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## Filming the Police: An Interference or a Public Service

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## COMMENT

### FILMING THE POLICE: AN INTERFERENCE OR A PUBLIC SERVICE

ARACELY RODMAN\*

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I. INTRODUCTION

On July 5, 2016, thirty-seven-year-old Alton Sterling was selling CD's outside a convenience store in Baton Rouge, Louisiana, when he was confronted by two police officers responding to a call made by a homeless man who reported Sterling was carrying a gun.<sup>1</sup> The officers attempted to subdue Sterling, leading to one of the officers fatally shooting Sterling multiple times.<sup>2</sup> A video recording of this went viral, sparking national

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1. See Joshua Berlinger, Faith Robinson, & Holly Yan, *Baton Rouge Officer: Alton Sterling Reached for a Gun Before He Was Shot*, CNN (July 13, 2016), <http://www.cnn.com/2016/07/12/us/police-shootings-investigations/> (describing the altercation between Alton Sterling and Baton Rouge police officers on the morning of July 5, 2016 which resulted in Sterling's death).

2. See Radley Balko, *Alton Sterling's Death Appears to Be Another Police Shooting that Was Both Legal and Presentable*, WASH. POST (July 6, 2016) <https://www.washingtonpost.com/news/the-watch/wp/2016/07/06/alton-sterlings-death-appears-to-be-another-police-shooting-that-was-both-legal-and-preventable/> (noting a witness stated Sterling was being cooperative and was not holding a gun when he was shot, but the footage did not conclusively show this as one of Sterling's hands was not clearly visible).

outrage and creating protests around the United States.<sup>3</sup> This is not a new occurrence, however. In the last several decades, the prevalence of citizens recording police officers on duty has risen dramatically due to the availability of new technology.<sup>4</sup> This new trend has been further amplified by the attention officers have been receiving for engaging in police misconduct<sup>5</sup> and movements such as “Black Lives Matter.”<sup>6</sup>

In response to this, the American Civil Liberties Union (ACLU) designed the Mobile Justice app—available, as of January 2017, in Arizona,

3. See *id.* (opining the Sterling incident was likely a case where the use of lethal force was legal, but also unnecessary); see also Berlinger, Robinson, & Yan, *supra* note 1 (stating the Sterling shooting and other recent shootings have sparked massive protests all over the nation).

4. See Rachel Costello, *Courts Split over First Amendment Protection for Recording Police Performance of Public Duties*, NEWS MEDIA & L., Spring 2011, at 26 (“The International Telecommunications Union estimated that 4.6 billion mobile phones were in use at any moment in 2010. More than one billion mobile phones are equipped with cameras, according to . . . an analyst at Strategies Unlimited, a market research firm . . .”).

5. See Bill Briggs, *Can the Cops Cuff You for Filming an Arrest?*, NBC NEWS (July 23, 2014), <http://www.nbcnews.com/tech/gadgets/can-cops-cuff-you-filming-arrest-n162351> (addressing the public uproar resulting from the death of Eric Garner following an altercation with New York Police Department officers); see also Sky Chadde, *Three Cop Watchers Get Arrested for Videotaping Arlington Police*, DALL. OBSERVER (Sept. 8, 2014), <http://www.dallasobserver.com/news/three-cop-watchers-get-arrested-for-videotaping-arlington-police-7120097> (detailing the arrests of Joseph Tye, Jacob Cordova, and Kory Watkins in Arlington, Texas where the three civilians allegedly got too close to police during a routine traffic stop following a growth in the media attention “cop-watching” groups got on the media and were charged with interference and obstructing a highway); Jack Healy, *Ferguson, Still Tense, Grows Calmer*, N.Y. TIMES (Nov. 26, 2014), <http://www.nytimes.com/2014/11/27/us/michael-brown-darren-wilson-ferguson-protests.html> (describing the atmosphere in Ferguson following the killing of unarmed teenager Michael Brown by local law enforcement); Jim Kavanagh, *Rodney King, 20 Years Later*, CNN (Mar. 3, 2011), <http://www.cnn.com/2011/US/03/03/rodney.king.20.years.later/> (recalling the violent beating of Rodney King by four Los Angeles Police Department officers). *But cf.* Ryan J. Reilly, *Ferguson Defends Arrest of Man Who Was Filming Police*, HUFFINGTON POST (May 7, 2015), [http://www.huffingtonpost.com/2015/05/07/ferguson-protest-arrest\\_n\\_7227596.html](http://www.huffingtonpost.com/2015/05/07/ferguson-protest-arrest_n_7227596.html) (reporting on support given by Ferguson, Missouri city officials to local law enforcement following the arrest of Scott Kampas, who was detained for taking a step into a blocked off street in an attempt to film the arrest of a protestor). Though the police officers who executed the arrest claimed they were arresting Mr. Kampas for disorderly conduct, it should be noted that while he was immediately detained for stepping into the street with his camera, a second protestor who also stepped into the street yelling at these same officers—but was not recording—was not detained. See Superbrotha, *A14 Shutdown-Ferguson Police Arrest Legal Observer*, YOUTUBE (Apr. 14, 2015), <https://www.youtube.com/watch?v=mrGBS9fqeso> (providing live footage of the arrests of Scott Kampas and Deborah Kennedy).

6. See generally Kiran Sidhu, Comment, *A Call for Minority Involvement in Cybersecurity Legislation Reform and Civil Rights Protests: Lessons from the Anti-SOPA/PIPA Demonstrations*, 38 *Hastings Comm. & Ent. L.J.* 117, 120–21 (2016) (explaining “Black Lives Matter” is a movement that formed after the acquittal of George Zimmerman—the man who fatally shot seventeen-year-old Trayvon Martin—and noting the “campaign has the potential to be the next bigger civil rights movement of American History” as it has garnered growing support following the deaths of Michael Brown, Eric Garner and countless others).

California, Colorado, Georgia, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Virginia, and Washington D.C.—with the specific intention that it be used to record law enforcement officials executing their public duties.<sup>7</sup> The Mobile Justice App has three main features: the ability to record, witness, and report.<sup>8</sup> Through the record feature, users can videotape encounters with the police as they occur and submit an optional description along with the recording.<sup>9</sup> As soon as the user stops the recording, it is immediately sent to a regional ACLU affiliate.<sup>10</sup> Consequently, even if an officer confiscates the user's phone or orders him to delete the video, the footage is nevertheless preserved.<sup>11</sup> Next, when a user activates the witness feature, the app automatically sends the location of the incident being reported by the user to nearby individuals who have the app installed on their mobile phones.<sup>12</sup> Finally, the report feature allows users to send a report of the occurrence to a local ACLU affiliate without a recording.<sup>13</sup> While this app certainly has the appeal of balancing the power law enforcement officers hold, users might be wary due to Texas Penal Code section 38.15, which states that civilians may be detained for interfering with an officer's execution of his public duties.<sup>14</sup>

Consequently, this Comment will explore what acts constitute interference with an officer's public duties and how the Mobile Justice App fits into this paradigm; ultimately concluding that the use of such an app does not provide a basis for the arrest of a civilian. Furthermore, this Comment will compare and contrast the right of a bystander to record police officers on duty with that of an individual stopped or detained by law enforcement.

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7. See *ACLU Apps to Record Police Misconduct*, ACLU, <https://www.aclu.org/feature/aclu-apps-record-police-conduct> (last visited Jan. 17, 2016) [hereinafter *ACLU Apps to Record Police Misconduct*] (encouraging the use of the Mobile Justice app in order to hold law enforcement officials accountable for their actions).

8. *Id.*

9. *Id.*

10. *Id.*

11. See *id.* (discussing how the app preserves footage captured by users).

12. See *id.* (detailing how a user may turn on the "broadcast my location" option on the app to notify nearby users of a police stop).

13. *Id.*

14. See TEX. PENAL CODE § 38.15(a)(1) (West 2016) ("A person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with . . . a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law[.]").

## II. HISTORY OF THE LAW

### A. *First and Fourth Amendment Issues*

Under the First Amendment, individuals are granted protection from Congress abridging their freedom of speech.<sup>15</sup> As such, citizens hold the right to both gather and disseminate information.<sup>16</sup> While there was initially some debate as to whether this aspect of free speech formed part of the protected rights of ordinary citizens or was reserved specifically to the press, the Supreme Court in *Martin v. City of Struthers*<sup>17</sup> affirmatively recognized the extension of this right to ordinary citizens.<sup>18</sup> However, the Supreme Court has not ruled on whether this includes the right to film on-duty police officers.<sup>19</sup> Currently, there is a circuit split as to whether citizens enjoy a First Amendment right to record law enforcement officials.<sup>20</sup> While the Third and Fourth Circuits have refused to recognize a First Amendment right to record police officers by holding that there is

15. See U.S. CONST. amend. I (granting citizens the freedom of speech and press).

16. See *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 601 (7th Cir. 2012) (noting the court in *Glik v. Cunniffe* “went on to conclude that the right to record the police was clearly established, resting its conclusion primarily on the Supreme Court’s observations about the right to gather and disseminate information about government” (citing *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011))).

17. *Martin v. City of Struthers*, 319 U.S. 141 (1943).

18. See *id.* at 143 (recognizing a First Amendment right to receive and distribute information); see also *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (finding individuals hold the same clearly established right to collect and disseminate information as the press). See generally Carol M. Bast, *Tipping the Scales in Favor of Civilian Taping of Encounters with Police Officers*, 5 U. DENV. CRIM. L. REV. 61, 98 (2015) (opining the availability of smartphones has significantly blurred the line between the media and the public as smartphones coupled with the Internet have enabled individuals to access an audience previously reserved for the press).

19. But see Steven A. Lutt, Note, *Sunlight Is Still the Best Disinfectant: The Case for a First Amendment Right to Record the Police*, 51 WASHBURN L.J. 349, 373 (2012) (reasoning that the monitoring of law enforcement officers through the use of devices, such as video cameras and cellphones, is protected by the First Amendment because it is a form of newsgathering, and “the video camera is the most potent and effective tool for obtaining and disseminating news”).

20. See Gregory T. Frohman, Comment, *What Is and What Should Never Be: Examining the Artificial Circuit “Split” on Citizens Recording Official Police Action*, 64 CASE W. RES. L. REV. 1897, 1898, 1911 (2014) (discussing the circuit split between the First, Seventh, Ninth, and Eleventh Circuits and the Third and Fourth Circuits, and accusing the latter circuits of being responsible for “doctrinal stagnation” as a result of their reluctance to rule either on the affirmative or not in the matter). See generally Clay Calvert, *The First Amendment Right to Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward*, 3 TEX. A&M L. REV. 131, 141 (2015) (contrasting Judge Bryant’s decision in the Second Circuit—that there was no clearly established right to film police at the time of the incident in question—with U.S. Magistrate Lane’s recognition of a consensus among circuit courts that the right to film officers is clearly established, and noting this stark contrast in opinions published just one month apart from each other epitomized the judicial discord currently present in our nation with regard to citizens’ right to record peace officers performing their public duties (citations omitted)).

insufficient evidence to support such findings, the First, Seventh, Ninth, and Eleventh Circuits have all reached the opposite conclusion by holding the First Amendment right to record law enforcement officials on duty has been clearly established.<sup>21</sup> Furthermore, while the Supreme Court has not provided a ruling on this issue, there is a general consensus among lower-level courts that civilians' First Amendment freedom of speech, in fact, affords them the right to record officers performing their duties in public areas.<sup>22</sup> However, these courts have also recognized that certain restrictions necessarily apply and limit the scope of this right.<sup>23</sup>

Under the Fourth Amendment, police officers are required to have probable cause to arrest an individual.<sup>24</sup> In most states, if an officer can prove probable cause to detain an individual without a warrant, he is automatically shielded from any claims of false arrest.<sup>25</sup> A police officer establishes probable cause to execute a warrantless arrest when he shows he "has 'knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing

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21. Compare *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010) (challenging the sufficiency of case law recognizing a First Amendment protection of filming officers on duty), and *Syzmecki v. Houck*, 353 F. App'x 852, 853 (4th Cir. 2009) (refusing to acknowledge a First Amendment right to recording peace officers), with *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (rationalizing if citizens have a right to disseminate recordings, it logically follows citizens must have a right to record), *Glik*, 655 F.3d at 82 (finding the act of filming an officer falls within the First Amendment right to gather and disseminate information), *Johnson v. Hawe*, 388 F.3d 676, 685 (9th Cir. 2004) (holding the citizen's act of recording the police officer did not give the police officer probable cause to arrest the citizen), and *Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding citizens have a right to film officers subject to certain limitations).

22. See, e.g., *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 540–42 (E.D. Pa. 2005) (holding defendant troopers violated a civilian's First Amendment right to videotape by arresting him under the state's harassment statute since the civilian filmed from a private lot with the owner's consent and maintained a reasonable distance to avoid interfering with the trooper's ability to perform his duties).

23. See *Smith*, 212 F.3d at 1333 (acknowledging a First Amendment right to record police exists "subject to reasonable time, manner, and place restrictions").

24. See U.S. CONST. amend. IV (protecting citizens from false arrest by requiring probable cause before persons or things may be seized by the government).

25. See *Anderson v. Creighton*, 483 U.S. 635, 663–64 (1987) ("Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved." (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967))); see also *Howlett v. Hack*, 794 F.3d 721, 726 (7th Cir. 2015) (requiring the "absence of probable cause" for a false arrest claim to prevail (quoting *Row v. Holt*, 864 N.E.2d 1011, 1016 (Ind. 2007))); *Jenkins v. City of New York*, 478 F.3d 76, 84 (2d Cir. 2007) (recognizing the existence of probable cause as a complete defense to a claim of false imprisonment under 42 U.S.C. § 1983); *Groman v. Twp. of Manalapan*, 47 F.3d 628, 634 (3d Cir. 1995) (ordering civilians to show police lacked probable cause to succeed on a false arrest claim). But see *Wyatt v. Cole*, 504 U.S. 158, 169 (1992) (leaving the issue of whether a defendant in a 42 U.S.C. § 1983 case may be entitled to an affirmative defense based on probable cause undecided).

a crime.”<sup>26</sup> Consequently, if a citizen is arrested for videotaping a police officer on duty, and the jurisdiction in which this occurs has previously held such act to be a clearly established right under the First Amendment, then the arresting officer lacked probable cause and the arrest is considered unconstitutional.<sup>27</sup>

#### B. *Circuit Court Cases Addressing the Right to Record Police Officers*

In *Smith v. City of Cumming*,<sup>28</sup> the Eleventh Circuit recognized a First Amendment right to record officers performing their public duties “subject to reasonable time, manner and place restrictions.”<sup>29</sup> In *Smith*, the plaintiffs claimed local law enforcement harassed them and that by preventing Plaintiff Smith to videotape police officers, his First Amendment rights were violated.<sup>30</sup> This case was paramount to the issue at bar because it was the first circuit court opinion affirmatively acknowledging the right to record police officers while setting a parameter for such a right.<sup>31</sup>

Throughout the years, courts in most jurisdictions have been furnishing holdings consistent with that of the Eleventh Circuit.<sup>32</sup> For example, in 2004, the Ninth Circuit decided *Johnson v. Hawe*,<sup>33</sup> where a civilian was arrested without probable cause for videotaping an officer in a public place.<sup>34</sup> The civilian was at a skateboard park filming his friends when he noticed a police officer—who was at the time looking for a missing

26. *Jaegly v. Couch*, 439 F.3d 149, 152 (2d Cir. 2006) (quoting *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996)); *see also Parker v. Texas*, 206 S.W.3d 593, 596 (Tex. Crim. App. 2006) (finding under Texas law, a police officer “must show that ‘at the moment [of the arrest] the facts and circumstances within the officer’s knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the arrested person had committed or was committing an offense’” in order to establish probable cause (quoting *Texas v. Steelman*, 93 S.W.3d 102, 107 (Tex. Crim. App. 2002) (en banc))).

27. *See, e.g., Johnson v. Hawe*, 388 F.3d 676, 685 (9th Cir. 2004) (holding the arresting officer did not have probable cause to arrest a citizen because the law sufficiently established the right to record a peace officer performing his public duties).

28. *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000).

29. *Id.* at 1333.

30. *Id.* at 1332.

31. *See id.* at 1333 (agreeing with the civilians’ argument that the First Amendment necessarily encompasses a right to film the actions of officers on public property as a matter of public interest, while outlining the conditions required for such a right to be recognized).

32. *But see, e.g., Gravolet v. Tassin*, No. 08-3646, 2009 WL 1565864, at \*4 (E.D. La. June 2, 2009) (refusing to find a clearly established right to film police due to a scarcity of applicable law from the Fifth Circuit).

33. *Johnson v. Hawe*, 388 F.3d 676 (9th Cir. 2004).

34. *Id.* at 685.



minor—and began videotaping him.<sup>35</sup> Upon approaching the officer's vehicle, the officer informed the individual that he was not allowed to record someone without prior consent and demanded that the plaintiff cease recording.<sup>36</sup> Following a second warning, the officer attempted to confiscate the civilian's camera by force and subsequently arrested him with the aid of a fellow officer.<sup>37</sup> Ultimately, the Ninth Circuit refused to sustain the civilian's arrest, holding the police officer lacked probable cause in arresting the civilian because the civilian had not violated any laws by merely filming the officer.<sup>38</sup>

Several years later, in *Glik v. Cunniffe*,<sup>39</sup> the First Circuit affirmatively recognized a right to film officers by refusing to grant qualified immunity to the defendant police officers in a 42 U.S.C. §1983 claim<sup>40</sup> after they arrested a civilian for allegedly violating Massachusetts's wiretap statute.<sup>41</sup> In this case, the civilian was walking on a public sidewalk and witnessed the police officers arresting an individual with what he perceived to be excessive force.<sup>42</sup> Concerned about the arrestee's safety, the civilian stopped approximately ten feet away from where the arrest was taking place and began recording the incident with his mobile phone.<sup>43</sup> One of the officers approached the civilian, and upon learning that the civilian recorded the incident and stated that he witnessed the officer punch the individual, the police officers arrested the civilian pursuant to the state's

35. *Id.* at 679–80.

36. *Id.* at 680.

37. *Id.*

38. *Id.* at 685.

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

40. In *Ramirez v. Martinez*, the Fifth Circuit defined qualified immunity as follows:

The doctrine of qualified immunity protects public officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known . . . . To determine whether a public official is entitled to qualified immunity, we decide “(1) whether the facts that the plaintiff has alleged make out a violation of a constitutional right; and (2) whether the right at issue was clearly established at the time of the defendant’s alleged misconduct.”

*Ramirez v. Martinez*, 716 F.3d 369, 375 (5th Cir. 2013) (quoting *Brown v. Strain*, 663 F.3d 245, 249 (5th Cir. 2011)).

41. *Glik*, 655 F.3d at 85, 88. *But see* *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014) (holding a police officer may order an individual to cease filming as a precautionary safety measure, e.g., when an armed suspect present, even if this would inhibit the individual's freedom of speech; but if such an order is directed specifically at the citizen's right to film, the officer must be able to “reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties”).

42. *Glik*, 655 F.3d at 79–80.

43. *Id.*

wiretap statute.<sup>44</sup> This First Circuit decision contributed to the First and Fourth Amendments issue because the court determined the officers lacked probable cause to detain the civilian.<sup>45</sup> It was clear the civilian was exercising his established right to videotape the officers in a public forum, and the civilian's actions were nevertheless outside the reach of the applicable state statutes since his acts were not done in secret.<sup>46</sup>

Finally, in 2012, the Seventh Circuit joined the aforementioned circuits in recognizing a First Amendment right to film officers.<sup>47</sup> In *ACLU of Ill. v. Alvarez*,<sup>48</sup> the ACLU sought an injunction prohibiting the state from arresting citizens recording police officers in public forums pursuant to its eavesdropping statute.<sup>49</sup> The court ultimately ruled in favor of the ACLU's police accountability program, which involved the recording of police officers performing their public duties, by barring arrests for such acts pursuant to the state's eavesdropping statute.<sup>50</sup>

Despite the seeming consistency amidst the other circuits in recognizing a First Amendment right to record on-duty peace officers, the Third and Fourth Circuits have strayed from the majority, opting instead for a narrower interpretation of the First Amendment.<sup>51</sup> In *Syzmecki v. Houck*,<sup>52</sup> the Fourth Circuit upheld the lower court's ruling in favor of the defendant police officer in a 42 U.S.C. § 1983 complaint.<sup>53</sup> The court agreed with the lower court's finding that a citizen's assertion to First Amendment protection of her conduct—recording police activity in a public venue—was unfounded as said right had not been clearly established within the Fourth Circuit when the alleged conduct

44. *Id.*

45. *Id.*

46. *Id.* at 88. *But see* *King v. City of Indianapolis*, 969 F. Supp. 2d 1085, 1092 (S.D. Ind. 2013) (distinguishing the case at bar with *Glik* due to the existence of an individual resisting arrest and an agitated crowd, thereby concluding the citizen did not have a clearly established right to film the police officers).

47. *See* *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595–96, 608 (7th Cir. 2012) (granting citizens the right to record police activity in public without fear of sanctions pursuant to the state's eavesdropping statute).

48. *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012).

49. *Id.* at 586.

50. *Id.* at 586, 608.

51. *See* *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262–63 (3d Cir. 2010) (finding the defendant officer did not lack probable cause and acted in good faith when he detained a civilian because the civilian did not have a constitutional right to film the officer without the officer's consent); *see also* *Syzmecki v. Houck*, 353 F. App'x 852, 853 (4th Cir. 2009) (failing to find a clearly established right to film police activity in a public forum).

52. *Syzmecki v. Houck*, 353 F. App'x 852 (4th Cir. 2009).

53. *Id.* at 852.

occurred.<sup>54</sup>

A year later, the Third Circuit followed suit in *Kelly v. Borough of Carlisle*.<sup>55</sup> Here, the plaintiff was riding as a passenger in his friend's vehicle when they were pulled over for a traffic violation.<sup>56</sup> After observing the officer's conduct toward the driver, Kelly placed his camera on his lap and began recording the officer.<sup>57</sup> Upon discovering he was being recorded, the officer requested the camera and contacted an assistant district attorney to verify whether such acts violated the Wiretap Act.<sup>58</sup> Thereafter, Kelly was arrested for recording the officer without informing him or acquiring his consent prior to the commencement of the recording.<sup>59</sup> Though the charges against him were subsequently dropped, Kelly filed a 42 U.S.C. § 1983 claim, alleging the arrest constituted a violation of his First and Fourth Amendment rights.<sup>60</sup> The court ruled in favor of the police officer, holding there was insufficient precedent to firmly establish the existence of a First Amendment right to record officers carrying out their public duties.<sup>61</sup>

### C. District Court Cases Addressing the Right to Record Police Officers

In addition to the aforementioned circuit court cases, there have been various district court decisions both supporting the recognition of an established right to film peace officers and attempting to further clarify the scope of such right.<sup>62</sup> In *Fordyce v. City of Seattle*,<sup>63</sup> Fordyce was videotaping a public demonstration when he got into an altercation with a pedestrian and her nephews as a result of his reluctance to cease filming her.<sup>64</sup> A nearby police officer approached Fordyce and the pedestrian,

54. *Id.* at 853.

55. *Kelly v. Borough of Carlisle*, 622 F.3d 248, 251–52 (3d Cir. 2010) (detailing the arrest of a civilian which resulted after the man filmed a police officer conducting a traffic stop without the officer's prior consent).

56. *Id.* at 251.

57. *Id.*

58. *Id.* at 251–52.

59. *Id.* at 252.

60. *Id.*

61. *Id.* at 262.

62. *See* *Mocek v. City of Albuquerque*, No. CIV 11-11009 JB/KBM, 2013 WL 312881, at \*62 (D.N.M. Jan. 14, 2013) (limiting the ability to film officers on governmental premises); *see also* *Fordyce v. City of Seattle*, 840 F. Supp. 784, 794 (W.D. Wash. 1993) (holding the state's wiretap statute did not include communications made in public or the filming of peace officers, thus making these acts legal).

63. *Fordyce*, 840 F. Supp. 784.

64. *Id.* at 787–88.

informing Fordyce his actions constituted a misdemeanor.<sup>65</sup> When Fordyce continued filming, he was arrested and charged for recording a private conversation without prior consent.<sup>66</sup> Although the officers were granted qualified immunity because they relied on a presumptively valid statute,<sup>67</sup> the court did limit the application of the Washington wiretap statute;<sup>68</sup> thus, this court held the illegal recording of persons in a private conversation did not encompass communications made in a public forum or the recording of police officers performing their public duties.<sup>69</sup>

In *Mocek v. City of Albuquerque*,<sup>70</sup> Mocek refused to provide a form of identification once he reached the Transportation Security Administration (TSA) podium at the airport and began videotaping his exchange with the TSA officer upon the latter's insistence that Mocek could not board the plane unless his identity was established.<sup>71</sup> After the TSA officer ordered Mocek to cease recording, to no avail, Albuquerque Aviation Police Department (AAPD) officers arrived at the checkpoint and communicated to Mocek that he could be arrested for filming at a federal checkpoint.<sup>72</sup> Though the recording took place in a public section of the airport, Mocek was nevertheless arrested.<sup>73</sup> Notwithstanding the court's recognition of a right to film officers under certain conditions, it held Mocek's arrest did not amount to a violation of his Fourth Amendment right because the

65. *Id.* at 788.

66. *Id.*

67. Qualified immunity provides law enforcement officials with protection from suit rather than a defense against liability. *Id.* This doctrine requires that an officer hold an objectively reasonable belief that his conduct was valid. *See* *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (recognizing case law has established that an officer is immune from a suit for damages if "a reasonable officer could have believed . . . [the arrest was] lawful, in light of clearly established law and the information the [arresting] officer possessed" quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). In a sense, it is analogous to the good faith exception to the exclusionary rule under the Fourth Amendment established in *United States v. Leon*, which states evidence should not be suppressed if it can be shown that a *reasonable officer* would have *reasonably relied* on a warrant and *believed their actions to be valid*. *United States v. Leon*, 468 U.S. 897, 919–21 (1984). However, unlike the good faith doctrine, qualified immunity will not shield police officers when the plaintiff has "suffered a violation of his constitutional rights." *Buehler v. City of Austin*, No. A-13-CV-1100-ML, 2015 WL 737031, at \*9 (W.D. Tex. Feb. 20, 2015) (citing *Russell v. Altom*, 546 F. App'x 432, 436 (5th Cir. 2013)).

68. *See* WASH. REV. CODE § 9.73.030 (2016) (declaring it unlawful for any entity to intercept or record private communications transmitted through any device or private communications recorded on any device without prior consent).

69. *Fordyce v. City of Seattle*, 840 F. Supp. 784, 790–91, 794 (W.D. Wash. 1993).

70. *Mocek v. City of Albuquerque*, No. CIV 11-11009 JB/KBM, 2013 WL 312881 (D.N.M. Jan. 14, 2013).

71. *Id.* at \*3.

72. *Id.* at \*3–4.

73. *Id.* at \*4.

TSA officers acted reasonably in limiting the plaintiff's ability to film due to the forum.<sup>74</sup>

In *Fleck v. Trustees of the University of Pennsylvania*,<sup>75</sup> a couple of civilians drove to a mosque on two different occasions for the express purpose of exercising their freedom of speech by yelling negative statements about Islam.<sup>76</sup> On both occasions, the civilians' conduct led to altercations between the civilians and people attending the mosque, causing the formation of a crowd around those involved outside of the mosque.<sup>77</sup> Further, on both occasions, one of the civilians began filming when police arrived at the scene and was arrested for handling the camera in a manner perceived as threatening to two different officers.<sup>78</sup> In formulating its decision, the court recognized "even protected speech is not equally permissible in all places and at all times[.]" and thus held there is no right to record police officers when doing so will hinder law enforcement from restoring public order.<sup>79</sup>

### III. DETERMINING WHAT CONSTITUTES AN INTERFERENCE AND IDENTIFYING THE APPLICABLE PARAMETERS

Although there has been a general lack of guidance from the Fifth Circuit, recent Fifth Circuit case law indicates an inclination to observe a clearly established right in filming law enforcement carrying out their civic duties.<sup>80</sup> Thus, the next logical step is to identify any court-recognized limitations on the right to film, as this would be the only

74. *See id.* at \*53, 62 (holding Mocek did not have a clearly established right to film peace officers in the situation presented). The manner in which courts treat airports as compared to other public venues may be explained by the heightened security measures implemented post-9/11; although still public venues in a technical sense, the rights afforded to civilians in airports has been somewhat constrained for purposes of national security. *See also* Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CALIF. L. REV. 301, 313 (2009) (noting there is "a necessary tradeoff between liberty and security," pointing out that "[a]nyone who has passed through airport security knows what it means to sacrifice comfort and convenience as an individual in order to avoid being murdered in a group").

75. *Fleck v. Tr. of the Univ. of Pa.*, 995 F. Supp. 2d 390 (E.D. Pa. 2014).

76. *See id.* at 395–97 (describing the civilians' conduct as hostile towards the mosque attendees).

77. *Id.* at 396–97.

78. *See id.* at 396–98 (describing plaintiff Maravage's actions and handling of the camera as causing Officer Michel to feel threatened due to the camera's close proximity to her face on July 3rd and Officer Stanford to feel as if plaintiff Marcavage was attempting to strike him).

79. *Id.* at 403, 408 (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)).

80. *Buehler v. City of Austin*, No. A-13-CV-1100-ML, 2015 WL 737031, at \*9 (W.D. Tex. Feb. 20, 2015) (first citing *Keenan v. Tejada*, 290 F.3d 252, 259 (5th Cir. 2002); and then citing *Enlow v. Tishomingo Cty.*, 962 F.2d 501, 509–10 (5th Cir. 1992)) (finding the existence of a Fifth Circuit precedent affirmatively acknowledging a clearly established right to film police officers on public property).

constitutional manner in which an officer could arrest an individual for filming them once the right was affirmatively recognized. This section commences the discussion on the application of Texas Penal Code section 38.15 to the act of recording law enforcement officers while executing their duties by addressing vital questions to the issue presented.

A. *What Constitutes an Interference Pursuant to Texas Penal Code Section 38.15?*

Section 38.15 of the Texas Penal Code states that an individual commits an offense if, with criminal negligence, she “interrupts, disrupts, impedes, or otherwise interferes with” a peace officer’s ability to carry out his duties.<sup>81</sup> Not only may a citizen be arrested under this statute, but he may also be charged with a criminal offense, which under this statute is considered a Class B misdemeanor.<sup>82</sup> However, the statute does provide a defense to prosecution if the alleged interference consists of speech only.<sup>83</sup> To determine what actions may be interpreted as constituting an interference pursuant to section 38.15 of the Texas Penal Code, this Comment will specifically examine *Berrett v. Texas*<sup>84</sup> and *Buehler v. City of Austin*<sup>85</sup> to establish what conduct Texas courts have affirmatively recognized as creating an interference with a police officer’s execution of his public duties.<sup>86</sup>

In *Berrett v. Texas*, a citizen was pulled over by a police officer for failing to wear his seatbelt.<sup>87</sup> The officer attempted to issue a citation, but the plaintiff became confrontational with the officer and began recording

81. TEX. PENAL CODE § 38.15 (West 2016).

82. *Id.*

83. *Id.*

84. *Berrett v. Texas*, 152 S.W.3d 600 (Tex. App.—Houston [1st Dist.] 2004, pet. ref’d).

85. *Buehler v. City of Austin*, No. A-13-CV-1100-ML, 2015 WL 737031 (W.D. Tex. Feb. 20, 2015).

86. *See Holt v. Texas*, No. 05-08-00134-CR, 2009 WL 311451, at \*1 (Tex. App.—Dallas Feb. 10, 2009, no pet.) (finding Holt interfered with police officers’ public duties by yelling profanities and taking photographs of the officers making an arrest in a dangerous neighborhood because such acts were distracting and caused the arrestee to become agitated); *see also Aguero v. Texas*, No. 08-06-00250-CR, 2008 WL 2555121, at \*6 (Tex. App.—El Paso June 26, 2008, no pet.) (“The interference with public duties charge was based on Appellant’s refusal to obey the officer’s commands to not approach the child victim at the scene.”); *In re S.T.*, No. 11-05-00151-CV, 2007 WL 512725, at \*4 (Tex. App.—Eastland Feb. 15, 2007, no pet.) (finding the citizens’ affirmative conduct of charging towards the officers constituted more than mere speech); *Dickerson v. Texas*, No. 01-05-00948-CR, 2006 WL 3316735, at \*1, 8 (Tex. App.—Houston [1st Dist.] Nov. 16, 2006, no pet.) (concluding *Dickerson* interfered with the deputy’s public duty to subpoena *Dickerson* by forcing the deputy off of her property).

87. *Berrett v. Texas*, 152 S.W.3d 600, 602 (Tex. App.—Houston 1st Dist. 2004, pet. ref’d).

him.<sup>88</sup> As a result, the officer attempted to arrest the plaintiff by handcuffing him but the plaintiff repeatedly moved his arms out of the officer's reach and continued recording.<sup>89</sup> In opposition to the plaintiff's claim that his actions constituted mere speech, and thus his arrest was unlawful, the court held the plaintiff's actions went beyond speech, leading it to conclude the arrest did not constitute a violation of the plaintiff's rights.<sup>90</sup>

*Buehler v. City of Austin* presents various examples of an individual being detained pursuant to Texas Penal Code Section 38.15 while filming police activity in a public forum.<sup>91</sup> Here, plaintiff was arrested on two different occasions for interfering with police duties while recording their activities.<sup>92</sup> On the first occasion, August 26, 2012, one of the defendant officers was in the process of executing an arrest warrant when he and a second officer encountered Mr. Buehler, whom they eventually arrested.<sup>93</sup> According to the officer executing the arrest warrant, Mr. Buehler interfered with his ability to perform his duties when he and several of his "cop-watching"<sup>94</sup> group members surrounded the officer and began recording, causing the arrestee to become uncooperative with the officer.<sup>95</sup> The officer alleged he ordered them to move back several times, and when Buehler was the only person who failed to obey his orders, the officer proceeded to arrest him.<sup>96</sup> On the second occasion, September 12, 2012, the defendant officer was conducting a DWI stop when Buehler again appeared at the scene with members of his cop-watch group and began recording.<sup>97</sup> The arresting officer alleged he ordered Buehler and other individuals to step back as they surrounded him, and when no one

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88. *Id.*

89. *Id.*

90. *Id.* at 604.

91. *See* *Buehler v. City of Austin*, No. A-13-CV-1100-ML, 2015 WL 737031, at \*4–6 (W.D. Tex. Feb. 20, 2015) (describing the arrests of Antonio Buehler for interference with a peace officer's public duties).

92. *See id.* at \*3, 5–6 (detailing two different incidents in which Antonio Buehler was arrested in Austin, Texas for interfering with the duties of a peace officer).

93. *Id.* at \*3.

94. "Cop-Watching" is an activity that has evolved as a result of the high media attention being given to instances of police misconduct and involves self-proclaimed "cop-watchers" recording police interactions with civilians in an attempt to hold officers accountable for their actions. *See* Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. Rev. 117, 134 (2016) (describing the purpose of cop-watching groups, and detailing what activities these groups normally engage in); *see also* Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. Rev. 870, 923–24 (2015) (providing a definition for the new phenomenon of cop-watching).

95. *Buehler*, 2015 WL 737031 at \*5.

96. *Id.*

97. *Id.* at \*6.

obeyed his requests, he called for backup.<sup>98</sup> According to the officer, Buehler continued to disregard orders and was arrested again for interfering with an officer's public duties.<sup>99</sup> However, Buehler contested these allegations and insisted he and his group members not only moved about ten feet back when first requested to do so, but about a total of sixty-five feet upon the second officer's directives.<sup>100</sup> Furthermore, Buehler alleged he repeatedly asked the second officer how far back he needed to stand in an attempt to comply with his orders, and claimed the officer only continued to order him to stand further back and repeatedly threatened to arrest him for interfering with the officers' public duties.<sup>101</sup> Though the court ultimately ruled against Buehler, it did acknowledge the precedent set by the Fifth Circuit, and consequently found the existence of a clearly established right to photograph or record officers while performing their public duties.<sup>102</sup>

These cases demonstrate that an individual's conduct must be more than mere speech in order to be classified as an interference under Texas Penal Code section 38.15.<sup>103</sup> When an officer lawfully arrests an individual filming the officer's conduct, it is usually for something unrelated to the actual act of filming.<sup>104</sup> For example, as the case law related to this issue shows, officers may make the arrest as a result of an individual making threatening gestures towards the officer, inhibiting the officer's ability to maintain public order, or failing to keep a reasonable distance.<sup>105</sup> Consequently, it is vital to this discussion to determine when an act becomes more than mere speech.<sup>106</sup>

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at \*9, 14; *see also* *Enlow v. Tishomingo Cty.*, 962 F.2d 501, 509–10 (5th Cir. 1992) (recognizing the arrest was unconstitutional because it was made in response to a citizen's exercise of his First Amendment right to freedom of speech).

103. *See Buehler*, 2015 WL 737031 at \*5 (determining Buehler's actions constituted an interference because he consistently refused to follow the officer's orders); *see also* *Berrett v. Texas*, 152 S.W.3d 600, 604 (Tex. App.—Houston [1st Dist.] 2004, pet. *ref'd*) (finding the civilian's actions surpassed mere speech because he became confrontational and resisted arrest).

104. *See* Jesse Harlan Alderman, *Before You Press Record: Unanswered Questions Surrounding the First Amendment Right to Film Public Police Activity*, 33 N. ILL. U. L. REV. 485, 517 (2013) (concluding a First Amendment right to film officers does not curtail an officer's effective execution of his public duties because an individual may still be charged with obstruction of justice or a similar crime).

105. *See Buehler*, 2015 WL 737031 at \*6 (describing Buehler's arrest after he failed to maintain what the arresting officer allegedly deemed to be a reasonable distance from an officer conducting a DWI stop); *see also* *Berrett*, 152 S.W.3d at 604 (holding the civilian's arrest was not unconstitutional because his actions surpassed mere speech).

106. *See* *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949) (recognizing speech is protected unless



B. *What is the Threshold for When an Act Transitions to Being More than Mere Speech?*

The difficulty in forming clear parameters for what constitutes interfering with an officer's duties is the catch-all phrase "or otherwise interferes" at the end of Texas Penal Code section 38.15(a).<sup>107</sup> One factor courts focus on is proximity.<sup>108</sup> This seems reasonable when considering that the closer an individual is to an officer, the more likely it becomes that the individual will somehow interfere with the officer's duties, even if inadvertently.<sup>109</sup> In fact, the distance kept by an individual recording the police is usually the determining factor in whether the individual was properly arrested pursuant to the interference statute.<sup>110</sup> While law

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it "rises far above public inconvenience, annoyance, or unrest").

107. TEX. PENAL CODE § 38.15(a) (West 2016). Nevertheless, there is certain conduct most jurisdictions agree citizens must observe to avoid interfering with a peace officer's public duties, including:

Keeping a "reasonable distance" from officers; [n]ot "repeatedly engaging officers with questions or distractions that unduly hinder police activities to protect life and safety, or the integrity of a crime scene;" [n]ot positioning "themselves in a manner that would either passively or actively hinder[/]impede" officers, first responders, or traffic' [n]ot filming "sensitive police operations and tactical situations if they could reasonably jeopardize the safety of officers or third parties," for example, a police response to a school shooting; [n]ot violating "the privacy of victims and witnesses."

Briggs, *supra* note 5. Indeed, one article indicates:

With those rules in place, anyone filming officers—even in public places—is at risk for arrest, "rightly or wrongly depending on the facts, on charges ranging from disorderly conduct and obstructing with an arrest to eavesdropping and the failure to obey an order to stop filming," said Calvert, the First Amendment expert.

*Id.* But see Mario Cerame, Note, *The Right to Record Police in Connecticut*, 30 QUINNIPIAC L. REV. 385, 403 n.117 (2012) (suggesting the interference statute may not—or at least should not—apply when (1) the recording is done to capture police misconduct because misconduct does not fall within the scope of the officer's duties or (2) when an individual secretly records a peace officer because there could not be an interference by the mere fact that the action was done secretly).

108. Compare *Buehler*, 2015 WL 737031 at \*6 (stating Buehler alleged he was over fifty feet away from an officer conducting a DWI stop and was still told he was too close), with *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa 2005) (finding it was not an interference for an individual to record from twenty to thirty feet away from the peace officer).

109. See *Buehler*, 2015 WL 737031 at \*6 (W.D. Tex. Feb. 20, 2015) (describing Buehler's encounter with Austin Police Department officers on September 21, 2012, where Buehler alleged he was arrested for refusing to move further away from a DWI stop even though he was already fifty feet away); see also *Holt v. Texas*, No. 05-08-00134-CR, 2009 WL 311451, at \*1 (Tex. App.—Dallas Feb. 10, 2009, no pet.) (insinuating being as close as five feet from an officer performing his duties is too close).

110. See Robinson Meyer, *What to Say When the Police Tell You to Stop Filming Them*, ATLANTIC (Apr. 28, 2015), <http://www.theatlantic.com/technology/archive/2015/04/what-to-say-when-the-police-tell-you-to-stop-filming-them/391610/> (suggesting police have replaced outright telling

enforcement officers may excuse other behavior, this seems to be the leading reason they provide for arresting citizens filming their activities.<sup>111</sup>

An additional factor considered is the place in which filming occurs.<sup>112</sup> As noted by circuit court decisions, one limitation imposed on the right to film officers is that the filming must take place in a public forum.<sup>113</sup> Furthermore, the right to film has also been limited on governmental property.<sup>114</sup> Consequently, even if the filming takes place somewhere public, such as an airport or at a post office, because these venues are owned by the government, a citizen's ability to freely film law enforcement is more limited.<sup>115</sup>

A third factor considered by courts is the context in which the events occur.<sup>116</sup> As discussed before, circuit courts have limited the right to record a police officer when such acts could disturb the officer's ability to maintain the peace.<sup>117</sup> Included within this is threatening or failing to

citizens they are not allowed to record peace officers with the "back-up game"—instead of simply objecting to being recording, an officer will order the individual recording to back away from the arresting scene without specifying how much until the individual resigns or has backed away by some ambiguous distance); *see also* Steve Silverman, *7 Rules for Recording Police*, FLEX YOUR RIGHTS (May 21, 2012), <https://www.flexyourrights.org/7-rules-for-recording-police/> (discussing the correlation between the distance an individual chooses to maintain between himself and the arresting officer and the likelihood one is to be detained for interfering with a law enforcement officer's public duties).

111. *E.g.*, Amy Martyn, *It's Definitely OK to Film Cops, Texas Judge Rules*, DALL. OBSERVER (July 30, 2014), <http://www.dallasobserver.com/news/its-definitely-ok-to-film-cops-texas-judge-rules-7138520> (quoting the president of the Dallas Police Association, who stated he did not mind being filmed, so long as the person doing so did not get in the way). Opponents of the right to film have also spoken against civilians filming them because of the questionable identity of the person filming. *Id.* When suggesting citizen taping is unsafe, the Dallas Police Association president stated: "We don't know who it is pulling behind us . . . We don't know they're there to videotape." *Id.*

112. *See, e.g.*, Johnson v. Hawe, 388 F.3d 676, 680 (9th Cir. 2004) (noting an officer should not have any expectation of privacy when conducting his duties openly in a public forum).

113. *See* Glik v. Cunniffe, 655 F.3d 78, 88 (1st Cir. 2011) (holding a citizen's First Amendment right to film law enforcement officers will be protected if done in a public forum). *See generally* Briggs, *supra* note 5 (suggesting a form of interfering with an officers duties may be by violating the privacy of the individual said officer is interacting with).

114. *See* *Mocek v. City of Albuquerque*, No. CIV 11-11009 JB/KBM, 2013 WL 312881, at \*49 (D.N.M. Jan. 14, 2013) (granting qualified immunity to officers who arrested an individual for refusing to cease filming TSA officers in an airport following an incident regarding the individual's identification).

115. *See id.* at \*62 (including filming on federal premises as an additional limitation to a citizen's right to film peace officers because "the Government has not dedicated its property to First Amendment activity" (quoting *United States v. Kokinda*, 497 U.S. 720, 726–27 (1990))).

116. *See, e.g.*, Key v. Texas, 88 S.W.3d 672, 676–77 (Tex. App.—Tyler 2002, pet. ref'd) (concluding there was sufficient evidence to support a conviction under Texas Penal Code section 38.15 because a defendant stepped off the sidewalk multiple times contrary to the arresting officer's instructions).

117. *See* Fleck v. Tr. of the Univ. of Pa., 995 F. Supp. 2d 390, 404 (E.D. Pa. 2014) (refusing to acknowledge a right to film officers when such acts interfered with police officers' attempts at

obey directions issued by law enforcement as this may lead to adverse results that an officer is specifically responsible for preventing or minimizing.<sup>118</sup> In Texas, evidence for the uncertainty surrounding the parameters of the right to film officers goes beyond case law as many situations frequently encountered by officers have yet to be heard before a court of law.<sup>119</sup>

One distinguishing factor that does seem to be present in most Texas cases and leads plaintiffs to either be ruled in favor of or against is whether they were not only the individual recording, but also the person being stopped or arrested for allegedly committing some other violation.<sup>120</sup> Even in *Buehler v. City of Austin*, the police claimed to have arrested Buehler not for the act of recording, but because of his failure to comply with the officer's orders.<sup>121</sup> Naturally, this discussion thus turns to a comparison of how the outcome of a situation differs depending on whether the person filming the police officer is a mere bystander or whether the person is being stopped or detained by the officer for another reason such as a traffic violation.

#### IV. WHAT RIGHTS DOES A PERSON POSSESS TO FILM AN INCIDENT BETWEEN LAW ENFORCEMENT OFFICIALS AND INDIVIDUALS IN A PUBLIC FORUM?

A key point when comparing and contrasting the rights of an individual

maintaining public order).

118. *E.g.*, *Tillett v. Wyoming*, 637 P.2d 261, 263–64 (Wyo. 1981) (affirming Tillett's conviction for interference with an officer after he argued with officers, made threatening gestures, and failed to obey the officers orders during a traffic stop). *But see* *Carney v. Texas*, 31 S.W.3d 392, 394, 398 (Tex. App.—Austin, 2000, no pet.) (determining the appellant did not interfere with the officer's public duties by arguing about the validity of a search warrant since he ultimately allowed them inside after being warned that the officers could knock down the door, and his reluctance to allow them in was in the form of pure speech); *In re Goodman*, 531 P.2d 478, 478–79 (Utah 1975) (reversing a finding that Goodman interfered with an officer's duties by requesting a ride while he was executing a traffic citation and calling the officer expletives upon his denial of her request).

119. *See, e.g.*, Neena Satija, *Texas a Flashpoint in Debate over Right to Film Police*, TEX. TRIB. (May 9, 2015), <http://www.texastribune.org/2015/05/09/reveal-story-1/> (relaying the apprehension felt by law enforcement officers regarding cop-watchers led by Texas activist Kory Watkins who walk around in public areas with guns, including AK-47s and AR-15's, and noting these cop-watchers have been arrested previous times pursuant to the interference statute because of the distracting nature of the guns).

120. *E.g.*, *Berrett v. Texas*, 152 S.W.3d 600, 602–05 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (upholding the defendant's interference with public duties conviction due to the defendant's conduct after he was pulled over by the arresting officer for a seatbelt violation).

121. *See* *Buehler v. City of Austin*, No. A-13-CV-1100-ML, 2015 WL 737031, at \*5 (W.D. Tex. Feb. 20, 2015) (claiming Buehler was not arrested because he was filming, but because of his refusal to step back when the officer told him to do so).

who is stopped or detained with those of a mere bystander is that filming an officer is only prohibited when it interferes with an officer's ability to execute his public duties.<sup>122</sup> As a result, it must be noted that though the right<sup>123</sup> to film will be more limited, if the person filming is the person stopped or detained, this person's rights do not initially differ from a mere bystander who is filming.<sup>124</sup> Instead, the difference arises from the fact that this type of individual will be in a more interactive situation with the officer, and it is this that imposes more limitations on his rights.<sup>125</sup> For example, if a mere bystander is filming police activity, one of his few concerns will be to keep a reasonable distance so as not to interfere.<sup>126</sup> In contrast, a person who is stopped or detained by police will inevitably need to interact with the officer, thus bringing into question many other factors regarding what constitutes interference.<sup>127</sup>

Consequently, a sort of sliding scale is created when determining an individual's rights based on his role in relation to the peace officer. With the mere bystander and the person being stopped or detained at opposite ends of this scale, the former will be at the point of this scale with the most rights available to him so long as he is an acceptable distance away and passively recording, while the latter's ability to record will be much more constrained as filming may bring about charges such as interfering with police due to the proximity between this individual and the officer.<sup>128</sup>

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122. See *id.* at \*9 (acknowledging filming is a protected form of speech); *Berrett*, 152 S.W.3d at 603–04 (citing TEX. PENAL CODE § 38.15(a)(1), (d) (West 2016) (finding conduct that is merely speech is an affirmative defense to a charge of interference with public duties).

123. This section proceeds under the assumption that the Fifth Circuit will recognize the right to film.

124. See *Carney v. Texas*, 31 S.W.3d 392, 396 (Tex. App.—Austin, 2000, no pet.) (observing mere speech does not constitute an interference pursuant to Texas Penal Code section 38.15(d)).

125. Compare *Glik v. Cunniffe*, 655 F.3d 78, 79–80, 88 (1st Cir. 2011) (holding *Glik's* arrest was unconstitutional because he did nothing more than exercise his freedom of speech by filming an officer arresting another individual on a public sidewalk), with *Berrett*, 152 S.W.3d at 602 (concluding the defendant interfered with the officer's duties after he was pulled over for a seatbelt violation).

126. See *Briggs*, *supra* note 5 (identifying keeping a reasonable distance from the police officer as one of the five main things for a recording individual to do so as to avoid interfering with the officer's duties).

127. See, e.g., *Berrett*, 152 S.W.3d at 602–05 (portraying how a citizen's behavior during a routine traffic stop escalated the situation and ultimately led to his arrest and conviction pursuant to the Texas interference statute).

128. Although it is less likely that an individual will be placed under arrest for recording police activities when he is a simple bystander, the facts in *Garcia v. Montgomery County* illustrate that this is not always the case. See *Garcia v. Montgomery Cty.*, Civ. No. JFM-12-3592, 2013 WL 4539394, at \*1 (D. Md. Aug. 23, 2013) (addressing how a photojournalist came to be arrested after recording police arresting two Hispanic men). Upon observing what he perceived to be the use of excessive force during the arrest of two men by Maryland police, Mannie Garcia commenced videotaping the

However, this is a sliding scale because even though the bystander's rights are not as limited, he must still record within the allowed parameters, and his failure to do so could potentially place him in the same position as the person who records while in the process of being stopped or detained.<sup>129</sup>

#### V. HOW DO WE KNOW CITIZENS ARE NOT BEING UNJUSTLY ARRESTED PURSUANT TO THE INTERFERENCE STATUTE?

How do we know people aren't being arrested as a result of an officer's unfair use of the restrictions discussed above? An officer may claim to be arresting or ordering an individual to cease filming on the basis that the individual's act has fallen within one of the recognized restrictions, but the officer's actions might be more strongly motivated by a desire to limit the act of filming itself.<sup>130</sup> So how can we implement limitations to allow an officer to effectively perform his public duties without the risk of the officer unfairly using these limitations to curtail a citizen's First Amendment right to film further than needed?

In Texas, Senate Bill 897—otherwise known as the Freedom to Film Act—was proposed to identify the specific situations in which a person could be arrested for participating in the legal act of filming officers, in addition to allowing citizens to avoid charges for interference with public duties when their conduct did not go beyond filming police officers.<sup>131</sup>

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incident from about thirty feet away without interfering with the officers. *Id.* After being signaled by one of the officers with his flashlight, Mr. Garcia proceeded to cross the street, now standing approximately one hundred feet away from where the arrest was taking place. *Id.* As he was approached by the officer, Mr. Garcia "identified himself as a member of the press and opened his hands to show that he had nothing in his possession except a camera." *Id.* The officer reacted by yelling he was under arrest and proceeding to place him in a chokehold while forcibly dragging him into the police cruiser. *Id.* After placing Mr. Garcia in handcuffs and confiscating his camera, the officer "kicked Mr. Garcia's right foot out from under him, causing Mr. Garcia to hit his head on the police cruiser as he fell to the ground." *Id.* Mr. Garcia was thereafter arrested, taken to the local detention center, and charged with disorderly conduct. *Id.*

129. See Satija, *supra* note 119 (citing police statements stating cop-watchers who fail to keep a reasonable distance from officers place themselves at risk of being arrested for interference with public duties).

130. See Lutt, *supra* note 19, at 356 n. 67 (quoting Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Disclosure, and the Right to Record*, 159 U. PA. L. REV. 335, 363–64 (2011)) (claiming officers will arrest citizens recording without valid grounds under the state's interference statute when they refuse to cease recording by referring to a case where an officer arrested an individual and subsequently asked his colleague, "What do we charge him with?" (internal quotation marks omitted)); see also Chadde, *supra* note 5 (demonstrating how arbitrary the limitations currently imposed are by describing the arrest of three civilians who were allegedly too close to police during a routine traffic stop although it was the same distance from which they had previously recorded without issue).

131. See Tex. S.B. 897, 83rd Leg., R.S. (2013) ("It is a defense to prosecution under . . . [Texas

As made evident by the drafting of this bill, legislatures are worried about the vagueness<sup>132</sup> of the current standards in place for balancing an individual's freedom to film with an officer's ability to effectively perform his duties, as well as the possibility of officers taking advantage of such vagueness and using it to unjustly limit an individual's freedom.<sup>133</sup> Consequently, the most sensible solution is for legislatures to find a balance between these conflicting interests and make the limitations as specific as possible to prevent law enforcement officers from restricting one's performance of his rights by abusing these limitations.<sup>134</sup>

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Penal Code section 38.15(a)(1)] that the conduct engaged in by the defendant . . . consisted only of filming, recording, photographing, documenting, or observing a peace officer.”); *see also* Julian Aguilar, *Bill Seeks to Protect Those Who Film Peace Officers*, TEX. TRIB. (Mar. 19, 2013), <http://www.texastribune.org/2013/03/19/bill-seeks-protect-those-who-film-peace-officers/> (describing the goals of legislation proposed by Republican Senator Craig Estes to reform the current standards used to deal with citizens filming peace officers). *Contra* Tex. H.B. 2918, 84th Leg., R.S. (2015) (seeking to amend the current interference statute by making it illegal for an unarmed individual to film within twenty-five feet of an officer, and over one hundred feet if the individual is armed). While it is possible for a bill like the Freedom to Film Act to be passed based on the majority of court rulings on the subject and the stance Texas has taken on the issue, a bill such as House Bill 2918 is unlikely to get far due to the frequency of police misconduct reports and the current animosity towards uniformed officers in general. *See, e.g.*, Allison Wisk, *Bill to Limit Filming of Police Activity Is Dropped*, DALL. MORNING NEWS (Apr. 10, 2015), <http://www.dallasnews.com/news/politics/state-politics/20150410-bill-to-limit-filming-of-police-activity-is-dropped.ece> (reporting House Bill 2918 was dropped days after a South Carolina police shooting gained national attention, and relaying State Representative Jason Villalba's—who proposed the bill in March 2015—statement that the concept was “not likely to find success now or in the future?”); *see also* Andy Campbell, *Texas Bill Would Make Recording Police Illegal*, HUFF. POST (Mar. 15, 2015), [http://www.huffingtonpost.com/2015/03/13/bill-recording-police-illegal\\_n\\_6861444.html](http://www.huffingtonpost.com/2015/03/13/bill-recording-police-illegal_n_6861444.html) (noting House Bill 2918 was contrary to precedent set by appellate courts and came at a time of heightened public scrutiny over controversial police killings of individuals such as Michael Brown and Eric Garner).

132. Pursuant to the void for vagueness doctrine, criminal laws must be drafted in a manner that avoids vagueness and gives citizens fair notice by explicitly stating what is punishable under a given rule. *See* *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (“[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”).

133. *See* Aguilar, *supra* note 131 (commenting legislatures are worried the vague limitations for filming police could lead to police retribution).

134. *See* Satija, *supra* note 119 (“Police say that some cop watchers get too close to the action and could be guilty of interference with public duties, a misdemeanor in Texas. But everyone has a different opinion on how close someone can get, and what interference means.”(internal quotation marks omitted)). *Cf.* Thiago M. Coelho & Carol M. Bast, *Citizens Policing the Police: An Evaluation of Citizens Recording Police Officers and Eavesdropping Laws*, 51 No. 1 CRIM. L. BULL. ART. 6 (2015) (determining the Illinois Wiretap Act was problematic because it lacked specificity as its language was too broad and thus could lead to the criminalization of acts that should otherwise be protected by the First Amendment freedom of speech); Travis S. Triano, Note, *Who Watches the Watchmen? Big Brother's Use of Wiretap Statutes to Place Civilians in Timeout*, 34 CARDOZO L. REV. 389, 416 (2012) (arguing the

VI. THE STANDARD FOR WHEN A PERSON INTERFERES WITH AN OFFICER'S DUTIES WHILE FILMING SHOULD BE CONSTRUED TO ALLOW FOR AS MUCH FREEDOM TO FILM AS POSSIBLE FOR PUBLIC POLICY REASONS.

It is clear that the standard for what constitutes interference requires clarification to prevent any abuse on the officer's behalf.<sup>135</sup> However, it is also essential that any standard produced be the least speech-restrictive for public policy reasons.<sup>136</sup>

First, video evidence provides the best type of conclusive evidence.<sup>137</sup> In fact, in *Scott v. Harris*<sup>138</sup> the Supreme Court reached its holding by giving decisive weight to recorded evidence.<sup>139</sup> This seems logical because it provides a way for the fact-finders to determine what really happened in a given situation, and thus promotes true justice, especially in situations where the facts may be disputed between the arresting officers and the arrestee.<sup>140</sup> This is further supported by the fact that the public is pushing for more recorded evidence as made apparent by the manifestation of more recording hardware being utilized not only by

Illinois and Massachusetts Wiretap Acts were too broad because they required the consent of all parties involved and lacked a privacy exception, consequently predisposing them to abuse).

135. Compare Cerame, *supra* note 107, at 422 (acknowledging the safety interests inherent in the restrictions applicable to filming police, but arguing for the least speech-restrictive means available for achieving this without compromising the aforementioned safety interests so as not to make any applicable limitations overinclusive), with Lautt, *supra* note 19, at 355 (reasoning police may be wary about filming police because filming could cause law enforcement to act in certain ways during life-threatening situations if they are being filmed).

136. See Bast, *supra* note 18, at 97 (claiming benefits associated with monitoring police conduct by recording their actions include promoting police accountability, punishing officers engaged in misconduct, promoting the circulation of information regarding police activities, educating the general public, and deterring future police misconduct, among others); see also Cerame, *supra* note 107, at 395–96 (“Recording police conduct is important for justice. Citizen-recordings provide valuable evidence, deter misconduct, and provide an opportunity for civic participation. Furthermore, prohibiting recordings undermines police legitimacy.”).

137. See Timothy Karr, *Your Right to Record: Protected by Law, Disrespected by Law Enforcement*, HUFF. POST (June 17, 2015), [http://www.huffingtonpost.com/timothy-karr/your-right-to-record-prot\\_b\\_7085024.html](http://www.huffingtonpost.com/timothy-karr/your-right-to-record-prot_b_7085024.html) (reporting the story of a young man who captured footage of an officer shooting an unarmed, fleeing Walter Scott).

138. *Scott v. Harris*, 550 U.S. 372 (2007).

139. See *id.* at 378 (finding the evidence in a motion for summary judgment is usually interpreted in the light most favorable to the opposing party, but recognizing this is not applicable when the evidence is recorded because such evidence is undisputable so long as it is not tampered with or altered in any way).

140. See, e.g., Lautt, *supra* note 19, at 355–56 (suggesting officers may consciously or unconsciously use the deference given to their testimony in criminal trials to embellish facts to attain a conviction).

public individuals, but by law enforcement as well.<sup>141</sup> While police cruiser dashboard cameras have been utilized for many years, the public's insistence on police accountability has sprung a new police-monitoring trend: body cameras.<sup>142</sup> Body cameras are "small, pager-sized cameras that clip on to an officer's uniform or are worn as a headset, and record audio and video of the officer's interactions with the public."<sup>143</sup> Consequently, body cameras provide a more accurate account of police interactions with the public due to their mobility and capability of capturing a number of versatile angles that dashboard cameras cannot.<sup>144</sup> While some might argue police body cameras should be sufficient to provide reliable evidence of a particular occurrence, having footage recorded from both the perspective of the officer and the involved citizen gives fact-finders the full picture of exactly what happened. This is because body cameras allow the fact-finders to see events from each party's perspective as well as the body language and demeanor of the

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141. See Cerame, *supra* note 107, at 398 (citing Demian Bulwa, *Mehserle Convicted of Involuntary Manslaughter*, S. F. CHRON. (July 9, 2010), <http://www.sfgate.com/bayarea/article/Mehserle-convicted-of-involuntary-manslaughter-3181861.php> (identifying dashboard cameras as a method of protecting police, but also noting their beneficial use is limited as these types of cameras fail to provide footage from various angles, which may sometimes be crucial such as in the case of former California police officer Johannes Mehserle, who was convicted of involuntary manslaughter instead of voluntary manslaughter or second degree murder after footage of the incident leading to the shooting of Oscar Grant showed Mehserle intended to draw his taser instead of his pistol). *But see* Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All*, ACLU (Mar. 2015), <https://www.aclu.org/police-body-mounted-cameras-right-policies-place-win-all> (arguing surveillance methods utilized by police will only be beneficial if accompanied by appropriate legislation, e.g., officers should be prohibited from manipulating the hardware in such a way that what gets captured is completely up to the officer's discretion by way of allowing them to turn the device on and off as they please, ensuring officers and the public are both protected without such surveillance measures becoming another form of government surveillance of the people).

142. See Mitra Ebadolahi, *New ACLU Mobile Justice App Empowers Public to Safeguard Rights*, ACLU N. CAL. (Apr. 30, 2015), <https://www.aclunc.org/blog/new-aclu-mobile-justice-app-empowers-public-safeguard-rights> (attributing the public's concern regarding the right to film police activity to recent tragedies such as the killing of Michael Brown); *see also* Stanley, *supra* note 141 (pinpointing the shooting of Michael Brown as the catalyst for the sudden spike in interest in police body cameras and noting these devices may be part of the solution to police violence).

143. Stanley, *supra* note 141.

144. See Lisa A. Skehill, Note, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 SUFFOLK U. L. REV. 981, 997 (2009) (praising the use of electronic devices, such as body cameras, to create an evidentiary record of the interactions between citizens and peace officers, and deeming them an invaluable technological advancement because such devices aid in providing clarity to court proceedings); *see also* Martyn, *supra* note 111 (conveying Dallas Police Association President Ron Pinkston's support for dashboard and body cameras as a safe alternative to civilian filming, since he believes the latter places officers at risk, stating "police officer deaths at traffic stops aren't uncommon").



officer and the citizen.<sup>145</sup>

Second, video evidence promotes good behavior in law enforcement officers, thereby reducing the possibility of police misconduct.<sup>146</sup> While some sources refer to an officer's hesitation to act when being recorded as a reason to make the parameters within which individuals may record more stringent,<sup>147</sup> such hesitation may be a positive feature if it is the distinguishing factor between a police officer unjustly physically assaulting an individual or not when the situation does not call for such extreme measures.<sup>148</sup> Furthermore, recording police raises police accountability issues because it provides officers with the incentive of avoiding harsher consequences in the future if they immediately report their misconduct to their department.<sup>149</sup> In cases where knowledge that he is being recorded

145. See Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers' Power*, 117 YALE L.J. 1549, 1553 (2008) (arguing recordings made by law enforcement officers are insufficient because they have the ability to power off the devices or record over footage as they deem necessary to maintain a good public perception or avoid consequences for acting unconstitutionally or unethically); see also Alexander Shaaban, *Officer! You Are on Candid Camera: Why the Government Should Grant Private Citizens an Exemption from State Wiretap Laws When Surreptitiously Recording On-Duty Officers in Public*, 42 W. ST. L. REV. 201, 205 (2015) (identifying one substantial defect of police body cameras as "important and probative details such as the mannerisms and non-verbal conduct of the officer will be missing").

146. See Ebadollahi, *supra* note 142 (identifying at least thirty-five deaths since January 2010 as having resulted from the use of lethal force by U.S. Customs and Border Protection agents); see also Cerame, *supra* note 107, at 396–97 (discussing the extensive problems with police perjury during trials as well as the apparent extensive distaste many officers have towards being monitored while on duty by referencing the disappearance of several dashboard cameras after a woman was allegedly manhandled by police during her investigative reporting, and advocating the act of recording police as a method of distinguishing the "good apples" from the "bad apples" within the police department); Lautt, *supra* note 19, at 354 (noting the Rodney King beating significantly modified the manner in which police conduct themselves and led to a major reform in police training—placing officers on notice that they should now operate under the assumption that they are continuously monitored as it became clear their actions could be viewed around the world within a short timeframe); Stanley, *supra* note 141 (addressing the problem of police violence in the United States by comparing the number of civilians killed by police in the United States—404 in 2011—to the number of civilians killed by police in other countries—"six people in Australia, two in England, [and] six in Germany"—in the same year).

147. Cf. Douglas Hanks, *Police Union Tries to Block Camera Plan for Miami-Dade Officers*, MIAMI HERALD (Aug. 22, 2014), <http://www.miamiherald.com/news/local/community/miami-dade/article1981217.html> (describing a police union's opposition to police-worn body cameras due to the possibility that the cameras could inhibit an officer's ability to react in dangerous situations).

148. See Cerame, *supra* note 107, at 397 (suggesting police are less likely to commit police misconduct when they are aware that they are being monitored); see also Skehill, *supra* note 144, at 1008 (arguing legislative recognition of a right to freely record law enforcement carrying out their public responsibilities would serve as a major disincentive to police officers who might otherwise be inclined to engage in police misconduct).

149. See Mishra, *supra* note 145, at 1553–54 ("[C]itizen recording gives officers reason to admit their illegal practices to their supervisors immediately . . . before a citizen brings suit using a recording

is not sufficient to deter an officer from violating an individual's rights, footage of the police officer's misconduct may be used to rectify the violation and hold the officer accountable for his actions.<sup>150</sup>

Finally, video evidence provides an opportunity for citizens to be involved in the community by freely exercising their freedom of speech.<sup>151</sup> Although relatively unheard of during the Rodney King era, during the last several years cop-watching has become a cultural phenomenon many citizens are beginning to partake in.<sup>152</sup> As a result, there now exist a wide variety of cop-watching groups individuals may join.<sup>153</sup>

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as evidence.”).

150. See Bast, *supra* note 18, at 94 (“Society’s general trust of police activity combined with police bravado means that, without a citizen recording, the officer’s testimony would be believable even if the officer is falsifying information.”); see also Oliver Darcy, *Watch How Texas Cop Responds When Woman Recording Officers Refuses to Show ID: ‘What’s My Charge?’*, BLAZE (Dec. 1, 2014), <http://www.theblaze.com/stories/2014/12/01/watch-how-texas-cop-responds-when-woman-recording-officers-refuses-to-show-id-whats-my-charge/> (relaying an incident involving Lanessa Espinosa, a woman in Corpus Christi, Texas, who captured footage of herself being put in a chokehold and threatened with being detained if she insisted on refusing to provide the sergeant at the scene with some form of identification, despite the officers allegedly not having any intentions of charging her prior to this).

151. See Cerame, *supra* note 107, at 398 (arguing that allowing citizens to freely record and disseminate videos of police performing their public duties promotes direct civic participation); see also Geoffrey J. Derrick, *Qualified Immunity & the Right to Record Police*, 22 B.U. PUB. INT. L.J. 243, 289 (2013) (“At least thirty-five major American cities or counties have created civilian review boards that allow community members to directly oversee, monitor, and account for conduct of police officers. . . . [T]hey represent the growing portion of private citizens who have recently become involved in police oversight.”).

152. See, e.g., Satija, *supra* note 119 (listing various popular cop-watching groups and organizations in Texas).

153. See generally Muna Mire, *Here’s How to Cop Watch*, NATION (Sept. 23, 2015), <http://www.thenation.com/article/heres-how-to-cop-watch/> (offering a general description of what cop-watching is, how individuals may form their own cop-watching groups, and how to cop-watch). Led in part by gun activist Cory Watkins and based in Arlington, Texas, Open Carry Cop Watch is a cop-watching group where members actively search for traffic stops to film, but unlike other groups, some do so while armed with weapons such as assault rifles. See Zach Noble, *Texas Open Carry Advocates Are Using a Black Panthers Tactic as They Go ‘Cop-Watching’*, BLAZE (Jan. 5, 2015), <http://www.theblaze.com/stories/2015/01/05/texas-open-carry-advocates-are-using-a-black-panthers-tactic-as-they-go-cop-watching/> (comparing Open Carry Cop Watch to the Black Panther Party as a result of the parties’ similar patrolling styles); see also Satija, *supra* note 119 (distinguishing Open Carry Cop Watch from other groups as a result of their affinity for “carrying weapons such as AK-47 and AR-15 rifles” during their cop-watching ventures).

VII. THE RECOGNITION OF A FIRST AMENDMENT RIGHT TO RECORD POLICE OFFICERS IN A PUBLIC FORUM DOES NOT PROVIDE A BLANKET PROTECTION FOR ALL CONDUCT PERFORMED IN CONJUNCTION WITH THE ACT OF RECORDING.

Based on the manner in which the majority of the circuit courts who have ruled on the issue,<sup>154</sup> recognition by the Supreme Court of a clearly established right to film officers is possible.<sup>155</sup> The act of recording itself must not be classified as an interference with public duties.<sup>156</sup> So long as people are recording within the parameters generally recognized by most courts and scholars, being arrested under an interference statute would undoubtedly constitute a violation of the individual's First Amendment freedom of speech.<sup>157</sup>

However, this does not mean individuals will be allowed to do other

154. See *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (determining the existence of a right to record officers is a logical extension of the right to disseminate recordings); see also *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (incorporating the right to film an officer within the First Amendment right to gather and disseminate information); see also *Johnson v. Hawe*, 388 F.3d 676, 685, 687 (9th Cir. 2004) (supporting a right to film officers regardless of the court's refusal to hear the plaintiff's claim for the violation of his First Amendment freedom of speech, as it was first raised on appeal, by holding the police officer lacked probable cause to arrest the plaintiff since such act was not criminal); *Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding citizens have a right to film officers within the parameter of specific limitations).

155. In fact, the vagueness currently associated with the ability to film officers in a public arena itself calls for clarification. See *supra* note 32. If the Court were to affirmatively recognize a right to film police officers, even if subject to certain exceptions such as time, place, and manner, it would cure the issue between the ability to film and the fair notice doctrine. Implementing limitations along with a recognized right would protect law enforcement by ensuring they are still able to carry out their civic duties, and at the same time benefit citizens by providing them with better-defined parameters as to which actions are permissible and which are subject to legal consequences. Further supporting the conclusion that the Supreme Court will—or should—ultimately recognize a First Amendment Right to videotape officers is the fact that not only is the act of filming characteristic of speech, but allowing individuals to film the conduct of officers in a public forum makes for good public policy because such an action more frequently than not will assist, rather than hinder police duties by providing direct evidence of the occurrence filmed. See *Alderman*, *supra* note 104, at 517 (arguing it is more likely for a recording to assist police officers). Additionally, many of the individuals who have encounters with law enforcement as a result of filming deliberately roam public areas in search of officers to film as they believe doing so will promote police being accountable for their actions and thus reduce the possibility of police misconduct. See *Satija*, *supra* note 119 (quoting Antonio Buehler claiming law enforcement officers treat citizens with a higher level of respect when they are aware their conduct is being videotaped).

156. See *TEX. PENAL CODE* § 38.15(d) (West 2016) (“It is a defense to prosecution under this section that the interruption, disruption, impediment, or interference alleged consisted of speech only.”).

157. See *id.* (asserting mere speech does not constitute as an exception to the statute, thereby implying citizens should not be arrested for interfering with police duties if their actions do not surpass mere speech).

things in connection with videotaping that, on their own, would constitute a violation under either an interference statute or another, and still be shielded from being criminally reprimanded.<sup>158</sup> Thus, if an individual failed to keep a sufficient amount of distance between himself and an officer so as to interfere with the officer's duties, he could lawfully be arrested; the arrest, however, would be as the result of his violation of the interference statute and not for the actual act of recording an officer on duty.<sup>159</sup> *Berrett v. Texas* provides another great example of this.<sup>160</sup> If an individual threatens or assaults an officer in the course of filming him, his actions surpass mere speech, thus making him susceptible to arrest for reasons other than filming the officer.<sup>161</sup> Consequently, in *Berrett*, the fact that Berrett was filming the officer did not provide him with a constitutional shield from being arrested, because his act of recording the arresting officer surpassed speech when he became confrontational, threatened the officer, and resisted arrest.<sup>162</sup>

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158. See, e.g., Alderman, *supra* note 104, at 514–16 (disagreeing with Posner's dissent in *ACLU v. Alvarez* stating a First Amendment right to film officers compromises an officer's ability to keep sensitive information private and eliminates the invasion of privacy tort because the right recognized in *Glik* is a qualified one, and thus is limited to public places and must not be "performed in derogation of any law" (citing *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011)).

159. See, e.g., Meyer, *supra* note 110 (acknowledging an individual's right to film police is limited in the sense that he may not interfere with an officer's public duties, and thus suggesting people maintain a reasonable distance from the area in which the officer in question is conducting a routine traffic stop or arrest and "stay out of the scene" so as to not subject oneself to the possibility of being arrested). Groups such as Open Carry Cop Watch raise new questions regarding what constitutes an interference as their attitude towards law enforcement officers coupled with their visible pistols and rifles could place officers in a state of apprehension which could impair their ability to effectively perform their public duties, thus treading the fine line between what does and does not constitute an interference. See Michael Zennie, *The Armed Vigilantes Purposely Clashing with Police to Catch Out Officers for Brutality: 'Cop Block' Texas Activists Confront Officers in the Streets . . . While Strapped with Rifles and Recording Devices*, DAILY MAIL (Jan. 5, 2015), <http://www.dailymail.co.uk/news/article-2897638/The-Cop-Block-videos-Texas-gun-activists-confronting-officers-streets-strapped-handguns-assault-rifles.html> ("Cops say the activists have, at times, been a threat to officers who are just going about their jobs . . . 'When you see somebody being aggressive, interfering with a stop, and armed with a deadly weapon, the officer can't just ignore that.'").

160. See *Berrett v. Texas*, 152 S.W.3d 600, 602–03 (Tex. App.—Houston 1st Dist. 2004, pet. ref'd) (detailing the arrest of an individual which resulted after the individual, who was filming a police officer that attempted to cite him during a routine traffic stop, became aggressive and confrontational with the officer).

161. See *id.* (holding Berrett was guilty of interference because his conduct surpassed mere speech).

162. *Id.*

VIII. UNDER WHAT SITUATIONS MIGHT THE ACLU'S MOBILE JUSTICE APP'S FEATURES PLACE AN INDIVIDUAL AT RISK FOR REACHING THE AFOREMENTIONED THRESHOLD?

The App's two features that will most likely cause concern for users are the record and the witness features.<sup>163</sup> When analyzing these features through the lens of a court, the record button would raise the most obvious issue because the app user will be getting close enough to the officer to capture footage, which may be interpreted as interfering with the officer's public functions.<sup>164</sup> However, the witness feature presents potential problems of its own.<sup>165</sup> For example, if too many people respond to the notification of a nearby incident involving police conduct, this may lead the formation of a large crowd, which law enforcement would need to maintain under control.<sup>166</sup> As a result, police may set up perimeter controls or other boundaries—depending on the situation—which could increase the chances of the app user encountering a problem with officers.<sup>167</sup>

Furthermore, even if the Texas ACLU does not provide Texans with a state-based version of the Mobile Justice App, users in the state may nevertheless use the corresponding app from other states, such as Mobile

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163. See *ACLU Apps to Record Police Misconduct*, *supra* note 7 (describing the record and witness features of the Mobile Justice App).

164. See Satija, *supra* note 119 (identifying, based on police statements, proximity as a main factor in determining whether an individual is charged under the interference statute).

165. See *ACLU Apps to Record Police Misconduct*, *supra* note 7 (detailing the witness feature of the Mobile Justice App as a method to attract attention to any occurrences of police misconduct encountered by the app user); see also Alex Dobuzinskis, *California ACLU Group Launches App to Record Possible Police Misconduct*, REUTERS (Apr. 30, 2015), <http://www.reuters.com/article/us-usa-police-apps-idUSKBN0NL2SK20150430> (describing how the witness app helps draw people to a location where a citizen's rights are being violated by police officers).

166. See, e.g., Mitch Mitchell, *Arlington Police Say Three in Group Interfered with a Traffic Stop*, STAR-TELEGRAM (Sept. 8, 2014) <http://www.star-telegram.com/news/local/crime/article3872441.html> (discussing the arrest of three Arlington citizens, who are active members of various cop-watching groups, after they allegedly interfered with a routine traffic stop where over twenty other cop-watchers were also filming); see also Simone Alicea, *Police: Officer Suffers Broken Wrist in Scuffle with Protesters*, CHI. SUN-TIMES (Dec. 18, 2015), <http://chicago.suntimes.com/news/7/71/1193031/police-officer-suffers-broken-wrist-scuffle-protesters> (reporting that an officer suffered an injury as the result of a large group that formed to protest previously released video footage of the shooting of Laquan McDonald); Dobuzinskis, *supra* note 165 (relating apprehensions previously expressed by police advocates that filming officers may interfere with their ability to perform their duties in tense situations).

167. See, e.g., *Fleck v. Tr. of the Univ. of Pa.*, 995 F. Supp. 2d 390, 396 (E.D. Pa. 2014) (ordering protesters to move a precise distance away from the mosque they were protesting at because the protest was leading to the formation of various crowds that were beginning to impede the flow of traffic).

Justice CA.<sup>168</sup> If a user chose to do this, any relevant recordings would be sent to the ACLU of California, and if that ACLU determined a violation of an individual's civil rights had been committed, the footage would be forwarded to the individual's corresponding ACLU.<sup>169</sup> This could very well present its own problems as some of these apps, including the California app, include a feature detailing the state's relevant laws regarding the act of recording the police.<sup>170</sup> The ACLU has provided the following disclaimer about the usage of Mobile Justice CA by users outside of California:

It is important to note that the Know Your Rights materials in the app, including (and especially) those about interacting with and video recording police are tailored to California state law. Other states may have different state laws that affect your rights, including your right to film police. Do not rely on the Know Your Rights materials outside of California.<sup>171</sup>

Consequently, this could place Texas users of another state's app in danger of being arrested if they relied on such feature because, as similar as some applicable statutes might be, the other state's law might lack certain provisions contained in the Texas Penal Code or otherwise differ substantially from it.<sup>172</sup>

#### IX. HOW DOES THE TEXAS INTERFERENCE STATUTE DIFFER FROM OTHER INTERFERENCE OR SIMILAR STATUTES IN STATES WHERE THE MOBILE JUSTICE APP HAS BEEN ADOPTED?

California and Oregon are among the various states that have a cop-watching app offered by the ACLU, and also have statutes similar to the Texas statute making it a misdemeanor to interfere with the execution of a

168. See *Frequently Asked Questions, Is Mobile Justice Available in Other States?*, MOBILE JUSTICE CA, <https://www.mobilejusticeca.org/faq/> (last visited Jan. 17, 2017) [hereinafter *Frequently Asked Questions*] (advising out-of-state users that they may download the app, but warning that any discussion of laws provided therein may not be applicable to someone outside of California).

169. See *id.* (stating while the app Mobile Justice CA is officially meant to be used by California citizens, individuals from other states may download the app and send recorded footage to the California ACLU, which will subsequently be forwarded to the individual's local ACLU if it is determined that the recording captured a peace officer seriously violating a citizen's civil rights).

170. See Jon Wiener, *New ACLU Cellphone App Automatically Preserves Video of Police Encounters*, THE NATION (May 1, 2015), <http://www.thenation.com/article/new-aclu-cellphone-app-automatically-preserves-video-police-encounters/> (noting the app Mobile Justice CA has a "Know Your Rights" feature that lists the local, state, and federal laws applicable to California users).

171. *Frequently Asked Questions*, *supra* note 168.

172. See *id.* (warning against reliance on California law because any given deviation from the user's state could potentially result in adverse consequences for the user).

peace officer's performance of his public duties.<sup>173</sup> California's statute, for instance, states in part that it is a misdemeanor punishable by a maximum of one year imprisonment or "a fine not to exceed one thousand dollars" to "resist[], delay[], or obstruct any peace officer . . . in the discharge of any duty."<sup>174</sup> By comparison, Oregon's statute simply states an individual criminally interferes with a police officer when he "intentionally acts in a manner that prevents, or attempts to prevent, a peace officer . . . from performing the lawful duties of the officer with regards to another person; or . . . [refuses] to obey a lawful order by the peace officer . . . ."<sup>175</sup>

In California, a photographer was arrested for interfering with an officer's duties from over ninety feet away.<sup>176</sup> Another individual had her smart phone smashed after recording police in vests.<sup>177</sup> Later, in Oregon, a man was arrested for interfering with police, who were serving an unrelated individual with a felony parole violation warrant, but the facts involved were highly disputed as the police claimed the streets were blocked and the individual failed to obey orders to stand back, while the individual provided a minute and twenty-one seconds of video footage suggesting he was simply exercising his First Amendment right to record outside his home.<sup>178</sup> While not directly relevant to Texas, it is not

173. See *Victory! The Right to Film the Police Bill Passes the Oregon Legislature*, ACLU OR., [http://www.aclu-or.org/Right-to-Film-the-Police-HB\\_2704\\_2015](http://www.aclu-or.org/Right-to-Film-the-Police-HB_2704_2015) (last visited Jan. 17, 2017) (stating the Oregon statute, which provides an exception to the state's eavesdropping statute by allowing citizens to freely film police performing their public duties, does not afford citizens the freedom to trespass onto private property or interfere with police duties, and implying an individual could avoid interfering with the officer's duties by quietly standing by when recording so as to avoid amplifying an already tense situation for the officer).

174. CAL. PENAL CODE § 148(a)(1) (West 2016).

175. OR. REV. STAT. § 162.247 (2016).

176. See David Becker, *LA Photographer Detained for 'Interfering' While Taking Photos from 90 Feet Away*, PETAPIXEL (Aug. 15, 2013), <http://petapixel.com/2013/08/15/la-photographer-detained-for-interfering-while-taking-photos-from-90-feet-away/>.

177. See Tamara Bogosian & Jordan Ferguson, *California Reaffirms First Amendment Right to Record Police in Public*, PUBLIC CEO (Nov. 4, 2015), <http://www.publicceo.com/2015/11/california-reaffirms-first-amendment-right-to-record-police-in-public/> (illustrating the uncertainty in what constitutes an interference by detailing the events leading to an officer destroying an individual's phone after she recorded men wearing tactical vests and stating she did not feel safe); see also Becker, *supra* note 176 (describing the arrest of a photographer who was videotaping a domestic dispute from over ninety feet away in Los Angeles when he was arrested for interfering with police duties).

178. See Cheryl K. Chumley, *Oregon Man Arrested After Refusing to Stop Videotaping SWAT Raid*, THE WASH. TIMES (Sept. 9, 2014), <http://www.washingtontimes.com/news/2014/sep/9/oregon-man-arrested-after-refusing-stop-videotapin/> (clarifying that Fred Matlow noticed a militarized raid with tanks on his street and thus began filming "from across the street, several feet away from the scene," when he was arrested and fined \$5,000 for interfering with police by failing to cease filming upon their orders to do so); accord Stuart Tomlinson, *Man Claims Gresham Officers Arrested Him for*

difficult to imagine individuals being arrested under similar circumstances for interfering with police duties in Texas because of the similarity between the interference statutes in all three states.

X. A CLOSING SUMMARY ON THE RIGHT TO FILM OFFICERS AND WHY THE INTRODUCTION OF THE ACLU'S MOBILE JUSTICE APP IN TEXAS SHOULD NOT SUBJECT USERS TO ARREST PURSUANT TO THE INTERFERENCE STATUTE.

If one thing is clear, it is that measures being taken by individuals and organizations alike to hold law enforcement officers accountable for their actions are going to not only continue, but expand as well.<sup>179</sup> With the amplified media attention being directed at the growing number of instances of police brutality and misconduct, the right to record police is an issue that demands to be addressed now.<sup>180</sup> From the formation of various cop-watching groups such as Open Carry Cop Watch, Peaceful Streets Project, and Texas Cop Watch, to the creation of cop-watching apps by the one of the nation's leaders in civil rights protection, it is imperative that the boundaries within which one may freely record police performing their public duties within the protection of their First Amendment rights be addressed and clarified as much as possible by the Supreme Court and state legislatures.<sup>181</sup>

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*Videotaping Police Action; Police Say He Interfered, Resisted Arrest*, OREGONIAN (Sept. 10, 2014), [http://www.oregonlive.com/gresham/index.ssf/2014/09/man\\_claims\\_gresham\\_officers\\_ar.html](http://www.oregonlive.com/gresham/index.ssf/2014/09/man_claims_gresham_officers_ar.html) (questioning the motives behind the arrest of a man who was detained for interfering with peace officers' duties after the man allegedly disregarded the officer's statement that he would be arrested for interference if he did not "go inside" and cease recording from the sidewalk where he was standing).

179. See Kate Conger, *The Evolution of Ferguson's Copwatch Movement*, DAILY DOT (Aug. 11, 2015), <http://www.dailydot.com/politics/copwatch-ferguson-michael-brown/> (describing Michael Brown's death as "a symbol of brutal and racially biased policing in America," which has further fueled the public's growing concern with holding law enforcement officials accountable for their acts of police misconduct and brutality).

180. See Lutt, *supra* note 19, at 354–55 ("Greater visibility of police activity through citizen-generated media has created a popular new genre of Internet videos showing police officers engaged in various forms of questionable, if not blatantly criminal, conduct.").

181. Though the Supreme Court has not yet recognized a right to film police officers on duty in a public forum, previous holdings from the nation's highest court, as well as a clear trend among the circuit courts, suggest the country is leaning towards recognizing this right, stressing the need for clarification in this area. See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (finding the First Amendment not only protects the media and the right to self-expression of individuals, but also prohibits government from limiting the availability of information to the public); see also *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (acknowledging the right to gather news and information exists within the First Amendment); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (implying individuals and the press share the same right to collect information by stating the press does not hold any type



While some police advocates argue allowing citizens to record police potentially places officers in danger, public policy weighs strongly in favor of recognizing such a right.<sup>182</sup> Not only does recording police dissuade law enforcement from committing acts contrary to their duties, but it also serves as a device to hold officers accountable when they do engage in police misconduct by providing irrefutable evidence of their wrongdoings.<sup>183</sup>

The ACLU's Mobile Justice App provides the perfect avenue through which to conduct police monitoring.<sup>184</sup> While the witness feature is helpful in exposing potential police misconduct by notifying other users of incidents when they happen—which is ultimately one of the main goals for cop-watchers—this app's record feature is especially valuable to individuals who encounter peace officers violating citizens' rights.<sup>185</sup> Compared to using the standard recording feature most phones provide or a hand held video camera, the Mobile Justice App protects citizens and any

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of special access to information not otherwise provided to the public); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (holding the First Amendment encompasses a “right to receive information and ideas” which is fundamental to a free society regardless of the social worth of such information and ideas). See generally *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966) (demonstrating a strong desire “to protect the free discussion of governmental affairs” as such a right that ultimately serves to protect the nation from government officials who abuse their power, and thereby asserting any attempts to impede the free gathering and dissemination of information, especially that relating to governmental affairs, contradict what the Framers intended for the Constitution).

182. Compare *Bast*, *supra* note 18, at 94 (arguing the immense amount of power police officers hold should justify affording citizens the right to monitor and record them exercising said power), and *Lautt*, *supra* note 19, at 370 (stating citizens have a clearly established right to record law enforcement officers' publicly observable activities under the First Amendment, and arguing public policy demands for such a right to be protected in order to hold those we entrust with the maintenance of the peace in our communities accountable for their wrongdoings), with *Shaaban*, *supra* note 145, at 203 (conveying law enforcement officers oppose the recognition of a right to film officers on duty because they claim they should “have a reasonable expectation of privacy when they are in public” and being recorded nevertheless interferes with their ability to effectively execute their public duties). See generally *Mills*, 384 U.S. at 219 (“[T]he press serves and was designed to serve as a powerful antidote to any abuses of power of governmental officials and as a constitutionally chosen means for keeping officials . . . responsible to all the people whom they were selected to serve.”).

183. See *Skehill*, *supra* note 144, at 1008 (arguing knowledge of being recorded would discourage police officers from crossing any constitutional or ethical lines, while recordings themselves would be the most beneficial type of evidence a citizen who has fallen victim to police misconduct could provide at trial). See generally *Alderman*, *supra* note 104, at 511–12 (discussing the great evidentiary value recordings have by describing how such footage made an impressionable impact on society at various times by capturing footage such as the beating of Rodney King or the comments made by 2012 presidential candidate Mitt Romney).

184. See *ACLU Apps to Record Police Misconduct*, *supra* note 7 (giving users helpful tools for recording the police).

185. See *id.* (providing a detailed description of the witness, record, and report features of the Mobile Justice App).

evidence they obtain by automatically uploading footage recorded into their servers as a precaution against officers confiscating the device and attempting to destroy any footage captured.<sup>186</sup>

Though this app has yet to make its way to Texas, it is important to determine whether its usage by Texas users could potentially lead them to be arrested under the state's interference statute. Based on case law, it could be inferred the app does not automatically present individuals with the threat of being arrested because interference usually requires close proximity or the existence of particular circumstances in which filming could put either the officers or others in danger.<sup>187</sup> However, other sources suggest that it is not uncommon to see reports of citizens arrested for recording peace officers even where there clearly were no violations.<sup>188</sup> Consequently, adopting legislation such as Senate Bill 897—proposed by Craig Estes—would significantly reduce the number of wrongful arrests executed under the interference statute because it would clarify the circumstances under which individuals may record police.<sup>189</sup>

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186. See *id.* (describing how video footage captured on a user's device is automatically sent to a local ACLU office, which is then either disposed of after a certain time period or kept for evidentiary purposes if ACLU officials conclude the footage is sufficient evidence of a violation of an individual's civil rights).

187. *Contra* Buehler v. City of Austin, No. A-13-CV-1100-ML, 2015 WL 737031, at \*6 (W.D. Tex. Feb. 20, 2015) (stating a civilian was arrested for interfering with officers, although he was allegedly some sixty-five feet away from the incident and was still ordered to continue moving further back).

188. See, e.g., Radley Balko, *Despite Court Rulings, People Are Still Getting Arrested for Recording On-Duty Cops*, WASH. POST (May 13, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/05/13/despite-court-rulings-people-are-still-getting-arrested-for-recording-on-duty-cops/> (referencing a story of a woman who was arrested in Massachusetts for secretly recording police, and noting that while people are still being charged for videotaping peace officers, charges are normally dropped unless such charges for videotaping peace officers are brought in states with broad statutes such as Texas's interference statute); see also David Murphy, Comment, "V.I.P." Videographer Intimidation Protection: How the Government Should Protect Citizens Who Videotape the Police, 43 SETON HALL L. REV. 319, 327 (2013) (predicting police intimidation tactics aimed at dissuading individuals from recording police activity will continue unless legislation affirmatively recognizing and protecting citizens' right to monitor and record police is passed); Meyer, *supra* note 110 (noting that in the past, officers would state they could not be recorded, whereas now they object to individuals recording them by claiming those individuals are interfering with their duties).

189. See Aguilar, *supra* note 131 (stating the passage of a bill such as the Freedom to Film Act would "allow legal authorities to drop charges like interference with public duty" while also minimizing police retribution by removing an avenue through which individuals could be targeted by law enforcement when videotaping their actions).