

PRIOR RESTRAINT AND THE POLICE: THE FIRST  
AMENDMENT RIGHT TO DISSEMINATE RECORDINGS OF  
POLICE BEHAVIOR

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*Freedom of speech under the First Amendment once again is in jeopardy—this time, in the form of unconstitutional prior restraints on personal video recordings. In the age of smartphones and media-sharing services like YouTube and Facebook, video recording and uploading or distributing has become a natural—and even expected—form of communication. It is commonplace that people record trivial, everyday moments, and, it remains routine for people to record noteworthy events or occurrences. In a certain sense, countless media users and sharers around the country have become the functional equivalents of journalists reporting and commenting on all aspects of life and society. Thus, in the wake of a growing public disillusionment regarding law enforcement and the criminal justice system, people have begun video recording police behavior as the officers are acting in the public discharge.*

*Such videography has not existed without pushback from law enforcement. In response to these civilian-made video recordings, many police officers confiscate the video recording devices and/or destroy the files containing the recordings. This type of police interference has brought with it a storm of controversy. The debate centers on whether personal video recording of police conduct is “speech” that qualifies for First Amendment protection, and if so, whether confiscating and/or destroying the videos before their dissemination amounts to an unconstitutional prior restraint on speech—the most serious incursion of one’s First Amendment speech freedom.*

*This Note ultimately argues that destroying an individual’s video recording before the individual has the chance to disseminate it does indeed impose an unconstitutional prior restraint on speech. In arriving at this conclusion, this Note analyzes: (1) whether video recordings of police constitute speech, (2) whether the state can offer independent justifications for the restraint on speech, and (3) whether any exceptions articulated in prior restraint jurisprudence justify the de-*

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*struction of the recordings. In addition to its recommendation that police officers' confiscation and/or destruction of civilian-made videos be formally declared a prior restraint, this Note offers two suggestions to prevent the restraint from occurring: (1) require police to obtain warrants before seizing or destroying civilian-made video recordings, and (2) install a supervisory level of review to help curtail this form of prior restraint on speech.*

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## I. INTRODUCTION

“She was in high heels and she was freezing,” Antonio Buehler described of one of the DUI arrestees whose arrest he witnessed during the early hours of 2012 on New Year’s Morning.<sup>1</sup> According to Buehler, the “bulkier, dark-haired cop” then walked to the passenger side of a black sedan, opened the door, and there was “a very loud scream.”<sup>2</sup> The officer had wrenched another passenger from the car and forced her to her knees onto the concrete.<sup>3</sup> After “twisting her arms behind her back,” the first officer was then aided by a second, and together they lifted the female passenger—using her locked arms as a lever—to a standing position.<sup>4</sup> The passenger was screaming and crying and in a lot of pain—so much that Buehler felt that he and his friend could not simply return to their car and drive away.<sup>5</sup> Instead, they started taking pictures of the arrest. Upon seeing them do so, the arrestee beckoned at them, “Please film this.”<sup>6</sup>

The saga does not end there. After being accused of spitting in the officer’s face and subsequently arrested for third-degree felony harassment of a public servant due to the alleged spitting,<sup>7</sup> Buehler posted an ad on Craigslist to find other witnesses to the incident.<sup>8</sup> In response, someone posted a video of Buehler’s arrest that the witness took with a cellphone while across the street from the scene.<sup>9</sup> The witness’s cell-

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1. Marshall Jones, *War Veteran Antonio Buehler Continues Fight with Austin Police*, DIGITAL TEXAN (Jan. 9, 2012), <http://digitaltexas.net/2012/austin-local-news/war-veteran-antonio-buehler-takes-apd-years-melee/article13982/#.UJ7v-odZXeJ>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Jim Bergamo, *APD Officers Accused of Abuse During New Year’s Arrest*, KVUE.COM (ABC) (Jan 4, 2012, 11:18 PM), <http://www.kvue.com/video/yahoo-video/Two-APD-officers-accused-of-abuse-during-New-Years-arrest-136709358.html>.

9. For video footage see *id.*

phone video was shown to the grand jury, which ultimately decided not to bring the felony charge against Buehler.<sup>10</sup>

The use of a cellphone to video record a public official's conduct is not unique to Buehler's situation.<sup>11</sup> In fact, with "[n]early half of all American adults . . . and two-thirds of all young adults now own[ing] a smartphone,"<sup>12</sup> posting videos to media-sharing websites like Facebook and YouTube has never been easier.<sup>13</sup> Additionally, with the advent of such websites and technologies occurring after the Rodney King beatings in 1991—where an individual's videotape of the brutal incident singlehandedly enabled the investigation against the Los Angeles Police Department for excessive force<sup>14</sup>—the practice of recording police<sup>15</sup> activity has become routine.<sup>16</sup>

Yet, Buehler's case is distinct from other cases where private individuals have recorded police activity. Typically, cases where individuals video record police conduct culminate with the police confiscating or destroying the video<sup>17</sup> and sometimes arresting the individual for violation of the state's wiretap law.<sup>18</sup>

10. Calily Bien, *Antonio Buehler Won't Face Felony Case: Grand Jury No-Billed Buehler and Officer Involved*, KXAN.COM (Apr. 2, 2013, 10:10 PM), <http://www.kxan.com/news/local/austin/antonio-buehler-wont-face-felony-case>.

11. In fact, Buehler's situation is an exceptional one because the police did not delete the recordings that Buehler made of the scene. A more typical scenario is where an individual records police conduct, and the officer being recorded confiscates the recording device and deletes the photos and recordings from the device. See, e.g., Selwyn Crawford & Travis Hudson, *Witnesses to End of Chase Where Garland Officer Fired 41 Shots Say Police Deleted Cellphone Photos, Video*, DALLASNEWS.COM (Sept. 11, 2012, 2:05 PM), <http://www.dallasnews.com/news/crime/headlines/20120911-witnesses-to-end-of-chase-where-garland-officer-fired-41-shots-say-police-deleted-cellphone-photos-video.ece>; Jeni DiPrizio, *Memphis Police Delete Photographer's Cell Phone Pictures*, LOCALMEMPHIS.COM (Jan. 30, 2012, 4:54 PM), <http://www.localmemphis.com/news/local/story/Memphis-Police-Delete-Photographers-Cell-Phone/38kGSgNmikSoE7yuxBL2aQ.csp>; Madison Ruppert, *Massachusetts Police Confiscate Cell Phone of Witness, Destroy Evidence of Alleged Police Brutality*, END THE LIE, <http://endthelie.com/2012/03/10/massachusetts-police-confiscate-cell-phone-of-witness-destroy-evidence-of-alleged-police-brutality/#axzz2dvfglwFL> (last visited Sept. 23, 2013); Tom Tian, *Occupy Chicago Alleges Police Deleted Video Footage of Sunday March*, CHICAGOIST (Jan. 31, 2012, 2:20 PM), <http://chicagoist.com/2012/01/31/eavesdropping.php>.

12. PEW INTERNET, OUR SMARTPHONE HABITS (Sept. 17, 2012), available at <http://pewinternet.org/Infographics/2012/Our-Smartphone-Habits.aspx>.

13. See *id.* (reporting that fifty-five percent of "adult cell owners . . . now go online using their phones").

14. INDEP. COMM'N OF THE L.A. POLICE DEP'T, *Foreward* to REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT, at ii (1991), available at [http://www.parc.info/client\\_files/Special%20Reports/1%20-%20Christopher%20Commission.pdf](http://www.parc.info/client_files/Special%20Reports/1%20-%20Christopher%20Commission.pdf).

15. For purposes of this Note, the term "police" should be read synonymously with the terms "public official," "government official," "law enforcement officer," and "government agent" because the subsequent analysis applies to all individuals acting pursuant to federal, state, or local law.

16. *Police Fight Cellphone Recordings*, NEW ENG. CTR. FOR INVESTIGATIVE REPORTING, <http://necir-bu.org/investigations/police-fight-cellphone-recordings-2/police-fight-cellphone-recordings/> (last visited Oct. 27, 2013).

17. See *supra* note 11 (citing various instances in which police officers have deleted an individual's photos or video recordings depicting the same police officer's conduct).

18. For example, Simon Glik witnessed three police officers struggling to remove a plastic bag from a young man's mouth and used his cellphone to video record what he thought was excessive force, but the police seized his cellphone and arrested him for violating the Massachusetts wiretap statute. Glik v. Cunniffe, 655 F.3d 78, 80 (1st Cir. 2011); see also NEW ENG. CTR. FOR INVESTIGATIVE REPORTING, *supra* note 16.

Litigation treating the issue of whether video recording the police is a constitutionally protected right<sup>19</sup> strikes at the heart of the First Amendment guarantee of freedom of speech.<sup>20</sup> These types of cases mainly arise in two contexts.<sup>21</sup> First, most cases involving the prohibition and subsequent deletion of police recordings arise under 42 U.S.C. § 1983, which enables an individual to seek relief from state actors for having infringed upon her constitutional rights.<sup>22</sup> Thus, the plaintiff would argue that the police officer has violated her First Amendment rights by deleting her video. In turn, the state actor—usually a police officer—is permitted an affirmative defense of qualified immunity and must show that “(1) . . . the facts alleged or shown by the plaintiff [do not] make out a violation of a constitutional right; and (2) . . . [that] the right was [not] ‘clearly established’ at the time of the defendant’s alleged violation.”<sup>23</sup> When applying the qualified immunity test, it is of the courts’ discretion to determine the order of consideration for each prong based on the context of the case at hand.<sup>24</sup>

Second, other cases (usually alleging that the prohibition on citizens’ recordings of police conduct is inconsistent with the First Amendment) arise in conjunction with the state’s eavesdropping or wiretap laws.<sup>25</sup> In these cases, courts analyze issues of statutory interpretation to determine whether the pertinent wiretap or eavesdropping law applies to an individual’s behavior of recording police conduct.<sup>26</sup>

In both lines of cases, courts use substantive grounds to determine whether the prohibition and/or deletion of an individual’s video recordings of police conduct burdens her First Amendment right of free speech.<sup>27</sup> As a result, an individual’s legal ability to record police officers varies across the United States because the issue hinges on state

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19. Compare *ACLU v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012) (acknowledging that the criminalization of “all nonconsensual audio recording necessarily limits the information that might later be published or broadcast . . . and thus burdens First Amendment rights”), *Glik*, 655 F.3d at 83 (recognizing “that the First Amendment protects the filming of government officials in public spaces”), *Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000), and *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995), with *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010) (recognizing that the right to videotape police officers is not clearly established), and *Szynecki v. Houck*, 353 F. App’x 852, 853 (4th Cir. 2009) (per curiam).

20. U.S. CONST. amend. I.

21. See Michael Potere, *Who Will Watch the Watchmen?: Citizens Recording Police Conduct*, 106 *Nw. U. L. REV.* 273, 286 & n.96 (2012).

22. 42 U.S.C. § 1983 (2006) (“[E]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”).

23. *Glik*, 655 F.3d at 81.

24. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

25. See, e.g., *ACLU v. Alvarez*, 679 F.3d 583, 595, 608 (7th Cir. 2012) (holding that the “expansive reach of [the Illinois eavesdropping] statute is hard to reconcile with basic speech and press freedoms” and thus does not apply to recordings of police conduct); *Commonwealth v. Hyde*, 750 N.E.2d 963, 967 (Mass. 2001) (holding that the legislative intent of the Massachusetts wiretap statute justifies the statute’s use for banning the recording of public officials).

26. See, e.g., *Alvarez*, 679 F.3d at 595, 608; *Hyde*, 750 N.E.2d at 967.

27. See cases cited *supra* notes 18–19, 23–26.

law.<sup>28</sup> In other words, if and to what degree an individual's First Amendment right to record can be constitutionally inhibited by a state's wiretapping or eavesdropping law rests upon a detailed valuation by the courts of the countervailing interest at issue and the state's proffered interest in safeguarding it. In response to the incongruence of wiretap laws among the states<sup>29</sup> and recent litigation,<sup>30</sup> the United States Department of Justice (DOJ) drafted a letter asserting its stance that the right to videotape actions of police officers in public places is embedded within the First Amendment.<sup>31</sup>

What these cases<sup>32</sup> do not specifically decide and what the DOJ does not explicitly address,<sup>33</sup> however, is whether a law enforcement officer's *destruction* of an individual's recording, and not merely the prohibition on the act of recording the officer's conduct, comprises an unconstitutional prior restraint on speech under the First Amendment. Thus, this Note analyzes the prior restraint doctrine as applied specifically to scenarios in which a police officer deletes an individual's recordings of that officer's conduct while in the public discharge of duty.

Part II of this Note discusses the history of the prior restraint doctrine. Initially, this Part discusses the doctrine's derivation from English common law and its underlying goal of protecting the freedom of the press. Part II then contextualizes prior restraint within contemporary First Amendment doctrine and U.S. jurisprudence.

Part III of this Note initially analyzes whether the right to record the police falls within the purview of the First Amendment by defining *who* qualifies as "the press" and defining *what* constitutes an act of speech. After establishing that the First Amendment covers the right to record the police, Part III analyzes the different situations in which a

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28. Jennifer Preston, *Philadelphia Fires Police Officer Caught on Video Punching Woman*, N.Y. TIMES (Oct. 4, 2012, 2:42 PM), <http://thelede.blogs.nytimes.com/2012/10/04/philadelphia-fires-police-officer-caught-on-video-punching-woman/>.

29. See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (West 2012) (providing that an individual may not "willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication"). "[T]he legality of a recording in Maryland hinges on whether the recorded statements were part of a 'private conversation' and therefore fall within the definition of an 'oral communication.'" Marianne F. Kies, Note, *Policing the Police: Freedom of the Press, the Right to Privacy, and Civilian Recordings of Police Activity*, 80 GEO. WASH. L. REV. 274, 282 (2011); see also MASS. GEN. LAWS ANN. Ch. 272, § 99(C)(1) (West 2000) (prohibiting interception of oral communications). "[U]nless all parties have given consent to be recorded, the legality of a recording hinges on whether it was made covertly as opposed to openly." Kies, *supra*, at 285; see also 720 ILL. COMP. STAT. 5/14-2(a)(1) (2010). "[U]nder Illinois's wiretapping law, regardless of whether any party to a recording had a reasonable expectation of privacy, *all parties* to a communication must consent to be recorded for a recording of the communication to be lawful." Kies, *supra*, at 287.

30. Justin Fenton, *ACLU Sues Baltimore Police over Right to Videotape*, BALT. SUN (Aug. 31, 2011), [http://articles.baltimoresun.com/2011-08-31/news/bs-md-ci-aclu-taping-lawsuit-20110831\\_1\\_aclu-legal-director-howard-county-man-officers](http://articles.baltimoresun.com/2011-08-31/news/bs-md-ci-aclu-taping-lawsuit-20110831_1_aclu-legal-director-howard-county-man-officers).

31. Letter from Jonathan M. Smith, Chief of Special Litig. Section of the U.S. Dep't of Justice, to Mark H. Grimes & Mary E. Borja, litigants in *Sharp v. Baltimore City Police Department* (May 14, 2012) [hereinafter DOJ Letter], available at [http://www.justice.gov/crt/about/spl/documents/Sharp\\_ltr\\_5-14-12.pdf](http://www.justice.gov/crt/about/spl/documents/Sharp_ltr_5-14-12.pdf).

32. See cases cited *supra* note 19.

33. DOJ Letter, *supra* note 31.

police officer may impose a prior restraint on speech by arresting the individual making the recording and/or destroying the video. Finally, Part III evaluates the varying justifications that the government may proffer in support of officers' ability to levy a prior restraint on speech by seizing, deleting, and arresting individuals who record their actions.

Part IV recommends that the destruction of an individual's video recording of the police and/or arrest of the individual be formally deemed an unconstitutional prior restraint on speech. Additionally, this Part suggests that police officers should be required to obtain a warrant before seizing civilian-made videos. Finally, this Part recommends installing a level of supervisory review where an independent contractor of the police department would aid officers in their discretion regarding action toward citizen videographers on the scene. Part V concludes.

## II. HISTORY OF THE PRIOR RESTRAINT DOCTRINE

Without a precise definition of what actually constitutes an invalid prior restraint under the First Amendment, the esoteric doctrine remains a standing conundrum for legal scholars everywhere.<sup>34</sup> Though the Supreme Court has previously heard cases involving prior restraint, the resulting opinions are either very limited in scope,<sup>35</sup> issued *per curiam*,<sup>36</sup> or both—and all of them are over thirty-five years old.<sup>37</sup> As a result, discerning how prior restraint precedent fits within today's First Amendment case law is challenging,<sup>38</sup> and synthesizing the precedent into one cohesive understanding is almost impossible.<sup>39</sup>

Section A elaborates on the origins of prior restraint at common law, and Section B contextualizes the doctrine within contemporary times by examining two seminal U.S. Supreme Court cases on prior restraint, as well as the exceptions to the doctrine that they set forth and affirm.

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34. See, e.g., Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539 (1977); John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L. J. 409 (1983); Michael I. Meyerson, *Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087 (2001).

35. See, e.g., *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (*per curiam*); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Near v. Minnesota*, 283 U.S. 697 (1931).

36. *N.Y. Times Co.*, 403 U.S. at 714.

37. *Nebraska Press Association v. Stuart* is the most recent case where the Supreme Court considers prior restraint in part of its holding and not merely dicta. 427 U.S. 539 (1976).

38. See Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 649 (1955).

39. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 949 (3d ed. 2006) (“[A] clear definition of ‘prior restraint’ is elusive. It is too broad to say that a prior restraint is a government action that prevents speech from occurring. All laws outlawing speech would constitute prior restraints by this definition. Nor is the traditional distinction between censorship before speech and after the fact punishments sufficient.”).

*A. Prior Restraint and English Common Law*

Despite the fragmented jurisprudence that exists on the prior restraint doctrine, its roots in English common law give light to the doctrine's underlying motives and, consequently, its functional application.<sup>40</sup> The policy that undergirds much of what is understood as prior restraint—and more broadly, informs First Amendment ideals—derives from William Blackstone's aversion to censorship as related to guarding the liberty of the press.<sup>41</sup> While recognizing that certain “blasphemous, immoral, treasonable” or “seditious” libels should be punished in varying degrees, Blackstone asserted that the liberty of the press should not be “infringed or violated” because doing so is repugnant to a free state.<sup>42</sup> Further, Blackstone maintained that for the state to remain free and the liberty of the press intact, the government cannot impose “*previous* restraints upon publications.”<sup>43</sup>

If a restraint is a “previous” or “prior” restraint on speech, it bars communication before it takes place.<sup>44</sup> According to Blackstone, this practice functionally becomes a licensing system where “all freedom of sentiment [is subject] to the prejudices of one man,” the licensor, making him “the arbitrary and infallible judge of all controverted points in learning, religion, and government.”<sup>45</sup> Hence, a government that engages in a system of prior restraints jeopardizes the freedom of the state.

Blackstone indicates, however, that not all speech is good speech, and some speech is legally punishable.<sup>46</sup> Nevertheless, punishing reprehensible speech after one utters it—modernly referred to as “subsequent punishment”—is a less serious burden on the right to free speech than it is to curtail the speech from the outset by imposing a prior restraint.<sup>47</sup> The distinction is clear: subsequent punishment of speech allows the speaker to have her day in court to protest the government's ban on the speech; whereas, restraining the communication before it has been published bars the individual from speaking entirely and prevents the speech from entering the marketplace of ideas.<sup>48</sup>

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40. See generally RODNEY A. SMOLLA, 2 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 15:2 (2013) [hereinafter SMOLLA & NIMMER ON FREEDOM OF SPEECH] (discussing the history of the prior restraint doctrine in relation to English common law).

41. BLACKSTONE, ABRIDGMENT OF BLACKSTONE'S COMMENTARIES bk. IV, at 427–28 (William C. Sprague ed., 3d ed. 1895).

42. *Id.* at 427.

43. *Id.*

44. SMOLLA & NIMMER ON FREEDOM OF SPEECH, *supra* note 40, § 15:1, at 15-4.

45. See BLACKSTONE, *supra* note 41, at 428.

46. See *id.* at 427 (“Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.” (emphasis added)). In contemporary U.S. jurisprudence, obscenity is considered legally punishable. *Roth v. United States*, 354 U.S. 476, 487–88 (1957).

47. See Emerson, *supra* note 38, at 657.

48. See *id.*



Blackstone paints the distinction between subsequent punishments and prior restraints by suggesting that constraint on expression is sufferable when attained through a more suitable process—namely, “a fair and impartial trial” that judges whether the speech was of “pernicious tendency.”<sup>49</sup> Holding a fair and impartial trial allows for a check on governmental action to ensure that the government is not engaging in censorship. This close relationship between censorship and prior restraint explains Blackstone’s general disdain for prior restraints at English common law and thus illustrates why U.S. constitutional law regards prior restraints with such suspicion.<sup>50</sup>

### *B. Contemporary Understanding of Prior Restraint*

While modern First Amendment doctrine preserves Blackstone’s contempt for prior restraints, most contemporary First Amendment jurisprudence focuses on governmental regulation of speech through subsequent punishments.<sup>51</sup> The reason for this shift is likely twofold. First, “freedom of the press” is now understood more broadly and cannot simply be confined to immunity from previous censorship.<sup>52</sup> Second, Blackstone’s initial worry—that enabling the government to have unbridled discretion on regulating speech would jeopardize an open society<sup>53</sup>—highlights the benefit of the regulation of speech via subsequent punishment. The benefit is that subsequent punishment allows the individual to test the legitimacy of the government’s actions *in camera*.<sup>54</sup> Some argue that subsequent punishment, despite levying punishment for expression after it occurs, may effectively become a prior restraint if the punishment is so threatening that it causes a chilling effect on speech.<sup>55</sup> The contemporary notion of prior restraint, nonetheless, still considers unconstitutional prior restraints on speech as much more serious encroachments on First Amendment freedoms than subsequent punishments.<sup>56</sup>

The modern understanding of the doctrine separates prior restraint into two classifications: (1) administrative rules or judicial orders that instruct one not to engage in speech<sup>57</sup> and (2) physical prior restraints.<sup>58</sup> Administrative rules and judicial orders that instruct one not to engage in speech is the more common type of prior restraint found in

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49. BLACKSTONE, *supra* note 41, at 428; *see also* William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 248–49 (1982).

50. SMOLLA & NIMMER ON FREEDOM OF SPEECH, *supra* note 40 § 15:2, at 15-6 to -7.

51. *Id.* at 15-7.

52. *Id.* at 15-8.

53. *See* BLACKSTONE, *supra* note 41, at 427.

54. SMOLLA & NIMMER ON FREEDOM OF SPEECH, *supra* note 40 § 15:9, at 15-14.2.

55. *Id.*

56. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.16, at 970 (4th ed., 1991).

57. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 607, 609 (1976).

58. SMOLLA & NIMMER ON FREEDOM OF SPEECH, *supra* note 40 § 15:1, at 15-4 to -5.

modern society.<sup>59</sup> This type of prior restraint mainly applies to licensing systems where one must seek permission to publish a certain type of speech; thus, bureaucratic delays may cause a loss in the imminence and relevance of the speech.<sup>60</sup>

The second kind of prior restraint—a physical prior restraint—entails actual physical prevention of the speech from being disseminated in the future.<sup>61</sup> For example, “an injunction requiring an individual to turn over all tangible embodiments of information may, in a physical sense, actually prevent further dissemination of the information.”<sup>62</sup> Thus, if the government “binds and gags a speaker, or physically seizes a printing press or radio transmitter, or impounds copies of newspapers in newsstands,” it is imposing a physical prior restraint.<sup>63</sup>

The following Subsections discuss the pivotal Supreme Court cases that address prior restraint. Subsection 1 discusses *Near v. Minnesota*,<sup>64</sup> the first injection of the prior restraint doctrine known at common law into contemporary U.S. jurisprudence. Subsection 2 highlights the exceptions to the doctrine (i.e., situations where it is justified to impose a prior restraint) that *Near* articulates. Finally, Subsection 3 gives an overview of *New York Times Co. v. United States*<sup>65</sup> and presents different lines of analysis regarding the prior restraint doctrine.

### I. *Near v. Minnesota*

Modern prior restraint jurisprudence begins with the seminal case, *Near v. Minnesota*.<sup>66</sup> This case arose when the county attorney of Hennepin County sought to enjoin the publication of *The Saturday Press* for publishing allegedly improper material.<sup>67</sup> The newspaper claimed that a Minneapolis gangster was “gambling, bootlegging, and racketeering” and that the Minneapolis police were neglecting their jobs by failing to purge the streets of such crooked undertakings.<sup>68</sup> A Minnesota law enabled the government to bring suit to “abate” publications that were “malicious, scandalous,” or “defamatory.”<sup>69</sup> The Court deemed that *The Saturday Press* only publish information that was in accordance with a clean society (i.e., no malicious, scandalous, or defamatory matter).<sup>70</sup>

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59. *Id.* at 15-5.

60. *Id.*

61. *Id.* at § 15:9, at 15-14.1 n.1.

62. *Id.*

63. *Id.* at § 15:1, at 15-5.

64. *Near v. Minnesota*, 283 U.S. 697 (1931).

65. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

66. *Near*, 283 U.S. 697 (1931).

67. *Id.* at 703.

68. *Id.* at 704.

69. *Id.* at 701-02.

70. *Id.* at 706.

The Supreme Court reversed, holding that the Minnesota statute imposed an unconstitutional prior restraint.<sup>71</sup> Channeling Blackstone, the Court acknowledged that freedom of the press is historically rooted in “immunity from previous restraints or censorship.”<sup>72</sup>

The Court in *Near* seemingly gave two reasons for why it found the Minnesota statute unconstitutional. First, the Court implied that it overturned the Minnesota statute because the statute imposed an overbroad restraint on speech.<sup>73</sup> Second, and more prominently, it laid out three exceptions that dictate when a prior restraint may be used and found that the Minnesota statute did not fall within one of the exceptions. The exceptions to prior restraint that the Supreme Court articulates in *Near*<sup>74</sup> are discussed in Subsection 2.

The statute might have passed constitutional muster had it been narrowly tailored to furthering the compelling state interest of guarding against the increasing “malfeasance and corruption.”<sup>75</sup> But because the statute’s application risked curtailing both nonlibelous speech and libelous speech, the injunction was too broad and failed strict scrutiny.<sup>76</sup> The Court suggested that had the Minnesota statute restricted only libelous speech to protect against the increasing “malfeasance and corruption,” it may have been constitutional. Thus, an analysis of *Near*’s dicta unveils an interesting twist: while constitutional prior restraints can exist, the burden for proving their constitutionality is so high that they are almost always presumed invalid,<sup>77</sup> and the government bears the burden of showing the constitutionality of the restraint.<sup>78</sup>

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71. *Id.* at 722–23.

72. *Id.* at 716.

73. *See id.* at 710 (“The statute is directed . . . at the continued publication by newspapers and periodicals of charges against public officers of corruption, malfeasance in office, or serious neglect of duty.”); *see, e.g.*, *Berndt v. Cal. Dep’t of Corr.*, No. C03-3174 TEH, 2004 WL 1774227, at \*1 (“Prior restraints on free speech under the First Amendment are subject to the highest level of scrutiny.”).

74. 283 U.S. 697 (1931).

75. *See id.* at 720 (“The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct.”).

76. *See id.*

77. *Id.* at 716 (“[T]he protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in *exceptional cases.*” (emphasis added)); SMOLLA & NIMMER ON FREEDOM OF SPEECH, *supra* note 40 § 15:12, at 15-14.7 (“Prior restraints could be constitutional in ‘exceptional cases.’” (quoting *id.*)); *see also* *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*) (affirming that the government “carries a heavy burden of showing justification for the imposition of such a restraint”). For other cases following the *New York Times* line of analysis see *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 396 (1973); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965). The burden for proving that a prior restraint is constitutional is so exceptionally high that even in situations of libel, prior restraint may not be used as a remedy to curtail such libelous speech from the outset. *Near*, 283 U.S. at 718–19 (“Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions.”); *see also infra* notes 160–63 (elaborating further on libelous speech in the context of public officials).

78. *See, e.g., Keefe*, 402 U.S. at 419.

## 2. *Near v. Minnesota: Exceptions to the Prior Restraint Doctrine*

The Court in *Near* asserted that the freedoms that protect against prior restraint are not absolute.<sup>79</sup> As such, it carved out three exceptions for when it is acceptable to employ a prior restraint: (1) to guard “against incitements to acts of violence and the overthrow by force of an orderly government,” (2) “[w]hen a nation is at war” and the speech would hinder military recruitment or reveal “the sailing dates of transports or the number and location of troops,” and (3) to enforce decency against obscene publications.<sup>80</sup> Because these exceptions to protection against the prior restraint doctrine are extremely narrow, the Court suggested that anything that lies beyond their reach would comprise an unconstitutional prior restraint on speech.<sup>81</sup>

## 3. *The Pentagon Papers Decision*

In *N.Y. Times Co. v. United States*<sup>82</sup> (“The Pentagon Papers” decision), the United States tried to stop the *New York Times* from publishing matters of confidential historical study on Vietnam policy.<sup>83</sup> Though the decision was issued *per curiam*<sup>84</sup> and specifically affirms and interprets the national security exception established in *Near*,<sup>85</sup> the concurring opinions provide substantial guidance for how the common law notion of prior restraint functions under modern First Amendment jurisprudence.<sup>86</sup>

For example, Justice Black and Justice Douglas adopt the idea that exceptions allowing the imposition of a prior restraint virtually do not exist because any restraints on speech are repugnant to the First Amendment.<sup>87</sup> This notion finds its footing in the idea that the First Amendment “gave the free press the protection it must have to fulfill its essential role in” democracy, and “the press was to serve the governed, not the governors.”<sup>88</sup> In his concurrence, Justice Black emphasized that the Founding Fathers abolished the government’s power to censor the press so that the press could function as a check on the government.<sup>89</sup> Yet, if the press is not “free and unrestrained,” it cannot

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79. *Near*, 283 U.S. at 708; *see also* *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (“Prior restraints are not unconstitutional *per se.*”); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 n.10 (1963).

80. *Near*, 283 U.S. at 716.

81. *Id.* Additionally, the Court reasoned that its unwillingness to find a prior restraint in the past 150 years of jurisprudence suggests “the deep-seated conviction that such restraints would violate constitutional right.” *Id.* at 719.

82. 403 U.S. 713 (1971).

83. *Id.* at 713.

84. *Id.* at 714.

85. 283 U.S. 697 (1931).

86. *N.Y. Times Co.*, 403 U.S. at 714–63.

87. *Id.* at 717 (Black, J., concurring).

88. *Id.*

89. *Id.*

“effectively expose deception in government.”<sup>90</sup> Finally, Justice Black suggests that mere delays in the publication of speech are just as bad as banning the speech entirely.<sup>91</sup>

Justice Brennan’s view, on the other hand, at least flirts with the idea that justifications for imposing a prior restraint may exist.<sup>92</sup> Justice Brennan emphasizes that “the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.”<sup>93</sup> Instead, there must be “proof that publication” will “inevitably, directly, and immediately cause the occurrence of an event” of the requisite significance.<sup>94</sup>

Though these two views seem like independent binaries, melding them together provides a surprisingly cohesive explanation of how prior restraint doctrine is applied in contemporary jurisprudence. The main point of contention between the Justices is whether it is *ever* acceptable to enact a prior restraint; yet, because the presumption of unconstitutionality is so strong, whether exceptions actually exist may not really matter that much.

### III. ANALYSIS

The conclusion that a police officer levies unconstitutional prior restraint by destroying video recordings of her conduct is hardly a simple matter and requires a multistep analysis. This Note arrives at that conclusion by analyzing in Section A whether recording the police falls within the scope of First Amendment protection. Additionally, Subsection A addresses one of *Near v. Minnesota*’s exceptions to the prior restraint doctrine: guarding against incitement.<sup>95</sup> Upon establishing that the right to record the police falls within First Amendment protection, Section B analyzes two distinct situations and determines that the police may impose a prior restraint in one of the two situations. Section C examines whether that prior restraint is unconstitutional by considering three possible justifications for the prior restraint. These justifications include: (1) how the reliability of video recordings would affect the reputation of the police, (2) *Near v. Minnesota*’s national security exception,<sup>96</sup> and (3) *Near v. Minnesota*’s obscenity exception.<sup>97</sup>

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90. *Id.*; see also *id.* at 720 (Douglas, J., concurring) (“It should be noted at the outset that the First Amendment provides that ‘Congress shall make no law . . . abridging the freedom of speech, or of the press.’ That leaves, in my view, no room for governmental restraint on the press.”).

91. *Id.* at 714–15 (Black, J., concurring) (“Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country.”).

92. See *id.* at 726.

93. *Id.* at 725.

94. *Id.* at 726–27.

95. *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

96. *Id.*

97. *Id.*

A. *The Right to Record the Police Is Within the Purview of the First Amendment*

The First Amendment, in pertinent part, reads that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people . . . to petition the Government for redress of grievances.”<sup>98</sup> Before analyzing whether a law enforcement officer’s deletion of an individual’s video recordings is an unconstitutional prior restraint, it is necessary to determine whether the alleged speech would qualify for First Amendment protection.<sup>99</sup> To discern whether it does, the following considerations are made: (1) the classification of individuals that qualify as members of the press in the eyes of the First Amendment<sup>100</sup> and (2) whether the action of recording the police constitutes an act of speech in the first place.

1. *Defining Who: The Classification of Individuals that Comprises “the Press” Under von Bulow v. von Bulow*

When asked to conjure an image of “the press,” one may imagine a printing press, the written word, or a news program, and, subsequently, the individual who operates the printing press, who coins the phrase, and who serves as the anchor on the news show. Defining the composition of the latter subset—who the individuals of the press actually are—is the first step in determining which individuals may be entitled to First Amendment protection when videoing the police. From the layman’s perspective, all of these individuals fall under the umbrella category of journalism,<sup>101</sup> but the circuit courts have more narrowly circumscribed the classification of individuals that constitute “the press.”

In *von Bulow v. von Bulow*, the Second Circuit devised a functional analysis for differentiating journalists from nonjournalists.<sup>102</sup> The court held “that the individual claiming the [journalist’s] privilege must demonstrate . . . the intent to use material—sought, gathered, or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process.”<sup>103</sup> Thus, whether an individual is deemed a journalist hinges on the person’s intent at the

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98. U.S. CONST. amend. I.

99. If video recordings of police do not qualify as speech that would receive general First Amendment protection, then it is unlikely that an officer’s destruction of such recordings before dissemination would deem the prior restraint an unconstitutional one. The prior restraint, instead, would likely be justifiable on the basis that the original speech—the video recordings—is not protected speech. See *supra* note 46 and accompanying text.

100. See Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 568 (2007) (“[S]everal courts have attempted to define who qualifies as a journalist under the First Amendment.”).

101. See DAVID H. WEAVER ET AL., *THE AMERICAN JOURNALIST IN THE 21ST CENTURY: U.S. NEWS PEOPLE AT THE DAWN OF A NEW MILLENNIUM* 31 (Jennings Bryant & Dolf Zillmann eds., 2007).

102. 811 F.2d 136, 144–45 (2d Cir. 1987).

103. *Id.* at 144.

start of the material-collecting process.<sup>104</sup> The court in *von Bulow* further explained that one need not be a professional journalist to fall within the purview of the First Amendment Free Press Clause so long as the requisite intent was established.<sup>105</sup> The First<sup>106</sup> and Third<sup>107</sup> Circuits also follow the functional analysis set out in *von Bulow*.<sup>108</sup>

Notably, the *von Bulow* functional analysis is a qualified privilege.<sup>109</sup> To the extent that the functional analysis awards journalist status to civilian recorders who have the intent to distribute their recordings, the *von Bulow* test safeguards the purposes of individuals like Antonio Buehler who plan to disseminate their recordings in the attempt to “hold law enforcement officers accountable” for their actions.<sup>110</sup> The functional analysis does not, however, give First Amendment protection to the individual who records the police without the initial intent to disseminate.<sup>111</sup>

Because there are no specific courses or degrees required for journalism,<sup>112</sup> anyone theoretically can be considered a “journalist.” Indeed, many courts have held—and the DOJ has highlighted—that the private individual’s right to record is equivalent to that of the press’s right to record.<sup>113</sup> Further, because private individuals do not require “press credentials” to record police officers in public discharge,<sup>114</sup> the speech created by such individuals should receive the same First Amendment coverage and freedom from prior restraint that speech cultivated by the press would receive.<sup>115</sup>

104. *Id.*

105. *See id.*

106. *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998) (“Whether the creator of the materials is a member of the media or of the academy, the courts will make a measure of protection available to him as long as he intended ‘at the inception of the newsgathering process’ to use the fruits of his research ‘to disseminate information to the public.’” (quoting *von Bulow*, 811 F.2d at 144)).

107. The Third Circuit implements a stricter variety of *von Bulow*’s functional analysis by adding an additional requirement that the person seeking First Amendment protection as a member of the press be engaged in “investigative reporting.” *In re Madden*, 151 F.3d 125, 129–30 (3d Cir. 1998). “Because this test emphasizes the intent behind the newsgathering process rather than the mode of dissemination, it is consistent with the Supreme Court’s recognition that the ‘press’ includes all publications that contribute to the free flow of information.” *Id.* at 129.

108. *von Bulow*, 811 F.2d at 144.

109. *See id.* at 142; *see also Papandrea, supra* note 100, at 586.

110. *See Papandrea, supra* note 100, at 586.

111. *See id.* (“The important limitation is that the individual must communicate information ‘to the public.’ Admittedly, this limitation is not significant; anyone contributing information to a public chat room, Wikipedia, an online magazine or newspaper, youtube.com, or a blog open to all readers—and intended to be read by the general public—would be entitled to invoke the presumptive privilege.”).

112. *WEAVER ET AL., supra* note 101, at 35.

113. DOJ Letter, *supra* note 31, at 10.

114. *See, e.g., Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) (“The First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public’s right of access to information is coextensive with that of the press.”); *see also Lambert v. Polk County, Iowa*, 723 F. Supp. 128, 133 (S.D. Iowa 1989) (“It is not just news organizations . . . who have First Amendment rights to make and display videotapes of events—all of us . . . have that right.”).

115. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (emphasizing that the First Amendment “attempt[s] to secure ‘the widest possible dissemination of information from diverse and antagonistic

Subsections (a) and (b) of Section B will explain the inadequacies of the *von Bulow* functional analysis, but for now suffice it to say that the Supreme Court actually resolved the issue of *who* receives First Amendment coverage well over thirty years ago in one line: “the press does not have a monopoly on either the First Amendment or the ability to enlighten.”<sup>116</sup> As such, the press does not have superior First Amendment rights to an individual, nor does it have a greater ability to contribute valuable thought to society. Under this reasoning, anyone—both press and nonpress members—are eligible to create speech that will qualify for First Amendment coverage. Thus, individuals who are not formal members of the press would still receive First Amendment protection when video recording the police.

## 2. *Defining What: Video Recording the Police as an Act of Speech*

For First Amendment protection to attach to videographers who record the police in public discharge, the isolated act of recording the police must be deemed a form of speech. Framed in this manner, the *von Bulow* court’s refusal to extend First Amendment protection to individuals who are merely recording the police without the intent to disseminate the recordings<sup>117</sup> is a little easier to swallow. Theoretically, the *von Bulow* court’s reasoning rests on the notion that acts of recording the police do not constitute speech and are merely considered unfavorable behavior. As such, the act of recording would exceed the scope of the First Amendment because the First Amendment does not protect an individual’s behavior.<sup>118</sup> When examining whether the act of video recording the police constitutes speech, it is necessary to address two distinct modes of analysis: (1) cases that focus on the speech created as an individual is recording a police officer (simultaneous speech), and (2) cases that focus on the speech that will be disseminated as a result of an individual’s video recording (nonsimultaneous speech). Subsections (a) and (b) develop each line of analysis respectively.

### a. Simultaneous Speech

Cases of simultaneous speech focus on the speech acts that occur while an individual is recording the police (e.g., talking, heckling, and criticizing). Indeed, one can imagine instances where an individual who is recording the police also simultaneously threatens the safety of “the officer, the accused, or bystanders; disobeys the law;<sup>119</sup> or encour-

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sources,” including “the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press” (citations omitted)).

116. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978).

117. *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987).

118. U.S. CONST. amend. I.

119. *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) (“[C]riminal conduct . . . cannot have shelter in the First Amendment.”).



ages others to disobey the law.<sup>120</sup> For example, if an individual is uttering words that are “likely to cause a fight” while recording the police, then this speech is not protected by the First Amendment.<sup>121</sup> Further, although destroying the video containing unprotected speech *is* a prior restraint, there would likely be a substantial justification for levying the prior restraint because the video houses speech that may serve as an “incitement to acts of violence.”<sup>122</sup> The prior restraint would therefore be justified under *Near v. Minnesota*.<sup>123</sup> Nonetheless, even if the prior restraint is ostensibly justified under the incitement exception, the exception would be hard to invoke. Case law suggests

that even the “fighting words” [or incitement] exception . . . might require a narrower application in cases involving words addressed to a police officer[] because “a properly trained officer may reasonably be expected to ‘exercise a higher degree of restraint’ than the average citizen, and thus be less likely to respond belligerently to ‘fighting words.’”<sup>124</sup>

Stated differently, individuals who record the police can express septic views of the officer while doing so because such speech will not likely lead to incitement. Thus, the speech still receives protection under the First Amendment.

Although the act of speaking is clearly severable from the act of video recording (obviously one does not require a video recording device to speak), it is at least arguable that holding a video recording device encourages one to speak her mind about the scene she is recording because there is a need for narration.<sup>125</sup> Further, banning such videography<sup>126</sup> may inevitably bar the narration that the video encourages,<sup>127</sup>

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120. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

121. *Id.*

122. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

123. *Id.*; see also *supra* note 80 and accompanying text. Situations where destruction of an individual’s recording may be justified consist of those where the individual making the recording has actually obstructed a police officer’s investigation. See, e.g., *Colten v. Kentucky*, 407 U.S. 104 (1972); *King v. Ambs*, 519 F.3d 607 (6th Cir. 2008).

124. *City of Houston v. Hill*, 482 U.S. 451, 462 (1987) (citations omitted); see also *Duran v. City of Douglas*, 904 F.2d 1372, 1377–78 (1990) (explaining that “making obscene gestures . . . and yelling profanities” at a police officer “fell squarely within the protective umbrella of the First Amendment and any action to punish or deter such speech—such as stopping or hassling the speaker—is categorically prohibited by the Constitution”); *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973) (“Surely, one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer.”).

125. Most videos on YouTube lack the objectivity of traditional journalism and serve to communicate one’s viewpoint. See Limor Peer & Thomas B. Ksiazek, *YouTube and the Challenge to Journalism: New Standards for News Videos Online*, 12 JOURNALISM STUD. 45, 54 (2011) (“Along with the finding that only about one-third (36.7 percent) of ‘News’ videos consulted any outside sources and that less than one-third (31.9 percent) of the ‘News’ videos had no agenda, these results reveal a tendency for the public to reward editorializing in online news videos, which signals a move away from traditions of objectivity in journalism, at least in terms of what is most popular among viewers.” (footnote omitted)).

126. *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (“[T]he Supreme Court has voiced particular concern with laws that foreclose an entire medium of expression.” (citations omitted) (internal quotation marks omitted)).

despite the First Amendment coverage of that narration. Thus, banning videography of the police would impose an overbroad regulating measure on speech.<sup>128</sup>

The *von Bulow* functional test<sup>129</sup> cannot withstand this line of analysis suggesting that video recording the police encourages simultaneous candid speech. Instead, the functional test assumes that just because an individual does not intend to disseminate her video recording of the police at the time she is producing it, the resulting speech is not protected.<sup>130</sup> Yet, it is at least feebly arguable that because the act of video recording encourages candid narration, the recording and the narration are one inextricable act of speech. That is, but for the video recording, the narration simply would not occur. As a result, video recording the police is not merely behavior—it is speech—and the proffered justification for the *von Bulow* functional test offered above<sup>131</sup> no longer stands. Thus, at the very least, videoing the police without obstructing the officials' activity is generally protected under the First Amendment.<sup>132</sup>

#### b. Nonsimultaneous Speech

Cases of nonsimultaneous speech focus on the speech that potentially will be circulated after a person films the police acting in the public discharge of duty. It is widely known that “[a]udio and audiovisual recording are media of expression commonly used for the preservation and dissemination of information and ideas and thus are ‘included within the free speech and free press guaranty of the First and Fourteenth Amendments.’”<sup>133</sup> As such, it follows that the act of creating an audio or audiovisual recording falls within the First Amendment’s protection “of speech and press rights as a corollary of the right to disseminate the resulting recording.”<sup>134</sup> In other words, unlike the cases of simultaneous

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127. The “encouraging speech” argument is distinct from the “enabling speech” argument. See *infra* Part III.A.2.b for discussion on the “enabling speech” argument. The court in *Alvarez* stated that “[i]f the state were to prohibit the use of projectors without a license, First Amendment coverage would undoubtedly be triggered . . . not because projectors constitute speech acts, but because they are integral to the forms of interaction that comprise the genre of the cinema.” 679 F.3d at 596 (quoting Robert Post, *Encryption Source Code and the First Amendment*, 15 BERKLEY TECH. L.J. 713, 717 (2000)). While projectors can be analogized to video recording devices in that they both enable the dissemination of speech, projectors are different from video recording devices because the use of projectors does not encourage an individual to provide candid narration as would the use of a video recording device. Instead, projectors are purely apparatuses for the dissemination of speech.

128. *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961) (“[A]ny regulation must be highly selective in order to survive [a] challenge under the First Amendment . . . ‘[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.’” (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960))); see *supra* note 77 and accompanying text.

129. 811 F.2d 136, 144–45 (2d Cir. 1987).

130. *Id.*

131. See *supra* notes 98–100 and accompanying text.

132. DOJ Letter, *supra* note 31, at 6.

133. *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (quoting *Burstyn v. Wilson*, 343 U.S. 495, 502 (1952)).

134. *Id.*

speech acts discussed above<sup>135</sup> that focus on the act of speech occurring at the time of the recording, nonsimultaneous speech cases focus on the speech act that occurs because of dissemination of the video.

At first blush, the *von Bulow* functional test is justified vis-à-vis the perspective that the creation of a video recording is an act separate from the dissemination of said recording.<sup>136</sup> It seems that the same argument that appeared to apply to cases of simultaneous speech would surely apply to cases of nonsimultaneous speech: if viewed independently of one another, the first step of videoing the police is clearly conduct, and the second step of disseminating the video is clearly an act of speech. As a result, First Amendment protection would only attach to the video's dissemination and not to the act of recording the police.

Nonetheless, the *von Bulow* functional test falls by the wayside when the two acts—creating the recording of the police and then disseminating it—are viewed as one inextricable act of speech. The idea that the First Amendment draws a sharp line between the act of creating speech and the speech itself is preposterous.<sup>137</sup> As the Ninth Circuit eloquently stated, “The process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that we could value Beethoven without the benefit of strings and woodwinds.”<sup>138</sup> Additionally, the Seventh Circuit in *ACLU v. Alvarez* stated that “[t]he right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected.”<sup>139</sup>

The notion that video recordings enable speech is analogous to the reasoning that the Supreme Court provides in its campaign-finance cases. For example, in *Buckley v. Valeo*, the Court held that campaign-finance regulations involve the First Amendment because they enable subsequent political speech.<sup>140</sup> Additionally, the Court in *Citizens United v. FEC* stated that “[l]aws enacted to control or suppress speech may operate at different points in the speech process.”<sup>141</sup> Thus, the *von Bulow* functional test cannot withstand the campaign-finance line of analysis because the campaign-finance reasoning suggests that every part of the speech process is speech, and no part of the process is merely behavior.

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135. See *supra* Part III.A.2.a.

136. See *supra* notes 111–13.

137. See *Minneapolis Star and Tribune Co v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 582–83 (1983) (holding that the imposition of use tax on cost of paper and ink burdens the freedom of the press).

138. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010).

139. *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012).

140. 424 U.S. 1, 92–93 (1976) (“Subtitle H is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.”).

141. 558 U.S. 310, 336 (2010).

### B. *Prior Restraint Analysis*

Because both the act of recording the police and the act of disseminating the recording qualify for general protection under the First Amendment, the next question to address is whether the destruction of an individual's video before it is disseminated qualifies as a prior restraint in (1) situations of simultaneous speech and (2) situations of nonsimultaneous speech.

An effective way to comparatively analyze each situation is to center the analysis on the following hypothetical: *A passerby witnesses what he thinks is police brutality as a police officer is arresting a young woman. The passerby sees the policeman forcing the young woman onto the ground by driving his knees into her back and squeezing her arms so tightly that the young woman starts to cry. About one minute into the action, the passerby decides to withdraw his cellphone and record the drama so that there is future evidence; he planned to post the video on YouTube once he arrived home. As he is recording the scene of the policeman making this arrest, the passerby gives a play-by-play account of the action as well as an account of what happened during the previous minute of the action before he started recording. The passerby's narration and tone clearly express his disapproval of the police officer's actions. The police officer then confiscates the passerby's cellphone, deletes the video recording, and arrests the passerby for violation of the state's wiretap law.*

The Subsections below discuss whether the police officer has imposed a prior restraint on (1) the passerby's narration that the video encouraged (simultaneous speech) and (2) the video that would have been disseminated had it not been deleted first (nonsimultaneous speech).

#### 1. *Prior Restraint Analysis for Simultaneous Speech Scenarios*

To recap, in situations of simultaneous speech, the focus is on the live speech that occurs while the video of the police is being filmed (before dissemination) and *not* on the speech as it is represented on the video (after dissemination).<sup>142</sup> In the hypothetical situation above,<sup>143</sup> the simultaneous speech is the critical narration that the passerby supplied to augment his video of the police.

The upshot is that the police officer has not implicated a prior restraint by arresting the individual for engaging in disapproving narration. Though the passerby has been arrested for making a video, which, admittedly, was the impetus for his disapproving narration of the officer's conduct, the passerby's arrest takes the form of a subsequent punishment, and not a prior restraint, for two reasons. First, the passerby will have his day in court to contest the validity of the arrest

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142. See *supra* Part III.A.2.a.

143. See *supra* Part III.B.

within the First Amendment.<sup>144</sup> Second, whether the passerby wins or loses his claim of First Amendment violation is irrelevant for determining the existence of a prior restraint because the passerby disseminated the narration by physically voicing it.

To explain the second prong of the analysis more clearly, the key to determining whether a prior restraint exists is identifying “the precise point at which speech ‘occurs,’” which is usually “at the point of general dissemination.”<sup>145</sup> As a result, though the police officer deleted the video recording before the passerby disseminated it on YouTube, the speech at issue is not that which is contained on the film. It is the speech that is occurring as the video is being made. The passerby is basing his prior restraint claim on the fact that the officer arrested him for voicing a critical opinion. Because the passerby was able to voice that opinion, effectively disseminating it, a claim of physical prior restraint fails. Thus, punishment based on the occurrence of simultaneous speech does not constitute a prior restraint; though it may still impose a First Amendment violation when examined in court.

Two minor modifications to the above hypothetical<sup>146</sup> will reiterate the importance of the speaker’s ability to contest the prosecution in court and of determining the point of dissemination: *The passerby engages in no candid narration but merely records the officer, and the officer does not destroy the video recording but confiscates it and arrests the passerby for violation of the wiretap law.*

In this situation, there is still no prior restraint. The reasoning is the same here as it was with the original simultaneous speech situation: (1) the speaker can challenge the arrest in court under a violation of the First Amendment, and (2) there is the possibility that if the speech on the video is found to be protected speech under the First Amendment, the videographer will have his video restored to him, and he will be free to disseminate it.

## 2. *Prior Restraint Analysis for Nonsimultaneous Speech Scenarios*

The nonsimultaneous speech analysis focuses on the speech as it is represented on the passerby’s video and not on the live narration that he engaged in while filming. Thus, the issue is whether the officer imposed a prior restraint by deleting the passerby’s video. The answer is

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144. See SMOLLA & NIMMER ON FREEDOM OF SPEECH, *supra* note 40 § 15:9, at 15-14.2 (“In a criminal prosecution the defendant has previously gambled that the publication will not later be held to have violated the law. If it is determined by a trial judge and jury that such a violation has taken place, and that judgment is affirmed on appeal, then the defendant is subject to punishment.”). This is distinct from the prior restraint situation where “the defendant is permitted to obtain a judicial determination of his or her rights prior to publication.” *Id.*

145. RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 113 (1992) (“In some settings government may learn of the existence of the proposed expression before it takes place or is widely disseminated . . . [These] attempts by the government to restrain the speech before it even occurs . . . are known as ‘prior restraints.’”).

146. See *supra* Part III.B.

simple: yes, the officer has imposed a prior restraint based upon the familiar dual-factor analysis.

First, the passerby is unable to challenge the police officer's actions in court because the speech at issue—the video on the cell phone—has been permanently erased. Thus, a court or jury would be unable to make a determination on whether the speech qualifies for First Amendment protection because the speech itself is unavailable. Further, because the speech at issue is unavailable for examination in court, there can be no check on the officer's actions. The officer may continue to delete videos that he feels cast him in an unfavorable light, and there is no method of recourse for the individual. As a result, the officer's actions will become perpetually untestable in court. This provides an exemplary model of censorship<sup>147</sup> and illustrates the main reason “for treating prior restraints as uniquely antithetical to a free society.”<sup>148</sup>

Second, the passerby never had the opportunity to disseminate the speech because the officer destroyed it before he could. Moreover, the fact that the officer has destroyed the passerby's video means that there is no possibility for future dissemination of the information it contained, which unduly robs society of the speech's potential impact in the marketplace of ideas.<sup>149</sup> Thus, the police officer has imposed a physical prior restraint on the passerby's video.<sup>150</sup>

First Amendment scholar Rodney A. Smolla's explanation of what constitutes a physical prior restraint is directly analogous to the hypothetical at hand and generally applicable to situations where police officers destroy individuals' video recordings before those individuals have the opportunity to disseminate them. Smolla states, “In the case of information such as a photograph, an injunction ordering it returned may effectively prevent dissemination even though it has been ‘read’ by the news organization, since without the original or any copies, the essence of the communicative impact may be lost.”<sup>151</sup> Because the passerby does not have his original video recording, and because the officer has permanently destroyed the video, dissemination is a practical impossibility. As a result, the officer has imposed a physical prior re-

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147. See *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (“If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.”).

148. See SMOLLA & NIMMER ON FREEDOM OF SPEECH, *supra* note 40 § 15:9, at 15-14.3.

149. See Emerson, *supra* note 38, at 657.

150. See SMOLLA & NIMMER ON FREEDOM OF SPEECH, *supra* note 40, § 15:9, at 15-14.1 n.1 (“[W]hen a court enforces a subpoena and orders a news organization to turn a document over to the custody of the government before anyone in the organization has had a chance to read the document or make a copy of it to keep,” there is a physical prior restraint.); *supra* notes 59–61.

151. SMOLLA & NIMMER ON FREEDOM OF SPEECH, *supra* note 40 § 15:9, at 15-14.1 n.1.

straint on speech, and the government bears the burden of justifying the necessity of the restraint.<sup>152</sup>

### C. Possible Justifications for the Prior Restraint on Speech

#### 1. Reliability of Video Recordings and the Reputation of the Police

Because anyone may qualify as a journalist within the eyes of the First Amendment,<sup>153</sup> the question of *how* speech is disseminated becomes a pertinent issue when discussing civilian-made recordings of the police. This topic is of particular consequence in today's technologically driven world where ubiquitous access to recording devices like smartphones<sup>154</sup> and online media websites like YouTube<sup>155</sup> offer private individuals the ability to amass and publish remarkable amounts of information with an ease that challenges that of traditional news media.<sup>156</sup> As a result, even if the First Amendment did recognize a strict line between private individuals and members of the press, that line is becoming blurred with the prevalent use of websites like YouTube, Facebook, and Twitter<sup>157</sup>—all of which are journalistic in nature.

In *Shoen v. Shoen*, the Ninth Circuit extended the *von Bulow* functional analysis to apply to “protect investigative reporting, *regardless of the medium* used to report the news to the public.”<sup>158</sup> Additionally, the court emphasized that “what makes journalism journalism is not its format but its content.”<sup>159</sup> The court's reasoning in *Shoen* lends credibility to all the amateur journalists of the world as well as the media platforms they use to share their videos and images. The following Subsections address: (a) whether amateur journalists' departures from traditional journalism practices affect the reliability of the videos created, (b) the states' interest in stymying the circulation of civilian-made

152. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (“Any prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity. Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint.” (citations omitted)).

153. *See supra* Part III.A.1.

154. LEE RAINIE, PEW INTERNET, SMARTPHONE OWNERSHIP UPDATE: SEPTEMBER 2012, at 1 (Sept. 11, 2012), available at [http://pewinternet.org/~media/Files/Reports/2012/PIP\\_Smartphones\\_Sept12%209%2010%2012.pdf](http://pewinternet.org/~media/Files/Reports/2012/PIP_Smartphones_Sept12%209%2010%2012.pdf) (“Two-thirds of young adults and those with higher income are smartphone owners.”).

155. KATHLEEN MOORE, PEW INTERNET, 71 % OF ONLINE ADULTS NOW USE VIDEO-SHARING SITES 5 (Jul. 26, 2011), available at <http://pewinternet.org/~media/Files/Reports/2011/Video%20sharing%202011.pdf> (“Higher use of video-sharing sites coincides with the explosion of content on YouTube, including videos produced by amateurs[.]”).

156. *See Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (“[M]any of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.”).

157. Social Networking Statistics, STATISTIC BRAIN, (Aug. 12, 2013), <http://www.statisticbrain.com/social-networking-statistics/> (finding that 98% of 18-24 year olds use social media).

158. *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (emphasis added).

159. *Id.*

videos, and (c) whether the states' proffered interest justifies the prior restraint imposed by deleting individuals' recordings.

a. The Amateur Journalist's Method of Creating News Videos

It is important to consider the reliability of the videos that amateur journalists create and post to the Internet after recording the police before one can fully consider whether the states' proffered interest in upholding sweeping wiretap laws outweighs the First Amendment right of an individual. In a content analysis of 882 videos on YouTube, communication scholars Limor Peer and Thomas B. Ksiazek found that while videos posted to YouTube were likely to adhere to what they label as "traditional standards" of television journalism<sup>160</sup> (e.g., "proper shooting and editing techniques, a limited use of natural sound, and 'the rule of thirds'"<sup>161</sup>), videos on YouTube notably departed from the practice of objectivity<sup>162</sup> that "quality journalism [would typically implement by creating] a product that was up to standards such as balance, detachment, facticity, timeliness, fairness, objectivity, and in-depth reporting."<sup>163</sup> As such, videos on YouTube were more likely biased, being fine-tuned to views of the creator.<sup>164</sup> This finding of bias is reflected in the hypothetical situation presented above where the passerby expresses his disapproval on camera as he is narrating the scene of the arrest.<sup>165</sup>

Two additional matters contributing to a video's lack of objectivity are: (1) an individual's unregulated ability to modify the video as he sees fit and (2) the failure of online videos to consult outside sources.<sup>166</sup> Both of these factors may impinge upon the video's overall credibility as a source of truth.

The credibility of videos posted online is a matter of particular weight when deciding whether there is a valid state interest in restraining the individual's video from the outset. With more people using online platforms to view videos, and with most of those videos being "news" videos,<sup>167</sup> there is a definite interest in ensuring that the videos posted are reliable.<sup>168</sup> Misrepresentative news stories may be harmful if they present false or distorted information to the public.

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160. Limor Peer & Thomas B. Ksiazek, *supra* note 125, at 56.

161. *Id.* at 46.

162. *Id.* at 56.

163. *Id.* at 46.

164. *See id.* at 57.

165. *See supra* Part III.B.

166. Limor Peer & Thomas B. Ksiazek, *supra* note 125, at 54 ("[O]nly about one-third (36.7 percent) of the 'News' videos consulted any outside sources . . .").

167. *Id.* at 47.

168. *See, e.g.,* Mike Masnick, *Police Officer Fired over Questionable Confrontation, Would Have Gone Unnoticed Without YouTube Video*, TECHDIRT (Apr. 30, 2012, 9:15 AM), <http://www.techdirt.com/articles/20120430/01382118696/police-officer-fired-over-questionable-confrontation-would-have-gone-unnoticed-without-youtube-video.shtml>.



b. States' Interest in Halting Circulation of Videos of the Police

The state may have a valid interest in regulating the types of videos disseminated when police officers are the subject of such videos, because it is widely accepted that media influences the way individuals perceive reality, regardless of its alleged truth.<sup>169</sup> For example, online videos that revile the police may destroy the trust that the community has for its officers.<sup>170</sup> Yet, the effectiveness of the police hinges greatly upon the degree to which the courts, the press, and the public trust the officers.<sup>171</sup> When the public *trusts* the police, it is more likely to cooperate with them<sup>172</sup> and harbor feelings of safety.<sup>173</sup> Thus, law enforcement officers are able to police “by consent” of the public.<sup>174</sup> When the public *lacks trust* in police officers, however, “policing by consent” is not a viable option because the public is less likely to respond to the officer’s authority, and, as a result, law enforcement officers will have to resort to more arbitrary and violent methods of policing.<sup>175</sup> This argument is a catalyst for a parade of horrors: the use of arbitrary and violent methods of policing will only further diminish the reputations of law enforcement officers in the eye of the public, the police will no longer feel accountable for drastic measures they may need to implement to gain control, and the officers will thus fail to act responsively toward the concerns of the society that they intend to regulate.<sup>176</sup>

c. The Government’s Interest in Destroying Recordings Does Not Justify the Prior Restraint

While the effectiveness of law enforcement officers is a pressing state concern, it does not outweigh an individual’s right to record the police. Instead, the argument only considers the *effect* of the video-speech and completely overlooks the benefit provided by the *act* of creating the recording. That is, the act of recording the police may serve as check on the officer’s actions, thus incentivizing police to employ proper methods in the course of public discharge.<sup>177</sup> Thus, theoretically speaking there

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169. See JULIANNE SCHULTZ, *REVIVING THE FOURTH ESTATE* 1 (1998) (“In the intervening decades the news media has itself become a source of real and significant power and influence, an industry prepared to exercise and pursue self-interested commercial, political and cultural agendas.”).

170. In a study conducted on how much jurors trust the police within their community, the mean was 5.1 and the standard deviation was 1.5 based upon a one to seven scale where one meant that the juror held no trust in the officers, and seven meant that the juror held a great deal of trust in the community’s police officers. Nicole L. Waters & Valerie P. Hans, *A Jury of One: Opinion Formation, Conformity, and Dissent on Juries*, 6 J. EMPIRICAL LEGAL STUD. 513, 519 (2009).

171. Andrew Goldsmith, *Police Reform and the Problem of Trust*, 9 THEORETICAL CRIMINOLOGY 443, 444 (2005).

172. *Id.*

173. *Id.* at 444–45.

174. *Id.* at 445.

175. *Id.*

176. *Id.*

177. For example, Peaceful Streets Project is a volunteer effort that seeks to bring a “cultural shift where individuals understand their rights and hold law enforcement officials accountable,” mainly by

would be fewer videos in the mainstream that cast police in unfavorable lighting because, given the scrutiny of the video-recording devices, the actions of law enforcement officers would be more likely to fall within the bounds of the law. For these reasons, the state's countervailing interest of ensuring the effectiveness of police officers does not justify the prior restraint on speech imposed when a police officer deletes an individual's video recording.

Another problem with imposing a prior restraint on all civilian-made video recordings is that the restraint is not narrowly tailored to achieving the proffered state interest; thus, it fails strict scrutiny.<sup>178</sup> Imposing a blanket prior restraint on civilian-made recordings of the police operates off the assumption that all the resulting videos of the police are ones that express negative opinions or make false assertions about them.<sup>179</sup> As a result, banning the act of recording the police and justifying the destruction of individuals' recordings is an overbroad regulating measure<sup>180</sup> and basically recreates the same unconstitutional prior restraint that the Supreme Court originally saw in *Near v. Minnesota* over eighty years ago.<sup>181</sup>

Yet, even if all the videos uploaded to the Internet were, in fact, critical of the police in a libelous way, there is still no justification for the prior restraint because prior restraint is not intended as a remedy for libel.<sup>182</sup> To remedy libel, there are libel laws. Though, the Supreme Court's reasoning in *New York Times Co. v. Sullivan*, the seminal case in defamation, and the policy reasons that undergird it<sup>183</sup> suggest that even libel laws are subject to the rigorous constitutional demands of the First Amendment,<sup>184</sup> rendering prior restraint a seemingly untenable remedy for libelous speech regarding police officers. Because prior restraint is almost always presumed unconstitutional, barring any justifications for it that the state might have, it is difficult to implement in regular, nonlibelous contexts. Thus, using prior restraint as a remedy for libelous speech regarding public officials in the context of civilian-made recordings makes the fix even more difficult. Further, implementing prior restraint in these situations effectively bars discussion of public officials entirely,<sup>185</sup>

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video recording police activity. *About*, PEACEFUL STREETS PROJECT, <http://peacefulstreets.com/about/> (last visited Sept. 23, 2013).

178. Prior restraints receive heightened scrutiny. *See* *Near v. Minnesota*, 283 U.S. 697, 720 (1931); *supra* Part II.B.1.

179. *See* LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 6 (1991) (“[T]he system cannot afford to banish falsehoods from public debate, even if they are valueless, for at the same time it would inevitably excise much that was true and good.”).

180. *See id.*

181. *See supra* notes 70–73 and accompanying text.

182. *See supra* note 72 and accompanying text.

183. 376 U.S. 254, 270–71 (1964).

184. *Id.* at 269 (“[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.”).

185. *See id.* at 268 (“[D]iscussion [of public men] cannot be denied and the right as well as the duty, of criticism must not be stifled.” (quoting *Beauharnais v. Illinois*, 343 U.S. 250, 263–64 (1952))).

which cuts against the original ideals of disseminating speech into the marketplace of ideas<sup>186</sup> and the ability to revile the government.<sup>187</sup>

For these reasons, the state's proffered interest of protecting the reputation of the police does not justify the prior restraint imposed when officers delete individuals' recordings. The restraint is an overbroad regulating measure, and the cameras serve as a natural check on the actions of officials when operating in the public discharge.

## 2. *National Security Exception*

The national security exception is one of the exceptions to the prior restraint doctrine that *Near v. Minnesota* establishes<sup>188</sup> and that *New York Times Co. v. United States* affirmed and explained.<sup>189</sup> That is, when the nation is at war and publication of certain information would expose national military secrets or impose a general threat to the United States, *Near* justifies halting dissemination of that information.<sup>190</sup> This exception is largely irrelevant to situations involving individuals recording police officers. For the exception to apply, the government would have to sustain the argument that arresting thugs on local streets to mitigate urban brawls causes concern for U.S. national security, and this is not a strong argument.

If anything can reach the level of threatening national security where restraining the speech is justified under *Near*,<sup>191</sup> it would be the course of action that occurs at airport security checkpoints, which are regulated by the Transportation Security Administration (TSA). Yet, even the TSA allows filming of "security checks as long as it [does not] interfere with the screening process."<sup>192</sup> As such, it is unlikely that the national security exception could be properly invoked to justify a prior restraint on video recordings of police conduct.

## 3. *Obscenity Exception*

The obscenity exception is the third justification that *Near* establishes for imposing a prior restraint.<sup>193</sup> If the material being suppressed is deemed obscene, then the prior restraint is substantiated.<sup>194</sup> Aside from being unable to escape the halt of a prior restraint, obscenity does not qualify for general First Amendment protection.<sup>195</sup>

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186. See SMOLLA & NIMMER ON FREEDOM OF SPEECH, *supra* note 40 § 15:9, at 15-14.2.

187. See *supra* notes 89-90 and accompanying text.

188. *Near v. Minnesota*, 283 U.S. 697, 716 (1931); see *supra* Part II.B.2.

189. *N.Y. Times Co. v. United States*, 403 U.S. 713, 723 (1971); see *supra* Part II.B.2.

190. *Near*, 283 U.S. at 716.

191. *Id.*

192. Riya Bhattacharjee, *TSA Apologizes After 3-year-old Cries in Airport Pat-down*, MSN NEWS (Feb. 22, 2013), <http://news.msn.com/us/tsa-apologizes-after-3-year-old-cries-in-airport-pat-down>.

193. *Near*, 283 U.S. at 716; see *supra* Part II.B.2.

194. *Id.*

195. *Roth v. United States*, 354 U.S. 476, 486-87 (1957).

Further, Justice Stewart's colloquial standard for obscenity, "I know it when I see it,"<sup>196</sup> is clearly not implicated in cases where the police delete individuals' recordings. Typically, obscenity is associated with cases dealing with publications that allegedly compromise the decency of our society, such as "lewd novels, pornographic magazines, and the like."<sup>197</sup> Thus, it is hard to imagine how a video of an arrest would be obscene. Though one may be able to think up the rare occasion where the video is considered obscene, it is simply not common or likely. As a result, the obscenity exception cannot justify the prior restraint that police officers impose when they destroy the public's recordings of their conduct.

Although it is unlikely that obscenity would be invoked as a justification for the prior restraint, the procedure involved with cases where the police confiscate allegedly obscene items is worth examining because it is largely analogous to scenarios where police officers seize recording devices and destroy the files on them.<sup>198</sup> Subsections (a), (b), and (c) provide three distinct examples of obscenity cases where a judicial determination was necessary to determine whether the confiscated material would receive First Amendment coverage and to ensure the claimant sufficient due process. Subsection (d) analogizes these cases of obscenity to cases where the police confiscate an individual's video recording and there is a judicial determination to follow.

a. *Marcus v. Search Warrants of Property at 104 East Tenth Street*

In *Marcus v. Search Warrants of Property at 104 East Tenth Street*, a Missouri statute certified the search and seizure of purportedly obscene publications if the officers conducting the search could establish probable cause justifying that the material they confiscated was obscene.<sup>199</sup> While the property owner was not guaranteed a pre-seizure hearing, the judge that issued the warrant set the date of the hearing after the seizure took place to determine whether the seized material was actually obscene.<sup>200</sup> If the judge then deemed the material obscene, it would be publicly destroyed, and if he found the material was not obscene, then it would be returned to the owner.<sup>201</sup>

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196. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). It is important to note that Justice Stewart's "I know it when I see it" standard is not the actual legal standard applied in obscenity analyses. Today, the phrase is merely a colloquialism used when talking about obscenity cases in general. Given the narrow scope of this Note, and the high improbability that confiscating and/or destroying recordings of police behavior qualifies as unprotected speech under the obscenity exception, it is unnecessary to conduct an obscenity analysis using the formal tripartite standard set out in *Miller v. California*. 413 U.S. 15, 24–25 (1973).

197. Lauren Campbell, *Is It a Prior Restraint for Police to Delete Video of Their Conduct?*, DIGITAL MEDIA LAW PROJECT (Apr. 19, 2012), <http://www.dmlp.org/blog/2012/it-prior-restraint-police-delete-video-their-conduct>.

198. *Id.*

199. *Marcus v. Search Warrants of Prop. at 104 E. Tenth St.*, 367 U.S. 717, 720 (1961).

200. *Id.* at 719–20.

201. *Id.* at 721.

A Missouri court later issued a warrant permitting the search and seizure of the owner's business site and five newsstands.<sup>202</sup> The warrant did not detail which publications should be confiscated, so the officer in charge "seized all magazines" that he considered obscene, and when he decided that "a magazine ought to be picked up," he confiscated every copy of it, totaling approximately 11,000 copies of 280 publications.<sup>203</sup>

The Supreme Court held that the seizure was unconstitutional because "in restraining distribution pending final judicial determination of the claim," the court already "had the allegedly obscene material before it and could exercise an independent check on the judgment of the prosecuting authority at a point *before* any restraint took place."<sup>204</sup>

b. *Quantity of Copies of Books v. Kansas*

In *Quantity of Copies of Books v. Kansas*,<sup>205</sup> a Kansas statute, parallel to the Missouri statute in *Marcus*,<sup>206</sup> permitted the seizure of purportedly obscene publications without instituting an adversary hearing beforehand to determine their obscenity.<sup>207</sup> Instead, the obscenity of the materials would be determined during a trial *after* the seizure, and if the materials were found obscene, they would be destroyed.<sup>208</sup> If they were found not obscene, they would be returned to the owner.<sup>209</sup>

During a forty-five minute extended *ex parte* hearing, the judge pored over seven books, labeled as "Night Stand" books, and concluded that they were obscene.<sup>210</sup> He then issued a search warrant authorizing the seizure of all "Night Stand" books specifically at the place of business of P-K News Service ("P-K").<sup>211</sup> When the warrant was achieved on the date of its issue, "only 31 of the titles were found" on the premises, but the police seized and impounded all 1715 copies of such titles.<sup>212</sup>

At a postseizure hearing, P-K claimed that the procedure before the seizure was constitutionally lacking because it did not provide P-K the opportunity to determine whether the books were obscene before the time of the seizure.<sup>213</sup> P-K thus argued that the procedure "operat[ed] as a prior restraint on the circulation and dissemination of books in violation of the constitutional restrictions against abridgment of freedom of speech and press."<sup>214</sup> A plurality of the Court upheld

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202. *Id.* at 722–23.

203. *Id.* at 723.

204. *Id.* at 735, 738 (emphasis added).

205. *Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964).

206. See *Marcus*, 367 U.S. at 720; *supra* note 195 and accompanying text.

207. *Quantity of Copies*, 378 U.S. at 206–07.

208. *Id.*

209. *Id.*

210. *Id.* at 208–209.

211. *Id.*

212. *Id.* at 209.

213. *Id.*

214. *Id.* (internal quotation marks omitted).

P-K's claim without specifically reaching the prior restraint issue.<sup>215</sup> Instead, the Court simply stated that an adversary determination regarding the books' obscenity is necessary prior to seizure.<sup>216</sup>

c. *United States v. Thirty-Seven Photographs*

In *United States v. Thirty-Seven Photographs*, Luros, the claimant, was returning from Europe, and the customs agents confiscated what they thought to be thirty-seven obscene photographs from his bags pursuant to the Tariff Act of 1930.<sup>217</sup> The customs agents referred the matter of the seizure to the U.S. Attorney who then brought forfeiture proceedings two weeks later to determine if the confiscated material was obscene.<sup>218</sup> Luros counterclaimed, denying that the photographs were obscene and claiming that Section 1305(a) of the Tariff Act of 1930 was unconstitutional as applied to him.<sup>219</sup> The lower court found Section 1305(a) of the statute unconstitutional as applied and ordered the photographs returned to Luros.<sup>220</sup>

The Supreme Court reversed, holding that the statute "may constitutionally be applied to [this] case"<sup>221</sup> and that Luros was not deprived of due process because the government timely commenced adversarial hearings to establish the obscenity of the materials and whether they should be forfeited.<sup>222</sup> Nevertheless, the Court did note that in previous cases improperly long administrative procedures that take place before a seizure, or the lack of such procedures entirely, were enough to invalidate statutes and administrative decisions.<sup>223</sup>

d. Analogizing Obscenity to Recording the Police

In *Marcus*,<sup>224</sup> *Quantity of Copies of Books*,<sup>225</sup> and *Thirty-Seven Photographs*,<sup>226</sup> the purpose of the judicial determination was to determine whether the material seized was constitutionally protected under the First Amendment.<sup>227</sup> Further, the absence of these judicial determinations or an unduly long wait in instituting them is considered to be con-

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215. *Id.* at 213.

216. *Id.*

217. 402 U.S. 363, 365–66 (1971).

218. *Id.* at 366.

219. *Id.*

220. *Id.*

221. *Id.* at 374.

222. *Id.*; see also *id.* at 371 ("[C]ensors must resort to the courts 'within a specified brief period' and . . . such resort must be followed by 'a prompt final judicial decision . . .'" (quoting *Freedman v. Maryland*, 380 U.S. 51, 59 (1965))).

223. *Id.* at 367–68.

224. 367 U.S. 717 (1961).

225. 378 U.S. 205 (1964).

226. 402 U.S. 363 (1971).

227. *Marcus*, 367 U.S. at 721; *Quantity of Copies of Books*, 378 U.S. at 206–207; see *Thirty-Seven Photographs*, 402 U.S. at 366.

stitutionally deficient because both scenarios violate the claimant's right to adequate due process.<sup>228</sup>

These obscenity cases easily parallel the modified hypothetical explained above,<sup>229</sup> where the passerby records the conduct of a police officer, and the police officer confiscates the video, but does not destroy it, and arrests the passerby for violating the wiretap law. In this situation, there is said to be no prior restraint because the speaker has the ability to bring First Amendment defenses in court to rebut his arrest. Further, if the fact finder deems the speech protected under the First Amendment, the video will be returned to the individual, and the individual is free to disseminate it.<sup>230</sup> It is specifically because of the judicial determination in these cases that there is no prior restraint.<sup>231</sup>

Yet, it is inconsistent to say that no prior restraint exists so long as there is a hearing *after* the seizure of the video to determine the constitutionality of the material. The obscenity cases presented stand for the proposition that the judicial determination should take place *before* the seizure<sup>232</sup> and that it should happen quickly.<sup>233</sup> The adversary hearing functions as a procedural safeguard to help ensure that undue prior restraint and censorship do not prevail.<sup>234</sup> As a result, it is curious that obscenity cases—where more justification for restraint exists because the speech at issue is potentially prurient and harmful to society—are treated with a much more tender hand than are these cases of video recordings of police conduct where the speech being restrained is largely innocuous, if not beneficial, to society.

As seen in *Marcus*, the Court remained unwilling to retain possession of the seized material while awaiting judicial determination because it said that doing so would rob the individual of the independent check on the judgment of the government.<sup>235</sup> Nonetheless, in the hypothetical case where the police have confiscated the passerby's video recording, the passerby must bear the burden of waiting for trial when the seized material—the video of the police's conduct—is not constitutionally objectionable whatsoever.<sup>236</sup>

The interim between the officer's seizure of the video and the judicial determination of the video's constitutionality is a prior restraint op-

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228. See, e.g., *Thirty-seven Photographs*, 402 U.S. at 373–74 (articulating that brevity of the forfeiture proceedings is a factor in the constitutional calculus).

229. See *supra* Part III.B.1.

230. See *supra* note 54 and accompanying text.

231. See *supra* notes 47–48 and accompanying text.

232. See *Quantity of Copies of Books*, 378 U.S. at 213; *Marcus*, 367 U.S. at 735.

233. See *Thirty-seven Photographs*, 402 U.S. at 373–74.

234. See *Freedman v. Maryland*, 380 U.S. 51, 58 (“Applying the settled rule of our cases, we hold that a noncriminal process which requires the prior submission of a film to a censor avoid constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor.”).

235. *Marcus*, 367 U.S. at 735; see *supra* note 89 and accompanying text.

236. The right to record the police is clearly established under the First Amendment. See *supra* Part III.A.; see also DOJ Letter *supra* note 31, at 2–4.

erating under the guise of subsequent punishment. Because the police can theoretically seize whatever video they want and have the courts hold it hostage while awaiting judicial determination, the police and courts together are effectively stymying dissemination, so that the speech—if found constitutional and later published—becomes less imminent.<sup>237</sup> Further, if it becomes widely understood that a court proceeding is the natural consequence of videoing the police, a chilling effect on recording the police may take hold until recording the police stops entirely.<sup>238</sup> As such, the subsequent punishment may function as a prior restraint.<sup>239</sup>

Additional grounds to support the idea that mere delays in dissemination of speech may function as prior restraints are found in Justice Black's concurrence in *New York Times Co. v. United States*.<sup>240</sup> Justice Black states that "halt[ing] the publication of news by resorting to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make 'secure.'"<sup>241</sup>

Overall, because videos of police conduct are assumed to be constitutionally protected under the First Amendment, there is no reason for an individual to bear the burden of waiting for an adversary hearing to make this determination. In fact, the adversary hearing seems like a tactic that police officers and courts could use to circumvent labeling the prevention of dissemination as a prior restraint. Finally, because there is the constant possibility of subsequent punishment for filming the police, a chilling effect would emerge and effectively freeze expression in the form of videoing the police; this is an unconstitutional prior restraint on speech.

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237. In situations where the police are deleting citizen-made video recordings of their conduct, the officer becomes a censor of these recordings. Censors will have an intrinsic propensity to over-edit, striking the good out with the bad. *See Se. Promotions Ltd., v. Conrad*, 420 U.S. 546, 559 (1975) ("[T]he line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable.").

238. *See* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 24 (1981) ("Speakers, listeners, and society at large all suffer when the peculiar features of a regulatory scheme have a 'chilling effect' on persons that causes them to forgo protected expression rather than get themselves enmeshed in the scheme.").

239. *See id.* Even if the delay is not permanent and only occurs while waiting for an adversary hearing, it may render an effect of finality which violates the procedural safeguards employed when limiting speech. *Freedman*, 380 U.S. at 58 ("[W]hile the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression.").

240. *N.Y. Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring); *see also supra* note 91 and accompanying text.

241. *N.Y. Times Co.*, 403 U.S. at 719 (Black, J., concurring).



#### IV. RECOMMENDATION

This Recommendation proposes three separate checks that would reach the goal of ensuring individuals their primary right to record police conduct without arrest and their subsequent right to disseminate such recordings into the marketplace of ideas. The first check is to declare the following a prior restraint on speech: (1) confiscations of video devices and (2) arrests made on the basis that the individual was recording the police. Second, police officers should be required to obtain a warrant if they wish to seize a video recording device. Finally, there should be a level of supervisory review that helps the police officer decide when it is appropriate to take action regarding civilian recorders and the destruction of their videos. Each check is discussed in turn below.

##### A. *Declare a Prior Restraint*

This Note has argued three ways in which a prior restraint in the context of video recording the police can occur: (1) the video is deleted before the individual has an opportunity to disseminate it; (2) the individual has to wait a long time for an adversary hearing to determine the constitutionality of the video while the court retains possession of the video, or the individual is arrested because of the recording, thereby preventing the recording's dissemination; and (3) the chilling effect that may occur on speech due to repeated and widely known subsequent punishments. The best way to ensure that individuals can both record the police and disseminate the recordings is to declare the three abovementioned scenarios prior restraints on speech.

Another legal scholar has suggested that one way to ensure that individuals may record the police is by amending the federal wiretap law, rendering it inapplicable to cases involving recording the police.<sup>242</sup> As a result, the federal wiretap law would preempt other state wiretap laws that conflict with it.<sup>243</sup> The problem with this remedy is that it is too narrow. Limiting the remedy solely to wiretap statutes discounts the other types of claims that may arise in the context of police recordings.<sup>244</sup> For instance, police officers may have myriad reasons for why they think deleting an individual's video recording is justified in a particular situation, but declaring such an action a prior restraint will make it much more difficult for these justifications to withstand the exacting judicial scrutiny that prior restraints receive.

Additionally, police departments are more likely to develop a set of standards that will positively govern the way officers interact with civilian recorders if seizing and/or deleting the subsequent recordings is declared a prior restraint. In other words, remedying the video-recording prohibition via the federal wiretap statute will not solve other behavioral issues

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242. See Kies, *supra* note 29, at 307–10.

243. *Id.* at 309.

244. See *supra* notes 22–24 and accompanying text.

on behalf of the police, such as an officer's purposeful obstruction of the camera so that the recorder cannot obtain a clear view of the scene. In this scenario, there is more chance for remedial action under the prior restraint doctrine by arguing along the lines of prevention of dissemination of the intended message than there would be by arguing a violation of the wiretap statute where the focus is on the action of recording rather than the communication of the message.

*B. Require Search Warrants to Seize Video Recording Devices*

Requiring that officers obtain a warrant before searching an individual and seizing that individual's video recording device would serve two purposes. First, it would greatly limit the amount of video recordings seized and destroyed by the police, and, second, the warrants would help ensure that the material seized is actually constitutionally adverse.

The three aspects that are necessary to have a facially valid warrant will serve the second benefit of preventing overbroad seizures of video speech. First, the warrant must be produced by a "neutral and detached magistrate."<sup>245</sup> This will ensure that the police officer is not acting on his sole discretion to restrain speech, building in another check on the government.<sup>246</sup>

Second, the warrant must "be issued only upon probable cause, supported by an affidavit, particularly describing the property and place to be searched."<sup>247</sup> Further, "[t]he affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist."<sup>248</sup> The probable cause requirement of the warrant, and having to obtain the warrant in the first place, will slow down the process, incentivizing the police officer to make a more thorough determination of what she intends to search and seize, rather than simply acting on the spot in response to stress or irritation. As a result of the probable cause requirement in search warrants, the seizures of video recordings that do occur will be more based in reason, and the videos more likely constitutionally adverse.

Finally, the third requirement—that the warrant be particular—ensures that the police officer's search is not overbroad.<sup>249</sup> The breadth of the search relates to the extent of censorship that an officer may impose (i.e., will the officer merely confiscate the recording device, or will she delete the recordings, too?). This inquiry is important because she who has complete discretion effectively becomes a censor, and one's in-

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245. *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971).

246. *See supra* note 237; *see also* *Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 223 (1964) (Harlan, J., dissenting) ("The censor is part of the executive structure, and there is at least some danger that he will develop an institutionalized bias in favor of censorship because of his particular responsibility, [while in the case of court orders] the decision-maker belongs to an independent branch of the government, and neither a judge or juror has any personal interest in active censorship.").

247. *Steele v. United States*, 267 U.S. 498, 501 (1925).

248. *Id.*

249. *See id.*

terest in censorship only leads to more censorship.<sup>250</sup> As a result, if police officers are left with too much discretion for allowing or destroying videos, they may develop an interest in censorship and simply never allow individuals to record them.

### *C. Install a Level of Supervisory Review*

The final step of this tripartite Recommendation is to install a level of supervisory review so that police officers do not have sole discretion regarding when it is appropriate to take action with videographers. Ideally, police departments will independently contract someone that would arrive on scene to aid the officer in his discretion in deciding when it is appropriate to seize a video recording.

The independent contractor will ultimately serve the purpose of monitoring the videographers and ensuring that the police officer can perform his duties without interference from them. Of course, it would not be within the role of the independent contractor to seize the recordings from individual videographers; rather, the independent contractor's main purpose would be to contribute a detached perspective on the videographers' actions and alleviate the officer from having to manage them alone.

## V. CONCLUSION

In a free society, there is no such thing as permission to speak. Levying prior restraints by halting speech from the outset or imposing a delay on the speech's dissemination is contrary to a free society. A free society, instead, is one where an individual may speak about both the positives and the negatives of almost any situation, and there are very few types of speech that are constitutionally reprehensible. Even reviling the government is considered fair game, if not helpful.

Thus, as individuals record police officers, they are expressing an opinion on the manner of the officers' conduct as well as offering a general societal commentary on the duty the officers serve. This, too, enriches discussion. Further, as video recording devices and online platforms for dissemination continue to prevail, so should the ability to speak. We should not restrict new methods of speech simply because they unearth opinions that we do not wish to hear. The beauty of new these new technological developments is that they provide everyone who has an opinion with a voice. Thus, civilian-made videos of the police should be embraced and all prior restraints on their circulation thrown by the wayside.

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250. See *supra* note 237 and accompanying text.

