

“FIRST AMENDMENT EXCEPTIONALISM” AND THE SPECTER OF
AN ORWELLIAN AMERICA: RECORDINGS OF POLICE, ALL PUBLIC
OFFICIALS (AND LIKELY ALL OF US) IN PUBLIC AT GROUND
LEVEL

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“First Amendment exceptionalism’ [connotes] the belief that the First Amendment weighs the scales above and beyond what a sensible theory of freedom of speech, understood as part of a general theory of freedom, would require.”¹

INTRODUCTION

This Article critiques in depth the purported “growing consensus” of federal appellate courts invalidating on First Amendment grounds almost all attempts to constrain citizen-journalists’ recordings of acts and expressions of police officers in public—a position that will inexorably domino into recording all public officials and all private persons as to matters of public concern occurring in public.² The conclusory assumptions the courts make about the rights of police officers in public—and probably all of society—are practically Orwellian. The courts’ analyses are based in major part on selectively quoted broad dicta and amorphous language from the Supreme Court’s restrictive newsgathering jurisprudence that bear little resemblance to the Court’s actual decisions.

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¹ Richard Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003, 1006 (2000).

² See, e.g., *Fields v. City of Philadelphia*, 862 F.3d 353, 355–56 (3d Cir. 2017) (citations omitted) (“Every Circuit Court of Appeals to address this issue (First, Fifth, Seventh, Ninth, and Eleventh) has held that there is a First Amendment right to record police activity in public. Today we join this growing consensus.”); *Chestnut v. Wallace*, 947 F.3d 1085, 1090–91 (8th Cir. 2020) (referring to the “robust consensus” of “persuasive authority” from other appellate circuits indicating that recording police in public is protected by the First Amendment); *Irizarry v. Yehia*, 38 F.4th 1282, 1289–92 (10th Cir. 2022) (noting that video recording a police officer on duty is “‘unambiguously’ speech creation, not mere conduct” because all other federal circuits to rule on the issue adopted such rules (quoting *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1228 (10th Cir. 2021))).

These federal cases collectively raise basic issues about what rights, if any, Americans—and police in particular—have in public to avoid cell phone recordings and dissemination of the contents thereof on the Internet by anyone with the ubiquitous cell phone. These cases also collectively represent an elitist, warped perception of U.S. law-enforcement officers as chronic violators of citizens' constitutional rights in a systemically racist society—a short-sighted assumption that does not reflect objective reality, the way most Americans perceive police,³ and the largely contradictory, available empirical data on point.⁴ More importantly, this may have the unintended consequence of undermining police-officer and public safety. It is doubtful that the Roberts Court, with its bipartisan concern about privacy in the digital era, will adopt this purported “growing consensus.” This Article offers a proposal based on the common-law tradition of qualified privilege that would provide a limited First Amendment privilege to record law-enforcement activity by requiring that any such recordings be first made available to police and prosecutors.

The Supreme Court has not accepted a case involving the “growing-consensus” doctrine. Ultimately, it will likely do so. This Article critiques the different doctrines relied on by the courts, including the treatment of photography—prototypical conduct—as speech and which have effectively collapsed the *speech-versus-conduct* dichotomy that underlies the Court's precedents providing very restricted protection for newsgathering *conduct*. In largely ignoring the Court's jurisprudence, the federal appellate decisions supporting the “growing-consensus” doctrine—a term the author uses throughout this Article—have likely created an inexorable expansion of newsgathering protection/dissemination to all matters of public concern in public—and perhaps beyond. This Article expands on an excellent dissent by Judge Richard A. Posner that raised a host of issues related to law-enforcement officers' and the body politic's legitimate security and privacy concerns—concerns that the author believes, if left unchecked by the Court, will lead to cellphone/Internet decimation of privacy.

³ See *Americans' trust in law enforcement, desire to protect law and order on the rise*, Ipsos (Mar. 5, 2021), <https://www.ipsos.com/en-us/americans-trust-law-enforcement-desire-protect-law-and-order-rise>.

⁴ C.f. Aurélie Ouss and John Rappoport, *Is Police Behavior Getting Worse? Data Selection and the Measurement of Policing Harms*, 49 J. LEGAL STUD. 153, 167–176 (2020) (noting that the number of insurance claims against police departments in the sample decreased between 1995 and 2017 despite increased public scrutiny of police misconduct).

Part II will analyze in greater detail the game-changing nature of drones and their “eyes-in-the-sky” surveillance and potential for intruding on individual privacy, both in public and on private land.⁵ This second Article will analyze in greater detail the impact of the Supreme Court’s post-digital Fourth Amendment jurisprudence on the Court’s anti-civil-liberties, pre-digital-era decisions of a half-century ago that even then created the specter of an Orwellian America—and the portents these recent Court decisions have for newsgathering under the First Amendment. In so doing, Part II will examine the failed attempt of the National Conference of Commissioners on Uniform State Laws (NCCSL) to finalize a model statute dealing with drone overflight and surveillance, the ongoing litigation attempting to eviscerate states’ legislative attempts to regulate drones, a dubious proposal for a possible limited public forum for drone surveillance, and the impact of the Court’s expansive Taking’s Clause jurisprudence on attempts—whether judicially or legislatively—to impose drone-overflight zones over or near private land.

BACKGROUND

I. PUBLIC SPACES AND THE RIGHT TO RECORD POLICE AND OTHERS

The Supreme Court’s restrictive protection for newsgathering access to lands, buildings, records, and data sources not open or available to the public has only limited application to open spaces at ground level historically accessed and available to the public.⁶ The question then arises as to what newsgathering or information-gathering

⁵ See David A. Elder, “First Amendment Exceptionalism” and the Specter of an Orwellian America: Recordings of Police, All Public Officials (and Likely All of Us) in Public by Drone “Eyes in the Sky”, 34 GEO. MASON UNIV. CIV. RTS. L.J. (forthcoming 2024) [hereinafter Elder, *Recordings II*].

⁶ *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 598 n.7 (7th Cir. 2012) (“Access is assumed here; the ACLU claims a right to audio record events and communications that take place in traditional public fora like streets, sidewalks, plazas, parks, and other open public spaces.”), *cert. denied*, 568 U.S. 1027 (2012). *Alvarez* was distinguished where viewpoint-neutral criteria were used to determine limited access to a Governor’s press briefings and conferences. Media had no right of “special access to newsgathering” and to exemption from “rules of general application.” *John K. MacIver Inst. for Pub. Pol’y, Inc. v. Evers*, 994 F.3d 602, 614–15 (7th Cir. 2021) (citing *ACLU of Ill.*, 679 F.3d at 598). For discussions of the Court’s access jurisprudence and its ramifications, see *infra* Section II. The constraints imposed by “access” jurisprudence may apply by analogy to recording-in-public cases. For example, these constraints may parallel limitations on use of photography or video-recording during an administrative or court hearing, with its potential impact on participants

rules extend to areas open to the public and to whom and to what issues or information such apply—both at ground level and via “eyes-in-the-sky” drones. These issues will be dealt with in that order. There has been considerable litigation in the newsgathering and information-gathering context involving recordings of police officers acting in their official capacities in public. The purported “growing consensus”⁷ of the federal circuits that likely governs most of the country in the absence of a Supreme Court ruling⁸ adopts the following “rule:” “Simply put, the First Amendment protects the act of photographing, filming, or otherwise recording, police officers conducting their official duties in public.”⁹ If this in fact is accurate, which is doubtful, it hardly reflects the widely-held view on third-party recording in public.¹⁰

The “growing consensus” raises two pivotal issues. The first is whether the *Cohen-Bartnicki* rule controls. In *Cohen v. Cowles Media Co.*, Justice White’s majority opinion found that state enforcement of the accepted contract doctrine of promissory estoppel did not violate the First Amendment, and rejected application of *Smith v. Daily Mail Publishing* and *Florida Star v. B.J.F.*, known as “the *Daily Mail* principle,”

or witnesses, including the selectively edited dissemination thereof, and the impact of video-recording on an ongoing internal official investigation. See *infra* notes 45, 90–91, 162, 253, 320, 336.

⁷ *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017).

⁸ The Supreme Court has not accepted a case directly adopting or rejecting this “growing consensus” rule. Two jurisdictions have adopted very specific and protective statutes as to recording of law enforcement actions. N.Y. CIV. RIGHTS LAW § 79-p (McKinney 2020); COLO. REV. STAT. ANN. §§ 16-3-311, 13-21-128 (West 2016). Hawaii has adopted the “growing consensus” under both the U.S. and Hawaii Constitutions. *State v. Russo*, 407 P.3d 137, 139, 146–50 (Haw. 2017).

⁹ *Fields*, 862 F.3d at 356; see also *id.* at 360 (“... [U]nder the First Amendment’s right of access to information the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas.”). This Article will argue throughout that the court’s broad emphasis on a “right of access to information” does not accurately reflect the Court’s First Amendment newsgathering jurisprudence.

¹⁰ See, e.g., *Potts v. City of Lafayette*, 121 F.3d 1106, 1111 (7th Cir. 1997) (upholding a conviction based on a ban of objects usable as weapons, finding that denial of a right to bring a camera into a KKK rally did not violate the attempted-recorder’s First Amendment rights). Judge William Bauer noted in *Potts* that: “[T]here is nothing in the Constitution which guarantees the right to record a public event.” *Id.* He further reasoned that other options for newsgathering remained available: nothing stopped Potts from getting a press pass, nothing “limited anyone from attending the rally or from expressing or receiving any particular message,” and nothing stopped Potts from attending and “record[ing] his observations from memory.” *Id.* at 1112. Numerous helpful journal articles provide detailed analyses of lower court cases addressing third-party recording in public. See Peter Jacobs, *Protests, the Press, and First Amendment Rights Before and After the “Floyd Caselaw”*, 24 U. PA. J. CONST. L. 591 (2022); Clay Calvert, *The Right to Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?*, 64 UCLA L. REV. DISCOURSE 230 (2016).

where “truthful matter of public significance” could not be punished or sanctioned “absent a need to further a state interest of the highest order.”¹¹ Justice White found the latter rule “unexceptionable” as to “truthful, lawfully acquired information.”¹² This case was controlled, however, by an equally well-established set of precedent holding that “generally applicable laws do not offend the First Amendment simply because their enforcement has incidental effects on its ability to gather and report the news.”¹³

The Court rejected strict scrutiny or a media special immunity and explained that its precedents recognize that truthful information the media seeks to publish must be lawfully acquired and that the media is not immunized from breaking and entering an office or home to gather news.¹⁴ Justice White relied on *Branzburg v. Hayes*, which held that a reporter had a duty shared with all citizens to respond to grand-jury subpoenas, and *Zacchini v. Scripps-Howard Broadcasting Co.*, upholding a “right of publicity” claim where defendant broadcasted plaintiff’s “entire act” as a “human cannonball.”¹⁵ Indeed, the Court in *Zacchini* equated the latter to a theft-misappropriation of goodwill and repulsed the argument the broadcast was a “routine example of the press’ fulfilling the informing function so vital to our system.”¹⁶ In *Cohen*, Justice White found that promissory estoppel in no way targeted or singled out the media but applied generally to all citizens’ daily transactions. As such, the First Amendment did not bar its application to the media.¹⁷

In *Bartnicki v. Vopper*, the Court partially invalidated the federal and Pennsylvania wiretap statutes on the new and restricted issue of whether disclosures by defendants with scienter that the material had been allegedly acquired by an unknown-third-party, non-agent stranger could be sanctioned where defendants intentionally publicized matters of public concern—in this case, threats by public educators involved

¹¹ *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668–72 (1991) (quoting *Smith v. Daily Mail Publ’g*, 443 U.S. 97, 103 (1979), and rejecting application of the principles stated therein and restated in *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989)).

¹² *Id.* at 669 (emphasis added).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 669 (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972), and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)); *Zacchini*, 433 U.S. at 563–76.

¹⁶ *Zacchini*, 433 U.S. at 580 (Powell, J., dissenting).

¹⁷ *Cohen*, 501 U.S. at 670.

in labor negotiations.¹⁸ Justice Stevens's "majority" opinion viewed the competing interests—disclosure of truthful matters of public concern and privacy, with its corollary First Amendment interest in "fostering private speech"—as competing equivalent "interests of the highest order."¹⁹ Justice Stevens noted that *Florida Star v. B.J.F.* left open the issue of whether a publisher could be held accountable for illegal acquisition of information by a source.²⁰ He emphasized that the information was "obtained lawfully, even though the information was itself intercepted unlawfully by someone else."²¹

Justice Stevens found the disclosure provisions, unlike the use-conduct provisions, to be both content-neutral and "a regulation of pure speech."²² Under the result-determinative "*Daily Mail* principle" barring prohibitions on speech "absent a need of the highest order," he found "quite remarkable" the government's focus on implementing a deterrence rationale against the legal possessor rather than the illegal obtainer.²³ He rejected the stolen-property and mail-theft analogies as not involving speech prohibitions.²⁴ Justice Breyer's narrowing concurrence found strict scrutiny inappropriate in such scenarios involving interests of equal status and limited the concurrence to the specific narrow facts before the Court, where privacy interests were "unusually low" and the public interest "unusually high."²⁵ He emphasized the lawfulness of respondents' behavior.²⁶ The Breyer-O'Connor concurrence is the true holding of *Bartnicki*.

II. THE "GROWING CONSENSUS": A CRITIQUE

To get a flavor for the arguments of the purported right-to-record-police-in-public doctrine, it is worth analyzing the major appellate decisions—which one scholar protective of the right-to-record finds

¹⁸ See *Bartnicki v. Vopper*, 532 U.S. 514, 518–36 (2001).

¹⁹ *Id.* at 518.

²⁰ *Id.* at 528; see *Florida Star v. B.J.F.*, 491 U.S. 524, 538 n.8 (1989).

²¹ *Bartnicki*, 532 U.S. at 525.

²² *Id.* at 526–27.

²³ See *id.* at 527–30 (internal citations omitted).

²⁴ *Id.* at 530 n.13.

²⁵ See *id.* at 536–40 (Breyer, J., concurring).

²⁶ *Id.*

“based on fairly cursory analysis”—in reverse order.²⁷ The most recent of the “growing consensus” cases was *Sharpe v. Winterville Police Department*, involving a passenger livestreaming a traffic stop.²⁸ For the Fourth Circuit, Judge Julius N. Richardson found that the plaintiff had plausibly pleaded a Sec. 1983 “*Monell*” municipal-liability claim.²⁹ He adopted a broad interpretation of the federal appellate cases, concluding that the “recording of police encounters creates information that contributes to discussion of government affairs,” as does livestreaming such information, “often creating its own record.”³⁰ Accordingly, livestreaming was entitled to First Amendment protection.³¹

²⁷ Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1042–43 (2015). This information-gathering right in or along public thoroughfares could be, but has never been, compared to the very broad rights governments have to regulate or even ban signs on utility poles and billboard ads of all kinds—speech regulated under very-deferential-to-government criteria. One “should not lose sight of the fact that these restrictions eliminate cheap and efficient methods of *writing* in spaces frequented by the public.” Timothy Zick, *Space, Place, and Speech: Expressive Topography*, 74 GEO. WASH. L. REV. 439, 474–75 (2006) (“Restrictions on speech upon utility poles and billboards seek to define not only norms of community aesthetics, but proper communicative methods as well.”). A compelling, data-based book by Rafael Mangual supports the inference that the litigation surge of the last-decade-plus involving recording-police-in-public parallels his finding that, as of 2010, it was “beginning to seem as though there just wasn’t any room (or tolerance) for the idea that policing and incarceration were legitimate societal enterprises.” RAFAEL A. MANGUAL, *CRIMINAL [IN]JUSTICE: WHAT THE PUSH FOR DECARCERATION AND DEPOLICING GETS WRONG AND WHO IT HURTS MOST* 18 (2022). Indeed, Mangual noted that “[t]hings took an even more radical turn in the years that followed, and viral police use of force incidents were a major reason for this.” *Id.* Incidents in 2020 were prefaced by a decade of “[i]ncreasingly vitriolic expressions of anti-police rhetoric in the media and academia.” *Id.* at 21. Two other major factors helped fuel this anti-police antagonism. One was the increasingly large part of the population expending greater amounts of time on social media platforms, which permitted “instantaneous dissemination of information (and misinformation) . . . that might not have captured as much attention in a different era.” *Id.* at 18. For example, he cited the example of the apparently false, but viral narrative (still chanted widely) of “Hands up, don’t shoot!”—that Michael Brown had his hands up when shot in Ferguson, Missouri in 2014. *Id.* The other factor Mangual cited was the huge percentage of the population carrying cell phone cameras, which created a “much higher chance of police uses of force being filmed and widely disseminated by bystanders who were essentially transformed into citizen journalists.” *Id.* at 18–19. This “contributed to the increasingly widespread sense that police uses of force were far more common than they actually were,” with “the effect of driving more visceral reactions to force incidents as more people actually got to see these things take place.” *Id.* at 19.

²⁸ See *Sharpe v. Winterville Police Dep’t*, 59 F.4th 674 (4th Cir. 2023) (detailing amicus curiae briefs by police-accountability projects, civil-liberties groups, three law-school First Amendment clinics, the National Press Photographers Association, and three electronic-privacy/information centers).

²⁹ *Id.* at 679.

³⁰ *Id.* at 681.

³¹ *Id.* at 680–81.

Judge Richardson found that officer safety was unquestionably a strong government interest and one particularly critical during traffic stops.³² Officer safety might justify the municipal custom or policy at issue on remand but was not supported by the record.³³ Judge Richardson did find that the individual officer was entitled to a qualified-immunity defense, as there was no circuit authority or “persuasive authority” on livestreaming elsewhere on point.³⁴ The cases cited by the plaintiff involved third-party recordings, not livestreaming by the person stopped, which created a different weighing of the risks identified by the officers.³⁵

Judge Paul V. Niemeyer concurred in the judgment on both points but criticized the majority for applying “a free-standing First Amendment analysis” to the prohibition in question rather than treating the issue as part of a restriction incidental to a lawful stop-seizure under the Fourth Amendment—which the majority had difficulty in recognizing.³⁶ Properly framed, the issue became one of the officer’s reasonableness in prohibiting electronic communication by those detained in the car with third parties elsewhere.

Judge Niemeyer cited an illustrative response from the livestreaming—including “Where y’all at?”—and noted that viewers could hear the driver claiming that police were following them for some time and harassing them based on a racist stereotype they were drug dealers.³⁷ Judge Niemeyer detailed how the Supreme Court had long affirmed how traffic stops were “especially fraught with danger to police officers” from the possible discovery of evidence of more serious criminality to how passengers added potential sources of risk of injury to stopping officers.³⁸ For these reasons, stopping officers “routinely

³² *Id.* at 682.

³³ *Id.* at 682 (citing defendants’ argument that livestreaming risks harm to officers because it enables viewers to find and intervene in police encounters in real time and it facilitates planned violence against officers).

³⁴ *Sharpe v. Winterville Police Dept.*, 59 F.4th 674, 683 (4th Cir. 2023). Qualified immunity shelters from civil liability executive officers, including police, exercising discretionary functions, where there is insufficient evidence that the officer engaged in violation of a clearly-established constitutional or statutory rights of which the reasonable officer would have known. JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10486, CONGRESS AND POLICE REFORM: CURRENT LAW 3 (2023).

³⁵ *Id.* at 684 (noting the Court’s recognition of augmented risks during traffic stops and citing testimony that livestreaming was riskier than recording).

³⁶ *Id.* at 685 (Niemeyer, J., concurring).

³⁷ *Id.* at 685–86.

³⁸ *Id.* at 686–87 (quoting *Michigan v. Long*, 463 U.S. 1032, 1047 (1983)).

exercise unquestioned command of the situation”³⁹ and established precedent authorized them to take reasonable self-protective measures during such stops even if such acts invade the liberty interests of those stopped.⁴⁰ In applying this frank concept of reasonableness, Judge Niemeyer synthesized the individual officer’s testimony as to the added risks posed by anyone viewing the livestream—a potentially large number of individuals who know where an officer is located and what he or she is doing.⁴¹ In other words, livestreaming has a unique ability to transform “a routine traffic stop into a crowd control operation, leaving the officer in an unsafe position.”⁴²

In the next most recent case, *Price v. Garland*, Senior Judge of the D.C. Circuit Douglas H. Ginsburg applied a historical approach to the issue of whether federal statutory fee and permit requirements for commercial filmmaking on public land precipitated public-forum heightened scrutiny.⁴³ The *Price* majority adopted a reasonableness criterion,⁴⁴ finding that the type of “communicative activity” envisioned historically in forum analysis did not cover filmmaking—“an activity that involved *merely a noncommunicative step in the production of speech*.”⁴⁵ Indeed, “it would be a category error” to extend public-forum

³⁹ *Id.* at 687 (quoting *Maryland v. Wilson*, 519 U.S. 408, 414 (1997)) (analyzing what law enforcement officers can lawfully do during a traffic stop).

⁴⁰ See *Sharpe v. Winterville Police Dep’t*, 59 F.4th 674, 687 (4th Cir. 2023).

⁴¹ See *id.* at 687–88.

⁴² *Id.* at 688.

⁴³ *Price v. Garland*, 45 F.4th 1059, 1064–65 (D.C. Cir. 2022), *cert. denied*, 143 S. Ct. 2432 (2023) (noting *Price*, a part-time independent filmmaker, used a camera, tripod, microphone, and a crew of no more than four).

⁴⁴ *Id.* at 1072. The “reasonableness” criteria for “noncommunicative first amendment activity” “requires something more than the toothless ‘rational basis’ test to review the typical exercise of the state’s police power,” but is “a relatively low bar.” *Id.* (internal citations omitted). Judge Ginsburg upheld the fee requirement for commercial uses, putting a filmmaker on the “same footing” as others seeking to use government land for a profit. *Id.* at 1073. The court upheld the permit requirement for commercial but not for noncommercial uses, as the former was “likely to involve more activities that are disruptive to park operations” and “to cause damage to park resources.” *Id.* at 1074. The distinction “seems reasonably related” to governmental interests. *Id.* The court rejected a reasonableness attack on the distinction between a documentary (commercial) and the newsgathering exemption contained in the statute as meritless. *Id.* at 1075. The “favorable treatment” of newsgathering was an example of Congress’s “unremarkable practice” of granting the media special immunity, such as reduced fees under FOIA. *Id.*

⁴⁵ *Id.* at 1068 (emphasis added). The court agreed with the government’s reasoning that “[b]ecause a filmmaker does not seek to communicate with others at the location in which he or she films, the filmmaker does not use the location as a ‘forum.’” *Id.* The court was “buoyed” by the Court’s recent admonition “against extending the public forum doctrine ‘in a mechanical way’ to contexts that meaningfully differ from those in which the doctrine has traditionally been

“speech-protective rules” in such a context.⁴⁶ In a powerful analogy, Judge Ginsburg found that filmmaking was like *typing a manuscript*, which is “not itself a communicative activity,” but is “*merely a step in the creation of speech* that will be communicated at some other time, usually at some other location.”⁴⁷

Judge Ginsburg viewed the recording-of-public-officials-performing-public-duties-in-public cases as not constructing a general right to record in public places but only as precedents “implicat[ing] unique [F]irst [A]mendment interests”—that is, gathering information about government officials in a form that can be readily disseminated to others serves a cardinal First Amendment interest in protecting “the free discussion of governmental affairs.”⁴⁸ Judge Ginsburg also suggested the *Price* majority’s distinction between “communicative activity” and “steps in the creation of speech” under public-forum doctrine may not apply to “live streaming, which is communicative activity, albeit to people who are not necessarily located in the forum in which the streaming is conducted.”⁴⁹ He interpreted the recording-police-in-public cases as not barring such point-blank, “so long as the recording does not interfere with the performance of the official’s public duties.”⁵⁰ Judge Karen LeCraft Henderson concurred, stating that filmmaking “presents a paradigmatic example of non-communicative speech, which is itself an oxymoronic term.”⁵¹

applied.” *Id.* Judge Ginsburg summarized the “communicative activities” covered by forum doctrine: “assembly, the exchange of ideas to and among citizens, the dissemination of information and opinion, and debate.” *Id.* at 1069. Every Supreme Court case focused on public forum doctrine involved such covered communicative activities. *Id.* at 1070. Accordingly, “[c]reation of speech is not the type of activity for which streets and parks have been used ‘time out of mind,’ . . . There is no historical right of access to government property in order to create speech.” *Id.* (emphasis added).

⁴⁶ *Id.* at 1068.

⁴⁷ *Id.* at 1070 (emphasis added). This focus on mechanical filming or typing emphasized the non-expressive *conduct* involved and was an implicit rejection of the hyperbole in the petitioner’s brief to the Court: “[t]o say the protection of expressive speech does not extend to acts which create such speech is as absurd as finding a right to scuba does not cover the use of an oxygen tank.” Brief for National Photographers Ass’n, et al. as Amici Curiae Supporting Petitioner at 6, *Price v. Garland*, 45 F.4th 1059 (D.C. Cir. 2022) (No. 22-665).

⁴⁸ *Price*, 45 F.4th at 1070–71 (internal citation omitted) (quoting from *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011)).

⁴⁹ *Price*, 45 F.4th at 1071 n.3.

⁵⁰ *Id.* at 1071 (quoting *Glik*, 655 F.3d at 84) (“Such peaceful recording of [the performance of a public duty] in a public place is not reasonably subject to limitation.”).

⁵¹ *Price*, 45 F.4th at 1076 (Henderson, J., concurring) (internal citation omitted) (noting petitioner would “still need to edit and show his film before ‘communicating’ what he ‘inten[ds] to convey’”).

Judge David S. Tatel dissented from the majority conclusion and cited many of the circuit cases discussed below as not limited to public officials but as “broader.”⁵² The majority “leaves important expressive activities unprotected” in public places where First Amendment public-forum protections are at their highest point, by denying heightened protection.⁵³ The majority’s “sweeping holding” put the District of Columbia Circuit in direct opposition to every other circuit by “disaggregat[ing] speech creation and dissemination, thus degrading First Amendment protection for filming, photography, and other activities essential to free expression in today’s world.”⁵⁴ Petitioners sought review by the Supreme Court, claiming that *Price* contradicts every other circuit, all of which have “resoundingly held that the right to record is an inseparable part of the speech process.”⁵⁵ Interestingly, the *Price* opinions, critics, and the petitioner’s appellate brief do not discuss the parallel controlling pure-expression-versus-conduct-in-acquisition dichotomy the Supreme Court has adopted in its newsgathering jurisprudence discussed in detail in this Article. The petition for writ of certiorari was denied on May 1, 2023.⁵⁶

Earlier in 2022, the Tenth Circuit in *Irizarry v. Yehia* adopted the “growing consensus” rule, finding that every federal circuit that had dealt with the issue adopted the rule that video-recording is “‘unambiguously’ speech-creation, not mere conduct.”⁵⁷ In this case the defendant had intentionally, physically obstructed the plaintiff’s efforts to film a DUI traffic stop by standing in front of him, shining his flashlight into the camera, and driving his car directly at plaintiff and another YouTube journalist and blogger in a physically threatening manner in retaliation

⁵² *Id.* at 1081–82 (Tatel, J., dissenting).

⁵³ *Id.* (The majority “reimagin[e] the public forum to protect the stumping politician but not the silent photographer, to shield the shouting protestor but not the notetaking reporter . . . distinctions find[ing] no basis in First Amendment jurisprudence.”).

⁵⁴ *Id.* at 1082.

⁵⁵ Brief for National Photographers Ass’n, *supra* note 47, at 2. The brief conceded the Court has never been explicitly requested to “affirm that the *creation* of a motion picture is protected speech, subject only to reasonable time, place, and manner restrictions.” *Id.* at 4. Petitioner argued that earlier eras’ congressional distinctions between video and still photography and how “social media has democratized commercial filming” have precipitated “arbitrary and content-based enforcement.” *Id.* at 13–15.

⁵⁶ See *Price v. Garland*, 143 S.Ct. 2432 (2023) (mem.) (denying certiorari).

⁵⁷ *Irizarry v. Yehia*, 38 F.4th 1282, 1289–92 (10th Cir. 2022) (quoting *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1228 (10th Cir. 2021), *cert. denied*, 142 S.Ct. 2647 (2022)).

for their filming efforts.⁵⁸ The court found its earlier decision in *Frasier v. Evans* inapplicable, as the legal terrain had changed in the five years since the 2014 events therein.⁵⁹ Consequently, the police-defendant's "disruptive and uncontrolled behavior" that furthered no legitimate law-enforcement objective was not entitled to qualified immunity.⁶⁰

In 2021, in *Frasier v. Evans*, the Tenth Circuit gave an abrupt, date-specific, transitory jolt to the development of the purported First Amendment-based right-to-record-police-acting-officially-in-public-spaces rule.⁶¹ In pointed fashion, Judge Jerome A. Holmes's opinion noted that the court did not examine nor have an opinion on whether Frasier—a citizen-observer who videotaped officers during an arrest⁶²—had such a First Amendment right.⁶³ The court strictly limited itself to the issue of whether such a right had been clearly established at the time of the purported 2014 retaliatory acts against Frasier for videotaping.⁶⁴ In a lengthy analysis, Judge Holmes rejected the trial court's denial of qualified privilege based on the officers' actual knowledge through extensive training over several years that emphasized third parties' right to record police actions in public spaces.⁶⁵

Judge Holmes found that judicial decisions were the only legitimate explanatory source for the objective determination of clearly-established-constitutional-right status, terming as beyond doubt that judicial decisions specifically and reliably define the boundaries of acceptable behavior "in a way that government-employer training never can."⁶⁶ Accordingly, whatever training the officers received was irrelevant.⁶⁷ The trial court's reliance thereon to circumvent the clearly-established requirement was in error.⁶⁸ Frasier filed a petition for writ of certiorari to the Supreme Court, supported by a wide array of amicus curiae briefs, including one by a group of First Amendment scholars

⁵⁸ *Irizarry*, 38 F.4th at 1285–86, 1292–93 nn.11–12, 1297.

⁵⁹ *Id.* at 1294–96 (observing that two additional circuits had joined the recording-police-in-public chorus, with a minimum of six other federal appellate circuits adopting the rule).

⁶⁰ *Id.* at 1293, 1293 n.12, 1298.

⁶¹ See *Frasier v. Evans*, 992 F.3d 1003 (10th Cir. 2021).

⁶² *Id.* at 1008.

⁶³ *Id.* at 1020 n.4.

⁶⁴ *Id.* at 1011–12.

⁶⁵ *Id.* at 1008–09.

⁶⁶ *Id.* at 1019.

⁶⁷ See *Frasier v. Evans*, 992 F.3d 1003, 1019 (2021).

⁶⁸ *Id.*

and another by The Reporters Committee for Freedom of the Press and numerous media entities.⁶⁹ Notably, the Supreme Court denied the petition without a single dissenting Justice,⁷⁰ prompting strong criticism.⁷¹

Although it did not directly involve a recording-police-in-public scenario, the 2020 Eighth Circuit decision in *Chestnut v. Wallace*, affirming a denial of a qualified privilege in a Fourth Amendment setting,⁷² indicated that the Eighth Circuit would likely follow that line of cases, which the court described as a “robust consensus” of “persuasive authority” adopted by every appellate circuit that had encountered the

⁶⁹ See Brief for Reporters Comm. for Freedom of the Press et al. as Amici Curiae Supporting Petitioner, *Frasier*, 992 F.3d 1003, at 4, 20 (No. 21-57) (asserting the Circuit’s decision “was characteristic of a broader dysfunction in the way lower courts approach qualified-immunity analysis, when the right to gather the news is at stake,” and arguing that protecting the right to record would “extend [to] the right to gather information the shelter of ordinary First Amendment standards . . .”); Brief for First Amend. Scholars as Amici Curiae Supporting Petitioner at 5, 22, *Frasier*, 992 F.3d 1003, at 5, 22 (No. 21-57). (“Public-cubed recordings can be viewed through three lenses: as an inherently expressive activity . . . as part of the speech-creation process . . . or as necessary to exercise the First Amendment protected right of newsgathering . . . Under any of these lenses, recording is protected by long-established First Amendment case law.”). Note that *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) was not discussed at all in the above briefs. *Bartnicki v. Vopper*, 532 U.S. 514 (2001) received a single reference: “privacy and speech ‘are important interests to be considered on *both* sides of the constitutional calculus.” *Id.* at 22. The First Amendment Scholars Brief implicitly rejected these cases by viewing recordings as “expressive activity, rather than mere conduct.” *Id.* at 21–22. It placed considerable emphasis on the public-access cases, “which implicate the ability of ordinary citizens to hold their public officials accountable and monitor the proper functioning of government” based on the “traditions of accessibility” to judicial forums, noting that police performing public functions in public places are “well within this newsgathering/access right . . .” *Id.* at 17. At no point did the brief discuss and attempt to distinguish *Estes v. Texas*, 381 U.S. 532 (1965), and its progeny, which *bar* cameras in such proceedings and relegate observers to use of memory, note taking, and sketches. Instead, the First Amendment Scholars Brief viewed photographs as “simply a modern form of note taking.” Brief for First Amend. Scholars, *supra*, at 15, without analyzing how *Estes* discussed the two or explaining why that distinction should be abrogated as to recordings in the public sphere. Nor did the First Amendment Scholars Brief discuss the extensive privacy precedent affirming that unauthorized and surreptitious recording denies the victim thereof control and autonomy over second-hand dissemination of the information acquired. See *infra* notes 148, 172–80, 318, 332, 348–49; see also Elder, *Recordings II*, *supra* note 5.

⁷⁰ *Frasier v. Evans*, 142 S. Ct. 427 (2021) (mem.) (denying certiorari).

⁷¹ See, e.g., Nick Sibilla, *Supreme Court Refuses to Protect First Amendment Right to Film Police Brutality*, FORBES (Nov. 2, 2021), <https://www.forbes.com/sites/nicksibilla/2021/11/02/supreme-court-refuses-to-protect-first-amendment-right-to-film-police-brutality/?sh=4cf31c9f7d91> (arguing that *Frasier* was a “stark outlier” giving police a “free pass.”); John Spisak, *Qualified Apathy: The Tenth Circuit Concedes Jurisdiction Over Constitutional Questions*, 61 WASHBURN L.J. ONLINE 83, 94 (2022).

⁷² See *Chestnut v. Wallace*, 947 F.3d 1085, 1087 (8th Cir. 2020) (noting that questions of material fact precluded resolution).

issue.⁷³ *Chestnut* involved a twenty-minute investigatory stop directed at a jogger who had followed a female police officer on a winter night. As she made consecutive traffic stops at dusk or night, the jogger stood in a tree line in a park where there had been recent “testy exchanges” between citizens and police.⁷⁴

On the facts before it, the court held that no reasonable police officer could decide that distant passive observation of a police-citizen interplay was criminal.⁷⁵ Applying the “robust consensus” rule, the court found, “if, the constitution protects one who records police activity, then surely it protects one who merely observed—a necessary prerequisite to recording.”⁷⁶ If evidence at trial indicated that plaintiff was “lurking in the woods” or otherwise disputed plaintiff’s rendition of events, qualified immunity might be available.⁷⁷ The court analogized the cases of citizens cursing or verbally criticizing police while performing their duties, which “necessarily included” a non-interfering-by-police right to observe from a distance.⁷⁸

The Eighth Circuit emphasized the people’s right to “monitor” law-enforcement activity to ensure police fulfill their professional responsibilities.⁷⁹ Without citing *Chestnut*, the Eighth Circuit later adopted *ACLU of Illinois v. Alvarez* and concluded that a self-described

⁷³ *Id.* at 1090–91 (dicta).

⁷⁴ *See id.* at 1087–88. The events at issue occurred on Feb. 6, 2015. *Id.* at 1094 (Gruender, J., dissenting) (referring to this as a neighborhood where police recently faced “violent attacks”). Notice how the dissent’s characterization differs from the majority’s tepid description of “testy exchanges” that happened three months earlier. *Id.* at 1087–90, 1092. Presumably, the referenced attacks were part of the response—in St. Louis and elsewhere—to a St. Louis County grand jury’s failure to indict Officer Darren Wilson based on self-defense—a decision later affirmed after investigation by the U.S. Department of Justice. *See* Chico Harlan et. al., *Ferguson police officer won’t be charged in fatal shooting*, WASH. POST (Nov. 25, 2014), https://www.washingtonpost.com/politics/grand-jury-reaches-decision-in-case-of-ferguson-officer/2014/11/24/de48e7e4-71d7-11e4-893f-86bd390a3340_story.html; DEP’T OF JUST., DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 7 (2015).

⁷⁵ *Chestnut*, 947 F.3d at 1090.

⁷⁶ *Id.* The court also noted that “merely observing police officers at work cannot give rise to a reasonable inference that criminal mischief is afoot.” *Id.* at 1092 (dicta). The dissenter agreed with the majority’s description of precedent, while noting that these cases were not even raised by plaintiffs, *id.* at 1096 (Gruender, J., dissenting), and also found that the defendant’s actions were “not objectively unreasonable,” *id.* at 1093 (Gruender, J., dissenting), as the evidence supported a “reasonable suspicion of criminality”—potential stalking. *Id.* at 1095–97 (Gruender, J., dissenting).

⁷⁷ *Id.* at 1092 (majority opinion).

⁷⁸ *Id.* at 1091 (dicta).

⁷⁹ *See id.* at 1092 (dicta).

“point person” had a right to videotape matters of public interest relating to a charter school’s use of a public park: “If the act of making a photograph or record is to facilitate speech that will follow, the act is a step in the ‘speech process,’ and thus qualifie[d] itself as speech protected by the First Amendment.”⁸⁰ The ordinance was unconstitutional as applied because its prohibition on unconsented-to photography was content-based and not narrowly tailored.⁸¹

In the 2019 unpublished case of *Toole v. City of Atlanta*, the Eleventh Circuit upheld claims founded on both the Fourth and First Amendments after a police officer had arrested a protestor.⁸² During attempts to disperse protestors in the aftermath of authorities’ failure to indict the officer who shot Michael Brown in Ferguson, Missouri, the arrested protestor had zoomed in on an officer, filmed his name tag, and announced it out loud.⁸³ Seemingly unconcerned with the potential physical risks to or the psychological and reputational impact of publicly targeting and potentially widely disseminating the identity of a particular officer during a volatile situation, the court followed its earlier decision in *Smith v. City of Cumming* and found no qualified privilege as to the officer’s violation of the clearly-established dual First Amendment rights to protest and to film the events at issue.⁸⁴

In the 2018 decision of *Askins v. U.S. Department of Homeland Security*, the Ninth Circuit affirmed the First Amendment right of border-patrol advocates “to photograph and record matters of public interest,”⁸⁵ including allegations of excessive force and racial and

⁸⁰ *Ness v. City of Bloomington*, 11 F.4th 914, 918, 923–24 (8th Cir. 2021) (citing *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595–97 (7th Cir. 2012)).

⁸¹ *See Ness*, 11 F.4th at 924.

⁸² *See Toole v. City of Atlanta*, 798 Fed. App’x 381, 387–88 (11th Cir. 2019) (unpublished decision) (per curiam).

⁸³ *Id.* at 383.

⁸⁴ *See Toole*, 798 Fed. App’x at 387–88 (citing *Smith v. City of Cumming*, 212 F.3d at 1332, 1333 (11th Cir. 2000) (dicta) (stating cryptically in a brief opinion the First Amendment “protects the right to videotape police activities” but then concluding plaintiff had adduced no proof of a violation.)), *cert. denied*, 531 U.S. 978 (2000)).

⁸⁵ *Askins v. Dep’t of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018) (citing among others *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (upholding assault and battery claims against an officer and a constitutional claim that his actions “interfered with [claimant’s] First Amendment right to gather news” by videotaping police targets at a protest march)). The court applied strict scrutiny to content-based rules and concluded that, “[w]ithout question, protecting our territorial integrity is a compelling interest that would justify reasonable restrictions on speech activities at points of entry.” *Askins*, 899 F.3d at 1045. Interestingly, *Fordyce* upheld a claim of qualified immunity when police arrested Fordyce for continuing to audiotape two minors without

religious profiling by border officials acting in their official capacities,⁸⁶ as to “speech on matters exposed to public view”⁸⁷ in public fora. Plaintiffs claimed they were stopped, searched, and their photographs destroyed while so engaged.⁸⁸ The court concluded that the nature and extent of the alleged public fora was a fact-intensive issue to be resolved on remand⁸⁹ and rejected defendant’s broad argument that such controls on photography should be treated as an access-to-government-proceedings case comparable to courtrooms, jails or prisons, town halls and executions.⁹⁰ The latter right of access might be relevant as to photographing computer screens, interior or secured port-of-entry areas, or holding cells that potentially involved access to government-controlled information or areas not freely open to the public.⁹¹

In the most recent of two 2017 cases involving open-with-presumed-actual-notice recording, the Third Circuit in *Fields v. City of Philadelphia* rejected any requirement that the First Amendment right-to-record-police-in-public is limited by a requirement that the recorder-capturer’s decision be based in “expressive conduct”⁹² or that it be “inherently expressive.”⁹³ Either limitation would have gutted the two plaintiffs’ claims, as claimant Geraci acted as a “legal observer” for an anti-fracking protest at a convention center,⁹⁴ while claimant Fields,

their consent after an adult supervisor objected and complained to police and police warned Fordyce that recording in this context violated a Washington State statute. *Fordyce*, 55 F.3d at 439–40. The court reached this conclusion because Washington state law had not yet settled which conversations on public streets could be “private” under the relevant recording statute. *Id.* at 439.

⁸⁶ *Askins*, 899 F.3d at 1043–44.

⁸⁷ *Id.* at 1044 n.2.

⁸⁸ *Id.* at 1038.

⁸⁹ *Id.* at 1045–47.

⁹⁰ *Id.* at 1044 n.2.

⁹¹ *Id.*

⁹² *Fields v. City of Philadelphia*, 862 F.3d 353, 355 (3rd Cir. 2017) (“[T]his case is not about whether plaintiffs expressed themselves through conduct.”). Neither party “contested the existence” of the right-to-record-police-in-public at trial. *Id.* at 355. The court cited the excellent briefs by both parties and eight amici curiae, including the U.S. Department of Justice, the Cato Institute, “well-known” First Amendment scholars, and several of the country’s largest news organizations. *Id.* at 358. A brief by the Reporters Committee for Freedom of the Press also represented 31 media entities. *Id.* at 354–55. Only the City of Philadelphia Law Department represented the police and city. *Id.* at 354. The court cited extensively the amici briefs, including a leading article by co-counsel for appellants. *Id.* at 355 (citing Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335 (2011)).

⁹³ *Fields*, 862 F.3d at 359 (noting the argument recordings were comparable to “painting, writing a diary, dancing, or marching in a parade”).

⁹⁴ *Id.* at 356 (acting as part of a “police watchdog group” “Up Against the Law”).

a college student, filmed police breaking up a university house party from a sidewalk across a public street.⁹⁵ Although in no way interfering with police, Geraci was suddenly shoved against a pillar.⁹⁶ Field was ordered to leave.⁹⁷ When he refused, his camera was confiscated, opened and scrutinized.⁹⁸ Neither claimant had an “expressive purpose” to challenge or criticize police actions.⁹⁹ The court found that such a requirement would have frustrated the proposed right, as recorders often do not know the significance of what they have recorded until later, fuller examination of the contents thereof.¹⁰⁰ In essence, the court subsumed thereunder a veritable First Amendment vacuum-cleaner suction system for information-gatherers of unfettered discretion to disseminate to the public at large.

The right-to-record-police-in-public phenomenon, sometimes called “copwatching,”¹⁰¹ is purportedly a “widespread, common practice”

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Fields*, 862 F.3d at 358.

¹⁰⁰ See *id.* at 358. This is one of Professor Kreimer’s arguments: “. . . [T]he act of delaying in a publication in order to edit the stream of images seems more manifestly a part of protected expression than the act of automatically disseminating images wholesale.” Kreimer, *supra* note 92, 377 (2011). Camera-wielders’ use of unfettered footage to glean recordings for juicy snippets of “newsworthy” or other matters of interest is a major aggravating factor that concerns privacy advocates. One can see this in the extraordinarily unfair result in *McNamara v. Freedom Newspapers*, 802 S.W.2d 901, 903 (Tex. App. 1991), a case applying the newsworthiness doctrine to footage of a high-school soccer player that showed the plaintiff’s genitalia. One commentator criticizes *McNamara*: “Camera lenses both magnify and freeze an image, thereby drawing attention to aspects of a scene that might not be observable to the naked eye. . . . Because [McNamara] was moving and the spectators were watching from a distance, his exposed genitalia would have gone unnoticed but for the click of a camera.” Nancy D. Zeronda, *Street Shootings: Covert Photography and Public Privacy*, 64 VAND. L. REV. 1131, 1149–50 (2010).

¹⁰¹ See Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016). Professor Simonson describes “the phenomenon of organized copwatching”: “. . . groups of local residents who wear uniforms, carry visible recording devices, patrol neighborhoods, and film police-citizen interactions in an effort to hold police departments accountable to the populations they police. Rather than seek consensus with police officers, copwatching groups take an adversarial stance toward the police: they point their cameras at officers, ask them questions about the officers’ practices and policies, and critique those practices and policies on social media and in court.” *Id.* at 393. She distinguishes such from “casual bystanders filming”: “Copwatching” is designed “to prevent police misconduct rather than to catch it. Some copwatchers speak of the ‘three Ds of copwatching’: deter, deescalate, and document.” *Id.* at 409–10. Copwatchers engage in a variety of activities, such as online presence, and often attend courtroom proceedings. See *id.* at 411. “Copwatching” uses observations plus cameras “to transfer power from the police to the people”—“surveillance

in light of the ubiquitous availability of cell phones.¹⁰² Emphasizing that there is no practical significance between proscribing taking or recording and possessing or distributing the matter recorded,¹⁰³ the *Fields* court repeated the broad mantra of other courts, finding that the First Amendment protects the public's "right of access to information" about officials' public responsibilities, invoking the right of individual self-expression to bar government from "*limiting the stock of information* from which members of the public may draw."¹⁰⁴ Access to such information regarding police conduct is especially important because it leads to citizen discussion on public issues, "the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."¹⁰⁵

Such bystander recordings add measurably to a national discourse about suitable policing,¹⁰⁶ substitute objectively determined facts for subjective interpretation, provide differing perspectives to police recordings, plug the lacunae left by police decisions not to record, tender a characteristically personal complement to the news, invite action at multiple levels to deal with police misconduct and to amplify and improve policies and procedures, assist police in doing police work in fact-gathering and investigating, and can even exonerate police from allegations of misconduct.¹⁰⁷ In sum, the First Amendment and society "ask much of our police" officers, including that they put up

becomes a form of resistance." *Id.* at 415. Most "routine patrols" are "relatively uneventful," not encountering "active scenes of police brutality." *Id.* at 416.

¹⁰² See *Fields*, 862 F.3d at 357. Cell phone camera capability and social-networking sites "enable any holder of an image to make it instantly available to the world at large." See Kreimer, *supra* note 92, at 341.

¹⁰³ *Fields*, 862 F.3d at 358 (citing *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012) ("Restricting the use of an audio or visual recording device suppresses speech just as effectively as restricting the dissemination of the resulting recording.")).

¹⁰⁴ See, e.g., *Fields*, 862 F.3d at 359 (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (emphasis added); *Turner v. Driver*, 848 F.3d 678, 688 (5th Cir. 2017) (dicta); *Glik v. Cuniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

¹⁰⁵ *Fields*, 862 F.3d at 359 (quoting *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)).

¹⁰⁶ See *Fields*, 862 F.3d at 358.

¹⁰⁷ See *id.* at 359–60. The court's analysis largely tracks that of Professor Kreimer, who participated in appellant's brief. *Id.* at 354; see Kreimer, *supra* note 92, at 366. The U.S. Department of Justice takes the position that it "frequently relies" on photos and video, including those taken by members of the public, in investigating and prosecuting violations of constitutional rights under federal law by law-enforcement officers—e.g., George Floyd, Walter Scott, and Rodney King—and in conducting "pattern or practice of conduct" investigations. See Brief for the United States As Amicus Curiae Supporting Neither Party at 1–2, *Irizarry v. Yehia*, 34 F.4th 1282 (10th Cir. 2022) (No. 21-1247).

with bystanders recording their actions as essential to promoting the access that promotes discussions of government actions.¹⁰⁸ In so ruling, the court suggested this is an assumed risk police officers must accept as a condition of employment—a rationale that is under attack in the defamation setting.¹⁰⁹

Yet, even in *Fields* the officers were entitled to a qualified immunity, as the scenario at issue was not one for which the right was clearly established at the time of deprivation.¹¹⁰ Indeed, whatever the “growing consensus” may be, it is often at a level of breadth generally disconnected from the facts, specific issues, and results of the particular case. Relatively few cases to date have actually resulted in liability.¹¹¹ This broad level of generality is also reflected in the other 2017 circuit case, *Turner v. Driver*, where the Fifth Circuit panel majority found no circuit split on the clearly-established-right-to-record-police-in-public

¹⁰⁸ See *Fields*, 862 F.3d at 362.

¹⁰⁹ C.f. David Elder, *The Law of Defamation, the First Amendment, and Justice William H. Rehnquist's Attempts to “Hold[] the Balance True”: A Framework for Assessing the Continuing Viability of New York Times v. Sullivan*, 83 LA. L. REV. 129, 144–45 (2022) (describing how Justice Rehnquist's defamation jurisprudence reflects the assumption of risk by public officials) [hereinafter Elder, *Rehnquist's Attempts*].

¹¹⁰ See *Fields*, 862 F.3d at 360–62 (finding no “robust consensus” at the time of the act on the ground that other appellate cases previously protecting recordings involved “expressive interest”—which the lower court in *Fields* and others in the circuit relied on). Another case in the Third Circuit declined to affirm the right-to-record, noting the argument photography is “not sufficiently expressive.” *Pomykacz v. Borough of West Wildwood*, 438 F. Supp. 2d 504, 513 n.14 (D.N.J. 2006). Judge Richard Lowell Nygaard disagreed on this issue in his separate opinion. See *Fields*, 862 F.3d at 364 (Nygaard, J., concurring in part, dissenting in part) (noting that a reasonable law-enforcement officer “would have understood, first-hand, the significance of the proliferation of personal electronic devices that have integrated image capture into our daily lives...”). The Supreme Court's reversal in *Pearson v. Callaghan*, 555 U.S. 223, 236 (2009), permitted exercise of “sound discretion” to decide qualified privilege *before* the constitutional-rights issue. This has been criticized as “lead[ing] to the undesirable consequence that a right might never be ‘established.’” Michael Potere, *Who Will Watch the Watchmen? Recording Police Conduct*, 106 NW. U. L. REV. 273, 289 (2012). The Court's ruling creates a variation of the chicken-or-egg conundrum. If a court decides to affirm the right as prospectively valid but also holds that the officer has a qualified privilege as to the scenario before it at the time of the incident, as in *Fields*, does that not effectively render *Fields*' approval of the “growing consensus” rule extravagant dicta, as in *Turner v. Lieutenant Driver*, 848 F.3d 678, 686–87 (5th Cir. 2017) (dicta)?

¹¹¹ Compare *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 538–43, 546 (E.D. Pa. 2005) (upholding a modest compensatory damages award and small punitive damages award against each defendant for spurious harassment charges filed against plaintiff for filming from private land with permission police engaged in truck inspections where no conceivable interference occurred), with *Robinson v. Fetterman*, 387 F. Supp. 2d 432, 438 (E.D. Pa. 2005) (awarding plaintiff attorney fees and costs).

rule,¹¹² but also found no violation of the right at the time of the acts in question, which involved filming police officers entering and exiting a particular police station.¹¹³ In dicta adopting the rule prospectively, the court broadly stated that it had “not attempted to *disconnect the end product from the act of creation*.”¹¹⁴

The court emphasized the state’s special motivation to repress officers’ resistance to being recorded, noting that the motivation was “particularly true of law enforcement officials . . . granted substantial discretion that may be misused to deprive individuals of their liberties.”¹¹⁵ Thus, securing the public’s information-gathering rights about officials not only assists in uncovering abuses, but may have the beneficial effect on government functioning in general.¹¹⁶ Judge Edith Brown Clement strongly criticized the majority for asserting in dicta a right “unconnected to the particular facts and unnecessary to the disposition of the case before it.”¹¹⁷ The majority’s refusal to apply the asserted rule to the facts therein may have reflected that police could “for reasonable security reasons to restrict individuals from filming officers” in such entering/leaving-police-station scenarios.¹¹⁸

¹¹² See *Turner v. Driver*, 848 F.3d 678, 686–87 (5th Cir. 2017) (dicta).

¹¹³ See *id.* at 686–87.

¹¹⁴ *Id.* at 689 (emphasis added) (internal citation omitted).

¹¹⁵ *Id.* (internal citation omitted). The panel majority’s analysis of the separate Fourth Amendment claims supports Judge Clement. In finding the initial detention was reasonable, Judge Jacques L. Wiener cited approvingly data about general incidents of attacks on both police officers and police stations, including in Austin and Dallas. *Id.* at 692 n.63. These officers—as “objectively reasonable person[s]”—“*could have suspected* [plaintiff] was casing the station for an attack, stalking an officer, or otherwise preparing for criminal activity” and “*sufficiently suspicious* to warrant questioning and a brief detention.” *Id.* at 692–93 (emphases added). An arrest was not, however, justified on the alleged facts. *Id.* at 692–95. The attacks on police stations and like government facilities in the immediate post-George-Floyd era provide additional reasons for concern about videotaping near a police station and officers arriving and departing therefrom. Judge Clement’s comments about objectively reasonable officers may arguably apply outside that context in other public areas where police may be even more vulnerable, particularly during potentially confrontational or volatile episodes or periods of civil unrest.

¹¹⁶ See *Turner*, 848 F.3d at 689–90 (dicta) (internal citation omitted).

¹¹⁷ See *id.* at 697 (Clement, J., dissenting).

¹¹⁸ *Id.* at 697 (Clement, J., dissenting) (Judge Clement noted that “[t]o the extent there is any consensus of persuasive authority,” it was only as to police doing their duties in public.). Several other appellate decisions were preemptively resolved on the ground that the underlying violation was not one involving a clearly-established constitutional right. See *McCormack v. City of Lawrence*, 130 Fed. Appx. 987, 988 (10th Cir. 2005) (upholding trial court decision that “destruction of recordings was not a clearly established First Amendment violation,” and finding the officers had probable cause to both search and seize plaintiffs’ recording devices based on plaintiffs’ likely violation of a local ordinance “prohibiting interference with an officer’s carrying

The First Circuit’s 2014 decision, *Gericke v. Begin*,¹¹⁹ reaffirmed its decision in *Glik v. Cunniffe*,¹²⁰ which had specifically distinguished traffic stops as “inherently dangerous situations” and “worlds apart” from the arrest before the *Glik* court, involving a day-time arrest on historic Boston Commons.¹²¹ *Gericke* involved just that specifically dangerous scenario writ large—a late-night traffic stop; multiple vehicles; multiple individuals, with one or more acting confrontationally; and a gun—announced by the stopped-driver-custodian to the stopping police officer.¹²² The district court found a factual issue as to whether plaintiff’s filming thirty feet away from over a fence after first pulling into an adjacent school parking lot—before being asked to return to her car, where she continued filming—might have constituted a recording in a “disruptive manner” despite the fact that she had complied with all police orders.¹²³ Plaintiff was arrested when another police officer asked her where the camera was and she refused to tell him.¹²⁴

The First Circuit found this a retaliatory violation of plaintiff’s First Amendment right-to-record.¹²⁵ Specifically, the court found that the right-to-record-police-in-public rule was “based on first principles” of the First Amendment, including the expectation that police must bear substantial burdens from citizens’ exercise of their First Amendment rights to record, just as in cases of “provocative and challenging’

out an official duty”). The latter ground of *McCormack* has not been discussed in any appellate decisions. Compare this with the Sixth Circuit’s analysis of recording officer-required interviews during a citizen-complaint investigation in *Hils v. Davis*, 52 F.4th 997, 1005 (6th Cir. 2022). These same officers had a right to record police entering their homes to execute a warrant even where the public had no equivalent right: “Homeowners have a right to be in their home. Other individuals do not. What a citizen may do under his roof does not tell us what he may do under the government’s roof or indeed what he is permitted to do once there. Just as the public does not have a right to accompany the police when they question a suspect at the local police station, they do not have a right to accompany the police when they execute a warrant at an individual’s home.” *Id.*

¹¹⁹ See *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014). This is First Amendment exceptionalism at work. Compare *id.* at 9 n.11 (noting that “terseness” of discussion of the right to record police in public reflected the rule’s “fundamental and virtually self-evident nature”), with *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 612–13 (7th Cir. 2012) (Posner, J., dissenting) (observing that a lack of reasoned discussion is not a compelling rationale).

¹²⁰ See *id.* at 6–7 (citing *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011)).

¹²¹ *Glik*, 655 F.3d at 85.

¹²² See *Gericke*, 753 F.3d at 3–4.

¹²³ See *id.* at 3–5.

¹²⁴ *Id.* at 3–4.

¹²⁵ *Id.* at 9.

speech.”¹²⁶ Under such principles, the right-to-record-police-in-public “necessarily remains unfettered”—even in late-night-stop cases—“unless and until a reasonable restriction is imposed or in place.”¹²⁷ The court viewed as “nonsensical” any argument that the recording party had any duty to exercise restraint—this follows unavoidably from the very nature of the First Amendment right, which does not have self-censorship in mind.¹²⁸ Since no such specific police order or directive in force had been violated, plaintiff’s established right was actionable as a matter of law.¹²⁹

The leading, hotly contested, panel decision on the right-to-record-police-in-public controversy is that of the Seventh Circuit in *ACLU of Illinois v. Alvarez*, in which a panel majority struck down an Illinois anti-audio-recording statute, denominated a “national outlier” by Judge Diane S. Sykes,¹³⁰ with a detailed and persuasive dissent by Judge Richard A. Posner.¹³¹ The ACLU of Illinois brought litigation to forestall prosecutions of its personnel and volunteer agents in implementing its police-accountability project, which involved only

¹²⁶ *Id.* at 8–9. The court perfunctorily noted that the problem of a malfunctioning camera—which Gericke continued to direct at the police throughout the encounter—was irrelevant to her First Amendment right, instead relying on her “frustrated” attempt to record. *See id.* at 3 n.2. This glossed-over point pokes a huge hole in the “expressive” or “inherently expressive”-artistic analogy. It’s somewhat like a journalist trying to claim that attempts to use his or her malfunctioning computer or a pianist saying his or her dysfunctional instrument is nonetheless an “expressive” act even though nothing happens or the result is gibberish.

¹²⁷ *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014).

¹²⁸ *See id.* at 8–9. This nonsensical argument suggests that no newsgatherer need exercise any personal or professional restraint and that only law-enforcement officers must exercise restraint. This article and the literature generally provide detailed examples of the duties imposed by the criminal law, the common law of torts, and civil liability for other wrongful acts where the courts have not allowed defendants to immunize themselves under the First Amendment.

¹²⁹ *Id.* at 9. The court noted that if the case were to go to trial, a fact-finder might be provided a different picture as to whether Gericke was ordered to leave or cease filming—which might affect the qualified-immunity issue. *Id.* at 10 n.13.

¹³⁰ *ACLU v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012), *cert. denied*, 568 U.S. 1027 (2012).

¹³¹ *See Alvarez*, 679 F.3d at 608–14. The statute did not bar *silent* videotaping, as only turning on the audio “trigger[ed]” the statute. *Id.* at 586. *See* Jesse Harlan Alderman, *Police Privacy in the iPhone Era: The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian’s Right to Record Public Police Activity*, 9 FIRST AMEND. L. REV. 487, 500–01 (2011) (terming such “arguably the most draconian in the nation”). Reflective of his strong views on this issue, Alderman concludes that use of a non-recording statute “to suppress . . . memorials” of police misconduct or a criminal defendant’s innocence constitutes a “police state,” “not a democracy.” *Id.* at 531. His over-the-top hyperbole appears to be reflected in the federal appellate decisions viewed as a collective.

open-presumed-actual-notice recordings of conversations of police officers with others that were audible to the “unassisted human ear.”¹³²

Judge Sykes viewed the statute as restricting “at the front end”¹³³ a “medium of expression used for the preservation and communication of information and ideas, thus triggering First Amendment scrutiny”¹³⁴ and as criminalizing normal conversations, including recordings of public officials performing public duties in public, regardless of whether the recordings were open and obvious or surreptitious in nature.¹³⁵ Note Judge Sykes’ expansive use of “public officials.”¹³⁶ Obviously, the Seventh Circuit panel majority viewed police as merely a subset of an expansive class of public officialdom—a concern dealt with below.

The Seventh Circuit majority rejected perfunctorily the state’s argument that the recorded police officers were “not ‘willing speakers’”—the position taken by the district court—and that the plaintiff’s claim constituted an “unprecedented expansion of the First Amendment.”¹³⁷ Judge Sykes found the “willing speaker” doctrine inapplicable, as any third person could have *heard* the conversation at the very moment it was spoken.¹³⁸ Obviously, the statute did not bar such recording.¹³⁹ Yet, this seems to be a *non sequitur* that is true of *every* act of wiretapping or electronic surveillance. Judge Sykes’ opinion also found that the “act of making” an audio or audiovisual recording was “necessarily included” within speech-press rights “as a corollary of the right to disseminate the resulting recording.”¹⁴⁰ Judge Sykes compared prohibiting audiotaping

¹³² *Alvarez*, 679 F.3d at 586, 588. These cases would not protect against use of high-tech devices that would record sounds from a distance.

¹³³ *Id.* at 596.

¹³⁴ *Id.* at 586.; *see also id.* at 603–04 (finding the statute content-neutral on its face, rejecting the argument that the law-enforcement exception made it non-neutral, and applying the general rule that “this kind of content-based discrimination arises only when the government discriminates among *private* speakers, not when it facilitates its own speech”).

¹³⁵ *Id.* at 586.

¹³⁶ *C.f. id.* at 599–600 (citing various records from the time of the Founding that advocate for a broad interpretation of “public officials” when interpreting the liberties of speech and press).

¹³⁷ *See ACLU v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012).

¹³⁸ *See id.* at 592.

¹³⁹ *See id.*

¹⁴⁰ *Id.* at 595. This parallels Professor Kreimer’s analysis: “... [I]mage capture is an essential element in producing and ultimately disseminating, photos, videos, and montages... contemporary image capture is part of a broader digital ecology of communication.” *See Kreimer, supra* note 92, at 381. Judge Sykes compared prohibiting audiotaping to barring notetaking or photographs at public events. *See Alvarez*, 679 F.3d at 595–96. She similarly refused to sub-define painting and writing into their “constituent acts” and applied that analogy where “the expressive medium is

to the simple comparison of barring notetaking or photographs at public events, which would precipitate First Amendment concerns.¹⁴¹ Judge Sykes argued that the right to publish would be rendered “insecure or largely ineffective” if the “antecedent act” of recording were to be left unprotected.¹⁴² Such a restriction on use of an omnipresent implement of communication operated “directly, not incidentally” on speech-press rights¹⁴³ and burdened First Amendment rights more than required to enhance the important government right in question under

mechanical rather than manual.” *Alvarez*, 679 F.3d at 596 (citing *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010) (holding tattoos and the tattooing process were “inextricably intertwined” pure expression accorded full First Amendment protection)). Professor Bhagwat trenchantly criticizes the *Alvarez* majority for “exten[ding] First Amendment protection to speech production without explaining why and without explaining whether protection extends to *all* conduct associated with the production of speech or merely some.” See Bhagwat, *supra* note 27, at 1040; see also Wesley J. Campbell, *Speech Facilitating Conduct*, 68 STAN. L. REV. 1, 50 (2016) (citing *Bartnicki v. Vopper*, 532 U.S. 514 (2001)) (“Conceptually and typically, recording and dissemination are two separate acts. The fact that these acts are sometimes merged by ‘technological fortuity’ is an unpersuasive reason to abandon the line between protected expression and unprotected conduct.”). Professor Campbell criticizes Professor Bambauer’s view that “state action will trigger the First Amendment any time it purposefully interferes with the creation of knowledge,” stating that : “...[Professor Bambauer’s] far-reaching prescription relies on the questionable argument that restricting access to otherwise private information abridges a freedom of thought derived from the First Amendment. *Id.* at 50 (referencing Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 63 (2014)). Professor Campbell continues: “Consider, for instance, the difference between audio-visual recording restrictions and laws against wiretapping. In the case of recording restrictions, the regulated party generally has lawfully access to the relevant information, and thus, as Bambauer observes, recording restrictions seem ‘designed to cut down on communicative potential,’ implicating First Amendment concerns... The first-order aim of a wiretapping law, however, is to prevent access to private information, not to prevent dissemination of that information. The law thus seeks to prevent *noncommunicative* harm, and the connection to expression is at best attenuated.” Campbell, *supra*, at 50 and n.281 (internal citations omitted).

¹⁴¹ See *Alvarez*, 679 F.3d at 595–96.

¹⁴² *Id.* at 595.

¹⁴³ *Id.* at 602–03. The *Cohen-Branzburg* generally-applicable-law doctrine was not applicable where statutes were “aimed at speech or press rights as such” by specifically targeting use of a recorder and “directly leveled” at “an expressive element” of speech. *Id.* at 601–03. Such was “far from incidental.” *Id.* at 602. Judge Sykes treated these pivotal cases as “stand[ing] for the unremarkable proposition that the press does not enjoy a special exemption from generally applicable laws.” *Id.* The problem with this analysis is that all mechanisms incorporated into the newsgathering process—a drone surveillance camera or a helicopter with camera technology—are indistinguishable. Is a speeding journalist racing by car or helicopter to a newsworthy venue logically distinguishable? No court would accord vehicular negligence or recklessness First Amendment protection. See *Weirum v. RKO General, Inc.*, 15 Cal.3d 40, 48 (1975) (noting that a First Amendment defense was unquestionably non-meritorious where defendants created a “competitive scramble” at high speed that resulted in the death of a third party).

the heightened intermediate level of scrutiny Judge Sykes deemed controlling.¹⁴⁴

Judge Sykes conceded that the state’s interest in protecting true conversational privacy was undeniably an important government concern, as it posed a potential chilling effect on private speech.¹⁴⁵ She distinguished the Court’s precedents on surreptitiously accessed conversations¹⁴⁶ as inapplicable to the case before the court. These principles were not in question, as the case before it involved audible voices openly recorded in public spaces: “Communications of this sort lack any ‘reasonable expectation of privacy’ for purposes of the Fourth Amendment.”¹⁴⁷ While Illinois could, of course, extend greater

¹⁴⁴ *Alvarez*, 679 F.3d at 604, 606–08. Professor Campbell interprets *Alvarez* as an exemplar of why his “anti-targeting principles” as to restrictions on recordings “trigger heightened scrutiny:” “Cameras and other audiovisual recording devices are conventional means of communication... [t]hose conventionally used for communication purposes. Targeted regulations of audiovisual recordings thus single out conduct commonly associated with expression and impose an apparent disproportionate burden on speech.” Campbell, *supra* note 140, at 50–51. He does not elucidate in detail what types of restrictions on “mechanical devices” would be sustained other than to exclude wiretapping and thermal-imaging devices. *Id.* at 52. Such “enable access to otherwise private information” but are “not conventional means of expression regardless of whether they happen to include a recording feature.” *Id.* Laws targeting such would raise no First Amendment difficulties “even when expressive goals inspire the use” of them or when such devices contain a recording feature. *Id.* Another scholar concedes that if such content-neutral rules were subject to only the rational-basis criterion, *Alvarez* “would come out the other way”—a “quite troublesome” proposition. Bhagwat, *supra* note 27, at 1065. A leading article describes this deferential standard that terrifies the media and other newsgatherers: “[T]he Court considers ‘every conceivable basis’ that might support a challenged law, even those the legislature did not articulate or rely on, and will uphold the law as long as there is some legitimate basis that the law rationally advances.” Marc Blitz et al., *Regulating Drones Under the First and Fourteenth Amendments*, 57 WM. & MARY L. REV. 49, 117 (2015).

¹⁴⁵ *Alvarez*, 679 F.3d at 605.

¹⁴⁶ *Id.* (first citing *United States v. Jones*, 132 S. Ct. 945, 945–52 (2012); then citing *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001); and then *Katz v. United States*, 389 U.S. 347, 351–52 (1967); see also Elder, *Recordings II*, *supra* note 5 (discussing the privacy implications of wiretapping and electronic listening devices).

¹⁴⁷ *Id.* at 606. Judge Sykes cited the intrusion-upon-seclusion and public-disclosure-of-private-facts torts and stated: “Dissemination of these communications would not be actionable in tort.” *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D (AM. L. INST. 1977)). She highlighted Section 652D of the Second Restatement of Torts, saying: “A tortious invasion of privacy occurs when a person ‘gives publicity concerning the private life of another . . . if the matter is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” *Id.* at 606 n.12 (citing RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977)). She cryptically concluded: “The communications at issue here are not of this kind.” *Id.* Here, Judge Sykes appears to collapse the acquisition-versus-dissemination dichotomy, ignoring case law concluding that intrusion upon seclusion poses no First Amendment problems in imposing liability for tortious acquisitions. See DAVID A. ELDER, *PRIVACY TORTS* § 2:8 n.1 (rev. ed. 2023). In

protection than the Fourth Amendment or the common law—neither of which provided relief in such cases¹⁴⁸—a legislature’s decision to legislate broadly and criminalize a recording of “any conversation, even those that are *not* in fact private . . . severed the link [of the statute’s] meaning and its end” by banning almost all recordings without the parties’ consent despite the absence of any privacy interest.¹⁴⁹ Judge Sykes found no state-identified “substantial government interest” that was implemented by such a near-total ban.¹⁵⁰

Judge Sykes conceded Judge Posner’s argument that “[p]rivate talk in public places is common” but concluded that this concept did not apply to the conversations at issue, as they were not “conversations that carry privacy expectations even though in public places”—the case before it involved overt recordings, with imputed notice, to police in

fact, public disclosure of private facts specifically contemplates that subsequent publicity given to material acquired via an intrusion upon seclusion is compensable. See RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a (1977) (stating that, in conjunction with § 652B claims, “disclosure of the information so obtained will certainly add to the amount of damages”). This is *Bartnicki v. Vopper*’s clear implication. See ELDER, PRIVACY TORTS, *supra*, §§ 2:18, 3:19.

¹⁴⁸ See *Alvarez*, 679 F.3d at 606. An earlier Illinois case rejected intrusion upon seclusion for videotaping a police officer operating undercover at a massage parlor, relying on libel cases treating all police officers as public officials. See *Cassidy v. American Broadcasting Cos.*, 377 N.E.2d 126, 130–32 (Ill. App. 1978). *Cassidy* rejected any claim based on the existing one-party consent statute on two grounds. First, anything said during the preliminary conversations in the massage-parlor room was heard by the auditors’ unaided ears, not by use of a device. See *id.* at 129–30. Second, the officer had asked the arrested solicitor about cameras and filming, so there was nothing of a “private nature” accorded a reasonable expectation of privacy. *Id.* at 130. The court also rejected the application of *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971), noting that the case involved a private individual. See *Cassidy*, 377 N.E.2d at 132. Judge Shirley Hufstedler’s famous opinion in *Dietemann* rejected the argument hidden cameras and bugs were “indispensable tools of investigative reporting.” *Dietemann*, 449 F.2d at 249. In the opinion, Judge Hufstedler argued that the First Amendment “has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering” and “is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another’s home or office” just “because the person subjected to the intrusion is reasonably suspected of a crime.” *Id.* She conceded that “[o]ne who invites another into his home or office takes a risk that the visitor may repeat all he hears or observes when he leaves... But he does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or, in our modern world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select” *Id.* See also *Project Veritas v. Schmidt*, 72 F.4th 1043, 1074–83 (9th Cir. 2023) (Christen, J., dissenting) (critiquing the court’s departure from *Dietemann*’s autonomy analysis).

¹⁴⁹ See *Alvarez*, 679 F.3d at 606.

¹⁵⁰ *Id.* The majority noted that observers could legally watch and listen to officers’ conversations, make videos without audio, take still photos, take notes, make transcripts thereof, and post all such to the world without violating the statute. See *id.*

public places.¹⁵¹ As to Judge Posner’s concern about recorded civilians’ privacy, Judge Sykes reverted again to Illinois’ decision to criminalize all such nonconsensual recordings in public “regardless of whether the communication is private in any sense.”¹⁵² To justify such a restriction, the legislature had to pass a law more carefully fitted to satisfy that interest without treading heavily on free-speech-press rights.¹⁵³ Judge Sykes footnoted an illustrative Oregon statute that exempted “unconcealed” recordings but otherwise mandated consent by all parties whose conversations were being recorded.¹⁵⁴ Judge Sykes ended with a portentous footnote for those concerned with privacy protection. She was in no way suggesting the First Amendment protects only open recordings—the open-versus-concealed dichotomy was only relevant to the calculus demanded by the intermediate standard of review, as covert recordings would “bring stronger privacy interests into play.”¹⁵⁵

Judge Posner’s excellent, provocative dissent is worth synthesizing at length. He first noted that the majority’s opinion “casts a shadow” over the electronic-surveillance statutes of other states, as many such statutes “tee off from . . . *Katz*” and its limiting corollary to the knowingly exposes rubric: “But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”¹⁵⁶ He

¹⁵¹ See *id.* at 606–07 (noting that the ACLU contemplated recording “openly, thus giving the police and others notice others are being recorded”).

¹⁵² *Id.* at 608. See also Elder, *Recordings II*, *supra* note 5 (describing how Judges Sykes’ analysis reflects the circularity of the *Katz*-based reasonable-expectations-of-privacy rule).

¹⁵³ See *id.* at 608.

¹⁵⁴ *Id.* at 595 n.4; see also *Martin v. Gross*, 340 F.Supp.3d 87, 93 (D. Mass. 2018) (discussing the overt-versus-secret issue).

¹⁵⁵ *Alvarez*, 679 F.3d at 607 n.13 (7th Cir. 2012) (dicta). Even as to overt recordings, assuming the adequate-alternative-channels criterion applied, Judge Sykes emphasized that audio and audiovisual are “uniquely reliable and powerful methods of preserving and disseminating” information about public occurrences. *Id.* at 607 (dicta). Their “self-authenticating character makes it highly unlikely” alternatives would be “reasonably adequate substitutes.” *Id.* (dicta). Under this reasoning, few, if any, recording statutes could ever survive scrutiny. Judge Sykes made a similarly broad suggestion that appears to apply to criminalizing any recording statute limiting information: “Criminalizing all non-consensual audio recordings necessarily limits the information that might later be published or broadcast – whether to the general public or a single family member or friend – and thus burdens First Amendment rights. . . . Audio recording is entitled to First Amendment protection.” *Id.* at 597 (dicta). Surely, Judge Sykes cannot be serious in suggesting that all recording prohibitions, wherever and whenever occurring, involving public or private information, are “entitled to First Amendment protection.” This is not a position that can be easily defended, and almost no one has done so.

¹⁵⁶ *Alvarez*, 679 F.3d at 609–10 (Posner, J., dissenting) (internal citations omitted) (quoting *Katz v. U.S.*, 389 U.S. 347, 351 (1967)).

provided illustrative examples: *Katz* modified to a door-less telephone booth or one without a sound-proof door and someone five feet away able to hear a phone conversation; a crime victim conversing with a police officer in low voices on a populated sidewalk where others are "within earshot but [where] the conversants reasonably assume that no one is listening, though they notice someone looking at his cell phone and the recorder in the cell phone might be turned on."¹⁵⁷

Judge Posner emphasized the majority's proposed rule would not be limited to political demonstrations or protests but would "extend to all audible police conversations in public places, whether outdoors on sidewalks and in parks or indoors in the lobbies or other public spaces of courthouses and other government buildings."¹⁵⁸ The breadth of the majority's rule framed the question debated by the majority and the dissent—"whether a state, to protect both privacy and public safety, should be allowed in addition to forbid the recording of conversations between police and members of the public in a public place unless both parties to the conversation consent to being recorded for posterity."¹⁵⁹ The majority held that the answer is no.¹⁶⁰

Judge Posner listed exemplars of those ensnared by the majority's no-privacy-in-public rule regarding conversations with a law-enforcement officer on duty:

... a suspect whom the officer wants to question . . . a bystander whom the police are shooing away from the scene of a crime or an accident . . . an injured person seeking help . . . a crime victim seeking police intervention . . . [someone] asking for directions . . . [or] arguing with a police officer over a parking ticket . . . [or] reporting a traffic accident.¹⁶¹

In many such conversations, those talking with police may be very reluctant to the conversation "being broadcast on the evening news or blogged throughout the world."¹⁶² In some cases, the publicity would

¹⁵⁷ *Alvarez*, 679 F.3d at 610 (Posner, J., dissenting).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 611.

¹⁶⁰ *Id.* at 608.

¹⁶¹ *Id.* at 611.

¹⁶² *Id.* Compare this with the Supreme Court's statement on televised trials: "The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable . . . Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for truth, as may a natural tendency toward

violate the rules governing the public-disclosure-of-private-facts tort, a classical exception to free speech by the majority’s opinion.¹⁶³

In Judge Posner’s analysis, privacy and public safety are unquestionably protected social values.¹⁶⁴ The majority’s “created” First Amendment right is “likely to impair the ability of the police both to extract information relevant to police duties and to communicate effectively with a person whom they speak with in the line of duty.”¹⁶⁵ For example, a police officer “may freeze if he sees a journalist recording a conversation between the officer and a crime victim, or dissatisfied

overdramatization. Furthermore, inquisitive strangers and ‘cranks’ might approach witnesses on the street with jibes, advice or demands for explanation of testimony . . . the mere fact that the trial is to be televised might render witnesses reluctant to appear and thereby impede the trial and the discovery of the truth.” *Estes v. Texas*, 381 U.S. 532, 547 (1965). No decision analyzed herein has discussed *Estes*’s ramifications.

¹⁶³ *Alvarez*, 679 F.3d at 611 (Posner, J., dissenting). Judge Posner ignored the possibility of intrusion upon intrusion. He’s no fan of the latter, as reflected by his opinion in *Desnick v. American Broadcasting Co., Inc.*, 44 F.3d 1345 (7th Cir. 1995). In that case, undercover investigative reporters gained access to plaintiff’s clinic by fraudulent misrepresentations of identity and taped conversations with doctors. *See id.* at 1348. Judge Posner concluded such an entrance did not violate “any of the specific interests” protected by trespass to land when the doctors “engaged only in professional, not personal communications” with the “testers” and where the entrants engaged in no intrusive conduct. *Id.* at 1352–53. Judge Posner’s iconoclastic analysis did not cite and attempt to distinguish the extensive legal doctrine applying the fraud-vitiates-consent rule. Several subsequent cases disagreed on parallel facts. *See Planned Parenthood of Am., Inc. v. Ctr. for Medical Progress*, 402 F.Supp.3d 615, 675–79 (N.D.Cal. 2019) (finding trespass to land for fraudulent access to an abortion facility and offices), *aff’d in part and rev’d in part on other grounds*, 51 F.4th 1125, 1130–35 (9th Cir. 2022); *Jensen v. Sawyers*, 130 P.3d 325, 338, 341–42 (Utah 2005) (upholding jury verdict for statutory wiretap and intrusion upon seclusion, emphasizing that privacy’s “plastic nature” and “relative and highly-fact dependent” nature provided “recognition that reasonable people may find a legally protectable private environment in a multiple and varied array of physical settings”); *Lieberman v. KCOP Television, Inc.*, 1 Cal. Rptr. 3d 536, 545–46 (Cal. Ct. App. 2003) (upholding a statutory-wiretap claim and rejecting “a broad affirmative defense based solely on a legitimate newsgathering motive”); *Shiffman v. Empire Blue Cross and Blue Shield*, 681 N.Y.S.2d 511, 512 (N.Y. App. Div. 1998) (applying the fraud-vitiates-consent rule, upholding a trespass to land, and concluding that free-expression guarantees “confer no privilege for trespass”). The dissenters in *Florida v. Jardines*, 133 S. Ct. 1409, 1422 (2013) (Alito, J., dissenting), relied substantially on *Desnick*’s premise — “[C]onsent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent.” *See id.* at 1422 (quoting *Desnick*, 44 F.3d at 1351). The Court rejected this perversion of traditional tort-property rules and adopted an implied license specifically limited by the entrant’s *purpose*, which did not include police entrance with a trained drug-sniffing dog. *Jardines*, 133 S. Ct. at 1416–17. The concurrence would have alternatively found a search based on *Jardines*’s curtilage-privacy rights. *Id.* at 1418–19 (Kagan, J., concurring).

¹⁶⁴ *Alvarez*, 679 F.3d at 611 (Posner, J., dissenting).

¹⁶⁵ *Id.*

member of the public.”¹⁶⁶ An officer may grow concerned when an unknown third party comes within hearing range, or when he observes a recording device such as a cell phone in that stranger’s hand.¹⁶⁷ In other words, “[t]o distract police during tense encounters with citizens endangers public safety and undermines effective law enforcement.”¹⁶⁸

Judge Posner was “not reassured” by the majority’s disclaimer that it did not intend to immunize conduct that distracted or in any way interfered with police duties.¹⁶⁹ Judge Posner made this point directly and unambiguously: “A fine line separates ‘mere’ recording of a police-citizen encounter (whether friendly or hostile) from obstructing a police operation by distracting the officers and upsetting the citizens they are speaking with.”¹⁷⁰ In fact, the majority opinion may precipitate extensive litigation because it will doubtlessly incentivize police “to shoo away bystanders” under *Colten v. Kentucky* and progeny when the officer wishes to have a private colloquy with a citizen in a public place.¹⁷¹

Judge Posner rejected the majority’s emphasis on the statute’s inapplicability to the non-recording auditor-bystander as “not hav[ing] the significance” Judge Sykes bestowed on it.¹⁷² Judge Posner focused on the important difference¹⁷³ identified by Justice Harlan in his vigorous dissent in *U.S. v. White*—that third-person-bugging acts

to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society The argument of the plurality, to the effect that it is irrelevant whether secrets are revealed by the mere tattletale or to the transistor, ignores the differences occasioned by third-party monitoring and recording which insures full and accurate disclosure

¹⁶⁶ *Id.*

¹⁶⁷ *See id.* at 611–12.

¹⁶⁸ *Id.* at 612.

¹⁶⁹ *Id.*

¹⁷⁰ *Alvarez*, 679 F.3d at 612 (Posner, J., dissenting). *See also* *Pomykacz v. Borough of Wildwood*, 438 F.Supp.2d 504, 516 n.17 (D.N.J. 2006) (“There are many malevolent reasons why someone would photograph an officer on duty that do not implicate First Amendment interests—to identify a confidential informant, to assist in planning a crime, or to interfere with an official investigation, for example.”).

¹⁷¹ *Alvarez*, 679 F.3d at 612 (Posner, J., dissenting) (citing *Colten v. Kentucky*, 407 U.S. 104, 109–10 (1972)).

¹⁷² *Alvarez*, 679 F.3d at 612 (Posner, J., dissenting).

¹⁷³ *Id.*

of all that is said, free of the possibility of error and oversight that inheres in human reporting.¹⁷⁴

No authority was needed “to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed.”¹⁷⁵ Were such “third-party bugging a prevalent practice it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life.”¹⁷⁶

Moreover, off-hand exchanges are inherently protected by the limited audience and the likelihood that the listener will be unable to fully remember what was said without a documented record.¹⁷⁷ And, “[a]ll these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant.”¹⁷⁸ Justice Harlan’s distinction “between an overheard private conversation recalled from memory and one that is recorded is *something everyone else feels—and feels more acutely in the electronic age than 41 years ago*.”¹⁷⁹ In light of the new privacy challenges from the

¹⁷⁴ *Id.* (quoting *United States v. White*, 401 U.S. 745, 787–89 (1971) (Harlan, J., dissenting)).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* A Michigan court posed the concern poignantly: “How different life in this state would be if everyone had to expect that their every conversation, their every careless phrase or ill-advised statement could be captured and preserved for all time. Such a life-style is not what is expected nor desired by the member in a free society.” *Dickerson v. Raphael*, 564 N.W.2d 85, 87 (Mich. Ct. App. 1997) (internal citations omitted), *rev’d on other grounds*, 601 N.W.2d 108 (Mich. 1999). The court upheld an action against third-party media defendants for a recording in public under Michigan’s two-party-consent statute, following *Cohen v. Cowles Media Co.*’s generally-applicable laws-incident-effects-on-newsgathering analysis. *Dickerson*, 564 N.W.2d at 92. No recording-police-in-public case discusses this important decision.

¹⁷⁷ See *Alvarez*, 679 F.3d at 612 (Posner, J., dissenting) (internal citation omitted).

¹⁷⁸ *Id.* The cases critiqued herein seem to make every cell phone owner a *willing assistant*.

¹⁷⁹ *Id.* (emphasis added). Professor Citron provides a persuasive analysis on this point: “While public disclosures of the past were more easily forgotten, memory decay has largely disappeared . . . [P]eople cannot depend upon time’s passage to alleviate reputational and emotional damage[s] . . . The Internet guarantees a Nietzschean ‘eternal return’ of damaging disclosures.” See Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1813 (2010). Other privacy scholars advocate rethinking the right to be forgotten in the Internet age. See Samantha Barbas, *The Sidis Case and the Origins of Modern Privacy Law*, 36 COLUM. J.L. & ARTS 21, 68–69 (2012); ELDER, *PRIVACY TORTS*, *supra* note 147, § 3:18 (proposing adoption of the compelling logic of the “right to be forgotten” decision of the European Court of Justice). The Court has recognized this phenomenon. See *United States Dept. of Just. v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749, 763–64 (1989) (“... [T]he extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private.”).

commonplace presence of recording technology and the huge amount of stored personal data, judges “[l]acking relevant experience, lacking evidence, forced back on intuition . . . should hesitate to invalidate legislative attempt to solve these problems.”¹⁸⁰

Although Judge Sykes conceded “the difference in accuracy and immediacy” of a recording as juxtaposed to notes, or even a silent video or a transcript, she viewed such a distinction—as to the privacy issue in question—as insufficient to support criminalizing this recording to preserve and publish the public conversations of these police-officer public officials.¹⁸¹ Judge Posner viewed this proposition as not providing a supporting rationale and ignoring the fact that such a recording will also preserve what the private person-civilian speaking with a police officer says.¹⁸²

More dubiously, the majority’s conclusion that these conversations do not have privacy expectations when uttered in public places necessarily “implies that anything said outdoors is *ipso facto* public.”¹⁸³ On the contrary:

[P]eople often say things in public they don’t expect others around them to be listening to, let alone recording for later broadcasting, and we are given no reason to think that this is never the case when someone complains to a police officer, or otherwise speaks to one ‘in public,’ in the sense of being in a place in which there are other people about.¹⁸⁴

¹⁸⁰ *Alvarez*, 679 F.3d at 612–13 (Posner, J., dissenting).

¹⁸¹ *Id.* at 606.

¹⁸² *Id.* at 613 (Posner, J., dissenting).

¹⁸³ *Id.*; see also *Bowens v. Ary, Inc.*, No. 282711, 2009 WL 3049580, at *7 (Mich. Ct. App. Sept. 24, 2009). The court in *Bowens* rejected defendant-entertainment company’s argument that plaintiff-public official-police officers’ status made their conversations “public ‘per se’” under the Michigan wiretapping statute. *Bowens*, 2009 WL 3049580, at *7. The court rejected the argument that, as a matter of law, “an on-duty police agent may not engage in a private conversation.” *Id.* Defendants offered no authority for such: “[S]uch a rule would unduly inhibit the ability of police officers to converse among themselves or with others at a crime scene or other law enforcement locations.” *Id.* No appellate recording-police-in-public cases has discussed *Bowen*. The Michigan Supreme Court reversed, finding that a series of six factors negated any privacy expectation in that particular conversation. *Bowens v. Ary, Inc.*, 794 N.W.2d 842, 843–44 (Mich. 2011). A strong dissent criticized the majority for deciding this preeminently factual issue as a matter of law, particularly since defendants had “explicitly acquiesced in plaintiffs’ demand the conversation be held in private.” *Id.* at 844–45 (Kelly, J., dissenting).

¹⁸⁴ *Alvarez*, 679 F.3d at 613 (Posner, J., dissenting). Judge Posner intimated “public” — “a place in which there are other people about” — may not be limited to traditional or conventional public places. *Id.* Indeed, it could extend to restaurants, department stores, shopping centers, common

Judge Posner provided the example of a police officer and informant seated on a park bench: “A crime reporter sidles up, sits down next to them, takes out his iPhone, and turns on the recorder. The detective and his informant relocate to continue their private conversation. The reporter shadows them. Is this what the Constitution privileges?”¹⁸⁵ Posner poses a powerful question here.

Yet, the ACLU argued it would only record *openly*, giving notice to those being recorded.¹⁸⁶ Judge Posner viewed the typical recording device to be modernly a cell phone “hidden in plain view” and that the individual desiring not to be audio-recorded will need “to keep a sharp eye out for anyone nearby holding a cell phone, which in many settings is almost everyone.”¹⁸⁷ Moreover, the omnipresence of such recording equipment will enhance security issues for law-enforcement officers.¹⁸⁸ In fact, openness can be deceiving. How would one treat the above crime reporter who mimics use of a cell phone for a fake conversation while using a second cell phone in the recorder’s lap or hidden in a bag or purse to record the park-bench conversations, creating a deceptive implication he or she is otherwise preoccupied but all the while using that as a subterfuge for surreptitious recordation? Such openness typifies a type of creatively manipulative duplicity-in-plain-view. Hidden cameras, which many in the media defend as wholly legitimate, are already extensively used.¹⁸⁹

Judge Posner’s most eloquent criticism of the majority opinion went beyond the state’s interest in privacy of communications and effectiveness of law enforcement to First Amendment values and the majority’s determination that there were no such conversational privacy and free-expression concerns in these recordings in public places—that is, Judge Sykes’ statement “this case has nothing to do with private

areas of apartment complexes, that is, any place open-to-the public or where police officers may be required to go while performing their duties in public.

¹⁸⁵ *Id.* at 613 (Posner, J., dissenting).

¹⁸⁶ *See id.*

¹⁸⁷ *Id.* *See also* Alan Kato Ku, *Talk is Cheap, but a Picture Is Worth a Thousand Words: Privacy Rights in the Era of Camera Phone Technology*, 45 SANTA CLARA L. REV. 679, 691 n.106 (2005) (“Unlike cameras or video equipment, camera phones do not distinguish themselves to individuals who are being photographed. Thus, the presence of cell phones aimed at an individual would not raise the same concerns as if someone was pointing a camera in his or her direction.”).

¹⁸⁸ *Alvarez*, 679 F.3d at 613 (Posner, J. dissenting).

¹⁸⁹ *See* David A. Elder, Neville L. Johnson & Brian A. Rishwain, *Establishing Constitutional Malice for Defamation and Privacy/False Light Claims When Hidden Cameras And Deception Are Used By The Newsgatherer*, 22 LOY. L.A. ENT. L. REV. 327, 347–61 (2002).

conversations” and the First Amendment interests served thereby.¹⁹⁰ Judge Posner’s excoriating analysis—and defense of privacy-in-public, which he seems to extend alike to police and private parties—is worth quoting at length:

But private talk in public spaces is common, indeed ubiquitous, because most people spend a lot of their time in public places; because they rely on their anonymity and on the limited memory of others to minimize the risk of publication; because public places are (paradoxically) often more private than private places (imagine if detectives could meet with their informants only in police stations); and because eavesdropping on strangers is actually rather uncommon because it is so difficult in most cases to understand a conversation between strangers.¹⁹¹

Judge Posner rejected the majority’s conclusion that its rule did not affect confidential conversations with sources and speakers and that conversations about national and local security issues never occur in places where others can hear.¹⁹²

Honing in on the local-security concern, Judge Posner suggested that “the people who most need police assistance and who most want their conversations kept private are often the people least able to delay their conversations until they reach a private place”—victims of serious crimes, those severely injured in a vehicular collision, witnesses to such occurrences, and those who seek the assistance of law enforcement.¹⁹³ In such cases, what is the sense of informing them they can “trot off to the nearest police station for a cozy private conversation, but that otherwise the First Amendment gives passersby the right to memorialize and publish (on Facebook, on Twitter, on YouTube, on a blog) his agonized

¹⁹⁰ *Alvarez*, 679 F.3d at 613 (Posner, J., dissenting). Compare this with the views of one scholar on the chilling effect governmental surveillance causes amongst protestors: “Surveillance... imposes a chilling effect on both the target and on other putative speakers who censor themselves to avoid being surveilled... [O]f perhaps greater concern, is the impact of covert surveillance... [which] sends a message to those in law enforcement and other governmental and non-governmental agencies that protestors are dangerous and that activities should be monitored.” Jennifer M. Kinsley, *Black Speech Matters*, 59 U. LOUISVILLE L. REV. 1, 16 (2020). Apply the what’s-good-for-the-goose-is-good-for-the-gander rubric: Does this analysis not send a parallel message regarding targeted surveillance of police and “other putative speakers” as likewise “dangerous” and whose “activities should be monitored?”

¹⁹¹ *Alvarez*, 679 F.2d at 613–14 (Posner, J., dissenting).

¹⁹² *Id.* at 614.

¹⁹³ *Id.*

plea for help?”¹⁹⁴ For example, “many [informants] who police want to talk to do not want to be seen visiting police stations.”¹⁹⁵

In sum, in Judge Posner’s view:

Accuracy is a social value, and a recording of a conversation provides a more accurate record of the conversation than the recollection of the conversant: more accurate, and also more truthful, since a party to a conversation, including a police officer, may lie about what he heard or said. But on the other side of the balance are the inhibiting effect of nonconsensual recording of conversations on the number and candor of conversations, hence on the values the First Amendment protects: the baleful effects on privacy; the negative effects on law enforcement; and the litigation likely to be engendered by police officers’ shooing away intruders in their private conversations with citizens. *These are significant social costs, and the majority offers no basis in fact or history, in theory or practice, in constitutional text or judicial precedent, for weighing them less heavily than the social value of recorded eavesdropping.*¹⁹⁶

In the earliest case in the last decade, *Glik v. Cunniffe*, the plaintiff, concerned police were using excessive force during an arrest on fabled Boston Commons, used a cell phone camera from ten feet away to record several police officers effecting the arrest.¹⁹⁷ When a police officer approached him, plaintiff responded, “I saw you punch him.”¹⁹⁸ The officer arrested Glik for an unlawful audio recording, which the trial court later dismissed.¹⁹⁹ Limited to the qualified-privilege issue, the First Circuit found a violation of plaintiff’s clearly-established “undoubted right to gather news ‘from any source within the law,’” particularly as to police officers performing their duties in a public area such as Boston Commons, the perfect example of a public forum.²⁰⁰ Such a tranquil recording was not reasonably subject to restriction and was the exercise of “a basic, vital, and well-established liberty safe-guarded by the First

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* Much of the discussion of the security of the public or of police officers is perfunctory and conclusory. See Alderman, *supra* note 131, at 525 (“Surely passive recording of police activity, surreptitiously or openly, does not imperil public safety or the efficacy of the police function.”).

¹⁹⁶ *Alvarez*, 679 F.3d at 614 (emphasis added).

¹⁹⁷ See *Glik v. Cunniffe*, 655 F.3d 78, 79–80 (1st Cir. 2011).

¹⁹⁸ *Id.* at 80.

¹⁹⁹ See *id.*

²⁰⁰ See *id.* at 82–84 (internal citations omitted).

Amendment”—videotaping that commemorates without interfering with police work in public spaces.²⁰¹

It is worth ending this overview with a discussion of an issue not dealt with directly by any of the appellate decisions until 2020—whether the powerful, pro-privacy Massachusetts two-party consent statute, or another state’s equivalent, would survive attack as to secret recordings of police officers engaged in their official duties. An earlier Massachusetts decision upheld a criminal conviction of a party-recording made during a routine traffic stop in the leading case, *Commonwealth v. Hyde* in 2001, just two months before 9/11.²⁰² That same issue arose again in 2018 before a Massachusetts federal district court in *Martin v. Gross*.²⁰³ Relying heavily on the Seventh Circuit’s *Alvarez* decision, the district court found the Massachusetts statute construed in *Hyde* could not be constitutionally applied to secret recordings of law-enforcement officers and other governmental officials performing official duties in public spaces.²⁰⁴

²⁰¹ *Id.* at 83–85. The court relied in part on *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999), a Fourth Amendment case. This case focused almost exclusively on whether a police officer’s arrest of plaintiff for filming historic district commissioners and a private citizen in a public hallway after being told to stop constituted disorderly conduct under the Massachusetts statute. *Id.* at 17–18, 21–22. The court vaguely alluded to plaintiff’s filming as “done in the exercise of his First Amendment rights” in a place where “he had the right to be.” *Id.* at 25. This was clearly dicta, as the court’s focus was on the lack of any disorderly-conduct violation as defined by statute. *Id.* at 25.

²⁰² See *Commonwealth v. Hyde*, 750 N.E.2d 963, 969 (Mass. 2001) (rejecting the argument police “should be singled out for particular approbation to safeguard the integrity of the ‘Republic.’”). Judge Greaney expanded on this rationale in his majority opinion: “Followed to its logical conclusion, the dissent would encourage drug manufacturers to mount hidden video cameras in their facilities so they can capture the moment of truth when the police execute a search warrant and would authorize drug dealers secretly to tape record conversations with suspected undercover officers or informants in order to protect the dealers’ rights against hypothetical police abuse. Numerous other examples exist. The point is an obvious one. Every police encounter would be available for secret recording, even meter maids wouldn’t be spared. The value of obtaining probative evidence of occasional official misconduct does not justify a failure to enforce the clear terms of the statute.” *Id.*

²⁰³ See *Martin v. Gross*, 340 F. Supp.3d 87, 109 (D. Mass. 2018). In a footnote in *Kelly v. Borough of Carlisle*, 622 F.3d 248, 259 n.7 (3d Cir. 2010), the Third Circuit noted, on summary judgment, a factual dispute as to whether the camera, which was in Kelly’s lap at the time of audio-recording, was “hidden,” rather than in “plain view.” *Id.* The court added important dicta: “... [I]t is unclear why the ‘surreptitious’ nature of the videotaping would be significant to whether the videotaping implicates the existence of a First Amendment right or its clearly established nature. The Defendants have not cited any cases making such a distinction, and we fail to see how the covert nature of a recording would affect its First Amendment value, which will most often be realized upon the recording’s dissemination.” See *id.* This reference to First Amendment dissemination is totally misplaced under *Cohen-Bartnicki*’s wrongful-versus-lawful-acquisition dichotomy.

²⁰⁴ See *Martin*, 340 F. Supp.3d at 97–98, 107.

The court noted and accepted plaintiffs’ argument that an overtness or other notice requirement would allow officers to respond properly and allow them to modify inappropriate conduct, which would interfere with plaintiffs’ monitoring of government functions.²⁰⁵ In its analysis, the court focused more on the modifying of bad police behavior rather than deterring it.²⁰⁶ Citing the broad right-to-record First Amendment rationales of *Glik* and *Alvarez*, the district court appeared unconcerned by incursions on the privacy of such government officials, relying—strangely—on a broad assumed-risk analysis from defamation precedent.²⁰⁷

The *Martin* court was also unconcerned by the hypotheticals posed by defendant as to how recording law-enforcement officers’ conversations with informants and victims might endanger the privacy and safety of the latter.²⁰⁸ The court cryptically suggested that the officers in question could order the recorder to terminate the recording—without analyzing how the officer could or would know to do so since the recording was secret.²⁰⁹ Alternatively, the police officer could preemptively conduct the discussion at a safe distance from bystanders or in a non-public setting.²¹⁰ The court did not discuss how the latter would work in practice, nor the feasibility of such action under myriad circumstances, the delays such action might cause, the additional personnel needed to implement such action and the cost thereof, the interference with and delays of police investigations that might or likely would result therefrom, including the enhanced suspicions of observers—whether at the scene or who view them on social media—directed at relocated sources, and so on. Applying intermediate-level scrutiny, the court

²⁰⁵ See *id.* at 106–07 (noting “the same basic interest applies generally to government officials”).

²⁰⁶ See *id.* at 106.

²⁰⁷ See *id.* at 107 (“An individual who decides to seek government office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society’s interest in the officers of government is not strictly limited to the formal discharge of official duties.” (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974))). Scholars are increasingly attacking the assumed-risk justification for the public-versus-private-person dichotomy in the Court’s defamation jurisprudence. See Elder, *Rehnquist’s Attempts*, *supra* note 109, at 159.

²⁰⁸ See *Martin*, 340 F. Supp.3d at 107–08.

²⁰⁹ See *id.*

²¹⁰ See *id.* at 107.

ultimately invalidated the Massachusetts statute as not meeting the narrow-tailoring requirement.²¹¹

The *Martin* court did not resolve the difficult issue of what the right-to-record-in-a-public-space doctrine encompassed.²¹² Clearly, the right extended to traditional public fora—highways, parks, sidewalks. The concept might be more expansive.²¹³ The *Martin* court did not resolve whether “public space” included a restaurant-open-to-the-public with the recorder standing outside the building on a sidewalk.²¹⁴ The court did note that no First Amendment protection extended onto private premises.²¹⁵ Nor did the *Martin* court resolve which officers might be encompassed within the group of “government officials” performing their duties in “public space,” while noting that defamation precedent defining the concept of “public official” might provide some direction.²¹⁶ One co-plaintiff, Project Veritas Action, was keenly interested in certain aspects of Harvard University policies²¹⁷ and was willing apparently to engage in use of highly sophisticated technology and undercover operations to acquire footage discussing Harvard policies.²¹⁸

²¹¹ *Id.* at 93, 106–07.

²¹² *Id.* at 108.

²¹³ *Id.* at 108–09.

²¹⁴ *Martin*, 340 F. Supp.3d at 108–09.

²¹⁵ *Id.* at 108. Pictures taken from a public sidewalk or other place where defendants have a right to be present may be protected under the common law. *See* ELDER, *PRIVACY TORTS*, *supra* note 147, § 2:7.

²¹⁶ *Martin*, 340 F. Supp.3d at 108–09.

²¹⁷ *Id.* at 95 (describing Project Veritas Action’s interest in studying Harvard University’s use of federal funds and endowment).

²¹⁸ *Id.* (“[A Project Veritas Action (PVA) reporter] develops a ‘cover story’ designed to develop trust with the source. The ‘cover story’ is ‘rarely’ true, but PVA enhances its verisimilitude by, for instance, creating fake e-mail or social media accounts, printing false business cards, or creating a new business entity. Often the ‘conversation’ involves volunteering or interning at a target’s office or donating to it. In other cases, PVA reporters use flattery, sex appeal, or romantic overtures to appeal to target sources. PVA reporters use ‘sophisticated’ recording equipment, including necktie cameras, purse cameras, eyeglass cameras, and cameras whose lenses are small enough to fit into a button or rhinestone. They have made recordings during campaign staff meetings, within a target’s offices, and while meeting with representatives of a targeted organization. They have also recorded pretextual ‘dates’ with targeted individuals and conversations at bars . . .”). Project Veritas has been involved in some ground-breaking litigation that builds on the “growing consensus” rules. *See* *Project Veritas v. Schmidt*, 72 F.4th 1043, 1052–53 (9th Cir. 2023). The court invalidated Oregon’s required-notice-prior-to-recording statute because it included two provisions that made non-neutral content-based distinctions. *Id.* at 1054–58. One was an exception incorporating the “growing consensus” doctrine but which was limited to law-enforcement officers. *See id.* at 1054–57; *infra* note 297. Although the majority limited its holding to public settings, Judge Christen in dissent criticized this as ignoring Project Veritas’s averment that it would do most of its recording

Would a secret recording of a high-ranking university administrator-spokesperson—arguably a public figure for defamation purposes—be covered by the First Amendment privilege while in a traditional public forum or while walking between Harvard buildings on campus in areas open-to-the-public but outside the traditional public-forum doctrine?²¹⁹ What of a recording of a Harvard student complaining about or supporting Harvard policy about matters of legitimate public interest or concern, for example, the Supreme Court case finding unlawful discrimination against Asian-American applicants?²²⁰ Apparently, the *Martin* court would not include the recorded-student scenario as within the First Amendment information-gathering privilege.²²¹ The district court provided almost no guidance on how to resolve the host of issues raised by its opinion other than to conclude that government officials have extremely limited privacy-in-public.²²²

The First Circuit affirmed the core holding of *Martin* in the companion case, *Project Veritas Action Fund v. Rollins*.²²³ The panel opinion by Judge David J. Barron, former Justice David H. Souter, and Judge Bruce M. Selya emphasized that the Massachusetts all-party consent statute—passed as a strong anti-racketeering measure—did not, unlike those in other states, have a reasonable-expectation-of-privacy-limitation.²²⁴ Consequently, the statute’s “categorical and sweeping nature” raised important First Amendment questions, as the statute

makes it as much a crime for a civic-minded observer to record from a safe distance what is said during a police officer’s mistreatment of a civilian in a city park as it is for a revenge-seeker to hide a tape recorder under a table at a private home to capture a conversation with an ex-spouse.²²⁵

in public places, without identifying the other locations in which it contemplated recording. *Id.* at 1071, 1076 (Christen, J., dissenting).

²¹⁹ See DAVID A. ELDER, *DEFAMATION: A LAWYER’S GUIDE*, § 5:16 (rev. ed. 2023).

²²⁰ *Students for Fair Admissions v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023).

²²¹ See *Martin*, 340 F. Supp. 3d at 96, 104 n.5.

²²² See *id.* at 107 (Any privacy interest of police officers or government officials was outweighed by the First Amendment interest in newsgathering and dissemination of information.).

²²³ See *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 817, 844 (1st Cir. 2020). Per routine, media and civil-rights organizations filed amicus curiae briefs. *Id.* at 816.

²²⁴ See *id.* at 817–19. The issue of reasonable expectation of privacy is the proverbial can of worms, as it is often circular and hard to define. See also Elder, *Recordings II*, *supra* note 5.

²²⁵ *Id.* at 817.

Later, the court concluded that the state “may not deploy the blunderbuss prohibitory approach” of the statute “to protect civilians in the core set of situations where their privacy interests may be heightened.”²²⁶ The First Circuit all but conceded that the statute is a generally applicable law and content neutral.²²⁷

Judge Barron noted that the Supreme Court has not decided a recording-police-in-public case—whether by openly or secretly—that prior appellate cases involved non-secret recording scenarios, that several cases had applied qualified privilege—that the right-to-record was not clearly established—and that no appellate court had denied such a right.²²⁸ The First Circuit also noted that the issue of applying a below-intermediate-level-of-scrutiny had been raised below by defendants but had not been briefed in detail and was not considered by the court in *Martin*.²²⁹ Judge Barron also footnoted the district attorney’s observation that the all-party wiretap statute “might alternatively be analyzed as a regulation of conduct that imposes a mere incidental burden on expression.”²³⁰ The First Circuit treated this pivotal issue as waived, as it had not been adequately developed.²³¹

Interestingly and amazingly omitted from the opinion was any reference to *Cohen v. Cowles Media Co.*, the Court’s leading newsgathering-misconduct-no-First-Amendment-protection case which, if followed, would have eliminated any need for the court’s evisceration of the district attorney’s arguments based on the statute’s failure to be narrowly tailored under the intermediate-level-of-scrutiny standard.²³² Instead, Judge Barron parroted the famous, “amorphous” dicta in the plurality opinion *Branzburg v. Hayes*,²³³ but without acknowledging its status as such or the important qualifications thereon:

²²⁶ *Id.* at 839.

²²⁷ *Id.* at 834–37.

²²⁸ *Id.* at 832, 835.

²²⁹ Project Veritas Action Fund v. Rollins, 982 F.3d 813, 821 (1st Cir. 2020).

²³⁰ *Id.* at 840 n.4.

²³¹ *Id.*

²³² *Id.* at 836–40. *Cohen* is generally treated as applying lowest-tier First Amendment review. See also *supra* text accompanying notes 11–27, 44, 143–44, 229–31, and *infra* notes 285–94, 308–16, 428; Elder, *Recordings II*, *supra* note 5.

²³³ Project Veritas Action Fund, 982 F.3d at 827, 831.

“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”²³⁴

The First Circuit did make several references to *Bartnicki v. Vopper*²³⁵—the first appellate court to provide more than a terse reference to *Bartnicki*. It cited *Bartnicki* as support for the district court’s conclusion that the Massachusetts statute was a content-neutral law of general applicability, in that it barred secret recordings without considering the subject matter or ideas recorded.²³⁶ The court cited *Bartnicki* for the unquestioned proposition that Massachusetts had an important government interest in protecting individual privacy.²³⁷ Following its decision in *Glik*, however, it concluded that police officers acting officially in public are expected to bear substantial burdens emanating from citizens’ exercise of First Amendment freedoms.²³⁸ It also discussed *Bartnicki* briefly in the context of wiretapping of other private citizens in the vicinity of the officer recorded—ensnared collateral victims—and the argument by the district attorney that wiretapping such citizens without notice made them unwilling captives.²³⁹ All are examples of unwilling and unwitting information-providers, a powerful thrust of *Bartnicki* endorsed by every member of the Court.²⁴⁰

²³⁴ *Id.* at 831 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (dicta)). These amorphous dicta from a plurality opinion were strictly circumscribed by its “by means within the law” and other qualifications. See *Branzburg*, 408 U.S. at 681–82; see also *infra* note 249. It was also qualified by examples of newsgathering methods not protected. *Branzburg*, 408 U.S. at 682–86.

²³⁵ See *Project Veritas Action Fund*, 982 F.3d at 834, 838–39 (citing *Bartnicki v. Vopper*, 532 U.S. 514 (2001)).

²³⁶ *Project Veritas Action Fund*, 982 F.3d at 834. The District Court relied on the opinion by Justice Stevens. See *Bartnicki*, 532 U.S. at 526.

²³⁷ *Project Veritas Action Fund*, 982 F.3d at 838. Actually, the entire *Court* gave it “highest-order” status. See *infra* note 362.

²³⁸ See *Project Veritas Action Fund*, 982 F.3d at 838 (quoting *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011)). The court noted that, “even if there might be circumstances” where police officers working in public might have a privacy interest that secret recordings might threaten, “a total ban... is too unqualified to be justified in the name of protecting that degree of privacy.” *Id.* Neither *Glik* nor *Gericke* “explicitly or implicitly” held that publicly accessible private property was encompassed within the scope of the “public spaces” under the right to record-police-in-public cases. *Id.* at 827.

²³⁹ See *Project Veritas Action Fund*, 982 F.3d at 838.

²⁴⁰ See *Bartnicki*, 532 U.S. at 532–34 (detailing cases and quoting from *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985) (holding media not immune from copyright violations under the First Amendment), about the First Amendment right “not to speak publicly”); *id.* at 536 (Breyer, J., concurring) (“[Both statutes] ensure the privacy of telephone conversations much as a trespass statute ensures privacy within the home . . . [and] help [us] to overcome our natural reluctance to discuss private matters when we fear that our private conversations may become public . . . [and] consequently encourage conversations that otherwise

The First Circuit cryptically treated the “captive-audience line of authority” as only involving the government interest in protecting individuals from subjection to speech they wish to evade—not a concern in the case before it.²⁴¹ In addition, the court stated that the private citizens recorded were “in public spaces . . . within earshot of police officers and choose to speak.”²⁴² In such cases, a blanket ban on secret recordings did not involve “substantial privacy interests . . . being invaded in an essentially intolerable manner.”²⁴³ Nor did the First Circuit find *Barnicki* persuasive, as the circumstances of the recorded telephone conversation in *Barnicki* were unlike those at issue before the court that apply only to much more public surroundings, so the differences between the two scenarios were “too great to make the analogy a persuasive one.”²⁴⁴

In other words, private citizens who voluntarily talk with police in the presence or “earshot” of recording third parties have no substantial privacy interest worth protecting—at least in the recording-police-in-public-collateral-private-victim scenario.²⁴⁵ Ultimately, the First Circuit conceded, as it must, that “[t]he privacy that we enjoy, even in public,

might not take place”); *id.* at 542–43 (“[T]he Court’s decision diminishes, rather than enhances, the purposes of the First Amendment, thereby chilling the speech of millions of Americans who rely upon electronic technology to communicate each day . . . [they were] inseparably bound up with the desire that personal conversations be frank and uninhibited, not cramped by fears of clandestine surveillance and purposeful disclosure.”); *id.* at 553–54 (Rehnquist, C.J., dissenting) (quoting from *Harper & Row Publishers, Inc.*, and concluding the First Amendment “should not protect involuntary broadcast of personal conversations”).

²⁴¹ *Project Veritas Action Fund*, 982 F.3d at 838–39. A distinction between the right of government to protect speakers from suffering unwanted speech under the First Amendment but denying government the equivalent, parallel right to protect speakers from becoming unwilling and unwitting information providers is difficult to justify under *Barnicki* and the Court’s jurisprudence generally. Judge Christen characterized this action of nonconsensual recording as “one speaker’s appropriation of another person’s speech.” *Project Veritas v. Schmidt*, 72 F.4th 1043, 1079 (9th Cir. 2023) (Christen, J., dissenting).

²⁴² *Project Veritas Action Fund*, 982 F.3d at 839 (“[A]s a general matter, an individual’s privacy interests are hardly at their zenith in speaking audibly in a public space within earshot of a police officer.”). The court suggests a type of assumed-risk rationale inconsistent with the Court’s modern Fourth Amendment jurisprudence. *See infra* text accompanying notes 246–48; Elder, *Recordings II*, *supra* note 5. Surely, the court is not suggesting a lower standard for waiver of, forfeiture of, or assumed risk of loss of First Amendment rights than those under the Fourth. Or is it?

²⁴³ *Id.* (quoting *Cohen v. California*, 403 U.S. 15, 21 (1972)). The rhetoric invoked here reflects the worst of judicial elitism by assuming the right to determine *what matters* to those who interact with police, often involuntarily.

²⁴⁴ *Project Veritas Action Fund*, 982 F.3d at 839.

²⁴⁵ *Id.* at 839.

is too important to be taken for granted.”²⁴⁶ The court tersely cited the Supreme Court’s recent jurisprudence in *Carpenter v. U.S.*, finding a privacy interest in cell phone metadata—which itself cited Justices Alito’s and Sotomayor’s opinions in *United States v. Jones*—involving police use of a GPS tracking device violated Jones’s privacy.²⁴⁷ Importantly, these two Supreme Court opinions strongly questioned assumption of risk or forfeiture of privacy for merely being in a public area, and required government to have a warrant because the Orwellian implications of such government conduct violated the Fourth Amendment through surreptitious and anonymous data-gathering.²⁴⁸

Surprisingly, this reasoning was basically ignored by the First Circuit, which allows citizen-recorders, individually and collectively, to record conversations secretly, publish them widely and even on the Internet, finding any such ban thereon to violate the First Amendment. The reason for this discrepancy: The First Circuit found another right “too important to be taken for granted . . . the role that laypersons can play in informing the public about the way public officials, and law enforcement in particular, carry out their official duties.”²⁴⁹ This role must be met by a First Amendment-based right to secretly record under *Glik*:

[A]s recent events around the nation vividly demonstrate, such undetected recording can itself serve “a cardinal First Amendment interest in protecting and promoting ‘the free discussion of government affairs,’” and “not only aids in the uncovering of abuses . . . but may also have a salutary effect on the functions of government more generally.”²⁵⁰

²⁴⁶ *Id.* at 844.

²⁴⁷ *Id.* (citing *Carpenter v. United States*, 138 S. Ct. 2206, 2217–18 (2018) (citing *United States v. Jones*, 565 U.S. 400 (2012))).

²⁴⁸ See *infra* text accompanying notes 318; see also Elder, *Recordings II*, *supra* note 5.

²⁴⁹ *Project Veritas Action Fund*, 982 F.3d at 844.

²⁵⁰ *Id.* at 832. This court—like others analyzed herein—appears to accept the narrative that “essentially boils down to an assertion that the United States can aptly be described as an oppressive carceral state that has expelled justice from every corner and crevice of the law enforcement apparatus”—which “mirrors those advanced by left-of-center public intellectuals in the latter half of the twentieth century.” See MANGUAL, *supra* note 27, at 4, 9. This narrative is by no means generally accepted. Indeed, Mangual savages the argument that systemic racism can be based on disparate results: “The fact is that there is no such thing as incidental racism. And if racial disparities within a particular system are not the result of racial animus, critics of that system shouldn’t be allowed to get away with implying that they are.” *Id.* at 156. When focus is shifted to high-crime-rate areas and demographic factors, “frequently generat[ed] findings” indicate that racial bias is substantially reduced or eliminated. *Id.* at 158. Mangual concludes “there isn’t a good

The First Circuit found that *Glik*, *Gericke*, and *Branzburg* collectively stand for the proposition that “the First Amendment limits the government regulation of information collection.”²⁵¹ Of course, the *Branzburg* plurality dicta expressly cited wiretapping of private conversations as an illustration of conduct unprotected by the First Amendment—a powerful exemplar the First Circuit does not discuss.²⁵² *Branzburg* also emphasized, among its other qualifications, that all citizens must operate within the law, not outside it.²⁵³ But, the First Circuit

explanation for why a system allegedly rigged against and operated to the detriment of Black and brown Americans would *benefit* Black and brown Americans almost exclusively when the system attains the goals set by those at the helm.” *Id.* at 169. He demonstrates empirically that “the frequency of police use of force is fantastically overstated” and “mountain[s] of evidence” rebut “the misconception that the statistical overrepresentation of Black and brown men in the data on stops and frisks, arrests, uses of force, and incarceration constitutes clear evidence of racism that is built into the system and animates police, prosecutors, judges, and the like.” *Id.* at 175. The risk of death for Black men “at the hand of police is far lower than their risk of being killed by gun violence, generally” and “far lower” than from traffic accidents. *See id.* at 186. He summarizes his findings: “In reality, police very rarely use force; and when they do, it very rarely results in serious injury.” MANGUAL, *supra* note 27, at 186. Indeed, “on the whole, police use of force is extremely rare” and “[r]arer still are uses of force that are injurious and unwarranted.” *Id.* at 200. Mangual argues that these persistent misperceptions have “real consequences” “for the population the most vociferous police critics purport to represent,” citing as an example how Blacks were “significantly less likely to call 911 after a controversial use of force went viral” due, in part, to “legal cynicism” that undermines public safety. *Id.* at 201. Mangual ends with a challenge: “[T]he idea that our criminal justice system is fairly characterized as one that regularly brutalizes disfavored groups via overly draconian sentences and unjustifiably violent policing is nothing short of defamatory . . . [T]he best way to restore the respect that this group acknowledges has been lost is to fight innuendo with empiricism, obfuscation with analysis, lies with truth.” *Id.* at 204. Maybe courts should proceed on the same premises. Have the appellate courts’ decisions, both before and after the death of George Floyd, been a contributing factor in the early retirements among police, lowering of standards for hiring police, and the concomitant “deprofessionalization of policing[, which] is a danger to public safety,” by “demoralizing veteran officers and turning off high quality candidates?” *See* Jason Johnson, Opinion, ‘Defund the Police’ Led to Lower Standards, WALL ST. J. (Feb. 22, 2023), <https://www.wsj.com/articles/defund-the-police-led-to-lower-standards-nypd-applications-memphis-tyre-nichols-george-floyd-eb606cef>.

²⁵¹ *Project Veritas Action Fund*, 982 F.3d at 831.

²⁵² *Branzburg v. Hayes*, 408 U.S. 665, 691–92 (1972).

²⁵³ *Id.* In *Branzburg*, the Court upheld governments’ right to compel reporters to comply with grand jury subpoenas and to testify in criminal cases regarding confidential sources. *Id.* at 681–82. The Court’s plurality opinion included amorphous dicta: “Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.” *Id.* at 681. The opinion strongly limited those dicta. Newsgatherers “remain free to seek news from any sources by means within the law.” *Id.* at 681–82. Indeed, “[i]t would be frivolous to assert . . . that the First Amendment, in the interest of securing news of otherwise, confers a license on either the reporter or his source to violate valid criminal laws.” *Id.* at 691. Neither reporter nor source would be immune from “stealing private documents or private wiretapping [that] would provide newsworthy information . . . whatever the

concluded that protection of secret recording-wiretapping is mandated by the First Amendment—a wallaby leap beyond *Glik-Gericke*, which involved only open-with-presumed-actual-notice recordings.²⁵⁴ The latter duet “described the scope of recording activity that triggers First Amendment protection as a type of newsgathering capaciously”; this expansive formulation did not exempt secret recordings therefrom but instead supplied broad authority for such.²⁵⁵

In support of secret recording, the First Circuit cited the *Hyde* dissent’s reference to George Holliday’s filming of the savaging of Rodney King by the Los Angeles police in 1991 and the “recent events” discussed above—apparently a reference to the killing of George Floyd and ensuing developments locally and nationally—with the Holliday video viewed as “unlikely” to have qualified as open-with-presumed-actual-notice.²⁵⁶ The court accepted the views of the *Martin*

impact on the flow of news.” *Id.* The First Amendment does not authorize either to invade “the rights of other citizens through reprehensible conduct forbidden to all persons.” *Id.* at 692. At least seven Justices later reaffirmed that newsgathering under *Branzburg* is limited to “means within the law.” *Houchins v. KQED, Inc.*, 438 U.S. 1, 10–11 (1978). Scholars generally agree the *Branzburg* dicta quoted is of little constitutional value. *See, e.g.*, Chermerinsky, *Protecting the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143, 1144–45 (2000) (describing *Branzburg* as “empty rhetoric,” conceding the Court’s jurisprudence is to the contrary, and proposing an intermediate standard of review that would reverse *Cohen v. Cowles Media Co.*); Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONSL. & PUB. POL’Y 113, 183–85 (2000) (characterizing *Branzburg*’s comments as “just platitudinous dicta” but suggesting the Court might intervene in a case involving a statute prohibiting videotaping of interviews in public spaces); Bhagwat, *supra* note 27, at 1052 n.132 (conceding the Court’s exclusive recognition of a “narrow right” of access to judicial proceedings and that it had “flatly rejected” a First Amendment right to gather information); *see also infra* notes 349 (discussing *Sanders v. ABC*, 978 P.2d 67 (Cal. 1999)). The Court has been “particularly reluctant to embrace constitutionally based newsgathering rights.” Mary-Rose Papandrea, *Protecting the Role of the Press During Times of Crisis*, 61 WM. & MARY L. REV. 1159, 1181–85 (2020). Indeed, the Court’s decisions indicate there is “no right of access at all to government information” and recognition is only provided to criminal judicial proceedings—with the collective meaning that “the press has no right to gather information necessary for an informed public debate.” *Id.*

²⁵⁴ *Project Veritas Action Fund*, 982 F.3d at 832.

²⁵⁵ *Id.* The court’s reference to a “capacious” First Amendment newsgathering right is far afield from objective reality.

²⁵⁶ *Project Veritas Action Fund*, 982 F.3d at 819–20, 832. Compare Justice Greaney’s critique of the “emotional rhetoric” of relying on the Rodney King episode instead of an honest, frank interpretation of the Massachusetts statute, which differed from the California statute, with its limitation for “communications . . . in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.” *Hyde v. Commonwealth*, 750 N.E.2d 963, 970–71 (Mass. 2001) (internal citation omitted). Compare this with the progressive narrative promoted by the U.S. Department of Justice: “The logic of these

Plaintiffs—described as Boston civil rights activists²⁵⁷—that recording “can sometimes be a better tool” for such police-in-public-information-gathering.²⁵⁸ The court provided two reasons: “recording from a distance . . . out of plain sight” of the victim “will often be the least likely to disrupt the police in carrying out their functions,” and such recording without the recorded officer’s actual knowledge, even if recorded nearby, “may best ensure that it occurs at all,” given the allegations of the *Martin* Plaintiffs “about the resistance from official quarters that open recording sometimes generates.”²⁵⁹

So, the First Circuit bought into the unproved allegations in the record by civil-rights activists and concluded that such recordings “*can* constitute newsgathering every bit as much as a credentialed reporter’s after-the-fact efforts to ascertain what had transpired.”²⁶⁰ Of course, the former allegations-rather-than-evidence are dramatically different from the latter “paradigmatically ‘routine’”²⁶¹ lawful newsgathering conduct, which, by definition, does *not* involve a violation of a generally applicable state criminal statute according the wiretap victim a civil remedy.²⁶²

[federal appellate] cases has been powerfully reaffirmed in recent years as bystander and journalist recordings of police misconduct have helped to shape national debate over law-enforcement policy.” United States As Amicus Curiae in *Irizarry v. Yehia*, *supra* note 107, at 12.

²⁵⁷ *Project Veritas Action Fund*, 982 F.3d at 820 (“...who have regularly and openly recorded audio of police officers without their consent as they discharge their official duties in public”). The named co-plaintiff is “a national media organization dedicated to uncover investigative journalism.” *Id.* at 817; *see also supra* note 218 (providing how the co-plaintiff describes itself). This description appears to be an admission-against-interest of Project Veritas Action Fund’s willingness to engage in all manner of crimes, torts, and other wrongful acts to achieve its newsgathering aims—a description consistent with its very checked history. *See Democracy Partners, LLC v. Project Veritas Action Fund*, No. CV 17-1047, 2022 WL 3334689, *2–3 (D.D.C. Aug. 12, 2022) (allowing claims for fraudulent misrepresentations and breaches of fiduciary duty by defendant’s agent to proceed); Jonathan Stempel, *Project Veritas loses jury verdict to Democratic consulting firm*, REUTERS, Sept. 23, 2022, <https://www.reuters.com/legal/project-loses-jury-verdict-democratic-consulting-firm-2022-09/23> (noting the \$120,00 jury award for fraudulent misrepresentations, with the judge to assess other damages based on a jury finding of defendant’s operative’s breach of a duty of loyalty).

²⁵⁸ *Project Veritas Action Fund*, 982 F.3d at 832–33.

²⁵⁹ *Id.* at 833.

²⁶⁰ *Id.* (emphasis added). Note the qualified and contingent nature of plaintiffs’ allegations. Is it the proper function of courts to make policy-based, quasi-legislative determinations invalidating a federal or state statute based on such, particularly where the legislature has presumably made factual findings underpinning the proscription of the specific conduct in question?

²⁶¹ *Florida Star v. B.J.F.*, 491 U.S. 524, 538 (1989) (internal citation omitted).

²⁶² MASS. GEN. LAWS ANN. ch. 272, § 99(Q) (West 2023). The statute was aimed at “increasing activities of organized crime [that] constitute a grave danger to the public welfare and safety.” *Id.* § 99(A).

Moreover, violation of a clearly-established-right-to-record-police-in-public-openly-covertly-in-plain-sight-with-presumed-actual-notice would already provide the non-secret recorders a Sec. 1983 claim *if* the “growing consensus” rule is sustained.

The First Circuit affirmed the self-evident—that governments are “under no obligation to permit a type of newsgathering that would interfere with a police officer’s ability to do their job.”²⁶³ A statute must be narrowly tailored under the intermediate-level-of-review standard, however, to effectuate the state’s non-disruption interest.²⁶⁴ The court noted that both *Glik* and *Gericke* found that mere open-with-presumed-actual-notice recording did not “so severely disrupt officers” as to justify the prohibition unless all recorded persons consented to the prohibition, and that disruption would not be measured by the officer’s own perception of what constitutes disruption.²⁶⁵

In secret-recording scenarios, by definition, the officer would not be on notice. Yet, “insofar as the mere prospect of being recorded leads the officer to feel the need to refrain from uttering words or engaging in action that would constitute misconduct, it hardly interferes with their official duties.”²⁶⁶ Nor did the record demonstrate that “heightened consciousness” of being recorded without actual notice thereof “would appreciably alter their ability to protect the public either in gross or at the retail level of more individualized interactions.”²⁶⁷ The absence of any court reference to or recognition of the officer’s privacy interest, the officer’s interest in professional reputation, and the officer’s personal safety literally leaps off the page.

The First Circuit rejected Judge Posner’s dissenting analysis in *Alvarez* regarding informants,²⁶⁸ presumed that police officers “are already careful when engaged in such sensitive conversations” within the

²⁶³ *Project Veritas Action Fund*, 982 F.3d at 836.

²⁶⁴ *Id.* at 835–36.

²⁶⁵ *Id.* at 836.

²⁶⁶ *Id.* This reflects an extraordinarily circumscribed focus in assessing the debilitating impact on an officer’s decision-making process, which likely includes a substantial quantum of conduct and speech that may well be considered “misconduct” under prevailing social norms but is nonetheless protected by the First Amendment.

²⁶⁷ *Id.* at 836. As indicated herein, there is almost invariably a gross disparity of legal resources on the privacy side of the ledger. This will often, as in this case, leave the arguments favoring privacy, reputation, free expression, public security, and the impact on law-enforcement effectiveness and morale inadequately developed. *See supra* notes 28, 69, 92, 223, 261.

²⁶⁸ *See supra* text accompanying notes 163–68.

hearing of others,²⁶⁹ and concluded that the record provided no details as to how any such enhanced caution might disrupt law-enforcement practices in any significant way in the array of circumstances in which third parties secretly tape police.²⁷⁰ Accordingly, the blanket ban in the Massachusetts statute was not narrowly tailored but broadly proscribed secret recording in the face of the counter circumstances in which recording may play a decisive role in informing the public about how the police are behaving, whether by proving their heroism, refuting claims of police misconduct, or making easy the public's ability to hold them liable for their misconduct.²⁷¹

Toward the end of his opinion, Judge Barron noted that the court need not analyze the "viable alternative channels" aspect of intermediate scrutiny—but then proceeded to do so.²⁷² It was unpersuaded by the district attorney's argument that open-overt-in-plain-sight-with-presumed-actual-notice recording under *Glik-Gericke* was a sufficient alternative and quoted the *Alvarez* majority about how both audio and audiovisual "are uniquely reliable and powerful methods of disseminating news and information"²⁷³ and how the unquestioned record reflected the *Martin* Plaintiffs' "concern that open recording puts them at risk of physical harm and retaliation and thereby undermines its capacity to serve as an adequate alternative means of newsgathering" if secret recordings were barred.²⁷⁴

²⁶⁹ *Project Veritas Action Fund*, 982 F.3d at 837.

²⁷⁰ See *id.* The court did "envision circumstances where an individual with (or in the vicinity of) police might have a particularly legitimate reason to wish to have notice that her comments are being recorded." *Id.* at 839 (referencing rape victims, minors who are sex-crime victims, and causing "unnecessary embarrassment" to victims). Notice may assist "such private individuals avoid embarrassment of their unfiltered comments or help prevent their statements from being taken out of context." *Id.* But the statute's "blunderbuss prohibitory approach" could not be used "to protect civilians in the core set of situations where their privacy interests may be heightened." *Id.* Any attempt to protect a substantial class of such deserving persons would undoubtedly be attacked as not content-neutral and over- and under-inclusive in some or many respects. See, e.g., the Arizona statute discussed *infra* in text accompanying notes 419-26 and the Texas drone-statute litigation discussed in Elder, *Recordings II*, *supra* note 5.

²⁷¹ See *Project Veritas Action Fund*, 982 F.3d at 837. The court's first two listed items—heroism and demonstrating police innocence—would surely be viewed with cynical skepticism, if not utter disbelief, derision, and disdain in most police circles.

²⁷² *Id.* at 840.

²⁷³ See *id.* at 840 (internal citations omitted) (dicta).

²⁷⁴ *Id.* (dicta). It's difficult to imagine a broader, anti-police stereotype, which the court accepted as unchallenged.

In the last part of its opinion the First Circuit reversed two aspects of the district court on ripeness-case-and-controversy grounds. The first dealt with a First Amendment attack on the statute as to secret recording of any person lacking a reasonable expectation of privacy—that is, where “the parties to the communication may reasonably expect the communication may not be overheard or recorded.”²⁷⁵ The second dealt with the disconnect between the *Martin* Plaintiffs’ assertions and their actual intent in investigating government “officials and civil servants,” a class that “covers everyone from an elected official to a public school teacher to a city park maintenance worker.”²⁷⁶ The court vacated without prejudice the district court’s ruling barring the statute’s application to a person’s recording of “any government official discharging official duties in public places.”²⁷⁷ In a fascinating footnote, the First Circuit stated it would not address “the possible bounds of the right to secretly record, such as whether it includes recording via deceptive tactics that would affirmatively mislead officers into incorrectly thinking they are not being recorded.”²⁷⁸ The Supreme Court denied a writ of certiorari in late 2021.²⁷⁹

So, where does this leave the secret-recording issue? According to the First Circuit, the right to secretly audiotape “constitutes a type of newsgathering that falls within the scope of the First Amendment,” in addition to audiotaping that is open-with-presumed-actual-notice.²⁸⁰ At this point, however, the right is limited to targeting police officers in public—extension of the secret recording to a broad range of loosely defined other “‘government officials’ discharging official duties in public spaces” remains for another day, as does the specter of affirmatively deceptive tactics to secretly record.²⁸¹ But the court also left for another

²⁷⁵ *Id.* at 842–43.

²⁷⁶ *Id.* at 843.

²⁷⁷ See *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 817, 843–44 (1st Cir. 2020). Compare this to the important dicta the Court issued in *Hutchison v. Proximire*, 443 U.S. 111, 119, n.8 (1979) (“The Court has not provided precise boundaries to the category of ‘public official’; it cannot be thought to include all public employees, however.”). See *infra* notes 281, 296–302.

²⁷⁸ *Id.* at 833 n.2. Note that common synonyms to “secret” include “clandestine, covert, furtive, stealthy, surreptitious, and underhanded.” See *Secret*, Merriam-Webster, <https://www.merriam-webster.com/thesaurus/secret> (last visited Jan. 15, 2024). “Secret” already connotes an element of deceitful or duplicitous conduct. These adjectives add nothing substantial.

²⁷⁹ *Project Veritas Action Fund v. Rollins*, 142 S. Ct. 560, 211 L. Ed. 360 (2021) (mem.) (denying certiorari).

²⁸⁰ *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 833 (1st Cir. 2020).

²⁸¹ See *id.* at 833 n.2.

day the issue of whether what is involved in all these cases is conduct, not speech, although it emphasized some speech might constitute, or be a part of, official misconduct.²⁸² Even if the latter caveat is resolved arbitrarily in favor of use of mechanical devices as protected speech, and not conduct unprotected by the First Amendment—even though the recording involves both a crime and a tort—the courts still must resolve whether the dubious addition of affirmatively deceptive tactics transforms speech into conduct.

In other words, some types of conduct-by-wiretapping constitute pure speech, but others may be conduct subject to criminal and tort remedies under the Massachusetts statute. This creates an immediately apparent inconsistency: If an unobserved recorder secretly hides behind a nearby wall or a tree to record a police officer acting officially in public, *Project Veritas Action Fund* allows him or her to do so and protects him or her from application of the Massachusetts statute.²⁸³ If two recorders act together, however, with one distracting the police officers so that the other can more effectively record unobserved—a common paparazzi technique—this protection may vanish.²⁸⁴ The increasingly head-scratching, obtuse, artificial, and unworkable distinctions—a form of Orwellian “double-speak”—necessitated by the recording-police-in-public cases argue persuasively for the Supreme Court to end this “magical mystery tour” of twisted constitutional analysis and apply the logic and clear message of *Cohen v. Cowles Media Co.*,²⁸⁵ *Bartnicki v. Vopper*,²⁸⁶ and *Branzburg v. Hayes*:²⁸⁷ that all wiretapping by non-law enforcement individuals and entities is prototypically a criminal and tortious conduct—if made so under a generally applicable state law—undeserving of First Amendment protection under the Court’s deferential mere-rationality standard of review.

²⁸² See *id.* at 840 n.4.

²⁸³ See *id.* at 833.

²⁸⁴ See *id.* at 840 n.2.

²⁸⁵ See *supra* text accompanying notes 11–17.

²⁸⁶ See *supra* text accompanying notes 18–26.

²⁸⁷ See *supra* text accompanying note 253.

ANALYSIS

III. THE “GROWING CONSENSUS” LARGELY IGNORES THE SUPREME COURT’S EXTENSIVE NEWSGATHERING JURISPRUDENCE

The recording-police-in-public cases synthesized above disavow point-blank, without expressly saying so, the underlying distinction drawn in *Cohen v. Cowles Media Co.*, *Bartnicki v. Vopper*, and the Court’s newsgathering jurisprudence in general,²⁸⁸ and collapses the dichotomy between the means used to acquire information and the resulting product disseminated as a result thereof. In other words, the tort, crime, or other wrongful act in acquiring becomes part of an unbroken First Amendment-protected, indivisible continuum. As noted above, the wiretap in *Bartnicki*, resulting in the publication of core political speech, that is, threats by public figures, would not have been constitutionally protected had the disseminator, media or non-media, been actively involved—even very modestly—in its criminal/tortious/other wrongful act of acquiring such.²⁸⁹ In *Cohen*, defendants’ decision to repudiate its promise of source anonymity, exposure of a provider of political sleaze regarding an opposing party’s candidate, likewise involved core political speech.²⁹⁰ Both these pivotal decisions are viewed as involving a very deferential standard of review—the rational-basis standard—because

²⁸⁸ See *supra* Section I.

²⁸⁹ Justice Stevens’s opinion in *Bartnicki* distinguished *Boehner v. McDermott*, 19 F.3d 463, 476 (D.C.Cir. 1999), *vacated*, 532 U.S. 1050 (2000), as involving defendant-Congressman “act[ing] unlawfully in accepting [a] tape in order to provide it to the media.” *Bartnicki v. Vopper*, 532 U.S. at 522 n.5 (2001). He found that the media in *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000), “in fact participated in the interception at issue.” *Bartnicki*, 532 U.S. at 522 n.5. Justice Breyer’s pivotal concurrence emphasized co-defendant broadcaster had “neither encouraged nor participated directly or indirectly in the interception,” nor “ordered, counseled, encouraged, or otherwise aided or abetted” the third-party’s interception, the tape’s delivery to the non-media co-defendant intermediary, or the intermediary’s later delivery to the media-defendant. *Id.* at 538 (Breyer, J., concurring). Mere receipt of the third-party-stranger’s illegally intercepted information did not constitute an illegal or unlawful obtaining. *Id.* Professor Smolla interprets the latter as indicating that “any involvement by the media would have disqualified it from the protection the Court granted in *Bartnicki*.” Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 Nw. U. L. REV. 1099, 1144 (2002) [hereinafter Smolla, *Contraband*]. A strong proponent of the rule concedes: “The *Bartnicki* decision was clear that the First Amendment only immunizes publishers with clean hands and not the original and illegal recorder.” Alderman, *supra* note 131, at 522.

²⁹⁰ See *supra* text accompanying notes 11–27, 44, 143–44, 229–32, 285–89; *infra* text accompanying notes 91–94, 308–17, 428.

they enforce rules of general applicability having only an “incidental” impact on newsgathering and free-expression freedoms.²⁹¹

Yet, the word “incidental” should not be equated with “insignificant.” “Incidental” has a huge but amorphous impact on the law, public policy, and media journalistic practices, as evidenced by the multiple examples provided below as to why legal restraints on the mechanical act of recording have merely an “incidental” impact on free expression and cannot be considered protected speech-creation. This is demonstrated by the Court’s pivotal newsgathering decisions and *Bartnicki*’s authorization of imposition of liability on any newsgatherer for breach of any general rule of criminal law, tort law, or other-wrongful-act rule of civil actionability—very broadly defined and liberally construed—involving any, very modest active involvement in acquiring the material later published.²⁹² But in the face of such controlling authority, the recording-of-police-in-public cases immunize the acquisition of the material published or disseminated by eviscerating the acquisition-versus-publication distinction. The act of creation—via recording by either audio or audio-visual in violation of state

²⁹¹ See *Cohen*, 501 U.S. at 669–70; *Bartnicki*, 532 U.S. at 544 (Rehnquist, C.J., dissenting); Smolla, *Contraband*, *supra* note 289, at 1120 (*Cohen* “refused to apply any heightened First Amendment standard” despite the case’s “numerous intersections with expressive activity”); Chermersinsky, *Protect the Press*, *supra* note 253, at 1144–45 (2000) (finding that the Court consensus reflected in *Cohen* was “wrongly decided” and proposing a more demanding intermediate level of scrutiny); Joseph W. Ragusa, *Biting the Hand that Feeds You: The Reporter Confidential Source Relationship in the Wake of Cohen v. Cowles Media Co.*, 67 ST. JOHN’S L. REV. 125, 136 (1993) (“[O]nly those common-law claims where actionability rests solely on expression and/or publication (e.g., defamation or false light) will, after *Cohen*, be subject to *New York Times*-type constitutional scrutiny.”); Campbell, *supra* note 140, at 31 (“[U]nlike in *Branzburg*, where the Court observed that ‘a State’s interest must be “compelling” or “paramount” to justify even an indirect burden on First Amendment rights,’ in *Cowles Media* the Justices did not seem to think that indirect burdens on speech triggered heightened scrutiny. . . . [T]he Court has consistently followed this approach ever since.”); Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 337–39 (2004) (claiming that *Cohen* is “unwise and unwarranted” and “essentially repudiat[es] any First Amendment protection for newsgathering conduct that is alleged to run afoul of general contract, tort, property, intellectual property or even less serious criminal laws”). As indicated herein, *Cohen* would have controlled under the *Bartnicki* facts, if the media and non-media publishers had actively participated in the information’s acquisition, rather than being passive recipients of illegal acquisition by a third-party stranger. This means the *Alvarez*-recording-police-in-public line of cases, which involved illegal-acquisition-republication in violation of law, should be subject to the same rational-basis-review standard. Supporters of the “growing consensus” rule acknowledge these cases “would [then] come out the other way, which is quite troublesome.” Bhagwat, *supra* note 27, at 1065.

²⁹² *Bartnicki*, 532 U.S. at 520; *id.* at 539 (Breyer, J., concurring); see *supra* note 289.

law—and dissemination-publication are collapsed into a conclusively presumed, indivisible speech-production-protection process. This is the proverbial tough-row-to-hoe under the Court’s traditional, very narrow construction of the First Amendment right to gather news discussed above.²⁹³

How broad is this right? Does it, as the decisions above seem to suggest, provide that *any* newsgatherer with a cell phone has the unfettered right—absent a narrowly drawn statute—to record law-enforcement personnel of all varieties and at all levels in “public”—whatever that means—with impunity and with a corollary right to transmit or publish what they record to anyone they desire or to the general public-world at large immediately and for posterity?²⁹⁴ Does it

²⁹³ See *Project Veritas Action Fund*, 982 F.3d at 824. Even proponents of protection for “speech protection” concede, as they must, that “the production of speech is itself conduct, which can cause social harm.” Bhagwat, *supra* note 27, at 1059.

²⁹⁴ Not only does the growing consensus rule fail to answer this central question, it does not even answer what is meant by “public.” See *supra* text accompanying notes 6, 184, 213–15, 218, 238. “Public” does not include cell phone recordings in a sheriff’s office in a courthouse. *Anthony v. Olivia*, No. CV 12-1369, 2013 WL 1127104, at *8–9, 9 n.5 (C.D.Cal. Jan. 29, 2013). While an airport security checkpoint is a public place in some sense, it likely must be treated as a non-public forum. See *Mocek v. City of Albuquerque*, 813 F.3d 912, 930–31 (10th Cir. 2015) (dicta). In discussing Fourth Amendment claims, *Mocek* emphasized a security checkpoint’s “uniquely sensitive setting,” with tense travelers “in various stages of disrobing and adjusting clothing without a modicum of privacy.” *Id.* at 924 (dicta). The possibility of “mal[evolent] intentions” “raised the likelihood” of compromising orderly checkpoint operations. *Id.* No court has acknowledged whether *Mocek*’s concerns apply in some or many police-recording-in-public settings. See *Hils v. Davis*, 52 F.4th 997, 1005 (6th Cir. 2022) (concluding that none of the recording-police-in-public cases involved “a right to record internal government proceedings or to compel public and media access to information during an ongoing investigation.”). *Hils* involved a claimed First Amendment right to record interviews during an investigation of police misconduct by the city’s Citizen Complaint Authority, in which officers were required to participate. *Id.* at 1000. The court rejected a First Amendment right to record on several additional grounds. First, the city’s prohibition on recording by interviewees did not involve prohibition on speech but involved “conduct.” *Id.* at 1001. Second, it involved access to information within the government’s control. *Id.* (“We know of no American tradition, whether under federal or state law, by which the subjects of a governmental investigation have a right to record all interviews . . . [or] the corollary right to make the recordings or videotapes public before the investigation ends.”). Third, the interviews involved “the government’s speech, not the officer’s speech.” *Id.* at 1003. The First Amendment allows the governmental employer to control not only “what employees can and cannot say on the job” but the message contained therein. *Id.* at 1003. Fourth, there was no claim to public-forum doctrine applied. *Hils*, 52 F.4th at 1003–04. In sum, the city’s wish to bar recordings of “government investigations during an ongoing investigation does not violate the First Amendment.” *Id.* at 1004. Chief Judge Jeffrey Sutton provided a powerful rationale: “It’s not hard to envision problems that could arise from giving subjects of an investigation the same rights as the investigators. Perhaps indeed better rights. . . . Yet under the claimants’ view, they would have the right to release favorable video clips on the evening news or social media sites, all before the investigation ends. That is not a recipe for a

extend only to official conduct or also anything said unaccompanied by specific acts—maybe in jest, maybe off-handedly, maybe sarcastically, maybe metaphorically—that is audible enough to be heard and recorded by a stranger and which may be considered as misconduct reflecting on their fitness for remaining a police officer?²⁹⁵ Officers walk beats, sometimes in pairs. They talk to large numbers of people. They stop their official vehicles on or along public streets to engage the public, converse with fellow police officers, and strategize about how to confront crime and particular suspected criminals. They take meal and “convenience” breaks, all the while remaining observant and performing their duties.

Does every “gotcha” comment, smile, laugh, shrug, grimace, gesture, or instance of “rolled eyes” recorded while a police officer is on duty that may arguably—in some observer-recorder’s view—reflect on his or her fitness for police work become covered by the purported “growing consensus” rule discussed above? Do police officers wearing a uniform or undercover ever have a right to conversational privacy while in a public arena, building, park, or whatever additional venues some courts may consider “public”? As the defamation cases indicate, the relevance-to-fitness standards are exceptionally broad—almost nothing is irrelevant as to employees paid with government funds, particularly those wearing a badge and carrying a weapon.²⁹⁶

productive and fair investigation into police misconduct.” *Id.* The policy met rational-basis review. *Id.* Many of these same governmental interests apply to actions of police officers in performing their law-enforcement duties in public. It remains to be seen whether courts will pursue these compelling arguments in applying the purported “growing consensus.”

²⁹⁵ See David Elder, *Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria—A Proposal for Revivification: Two Decades after New York Times Co. v. Sullivan*, 33 BUFF. L. REV. 579, 656–57 (1984) [hereinafter Elder, *Public Officialdom*] (discussing the issues with relying on an official-conduct-versus-private-conduct dichotomy). Is pure expression of police officers to be treated the same as, or inseparable from, actions or conduct, such as an arrest or an abuse of civil rights? Speech cannot be separated in cases where expression accompanies and is a part of an unconstitutional act. But what of purely communicative statements, including those that would be constitutionally protected from liability under defamation or “false-light” privacy law, or as pure opinions or expressions that might be actionable in a civil-rights cause of action if a governmental employer punishes an employee? See ELDER, DEFAMATION, *supra* note 219, at § 8:2 (describing the broad reach of the “pure opinion” doctrine). What is protected “opinion” and what is not are often quite difficult, fact-intensive, and almost invariably confusing. The cases are still, to use Judge Harry Edwards’ memorable phrase, “a mess.” *Id.* § 8:14.

²⁹⁶ See ELDER, DEFAMATION, *supra* note 219, § 5:2; see also *supra* note 119; Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210, 1216–38 (10th Cir. 2007) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)) (“[A]nything which might touch on an officer’s fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official’s private character.”).

How can this rule, once adopted, even be cabined to police officers? As indicated above, most of the cases allude more broadly to “public officials”²⁹⁷—a concept that has its own amorphous and unfair criteria, at least at the lower levels of non-elected officialdom.²⁹⁸ Is every elected public official—at whatever level—or non-elected governmental employee that qualifies as a “public official” for defamation purposes also subject to the right-to-record-in-public rule?²⁹⁹ The ramifications

²⁹⁷ See, e.g., *Price v. Garland*, 45 F.4th 1059, 1070–71 (D.C. Cir. 2022), *cert. denied*, 143 S. Ct. 2432 (2023); *Irizarry v. Yehia*, 38 F.4th 1282, 1289, 1295 (10th Cir. 2022); *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 844–45 (1st Cir. 2020), *cert. denied*, 145 S. Ct. 560 (2021); *Toole v. City of Atlanta*, 798 Fed. Appx. 381, 387–88 (11th Cir. 2019); *Askins v. U.S. Dep’t of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018); *Fields v. City of Philadelphia*, 862 F.3d 353, 355, 358, 359 (3d Cir. 2017); *Geriche v. Begin*, 753 F.3d 1, 9 (1st Cir. 2014); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 586 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). This dominoing extension was clearly demonstrated by *Project Veritas v. Schmidt*, 72 F.4th 1043 (9th Cir. 2023), which invalidated an Oregon statute which had incorporated a “law-enforcement” exception under heavy lobbying. The court found the statute content-based, as it did not extend to state executive officials, and failed under strict-scrutiny criteria. *Id.* at 1057–58, 1062, 1068. See also *supra* text accompanying notes 202–80 (discussing the *Martin v. Gross* litigation). Neither courts nor commentators open to extending the rule to all or many other public officials discuss the proverbial (but never-mentioned) elephant-in-the-room defect: How are public figures distinguishable? The Court has applied the same standards and jurisprudential assumptions to both categories—now under vigorous attack. See Elder, *Rehnquist’s Attempts*, *supra* note 109, at 157–78, 267–315. Would these scholars distinguish public officials, however defined, from candidates for public office, public officials’ unpaid or paid advisors and advisor-equivalents for candidates for public office? What about the host of other non-candidate participants in the public political arena who may be public figures? See ELDER, DEFAMATION, *supra* note 219, § 5:25. What about the expansive categories of public figures held to be public-official equivalents who may wield influence comparable to public officials? *Id.* §§ 5:3–5:27. Is the logical corollary of the recording-police-in-public extension that all public figures are necessarily swept thereunder?

²⁹⁸ See ELDER, DEFAMATION, *supra* note 219, § 5:1. It is not even certain whether “public official” includes the lowest ranks of law-enforcement officers. In *Rosenblatt v. Baer*, 383 U.S. 75, 86 n.13 (1966), Justice Brennan emphasized that “[t]he employee’s position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion of the person occasioned by the particular charges in controversy.” The Court appeared to reject Justice Douglas’s suggestion in dissent that a government “night watchman” would *per se* be covered. *Id.* This has been ignored in the voluminous case law applying *New York Times Co.* to all law-enforcement officers. See ELDER, DEFAMATION, *supra* note 219, § 5:1 nn.170–76; Elder, *Rehnquist’s Attempts*, *supra* note 109, at 169–78; Elder, *Public Officialdom*, *supra* note 296, at 594–95.

²⁹⁹ See *Commonwealth v. Hyde*, 750 N.E.2d 963 (Mass. 2001). Such a rule could not be limited to police officers, and could include even meter-maid-officers, and would “permit the untrammelled interception of communications by legislators, executive officers and agents, judicial officials, municipal officers, among others” *Id.* at 970. It would cover “virtually every encounter or meeting between a person and a public official, whether the meeting or encounter is one that is stressful (like the one in this case, or perhaps a session with a tax auditor) or non-stressful like a routine meeting between a parent and a teacher in a public school to discuss a good student’s

of providing a protected First Amendment right to every citizen of a free-rein nature to bug or photograph the large number of persons deemed “public officials”—as long as the bugging or audiovisual occurs “in public”—are unknown. For example, if a school principal goes for a walk with his dog to a local critter-friendly park and chats with fellow dog-owners, must he or she check earnestly to see if he or she is being recorded?³⁰⁰ What of a garden-variety teacher—like principals, the cases are sharply divided on their “public official” status³⁰¹—recorded by a parent or co-teacher in front of a school or in a hallway or in the school parking lot? Teachers are often poorly paid and overworked, answer to a variety of demanding and often conflicting, stress-inducing, constituencies, and have a disproportionately high attrition rate even before Covid-19 and its variants.³⁰² Adding an assumed-third-party-recording-risk-and-public-Internet-dissemination to their many reasons for rethinking the teaching profession can only have disastrous effects.

Most of the cases talk more broadly about First Amendment core values as to any matter of public concern.³⁰³ So, maybe the right-to-record-in-public inevitably dominoes to any audible voice or visible person involved in conduct or speech some perceive as of public

progress. The door once opened would be hard to close... and would contravene the statute's broad purpose and the Legislature's clear prohibition of all secret interceptions and recordings by private citizens.” *Id.* The dissent would have limited the rule to police officers, who have “awesome powers” and “concomitantly reduced” privacy interests. *Id.* at 976–77 (Marshall, C.J., dissenting).

³⁰⁰ See Frank Bruni, *Dogs Will Fix Our Broken Democracy*, N.Y. TIMES (Aug. 31, 2019), <https://www.nytimes.com/2019/08/31/opinion/dogs-democracy.html> (discussing the “degradation of our country’s civic culture,” describing “honest-to-goodness conversations with actual strangers” as “something so rare . . . that it’s practically revolutionary,” and arguing that parks, together with public libraries, are “road[s] out of a tribalism that’s tearing us apart”); see also Smolla, *Contraband*, *supra* note 289, at 1145 (discussing implications of the right-to-record rule on private conversations between judges and their law clerks).

³⁰¹ Elder, *Public Officialdom*, *supra* note 296, at 672–73.

³⁰² See Alia Wong, *Overworked, Underpaid? The Toll of Burnout is Contributing to Teacher Shortages Nationwide*, USA TODAY (Dec. 21, 2022, 5:00 AM), <https://www.usatoday.com/story/news/education/2022/12/21/why-there-teacher-shortage-schools-struggled-nationwide-2022/10882103002/>.

³⁰³ See *Project Veritas v. Schmidt*, 72 F.4th 1043, 1055 (9th Cir. 2023) (affirming *Askins v. U.S. Department of Homeland Security*); *Sharpe v. Winterville Police Dep’t*, 59 F.4th 674, 681 (4th Cir. 2023); see also *Price v. Garland*, 45 F.4th 1059, 1071 (D.C. Cir. 2022), *cert. denied*, 143 S. Ct. 2432 (2023); *Irizarry v. Yehia*, 38 F.4th 1282, 1290 (10th Cir. 2022); *Ness v. City of Bloomington*, 11 F.4th 914, 923–24 (8th Cir. 2021); *Toole v. City of Atlanta*, 798 Fed. Appx. 381, 387–88 (11th Cir. 2019); *Askins v. U.S. Dep’t of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). The U.S. Department of Justice adopts this broad extension. See *United States as Amicus Curiae in Irizarry v. Yehia*, *supra* note 107, at 12–14.

interest or concern in a social media-fixated world—a broad, if not self-defining concept without any real definitional content and limitation.³⁰⁴ Is that where the purported “growing consensus” inevitably leads us: everybody gets to bug, audiotape, or photograph everyone else in public as long as they do so overtly rather than secretly or covertly, maybe even if done secretly or covertly—a dichotomy that presents its own difficult definitional difficulties, as indicated above—and the resulting matter recorded can then be published or disseminated immediately and permanently on the Internet under the protection of the First Amendment as a matter of public interest or concern? Who would want to live or work in a society where courts treat every cell phone owner-user as a First Amendment scribe who can show or disseminate “look what I heard, or saw and recorded” about any other person in public at his or her sole discretion? The potential open-endedness of the recording-police-in-public doctrine is Orwellian in its implications³⁰⁵ and brings to mind surveillance in the Peoples’ Republic of China—complete with the use of “social credit” scores, government control of social media, widespread use of facial recognition technology, gross abuse of basic human rights, and oppressive censorship.³⁰⁶ An enthusiastic array of

³⁰⁴ See Elder, *Recordings II*, *supra* note 5; Bhagwat, *supra* note 27, at 1069–70. Compare Bhagwat, *supra* note 27, at 1069–70 (“[I]n a legitimate attempt to protect privacy, the government has a clear and strong regulatory interest in prohibiting *all* wiretaps . . . [I]t is hard to see how an exemption from wiretap law for intercepting conversations ‘on matters of public concern’ would be manageable.”), with Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 232 (2017) (proposing an even more-protective rule for public forums, with “the right to record, regardless of whether the subject of the recording is a matter of public concern,” and acknowledging that this goes beyond the intimations in the cases). The Court has reaffirmed that matters of purely private concern, even matters legally acquired, have First Amendment protection. See Elder, *Recordings II*, *supra* note 5.

³⁰⁵ For example, columnist Kathleen Parker describes how “social media literati” focused on a fiction author’s “genetic shortcomings” to condemn her for writing a deeply researched novel about the border crisis for immigrants and “high-tech mob[s] can [then] be marshaled in moments” to cancel a book tour. Kathleen Parker, *Punishing Novelist for cultural appropriation is wrong, dangerous*, POST & COURIER, Feb. 4, 2020, at A9. This reflects “[t]he trend of punishing folks for expressing unpopular thoughts—or for not meeting standards set by a special-interest group . . . All thinking people should rail against the bullying of self-anointed censors whose methods have no place in a free, democratic society . . .” *Id.* See also Elder, *Public Officialdom*, *supra* note 296, at 644 (discussing the possibility that actions outside an official’s duties may be relevant to fitness).

³⁰⁶ See Eunsun Cho, *The Social Credit System: Not Just Another Chinese Idiosyncrasy*, PRINCETON J. PUB. INT’L AFFS. (May 1, 2020), <https://jpia.princeton.edu/news/social-credit-system-not-just-another-chinese-idiosyncrasy>.

courts and commentators suggest this is and must be the law mandated by our First Amendment.³⁰⁷

But is this legal scenario dictated by the Supreme Court's free-expression jurisprudence? It's worth revisiting once again what *Bartnicki v. Vopper* did and did not do. That case *only* involved civil sanctions for republication-distribution of information passively received from unidentified-third-party-strangers who had themselves illegally acquired it. So, the case involved a more speech-protective standard for evaluating true matters of public interest or concern involving non-culpable-by-acquisition defendants who published such information—in other words, *pure* communicative expression. The Court's clear consensus implication was and is that any active participation in wrongful acquisition would have been treated under the much more deferential, private-speech-protective standard—like that in *Cohen v. Cowles Media Co.*³⁰⁸ Moreover, the demanding Stevens opinion in *Bartnicki* should not be understood as the true holding on point even as to the pure-expression issue before it.

Two members of the Court—Justices Breyer and O'Connor—issued an opinion considerably more deferential to legislatures and narrowly limited the holding to the facts therein.³⁰⁹ Three dissenters

³⁰⁷ See, e.g., Clay Calvert et al., *Newsgathering Takes Flight in Choppy Skies: Legal Obstacles Affecting Journalistic Drone Use*, 26 FORD. INTELL. PROP. MEDIA & ENT. L.J. 535, 551-52 (2016); Bhagwat, *supra* note 27, at 260, 266; Kreimer, *supra* note 92, at 386-97; Potere, *supra* 110, at 302-12; Alderman, *supra* note 131, at 500-09, 511-32; Blitz et al., *supra* note 144, at 85-88 (generally approving the concept and that it might apply "equal force" at ground level and from the air); Kaminski, *supra* note 305, at 233-35.

³⁰⁸ See Neil M. Richards, *The Limits of Tort Privacy*, 9 J. TELECOMM. & HIGH TECH. L. 357, 377-78 (2010). Professor Richards draws the only permissible conclusion from *Bartnicki*—its inapplicability to unlawful-obtaining: "This is consistent with the idea in First Amendment law that the press has no exemption from 'generally applicable laws' . . . the press should have wide discretion in being able to disseminate ideas and information, but that this discretion does not allow exemption from the ordinary tort, contract, property and regulatory laws that govern all of us in our daily affairs without dictating the content of our expression. . . . [T]here is a crucial distinction between breaking the law to obtain information (whether by wiretapping, trespass, hacking, or other means) and the innocent dissemination of news generated by that law breaking." *Id.* at 377-78. He applies this analysis to the intrusion-upon-seclusion versus public-disclosure-of-private-facts dichotomy: "... [U]nlike disclosure, which requires the act of disclosure of words or images, no act of expression is necessary to satisfy the intrusion tort. Publication is only relevant to intrusion when damages are computed. Thus, unless we are prepared to recognize a First Amendment right to break laws in pursuit of gathering news or to take secret video, the intrusion tort has been satisfied without implicating the First amendment at all." *Id.* at 382-83.

³⁰⁹ See *Bartnicki*, 532 U.S. at 536-37 (Breyer, J., concurring) ("I would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions that are disproportionate when measured

would have upheld imposition of civil liability even as to publication of material of public concern passively received with scienter by the publisher that the material was wrongfully acquired by third parties.³¹⁰ All members of the Court appear to concur with the view that active participation—at a very modest level—in acquiring the material by criminal, tortious, or other wrongful conduct of even core political speech would have precipitated a much more privacy-protective, deferential standard,³¹¹ particularly in light of the free-expression values reflected in private conversations taped by third parties.³¹² Thus, what jumps off the page is the fundamental issue posed but never discussed in significant detail by the purported “growing consensus” of the cases:

against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the effect of these benefits, as well as the need for restrictions in order to secure these benefits?”). This is the standard Justices Breyer and O'Connor would have employed in the passive-receipt, legally obtained information, pure-expression setting. *See, infra* note 304.

³¹⁰ The dissenters in *Bartnicki* strongly criticized the Court's self-censorship argument as grounds for upholding the statutes. *Bartnicki*, 532 U.S. at 547 (Rehnquist, CJ., dissenting). They also listed the Court's statements on the illegal-acquisition issue and emphasized the illegality of the interceptors' publicization of the parties. *Id.* at 547–48. The dissenters would have denied First Amendment protection even for the passive receipt with scienter of a third-party stranger's illegal acquisition. This reflects the view of the *rest* of the Court. *See id.* at 521 (noting the district court finding that interceptors were “not agents” of defendants); *id.* at 522 n.5 (distinguishing *Peavy v. WFAA*, *see supra* note 289); *id.* at 525 (stating defendant “played no part in the illegal interception,” as their access to the tapes was “obtained lawfully”); *id.* at 526–27 (distinguishing “use” of illegal interceptions); *id.* at 529–30 (emphasizing the “normal method of deterring unlawful conduct is to impose an appropriate punishment” on the interceptor, and, if there is insufficient deterrence, “perhaps those sanctions should be more severe”—it would be “quite remarkable to hold that speech of a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party”); *id.* at 532 n.19 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 691–92 (1972)) (“It would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news.”); *id.* at 535 (noting that a “stranger's illegal conduct did not suffice to remove the First Amendment shield from speech about a matter of public concern”); *id.* at 537, 541 (Breyer, J., concurring) (noting that emerging technology's “[c]landestine and pervasive invasions of privacy” may be of greater significance than criminal-trespass statutes, and the statutes at issue “resemble[e] laws that would award damages caused through publication of information obtained by theft from a private bedroom”); *id.* at 538 (citing to the majority opinion to emphasize the concurrence's consistency therewith). The *entire* Court appears to endorse an entirely different rule in illegal-acquisition cases—involving even modest participation by the defendant in the illegal-acquisition.

³¹¹ *See id.*

³¹² *See supra* text accompanying notes 18–25, 238, 241.

Are recordings-of-police-in-public not prototypical exemplars of active-participation-conduct under *Cohen-Bartnicki*?³¹³

The circuit courts either totally ignore or grossly understate the significance of the *Cohen-Bartnicki* parallel in concluding that the recording-of-police-public-officials-and-perhaps-others-in-public decisions constitute the purported “growing consensus” rule. They do so in two dramatic and unjustified ways. First, as indicated above, they deem the act of recording to be an act of creating or producing speech rather than a technical and mechanical act—that is, conduct-in-acquisition of information.³¹⁴ Recording is treated as part of an indivisible and necessary information-newsgathering-acquisition-dissemination-republication continuum, ignoring the clear dictates of *Cohen-Bartnicki* and the Court’s jurisprudence generally. It is worth repeating that the latter precedents have vigorously distinguished the means of acquisition and the legality thereof from the resulting published product. The stunning means-ends-collapsed-continuum adopted by the circuits is one the Court has never countenanced in the past.

It is worth reiterating—and emphasizing—what Justice Breyer stated in his important *Snyder v. Phelps* concurrence illustration and analysis, which apparently reflects the Court’s view in that case and its broader implications for unprotected tortious conduct—and its traditional, oft-stated consensus: “The constitutionally protected nature of the end [speech of public concern] would not shield [a physical

³¹³ See *id.* at 547–48 (Rehnquist, J., dissenting).

³¹⁴ See *D’Amario v. Providence Civic Center Authority*, 639 F.Supp. 1538, 1541 (D.R.I. 1986), *aff’d without opinion*, 819 F.2d 692 (1st Cir. 1987), where Judge Bruce Selya rejected a photographer’s claim to photograph a concert singer’s performance as protected expression. This was “conduct, pure and simple.” *Id.* He rejected any “license to let his camera roam at will” based on some “speculative rights of access to ‘information’” by either a photojournalist or a photographer. *Id.* Professor Bambauer views “[d]istinguishing speech from conduct [as] the First Amendment’s Sisyphean task.” Bambauer, *supra* note 140, at 78. She recognizes *Dietemann* may be defensible on First Amendment grounds and *Shulman v. Group W Prods* was well-decided. *Id.* at 81–86; see *infra* text accompanying notes 348–49. She concludes that intrusion upon seclusion protects “a sufficiently compelling interest to survive First Amendment scrutiny,” but views “the need and expectation of seclusion” as one that “cannot go far beyond the home, private conversations and other narrow circumstances” without “hav[ing] severe effects on the liberties of others.” Bambauer, *supra* note 140, at 111–12. See also *Hills v. Davis*, 52 F.4th 997 (6th Cir. 2022) (concluding officer-participants in an internal citizens-complaint-authority investigation had no right to record interviews—audio and video). The text of the First Amendment did not include the “conduct” in question: “A prohibition on recording speech is not a prohibition on speaking.” *Id.* at 1001.

assaulter’s] use of unlawful, unprotected means,” even where the assault was calculated “to transmit to the public his views on a matter of public concern.”³¹⁵ No circuit decision has even discussed Justice Breyer’s means-versus-ends analysis or the Court’s broader implications for newsgathering even though *Snyder* involved torts committed in public. This entire line of circuit cases criticized herein ignores limitations on newsgathering of *Cohen-Bartnicki-Snyder*. As Professor Richard Epstein has emphasized, *Cohen* “upholds all rules, whether at common law or by statute, that bring about some general social improvement from the common law baselines.”³¹⁶ Despite this, the circuits have largely ignored the core principles of *Cohen-Bartnicki-Snyder*.

The other circumvention device adopted is that both police conduct and statements related to official duties and fitness of public officials are, as a matter of constitutional law, never private.³¹⁷ As indicated earlier, Judge Posner has discussed this mistreatment of privacy in detail and honed in most specifically on the right of those the police have contact with in public and the destabilizing and distracting effects audio and

³¹⁵ *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (Breyer, J., concurring); see also *id.* at 1226–27 (Alito, J., dissenting). The Court’s opinion is replete with indications of potential conduct-based liability. The Court’s opinion suggests that, if the defendants’ picketing via expressive conduct had measurably interfered with the funeral, the result may well have been different. In other words, where “extreme and outrageous” “expressive speech” moves into the realm of interfering conduct, it would be more like residential picketing, and an abortion-clinic “buffer zone.” See *id.* at 456–57 (first citing *Frisby v. Schultz*, 487 U.S. 444 (1988); then citing *Madsen v. Women’s Center*, 512 U.S. 753 (1994)). The *Snyder* facts involved peaceful, non-profane speech that did not involve yelling, was one thousand feet from the funeral and outside respondent’s view, and did not interfere with the funeral. *Id.* at 448–49. Importantly, perhaps pivotally, respondent saw the signs’ very hurtful content only while watching a later broadcast—unquestioned pure expression. See *id.* at 449, 461. In sum, the Court treated the *Snyder* facts as indistinguishable from pure expression. See also *Counterman v. Colorado*, 600 U.S. 66, 87 (2023) (Sotomayor, J., concurring in part) (describing *Snyder* as a “hateful rhetoric” speech case). No case adopting the recording-police-in-public doctrine has discussed these hugely important and narrowing aspects of *Snyder*. The approach of *Cohen-Bartnicki-Snyder* is not unique to the U.S. The European Court of Human Rights upheld Italian law criminalizing interception of confidential law-enforcement communications by journalists who routinely accessed police frequencies to arrive at the scene of police activity. See *Brambilla v. Italy*, App. No. 22567/09, ¶¶ 61–68 (Sept. 23, 2016), <https://hudoc.echr.coe.int/eng?i=001-164526>. The Court found no violation of Article 10 of the European Convention for the Protection of Human Rights. *Id.* ¶ 68. Journalists have no “cast-iron defense” or “exclusive immunity” from their “duty to obey the ordinary criminal” law as “responsible journalis[ts]” regarding non-publication-based conduct “based solely on possession and use” of devices violating “a general prohibition on a person’s interception of any conversations not intended for him or her, including those between law-enforcement officers.” *Id.* ¶¶ 54–55, 61, 65.

³¹⁶ Epstein, *Privacy, Publication, and the First Amendment*, *supra* note 1, at 1026.

³¹⁷ Elder, *Public Officialdom*, *supra* note 296, at 582–83.

audiovisual recording and dissemination may have on police-witness-informant-community relations and trust.³¹⁸ It is common knowledge that police have problems gaining trust and support in some segments of American communities, particularly in minority communities. These communities are often unwilling to come forward and become witnesses — “snitches” — to criminal or other antisocial behavior for fear of retaliation.³¹⁹ Becoming what the Ulster Irish call a “tout” — a traitor — can be extraordinarily dangerous, psychologically damaging, socially ostracizing and stigmatizing, and economically devastating.³²⁰ How is

³¹⁸ *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 611–12 (7th Cir. 2012) (Posner, J., dissenting); see also *supra* text accompanying notes 156–98, 348–49; *Marich v. QRZ Media, Inc.*, 86 Cal. Rptr. 2d 406, 419 (Cal. App. 1999) (“[A] person speaking with a police officer may expect that all or part of his or her conversation may be divulged by that officer either by written memorandum or passing on the gist of the conversations to another officer. However, that is not the same as a third person recording the conversation for other use on a commercial television program. The distinction is recognized by *Shulman* and *Sanders*” for intrusion upon seclusion and statutory two-party-consent-to-wiretapping statute.), *rev. denied* (1999).

³¹⁹ See Robert L. Woodson, *America’s Inner-City Cartels*, WALL ST. J. (Nov. 18, 2019, 7:06 PM), <https://www.wsj.com/articles/americas-inner-city-cartels-11574121983> (analyzing how the “war against the police” by “self-proclaimed social justice warriors” who “demonize” police and “sometimes openly celebrate violence against police” “mak[es] it harder for police to gain residents’ trust,” in “crime-plagued communities,” creating “pockets of immunity” from murder investigations, “a bleak trend [which] police [in St. Louis] attribute to local unwillingness to report suspects”); Matt Kreiner, Letter to Editor, *Blacks Are at a Disadvantage Despite the Law*, WALL ST. J., Aug. 1-2, 2020, at A12 (“The discussion of police interactions with the community will be serious when activists question ‘snitches get stitches’ as intensely as they focus on aberrant police behavior.”).

³²⁰ See PATRICK RADDEN KEEFE, *SAY NOTHING: A TRUE STORY OF MURDER AND MEMORY IN NORTHERN IRELAND* (2019); see also Paddy Hirsch, *‘Say Nothing’ Is A Timely Warning That Ireland’s Old Wounds Are Easily Opened*, N.P.R. (Feb. 25, 2019), <https://www.npr.org/2019/02/25/697727036/say-nothing-is-a-timely-warning-that-irelands-old-wounds-are-easily-opened>. The Court “has recognized what are essentially privacy interests” under the Due Process Clause, concluding that recording a criminal trial “would cause participants to change their behavior because they would be conscious of the expanded audiences,” which is “socially undesirable” in the context of criminal proceedings. Kaminski, *Right to Record*, *supra* note 305, at 209–10. Why are there not comparable privacy interests for potential witnesses in criminal or accident investigations, where the temptation to “play to the crowd” or the possibility of being intimidated by public exposure may be equally true when those assisting know they are being recorded? In criminal investigations, the fear of retaliation against the witness or his or her family may exert a substantial coercive impact on what he or she tells the police and the integrity of the truth-seeking process. See, e.g., *Capra v. Thoroughbred Racing Ass’n of N. Am.*, 787 F.2d 463 (9th Cir. 1986) (allowing a jury to determine the newsworthiness of identifying participants in the federal witness-protection program under threat from organized crime because of “the social value of the facts published in light of the public’s interest in protecting persons willing to testify,” “the seriousness of the intrusion caused by the publication,” and “the extent to which the parties voluntarily exposed themselves to public notoriety”); *Times-Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556, 559–64 (Cal. App. 1988) (“The state must investigate violent crimes and protect witnesses. Already reluctant witnesses will be

public dissemination of police officer-community-member contacts and conversations going to lead to anything but enhanced unwillingness of witness to step forward, a phenomenon that no reasonable person, court, or legislature should wish to indirectly encourage, support, or incentivize?

But, as Judge Posner indicated, police do in fact have a right to conversational privacy and to engage in private speech that the law should protect and not substantially undermine, deter, or needlessly sanction.³²¹ Police should neither hesitate in communicating with fellow officers regarding a developing, potentially dangerous situation nor camouflage their comments and conversations in politically correct double-speak for fear of camera-wielding recorders—Orwell’s new civilian “Police Patrol”—lurking nearby. Lives and safety, theirs and civilians, including the suspects in question and members of the community, can be endangered by lack of clarity or hesitancy in providing information or a warning or directive to other officers or members of the public.

Officers should not be hesitant about discussing and criticizing each other, their superiors, police policy and procedures, their union, politics and politicians, or the foibles or proclivities of civilians for fear of being recorded, having such thoughts disseminated to the public, and possibly facing a disciplinary action or proceeding and the prospect of a ruined career for comments made that violate expanding norms of political correctness.³²² After all, police officers are Americans with the

hesitant to provide information if their names will appear in the morning paper. The state’s interest is particularly strong where the criminal is still at large.”), *cert. dismissed*, 489 U.S. 1094 (1988); *Hyde v. City of Columbia*, 637 S.W.2d 251, 253–71 (Mo. App. 1982) (rejecting any suggestion that the First Amendment protected newspaper disclosures of information lawfully received about who reported an attempted abduction, because such information is of “trivial public concern compared with the high probability of risk to the victim,” particularly if the at-large assailant can still “attempt an intentional harm or a criminal obstruction of justice to prevent the victim from a confirmed identification and prosecution of the assailant”), *cert. denied*, 459 U.S. 1226 (1983). No recording-police-in-public appellate decision has discussed the implications of these cases, none of which even involved a crime/tort/other wrongful action in defendant acquiring the matter, but only in publishing the matter at issue that had been lawfully acquired—pure expression.

³²¹ See *Alvarez*, 679 F.3d at 613–14 (Posner, J., dissenting); see also *supra* text accompanying notes 156–96.

³²² See Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465, 484, 518 (2014) (“[P]rivacy may be important for the development of new ideas, for challenges to the status quo for change, and for a vigorous democracy . . . [T]he conforming effect should be as worrisome as the much touted chilling effect.”); Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1906

right of protected free expression, right?³²³ Far-fetched? Unfortunately, this is a significant concern in today's "cancel culture"- "social media" environment."³²⁴ Courts have suggested, often off-handedly, that recordation-dissemination can help police to do their jobs.³²⁵ These same courts rarely, if ever, with the exceptions of Judges Posner and Clement, seem concerned by how such recordings may and probably will seriously impede police officers from doing their jobs conscientiously, professionally, and safely.³²⁶

Much breast-thumping surrounds the allegedly supreme importance of the objectivity and accuracy of information recorded and disseminated. But, as the author has detailed elsewhere, accuracy does not invariably equate to truth, although the media often attempts to obfuscate the distinction.³²⁷

(2013) ("Privacy incursions in the name of progress, innovation, and ordered liberty jeopardize the continuing vitality of the political and intellectual culture that we say we value.").

³²³ See Blitz et al., *supra* note 144, at 94 ("Consider, for example, a law that makes it illegal to place, and record from, a hidden microphone near a bench in a public park or a public plaza. Allowing such surreptitious sound capture seems incompatible with a society that leaves sufficient room for private conversations. Even in public spaces, people do not expect that their sometimes-sensitive discussions with friends and family members will be available for anyone who wants to record them. Courts have not classified such surreptitious audio recording as First Amendment activity... perhaps the same rule should apply to video surveillance."). See also *Fordyce v. City of Seattle*, 55 F.3d 436, 439–40 (raising the issue of whether police officer—on or off duty—ever has a right of privacy in a conversation in public).

³²⁴ See Megan McArdle, *Can we Stop Living in Fear of the Internet Speech Mob*, POST & COURIER (Aug. 27, 2017), https://www.postandcourier.com/opinion/commentary/can-we-stop-living-in-fear-of-the-internet-speech-mob/article_8ff52908-8913-11e7-a28f-abcc1ae6f2ef.html ("What the internet changed is the scale of the disasters, and the number of people who are vulnerable to them and the cold implacable permanence of the wreckage they leave behind . . . [Y]our true opinions about anything more important than tea cozies are only ever aired to a tiny circle of highly trusted friends . . .").

³²⁵ See *Martin v. Gross*, 340 F. Supp. 3d 87, 96–97 (D. Mass. 2018); *supra* text accompanying notes 106–08.

³²⁶ See *Alvarez*, 679 F.3d at 613–14 (Posner, J., dissenting); *Turner v. Driver*, 848 F.3d at 697 (Clement, J., dissenting). A general fear of being recorded is not within the tort rule that treats "the hidden or undiscovered observing [a]s represent[ing] the quintessential privacy harm" but only when the person observed finds out about such: "Without that, there is no perception of unwanted observation, nor is there use of information adverse to the individual being observed." M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L. REV. 1131, 1160 (2011). Professor Calo views such as "architectural harms": "The absence of privacy creates and reinforces power imbalances and interferes with citizen self-actualization. These harms go to the very architecture or structure of society." *Id.* at 1159. The proper body for resolving these concerns is the legislature or Congress. See *infra* notes 363–68.

³²⁷ David A. Elder, *Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwock's Attempts to Circumvent* *New York Times v. Sullivan*, 9 VAND. J. ENT. & TECH. L. 551, 600–11 (2007);

And, is a conversation partially recorded, maybe only in snippets, with parts unintelligible, truly “accurate” other than in a wholly artificial sense?³²⁸ What if the cell phone wielding voice-capturer records and republishes only one side of a police officer’s cell phone or other audio communication but not the other side, with its qualifications, revisions, criticisms, additions and subtractions that the recorded party nods in response to and silently concurs with but which are not recorded by the audio?³²⁹ Such a report would be inherently dubious.³³⁰ The same is true of a face-to-face conversation between police where only one side is audible or where it is only part of an on-going discussion.³³¹ And, what about such information being instantaneously disseminated without the cooling effect of later, and maybe more dispassionate, analysis? Imagine the potential for catastrophe in a volatile situation

JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA*, 8 (2000) (“Privacy protects us from being misdefined and judged out of context in a world of short attention spans, a world in which information can easily be confused with knowledge.”).

³²⁸ See Epstein, *Privacy, Publication and the First Amendment*, *supra* note 1, at 1031–32 (“[T]he question of truth is not simply a matter of whether certain isolated statements are true. The question is whether truth counts as a fair and accurate abridgment of the entire record . . . What is distressing about the current literalist sense of truth is that it compounds the difficulties in this area so that the question of representativeness . . . critical to the public value of the information published, is securely hidden from public view.”). This stands in contrast to video recordings by copwatching groups. See Simonson, *Copwatching*, *supra* note 101, at 418 (“[V]ideos taken by organized copwatching groups are more likely to contain footage that shows the interaction from beginning to end, rather than only filming from a moment of conflict or violence, as a casual bystander might.”).

³²⁹ See, e.g., Tunku Varadarajan, *A Veteran’s View of American Policing*, WALL ST. J. (June 12, 2020), <https://www.wsj.com/articles/a-veterans-view-of-american-policing-11591987454> [hereinafter Varadarajan, *Interview with Kelly*] (“‘We’re in the age of the cellphone camera, so everyone wants their prize,’ he says. ‘For a lot of people, it’s having cops overreact. And oftentimes in the video they don’t show you the beginning of the event.’ Viewers see only the middle and the end, when the cop is ‘overreacting—or trying to defend himself or making the arrest.’ There are ‘no Marquess of Queensberry rules for making an arrest of people that don’t want to be arrested.’”).

³³⁰ See Elder, Johnson & Rishwain, *supra* note 189, at 353–62, 380–84, 393–402, 406–09. One commentator argues “the threat of being sued [for libel] for publishing distorting footage might discourage wanton recording of police officers.” Potere, *supra* note 110, at 315–16. Under the almost universal rule, police officers are public officials subject to demanding constitutional-malice standard. See *supra* text accompanying notes 277, 281, 296–302. It is doubtful any recorder, particularly the citizen-recorder, will be deterred by such a theoretical threat of litigation, even when published on the Internet. See Elder, *Rehnquist’s Attempts*, *supra* note 109, at 306 n.1052.

³³¹ Professor Solove writes elegantly about communications not intended for “widespread disclosure”: “Communication often occurs within the context of a relationship, in which people already share mutual knowledge, and their communication is frequently part of a continuing dialogue. For this reason, communication is especially prone to misinterpretation when disclosed to people lacking the same background information.” Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protection Against Disclosure*, 53 DUKE L.J. 967, 994 (2002).

with camera shots and recordings being disseminated to the public by multiple actors and viewed by bystanders, maybe with competing agendas in today's highly polarized world?³³² And, is all matter—audio or video—that recorders choose to disseminate necessarily objective? As discussed elsewhere as to hidden-camera usage, what about the recorder-disseminator “consumed by selection bias” in what he or she records, edits, and publishes?³³³ Remember such footage, like hidden cameras, could—and maybe calculatedly so—make a Mother Teresa or a police officer look like a reprobate.³³⁴ As one commentator has recently said, “[i]n 21st century partisan warfare, objective truth is a deadly burden.”³³⁵ Or, as Professor Solove sagely suggests: “[I]solated

³³² See Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1781 (2019) (“A sufficiently inflammatory deep fake depicting a police officer using racial slurs, shooting an unarmed person or both could set off substantial civil unrest, riots, or worse . . . Such events would impose tangible costs by sharpening societal divisions, as well as tangible costs for those tricked into certain actions and those suffering from those actions.”); Christine Rosen, *Apocalyptic Fatigue*, COMMENTARY MAG. (Jan. 9, 2020), <https://www.commentary.org/christine-rosen/apocalypse-fatigue/> (“Technology and its many platforms accelerate both these impulses in the age of information overload. . . [T]o make oneself heard above the din, you have to shout. . . [T]he way to rouse people to get out and actually *do* something is to declare your cause an existential one. . . Trafficking in doomsday scenarios and overheated rhetoric gives people a sense of purpose and control in an age of anxiety. . .”); *Hils v. Davis*, 52 F.4th 997, 1001–002, 1004 (6th Cir. 2022) (“It’s the risk that only part of the interview will be shared with the media or that the media will use only part of the video during the nightly news. If it is unfair to an officer charged with misconduct to turn a recording on and off during an interview of him, it is equally unfair to the integrity of the investigation and the objective of public confidence in it to share bits and pieces of the investigation with the public before the full investigation ends.”); *Project Veritas v. Schmidt*, 72 F.4th 1043, 1074–83 (9th Cir. 2023) (Christen, J., dissenting) (citing Chesney and Citron and applying *Dietemann v. Time, Inc.*’s argument about the distinction between hearing, repeating, recording, and disseminating, and skewering the majority’s analysis for allowing forwarded recordings “to vast audience, [to be] posted on the internet in perpetuity, selectively edited, presented devoid of context, or manipulated using modern technology”).

³³³ See Epstein, *supra* note 1, at 1020 (noting that the “only information” published is that “known to be harmful” to the victim, “in a form calculated to score a knockout blow”); CLAY CALVERT, *VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE* 61–62 (2004) (discussing “truth” in the context of “mediated voyeurism,” including hidden cameras or “ride-along” crime-cop shows: “Shows that feature unscripted, unstaged videotape. . . offer viewers a glimpse of what *appears* to be the truth. . . as if a camera or a video recorder is an objective observer, free from the interference of a human hand. . . That, at least, is the theory. Much of mediated voyeurism. . . does *not* reflect or correspond with reality. . .”).

³³⁴ See Elder, Johnson & Rishwain, *supra* note 189, at 359.

³³⁵ Abe Greenwald, *The Climate Change Depressives*, COMMENTARY, (Sept. 13, 2019), <https://www.commentary.org/abe-greenwald/the-climate-change-depressives/>.

information, often constituting only part of a very complicated reality, may lead to hasty condemnation.”³³⁶

Is the overtness-with-presumed-actual-notice limitation, if it is that, a meaningful or constitutionally defensible limitation?³³⁷ As indicated above, Judge Posner mentioned the “hidden in plain view” nature of cell phones and the implicit need for those being potentially recorded to be always searching and watchful for recording devices.³³⁸ Such a harsh requirement is reminiscent of the much-maligned concept of the “open and obvious danger,” assumed-risk, no-duty rule of traditional premises-liability law that left many foreseeable and deserving parties unprotected.³³⁹ And, the “overtness” concept appears to be operational even when the police officer does not in fact see the device if it is being openly used but the officer is otherwise distracted or preoccupied by performing his or her assigned duties.³⁴⁰ This overt-with-presumed-actual-notice qualification smacks of an implicitly *Katz*-based assumed-risk and forfeiture-of-privacy construct while ignoring Justice Stewart’s corollary discussed above about a right-to-privacy-in-public.³⁴¹ And, how truly voluntary is such an assumption when the

³³⁶ Solove, *The Virtues of Knowing Less*, *supra* note 332, at 1039. Compare Zeronda, *supra* note 100, at 1137 (“[B]ecause a camera replicates the scene before its lens, photographs create a misconception of objectivity... Cameras are limited... in their capacity to tell the whole truth... [T]he camera does not capture the events immediately before and after a photograph is taken... the photograph removes an image from its temporal context... [D]epending on the width of the lens or the position of the cameraman, a photograph may not capture a subject’s entire surroundings, thereby misrepresenting the subject.”), with *Estes v. Texas*, 381 U.S. 532, 574 (1965) (Warren, C.J., concurring) (“Broadcasting in the courtroom would give the television industry an awesome power to condition the public mind either for or against the accused. By showing only those parts of its films or tapes which depict the defendant or his witnesses in an awkward or unattractive position, television directors could give the community, state or country a false and unfavorable impression of the man on trial.”).

³³⁷ Some authors would extend it to all recordings, including surreptitious. See Alderman, *supra* note 131, at 525; see also *supra* text accompanying notes 202–79 (discussing the *Martin v. Gross* litigation).

³³⁸ See *ACLU v. Alvarez*, 679 F.3d 583, 612 (7th Cir. 2012) (Posner, J., dissenting).

³³⁹ See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *HORNBOOK ON TORTS* 470–73 (2d ed. 2016) (criticizing the rule and noting the Third Restatement of Torts extension of a duty of reasonable care even as to “known or obvious dangers where harm is nonetheless foreseeable as to all entrants on the land except non-flagrant trespassers”).

³⁴⁰ Compare this with the analysis of overtness-non-secrecy in the Fourth Amendment context of an asserted illegal videotaping in *Glik v. Cunniffe*, 655 F.3d 78, 87–88 (1st Cir. 2011) (“[T]he use in plain view of a device commonly known to record audio is, on its own, sufficient evidence from which to infer the subjects’ actual knowledge of the recording.”).

³⁴¹ See *Katz v. United States*, 389 U.S. 347, 351 (1967) (“But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”).

officer is performing—as the rule requires—his or her duties in public? None of the appellate cases seriously considers this limitation in view of the Supreme Court’s *Jones-Carpenter* jurisprudence³⁴² and the Court’s recent emasculation of the third-party doctrine as based largely on essentially fictitious and laughable rationales.³⁴³

Much has been made of recording-police-in-public and its speech creation-production-enablement potential. Yet, any attempt to argue that the mechanical act of recording—either audio or visual—somehow reflects and is an inherent and indispensable part of an expressive or artistic act³⁴⁴ is rather amusing and difficult to jive with many well-known precedents: what about the confrontational civil-disobedience arrests in *Adderley v. Florida* precipitated with the intent or fervent hope of garnering or weaponizing public notoriety on one of the great public issues of our time;³⁴⁵ the deliberative acts of newspaper editors in *Cohen* as the supreme expression of high-level, potentially expensive, and profoundly precedent-setting editorial judgments;³⁴⁶ the hypothetical physical assaulter in Justice Breyer’s unanswerable illustration who acts in a theatrically calculated manner to “provide an opportunity to transmit to the public his views on a matter of public

³⁴² See *supra* text accompanying notes 246–50 (noting how the First Circuit cited, but largely ignored, *Jones and Carpenter in Project Veritas Action Fund v. Rollins*, 982 F.3d 813,821 (1st Cir. 2020)).

³⁴³ See Elder, *Recordings II*, *supra* note 5. Notice can be important as a form of “boundary management” rather than prohibiting recording *in toto*. See Margot E. Kaminski, *Regulating Real World Surveillance*, 90 WASH. L. REV. 1113, 1140 (2015) (“Prohibiting surreptitious recording effectively requires notice by making surveillance legal only when the recorder notifies her subject. . . . Boundary management laws . . . centering on notice let individuals calibrate an ideal level of disclosure rather than relying on the legislature to identify a ‘sensitive’ category of information. Such laws allow for more flexibility for normative change over time.”).

³⁴⁴ See *supra* text accompanying notes 57, 73–76, 80, 92–93, 99–109, 114, 125–27, 133–34, 142–44, 200–01, 234, 238; *infra* text accompanying notes 249–51, 255.

³⁴⁵ *Adderley v. Florida*, 385 U.S. 39 (1966) (upholding “even-handed enforcement” of the state’s interest—parallel to that of private landowners—in protecting its property for its “lawfully dedicated” purpose and rejecting the protestors’ “major unarticulated premise . . . that people who want to propagandize protests or views have a constitutional right to do so whenever and however or wherever they please.”).

³⁴⁶ *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). See also *Anderson v. Strong Mem’l Hosp.*, 573 N.Y.S.2d 828, 830–33 (N.Y. Sup.Ct. 1991) (quoting an editorial on *Cohen* by third-party-defendant Gannett that failure to follow a source-anonymity promise “[w]ould be to say, ‘The First Amendment gives us the “right to lie” . . . Talk about a blow to the First Amendment: if people do not trust us, they wouldn’t tell us anything. Then we wouldn’t print the truth, and you couldn’t read it.”).

concern”;³⁴⁷ the intricate, highly sophisticated undercover, false-friend operations in both *Shulman v. Group W Productions, Inc.*³⁴⁸ and *Sanders v. ABC*;³⁴⁹ the tightly organized, multi-dimensional, anti-Food Lion operation—including fabricated references and fake resumes provided by an antagonistic union—trespassory hoaxes via hidden camera that decimated plaintiff in order to enhance defendant’s advertising revenue;³⁵⁰ the orchestrated, planned outing-resulting-in-suicide of the alleged child predator by joint actor-law-enforcement and media co-defendants and served to the public in highly sensational doses as entertainment.³⁵¹ In view of the above—many more could be added—it is difficult to take seriously the argument that mechanical recordings are “expressive” or “artistic.”³⁵²

As tacitly acknowledged in *Fields v. City of Philadelphia*, which rejected an expressive conduct or inherently expressive threshold for First Amendment protection, defending the argument that audiotaping or videotaping conduct is “expressive” is a tough argument to sell.³⁵³ Many distinguished scholars have rejected the argument. As Professor

³⁴⁷ See *Snyder v. Phelps*, 562 U.S. 443, 461 (2011); see also *supra* text accompanying note 315.

³⁴⁸ *Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 494–99 (Cal. 1998) (finding no impermissible burden under the First Amendment for audio and visual recordings of a paralyzed-accident-victim in a helicopter-ambulance and a hidden-microphone recording of conversations at an accident site by a nurse-rescuer). See *id.* at 495–96 (citing *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971)) (“The conduct of journalism does not depend, as a general matter, on the use of secret devices to record private conversations.” Such a prohibition does not deprive journalists of “their ‘indispensable tools.’”). See discussion *supra* note 148.

³⁴⁹ *Sanders v. ABC*, 978 P.2d 67, 69–79 (Cal. 1999) (finding that co-defendant-investigative-reporter-false-employee’s recording of private conversations in a private workplace not open to the public violated plaintiff’s “limited but legitimate expectation” of workplace privacy as to a third-party-stranger’s covert recording for public dissemination.).

³⁵⁰ See *Elder, Johnson & Rishwain, supra* note 189, at 362–76.

³⁵¹ See *Conrad v. NBC Universal*, 536 F. Supp. 2d 380, 392–98 (S.D.N.Y. 2008) (denying defendant’s motion to dismiss plaintiff’s claims for intentional infliction of emotional distress, violation of Fourth Amendment rights, and violation of Fourteenth Amendment substantive due process rights, finding that the complaint plausibly alleged that some aspects of the execution of the warrants were “inherently fictional dramatization[s]” in significant respects.).

³⁵² See *Blitz et al., supra* note 144, at 97 (criticizing Professor Kreimer’s broad protection for photography as “seem[ing] to cut against the strong intuition that use of video for surveillance has less in common with photography than with nonspeech information gathering, such as electronic eavesdropping or location tracking”).

³⁵³ See *Fields v. City of Philadelphia*, 862 F.3d 353, 355 (3d Cir. 2017) (finding that “[t]he First Amendment protects the public’s right of access to information about their officials’ public activities”). The majority noted that this “case is not about people attempting to create art with police as their subjects. It is about recording police officers performing their official duties.” *Id.* at 359.

Bhagwat says, “[t]he act of recording is not itself expressive in the way that burning a flag is expressive because it does not communicate a message; it creates a message to be communicated later.”³⁵⁴ Professor Dienes similarly concludes that “[t]he taking of photographs or the making of sound recordings is not itself speech . . . the sale or trade of a photo or recording is probably not a form of expression.”³⁵⁵ Professor McDonald finds that electronic devices—such as cameras, computers or video-recorders—are “difficult to describe as ‘expressive activity’ when they are being used to simply record, store, and process information for dissemination at a later date.”³⁵⁶ Professor Solove rejects the argument that California’s anti-paparazzi statute “unfairly singl[es] out newsgathering activities” of paparazzi, as “people might undertake these activities for other reasons, such as snooping on others. Taking photos and recording sound are not inherently and exclusively newsgathering activities.”³⁵⁷ A California appellate decision concurred with this line of thinking, holding that “taking photographs and making recordings for personal gain are not always or necessarily journalistic activities.”³⁵⁸ Otherwise “a private detective who takes a person’s photograph to sell to a client, or a blackmailer who does so to extort money would have to be characterized as a journalist.”³⁵⁹ Interestingly, but unsurprisingly, the federal appellate circuits have not discussed either *Raef* or these scholarly critiques.

As Judge Posner has eloquently suggested, the purported “right”-to-record-police-in-public issue is much more complex, nuanced, and fraught with difficulties than the shallow views reflected thus far in the alleged “growing consensus” on the issue.³⁶⁰ For one who has assisted in defamation and privacy litigation on the side of the wounded, it is beyond dispute that courts are often overwhelmed—and sometimes mesmerized—by the collective weight of a deeply-resourced, extremely aggressive and self-protective media and a collaborationist-media-First

³⁵⁴ Bhagwat, *supra* note 27, at 1042.

³⁵⁵ Thomas Dienes, *Protecting Investigative Journalism*, 67 GEO. WASH. L. REV. 1139, 1146 (1999).

³⁵⁶ McDonald, *supra* note 291, at 270.

³⁵⁷ Daniel J. Solove, *California’s Tougher Anti-Paparazzi Law and the First Amendment*, TEACHPRIVACY (Oct. 5, 2005), <https://teachprivacy.com/californias-tougher-anti-paparazzi-law/>.

³⁵⁸ *Raef v. App. Div. of the Super. Ct.*, 193 Cal. Rptr. 3d 159, 167 (Cal. Ct. App. 2015).

³⁵⁹ *Id.*

³⁶⁰ *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 610 (7th Cir. 2012) (Posner, J., dissenting).

Amendment-scholar collective.³⁶¹ The latter have little interest, predisposition or incentive to delve deeply into the impact on the victims—law enforcement, people they contact in public, and potentially countless others if, as suggested above, the rule dominoes broadly—or of the impact on the public—generally decreased law-enforcement effectiveness and its effects on individual and public safety, the undermining of privacy-in-public and security in public areas, the potentially debilitating sense of civility and community in a democracy, and so on—of a new doctrine that aggressively pushes the envelope to modify the Court’s heretofore highly restricted newsgathering protection.³⁶²

By contrast, legislatures—the Congress and the states—usually solicit and listen to a broader, more balanced array of competing interests and are in a better position to assess in a deliberative and measured way the variables in question as they impact the public good.³⁶³ Five members of the *Bartnicki* Court—the two concurers³⁶⁴ and the three dissenters³⁶⁵—would, in the words of Justice Breyer, have “avoid[ed] adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility” in the pure-expression setting before the Court.³⁶⁶ The Court’s powerful and creative *Jones-Carpenter* jurisprudence seems to reflect a parallel overall preference for or willingness to defer.³⁶⁷ Federal appellate circuits should have

³⁶¹ See Elder, *Rehnquist’s Attempts*, *supra* note 109, at 280–85 (proposing courts solicit the filing of *amici curiae* briefs in libel cases “on important questions to off-set in part the media’s awesome ability to energize the Jabberwockian hordes in its defense” and the possibility of law-school involvement in protecting reputational interests). These criticisms and recommendations apply equally to issues of personal privacy. See *supra* notes 28, 69, 92, 291.

³⁶² See *supra* notes 11–27, 148, 163, 176, 240, 253, 261, 189–91, 308–16, 345–59.

³⁶³ *Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., concurring).

³⁶⁴ *Id.* at 535–41.

³⁶⁵ *Bartnicki*, 532 U.S. at 541–56 (Rehnquist, C.J., dissenting).

³⁶⁶ *Bartnicki*, 532 U.S. at 541 (Breyer, J., concurring).

³⁶⁷ See, e.g., *U.S. v. Jones*, 565 U.S. 400, 429–30 (2012) (Alito, J., concurring) (noting that in circumstances of “dramatic technological change,” the preferred solution is legislative, by Congress or the states, as a legislative body is “well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way”); *Riley v. California*, 573 U.S. 373, 408 (2014) (Alito, J., concurring) (“[I]t would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment. Legislatures . . . are in a better position . . . to assess and respond” to present and future technological change.); *Carpenter v. U.S.*, 138 S. Ct. 2206, 2267–70 (2018) (Gorsuch, J., dissenting) (internal citations omitted) (detailing areas for property-rights analyses of a Fourth Amendment “tied to the law,” with the advantage that judges would decide cases based on “‘democratically legitimate sources of law,’” such as positive law, rather than the

taken account in the past—but likely will not adopt in the future—the wise course promoted above for the right-to-record-police-in-public setting and accord due weight to legislative determinations balancing safety, privacy, and private speech, association, and autonomy interests on the one hand and free speech-press interests on the other—interests all *Bartnicki* Court members treated as co-equally of “the highest order.”³⁶⁸

The cases concede, as they must, that reasonable restrictions, including time, place, and manner restrictions, may be imposed in recording-police-in-public scenarios.³⁶⁹ This concession reflects in broad terms the view of the Supreme Court in *Colten v. Kentucky*,³⁷⁰ where the Court upheld a disorderly-conduct-in-a-public-place conviction where numerous cars and actors congregated near a valid traffic stop following a political protest directed at Mrs. Richard Nixon and Colten’s refusal to “move on” when directed by a police officer on multiple occasions. The Court perfunctorily rejected Colten’s First Amendment

judges’ “own biases or personal policy preferences.” This approach “carves out significant room for legislative participation” by requesting judges “to consult what the people’s representatives have to say about their rights,” and “suppl[ies] a sounder basis for judicial decisionmaking than judicial guesswork about societal expectations.”). *See also* *Carpenter*, 138 S. Ct. at 2261 (Alito, J., dissenting) (arguing that the Court’s decision undermined interest in legislative resolutions of modern technology issues affecting privacy and law enforcement).

³⁶⁸ *Bartnicki*, 532 U.S. at 518 (“[T]hese cases present a conflict between interests of the highest order . . . the interest in the full and free dissemination of information concerning public issues, and . . . the interest in individual privacy and, more specifically, in fostering private speech.”). *See also id.* at 536–38 (Breyer, J., concurring); *id.* at 544 (Rehnquist, C.J., dissenting).

³⁶⁹ *See* *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (“To be sure, the right to film is not without limitations. It may be subject to reasonable time, place, and manner restrictions.”); *Gericke v. Begin*, 753 F.3d 1, 7–10 (1st Cir. 2014) (“Reasonable restrictions on the exercise of the right to film may be imposed when the circumstances justify them.”); *Irizarry v. Yehia*, 38 F.4th 1282, 1292 n.10 (11th Cir. 2022) (“[I]n this case, there is no ‘time, place, and manner’ restriction issue because a ‘peaceful recording’ of a traffic stop in ‘a public space that does not interfere with the police officers’ performance of their duties is not reasonably subject to limitation.” (citing *Glik*, 655 F.3d at 84)); *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017) (noting that not all recording is protected or desirable) (“The right to record is not absolute. ‘[I]t is subject to reasonable time, place, and manner restrictions.’ But in public places these restrictions are restrained.”); *Turner v. Driver*, 848 F.3d 678, 688, 690 (5th Cir. 2017) (finding that “a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions”); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (finding that the Smiths had a “First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct”).

³⁷⁰ *Colten v. Kentucky*, 407 U.S. 104, 109 (1972) (“[W]e have little doubt that Colten’s conduct in refusing to move on after being directed to do so was not, without more, protected by the First Amendment.”).

argument—that his actions in trying to arrange transportation for his cited friend-motorist, “observing the issuance” of the citation, and “disseminating and receiving information” were constitutionally-protected—as a “strained, near frivolous contention.”³⁷¹ The Court also found the order wholly legitimate. Colten had “no constitutional right to observe” the traffic citation’s issuance or “to engage the issuing officer in conversation at that time.”³⁷² The Court referenced the state’s legitimate interest in traffic-law enforcement and law-enforcement officers’ concomitant entitlement “to enforce [state law] free from *possible* interference or interruption from bystanders,” even those who claimed “a third-party interest in the transaction.”³⁷³ Here the police “had *cause for apprehension*” that legitimate accident concerns—a strip along a public road, crowded with vehicles and people—“*might* expose the entourage, passing motorists, and police” to accident risks.³⁷⁴

That the right-to-record-police-in-public cases have taken an unduly narrow view of what the “*possible* interference or interruption”³⁷⁵ that required *Colten*-deference encompasses is amply reflected in Judge Posner’s *Alvarez* dissent discussed above.³⁷⁶ Even Judge Sykes in *Alvarez* conceded that under *Colten* nothing in the majority opinion “immunizes behavior that obstructs or interferes with effective law enforcement or the protection of public safety,”³⁷⁷ although she narrowly construed *Colten*. Actual, not possible, obstruction or interference appears to be

³⁷¹ *Id.* Compare this with the discussion of the “right to observe” in *Chestnut v. Wallace*, 947 F.3d 1085 (8th Cir. 2020). See also *supra* text accompanying notes 72–78.

³⁷² *Colten*, 407 U.S. at 109.

³⁷³ *Id.* (emphasis added). Colten could be directed to “move on” despite the absence of any trespass or traffic violation. *Colten*, 407 U.S. at 109. At trial Colten stated he “feared violence” by police. *Id.* at 107. In his brief, Colten made a “passing reference” to “the possibility” of such violence and that he stayed “to avert misdeeds or to be a potential witness to them.” Colten failed to develop any factual basis “for a reasonable apprehension of violence and seemingly dispels whatever force” such a statement might have by admitting that “[i]n the overwhelmingly majority of cases, that suspicion [of police brutality] is undoubtedly wrong, but it is there.” *Id.* at 107 n.2. Surprisingly, no circuit court has addressed this issue. If baseless, wrongful suspicion in the “overwhelming majority” of instances does not justify a First Amendment-based right to refuse to “move on” when ordered, how does such parallel, likely baseless, possibly highly politicized, wrongful general suspicion justify an “unfettered” right-to-record-police-in-public as a prophylactic measure purportedly required by the First Amendment? The federal appellate courts’ collective silence regarding the Court’s terse rejection of Colten’s First Amendment claim is deafening.

³⁷⁴ *Colten*, 407 U.S. at 109 (emphasis added).

³⁷⁵ *Id.* (emphasis added).

³⁷⁶ See *ACLU v. Alvarez*, 679 F.3d 583, 612 (7th Cir. 2012) (Posner, J., dissenting).

³⁷⁷ *Alvarez*, 679 F.3d at 607.

the *Alvarez* majority threshold. While police can “take all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations,” a police officer “surely cannot issue a ‘move on’ order to a person *because* he is recording”—under *Colten*, such authority to “order bystanders to disperse” is limited to “reasons related to public safety and order and other legitimate law enforcement needs.”³⁷⁸

The First Circuit in *Gericke* likewise conceded such a right to impose “reasonable restrictions” but “only if the officer can reasonably conclude” that the act of filming or recording “*itself is interfering or is about to interfere*” with police duties.³⁷⁹ Such a restriction could be in multiple forms—“a reasonable, contemporaneous order” or a preexistent provision—statute, ordinance, regulation, or “other published restriction with a legitimate governmental purpose.”³⁸⁰ In *Gericke*, no

³⁷⁸ *Id.* See also *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (“The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.” (quoting *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987))). In *City of Houston*, the Court invalidated as overbroad an ordinance criminalizing mere verbal interruptions of police, concluding that police “must respond with restraint” to such “verbal challenges to police action. . . . [A] certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.” *City of Houston*, 482 U.S. at 471–72. The First Amendment “protects a significant amount of verbal criticism and challenge directed at police officers.” *Id.* at 461.

³⁷⁹ *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014) (dicta) (emphasis added). Restrictions could involve traffic stops, particularly if the detained person is armed, and could justify security measures such as a dispersal directive to bystanders for “legitimate safety reasons” even if this would “incidentally impact” a recorder’s First Amendment rights. *Id.* The court briefly footnoted the special protections given police officers in traffic-stop situations because of legitimate safety concerns. *Id.* at 7 n.9. Compare this with *Cobarobio v. Midland County*, No. MO:13-CV-00111, 2015 WL 13608102 (W.D. Tex. Jan. 7, 2015), *aff’d* 695 F. App’x 88 (5th Cir. 2017). In *Cobarobio*, the court rejected a First Amendment right-to-record and retaliation claims when plaintiff-citizen journalist attempted to videotape carnage following a train wreck, refused to stop filming and relinquish his camera, emphasizing that the plaintiff had not taken video from a distance, but videotaped from the “exact location” where police and emergency medical personnel were responding. *Cobarobio*, 2015 WL 13608102 at *12, *15–17. As the court said, “Plaintiff[] disregard[ed] the substantial and unjustified risk his presence posed at this central location” with “interrupting, disrupting, impeding, or otherwise interfering” behavior that led to his arrest. Indeed, “there was no clearly-established First Amendment right to film police activity where, as here, Plaintiff actively impeded the officers’ efforts secure the scene and restore public order.” Officers “were faced with the overwhelming task of securing a frantic scene following a disastrous train collision.” *Id.*

³⁸⁰ See *Gericke*, 753 F.3d at 8 (dicta). See also Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 Geo. L.J. 1559, 1577 (2016). Professor Simonson interprets *Gericke* and parallel broad language in *Glik*, 655 F.3d at 84, as barring any restriction on recording—including time/place/manner—unless “interference constitutes a physical obstruction”

such provisions were in place, plaintiff complied with all orders, and was never asked to leave.³⁸¹ Under this very restrictive approach of the courts’ idyllic view of police interactions with the public, “reasonable police officer[s] would have understood, first hand, the significance of this proliferation of electronic devices” as a “routine aspect of the way in which people record and communicate events.”³⁸² The latter

to police work. *Id.* In answering a hypothetical posed by *City of Houston*, 482 U.S. at 462 n.11—“what is of concern in that example [of a running, shouting party] is not simply contentious speech, but rather the possibility that by shouting and running beside the officer the person may physically obstruct the officer’s investigation”—Professor Simonson postulates that a smartphone in the runner’s hand would mean that “the only point at which the runner can lawfully be asked to stop what she is doing is if she is physically in the way of the officer’s investigation. Any other form of interference—screaming, recording, asking questions—is protected First Amendment activity, even if it does ‘interfere’ with what an officer is trying to do in the lay meaning of the term.” Simonson, *Beyond Body Cameras*, *supra*, at 1577. An unprotected “physical impediment to public safety” is not limited to touching a police officer, but might involve “someone jumping between an officer and an individual that officer is attempting to handcuff or someone physically obstructing the work of firefighters or emergency medical technicians.” *Id.* at 1577–78. Justice Powell would not have so limited what a city could prosecute: “. . . I question the implication of the Court’s opinion that the First Amendment generally protects verbal ‘challenge[s] directed at police officers’. . . In many situations, speech of this type directed at police officers will be functionally indistinguishable from conduct that the First Amendment does not protect. . . I have no doubt that a municipality constitutionally may punish an individual who chooses to stand near a police officer and persistently attempt to engage the officer in conversation while the officer is directing traffic at a busy intersection. Similarly, an individual, by contentious and abusive speech, could interrupt an officer’s investigation of possible criminal conduct. A person observing an officer pursuing a person suspected of a felony could run beside him in a public street shouting at the officer. Similar tactics could interrupt a policeman lawfully attempting to interrogate persons believed to be witnesses to a crime.” *City of Houston*, 482 U.S. at 479 (Powell, J., concurring). The Court’s opinion “appears to reflect a failure to apprehend that this ordinance . . . is intended primarily to further the public’s interest in law enforcement.” *Id.* at 480. Indeed, “there is a fine line between legitimate criticism of police and the type of criticism that interferes with the very purpose of having police officers. But the Court unfortunately seems to ignore this fine line and to extend First Amendment protection to any type of verbal molestation or interruption of an officer in the performance of his duty.” *Id.* at 480. Justice Scalia agreed. *Id.* at 472–73 (Scalia, J., concurring). Chief Justice Rehnquist would not have found the ordinance unconstitutional. *Id.* at 481–82 (Rehnquist, C.J., dissenting). Justice Brennan agreed that a “properly tailored” statute or ordinance could make it an offense “to fail to disperse in response to a valid police order or to create a traffic hazard” as seen in *Colten*, but not by “criminalizing speech directed to an officer,” as in this case permitting an arrest of a person “who in *any* manner verbally interrupts an officer.” *Id.* at 462 n.11 (citing *Colten v. Kentucky*, 407 U.S. 104 (1972)). He responded to Justice Powell’s example of “‘contentious and abusive’ speech—running/shouting at the officer pursuing a suspected felon—as ‘not simply contentious speech’ but as involving the possibility of ‘physically obstruct[ing] the officer’s investigation.’” *Id.* at 462 n.11. Such was punishable under a tailored statute but not “a broad statute aimed at speech.” *Id.*

³⁸¹ See *Gericke*, 753 F.3d at 3 (stating that Gericke complied with the police officer’s orders).

³⁸² *Fields v. City of Philadelphia*, 862 F.3d 353, 364 (3d Cir. 2017) (Nygaard, J., concurring in part, dissenting in part).

standard would seem to require carefully calibrated reasonableness, an indefensible requirement that the First Amendment does not impose on other professionals, including the media, particularly given the extraordinary demands and time limitations imposed on police officers, the inherent dangers facing them as an almost broodingly omnipresent aspect of employment, and the often-quick-action and intuitive nature of required decision making.

IV. A PROPOSAL FOR LIMITED PROTECTION FOR THE RECORDING AND DISSEMINATION OF POLICE ACTIVITIES IN PUBLIC

The collective tenor of circuit decisions reflects, with the exceptions of Judges Posner and Clement, a very narrowly focused, almost messianic need to confront and control purportedly widespread police abuses of authority,³⁸³ with only limited exceptions “narrowly tailored”—but not “the least restrictive or least intrusive means”—for ways to serve governments’ significant or important interests.³⁸⁴ Again, these exceptions presume a broad First Amendment right-to-record-police-in-public-and-disseminate-the-fruits-thereof without limitation, with the potentially appalling side effects discussed above. But, is such an expansive First Amendment rule truly necessary or can, to use its proponents’ fraught language, a “more narrowly tailored” rule be adopted by courts or legislatures that reflects established common-law

³⁸³ See Varadarajan, *Interview with Kelly*, *supra* note 330 (quoting former Commissioner Ray Kelly claiming that acts like the death of George Floyd are “total aberrations”). See also *Commonwealth v. Hyde*, 750 N.E.2d 963, 969 (Mass. 2001) (Rejecting the implication police “routinely act illegally or abusively to the degree that public policy strongly requires documentation of details of contacts between the police and members of the public to protect important rights,” the Court was “not convinced that the widespread clandestine recording of encounters between individuals and police officers would be desirable or even efficacious.”); Wilfrid C. Reilly, *American Run Riot: The Narrative Around the Killing of George Floyd is Destructively False*, COMMENTARY MAGAZINE, (July-Aug. 2020) (Citing Washington Post statistics, Professor Reilly concludes they “torpedo the [racial] ‘genocide’ claim—and for that matter any narrative about generally out-of-control policing,” “that there is an extraordinary wave of widely tolerated police and citizen violence against people of color” and how, “[t]o a remarkable degree, mainstream media and even America’s corporate brands have played a significant role in promoting the conventional police-brutality narrative.”); Clay Calvert & Robert D. Richards, *The Irony of News Coverage: How the Media Harm Their Own First Amendment Rights*, 24 HASTINGS COMM. & ENT. L.J. 215, 228–29, 236, 239 (2002) (Media “agenda setting” in school campus shootings created a “largely misguided and unfounded” public perception about the magnitude thereof—a “pseudo-environment” that “does not match the reality of the actual environment” does not “deliver[] on one of [the media’s] primary responsibilities—telling the truth.”).

³⁸⁴ *Turner v. Driver*, 848 F.3d 678, 690 (5th Cir. 2017) (dicta).

doctrine and historical wisdom, practice, and policy³⁸⁵ and circumscribes the privilege to a specific focus—limiting observers and even recorders to bringing to the attention of police and prosecutors evidence of alleged police abuse of authority or criminality? Of course, if government officials take official action thereon, the media and others can report such under the doctrine of “fair report.”³⁸⁶

Justice Breyer hinted at such an approach in *Bartnicki v. Vopper*,³⁸⁷ where he referenced Restatement (Second) of Torts § 595³⁸⁸ and its parallel adoption in privacy cases in § 652(g)³⁸⁹ and stated broadly that “[w]here publication of private information constitutes a wrongful act,

³⁸⁵ See RESTATEMENT (SECOND) OF TORTS § 592A (AM. L. INST. 1977) (“Like these privileges [for intentional torts like assault, battery, false imprisonment, trespass to land and chattels, these conditional privileges] give protection from liability only when exercised for the purpose for which they are given and with reasonable care that no more harm shall be done to the interests of others than is necessary to accomplish the end for which the privilege is given.”).

³⁸⁶ See ELDER, DEFAMATION, *supra* note 219, § 3:8 (2023).

³⁸⁷ *Bartnicki v. Vopper*, 532 U.S. 514, 539 (2001) (Breyer, J., concurring).

³⁸⁸ *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 595 cmt. g (AM. L. INST. 1977)) (holding out the cited section of the Restatement as standing for a “general privilege to report that ‘another intends to kill or rob or commit some other serious crime against a third person’”). Justice Breyer’s quotation does not quote the entire sentence: “Any person is conditionally privileged to convey to a police officer his belief or suspicion that another intends to kill or rob or commit some other serious crime against a third person.” Compare *id.* with RESTATEMENT (SECOND) OF TORTS § 595 cmt. g (AM. L. INST. 1977). Such can also be made “to the person whose life or property is in peril or even to a stranger, since there is a social justification for reasonable efforts to protect anyone, friend or stranger, against violence.” RESTATEMENT (SECOND) OF TORTS § 595 cmt. g (AM. L. INST. 1977). This limited privilege only covers disclosure to a recipient to whom the publisher owes a legal duty or to “a person to whom its publication is otherwise within the generally accepted standards of decent conduct.” *Id.* at § 595. There is *no* suggestion in the black-letter rule that publication via mass dissemination in the media or on social media is contemplated. The conveyance-to-a-police-officer reference in § 595 cmt. g overlaps with § 598, providing a “public-interest” privilege to anyone to publish “the defamatory matter to a public officer or a private citizen who is authorized or privileged to take action if the defamatory matter is true . . . when any recognized interest of the public is in danger, including the interest in the prevention of crime and the apprehension of criminals,” and also where it is in “the interest in the honest discharge of their duties by public officers.” *Id.* at § 598. This includes a public officer’s duty to supervise “inferior officers [which] in many cases carries with it the power to remove or discipline the inferiors for neglect of duty or malfeasance in office, or to report the misconduct to heads of departments or others having the power of removal or discipline.” *Id.* at § 598 cmt. e. In performing the latter, “it is desirable that public officers have extensive information concerning the conduct of their subordinates.” *Id.* The latter is a qualified privilege—it is unavailable if made “for some improper purpose” under § 603 or made via “excessive publication” under § 604. *Id.* at § 598 cmt. a. Neither § 595 nor § 598 extend to dissemination of information to the general public or on the Internet.

³⁸⁹ *Bartnicki*, 532 U.S. at 539 (Breyer, J., concurring) (citing RESTATEMENT (SECOND) OF TORTS § 652(g) (AM. L. INST. 1977)). § 652 adopts the privileges in § 614–19 “so far as they are pertinent.” RESTATEMENT (SECOND) OF TORTS § 652 cmt. a (AM. L. INST. 1977).

the law recognizes a privilege allowing the reporting of threats to public safety.”³⁹⁰ Justice Breyer’s brief references did not specifically restrict his analysis to limited, rather than to broad, publicization.³⁹¹ But he also cited as on point the famous exception to psychotherapists’ duty of patient confidentiality³⁹²—*Tarasoff v. Regents of Univ. of Cal.*,³⁹³ a limited-dissemination duty to inform the threatened person or those who will protect his interests, one which does not contemplate that the psychotherapist who owes the duty of confidentiality will hold a press conference to publicize said threats to the public-at-large.³⁹⁴ There would be no unfettered First Amendment privilege to do that.³⁹⁵

³⁹⁰ *Barnicki*, 532 U.S. at 539 (Breyer, J., concurring).

³⁹¹ See *id.* Justice Breyer seems inclined to extend his analysis broadly: “Even where the danger may have passed by the time of publication, that fact cannot legitimize the speaker’s earlier privacy expectation. Nor should editors, who must make a publication decision quickly, have to determine present or continued danger before publishing this kind of threat.” *Id.*

³⁹² *Id.* (citing *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1967)).

³⁹³ *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d at 340 (Cal. 1967) (imposing negligence liability on psychotherapists for failing “to warn the intended victim or others likely to apprise the victim” of threats of violence posed by their patient—including notifying the police or taking “whatever other steps are reasonably necessary under the circumstances.”). For a brief overview of state reactions to *Tarasoff*, see DOBBS ET AL., *supra* note 340, at 658–59.

³⁹⁴ *Tarasoff*, 551 P.2d at 347 (“[T]he therapist’s obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger.”). Neither of Justice Breyer’s references justifies a common-law privilege of public dissemination. *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 851–54 (10th Cir. 1972), merely held that defendant could not be sued for breach of contract/confidentiality where it notified an adjacent property owner that drilling done for plaintiff had tapped into the recipient’s oil and gas rights, which resulted in litigation against plaintiffs. Justice Breyer also cited RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40 cmt. c (AM. L. INST. 1995), noting that “trade-secret law permits disclosures relevant to public health or safety, commission of crime or tort, or other matters of substantial public concern.” *Barnicki*, 532 U.S. at 539 (Breyer, J., concurring). Justice Breyer did not quote the prefatory language: “The existence of a privilege to disclose another’s trade secret depends upon the circumstances of the particular case, including the nature of the information, the purpose of the disclosure, and the means by which the actor acquired the information.” Compare *id.* with RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40 cmt. c (AM. L. INST. 1995).

³⁹⁵ See *Boehner v. McDermott*, 484 F.3d 573, 579 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1072 (2007). In *Boehner*, the court sanctioned Congressman McDermott’s sharing of newsworthy confidential information with the media related to Speaker Newt Gingrich’s negotiated settlement with the House Ethics Committee that McDermott received from third-party illegal receivers of a phone call with John Boehner. *Id.* at 575–76, 581. The court cited as “closely analogous,” *id.* at 578, the 1995 case *U.S. v. Aguilar*, 515 U.S. 593, 605–06 (1995), rejecting First Amendment protection for a federal judge who disclosed to an investigative-wiretap subject information disclosed to him by another judge. *Boehner* interpreted *Aguilar* for “the principle that those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their

Yet, in another respect, Justice Breyer’s reference to common-law privileges as persuasive analogies is very helpful. The common law’s time-honored approach provides only *qualified* privileges to persons in scenarios where there is a matter “affect[ing] a sufficiently important public interest” communicated to a public officer or a private citizen “authorized or privileged to take action if the defamatory matter is true.”³⁹⁶ As the author indicates elsewhere, the “consensus”³⁹⁷ — “overwhelming majority view”³⁹⁸ — of the voluminous precedent accords only a qualified public-interest privilege to communicate with those designated persons. It is not an absolute privilege and does not cover broad dissemination to those outside the privilege or to the public at large.³⁹⁹

responsibilities have *no* First Amendment right to disclose that information.” *Boehner*, 484 F.3d at 579 (emphasis added). *Boehner* interpreted House confidentiality rules on investigations as demonstrating voluntary acceptance of a duty of confidentiality encompassing both defendant’s lawful receipt and his wrongful handling-disclosure-publication of the contents. *Id.* at 581 (Griffin, J., concurring). The court rejected defendant’s reliance on *Barnicki*, which involved private individuals not “occupying positions of trust.” *Id.* at 579. Another famous case involved a psychiatrist-book author who published a verbatim record of treatment. *Doe v. Roe*, 345 N.Y.S.2d 559, 560 (N.Y. App. Div. 1973), *aff’d*, 307 N.E.2d 823 (N.Y. 1973). The U.S. Supreme Court granted certiorari, *Roe v. Doe*, 417 U.S. 907 (1974), but later found this grant improvident. *Roe v. Doe*, 420 U.S. 307 (1975). On remand, the court upheld liability for damages, including those based on publication, resulting from breach of confidentiality, injunctive relief, and parallel relief against the co-defendant psychologist-husband, “a willing, indeed, avid, co-violator.” *Doe v. Roe*, 400 N.Y.S.2d 668, 677–78 (N.Y. Sup. Ct. 1977). *See also* ELDER, DEFAMATION, *supra* note 219, § 2:12 (discussing extensive precedent denying the judicial-proceedings privilege to lawyers and others who make disclosures to the media under the “almost universally found” doctrine); § 2:24 (acknowledging that the “great majority rule” rejects a “common-interest” privilege between the media and its viewers or hearers); *id.*, at § 2:28 (rejecting § 595 privilege as to dissemination to the media of lawsuit to be filed); *id.* at § 2:34 (discussing “excessive publication” as a limitation: “Clearly, the very notion of a qualified privilege precludes widespread or restricted communication.” (internal citation omitted)); *id.* at § 6:2 (acknowledging that only a “small minority” have adopted the *Rosenbloom v. Metromedia, Inc.* standard in private person-public interest or concern cases under state law after *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974), or any “proposed common law public interest privilege”).

³⁹⁶ RESTATEMENT (SECOND) OF TORTS § 598 (AM. L. INST. 1977).

³⁹⁷ ELDER, DEFAMATION, *supra* note 219, § 2:26.

³⁹⁸ *Id.* § 2:10.

³⁹⁹ RESTATEMENT (SECOND) OF TORTS § 598 (AM. L. INST. 1977). The privilege applies to third-party, non-law-enforcement personnel only “under circumstances which, if true, would give the recipient a privilege to act for the purpose of preventing a crime or apprehending a criminal or fugitive from justice.” *Id.* § 598 cmt. f. The author’s approach is much more constrained than the open-ended, cryptic suggestion by Ku, *supra* note 187, at 204–05, that any use of a cell phone to capture any matter of “legitimate public interest,” like commission of a crime, would result in immunity, apparently absolute in nature and parallel the police-recording-in-public absolute First Amendment immunity in its broadest iteration. *See supra* the text accompanying notes 303–07.

A more modest approach is to find that this common-law-based approach is consistent with the First Amendment and would effectuate the competing interests in question. Importantly, it would do so without exacerbating a potentially violent or dangerous situation or endangering those involved—police officers, suspects, those police meet with, or even the public—through instantaneous, wide-spread and permanent recording of potentially inflammatory information. Such recordings, as suggested above, may well be false, partially true, calculatedly misleading, based on partisan or anti-police bias, or even if truthful could needlessly exacerbate a volatile situation.⁴⁰⁰ By contrast, the right-to-record-police-in-public cases have no limitations. These cases invariably reflect a callous, “full-speed-ahead” mentality that, in the words of former Secretary of State Condoleezza Rice, “has shortened the time frame in which we make policy.”⁴⁰¹ That approach may, on balance, cause incalculable harm not only to individual and public safety and security, but to individual reputation, privacy, and free-expression-interests—values deemed equivalent to free-expression concerns identified by the Supreme Court.⁴⁰²

A common-law approach, which models the behavior of George Holliday in the 1991 Rodney King case in Los Angeles,⁴⁰³ requires the recorder to approach, as a first resort, directly or indirectly—as in the case of Walter Scott in North Charleston, South Carolina⁴⁰⁴—law enforcement or prosecutors in a good-faith attempt to ensure that the matter is properly investigated and no cover-up occurs. In this case, the observer or recorder of police conduct would only be entitled to a broader-dissemination privilege when such a first proffer is rejected, not pursued, frustrated, obfuscated, or concealed. But this second, broader

⁴⁰⁰ See *supra* text accompanying notes 322–36.

⁴⁰¹ See *Firing Line with Margaret Hoover: Condoleezza Rice*, (PBS Sept. 13, 2019).

⁴⁰² See *supra* text accompanying notes 19, 237, 268; see also *Time, Inc. v. Firestone*, 424 U.S. 448, 456–57 (1976). (denominating redress of reputational harm as an “equally compelling need” to free expression and rejecting the “rather drastic limitations” of the *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), rule absent “convincing assurance” such were required to protect free expression); Elder, *Rehnquist’s Attempts*, *supra* note 109, at 146–47, 146 n.94.

⁴⁰³ See Kreimer, *supra* note 92, at 347–48, 348 n.40 (quoting Holliday as first going to the LAPD—“they pretty much hung up on me... before I could mention I had a tape... So then I called Channel 5.”).

⁴⁰⁴ See Alex Blinder & Timothy Williams, *Ex-South Carolina Officer Is Indicted in Shooting Death of Black Man*, N.Y. TIMES, June 8, 2015 (observing that the important evidence recorded on a cell phone by a pedestrian witnessing the shooting of Mr. Walter Scott by Mr. Slager was provided to Mr. Scott’s family, who “turned it over to the authorities”).

privilege comes with a common-sense caveat. Maybe the first request went nowhere for a legitimate reason—for example, upon investigation, the recorder’s suspicion was not accurate or corroborated, did not reflect an objective analysis of the entire episode at issue, the source was legitimately viewed as suspect, the matter was under good-faith investigation, and so on. In such a scenario, the recorder-profferer to the general public takes the risk of liability for abusing the proposed qualified privilege under both the common law⁴⁰⁵ and the First Amendment. As has been repeatedly shown and as repeatedly reaffirmed by the Supreme Court, information-gatherers and newsgatherers of all varieties have no special protection under the First Amendment from rules of general applicability.⁴⁰⁶

Proponents of the burgeoning “growing consensus” may criticize the above proposal as unworkable, claim that the dynamic facts of individual cases need to be assessed quickly and immediately by the public, and that the unwieldy mix of thin policies critiqued herein justifies the present rule. But that approach largely leaves the First Amendment field to newsgatherers with a cell phone. The law does not accord lawyers and parties absolute immunity to litigate cases filed with the courts by disseminating filings to the public or through the media. It requires them to proceed through the established deliberative process of the judicial system, where the rights of all are protected.⁴⁰⁷ The “growing consensus” rule provides no protection to those filmed—in the cases thus far, the police and those they interact with, often in volatile or anxiety-producing settings involving those being investigated or charged with crime, victims of crimes and accidents, and so on. How can a rule that contemplates and incentivizes unfettered dissemination on the Internet that adds measurably to the volatility and risk to police officers and the public and the privacy of those ensnared therein be justified? Those that attack the proposal’s limitation on the public’s “right to know” will no doubt respond—and vigorously. Let the debate begin.

The proposal has the decided attraction of being consistent with the common-law defamation tradition, whether of 1791 or 1868, and provides a starting point for analysis the current Court in constitutional-rights

⁴⁰⁵ On abuse/forfeiture of a qualified privilege in defamation, *see* ELDER, DEFAMATION, *supra* note 219, §§ 2:31–35. For parallel analyses in privacy, *see* ELDER, PRIVACY TORTS, *supra* note 147, §§ 2:13, 3:10.

⁴⁰⁶ *See, e.g., supra* text accompanying notes 11–12.

⁴⁰⁷ *See* ELDER, DEFAMATION, *supra* note 219, § 2:12.

cases. Doubters and opponents will no doubt suggest that police and prosecutors tend to conceal chronic police abuse. But, the allegation of such abuse has been disproved, as the discussion above indicates. To the extent that such abuse does occur, there are a plethora of readily available legal and political limitations already in effect to counter concealment—media and non-media interest in exposing crime and corruption, increasing use of police body-and-vehicle cameras, state FOIA statutes to gain access to this footage and other records, a host of local, state, and federal actors with an interest in and duty to investigate allegations of police abuse and cover-ups. At present, the prevailing First Amendment precedent is the “growing consensus” doctrine critiqued herein. But, as the analysis above suggests, this rule is, as the late Judge Laurence Silberman said in another context, “simply cut from whole cloth”⁴⁰⁸ and ignores the Court’s newsgathering jurisprudence. The proposal has the decided benefit of following a time-honored and deep line of precedent consistent with the common-law tradition. It provides a rule that, as Justice Scalia, said of his property-rights baseline in Fourth Amendment cases, “keeps easy cases easy.”⁴⁰⁹

CONCLUSION

In *Alvarez*, Judge Posner disparaged the now-denominated “growing consensus” as a “create[d]” First Amendment doctrine. Professor Bhagwat correctly views it as “based on fairly mere cursory analysis.” Professor Bhagwat’s criticism is worth further analysis. As a prominent defender of the “growing consensus” rule, he nonetheless excoriates this rule as based on oft-quoted language about “prohibiting government from *limiting the stock of information* members of the public may draw.”⁴¹⁰ He disparages this as based on Court discussions “completely off point or that rejected First Amendment claims.”⁴¹¹ Professor Chermersinsky, another prominent legal scholar, similarly criticizes parallel oft-cited, amorphous dicta in *Branzburg v. Hayes*—“without some protection for seeking out the news, freedom of the

⁴⁰⁸ *Tah v. Glob. Witness Publ’g Co.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting), *cert. denied*, 142 S. Ct. 427 (2021).

⁴⁰⁹ *Florida v. Jardines*, 569 U.S. 1, 11 (2013). Rejection of ad hoc and multi-factor balancing rules is developed further in Section II.

⁴¹⁰ See *supra* text accompanying note 104.

⁴¹¹ Bhagwat, *supra* note 27, at 1041.

press could be eviscerated”⁴¹²—as “empty rhetoric.”⁴¹³ The two cases underlying the “stock of information” justification are *National Bank v. Bellotti*, invalidating a prohibition on corporations making donations to political campaigns,⁴¹⁴ and *Stanley v. Georgia*, finding a First Amendment right to possess obscenity in the home.⁴¹⁵ Professor Simonson, another scholar and strong proponent of the “growing consensus” rule—though not adopting that term—finds this “stock-of-information” rationale unfinished.⁴¹⁶ In her view, “[t]he transfer of power inherent in the act of observation turns the filming of a police officer in public into a form of resistance—into a challenge to their authority.”⁴¹⁷ In sum, both of these rationales involve much ado based on very little.

As demonstrated above, this “growing-consensus” doctrine is founded on thin constitutional gruel, much taken-out-of-context language, and theories at odds with the Court’s restrictive First Amendment protection and its unequivocal speech-versus-conduct dichotomy. Under the appellate courts’ strange, skewed analyses that collectively collapse prototypical conduct into an indivisible speech-conduct continuum, unconsented-to recordings and wiretapping become a type of pure expression subject to heightened scrutiny rather than a crime or tort as defined by state law and subject to deferential review. These decisions ignore what Judge Posner denominated the “significant social costs” of constitutionalizing the right-to-record-police⁴¹⁸—and, as the courts intimate, extension to all public officials and all private

⁴¹² *Branzberg v. Hayes*, 408 U.S. 665, 681 (1972) (dicta).

⁴¹³ Chermersky, *supra* note 253, at 1145.

⁴¹⁴ *Nat’l Bank v. Bellotti*, 435 U.S. 765, 783–84 (1978).

⁴¹⁵ *Stanley v. Georgia*, 394 U.S. 557, 563–64 (1969).

⁴¹⁶ Simonson, *supra* note 381, at 1570–71.

⁴¹⁷ *Id.* at 1568. In other words, “holding up a recording device in the visible presence of an officer communicates something important in that moment to that officer and to the larger public.” *Id.* at 1572. Professor Simonson says observation “can be a form of in-the-moment expression itself” by “impact[ing] the decision-making of those officials and help[ing] shape the public meaning of those official acts.” *Id.* “[R]ecording backs up the power of observation—indeed, for some traditionally disempowered populations, the activity of close observation would not be safe or possible without the ‘weapon’ of the camera to provide safety.” *Id.* In essence, Professor Simonson views “filming police in public [as] an expression of dissent. Pointing a smartphone at a police officer in public is a statement to that officer; it can serve as a symbol of quiet defiance.” *Id.* at 1573. Professor Simonson is concerned a “stock-of-information” rationale would justify spatial restrictions that would frustrate the separate basis for First Amendment protection—the right of “civilians to contest police actions in the moment” by “visibly holding the recording device,” with its “expressive content.” *Id.* at 1576–78.

⁴¹⁸ *ACLU v. Alvarez*, 679 F.3d 583, 614 (7th Cir. 2012) (Posner, J., dissenting).

persons engaged in matters of public concern—and authorize anyone with a cell phone to post audio and video disseminated to the public and on the Internet with “unfettered” impunity unless government can meet heightened-review standards and the almost-always-devastating “narrow tailoring” requirement.

The impact of strict scrutiny and “narrow tailoring” were strikingly evidenced by a prototypically aggressive and successful media and civil-liberties-organization attack in 2022 that resulted in a federal court enjoining enforcement of an Arizona statute⁴¹⁹ making it a misdemeanor to fail to step back from an eight-foot zone after receiving a verbal admonition when video-recording a “law-enforcement activity”—defined as “[q]uestioning a suspicious person,” “[c]onducting an arrest, issuing a summons or enforcing the law,” or “[h]andling an emotionally disturbed or disorderly person who is exhibiting abnormal behavior.”⁴²⁰ Concerns for officer and public safety prompted the statute, with its sponsor emphasizing that cop-watching followers, unlike professional journalists, often stand a foot or two from police officers involved in an encounter and film it without the officers knowing who they are.⁴²¹ No co-defendant defended the statute.⁴²² The court granted a preliminary injunction, finding the statute subject to strict scrutiny as content-based because it “single[d] out” video recording of law enforcement for differential analysis and failed to meet the necessary-to-a-compelling-interest and narrowly-drawn-to-achieve-such-end requirements.⁴²³ The statute’s ostensible rationale in preventing interference with law-enforcement officers failed in view of other statutes available to prevent such interference. The court primarily relied on a provision making it a misdemeanor to “commit obstructing government operations” in narrowly limited circumstances.⁴²⁴

Surely, the legislature is not limited to the options cited therein in determining under the states’ constitutional police power what acts of interference with or distraction of an officer are permissible under the First Amendment. The court found the statute over-inclusive if

⁴¹⁹ *Arizona Broads. Ass’n v. Brnovich*, 626 F. Supp. 3d 1102, 1105 (D. Ariz. 2022).

⁴²⁰ ARIZ. REV. STAT. ANN. § 13-3732 (2022).

⁴²¹ FIRST AMENDMENT WATCH, *Preliminary Injunction Blocks Arizona Law Restricting Recording of Police* (Sept. 9, 2022), <https://firstamendmentwatch.org/preliminary-injunction-blocks-arizona-law-restricting-recording-of-police-officers/>.

⁴²² *Arizona Broads. Ass’n*, 626 F. Supp. 3d at 1104.

⁴²³ *Id.* at 1106.

⁴²⁴ *See id.* at 1106 (citing ARIZ. REV. STAT. ANN. § 13–2402 (2022)).

its goal was to prevent such interference, as it “fail[ed] to see how the presence of a person recording a video near an officer *interferes* with the officer’s activities.”⁴²⁵ The court also found it under-inclusive, as the statute did not bar either audio-recording or photography from the same location or device and did not address individuals utilizing cell phones for other reasons, such as texting.⁴²⁶ In other words, the court utilized the First Amendment to micromanage the Arizona legislature’s determination that close videotaping was its overarching target. It rejected the legislature’s right to make reasoned distinctions between videorecording, which, unlike audio recording, necessarily identifies the officer in question and measurably enhances his or her perceived risk, particularly in the context of an ongoing volatile or potentially volatile scenario and the video’s potential dissemination on social media. It also ignored the likelihood that the nature of live video, unlike a photo(s), poses a quite different hazard. Of course, mere texting is indistinguishable from notetaking, with few, in any, such risks and is generally permitted to attendees even in criminal proceedings.⁴²⁷

Yet, that purported “growing consensus”—which defenders undoubtedly now view as *the consensus*—is founded on a line of superficially reasoned cases involving extensive reliance on dicta, qualified-privilege holdings, and fact-intensive decisions—including some remanded for further fact-finding. There is little substantive analysis of the Court’s *Branzburg-Cohen-Bartnicki* jurisprudence, no discussion of Justices Breyer’s important concurrence in *Snyder* or the decision’s much broader implications for newsgathering, and not a single reference to the Court’s terse rejection of a frantic media appeal from the important post-*Branzburg* decision by the Florida Supreme Court’s 1977 *Shevin v. Sunbeam Television Corp.* opinion, where many arguments later raised in the “growing consensus” cases were specifically rejected in favor of traditional, rational-basis deference to legislative determinations on privacy issues.⁴²⁸

In *Project Veritas Action Fund*, Judge Barron acknowledged that the Court has not accepted any of the “growing-consensus” cases and

⁴²⁵ *Arizona Broads. Ass’n*, 626 F. Supp. 3d at 1106 (emphasis added).

⁴²⁶ *Id.*

⁴²⁷ *Id.* See also *supra* text accompanying note 69.

⁴²⁸ *Shevin v. Sunbeam Television Corp.*, 351 So.2d 723 (Fla. 1977), *cert. denied*, 435 U.S. 920, 1018 (1978), will be discussed in greater depth in the forthcoming follow-on piece, Elder, *Recordings II*, *supra* note 5.

specifically noted two pivotal issues not before the First Circuit—whether a lower-than-intermediate-level standard of review was appropriate and whether recording constituted *conduct*, with “a mere incidental burden” on free expression.⁴²⁹ The Court denied review in 2021. The Court should resolve these and related issues and reject the specter of Orwellian America this line of precedent fosters.⁴³⁰ The Court should consider Judge Ginsburg’s assessment of filmmaking as “merely a noncommunicative step in the production of speech” indistinguishable from typing a manuscript⁴³¹ and Judge Sutton’s conclusion that a participant-police-officer’s asserted right to record a complaint proceeding involves *conduct*, not *speech*.⁴³²

⁴²⁹ Project Veritas Action Fund v. Rollins, 982 F.3d 813, 834, 836, 840 n.4 (1st Cir. 2020). On the rational basis standard, *see supra* notes 11–27, 44, 143–44, 229–32, 285–94, 308–16, 428.

⁴³⁰ *See supra* notes 148, 218, 297, 303, 332 for brief discussions of Project Veritas v. Schmidt, 72 F.4th 1043 (9th Cir. 2023) (invalidating Oregon’s statute incorporating the “growing-consensus” doctrine as to law-enforcement only as content-based and subject to strict scrutiny); *see also* PETA v. N.C. Farm Bureau Fed’n, Inc., 60 F.4th 815 (4th Cir. 2023) (applying heightened scrutiny and enjoining as applied to PETA legislative adoption of the duty-of-loyalty/trespass standards as to false employees found to comply with *Cohen v. Cowles Media Co* in *Food Lion v. ABC*, *see supra* note 350, because the statutory provisions punished only those who intended by recording and document capture to breach a duty of loyalty with intent to cause harm to the entity by use of the fruits thereof, concluding such would “halt all meaningful undercover investigations” on private business properties), *cert. denied*, Oct. 16, 2023.

⁴³¹ Price v. Garland, 45 F.4th 1059, 1068 (D.C. Cir. 2022).

⁴³² *See Hils v. Davis*, 52 F.4th 997, 1005–06 (6th Cir. 2022).