BEYOND THE FIRST AMENDMENT: BROADER PROTECTIONS FOR A CITIZEN'S RIGHT TO RECORD

INTRODUCTION

"I can't breathe. I can't breathe. I can't breathe."[1] For members of the public paying even the slightest bit of attention to the news over the past few years, those words are immediately recognizable as the last words of forty-three-year-old Eric Garner. In a video released mere days after the actual incident,[2] police officers can be seen talking to Garner for a number of minutes before the interaction rapidly escalates as one of the officers grabs Garner around the neck and places him in a chokehold.[3]

From what one can make out from the captured dialogue, it sounds like the police officers initially approached Garner to question him about alleged sales of untaxed cigarettes.[4] At numerous points throughout the video, however, the man recording can be heard saying that the police officers were attempting to "lock somebody up for breaking up a fight."[5] Other reports tend to lend support to the recorder, affirming that Garner was breaking up a fight on the street minutes before police arrived.[6]

While the reason behind the police stop may be unclear, the escalation of the situation and the officers' use of force is painfully vivid. Prior to the attempted arrest, Garner can be heard saying, "every time you see me you wanna harass me. You wanna stop me . . . . I'm minding my business, please just leave me alone. I told you the last time, please just leave me alone."[7] Several minutes pass before the police attempt to arrest Garner, and what actually warrants the arrest is not readily apparent.[8] As the officers begin to

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1. *'I Can't Breathe': Eric Garner Put in Chokehold by NYPD Officer – Video*, GUARDIAN (Dec. 4, 2014), http://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video.

2. Josh Sanburn, *Behind the Video of Eric Garner's Deadly Confrontation with New York Police*, TIME (July 22, 2014), http://time.com/3016326/eric-garner-video-police-chokehold-death/.

3. *'I Can't Breathe': Eric Garner Put in Chokehold by NYPD Officer – Video*, *supra* note 1.

4. *Id.*

5. *Id.*

6. Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?_r=0.

7. *'I Can't Breathe': Eric Garner Put in Chokehold by NYPD Officer – Video*, *supra* note 1.

8. *Id.*

approach and arrest Garner, he starts to plead: "Please don't touch me. No listen, don't touch me, please."[9] The video shows Garner trying to pull away from the officers, but at no point does it appear that the father of six reacted with violence or force.[10] In fact, as the police officer pulls him down into a chokehold, Garner's hands are raised.[11] Garner was taken down in the same pose that has become a symbol of the Black Lives Matter movement: hands up.[12]

The existence of this recording was vital in providing the public with at least some objective evidence as to what occurred in the moments leading up to Eric Garner's death. Ramsey Orta, the man who hit "record," seemed well aware of the importance of capturing the interaction. After the incident hit the newsstands, Orta was quoted stating, "It just gives me more power to not be afraid to pull out my camera anytime . . . . Even if they're pushing me back, I might just keep going forward and if I get arrested, hey, I got something on camera."[13]

As technology and social justice movements proliferate at ever-increasing speeds, conversations about the right to record police interactions must naturally follow. This Comment seeks to examine various constitutional protections for this right that could expand beyond First Amendment claims. Part II will provide background on how the right to record has developed through case law, focusing specifically on the circuit split that currently exists as to whether the right to record is guaranteed under the First Amendment. Part III will briefly discuss the interplay between current social justice movements and the way technology is being used to further those efforts. Part IV will then assess how these new purposes for citizen-produced recordings can be more broadly protected through the application of due process principles. Finally, Part V will anticipate how these new protections could be applied to better public policy.

I. THE HISTORY OF RECORDING POLICE CONDUCT

A. First Amendment Origins

Historically, the right to record police conduct emerged from First Amendment cases that involved a third party's right to record the police, often in an attempt to use the footage for media

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9. *Id.*
10. *Id.*
11. *Id.*
12. *See Ferguson, 1 Year Later: Why Protesters Were Right to Fight for Mike Brown Jr.*, BLACK LIVES MATTER, http://blacklivesmatter.com/ferguson-1-year-later-why-protesters-were-right-to-fight-for-mike-brown-jr/ (last visited Mar. 3, 2016).
13. Sanburn, *supra* note 2.

purposes.[14] Over time, and with the development of new technology, the relevant case law has expanded to address citizens who record police interactions for more defensive purposes.[15] While a citizen's right to record police conduct plays a vital role in both uncovering abuses and improving government functions,[16] during its development this right was often at odds with early state wiretapping statutes.[17]

The rise of state wiretapping statutes occurred after Congress enacted the Federal Wiretap Act in 1968.[18] The Federal Wiretap Act was primarily intended to combat organized crime by prohibiting the intentional interception of communications.[19] As an exception to this overall prohibition, the Act allows recording if one party to the communication consents.[20] This exception is more commonly known as the "one-party consent rule."[21]

As states began to enact their own wiretapping statutes, the one-party consent rule quickly became the majority approach.[22] A number of states, however, have imposed stricter regulations that require multiple parties or even all parties to consent.[23] Consequently, these discrepancies between state laws have contributed to inconsistencies amongst factually similar right-to-record cases, many of which have reached the federal circuit courts.[24]

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14. *See, e.g.*, Iacobucci v. Boulter, 193 F.3d 14, 17 (1st Cir. 1999); Fordyce v. City of Seattle, 55 F.3d 436, 438 (9th Cir. 1995); Thompson v. City of Clio, 765 F. Supp. 1066, 1068 (M.D. Ala. 1991).

15. *See, e.g.*, Glik v. Cunniffe, 655 F.3d 78, 79–80 (1st Cir. 2011) (involving plaintiff who recorded an arrest out of concern that officers were using excessive force); Kelly v. Borough of Carlisle, 622 F.3d 248, 251 (3d Cir. 2010) (involving a passenger's recording of a police officer during a traffic stop).

16. *Glik*, 655 F.3d at 82–83.

17. *See, e.g.*, ACLU of Ill. v. Alvarez, 679 F.3d 583, 586 (7th Cir. 2012); *Glik*, 655 F.3d at 85–88.

18. Omnibus Crime Control and Safe Streets Act (Federal Wiretap Act) of 1968, Pub. L. No. 90-351, 82 Stat. 197, 211 (codified as amended at 18 U.S.C. § 2510–22 (2012)).

19. 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, 391–92 (2012).

20. 18 U.S.C. § 2511(2)(d) ("It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception . . . .").

21. Triano, *supra* note 19, at 394.

22. *Id.*

23. *Id.* at 394–95.

24. *Id.* at 395–96.

Once before the courts, these cases were almost always analyzed under the First Amendment.[25] This was logical considering the challenges at hand primarily involved the conflict between complex wiretapping statutes and issues of free speech and the right to disseminate information.[26]

B. Bridging the Gap: The Right-to-Record Circuit Split

Since the 1990s, a circuit split has developed as to whether the First Amendment protects a citizen's right to record police officers who are acting in their public function.[27] Further, because many courts have struggled to balance citizens' First Amendment rights with varied wiretapping statutes, a number of cases lack meaningful analysis for other courts to consider.[28]

One of the first cases to address this issue was *Fordyce v. City of Seattle*.[29] This case involved a political protestor who was charged with videotaping police officers' conduct in violation of a state wiretapping statute.[30] After the charges against him were dropped, the protestor brought a § 1983 claim against the city and eight police officers.[31] While the Ninth Circuit acknowledged that the protestor had a "First Amendment right to film matters of public interest," the court provided no rationale as to why this was the case.[32]

The Eleventh Circuit followed suit five years later when it held that citizens had a First Amendment right to record police conduct.[33] While the court's opinion in *Smith v. City of Cumming*[34] was extremely condensed and offered little to no analysis, the Eleventh Circuit did hold that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."[35] The Eleventh Circuit also briefly mentioned that this right was "subject to reasonable time, manner and place restrictions."[36]

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25. *See, e.g.*, Glik v. Cunniffe, 655 F.3d 78, 80 (1st Cir. 2011); Fordyce v. City of Seattle, 55 F.3d 436, 438 (9th Cir. 1995).

26. *See Glik*, 655 F.3d at 79–80; *Fordyce*, 55 F.3d at 438.

27. 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, 1920 (2014).

28. Travis Gunn, Note, *Knowledge is Power: The Fundamental Right to Record Present Observations in Public*, 54 WM. & MARY L. REV. 1409, 1419 (2013).

29. 55 F.3d 436.

30. *Id.* at 438.

31. *Id.*

32. *Id.* at 439.

33. Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000).

34. *Id.*

35. *Id.*

36. *Id.*

While these cases upheld citizens' right to record, it was not until 2011 that the First Circuit offered a full articulation of the First Amendment analysis in a right-to-record case.[37] In *Glik v. Cunniffe*,[38] the First Circuit explained that the right to record the public actions of police officers stems from the broadly inclusive language of the First Amendment itself.[39] The First Circuit went on to note that the beneficial consequences of such recordings align with First Amendment principles.[40] Specifically, the First Circuit focused on the public interest in freely discussing, and even scrutinizing, police conduct in order to remedy abuses.[41] The First Circuit also clearly indicated that the right to record can be limited by certain time, place, and manner restrictions, but did not provide much explanation as to what those limits might entail.[42]

Following the heightened analysis in *Glik*, the Seventh Circuit utilized its opinion in *American Civil Liberties Union of Illinois v. Alvarez*[43] to provide even further insight on "time, place, or manner" restrictions.[44] In that case, the Seventh Circuit considered the right to record in light of an Illinois wiretapping statute and noted that "a regulatory measure may be permissible as a 'time, place, or manner' restriction if it is 'justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information.'"[45] Thus, while acknowledging the potential limits implicated by the state wiretapping law, the Seventh Circuit established a broad basis for recognizing a First-Amendment-based right to record.[46]

In contrast to the First, Seventh, Ninth, and Eleventh Circuits, the Third and Fourth Circuits have declined to acknowledge a First Amendment right to record.[47] In *Kelly v. Borough of Carlisle*,[48] the Third Circuit discussed the First Amendment issue in detail while determining whether the involved police officer was entitled to qualified immunity.[49] The court, however, ultimately avoided coming to any firm conclusion on the matter and instead focused on

37. *See* Glik v. Cunniffe, 655 F.3d 78, 82–85 (1st Cir. 2011).
38. *Id.*
39. *Id.* at 82.
40. *Id.*
41. *Id.* at 82–83.
42. *Id.* at 84.
43. 679 F.3d 583 (7th Cir. 2012).
44. *Id.* at 605.
45. *Id.* (alterations in original) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
46. *Id.*
47. *See* Kelly v. Borough of Carlisle, 622 F.3d 248, 260–62 (3d Cir. 2010); Szymecki v. Houck, 353 Fed. App'x 852, 852–53 (4th Cir. 2009).
48. 622 F.3d 248.
49. *Id.* at 259–63.

distinguishing the facts of *Kelley* from cases in other circuits, basing its analysis primarily on "time, place, and manner" restrictions.[50] The Third Circuit also noted that the right to record may depend on whether the recording was intended to be "expressive or communicative" in purpose.[51]

The Fourth Circuit was even more unwilling to recognize an individual's right to record. In *Szymecki v. Houck*,[52] another qualified immunity case, the Fourth Circuit dismissed the right-to-record issue in two sentences, explaining that there was simply no clearly established precedent within the circuit at that time.[53] Without such precedent, the Fourth Circuit declined to uphold the right, and in doing so, also neglected to provide any guidance for cases that might be brought on similar facts.[54] Thus, the possibility of a First Amendment right to record being recognized in courts within the Fourth Circuit remains somewhat tentative.

This discrepancy amongst the circuits means that a citizen's right to record, at least as it exists under the First Amendment, is geographically limited and vague. One commentator even refuses to acknowledge the circuits are plainly divided on the issue, calling the split "artificial" due to the sparse reasoning available in so many of the cases.[55] And while this circuit split may well be on its way to resolution,[56] a clear federal precedent has yet to be established.[57] The effects of such indeterminacy were recently realized when a district court judge ruled that the right to record police officers was not protected by the First Amendment.[58]

In *Fields v. City of Philadelphia*,[59] a police officer arrested a college student for taking a picture of officers who were congregated outside a home where someone was hosting a party.[60] As one might expect, the district judge for the Eastern District of Pennsylvania relied heavily on the Third Circuit's reasoning in *Kelly*, stating, "[O]ur Court of Appeals has never held speech unaccompanied by an expressive component [to be guaranteed] First Amendment

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50. *Id.* at 262.
51. *See id.* at 261.
52. 353 Fed. App'x 852.
53. *Id.* at 853.
54. *Id.*
55. Frohman, *supra* note 27, at 1897.
56. Glenn Harlan Reynolds & John A. Steakley, *A Due Process Right to Record the Police*, 89 WASH. U. L. REV. 1203, 1204 (2012).
57. Frohman, *supra* note 27, at 1900.
58. Radley Balko, Opinion, *Federal Judge: Recording Cops Isn't Necessarily Protected by the First Amendment*, WASH. POST (Feb. 23, 2016), https://www.washingtonpost.com/news/the-watch/wp/2016/02/23/federal-judge-recording-cops-isnt-necessarily-protected-by-the-first-amendment/?utm_term=.d0dd02524795.
59. 166 F. Supp. 3d 528 (E.D. Pa. 2016).
60. *Id.* at 531–32.

protection."[61] Because the plaintiff did not outwardly criticize or challenge the police officers before taking the photo, the judge determined that the First Amendment was not implicated.[62] This outcome is worrisome in the current climate of highly publicized police misconduct,[63] where individuals are recording in an attempt to monitor and archive abusive interactions but may not be outwardly voicing their intent to scrutinize officers.[64]

II. A NEW PURPOSE

Since *Glik*, the first seminal case involving a smartphone recording, technology has only continued to evolve.[65] As of late 2015, approximately sixty-eight percent of adults owned a smartphone.[66] This percentage increased to eighty-six percent when looking solely at adults ages eighteen to twenty-nine.[67] Alongside this technological development, there has been an uptick in media footage showing police misconduct and use of excessive force.[68] While some of this footage has been obtained through the use of police-issued body and dashboard cameras,[69] many of the most publicized recordings have been captured through the use of a bystander's cellphone.[70]

Further, even though much of this footage has ended up in mainstream media, the recordings themselves are not necessarily taken with the intent to express or communicate an idea. Indeed, there are a number of plausible reasons a bystander might desire to record a police officer's use of deadly force, one of the greatest perhaps stemming from a deeply rooted distrust of institutional actors.[71] Regardless of their underlying intentions, however, bystanders who record police officers' use of excessive force are likely to act similarly to the plaintiff in *Fields*—"with no further comments or conduct."[72] As already discussed, this can lead to

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61. *Id.* at 535.

62. *Id.* at 537.

63. *See* Iesha S. Nunes, Note, *"Hands Up, Don't Shoot": Police Misconduct and the Need for Body Cameras*, 67 FLA. L. REV. 1811, 1819 (2015).

64. Triano, *supra* note 19, at 404–05.

65. MONICA ANDERSON, PEW RESEARCH CTR., TECHNOLOGY DEVICE OWNERSHIP: 2015, at 4 (2015), http://www.pewinternet.org/files/2015/10/PI_2015-10-29_device-ownership_FINAL.pdf.

66. *Id.* at 3.

67. *Id.* at 4.

68. *See* Nunes, *supra* note 63, at 1819.

69. *See Police Release Video of Laquan McDonald's Shooting*, CNN MONEY (Nov. 24, 2015), http://money.cnn.com/video/media/2015/11/24/laquan-mcdonald-shooting-police-dashcam-video-released.cnnmoney.

70. *See* Nunes, *supra* note 63, at 1820–21.

71. *See* Carol M. Bast, *Tipping the Scales in Favor of Civilian Taping of Encounters with Police Officers*, 5 U. DENV. CRIM. L. REV. 61, 94–95 (2015) (describing corrupt police practices that contribute to mistrust).

72. Fields v. City of Philadelphia, 166 F. Supp. 3d 528, 535 (E.D. Pa. 2016).

issues in circuits where no First Amendment right to record has been established.[73]

This confusion is especially troubling in light of movements like Black Lives Matter, where one of the main goals is to hold police officers accountable for their actions.[74] While the name "Black Lives Matter" is certainly striking, the title was not something meticulously chosen by marketing executives or institutional leaders. Rather, the name grew out of a grassroots movement that is still striving desperately for social change.[75] As one commentator notes, the protests, riots, court cases, and media attention are all vital in "keeping this issue in the forefront . . . by preventing the legal and cultural systems from forgetting, by showing outrage and grief about the fact that officers can kill people of color with little legal recourse, and by putting pressure on all levels of government to control police."[76] These may be some of the aspirations and purposes of a widespread movement like Black Lives Matter, but they do not necessarily translate to the underlying motivations of every citizen recorder.

For example, the facts in *Fields* indicate that the plaintiff simply wanted to take a "good picture" of an "interesting scene."[77] If a bystander watching a police officer's misuse of excessive force were to silently tape the scene, or state a reason for recording similar to the one given by the plaintiff in *Fields*, it certainly seems possible that her right to record would not be upheld in courts within the Third Circuit. This could be the outcome even if the video was later vital to others, who might use it to spark discussion, challenge abuses, or grow a movement. Without clear guidance as to what actually warrants "expressive conduct," it is impossible to predict where the protections of a right to record might begin or end.

Naturally then, as the purposes for an individual's right to record become more nuanced and varied, it makes sense for lawyers, judges, and policy makers to reconsider why and how this right should be protected under the Constitution. Specifically, those in the legal field should be ready to recognize supplemental due process protections for the right to record.

III. POSSIBILITIES UNDER THE FOURTEENTH AMENDMENT

Because citizen recordings of police conduct are a fairly recent phenomenon, the current body of case law only analyzes the right to record under the previously discussed First Amendment precedent.

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73. *See id.* at 528.

74. Zach Newman, Note, *"Hands Up, Don't Shoot": Policing, Fatal Force, and Equal Protection in the Age of Colorblindness*, 43 HASTINGS CONST. L.Q. 117, 124–25 (2015).

75. *Id.*

76. *Id.* at 126.

77. *Fields*, 166 F. Supp. 3d at 532.

Discussion among scholars, however, has begun to take place regarding whether certain protections could be afforded under the Due Process Clause of the Fourteenth Amendment.

A. *Substantive Due Process*

One of the possibilities that would perhaps offer the broadest protection of this right would be to establish a fundamental right to record. Because the right to record has not yet been recognized as a fundamental right and is not expressly provided for in the Constitution, this approach would face the difficult hurdle of convincing courts that they should adopt the right to record as a new, implicit, fundamental right.[78] There are those, however, who argue that the Supreme Court has recently been trending toward a more inclusive mindset.[79]

Travis Gunn, in his note on this topic, has fleshed out the possibility of a fundamental right to record in great detail.[80] Gunn recognizes that courts are far less likely to incorporate a fundamental right to record under a "reasoned judgment" analysis, primarily because this would elicit concerns regarding judicial activism and separation of powers.[81] Thus, the right to record would be better served by arguments that elaborate on the right's "historical tradition" in the American legal system.[82]

In examining what this argument might look like, Gunn walks step by step through the history of record making, going back to times when "recording" was the process of human observation and the following documentation and recollection of that observation.[83] He then argues that the recent proliferation of technology has only built on what has always been a well-established right in American society: the right to observe public police conduct and to present those observations at a later time.[84]

Once a fundamental right has been established, courts are required to partake in a strict scrutiny analysis when comparing individual and state interests.[85] Thus, any state infringement on a citizen's right to record would have to be both justified by a

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78. *See* Gunn, *supra* note 28, at 1424–25.

79. Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 836 (2003).

80. *See generally* Gunn, *supra* note 28 (discussing at length the arguments for establishing the right to record as a fundamental right).

81. *Id.* at 1427.

82. *Id.* at 1427, 1429.

83. *See id.* at 1431–39.

84. *Id.* at 1440, 1444.

85. Zablocki v. Redhail, 434 U.S. 374, 388 (1978) ("When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.").

compelling government interest and narrowly tailored in scope.[86] If this analysis were to take hold and a fundamental right to record were established, that right would provide the broadest protection for citizens recording public officials. Most importantly, it would protect an individual's right to record regardless of his or her underlying motivations.

B. Equal Protection

A citizen's right to record could also potentially be afforded protection under the Fourteenth Amendment's Equal Protection Clause.[87] Under an equal protection analysis, plaintiffs would have to show that the challenged state action treats citizen recorders, as a class, differently from similarly situated individuals.[88]

If citizen recorders are the alleged protected class, the scrutiny for review would likely be rational basis.[89] Thus, to be constitutional, the state action would only have to be reasonably related to a legitimate state interest.[90] However, if a police officer were to act with "bald animus" toward a citizen recorder, an equal protection claim could still have validity, even under this relatively low standard.[91] An example of this might be a police officer using unnecessary force on an individual because he or she is recording.[92] Further, an examination of a state actor's intent toward the specific individual should always be considered as well, since there are some occasions when an argument can be made that an official acted for impermissible motives.[93] In scenarios where such animus is lacking, however, most courts would likely err on the side of giving state actors discretion to act in accordance with a legitimate state interest.[94]

Some have also argued that a recent shift in equal protection jurisprudence could allow for more viable disparate impact claims in situations that result in disproportionate outcomes against a racial

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86. *Id.*

87. Mario Cerame, Note, *The Right to Record Police in Connecticut*, 30 QUINNIPIAC L. REV. 385, 441 (2012).

88. *Id.*

89. *Id.* at 442.

90. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

91. Cerame, *supra* note 87, at 442.

92. *See id.*

93. *See, e.g.*, Cerame, *supra* note 87, at 443 (arguing under the facts of one case "a court could find an equal protection violation for disparate treatment motivated by impermissible animus").

94. *See id.* (explaining that even when the state action is "considerably underinclusive and overinclusive," courts will often still conclude that it meets the rational basis requirement).

group.[95] Thus, if an individual could show that state action against recorders constituted a disparate impact and an intent to discriminate, the judicial scrutiny could potentially be heightened.[96] However, because an equal protection claim based on disparate impact requires a showing of intent, this could prove to be a difficult task.[97] But while showing disparate impact is not easy, an argument based on statistics could at least be presented. Statistics show that violent police encounters occur disproportionately more frequently with the black population.[98] If one could provide similar statistics, perhaps showing that most citizen recorders also tend to be black, that might be enough to receive somewhat heightened scrutiny, at least before some courts.

Similarly, if a fundamental right was also implicated in the complaint, an analysis under the Equal Protection Clause would have to be heightened. The existence of a fundamental right would necessarily require courts to apply strict scrutiny.[99] Thus, agreement among the circuits as to whether the First Amendment protects a citizen's right to record would also heighten the level of judicial scrutiny, expanding the protection under an equal protection analysis as well.

C. *Evidentiary Rights*

Some commentators have also noted that a due process argument for the right to record might stem naturally from the duty of law enforcement to preserve evidence.[100]

In *Brady v. Maryland*,[101] the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[102] Expounding further on the Court's holding, some have argued that, in a number of cases, video recordings may be the only exculpatory evidence available to a defendant.[103]

Critics of this argument are likely to point to *Arizona v. Youngblood*,[104] where the Supreme Court held that the destruction of exculpatory evidence was not a violation of due process when it

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95. Newman, *supra* note 74, at 142.
96. *See* Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 265 (1977).
97. *Id.*
98. Newman, *supra* note 74, at 123–24.
99. *See* Zablocki v. Redhail, 434 U.S. 374, 388 (1978).
100. *See, e.g.*, Reynolds & Steakley, *supra* note 56, at 1207–08; Cerame, *supra* note 87, at 444–45.
101. 373 U.S. 83 (1963).
102. *Id.* at 87.
103. Reynolds & Steakley, *supra* note 56, at 1207–08.
104. 488 U.S. 51 (1988).

was not done in bad faith.[105] It should be noted, however, that the Court's bright-line approach to bad faith has been rejected in several states where the state constitution is more protective of individuals' rights.[106] Further, the language used in *Youngblood* has been interpreted as cautioning against putting an extra burden on police officers in the gathering of evidence. Specifically, the Court stated:

> If the [the Arizona Court of Appeals meant] that the Due Process Clause is violated when the police fail to use a particular investigatory tool, we strongly disagree. The situation here is no different than a prosecution for drunken driving that rests on police observation alone; the defendant is free to argue to the finder of fact that a breathalyzer test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests.[107]

Thus, in *Youngblood*, the Court seemed primarily concerned with whether a police officer had a constitutional duty to investigate in a certain way for the defendant's benefit. *Youngblood* does not speak directly to a citizen's right to evidence he or she gathered independently.

The argument for the right to record imposes no such burden on police.[108] To the contrary, proponents suggest the right to record would extend *Brady* only to the extent that it allows a defendant the right to exculpatory evidence he or she preemptively recorded.[109] While a defendant's private interest in a solid defense and fair trial would be great, the burden on state actors would be negligible.[110] This is so because police officers would not be the ones responsible for recording their interactions with citizens. In fact, police officers would not be required to do anything beyond their normal day-to-day duties. The gathering of evidence would be up to the citizen alone, and the law under *Brady* would simply preserve a citizen's right to gather that evidence and maintain access to it for trial.

Although some people might have concerns with the evidential reliability of citizen recordings, scholars have noted that the rules of evidence should protect against such issues and that courts currently face similar concerns with body, dashboard, and security camera footage.[111]

Because the right to record for evidentiary purposes is a logical extension of the due process guarantees recognized in *Brady* and creates no extra hardship for police officers, this argument is

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105. *Id.* at 58.
106. Reynolds & Steakley, *supra* note 56, at 1208.
107. *Youngblood*, 488 U.S. at 58–59.
108. Reynolds & Steakley, *supra* note 56, at 1208.
109. *See id.* at 1207–10.
110. *Id.* at 1208–09.
111. *See id.* at 1210.

primarily concerned with ensuring that citizens have a fair shot at trial. In cases where a citizen's only exculpatory evidence lies in the events caught on video, the right to record is vital.

IV. RESOLVING THE CIRCUIT SPLIT AND BROADENING RIGHTS

The current circuit split regarding a citizen's right to record focuses solely on First Amendment issues. As already noted, if the split were resolved in favor of the right to record, the issue would warrant heightened scrutiny under substantive due process and equal protection analyses as well.

However, for the reasons noted in Part III, there is an immediate need for broader protection of these rights. It is unclear whether the Supreme Court will address the First Amendment issue in the near future. In the meantime, as evidenced by *Fields*, a private individual's right to record public police conduct is not always guaranteed.[112] Arguing these cases under the First *and* Fourteenth Amendments could potentially resolve some of the discordance between the circuits and set a strong, lower-court precedent in the event that the issue is eventually brought before the Supreme Court. Further, the policy implications of broadening this protection would significantly benefit common governmental interests and goals.

A. Citizen Recordings Can Provide Vital Evidence to Clarify "He Said, She Said" Issues at Trial

The American public bestows a great deal of trust and deference upon our police force. This trust is often more than justified given the daily commitment many officers make to serve and protect their communities. However, when this public deference toward police officers infiltrates the courtroom, it can significantly hamper a private citizen's right to a fair trial.

Especially in cases where other evidence is lacking, witness testimony carries a great deal of weight. A prime example would be a case brought against a police officer under 42 U.S.C. § 1983.[113] In order to succeed in a suit under § 1983, a plaintiff must be able to show that a state official, acting under the color of state law, deprived the plaintiff of his or her civil rights.[114] Many of these cases involve facts concerning police officers' excessive use of force, which may or may not have been observed by third parties.[115] When such a case is brought against a police officer, it is not uncommon for the evidence submitted at trial to devolve into a battle of the officer's

112. Fields v. City of Philadelphia, 166 F. Supp. 3d 528, 537 (E.D. Pa. 2016).
113. 42 U.S.C. § 1983 (2012).
114. *Id.*
115. *See, e.g.*, Kentucky v. Graham, 473 U.S. 159 (1985); Tennessee v. Garner, 471 U.S. 1 (1985).

word against the plaintiff's. In cases like these, too much public trust in government institutions can have severely unjust repercussions.

While it may be disheartening to admit, the truth is that some police officers do lie, even while on the stand.[116] Sometimes referred to as "testilying," the problem of officer falsification has certainly not gone unnoticed by those in the criminal justice field.[117] Some of this behavior might be the consequence of the loyalty inherent in being a member of an interdependent and close-knit police force.[118] Even when police officers do not lie outright, some officers will still stand in silent solidarity with dishonest fellow officers.[119] One solution is to demand better internal policies and practices for police departments. However, without any concrete proof that a police officer has engaged in misconduct, internal disciplinary measures may still prove ineffective.[120]

Conversely, establishing a right to record would allow citizens to provide their own evidence to rebut officer falsifications. One scholar summed up the benefit of such a practice, explaining, "Jurors are likely to believe police officer testimony and are not likely to have experienced police corruption first-hand. Taping allows weighing the power of the police against the corrective power of the citizenry."[121] As illustrated by the recording of Eric Garner, videotape evidence of a police interaction can, at the very least, provide objective, visual proof regarding certain aspects of a police officer's conduct.[122] Thus, it makes sense to encourage the practice of citizen recording by protecting this individual right under both the First and Fourteenth Amendments.

B. Enforcing the Right to Record Discourages Police Misconduct and Other Negative Government Practices

Another benefit of an established right to record is that the possibility of a citizen having visual evidence of police misconduct would discourage such behavior and encourage officer accountability. If an officer knows that his or her actions are always susceptible to public scrutiny, he or she might be more likely to act in accordance with that public's expectations. Contrary to the argument above concerning the potential ineffectiveness of

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116. Bast, *supra* note 71, at 95 (discussing the results of the Mollen Commission, a commission created by the City of New York to investigate police corruption).

117. *Id.* at 94–95.

118. *Id.* at 95 ("One of the root causes of police corruption is what is sometimes referred to as the code of silence.").

119. *Id.* at 95–96.

120. *Id.* at 94.

121. *Id.* at 95.

122. *See 'I Can't Breathe': Eric Garner Put in Chokehold by NYPD Officer – Video*, *supra* note 1.

departmental policies, allowing citizens to actually police their police force would likely have a much more impactful effect.

Although some officers may dislike the idea of having their conduct constantly up for review, many commentators would argue that this is precisely the responsibility that comes with the power of wearing the badge.[123] Further, holding police officers accountable will simply encourage them to act as they should be acting even when they are not being recorded by citizens.[124]

The fear of besmirching police reputation also lacks merit. As one commentator aptly noted, "if the police footage reinforces the desired belief that the police generally keep the public safe and protected, then recording and sharing footage of police conduct may actually improve the public's perception of them. This, in turn, may increase the public's willingness to cooperate in police investigations."[125]

Alongside this point, it is also important to remember that current technology allows for recordings to be uploaded and shared universally. This means that while police misconduct could have far-reaching, negative repercussions, the opposite possibility is also true; police forces could potentially improve their national reputation simply by acting in conformity with societal expectations.

Some police departments would seem to agree with this point, and are implementing policies requiring officers to wear body cameras while on duty.[126] The federal government is also encouraging the use of body and dashboard cameras in an attempt to heighten officer accountability, and this approach is being followed by some state governments as well.[127] These efforts certainly place more of an investigatory burden on police officers than simply allowing citizens to exercise their right to record. Simply ensuring a due process right to record could provide for more accountability with far less cost, time, and energy being expended by governmental institutions.

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123. *See, e.g.*, Bast, *supra* note 71, at 94 ("The police officer wields immense power and this immense power should justify allowing law enforcement activity to be scrutinized.").

124. *See* Timothy D. Rodden Jr., Note, *Yes, This Phone Records Audio!: The Case for Allowing Surreptitious Citizen Recordings of Public Police Encounters*, 47 SUFFOLK U. L. REV. 905, 935 (2014) (noting that a failure to hold police officers accountable by suppressing recordings of them will enable officers to act "in any manner they wish").

125. Michael Potere, Comment, *Who Will Watch the Watchmen?: Citizens Recording Police Conduct*, 106 NW. U. L. REV. 273, 314 (2012).

126. Nunes, *supra* note 63, at 1834.

127. *Id.* at 1834–38.

C. A Broadly Protected Right to Record Would Reaffirm Free Speech Principles Regardless of Underlying Motivations

Protecting the right to record under the Fourteenth Amendment would still serve the free speech principles outlined in *Glik*. Specifically, this approach would satisfy the "interest in protecting and promoting 'the free discussion of governmental affairs.'"[128] The First Circuit was careful to note that at least some of the benefits of a citizen's right to record lie in the fact that this information "can readily be disseminated to others."[129] While it is clear from the current circuit split that some courts focus heavily on the motivations of the recorder, the language in *Glik* seems primarily concerned with what purpose the recording would serve to the public at large.[130]

This perspective is certainly more conducive to encouraging social movements and social change. It expands freedom of speech, allowing the First Amendment to cover instances where citizens do not intend to act as journalists but in effect do just that.

> Moreover, changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.[131]

The First Circuit went on to note that the plaintiff in *Glik* actually filmed the officers at a distance, and did not speak to them until addressed.[132] Unlike the Third Circuit, the First Circuit did not feel the need to require clear and unequivocal "expressive" conduct. Unfortunately, noting this distinction does nothing to resolve the current circuit split, and the First Circuit's decision in *Glik* has no more precedential weight than the Third Circuit's decision in *Kelley*. Thus, until the discrepancy among the circuits is resolved, a citizen is not guaranteed a right to record under the First Amendment, even if free speech concerns are highly relevant to the facts of the case.

If courts, however, were to recognize the right to record under the protections of the Fourteenth Amendment, all of the purposes listed in *Glik* would still be effectively realized. As outlined in Part IV, the due process and equal protection analyses are not concerned

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128. Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

129. *Id.*

130. *See id.*

131. *Id.* at 84.

132. *Id.*

with the motivations of the citizen recorder. Rather, they involve either the (1) establishment of a fundamental right, (2) identification of a protected group, or (3) need for exculpatory evidence. While not concerned with motivation, allowing a right to record under the Fourteenth Amendment accomplishes the same goals as identifying such a right under the First Amendment (e.g., the dissemination of relevant information, the promotion of free discussion, and the recognition of officer abuses).[133]

D. An Established Right to Record Could Alleviate Racial and Economic Tensions by Affirming an Individual's Interest in Security

The culmination of these policy concerns is most relevant in the wake of movements like Black Lives Matter and the recent trend of excessive-force altercations between citizens and police officers. The citizens regularly using their phones to record police are on the defensive. Their conduct may not always be explicitly "expressive," but it is purposeful. It is the natural response to statistics that indicate a vast discrepancy between the number of black and white Americans killed by police officers in a year, month, week, or day.[134]

In an article that focuses specifically on policing in black communities, Zach Newman explains that these recordings are both eliciting and responding to a moment of "public mourning."[135] He continues by explaining that these visceral responses are intimately related to issues of free speech and societal justice.[136] He states, "Discourse and the politics of knowledge shape how events are read, understood, and digested. By acknowledging the power that law and speech have to define an event, the naming process becomes an essential site for legal and socio-cultural intelligibility."[137] Thus, the need for recordings that alert the world to the facts of the actual events, as they unfolded, becomes an integral part of educating the community at large.

This goal of informing the public is now well underway, thanks in large part to citizen recordings. Cases like Eric Garner's are being reported at what seems to be an accelerated rate. Videos continue to surface showing police officers shooting at unarmed teens.[138] One recording captured an officer ripping a high school girl

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133. *See id.* at 82–83.
134. Newman, *supra* note 74, at 122–24.
135. *Id.* at 125–26.
136. *See id.* at 129.
137. *Id.*
138. *See, e.g.*, *A Look at Recent Police Shootings Involving Black Men*, AP (July 7, 2016), http://bigstory.ap.org/article/1c5658f4b50e49ff8ce6c79d6de1d3c7/look-recent-police-shootings-involving-black-men (discussing the shooting of teenager Laquan McDonald and the recording of the incident that was released).

from her chair and throwing her to the ground.[139] In another, a teenage girl—clothed only in the bathing suit she wore to attend a pool party with her friends—is being pinned face-down on the ground by the knee of a white, male police officer as he straddles her back.[140] These are gripping and disturbing images that have only come to light because individuals thought to pull out their phones.

Here especially, the right to record is vital. One scholar explained that recordings are valued for their ability to "memorialize[] the tension of the moment, capturing what was said, with the tone of voice and context intact. The self-authenticating character of taped information can corroborate one person's version of events or perhaps shed light on an aspect of the incident not recalled by any participant or bystander."[141] The issue of corroboration is especially important in a social environment where individuals feel that their voices are less likely to be heard because of their race or socio-economic class.

And yet in a number of these videos a police officer will, at some point, tell the recorder to put his or her phone away.[142] Sometimes the officer phrases the order as more of a request; other times it is a far more aggressive command. Even in jurisdictions where the right to record is likely to be upheld under the First Amendment, it appears that police officers are not always aware of that right. That, or they simply hope that their authority as a public official might override a citizen's confidence in that right. But while police officers may be understandably wary of citizen recorders memorializing misconduct, the argument still stands that so long as officers are acting lawfully, they should have nothing to fear. Further, there should be at least some recognition that citizen recorders are using this tactic as a way to defend themselves and their communities at large.

As Orta made clear in his interview with *Time*, his motivation for recording is that it allows him to live his life knowing that, should a government official try to unlawfully interfere with his actions, he will at least have some evidence to corroborate his side of the story.[143] This kind of non-violent citizen policing should be

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139. Tim Stelloh & Tracy Connor, *Video Shows Cop Body-Slamming High School Girl in S.C. Classroom*, NBC NEWS (Oct. 27, 2015, 9:38 AM), http://www.nbcnews.com/news/us-news/video-appears-show-cop-body-slamming-student-s-c-classroom-n451896.

140. Scott Neuman, *Video Shows Texas Police Officer Pulling Gun on Teens at Pool Party*, NPR (June 7, 2015, 4:35 PM), http://www.npr.org/sections/thetwo-way/2015/06/07/412708943/video-shows-texas-police-officer-pulling-gun-on-teens-at-pool-party.

141. Bast, *supra* note 71, at 98.

142. *See, e.g.*, *'I Can't Breathe': Eric Garner Put in Chokehold by NYPD Officer – Video*, *supra* note 1; Neuman, *supra* note 140.

143. Sanburn, *supra* note 2.

encouraged, especially if police forces want to improve officer accountability while still promoting a safe environment.

Acknowledging the right to record as a valid tool for self-defense may also help discourage more violent alternatives. Indeed, as minority populations become more and more frustrated with the policing that occurs in their communities, defense through use of force may very well be offered up as a potential solution. In an essay examining such an argument, Kindaka Sanders explains how issues concerning a Second Amendment right to defend strangers go all the way back to the Civil Rights Movement, when the Black Panther Party sought to hold the police accountable through use of force.[144] Sanders next poses a number of hypotheticals concerning recent incidents where police officers used excessive force on black citizens.[145] In each hypothetical, Sanders asks his readers to consider how these situations could have turned out differently had a bystander come to the defense of the victim by using force against the offending police officer.[146] Sanders ultimately concludes by stating, "An individual can only use defensive force against a public servant in defense of a stranger when the use of defensive force constitutes resistance to individuated acts of government tyranny. This type of defense is not self-defense but defense-in-resistance."[147] This argument is not without merit, and it supports the use of forceful action that police officers would likely prefer to avoid.

For all of the reasons discussed previously, an established right to record would hopefully lessen the need for a "right to rebel"[148] against police officers. If citizens are allowed, and ideally encouraged, to exercise their right to record, the captured footage could spur a global discussion concerning police conduct and expectations. As more and more people participate in the discussion, the hope is that the voices of the black community will both *feel* heard and *be* heard.

As conversation expands, it is less likely that people will feel the need to advocate for violent responses to police misconduct. Instead, citizens will hopefully be able to retain some confidence in the fact that their stories can and will be validated by their decision to record, even when it is their word against a police officer's. Further, the assurance that police officers will be held accountable should also prompt police forces across the country to prepare for that accountability, which could result in better internal policies, procedures, and disciplinary action. This change will not happen

144. Kindaka Sanders, *A Reason to Resist: The Use of Deadly Force in Aiding Victims of Unlawful Police Aggression*, 52 SAN DIEGO L. REV. 695, 698–99 (2015).

145. *Id.* at 699–701.

146. *Id.* at 700–01.

147. *Id.* at 749.

148. *Id.*

overnight, nor can it be claimed that it will solely be the consequence of a broadly protected right to record. As Newman points out, the movement for social justice is being fueled and maintained by a long list of public actions, such as protests, riots, litigation, etc.[149] That said, ensuring that all citizens enjoy the freedom to record police interactions should at least begin to provide individuals with the tools necessary to effect substantial social change through a multitude of other means.

CONCLUSION

This Comment has attempted to illuminate some of the challenges to and benefits of establishing broad protections for an individual's right to record. Because technology has developed so rapidly in the past few decades, it will likely take courts time to catch up.

As it currently stands, the First Amendment circuit split means that the right to record is not firmly guaranteed to all American citizens. While the Supreme Court could remedy this issue by affirming the First Circuit's language in *Glik*, the possibility also remains that the right to record warrants protection under the Fourteenth Amendment as well. As such, legal advocates and judges should consider due process arguments that could offer broader protection for the right to record.

These supplemental protections would ultimately encourage discussion, aid in the uncovering of misconduct, and hold government officials to a higher level of accountability. Finally, and perhaps most importantly, an established right to record could greatly improve citizen and police relations in a time when such improvements are desperately needed. Protecting this right ensures that the heartbreaking last words of Eric Garner will be given new breath as our society strives to do and demand better.

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149. Newman, *supra* note 74, at 125.

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