outweighed by the social interest in order and morality."[79] In other words, criticism that is not founded in fact or does not advance public discussion but rather seeks only to undermine and mark the image of law enforcement might not be protected under the First Amendment.[80]

Further, certain types of criticism directed at law enforcement may be unprotected under the First Amendment because it obstructs and investigation or jeopardizes officer safety.[81] By virtue of their position in society and the government, "officers [are] entitled to enforce [the law] free from possible interference or interruption from bystanders."[82] Engaging in criticism that creates an obstruction to law enforcement or endangers the officers while performing their duties has a low social value when compared to the state's valid interest in the maintenance of public order.[83] Therefore, criticism of the police in a way that interferes with or creates danger to law enforcement will not be protected under the First Amendment. As a result of these Supreme Court decisions, whether a specific instance of exercising the right to criticize law enforcement will be protected turns on if that criticism was done in a peaceful manner as opposed to one that obstructed or endangered law enforcement officers.

IV. ANALYSIS OF THE RIGHT

a. Right to Record Police Activity with Handheld Devices

[79] *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1041 (1942).
[80] *Id.*
[81] *Colten*, 407 U.S. at 109, 92 S. Ct. 1953.
[82] *Id.*
[83] *Id.*

Given the line of reasoning passed down by the United States Supreme Court regarding protected First Amendment rights, it would appear that the Second Circuit erred in holding that there is no clearly established right to record police activity with a handheld device such as a cell phone. While there has been a split amongst the Circuit Courts of Appeals, the reasoning required to make the right to record police activity a constitutional one has been previously decided by the United States Supreme Court. Since the basis has been so clearly passed down from the highest court, the Courts of Appeals should have also found that the right is clearly established and thus a claim under § 1983 would not be barred by qualified immunity. So far, the Eighth Circuit has yet to encounter a case where it will have to determine whether there is a clearly established constitutional right to record police activity with a handheld device. However, when the opportunity arises the Eighth Circuit should hold that this right has been clearly established as our understanding of the First Amendment has evolved.

The United States Supreme Court has established conclusively that the freedom of the press mentioned in the First Amendment includes the right for the press to gather information by any lawful means.[84] The purpose behind this is for the media to consolidate and distribute that information for the public to be aware of and to hold the government accountable.[85] This right has been extended to private citizens in the United States as well.[86]

Even if this right had not been clearly extended to private citizens, in this day and age the advances in technology "have made the lines between private

[84] *See* Part III(a), *infra*.
[85] *Id.*
[86] *See* Part III(b)(i), *infra*.

citizen and journalist exceedingly difficult to draw."[87] People everywhere have cell phones that are capable of recording like a "traditional film crew" would have done in the past.[88] In modern times, "news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper."[89] It is clear that it is no longer feasible to protect the right to gather and distribute information under the First Amendment solely based on a profession or credentials.[90]

Further, the Supreme Court has stated that people should be allowed to criticize law enforcement officers in the performance of their duties so long as the criticism does not interfere with the performance of those duties or endanger the lives of the officers in the process.[91] This allows the state's interest in the maintenance of order to prevail over an individual person's criticism of the police.[92] At the same time, this allows the United States to be a democratic society rather than a police state.[93] By allowing the use of recording devices and allowing the public to criticize law enforcement, the Supreme Court has ensured that the free speech rights have been adequately protected, and by requiring that these actions take place in a lawful manner, peacefully, and in a way that does not interfere with an investigation or endangers officer safety, the jurisprudence has adequately balanced those rights with the government's interest in an orderly society.

---

[87] *Glik*, 655 F.3d at 84.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Colten*, 407 U.S. at 109, 92 S. Ct. 1953.
[92] *Id.*
[93] *City of Houston, Texas v. Hill*, 482 U.S. at 462-63, 107 S. Ct. 2502.

Although the Third Circuit in *Kelly* found that there was not an established constitutional right to record police activity, the facts of that case were that the recording was taken during a traffic stop.[94] This differs from most scenarios, such as the one presented in *Glik* where the recording was made from a distance while officers were arresting another individual.[95] A traffic stop is a situation that differs in many significant ways from an arrest in a public place.[96] The United States Supreme Court itself has consistently acknowledged "the inordinate risk confronting an officer as he approaches a person seated in an automobile."[97] The court in *Mimms* referenced a study that stated that about thirty percent of police shootings took place as an officer was approaching a suspect who was sitting in an automobile.[98] Another study had found "that a significant percentage of murders of police officers occurs when the officers are making traffic stops."[99] Thus, the Third Circuit could have distinguished their finding from those of the other circuits by citing to the danger to officers inherent in traffic stops. This would still allow for a constitutional right to record police activity in other public places.

Any restriction placed on a constitutional right that encroaches on personal liberty is usually subject to strict scrutiny.[100] In order to survive the strict scrutiny test, a limitation on the constitutional right to free speech must serve a compelling

---

[94] *Kelly*, 622 F.3d at 262.
[95] *Glik*, 655 F.3d at 80.
[96] *Id*. at 85.
[97] *Pennsylvania v. Mimms*, 434 U.S. 106, 110, 98 S.Ct. 330, 333, 54 L.Ed.2d 331 (1977).
[98] *Id.* (citing *Adams v. Williams*, 407 U.S. 143, 148 n. 3 (1972).
[99] *Mimms*, 434 U.S. at 110, 98 S.Ct. at 333 (citing *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973).
[100] *Griswold v. Connecticut*, 381 U.S. 479, 497, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (citing *Bates v. Little Rock*, 361 U.S. 516, 524, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960)).

government interest and be narrowly tailored to meet that compelling interest.[101] The *Kelly* decision would still be found to comport with this and thus be valid. There is no doubt that the government has a compelling interest in law enforcement officer safety.[102] Since it has been well established that traffic stops are "especially fraught with danger to police officers,"[103] prohibiting citizens from recording police activity during traffic stops is a restriction that would be narrowly tailored to serve the government interest in officer safety. The same would be true of a rule that prohibited the recording of police activity in a way that would be likely to endanger or impede law enforcement officers while they are engaged in their duties. Such restrictions would only be in effect when the method used to record police activity poses a threat to the safety of the law enforcement officials or their ability to carry out their legal duties. Thus, those restrictions would be narrowly tailored to meet the compelling "legitimate and weighty" interest that the government has in officer safety.[104] These restrictions would likely have to come from individual States' legislatures, however.

The argument that allowing people to record in public places infringes upon the privacy of other citizens, especially those who were the subject of an arrest and did not give consent, was one that was used by police for years in a number of states when using wiretapping laws as a basis to arrest citizens who recorded police activity.[105] However, a First Amendment right to record in public

---

[101] *Id.*
[102] *See Mimms*, 434 U.S. at 110 (stating that it is "too plain for argument" that officer safety is "legitimate and weighty.").
[103] *Rodriguez v. United States*, 135 S.Ct. 1609, 1616, 191 L.Ed.2d 492, 2015 U.S. LEXIS 2807 (quoting *Arizona v. Johnson*, 555 U.S. 323,330, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009).
[104] *Mimms*, 434 U.S. at 110.
[105] Michael Potere, *supra*, 106 NW. U. L. Rev. 273.

areas outweighs these privacy concerns because when in public, "one person's privacy collides with other peoples' experience and memory."[106] Even photographic or video recording does not implicate privacy issues because "this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see."[107]

Taking this as a whole, it seems only a matter of time before the recognition of a constitutional right to record police activity becomes well-established across all of the circuits. Over the past year, as levels of distrust in the police have grown, it seems that citizens have been more prone to take out their cell phones and record when they see something that they believe to be excessive force or inappropriate police conduct. Allowing this as a constitutional right would likely serve an important function as a check on police officers as they carry out their official duties.

Additionally, granting citizens the constitutional right to record police activity would probably also be beneficial to the states' and police's interests. Although many departments are now beginning to implement body camera programs, the body cameras do not capture everything about the officer's surroundings and therefore may not tell the full story when an officer gets involved in an incident that draws public concern. If a citizen, standing at a safe distance away is allowed to record the incident without the fear of being arrested of having his or her cell phone seized, the surrounding circumstances are more

[106] Margot E. Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry*, 4 Calif. L. Rev. 57, 62-63.
[107] William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 391-92 (1960).

likely to be recorded and could be used to absolve the officer of any allegations of misconduct down the road. In an instance where a police officer did in fact commit some form of misconduct or there are potential criminal charges, having a video from a citizen that captures a more complete recording of the incident could be beneficial to the attorneys in the case as well.

If citizens are concerned that they may be arrested or have their phones or cameras taken away from them by the police for recording police activity in public and from a safe distance away, this may cause hesitation to record or even prevent it fully. This would cause more harm to the system than good. As a result of the Supreme Court's interpretation of the First Amendment rights to free speech and the restrictions laid out by prior case law, courts should recognize that the right to record police activity is a constitutionally protected right and not allow for qualified immunity when an officer arrests a citizen or seizes a phone from a citizen for exercising that right.

b. Right to Record Police Activity with a Drone

i. Use of Drones May Endanger Officer Safety or Obstruct Investigation

The requirement that the recording and commenting on law enforcement activity not endanger law enforcement officers is well served by allowing recording by a handheld device, such as a cell phone, at a reasonable distance away. However, it is not clear that this requirement is met when a citizen uses a drone to record law enforcement actions from overhead, especially in a high stakes situation.

There is now "a wide and growing array of ever-more-sophisticated drones […] readily available for purchase at hobby stores and on the internet."[108] Originally developed for use by the military, civilians and journalist have started to use them as well.[109] Drones cost just a few hundred dollars and "can effortlessly be controlled from ordinary smartphones."[110] "As drone technologies improve, the list of promising domestic uses for the devices continues to grow."[111] While *Rivera* may be one of the earlier cases where use of a drone to record police activity was an issue, the number of cases litigating this matter is likely to increase in the coming years. Thus, it would be prudent for the courts to adopt a position on whether use of a drone to record police activity is a right that is constitutionally protected under the First Amendment to the same extent as the right to record police activity with a handheld device.

An officer on the ground when making an arrest or being engaged in a stop of some other kind is charged with the task of controlling their environment. While officers are trained to be aware of their surroundings, this task would become significantly more difficult if the officer had to be aware of not only what is going on around him or her, but also what is taking place in the air above. While the argument could be made that a drone that is only equipped with a camera to record what is transpiring below is not dangerous, law enforcement has no way of actually knowing what capabilities a drone has from that distance. A

---

[108] Troy A. Rule, *Airspace in an Age of Drones*, 95 B.U.L. Rev. 155, 157 (2015).
[109] Leslie Kaufman & Ravi Somaiya, *Drones Offer Journalists a Wider View*, N.Y. Times, Nov. 24, 2013. http://www.nytimes.com/2013/11/25/business/media/drones-offer-journalists-a-wider-view.html.
[110] Troy A. Rule, *supra*, at 157.
[111] *Id.* at 160.

general rule permitting citizens to use drones to record police activity from above would be overbroad in that it would be possible for people to use drones that had other capabilities as well.

Drones "are often heavy, powerful machines."[112] Further, drones are generally electronic and operate on battery power. While hovering hundreds of feet over a situation that is transpiring may not be inherently dangerous towards law enforcement officers engaged in their official duties, there is always the possibility that while one of these may lose power or run out of a battery charge while flying over the officers. This could create a dangerous situation for the officers, as the officers would be at risk of being hit, and possibly severely injured, from a falling drone with gravity accelerating the speed of its fall over hundreds of feet. This risk would also interfere with the performance of duties by the officers because if a constitutional right to use drones to record police activity from above was established, officers would need to constantly be looking up in the air to make sure there is no drone falling at them. This would be distracting to the officer from the duties that he or she is engaged in, and could cause more mistakes or potentially allow a suspect to break free and escape or injure the officer.

Even though the use of drones has only recently become more prevalent, there have already been some reports of drone operated by civilians "crashing into buildings [and] having hazardously close encounters with helicopters."[113] They have "crashed into skyscrapers in Midtown Manhattan and [fallen] to a sidewalk"

[112] Leslie Kaufman & Ravi Somaiya, *supra*.
[113] Troy A. Rule, *supra*, at 157.

as well as "spun out of control and into the crown at a bull-running event in Virginia."[114] Even just a couple of months ago, a drone fell from the sky in California in pieces.[115] One part of the drone hit an 11-month old baby girl as she was being pushed in a stroller by her mother, causing a large bruise on her forehead and a small cut on the side of her head.[116] When the owner was interviewed by the police at the scene of the accident, he said that he had simply lost control of his drone.[117] About a week prior to that incident, a New York City teacher was arrested after he crashed his drone into the empty seats at a U.S. Open tennis match.[118]

These anecdotal stories illustrate the fact that it is highly possible for a drone operator to lose control of the drone he or she is piloting. This would definitely by an issue if the drone was hovering above police officers responding to a call. If a police officer was engaged in the process of making an arrest or rendering aid to an injured person, having a drone that may malfunction overhead could pose a serious threat to the officer's ability to carry out those tasks. Additionally, an officer carrying out investigative tasks may be distracted from those duties if he or she had a drone hovering overhead, due to the fact that it could malfunction at any minute and come crashing down. Extending the constitutional right to record police activity to a right to use drones to record

---

[114] Leslie Kaufman & Ravi Somaiya, *supra.*
[115] Dan Weikel, *11-Month-Old Girl Hit in Head by Crashing Drone; FAA Investigating*, Los Angeles Times, Sept. 16, 2015. http://www.latimes.com/local/lanow/la-me-ln-pasadena-drone-flight-20150916-story.html.
[116] *Id.*
[117] *Id.*
[118] Laura Wagner, *Drone Crash at U.S. Open, New York City Teacher Arrested*, Minnesota Public Radio, Sept. 4, 2015. http://www.npr.org/sections/thetwo-way/2015/09/04/437539727/drone-crash-at-u-s-open-new-york-city-teacher-arrested.

police activity could put officers' safety at risk and may impede ongoing investigations.

Although denying the right to record police activity with a drone is limiting the First Amendment rights, it is one that is narrowly tailored to meet a compelling government interest. As stated above, the government has a compelling interest in protecting the safety of its law enforcement officers. Given the dangers that the use of drones to record police activity could pose, limiting only the right to record by drone is sufficiently narrow that it would stand against strict scrutiny.

ii. Use of Drones to Record May Not Be Lawful

Even if the use of drones to record police activity did not pose a potential danger to the lives of police officers or have the potential to interfere with an investigation, it would still likely fail to be recognized as a clearly established constitutional right under a different analysis. The right to gather the news and record may be completed by use of any source so long as it is done by lawful means.[119] Thus, if the recording is not done by a lawful means, it is not protected by the constitution so a police officer or other official interfering with such recording is not a violation of a constitutional right and there can be no § 1983 claim for such interference.

As drones have become more and more prevalent, one of the key issues that has been repeatedly presented is how property laws will apply to the

[119] *Houchins*, 438 U.S. at 1, 98 S. Ct. 2588.

increasing use of drones. This includes how to determine whether or not a drone is trespassing on private property based on its use. In many instances where there have been disagreements over a drone flying in a particular place, it has been unclear whether the operator of the drone was able to be held liable for such operation.[120] For the time being, there is no clear set of laws that apply to drones so questions of liability remain largely unanswered.[121] This means the legality of a drone appearing in certain locations is also largely unestablished.

Originally, the common law rule was that whoever owned a certain patch of land owned the air above the land as part of their property interest in the land.[122] Over time – and especially after airplanes, helicopters, and other related machines were developed – it became clear that it was not feasible to allow a landowner to have rights that reached all the way into outer space over the land that they owned.[123] Recognizing the common law rule would mean that anytime an aircraft wanted to travel, it would be required to get an easement over the land that it sought to pass over from each individual landowner.[124] Such a practice would have been impracticable, which is especially evident in modern times where so many aircrafts travel long distances each and every day. In relation to drones, this would mean that any drone operator who is sending his or her drone over someone else's land would need that person's permission to pass over the land prior to sending the drone on that flight. To combat this issue, the federal

[120] Troy A. Rule, *supra*, 163-64.
[121] *Id.* at 164-65.
[122] *Id.* at 166 (citing Stuart S. Ball, *The Vertical Extent of Ownership in Land*, 76 U. Pa. L. Rev. 631, 631 (1928)).
[123] Troy A. Rule, *supra*, at 166.
[124] *Id.* (citing *Cnty. Of Westchester v. Town of Greenwich, Conn.*, 793 F. Supp. 1195, 1204 (S.D.N.Y. 1992)).

government instituted laws that allowed flights to be made within the "navigable airspace," which has been defined by regulations to mean airspace that is over five hundred feet above the ground.[125]

The United States Supreme Court set out a landmark holding in *United States v. Causby* in 1946 which provided further, albeit unclear, guidance as to what rights the owner of a parcel of land has over the airspace above that land.[126] The Causby family sued the government over a number of flights passing over their land that were going from and coming to the airport that the government had leased on an adjacent parcel.[127] The lights and loud noises from the flights were causing a panic among the chickens owned by the family, which led to the chickens flying into the walls of their coop and dying.[128] The Causbys sued, alleging that the low flights constituted an impermissible taking of their land by the government and that they were entitled to just compensation under the Fifth Amendment.[129]

The Court started by declaring that the common law rule that allowed ownership rights to a landowner of all the airspace above his or her land defied common sense and could not be said to have any reasonable application in the modern world.[130] In support of this finding, the Court pointed to the fact that Congress had already passed the previously mentioned legislation permitting the use of certain parts of the airspace by the public.[131] The majority made clear that

---

[125] Troy A. Rule, *supra*, at 166 (citing Civil Aeronautics act of 1938, ch. 601, 52 Stat. 973).
[126] 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946).
[127] *Id*. at 328 U.S. at 258, 66 S. Ct. 1062.
[128] *Id*. at 259.
[129] *Id*. at 258.
[130] *Id*. at 260-61.
[131] *Id*.

the owner of a parcel of land owned the space above the ground that the owner could "occupy or use in connection with the land."[132] When the space above the ground that can be occupied or used by the owner for some purpose in connection with the land is invaded by another, that invasion has the same character as an invasion of the ground itself.[133] Thus, when the airspace above one's land is intruded upon by another the landowner may have a cognizable suit for trespass against the invader, who then may be civilly or criminally liable.[134]

The holding in *Causby*, while recognizing that in some cases a landowner may have a valid trespassing claim against another, limits the extent to which the owner of a parcel of land owns the airspace above that land.[135] The common law rule that the landowner alone owns the total airspace, extending into the atmosphere, above their land no longer has any application.[136] As a result, airspace higher off the ground is not considered part and parcel of ownership of the land below and therefore, others cannot be excluded by the owner from those higher altitudes.[137] Perhaps more importantly, and more relevant to the discussion of drones, the *Causby* holding provided basis for the rule that a landowner does in fact have the ability to exclude others from the airspace that is considered below the navigable airspace levels.[138]

If a drone flies over a private landowner's property within these lower altitudes or hovers above them, the operator could potentially be liable for

---

[132] *Id.*
[133] *Id.* at 265.
[134] *Id.*
[135] Troy A. Rule, *supra*, at 168.
[136] *Id.*
[137] 328 U.S. at 266, 66 S. Ct. 1062.
[138] Troy A. Rule, *supra*, at 168 (citing *Causby*, 328 U.S. at 266, 66 S. Ct. 1062).

trespass. Thus, this would be an instance where the drone would be present in a place where it does not have a lawful right to be. Since *Houchins* held that the right to record is protected under the First Amendment so long as it is accomplished by lawful means[139], if a drone that is recording is in a place without having a lawful right to be present then the drone would not be conducting its recording by lawful means. Such recording would not then be protected by the First Amendment. Whether a recording made by a drone is conducted lawfully, from a place where the drone has a legal right to be, turns on whether or not the airspace is in the public domain or is privately owned and subject to the right of exclusion.

The *Causby* Court expressly declined to set a precise limit on how much space above the surface but below the five-hundred foot navigable airspace line could be considered the owner's property.[140] The only guidance provided by the court was that the landowner could exclude others from the "immediate reaches" of the land.[141] The most specificity provided was that any part of the airspace that the landowner was able to "occupy or use in connection with the land" would be considered to be part of these "immediate reaches."[142] Also, as with most traditional property rights, the owner of the land would be able to exclude any type of invasion to the airspace above his or her land – but below the five-hundred foot navigable airspace line – that would interfere with the owner's full

[139] 438 U.S. at 1, 98 S. Ct. 2588.
[140] Troy A. Rule, *supra*, at 168 (citing 328 U.S. at 266, 66 S. Ct. 1062 (stating "We need not determine at this time what those precise limits are.")).
[141] *Id.* at 168-69.
[142] *Id*. at 169 (citing 328 U.S. at 264, 66 S. Ct. 1062).

occupation or use of that airspace.[143] Beyond this, there was no further guidance as to how one is to determine what the immediate reaches of the land are. There was no definitive test laid down as to how to determine what part of the land a landowner could necessarily use and occupy, nor how much of the airspace beyond the parts actively being used by the landowner would be considered to be within the "immediate reaches" of the land. Additionally, the standard developed in *Causby* is equally silent as to how one is to determine when a significant interference to the airspace use is present as the result of an intrusion.

Which such ambiguous standards as to when an intrusion into the airspace over a specific plot of land is unlawful, it seems impossible to say that there can be a clearly established constitutional right to record police activity by drone. The argument could be made that a drone that is recording police activity in one area either passed through airspace owned by another or that it is hovering in a place that it does not have a lawful right to be. In other words, it would be possible to argue that any drone that is recording police activity is either currently trespassing or has trespassed on its path to get to the location it is currently in. If these arguments prevail, then the recording may have been obtained by unlawful means since the drone violated the trespassing rules to get to its location, and thus the recording would not be protected under the First Amendment.

This type of recording would be easily distinguishable from one where a person is standing still in a public place to record by means of a handheld device. At that moment, the person would be in a public space – somewhere where there is a lawful right to be – and the recording would be taking place from that

[143] *Id.* at 265.

location. Whether a drone is in a place where it has a lawful right to be is much more ambiguous, however, since that depends on whether the airspace is considered public or subject to the control of a landowner. This ambiguity and complexity as to whether a drone is in a certain place lawfully is illustrated by the fact that there have been so many concerns and issues that have yet to be resolved over whether the use of drones in various places can subject the drone operator to criminal or civil liability.[144]

These issues have yet to reach the Courts of Appeals for determination in relation to drones, and given the uncertain standard laid out by the *Causby* doctrine the decisions that would follow from such cases would likely be far from consistent. This issue is also compounded by the fact that the FAA and other agencies, as well has Congress, have yet to pass laws and regulations specific to drone operations. While airplanes are allowed to fly in the public domain of "navigable airspace," no similar promulgations have been made for the use of drones.

Under property law, the use of a drone to record might not be considered lawful depending on the space that it is occupying when such recording is made. The way case law, laws on the books, and regulations currently stand, it is unclear when a drone operator will be subject to criminal or civil liability for piloting a drone in certain areas and when such operation will be considered lawful. As a result, if a police officer were to interfere with or inhibit a drone from recording police activity, the officer would likely be covered under qualified immunity from a civil rights violation claim under § 1983.

[144] Troy A. Rule, *supra*, 163-64.

The right to record by drone is not a clearly established right under the First Amendment because in order to fall under the blanket of recordings that are protected, the recording must take place in a manner that is considered lawful. Since the issue of when and where the use of a drone is considered lawful is still largely undecided, it cannot be said that there is any clearly established rule as to the lawfulness of recording by drone. As a result, it logically follows that if the lawfulness of using a drone is not clearly established then the use of the drone to record cannot be considered a clearly established protected right under the First Amendment. Since the right is not one that is clearly established, qualified immunity may be applied to protect the officers from § 1983 liability.

V. CONCLUSION

The First Amendment protects the rights of citizens and the press alike to engage in recording activity in public places as part of the freedom of expression. This includes police activity. However, this right is rightfully limited by constraining the right to record police activity in situations where it could be dangerous to the officers engaged in their official duties. Accordingly, there should not be a constitutional right to record police activity by way of drones, as drones have the potential to cause harm and injury to police officers even if the owner does not intend for them to. For the reasons outlined above, the constitutional right to record police activity should be limited to recording by handheld devices in situations that do not pose a risk to officer safety. Even if the argument was made that the right to record police activity by use of a drone should be considered a constitutional right, the ambiguity as to the lawfulness of

use of a drone prevents such a right from being considered a clearly established one.

Thus, a claim against a police officer under § 1983 should not be barred by qualified immunity when the police officer interferes with or arrests a person recording the officers engaged in their official duties from a place where the person lawfully can be and by means of a handheld device when such recording does not endanger the officers or interfere with the performance of their duties. A claim against a police officer under § 1983 should, however, be barred against a police officer who interferes with or arrests a person who is recording by means of drone, at least under the current undeveloped laws and jurisprudence regarding drones.