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Note
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QUALIFIED IMMUNITY FORMALISM: "CLEARLY ESTABLISHED LAW" AND THE RIGHT TO RECORD POLICE ACTIVITY

The Supreme Court's qualified immunity jurisprudence provides little guidance on a central component of the doctrine: the proper sources of "clearly established law." As a result, lower courts often resort to a restrictive definition of clearly established law, requiring a controlling precedent in the jurisdiction where the violation took place. This formalist approach unmoors qualified immunity from its intended purpose: ensuring that public officials are subject to liability only when they have fair warning about the legality of their conduct.

As applied to the First Amendment right to record police, qualified immunity formalism has produced an artificial circuit split. While the Supreme Court has yet to rule on the issue, each of the six federal appellate courts to address the constitutional question has concluded that the First Amendment protects the right of citizens to document the police. In the other circuits, which have remained silent on the matter, trial courts maintain that the right is not clearly established, thereby immunizing law enforcement defendants from liability. Despite the near-nationwide agreement that citizen recording merits constitutional protection, courts generally refuse to consider out-of-circuit decisions in their qualified immunity analyses.

This Note critiques qualified immunity doctrine in the context of the First Amendment right to record public police activity, arguing that the formalist approach deviates from the policy considerations under-girding qualified immunity and impedes the development of First Amendment jurisprudence. It proposes a more functional approach to qualified immunity in which a "robust consensus of persuasive authority" suffices to establish federal rights.

*446 INTRODUCTION

In July 2017, the Third Circuit Court of Appeals held that a police officer violated Amanda Geraci's First Amendment rights by pinning her against a pillar to prevent her from recording the arrest of an antifracking protestor outside the Philadelphia Convention Center. [1] That conduct constituted illegal retaliation against the exercise of a constitutional right to record police activity in public. [2] The court reached the same conclusion about the Philadelphia police officers who arrested Rick Fields for filming the breakup of a Temple University house party. [3] Yet the police officers in both cases were immune from liability. According to the court, the right to record, although constitutionally protected, was not "clearly established" at the time of the incidents, at least not within the Third Circuit. [4]

The *Fields* court acknowledged that it joined a "growing consensus" [5] by following the First, [6] Fifth, [7] Seventh, [8] Ninth, [9] and Eleventh [10] Circuits in recognizing a constitutional right to record the police. Cellphone videos have become a regular feature of public life in the United States. Recordings of police misconduct occupy a place of particular importance in the national conversation on criminal justice, from the beating of Rodney King in 1991, [11] to the suffocation of Eric Garner in 2014. [12] The proliferation of citizen recording has lent legitimacy to the activity, which is now recognized by the federal government and local police departments ***447** alike. [13] The Supreme Court has yet to rule on the issue. But every federal appellate court to address the constitutional question has concluded that the First Amendment protects the right of citizens to document the police. [14] Yet within those circuits that have remained silent on the matter, trial courts continue to hold that the right is not "clearly established," thereby entitling law enforcement defendants to qualified immunity. [15]

Qualified immunity is a defense to civil rights suits that insulates government officials from damages liability unless they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." [16] The Supreme Court promotes an expansive view of qualified immunity protection, imposing a high bar for showing that conduct violates clearly established law. Prior case law must define the established right with sufficient particularity, and that definition must correspond to the facts of the case at hand. [17] But the Court's qualified immunity jurisprudence provides lower courts with scant guidance on a central component of the analysis: the proper sources of "clearly established law." [18] In response to the uneven jurisprudence on this issue, lower courts tend to resort to a restrictive definition of clearly established law that requires a controlling precedent, either from the Supreme Court, the court of appeals in that circuit, or the highest court of the state where the violation took place. [19] The inquiry focuses exclusively on binding case law, without interrogating other sources that might educate a reasonable person on prevailing norms of constitutional rights. [20] This approach evokes formalism by promoting a predictable bright-line rule while giving little weight to the underlying objectives of qualified immunity. [21]

***448** As applied to the First Amendment right to record police, this formalist approach to qualified immunity doctrine has produced an "artificial" circuit split. [22] In six circuits, law enforcement defendants can be held to account for interference with citizen recorders. Everywhere else in the country, police are immune from liability. Despite the near-nationwide agreement on the merits of the right, courts generally refuse to look beyond controlling decisions to determine whether the right is clearly established. Yet the Supreme Court has never commanded federal courts to limit the geographical scope of their analysis. Doctrinally, this restrictive definition of clearly established law strays from the underlying purpose of qualified immunity: providing fair warning to public officials about the state of the law. [23] In practice, qualified immunity formalism impedes the development of First Amendment jurisprudence and deters valuable social activity. [24]

This Note critiques the formalism of qualified immunity doctrine in the context of the First Amendment right to record public police activity. Part I describes the relevant legal background, beginning with the definition of "clearly established law" and then examining its application to the right to record police activity. Part II assesses the prevailing qualified immunity framework in light of the contemporary legal status of the right to record. Lastly, Part III proposes a more functional approach to qualified immunity, in which a "robust consensus of persuasive authority" suffices to establish federal rights.

I. QUALIFIED IMMUNITY, CLEARLY ESTABLISHED LAW, AND THE RIGHT TO RECORD

When a public official asserts a qualified immunity defense, courts engage in a two-part inquiry, asking (1) whether the facts alleged by the plaintiff make out a violation of a constitutional right, and (2) whether, at the time of the defendant's alleged misconduct, the right at issue was clearly established such that a reasonable person would have known of it. [25] ***449** Courts need not conduct their analysis in that order. [26] The Supreme Court has encouraged courts to begin on the second prong to avoid expending judicial resources on constitutional questions that are effectively advisory. [27] In practice, such discretionary sequencing allows courts to dispose of cases on the question of clearly established law without engaging with the merits of the right.

This Part describes qualified immunity doctrine, in general and as applied to the right to record police activity. Section I.A canvasses the Supreme Court's definitions of clearly established law and the various applications of this precedent by the courts

of appeals. Section I.B examines the application of qualified immunity to the right to record police, addressing both prongs of the analysis: the question of clearly established law and the merits of the constitutional right.

A. *Defining "Clearly Established Law"*

The Supreme Court established the baseline for evaluating qualified immunity in *Harlow v. Fitzgerald*: Government officials are immune from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[28] The standard of clearly established law represents an objective proxy for reasonable behavior.[29] Given the continual evolution of the law, public officials cannot reasonably be expected to anticipate legal developments and should not be held accountable for conduct previously identified as lawful.[30] The clearly established standard ensures that officers are subject to liability only when the law provides "'fair and clear warning' of what the Constitution requires."[31] This section describes the Supreme Court's exposition of this standard and the interpretation of that precedent by the courts of appeals.

1. *The Supreme Court's View*.--The Supreme Court promotes a robust conception of qualified immunity[32] in which it is very difficult to show that conduct violates clearly established law.[33] The message from ***450** the Court is clear: Qualified immunity should be difficult to overcome.[34] Yet precedent provides little practical guidance to lower courts on how to define clearly established law.[35] *Harlow* expressly declined to determine whether "the state of the law" should be evaluated by reference to Supreme Court opinions, or those of the relevant courts of appeals or district courts.[36] More than thirty-six years later, the Court has yet to decide which types of authority are relevant to the analysis. It remains unclear, for example, whether a Supreme Court ruling is necessary to clearly establish a right or whether other controlling precedent suffices.[37] In its qualified immunity jurisprudence, the Court has cited various bodies of law, leaving it to lower courts to determine whether those sources are appropriate for their own cases.[38] As a result, the doctrine remains ambiguous with respect to the nature of authority required to find a clearly established right.[39] In lieu of specific guidance, the Court has broadly asserted that "existing precedent" should place the constitutional question "beyond debate."[40] Jurisprudence on the effect of contrary authority is unambiguous: Public officials are not subject to liability for picking the wrong side of an ongoing debate on a constitutional question.[41] In other words, a circuit split all but guarantees qualified immunity.

***451** The Court has repeatedly intimated that controlling precedent is not necessary to clearly establish a right. Invariably in the context of granting immunity, the Court has invoked the possibility that a consensus of persuasive authority may clearly establish a federal right.[42] The Court has never, however, applied the consensus standard nor held a right to be clearly established by persuasive authority alone.[43]

In its recent qualified immunity cases, the Supreme Court has concentrated little attention on the relevant sources of law, instead focusing its holdings on the specificity with which the right must be defined.[44] The specificity requirement is grounded in the principle of fair warning that underlies all qualified immunity. The invoked right must be defined with sufficient clarity so that a reasonable official would understand that what she is doing violates that right.[45] The Court has spoken forcefully against broadly defined rights.[46]

***452** On the other hand, the Court has stated that the facts of a previous case need not be "materially similar" to the situation at hand.[47] Although the precise action in question need not have previously been proved unlawful, preexisting law must clearly demonstrate the unlawfulness of that action.[48] Reconciling the Court's ambiguous pronouncements on specificity presents difficulties for lower courts.[49] The degree to which the specific facts of the violation need to match existing precedent remains unclear. Nonetheless, the Court has followed a distinct trend toward greater specificity in recent years, reversing several denials of qualified immunity for relying on prior precedent that established constitutional principles at a high level of generality.[50] The Court has been decidedly less clear about which sources of law should be relevant to the inquiry.

2. *Circuit Court Approaches to Clearly Established Law*.-- Circuit courts differ markedly in their definitions of clearly established law. [51] The inconsistencies that mar the Supreme Court's qualified immunity jurisprudence have trickled down to the circuit level. The inconsistencies tend to benefit defendants. In response to the Supreme Court's broad view of qualified immunity, circuit courts ordinarily impose a rigorous standard for clearly established law. [52] This tendency manifests itself in a restricted view of applicable sources of law.

Circuit courts differ as to which bodies of law are relevant to the clearly established analysis. As a general rule, courts look first to binding case law from the Supreme Court or their own circuit. [53] When controlling authority is not dispositive, the circuit courts diverge in their approaches. [54] No court of appeals has articulated a cogent definition of clearly established law that it applies consistently. [55] In many circuits, ***453** different panels have announced conflicting approaches without acknowledging any deviation from precedent. [56] No federal appellate court has expressly prohibited courts in its jurisdiction from considering the decisions of sister circuits. Each acknowledges, if only as a possibility, that a consensus of cases of persuasive authority can clearly establish a right. [57] ***454** The biggest commonality among circuit court definitions of clearly established law may be irregularity in the approach to the question. In practice, courts err on the side of granting qualified immunity, often through a formalist conception of relevant law.

B. *The Application of Qualified Immunity to the Right to Record Police Activity*

Legal challenges involving citizen recording of police activity have tracked the growth of smartphone use. [58] Yet the Supreme Court has declined to address the constitutionality of the activity. In 2012, the Court denied a petition for certiorari [59] to determine "[w]hether the First Amendment guarantees the right of a non-participant to audio record a public conversation between a police officer and a civilian, where no party has consented to such a recording." [60] The silence of the Supreme Court has forced lower courts to determine whether the right is clearly established within their own jurisdictions. This section surveys the application of both prongs of qualified immunity analysis--the merits of the right and whether it is clearly established--to the right to record police activity. Section I.B.1 identifies the divergent approaches of circuit courts to defining clearly established law in this context. The subsequent section examines appellate decisions on the merits of the constitutional question, which have uniformly held that citizen recording deserves First Amendment protection.

1. *Clearly Established Law and the Right to Record*.-- Inconsistency in the definition of clearly established law has colored the treatment by federal appellate courts of the right to record police. Panels that have addressed the right have taken different approaches to the question, notably in terms of the bodies of law considered in the analysis.

In *Szymecki v. Houck*, the Fourth Circuit affirmed summary judgment for defendants on qualified immunity grounds. [61] Without discussing the facts of the case or canvassing the relevant law within the Fourth Circuit, the court held that the right to record police activities on public property was not clearly established in the circuit at the time of the alleged conduct. [62] The court declined to look beyond controlling precedent, noting that the recognition of the right in another circuit would not ordinarily ***455** defeat a qualified immunity defense. [63] Because neither the Supreme Court nor the Fourth Circuit had ruled on the issue, the question was easily dispensed with. [64] The court opted not to address the constitutional merits of the right. Although unpublished and nonprecedential, the decision has been cited as standing for the proposition that the right to record is not clearly established within the Fourth Circuit. [65]

The First Circuit took the opposite approach in *Glik v. Cunniffe*, relying on general First Amendment precedent to find that the right to film police officers in a public space was clearly established at the time of the violation. [66] *Glik* is the only federal appellate case to find that the right to record was clearly established *prior* to the issuance of a controlling opinion in that circuit. [67] Notably, the court did not base its conclusion solely on the analysis of Supreme Court principles. It relied in part on a prior First Circuit holding that an officer who arrested a journalist for refusing to stop filming a public meeting lacked the authority to impede the exercise of a First Amendment right. [68] The court also pointed to authority from the Ninth and Eleventh Circuits to support the proposition that the right was self-evident, thus providing the defendants with fair warning that their conduct was unconstitutional. [69] Relative to the approach of its sister circuits, *Glik* is an outlier: The case made liberal use of persuasive precedent and defined the right at a high level of generality in order to incorporate Supreme Court jurisprudence.

The Third and Fifth Circuits adopted a more moderate approach. Each found that the right was not clearly established at the time of the ***456** violations.[70] Yet both courts opted to engage with the merits of the right and ultimately found that it was protected by the First Amendment. Looking principally at controlling precedent, both asked whether the contours of the right to film police were so clearly established that a reasonable official would understand that what she is doing violates that right.[71] The Fifth Circuit recognized that "a robust consensus of persuasive authority ... that defines the contours of the right in question with a high degree of particularity" may theoretically suffice to clearly establish a right.[72] Existing authority, however, had not placed the question beyond debate.[73] The Third Circuit reached the same conclusion, downplaying the relevance of Philadelphia Police Department policy that recognized the right of citizens to record police in public.[74] Effectively, both courts would require a controlling precedent that specifically extends First Amendment protection to the recording of police.

2. *The Constitutional Merits on the Right to Record*.--With regard to the constitutional question--the other prong of qualified immunity analysis--each and every federal appellate court that has addressed the merits of the right to record police has concluded that the activity is ***457** protected under the First Amendment. Those decisions agree on the scope of the constitutional protection of citizen recording, which encompasses the open recording of police engaged in official activities in public places. Taken together, the cases form a strong consensus on the constitutional merits of the right to record. This section outlines that consensus.

Reconciling citizen recording with existing free speech jurisprudence is not intuitive. Capturing video may represent an intrinsic precursor to speech or a form of speech itself.[75] Courts have taken a variety of approaches in their application of free speech doctrine to an emergent social context. Citizen recording implicates a number of the traditional justifications for First Amendment protection: conduct incident to speech,[76] the right to gather information of public interest,[77] and expressive conduct.[78]

***458** The major federal appellate decisions on the merits of the right to record have engaged in lengthy discussion to tie the right to record to one or more of the existing strains of free speech jurisprudence. The First Circuit decided the first major case on the subject, *Glik v. Cunniffe*,[79] in 2011, although the Ninth and Eleventh Circuits summarily recognized the right years earlier.[80] *Glik* declared that the right to film police during an arrest was so obviously protected by the First Amendment that it was clearly established.[81] According to the court, the right was encompassed in the protections afforded to conduct related to the gathering of information as well as the right to criticize public officials.[82] In 2012, the Seventh Circuit held that the application of an Illinois eavesdropping statute to the ACLU's police accountability program--which involved the open recording of police officers in public places--directly burdened First Amendment rights.[83] Per the court, the right to make an audiovisual recording fell under the First Amendment's guarantee of speech and press rights, as a corollary to the established rights to disseminate that recording and to gather information about government affairs.[84]

No other circuit court addressed the merits of the right to record police until February 2017. In *Turner v. Lieutenant Driver*, the Fifth Circuit found that the right to film a police station fit comfortably within basic First Amendment principles, namely the protection of the free discussion of government affairs and the right to receive information and ideas.[85] A few months later, the Third Circuit in *Fields* focused on the narrow question of whether recording police activity requires "expressive intent" to ***459** fall under First Amendment protection.[86] Clarifying that the Constitution protects recording without regard to the intent of that conduct, the Third Circuit joined a "growing consensus" in declaring that "the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public."[87]

There is little contrary authority on the subject.[88] Only the Fourth Circuit has directly addressed the right to record without ruling on the merits, concluding that it was not clearly established in that jurisdiction.[89] The Second Circuit has "yet to weigh in" on the subject.[90] The Sixth, Eighth, Tenth, and D.C. Circuits have apparently not yet evaluated the constitutionality of recording police.

*460 II. COLLATERAL CONSEQUENCES OF THE PREVAILING APPROACH TO QUALIFIED IMMUNITY

The prevailing approach to qualified immunity makes it very difficult for plaintiffs to show that conduct violates clearly established law. In practice, a right is not clearly established unless controlling precedent defines that right at a high level of factual specificity. [91] Limiting the sources of law in this manner makes for a restrictive and formalist assessment. [92] Seldom does a court engage with the question of whether a reasonable person would have known of the right at issue. Courts instead rely on the mechanical analysis of controlling precedent as a proxy for legally reasonable behavior. [93]

On the one hand, this approach accords with the Supreme Court's view that qualified immunity provides expansive protection. [94] On the other hand, the narrow view of relevant precedent makes the search for clearly established law increasingly unlikely to succeed, rendering qualified immunity "nearly absolute" and placing a heavy thumb on the scale in favor of government interests. [95] Ultimately, the formalist approach to clearly established law upsets the balance that qualified immunity is supposed to create between the vindication of constitutional rights and the insulation of public officials from insubstantial lawsuits. [96] The application of qualified immunity to citizen recording of police brings this imbalance into stark relief.

This Part critiques the formalist definition of clearly established law in the context of the First Amendment right to record police. Section II.A evaluates the application of clearly established law analysis to right-to-record cases in light of the policy considerations that undergird qualified immunity doctrine. Section II.B demonstrates that the restrictive ***461** view of clearly established law has manufactured an "artificial" circuit split that threatens to impede the development of First Amendment jurisprudence. Lastly, sections II.C and II.D discuss the social consequences of qualified immunity in this area, explaining how the doctrine prevents the vindication of meritorious First Amendment claims and deters private citizens from engaging in socially desirable conduct.

A. *Policy Implications of Applying Qualified Immunity to the Right to Record*

Qualified immunity is a judicially made defense, the contours of which are largely shaped by "policy considerations." [97] It serves to quickly terminate insubstantial lawsuits against public officials and protect officials from the burdens of litigation regarding unclear doctrine. [98] The purpose of the defense is to protect good-faith mistakes of law by public officials. [99] Qualified immunity is meant to give state actors "breathing room to make reasonable but mistaken judgments about open legal questions." [100]

The lodestar of qualified immunity is notice or fair warning. [101] Requiring clarity in the establishment of the allegedly violated right allows officials to reasonably anticipate when their conduct may give rise to liability. [102] That requirement ensures that state actors are on notice that their conduct is unlawful before they are subjected to suit. [103] This section describes how the application of qualified immunity to the right to record deviates from these fair-warning principles. Section II.A.1 contends that the current state of the law provides public officials with more than sufficient notice about the constitutionality of interfering with citizen recorders. The subsequent section explains how the formalist definition of clearly established law fails to account for that notice.

1. *The Current State of the Law and Fair Warning*.--Recent decisions on the right to document police officers attest to a growing judicial ***462** consensus that such behavior merits First Amendment protection. [104] This issue has reached appellate courts in multiple circuits because large numbers of citizens have filed suit alleging the violation of their right to record. The quantity of litigation implies that the public perceives the right as well established. Yet federal courts continue to conclude that the right is not clearly established whenever there is no directly controlling precedent in that jurisdiction. [105] This approach deviates from the notice principle articulated in *Harlow*. [106] In asking whether a right is clearly established, courts are really asking whether the government official ought to have known about that right. [107] The underlying concern is whether the state of the law provides defendants with fair warning about the constitutionality of their behavior. Preexisting law should make the unlawfulness of particular conduct so apparent that reasonable officials could not disagree on the issue. [108]

Given the weight of judicial authority on the subject, it is arguably unreasonable to believe that preventing a citizen from filming police activity is lawful. There is no legal debate about the constitutional merits of the right. [109] In addition to the guidance provided by appellate courts, federal and local policies alike have coalesced around the recognition of the right to record. [110] In May 2012, the Department of Justice issued a recommendation to all police departments to affirmatively set forth the First Amendment right to record police activity. [111] Multiple settlements between the Obama Administration and police departments included provisions to protect the right to record police: New Orleans, Louisiana; ***463** East Haven, Connecticut; Ferguson, Missouri; and Newark, New Jersey. [112] The Obama Justice Department filed statements of interest in at least two right-to-record cases, indicating that "[t]he First Amendment protects the rights of private citizens to record police officers during the public discharge of their duties." [113] Law enforcement organizations themselves have stated that the recording of police does not by itself establish legal grounds for arrest or other actions to restrict such recordings. [114] Those statements are consistent with official police policy in municipalities throughout the country, such as St. Louis, Missouri; New York, New York; Baltimore, Maryland; Montgomery County, Maryland; and Philadelphia, Pennsylvania, among others. [115]

This combination of policy and judicial authority provides fair warning that the recording of public police conduct is lawful. Conversely, a ***464** number of courts have found that the right to record is not clearly established. [116] Such rulings arguably send conflicting messages to police officers. Yet a case that is silent on the merits of the right should not qualify as contrary authority. Decisions grounded in qualified immunity merely indicate to officials that there is an increased possibility of immunity from suit; they say nothing about the lawfulness of potential conduct and therefore should not be treated as precedential. The existence of such decisions does not meaningfully interfere with the notice to police officers and should not warrant immunity.

2. *The Limitations of the Formalist Approach*.--By fixating on controlling case law at the expense of all other authority, the prevailing approach fails to ask the crucial question of qualified immunity: whether a reasonable officer would have known that her behavior was unlawful. The presumption that public officials are aware of ongoing developments in constitutional law is well recognized as a legal fiction. [117] This fiction is valuable insofar as it creates incentives for officials to keep up with legal developments in order to stay on the right side of the law. [118] In practice, however, the legal education of police officers likely derives from formal training and policy directives, or the advice of counsel. [119] The formalist analysis ignores the influence of these materials, as well as that of persuasive judicial authority.

The restrictive approach to clearly established law produces perverse results. Its application to the right to record is a prime example. Granting qualified immunity because no prior case has held sufficiently similar conduct to be unconstitutional is defensible on fair-warning grounds. Immunizing a government official because no prior case *in that jurisdiction* has held similar conduct to be unconstitutional is less defensible. Judicial silence should not be accorded the same weight as contrary authority. A right is clearly established when "a reasonable person in a defendant's position should know about the constitutionality of the ***465** conduct." [120] Confining the analysis to controlling precedent arbitrarily limits the scope of that inquiry. As a result, police officers in six circuits have impunity to retaliate against citizen recorders for conduct that is evidently constitutional. Qualified immunity exists to protect reasonable mistakes, not knowingly illegal conduct. [121]

B. *The Artificial Circuit Split*

Trial courts continue to dismiss right-to-record suits on qualified immunity grounds in incipient jurisdictions. [122] Despite the recognition of the right by six circuits, lower courts decline to find it clearly established by the weight of persuasive authority. [123] Most maintain that directly controlling authority is required to defeat a qualified immunity defense. Of those that acknowledge the potential role of persuasive authority in clearly establishing law, many improperly treat qualified immunity decisions as contrary authority. As a result, police officers who arrest or harass those seeking to record their official conduct continue to evade liability in those jurisdictions.

Qualified immunity has produced an artificial circuit split over the right to record police activity in public places. [124] Police officers in Baltimore are held to a different constitutional standard than their counterparts a hundred miles away in Philadelphia--not because of substantive disagreement over the First Amendment but because of the application of qualified immunity doctrine. The split did not arise because of local ***466** differences in the assessment of constitutional protection but rather

because the Third Circuit opted to address the merits of the issue while the Fourth Circuit did not. [125] Under the approach restricting clearly established law to controlling precedent, this split will persist until each of the remaining circuit courts of appeals individually recognizes the right to record as clearly established. [126] This section analyzes the effects of the artificial split on the development of jurisprudence and how the misapprehension of contrary authority exacerbates those effects.

1. *The Role of Qualified Immunity in Constitutional Development*.--In theory, qualified immunity promotes the development of constitutional rights because it requires courts to decide whether an asserted right is cognizable under the Constitution. [127] The two-step procedure--deciding the merits of the constitutional right as well as the question of whether that right is clearly established--is "especially valuable" for the development of rights that "do not frequently arise in cases in which a qualified immunity defense is unavailable." [128]

The discretion to dodge the constitutional question if the right is not clearly established leads courts to dispose of cases without ruling on the merits. [129] While the practice promotes judicial economy, it impedes the role of qualified immunity as a mechanism for the development of constitutional law. [130] In the context of the right to record, there is considerable room for development: clarifying the meaning of reasonable time, manner, and place restrictions; determining what degree of civilian interference with police activity is permissible; and deciding to what degree the right extends to nonpublic fora. [131] If courts in incipient jurisdictions wait for courts of appeals, state supreme courts, or the U.S. Supreme Court to rule, the law may remain unsettled for many years, leaving ***467** "standards of official conduct permanently in limbo" [132] --and preventing plaintiffs with meritorious claims from vindicating their rights.

Because of discretionary sequencing, [133] qualified immunity has the perverse effect of preventing rights from *becoming* clearly established. The result is unsettled law, insulation from liability, and a stagnant jurisprudence that provides little guidance on the scope of constitutional rights. [134] The right to record police exemplifies this pathology. [135] By opting to address the merits, the 2017 cases from the Third and Fifth Circuits, *Fields v. City of Philadelphia* [136] and *Turner v. Lieutenant Driver*, [137] were outliers in this respect. [138] The *Turner* court grounded its merits-first approach in the unique importance of the right, which "continues to arise in the qualified immunity context." [139] In *Szymecki*, the Fourth Circuit adopted the opposite method, leaving the constitutional question unsettled within that jurisdiction. [140] The Second Circuit took a third approach, disposing of a First Amendment retaliation claim on other grounds and declining to address whether police officers were entitled to qualified immunity for arresting a citizen recorder. [141] Trial judges in incipient jurisdictions typically opt not to reach the merits of the issue. [142] The preference for constitutional avoidance creates a negative feedback loop: When a court dismisses a case on qualified immunity grounds without deciding the underlying question of substantive law, the next time the same conduct occurs, the officer will once again be immune from suit because a court has never established the governing law. [143]

***468** 2. *The Misapplication of Contrary Authority*.-- Qualified immunity's ossification of the law is exacerbated by the tendency to treat decisions decided on clearly established law grounds as evidence of a circuit split. Even when courts do consider persuasive authority in their analysis, they often treat qualified immunity rulings as contrary authority. A substantive circuit split provides dispositive evidence that the law is unsettled and therefore not clearly established. [144] Finding contrary authority is thus outcome determinative in most qualified immunity cases.

For example, in *Mesa v. City of New York*, [145] a Southern District of New York court concluded that the right to document police misconduct was not clearly established in the Second Circuit at the time of the violation in question. Acknowledging that several courts of appeals had recognized the right, the court agreed that citizen recording of police "fits comfortably" within First Amendment principles. [146] However, the court then cited decisions from the Third and Fourth Circuits to claim that "other circuits have decided just the opposite, declining to extend First Amendment protections to the recording of police activity." [147] Yet neither of the cited decisions had reached the merits of the constitutional question. [148] Both were decided exclusively on the clearly established prong.

Mesa is not an outlier. District courts across the country have adopted a similar approach, insisting that there is "a circuit split on the issue" [149] because of qualified immunity decisions that are silent on the underlying constitutional question. [150] Another

Southern District of New York court held that the existence of a "considerable debate" among the circuit courts over the scope of the right was sufficient to demonstrate that the right was not clearly established. [151]

Equating clearly established law rulings with contrary precedent on the merits of the constitutional question conflates the two prongs of qualified immunity analysis. Such cases purposefully avoided the constitutional ***469** issue, holding only that the right was not clearly established in the specific factual context before the court. [152] Because such holdings are irrelevant to determining whether there is a consensus on the *existence* of a constitutional right, they lack relevant precedential value. In other words, *Szymecki* does not stand for the proposition that the Fourth Circuit does not recognize the right to record, but only that such a right "was not clearly established in the Fourth Circuit as of sometime prior to 2009." [153] Treating such cases as evidence of a circuit split turns qualified immunity into a self-fulfilling prophecy: If the right was not clearly established by another court in an analogous factual situation, it cannot be so held by a future court operating in a different jurisdiction and time. This reading fails to account for subsequent developments in the law.

Szymecki is a case in point. Since that unpublished decision in 2009, the legal landscape has changed dramatically: Four circuits have recognized the constitutional right to record, [154] and the federal government has issued guidance acknowledging the right to record police. [155] Yet as recently as 2018, *Szymecki* was cited as contrary authority. [156] The misapprehension of contrary authority threatens to perpetuate the artificial circuit split, until the Supreme Court rules on the issue.

3. *The Supreme Court Is Not Likely to Address the Issue*.-- There is no judicial dispute on the merits of the right to record as that concept is typically understood in qualified immunity analysis. [157] The only "dispute" concerns whether the right is clearly established. Because there is no circuit split on the merits, the Supreme Court is not likely to weigh in on the question. Seventy percent of the Supreme Court docket addresses legal questions over which lower courts have differed, demonstrating that uniformity is a central consideration in case selection. [158] In 2012, the Court denied certiorari on this very question. [159] Unless a genuine circuit ***470** split emerges, it is unlikely that the Supreme Court will resolve the constitutionality of the right to record anytime soon.

C. *Qualified Immunity Doctrine Impedes Vindication of the Right to Record*

Qualified immunity, in addition to stunting jurisprudential development, may impede the remediation of constitutional rights. Doctrinally, qualified immunity applies only to a specific subset of cases, namely suits for damages against public officials acting in their individual capacities. [160] Although municipalities are subject to § 1983 under the *Monell* doctrine, [161] they cannot invoke the defense. Nor does it apply to suits for injunctive or declaratory relief. [162] In the case of the right to record police, however, money damages are often the only adequate form of relief. Defendants are therefore able to invoke the defense in almost all cases. This section analyzes how qualified immunity stands as a particular impediment to remedying violations of the right to record police. Section II.C.1 describes the nexus between the right to record and § 1983, and the following sections explain why alternate forms of relief generally are unavailable to plaintiffs in this context.

1. *The Importance of § 1983 Claims to First Amendment Retaliation*.--The vast majority of right-to-record causes of action stem from the conduct of individual police officers. To a lesser degree, they may implicate the pattern or practice of a particular law enforcement agency. Retaliatory arrests are more frequently justified under the pretext of catchall statutes--disorderly conduct, loitering, disturbing the peace--than state wiretapping or privacy laws. [163] These discretionary charges are easily used to curtail speech or retaliate against individuals for exercising First Amendment rights. [164] Right-to-record cases typically seek a remedy for a particular instance of rights deprivation, rather than relief from a burdensome piece of legislation. Legislative challenges, an avenue traditionally available for the vindication of constitutional rights, are less suited to ***471** this context. [165] The principal remedy for the unreasonable application of facially valid laws is § 1983, in which the qualified immunity defense generally applies. [166]

2. Monell *Liability Is Not a Useful Vehicle for Retaliation Against Citizen Recorders*.--Municipalities, although subject to liability under § 1983, are barred from raising qualified immunity as a defense. [167] Under *Monell*, a municipality is vicariously liable for the conduct of persons for whom it is responsible only if the plaintiff's injury is the result of a municipal policy, custom, or practice. [168] Whether or not the right violated by the municipal policy was clearly established is irrelevant. [169] Nor

does dismissal of claims against individual police officers on qualified immunity grounds preclude municipal liability for the same violation. [170] *Monell* does not provide a separate cause of action but rather *"extends* liability to a municipal organization where that organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation." [171]

Generally speaking, contemporary municipal policies on citizen recording of police activity are facially supportive of the First Amendment ***472** right. [172] Succeeding on a *Monell* claim, therefore, would likely require a plaintiff to demonstrate that a police department violated its own policy. That is a high bar to clear. A plaintiff must demonstrate that a municipality failed to act in the face of a pattern of misconduct, compelling the conclusion that it acquiesced to the unlawful actions of its subordinates. [173] Failure to train employees in a relevant respect must amount to "deliberate indifference" to the rights of persons with whom the untrained employees come into contact. [174] A pattern of similar constitutional violations is ordinarily necessary to demonstrate such indifference. [175] In the context of retaliation against individual recorders, it may be difficult for a plaintiff to demonstrate the numerous instances of unconstitutional conduct necessary to establish a custom or practice. [176]

3. *The Unavailability of Injunctive Relief*.--Qualified immunity is not available in suits against individuals in their official capacities when the remedy is limited to injunctive relief. [177] However, injunctions in the § 1983 context are difficult to obtain due to the standing requirements that the Supreme Court established in *City of Los Angeles v. Lyons*: A plaintiff must demonstrate "remedial standing"--not just standing to bring a lawsuit but standing to pursue each specific remedy. [178] For an injunction, a plaintiff must demonstrate that she will be subject again to the ***473** challenged conduct. [179] The Court found that Lyons failed to allege that a "uniform City practice or policy" of chokeholds violated his rights. [180] The same obstacle applies, if not with greater force, to citizen recorders alleging retaliation. Unlike the chokehold--a discrete practice that can be directly prohibited--restrictions on the right to record are often justified by pretextual arrests under discretionary statutes. [181] In other cases, police may simply prevent citizens from recording, either through physical means or by demanding that the recorder leave the scene. [182] It would therefore be difficult to fashion an effective injunction against retaliation.

Law enforcement resistance to civilian filming typically happens on an ad hoc basis, ranging from commands for bystanders to stop filming to arrests of individuals for interference with police work. [183] Because injunctive relief and *Monell* liability are generally not available, money damages represent the best--albeit imperfect [184] --remedy for vindicating this particular right. As the Supreme Court concluded about instances of individual abuse of office, "[A]n action for damages may offer the only realistic avenue for vindication of constitutional guarantees." [185] Qualified ***474** immunity therefore stands as an obstacle to citizen recorders seeking redress. To vindicate the right--and to guarantee the court reaches the constitutional issue--a plaintiff must show that the challenged conduct violates clearly established law.

D. *The Unsettled Nature of the Right to Record Police Chills Socially Valuable Activity*

In the First Amendment context, qualified immunity decisions have the potential to directly influence citizen behavior. Unlike the Fourth Amendment protection against unreasonable search and seizure or the Eighth Amendment prohibition of cruel and unusual punishment--the rights implicated in the vast majority of qualified immunity decisions [186] --First Amendment jurisprudence governs the conduct of private citizens. Because of qualified immunity doctrine, the current legal framework sends a mixed message to potential civilian recorders: Although the right is protected under the First Amendment, there is no remedy for a violation. Absent legal guarantees, those seeking to document police activity run the risk of being arrested, even when the act of recording does not interfere with law enforcement duties. [187] The threat of arrest presents a potent deterrent, especially to spontaneous recorders who may "have no deep commitment to capturing any particular image." [188]

Deterring citizen recorders is troublesome because the documentation of police conduct serves a number of social goals. Recording furthers the interest in promoting constitutional policing, as documented interactions with police carry greater accuracy and legitimacy than testimonial evidence. [189] Cellphone videos have both exposed police misconduct and exonerated officers from wrongful charges. [190] Citizen recording contrasts with the use of police body cameras, which can be turned off or forgotten to be turned on. [191] Given the ubiquity of recording devices in the contemporary United States and the growing

prevalence of ***475** civilian cop-watch organizations, it is perhaps no surprise that cases of police retaliation against citizen recorders arise frequently. [192] There is little reason to believe that citizen recorders will cease to bring legal claims, forcing courts to grapple with qualified immunity.

Qualified immunity is meant to discourage the filing of insubstantial cases, [193] not to discourage the filing of meritorious cases, and certainly not to discourage private citizens from engaging in constitutionally protected behavior. In doing so here, the defense is not performing the proper function assigned to it by the Supreme Court.

III. FRAMEWORK FOR A LESS RESTRICTIVE APPROACH: A ROBUST CONSENSUS OF PERSUASIVE AUTHORITY

The proposition that the First Amendment protects the right of citizens to record police activity now enjoys a strong judicial consensus. [194] In more than half of U.S. states, federal courts have clearly established the right to record, allowing citizen recorders to pursue legal remedies when that right is violated. In the other half of the country, however, qualified immunity doctrine effectively precludes vindication of the right. [195] Without an effective remedy, the right to record exists in a state of legal limbo. Yet any public official should know that interfering with citizen recording violates the Constitution, given the state of the law on the issue. [196] Sufficient notice cannot be defined by jurisdictional boundaries. Granting qualified immunity in this context is no longer justified by the fair-warning principles that undergird the defense. In applying qualified immunity to the right to record, courts have misinterpreted precedent ***476** and, as a result, struck the wrong balance between fairness and accountability for law enforcement officers.

The weight of existing authority has settled the constitutional question, arguably beyond debate. [197] As a result, lower courts would find the right clearly established were they to consider the weight of persuasive authority. Instead of waiting for controlling precedent that may never come, federal courts should apply an oft-cited but rarely used approach to qualified immunity: A robust [198] consensus of cases of persuasive authority may clearly establish a constitutional right. [199] The unanimity among six courts of appeals on the right to record, coupled with the absence of contrary authority, constitutes the robust consensus necessary to clearly establish law.

This Part argues that broadening the sources of law that can clearly establish rights--moving from an analysis limited to controlling precedent to one that considers the weight of persuasive authority--would better align qualified immunity doctrine with the policy considerations underlying the defense. Section III.A proposes a definition of "robust consensus" and applies it to the right to record police activity. Section III.B contends that this solution is both legally feasible and normatively desirable, addressing potential counterarguments to a more expansive definition of clearly established law.

A. *A New Framework of Clearly Established Law*

Principles of fair warning should guide the robust-consensus analysis. Courts should begin by canvassing controlling precedent, as is common practice now. When binding authority is silent on the issue at hand, courts should look to persuasive authority to determine whether a consensus view provides fair warning to officials about the lawfulness of their conduct. This section outlines a definition of robust consensus based on the existing jurisprudence on the subject and then applies that analysis to the right to record.

1. *The Precedent of Robust Consensus*.--The Supreme Court has never provided a definition of a robust consensus of cases of persuasive authority. The Court's treatment of the concept is cursory, in dicta, and styled as a counterfactual. In *Wilson v. Layne*, the Court granted qualified immunity because the plaintiff failed to identify "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." [200] Justice Scalia's majority opinion in *Ashcroft v. al-Kidd* added the qualifier "robust" to the consensus of cases that was theoretically ***477** necessary to establish a right in the absence of controlling precedent. [201] The Court's most recent discussion of the subject suggests that it remains an open question whether such a consensus suffices to overcome a qualified immunity claim. [202] In none of these opinions did the Court offer a rationale for its caveats or acknowledge that it may have been departing from precedent. [203]

Although a number of lower courts have determined rights to be clearly established on the basis of persuasive authority, [204] no circuit has elaborated a formal test to determine when such authority is sufficient to clearly establish law. The Second Circuit at times will consider out-of-circuit precedent if those decisions foreshadow a particular ruling on the issue by a future court. [205] Similarly, some panels of the Seventh Circuit look to whether the trend in the case law is sufficiently clear to assure the court that a recognition of the right by controlling precedent is "merely a question of time." [206] Perhaps the most extensive recent analysis of robust consensus comes from the Fourth Circuit in *Booker v. South Carolina* ***478** *Department of Corrections*. [207] The *Booker* court noted that seven circuit courts had recognized the right at issue in published decisions, remarking on the consistency in their holdings. Unanimity among those circuit courts that had confronted the issue demonstrated that the constitutional question was "beyond debate," supporting a conclusion that the right was clearly established. [208]

2. *Defining "Robust Consensus."*--Federal courts have not elaborated on the meaning of robust consensus. This Note fills that gap by proposing a definition of robust consensus grounded in the bedrock principle of qualified immunity: The state of the law must provide clear notice to public officials about the constitutional limits of their behavior. Notice manifests itself in a number of ways. First, circuit court decisions must be sufficiently consistent to foreshadow a similar ruling by a future court. Second, rulings must be unanimous on the existence and general scope of the right in question. Third, jurisprudence must have developed to such an extent that it constitutes a consensus. In sum, the body of persuasive authority must justify the conclusion that no reasonable public official would believe that her actions are lawful, regardless of the jurisdiction in which she finds herself. These principles form the basis of the operational definition of a "robust consensus of persuasive authority." [209]

As a threshold matter, the expansion of the analysis beyond controlling precedent requires a delineation of what bodies of law constitute relevant persuasive authority. The Supreme Court has not taken a consistent position on this issue but has suggested that decisions from the courts of appeals may be a dispositive source of clearly established law. [210] Circuit courts that discuss the robust consensus have more clearly indicated that the universe of relevant decisional law centers on federal ***479** appellate cases. [211] Courts should look primarily to precedential decisions by courts of appeals, with other case law playing a lesser role. [212]

Consensus means general agreement. [213] When applied to persuasive authority, the threshold marker of consensus is unanimity on the merits of the right in question. Substantive uniformity exists when the contours of a particular right can be gleaned from a review of the relevant holdings: when *"various courts* have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand." [214] On the other hand, a consensus cannot exist when sources of law conflict. Any contrary authority by a higher court--whether a federal or state appellate court--should be dispositive. A strict unanimity requirement is consistent with the Supreme Court's broad conception of qualified immunity. [215] Nonetheless, courts must be careful to distinguish between cases that engage with the substance of the right and those decided on qualified immunity grounds. Prior decisions that merely held that the right in question was not clearly established should have no relevance in the robust-consensus analysis.

The body of persuasive authority should sufficiently clarify the scope of the right. Taken together, circuit court decisions must make the unlawfulness of conduct apparent to the extent that a reasonable official understands that what she is doing violates that right. [216] Introducing persuasive authority to the definition of clearly established law would not interfere with existing jurisprudence on the particularity with which rights need be defined. Courts should look to the agreed-upon contours of the right that emanate from prior decisions to determine whether the ***480** constitutional rule applies with clarity to the specific conduct in question. [217] The only change wrought by the robust-consensus approach would be to broaden the scope of the analysis from one line of controlling precedent to the decisions of multiple courts.

The next inquiry concerns the weight of authority: when a consensus becomes sufficiently "robust" to render a right clearly established. By definition, consensus requires more than the decision of a single court. While judges should be mindful that a sufficient number of courts have ruled on the issue, a rigid mathematical formula would be inherently arbitrary. [218] Courts should look to the trends of appellate decisions. The emergence of a discernable tendency may put public officials on notice of their potential liability. Consistent movement in one direction would foreshadow the recognition of the right by other courts yet to address the precise issue. This approach would prevent outlier cases from gaining national significance. Courts would have to evaluate the context to determine when an emerging trend matures into a robust consensus. Ultimately, that decision must be made case by case, based on whether the body of decisional law provides sufficient clarity about the legal status of the

right in question. That analysis should consider the number of cases, the depth of analysis conducted in those cases, and the particular detail with which the challenged right was described.

In line with the guiding principle of fair warning, courts should adopt the perspective of a reasonable official and consider decisional law in a real-world context.[219] The analysis of persuasive authority may--and perhaps should--extend to other relevant sources of law such as internal policies and statutory or administrative provisions.[220] These sources, which may well be informed by developments in constitutional law, exert a more direct influence on the behavior of a public official than appellate decisions.[221] Alone, administrative provisions cannot defeat qualified ***481** immunity.[222] Nonetheless, when relevant, they should be examined in conjunction with prevailing circuit law to determine whether defendants were on notice about the legality of their behavior.[223] Consideration of such sources would help the court determine whether there was actual ambiguity about the boundaries of the plaintiff's constitutional rights, from the perspective of a reasonable official in the position of the defendant.[224] In certain circumstances--such as the right to record police officers--the broader context in which the case arose may help the court address whether a defendant should have known that her behavior was unconstitutional.[225]

The robust-consensus approach provides a coherent alternative to the restrictive focus on controlling precedent. The consideration of persuasive authority would permit courts in incipient jurisdictions to meaningfully engage with the clearly established question. Although lacking the simplicity of the formalist approach, "robust consensus" can be defined with sufficient precision to guide lower courts. Courts may draw on objective indicia of such a consensus: uniformity in substance, weight of existing authority, and support from statutory and administrative sources. These factors are substantially similar to the principles that animate the few courts that have looked to persuasive authority. The test provides guidelines for the court to determine the underlying question of qualified immunity: whether the state of the law provided fair warning to public officials.

3. *Applying the Robust Consensus to the Right to Record*.-- The current state of the law on the right to record provides a prime example of a robust consensus. Six circuit courts have determined that First Amendment protection extends to civilian recorders. No higher court has ruled otherwise. Recent appellate decisions indicate a consistent tendency toward recognition of the right. Since the First Circuit decided *Glik v. Cunniffe* in ***482** 2011, three other circuits have aligned themselves with that position.[226] Each successive court has drawn from existing precedent. The *Fields* court expressly acknowledged that its decision joined a "growing consensus," citing the five circuit decisions that preceded it.[227] The judicial consensus accords with administrative authority in many police departments and the recognition of the right by the federal government.[228] Each case involved an in-depth discussion of the constitutional merits, placing the right to record into the general context of free speech jurisprudence.[229]

The scope of the right can be gleaned by reference to the narrowest holding common to these six decisions. The right involves four elements: (1) the open recording[230] (2) of officers who are performing public duties[231] (3) in public places, (4) where the manner of recording is otherwise lawful.[232] Each case involved the filming of police officers while they were engaged in police work.[233] Recording has uniformly taken place in a traditional public place: on the street[234] or in a city park.[235] Whether and to what degree the right extends to other types of spaces to which the public has access, such as police stations, courtrooms, or government buildings, remains an open question.[236]

***483** Determining whether the manner of recording is otherwise lawful will likely present the greatest difficulties in future litigation. As with the right to engage in other activity protected by the First Amendment,[237] the right to record is not absolute but "subject to reasonable time, place, and manner restrictions."[238] Police officers and legislators may have legitimate reasons for restricting the act of filming, namely to promote public safety.[239] Courts have yet to explore the permissibility of those limitations to the recording of police.[240] In that context, courts will have to determine the degree to which restrictions on citizen recording are required in order to allow police officers to carry out their responsibilities effectively.[241] The reasonableness of restrictions is especially relevant as filming often involves "provocative behavior" that inevitably irritates police officers.[242]

B. ***The Legal and Practical Effects of the Robust-Consensus Approach***

Application of the robust-consensus proposal would effect a number of normatively desirable results. A more searching analysis of notice would promote greater accountability for officials who knowingly violate constitutional rights. Expanding the analysis of clearly established law would also help promote the development of constitutional law in light of the obstacles created by discretionary sequencing. [243] In sum, the positive effects would extend to the two principal functions of federal courts: dispute resolution and law declaration. [244]

***484** Introducing persuasive authority into the clearly established law analysis would be a positive step toward reconciling extant qualified immunity doctrine with the policy justifications for the defense. By removing the implicit restriction to controlling precedent, courts would be able to conduct a more meaningful inquiry into whether the defendant had sufficient notice about the contours of the right, without requiring additional discovery or any inquiry into the knowledge of any individual defendant. The mere absence of controlling authority holding identical conduct unlawful should not guarantee qualified immunity. [245] The defense was not meant to protect the discretion to act in illegal ways. [246] The introduction of persuasive authority would align judicial analysis with the perspective of a reasonable official and permit courts to determine legal ambiguity from a real-world context.

Expanding the clearly established analysis to encompass persuasive authority would also encourage the development of constitutional law. Courts tend to avoid reaching the merits of the constitutional question when a right is not clearly established in that jurisdiction. [247] A more functional approach to clearly established law would increase the rate at which courts address the constitutional merits of the cases that come before them. More engagement with rights would promote the further development of the contours of those rights. In the context of citizen recording, removing the obstacles that qualified immunity places in the way of constitutional development would help courts to better calibrate the balance between free speech and the countervailing interests of privacy and public safety. [248]

The robust-consensus approach would promote consistency in constitutional interpretation nationwide, preventing the emergence of artificial circuit splits. [249] Incipient jurisdictions would be able to draw from out-of-circuit precedent without having to wait for their own circuit courts to issue opinions. Federalism advocates may argue that geographical differences in constitutional interpretation reflect the diversity of the ***485** nation. [250] In the same vein, Justice Kennedy has warned that "too expansive a view of 'clearly established law' would risk giving local judicial determinations ... *de facto* national significance." [251] That concern is alleviated by the weight-of-authority requirement. A clear trend must be discerned in order to qualify as a robust consensus. Furthermore, the change in the view of clearly established law in no way jeopardizes the ability of circuit courts to adopt different interpretations of the Constitution. Recognizing persuasive authority simply prevents courts from treating silence by the controlling circuit as equivalent to a dissenting opinion.

By broadening the bodies of law that can clearly establish rights, this proposal potentially exposes public officials to greater liability or, at a minimum, increased litigation. Such a result would run counter to a steady trend of Supreme Court cases that strengthen qualified immunity protections. [252] Recent cases send a signal to lower courts that they should err on the side of immunity. [253] However, those decisions hinged on the particularity with which relevant precedents defined the right. [254] The question of which courts can create clearly established law has not occupied the Supreme Court's attention. The robust-consensus approach does not affect the particularity analysis about which the Court has signaled such concern. Only when the body of persuasive authority defines a right with sufficient particularity can a right be deemed clearly established. As a result, the robust-consensus approach will not jeopardize the role of qualified immunity in sorting frivolous from meritorious suits at an early stage. The expanded definition of clearly established law does not interfere with qualified immunity's protection of public officials from insubstantial lawsuits. [255]

Nor will consideration of out-of-circuit precedent effect a sea change in qualified immunity analysis. [256] The proposal does not require intervention by the legislature or much innovation by courts. Lower courts at both the appellate and trial level would be able to consider persuasive ***486** authority in their definitions of clearly established rights without deviating from existing precedent. The robust-consensus proposal does not change the foundations of qualified immunity analysis, nor affect the trans-substantive nature of the doctrine by asking courts to conduct a special analysis for First Amendment cases. [257] Doctrinally, the robust-consensus approach is universally applicable. In practice, however, persuasive authority will clearly establish law only in rare instances. The standard remains exacting. Rare are cases when every circuit court that chooses to address the merits of a right reaches the same conclusion. [258] The right to record police constitutes a unique instance of applying long-held principles

to an emerging medium and social context. [259] Consequently, those courts that have addressed the issue have reached the same result, producing a robust consensus.

CONCLUSION

This Note proposes a move away from qualified immunity formalism in order to preserve the substance of qualified immunity. The consideration of persuasive authority would allow courts to make commonsense determinations of whether the state of the law provided fair warning to an official about the constitutionality of her conduct. A broader conception of clearly established law would encourage the development of constitutional law and prevent qualified immunity from manufacturing artificial circuit splits on the substance of constitutional rights.

The right of citizens to record police is a paradigmatic example of the need for a robust-consensus approach. Given the weight of authority on the subject, the conclusion that citizen recording is anything but a clearly established right of which a reasonable official would have known defies common sense. Yet current qualified immunity doctrine effectively forces such a conclusion. Courts should look beyond binding precedent, embrace the robust consensus of persuasive authority, and recognize the right to record police. If the state of the law on *this* right does not constitute a robust consensus, then that phrase is mere dicta, devoid of any meaning.

Footnotes

a1 J.D. Candidate 2019, Columbia Law School. The author would like to thank Brett Dignam for her invaluable guidance and expertise as well as the staff of the *Columbia Law Review*, particularly Ted Olds, for editorial assistance.

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

2 Id. at 355-56.

3 Id.

4 Id. at 362.

5 Id. at 356.

6 Gericke v. Begin, 753 F.3d 1, 7-9 (1st Cir. 2014); Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011).

7 Turner v. Lieutenant Driver, 848 F.3d 678, 688 (5th Cir. 2017).

8 ACLU of Ill. v. Alvarez, 679 F.3d 583, 586-87 (7th Cir. 2012).

9 See Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a First Amendment right "to film matters of public interest" in the context of filming a demonstration). *Fordyce* summarily recognized the right to record in a decision that reversed summary judgment due to a factual dispute about whether the police conduct at issue constituted retaliation. Id. Yet courts in the Ninth Circuit and beyond have cited *Fordyce* as establishing a right to record. See, e.g., *Fields*, 862 F.3d at 356 (citing *Fordyce* as holding that "there is a First Amendment right to record police activity in public"); Adkins v. Limtiaco, 537 F. App'x 721, 722 (9th Cir. 2013) (citing *Fordyce* to conclude that a First Amendment right to photograph a crash site was clearly established in the Ninth Circuit).

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

11 See Julian Zelizer, Did the Rodney King Video Change Anything?, CNN (July 19, 2017), http://www.cnn.com/2017/07/19/opinions/zelizer-nineties-rodney-king-video/index.html [https://perma.cc/7YBW-C2AC].

12 See Ken Murray et al., Staten Island Man Dies After NYPD Cop Puts Him in Chokehold--See the Video, N.Y. Daily News (July 18, 2014), http://www.nydailynews.com/new-york/1.1871486 [https://perma.cc/RD7D-AJRC] (last updated Dec. 3, 2014).

13 See infra notes 110-115 and accompanying text.

14 *Fields*, 862 F.3d at 355-56; see also infra section I.B.2.

15 See, e.g., J.A. v. Miranda, No. PX 16-3953, 2017 WL 3840026, at *6 (D. Md. Sept. 1, 2017); Mesa v. City of New York, No. 09 Civ. 10464(JPO), 2013 WL 31002, at *25 (S.D.N.Y. Jan. 3, 2013).

16 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Court's exact phrasing of clearly established law differs depending on the case. Compare Plumhoff v. Rickard, 572 U.S. 765, 778 (2014) (requiring "a statutory or constitutional right that was 'clearly established' at the time of the challenged conduct" (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011))), with Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017) (requiring "legal rules that were clearly established at the time [the action] was taken" (alteration in original) (internal quotation marks omitted) (quoting Anderson v. Creighton, 483 U.S. 635, 639 (1987))).

17 See, e.g., *al-Kidd*, 563 U.S. at 742 ("We have repeatedly told courts ... not to define clearly established law at a high level of generality.").

18 See infra section I.A.1.

19 See infra section I.A.2.

20 See infra section II.A.2.

21 Cf. Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1523-27 (1991) (discussing the concept of formalism in the separation of powers context).

22 The split is artificial in the sense that it is not based on any disagreement on the merits of the constitutional right but instead hinges on whether the court of appeals in that jurisdiction has issued an on-point ruling that "clearly establishes" the right. See Gregory T. Frohman, Comment, What Is and What Should Never Be: Examining the Artificial Circuit "Split" on Citizens Recording Official Police Action, 64 Case W. Res. L. Rev. 1897, 1954 (2014) ("What remains is an artificial split--not on the merits of the First Amendment right violated, but on technical qualified immunity grounds."); see also infra section II.B.

23 See infra section II.A.

24 See infra sections II.B-.D.

25 See, e.g., Pearson v. Callahan, 555 U.S. 223, 232 (2009) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)); see also Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam) ("Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct.").

26 *Pearson*, 555 U.S. at 236.

27 Id. at 236-37.

28 457 U.S. 800, 818 (1982).

29 See id. at 815-18.

30 See id. at 818-19.

31 Ashcroft v. al-Kidd, 563 U.S. 731, 746 (2011) (Kennedy, J., concurring) (quoting United States v. Lanier, 520 U.S. 259, 271 (1997)).

32 See, e.g., Malley v. Briggs, 475 U.S. 335, 341 (1986) ("As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

33 See Joanna C. Schwartz, How Qualified Immunity Fails, 127 Yale L.J. 2, 6 (2017) [hereinafter Schwartz, Qualified Immunity] (describing the Supreme Court's recent expansion of qualified immunity doctrine in order to limit the number of civil rights lawsuits that are filed against law enforcement officers).

34 See Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (noting that the Court displays an "unflinching willingness 'to summarily reverse courts for wrongly denying officers the protection of qualified immunity' but 'rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases'" (alteration in original) (quoting Salazar-Limon v. Houston, 137 S. Ct. 1277, 1282-83 (2017) (Sotomayor, J., dissenting from the denial of certiorari))).

35 John C. Williams, Note, Qualifying Qualified Immunity, 65 Vand. L. Rev. 1295, 1298-99 (2012) ("[T]he Supreme Court has never given a fully cogent definition of what it means for a right to be 'clearly established.'").

36 Harlow v. Fitzgerald, 457 U.S. 800, 818 n.32 (1982) (internal quotation marks omitted) (quoting Procunier v. Navarette, 434 U.S. 555, 565 (1978)).

37 See Kit Kinports, The Supreme Court's Quiet Expansion of Qualified Immunity, 100 Minn. L. Rev. Headnotes 62, 69-72 (2016), http://www.minnesotalawreview.org/wp-content/uploads/2016/02/Kinports_PDF1.pdf [https://perma.cc/FT6F-7E9Z]; see also Reichle v. Howards, 566 U.S. 658, 665-66 (2012) ("Assuming, *arguendo*, that controlling Court of Appeals' authority could be a dispositive source of clearly established law ... the Tenth Circuit's cases do not satisfy the 'clearly established' standard here.").

38 Williams, supra note 35, at 1309. As an example, the Court has intimated that appellate decisions from other circuits could figure into its analysis, if relevant to the facts at hand. See Hope v. Pelzer, 536 U.S. 730, 747 n.13 (2002) (looking to case law from other circuits but finding no relevant persuasive authority).

39 The Supreme Court, 2008 Term: Leading Cases, 123 Harv. L. Rev. 272, 278 (2009) [hereinafter Leading Cases].

40 Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011); see also, e.g., District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (holding that "clearly established" means the law was sufficiently clear that every reasonable official would understand her actions were unlawful).

41 See, e.g., *Reichle*, 566 U.S. at 669-70 ("As we have previously observed, '[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.'" (quoting Wilson v. Layne, 526 U.S. 603, 618 (1999))).

42 The first pronouncement and clearest illustration of this tendency is *Wilson v. Layne*, in which the Court remarked that a plaintiff could identify "a consensus of cases of persuasive authority" such that a reasonable official could not have believed that her actions were lawful. 526 U.S. at 617. *Ashcroft v. al-Kidd* modified the approach slightly by indicating that "a *robust* 'consensus of cases of persuasive authority'" is necessary to clearly establish a right absent controlling authority. 563 U.S. at 742 (emphasis added) (quoting *Wilson*, 526 U.S. at 617); see also Plumhoff v. Rickard, 572 U.S. 765, 767 (2014) ("[R]espondent must meaningfully distinguish [contrary cases] or point to any 'controlling authority' or 'robust "consensus of cases of persuasive authority,"' that emerged between the events there and those here that would alter the qualified-immunity analysis." (citation omitted) (quoting *al-Kidd*, 563 U.S. at 742)).

43 The Court has considered persuasive authority as part of its analysis, albeit infrequently. See *Hope*, 536 U.S. at 741-42 (citing prison regulations and a Department of Justice report advising of the constitutional infirmity of the challenged practice as support for its conclusion that the violated right was clearly established).

44 See, e.g., Kisela v. Hughes, 138 S. Ct. 1148, 1154 (2018) (instructing the lower court not to read prior precedent too broadly when deciding whether a new set of facts is governed by clearly established law); *Wesby*, 138 S. Ct. at 590 (stressing the importance of the specificity of the legal principle in the Fourth Amendment context); White v. Pauly, 137 S. Ct. 548, 551 (2017) ("While this Court's case law 'do[es] not require a case directly on point' for a right to be clearly established, 'existing precedent must have placed the statutory or constitutional question beyond debate.'" (alteration in original) (quoting Mullenix v. Luna, 136 S. Ct. 305, 308 (2015))).

45 *Hope*, 536 U.S. at 739; see also *al-Kidd*, 563 U.S. at 741 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

46 See *Anderson*, 483 U.S. at 640 n.2 ("A passably clever plaintiff would always be able to identify an abstract clearly established right that the defendant could be alleged to have violated ...."). For example, the right to be free from warrantless searches absent probable cause is too general. A reasonable official could mistakenly conclude that probable cause was present given the inherent ambiguity of the term. See id. at 640-41. The same logic applies to the right to be free from "unreasonable search and seizure" under the Fourth Amendment. See, e.g., *al-Kidd*, 563 U.S. at 742. More specificity is required to put the defendant official on sufficient notice to defeat a qualified immunity defense.

47 *Hope*, 536 U.S. at 733, 741.

48 *Anderson*, 483 U.S. at 640.

49 See Williams, supra note 35, at 1307-08 (describing "a gaping hole in qualified immunity law").

50 See White v. Pauly, 137 S. Ct. 548, 551-52 (2017) ("In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases .... Today, it is again necessary to reiterate the longstanding principle

that 'clearly established law' should not be defined 'at a high level of generality.'" (quoting *al-Kidd*, 563 U.S. at 732)); see also Kisela v. Hughes, 138 S. Ct. 1148, 1152-53 (2018); District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018).

51 Leading Cases, supra note 39, at 279.

52 Id. at 278-79.

53 Id.

54 Id. See generally Michael S. Catlett, Note, Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine, 47 Ariz. L. Rev. 1031, 1044-50 (2005) (cataloguing circuit court standards regarding "which decisional law is relevant").

55 For example, the Second Circuit will occasionally treat the law as clearly established without controlling precedent if controlling authority "clearly foreshadow[s] a particular ruling on the issue." See Terebisi v. Torreso, 764 F.3d 217, 231 (2d Cir. 2014) (internal quotation marks omitted) (quoting Scott v. Fischer, 616 F.3d 100, 105 (2d Cir. 2010)).

The Sixth Circuit has stated that the inquiry should look beyond Supreme Court and Sixth Circuit precedent only in "extraordinary cases." Walton v. City of Southfield, 995 F.2d 1331, 1336 (6th Cir. 1993). Yet the same circuit court cited *Walton* in an opinion that found a right clearly established based on persuasive authority. See Brown v. Battle Creek Police Dep't, 844 F.3d 556, 567 (6th Cir. 2016) (finding "clearly established" that the unreasonable killing of a dog constitutes an unconstitutional seizure of personal property under the Fourth Amendment because every "sister circuit" that had confronted the issue so concluded).

In the Fourth Circuit, compare Owens ex rel. Owens v. Lott, 372 F.3d 267, 280 (4th Cir. 2004) ("When there are no [relevant] decisions from courts of controlling authority, we may look to 'a consensus of cases of persuasive authority' from other jurisdictions, if such exists." (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999))), with Edwards v. City of Goldsboro, 178 F.3d 231, 251 (4th Cir. 1999) ("In determining whether a right was clearly established at the time of the claimed violation, 'courts in this circuit [ordinarily] need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose ....'" (alteration in original) (quoting Jean v. Collins, 155 F.3d 701, 709 (4th Cir. 1998) (en banc))).

56 For example, compare Szymecki v. Houck, 353 F. App'x 852, 852 (4th Cir. 2009) (confining courts in the Fourth Circuit to in-circuit and in-state cases) (citing *Edwards*, 178 F.3d at 251)), with Booker v. S.C. Dep't of Corr., 855 F.3d 533, 538-39 (4th Cir. 2017) ("[W]hen 'there are no such decisions from courts of controlling authority, we may look to "a consensus of cases of persuasive authority" from *other jurisdictions*, if such exists.'" (quoting *Owens*, 372 F.3d at 280)).

57 See, e.g., Reed v. Palmer, 906 F.3d 540, 547 (7th Cir. 2018) (holding that courts should broaden their survey to include all relevant case law if no controlling precedent exists); Grissom v. Roberts, 902 F.3d 1162, 1168 (10th Cir. 2018) ("[O]rdinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." (internal quotation marks omitted) (quoting Toevs v. Reid, 685 F.3d 903, 916 (10th Cir. 2012))); Fields v. City of Philadelphia, 862 F.3d 353, 361 (3d Cir. 2017) ("We do not need Supreme Court precedent or binding Third Circuit precedent to guide us if there is a 'robust consensus of cases of persuasive authority in the Courts of Appeals.'" (quoting L.R. v. Sch. Dist. of Phila., 836 F.3d 235, 247-48 (3d Cir. 2016))); *Booker*, 855 F.3d at 545 ("The unanimity among our sister circuits demonstrates that the constitutional question is 'beyond debate,' and therefore we find that the right at issue was clearly established."); *Brown*, 844 F.3d at 567 (finding the right clearly established because every circuit to address the issue had reached that conclusion); Eves v. LePage, 842 F.3d 133, 144 n.6 (1st Cir. 2016) (noting that absent controlling authority, the plaintiff bears the burden of identifying a consensus of cases of persuasive authority from other circuits); *Terebisi*, 764 F.3d at 231 ("[W]e may ... treat the law as clearly established if decisions from this or other circuits 'clearly foreshadow a particular ruling on the issue.'" (quoting *Scott*, 616 F.3d at 105)); Morgan v. Swanson, 659 F.3d 359, 371-72 (5th Cir. 2011) (stating that a plaintiff "must be able to point to controlling authority--

or a robust consensus of persuasive authority--that defines the contours of the right in question with a high degree of particularity" (internal quotation marks omitted) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011))); Vaughn v. Ruoff, 253 F.3d 1124, 1129 (8th Cir. 2001) ("We subscribe to a broad view of the concept of clearly established law, and we look to all available decisional law, including decisions from other courts, federal and state, when there is no binding precedent in this circuit.").

58 Seth F. Kreimer, Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record, 159 U. Pa. L. Rev. 335, 367 (2011) (noting that courts are increasingly called upon to address the "emerging medium" of citizen filming under the First Amendment).

59 See Alvarez v. ACLU of Ill., 568 U.S. 1027 (2012) (mem.).

60 Petition for a Writ of Certiorari at i, *Alvarez*, 568 U.S. 1027 (No. 12-318), 2012 WL 4060073.

61 353 F. App'x at 853.

62 Id.

63 Id. at 852.

64 See id. at 852-53.

65 See, e.g., J.A. v. Miranda, No. PX 16-3953, 2017 WL 3840026, at *6 (D. Md. Sept. 1, 2017) ("If anything, *Symecki* [sic] underscores that this First Amendment right is *not* clearly established by expressly reaching that very conclusion in an unpublished opinion."); Garcia v. Montgomery Cty., 145 F. Supp. 3d 492, 508-09 (D. Md. 2015) ("Indeed, the Fourth Circuit, albeit in an unpublished opinion, expressly stated that th[e] right [to record a police officer] is not clearly established." (citing *Szymecki*, 353 F. App'x at 853)); see also Holmes v. City of New York, No. 14 CV 5253-LTS-SDA, 2018 WL 1604800, at *5 (S.D.N.Y. Mar. 29, 2018) ("[T]he ... Fourth Circuit[] had determined that the right [to record police activity] was not clearly established." (citing *Szymecki*, 353 F. App'x at 853)).

66 655 F.3d 78, 82-85 (1st Cir. 2011).

67 Cf. Fields v. City of Philadelphia, 862 F.3d 353, 358-62 (3d Cir. 2017) (extending First Amendment protection to citizen recorders but finding the right was not clearly established); Turner v. Lieutenant Driver, 848 F.3d 678, 687-88 (5th Cir. 2017) (same).

68 See *Glik*, 655 F.3d at 83-85 (citing Iacobucci v. Boulter, 193 F.3d 14, 25 (1st Cir. 1999)). At least one court has attempted to distinguish *Glik*'s expansive view of clearly established law by focusing on its partial reliance on First Circuit precedent in determining that the right to record was clearly established. See *Garcia*, 145 F. Supp. 3d at 509.

69 See *Glik*, 655 F.3d at 85. The court cited Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) and Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995).

70 See *Fields*, 862 F.3d at 360-61; *Turner*, 848 F.3d at 685-87.

71 See *Fields*, 862 F.3d at 361. *Turner* focused on the generality with which the Supreme Court had defined free speech. Decisions clarifying that First Amendment protections extend to gathering information did not demonstrate whether

the specific act of recording the police was clearly established. See *Turner*, 848 F.3d at 686 & n.26. Such a conclusion would violate the Supreme Court's admonition not to define clearly established law at a "high level of generality." Id. at 686 (internal quotation marks omitted) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)).

72 *Turner*, 848 F.3d at 686 (internal quotation marks omitted) (quoting Morgan v. Swanson, 659 F.3d 359, 371-72 (5th Cir. 2011) (en banc)). The *Fields* decision followed a similar logic in concluding that there was no clearly established right to record police at the time of the violations. As to the question of permissible sources of law, the court recognized that binding precedent would not be necessary to clearly establish a right if there is a "robust consensus of cases of persuasive authority in the Courts of Appeals." *Fields*, 862 F.3d at 361 (internal quotation marks omitted) (quoting L.R. v. Sch. Dist. of Phila., 836 F.3d 235, 248 (3d Cir. 2016)).

73 Although no circuit court had held that First Amendment protection does not extend to the recording of police activity, the *Turner* court treated as contrary authority decisions that determined the law was not clearly established in their jurisdictions. In light of the absence of controlling authority and what the court characterized as "the dearth of even persuasive authority," there was no clearly established First Amendment right to record police at the time of the incident. *Turner*, 848 F.3d at 687.

In comparison, the *Fields* court pointed to a debate within the Third Circuit over whether citizen recorders need to demonstrate "expressive intent," which militated against a finding that the officers had fair warning. *Fields*, 862 F.3d at 361-62.

74 *Fields*, 862 F.3d at 361. In partial dissent, Judge Nygaard argued that the right was clearly established under a robust-consensus theory. Id. at 362-63 (Nygaard, J., concurring in part, dissenting in part). Judge Nygaard argued that the clearly established question should be considered "in a real-world context" from the perspective of a reasonable police officer and that Philadelphia police officers were put on "actual notice" that they were required to uphold the right by directives from their superiors. Id. at 362-64.

75 Strictly speaking, video recording is conduct rather than speech. First Amendment jurisprudence, however, does not draw a strict line between speech and conduct. Some types of conduct are intimately related to the values that undergird free speech. See Justin Marceau & Alan K. Chen, Free Speech and Democracy in the Video Age, 116 Colum. L. Rev. 991, 1015 (2016) (noting that many First Amendment scholars have observed that "all speech is conduct").

76 Image capture is akin to newsgathering or spending money to support a political candidate, activities that have received First Amendment protection. See, e.g., Citizens United v. FEC, 558 U.S. 310, 336-41 (2010) (holding that the right to free speech protects political expenditures by corporations); Branzburg v. Hayes, 408 U.S. 665, 681 (1972) ("Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."). Likewise, the act of filming is a necessary corollary to the right to disseminate that recording. See Marceau & Chen, supra note 75, at 1018.

77 By definition, the recording of police activity implicates gathering information about government activity. In a police-recording case, the Seventh Circuit stated that a major purpose of the First Amendment is to protect the free discussion of governmental affairs. ACLU of Ill. v. Alvarez, 679 F.3d 583, 597 (7th Cir. 2012) (citing Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 755 (2011)).

78 "Expressive conduct" merits constitutional protection as a form of "symbolic speech." In determining whether an act is protectable symbolic speech, the Supreme Court gives weight to the presence or absence of a specific message conveyed. See, e.g., Texas v. Johnson, 491 U.S. 397, 404 (1989) ("In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" (alterations in original) (quoting Spence v. Washington, 418 U.S. 405, 410-11 (1974))). The expressive-intent approach to free speech does not fit perfectly with citizen recording of police. Symbolic speech may not, for example, encapsulate bystanders who do not demonstrate a contemporaneous intent to criticize the police

or to disseminate the recordings. The conduct may not be sufficiently imbued with elements of communication to fall within the First Amendment's scope. For example, because neither of the two plaintiffs in *Fields* displayed an expressive purpose, the district court held that their activity did not qualify as First Amendment speech. Fields v. City of Philadelphia, 166 F. Supp. 3d 528, 535 (E.D. Pa. 2016), rev'd, 862 F.3d 353 (3d Cir. 2017).

79 655 F.3d 78 (1st Cir. 2011).

80 See Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding that plaintiffs had a First Amendment right to photograph or videotape police conduct because the First Amendment protects "a right to record matters of public interest"); Fordyce v. City of Seattle, 55 F.3d 436, 442 (9th Cir. 1995) (reversing grant of summary judgment dismissing claims against a police officer because of a factual dispute concerning whether the officer interfered with the plaintiff's "First Amendment right to gather news").

81 655 F.3d at 79. Plaintiff Simon Glik was arrested in 2007 for using a cellphone camera to film several police officers arresting a young man in Boston Common, a public park. Id. at 79-80. Glik openly began to film after expressing concern that the officers were using excessive force. Id. Boston police officers arrested Glik for violation of a Massachusetts state wiretap statute, disturbing the peace, and aiding in the escape of a prisoner. Id.

82 Id. at 82.

83 ACLU of Ill. v. Alvarez, 679 F.3d 583, 588, 595-96 (7th Cir. 2012).

84 Id. at 595-99.

85 848 F.3d 678, 688-89 (5th Cir. 2017). Noting that four other district court cases within the Fifth Circuit had confronted this very issue between 2015 and 2016, the court of appeals opted to resolve a question that "continue[d] to arise" in its jurisdiction. Id. at 688-90 & n.33.

86 Fields v. City of Philadelphia, 862 F.3d 353, 358 (3d Cir. 2017). The district court below found that neither plaintiff engaged in "customary expressive conduct," as each sought merely to document events without expressing any intent to share the images. See Fields v. City of Philadelphia, 166 F. Supp. 3d 528, 533-35 (E.D. Pa. 2016), rev'd, 862 F.3d 353 (3d Cir. 2017). Third Circuit case law was split on that issue, and sister circuits had not addressed expressive conduct because plaintiffs' objectives were apparent from context in those cases. See Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellants & Urging Reversal at 8-9, 22 n.14, *Fields*, 862 F.3d 353 (No. 16-651), 2016 WL 6574218. For example, the plaintiff in *Glik v. Cunniffe* began filming the arrest after telling police officers they were using excessive force. 655 F.3d at 79-80.

87 *Fields*, 862 F.3d at 356.

88 Outside of the specific context of police activity, other circuit courts have declined to find an unfettered First Amendment right to record. For example, in response to a constitutional challenge to the Missouri Department of Corrections' policy prohibiting the filming of executions, the Eighth Circuit stated that "neither the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government proceedings that are by law open to the public." Rice v. Kempker, 374 F.3d 675, 678 (8th Cir. 2004). That case is consistent with existing authority that affirms prohibitions on recording criminal trials. It is well established that "the First Amendment right of access [to such proceedings] is limited to physical presence." Id. at 679 (internal quotation marks omitted) (quoting United States v. Yonkers Bd. of Educ., 747 F.2d 111, 113 (2d Cir. 1984)). That line of cases is distinguishable from police recording because the restriction applies to government installations, rather than traditional public spaces like parks and sidewalks. A similar case from the Sixth Circuit-- questioning the constitutionality of a ban on electronic recording devices in a

Michigan county government center--reached the same conclusion, noting that courtrooms are traditionally considered "nonpublic" spaces for the purposes of the First Amendment. McKay v. Federspiel, 823 F.3d 862, 868 n.2 (6th Cir. 2016).

89 Szymecki v. Houck, 353 F. App'x 852, 853 (4th Cir. 2009).

90 Gerskovich v. Iocco, No. 15 Civ. 7280 (RMB), 2017 WL 3236445, at *6 n.9 (S.D.N.Y. 2017). In a July 2018 summary order, the Second Circuit declined to address the merits of a First Amendment right to record police *or* determine whether such a right was clearly established within that circuit. Higginbotham v. Sylvester, 741 F. App'x 28, 30-31 (2d Cir. 2018) (affirming summary judgment for defendants on other grounds without addressing the qualified immunity issue). The court declined to rule on the question despite the fact that both parties briefed the issue, and multiple amici curiae called on the court to resolve the uncertainty surrounding the right to record. See, e.g., Brief of Amici Curiae Media & Free Speech Organizations in Support of Plaintiff-Appellant at 11, *Higginbotham*, No. 16-3994 (2d Cir. Mar. 17, 2017), 2017 WL 1046937 [hereinafter Amicus Brief of Free Speech Organizations].

91 See, e.g., Ashcroft v. al-Kidd, 563 U.S. 731, 741-42 (2011) (granting qualified immunity because controlling precedent defined the law in question at "a high level of generality").

92 This method is formalist in the sense that that it equates "clearly established ... rights of which a reasonable person would have known" with appellate precedent in the particular jurisdiction in which the public official defendant happens to find herself. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). It fails to address the possibility that other types of authority can provide sufficient notice of what the Constitution requires. See infra section II.A.

93 Cf. United States v. Gomez, 763 F.3d 845, 853 (7th Cir. 2014) (en banc) ("Multipart tests are commonplace in our law and can be useful, but sometimes they stray or distract from the legal principles they are designed to implement; over time misapplication of the law can creep in.").

94 Schwartz, Qualified Immunity, supra note 33, at 6.

95 See John C. Jeffries, Jr., What's Wrong with Qualified Immunity?, 62 Fla. L. Rev. 851, 859 (2010).

96 See, e.g., Anderson v. Creighton, 483 U.S. 635, 639 (1987) (describing qualified immunity cases as striking a balance between vindicating constitutional rights and allowing officials to perform their duties).

97 Schwartz, Qualified Immunity, supra note 33, at 8.

98 Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982). The Court has made clear that qualified immunity is not just immunity from liability but also immunity from suit--that is, from the burdens of having to defend the litigation. See Martin A. Schwartz, Section 1983 Litigation 143 (3d ed. 2014) [hereinafter Schwartz, Section 1983].

99 The Court has reasoned that a purely objective test, which supersedes inquiry into the subjective intentions of the officer in question, is a more efficient approach because the actual intentions of the officer are a question of fact that could not be treated on summary judgment. The objective standard of "clearly established law" is thus a proxy for good faith. See *Harlow*, 457 U.S. at 814, 818-19.

100 Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).

101 See, e.g., Marsh v. Butler Cty., 268 F.3d 1014, 1031 (11th Cir. 2001) (en banc) (noting that "fair and clear notice to government officials is the cornerstone of qualified immunity").

102 Davis v. Scherer, 468 U.S. 183, 195 (1983).

103 Hope v. Pelzer, 536 U.S. 730, 731 (2002).

104 See supra section I.B.2.

105 See infra section II.B.

106 See supra notes 28-31 and accompanying text.

107 See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.").

108 See Malley v. Briggs, 475 U.S. 335, 341 (1986) ("[I]f officers of reasonable competence could disagree on [an] issue, immunity should be recognized."); see also *Harlow*, 457 U.S. at 819 (stating that when "an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate").

109 See supra section I.B.2. Existing precedent has arguably placed the constitutional question "beyond debate" as the Court requires. See Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

110 The Supreme Court has not provided clear guidance on the question of what role, if any, administrative policies or training materials should play in qualified immunity analysis. See, e.g., Hope v. Pelzer, 536 U.S. 730, 731-32 (2002) (finding that an Alabama Department of Corrections regulation was "relevant" to the constitutional infirmity of the challenged practices, as was an advisement from the Department of Justice).

111 See, e.g., Fields v. City of Philadelphia, 862 F.3d 353, 363 (3d Cir. 2017) (Nygaard, J., concurring in part, dissenting in part).

112 See Brief for the United States as Amicus Curiae at 2, *Fields*, 862 F.3d 353 (No. 16-651), 2016 WL 6574218.

113 Statement of Interest of the United States at 4, Sharp v. Balt. City Police Dep't, No. 1:11-cv-02888-BEL (D. Md. Jan. 10, 2012), 2012 WL 9512053; see also Statement of Interest of the United States at 1-2, Garcia v. Montgomery Cty., 145 F. Supp. 3d 492 (D. Md. 2015) (No. 8:12-cv-03592-JFM), https://www.justice.gov/sites/default/files/crt/legacy/2013/03/20/garcia_SOI_3-14-13.pdf [https://perma.cc/XG4S-UFCG].

114 The International Association of Chiefs of Police published a model policy stating that "[p]ersons who are lawfully in public spaces or locations where they have a legal right to be present--such as their home, place of business, or the common areas of public and private facilities and buildings-- have a First Amendment right to record things in plain sight or hearing," including police activity. See Int'l Ass'n of Chiefs of Police, Recording Police Activity Model Policy 1 (2015), https://www.theiacp.org/model-policy/wp-content/uploads/sites/6/2017/08/RecordingPolicePolicy.pdf [https://perma.cc/C6MS-3RK8].

115 Philadelphia Police Department policies explicitly recognize the First Amendment right. See *Fields*, 862 F.3d at 363 (Nygaard, J., concurring in part, dissenting in part). The patrol guide for the New York City Police Department states that police cannot arrest an individual for "[t]aking photographs, videotaping, or making a digital recording" of police activity, "absent additional actions constituting a violation of law." N.Y.C. Police Dep't, Patrol Guide: When a Member of the Service Encounters an Individual Observing, Photographing, and/or Recording Police Activity 1 (2018), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide1.pdf [https://perma.cc/V6BN-M9VH]. In 2009, the Chief of Police of the St. Louis Metropolitan Police Department issued a special order stating that members of the public "have an unambiguous First Amendment right" to record police officers in public places. See Chestnut v. Wallace, No. 4:16-cv-1721 PLC, 2018 WL 5831260 at *3 (E.D. Mo. Nov. 7, 2018).

Montgomery County police policy dictates that "[i]ndividuals have a right to record police officers in the public discharge of their duties." Montgomery Cty. Police Dep't, Citizen Videotaping Interactions 1 (2013), https://www.montgomerycountymd.gov/POL/Resources/Files/PDF/Directives/1100/FC1142_Citizen%20Videotaping%20Interactions.pdf [https://perma.cc/C9WH-MPVX]. In Baltimore, General Order J-16 instructs that no member of the police department may prohibit any person's ability to observe or record police activity that occurs in the public domain, unless such action falls into one of six exceptions, including violation of other laws. See Letter from Jonathan M. Smith, Chief, Special Litigation Section, U.S. Dep't of Justice, to Mark H. Grimes, Balt. Police Dep't (May 14, 2012), http://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp_ltr_5-14-12.pdf [https://perma.cc/G3FB-TSC8].

116 See, e.g., Szymecki v. Houck, 353 F. App'x 852, 853 (4th Cir. 2009); Basinski v. City of New York, 192 F. Supp. 3d 360, 368 (S.D.N.Y. 2016).

117 See Amore v. Novarro, 624 F.3d 522, 535 (2d Cir. 2010) ("[T]he statement in *Harlow* that reasonably competent public officials know clearly established law[] is a legal fiction." (second alteration in original) (internal quotation marks omitted) (quoting Lawrence v. Reed, 406 F.3d 1224, 1237 (10th Cir. 2005) (Hartz, J., dissenting))).

118 Edward C. Dawson, Qualified Immunity for Officers' Reasonable Reliance on Lawyers' Advice, 110 Nw. U. L. Rev 525, 542-43 (2016).

119 See, e.g., Frasier v. Evans, No. 15-cv-01759-REB-KLM, 2018 WL 6102828, at *1 (D. Colo. Nov. 21, 2018) (noting that defendant police officers had received formal and informal training on the Denver police policy regarding the constitutional right of citizens to record officers); *Fields*, 862 F.3d at 363 (Nygaard, J., concurring in part, dissenting in part) (describing the Philadelphia Police Department policy on citizen recorders as intended to clarify the duties of street-level officers); *Lawrence*, 406 F.3d at 1237 (Hartz, J., dissenting) (discussing the role of advice of counsel in the clearly established inquiry).

120 Young v. Cty. of Fulton, 160 F.3d 899, 903 (2d Cir. 1998).

121 Hardwick v. Cty. of Orange, 844 F.3d 1112, 1119 (9th Cir. 2017).

122 This Note refers to those circuits that have not yet ruled on the constitutional merits of the right to record police activity--the Second, Fourth, Sixth, Eighth, Tenth, and D.C. Circuits--as incipient jurisdictions.

123 See, e.g., Holmes v. City of New York, No. 14 CV 5253-LTS-SDA, 2018 WL 1604800, at *5-6 (S.D.N.Y. Mar. 29, 2018); J.A v. Miranda, No. PX 16-3953, 2017 WL 3840026, at *1 (D. Md. Sept. 1, 2017); Basinski v. City of New York, 192 F. Supp. 3d 360, 368 (S.D.N.Y. 2016); Rivera v. Foley, No. 3:14-cv-00196 (VLB), 2015 WL 1296258, at *9-10 (D. Conn. Mar. 23, 2015); Williams v. Boggs, No. 6:13-65-DCR, 2014 WL 585373, at *5-6 (E.D. Ky. Feb. 13, 2014); Mesa v. City of New York, No. 09 Civ. 10464(JPO), 2013 WL 31002, at *24-25 (S.D.N.Y. Jan. 3, 2013). There is at least one example of a district court defining the right to record as clearly established on the basis of persuasive authority. See Higginbotham v. City of New York, 105 F. Supp. 3d 369, 380 (S.D.N.Y. 2015). In the context of the filming of an

Occupy Wall Street protest, the court concluded that the right to record police activity in public, "at least in the case of a journalist who is otherwise unconnected to the events recorded," was clearly established at the time of the alleged violation, despite the fact that neither the Supreme Court nor the Second Circuit had decided the issue. Id. In doing so, the District Court for the Southern District of New York cited general Second Circuit precedent, as well as a "robust consensus of persuasive authority" because three circuit courts of appeals had concluded that the right existed at the time of the arrest in 2011, as had a number of district courts. Id. (citing Ashcroft v. al-Kidd, 563 U.S. 731, 741-42 (2011)).

124 See supra note 22.

125 Compare Fields v. City of Philadelphia, 862 F.3d 353, 358-60 (3d Cir. 2017) (reaching the merits of the First Amendment right to record), with Szymecki v. Houck, 353 F. App'x 852, 852 (4th Cir. 2009) (disposing of the case on qualified immunity grounds without deciding the constitutional question).

126 See Jeffries, supra note 95, at 859.

127 See Amicus Brief of Free Speech Organizations, supra note 90, at 11.

128 Pearson v. Callahan, 555 U.S. 223, 236 (2009); see also Camreta v. Greene, 563 U.S. 692, 708 (2011) ("[T]he very purpose served by the two-step process ... 'is to clarify constitutional rights without undue delay.'" (quoting Bunting v. Mellen, 541 U.S. 1019, 1024 (2004) (Scalia, J., dissenting from the denial of certiorari))).

129 See *Pearson*, 555 U.S. at 237.

130 See Geoffrey J. Derrick, Qualified Immunity and the First Amendment Right to Record Police, 22 B.U. Pub. Int. L.J. 243, 283-84 (2013).

131 See, e.g., Sandberg v. Englewood, No. 16-cv-01094-CMA-KMT, 2017 WL 1148691, at *5 (D. Colo. Mar. 27, 2017) (collecting federal appellate cases demonstrating unsettled law on these issues), aff'd in part, rev'd in part on other grounds, 727 F. App'x 950 (10th Cir. 2018).

132 *Camreta*, 563 U.S. at 706.

133 See supra notes 25-26.

134 See Derrick, supra note 130, at 286; Schwartz, Qualified Immunity, supra note 33, at 66.

135 See generally Derrick, supra note 130 (describing how courts adjudicating constitutional tort lawsuits related to the recording of police officers previously avoided deciding the scope of First Amendment rights and advocating a "mandatory sequencing" regime in which courts must decide the merits of First Amendment violations before issues of qualified immunity).

136 862 F.3d 353 (3d Cir. 2017).

137 848 F.3d 678 (5th Cir. 2017).

138 See Karen M. Blum, Qualified Immunity: Time to Change the Message, 93 Notre Dame L. Rev. 1887, 1897 (2018) (detailing how the Third and Fifth Circuits had spent "years ... disposing of the issue on the second prong").

139 *Turner*, 848 F.3d at 688.

140 Szymecki v. Houck, 353 F. App'x 852, 852-53 (4th Cir. 2009).

141 Higginbotham v. Sylvester, 741 F. App'x 28, 31-32 (2d Cir. 2018).

142 See, e.g., J.A. v. Miranda, No. PX 16-3953, 2017 WL 3840026, at *6 (D. Md. Sept. 1, 2017); Basinski v. City of New York, 192 F. Supp. 3d 360, 367-69 (S.D.N.Y. 2016); Rivera v. Foley, No. 3:14-cv-00196 (VLB), 2015 WL 1296258, at *9 (D. Conn. Mar. 23, 2015); Williams v. Boggs, No. 6:13-65-DCR, 2014 WL 585373, at *5 (E.D. Ky. Feb. 13, 2014); see also Derrick, supra note 130, at 283-84 & n.247.

143 Alexandra Lahav, In Praise of Litigation 81 (2017).

144 See supra note 41 and accompanying text.

145 No. 09 Civ. 10464(JPO), 2013 WL 31002 (S.D.N.Y. Jan. 3, 2013).

146 Id. at *25 (internal quotation marks omitted) (quoting Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2012)).

147 Id. at *24. The court was referring to Kelly v. Borough of Carlisle, 622 F.3d 248, 262-63 (3d Cir. 2010) and Szymecki v. Houck, 353 F. App'x 852, 853 (4th Cir. 2009).

148 *Kelly* concluded that "there was insufficient case law establishing a right to videotape police officers during a traffic stop." *Kelly*, 622 F.3d at 262. *Szymecki* summarily affirmed the district court's conclusion that the right was not clearly established in the circuit at the time of the alleged conduct. *Szymecki*, 353 F. App'x at 853.

149 See Sandberg v. Englewood, No. 16-cv-01094-CMA-KMT, 2017 WL 1148691, at *4 (D. Colo. Mar. 27, 2017).

150 See, e.g., Basinski v. City of New York, 192 F. Supp. 3d 360, 368 (S.D.N.Y. 2016); Rivera v. Foley, No. 3:14-cv-00196 (VLB), 2015 WL 1296258, at *9 (D. Conn. Mar. 23, 2015); Williams v. Boggs, No. 6:13-65-DCR, 2014 WL 585373, at *5 (E.D. Ky. Feb. 13, 2014).

151 Soto v. City of New York, No. 13 CV 8474-LTS-JLC, 2017 WL 892338, at *5 (S.D.N.Y. Mar. 6, 2017).

152 See Higginbotham v. City of New York, 105 F. Supp. 3d 369, 381 (S.D.N.Y. 2015).

153 Charles v. City of New York, No. 12-CV-6180 (SLT)(SMG), 2017 WL 530460, at *24 (E.D.N.Y. Feb. 8, 2017).

154 See supra notes 79-87 and accompanying text.

155 See supra notes 110-113 and accompanying text.

156 See Holmes v. City of New York, No. 14 CV 5253-LTS-SDA, 2018 WL 1604800, at *5 (S.D.N.Y. Mar. 29, 2018); see also J.A. v. Miranda, No. PX 16-3953, 2017 WL 3840026, at *6 (D. Md. Sept. 1, 2017).

157 Cf. Hope v. Pelzer, 536 U.S. 730, 753 (2002) (Thomas, J., dissenting) ("If, for instance, 'various courts have agreed that certain conduct [constitutes an Eighth Amendment violation] under facts not distinguishable in a fair way from the facts presented in the case at hand,' then a plaintiff would have a compelling argument that a defendant is not entitled to qualified immunity." (citation omitted) (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001))).

158 Amanda Frost, Overvaluing Uniformity, 94 Va. L. Rev. 1567, 1569 (2008). Because the Supreme Court promotes a broad view of qualified immunity protection, it is unlikely to intervene to alleviate an artificial circuit split that benefits public-official defendants. See supra section I.A.1.

159 See supra notes 59-60 and accompanying text.

160 See, e.g., Schwartz, Section 1983, supra note 98, at 143.

161 See infra section II.C.2.

162 See, e.g., Pearson v. Callahan, 555 U.S. 223, 242 (2009) (observing that qualified immunity is not available in "§ 1983 cases against a municipality, as well as § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages").

163 Kreimer, supra note 58, at 361 ("[O]fficers faced with defiant videographers frequently turn to broader criminal statutes that provide substantial enforcement discretion.").

164 Statement of Interest of the United States at 1-2, Garcia v. Montgomery Cty., 145 F. Supp. 3d 492 (D. Md. 2015) (No. 8:12-cv-03592-JFM), https://www.justice.gov/sites/default/files/crt/legacy/2013/03/20/garcia_SOI_3-14-13.pdf [https://perma.cc/XG4S-UFCG]; see also Kreimer, supra note 58, at 394 (noting that a growing source of litigation is the "tendency of police officers to arrest photographers on trumped-up charges ... as a way of preventing the spread of inconvenient truths").

165 In the past, civilian recorders were more frequently arrested under state wiretapping and privacy statutes. The application of these statutes to civilian recording was often successfully enjoined in the courts. See, e.g., ACLU of Ill. v. Alvarez, 679 F.3d 583, 586 (7th Cir. 2012) (challenging the application of an Illinois wiretapping statute to citizen recording of police in public places); Fordyce v. City of Seattle, 907 F. Supp. 1446, 1448 (W.D. Wash. 1995) (granting declaratory judgment that a Washington State privacy statute did not apply to public conversations). Now, however, most state electronic privacy statutes apply only to private conversations, or those that carry a reasonable expectation of privacy. Other statutes ban only surreptitious recording. See Jesse Harlan Alderman, Police Privacy in the iPhone Era?: The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian's Right to Record Public Police Activity, 9 First Amend. L. Rev. 487, 533-45 (2011) (collecting state statutes). The Illinois Supreme Court, for example, relied on the decision in *Alvarez* to strike down Illinois's eavesdropping statute as unconstitutional. See People v. Clark, 6 N.E.3d 154, 162 (Ill. 2014); People v. Melongo, 6 N.E.3d 120, 127 (Ill. 2014). Furthermore, prosecutors tend to drop wiretapping charges against citizen recorders in order to prevent the invocation of a First Amendment defense in criminal proceedings, thus staving off as-applied challenges to such legislation. See Derrick, supra note 130, at 250 n.31.

166 The purpose of § 1983 is "to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." Burnett v. Grattan, 468 U.S. 42, 55 (1984).

167 Owen v. City of Independence, 445 U.S. 622, 657 (1980) ("[M]unicipalities have no immunity from damages liability flowing from their constitutional violations ....").

168 Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

169 *Owen*, 445 U.S. at 656-57.

170 See Owens v. Balt. City State's Att'ys Office, 767 F.3d 379, 402 (4th Cir. 2014); Askins v. Doe No. 1, 727 F.3d 248, 253-54 (2d Cir. 2013); Barber v. City of Salem, 953 F.2d 232, 238 (6th Cir. 1992) ("Stated another way, it is possible that city officials may be entitled to qualified immunity for certain actions while the municipality may nevertheless be held liable for the same actions.").

171 Segal v. City of New York, 459 F.3d 207, 219 (2d Cir. 2006).

172 See supra note 115 (reviewing the Philadelphia, New York City, St. Louis, Montgomery County, and Baltimore police department policies on citizen recording of police activity).

173 See Reynolds v. Giuliani, 506 F.3d 183, 192 (2d Cir. 2007) (citing Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989)).

174 Connick v. Thompson, 563 U.S. 51, 61 (2011).

175 Id. at 62 (quoting Bd. of Comm'rs v. Brown, 520 U.S. 397, 409 (1997)).

176 See, e.g., Fordyce v. City of Seattle, 55 F.3d 436, 440 (9th Cir. 1995) (rejecting *Monell* liability because the plaintiff failed to show that "any Seattle policy or any decision by a governmentally authorized decisionmaker was the moving force behind any deprivation of his constitutional rights"); An v. City of New York, 230 F. Supp. 3d 224, 229-30 (S.D.N.Y. 2017) (concluding that six lawsuits and one newspaper article were insufficient proof of a "widespread illegal custom of violating individuals' First Amendment rights" to constitute standing under *Monell*). Admittedly, *Monell* claims have sometimes proved successful in right-to-record cases. In *J.A. v. Miranda*, a plaintiff who was assaulted by Montgomery County police officers while attempting to film his brother's arrest withstood summary judgment on his *Monell* claim. No. PX 16-3953, 2017 WL 3840026, at *7 (D. Md. Sept. 1, 2017). Although Montgomery County operated with a "Citizen Videotaping Policy," the court found that the policies that the police department "actually followed" allowed officers to violate the right, as evidenced by the inadequacy of the subsequent investigation into the incident at issue. Id.

177 See, e.g., Alexander A. Reinert, Does Qualified Immunity Matter?, 8 U. St. Thomas L.J. 477, 482 (2011).

178 461 U.S. 95, 105 (1983) (finding that the plaintiff had standing to seek damages but not to sue for injunctive relief).

179 Id. at 102; see also Linda E. Fisher, Caging *Lyons*: The Availability of Injunctive Relief in Section 1983 Actions, 18 Loy. U. Chi. L.J. 1085, 1085 (1987).

180 Fisher, supra note 179, at 1092 (citing *Lyons*, 461 U.S. at 106).

181 See, e.g., Fields v. City of Philadelphia, 862 F.3d 353, 356 (3d Cir. 2017) (describing how the defendants cited the named plaintiff for "Obstructing Highway and Other Public Passages").

182 See id. (noting that the police pinned the second plaintiff against a pillar).

183 Jocelyn Simonson, Beyond Body Cameras: Defending a Robust Right to Record the Police, 104 Geo. L.J. 1559, 1563 (2016). As an example, from 2014 to 2016, the New York City Civilian Complaint Review Board received 257 complaints of officers interfering with civilian recordings of police activity. John Annese, Hundreds of Civilians Prevented from Filming NYPD Cops as Officers Knock Cellphones Away, Threaten Arrests: Report, N.Y. Daily News (June 28, 2017), http://www.nydailynews.com/new-york/1.3283987 [https://perma.cc/7H26-VE9H].

184 Civil rights damages actions were designed not only to provide compensation for injuries but also to deter future violations. Empirical evidence indicates that the widespread indemnification of police officers impedes the deterrent effect of damages awards in practice. See Joanna C. Schwartz, Police Indemnification, 89 N.Y.U. L. Rev. 885, 952 (2014) [hereinafter Schwartz, Police Indemnification]. Municipal payouts may have their own deterrent effects, encouraging police departments to reduce the risk of future misconduct by disciplining or firing officers who engage in wrongdoing. See id. at 955. However, unless these judgments have political repercussions on the city, or police departments implement policies to collect and analyze information from lawsuits, damages awards are not likely to exert the deterrence effects that they have in theory. See Joanna C. Schwartz, Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking, 57 UCLA L. Rev. 1023, 1028 (2010). Individual officers may still be affected by the negative employment ramifications associated with defending a lawsuit and the distractions brought about by litigation: document requests, depositions, and court appearances. See Schwartz, Police Indemnification, supra, at 941.

185 Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (citing Butz v. Economou, 438 U.S. 478, 506 (1978)); see also Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (finding that for individuals in the plaintiff's position, for whom an injunction would provide no relief, "it is damages or nothing").

186 See William Baude, Is Qualified Immunity Unlawful?, 106 Calif. L. Rev. 45 app. at 88-90 (2018) (collecting twenty-nine Supreme Court cases on qualified immunity from 1982 to 2017 of which all but eight turned on Fourth and Eighth Amendment claims).

187 Amicus Brief of Free Speech Organizations, supra note 90, at 1-2.

188 Kreimer, supra note 58, at 366.

189 See Marceau & Chen, supra note 75, at 1009-10; see also Joseph Goldstein, 'Testilying' by Police: A Stubborn Problem, N.Y. Times (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html (on file with the *Columbia Law Review*) (describing how video evidence is increasingly used to discredit police testimony in criminal proceedings).

190 Fields v. City of Philadelphia, 862 F.3d 353, 355 (3d Cir. 2017).

191 Simonson, supra note 183, at 1567. The dispute over the disclosure of police camera videos depicting the shooting of Laquan McDonald in Chicago underscores this crucial difference. See Marceau & Chen, supra note 75, at 1005-06.

192 Examples are legion. In August 2016, Jose LaSalle, a "prominent New York City Cop Watch activist," was arrested for obstructing governmental administration after filming a stop-and-frisk near a housing project in the South Bronx. George Joseph, Police Arrested This Cop Watch Activist--But then Recorded Themselves by Accident, Nation (Apr. 3, 2017), http://www.thenation.com/article/police-arrested-this-cop-watch-activist-but-then-recorded-themselves-by-accident/ [https://perma.cc/MBL3-GUJQ]. In August 2017, a Detroit man attempting to film an arrest was handcuffed and detained for forty minutes while receiving a lecture on why he should not tape on-duty police officers. Brian Thompson, Detroit Man Detained by Highland Park Police for Recording Video, MI Headlines (Aug. 25, 2017), https://www.miheadlines.com/2017/08/25/detroit-man-detained-by-highland-park-police-for-recording-video-video/ [https://perma.cc/5HFY-H7FR].

193 See, e.g., Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987) (stating that "the driving force" behind prevailing qualified immunity principles is the early resolution of insubstantial claims against government officials); Harlow v. Fitzgerald, 457 U.S. 800, 808 (1982) (discussing the role of immunity in allowing federal courts to quickly terminate insubstantial lawsuits against public officials).

194 Each of the six courts of appeals to address the issue has agreed upon the basic contours of that right. No federal appellate court has ruled otherwise. Most have remained silent. See supra section I.B.

195 See supra section II.C.

196 See *Harlow*, 457 U.S. at 820-21 (Brennan, J., concurring).

197 No court of appeals that has addressed the merits of the right has held otherwise. See supra section I.B.2.

198 See infra note 201 and accompanying text.

199 See Wilson v. Layne, 526 U.S. 603, 617 (1999).

200 Id. at 617.

201 563 U.S. 731, 742 (2011). Justice Scalia provided no explanation for the addition of the modifier, but the Court has accepted his formulation. See, e.g., City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1778 (2015). This Note adopts the term "robust" to emphasize that the consensus of persuasive authority should be sufficiently rooted in national jurisprudence to justify the label of "clearly established."

202 *Sheehan*, 135 S. Ct. at 1778 ("[T]o the extent that a 'robust consensus of cases of persuasive authority' could itself clearly establish the federal right respondent alleges, no such consensus exists here." (citation omitted) (quoting *al-Kidd*, 563 U.S. at 746)). The *Sheehan* opinion tellingly concluded with an explanation that qualified immunity was appropriate because the defendants had no "fair and clear warning of what the Constitution requires." Id. (internal quotation marks omitted) (quoting *al-Kidd*, 563 U.S. at 746 (Kennedy, J., concurring)).

203 Kinports, supra note 37, at 71 (describing the Court's gradual and unacknowledged movement away from its own qualified immunity precedent).

204 Two district courts have so ruled in the context of the right to record. See Higginbotham v. City of New York, 105 F. Supp. 3d 369, 380-81 (S.D.N.Y. 2015) (finding the right to record clearly established because the other circuit court cases in favor of the right "clearly foreshadowed" an analogous ruling by a higher court); Crawford v. Geiger, 996 F.

Supp. 2d 603, 617 (N.D. Ohio 2014) (dismissing a qualified immunity defense because four circuit courts "had issued clear and consistent opinions finding that the First Amendment right to openly record police activity existed").

205 See Terebisi v. Torreso, 764 F.3d 217, 231 (2d Cir. 2014) (citing Scott v. Fischer, 616 F.3d 100, 105 (2d Cir. 2010)). The Second Circuit has issued inconsistent rulings on whether persuasive authority should play a role in the analysis of clearly established law. See supra note 55 and accompanying text.

206 Jacobs v. City of Chicago, 215 F.3d 758, 767 (7th Cir. 2000) (internal quotation marks omitted) (quoting Cleveland-Perdue v. Brutsche, 881 F.2d 427, 431 (7th Cir. 1989)). The Ninth Circuit has hinted at a similar focus on discernible trends in the case law. See Capoeman v. Reed, 754 F.2d 1512, 1515 (9th Cir. 1985) ("[A]n additional factor that may be considered in ascertaining whether the law is 'clearly established' is a determination of the likelihood that the Supreme Court or this circuit would have reached the same result as courts which had previously considered the issue.").

207 855 F.3d 533, 543-46 (4th Cir. 2017) (adopting a robust-consensus analysis to conclude that inmates possess a clearly established right to be free from retaliation for filing prison grievances). Notably, the *Booker* court did not acknowledge that it was deviating from existing Fourth Circuit precedent by considering persuasive authority.

208 Id. at 545. The Sixth Circuit adopted a similar approach in Brown v. Battle Creek Police Dep't, 844 F.3d 556, 567 (6th Cir. 2016) (finding that the individual property right in a dog was clearly established because "every sister circuit that has confronted this issue" so concluded).

209 Cf. Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) (noting that a "robust 'consensus of cases of persuasive authority"' is necessary to clearly establish law absent controlling authority (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999))).

210 See, e.g., United States v. Lanier, 520 U.S. 259, 268-69 (1997) (discussing cases in which the Court referred to circuit decisions in defining the established scope of a constitutional right).

211 See, e.g., Corrigan v. District of Columbia, 841 F.3d 1022, 1040 (D.C. Cir. 2016) (Brown, J., dissenting) (arguing that "a robust consensus of our sister circuits" did not clearly answer the legal questions faced by the defendants); L.R. v. Sch. Dist. of Phila., 836 F.3d 235, 248 (3d Cir. 2016) ("[I]t may be possible that a 'robust consensus of cases of persuasive authority' in the Court[s] of Appeals could clearly establish a right for purposes of qualified immunity." (second alteration in original) (quoting Mammaro v. N.J. Div. of Child Prot. & Permanency, 814 F.3d 164, 169 (3d Cir. 2016))).

212 The Supreme Court has noted that many courts of appeals decline to consider district court precedent when determining whether constitutional rights are clearly established for purposes of qualified immunity. See Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) ("Otherwise said, district court decisions--unlike those from the courts of appeals--do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity."). But see Doe v. Delie, 257 F.3d 309, 321 n.10 (3d Cir. 2001) (stating that district court decisions, though not binding, also "play a role in the qualified immunity analysis").

213 Consensus, Merriam-Webster, https://www.merriam-webster.com/dictionary/consensus [https://perma.cc/H3LU-8Z86] (last visited Oct. 13, 2018).

214 Saucier v. Katz, 533 U.S. 194, 202 (2001) (emphasis added). Justice Kennedy's majority opinion did not specify which courts he was referring to.

215 See, e.g., Malley v. Briggs, 475 U.S. 335, 341 (1986) (stating that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law").

216 Anderson v. Creighton, 483 U.S. 635, 640 (1987).

217 See Hope v. Pelzer, 536 U.S. 730, 741 (2002) (citing *Anderson*, 483 U.S. at 640).

218 But see Lincoln v. Turner, 874 F.3d 833, 850 (5th Cir. 2017) (concluding that the opinions of two other circuits, while perhaps indicating an emerging trend, were insufficient to establish "clearly established law").

219 Fields v. City of Philadelphia, 862 F.3d 353, 362 (3d Cir. 2017) (Nygaard, J., concurring in part, dissenting in part).

220 For example, in the context of the right to record, courts could look to official police policy or training materials on the subject. The existence and treatment of such materials may also provide evidence that a defendant *actually* knew about the federal right at issue. See Frasier v. Evans, No. 15-cv-01759-REB-KLM, 2018 WL 6102828, at *2 (D. Colo. Nov. 21, 2018) ("The fiction of the hypothetical reasonable officer is a useful device in attempting to discern what an individual officer should know, but it must give way when the reality shows the actual officer was better informed than his fictional colleague.").

221 See supra notes 117-118 and accompanying text.

222 See Davis v. Scherer, 468 U.S. 183, 194 (1984) ("Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.").

223 For example, the Supreme Court has analyzed prison regulations in combination with case law to determine whether an individual had fair warning of an Eighth Amendment violation. See Hope v. Pelzer, 536 U.S. 730, 741-42 (2002).

224 A number of circuit courts have adopted such an approach. See Booker v. S.C. Dep't of Corr., 855 F.3d 533, 546 (4th Cir. 2017) (citing Department of Corrections internal policies to buttress the conclusion that a reasonable person would have known of the right); Furnace v. Sullivan, 705 F.3d 1021, 1027 (9th Cir. 2013) ("[R]egulations governing the conduct of correctional officers are also relevant in determining whether an inmate's right was clearly established." (internal quotation marks omitted) (quoting Treats v. Morgan, 308 F.3d 868, 875 (8th Cir. 2002))).

225 Cf. Fields v. City of Philadelphia, 862 F.3d 353, 363-64 (3d Cir. 2017) (Nygaard, J., concurring in part, dissenting in part) (noting that Philadelphia police departmental directives put officers on "actual notice that they were required to uphold the ... right to make recordings of police activity").

226 Id. at 358 (majority opinion); Turner v. Lieutenant Driver, 848 F.3d 678, 688 (5th Cir. 2017); ACLU of Ill. v. Alvarez, 679 F.3d 583, 608 (7th Cir. 2012).

227 *Fields*, 862 F.3d at 356.

228 See supra notes 110-115 and accompanying text.

229 See supra section I.B.2.

230 None of the cases addressed the question of whether First Amendment protection extends to surreptitious recording, because none of the plaintiffs attempted to disguise the fact that they were filming the police. See, e.g., *Fields*, 862 F.3d at 356 (involving a member of a legal watchdog group who "carried her camera and wore a pink bandana that identified

her as a legal observer"); Glik v. Cunniffe, 655 F.3d 78, 80 (1st Cir. 2011) (involving a plaintiff who recorded an arrest on his cellphone from "roughly ten feet away").

231 None of these cases addressed situations in which citizens filmed the actions of off-duty police officers, for example. See infra note 233.

232 This definition derives from the holdings of the six circuit court cases but is also a modification of the ACLU's proposal in *Alvarez*. The ACLU challenged the application of a wiretapping statute to its police accountability program, which would openly record officers when: (1) the officers are performing their public duties; (2) the officers are in public places; (3) the officers are speaking at a volume audible to the unassisted human ear; and (4) the manner of recording is otherwise lawful. ACLU of Ill. v. Alvarez, 679 F.3d 583, 588 (7th Cir. 2012).

233 See id.; see also *Fields*, 862 F.3d at 356 (filming of police breaking up protests and a house party); Turner v. Lieutenant Driver, 848 F.3d 678, 683 (5th Cir. 2017) (filming of a police station); *Glik*, 655 F.3d at 84 (filming of an arrest); Smith v. City of Cumming, 212 F.3d 1332, 1332 (11th Cir. 2000) ("videotaping police actions"); Fordyce v. City of Seattle, 55 F.3d 436, 438 (9th Cir. 1995) (filming of police activity at a public protest).

234 See, e.g., *Fields*, 862 F.3d at 356; *Turner*, 848 F.3d at 683.

235 See *Glik*, 655 F.3d at 84.

236 The right to record in a location is distinct from the right to access that location. The level of First Amendment protection changes depending on whether the forum in question is a "traditional public forum, a limited public forum, or a nonpublic forum." Derrick, supra note 130, at 269 & n.155 (collecting Supreme Court cases contrasting protections in each of these fora). In the context of the right to record, see Rice v. Kempker, 374 F.3d 675, 678 (8th Cir. 2004) (finding no First Amendment right to film executions, described as "government proceedings that are by law open to the public").

237 See, e.g., Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 535-36 (1980) (discussing the history of time, place, and manner restrictions).

238 See, e.g., *Fields*, 862 F.3d at 360; *Glik*, 655 F.3d at 84; *Smith*, 212 F.3d at 1333.

239 See Simonson, supra note 183, at 1574-75.

240 See, e.g., Turner v. Lieutenant Driver, 848 F.3d 678, 690 (5th Cir. 2017) ("In this case, however, we need not decide which specific time, place, and manner restrictions would be reasonable."); *Glik*, 655 F.3d at 84 (finding "no occasion" to explore reasonable time, place, and manner restrictions since "Glik's exercise of his First Amendment rights fell well within the bounds of the Constitution's protections").

241 According to the First Circuit, citizen recording of police can be constitutionally prohibited only when officers can reasonably conclude that the recording interferes with police duties. Gericke v. Begin, 753 F.3d 1, 8 (1st Cir. 2014). No other circuit has followed the First Circuit's lead as of this writing.

242 See Simonson, supra note 183, at 1575. Professor Simonson proposes that recording should not be deemed interference unless the recording constitutes a *physical* obstruction to police work, which would include any physical impediment to public safety. Id. at 1577-78.

243 See supra section II.B.1.

244 See, e.g., Henry Paul Monaghan, On Avoiding Avoidance, Agenda Control, and Related Matters, 112 Colum. L. Rev. 665, 668 (2012) (describing the scholarly view that there are two basic adjudicatory models: the case or dispute resolution model and the law declaration model).

245 See Cleveland-Perdue v. Brutsche, 881 F.2d 427, 431 (7th Cir. 1989) (noting that the consensus approach "makes eminent sense for it precludes an official from escaping liability for unlawful conduct due to the fortuity that a court in a particular jurisdiction had not yet had the opportunity to address the issue").

246 See Anderson v. Creighton, 483 U.S. 635, 653-54 (1987) (Stevens, J., dissenting).

247 See supra section II.B.1.

248 Determining the reasonableness of time, place, and manner restrictions to particular speech rights has traditionally been the province of the courts in First Amendment jurisprudence. See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing various cases that delineate the reasonableness of restrictions of protected speech).

249 See supra section II.B.

250 Contra Leading Cases, supra note 39, at 280 ("In the context of qualified immunity, however, a federalism-based argument is untenable, from both liberal and conservative perspectives.").

251 See Ashcroft v. al-Kidd, 563 U.S. 731, 747 (2011) (Kennedy, J., concurring).

252 See Kinports, supra note 37, at 62-63. ("In the years since *Harlow*, the Court has continued to refine the defense and expand the protection it affords government officials."). The Supreme Court has not ruled in favor of a § 1983 plaintiff on the question of clearly established law since 2004. Id. at 63 & n.7; see also Baude, supra note 186, at 88-90.

253 See Baude, supra note 186, at 86.

254 See supra notes 44-46 and accompanying text.

255 See Pearson v. Callahan, 555 U.S. 223, 231 (2009).

256 The modesty of this proposal contrasts with other solutions furthered by critics of qualified immunity, such as changing the focus of the qualified immunity inquiry from clearly established law to whether the defendant's conduct was "clearly unconstitutional." See Jeffries, supra note 95, at 867.

257 Contra Derrick, supra note 130, at 290 (calling for a merits-first adjudicatory model in First Amendment cases). Although qualified immunity is a defense to a federal statute, 42 U.S.C. § 1983 (2012), it is a judicially made doctrine. Entirely the Court's creation, qualified immunity cannot run afoul of statutory language or § 1983's legislative history. See Kinports, supra note 37, at 78.

258 See Booker v. S.C. Dep't of Corr., 855 F.3d 533, 545 (4th Cir. 2017) ("Rarely will there be such an overwhelming consensus of authority recognizing that specific conduct is violative of a constitutional right.").

259 Courts were not forced to consider this issue with the same frequency before cellphone cameras became ubiquitous. The right to record, however, fits comfortably with the First Amendment principles of information-gathering incident to speech, the right to record matters of public interest, and expressive conduct. See supra section I.B.2.

119 CLMLR 445

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