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Camera Shy and Unaccountable: The Constitutional, Statutory, and Democratic Ramifications of Police Seizing and Deleting Photos and Video Taken in Public

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*Camera Shy and Unaccountable: The Constitutional, Statutory, and Democratic
Ramifications of Police Seizing and Deleting Photos and Video Taken in Public*

By

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Submitted in partial fulfillment of the requirements of the
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[T]o hold that the publication of news may sometimes be enjoined. . . . would make a shambles of the First Amendment.

*Only a free and unrestrained press can effectively expose deception in government.*¹

-Justice Black

¹ New York Times Co. v. United States, 403 U.S. 713, 715, 717 (1971) (Black, J., concurring).

INTRODUCTION

When Christopher Sharp took out his camera phone to record what he thought was an excessive use of force by police officers in 2010, he had no idea he would soon be subjected to another form of police abuse of power—one that is less obvious but no less dangerous.² When Baltimore Police officers noticed Sharp recording their brutal take-down of a bleeding, intoxicated woman at the Preakness Stakes horse race in July 2010, officers confiscated his phone, erased all of the data on it—including videos of Sharp’s young son—and set the phone to only be able to call 911.³ Sharp was not interfering with the police and was not arrested for any criminal activity, yet his property was irrevocably destroyed without any notice or process, and his ability to document and speak out about police brutality was effectively destroyed as well.⁴

Journalists and the more than 114 million Americans who carry smartphones⁵ are now in a position to instantly record and publicize any incident they see where police do not act properly, and some police officers are uncomfortable with this increased scrutiny.⁶ An alarming trend has developed of police officers seizing and deleting photographs and videos that were lawfully taken in public. Recent court cases and scholarship have clearly established citizens’ rights to record police officers’ actions in public.⁷ Yet, camera shy officers, either ignorant of the law or intentionally ignoring it, have increasingly been intimidating photographers into handing over

² Chris Healy, *The Right to Record in the Wrong Places: Documenting Police Arrests with Smart Phones Increases—With Consequences*, REPORTERS COMM. FOR FREEDOM PRESS, Feb. 1, 2013, available at <http://www.rcfp.org/police-protestors-and-press/right-record-wrong-places>.

³ *Id.*

⁴ *Id.* Boston paid Glik \$170,000 to settle the lawsuit he filed against the city. Bob Sullivan, ‘*First Amendment Rights can be Terminated*’: *When Cops, Cameras Don’t Mix*, NBCNEWS.COM (June 1, 2012, 5:13 AM) http://redtape.nbcnews.com/_news/2012/06/01/11998060-first-amendment-rights-can-be-terminated-when-cops-cameras-dont-mix?lite.

⁵ Henry Blodget, *Actually, the US Smartphone Revolution Has Entered the Late Innings*, BUS. INSIDER (Sept. 13 2012), <http://www.businessinsider.com/us-smartphone-market-2012-9>.

⁶ The term “police” will be used as a generic term for all law enforcement officers, state and federal, police and sheriff’s department employees in this Article.

⁷ See *infra* Part II.

their cameras and then erasing the memory cards or hard drives.⁸ These actions effectively illegally seize and destroy photographers' property without due process of law and cause a prior restraint of speech, in contravention to the First, Fourth, and Fourteenth Amendments to the U.S. Constitution and various federal statutes. Thanks to governmental immunity, police officers are rarely held accountable through lawsuits for these actions,⁹ yet the ramifications of unchecked police power and a suppressed ability to complain about abuses threaten the very fabric of American democracy. Steps must be taken to prevent these blatant violations of fundamental constitutional rights and preserve citizens' ability to hold police accountable by photographing or videotaping their actions in public.

Part I of this Article discusses the newsgathering rights of photojournalists and others to take photographs and video, and examines the evolution of the right to record police activity in public. Part II explores the current climate of police abuses of those rights and gives many examples of this conduct. Part III explains why police seizure and deletion of photographs and videos violates the First, Fourth, and Fourteenth Amendments to the U.S. Constitution, and sets out the statutory, democratic, and other concerns with those actions. Finally, Part IV discusses the possible remedies for these constitutional and statutory violations by police officers.

I. NEWSGATHERING RIGHTS AND THE RIGHT TO RECORD POLICE IN PUBLIC

A. The First Amendment and Newsgathering Rights

The First Amendment to the U.S. Constitution prevents Congress from making laws that abridge "the freedom of speech, or of the press."¹⁰ The U.S. Supreme Court has interpreted these twin clauses to give members of institutional media and every other citizen equal rights to gather

⁸ See *infra* Part I.

⁹ See *infra* Part V.

¹⁰ U.S. CONST. amend I.

and publish information; the press is entitled to no extra protections or special speech rights.¹¹ Generally, photographers are free to gather news by taking pictures or video of anything in public view if they have a right to be present in that location, subject only to reasonable time, place, and manner restrictions that are strictly scrutinized.¹² Especially in areas that are traditional public forums, like public parks, streets, and sidewalks, newsgathering and speech activities cannot often be limited.¹³ Common acceptable restrictions on photography include those designed to keep photographers from impeding traffic or harassing their subjects.¹⁴

When photojournalists attempt to document public events, accidents, or emergencies when police are involved, police may implement *reasonable* restrictions to prevent photographers from interfering with legitimate police or emergency functions, but they may not restrict photography any more than necessary to prevent such interference with their work.¹⁵ Thus, courts have held that photography can be curtailed if the photographer's actions jeopardize the safety of the officer, suspect, or others, if the photographer is breaking the law, or if he is inciting others to break the law.¹⁶ However, when photographers record police activity from a

¹¹ ERWIN CHERMERINKSY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1417 (2d ed. 2006). Thus, while this Article focuses on the media, the principles explained herein apply equally to institutional journalists, freelancers, bloggers, and everyone in the United States.

¹² Morgan Leigh Manning, *Less than Picture Perfect: The Legal Relationship Between Photographers' Rights and Law*, 78 TENN. L. REV. 105, 115-18 (2010). Subjects of photographs taken in public do not have a reasonable expectation of privacy in anything they do in public; if they do not want to be photographed, they have to take measures to avoid spending time in public view. BERT P. KRAGES, LEGAL HANDBOOK FOR PHOTOGRAPHERS: THE RIGHTS AND LIABILITIES OF MAKING IMAGES 29-30 (3d ed. 2012).

¹³ *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

¹⁴ Manning, *supra* note 12, at 116-17.

¹⁵ *Id.* at 118; *Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (explaining the "First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct"); *Attacking Access Problems*, REPORTERS COMM. FOR FREEDOM PRESS, <http://www.rcfp.org/reporter%E2%80%99s-field-guide/attacking-access-problems> (last visited March 29, 2013) (explaining that "[c]ase law makes clear that police can limit media access when they believe such restrictions are needed for public safety or to prevent interference with an investigation").

¹⁶ Letter from Jonathan M. Smith, Chief, Special Litigation Section, U.S. Dep't of Justice, to Mark H. Grimes and Mary E. Borja, Re: *Christopher Sharp v. Baltimore City Police Dep't*, et. al. 6 (May 14, 2012), http://www.justice.gov/crt/about/spl/documents/Sharp_ltr_5-14-12.pdf [hereinafter *Smith Letter*] (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (fighting words); *La. ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297

safe distance away and do not act to obstruct the police in any way, their First Amendment rights cannot be limited.¹⁷ It is clearly reasonable for law enforcement officers to ask journalists to stand back or move to a sidewalk, but police cannot restrict all photography of their public activities.¹⁸ Thus, when Sharp began recording at the Preakness Stakes race, police could have asked him to move back had he been interfering with their work or causing a dangerous situation, but they could not force him to stop recording.

Regardless of the sensitivity of information or how it was obtained, once photographs have been taken of police misconduct or another newsworthy event, the government cannot prohibit the publication of that information except in extreme situations, such as where it may compromise national security.¹⁹ The Supreme Court has held that in most situations the First Amendment prohibits the government from limiting the information from which members of the public may draw.²⁰ Thus, police cannot prevent the publication of photographs after they are taken, regardless of how they were obtained.²¹

Although newsgatherers have no extra protections, their First Amendment rights must be

(1961) (criminal activity); *Colten v. Commonwealth of Kentucky*, 407 U.S. 104 (1972) (pestering busy police officer); *King v. Ambs*, 519 F.3d 607 (6th Cir. 2008) (interfering with witnesses)).

¹⁷ *Smith Letter*, *supra* note 16, at 6. Even criticizing and yelling at officers is protected. *See id.* (citing *City of Houston, Tex. v. Hill*, 482 U.S. 451, 461 (1987); *Norwell v. City of Cincinnati, Ohio*, 414 U.S. 14, 16 (1973); *Duran v. City of Douglas, Ariz.*, 904 F.2d 1372, 1377-78 (9th Cir. 1990)).

¹⁸ KRAGES, *supra* note 12, at 21, 71.

Police, firefighters, and emergency technicians do not have the general power to order you not to take photographs. . . . While police and medical personnel often disapprove of such scenes being photographed, and victims and their family members may intensely resent such photographs, photographers are within their legal rights to record these scenes when in public view.

Id.

¹⁹ Eve B. Burton, *Where are All the Angry Journalists? The Use of Criminal Statutes and Tactics to Limit Newsgathering*, 16 COMM. L. 19, 19 (1998). *See also* *New York Times Co. v. United States*, 403 U.S. 713 (1971) (refusing to grant an injunction to prevent the publication of the Pentagon Papers, top secret Department of Defense documents concerning the Vietnam War).

²⁰ *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) (finding First Amendment protection for information from a corporation so public can be informed); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (finding that First Amendment rights protect mere possession of obscene material because “the Constitution protects the right to receive information and ideas”).

²¹ “Both the history and the language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.” *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

scrupulously honored to ensure the freedom of the press. The Supreme Court has recognized that “[w]ithout some protection for seeking out the news, freedom of the press could be eviscerated,” which would compromise and potentially devastate the democratic fabric of the United States.²² Thus, photographers must be free to exercise their established First Amendment newsgathering rights freely.

B. The Development of the Right to Video Record Police in Public

Since the First Amendment does not protect illegal activity, some police officers who do not want to be recorded have used eavesdropping or wiretapping laws to curtail video recording of police activity in public. Eavesdropping laws require one or both parties to consent to the recording of audio material. These laws were “conceived at a time when pocket-sized recording devices were available only to James Bond types,” long before most Americans carried smartphones with video recording capabilities, and were designed to protect against “snoops, spies, and peeping Toms”—not journalists.²³ In thirty-eight states, the eavesdropping law only requires the consent of one of the parties,²⁴ allowing journalists to freely record others. In the twelve remaining states, the law requires the consent of both parties.²⁵ However, in ten of those states, courts have held that the law doesn’t apply to on-duty police officers or people in public.²⁶

Recent litigation in the remaining two states—Massachusetts and Illinois—has severely limited the ability of police to use eavesdropping laws to curtail newsgathering. In *Glik v. Cunniff*, Simon Glik brought a § 1983 action against Boston police officers after he was arrested and charged with a violation of the wiretap statute for recording a video on his cell

²² See *infra* Section I.D.

²³ *Seven Rules for Recording Police*, GIZMODO.COM, <http://gizmodo.com/5900680/7-rules-for-recording-police> (last visited March 29, 2013).

²⁴ *Id.*

²⁵ *Id.* These states are California, Connecticut Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington. *Id.*

²⁶ *Id.*

phone of officers roughly arresting a young man.²⁷ The First Circuit held that only *secret* recording of police is illegal under the wiretap statute, while open recording is permissible.²⁸ Since Glik was holding his camera in plain sight, he was not guilty of violating the wiretap statute.²⁹

In *ACLU v. Alvarez*, the ACLU wanted to create a program of recording police activity in public to increase accountability, so it brought a lawsuit for declaratory and injunctive relief claiming the eavesdropping statute was unconstitutional.³⁰ The Seventh Circuit found that the ACLU had a strong likelihood of success on its First Amendment claim, and ordered an injunction against enforcement of Illinois' eavesdropping statute to recording police in public.³¹ The Supreme Court denied cert,³² leaving the Seventh Circuit's ruling in place. Even more, the First, Third, Seventh, Ninth, and Eleventh Circuits, as well as a number of district and state courts, have held that there is a First Amendment right to film matters of public interest, even in the face of wiretapping laws to the contrary.³³

Accordingly, wiretap or eavesdropping statutes should not be an obstacle to openly recording police doing their jobs in public in any state. Yet, a Baltimore police officer told Christopher Sharp, "It's illegal for you to tape anybody's voice or anything else. It's against the law in the state of Maryland"³⁴—a clearly incorrect statement of law. Such ignorance or disregard of First Amendment law raises serious concerns.

²⁷ 655 F.3d 78, 79-80 (1st Cir. 2011).

²⁸ *Id.* at 86.

²⁹ *Id.* at 87.

³⁰ *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 588 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (U.S. 2012).

³¹ *Id.* at 608.

³² *Alvarez v. ACLU of Illinois*, 133 S. Ct. 651 (2012). There is no other contrary Supreme Court precedent.

³³ Dori Ann Hanswirth & Theresa House, *Litigation: Don't Tape Me, Bro!*, INSIDE COUNSEL.COM (Aug. 2, 2012), <http://www.insidecounsel.com/2012/08/02/litigation-dont-tape-me-bro>. *See also* cases cited by Glik v. Cunniffe, 655 F.3d 78, 83 (1st Cir. 2011). "[I]s there a constitutionally protected right to videotape police carrying out their duties in public? Basic First Amendment principles, along with case law from this and other circuits, answer that question unambiguously in the affirmative." *Id.* at 82.

³⁴ *Baltimore Cops in a Campaign to Intimidate, Harass, and Embarrass Citizen Suing Them*, YOUTUBE (SEPT. 16, 2012), https://www.youtube.com/watch?v=w_fEus9J98w.

C. Statutory Protections for Photojournalists

Members of the media can also draw protection against their work product being seized or deleted by police officers from a federal statute. Section 2000 of the Privacy Protection Act (PPA) of 1980 makes it unlawful for police to search for or seize photographs that are reasonably intended to be disseminated to the public when they are investigating or prosecuting a criminal offense, subject to certain narrow exceptions.³⁵ Designed to increase the media's Fourth Amendment protections³⁶ and preserve materials that document matters of public interest³⁷ when journalists are merely innocent third parties, this statute requires police to get a subpoena, not just a search warrant, to gather evidence from journalists.³⁸ It mandates a minimum \$1,000 damage award to journalists who demonstrate a violation of the statute.³⁹

Yet, this section of the Privacy Protection Act has been rarely invoked or analyzed by the court, and has led to successful suits by the media on only a few occasions.⁴⁰ Most often, photographers lose suits under the PPA because police are able to prove they had probable cause to invoke the "criminal suspect" exception,⁴¹ or because photographers didn't make it clear to

³⁵ 42 U.S.C. § 2000aa (2013). The exceptions include when there is probable cause to believe the person who has the materials committed or is committing a criminal offense, if seizure is necessary to prevent death or serious bodily injury of a person, or if destruction of evidence is likely. *Id.*

³⁶ *Guest v. Leis*, 255 F.3d 325, 340 (6th Cir. 2001). The statute was passed as a reaction to the holding in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) that a student newspaper was not protected from the execution of a search warrant, despite its lack of involvement in illegal activity.

³⁷ *Binion v. City of St. Paul*, 788 F. Supp. 2d 935, 948 (D. Minn. 2011).

³⁸ *Remedies for Harassing or Retaliatory Behavior*, REPORTERS COMM. FOR FREEDOM PRESS (Feb. 1, 2012), <http://www.rcfp.org/police-protestors-and-press/remedies-harassing-or-retaliatory-behavior>. See, e.g., *In re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505 (2006) (challenging a subpoena for newspaper's computer hard drives); *In re Inquest Subpoena (WCAX)*, 890 A.2d 1240 (2005) (challenging subpoena for videotape of riot).

³⁹ *Remedies for Harassing or Retaliatory Behavior*, *supra* note 38. This set damage award prevents the problem of assessing damages based on the speculation of the damages suffered by a photographer and the need for conjecture of what they could have earned by publishing the photograph.

⁴⁰ One successful suit was *Morse v. Regents of Univ. of Cali., Berkeley*, 821 F. Supp. 2d 1112, 1121 (N.D. Cal. 2011), where a journalist's PPA claim for failure to screen, train, and supervise police officers on the statutory provisions of the PPA survived summary judgment.

⁴¹ See *Sennett v U.S.*, 667 F. 3d 531, 535 (4th Cir. 2012) (holding that journalist who videoed violent demonstration that caused property damage could not prevail on PPA claim because there was evidence she may have been involved with the demonstrators); and *Berglund v. City of Maplewood, Minn.*, 173 F. Supp. 2d 935, 949

officers that they intended to disseminate the photos or video to the public.⁴² Yet, in the right circumstances, the PPA can provide powerful relief for members of the media. *Minneapolis Star & Tribune Co. v. United States* involved a police officer who confiscated photographs and video of a drug bust by employees of two newspapers.⁴³ Even though the footage was returned a few hours later and the newspapers ultimately decided the footage was not newsworthy enough to publish, they were awarded the full statutory penalty amount, plus reasonable attorney's fees.⁴⁴

D. The Imperative Need for Public Documentation of Police Officers

The right to take photographs and video in public of police officers is one of the most important rights for the preservation of democracy.⁴⁵ Indeed, the Supreme Court has recognized that “[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristic by which we distinguish a free nation from a police state.”⁴⁶ The Associated Press has said that preventing citizens from recoding what government officials do in public is “antithetical to a democracy.”⁴⁷ Experience has shown time and again that photography is a powerful tool to increase public awareness and inspire reform; photographs of the horrors of the Vietnam War, the Kent State student protester shootings, and the civil rights movement of the 1950s and ‘60s are examples of the power of photography to

(D. Minn. 2001) (denying PPA claim after officers seized video containing evidence of the photographer's allegedly illegal actions in a dispute).

⁴² See *Lambert v. Polk Cnty., Iowa*, 723 F. Supp. 128, 132 (S.D. Iowa 1989) (defeating PPA claim for videographer who taped street fight but was not a news station employee and didn't tell officers he intended to sell or disseminate the video).

⁴³ 713 F. Supp. 1308, 1309-10 (D. Minn. 1989).

⁴⁴ *Id.* at 1310.

⁴⁵ In *New York Times Co. v. United States*, Justice Black wrote,

In the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people.

403 U.S. 713, 717 (1971).

⁴⁶ *Glik v. Cunniffe*, 655 F.3d 78, 79-80 (1st Cir. 2011).

⁴⁷ Sarah Vrumfield, *Police Sued over Deleted Videos of Confrontation*, ASSOCIATED PRESS (Aug. 31, 2011), <http://news.yahoo.com/police-sued-over-deleted-videos-confrontation-222958720.html>.

inspire action and change.⁴⁸ Photography is essential to a free press,⁴⁹ and the Department of Justice recently wrote that the right to record police in public and not be subjected to warrantless seizure and destruction of those records “are not only required by the Constitution. They are consistent with our fundamental notions of liberty, promote the accountability of our governmental officers, and instill public confidence in the police officers who serve us daily.”⁵⁰

The adage that sunlight is the best disinfectant⁵¹ reveals that publicity of police abuses is the only way to decrease those abuses of power. One commentator noted that photography can powerfully enhance accountability of law enforcement officials:

The mere awareness that one's behavior can be captured on camera provides a powerful incentive for officials to avoid acting outside the scope of their authority. Additionally, when police misconduct does occur and is captured on film, publication of the footage inspires public outrage and, consequently, reform (or at least increased vigilance).⁵²

Perhaps the most well-known proof of the need for public oversight of police action was the brutal beating of Rodney King in 1991, which caused a massive public outcry about police brutality.⁵³ Alternatively, when police use their power as they should, publicity of that good stewardship increases public confidence in officers. Given the many abuses of photographers’

⁴⁸ Manning, *supra* note 12, at 153-54; Cliff Collins, *Defending the Right to Shoot: Bert Krages Takes Aim at Photography Bans* 42, 43, OR. ST. B. BULL. (Feb./March 2009), <http://www.osbar.org/publications/bulletin/09febmar/profiles.html>. Manning wrote:

These images are striking examples of the power of photography to increase public awareness, shape the nation's conscience, inspire change, and instantaneously convey volumes of information in a manner often more effective than through the written or spoken word. . . . A powerful image is simply harder to ignore than a written or spoken description of the same image. One reason for this is that an image's effectiveness in conveying an idea does not depend as much on the viewer's trust in the source. The viewer has the ability to see for him or herself, making it harder to dismiss the information on the basis of questionable validity.

Manning, *supra* note 12, at 153.

⁴⁹ Manning, *supra* note 12, at 152.

⁵⁰ THOMAS E. PEREZ, JONATHAN M. SMITH & TIMOTHY D. MYGATT, STATEMENT OF INTEREST OF THE UNITED STATES IN SHARP V. BALTIMORE CITY POLICE DEPT. 1 (2012), *available at* http://www.justice.gov/crt/about/spl/documents/Sharp_SOI_1-10-12.pdf.

⁵¹ Sullivan, *supra* note 4.

⁵² Manning, *supra* note 12, at 153.

⁵³ *Rodney King Biography*, BIOGRAPHY.COM (2013), <http://www.biography.com/people/rodney-king-9542141>; Manning, *supra* note 12, at 153-54.

First, Fourth, and Fourteenth Amendment rights by police officers detailed below, the need for vigilant oversight by the so-called “fourth branch” of government clearly becomes necessary.

II. THE CURRENT CLIMATE OF POLICE ABUSES

The legal defense hotline run by the Reporters Committee for Freedom of the Press (RCFP) regularly fields calls from journalists who have been harassed by police officers or local government officials who are unhappy that they have become the focus of a news story.⁵⁴ Examples abound of police around the country confiscating videos, deleting news footage and photographs, and harassing photographers who have not broken laws or interfered with police work. While some of this misconduct may be motivated by misguided attempts to promote public safety, some instances are clearly motivated by distrust and even hostility against photographers, who serve as one of the only checks on police authority and actions.⁵⁵

In just the last few years, RCFP has learned that Memphis police officers deleted footage of an arrest taken by a journalist standing on a public sidewalk,⁵⁶ Miami Beach police officers confiscated video equipment from a photojournalist and a member of the public after they recorded officers shooting and killing a suspect on a public street,⁵⁷ and Chicago police officers deleted footage of an arrest taken by a journalism professor for a documentary on urban teens.⁵⁸ Additionally, U.S. Border Patrol agents deleted photos taken of male agents patting down

⁵⁴ *Remedies for Harassing or Retaliatory Behavior*, *supra* note 38.

⁵⁵ Manning, *supra* note 12, at 107-08.

⁵⁶ Andrea Papagianis, *Memphis Police Investigated for Deleting News Footage*, REPORTERS COMM. FOR FREEDOM PRESS (Jan. 31, 2012), <http://www.rcfp.org/browse-media-law-resources/news/memphis-police-investigated-deleting-news-footage>.

⁵⁷ Emily Peterson, *Miami Beach Police Officers Told Not to Confiscate Video*, REPORTERS COMM. FOR FREEDOM PRESS (Aug. 8, 2011), <http://www.rcfp.org/browse-media-law-resources/news/miami-beach-police-officers-told-not-confiscate-video>.

⁵⁸ J.C. Derrick, *Chicago Police Investigate Alleged Deletion of Arrest Footage*, REPORTERS COMM. FOR FREEDOM PRESS (Nov. 22, 2011), <http://www.rcfp.org/browse-media-law-resources/news/chicago-police-investigate-alleged-deletion-arrest-footage>.

women at the border,⁵⁹ a Minneapolis police officer shoved a news cameraman out of his way, breaking the camera and rendering the footage unusable during an “Occupy” march,⁶⁰ and a Michigan reporter’s photographs of an automobile crash were deleted because the officer didn’t want family members of the crash victim to see them in print.⁶¹ The ACLU has lamented what it calls a “widespread, continuing pattern of law enforcement officers ordering people to stop taking photographs from public places, and harassing, detaining, and arresting those who fail to comply.”⁶² One lawyer said that “[h]arassment and discrimination of photographers ha[s] become common,” since the 9/11 terrorist attacks.⁶³ The rise of the “Occupy Wall Street” movement has also led to many arrests and confrontations with photographers who are simply trying to document political protests in public.⁶⁴

Officers often confront photographers and ask or demand to see the camera to review the

⁵⁹ Lilly Chapa, *ACLU Files Lawsuit against U.S. Border Patrol over Harassment of Photographers*, REPORTERS COMM. FOR FREEDOM PRESS (Oct. 26, 2012), <http://www.rcfp.org/browse-media-law-resources/news/aclu-files-lawsuit-against-us-border-patrol-over-harassment-photogra>.

⁶⁰ Andrea Papagianis, *Minneapolis Police Chief Admits Officer’s Wrongdoing in Roughing up TV Photojournalist During Occupy March*, REPORTERS COMM. FOR FREEDOM PRESS (April 11, 2012), <http://www.rcfp.org/browse-media-law-resources/news/minneapolis-police-chief-admits-officers-wrongdoing-roughing-tv-phot>.

⁶¹ Jason Wiederin, *Reporter Says Police Deleted her Crash Scene Photos*, REPORTERS COMM. FOR FREEDOM PRESS (Nov. 20, 2008), <http://www.rcfp.org/browse-media-law-resources/news/reporter-says-police-deleted-her-crash-scene-photos>. Examples usually demonstrate officers who are unhappy with footage of themselves or how journalists cover news events. Issues of which photographs and video should be published are better left to journalistic ethics than police judgment.

⁶² *Know Your Rights: Photographers*, AMERICAN CIVIL LIBERTIES UNION, <http://www.aclu.org/free-speech/know-your-rights-photographers> (last visited Jan. 2, 2013).

A. ⁶³ Collins, *supra* note 48, at 42. Photography rights activist Bert Krages points out that overzealous police who try to prevent photography to reduce the risk of a terrorist attack are misguided; photography did not play a part in the major terrorist attacks of the last 10 to 15 years, and “[p]articularly with terrorism in a crowded area, citizen photography can act as a significant deterrent.” *Id.* at 43. He added, “Ideally, it would be better if everyone was taking pictures in subways.” *Id.* Krages’ point was aptly demonstrated by the Boston Marathon bomb investigation in April 2013; the bombs went off near the finish line, “one of the world’s busiest photography scenes,” so investigators called for citizens to submit their photographs and video to aid the investigation. Mark Trumbull, *In Boston Marathon Bombings, Spectators’ Pictures Could Hold Crucial Clues*, The Christian Science Monitor (April 16, 2013), <http://www.csmonitor.com/USA/Justice/2013/0416/In-Boston-Marathon-bombings-spectators-pictures-could-hold-crucial-clues>. Photos uploaded to the FBI’s website by spectators helped identify and find the two suspects. Mara Stine, *Gresham Runner in Boston Marathon Photo Used to Help[] Identify Bombing Suspects*, OUTLOOK.COM (April 26, 2013), <http://www.pamplinmedia.com/go/42-news/151284-gresham-runner-in-boston-marathon-photo-used-to-helped-identify-bombing-suspects>.

⁶⁴ Sullivan, *supra* note 4.

photos or video. Photographers who stick to their guns and refuse to give up cameras are often harassed, intimidated, or even arrested so police can get access to their photographs and video.⁶⁵ Overzealous police officers may arrest photographers or just threaten arrest using broadly-worded statutes like “obstruction of justice” or “interfering with a police officer,” even if the photographer was acting lawfully.⁶⁶ For example, Antonia Amador took pictures of a fatal accident in front of his house and an enraged officer threatened to arrest him if he did not delete the pictures.⁶⁷ In another case, journalist Carlos Miller took pictures of police officers for a news article and refused to leave the public street where he was working, so he ended up facing nine misdemeanor charges, including obstructing traffic, and spent sixteen hours in the county jail.⁶⁸ He was acquitted of all the criminal charges after a two-day trial.⁶⁹

Most of these trumped-up charges are dismissed and only used as an intimidation factor. For example, after yelling “Your First Amendment rights can be terminated,” Chicago police officers handcuffed one NBC news photographer, only to release him minutes later.⁷⁰ Even if charges are dropped or the photographer is released at the scene, the damage has already been done:

It is impossible to recreate the newsworthy events a journalist could have captured had he or she not been handcuffed. Likewise, it is impossible to “undelete” a memory card with days’, months’, or even years’ worth of pictures. Neither dropping charges nor issuing apologies compensates a photographer for the

⁶⁵ For example, a Texas newspaper photographer was detained for 45 minutes after he refused to show police officers pictures he took of workers tending to an oil spill. Kathleen Cullinan, *Texas Journalist Detained Over Oil Spill Photos*, REPORTERS COMM. FOR FREEDOM PRESS (July 29, 2008), <http://www.rcfp.org/browse-media-law-resources/news/texas-journalist-detained-over-oil-spill-photos>.

⁶⁶ Manning, *supra* note 12, at 106-07. These charges may include loitering, disorderly conduct, assault, obstruction of justice, failure to obey a police order, disturbing the peace, provoking a riot, or resisting a police officer. *Id.* at 114.

⁶⁷ Carlos Miller, *Maryland Cops Force Photographer to Delete Photos*, PHOTOGRAPHY IS NOT A CRIME (Nov. 6, 2009), <http://www.photographyisnotacrime.com/2009/11/06/maryland-cops-force-photographer-to-delete-photos/>.

⁶⁸ Manning, *supra* note 12, at 111-12. The police also tackled Miller, “bashing [his] head against the pavement, breaking a \$400 flash, and threatening to shoot [him] with a Taser gun.” *Id.* at 112.

⁶⁹ *Id.*

⁷⁰ Sullivan, *supra* note 4.

embarrassment and possible harm to his reputation experienced when a crowd of people sees him surrounded by blue lights and shoved into a police car.⁷¹

Even more concerning is the undeniable chilling effect of the threat of harassment or arrest, even if successful prosecutions under these broadly-worded statutes are rare.⁷² Photographers will not vigorously pursue police accountability if they are worried they will have to spend the night in jail or earn an unfounded criminal record.

When police officers unilaterally make decisions concerning what can be photographed and when it can be photographed, they are essentially doing the job of the legislature.⁷³ The problem with police adopting the policymaker role is that they have no accountability to the public like elected officials do.⁷⁴ Citizens have few constructive opportunities to show their disapproval with police policy and cannot vote them out of office to voice their desire for change. Instead, the very photographers who are harassed and abused by police officers serve as one of the only checks on police use of power, and measures must be implemented to prevent police from infringing on those photographers' First, Fourth, and Fourteenth Amendment rights.

III. CONSTITUTIONAL AND STATUTORY IMPLICATIONS OF THE SEIZURE AND DELETION OF PHOTOGRAPHS AND VIDEO

When police delete photographs or video taken in public, they violate a number of constitutional rights secured for every person in America by the Bill of Rights. The destruction of photographs and video prevents the photographer from meaningfully exercising his or her First Amendment rights of speech and press. The seizure, search, and destruction of that material also violates the Fourth Amendment's guarantee against unreasonable searches and seizures and contributes to the prior restraint. Finally, the destruction of this media work product without any

⁷¹ Manning, *supra* note 12, at 121.

⁷² Burton, *supra* note 19, at 19. "[T]he charges are usually reduced to noncriminal violations and rarely result in prison terms. However, they are often improperly brought and do result in less news being gathered and published." *Id.* at 21.

⁷³ Manning, *supra* note 12, at 154-55.

⁷⁴ *Id.* at 155.

hearing or impartial mediator intervention violates the Fifth and Fourteenth Amendments' guarantees of due process.

A. Violations of the First Amendment

Case law and the history of the United States leave no room for doubt that speech critical of how the government exercises its power is the main focus of the First Amendment's free speech and free press clauses.⁷⁵ After suffering under England's arbitrary licensing schemes and laws against criticizing the Crown, the early Americans passed the First Amendment to make sure such censorship would not happen in the United States.⁷⁶ The U.S. Supreme Court and various other federal courts have affirmed that government accountability and the free flow of information to the public are the core purposes of the First Amendment.⁷⁷ Accordingly, speech that is critical of police use of power should be one of the most protected exercises of First Amendment rights,⁷⁸ since police are "granted substantial discretion that may be misused to deprive individuals of their liberties."⁷⁹ Courts have held that even foul, profanity-laced tirades expressing disapproval of police actions are protected.⁸⁰

The courts have also left no room for doubt that photographers have a First Amendment right to film things they see in plain sight, including police officers doing their official duties.⁸¹

⁷⁵ *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment.").

⁷⁶ CHEMERINSKY, *supra* note 11, at 1045-46. "There is thus little doubt that the First Amendment was meant to prohibit licensing of publication such as existed in England and to forbid punishment for seditious libel." *Id.* at 1046.

⁷⁷ Burton, *supra* note 19, at 19; *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991), *Smith v. Cumming*, 212 F.3d 1332 (11th Cir. 2000), *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995), *Robinson v. Fetterman*, 378 F. Supp. E 534 (E.D. Pa. 2005).

⁷⁸ PEREZ, SMITH & MYGATT, *supra* note 50.

⁷⁹ *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

⁸⁰ *See Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010). Police officers are even held to a higher than normal standard for the fighting words exception; the Supreme Court held that "a properly trained officer may reasonably be expected to exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'" *Houston v. Hill*, 482 U.S. 451, 462 (1987). *See also* sources cited in *Smith Letter*, *supra* note 16, at 6, n.3.

⁸¹ Sullivan, *supra* note 4; *supra* Part I.

For disputes over these recordings, which amount to political speech, the Supreme Court has instructed courts and government officials to “err on the side of protecting political speech rather than suppressing it.”⁸² Yet, when police delete or seize photographs or video to prevent their publication, the First Amendment is violated on a number of fronts, including imposing an unconstitutional prior restraint and allowing viewpoint discrimination through excessive discretion.

1. *Preventing Publication in Any Way is Prior Restraint*

The seizure and deletion of publically-recorded material intended for publication amounts to prior restraint, the most frowned upon form of speech restrictions and what the First Amendment was primarily designed to prevent.⁸³ The First Amendment is violated when police impose prior restraints to keep photographs from being published.⁸⁴ Although prior restraints are usually thought of as administrative or judicial orders not to engage in speech activities, prior restraint also occurs if government actors physically prevent the dissemination of a publication with which they disagree.⁸⁵

In *Rossignol v. Voorhaar*, the Fourth Circuit found a “classic definition” of prior restraint when sheriffs’ deputies bought (and burned in a bonfire) every copy of a newspaper so that it could not reach readers because they were unhappy that an article criticized members of the

⁸² *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007); *Bertot v. School Dist. No. 1, Albany County, Wyo.*, 613 F.2d 245 252 (10th Cir. 1979) (“We prefer that governmental officials acting in sensitive First Amendment areas err when they do err, on the side of protecting those interests.”).

⁸³ *CHEMERINSKY*, *supra* note 11, at 922-93. The Supreme Court affirmed that “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

⁸⁴ *See Roaden v. Kentucky*, 413 U.S. 496 (1973) (holding that seizure of a film without a warrant was an unconstitutional prior restraint and Fourth Amendment search), *Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir. 2003) (finding that the mass seizure and burning of every copy of a newspaper was a prior restraint). This type of seizure also violates the Fourth Amendment: *see supra* Section II.B; *Roaden*, 413 U.S. at 503 (“When an officer ‘br[ings] to an abrupt halt an orderly and presumptively legitimate distribution or exhibition’ of material protected by the First Amendment, such action is ‘plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards.’”).

⁸⁵ *CHEMERINSKY*, *supra* note 11, at 1092.

sheriff's office.⁸⁶ The Court was concerned both with the prevention of speech and the viewpoint discrimination when the deputies prevented dissemination of speech critical of their own.⁸⁷ Analogously, if police delete or seize digital photographs or video that show them in a bad light so those materials cannot be disseminated, they are imposing a prior restraint. There is little difference between seizing the printed copies of a photograph destined for the eyes of readers and deleting that same photograph before it can be printed.⁸⁸ Both actions violate the speaker's right to communicate information and the recipients' right to receive that information.⁸⁹ Thus, police imposed a prior restraint on Christopher Sharp when they prevented him from publicly exposing the police brutality he captured with his cell phone video camera.

2. *Unfettered Discretion is Inconsistent with First Amendment Principles*

When the government imposes prior restraints through licensing schemes, it must demonstrate that there is an important reason for the licensing scheme and there must be clear standards for granting or denying a license that leave almost no discretion to the licensing authority.⁹⁰ In this way, the government prevents content-based censorship and viewpoint discrimination by the gatekeepers.⁹¹ The principles behind this area of First Amendment law demonstrate the problem with police officers vested with nearly unlimited discretion censoring

⁸⁶ *Rossignol*, 316 F.3d at 521. The court said the sheriff's deputies' concerted actions "clearly contravened the most elemental tenets of First Amendment law." *Id.*

⁸⁷ *Id.* The court held that when officers suppress speech because they disagree with it and don't want its message to be heard, that by itself is a constitutional violation. *Id.*

⁸⁸ See *Robinson v. Getterman*, 378 F. Supp. 2d 534 (E.D. Penn. 2005) (holding that the seizure of a video of police stops was a prior restraint); *Channel 10 v. Gunnarson*, 337 F. Supp. 634 (Minn. Dist. Ct. 1972) (finding that police seizure of a camera was a prior restraint).

⁸⁹ *Id.* at 522.

⁹⁰ *CHEMERINKSY*, *supra* note 11, at 1117. See *City of Lakeworth v. Plain Dealer Publishing*, 486 U.S. 750 (1988) (finding that licensing scheme giving major unbridled discretion to allow or deny applications to place news racks on public property was unconstitutional); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-53 (1969) (holding that a licensing scheme was unconstitutional because it gave "unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways."); *Thomas and Windy City Hemp v. Chi. Park Dist.*, 534 U.S. 316 (2002) (finding that a licensing scheme "sufficiently limited licensing officials['] discretion" to be constitutional), *Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150 (2002) (holding that ordinance requiring a permit before engaging in door-to-door advocacy was a violation of the First Amendment).

⁹¹ *Id.* at 1118.

the newsgathering and dissemination process according to their own whims.

When police officers prevent photographers from taking pictures of certain subjects based on what they think is acceptable and not based on clear criteria, they act just like an unconstitutional licensing scheme would. Just like when a corrupt city official denies a license to a group with whose message he disagrees, when one police officer can shut down speech whenever he wants, the First Amendment is violated. This is why police must act only according to statutes imposed by the legislature with clear criteria for when photography is not allowed, and not according to their own viewpoints about what should and should not be published.⁹²

Overall, it is plain from case precedent and the purposes of the First Amendment that citizens have a constitutional right to record public officials on the job, and that police must not exercise prior restraint or viewpoint discrimination by preventing photographs from being published without a statutory or criminal basis for seizure or censure. Yet, commentators continue to document and denounce police officers who are ignorant of or deliberately ignore this clear precedent, commenting that “it is anybody’s guess when local law enforcement will get the message.”⁹³ Officers at the Preakness Stakes thus violated Christopher Sharp’s First Amendment rights by imposing a prior restraint pursuant to a system giving officers unfettered discretion.

B. Violations of the Fourth Amendment

The Fourth Amendment of the U.S. Constitution guarantees that citizens will not be subjected to any unreasonable searches and seizures.⁹⁴ A vast body of law defines just what types of searches and seizures are reasonable and thus constitutional, but existing principles make clear

⁹² *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999) (“A police officer is not a law unto himself; he cannot give an order that has no colorable legal basis and then arrest a person who defies it.”)

⁹³ *Hanswirth & House*, *supra* note 33.

⁹⁴ *See* U.S. CONST. amend. IV.

that when police seize camera equipment or delete photographs taken by an innocent third-party photojournalist like Christopher Sharp, a violation of the Fourth Amendment occurs. Further, the Fourth Amendment interacts with the First Amendment and the PPA to provide additional protection against prior restraints on speech caused by seizing camera equipment.

1. *Reviewing, Seizing, or Deleting Material Possessed by an Innocent Photographer is an Unconstitutional Search and Seizure*

The Fourth Amendment requires law enforcement officers to employ only reasonable searches and seizures, but the Supreme Court has unequivocally held that the “reasonableness” inquiry is heightened when First Amendment material is involved.⁹⁵ Often, police use their position and power to search photographers’ cameras, seize the camera and the photos or video it contains, or even seize the innocent photographers themselves unreasonably through an arrest or temporary hold. Numerous courts have held that private citizens have a possessory interest in their cell phones and a recognized expectation of privacy in the contents of their cell phones.⁹⁶ This reasoning should comfortably stretch to include cameras and other video recording devices not attached to cell phones.⁹⁷

Fourth Amendment searches should normally be done pursuant to a warrant or subpoena, unless they fall within a number of narrow exceptions for warrantless searches.⁹⁸ Two exceptions police have used to search photojournalists are searches incident to an arrest⁹⁹ or more limited searches (*Terry* “stop and frisks”), which requires reasonable suspicion of a criminal act.¹⁰⁰

⁹⁵ *Roaden v. Kentucky*, 413 U.S. 496, 501-503 (1973).

⁹⁶ *See United States v. Finley*, 477 F.3d 250, 259-60 (5th Cir. 2007); *United States v. Young*, 278 F. App’x 242, 245-46 (4th Cir. 2008); *United States v. Wurie*, 612 F. Supp. 2d 104, 109 (D. Mass. 2009); *United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008).

⁹⁷ *See McCormick v. City of Lawrence*, 289 F. Supp. 2d 1264 (D. Kan. 2003) *aff’d sub nom. McCormick v. City of Lawrence*, Kansas, 130 F. App’x 987 (10th Cir. 2005). *But see Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) (holding that there is no reasonable privacy interest in material intended for mass distribution).

⁹⁸ *See U.S. v. Perez*, 393 F.3d 457 (4th Cir. 2004); Smith Letter, *supra* note 16.

⁹⁹ *See Chimel v. California*, 395 U.S. 752 (1969).

¹⁰⁰ *See Terry v. Ohio*, 392 U.S. 1 (1968).

When police effectuate an arrest without a warrant, they must have probable cause that the person committed a criminal offense.¹⁰¹

As detailed above, police who want to prevent photography at any cost may arrest a photographer or threaten to arrest them under state wiretapping or eavesdropping laws.¹⁰² They may also use vague statutes like “obstruction of justice” or “interfering with a police officer” as the basis for a search done with reasonable suspicion of a criminal act.¹⁰³ For example, in *Rice v. Gercar*, Mr. Rice videotaped police from his front porch as they put a suspected drug buyer in a chokehold to prevent him from swallowing the drugs.¹⁰⁴ Officers demanded that Mr. Rice turn over the tape, but he asked them to return with a warrant.¹⁰⁵ Officers then told Mr. Rice he would be arrested for obstruction of justice if he did not surrender the tape, so Mr. Rice begrudgingly complied.¹⁰⁶

Since courts in every circuit have found that all or most recording of police in public is not an offense under wiretapping or eavesdropping laws,¹⁰⁷ police can no longer use those laws to arrest photographers and get ahold of their cameras or memory cards. Additionally, police must refrain from using vaguely worded statutes to intimidate and control the journalists who hold them accountable to the public. If a photographer stays out of the way of police and doesn't interfere in any way with their actions, there is no colorable basis for law enforcement to use “obstruction” or “interfering” laws to arrest a photographer as a pretext to do a search of their

¹⁰¹ *Maryland v. Pringle*, 540 U.S. 366, 370 (2003). Importantly, it is well established that mere proximity to criminal activity is not enough to furnish probable cause. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). Thus, photographers covering criminal activity cannot be searched or arrested just because they happen to be on the scene taking pictures of criminal activity. There must be some other reason to raise suspicions that the photographer is or will violate the law.

¹⁰² *See supra* Part II.

¹⁰³ Manning, *supra* note 12, at 106. *See supra* notes 66-69 and accompanying text.

¹⁰⁴ 77 F.3d 483, 483 (6th Cir. 1996).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See infra* Section I.B.

photos or video; if they do so on their own whims, the freedoms and rights guaranteed by the Constitution are trampled.

Similarly, if police seize or arrest photographers who have not violated laws legitimately, they run roughshod over the Fourth Amendment. To stop or arrest a person, police must have probable cause that the person has violated the law, which requires an individualized suspicion of wrongdoing.¹⁰⁸ This wrongdoing must be based on a legitimate application of “obstruction” and “interfering” laws, and not on wiretapping or eavesdropping laws that courts will no longer apply to recording police activity.

When photojournalists are covering riots, demonstrations, or other situations that could get violent, police may have a reason to do a *Terry* stop and frisk to make sure the photographer is not involved in the fracas, but it must be reasonable under the circumstances and limited to a quick frisk. For example, in *Binion v. City of St. Paul*, officers could have done a simple frisk of a journalist who was covering a riot to determine if she was carrying bricks, as the demonstrators were, but instead they arrested her immediately without any indication that she was doing anything illegal.¹⁰⁹ The Court highlighted that the police should have done a search to reveal only bricks and thus neutralize the danger; the situation didn’t authorize them to search for “a pocket knife or an Ecstasy tablet or a stolen coin.” Likewise, when police encounter photographers in large, potentially dangerous crowds, they cannot immediately arrest the person without probable cause of illegal action, and they should be limited to a search for the obvious evidence the photographer is actually a co-conspirator with the crowd. This evidence plainly does not include photographs or video taken by the photographer, or their non-dangerous equipment.

¹⁰⁸ Manning, *supra* note 12, at 28; *US v. McClain*, 444 F.3d 556 (6th Cir. 2005) (holding that police did not have sufficient probable cause to believe that a burglary was in progress to support warrantless search of residence).

¹⁰⁹ 788 F. Supp. 2d 935, 943 (D. Minn. 2011).

Of course, police may argue that all searches or voluntary conversations undertaken with the consent of the subject are permissible under the Fourth Amendment.¹¹⁰ While this is a correct statement of law,¹¹¹ the problem is that consent is rarely willingly and voluntarily given to police asserting their authority in situations like those described in this Article.¹¹² Fourth Amendment law dictates that law enforcement officers cannot use implicit or explicit duress or coercion to get the consent they seek.¹¹³ When police threaten to arrest photographers or intimidate them into giving over their cameras, it is not effective consent devoid of coercion or duress.¹¹⁴

Further, consent to search is never consent to destroy, since destruction exceeds the scope of a reasonable person's consent in that situation.¹¹⁵ When Christopher Sharp handed his phone over to police so they could download the videos "for evidence," he certainly had no idea the officers would delete everything on the phone, including the videos of his young son, and render the phone useless to call any number other than 911.¹¹⁶ Whether consent was willingly given or not, any search or seizure that results in the irreparable destruction of property cannot be called "reasonable" under the Fourth Amendment's guarantees. Police are never authorized to destroy

¹¹⁰ See *Lambert v. Polk County, Iowa*, 723 F. Supp. 128, 133 (S.D. Iowa 1989) ("Defendants contend that Lambert voluntarily consented to the police taking the videotape.").

¹¹¹ See *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Jacobson*, 466 U.S. at 124; *U.S. v. Neely*, 546 F.3d 346 (4th Cir. 2009).

¹¹² Psychological studies suggest that compliance with persons in a position of authority may not be a voluntary response at all, but one that is described as mechanical, automatic, and even unconscious. Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L. Q. 175, 188 (1991). See also *Lambert v. Polk Cnty., Iowa*, 723 F. Supp. 128, 133 (S.D. Iowa 1989). The court held that police:

did not ask for the tape—they simply *told* Lambert they were taking it. I think it likely that the trier of fact, in evaluating a situation in which an individual is *told, not asked*, by two policemen on the street in the middle of the night at the scene of a violent crime that they are taking his tape, will find that such a situation presented *implied duress or coercion* resulting in delivery of the tape to the police.

Id. (emphasis added).

¹¹³ Smith Letter, *supra* note 16, at 14 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973) and *United States v. Hylton*, 349 F.3d 781, 785 (4th Cir. 2003)).

¹¹⁴ Christopher Sharp handed over his phone to police because he "felt extremely intimidated." Healy, *supra* note 2.

¹¹⁵ See *United States v. Strickland*, 902 F.2d 937, 941-42 (11th Cir. 1990) ("A police officer could not reasonably interpret a general statement of consent to search an individual's vehicle to include the intentional infliction of damage to the vehicle or the property contained within it.").

¹¹⁶ Healy, *supra* note 2.

property in situations like this.¹¹⁷

Seizure of camera equipment, memory cards, or photos and video likewise must be reasonable considering its First Amendment value. Such seizures of tangible or intellectual property are only reasonable when the officer has a good faith belief that (1) the camera or photo contains evidence of a crime by someone other than the police themselves,¹¹⁸ or (2) as incident to arrest when the images or equipment constitute evidence of a crime.¹¹⁹ Taking photographs is only a crime when it involves counterfeiting, obscenity, or child pornography, so the second exception should rarely, if ever, apply to photojournalists.¹²⁰ The evidence of crime category, however, must be considered in light of § 2000aa of the Privacy Protection Act. Legislative history demonstrates that the PPA was intended to give the media an added layer of protection over what the Fourth Amendment usually gives: it was enacted to afford “the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment.”¹²¹ The PPA explicitly requires police to proceed with a subpoena to gather evidence that may be contained in material intended for mass distribution.¹²² Thus, on-the-scene seizure of material simply to preserve evidence of a third party’s criminal activity without even a warrant is unacceptable.

Further, the PPA protects not only members of the institutional media, but anyone who intends to disseminate the photo or video to the public. The Internet Age gives every person the

¹¹⁷ Jeni DePrizio, *Memphis Police Delete Photographer’s Cell Phone Pictures*, ABC 24 (Jan. 30, 2012, 4:54 PM), <http://www.abc24.com/news/local/story/Memphis-Police-Delete-Photographers-Cell-Phone/J8kGSgNmikSoE7yuxBL2aQ.csp>; Rachael Mason, *Is it Legal . . . To Photograph the Police*, THELAW.TV (Oct. 17, 2012), <http://news.thelaw.tv/2012/10/17/is-it-legal-photographing-the-police/>. Even when police have temporary custody of evidence or personal property, they have obligations under state law to take reasonable care of those items, and they cannot destroy anything. As an example, Ohio’s laws clearly require police to take care of property in their possession. OHIO REV. CODE ANN. § 2981.11 (LexisNexis 2013).

¹¹⁸ *Know Your Rights: Photographers*, *supra* note 62; KRAGES, *supra* note 12, at 74

¹¹⁹ KRAGES, *supra* note 12, at 82.

¹²⁰ *Id.* at 84.

¹²¹ S.Rep. No. 96–874, at 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3950.

¹²² 42 U.S.C. § 2000aa (2013).

ability to quickly and easily publish photos and videos for public consumption through YouTube, Facebook, blogs, Twitter, Instagram, and any number of other websites. As such, the use of the Internet to document every detail of peoples' lives and especially social injustices has exploded in about the last decade. Accordingly, police should presume that any photographer is going to publically disseminate his photos or video and thus is entitled to the extra protection of the PPA. Although one court found that a videographer's claim was barred because he didn't tell police he intended to sell or disseminate the video in the 1989 case *Lambert v. Polk County, Iowa*,¹²³ that case was decided before digital photography and smartphones existed, before handheld video cameras and the use of the Internet were widespread, and thus before lay people had access to easy publishing platforms. Now, photographers should not have an affirmative duty to tell officers that they intend to sell or disseminate their photos or video to be protected against warrantless searches and seizures under the PPA.

Even if property is legitimately seized, police may not search its contents unless they first obtain a warrant.¹²⁴ Thus, the Department of Justice's position is that "in the context of the seizure of recording devices, this means that officers may not search for or review an individual's recordings absent a warrant."¹²⁵ If a camera or memory card is properly seized and will be kept in a secure location, there is simply no reason for officers to immediately review the contents of the camera on the scene; any evidence will be preserved until a warrant can be obtained.

¹²³ 723 F. Supp. 128, 132 (S.D. Iowa 1989) (defeating PPA claim because videographer didn't tell officers he intended to sell or disseminate the video).

¹²⁴ *United States v. Place*, 462 U.S. 696, 701 & n. 3 (1983); Sarah Vrumfield, *Police Sued over Deleted Videos of Confrontation*, ASSOCIATED PRESS (Aug. 31, 2011), <http://news.yahoo.com/police-sued-over-deleted-videos-confrontation-222958720.html>. If police need to view footage or photographs, the usual procedure is to seize the camera or media card as evidence, submit it to the evidence control until, and then obtain a search warrant to review the media. *Id.*

¹²⁵ *Smith Letter*, *supra* note 16. *But see Rice v. Gercar*, 77 F.3d 483 (6th Cir. 1996) (holding that people have no reasonable expectation of privacy in footage of events that took place in public, and the police officer's viewing of personal videos also on the tape was inadvertent).

2. *Unreasonable Seizure of Photographic Equipment and Photographs or Video Imposes Unconstitutional Prior Restraints on Speech*

In addition to the First Amendment prior restraint concerns detailed above, some courts have also explicitly held that unreasonably seizing a camera or otherwise interfering with a photographer's legal right to take pictures or video is an unconstitutional prior restraint.¹²⁶ Like deleting photographs or seizing all of the copies of a newspaper,¹²⁷ seizing camera equipment and thereby preventing a photojournalist from publishing what they have captured on film prevents the message from being disseminated and thus is official action imposing a prior restraint. Given the broad restraints on seizures detailed above, police should have very few opportunities in on-the-scene situations to constitutionally impose prior restraints by seizing equipment from innocent third parties. Even if the material is later returned, if the window of newsworthiness for publication is missed because of the seizure, Fourth and First Amendment violations should be found.

Further, any time seizure is done for the purpose of stopping the message therein it violates both the First and Fourth Amendments.¹²⁸ When police abuse their power to conduct searches and seizures outside the bounds of the Fourth Amendment to prevent publication of photos or video critical of their exercise of power, they are violating these individual liberties. When the power of search and seizure is unrestricted, the impact on free speech can be devastating.¹²⁹ The fear that First and Fourth Amendment rights will not be respected can stifle liberty of expression and cause journalists to self-“chill” their speech.

Thus, when police search, seize, and delete photographs taken by innocent members of

¹²⁶ See *Channel 10, Inc. v. Gunarson*, 337 F. Supp. 634, 638 (D. Minn. 1972).

¹²⁷ See *supra* Part II.

¹²⁸ PEREZ, SMITH & MYGATT, *supra* note 50 at 11-12.

¹²⁹ See *Walter v. United States*, 447 U.S. 649 (1980); *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986); *Heller v. New York*, 413 U.S. 496 (1973).

the media, or arrest photographers, they violate the Fourth Amendment in a myriad of ways. These actions impose prior restraints on speech and violate established Fourth Amendment principles against unreasonable warrantless searches and seizures without cause. In Christopher Sharp’s case, then, the police conducted an unreasonable search and seizure in violation of the Fourth Amendment when they seized and deleted the videos and data on his phone. Even more, this destruction violates photographers’ due process rights.

C. Fifth and Fourteenth Amendment Due Process Violations

The Fifth and Fourteenth Amendments guarantee that a state or the federal government will not subject anyone to deprivation of “life, liberty, or property, without due process of law.”¹³⁰ Yet, when police delete photographs or video or seize camera equipment from journalists who have done nothing wrong, they deprive them of property without that due process.¹³¹ Generally, due process requires notice and an opportunity to be heard by a neutral third party decision maker—steps that are foundational to America’s ordered society.¹³² These processes protect against arbitrary government action and substantively unfair or mistaken deprivations.¹³³

The destruction of digital photographs is, in most cases, irreparable.¹³⁴ Just the simple press of the “delete” button erases the data and prevents anyone from ever seeing that image again. Photographers cannot recreate the image, as the moment has already passed. In the all-too-common situation of police deleting photographs or video on the scene, like they did in

¹³⁰ U.S. CONST. amend. XIV § 1.

¹³¹ *Lambert v. Polk County, Iowa*, 723 F. Supp. 128, 133 (S.D. Iowa 1989) (holding that plaintiff had a good chance of success in a due process violation claim against police who took his video of a fight that turned fatal and refused to return it).

¹³² *See Mathews v. Eldridge*, 424 U.S. 319 (1976) (examining proper procedure necessary to terminate social security benefits); *Stotter v. University of Texas at San Antonio*, 508 F.3d 812, 823 (5th Cir. 2007) (examining the necessary process to terminate an employment contract).

¹³³ *Helton v. Hunt*, 330 F.3d 242, 247 (4th Cir. 2003); PEREZ, SMITH & MYGATT, *supra* note 50 at 16.

¹³⁴ PEREZ, SMITH & MYGATT, *supra* note 50 at 17.

Christopher Sharp's case, there is no process at all given to someone whose intellectual or physical property is destroyed irrevocably.¹³⁵ No one stands between the citizen and the nearly unfettered discretion of the police, and the threat of arrest that hangs over every citizen prevents them from fully arguing their case. No impartial mediator can make a reasoned decision; instead, police are quick to hit the delete button in the passion of the moment.

Beyond the bare destruction of property without due process, when photographers are actually charged under criminal statutes for obstruction, interference, and similar vague statutes, the destruction of their property violates their due process right to a fair criminal trial. Since the video or photos often include the confrontation between the police and the photographer, that becomes the only objective evidence of what happened and whether the photographer was actually obstructing justice or interfering with police.¹³⁶ If police delete that video or photo, the criminal charge is based only on "he said/she said." Courts have found that it is a violation of criminal defendants' due process rights when exculpatory evidence is destroyed by law enforcement officials.¹³⁷ For example, when Dave Ridley was arrested for trespassing at a political event involving Vice President Joe Biden, police said he refused to leave when they told him to.¹³⁸ Yet, because his footage of the event remained intact and proved otherwise, he was acquitted.¹³⁹ Thus, to protect media defendants' due process rights, police must refrain from deleting photographs and video or seizing camera equipment on the scene without notice, hearing, or a chance for the photographer to prove his or her innocence.

¹³⁵ Liz Kilmas, *DOJ Letter Affirms Recording On-Duty Police is a "Form of Free Speech,"* THEBLAZE.COM (May 17, 2012), <http://www.theblaze.com/stories/2012/05/17/doj-letter-affirms-recording-on-duty-police-is-a-form-of-free-speech/>.

¹³⁶ Healy, *supra* note 2.

¹³⁷ See § 1.2 History of Legal Control of the Destruction of Evidence, DSTEVID § 1.2

¹³⁸ *Seven Rules for Recording Police*, *supra* note 23.

¹³⁹ *Id.*

IV. REMEDIES FOR THE VIOLATIONS OF PHOTOGRAPHERS' CONSTITUTIONAL AND STATUTORY RIGHTS

While the constitutional and statutory violations at issue may be plain, the solution is not. As one professor explained, “[r]ights are dependent on remedies not just for their application to the real world, but for their scope, shape and very existence.”¹⁴⁰ Yet, the vehicle of private lawsuits, on its own, is not a sufficient remedy and deterrent to preserve photographers’ rights to capture public police action and thereby hold police accountable.

Photographers who wish to bring lawsuits face a variety of obstacles, including ripeness concerns,¹⁴¹ lack of funding, inadequate remedies, significant delay,¹⁴² and more.¹⁴³ Perhaps the highest hurdle to clear is governmental immunity.¹⁴⁴ In § 1983 suits against state officials, plaintiffs must prove, among other things, that the law is clearly established, and in *Bivens* actions against federal actors, the law enforcement officers involved are not liable for “good faith” violations.¹⁴⁵ It may be difficult to prove damages for yet-to-be-published photographs.¹⁴⁶ The monetary awards for winning a lawsuit against government bodies or officers can be less than satisfactory, since punitive damages may not be available,¹⁴⁷ federal employees may not have deep pockets, courts may limit recovery to the speculative commercial value of a photo

¹⁴⁰ Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

¹⁴¹ The government may argue that a case involving an isolated violation by one officer asking for future injunctive relief is not ripe; lawsuits can only address the immediate harm at issue. Thus, in *O’Shea v. Littleton*, 414 U.S. 488 (1974) and *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the cases were held to be not ripe where there was no immediate threat the named police officer would engage in the same unconstitutional conduct to the same person.

¹⁴² Lawsuits can take a number of years to be resolved. For example, *Glik v. Cunniffe* took five years to reach a resolution.

¹⁴³ “[J]umping through all of the hoops required to succeed in a § 1983 action is a lengthy, arduous, and costly process.” Manning, *supra* note 12, at 140.

¹⁴⁴ A detailed discussion of governmental immunity is beyond the scope of this note. For an extensive exploration of government immunity concerns in the context of photography violations, see Manning, *supra* note 12, at 121-151.

¹⁴⁵ Manning, *supra* note 12, at 145.

¹⁴⁶ *Id.* at 139-40.

¹⁴⁷ See *Iacobucci v. Boulter*, 193 F.3d 14, 26 (1st Cir. 1999).

published in the newspaper,¹⁴⁸ and attorney's fees may not be available.¹⁴⁹ Police often must only show *arguable* probable cause to be entitled to immunity, a very easy burden to meet. Further, if the photographs or video were deleted, the suit turns on the police officer's word against the citizen's word, and courts often give deference to the police officer's decisions.¹⁵⁰ Journalists are likely well aware that success is rare in these types of suits; of the 12,000 *Bivens* actions brought from 1971 to 1989, only four were successful.¹⁵¹ In the end, "few observers have the time, money, or wherewithal to see a First Amendment case through to completion,"¹⁵² and there is no "pot of gold" at the end of the arduous process.¹⁵³ The media especially have been struggling with budget woes for years,¹⁵⁴ and do not have the ability financially to take on any unnecessary litigation.¹⁵⁵

While these hurdles are often difficult to clear, it is not impossible to win a suit against the police for these constitutional violations, especially when journalists invoke the PPA's additional protections and remedies. The right to record police officers in public is now clearly established through case law or statute in nearly every jurisdiction and at the very least through a

¹⁴⁸ Manning, *supra* note 12, at 139 ("While the true value of a journalist's pictures is not fully realized until after they are published, the constitutional violation due to their destruction occurs much before then. Courts are likely to discard any arguments regarding the potential uses of the photographs as speculative and attenuated and perhaps unforeseen.").

¹⁴⁹ Manning, *supra* note 12, at 146. "When litigation is commenced, a plaintiff has no guarantee that the days, weeks, and sometimes years her attorney spends on the case will be paid for by someone other than herself." *Id.* at 140.

¹⁵⁰ Manning, *supra* note 12, at 124.

¹⁵¹ Manning, *supra* note 12, at 143.

¹⁵² Sullivan, *supra* note 4.

¹⁵³ Most of what Glik recovered went to pay his attorney's fees. *Id.*

¹⁵⁴ See generally Paul Gillin, *About*, NEWSPAPER DEATH WATCH, <http://newspaperdeathwatch.com/about-2/> (last visited May 1, 2013); Adolfo Mendez, *Updated: U.S. Dailies See Declines in Revenue, Profits over 5-year Span*, INLAND PRESS ASS'N (Apr. 1, 2010), http://www.inlandpress.org/articles/2011/08/08/knowledge/management_human_resources/doc4a53ce729fc97677262186.txt.

¹⁵⁵ See MEDIA LAW RES. CTR., NFOIC OPEN GOVERNMENT SURVEY 10 (2009), available at <http://www.nfoic.org/sites/default/files/MLRC-NFOIC-Open-Govt-Survey.pdf> (detailing the decrease in discretionary access and open records litigation due to media budget cuts). See also Laura Danielson, *Giving Teeth to the Watchdogs: Optimizing Open Records Appeals Processes to Facilitate the Media's Use of FOIA Laws*, 2012 MICH. ST. L. REV. 981, 995-996.

consensus of jurisdictions.¹⁵⁶ In addition to statutes and case law from every circuit, “the fundamental and virtually self-evident nature of the First Amendment’s protections in this area” clearly establishes the right to record police.¹⁵⁷ Likewise, courts will likely find that the Fourth and Fourteenth Amendment rights that are trampled by overzealous police officers dealing with photographers are clearly established as well.¹⁵⁸ Courts should also find that probable cause to stop, search, or arrest is not even arguable when police target a photographer trying to document, rather than participate in, a crime, as the Fourth Circuit did in *Glik v. Cunniffe*.¹⁵⁹ Finally, perceived problems with proving damages should not be a barrier, since the PPA specifies a minimum damage award of \$1,000 and allows for an award of costs.¹⁶⁰ Case law has made plain that when the First Amendment is violated, damages are not limited to lost profits and should be much more than those lost profits.¹⁶¹

Yet, the possibility that law enforcement officers will be held liable for their actions through litigation has not restrained police from harassing photographers so far.¹⁶² Due to the difficulties or perceived difficulties of bringing lawsuits against government officials, and the

¹⁵⁶ See *supra* Section I.B.

¹⁵⁷ *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011).

¹⁵⁸ Manning, *supra* note 12, at 128-31, 134-35.

¹⁵⁹ *Glik*, 655 F.3d at 88 (holding that “the presence of probable cause was not even arguable”).

¹⁶⁰ 42 U.S.C. § 2000aa (2013). For those who do not bring suit under the PPA, commentators have suggested amending § 1983 to include liquidated damages for constitutional violations, such as a minimum of \$1,000 for any deprivation of a constitutional right. See Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers’ Misconduct*, 87 YALE L. J. 447, 465 (1978).

¹⁶¹ *Rossignol v. Voorhaar*, 316 F.3d 516 (2003). The Court wrote:

It is because of the inherently communicative purpose of First Amendment activity that *compensation in the form of lost profits is legally insufficient as a remedy for the loss of First Amendment freedoms*. The fact that a small newspaper seeks to turn a meager profit does not remove it from the protections of the First Amendment. The Supreme Court has made clear that the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away. What matters is that defendants intentionally suppressed the dissemination of plaintiffs’ political ideas on the basis of their viewpoint. And in doing so before the critical commentary ever reached the eyes of readers, their conduct met the classic definition of a prior restraint.

Id. (citations omitted, emphasis added).

¹⁶² KRAGES, *supra* note 12, at 74 (“Unfortunately, the lack of legal authority has not restrained some officers from engaging in overzealous and unnecessary harassment of photographers.”).

financially precarious positions of many media outlets, lawsuits for these violations are brought sparingly.¹⁶³ Without the consequence of frequent lawsuits, there is little deterrent for police to refrain from harassing the photographers who hold them accountable. Part of the solution, then, is simply to bring more lawsuits to show the police that deprivations of constitutional rights will not be tolerated. Even though many suits may not succeed, if citizens and media members are committed to filing a lawsuit every time their rights are violated, the police departments will tire of defending the suits and change their policies and training.¹⁶⁴

To start, media should report extensively on any incidents of police preventing their newsgathering unconstitutionally, which will bring the violations into the public eye. Since photography and video have proven to be strong impetuses for social change in the past, media must publish this evidence of constitutional violations to raise public ire and powerfully advocate for change. Next, media must commit some of their scarce resources to bringing lawsuits.¹⁶⁵ The more police defendants who are sued mean the more police officers and judges who will be aware of the law.

To accomplish the goal of bringing more lawsuits on behalf of cash-strapped media organizations, those organizations should work with law schools to establish legal clinics that can employ armies of law students eager for experience, or work with national media organizations or nonprofits who recognize the necessity of a strong “fourth branch” of government. The PPA has plainly been underutilized. Also, photographers can challenge any obstruction-of-justice-type law they are arrested under as unconstitutionally broad or vague.

¹⁶³ “There are no relevant published Ninth Circuit opinions, and in fact there are few appellate court opinions that discuss the PPA at all.” *Morse v. Regents of Univ. of California, Berkeley*, 821 F. Supp. 2d 1112, 1121 (N.D. Cal. 2011).

¹⁶⁴ *Burton*, *supra* note 19, at 22. “The public simply has not shown any outrage at the restriction of rights. Owners of media organizations and senior editors have shown only slightly more concern, often choosing not to cover or to give short mention of such incidents.” *Id.*

¹⁶⁵ *Id.* “The first and most obvious solution is to invest immediately the resources in defending journalists in any criminal action that results from newsgathering, regardless of the cost.” *Id.*

Even if these lawsuits are not successful, it will alert police to the fact that something needs to change. There is no doubt this increase in litigation will be time consuming and expensive, but liberty is worth the price. Those bringing the suits must be committed to protecting the rights of watchdog photographers rather than making money, since big profits are unlikely.

Another option is encouraging the attorney general to utilize his or her powers under one provision of the Violent Crime Control and Law Enforcement Act of 1994.¹⁶⁶ This act allows the attorney general to seek court orders to reform police departments that have demonstrated a pattern of constitutional violations.¹⁶⁷ Since private citizens and media companies will struggle to afford lawsuits, there is no better place for the attorney general to represent the interests of the people than to prevent blatant violations of their First, Fourth, Fifth, and Fourteenth Amendment rights by seeking reform of police departments. Concurrently, media and vigilant citizen photographers should pressure Congress to adopt some sort of legislation to prevent these types of abuses.¹⁶⁸ It is plainly the province of the federal Congress to protect the civil rights of the citizens of the United States. Congress can also explicitly disclaim federal governmental immunity for these violations, as it did in the Federal Tort Claims Act,¹⁶⁹ or abrogate state immunity to provide another avenue for suit and thereby encourage greater compliance.

Outside of the judicial and legislative systems, many steps can be taken to train police officers to conform their conduct to constitutional requirements. The Department of Justice (DOJ) has set out explicit policy and training requirements in its publications in response to the Christopher Sharp incident that every police department should implement.¹⁷⁰ The DOJ recommends that department policies explicitly set out the contours of citizens' right to record

¹⁶⁶ See 42 U.S.C. § 14141 (2012).

¹⁶⁷ *Id.*

¹⁶⁸ Manning, *supra* note 12, at 159.

¹⁶⁹ See 28 U.S.C. § 1346 (2012).

¹⁷⁰ Smith Letter, *supra* note 16, at 2-10.

police under the First Amendment, and should include clear examples of what the police can and cannot do.¹⁷¹ These examples should tell where individuals can lawfully record police activity, and what types of activity can be recorded.¹⁷² Policies should tell police to encourage First Amendment activities rather than try to arrest people and stop photography.¹⁷³ Police should be instructed that officers should not search or seize cameras and recording devices without a warrant or subpoena except in very exceptional circumstances, and make clear that destruction of photos and video is unacceptable in every circumstance and violates due process under the Fifth and Fourteenth Amendments.¹⁷⁴ Since it is acceptable to prevent photography when photographers are interfering with police activity, policies should give definitions and examples of what exactly “interference” looks like, including when it is enough to subject the photographer to arrest.¹⁷⁵ In all areas, the policy should not differ for media and non-media photographers.¹⁷⁶

A good example of such a policy is the Miami Beach police department’s General Order 11-03: Seizure & Search of Portable Video and Photo Recording Devices.¹⁷⁷ From the beginning, it recognizes citizens’ right to record police.¹⁷⁸ It goes on to list when photography is acceptable, and sets out guidelines for how to conduct a reasonable initial stop.¹⁷⁹ It restricts when police can

¹⁷¹ *Id.* at 2.

¹⁷² *Id.* at 3.

¹⁷³ *Id.* at 7. Policies “should encourage officers to provide ways in which individuals can continue to exercise their First Amendment rights as officers perform their duties, rather than encourage officers to look for potential violations of the law in order to restrict the individual’s recording.” *Id.*

¹⁷⁴ *Id.* at 5.

¹⁷⁵ *Id.* at 5, 7.

¹⁷⁶ *Id.* at 10.

¹⁷⁷ General Order #11-03: Seizure & Search Of Portable Video And Photo Recording Devices, MIAMI BEACH POLICE DEPARTMENT (effective Aug. 1, 2011), *available at* <http://blogs.nppa.org/advocacy/files/2011/08/MBPD-GO11-03-08-01-11.pdf>.

¹⁷⁸ The policy states: “The Department recognizes that the taking of photographs and/or videos by private citizens and media personnel is permitted within areas open to general public access and occupancy.” *Id.*

¹⁷⁹ *Id.* “A civilian may video record or photograph a police employee’s activities as long as they:

1. Remain at a reasonable distance;
2. Do not interfere with the employee’s duties and responsibilities;

seize cameras or recording devices to when the photographer is “under arrest or directly involved in the criminal act.”¹⁸⁰ Warrantless searches of video are also prohibited unless such a search is necessary to prevent serious bodily injury or death.¹⁸¹ The policy even references the PPA and its increased protections for material intended for dissemination to the public.¹⁸² While the presence of such policies is a great step forward, police departments must implement them by disciplining errant officers for every violation and conducting regular training and education of officers.¹⁸³

Another change that could effectively cut down on constitutional abuses is increased supervision. Supervisors should be called in before any warrantless search or seizure of a camera or recording device begins,¹⁸⁴ which should cut down on violations from both officers who are ignorant of the law and those who would deliberately violate it. Finally, police departments could implement an ombudsman position to resolve conflicts between the press and police and facilitate good relationships between the two.¹⁸⁵ This solution has proved successful in Florida, where problems are mostly resolved quickly and inexpensively now.¹⁸⁶ Accordingly, more litigation and better policies, training, and supervision will help prevent the constitutional violations that result from police seizure and deletion of photos and video taken in public.

CONCLUSION

When camera shy police officers seize recording equipment and delete photographs or videos, they violate the photographer’s First, Fourth, and Fifth or Fourteenth Amendment rights, as well as the Privacy Protection Act. The deletion of media materials creates an unconstitutional

3. Do not create a safety concern for the employee, person detained, or other persons.”

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Emily Peterson, *Miami Beach Police Officers Told Not to Confiscate Video*, REPORTERS COMM. FOR FREEDOM PRESS (Aug. 8, 2011), <http://www.rcfp.org/browse-media-law-resources/news/miami-beach-police-officers-told-not-confiscate-video>.

¹⁸⁴ Smith Letter, *supra* note 16, at 7.

¹⁸⁵ Burton, *supra* note 19, at 22.

¹⁸⁶ *Id.*

prior restraint on the publication of that material, and the unfettered discretion of one officer to do so violates First Amendment principles.¹⁸⁷ The search and seizure of camera equipment owned by photographers not involved in criminal activity violates the Fourth Amendment. Police cannot seize anything intended for publication without a subpoena, pursuant to the Privacy Protection Act, and police should assume that photographers are entitled to the PPA's protections since publication online is so easy.¹⁸⁸ Due process violations occur when physical or intellectual property is taken or destroyed without notice or hearing, and deletion of evidence threatens criminal due process if photographers are arrested.¹⁸⁹

Even though lawsuits against government officials or bodies can be very difficult and may not often be successful, media must commit the resources to vigorously pursue lawsuits, utilizing law school clinics or advocacy groups if necessary. Photographers should encourage the attorneys general in their states to pursue court orders under the Violent Crime Control and Law Enforcement Act, and push for police departments to create strong department policies and training programs to prevent constitutional violations. Increased supervision, strong inter-department discipline, and ombudsman positions will strengthen enforcement.¹⁹⁰

In the end, these measures are necessary to ensure that police officers are held accountable for how they use their power and discretion. To prevent police abuses of power and the disregard of constitutional rights, and to preclude the vibrant American democracy from becoming a police state, citizens and journalists must be free to exercise their constitutional free speech rights without fear of unaccountable and camera shy police officers destroying their property and thereby their voices.

¹⁸⁷ *See supra* Section III.A.

¹⁸⁸ *See supra* Section III.B.

¹⁸⁹ *See supra* Section III.C.

¹⁹⁰ *See supra* Part IV.