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Cell Phone Buffer Zones

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CELL PHONE BUFFER ZONES

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INTRODUCTION

As more and more people videotape the police with their cell phones, new and interesting First Amendment issues arise. This essay sketches several of these issues and proposes some solutions.

This essay considers whether the First Amendment protects videotaping the police and, more importantly, why. The case law largely finds the First Amendment applies but focuses almost entirely on one rationale—a newsgathering rationale.[1] That is, a person may videotape the police because such videotaping is necessary to the later free speech right of publicizing that video, and any misfeasance it reveals.

But this essay identifies two other forms of protected speech often overlooked by the courts. Jocelyn Simonson, professor at Brooklyn Law School, argues that those videotaping the police are making a symbolic statement merely by the act of videotaping.[2] They are saying, in essence, "I am watching you." This message and type of speech should enjoy the same level of protection under the First Amendment as the later speech revealing what the officer has done. The speech is central to political protest.

Those who videotape the police are making art. This might sound silly, but the First Amendment protects making art and similar self-expression, and when people photograph or videotape the police, they engage in artistic expressive activity.[3] In a recent Pennsylvania case, a plaintiff arrested for photographing the police with his phone said he did so simply because it looked "cool" and, in essence, artistic.[4] This activity likely enjoys a lower level of First Amendment protection—or at least might cede more easily to other competing interests—but can help us to understand the different strands of speech that make up cell phone recording of police activity.

Having identified the interests supporting a right to videotape the police, we must then answer the harder question: how much protection does this right afford? This question splits, in turn, into two sub-questions. First, what level of scrutiny should courts apply to videotaping the police and second, whether the courts are assessing an ordinance or discretionary police activity on the street. This essay argues that under last year's Supreme Court case, *Reed v. Town of Gilbert*,[5] courts should apply strict scrutiny, at least to statutes.

Once we decide upon a level of scrutiny, we must then apply that scrutiny to specific statutes, or to specific discretionary activity by the police. As for statutes, no statute that particularly singles out cell phone videotaping of the police should survive strict scrutiny, or even medium scrutiny. Courts should find that existing laws, such as disorderly conduct,

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1. *E.g.* Glik v. Cunniff, 655 F.3d 78 (1st Cir. 2011).
2. Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1573 (2016).
3. *Id.* at 1575.
4. Fields v. City of Phila., 166 F. Supp. 3d. 528, 532 (E.D. Pa. 2016).
5. 135 S. Ct. 2218, 2227 (2015).

assault, or privacy laws, afford police and civil plaintiffs adequate protection against intrusions by those who videotape the police. In light of the adequacy of existing law, an extra law that expressly targets cell phone recording, with the purpose of targeting speech, would be prohibited.

Lastly, the hardest question asks: how much discretion do the existing laws give officers to arrest or otherwise physically interfere with a person videotaping the police? Again, Simonson has argued for a robust, *per se* rule that the police may not arrest or stop a person from videotaping unless that person is *physically* interfering with the officer's duties.[6]

Simonson's rule goes too far. This essay focuses on the existing statutes, such as disorderly conduct or assault. In addition to conduct that involves actual physical contact, an officer may arrest a person for conduct that amounts to an assault.[7] For example, attempted battery is conduct intended to threaten imminent physical interference.[8] The police should be able to arrest individuals who are videotaping while also committing other minor offenses, such as disorderly conduct, blocking traffic, etc.—though I argue that any prosecutor must prove an enhanced *mens rea* of intent.[9] Invasion of privacy may also afford grounds for restricting cell phone recording—for example, when the police interview a rape victim or domestic violence victim on the scene, they should be able to order anyone recording to stop or move further away.

A remaining issue is whether the police may arrest or stop a person who reasonably *appears* to present a threat, even if that person does not intend to communicate a threat. This issue remains unresolved under Supreme Court precedent.[10] The Court sidestepped the issue in *Elonis*,[11] but this essay concludes that defendants cannot be prosecuted absent proof they intended to threaten physical harm or interference, or knew their actions would be perceived as a threat.

When we apply such an intent standard, we will likely find that prosecutors will decline to bring cases in ordinary cell phone recording situations. After all, a person who records the police with a cell phone is unlikely, by doing so, to present a threat of physical violence. Unfortunately, many courts[12] appear to evince unwarranted deference to

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6. *Simonson*, *supra* note 2 at 1577 ("government officials cannot claim that recording interferes with police work unless that interference constitutes a physical obstruction to that police work.").

7. Gericke v. Begin, 753 F.3d 1, 8 (1st Cir. 2014) (restriction constitutional if "officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties.").

8. *Id.*

9. I would require proof that the individual intended a threat or knew it would be taken as a threat of violence or physical interference.

10. *Elonis v. United States*, 135 S. Ct. 2001 (2015) (holding federal threat statute required showing of *mens rea* above negligence based on statutory interpretation, avoiding constitutional question).

11. *Id.*

12. *E.g. Fields*, 166 F. Supp. 3d at 532.

police decisions, no matter how unsupported they are by objective indications of danger.

Part I discusses the different First Amendment interests underlying a right to record the police. Part II discusses the level of First Amendment scrutiny likely to apply. Part III applies these principles directly to statutes or cases involving recording the police. Part III(A) concludes that statutes targeting police recordings should be found unconstitutional.

The remainder of Part III tackles the key question: when may police arrest those recording them in the field? It concludes that we should start with existing statutes such as disorderly conduct and interpret those statutes to require the heightened *mens rea* of purpose or knowledge to avoid unnecessary incursion on free speech rights.[13] In civil cases, by contrast, officers should be immune from liability if they reasonably believe the person recording presented a threat.

PART I: PART ONE

A great many federal circuit courts of appeals are gravitating toward the rule that the First Amendment protects an individual's right to videotape the police.[14] For example, the First Circuit in *Glik v. Cunniff* flatly recognized a First Amendment right to videotape the police.[15] It premised this right on the First Amendment right to gather news as part of the process of disseminating news. It similarly premised the right in the First Amendment function of keeping the government accountable. Recording public officials including the police plays a central role in such accountability.

Numerous other circuits have recognized a right, often of news outlets, to videotape public officials.[16] Even though many did involve news organizations, *Glik* concluded these precedents apply to ordinary individuals, not connected to a news organization.[17] As the court in *Glik* put it: "It is of no significance that the present case, unlike. . .many of those cited above, involves a private individual, and not a reporter, gathering information about public officials."[18]

As noted in the introduction, many of these cases such as *Glik* premise the right to record upon the right to gather information about public

13. Many criminal laws or offenses already require purpose or knowledge, but many others, such as New York's disorderly conduct statute, allow conviction based on a finding of recklessness.

14. *Glik*, 655 F.3d 78; ACLU of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012); *see also*, Glenn Harlan Reynolds & John A. Steakley, *A Due Process Right to Record the Police*, 89 Wash. U. L. Rev. 1203 (2012) ("it seems safe to say the case for First Amendment protection regarding photos and video of law enforcement officers in public is quite strong. . .").

15. *Glik*, 655 F.3d at 83-84.

16. Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000); Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995); Demarest v. Athol/Orange Cmty. Television, Inc., 188 F. Supp. 2d 82 (D. Mass. 2002).

17. *See Glik*, at 83-84.

18. *Id*. at 83.

officials.[19] The Court in *Glik* expressly framed the right as one of gathering news so as to later circulate it to others.[20] Indeed, the cases almost entirely limit their rationale to this notion that individuals or the press must be able to gather information about public officials so that they may disseminate it.[21]

On the other hand, the Third Circuit has resisted expressly holding the First Amendment protects a right to film the police, though they have done so in the context of qualified immunity.[22] In other words, they have held that the law has not clearly established such a right.

A. FILMING AS SPEECH

But we may identify a second First Amendment value and function underlying filming the police: protest speech directed at the police themselves. When an individual records the police in a manner calculated to let them see, she essentially says, "I am watching you." Indeed, the closer she gets, the more noisily she films, or the more numerous the filmers are, the more effective is this protest.

Effective can mean two things. First, filming can be effective in that the police *understand* that the person intends to communicate the message that they are, in fact, protesting, contesting, and resisting. Second, that message itself can be effective in actually checking police abuse. "We are watching" alone can keep the police from abusing their power even beyond the fear that any video will later be distributed—though of course the two are hard to disentangle.

Simonson has most fully articulated this value.[23] She has catalogued the recent phenomenon of "copwatching," local groups that set out in an organized fashion to keep tabs on police conduct.[24] These groups often "wear uniforms, carry visible recording devices, patrol neighborhoods, and film citizen-police interactions."[25] One point, of course, is to record the interactions for later distribution.

But another and perhaps more salient point of copwatching involves protest speech in the moment. The uniforms, the organized patrols, the methodological training, and the routine filming form an entire statement: "we are watching." Of course, the symbolic speech likely goes further to

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19. *E.g.*, *Smith*, 212 F.3d 1332 ("The First Amendment protects the right to gather information about what public officials do. . .").

20. *Glik*, 655 F.3d at 82 ("Gathering information about government officials in a form that can readily be disseminated to others serves cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'")

21. *Simonson*, *supra* note 3 at 1570.

22. Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010).

23. *Simonson*, *supra* note 2. *But see*, Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029 (2015) (arguing gathering information or recording images should receive lower First Amendment protection than disseminating information).

24. *Simonson*, *supra* note 3 at 1569.

25. Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. 391 (Apr. 1, 2016).

include other cognate messages: "we do not trust you" or: "stop harassing that innocent black man."

But as Simonson herself says, the symbolic, or actual, messages might sometimes be more positive.[26] The groups' often careful training and respectful filming can also be understood as an intention to communicate to police: "we respect you when you act professionally"[27] or: "we hereby appeal to your professionalism."[28] Simonson says that in some jurisdictions, at least, the police welcome, or at least tolerate, the copwatchers as legitimate and perhaps even helpful.[29]

This rationale for a First Amendment right leads to its own conclusions about downstream questions such as how close a person may film, or how disruptively. A right to film premised in protest seems to afford greater protection to get closer to the police, and in a more disruptive fashion, than a right premised entirely upon a newsgathering function.

B. ART

The First Amendment protects art.[30] It applies to film,[31] to theater,[32] to music,[33] to nude dancing,[34] to painting, and to photography.[35] It applies to videos, even those that depict the killing or maiming of animals.[36] The Second Circuit boldly pronounced that paintings and photographs "always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection."[37]

But of course many of these cases rest upon the expression and dissemination of art rather than the *making* of art.[38] Nevertheless, this right to disseminate art must necessarily include a right to make art that one can disseminate. Thus, analogously to the newsgathering and news dissemination argument above, one can imagine courts protecting the right to *take* photographs as much as to sell them—at least when the person taking the photograph does intend to disseminate it.

But what about art for art's sake? Does the First Amendment protect the right to make art that one does not intend to distribute, simply for a person's personal artistry? One must certainly imagine the answer is yes.[39] How can

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26. *Simonson*, *supra* note 3 at 1573.
27. *Id*. at 1572.
28. *Id*.
29. *Id.*
30. Bery v. City of New York, 97 F.3d 689, 695 (2d Cir. 1996).
31. Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495, 502 (1952).
32. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975).
33. Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).
34. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 561 (1991).
35. *Bery*, 97 F.3d at 696.
36. United States v. Stevens, 559 U.S. 460, 468 (2010).
37. *Bery*, 97 F.3d at 696.
38. *See Stevens*, 559 U.S. at 468; *Barnes*, 501 U.S. at 561; *Ward*, 491 U.S. at 790; *Conrad*, 420 U.S. at 558; *Wilson*, 343 U.S. at 502; *Bery*, 97 F.3d at 696.
39. *C.f.*, Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57 (Jan. 2014) (arguing that the

an artist develop her talent without first taking many photographs she never distributes, or painting many paintings she quickly destroys?

Seth Kreimer, professor at University of Pennsylvania Law School, has vigorously argued the First Amendment protects speech with oneself to develop one's faculties, such as making a diary entry: "[a] diary entry begins a process of communicating with an audience of oneFalse speech is protected not simply as a way of communicating with others, but as a means of defining the speaker's thoughts, intellect, and memories."[40]

A recent cell phone case illustrates the point nicely. In *Fields v. City of Philadelphia*,[41] an individual took a picture of the police (at an outdoor party) merely because he thought the image looked "cool." In his testimony, he explained, "'It was an interesting scene. It would make a good picture. . .'"[42] He evinced no interest in distributing the image further, whether for political or even artistic reasons. He simply wanted to satisfy his own, internal artistic genius.

The Court held he had no First Amendment right to photograph the party precisely because he had no interest in distributing the image to others as part of political speech.[43] Arguably, along with Kreimer, he had a protected right to make art, even for himself.

* * *

Put together, these three free speech interests can combine to illuminate that a person who videotapes the police has an interest in doing so from different angles, at different distances, and so on. Of course, safety or privacy may limit these interests, but as a prima facie matter, an artist may wish to film closer, or from above, to get a more artistic composition. A protestor may wish to film closely to ensure the police receive her message: "I am watching." Similarly, protestors might wish to have numerous people videotaping at the same time. A person taping for news or later dissemination and accountability might also wish to get close to better document what is really happening; or also wish to have numerous people taping to obtain numerous angles for a better approximation of the truth.

Of course, all of these points may need to yield in some circumstances to government interests in safety or privacy. But we must first identify the interests, and the conduct they justify, before we may weigh that conduct against the government interest.

First Amendment protects the right of a person to inform themselves simply for its own sake); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 339 (Jan. 2011) ("personal image capture is part of a medium of expression entitled to First Amendment cognizance.").

40. *Kreimer*, *supra* note 39 at 378-79.
41. *Supra* note 4.
42. *Id.*
43. *Id*. at 542.

PART II: ORDINANCES, LEVEL OF SCRUTINY, AND BUFFER ZONES

This section provides some background on First Amendment law as it relates to ordinances that impinge on speech. These may be ordinances that limit signs, create buffer zones, or limit conduct that involves symbolic speech. In assessing these ordinances, the Court addresses them facially or as applied, but in either case sets up a framework for review. We can apply this framework to any proposed ordinance directed at cell phone videotaping.

In a later section I discuss the framework for a slightly different question: how should courts review police who act under concededly valid laws such as disorderly conduct, menacing, threats, etc., to limit cell phone recording?

A. LEVEL OF SCRUTINY

Two of the Court's most recent cases point in different directions as to the level of scrutiny that should apply to a law that involves speech. The Court's recent abortion provider buffer zone case used medium scrutiny, though several Justices would have used strict scrutiny. Last summer's case involving a town ordinance regulating signs used strict scrutiny; it also proclaimed that strict scrutiny should apply to a broad range of situations. I will consider these two cases below.

1. Reed v. Town of Gilbert

In *Reed v. Town of Gilbert*,[44] a town ordinance regulating lawn signs created several categories of signs, such as those espousing an ideological message versus those providing temporary directions to events.[45] Some categories, such as the ideological category, had far fewer restrictions than other types of signs.[46]

So, for example, a sign that the law called "ideological" had few restrictions as to size, location, and time. It could be up to twenty square feet in area and placed anywhere at any time. But the law imposed greater restrictions for those it called "political." These could only be up to sixteen square feet when on a residential property, and could only be displayed up to sixty days before a primary and up to sixteen days after a general election.

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44. 135 S. Ct. 2218 (2015).
45. *Id.*
46. *Id.*

But the law reserved some of its greatest restrictions for another category: "Temporary Directional Signs Relating to a Qualifying Event." These could be no bigger than six square feet appearing no more than twelve hours before and one hour after the event.

Unfortunately for a local church in the town, the law categorized a sign for church services as a "Temporary Directional Sign," therefore imposing these harsher restrictions. The church had no fixed location; rather, it held services in various locations such as schools in or around the town, and therefore relied upon temporary signs posted around town to inform parishioners where to go.

The church typically put up fifteen to twenty signs with its name and the time and location of that Sunday's service. They put them up early Saturday and removed them midday Sunday. This was not good enough for the town, however.

The town's "Sign Code compliance manager" cited the church for violating the town's sign ordinance. The church had left the signs up for too long—several hours beyond the one-hour limit on Sundays, and had otherwise violated the ordinance. The church tried to reach an accommodation with the town, but the compliance manager told the church that "there would be 'no leniency under the Code.'"[47]

The church sued and, surprisingly, both the District Court and Ninth Circuit upheld the ordinance. The categories were content neutral and the code met intermediate scrutiny, according to the Ninth Circuit.

The Supreme Court reversed. This particular ordinance did not seem to present much of a challenge to the Court. The ordinance distinguished between messages on their face and was therefore subject to strict scrutiny. Under that standard, the distinction between messages could not justify the different levels of restriction on the use of signs.

But the Court went further to create a general test for what counts as content regulations that trigger strict scrutiny, and it is this test we must consider more carefully. As Justice Kagan pointed out,[48] the new test enlarges what counts as content-based speech. In particular, the Court held that a law counts as content-based if it regulates based on the "topic discussed."[49] Even more demanding, the Court held that a law is content-based if its justification rests by mere "reference" to content—even if the law is facially neutral.[50]

That is, a facially neutral law counts as content-based, requiring strict scrutiny, if the law "cannot be 'justified without reference to the content of

47. *Reed*, 135 S. Ct. at 2226-27 (2015) (opinion of Thomas, J.) (One can imagine he reported this particular fact with contempt for the apparent petty tyranny of the compliance manager, and one could hardly blame the Justice).

48. *Reed*, 135 S. Ct. at 2218 (Kagan, J., concurring).

49. *Id.* at 2227

50. *Id.*

the regulated speech.'"[51] Viewpoint discrimination is merely a more "blatant," or "egregious" form of content discrimination.[52]

This test departs from earlier case law, which did not simply deem a law content-based if it merely "referred" to the content of speech. Rather, the earlier test required more: that the law have been adopted "because of disagreement with the message it conveys."[53]

The Seventh Circuit in *Norton v. City of Springfield* nicely encapsulates the Supreme Court's new standard.[54] That case addressed Springfield's panhandling ordinance, which bans oral requests for money now but allows signs requesting money later. The plaintiffs claimed the law violated the First Amendment by distinguishing messages based on content: those asking for money to be mailed later could speak; those who asked for money now could not.

The Seventh Circuit had originally found the Springfield ordinance constitutional.[55] It regulated on the basis of *subject matter* but not on the basis of content—and was therefore subject to medium scrutiny rather than strict scrutiny. The ordinance did not regulate on the basis of *content*, the Seventh Circuit had originally held, because Springfield had not attempted to interfere in the marketplace of ideas. It did not take a side in a debate, and it did not ban the message because it disagreed with it.[56]

But the Seventh Circuit reconsidered the case after *Reed*, and reversed itself. The Seventh Circuit explained that the new test in *Reed* to determine whether a law regulates on the basis of content no longer requires a showing that the government passed the law because it disagreed with the message. It was now enough under *Reed* for a plaintiff to show that the law regulated on the basis of subject matter, and that we must look to the content of the speech to determine that subject matter.

Under the new *Reed* test, the Seventh Circuit held that Springfield's ordinance was content-based and therefore subject to strict scrutiny. Even if Springfield's government did not disagree with the message—oral requests for money now—the ordinance applied only by reference to that message. The ordinance was therefore content-based.

As the Seventh Circuit concluded, the Supreme Court had made content regulation and subject-matter regulation equivalent. Strict scrutiny applies.

The majority opinion in Reed effectively abolishes any distinction between content regulation and

51. *Id.*
52. *Id.* at 2230
53. *Id.*
54. Norton v. City of Springfield, 806 F.3d 411 (7th Cir. 2015).
55. Norton v. City of Springfield, 768 F.3d 713 (7th Cir. 2014).
56. One could challenge the Seventh Circuit's conclusion. A fair reading of the history suggests Springfield *did* pass the ordinance because it disagreed with the message—asking for money.

> *subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.*[57]

Reed likewise calls into question another Seventh Circuit case: *ACLU of Ill. v. Alvarez*.[58] There, the court held that an eavesdropping statute that prohibited recording any conversation in public without the consent of those to the conversation was unconstitutional. The state had refused to rule out applying the law to those using their cell phones to record the police. The court held it would violate the free speech rights of those recording the police to criminalize their activity under the eavesdropping statute.

But in so doing, the court held the statute was content-neutral. It asserted that the test for whether a law is content-neutral is not simply whether law enforcement was to look at the content to determine a violation, but rather, whether the legislature enacted the law because it disagreed with the content. Of course, *Reed* held that the test for content neutrality is precisely the cone the Seventh Circuit rejected: if law enforcement must look at the content of the speech to determine a violation, then the statute counts as content-based. Of course, *Reed* would not have affected the outcome in *Alvarez*, since the court found the statute unconstitutional under intermediate scrutiny.

One year before *Reed*, the Supreme Court decided *McCullen v. Coakley*[59]—a case involving an ordinance creating a buffer zone around abortion clinics. *McCullen* likely no longer stands as good law for determining whether an ordinance counts as content-based and therefore requires a strict scrutiny analysis in light of *Reed*. I will nevertheless discuss that issue briefly as another angle to understand the change brought about by *Reed*.

I will then consider the more important aspect of *McCullen* for our purposes: even under medium scrutiny, the buffer zone law violated the First Amendment. This will have important implications for any law purporting to prohibit cell phone recordings of the police.

2. McCullen v. Coakley

In *McCullen v. Coakley*, Massachusetts law made it a crime for anyone to stand on a sidewalk within thirty-five feet of an abortion clinic.[60] One plaintiff, a self-described grandmother who said she sought merely to counsel to those entering clinics to get an abortion, sued. She argued the *per se* buffer violated the First Amendment.

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57. *Id.* at 412.
58. 679 F.3d 583 (7th Cir. 2012).
59. 134 S. Ct. 2518 (2014).
60. *Id.*

The Court agreed, holding the ordinance violated the Free Speech Clause.[61] In doing so, it announced several principles that apply with equal force to cell phone video recording of the police.

First, the Court held that public sidewalks enjoy a special place in our culture and history as public fora—-places where we assemble and discuss public questions. They also afford an opportunity to reach an audience who might not otherwise want to listen to your message. Sidewalks "remain one of the few places where a speaker can be confident that he is not simply preaching to the choir."[62]

The Court therefore concluded that even though the statute does not, on its face, restrict speech, the First Amendment applies because the statute restricts access to this traditional public forum so central to free speech.

Second, the Court determined that the act was not content-based and therefore medium, as opposed to strict, scrutiny applied. The plaintiffs had argued the law was content-based both because it created buffer zones only at abortion clinics and because it exempted clinic employees, thereby favoring "one viewpoint about abortion over another."[63]

But the Court found the law not to be content-based. First, on its face it did not refer to speech, and law enforcement could determine whether someone had violated the statute without regard to speech. Anyone (not an employee) within thirty-five feet violated the act regardless of what they said. The content of speech was not an element.

The Court disagreed with Plaintiffs that the legislature, by restricting the law to abortion clinics only, essentially was targeting a particular type of speech that it disfavored. Again, the Court said that the legislature was addressing the physical "crowding, obstruction, and even violence outside such clinics"[64] and not the speech there.

The Court similarly disagreed with Plaintiffs that the exception for employees showed the legislature was favoring one viewpoint over another; the Court said the exception merely allowed the employees to do their job, including going to work, rather than creating a favorable class of employee-escorts who could walk next to women seeking abortions and support them in their decision. After all, the exception does not even envision the employees talking about abortion; rather, again, it exempts them so they can do their jobs. If individual employees or escorts did talk about abortion, then that would violate the Massachusetts Act, but would be an enforcement issue, the Court concluded.

Having concluded that the medium scrutiny of time, manner, and place restriction applied, the Court then considered whether the act was narrowly tailored. That is, under a time, manner, and place justification, the version of medium scrutiny the Court applies still carefully reviews the regulations.

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61. *Id.* at 2519
62. *Id*. at 2529.
63. *McCullen v. Coakley*, 134 S. Ct. 2518, 2523 (2014).
64. *Id.*

In particular, the restrictions must be justified "without reference to the content of the regulated speech, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information."[65] The test does not require the least intrusive restriction—as under strict scrutiny—but it must not "burden substantially more speech than is necessary."[66] The Court concluded that the Massachusetts ordinance failed this test.

In making the balance, the Court credited the government's interest in keeping the sidewalks outside abortion clinics safe. But it also wrote that the law imposed significant burdens on free speech, noting that one-on-one conversations were among the "most effective, fundamental, and perhaps economical avenue[s] of political discourse."[67] The law prohibited, or at least sharply restricted, precisely these kinds of conversations. In some ways, the key, the Court said, was to consider that the plaintiffs were not protesters—who could chant or display signs as effectively outside a buffer zone as within—but "sidewalk counselors" who sought to speak intimately with the women entering the clinics.[68]

The Court concluded that the law burdened more speech than permissible, especially in light of existing law, or other aspects of this statute, that already prohibited in a more targeted fashion harassment or obstruction. Massachusetts could pass other laws, more carefully tailored to the harm they seek to avoid without burdening so much speech.

We may draw two conclusions for *McCullen*. First, as to the level of scrutiny, we could attempt to harmonize *McCullen* and *Reed* by arguing the *Reed* rule applies only to statutes that refer to speech on their face and require those enforcing the law to consider the content of speech in deciding if the law applies. *McCullen* does not expressly refer to speech, whereas the ordinance in *Reed* did.

On the other hand, in light of *Reed*, the Court would likely find the law in *McCullen* to be content-based because it targeted only abortion clinics for buffer zones. In doing so, it essentially chose a topic—abortions—for restriction.

Second, and more important, *McCullen* teaches that even under medium scrutiny, a law that substantially affects speech will be unconstitutional if other, more neutral laws could reasonably be expected to address the problem. If the law in *McCullen* does not survive medium scrutiny, then surely a statute expressly mentioning content, such as one restricting recording of police by setting up a distance requirement, would fail strict scrutiny.

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65. *Id*. at 2529.
66. *Id*. at 2523.
67. *McCullen v. Coakley*, 134 S. Ct. 2518, 2536 (2014).
68. *Id.* at 2535.

PART III: CELL PHONE RECORDING

A. LAWS AIMED AT CELL PHONE RECORDING

So far, few jurisdictions have taken the drastic step of expressly prohibiting, or even restricting by statute individuals from using their cell phones to record the police. Last year, a Texas legislator proposed a bill that would have made it a crime to film a police officer within twenty-five feet[69]—ten feet less than the *McCullen* buffer. It would have amended the existing more general law barring negligent interference with the police.[70] But this bill remains in committee.[71]

Another lawmaker in Arizona proposed a similar law, with a buffer zone of twenty feet.[72] According to press reports, the Republican lawmaker argued that twenty feet should be close enough for a person to get a good view of the police officer's conduct, but far enough away so as not to be a distraction or threat.[73] Only a few weeks later, however, this sponsor withdrew the bill in the face of opposition.[74]

Other states are considering laws to clarify when recording the police becomes unlawful interference.[75] Many of these states appear to be contemplating bills that will protect filming, rather than prohibit it.[76]

As noted above, the Supreme Court's holdings in *Reed*—and especially *McCullen*—make it unlikely that any law that creates a *per se* buffer zone for recording the police will survive a First Amendment challenge. If the law refers to a person who records police conduct, then the law expressly mentions a topic or subject matter of speech, which under *Reed* would constitute a content-based restriction requiring strict scrutiny review. This follows because, under *Reed*, when law enforcement must consider the content of the speech, it counts as content-based even if the legislature does not evince disagreement with the message. How can law enforcement

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69. H.B. 2918, 84th Leg., Reg. Sess. (Tex. 2015).

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

71. *Relating to the Prosecution of the Offense of Interference with Public Duties; Increasing a Penalty: Hearing on H. B. 2918 Before the H, Select Comm. on Emerging Issues in Texas Law Enforcement*, 84th Leg., Reg. Sess. (Tex. 2015) (March 26, 2015–"No action taken in committee").

72. S.B. 1054, 52nd 2nd Leg., 2nd Sess. (Ariz. 2016) (making filming within twenty feet without permission a petty offense, but if the person fails to obey a warning to stop, a misdemeanor).

73. Steven Nelson, *Arizona May Criminalize Recording Cops in Public*, U.S. NEWS & WORLD REPORT, Jan. 11, 2016, http://www.usnews.com/news/articles/2016-01-11/arizona-may-criminalize-recording-cops-in-public.

74. Philip A. Janquart, *Bill Limiting Filming of Police Dies in Arizona*, COURTHOUSE NEWS SERVICE, Jan. 28, 2016, http://www.courthousenews.com/2016/01/28/bill-limiting-filming-of-police-dies-in-arizona.htm.

75. Hansi Lo Wang, *All Things Considered: Civilians Can Record Police Encounters, But When is it Interference?* (NPR radio broadcast, Apr. 9, 2015).

76. John Haughey, *Top Ten State Legislation Trends to Watch in 2016*, CQ ROLL CALL, Dec. 29, 2015, *http://cqrollcall.com/statetrackers/top-10-state-law-trends-to-watch-in-2016/*.

determine whether a person is filming the police or filming something else, like the sunset? By looking at what they filmed, to start. Any trial would introduce the content of the film as Exhibit A.

Once we decide upon strict scrutiny review, any law that simply establishes a *per se* twenty-foot (say) prohibition would likely fail to meet the least restrictive alternative standard. The Court would likely hold that less intrusive laws that are more narrowly tailored can sufficiently protect officer and public safety. The Court would likely point to existing laws, such as those banning interference with the police, as affording sufficient protection without targeting or referencing speech or recording.

Even under intermediate scrutiny which would treat such a law as a restriction not directly on speech but as one on the time, manner, and place of the recording—that law would likely fail. As *McCullen* makes clear, where existing law appears to supply adequate tools to guard against those who, in recording the police, might interfere with their duties, the state must rely on those laws rather than taking an expedient that would substantially intrude upon free speech.

A buffer zone for cell phone recording would substantially intrude upon free speech rights, in much the same way as the law in *McCullen* did. In *McCullen*, the plaintiffs needed to be close so as to have calmer, more intimate counseling-type conversations with the women seeking abortions. For one recording the police, getting close can often be necessary to properly hear the conversation and to see what is really happening. This is particularly true given that police officers will sometimes block the person recording their conduct to avoid being recorded.

Any law that attempts to set down *per se* rules regarding the recording of police will likely fail. But laws that set forth prohibitions based on general concerns should, if properly crafted, survive. With respect to buffer zones, existing laws that prohibit assault or interference with police duties, prohibit the feared conduct without targeting, referencing, or singling out speech or recording activities. A person who gets too close to the police might be interfering or causing apprehension regardless of whether they are recording.

Similarly, laws that balance the right to record against privacy interests should also survive. A law that generally prohibits wiretapping and eavesdropping on private conversations, for example (like Illinois' new eavesdropping statute) makes sense. After all, we do not want individuals to videotape the police when they take a statement from a rape victim, or a victim of domestic violence, even if that occurs in public by some necessity. Nor do we want an individual to film an undercover officer talking to a confidential informant, though this scenario might require careful balancing and discussion.

B. POLICE DISCRETION

We come finally to the hardest issue: police discretion to order someone to stop recording—or discretion to arrest someone for doing so. Let us assume an officer acts under an existing law that does not target cell phone recording, such as a law that prohibits interfering with official duties, or disorderly conduct.

Such laws, even on their face, contain problematic discretion aside from cell phone recording. New York's disorderly conduct statute, for example, includes a prohibition on failing to obey a lawful order, or creating a "physically offensive condition" by any act that "serves no legitimate purpose."[77] These terms, typical to many statutes, supply officers with power and discretion that one can easily see might lead to abuse. Vague terms such as "no legitimate purpose,"[78] or "lawful order," can easily create mischief.

The mischief becomes multiplied when an individual videos an officer who does not want to be recorded. The recording itself suddenly seems a threat, or an offensive condition, or, once ordered to stop, disobeying a lawful order.

On the other hand, disorderly conduct is a real thing; police must be able to order people to stop creating a hazard. They likewise must be able to perform their jobs without physical threats or interference. Thus, changing the words of a particular law may matter less than addressing conduct in the field. In other words, when it comes to cell phone recording, what should the rules be?

City of Houston v. Hill[79] provides further help considering police in the field, even though that case involved a facial challenge to a statute. In that case, the statute prohibited verbally interrupting an officer in the their duties. The Court held the statute was unconstitutionally overbroad because it proscribed so much protected speech. It was not, for example, narrowly tailored to proscribe "fighting words" or disorderly conduct. It targeted the speech of those who merely verbally oppose police action, or words that merely annoy or offend the police. The First Amendment protects such speech.

But in a footnote, the Court did provide examples of statutes that might be constitutional even though they prohibited words only. First, a statute might be constitutional if it prohibited a person from standing next to an officer, who was directing traffic, and engaging with that officer *in such a way* as to distract the officer and cause traffic problems. This illustration does *not* involve physical interference. Rather, a verbal distraction, which

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77. NEW YORK PENAL L. § 240.20.

78. *E.g.* Gray v. Kohl, 568 F. Supp. 2d 1368 (S.D. Fla. 2008) (holding statute that prohibited anyone from entering within 500 feet of a school with no "legitimate business" unconstitutionally vague).

79. City of Houston v. Hill, 482 U.S. 451 (1987).

might survive a challenge, according to the Court. Second, the Court said that a statute that prohibited a person from running alongside an officer and physically obstructing him, while also speaking, might survive as long as the statute targeted the physical obstruction.

Though addressing possible statutes, these two illustrations from *Hill*, albeit *dicta*, support a view that a police officer may arrest someone under a disorderly conduct statute for words that, in the context and combined with physical proximity or threats, present imminent interference.

We also do not want to erect a *per se* rule protecting all cell phone recording in all circumstances because there are too many variations on how a situation may play out to address, in advance and with *per se* rules, what manner of recording will implicate undue interference with the police, whether in the form of actual physical interference or in the form of a threat or even distraction. Every situation is different.

On the other hand, the open-textured power afforded by many disorderly conduct laws creates a great risk of abuse by police. This risk becomes magnified because the police, perhaps defensively, have a great incentive to order a person to stop recording for improper reasons. Moreover, in the great majority of cases, it is hard to see how cell phone recording *will* create a genuine threat.

C. PROPOSED RULE

This essay proposes a general rule of guidance for police enforcing existing laws such as disorderly conduct to maintain order on the street, without violating the free speech rights of those recording them. We must begin by distinguishing criminal cases—cases in which the government prosecutes a person criminally for recording the police—versus civil cases in which the individual sues the police for false arrest or a violation of her Fourth Amendment rights. I will begin on the criminal side.

As an obvious threshold, the government would need to identify some existing criminal law or offense under which to prosecute the person recording the police—such as disorderly conduct. This offense, in turn, would ordinarily mean that the person presented a threat of violence, a threat to safety, or obstructed traffic in a substantial way. It would not be enough, therefore, for the government simply to allege generally that the police perceived some generalized threat.

But I would also add an enhanced *mens rea* requirement derived from the First Amendment. The government would also have to prove that the person acted with intent—meaning purpose or knowledge—to create such a threat. I say "enhanced" because some disorderly conduct statutes,[80] or harassment or threat statutes, merely require a *mens rea* of recklessness or even gross negligence.[81]

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80. N.Y. PENAL L. § 240.20 (2016).
81. TEX. PENAL L. § 38.15 (2016).

Thus, for example, if a person records the police and blocks traffic, they can only be prosecuted if they sought to block traffic, or at least knew that they were blocking traffic. If an individual gets so close to an officer that the officer reasonably believes he is being threatened, the individual can only be found guilty of a crime or offense if the government can prove the individual *intended* to cause a threat, or *knew* their conduct created this appearance of a threat.

In a civil case, by contrast, when a person arrested sues the police under § 1983 for a violation of their free speech rights, that plaintiff must establish that the officer perceived a threat and was unreasonable in believing the filmer presented a threat. In other words, even if the person filming the officer did not intend to create a threat, and did not even know their conduct might create a threat, they may not recover damages without a showing of some culpability on the part of the officer. Again, this culpability would take its familiar form: a reasonable officer would not have perceived the conduct as a physical threat.[82]

Let's return to New York's disorderly conduct statute to see a little better how these principles may play out. In rough summary, the statute prohibits certain conduct, such as fighting or threats or unreasonable noise, undertaken with an intent to cause inconvenience, alarm, etc.[83] Let's break the statute into *mens rea* and conduct, and apply my rule from above.

The statute contains a *mens rea* of intent *or* recklessness. I would require intent (purpose or knowledge) in the context of filming; a showing of recklessness would not suffice. In addition, the type of intent in the New York disorderly conduct statute does not suffice. It forbids particular types of intent, including an intent to cause public inconvenience, annoyance or alarm. I would require that the intent at issue be on firmer footing: an intent to engage in the forbidden conduct (such as fighting) or to create a threat of that conduct.

Next, the conduct: it forbids seven categories of conduct. Summarized, these are: (1) fighting or threats; (2) unreasonable noise; (3) obscene language; (4) disturbing lawful assembly; (5) obstructing traffic; (6) refusing to comply with a lawful order to disperse; and (7) creating a hazardous or physically offensive condition without a legitimate purpose.[84]

I will consider Subsections (1) and (5) only, since they are *most* applicable to cell phone recording. Subsection (6) would apply only if either Subsection (1) or (5) already did. (Privacy or eavesdropping laws might also apply.)

Subsection (2) bans loud noise such as parties or stereos, and thus should rarely apply to cell phone recording. Subsection (3) prohibits obscenity. To the extent obscenity refers to obscene pornography, this

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82. Pearson v. Callahan, 555 U.S. 223 (2009) (qualified immunity protects what a reasonable officer believed was lawful; it protects mistakes of fact as well as mistakes of law).

83. N.Y. PENAL L. § 240.20 (2016).

84. *Id.*

category does not apply to cell phone recording; to the extent it applies to profanity, when directed to the police, the First Amendment usually protects profanity.[85] Finally, Subsection (7) should be interpreted as applying to pollution or smells, and not cell phone recording. We are thus left primarily with Subsections (1), (5), and (6) as the core cases.

This leaves us with a fairly straightforward general rule under New York's disorderly conduct statute, and most typical disorderly conduct statutes as applied to recording the police. The police may arrest a person recording with their cell phone if they physically interfere, or threaten to interfere, with police duties, or with traffic, and the person does so knowingly or purposely. If the person lacks this *mens rea*, the officer can tell them that they are blocking traffic, or interfering with the officer's duties, and order them to stop. If the individual actually is blocking traffic or interfering, and if the person persists in filming despite the warning, that continuing conduct should generally supply strong evidence of the required *mens rea*.

If the police do arrest a person, courts and juries will have to assess whether the person did actually physically interfere, or threaten to do so. With respect to actual physical interference, often the cell phone video itself will help with this task. In cases of threat, however, juries will have a tougher time determining whether the person filming actually presented a threat. Since this is a criminal prosecution, it is not enough to show the officer reasonably believed the person presented a threat; rather, the jury must find the person actually did present a threat (of physical interference or harm), and that the person continued to film with this purpose, or at least knowing the conduct was threatening.

During such a trial, defense counsel will generally argue that the jury or court must treat any avowals by officers that the defendant presented an actual threat with skepticism. First, officers are likely to be defensive and will sometimes make decisions based upon their own interest in shielding their conduct (whether that conduct is appropriate or not). Second, those who film the police are almost certainly the least likely to present a genuine physical threat. They are filming *instead of* physically interfering. These commonsense observations seem a sensible starting point, but of course one can easily imagine exceptions on both sides: well-trained officers who give ample leeway to those taping them; meddlesome individuals who film in order to distract or interfere with lawful process.

Suppose the jury acquits. The defendant may then sue arguing the officer, in arresting her, violated her First or Fourth Amendment rights, or state tort law. In either case, the plaintiff will likely have to prove, under the underlying cause of action, that a reasonable officer would not have

85. *E.g.*, United States v. Poocha, 259 F.3d. 1077 (9th Cir. 2001) (First Amendment protects defendant who said "fuck you" to officer arresting him).

perceived the conduct as a threat. I suggest this standard would be consistent with the First Amendment.

One probably notices a lacuna between the two standards—one for criminal prosecution and another for civil remedies. The same situation, a police officer arresting a person filming, could result in acquittal in the criminal case and a finding of no liability against the officer in the civil case. This middle ground simply reflects ordinary burden of proof requirements. *Both* the prosecution and the individual may not be able to establish their respective causes of action. They are not mirror images of each other; if a person is acquitted, that acquittal does not mean they must win their civil suit.

PART IV: CONCLUSION

This essay sketches some of the major principles underlying an individual's use of a cell phone to record the police and the First Amendment. A few states have shakily begun to introduce laws to specifically create buffer zones within which individuals may not record the police, but seem to have abandoned these misguided efforts—misguided because they are almost certainly unconstitutional under cases such as *Reed*, and especially *McCullen*. The more difficult issue arises when police enforce, or purport to enforce, ordinary laws such as disorderly conduct, as against those filming. In these cases, we must first impose certain additional protections to ensure these laws of general applicability do not substantially intrude upon free speech. For disorderly conduct, for example, I propose we require a showing that the person filming intended his conduct as a threat. Second, juries must meet any assertion by officers that they acted out of concerns for safety with skepticism, given the obvious conflict of interest and defensiveness a typical officer will likely have in the face of close or persistent recording of his or her activities.